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

ANGELA SHANKLES,

Plaintiff,

No. 2:09-cv-01258-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 request for Supplemental Security Income under Title XVI of the Social Security Act.<sup>1</sup> Plaintiff contends that the Administrative Law Judge (“ALJ”) erred by: (1) determining that there are jobs in significant numbers in the national economy that plaintiff can perform despite plaintiff’s mental impairments; (2) determining that plaintiff was able to perform jobs in the national economy without first consulting a Vocational Expert (“VE”); (3) failing to properly assess plaintiff’s non-mental impairments at step two of the required five-step analysis; and (4) failing to properly document his findings regarding

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<sup>1</sup> 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, 10.) This case was reassigned to the undersigned by an order entered February 9, 2010. (Dkt. No. 20.)

1 plaintiff's mental impairments in accordance with 20 C.F.R. § 416.920a and the Commissioner's  
2 Hearings, Appeals, and Litigation Manual ("HALLEX") I-2-8-25C(2). (Pl.'s Mot. for Summ. J.  
3 ("Pl.'s Mot."), Dkt. No. 17.) The Commissioner filed a cross-motion for summary judgment.  
4 (Def.'s Opp'n & Cross-Motion for Summ. J., Dkt. No. 19.) Plaintiff filed a reply to defendant's  
5 motion. (Pl.'s Reply to Def.'s Opp'n & Cross-Motion for Summ. J. ("Pl.'s Reply"), Dkt.  
6 No. 21.)

7 For the reasons that follow, the court denies plaintiff's motion for summary  
8 judgment in part, grants the Commissioner's cross-motion for summary judgment in part, and  
9 remands this case to the agency for further proceedings consistent with this order.

10 I. BACKGROUND

11 A. Procedural Background

12 On January 3, 2006, plaintiff filed an application for Supplemental Security  
13 Income ("SSI"). (Administrative Transcript ("AT") 31.) Plaintiff alleged a disability onset date  
14 of December 1, 2000. (AT 44, 46.) Following an initial denial of her claims, plaintiff filed a  
15 Request for Reconsideration that was subsequently denied on February 7, 2006. (AT 12, 36, 37.)  
16 Plaintiff timely filed a request for a hearing, and the ALJ conducted a hearing on October 29,  
17 2008. (AT 35, 135.) At the hearing, the ALJ heard testimony only from plaintiff. (AT 40, 135.)  
18 The ALJ also considered written statements submitted by plaintiff's sister, Teddi Hamilton, and  
19 plaintiff's husband, William Shankles. (AT 17, 166-69.)

20 In a decision dated February 2, 2009, the ALJ denied plaintiff's application,  
21 finding that there were a significant number of jobs in the national economy that plaintiff could  
22 perform despite some limitations in her residual functional capacity.<sup>2</sup> (AT 20.) The ALJ's  
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24 <sup>2</sup> Generally speaking, SSI is paid to disabled persons with low income. See 42 U.S.C. §§  
25 1382 et seq. Under the SSI benefit scheme, the term "disability" is defined, in part, as an  
26 "inability to engage in any substantial gainful activity" due to "any medically determinable  
physical or mental impairment which can be expected to result in death or which has lasted or  
can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §

1 decision became the final decision of the Commissioner when the Appeals Council denied  
2 plaintiff's request for review on April 17, 2009. (AT 2-5.) Plaintiff seeks judicial review of the  
3 denial of her application.

4 B. Summary of Relevant Medical History and Evidence

5 At the time of her hearing before the ALJ, plaintiff was 39-years-old and had not  
6 worked since approximately 2003. (AT 31, 62.) Plaintiff completed the ninth grade of high  
7 school and received her diploma through home schooling in approximately 2002. (AT 139-40.)  
8 Plaintiff had worked doing yard-duty and bus-duty for her daughter's school, but quit amidst an  
9 incident involving her daughter's classmate. (AT 143-46.) Prior to that time, plaintiff worked as  
10 a dietary aide and for a Burger King restaurant. (AT 146.)

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11 1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. See 20 C.F.R.  
12 §§ 416.920, 416.971-76; see also Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987). The Ninth  
13 Circuit Court of Appeals has summarized the sequential evaluation as follows:

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

17 Step two: Does the claimant have a "severe" impairment?  
18 If so, proceed to step three. If not, then a finding of not disabled is  
19 appropriate.

20 Step three: Does the claimant's impairment or combination  
21 of impairments meet or equal an impairment listed in 20 C.F.R., Pt.  
22 404, Subpt. P, App.1? If so, the claimant is automatically  
23 determined disabled. If not, proceed to step four.

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

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

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 Plaintiff first sought medical treatment relative to her condition herein on August  
2 17, 2004, at Midtown Medical Center (“MMC”). (AT 130.) Plaintiff complained of a right knee  
3 fracture after an auto accident. (Id.) An x-ray revealed that there was no fracture. (AT 122.)  
4 From August 24, 2004, through December 29, 2004, plaintiff was prescribed Vicodin,<sup>3</sup> Ultram,<sup>4</sup>  
5 and Soma.<sup>5</sup> (AT 121, 126, 127, 128, 196-98, 270.)

6 Plaintiff returned to MMC on June 1, 2005, and was prescribed Lexapro<sup>6</sup> and  
7 Seroquel.<sup>7</sup> (AT 125.) In January 2006, plaintiff presented to MMC for a physical examination  
8 and complained of depression. (AT 124.) Plaintiff was prescribed Zoloft<sup>8</sup> as a replacement for  
9 Lexapro. (Id.)

10 Plaintiff presented to Timothy Canty, M.D., for a psychiatric evaluation on  
11 February 2, 2006. (AT 109.) Plaintiff’s primary complaint was that she was “not so good with  
12 people,” and she indicated that her mood had improved with medications. (Id.) Plaintiff  
13 reported that she was taking Seroquel and Zoloft. (Id.) Plaintiff reported that she had not sought

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15 <sup>3</sup> Vicodin is a combination of the drugs acetaminophen and hydrocodone indicated for  
16 the relief of moderate to moderately severe pain. See Physicians’ Desk Reference 560 (64th ed.  
17 2010).

18 <sup>4</sup> Ultram is a brand name for the drug tramadol, which is an analgesic indicated for the  
19 management of moderate to moderately severe chronic pain in adults. See Physicians’ Desk  
20 Reference 2693-94 (64th ed. 2010).

21 <sup>5</sup> Soma is a brand name for the drug carisoprodol, which is a muscle relaxant that is  
22 indicated for the treatment of “acute, painful musculoskeletal conditions in adults.” See  
23 Physicians’ Desk Reference 1931 (63rd ed. 2009).

24 <sup>6</sup> Lexapro is a brand name for the drug escitalopram oxalate, which is indicated for the  
25 treatment of major depressive disorder and generalized anxiety disorder. See Physicians’ Desk  
26 Reference 1160-61 (64th ed. 2010).

<sup>7</sup> Seroquel is a brand name for the drug quetiapine fumarate, which is indicated for the  
treatment of bipolar disorder and schizophrenia. See Physicians’ Desk Reference 751-52 (64th  
ed. 2010).

<sup>8</sup> Zoloft is indicated for the treatment of, among other conditions, major depressive  
disorder, obsessive-compulsive disorder, panic disorder, and social anxiety disorder. See  
Physicians’ Desk Reference 2588 (61st ed. 2007).

