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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

KELLY ARLENE TURNER,
Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Defendant.

**Case No. 1:14-cv-1482-EPG
ORDER REGARDING PLAINTIFF'S
SOCIAL SECURITY COMPLAINT**

I. INTRODUCTION

Plaintiff , Kelly Arlene Turner (“Plaintiff”), seeks judicial review of a final decision by the Commissioner of Social Security (“Commissioner” or “Defendant”) denying her application for Supplemental Security Income (“SSI”) benefits pursuant to Title XVI of the Social Security Act. The matter is currently before the Court on the parties’ briefs, which were submitted without oral argument to the Honorable Erica P. Grosjean, United States Magistrate Judge.¹

II. BACKGROUND AND PRIOR PROCEEDINGS²

Plaintiff was 52 years old at the time of the hearing. AR 44. AR 38. She has a GED and most recently worked as an in-home care aid assisting her cousin in 2008. AR 51-52, 64.

Plaintiff filed an application for SSI on December 20, 2010, alleging disability due to

¹ The parties consented to the jurisdiction of the United States Magistrate Judge. (ECF Nos. 7, 8, 10.)
² References to the Administrative Record will be designated as “AR,” followed by the appropriate page number.

1 osteoarthritis, hypertension, bronchial asthma, extreme obesity, anxiety and depression. AR 191.
2 Her application was denied initially on July 8, 2011, and on reconsideration on November 2,
3 2011. AR 40, 107, 114. A hearing was conducted before Administrative Law (“ALJ”) Sharon
4 Madsen (the “ALJ”) on October 4, 2012. AR 40-75. On December 7, 2012, the ALJ issued an
5 unfavorable decision finding that Plaintiff was not disabled. AR 21-30. Plaintiff filed an appeal
6 of the decision with the Appeals Council. AR 18. The Appeals Council denied her appeal,
7 rendering the order the final decision of the Commissioner. AR 1-3.

8 Plaintiff now challenges that decision, arguing that: (1) the ALJ failed to give clear and
9 convincing reasons for discounting Plaintiff’s treating physician’s opinion regarding her physical
10 impairments; (2) the ALJ improperly evaluated the effects of Plaintiff’s obesity; and (3) the ALJ
11 erred by discounting the examining psychologist’s opinion and finding Plaintiff’s impairment was
12 not severe. Doc. 14, pgs. 2-14). Plaintiff argues that these errors can only be addressed by
13 remanding this case for further proceedings. In opposition, Defendant argues: (1) that the ALJ
14 correctly evaluated the medical evidence; (2) the ALJ’s analysis of Plaintiff’s obesity was proper,
15 and (3) the decision is supported by substantial evidence. (Doc. 15, pgs. 5-15). Upon a review of
16 the administrative record, the Court finds the ALJ’s decision is not supported by substantial
17 evidence, and the case is remanded to the agency for further proceedings.

18 **III. THE DISABILITY DETERMINATION PROCESS**

19 To qualify for benefits under the Social Security Act, a plaintiff must establish that he or
20 she is unable to engage in substantial gainful activity due to a medically determinable physical or
21 mental impairment that has lasted or can be expected to last for a continuous period of not less
22 than twelve months. 42 U.S.C. § 1382c(a)(3)(A). An individual shall be considered to have a
23 disability only if:

24 . . . his physical or mental impairment or impairments are of such severity that he
25 is not only unable to do his previous work, but cannot, considering his age,
26 education, and work experience, engage in any other kind of substantial gainful
27 work which exists in the national economy, regardless of whether such work
exists in the immediate area in which he lives, or whether a specific job vacancy
exists for him, or whether he would be hired if he applied for work.

28 42 U.S.C. § 1382c(a)(3)(B).

1 To achieve uniformity in the decision-making process, the Commissioner has established
2 a sequential five-step process for evaluating a claimant’s alleged disability. 20 C.F.R. §
3 416.920(a)-(f). The ALJ proceeds through the steps and stops upon reaching a dispositive finding
4 that the claimant is or is not disabled. 20 C.F.R. § 416.920(a)(4). The ALJ must consider
5 objective medical evidence and opinion testimony. 20 C.F.R. §§ 416.927, 416.929.

