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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAMONICA MARTINEZ,
Plaintiff,
v.
MICHAEL J. ASTRUE,
Defendant.Case No. [12-cv-02997-JCS](#)**ORDER RE CROSS MOTIONS FOR
SUMMARY JUDGMENT****Dkt. Nos. 17, 20****I. INTRODUCTION**

Plaintiff Monica Martinez seeks review of the final decision of the Commissioner of the Social Security Administration (hereafter, “Defendant” or “Commissioner”) denying her application for Social Security Income and Social Security Disability Insurance benefits. Plaintiff asks the court to reverse the Commissioner’s denial of benefits and either remand for an award of benefits or for an additional administrative hearing. The parties have filed Cross-Motions for Summary Judgment. For the reasons stated below, the Court GRANTS Plaintiff’s Motion for Summary Judgment, DENIES Defendant’s Cross-Motion for Summary Judgment, REVERSES the decision of the Commissioner and REMANDS the case for further proceedings consistent with this Order.¹

II. BACKGROUND**A. Procedural History**

On or about May 21, 2009, Plaintiff filed applications for Supplemental Social Security

¹ The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c).

1 Income (“SSI”) and Social Security Disability Insurance (“SSDI”) benefits. Administrative
2 Record (“AR”) 19. In her filing, Plaintiff alleged disability beginning on November 1, 2008. *Id.*
3 Her application was denied on September 10, 2009. *Id.* Plaintiff’s “Request for Reconsideration”
4 was denied on March 30, 2010. *Id.* at 111. An administrative hearing took place February 16,
5 2011 before an Administrative Law Judge (“ALJ”). *Id.* at 37. The ALJ issued a decision dated
6 March 28, 2011 denying Plaintiff’s claim. *Id.* at 20. Plaintiff appealed the ALJ’s decision to the
7 Appeals Council on March 28, 2011, and submitted additional evidence to the Appeals Council
8 that had not been considered by the ALJ. *Id.* at 14. The Appeals Council denied Plaintiff’s
9 request for review of the ALJ’s decision, which made the ALJ’s decision the “final decision” of
10 the Commissioner. *Id.* at 1-3; *see also* 42 U.S.C. § 405.

11 Plaintiff filed this action pursuant to 42 U.S.C. § 405(g), which gives the Court jurisdiction
12 to review the final decision of the Commissioner. *See id.* Plaintiff filed a motion for summary
13 judgment asking the Court to reverse the Commissioner’s denial of benefits. Dkt. No. 17
14 (“Plaintiff’s Motion”). The Commissioner filed a cross-motion for summary judgment. Dkt. No.
15 20 (“Commissioner’s Motion”). Plaintiff also filed a reply to the Commissioner’s Motion. Dkt.
16 No. 23 (“Plaintiff’s Reply”).

17 **B. Factual Background**

18 Plaintiff is from San Francisco, California, and was forty-two when she filed her
19 application for SSI and SSDI benefits on November 1, 2008. AR 155. Plaintiff has a high school
20 education. *Id.* at 317. She has been married and divorced twice. *Id.* Plaintiff has two sons, the
21 younger of whom she currently lives with. *Id.* at 317, 487.

22 Prior to her disability claim, Plaintiff was self-employed as an Adult/Child Care Worker.
23 AR 191. In this role, she cared for elderly people and assisted them in their daily activities
24 including helping them with chores and medications. *Id.* at 192. After varicose vein surgery in
25 October of 2008, Plaintiff did not return to work. *Id.* at 199. In her original filing for Social
26 Security benefits, plaintiff alleged she was unable to return to work because of a back injury,
27 irritable bowel syndrome, food allergies, a tumor in her uterus, and anemia. *Id.* Plaintiff noted
28 she had a hysterectomy in November of 2009. *Id.* at 240. Plaintiff has not engaged in any gainful

1 employment since November 1, 2008. *Id.*

2 **C. Plaintiff’s Medical Evidence that was Considered by the ALJ**

3 **1. Psychiatric History**

4 In support of her claim, Plaintiff submitted a multidisciplinary evaluation from the
5 Department of Neurology, Memory and Aging at the University of California San Francisco
6 (“UCSF”). *See* AR 302. This evaluation, which took place March 24, 2006, consisted of a
7 neurological evaluation, neuropsychological testing, caregiver interview, psychiatric screening,
8 and functional assessment. *Id.* During this evaluation, Plaintiff reported problems with her short
9 term memory; specifically, she reported misplacing objects, forgetting conversations, and
10 becoming easily distracted. *Id.* Plaintiff described “the severity of her memory problems as
11 moderate-to-severe.” AR 303. Plaintiff reported being, “highly reliant on written reminders . . .
12 [and] disoriented in familiar environments.” *Id.* Additionally, Plaintiff reported she had difficulty
13 planning and motivating and often felt “overwhelmed by the task at hand.” *Id.*

14 Plaintiff also reported “a history of head trauma starting from childhood when she was
15 beaten by her half-brother and adult caregivers.” AR 302. This trauma continued into adulthood
16 as she was the victim of domestic violence. *Id.* The evaluation stated that the last significant head
17 trauma Plaintiff sustained was in 1999 or 2000 when her head was slammed into a wall. *Id.* “An
18 MRI at the time showed several nonspecific punctate foci of signal abnormality involving the
19 subcortical white matter.” *Id.*

20 With regards to behavioral and neuropsychiatric symptoms, the evaluation stated Plaintiff
21 “endorses apathy, decreased motivation, intermittent depression, anxiety, emotional liability, and
22 irritability.” AR 303. Plaintiff’s son reported “some obsessive-compulsive behavior in the form
23 of washing and checking things, although [Plaintiff] denied this.” *Id.* It was unclear whether
24 Plaintiff was diagnosed with possible bipolar affective disorder. *Id.* She was not on a mood
25 stabilizer at the time of the March 24, 2006 evaluation. *Id.*

26 The UCSF evaluation indicated Plaintiff’s physical examination was “notable for a
27 subjective asymmetric diminished sensation on the right side of [Plaintiff’s] body including face,
28 upper and lower extremity [sic].” AR at 306. This sensation was “described [by Plaintiff] as a

1 'delayed' sensation despite being intact to light touch, pinprick, temperature, and vibration." *Id.*
2 Other testing revealed Plaintiff had "impairments in verbal memory, abstract reasoning, problem
3 solving, verbal fluency . . . and attention." *Id.* The evaluation pointed to Plaintiff's repeated head
4 injuries, a possible demyelinating disorder, or a possible bipolar disorder as potential causes.

5 In another exam dated June 12, 2006, doctors from UCSF's Multiple Sclerosis Center
6 indicated that Plaintiff's symptoms were "not suggestive of multiple sclerosis." AR at 311.
7 However, the doctors noted that two MRIs Plaintiff had taken in 2002 and 2006 show "T2 white
8 matter irregularities," which did indicate a clinical history "suggestive of bipolar disorder type 1
9 disease." *Id.* Plaintiff's "denial that anything is wrong, her irritability, her strange bouts of
10 energy, her lack of sleep and her somewhat intrusive behavior" supported this diagnosis. *Id.*

11 2. MRIs of Spine and Brain

12 On July 6, 2007, Plaintiff had MRIs taken of the thoracic and lumbar spine after
13 complaining of back pain. AR 312. With respect to the thoracic spine, the MRI indicated "normal
14 alignment of the vertebral bodies." The MRI showed "no significant degenerative changes,"
15 including no "demonstrate[d] spinal canal or neural foraminal stenosis." *Id.* The radiologist
16 indicated that "[a] single sagittal image of the cervical spine was submitted" which
17 "demonstrate[s] posterior disk bulge at C4-C5, C5-C6 and C6-C7," and noted that "this could be
18 more definitively evaluated with a targeted MRI of the cervical spine as clinically indicated." *Id.*

19 With respect to the lumbar spine, the MRI indicated "mild spondylitic changes throughout
20 the lumbosacral spine." AR 313. The radiologist wrote that there was "minimal posterior
21 subligamentous disk bulge identified at L2-L3, L3-L4, and L4-L5," and noted that there was "no
22 spinal canal or neural foraminal stenosis at these levels." *Id.* At L5-S1, the MRI showed a "mild
23 central posterior disk bulge/protrusion with slight impression on the ventral aspect of the thecal
24 sac," but still "no spinal canal or neural foraminal stenosis." *Id.*

25 On July 10, 2007, Plaintiff had a MRI of her brain at St. Luke's Hospital as a follow up to
26 reexamine a "white matter lesion on a prior MRI." AR 314. The radiologist found "small
27 scattered T2 hyperintensities in the deep white matter on the centrum semiovale bilaterally,"
28 which were "identical to the prior exam." *Id.* No new lesions were identified. *Id.* The radiologist

1 noted these hyperintensities “may represent the residua of a stable demyelinating process (i.e.
2 multiple sclerosis).” *Id.* Other than those hyperintensities, the MRI of Plaintiff’s brain was
3 normal. *Id.*

4 That same day, Plaintiff also had a MRI taken of her cervical spine. AR 314. The MRI
5 notes that at the C3-C4 level, there was “a mild posterior central protrusion of the disk which does
6 not touch the spinal cord.” *Id.* at 315. At the C4-C5 level, there was “a broad-based posterior
7 protrusion of the disk which is greater on the right side. This disk protrusion “extend[ed] into the
8 right neural foramen, creating moderate to severe neural foraminal stenosis.” *Id.* There was also
9 “mild uncinata spurring on the left side creating mild left neural forminal stenosis.” *Id.* At the
10 C5-C6 level, the MRI showed “a broad-based posterior central protrusion of the disk with dorsal
11 ridging of the vertible body endplates creating moderate to severe central stenosis.” The
12 radiologist’s final impression was as follows:

Moderate central stenosis of C4-5, C5-6, C6-7 levels secondary to
the posterior central disk herniations with dorsal ridging of the
vertebral body endplates. This is most pronounced at the C5-6 level.
The spinal cord is slightly compressed; however, there is no
evidence of cord edema at any level.

