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

<b>LUPE ZAMORA,</b>	)	<b>NO. EDCV 17-0502-KS</b>
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>MEMORANDUM OPINION AND ORDER</b>
	)	
<b>NANCY A. BERRYHILL, Acting</b>	)	
<b>Commissioner of Social Security,</b>	)	
<b>Defendant.</b>	)	
_____	)	

**INTRODUCTION**

Lupe Zamora (“Plaintiff”) filed a Complaint on March 17, 2017, seeking review of the denial of her application for Supplemental Security Income (“SSI”). (Dkt. No. 1.) On April 25, 2017, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. (Dkt. Nos. 12, 14, 15.) On November 13, 2017, the parties filed a Joint Stipulation (“Joint Stip.”). (Dkt. No 23.) Plaintiff seeks an order reversing the Commissioner’s decision and remanding for further proceedings. (Joint Stip. at 22.) The Commissioner requests that the ALJ’s decision be affirmed. (Joint Stip. at 22.) The Court has taken the matter under submission without oral argument and remands the case for further proceedings.



1 (AR 17.) At Step Three, the ALJ concluded that Plaintiff did not have an impairment or  
2 combination of impairments that met or medically equaled the severity of any impairments  
3 listed in 20 C.F.R. part 404, subpart P, appendix 1 (20 C.F.R. §§ 416.920(d), 416.925,  
4 416.926). (AR 17.) The ALJ then determined that Plaintiff had the residual functional  
5 capacity (“RFC”) to perform medium work with the following limitations:

6  
7 “[Plaintiff] can lift and carry 50 pounds occasionally and 25 pounds frequently.  
8 She can stand and walk for six hours out of an eight-hour workday, and she can  
9 sit for six hours out of an eight-hour workday. She can frequently walk over  
10 uneven terrain, climb ladders, and work at heights. She can frequently bend,  
11 crouch, stoop, and crawl. She is limited to simple, repetitive tasks.”

12  
13 (AR 19.)

14  
15 At Step Four, the ALJ found that Plaintiff had no past relevant work. (AR 26.)  
16 Finally, at Step Five, the ALJ considered Plaintiff’s RFC and relying on the testimony of the  
17 VE found that Plaintiff could perform jobs existing in significant numbers in the national  
18 economy, such as industrial cleaner (DOT<sup>2</sup> 381.687-018), hand packager (DOT 920.587-  
19 018), and kitchen helper (DOT 318.687-010). (AR 27.) Accordingly, the ALJ determined  
20 that Plaintiff had not been under a disability, as defined in the Social Security Act, from the  
21 application filing date through the date of the ALJ’s decision. (*Id.*)

## 22 23 STANDARD OF REVIEW

24  
25 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to  
26 determine whether it is free from legal error and supported by substantial evidence in the

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<sup>2</sup> “DOT” refers to the *Dictionary of Occupational Titles*.

1 record as a whole. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). “Substantial evidence  
2 is ‘more than a mere scintilla but less than a preponderance; it is such relevant evidence as a  
3 reasonable mind might accept as adequate to support a conclusion.’” *Hill v. Astrue*, 698 F.3d  
4 1153, 1159 (9th Cir. 2012) (citations omitted). “Even when the evidence is susceptible to  
5 more than one rational interpretation, we must uphold the ALJ’s findings if they are  
6 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d  
7 1104, 1111 (9th Cir. 2012).

8  
9 Although this Court cannot substitute its discretion for the Commissioner’s, the Court  
10 nonetheless must review “the entire record as a whole, weighing both the evidence that  
11 supports and the evidence that detracts from the Commissioner’s conclusion.” *Garrison v.*  
12 *Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014) (citations omitted); *Desrosiers v. Sec’y of Health*  
13 *& Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). “The ALJ is responsible for  
14 determining credibility, resolving conflicts in medical testimony, and for resolving  
15 ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) (citations omitted).

16  
17 The Court will uphold the Commissioner’s decision when “the evidence is susceptible  
18 to more than one rational interpretation.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir.  
19 2005). However, the Court may review only the reasons stated by the ALJ in his decision  
20 “and may not affirm the ALJ on a ground upon which he did not rely.” *Orn*, 495 F.3d at  
21 630; *see also Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). The Court will not  
22 reverse the Commissioner’s decision if it is based on harmless error, meaning error that is  
23 “inconsequential to the ultimate nondisability determination, or that, despite the legal error,  
24 the agency’s path may reasonably be discerned.” *Brown-Hunter v. Colvin*, 806 F.3d 487,  
25 492 (9th Cir. 2015) (citations omitted).

26 //

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1 enthesophytes and mild degenerative changes, but no acute abnormalities. (AR 303.) X-  
2 rays of Plaintiff hands on January 23, 2015 were considered unremarkable but showed  
3 osteophytosis or periarticular erosion and small accessory ossicles. (AR 274.)  
4

5 **a. Plaintiff's doctors' treatment notes**  
6

7 Doctor Nguyen-Phuong Pham appears to have started treating Plaintiff around July  
8 2012. (AR 249-253.) Dr. Pham was her primary care physician at least through early 2015  
9 and treated her or referred her for a number of issues including knee pain, ankle pain,  
10 calcaneal spurs, elbow pain, hypertension, hypothyroidism, headaches, insomnia, and  
11 psychological issues including depression and bipolar disorder. (AR 189-270).  
12

13 Plaintiff underwent surgery on her left foot for plantar fasciitis on January 15, 2015.  
14 (AR 278.) Doctor David Shofler performed the surgery. (AR 278.) On January 23, 2015,  
15 eight days after the surgery, Plaintiff walked to the doctor's office for a postoperative visit  
16 where she complained of persistent pain that was not controlled by her pain medication. (AR  
17 275.) Plaintiff had changed the bandage on her foot despite instructions to leave the original  
18 bandage in place. (AR 275.) Plaintiff also needed to walk home after the visit but was  
19 advised to walk on it as little as possible until her next appointment in two weeks. (AR 275.)  
20 Plaintiff had x-rays of her hands taken on the same day at the same medical center. (AR  
21 274.) Plaintiff returned for her second postoperative appointment one week later, which was  
22 one week early. (AR 273.) She walked to this visit as well, admitted to walking a lot, and to  
23 walking mostly without the protective boot. (AR 273.) Her new pain prescription had not  
24 been filled yet, so the doctor contacted the pharmacy again. (AR 273.) One week later, she  
25 returned to have her sutures removed. (AR 272.) The skin around the incision was healing  
26 well and the doctor attributed the persistent pain to Plaintiff's walking a lot after the surgery.  
27 (AR 272.) Dr. Shofler noted Plaintiff was noncompliant with postoperative protocol but did  
28 say her frequent walking post-surgery was a result of her personal circumstances. (AR 272.)