6 Specifically, the ALJ is required to determine: (1) whether a claimant engaged in
7 substantial gainful activity during the period of alleged disability, (2) whether the claimant had
8 medically-determinable “severe” impairments,³ (3) whether these impairments meet or are
9 medically equivalent to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P,
10 Appendix 1, (4) whether the claimant retained the residual functional capacity (“RFC”) to
11 perform his past relevant work,⁴ and (5) whether the claimant had the ability to perform other jobs
12 existing in significant numbers at the regional and national level. 20 C.F.R. § 416.920(a)-(f).

13 Using the Social Security Administration’s five-step sequential evaluation process, the
14 ALJ determined that Plaintiff did not meet the disability standard. AR 30. In particular, the ALJ
15 found that Plaintiff had not engaged in substantial gainful activity since December 20, 2010, the
16 date her application was filed. AR 23. Further, the ALJ identified lumbar and cervical
17 degenerative disc disease, obesity, and asthma as severe impairments, however, she found that
18 Plaintiff’s depression was not severe.⁵ AR 23. The ALJ also determined that Plaintiff did not
19 have an impairment or combination of impairments that meets or equals the severity of one of the
20 listed impairments in 20 CFR Part 404, Subpart P, Appendix 1. AR 20.

21 Based on a review of the entire record, the ALJ determined that Plaintiff had the RFC to
22 lift and/or carry 20 pounds occasionally and 10 pounds frequently; sit, stand, and walk for 6 hours
23 in an 8-hour workday; occasionally climb, stoop, crouch, crawl, and frequently balance and kneel;

24 _____
25 ³ “Severe” simply means that the impairment significantly limits the claimant’s physical or mental ability to do basic
work activities. See 20 C.F.R. § 416.920(c).

26 ⁴ Residual functional capacity captures what a claimant “can still do despite [his or her] limitations.” 20 C.F.R. §
27 416.945. “Between steps three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in
which the ALJ assesses the claimant’s residual functional capacity.” *Massachi v. Astrue*, 486 F.3d 1149, 1151 n. 2
(9th Cir. 2007).

28 ⁵ The ALJ also found that Plaintiff’s hypertension, hepatitis C, and history of cocaine abuse were also not severe
impairments, but these conditions are not reference in this discussion because they are not at issue in this appeal.

1 and that Plaintiff should avoid exposure to dust, gases, fumes, cold, wetness, and humidity. AR
2 24. Based on this RFC, the ALJ found that Plaintiff could perform jobs that exist in significant
3 numbers in the national economy, including a packaging line worker, a garment sorter, and a
4 ampoule filler. AR 29.

5 **IV. STANDARD OF REVIEW**

6 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine
7 whether: (1) it is supported by substantial evidence; and (2) it applies the correct legal standards.
8 See *Carmickle v. Commissioner*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*, 499 F.3d
9 1071, 1074 (9th Cir. 2007).

10 “Substantial evidence means more than a scintilla but less than a preponderance.”
11 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). It is “relevant evidence which,
12 considering the record as a whole, a reasonable person might accept as adequate to support a
13 conclusion.” *Id.* “Where the evidence is susceptible to more than one rational interpretation, one
14 of which supports the ALJ's decision, the ALJ's conclusion must be upheld.” *Id.*

15 **V. DISCUSSION**

16 **A. The ALJ’s Assessment of the Medical Opinions is Not Supported by Substantial** 17 **Evidence.**

18 Plaintiff argues that the ALJ improperly considered the medical evidence regarding
19 Plaintiff’s physical impairments. Specifically, Plaintiff is challenging the ALJ’s reliance on Dr.
20 Khong, a non-examining state agency physician’s opinion, in lieu of Dr. Bhateja, her treating
21 physician’s opinion. Plaintiff argues that the medical evidence supports Dr. Bhateja’s opinion,
22 and that the ALJ failed to give clear and convincing reasons for rejecting the report. Plaintiff
23 contends that by failing to obtain additional tests or evaluations to clarify any ambiguities in the
24 record, the ALJ relied on her own lay opinion, which is improper. (Doc. 14, pgs. 2-8).

25 Defendant contends that the ALJ’s assessment of the medical analysis is supported by
26 substantial evidence, and the ALJ properly rejected Dr. Bhateja’s opinion. Defendant also asserts
27 that there is no evidence that Dr. Bhateja was Plaintiff’s treating physician. In fact, it is not clear
28 from the opinion that the doctor ever examined the Plaintiff and there was no medical basis for

1 the doctor's findings. (Doc. 15, pgs. 5-7).

