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

ALISA ANN A., ¹)	Case No. CV 19-1066-JPR
)	
Plaintiff,)	
)	MEMORANDUM DECISION AND ORDER
v.)	REVERSING COMMISSIONER
)	
ANDREW SAUL, Commissioner)	
of Social Security,)	
)	
Defendant.)	
)	
)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner’s final decision denying her application for Social Security supplemental security income benefits (“SSI”). The parties consented to the jurisdiction of the undersigned under 28 U.S.C. § 636(c). The matter is before the Court on the parties’ Joint Submission, filed December 4, 2019, which the Court has taken under

¹ Plaintiff’s name is partially redacted in line with Federal Rule of Civil Procedure 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

1 submission without oral argument. For the reasons stated below,
2 the Commissioner's decision is reversed and this matter is
3 remanded for further proceedings.

4 **II. BACKGROUND**

5 Plaintiff was born in 1972. (Administrative Record ("AR")
6 221.) She completed high school in juvenile hall. (AR 243,
7 363.) She never worked regularly. (AR 257-60.) On September
8 30, 2015, she applied for SSI, alleging that she had been unable
9 to work since January 1, 1986, because of bipolar disorder,
10 depression, and schizophrenia.² (AR 115, 242.) After
11 Plaintiff's application and reconsideration of it were denied (AR
12 145-46, 154-55), she requested a hearing before an Administrative
13 Law Judge (AR 161-63). A hearing was held on August 25, 2017, at
14 which Plaintiff, represented by counsel, testified, as did a
15 vocational expert. (AR 32-89.) In a written decision issued
16 December 8, 2017, the ALJ determined that she was not disabled.
17 (AR 12-25.) On December 11, 2018, the Appeals Council denied her
18 request for review. (AR 1-3.) This action followed.

19 **III. STANDARD OF REVIEW**

20 Under 42 U.S.C. § 405(g), a district court may review the
21 Commissioner's decision to deny benefits. The ALJ's findings and
22 decision should be upheld if they are free of legal error and
23 supported by substantial evidence based on the record as a whole.

24
25 ² Plaintiff applied for Social Security benefits in 2012
26 (see AR 93); her claim was denied by an Administrative Law Judge
27 on February 27, 2014. (AR 90-103.) The ALJ here found that
28 Plaintiff had rebutted the presumption of continuing
nondisability, see Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir.
1988), because the regulations "for evaluating mental disorders"
had changed since the prior decision. (AR 18.)

1 See Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v.
2 Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence
3 means such evidence as a reasonable person might accept as
4 adequate to support a conclusion. Richardson, 402 U.S. at 401;
5 Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It
6 is "more than a mere scintilla but less than a preponderance."
7 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
8 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). "[W]hatever the
9 meaning of 'substantial' in other contexts, the threshold for
10 such evidentiary sufficiency is not high." Biestek v. Berryhill,
11 139 S. Ct. 1148, 1154 (2019). To determine whether substantial
12 evidence supports a finding, the reviewing court "must review the
13 administrative record as a whole, weighing both the evidence that
14 supports and the evidence that detracts from the Commissioner's
15 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
16 1998). "If the evidence can reasonably support either affirming
17 or reversing," the reviewing court "may not substitute its
18 judgment" for the Commissioner's. Id. at 720-21.

19 **IV. THE EVALUATION OF DISABILITY**

20 People are "disabled" for purposes of receiving Social
21 Security benefits if they are unable to engage in any substantial
22 gainful activity owing to a physical or mental impairment that is
23 expected to result in death or has lasted, or is expected to
24 last, for a continuous period of at least 12 months. 42 U.S.C.
25 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
26 1992).

27 A. The Five-Step Evaluation Process

28 An ALJ follows a five-step sequential evaluation process to

1 assess whether someone is disabled. 20 C.F.R. § 416.920(a)(4);
2 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995) (as
3 amended Apr. 9, 1996). In the first step, the Commissioner must
4 determine whether the claimant is currently engaged in
5 substantial gainful activity; if so, the claimant is not disabled
6 and the claim must be denied. § 416.920(a)(4)(i).

7 If the claimant is not engaged in substantial gainful
8 activity, the second step requires the Commissioner to determine
9 whether the claimant has a "severe" impairment or combination of
10 impairments significantly limiting her ability to do basic work
11 activities; if not, a finding of not disabled is made and the
12 claim must be denied. § 416.920(a)(4)(ii) & (c).

13 If the claimant has a "severe" impairment or combination of
14 impairments, the third step requires the Commissioner to
15 determine whether the impairment or combination of impairments
16 meets or equals an impairment in the Listing of Impairments
17 ("Listing") set forth at 20 C.F.R., part 404, subpart P, appendix
18 1; if so, disability is conclusively presumed and benefits are
19 awarded. § 416.920(a)(4)(iii) & (d).

