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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MELYNDA PARKER,
Plaintiff,
v.
NANCY A. BERRYHILL, Deputy
Commissioner for Operations of Social
Security Administration,
Defendant.

Case No. ED CV 16-2363-SP

MEMORANDUM OPINION AND
ORDER

I.

INTRODUCTION

On November 15, 2016, plaintiff Melynda Parker 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”). The parties have fully briefed the matters in dispute, and the court deems the matter suitable for adjudication without oral argument.

Plaintiff presents one disputed issue for decision: whether the Administrative

1 Law Judge (“ALJ”) properly considered the opinion of an examining physician in
2 his residual functional capacity (“RFC”) determination. Memorandum in Support
3 of Plaintiff’s Complaint (“P. Mem.”) at 3-10; Memorandum in Support of
4 Defendant’s Answer (“D. Mem.”) at 3-6.

5 Having carefully studied the parties’ memoranda on the issue in dispute, the
6 Administrative Record (“AR”), and the decision of the ALJ, the court concludes
7 that, as detailed herein, the ALJ improperly failed to consider all of the examining
8 physician’s opined mental limitations in his RFC determination. The court
9 therefore remands this matter to the Commissioner in accordance with the
10 principles and instructions enunciated in this Memorandum Opinion and Order.

11 II.

12 FACTUAL AND PROCEDURAL BACKGROUND

13 Plaintiff was forty-six years old on her alleged disability onset date. AR at
14 72, 89, 108, 125. Plaintiff has a seventh grade education and past relevant work as
15 a retail sales associate. *Id.* at 44-47, 67, 72, 89.

16 On December 7, 2012, plaintiff filed applications for a period of disability,
17 DIB, and SSI, alleging an onset disability date of April 9, 2011. *Id.* at 72, 89, 221-
18 28, 229-34. Plaintiff alleged disability due to chronic obstructive pulmonary
19 disease (“COPD”), heart failure, diabetes, and depression. *Id.* at 72, 89. The
20 Commissioner denied plaintiff’s applications initially and upon reconsideration,
21 after which she filed a request for a hearing. *Id.* at 146-52, 153-59, 161-66, 167-
22 72, 173.

23 On April 22, 2015, plaintiff, represented by an attorney, appeared and
24 testified before the ALJ. *Id.* at 43-66. The ALJ also heard testimony from
25 Elizabeth Ramos Brown, a vocational expert (“VE”). *Id.* at 66-69, 213-14. On
26 July 13, 2015, the ALJ denied plaintiff’s claim for benefits. *Id.* at 20-34.

27 Applying the well-known five-step sequential evaluation process, the ALJ
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1 found, at step one, that plaintiff had not engaged in substantial gainful activity
2 since April 9, 2011, the alleged disability onset date. *Id.* at 25.

3 At step two, the ALJ found plaintiff suffered from the following severe
4 impairments: spina bifida, history of pulmonary embolism, cardiac dysrhythmias,
5 COPD, obesity, and mood disorder. *Id.*

6 At step three, the ALJ found plaintiff's impairments, whether individually or
7 in combination, did not meet or medically equal one of the listed impairments set
8 forth in 20 C.F.R. part 404, Subpart P, Appendix 1 (the "Listings"). *Id.* at 26.

9 The ALJ then assessed plaintiff's residual functional capacity,¹ and
10 determined she had the RFC to perform light work, with the limitations that she:
11 could only occasionally perform postural activities; could not work on ladders,
12 ropes, or scaffolds; must avoid concentrated exposure to extremes of temperature
13 and pulmonary irritants; and could not work at unprotected heights or around
14 dangerous machinery. *Id.* at 28. The ALJ also limited plaintiff to non-complex
15 and routine tasks, but no tasks requiring hypervigilance, no responsibility for the
16 safety of others, no jobs requiring public interaction, and no jobs requiring
17 significant teamwork. *Id.*

18 The ALJ found, at step four, that plaintiff was unable to perform her past
19 relevant work. *Id.* at 31.

20 At step five, the ALJ determined that, based upon plaintiff's age, education,
21 work experience, and RFC, plaintiff could perform other jobs that exist in
22 significant numbers in the national economy, including basket filler, garment
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24 ¹ Residual functional capacity is what a claimant can do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-
26 56 n.5-7 (9th Cir. 1989). "Between steps three and four of the five-step evaluation,
27 the ALJ must proceed to an intermediate step in which the ALJ assesses the
28 claimant's residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151
n.2 (9th Cir. 2007).

