

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NAJIBA ZAZAI,
Plaintiff,
v.
CAROLYN W. COLVIN,
Defendant.

Case No. 15-cv-03591

**ORDER ON MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 16, 17

Plaintiff Najiba Zazai seeks disability insurance benefits and supplemental security income due to her major depressive and generalized anxiety disorders. In denying Zazai’s claims for benefits, an Administrative Law Judge (“ALJ”) relied on treatment records from monthly medication management visits to conclude that Zazai’s symptoms were well controlled with medication and, therefore, not disabling. However, the ALJ both mischaracterized the efficacy of her treatment and improperly discounted the longitudinal evidence provided by her primary treating physician demonstrating persistent debilitation in favor of the opinion of a non-examining physician. In addition, the ALJ’s credibility finding is not sufficiently specific because the ALJ failed to identify which portions of Zazai’s testimony were not credible; the proffered reasons for discrediting Zazai’s testimony were not supported by substantial evidence in the record. As a result of these errors, I GRANT Zazai’s motion for summary judgment, DENY the Commissioner’s motion, and remand for further proceedings.

BACKGROUND

I. PROCEDURAL HISTORY

On January 2, 2013, plaintiff Zazai applied for Title II Social Security Disability Insurance (“SSDI”), and on January 31, 2013, she applied for Title XVI Supplemental Security Income (“SSI”), alleging an onset of disability of October 1, 2010. Administrative Record (“AR”) 153-62; Exs. 1D, 2D. Her claims were initially denied on May 3, 2013(AR 97-101) and denied on reconsideration on December 5, 2013. AR 103-09. She filed a written request for an ALJ hearing and on September 16, 2014, a hearing was held before ALJ Michael Blume. AR 26. On

1 December 16, 2014, the ALJ issued an unfavorable decision and concluded that Zazai was not
2 under a disability within the meaning of the Social Security Act from October 1, 2010 through the
3 date of his decision. AR 9-25. The ALJ’s decision became final when the Appeals Council
4 denied Zazai’s request for review. AR 1-3. Zazai filed this action on August 5, 2015. Currently
5 before me are the parties’ motions for summary judgment. Dkt. Nos. 16, 17.

6 **II. ZAZAI’S BACKGROUND AND IMPAIRMENTS**

7 Zazai is a 41-year-old woman from Afghanistan and the mother of four children. AR 482,
8 391. She had a traumatic childhood--she grew up in a war-torn country, experiencing frequent
9 bombings, violence, and death. AR 392. Both her father and sister died during the war, and her
10 cousin committed suicide after getting “mentally sick from the war.” *Id.* As an adolescent, Zazai
11 was hit by shrapnel over her eye and almost died from the injury. *Id.* Her family eventually fled to
12 Pakistan and settled there. *Id.* As a result, she was forced to leave school in “seventh or eighth
13 grade”¹ and never completed her education. AR 30, 392. Zazai is concerned the war in
14 Afghanistan will never end and fears the loss of more family and friends. AR 482. She remains in
15 contact with her friends and family in Afghanistan; bad news of the war increases her depression.
16 AR 482.

17 In 2012, about two years after coming to the United States, AR 31, Zazai enrolled in
18 English classes, but dropped out after a few months due to poor motivation and impaired memory.
19 AR 31, 394. She claims she forgot most of the little English she learned. AR 31. A consultative
20 examiner found that she was able to speak in “simple sentences.” AR 393. On her disability
21 report, Zazai indicated that she cannot read or write English. AR 191.

22 From 2007 to 2010, Zazai worked as an in-home care aide for approximately 20 hours per
23 week. AR 181-86, 193-94. She states that she had to stop working in October 2010 because of
24 her deteriorating mental health, including her memory impairments. AR 37- 38. She says that she
25 stopped working as an in-home care taker in part because she was concerned for her clients’ safety,
26

27 _____
28 ¹ The record has conflicting evidence about when Zazai’s schooling ended. *See, e.g.*, AR 392
 (“grade ten”); AR 193 (“3rd grade”). Her husband explained the discrepancies to a consultative
 examiner as due to the fact that “dates and ages is not a construct used in Afghanistan.” AR 394.

1 that she was afraid that she might give them the wrong medication. *See also* AR 193, 392.

2 Zazai testified that when she feels sad, she wants to be left alone and isolates herself in a
3 room. AR 42, 43, 394. On good days she is able to cook, clean, and care for her children. AR 42.
4 She says that the number of good days she has fluctuates greatly, ranging from one day a week to
5 four days a week. AR 33 (testifying she had 2-3 good days a week); AR 44 (testifying that
6 number of good days fluctuates between one and four a week). Her husband largely cares for their
7 children. AR 394. She testified that she tries her best to take care of her children, but cannot
8 when not feeling well. Her husband cooks and cleans, but she will also cook when feeling well.
9 AR 394; *but see* AR 391 (she forgot that she warmed milk and almost started a fire); 478 (forgets
10 to turn off the stove). Her husband takes care of the children in the morning, and when her eldest
11 daughter gets home from school (her husband works in the afternoons), the daughter takes care of
12 her and the younger children. AR 33.

13 Zazai says that sometimes she can go out alone to Safeway or drive, but is scared of
14 strangers and concerned that she will forget where she lives. AR 34-35. She drives occasionally
15 to pick up her kids when she is a “little bit okay,” and won’t otherwise drive alone except in
16 emergencies. *Id.* At the ALJ hearing she testified that her condition has gotten worse since 2010,
17 and that her prescribed medication helps her feel more relaxed. AR 38-39.

18 Zazai alleges a disability onset date of October 1, 2010. AR 153, 155. In February 2011,
19 she complained of insomnia, stress, memory problems, and crying spells to Dr. Shaista Shah, her
20 primary care physician at California Cardiovascular Consultants. AR 256. Dr. Shah diagnosed
21 Zazai with Depression, prescribed Prozac and Ambien, and referred her for mental health
22 treatment. AR 257. Dr. Shah has also treated Zazai for certain physical ailments that are not at
23 issue now.²

24 Zazai is a regular patient at Alameda County Behavioral Health Care Services. She began
25 weekly psychotherapy session in October 2012 with clinical psychologist Dr. Kambiz Sakhai. *See*
26 AR 476-578. On November 1, 2012, Dr. Sakhai diagnosed Zazai with “Major Depressive
27

28 ² Dr. Shah diagnosed Zazai with hypothyroidism and treated her for right knee pain. AR 290.

1 Disorder, Recurrent, Severe With Psychotic Features.” AR 370-73, 457, 476. Dr. Sakhai
2 described the psychotic features as “voices” in Zazai’s head telling her “you will lose all your
3 family.” AR 482. In the treatment plan dated November 1, 2012, Dr. Sakhai noted that Zazai
4 “continues to suffer from lack of trust in others, crying spells, depressed mood, and anhedonia on
5 a daily basis.” AR 478. Dr. Sakhai also noted that Zazai “forgets to turn off the stove or [lock]
6 the door at all times.” *Id.*

7 In her psychological evaluations on March 14, 2013 and September 9, 2013, Dr. Sakhai
8 noted that Zazai’s “severe depression” continued and that her current symptoms included severe
9 memory loss, inability to concentrate, depression, apathy, inappropriate guilt, sense of
10 worthlessness, and sleep disturbances. AR 370-73, 454-56. Dr. Sakhai indicated that Zazai must
11 be reminded of her appointments or else she fails to remember them. AR 370, 454. In March
12 2013, Dr. Sakhai again reported that Zazai exhibited psychotic symptoms, including visual and
13 auditory hallucinations, which began soon after her depression started. AR 370. Dr. Sakhai
14 explained that Zazai’s depression and the voices in her head make it very difficult for her to follow
15 and understand instructions. AR 372, 456. She also reports that Zazai is unable to keep regular
16 attendance and schedules due to her memory loss, and requires attention at home. AR 373, 456.
17 In September 2013, Dr. Sakhai concluded that Zazai’s depression “worsened when she realized
18 that she was not able to hold a job because of her condition.” AR 454. According to Dr. Sakhai,
19 Zazai’s depression stems from painful memories of the war in Afghanistan and “unfinished
20 mourning for the lost love[d] ones . . . [which] have turned into severe depression and have
21 disabled [t]he patient.” AR 454.

