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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KRISTINA RAE DEAN,

CASE NO. 1:10-cv-00523-SMS

Plaintiff,

v.

ORDER AFFIRMING AGENCY’S
DENIAL OF BENEFITS AND ORDERING
JUDGMENT FOR COMMISSIONER

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

_____ /

Plaintiff Kristina Rae Dean seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying her application for disability insurance benefits under Title II, and for supplemental security income pursuant to Title XVI, of the Social Security Act (42 U.S.C. § 301 *et seq.*) (the “Act”). The matter is currently before the Court on the parties’ cross-briefs, which were submitted, without oral argument, to the Honorable Sandra M. Snyder, United States Magistrate Judge.¹ Following a review of the complete record and applicable law, this Court finds the decision of the Administrative Law Judge (“ALJ”) to be supported by substantial evidence in the record as a whole and based on proper legal standards. Accordingly, this Court denies Plaintiff’s appeal.

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¹ Both parties consented to the jurisdiction of a United States Magistrate Judge (Docs. 6 & 9).

1 **I. Administrative Record**

2 **A. Procedural History**

3 On December 5, 2005, Plaintiff protectively filed an application under both Title II and
4 Title XVI for a period of disability, disability insurance benefits, and supplemental security
5 income (SSI) for a disability beginning December 29, 2005. The claims were denied initially on
6 August 25, 2006, and upon reconsideration on May 17, 2007. Plaintiff requested a hearing on
7 May 29, 2007.

8 Plaintiff appeared and testified at a hearing on January 3, 2008. In a decision dated April
9 17, 2008, Administrative Law Judge Laura Speck Havens denied Plaintiff's application. On
10 January 22, 2010, the Appeals Council affirmed the ALJ's decision. On March 24, 2010,
11 Plaintiff filed her complaint in this Court.

12 **B. Factual Record**

13 Plaintiff (born June 10, 1977) graduated from high school and completed about three
14 years of college through part-time attendance. She worked at a series of entry-level positions
15 including retail clerk, waitress, restaurant hostess, customer service clerk, deli clerk, and
16 receptionist. Although she applied for disability benefits in December 2005, she continued
17 working at least through November 2006, earning \$10,366.45 in 2006.

18 In a work activity report of employment since December 29, 2005, completed by Plaintiff
19 on May 18, 2006, Plaintiff reported that she worked an average of 30 hours per week at Bed,
20 Bath & Beyond in Salt Lake City, Utah, from March through May 2006, earning \$8.50 per hour,
21 before returning to California for an unspecified family emergency. Before that, she worked 35
22 to 40 hours a week at WalMart in Sonora, California, earning \$8.80 per hour. Plaintiff reported
23 that she left both these jobs for reasons other than her medical condition. (Plaintiff appears to
24 have left WalMart to move to Utah and then to have left Bed Bath & Beyond to return to
25 California due to the "family emergency.") Following her return to California, Plaintiff returned
26 to Walmart. From January through May 2006, Plaintiff reported earning \$4,000. At that point,
27 the agency permitted Plaintiff's application to proceed for earnings below the limit for substantial
28 gainful employment.

1 In an undated adult disability report (completed after December 2005 and before a
2 psychiatric appointment scheduled in March 2006), Plaintiff reported that she quit work on
3 December 29, 2005, because she “had a breakdown.” AR 99. Nothing in the agency record
4 documents treatment of any type for a “breakdown” at that time.

5 In her hearing testimony, Plaintiff had no explanation for initially selecting December 29,
6 2005, as her disability date. She testified that she had worked at Walmart for three months and
7 left in August 2006. Thereafter, she had only “sporadic jobs,” such as working at Mervyns for
8 three days. She testified that she never worked anywhere other than Walmart for more than a
9 month. According to Plaintiff, she was unable to stay on the job due to panic attacks, her learning
10 disability and her “need to leave.” She had always had the same impairments but never knew that
11 Social Security was an alternative to her working. When the ALJ questioned Plaintiff with her
12 earnings in prior years, Plaintiff was unable to explain how her condition had changed so that she
13 was now unable to work. When the ALJ asked her about the two years in which she worked at a
14 casino, Plaintiff responded that she performed three different jobs while working there, switching
15 from one job to another because she was bored and had to deal with too many people, She
16 reported difficulty making correct change.

17 Plaintiff testified that she had been affected since childhood by a variety of personality and
18 anxiety disorders, including learning disabilities, attention deficit disorder, obsessive-compulsive
19 disorder and depression. According to Plaintiff, her obsessive-compulsive disorder focused on
20 dirt and germs. She repeatedly cleaned her house and repeatedly washed herself, without regard
21 to actual dirtiness. Plaintiff had a history of alcohol abuse, which was in remission before she
22 applied for disability benefits. As of December 2007, her medications included Celexa
23 (depression), Klonopin (anxiety), Topomax (obsessive-compulsive disorder and post traumatic
24 stress syndrome), and Melatonin (insomnia).

25 Plaintiff liked swimming “the most” and swam at the gym three or four times weekly. She
26 swam more frequently when she was unhappy. According to her disability report, she did not need
27 to be reminded to go places: “I take part in most activities.” Nor did she need anyone to
28 accompany her: “I can do most things on my own.”

1 According to Plaintiff's father, who completed a third-party disability report in February
2 2006, Plaintiff spent her days doing household activities, swimming for exercise, and working
3 part-time at Walmart. She did cleaning, laundry and ironing, but not repairs or yard work, and
4 performed all tasks at normal times and on as-needed basis. She shopped as needed in a normal
5 amount of time for her groceries and personal needs. She visited with others, went to movies, and
6 ate in restaurants. She attended church.

7 **Plaintiff's psychiatrist.** Psychiatrist Alan Peters, M.D., treated Plaintiff's depression and
8 obsessive-compulsive disorder from December 6, 2004, to January 5, 2006, seeing her for twenty
9 or thirty minutes about every few months.² Peters monitored Plaintiff's medications, and referred
10 her for one-to-one therapy.³ On December 6, 2004, Peters noted that Plaintiff was not adapting
11 well to the disruption of her sleep cycle attendant with a casino job on the overnight shift.
12 Nonetheless he observed that, with recent changes in medication, Plaintiff felt better, her mood
13 had stabilized, and her obsessive-compulsive thoughts were less intense. She was more convivial
14 and less morose.

15 By her followup appointment on January 20, 2005, however, Plaintiff had been briefly
16 hospitalized after a disagreement with her aging father, quit her casino job, and precipitously
17 married her boyfriend because it was "a good idea."⁴ By quitting her casino job, Plaintiff lost her
18 medical insurance. Peters noted that Plaintiff was not compliant with her medications. Peters
19 commented that Plaintiff, who had received Social Security disability payments until her earnings
20 disqualified her, contemplated again seeking benefits.

21 In the interval before the next follow-up appointment on March 3, 2005, Plaintiff became
22 pregnant, went off her medications, and miscarried. Plaintiff told Peters that she wanted to wait a
23 year before becoming pregnant again. Her mental status was more positive: she was "not
24 particularly depressed."

25
26 ² Plaintiff contended that Peters had treated her consistently since October 31, 2002. The agency record
only includes Peters' records for the indicated dates.

27 ³ The record includes no evidence that Plaintiff ever received any psychological therapy.

28 ⁴ The record does not include any records relating to the reported hospitalization.