1 bagger, and folding machine operator. *Id.* at 33. Consequently, the ALJ concluded
2 plaintiff did not suffer from a disability as defined by the Social Security Act
3 (“SSA”). *Id.* at 33-34.

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, 16-18. The ALJ’s decision stands as the
6 final 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 the ALJ’s findings are based on legal
14 error or are not supported by substantial evidence in the record, the court may
15 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 Plaintiff argues the ALJ improperly rejected the opinion of an examining
8 physician, Dr. Kara Cross. P. Mem. at 3-10. Specifically, plaintiff contends the
9 ALJ's RFC limitations failed to adequately incorporate Dr. Cross's mental
10 impairment findings, and the failure to do so was not supported by substantial
11 evidence in the administrative record. *Id.* at 6-8. Defendant responds the ALJ
12 appropriately accommodated Dr. Cross's opinion in his RFC determination. D.
13 Mem. at 3-6.

14 In determining whether a claimant has a medically determinable impairment,
15 among the evidence the ALJ considers is medical evidence. 20 C.F.R. §§
16 404.1527(b), 416.927(b). In evaluating medical opinions, the regulations
17 distinguish among three types of physicians: (1) treating physicians; (2) examining
18 physicians; and (3) non-examining physicians. 20 C.F.R. §§ 404.1527(c), (e),
19 416.927(c), (e); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (as amended).
20 "Generally, a treating physician's opinion carries more weight than an examining
21 physician's, and an examining physician's opinion carries more weight than a
22 reviewing physician's." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir.
23 2001); 20 C.F.R. §§ 404.1527(c)(1)-(2), 416.027(c)(1)-(2). The opinion of the
24 treating physician is generally given the greatest weight because the treating
25 physician is employed to cure and has a greater opportunity to understand and
26 observe a claimant. *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996);
27 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

1 Nevertheless, the ALJ is not bound by the opinion of the treating physician.
2 *Smolen*, 80 F.3d at 1285. If a treating physician’s opinion is uncontradicted, the
3 ALJ must provide clear and convincing reasons for giving it less weight. *Lester*,
4 81 F.3d at 830. If the treating physician’s opinion is contradicted by other
5 opinions, the ALJ must provide specific and legitimate reasons supported by
6 substantial evidence for rejecting it. *Id.* Likewise, the ALJ must provide specific
7 and legitimate reasons supported by substantial evidence in rejecting the
8 contradicted opinions of examining physicians. *Id.* at 830-31. The opinion of a
9 non-examining physician, standing alone, cannot constitute substantial evidence.
10 *Widmark v. Barnhart*, 454 F.3d 1063, 1066 n.2 (9th Cir. 2006); *Morgan v.*
11 *Comm’r*, 169 F.3d 595, 602 (9th Cir. 1999); *see also Erickson v. Shalala*, 9 F.3d
12 813, 818 n.7 (9th Cir. 1993).

13 RFC is what one can “still do despite [his or her] limitations.” 20 C.F.R.
14 §§ 404.1545(a)(1)-(2), 416.945(a)(1)-(2). The ALJ reaches an RFC determination
15 by reviewing and considering all of the relevant evidence, including non-severe
16 impairments. *Id.*

17 **A. Medical Opinions**

18 **1. Examining Physician Dr. Kara Cross**

19 Dr. Kara Cross, Ph. D., a clinical psychologist, examined plaintiff on April
20 6, 2013 by administering a complete mental evaluation. AR at 306-12. Plaintiff
21 presented to the examination with complaints of trouble concentrating, worried
22 thoughts, moderate to severe depression due to her life situation and deteriorating
23 health, and past suicidal thoughts. *Id.* at 306-07. Dr. Cross noted plaintiff had not
24 received any psychiatric treatment, was never hospitalized in a psychiatric facility,
25 but was taking Celexa, Wellbutrin, Nexium, metoprolol, Coumadin,
26 hydrochlorothiazide, and lovastatin medications. *Id.* at 307.

