

O

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JACQUELINE DOBBINS SMITH,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security  
Administration,

Defendant.

Case No. ED CV 13-1306-SP

MEMORANDUM OPINION AND  
ORDER

**I.**

**INTRODUCTION**

On August 1, 2013, plaintiff Jacqueline Dobbins Smith filed a complaint against defendant, the Commissioner of the Social Security Administration (“Commissioner”), seeking a review of a denial of a period of disability, disability insurance benefits (“DIB”), and Supplemental Security Income (“SSI”). Both plaintiff and defendant have consented to proceed for all purposes before the assigned Magistrate Judge pursuant to 28 U.S.C. § 636(c). The court deems the matter suitable for adjudication without oral argument.

1 Plaintiff presents one overarching issue for decision: whether the  
2 Administrative Law Judge (“ALJ”) erred at step two by failing to find plaintiff  
3 suffered from a severe mental impairment due to his failure to properly consider  
4 the opinions of a treating physician and two examining physicians. Memorandum  
5 in Support of Plaintiff’s Complaint (“P. Mem.”) at 4-14; Memorandum in Support  
6 Defendant’s Answer (“D. Mem.”) at 3-11.

7 Having carefully studied, inter alia, the parties’ moving papers, the  
8 Administrative Record (“AR”), and the decision of the ALJ, the court concludes  
9 that, as detailed herein, the ALJ erred at step two when he improperly rejected the  
10 opinions of plaintiff’s treating physician and examining physicians without  
11 providing specific and legitimate reasons supported by substantial evidence for  
12 doing so. Therefore, the court remands this matter to the Commissioner in  
13 accordance with the principles and instructions enunciated in this Memorandum  
14 Opinion and Order.

## 15 II.

### 16 **FACTUAL AND PROCEDURAL BACKGROUND**

17 Plaintiff, who was forty-six years old on her alleged disability onset date,  
18 has a high school education and completed one year of college. AR at 31, 180.  
19 Her past relevant work was as a fast food manager, sales clerk, and fast food  
20 worker. *Id.* at 66-67.

21 On February 25 and 28, 2010, plaintiff filed applications for a period of  
22 disability, DIB, and SSI due to lung and respiratory injury, psychological  
23 problems, hip injury, neck injury, stomach issues, chemical asthma, shortness of  
24 breath, and panic attacks. *Id.* at 10, 180, 184. The Commissioner denied  
25 plaintiff’s application initially and upon reconsideration, after which she filed a  
26 request for a hearing. *Id.* at 80-85, 92-96, 98.

27 On June 13, 2011, plaintiff, represented by counsel, appeared and testified  
28

1 at a hearing before the ALJ. *Id.* at 26-51. On October 17, 2011, plaintiff testified  
2 at a supplemental hearing. *Id.* at 52-73. The ALJ also heard testimony from Alan  
3 Boroskin, a vocational expert. *Id.* at 66-72. On December 16, 2011, the ALJ  
4 denied plaintiff’s claim for benefits. *Id.* at 10-20.

5 Applying the well-known five-step sequential evaluation process, the ALJ  
6 found, at step one, that plaintiff had not engaged in substantial gainful activity  
7 since February 16, 2008, the alleged onset date. *Id.* at 12.

8 At step two, the ALJ found that plaintiff suffered from the following severe  
9 impairments: reactive airway disease syndrome and asthma status-post acute  
10 smoke inhalation; osteoporosis; and obesity. *Id.*

11 At step three, the ALJ found that plaintiff’s impairments, whether  
12 individually or in combination, did not meet or medically equal one of the listed  
13 impairments set forth in 20 C.F.R. part 404, Subpart P, Appendix 1 (the  
14 “Listings”). *Id.* at 17.

15 The ALJ then assessed plaintiff’s residual functional capacity (“RFC”),<sup>1</sup> and  
16 determined that plaintiff had the RFC to: lift/carry twenty pounds occasionally  
17 and ten pounds frequently; sit/stand/walk for six hours in an eight-hour day;  
18 occasionally use a cane for uneven services; and occasionally climb, balance,  
19 stoop, kneel, crouch, and crawl. *Id.* at 17-18. The ALJ prohibited plaintiff from:  
20 climbing ladders, ropes, or scaffolds; working at extreme temperatures; and  
21 working where there is an excessive amount of dust, fumes, and gases. *Id.* at 18.