20 If the claimant's impairment or combination of impairments
21 does not meet or equal one in the Listing, the fourth step
22 requires the Commissioner to determine whether the claimant has
23 sufficient residual functional capacity ("RFC")³ to perform her
24

25 ³ RFC is what a claimant can do despite existing exertional
26 and nonexertional limitations. § 416.945(a)(1); see Cooper v.
27 Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). The
28 Commissioner assesses the claimant's RFC between steps three and
four. Laborin v. Berryhill, 867 F.3d 1151, 1153 (9th Cir. 2017)

(continued...)

1 past work; if so, she is not disabled and the claim must be
2 denied. § 416.920(a)(4)(iv). The claimant has the burden of
3 proving she is unable to perform past relevant work. Drouin, 966
4 F.2d at 1257. If the claimant meets that burden, a prima facie
5 case of disability is established. Id.

6 If that happens or if the claimant has no past relevant
7 work, the Commissioner bears the burden of establishing that the
8 claimant is not disabled because she can perform other
9 substantial gainful work available in the national economy, the
10 fifth and final step of the sequential analysis.

11 §§ 416.920(a)(4)(v), 416.960(b).

12 B. The ALJ's Application of the Five-Step Process

13 At step one, the ALJ found that Plaintiff had not engaged in
14 substantial gainful activity since September 30, 2015, the
15 application date. (AR 18.) At step two, he determined that she
16 had the severe impairments of "bipolar affective disorder;
17 personality disorder; [and] mood disorder." (Id.)

18 At step three, he concluded that Plaintiff's impairments did
19 not meet or equal any of the impairments in the Listing. (AR 19-
20 20.) At step four, he found that Plaintiff had the RFC to
21 perform

22 a full range of work at all exertional levels but with
23 the following nonexertional limitations. She: is able to
24 perform work consisting of simple, 1-2 step tasks at
25 reasoning level 1; can have no public contact; and can

27 ³ (...continued)
28 (citing § 416.920(a)(4)).

1 have occasional contact with supervisors and coworkers.
2 (AR 20.) Because Plaintiff had no past relevant work, the ALJ
3 continued to step five. (AR 23.)

4 At that step, considering Plaintiff's age, education, work
5 experience, RFC, and the VE's testimony, he found that Plaintiff
6 could perform several jobs existing in significant numbers in the
7 national economy. (AR 23-24.) Accordingly, he found her not
8 disabled. (Id.)

9 **V. DISCUSSION⁴**

10 Plaintiff contends that the ALJ erred in assessing her RFC
11 and in evaluating her subjective symptom statements. (J. Stip.
12 at 3-6, 8-12, 16-17.) For the reasons discussed below, reversal
13 is necessary.

14 A. The ALJ Erred in Assessing Plaintiff's RFC

15 Plaintiff argues that the ALJ improperly relied on the
16 opinions of consulting psychiatrist Stephen Simonian and state-
17 agency psychological consultant Ralph Mertens, "cherry-pick[ing]"
18 from their opinions without explanation to reach a conclusion
19 that had "no basis in the record." (Id. at 3-4.) She also
20 contends that the ALJ failed to include her limitations in

21
22 ⁴ In Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018), the Supreme
23 Court held that ALJs of the Securities and Exchange Commission
24 are "Officers of the United States" and thus subject to the
25 Appointments Clause. To the extent Lucia applies to Social
26 Security ALJs, Plaintiff has forfeited the issue by failing to
27 raise it during her administrative proceedings. (See AR 32-52,
28 319-19); Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir. 1999) (as
amended) (plaintiff forfeits issues not raised before ALJ or
Appeals Council); see also Kabani & Co. v. SEC, 733 F. App'x 918,
919 (9th Cir. 2018) (rejecting Lucia challenge because plaintiff
did not raise it during administrative proceedings), cert.
denied, 139 S. Ct. 2013 (2019).

1 maintaining concentration, persistence, and pace in his
2 hypothetical to the VE. (Id. at 4.)

3 As explained below, the ALJ failed to explain why, despite
4 giving "great weight" to Dr. Simonian's opinion, he did not
5 incorporate the doctor's finding of marked limitation in social
6 interaction with coworkers and supervisors into Plaintiff's RFC
7 but credited that same finding as to the public by barring her
8 from any contact with them. Nor did the ALJ reconcile the
9 inconsistencies between Dr. Simonian's opinion and that of Dr.
10 Jacob Tendler,⁵ both of which he gave "great weight."