1 mental-health treatment “but was placed on a 72-hour hold after she complained of suicidal  
2 ideation while in jail.” (Id.)

3 Dr. Canty diagnosed plaintiff’s DSM-IV characteristics as follows:

4 Axis I: Methamphetamine dependence in remission per claimant, Anxiety  
disorder NOS.

5 Axis II: None.

6 Axis III: Deferred.

7 Axis IV: Mild.

8 Axis V: 65/70.<sup>9</sup>

9 (AT 111.)

10 Dr. Canty determined that plaintiff had the cognitive ability to manage money, but  
11 that she “would not do well in a public or overly stressful job.” (AT 112.) Dr. Canty stated that  
12 plaintiff would not have difficulty in “most nonpublic, simple jobs.” (Id.) Lastly, Dr. Canty  
13 reported that plaintiff’s anxiety would not interfere with attending work that she was highly  
14 motivated to perform, but that she would probably do best with a limited number of coworkers  
15 and supervisors. (Id.)

16 On February 24, 2006, plaintiff returned to MMC complaining of left arm pain  
17 and headaches. (AT 239.) The chart note indicated that plaintiff’s depression was “controlled on  
18 Zoloft.” (Id.)

19 During March and April of 2006, plaintiff continued to be seen at MMC for  
20 headaches and depression. (AT 281, 283.) Plaintiff was prescribed Imitrex,<sup>10</sup> but on May 17,  
21 2006, she complained that the medication was not helping with her headaches. (AT 279, 283.)

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22 <sup>9</sup> Axis V classifies a person’s Global Assessment of Functioning (“GAF”). American  
23 Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 25 (4th ed. 1994)  
24 (“DSM-IV”). The GAF is assessed on a scale of 1-100 and is used for reporting the clinician’s  
25 judgment of an individual’s overall level of functioning. Id. at 30. A GAF of 61 to 70 indicates  
26 “[s]ome mild symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social,  
occupational, or school functioning (e.g., occasional truancy, or theft within the household), but  
generally functioning pretty well, has some meaningful interpersonal relationships.” Id. at 32.

<sup>10</sup> Imitrex is a brand name for the drugs sumatriptan and sumatriptan succinate, and is  
indicated, in part, for the treatment of migraine headaches. See Physicians’ Desk Reference  
1497-98, 1503-04 (64th ed. 2010).

1 Plaintiff also complained that she had low back pain since 2004 when she underwent a procedure  
2 to treat kidney stones. (AT 279.) On July 25, 2006, plaintiff was prescribed Topomax<sup>11</sup> for her  
3 headaches, and on August 25, 2006, plaintiff reported that Topomax helped. (AT 233, 234.)

4           During the remainder of 2006 and early 2007, plaintiff continued to visit MMC  
5 and was prescribed medication for migraines, anxiety, and depression. (See AT 228-32.) On  
6 February 23, 2009, plaintiff complained of chest pain and was diagnosed with gastroesophageal  
7 reflux disease (“GERD”). (AT 227.) Plaintiff’s GERD symptoms were treated with Prevacid,<sup>12</sup>  
8 and she was prescribed Xanax.<sup>13</sup> (Id.)

9           On May 17, 2007, plaintiff presented to Mercy San Juan Hospital and was  
10 diagnosed with acute lumbar strain. (AT 192.) On May 29, 2007, plaintiff returned to MMC  
11 complaining of back pain and was prescribed Flexeril.<sup>14</sup> (AT 224.)

12           Between June 28, 2007, and July 3, 2008, plaintiff continued to be treated at  
13 MMC on an approximately monthly basis for a number of health reasons including anxiety,  
14 depression, headaches, low back pain, and cough. (AT 210-13, 217-23.) During this time  
15 period, plaintiff was treated with the following medications: Zoloft, Xanax, Seroquel, Ultram,  
16 Flexeril, and Topomax. (Id.)

17           On July 12, 2008, plaintiff presented to Mercy San Juan Hospital where she was  
18 diagnosed with colitis. (AT 195.) Plaintiff followed up regarding her colitis symptoms at MMC  
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20           <sup>11</sup> Topamax is a brand name for the drug topiramate and is indicated for treatment of  
21 seizures and migraine headaches. See Physician’s Desk Reference 2380 (62nd ed. 2008).

22           <sup>12</sup> Prevacid is a brand name for the drug lansoprazole, which is used to decrease “the  
23 amount of acid produced in the stomach. See Physicians’ Desk Reference 3271 (61st ed. 2007)

24           <sup>13</sup> Xanax is a brand name “tranquilizer used in the short-term relief of symptoms of  
25 anxiety or the treatment of anxiety disorders.” Burger v. Astrue, 536 F. Supp. 2d 1182, 1189 n.8  
(C.D. Cal. 2008) (citing The PDR Family Guide to Prescription Drugs 742 (9th ed. 2000)).

26           <sup>14</sup> Flexeril is a muscle relaxant. See Bishop v. Sullivan, No. Civ S-90-1305-GGH, 1992  
WL 120376, at \*3 n.3 (E.D. Cal. Mar. 11, 1992) (unpublished) (citing Physicians’ Desk  
Reference 1424 (45th ed. 1991)).

1 on July 16, 2008, and July 24, 2008. (AT 208, 209.) On August 4, 2008, plaintiff presented to  
2 MMC complaining of right side back pain and left side “belly pain.” (AT 206.) Plaintiff’s  
3 corresponding chart note reported colitis, abdominal pain which required a colonoscopy, GERD  
4 which was treated with Prilosec,<sup>15</sup> constipation, anxiety which was treated with Xanax,  
5 depression which was treated with Zoloft, headaches which were treated with Topomax, and low  
6 back pain which was treated with Flexeril and Ultram. (Id.)

7 On August 28, 2008, an ultrasound of plaintiff’s abdominal region identified a  
8 calculus<sup>16</sup> measuring 5.0 x 2.3 mm in plaintiff’s left kidney. (AT 252.) The ultrasound also  
9 revealed that plaintiff’s “pancreas is echogenic consistent with atrophy.” (Id.)

10 A radiological report dated September 2, 2008, revealed that plaintiff had “two  
11 adjacent calcifications projecting over the inferior pole left kidney measuring 3 and 4 mm.” (Id.)  
12 From September 2, 2008, to October 1, 2008, plaintiff continued treatment at MMC and  
13 complained of left side stomach pain, nausea, vomiting, sharp pain in her lower back, and  
14 anxiety. (AT 202-04.)

15 On October 7, 2008, plaintiff presented to Mercy San Juan Hospital. (AT 194.)  
16 A CT scan of her abdomen and pelvis revealed calcified granuloma at plaintiff’s right lateral lung  
17 base and multiple old calyceal stones in her left kidney. (Id.) The report indicated that plaintiff  
18 was at risk for episodes of left sided renal colic and that the colitis that had been present on a  
19 scan from the previous July had been resolved. (Id.)

20 On October 8, 2008, plaintiff presented to MMC complaining of blood in her  
21 urine, and kidney pain. (AT 201.) During her October 28, 2008 visit to MMC, plaintiff also  
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23 <sup>15</sup> Prilosec is a brand name medication used to treat the symptoms of frequent heartburn.  
24 See Physicians’ Desk Reference 2565-66 (63rd ed. 2009).