22 The ALJ found, at step four, that plaintiff was capable of performing her  
23

---

24 <sup>1</sup> Residual functional capacity is what a claimant can do despite existing  
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152,  
26 1155-56 n.5-7 (9th Cir. 1989). “Between steps three and four of the five-step  
27 evaluation, the ALJ must proceed to an intermediate step in which the ALJ  
28 assesses the claimant’s residual functional capacity.” *Massachi v. Astrue*, 486  
F.3d 1149, 1151 n.2 (9th Cir. 2007).

1 past relevant work as a fast food manager, fast food worker, and sales clerk. *Id.* at  
2 19-20. Consequently, the ALJ concluded that plaintiff did not suffer from a  
3 disability as defined by the Social Security Act. *Id.* at 20.

4 Plaintiff filed a timely request for review of the ALJ's decision, which was  
5 denied by the Appeals Council. *Id.* at 1-3. The ALJ's decision stands as the final  
6 decision of the Commissioner.

### 7 III.

#### 8 STANDARD OF REVIEW

9 This court is empowered to review decisions by the Commissioner to deny  
10 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security  
11 Administration must be upheld if they are free of legal error and supported by  
12 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001)  
13 (as amended). But if the court determines that the ALJ's findings are based on  
14 legal error or are not supported by substantial evidence in the record, the court  
15 may reject the findings and set aside the decision to deny benefits. *Aukland v.*  
16 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d  
17 1144, 1147 (9th Cir. 2001).

18 “Substantial evidence is more than a mere scintilla, but less than a  
19 preponderance.” *Aukland*, 257 F.3d at 1035. Substantial evidence is such  
20 “relevant evidence which a reasonable person might accept as adequate to support  
21 a conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276  
22 F.3d at 459. To determine whether substantial evidence supports the ALJ's  
23 finding, the reviewing court must review the administrative record as a whole,  
24 “weighing both the evidence that supports and the evidence that detracts from the  
25 ALJ's conclusion.” *Mayes*, 276 F.3d at 459. The ALJ's decision “cannot be  
26 affirmed simply by isolating a specific quantum of supporting evidence.”  
27 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th  
28

1 Cir. 1998)). If the evidence can reasonably support either affirming or reversing  
2 the ALJ's decision, the reviewing court "may not substitute its judgment for that  
3 of the ALJ." *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.  
4 1992)).

#### 5 IV.

### 6 DISCUSSION

#### 7 **A. The ALJ Failed to Properly Consider the Opinions of Plaintiff's** 8 **Treating Physician and Examining Physicians**

9 Plaintiff contends that the ALJ improperly rejected the opinions of her  
10 treating physician, Dr. Esther Chodakiewitz, and examining physicians, Dr. Perry  
11 Maloff and Dr. Theresa Darrington. P. Mem. at 5-14. Specifically, petitioner  
12 argues that the reasons the ALJ provided for rejecting their opinions were not  
13 specific and legitimate and supported by substantial evidence. *Id.*

14 In determining whether a claimant has a medically determinable  
15 impairment, among the evidence the ALJ considers is medical evidence. 20  
16 C.F.R. §§ 404.1527(b), 416.927(b). In evaluating medical opinions, the  
17 regulations distinguish among three types of physicians: (1) treating physicians;  
18 (2) examining physicians; and (3) non-examining physicians.<sup>2</sup> 20 C.F.R.  
19 §§ 404.1527(c), (e), 416.927(c), (e); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.  
20 1996). "Generally, a treating physician's opinion carries more weight than an  
21 examining physician's, and an examining physician's opinion carries more weight  
22 than a reviewing physician's." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th  
23 Cir. 2001); 20 C.F.R. §§ 404.1527(c)(1)-(2); 416.927(c)(1)-(2). The opinion of  
24 the treating physician is generally given the greatest weight because the treating

---

25  
26 <sup>2</sup> Psychologists are considered acceptable medical sources whose opinions  
27 are accorded the same weight as physicians. 20 C.F.R. §§ 404.1513(a)(2),  
28 416.913(a)(2). Accordingly, for ease of reference, the court will refer to Dr.  
Darrington as a physician.

1 physician is employed to cure and has a greater opportunity to understand and  
2 observe a claimant. *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996);  
3 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

4 Nevertheless, the ALJ is not bound by the opinion of the treating physician.  
5 *Smolen*, 80 F.3d at 1285. If a treating physician’s opinion is uncontradicted, the  
6 ALJ must provide clear and convincing reasons for giving it less weight. *Lester*,  
7 81 F.3d at 830. If the treating physician’s opinion is contradicted by other  
8 opinions, the ALJ must provide specific and legitimate reasons supported by  
9 substantial evidence for rejecting it. *Id.* at 830. Likewise, the ALJ must provide  
10 specific and legitimate reasons supported by substantial evidence in rejecting the  
11 contradicted opinions of examining physicians. *Id.* at 830-31. The opinion of a  
12 non-examining physician, standing alone, cannot constitute substantial evidence.  
13 *Widmark v. Barnhart*, 454 F.3d 1063, 1067 n.2 (9th Cir. 2006); *Morgan v.*  
14 *Comm’r*, 169 F.3d 595, 602 (9th Cir. 1999); *see also Erickson v. Shalala*, 9 F.3d  
15 813, 818 n.7 (9th Cir. 1993).

