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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DORENDA CRAWFORD,  
Plaintiff,  
v.  
CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,  
Defendant.

No. 2:13-cv-2278-EFB

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying, in part, her applications for a period of disability and Disability Insurance Benefits (“DIB”) and for Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act. The parties’ cross-motions for summary judgment are pending. For the reasons discussed below, plaintiff’s motion is granted and defendant’s motion is denied.

I. BACKGROUND

Plaintiff filed an application for a period of disability and DIB on February 23, 2010, and an application for SSI on January 7, 2011. Administrative Record (“AR”) 101, 169-182. Both applications alleged that plaintiff had been disabled since December 4, 2009. *Id.* at 170, 174. Plaintiff’s applications were denied initially and upon reconsideration. *Id.* at 107-111, 113-117.

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1 On October 12, 2011, a hearing was held before administrative law judge (“ALJ”) K. Kwon. *Id.*  
2 at 56-95. Plaintiff was represented by counsel at the hearing, at which she and a vocational expert  
3 (“VE”) testified. *Id.*

4 On December 16, 2011, the ALJ issued a decision finding that plaintiff was not disabled  
5 under sections 216(i), 223(d), and 1614(a)(3)(A) of the Act at any time from the date of her  
6 alleged onset of disability through the date the decision.<sup>1</sup> *Id.* at 40-50. The ALJ made the  
7 following specific findings:

- 8 1. The claimant meets the insured status requirements of the Social Security Act through  
9 December 31, 2014.

10  
11 <sup>1</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to the  
12 Social Security program, 42 U.S.C. §§ 401 *et seq.* Supplemental Security Income (“SSI”) is paid  
13 to disabled persons with low income. 42 U.S.C. §§ 1382 *et seq.* Under both provisions,  
14 disability is defined, in part, as an “inability to engage in any substantial gainful activity” due to  
15 “a medically determinable physical or mental impairment.” 42 U.S.C. §§ 423(d)(1)(a) &  
16 1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. *See* 20 C.F.R.  
17 §§ 423(d)(1)(a), 416.920 & 416.971-76; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). The  
18 following summarizes the sequential evaluation:

19 Step one: Is the claimant engaging in substantial gainful  
20 activity? If so, the claimant is found not disabled. If not, proceed  
21 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.

25 Step three: Does the claimant’s impairment or combination  
26 of impairments meet or equal an impairment listed in 20 C.F.R., Pt.  
27 404, Subpt. P, App.1? If so, the claimant is automatically  
28 determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past  
work? If so, the claimant is not disabled. If not, proceed to step  
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. *Yuckert*, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential  
evaluation process proceeds to step five. *Id.*

- 1 2. The claimant has not engaged in substantial gainful activity since December 4, 2009, the  
2 alleged onset date (20 CFR 404.1571 *et seq.*, and 416.971 *et seq.*)
- 3 \* \* \*
- 4 3. The claimant has the following severe impairments: diabetes mellitus, depressive disorder,  
5 and obesity (20 CFR 404.1520(c) and 416.920(c)).
- 6 \* \* \*
- 7 4. The claimant does not have an impairment or combination of impairments that meets or  
8 medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart  
9 P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and  
10 416.926).
- 11 \* \* \*
- 12 5. After careful consideration of the entire record, the undersigned finds that the claimant has  
13 the residual functional capacity to perform less than the full range of light work as defined  
14 in 20 CFR 404.1567(b) and 416.967(b). She is capable of simple, routine, 1-2 step  
15 unskilled light work with limited interaction with the general public. She is unable to  
16 climb ladders, ropes and scaffolds.
- 17 \* \* \*
- 18 6. The claimant is unable to perform any past relevant work (20 CFR 404.1565 and  
19 416.965).
- 20 \* \* \*
- 21 7. The claimant was born on September 16, 1956 and was 53 years old, which is defined as  
22 an individual closely approaching advanced age, on the alleged disability onset date (20  
23 CFR 404.1563 and 416.963).
- 24 8. The claimant has at least a high school education and is able to communicate in English  
25 (20 CFR 404.1564 and 416.964).
- 26 9. Transferability of job skills is not material to the determination of disability because using  
27 the Medical-Vocational Rules as a framework supports a finding that the claimant is “not  
28 disabled,” whether or not the claimant has transferable job skills (See SSR 82-41 and 20  
CFR Part 404, Subpart P, Appendix 2).
10. Considering the claimant’s age, education, work experience, and residual functional  
capacity, there are jobs that exist in significant numbers in the national economy that the  
claimant can perform (20 CFR 404.1569, 404.1569(a), 416.969, and 416.969(a)).
- \* \* \*

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1 11. The claimant has not been under a disability, as defined in the Social Security Act, from  
2 December 4, 2009, through the date of this decision (20 CFR 404.1520(g) and  
3 416.920(g)).