11 1. Relevant background

12 a. *Plaintiff's treating doctors*

13 Plaintiff was treated on and off from September 12, 2011,
14 through May 21, 2014, at a mental-health clinic. (AR 320-54.)
15 Her initial assessment describes her chief complaints as
16 "insomnia, anxiety, . . . irritab[ility], cutting from age 12,
17 burning self with cigarettes, moody, angry, sad, frustrated,
18 needy, hates to be alone, no purpose – does not know what she is
19 here for, borderline . . . self-[destructive], but now wants to
20 try and take medication." (AR 320.) She reported having
21 antisocial personality disorder and said she did not like to take
22 medication. (Id.) As for psychiatric history, she claimed that
23 on Halloween 2010, she cut herself with a knife because she was
24 angry. (Id.) She also reported a suicide attempt in 1992, in

25
26 ⁵ Dr. Tendler appears to specialize in psychiatry because
27 his electronic signature includes a specialty code of 37. (See
28 AR 134); Soc. Sec. Admin., Program Operations Manual System
(POMS) DI 24501.004, (May 5, 2015), <https://secure.ssa.gov/apps10/poms.nsf/lrx/0424501004>.

1 which she took over-the-counter sleeping pills, was hospitalized
2 for three days, and jumped out a second-floor window to escape.
3 (Id.) As for psychosocial history, Plaintiff reported that her
4 mother's boyfriend molested her at age nine, and she was raped at
5 age 14 and kidnapped. (AR 322.) She was in and out of juvenile
6 hall from age 14 to 18 and was in custody several times as an
7 adult. (Id.) She was on probation at the time of the 2011
8 assessment. (Id.)

9 Evaluators found impaired intellectual functioning and
10 judgment and a below-average fund of knowledge. (AR 323.) Her
11 insight was severely impaired and her mood was irritable. (Id.)
12 Her memory was unimpaired and her concentration intact. (Id.)
13 As for behavioral disturbances, she was described as aggressive,
14 uncooperative, demanding, demeaning, belligerent, violent,
15 destructive, self-destructive, manipulative, and antisocial, and
16 she had poor impulse control and "excessive/inappropriate display
17 of anger." (Id.) The examiner added the notation, "antisocial
18 and dangerous." (Id.) Her principal diagnosis was antisocial
19 and borderline personality disorders, with a secondary diagnosis
20 of mood disorder not specified and malingering. (AR 324.) The
21 examiner found her primary problems to be educational and
22 occupational and gave her a Global Assessment of Functioning
23 score of 60.⁶ (Id.) He noted that she "likely wants SSI." (AR
24

25 ⁶ GAF scores assess a person's overall psychological
26 functioning on a scale of 1 to 100. See Diagnostic and
27 Statistical Manual of Mental Disorders 32 (revised 4th ed. 2000).
28 A GAF score between 51 to 60 describes "moderate symptoms" or any
moderate difficulty in social, occupational, or school

(continued...)

1 323.)

2 The few treatment notes in the record begin on October 31,
3 2012, and are largely illegible but appear to say that Plaintiff
4 had stopped coming to appointments. (See AR 354.) She reported
5 past use of crack cocaine but said she had been sober for three
6 years as of October 2012. (Id.) The notes indicate that she
7 needed medication and therapy, could not sleep, and was hearing
8 voices. (Id.) She missed her November appointment, and her next
9 visit was January 2, 2013. (AR 351-52.) She had been prescribed
10 Lithium⁷ and Abilify,⁸ but poor medication compliance was noted.

11
12 ⁶ (...continued)
13 functioning. Garrison v. Colvin, 759 F.3d 995, 1023 n.4 (9th
14 Cir. 2014). The Commissioner has declined to endorse GAF scores,
15 Revised Medical Criteria for Evaluating Mental Disorders and
16 Traumatic Brain Injury, 65 Fed. Reg. 50764-65 (Aug. 21, 2000)
17 (codified at 20 C.F.R. pt. 404) (GAF score "does not have a
18 direct correlation to the severity requirements in our mental
19 disorders listings"), and the most recent edition of the DSM
20 "dropped" the GAF scale, citing its lack of conceptual clarity
21 and questionable psychological measurements in practice, DSM-V at
22 16 (5th ed. 2013). Because GAF scores continue to be included in
23 claimant medical records, however, the Social Security
24 Administration has clarified that they are "medical opinion
25 evidence under 20 C.F.R. § . . . 416.927(a)(2) if they come from
26 an acceptable medical source." Wellington v. Berryhill, 878 F.3d
27 867, 871 n.1 (9th Cir. 2017) (citation omitted).