27 Plaintiff had fair relationships with her friends and family, could focus
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1 attention, and had no difficulty making decisions. *Id.* at 308. But plaintiff had
2 some difficulty completing household tasks, was socially avoidant of others
3 besides her family, and tried to avoid her family due to her feelings of depression
4 and helplessness. *Id.* During the mental status examination, Dr. Cross observed
5 plaintiff had coherent and organized thought processes, good thought content and
6 speech, and was oriented to time, place, person, and purpose. *Id.* at 309. Yet
7 plaintiff's mood and affect were very depressed, sad, tearful, and somewhat
8 anxious. Plaintiff also could not repeat four digits forward and backward, or recall
9 three items immediately and after five minutes. *Id.* Dr. Cross also observed
10 plaintiff's difficulties with concentration and calculation, as she could not perform
11 serial threes or alpha numeric reasoning. *Id.* at 310. Based on the initial
12 evaluation, tests, history, and medical records, Dr. Cross's diagnostic impression
13 was that plaintiff suffered from major depression, and she assessed plaintiff a
14 Global Assessment of Functioning ("GAF") score of 55.²

15 With respect to plaintiff's functional assessment, Dr. Cross opined plaintiff
16 had moderate mental impairments due to her depression with regard to her ability
17 to: relate and interact with co-workers and the public; maintain concentration and
18 attention, persistence, and pace; and maintain regular attendance in the workplace
19 and perform work activities on a consistent basis. AR at 311. Dr. Cross also
20 opined plaintiff was able to "understand, remember, and carry out *simple* one or
21 two-step job instructions," and "[a]lthough she is able, she would not be able to
22 maintain emotional equilibrium for an 8-hour day." *Id.* Plaintiff was also unable
23 to follow detailed or complex instructions. *Id.* Plaintiff had no functional
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25 ² A GAF score of 55-60 indicates "[m]oderate symptoms (e.g., flat affect and
26 circumstantial speech, occasional panic attacks) or moderate difficulty in social,
27 occupational, or school functioning (e.g., few friends, conflicts with peers or co-
28 workers)." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental
Disorders 34 (4th Ed. 2000) ("DSM").

1 limitations with respect to her ability to: associate with day-to-day work activity,
2 including attendance and safety; ability to accept instructions from supervisors;
3 and ability to perform work activities without special or additional supervision. *Id.*
4 Dr. Cross additionally opined plaintiff would not be a danger in the workplace. *Id.*

5 **2. State Agency Physicians**

6 State agency physicians Dr. Brady Dalton, Psy. D., on May 9, 2013, and Dr.
7 Philip Rosenshield, Ph. D., on December 28, 2013, separately opined plaintiff had
8 the mental capacity for simple work in settings with limited social or public
9 contacts. *Id.* at 85-86, 102-03, 122, 139. Dr. Dalton and Dr. Rosenshield both
10 opined plaintiff had moderate limitation with respect to: understanding and
11 remembering detailed instructions; carrying out detailed instructions; maintaining
12 attention and concentration for extended periods; performing activities within a
13 schedule, maintaining regular attendance, and being punctual within customary
14 tolerances; working in coordination with or in proximity to others without being
15 distracted; completing a normal workday and workweek without interruptions from
16 psychologically-based symptoms and performing at a consistent pace without
17 unreasonable rest periods; interacting with the general public; and responding
18 appropriately to changes in the work setting. *Id.* at 84-85, 101-02, 120-22,137-39.

