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

NATALIE MARTEL,

Plaintiff,

v.

CAROLYN W. COLVIN,  
Acting Commissioner of Social Security,<sup>1</sup>

Defendant.

No. C 11-02961 CRB

**ORDER (1) GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT; (2) DENYING  
DEFENDANT'S CROSS-MOTION  
FOR SUMMARY JUDGMENT; (3)  
VACATING DEFENDANT'S FINAL  
DECISION; AND (4) REMANDING  
FOR RECONSIDERATION**

In this case, Natalie Martel (“Plaintiff”) seeks review of the Social Security Commissioner’s (“Defendant’s”) denial of her request for supplemental security income (“SSI”). Before the Court are two motions: (1) Plaintiff’s Motion for Summary Judgment and (2) Defendant’s Cross-Motion for Summary Judgment. For the reasons discussed below, the Court GRANTS Plaintiff’s Motion for Summary Judgment and DENIES Defendant’s Cross-Motion for Summary Judgment. The Court VACATES Defendant’s final decision and REMANDS for further consideration consistent with this Order.

**I. PROCEDURAL BACKGROUND**

Plaintiff originally filed for SSI on November 16, 2005. AR 17. Defendant denied her claim initially on June 21, 2006, and upon reconsideration on August 28, 2007. *Id.*

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<sup>1</sup> Carolyn Colvin became the Acting Commissioner of Social Security on February 14, 2013, and is therefore substituted for Michael Astrue as the Defendant in this action. *See* 42 U.S.C. § 405(g); Fed. R. Civ. P. 25(d). This Order refers to Colvin as the “Commissioner.”

1 Plaintiff appealed the Defendant’s decision, and Administrative Law Judge (“ALJ”) Thomas  
2 P. Tielens heard the appeal on December 4, 2008. Id. The ALJ found Plaintiff not disabled  
3 in his written decision of April 8, 2009. Id. The Appeals Counsel denied her request for  
4 review on September 18, 2009, making the ALJ’s decision the Defendant’s final decision.  
5 AR 4. Plaintiff filed the present action on June 16, 2011. Compl. (dkt. 1). Plaintiff alleges  
6 (1) that Defendant’s actions, findings, and conclusions were not supported by substantial  
7 evidence, and (2) that the ALJ employed incorrect legal standards in determining the ultimate  
8 issues. Id. ¶ 6. She now seeks a judgment from this Court vacating Defendant’s final  
9 decision and remanding for payment of benefits without rehearing, or alternatively, vacating  
10 Defendant’s final decision and remanding for rehearing, as the Court deems proper. MSJ  
11 (dkt. 30) at 1.

## 12 **II. LEGAL STANDARDS**

### 13 **A. Judicial Review of Social Security Administration Determinations**

14 A district court reviews the Commissioner’s final decision to determine whether it is:  
15 (1) based on proper legal standards; and (2) supported by substantial evidence in the record  
16 as a whole. See Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). “Substantial  
17 evidence” is more than a mere scintilla, but less than a preponderance. See Saelee v. Chater,  
18 94 F.3d 520, 522 (9th Cir. 1996). It is “such relevant evidence as a reasonable mind might  
19 accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401  
20 (1971). The Court must consider the record as a whole, including the evidence that supports  
21 and the evidence that detracts from the Commissioner’s conclusion. See Howard v. Heckler,  
22 782 F.2d 1484, 1487 (9th Cir. 1986); Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985).

23 The court may not affirm the Commissioner’s decision “simply by isolating a specific  
24 quantum of supporting evidence.” Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)  
25 (citing Jones, 760 F.2d at 995). However, if substantial evidence supports the administrative  
26 findings, or if there is conflicting evidence supporting a particular finding, the  
27 Commissioner’s finding is conclusive. See Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th  
28 Cir. 1987). Therefore, where the evidence is susceptible to more than one rational

1 interpretation, one of which supports the Commissioner’s decision, the decision must be  
2 affirmed, and may be set aside only if the Commissioner applied an improper legal standard  
3 in weighing the evidence. See Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002); see  
4 also Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).

5 Summary judgment is a method for disposing of an action in which there is no  
6 genuine issue of material fact, and the moving party is entitled to judgment as a matter of  
7 law. See Fed. R. Civ. P. 56. The burden of establishing the lack of a genuine issue of  
8 material fact is on the moving party. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23  
9 (1986). An issue is “genuine” only if there is sufficient evidence for a reasonable fact finder  
10 to find for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
11 248-49 (1986). A fact is “material” if it could affect the outcome of the case. See id. at 248.  
12 All inferences to be drawn from the underlying facts must be viewed in the light most  
13 favorable to the nonmoving party. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n,  
14 809 F.2d 626, 630 (9th Cir. 1987). “The district court need not examine the entire file for  
15 evidence establishing a genuine issue of fact, where the evidence is not set forth in the  
16 opposing papers with adequate references so that it could conveniently be found.” Carmen v.  
17 S.F. Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001).

18 **B. Standard for Determining Disability**

19 A person is “disabled” for purposes of receiving SSI if he or she is unable to engage in  
20 substantially gainful activity due to a physical or mental impairment that has lasted for a  
21 continuous period of not less than twelve months. 42 U.S.C. § 423(d)(1)(A). Social Security  
22 disability cases are evaluated under a five-step test. 20 C.F.R. § 416.920(a)(4). In the first  
23 step, the ALJ must determine whether the claimant is currently engaged in substantially  
24 gainful activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is not so engaged, the second  
25 step requires the ALJ to determine whether the claimant has a “severe” impairment which  
26 significantly limits the claimant’s ability to perform basic work activities. 20 C.F.R. §  
27 416.920(a)(4)(ii). If the ALJ concludes that the claimant does not have a “severe”  
28 impairment, the claimant is not “disabled” and the claim is denied. Id. If the claimant does

1 have a “severe” impairment, the third step requires the ALJ to determine whether the  
2 impairment meets or equals the criteria of an impairment listed in the relevant regulation. 20  
3 CFR § 404, Subpt. P, App. 1; 20 C.F.R. § 416.920(a)(4)(iii). In the fourth step, the  
4 Commissioner must determine whether the claimant has sufficient residual functional  
5 capacity (RFC) to perform his or her past work. 20 C.F.R § 416.920(a)(4)(iv). If so, the  
6 claimant is not “disabled” and the claim must be denied. Id. The claimant has the burden of  
7 proving that he or she is unable to perform past relevant work. Drouin v. Sullivan, 966 F.2d  
8 1255, 1257 (9th Cir. 1992). If the claimant meets this burden, he or she has presented a  
9 prima facie case of disability. Id. In the fifth step of the analysis, the burden shifts to the  
10 Commissioner to establish that the claimant can perform other substantial gainful work. 20  
11 C.F.R. § 416.920(a)(4)(v). If the Commissioner fails to meet this burden, the claimant must  
12 be found disabled. Id.

