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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHELLE L. ROQUE,

Plaintiff,

v.

NANCY A. BERRYHILL,
Acting Commissioner of Social Security,

Defendant.

Case No. 1:17-cv-00192-SKO

ORDER ON PLAINTIFF’S SOCIAL
SECURITY COMPLAINT

(Doc. 1)

_____ /

On February 10, 2017, Plaintiff Michelle L. Roque (“Plaintiff”) filed a complaint under 42 U.S.C. § 1383(c) seeking judicial review of a final decision of the Commissioner of Social Security (the “Commissioner” or “Defendant”) denying her application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act (the “Act”). (Doc. 1.) Plaintiff filed her opening brief on January 4, 2018, (Doc. 23), Defendant filed her opposition on February 2, 2018, (Doc. 24), and Plaintiff filed her reply on February 21, 2018, (Doc. 25). The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to the Honorable Sheila K. Oberto, United States Magistrate Judge.¹

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¹ The parties consented to the jurisdiction of a U.S. Magistrate Judge. (Docs. 13, 14.)

1 **I. BACKGROUND**

2 On July 19, 2012, Plaintiff filed an application for SSI payments, alleging that she became
3 disabled on June 1, 1999, due to bipolar disorder, Takotsubo cardiomyopathy², lower back pain,
4 asthma, hypertension, and morbid obesity. (Administrative Record (“AR”) 21, 74–75, 90–91,
5 170–80, 191) Plaintiff was born on July 28, 1974, and was 37 years old on the application date.
6 (AR 29, 170.) She graduated from high school and received vocational training as a medical
7 assistant/pharmacy technician. (AR 190.) Plaintiff completed the ninth grade and dropped out of
8 high school during the tenth grade. (AR 42–43.)

9 **A. Relevant Medical Evidence³**

10 **1. St. Agnes Medical Center**

11 In 2010 and 2011, Plaintiff presented to the Emergency Department, where she was
12 observed to have anxiety and panic attacks. (AR 283, 299.)

13 On April 23, 2012, Plaintiff was admitted for an intentional overdose of sleeping pills and
14 other medications. (AR 323–454.) On evaluation by the attending psychiatrist, Plaintiff stated
15 that she had an argument with her 17-year-old daughter, whom she felt was “not listening to her”
16 and was using drugs and staying out late. (AR 383.) Plaintiff reported that after the argument
17 she “got angry” and took “a bunch of pills.” (AR 383.) She stated that she “did not mean to die”
18 and that she believed she could “get attention from [her] daughter and that she can listen to me.”
19 (AR 383.) She denied any suicidal or homicidal thoughts. (AR 383, 384.) Plaintiff’s speech was
20 slow and low in volume, and she had a sad and depressed mood. (AR 384.) She had good eye
21 contact, goal-oriented and linear thought processes, intact memory, a good fund of knowledge,
22 good attention and concentration, concrete thinking, and fair insight and judgment. (AR 384.)
23 Plaintiff agreed to continue to take Prozac, which she would obtain from her primary care
24 physician, as she did not want to go to the psychiatrist. (AR 384.) She was discharged from the

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26 ² Takotsubo cardiomyopathy is “a weakening of the left ventricle, the heart’s main pumping chamber, usually as the
27 result of severe emotional or physical stress, such as a sudden illness, the loss of a loved one, a serious accident, or a
28 natural disaster such as an earthquake.” See Harvard Medical School, Harvard Health Publishing, website, available
at <https://www.health.harvard.edu/heart-health/takotsubo-cardiomyopathy-broken-heart-syndrome> (last visited April
16, 2018).

³ As Plaintiff’s assertion of error is limited to the ALJ’s finding that Plaintiff’s mental impairments were not severe,
only evidence relevant to that argument is discussed below.

1 hospital on April 28, 2012. (AR 326.)

2 Plaintiff was placed under an involuntary psychiatric hold on August 4, 2012, for
3 “wanting to OD on meds because life is too hard.” (AR 821.) During her assessment, Plaintiff
4 “became tearful” and stated “it wasn’t an intentional OD” but that “she wants it to all stop.” (AR
5 821.) She reported being “overwhelmed” by life, particularly by being unemployed and only
6 receiving a small amount of money from welfare. (AR 821.) Plaintiff’s mental status
7 examination showed depressed mood and decreased insight and judgment, but was otherwise
8 normal. (AR 823.) She was observed to be “motivated for treatment,” was referred to a wellness
9 center and outpatient drug treatment center, and prescribed Wellbutrin. (AR 824.)

