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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LANI M. QUINTANA,¹

Plaintiff,

No. 2:09-cv-01056 KJN

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

ORDER

_____/

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying plaintiff’s application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“Act”), and her protectively filed application for Supplemental Security Income (“SSI”) under Title XVI of the Act.² (Dkt. No. 24.) In her motion for summary judgment, plaintiff contends that the Administrative Law Judge (“ALJ”) erred by: (1) not finding that plaintiff’s diagnosed condition of ciliary neuralgia, which may be

¹ Ms. Quintana has also gone by the name “Lani M. DeLuze,” and is referred to as such in some portions of the record.

² This case was referred to the undersigned pursuant to Eastern District of California Local Rule 302(c)(15) and 28 U.S.C. § 636(c), and both parties have voluntarily consented to proceed before a United States Magistrate Judge. (Dkt. Nos. 9, 11.) This case was reassigned to the undersigned by an order entered February 9, 2010. (Dkt. No. 18.)

1 used to refer to the occurrence of “cluster headaches,” was a “severe” impairment at step two of
2 the applicable five-step analysis; (2) improperly rejecting the opinion of one of plaintiff’s treating
3 physicians, Dr. Shalini Gupta, regarding the disabling nature of plaintiff’s ciliary neuralgia, and
4 otherwise failing to develop the record in this regard; (3) failing to credit plaintiff’s testimony
5 regarding the disabling nature of her impairments; (4) rejecting the statements of a lay witness,
6 plaintiff’s boyfriend, without providing reasons for doing so; (5) failing to credit the testimony of
7 a vocational expert who testified regarding plaintiff’s ability to work in response to plaintiff’s
8 counsel’s hypothetical questions; and (6) relying on the vocational expert’s improper testimony
9 regarding available jobs in the economy. The Commissioner filed an opposition to plaintiff’s
10 motion and a cross-motion for summary judgment. (Dkt. No. 28.)

11 For the reasons stated below, the court will grant plaintiff’s motion for summary
12 judgment in part, deny the Commissioner’s cross-motion for summary judgment, and remand
13 this matter for further proceedings.

14 I. BACKGROUND³

15 Plaintiff was 44 years old at the time of the ALJ’s decision denying DIB and SSI
16 benefits and she has a high school level education. (Administrative Transcript (“AT”) 17.) She
17 previously worked: at a food store or market operating a pasta machine; as a receptionist; an
18 office manager; a mobile home park assistant manager; and a telemarketer. (See AT 16, 46, 80-
19 81.) In February of 2005, plaintiff visited an emergency room and reported that approximately
20 two weeks prior she had felt her nose “pop” while she was manipulating pasta dough at work.
21 (AT 46, 229.) She reported severe pain, dizziness, and anxiety. Over the following years,
22 plaintiff visited health care providers frequently with respect to her physical conditions including
23 ciliary neuralgia, and mental conditions including depression and bipolar disorder.

24 ³ Because the parties are familiar with the factual background of this case, including
25 plaintiff’s medical history, the undersigned does not exhaustively relate those facts here. The
26 facts related to plaintiff’s impairments and medical history will be addressed only insofar as they
are relevant the issues presented by the parties’ respective motions.

1 A. Procedural Background

2 Plaintiff filed an application for DIB, with a protective application for SSI
3 benefits, alleging a disability onset date of February 10, 2005. (AT 25-30.) The Social Security
4 Administration denied plaintiff’s applications initially and upon reconsideration. (AT 90-99,
5 103-09.) Plaintiff filed a request for a hearing, and the ALJ conducted a hearing regarding
6 plaintiff’s claims on September 28, 2008. (AT 40-90, 110.) Plaintiff, who was represented by
7 counsel at the hearing, testified at the hearing. A vocational expert also testified at the hearing.
8 Plaintiff’s boyfriend, Emery Young, also provided a third party witness statements regarding
9 plaintiff’s functional limitations. (AT 137-43.)