4 *Id.* at 42-49.

5 Plaintiff requested that the Appeals Council review the ALJ's decision, *id.* at 33-36, and  
6 the Appeals Council granted a review. *Id.* at 166-168. On September 5, 2013, the Appeals  
7 Council reversed in part and found plaintiff to be disabled beginning September 15, 2011, the day  
8 her age category changed to advanced age (55). *Id.* at 3-11. The appeals counsel affirmed the  
9 finding of not disabled for the period December 4, 2009, the alleged date of onset of disability, to  
10 September 15, 2011, adopting the ALJ's evidentiary findings as to that period. *Id.* at 7. Plaintiff  
11 now challenges the Commissioner's finding that she was not disabled before September 15, 2011.

## 12 II. LEGAL STANDARDS

13 The Commissioner's decision that a claimant is not disabled will be upheld if the findings  
14 of fact are supported by substantial evidence in the record and the proper legal standards were  
15 applied. *Schneider v. Comm'r of the Soc. Sec. Admin.*, 223 F.3d 968, 973 (9th Cir. 2000);  
16 *Morgan v. Comm'r of the Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999); *Tackett v. Apfel*,  
17 180 F.3d 1094, 1097 (9th Cir. 1999).

18 The findings of the Commissioner as to any fact, if supported by substantial evidence, are  
19 conclusive. *See Miller v. Heckler*, 770 F.2d 845, 847 (9th Cir. 1985). Substantial evidence is  
20 more than a mere scintilla, but less than a preponderance. *Saelee v. Chater*, 94 F.3d 520, 521 (9th  
21 Cir. 1996). "It means such evidence as a reasonable mind might accept as adequate to support a  
22 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v.*  
*N.L.R.B.*, 305 U.S. 197, 229 (1938)).

23 "The ALJ is responsible for determining credibility, resolving conflicts in medical  
24 testimony, and resolving ambiguities." *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.  
25 2001) (citations omitted). "Where the evidence is susceptible to more than one rational  
26 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld."  
27 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

1 III. ANALYSIS

2 Plaintiff argues the ALJ erred by: (1) failing to find plaintiff's affective and anxiety  
3 disorders were severe impairments at step two of the sequential evaluation process; (2) failing to  
4 consider all of his mental impairments at step three; (3) rejecting the opinion of plaintiff's treating  
5 physician; (4) failing to provide proper rationale for discounting plaintiff's subjective complaints  
6 and credibility; and (5) failing to rely upon VE testimony tendered in response to a complete  
7 hypothetical question. *Id.* at 8-13. Plaintiff further argues that these errors led to an incorrect  
8 residual functional capacity ("RFC") assessment that plaintiff was capable of performing "light  
9 work," which was relied upon by the Appeals Council in a misapplication of the Medical  
10 Vocational Guidelines ("Grids"). *Id.* at 6.

11 A. The ALJ's Failure to Find Plaintiff's Mental Impairments as Severe at Step Two was  
12 Harmless Error

13 Plaintiff argues that the ALJ erred at step two of the sequential evaluation process by  
14 failing to find plaintiff's affective and anxiety disorders were severe impairments. ECF No. 16 at  
15 11.