1 Plaintiff did not see Peters again until an overdue follow-up on June 3, 2005. Peters noted
2 that Plaintiff was “not really presenting with any kind of objective evidence to underscore her
3 complaints of depression, nor anxiety.” He wrote:

4 She notes that she has not been doing well lately. She has become anxious, is
5 depressed. Part of her agenda is to try and seek some disability, although in
6 discussing it with her, I make clear that: 1) Social Security Disability, in particular,
7 takes an extensive period of time to acquire, which she is aware of, as she has been
8 on it in the past; 2) She may well be suffering an impairment but she does well
9 when she is on appropriate medication, namely fluvoxamine 300 mg. at bedtime,
10 which she has not been taking. Rather, she has been taking 200 mg. and then also
11 her use of lorazepam 1 mg., which she should be taking one twice daily on a p.r.n.
12 basis. She is only taking one and not even that often.

13 Overall, her anxiety has to do with finances, as her husband is on disability. She is
14 evasive with regards to her alcohol use, which has been problematic.

15 AR 179.

16 Although Plaintiff later attributed her noncompliance with medication to financial
17 problems, Peters noted that Plaintiff had prescription coverage through CMSP and would receive
18 coverage for her medications if Peters arranged prior authorization.

19 On September 21, 2005, Plaintiff reported experiencing anxiety and panic attacks in her
20 new job at Walmart. Plaintiff feared that she might be bipolar. She wanted to move to Texas to
21 live near her father. Peters noted, “[W]e discussed her ongoing dismay of her jobs and how she
22 really wants little to do with the responsibility of working, or certainly of having expectations
23 placed on her.” AR 177.

24 In November 2005, just prior to Plaintiff’s applying for disability benefits, Peters noted
25 that Plaintiff’s recent marriage had become a source of stress because of her husband’s alcohol
26 and drug use, which the husband attributed to stress associated with Plaintiff’s emotional and
27 mental problems. Plaintiff’s inclination was to leave and go live with her father in Texas. Of
28 Plaintiff’s job, Peters wrote:

The patient continues to work at Walmart, which she finds dismal. She continues
working in the men’s department, having to lift heavy things, and is alone. She is
not able to multitask and feeling overwhelmed [*sic*] much of the time. She asks for
a note wherein she might be able to get a transfer into something like cashiering,
which she has been told will be done but she has perceived it as foot dragging.

AR 175.

1 Describing Plaintiff as “forlorn,” Peters diagnosed her problem as marital problems superimposed
2 on her obsessive compulsive disorder. Despite Plaintiff’s claim of being clean and sober, Peters
3 directed her to resume treatment with Doris Jensen.⁵

4 On January 5, 2006, Peters documented Plaintiff’s problems with lithium, which made her
5 vomit, and stomach problems that the hospital emergency room attributed to stress. Plaintiff’s
6 marital problems continued. Despite the reported digestive problems, Plaintiff was eating
7 excessively and had gained weight. Peters referred Plaintiff for one-on-one therapy at the
8 women’s center.⁶

9 **Psychological consultant.** Psychologist Joe M. Azevedo, Ph.D., evaluated Plaintiff for
10 the agency on June 24, 2006. Plaintiff told Acevedo that she was working 32 hours per week at
11 Walmart. He opined:

12 The patient has the general cognitive abilities to understand, remember, and carry
13 out one- and two-step instructions of mild to moderate levels of complexity. Her
14 abilities in maintaining concentration, persistence, and pace seem to be variably
15 impaired, increasingly so during times of increased anxiety. She maintains the
16 ability to make judgments on simple work-related decisions. Her anxiety is likely
17 to result in periodic disruptions in her attempts to manage work pressures and
18 respond to changes in a typical work environment. There also appear to be at least
19 mild limitations in her ability to interact appropriately with supervisors, co-
20 workers, and the general public on a consistent basis.

21 She appears to have only mild psychological restrictions in managing activities of
22 daily living, associated with her obsessive-compulsive behaviors and the associated
23 time-consuming elements.

24 AR 190.

25 In a psychiatric review technique performed August 21, 2006, agency psychiatrist
26 Archimedes Garcia identified that Plaintiff had affective and personality disorders that resulted in
27 mild functional limitations, but had no restriction of activities of daily living, difficulties in
28 maintaining social functioning, or difficulties in maintaining concentration, persistence and pace.

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26 ⁵ The record does not identify Doris Jensen or the type of treatment she provided. No records of any
27 treatment Plaintiff may have received from Doris Jensen are included in the record.

28 ⁶ No reports of any treatment Plaintiff may have received from the Women’s Center are included in the
record.

1 In September 2006, two weeks after a change in her medications, Plaintiff felt “weird”
2 and was treated in the emergency room of Tuolumne General Hospital. The hospital found
3 nothing wrong.

4 On February 15, 2007, Peters completed an assessment of Plaintiff’s ability to do work-
5 related activities. He opined that Plaintiff had fair ability to follow work rules, relate to co-
6 workers, deal with the public, use judgment, and understand, remember and carry out job
7 instructions. She had poor or no ability to interact with supervisors; deal with work stress;
8 function independently; maintain attention or concentration; understand, remember and carry out
9 complex job instructions; or understand, remember, and carry out detailed, but not complex, job
10 instructions. Peters explained that the intrusive nature of Plaintiff’s obsessive-compulsive
11 thoughts interfered with her ability to pay attention and to process instructions. Peters also
12 completed a psychiatric review technique, concluding that Plaintiff had marked limitations in
13 activities of daily living and maintaining social functioning, and frequent deficiencies of
14 concentration, persistence or pace. Peters reported that Plaintiff had three or more instances of
15 deterioration or decompensation, but did not explain what those instances were.

16 On October 9, 2007, Lorrin M. Koran, M.D., evaluated Plaintiff on Peters’ referral. Koran
17 opined that, in addition to her other impairments, Plaintiff displayed symptoms supporting a
18 diagnosis of Tourette disorder. Koran described Plaintiff’s obsessive-compulsive disorder as
19 severe and treatment-resistant. Plaintiff’s obsessive-compulsive disorder and anxiety had the
20 capacity to inappropriately influence her judgment.

21 Koran suggested that Plaintiff would benefit from a complex regimen of medications as
22 well as cognitive behavioral therapy focused on her obsessive-compulsive disorder and skin-
23 picking.⁷ Plaintiff should be evaluated to identify the most beneficial medications for her
24 impairments. Koran offered no opinion on Plaintiff’s ability to work.

25 George Meyers, a vocational expert, testified that Plaintiff could perform several of her
26 prior jobs, including cafeteria attendant, retail sales clerk, and deli clerk.

27
28 ⁷ Nothing in the record indicates that Plaintiff began a more complex regimen of medications or received
cognitive behavioral therapy following Koran’s recommendations.

1 **II. Discussion**

2 **A. Scope of Review**

3 Congress has provided a limited scope of judicial review of the Commissioner’s decision
4 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,
5 a court must determine whether substantial evidence supports the Commissioner’s decision. 42
6 U.S.C. § 405(g). Substantial evidence means “more than a mere scintilla” (*Richardson v. Perales*,
7 402 U.S. 389, 402 (1971)), but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d
8 1112, 1119 n. 10 (9th Cir. 1975). It is “such relevant evidence as a reasonable mind might accept
9 as adequate to support a conclusion.” *Richardson*, 402 U.S. at 401. The record as a whole must
10 be considered, weighing both the evidence that supports and the evidence that detracts from the
11 Commissioner’s decision. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). In weighing the
12 evidence and making findings, the Commissioner must apply the proper legal standards. *See, e.g.*,
13 *Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must uphold the ALJ’s
14 determination that the claimant is not disabled if the ALJ applied the proper
15 legal standards, and if the ALJ’s findings are supported by substantial evidence. *See Sanchez v.*
16 *Secretary of Health and Human Services*, 812 F.2d 509, 510 (9th Cir. 1987).

