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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARSHA D. RICE,
Plaintiff,
v.
CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

No. 2:15-cv-1763 DB

ORDER

This social security action was submitted to the court without oral argument for ruling on plaintiff’s motion for summary judgment and defendant’s cross-motion for summary judgment.¹ For the reasons explained below, plaintiff’s motion is granted, defendant’s cross-motion is denied, the decision of the Commissioner of Social Security (“Commissioner”) is reversed, and the matter is remanded with instructions to award benefits.

PROCEDURAL BACKGROUND

In May of 2012, plaintiff filed an application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“the Act”), alleging disability beginning on July 8, 2011. (Transcript (“Tr.”) at 19, 222-28.) Plaintiff’s application was denied initially, (id. at 113-15), and

¹ Both parties have previously consented to Magistrate Judge jurisdiction over this action pursuant to 28 U.S.C. § 636(c). (See ECF Nos. 5 & 6.)

1 upon reconsideration. (Id. at 124-29.) Plaintiff requested an administrative hearing and a hearing
2 was held before an Administrative Law Judge (“ALJ”) on October 31, 2014. (Id. at 35-83.)
3 Plaintiff was represented by an attorney and testified at the administrative hearing. (Id. at 35-36.)

4 In a decision issued on November 21, 2014, the ALJ found that plaintiff was not disabled.
5 (Id. at 30.) The ALJ entered the following findings:

6 1. The claimant meets the insured status requirements of the Social
7 Security Act through December 31, 2016.

8 2. The claimant has not engaged in substantial gainful activity
9 since July 8, 2011, the alleged onset date (20 CFR 404.1571 *et*
10 *seq.*).

11 3. The claimant has the following severe impairments: depressive
12 disorder and anxiety disorder (20 CFR 404.1520(c)).

13 4. The claimant does not have an impairment or combination of
14 impairments that meets or medically equals the severity of one of
15 the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1
16 (20 CFR 404.1520(d), 404.1525, and 404.1526).

17 5. After careful consideration of the entire record, I find that the
18 claimant has the residual functional capacity to perform a full range
19 of work at all exertional levels but with the following nonexertional
20 limitations: the claimant is capable of simple and repetitive tasks.
21 The claimant is capable of occasional detailed tasks which are at a
22 semi-skilled level but not complex tasks. She is capable of non-
23 public work, with only occasional interactions with coworkers and
24 supervisors. The claimant needs work that is independent, which
25 means not coordinating or depending on others for completion of
26 tasks.

27 6. The claimant is unable to perform any past relevant work (20
28 CFR 404.1565).

7. The claimant was born on June 1, 1957 and was 54 years old,
which is defined as an individual closely approaching advanced
age, on the alleged disability onset date (20 CFR 404.1563).

8. The claimant has at least a high school education and is able to
communicate in English (20 CFR 404.1564).

9. Transferability of job skills is not material to the determination
of disability because using the Medical-Vocational Rules as a
framework supports a finding that the claimant is “not 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

1 perform (20 CFR 404.1569 and 404.1569(a)).

2 11. The claimant has not been under a disability, as defined in the
3 Social Security Act, from July 8, 2011, through the date of this
4 decision (20 CFR 404.1520(g)).

5 (Id. at 21-30.)

6 On June 22, 2015, the Appeals Council denied plaintiff's request for review of the ALJ's
7 November 21, 2014 decision. (Id. at 1-3.) Plaintiff sought judicial review pursuant to 42 U.S.C.
8 § 405(g) by filing the complaint in this action on August 20, 2015. (ECF No. 1.)

9 LEGAL STANDARD

10 "The district court reviews the Commissioner's final decision for substantial evidence,
11 and the Commissioner's decision will be disturbed only if it is not supported by substantial
12 evidence or is based on legal error." Hill v. Astrue, 698 F.3d 1153, 1158-59 (9th Cir. 2012).
13 Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to
14 support a conclusion. Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Sandgathe v.
15 Chater, 108 F.3d 978, 980 (9th Cir. 1997).

