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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

GRETTA VERRETT-BRILEY,  
  
Plaintiff,  
  
v.  
  
NANCY A. BERRYHILL, Acting  
Commissioner of Social  
Security,  
  
Defendant.

CASE NO. CV 17-2196 SS

**MEMORANDUM DECISION AND ORDER**

**I.  
INTRODUCTION**

Gretta Verrett-Briley ("Plaintiff") seeks review of the final decision of the Acting Commissioner of Social Security (the "Commissioner" or "Agency") denying her application for social security benefits. The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. (Dkt. Nos. 11, 13, 14). For the reasons stated below, the decision of the Commissioner is REVERSED and this case

1 is REMANDED for further administrative proceedings consistent with  
2 this decision.

3  
4 **II.**

5 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

6  
7 To qualify for disability benefits, a claimant must  
8 demonstrate a medically determinable physical or mental impairment  
9 that prevents the claimant from engaging in substantial gainful  
10 activity and that is expected to result in death or to last for a  
11 continuous period of at least twelve months. Reddick v. Chater,  
12 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)).  
13 The impairment must render the claimant incapable of performing  
14 work previously performed or any other substantial gainful  
15 employment that exists in the national economy. Tackett v. Apfel,  
16 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C.  
17 § 423(d)(2)(A)).

18  
19 To decide if a claimant is entitled to benefits, an ALJ  
20 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The  
21 steps are:

- 22
- 23 (1) Is the claimant presently engaged in substantial gainful  
24 activity? If so, the claimant is found not disabled. If  
25 not, proceed to step two.
  - 26 (2) Is the claimant's impairment severe? If not, the  
27 claimant is found not disabled. If so, proceed to step  
28 three.

1 (3) Does the claimant's impairment meet or equal one of the  
2 specific impairments described in 20 C.F.R. Part 404,  
3 Subpart P, Appendix 1? If so, the claimant is found  
4 disabled. If not, proceed to step four.

5 (4) Is the claimant capable of performing his past work? If  
6 so, the claimant is found not disabled. If not, proceed  
7 to step five.

8 (5) Is the claimant able to do any other work? If not, the  
9 claimant is found disabled. If so, the claimant is found  
10 not disabled.

11  
12 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,  
13 262 F.3d 949, 953-54 (9th Cir. 2001); 20 C.F.R. §§ 404.1520(b)-  
14 (g)(1), 416.920(b)-(g)(1).

15  
16 The claimant has the burden of proof at steps one through four  
17 and the Commissioner has the burden of proof at step five.  
18 Bustamante, 262 F.3d at 953-54. Additionally, the ALJ has an  
19 affirmative duty to assist the claimant in developing the record  
20 at every step of the inquiry. Id. at 954. If, at step four, the  
21 claimant meets his or her burden of establishing an inability to  
22 perform past work, the Commissioner must show that the claimant  
23 can perform some other work that exists in "significant numbers"  
24 in the national economy, taking into account the claimant's  
25 residual functional capacity ("RFC"), age, education, and work  
26 experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at  
27 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner  
28 may do so by the testimony of a VE or by reference to the Medical-

1 Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P,  
2 Appendix 2 (commonly known as "the grids"). Osenbrock v. Apfel,  
3 240 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both  
4 exertional (strength-related) and non-exertional limitations, the  
5 Grids are inapplicable and the ALJ must take the testimony of a  
6 vocational expert ("VE"). Moore v. Apfel, 216 F.3d 864, 869 (9th  
7 Cir. 2000) (citing Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir.  
8 1988)).

9  
10 **III.**

11 **THE ALJ'S DECISION**

12  
13 The ALJ employed the five-step sequential evaluation process  
14 in evaluating Plaintiff's case. At step one, the ALJ found that  
15 Plaintiff has not engaged in substantial gainful activity since  
16 August 8, 2012, the alleged onset date. (AR 28). At step two,  
17 the ALJ found that Plaintiff's status-post left partial nephrectomy  
18 for grade 2 renal cell carcinoma without evidence of recurrence is  
19 a severe impairment. (AR 28). At step three, the ALJ determined  
20 that Plaintiff does not have an impairment or combination of  
21 impairments that meet or medically equal the severity of any of  
22 the listings enumerated in the regulations. (AR 30-32).