### 13 **III. DISCUSSION**

#### 14 **A. The ALJ’s Decision**

15 At step one of the five-step sequential analysis, the ALJ found that Plaintiff has not  
16 engaged in substantially gainful activity since the date of her application, November 16,  
17 2005. AR 19. At step two, he found that Plaintiff has the following severe impairments:  
18 right upper extremity and cervical residuals post bicycle/vehicular accident/injury in January  
19 2004; mental impairment with varying inconclusive diagnoses such as: generalized anxiety  
20 disorder, personality disorder, ADHD, bipolar disorder, organic mental disorder; and a  
21 history of drug and alcohol abuse with varying dates of remission and likely ongoing  
22 marijuana use. Id. At step three, he found that Plaintiff’s impairments and combination of  
23 impairments did not meet or medically equal one of the regulatory listed impairments. Id. In  
24 so finding, the ALJ considered whether Plaintiff satisfied the “paragraph B” criteria, which  
25 require that a claimant’s mental impairment result in at least two of the following: marked  
26 restriction of activities of daily living; marked difficulties in maintaining social functioning;  
27 marked difficulties in maintaining concentration, persistence, or pace; or repeated episodes of  
28

1 decompensation,<sup>2</sup> each of extended duration. Id. The ALJ concluded that Plaintiff’s mental  
2 impairment was mild with respect to restrictions of daily living; mild with respect to  
3 difficulties in maintaining social functioning; and mild with respect to difficulties in  
4 maintaining concentration, persistence, or pace. AR 20. He also concluded that the evidence  
5 showed no episodes of decompensation. Id. Prior to step four, the ALJ determined that  
6 Plaintiff has the RFC to perform light work, limited by the following restrictions: occasional  
7 overhead work with the dominant right upper extremity, simple repetitive tasks, and limited  
8 public interaction. AR 20-25. As part of this analysis, the ALJ also determined that  
9 Plaintiff’s statements about the intensity, persistence, and functionally limiting effects of her  
10 symptoms were not credible to the extent that they were inconsistent with his RFC analysis.  
11 AR 22-24. At step four, the ALJ found that Plaintiff had no past relevant work. AR 25. At  
12 step five, the ALJ considered Plaintiff’s age, education, work experience, and RFC, and  
13 concluded that there are jobs that exist in the national economy that Plaintiff can perform.  
14 AR 25-26. Thus, the ALJ concluded that Plaintiff was not disabled within the meaning of  
15 the Social Security Act (SSA). AR 26.

16 **B. Analysis**

17 Plaintiff avers that the Commissioner’s decision denying benefits should be vacated  
18 and remanded for reconsideration in light of the following errors: (1) the ALJ discredited the  
19 opinions of Plaintiff’s treating physician, examining psychiatrist, and consultative examining  
20 psychologist without substantial evidence; (2) the ALJ failed to find that Plaintiff’s  
21 impairments met or equaled at least Listing 12.08—Personality Disorders (ADHD) at Step  
22 Three; (3) the ALJ discredited Plaintiff’s testimony without adequate cause; (4) the ALJ  
23 determined Plaintiff’s RFC without considering all limitations established by her history of  
24 medical and mental impairments. See MSJ at 15. Conversely, Defendant urges that the  
25 ALJ’s decision denying benefits was properly supported by substantial evidence, and should  
26 therefore be upheld. See generally XMSJ (dkt. 31). Defendant denies that the

27 \_\_\_\_\_  
28 <sup>2</sup> “Episodes of decompensation may be demonstrated by an exacerbation in symptoms or signs that would ordinarily require increased treatment or a less stressful situation (or a combination of the two).” 3 Social Security Law & Practice § 42:124 (2010).

1   aforementioned issues amount to legal error. See XMSJ at 7-16. Defendant further  
2   identifies Plaintiff’s refusal to obtain a consultative examination from a psychiatric specialist  
3   of the ALJ’s choosing as an independent basis on which to affirm the denial of benefits.  
4   XMSJ at 17-19. The Court addresses each of the parties’ contentions in turn.

5                   **1.     The ALJ’s Rejection of Plaintiff’s Treating and Examining Source**  
6                   **Opinions Was Unsupported by Substantial Evidence in the Record**

7           Plaintiff contends that the ALJ did not properly credit the medical opinions of her six-  
8   year treating physician Dr. Witte, her examining psychiatrist Dr. Goodheart, and her  
9   consultative neuro-psychologist/psychologist Dr. Drew. MSJ at 16-19. In the Ninth Circuit,  
10   courts “distinguish among the opinions of three types of physicians: (1) those who treat the  
11   claimant (treating physicians); (2) those who examine but do not treat the claimant  
12   (examining physicians); and (3) those who neither examine nor treat the claimant  
13   (nonexamining physicians).” Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). Generally,  
14   more weight is given to a treating physician’s opinion as to the nature and severity of a  
15   claimant’s impairment(s). 20 C.F.R. § 416.927(c)(2); Winans v. Bowen, 853 F.2d 643, 647  
16   (9th Cir. 1987). Nevertheless, a treating physician’s opinion is only regarded as controlling  
17   where it is “well-supported by medically acceptable clinical and laboratory diagnostic  
18   techniques and is not inconsistent with the other substantial evidence in [the] case record.”  
19   20 C.F.R. § 416.927(c)(2). Where the treating doctor’s opinion is not contradicted by  
20   another doctor, it may be rejected only for “clear and convincing” reasons. Baxter v.  
21   Sullivan, 923 F.2d 1391, 1396 (9th Cir. 1991). Even if the treating doctor’s opinion is  
22   contradicted by another doctor, the Commissioner may not reject this opinion without  
23   providing “specific and legitimate” reasons supported by substantial evidence in the record  
24   for so doing. Murray v. Heckler, 722 F.2d 499, 502 (9th Cir. 1983).

25           The opinion of an examining physician, in turn, is entitled to greater weight than the  
26   opinion of a nonexamining physician. Pitzer v. Sullivan, 908 F.2d 502, 506 (9th Cir.1990);  
27   Gallant v. Heckler, 753 F.2d 1450 (9th Cir.1984). As is the case with the opinion of a  
28   treating physician, the Commissioner must provide “clear and convincing” reasons for  
  rejecting the uncontradicted opinion of an examining physician. Pitzer, 908 F.2d at 506.

1 And like the opinion of a treating doctor, the opinion of an examining doctor, even if  
2 contradicted by another doctor, may only be rejected for “specific and legitimate” reasons  
3 that are supported by substantial evidence in the record. Andrews, 53 F.3d at 1043.

4 While the ALJ’s decision referenced a number of issues that might be bases on which  
5 to question the conclusions of Dr. Witte, Dr. Goodheart, and Dr. Drew, the Court finds that  
6 the ALJ failed to provide specific and legitimate reasons supported by substantial evidence in  
7 the record for rejecting these treating and examining source opinions.<sup>3</sup> The Court now  
8 describes each of the medical opinions to which the ALJ cited in making his determination  
9 that Plaintiff is not disabled.

10 **a. Dr. Witte<sup>4</sup>**

11 The ALJ rejected Dr. Witte’s opinion for the following reasons: (1) he did not initially  
12 provide progress or treatment notes in support of his Mental Impairment Questionnaire  
13 (MIQ);<sup>5</sup> (2) he did not complete the DSM-IV diagnosis or global assessment of functioning  
14 section of the MIQ; (3) he consistently notes that medications have helped and that Plaintiff  
15 is improving; and (4) he is not a specialist in the field of psychiatry or psychology and no  
16 specialist has been able to confirm his diagnosis of bipolar disorder. AR 22-25. The Court  
17 addresses each of these issues in turn.

18 First, the Court recognizes that an ALJ may permissibly reject a check-off report that  
19 does not contain any explanation. See Crane v. Shalala, 76 F.3d 251, 253 (9th Cir. 1996).  
20 However, Dr. Witte provided his progress and treatment notes to the ALJ prior to the date of  
21 the administrative hearing. AR 276-88. Dr. Witte’s notes indicate that he had been seeing

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22 <sup>3</sup> Although the record reflects some uncertainty as to Plaintiff’s precise medical diagnoses,  
23 all three physicians agree that she suffers from some combination of severe mental impairments.  
24 Nevertheless, because of this discrepancy as to Plaintiff’s medical diagnoses, the Court evaluates the  
25 ALJ’s consideration of Dr. Witte, Dr. Goodheart, and Dr. Drew’s medical opinions under the less  
stringent “controverted” standard.

26 <sup>4</sup> Dr. Witte is Plaintiff’s treating physician. AR 22. He is a family practitioner. AR 25. He  
is not a specialist in the field of psychiatry or psychology. Id.