10 On May 12, 2014, Plaintiff was again placed under an involuntary psychiatric hold for an
11 alleged overdose of Benadryl. (AR 825–40.) Plaintiff reported that was “really upset” to find out
12 that her youngest daughter was pregnant and started drinking alcohol. (AR 825.) She stated that
13 she was drunk, which is why she could not be awakened, and did not take Benadryl. (AR 825.)
14 Plaintiff reported she was just “hurt” from the news of the pregnancy and that she does not want
15 to her hurt herself or anyone. (AR 825.) Her mental status exam was normal, except that she
16 admitted to auditory hallucinations, stating that “[w]hen I get really upset, the voices are just
17 random stuffs.” (AR 825.) Plaintiff was discharged the same day. (AR 826–28, 830.)

18 **2. Clinica Sierra Vista**

19 In 2011, Plaintiff was observed to be “crying and sad” as she completed paperwork to
20 obtain a wheelchair. (AR 486.)

21 In February 2012, Plaintiff presented with low back pain. (AR 475–76). Although she
22 was observed to be crying, Plaintiff was noted as demonstrating the appropriate mood and affect.
23 (AR 476.) She was oriented to time, place, person, and situation. (AR 476.) Plaintiff
24 complained of anxiety in March 2012, with no suicidal or homicidal ideation. (AR 469.) She
25 was oriented to time, place, person, and situation, and demonstrated the appropriate mood and
26 affect. (AR 470.) Plaintiff reported to the attending physician she was taking Xanax once a day
27 and was told that taking the medication in that way “will cause many problems.” (AR 471.) She
28 was prescribed buspirone and a selective serotonin reuptake inhibitor (SSRI). (AR 471.)

1 On May 25, 2012, Plaintiff complained of depression. (AR 465.) She reported
2 “improvement of initial symptoms,” but that functioning is “somewhat difficult.” (AR 465.)
3 Plaintiff presented with “anxious/fearful thoughts, compulsive thoughts, difficulty staying asleep,
4 diminished interest or pleasure, fatigue, feelings of invulnerability, racing thoughts and thoughts
5 of death or suicide.” (AR 465.) The treatment note observed Plaintiff had recently been released
6 from the hospital for a “suicidal gesture” of taking sleeping pills after a fight with her daughter.
7 (AR 465.) The “suicidal gesture” was characterized as not a “true attempt” at suicide. (AR 465.)
8 Plaintiff was advised to continue on Prozac and to add Gabapentin for pain, as it “should also
9 help with sleep.” (AR 468.) Plaintiff was observed as “anxious” in August 2012. (AR 459.)

10 On January 15, 2013, Plaintiff underwent a psychiatric evaluation and assessment. (AR
11 699–703.) Plaintiff reported she had last seen a psychiatrist in 2004. (AR 699.) She recounted
12 three suicide attempts, most recently in April 2012, after which she was hospitalized for a week.
13 (AR 699.) Plaintiff also reported being placed under an involuntary psychiatric hold in June 2012
14 due to suicidal ideation. (AR 699.) On mental status examination, Plaintiff’s mood was anxious
15 and depressed. (AR 700.) She had goal-oriented and logical thought processes, unremarkable
16 thought content, fair insight and judgment, good memory, intact attention and concentration,
17 average intelligence, and was oriented to time, place, person, and situation. (AR 700–701.)
18 Plaintiff did not appear to be a danger to herself or to others. (AR 702.) She was diagnosed with
19 bipolar mood disorder, not otherwise specified, and post-traumatic stress disorder (PTSD). (AR
20 702.) It was recommended that Plaintiff continue her current dose of Wellbutrin until she could
21 follow up with the Fresno County Department of Behavior Health’s Urgent Care Wellness
22 Center. (AR 702.)

23 Plaintiff presented with chest pain in May 2013. (AR 784–88.) Plaintiff appeared
24 anxious, but was deemed “stable mentally” and denied any risk of harm to herself or to others.
25 (AR 787.)

26 **3. Fresno County Department of Behavior Health**

27 On February 12, 2013, Plaintiff reported having mood swings every day for the entire
28 day, having depressed mood three to five times a week for the entire day, and having suicidal

1 thoughts every day for part of the day. (AR 754.) Individual and group therapy was
2 recommended and scheduled. (AR 754.) Plaintiff called on February 19, 2013, to apologize for
3 not being able to attend a group therapy earlier than week due to a stomach virus. (AR 755.) She
4 denied suicidal or homicidal ideation and reported she was “doing well” other than her physical
5 illness. (AR 755.)

