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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LYNN C.,<sup>1</sup>  
Plaintiff  
v.  
KILOLO KIJAKAJI, Acting  
Commissioner of Social Security,  
Defendant.

Case No. 8:20-cv-01844-GJS

**MEMORANDUM OPINION AND  
ORDER**

**I. PROCEDURAL HISTORY**

Plaintiff Lynn C. (“Plaintiff”) filed a complaint seeking review of the decision of the Commissioner of Social Security denying her applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”). The parties filed consents to proceed before the undersigned United States Magistrate Judge [Dkts. 12 and 14] and briefs [Dkt. 22 (“Pl. Br.”) and Dkt. 28 (“Def. Br.”)] addressing disputed issues in the case. Plaintiff did not file a reply. The matter is now ready for decision. For the reasons discussed below, the Court finds that this

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<sup>1</sup> In the interest of privacy, this Order uses only Plaintiff’s first name and initial of her last name.

1 matter should be remanded for further proceedings.

## 3 II. ADMINISTRATIVE DECISION UNDER REVIEW

4 In August 2016, Plaintiff filed applications for DIB and SSI alleging  
5 disability beginning June 30, 2009.<sup>2</sup> [Dkt. 19, Administrative Record (“AR”) 480,  
6 848-63.] Plaintiff’s applications were denied at the initial level of review and on  
7 reconsideration. [AR 480, 746-50, 754-58, 761-65.] A hearing was held before  
8 Administrative Law Judge Susanne M. Cichanowicz (“the ALJ”) on December 18,  
9 2018. [AR 480, 622-51.]

10 On March 18, 2019, the ALJ issued an unfavorable decision applying the  
11 five-step sequential evaluation process for assessing disability. [AR 480-91]; *see* 20  
12 C.F.R. §§ 404.1520(b)-(g)(1), 416.920(b)-(g)(1). At step one, the ALJ determined  
13 that Plaintiff had not engaged in substantial gainful activity (“SGA”) since the  
14 alleged onset date. [AR 483.] At step two, the ALJ determined that Plaintiff has the  
15 following severe impairments: hypertension, thyroid disorder, and chronic  
16 obstructive pulmonary disease. [AR 483.] At step three, the ALJ determined that  
17 Plaintiff does not have an impairment or combination of impairments that meets or  
18 medically equals the severity of one of the impairments listed in Appendix I of the  
19 Regulations. [AR 487]; *see* 20 C.F.R. Pt. 404, Subpt. P, App. 1. The ALJ found  
20 that Plaintiff has the residual functional capacity (“RFC”) to perform medium work,

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24 <sup>2</sup> Plaintiff filed earlier applications for DIB and SSI in 2012, alleging disability  
25 since June 30, 2009. [AR 480, 656.] The previous applications were denied by an  
26 ALJ on April 10, 2014. [AR 480-81, 656-64.] There is no indication in the record  
27 that Plaintiff appealed the unfavorable decision. Because this case involved a prior  
28 ALJ decision finding Plaintiff not disabled, the ALJ applied Acquiescence Ruling  
97-4(9), 1997 WL 742758 at \*3. *See Chavez v. Bowen*, 844 F.2d 691, 692 (9th Cir.  
1988). The ALJ determined that Plaintiff rebutted the presumption of continuing  
non-disability by submitting evidence that Plaintiff was diagnosed with chronic  
obstructive pulmonary disease. [AR 481.]

1 as defined in 20 C.F.R. §§ 404.1567(c), 416.967(c), and is able to lift/carry and  
2 push/pull 50 pounds occasionally and 25 pounds frequently, stand/walk 6 hours in  
3 an 8-hour workday, sit 6 hours in an 8-hour workday, frequently climb ramps/stairs,  
4 ladders, ropes, and scaffolds, frequently balance, stoop, kneel, crouch, and crawl,  
5 and occasionally have exposure to pulmonary irritants such as fumes, odors, dusts,  
6 and gases. [AR 487.] At step four, the ALJ determined that Plaintiff is capable of  
7 performing past relevant work as a licensed vocational nurse. [AR 491.] Based on  
8 these findings, the ALJ found Plaintiff not disabled from June 30, 2009, through the  
9 date of the decision. [AR 491.]