22 In her treatment plan dated March 2013, Dr. Sakhai noted that Zazai’s symptoms were
23 improved but that despite Zazai’s medications, she continued to suffer from severe sleep
24 disturbances, problems with her memory and concentration, and social isolation. AR 503. Dr.
25 Sakhai confirmed that Zazai is taking medication to prevent worsening of her symptoms and must
26 continue treatment “to not deteriorate symptoms and to not get hospitalized.” AR 503.

27 In a Medical Source Statement dated February 19, 2014, Dr. Sakhai opined that Zazai’s
28 ongoing impairments would cause her to miss work more than 3 times a month, and that her

1 capabilities of performing the following activities are at an “extreme loss”: to understand and
2 carry out very short, simple instructions; to maintain attention and concentration for 2-hour
3 segments; to maintain regular attendance and be punctual; to deal with stress of semi-skilled work;
4 and to be aware of normal hazards and take appropriate precautions. AR 603-05. In addition, in
5 an evaluation dated February 24, 2014, Dr. Sakhai found that Zazai has extreme functional
6 limitations, including continual “[e]pisodes of deterioration or decompensation in work or work-
7 like settings which cause the individual to withdraw from that situation or to experience
8 exacerbation of signs and symptoms” and that she has constant “deficiencies of concentration,
9 persistent, or pace resulting in failure to complete tasks in a timely manner.” AR 605.

10 Dr. Sakhai’s late 2013 and 2014 weekly progress notes indicate Zazai continued to suffer
11 from her depression and anxiety through July 2014. *See, e.g.*, AR 512, 513, 519, 525 (November
12 and December 2013 and January 2014 notes reporting Zazai felt down and depressed most days
13 prior week); AR 608-09, 611, 615, 623 (March, April, May and June 2014 notes reporting
14 continued depression, severe sleep disturbances, irrational guilt, tearful affect, agitation, and low
15 moods). In Dr. Sakhai’s March 2014 progress note, she reported that Zazai was not interested in
16 communicating or connecting with her and described her as apathetic, nervous, and agitated. AR
17 622-23. In April 2014, Dr. Sakhai described incidents of lack of self-confidence and low self-
18 esteem, and how Zazai was in tears and “could not elevate her mood at all during the last week.”
19 AR 618-19. In May 2014, Dr. Sakhai’s progress notes show that Zazai reported severe sleep
20 disturbances, felt “down and depressed,” had feelings of irrational guilt, and increased lack of
21 energy and motivation throughout the week. AR 609, 611, 613, 615. In a progress note dated
22 June 4, 2014, Dr. Sakhai reported that Zazai felt “down and depressed most of the days.” AR 608.

23 In a Mental Impairment Questionnaire from July 2014, Dr. Sakhai again concluded that
24 Zazai was severely depressed with a high level of anxiety, despite taking medications and coming
25 to weekly therapy sessions. AR 630. Dr. Sakhai, again, opined that Zazai’s cognitive ability,
26 memory and mental processing are “severely impaired” and that these severe limitations would
27 last at least 12 months. AR 630-35.

28 At the request of Zazai’s social worker, Zazai saw Dr. Abraham, a psychologist, who

1 examined her one time on June 10, 2013. *See* AR 390-98. Dr. Abraham also diagnosed Zazai
2 with Major Depressive Disorder and characterized her disorder as Recurrent and Severe due to the
3 “debilitating symptoms that interfere with her ability to function effectively in occupational and
4 social arenas.” AR 396. Dr. Abraham indicated that Zazai’s depression surfaced in childhood as a
5 result of her traumatic childhood and loss of family members and that she also had a genetic
6 predisposition to depression given her mother and grandmother’s history of depression. AR 396.
7 According to Dr. Abraham, Zazai has passive suicidal ideation, although Zazai reports that she
8 would “never do that” as it is against her religion. AR 393. Dr. Abraham also reported that she
9 suffers from exhaustion and severe lack of motivation and concentration, and that she exhibited
10 compromised hygiene due to her failure to bathe. AR 394-97.³

11 Zazai has also been a regular patient at Pathways to Wellness Medication Clinic for
12 psychiatric medication management. She began monthly visits with Dr. Rim Said in October
13 2012, and with Dr. Pradeep Kumar in September 2013. AR 422-38, 579-601. These treating
14 psychiatrists diagnosed Zazai with Major Depressive Disorder and Generalized Anxiety Disorder.
15 AR 424-38, 582-87, 590-91. Her treatment records from October 2012 to February 2014 show
16 that Zazai’s symptoms fluctuated, with periods of improvement followed by recurrent symptoms
17 of depression, anxiety, and panic. *See* AR 424-31, 582-87, 590-91, 593, 594, 599-600.

18 In his initial assessment in October 2012, Dr. Said reported that Zazai’s symptoms
19 included feeling helpless, hopeless, having no energy, being unable to concentrate and make
20 decisions, having pressure in her chest, feeling constantly scared, and preferring to stay in a dark
21 room. AR 422-43, 436. Dr. Said also reported that Zazai suffered from fainting attacks and had
22 poor attention and concentration. AR 433, 601. According to Dr. Said, Zazai kept asking about a
23 “strong” medicine to feel better. AR 435. In December 2012, Dr. Said found Zazai’s judgment
24 was “fair” and noted that her mood was sad, she had trouble breathing, and felt angry at times.

25
26 ³ A DDS psychological consultant, Dr. Solomon, reviewed Zazai’s records on November 22, 2013
27 and concluded that Zazai’s mental impairments are not severe. AR 90. According to Dr.
28 Solomon, Zazai appeared to be “adjusting” and not “floridly psychotic” since she is not suicidal.
Id. Dr. Solomon suggested that her depression is reflective of adjustment issues and “heavily
influenced by situational factors,” namely her “coping” with young children, and relied heavily on
the fact that Zazai was able to work “even after war experiences.” *Id.*

1 AR 594. In February 2013, Dr. Said reported on Zazai’s continued feelings of depression, trouble
2 sleeping, poor concentration, and a sad affect. AR 592-93.

3 Dr. Said’s progress notes from March to May 2013 indicate an improvement in Zazai’s
4 symptoms. See AR 426-31. In March, Zazai reported that she felt better on Cymbalta, and Dr.
5 Said noted that her depression was “partially improved” with a “fair” prognosis. AR 430-31. In
6 April, Zazai stated that she “feels good when she takes the medicines” though there were
7 indications of residual depression. AR 428-29. In May 2013, Dr. Said reported that Zazai still has
8 problems sleeping but described Zazai as “stable[,]” and feels better on Wellbutin, indicating that
9 her prognosis was “good.” AR 426-27.