10 In a decision dated December 12, 2008, the ALJ denied plaintiff’s application.
11 (AT 10-18.) He determined that plaintiff could perform her past work as a machine operator and
12 that, alternatively, plaintiff could perform jobs that exist in significant numbers in the national
13 economy.⁴ (AT 16-18.) The ALJ’s decision became the final decision of the Commissioner
14

15 ⁴ Disability Insurance Benefits are paid to disabled persons who have contributed to the
16 Social Security program, 42 U.S.C. §§ 401 et seq. Generally speaking, Supplemental Security
17 Income (“SSI”) is paid to disabled persons with low income. 42 U.S.C. §§ 1382 et seq. Under
18 both benefit schemes, the term “disability” is defined, in part, as an “inability to engage in any
19 substantial gainful activity” due to “any medically determinable physical or mental impairment
20 which can be expected to result in death or which has lasted or can be expected to last for a
21 continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A).
22 A five-step sequential evaluation governs eligibility for benefits. See 20 C.F.R. §§ 404.1520,
23 404.1571-1576, 416.920, 416.971-976; see also Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987).
24 The Ninth Circuit Court of Appeals has summarized the sequential evaluation as follows:

21 Step one: Is the claimant engaging in substantial gainful
22 activity? If so, the claimant is found not disabled. If not, proceed
23 to step two.

22 Step two: Does the claimant have a “severe” impairment?
23 If so, proceed to step three. If not, then a finding of not disabled is
24 appropriate.

24 Step three: Does the claimant’s impairment or combination
25 of impairments meet or equal an impairment listed in 20 C.F.R., Pt.
26 404, Subpt. P, App.1? If so, the claimant is automatically
determined disabled. If not, proceed to step four.

25 Step four: Is the claimant capable of performing his past
26 work? If so, the claimant is not disabled. If not, proceed to step

1 when the Appeals Council denied plaintiff's request for review. (AT 1-3.) Plaintiff subsequently
2 filed this action.

3 B. Summary of the ALJ's Findings

4 The ALJ conducted the required five-step evaluation and concluded that plaintiff
5 was not disabled within the meaning of the Act. At step one, the ALJ concluded that plaintiff
6 had not engaged in substantial gainful activity since February 10, 2005, the alleged date of onset.
7 (AT 12.) At step two, the ALJ concluded that plaintiff had the following "severe" impairments:
8 depression, anxiety, and a pain disorder. (AT 13.) The ALJ stated the following: "The claimant
9 reported that she has daily facial pain which prevents her from doing activities and is exacerbated
10 by lifting and bending. She also noted that she has become progressively sad, depressed,
11 discouraged and anxious concerning her future." (AT 13.) The ALJ did not expressly resolve
12 whether plaintiff's diagnosed condition of ciliary neuralgia was "severe" within the meaning of
13 the Act. At step three, he determined that plaintiff's impairments, whether alone or in
14 combination, did not meet or medically equal any impairment listed in the applicable regulations.
15 (AT 13.)

16 The ALJ further determined that prior plaintiff had the residual functional
17 capacity ("RFC") to perform work at "all exertional levels" and "is able to perform simple tasks
18 that involve limited public contact." (AT 13.) In arriving at this RFC, the ALJ considered, but
19 did not adopt, the medical opinion of plaintiff's treating physician, Dr. Gupta, who had opined
20 that plaintiff's diagnosed condition of ciliary neuralgia was disabling to plaintiff. (See AT 15-16,

21 _____
22 five.

23 Step five: Does the claimant have the residual functional
24 capacity to perform any other work? If so, the claimant is not
25 disabled. If not, the claimant is disabled.

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

The claimant bears the burden of proof in the first four steps of the sequential evaluation process. Bowen, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential evaluation process proceeds to step five. Id.