2 **1. The ALJ's Findings**

3 When evaluating Plaintiff's physical impairments, the ALJ outlined Plaintiff's treatment
4 by summarizing tests, MRI's, and x-rays. AR 26-28. When evaluating the doctors' opinion
5 evidence, the ALJ states as follows:

6 As for the opinion evidence, the State Agency consultant [Dr.
7 Khong] opined that the claimant could lift and carry 20 pounds
8 occasionally, and 10 pounds frequently, sit, stand, and walk for six
9 hours in an 8 hour day, occasionally climb ladders, ropes, and
10 scaffolds, stoop crouch, and crawl, and frequently climb ramps and
11 stairs, balance, and kneel. I give significant weight to this opinion
12 as [it] is consistent with the medical evidence and the residual
13 functional capacity as determined above.

14 Regarding the other doctors' opinions, the ALJ noted the following:

15 Dr. Wagner opined that claimant could lift and carry 50 pounds
16 occasionally and 25 pounds frequently, stand and walk up to six
17 hours, and occasionally stoop, and should not work around
18 extremes of temperature, chemicals, dust, fumes, or gases. I give
19 great weight to Dr. Wagner's opinion regarding [the] standing,
20 walking, stooping, and environmental limitations, but little weight
21 to his opinion regarding the lifting and carrying.

22 Dr. Meera Bhateja opined that claimant can lift and carry 10 pounds
23 occasionally and frequently, stand and walk for about three hours,
24 sit for about six [sic] hours in an 8 hour day, occasionally stoop,
25 crouch, and climb stairs, and never climb ladders, and should not
26 work with machinery that could cut him or cause him to fall. I find
27 that this opinion is not consistent with the minimal clinical findings
28 and is given little weight.

AR 28 (citations omitted).

2. Legal Standards for Medical Opinions

The weight given to medical opinions depends in part on whether they are offered by
treating, examining, or non-examining (reviewing) professionals. *Holohan v. Massanari*, 246
F.3d 1195, 1201 (9th Cir. 2001); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Ordinarily,
more weight is given to the opinion of a treating professional, who has a greater opportunity to
know and observe the patient as an individual. *Id.*; *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th
Cir. 1996).

1 An ALJ may reject an uncontradicted opinion of a treating or examining medical
2 professional only for “clear and convincing” reasons. *Lester*, 81 F.3d at 831. In contrast, a
3 contradicted opinion of a treating or examining professional may be rejected for “specific and
4 legitimate” reasons. *Lester*, 81 F.3d at 830. While a treating professional's opinion is generally
5 accorded superior weight, if it is contradicted by an examining professional's opinion (when
6 supported by different independent clinical findings), the ALJ may resolve the conflict. *Andrews*
7 *v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995), citing *Magallanes v. Bowen*, 881 F.2d 747, 751
8 (9th Cir. 1989). The regulations require the ALJ to weigh the contradicted treating physician
9 opinion, *Edlund v. Massanari*, 253 F.3d 1152 (9th Cir. 2001), except that the ALJ need not give it
10 any weight if it is conclusory and supported by minimal clinical findings. *Meanel v. Apfel*, 172
11 F.3d 1111, 1113 (9th Cir. 1999) (treating physician's conclusory, minimally supported opinion
12 rejected); *see also Magallanes*, 881 F.2d at 751.

13 The opinion of an examining physician is, in turn, entitled to greater weight than the
14 opinion of a non-examining physician. *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990);
15 *Gallant v. Heckler*, 753 F.2d 1450 (9th Cir. 1984). As is the case with the opinion of a treating
16 physician, the Commissioner must provide “clear and convincing” reasons for rejecting the
17 uncontradicted opinion of an examining physician. And like the opinion of a treating doctor, the
18 opinion of an examining doctor, even if contradicted by another doctor, can only be rejected for
19 specific and legitimate reasons that are supported by substantial evidence in the record. *Lester v.*
20 *Chater*, 81 F.3d 821, 830 (9th Cir. 1996).

21 The opinion of a non-examining physician may constitute substantial evidence when it is
22 “consistent with independent clinical findings or other evidence in the record.” *Thomas v.*
23 *Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). Such independent reasons may include laboratory
24 test results or contrary reports from examining physicians, and plaintiff's testimony when it
25 conflicts with the treating physician's opinion. *Lester*, 81 F.3d at 831, citing *Magallanes*, 881
26 F.2d at 751–55.