10 Zazai returned to see Dr. Said two months later in July 2013, and the progress note
11 indicated that her prognosis had worsened to “fair[,]” that she had memory problems (indicated by
12 her failure to take her medication sometimes, but that she remembers when “she feels sad”), and
13 that she wakes up 2-3 times a night. AR 424-25. Dr. Kumar’s progress notes over the next six
14 months until January 2014 show that Zazai remained depressed, with symptoms of anxiety, panic,
15 and insomnia. AR 584-85, 586-87, 590-91. In January 2014, Dr. Kumar said that Zazai’s
16 prognosis worsened to “still poor” and that she still has symptoms of depression, was unable to
17 sleep at night, and had a sad and anxious mood. AR 584-85. However, in February 2014, another
18 improvement her symptoms was noted in Dr. Kumar’s progress note, which indicated that Zazai
19 was “doing very well” with her current medication and that her “[d]epression is under control.”
20 AR 582-83.

21 With the exception of one progress note in September 2013, Drs. Said and Kumar assigned
22 GAF scores of increasingly greater levels of functioning ranging from 40 to 60 from October 2012
23 through February 2014. See AR 436, 592, 430, 590, 428, 426, 424, 586, 584, 582, 600.⁴ In
24 September 2013, Zazai’s GAF decreased from 60 to 50, and then increased to 60 in November
25 2013. AR 424, 590, 586.⁵ Zazai’s GAF score remained at 60 for her visits in January 2014 and

26

27 ⁴ Generally a GAF score of 60 shows “moderate limitations,” and lower scores indicate more
28 serious symptoms and limitations. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND
STATISTICAL MANUAL OF MENTAL DISORDERS 32 (4th ed.).

⁵ Dr. Abraham, who only saw Zazai once as a consultative examiner, assessed her with a GAF of

1 February 2014. AR 584, 582. Dr. Sakhai, who was meeting with Zazai on a weekly basis, gave
2 Zazai a GAF of 41 in February 2014, and indicated that Zazai’s GAF had never been above 50 in
3 the last year. AR 602.

4 **III. DISABILITY DETERMINATION**

5 A claimant is “disabled” as defined by the Social Security Act if: (1) “he is unable to
6 engage in any substantial gainful activity by reason of any medically determinable physical or
7 mental impairment which can be expected to result in death or which has lasted or can be expected
8 to last for a continuous period of not less than twelve months,” and (2) the impairment is “of such
9 severity that he is not only unable to do his previous work but cannot, considering his age,
10 education, and work experience, engage in any other kind of substantial gainful work which exists
11 in the national economy.” 42 U.S.C. §§ 1382c(a)(3)(A)-(B) (West 2004); *Hill v. Astrue*, 698 F.3d
12 1153, 1159 (9th Cir. 2012).

13 **A. The Five-Step Inquiry**

14 To determine whether a claimant is disabled, an ALJ engages in a five-step sequential
15 analysis as required under 20 C.F.R. sections 404.1520(a)(4)(i)-(v). In the first two steps of the
16 evaluation, the claimant must establish that he or she (1) is not performing substantial gainful
17 activity, and (2) is under a “severe” impairment. *Id.* § 416.920(a)(4)(i)-(ii). At step two, an
18 impairment must have lasted or be expected to last 12 months in order to be considered “severe.”
19 *Id.* § 416.909. In addition, a “severe” impairment or combination of impairments significantly
20 limits an individual’s ability to perform basic work activities. *Id.* § 416.920(c). Conversely, an
21 impairment or combination of impairments that is “not severe” within the meaning of the
22 regulations is only a slight abnormality that has no more than a minimal effect on an individual’s
23 ability to work. *Id.* § 416.921.

24 In the third step, the claimant must establish that his or her impairment meets or medically
25 equals a listed impairment described in the administrative regulations. *Id.* § 416.920(a)(4)(iii). If
26 the claimant’s impairment does not meet or equal one of the listed impairments, the ALJ must first
27

28 35 in June 2013. AR 396.

1 determine the claimant’s Residual Functional Capacity (“RFC”) before proceeding to step four.
2 *Id.* §§ 404.1520(e), 416.920(e). This determination is made based on all the evidence in the
3 record, including impairments that are not severe, and is used to evaluate the claimant's work
4 capacity for steps four and five. *Id.* § 416.920(e).

5 In step four, the claimant must establish that his or her impairment prevents the claimant
6 from performing relevant work he or she did in the past. *Id.* § 416.920(a)(4)(iv). The claimant
7 bears the burden to prove steps one through four, as “[a]t all times, the burden is on the claimant to
8 establish [his] entitlement to disability insurance benefits.” *Id.* (alterations in original). Once the
9 claimant has established this prima facie case, the burden shifts to the Commissioner to show at
10 the fifth step that the claimant is able to do other work, and that there are a significant number of
11 jobs in the national economy that the claimant can do. *Id.* §§ 416.920(a)(4)(v),(g); 416.960(c).

12 In step five, significant jobs in the “national economy” must exist either “in the region
13 where such individual lives or in several regions in the country.” 42 U.S.C. § 423(d)(2)(A). There
14 is no bright-line rule for determining how many jobs are “significant” under step five in the Ninth
15 Circuit, although “a comparison to other cases is instructive.” *Beltran v. Astrue*, 700 F.3d 386,
16 389 (9th Cir. 2012). Moreover, there must be more than a few “scattered”, “isolated” or “very
17 rare” jobs available. *Walker v. Mathews*, 546 F.2d 814, 820 (9th Cir. 1976); *see also Gutierrez v.*
18 *Comm'r of Soc. Sec.*, 740 F.3d 519, 529 (9th Cir. 2014). Finally, even if there are not sufficient
19 jobs in the regional economy, courts must still look to the availability of those jobs across several
20 regions in the national economy. *Gutierrez*, 740 F.3d at 528.

21 **B. The ALJ’s Decision**

22 At step one, the ALJ found that Zazai has not engaged in substantial gainful activity since
23 the alleged onset date of October 1, 2010. AR 14. At step two, which is at issue here, the ALJ
24 found that Zazai did not have an impairment or combination of impairments that significantly
25 limited her ability to perform basic work-related activities for 12 consecutive months. AR 14. In
26 reaching this conclusion, the ALJ said that he “considered all symptoms and the extent to which
27 these symptoms can reasonably be accepted as consistent with the objective medical evidence . . .
28 .” AR 15. The ALJ engaged in a two-step process to evaluate the symptoms: (1) determine

1 whether there is an underlying physical or mental impairment that can be shown by medically
2 acceptable clinical and laboratory diagnostic techniques which could reasonably be expected to
3 produce the claimant's pain; and (2) once such an impairment is shown, evaluate the intensity,
4 persistence, and limiting effects of the symptoms to determine the extent to which they limit the
5 claimant's functioning. AR 15.

6 The ALJ did not find Zazai's physical ailments – her hypothyroidism and knee pain –
7 sufficiently limiting. AR 15-16. As to her mental impairments, the ALJ discounted the medical
8 source statements of her treating clinical psychologist Dr. Sakhai, who concluded that Zazai's
9 impairments caused an "extreme" loss in the ability to perform a wide range of work-related
10 functions. AR 17. The ALJ determined that Dr. Sakhai's opinion was not substantiated by the
11 record because "[t]he treatment records indicate that . . . [Zazai] reported significant improvement
12 in symptoms with medication" since beginning her psychiatric assessments. AR 16. He found
13 that Dr. Sakhai's treatment notes were "cursory at best, and without documented mental status
14 examinations." AR 17. The ALJ also gave little weight to the assessment of Dr. Abraham
15 (consistent with Dr. Sakhai's diagnoses and concluding that Zazai's symptoms preclude her from
16 sustaining work) for similar reasons, namely that it conflicts with the reports of the treating
17 psychiatrists at Pathways to Wellness.

