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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARIA THERESA WORTH,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendants.

Case No. 2:17-cv-04400-KES

MEMORANDUM OPINION AND
ORDER

I.
BACKGROUND

On June 26, 2013, Maria Theresa Worth (“Plaintiff”) filed applications for disability insurance benefits (“DIB”) and supplemental security income (“SSI”) alleging an inability to work due to anxiety, depression, a skin disorder, and osteoporosis since July 20, 2008, after her fiancé’s suicide. Administrative Record (“AR”) 177-84, 191, 296. Prior to that, she had worked as a typist through a temporary employment agency and also did bookkeeping and property management. AR 68-71.

On December 2, 2014, an Administrative Law Judge (“ALJ”) conducted a hearing at which Plaintiff, who was represented by counsel, appeared and testified.

1 AR 60-92. At the hearing, Plaintiff testified that she cried all the time, and she
2 cried at the hearing. AR 76-79. The ALJ continued the hearing for consultative
3 examinations, and on July 17, 2015, a second hearing was held, again with
4 testimony from Plaintiff and a vocational expert (“VE”). AR 36-59. By the date of
5 the second hearing, Plaintiff was homeless. AR 38.

6 On August 14, 2015, the ALJ issued a decision denying Plaintiff’s
7 applications. AR 18-31. The ALJ found that Plaintiff does not suffer from any
8 severe mental impairments, but suffers from the severe physical impairments of
9 osteoarthritis, degenerative disc disease, polyneuropathy, and migraine headaches.
10 AR 24. Despite these impairments, the ALJ determined that Plaintiff has the
11 residual functional capacity (“RFC”) to lift and or carry twenty pounds occasionally
12 and ten pounds frequently, stand and/or walk up to six hours in an eight-hour
13 workday, and sit up to six hours in an eight-hour workday, with no climbing
14 ladders, ropes, or scaffolds; no exposure to hazards; no walking on uneven surfaces;
15 and no more than occasional balancing, stooping, kneeling, crouching, crawling, or
16 climbing ramps or stairs. AR 27.

17 Based on this RFC and the VE’s testimony, the ALJ determined that Plaintiff
18 could perform her past jobs as a bookkeeper or apartment house manager. AR 30.
19 As a result, the ALJ concluded that Plaintiff was not disabled. AR 31.

20 II.

21 PROCEDURES AND LEGAL STANDARDS

22 A. The Evaluation of Disability.

23 A person is “disabled” for purposes of receiving Social Security benefits if he
24 is unable to engage in any substantial gainful activity owing to a physical or mental
25 impairment that is expected to result in death or which has lasted, or is expected to
26 last, for a continuous period of at least twelve months. 42 U.S.C. § 423(d)(1)(A);
27 Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992). A claimant for disability
28 benefits bears the burden of producing evidence to demonstrate that he was

1 disabled within the relevant time period. Johnson v. Shalala, 60 F.3d 1428, 1432
2 (9th Cir. 1995).

3 **B. The Five-Step Evaluation Process.**

4 The ALJ follows a five-step sequential evaluation process in assessing
5 whether a claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); Lester
6 v. Chater, 81 F.3d 821, 828 n. 5 (9th Cir. 1996). In the first step, the Commissioner
7 must determine whether the claimant is currently engaged in substantial gainful
8 activity; if so, the claimant is not disabled and the claim must be denied. 20 C.F.R.
9 §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

10 If the claimant is not engaged in substantial gainful activity, the second step
11 requires the Commissioner to determine whether the claimant has a “severe”
12 impairment or combination of impairments significantly limiting his ability to do
13 basic work activities; if not, the claimant is not disabled and the claim must be
14 denied. Id. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

15 If the claimant has a “severe” impairment or combination of impairments, the
16 third step requires the Commissioner to determine whether the impairment or
17 combination of impairments meets or equals an impairment in the Listing of
18 Impairments (“Listing”) set forth at 20 C.F.R., Part 404, Subpart P, Appendix 1; if
19 so, disability is conclusively presumed and benefits are awarded. Id.
20 §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

21 If the claimant’s impairment or combination of impairments does not meet or
22 equal an impairment in the Listing, the fourth step requires the Commissioner to
23 determine whether the claimant has sufficient residual functional capacity to
24 perform his past work; if so, the claimant is not disabled and the claim must be
25 denied. Id. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The claimant has the burden
26 of proving he is unable to perform past relevant work. Drouin, 966 F.2d at 1257. If
27 the claimant meets that burden, a prima facie case of disability is established. Id.

28 If that happens or if the claimant has no past relevant work, the

1 Commissioner then bears the burden of establishing that the claimant is not
2 disabled because he can perform other substantial gainful work available in the
3 national economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). That
4 determination comprises the fifth and final step in the sequential analysis. Id.
5 §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

6 **C. Standard of Review.**

7 A district court may review the Commissioner's decision to deny benefits.
8 The ALJ's findings and decision should be upheld if they are free from legal error
9 and supported by substantial evidence based on the record as a whole. 42 U.S.C.
10 § 405(g); Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v. Astrue, 481
11 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such relevant evidence
12 as a reasonable person might accept as adequate to support a conclusion.
13 Richardson, 402 U.S. at 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir.
14 2007). It is more than a scintilla, but less than a preponderance. Lingenfelter, 504
15 F.3d at 1035 (citing Robbins v. Comm'r of SSA, 466 F.3d 880, 882 (9th Cir.
16 2006)). To determine whether substantial evidence supports a finding, the
17 reviewing court "must review the administrative record as a whole, weighing both
18 the evidence that supports and the evidence that detracts from the Commissioner's
19 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). "If the
20 evidence can reasonably support either affirming or reversing," the reviewing court
21 "may not substitute its judgment" for that of the Commissioner. Id. at 720-21.

