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

ALTHEIA TAYLOR,
Plaintiff,
v.
CAROLYN W. COLVIN,¹
Acting Commissioner of Social
Security,
Defendant.

) **NO. EDCV 12-00819-MAN**
)
) **MEMORANDUM OPINION**
) **AND ORDER**
)

Plaintiff filed a Complaint on May 31, 2012, seeking review of the denial of plaintiff's application for a period of disability, disability insurance benefits ("DIB"), and supplemental security income ("SSI"). On June 15, 2012, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. On March 7, 2013, a settlement conference was held before the undersigned United States Magistrate Judge, but no settlement was reached. On June 27, 2013, the parties filed a Joint Stipulation in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits or, alternatively, for further administrative proceedings; and the Commissioner

¹ Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013, and is substituted in place of former Commissioner Michael J. Astrue as the defendant in this action. (*See* Fed. R. Civ. P. 25(d).)

1 requests that her decision be affirmed or, alternatively, remanded for further administrative
2 proceedings. The Court has taken the parties' Joint Stipulation under submission without oral
3 argument.

4
5 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
6

7 Plaintiff filed an application for a period of disability and DIB on February 19, 2009, and
8 she filed an application for SSI on January 29, 2010. (Administrative Record ("A.R.") 13.)
9 Plaintiff, who was born on January 23, 1963 (A.R. 18), claims to have been disabled since May
10 3, 2008, due to schizophrenia and bipolar disorder (A.R. 81, 90). Plaintiff has past relevant work
11 experience as a parking lot attendant, sales clerk, hotel customer service clerk, and cashier
12 checker. (A.R. 18.)
13

14 After the Commissioner denied plaintiff's claim initially and upon consideration, plaintiff
15 requested a hearing. (A.R. 13.) On September 17, 2010, plaintiff, who was represented by
16 counsel, appeared and testified at a hearing before Administrative Law Judge Michael D.
17 Radensky (the "ALJ"). (*Id.*) Vocational expert David A. Rinehart also testified. (*Id.*) On October
18 29, 2010, the ALJ denied plaintiff's claim (A.R. 13-20), and the Appeals Council subsequently
19 denied plaintiff's request for review of the ALJ's decision (A.R. 1-3). That decision is now at issue
20 in this action.
21

22 **SUMMARY OF ADMINISTRATIVE DECISION**
23

24 In his October 29, 2010 decision, the ALJ found that plaintiff met the insured status
25 requirements of the Social Security Act through September 30, 2012, and plaintiff has not
26 engaged in substantial gainful activity since May 3, 2008, the alleged onset date of her disability.
27 (A.R. 15.) The ALJ determined that plaintiff has the severe impairments of mood disorder,
28 posttraumatic stress disorder, and borderline personality disorder. (*Id.*) The ALJ concluded,

1 however, that plaintiff “does not have an impairment or combination of impairments that meets
2 or medically equals one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20
3 CFR [§§] 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).” (*Id.*)
4

5 After reviewing the record, the ALJ determined that plaintiff has the residual functional
6 capacity (“RFC”) “to perform a full range of work at all exertional levels but with the following
7 nonexertional limitations: simple repetitive work and limited public interaction.” (A.R. 16.) In
8 making this finding, the ALJ considered: the subjective symptom testimony of plaintiff, which the
9 ALJ found was not entirely credible; the medical opinions and evidence of record.; and the
10 unfavorable May 2, 2008 decision on plaintiff’s prior application for DIB and SSI. (A.R. 16-18.)
11 With respect to the medical opinions of record, the ALJ gave little weight to the opinion of
12 plaintiff’s treating psychiatrist, Imelda Alfonso, M.D., because the evidence of record did not
13 support her opinions, and she failed to mention plaintiff’s noncompliance with her medication
14 treatment. (A.R. 18.) Instead, the ALJ agreed with, and gave “great weight” to, the opinion of
15 the State agency medical consultant that “the evidence of record does not provide a basis for
16 deviating from the May 2, 2008 decision that [plaintiff] is not disabled.” (A.R. 18.) The ALJ noted
17 that, in accordance with Chavez v. Bowen, 844 F.2d 691 (9th Cir. 1988), the prior, unfavorable
18 decision “gives rise to a presumption that the claimant continues to be not disabled after the
19 period adjudicated, and that this presumption of continuing nondisability applies when
20 adjudicating a subsequent disability claim with an unadjudicated period arising under the same
21 title of the Act as the prior claim.” (A.R. 17.) The ALJ further noted that a claimant must show
22 “changed circumstances” to rebut the presumption. (*Id.*) After detailing the May 2, 2008
23 decision, and the evidence of record, the ALJ found that plaintiff “ha[d] not met her burden of
24 proving changed circumstances indicating greater disability.” (A.R. 18.)