1 stoop, and crawl. (AR 139-40.) He found Plaintiff did not need an assistive device when  
2 walking and that she had no limitations related to her hands. (AR 140.)

## 3 4 **2. Psychological medical history**

5  
6 Plaintiff went to the Emergency Room on April 24, 2012 because she was depressed  
7 and claimed she had been crying “all the time” for two weeks. (AR 355.) She denied  
8 having hallucinations or suicidal thoughts. (AR 355-56.) On September 18, 2013, Plaintiff  
9 received emergency treatment for a possible drug overdose. (AR 161-63.) She stated she  
10 had taken medication to help her sleep because she had been having trouble sleeping for a  
11 few days. (AR 172.) Plaintiff denied having ever attempted to commit suicide, denied  
12 having hallucinations, and she was not admitted on an involuntary psychiatric hold. (AR  
13 161, 170-72.) A few weeks prior to this, on August 29, 2013, Doctor Denise Dittenmore  
14 began treating Plaintiff for mental health. (AR 150-51.) Plaintiff reported to Dr. Dittenmore  
15 that she experienced visual hallucinations. (AR 150.) Dr. Dittenmore diagnosed Plaintiff  
16 with bipolar disorder and depression with psychosis. (AR 151, 153.) Plaintiff’s treatment,  
17 or at least prescription of medication, appears to have been largely consistent with Dr.  
18 Dittenmore from August 2013 through February 2015. (AR 184-86.)

### 19 20 **a. Doctor Dittenmore’s Medical Opinion**

21  
22 Dr. Dittenmore completed a Mental Residual Functional Capacity Statement for  
23 Plaintiff. (AR 394-97.) It was submitted as additional evidence to the Appeals Council after  
24 the ALJ’s decision. (AR 8.) Dr. Dittenmore again diagnosed Plaintiff with bipolar disorder  
25 and depression with psychosis. (AR 394.) Dr. Dittenmore rated Plaintiff as being precluded  
26 from performance for 15% or more of an 8-hour work day in understanding and memory.  
27 (AR 395.) Dr. Dittenmore rated Plaintiff as being precluded from performance for 15% or  
28 more of an 8-hour work day in sustained concentration and memory except she was not



1 precluded from making simple work-related decisions. (AR 395.) For social interactions,  
2 Dr. Dittenmore found Plaintiff was not precluded from asking simple questions and  
3 requesting assistance or from maintaining socially appropriate behavior and adhering to  
4 basic neatness and cleanliness standards. (AR 395-96.) Plaintiff was 5% precluded from  
5 interacting appropriately with the general public. (AR 395.) Plaintiff was precluded from  
6 performance for 15% or more of an 8-hour work day in accepting instructions and  
7 responding appropriately to criticism from supervisors and in getting along with coworkers  
8 or peers without distracting them or exhibiting behavioral extremes. (AR 395.) In regards to  
9 adaptation, Dr. Dittenmore listed Plaintiff as being precluded from performance during an 8-  
10 hour work day 5% of the time relating to being aware of normal hazards and taking  
11 appropriate precautions, 10% of the time for setting realistic goals or making plans  
12 independently of others, and 15% or more of the time for responding appropriately to  
13 changes in the work setting and traveling in unfamiliar places or using public transportation.  
14 (AR 396.) Dr. Dittenmore wrote in relation to this last point that Plaintiff needed to travel  
15 with her boyfriend. (AR 396.)

16  
17 Dr. Dittenmore further found that Plaintiff would be off task more than 30% of the  
18 time, would miss more than 6 days of work per month, and would be unable to complete an  
19 8-hour work day more than 6 days per month. (AR 396.) Dr. Dittenmore stated Plaintiff did  
20 not have reduced intellectual functioning but that she was in special education from 4<sup>th</sup> to  
21 12<sup>th</sup> grade. (AR 397.) Finally, Dr. Dittenmore wrote that Plaintiff has “severe mood  
22 swings” and “anger outbursts” and that she is “essentially illiterate, can’t spell, read, or solve  
23 math problems.” (AR 397.)

#### 24 25 **b. Doctor Chehrazi’s Medical Opinion**

26  
27 Doctor Avazeh Chehrazi also provided a psychological evaluation of Plaintiff at the  
28 request of the Department of Social Services. (AR 141-45.) The evaluation took place on

1 June 1, 2013. (AR 141.) Plaintiff's medications at the time included Elavil, Lioresal, Norco,  
2 Zoloft, Synthroid, and Vasotec. (AR 142.) Plaintiff denied any psychiatric hospitalizations  
3 or suicidal ideations. (AR 142.) Plaintiff denied seeing or hearing hallucinations and no  
4 "bizarreness or confusion was present." (AR 143.) Plaintiff stated she graduated from high  
5 school but was in special education from first through twelfth grade. (AR 142.) She  
6 reported being able to dress, bathe, make simple meals, and pay bills without help but stated  
7 she did need help shopping, doing laundry, and doing household chores because of pain.  
8 (AR 143.) She also reported relying on others to drive her places because she does not have  
9 a driver's license. (AR 143.)