10 The Appeals Council denied review of the ALJ's decision on July 31, 2020.  
11 [AR 1-7.] This action followed.

12 Plaintiff raises the following issues challenging the ALJ's findings and  
13 determination of non-disability:

- 14 1. The ALJ failed to properly consider the impact of Plaintiff's  
15 medically determinable impairments of anxiety and depression on  
16 the ability to perform her past work as a licensed vocational nurse.  
17 [Pl. Br. at 4-8.]
- 18 2. The ALJ failed to properly consider the opinions of the examining  
19 and reviewing physicians in determining Plaintiff does not suffer  
20 from a severe mental impairment. [Pl. Br. at 9-17.]

21 The Commissioner asserts that the ALJ's decision should be affirmed. [Def.  
22 Br. at 1-10.]

### 23 24 **III. GOVERNING STANDARD**

25 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner's decision to  
26 determine if: (1) the Commissioner's findings are supported by substantial  
27 evidence; and (2) the Commissioner used correct legal standards. *See Carmickle v.*  
28 *Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Brewes v. Comm'r*

1 *Soc. Sec. Admin.*, 682 F.3d 1157, 1161 (9th Cir. 2012). “Substantial evidence is  
2 more than a mere scintilla but less than a preponderance; it is such relevant evidence  
3 as a reasonable mind might accept as adequate to support a conclusion.” *Gutierrez*  
4 *v. Comm’r of Soc. Sec.*, 740 F.3d 519, 522-23 (9th Cir. 2014) (internal quotation  
5 marks and citation omitted).

6 The Court will uphold the Commissioner’s decision when “the evidence is  
7 susceptible to more than one rational interpretation.” *Magallanes v. Bowen*, 881  
8 F.2d 747, 750 (9th Cir. 1989). However, the Court may review only the reasons  
9 stated by the ALJ in his decision “and may not affirm the ALJ on a ground upon  
10 which he did not rely.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). The  
11 Court will not reverse the Commissioner’s decision if it is based on harmless error,  
12 which exists if the error is “inconsequential to the ultimate nondisability  
13 determination.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015)  
14 (internal quotation marks and citations omitted).

#### 15 16 **IV. DISCUSSION**

##### 17 **A. The ALJ Erred in Evaluating the Medical Opinion Evidence**

18 Plaintiff contends the ALJ improperly rejecting the opinion of her examining  
19 psychiatrist, Dr. Ernest A. Bagner III, and in turn, erred at step two by finding that  
20 she has no severe mental impairment. [Pl. Br. 9-17.] The Court agrees with  
21 Plaintiff for the reasons discussed below.

22 The weight given to medical opinions depends in part on whether they are  
23 proffered by treating, examining, or non-examining professionals. *See Holohan v.*  
24 *Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001); *Lester v. Chater*, 81 F.3d 821,  
25 830 (9th Cir. 1996).<sup>3</sup> In general, opinions of treating sources are entitled to the

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28 <sup>3</sup> The regulations governing the evaluation of medical evidence were amended  
for claims filed after March 27, 2017. *See* 20 C.F.R. §§ 404.1520c, 416.920c. The

1 greatest weight, opinions of examining, non-treating sources are entitled to lesser  
2 weight, and opinions of non-examining, non-treating sources are entitled to the least  
3 weight. *See Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

4 If a treating or examining doctor’s opinion is contradicted by another doctor’s  
5 opinion, an ALJ may only reject it by providing “specific and legitimate reasons that  
6 are supported by substantial evidence in the record.” *Lester*, 81 F.3d at 830-31. An  
7 ALJ can satisfy this standard by “setting out a detailed and thorough summary of the  
8 facts and conflicting evidence, stating his [or her] interpretation thereof, and making  
9 findings.” *Magallanes*, 881 F.2d at 751 (internal quotation marks and citation  
10 omitted).