25 <sup>16</sup> A calculus, or stone, is a “concentration formed in any part of the body, most  
26 commonly in the passages of the biliary and urinary tracts; usually composed of salts of inorganic  
or organic acids, or of other material such as cholesterol.” Stedman’s Medical Dictionary 289  
(Lippincott Williams & Wilkins, eds., 28th ed. 2006).

1 complained of lower back pain and left side stomach pain. (AT 200.) The diagnosis and  
2 treatment plan taken from the chart notes of these two visits are as follows: renal stones for  
3 which plaintiff was to be referred to urology; obesity which listed “lifestyle” as a treatment plan;  
4 GERD, which was treated with Prilosec; depression, which was treated with Zoloft; anxiety,  
5 which was treated with Xanax; headaches, which were treated with Topomax; chronic low back  
6 pain, which was treated with Vicodin and Flexeril; shingles, which was treated with Acyclovir;<sup>17</sup>  
7 bipolar disorder, which was treated with Seroquel; and colitis. (AT 200-01.)

8           Meanwhile, on October 15, 2008, plaintiff presented to John T. Hata, M.D.,  
9 complaining of abdominal pain, blood in her stool, and GERD. (AT 250.) Dr. Hata reported that  
10 plaintiff suffered from chronic anxiety and that plaintiff’s prescribed medications included:  
11 Prilosec, Seroquel, Zoloft, Vicodin, Xanax, Topomax, and Flexeril. (Id.) Plaintiff further  
12 complained of episodic lower back pain and shingles. (Id.) Plaintiff also stated that the onset of  
13 her heartburn was four years ago and that the problem had not resolved. (Id.) Dr. Hata reported  
14 that plaintiff was stable on Prilosec and should continue treatment with medication. (AT 251.)

15           On October 23, 2008, plaintiff was referred by her attorney to Michelina Regazzi,  
16 Ph.D., for a psychological evaluation. (AT 272.) With regard to her medical history, plaintiff  
17 reported that was recently told she had colitis and that she was being treated for kidney stones.  
18 (Id.) Plaintiff reported that her medications included Xanax, Prochlorperazine,<sup>18</sup> Vicodin “for the  
19 kidney stones,” Flexeril, Topomax, Seroquel, Zoloft, and Prilosec. (Id.)

20           Plaintiff reported that she had been taking psychiatric medication on and off for  
21 years, although she had never been admitted to a psychiatric facility. (Id.) Plaintiff further

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23 <sup>17</sup> Acyclovir is an antiviral drug that is “active against herpes viruses.” Physicians’ Desk Reference 1760 (64th ed. 2010).

24 <sup>18</sup> Prochlorperazine is an anti-psychotic medication used to treat psychotic disorders such  
25 as schizophrenia, and is also used on a short-term basis to treat anxiety not controlled by other  
26 medications. It is also used to control severe nausea and vomiting. Medline Plus, available at  
<http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682116.html> (last visited December 8,  
2010).



1 reported that she had recently tried to get into counseling but there were problems with her  
2 insurance. (Id.)

3 With regard to her substance abuse history, plaintiff reported that she had last  
4 used “crank” over 16 years ago. (AT 273.) Dr. Regazzi noted that this was not consistent with  
5 plaintiff’s 2006 psychiatric evaluation. (Id.)

6 With regard to her daily activities, plaintiff stated that while her husband did most  
7 of the cooking, she was able to clean the house. (AT 274.) Plaintiff stated that she was fearful of  
8 driving and that she received rides from her mother or sister. (Id.) Plaintiff further stated that her  
9 husband handled the finances but she was able to do the grocery shopping with him. (Id.)

10 Dr. Regazzi reported that at the start of the mental status examination plaintiff  
11 was “quite anxious,” but that her anxiety dissipated within “about ten minutes.” (Id.) When  
12 asked to describe her predominant mood, plaintiff responded that sometimes she became agitated  
13 and “sometimes [she was] okay.” (Id.) Plaintiff reported that a lot of times she felt  
14 overwhelmed. (Id.)

15 With regard to plaintiff’s test results, Dr. Regazzi reported that plaintiff’s reading  
16 ability was low average and “equivalent to the 8th grade level,” while her spelling and arithmetic  
17 scores fell within the deficient range. (AT 275.) Plaintiff’s intellectual functioning was tested by  
18 her performance on the Wechsler Adult Intelligence Scale. (Id.) Plaintiff’s verbal  
19 comprehension index score was 80 while her perceptual organization index score was 116. (Id.)  
20 Dr. Regazzi reported that a “discrepancy of this magnitude is uncommon and points to a relative  
21 weakness in cognitive skills.” (Id.)

22 Dr. Regazzi diagnosed plaintiff as follows:

- 23 Axis I: Anxiety Disorder, NOS; Learning Disorder, NOS.
- 24 Axis II: No Diagnosis.
- 25 Axis III: Colitis, kidney stones, by report.
- 26 Axis IV: None.

1 Axis V: 58.<sup>19</sup>

2 (AT 276.)

3 Based on her evaluation of plaintiff, Dr. Regazzi assessed the following  
4 capabilities and limitations solely with respect to mental factors and without consideration of any  
5 of plaintiff's reported physical limitations: while plaintiff has moderate impairments in her daily  
6 living activities, she "is capable of carrying out all personal care and daily living activities";  
7 plaintiff is able to understand, carry out, and remember simple written or oral instructions in a  
8 workplace with few coworkers and no contact with the public; plaintiff has moderate impairment  
9 in her ability to communicate or interact with coworkers and supervisors and severe impairment  
10 in dealing with the public due to her anxiety; plaintiff has no significant impairment in her ability  
11 to attend work on a regular basis, moderate impairment in her ability to follow safety standards,  
12 and marked impairment in her ability to deal with unexpected situations that might arise in the  
13 course of a workday; plaintiff had moderate to marked impairment in her ability to maintain  
14 stable emotional functioning in the workplace and; if granted disability benefits, plaintiff is  
15 capable of managing her own funds. (Id.)

16 C. Summary of Relevant Hearing Testimony and Witness Statements

17 At the administrative hearing, plaintiff testified that she was enrolled in special  
18 education while in high school and had trouble reading. (AT 140-41.) Plaintiff testified that she  
19 was able to read children's books but has trouble with comprehension when reading the  
20 newspaper. (AT 141-42.) She also testified that she does not spell very well, that she would be  
21 able to write a letter only if it contained basic words, and that she is only able to complete basic  
22 arithmetic. (AT 142-43.) Plaintiff explained that she had trouble with her memory and  
23 attributed it to her medication. (AT 147.)

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25 <sup>19</sup> A GAF of 51 to 60 indicates "[m]oderate symptoms (e.g., flat affect and circumstantial  
26 speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school  
functioning (e.g., few friends, conflicts with peers or co-workers)." DSM-IV at 32.

1 Plaintiff testified that at the time of the hearing, she was prescribed Seroquel,  
2 Zoloft, Vicodin for kidney stones and a past case of shingles, Flexeril for muscle spasms,  
3 Topomax for migraines, Xanax, and Prochlorperazine for nausea. (AT 147-48.) Plaintiff  
4 attributed her nausea to “problems with my bowels” and testified that she had recent back pain.  
5 (AT 148.)