22 "A decision of the ALJ will not be reversed for errors that are harmless."
23 Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). Generally, an error is
24 harmless if it either "occurred during a procedure or step the ALJ was not required
25 to perform," or if it "was inconsequential to the ultimate nondisability
26 determination." Stout v. Comm'r of SSA, 454 F.3d 1050, 1055 (9th Cir. 2006).

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III.
ISSUE PRESENTED

Plaintiff’s appeal presents the sole issue of whether the ALJ erred at step two of the sequential evaluation process by finding that Plaintiff’s medically determinable mental impairments of anxiety and depression were not “severe.” (Dkt. 19, Joint Stipulation [“JS”] at 4.) Plaintiff contends that the ALJ failed to state specific and legitimate reasons for giving more weight to the opinion of consultative psychiatric examiner Dr. Elmo Lee than that of Plaintiff’s treating psychiatrist, Dr. Eun Joo Justice. (*Id.* at 4-12.)

IV.
DISCUSSION

A. Rules Governing Step Two of the Sequential Evaluation Process.

1. Severity Defined.

A determination that an individual’s impairment(s) (or combination thereof) is not severe requires a careful evaluation of the medical findings that describe the impairment(s) and an informed judgment about the limitations and restrictions it imposes on the individual’s mental ability to do basic work activities. Social Security Ruling (“SSR”) 85-28, 1985 SSR LEXIS, governs the evaluation of whether an alleged impairment is severe:

An impairment or combination of impairments is found “not severe” ... when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual’s ability to work ... i.e., the person’s impairment(s) has no more than a minimal effect on his or her physical or mental ability(ies) to perform basic work activities. ...

If such a finding [of non-severity] is not clearly established by medical evidence, however, adjudication must continue through the

1 sequential evaluation process.

2 * * *

3 Great care should be exercised in applying the not severe
4 impairment concept. If an adjudicator is unable to determine clearly
5 the effect of an impairment or combination of impairments on the
6 individual's ability to do basic work activities, the sequential
7 evaluation process should not end with the not severe evaluation step.

8 Rather, it should be continued.

9 SSR 85-28, 1985 SSR LEXIS 19 at *7-12. With regard to mental functioning,
10 "basic work activities" include use of judgment; responding appropriately to
11 supervision, coworkers, and usual work situations; and dealing with changes in a
12 routine work setting. See, e.g., 20 C.F.R. § 404.1521(b)(3-6).¹

13 The claimant's burden at Step Two is relatively light. The Ninth Circuit has
14 held that "the step two inquiry is a de minimis screening device to dispose of
15 groundless claims." Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996). Thus,
16 "[a]n impairment or combination of impairments can be found 'not severe' only if
17 the evidence establishes a slight abnormality that has 'no more than a minimal
18 effect on an individual's ability to work.'" Id. (citing SSR 85-28, 1985 SSR LEXIS
19 19; Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988) (adopting SSR 85-28)).

20 **2. Evaluating the Severity of Mental Impairments.**

21 When an applicant for DIB or SSI claims mental impairment, the ALJ must
22 employ the "special technique" described in 20 C.F.R. §§ 404.1520a and 416.920a.
23 Keyser v. Comm'r of SSA, 648 F.3d 721, 725 (9th Cir. 2011). Specifically, the

24 _____
25 ¹ The Court cites to regulations in effect at the time of the ALJ's decision.
26 See Patino v. Berryhill, No. 16-02970, 2017 WL 3184468, at *1, n.3 (C.D. Cal.
27 July 26, 2017) ("Where, as here, the ALJ's decision is the final decision of the
28 Commissioner, the reviewing court generally applies the law in effect at the time of
the ALJ's decision.").

1 ALJ must determine whether an applicant has a medically determinable mental
2 impairment, id. §§ 404.1520a(b), 416.920a(b), rate the degree of functional
3 limitation for four functional areas, id. §§ 404.1520a(c), 416.920a(c), determine the
4 severity of the mental impairment (in part based on the degree of functional
5 limitation), id. §§ 404.1520a(d), 416.920a(d) and then, if the impairment is severe,
6 proceed to step three of the disability analysis. Keyser, 648 F.3d at 725. As of the
7 date of the ALJ’s opinion, the four functional areas the ALJ had to assess were:
8 (1) activities of daily living; (2) social functioning; (3) concentration, persistence,
9 or pace; and (4) episodes of decompensation. 20 C.F.R. §§ 404.1520a(c)(3),
10 416.920a(c)(3). Limitations in the first three functional area are assessed on a five-
11 level scale: (1) none, (2) mild, (3) moderate, (4) marked, or (5) extreme. 20 C.F.R.
12 §§ 404.1520a(c)(4), 416.920a(c)(4). Limitations in the fourth functional area are
13 assessed on a four-point scale: none, one or two, three, and four or more. Id.

