

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

KAYDEN THUY NGUYEN,
Plaintiff,
v.
NANCY A. BERRYHILL,
Defendant.

Case No. 3:16-cv-01665-LB
**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**
ECF Nos. 13 & 16

INTRODUCTION

Plaintiff Kayden Thuy Nguyen moves for summary judgment, seeking judicial review of the Social Security Administration’s decision to deny her disability benefits for her claimed disabilities of degenerative disc disease of the cervical and lumbar spine as well as asthma, depression, and anxiety.¹ The Administrative Law Judge (“ALJ”) found that Ms. Nguyen had the residual functional capacity to perform light work as defined in 20 C.F.R. § 404.1567(b), with

¹ Motion for Summary Judgment – ECF No. 13 at 6–22. Record citations refer to the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of documents.

1 limitations, and was not disabled.² The Commissioner opposes Ms. Nguyen’s summary-judgment
2 motion and cross-moves for summary judgment.³

3 Under Civil Local Rule 16-5, the matter is deemed submitted for decision by this court without
4 oral argument. All parties have consented to magistrate jurisdiction.⁴ The court grants the
5 plaintiff’s motion and denies the Commissioner’s cross-motion and remands for further
6 proceedings.

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STATEMENT

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1. Procedural History

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Ms. Nguyen filed her initial disability claim on January 11, 2013, alleging disability beginning
December 29, 2011.⁵ The Social Security Administration (“SSA”) stated that Ms. Nguyen’s
disability was not severe enough to keep her from working and denied her claim.⁶ On December 9,
2013, Ms. Nguyen requested reconsideration, but the SSA determined that the initial decision was
correct.⁷ Ms. Nguyen appealed the SSA’s decision and requested a hearing before the ALJ.⁸

The ALJ held the hearing on October 3, 2014, in San Francisco, California.⁹ Ms. Nguyen
attended the hearing with her attorney Katherine Siegfried.¹⁰ ALJ Catherine R. Lazuran and
vocational expert Corinne Porter also attended the hearing, and Ms. Nguyen’s brother Kenneth
Nguyen attended and testified as a witness.¹¹ The ALJ found that Ms. Nguyen was not disabled

² AR 39. Administrative Record (“AR”) citations refer to the page numbers in the bottom right hand
corner of the Administrative Record.

³ Cross-Motion for Summary Judgment – ECF No. 16.

⁴ ECF Nos. 2 & 9.

⁵ AR 102.

⁶ AR 121.

⁷ AR 125.

⁸ AR 134.

⁹ AR 49.

¹⁰ AR 47.

¹¹ AR 47, 82.

1 during the applicable disability period of December 29, 2011, to January 28, 2015, the date of the
2 ALJ’s opinion.¹²

3 Ms. Nguyen requested review of the ALJ’s decision by the Appeals Council,¹³ which denied
4 her request for review.¹⁴ After receiving an extension of time to file a federal suit, Ms. Nguyen
5 sought judicial review of the ALJ’s decision¹⁵ and now moves for summary judgment.¹⁶ The
6 Commissioner answered the complaint and cross-moves for summary judgment.¹⁷

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8 **2. Summary of Records and Administrative Filings**

9 **2.1 Records**

10 **2.1.1 Treatment Records Regarding Degenerative Disc Disease¹⁸**

11 Ms. Nguyen was hospitalized at Kaiser from January 9 to 16, 2012, for “lower back pain” with
12 “uncontrolled symptoms,” with mobility needs of “[m]ust be allowed to use a walker, wheelchair
13 as directed.”¹⁹ Her status was “off work.”²⁰ An MRI showed a bulging disc at L4–L5 and central
14 bulging at C5–C6 and C6–C7.²¹ Her diagnosis was intervertebral disc disorder and myelopathy in
15 her lumbar spine.²² On January 16, one of her treating doctors, Dr. Chan, summarized her
16 diagnoses,²³ noted the drugs she had received (including empiric steroids, escalating doses of
17 dilaudid, and valium),²⁴ and noted that there were “no objective findings to explain her numerous

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19 ¹² AR 27.

20 ¹³ AR 19–23.

21 ¹⁴ AR 6.

22 ¹⁵ ECF Nos. 1, 13.

23 ¹⁶ Id.

24 ¹⁷ ECF No. 16.