6 Plaintiff testified that she had been seeing a specialist due to kidney stones and her  
7 back was in constant pain. (AT 148-49.) She testified that no x-rays had been taken despite her  
8 back complaints. (AT 149.) Plaintiff testified that she had colitis. (Id.)

9 Plaintiff testified that despite taking medication, she experienced migraine  
10 headaches at least three to four times per week that left her unable to function on those days.  
11 (AT 149-50.) She further testified that her colitis continued to give her problems and that it  
12 affected her daily activities. (AT 150-51.)

13 Plaintiff also testified that she experienced severe anxiety and panic attacks. (AT  
14 151.) She explained that these symptoms were brought on by being in a room with a lot of  
15 people and left her feeling like she was gasping for air. (Id.) Accordingly, plaintiff testified that  
16 if she did the shopping, she was only able to do it at night; that if she had anywhere to go, she  
17 was driven by her mom or her daughter because she would get panic symptoms when she drove;  
18 and that she avoided crowds and new surroundings. (AT 152.)

19 Plaintiff testified that she watched television and movies during the day and that  
20 while she was able to keep her bedroom neat, her children did the majority of the housework.  
21 (AT 152-53.) She explained that she had trouble watching her grandson without help from her  
22 husband because she did not feel good. (AT 153-54.) Plaintiff further testified that she believed  
23 her anxiety caused problems at her yard-duty and dietary aide jobs. (AT 154.) Plaintiff testified  
24 that although losing these positions ended up hurting her self-esteem, she “was good” at the time  
25 she was doing these respective jobs. (Id.) Finally, plaintiff testified that she had always had  
26 problems with anxiety and that she was unable to socialize with people outside of her family.

1 (AT 154-55.)

2 Plaintiff's husband, William Shankles, wrote a statement indicating that during  
3 the prior seven years, plaintiff had suffered from "severe bouts of depression, social anxiety, and  
4 confidence issues" resulting in plaintiff "seldom leaving the comfort/safety of her own home."

5 (AT 166.) Mr. Shankles further wrote that plaintiff's anxiety necessitated that he perform more  
6 of the everyday tasks and that plaintiff lacked the ability to work or deal with society. (AT 166-  
7 67.)

8 Plaintiff's sister, Teddi Hamilton, wrote a statement indicating that plaintiff had  
9 transformed into someone "who seldom leaves the safety of her home." (AT 168.) Ms.  
10 Hamilton further wrote that plaintiff did not drive due to anxiety and did not like to be in closed  
11 spaces. (Id.) Ms. Hamilton also stated that plaintiff was unable to be in a room with many  
12 people without becoming overwhelmed to the point of tears. (Id.) Ms. Hamilton explained that  
13 she had seen plaintiff become more physically ill in recent years to the point of being unable to  
14 hold a job. (AT 169.)

15 D. Summary of the ALJ's Findings

16 The ALJ conducted the required five-step evaluation and concluded that plaintiff  
17 had not been disabled from January 3, 2006, through the date of the ALJ's decision. (AT 20.) At  
18 step one, the ALJ concluded that plaintiff had not engaged in substantial gainful activity since  
19 January 3, 2006, plaintiff's application date. (AT 14.)

20 At step two, the ALJ found that plaintiff suffered from the following severe  
21 impairments: panic attacks and bipolar disorder. (Id.) The ALJ determined that plaintiff's  
22 impairments resulted in "more than minimal limitations" in her ability to "perform work related  
23 physical and mental tasks." (Id.) The ALJ also found that plaintiff's headaches did not result in  
24 significant physical limitations and that plaintiff seemed to be "doing fairly well" on her  
25 medication, Topomax. (Id.) The ALJ did not address any of plaintiff's other physical  
26 impairments in the portion of his order specifically addressing step two. (Id.)

1 At step three, the ALJ determined that plaintiff's impairments, whether alone or in  
2 combination, did not meet or medically equal any impairment listed in the applicable regulations.

3 (Id.) The ALJ assessed plaintiff's residual functional capacity ("RFC") as follows:

4 Having considered all of the evidence of the entire record and testimony of record,  
5 the undersigned finds that the claimant has no exertional limitations. She can  
6 perform unskilled work, with no frequent interaction with coworkers or  
supervisors and no public jobs.

7 (Id.)

8 At step four, the ALJ found that plaintiff was incapable of performing her past  
9 work as a dietary aide because the duties required by that position were in excess of her current  
10 RFC. (AT 19.) At step five, the ALJ concluded that although plaintiff's ability to perform work  
11 at all exertional levels had been compromised by her non-exertional limitations, these limitations  
12 had little or no effect on the occupational base of unskilled work at all exertional levels. (AT  
13 20.) Accordingly, the ALJ determined that a finding of "not disabled" was appropriate under  
14 Medical-Vocational Guidelines section 204.00. (Id.) Therefore, the ALJ determined that  
15 plaintiff had not been under a disability, as defined in the Social Security Act, from her filing  
16 date through the date of the ALJ's decision. (Id.)

17 II. ISSUES PRESENTED

18 Plaintiff contends that the ALJ committed the following errors in denying her  
19 claim. First, plaintiff argues that the ALJ erred by failing to find that plaintiff's physical  
20 limitations were severe at step two of the five-step analysis. Second, although buried in a  
21 footnote, plaintiff cursorily argues that the ALJ erred at step three of the sequential analysis by  
22 failing to properly document his findings regarding plaintiff's inability to satisfy the "B" criteria  
23 contained in the appropriate listing. Finally, plaintiff contends that the ALJ erred by determining  
24 that there were significant jobs in the national economy that plaintiff could perform despite  
25 plaintiff's mental impairments, and that the ALJ erred in making this determination without the  
26 aid of a VE.

1 III. STANDARDS OF REVIEW

2 The court reviews the Commissioner’s decision to determine whether it is: (1) free  
3 of legal error, and (2) supported by substantial evidence in the record as a whole. Bruce v.  
4 Astrue, 557 F.3d 1113, 1115 (9th Cir. 2009). This standard of review has been described as  
5 “highly deferential.” Valentine v. Comm’r of Soc. Sec. Admin., 574 F.3d 685, 690 (9th Cir.  
6 2009). “Substantial evidence means more than a mere scintilla but less than a preponderance; it  
7 is such relevant evidence as a reasonable mind might accept as adequate to support a  
8 conclusion.” Bray v. Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1222 (9th Cir. 2009)  
9 (quoting Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995)). “The ALJ is responsible for  
10 determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities.”  
11 Andrews, 53 F.3d at 1039.