16 "The step-two inquiry is a de minimis screening device to dispose of groundless claims."  
17 *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). The purpose is to identify claimants  
18 whose medical impairment is so slight that it unlikely they would be disabled even if age,  
19 education, and experience were not taken into account. *Bowen v. Yuckert*, 482 U.S. 137, 153, 107  
20 S. Ct. 2287, 96 L. Ed. 2d 119 (1987). At step two of the sequential evaluation, the ALJ  
21 determines which of claimant's alleged impairments are "severe" within the meaning of 20  
22 C.F.R. § 404.1502(c). A severe impairment is one that "significantly limits" a claimant's  
23 "physical or mental ability to do basis work activities." 20 C.F.R. § 404.1520(c). "An  
24 impairment is not severe if it is merely 'a slight abnormality (or combination of slight  
25 abnormalities) that has no more than a minimal effect on the ability to do basic work activities.'" *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005) (quoting Social Security Ruling ("SSR") 96-  
26 3p, 1996 SSR LEXIS 10 (1996)).  
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1 At step two the ALJ found plaintiff's only severe impairments were diabetes mellitus,  
2 depressive disorder, and obesity. AR 42. In making this finding, the ALJ did not address any  
3 evidence concerning plaintiff's anxiety disorder. Indeed, the ALJ's step two finding contained no  
4 discussion of any evidence in the record. *Id.* While it is not entirely clear why the ALJ did not  
5 find these mental impairments to be severe, the ALJ did in fact consider the impairments in  
6 assessing plaintiff's RFC, and therefore any failure to properly characterize them as severe was  
7 harmless. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (finding harmless an ALJ's  
8 failure to list certain impairment at step two where the ALJ fully evaluated the impairment at step  
9 four); *Stout v. Comm'r Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *Smolen*, 80 F.3d at  
10 1290 (if one severe impairment exists, all medically determinable impairments must be  
11 considered in the remaining steps of the sequential analysis) (citing 20 C.F.R. § 404.1523); *Burch*  
12 *v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005) (ALJ's failure to find claimant's obesity severe at  
13 step two was harmless error where it was considered in determining claimant's RFC).

14 In assessing plaintiff's RFC, the ALJ specifically noted plaintiff's testimony of anxiety  
15 attacks and Dr. Luo's finding that plaintiff's "mood was depressed and anxious." AR 46-47.  
16 Because the ALJ considered plaintiff's anxiety in assessing his RFC, any error in failing to find  
17 these impairments severe at step two was, at most, harmless.

18 **B. The ALJ Did Not Err at Step Three**

19 Plaintiff next argues that the ALJ erred in assessing her mental impairments at step three.  
20 ECF No. 16 at 12.

21 At step three of the sequential evaluation process, the ALJ determines whether the  
22 claimant's impairment or combination of impairments meets or equals the criteria for a listed  
23 impairment in 20 C.F.R. Part 404, Subpart P, Appendix 1. Step three represents impairments at  
24 the opposite end of the spectrum from those failing to meet the screening threshold severity  
25 requirement at step two. If an impairment is found to meet or equal the criteria for a listed  
26 impairment, it is considered presumptively disabling. Pursuant to the analytical procedure  
27 prescribed by the regulations, after the ALJ determines that the claimant has a medically  
28 determinable mental impairment, he then rates the degree of the claimant's functional limitations

1 in four areas, known as the “B Criteria”: (1) activities of daily living; (2) social functioning; (3)  
2 concentration, persistence, or pace; and (4) episodes of decompensation. 20 C.F.R.  
3 § 404.1520a(b)-(c). In the first three areas, the ALJ rates the limitations as either none, mild,  
4 moderate, marked, or extreme and the fourth functional area, episodes of decompensation, is rated  
5 on a four point scale of none, one or two, three, and four or more. 20 C.F.R. § 404.1520a(c)(3)-  
6 (4). To satisfy the criteria, and meet or equal a mental impairment listing, a claimant must show  
7 at least two “marked” limitations” or one “marked” limitation and repeated episodes of  
8 decompensation, each of an extended duration. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing  
9 12.04 (B). Plaintiff bears the burden of showing his mental impairment(s) meets or equals a  
10 Listing. *Yuckert*, 482 U.S. at 146 n.5.

11 Plaintiff contends that the ALJ’s failure to identify plaintiff’s anxiety disorder as severe at  
12 step two rendered the ALJ’s analysis of plaintiff’s mental impairments at step three incomplete.  
13 ECF No. 16 at 12. Plaintiff relies on *Keyser v. Commissioner of Social Security*, 648 F.3d 721  
14 (9th Cir. 2011). *Id.* That case, however, is inapposite to the issue plaintiff raises. In *Keyser*, the  
15 court held that the ALJ erred because he failed to incorporate the mode of analysis in a  
16 Psychiatric Review Technique Form (“PRTF”) in determining whether the plaintiff’s mental  
17 impairments were severe and whether they met or equaled a listed impairment. *Keyser*, 648 F.3d  
18 721. Here, the ALJ’s analysis followed the proper PRTF and Criteria B analysis, thus *Keyser* has  
19 no application.