11 In January 2017, after performing a complete psychiatric evaluation of  
12 Plaintiff, Dr. Bagner diagnosed Plaintiff with major depressive disorder with anxiety  
13 and assessed “moderate” limitations in the ability to follow detailed instructions,  
14 interact appropriately with the public, co-workers, and supervisors, and respond to  
15 work pressure in a usual work setting. [AR 484-85, 1108-12.]

16 The ALJ’s stated reasons for rejecting Dr. Bagner’s opinion are not supported  
17 by substantial evidence. First, the ALJ asserted that Dr. Bagner’s opinion was  
18 entitled to “little weight” because Plaintiff’s “consultative examination was  
19 generally unremarkable except for poor eye contact and problems with memory in  
20 recalling objects after 5 minutes” and “[t]here were no other significant  
21 psychological symptoms.” [AR 485.] However, Dr. Bagner reported other  
22 significant symptoms that were not mentioned by the ALJ. Plaintiff’s mental status  
23 exam showed she was tearful and tense, her speech was slow and emotional, and her  
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26 new regulations change how the Social Security Administration considers medical  
27 opinions and eliminate the deference to treating source medical opinions. *See* 20  
28 C.F.R. § 404.1520c(a); *see also* 81 Fed. Reg. 62560, at 62573-74 (Sept. 9, 2016).  
Petitioner’s applications for DIB and SSI were filed before the new regulations went  
into effect. [AR 848-63.]

1 mood was depressed. [AR 1110.] In addition, Plaintiff was able to repeat only 3  
2 digits forward and 3 digits backward on the digit span subtest and she was unable to  
3 spell the word “music” forward and backward. [AR 1111.] It was improper for the  
4 ALJ to selectively rely on some entries in Dr. Bagner’s report that were consistent  
5 with her conclusion while ignoring other entries that supported a different  
6 conclusion. *See Holohan v. Massanari*, 246 F.3d 1195, 1207 (9th Cir. 2001)  
7 (finding that “the ALJ’s specific reason for rejecting [a physician’s] medical opinion  
8 [was] not supported by substantial evidence” because, in part, “the ALJ selectively  
9 relied on some entries in [the plaintiff’s] records ... and ignored the many others that  
10 indicated continued, severe impairment”); *Gallant v. Heckler*, 753 F.2d 1450, 1456  
11 (9th Cir.1984) (the ALJ must not “reach a conclusion first, and then attempt to  
12 justify it by ignoring competent evidence in the record that suggests an opposite  
13 result”).

14 Second, the ALJ found that Plaintiff had not received regular and consistent  
15 mental health treatment with psychotropic medication and psychotherapy  
16 counseling. [AR 485.] This finding is inaccurate. Although Plaintiff may not have  
17 been seeing a specialist at the time of Dr. Bagner’s examination, there is ample  
18 objective evidence that Plaintiff received mental health treatment, which included  
19 strong psychotropic medication. In September 2015, Plaintiff was diagnosed with  
20 anxiety and depression was prescribed Valium by her treating physician, Dr.  
21 Michael Gross. [AR 1051, 1053, 1057, 1060, 1063.] In July 2016, Dr. Gross  
22 assessed Plaintiff with major depressive disorder, single episode and began treating  
23 Plaintiff’s symptoms with Xanax. [AR 1038, 1046, 1109, 1896, 1905.] In May  
24 2017, Plaintiff started receiving mental health treatment at Behavioral Health, where  
25 she was diagnosed with recurrent major depressive episodes, moderate and  
26 generalized anxiety disorder and was prescribed Wellbutrin and Xanax. [AR 1896,  
27 1899, 1929, 1933, 1936, 1940, 1947, 1954, 1963, 1968, 1972, 1977, 1987, 1995,  
28 1997, 2000.] Later, Zoloft was added to Plaintiff’s medication regimen. [AR 1909,