27 3. Analysis

28 Here, there is no dispute regarding the content of the medical records, or the doctors’

1 opinions. Instead, the parties are disputing the weight that the ALJ accorded the physicians'
2 opinions, and the interpretation of the medical record. As a preliminary matter, the Court is not
3 persuaded by Plaintiff's argument that the ALJ applied her own lay interpretation of the medical
4 data. Instead, the ALJ summarized the medical record and relied on Dr. Khong's findings in lieu
5 of Dr. Bhateja's opinion. AR 28. Similarly, because there are two conflicting medical opinions,
6 contrary to Plaintiff's assertions that clear and convincing reasons are required, the ALJ is only
7 required to provide specific and legitimate reasons for rejecting Dr. Bhateja's opinion. *Lester*, 81
8 F.3d at 830.

9 Notwithstanding the above, the ALJ's analysis is not supported by substantial evidence
10 because the only reason given to reject Dr. Bhateja's opinion is that, "it is not consistent with the
11 minimal clinical findings and is given little weight." AR 28. As noted above, an ALJ may rely
12 on a non-examining physicians' opinion in certain circumstances. *See, Meanel*, 172 F. 3d at 1113
13 (treating physician's conclusory, minimally supported opinion rejected); *Magallanes*, 881 F.2d at
14 751. However, here, the ALJ did not identify the minimal clinical findings in Dr. Bhateja's
15 opinion she found insufficient and why.

16 The Commissioner argues the ALJ properly rejected Dr. Bhateja's opinion because the
17 only medical finding supporting the proposed limitations is that Plaintiff was "on blood thinner
18 and risk of falls should not be taken." AR 501. Also, the Commissioner notes that there is no
19 evidence that the doctor was Plaintiff's treating physician, and it is unclear whether the doctor
20 even examined Plaintiff as part of the evaluation. (Doc. 15, pgs. 6-7). However, the ALJ did not
21 rely on these factors as part of her analysis and the Court is not permitted to accept post hoc
22 explanations for the ALJ. *Lewin v. Schweiker*, 654 F.2d 631, 634 35 (9th Cir. 1981). A
23 reviewing court cannot affirm an ALJ's decision denying benefits on a ground not invoked by the
24 Commissioner. *Stout v. Comm'r*, 454 F.3d 1050, 1054 (citing *Pinto v. Massanari*, 249 F.3d 840,
25 847 (9th Cir. 2001)).

26 Additionally, when giving Dr. Khong's opinion significant weight, the ALJ stated she was
27 doing so because Dr. Khong's opinion, "is consistent with the medical evidence, and the RFC as
28 determined above." AR 28. This is problematic because it is well established that a claimant's

1 RFC is “the most [the Claimant] can still do despite [his or her] limitation[s].” 20 C.F.R. §
2 404.1545(a); 20 C.F.R. § 416.945(1). “The assessment of a RFC must be based on all the relevant
3 evidence in [the claimant’s] case record.” *Id.* Furthermore, if the RFC assessment conflicts with a
4 medical source opinion, the ALJ must explain why the opinion was not adopted. SS 96-8. Here,
5 the ALJ’s reasoning is misplaced because she used the RFC she formulated as a basis to support
6 Dr. Khong’s limitations, rather than using the limitations outlined in Dr. Khong’s opinion to
7 formulate the RFC. Furthermore, although the ALJ did a thorough summary of the medical
8 record in this case, it is unclear what portions of the summary the ALJ was relying on in claiming
9 that the record supported Dr. Khong’s findings. AR 26-28.

10 In light of the above, the ALJ’s analysis of the physician opinions of Plaintiff’s medical
11 impairments is not supported by substantial evidence. The case will be remanded so the ALJ can
12 more fully explain her reasoning for giving Dr. Khong’s opinion greater weight, and why Dr.
13 Bhateja’s opinion was rejected. In remanding the case, the Court does not offer an opinion about
14 whether additional examination or testing is required, or whether the ALJ’s disability
15 determination should altered, only that the record needs to be more fully developed so this Court
16 can properly evaluate the ALJ’s reasoning.

