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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA-SOUTHERN DIVISION

VICTORIA E. B., <sup>1</sup>	)	Case No. SACV 20-01047-AS
	)	
Plaintiff,	)	<b>MEMORANDUM OPINION AND ORDER OF</b>
	)	
v.	)	<b>REMAND</b>
	)	
ANDREW M. SAUL, Commissioner	)	
of the Social Security	)	
Administration,	)	
	)	
Defendant.	)	
_____	)	

For the reasons discussed below, IT IS HEREBY ORDERED that, pursuant to Sentence Four of 42 U.S.C. § 405(g), this matter is remanded for further administrative action consistent with this Opinion.

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<sup>1</sup> Plaintiff's name is partially redacted in accordance with Federal Rule of Civil Procedure 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.



1 issued a decision denying Plaintiff's request for benefits. (See AR 15-  
2 23).

3  
4 Applying the five-step sequential process, the ALJ found at step  
5 one that Plaintiff had not engaged in substantial gainful activity from  
6 September 9, 2016, the alleged onset disability onset date. (AR 17).  
7 At step two, the ALJ determined that Plaintiff had the severe  
8 impairments of bipolar disorder, anxiety and alcohol abuse in recent  
9 remission. (AR 17-18).<sup>2</sup> At step three, the ALJ determined that  
10 Plaintiff did not have an impairment or combination of impairments that  
11 met or medically equaled the severity of any of the listed impairments  
12 in the regulations. (AR 18).<sup>3</sup>

13  
14 The ALJ then assessed Plaintiff's residual functional capacity  
15 ("RFC")<sup>4</sup> and found that Plaintiff could perform the full range of work  
16 at all exertional levels with the following limitations: "can perform  
17 simple repetitive tasks; able to understand, remember, [and] carry out  
18 simple written/oral instructions from supervisors; perform activities  
19 within a schedule and maintain regular attendance; perform work activity  
20 without additional supervision; occasional interaction [with]  
21 supervisors, co-workers and the public; focus and concentration 2 hours  
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23  
24 <sup>2</sup> The ALJ found that Plaintiff's other alleged impairments --  
25 diabetes, neuropathy, diabetic retinopathy, and fatty liver -- were  
26 nonsevere. (AR 17-18).

27  
28 <sup>3</sup> The ALJ specifically considered Listings 12.04 (depressive and  
bipolar related disorders) and 12.06 (anxiety and obsessive-compulsive  
disorders). (AR 18).

<sup>4</sup> A Residual Functional Capacity is what a claimant can still do  
despite existing exertional and nonexertional limitations. See 20  
C.F.R. § 404.1545(a)(1).

1 at a time; and miss work once every 30-45 days.” (AR 19-22). At step  
2 four, the ALJ found that Plaintiff was unable to perform any past  
3 relevant work. (AR 21-22). At step five, the ALJ determined, based on  
4 Plaintiff’s age, education, work experience, RFC, and the VE’s  
5 testimony, that there were jobs that existed in significant numbers in  
6 the national economy that Plaintiff could perform. (AR 22-23).  
7 Accordingly, the ALJ found that Plaintiff had not been under a  
8 disability, as defined in the Social Security Act, from September 9,  
9 2016 though April 17, 2019. (AR 23).

10  
11 The Appeals Council denied Plaintiff’s request for review on April  
12 23, 2020. (AR 1-5). Plaintiff now seeks judicial review of the ALJ’s  
13 decision, which stands as the final decision of the Commissioner. See  
14 42 U.S.C. §§ 405(g), 1383(c).

15  
16 **STANDARD OF REVIEW**

17  
18 This Court reviews the Commissioner’s decision to determine if it  
19 is free of legal error and supported by substantial evidence. See  
20 Brewes v. Comm’r, 682 F.3d 1157, 1161 (9th Cir. 2012). “Substantial  
21 evidence” is more than a mere scintilla, but less than a preponderance.  
22 Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). “It means such  
23 relevant evidence as a reasonable mind might accept as adequate to  
24 support a conclusion.” Revels v. Berryhill, 874 F.3d 648, 654 (9th Cir.  
25 2017). To determine whether substantial evidence supports a finding,  
26 “a court must consider the record as a whole, weighing both evidence  
27 that supports and evidence that detracts from the [Commissioner’s]  
28