12 Findings of fact that are supported by substantial evidence are conclusive. 42  
13 U.S.C. § 405(g); see also McCarthy v. Apfel, 221 F.3d 1119, 1125 (9th Cir. 2000). “Where the  
14 evidence as a whole can support either a grant or a denial, [the court] may not substitute [its]  
15 judgment for the ALJ’s.” Bray, 554 F.3d at 1222 (citing Massachi v. Astrue, 486 F.3d 1149,  
16 1152 (9th Cir. 2007)); see also Ryan v. Comm’r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir.  
17 2008) (“Where evidence is susceptible to more than one rational interpretation,’ the ALJ’s  
18 decision should be upheld.”) (quoting Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005)).  
19 However, the court “must consider the entire record as a whole and may not affirm simply by  
20 isolating a ‘specific quantum of supporting evidence.’” Ryan, 528 F.3d at 1198 (quoting  
21 Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006)); accord Lingenfelter v. Astrue,  
22 504 F.3d 1028, 1035 (9th Cir. 2007). Plaintiff bears the burden of proving she is disabled with  
23 the meaning of the Act. Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005) (citing Meanel  
24 v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999)).

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1 IV. ANALYSIS

2 A. The ALJ Did Not Err at Step Two

3 Plaintiff argues that the ALJ erred by failing to find that plaintiff had any severe  
4 physical impairments at step two of the required analysis and, therefore, the ALJ improperly  
5 assessed plaintiff's RFC. (Pl.'s Mot. at 8.) The Commissioner argues that the ALJ did not err  
6 because the proper inquiry is whether plaintiff's impairments affect her ability to work, "not  
7 simply whether the plaintiff experiences a medical condition or abnormality." (Def.'s Opp'n &  
8 Cross-Motion for Summ. J. at 6.)

9 At step two, the ALJ is required to determine if plaintiff has a severe impairment.  
10 "An impairment or combination of impairments may be found not severe only if the evidence  
11 establishes a slight abnormality that has no more than a minimal effect on an individual's ability  
12 to work." Webb v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005) (quoting Smolen v. Chater, 80  
13 F.3d 1273, 1290 (9th Cir. 1996)) (internal quotation marks omitted). In other words, an  
14 impairment is not severe if it does not significantly limit a claimant's physical or mental ability to  
15 do basic work activities. 20 C.F.R. § 404.1521. At step two, an ALJ's decision that plaintiff  
16 lacks a medically-severe impairment or combination of impairments must be supported by  
17 clearly established medical evidence. Webb, 433 F.3d. at 687 (quoting Social Security Ruling  
18 ("SSR") 85-28<sup>20</sup>) (internal quotation marks omitted).

19 Here, the ALJ found that plaintiff suffered from two severe mental impairments:  
20 panic attacks; and bipolar disorder. (AT 14.) Plaintiff argues that the ALJ erred by finding that  
21 plaintiff's headaches were not severe and by not addressing plaintiff's noted conditions of colitis,  
22 kidney stones, chronic low back pain, obesity, and GERD insofar as step two is concerned. (Pl.'s  
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24 <sup>20</sup> The Secretary of Social Security issues SSRs to clarify the Secretary's regulations and  
25 policies. See Paulson v. Bowen, 836 F.2d 1249, 1252 n.2 (9th Cir. 1988). Although SSRs do  
26 not have the force of binding law, the Ninth Circuit Court of Appeals "nevertheless give[s]  
deference to the Secretary's interpretation of its own regulations." Bunnell v. Sullivan, 947 F.2d  
341, 346 (9th Cir. 1991).

1 Mot. at 6.) Specifically, plaintiff argues that the October 7, 2008 abdominal CT scan, which  
2 showed evidence of “old stones” and contained a “reference to Mrs. Shankles being at risk for  
3 kidney colic,” would “seem to establish a medically determinable impairment, the pain from  
4 which would at least occasionally interfere with performing work.” The undersigned disagrees.  
5 After careful review, the undersigned finds that the ALJ properly addressed all of plaintiff’s  
6 physical impairments, albeit, not specifically in the portion of the decision contained under the  
7 step two heading. Although the ALJ only addressed plaintiff’s headaches in that express, step  
8 two discussion (AT 14), he subsequently discussed plaintiff’s physical impairments and the  
9 corresponding medical evidence when assessing plaintiff’s RFC. (See AT 15-19.)

10           Substantial evidence supports the ALJ’s decision that plaintiff’s non-mental  
11 impairments were not severe. With regard to plaintiff’s physical impairments, in the step two  
12 analysis the ALJ wrote that the “evidence shows that the claimant’s headaches do not appear to  
13 result in any significant physical limitations. The claimant was prescribed Topomax and seemed  
14 to be doing fairly well on this medication.” (Id.) Evidence showing plaintiff’s symptoms are  
15 controlled by medication tends to support a finding of no disability. Warre v. Comm’r of Soc.  
16 Sec. Admin., 439 F.3d 1001, 1006 (9th Cir. 2006). Plaintiff indicated on May 17, 2006, that her  
17 medication, Imitrex, was “not helping” with her migraine headaches. (AT 279.) Plaintiff’s  
18 medical records indicate that her prescription was changed to Topomax on July 25, 2006. (AT  
19 234.) The ALJ wrote that plaintiff “seemed to be doing fairly well” on Topomax and that after  
20 reviewing plaintiff’s medical records, the ALJ “notes that the claimant has not been hospitalized,  
21 or to the emergency room with complaints nor has she described any side effects from her  
22 medications.” (AT 14, 16.) While plaintiff’s medical records list headaches as an ongoing  
23 impairment, there is no indication that the headaches were increasing in severity, that they were  
24 not properly controlled with medication, or that they impaired her ability to work. Accordingly,  
25 the ALJ pointed to substantial evidence and did not err by finding that plaintiff’s headaches were  
26 not severe.



1           The ALJ also did not err by finding that plaintiff’s other physical impairments  
2 were not “severe.” While acknowledging plaintiff’s “numerous physical complaints,” the ALJ  
3 wrote that the “minimal clinical findings do no justify the claimant’s contention that they keep  
4 her from working.” (AT 18.) While the ALJ’s discussion of plaintiff’s other physical  
5 impairments is limited,<sup>21</sup> the ALJ pointed to sufficient evidence in the record to support the  
6 conclusion that plaintiff’s physical impairments did not significantly limit plaintiff’s ability to  
7 work. The ALJ found that “[f]indings have been very minimal. There is no evidence of atrophy,  
8 weakness, deformity, muscle tenderness or spasms, anatomically consistent sensation changes or  
9 reflex changes” and “claimant stated that she was sleeping better with Seroquel.” (*Id.*)

10           Substantial evidence in the record supports the ALJ’s conclusion. While  
11 plaintiff’s medical records contain evidence of physical impairments, there is no objective  
12 evidence to support the conclusion that they were of such severity to limit her ability to work.  
13 Indeed, aside from a November 24, 2004 chart note indicating that plaintiff’s knee pain prevented  
14 her from participating in walking or prolonged standing until February 1, 2005, plaintiff’s  
15 medical records do not evidence that her physical impairments placed functional limitations on  
16 her ability to work. (AT 197.) Plaintiff’s medical records, paired with her conservative  
17 treatment, support the ALJ’s finding that plaintiff’s non-mental impairments were not severe  
18 within the meaning of the Act.<sup>22</sup> Because plaintiff has failed to meet her burden of proving that  
19 her physical impairments significantly limited her ability to do basic work activities, the ALJ did  
20 not err by failing to find plaintiff’s non-mental impairments as severe at step two of the analysis.  
21 See Bowen, 482 U.S. at 141 (citations and internal quotation marks omitted); Matthews v.

