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

FELICIA BOISSIERE,

Plaintiff,

v.

NANCY BERRYHILL, ACTING  
COMMISSIONER OF SOCIAL  
SECURITY ADMINISTRATION,

Defendant.

No. ED CV 16-2140-PLA

**MEMORANDUM OPINION AND ORDER**

**I.**

**PROCEEDINGS**

Plaintiff filed this action on October 10, 2016, seeking review of the Commissioner’s<sup>1</sup> denial of her application for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) payments. The parties filed Consents to proceed before a Magistrate Judge on December 9, 2016, and January 27, 2017. Pursuant to the Court’s Order, the parties filed a Joint Stipulation (alternatively “JS”) on August 24, 2017, that addresses their positions concerning the disputed

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<sup>1</sup> Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Nancy Berryhill, the current Acting Commissioner of Social Security, is hereby substituted as the defendant herein.

1 issues in the case. The Court has taken the Joint Stipulation under submission without oral  
2 argument.

3  
4 **II.**

5 **BACKGROUND**

6 Plaintiff was born on April 11, 1968. [Administrative Record (“AR”) at 96, 341, 345.] She  
7 has past relevant work experience as an administrative clerk, a receptionist, and a real estate  
8 sales person. [AR at 96, 138.]

9 On January 10, 2013, plaintiff filed an application for a period of disability and DIB, and on  
10 January 11, 2013, she filed an application for SSI payments, alleging that she has been unable  
11 to work since May 1, 2008.<sup>2</sup> [AR at 85; see also AR at 341-44, 345-54.] After her applications  
12 were denied initially and upon reconsideration, plaintiff timely filed a request for a hearing before  
13 an Administrative Law Judge (“ALJ”). [AR at 85, 242-43.] A hearing was held on October 23,  
14 2014, at which time plaintiff appeared telephonically, represented by an attorney, and testified on  
15 her own behalf. [AR at 104-49.] A vocational expert (“VE”) also testified. [AR at 137-45.] On  
16 April 20, 2015, the ALJ issued a decision concluding that plaintiff was not under a disability from  
17 May 1, 2008, the alleged onset date, through April 20, 2015, the date of the decision. [AR at 85-  
18 98.] Plaintiff requested review of the ALJ’s decision by the Appeals Council. [AR at 80.] When  
19 the Appeals Council denied plaintiff’s request for review on August 12, 2016 [AR at 67-71], the  
20 ALJ’s decision became the final decision of the Commissioner. See Sam v. Astrue, 550 F.3d 808,  
21 810 (9th Cir. 2008) (per curiam) (citations omitted). This action followed.

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23 **III.**

24 **STANDARD OF REVIEW**

25 Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s  
26 decision to deny benefits. The decision will be disturbed only if it is not supported by substantial  
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28 <sup>2</sup> Plaintiff’s application for SSI payments alleges disability beginning on August 1, 2007.

1 evidence or if it is based upon the application of improper legal standards. Berry v. Astrue, 622  
2 F.3d 1228, 1231 (9th Cir. 2010) (citation omitted).

3 “Substantial evidence means more than a mere scintilla but less than a preponderance; it  
4 is such relevant evidence as a reasonable mind might accept as adequate to support a  
5 conclusion.” Carmickle v. Comm’r, Soc. Sec. Admin., 533 F.3d 1155, 1159 (9th Cir. 2008) (citation  
6 and internal quotation marks omitted); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998)  
7 (same). When determining whether substantial evidence exists to support the Commissioner’s  
8 decision, the Court examines the administrative record as a whole, considering adverse as well  
9 as supporting evidence. Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001) (citation omitted);  
10 see Ryan v. Comm’r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008) (“[A] reviewing court must  
11 consider the entire record as a whole and may not affirm simply by isolating a specific quantum  
12 of supporting evidence.”) (citation and internal quotation marks omitted). “Where evidence is  
13 susceptible to more than one rational interpretation, the ALJ’s decision should be upheld.” Ryan,  
14 528 F.3d at 1198 (citation and internal quotation marks omitted); see Robbins v. Soc. Sec. Admin.,  
15 466 F.3d 880, 882 (9th Cir. 2006) (“If the evidence can support either affirming or reversing the  
16 ALJ’s conclusion, [the reviewing court] may not substitute [its] judgment for that of the ALJ.”)  
17 (citation omitted).