1 conclusion." Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir.  
2 2001) (internal quotation omitted). As a result, "[i]f the evidence can  
3 support either affirming or reversing the ALJ's conclusion, [a court]  
4 may not substitute [its] judgment for that of the ALJ." Robbins v. Soc.  
5 Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).<sup>5</sup>

6  
7 **PLAINTIFF'S CONTENTIONS**

8  
9 Plaintiff contends that the ALJ erred in assessing Plaintiff's RFC  
10 by failing to properly consider (1) Plaintiff's subjective symptom  
11 testimony, (2) the opinion of Plaintiff's treating physician (Dr.  
12 Lupsa), (3) the opinion of a consultative examiner (Dr. Herron), (4) the  
13 opinion of a licensed clinical social worker (Karen Depreist), and (5)  
14 the opinions of all consultative examiners that Plaintiff was disabled.  
15 (See Joint Stip. at 3-14, 23-31, 36-40, 43-49).

16  
17 **DISCUSSION**

18  
19 After consideration of the record as a whole, the Court finds that  
20 Plaintiff's first claim -- that the ALJ erred in failing to provide  
21 clear and convincing testimony for rejecting Plaintiff's testimony about  
22 her pain and limitations -- warrants a remand for further consideration.  
23 Since the Court is remanding the matter based on Plaintiff's first  
24 claim, the Court will not address Plaintiff's claims that the ALJ erred  
25

26  
27 <sup>5</sup> The harmless error rule applies to the review of  
28 administrative decisions regarding disability. See McLeod v. Astrue,  
640 F.3d 881, 886-88 (9th Cir. 2011); Burch v. Barnhart, 400 F.3d 676,  
679 (9th Cir. 2005) (An ALJ's decision will not be reversed for errors  
that are harmless).

1 in failing to properly assess the opinions of Plaintiff's treating  
2 physician, the consultative examiners, and the licensed clinical social  
3 worker.

4  
5 **A. The ALJ Failed to Provide Clear and Convincing Reasons for**  
6 **Rejecting Plaintiff's Subjective Symptom Testimony**

7  
8 Plaintiff asserts that the ALJ did not provide clear and  
9 convincing reasons for rejecting Plaintiff's testimony about her pain  
10 and limitations. (See Joint Stip. at 3-14, 23-27). Defendant asserts  
11 that the ALJ provided valid reasons for discounting Plaintiff's  
12 testimony. (See Joint Stip. at 15-23).

13  
14 1. Legal Standard

15  
16 When assessing a claimant's credibility regarding subjective pain  
17 or intensity of symptoms, the ALJ must engage in a two-step analysis.  
18 Trevizo v. Berryhill, 871 F.3d 664, 678 (9th Cir. 2017). First, the ALJ  
19 must determine if there is medical evidence of an impairment that could  
20 reasonably produce the symptoms alleged. Id. (citing Garrison v.  
21 Colvin, 759 F.3d 995, 1014-15 (9th Cir. 2014)). "In this analysis, the  
22 claimant is not required to show that her impairment could reasonably  
23 be expected to cause the severity of the symptom she has alleged; she  
24 need only show that it could reasonably have caused some degree of the  
25 symptom." Id. (emphasis in original) (citation omitted). "Nor must a  
26 claimant produce objective medical evidence of the pain or fatigue  
27 itself, or the severity thereof." Id. (citation omitted).

1           If the claimant satisfies this first step, and there is no evidence  
2 of malingering, the ALJ must provide specific, clear and convincing  
3 reasons for rejecting the claimant's testimony about the symptom  
4 severity. Id. (citation omitted); see also Robbins v. Soc. Sec. Admin.,  
5 466 F.3d 880, 883 (9th Cir. 2006) ("[U]nless an ALJ makes a finding of  
6 malingering based on affirmative evidence thereof, he or she may only  
7 find an applicant not credible by making specific findings as to  
8 credibility and stating clear and convincing reasons for each."); Smolen  
9 v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996) ("[T]he ALJ may reject the  
10 claimant's testimony regarding the severity of her symptoms only if he  
11 makes specific findings stating clear and convincing reasons for doing  
12 so."). "This is not an easy requirement to meet: The clear and  
13 convincing standard is the most demanding required in Social Security  
14 cases." Garrison, 759 F.3d at 1015 (citation omitted).  
15