23  
24 The ALJ then assessed Plaintiff's RFC and concluded that she  
25 can perform light work,<sup>1</sup> except:

26  
27 \_\_\_\_\_  
28 <sup>1</sup> "Light work involves lifting no more than 20 pounds at a time with  
frequent lifting or carrying of objects weighing up to 10 pounds. Even  
though the weight lifted may be very little, a job is in this category

1 [Plaintiff] is restricted to performing all postural  
2 activities occasionally; would have mild inability  
3 understanding, remembering and carrying out detailed  
4 instructions, but would be able to make simplistic work-  
5 related decisions without supervision; mild inability  
6 interacting appropriately with supervisors, co-workers  
7 and peers; and can manage funds on her own behalf.

8  
9 (AR 32). At step four, the ALJ found that Plaintiff is capable of  
10 performing past relevant work as a paralegal, administrative clerk,  
11 and sales clerk. (AR 34). Accordingly, the ALJ found that  
12 Plaintiff was not under a disability as defined by the Social  
13 Security Act from August 8, 2012, through the date of the decision.  
14 (AR 35).

#### 15 16 IV.

#### 17 STANDARD OF REVIEW

18  
19 Under 42 U.S.C. § 405(g), a district court may review the  
20 Commissioner's decision to deny benefits. "[The] court may set  
21 aside the Commissioner's denial of benefits when the ALJ's findings  
22 are based on legal error or are not supported by substantial

23  
24 \_\_\_\_\_  
25 when it requires a good deal of walking or standing, or when it involves  
26 sitting most of the time with some pushing and pulling of arm or leg  
27 controls. To be considered capable of performing a full or wide range of  
28 light work, you must have the ability to do substantially all of these  
activities. If someone can do light work, we determine that he or she  
can also do sedentary work, unless there are additional limiting factors  
such as loss of fine dexterity or inability to sit for long periods of  
time." 20 C.F.R. §§ 404.1567(b), 416.967(b).

1 evidence in the record as a whole.” Aukland v. Massanari, 257 F.3d  
2 1033, 1035 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1097); see  
3 also Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing  
4 Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

5  
6 “Substantial evidence is more than a scintilla, but less than  
7 a preponderance.” Reddick, 157 F.3d at 720 (citing Jamerson v.  
8 Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is “relevant  
9 evidence which a reasonable person might accept as adequate to  
10 support a conclusion.” (Id.). To determine whether substantial  
11 evidence supports a finding, the court must “ ‘consider the record  
12 as a whole, weighing both evidence that supports and evidence that  
13 detracts from the [Commissioner’s] conclusion.’ ” Aukland, 257  
14 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir.  
15 1993)). If the evidence can reasonably support either affirming  
16 or reversing that conclusion, the court may not substitute its  
17 judgment for that of the Commissioner. Reddick, 157 F.3d at 720-  
18 21 (citing Flaten v. Sec’y of Health & Human Servs., 44 F.3d 1453,  
19 1457 (9th Cir. 1995)).e

20  
21 **V.**

22 **DISCUSSION**

23  
24 **A. The New Evidence Should Have Been Made Part Of The Record**

25  
26 Plaintiff submitted new and material evidence to the Appeals  
27 Council that postdated the ALJ’s decision: (1) a November 24, 2015  
28 Mental Medical Source Statement by Thomas Hoffman, M.D.; and (2) a