16 *Id.* The final impression also noted “[m]ultilevel bilateral neural stenosis.” *Id.*

17 **3. Dr. Senter – Plaintiff’s Treating Physician**

18 On December 9, 2010, Plaintiff’s treating physician, Dr. Senter, gave her professional
19 opinion regarding Plaintiff’s ability to do certain tasks taking into account Plaintiff’s limitations
20 caused by her impairments. *See* AR at 830-33. Dr. Senter reported that Plaintiff could
21 occasionally lift less than 10 pounds, stand and/or walk for less than 2 hours in an 8-hour
22 workday, sit less than 6 hours in an 8-hour workday (while having to periodically sit and stand to
23 relieve pain or discomfort). *Id.* She further noted that Plaintiff was limited in pushing and pulling
24 in both her lower and upper extremities, as well as her ability to reach in all directions, including
25 overhead. Dr. Senter wrote that Plaintiff could only occasionally climb or balance, and that she
26 could never kneel, crouch, crawl or stoop. *Id.* at 831.

27 Dr. Senter wrote that it was medically reasonable to expect that Plaintiff’s ability to
28 maintain attention and concentration on work tasks throughout an 8-hour workday would be

1 significantly compromised by both pain and her prescribed medication. *Id.* at 832. She noted the
2 following environmental limitations: temperature extremes, noise, dust, vibration,
3 humidity/wetness, hazards, fumes, odors, chemicals and gases. *Id.* at 833. Dr. Senter noted that
4 “Patient does report occasional hot flashes and heat intolerance. Dust causes her asthma to act up,
5 as does dampness and mildew.” *Id.*

6 **4. Dr. Johnson – Consultant Psychiatric Examiner**

7 Plaintiff underwent a psychiatric exam by Ronald F. Johnson, M.D. (“Dr. Johnson”), on
8 August 20, 2009. AR at 317. The purpose of this exam was to determine Plaintiff’s eligibility for
9 disability benefits. *Id.* During the exam, Plaintiff described her daily routine:

10 I get up in the morning, pace the floor . . . or lay in bed and take my
11 meds . . . I get up between ten and eleven in the morning . . . I wait
12 for my son to come home . . . we do some shared cooking . . . I can't
13 sleep at night because of arthritis . . . I have pain in my spine, hips,
14 neck, and pelvic area.

15 AR at 318. Plaintiff went on to explain that she “[doesn’t] like people” and that she doesn’t have
16 a social life as a result. *Id.*

17 Dr. Johnson found Plaintiff suffered from a “[m]ood disorder with mixed moderate to
18 marked anxiety and depressive features in the context of her multiple stated medical symptoms
19 and conditions.” Additionally, Dr. Johnson found Plaintiff suffered from a pain disorder
20 associated with both psychological factors and a general medical condition. AR at 319. Dr.
21 Johnson deferred to the medical reports with regards to the medical conditions and medical
22 symptoms associated with this pain and mood disorder. *Id.* Dr. Johnson also found that Plaintiff
23 had an “[u]nderlying personality disorder, mixed features (with depressive, narcissistic, impulsive,
24 and borderline traits).” AR at 319. Dr. Johnson noted Plaintiff had a “[l]ife circumstance problem
(facing her early and middle forties and the challenges of adult functioning in that decade of life,
25 now in the context of her multiple medical symptoms and conditions).” *Id.*

26 Dr. Johnson, while noting that his examination was limited in scope as it was based upon
27 one session with Plaintiff, concluded given the evidence presented, Plaintiff “would have
28 moderate difficulties concentrating and focusing on simple, sustained work tasks.” *Id.*
Additionally, Plaintiff “would have further difficulties, even marked, in the context of

1 requirements to fulfill a full 8-hour workday or full 40-hour workweek.” In support of this
2 conclusion, Dr. Johnson pointed to Plaintiff’s difficulty in “communicating effectively and
3 appropriately in a work environment that required coordination and back-and-forth tasks-oriented
4 communications.” *Id.* Dr. Johnson stated “[plaintiff’s] anxious tension and irritability would be
5 clearly apparent to others in a workplace.” AR at 320. However, Dr. Johnson also noted that
6 Plaintiff would have “no discernible difficulties maintaining attendance in locations, based purely
7 upon her psychiatric condition.” *Id.*

8 With regards to a long-term prognosis, Dr. Johnson found that Plaintiff would “benefit
9 from ongoing regular counseling, and psychotherapy with further exploration of anti-depressant
10 medications.” *Id.* However, Dr. Johnson noted that Plaintiff’s long term prognosis “will depend
11 upon continuing assessment, possible treatment options, and the clinical course of her multiple
12 stated medical conditions.” *Id.*

13 **5. Dr. Gable – Consultant Medical Examiner**

14 Plaintiff underwent a medical exam by Dr. Clark E. Gable (“Dr. Gable”) on August 14,
15 2009. AR at 322. The purpose of this exam was to determine Plaintiff’s eligibility for disability
16 benefits. *Id.* At this exam, Plaintiff’s chief complaints were chronic tiredness, asthma, irritable
17 bowel syndrome, long standing disk disease of both the neck and the lumbar areas, heavy bleeding
18 with significant fibroid disease, and venous strippings, which have caused ongoing leg pains. *Id.*

19 Dr. Gable noted during the physical exam that Plaintiff’s abdomen was “quite bloated” and
20 that she was “[t]ender in the belly.” *Id.* Plaintiff could “flex [her neck] 0 to 40 degrees and extend
21 about 0 to 50 and rotation about 0 to 60 to the right and left.” *Id.* Dr. Gable found Plaintiff’s neck
22 was “moderately tender over the posterior cervical area with spasm as well as in the upper
23 borders of the trapezius.” AR at 323. Dr. Gable noted “the range of motion about her shoulder
24 appears to be normal.” *Id.* Dr. Gable also noted that Plaintiff could “anteroflex and nearly touch
25 her toes.” *Id.*

26 Dr. Gable’s conclusive impressions of the Plaintiff at the time of his exam were that she
27 had “significant psychiatric problems” with little or no treatment as she was “not currently on any
28 psychiatric medicines and not seeing a psychiatrist.” *Id.* He further concluded that she has “quite

1 significant” irritable bowel syndrome that “should be helped by her stopping iron [supplements]
2 and Ibuprofin.” *Id.* This is in addition to her “spastic colon, which would benefit from additional
3 medications.” *Id.* Dr. Gable also concluded Plaintiff “has degenerative disk disease in her neck . .
4 . with chronic pain” and “that she apparently has ongoing fibroids, for which she may need a
5 hysterectomy.” *Id.*

6 With regards to a functional capacity assessment, Dr. Gable wrote:

7 As best I can tell, she could probably [sit] up to six hours a day with
8 usual breaks. I think she could stand and walk possibly up to six
9 hours depending upon her degree of pain. She could lift 20 pounds
frequently and possibly 40 pounds occasionally, and I don’t see any
problems with fine finger and hand movements.

10 *Id.* Dr. Gable went on to note Plaintiff’s psychiatric problems were “beyond the purview of his
11 evaluation.” *Id.*

12 **6. Physical Residual Functional Capacity Assessment by Dr. Bradus**

13 On September 2, 2009, medical consultant Dr. J. Bradus, M.D. completed a Residual
14 Functional Capacity Assessment (“RFC”) based on a review of Plaintiff’s medical records. AR
15 327-31. This RFC was purportedly based on all evidence in Plaintiff’s file. AR 327. Dr. Bradus
16 found that Plaintiff could: (1) occasionally lift and/or carry 20 pounds; (2) frequently lift and/or
17 carry 10 pounds; (3) stand and/or walk (with normal breaks) for a total of about 6 hours in an 8-
18 hour work day; and (4) sit (with normal breaks) for a total of about 6 hours in an 8-hour workday.
19 AR 328. Additionally, Dr. Bradus found Plaintiff could push and/or pull (including operation of
20 hand/foot controls) without limitation in either the upper or lower extremities. *Id.* Dr. Bradus
21 determined Plaintiff could frequently climb ramps/stairs, occasionally climb ladders, ropes, and
22 scaffolds, and frequently balance, stoop, kneel, crouch, and crawl. In support of these
23 determinations, Dr. Bradus stated:

24 [Claimant] has [history] of periodic pelvic pain and fibroids with
25 allegations of bleeding however recent [hematocrit is within normal
26 limits], including current. [Claimant] has [history] of diarrhea and
27 abdominal pain and irritable bowel disease [diagnosed]. No weight
28 loss. [Claimant] has [abnormal] back x-ray with mild [degenerative]
changes but no back [treatment] and exam at CE showed mild
decrease in [range of motion] and some [tenderness to palpation].
No evidence of severe food allergies or asthma.

1 AR 328. Dr. Bradus also determined that Plaintiff had no manipulative limitations, visual
2 limitations, communicative limitations, or environmental limitations. AR 329-30.

3 Dr. Bradus also determined Plaintiff was only “partially credible” with regards to her
4 allegations and symptoms. AR 333. In support of this conclusion, Dr. Bradus pointed to the fact
5 Plaintiff “has not had documented severe back disease, weight loss, or severe persistent anemia.”
6 AR 334.

7
8 **7. Psychiatric Review Technique and Mental RFC Assessment by Dr.
Lucila**

9 Also on September 9, 2009, a Psychiatric Review Technique, including a Psychiatric RFC,
10 was completed by Dr. D. Lucila. AR 336-49. Dr. Lucila determined Plaintiff had several
11 “medically determinable impairment[s] . . . that [did] not precisely satisfy the diagnostic criteria”
12 listed. AR 339. These impairments were in the form of an affective disorder, somatoform
13 disorder, and a “mixed” personality disorder. *Id.* With regards to functional limitations, Dr.
14 Lucila found Plaintiff had mild restrictions on “activities of daily living” and moderate difficulties
15 in “maintaining social functioning” and “maintaining concentration, persistence, or pace.” AR
16 344. Dr. Lucila noted there was insufficient evidence to support any degree of limitation with
17 regards to extended episodes of decompensation.