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1 Based on plaintiff's age, education,² work experience, and RFC, as well as the testimony
2 of the vocational expert, the ALJ determined that, although plaintiff was unable to perform any
3 past relevant work, there were other jobs that plaintiff could perform in the national economy,
4 including those of hand packager, floor waxer, and laundry worker. (A.R. 19.) Accordingly, the
5 ALJ concluded that plaintiff "has not been under a disability, as defined in the Social Security Act,
6 from May 3, 2008, through [October 29, 2010,] the date of []his decision." (A.R. 20.)

7 8 STANDARD OF REVIEW

9
10 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine
11 whether it is free from legal error and supported by substantial evidence in the record as a whole.
12 Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "such relevant evidence
13 as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted).
14 The "evidence must be more than a mere scintilla but not necessarily a preponderance." Connett
15 v. Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the record can constitute
16 substantial evidence, only those 'reasonably drawn from the record' will suffice." Widmark v.
17 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006) (citation omitted).

18
19 Although this Court cannot substitute its discretion for that of the Commissioner, the Court
20 nonetheless must review the record as a whole, "weighing both the evidence that supports and
21 the evidence that detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of Health
22 and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also* Jones v. Heckler, 760 F.2d 993, 995
23 (9th Cir. 1985). "The ALJ is responsible for determining credibility, resolving conflicts in medical
24 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir.
25 1995).

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² The ALJ determined that plaintiff "has at least a high school education and is able
to communicate in English." (A.R. 19.)

1 The Court will uphold the Commissioner's decision when the evidence is susceptible to
2 more than one rational interpretation. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).
3 However, the Court may review only the reasons stated by the ALJ in his decision "and may not
4 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d at 630; *see also* Connett,
5 340 F.3d at 874. The Court will not reverse the Commissioner's decision if it is based on harmless
6 error, which exists only when it is "clear from the record that an ALJ's error was 'inconsequential
7 to the ultimate nondisability determination.'" Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th
8 Cir. 2006) (quoting Stout v. Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); *see also* Burch, 400
9 F.3d at 679.

10 DISCUSSION

11
12
13 Plaintiff asserts three sources of error. (Joint Stipulation ("Joint Stip.") at 4.) First, plaintiff
14 claims that the ALJ erred in his application of Chavez in giving res judicata effect to the prior,
15 unfavorable May 2, 2008 decision. Second, plaintiff claims that the ALJ failed to properly consider
16 the relevant medical evidence of record in this case. Third, plaintiff claims the ALJ failed to
17 properly assess her subjective symptom testimony.

18 19 I. The ALJ's Determination That Plaintiff Has Failed To Rebut The 20 Presumption Of Continuing Nondisability Is Not Supported By 21 Substantial Evidence.