1 February 5, 2016 Operative Report for removal of Plaintiff's left  
2 kidney. (Dkt. No. 25, Exs. 1-2; see AR 5). The Appeals Council  
3 considered the evidence but nevertheless declined to review the  
4 ALJ's decision.<sup>2</sup> (AR 4-7). Thus, the new evidence became part of  
5 the record and must be considered by this Court in reviewing the  
6 ALJ's decision. Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d  
7 1157, 1163 (9th Cir. 2012) ("[W]hen the Appeals Council considers  
8 new evidence in deciding whether to review a decision of the ALJ,  
9 that evidence becomes part of the administrative record, which the  
10 district court must consider when reviewing the Commissioner's  
11 final decision for substantial evidence."). In other words, this  
12 Court must "determine whether the ALJ's finding of nondisability  
13 was supported by substantial evidence in the entire  
14 record -- including any new evidence in the administrative record  
15 that the Appeals Council considered -- not just the evidence before  
16 the ALJ." Gardner v. Berryhill, 856 F.3d 652, 656 (9th Cir. 2017).

17  
18 Here, the Appeals Council should have required the ALJ to  
19 consider the new evidence as part of the administrative record.  
20 While the new evidence postdates the ALJ's decision by a few months,  
21 it provides strong circumstantial evidence of Plaintiff's  
22 impairments during the relevant period. See, e.g., Forsythe v.  
23 Astrue, No. 10-CV-1515, 2012 WL 217751, at \*7 (E.D. Cal. Jan. 24,  
24 2012) ("Courts have found that circumstantial evidence can infer a  
25 deficit in adaptive functioning."); Christner v. Astrue, 498 F.3d

26 <sup>2</sup> While it is not clear that the Appeals Council considered the February  
27 2016 operative report (AR 5), the Commissioner does not contend otherwise  
28 (Dkt. No. 28 at 1-2). Nevertheless, in determining that remand is  
required, this Court does not rely on the February 2016 report.

1 790, 793 (8th Cir. 2007) (finding "circumstantial evidence to  
2 support the fact that Christner's deficiency manifested before age  
3 twenty-two"); Gomez v. Astrue, 695 F. Supp. 2d 1049, 1061 (C.D.  
4 Cal. 2010) ("Evidence regarding [claimant's] educational history  
5 before age 22 permits the inference that his mental retardation  
6 had an onset date during the developmental period."). The Ninth  
7 Circuit has repeatedly recognized that retrospective diagnoses by  
8 treating physicians and medical experts are relevant to a  
9 determination of a disability. See Lester v. Chater, 81 F.3d 821,  
10 831 n. 10 (9th Cir. 1995); Flaten v. Sec. of HHS, 44 F.3d 1453,  
11 1465 n. 5 (9th Cir. 1995). On remand, the ALJ must evaluate all  
12 the medical evidence, including the November 2015 Mental Medical  
13 Source Statement and the February 2016 Operative Report.

14  
15 **B. The ALJ Failed To Properly Assess Plaintiff's Depression As A**  
16 **Severe Impairment At Step Two Of The Evaluation**

17  
18 The ALJ found that Plaintiff's only severe impairment was her  
19 status-post left partial nephrectomy for grade 2 renal cell  
20 carcinoma. (AR 28). Further, the ALJ determined that Plaintiff's  
21 depression "do[es] not cause more than minimal work-related  
22 impairments, and [is] for this reason non-severe." (AR 29).

23  
24 By its own terms, the evaluation at step two is a de minimis  
25 test intended to weed out the most minor of impairments. See Bowen  
26 v. Yuckert, 482 U.S. 137, 153-54 (1987) (O'Connor, J., concurring);  
27 Edlund v. Massanari, 253 F.3d 1152, 1158 (9th Cir. 2001) ("We have  
28 defined the step-two inquiry as a de minimis screening device to

1 dispose of groundless claims." ). An impairment is not severe only  
2 if the evidence establishes a slight abnormality that has only a  
3 minimal effect on an individual's ability to work. Smolen, 80 F.3d  
4 at 1290 (internal citation omitted).