6 Plaintiff attended an individual therapy session on February 28, 2013, and reported feeling
7 irritable and anxious. (AR 756.) She reported “intrusive, distressing thoughts and images” that
8 recalled a traumatic event. (AR 756.) Plaintiff was observed as tearful, was noted as being
9 “cooperative and receptive to intervention,” and “appeared interested and asked questions
10 related” behavioral therapy. (AR 756.) Plaintiff stated she felt better after the session and agreed
11 to practice “mindfulness.” (AR 756.)

12 On March 14, 2013, Plaintiff reported during an individual therapy session feeling
13 “irritable, sad, and angry.” (AR 757.) She stated she “spends most days in her room.” (AR 757.)
14 Plaintiff reported that her depressed mood “doesn’t allow for her to interact well with others
15 without ‘going off on them.’” (AR 757.) At another individual therapy session later than month,
16 Plaintiff reported getting “easily agitated and having angry outburst[s].” (AR 758.) She was
17 noted as “receptive and cooperative” and “asked questions related to intervention.” (AR 758.)

18 **4. Consultative Examiner Michael Cohn, Ph.D.**

19 On November 19, 2012, psychologist Dr. Cohn performed a comprehensive psychiatric
20 examination of Plaintiff. (AR 692–96.) Plaintiff was observed to be appropriately dressed and
21 cooperative. (AR 692.) Plaintiff complained that she does not like to be around people. (AR
22 692.) She reported being able to take care of her personal hygiene tasks, including bathing and
23 dressing, without difficulty. (AR 693.) Plaintiff is able to pay bills and handle cash
24 appropriately. (AR 693.) She can go out alone without difficulty and reported that her
25 relationships with family and friends are “fair.” (AR 693.) Plaintiff reported no difficulty
26 completing household tasks or making decisions on a daily basis. (AR 693.) She stated that
27 during a typical day she eats, cooks, cleans the house, sleeps, eats, and provides care for her
28 daughters. (AR 693.)

1 Plaintiff's concentration, persistence, and pace were adequate. (AR 693.) Dr. Cohn noted
2 Plaintiff was "poorly groomed" and used a walker. (AR 693.) Plaintiff was able to volunteer
3 information and appeared to be "genuine and truthful." (AR 228.) Dr. Cohn found Plaintiff's
4 stream of mental activity was within normal limits and her speech was normally and clearly
5 articulated. (AR 694.) She was not delusional and there was no bizarre or psychotic thought
6 content observed. (AR 694.) Dr. Cohn found Plaintiff had no suicidal or homicidal ideation and
7 no paranoid ideation during the interview. (AR 694.) She denied recent auditory or visual
8 hallucinations. (AR 694.) Plaintiff's mood was noted as euthymic and her affect was within
9 normal limits and congruent with thought content. (AR 694.) She was not tearful and denied
10 feelings of hopelessness, helplessness, and worthlessness. (AR 694.) Dr. Cohn found Plaintiff
11 alert and oriented and her fund of general knowledge and information was within normal limits.
12 (AR 694.) Her ability to perform calculations and her concentration were both intact. (AR 694.)
13 Dr. Cohn provided no diagnosis and assigned Plaintiff a Global Assessment of Functioning
14 ("GAF") score of 75. (AR 695.) With respect to Plaintiff's mental residual functional capacity
15 ("RFC")⁴, Dr. Cohn opined that Plaintiff's mental functioning was unimpaired, with "no evidence
16 of any psychiatric illness whatsoever." (AR 695-96.)

17 **5. State Agency Consultants**

18 State agency non-examining consultant Jaine Foster-Valdez, Ph.D., reviewed the record
19 and assessed Plaintiff's mental RFC on December 14, 2012. (AR 82-84.) Dr. Foster-Valdez
20 found that Plaintiff's mental impairments were non-severe and did not require any limitations.
21 (AR 82, 84.) Upon reconsideration on September 6, 2013, another state agency non-examining
22 consultant, Jane V. Buerger, Ph.D., reviewed the record and affirmed Dr. Foster-Valdez's
23 findings. (AR 98, 100.)

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26 ⁴ RFC is an assessment of an individual's ability to do sustained work-related physical and mental activities in a
27 work setting on a regular and continuing basis of 8 hours a day, for 5 days a week, or an equivalent work schedule.
28 Social Security Ruling 96-8p. The RFC assessment considers only functional limitations and restrictions that result
from an individual's medically determinable impairment or combination of impairments. *Id.* "In determining a
claimant's RFC, an ALJ must consider all relevant evidence in the record including, inter alia, medical records, lay
evidence, and 'the effects of symptoms, including pain, that are reasonably attributed to a medically determinable
impairment.'" *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006).