27 <sup>5</sup> The MIQ includes a Psychological Review Technique Form (PRTF). AR 262. The PRTF  
28 is used to evaluate the severity of and functional limitation caused by a claimant’s mental impairment.  
It is particularly relevant at steps two and three of the five-step analysis as it tracks the “paragraph B”  
criteria, which the Court explains in greater detail in Section III.B.2.

1 Plaintiff every two months from August 2007 to September 2008, during which time he  
2 treated her for “general anxiety disorder/bipolar disorder/?ADHD.” Id. His treatment notes,  
3 while illegible and cursory at points, document Plaintiff’s symptoms, her clinical  
4 presentation, prescribed medications, her various responses to those medication, and changes  
5 to her treatment. Id. Thus, the Court finds the ALJ’s assertion that he was not provided with  
6 progress or treatment notes to be entirely without merit.

7         Second, the ALJ took issue with Dr. Witte’s not having provided a DSM-IV diagnosis  
8 or global assessment of functioning, two metrics that apparently would have been helpful in  
9 assessing Plaintiff’s impairment. AR 259. However, the regulations do not require that a  
10 medical opinion contain this type of evaluation in order to be found credible. The ALJ  
11 concedes that Dr. Witte provided other relevant information on the MIQ that relates  
12 primarily to Plaintiff’s anxiety-related symptoms. AR 259-63. In terms of accompanying  
13 explanation, he indicated that Plaintiff was very psychologically fragile and anti-social,  
14 fearful and somewhat paranoid, and tremendously fearful. AR 260-61. He also noted that  
15 Plaintiff had “poor stress management” and “poor social interaction at times.” AR 262.  
16 Finally, Dr. Witte assessed Plaintiff’s degree of functional limitation as a result of her mental  
17 impairments. Id. This metric is particularly relevant for determining the severity of a  
18 claimant’s impairment at steps two and three of the ALJ’s disability assessment. Contrary to  
19 the ALJ’s findings at step three, Dr. Witte found that Plaintiff’s mental impairment was  
20 moderate as to restriction of activities of daily living, marked as to difficulties in maintaining  
21 social functioning, often as to deficiencies of concentration, persistence, or pace, and  
22 repeated (three or more) episodes of deterioration or decompensation. Id. The ALJ made no  
23 mention of Dr. Witte’s assessment in this regard. The Court finds that the ALJ’s failure to  
24 mention this portion of Dr. Witte’s opinion was error. See Nguyen v. Astrue, 179 Soc. Sec.  
25 Rep. Serv. 198, \*13 (N.D. Cal. June 11, 2012) (similarly finding error where the ALJ failed  
26 to properly credit the opinion of claimant’s treating physician as to the severity of claimant’s  
27 impairment).

1 Third, the record does not fully support the ALJ’s assertion that Dr. Witte consistently  
2 notes that medications have helped and that Plaintiff is improving. On the MIQ, Dr. Witte  
3 notes that Plaintiff “may improve with corrections in medication [and] ongoing  
4 psychotherapy.” AR 261. His progress and treatment notes state the following: “Celexa  
5 helped for a while - now not helping at 2/day,” AR 278; “‘sleeping pills’ not helping,” AR  
6 280; “Doing better” and “much improved,” AR 285; “Meds have helped,” AR 286. These  
7 statements do not reflect a consistent pattern of improvement. Additionally, the ALJ plucked  
8 these “improvement” notes out of a much larger record that documents a plethora of other  
9 clinical observations and treatment notes that more fully support Dr. Witte’s medical opinion  
10 that Plaintiff suffers from serious functional limitations as a result of her mental impairment.  
11 Thus, the Court declines to assign these “improvement” observations any greater weight than  
12 they are entitled in light of Dr. Witte’s other progress and treatment notes.

13 Finally, the ALJ also disregarded Dr. Witte’s medical opinion because he is not a  
14 specialist in the field of psychiatry or psychology and no specialist has been able to confirm  
15 his diagnosis of bipolar disorder. AR 25. This finding directly contravenes Ninth Circuit  
16 precedent. See Lester, 81 F.3d at 833 (quoting Sprague v. Bowen, 812 F.2d 1226, 1232 (9th  
17 Cir. 1987)) (finding that the opinion of a treating physician who prescribes medication is  
18 “‘competent psychiatric evidence’ and may not be discredited on the ground that he is not a  
19 board certified psychiatrist”). Generally more weight is afforded “to the opinion of a  
20 specialist about medical issues related to his or her area of speciality than to the opinion of a  
21 source who is not a specialist.” 20 C.F.R. § 416.927(c)(5). However, a treating physician’s  
22 “continuing relationship with the claimant also makes him especially qualified . . . to form an  
23 overall conclusion as to the functioning capacities and limitations.” Lester, 81 F.3d at 833.  
24 This is certainly true where, as here, “the parts of the functional restrictions arising from the  
25 claimant’s [different] impairments cannot be separated.” Id.

26 The Court further finds the ALJ’s insistence on a confirmation of Dr. Witte’s  
27 diagnoses of bipolar disorder from a specialist in the field of psychiatry or psychology to be  
28 pretextual. The Ninth Circuit has said that “[w]hen confronted with conflicting medical

1 opinions, an ALJ need not accept a treating physician’s opinion that is conclusory and brief  
2 and unsupported by clinical findings.” Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.  
3 2001) (citing Matney v. Sullivan, 981 F.2d 1016, 1019 (9th Cir. 1992)); Batson v. Comm’r,  
4 359 F.3d 1190, 1195 (9th Cir. 2004). However, such is not the case here—the ALJ was not  
5 confronted with directly conflicting medical opinions as to the severity of Plaintiff’s mental  
6 impairments or her diagnosis of bipolar. The record is clear: neither Dr. Goldheart nor Dr.  
7 Drew outright disagree with Dr. Witte’s diagnosis of bipolar disorder. Dr. Goldheart stated  
8 that “it is not possible to rule out a contribution from [b]ipolar [d]isorder.” AR 271.  
9 Similarly, Dr. Drew found that “her attentional difficulties are likely secondary to some  
10 combination of bipolar disorder and an undiagnosed neurological disease/syndrome.” AR  
11 314. Thus, the Court finds that the ALJ failed to assert specific and legitimate reasons  
12 supported by substantial evidenced in the record for rejecting Dr. Witte’s medical opinion.

13 **b. Dr. Goodheart<sup>6</sup>**

14 The ALJ rejected Dr. Goodheart’s ultimate evaluation that Plaintiff was unable to  
15 meet competitive standards for most work functions because “the [examining]<sup>7</sup> physician’s  
16 opinion regarding the ultimate issue of disability is not necessarily conclusive.” AR 23.  
17 Specifically, the ALJ cited the following as justifications for his rejection of Dr. Goodheart’s  
18 psychiatric opinion: (1) inconsistencies in Plaintiff’s reported clean and sober status; (2)  
19 inconsistencies with Dr. Witte’s assessment of Plaintiff’s ability to understand, remember,  
20 carry out simple instructions, and ask questions; (3) inconsistencies in medical diagnoses;  
21 and (4) an absence of any contemporaneous progress notes, testing, or other verification. AR  
22 23-24.

23 First, with respect to Plaintiff’s history of drug use, any inconsistencies in the record  
24 are not relevant to the ALJ’s evaluation of Dr. Goodheart’s credibility, or the ultimate issue  
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27 <sup>6</sup> Dr. Goodheart is an examining psychiatrist who evaluated Plaintiff at various times in his  
capacity as psychiatric examiner for the General Assistance Program. AR 21.

28 <sup>7</sup> Here, the ALJ referred to Dr. Goodheart as a “treating” physician; however, Dr. Goodheart  
is an examining physician. See AR 23.