28 ⁷ "Lithium is used as a mood stabilizer, and is indicated
for the treatment of manic episodes and maintenance of bipolar
disorder." See Lithium carbonate, U.S. Nat'l Libr. of Med.,
<https://pubchem.ncbi.nlm.nih.gov/compound/Lithium-carbonate> (last
visited Apr. 13, 2020).

⁸ Abilify is the brand name for aripiprazole and "is
indicated for manic and mixed episodes associated with bipolar I
disorder, irritability associated with autism spectrum disorder,
. . . and as an adjunctive treatment of major depressive
disorder." See Aripiprazole, U.S. Nat'l Libr. of Med.,
(continued...)

1 (AR 351.) On January 30, 2013, Plaintiff complained of seeing
2 flashes and hearing dead people talking to her, as well as mood
3 swings and depression. (AR 350.) Because she said Abilify made
4 her hyperactive and restless, it was discontinued and she was
5 prescribed Risperidone.⁹ (Id.) She missed appointments on
6 November 14, 2012, March 20, June 26, and September 11, 2013, and
7 February 5, 2014. (See AR 325, 344-51.)

8 In progress notes from September 2013 to May 2014, she
9 reported goals of taking her medications, staying sober, and
10 using her coping skills. (AR 325-32.) She felt disbelieved by
11 her psychiatrist about medication compliance. (AR 329.) As to
12 cutting herself, she was "very aware of the intention to treat
13 herself with care and that not-cutting will express that
14 intention." (Id.) During this period, she made "some progress"
15 in employing coping skills and appeared to be "sharing more and
16 allowing deeper discussion of barriers and coping." (AR 329-32.)

17 b. *Examiners and reviewers*

18 Dr. Simonian performed a complete psychiatric evaluation of
19 Plaintiff on March 3, 2016. (AR 355-60.) She had not seen a
20 psychiatrist for five months and was not taking medication
21 because of "insurance problems." (AR 356.) She denied a history

22
23 ⁸ (...continued)
24 [https://pubchem.ncbi.nlm.nih.gov/compound/60795#section=](https://pubchem.ncbi.nlm.nih.gov/compound/60795#section=Drug-Indication)
25 [Drug-Indication](https://pubchem.ncbi.nlm.nih.gov/compound/60795#section=Drug-Indication) (last visited Apr. 13, 2020).

26 ⁹ "Risperidone is indicated for the treatment of
27 schizophrenia, acute manic or mixed episodes associated with
28 Bipolar I Disorder, and irritability associated with autistic
disorder." See Risperidone, U.S. Nat'l Libr. of Med.,
[https://pubchem.ncbi.nlm.nih.gov/compound/5073#section=](https://pubchem.ncbi.nlm.nih.gov/compound/5073#section=Drug-and-Medication-Information)
[Drug-and-Medication-Information](https://pubchem.ncbi.nlm.nih.gov/compound/5073#section=Drug-and-Medication-Information) (last visited Apr. 13, 2020).

1 of drug or alcohol abuse but had been psychiatrically
2 hospitalized several times. (Id.) Dr. Simonian found Plaintiff
3 "alert and oriented," with normal but rather fast speech. (AR
4 357.) Her mood was labile, described as normal but at times
5 irritable. (Id.) Her arms showed evidence of cutting. (Id.)

6 Dr. Simonian diagnosed her with bipolar affective disorder
7 in partial remission, personality disorder not otherwise
8 specified with borderline personality features, and moderate
9 psychological stressors. (AR 358.) He gave her a GAF score of
10 50.¹⁰ (Id.) He assessed her ability to understand simple one-
11 or two-step job instructions as "not limited." (AR 359.) He
12 found her "moderately limited" in her ability to follow detailed
13 and complex instructions, maintain concentration and attention
14 for a period of time, adapt to the stresses common to a normal
15 work environment, maintain regular attendance in the workplace
16 and perform work activities on a consistent basis, and perform
17 work activities without special or additional supervision. (Id.)
18 He determined that her ability to "relate and interact with
19 supervisors, co-workers, and the public is markedly limited."
20 (Id.)

21 Dr. Mertens reviewed the record on May 12, 2016. (AR 119-
22 27.) He assessed her statements as "partially consistent" with
23 the file evidence and concluded that "[w]hile the evidence
24

25 ¹⁰ A GAF score of 41 to 50 indicates "[s]erious symptoms
26 (e.g., suicidal ideation, severe obsessional rituals, frequent
27 shoplifting) OR any serious impairment in social, occupational,
28 Diagnostic and Statistical Manual of Mental Disorders 32 (revised
4th ed. 2000).

1 supports some functional limitations, it does not support
2 complete inability to work." (AR 122.)