1 336.) The ALJ also found that plaintiff was not a credible witness, stating that plaintiff's
2 "statements concerning the intensity, persistence and limiting effects of these symptoms are not
3 credible to the extent that they are inconsistent with the above residual functional capacity
4 assessment." (AT 15.)

5 At step four, the ALJ found that, considering plaintiff's RFC and testimony of the
6 vocational expert, plaintiff was capable of performing past relevant work as a machine operator
7 "as she performed it and as it is generally performed in the national economy." (AT 16.) As an
8 alternative finding, the ALJ concluded at step five that "there are jobs that exist in significant
9 numbers in the national economy that [plaintiff] can perform." (AT 17.) Accordingly, the ALJ
10 found that plaintiff was not disabled.

11 II. STANDARDS OF REVIEW

12 The court reviews the Commissioner's decision to determine whether it is (1) free
13 of legal error, and (2) supported substantial evidence in the record as a whole. Bruce v. Astrue,
14 557 F.3d 1113, 1115 (9th Cir. 2009); accord Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir.
15 2009). This standard of review has been described as "highly deferential." Valentine v. Comm'r
16 of Soc. Sec. Admin., 574 F.3d 685, 690 (9th Cir. 2009). "Substantial evidence means more than
17 a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind
18 might accept as adequate to support a conclusion." Bray v. Comm'r of Soc. Sec. Admin., 554
19 F.3d 1219, 1222 (9th Cir. 2009) (quoting Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir.
20 1995)); accord Valentine, 574 F.3d at 690 (citing Desrosiers v. Sec'y of Health & Human Servs.,
21 846 F.2d 573, 576 (9th Cir. 1988)). "The ALJ is responsible for determining credibility,
22 resolving conflicts in medical testimony, and for resolving ambiguities." Andrews, 53 F.3d at
23 1039; see also Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008) ("[T]he ALJ is the
24 final arbiter with respect to resolving ambiguities in the medical evidence."). Findings of fact
25 that are supported by substantial evidence are conclusive. 42 U.S.C. § 405(g); see also McCarthy
26 v. Apfel, 221 F.3d 1119, 1125 (9th Cir. 2000). "Where the evidence as a whole can support

1 either a grant or a denial, [the court] may not substitute [its] judgment for the ALJ's." Bray, 554
2 F.3d at 1222 (citing Massachi v. Astrue, 486 F.3d 1149, 1152 (9th Cir. 2007)); see also Ryan v.
3 Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008) ("Where evidence is susceptible to
4 more than one rational interpretation,' the ALJ's decision should be upheld.") (quoting Burch v.
5 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005)). However, the court "must consider the entire
6 record as a whole and may not affirm simply by isolating a 'specific quantum of supporting
7 evidence.'" Ryan, 528 F.3d at 1198 (quoting Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882
8 (9th Cir. 2006)); accord Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).

9 IV. ANALYSIS

10 As noted above, plaintiff alleges that the ALJ erred by: (1) not considering
11 plaintiff's diagnosed condition of ciliary neuralgia to be a "severe" impairment at step two of the
12 analysis; (2) rejecting the opinion of Dr. Gupta regarding the disabling nature of plaintiff's ciliary
13 neuralgia and otherwise failing to develop the record in this regard; (3) discrediting plaintiff's
14 testimony without providing clear and convincing reasons for doing so; (4) rejecting the
15 statements of plaintiff's boyfriend without providing reasons for doing so; (5) failing to credit the
16 vocational expert's response to hypothetical questions posed by plaintiff's counsel; and
17 (6) relying on the vocational expert's improper testimony regarding available jobs. Some of
18 plaintiff's claims of error are well-taken and necessarily warrant a remand for further
19 proceedings.

20 A. The ALJ Erroneously Rejected Lay Witness Evidence

21 As an initial matter, the undersigned concludes that the ALJ committed legal error
22 by silently rejecting the lay witness statements submitted by plaintiff's boyfriend, Emery Young,
23 regarding plaintiff's functional limitations. This error, by itself, warrants a remand to the agency
24 for further proceedings.