14 The regulations do not explain the difference between “mild,” “moderate,”
15 “marked,” and “extreme.” While there are no bright lines between the rating
16 levels,² the distinctions are critical. If the degree of limitation in the three
17 functional areas is rated as “none” or “mild” and the claimant has not experienced
18 any episodes of decompensation, it will generally be concluded that the impairment
19 is not severe unless the evidence otherwise indicates that there is more than a

21 ² For example, district courts have interpreted lack of medical treatment for
22 mental impairments in different ways. Compare Frias v. Colvin, No. 15-02185,
23 2015 U.S. Dist. LEXIS 165768, at *14 (C.D. Cal. Dec. 10, 2015) (upholding ALJ’s
24 determination that depression not severe where claimant provided no evidence of
25 mental health treatment) and Garcia v. Colvin, No. 13-7110, 2014 U.S. Dist.
26 LEXIS 100699, at *17 (C.D. Cal. July 22, 2014) (reversing ALJ’s determination
27 that depression not severe where ALJ gave unsupported reasons for discounting
28 opinion of examining doctor and overly relied on claimant’s lack of mental health
treatment, because it is “a questionable practice to chastise one with a mental
impairment for the exercise of poor judgment in seeking rehabilitation” (citation
omitted)).

1 minimal limitation in the ability to do basic work activities. 20 C.F.R.
2 §§ 404.1520a(d)(1), 416.920a(d)(1).

3 The ALJ may consider objective medical evidence, such as what medications
4 a claimant uses to alleviate symptoms, in evaluating severity and limiting effects of
5 an impairment. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3). Thus, a claimant
6 whose depressive symptoms are minimized by taking antidepressant medication
7 may not suffer from “severe” depression. See Beck v. Astrue, 303 F. App’x 455,
8 457 (9th Cir. 2008) (holding that substantial evidence supported ALJ’s finding that
9 plaintiff’s depression with anxiety were not severe impairments because conditions
10 could be “controlled effectively” with treatment and medical records did “not
11 indicate any severe problems”); Fields v. Astrue, No. 07-1442, 2008 U.S. Dist.
12 LEXIS 79828, 2008 WL 4384248, at *7 (C.D. Cal. Sept. 3, 2008) (holding that
13 substantial evidence supported ALJ’s finding that plaintiff’s depression was “not
14 severe and adequately controlled with mild anti-depressive medication with no
15 more than mild functional limitations” because record showed that plaintiff
16 “responds well to medications” and no evidence of longitudinal history of
17 psychiatric impairment, hospitalization, or prolonged outpatient treatment).

18 **3. Evaluating Conflicting Medical Evidence.**

19 At the second step of sequential evaluation, the ALJ examines the medical
20 evidence to determine whether an impairment is “not severe”—i.e., whether the
21 medical evidence establishes only a slight abnormality or a combination of slight
22 abnormalities which would have no more than a minimal effect on an individual’s
23 ability to work. SSR 85-28, 1985 SSR LEXIS 19. The weight given to medical
24 opinions depends in part on whether they are proffered by a medical source who
25 (1) directly treated the plaintiff, (2) who examined but did not treat the plaintiff, or
26 (3) who did not treat or examine the plaintiff, but reviewed the plaintiff’s medical
27 records. See 20 C.F.R. §§ 404.1527(c), 416.927(c); Lester, 81 F.3d at 830.

28 A treating physician’s opinion is generally entitled to more weight than that

1 of an examining physician, which is generally entitled to more weight than that of a
2 non-examining physician. Lester, 81 F.3d at 830. Thus, the ALJ must give specific
3 and legitimate reasons for rejecting a treating physician’s opinion in favor of a non-
4 treating physician’s contradictory opinion or an examining physician’s opinion in
5 favor of a non-examining physician’s opinion. Orn v. Astrue, 495 F.3d 625, 632
6 (9th Cir. 2007) (citing Reddick, 157 F.3d at 725); Lester, 81 F.3d at 830-31 (citing
7 Murray v. Heckler, 722 F.2d 499, 502 (9th Cir. 1983)).

8 Despite these general rules, “[t]he ALJ need not accept the opinion of any
9 physician, including a treating physician, if that opinion is brief, conclusory, and
10 inadequately supported by clinical findings.” Thomas v. Barnhart, 278 F.3d 947,
11 957 (9th Cir. 2002); accord Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.
12 2001). The factors to be considered by the adjudicator in determining the weight to
13 give a medical opinion include: “[l]ength of the treatment relationship and the
14 frequency of examination” by the treating physician; and the “nature and extent of
15 the treatment relationship” between the patient and the treating physician. Orn, 495
16 F.3d at 631 (quoting 20 C.F.R. § 404.1527(d)(2)(i)-(ii)).

17 **B. Summary of the Medical Evidence of Plaintiff’s Mental Impairments.**

18 Plaintiff provided records from her primary care physician, Dr. Hernandez,
19 her treating psychiatrist, Dr. Justice, and other mental health professionals (such as
20 psychologists, therapists, and social workers) associated with Dr. Justice’s practice
21 at the South Bay Mental Health Center (“SBMHC”), part of the Los Angeles
22 County Department of Mental Health.