17 **B. Legal Standards**

18 To qualify for benefits, a claimant must establish that he or she is unable to engage in
19 substantial gainful activity because of a medically determinable physical or mental impairment
20 which has lasted or can be expected to last for a continuous period of not less than twelve months.
21 42 U.S.C. § 1382c (a)(3)(A). A claimant must demonstrate a physical or mental impairment of
22 such severity that he or she is not only unable to do his or her previous work, but cannot,
23 considering age, education, and work experience, engage in any other substantial gainful work
24 existing in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir. 1989).

25 To encourage uniformity in decision making, the Commissioner has promulgated
26 regulations prescribing a five-step sequential process for evaluating an alleged disability. 20
27 C.F.R. §§ 404.1520 (a)-(f); 416.920 (a)-(f). The process requires consideration of the following
28 questions:

- 1 Step one: Is the claimant engaging in substantial gainful activity? If so, the
2 claimant is found not disabled. If not, proceed to step two.
- 3 Step two: Does the claimant have a “severe” impairment? If so, proceed to
4 step three. If not, then a finding of not disabled is appropriate.
- 5 Step three: Does the claimant’s impairment or combination of impairments
6 meet or equal an impairment listed in 20 C.F.R., Pt. 404, Subpt. P,
7 App. 1? If so, the claimant is automatically determined disabled. If
8 not, proceed to step four.
- 9 Step four: Is the claimant capable of performing his past work? If so, the
10 claimant is not disabled. If not, proceed to step five.
- 11 Step five: Does the claimant have the residual functional capacity to perform
12 any other work? If so, the claimant is not disabled. If not, the
13 claimant is disabled.

14 *Lester v. Chater*, 81 F.3d 821, 828 n. 5 (9th Cir. 1995).

15 ALJ Havens found that Plaintiff had not engaged in substantial gainful activity since the
16 alleged onset date of December 29, 2005. Her severe impairments included depression, anxiety,
17 obsessive-compulsive disorder, and attention deficit disorder. The ALJ concluded, however, that
18 none of Plaintiff’s impairments met or equaled an impairment listed in 20 C.F.R. Part 404,
19 Subpart P, Appendix 1. Plaintiff remained capable of performing her past work as a retail sales
20 clerk, cafeteria attendant, and delicatessen clerk. Accordingly, the ALJ concluded that Plaintiff
21 was not disabled.

22 **C. Step One: Is the Claimant Engaging in Substantial Gainful Activity?**

23 At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity
24 since the alleged onset date of December 29, 2005. In making this determination, the ALJ erred
25 since Plaintiff clearly engaged in substantial gainful activity after the December 29, 2005 onset
26 date.

27 **Substantial gainful activity.** The hearing decision stated, “In order to reach a conclusion
28 as to whether the claimant engaged in substantial gainful activity at any time after the alleged
onset date, further evidence must be obtained and additional evaluation must be made.” AR 10.
The ALJ skipped step one, reasoning that, since Plaintiff’s claim could be denied at step four, she
need not determine whether Plaintiff engaged in substantial gainful activity. Substantial evidence

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1 supported a conclusion that Plaintiff engaged in substantial gainful activity after the alleged onset
2 date of her disability.

3 An individual engaged in substantial gainful activity may not receive disability benefits
4 regardless of his or her medical condition, age, education, and work experience. 20 C.F.R. §
5 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987). Substantial gainful activity is work that is
6 both substantial and gainful. 20 C.F.R. § 416.972. Substantial work, which includes part-time
7 work, involves significant mental or physical activities. 20 C.F.R. § 416.972 (a). No person who
8 is capable of performing substantial gainful employment is entitled to disability benefits, even if
9 he or she has a mental or physical disability. 42 U.S.C § 1382c (a)(3)(A) and (B); *Corrao v.*
10 *Shalala*, 20 F.3d 943, 947 (9th Cir. 1994). Substantial gainful activity bars a finding of disability.
11 *Clauson v. Astrue*, 231 Fed.Appx. 660, 662 (9th Cir. 2007).

12 At step one, the applicant bears the burden of proving that he or she is not working. 20
13 C.F.R. § 416.912; *Bowen v. Yuckert*, 482 U.S. 137, 146 n. 5 (1987). Although the ALJ has the
14 duty to develop an adequate record from which a reasonable conclusion can be drawn, he or she
15 need not further develop a record from which a reasoned evaluation may be drawn. *Ribeiro v.*
16 *Barnhart*, 149 Fed.Appx. 7, 8 (1st Cir. 2005)(*internal quotations and citations omitted*).

17 **The earnings presumption.** Disability benefits are intended to ensure that disabled
18 persons have sufficient income to maintain a minimum standard of living. 20 C.F.R. § 416.110.
19 The agency's principal way to evaluate work activity is to apply the earnings guidelines. 20
20 C.F.R. § 416.974 (b)(2). If an applicant's monthly earnings for the year in question average more
21 than the amount for the previous year, or if the applicant's earnings exceed the guideline amount,
22 the applicant is presumed to have engaged in substantial gainful activity. *Id.* Plaintiff's 2006
23 earnings (the last year for which income information is included in the agency record) create a
24 presumption of substantial gainful activity using either measure. Plaintiff's 2006 earnings
25 (\$10,366.45) exceed those of 2005 (\$9124.14). For 2006, the monthly guideline amount was
26 \$860.00. Plaintiff's average monthly earnings (\$10,366.45/12) in 2006 were approximately \$864.
27 Accordingly, Plaintiff is presumed to have engaged in substantial gainful activity in 2006.

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1 Although an applicant’s income creates a presumption of substantial gainful activity, the
2 guidelines are only a presumption and do not relieve the ALJ from fully and fairly developing the
3 record. *Corrao*, 20 F.3d at 948. For an activity to constitute substantial gainful activity, it must
4 involve “significant physical or mental activities” and must be the type of work usually performed
5 for pay or profit. *Id.* Plaintiff’s work as a retail salesperson meets this requirement.

6 A claimant may rebut the presumption by establishing an inability to perform the job well,
7 without special assistance, or only for brief periods of time. *Keyes v. Sullivan*, 894 F.2d 1053,
8 1056 (9th Cir. 1990). Other relevant factors are the amount of time spent working, the quality of
9 the person’s performance, special working conditions, and the possibility of self-employment.
10 *Katz v. Secretary of Health & Human Services*, 972 F.2d 290, 293 (9th Cir. 1992).

11 Plaintiff testified that she was able to hold jobs for less than two months at a time.
12 Although slight work performed for minimal amounts of time is not substantial, part-time work
13 may constitute substantial gainful activity. 20 C.F.R. § 416.972(a); *Corrao*, 20 F.3d at 948. Until
14 she left Walmart in August 2006, Plaintiff worked nearly full time, 35 to 40 hours per week, an
15 amount certainly within the boundaries of substantial work. *See Keyes*, 894 F.2d at 1056
16 (approximately twenty-five hours of work per week is substantial gainful activity). *See also*
17 *Burkhalter v. Schweiker*, 711 F.2d 841, 843 (8th Cir. 1983) (a claimant who was able to work
18 competently as a house cleaner on a regular basis without special help was engaged in substantial
19 gainful activity even though she only worked five hours daily). Plaintiff’s claim is not credible.