18 Dr. Lucila’s Psychiatric RFC found Plaintiff was “moderately limited” in her ability to: (1)
19 maintain attention and concentration for extended periods of time; (2) complete a normal workday
20 and workweek without interruptions from psychologically based symptoms and to perform at a
21 consistent pace without an unreasonable number and length of rest periods; (3) interact
22 appropriately with the general public; (4) accept instructions and respond appropriately to
23 criticism from supervisors; (5) get along with coworkers or peers without distracting them or
24 exhibiting behavioral extremes; and (6) maintain socially appropriate behavior and to adhere to
25 basic standards of neatness and cleanliness. AR 347-48.

26 **D. The Administrative Hearing**

27 **1. Plaintiff’s Testimony**

28 The ALJ held an administrative hearing on February 16, 2010. AR 19. Plaintiff testified

1 she could not work due to mental and physical issues. AR 42. With regards to Plaintiff’s mental
2 issues, Plaintiff testified she had a problem with anxiety and she had been prescribed Trazodone, a
3 sleeping medication, to help. *Id.* Plaintiff testified that this medication did not help and only gave
4 her irritable bowel syndrome. *Id.* When asked about whether she talked to her psychiatrist about
5 any other medications that might help with her anxiety, Plaintiff testified she was on medication
6 that made her “manic-depressive and [she] charged up [her] credit cards about \$30,000.” AR 42.
7 Plaintiff further testified she has a difficult time getting along with people. AR 44. When asked
8 the cause of this, Plaintiff testified she was the victim of physical abuse and suffered from post-
9 traumatic stress disorder. *Id.* When asked whether she has had any treatment for the anxiety or
10 the problems getting along with other people, Plaintiff testified she has taken a stress management
11 class and gone to church. *Id.* Plaintiff testified that neither of these activities made a difference
12 and that she “feels like [she doesn’t] fit in anywhere.” *Id.*

13 With regards to physical issues, Plaintiff testified she currently is not on medications for
14 bipolar and that she has some “mild cognitive impairment” that makes it difficult for her to learn
15 new things. AR 47. As for the cause of these impairments, Plaintiff testified she hit her head
16 many times and has brain damage. *Id.* Plaintiff further testified she had pain in her spine, neck
17 and lower back that inhibited her ability to comb her hair. AR 49. When asked by the ALJ if
18 there were any further physical problems that kept Plaintiff from working, Plaintiff testified,
19 “Physically, mostly just being able to get ready and to—it takes me like four or five hours just to
20 try to get ready.” AR 49.

21 The ALJ went on to question the Plaintiff about the onset date of her physical and mental
22 problems. AR 50. The ALJ asked, “since you already had these problems before . . . was there
23 anything that changed in October of 2008, when you stopped working, that made any difference in
24 your ability to work?” AR 51. Plaintiff testified her varicose vein surgery was the impetus for the
25 change in circumstance. *Id.* Plaintiff further testified:

26 then my periods started spinning out of control and I was having two
27 periods a month, that lasted about two-and-a-half weeks, and I was
28 hemorrhaging and became anemic and I was bed ridden and laying
on the couch for months and months at a time before they decided to
do surgery to remove my uterus.

1 *Id.* When asked whether the hysterectomy solved the problems of heavy periods, Plaintiff
2 responded that it did, but then she continued to have problems getting in and out of bed due to
3 continuing pelvic pain. AR 52. When asked how the pelvic pain keeps her from working,
4 Plaintiff responded “the pain keeps me from getting dressed . . . I’m mostly in my pajamas all day
5 long.” *Id.* Plaintiff further testified, “How am I going to leave the house when I’m peeing my
6 pants? Sir, I have a problem peeing half the time.” AR 53.

7 In response to her own attorney’s questions, Plaintiff testified that her employment prior to
8 2008 only consisted of light cleaning and helping her friend with her children. *Id.* Plaintiff
9 testified, “I just have a problem when I sit or stand for more than a half-hour to an hour. If I’m
10 walking, that doesn’t bother me. What bothers me, when I sit or stand for long periods of time.”
11 AR 54. Plaintiff’s attorney asked whether Plaintiff does any chores and if so, how does she feel
12 after doing them. *Id.* Plaintiff responded she does some light cleaning and when she tries to
13 “challenge herself to do like the tub or the floor . . . then [she] might end up bedridden for
14 three/four days at a time.” *Id.* When asked if she drives, Plaintiff responded she does, but can
15 only drive for a half-hour and then the circulation to her lower abdomen gets cut off “trigger[ing]
16 the chronic pain.” *Id.*

17 The ALJ again questioned Plaintiff regarding her medical history. AR 57. He asked
18 whether Plaintiff remembered telling her doctor: “I’ve been building a case of disability for 15
19 years.” *Id.* Plaintiff responded she did remember saying that to her doctor. *Id.* The ALJ went on
20 to ask, “You indicated that you were trying to convince [the doctor] that you’re really sick
21 mentally and then . . . you hinted to the doctor that you really want help with getting your General
22 Assistance and Disability. So what actually was the story of what you were trying to
23 accomplish?” AR 57-58. Plaintiff attempted to respond to the question, but was unable because
24 the ALJ criticized her for interrupting his question, and then moved on. AR 58. Throughout the
25 hearing, it was clear that the ALJ’s frustration with Plaintiff grew as she spoke out of turn.

26 2. Medical Experts’ Testimony

27 The ALJ questioned Dr. Singer, a psychiatrist, about his assessment of Plaintiff’s
28 conditions. AR 60-66. Dr. Singer diagnosed Plaintiff with a mood disorder, a pain disorder, and a

1 personality disorder, but said that either individually or in combination, “these psychiatric
2 impairments do not reach a level of meeting or equaling a listing.” AR 61, 63. Dr. Singer testified
3 “the issue that makes it very difficult to treat this woman is the personality disorder. She seems to
4 have a knack for getting into conflict with people.” AR 62. Dr. Singer testified “this would
5 impose limitations in terms of [Plaintiff] dealing with supervisors and co-workers.” *Id.* Dr.
6 Singer also referenced Plaintiff’s General Assessment of Functioning (“GAF”) scores “in the
7 range of 60” as a basis for his conclusion that plaintiff does not meet the listed impairments. AR
8 63.²

9 With regards to treatment, Dr. Singer testified, “I think that [the prior attending physicians]
10 tried to talk to the [Plaintiff] about a mood stabilizer and I don’t think she was receptive to that or
11 it didn’t work.” AR 64. Dr. Singer went on to say, “People with the kinds of disorders that
12 [Plaintiff] has, and the nature of the disorders are frequently quite difficult to treat, and particularly
13 when they have a strong conviction that they’ve been mistreated by Government agencies and so
14 on.” *Id.* Dr. Singer noted that “the advocacy of her disability is an important focus of her life and
15 she’s not been particularly amenable to psychiatric treatment.” AR 65.

16 The ALJ asked Dr. Singer what functional limitations he should consider in his decision.
17 *Id.* Dr. Singer testified Plaintiff should be limited in dealing with the public, co-workers, and
18 supervisors and limited to simple one and two-step processes. *Id.*

19 The ALJ then questioned Dr. White, a medical expert, about his assessment of Plaintiffs
20 condition. AR 67-76. Dr. White testified that Plaintiff did “not meet a listing or an equivalent.”
21 *Id.* at 68. When asked whether she had a medically determinable impairment, Dr. White testified
22 that “[s]he has symptoms of pain.” *Id.* Dr. White elaborated: “Most of it is really pain, and on
23 physical examination, she has perfect range of movement. There is no significant muscle atrophy
24

25
26 ² A Global Assessment of Functioning (“GAF”) score is the clinician’s judgment of the
27 individual’s overall level of functioning. It is rated with respect only to psychological, social, and
28 occupational functioning, without regard to impairments in functioning due to physical or
environmental limitations. *See American Psychiatric Association, Diagnostic and Statistical
Manual of Mental Disorders* at 32 (4th Ed. 2000).

1 or neurological abnormalities that I can find on the record, and the record extends for years.” *Id.*
2 Dr. White testified there was no “physical basis” for Plaintiff’s pain symptoms, including her
3 pelvic pain. AR 69.

4 When asked whether Plaintiff had physical limitations, Dr. White testified Plaintiff should
5 stay away from environments with concentrated pollutants due to her asthma, and, depending on
6 what medications she was on, perhaps refrain from other activities such as climbing heights. AR
7 71. Dr. White continued:

8 But, otherwise, I don’t see any limitations on an organic basis. The
9 only evidence that she may have something was that of the MRIs,
10 which showed some bulges, degenerative disc disease, but that alone
is not sufficient if the patient does not show any physical or
neurological abnormalities.

11 *Id.* Dr. White noted that other than Plaintiff’s complaints of pain, there were no “physical or
12 neurological abnormalities that would equal or be [casually] tied to those bulges or degenerative
13 disc disease.” AR 71-72. Dr. White concluded by noting that “there is really nothing physically
14 that would limit her significantly.” *Id.*

15 Plaintiff’s attorney questioned Dr. White regarding the results of Plaintiff’s 2007 MRI.
16 AR 72-76. Plaintiff’s attorney asked Dr. White if the MRI’s findings, which included “moderate
17 to severe central stenosis that compresses the spinal cord,” could “reasonably [cause] the kind of
18 pain that [Plaintiff] has?” *Id.* Dr. White responded:

19
20 Well, it would be reasonable to cause pain, but we cannot rely on an
21 MRI solely because, according to the listings, the patient has to have
22 physical/neurological abnormalities. As a matter of fact, her pain
23 alone, without finding any physical abnormalities, is not really a
24 good indication for getting an MRI... [P]ain is very difficult to
25 judge. It is a subjective problem. And this patient has a number of
other subjective problems like bloating and so on, so we can’t rely
just on the patient’s description of the pain and the MRI showing the
abnormality because such abnormalities can be found in normal
people walking on the street.