3 Dr. Mertens weighed Dr. Simonian's opinion and found that it
4 was "grossly consistent" but "overestimate[d] marked limitation
5 dealing [with] others." (Id.) He explained that she "clearly
6 demonstrates distress, but interacts reasonably well during
7 documented contacts"; he recommended limited social contact but
8 found no "marked disab[ility]" in that area. (Id.)

9 He noted moderate limitation in most areas, including her
10 ability to understand and remember detailed instructions, carry
11 out detailed instructions, maintain attention and concentration
12 for extended periods, work in coordination with or in proximity
13 to others without being distracted by them, interact
14 appropriately with the general public, accept instructions and
15 respond appropriately to criticism from supervisors, and get
16 along with coworkers or peers without distracting them or
17 exhibiting behavioral extremes. (AR 123-24.) Dr. Mertens noted
18 that an undated function report reflected that she was "personal
19 care independent," prepared simple meals, and completed household
20 chores. (AR 124; see AR 248-56.) She "walk[ed], use[d] public
21 transportation, shop[ped], and manage[d] her own finances
22 unassisted." (AR 124.) She did not like to spend time with
23 others and required reminders for personal hygiene, medication
24 management, and appointments. (Id.) She reported problems with
25 memory, task completion, concentration, understanding, following
26 instructions, and getting along with others. (Id.) She could
27 follow spoken or written instructions, but her stress management
28 was poor and she coped by cutting herself. (Id.) According to

1 Dr. Mertens:

2 [A] preponderance of the evidence contained in [the]
3 file suggests that [Plaintiff] is capable to meet the
4 basic mental and emotional demands of competitive,
5 renumerative, unskilled work, including the abilities to
6 do the following on a sustained basis in a work setting
7 with low social contact:

8 A. Understand, remember, carry out at least
9 simple instructions.

10 B. Make simple work related decisions and abide
11 by a schedule.

12 C. Respond appropriately to supervisors,
13 coworkers, and social interactions in a work
14 setting with reduced social contact.

15 D. Deal with at least minor changes in work
16 routines.

17 (AR 125.)

18 Dr. Tendler reviewed Plaintiff's file on July 25, 2016, and
19 found medically determinable mental impairments of bipolar and
20 personality disorder but "less than significant limitations."

21 (AR 134; see AR 133-41.) He found Dr. Simonian's opinion "more
22 limiting than warranted based on objective evidence in exam and
23 reported functioning" and gave it "other than great weight." (AR
24 134.) He concluded that Plaintiff's impairments could reasonably
25 be expected to produce some of the symptoms alleged, but her
26 statements concerning the intensity, persistence, and limiting
27 effects of those symptoms were only "partially consistent."

28 (Id.)

1 He opined that she should not be expected to memorize or
2 understand detailed instructions but could "understand, remember,
3 and carry out a two-step command involving simple instructions."
4 (AR 137.) He explained that she could concentrate and maintain
5 persistence on simple tasks and would be able to have "extended
6 periods of concentration and attention greater than 2-4 hour
7 segments." (AR 138.) She could "maintain attendance and
8 complete a normal workweek and maintain pace with occasional
9 absences." (Id.) As to social interaction, he found that she
10 was "[s]ocially available for superficial interactions," could
11 "tolerate the minimum social demands of simple-task settings,"
12 and was "[a]ble to relate to coworkers [and] supervisors but
13 would have difficulty relating to the public on a regular basis."
14 (Id.) Finally, as to adaptation limitations, he explained that
15 she could "maintain an acceptable level of attendance" and
16 "adequately adapt to changes of routine, and to simple
17 situations, not calling for rapid or extensive changes in work
18 tasks or procedures." (AR 139.)

19 2. Applicable law

20 Three types of physicians may offer opinions in Social
21 Security cases: those who directly treated the plaintiff, those
22 who examined but did not treat the plaintiff, and those who did
23 neither. Lester, 81 F.3d at 830. A treating physician's opinion
24 is generally entitled to more weight than an examining
25 physician's, and an examining physician's opinion is generally
26
27
28

1 entitled to more weight than a nonexamining physician's.¹¹ Id.

2 When a treating or examining physician's opinion is not
3 contradicted by other evidence in the record, it may be rejected
4 only for a "clear and convincing" reason. See Carmickle v.
5 Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1164 (9th Cir. 2008)
6 (quoting Lester, 81 F.3d at 830-31). When a treating or
7 examining physician's opinion is contradicted, the ALJ must
8 provide only a "specific and legitimate reason" for discounting
9 it. Id. The weight given an examining physician's opinion,
10 moreover, depends on whether it is consistent with the record and
11 accompanied by adequate explanation, among other things.
12 § 416.927(c)(3)-(6). Furthermore, "[t]he ALJ need not accept the
13 opinion of any physician . . . if that opinion is brief,
14 conclusory, and inadequately supported by clinical findings."
15 Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); accord
16 Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th
17 Cir. 2004).