20 The assertion that Plaintiff was unable to hold a job more than a month or two did not
21 emerge until a disability report filed September 19, 2006, in which Plaintiff claimed that she was
22 unable to hold a job for more than two months at a time since filing for disability. Plaintiff’s
23 attorney again raised the issue on her behalf in a transmittal letter to the ALJ, commenting that
24 under SSR 96-8p, Plaintiff’s sporadic job history demonstrated that Plaintiff was not able to work
25 on a regular and consistent basis. Curiously, Plaintiff continued to work at Walmart for well over
26 two months after applying for disability benefits. She then moved to Utah where she again
27 worked full- or nearly full-time in a retail sales job. Shortly after returning to California from

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1 Utah and her resumption of her job at Walmart, Plaintiff reported to the agency that her departure
2 from these two jobs was unrelated to her physical impairments.

3 Social Security Ruling 96-8p, which addresses the determination of residual functional
4 capacity when an individual is not engaging in substantial gainful activity, does not support
5 Plaintiff's contentions. Nor does Plaintiff convincingly tie her impairments to her multiple jobs in
6 rapid succession after leaving Walmart in August 2006. Until that point, nothing in the record
7 suggests that Plaintiff's job behavior differed significantly from the large number of young (and
8 some not-so-young) people, who periodically swap one low-paid service sector position for
9 another, whether motivated by boredom, convenience, or the promise of a small increment in
10 hourly wages. Plaintiff herself testified that she had her psychological condition her entire life
11 and it had not suddenly worsened.

12 Unfortunately, neither the ALJ nor Plaintiff's attorney asked Plaintiff why she began
13 quickly changing jobs in August 2006 or why she completely stopped working in November 2006.
14 The ALJ sidestepped the matter by skipping step one. Nonetheless, substantial evidence in the
15 record as a whole established that Plaintiff engaged in substantial gainful activity and was not
16 disabled.

17 **D. Did the ALJ improperly evaluate the physicians' opinions?**

18 Plaintiff first contends that the ALJ improperly rejected the opinions offered by her
19 treating physician, Peters, and her examining physician, Koran, while giving undue weight to the
20 opinion of examining physician Acevedo, who provided a consulting opinion on behalf of the
21 agency. The ALJ explained the weight given to the medical opinions:

22 As for opinion evidence, the undersigned gives substantial weight to the
23 assessments of the State Agency medical consultant [Acevedo] to the effect that
24 the claimant [could] understand, remember and carry out complex instructions,
25 make judgments on simple, work-related matters and interact appropriately with
26 supervisors, co-workers and the public with only mild limitation. This assessment
27 is wholly consistent with the weight of the evidence of record and rendered by a
28 physician who is expert in the evaluation of the medical issues in disability claims
under the Social Security Act. Little weight is given to the assessment of the State
Agency medical consultant to the effect that the claimant has a less than severe
impairment as this is not consistent with the weight of the evidence of record.

The undersigned gives little weight to the assessment of the claimant's treating
physician Allan Peters, M.D., because it is not well-supported by his treatment

1 records showing the claimant maintaining well when she is compliant with
2 medications. Likewise, the claimant [*sic*] gives little weight to the assessment of
3 Lorrin Koran, M.D., to the effect that the claimant is disabled. This non-
4 examining doctor's opinion is without substantial support from the other evidence
5 of record, which obviously renders it less persuasive. Further, the doctor
6 apparently relied quite heavily on the subjective report of symptoms and
7 limitations provided by the claimant, and seemed to uncritically accept as true
8 most, if not all, of what the claimant reported. Yet, as explained elsewhere in this
9 decision, there exist good reasons for questioning the reliability of the claimant's
10 subjective complaints.

11 AR 14-15 (*citations to exhibits omitted*).

12 **1. Evaluation of Doctor's Opinions**

13 Physicians render two types of opinions in disability cases: (1) medical, clinical opinions
14 regarding the nature of the claimant's impairments and (2) opinions on the claimant's ability to
15 perform work. *See Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). An ALJ is "not bound
16 by an expert medical opinion on the ultimate question of disability." *Tomasetti v. Astrue*, 533
17 F.3d 1035, 1041 (9th Cir. 2008); Social Security Ruling 96-5p. The regulations provide that
18 medical opinions be evaluated by considering (1) the examining relationship; (2) the treatment
19 relationship, including (a) the length of the treatment relationship or frequency of examination,
20 and the (b) nature and extent of the treatment relationship; (3) supportability; (4) consistency; (5)
21 specialization; and (6) other factors that support or contradict a medical opinion. 28 C.F.R. §
22 404.1527(d).

23 Three types of physicians may offer opinions in social security cases: "(1) those who
24 treat[ed] the claimant (treating physicians); (2) those who examine[d] but d[id] not treat the
25 claimant (examining physicians); and (3) those who neither examine[d] nor treat[ed] the claimant
26 (nonexamining physicians)." *Lester*, 81 F.3d at 830. A treating physician's opinion is generally
27 entitled to more weight than the opinion of a doctor who examined but did not treat the claimant,
28 and an examining physician's opinion is generally entitled to more weight than that of a non-
examining physician. *Id.* The Social Security Administration favors the opinion of a treating
physician over that of nontreating physicians. 20 C.F.R. § 404.1527; *Orn v. Astrue*, 495 F.3d 625,
631 (9th Cir. 2007). A treating physician is employed to cure and has a greater opportunity to
know and observe the patient. *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987).

1 Nonetheless, a treating physician’s opinion is not conclusive as to either a physical condition or
2 the ultimate issue of disability. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

3 Once a court has considered the source of a medical opinion, it considers whether the
4 Commissioner properly rejected a medical opinion by assessing whether (1) contradictory
5 opinions are in the record; and (2) clinical findings support the opinions. The ALJ may reject the
6 uncontradicted opinion of a treating or examining medical physician only for clear and convincing
7 reasons supported by substantial evidence in the record. *Lester*, 81 F.3d at 831. Even though the
8 treating physician’s opinion is generally given greater weight, when it is contradicted by an
9 examining physician’s opinion that is supported by different clinical findings the ALJ may resolve
10 the conflict. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). The ALJ must set forth a
11 detailed and thorough factual summary, address conflicting clinical evidence, interpret the
12 evidence and make a finding. *Magallanes*, 881 F.2d at 751-55. Without specific and legitimate
13 reasons to reject the opinion, the ALJ must defer to the treating or examining professional.
14 *Lester*, 81 F.3d at 830-31. The ALJ need not give weight to a conclusory opinion supported by
15 minimal clinical findings. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999); *Magallanes*, 881
16 F.2d at 751.

17 Although an ALJ is not bound by opinions rendered by a plaintiff’s physicians regarding
18 the ultimate issue of disability, he or she cannot reject them out of hand, but must set forth clear
19 and convincing reasons for rejecting them. *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993).
20 A general statement that objective factors or the record as a whole are insufficient: the ALJ must
21 tie the objective factors or the record as a whole to the opinions and findings that he or she rejects.
22 *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988).

23 **2. Dr. Peters**

24 The ALJ gave little weight to treating physician Peters’ opinion, finding it inconsistent
25 with the statement in his treatment records that Plaintiff did well when she was compliant with her
26 medications. In evaluating Peters’ opinion, relevant factors include the nature and extent of the
27 treatment relationship, supportability and consistency.