22
23 "The principles of res judicata apply to administrative decisions, although the doctrine is
24 applied less rigidly to administrative proceedings than to judicial proceedings." Chavez, 844 F.2d
25 at 693. "Normally, an ALJ's findings that a claimant is not disabled 'creates a presumption that
26 the claimant continued to be able to work after that date.'" Vasquez v. Astrue, 572 F.3d 586, 597
27 (9th Cir. 2009) (quoting Lester v. Chater, 81 F.3d 821, 827 (9th Cir. 1995)). The presumption,
28 however, does not apply "where the claimant [wa]s unrepresented by counsel at the time of the

1 prior claim.” Lester, 81 F.3d at 828. The presumption also does not apply if there are “changed
2 circumstances.” *Id.* at 827 (citation and internal quotations omitted). Examples of changed
3 circumstances precluding the application of res judicata to a subsequent unadjudicated period of
4 alleged disability include “[a]n increase in the severity of the claimant’s impairment,” “a change
5 in the claimant’s age category, as defined in the Medical-Vocational Guidelines,” and “where the
6 claimant raises a new issue, such as the existence of an impairment not considered in the
7 previous application.” Lester, 81 F.3d at 827 (citations omitted).

8
9 In his decision, the ALJ discussed the prior, unfavorable May 2, 2008 decision. The ALJ
10 noted that the:

11
12 The May 2, 2008 decision details [plaintiff]’s lack of credibility. She has a history
13 of malingering and going to different therapists to get desired diagnoses. [Plaintiff]
14 missed appointments for psychological testing on several occasions. She asserted
15 having schizophrenia when there was no medically documented basis for it. Even
16 her counselor did not find [plaintiff]’s report of hallucinations and other stories to
17 be credible. [Plaintiff] also expresses no desire to work. She represented that she
18 quit a seasonal telemarketing position because she was afraid of a worker, but it
19 was evident from her statements that the actual reason for quitting was she simply
20 wanted money for the holidays. [Plaintiff] testified she had worked long enough
21 in her life and went into a tirade about being owed Social Security benefits.

22
23 (A.R. 18; internal citations omitted.) The ALJ also noted that the prior, unfavorable decision gave
24 rise to a presumption that plaintiff continued to be not disabled. (A.R. 17.) The ALJ determined
25 that plaintiff had not rebutted the presumption of continuing nondisability, because she had not
26 met her burden of showing changed circumstances. (A.R. 18.) Specifically, the ALJ noted that
27 “[plaintiff’s] current treatment records and testimony show no worsening of her condition and
28 confirm prior findings of her lack of credibility.” (*Id.*)

1 As an initial matter, it appears that the ALJ may have erred in giving res judicata effect to
2 the prior, unfavorable May 2, 2008 decision. As noted *supra*, res judicata should not be applied
3 where claimant was unrepresented by counsel at the time of the prior claim. Lester, 81 F.3d at
4 828. In this case, plaintiff was not represented by counsel at the time of her prior claim and,
5 instead, was represented by a non-attorney representative. (A.R. 70.) Thus, it may well be that
6 the ALJ should have evaluated the evidence *de novo* instead of applying a presumption of non-
7 disability that plaintiff had to overcome.

8
9 Further, the Court cannot determine whether the ALJ's finding that plaintiff failed to rebut
10 the presumption of continuing nondisability is supported by substantial evidence. First, plaintiff
11 alleges, and the medical records appear to confirm, that she has been hospitalized on two
12 separate occasions pursuant to a 5150³ admission since the prior, unfavorable decision. (Joint
13 Stip. at 5.) Specifically, the record contains a January 13, 2010 Patient Aftercare Plan, which was
14 completed on the same date plaintiff was discharged from the hospital. (A.R. 324.) In that form,
15 it was noted that plaintiff has a schizoaffective disorder and was a danger to herself and to
16 others. (*Id.*) Plaintiff's expected course of recovery was described as "fair." (*Id.*) The record
17 also contains an identical Patient Aftercare Plan form dated October 13, 2011. (A.R. 354.) In that
18 form, it was noted that plaintiff was a danger to herself, and plaintiff's expected course of
19 recovery was described as "good." (*Id.*) While the latter form was not before the ALJ at the time
20 of his decision, the ALJ made no mention of the prior form and/or plaintiff's January 2010
21 hospitalization for her mental illness. Such a psychiatric hospitalization, particularly if it were
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23 ³ California Welfare and Institutions Code § 5150 provides:

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25 When any person, as a result of mental disorder, is a danger to others, or to himself
26 or herself, or gravely disabled, a peace officer, member of the attending staff, as
27 defined by regulation, of an evaluation facility designated by the county, designated
28 members of a mobile crisis team provided by section 5651.7, or other professional
person designated by the county may, upon probable cause, take, or cause to be
taken, the person into custody and place him or her in a facility designated by the
county and approved by the State Department of Social Services as a facility for 72-
hour treatment and evaluation.

1 pursuant to a 5150 admission, as plaintiff alleges, would appear to indicate a worsening of
2 plaintiff's condition.

3
4 Second, contrary to the ALJ's assertion, the treatment records from plaintiff's treating
5 psychiatrist, Dr. Alfonso, whose opinion, as noted below, the ALJ failed to consider properly,
6 indicate a worsening in plaintiff's condition. For example, Dr. Alfonso noted in a September 12,
7 2008 Mental Disorder Questionnaire form that plaintiff has a "paranoid type" schizophrenia with,
8 *inter alia*, *increased* anxiety, *increased* depression, *increased* paranoia, and *increased* auditory
9 hallucinations. (A.R. 233-34.) Similarly, in a September 17, 2008 Short-Form Evaluation for
10 Mental Disorders, Dr. Alfonso noted that plaintiff has, *inter alia*, a "paranoid type" schizophrenia
11 with *increased* anxiety and *increased* paranoia. (A.R. 237-40.) In an April 17, 2009 Short-Form
12 Evaluation for Mental Disorders form, Dr. Alfonso again noted plaintiff's diagnosis of
13 "schizophrenia, paranoid type" as well as the fact that plaintiff is experiencing "*increasing* multiple
14 'voices' [and] *increasing* paranoid delusions." (A.R. 262-63; emphasis added.) In that same form,
15 Dr. Alfonso noted that plaintiff "was recently hospitalized . . . in March, 2009[,] after she 'flipped'
16 out [and] became agitated towards her sister. [Plaintiff] decompensated [and] her medications
17 were changed." (A.R. 264.) Dr. Alfonso noted that "[plaintiff] is out of the hospital but [her]
18 prognosis is guarded." (*Id.*) Lastly, in a June 12, 2009 form entitled "Medical Opinion Re: Ability
19 To Do Work-Related Activities (Mental)," Dr. Alfonso indicated, among other things, that plaintiff
20 has *increased* anxiety and *increased* paranoia, and "her concentration is severely impaired due
21 to *increasing* auditory hallucinations." (A.R. 316; emphasis added.) While the Court does not
22 have Dr. Alfonso's initial evaluation before it for comparison or the records that were before the
23 prior ALJ at the time of the May 2, 2008 decision,⁴ it is clear from Dr. Alfonso's current treatment
24

25
26 ⁴ In his May 2, 2008 decision, the prior ALJ did not discuss Dr. Alfonso's initial findings
27 and/or observations in any great detail. Instead, the ALJ only noted that plaintiff came to see Dr.
28 Alfonso on December 4, 2007, for a medication refill and evaluation and that "[t]he diagnostic
impression was schizophrenia." (A.R. 76.) Ultimately, the prior ALJ afforded "little weight" to
the "observation" by Dr. Alfonso, because "[it] [wa]s inconsistent with the record as a whole."
(*Id.*)

1 notes, particularly her multiple notations that plaintiff's symptoms are "increasing" and her
2 condition is worsening as compared to earlier evaluations.