17 **B. Plaintiff’s Obesity**

18 Plaintiff argues that the ALJ improperly evaluated the effects of the Plaintiff’s obesity.
19 An evaluation of the ALJ’s consideration of Plaintiff’s obesity is dependent on weight the ALJ
20 accords the medical evidence. Accordingly, if different medical evidence is presented on remand,
21 the ALJ’s obesity analysis may also change. However, based on the record currently before the
22 Court, the ALJ’s analysis of Plaintiff’s obesity is supported by substantial evidence.

23 An ALJ is required to consider an individual’s obesity at steps two through five of the
24 sequential disability evaluation. SSR 02-1p, 2002 WL 34686281 (2002). Moreover, obesity must be
25 considered in combination with the individual’s other impairments. *Id.* SSR 02-1p directs that “[the
26 ALJ] will not make assumptions about the severity or functional effects of obesity combined with
27 other impairments.” *Id.* Rather, “[the ALJ] will evaluate each case based on the information in the
28 case record.” *Id.* When the record does not contain evidence of functional limitation due to obesity, or

1 indicate that obesity exacerbated other impairments, the ALJ is not required to consider obesity in
2 combination with other impairments. *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005); *see also*
3 *Garcia v. Comm’r of SSA*, 498 Fed. Appx. 710, 712 (9th Cir. 2012) (the ALJ’s finding that obesity did
4 not impact the RFC was proper where the Plaintiff “did not provide any evidence of functional
5 limitations due to obesity which would have impacted the ALJ’s analysis”) (internal quotation marks
6 omitted); *Hoffman v. Astrue*, 266 Fed. Appx. 623, 625 (9th Cir. 2008) (“The ALJ’s failure to consider
7 Hoffman’s obesity in relation to his RFC was proper because Hoffman failed to show how his obesity
8 in combination with another impairment increased the severity of his limitations.”).

9 In this case, the ALJ noted that Plaintiff weighs 230 pounds, is 5 feet 3 inches tall, and that
10 Plaintiff’s weight ranged from 220 to 258 pounds. AR 26, 28. The ALJ also found Plaintiff’s obesity
11 was a severe impairment, but noted that no doctor imposed any limitation based on her weight. AR
12 28. Plaintiff as not articulated any functional limitations a doctor has imposed because of her obesity,
13 or demonstrated that her obesity exacerbated other impairments. Under these circumstances, the ALJ
14 was not required to consider Plaintiff’s obesity in combination with other impairments. Therefore, the
15 ALJ’s consideration of obesity was without legal error and is supported by substantial evidence.

16 **C. The ALJ Improperly Assessed Plaintiff’s Mental Impairment at Step Two**

17 Plaintiff challenges the ALJ’s finding that Plaintiff’s mental impairment was not severe.
18 Specifically, Plaintiff argues that the ALJ improperly discounted the opinion of the consultative
19 examining psychologist, Dr. Gauch’s, and as a result, the formulation of the RFC determination
20 was improper. The Commissioner responds that the ALJ properly gave Dr. Gauch’s report little
21 weight because it was more restrictive than her examination supported, which is a proper basis to
22 reject the opinion. Notably, the Commissioner does not specifically address the ALJ’s analysis at
23 step two.

24 **1. The ALJ’s Findings**

25 The ALJ found Plaintiff’s depression to be non-severe at step two of the disability
26 analysis. The ALJ discussed the medical evidence regarding Plaintiff’s mental impairment, and
27 rejected the opinion of Dr. Gauch, Psy.D., a state agency consulting psychologist, who found that
28 Plaintiff was incapable of managing her funds and had a poor ability to sustain an ordinary

1 routine without special supervision. AR 23, 439-440. Dr. Gauch also opined that Ms. Turner had
2 a fair ability to understand and remember very short and simple, instructions; could complete a
3 normal workday and workweek without interruptions at a constant pace; deal with the various
4 changes in the work setting; but had a fair likelihood of emotionally deteriorating in the work
5 environment. AR 439-440.

6 The ALJ gave Dr. Gauch’s findings little weight because “her opinion is more restrictive
7 than her examination supports.” AR 23, 435, 440. In finding Plaintiff’s depression was not
8 severe, the ALJ also noted that the state agency consultants opined that Plaintiff did not have any
9 severe impairments (AR 323-333; 441-444), and that Plaintiff did not seek out any mental health
10 treatment. AR 23.