#### 18 19 IV.

#### 20 THE EVALUATION OF DISABILITY

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

#### 26 27 A. THE FIVE-STEP EVALUATION PROCESS

28 The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing

1 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lester v. Chater, 81 F.3d 821,  
2 828 n.5 (9th Cir. 1995), as amended April 9, 1996. In the first step, the Commissioner must  
3 determine whether the claimant is currently engaged in substantial gainful activity; if so, the  
4 claimant is not disabled and the claim is denied. Id. If the claimant is not currently engaged in  
5 substantial gainful activity, the second step requires the Commissioner to determine whether the  
6 claimant has a “severe” impairment or combination of impairments significantly limiting her ability  
7 to do basic work activities; if not, a finding of nondisability is made and the claim is denied. Id.  
8 If the claimant has a “severe” impairment or combination of impairments, the third step requires  
9 the Commissioner to determine whether the impairment or combination of impairments meets or  
10 equals an impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R. § 404, subpart  
11 P, appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id. If the  
12 claimant’s impairment or combination of impairments does not meet or equal an impairment in the  
13 Listing, the fourth step requires the Commissioner to determine whether the claimant has sufficient  
14 “residual functional capacity” to perform her past work; if so, the claimant is not disabled and the  
15 claim is denied. Id. The claimant has the burden of proving that she is unable to perform past  
16 relevant work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a prima facie case  
17 of disability is established. Id. The Commissioner then bears the burden of establishing that the  
18 claimant is not disabled, because she can perform other substantial gainful work available in the  
19 national economy. Id. The determination of this issue comprises the fifth and final step in the  
20 sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966  
21 F.2d at 1257.

## 22

### 23 **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

24 At step one, the ALJ found that plaintiff had not engaged in substantial gainful activity since  
25 May 1, 2008, the alleged onset date.<sup>3</sup> [AR at 87.] At step two, the ALJ concluded that plaintiff has  
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<sup>3</sup> The ALJ concluded that plaintiff met the insured status requirements of the Social Security Act through September 30, 2012. [AR at 87.]

1 the severe impairments of thoracic spine strain; posttraumatic stress disorder (“PTSD”);  
2 depression; and personality disorder. [AR at 87.] At step three, the ALJ determined that plaintiff  
3 does not have an impairment or a combination of impairments that meets or medically equals any  
4 of the impairments in the Listing. [AR at 88.] The ALJ further found that plaintiff retained the  
5 residual functional capacity (“RFC”)<sup>4</sup> to perform medium work as defined in 20 C.F.R. §§  
6 404.1567(c), 416.967(c),<sup>5</sup> except as follows:

7 [Plaintiff] can lift and/or carry 50 pounds occasionally and 25 pounds frequently; she  
8 can stand and/or walk for six hours out of an eight-hour workday with regular  
9 breaks; she can sit for six hours out of an eight-hour workday with regular breaks;  
10 she can frequently perform postural activities; she is limited to work involving simple  
11 repetitive tasks; and she is limited to work involving no more than occasional contact  
12 with coworkers and no contact with the public.

13 [AR at 89.] At step four, based on plaintiff’s RFC and the testimony of the VE, the ALJ concluded  
14 that plaintiff is unable to perform any of her past relevant work as an administrative clerk, a  
15 receptionist, and a real estate sales person. [AR at 96, 139.] At step five, based on plaintiff’s  
16 RFC, vocational factors, and the VE’s testimony, the ALJ found that there are jobs existing in  
17 significant numbers in the national economy that plaintiff can perform, including work as a “hand  
18 packager” (Dictionary of Occupational Titles (“DOT”) No. 920.587-018), “floor waxer” (DOT No.  
19 381.687-034), and “laundry worker I” (DOT No. 361.684-014). [AR at 97, 139-40.] Accordingly,  
20 the ALJ determined that plaintiff was not disabled at any time from the alleged onset date of May  
21 1, 2008, through April 20, 2015, the date of the decision. [AR at 97-98.]

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24 <sup>4</sup> RFC is what a claimant can still do despite existing exertional and nonexertional  
25 limitations. See Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). “Between steps  
26 three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which  
the ALJ assesses the claimant’s residual functional capacity.” Massachi v. Astrue, 486 F.3d 1149,  
1151 n.2 (9th Cir. 2007) (citation omitted).