20 Although the ALJ did not identify plaintiff’s anxiety disorder as severe impairments at  
21 step-two, the ALJ considered all of plaintiff’s mental impairments in his step-three analysis. AR  
22 42-44. In determining whether plaintiff’s mental impairments equaled a listing, the ALJ  
23 “considered all of the claimant’s impairments individually and in combination,” but found “no  
24 evidence that the combined clinical findings from such impairments reach the level of severity  
25 contemplated by the Listings.” *Id.* at 43. Taking all of plaintiff’s mental impairments into  
26 account, the ALJ still only found mild limitations in daily activities and social functioning and  
27 moderate limitations in concentration, persistence, or pace. *Id.* Thus, contrary to plaintiff’s

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1 contentions, the ALJ did not focus solely on the effect of her depression in conducting the step-  
2 three evaluation.

3 Accordingly, the ALJ did not err in assessing plaintiff's mental impairments at step three.

4 C. The ALJ Did Not Err in Rejecting the Opinion of Plaintiff's Treating Psychiatrist

5 Plaintiff also argues that the ALJ erred in improperly rejecting the opinion of plaintiff's  
6 treating psychiatrist, Dr. Xingxing Luo. ECF No. 16 at 10-11.

7 The weight given to medical opinions depends in part on whether they are proffered by  
8 treating, examining, or non-examining professionals. *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.  
9 1996). Ordinarily, more weight is given to the opinion of a treating professional, who has a  
10 greater opportunity to know and observe the patient as an individual. *Id.*; *Smolen v. Chater*, 80  
11 F.3d 1273, 1285 (9th Cir. 1996). To evaluate whether an ALJ properly rejected a medical  
12 opinion, in addition to considering its source, the court considers whether (1) contradictory  
13 opinions are in the record; and (2) clinical findings support the opinions. An ALJ may reject an  
14 uncontradicted opinion of a treating or examining medical professional only for "clear and  
15 convincing" reasons. *Lester*, 81 F.3d at 831. In contrast, a contradicted opinion of a treating or  
16 examining medical professional may be rejected for "specific and legitimate" reasons that are  
17 supported by substantial evidence. *Id.* at 830. While a treating professional's opinion generally  
18 is accorded superior weight, if it is contradicted by a supported examining professional's opinion  
19 (e.g., supported by different independent clinical findings), the ALJ may resolve the conflict.  
20 *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d  
21 747, 751 (9th Cir. 1989)). However, "[w]hen an examining physician relies on the same clinical  
22 findings as a treating physician, but differs only in his or her conclusions, the conclusions of the  
23 examining physician are not 'substantial evidence.'" *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir.  
24 2007).

25 Dr. Luo, plaintiff's treating psychiatrist, completed a Mental RFC Assessment on June 15,  
26 2011. *Id.* at 764-768. Dr. Luo diagnosed plaintiff with bipolar disorder, depression, and manic  
27 syndrome. *Id.* at 762. Dr. Luo opined that plaintiff has marked limitations in understanding and  
28 remembering detailed instructions, maintaining attention and concentration for extended periods



1 of time, and working in coordination with proximity to others without being distracted by them.  
2 *Id.* at 764-765. Dr. Luo also opined that plaintiff has moderate limitations in remembering  
3 locations, work procedures, and very short simple instructions; carrying out very short simple  
4 instructions, detailed instructions; performing activities within a schedule; maintaining regular  
5 attendance; sustaining an ordinary routine without special supervision, interacting socially; and  
6 adapting in the workplace. *Id.*