26 AR 74.

27 Plaintiff’s attorney then went on to ask Dr. White if there are “patients described in
28 medical literature that continue to have pain after [surgery for fibroids].” AR 75. Dr. White

1 testified, “there is a diagnosis of chronic pain syndrome, whereby the patient having pain, which
2 results and impresses itself in the brain and the patient continues to complain of pain.” *Id.*
3 Nevertheless, Dr. White distinguished Plaintiff’s case from those chronic pain cases by noting that
4 those patients had pain for years while Plaintiff “did not develop this pain but just a short time
5 ago.” *Id.*

6 At this point in the proceeding, Plaintiff became noticeably upset when she was unable to
7 ask the doctor why, if they noticed a problem on her MRI, he said the pain was all in her head.
8 AR 76. The ALJ informed Plaintiff that she would have to ask her lawyer, and that he would not
9 argue with her further. *Id.* at 77. The ALJ told Plaintiff, “You need to work.” *Id.*

10 The ALJ then questioned Robin Shearer, the vocational expert. Ms. Shearer noted that
11 Plaintiff’s past work would be characterized as “a companion,” and said this position is generally
12 characterized as “light, with an SVP of 3.” *Id.* at 78-79. The ALJ remarked that Plaintiff had
13 previously reported that she regularly lifted 100 pounds in her past job, but Plaintiff denied ever
14 lifting 100 pounds, and said she never lifted more than five to ten pounds. AR 79. The ALJ
15 noted that “the light description would work,” and then asked Ms. Shearer

16 to assume a hypothetical individual who has the same age, education
17 and experience as Ms. Martinez, who has the additional capacity to
18 engage in exertional work at the following capacity: the ability to
19 perform light work, including lifting and carrying up to 10 pounds
20 frequently and 20 pounds occasionally, the ability to sit stand and
walk for six out of eight hours, however, for each position, with a
sit/stand option, though, at will....

21 For mental capacity for this hypothetical person, they would be able
22 to engage in simple, repetitive, one to two step tasks; occasional and
23 as minimal as possible, which I’ll have to ask you something about,
24 contact with co-workers and supervisors; no public contact; and then
a low-stress occupation defined as few changes in the work or its
setting and few decisions required. And, finally, this hypothetical
individual would also be off task up to ten percent of the workday.

25 AR 81-82.

26 When asked whether Plaintiff could return to her past work with the foregoing limitations,
27 Ms. Schearer concluded that “it would be a hard call.” AR 83. Ms. Schearer testified this would
28 depend on the hypothetical person’s ability to choose the people she works with; if they did not

1 get along with the person they were to be caring for, then “that really wouldn’t work.” *Id.*
2 However, Ms. Schearer also concluded if the hypothetical person were able to choose and screen
3 her clients, which was likely the case because of the self-employment situation, then they would
4 be able to do past work. *Id.* As to other occupations, Ms. Shearer also testified that could be a
5 router, a marker, or a coin machine collector. AR 84-88.

6 Plaintiff’s attorney issued his own hypothetical individual to Ms. Schearer. AR 89. This
7 hypothetical person had the same physical and mental limitations as outlined by the ALJ, with the
8 additional limitation that the person would have to be off-tasks for 20% of the day. Ms. Shearer
9 responded that this person could likely perform past work as a companion because “most people in
10 the workforce are off task up to 20% of any given workday.” *Id.*

11 Plaintiff’s attorney issued his own hypothetical individual to Ms. Schearer. This
12 hypothetical person could occasionally lift less than ten pounds, stand and walk less than two
13 hours at an eight-hour work day, sit less than six hours out of an eight hour workday, and must
14 periodically alternate sitting and standing to relieve upper body pain and discomfort. AR at 93.
15 Ms. Schearer responded this hypothetical person could not keep a fulltime job, as they would be
16 limited to less than eight hours a day due to the “less than six hours” of sitting and the “less than
17 two hours” of standing and walking. AR at 93-94.

18 **E. The Five Step Analysis**

19 A claimant is eligible for disability benefits under the Social Security Act if he is unable
20 “to engage in any substantial gainful activity by reason of any medically determinable physical or
21 mental impairment . . . which has lasted or can be expected to last for a continuous period of not
22 less than 12 months.” 42 U.S.C. § 423(d)(1)(A); *see also* 42 U.S.C. § 423(a)(1). A claimant is
23 only disabled if his or her physical or mental impairments are of such severity that he cannot do
24 his previous work and “cannot, considering his age, education, and work experience, engage in
25 any other kind of substantial gainful work which exists in the national economy.” 42 U.S.C. §
26 423(d)(2)(A).

27 The Commissioner established a sequential five-step evaluation process to determine
28 whether a claimant meets this definition. 20 C.F.R. § 404.1520(a). If the Commissioner

1 concludes that the claimant is or is not disabled at one of the steps, the Commissioner does not
2 proceed to the next step. *Id.* at § 404.1520(a)(4). Otherwise, the evaluation proceeds to the next
3 step. The claimant bears the burden of proving Steps One through Four. *Parra v. Astrue*, 481
4 F.3d 742, 746 (9th Cir. 2007). At Step Five, the burden shifts to the Commissioner to prove that
5 the claimant can perform other work. *See Distasio v. Shalala*, 47 F.3d 348, 349 (9th Cir. 1995).

6 At Step One, the Commissioner considers the claimant’s work history. 20 C.F.R. §
7 404.1520(a)(I). If the claimant is doing “substantially gainful activity,” the claimant is not
8 disabled. *Id.* If not, then the evaluation proceeds to Step Two. *Id.*

9 At Step Two, the Commissioner considers whether the claimant has a “severe medically
10 determinable physical or mental impairment” or combination of such impairments that has lasted
11 or is expected to last more than 12 months. *Id.* § 404.1520(a)(ii). An impairment is severe if it
12 “significantly limits [the claimant’s] physical or mental ability to do basic work activities.” *Id.* §
13 404.1520(c). “[T]he step two inquiry is a de minimis screening device to dispose of groundless
14 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citing *Bowen v. Yuckert*, 482 U.S.
15 137, 153-54 (1987)). “A claim may be denied at step two only if the evidence shows that the
16 individual’s impairments, when considered in combination, are not medically severe, i.e., do not
17 have more than a minimal effect on the person’s physical or mental abilit[ies] to perform basic
18 work activities.” Social Security Ruling (“SSR”) 85-28.³ If medical evidence does not clearly
19 establish such a finding, the evaluation proceeds to the next step. *Id.*

20 At Step Three, the Commissioner compares the claimant’s impairment(s) with a list of
21 impairments from 20 C.F.R. Part 404, Subpart P, Appendix 1. *See* 20 C.F.R. § 404.1520(a)(iii).
22 If the impairment(s) “meets or equals” in severity an item on the list and meets the duration
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24 ³ “The Commissioner issues Social Security Rulings to clarify the Act’s implementing
25 regulations and the agency’s policies.” *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir.
26 2001). While “SSRs do not have the force of law,” they are “binding on all components of the
27 SSA.” *Id.* (citing 20 C.F.R. § 402.35(b)(1)). “[B]ecause they represent the Commissioner’s
28 interpretation of the agency’s regulations,” the Ninth Circuit gives them “some deference” unless
they are “inconsistent with the statute or regulations.” *Id.* (citing *Bunnell v. Sullivan*, 947 F.2d
341, 346 n. 3 (9th Cir. 1991) (*en banc*)).

1 requirement, the claimant is disabled. *Id.* Otherwise, the Commissioner proceeds to Step Four.
2 *Id.*

3 At Step Four, the Commissioner considers the claimant’s Residual Functional Capacity
4 (“RFC”). 20 C.F.R. § 404.1520(a)(4)(iv). A claimant’s RFC is the most the claimant can do in
5 light of the physical and/or mental limitations caused by the impairment(s). *Id.* § 404.1545. If the
6 claimant can perform his past relevant work, he is not disabled. *Id.* Past relevant work is work the
7 claimant has done in the fifteen months prior to the evaluation and was substantial gainful activity
8 that lasted long enough for the claimant to learn to do it. *Id.* § 404.1560(b)(I). If the claimant
9 cannot perform his past relevant work, the evaluation proceeds to Step Five. *Id.* § 404.1545.

10 At Step Five, the Commissioner considers whether the claimant, in light of the RFC, age,
11 education, and work experience, can make an adjustment to “other work” in the national economy.
12 *Id.* § 404.1520(a)(v). If the claimant can make an adjustment to other work, she is not disabled.
13 *Id.* If she cannot, she is disabled and eligible for disability benefits. *Id.*

14 **F. The ALJ’s Findings of Fact and Conclusions of Law**

15 The ALJ issued his decision in Plaintiff’s case on March 7, 2011. *See* AR 19–28. At Step
16 One, the ALJ found Plaintiff has not engaged in any substantial gainful activity since November 1,
17 2008, the alleged onset date. AR at 21. Thus, he continued to Step Two of the analysis.

18 At Step Two, the ALJ found Plaintiff had the following severe impairments: Anxiety
19 disorder, mood disorder, chronic pain disorder, and personality disorder. *Id.*

20 At Step Three, the ALJ found the Plaintiff did not have an impairment or combination of
21 impairments that met or equaled a listed impairment in 20 C.F.R. Part 404, Subpart P, Appendix 1.
22 *Id.* In support of this finding, the ALJ cited Dr. White’s testimony that Plaintiff “mostly has pain
23 symptoms, with full range of motion on examination, no significant muscle atrophy, and no
24 neurological abnormalities. AR 21. The ALJ also noted that after a review of Plaintiff’s MRI
25 results, an internal medicine consultative examiner found no evidence of low back radiculopathy
26 and as a result Plaintiff could “sit up to 6 hours a day, stand/walk 6 hours a day, lift 20 pounds
27 frequently and 40 occasionally” and that Plaintiff had a full range of motion in her neck. AR 22.