5  
6 As a threshold matter, Plaintiff's depression is well  
7 established by the record. As more fully discussed below, multiple  
8 physicians, including Plaintiff's treating physician, the medical  
9 expert ("ME"), the consultative examiner and the State Agency  
10 physicians, found that Plaintiff suffers from major depression.  
11 (AR 56, 80, 290, 387-88). Moreover, the medical record indicates  
12 that Plaintiff's depression has led to multiple long-term  
13 complications, including moderate restrictions in activities of  
14 daily living and moderate difficulties in maintaining  
15 concentration, persistence or pace. (AR 80). Thus, the ALJ's  
16 discussion of Plaintiff's condition does not fairly represent the  
17 significance of her depression and the limitations and  
18 complications arising from it, as reflected in the record.

19  
20 Because a step-two evaluation is to dispose of "groundless  
21 claims," and the evidence here established that Plaintiff suffers  
22 from depression, the ALJ erred by not addressing this ailment. See  
23 Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005). The evidence  
24 in the record was sufficient for the ALJ to conclude that  
25 Plaintiff's depression is a severe impairment at step two under  
26 the de minimis test.

1 For the foregoing reasons, the matter is remanded for further  
2 proceedings. On remand, the ALJ must evaluate Plaintiff's  
3 depression as a severe impairment at step-two and include  
4 limitations imposed by Plaintiff's depression in the ALJ's overall  
5 evaluation of Plaintiff.

6  
7 **C. The ALJ's RFC Assessment Is Not Supported By Substantial**  
8 **Evidence**

9  
10 "A claimant's residual functional capacity is what he can  
11 still do despite his physical, mental, nonexertional, and other  
12 limitations." Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th  
13 Cir. 1989) (citing 20 C.F.R. § 404.1545). An RFC assessment  
14 requires the ALJ to consider a claimant's impairments and any  
15 related symptoms that may "cause physical and mental limitations  
16 that affect what [he] can do in a work setting." 20 C.F.R.  
17 §§ 404.1545(a)(1), 416.945(a)(1). In determining a claimant's RFC,  
18 the ALJ considers all relevant evidence, including residual  
19 functional capacity assessments made by consultative examiners,  
20 State Agency physicians and medical experts. 20 C.F.R.  
21 §§ 404.1545(a)(3), 416.945(a)(3); see also id. §§ 404.1513(c),  
22 416.913(c).

23  
24 In formulating Plaintiff's nonexertional limitations, the ALJ  
25 gave great weight to the consultative examiner's opinion and little  
26 weight to all other medical sources who evaluated Plaintiff's  
27 mental impairments. (AR 32-34). The ALJ's assessment is not  
28 supported by substantial evidence.

1 First, the ALJ improperly rejected the State Agency  
2 physician's opinion. On March 17, 2014, Charles F. Bridges, Ph.D.,  
3 a State Agency physician, reviewed the medical record and opined  
4 that Plaintiff has a severe affective disorder (depression) that  
5 moderately restricts her activities of daily living and moderately  
6 limits her ability to maintain concentration, persistence or pace.  
7 (AR 80). Dr. Bridges also opined that Plaintiff is moderately  
8 limited in her ability to understand, remember and carry out  
9 detailed instructions; maintain attention and concentration for  
10 extended periods; perform activities with a schedule, maintain  
11 regular attendance and be punctual within customary tolerance;  
12 complete a normal workday and workweek without interruptions from  
13 psychologically based symptoms and to perform at a consistent pace  
14 without an unreasonable number and length of rest periods; interact  
15 appropriately with the general public; accept instructions and  
16 respond appropriately to criticism from supervisors; get along with  
17 coworkers or peers without distracting them or exhibiting  
18 behavioral extremes; maintain socially appropriate behavior and  
19 adhere to basic standards of neatness and cleanliness; and respond  
20 appropriately to changes in the work setting. (AR 82-83).