3
4 Third, as further evidence of changed circumstances, plaintiff notes that, in a subsequent
5 application for DIB and SSI, she was found to be disabled on October 30, 2010 -- *to wit*, the day
6 after the unfavorable decision at issue here. (Joint Stip. at 7.) The fact that plaintiff was
7 awarded benefits in a subsequent claim so close in time to the prior denial warrants
8 reconsideration so that the ALJ may further evaluate whether records that formed the basis for
9 a finding of disability in the most recent claim may relate to this claim. See Luna v. Astrue, 623
10 F.3d 1032 (9th Cir. 2010) (noting that "in certain circumstances, an award based on an onset date
11 coming in immediate proximity to an earlier denial of benefits is worthy of further administrative
12 scrutiny to determine whether the favorable event should alter the initial, negative outcome on
13 the claim").

14
15 Accordingly, for the aforementioned reasons, the Court cannot find the ALJ's determination
16 that plaintiff has failed to rebut the presumption of continuing nondisability to be supported by
17 substantial evidence.⁵

18
19 ⁵ Plaintiff also takes issue with the fact that the previous records, which were
20 referenced by the prior ALJ in his March 2, 2008 decision, are not available for plaintiff and this
21 Court to review. (Joint Stip. at 5-7.) Plaintiff states that "it is impossible to ascertain the
22 legitimacy of the conclusions of the prior ALJ, and while *res judicata* may in fact apply to the prior
23 period of alleged disability, Chavez should not require that mistakes made on the prior decision
24 be repeated on the present case, without any evidentiary basis whatsoever." (Joint Stip. at 7.)

25 For example, plaintiff notes that:

26 The present ALJ discusses references from the prior ALJ[']s decision as support for
27 evidence on non-compliance. It is unclear to both Plaintiff and Plaintiff's counsel
28 what specific evidence of medical non-compliance the current ALJ or the prior ALJ
are referring to. The prior ALJ states in his denial of May 2, 2008, that Plaintiff
"missed psychological testing 3 to 4 times" No citations were provided by the
ALJ documenting these "3 to 4 times[.]" Obviously, if there were specific instances
of such non-compliance, the ALJ would have or should have been able to know if
Plaintiff actually missed testing on 3 occasions or rather, if Plaintiff missed testing
on 4 occasions. Based on the prior ALJ's statement, and complete lack of any

1 **II. The ALJ Failed To Give Specific And Legitimate Reasons For**
2 **Rejecting The Opinions Of Plaintiff’s Treating Psychiatrist.**

3
4 An ALJ is obligated to take into account all medical opinions of record. 20 C.F.R. §§
5 404.1507(d), 416.907(d). It is the responsibility of the ALJ to resolve conflicts in medical
6 testimony and analyze evidence. Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989). In
7 the hierarchy of physician opinions considered in assessing a social security claim, “[g]enerally,
8 a treating physician’s opinion carries more weight than an examining physician’s, and an
9 examining physician’s opinion carries more weight than a reviewing physician’s.” Holohan v.
10 Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001); *see also* 20 C.F.R. §§ 404.1527(d), 416.927(d).

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13 The opinions of treating physicians are entitled to the greatest weight, because the treating
14 physician is hired to cure and has a better opportunity to know and observe the claimant.
15 Magallanes, 881 F.2d at 751. When a treating or examining physician’s opinion is not
16 contradicted by another physician, it may be rejected only for “clear and convincing” reasons.
17 Lester, 81 F.3d at 830. When contradicted by another doctor, a treating or examining physician’s
18 opinion may only be rejected if the ALJ provides “specific and legitimate” reasons supported by
19 substantial evidence in the record. *Id.*; *see also* Ryan v. Comm’r of Soc. Sec., 528 F.3d 1194, 1198
20 (9th Cir. 2008); Orn, 495 F.3d at 632.

21
22
23 evidentiary support whatsoever, Plaintiff maintains that it was error for the current
24 ALJ in the present case to rely on this vague and ambiguous statement from the
prior ALJ without any evidentiary foundation whatsoever.