16  
17           Where, as here, the ALJ finds that a claimant suffers from a  
18 medically determinable physical or mental impairment that could  
19 reasonably be expected to produce his alleged symptoms, the ALJ must  
20 evaluate "the intensity and persistence of those symptoms to determine  
21 the extent to which the symptoms limit an individual's ability to  
22 perform work-related activities for an adult." Soc. Sec. Ruling ("SSR")  
23 16-3p, 2017 WL 5180304, at \*3.<sup>6</sup> SSR 16-3p eliminated the term  
24

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25  
26           <sup>6</sup> SSR 16-3p, which superseded SSR 96-7p, is applicable to this  
27 case, because SSR 16-3p, which became effective on March 28, 2016, was  
28 in effect at the time of the Appeal Council's April 23, 2020 denial of  
Plaintiff's request for review. Nevertheless, the regulation on  
evaluating a claimant's symptoms, including pain, see 20 C.F.R. §  
404.1529, has not changed.

1 "credibility" from the Agency's sub-regulatory policy. However, the  
2 Ninth Circuit Court of Appeals has noted that SSR 16-3p:

3 makes clear what [the Ninth Circuit's] precedent already  
4 required: that assessments of an individual's testimony by an  
5 ALJ are designed to "evaluate the intensity and persistence of  
6 symptoms after the ALJ finds that the individual has a  
7 medically determinable impairment(s) that could reasonably be  
8 expected to produce those symptoms," and not to delve into  
9 wide-ranging scrutiny of the claimant's character and apparent  
10 truthfulness.

11 Trevizo, 871 F.3d at 678 n.5 (quoting SSR 16-3p) (alterations omitted).

12 In discrediting the claimant's subjective symptom testimony, the  
13 ALJ may consider: "ordinary techniques of credibility evaluation, such  
14 as . . . prior inconsistent statements concerning the symptoms, and  
15 other testimony by the claimant that appears less than candid;  
16 unexplained or inadequately explained failure to seek treatment or to  
17 follow a prescribed course of treatment; and the claimant's daily  
18 activities." Ghanim v. Colvin, 763 F.3d 1154, 1163 (9th Cir. 2014)  
19 (citation omitted). Inconsistencies between a claimant's testimony and  
20 conduct, or internal contradictions in the claimant's testimony, also  
21 may be relevant. Burrell v. Colvin, 775 F.3d 1133, 1137 (9th Cir.  
22 2014). In addition, the ALJ may consider the observations of treating  
23 and examining physicians regarding, among other matters, the functional  
24 restrictions caused by the claimant's symptoms. Smolen, 80 F.3d at  
25 1284; accord Burrell, supra. However, it is improper for an ALJ to  
26 reject subjective testimony based "solely" on its inconsistencies with  
27 the objective medical evidence presented. Bray v. Comm'r of Soc. Sec.  
28 Admin., 554 F.3d 1219, 1227 (9th Cir. 2009) (citation omitted).



1 The ALJ must make a credibility determination with findings that  
2 are "sufficiently specific to permit the court to conclude that the ALJ  
3 did not arbitrarily discredit claimant's testimony." Tommasetti v.  
4 Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008) (citation omitted); see  
5 Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir. 2015) ("A finding  
6 that a claimant's testimony is not credible must be sufficiently  
7 specific to allow a reviewing court to conclude the adjudicator rejected  
8 the claimant's testimony on permissible grounds and did not arbitrarily  
9 discredit a claimant's testimony regarding pain;" citation omitted).  
10 Although an ALJ's interpretation of a claimant's testimony may not be  
11 the only reasonable one, if it is supported by substantial evidence, "it  
12 is not [the court's] role to second-guess it." Rollins v. Massanari,  
13 261 F.3d 853, 857 (9th Cir. 2001).  
14

15  
16 2. Plaintiff's Subjective Statements and Testimony<sup>1</sup>  
17

18 Plaintiff completed an Adult Function Report, dated January 12,  
19 2017 (see AR 191-99), in which she reported that she is limited in her  
20 ability to work because she is physically tired, is sometimes unable to  
21 move because of depression and pain, has distracting audio and visual  
22 hallucinations, feels unsafe leaving the house, is paranoid, and is  
23

24  
25  
26 <sup>1</sup> Plaintiff submitted an Adult Function Report, and testified at  
27 an administrative hearing. The Court assumes, unless it is clear that  
28 Plaintiff was referring to a prior time frame, that Plaintiff's  
statements and testimony about her subjective symptoms referred to the  
symptoms she was experiencing at the time the statements were made.