18 The Court must consider the ALJ's decision in the context of
19 "the entire record as a whole," and if the "evidence is

21 ¹¹ For claims filed on or after March 27, 2017, the rules in
22 § 416.920c (not § 416.927) apply. See § 416.920c (evaluating
23 opinion evidence for claims filed on or after Mar. 27, 2017).
24 The new regulations provide that the Social Security
25 Administration "will not defer or give any specific evidentiary
26 weight, including controlling weight, to any medical opinion(s)
27 or prior administrative medical finding(s), including those from
28 your medical sources." § 416.920c(a). Thus, the new regulations
eliminate the term "treating source" as well as what is
customarily known as the treating-source or treating-physician
rule. See § 416.920c. Plaintiff's claim was filed before March
27, 2017, and the Court therefore analyzes it under the treating-
source rule in § 416.927.

1 susceptible to more than one rational interpretation,' the ALJ's
2 decision should be upheld." Ryan v. Comm'r of Soc. Sec., 528
3 F.3d 1194, 1198 (9th Cir. 2008) (citation omitted).

4 3. Analysis

5 The ALJ gave "great weight" to the opinions of Drs. Simonian
6 and Tendler and "moderate weight" to Dr. Mertens's. (AR 21-23.)
7 An ALJ is tasked with "resolv[ing] conflicts in the testimony"
8 and "ambiguities in the record." Treichler v. Comm'r of Soc.
9 Sec. Admin., 775 F.3d 1090, 1098 (9th Cir. 2014). Nevertheless,
10 the ALJ here gave no explanation for apparently crediting only
11 part of Dr. Simonian's opinion and did not reconcile the
12 differences between the two opinions to which he gave "great
13 weight." See Nguyen v. Chater, 100 F.3d 1462, 1464 (9th Cir.
14 1996) (ALJ erred when he did not explicitly reject examining
15 psychologist's opinion or set forth specific, legitimate reasons
16 for crediting nonexamining psychologist's opinion over his).

17 a. *The ALJ erred in assessing Dr. Simonian's*
18 *opinion*

19 The ALJ attributed "great weight" to the opinions of Drs.
20 Simonian and Tendler, finding them "supported with explanation"
21 and "both internally consistent and consistent with the record as
22 a whole." (AR 22, 23.) As to Plaintiff's ability to relate to
23 and interact with supervisors, coworkers, and the public, Dr.
24 Simonian opined that she was "markedly limited" (AR 359), and Dr.
25 Tendler believed that she was "[s]ocially available for
26 superficial interactions," could "tolerate the minimum social
27 demands of simple-task settings," and was "[a]ble to relate to
28 coworkers [and] supervisors but would have difficulty relating to

1 the public on a regular basis" (AR 138).

2 Dr. Tendler, who reviewed the record on reconsideration,
3 found Dr. Simonian's psychiatric report "more limiting than
4 warranted based on objective evidence in exam and reported
5 functioning or [activities of daily living]." (AR 134.) Thus,
6 Dr. Tendler gave Dr. Simonian's report "other than great weight"
7 and concluded that "[w]hile the evidence supports some functional
8 limitations, it does not support complete inability to work."
9 (AR 134, 136.)

10 The ALJ appears to have adopted Dr. Tendler's opinion over
11 Dr. Simonian's on this issue because he limited Plaintiff to no
12 interaction with the public but occasional contact with coworkers
13 and supervisors. (AR 20.) But he did not expressly resolve this
14 obvious conflict, nor did he provide a "specific and legitimate
15 reason" for implicitly discounting Dr. Simonian's finding of
16 "marked limitation" as to Plaintiff's interaction with coworkers
17 and supervisors. See Carmickle, 533 F.3d at 1164 (ALJ must give
18 "specific and legitimate reason" for discounting contradicted
19 examining physician's opinion). This was error:

20 [When] an ALJ does not explicitly reject a medical
21 opinion or set forth specific, legitimate reasons for
22 crediting one medical opinion over another, he errs. In
23 other words, an ALJ errs when he rejects a medical
24 opinion . . . while doing nothing more than ignoring it.

25 Garrison v. Colvin, 759 F.3d 995, 1012-13 (9th Cir. 2014)

26 (citation omitted).