18 The ALJ relied heavily on the treatment records from Pathways to Wellness, which
19 according to the ALJ demonstrated an improvement in Zazai's symptoms since her October 2012
20 intake. AR 17. The ALJ specifically pointed to the March and April 2013 notes of Dr. Said
21 where Zazai reported feeling "much better" on Cymbalta (AR 16, AR 530), and that Zazai's
22 insomnia issues were improving. AR 17, 428. The ALJ relied on the May 2013 notes where
23 Zazai reported feeling better on Wellbutin and Dr. Said indicated that she was "stable." AR 17,
24 426-27. The ALJ also relied on Dr. Kumar's February 2014 progress note showing that Zazai's
25 depression was "under control," AR 17, 582-83, and on the mental status examinations noting a
26 healthy appearance, cooperative attitude, linear thought process, no evidence of hallucinations,
27 good concentration and attention. AR 17. The ALJ did not, however, consider the periods of
28 depression that both preceded and followed progressions of improvement noted by the Doctors at

1 Pathways to Wellness. *See, e.g.*, AR 584 (January 2014: “still having symptoms of depression,
2 anxiety, and panic[,]” prognosis is “still poor”), AR 593 (February 2013: poor
3 attention/concentration, “seems to be more depressed & sad.”), AR 590-91 (September 2013: still
4 feeling depressed). The record does not include any treatment records after February 2014 from
5 Pathways to Wellness.

6 The ALJ found Zazai’s testimony only “partially credible,” although the ALJ did not
7 clearly identify which parts of her testimony he was referring to. AR 16. It appears that the ALJ
8 discredited Zazai’s testimony that she stopped working in 2010 because of her worsening
9 depression and memory problems, and that she still suffers from memories of war and violence in
10 her country. *See* AR 37-40. He concurred with DDS psychological consultant Dr. Solomon, who
11 only reviewed Zazai’s record. *Id.*; AR 90. Dr. Solomon opined that Zazai’s symptoms “are
12 heavily influenced by situational factors and largely reflect adjustment issues” because she was
13 able to work at a substantial gainful activity even after her traumatic upbringing in a war torn
14 country. AR 16. The ALJ also determined that any adjustment issues she may have are a result of
15 learning how to raise four children ages 11 and under. AR 16.

16 Although he could have ended his analysis ends at step two (after finding no severe
17 impairment), the ALJ made “alternative findings” as to steps three to five. At step three, the ALJ
18 alternatively found that Zazai’s impairments did not meet the criteria for disability listed in the
19 administrative regulations. AR 17-18. The ALJ also concluded that the evidence demonstrates
20 “no more” than a “moderate limitation” due to Zazai’s depression and anxiety disorder. AR 18.
21 The ALJ found that Zazai had the RFC to perform “simple, repetitive tasks and occasional contact
22 with others.” AR 18. In determining Zazai’s RFC, the ALJ discussed the lack of objective
23 evidence in the record substantiating Zazai’s claims for severe memory loss, difficulty
24 concentrating, and frequent inability to be around others. AR 18. The ALJ specifically pointed to
25 a lack of corroboration of Dr. Sakhai’s report of Zazai’s psychotic symptoms, as well as the
26 normal mental status examinations that reported linear thought processes and fair judgment from
27 Pathways to Wellness. AR 18, 424-431. The ALJ also relied on Dr. Kumar’s progress note in
28 January 2014 that Zazai had an intact memory, and good attention and concentration, AR 18, 585,

1 587, as well as Zazai’s statement that she was “doing very well” and that her sleep, appetite, and
2 depression were under control. AR 19, 582.

3 In finding that Zazai is limited to occasional contact with others, the ALJ considered her
4 testimony that she isolates herself on bad days but, given her cooperative and calm demeanor
5 during treatment visits, found that she is not precluded from all social interaction.. AR 18 (relying
6 on Pathways to Wellness reports indicating her mood as “euthymic”).

7 At step four, the ALJ alternatively found that Zazai is unable to perform her past relevant
8 work as a home health aide. AR 18. The ALJ determined that Zazai is a “younger individual[,]”
9 which is defined as an individual between the ages of 18 and 49. AR 19; 20 C.F.R. §§ 404.4563,
10 416.963. He also found that she is illiterate but is able to communicate with “rudimentary spoken
11 English.” AR 19.

12 At step five, the ALJ’s alternative finding relied on testimony of a vocational expert and
13 determined that Zazai is capable of performing other jobs existing in significant numbers in the
14 national economy. AR 19. The ALJ posed the following hypothetical to the expert:

15 We have a hypothetical younger individual who is illiterate in
16 English and speaks only rudimentary English with the same past
17 work as the claimant who has no physical limitations but who’s
limited to simple, repetitive contact with occasional contact with
others.

18 The vocational expert opined that she would be able to perform the requirements of
19 representative unskilled occupations such as a palletizer with 333,000 jobs in the national
20 economy, or a garment sorter with 233,000 national jobs. AR 19-20. The ALJ did not expressly
21 include in the hypothetical to the vocational expert his alternate finding that Zazai had moderate
22 limitations with regards to her depression and anxiety disorders. In addition, the ALJ did not
23 consider the additional testimony by the vocational expert, elicited by Zazai’s counsel and based
24 on Dr. Sakhai’s RFC assessment, that “three to four unplanned absences per month” would “in
25 and of itself close the world of work.” AR 46.

26 LEGAL STANDARD

27 I. SUMMARY JUDGMENT

28 Summary judgment on a claim or defense is appropriate “if the movant shows that there is

1 no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
2 law.” FED. R. CIV. P. 56(a). In order to prevail, a party moving for summary judgment must show
3 the absence of a genuine issue of material fact with respect to an essential element of the non-
4 moving party's claim, or to a defense on which the non-moving party will bear the burden of
5 persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has
6 made this showing, the burden then shifts to the party opposing summary judgment to identify
7 “specific facts showing there is a genuine issue for trial.” *Id.* The party opposing summary
8 judgment must then present affirmative evidence from which a jury could return a verdict in that
9 party’s favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

10 **II. STANDARD OF REVIEW**

11 Under 42 U.S.C. section 405(g), courts review an ALJ’s decision to determine whether
12 substantial evidence supports the ALJ’s findings and if they are free of legal error. *See Smolen v.*
13 *Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996); *DeLorme v. Sullivan*, 924 F.2d 841, 846 (9th Cir.
14 1991) (ALJ’s disability determination must be supported by substantial evidence and based on the
15 proper legal standards). Substantial evidence means “‘more than a mere scintilla,’ but less than a
16 preponderance.” *Saelee v. Chater*, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting *Richardson v.*
17 *Perales*, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a
18 reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402 U.S. at 401,
19 (internal quotation marks and citation omitted).