19 **B. Medical Evidence**

20 Plaintiff presented with depression and mild suicidal ideation at an
21 assessment performed for Riverside County Mental Health Plan on July 31, 2013.
22 *Id.* at 420-22. Plaintiff had a moderate dysfunction rating and a GAF score of 50.³
23 *Id.* at 422. A treatment plan of two sessions per month to see a psychiatrist for
24 medical evaluation was proposed. *Id.* Plaintiff was noted to be isolated and
25 sometimes slept all day without caring if she died. *Id.* at 423.

26
27 ³ A GAF score of 41-50 is indicative of “serious symptoms,” such as suicidal
28 ideation or an inability to maintain employment. DSM at 34.

1 Plaintiff presented to Banning Mental Health on multiple occasions between
2 November 6, 2013 and February 24, 2014. *See id.* at 431-33. Progress notes
3 during these visits documented plaintiff’s depression, anxiety, irritability, and
4 angry mood, which occurred “daily almost all day.” *Id.* The notes also report
5 plaintiff experienced side effects of increased anger and agitation when her
6 prescription medication dosage was doubled. *See id.* at 433. Plaintiff’s mood
7 swings led to suicidal ideation and poor relationships with others. *Id.*

8 **C. The ALJ’s Findings**

9 The ALJ was obligated to consider plaintiff’s mental limitations,
10 notwithstanding the ALJ’s finding that they were non-severe impairments. *See*
11 Social Security Ruling 96-8p (“In assessing RFC, the adjudicator must consider
12 limitations and restrictions imposed by all of an individual’s impairments, even
13 those that are not ‘severe.’”).

14 The ALJ’s RFC determination included the following mental limitations for
15 plaintiff: limited to non-complex and routine tasks; no tasks requiring
16 hypervigilance; no responsibility for the safety of others; no jobs requiring public
17 interaction; and no jobs requiring significant teamwork. AR at 28. The ALJ gave
18 the opinions of Dr. Cross and the state agency physicians “significant” weight in
19 determining plaintiff was “capable of performing at least simple tasks with limited
20 social contact.” *Id.* at 31 (citing *id.* at 72-88, 89-105, 108-24, 125-41, 306-12). The
21 ALJ found plaintiff’s mental RFC was appropriate because the physicians’
22 opinions were consistent with plaintiff’s testimony and lack of additional objective
23 mental health evidence. *Id.* The ALJ also suggested the medical record, as
24 evidenced by a lack of mental health treatment, supports his RFC finding. *See*
25 *id.* at 30-31.

26 Plaintiff argues the ALJ erred by rejecting specific portions of Dr. Cross’s
27 opinions, including that plaintiff was unable to maintain an emotional equilibrium
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1 for an 8-hour day, plaintiff’s moderate impairment in maintaining concentration,
2 attention, persistence, and pace, and plaintiff’s moderate impairment in her ability
3 to maintain a regular attendance in the workplace and perform consistent work
4 activities. P. Mem. at 5, 6.

5 **1. Emotional Equilibrium**

6 As to plaintiff’s difficulty maintaining “emotional equilibrium,” none of the
7 ALJ’s RFC limitations appear to address this aspect of Dr. Cross’s opinion. The
8 medical record suggests plaintiff’s depression affected her daily mood, which was
9 consistently noted to be angry or irritable. But the court agrees with defendant that
10 Dr. Cross’s opinion is confusingly stated and self-contradictory. *See* D. Mem. at 5-
11 6. Dr. Cross states that “[a]lthough she is able, [plaintiff] would not be able to
12 maintain emotional equilibrium for an 8-hour day.” AR at 311. The structure of
13 the statement leaves unclear what Dr. Cross intended to convey regarding
14 plaintiff’s actual ability to maintain emotional equilibrium throughout a workday.
15 As such, the ALJ may have reasonably determined that Dr. Cross opined plaintiff
16 could maintain her emotional equilibrium for a full workday. The ALJ did not err
17 in his RFC determination by failing to accommodate this particular opinion, since
18 he could have relied on Dr. Cross’s own statement to find plaintiff was in fact able
19 to maintain emotional equilibrium.