21  
22 The ALJ gave "little weight" to Dr. Bridges's opinion, finding  
23 it inconsistent with the consultative examiner's opinion and not  
24 having the benefit of the updated medical record. (AR 31).  
25 However, that one medical opinion differs from another opinion does  
26 not provide sufficient reasoning or substantial evidence for  
27 choosing one over the other. Further, the only medical record  
28 reviewed by the consultative examiner before giving her opinion

1 was related to Plaintiff's cancer surgery. (AR 288). In contrast,  
2 Dr. Bridges reviewed not only the consultative examiner's opinion  
3 but also other evidence submitted prior to March 2014, including  
4 Plaintiff's function report. (AR 76-77).

5  
6 Second, the ALJ failed to give the proper weight to  
7 Plaintiff's treating therapists. Plaintiff began treating with  
8 the Airport Marina Counseling Service in September 2010. (AR 427-  
9 30). Plaintiff reported struggling with depression "for years,"  
10 and which has recently worsened. (AR 427). She is a college  
11 graduate, who worked for over thirty years until July 2010. (AR  
12 427-28). Plaintiff reported being raped when she was thirteen  
13 years old. (AR 428). Her depression symptoms included sadness,  
14 diminished interest in activities, insomnia, feelings of guilt,  
15 overeating,<sup>3</sup> and prior suicidal ideations. (AR 427). She  
16 acknowledged smoking marijuana on occasion. (AR 429). Michelle  
17 Mitchells, Plaintiff's therapist, diagnosed major depressive  
18 disorder, recurrent, moderate, and cannabis dependence and assigned  
19 a Global Assessment of Function ("GAF") score of 50.<sup>4</sup> (AR 429).

20  
21 <sup>3</sup> The ALJ acknowledged that Plaintiff is morbidly obese. (AR 29).

22 <sup>4</sup> "A GAF score is a rough estimate of an individual's psychological,  
23 social, and occupational functioning used to reflect the individual's  
24 need for treatment." Vargas v. Lambert, 159 F.3d 1161, 1164 n. 2 (9th  
25 Cir. 1998). The GAF includes a scale ranging from 0-100, and indicates  
26 a "clinician's judgment of the individual's overall level of  
27 functioning." American Psychiatric Association, Diagnostic and  
28 Statistical Manual of Mental Disorders 32 (4th ed. text rev. 2000)  
(hereinafter DSM-IV). According to the DSM-IV, a GAF score between 41  
and 50 describes "serious symptoms" or "any serious impairment in social,  
occupational, or school functioning." Id. 34. "Although GAF scores,  
standing alone, do not control determinations of whether a person's  
mental impairments rise to the level of a disability (or interact with  
physical impairments to create a disability), they may be a useful

1 In June 2012, after attending more than sixty therapy sessions,  
2 Plaintiff continued to struggle with depression, weight gain, low  
3 self-esteem, lack of familial support and dysfunctional  
4 relationships. (AR 415). Kevin Kunkel, Plaintiff's therapist,  
5 diagnosed major depressive disorder, recurrent, in partial  
6 remission, and cannabis dependence, and assigned a GAF score of  
7 59.<sup>5</sup> (AR 416). In January 2013, Plaintiff reported continuing  
8 dysfunctional relationships and low self-esteem. (AR 413). Her  
9 therapist, Ron Goode, diagnosed major depressive disorder,  
10 recurrent, in partial remission, and cannabis dependence, and  
11 assigned a GAF score of 59. (AR 413-14).

12  
13 The ALJ gave the treating therapists reports only "partial  
14 weight." (AR 34). Even though their GAF assessments were  
15 consistent with the consulting examiner's assessment,<sup>6</sup> the ALJ  
16 concluded that "the record does not make clear whether these  
17 therapists qualify as acceptable medical sources." (AR 34).  
18 However, it appears that the treating therapists were under the  
19 supervision of treating psychiatrist Ronald Markham, M.D., who  
20 noted depressive symptoms and diagnosed dysthymia vs. depressive  
21 disorder NOS. (AR 426). The ALJ failed to even discuss Dr.