1 **B. Administrative Proceedings**

2 The Commissioner denied Plaintiff's application for benefits initially on December 20,
3 2012, and again on reconsideration on September 11, 2013. (AR 107–12, 116–20.)
4 Consequently, Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (AR
5 121–27.) On February 11, 2015, Plaintiff appeared with counsel and testified before an ALJ as
6 to her alleged disabling conditions. (AR 40–68.) A vocational expert ("VE") also testified at
7 the hearing. (AR 68–72.)

8 Plaintiff testified that she is unable to work because she is "very depressed," is
9 "bipolar," has "heard voices throughout [her] life," and has "violent tendencies" triggered by
10 noises and eye contact. (AR 44, 60–61.) Plaintiff testified that she attempted suicide three
11 times: in April 2012, June 2012, and May 2014. (AR 48–49.) She testified that when she was
12 hospitalized in 2012, the hospital implanted a "chip" in the back of her ear so that "[e]ither the
13 government or the doctors . . . [or] [t]he president, the police" can "track" her. (AR 59–60.)

14 Plaintiff testified she received mental health treatment for about a year during that
15 period but stopped because she did not want to talk to her provider about her issues. (AR 49–
16 50.) Plaintiff testified she was taking Wellbutrin for her mood, which is prescribed by her
17 primary care physician. (AR 50–51.) Although she was recommended to attend group therapy,
18 Plaintiff did not go because she did not like talking about her issues with "a lot of people
19 around" her. (AR 52.) Plaintiff denied having received any inpatient mental health treatment.
20 (AR 52.)

21 **C. The ALJ's Decision**

22 In a decision dated April 10, 2015, the ALJ found that Plaintiff was not disabled, as
23 defined by the Act. (AR 18–30.) The ALJ conducted the five-step disability analysis set forth in
24 20 C.F.R. § 416.920. (AR 23–30.) The ALJ decided that Plaintiff had not engaged in substantial
25 gainful activity since July 19, 2012, the application date (Step One). (AR 23.) At Step Two, the
26 ALJ found Plaintiff's following impairments to be severe: obesity and cardiomyopathy. (AR 23.)
27 The ALJ further found, however, only mild limitations in Plaintiff's activities of daily living,
28 social functioning and concentration, persistence, and pace, and no episodes of decompensation

1 that have been of extended duration. (AR 25.) The ALJ, therefore, found that “[b]ecause
2 [Plaintiff’s] medically determinable mental impairments cause no more than ‘mild’ limitation in
3 any of the first three functional areas and ‘no’ episodes of decompensation which have been of
4 extended duration in the fourth area, they are nonsevere.” (AR 25) (citing 20 C.F.R. §
5 416.920a(d)(1)).) Moreover, Plaintiff did not have an impairment or combination of impairments
6 that met or medically equaled one of the listed impairments in 20 C.F.R. Part 404, Subpart P,
7 Appendix 1 (“the Listings”) (Step Three). (AR 25–26.)

8 The ALJ then assessed Plaintiff’s RFC and applied the RFC assessment at Steps Four and
9 Five. *See* 20 C.F.R. § 416.920(a)(4) (“Before we go from step three to step four, we assess your
10 residual functional capacity We use this residual functional capacity assessment at both step
11 four and step five when we evaluate your claim at these steps.”). The ALJ determined that
12 Plaintiff retained the RFC:

13 to occasionally and frequently lift and/or carry 10 pounds, stand and/or
14 walk 2 hours in an 8 hour workday with normal breaks, sit six hours in an
15 8 hour workday with normal breaks, and occasionally climb ramps, stairs,
16 ladders, ropes, and scaffolds, balance, stoop, kneel, crouch, and crawl (20
CFR [§] 416.967(a)).

17 (AR 26.) Although the ALJ recognized that Plaintiff’s impairments “could reasonably be
18 expected to cause the alleged symptoms[,]” he rejected Plaintiff’s subjective testimony as “not
19 entirely credible.” (AR 27.)

20 The ALJ found that Plaintiff had no past relevant work (Step Four), but that, on the basis
21 of the RFC assessment, Plaintiff retained the capacity to perform other work that existed in
22 sufficient numbers in the national economy (Step Five). (AR 29–30.) In making this
23 determination, the ALJ posed a series of hypothetical questions to the VE based upon Plaintiff’s
24 RFC. (AR 69–70.) In response, the VE testified that a person with the specified RFC could
25 perform occupations such as document preparer, ampoule sealer, and weight tester—paper. (AR
26 70.)

27 Plaintiff sought review of this decision before the Appeals Council, which denied review
28 on September 1, 2016. (AR 10–16.) Therefore, the ALJ’s decision became the final decision of

1 the Commissioner. 20 C.F.R. § 416.1481.