28 With regards to Plaintiff’s psychological health, the ALJ cited the diagnoses from Dr.

1 Singer, who diagnosed Plaintiff with a mood disorder, pain disorder, and personality disorder, as
2 well as Dr. Johnson, who diagnosed Plaintiff with “a mood disorder with mixed moderate to
3 marked anxiety and depressive features,” as well as a pain disorder and personality disorder. AR
4 22-23. Nevertheless, the ALJ found that Plaintiff’s mental impairments, considered alone and in
5 combination, do not meet or medically equal the listings in 20 C.F.R. Part 404, Subpart P,
6 Appendix 1. Specifically, the ALJ found that Plaintiff did not meet the listings 12.04, 12.06,
7 12.07 and 12.08. AR 23.

8 With regard to whether Plaintiff “medically equals” a listing, the ALJ noted:

9 [I]n order to satisfy the “paragraph B” criteria, the mental
10 impairments must result in a least two of the following: Marked
11 restriction of activities of daily living; marked difficulties in
12 maintaining social function; marked difficulties in maintaining
13 concentration, persistence or pace; or repeated episodes of
14 decompensation, each of extended duration. A marked limitation
15 means more than moderate but less than extreme.

14 *Id.* The ALJ concluded Plaintiff has mild restrictions in daily living, as she cooks meals, helps
15 with household chores and feeds the dog. *Id.* The ALJ further concluded Plaintiff has moderate
16 difficulties in social functioning, as she has a history of belligerent and aggressive attitudes
17 towards healthcare providers. AR 23. With regards to concentration, persistence or pace, the ALJ
18 concluded Plaintiff has moderate difficulties due to a mild cognitive impairment. *Id.* The ALJ
19 found Plaintiff had not experienced any episodes of decompensating that have been extended in
20 duration. *Id.* The ALJ noted that Plaintiff did mention “a remote history of suicide attempt but
21 there [was] no documented psychiatric hospitalizations in the record.” *Id.* Because the ALJ found
22 that Plaintiff’s impairments do not cause at least two marked limitations or one marked limitation
23 and repeated episodes of decompensation, each of extended duration, the ALJ found the
24 “paragraph B” criteria were not satisfied. *Id.*

25 At Step Four, the ALJ found Plaintiff had the following (“RFC”):

26 . . . the claimant has the residual functioning capacity to perform
27 light work as defined in 20 C.F.R. 404.1567(b) and 416.967(b)
28 except for the following limitations: lift/carry 10 pounds frequently,
20 pounds occasionally; sit/stand/walk 6 hours in an 8hour day with

1 a sit/stand option at will; no ladder/rope/scaffold climbing; no
2 overhead reaching or pushing/pulling above shoulder level; no
3 crawling or kneeling; occasional crouching, crawling, stooping, and
4 climbing of ramps/stairs; frequent balancing; no concentrated
5 exposure to dust, gases, or fumes, or to wetness or dampness, or to
6 extremes of heat; no exposure to industrial hazards (work at
7 unprotected heights or with hazardous machinery); limited to simple
8 repetitive 1-2 step tasks; occasional/minimal contact with coworkers
9 and supervisors; no contact with the general public; limited to low
10 stress occupations (few changes in work or its settings, and few
11 decisions required); and off task up to 20% of the workday.

12 AR 24. In reaching this conclusion, the ALJ found Plaintiff's symptoms could be caused by her
13 medically determinable impairments; however, the Plaintiff's statements concerning the intensity,
14 persistence and limiting effects of her symptoms was not credible to the extent they were
15 inconsistent with the RFC. *Id.* The ALJ noted that Plaintiff "stated in a treatment note that she
16 has been building a case for 15 years to get social security benefits." *Id.* Additionally, the ALJ
17 noted that Plaintiff "has reported that the only reason she is staying in treatment [for her mental
18 health issues] 'is SSI.'" *Id.*

19 The ALJ further based the RFC on his findings that the Plaintiff gave inconsistent reports
20 of her treatment history and employment history. The ALJ pointed to Plaintiff's testimony
21 describing her recovery from varicose vein surgery as an example. AR 25. Plaintiff initially
22 described her recovery from the surgery as "being in leg wraps for one month" while at the
23 hearing she stated that she needed three months to recover. *Id.* The ALJ also noted Plaintiff's
24 inconsistency with regards to how much she lifted in her previous employment (Plaintiff originally
25 reported she lifted up to one hundred pounds in her work history report while at the hearing she
26 said she lifted ten pounds at most). *Id.*

27 Additionally, the ALJ found Plaintiff had no physical basis for her multiple symptoms
28 according to Dr. White, the internal medical expert. *Id.* The ALJ noted Plaintiff declined
suggested therapies for her pain symptoms and that "her perceived disability is the focus of her life
and that she pursues treatment to attempt to qualify for disability benefits." AR 23.

The ALJ gave great weight to the opinions of both Dr. Singer and Dr. White "as they have
had the opportunity to review claimant's entire medical record and listen to all of her testimony."

1 AR at 26. The ALJ gave significant weight to Dr. Johnson, the consultative examiner. While Dr.
2 Johnson found that Plaintiff would have “moderate to marked” difficulties in working with others,
3 the ALJ concluded that given the record as a whole, Plaintiff “would be more toward the
4 ‘moderate’ end of that spectrum. *Id.* The ALJ noted that Plaintiff generally has been given a GAF
5 of 55-60, which indicates a moderate to mild impairment. *Id.* Additionally, the ALJ gave
6 significant weight to the opinions of Dr. Yakimovich-Maurer, who gave Plaintiff a GAF score of
7 60, and Dr. Chu, who gave plaintiff a GAF score of 55. *Id.* The ALJ gave less weight to Dr.
8 Senter, as her restrictive RFC was inconsistent with the medical evidence of record. *Id.*

9 At Step Five, the ALJ found Plaintiff was able to perform her past relevant work as a
10 companion because she has the opportunity to interview her customers “to find one she could
11 work for in a self-employment situation.” *Id.* Based on the testimony of the vocational expert in
12 response to his RFC, the ALJ concluded “considering the claimant’s age, education, work
13 experience, and [RFC], the claimant is capable of making a successful adjustment to other work
14 that exists in significant numbers in the national economy.” AR at 27. The ALJ ruled Plaintiff
15 “has not been under a disability, as defined in the Social Security Act, from November 1, 2008,
16 through the date of [the] decision.” AR at 27.

17 **G. New Medical Evidence Submitted to the Appeals Council**

18 On August 12, 2011, after the ALJ issued his decision, Plaintiff submitted additional
19 evidence to the Appeals Council accompanied by a brief written by Plaintiff’s attorney. AR 297-
20 99 (brief). The evidence consists of: (1) a X-ray of Plaintiff’s lumbar spine taken on March 10,
21 2011 (AR 894-95); (2) a MRI of Plaintiff’s lumbar spine taken on March 27, 2011 (AR 896-98);
22 (3) a MRI of Plaintiff’s cervical spine taken on April 27, 2011 (AR 899-901); and (4) a discharge
23 summary written by the California Pacific Medical Center in San Francisco on February 22, 2011,
24 following a two-day involuntary hospitalization after Plaintiff attempted suicide (AR 902-04).

25 The x-ray of the lumbar spine revealed “[s]evere disk space narrowing” affecting the L4-
26 L5 level, with milder narrowing noted at L5--S1. AR at 895. The MRI of the lumbar spine
27 revealed:

28 (1) Marked bone marrow edema pattern of the L4 and L5 vertebral
bodies as above with additional disk bulges at these levels which

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result in severe right lateral recess/neural foraminal stenosis at L4-L5 and moderate to severe right neural foraminal narrowing at L5-S1. Although these findings likely represent erosive degenerative disk disease, given the degree of bone marrow edema a low grade infectious process cannot be excluded. Recommend MRI follow-up in two months to ensure stability.

(2) Multilevel degenerative disk disease as above from L2-L3 through L5-S1.

AR at 898. The MRI of the cervical spine revealed:

Multilevel degenerative disk disease, severe at C4-C5 and C5-C6 where there is narrowing of the spinal canal, mass effect upon the ventral cord and up to severe neural foraminal stenosis as described. Cervical cord maintains normal signal.

AR 901.

Plaintiff also submitted a discharge summary written by the California Pacific Medical Center in San Francisco on February 22, 2011, written after a two-day hospitalization following a suicide attempt. AR 902-04. Plaintiff had been held in the hospital for fear that she was a danger to herself. AR 903. In the discharge summary, the following notes were made under the section “depression and suicidality”:

The patient was on suicide 1 precautions. She stated that she took the pills so that she could sleep and never wake up since things were not going her way. She admitted that she had had frequent suicidal ideation for years, whenever she is treated unfairly or has interpersonal problems. She has made multiple suicide attempts, mostly by overdose on pills. The main stressor for this episode was discovering that she had been denied disability the week prior, and also having gotten stuck in traffic, which ruined her plans to go out to dinner. While in the hospital, the patient was irritable, complained frequently of pain and was not participatory in groups. She complained of depression when specifically asked if she was depressed, but otherwise state her mood was “in pain” or “annoyed.” She denied suicidal ideation throughout hospitalization, but stated if she went home she might take something to fall asleep. The patient was felt safe to return home on 2/22/2011 with a follow-up appointment at Sunset Mental Health on 3/03/2011.

AR 903. Plaintiff contends that the discharge summary also says that she has a GAF score of 50. See AR 904 (“Axis V: 50”).

1 * * *

2 As noted above, the Appeals Council denied Plaintiff's request for review of the ALJ's
3 decision, which rendered the ALJ's decision the final, appealable decision of the Commissioner in
4 this case. AR 1.