20 **2. Concentration, Attention, Persistence, and Pace**

21 With respect to Dr. Cross’s opinion that plaintiff had moderate impairments
22 in her ability to maintain concentration, attention, persistence, and pace, it appears
23 the ALJ adequately accommodated this limitation by imposing a restriction that
24 plaintiff not perform any tasks requiring “hypervigilance.” AR at 28. In essence,
25 this particular RFC limitation appears designed to restrict plaintiff from tasks
26 requiring careful attention or focus. Plaintiff has not explained how the
27 hypervigilance restriction does not accommodate Dr. Cross’s concentration,
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1 attention, persistence, and pace restrictions. Accordingly, the ALJ did not appear
2 to reject this portion of Dr. Cross's opinion, as defendant suggests. *See* D. Mem. at
3 5.

4 **3. Ability to Maintain Regular Attendance**

5 The crux of the RFC issue here is the ALJ's failure to address, either in his
6 development of the record or RFC discussion, Dr. Cross's opinion regarding
7 limitations on plaintiff's ability to maintain regular attendance and consistently
8 perform work activity. If the ALJ rejected Dr. Cross's findings of moderate mental
9 limitations relating to plaintiff's ability to maintain a regular attendance in the
10 workplace, he was required to say so and provide specific and legitimate reasons
11 supported by substantial evidence in the record. *See Lester*, 81 F.3d at 830. The
12 ALJ gave no such reasons here. On the contrary, the ALJ's RFC analysis indicated
13 he accepted Dr. Cross's opinion, as he gave significant weight to it and stated it
14 was consistent with plaintiff's testimony and the objective medical record. *See AR*
15 at 31. The ALJ also gave significant weight to the opinions of the state non-
16 examining physicians to support his RFC determination. *Id.* As noted above, both
17 Dr. Dalton and Dr. Rosenshield opined plaintiff had moderate limitations relating
18 to her ability to perform activities within a schedule, maintain regular attendance,
19 and be punctual within customary tolerances. *Id.* at 84, 101, 121, 138. These non-
20 examining opinions do not controvert Dr. Cross's opinion but instead serve as
21 substantial evidence that is consistent with Dr. Cross's independent clinical
22 findings. *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). But despite
23 giving significant weight to Dr. Cross and the non-examining state physicians'
24 opinions, the ALJ appears to have actually rejected them in part, given that he did
25 not incorporate the opined moderate limitations relating to regular workplace
26 attendance into his RFC determination.

27 The ALJ cited plaintiff's own testimony and the objective medical record as
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1 justification for his RFC finding. AR at 31. The ALJ's reliance on the lack of
2 mental health treatment in the record relates to plaintiff's credibility for her
3 allegations, which is not at issue here. *See id.* at 30. This is an improper basis to
4 reject the examining physician's opinions, even assuming it was a basis. *See*
5 *Edlund v. Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001) ("In sum, the ALJ
6 appears to have relied on her doubts about [the claimant's] overall credibility to
7 reject the entirety of [the examining psychologist's] report, including portions that
8 [the psychologist] deemed to be reliable."). Nothing in the record indicates Dr.
9 Cross did not believe plaintiff's description of her symptoms, or that Dr. Cross
10 relied on plaintiff's descriptions more heavily than her own observations in opining
11 plaintiff had moderate impairments in maintaining a regular work schedule. *See*
12 *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1200 (9th Cir. 2007). The remaining
13 portions of the medical record relating to plaintiff's mental health also do not
14 support a rejection of Dr. Cross's opinion. As documented above, the mental
15 health medical record noted plaintiff's depression and resulting symptoms, but did
16 not reveal any findings relating to plaintiff's ability to attend work.