25 (Joint Stip. at 5.) While plaintiff is correct that the records upon which the prior ALJ relied are
26 unavailable for review, plaintiff is incorrect that the prior ALJ failed to provide a citation to support
27 his statement that plaintiff missed psychological testing 3 to 4 times. In fact, in his May 2, 2008
28 decision, the prior ALJ specifically referenced “Exhibit 10F/3” when he noted that plaintiff missed
her psychological testing appointment three to four times. (A.R. 75.) The prior ALJ’s statement,
particular in view of his citation to the record, is not, as plaintiff contends, so vague and
ambiguous that the present ALJ erred in relying upon that statement.

1 In his decision, the ALJ rejected the opinion of plaintiff's treating psychiatrist, Dr. Alfonso,
2 in favor of the opinion of the State agency medical consultant, because: (1) Dr. Alfonso never
3 mentioned plaintiff's noncompliance with her medication treatments; and (2) "[t]he evidence of
4 record does not support Dr. Alfonso's . . . assertion of disability." (A.R. 18.)

5
6 The ALJ's first reason for rejecting Dr. Alfonso's opinion is potentially flawed. In her
7 treatment notes, Dr. Alfonso indicated on multiple occasions that plaintiff's compliance with her
8 medication treatment has been "fair." (*See, e.g.*, A.R. 286, 293, 296, 335.) Clearly, Dr. Alfonso's
9 description of plaintiff's medication compliance as "fair" is an acknowledgment that plaintiff has
10 not been completely compliant with her medication treatment. However, and for the reasons
11 discussed *infra* at pages 13-14, plaintiff's "fair" compliance with her medication treatment does
12 not constitute a legitimate reason for the wholesale rejection of Dr. Alfonso's opinion.

13
14 The ALJ's second reason for rejecting Dr. Alfonso's opinion -- *to wit*, that the evidence of
15 record does not support her assertion of disability -- is impermissibly conclusory and provides no
16 specific reference as to how Dr. Alfonso's opinion is lacking in support from the evidence of
17 record. *See Regennitter v. Comm'r of SSA*, 166 F.3d 1294, 1299 (9th Cir. 1999) (noting that
18 "conclusory reasons will not justify an ALJ's rejection of a medical opinion"); *Embrey v. Bowen*,
19 849 F.2d 418, 421-22 (9th Cir. 1988) ("To say that medical opinions are not supported by
20 sufficient objective findings or are contrary to the preponderant conclusions mandated by the
21 objective findings does not achieve the level of specificity our prior cases have required
22 The ALJ must do more than offer his conclusions. He must set forth his own interpretation and
23 explain why they, rather than the doctors', are correct."). As such, the ALJ's reasoning does not
24 constitute a specific and legitimate reason for rejecting Dr. Alfonso's opinion.

25
26 Accordingly, for the aforementioned reasons, the ALJ failed to properly reject the opinion
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28

1 of Dr. Alfonso.⁶

2
3 **III. On Remand, The ALJ Should Also Revisit His Assessment Of**
4 **Plaintiff's Credibility.**
5

6 Once a disability claimant produces objective medical evidence of an underlying impairment
7 that is reasonably likely to be the source of claimant's subjective symptom(s), all subjective
8 testimony as to the severity of the claimant's symptoms must be considered. Moisa v. Barnhart,
9 367 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991); *see also*
10 20 C.F.R. §§ 404.1529(a), 416.929(a) (explaining how pain and other symptoms are evaluated).
11 "[U]nless an ALJ makes a finding of malingering based on affirmative evidence thereof, he or she
12 may only find an applicant not credible by making specific findings as to credibility and stating
13 clear and convincing reasons for each." Robbins, 466 F.3d at 883. The factors to be considered
14 in weighing a claimant's credibility include: (1) the claimant's reputation for truthfulness; (2)
15 inconsistencies either in the claimant's testimony or between the claimant's testimony and her
16 conduct; (3) the claimant's daily activities; (4) the claimant's work record; and (5) testimony from
17 physicians and third parties concerning the nature, severity, and effect of the symptoms of which
18 the claimant complains. *See* Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); *see also*
19 20 C.F.R. §§ 404.1529(c), 416.929(c).
20