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1 Peters' status as the sole treating physician to provide an opinion in Plaintiff's disability
2 application is not disputed. Plaintiff contends that Peters treated her for many years yet provided
3 treatment notes only for the limited period of December 6, 2004, to January 5, 2006, during which
4 Plaintiff saw Peters seven times. The brief and infrequent appointments apparently existed
5 primarily to permit Peters to supervise Plaintiff's continuing prescription medications. Although
6 the record includes no evidence that Plaintiff ever received any psychological therapy, Peters
7 repeatedly referred Plaintiff to others for that treatment. The treatment notes assess Plaintiff's
8 mood and thought processes, as well as current stressors then affecting Plaintiff. Peters monitored
9 the effects of Plaintiff's medications, addressed side effects, and adjusted dosages. During the
10 period covered in the treatment notes, Plaintiff confronted a variety of stressors including a third-
11 shift job, an impulsive wedding followed by a difficult marriage, a pregnancy during which she
12 discontinued her medications, sharing a home with her new mother-in-law, a miscarriage, a move
13 to another state, and an emergency return to California. Nonetheless, her appointments with
14 Peters were short and infrequent, and her illness was conservatively managed solely through
15 medication. Throughout this period, Plaintiff reportedly did well when she complied with the
16 prescribed timing and dosage of her medications and did poorly when she was noncompliant.

17 Peters' February 15, 2007 assessment was not consistent with the treatment notes. His
18 opinion of marked limitations in daily living activities and maintenance of social function as well
19 as frequent deficiencies of concentration, persistence, and pace contrasted sharply with the level
20 and intensity of treatment provided, that is to say, medication and infrequent monitoring through
21 short appointments. Nor is the opinion consistent with treatment notes indicating that medication
22 improved Plaintiff's general well being and stabilized her mood while diminishing the intensity of
23 her obsessive-compulsive thoughts. When compliant with her medications, Peters wrote that
24 Plaintiff was more convivial, less morose, had more positive mental status, was not particularly
25 depressed. Most telling was Peters' observation that Plaintiff did not like to work and did not
26 want the responsibility of working or other expectations. When Plaintiff indicated her intent to
27 seek disability, Peters observed that Plaintiff's abilities were not impaired when she was
28 compliant with her medications.

1 Similarly, Peters' treatment notes do not support his opinion. Most obviously, the notes
2 include no evidence of three or more instances of deterioration or decompensation. Other than
3 recording Plaintiff's dislike of her jobs and of work in general, the notes include no information
4 supporting Peters' opinion that Plaintiff had fair ability to follow work rules, relate to co-workers,
5 deal with the public, use judgment, and understand, remember and carry out job instructions, but
6 had poor or no ability to interact with supervisors; deal with work stress; function independently;
7 maintain attention or concentration; understand, remember and carry out complex job instructions;
8 or understand, remember, and carry out detailed, but not complex, job instructions.

9 Plaintiff counters by pointing out those portions of the treatment notes that support her
10 disability claims. That portions of the notes support an opinion contrary to the hearing decision is
11 immaterial. The standard of this Court's review is whether substantial evidence supports the
12 Commissioner's decision, not whether substantial evidence could have supported an alternative
13 conclusion. 42 U.S.C. § 405(g).

14 Plaintiff also objects to the ALJ's addressing her noncompliance with medication since, as
15 Peters recognized, Plaintiff sometimes failed to take medications, claiming she could not afford
16 them. That Plaintiff was sometimes noncomplaint with her medications was not the point of the
17 ALJ's finding. Instead the ALJ sought to emphasize that Plaintiff was not severely functionally
18 impaired when she took her medications. In any event, the treatment records noted that Plaintiff's
19 claim that finances dictated her noncompliance was baseless in light of coverage available from
20 CMSP and Peters' willingness to expedite prior approval requests for her medications.

21 The ALJ did not err in assigning Peters' opinion little weight.

22 **3. Dr. Koran**

23 The ALJ gave little weight to Koran's report, which she found unpersuasive for its lack of
24 support from other evidence in the record and reliance on Plaintiff's subjective reports of her
25 symptoms and limitations.

26 According to Koran, Peters referred Plaintiff to Koran "for consultation regarding
27 management of her multiple mental health disorder." AR 262. Koran's report set forth his opinion
28 of her proper diagnoses and suggested pharmacological and therapeutic measures that might

1 effectively treat her symptoms. The Court was unable to identify any opinion that Koran
2 considered Plaintiff disabled. To the contrary, Koran expressed optimism that a series of trials of
3 various medications and combinations of medications could address Plaintiff's multiple symptoms,
4 particularly if combined with cognitive behavior therapy. (There is no evidence that Plaintiff
5 followed through with Koran's recommendations for medication and therapy.)

6 Plaintiff adds that the ALJ erred in evaluating Koran as a nonexamining physician. Since
7 the ALJ's opinion recognizes that Koran examined Plaintiff, the Court agrees with the
8 Commissioner that this misdesignation is no more than a typographical or transcription error.

9 Substantial evidence supported the ALJ's assessment of Koran's opinion.

10 **4. Dr. Acevedo**

11 Although the ALJ disagreed with Acevedo's determination that Plaintiff did not have a
12 severe impairment, she gave substantial weight to the psychologist's assessment that Plaintiff
13 could understand, remember, and carry out complex instructions; make judgments on simple work-
14 related matters, and interact appropriately with supervisors, co-workers, and the general public.
15 Noting Acevedo's specialization in the medical issues of disability claims, the ALJ found
16 Acevedo's opinions consistent with the record as a whole.

17 The Court agrees with the ALJ. Acevedo's report was extensive and complete. His
18 objective of evaluating Plaintiff's current levels of cognitive, emotional, perceptual, and motor
19 functioning was clearly stated. He considered Plaintiff's reported mental health history and her
20 application for disability benefits. Acevedo administered various tests of verbal and perceptual
21 intelligence, on which she generally scored in the low normal range. Plaintiff related competency
22 in activities of daily living: supporting herself with her Walmart earnings, maintaining personal
23 grooming and hygiene, socializing with friends, enjoying swimming and television. That Plaintiff
24 also told Acevedo that she was working at Walmart at the time Acevedo examined her was
25 powerful proof Acevedo's findings that she was able to work in a substantially gainful activity.

26 **5. Summary**

27 The ALJ properly evaluated the opinions of the various physicians.

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1 **E. Step Three: Did Plaintiff Meet Listing 12.04 or 12.06?**

2 The ALJ found that Plaintiff's severe impairments included depression, anxiety, obsessive-
3 compulsive disorder, and attention deficit disorder. Focusing on her meeting the requirements of
4 Subsection A of each listing, Plaintiff contends that the ALJ erred in failing to find that she
5 satisfied the requirements of 20 C.F.R. Pt. 404, Subpt. P, App.1, § 12.04 (affective disorders) or §
6 12.06 (anxiety related disorders). The Court need not address whether Plaintiff satisfied the
7 requirements of Subsection A of each list since Plaintiff fails to satisfy the remaining requirements
8 of the listing.

9 **1. Subsections A and B**

10 For step three of the analysis, the ALJ evaluated Plaintiff using 20 C.F.R., Pt. 404, Subpt.
11 P, App. 1, §§ 12.04 and 12.06, which considered affective disorders and anxiety related disorders.
12 Both listings are similarly structured, first providing an introductory statement characterizing the
13 nature of the impairment. Subsection A of each of listings is tailored to set forth the criteria
14 supporting the specific medical diagnosis. 20 C.F.R., Pt. 404, Subpt. P, App. 1, §12.00A. With
15 regard to affective disorders, such as depression or bipolar disorder, Section 12.04 provides:

16 12.04 *Affective Disorders*: Characterized by a disturbance of mood,
17 accompanied by full or partial manic or depressive syndrome. Mood refers to
18 prolonged emotion that colors the whole psychic life; it generally involves either
19 elation or depression.