25 In assessing whether a claimant is disabled, an ALJ "must" consider lay witness
26 testimony regarding the claimant's ability to work. Bruce, 557 F.3d at 1115 (citing Stout v.

1 Comm'r, 454 F.3d 1050, 1053 (9th Cir. 2006), and 20 C.F. R. §§ 404.1513(d)(4), (e)). Such
2 testimony “cannot be disregarded without comment.” Id. (citation omitted). “When an ALJ
3 discounts the testimony of lay witnesses, ‘he [or she] must give reasons that are germane to each
4 witness.’” Valentine, 574 F.3d at 694 (modification in original) (quoting Dodrill v. Shalala, 12
5 F.3d 915, 919 (9th Cir. 1993)). “[T]he reasons ‘germane to each witness’ must be specific.”
6 Bruce, 557 F.3d at 1115 (citing Stout, 454 F.3d at 1054).

7 Here, plaintiff’s boyfriend provided a third party “Function Report” on a ten-page
8 form. (AT 137-43.) Among other things, he reported that plaintiff: can only sleep for a couple
9 of hours at a time, would wake up in pain, tries to do chores but can only do a little at a time, is
10 dizzy most of the time, sometimes requires assistance bathing, has trouble bending down, can
11 feed herself, but is often in pain, sometimes needs assistance in the bathroom, needs help
12 shopping for groceries, will not go for walks due to her dizziness, and only drives for doctor’s
13 appointments. He also checked boxes on the form indicating that plaintiff had trouble lifting,
14 squatting, bending, standing, reaching, walking, kneeling, and completing tasks. He reported that
15 plaintiff does not struggle with tasks such as following written and spoken instructions, gets
16 along with authority figures, and prepares simple meals twice a day.

17 The ALJ identified Mr. Young’s report in his decision and related several of the
18 limitations reported by Mr. Young therein. (AT 15.) However, the ALJ did not expressly accept
19 or reject Mr. Young’s statements of plaintiff’s limitations. Indeed, the ALJ offered no comment
20 or characterization of Mr. Young’s report. Although it appears from the ALJ’s ultimate disability
21 determination that he necessarily rejected Mr. Young’s report, the ALJ erred by not providing
22 specific reasons for such rejection, let alone specific reasons germane to Mr. Young.

23 The Commissioner argues that the ALJ properly rejected Mr. Young’s report
24 because the ALJ addressed Mr. Young’s statements and plaintiff’s subjective complaints
25 together. He argues that, as a result, the ALJ provided reasons for rejecting Mr. Young’s
26 statements that were germane to Mr. Young. The Commissioner’s conclusory argument is not

1 supported by the text of the ALJ’s decision. Immediately after identifying the report submitted
2 by Mr. Young, the ALJ discussed why *plaintiff’s* “statements concerning the intensity,
3 persistence and limiting effects of these symptoms are not credible to the extent that they are
4 inconsistent with the above residual functional capacity assessment.” (AT 15 (referring to “her
5 statements”).) This paragraph makes no mention of Mr. Young’s statements. In the subsequent
6 paragraph explaining the reasons for the adverse credibility finding, the ALJ only addresses
7 *plaintiff’s* subjective complaints and does not include any statement to the effect that he rejected
8 Mr. Young’s statements for the same reasons. Thus, the ALJ did not provide specific reasons for
9 rejecting Mr. Young’s statements that were germane to Mr. Young.

10 The ALJ might have had a proper basis for rejecting the evidence provided by Mr.
11 Young. However, the ALJ’s consideration and rejection of that evidence was erroneous under
12 the applicable legal standards, and the Commissioner’s arguments to the contrary lack merit.
13 Accordingly, the undersigned will remand this matter so that the ALJ can adequately address the
14 evidence provided by Mr. Young.