1 of Plaintiff's mental impairment.<sup>8</sup> Dr. Goodheart notes that Plaintiff used a great deal of  
2 cocaine until 1994, used it moderately until 2002, and stopped completely thereafter. AR  
3 267. Dr. Drew, however, reports that "Plaintiff stated that she has not used cocaine since the  
4 early 1990s." AR 313. The ALJ also cited testimony from Plaintiff's friend who said that  
5 "she acts now like she did when using in [the] 1990s." AR 23. The ALJ went on to state that  
6 "[Plaintiff's friend] stated he believes claimant is not presently using drugs but then admitted  
7 he does not know what she is doing most of the time as she comes and goes on her own."  
8 AR 24. The Court finds this lay testimony to be highly speculative on the issue of Plaintiff's  
9 current cocaine use and certainly not a basis on which to discredit Dr. Goodheart's medical  
10 opinion. These minor inconsistencies are not relevant because, according to all sources,  
11 including Plaintiff herself, she no longer uses cocaine.<sup>9</sup> If Plaintiff reported different dates  
12 of remission to Dr. Goodheart and Dr. Drew, the Court finds it relevant only to the extent  
13 that it affects Plaintiff's own credibility.

14 Furthermore, contrary to the ALJ's contention, there is not a conflict in medical  
15 opinion as to Plaintiff's reported marijuana use. Dr. Goodheart reported that Plaintiff  
16 significantly reduced her marijuana use in late 2005, but still uses it occasionally. AR 267.  
17 This statement is not inconsistent with his diagnosis that Plaintiff's marijuana abuse is full  
18 remission since 2006. AR 272. Dr. Gonick-Hallows confirmed that Plaintiff smokes  
19 marijuana for appetite stimulation. AR 200. Dr. Drew also confirmed that Plaintiff  
20 occasionally uses marijuana. AR 313. Plaintiff did not testify as to her current marijuana  
21 use. Rather, her testimony regarding drug use was limited to her use of cocaine. AR 332.

22 Second, the ALJ referenced Dr. Witte and Dr. Goodheart's difference of opinion as to  
23 Plaintiff's ability to understand, remember, and carry out simple instructions and ask simple  
24 questions as a basis for rejecting Dr. Goodheart's entire medical opinion. AR 23. Dr.

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26 <sup>8</sup> The Court addresses the proper standard under which to evaluate a claimant's drug use/abuse  
27 in Section III.B.5. of this Order.

28 <sup>9</sup> Contrary to the ALJ's assertion, Plaintiff did not testify that "there has been no drug use  
since 1993." AR 25. Rather, according to the transcript of the administrative hearing, Plaintiff only  
stated that she did not use cocaine after 1993. AR 332.

1 Goodheart found her “seriously limited, but not precluded” in these areas, while Dr. Witte  
2 found her to be “good” in these areas. AR 274, 260. Dr. Goodheart found her “unable to  
3 meet competitive standards” in remembering work-like procedures, while Dr. Witte found  
4 her performance in this area to be “fair.” AR 274, 260. Again the ALJ plucked these minor  
5 discrepancies out of a much larger evaluation in which Dr. Goodheart and Dr. Witte mostly  
6 agreed. AR 274, 260. Of the twenty-five categories of evaluation, both Dr. Goodheart and  
7 Dr. Witte agreed as to Plaintiff’s degree of functionality in at least sixteen of them—most  
8 often finding that she was “unable to meet competitive standards” or her abilities in these  
9 areas were “poor or none.”<sup>10</sup> AR 260, 262, 274. Furthermore, in his written assessment, Dr.  
10 Goodheart acknowledged these differences in opinion and provided an explanation as to why  
11 he came to a different conclusion. AR 272-73.

12 According to regulatory authority, “the more consistent an opinion is with the record  
13 as a whole, the more weight [an ALJ] will give to that opinion.” 20 C.F.R. § 416.927(c)(4).  
14 Here, the ALJ entirely disregarded a large part of the record in which Dr. Goodheart and Dr.  
15 Witte agreed as to Plaintiff’s very limited functional capacity in favor of a few comparatively  
16 minor discrepancies. The Court finds that the minor discrepancies regarding Plaintiff’s  
17 ability to understand, remember, and carry out simple instructions and ask simple questions  
18 are not a basis on which to reject Dr. Goodheart’s entire psychiatric opinion, which is largely  
19 consistent with Dr. Witte’s opinion.

20  
21 \_\_\_\_\_  
22 <sup>10</sup> The categories in which Dr. Goodheart and Dr. Witte appear to agree include the following:  
23 Maintain regular attendance and be punctual within customary, usually strict tolerances; Sustain an  
24 ordinary routine without special supervision; Work in coordination with or proximity to others without  
25 being unduly distracted; Complete a normal workday and workweek without interruptions from  
26 psychologically based symptoms; Perform at a consistent pace without an unreasonable number and  
27 length of rest periods; Accept instructions and respond appropriately to criticism from supervisors; Get  
28 along with co-workers or peers without unduly distracting them or exhibiting behavioral extremes;  
Respond appropriately to changes in a routine work setting; Deal with normal work stress; Deal with  
stress of semiskilled and skilled work; Interact appropriately with the general public; and Maintain  
socially appropriate behavior. AR 260, 262, 274. However, the Court notes that Dr. Goodheart rated  
Plaintiff on a five-level scale, whereas Dr. Witte used only a four-level scale. Additionally, the  
description of evaluation levels differed. Dr. Goodheart rated Plaintiff on a scale of “Unlimited or Very  
Good,” “Limited but Satisfactory,” “Seriously Limited, but Not Precluded,” “Unable to Meet  
Competitive Standards,” and “No Useful Ability to Function.” AR 274. Dr. Witte rated Plaintiff on a  
scale of “Unlimited of Very Good,” “Good,” “Fair,” and “Poor or None.”

1 Third, the ALJ cites Dr. Drew’s alleged questioning of Dr. Goodheart’s ADHD  
2 diagnosis as a basis on which to reject the latter’s opinion. However, the ALJ exaggerates  
3 the discrepancy between Dr. Drew’s medical opinion and Dr. Goodheart’s diagnosis of  
4 ADHD. Dr. Drew noted that “[c]learly, [Plaintiff’s] clinical presentation is much more  
5 severe, and requires greater intervention, than a diagnosis of [ADHD]. This is not to suggest  
6 that she does not have attentional difficulties. However, her attentional difficulties are likely  
7 secondary to some combination of bipolar and an undiagnosed neurological  
8 disease/syndrome. Children and adults who have ADHD do not have the plethora [of]  
9 symptoms and pathological behaviors exhibited by [Plaintiff] unless they also have some  
10 other underlying primary disorder.” AR 314. Thus, Dr. Drew did not disagree with Dr.  
11 Goodheart’s diagnosis of ADHD; rather, he merely opined that Plaintiff’s ADHD was  
12 secondary to another underlying impairment. Thus, there appears to be no dispute that  
13 Plaintiff suffered from significant attentional impairments.

14 In Lester, the Ninth Circuit found it irrelevant whether the claimant’s symptoms  
15 resulted solely from his mental impairment or from a combination of his mental and physical  
16 impairments. 81 F.3d at 829-30. Because the consequences of multiple impairments are “so  
17 inextricably linked,” courts must consider the combined effect of those impairments. Id. By  
18 analogy, it matters not whether Dr. Goodheart and Dr. Drew agreed upon a single diagnosis.  
19 Rather, “the Commissioner must consider whether [a claimant’s] impairments taken together  
20 result in limitations” severe enough to warrant a finding of disabled. Id. at 830 (emphasis in  
21 original). Thus, the Court finds that the alleged discrepancy between Dr. Goodheart and Dr.  
22 Drew’s ultimate diagnoses is exaggerated and not a basis on which to reject Dr. Goodheart’s  
23 psychiatric opinion.