22  
23 \_\_\_\_\_  
24 measurement." Garrison v. Colvin, 759 F.3d 995, 1003 n.4 (9th Cir.  
2014).

25 <sup>5</sup> A GAF score of 51-60 indicates moderate symptoms (e.g., flat affect and  
26 circumlocutory speech, occasional panic attacks) or moderate difficulty  
in social, occupational, or school functioning (e.g., few friends,  
conflicts with peers or co-workers). DSM-IV 34.

27 <sup>6</sup> The consultative examiner assigned Plaintiff a GAF score of 60. (AR  
28 290).

1 Markham's treating notes. See Orn v. Astrue, 495 F.3d 625, 632  
2 (9th Cir. 2007) (even if the treating physician's opinion is  
3 contradicted by another doctor, the ALJ may not reject this opinion  
4 without providing specific, legitimate reasons, supported by  
5 substantial evidence in the record.).

6  
7 Further, the ALJ's finding that the treating therapists are  
8 not "acceptable medical sources" is not a legitimate reason, by  
9 itself, for giving their opinions only partial weight. While the  
10 opinion of a therapist "cannot establish the existence of a  
11 medically determinable impairment," information from  
12 "therapists . . . may provide insight into the severity of the  
13 impairment(s) and how it affects the individual's ability to  
14 function." Social Security Ruling (SSR) 06-3p, at \*2.<sup>7</sup> SSR 06-03  
15 further explains:

16  
17 With the growth of managed health care in recent years  
18 and the emphasis on containing medical costs, medical  
19 sources who are not "acceptable medical sources," such  
20 as [therapists], have increasingly assumed a greater  
21 percentage of the treatment and evaluation functions  
22 previously handled primarily by physicians and  
23 psychologists. Opinions from these medical sources, who  
24

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25 <sup>7</sup> Social Security Rulings (SSRs) "do not carry the 'force of law,' but  
26 they are binding on ALJs nonetheless." Bray v. Comm'r of Soc. Sec.  
27 Admin., 554 F.3d 1219, 1224 (9th Cir. 2009). They "reflect the official  
28 interpretation of the [Agency] and are entitled to some deference as long  
as they are consistent with the Social Security Act and regulations."  
Id. (citation omitted).

1 are not technically deemed "acceptable medical sources"  
2 under our rules, are important and should be evaluated  
3 on key issues such as impairment severity and functional  
4 effects, along with the other relevant evidence in the  
5 file.

6  
7 Id. at \*3. Thus, while the treating therapists' opinions cannot  
8 be given controlling weight, they cannot be discounted merely  
9 because they are not acceptable medical sources. Garrison v.  
10 Colvin, 759 F.3d 995, 1013-14 (9th Cir. 2014) (other sources "can  
11 provide evidence about the severity of a claimant's impairment(s)  
12 and how it affects the claimant's ability to work.") (citation and  
13 alterations omitted).

14  
15 Finally, the treating therapists' evaluations were supported  
16 by other medical evidence. In January 2015, Ingrid Liu, M.D.,  
17 Plaintiff's primary care doctor, noted Plaintiff's "persistent  
18 depressed mood and crying episodes," "PTSD [from] sexual assault  
19 as a child" and "chronic, uncontrolled" depression, with the  
20 following symptoms: depressed, hopeless, anhedonia, insomnia,  
21 overeating, trouble concentrating, and suicidal thoughts. (AR 387-  
22 88, 391). In November 2015, Dr. Hoffman completed a Mental Medical  
23 Source Statement. (Dkt. No. 25, Ex. 1). Dr. Hoffman's clinical  
24 findings included chronic, persistent depression, anxiety,  
25 tearfulness, restricted range of affect, anhedonia, sadness, worry,  
26 hyperarousal, irritability, insomnia, poor concentration,  
27 flashbacks, fear, low motivation, lethargy and hopelessness.  
28 (Id.). He diagnosed PTSD and recurrent major depression. (Id.).