23 **1. Dr. Hernandez.**

24 The treating records from Dr. Hernandez span from 2007-2015. AR 322-52,
25 384-409. These records focus on Plaintiff’s physical ailments, noting by 2011 that
26 she was seeing other doctors for psychiatric care. AR 340. Nevertheless, Dr.
27 Hernandez recorded observations of Plaintiff’s visible anxiety and crying (e.g., AR
28 293-95, 441). As diagnoses, Dr. Hernandez consistently listed anxiety and

1 depression. See, e.g., AR 313, 323, 326. These records reflect that at times,
2 Plaintiff was taking no mental health medication (AR 324), but at other times, she
3 was prescribed Xanax/alprazolam (AR 342), Zoloft/sertraline (AR 316),
4 Remeron/mirtazapine (AR 311, 355), and Ativan/lorazepam (AR 293).

5 **2. Dr. Justice and SBMHC.**

6 In July 2011, SBHMC diagnosed Plaintiff as suffering from a mood disorder
7 and anxiety. AR 321. The staff administered a mental status exam that revealed
8 excessive speech and worried affect, but no other abnormalities. AR 320; see also
9 AR 443 (in 2015, Plaintiff observed talking in “nonstop fashion”). Plaintiff was
10 assigned a Global Assessment of Functioning (“GAF”) score of 50.³ AR 321.

11 Plaintiff’s 2011 care plan included meeting with licensed social worker Lynn
12 Barnard and a therapist, psychologist Marlon Young. AR 301, 507. Dr. Young set
13 a treatment goal of reducing panic attacks from “3x/day to 10x/wk” and reducing
14 excessive crying from “2-3x/day to 10x/wk.” AR 507.

15 In January 2014, Ms. Barnard opined that Plaintiff could not be gainfully
16 employed until an estimated date of January 1, 2015. AR 355. At that time,
17 Plaintiff was diagnosed with generalized anxiety disorder and taking the anti-
18 depressant Remeron. Id.

19 In December 2014, Dr. Justice completed a “Medical Source Statement of
20 Ability to do Work-Related Activities (Mental)” form (“MSS Form”). AR 356-59.

21 ³ A GAF score of 50 “denotes serious symptoms or a serious impairment in
22 functioning.” Preston v. Astrue, No. EDCV 11-01914, 2012 U.S. Dist. LEXIS
23 157143, at *18 (C.D. Cal. Oct. 31, 2012). A GAF score between 51 and 60 means
24 the claimant has “moderate symptoms.” Schmidt v. Colvin, No. 2:12-cv-00016-
25 KJN, 2013 U.S. Dist. LEXIS 137861, at *42 (E.D. Cal. Sep. 25, 2013). A GAF
26 score between 61 and 70 means the claimant has some mild symptoms, but
27 generally functioning pretty well. A GAF score between 71 and 80 means the
28 claimant has no more than slight impairment. Provenzano v. Astrue, No. ED CV
09-1256-CT, 2009 U.S. Dist. LEXIS 118151, at *39-40 n.4 (C.D. Cal. Dec. 17,
2009).

1 Dr. Justice opined that Plaintiff had “moderate” or “marked” limitations in all the
2 functional areas listed. Id. The form defined “moderate” as “more than a slight
3 limitation in this area but the individual is still able to function satisfactorily,” and
4 “marked” as “serious limitation in this area” with “substantial loss in the ability to
5 effectively function.” Id. To support opinions concerning Plaintiff’s limitations
6 understanding and carrying out instructions, Dr. Justice stated, “Is easily
7 overwhelmed by stressors and chronic anxiety symptoms. Unable to maintain
8 psychotherapy session participation due to preoccupation with life stressors and
9 disorganization.” AR 356. To support opinions about Plaintiff’s social
10 functioning, Dr. Justice cited, “verbally aggressive behavior directed at staff.” AR
11 357; see also AR 429 (11/25/14 SBMHC progress notice stating, “client walked in
12 with appointment requesting assistance, clerical staff at front desk described her as
13 ‘demanding to be seen,’ but was subsequently appropriate ...”). Dr. Justice also
14 noted that Plaintiff reported difficulty making decisions, frequent tardiness, and
15 confusion using the bus system, reports Dr. Justice considered “consistent” with
16 “observations of her functioning when at appointments.” AR 357.

17 In March 2015, Plaintiff’s therapist called her generalized anxiety disorder
18 and major depressive disorder “moderate.” AR 443. By June 2015, Dr. Justice’s
19 treatment plan for Plaintiff included “to decrease anxiety from 50% a day to 10% a
20 day.” AR 410. At various times in 2014 and 2015, Plaintiff reported to SBMHC
21 that she was homeless. AR 429, 433.

22 **3. Dr. Lee.**

23 Dr. Lee evaluated Plaintiff once in January 2015. AR 370-74. He noted that
24 Plaintiff had been receiving mental health treatments at SBMHC since 2011 and
25 was currently taking Ativan and pain medication. AR 371. She told him that she
26 had been homeless in the past, but was then living with a friend. Id. He observed
27 that her affect was “mildly anxious” and she became “briefly tearful” during the
28 evaluation. AR 372. Nevertheless, she was “focused throughout the interview.”