7 Plaintiff underwent a comprehensive psychiatric evaluation, which was conducted by  
8 examining psychologist Silvia Torrez, Doctor of Psychology.<sup>2</sup> *Id.* at 522-529. Dr. Torrez  
9 diagnosed plaintiff with a mood disorder (not otherwise specified). *Id.* at 526-527. She opined  
10 that plaintiff has a good ability in understanding and remembering very simple as well as detailed  
11 instructions, maintaining concentration and attention, sustaining an ordinary routine without  
12 special supervision, completing a normal workday and workweek without interruptions at a  
13 constant pace, and dealing with various changes in the work setting. *Id.* at 528. It was also her  
14 opinion that plaintiff's ability to accept instruction from supervisors and interact appropriately  
15 with coworkers is fair. *Id.* Dr. Torrez further opined that the likelihood of plaintiff emotionally  
16 deteriorating in the work environment is fair. *Id.*

17 The record also contains a Mental RFC Assessment completed by non-examining  
18 physician Dr. Dalton. *Id.* at 557-560. Dr. Dalton opined that plaintiff is moderately limited in:  
19 carrying out detailed instructions; maintaining concentration and attention for extended periods of  
20 time; performing activities within a schedule, maintaining regular attendance, and being punctual  
21 in customary tolerance; sustaining a routine without special supervision; and working with and  
22 around others without being distracted. *Id.* at 557. Dr. Dalton also found that plaintiff has  
23 moderate limitations in: interacting appropriately with the general public; getting along with  
24 coworkers and peers; and responding appropriately to changes in work setting. *Id.* at 558.  
25 However, Dr. Dalton opined that plaintiff is capable of performing simple, unskilled tasks in a  
26 low stress setting with limited social interaction. *Id.* at 559.

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27 <sup>2</sup> Although the form in the record indicates that the examination was a "psychiatric"  
28 evaluation, Dr. Torres is a psychologist and not a psychiatrist.

1 The ALJ assigned limited weight to Dr. Luo's opinion, while giving great weight to the  
2 assessments by Drs. Torrez and Dalton. *Id.* at 46-47. Because Dr. Luo's opinion was  
3 contradicted by Drs. Torrez and Dalton's opinions, the ALJ was required to give "specific and  
4 legitimate reasons for rejecting Dr. Luo's opinion. *See Orn*, 495 F.3d at 632.

5 The ALJ gave several reasons for discounting Dr. Luo's opinion. First, the ALJ accorded  
6 it limited weight because "it is markedly inconsistent with [her] own treatment records that are  
7 relatively unremarkable." AR 47. Contradictions between a treating physician's assessment and  
8 clinical notes are a clear and convincing reason for an ALJ to reject the doctor's opinion. *Bayliss*  
9 *v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). The ALJ noted that "Dr. Luo's  
10 contemporaneous treatment record indicates that other than the claimant's depressed mood, the  
11 mental status examinations are all within normal limits and without any notable extremes to  
12 account for the dramatic findings . . . ." AR 47. Indeed, in the Short Form Evaluation completed  
13 on March 24, 2011, Dr. Luo indicated that plaintiff's concentration is intact and her memory was  
14 normal, and then opined that plaintiff had poor ability to understand, remember, and carry out  
15 complex instructions. *Id.* at 664-665. Further, Dr. Luo's treatment notes from January 2011 to  
16 late April 2012 consistently indicate that plaintiff has fair concentration and her memory is intact  
17 for the "immediate, recent and remote." *Id.* at 633, 676, 677, 678, 704, 707, 709, 714, 719, 720,  
18 723, 771, 813, 815, 818, 820. These findings of fair and normal concentration and memory in the  
19 treatment notes are inconsistent with the extreme mental limitations opined by Dr. Luo, which  
20 included marked limitations in maintaining attention and concentration.

21 The ALJ further noted that Dr. Luo's opinion lacked "any explanation or rationale for the  
22 incongruent opinion on the form." *Id.* at 47. An ALJ may reject a treating physician's opinion  
23 that is conclusory, brief, and unsupported by the record as a whole or objective medical findings.  
24 *Baston v. Comm'r of the SSA*, 359 F.3d 1190, 1195 (9th Cir. 2004); *see also* Social Security  
25 Ruling 9602p, 1996 SSR LEXIS 9 (noting it would be "error to give an opinion controlling  
26 weight simply because it is the opinion of a treating source if it is not well supported . . . or if it is  
27 inconsistent with the other substantial evidence"). Dr. Luo's opinion took the form of three  
28 check-the-box forms and was not supported by a single explanation or rationale of how she

1 formed her opinion about plaintiff's extreme mental limitations. AR 663-665, 762-766. In the  
2 comment section, Dr. Luo simply wrote "[p]lease see my notes." *Id.* at 766. However, as  
3 discussed above, Dr. Lou's treatment notes are inconsistent with her stated opinion in the check-  
4 the-box forms. Accordingly, the ALJ properly gave reduced weight to the conclusory and  
5 unsupported opinion.