10  
11 Plaintiff's behavior during the evaluation appears to have been normal. (AR 143.)  
12 Her mood was sad and her affect dysphoric. (AR 143.) Her intellectual functioning was  
13 mildly delayed. (AR 143.) Plaintiff's immediate and recent memories were weak evidenced  
14 by her ability to repeat five digits forward but only two backward and recall only two out of  
15 three objects after a five minute period with an intentional distraction. (AR 143.) Her fund  
16 of knowledge was poor as she knew who the current president was and how many days are  
17 in a week, but incorrectly answered how many items make a dozen. (AR 143.) Her  
18 attention and concentration were adequate throughout the interview and testing. (AR 143.)  
19 Her judgment for common sense hypotheticals was also adequate as she knew why cars have  
20 seat belts and what she would do if she found someone's wallet in a store. (AR 143-44.)  
21 Weschsler tests showed Plaintiff's general intellectual functioning as mildly delayed and her  
22 general memory function as borderline to mildly delayed. (AR 144.)

23  
24 Dr. Chehrazi found Plaintiff's overall cognitive ability was mildly delayed and listed  
25 her probable diagnoses as dysthymic disorder, mild intellectual disability, and economic  
26 psychosocial stressors. (AR 144.) It was Dr. Chehrazi's medical opinion that Plaintiff  
27 would have no difficulty with following simple instructions but would have moderate  
28 difficulty with detailed and complex instructions. (AR 145.) Dr. Chehrazi further opined

1 that Plaintiff would have no difficulty making simple work-related decisions or responding  
2 to changes in a work environment. (AR 145.) Dr. Chehrazi found Plaintiff would have mild  
3 difficulty complying with safety and attendance job rules as well as maintaining normal  
4 work persistence and pace. (AR 145.) Although Dr. Chehrazi thought Plaintiff was socially  
5 appropriate during the appointment, Dr. Chehrazi stated Plaintiff would have mild difficulty  
6 consistently interacting socially with people at work in an appropriate manner. (AR 145.)  
7 Dr. Chehrazi also stated Plaintiff appeared capable of managing her own finances but  
8 Plaintiff did report that her boyfriend managed their finances. (AR 143-145.)  
9

### 10 **3. The ALJ's RFC Determination**

11

12 The ALJ noted that Plaintiff alleged she was disabled due to “arthritis, thyroid disease,  
13 asthma, a learning disability, seizures, emotional problems, hypertension, and depression.”  
14 (AR 20.) The ALJ then discussed Plaintiff’s medical records in detail. (AR 20-26.) The ALJ  
15 found Plaintiff’s physical pain was either transitory in nature or controlled with pain  
16 medication evidenced primarily by her comments to Dr. Pham in the treatment records. (AR  
17 20-26.) The ALJ discussed Plaintiff’s foot pain, surgery, post-surgery pain and walking  
18 despite instructions to rest, and noted her surgical wound had healed well. (AR 22.) He  
19 considered Dr. Bernabe’s medical opinion and found it was largely consistent with the  
20 examination and medical records, although he stated a light exertional capacity for Plaintiff  
21 would be more appropriate than Dr. Bernabe’s opined medium exertional capacity. (AR 20-  
22 21.) The ALJ found Plaintiff’s hypothyroidism and hypertension were largely controlled  
23 when Plaintiff took medication for them. (AR 20, 23.) The ALJ addressed additional  
24 medical issues, like Plaintiff’s headaches and hand pain, finding they were transitory and only  
25 affected her minimally. (AR 22.) The ALJ dismissed Plaintiff’s complaints of asthma and  
26 seizures because there was no evidence of treatment for either condition. (AR 23.) The ALJ  
27 stated he considered her weight when determining Plaintiff’s RFC. (AR 23.)  
28

1 Next, the ALJ considered Plaintiff's psychological impairments. (AR 23-26.) The  
2 ALJ delineated Plaintiff's first trip to the emergency room, being prescribed different  
3 depression medications, and being diagnosed with bipolar disorder. (AR 23.) The ALJ next  
4 discussed Dr. Chehrazi's observations and opinions and then adopted them. (AR 23-24.)  
5 The ALJ found Plaintiff had been in special education classes but had graduated high school  
6 and that nothing in the record showed Plaintiff had low intellectual functioning prior to age  
7 22. (AR 24.) The ALJ also stated that the record showed Plaintiff understands treatment  
8 plans and is capable of communicating her needs. (AR 24.) Next, the ALJ mentioned  
9 Plaintiff's meeting with a psychiatrist (Dr. Dittenmore) on August 29, 2013 where she alleged  
10 to have visual hallucinations. (AR 24.) The ALJ commented Plaintiff went to the emergency  
11 room for a suspected drug overdose but was released to go home because she was not  
12 believed to be a danger to herself or others. (AR 25.) Then the ALJ listed times where  
13 Plaintiff had varying levels of depression despite sometimes being out of her medication.  
14 (AR 25.) The ALJ stated that at the hearing, Plaintiff said she was not receiving mental  
15 health treatment but her medication was helping. (AR 25.) The ALJ also found that despite  
16 instances of claiming to have hallucinations, there was "no evidence the claimant responds to  
17 internal stimuli." (AR 25.) The medical opinions of the Stage Agency doctors also suggested  
18 Plaintiff could perform simple work tasks in a non-public environment. (AR 26.)

19  
20 The ALJ found there was substantial evidence that showed Plaintiff could still perform  
21 work activities. Plaintiff's daily activities included washing dishes, making simple meals,  
22 dressing herself, bathing herself, going for a walk, watching television, doing puzzles, and  
23 spending time with family and friends. (AR 25.) Plaintiff was in special education but  
24 graduated from high school and only received a few D grades and she stated she can read and  
25 write simple words. (AR 25.) Plaintiff walked to her podiatry appointment shortly after  
26 surgery, there was no evidence of complications since the surgery, and the rest of Plaintiff's  
27 treatment had been conservative. (AR 25.) Accordingly, the ALJ found Plaintiff could  
28 perform medium work with limitations mentioned previously. (AR 19, 25-27.)