11 **2. Legal Standard for Evaluating Whether an Impairment is Severe**

12 At step two of the five-step sequential disability inquiry, the Commissioner determines
13 “whether medical evidence establishes an impairment or combination of impairments of such
14 severity as to be the basis of a finding of inability to engage in any [substantial gainful activity].”
15 SSR 85-28, 1985 WL 568556 (1985) (internal quotation marks omitted); *see also* 20 C.F.R. §§
16 404.1520(c), 416.920(c). Under Social Security regulations, “[a]n impairment or combination of
17 impairments is not severe if it does not significantly limit [an individual’s] physical or mental
18 ability to do basic work activities.”⁶ 20 C.F.R. §§ 404.1521(a), 416.921(a). Social Security
19 Ruling (“SSR”) 85-28 further clarifies that an impairment or combination of impairments is “not
20 severe” when “medical evidence establishes only a slight abnormality or a combination of slight
21 abnormalities *which would have no more than a minimal effect on an individual’s ability to work*
22 even if the individual’s age, education, or work experience were specifically considered.” SSR
23 85-28, 1985 WL 568556 (1985) (emphasis added); *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir.
24 1988) (adopting SSR 85-28); *Thune v. Astrue*, 499 Fed.Appx. 701, 703 (2012) (an impairment

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26 ⁶ Basic work activities are defined as “the abilities and aptitudes necessary to do most jobs,” including physical
27 functions (such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling); capacities for
28 seeing, hearing, and speaking; understanding, carrying out, and remembering simple instructions; use of judgment;
responding appropriately to supervision, co-workers and usual work situations; and dealing with changes in a routine
work setting. 20 C.F.R. §§ 140.1521(b), 416.921(b).

1 can be found “not severe” only if the evidence establishes a slight abnormality that has no more
2 than a minimal effect on an individual’s ability to work). Put differently, the step two severity
3 inquiry is a “de minimus screening device to dispose of groundless claims.” *Smolen v. Chater*, 80
4 F.3d 1273, 1290 (9th Cir. 1996).

5 When the severity of a mental impairment is at issue, the regulations require a state
6 agency reviewing physician to rate the claimant’s functional limitations in four broad areas
7 (activities of daily living; social functioning; concentration, persistence or pace; and episodes of
8 decompensation). The ALJ’s written decision must then address the reviewing physician’s
9 findings in relation to his or her determination at step two of the analysis. SSR 96-8p, 1996 WL
10 374184 (1996); 20 C.F.R. §§ 404.1520a(c)(3) and (e), 416.920a(c)(3) and (e); *Keyser v.*
11 *Commissioner of Social Security*, 648 F. 3d 721, 725 (9th Cir. 2011). If the degree of functional
12 limitations in the first three functional areas is rated as “none” or “mild” and “none” in the fourth
13 area, the impairment is generally considered not severe, unless the evidence otherwise indicates
14 that there is more than a minimal limitation in the ability to do basic work activities. 20 C.F.R. §§
15 404.1520a(d)(1), 416.920a(d)(1).

16 Here, the ALJ gave little weight to Dr. Gauch’s opinion because she felt the doctor’s
17 limitations were more restrictive than her examination results. Contrary to Plaintiff’s assertions,
18 this is a legitimate and specific reason to reject the opinion because the ALJ noted several areas
19 where Plaintiff’s evaluation was within normal limits including Plaintiff’s stream of mental
20 activity, her speech form, and that Plaintiff’s ability to complete a normal workday and workweek
21 without interruptions at a constant pace was fair. AR 23-24.

22 However, the troubling aspect of the ALJ’s analysis is the application of the psychiatric
23 review technique (“PRT”) pursuant to 20 C.F.R. § 416.920a. Although the ALJ did the PRT
24 analysis in the decision, a review of the PRT form completed by the state agency doctor is
25 incomplete - the doctor makes an assessment that Plaintiff’s mental impairment is non-severe on
26 the first page, but the rest of the form is blank. AR 323-333. This is problematic because the
27 doctor never rated Plaintiff in the four functional areas before making the non-severity finding.
28 This is not in compliance with the regulations that require that the assessment in the four areas be