24 Fourth, the ALJ criticizes Dr. Goodheart’s report as “unsupported by any  
25 contemporaneous progress notes, testing or other verification” and “all subjective – page  
26 upon page of retelling claimant’s own narration.” AR 24. Defendant cites Bayliss v.  
27 Barnhart for the proposition that an ALJ need not rely on the opinion of a physician who  
28 based his assessment on the claimant’s own subjective complaints without reviewing

1 objective medical data or reports from treating physicians. 427 F.3d 1211, 1217 (9th Cir.  
2 2005). Here, however, in addition to summarizing Plaintiff’s own narration of her  
3 symptoms, Dr. Goodheart twice documented his own clinical observations and reviewed  
4 Plaintiff’s treatment history with Dr. Witte. AR 269-72. Thus, the Court finds that Dr.  
5 Goodheart’s reports are not unsupported or merely a subjective retelling of Plaintiff’s own  
6 story.

7 Finally, the Court finds Defendant’s reliance on Ukolov v. Barnhart to be  
8 unpersuasive. 420 F.3d 1002 (9th Cir. 2005). In Ukolov, the court found that the failure of  
9 an ALJ to address a piece of medical evidence was harmless error, in part, because the  
10 evidence listed only symptoms but provided no medical opinion as to the claimant’s  
11 condition. Id. at 1006 n.6. In the present case, however, Dr. Goodheart enumerated  
12 Plaintiff’s symptoms based on his own mental status examination, reviewed Plaintiff’s  
13 treatment with Dr. Witte, made his own medical diagnoses, and detailed Plaintiff’s disability  
14 and impairment in work functions. AR 269-73. While the ALJ documented much of this  
15 testimony, he appears not to have given it any weight. Even if the Court were to accept that  
16 Dr. Goodheart’s report lacked sufficient objective support, the ALJ still failed to adequately  
17 justify his rejection of Dr. Goodheart’s medical opinion. “To say that medical opinions are  
18 not supported by sufficient objective findings . . . does not achieve the level of specificity  
19 [the Ninth Circuit’s] prior cases have required. . . . The ALJ must do more than offer his  
20 conclusions. He must set forth his own interpretations and explain why they, rather than the  
21 doctors’, are correct.” Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988). The Court  
22 concludes that the ALJ’s failure to credit or adequately justify his rejection of Dr.  
23 Goodheart’s psychiatric opinion was error.



1 maintain gainful employment. . . . [T]he thought of trying to train her to learn the duties and  
2 responsibilities for a specific job is frankly overwhelming.” AR 315. Without providing any  
3 explanation, the ALJ conclusorily rejected Dr. Drew’s medical observations and findings.

4 To the extent that the ALJ agreed with Dr. Drew’s recommendation that Plaintiff be  
5 further evaluated, the Court finds this to be an insufficient basis on which to reject Dr.  
6 Drew’s opinion in its entirety. Dr. Drew appears to recommend further evaluation for  
7 purposes of treatment, not for purposes of determining the severity of Plaintiff’s disability.  
8 See AR 314-15. Dr. Drew made clear in his PRTF that he found Plaintiff to be disabled  
9 within the meaning of the SSA. See AR 296-307. Finally, Dr. Drew never suggested that  
10 Plaintiff’s impairments were drug related. To the contrary, he stated that “[Plaintiff’s]  
11 marijuana use appears to be medicinal and is not likely to be a contributing factor to her  
12 clinical presentation.” AR 313. Thus, the Court finds that the ALJ failed to provide specific  
13 and legitimate reasons supported by substantial evidence in the record for rejecting Dr.  
14 Drew’s psychological assessment.

15 In conclusion, the Court finds that Dr. Witte, Dr. Goodheart, and Dr. Drew’s medical  
16 opinions are not inconsistent with respect to the severity of and the functional limitations  
17 caused by Plaintiff’s mental impairments. “Where the purported existence of an  
18 inconsistency is squarely contradicted by the record, it may not serve as the basis for the  
19 rejection of an examining [or treating] physician’s conclusions.” Nguyen v. Chater, 100 F.3d  
20 1462, 1465 (9th Cir. 1996). Thus, the ALJ’s refusal to give due weight to their opinions was  
21 error and the Court directs the Commissioner to properly consider this evidence on remand.

22 **d. Dr. Tekeli and Dr. Gonick-Hallows**

23 While Plaintiff does not take issue with the ALJ’s treatment of these opinions, the  
24 Court finds them relevant to the extent that they are not inconsistent with Dr. Witte, Dr.  
25 Goodheart, and Dr. Drew’s medical opinions. Dr. Tekeli is Plaintiff’s internal medicine  
26 physician. AR 24. The bulk of his medical opinion testimony relates to Plaintiff’s past  
27 physical impairments and does not appear contested. Nevertheless, Dr. Tekeli did include  
28 some comments regarding Plaintiff’s psychological presentation as well. Prior to Plaintiff’s

1 alleged bike accident in 2004, Dr. Tekeli noted that Plaintiff suffered from general fatigue,  
2 anxiety, and low weight. AR 221. He also noted that he “believe[d] her problems [were]  
3 mostly lifestyle related, poor sleep habits, poor nutrition.” AR 221-22. Following Plaintiff’s  
4 alleged bike accident, Dr. Tekeli found that Plaintiff suffered from depression, but was  
5 intolerant of anti-depressant medication. AR 250. He also indicated that Plaintiff had  
6 “possible ADD.” AR 239. Finally, he encouraged Plaintiff to seek further evaluation at  
7 CMH.<sup>12</sup> Id.

8 Dr. Gonick-Hallows conducted a psychological evaluation of Plaintiff in April 2006.  
9 AR 200-03. Dr. Gonick-Hallows indicated that “overall . . . [Plaintiff] was . . . a person with  
10 significant anxiety features.” AR 200. While he could not totally rule out the possibility of  
11 ADHD, he felt that her anxiety symptoms were “predominant.” AR 202. He diagnosed her  
12 with “Axis I: 300.02 – Generalized Anxiety Disorder with Anxiety-Based Attention Deficit.  
13 305.9 – Rule out Mixed Substance Abuse. Axis II: 301.9 – Mixed Personality Disorder with  
14 Inadequate, Borderline, and Narcissistic Features.”<sup>13</sup> Id. He also assigned Plaintiff a GAF  
15 score of 63, which indicates mild to moderate symptoms. See Keyser v. Comm’r of Soc.  
16 Sec. Admin., 648 F.3d 721, 727 (9th Cir. 2011) (claimant received a GAF of 55 to 65, which  
17 indicates mild to moderate symptoms). Nevertheless, Dr. Gonick-Hallows concluded that  
18 Plaintiff’s “overall prognosis is less than clear and would depend upon a complex mix of  
19 physical and emotional features.” AR 203. He also noted that Plaintiff admitted to using  
20 marijuana most of her life, including at that time for appetite stimulation. AR 200.

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26 <sup>12</sup> “CMH” appears to be the facility at which testing for ADD takes place.

27 <sup>13</sup> Axis I includes the clinical syndromes that are the focus of the diagnosis; Axis II includes  
28 the long-standing chronic conditions that may affect the clinical syndromes listed in Axis I. American  
Psychiatric Association (APA), Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, Text  
Revision (DSM-IV-TR).

1 e. Dr. Smith<sup>14</sup>

2 The ALJ did not specifically mention Dr. Smith in his decision, however he appears to  
3 have relied heavily on Dr. Smith’s opinion at step three. Dr. Smith partially completed a  
4 PRTF in May 2006, finding that the functional limitations caused by Plaintiff’s 12.06  
5 Anxiety-Related Disorder and 12.08 Personality Disorder were mild as to restrictions in  
6 activities of daily living, mild as to difficulties in maintaining social functioning, mild as to  
7 difficulties in maintaining concentration, persistence, or pace, and insufficient evidence as to  
8 episodes of decompensation. AR 192. He also found her understanding and memory,  
9 sustained concentration and persistence, social interaction, and adaptation to be mostly “not  
10 significantly limited.” AR 196-97.