1 overwhelmed. (AR 191).<sup>2</sup> On a typical day, she checks her blood sugar,  
2 prepares coffee/food, reads, feeds dogs, checks mail, reads again, does  
3 laundry and possibly washes dishes, takes a nap, eats dinner with her  
4 husband, watches a show, and sleeps. (AR 192). As a result of her  
5 conditions, she can no longer walk or stand for long periods,  
6 concentrate, focus or produce work. (Id.). She goes out daily and can  
7 go out alone, but she does not like to go out. Although she drives, she  
8 does not like driving, and parking lots cause her anxiety. She shops in  
9 stores for groceries weekly, which takes two to three hours. (AR 194-  
10 95). She is able to pay bills, handle a savings account and use a  
11 checkbook/money orders during moments of clarity throughout the month,  
12 but she cannot count change (due to her inability to do quick math and  
13 to being distracted because of her conditions). (Id.). She has  
14 problems getting along with others because she is paranoid and often  
15 feels attacked. She does not get along well with authority figures  
16 because she is anxious and intimidated. (AR 196-97). Her conditions  
17 affect her ability to walk, stair-climb, use hands, talk, see, memory,  
18 complete tasks, concentrate, understand, follow instructions, and get  
19 along with others. She does not finish what she starts. She can follow  
20 written instructions but she cannot follow spoken instructions very  
21 well. (AR 196).

22  
23  
24 At the administrative hearing, Plaintiff testified that she last  
25 worked in 2016, but she had a period of psychosis and was given a leave  
26

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27 <sup>2</sup> Since, as noted above, the ALJ did not find Petitioner's  
28 alleged physical impairments severe, the Court will not discuss  
Plaintiff's testimony concerning her alleged physical impairments.

1 of absence which was extended a year. She described the period of  
2 psychosis as hearing things, not feeling like herself, having visual and  
3 audio hallucinations, having out-of-control blood sugar, not being able  
4 to take care of herself properly, and feeling like she was losing her  
5 mind. She wanted to return to work but she was unreliable and unable to  
6 work due to her conditions. (AR 33). She is unable to work because her  
7 mental health prevents her from taking care of herself, her physical  
8 state makes her unable to know when she is able to work and sometimes  
9 causes her to sleep or recover at home several days a week, and she  
10 hears and sees things (preventing her from interacting with people and  
11 doing things), albeit not as bad as when she stopped working. (AR 35-  
12 36). She sleeps a lot during the day. Id. Although she drives, she  
13 does not like to drive because she feels she is a hazard. (AR 37). She  
14 has difficulty interacting with people because she is uncomfortable  
15 around others and sometimes hears things (which causes her to answer  
16 unasked questions or to react to noises). (AR 37, 41). She has to  
17 attend to her diabetes constantly. (AR 38). She would not be able to  
18 do a simple, low stress job because she has very little energy, takes  
19 naps throughout the day (she feels tired due to her diabetes and  
20 psychiatric medications), and gets easily distracted. (AR 37, 39). She  
21 has panic attacks approximately two to three times a month, "depending  
22 on what's going on in" her life. The panic attacks are random and  
23 unpredictable and might be triggered by, for example, being stuck at  
24 home without a car and feeling trapped. (Id.). She sees a psychiatrist  
25 every two to three weeks and a therapist every three weeks (she has  
26  
27  
28

1 difficulty getting appointments, and she misses appointments because it  
2 is hard to get out of bed). (AR 40-41).

3  
4 3. The ALJ's Credibility Findings

5  
6 After briefly summarizing Plaintiff's testimony and statements (see  
7 AR 19), the ALJ found Plaintiff's testimony about the intensity,  
8 persistence and limiting effects of her mental health symptoms to be  
9 inconsistent with the objective medical evidence, her activities of  
10 daily living, and Plaintiff's prior report of her symptoms. (See AR 19-  
11 20).