16 "[A] reviewing court must consider the entire record as a whole and may not affirm
17 simply by isolating a 'specific quantum of supporting evidence.'" Robbins v. Soc. Sec. Admin.,
18 466 F.3d 880, 882 (9th Cir. 2006) (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.
19 1989)). If, however, "the record considered as a whole can reasonably support either affirming or
20 reversing the Commissioner's decision, we must affirm." McCarty v. Massanari, 298 F.3d
21 1072, 1075 (9th Cir. 2002).

22 A five-step evaluation process is used to determine whether a claimant is disabled. 20
23 C.F.R. § 404.1520; see also Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). The five-step
24 process has been summarized as follows:

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

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

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1 Step three: Does the claimant's impairment or combination of
2 impairments meet or equal an impairment listed in 20 C.F.R., Pt.
3 404, Subpt. P, App. 1? If so, the claimant is automatically
4 determined disabled. If not, proceed to step four.

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

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

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

11 The claimant bears the burden of proof in the first four steps of the sequential evaluation
12 process. Bowen v. Yuckert, 482 U.S. 137, 146 n. 5 (1987). The Commissioner bears the burden
13 if the sequential evaluation process proceeds to step five. Id.; Tackett v. Apfel, 180 F.3d 1094,
14 1098 (9th Cir. 1999).

15 APPLICATION

16 In her pending motion plaintiff asserts the following two principal claims: (1) the ALJ's
17 treatment of the medical opinion evidence constituted error; and (2) the ALJ's treatment of
18 plaintiff's subjective testimony constituted error. (Pl.'s MSJ (ECF No. 10) at 14-25.²)

19 **I. Medical Opinion Evidence**

20 The weight to be given to medical opinions in Social Security disability cases depends in
21 part on whether the opinions are proffered by treating, examining, or nonexamining health
22 professionals. Lester, 81 F.3d at 830; Fair v. Bowen, 885 F.2d 597, 604 (9th Cir. 1989). "As a
23 general rule, more weight should be given to the opinion of a treating source than to the opinion
24 of doctors who do not treat the claimant" Lester, 81 F.3d at 830. This is so because a
25 treating doctor is employed to cure and has a greater opportunity to know and observe the patient
26 as an individual. Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996); Bates v. Sullivan, 894
27 F.2d 1059, 1063 (9th Cir. 1990).

28 The uncontradicted opinion of a treating or examining physician may be rejected only for
clear and convincing reasons, while the opinion of a treating or examining physician that is

² Page number citations such as this one are to the page number reflected on the court's CM/ECF system and not to page numbers assigned by the parties.

1 controverted by another doctor may be rejected only for specific and legitimate reasons supported
2 by substantial evidence in the record. Lester, 81 F.3d at 830-31. “The opinion of a nonexamining
3 physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion
4 of either an examining physician or a treating physician.” (Id. at 831.) Finally, although a
5 treating physician’s opinion is generally entitled to significant weight, “[t]he ALJ need not
6 accept the opinion of any physician, including a treating physician, if that opinion is brief,
7 conclusory, and inadequately supported by clinical findings.” Chaudhry v. Astrue, 688 F.3d 661,
8 671 (9th Cir. 2012) (quoting Bray v. Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1228 (9th Cir.
9 2009)).

10 **A. Dr. David Dahnke**

11 Here, plaintiff argues that the ALJ erred in rejecting the opinion of Dr. David Dahnke,
12 plaintiff’s treating physician. (Pl.’s MSJ (ECF No. 10) at 16-20.) In this regard, on May 2, 2012,
13 Dr. Dahnke opined that “[a]t this point” he recommended “permanent total disability as prospects
14 for employment” that plaintiff could perform “appear dim.” (Tr. at 357.) On January 28, 2015,
15 Dr. Dahnke also completed a “Mental Impairment Questionnaire,” in which he found that
16 plaintiff was moderately to markedly limited in several areas of functioning and would be absent
17 from work as a result of her impairments more than three times per month.³ (Id. at 500-04.)