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23           <sup>21</sup> The ALJ lists the majority of plaintiff’s impairments in a single sentence. “She was  
24 treated for various complaints of shingles, migraine headaches, depression, low back pain, colitis,  
25 obesity.” (AT 18.)

25           <sup>22</sup> The ALJ also stated that plaintiff “has not received or been referred for trigger point  
26 injections, acupuncture, or chiropractic treatment” and that there are “no emergency room  
treatments, no surgeries, or hospitalization.” (AT 18.)

1 Shalala, 10 F.3d 678, 680 (9th Cir. 1993) (holding that the mere existence of an impairment is  
2 insufficient proof of a disability and that plaintiff bears the burden of proving that an impairment  
3 is disabling).

4           Finally, plaintiff argues that the ALJ further erred by ignoring plaintiff's obesity  
5 when formulating plaintiff's RFC. (Pl.'s Mot. at 7.) When evaluating obesity in order to  
6 determine a claimant's RFC, the ALJ must consider "an individual's maximum remaining ability  
7 to do sustained work activities in an ordinary work setting on a regular and continuing basis."  
8 Burch, 400 F.3d at 683 (citations omitted). In assessing plaintiff's RFC, the ALJ must consider  
9 the limitations and restrictions imposed by all of plaintiff's impairments, even those that are not  
10 severe. Id. (quoting SSR 96-8p (1996)). Plaintiff bears the burden of proving that her obesity  
11 exacerbated her other impairments. See Burch, 400 F.3d at 682.

12           The ALJ did not err and properly incorporated plaintiff's obesity when assessing  
13 plaintiff's RFC. The ALJ noted that in 2008, plaintiff was diagnosed with obesity. (AT 14.)  
14 The ALJ noted that the record did not indicate that plaintiff had been diagnosed with any  
15 exertional or physical limitations resulting from her obesity (id.). See Burch, 400 F.3d at 684  
16 (holding that the ALJ did not err in assessing plaintiff's RFC because plaintiff failed to set forth  
17 evidence, and there was no evidence in the record of functional limitations caused by plaintiff's  
18 obesity). After reviewing plaintiff's medical records, the ALJ concluded that obesity, like  
19 plaintiff's other physical impairments, did not impose exertional limitations. Plaintiff also fails  
20 to specify how her obesity exacerbates her existing impairments. Plaintiff has failed to point to  
21 evidence in the record that establishes that plaintiff's remaining ability to do sustained work  
22 activities was negatively impacted by her obesity. Accordingly, the ALJ did not err in assessing  
23 plaintiff's RFC.

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1 B. Any Failure to Properly Follow 20 C.F.R. § 416.920a and HALLEX was  
2 Harmless Error

3 Buried in a footnote in her motion for summary judgment, plaintiff forwards an  
4 additional argument. (Pl.’s Mot. at 4 n.1.) She argues that the ALJ erred at step three of the  
5 sequential analysis by failing to properly document findings in his decision regarding plaintiff’s  
6 inability to satisfy the “B” criteria of the applicable listings. Specifically, plaintiff asserts that the  
7 ALJ failed to document his findings to the level of specificity dictated by 20 C.F.R. § 416.920a  
8 and HALLEX I-2-8-25C(2).

9 In order to determine whether a claimant’s mental condition meets a listed  
10 impairment, the ALJ must consider: (1) whether specified diagnostic criteria (“paragraph A”  
11 criteria) are met; and (2) whether specified functional restrictions are present (“paragraph B”  
12 criteria). Lester, 81 F.3d at 828 (citing 20 C.F.R. § 404.1520a). If the claimant’s mental  
13 impairment is severe, the ALJ must determine if it meets or is equivalent in severity to a listed  
14 mental disorder. 20 C.F.R. § 416.920a(d)(2). This determination is accomplished by comparing  
15 the medical findings pertaining to the claimant’s impairment “and the rating of the degree of  
16 functional limitation to the criteria of the appropriate listed mental disorder.” Id. The degree of  
17 functional limitation for the first three paragraph “B” criteria are rated as none, mild, moderate,  
18 marked, or extreme. 20 C.F.R. § 416.920a(c)(4). The final paragraph “B” criteria is rated as  
19 none, one or two, three, four or more. Id.

20 Simply put, after the ALJ determines plaintiff’s paragraph “A” criteria, the ALJ  
21 reviews the medical findings and rates plaintiff’s functional limitations to determine if they  
22 satisfy the “B” criteria. A plaintiff who satisfies the paragraph “A” criteria must be found  
23 disabled if his or her impairments results in two or more functional limitations found in  
24 paragraph “B.” Lester, 81 F.3d at 828-29.

25 Although the ALJ did not specifically address which paragraph “A” criterion  
26 corresponds to plaintiff’s impairments, plaintiff identifies 12.06 as the appropriate listing and

1 does not assign any error relative to evaluation of the “A” criteria.<sup>23</sup> Regarding the “B” criteria  
2 stated in listing 12.06, plaintiff must demonstrate that she suffers from two of the four following  
3 functional restrictions to support a finding of disability: (1) marked restriction of activities of  
4 daily living; (2) marked difficulties in maintaining social functioning; (3) marked difficulties in  
5 maintaining concentration, persistence, or pace; or (4) repeated episodes of decompensation, each  
6 of extended duration. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.06 B.

7           The ALJ did not technically rate the four “B” criteria in accordance with 20  
8 C.F.R. § 416.920a. Instead, the ALJ stated that plaintiff’s mental impairments did not result in  
9 “marked limitations in two or more areas of mental functioning” and that, therefore, plaintiff’s  
10 impairments did not meet or medically equal one of the listed impairments under 20 C.F.R. Pt.  
11 404, Subpt. P, App. 1. (AT 14.)

12           To the extent that the ALJ’s failed to properly rate plaintiff’s “B” criteria, such an  
13 error was harmless. Harmless error exists when it is clear from the record that the ALJ’s error  
14 was inconsequential to the ultimate non-disability determination. Tommasetti v. Astrue, 533  
15 F.3d 1035, 1038 (9th Cir. 2008) (citations and internal quotation marks omitted). While the ALJ  
16 did not “rate” all four criteria in the manner required under 20 C.F.R. § 416.920a(c)(4), he did  
17 review and discuss the relevant evidence and determine that plaintiff lacked “marked”  
18 impairment in two of the four required criteria. (AT 14.) The ALJ specifically addressed three  
19 of the four criteria, writing that the “medical evidence showed that the claimant was capable of  
20 activities of daily living” and that the records “do not show the presence of . . . marked  
21 impairment in daily activities, social functioning or concentration.” (AT 19.) The ALJ  
22 determined that plaintiff suffered from mental impairment which had been “incorporated into the  
23 established residual functional capacity.” (Id.) As plaintiff essentially acknowledges (Pl.’s Mot.  
24 at 4, n.1), the ALJ’s conclusions are supported by substantial evidence in the record.

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26           <sup>23</sup> 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.06 B refers to “Anxiety Related Disorders.”

1 Accordingly, the ALJ’s failure to properly “rate” the four criteria was harmless.<sup>24</sup>

2 The ALJ also did not err by failing to document his conclusions in conformity  
3 with HALLEX I-2-8-25C(2).<sup>25</sup> HALLEX is not binding on the ALJ or the court. Lockwood v.  
4 Comm’r Soc. Sec. Admin., 616 F.3d 1068, 1072 (9th Cir. 2010) (“HALLEX does not impose  
5 judicially enforceable duties on either the ALJ or this court.”).