6 Significantly, plaintiff does not address these reasons in her motion for summary  
7 judgment. Instead, plaintiff argues that the ALJ should have given Dr. Luo's opinion controlling  
8 weight, instead of giving greater weight to Drs. Torrez and Dalton's opinions. ECF No. 16 at 9,  
9 11-12. The ALJ did not reject Dr. Luo's opinion because it conflicted with the opinions of Drs.  
10 Torrez and Dalton. Rather, as explained above the ALJ gave a number of specific and legitimate  
11 reasons for rejecting Dr. Luo's opinion. *See Lester*, 81 F.3d at 830 (an ALJ may reject a  
12 contradicted opinion of a treating medical professional for "specific and legitimate" reasons).

13 Accordingly, the ALJ did not err in rejecting plaintiff's treating psychiatrist's opinion.

#### 14 D. The ALJ Erred in Assessing Plaintiff's Credibility

15 Plaintiff next argues that the ALJ's rejection of plaintiff's subjective complaints and  
16 credibility is not supported by substantial evidence. ECF No. 16 at 8-10.

17 In evaluating whether subjective complaints are credible, the ALJ should first consider  
18 objective medical evidence and then consider other factors. *Bunnell v. Sullivan*, 947 F.2d 341,  
19 344 (9th Cir. 1991) (en banc). If there is objective medical evidence of impairment, the ALJ may  
20 then consider the nature of the symptoms alleged, including aggravating factors, medication,  
21 treatment and functional restrictions. *See id.* at 345-347. The ALJ may also consider: (1) the  
22 applicant's reputation for truthfulness, prior inconsistent statements or other inconsistent  
23 testimony, (2) unexplained or inadequately explained failure to seek treatment or to follow a  
24 prescribed course of treatment, and (3) the applicant's daily activities. *Smolen*, 80 F.3d at 1284.  
25 Work records, physician and third party testimony about nature, severity and effect of symptoms,  
26 and inconsistencies between testimony and conduct also may be relevant. *Light v. Soc. Sec.*  
27 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). A failure to seek treatment for an allegedly  
28 debilitating medical problem may be a valid consideration by the ALJ in determining whether the

1 alleged associated pain is not a significant nonexertional impairment. *See Flaten v. Secretary of*  
2 *HHS*, 44 F.3d 1453, 1464 (9th Cir. 1995). The ALJ may rely, in part, on his or her own  
3 observations, *see Quang Van Han v. Bowen*, 882 F.2d 1453, 1458 (9th Cir. 1989), which cannot  
4 substitute for medical diagnosis. *Marcia v. Sullivan*, 900 F.2d 172, 177 n. 6 (9th Cir. 1990).  
5 “Without affirmative evidence showing that the claimant is malingering, the Commissioner’s  
6 reasons for rejecting the claimant’s testimony must be clear and convincing.” *Morgan*, 169 F.3d  
7 at 599.

8 Plaintiff testified that her depression was her “biggest problem” because “it keeps [her]  
9 pretty much bound inside the house,” that her “bipolar disorder . . . keeps [her] from working,”  
10 and that she doesn’t “know how to deal with people anymore.” *Id.* at 66, 70. Plaintiff also  
11 testified that she is obese, which keeps her from being able to “get out and walk,” and can  
12 sometimes make standing difficult. *Id.* at 84. However, she stated she could assist with some  
13 household chores, such as emptying the dishwasher or raking leaves and can drive to her doctor’s  
14 appointments. *Id.* at 70-71. Plaintiff further stated that she experiences side effects from her  
15 medication, has difficulty concentrating, and that her diabetes causes her to feel weak, dizzy, and  
16 lightheaded. *Id.* at 75-76, 81, 83.