1 At the ALJ hearing, the ALJ posed a hypothetical to the VE that included an almost  
2 identical RFC (medium work with certain limitations) that he later included in his decision.  
3 (AR 19, 420-21.) Based on the VE's testimony, the ALJ determined that despite Plaintiff's  
4 limitations, there were jobs in significant numbers in the national economy Plaintiff could  
5 perform and she was not disabled. (AR 26-27.)

### 6 7 **B. Applicable Law**

8  
9 A claimant's RFC represents the most a claimant can do despite his or her limitations.  
10 20 C.F.R. § 416.945 (a)(1); *Reddick v. Chater*, 157 F.3d 715, 724 (9th Cir. 1998). An ALJ's  
11 RFC determination "must set out *all* the limitations and restrictions of the particular  
12 claimant." *Valentine v. Comm'r SSA*, 574 F.3d 685, 690 (9th Cir. 2009) (emphasis in  
13 original) (citation omitted). In particular, the RFC determination must account for the  
14 opinion of a claimant's treating physician unless that opinion is properly rejected. *See*  
15 *Carmickle v. Comm'r, SSA*, 533 F.3d 1155, 1164 (9th Cir. 2008).

16  
17 There are three categories of physicians: treating physicians, examining physicians,  
18 and nonexamining physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995); *see* 20  
19 C.F.R. 416.927.<sup>3</sup> Treating physician opinions should be given more weight than examining  
20 or nonexamining physician opinions. *Orn*, 495 F.3d at 632. If the treating physician's  
21 opinion is not contradicted by another doctor, it may be rejected only if the ALJ provides  
22 "clear and convincing reasons supported by substantial evidence in the record." *Id.* If the  
23 treating physician's opinion is contradicted by another doctor, it may be rejected only by  
24 "specific and legitimate reasons supported by substantial evidence in the record." *Id.*

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<sup>3</sup> Effective March 27, 2017, the Social Security Administration revised its regulations directing the evaluation of  
28 medical opinion evidence, including 20 C.F.R §§ 404.1527, 416.927. But these revisions are not applicable or relevant to  
the analysis here relating to Plaintiff's November 28, 2012 application for SSI benefits.

1 Examining physician opinions too are given more weight than nonexamining  
2 physician opinions. *Lester*, 81 F.3d at 830. If the examining physician’s opinion is not  
3 contradicted by another doctor, it too may be rejected only if the ALJ provides clear and  
4 convincing reasons supported by substantial evidence in the record. *Id.* If the examining  
5 physician’s opinion is contradicted by another doctor, it may be rejected only if there are  
6 specific and legitimate reasons supported by substantial evidence in the record. *Id.* at 830-31.  
7 An ALJ can satisfy the substantial and legitimate reasons standard by “setting out a detailed  
8 and thorough summary of the facts and conflicting clinical evidence, stating his  
9 interpretations thereof, and making findings.” *Orn*, 495 F.3d at 632.

10  
11 An ALJ also has a special duty to fully and fairly develop the record and to assure that  
12 the claimant’s interests are considered, even when the claimant is represented by counsel.  
13 *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983) (citation omitted). Although the burden  
14 to establish disability lies with the claimant, “it is equally clear that the ALJ has a duty to  
15 assist in developing the record.” *Reed v. Massanari*, 270 F.3d 838, 841 (9th Cir. 2001)  
16 (citations omitted). The ALJ’s duty to develop the record is triggered “when there is  
17 ambiguous evidence or when the record is inadequate to allow for proper evaluation of the  
18 evidence.” *Mayes v. Massanari*, 276 F.3d 453, 459-460 (9th Cir. 2001) (citation omitted).  
19 The Social Security Administration (“SSA”) will attempt to get medical evidence from a  
20 claimant’s medical sources if given permission and may request and provide for a  
21 consultative examination if necessary. *See* 20 C.F.R. § 416.912.

## 22 23 **C. Analysis**

### 24 25 **1. Physical impairments**

26  
27 Plaintiff relies on three sources of evidence in her argument to show the ALJ erred in  
28 his RFC determination related to her physical impairments. First, Plaintiff cites many of her

1 physical impairments, primarily related to her lower extremities and morbid obesity, to show  
2 the ALJ failed to properly consider her physical medical evidence in determining her RFC.  
3 (Joint Stip. at 3-4.) Second, Plaintiff identifies an inconsistency in the ALJ's opinion  
4 relating to the level of exertional capacity that he found Plaintiff can perform. (Joint Stip. at  
5 4.) Third, Plaintiff criticizes the opinion of the orthopedic consultative examiner and argues  
6 any reliance by the ALJ on the consultative examiner's opinion was error because the SSA  
7 has since fired the doctor as a consultative examiner. (Joint Stip. at 4-5.) Defendant argues  
8 the ALJ considered and discussed in detail the entire medical record, any inconsistency in  
9 the exertional level was a harmless typographical error, and substantial evidence in the  
10 record supports the ALJ's conclusion. (Joint Stip. at 7-12.)

11  
12 Although Plaintiff argues that in reaching his RFC determination, the ALJ did not fully  
13 consider the objective medical evidence concerning her lower extremities and morbid  
14 obesity, the ALJ's opinion shows he reviewed all of her medical records. Specifically,  
15 Plaintiff claims the RFC is wrong because she cannot perform medium work, cannot stand  
16 and/or walk for six hours out of an eight-hour work day, and cannot climb ladders  
17 frequently. (Joint Stip. at 3.) The ALJ considered the objective medical evidence, but found  
18 the record showed Plaintiff's impairments did not prevent her from performing these work-  
19 related activities. The record showed her symptoms were largely controlled with medication  
20 and conservative treatment or no treatment. Further, the fact Plaintiff walked to two of her  
21 post-surgical podiatry appointments showed she was capable of walking farther than she  
22 claimed.