16 **1. Medical History**

17 **Dr. Esther Chodakiewitz**

18 Dr. Chodakiewitz, a psychiatrist, treated plaintiff from March 5, 2008  
19 through at least April 21, 2010. *See* AR at 553, 681. Dr. Chodakiewitz began  
20 treating plaintiff after she reported mental health problems as a result of a fire at  
21 her workplace.<sup>3</sup> *See id.* at 681. After the initial March 5, 2008 evaluation, Dr.  
22 Chodakiewitz diagnosed plaintiff with, inter alia, post-traumatic stress disorder  
23 (“PTSD”) and “occupational problems,” and assessed a global assessment of  
24

---

25 <sup>3</sup> On February 16, 2008, plaintiff was working as a shift supervisor at a  
26 McDonald’s restaurant. AR at 416, 682-83. When an electrical fire began in the  
27 kitchen, plaintiff attempted to put out the fire with an extinguisher and helped to  
28 evacuate customers. *See id.* at 416, 683. As a result of the fire and her actions,  
plaintiff suffered from smoke inhalation. *See id.* at 417, 683.

1 functioning (“GAF”) score of 25 (“March 2008 Opinion”).<sup>4</sup> *See id.* at 681-91. At  
2 her treatment sessions, Dr. Chodakiewitz consistently observed that plaintiff was  
3 cooperative, but irritable and anxious. *See, e.g., id.* at 554, 562, 613, 661, 670.  
4 Dr. Chodakiewitz diagnosed plaintiff with post traumatic stress disorder (“PTSD”)  
5 and treated her with therapy and Paxil. *See, e.g., id.* at 698.

6 On July 14, 2009, Dr. Chodakiewitz issued a Permanent and Stationary  
7 Report (“July 2009 Opinion”). *Id.* at 576-604. In the July 2009 Opinion, Dr.  
8 Chodakiewitz noted that she placed several requests for plaintiff to receive  
9 psychotherapy from Dr. Darrington, but that those were rejected. *Id.* at 578-81.  
10 Dr. Chodakiewitz noted that plaintiff reported frustrations concerning Dr. Maloff  
11 and felt that he was not helping her. *Id.* at 581-84. Plaintiff also reported that Dr.  
12 Maloff wanted her to discontinue Paxil and start other medications, which she did  
13 not want to do. *Id.* at 584, 591.

14 Based on her treatment of plaintiff, plaintiff’s treatment records, and Dr.  
15 Darrington’s evaluation, Dr. Chodakiewitz opined that plaintiff suffers from  
16 PTSD, occupational problems, and had a GAF score of 50 at the time.<sup>5</sup> *Id.* at 589.  
17 Dr. Chodakiewitz opined that plaintiff suffers from the following impairments:  
18 slight impairment in her ability to comprehend and follow instructions and  
19 perform simple repetitive tasks; slight to moderate impairment in her ability to  
20 maintain a work pace appropriate to a given work load; moderate impairment in  
21

---

22  
23 <sup>4</sup> A GAF score of 21-30 indicates that “[b]ehavior is considered influenced  
24 by delusions or hallucinations *or* serious impairment, in communication or  
25 judgment [] *or* inability to function in almost all areas [.]” Am. Psychiatric Ass’n,  
26 Diagnostic and Statistical Manual of Mental Disorders 34 (4th Ed. 2000) (“DSM”)  
(emphasis in original).

27 <sup>5</sup> A GAF score in the 41-50 range indicates “[s]erious symptoms [] *or* any  
28 serious impairment in social, occupational, or school functioning [.]” DSM  
(emphasis in original).

1 her ability to perform complex or varied tasks, relate to other people beyond  
2 giving and receiving instructions, influence others, perform activities of daily  
3 living; and a moderate to severe impairment in her ability to make generalizations,  
4 evaluations or decisions without supervision and to accept and carry out  
5 responsibilities for directions, controls, and planning. *Id.* at 596, 598. Dr.  
6 Chodakiewitz disagreed with Dr. Maloff over the best course of treatment for  
7 plaintiff, particularly over the use of benzodiazepines. *See, e.g., id.* at 572, 584-  
8 85.