21 After considering plaintiff's testimony, the ALJ cited no current evidence of malingering by
22 plaintiff and concluded that "[plaintiff]'s medically determinable impairments could reasonably be
23 expected to cause the alleged symptoms." (A.R. 17.) Nonetheless, the ALJ determined that
24 plaintiff's "statements concerning the intensity, persistence and limiting effects of [her] symptoms
25 are not credible to the extent they are inconsistent with the [RFC] assessment." (*Id.*)
26

27 ⁶ Although the Commissioner now offers other reasons to explain the ALJ's rejection
28 of Dr. Alfonso's opinion, the Court cannot entertain these post hoc rationalizations. *See, e.g.,*
Orn, 495 F.3d at 630 ("We review only the reasons provided by the ALJ in the disability
determination and may not affirm on a ground upon which he did not reply.").

1 Accordingly, the ALJ's reasons for finding that plaintiff is not credible with respect to her
2 subjective symptom testimony must be "clear and convincing."

3
4 In his decision, the ALJ primarily rejected plaintiff's credibility because of "her unwillingness
5 to participate in meaningful mental health treatment." (A.R. 18.) Specifically, the ALJ noted that
6 "[s]everal treatment notes indicate [plaintiff's] noncompliance with medication treatment." (*Id.*)
7 In support of his assertion, the ALJ cited an October 31, 2008 Clinic Visit Sheet from a San
8 Bernardino County Tuberculosis Control Program in which plaintiff's noncompliance with her
9 tuberculosis medication was noted. (*Id.*; citing A.R. 256.) The ALJ also cited an April 28, 2010
10 treatment note wherein it was noted that plaintiff was not compliant with her medication plan.
11 (*Id.*; citing A.R. 328.)

12
13 It is well established that a failure to follow a prescribed treatment plan may constitute a
14 valid basis for denying benefits. 20 C.F.R. §§ 404.1530(b), 416.930(b). However, it is not a
15 proper basis when, as in this case, a claimant provides a good reason for her failure to comply
16 with the treatment plan. *See Orn*, 495 F.3d at 638 (failure to follow prescribed treatment, when
17 there is a good reason not to do so, may not be used as a basis to deny disability benefits);
18 *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (noting that an ALJ may not reject symptom
19 testimony when a claimant provides "evidence of a good reason for not [seeking treatment]").
20 With respect to the ALJ's first example of noncompliance, plaintiff alleges that her noncompliance
21 with her tuberculosis treatment plan resulted from "some type of confusion with the other
22 instructions she received [from her physician] at L.A. County - USC Medical Center." (Joint Stip.
23 at 18.) Indeed, the October 31, 2008 Clinic Visit Sheet appears to support plaintiff's allegation,
24 noting that plaintiff "insisted" that she was already taking tuberculosis medication prescribed to
25 her by her physician at L.A. County - USC Medical Center. (A.R. 256.) With respect to the ALJ's
26 second example of noncompliance, the treatment note upon which the ALJ relied clearly indicates
27 that plaintiff is indigent and has problems with housing and access to health care. (A.R. 327)
28 The Ninth Circuit has "proscribed the rejection of a claimant's complaints for lack of treatment

1 when the record establishes that the claimant could not afford it.” Regennitter, 166 F.3d at 1287.
2 Accordingly, because plaintiff provided good reasons for her failure to comply with her treatment
3 plan, the ALJ’s reasoning does not constitute a clear and convincing reason for discrediting
4 plaintiff’s subjective symptom testimony.