17 Plaintiff's testimony at the hearing also did not address her ability, or lack
18 thereof, to regularly attend a job. Plaintiff testified that her depression negatively
19 affects her ability to interact with others and her concentration and memory. AR at
20 50-52. She was seeing social worker Peter Hilliard for her mental issues. *See id.*
21 at 53, 57. Her primary care physician Dr. Edward Bacho had prescribed
22 psychiatric medications, though it was described at the hearing as not significant
23 treatment. *Id.* at 57, 64. Plaintiff stated she was not mentally able to handle the
24 responsibility of working and cited her past unsuccessful return to work to provide
25 examples where she had memory and focus issues. *Id.* at 53-54. Plaintiff's
26 testimony arguably supports the ALJ's RFC findings with respect to her ability to
27 perform simple tasks with limited social interaction. But the testimony does not
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1 clearly address Dr. Cross’s opinion that plaintiff would have moderate impairments
2 relating to her ability to maintain regular workplace attendance. At most the
3 testimony might be said to substantiate Dr. Cross’s limitation, since plaintiff
4 testified to her mental inability to return to work. As such, plaintiff’s testimony
5 does not provide a specific and legitimate reason supported by substantial evidence
6 to justify the ALJ’s implicit rejection of this aspect of Dr. Cross’s mental limitation
7 opinion.

8 Consequently, the ALJ erred in his RFC determination because he was
9 required to consider all of the mental limitations opined by Dr. Cross, which in this
10 case included moderate limitations with regard to plaintiff’s ability to maintain a
11 regular attendance in the workplace and consistently perform work activities. *See*
12 *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1164 (9th Cir. 2008)
13 (ALJ erred in failing to include a treating physician’s opined limitation in his RFC
14 assessment). The ALJ’s failure to even acknowledge the opined limitation
15 anywhere in his RFC discussion suggests he simply ignored this aspect of Dr.
16 Cross’s opinion without reason. The ALJ may ultimately conclude that the opined
17 mental limitation does not need to be included in plaintiff’s RFC, but his failure to
18 even consider the mental limitation in his RFC determination was error. Nor was it
19 plainly a harmless error, given the absence of clear testimony from the vocational
20 expert as to the effect such moderate regular attendance limitations would have on
21 plaintiff’s ability to work. *See AR at 67-69.* As such, the ALJ erred in his RFC
22 assessment.

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). It is appropriate for the court to exercise this
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1 discretion to direct an immediate award of benefits where: “(1) the record has been
2 fully developed and further administrative proceedings would serve no useful
3 purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting
4 evidence, whether claimant testimony or medical opinions; and (3) if the
5 improperly discredited evidence were credited as true, the ALJ would be required
6 to find the claimant disabled on remand.” *Garrison v. Colvin*, 759 F.3d 995, 1020
7 (9th Cir. 2014) (setting forth three-part credit-as-true standard for remanding with
8 instructions to calculate and award benefits). But where there are outstanding
9 issues that must be resolved before a determination can be made, or it is not clear
10 from the record that the ALJ would be required to find a plaintiff disabled if all the
11 evidence were properly evaluated, remand for further proceedings is appropriate.
12 *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*,
13 211 F.3d 1172, 1179-80 (9th Cir. 2000). In addition, the court must “remand for
14 further proceedings when, even though all conditions of the credit-as-true rule are
15 satisfied, an evaluation of the record as a whole creates serious doubt that a
16 claimant is, in fact, disabled.” *Garrison*, 759 F.3d at 1021.

17 Here, remand is required because the ALJ erred in his RFC determination,
18 and it is unclear what plaintiff’s RFC would be if the ALJ properly considered the
19 entirety of Dr. Cross’s opinion, or what effect a change in RFC would have on the
20 disability determination. On remand, the ALJ shall consider all of the mental
21 limitations opined by Dr. Cross and reassess plaintiff’s RFC. The ALJ shall then
22 proceed through steps four and five to determine what work, if any, plaintiff is
23 capable of performing.

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VI.

CONCLUSION

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

DATED: October 9, 2018



SHERI PYM
United States Magistrate Judge