12  
13 The ALJ stated that, while Plaintiff claimed to suffer from  
14 depression, anxiety, and audio visual hallucinations, her allegations  
15 were inconsistent with the notations/findings in several medical  
16 records, specifically, (1) an office visit on October 11, 2016 reporting  
17 that "Plaintiff's mood has improved, denies side effects with  
18 medication. Noises has [sic] decreased," (AR 378); (2) mental status  
19 health examinations on November 30, 2015, January 4, 2016, March 7,  
20 2016, March 21, 2016, April 4, 2016, June 16, 2016, August 1, 2016,  
21 August 17, 2016, September 15, 2016, and October 11, 2016 office  
22 indicating that Plaintiff has fair grooming, is cooperative, has clear  
23 and coherent speech, has a depressed and anxious mood and a restricted  
24 affect, denies having auditory or visual hallucinations, is alert and  
25 goal-oriented, has intact insight/judgment, and has intact  
26 memory/cognition and impulse control including a November 11, 2016  
27  
28

1 report that Plaintiff's depressed mood is improving. (AR 400, 398, 395,  
2 393, 391, 389, 386, 384, 382, 380, 378; (3) an office visit on November  
3 29, 2016 noting that Plaintiff is properly dressed, has good hygiene and  
4 grooming, is mildly anxious, has a depressed mood and affect, makes good  
5 eye contact, has speech within normal limits, is oriented and linear,  
6 denies having auditory or visual limitations at the preset time, and has  
7 intact insight and judgment (AR 441); and (4) Kaiser Permanente Progress  
8 Notes containing mental status examinations on January 4, 2017, February  
9 16, 2017, April 17, 2017, May 12, 2017 and May 17, 2017 indicating that  
10 Plaintiff has good grooming, appropriate dress, normal and cooperative  
11 behavior, normal speech, is oriented and alert, has intact recent and  
12 remote memory, fair or good insight, fair or unimpaired judgment,  
13 coherent and normal thoughts, congruent mood, affect within normal  
14 limits, normal motor, and no suicidal or homicidal ideation, plan or  
15 intent (AR 557-58, 674.  
16

17  
18 The ALJ found that Plaintiff's statement that she was paranoid to  
19 leave the house (see AR 191) to be inconsistent with her statements that  
20 she goes out daily, shops for groceries weekly, and goes out to dinners  
21 with her husband and/or to the doctors almost daily (see AR 194-95).  
22 (AR 20).  
23

24 The ALJ also found Plaintiff's statements about her difficulties  
25 with memory, completing tasks, concentrating, understanding, following  
26 instructions, and getting along with others (see AR 196) to be  
27 inconsistent with Plaintiff's statement that she can pay bills, handle  
28

1 a savings account, and use a checkbook/money orders (see AR 194). (AR  
2 20).

3  
4 The ALJ further found Plaintiff's testimony about having panic  
5 attacks two to three times a month on a random basis (see AR 38-39) to  
6 be inconsistent with a notation in a February 16, 2017 Kaiser Permanente  
7 Progress Note that Plaintiff reported that her panic attacks are less  
8 frequent, once a month, and that her depression is well-controlled (see  
9 AR 666). (AR 20).

10  
11 4. Analysis

12  
13 The Court finds that the ALJ failed to provide clear and convincing  
14 reasons for rejecting Plaintiff's testimony about the intensity,  
15 persistence and limiting effects of her symptoms.  
16

17  
18 While the ALJ properly found there was a lack of objective medical  
19 evidence supporting Plaintiff's testimony concerning her symptoms and  
20 limitations, see SSR 16-3p, \*5 ("objective medical evidence is a useful  
21 indicator to help make reasonable conclusions about the intensity and  
22 persistence of symptoms, including the effects those symptoms may have  
23 on the ability to perform work-related activities"); 20 C.F.R. §  
24 404.1529(c)(2) ("Objective medical evidence . . . is a useful indicator  
25 to assist us in making reasonable conclusions about the intensity and  
26 persistence of your symptoms and the effect those symptoms, such as  
27 pain, may have on your ability to work."); see also Nguyen v. Colvin,

1 639 Fed.Appx. 510, 511 (9th Cir. 2016) ("A diagnosis, in itself, is not  
2 sufficient to establish a disability."), this factor cannot, by itself,  
3 support an adverse finding about Plaintiff's testimony. See Trevizo,  
4 871 F.3d at 679 (once a claimant demonstrates medical evidence of an  
5 underlying impairment, "an ALJ 'may not disregard [a claimant's  
6 testimony] solely because it is not substantiated affirmatively by  
7 objective medical evidence.'" (quoting Robbins, supra); see also SSR  
8 16-3p, \*7 ("We must consider whether an individual's statements about  
9 the intensity, persistence, and limiting effects of his or her symptoms  
10 are consistent with the medical signs and laboratory findings of record.  
11 . . . However, we will not disregard an individual's statements about  
12 the intensity, persistence, and limiting effects of symptoms solely  
13 because the objective medical evidence does not substantiate the degree  
14 of impairment related-symptoms alleged by the individual." ).<sup>3</sup>  
15