27 <sup>5</sup> “Medium work involves lifting no more than 50 pounds at a time with frequent lifting or  
28 carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that  
he or she can also do sedentary and light work.” 20 C.F.R. §§ 404.1567(c), 416.967(c).

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V.

**THE ALJ'S DECISION**

Plaintiff contends that the ALJ erred when he: (1) discounted plaintiff's subjective symptom testimony; and (2) failed to order a consultative mental health examination and to consider or incorporate certain opinion evidence into the RFC determination. [JS at 3, 15-16.] As set forth below, the Court agrees with plaintiff, in part, and remands for further proceedings.

**A. SUBJECTIVE SYMPTOM TESTIMONY**

**1. Background**

Plaintiff contends that the ALJ failed to articulate legally sufficient reasons for rejecting plaintiff's subjective symptom testimony. [JS at 3-6.] Generally, plaintiff testified that she has difficulty with stress, and it makes her feel like she is "going to die from it" [AR at 120, 130]; she cannot sit for long periods of time, and it was recommended that she rise every two hours [*id.*]; she usually lifts no more than 10 pounds [AR at 126]; on a typical day she may pay bills, cook for her daughter, go to doctor appointments, go grocery shopping, or communicate with her daughter's school [AR at 127]; her anemia makes her very tired, and she takes a nap "about every day" [AR at 129]; her PTSD causes her to experience pain in her head and medications soothe but do not stop the pain [AR at 129-30, 135, 1651]; although her medication "soothes" her brain, when the pain is severe it does not go away [AR at 135]; her PTSD episodes affect her ability to concentrate and focus [*id.*]; she does not engage in any social activity other than taking care of her daughter and herself [AR at 136]; and she experiences intrusive thoughts. [AR at 131.]

**2. Legal Standards**

Preliminarily the Court notes that the ALJ in his decision included the following boilerplate language with respect to plaintiff's subjective symptom testimony:

After careful consideration of the evidence, the undersigned finds [plaintiff's] medically determinable impairments could reasonably be expected to cause some of the alleged symptoms; however, [plaintiff's] and her daughter's statements concerning the intensity, persistence and limiting effects of these symptoms *are not credible to the extent they are inconsistent with the above residual functional*

1           *capacity assessment.*

2 [AR at 92 (emphasis added).] The Ninth Circuit has recently held that this boilerplate language  
3 “is problematic,” illogical, and incorrect as a matter of law. Laborin v. Berryhill, 2017 WL 3496031,  
4 at \*3 (9th Cir. Aug. 16, 2017) (citations omitted) (this “improper procedure both inverts and  
5 subverts the way an RFC must be determined relying on credible evidence, including credible  
6 testimony”). However, the inclusion of this “flawed boilerplate language is not, by itself, reversible  
7 error and can be harmless” if the ALJ provides specific, clear and convincing reasons to discount  
8 the claimant’s testimony. Id. (citing Trevizo v. Berryhill, 862 F.3d 987, 1000 & n.6 (9th Cir. 2017)).

9           To determine the extent to which a claimant’s symptom testimony must be credited, the  
10 Ninth Circuit has “established a two-step analysis.”<sup>6</sup> Trevizo, 862 F.3d at 1000 (citing Garrison  
11 v. Colvin, 759 F.3d 995, 1014-15 (9th Cir. 2014)). “First, the ALJ must determine whether the  
12 claimant has presented objective medical evidence of an underlying impairment which could  
13 reasonably be expected to produce the pain or other symptoms alleged.” Id. (quoting Garrison,  
14 759 F.3d at 1014-15); Treichler v. Comm’r of Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th Cir.  
15 2014) (quoting Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007) (internal quotation  
16 marks omitted). If the claimant meets the first test, and the ALJ does not make a “finding of  
17 malingering based on affirmative evidence thereof” (Robbins, 466 F.3d at 883), the ALJ must  
18 “evaluate the intensity and persistence of [the] individual’s symptoms . . . and determine the extent