1 Id. She performed well on basic tests of memory and cognition, and Dr. Lee
2 assigned her a GAF score of 65. AR 372-73. Based on her reporting that she can
3 perform personal care, domestic chores, driving, and shopping, Dr. Lee found that
4 Plaintiff “is able to perform her own ADLs [activities of daily living].” AR 371.
5 He rated her thought content as free of delusions, hallucinations, and suicidal
6 ideation, but noted that Plaintiff had “various somatic concerns” and “describe[d]
7 her exquisite pains in vivid detail.” AR 372.

8 Dr. Lee summed up Plaintiff’s “psychiatric symptoms” as “relatively mild to
9 moderate,” noting that her condition “may improve within the next 12 months”
10 because she was receiving “regular mental health services” and “psychotropic
11 medications.” AR 373. He opined that if she continued with her “current mental
12 health treatment or prescribed psychotropic medication,” then she could interact
13 with others, perform work activities on a consistent basis, maintain regular
14 attendance, and “deal with the usual stress encountered in the workplace.” AR 373-
15 74. He did not identify any areas of mental functioning in which Plaintiff had
16 limitations of any degree. Id. The report does not state how much time Dr. Lee
17 spent with Plaintiff.

18 **C. The ALJ’s Treatment of the Medical Evidence.**

19 The ALJ gave Dr. Lee’s opinion “significant probative weight” because it
20 was supported by the objective medical evidence, and Dr. Lee “had the opportunity
21 to review and consider the relevant documentary evidence” AR 25.

22 As examples of supporting objective medical evidence, the ALJ cited
23 (1) SBMHC’s July 2011 mental status exam which found some abnormalities with
24 speech and affect, but no thought content or process disturbances (AR 25, citing
25 AR 320), (2) subsequent records from May 2012 and July 2012 that revealed
26 “normal speech, average intellect and memory, fair insight, and a good attitude”
27 (id., citing AR 310-11), and (3) a March 2014 treatment note characterizing
28 Plaintiff’s as “stable” (id., citing AR 295). The ALJ summarized Plaintiff’s treating

1 records as reflecting that she continually complained about anxious and depressive
2 symptoms, but her treating medical sources observed “mostly normal cognitive,
3 expressive, receptive, and social functioning.” AR 25.

4 The ALJ gave Dr. Justice’s MSS Form “little probative weight.” AR 26. As
5 reasons for discounting Dr. Justice’s MSS Form opinions, the ALJ cited (1) lack of
6 supporting objective evidence, (2) inconsistency with Dr. Lee’s opinion, and (3) Dr.
7 Justice “appears [to have] relied quite heavily on the subjective report of symptoms
8 and limitations provided by claimant” despite “good reasons for questioning [their]
9 reliability.” Id.

10 Relying on Dr. Lee, the ALJ found that Plaintiff’s mental impairments
11 caused no more than “mild” limitations in activities of daily living, social
12 functioning, and concentration, persistence, or pace, and that Plaintiff had not
13 experienced any episodes of decompensation. AR 26. The ALJ concluded the
14 Plaintiff’s depression and anxiety were not “severe.” Id.

15 **D. Analysis of the ALJ’s Reasons for Discounting Dr. Justice’s MSS Form in**
16 **Favor of Dr. Lee’s Opinion.**

17 **1. Inconsistency with Dr. Lee.**

18 The fact that Dr. Justice and Dr. Lee rendered inconsistent opinions is not, by
19 itself, a sufficient reason to give Dr. Lee’s opinion more weight than Dr. Justice’s.
20 It does mean, however, that the ALJ could discredit Dr. Justice’s opinion for
21 “specific and legitimate” reasons, rather than “clear and convincing” ones. See
22 Lester, 81 F.3d at 830-31.

23 **2. Dr. Lee’s Opportunity to Review Plaintiff’s Medical Records.**

24 Contrary to the ALJ’s claim that Dr. Lee “had the opportunity to review and
25 consider the relevant documentary evidence ...” (AR 25), Dr. Lee’s report says,
26 “There were no records for review.” AR 370. Elsewhere, Dr. Lee’s report
27 describes Plaintiff’s past medical history as “per the medical records” and Axis III
28 diagnosis as “per the medical records,” but it is unclear whether this is referring to

1 medical records that Dr. Lee actually reviewed. AR 373-72. Dr. Lee did not know
2 exactly what care Plaintiff was receiving for her depression and anxiety, indicating
3 that she was receiving “regular mental health services through a local mental health
4 provider *or* is receiving psychotropic medications through a primary physician.”
5 AR 373, emphasis added. In contrast, Dr. Justice had access to all of Plaintiff’s
6 records from SBMHC from 2011 through 2015. Thus, the ALJ’s second reason for
7 giving greater weight to Dr. Lee’s opinions is not a legitimate reason supported by
8 substantial evidence.

9 **3. Lack of Supporting Objective Evidence.**

10 The ALJ found that Dr. Lee’s opinion was supported by the weight of the
11 objective medical evidence, whereas Dr. Justice’s was not. The evidence cited by
12 the ALJ, however, does not support Dr. Lee’s finding that Plaintiff has no
13 functional limitations attributable to depression or anxiety. For example,
14 SBMHC’s initial 2011 mental status exam noted “restless” motor activity,
15 “excessive” speech, and “anxious” and “worried” mood and affect. AR 320. Such
16 mannerisms could more than minimally affect Plaintiff’s ability to perform basic
17 work activities, such that the exam cannot be cited as supporting Dr. Lee’s opinion
18 of no functional limitations.