6 The undersigned concludes that the ALJ sufficiently discussed why plaintiff’s  
7 mental impairments failed to meet the paragraph “B” criteria and any error in this regard was  
8 harmless. Moreover, HALLEX is not binding on the ALJ or this court. Accordingly, the  
9 undersigned finds that the ALJ did not err at step three.

10 C. The ALJ Erred by Failing to Utilize a VE

11 Finally, plaintiff contends that the ALJ erred by finding that plaintiff was able to  
12 perform jobs in the national economy despite plaintiff’s mental impairments. Plaintiff argues  
13 that her marked impairment in the ability to deal with unexpected situations that might arise in  
14 the course of a workday supports a finding of disability.<sup>26</sup> (Pl.’s Mot. at 5.) Plaintiff further  
15 argues that the ALJ erred by failing to utilize a VE when making this determination. (Id.) The  
16 Commissioner argues that despite medical evidence suggesting that plaintiff “should have no  
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18 <sup>24</sup> Plaintiff’s argument in this regard appears to be a hyper-technical one, in that plaintiff  
19 disagrees with the arrangement of the ALJ’s discussion. The ALJ’s failure to organize his  
20 discussion to plaintiff’s liking does not constitute error. See Lemke v. Comm’r Soc. Sec.  
21 Admin., 380 Fed. Appx. 599, 601 (9th Cir. 2010) (unpublished) (“ALJs are no longer required to  
22 attach a specific psychiatric review technique form when evaluating the severity of a claimant’s  
23 mental impairments; while the present regulations require adjudicators to document their  
24 findings using the special technique, they give ALJs greater discretion in deciding how to publish  
25 those findings”).

26 <sup>25</sup> The provisions of HALLEX relied on by plaintiff provide a list of subjects that an ALJ  
“should” discuss to support the rationale for his or her findings pertaining to relevant issues and  
the ultimate conclusion of the case. See HALLEX I-2-8-25C(2).

<sup>26</sup> Plaintiff argues that “Dr. Regazzi’s findings of moderate to marked impairment in  
ability to maintain stable emotional functioning in the workplace” also supports a finding of  
disability. (Pl.’s Mot. at 5.) Because the undersigned finds that remand is necessary for failure to  
consult a VE, the court does not reach this issue.

1 frequent interaction with coworkers, supervisors, or the public,” there are a significant number of  
2 jobs which do not require such interaction and therefore, the ALJ did not err. (Def.’s Opp’n &  
3 Cross-Motion for Summ. J. at 8.) He further argues that the ALJ was not required to consult a  
4 VE here because SSR 85-15 makes clear that there are jobs available that fit plaintiff’s  
5 limitations. (Id. at 10.)

6 At step five, the burden shifts to the Commissioner to show that specific jobs exist  
7 in substantial numbers in the national economy that plaintiff can perform despite his or her  
8 identified limitations. Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995). This burden is  
9 satisfied by either “(1) applying the Medical-Vocational Guidelines (“grids”) in appropriate  
10 circumstances or (2) taking the testimony of a vocational expert.”<sup>27</sup> Id. If the Commissioner  
11 satisfies this burden, a plaintiff is not disabled and is not entitled to disability benefits.  
12 Lounsbury, 468 F.3d at 1114. If the Commissioner cannot meet this burden, the plaintiff is  
13 “disabled” and entitled to disability benefits. Id.

14 In this case, plaintiff’s mental health impairments, consisting of panic attacks and  
15 bipolar disorder, are non-exertional impairments. Non-exertional limitations are those that do

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17 <sup>27</sup> The Ninth Circuit Court of Appeals has described the Medical-Vocational Guidelines,  
18 or the “grids,” which appear at 20 C.F.R. Part 404, Subpart P, Appendix 2, as follows:

19 The grids are applied at the fifth step of the analysis under 20 C.F.R. §  
20 404.1520, and present, in table form, a short-hand method for determining  
21 the availability and numbers of suitable jobs for a claimant. [Tackett v.  
22 Apfel, 180 F.3d 1094, 1101 (9th Cir.1999).] The grids categorize jobs by  
23 their physical-exertional requirements, and set forth a table for each  
24 category. A claimant’s placement with the appropriate table is determined  
25 by applying a matrix of four factors identified by Congress - a claimant’s  
26 age, education, previous work experience, and physical ability. For each  
combination of these factors, they direct a finding of either ‘disabled’ or  
‘not disabled’ based on the number of jobs in the national economy in that  
category of physical-exertional requirements. Id. If a claimant is found  
able to work jobs that exist in significant numbers, the claimant is  
generally considered not disabled. Heckler v. Campbell, 461 U.S. 458,  
461 (1983).

Tommasetti, 533 F.3d at 1043 n.4 (modifications in original) (quoting Lounsbury v. Barnhart,  
468 F.3d 1111, 1114-15 (9th Cir. 2006)).

1 not directly affect a claimant's strength, and include "mental, sensory, postural, manipulative, or  
2 environmental (e.g., inability to tolerate dust or fumes) limitations." Burkhart v. Bowen, 856  
3 F.2d 1335, 1340-41 (9th Cir. 1988) (citations and internal quotation marks omitted). Where a  
4 claimant suffers from non-exertional limitations, such as plaintiff here, the use of a VE is not  
5 mandatory unless the claimant's impairments result in significant and "sufficiently severe" non-  
6 exertional limitations. Hoopai v. Astrue, 499 F.3d 1071, 1076 (9th Cir. 2007).

7           The proper inquiry is whether a claimant's non-exertional limitations are "at a  
8 sufficient level of severity such as to make the grids inapplicable to the particular case," id., i.e.,  
9 whether the claimant has an impairment that limits his or her ability to work without directly  
10 affecting his or her strength. Penny v. Sullivan, 2 F.3d 953, 958 (9th Cir. 1993). Such  
11 "non-exertional impairments, if sufficiently severe, may limit the claimant's functional capacities  
12 in ways not contemplated by the guidelines. In such a case the guidelines would be  
13 inapplicable." Id. (citing Desrosiers v. Sec'y. of Health and Human Servs., 846 F.2d 573, 577  
14 (9th Cir. 1988)); see also Polny v. Bowen, 864 F.2d 661, 663-64 (9th Cir. 1988) (holding that  
15 where the plaintiff's non-exertional limitations are by themselves enough to limit his or her range  
16 of work, the testimony of a VE is necessary to identify specific jobs within the plaintiff's  
17 abilities) (citing Burkhart, 856 F.2d at 1340).

18           Here, the ALJ found that plaintiff's non-exertional limitations had little or no  
19 effect on the occupational base of unskilled work at all exertional levels. However, this  
20 conclusion did not properly resolve whether plaintiff's mental impairments were of sufficient  
21 severity to impair her ability to work irrespective of any physical limitations.