17 The ALJ found that plaintiff’s statements regarding the extent of her limitations were not  
18 fully credible. *Id.* at 47. The ALJ provided several reasons for rejecting plaintiff’s subjective  
19 complaints including: (1) non-compliance with diabetes treatment plan; (2) plaintiff’s depression  
20 was situational; (3) plaintiff’s reported daily activities are inconsistent with the allegations of  
21 disability; and (4) inconsistencies between plaintiff’s statements and the medical evidence. *Id.* at  
22 47-48.

23 First, the ALJ discredited plaintiff’s subjective complaints because of her failure to  
24 comply with her diabetes treatment. *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012); *see*  
25 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (holding where a claimant complains of  
26 disabling pain but fails to seek treatment, or fails to follow prescribed treatment, an ALJ may use  
27 such failure as a basis for finding the complaint unjust or exaggerated). Here, the ALJ noted that  
28 plaintiff “often did not bring her meter or log book, was not taking her medications, continued to

1 smoke, continued to drink alcohol, and was diet noncompliant.” AR 47. In January 2010,  
2 treatment notes indicate that plaintiff failed to bring her glucose meter to her doctor’s  
3 appointment. AR 436. Again in June 2011, treatment notes indicate plaintiff’s failure to bring  
4 both her meter and her log book. *Id.* at 799. Plaintiff also reported to Dr. Seu that “[h]er glucoses  
5 are better . . . depending on her compliance with her diet.” From this statement the ALJ could  
6 logically conclude that plaintiff was not consistently compliant with prescribed diet. *See Macri v.*  
7 *Chater*, 93 F.3d 540, 544 (9th Cir. 1996) (“[T]he ALJ is entitled to draw inferences logically  
8 flowing from the evidence”). There are also notations that plaintiff continued to smoke  
9 throughout the record. AR 424, 452, 595, 777, 784, 785. In the analysis of plaintiff’s credibility,  
10 the ALJ specifically noted that plaintiff “often did not bring her meter or log book, was not taking  
11 her medications, continued to smoke, continued to drink alcohol, and was diet noncompliant.” *Id.*  
12 at 47.

13 While plaintiff’s noncompliance may be a clear and convincing reason for the ALJ to  
14 discredit plaintiff’s subjective complaints, social security regulations only require plaintiff to be  
15 compliant with treatment that would restore her ability to work. *See* 20 C.F.R. §§ 404.1530(a)  
16 and 416.930(a). Here, the bulk of plaintiff’s purported disability is due to her mental  
17 impairments. Furthermore, as noted by the ALJ, although plaintiff is sometimes noncompliant  
18 with her treatment, “the substantial record indicates minor issues with her diabetes.” AR 47.  
19 Thus, even if plaintiff was compliant with her diabetes treatment, it would not affect her mental  
20 impairments nor “restore her ability to work.” Moreover, the remaining reasons given by the ALJ  
21 fall short of the clear and convincing standard.

22 As for plaintiff’s testimony regarding her mental impairments, the ALJ found that  
23 “notations state that [plaintiff’s] depression was situational, as she had recently split up with her  
24 partner of 24 years, and was alone for the first time in her adult life (Ex. 2F, 3F, 4F, 10F, and  
25 14F).” AR 47. Although there is evidence of a recent split from a significant other, the record  
26 indicates that plaintiff experienced depression and mental health symptoms well before plaintiff  
27 “split up with her partner” in September 2010. *See id.* at 649. In fact, plaintiff’s medical records  
28 indicate that plaintiff attempted suicide in March 2008 after receiving news that a friend died

1 unexpectedly and was subsequently admitted to a crisis center for treatment. *Id.* at 276-279, 284-  
2 285. Since that time, plaintiff has consistently been receiving mental health treatment. Thus, the  
3 ALJ's reasoning that plaintiff's impairments are related to a recent breakup is not supported by  
4 substantial evidence.