20 When looking for substantial evidence, courts must review the record as a whole and
21 consider adverse as well as supporting evidence. *See Robbins v. Soc. Sec. Admin.*, 466 F.3d 880,
22 882 (9th Cir. 2006). Where evidence is susceptible to more than one rational interpretation, the
23 ALJ’s decision must be upheld. *See Morgan v. Comm’r of the Soc. Sec. Admin.*, 169 F.3d 595,
24 599 (9th Cir. 1999). “However, a reviewing court must consider the entire record as a whole and
25 may not affirm simply by isolating a ‘specific quantum of supporting evidence.’” *Robbins*, 466
26 F.3d at 882 (quoting *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989)); *Orn v. Astrue*, 495
27 F.3d 625, 630 (9th Cir. 2007).

28

1 **DISCUSSION**

2 Zazai challenges several of the ALJ’s conclusions: (i) the finding at Step Two that
3 plaintiff has no severe impairments; (ii) the rejection for insufficient reasons of the opinions of
4 Zazai’s treating and examining sources; (iii) the failure to provide specific, clear, or convincing
5 reasons for rejecting Zazai’s subjective testimony; (iv) the lack of substantial evidence for the
6 alternate RFC; and (v) the alternate Step Five finding’s reliance on vocational expert testimony.
7 Each argument will be addressed in turn.

8 **I. THE ALJ ERRED AT STEP TWO**

9 The ALJ’s finding that Zazai has no severe impairments at Step Two is not supported by
10 substantial evidence. Where an adjudicator is “unable to determine clearly the effect of an
11 impairment or combination of impairments on the individual’s ability to do basic work activities,
12 the sequential evaluation should not end [at step two].” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th
13 Cir. 2005). Step two, then, is “a de minimis screening device [used] to dispose of groundless
14 claims.” *Id.* However, “[i]mpairments that can be controlled effectively with medication are not
15 disabling for the purpose of determining eligibility for SSI benefits.” *Warre v. Comm’r of Soc.*
16 *Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006).

17 The Commissioner argues that the ALJ’s determination was correct and that the ALJ
18 appropriately relied on mental status examinations demonstrating the efficacy of treating Zazai’s
19 anxiety and depression with medication. Defendant’s Motion for Summary Judgment [Dkt. No.
20 17], at 2-5. The Commissioner notes the ALJ’s reliance on treatment records from the Pathways
21 to Wellness Medication Clinic indicating Zazai’s depression and anxiety disorders improved with
22 medication and that her GAF improved over time. For example, Zazai reported feeling “much
23 better” on Cymbalta during her visit in March 2013, said that she “feels good when she takes the
24 medicines” in April 2013, and that she also feels better on Wellbutrin in May 2013. AR 430-31,
25 428-29, 426-27. In contrast, plaintiff argues that while the Pathways to Wellness records
26 document some improvement of symptoms, taken as a whole and looked at in full, the record
27 shows that her symptoms nevertheless persisted, the level of her depression and ability to cope
28 with her symptoms fluctuated, and the symptoms continued to interfere with her functioning.

1 Plaintiff's Reply Brief [Dkt. No. 18], at 2-3.

2 The ALJ's determination that Zazai's depression and anxiety are sufficiently controlled is
3 not supported by substantial evidence. See, e.g., *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d
4 1001, 1006 (9th Cir. 2006) (a claimant will not be disabled where the "severity of the problem had
5 decreased sufficiently to enable [her] to engage in gainful activity."). While Sasai's symptoms
6 stabilized (or at best showed some temporary improvement) once she was on medication, the
7 record nonetheless shows that serious symptoms of depression and anxiety persisted and,
8 occasionally, worsened. For example, Dr. Said reported at a medication visit in July 2013 that her
9 prognosis worsened from "good" to "fair," that she still exhibited memory problems (since she
10 forgot to take her medication at times, but remembered when she felt sad), and continued to wake
11 up 2-3 times a night. AR 424-25. He also described daytime sleepiness and found that her
12 judgment was only "fair." AR 425. In addition, treating physician Dr. Kumar reported that Zazai
13 was still feeling depressed and had a "sad" and "anxious" mood in a progress note dated
14 September 2013. AR 590-91. He also noted that Zazai was having poor sleep, and feeling
15 "hopeless and helpless," and described her concentration to be "fair." *Id.* At Zazai's next
16 medication visit in November 2013, Dr. Kumar described her mood as "sad," noted that she "still
17 feels depressed and [is] unable to sleep off and on," and stated that her prognosis remained "fair."
18 AR 586-87. In January 2014, Zazai's prognosis worsened to "still poor," and Dr. Kumar reported
19 continued symptoms of depression, anxiety, and panic. AR 584-85. These are all after plaintiff
20 had been on medications and under treatment at Pathways to Wellness since October 2012. AR
21 422.

22 The ALJ failed to address the evidence of ongoing symptoms as well as her
23 regressions/worsening symptoms noted within the Pathways to Wellness records. Nor did the ALJ
24 address the contemporaneous records from Dr. Sakhai that indicated Zazai was still suffering from
25 serious symptoms of her depression and anxiety disorders, even though the medicines helped
26 stabilize her symptoms to some extent.

27 Moreover, Dr. Sakhai, Zazai's primary treating clinical psychologist, whom she saw once
28 a week, opined that her impairments are severe enough to preclude her from sustaining work and

1 that while her medications help maintain her current level of functioning, she was nonetheless still
2 “severely” limited. AR 373, 603-05. In February and July 2014, Dr. Sakhai said that the claimant
3 was still at an “extreme loss” in understanding short, simple instructions, maintaining attention for
4 more than 2-hour segments, and working in coordination with or proximity to others without being
5 unduly distracted. AR 603-05, 630-35. Dr. Sakhai also reported an irritable mood, insomnia,
6 problems with memory and concentration, and “poor control over her impulses.” AR 603, 633. In
7 more recent progress notes from May 2014 to June 2014, Dr. Sakhai noted “increased lack of
8 energy and motivation,” lethargy, feelings of “irrational guilt,” and a sad/depressed mood. AR
9 608, 613, 615. Because the ALJ “isolat[ed]” the periods of improvement from Pathways to
10 Wellness and did not address the contradicting evidence described above, the ALJ’s decision is
11 not supported by “substantial evidence.” *See Lingenfelter*, 504 F.3d at 1035.

12 The Commissioner relies on *Landa v. Astrue*, No. 1:06-CV-001037-SMS, 2008 WL
13 256567, at *8 (E.D. Cal. Jan. 30, 2008) *aff’d*, 333 F. App’x 280 (9th Cir. 2009) to argue that a
14 global assessment of functioning (GAF) score of 60 is not sufficient to support a finding of a
15 severe mental impairment. Dkt. No. 17 at 3. There, the court found that the claimant’s GAF score
16 of 60-65 indicated “only mild symptoms or difficulty who was generally functioning pretty well,
17 or one with moderate symptoms or difficulties at best.” *Id.* However, *Landa* is distinguishable.
18 Here, the Doctors at Pathways to Wellness assessed Zazai from a low of 40 to a high of 60 with at
19 least one regression. AR 422-38, 579-601. In addition,, neither the ALJ nor the Commissioner
20 discuss the significantly lower GAF scores assessed by Drs. Sakhai and Abraham. Therefore,
21 while the ALJ could rely on the fact that plaintiff’s GAF score had improved and was assessed at
22 60, that score still indicated (at best) “moderate” limitations. He erred in ignoring the history of
23 regressions, the lower GAF’s assigned by Drs. Sakhai and Abraham, as well as the evidence by
24 Pathways doctors showing Zazai continued to suffer significant symptoms of depression and
25 anxiety. The ALJ’s reliance on the GAF of 60 does not provide substantial evidence.