27 The ALJ's failure to resolve the conflict was not harmless.
28 The RFC did not take into account Dr. Simonian's finding that

1 Plaintiff was essentially unable to interact with coworkers and
2 supervisors. See Denby v. Colvin, No. 1:15-CV-00191-SB, 2016 WL
3 917313, at *4, *13 (D. Ore. Mar. 8, 2016) (noting that crediting
4 doctor's opinion of "marked limitations" in interacting with
5 supervisors, public, and coworkers and in responding
6 appropriately to usual work situations would make claimant unable
7 to work). The ALJ provided no explanation for ignoring Dr.
8 Simonian's "marked limitation" finding as to coworkers and
9 supervisors even though he gave the opinion "great weight." See
10 Davis v. Colvin, No. 3:14-cv-00271-PK., 2015 WL 2218386, at *8,
11 *10 (D. Ore. May 9, 2015) (remanding because ALJ failed to
12 provide "detailed explanation" of implicit rejection of
13 limitations in doctors' opinions despite giving them substantial
14 weight); see also Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir.
15 1988) (remanding when ALJ failed to provide "detailed, reasoned
16 and legitimate rationales" for disregarding physician's finding).
17 Indeed, the vocational expert testified that if Plaintiff could
18 not interact with "supervisors, coworkers or the public," she
19 couldn't work at all. (AR 52.) Accordingly, the ALJ's error was
20 not harmless and reversal is necessary.

21 b. *The VE hypothetical was likely proper*

22 Citing almost exclusively law from the Seventh Circuit,
23 Plaintiff contends that the ALJ failed to ask the vocational
24 expert about her difficulties in maintaining concentration,
25 persistence, and pace. (J. Stip. at 4-5.) Because the ALJ's
26 hypothetical included the functional limitations in his RFC
27 finding and specified "1-2 step tasks" at "reasoning level 1," it
28 properly accounted for Plaintiff's limitations in that area. (AR

1 20; see AR 48-51); see Thomas, 278 F.3d at 956 (when hypothetical
2 includes all of claimant's credible functional limitations, ALJ
3 is generally entitled to rely on VE's response).

4 At step five, the Commissioner has the burden of showing the
5 existence of work in the national economy that a plaintiff can
6 perform, taking into account her age, education, and vocational
7 background. See Pinto v. Massanari, 249 F.3d 840, 844 (9th Cir.
8 2001). To meet this burden, the ALJ must "identify specific jobs
9 existing in substantial numbers in the national economy that
10 claimant can perform despite her identified limitations."

11 Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995). The ALJ
12 first assesses the claimant's RFC, then considers potential
13 occupations the claimant may be able to perform, usually relying
14 on the Dictionary of Occupational Titles or a VE's testimony.
15 See Gutierrez v. Colvin, 844 F.3d 804, 806-07 (9th Cir. 2016)
16 (ALJ may rely on VE to provide testimony about jobs applicant can
17 perform despite her limitations, using DOT to guide analysis).

18 An "ALJ's assessment of a claimant adequately captures
19 restrictions related to concentration, persistence, or pace where
20 the assessment is consistent with restrictions identified in the
21 medical testimony." Stubbs-Danielson v. Astrue, 539 F.3d 1169,
22 1174 (9th Cir. 2008) (citations omitted). Here, the ALJ posed to
23 the VE a hypothetical individual of Plaintiff's age and education
24 who was limited to one- or two-step tasks at reasoning level one,
25 with no public contact but occasional contact with supervisors
26 and coworkers. (AR 48-51.) This hypothetical was consistent
27 with her RFC, which included "perform[ing] work consisting of
28 simple 1-2 step tasks at reasoning level 1; can have no public

1 contact; and can have occasional contact with supervisors and
2 coworkers." (AR 20.)

3 Drs. Tendler and Mertens found Plaintiff "not significantly
4 limited" in the ability to carry out short and simple
5 instructions; perform activities within a schedule, maintain
6 regular attendance, and be punctual within customary tolerance;
7 sustain an ordinary routine without special supervision; and make
8 simple work-related decisions. (See AR 123, 137-38.) Both
9 doctors found her "moderately limited" in her ability to carry
10 out detailed instructions, maintain attention and concentration
11 for extended periods, work in coordination with or in proximity
12 to others without being distracted by them, complete a normal
13 workday and workweek without interruptions from psychologically
14 based symptoms, and perform at a consistent pace without an
15 unreasonable number or length of rest periods. (Id.) Dr.
16 Simonian also found her "moderately limited" in her ability to do
17 detailed and complex instructions, maintain concentration and
18 attention for a period of time, adapt to the stresses common to a
19 normal work environment, maintain regular attendance in the
20 workplace and perform work activities on a consistent basis, and
21 perform work activities without special or additional
22 supervision. (AR 359.) He found her ability to remember,
23 understand, and carry out simple one- or two-step instructions
24 "not limited." (Id.)