1 1912, 1976, 1980.] The ALJ erred in ignoring this significant evidence of mental  
2 health treatment. *See Holohan*, 246 F.3d at 1207; *Gallant*, 753 F.2d at 1456. In  
3 addition, Plaintiff’s treatment notes reflect that she had received psychotherapy, but  
4 her therapist became unavailable and she missed psychotherapy for a few months  
5 before finding a new therapist. [AR 1905, 1912.] While the ALJ asserted it was  
6 “unclear” how often Plaintiff received psychotherapy, the ALJ failed in her duty to  
7 adequately develop the record in this regard. *See Mayes v. Massanari*, 276 F.3d  
8 453, 459-60 (9th Cir. 2001) (holding that the ALJ has an affirmative duty to assist  
9 the claimant in developing the record “when there is ambiguous evidence or when  
10 the record is inadequate to allow for proper evaluation of the evidence”). “In cases  
11 of mental impairments, this duty is especially important.” *DeLorme v. Sullivan*, 924  
12 F.2d 841, 849 (9th Cir. 1991).

13 Third, the ALJ asserted that Plaintiff’s treatment records show that her  
14 “psychological symptoms improved with medication and that she feels better with  
15 treatment.” [AR 485.] However, the Ninth Circuit has cautioned against relying too  
16 heavily on the “wax and wane” of symptoms in the course of mental health  
17 treatment. *See Garrison*, 759 F.3d at 1017. “Cycles of improvement and  
18 debilitating symptoms are a common occurrence, and in such circumstances it is  
19 error for an ALJ to pick out a few isolated instances of improvement over a period  
20 of months or years and to treat them as a basis for concluding a claimant is capable  
21 of working.” *Id.*; *see also Holohan*, 246 F.3d at 1205 (explaining that a treating  
22 physician’s “statements must be read in context of the overall diagnostic picture he  
23 draws”). Indeed, while the ALJ cited three records showing moderate to good  
24 improvement with medication [AR 1899, 1902, 1905, 485], subsequent records  
25 reflect increased levels of depression and anxiety [AR 1976-78, 1980, 1986-88,  
26 1909, 1912, 1997].

27 Finally, the ALJ found that Dr. Bagner’s assessment of Plaintiff’s Global  
28 Assessment of Functioning (“GAF”) score of 60 was of “limited evidentiary value,”

1 as it “reveal[s] only snapshots of impaired and improved behavior, state[s] nothing  
2 in terms of function-by-function capacity or limitations, and do[es] not provide a  
3 reliable longitudinal picture of [Plaintiff’s] mental functioning.”<sup>4</sup> [AR 485.] Again,  
4 however, the ALJ failed to adequately consider Dr. Bagner’s examination report,  
5 which indicated significant mental impairments. [AR 1110-11.]

6 As such, the ALJ’s consideration of Dr. Bagner’s opinion and determination  
7 that Plaintiff does not have a severe mental impairment is not supported by  
8 substantial evidence.

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10 **V. REMAND FOR FURTHER PROCEEDINGS**