 The required level of severity for these disorders is met when the
requirements in both A and B are satisfied, or when the requirements in C are
satisfied.

20 A. Medically documented persistence, either continuous or intermittent, of
21 one of the following:

- 22 1. Depressive syndrome characterized by at least four of the following:
- 23 a. Anhedonia or pervasive loss of interest in almost all activities;
 - 24 b. Appetite disturbance with change in weight; or
 - 25 c. Sleep disturbance; or
 - 26 d. Psychomotor agitation or retardation; or
 - 27 e. Decreased energy; or
 - 28 f. Feelings of guilt or worthlessness; or
 - g. Difficulty concentrating or thinking; or
 - h. Thoughts of suicide; or
 - i. Hallucinations, delusions, or paranoid thinking

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1 With regard to anxiety-related disorders, Section 12.06 provides:

2 12.06. *Anxiety Related Disorders*: In these disorders anxiety is either the
3 predominant disturbance or it is experienced if the individual attempts to master
4 symptoms; for example, confronting the dreaded object or situation in a phobic
5 disorder or resisting the obsessions or compulsions in obsessive compulsive
6 disorders.

7 The required level of severity for these disorders is met when the
8 requirements in both A and B are satisfied, or when the requirements in both A and
9 C are satisfied.

10 A. Medically documented findings of at least one of the following:

11 1. Generalized persistent anxiety accompanied by three out of four
12 of the following signs or symptoms:

- 13 a. Motor tension; or
14 b. Autonomic hyperactivity; or
15 c. Apprehensive expectation; or
16 d. Vigilance and scanning;

17 or

18 2. A persistent irrational fear of a specific object, activity, or
19 situation which results in a compelling desire to avoid the dreaded
20 object, activity, or situation; or

21 3. Recurrent severe panic attacks manifested by a sudden
22 unpredictable onset of instant apprehension, fear, terror and sense of
23 impending doom occurring on the average of at least once a week; or

24 4. Recurrent obsessions or compulsions which are a source of
25 marked distress; or

26 5. Recurrent and intrusive recollections of a traumatic experience,
27 which are a source of marked distress.

28 A claimant must satisfy the requirements of both subsections A and B, or of Subpart C, to
qualify for either listing. As Plaintiff contends in this appeal, sufficient evidence in the record
could be mustered to satisfy the requirements of subsection A for either listing. Nonetheless, the
ALJ did not analyze whether Plaintiff satisfied the requirements of subsection A because he found
that Plaintiff could not satisfy the requirements of subsection B or C. He did not err in failing to
provide a written analysis of subsection A.

To satisfy subpart B of either listing, the symptoms found in subpart A of that listing must
result in at least two of the following:

1. Marked restriction of activities of daily living; or
2. Marked difficulties in maintaining social functioning; or

3. Marked difficulties in maintaining concentration, persistence, or pace; or
4. Repeated episodes of decompensation, each of extended duration.

Daily Living. Without great detail, the ALJ concluded that Plaintiff had a mild restriction of the activities of daily living. The regulation provides:

Activities of daily living include adaptive activities such as cleaning, shopping, cooking, taking public transportation, paying bills, maintaining a residence, caring appropriately for your grooming and hygiene, using telephones and directories, and using a post office. In the context of your overall situation, we assess the quality of these activities by their independence, appropriateness, effectiveness, and sustainability. We will determine the extent to which you are capable of initiating and participating in activities independent of supervision or direction.

We do not define “marked” by a specific number of activities of daily living in which functioning is impaired, but by the nature and overall degree of interference with function. For example, if you do a wide range of activities of daily living, we may still find that you have a marked limitation in your activities if you have serious difficulty performing them without direct supervision, or in a suitable manner, or on a consistent, useful, routine basis, or without undue interruptions or distractions.

20 C.F.R., Pt. 404, Subpt. P, App. 1, § 12.00 C.1.

Plaintiff contends that her deteriorating mental health and excessive fear and worry supported a finding of marked restrictions of daily living. As set forth in the agency record summary above, Plaintiff functioned well on a day-to-day basis, caring for her home and husband, shopping, holding a job, and attending church among other things. She was able to care for herself and demonstrated good personal hygiene. She was capable of relocating to another state, finding work, and then returning to California to respond to a family emergency. In her disability report, Plaintiff herself reported that she was generally able to take care of herself. Substantial evidence supported the ALJ’s finding that Plaintiff’s impairments caused only mild restriction of her activities of daily living.

Social Functioning. The regulatory definition states:

Social functioning refers to your capacity to interact independently, appropriately, effectively, and on a sustained basis with other individuals. Social functioning includes the ability to get along with others, such as family members, friends, neighbors, grocery clerks, landlords, or bus drivers. You may have demonstrated impaired social functioning by, for example, a history of altercations, evictions, firings, ***fear of strangers, avoidance of interpersonal relationships, or social isolation***. You may exhibit strength in social functioning by such things as your ability to initiate social contacts with others, communicate clearly with others, or interact and actively participate in group activities. We also need to consider cooperative behaviors, consideration for others, awareness of others’ feelings, and

1 social maturity. Social functioning in work situations may involve interaction with
2 the public, responding appropriately to persons in authority (e.g., supervisors), or
cooperative behaviors involving coworkers.

3 We do not define “marked” by a specific number of different behaviors in which
4 social functioning is impaired, but by the nature and overall degree of interference
5 with function. For example, if you are highly antagonistic, uncooperative, or hostile
6 but are tolerated by local shopkeepers, we may nevertheless find that you have a
7 marked limitation in social functioning because that behavior is not acceptable in
8 other social contexts.

9 20 C.F.R., Pt. 404, Subpt. P, App. 1, § 12.00 C.2 (*emphasis added*).

10 Plaintiff contends that her testimony supported a finding of restrictions of social function.
11 As detailed in the agency record summary above, Plaintiff socialized with friends, remarried, ate in
12 restaurants and attended church, among other social activities. Substantial evidence in the record
13 as a whole supports the ALJ’s determination.

14 **Concentration, Persistence, and Pace.** The ALJ concluded that Plaintiff had moderate
15 difficulties with concentration, persistence, or pace. The corresponding regulatory provision
16 provides:

17 *Concentration, persistence, or pace* refers to the ability to sustain focused attention
18 and concentration sufficiently long to permit the timely and appropriate completion
19 of tasks commonly found in work settings. Limitations in concentration,
20 persistence or pace are best observed in work settings, but also may be reflected by
21 limitations in other settings. In addition, major limitations in this area can often be
22 assessed through clinical examination or psychological testing. Wherever possible,
23 however, a mental status examination or psychological test data should be
24 supplemented by other available evidence.

25 On mental status examinations, concentration is assessed by tasks such as having
26 you subtract serial sevens or serial threes from 100. In psychological tests of
27 intelligence or memory, concentration is assessed through tasks requiring short-term
28 memory or through tasks that must be completed within established time limits.

In work evaluations, concentration, persistence, or pace is assessed by testing your
ability to sustain work using appropriate production standards, in either real or
simulated work tasks (e.g., filing index cards, locating phone numbers, or
disassembling and reassembling objects). Strengths and weaknesses in areas of
concentration and attention can be discussed in terms of your ability to work at a
consistent pace for acceptable periods of time and until a task is completed, and
your ability to repeat sequences of action to achieve a goal or an objective.