25 The ALJ properly translated these limitations, including
26 concerning concentration, persistence, and pace, into a concrete
27 restriction to "simple 1-2 step tasks at reasoning level 1." (AR
28 20); see also Stubbs-Danielson, 539 F.3d at 1173-74 (ALJ's

1 limitation to "simple, routine, repetitive" work sufficiently
2 accommodated medical-opinion evidence that claimant had
3 "moderate" limitation in pace and "other mental limitations
4 regarding attention, concentration, and adaption"); Phillips v.
5 Colvin, 61 F. Supp. 3d 925, 940 (N.D. Cal. 2014) (ALJ properly
6 assessed medical evidence in determining that despite moderate
7 difficulties in concentration, persistence, or pace, claimant
8 could perform "simple routine 1-2 step unskilled tasks").

9 Again citing only Seventh Circuit law, Plaintiff also
10 complains that the ALJ "failed to provide any analysis" of
11 "allowable time off-task in a competitive job." (J. Stip. at 5.)
12 The ALJ asked the VE whether someone who would be absent from
13 work an average of more than two days a month because of a
14 psychiatric condition or "off task at least 15% of the workday"
15 would be precluded from work, and the VE responded that those
16 were "beyond acceptable thresholds." (AR 51.) But the ALJ did
17 not include any such finding in the RFC. (See AR 20.) Nor were
18 such findings supported by the medical evidence. Drs. Simonian,
19 Tendler, and Mertens found Plaintiff "moderately limited" in her
20 ability to "maintain regular attendance in the workplace" or
21 complete a normal "workday and workweek without interruptions
22 from psychologically based symptoms." (AR 123, 137-38, 359.) To
23 the extent it is unclear whether those findings translate to more
24 than two absences a month or being off task 15 percent or more of
25 the time, on remand the ALJ can reconsider the issue. See Ajani
26 v. Comm'r of Soc. Sec., No. 18-cv-02226-SI, 2019 WL 2106232, at
27 *15 (N.D. Cal. May 14, 2019) (finding that claimant would be
28 barred from any job when he would miss three days monthly in

1 winter because of asthma and arthritis and two days monthly rest
2 of year).

3 B. Remand for Further Proceedings Is Appropriate

4 When, as here, an ALJ errs, the Court generally has
5 discretion to remand for further proceedings. See Harman v.
6 Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Under the
7 "credit-as-true" rule, a court may direct an immediate award of
8 benefits. See id. at 1179 ("[T]he decision of whether to remand
9 for further proceedings turns upon the likely utility of such
10 proceedings."); see also Garrison, 759 F.3d at 1019-20. When the
11 ALJ's findings are so "insufficient" that the Court cannot
12 determine whether the rejected testimony should be credited as
13 true, however, the Court has "some flexibility" in applying the
14 credit-as-true rule. Connett v. Barnhart, 340 F.3d 871, 876 (9th
15 Cir. 2003); see also Garrison, 759 F.3d at 1020 (noting that
16 Connett cautioned that credit-as-true rule may not be dispositive
17 in all cases). This flexibility should be exercised "when the
18 record as a whole creates serious doubt as to whether the
19 claimant is, in fact, disabled within the meaning of the Social
20 Security Act." Garrison, 759 F.3d at 1021.


21 Here, under Connett, remand for further proceedings is
22 appropriate. As discussed, the ALJ failed to fully explain his
23 decision, and further administrative proceedings will allow him
24 to do so. Moreover, as discussed, other doctors found Plaintiff
25 not as limited as Dr. Simonian did. On remand, the ALJ should
26 resolve the conflict in the record concerning Plaintiff's ability
27 to interact with coworkers and supervisors. Because reversal is
28 warranted on this ground, the Court does not decide whether

1 Plaintiff's subjective symptom statements were consistent with
2 the record. That should be reassessed on remand once the
3 conflict in the doctors' opinions is resolved.

4 **VI. CONCLUSION**

5 Consistent with the foregoing and under sentence four of 42
6 U.S.C. § 405(g),¹² IT IS ORDERED that judgment be entered
7 REVERSING the Commissioner's decision, GRANTING Plaintiff's
8 request for remand, and REMANDING this action for further
9 proceedings consistent with this Memorandum Decision.

10
11 DATED: April 15, 2020


12 JEAN ROSENBLUTH
13 U.S. Magistrate Judge
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26 ¹² That sentence provides: "The [district] court shall have
27 power to enter, upon the pleadings and transcript of the record,
28 a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."