9 **Dr. Perry Maloff**

10 Dr. Maloff and a colleague examined plaintiff on five occasions. *Id.* at 323-  
11 427. A therapist at Dr. Maloff's office also treated plaintiff an unspecified number  
12 of times. *See id.* at 332.

13 On August 15, 2008, Dr. Raymond J. Coffin, a psychologist at Dr. Maloff's  
14 practice, examined plaintiff. *Id.* at 416-27. Dr. Coffin conducted psychological  
15 tests and diagnosed plaintiff with, inter alia, PTSD and major depression, and  
16 assessed a GAF score of 50. *See id.* Dr. Coffin opined that many of plaintiff's  
17 results were difficult to interpret due to, inter alia, an unusually high number of  
18 elevated symptoms. *See id.* at 422, 425. Dr. Coffin noted that plaintiff's results  
19 suggested that she was "experiencing an extremely high level of psychological  
20 distress," she may have been over-reporting her symptoms, and her "pattern of  
21 diffuse responding is typical of patients who tend to both exaggerate their somatic  
22 distress and unrealistically disclaim psychological discomfort." *Id.* at 422-23.

23 On September 4, 2008, Dr. Maloff issued an evaluation after examining  
24 plaintiff on two occasions. *Id.* at 369-415. Dr. Maloff observed that plaintiff was  
25 alert, cooperative, depressed, and anxious, and diagnosed her with PTSD and  
26  
27  
28

1 several moderate to severe psychosocial stressors.<sup>6</sup> *Id.* at 406-07. Dr. Maloff  
2 reviewed plaintiff's medical history and specifically reported his disagreements  
3 with Dr. Chodakiewitz's March 2008 Opinion and Dr. Darrington's opinion. Dr.  
4 Maloff felt that Dr. Chodakiewitz missed many of the difficulties plaintiff was  
5 experiencing such as her reactions to odors and that a behavioral approach in  
6 desensitizing plaintiff was necessary. *Id.* at 397. Dr. Maloff criticized Dr.  
7 Chodakiewitz's diagnosis of "occupational problems" because Dr. Chodakiewitz  
8 failed to quantify or provide descriptions of plaintiff's stressors. *Id.* Dr. Maloff  
9 was also critical of Dr. Darrington's opinion on the ground that it was confusing  
10 and inconsistent. *Id.* at 399. Dr. Maloff noted that Dr. Darrington found that there  
11 was a high probability that plaintiff was malingering but then she also noted that  
12 plaintiff was likely feeling extremely vulnerable and defenseless. *Id.* But Dr.  
13 Maloff agreed with Dr. Darrington's opinion that systematic desensitization  
14 should be part of plaintiff's treatment plan. *Id.* at 400.

15 On March 25, 2009, Dr. Maloff examined plaintiff and issued another  
16 opinion. *Id.* at 355-68. Dr. Maloff issued the same diagnosis and a GAF score of  
17 30. *Id.* at 358-59. Dr. Maloff opined that plaintiff's condition had deteriorated but  
18 that plaintiff was highly motivated to get better. *Id.* at 364. Dr. Maloff disagreed  
19 with Dr. Chodakiewitz's treatment plan and recommended that plaintiff participate  
20 in behavioral desensitization programs and be prescribed anti-anxiety medication.  
21 *Id.* at 360-61, 364-65. Dr. Maloff reported that plaintiff asked him to help her find  
22 a new psychiatrist. *Id.* at 365.

---

23  
24  
25 <sup>6</sup> Dr. Maloff opined that plaintiff has the following moderate to severe  
26 psychosocial stressors: traumatic experience associated with the fire at work; an  
27 inability to return to gainful employment; reduced capacity to leave her home  
28 secondary to panic attacks and agoraphobia, triggered by associations between  
everyday odors and smoke; resentment toward employer; and alleged indifference  
demonstrated by employer. AR at 359.

1 Dr. Maloff examined plaintiff on July 21 and September 11, 2009, and  
2 issued an evaluation dated September 11, 2009.<sup>7</sup> *Id.* at 323-54. During the  
3 examination, Dr. Maloff observed that plaintiff was alert and oriented, but upset,  
4 frustrated, had pressured speech, and was tearful. *Id.* at 348. Dr. Maloff's  
5 diagnosis remained the same. *Id.* at 349. Dr. Maloff reviewed and specifically  
6 commented on several of plaintiff's medical records. Dr. Maloff: claimed to have  
7 never expressed to plaintiff that Dr. Chodakiewitz was committing malpractice as  
8 her notes allege; noted that plaintiff reported to Dr. Rhee, an emergency room  
9 physician, that Paxil did not help her; and noted that Dr. Fortamasce, who  
10 performed a brochoscopy on plaintiff, opined that plaintiff should be further  
11 evaluated to determine whether she was malingering or had a hysterical  
12 conversion and anxiety disorder, of which the latter was consistent with Dr.  
13 Maloff's opinion. *See id.* at 337-38, 341-42; *see also id.* at 315. Dr. Maloff  
14 concluded that plaintiff's condition was deteriorating, and once again disagreed  
15 with Dr. Chodakiewitz's treatment plan. *Id.* at 349-51