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21           <sup>6</sup> On March 28, 2016, after the ALJ’s assessment in this case, Social Security Ruling (“SSR”) 16-3p went into effect. See SSR 16-3p, 2016 WL 1119029 (Mar. 16, 2016). SSR 16-3p supersedes SSR 96-7p, the previous policy governing the evaluation of subjective symptoms. Id. at \*1. SSR 16-3p indicates that “we are eliminating the use of the term ‘credibility’ from our sub-regulatory policy, as our regulations do not use this term.” Id. Moreover, “[i]n doing so, we clarify that subjective symptom evaluation is not an examination of an individual’s character[;] [i]nstead, we will more closely follow our regulatory language regarding symptom evaluation.” Id.; Trevizo, 862 F.3d at 1000 n.5. Thus, the adjudicator “will not assess an individual’s overall character or truthfulness in the manner typically used during an adversarial court litigation. The focus of the evaluation of an individual’s symptoms should not be to determine whether he or she is a truthful person.” 2016 WL 1119029, at \*10. The ALJ is instructed to “consider all of the evidence in an individual’s record,” “to determine how symptoms limit ability to perform work-related activities.” Id. at \*2. SSR 16-3p shall apply on remand.

1 to which [those] symptoms limit his . . . ability to perform work-related activities . . .” SSR<sup>7</sup> 16-3p,  
2 2016 WL 1119029, at \*4. When the claimant has provided objective medical evidence of the  
3 impairments that might reasonably produce the symptoms or pain alleged and there is no  
4 evidence of malingering, the ALJ must give “specific, clear, and convincing reasons for rejecting”  
5 the testimony by identifying “which testimony [the ALJ] found not credible” and explaining “which  
6 evidence contradicted that testimony.” Brown-Hunter v. Colvin, 806 F.3d 487, 489, 494 (9th Cir.  
7 2015); Laborin, 2017 WL 3496031 at \*3 (citations omitted); Trevizo, 862 F.3d at 1000-01 (citing  
8 Garrison, 759 F.3d at 1014-15); Treichler, 775 F.3d at 1102.

9 Viewing the record as a whole, the ALJ did not give clear and convincing reasons for  
10 rejecting plaintiff’s subjective symptom testimony.

### 11

### 12 **3. The ALJ’s Analysis of Plaintiff’s Subjective Symptom Testimony**

13 The ALJ found plaintiff’s subjective symptom testimony was “less than fully credible” based  
14 on the following: (1) plaintiff’s “somewhat normal level of daily activity and interaction”; (2) her  
15 conservative and infrequent medical treatment; (3) her work history; and (4) the fact that the  
16 “objective medical evidence does not support the alleged severity of [her] symptoms.” [AR at 92-  
17 96.]

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#### 19 **a. Daily Activities**

20 The ALJ noted that plaintiff’s “somewhat normal level of daily activity and interaction,”  
21 includes caring for her own personal hygiene, completing household chores, raising her minor  
22 daughter, driving, grocery shopping, paying bills, and getting married in August 2014. [AR at 91.]  
23 He noted that “[s]ome of the physical and mental abilities and social interactions required to  
24 perform these activities are the same as those necessary for obtaining and maintaining

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26 <sup>7</sup> “SSRs do not have the force of law. However, because they represent the Commissioner’s  
27 interpretation of the agency’s regulations, we give them some deference. We will not defer to SSRs  
28 if they are inconsistent with the statute or regulations.” Holohan v. Massanari, 246 F.3d 1195, 1202  
n.1 (9th Cir. 2001) (citations omitted).



1 employment.” [Id.] He also noted that her ability to participate in these activities “diminishes the  
2 credibility of her allegations of functional limitations.” [Id.] Plaintiff contends that the ALJ failed  
3 to mention that a “great component” of plaintiff’s mental illness is her tendency to isolate, that she  
4 suffers from agoraphobia, and that she is unwilling to leave her home. [JS at 4 (citing AR at 939,  
5 1722, 1729).] She points out that one of her therapy goals was to leave her home more than one  
6 time per week. [Id. (citing AR at 1722).]