23  
24 While there was no medical opinion from any of Plaintiff's treating physicians for her  
25 physical conditions, there was a consultative medical examiner's opinion. An examining  
26 physician's opinion that is uncontradicted may only be rejected by the ALJ if there are clear  
27 and convincing reasons supported by substantial evidence in the record. *Lester*, 81 F.3d at  
28 830. Dr. Bernabe's opinion appears to be uncontradicted as there is no other medical

1 opinion concerning Plaintiff's physical impairments in the record. As the ALJ did not find  
2 clear and convincing reasons to reject the opinion, it serves as a credible opinion on which  
3 the ALJ was entitled to rely.  
4

5 Turning to Dr. Bernabe's status with SSA, Defendant has not disputed that Dr.  
6 Bernabe is no longer a consultative examiner for the SSA. State agencies, not the SSA,  
7 manage the hiring of consultative examiners and oversee that the examination reports  
8 comply with guidelines. *Reed v. Massanari*, 270 F.3d 838, 841-42 (9th Cir. 2001); 20  
9 C.F.R. § 416.919s. The SSA does monitor the State agencies "management of the  
10 consultative examination process." 20 C.F.R. § 416.919t. If Dr. Bernabe was dismissed  
11 from the consultative examiner pool, it indicates that the State agencies or SSA were  
12 performing their duty of monitoring the consultative examination process. However, since  
13 Dr. Bernabe was still performing examinations at the time of Plaintiff's examination, he  
14 must not have been dismissed yet. As Dr. Bernabe was an acceptable consultative examiner  
15 at the time Plaintiff underwent the consultative examination, the ALJ did not have a  
16 legitimate reason to refuse to consider Dr. Bernabe's opinion. *See Reed v. Massanari*, 270  
17 F.3d 838, 844 (9th Cir. 2001).  
18

19 Whether the orthopedic consultative examiner was later fired by the SSA is irrelevant  
20 if the ALJ's reliance on his medical opinion is supported by substantial evidence in the  
21 record. Dr. Bernabe did not have any of Plaintiff's medical records to review and did not  
22 take any x-rays, but he did examine Plaintiff. He found she was morbidly obese. Plaintiff's  
23 height and weight are documented throughout the record and Plaintiff endorses this finding.  
24 Dr. Bernabe also found patellofemoral pain syndrome in both of Plaintiff's knees, which is  
25 supported by the imaging of Plaintiff's knees showing bilateral osteoarthritis. Dr. Bernabe's  
26 assessment that Plaintiff had range of motion in both knees from 0 to 130 degrees was based  
27 on his personal examination of her. (AR 138.) The ALJ properly addressed the other  
28 objective medical evidence not assessed by Dr. Bernabe by giving a detailed summary of it



1 and rejecting the allegations of the severity of resulting limitations because of Plaintiff's  
2 activities. *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007). Thus, the ALJ's findings  
3 regarding Plaintiff's physical impairments are supported by substantial evidence based on  
4 the record as a whole. *Id.*

5  
6 The ALJ's RFC determination is based on his findings of Plaintiff's physical  
7 impairments. As his physical impairment findings are supported by substantial evidence,  
8 they also serve as substantial evidence of Plaintiff's RFC. *Hill v. Astrue*, 698 F.3d 1153,  
9 1159 (9th Cir. 2012). The alleged severity of Plaintiff's lower extremity ailments was  
10 contradicted by her daily activities: she takes care of herself, does dishes which requires  
11 standing, and goes for walks. She also walked to two podiatry appointments shortly after  
12 foot surgery. Even if Plaintiff was required to walk to her podiatry appointments because of  
13 her personal circumstances, the fact she was able to indicates that if she needed to walk as a  
14 work requirement, she would be capable. The ALJ also found Plaintiff had full range of  
15 motion in her knees based on Dr. Bernabe's examination and that her pain was controlled  
16 with medication based on Dr. Pham's treatment notes which together suggest she would not  
17 be precluded from climbing ladders. Accordingly, the ALJ's determination of Plaintiff's  
18 physical RFC is supported by substantial evidence.

19  
20 Finally, while Plaintiff claims the ALJ's opinion regarding Plaintiff's physical RFC is  
21 internally inconsistent, any error is harmless. Plaintiff identifies an inconsistency in the  
22 ALJ's opinion where he determines Plaintiff can perform medium work with some  
23 limitations but later states a light exertional capacity would be more appropriate than the  
24 medium exertional capacity opined by Dr. Bernabe. This sentence appears to be a  
25 typographical error. The ALJ adopted most of Dr. Bernabe's findings in his RFC  
26 determination and repeated almost the same limitations in his hypothetical to the VE. The  
27 testimony of the VE and the ALJ's findings based on the VE's testimony are not disputed.  
28 Aside from this one sentence saying a light exertional capacity would be more appropriate,

1 the rest of the ALJ's opinion and reasoning supports his physical RFC determination as  
2 discussed above. Thus, this typographical error is harmless.

## 3 4 **2. Mental impairments**

5  
6 Plaintiff also argues her mental impairments are understated in the ALJ's RFC  
7 determination. (Joint Stip. at 5.) Plaintiff bases this argument on the fact the ALJ relied on  
8 the medical opinion of the consultative examiner and failed to provide significant and  
9 legitimate reasons before rejecting Plaintiff's treating psychiatrist's opinion. (Joint Stip. at  
10 5-6.) Defendant argues that despite the fact that Plaintiff did not provide her treating  
11 psychiatrist's opinion until one month after the ALJ's decision, the ALJ's RFC  
12 determination is still consistent with the treating psychiatrist's opinion. (Joint Stip. at 8.)

13  
14 If the Appeals Council "considers new evidence in deciding whether to review a  
15 decision of the ALJ, that evidence becomes part of the administrative record, which the  
16 district court must consider when reviewing the Commissioner's final decision for  
17 substantial evidence." *Brewes v. Comm'r of SSA*, 682 F.3d 1157, 1163 (9th Cir. 2012);  
18 *accord Lingenfelter v. Astrue*, 504 F.3d 1028, 1030 n.2 (9th Cir. 2007). A contradicted  
19 treating physician's opinion received into evidence in the first instance by the Appeals  
20 Council must still be reviewed and can only be rejected under the specific and legitimate  
21 reasons standard. *Ramirez v. Shalala*, 8 F.3d 1449, 1453-54 (9th Cir. 1993).