26 Dr. Kumar’s indications that Zazai had good attention/concentration and intact memory in
27 January and February 2014 are not entitled to much weight. AR 583, 585. One-third of the total
28 mental status examinations from Pathways to Wellness fail to make *any* notation at all with

1 regards to her memory or attention/concentration. *See* AR 425 (July 2013); 427 (May 2013); 429
2 (April 2013); 431 (March 2013). Where Dr. Kumar did make notations as to her attention and
3 memory, he simply checked the relevant boxes on the progress report without providing any
4 further explanation or notes. *See Holohan v. Massanari*, 246 F.3d 1195, 1207 (9th Cir. 2001)
5 (finding that the opinion of an examining physician who “merely checked boxes without giving
6 supporting explanations are insufficient to outweigh the opinion of a treating physician”). It is not
7 clear whether these assessments were based on objective testing. On the other hand, Zazai’s
8 treating psychologist contemporaneously determined that Zazai had problems with memory and
9 concentration, and was at an “extreme loss” in remembering locations and work-like procedures in
10 February 2014. AR 603-04. In a July 2014 mental impairment questionnaire, Dr. Sakhai
11 continued to opine that Zazai’s cognitive ability, memory, and mental processing were severely
12 impaired, and also reported difficulty thinking or concentrating. AR 630-31.⁶

13 Finally, as discussed in more detail below, the ALJ’s rejection of Dr. Sakhai’s opinion and
14 attempt to rely on a subset of the Pathways to Wellness records and findings to conclude that
15 plaintiff’s mental health diagnoses were not severe was erroneous. The entire record must be
16 considered “as a whole, weighing both the evidence that supports and the evidence that detracts
17 from the Commissioner’s conclusion, and may not affirm simply by isolating a specific quantum
18 of supporting evidence.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (internal
19 citations omitted) (internal quotation marks omitted). The ALJ’s Step Two determination is not
20 supported by substantial evidence.

21 **II. THE ALJ ERRED BY REJECTING THE OPINIONS OF THE TREATING AND**
22 **EXAMINING SOURCES FOR INSUFFICIENT REASONS**

23 Zazai also argues that the ALJ erred in assigning little weight to the medical opinions of
24 Dr. Sakhai, Zazai’s weekly treating clinical psychologist, and examining psychologist Dr.
25 Abraham, both of whom concluded that Zazai’s symptoms are debilitating enough to preclude her

26 _____
27 ⁶ The ALJ’s reliance on Dr. Kumar’s notation that Zazai’s thought processes have been linear and
28 her judgment fair to conclude that Zazai could perform “simple, repetitive tasks and occasional
contact with others” (AR 18) was misplaced for similar reasons. There is no explanation of how
Dr. Kumar made those “check box” assessments.

1 from sustaining work. Pl. Mot. at 10-12. The Commissioner argues that the ALJ properly
2 discounted their opinions because the severity of their assessments was inconsistent with mental
3 status examinations, as shown by the Pathways to Wellness notes, and lacked sufficient objective
4 support. Def. Mot. at 5-6.

5 The Ninth Circuit has distinguished among the opinions of three types of physicians: (1)
6 those who treat the claimant (treating physicians); (2) those who examine but do not treat the
7 claimant (examining physicians); and (3) those who neither examine nor treat the claimant
8 (nonexamining physicians). *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995), *as amended* (Apr.
9 9, 1996). In general, the opinions of treating medical sources are given the most weight, though
10 an ALJ may reject such opinions when they are contradicted by another doctor by stating “specific
11 and legitimate reasons” that are supported by substantial evidence. *Lester*, 81 F.3d at 830. The
12 opinion of an examining doctor is also entitled to special weight, though not as much as a treating
13 source. As with that of a treating source, a contradicted opinion of an examining doctor can only
14 be rejected by providing “specific and legitimate reasons” supported by substantial evidence in the
15 record. *Id.*

16 If a treating physician’s opinion is not given “controlling weight” because it is not “well-
17 supported” or because it is inconsistent with other substantial evidence in the record, the SSA
18 considers specified factors in determining the weight it will be given. Those factors include the
19 “[l]ength of the treatment relationship and the frequency of examination” by the treating physician
20 and the “nature and extent of the treatment relationship” between the patient and the treating
21 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007).

22 In this case, the ALJ’s decisions to reject the opinions of treating clinical psychologist Dr.
23 Sakhai and examining psychologist Dr. Abraham were not warranted. The ALJ found that these
24 opinions were unsubstantiated and contradicted by the notes from the treating psychiatrists at
25 Pathways to Wellness (Drs. Kumar and Said), as well as non-examining source Dr. Solomon. But
26 as discussed above, the opinions of Drs. Sakhai and Abraham are not inconsistent with records
27 from Pathways to Wellness when viewed as a whole. While the records from Pathways to
28 Wellness show improvement with medication, they also corroborate the diagnosis of severe

1 anxiety and depression by Zazai’s treating psychologist. *See, e.g.*, AR 593 (can’t sleep for a long
2 time, continues to be depressed, poor attention/concentration); AR 586-87 (still feels depressed
3 and unable to sleep); AR 584-85 (still having symptoms of depression, anxiety, and panic).
4 While the ALJ pointed to improvements detailed in the monthly visit notes at Pathways to
5 Wellness, he ignored the regressions noted by those same psychiatrists as well as their notes
6 showing Zazai continued to suffer from significant symptoms from her depression and anxiety.
7 AR 424-25 (July 2013 notes indicate ongoing problems with memory loss and insomnia); AR
8 590-91 (September 2013 notes that Zazai was still feeling depressed); AR 586-87 (November
9 2013 notes that Zazai still feeling depressed and unable to sleep); AR 584-85 (January 2014 notes
10 reducing Zazai’s prognosis to “still poor”).

11 When viewing the records as a whole – other than a discrepancy in the GAF’s assigned by
12 the various doctors – the Pathways to Wellness records from monthly visits do not necessarily
13 contradict, much less fully undermine, the opinions of Zazai’s weekly treating clinical
14 psychologist and examining psychologist Dr. Abraham.

15 In addition, though the ALJ found Dr. Sakhai’s opinion “was not well supported,” it still
16 merits special weight pursuant to the specified factors identified in *Orn*. Dr. Sakhai has treated
17 Zazai the longest--her progress notes span over two years--and their treatment relationship is
18 significant because Zazai had psychotherapy sessions with her on a weekly basis. *See* AR 482-
19 578. While the opinions of Drs. Said and Kumar also merit special weight, they did not see
20 claimant as often, and their relationship to claimant was only to manage her medication. Dr. Said
21 saw Zazai on a nearly monthly basis eight times, AR 424-31, 593-94, 599-600, and Dr. Kumar
22 saw Zazai four times, AR 582-87, 590-91.

23 The ALJ improperly discounted Dr. Sakhai and Abraham’s opinions as “contradictory” to
24 Drs. Said and Kumar. To the extent they were contradictory (*e.g.*, the GAF scores, which were
25 not discussed by the ALJ), the ALJ failed to state “specific and legitimate reasons” to give
26 decreased weight to Drs. Sakhai and Abraham.