1 performed in order for the severity determination to be made. 20 C.F.R. §416.920a(d) (“Use of
2 the technique to evaluate mental impairments. After we rate the degree of functional limitation
3 resulting from your impairment(s), we will determine the severity of your mental
4 impairment(s)”). When finding that Plaintiff’s impairment was not severe, the ALJ relied in part
5 on the fact that state agency consultants opined that Plaintiff did not have a severe impairment.
6 AR 23, 323-333, 441-444. However, only one state agency doctor, Dr. Vea, found Plaintiff’s
7 depression was not severe, and this was based on an incomplete form, which is not consistent
8 with the regulations. 20 C.F.R. §416.920a(e) (“the [s]tate agency medical or psychological
9 consultant has overall responsibility for assessing medical severity. A [s]tate agency disability
10 examiner may assist in preparing the standard document. However, our medical or psychological
11 consultant must review and sign the document to attest that it is complete and that he or she is
12 responsible for the content, including the findings of fact and any discussion of supporting
13 evidence”). This is especially relevant because the ALJ rejected Dr. Gauch’s opinion part, based
14 on Dr. Vea’s non-severity finding. AR 23.

15 Furthermore, in finding that Plaintiff’s mental impairment was not severe, the ALJ noted
16 that Plaintiff had not sought out any mental health treatment (AR 23), however, this finding is not
17 supported by the record. Plaintiff reported that she is being seen by a therapist. AR 57, 61,
18 66, 436. She also testified that has been taking Zoloft for many years, which is supported by the
19 record. AR 66, 284, 301, 305, 317, 381-383.

20 An error at step two is harmless if the ALJ considered the alleged impairment in the
21 subsequent analysis. *Lewis v. Apfel*, 498 F.3d 909, 911 (9th Cir. 2007). In this instance, however,
22 the ALJ never addressed Plaintiff’s depression elsewhere in the opinion, and did not incorporate
23 any limitations related to Plaintiff’s mental impairments into the RFC. Therefore, the case will be
24 remanded for the ALJ to order any additional evaluations related to Plaintiff’s mental
25 impairments that she deems necessary, and to re-evaluate the medical evidence regarding
26 Plaintiff’s mental impairment at step two and other steps of the disability determination process
27 as appropriate.

28 ///

1 **VI. REMAND FOR FURTHER ADMINSTRATIVE PROCEEDINGS**

2 Given the above, the Court must determine whether this action should be remanded to the
3 Commissioner with instructions to immediately award benefits or whether this action should be
4 remanded to this Commissioner for further administrative proceedings. Remand for further
5 proceedings is appropriate when an evaluation of the record as a whole creates serious doubt as to
6 whether the claimant is in fact disabled. *Garrison v. Colvin*, 759 F. 3d 995, 1021 (9th Cir. 2014).
7 Conversely, a court should remand with for an award of benefits when: (1) the record has been
8 fully developed and further administrative proceedings would serve no useful purpose; (2) the
9 ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant
10 testimony or medical opinion; and (3) if the improperly discredited evidence were credited as
11 true, the ALJ would be required to find the claimant disabled on remand. *Id.* at 1020. Even if all
12 three of these criteria are met, the Court can retain flexibility in determining an appropriate
13 remedy. *Brown-Hunter v. Colvin*, 806 F. 3d 487, 495 (9th Cir. 2015).

14 In this case, the ALJ did not give specific and legitimate reasons for rejecting Dr.
15 Bhateja’s opinion. The Court finds that remand for further administrative proceedings is
16 necessary to further develop the record in this area. Additionally, the ALJ shall re-examine the
17 PRT form and process, order further evaluations if needed, and reevaluate Plaintiff’s mental
18 impairment at step two, incorporating any limitation into the five step disability evaluation as
19 appropriate.

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VII. CONCLUSION

Based on the foregoing, the Court finds that the ALJ’s decision that the Plaintiff is not disabled as defined by the Social Security Act is not supported by substantial evidence in the record as a whole, and is not based on proper legal standards. Accordingly, this Court GRANTS Plaintiff’s appeal from the administrative decision of the Commissioner of Social Security. The Clerk of this Court is DIRECTED to enter judgment in favor of Plaintiff, Kelly Arlene Turner, and against Carolyn W. Colvin, the Commissioner of Social Security.

IT IS SO ORDERED.

Dated: February 16, 2016

/s/ Eric P. Grig
UNITED STATES MAGISTRATE JUDGE