7 An ALJ may rely on a claimant’s daily activities to support an adverse credibility  
8 determination when those activities: (1) “contradict [claimant’s] other testimony”; or (2) “meet the  
9 threshold for transferable work skills.” Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007). As a  
10 result, a plaintiff’s credibility may be discounted if he “is able to spend a substantial part of [his]  
11 day performing household chores or other activities that are transferable to a work setting.”  
12 Smolen v. Chater, 80 F.3d 1273, 1284 n.7 (9th Cir. 1996) (citation omitted). A claimant, however,  
13 need not be “utterly incapacitated to be eligible for benefits . . . and many home activities are not  
14 easily transferable to what may be the more grueling environment of the workplace, where it might  
15 be impossible to periodically rest or take medication.” Fair v. Bowen, 885 F.2d 597, 603 (9th Cir.  
16 1989) (citations omitted); Gallant v. Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984) (an ability to  
17 engage in some physical activities is not necessarily inconsistent with a finding of disability).  
18 “Even where those activities suggest some difficulty functioning, they may be grounds for  
19 discrediting the claimant’s testimony to the extent that they contradict claims of a totally debilitating  
20 impairment.” Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2010) (citing Turner v. Comm’r of  
21 Soc. Sec., 613 F.3d 1217, 1225 (9th Cir. 2010); Valentine v. Comm’r of Soc. Sec. Admin., 574  
22 F.3d 685, 693 (9th Cir. 2009)).

23 An ALJ must identify “*which* daily activities conflicted with *which* part of [c]laimant’s  
24 testimony,” pointing to *specific facts* in the record to support an adverse credibility finding. Burrell  
25 v. Colvin, 775 F.3d 1133, 1138 (9th Cir. 2014) (emphasis in original). Here, although the ALJ  
26 listed a few daily activities that plaintiff testified she is able to do, the ALJ otherwise failed to  
27 elaborate at all on how these activities actually conflict with plaintiff’s subjective symptom  
28 testimony. For instance, the ALJ provided no information on how plaintiff’s ability to make simple

1 meals, clean her house, shop a couple of times a month for about two hours, and go to church  
2 once or twice a month, negatively impacts plaintiff's testimony that she has difficulty dealing with  
3 stress, cannot sit for long periods of time, lifts no more than 10 pounds, takes a daily nap,  
4 experiences headache-type pain that affects her ability to concentrate and focus, and experiences  
5 intrusive thoughts. Moreover, there is no indication that plaintiff is doing these limited activities  
6 for any extended period of time or even every day. For instance, she testified that she may spend  
7 20 minutes every other day making such items as cup of noodles, salads, smoothies, and  
8 sandwiches; that cleaning the house keeps her calm; that she goes outside to check the mail; she  
9 shops about once a month for two hours; and she goes to church once or twice a month. [AR at  
10 401-04.] The ALJ failed to mention plaintiff's difficulty with isolating herself from others and the  
11 effect that alleged symptom would have in a work environment. More importantly, the ALJ does  
12 not explain *how* caring for plaintiff's own personal hygiene, completing household chores, taking  
13 care of her fifteen year old daughter (who is presumably at school for most of the day during the  
14 week), driving, grocery shopping, and paying bills at the level described by plaintiff, describe a  
15 person capable of engaging in even basic work activity or *how* they are otherwise inconsistent with  
16 plaintiff's subjective symptom testimony. [AR at 91.]

17 The ALJ did not meet his burden of showing how plaintiff's daily activities either contradict  
18 plaintiff's other testimony, or meet the threshold for transferable work skills, sufficient to support  
19 his adverse credibility determination. Thus, this was not a specific, clear and convincing reason  
20 for discounting plaintiff's subjective symptom testimony.

#### 21 22 **b. Conservative and Infrequent Medical Treatment**

23 The ALJ discounted plaintiff's subjective symptom testimony on the ground that her  
24 treatment, "primarily in the form of medications," had been conservative and generally successful  
25 in controlling her alleged symptoms. [AR at 91 (citations omitted).] He also stated that "the lack  
26 of more aggressive treatment, such as surgical intervention, a referral to a spine specialist, or in-  
27 patient psychiatric hospitalization suggests [plaintiff's] symptoms and limitations were not as  
28 severe as she alleged." [Id.]