27
28

1 **III. THE ALJ ERRED BY FAILING TO PROVIDE SPECIFIC, CLEAR, OR**
2 **CONVINCING REASONS FOR REJECTING ZAZAI'S TESTIMONY**

3 In evaluating the credibility of a claimant's testimony about her impairments, an ALJ must
4 engage in a two-step analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal
5 citations omitted). "First, the ALJ must determine whether the claimant has presented objective
6 medical evidence of an underlying impairment 'which could reasonably be expected to produce
7 the pain or other symptoms alleged.'" *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)
8 (internal citations omitted). The claimant is not required to show that her impairment "could
9 reasonably be expected to cause the severity of the symptom she has alleged; she need only show
10 that it could reasonably have caused some degree of the symptom." *Id.* (internal citations omitted).
11 If there is medical evidence of an underlying impairment, the claimant's testimony may not be
12 discredited solely for the reason that there is a lack of objective medical evidence in support
13 thereof. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). If the claimant meets the first test
14 and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about
15 the severity of the symptoms if he gives "specific, clear and convincing reasons" for the rejection.
16 *Vasquez*, 572 F.3d at 591. "General findings are insufficient; rather, the ALJ must identify what
17 testimony is not credible and what evidence undermines the claimant's complaints." *Reddick v.*
18 *Chater*, 157 F.3d at 722. As the Ninth Circuit recently reemphasized, the ALJ must specifically
19 identify inconsistencies between the claimant's testimony and the evidence in the record, because
20 "[a] clear statement of the agency's reasoning is necessary because we can affirm the agency's
21 decision to deny benefits only on the grounds invoked by the agency." *Brown-Hunter v. Colvin*,
22 806 F. 3d 487, 494 (9th Cir. 2015)

23 In this case, the ALJ found Zazai's testimony to be only partially credible, and concurred
24 with the opinion of Dr. Solomon, a non-examining, psychological consultant. AR 16. Plaintiff
25 argues that the ALJ erred with regards to Zazai's testimony by failing to identify with specificity
26 which symptoms or limitations plaintiff testified about were not credible, or what evidence
27 undermined those complaints. Pl. Mot. at 13-18.

28 The ALJ did not specifically identify the portions of claimant's testimony that were
discredited. Zazai testified that she was happy to work, though she had to stop working in 2010

1 because she became weak, depressed, tired, and had memory problems, which she feared might
2 endanger her clients. AR 37-38. She also testified that her condition worsened since she stopped
3 working and that she can't sleep well because she has traumatic wartime memories that leave her
4 feeling scared. AR 39. Zazai testified that she has both good and bad days, and that her good
5 days fluctuated between one and four a week. On good days, she can help take care of her
6 children, though her husband is mostly responsible for the kids and housework. AR 42.
7 Sometimes she is able to drive, but she testified that she does so rarely and almost never on her
8 own because she fears getting lost due to her impaired memory. AR 35. On bad days, ranging
9 from two to six times a week, she cannot be around anybody and isolates herself in a room. AR
10 43.

11 The ALJ implicitly rejected the above testimony because he found that Zazai's
12 impairments are non-severe, causing "no more than mild limitations in activities of daily living . . .
13 social functioning . . . and maintaining concentration." AR 16. In support, the ALJ cited the
14 opinion of nonexamining physician Dr. Solomon, who opined that despite allegations of fear and
15 depression related to wartime memories, Zazai was able to work as a care aide even after these
16 experiences. Dr. Solomon asserted that the symptoms of depression were "heavily influenced by
17 situational factors and largely reflect adjustment issues." AR 16. Although the ALJ concurred,
18 there is no support in the record for Dr. Solomon's conclusions.

19 Plaintiff relies on *Gallant v. Heckler*, 753 F.2d 1450, 1454 (9th Cir. 1984), which provides
20 that a non-examining physician's opinion is "not substantial evidence when contradicted by all
21 other evidence in the record." I agree with plaintiff that Dr. Solomon's opinion is not sufficient to
22 support the ALJ's claim that Zazai's symptoms are merely situational because his opinion is
23 contradicted by those of her treating sources. The treatment records from Dr. Sakhai and Dr.
24 Kumar show that her longstanding diagnoses of depression and anxiety significantly limit her
25 functioning level. *E.g.*, AR 603-05 (extreme functional limitations); AR 584-85 (still having
26 symptoms of depression, anxiety, and panic, prognosis "still poor").

27 The only other support the ALJ offers for his credibility finding is his statement that the
28 Pathways to Wellness records "indicate that within the year following her initial psychiatric

1 assessments for treatment (October 2012), she reported significant improvement in symptoms with
2 medication.” *Id.* Reliance on this evidence of improvement must be qualified because the
3 improvements fluctuated and did not fully control her significant symptoms of depression and
4 anxiety. The ALJ only singled out portions of these records showing periods of improvement, but
5 failed to adequately address the periods where her symptoms worsened again. *See* AR 590-91,
6 586-87, 584-85; *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001) (finding that the
7 ALJ’s negative credibility finding was not supported by the evidence where the ALJ selectively
8 quoted from treatment records and cited no specific evidence to support his claim). The ALJ
9 acknowledged that claimant’s symptoms “wax and wane to some degree,” AR 17, in arguing that
10 her symptoms are well controlled with medicine. He offered no other evidence to reconcile the
11 evidence showing both regression in progress and continued serious symptoms despite some
12 improvement.

13 The Commissioner’s position is that the activities to which Zazai testified, such as walking
14 with others to the park and raising four children, are “inconsistent with a severe mental
15 impairment, let alone disability.” Def. Mot. at 8. However, under *Lingenfelter*, plaintiff “need
16 only show that [her impairment] could reasonably have caused *some degree* of the symptom.” *Id.*
17 at 1036 (emphasis added). Here, it is more than reasonable that her enduring depression and
18 anxiety caused *some degree* of the symptom.

19 Because the ALJ’s credibility finding is not supported by substantial evidence, and the
20 ALJ did not identify the discredited portions of claimant’s complaints with specificity, I conclude
21 that the ALJ’s credibility determination was erroneous.

22 **IV. THE ALJ’S RFC DETERMINATION IS ERRONEOUS**

23 An RFC that fails to take into account a claimant’s limitations is defective. *Valentine v.*
24 *Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009). A claimant’s subjective testimony
25 as to her limitations may only be excluded from an RFC assessment if the ALJ provided clear and
26 convincing reasons for finding that the alleged symptoms were not credible. *See Lingenfelter*, 504
27 F.3d at 1035 (finding that the ALJ’s RFC assessment was not supported by substantial evidence
28 where the ALJ did not provide clear and convincing reasons for finding claimant’s alleged pain

1 and symptoms not credible). Because I have determined that the ALJ erred in discounting
2 plaintiff's own and her treating physicians' testimony, the alternate RFC determination is likewise
3 without support.

4 As noted above, even after the ALJ "assumed" that plaintiff's mental impairments are
5 severe, he nonetheless determined she had the RFC to perform "simple, repetitive tasks, with
6 occasional contact with others." AR 18. In setting that RFC, the ALJ discounted plaintiff's
7 allegations of severe memory loss, difficulty concentrating, and need to isolate, and instead relied
8 on "check box" treatment notes indicating plaintiff had linear thought and fair judgment. *Id.* The
9 ALJ also limited plaintiff to occasional contact with others, considering both her self-described
10 isolation and the physician notes that she was cooperative and calm. *Id.*

11 The ALJ, however, wholly failed to explain how the "severe" mental limitations he
12 assumed would impact her RFC, other than the limited contact with others. Similarly, while
13 discounting the degree of memory loss and concentration testified to by plaintiff (and supported
14 by her treating doctors' notes), the ALJ did not provide any reasoned explanation of how she
15 nonetheless retained the ability to perform "simple, repetitive" tasks. Because the ALJ's
16 "alternative" RFC conclusion is based on the erroneous discounting of Zazai's and her treating
17 physicians' testimony and is not otherwise based on a reasoned explanation of the evidence, it is
18 not supported by substantial evidence.