19 The record at AR 311 is a Brief Follow-Up Medication Support Service form
20 (“Medication Form”) completed by Dr. Josephina Quano at SBMHC in May 2012.
21 Dr. Quano assessed eleven mental status items. She found Plaintiff’s mood and
22 affect “labile.”⁴ AR 311. She found Plaintiff’s intellect and memory “average,”
23 her insight “fair,” and her attitude “good.” *Id.* Her notation by “speech” is hard to
24 read, but it appears to say “RPID,” possibly an abbreviation for “rapid.” *Id.* Dr.
25 Quano identified Plaintiff’s “target symptoms” as “anxiety” and noted, “[illegible]
26

27 ⁴ Merriam-Webster.com defines “labile” as “readily or continually
28 undergoing chemical, physical, or biological change or breakdown: unstable.”

1 not good; trying to cope.” Id.

2 The record at AR 310 is another Medication Form completed by Dr. Quano
3 two months later. The form lists eleven items under “mental status” (including
4 thought, intellect, memory, mood, and attitude); Dr. Quano indicated that all were
5 “WNL [within normal limits].” AR 310. She also noted that Plaintiff was taking
6 Remeron and had a “reaction to medication – tried different dosages.” Id. The
7 recommended treatment is “continue therapy; needs grief therapy.” Id.

8 The record at AR 295 is a Medication Form completed by Dr. Danilo Ching
9 of SBMHC in March 2014. His handwritten notes are hard to read, but appear to
10 say, “Stable although needs coping skill & support. [Dr.] Davidson’s pt [patient] at
11 this time; needs a CM [case manager] here in South Bay; needs BCT [behavioral
12 cognitive therapy]; needs counselling.” AR 295. He noted that she was taking
13 Ativan and “medication helping” Id. Under “mental status,” he made notations
14 including “disturb speech” and possibly “sad affect.” Id.

15 These records recommending additional therapy and counselling and noting
16 visible grief and disturbed speech even after taking psychotropic medication show
17 that Plaintiff’s mental impairments caused visible symptoms over the course of
18 several years, and such visible symptoms could affect her ability to perform basic
19 work activities, such as speaking and interacting appropriately with others. These
20 records do not support Dr. Lee’s opinion that Plaintiff’s mental impairments did not
21 cause her even mild functional limitations.

22 In contrast, many of Dr. Justice’s opinions in the MSS Form were supported
23 by objective evidence. He cited his own observations of Plaintiff’s affect,
24 disorganization, and confusion made during their long treating relationship. AR
25 356-56. He cited observations of her speaking to staff inappropriately, which is
26 corroborated by other SBMHC records. AR 357, 429. Other physicians and the
27 ALJ had observed Plaintiff as tearful. AR 76-79, 293, 372. His opinions are
28 consistent with Plaintiff’s initial assessment GAF score of 50. AR 321.

1 Dr. Lee's report, on the other hand, is not even internally inconsistent. He
2 called her symptoms "mild to moderate," but he assigned a GAF score of 65, the
3 mid-range for only mild symptoms. AR 373. Dr. Lee referenced medical records
4 that he apparently never reviewed. AR 370-71, 373. He qualified his opinions
5 about Plaintiff's lack of functional limitations on the condition that she continue
6 receiving mental health care treatment, but he did not know the content of that
7 treatment other than from Plaintiff's own reports. AR 374. In 2015, he opined that
8 he expected her condition to improve in the next twelve months if she pursued the
9 same course of treatment (AR 373), without explaining (1) what improvements he
10 expected (since he opined she had no functional limitations), or (2) why
11 improvement would suddenly occur in 2015 if it had not occurred in 2011-2014.

12 In the big picture, the objective evidence shows that Plaintiff could do skilled
13 work before 2008, but she did not have substantial gainful employment after that
14 date, to the point of becoming homeless. AR 23, 429, 433. She sought treatment
15 for her mental health in 2011 and continued that treatment through 2015. AR 340,
16 410. None of her treating sources ever called her symptom-free or opined that she
17 was meeting her treatment goals. Her mental health treatment included taking
18 multiple psychotropic medications (AR 293, 311, 316, 324, 342, 355), but her
19 symptoms persisted such that even in 2014 and 2015, she was still displaying
20 disturbed speech and tearfulness (AR 295, 372, 443), and Dr. Justice set a treatment
21 goal of reducing her anxiety (AR 410). Thus, the Court concludes that the ALJ's
22 third reason for giving Dr. Justice's opinion less weight than Dr. Lee's is not a
23 legitimate reason supported by substantial evidence.

24 **4. Over-Reliance on Plaintiff's Subjective Reports.**

25 Over-reliance on a claimant's subjective self-assessment can provide a
26 specific and legitimate reason to discredit a treating doctor's opinion. See, e.g.,
27 Turner v. Comm'r of SSA., 613 F.3d 1217, 1223 (9th Cir. 2010) (finding that "the
28 ALJ reasonably rejected" the opinion of a physician where the physician's "opinion

1 was based almost entirely on the claimant’s self-reporting”); Tommasetti v. Astrue,
2 533 F.3d 1035, 1041 (9th Cir. 2008) (“An ALJ may reject a ... physician’s opinion
3 if it is based to a large extent on a claimant’s self-reports that have been properly
4 discounted as incredible.” (citation omitted)).