25 ¹⁸ AR 268–516, 581–84.

26 ¹⁹ AR 583–84.

27 ²⁰ Id.

28 ²¹ AR 446.

²² AR 268, 310.

²³ AR 447–48.

²⁴ AR 447.

1 symptoms.”²⁵ He was concerned about the possibility of either conversion disorder or secondary
2 gain.²⁶ He noted Ms. Nguyen’s anxiety and fear and her “full on panic attack” before a physical
3 therapy session.²⁷ She “had a lot of anxiety and fear that she will not be able to walk and [has] not
4 been able to participate very much with PT.”²⁸ He noted her other stressors: “she was engaged in a
5 bad working environment in which she was severely abused (details unknown as she claims to be
6 in litigation at this time);” and she had a death in her close social circle.²⁹ Dr. Chan also noted that
7 the “psych recommended SSRI for anxiety and scheduled Ativan until SSRI takes effect.”³⁰ Dr.
8 Chan ultimately diagnosed Ms. Nguyen with low back pain, somatization disorder, anxiety
9 disorder, leukocytosis, constipation and asthma.³¹ He recommended short-term rehabilitation at a
10 skilled nursing facility.³²

11 After her hospitalization at Kaiser, Ms. Nguyen was admitted to Valley House Care Center.³³
12 She had bladder incontinence, was in a wheelchair, and was at a high risk for falls.³⁴ Her pain was
13 constant and severe.³⁵ During her stay, she took medications, including Ativan, oxycodone,
14 Lyrica, Zoloft, Prednisone, and acetaminophen, among others.³⁶ She continued to experience back
15 pain and spasms.³⁷ When she was discharged in late January 2012, she had muscle weakness,
16 decrease in balance, gait abnormality, and increased risk for falls; physical therapy was
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19 ²⁵ Id.

20 ²⁶ Id.

21 ²⁷ Id.

22 ²⁸ Id.

23 ²⁹ Id.

24 ³⁰ Id.

25 ³¹ AR 448.

26 ³² AR 446.

27 ³³ AR 268–326.

28 ³⁴ AR 272–73.

³⁵ AR 275.

³⁶ AR 476–81.

³⁷ AR 494.

1 prescribed.³⁸ Kaiser records showed that from January 29 to February 26, she remained “off
2 work.”³⁹

3 In May 2012, as part of a worker’s compensation evaluation, Dr. Navani examined Ms.
4 Nguyen, who reported the significant impact of her back pain on her ability to work, perform
5 household chores, drive, walk, concentrate, sleep, and socialize.⁴⁰ Dr. Navani identified the disc
6 protrusion in the MRI (described by her as L4–L5) with central canal and bilateral neuro-foraminal
7 impingement.⁴¹ She had “an antalgic gait, limited range of motion in her cervical and lumbar
8 spine, and positive straight leg tests at 30 degrees bilaterally.”⁴² Dr. Navani diagnosed Ms.
9 Nguyen with “[b]ilateral lumbar radiculitis with neurological impairment along the left lower
10 extremity” and “[c]ervical axial pain with neurological impairment along the upper extremity, and
11 cervical, thoracic, and lumbar myofascial pain.”⁴³ Her restrictions were: limited to lifting and
12 carrying only fifteen pounds, and doing limited bending, twisting at the waist, and overhead
13 work.⁴⁴ Dr. Navani prescribed Ketoprofen, Prilosec, and acupuncture.⁴⁵ Dr. Navani observed that
14 Ms. Nguyen had a normal affect, was making good eye contact, had good judgment, and did not
15 exhibit pressurized speech, flight of ideas, or auditory or visual hallucinations.⁴⁶ A physician’s
16 assistant affiliated with Dr. Navani, Nadi Sarnevsh, recommended that Ms. Nguyen “continue
17 working with her chiropractor.”⁴⁷

18 In July 2012, Ms. Nguyen consulted with neurologist Dr. Rana, who did not have access to her
19 medical records or MRIs.⁴⁸ He noted that Ms. Nguyen presented with chronic lower back pain

20 ³⁸ AR 306.

21 ³⁹ AR 582–83.

22 ⁴⁰ AR 250.

23 ⁴¹ AR 254.

24 ⁴² AR 252.

25 ⁴³ Id.

26 ⁴⁴ AR 253.

27 ⁴⁵ AR 255.