5 The ALJ further rejected plaintiff's subjective complaints because they were inconsistent  
6 with plaintiff's reported daily activities and other statements. AR 48. While inconsistencies  
7 between plaintiff's testimony and reported daily activities constitutes a clear and convincing  
8 reason for discrediting plaintiff's subjective complaints, *see Burch*, 400 F.3d at 680-81, the ALJ  
9 failed to identify any inconsistencies in the record or explain what statements were inconsistent  
10 with plaintiff's daily activities. Instead, the ALJ leaves the plaintiff and the court to guess what  
11 evidence formed the basis for this reasons. This conclusory statement fails to meet the standards  
12 required for rejecting plaintiff's testimony. *See Social Security Ruling 96-7p*, 1996 SSR LEXIS 4  
13 ("It is not sufficient. . . for the adjudicator simply to recite factors that are described in the  
14 regulations for evaluating symptoms. The determination must contain specific reasons for the  
15 finding on credibility, supported by evidence in the case record, and must be sufficiently specific  
16 to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to  
17 the individual's statements and the reasons for the weight."). Thus, the ALJ's conclusory  
18 statement is not a clear and convincing reason for discrediting plaintiff's subjective complaints.

19 The final reason given by the ALJ for discrediting plaintiff's subjective complaints was  
20 that her statements were inconsistent with the medical evidence. AR 48. This reason alone,  
21 however, cannot serve as a basis for discrediting plaintiff's subject complaints. *See Burch*, 400 F.  
22 3d at 681 ("Although lack of medical evidence cannot form the sole basis for discounting pain  
23 testimony, it is a factor that the ALJ can consider in his credibility analysis.").

24 Although the ALJ provided an adequate reason for discounting plaintiff's subjective  
25 complaints regarding her diabetes, the ALJ failed to adequately address why he rejected  
26 plaintiff's statements regarding her mental impairment.

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1           Accordingly, the matter must be remanded for further consideration.<sup>3</sup>

2           As noted, plaintiff has argued that the various errors she alleges led to an incorrect RFC  
3 assessment that was relied upon by the Appeals Council in a misapplication of the Grids. The  
4 Grids present guidelines which have relevance to exertional impairments. They do not provide  
5 guidance for determining whether mental impairments (or other non-exertional impairments) are  
6 in question. *Desrosiers v. Sec’y of Health & Human Serv.*, 846 F.2d 573, 577 (9th Cir. 1988)  
7 (“This court has recognized that significant non-exertional impairments . . . may make reliance on  
8 the grids inappropriate.”); *See Cox v. Astrue*, 2010 U.S. Dist. LEXIS 81134, at \*11 (W.D. Wash.  
9 July 9, 2010) (finding that the grids did not accurately and completely represent the plaintiff’s  
10 limitations to simple, routine work with limited social contact). Here, plaintiff’s claim relies  
11 primarily on alleged limitations due to her mental impairments. Thus, although the Appeals  
12 Council properly noted that as of her 55<sup>th</sup> birthday the plaintiff would satisfy Rule 202.06 of  
13 Table No. 2 of the grids, requiring a finding of disability for exertional impairments based on the  
14 change in age category, AR at 8, the Grids only have application to plaintiff’s exertional  
15 impairments. Nonetheless, the Appeals Council relied on the Grids to affirm the ALJ’s finding of  
16 not disabled prior to September 15, 2011. The Grids do not take account of functional limitations  
17 from mental impairments. Nor is there anything in the record to suggest a sudden onset of  
18 disability on the 55<sup>th</sup> birthday. Thus, on remand, any determination of whether plaintiff was  
19 disabled prior to that date must be based on a determination of plaintiff’s functional capacity in  
20 light of her mental impairments and vocational testimony. *Moore v. Apfel*, 216 F.3d 864, 869-  
21 870 (9th Cir. 2000) (“When the grids do not completely describe the claimant’s abilities, such as  
22 when the claimant has both exertional and nonexertional limitations . . . , the grids are  
23 inapplicable and the ALJ must take the testimony of a VE.”).

24       IV.    CONCLUSION

25           For the reasons set forth herein, it is hereby ORDERED that:

- 26           1. Plaintiff’s motion for summary judgment and/or remand is granted;

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28           <sup>3</sup> Because the court finds that remand is necessary for further consideration of plaintiff’s  
subjective complaints, the court declines to address plaintiff’s additional arguments.

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- 2. The Commissioner’s cross-motion for summary judgment is denied;
- 3. The Clerk is directed to enter judgment in the plaintiff’s favor; and
- 4. The matter is remanded for further consideration consistent with this opinion.

DATED: March 25, 2015.

  
EDMUND F. BRENNAN  
UNITED STATES MAGISTRATE JUDGE