16  
17 Although an inconsistency between a claimant's statement of  
18 disabling symptoms and limitations and a claimant's daily activities may  
19 be used to discount a claimant's testimony, see 20 C.F.R. §  
20 404.1529(c)(3)(1) (a claimant's daily activities are one factor to be  
21 considered in evaluating a claimant's symptoms, such as pain); Ghanim,  
22 763 F.3d at 1165 ("Engaging in daily activities that are incompatible  
23 with the severity of symptoms alleged can support an adverse credibility  
24 determination."); Molina v. Astrue, 674 F.3d 1104, 1113 (9th Cir.  
25 2012) ("[T]he ALJ may discredit a claimant's testimony when the claimant  
26 reports participation in everyday activities indicating capacities that  
27

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28 <sup>3</sup> As discussed below, the ALJ did not provide any other valid  
reason for discounting Plaintiff's testimony.

1 are transferable to a work setting;" "Even where those activities  
2 suggest some difficulty functioning, they may be grounds for  
3 discrediting the claimant's testimony to the extent that they contradict  
4 claims of a totally debilitating impairment."), the ALJ improperly found  
5 inconsistencies in Plaintiff's testimony.  
6

7         The ALJ's assertion that Plaintiff stated she was paranoid to leave  
8 the house (see AR 20 ["In spite of her allegation of paranoia to leave  
9 the house ([AR 191]), the claimant stated she goes out daily and shops  
10 weekly to dinners and doctors ([AR 194-95])."]) mischaracterized  
11 Plaintiff's statements about leaving her house and her paranoia.  
12 Plaintiff did not state that she was paranoid to leave the house.  
13 Rather, in response to a question asking how Plaintiff's conditions  
14 limit her ability to work, Plaintiff stated, in part, "I feel unsafe  
15 leaving the house. I am paranoid. I am overwhelmed and spiral into  
16 existential crisis." (AR 191). These statements, on their own, do not  
17 indicate or reflect a connection between Plaintiff's fear of leaving the  
18 house and Plaintiff's paranoia. Indeed, Plaintiff's fear of leaving the  
19 house may have been related to her other stated limitations, such as  
20 not doing yard work because she does not "like going outside or getting  
21 dirty" (AR 194) and not liking to drive (AR 37, 194). Moreover,  
22 Plaintiff's paranoia may have been related to her statement about her  
23 difficulties in getting along with families, friends, neighbors, or  
24 others because of her paranoia (AR 196). The ALJ did not ask Plaintiff  
25 at the administrative hearing about her statements regarding feeling  
26 unsafe leaving the house and experiencing paranoia, and possibly  
27 misconstrued Plaintiff's statements about feeling unsafe leaving the  
28



1 house and experiencing paranoia. Therefore, the ALJ erred in finding  
2 such statements to be inconsistent with Plaintiff's statements about her  
3 activities outside the house.  
4

5 The ALJ also erred in finding Plaintiff's statements about her  
6 difficulties with memory, completing tasks, concentrating,  
7 understanding, following instructions, and getting along with others  
8 (see AR 196) to be inconsistent with Plaintiff's ability to handle her  
9 financial affairs and bank accounts (see AR 194-95). (AR 20).  
10 Plaintiff stated that she was able to pay bills, handle a savings  
11 account, and use a checkbook/money orders, but was unable to count  
12 change. (AR 194). When asked to explain her answers, Plaintiff stated,  
13 "[U]nable to do quick math any longer, too distracted. Handle others in  
14 moments of clarity, throughout the month." (Id.). The ALJ failed to  
15 explain how Plaintiff's handling of money is inconsistent with  
16 Plaintiff's stated difficulties with memory, completing tasks,  
17 concentrating, understanding, following instructions, and getting along  
18 with others. Moreover, it is not clear whether the ALJ considered  
19 Plaintiff's explanation that she is able to handle her financial affairs  
20 "in moments of clarity, throughout the month," and the ALJ did not ask  
21 Plaintiff at the administrative hearing about her explanation.  
22  
23

24 Finally, the ALJ also erred in finding that Plaintiff's testimony  
25 about having panic attacks two to three times a month, randomly, was  
26 inconsistent with her prior report about the frequency of her panic  
27 attacks and the status of her depression. (AR 20). At the March 26,  
28 2019 hearing, Plaintiff testified that she has panic attacks, which she