15 B. The ALJ Erred at Step Two By Finding that Plaintiff’s Ciliary Neuralgia Was Not
16 a “Severe” Impairment

17 Despite determining that remand is warranted as a result of the ALJ’s erroneous
18 rejection of lay witness evidence, the undersigned will also address plaintiff’s primary complaint,
19 that the ALJ erred by not including ciliary neuralgia or cluster headaches as a “severe”
20 impairment at step two of the five-step analysis. Plaintiff argues that the ALJ “seriously
21 circumscribed” her claim by not including ciliary neuralgia as a severe impairment at step two,
22 because if ciliary neuralgia were found to be a severe impairment the ALJ would have had to
23 consider it throughout the remainder of the sequential analysis. The undersigned concludes that
24 the ALJ erred at step two and will remand this case for further consideration of whether
25 plaintiff’s condition of ciliary neuralgia is a severe impairment at step two.

26 At step two of the sequential evaluation, the ALJ determines whether the claimant

1 has a medically “severe” impairment or combination of impairments. See 20 C.F.R.
2 §§ 404.1520(a)(4)(ii); accord 20 C.F.R. § 416.920(a)(4)(ii); see also Smolen v. Chater, 80 F.3d
3 1273, 1289-90 (9th Cir. 1996) (citing Bowen v. Yuckert, 482 U.S. 140-41 (1987)). An
4 impairment is severe when it significantly limits a claimant’s “physical or mental ability to do
5 basic work activities” and lasted or is expected to last “for a continuous period of at least 12
6 months.” See 20 C.F.R. §§ 404.1509, 404.1520(a)(4)(ii), (c), 404.1521(a); accord 20 C.F.R. §§
7 416.920(a)(4)(ii), (c), 416.909. Basic work activities refer to “the abilities and aptitudes
8 necessary to do most jobs.”⁵

9 Although centered around the term “severe,” “the step-two inquiry is a de minimis
10 screening device to dispose of groundless claims.” See Smolen, 80 F.3d at 1290. The purpose is
11 to identify “at an early stage those claimants whose medical impairment is so slight that it is
12 unlikely they would be disabled even if their age, education, and experience were taken into
13 account.” Bowen, 482 U.S. at 153. “An impairment or combination of impairments may be
14 found not severe *only* if the evidence establishes a slight abnormality that has no more than a
15 minimal effect on an individual’s ability to work.” Webb v. Barnhart, 433 F.3d 683, 686 (9th
16 Cir. 2005) (citations and quotation marks omitted). If a severe impairment exists, all medically
17 determinable impairments must be considered in the remaining steps of the sequential analysis.
18 20 C.F.R. § 404.1523.

19 Plaintiff contends that she was diagnosed with ciliary neuralgia, which is
20 synonymous with a diagnosis of cluster headache syndrome, i.e., that the two terms are
21 interchangeable. A preliminary discussion of the diagnosis referred to as ciliary neuralgia may be
22 helpful. This condition has been defined in different ways. For example, “ciliary neuralgia”

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24 ⁵ The regulations provides examples of such abilities and aptitudes, and include :
25 “(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching,
26 carrying, or handling; (2) Capacities for seeing, hearing, and speaking; (3) Understanding,
carrying out, and remembering simple instructions; (4) Use of judgment; (5) Responding
appropriately to supervision, co-workers and usual work situations; and (6) Dealing with changes
in a routine work setting.” 20 C.F.R. § 404.1521.

1 refers to “[p]ain in the eye, brow, and/or temple caused by neuralgia . . . of the ciliary nerves
2 (nerves of the iris and ciliary muscles of the eyeball).” 1-C Attorneys’ Dictionary of Medicine C-
3 25111 (Matthew Bender 2009). However, the term “ciliary neuralgia” has also been used as a
4 synonym for a diagnosis of “cluster headache.” See, e.g., 1 Int’l Classification of Diseases, 9th
5 Rev., Table of Diseases and Injuries § 339 (6th Ed. May 2010 database) (listing “Ciliary
6 neuralgia” under a heading of “Cluster headache syndrome, unspecified”). Plaintiff’s arguments
7 at step two focus on the fact that the term ciliary neuralgia can be used as a synonym for cluster
8 headaches.⁶