5 **H. Plaintiff's Motion for Summary Judgment**

6 Plaintiff argues that the Commissioner's decision should be reversed for several reasons.
7 First, Plaintiff asserts that the ALJ's RFC was ambiguous as it conflated two separate functional
8 categories—(1) "standing and/or walking" and (2) "sitting." Plaintiff's Motion at 5; *see also* AR
9 at 24, 82. Plaintiff contends that it was legal error to combine the categories of "standing and/or
10 walking" and "sitting" in the RFC because they are two separate functional categories in the
11 regulations. *See* 20 C.F.R. §§ 404.1567(a)-(b), 416.96(a)-(b). Plaintiff contends that it is
12 impossible to determine how many hours in an eight-hour day the ALJ thought Plaintiff was
13 capable as to each of the two categories. In addition, Plaintiff notes that the vocational expert
14 testified in response to the ALJ's faulty RFC, and argues that because the ALJ relied on the
15 vocational expert's testimony, the ALJ lacked substantial evidence supporting the RFC.

16 Next, Plaintiff appears to argue that the ALJ's RFC was not supported by substantial
17 evidence because the ALJ gave insufficient weight to the RFC suggested by Plaintiff's treating
18 physician, Dr. Senter. Dr. Senter reported that Plaintiff could occasionally lift less than 10
19 pounds, stand and/or walk for less than 2 hours, and sit less than 6 hours in an 8-hour workday.
20 Plaintiff argues that if that if the Court credits Dr. Senter's opinion as a matter of law, then remand
21 for payment of benefits is the proper remedy.

22 Finally, Plaintiff contends that in light of the new medical evidence submitted to the
23 Appeals Council, which is considered part of the Administrative Record, the ALJ's decision is not
24 supported by substantial evidence. Plaintiff argues that the X-ray and MRIs taken in March and
25 April of 2011 relate back to the period on or before the date of the ALJ decision because they
26 show changes that occurred from 2007. Plaintiff also argues that the X-ray and new MRIs show
27 that the degree of impairment worsened overtime. Plaintiff contends that the discharge summary
28 following the suicide attempt, which noted a GAF score of 50 (which was lower than the ALJ's

1 GAF score of 55-60), also shows that the ALJ’s decision was not supported by substantial
2 evidence.

3 **I. Defendant’s Motion for Summary Judgment**

4 Defendant contends the Court should affirm the decision of the ALJ because there was no
5 legal error and the decision is supported by substantial evidence. First, Defendant argues that the
6 ALJ’s RFC is not ambiguous because, when read in context of the entire transcript and decision, it
7 was clear that the ALJ believed that Plaintiff could perform “light work.” Defendant points to the
8 fact neither Plaintiff’s attorney nor the vocational expert asked for clarification regarding the
9 ALJ’s RFC.

10 As to the opinion of Dr. Senter, Defendant argues that the ALJ considered this opinion
11 Plaintiff provides no evidence or argument to the contrary. In addition, Defendants contend that
12 Plaintiff did not contest the weight the ALJ accorded to Dr. Senter in the opposition brief, and
13 therefore waived this argument.

14 With respect to the new evidence admitted for the first time to the Appeals Council,
15 Defendant concedes that under Ninth Circuit precedent, evidence submitted to the first time to the
16 Appeals Council becomes part of the administrative record, “which the district court must consider
17 in determining whether the Commissioner’s decision is supported by substantial evidence.”
18 *Brewes v. Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157, 1159-60 (9th Cir. 2012) (declining to apply
19 the good cause and materiality standards in 42 U.S.C. § 405(g) for new evidence submitted to the
20 district court). Nevertheless, Defendant argues that, considering the record as a whole, the new
21 evidence that Plaintiff submitted to the Appeals Council does not change the fact that substantial
22 evidence supports the ALJ’s decision. Defendant notes that the Appeals Council need only
23 consider the evidence if “it relates to the period on or before the date of the administrative law
24 judge hearing decision,” 20 C.F.R. § 404.970(b), and argues that because the evidence submitted
25 to the Appeals Council is dated *after* the ALJ’s March 7, 2011 decision, it does not relate to the
26 relevant period. Defendant contends that Plaintiff submitted MRIs dated “just before and just
27 after” the relevant period, and there is no evidence that the latter MRIs are more indicative of her
28 condition during the relevant period.

1 As to the discharge summary from the California Pacific Medical Center that followed
 2 Plaintiff’s suicide attempt, Defendant argues it is “not probative” and does not change the
 3 substantial evidence supporting the ALJ’s decision. Defendant notes that the discharge summary
 4 indicates that Plaintiff said her episode was triggered by her “discovering that she had been denied
 5 disability the week prior” and also getting caught in traffic. Defendant contends this supports the
 6 ALJ’s finding that Plaintiff was not as limited as she claimed. Defendant also argues that the fact
 7 Plaintiff’s GAF score of 50 was lower than her previous GAF score of 55-60 is not probative
 8 because a GAF score only provides a snapshot of an individual’s level of functioning and is not
 9 synonymous with disability.

10 **III. LEGAL STANDARD**

11 When asked to review the Commissioner’s decision, the Court takes as conclusive any
 12 findings of the Commissioner which are free from legal error and supported by “substantial
 13 evidence.” 42 U.S.C. § 405(g). Substantial evidence is “such evidence as a reasonable mind
 14 might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401
 15 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial
 16 evidence means “more than a mere scintilla,” but “less than a preponderance.” *Desrosiers v. Sec’y*
 17 *of Health and Human Serv.*, 846 F.2d 573, 576 (9th Cir. 1988) (citations omitted). Even if the
 18 Commissioner’s findings are supported by substantial evidence, they should be set aside if proper
 19 legal standards were not applied when using the evidence to reach a decision. *Benitez v. Califano*,
 20 573 F.2d 653, 655 (9th Cir. 1978).

21 In reviewing the record, the Court must consider both the evidence that supports and
 22 detracts from the Commissioner’s conclusion. *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir.
 23 1996); *see also Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). “The ALJ is responsible for
 24 determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities.”
 25 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d
 26 747, 750 (9th Cir. 1989)). The Court “must uphold the ALJ’s decision where the evidence is
 27 susceptible to more than one rational interpretation.” *Id.* at 1039-40. However, a reviewing court
 28 must consider the entire record as a whole and may not affirm simply by isolating a “specific

1 quantum of supporting evidence.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)
2 (citing *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir.1989)).

3 **IV. DISCUSSION**

4 **A. Whether the ALJ’s RFC was Ambiguous such that he Committed Legal Error**

5 The heart of Plaintiff’s Motion challenges the sufficiency of the evidence supporting the
6 ALJ’s decision. Plaintiff also argues, however, that the ALJ committed legal error by articulating
7 an ambiguous RFC which conflated the two separate functional categories of “sitting” and
8 “standing and/or walking.” Plaintiff’s Motion at 5. In his decision, the ALJ wrote that Plaintiff
9 “has the residual functional capacity to perform *light work* as defined in 20 C.F.R. § 404.1567(b)
10 and 416.967(b),” with certain limitations including that Plaintiff can only “*sit/stand/walk* 6 hours
11 in an 8-hour day with a sit/stand option at will.” AR at 24 (emphasis added).

12 Plaintiff argues that it is impossible to determine, from the ALJ’s RFC, how many hours
13 the ALJ believed Plaintiff to be capable of sitting, standing and walking. Plaintiff also argues that
14 the ALJ’s RFC even suggests that the ALJ determined Plaintiff could only sit, stand and walk for
15 a “total” of six hours. The parties agree that if Plaintiff could only sit, stand and walk for a “total”
16 of six hours, then she would be unlikely to be able to work for 8-hours per day, and would likely
17 not be able to work full-time. In response, Defendant argues that, when the opinion is read in its
18 entire context, the ALJ clearly meant to hold that Plaintiff could fill an eight hour workday by
19 sitting up to six hours, and standing or walking up to six hours.

20 The Court acknowledges that the ALJ’s choice of words—“sit/stand/walk”—does not
21 clearly indicate what the ALJ meant. Nevertheless, the Court agrees with Defendant that Plaintiff
22 is creating confusion where there is none. Read in its proper context, it is clear that the ALJ meant
23 that Plaintiff could sit for six hours, and stand or walk for six hours in an eight-hour workday.
24 Immediately preceding the ALJ’s conclusion that Plaintiff could “sit/stand/walk” for six hours, the
25 ALJ wrote that Plaintiff could perform “light work.” AR. The regulations define “light work” as
26 requiring “a good deal of walking or standing.” 20 C.F.R. § 404.1567(b) and 416.967(b). The
27 SSA has noted that “the full range of light work requires standing *or* walking, off and on, for a
28 total of approximately 6 hours of an 8-hour workday.” SSR 83-10 (emphasis added). Moreover,

1 Dr. Bradus opined that Plaintiff could “stand and/or walk (with normal breaks for about 6 hours in
2 an 8-hour work day,” *and also* “sit (with normal breaks) for a total of about 6 hours in an 8-hour
3 work day.” AR 328. Similarly, Dr. Grable believed that Plaintiff “could stand and walk possibly
4 up to six hours depending upon her degree of pain.” AR 323. The foregoing regulations, as well
5 as the opinions of Dr. Bradus and Dr. Grable, are consistent with the ALJ’s description of the
6 RFC.

7 In addition, by holding that Plaintiff could perform “light work,” the ALJ found that
8 Plaintiff could hold a full-time job. If the ALJ had meant to hold that Plaintiff could only sit,
9 stand “and” walk for a “total” of six hours, then clearly, Plaintiff would not be able to work an
10 eight-hour workday, and therefore, would not be able to hold a full-time job. *See* AR at 93 (the
11 vocational expert testified that sitting less than six hours and standing/walking less than two hours
12 “would not equal an eight-hour workday and, therefore, this hypothetical person probably couldn’t
13 keep a job, a full-time job”). If Plaintiff were limited to sitting, standing “and” walking for a
14 “total” of six hours, then Plaintiff would not even be able to perform “sedentary work,” which
15 requires less than “light work.” *See* 20 C.F.R. § 404.1567(a) and 416.967(a). Accordingly, the
16 Court finds that the ALJ’s intent in articulating the RFC was clear, and no legal error resulted.