1 estimated occurred “[l]ike two to three times a month, depending on  
2 what’s going on in my life, and then sometimes they’re just random.”;  
3 and that the panic attacks were “completely unpredictable.” (AR 38-39).  
4 In a February 16, 2017 Kaiser Permanente Progress Note, Plaintiff  
5 reported that “[p]anic attacks, less frequent, once a month” and that  
6 “[d]epression is well controlled.” (AR 666). However, Plaintiff did  
7 not testify she definitively suffered two to three panic attacks a  
8 month; rather, she gave an estimate of the number of monthly panic  
9 attacks which she then stated were random and unpredictable. Moreover,  
10 variability in the frequency of panic attacks is not be uncommon. See  
11 Garrison, 759 F.3d at 1017 (“As we have emphasized while discussing  
12 mental health issues, it is error to reject a claimant’s testimony  
13 merely because symptoms wax and wane in the course of treatment. Cycles  
14 of improvement and debilitating symptoms are a common occurrence. . .”).  
15 The ALJ at the administrative hearing did not ask Plaintiff about any  
16 alleged discrepancy in the number of panic attacks Plaintiff suffered in  
17 March 26, 2019 and February 16, 2017. Therefore, Plaintiff’s statements  
18 in February 2017 about the frequency of her panic attacks were not  
19 necessarily inconsistent with her testimony in March 2019.  
20

21  
22 Because the Court finds that the ALJ did not discount Plaintiff’s  
23 symptom testimony on legally permissible grounds, the Court is unable to  
24 defer to the ALJ’s credibility determination. Cf. Flaten v. Sec’y of  
25 Health & Human Servs., 44 F.3d 1453, 1464 (9th Cir. 1995) (the court will  
26 defer to the ALJ’s credibility determinations when they are  
27 appropriately supported in the record by specific findings justifying  
28 that decision) (citations omitted).

1 **B. Remand Is Warranted**

2  
3 The decision whether to remand for further proceedings or order an  
4 immediate award of benefits is within the district court's discretion.  
5 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
6 useful purpose would be served by further administrative proceedings, or  
7 where the record has been fully developed, it is appropriate to exercise  
8 this discretion to direct an immediate award of benefits. Id. at 1179  
9 ("[T]he decision of whether to remand for further proceedings turns upon  
10 the likely utility of such proceedings."). However, where, as here, the  
11 circumstances of the case suggest that further administrative review  
12 could remedy the Commissioner's errors, remand is appropriate. McLeod  
13 v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); Harman, 211 F.3d at 1179-  
14 81.

15  
16  
17 Since the ALJ failed to properly assess Plaintiff's symptom  
18 testimony, remand is appropriate. Because outstanding issues must be  
19 resolved before a determination of disability can be made, and "when the  
20 record as a whole creates serious doubt as to whether the [Plaintiff]  
21 is, in fact, disabled within the meaning of the Social Security Act,"  
22 further administrative proceedings would serve a useful purpose and  
23 remedy defects. Burrell, 775 F.3d at 1141 (citations omitted).<sup>14</sup>

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25 <sup>14</sup> The Court has not reached any other issue raised by Plaintiff  
26 except to determine that reversal with a directive for the immediate  
27 payment of benefits would not be appropriate at this time.  
28 "[E]valuation of the record as a whole creates serious doubt that  
Plaintiff is in fact disabled." See Garrison v. Colvin, 759 F.3d 995,  
1021 (2014). Accordingly, the Court declines to rule on Plaintiff's  
claims regarding the ALJ's failure to properly consider the opinion of  
Plaintiff's treating physician (Dr. Lupsa) (see Joint Stip. at 27-31,  
36-38), the opinion of a consultative examiner (Dr. Herron) (see Joint  
Stip. at 38-40, 43-45), the opinion of a licensed clinical social worker  
(continued...)

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**ORDER**

For the foregoing reasons, the decision of the Commissioner is reversed, and the matter is remanded for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 8, 2021

\_\_\_\_\_  
/s/  
ALKA SAGAR  
UNITED STATES MAGISTRATE JUDGE

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<sup>14</sup> (...continued)  
(Karen Depreist) (see Joint Stip. at 45-47), and the opinions of all consultative examiners that Plaintiff was disabled (see Joint Stip. at 47-49). Because this matter is being remanded for further consideration, these issues should also be considered on remand.