5 That said, the Ninth Circuit has pointed out that assessing the severity of
6 mental conditions such as anxiety and depression necessarily requires some reliance
7 on the patient’s self-reporting, as follows:

8 mental health professionals frequently rely on the combination of their
9 observations and the patient’s reports of symptoms (as do all doctors)
10 To allow an ALJ to discredit a mental health professional’s opinion
11 solely because it is based to a significant degree on a patient’s
12 “subjective allegations” is to allow an end-run around our rules for
13 evaluating medical opinions for the entire category of psychological
14 disorders.

15 Ferrando v. Comm’r of SSA, 449 Fed. Appx. 610, 612 n.2 (9th Cir. 2011); see also
16 Ryan v. Comm’r of SSA, 528 F.3d 1194, 1199 (9th Cir. 2008) (noting that,
17 “unsurprisingly,” the doctor recorded the symptoms relayed to him by the claimant,
18 but he also “recorded several of his own clinical observations of [the claimant]” —
19 e.g., odd behavior and mannerisms, rapid speech, quick agitation, anger); Leach v.
20 Colvin, No. 13-00426, 2014 U.S. Dist. LEXIS 52126, at *22-23, 25 (D. Or. Apr.
21 15, 2014) (noting that even where mental status examinations were based in part on
22 self-reporting by claimant, that was “not, in itself, a sufficient basis to reject Dr.
23 Turner’s opinion”).

24 Here, the ALJ was tasked with weighing the conflicting opinions of Dr.
25 Justice and Dr. Lee. Dr. Lee necessarily relied on Plaintiff’s self-reporting to
26 complete the first two pages of his report (e.g., chief complaint, history of present
27 illness, current medication, social history, and activities of daily living) because he
28 apparently did not have any of Plaintiff’s medical records. AR 370-71. He could

1 rely on his own observations of her behavior and affect during the examination, but
2 he only met with her once for an unspecified amount of time. AR 370, 372. He
3 administered some tests that yielded objective results (such as being able to name
4 the President, spell “world” forwards and backwards, remember three objects after
5 three minutes, and state the similarity between an apple and an orange). AR 373.
6 From Plaintiff’s ability to do such basic tasks, Dr. Lee concluded that her mental
7 impairments did not cause any functional limitations, but only if she continued her
8 “current mental health treatment or the prescribed psychotropic medications,”
9 indicating that Dr. Lee did not know the extent of her treatment. AR 373-74.

10 In comparison, Dr. Justice also relied somewhat on Plaintiff’s subjective
11 complaints, but not exclusively. As discussed above, his MSS Form references
12 objective observations Dr. Justice acquired over years of treating Plaintiff, such as
13 her tendency to become confused and her inappropriate verbal interactions with
14 staff. AR 357. Given that both doctors relied somewhat on Plaintiff’s subjective
15 complaints but also relied on their own observations, and given Dr. Justice’s far
16 longer treating relationship with Plaintiff, over-reliance on Plaintiff’s subjective
17 complaints is not a legitimate reason to give Dr. Lee’s opinion more weight than
18 Dr. Justice’s.

19 **5. Harmless Error Analysis.**

20 The Court concludes that the ALJ did not give sufficient specific and
21 legitimate reasons for giving Dr. Justice’s opinion less weight than Dr. Lee’s.⁵
22 Even when the ALJ commits legal error, the Court must uphold the decision where
23 that error is harmless. Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012). An
24 ALJ’s failure to properly consider an impairment at step two may be harmless
25

26 ⁵ The Court does not conclude that Dr. Justice’s opinion is entitled to any
27 particular weight. The Court simply concludes that the ALJ did not give specific
28 and legitimate reasons for discounting it compared to Dr. Lee’s.

1 where the ALJ considered the functional limitations caused by that impairment later
2 in the decision. Lewis v. Astrue, 498 F.3d 909, 911 (9th Cir. 2007). Here, the ALJ
3 ultimately did not fully accept the opinions of Dr. Lee (i.e., no functional
4 limitations) or Dr. Justice (i.e., moderate and marked limitations), and instead took
5 a middle approach by finding that Plaintiff’s limitations were “no more than mild”
6 in the three functional areas relevant at step two. AR 26. The ALJ failed to
7 mention Plaintiff’s mild mental impairments beyond step two, however, “leaving
8 no means for the Court to determine whether the ALJ considered the effects of
9 these impairments at the later steps.” Acosta-Espinosa v. Berryhill, No. 16-5831,
10 2017 WL 5664656, at *4 (W.D. Wash. Nov. 27, 2017) (remanding after finding
11 error at step two to be not harmless). The Court therefore cannot conclude that the
12 ALJ’s error was harmless.

13 Nor can the Court conclude, on the basis of the record before it, that
14 substantial evidence supports the ALJ’s “no more than mild” limitations finding.
15 For example, the ALJ did not sufficiently develop Plaintiff’s testimony that she
16 attended cosmetology school on a fulltime basis from September 2012 through June
17 2013.⁶ See Tommasetti, 533 F.3d at 1039 (noting that ALJ can consider
18 inconsistency with daily activities when considering evidence regarding the degree
19 of impairment caused by mental health conditions); see also Tolman v. Colvin, No.
20 14-663 FFM, 2015 U.S. Dist. LEXIS 163867, at *15 (C.D. Cal. Dec. 7, 2015)
21 (upholding ALJ’s determination that depression was not severe where claimant
22 “was consistently employed during his 15- to 20-year history of depression”).