22           As discussed above, the undersigned concludes that the ALJ properly found at  
23 step two that plaintiff's physical impairments were not severe. Because plaintiff's severe  
24 impairments are non-exertional, SSR 85-15 provides the proper framework for determining  
25 whether a mental impairment is of sufficient severity to impair plaintiff's ability to work. "SSR  
26 85-15 provides guidance only for cases in which the claimant asserts solely nonexertional

1 impairments.” Roberts v. Shalala, 66 F.3d 179, 183 (9th Cir. 1995) (internal quotation marks  
2 omitted). “Mental impairments are generally considered to be nonexertional.” Id. (quoting SSR  
3 85-15 at 545) (internal quotation marks omitted).

4 SSR 85-15 provides in relevant part:

5 The basic mental demands of competitive, remunerative, unskilled work  
6 include the abilities (on a sustained basis) to understand, carry out, and  
7 remember simple instructions; to respond appropriately to supervision,  
8 coworkers, and usual work situations; and to deal with changes in a  
9 routine work setting. *A substantial loss of ability to meet any of these  
10 basic work-related activities would severely limit the potential  
11 occupational base.* This, in turn, would justify a finding of disability  
12 because even favorable age, education, or work experience will not offset  
13 such a severely limited occupational base.

14 Where there is no exertional impairment, unskilled jobs at all levels of  
15 exertion constitute the potential occupational base for persons who can  
16 meet the mental demands of unskilled work. These jobs ordinarily involve  
17 dealing primarily with objects, rather than with data or people, and they  
18 generally provide substantial vocational opportunity for *persons with  
19 solely mental impairments who retain the capacity to meet the intellectual  
20 and emotional demands of such jobs on a sustained basis.*

21 SSR 85-15, 1985 WL 56857, at \*4 (emphasis added). Therefore, SSR 85-15 requires that all  
22 three basic mental demands be met even in jobs where plaintiff deals primarily with objects as  
23 opposed to data or people. A finding that plaintiff lacked one of the these three basic mental  
24 demands compels a finding that the ALJ erred by failing to utilize a VE. See Cox v. Astrue, No.  
25 C10-5021RBL, 2010 WL 3120593, at \*11 (W.D. Wash. July 9, 2010) (unpublished) (stating that  
26 where plaintiff lacks one of the three basic mental demands required under SSR 85-15, the grids  
do not completely and accurately represent plaintiff’s limitations and testimony from a vocational  
expert is required); Stark v. Astrue, No. C 07-6465 MHP, 2009 WL 2566723, at \*8 (N.D. Cal.  
Aug. 18, 2009) (unpublished) (concluding that plaintiff’s inability to respond to supervision as  
required by SSR 85-15 severely limited plaintiff’s potential occupational base thereby requiring  
the use of a VE).

The undersigned concludes that because the record supports that plaintiff  
potentially lacks one of the basic mental demands required for an unskilled occupational base,



1 the ALJ erred by relying solely on the grids. Dr. Regazzi’s findings support the conclusion that  
2 plaintiff lacks the ability to perform a basic work-related activity: the ability to deal with changes  
3 in routine work setting. (AT 276.) Dr. Regazzi determined that plaintiff had “marked  
4 impairment” in her ability to deal with unexpected situations that might arise in the course of a  
5 workday.<sup>28</sup> (Id.)

6           Discussing Dr. Regazzi’s findings, the ALJ found “that Dr. Regazzi [*sic*] opinion  
7 is found to be reasonably well supported by medical findings and not inconsistent with the  
8 overall evidence in file.” (AT 17.) The ALJ further stated: “Dr. Regazzi reported that the  
9 claimant’s mental impairment is moderate and is consistent with the undersigned [*sic*] residual  
10 functional capacity except unexpected changes in work environment. However, there are number  
11 of jobs that do not involve changes in work routine.” (Id.) The ALJ noted that Dr. Regazzi  
12 reported “marked limitations” in this area, writing that “[n]onetheless, there are many jobs that  
13 do not involve changes in work routine.” (AT 18.) Therefore, it appears that while the ALJ  
14 agreed with Dr. Regazzi’s opinion that a “marked” limitation would substantially impair  
15 plaintiff’s ability to deal with unexpected changes in work environment or routine, the ALJ found  
16 that this was insufficient for a finding of disability because there were other jobs available that do  
17 not implicate plaintiff’s limitations.

18           Because a “marked limitation” in the ability to deal with changes in routine work  
19 setting would leave plaintiff unable to meet one of the three basic mental requirements of  
20 unskilled work, thereby severely limiting plaintiff’s potential occupational base, the testimony of  
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22           <sup>28</sup> The Commissioner argues that Dr. Regazzi’s findings do not parallel the language of  
23 SSR 85-15. (Def.’s Opp’n & Cross-Motion for Summ. J. at 9.) Specifically, he argues that Dr.  
24 Regazzi “was discussing Plaintiff’s abilities to deal with *unexpected* situations that *might* arise”  
25 which is not the same as an ability to deal with changes in routine work setting. (Id.) (emphasis  
26 in original). Because the ALJ’s discussion of Dr. Regazzi’s findings demonstrates the ALJ’s  
belief that Dr. Regazzi’s limitations parallel the language of SSR 85-15, the undersigned  
declines the Commissioner’s invitation to make this distinction. (See AT 17 (demonstrating the  
ALJ’s use of the terms “unexpected changes in work environment” and “changes in work  
routine” interchangeably when discussing Dr. Regazzi’s report).)

1 a VE was necessary to identify specific jobs within plaintiff's abilities. Accordingly, the ALJ  
2 erred by failing to utilize a VE, and the undersigned will remand this matter for further  
3 proceedings.

4 Plaintiff argues that because plaintiff's mental impairments "impose restrictions  
5 on basic work-related mental functions" remand is not necessary and this court should order that  
6 benefits be paid. (Pl.'s Mot. at 8.) The decision of whether to remand for further proceedings or  
7 simply to award benefits is within the court's discretion. McAllister v. Sullivan, 888 F.2d 599,  
8 603 (9th Cir. 1989). Generally, the court should direct the award of benefits in cases where no  
9 useful purpose would be served by further administrative proceedings. Varney v. Sec'y of Health  
10 and Human Servs., 859 F.2d 1396, 1399 (9th Cir. 1988). The undersigned finds that the ALJ's  
11 reliance on the grids was improper and that the ALJ was required to consult a VE. Because a VE  
12 must testify about whether there are jobs that plaintiff may perform despite a potentially severe  
13 limitation in her ability to deal with changes in routine work setting, the undersigned concludes  
14 that remand is appropriate. Although the court understands the importance of expediting  
15 disability claims, Varney, 859 F.2d at 1401, remanding this case for further administrative  
16 proceedings will serve a useful purpose in the resolution of this case. On remand, the ALJ must  
17 determine whether plaintiff's mental impairments allow her to meet the basic work-related  
18 activities required under SSR 85-15.<sup>29</sup> The ALJ must also take the testimony of a VE to  
19 determine whether there are jobs in the national economy that plaintiff is able to perform despite  
20 her mental limitations.

21 V. CONCLUSION

22 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 23 1. Plaintiff's motion for summary judgment (Dkt. No. 17) is granted in part  
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25 <sup>29</sup> The undersigned notes that there appears to be a conflict between the opinions of Dr.  
26 Canty and Dr. Regazzi that was not adequately addressed by the ALJ and may have a bearing on  
whether plaintiff is "markedly limited" in her ability to deal with changes in routine work setting.