18 The ALJ, however, afforded Dr. Dahnke’s opinion “little weight.” (Id. at 28.) In this
19 regard, the ALJ noted that Dr. Dahnke had “initially provided that the claimant can return to a
20 different line of work than her previous employment.” (Id.) The citation provided by the ALJ to
21 support this assertion, however, reflects that Dr. Dahnke actually “[e]ncourage[d]” plaintiff to
22 “continue to look for [a] different line of work,” because she was “not able to return to [her] prior
23

24 ³ Although the ALJ’s November 21, 2014 decision was issued prior to Dr. Dahnke’s January 28,
25 2015 questionnaire, the questionnaire was considered by the Appeals Council. (Tr. at 4.) As
26 acknowledged by the Commissioner, (Def.’s MSJ (ECF No. 11) at 8), “[w]hen, as here, ‘the
27 Appeals Council considers new evidence in deciding whether to review a decision of the ALJ,
28 that evidence becomes part of the administrative record, which the district court . . . must consider
when reviewing the [Commissioner’s] final decision for substantial evidence.” Burrell v. Colvin,
775 F.3d 1133, 1136 (9th Cir. 2014) (quoting Brewes v. Comm’r of Soc. Sec. Admin., 682 F.3d
1157, 1163 (9th Cir. 2012)).

1 type of work.” (Id. at 377.)

2 The ALJ also found that there was “no explanation” for Dr. Dahnke’s “drastic change in
3 his opinion and [that] his examination findings have remained the same throughout this period.”
4 (Id. at 28.) The evidence referred to by the ALJ, however, shows that Dr. Dahnke repeatedly
5 examined plaintiff and found that she suffered from “Major depression” and “Anxiety disorder.”
6 (Id. at 357, 359.)

7 Courts have recognized that a psychiatric impairment is not as
8 readily amenable to substantiation by objective laboratory testing as
9 is a medical impairment and that consequently, the diagnostic
10 techniques employed in the field of psychiatry may be somewhat
11 less tangible than those in the field of medicine. In general, mental
12 disorders cannot be ascertained and verified as are most physical
13 illnesses, for the mind cannot be probed by mechanical devices in
14 order to obtain objective clinical manifestations of mental illness . .
15 . . [W]hen mental illness is the basis of a disability claim, clinical
16 and laboratory data may consist of the diagnoses and observations
17 of professionals trained in the field of psychopathology.

18 Averbach v. Astrue, 731 F.Supp.2d 977, 986 (C.D. Cal. 2010) (quoting Sanchez v. Apfel, 85
19 F.Supp.2d 986, 992 (C.D. Cal. 2000)).

20 The ALJ also rejected Dr. Dahnke’s opinion because it was “inconsistent with the
21 claimant’s good activities of daily living.” (Tr. at 28.) However, as will be explained below in
22 addressing plaintiff’s challenge to the ALJ’s treatment of plaintiff’s testimony, the court finds that
23 this is not a legitimate reason supported by substantial evidence.

24 **B. Dr. Chester Sunde**

25 Plaintiff also challenges the ALJ’s treatment of the opinion of Dr. Chester Sunde. (Pl.’s
26 MSJ (ECF No. 10) at 20-22.) In this regard, on August 14, 2013, Dr. Sunde examined plaintiff
27 and completed a “comprehensive psychiatric evaluation.” (Tr. at 464-67.) The ALJ decisions
28 discussed Dr. Sunde’s opinion, noting that Dr. Sunde found plaintiff’s impairment to be
“moderate-to-marked” in several areas of functioning. (Id. at 28.) The ALJ, however, afforded
Dr. Sunde’s opinion “little weight” because it was “overly restrictive in light of the claimant’s
conservative treatment, lack of substantial counseling” and her “good activities of daily living.”
(Id. at 28.)

As noted above, the ALJ’s finding with respect to plaintiff’s purported good activities of

1 daily living is not a legitimate reason supported by substantial evidence for the reasons explained
2 below. Moreover, the Ninth Circuit has:

3 . . . particularly criticized the use of a lack of treatment to reject
4 mental complaints both because mental illness is notoriously
5 underreported and because ‘it is a questionable practice to chastise
one with a mental impairment for the exercise of poor judgment in
seeking rehabilitation.’