17 **B. Whether the ALJ’s Decision is Supported by Substantial Evidence**

18 Plaintiff contends the ALJ’s decision is not supported by substantial evidence for three
19 reasons. First, Plaintiff contends that there is insufficient evidence supporting the ALJ’s RFC
20 because the ALJ relied on the testimony of the vocational expert, who relied on the ALJ’s
21 hypothetical of an ambiguous RFC. Second, Plaintiff argues that the ALJ erred by giving
22 insufficient weight to her primary physician, Dr. Senter. Third, Plaintiff contends that in light of
23 the new evidence submitted to the Appeals Council, the ALJ’s decision is not supported by
24 substantial evidence. The Court finds that only the Plaintiff’s last argument has merit.

25 **1. Hypothetical with Ambiguous RFC**

26 In addition to contending that the ALJ committed legal error by articulating an ambiguous
27 RFC, Plaintiff also contends that the ALJ’s decision is not supported by substantial evidence
28 because of the ambiguous RFC. This is because the ALJ relied on the testimony of the vocational

1 expert, who relied on the ALJ’s hypothetical of an ambiguous RFC. Specifically, at the hearing,
2 the ALJ posed for the vocational expert a hypothetical where the individual had “the ability to sit
3 stand and walk for six out of eight hours, however, for each position, with a sit/stand option,
4 though, at will.” AR 82. The vocational expert responded that a person with the limitations
5 described in the hypothetical could perform the past work of Plaintiff’s, as well as other jobs that
6 exist in significant numbers in the national economy.

7 The Court has already held that, when read in its entire context, the RFC is not ambiguous.
8 Like the RFC written in the ALJ’s opinion, the RFC posed to the vocational expert during the
9 hearing is not ambiguous, as the ALJ’s intent was clear. Moreover, there is no indication the
10 vocational expert was confused about this point during the hearing. The vocational expert did not
11 indicate that she needed clarification. *See* AR at 82. Neither did Plaintiff nor her attorney.
12 Rather, it was clear that the ALJ was providing a hypothetical for a person able to perform “light
13 work.” *See id.*

14 **2. Dr. Senter**

15 Plaintiff’s treating physician, Dr. Senter, wrote a report indicating that Plaintiff could
16 occasionally lift less than 10 pounds, stand and/or walk for less than 2 hours, and sit less than 6
17 hours in an 8-hour workday (while having to periodically sit and stand to relief pain or
18 discomfort). AR 830-31. In his order, the ALJ wrote that he was giving “less weight” to the
19 opinion of Dr. Senter because it was “inconsistent with the medical evidence of record” and that
20 “the claimant’s treatment records do not support the restrictive residual functional capacity
21 described by Dr. Senter.” AR 26. Plaintiff argues that ALJ’s RFC is not supported by substantial
22 evidence because the limitations proposed by Dr. Senter should be treated “as a matter of law.”
23 Plaintiff’s Motion at 9.

24 Opinions of treating physicians are given “controlling weight” when supported by
25 medically acceptable diagnostic techniques and when not inconsistent with other substantial
26 evidence in the record. 20 C.F.R. § 404.1527(c); *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th
27 Cir. 2001) (citing *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995)). The ALJ may only reject
28 the uncontroverted opinion of a claimant’s treating physician by presenting clear and convincing

1 reasons for doing so. *See id.* In this case, however, the limitations noted by Dr. Senter are
2 inconsistent with the limitations noted by Dr. Bradus and Dr. Grable, who, after examination and
3 review, suggested that plaintiff could sit, stand or walk for six hours in an 8-hour workday. AR
4 328.

5 “[T]he ALJ may reject the opinion of a treating physician in favor of a conflicting opinion
6 of an examining physician if the ALJ makes ‘findings setting for the specific, legitimate reasons
7 for doing so that are based on substantial evidence in the record.’” *Thomas v. Barnhart*, 278 F.3d
8 947, 957 (9th Cir.2002) (quoting *Magallanes*, 881 F.2d at 751). “The ALJ can meet this burden
9 by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
10 stating his interpretation thereof, and making findings.” *Embrey v. Bowen*, 849 F.2d 418, 421-22
11 (9th Cir. 1988). Notably, while Plaintiff argues that Dr. Senter’s opinion should be treated “as a
12 matter of law,” Plaintiff does not argue that the ALJ erred by failing to provide “specific,
13 legitimate reasons ... based on substantial evidence” for rejecting the opinion of Dr. Senter.

14 The ALJ indeed provided specific and legitimate reasons explaining why the opinion of
15 Dr. Senter was inconsistent with the evidence. AR 25-26. The ALJ referenced Dr. White’s
16 testimony that “[t]here is no physical basis for claimant’s multiple symptoms and complaints of
17 pain....” AR 25. The ALJ also noted that “Claimant’s own treating physicians also note there is
18 no organic basis for her pain complaints.” *Id.* (citing AR 785). He also mentioned that “claimant
19 is also described in as noncompliant in her treatment and very rude with unrealistic goals,” and
20 “has declined suggested therapies for her pain symptoms.” AR 25. Accordingly, the ALJ did not
21 error by failing to give the opinion of Dr. Senter controlling weight.

22 Moreover, the Court notes that the reason the opinion of a treating physician is given more
23 weight is because the treating physician is “employed to cure and has a greater opportunity to
24 know and observe the patient as an individual.” *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir.
25 1987); *see also* 20 C.F.R. § 404.1527(c)(2)(i) (“*When the treating source has seen you a number*
26 *of times and long enough to have obtained a longitudinal picture of your impairment, we will give*
27 *the source’s opinion more weight than we would give it if it were from a nontreating source.*”)
28 (emphasis added). In this case, however, Plaintiff only cites to one report by Dr. Senter, and there

1 is no indication in this report that Dr. Senter had ever treated Plaintiff on a prior occasion. *See* AR
2 830-33. Moreover, in the report, Dr. Senter merely checks certain boxes noting Plaintiff’s
3 limitations, and provides little to no written evaluation regarding Plaintiff’s impairments. There
4 are no clinical findings aside from Plaintiff’s own complaints of “pain.” The Ninth Circuit has
5 held that an “ALJ need not accept the opinion of any physician, including a treating physician, if
6 that opinion is brief, conclusory, and inadequately supported by clinical findings.” *Thomas v.*
7 *Barnhart*, 278 F.2d 947, 957 (9th Cir. 2002). Dr. Senter’s opinion lacked indicia of a treatment
8 relationship, which would have made Dr. Senter’s opinion deserving of more weight.

9 **3. New Evidence Submitted to Appeals Council**

10 The final issue in this case is whether the ALJ’s opinion is still supported by substantial
11 evidence when taking into account new evidence submitted for the first time to the Appeals
12 Council, which the ALJ did not have a previous opportunity to consider. The Ninth Circuit has
13 held that “when a claimant submits evidence for the first time to the Appeals Council, which
14 considers that evidence in denying review of the ALJ’s decision, the new evidence is part of the
15 administrative record, which the district court must consider in determining whether the
16 Commissioner’s decision is supported by substantial evidence.” *Brewes v. Comm’r of Soc. Sec.*
17 *Admin.*, 682 F.3d 1157, 1159-60 (9th Cir. 2012).

18 The parties agree that pursuant to *Brewes*, this Court must determine whether the ALJ’s
19 decision is supported by substantial evidence while taking into account the new evidence
20 submitted for the first time to the Appeals Council. Defendant argues, however, that the new
21 evidence need not be considered because it does not “relate to” the time period prior to the ALJ’s
22 decision. *See* 20 C.F.R. § 404.970(b). Defendant also argues that the even taking into account the
23 new evidence, the ALJ’s opinion is still supported by substantial evidence. The Court disagrees,
24 and finds that this case must be remanded for reconsideration of Plaintiff’s impairments and
25 limitations in light of the new evidence.

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i. The New Evidence “Relates to” the Time Period Before the ALJ’s Decision

The SSA regulations require the Appeals Council to evaluate the new evidence “if it relates to the period on or before the date of the administrative law judge hearing decision.” 20 C.F.R. § 404.970(b). Defendant contends that the evidence submitted to the Appeals Council does not relate to this period because the evidence was gathered *after* the date of the ALJ’s decision. The Court finds this argument to be without merit.

The new evidence consists of MRIs from March and April of 2011 and a discharge summary following Plaintiff’s suicide attempt in late February of 2011. The relevant period is between November 1, 2008, the alleged onset date of Plaintiff’s disability, and March 7, 2011, the date of the ALJ’s decision. Because the discharge summary regarding Plaintiff’s suicide attempt was prepared on February 22, 2011, *before* the ALJ’s decision, it clearly relates to the relevant period.

The X-ray and MRIs were taken in March and April of 2011, just days and weeks after the ALJ rendered his decision on March 7, 2011. Nevertheless, this evidence still relates to the period before the ALJ’s decision because it permits a comparison of the changes to Plaintiff’s spine that occurred after the 2007 MRIs were taken. *See Oliver v. Astrue*, No. 11-04354, 2013 WL 211131 (N.D. Cal. Jan. 16, 2013) (Beeler, J.) (evidence submitted to the Appeals Council related to the time before the ALJ’s decision because Asperger’s Disorder is “a developmental disorder, not a condition which suddenly appeared after hearing.”). Moreover, most of the time between the two sets of MRIs (July 2007 to March/April 2011) was time that overlaps with the relevant period (November 1, 2008 to March 7, 2011). Therefore, the Court finds that the new evidence is “related to” the time period before the ALJ’s decision. 20 C.F.R. § 404.970(b).

ii. The ALJ’s Opinion is Not Supported by Substantial Evidence When Taking into Account the New Evidence

As explained above, while the ALJ found that Plaintiff had severe impairments consisting of an anxiety disorder, a mood disorder, a chronic pain disorder and a personality disorder, he also found that these impairments, alone and in combination, did not meet or medically equal the

1 listings. AR 22. The ALJ found that Plaintiff had a residual functional capacity to perform “light
2 work” with a few, additional restrictions, and held that Plaintiff could perform past work as well
3 as other work that exists in significant number in the national economy. *Id.* at 24-28.