22  
23 Plaintiff's treating psychiatrist's medical opinion was not considered by the ALJ  
24 because it was submitted after he rendered his decision. The Appeals Council considered it  
25 but denied review and in doing so failed to list any reasons as to why the opinion should be  
26 rejected. This is analogous to *Ramirez* where the ALJ appeared to rely on a nonexamining  
27 physician's opinion regarding the plaintiff's mental diagnosis without discussing a treating  
28 physician's opinion and the treating physician's supplemental report was not discussed

1 because it was only submitted to the Appeals Council, which denied review without  
2 comment. *Ramirez*, 8 F.3d at 1453-5. The Ninth Circuit not only reversed the Secretary’s  
3 decision but remanded for an immediate award of benefits. *Id.* at 1455. Indeed, in terms  
4 wholly pertinent here, the Ninth Circuit emphasized the ALJ’s error in disregarding the  
5 treating physician’s findings when “no testimony or other information in the record”  
6 contradicted the treating physician’s findings regarding Ramirez’s mental disorder. *Id.*

7  
8 Here, Dr. Dittenmore, Plaintiff’s treating physician, stated Plaintiff suffered from  
9 bipolar disorder and depression with psychosis. The ALJ found these specific impairments  
10 to be severe. (AR 17.) Dr. Dittenmore further stated that Plaintiff was precluded from most  
11 work-related activities for 15% or more of an eight-hour work day, had severe mood swings  
12 and anger outbursts, and cannot read, spell, or do math problems. None of these findings  
13 were expressly rejected by the ALJ by specific and legitimate reasons because the ALJ did  
14 not have Dr. Dittenmore’s opinion at the time of the adverse decision. The ALJ found  
15 Plaintiff’s mental health symptoms were controlled with medication, that she can read and  
16 write simple words, and that she was not responding to internal stimuli. These findings,  
17 even supplemented with Dr. Chehrazi’s examining opinion, are nonetheless insufficient to  
18 refute Dr. Dittenmore’s opined severe limitations because the ALJ was unaware of Dr.  
19 Dittenmore’s opinion when he rendered his decision. Because he was unaware of the  
20 treating physician’s opinion, he was unable to weigh it at all, let alone under the correct  
21 standard. Failure to reject Dr. Dittenmore’s opinion under the appropriate standard was  
22 reversible legal error. *See Orn v. Astrue*, 495 F.3d 625, 632-33 (9th Cir. 2007). Moreover,  
23 even though the Dittenmore opinion was not available to the ALJ, it was available and part  
24 of the record before the Appeals Council, which also failed to consider the treating  
25 physician’s opinion under the proper legal standard. *See Ramirez*, 8F.3d at 1452 (noting that  
26 under 20 C.F.R. § 404.970(b), the Appeals Council is obligated to “evaluate the entire  
27 record, including new relevant evidence” submitted after the hearing before the ALJ).

1           When there is legal error and there are outstanding issues to be resolved, the district  
2 court should remand the case for further proceedings rather than for an award of benefits.  
3 *See Dominguez v. Colvin*, 808 F.3d 403, 407-08 (9th Cir. 2015). In this case, the question of  
4 Plaintiff’s mental health disability and the associated limiting effects could benefit from  
5 further administrative investigation and review. Thus, this issue is remanded to the agency  
6 for further determination.

7  
8       **II.     The ALJ Erred in Discounting Plaintiff’s Credibility Concerning the Severity of**  
9       **Her Mental Health Symptoms**

10  
11           Plaintiff contends the ALJ failed to provide legally sufficient reasons to reject  
12 Plaintiff’s credibility concerning her physical and psychological symptoms and limitations.  
13 (Joint Stip. at 12.) The Court agrees in relation to her psychological symptoms.

14  
15           **A. ALJ Credibility Determination and Related Facts**

16  
17           First, the ALJ found that Plaintiff’s alleged symptoms could be caused by her medical  
18 conditions. (AR 20.) Next, the ALJ went through the objective findings as discussed above.  
19 Then, the ALJ found “[a]part from objective findings, there are substantial reasons ... that  
20 [Plaintiff] remains able to engage in a wide range of work-related activities.” (AR 25.)  
21 These reasons included her daily activities of light household chores, taking care of her  
22 personal needs, watching television, washing dishes, doing puzzles, and spending time with  
23 family and friends. (AR 25.) Her alleged foot pain that only allows her to walk one block or  
24 less he found discredited by her walking to podiatry appointments shortly after surgery. (AR  
25 25.) The ALJ also found “the remainder of [Plaintiff’s] treatment has been conservative in  
26 nature with no acute findings.” (AR 25.) He discounted her mental limitations evidenced in  
27 one way through her special education classes by saying she “admitted that she can read and  
28 write basic words.” (AR 25.)

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At the ALJ hearing, the ALJ received a record of Plaintiff's special education classes into evidence. (AR 407.) Plaintiff's attorney and the ALJ discussed what the information meant:

ALJ: She had a low full-scale IQ score. Is there anything showing -- do we have any records going back to before she was 22, showing such low scores?

ATTY: Your Honor, she does have a certificate from her high school that shows that she had lower standard proficiency in order to graduate.

...

ALJ: Eligible for differential standard of proficiency for graduation from Cajon (phonetic) High School. What does that mean?

ATTY: Your Honor, I'm not sure. I think it was just -- it must have been the testing is not the standard testing that's usually given.

ALJ: Okay.

ATTY: But I'm not sure back in the '80s what the standards were.

ALJ: I'm not either.

**BY THE ADMINISTRATIVE LAW JUDGE:**

Q: So you were in -- it doesn't say -- were you in special education classes?

A: Yes. I got into special ed when I was in 4<sup>th</sup> grade.

Q: Okay. Why were you in special ed?

A: Because I couldn't read, I couldn't write, and I couldn't do math.

Q: Yet you got an A in English, you got an A in reading.

...