1 An ALJ may properly rely on the fact that only routine and conservative treatment has been  
2 prescribed. Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995). “Conservative treatment” has  
3 been characterized by the Ninth Circuit as, for example, “treat[ment] with an *over-the-counter pain*  
4 *medication*” (see, e.g., Parra v. Astrue, 481 F.3d 742, 751 (9th Cir. 2007) (emphasis added);  
5 Tommasetti v. Astrue, 533 F.3d 1035, 1040 (9th Cir. 2008) (holding that the ALJ properly  
6 considered the plaintiff’s use of “conservative treatment including physical therapy and the use of  
7 anti-inflammatory medication, a transcutaneous electrical nerve stimulation unit, and a  
8 lumbosacral corset”)), or a physician’s failure “to prescribe . . . any serious medical treatment for  
9 [a claimant’s] supposedly excruciating pain.” Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir.  
10 1999).

11 However, although the ALJ suggested that had plaintiff undergone surgery or spent time  
12 in a psychiatric hospital he might find her subjective symptom allegations to be more credible, he  
13 failed to articulate what, if any, other treatment was currently recommended or available for  
14 plaintiff’s physical or mental impairments. He points to no evidence in the record that surgery had  
15 been recommended for plaintiff or was warranted for her conditions; he also failed to point to  
16 anything in the record to show that any specific treatment other than the medication and  
17 counseling plaintiff was receiving, is a standard method for treating individuals with plaintiff’s  
18 mental health conditions. Nor is there any authority suggesting that psychiatric hospitalizations  
19 or surgery are prerequisites to finding a claimant’s subjective symptom allegations credible. See  
20 Sandberg v. Comm’r of the Soc. Sec. Admin., 2015 WL 2449745, at \*6 (D. Or. May 22, 2015)  
21 (stating that there is no precedent to suggest “that a cocktail of prescription drugs is conservative  
22 treatment simply because the patient has not checked into a mental health facility”). Moreover,  
23 there is evidence that plaintiff experienced ongoing mental health symptoms in spite of her  
24 medications, that her medications -- which included Prozac, Abilify, and Cogentin -- were at times  
25 adjusted to better control her symptoms or to reduce her side effects, and that she also attended  
26 group or individual counseling on a regular basis. [See, e.g., AR at 93-94 (citations omitted),  
27 1553-54, 1651, 1739, 1743, 1760, 1764, 1765.]

28 Thus, this was not a specific, clear and convincing reason for discounting plaintiff’s

1 subjective symptom testimony.

2  
3 **c. Work History**

4 With respect to plaintiff's work history, the ALJ stated the following:

5 Notably, a review of [plaintiff's] work history shows that [she] worked only  
6 sporadically prior to the alleged disability onset date, which raises a question as to  
whether her continuing unemployment is actually due to medical impairments.

7 [AR at 91.]

8 In weighing a claimant's credibility, an ALJ may consider the claimant's prior work record  
9 and efforts to work. SSR 96-7p; see also Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.  
10 2002) (a claimant's "spotty" work history and failure to give maximum effort during physical  
11 evaluations supported adverse credibility determination). However, the ALJ acknowledged at the  
12 hearing that plaintiff had "a fair number of jobs done over the years. But it looks like a lot of them  
13 were relatively brief, just a few months." [AR at 114.]

14 The record reflects that plaintiff had earnings from multiple employers between 1996 and  
15 May 2008. [AR at 363-85.] Thus, the ALJ's vague reference to plaintiff's allegedly "sporadic" work  
16 history prior to the May 1, 2008, alleged onset date, is not supported by the record. Additionally,  
17 his failure to explain *how* plaintiff's allegedly "sporadic" employment prior to the 2008 onset date  
18 impacts her 2014 testimony regarding her physical and mental impairments, does not clearly and  
19 convincingly detract from her credibility. In fact, to the extent plaintiff's work history was  
20 "sporadic," or reflected a "fair number" of employers of relatively brief duration, this may actually  
21 be consistent with the fact that her physical and/or mental health symptoms were interfering with  
22 her ability to maintain full-time employment.

23 Accordingly, the Court cannot conclude that this was a specific, clear and convincing  
24 reason to discount plaintiff's subjective statements.

25  
26 **d. Objective Medical Evidence**

27 The ALJ also generally discounted plaintiff's subjective symptom testimony because "the  
28 objective medical evidence does not support the alleged severity of symptoms." [AR at 96.]