4 In discussing Plaintiff’s residual functional capacity, the ALJ undertook “a two-step
5 process” in which he first determined that Plaintiff had “medically determinable impairments
6 [that] could reasonably be expected to cause [her] alleged symptoms.” AR 25. In the second step
7 of the analysis, the ALJ evaluated the “intensity, persistence, and limiting effects of the claimant’s
8 symptoms to determine the extent to which they limit the claimant’s functioning.” AR 24. At this
9 step, the ALJ found that Plaintiff’s “statements concerning the intensity, persistence and limiting
10 effects of these symptoms are *not credible* to the extent they are inconsistent with the above
11 residual functional capacity assessment.” *Id.* (emphasis added).⁴

12 The new evidence submitted to the Appeals Council show that Plaintiff’s mental
13 impairments, which the ALJ already considered “severe,” may be worse than initially determined
14 by the ALJ. The evidence may also show that Plaintiff’s degenerative disc disease became worse
15 since her 2007 MRIs. The new evidence may therefore corroborate Plaintiff’s subjective
16 complaints of pain, which may cause the ALJ to find Plaintiff more credible. “The ALJ is
17 responsible for determining credibility, resolving conflicts in medical testimony, and for resolving
18 ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.1995). Accordingly, this case
19 must be remanded to the ALJ for consideration of the new evidence.

20 **a. Discharge Summary re Plaintiff’s Suicide Attempt**

21 Plaintiff submitted a discharge summary dated February 22, 2011 that was written by the
22 California Pacific Medical Center following a two-day hospitalization after Plaintiff took
23 numerous pills in a suicide attempt. *See* AR 903-04. The discharge summary notes that the “main
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25 ⁴ “Unless there is affirmative evidence showing that the claimant is malingering, the
26 Commissioner’s reasons for rejecting the claimant’s testimony must be “clear and convincing.”
27 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995) (quoting *Swenson v. Sullivan*, 876 F.2d 683,
28 687 (9th Cir. 1989)). In her Motion, Plaintiff does not argue that the ALJ erred in providing “clear
and convincing” reasons for the adverse credibility determination. Accordingly, the Court does
not consider whether the ALJ erred in rejecting Plaintiff’s testimony to a certain extent.

1 stressor for this episode was discovering that she has been denied disability the week prior, and
2 was also having gotten stuck in traffic, which ruined her plans to go out to dinner.” *Id.* at 903.
3 The discharge summary says that Plaintiff was involuntary admitted to the hospital because she
4 was a “danger to self.” *Id.*

5 The discharge summary shows that Plaintiff’s mental impairments are likely more severe
6 than the ALJ initially determined. In his decision, the ALJ wrote that “[t]he claimant mentions a
7 remote history of suicide attempt but there are no documented psychiatric hospitalizations in the
8 record.” AR 23. The discharge summary clearly fills that gap.

9 The ALJ also wrote that Plaintiff had a GAF score of 55-60, which indicates a “mild”
10 mental impairment. AR 26. The discharge summary indicates, however, that Plaintiff had a GAF
11 score of 50, which indicates “[s]erious symptoms (e.g., suicidal ideation, severe obsessional
12 rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school
13 functioning (e.g., no friends, unable to keep a job).” American Psychiatric Association,
14 *Diagnostic and Statistical Manual of Mental Disorders* at 32 (4th Ed. 2000). “The Commissioner
15 has determined the GAF scale does not have a direct correlation to the severity requirements in
16 [the Social Security Administration’s] mental disorders listings.” *McFarland v. Astrue*, 288 F.
17 App’x 357, 359 (9th Cir. 2008) (unpublished) (citing 65 Fed.Reg. 50,746, 50,765 (Aug. 21,
18 2000)). Nevertheless, the GAF score of 50 in the discharge summary conflicts with the higher,
19 earlier GAF scores of 55 and 60, upon which the ALJ clearly relied when making his decision.
20 *See* AR 26.

21 The discharge summary also notes that Plaintiff has “a reported history of bipolar
22 disorder.” AR 903. This is consistent with other evidence in the record, which is replete with
23 suggestions that Plaintiff may suffer from bipolar disease. Plaintiff’s psychiatric evaluation notes
24 that she may suffer from bipolar affective disorder. AR 303. The examination at UCSF’s
25 Multiple Sclerosis Center indicated that Plaintiff’s “clinical history is most suggestive of bipolar
26 type 1 disease, and noted that the “T2 white matter abnormalities” found in Plaintiff’s 2007 MRIs
27 “have been reported with some frequency in this context.” AR 311.

28 This evidence may also change the ALJ’s assessment of the findings of Dr. Johnston, the

1 psychiatrist who examined Plaintiff. Dr. Johnston found that Plaintiff would have “difficulties,
2 even marked, in the context of requirements to fulfill a full 8-hour workday or full 40-hour week.”
3 AR 319. Dr. Johnson also wrote that Plaintiff “would have moderate to marked difficulties
4 communicating effectively with others in a work environment that required coordination and back-
5 and-forth tasks-oriented communications.” *Id.* In finding that Plaintiff did not meet or medically
6 equal a listing, the ALJ considered Dr. Johnston’s report, and found that “the overall evidence of
7 record supports a finding that the claimant’s difficulties would be more towards the lower
8 ‘moderate’ end of that spectrum.” *Id.* If the ALJ finds that Plaintiff has “marked” limitations for
9 her “difficulties in maintaining social function” as well as “difficulties in maintaining
10 concentration, persistence or pace,” then Plaintiff would likely equal the listing for 12.04, which
11 covers affective disorders.

12 Finally, it is worth noting that the discharge summary may corroborate Plaintiff’s own
13 testimony regarding her mental impairments. At the hearing, Plaintiff testified that she “can’t
14 even get out of the house most of the time” and that she feels she does not belong anywhere. AR
15 44-45. In his decision, the ALJ wrote that “[t]he claimant appears to want to convince her
16 evaluators that she is mentally ill.” AR 25. The fact Plaintiff attempted suicide and was
17 involuntarily admitted to a hospital suggests that her testimony may be more credible than initially
18 believed. The Court finds that the discharge summary is new, material evidence that should be
19 considered by the ALJ.

20 **b. *X-ray and New MRIs***

21 Plaintiff contends that both of the 2011 MRIs “show considerably more severe conditions
22 than shown in the 2007 MRI reports,” and points to specific language used in the radiologists’
23 reports where the language used suggests a worsening condition. For instance, with respect to the
24 lumbar spine, the 2007 MRI report noted “disc bulge” at L2-L3, L3-L4, L4-L5, as well as L5-S1,
25 but reported “no spinal canal or neural foramina stenosis” at any level. AR 313. The 2011 MRI
26 reports disk bulge at the same level, and notes that the disk bulge at L4-L5 “result in severe right
27 lateral recess/neural foraminal stenosis.” AR 898.

28 With respect to the cervical spine, the 2007 MRI report noted:

1 *Moderate* central stenosis of the C4-5, C5-6 and C6-7 levels
2 secondary to posterior central disk herniations with dorsal ridging of
3 the vertebral body endplates. This is most pronounced at the C5-6
 level. The spinal chord is slightly compressed; however, there is no
 evidence of cord edema at any level.

4 AR 315 (emphasis added). Plaintiff compares and contrasts the 2011 MRI report of the cervical
5 spine, which noted:

6 Multilevel degenerative disk disease, severe at C4-C5 and C5-C6
7 where there is narrowing of the spinal canal, mass effect upon the
8 ventral cord and up to *severe* neural foraminal stenosis [at C4-C5
 and C5-C6]. Cervical cord maintains normal signal.

9 AR 901 (emphasis added).

10 The Court agrees that some of the language used in the 2011 MRIs may suggest a
11 worsening of Plaintiff’s degenerative disc disease. The ALJ noted in his decision that the 2007
12 thoracic MRI showed “some degenerative changes of the cervical spine,” and further noted that
13 the 2007 cervical MRI “showed moderate central stenosis of C4-5, C5-6 and C6-7 due to disc
14 herniations and multilevel bilateral neural foraminal stenosis.” AR 22. Despite noting these
15 irregularities, the ALJ believed that Plaintiff’s complaints of pain were not credible (to the extent
16 inconsistent with his RFC). The ALJ found support in the opinion of Dr. White, who reviewed
17 Plaintiff’s MRIs from 2007, and testified that the abnormalities found in these MRIs “can be
18 found on normal people walking on the street.” AR 74. If the new MRIs show a worsening of
19 Plaintiff’s degenerative disk disease, then Plaintiff’s subjective complaints of pain would be
20 supported by more objective medical evidence. This, in turn, may augment the ALJ’s assessment
21 of Plaintiff’s credibility, and support a finding that Plaintiff is either disabled or has a more
22 restrictive RFC.

23 Accordingly, when taking into account the new evidence submitted to the Appeals
24 Council, the Court concludes that the ALJ’s decision is not supported by substantial evidence.

25 **V. CONCLUSION**

26 For the foregoing reasons, the Court GRANTS Plaintiff’s Motion for Summary Judgment,
27 DENIES Defendant’s Cross-Motion for Summary Judgment, REVERSES the decision of the ALJ
28 and REMANDS the case for further proceedings.

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IT IS SO ORDERED.

Dated: January 28, 2014



JOSEPH C. SPERO
United States Magistrate Judge