9 A cluster headache is “[a] severe headache affecting one side of the head and face,
10 usually accompanied by tearing of the eye on the affected side and watery discharge from the
11 nose. Headache is recurrent, with attacks occurring in groups.” 1-C Attorneys’ Dictionary of
12 Medicine C-26232 (Matthew Bender 2009); accord Mark H. Beers, M.D., et al., eds., The Merck
13 Manual of Diagnosis and Therapy 1845 (Merck Research Labs., 18th ed. 2006) (hereinafter
14 “Merck Manual”); see also Cameron v. Bowen, No. C 85-3081 THE, 1986 WL 32331, at *3
15 (N.D. Cal. Feb. 28, 1986) (unpublished) (“Medical authority suggests that the diagnosis of cluster
16 headaches may itself be prima facie evidence that plaintiff’s head pain was quite severe--in fact,
17 so severe that no medication has been recognized to be effective either in preventing them or in
18 relieving their pain.”). Diagnosis of a cluster headache is clinical and is “based on the distinctive
19 symptom pattern and exclusion of intracranial pathology.” Merck Manual at 1845.

20 As plaintiff notes in her brief, the record is replete with references to ciliary
21 neuralgia. Plaintiff was diagnosed with ciliary neuralgia by at least two different treating
22 physicians at the Del Norte Clinics and was prescribed several different medications to treat the
23 resulting symptoms. First, Dr. Aliya Akbar specifically noted a diagnosis of ciliary neuralgia
24 following visits with plaintiff on January 24, 2006 (AT 248); July 6, 2006 (AT 236); November

25 ⁶ The Commissioner does not contest plaintiff’s assertion that diagnoses of ciliary
26 neuralgia and cluster headache can be synonymous.

1 20, 2006 (AT 289); February 15, 2007 (AT 287); April 10, 2007 (AT 283); June 5, 2007
2 (AT 281); August 2, 2007 (AT 317); and July 3, 2007 (AT 318).⁷ Dr. Shalini Gupta noted a
3 diagnosis of ciliary neuralgia following visits with plaintiff on February 4, 2008 (AT 316);
4 February 14, 2008 (AT 315); February 22, 2008 (AT 314); and March 18, 2008 (AT 312). Aside
5 from noting plaintiff's pain and the occurrence of headaches, the treatment notes from those
6 appointments do not identify specific functional limitations related to plaintiff's ability to
7 perform basic work activities that were caused by ciliary neuralgia. Additionally, none of those
8 physicians specifically diagnosed a "cluster headache"; all references are to ciliary neuralgia.
9 However, on September 18, 2008, Dr. Gupta wrote a letter "To Whom It May Concern," which
10 states:

11 This is to certify that Lani Deluze [*sic*] has ciliary neuralgia on the left
12 side, which results in intermittent pain around her face in the eye and
13 cheek area, which is usually precipitated by lifting, bending, etc. This also
14 causes headaches and blurred vision and is disabling to the patient.

14 (AT 336.)

15 Plaintiff's diagnosis of ciliary neuralgia probably would meet the *de minimis*
16 threshold at step two and constitute a severe impairment on the basis of Dr. Gupta's letter and the
17 nearly two years of treatment notes documenting this condition.⁸ This evidence demonstrates
18 more than a slight abnormality that would have a significant effect on plaintiff's ability to
19 perform basic work activities. However, the ALJ did not find as much in his terse discussion at

21 ⁷ Dr. Akbar noted a diagnosis of "neuralgia" on January 16, 2007. (AT 288.) Although
22 it is unclear whether it constitutes the same diagnosis as ciliary neuralgia, Dr. Jagdeep Bal of the
23 Del Norte Clinics also diagnosed plaintiff with "Neuralgia" on February 27, 2006, and
24 "NEURALGIA WITH HISTORY OF INJURY TO THE NOSE" on March 24, 2006. (AT 245,
25 248.)