ALJ: These are basically report cards -- I want to just look up and see -- let's look up on the Internet and see what it says... I imagine it just means they're going to give -- let her have a lower standard. And this is from Irvine. Let's see what it says. It just means there's different grounds other than taking a -- let's

1 see. What it looks like is that, essentially, what it means is, like, if they have an  
2 individualized education plan, if they meet those goals --

3 ATTY: Okay.

4 ALJ: -- then they'll be eligible to graduate as if -- they would have -- they would  
5 be able to graduate along with people who didn't have an IEP. They just had to  
6 meet the regular -- there were different goals.

7 ATTY: Okay. With a regular diploma?

8 ALJ: Yeah. With a regular diploma and all the same advantages as somebody  
9 who graduated with a regular diploma --

10 ATTY: Okay.

11 ALJ: -- or went to regular classes. I don't really see a lot in here other -- you  
12 know, that would make me think that she had a really low IQ score, though, that  
13 I can say, yes, she had a low IQ score.

14 ATTY: Right.

15 ALJ: Okay. If you had her IEP, that might have had it.

16  
17 (AR 405-08.)

18  
19 The ALJ further found in relation to Plaintiff's mental impairments that her psychiatric  
20 medications have helped her. (AR 25.) He found Plaintiff's complaint of crying spells on  
21 October 24, 2013 was explained by the fact she had been out of her medication for one week.  
22 (AR 25.) He found she only had mild depression after being out of medication for two  
23 weeks. (AR 25.) However, he also identified an approximate one year span of time where  
24 her medication did not help her. (AR 24.) The ALJ also stated that Plaintiff testified she was  
25 not receiving mental health treatment, only medication. (AR 25.) Plaintiff's testimony,  
26 however, included that she *had* been undergoing mental health treatment for about a year and  
27 a half, that her doctor told her to try to do things around the house to avoid getting anxious,  
28

1 and that her doctor was working on adjusting her medication to limit side effects. (AR 410,  
2 415, 417.)

### 3 4 **B. Applicable Law**

5  
6 An ALJ must make two findings before determining that a claimant's pain or symptom  
7 testimony is not credible.<sup>4</sup> *Treichler v. Comm'r of SSA*, 775 F.3d 1090, 1102 (9th Cir. 2014).  
8 "First, the ALJ must determine whether the claimant has presented objective medical  
9 evidence of an underlying impairment which could reasonably be expected to produce the  
10 pain or other symptoms alleged." *Id.* (quoting *Lingenfelter*, 504 F.3d at 1036). "Second, if  
11 the claimant has produced that evidence, and the ALJ has not determined that the claimant is  
12 malingering, the ALJ must provide specific, clear and convincing reasons for rejecting the  
13 claimant's testimony regarding the severity of the claimant's symptoms" and those reasons  
14 must be supported by substantial evidence in the record. *Treichler*, 775 F.3d at 1102; *see*  
15 *also Marsh v. Colvin*, 792 F.3d 1170, 1174 n.2 (9th Cir. 2015); *Carmickle*, 533 F.3d at 1161  
16 (court must determine "whether the ALJ's adverse credibility finding . . . is supported by  
17 substantial evidence under the clear-and-convincing standard").

18  
19 In weighing a plaintiff's credibility, the ALJ may consider a number of factors,  
20 including: "(1) ordinary techniques of credibility evaluation, such as the claimant's  
21 reputation for lying, prior inconsistent statements concerning the symptoms, and other

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22  
23 <sup>4</sup> Effective March 28, 2016, Social Security Ruling ("SSR") 16-3p superseded SSR 96-7p, which required the ALJ  
24 to assess the credibility of a claimant's statements. SSR 16-3p focuses on the existence of medical cause and an  
25 evaluation of "the consistency of the individual's statements about the intensity, persistence, or limiting effects of  
26 symptoms with the evidence of record without consideration of the claimant's overall 'character or truthfulness'." *See*  
27 *Guide to SSA Changes in Regulations and Rulings 2016-17*, June 2017. The revision is not applicable to Plaintiff's  
28 application here, which was filed on March 28, 2013. But the Ninth Circuit has acknowledged that SSR16-3p is  
consistent with existing precedent that requires that the assessments of an individual's testimony be focused on evaluating  
the "intensity and persistence of symptoms" after the ALJ has found that the individual has medically determinable  
impairments that could reasonably be expected to produce those symptoms. *Trevizo v. Berryhill*, 862 F.3d 987, 1000, n.5  
(9th Cir. 2017).

1 testimony . . . that appears less than candid; (2) unexplained or inadequately explained failure  
2 to seek treatment or to follow a prescribed course of treatment; and (3) the claimant’s daily  
3 activities.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). The ALJ must also  
4 “specifically identify the testimony [from the claimant that] she or he finds not to be credible  
5 and . . . explain what evidence undermines the testimony.” *Treichler*, 775 F.3d at 1102  
6 (quoting *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001)). “General findings are  
7 insufficient.” *Brown-Hunter*, 806 F.3d at 493 (quoting *Reddick v. Chater*, 157 F.3d 715, 722  
8 (9th Cir. 1998)).

### 9 10 **C. Analysis**

11  
12 The ALJ found there was no medical evidence to support the allegation that Plaintiff  
13 suffered from seizures and asthma, so he did not need to reach the severity of the symptoms.  
14 *Treichler*, 775 F.3d at 1102. The ALJ gave Plaintiff’s allegations of physical symptom  
15 severity relating to arthritis, thyroid disease, and hypertension little weight because the record  
16 revealed these symptoms were largely controlled with medication. Plaintiff received either  
17 no treatment or conservative treatment for the majority of her physical impairments. Plaintiff  
18 did undergo surgery on her foot, but then she walked to her podiatry appointments after the  
19 surgery. All of these reasons, based on substantial evidence in the record, support the ALJ’s  
20 credibility finding relating to Plaintiff’s allegations of the debilitating effects of her physical  
21 symptoms.