11 The Court finds the ALJ’s apparent reliance on Dr. Smith’s opinion to be troubling for  
12 several reasons. First, Dr. Smith’s report contains no explanation as to his findings. AR  
13 182-99. Second, Dr. Smith’s opinion does not account for subsequent medical evidence,  
14 including the medical opinion of treating physician Dr. Witte, the psychological assessments  
15 of examining psychiatrist Dr. Goodheart, and consultative examining psychologist Dr. Drew.  
16 Even if Dr. Smith’s opinion was entitled to weight at the time it was rendered, its continued  
17 validity is questionable in light of more recent evidence. Plaintiff cites Young v. Heckler,  
18 803 F.2d 963, 968 (9th Cir. 1986), for the proposition that “[w]here a claimant’s condition is  
19 progressively deteriorating, the most recent medical report is the most probative.” In Young,  
20 the court declined to follow this general rule because it was far from clear that the claimant’s  
21 condition was worsening. Id. Here, however, the record as a whole suggests that Plaintiff’s  
22 condition is progressively deteriorating.<sup>15</sup> Thus, the Court finds it significant that Dr.

23  
24 <sup>14</sup> It is unclear from the record in what capacity Dr. Smith evaluated Plaintiff. However,  
25 Plaintiff and Defendant agree that he is a State agency reviewing physician (i.e., a nonexamining  
physician). Opp’n to XMSJ (dkt. 32) at 8; XMSJ at 11.

26 <sup>15</sup> In August 2008, Dr. Witte noted that “meds have helped.” AR 286. In October 2008, Dr.  
27 Goodheart found that Plaintiff was “undergoing some improvement with treatment.” AR 271.  
28 Following a January 2009 examination, Dr. Drew indicated that Plaintiff’s “clinical presentation is much  
more severe . . . than a diagnosis of ADHD,” and that “attentional difficulties are likely secondary to  
some combination of bipolar disorder and some undiagnosed neurological disease/syndrome.” AR 314.

1 Smith's review did not include the subsequent opinions of Dr. Witte, Dr. Goodheart, and Dr.  
2 Drew.

3 Finally, Dr. Smith's opinion as to the severity of Plaintiff's impairment is contradicted  
4 by all of the other evidence in the record, including Dr. Witte's, Dr. Goodheart's, and Dr.  
5 Drew's medical opinions. Specifically, Dr. Smith's PRTF is contradicted by treating  
6 physician Dr. Witte's PRTF. Dr. Witte found that Plaintiff's mental impairments caused  
7 moderate restriction of activities of daily living, marked difficulties in maintaining social  
8 functioning, often deficiencies of concentration, persistence, or pace resulting in failure to  
9 complete tasks in a timely manner (in work settings or elsewhere), and repeated (three or  
10 more) episodes of deterioration or decompensation in work or work-like settings. AR 262.  
11 While examining psychiatrist Dr. Goodheart did not complete a PRTF, Dr. Smith's PRTF is  
12 inconsistent with Dr. Goodheart's opinion that Plaintiff's mental incapacity is severe. AR  
13 272. Finally, Dr. Smith's PRTF is contradicted by consultative examining psychologist Dr.  
14 Drew's PRTF. See AR 306 in which Dr. Drew finds that Plaintiff's mental impairments  
15 cause marked restriction of activities of daily living; marked difficulties in maintaining social  
16 functioning; extreme (i.e., greater than marked) difficulties in maintaining concentration,  
17 persistence, or pace; and insufficient evidence to determine episodes of decompensation. In  
18 spite of this directly conflicting evidence, the ALJ appears to have afforded significant  
19 weight to Dr. Smith's opinion as he adopted his conclusions exactly.<sup>16</sup>

20 The law is clear that "[t]he opinion of a nonexamining physician cannot by itself  
21 constitute substantial evidence that justifies the rejection of the opinion of either an  
22 examining physician or a treating physician." Lester, 81 F.3d at 831 (citing Pitzer, 908 F.2d  
23 at 506 n.4; Gallant, 753 F.2d at 1456). In Gallant, the Ninth Circuit held that "'the report of  
24 [a] non-treating, non-examining physician, combined with the ALJ's own observance of [the]  
25 claimant's demeanor at the hearing' did not constitute 'substantial evidence' and, therefore,  
26 did not support the Commissioner's decision to reject the examining physician's opinion that

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28 <sup>16</sup> The Court notes that the ALJ was not explicit about his reliance thereon in the decision.  
Nevertheless, Dr. Smith's PRTF appears to be the only evidence in support of the ALJ's determination  
at step three.

1 the claimant was disabled.” Lester, 81 F.3d at 831 (quoting Gallant, 753 F.2d at 1456).  
2 Similarly, in Pitzer, the Ninth Circuit held that where there was nothing in the record to  
3 support the nonexamining physicians’ written reports, the nonexamining physicians’  
4 opinions “with nothing more” could not constitute substantial evidence. 908 F.2d 502, 506  
5 n.4. The Ninth Circuit has only expressed a willingness to reject the opinion of a treating or  
6 examining physician where the contradictory testimony of a nonexamining medical advisor  
7 is accompanied by an abundance of additional evidence in the record, such as laboratory test  
8 results, contrary reports from examining physicians, and conflicting testimony from the  
9 claimant herself. See Magallanes, 881 F.2d at 751-55.

10 The Court finds that Dr. Smith’s opinion, alone, does not satisfy the substantial  
11 evidence requirement necessary to support the ALJ’s conclusions as to the severity of  
12 Plaintiff’s impairments, or his decision to reject the medical opinions of Dr. Witte, Dr.  
13 Goodheart, and Dr. Drew. Thus, the Court concludes that the ALJ’s treatment of these  
14 medical opinions was error. The Court REMANDS for reconsideration consistent with this  
15 Order.

16 **2. The ALJ Did Not Properly Consider the Severity of Plaintiff’s**  
17 **Impairment at Step Three**

18 At steps two and step three of the five-step sequential analysis, the ALJ is required to  
19 determine the severity of the claimant’s mental impairments. At step two, the ALJ must first  
20 establish the presence of a medically determinable impairment. 20 C.F.R. § 416.920a(c);  
21 12.00 Mental Disorders, ¶ B. Second, the ALJ must determine the severity of those  
22 identified mental impairments by rating the degree of functional loss or limitation resulting  
23 from the impairment. Maier v. Comm’r of Soc. Sec. Admin., 154 F.3d 913, 915 (9th Cir.  
24 1998) (per curiam); 20 C.F.R. § 416.920a(c), (d); 12.00 Mental Disorders, ¶ C. The ALJ  
25 must rate the claimant’s degree of functional limitation by evaluating four areas of function:  
26 (a) activities of daily living; (b) social functioning; (c) concentration, persistence, or pace;  
27  
28

1 and (d) episodes of decompensation.<sup>17</sup> 20 C.F.R. § 416.920a(c)(3). The first three  
2 functional areas (activities of daily living; social functioning; and concentration, persistence,  
3 or pace) are rated on a five-point scale: none, mild, moderate, marked, and extreme. 20  
4 C.F.R. § 416.920a(c)(4). The fourth functional area (episodes of decompensation) is rated on  
5 a four-point scale: none, one or two, three, four or more. Id. If the ALJ rates the degree of  
6 limitation in the first three functional areas as “none” or “mild” and “none” in the fourth area,  
7 he will “generally conclude that [the] impairment(s) is not severe, unless the evidence  
8 otherwise indicates that there is more than a minimal limitation in your ability to do basic  
9 work activities.” 20 C.F.R. § 416.920a(d)(1). Where the ALJ determines that a claimant’s  
10 mental impairment is severe, he must then move onto step three. 20 C.F.R. § 416.920a(d)(2).