1 While a lack of objective medical evidence supporting a plaintiff's subjective complaints  
2 cannot provide the only basis to reject a claimant's subjective symptom testimony (Trevizo, 862  
3 F.3d at 1001 (quoting Robbins, 466 F.3d at 883)), it is one factor that an ALJ can consider in  
4 evaluating symptom testimony. See Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005)  
5 ("Although lack of medical evidence cannot form the sole basis for discounting pain testimony, it  
6 is a factor the ALJ can consider in his credibility analysis."); accord Rollins v. Massanari, 261 F.3d  
7 853, 857 (9th Cir. 2001).

8 Here, however, the Court has found that none of the ALJ's other reasons for discounting  
9 plaintiff's subjective symptom testimony was legally sufficient. Moreover, the ALJ reviewed the  
10 medical evidence, stated his conclusion that plaintiff's testimony was "less than fully credible," and  
11 then stated his finding that the objective findings in the record also supported his RFC  
12 determination and did not support plaintiff's allegations. [AR at 96.]

13 As the Ninth Circuit recently held, "an ALJ's 'vague allegation' that a claimant's testimony  
14 is 'not consistent with the objective medical evidence,' without any 'specific finding in support' of  
15 that conclusion, is insufficient." Treichler, 775 F.3d at 1103 (citation omitted). The "ALJ must  
16 identify the testimony that was not credible, and specify 'what evidence undermines the claimant's  
17 complaints.'" Id. (citation omitted); Brown-Hunter, 806 F.3d at 493. The ALJ did not identify the  
18 testimony he found not credible and "link that testimony to the particular parts of the record"  
19 supporting his non-credibility determination. Brown-Hunter, 806 F.3d at 494. In short, "[t]his is  
20 not the sort of explanation or the kind of 'specific reasons' we must have in order to review the  
21 ALJ's decision meaningfully, so that we may ensure that the claimant's testimony was not  
22 arbitrarily discredited," nor can the error be found harmless. Id. at 493.

23 Thus, even if it was supported by the record -- which the Court does not find -- because the  
24 alleged lack of objective medical evidence by itself cannot be the only reason for discounting  
25 plaintiff's testimony, remand is warranted to provide specific, clear and convincing reasons for  
26 discounting plaintiff's subjective symptom testimony, if supported by the evidence. Treichler, 775  
27 F.3d at 1103; Brown-Hunter, 806 F.3d at 493-94.

1 **B. RFC DETERMINATION**

2 Plaintiff contends that because the ALJ failed to order a consultative mental health  
3 examination and failed to consider or incorporate certain opinion evidence into the RFC  
4 determination, that determination is not supported by substantial evidence. [JS at 15-17.]  
5 Specifically, plaintiff contends that the ALJ gave “some weight” to the opinion of the internal  
6 medicine consultative physician, Dr. Schwartz, who “did not even make note of the fact that  
7 [plaintiff] was suffering from anemia, which would have given rise to additional physical limitations.”  
8 [JS at 15 (citing AR at 94).] She further contends that there was opinion evidence regarding  
9 plaintiff’s edema that was not mentioned by the ALJ [JS at 16 (citing AR at 120, 1061, 1064, 1231-  
10 32)], and that despite counsel pointing out to the ALJ that there was no consultative examining  
11 psychiatrist’s report in the file, the ALJ instead relied on the State Agency physicians who had not  
12 reviewed plaintiff’s most recent psychiatric and psychological treatment records, which included  
13 her new diagnosis of agoraphobia. [JS at 16 (citing AR at 95, 109, 1729, 1732, 1735).] Finally,  
14 plaintiff submits that the ALJ should have given greater weight to the opinion of plaintiff’s treating  
15 physician’s assistant, Ali Williams.<sup>8</sup> [JS at 17 (citing AR at 1732-33, 1740-41).]

16 Defendant counters these arguments. However, because the matter is being remanded  
17 for reconsideration of plaintiff’s subjective symptom testimony, and the ALJ on remand must as  
18 a result reconsider plaintiff’s RFC in light of her testimony, the ALJ must also reconsider on  
19 remand the medical evidence of record.