2 II. LEGAL STANDARD

3 A. Applicable Law

4 An individual is considered “disabled” for purposes of disability benefits if he or she is
5 unable “to engage in any substantial gainful activity by reason of any medically determinable
6 physical or mental impairment which can be expected to result in death or which has lasted or can
7 be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §
8 423(d)(1)(A). However, “[a]n individual shall be determined to be under a disability only if [her]
9 physical or mental impairment or impairments are of such severity that [s]he is not only unable to
10 do [her] previous work but cannot, considering [her] age, education, and work experience, engage
11 in any other kind of substantial gainful work which exists in the national economy.” *Id.* §
12 423(d)(2)(A).

13 “In determining whether an individual’s physical or mental impairment or impairments
14 are of a sufficient medical severity that such impairment or impairments could be the basis of
15 eligibility [for disability benefits], the Commissioner” is required to “consider the combined
16 effect of all of the individual’s impairments without regard to whether any such impairment, if
17 considered separately, would be of such severity.” *Id.* § 423(d)(2)(B). For purposes of this
18 determination, “a ‘physical or mental impairment’ is an impairment that results from anatomical,
19 physiological, or psychological abnormalities which are demonstrable by medically acceptable
20 clinical and laboratory diagnostic techniques.” *Id.* § 423(d)(3).

21 “The Social Security Regulations set out a five-step sequential process for determining
22 whether a claimant is disabled within the meaning of the Social Security Act.” *Tackett v. Apfel*,
23 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 20 C.F.R. § 404.1520). The Ninth Circuit provided
24 the following description of the sequential evaluation analysis:

25 In step one, the ALJ determines whether a claimant is currently engaged in
26 substantial gainful activity. If so, the claimant is not disabled. If not, the ALJ
27 proceeds to step two and evaluates whether the claimant has a medically severe
28 impairment or combination of impairments. If not, the claimant is not disabled. If
so, the ALJ proceeds to step three and considers whether the impairment or
combination of impairments meets or equals a listed impairment under 20 C.F.R.
pt. 404, subpt. P, [a]pp. 1. If so, the claimant is automatically presumed disabled.

1 If not, the ALJ proceeds to step four and assesses whether the claimant is capable
2 of performing her past relevant work. If so, the claimant is not disabled. If not,
3 the ALJ proceeds to step five and examines whether the claimant has the [RFC] . .
4 . to perform any other substantial gainful activity in the national economy. If so,
5 the claimant is not disabled. If not, the claimant is disabled.

6 *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *see, e.g.*, 20 C.F.R. § 404.1520(a)(4)
7 (providing the “five-step sequential evaluation process”); *id.* § 416.920(a)(4) (same). “If a
8 claimant is found to be ‘disabled’ or ‘not disabled’ at any step in the sequence, there is no need to
9 consider subsequent steps.” *Tackett*, 180 F.3d at 1098 (citing 20 C.F.R. § 404.1520).

10 “The claimant carries the initial burden of proving a disability in steps one through four of
11 the analysis.” *Burch*, 400 F.3d at 679 (citing *Swenson v. Sullivan*, 876 F.2d 683, 687 (9th Cir.
12 1989)). “However, if a claimant establishes an inability to continue her past work, the burden
13 shifts to the Commissioner in step five to show that the claimant can perform other substantial
14 gainful work.” *Id.* (citing *Swenson*, 876 F.2d at 687).

15 **B. Scope of Review**

16 “This court may set aside the Commissioner’s denial of disability insurance benefits
17 [only] when the ALJ’s findings are based on legal error or are not supported by substantial
18 evidence in the record as a whole.” *Tackett*, 180 F.3d at 1097 (citation omitted). “Substantial
19 evidence is defined as being more than a mere scintilla, but less than a preponderance.” *Edlund*
20 *v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001) (citing *Tackett*, 180 F.3d at 1098). “Put
21 another way, substantial evidence is such relevant evidence as a reasonable mind might accept as
22 adequate to support a conclusion.” *Id.* (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

23 “This is a highly deferential standard of review” *Valentine v. Comm’r of Soc. Sec.*
24 *Admin.*, 574 F.3d 685, 690 (9th Cir. 2009). “The ALJ’s findings will be upheld if supported by
25 inferences reasonably drawn from the record.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th
26 Cir. 2008) (citation omitted). Additionally, “[t]he court will uphold the ALJ’s conclusion when
27 the evidence is susceptible to more than one rational interpretation.” *Id.*; *see, e.g., Edlund*, 253
28 F.3d at 1156 (“If the evidence is susceptible to more than one rational interpretation, the court
may not substitute its judgment for that of the Commissioner.” (citations omitted)).