16 **Dr. Theresa Darrington**

17 Dr. Darrington examined plaintiff on March 24, 2008. *Id.* at 671-79. Dr.  
18 Darrington also reviewed plaintiff's medical records and a preliminary draft of Dr.  
19 Chodakiewitz's report. *Id.* at 672-73. Dr. Darrington observed that plaintiff was  
20 cooperative, tearful, fairly reliable, and appeared to fatigue easily. *Id.* at 674.  
21 During the psychological tests, plaintiff was "not motivated in attempting tasks  
22 presented to her," spent a below average amount of time on items, and responded  
23 without looking at items carefully. *Id.* at 674-75. Plaintiff also frequently failed  
24 to correct her errors when she recognized them and did not comprehend all the

---

25  
26 <sup>7</sup> Dr. Maloff reported that on June 22, 2009 plaintiff's case manager  
27 requested that he become plaintiff's treating physician. AR at 330. Dr. Maloff  
28 saw plaintiff on July 21, 2009 in that capacity but was subsequently asked to  
continue on as a qualified medical examiner. *Id.*

1 instructions. *Id.* at 675. Dr. Darrington noted that plaintiff responded to the  
2 MMPI-2 test in “an extremely exaggerated manner” and her “scores may have  
3 been the result of confusion, disorganization, illiteracy, faking mental illness or a  
4 cry for help.” *Id.* at 676. Plaintiff’s MCMI-III disclosure score was unusually  
5 high and “may represent an anxious plea for help as a consequence of her inability  
6 to cope with current life stresses,” but the results were invalid. *Id.* at 676-77.  
7 Plaintiff’s MPS T-scores indicate that plaintiff had a 99.9% likelihood of  
8 malingering. *Id.* at 677.

9       Based on her examination and test results, Dr. Darrington opined that there  
10 was a very high probability that plaintiff was malingering, but did not diagnose  
11 plaintiff with malingering because there were no external incentives such as the  
12 avoidance of work. *Id.* at 677-79. Instead, Dr. Darrington opined that her  
13 exaggeration of symptoms was “most likely due to an anxious plea for help as a  
14 consequence of her inability to cope with her current life stresses” and that her  
15 “psychological symptoms of PTSD [were] so overwhelming that she []  
16 exaggerated her symptoms in a desperate plea for help.” *Id.* at 677, 679. Dr.  
17 Darrington also opined that plaintiff was likely feeling extremely vulnerable and  
18 defenseless, had difficulties in concentration, had symptoms of high anxiety and  
19 low energy, was likely going to have difficulty keeping up with her peers, and  
20 was unlikely to be able to function in an employment setting. *Id.* at 677-78. Dr.  
21 Darrington found that a diagnosis of PTSD was congruent with the testing and  
22 plaintiff’s self-report, and opined that psychotherapy and systematic  
23 desensitization would be beneficial. *Id.* at 678-79. Dr. Darrington stated that if  
24 plaintiff’s symptoms did not improve with treatment, then she would reconsider a  
25 malingering diagnosis. *Id.* at 679.

26                   **Dr. Katrine Enrile**

27               Dr. Enrile, a consultative psychiatrist, examined plaintiff on June 6, 2010.  
28

1 *Id.* at 711-15. Dr. Enrile did not review any medical records other than a record  
2 dated September 11, 2009. *Id.* at 712. Dr. Enrile observed that plaintiff was  
3 anxious, cooperative, tearful, and had a linear thought process. *Id.* at 713. Dr.  
4 Enrile diagnosed plaintiff with PTSD and panic disorder, and assessed a GAF  
5 score of 50. *Id.* at 714. Dr. Enrile opined that plaintiff would have somewhat  
6 impaired day-to-day functioning, her ability to focus would be mildly limited, she  
7 could perform detailed tasks with prompting, she could follow instructions, and  
8 she could adequately interact with coworkers and public. *Id.*