23 Plaintiff testified that she attended “beauty school” for forty hours/week with
24

25 ⁶ Plaintiff’s therapy notes also discuss other activities that suggest Plaintiff’s
26 mental impairments do not affect her functioning more than minimally, such as
27 helping a friend move (AR 495), attending art classes (AR 478), planning a 10-day
28 trip to El Salvador with her church (AR 485), and planning a trip to Missouri to
visit a friend (AR 437). The ALJ did not discuss these activities.

1 “perfect” attendance and “almost finished,” but she was “dropped” from the
2 program due to a skin condition that caused her to develop open wounds. AR 52-
3 55; see also AR 503 (Plaintiff attended WIA [Workforce Investment Act] program
4 orientation in 2011 and “was to attend cosmetology training,” but needed to follow
5 up); AR 500 (in June 2012, Plaintiff was approved “to begin a year-long program,
6 M-F, 8-5” at cosmetology school); AR 498 (telling therapist in June 2012 she was
7 “discouraged by issues with cosmetology school funding via WIA program”); AR
8 470 (telling therapist in February 2014 about skin disorder “from nail care
9 chemicals”); AR 332-34 (in early 2014, Dr. Hernandez diagnosed Plaintiff as
10 suffering from eczema, scabies, and “lesions on skin”). She testified that she
11 received a 3.4 average in her coursework. AR 54. After her skin condition cleared
12 up, she tried to go back, but she was told “no” without any explanation. AR 55.

13 The ALJ asked Plaintiff why she could not work fulltime if she could attend
14 beauty school fulltime. AR 56. Plaintiff responded by explaining that she was
15 placed at the school through a county program that paid the school \$8,000, whereas
16 the school only received \$3,000 from regular students. AR 56. Plaintiff’s answer
17 suggests that the school was willing to overlook functional shortcomings of
18 students referred through the county program because their enrollment was
19 profitable. Plaintiff also said, “It’s not like working – you sit there and do nothing
20 for six hours, well I go to school for four. The other four you just sit there.” AR
21 57.

22 It remains unclear what school Plaintiff attended, what tasks were required of
23 her, how well she performed them, and why she was unable to return and obtain a
24 cosmetology license if she was close to completing the program successfully.⁷ The
25 Court therefore cannot conclude that the ALJ’s improper rejection of Dr. Justice’s
26 opinion was inconsequential to the ultimate nondisability determination, because

27 ⁷ The school is identified only as being “on Venice and Vermont.” AR 491.
28

1 the Court cannot determine whether substantial evidence supports the ALJ’s finding
2 of “mild” functional limitations caused by Plaintiff’s mental impairments.

3 **E. Remand.**

4 In general, the Court has “discretion to remand for further proceedings or to
5 award benefits.” Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990). Where an
6 ALJ improperly rejects a medical opinion, the district court may grant a direct
7 award of benefits when certain conditions are met. The three-part analysis for such
8 conditions is known as the “credit-as-true” rule. Garrison v. Colvin, 759 F.3d 995,
9 1019 (9th Cir. 2014). First, the court asks whether the “ALJ failed to provide
10 legally sufficient reasons for rejecting evidence, whether claimant testimony or
11 medical opinion.” Id. at 1020. Second, the court determines whether there are
12 outstanding issues that must be resolved before a disability determination can be
13 made and whether further administrative proceedings would be useful. Treichler v.
14 Comm’r of SSA, 775 F.3d 1090, 1101 (9th Cir. 2014). When these first two
15 conditions are satisfied, the district court then credits the discredited testimony as
16 true for the purpose of determining whether, on the record taken as a whole, there is
17 no doubt as to disability. Id.

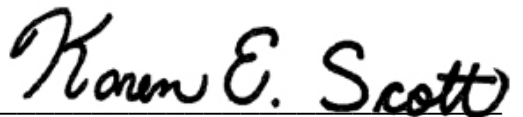
18 As explained above, the Court has determined that the ALJ failed to provide
19 legally sufficient reasons for giving Dr. Justice’s opinion less weight than Dr.
20 Lee’s. The Court concludes, however, that there are outstanding issues to be
21 resolved before a disability determination can be made, and that further
22 administrative proceedings would be useful. On remand, the ALJ should develop
23 the record as to whether Plaintiff’s participating in the beauty-school program truly
24 required her to perform basic work activities relevant to assessing any limitations
25 caused by her mental impairments, and should also reevaluate the medical evidence
26 at step two with respect to Plaintiff’s mental impairments.

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V.
CONCLUSION

The Court does not conclude that the ALJ should have found at step two that Plaintiff's mental impairments are severe. The Court does conclude, however, that the ALJ did not give specific and legitimate reasons for giving Dr. Justice's opinion less weight than Dr. Lee's, that this error was not necessarily harmless, and that further development of the record is warranted to determine whether Plaintiff's mental impairments caused only a minimal effect on her ability to work. IT IS THEREFORE ORDERED that this case be REVERSED and REMANDED for further proceedings consistent with this order.

DATED: February 15, 2018


KAREN E. SCOTT
United States Magistrate Judge