11 At step three, the ALJ considers whether the claimant meets or equals a listed  
12 impairment. Id. Federal Regulations and the Ninth Circuit are clear that “[a] generalized  
13 assertion of functional problems is not enough to establish disability at step three.” Tackett  
14 v. Apfel, 180 F.3d 1094, 1100 (9th Cir. 1999) (citing 20 C.F.R. § 404.1526). “The mere  
15 diagnosis of an impairment listed in 20 C.F.R. Appendix 1, Subpart P, § 4.12 is not sufficient  
16 to sustain a finding of disability.” Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990).  
17 “For a claimant to show that his impairment matches a listing, it must meet all of the  
18 specified medical criteria. An impairment that manifests only some of those criteria, no  
19 matter how severely, does not qualify.” Sullivan v. Zebley, 493 U.S. 521, 530 (1990),  
20 superseded by statute on other grounds. The specified medical criteria are broken up into  
21 three categories: “paragraph A” criteria, “paragraph B” criteria, and “paragraph C” criteria.  
22 20 C.F.R. § 404, Subpt. P, App. 1. The required level of severity for a listed disorders is met  
23 when the requirements in both “paragraph A” and “paragraph B” are satisfied, or when the  
24 requirements in both “paragraph A” and “paragraph C” are satisfied. Id. The “paragraph A”  
25 criteria differ depending on the particular listing. See generally id. “Paragraph B” requires

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27 <sup>17</sup> This technique used to rate the degree of functional loss or limitation resulting from  
28 impairment is commonly documented in a PRTF. See Keyser v. Comm’r of Soc. Sec. Admin., 648 F.3d  
721, 725 (9th Cir. 2011). The same technique is also used at step three and is referred to as the  
“paragraph B” criteria.

1 that the mental impairment result in at least two of the following: (1) marked restriction of  
2 activities of daily living; (2) marked difficulties in maintaining social functioning; (3) marked  
3 difficulties in maintaining concentration, persistence, or pace; or (4) repeated episodes of  
4 decompensation, each of extended duration. Id. “Paragraph C” requires a finding that the  
5 claimant’s impairment results in a “complete inability to function independently outside the  
6 area of one’s home.” Id.

7 At step two, the ALJ determined that Plaintiff suffered from a severe mental  
8 impairment. AR 19. At step three of the analysis, the ALJ concluded that Plaintiff did not  
9 have a listed impairment or combination of impairments. Id. In making this finding, the ALJ  
10 considered whether the “paragraph B” criteria were satisfied. Id. The ALJ concluded that  
11 “the degree of functional limitation caused by [Plaintiff’s] mental impairment (listing 12.06  
12 Anxiety-Related Disorders, 12.08 Personality Disorders) is mild with respect to restrictions  
13 of activities of daily living; mild with respect to difficulties in maintaining social functioning;  
14 mild with respect to difficulties in maintaining concentration, persistence, or pace; [and] no  
15 episodes of decompensation based on the record.”<sup>18</sup> AR 19-20. Accordingly, the ALJ  
16 determined that the “paragraph B” criteria were not satisfied. AR 20. The ALJ further  
17 determined that the “paragraph C” criteria were not satisfied.<sup>19</sup> Id. Because either  
18 “paragraph B” or “paragraph C” criteria must be met in order to satisfy the requirements of  
19 12.06 and 12.08, the ALJ did not consider Plaintiff satisfied the “paragraph A” criteria for  
20 listings 12.06 or 12.08.

21 Plaintiff contends that the ALJ failed to consider all evidence relevant to a  
22 determination that she has impairments meeting or equaling Listing 12.08 Personality  
23 Disorders. As previously noted, the only evidence in the record that supports the ALJ’s  
24 determination of Plaintiff’s functional limitations under the “paragraph B” criteria is Dr.  
25 Smith’s PRTF. Furthermore, Dr. Witte, Dr. Goodheart, and Dr. Drew all agree that

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26 <sup>18</sup> The ALJ made his determination at step three based on the same PRTF analysis that applies  
27 at step two of the five-step analysis.

28 <sup>19</sup> The Court accepts for purposes of this Order the ALJ’s conclusion that the “paragraph C”  
criteria were not met.

1 Plaintiff's functional limitations are much more severe. "Particularly in a case where the  
2 medical opinions of the physicians differ so markedly from the ALJ's, it is incumbent on the  
3 ALJ to provide detailed, reasoned, and legitimate rationales for disregarding the physicians'  
4 findings." Embrey v. Brown, 849 F.2d 418, 422 (9th Cir. 1988). In Embrey, three treating  
5 physicians and one consulting physician determined that the claimant was disabled. Id. The  
6 ALJ reached the opposite conclusion. Id. Because he failed to provide detailed, reasoned,  
7 and legitimate rationales for disregarding all four physicians' opinions, the Ninth Circuit  
8 remanded the case for proper consideration of the evidence. Id. Similarly here, one treating  
9 physician and two examining physicians agree that Plaintiff met the "paragraph B" criteria  
10 and the ALJ failed to properly consider their medical opinions. Thus, the Court agrees with  
11 Plaintiff that the ALJ's conclusory dismissal of Dr. Drew's, Dr. Goodheart's, and Dr. Witte's  
12 opinions in favor of Dr. Smith's opinion was improper.

13 The Court also finds the ALJ's determination at steps two and three of the sequential  
14 evaluation to be contradictory. Without any explanation, the ALJ determined that Plaintiff  
15 suffered from severe mental impairments at step two, and then proceeded to deny that the  
16 limitation caused by that severe impairment satisfied the "paragraph B" criteria at step three.  
17 According to the ALJ's findings under "paragraph B," Plaintiff's functional limitations were  
18 mild in the first three categories and zero in the fourth. Such findings would be more  
19 consistent with a conclusion at step two that the impairment is not severe. See 20 C.F.R. §  
20 416.920a(d)(1). Nevertheless, here the ALJ concluded that Plaintiff's impairments were  
21 indeed severe at step two. AR 19. Because the ALJ did not provide any explanation for his  
22 findings, the Court has no basis on which to reconcile this apparent contradiction.

23 Finally, the Court finds that the absence of any explanation or reference to medical  
24 evidence as to the degree of functional limitation at step two and three of the analysis  
25 constitutes legal error. See 20 C.F.R. § 416.920a(e)(4) ("the written decision must  
26 incorporate the pertinent findings and conclusions based on the technique" and it "must show  
27 the significant history, including examination and laboratory findings, and the functional  
28 limitations that were considered in reaching a conclusion about the severity of the mental

1 impairment(s)"); see also Keyser v. Comm'r Soc. Sec. Admin., 648 F.3d 721, 726 (9th Cir.  
2 2011) (finding legal error where "the written decision did not document the ALJ's  
3 application of the technique[,] did not include a specific finding as to the degree of limitation  
4 in any of the four functional areas[, and] simply referenced and adopted the PRTF completed  
5 earlier by [another physician]").

6 For the same reasons mentioned in Section III.B.1. of this Order, the Court finds that  
7 the ALJ improperly discounted the opinions of Drs. Witte, Goodheart, and Drew in favor of  
8 Dr. Smith and further finds the ALJ's determination of the "paragraph B" criteria is  
9 unsupported by substantial evidence. In order to properly evaluate the severity of Plaintiff's  
10 mental impairments at step three, the ALJ must reevaluate the "paragraph B" criteria, giving  
11 proper weight to the medical opinions of Drs. Witte, Dr. Goodheart, and Dr. Drew.  
12 Additionally, depending on the outcome, he may also be required to evaluate the "paragraph  
13 A" criteria. The Court REMANDS for reconsideration of step three consistent with this  
14 Order.