11 The Court has discretion to remand or reverse and award benefits. *See*  
12 *Trevizo v. Berryhill*, 871 F.3d 664, 682 (9th Cir. 2017). “Remand for further  
13 proceedings is appropriate where there are outstanding issues that must be resolved  
14 before a determination can be made, and it is not clear from the record that the ALJ  
15 would be required to find the claimant disabled if all the evidence were properly  
16 evaluated.” *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012); *Treichler v.*  
17 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014) (remand for  
18 award of benefits is inappropriate where “there is conflicting evidence, and not all  
19 essential factual issues have been resolved”). But “[w]here ‘(1) the record has been  
20 fully developed and further administrative proceedings would serve no useful  
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24 <sup>4</sup> The ALJ also noted that Plaintiff’s treating physician assessed Plaintiff with a  
25 GAF score of 50. [AR 485, 1986.] A GAF score between 41 and 50 indicates  
26 serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent  
27 shoplifting) or any serious impairment in social, occupational, or school functioning  
28 (e.g., no friends, inability to keep a job). *See American Psychiatric Association,*  
*Diagnostic & Statistical Manual of Mental Disorders* (“DSM-IV”), at 34 (4th ed.  
2000). A GAF score between 51 and 60 indicates moderate symptoms or moderate  
difficulty in social, occupational, or school functioning (e.g., few friends, conflicts  
with peers or coworkers). *Id.*



1 purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting  
2 evidence, whether claimant testimony or medical opinion; and (3) if the improperly  
3 discredited evidence were credited as true, the ALJ would be required to find the  
4 claimant disabled on remand,” it is appropriate to exercise this discretion to direct  
5 an immediate award of benefits. *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison*,  
6 759 F.3d at 1020).

7 Here, remand is required because the ALJ failed to properly evaluate Dr.  
8 Bagner’s opinion and there are outstanding issues that must be resolved before a  
9 final determination can be made. On remand, the ALJ should reconsider Dr.  
10 Bagner’s opinion, explain the weight afforded to that opinion, and provide legally  
11 sufficient reasons for rejecting any portion of that opinion.

12 Having found that remand is warranted, the Court declines to address  
13 Plaintiff’s remaining issues. *See Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir.  
14 2012) (“Because we remand the case to the ALJ for the reasons stated, we decline to  
15 reach [plaintiff’s] alternative ground for remand.”).<sup>5</sup>

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19 <sup>5</sup> As noted above, Plaintiff filed earlier applications for DIB and SSI in 2012,  
20 alleging disability since June 30, 2009, and those applications were denied by an  
21 ALJ on April 10, 2014. [AR 480-81, 656-64.] Although the ALJ did not discuss  
22 medical evidence relating to the previously adjudicated period of non-disability,  
23 June 30, 2009 to April 10, 2014, the ALJ addressed the issue of Plaintiff’s disability  
24 during that period by concluding that Plaintiff was not disabled from June 30, 2009  
25 through the date of the decision, March 18, 2019. [AR 480-91.] As this case is  
26 being remanded for further proceedings, the ALJ on remand should determine the  
27 relevant time period to be adjudicated and whether reopening of Plaintiff’s prior  
28 disability determination would be appropriate under the regulations and applicable  
authorities. *See* 20 C.F.R. §§ 404.988, 416.1488; *see also Lewis v. Apfel*, 236 F.3d  
503, 510 (9th Cir. 2001) (finding “it is appropriate for the Court to treat the ALJ’s  
actions as a de facto reopening” when the ALJ is aware of the denial of a claimant’s  
prior application for DIB or SSI benefits, accepts the alleged onset date during the  
previously-adjudicated period, and considers evidence of disability from the  
already-adjudicated period).

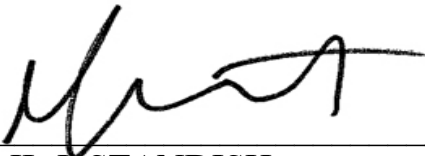
1 **VI. CONCLUSION**

2 For all of the foregoing reasons, **IT IS ORDERED** that:

- 3 (1) the decision of the Commissioner is REVERSED and this matter is  
4 REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further  
5 administrative proceedings consistent with this Memorandum Opinion and  
6 Order; and  
7 (2) Judgment be entered in favor of Plaintiff.

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9 **IT IS ORDERED.**

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11 DATED: July 18, 2022

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15 GAIL J. STANDISH  
16 UNITED STATES MAGISTRATE JUDGE  
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