5
6 Moreover, even assuming *arguendo* that plaintiff failed to provide good reasons for her
7 noncompliance, plaintiff’s inability to follow her treatment may have been symptomatic of her
8 mental impairments and, therefore, does not provide an appropriate basis for discrediting her
9 subjective symptom testimony. *See, e.g., Butts v. Astrue*, 2011 U.S. Dist. LEXIS 61422, 2011 WL
10 2261279, * 3 (C.D. Cal. June 8, 2011) (finding that claimant’s noncompliance with her treatment
11 plan could have been symptomatic of the severity of her mental impairment and, thus, was not
12 a clear and convincing reason for discrediting her subjective symptom testimony); Buckard v.
13 Astrue, 2010 U.S. Dist. LEXIS 141070, 2010 WL 5789044, * 16 (D. Or. Dec. 7, 2010) (finding that
14 claimant’s noncompliance with her depression medications did not constitute a legitimate basis
15 for discrediting her testimony); Clark v. Astrue, 2010 U.S. Dist. LEXIS 10210, 2010 WL 457357,
16 * 5 (E.D. Wash. Feb. 5, 2010) (“[I]t was not appropriate for the ALJ to consider plaintiff’s limited
17 mental health treatment as evidence of a lack of credibility since the failure to follow through with
18 mental health treatment may itself be a symptom of significant mental health problems.”); *see*
19 *also* Nguyen v. Chater, 100 F.3d 1462 (9th Cir. 1996) (“[I]t is a questionable practice to chastise
20 one with a mental impairment for the exercise of poor judgment in seeking rehabilitation.”)
21 (internal quotation marks and citation omitted); Pate-Fires v. Astrue, 564 F.3d 935, 945 (8th Cir.
22 2009) (collecting cases finding that: “a mentally ill person’s noncompliance with psychiatric
23 medications can be, and usually is, the result of the mental impairment itself and, therefore,
24 neither willful nor without a justifiable excuse”) (internal citations and quotations omitted);
25 Kangail v. Barnhart, 454 F.3d 627, 630 (7th Cir. 2006) (noting that “mental illness in general . .
26 . may prevent the sufferer from taking [her] prescribed medicines or otherwise submitting to
27 treatment”).

1 Accordingly, for the aforementioned reasons, the Court finds that the ALJ's negative
2 credibility determination premised upon plaintiff's noncompliance lacks the requisite support of
3 substantial evidence in the record. Therefore, on remand, the ALJ must either credit plaintiff's
4 subjective symptom testimony or provide clear and convincing reasons why plaintiff's testimony
5 in this respect is not credible.

6
7 **IV. Remand Is Required.**

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9 The decision whether to remand for further proceedings or order an immediate award of
10 benefits is within the district court's discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th
11 Cir. 2000). Where no useful purpose would be served by further administrative proceedings, or
12 where the record has been fully developed, it is appropriate to exercise this discretion to direct
13 an immediate award of benefits. *Id.* at 1179 (“[T]he decision of whether to remand for further
14 proceedings turns upon the likely utility of such proceedings.”). However, where there are
15 outstanding issues that must be resolved before a determination of disability can be made, and
16 it is not clear from the record that the ALJ would be required to find the claimant disabled if all
17 the evidence were properly evaluated, remand is appropriate. *Id.* at 1179-81.

18
19 Remand is the appropriate remedy to allow the ALJ the opportunity to remedy the above-
20 mentioned deficiencies and errors. On remand, the ALJ must correct the above-mentioned
21 deficiencies and errors.

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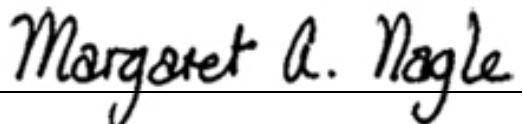
1 **CONCLUSION**

2
3 Accordingly, for the reasons stated above, IT IS ORDERED that the decision of the
4 Commissioner is REVERSED, and this case is REMANDED for further proceedings consistent with
5 this Memorandum Opinion and Order.
6

7 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this
8 Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for defendant.
9

10 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

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12 DATED: March 24, 2014

13 
14 MARGARET A. NAGLE
15 UNITED STATES MAGISTRATE JUDGE
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