### 15 3. The ALJ Failed to Properly Credit Plaintiff's Testimony

16 The ALJ states that "the claimant's statements concerning the intensity, persistence  
17 and limiting effects of these symptoms are not credible to the extent they are inconsistent  
18 with the . . . [RFC] assessment." AR 24. "For the ALJ to reject the claimant's complaints,  
19 [he] must provide 'specific, cogent reasons for the disbelief.'" Lester, 81 F.3d at 834  
20 (quoting Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990)). "Once the claimant  
21 produces medical evidence of an underlying impairment, the Commissioner may not  
22 discredit the claimant's testimony as to the subjective symptoms merely because they are  
23 unsupported by objective evidence." Id. (citing Bunnell v. Sullivan, 947 F.2d 341, 343 (9th  
24 Cir. 1991)). "Unless there is affirmative evidence showing that the claimant is malingering,  
25 the Commissioner's reasons for rejecting the claimant's testimony must be 'clear and  
26 convincing.'" Id. (citing Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)). "General  
27 findings are insufficient; rather, the ALJ must identify what testimony is not credible and  
28

1 what evidence undermines the claimant’s complaints.” Id. (citing Dodrill v. Shalala, 12 F.3d  
2 915, 918 (9th Cir. 1993)).

3 Because the ALJ did not find that Plaintiff was malingering, he was required to  
4 provide clear and convincing evidence to justify his rejection of her testimony. The Court  
5 finds that the ALJ failed to credit Plaintiff’s testimony in accordance with this requirement.  
6 The ALJ’s rejection of Plaintiff’s testimony merely because it was inconsistent with his RFC  
7 analysis was error. See Taylor v. Comm’r of Soc. Sec. Admin., 659 F.3d 1228, 1234 (9th  
8 Cir. 2011) (finding that a conflict between the claimant’s testimony and the ALJ’s RFC  
9 determination legally insufficient to support the ALJ’s credibility finding). Rather, he was  
10 required to identify specific, cogent reasons for his disbelief. To that end, the ALJ noted that  
11 Plaintiff claimed to have worked at various times, but never reported any IRS earnings, and  
12 that she reported different dates on which she claimed to have stopped using cocaine. AR  
13 23. However, the Court finds that these minor discrepancies do not suffice as “clear and  
14 convincing” evidence sufficient to disregard her testimony regarding the intensity,  
15 persistence, and functionally limiting effects of her symptoms. As Plaintiff’s counsel  
16 persuasively argues, Plaintiff’s confusion and memory deficiencies could very well be a  
17 manifestation of the very psychological difficulties from which she suffers. Opp’n to XMSJ  
18 at 12; see also Pate-Fires v. Astrue, 564 F.3d 935, 945-46 (8th Cir. 2009) (ALJ may not rely  
19 on a claimant’s behavior as evidence that she was not credible where medical evidence  
20 showed that claimant’s behavior was attributable to her mental illness).

21 The ALJ also points to testimony by Plaintiff’s friend Salvitor Fericano, stating that  
22 “[h]e essentially says she is not credible.” AR 23-24. However, the ALJ also states that he is  
23 “giving his testimony little weight in that he has generally discussed [Plaintiff’s] behavior as  
24 she was while admittedly regularly using cocaine from 1994 through 2002.” AR 24. Thus,  
25 the Court also finds that Fericano’s testimony as to Plaintiff’s credibility falls short of the  
26 clear and convincing standard. For the aforementioned reasons, the Court REMANDS for  
27 proper consideration of Plaintiff’s credibility consistent with this Order.

28

1                                   **4. The ALJ Failed To Properly Consider All of Plaintiff’s Limitations**  
2                                   **in his RFC Evaluation**

3                                   “The RFC assessment considers only functional limitations and restrictions that result  
4 from an individual’s medically determinable impairment or combination of impairments,  
5 including the impact of any related symptoms.” SSR 96-8p. Furthermore, the “RFC  
6 assessment must always consider and address medical source opinions,” and in cases where  
7 the ALJ’s assessment conflicts with an opinion from a medical source, the ALJ “must  
8 explain why the opinion was not adopted.” *Id.* As explained in Section III.B.1, the Court  
9 finds that the ALJ failed to properly credit the medical opinions of Drs. Witte, Dr.  
10 Goodheart, and Dr. Drew. Thus, the Court REMANDS for proper consideration of  
11 Plaintiff’s RFC, consistent with this Order.

12                                   **5. Additional Testing Is Not Required in Order to Reach the Ultimate**  
13                                   **Issue of Disability**

14                                   The ALJ found that “there needs to be more testing as the described symptoms are  
15 more than merely ‘psychological’ and could be drug related.” AR 25 (citing Dr. Drew’s  
16 medical opinion). Specifically, the ALJ concluded that a psychiatric/psychological  
17 consultative evaluation and verification of Plaintiff’s clean and sober status was necessary in  
18 order to confirm her medical diagnosis. AR 24-25. However, as previously noted, the  
19 absence of a confirmed medical diagnosis does not preclude a finding as to whether Plaintiff  
20 suffers from a combination of severe impairments sufficient to warrant a finding of disabled  
21 under the SSA. The ALJ failed to explain why the present record, properly considered, is  
22 inadequate for purposes of making such a determination.<sup>20</sup>

23                                   Additionally, the ALJ did not properly evaluate Plaintiff’s drug use/abuse. Regulatory  
24 authority provides that where there is medical evidence of drug addiction or alcoholism, the  
25 ALJ must determine whether the claimant’s drug addiction or alcoholism is a contributing  
26 factor material to the determination of disability. 20 C.F.R. § 416.935(a). One of the key

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27                                   <sup>20</sup> As previously noted, the parties dispute the propriety of the ALJ’s refusal to accept a  
28 consultative examination from Plaintiff’s treating source. *See* MSJ at 22; XMSJ at 17; Opp’n to XMSJ  
at 13. The Court declines to resolve this dispute because Dr. Drew performed a psychological  
consultative examination and his report is now part of the record.

1 factors that the ALJ must consider is whether he would still find the claimant disabled if she  
2 stopped using drugs or alcohol. 20 C.F.R. § 416.935(b)(1).

3 Here, no physician has suggested that Plaintiff is currently struggling with drug  
4 addiction or alcoholism. Furthermore, no physician indicated that her present occasional  
5 marijuana use is a contributing factor material to the determination of disability. Dr.  
6 Goodheart noted that Plaintiff reported using cocaine in the past because it “brought some  
7 ‘clarity’ to her thinking and helped her ‘focus better’ and she sees it as having provided some  
8 ‘self-medication for [her] ADHD.’” AR 267. He also noted that she reported using  
9 marijuana “to help her ‘keep eating’ and stave off her marginal weight status.” Id.  
10 Additionally, Dr. Drew indicated that “her [current] marijuana use appears medicinal and is  
11 not likely to be a contributing factor to her clinical presentation.” AR 313. These statements  
12 indicate that Plaintiff used drugs in order to relieve the symptoms of her mental impairments,  
13 not that Plaintiff’s drug use was necessarily the cause of her symptoms. Nevertheless, the  
14 ALJ did not reach the ultimate issue of whether Plaintiff’s possible drug use was a  
15 contributing factor material to the determination of disability. Thus, the Court REMANDS  
16 for proper consideration of whether Plaintiff’s drug use is a contributing factor to her mental  
17 impairment(s).

18 **IV. CONCLUSION**

19 For the foregoing reasons, the Court GRANTS Plaintiff’s Motion for Summary  
20 Judgment and DENIES Defendant’s Cross-Motion for Summary Judgment. The Court  
21 VACATES the Commissioner’s final decision and REMANDS for reconsideration consistent  
22 with this Order.

23 **IT IS SO ORDERED.**

24  
25 Dated: March 25, 2013

  
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CHARLES R. BREYER  
UNITED STATES DISTRICT JUDGE