1 “[A]n impairment is not severe if it does not significantly limit [the claimant’s] . . . ability
2 to do basic work activities.” *Id.* at 1290 (citing 20 C.F.R. §§ 404.1520(c) & 404.1521(a)).
3 “[B]asic work activities are the abilities and aptitudes necessary to do most jobs.” SSR 85–28.
4 Examples of “basic work activities” include (1) “[p]hysical functions such as walking, standing,
5 sitting, lifting, pushing, pulling, reaching, carrying, or handling,” (2) “[c]apacities for seeing,
6 hearing, and speaking,” (3) “[u]nderstanding, carrying out, and remembering simple
7 instructions,” (4) “[u]se of judgment,” (5) “[r]esponding appropriately to supervision, co-workers
8 and usual work situations,” and (6) “[d]ealing with changes in a routine work setting.” 20 C.F.R.
9 § 416.922(b).

10 “An impairment or combination of impairments can be found ‘not severe’ only if the
11 evidence establishes a slight abnormality that has ‘no more than a minimal effect on an
12 [individual’s] ability to work.’” *Smolen*, 80 F.3d at 1290 (quoting SSR 85–28). Additionally,
13 “an ALJ may find that a claimant lacks a medically severe impairment or combination of
14 impairments only when his conclusion is ‘clearly established by medical evidence.’” *Webb v.*
15 *Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005) (citing SSR 85–28); *cf. Ukolov v. Barnhart*, 420 F.3d
16 1002, 1006 (9th Cir. 2005) (finding that the claimant “failed to meet his burden of establishing
17 disability” where “none of the medical opinions included a finding of impairment, a diagnosis, or
18 objective test results”).

19 “Great care should be exercised in applying the not severe impairment concept.” SSR
20 85–28. “The Commissioner has stated that ‘[i]f an adjudicator is unable to determine clearly the
21 effect of an impairment or combination of impairments on the individual’s ability to do basic
22 work activities, the sequential evaluation should not end with the not severe evaluation step.’”
23 *Webb*, 433 F.3d at 687 (alteration in original) (quoting SSR No. 85–28).

24 Ultimately, “[t]he severity regulation increases the efficiency and reliability of the
25 evaluation process by identifying at an early stage those claimants whose medical impairments
26 are so slight that it is unlikely they would be found to be disabled even if their age, education, and
27 experience were taken into account.” *Yuckert*, 482 U.S. at 153. In other words, “the step-two
28 inquiry is a de minimis screening device to dispose of groundless claims.” *Smolen*, 80 F.3d at

1 1290 (*citing Yuckert*, 482 U.S. at 153–54). Nonetheless, “[t]he plaintiff has the burden of
2 establishing the severity of the impairment.” *Cookson v. Comm’r of Soc. Sec.*, No. 2:12–cv–
3 2542–CMK, 2014 WL 4795176, at *2 (E.D. Cal. Sept. 25, 2014); *see, e.g., Burch v. Barnhart*,
4 400 F.3d 676, 679 (9th Cir. 2005) (“The claimant carries the initial burden of proving a disability
5 in steps one through four of the analysis.”) (*citing Swenson v. Sullivan*, 876 F.2d 683, 687 (9th
6 Cir. 1989)).

7 **2. Discussion**

8 In determining at Step Two whether Plaintiff’s mental impairments were severe, the ALJ
9 considered (1) Plaintiff’s mental health treatment records; (2) the consultative psychiatric
10 examination report of Dr. Cohn; and (3) the opinions of the state agency medical consultants Drs.
11 Foster-Valdez and Buerger. (AR 23–24.) The ALJ concluded that the treatment evidence failed
12 to establish the presence of a severe mental impairment. In finding Plaintiff’s mental
13 impairments nonsevere, the ALJ noted that Plaintiff had been diagnosed with a mood disorder
14 and prescribed “various psychotropic medications.”⁵ (AR 23.) The ALJ also noted Plaintiff’s
15 three psychiatric hospitalizations. (AR 24.) The ALJ concluded that Plaintiff had participated in
16 “very little mental health treatment” and her mental status examinations were “essentially . . .
17 within normal limits.” (AR 23.)