9 **Dr. Dan Funkenstein**

10 Dr. Funkenstein, a State Agency physician, reviewed plaintiff's medical  
11 records. *See id.* at 730-31. Based on his review, he opined that plaintiff suffered  
12 from PTSD and anxiety, and she had moderate limitations with regard to:  
13 activities of daily living; maintaining social functioning; maintaining  
14 concentration, persistence, or pace; understanding, remembering, and carrying out  
15 detailed instructions; performing activities within a schedule; maintaining regular  
16 attendance; sustaining an ordinary route without special supervision; making  
17 simple work-related decisions; completing a normal workday and week;  
18 interacting appropriately with the general public; responding appropriately to  
19 changes; and setting realistic goals. *Id.* at 720, 724, 727-28. Dr. Funkenstein  
20 opined that plaintiff was capable of simple, repetitive tasks in a non-public setting,  
21 and her allegations were credible. *Id.* at 726, 729.

22 **2. The ALJ's Findings**

23 The ALJ concluded that plaintiff did not have a severe mental impairment.  
24 *Id.* at 12. In reaching that determination, the ALJ gave some weight to the opinion  
25 of Dr. Enrile and little weight to the opinions of Dr. Chodakiewitz, Dr. Maloff, Dr.  
26 Darrington, and Dr. Funkenstein. *Id.* at 16-17. The ALJ gave little weight to the  
27 opinions of Dr. Chodakiewitz, Dr. Maloff, and Dr. Darrington because they failed  
28 to adequately consider malingering and were inconsistent with plaintiff's daily

1 activities. *Id.* at 16-17. The ALJ gave Dr. Funkenstein’s opinion little weight  
2 because it too was inconsistent with plaintiff’s daily activities. *Id.* at 17. The  
3 ALJ’s reasons for rejecting the opinions of Dr. Chodakiewitz, Dr. Maloff, and Dr.  
4 Darrington were not specific and legitimate and supported by substantial  
5 evidence.<sup>8</sup>

6 The first reason the ALJ gave for rejecting the opinions of Dr.  
7 Chodakiewitz, Dr. Maloff, and Dr. Darrington was that they failed to adequately  
8 consider malingering. *Id.* at 16. An ALJ may reject a physician’s opinion if that  
9 opinion is based on the subjective testimony and reporting of a claimant whose  
10 credibility the ALJ discounted. *See Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th  
11 Cir. 1995) (diagnosis based on the self-reporting of an unreliable person may be  
12 discounted).

13 Here, contrary to the ALJ’s contentions, Dr. Chodakiewitz, Dr. Maloff, and  
14 Dr. Darrington were all presented with the question of malingering and determined  
15 that plaintiff is not a malingerer, although she likely exaggerated her symptoms.  
16 The basis of the ALJ’s determination that plaintiff is malingering was the fact that  
17 several of her physicians – including those three physicians – mentioned that it  
18 was a possibility. AR at 13-15. This in itself reflects that the physicians  
19 considered the possibility of malingering. Taking the physician’s opinions out of  
20 context, it would appear that plaintiff is a malingerer. But here, it is important to  
21 note that while the physicians discussed the possibility of malingering, none  
22 opined that plaintiff is a malingerer. Instead, all ultimately opined that plaintiff  
23 suffers from PTSD and has limitations resulting from it.

24 First, despite tests that reflected that she is a likely malingerer, Dr.  
25 Darrington did not diagnose plaintiff as a malingerer because plaintiff did not

---

27 <sup>8</sup> Plaintiff does not argue that the ALJ improperly rejected the opinion of Dr.  
28 Funkenstein.

1 appear to have any motive for malingering, including the avoidance of work. *Id.*  
2 at 678-79. Instead Dr. Darrington considered plaintiff's symptoms and the various  
3 possible explanations for the test results, and concluded that plaintiff's  
4 exaggeration was most likely a plea for help to alleviate the actual overwhelming  
5 symptoms she was experiencing. *Id.* at 677, 679. In other words, plaintiff was not  
6 making up her mental impairment but exaggerating her symptoms to get help for  
7 them.<sup>9</sup> This opinion was consistent with Dr. Maloff's. *See id.* at 341-42.

8 Similarly, contrary to the ALJ's assertion, Dr. Chodakiewitz did not opine  
9 that plaintiff is a malingerer. Although Dr. Chodakiewitz concluded that plaintiff  
10 was not reliable or capable of reporting her situation adequately, that opinion did  
11 not mean that she thought plaintiff was lying, particularly when read in  
12 conjunction with her later statement that plaintiff "has been highly motivated to  
13 get better," a comment that is incongruent to a finding of malingering. *Id.* at 588-  
14 89. There are a number of potential causes for why a claimant may be an  
15 unreliable historian, including mental limitations. Indeed, in discussing Dr.  
16 Darrington's evaluation, Dr. Chodakiewitz emphasized Dr. Darrington's  
17 conclusion that plaintiff's exaggerations were a cry for help for her actual  
18 symptoms. *See id.* at 591.