19 **V. THE ALJ ERRED AT STEP 5**

20 Plaintiff argues that the ALJ erred at Step 5 in two ways: (i) by not giving the VE a
21 complete hypothetical; and (ii) by relying on VE testimony that is inconsistent with the DOT.

22 **A. Incomplete Hypothetical**

23 Hypothetical questions posed to the vocational expert must set out *all* the limitations and
24 restrictions of the particular claimant. *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)
25 (emphasis in original). Plaintiff argues that the ALJ's reliance on the vocational expert's
26 testimony was erroneous for three reasons. Pl. Mot. at 22. First, the hypothetical does not include
27 all of her limitations because it reflects an inaccurate RFC and misstates her vocational ability.
28 Second, plaintiff distinguishes between a claimant who speaks "simple English" and one who

1 speaks only “rudimentary English.” She points out that when the ALJ asked the VE about a
2 person who was “illiterate in English and speaks only rudimentary English,” the VE testified that
3 there would be no work. AR 45. While the ALJ then asked the VE about someone who spoke
4 “simple English” and the VE indicated there would be “show and tell” work available, in his
5 written decision the ALJ went back to characterizing plaintiff as having “rudimentary” spoken
6 English. AR 19. Third, the ALJ’s explanation to the VE that plaintiff could speak “simple”
7 English is not supported by the record. *Id.* In opposition, the Commissioner argues that the
8 hypothetical included all the limitations of the RFC determination, and that the ALJ properly
9 characterized Zazai’s ability to speak English. Def. Mot. at 10.

10 Initially, I agree with plaintiff that the hypothetical misstates Zazai’s vocational ability
11 because the RFC was defective, as discussed above. As to plaintiff’s additional arguments, with
12 respect to her proficiency in spoken English, plaintiff does not cite any cases or regulations that
13 explain the difference (if any) between “simple” and “rudimentary” spoken English. However, the
14 testimony of the VE in response to the ALJ’s question about an illiterate individual who spoke
15 only rudimentary English was clear; there would be no work. AR 45. The ALJ himself used the
16 same terms in his final order; finding that plaintiff is “illiterate (cannot read or write) in English,
17 but is able to communicate with rudimentary spoken English.” AR 19. There is, therefore, a
18 discrepancy between the VE’s testimony and the ALJ’s reliance on it in his written order. The
19 ALJ’s belief as to the extent of plaintiff’s ability to communicate in English should be clarified on
20 remand.⁷

21 **VI. CONSISTENCY WITH DOT**

22 Plaintiff also challenges the ALJ’s reliance on the VE’s testimony that, she argues, was
23 inconsistent with the DOT. Specifically, the ALJ relied on the vocational expert’s testimony that
24 Zazai would be able to perform the job of a palletizer or a garment sorter, which plaintiff argues
25

26 ⁷ The record is generally unclear as to Zazai’s ability to communicate in English. While
27 defendant argues that plaintiff testified at the ALJ hearing in English, plaintiff responds that
28 plaintiff testified through an interpreter and only attempted to answer one question directly in
English without the help of her interpreter. *Compare* Def. Mot. at 10 *with* Pl. Reply at 8 (citing
AR 30). The ALJ should clearly establish Zazai’s ability to communicate in English on remand.

1 require language level 2 and language level 1 respectively under the DOT. Pl. Mot. at 23; AR 19-
2 20. According to plaintiff, those language levels require the ability to read and write in English
3 above the skills of someone who is “illiterate.” Pl. Mot. at 23-24. Because the ALJ did not ask
4 the VE to explain this deviation, it was error for the ALJ to rely on the VE’s opinion about
5 available jobs. *Id.* at 24.

6 Defendant does not dispute that the jobs identified by the VE require level 1 and 2
7 language abilities. Instead, the Commissioner argues that the vocational expert testimony was not
8 in conflict with the DOT because the DOT lists only “maximum requirements of occupations as
9 generally performed,” and a vocational expert may supplement these with more specific
10 information. Def. Mot. at 11.⁸ However, the record does not reflect that the VE made any
11 “supplementation.”

12 The vocational expert did not provide any “more specific” or particularized information as
13 to the job listings to explain why an individual with Zazai’s language limitations could perform
14 them and, therefore, his testimony conflicts with the DOT. The ALJ could not appropriately rely
15 on that testimony. *Zavalin v. Colvin*, 778 F.3d 842, 846 (9th Cir. 2015) (“When there is an
16 apparent conflict between the vocational expert’s testimony and the DOT—for example, expert
17 testimony that a claimant can perform an occupation involving DOT requirements that appear
18 more than the claimant can handle—the ALJ is required to reconcile the inconsistency. . . . The
19 ALJ’s failure to resolve an apparent inconsistency may leave us with a gap in the record that
20 precludes us from determining whether the ALJ’s decision is supported by substantial evidence.”).

21 **VII. REMAND FOR FURTHER PROCEEDINGS**

22 Plaintiff argues that in light of the errors made by the ALJ here, remand for payment of
23 benefits is warranted. When reviewing courts find that an ALJ has erred, they typically follow the
24 “ordinary remand rule,” which states that courts should remand to the agency for additional
25 proceedings where “the record before the agency does not support the agency action, . . . the
26

27 ⁸ The Commission also argues that any error was harmless because the ALJ properly found no
28 severe impairments at Step 2. As I have rejected the ALJ’s Step 2 finding, the Step 5 error is not
harmless.

1 agency has not considered all relevant factors, or . . . the reviewing court simply cannot evaluate
2 the challenged agency action on the basis of the record before it.” *Treichler v. Comm’r of Soc.*
3 *Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014). However, courts may depart from this practice
4 in “rare circumstances.” *Id.*

5 The Ninth Circuit has articulated a three-part standard for determining when departures
6 from the ordinary remand rule are appropriate. Courts may remand to an ALJ with instructions to
7 award benefits when the following requirements are satisfied: “(1) the record has been fully
8 developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has
9 failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or
10 medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ
11 would be required to find the claimant disabled on remand.” *Garrison v. Colvin*, 759 F.3d 995,
12 1020 (9th Cir. 2014); *see also Treichler*, 775 F.3d at 1101. No further proceedings are necessary
13 where “it is clear from the record that a claimant is entitled to benefits” and “the record has been
14 developed fully and further administrative proceedings would serve no useful purpose.” *Garrison*,
15 759 F.3d at 1019; *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004).

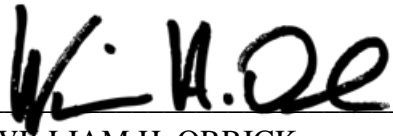
16 Here, while the ALJ has committed a number of errors, I cannot say that it is clear from the
17 record that the claimant is entitled to benefits and that further administrative proceedings would
18 serve no useful purpose.

19 **CONCLUSION**

20 Plaintiff’s motion for summary judgment is GRANTED. Defendant’s motion for summary
21 judgment is DENIED. The case is REMANDED for further proceedings consistent with this
22 opinion.

23 **IT IS SO ORDERED.**

24 Dated: May 6, 2016

25 
26 _____
27 WILLIAM H. ORRICK
28 United States District Judge