18 The medical evidence in this case does not “clearly establish” the absence of a severe
19 mental impairment. The ALJ selectively highlighted those portions of Plaintiff’s mental health
20 records that supported the ALJ’s conclusion that Plaintiff’s mental impairments were nonsevere,
21 while downplaying or omitting evidence to the contrary. For example, the ALJ stated that
22 Plaintiff reported in February 2013 “doing well other than her physical illnesses.” (AR 23.)
23 However, that same month Plaintiff reported having mood swings every day for the entire day,
24 having depressed mood three to five times a week for the entire day, and having suicidal thoughts
25 every day for part of the day. (AR 754.) At an individual therapy session on February 28, 2013,
26

27 ⁵ Plaintiff reported taking Xanax (AR 471), (used to treat panic disorders), Prozac (AR 384, 468), and used to treat
28 depression and obsessive-compulsive disorder), and Wellbutrin (AR 50–51). Xanax is used to treat panic disorders,
and Prozac and Wellbutrin are used to treat depression. *See* U.S. National Library of Medicine and National
Institutes of Health, MedlinePlus website, available at <https://medlineplus.gov/> (last visited April 17, 2018).

1 Plaintiff was tearful and reported feeling irritable, anxious, and having “intrusive, distressing
2 thoughts and images” that recalled a traumatic event. (AR 756.) Similarly, the ALJ stated
3 Plaintiff’s primary care physician reported in May 2013 that Plaintiff was “stable mentally and
4 she denied risk of harm to herself or others,” but the ALJ failed to note that the same record also
5 showed that Plaintiff “appeared anxious.” (AR 787.)

6 In evaluating the opinion evidence, ALJ gave “great weight” to psychological consultative
7 examiner Dr. Cohn’s opinion that Plaintiff’s mental functioning was unimpaired, and to state
8 agency medical consultants Drs. Foster-Valdez and Buerger opinions that Plaintiff’s mental
9 impairments were non-severe, finding the opinions “consistent with the medical evidence of
10 record as a whole.” (AR 24) This evaluation, however, ignores the fact that Plaintiff was
11 subsequently hospitalized for yet another suicide attempt. (*See* AR 825–40.)

12 While Plaintiff’s three psychiatric hospitalizations do not in and of themselves establish
13 that her impairments are “severe,” *see Macias v. Colvin*, No. 1:15-cv-00107-SKO, 2016 WL
14 1224067, at *7 (E.D. Cal. Mar. 29, 2016), they do exemplify Plaintiff’s struggle with her mental
15 impairments. Indeed, review of Plaintiff’s psychiatric hospitalization records reveals a more
16 complicated picture of Plaintiff’s mental health than that portrayed by the ALJ. For example,
17 while the ALJ notes that Plaintiff attempted suicide in April 2012 to get attention from her
18 daughter and that she “did not mean to die,” the ALJ ignores findings that Plaintiff’s speech was
19 slow and low in volume and that she had a sad and depressed mood. (AR 383–84.) The ALJ
20 incorrectly stated that Plaintiff’s mental status examination following her suicide attempt in
21 August 2012 was “essentially within normal limits, except for decreased judgment and insight”
22 (AR 24), as he neglected to note her mood was indicated as “depressed.” (AR 823.) Nor was
23 Plaintiff’s mental status “within normal limits” in May 2014: although Plaintiff reported she was
24 just “hurt” from the news of her daughter’s pregnancy and that she did not want to hurt
25 herself, the ALJ ignored the fact that Plaintiff admitted during that hospitalization to auditory
26 hallucinations, stating that “[w]hen I get really upset, the voices are just random stuffs.” (AR
27 825.) The ALJ also made no mention in his decision at Step Two regarding Plaintiff’s testimony
28 at the hearing, including the testimony regarding her belief that the hospital implanted a chip in

1 her head for tracking purposes. *See, e.g., Schiller v. Colvin*, No. 1:12-CV-00771-AA, 2013 WL
2 3874044, at *3 (D. Or. July 23, 2013) (reversing the ALJ’s step two finding where the ALJ
3 ignored, without explanation, the testimony of the plaintiff, among other portions of the medical
4 record).

5 Thus, contrary to the ALJ’s characterization of Plaintiff’s mental health records, the
6 record as a whole demonstrates a longitudinal history of suicidal ideation and hospitalizations,
7 depression, and anxiety, for which Plaintiff has been treated with various psychiatric medications.
8 *See Reddick v. Chater*, 157 F.3d 715, 722-23 (9th Cir. 1998) (An ALJ may not “cherry pick”
9 from a record to support the conclusion, but rather must account for the context of the whole
10 record.). Moreover, evidence of limited treatment does not negate the possibility that her mental
11 impairments were severe. The record shows Plaintiff attended a total of three individual therapy
12 sessions in 2013 (AR 756–58), and that she stopped attending the sessions because she did not
13 want to talk to her provider about her issues. (AR 49–50.) She did not attend any group therapy
14 sessions because she did not like talking about her issues with “a lot of people around” her. (AR
15 52.) As Plaintiff points out, the Ninth Circuit recognized in *Nguyen v. Chater* that “it is common
16 knowledge that depression is one of the most underreported illnesses in the country because those
17 afflicted often do not recognize that their condition reflects a potentially serious mental illness”
18 and cautioned that “it is a questionable practice to chastise one with a mental impairment for the
19 exercise of poor judgment in seeking rehabilitation.” 100 F.3d at 1465 (citations omitted). Here,
20 Plaintiff was involuntarily hospitalized twice and her insight and judgment were consistently
21 found to be fair to decreased (*see* AR 384, 701, 823, 825), weakening any inference that might be
22 drawn that Plaintiff’s failure to participate in “very little mental health treatment” was because
23 her mental impairments were not severe. *See, e.g., Fillmore v. Astrue*, No. C–10–03655 JCS,
24 2012 WL 298341, at *22 (N.D. Cal. Feb. 1, 2012).