6 Regennitter v. Commissioner of Social Sec. Admin., 166 F.3d 1294, 1299-1300 (9th Cir. 1999)
7 (quoting Nguyen v. Chater, 100 F.3d 1462, 1465 (9th Cir. 1996)); see also Garrison v. Colvin,
8 759 F.3d 995, 1018 fn 24 (9th Cir. 2014) (“In other words, we do not punish the mentally ill for
9 occasionally going off their medication when the record affords compelling reason to view such
10 departures from prescribed treatment as part of claimants’ underlying mental afflictions.”).

11 **C. Dr. Les Kalman**

12 Next, plaintiff challenges the ALJ’s treatment of the opinion of Dr. Les Kalman. (Pl.’s
13 MSJ (ECF No. 10) at 22-23.) In this regard, Dr. Kalman examined plaintiff on June 8, 2014, and
14 provided a “Psychiatric Evaluation,” (Tr. at 469-72), and a “Mental Impairment Questionnaire.”
15 (Id. at 473-77.) Dr. Kalman opined, in relevant part, that plaintiff was moderately, moderately-to-
16 markedly, and markedly limited in most of her areas of mental functioning. (Id. at 476.) Dr.
17 Kalman also opined that plaintiff would be absent from work three or more times per month as a
18 result of her impairments. (Id. at 477.)

19 While the ALJ afforded “great weight” to the portion of Dr. Kalman’s opinion that was
20 consistent with the ALJ’s residual functional capacity determination, the ALJ afforded only
21 “reduced weight” to the remainder of Dr. Kalman’s opinion “because it is overly restrictive and
22 inconsistent with the claimant’s treatment record and mental status examination.” (Id. at 27.)

23 To say that medical opinions are not supported by sufficient
24 objective findings or are contrary to the preponderant conclusions
25 mandated by the objective findings does not achieve the level of
26 specificity . . . required, even when the objective factors are listed
seriatim. The ALJ must do more than offer his conclusions. He
must set forth his own interpretations and explain why they, rather
than the doctors’, are correct.

27 Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988); see also Alatorre v. Astrue, No. CV 12-
28 0746 SS, 2013 WL 424727, at *8 (C.D. Cal. Feb.1, 2013) (the ALJ’s finding that a medical

1 opinion was “too restrictive” and not supported by “social security rules and regulations”
2 constituted “mere conclusions, with no citation to record evidence” and thus were not “specific or
3 legitimate reasons for rejecting” the opinion). In this regard, an ALJ errs by assigning a medical
4 opinion “little weight while doing nothing more than . . . criticizing it with boilerplate language
5 that fails to offer a substantive basis for his conclusion.” Garrison, 759 F.3d at 1012-13.

6 The ALJ also assigned little weight to Dr. Kalman’s opinion because he examined
7 plaintiff “only once and provided limitations that retroactively apply to the claimant’s alleged
8 onset date of July 2011.” (Tr. at 27.) Examining physicians, however, typically examine the
9 claimant on only one occasion. Moreover, the ALJ cited no evidence to support questioning Dr.
10 Kalman’s retroactive application of plaintiff’s limitations.

11 Accordingly, plaintiff is entitled to summary judgment on her claim that the ALJ’s
12 treatment of the medical opinion evidence constituted error.

13 **D. Plaintiff’s Medical Treatment**

14 Finally, the ALJ failed to explain or support the assertion that plaintiff’s treatment has
15 been conservative. (Tr. at 28.) The record reflects that plaintiff’s treatment has included
16 medications such as Fluoxetine (Prozac), Citalopram (Celexa), Alprazolam (Xanax), Prazosin
17 (Minipress)⁴, Risperidone (Risperdal), and Venlafaxine (Effexor). (Tr. at 372, 394, 442 and 450.)