20 /

21 \_\_\_\_\_  
22 <sup>8</sup> The Court notes that for all claims filed on or after March 27, 2017, the Rules in 20 C.F.R.  
23 § 404.1520c (not § 404.1527) for determining the persuasiveness of the medical evidence shall  
24 apply. The new regulations provide that after that date, the Social Security Administration “will not  
25 defer or give any specific evidentiary weight, including controlling weight, to any medical opinion(s)  
26 or prior administrative medical finding(s), including those from your medical sources.” 20 C.F.R.  
27 § 404.1520c. Thus, the new regulations eliminate the term “treating source,” as well as what is  
28 customarily known as the treating source or treating physician rule. See 20 C.F.R. § 404.1520c;  
see also 81 Fed. Reg. 62560, at 62573-74 (Sept. 9, 2016). Moreover, under the new regulations,  
“acceptable medical source” is now defined to *include* a Licensed Physician Assistant, “for  
impairments within . . . her licensed scope of practice.” 20 C.F.R. § 404.1502(a)(8). Because  
plaintiff’s applications for benefits were filed prior to March 17, 2017, these new regulations did  
not apply at the time the ALJ issued his decision. If appropriate, they shall apply on remand.

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3 **VI.**

4 **REMAND FOR FURTHER PROCEEDINGS**

5 The Court has discretion to remand or reverse and award benefits. McAllister v. Sullivan,  
6 888 F.2d 599, 603 (9th Cir. 1989). Where no useful purpose would be served by further  
7 proceedings, or where the record has been fully developed, it is appropriate to exercise this  
8 discretion to direct an immediate award of benefits. See Lingenfelter, 504 F.3d at 1041; Benecke  
9 v. Barnhart, 379 F.3d 587, 595-96 (9th Cir. 2004). Where there are outstanding issues that must  
10 be resolved before a determination can be made, and it is not clear from the record that the ALJ  
11 would be required to find plaintiff disabled if all the evidence were properly evaluated, remand is  
12 appropriate. See Benecke, 379 F.3d at 593-96.

13 In this case, there are outstanding issues that must be resolved before a final determination  
14 can be made. In an effort to expedite these proceedings and to avoid any confusion or  
15 misunderstanding as to what the Court intends, the Court will set forth the scope of the remand  
16 proceedings. First, because the ALJ failed to provide specific, clear and convincing reasons,  
17 supported by substantial evidence in the case record, for discounting plaintiff's subjective symptom  
18 testimony, the ALJ on remand, in accordance with SSR 16-3p, shall reassess plaintiff's subjective  
19 allegations and either credit her testimony as true, or provide specific, clear and convincing  
20 reasons, supported by substantial evidence in the case record, for discounting or rejecting any  
21 testimony. Second, the ALJ on remand shall reassess the medical opinions of record, including,  
22 as warranted, records reflecting plaintiff's anemia, edema, and the records of physician's assistant,  
23 Ms. Williams.<sup>9</sup> Finally, based on his reevaluation of the entire medical record and assessment of  
24 plaintiff's subjective symptom testimony, the ALJ on remand shall reassess plaintiff's RFC and  
25 determine, at step five, with the assistance of a VE if necessary, whether there are jobs existing  
26 in significant numbers in the national economy that plaintiff can still perform.<sup>10</sup> See Shaibi v.

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26 <sup>9</sup> If appropriate, the ALJ shall apply 20 C.F.R. §§ 404.1502 and 404.1520c on remand. (See  
27 supra note 8).

28 <sup>10</sup> Nothing herein is intended to disrupt the ALJ's step four finding that plaintiff is unable to  
(continued...)

1 Berryhill, \_\_\_ F.3d \_\_\_, 2017 WL 3598085, at \*6-7 (9th Cir. Aug. 22, 2017).

2  
3 **VII.**

4 **CONCLUSION**

5 **IT IS HEREBY ORDERED** that: (1) plaintiff's request for remand is **granted**; (2) the  
6 decision of the Commissioner is **reversed**; and (3) this action is **remanded** to defendant for further  
7 proceedings consistent with this Memorandum Opinion.

8 **IT IS FURTHER ORDERED** that the Clerk of the Court serve copies of this Order and the  
9 Judgment herein on all parties or their counsel.

10 **This Memorandum Opinion and Order is not intended for publication, nor is it**  
11 **intended to be included in or submitted to any online service such as Westlaw or Lexis.**

12 

13 DATED: August 30, 2017

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15 PAUL L. ABRAMS  
16 UNITED STATES MAGISTRATE JUDGE  
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28 <sup>10</sup>(...continued)  
return to her past relevant work.