25 While Plaintiff may not “succeed in proving that [she] is disabled,” the ALJ “lacked
26 substantial evidence to find that the medical evidence clearly established [plaintiff’s] lack of” a
27 medically severe mental impairment. *Webb*, 433 F.3d at 688. Accordingly, the ALJ’s Step Two
28 finding cannot stand.

1 Because Plaintiff was found to have at least one severe impairment (*see* AR 23), this case
2 was not resolved at Step Two. Plaintiff does not assign error to the ALJ’s finding at Step Three.
3 Thus, any error in the ALJ’s finding at Step Two is harmless, if all impairments, severe and non-
4 severe, were considered in the determination Plaintiff’s RFC. *See Lewis v. Astrue*, 498 F.3d 909,
5 910 (9th Cir. 2007) (holding that a failure to consider an impairment in step two is harmless error
6 where the ALJ includes the limitations of that impairment in the determination of the residual
7 functional capacity). The record demonstrates this was not done. (*See* AR 27–28.) The ALJ did
8 not consider or discuss any limitations resulting from mental impairments. Rather, as part of the
9 his assessment of Plaintiff’s credibility, the ALJ merely repeated his findings from Step Two that
10 Plaintiff had “very little mental health treatment,” that her “mental status examinations have
11 essentially been within limits,” that in May 2013 she was “stable mentally,” that she “did not
12 report any hallucinations or thoughts of hurting herself or others to the psychological consultative
13 examiner or her mental health providers,” and that she was “non-compliant with her
14 recommended health treatment.” (AR 28.) As set forth above, these findings are not supported
15 by substantial evidence. The Court therefore finds that the ALJ improperly failed to properly
16 account Plaintiff’s mental limitations in her RFC, and any error by failing to consider these
17 limitations severe at Step Two was not harmless. *See, e.g., Inskip v. Colvin*, No. 3:15-cv-
18 00759-BR, 2016 WL 3509395, at *4 (D. Or. June 27, 2016) (concluding that the ALJ erred at
19 Step Two when he found Plaintiff’s mental impairments are nonsevere and finding that error is
20 not harmless because the ALJ did not include any mental limitations in his assessment of
21 Plaintiff’s RFC.) Remand is appropriate.

22 **B. Remand for Further Proceedings is Appropriate.**

23 The Court has the discretion to remand the case for additional evidence and findings or to
24 award benefits. *Smolen*, 80 F.3d at 1292. The Court may award benefits if the record is fully
25 developed and further administrative proceedings would serve no useful purpose. *Id.* Remand is
26 appropriate when additional administrative proceedings could remedy defects. *Rodriguez v.*
27 *Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court finds that further proceedings
28 are necessary to formulate an assessment of Plaintiff’s RFC that includes Plaintiff’s mental

1 limitations and to determine whether Plaintiff is disabled. Accordingly, the Court remands this
2 matter to the Commissioner for further administrative proceedings. *See, e.g., Simmons v. Colvin*,
3 No. CV 12-06060-AJW, 2013 WL 3337666, at *3-4 (C.D. Cal. July 1, 2013) (finding error at
4 step two and remanding for further administrative proceedings).

5 **IV. CONCLUSION AND ORDER**

6 Based on the foregoing, the Court finds that the ALJ's decision is not supported by
7 substantial evidence and is, therefore, VACATED and the case REMANDED to the ALJ for
8 further proceedings consistent with this Order. The Clerk of this Court is DIRECTED to enter
9 judgment in favor of Plaintiff Michelle L. Roque and against Defendant Nancy A. Berryhill,
10 Acting Commissioner of Social Security.

11 IT IS SO ORDERED.

12 Dated: April 23, 2018

13 */s/ Sheila K. Oberto*
14 UNITED STATES MAGISTRATE JUDGE

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