19 Finally, the ALJ noted Dr. Geoffrey Smith's comments about plaintiff's  
20 possible malingering. *See id.* at 15. Dr. Smith, an examining otolaryngologist,  
21 found that plaintiff's allergy symptoms did not make physiologic sense and could  
22 not have resulted from the smoke inhalation. *Id.* at 871. Dr. Smith also noted that

---

23  
24 <sup>9</sup> Dr. Darrington reported that she would reconsider a malingering diagnosis  
25 if plaintiff did not improve with treatment. AR at 679. But plaintiff did not  
26 receive the desensitization treatment or psychotherapy recommended by Dr.  
27 Darrington. Although Dr. Chodakiewitz treated plaintiff with medication, Dr.  
28 Chodakiewitz did not provide psychotherapy as evidenced by the short length of  
each of plaintiff's visits and Dr. Chodakiewitz's continued request for  
psychological treatment for plaintiff. *See id.* at 329, 580, 603.

1 plaintiff's alleged problem with throwing up could not be reconciled with her  
2 weight gain. *Id.* With regard to the allergy symptoms, such finding is consistent  
3 with Dr. Maloff's opinion about plaintiff's anxiety.<sup>10</sup> As for the weight gain, Dr.  
4 Smith does not appear to have reviewed plaintiff's medical records, which indicate  
5 that her weight gain may have been a side effect of her medication. *See id.* at 329,  
6 351.

7 In short, Dr. Chodakiewitz, Dr. Maloff, and Dr. Darrington, whether in their  
8 discussion of psychological tests or others' opinions, all considered the possibility  
9 of malingering, and all interpreted the results and exaggerations as a cry for help  
10 to alleviate plaintiff's actual symptoms and not as actual malingering. As such,  
11 Dr. Chodakiewitz, Dr. Maloff, and Dr. Darrington all diagnosed plaintiff with  
12 PTSD and opined that she had moderate to severe limitations which would affect  
13 her ability to work. Notably, although Dr. Chodakiewitz and Dr. Maloff  
14 vehemently disagreed as to the best course of treatment and each other's  
15 competency, they were in general agreement as to plaintiff's mental problems. *See*  
16 *id.* at 364, 589. Thus, the evidence shows that while there may be concern of  
17 possible exaggeration, the treating and examining physicians properly and  
18 adequately considered the possibility of malingering, and none doubted that  
19 plaintiff indeed suffers from PTSD and has more than mild limitations.

20 The second reason the ALJ provided for rejecting these physicians'  
21 opinions – that the opined limitations are inconsistent with plaintiff's daily  
22 activities – is similarly not supported by substantial evidence. The ALJ noted that  
23 plaintiff could, inter alia, perform some household chores, care for her cat, prepare  
24 meals and do some baking, read, watch television, use a computer, go to medical  
25 appointments, travel to Tennessee, and attend church. *Id.* at 16. “[T]he mere fact

---

26  
27 <sup>10</sup> It is also consistent with the opinion of Dr. Leung, plaintiff's treating  
28 pulmonologist, and Dr. Fortamsce that plaintiff may have a trigger sensitivity or  
hysterical conversion and anxiety disorder. *See AR* at 341-32, 405.

1 a plaintiff has carried on certain daily activities, such as grocery shopping, driving  
2 a car, or limited walking for exercise, does not in any way detract from her  
3 credibility as to her overall disability.” *Vertigan v. Halter*, 260 F.3d 1044, 1050  
4 (9th Cir. 2001). A claimant does not need to be “utterly capacitated.” *Fair v.*  
5 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). But if a claimant is “able to spend a  
6 substantial part of [her] day engaged in pursuits involving the performance of  
7 physical functions that *are* transferable to a work setting, a specific finding as to  
8 this fact may be sufficient to discredit” her. *Id.* (emphasis in original).