18 It is entirely unclear to the court how treatment with such medications could be
19 characterized as conservative. See Garcia v. Colvin, Case No. CV 14-0092-AS, 2015 WL
20 4450901, at *3 (C.D. Cal. July 20, 2015) (“The ALJ erred in finding Plaintiff’s treatment
21 conservative because . . . Xanax prescriptions are not considered conservative treatment.”);
22 Carden v. Colvin, No. CV 13-3856-E, 2014 WL 839111, at *3 (C.D. Cal. Mar. 4, 2014) (“Courts
23 specifically have recognized that the prescription of several of these medications connotes mental
24 health treatment which is not ‘conservative,’ within the meaning of social security
25 jurisprudence.”); Baker v. Astrue, No. ED CV 09-1078 RZ, 2010 WL 682263, at *1 (C.D. Cal.
26 Feb. 24, 2010) (“Where mental activity is involved, administering medications that can alter

27 ⁴ “Prazosin can be used to treat sleep problems associated with post-traumatic stress disorder.”
28 Ramo v. Colvin, Civil No. 13-1233 (JRT/JJK), 2014 WL 896729, at *5 (D. Minn. 2014).

1 behavior shows anything but conservative treatment.”).

2 **II. Plaintiff’s Testimony**

3 Plaintiff argues that the ALJ’s treatment of plaintiff’s testimony constituted error when the
4 ALJ found that plaintiff’s testimony was not entirely credible. (Pl.’s MSJ (ECF No. 10) at 23-
5 25.) This court concurs.

6 **A. Legal Standard**

7 The Ninth Circuit has summarized the ALJ’s task with respect to assessing a claimant’s
8 credibility as follows:

9 To determine whether a claimant’s testimony regarding subjective
10 pain or symptoms is credible, an ALJ must engage in a two-step
11 analysis. First, the ALJ must determine whether the claimant has
12 presented objective medical evidence of an underlying impairment
13 which could reasonably be expected to produce the pain or other
14 symptoms alleged. The claimant, however, need not show that her
15 impairment could reasonably be expected to cause the severity of
16 the symptom she has alleged; she need only show that it could
17 reasonably have caused some degree of the symptom. Thus, the
18 ALJ may not reject subjective symptom testimony . . . simply
19 because there is no showing that the impairment can reasonably
20 produce the degree of symptom alleged.

21 Second, if the claimant meets this first test, and there is no evidence
22 of malingering, the ALJ can reject the claimant’s testimony about
23 the severity of her symptoms only by offering specific, clear and
24 convincing reasons for doing so

25 Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007) (citations and quotation marks
26 omitted). “The clear and convincing standard is the most demanding required in Social Security
27 cases.” Moore v. Commissioner of Social Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002). “At
28 the same time, the ALJ is not required to believe every allegation of disabling pain, or else
disability benefits would be available for the asking” Molina v. Astrue, 674 F.3d 1104, 1112
(9th Cir. 2012).

“The ALJ must specifically identify what testimony is credible and what testimony
undermines the claimant’s complaints.” Valentine v. Commissioner Social Sec. Admin., 574
F.3d 685, 693 (9th Cir. 2009) (quoting Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d 595,
599 (9th Cir. 1999)). In weighing a claimant’s credibility, an ALJ may consider, among other
things, the “[claimant’s] reputation for truthfulness, inconsistencies either in [claimant’s]

1 testimony or between [her] testimony and [her] conduct, [claimant's] daily activities, [her] work
2 record, and testimony from physicians and third parties concerning the nature, severity, and effect
3 of the symptoms of which [claimant] complains.” Thomas v. Barnhart, 278 F.3d 947, 958-59
4 (9th Cir. 2002) (modification in original) (quoting Light v. Soc. Sec. Admin., 119 F.3d 789, 792
5 (9th Cir. 1997)). If the ALJ’s credibility finding is supported by substantial evidence in the
6 record, the court “may not engage in second-guessing.” Id.