We must exercise great care in reaching conclusions about your ability or inability
to complete tasks under the stresses of employment during a normal workday or
work week based on a time-limited mental status examination or psychological
testing by a clinician, or based on your ability to complete tasks in other settings
that are less demanding, highly structured, or more supportive. We must assess
your ability to complete tasks by evaluating all the evidence, with an emphasis on

1 how independently, appropriately, and effectively you are able to complete tasks on
2 a sustained basis.

3 We do not define “marked” by a specific number of tasks that you are unable to
4 complete, but by the nature and overall degree of interference with function. You
5 may be able to sustain attention and persist at simple tasks but may still have
6 difficulty with complicated tasks. Deficiencies that are apparent only in performing
7 complex procedures or tasks would not satisfy the intent of this paragraph B
8 criterion. However, if you can complete many simple tasks, we may nevertheless
9 find that you have marked limitation in concentration, persistence, or pace if you
10 cannot complete these tasks without extra supervision or assistance, or in
11 accordance with quality and accuracy standards, or at a consistent pace without an
12 unreasonable number and length of rest periods, or without undue interruptions or
13 distractions.

14 Although the hearing decision recognized that Plaintiff had moderate difficulties in
15 concentration, persistence, or pace, the record does not support the a contention in Plaintiff’s
16 memorandum of law that she is unable to function independently outside of her home. To the
17 contrary, the record as a whole included substantial evidence that, despite some restriction in this
18 regard, Plaintiff functioned well outside her home and was both capable of holding a job and
19 actually did hold a job.

20 **Decompensation episodes.** The regulation provides:

21 *Episodes of decompensation* are exacerbations or temporary increases in symptoms
22 or signs accompanied by loss of adaptive functioning, as manifested by difficulties
23 in performing activities in daily living, maintaining social relationships, or
24 maintaining concentration, persistence or pace. Episodes of decompensation may
25 be demonstrated by an exacerbation in symptoms or signs that would ordinarily
26 require increased treatment or a less stressful situation (or combination of the two).
27 Episodes of decompensation may be inferred from medical records showing
28 significant alteration in medication; or documentation of the need for a more
structured psychological support system (e.g., hospitalizations, placement in a
halfway house, or a highly structured and directed household); or other relevant
information in the record about the existence, severity, and duration of the episode.

The term *repeated episodes of decompensation, each of extended duration* in these
listings means three episodes within one year, or an average of once every 4 months,
each lasting for at least 2 weeks. ***If you have experienced more frequent episodes
of shorter duration or less frequent episodes of longer duration, we must use
judgment to determine if the duration and functional effects of the episodes are of
equal severity and may be used to substitute for the listed finding in a
determination of equivalence.***

20 C.F.R., Pt. 404, Subpt. P, App. 1, § 12.00 C.4 (*emphasis added*).

The ALJ found no evidence of episodes of decompensation. Plaintiff does not challenge
her conclusion.

1 **Summary.** Because substantial evidence did not establish that Plaintiff satisfied two
2 provisions in subsection B, she did not satisfy the listing criteria of meeting the requirements of
3 both subsections A and B.

4 **2. Subsection C**

5 For Listing 12.06, subsection C requires that the claimant’s disorder result in a “complete
6 inability to function outside the area of ones home.” The agency record provides substantial
7 evidence of Plaintiff’s ability to satisfactorily function outside her home.

8 For listing 12.04, subsection C provides:

9 Medically documented history of a chronic affective disorder of at least 2 years’
10 duration that has caused more than a minimal limitation of ability to do basic work
11 activities, with symptoms or signs currently attenuated by medication or
12 psychosocial support, and one of the following:

- 13 1. Repeated episodes of decompensation, each of extended duration; or
- 14 2. A residual disease process that has resulted in marginal adjustment that even a
15 minimal increase in mental demands or change in the environment would be
16 predicted to cause the individual to decompensate; or
- 17 3. Current history of 1 or more years’ inability to function outside a highly
18 supportive living arrangement, with an indication of continued need for such
19 arrangement.

20 Nothing in the record supports a finding that Plaintiff met any of the listing 12.04
21 subsection C requirements. Substantial evidence supported the ALJ’s determination that Plaintiff
22 did not meet the listing requirements of 12.04 or 12.06.

23 **F. Plaintiff’s Credibility**

24 Plaintiff contends that the ALJ erred in finding that (1) her medical treatment did not reach
25 the levels to be expected for a totally disabled individual; (2) Plaintiff’s treatment was routine and
26 conservative, and her medications ameliorated her symptoms if she was compliant with the
27 prescribed doses and timing; (3) Plaintiff had a history of alcohol abuse and was not candid with
28 her psychiatrist regarding the status of her remission; (4) despite claiming that she had suffered
with obsessive compulsive disorder since birth Plaintiff had completed college course the extreme
nature of the symptoms to which Plaintiff testified was implausible in light of the evidence in the

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1 record; and (4) Plaintiff claimed not to be aware of disability benefits and continued working after
2 applying for social security. Plaintiff contends that the ALJ erred.

3 An ALJ is not “required to believe every allegation of disabling pain” or other non-
4 exertional requirement. *Orn*, 495 F.3d at 635, quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
5 1989). But if he or she decides to reject a claimant’s pain testimony after a medical impairment
6 has been established, the ALJ must make specific findings assessing the credibility of the
7 claimant’s subjective complaints. *Ceguerra v. Secretary of Health and Human Services*, 933 F.2d
8 735, 738 (9th Cir. 1991). “[T]he ALJ must identify what testimony is not credible and what
9 evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834, quoting *Varney v.*
10 *Secretary of Health and Human Services*, 846 F.2d 581, 584 (9th Cir. 1988). He or she must set
11 forth specific reasons for rejecting the claim, explaining why the testimony is unpersuasive. *Orn*,
12 495 F.3d at 635. See also *Robbins v. Social Security Administration*, 466 F.3d 880, 885 (9th Cir.
13 2006). The credibility findings must be “sufficiently specific to permit the court to conclude that
14 the ALJ did not arbitrarily discredit claimant’s testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958
15 (9th Cir. 2002).

16 When weighing a claimant’s credibility, the ALJ may consider the claimant’s reputation for
17 truthfulness, inconsistencies in claimant’s testimony or between her testimony and conduct,
18 claimant’s daily activities, claimant’s work record, and testimony from physicians and third parties
19 about the nature, severity and effect of claimant’s claimed symptoms. *Light v. Social Security*
20 *Administration*, 119 F.3d 789, 792 (9th Cir. 1997). The ALJ may consider “(1) ordinary techniques
21 of credibility evaluation, such as claimant’s reputation for lying, prior inconsistent statements
22 concerning the symptoms, and other testimony by the claimant that appears less than candid; (2)
23 unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of
24 treatment; and (3) the claimant’s daily activities.” *Tommasetti*, 533 F.3d at 1039 (9th Cir. 2008),
25 quoting *Smolen v. Chater*, 80 F.3d 1273 (9th Cir. 1996). If the ALJ’s finding is supported by
26 substantial evidence, the Court may not second-guess his or her decision. *Thomas*, 278 F.3d at
27 959.