26 ⁸ At the hearing before the ALJ, plaintiff also testified repeatedly about her condition of
ciliary neuralgia. (AT 53, 60, 66-69, 74-75.) In addition to testifying to resulting nerve pain and
dizziness, plaintiff testified that her ciliary neuralgia led to daily headaches that lasted roughly six
hours and caused pain that was as bad as the pain in plaintiff's nose. (AT 66-69.) The ALJ
found plaintiff to be not credible in formulating plaintiff's RFC. The undersigned does not
address the ALJ's adverse credibility determination in this order.

1 step two. Indeed, the ALJ did not discuss any of this evidence in his analysis at step two. (See
2 AT 13.) The ALJ only stated the following: “The claimant reported that she has daily facial pain
3 which prevents her from doing activities and is exacerbated by lifting and bending. She also
4 noted that she has become progressively sad, depressed, discouraged and anxious concerning her
5 future.” (AT 13.)

6 The ALJ did, however, subsequently address Dr. Gupta’s September 18, 2008
7 letter while assessing plaintiff’s RFC. Although not clear from the ALJ’s decision, it appears
8 that the ALJ might have omitted ciliary neuralgia at step two because he subsequently gave
9 “minimal weight” to Dr. Gupta’s opinion regarding the disabling nature of ciliary neuralgia as to
10 plaintiff. The ALJ rejected Dr. Gupta’s opinion on the grounds that it “is not supported by
11 objective findings, but rather draws inferences from the claimant’s history and subjective
12 complaints.”⁹ (AT 16.) The ALJ’s decision is by no means a model of clarity, and the
13 Commissioner’s brief offers little help in assessing the ALJ’s decision. Nevertheless, it appears
14 that the appropriateness of the ALJ’s omission of ciliary neuralgia as a severe impairment at step
15 two rises or falls with his rejection of Dr. Gupta’s treating physician opinion, and the
16 undersigned will address the propriety of that rejection.

17 The medical opinions of three types of medical sources are recognized in social
18 security cases: “(1) those who treat the claimant (treating physicians); (2) those who examine but
19 do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the
20 claimant (nonexamining physicians).” Lester, 81 F.3d at 830. Generally, a treating physician’s
21 opinion should be accorded more weight than opinions of doctors who did not treat the claimant,
22 and an examining physician’s opinion is entitled to greater weight than a non-examining
23 physician’s opinion. Id. Where a treating or examining physician’s opinion is uncontradicted by
24 another doctor, the Commissioner must provide “clear and convincing” reasons for rejecting the

25 _____
26 ⁹ During the hearing, the ALJ also expressed skepticism regarding Dr. Gupta’s opinion
due to the lack of “diagnostic studies.” (AT 78.)

1 treating physician’s ultimate conclusions. Id. If the treating or examining doctor’s medical
2 opinion is contradicted by another doctor, the Commissioner must provide “specific and
3 legitimate” reasons for rejecting that medical opinion, and those reasons must be supported by
4 substantial evidence in the record. Id. at 830-31; accord Valentine, 574 F.3d at 692. “The ALJ
5 can meet this burden by setting out a detailed and thorough summary of the facts and conflicting
6 clinical evidence, stating [her] interpretation thereof, and making findings.” Tommasetti, 533
7 F.3d at 1041 (quoting Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)).

8 Here, none of the consultative reports in the record, which appear to have been
9 completed only by psychiatrists, contradicts Dr. Gupta’s statement regarding the functional
10 limitations caused by plaintiff’s ciliary neuralgia.¹⁰ (See AT 256-77.) Accordingly, the ALJ was
11 required to state clear and convincing reasons for rejecting that opinion. He did not do so. Even
12 assuming the presence of a contradictory opinion, which would require the ALJ to provide
13 specific and legitimate reasons for rejecting Dr. Gupta’s opinion, the ALJ did not properly reject
14 Dr. Gupta’s opinion.