9 Here, plaintiff’s daily activities are not inconsistent with the physicians’  
10 limitations. Dr. Chodakiewitz opined that plaintiff has moderate impairments with  
11 regard to activities of daily living, but has more severe impairments with regard to  
12 work functions, such as her ability to make generalizations, evaluations, or  
13 decisions without supervision, and to accept and carry out responsibilities for  
14 directions, controls, and planning. *Id.* at 596, 598. Dr. Maloff opined that  
15 plaintiff has moderate to severe psychosocial stressors, most of which were work-  
16 related and not necessarily related to activities of daily living. Finally, Dr.  
17 Darrington also opined employment related limitations such as difficulties in  
18 concentration, low energy, and difficulty keeping up with her peers. *Id.* at 677-  
19 78. Other than Dr. Chodakiewitz, plaintiff’s physicians opined impairments  
20 primarily related to work. And even assuming that plaintiff only has mild  
21 limitations with regard to activities of daily living as the ALJ found, such mild  
22 limitations would not be incompatible with the work-related limitations the  
23 physicians opined and do not undermine their opinions.

24 Accordingly, the ALJ failed to cite specific and legitimate reasons  
25 supported by substantial evidence to reject the opinions of Dr. Chodakiewitz, Dr.  
26 Maloff, and Dr. Darrington.

27 **B. The ALJ Erred at Step Two**

28 Plaintiff argues that the ALJ failed to properly determine that plaintiff has a

1 severe mental impairment. P. Mem. at 5, 13-14. At step two, the Commissioner  
2 considers the severity of the claimant's impairment. 20 C.F.R. §§  
3 404.1520(a)(4)(ii), 416.920 (a)(4)(ii). "[T]he step-two inquiry is a de minimis  
4 screening device to dispose of groundless claims." *Smolen*, 80 F.3d at 1290.

5 As discussed above, the ALJ improperly rejected the opinions of Dr.  
6 Chodakiewitz, Dr. Maloff, and Dr. Darrington, all of whom opined that plaintiff  
7 had mild to severe non-exertional limitations due to PTSD. Consequently, the  
8 ALJ's step two determination is not supported by substantial evidence.

9 In many instances, error at step two is harmless where, as here, the ALJ  
10 found the claimant suffered from other severe impairments. *See Burch v.*  
11 *Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005) (any error by ALJ at step two was  
12 harmless because the step was resolved in plaintiff's favor). But the ALJ's error  
13 here was not harmless, as in assessing plaintiff's RFC the ALJ found no mental  
14 limitations, and it is apparent that he gave no consideration to plaintiff's mental  
15 impairments. *See Social Security Ruling 96-8p* ("In assessing RFC, the  
16 adjudicator must consider limitations and restrictions imposed by all of an  
17 individual's impairments, even those that are not 'severe.'"). This makes sense  
18 given the ALJ's rejection of the opinions of Dr. Chodakiewitz, Dr. Maloff, and Dr.  
19 Darrington, but as discussed, that rejection was in error.

20 Accordingly, the ALJ erred at step two in rejecting the opinions of Dr.  
21 Chodakiewitz, Dr. Maloff, and Dr. Darrington and consequently finding plaintiff  
22 did not suffer from a severe mental impairment, and such error was not harmless.

23 V.

24 **REMAND IS APPROPRIATE**

25 The decision whether to remand for further proceedings or reverse and  
26 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
27 888 F.2d 599, 603 (9th Cir. 1989). Where no useful purpose would be served by  
28 further proceedings, or where the record has been fully developed, it is appropriate

1 to exercise this discretion to direct an immediate award of benefits. *See Benecke*  
2 *v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d  
3 1172, 1179-80 (9th Cir. 2000) (decision whether to remand for further proceedings  
4 turns upon their likely utility). But where there are outstanding issues that must be  
5 resolved before a determination can be made, and it is not clear from the record  
6 that the ALJ would be required to find a plaintiff disabled if all the evidence were  
7 properly evaluated, remand is appropriate. *See Benecke*, 379 F.3d at 595-96;  
8 *Harman*, 211 F.3d at 1179-80.

9 Here, as set out above, remand is required because the ALJ erred in failing  
10 to properly evaluate the opinions of Dr. Chodakiewitz, Dr. Maloff, and Dr.  
11 Darrington. On remand, the ALJ shall reconsider the opinions provided by Dr.  
12 Chodakiewitz, Dr. Maloff, and Dr. Darrington and either credit their opinions or  
13 provide specific and legitimate reasons supported by substantial evidence for  
14 rejecting them. The ALJ shall then proceed through steps two, three, four, and  
15 five to determine what work, if any, plaintiff is capable of performing.

16 **VI.**

17 **CONCLUSION**

18 IT IS THEREFORE ORDERED that Judgment shall be entered  
19 REVERSING the decision of the Commissioner denying benefits, and  
20 REMANDING the matter to the Commissioner for further administrative action  
21 consistent with this decision.

22  
23 DATED: July 14, 2014

24   
25 \_\_\_\_\_  
26 SHERI PYM  
27 United States Magistrate Judge  
28