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1 The Ninth Circuit has summarized the applicable standard:

2 [T]o discredit a claimant's testimony when a medical impairment has been
3 established, the ALJ must provide "specific cogent reasons for the disbelief."
4 *Morgan*, 169 F.3d [595,] 599 [9th Cir. 1999] (quoting *Lester*, 81 F.3d at 834). The
5 ALJ must "cit[e] the reasons why the [claimant's] testimony is unpersuasive." *Id.*
6 Where, as here, the ALJ did not find "affirmative evidence" that the claimant was a
7 malingerer, those "reasons for rejecting the claimant's testimony must be clear and
8 convincing." *Id.* Social Security Administration rulings specify the proper bases
9 for rejection of a claimant's testimony . . . An ALJ's decision to reject a claimant's
10 testimony cannot be supported by reasons that do not comport with the agency's
11 rules. *See* 67 Fed.Reg. at 57860 ("Although Social Security Rulings do not have the
12 same force and effect as the statute or regulations, they are binding on all
13 components of the Social Security Administration, . . . and are to be relied upon as
14 precedent in adjudicating cases."); *see Daniels v. Apfel*, 154 F.3d 1129, 1131 (10th
15 Cir. 1998) (concluding the ALJ's decision at step three of the disability
16 determination was contrary to agency rulings and therefore warranted remand).
17 Factors that an ALJ may consider in weighing a claimant's credibility include
18 reputation for truthfulness, inconsistencies in testimony or between testimony and
19 conduct, daily activities, and "unexplained, or inadequately explained, failure to
20 seek treatment or follow a prescribed course of treatment." *Fair*, 885 F.2d at 603;
21 *see also Thomas*, 278 F.3d at 958-59.

22 *Orn*, 495 F.3d at 635.

23 Here, the ALJ thoughtfully explained his reasons for discounting Plaintiff's credibility in
24 great detail, emphasizing the inconsistencies in Plaintiff's testimony and her ability to continue
25 working well beyond the alleged disability date. His determination was supported by substantial
26 evidence. Having reviewed the record as a whole, the Court agrees with the ALJ's assessment of
27 Plaintiff's lack of credibility.

28 Once again, Plaintiff is confused about the scope of this Court's review of the
Commissioner's decisions. Even if the record includes evidence supporting the interpretation that
Plaintiff favors, the applicable measure is whether the ALJ's determination was supported by
substantial evidence. The treatment notes in the agency record, including Plaintiff's own report of
December 6, 2007, fully support the ALJ's determination in that Plaintiff's impairments were
addressed pharmacologically with period follow-up appointments to permit Plaintiff's psychiatrist
to monitor her condition. Interestingly, Plaintiff submitted only a limited number of Dr. Peters'
treatment notes and no documentation at all of Dr. Gleason's treatment.

Despite Plaintiff's protest of her difficulties in college and at work, Plaintiff was able to
attend college and to work. The Court is not impressed by Plaintiff's offer to amend her alleged

1 disability date after the agency discovered that she applied for benefits but continued to work after
2 the alleged disability date. Indeed, the Court finds Plaintiff to lack credibility specifically because
3 of her attempts to manipulate the system so that she could continue to work and earn until she
4 could support herself with taxpayer assistance. Plaintiff's testimony that, because she was
5 unfamiliar with Social Security, she had no idea that she should not have continued to work after
6 her alleged disability date is especially incredible in light of her telling Peters that she had
7 previously received disability assistance, had lost it when she earned too much money, but wanted
8 to regain disability benefits. Elsewhere, noting Plaintiff's ongoing dismay with her jobs, Peters
9 commented that Plaintiff "really wants little to do with the responsibility of working." AR 177.

10 The contradictions between Plaintiff's testimony and behavior, and the other evidence is
11 apparent in a number of areas. For example, Plaintiff claimed to be unable to make change, yet
12 repeatedly worked in cashier positions. She claimed to have panic attacks if too many people were
13 around, yet she sought to have her Walmart supervisors transfer her from the men's department to
14 the cash registers because she was alone in the men's department. Plaintiff claimed that she was
15 repeatedly discharged from jobs for learning disabilities, but her employment history showed that
16 she was able to hold jobs for several years at a time. Plaintiff herself reported that she left various
17 jobs for reasons unrelated to her impairments.

18 The ALJ's assessment of Plaintiff's credibility was supported by substantial evidence.

19 **G. Plaintiff's Father's Statement**

20 Plaintiff contends that the ALJ erred in failing to assign weight to the third-party disability
21 report of Plaintiff's father, Robert Lowry. In the course of assessing Plaintiff's limitations, the ALJ
22 acknowledged various details Lowry's report in a full paragraph.

23 "Lay testimony as to a claimant's *symptoms* is competent evidence which the Secretary
24 must take into account, unless he ultimately determines to disregard such testimony, in which case
25 'he must give reasons that are germane to each witness.'" *Nguyen v. Chater*, 100 F.3d 1462, 1467
26 (9th Cir. 1996), *quoting Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). Friends and family
27 members who are in a position to observe the claimant's symptoms and daily activities are
28 competent to testify about their observations of the claimant's condition. *Dodrill*, 12 F.3d at 918-

1 19. An ALJ’s disregard of the testimony of friends and family members violates the regulations,
2 which provide for consideration of the observations of non-medical sources regarding the effects of
3 the claimant’s impairments on his ability to work. *Id.*, citing 20 C.F.R. § 404.1513(e)(2).⁸ *See*
4 *also Sprague*, 812 F.2d at 1232. When a claimant alleges symptoms that are not supported by
5 medical evidence in the record, the agency directs the adjudicator to obtain information about those
6 symptoms from third parties likely to have such knowledge. SSR 88-13. The ALJ must give “full
7 consideration” to such testimony. *Id.*

8 Plaintiff’s claim that the ALJ failed to assign weight to her father’s report is baffling. The
9 ALJ fully considered the report in the course of the hearing opinion. Nothing more was required.

10 **H. Vocational Expert Testimony**

11 Citing *Robbins*, 466 F.3rd at 883, for the proposition that an ALJ must consider all relevant
12 evidence in determining a claimant’s residual functional capacity, Plaintiff contends that the ALJ
13 erred in failing to pose hypothetical questions including all of Plaintiff’s limitations. Taken in
14 context, the language on which Plaintiff relies relates to an ALJ’s determination of a claimant’s
15 credibility. Later in the *Robbins* opinion, addressing Robbins’ contention that the ALJ failed to
16 include some of his functional limitations, the court opined, “[T] ALJ must only include those
17 limitations supported by substantial evidence.” *Id.* at 886. Because the *Robbins* court concluded
18 that the ALJ erred in disregarding the testimony of Robbins and his father, the ALJ in *Robbins*
19 erred by not including evidence derived from that testimony in its hypothetical questions. *Id.*

20 This case is distinguishable in that the ALJ here did not wrongly exclude any of the
21 evidence that Plaintiff would have had her include. The hypothetical questions in this case
22 satisfied the *Robbins* standard since they include all limitations supported by substantial evidence.

23 **III. Conclusion and Order**

24 The Court finds that the ALJ applied appropriate legal standards and that substantial
25 credible evidence supported the ALJ’s determination that Plaintiff was not disabled. Accordingly,
26 the Court hereby DENIES Plaintiff’s appeal from the administrative decision of the Commissioner
27

28 ⁸ The relevant section is now designated 20 C.F.R. § 1513 (d)(4).

1 of Social Security. The Clerk of Court is DIRECTED to enter judgment in favor of the
2 Commissioner and against Plaintiff.

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4 IT IS SO ORDERED.

5 **Dated: June 24, 2011**

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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