7 **B. Analysis**

8 Here, the ALJ found that plaintiff’s medically determinable impairments could reasonably
9 be expected to cause her alleged symptoms, but that plaintiff’s statements concerning the
10 intensity, persistence and limiting effects of those symptoms was not entirely credible. (Tr. at
11 26.) In this regard, the ALJ found that plaintiff “engaged in activities consistent with an ability to
12 perform simple and repetitive tasks as well as detailed, noncomplex tasks.” (Id. at 26.)
13 Specifically, the ALJ noted that plaintiff “plays solitaire,” “generally takes her medication on
14 time,” “can perform standard household chores,” and “takes care of her grandson once a week,
15 without any help.” (Id.) The ALJ found that “[t]hese activities of daily living provide that the
16 claimant is not as limited as she alleges,” and, therefore, plaintiff’s allegations were afforded
17 “reduced weight.”⁵ (Id.)

18 The Ninth Circuit, “has repeatedly asserted that the mere fact that a plaintiff has carried
19 on certain daily activities . . . does not in any way detract from her credibility as to her overall
20 disability.” Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007) (quoting Vertigan v. Halter, 260
21 F.3d 1044, 1050 (9th Cir. 2001)); see also Cooper v. Bowen, 815 F.2d 557, 561 (9th Cir. 1987)
22 (“Disability does not mean that a claimant must vegetate in a dark room excluded from all forms
23 of human and social activity.”). In general, the Commissioner does not consider “activities like

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25 ⁵ Buried within this arguments, the ALJ states that plaintiff’s “mental status examinations do not
26 indicate significant cognitive or memory deficits.” (Tr. at 26.) “[A]fter a claimant produces
27 objective medical evidence of an underlying impairment, an ALJ may not reject a claimant’s
28 subjective complaints based solely on a lack of medical evidence to fully corroborate the alleged
severity of [the impairment].” Burch v. Barnhart, 400 F.3d 676, 680 (9th Cir. 2005); see also Putz v. Astrue, 371 Fed. Appx. 801, 802-03 (9th Cir. 2010) (“Putz need not present objective
medical evidence to demonstrate the severity of her fatigue.”)

1 taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities, or
2 social programs” to be substantial gainful activities. 20 C.F.R. § 404.1572(c). “Rather, a Social
3 Security claimant’s activities of daily living may discredit her testimony regarding symptoms
4 only when either (1) the activities ‘meet the threshold for transferable work skills’ or (2) the
5 activities contradict her testimony.” Schultz v. Colvin, 32 F.Supp.3d 1047, 1059 (N.D. Cal.
6 2014) (quoting Orn, 495 F.3d at 639).

7 The critical differences between activities of daily living and
8 activities in a full-time job are that a person has more flexibility in
9 scheduling the former than the latter, can get help from other
10 persons . . . and is not held to a minimum standard of performance,
as she would be by an employer. The failure to recognize these
differences is a recurrent, and deplorable, feature of opinions by
administrative law judges in social security disability cases.

11 Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012).

12 The ALJ also discredited plaintiff’s testimony because after her alleged onset date,
13 plaintiff attempted to find work, but “failed for reasons unrelated to her mental impairments”
14 (Tr. at 26.) However, that plaintiff applied for work but was not hired for reasons unrelated to her
15 impairment does not support the ALJ’s finding that plaintiff is “capable of performing some
16 work.” (Id.) “[D]isability claimants should not be penalized for attempting to lead normal lives
17 in the face of their limitations.” Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).

18 The final reason offered by the ALJ for discrediting plaintiff’s testimony was plaintiff’s
19 “continued noncompliance with prescribed treatment, evidenced by her refusal to take the
20 recommended dosage of antidepressants and recommended frequency of counseling session”
21 (Tr. at 26.) As noted above, “it is a questionable practice to chastise one with a mental
22 impairment for the exercise of poor judgment in seeking rehabilitation.” Nguyen, 100 F.3d at
23 1465 (quoting Blankenship v. Bowen, 874 F.2d 1116, 1124 (9th Cir. 1989)). Moreover, plaintiff
24 indicated that she does not attend more frequent counseling sessions due to “financial concerns.”
25 (Tr. at 313.) The Ninth Circuit has “proscribed the rejection of a claimant’s complaints for lack
26 of treatment when the record establishes that the claimant could not afford it.” Regennitter, 166
27 F.3d at 1297 (citing Gamble v. Chater, 68 F.3d 319, 322 (9th Cir. 1995)).