15 The ALJ’s written decision and remarks at the hearing reveal that he rejected Dr.
16 Gupta’s opinion for two related reasons. First, the ALJ rejected Dr. Gupta’s opinion because it
17 was based on plaintiff’s subjective complaints. Second, and relatedly, the ALJ discounted Dr.
18 Gupta’s opinion because it was not supported by objective findings or diagnostic studies.

19 Ordinarily, these reasons could adequately support the rejection of a treating
20 physician’s opinion. See e.g., Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001)
21 (holding that ALJ did not err by rejecting a physician opinion where it was unsupported by
22 objective medical findings and treating notes, and where the physician relied only on the
23 plaintiff’s complaints that were found to be not credible). However, a diagnosis of ciliary
24

25 ¹⁰ Although the Commissioner intimates in his cross-motion that Dr. Gupta’s opinion is
26 controverted, he cites to no other medical opinion or other evidence in the record that supports
this suggestion.

1 neuralgia, as synonymous with cluster headaches, presents a peculiar case. First, a diagnosis of
2 cluster headaches is made on a clinical basis. See Merck Manual at 1845, i.e., on the basis of
3 signs and symptoms reported by the patient; see also Stedman's Med. Dictionary 531 (Lippincott
4 Williams & Wilkins, eds., 28th ed. 2006) (defining the term "clinical diagnosis" as "a [diagnosis]
5 made from a study of the signs and symptoms of a disease"). Moreover, there does not appear to
6 be an objective test designed to diagnosis ciliary neuralgia. Thus, the ALJ rejected Dr. Gupta's
7 opinion on grounds that constitute the very manner in which cluster headaches are diagnosed.

8 Without more, the undersigned concludes that the ALJ provided neither clear and
9 convincing reasons nor specific and legitimate reasons for rejecting Dr. Gupta's opinion
10 regarding ciliary neuralgia insofar as it refers to cluster headaches. As a result, the ALJ's basis
11 for not including ciliary neuralgia as a severe impairment at step two of the sequential analysis is
12 not adequately supported. Accordingly, the undersigned will remand this matter to the agency
13 for further proceedings. On remand, the agency should reassess plaintiff's impairments at step
14 two of the analysis, and specifically whether or not the record supports a conclusion that plaintiff
15 had a severe impairment in the form of ciliary neuralgia as that term may relate to a diagnosis of
16 cluster headaches. This remand does not preclude the ALJ from reassessing the existing record
17 and Dr. Gupta's opinion, and/or further developing the record regarding the diagnosis of ciliary
18 neuralgia/cluster headaches and the functional limitations resulting from these conditions insofar
19 as the remainder of the disability determination, including assessment of plaintiff's RFC, is
20 concerned.

21 Finally, plaintiff claims that the ALJ committed several other errors. However,
22 the undersigned does not address those alleged errors in this order because the nature of the
23 remand ordered herein is of a sort that will likely impact the ALJ's sequential analysis from step
24 two through step five. Moreover, because the remaining claims of error derive, at least in part,
25 from the errors addressed above, the undersigned need not address those alleged errors here.

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1 V. CONCLUSION

2 Based on the foregoing, IT IS HEREBY ORDERED that:

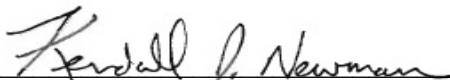
3 1. Plaintiff's motion for summary judgment or remand is granted in part.

4 2. The Commissioner's cross-motion for summary judgment is denied.

5 3. This matter be remanded for further proceedings pursuant to sentence four
6 of 42 U.S.C. § 405(g).

7 4. The Clerk of Court is directed to enter judgment in plaintiff's favor.

8 DATED: August 25, 2010

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12 KENDALL J. NEWMAN
13 UNITED STATES MAGISTRATE JUDGE
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