22  
23 However, the ALJ did not properly evaluate Plaintiff’s credibility regarding the  
24 disabling effect of her mental impairments. Plaintiff alleged she could not work because of a  
25 learning disability, emotional problems, and depression. The ALJ found Plaintiff had bipolar  
26 disorder, depression with psychosis, and that she was in special education classes, all of  
27 which served as objective medical findings that could produce her alleged symptoms,  
28 satisfying the first credibility test prong. *Treichler*, 775 F.3d at 1102. The ALJ then needed



1 to either find that Plaintiff malingered or provide clear and convincing reasons substantially  
2 supported by the record to reject her testimony regarding the severity of her mental  
3 symptoms. *Id.*

4  
5 The reasons the ALJ provided for giving little weight to Plaintiff's credibility  
6 regarding her mental impairments were not clear and convincing reasons or supported by  
7 substantial evidence in the record. The ALJ's finding that Plaintiff testified she was not  
8 receiving mental health treatment is not supported by the hearing transcript because Plaintiff  
9 testified about the mental health treatment she was receiving from her doctor. (*See* AR 410.)  
10 The ALJ found Plaintiff's medications have helped her, which would undermine the severity  
11 of her symptoms, but the ALJ himself observed that there was an approximate one year span  
12 of time where her medication did not help her. This portion of the record remains  
13 unexplained and is contrary to the ALJ's finding that her mental impairments were  
14 adequately managed with medication. Indeed, at the hearing when asked directly whether the  
15 medications have helped with her mental health problems, Plaintiff testified, "They help a  
16 little but not very much though." (AR 414.) The ALJ's conclusion that her medication was  
17 helping her also appears contrary to her allegations that she started having and continued to  
18 have hallucinations. (*See* AR at 414 ("I just hear things or see things a lot.").) Further, the  
19 record indicates that Plaintiff had been prescribed a variety of strong medications for her  
20 depression, including Fluoxetine, Elavil, Celexa and Zoloft as well as psychotropic  
21 medications. (AR 23; 25; 150-152.)

22  
23 The ALJ found there was no indication that Plaintiff responded to internal stimuli.  
24 This is not a clear and convincing reason to discredit Plaintiff's allegation of seeing and  
25 hearing hallucinations. Plaintiff did not claim she responded to her hallucinations, she  
26 claimed to see and hear them. Failure to respond to hallucinations is not proof that they do  
27 not occur. Plaintiff did not claim to be experiencing hallucinations on June 1, 2013 when she  
28 saw Dr. Chehrazi. When she saw Dr. Dittenmore on August 29, 2013, she did claim to be

1 experiencing visual hallucinations. On September 19, 2013 during an involuntary psychiatric  
2 hold evaluation, Plaintiff did not report hallucinations, but during the ALJ hearing on April 9,  
3 2015, Plaintiff testified to experiencing auditory and visual hallucinations. In finding that  
4 Plaintiff's allegation of hallucinations was not credible the ALJ did not rely on this  
5 inconsistency. Indeed, the ALJ did not point to any record evidence that Plaintiff was  
6 untruthful, malingering, testified inconsistently, or failed to seek treatment, as a basis for  
7 discounting her credibility. The Court thus finds the ALJ wholly failed to provide legally  
8 sufficient reasons for discounting her credibility.

9  
10 The ALJ also found that Plaintiff's alleged learning disabilities did not preclude her  
11 ability to work. The ALJ based his finding on the fact she graduated from high school and  
12 only received a few D grades, her testimony that she can read and write basic words, and the  
13 examining psychologist's medical opinion. (*See* AR 25.) However, the record also shows  
14 the ALJ was unsure how to evaluate Plaintiff's special education classes. (AR 406.) In  
15 examining Plaintiff's academic records that were presented at the hearing, the ALJ was  
16 unsure what was meant by a notation that Plaintiff was "Eligible for differential standard of  
17 proficiency for graduation from Cajon High School." (*Id.*) Plaintiff testified she had been in  
18 special education classes since fourth grade because she could not read, write, or do math, but  
19 the ALJ remarked, "Yet you got an A in English, you got an A in reading." (AR 407.)

20  
21 There is an affirmative duty on the ALJ to develop the record if there is an ambiguity  
22 in the evidence. *Mayes*, 276 F.3d at 459-460. The ALJ did not know how to evaluate  
23 Plaintiff's special education classes, so he questioned Plaintiff as to what they meant. When  
24 Plaintiff was unable to give a sufficient explanation, the ALJ did an internet search. (AR  
25 407-408.) The internet search did not provide very detailed information and based on the  
26 transcript, it is unclear if the search results were from the time period Plaintiff was in school.  
27 (*Id.* at 408.) The record is thus ambiguous as to how to assess Plaintiff's academic record and  
28 the ALJ erred in not developing the record further to resolve the ambiguity.

1  
2 The ALJ has not provided clear and convincing reasons supported by substantial  
3 evidence to support his discounting of Plaintiff's subjective testimony regarding the severity  
4 of the symptoms of her mental health impairments. This is particularly true because the ALJ  
5 did not have the benefit of Plaintiff's treating psychiatrist's medical opinion.  
6

7 Thus, the ALJ's determination regarding Plaintiff's mental health symptoms must be  
8 remanded to the agency for further administrative proceedings to adequately assess the  
9 opinions of Plaintiff's treating physician and to resolve remaining ambiguities in the record  
10 necessary to properly weigh Plaintiff's credibility as to the severity of her mental health  
11 symptoms. *See Dominguez*, 808 F.3d at 407-08.  
12


13 **CONCLUSION**  
14

15 Accordingly, for the reasons stated above, IT IS ORDERED that the decision of the  
16 Commissioner is REVERSED AND REMANDED for further administrative proceedings  
17 consistent with this Order.  
18

19 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this  
20 Memorandum Opinion and Order and the Judgment on counsel for plaintiff and counsel for  
21 defendant.  
22

23 LET JUDGMENT BE ENTERED ACCORDINGLY.  
24

25 DATE: April 9, 2018

26   
27 KAREN L. STEVENSON  
28 UNITED STATES MAGISTRATE JUDGE