28 Accordingly, the court finds that plaintiff is also entitled to summarize judgment with

1 respect to her claim that the ALJ’s treatment of plaintiff’s subjective testimony constituted error.

2 CONCLUSION

3 With error established, the court has the discretion to remand or reverse and award
4 benefits. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989). A case may be remanded
5 under the “credit-as-true” rule for an award of benefits where:

- 6 (1) the record has been fully developed and further administrative
7 proceedings would serve no useful purpose; (2) the ALJ has failed
8 to provide legally sufficient reasons for rejecting evidence, whether
9 claimant testimony or medical opinion; and (3) if the improperly
discredited evidence were credited as true, the ALJ would be
required to find the claimant disabled on remand.

10 Garrison, 759 F.3d at 1020. Even where all the conditions for the “credit-as-true” rule are met,
11 the court retains “flexibility to remand for further proceedings when the record as a whole creates
12 serious doubt as to whether the claimant is, in fact, disabled within the meaning of the Social
13 Security Act.” Id. at 1021; see also Dominguez v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015)
14 (“Unless the district court concludes that further administrative proceedings would serve no
15 useful purpose, it may not remand with a direction to provide benefits.”); Treichler v.
16 Commissioner of Social Sec. Admin., 775 F.3d 1090, 1105 (9th Cir. 2014) (“Where . . . an ALJ
17 makes a legal error, but the record is uncertain and ambiguous, the proper approach is to remand
18 the case to the agency.”).

19 Here, further administrative proceedings would serve no useful purpose. The record has
20 been fully developed and leaves no doubt that claimant is, in fact, disabled within the meaning of
21 the Social Security Act. In this regard, the ALJ’s opinion failed to provide a legally sufficient
22 reason for rejecting the medical opinions of plaintiff’s treating physician and two examining
23 physicians.⁶ The ALJ’s decision also failed to provide a specific and legitimate reason for
24 rejecting plaintiff’s subjective testimony. This evidence, taken individually or in total, establishes

25 _____
26 ⁶ The only medical opinions the ALJ did not discredit were those of the nonexamining state
27 agency physicians. (Tr. at 27.) “In the absence of record evidence to support it, the
28 nonexamining medical advisor’s testimony does not by itself constitute substantial evidence that
warrants a rejection of either the treating doctor’s or the examining psychologist’s opinion.”
Lester, 81 F.3d at 832.

1 that plaintiff is disabled based on the testimony of the Vocational Expert at the October 31, 2014
2 hearing. (Tr. at 76-83.)

3 Accordingly, this matter will be remanded for the immediate payment of benefits. See
4 Peterson v. Colvin, 2016 WL 4410079, at *1 (9th Cir. 2016) (“the testimony of the vocational
5 expert establishes that, crediting Dr. Bormann’s opinion, Peterson could not perform jobs existing
6 in significant numbers in the national economy. Because ‘the ALJ would necessarily have to
7 conclude’ that Peterson is disabled, we exercise our discretion to remand with instructions that the
8 district court remand to the Commissioner for payment of benefits.”); Trnavsky v. Colvin, 636
9 Fed. Appx. 390, 393 (9th Cir. 2016) (“Because this evidence established that Trnavsky’s
10 impairments would rule out competitive employment, the district court did not abuse its
11 discretion in finding that the evidence compelled a finding of disability.”); cf. Benecke v.
12 Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (“Allowing the Commissioner to decide the issue
13 again would create an unfair ‘heads we win; tails, let’s play again’ system of disability benefits
14 adjudication.”).

15 Accordingly, IT IS HEREBY ORDERED that:

- 16 1. Plaintiff’s motion for summary judgment (ECF No. 10) is granted;
- 17 2. Defendant’s motion for summary judgment (ECF No. 11) is denied;
- 18 3. The Commissioner’s decision is reversed; and
- 19 4. This matter is remanded with instructions to award benefits.

20 Dated: January 9, 2017

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23 
24 DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

25 DLB:6
26 DLB1\orders.soc sec\rice1763.ord
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