28 ⁴⁶ AR 254.

⁴⁷ AR 258.

⁴⁸ AR 263.

1 “most probably secondary to her scoliosis” as well as “probably mild degenerative disc disease.”⁴⁹
2 He opined that Ms. Nguyen could sit for six hours with breaks in an eight-hour day, carry ten
3 pounds frequently and twenty pounds occasionally, and frequently stoop, bend, kneel, crouch and
4 climb.⁵⁰ Ms. Nguyen “has difficulty sitting, standing or walking for more than [two to three] hours
5 at a stretch” but “[s]he can do all her activities otherwise.”⁵¹ Ms. Nguyen was “pleasant,”
6 “appeared her stated age,” and cooperated with the examination.⁵² Ms. Nguyen had “mild
7 scoliosis” and “mild tenderness . . . in her lower back,” but her range of motion was “within
8 normal limits.”⁵³ Ms. Nguyen “walks with [a] somewhat stiff back,” but “no limp was noted,” and
9 “no assistive device [was] used.”⁵⁴

10 A February 2013 MRI showed degenerative disc disease at L5–S1, with some facet
11 sclerosis.⁵⁵ An April 2014 X-ray showed intervertebral disc-space narrowing at L5–L6 with
12 endplate sclerosis and anterior osteophytic activity and facet imbrication at L5–L6; this was
13 diagnosed as Grade I spondylolisthesis.⁵⁶

14 In March 2014, Dr. Han, a doctor of osteopathy, produced a “supplemental medical-legal
15 evaluation” as part of the worker’s compensation process.⁵⁷ Dr. Han diagnosed Ms. Nguyen with
16 lumbosacral degenerative disc disease, lumbar sprain, chronic pain syndrome, and “spasm of
17 muscle.”⁵⁸ He believed that her injury was a “recurrence defined as a reappearance of prior
18 symptoms from a prior injury in the absence of clearly definable injury or trauma.”⁵⁹ He

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⁴⁹ AR 265.

⁵⁰ Id.

⁵¹ AR 263

⁵² AR 264.

⁵³ Id.

⁵⁴ Id.

⁵⁵ AR 517.

⁵⁶ AR 522.

⁵⁷ AR 552.

⁵⁸ AR 553.

⁵⁹ Id.

1 apportioned 90% of her disability to a non-industrial pre-existing condition and normal
2 degeneration, and 10% to the industrial injury caused by prolonged sitting during her time spent
3 working at Wal-Mart.⁶⁰

4 Ms. Nguyen's chiropractor treated her from March 2012 to June 2014, three times a week.⁶¹
5 Some of the events in the treatment records include Dr. Lee's request in September 2013 that Ms.
6 Nguyen be excused from school until October 2 due to extreme pain while sitting and walking.⁶²
7 By September 2014, Dr. Lee reported the following in the residual-functional-capacity
8 questionnaire: Ms. Nguyen had clinical signs of back pain with decreased range of motion, could
9 not sit or stand for more than 20 minutes at a time without needing to shift positions, could stand
10 and walk for two hours or less in an eight-hour workday, needed to walk around for periods of
11 time, needed to take breaks, could not lift more than ten pounds, and likely would be absent at
12 least four days a month.⁶³

13 Ms. Nguyen's acupuncturist treated her from June 2012 to September 2014.⁶⁴ In the residual-
14 functional-capacity questionnaire, the acupuncturist reported that Ms. Nguyen's symptoms would
15 interfere frequently with Ms. Nguyen's concentration and attention.⁶⁵ Based on the acupuncturist's
16 observations, Ms. Nguyen could not stand, walk, or sit for more than two hours in an eight-hour
17 workday, needed to walk around and switch positions at will, needed to take unscheduled breaks
18 during the day, could not lift more than ten pounds, and would be absent at least four days a month
19 because of her symptoms.⁶⁶

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23 ⁶⁰ AR 554.

24 ⁶¹ AR 519, 528–47.

25 ⁶² AR 535.

26 ⁶³ AR 549–51.

27 ⁶⁴ AR 587–630.

28 ⁶⁵ AR 632.

⁶⁶ AR 632–34.

1 **2.1.2 Dr. Bill Payne and Dr. J.R. Saphir — DDS Medical Consultants**

2 In July 2013, Disability Determination Services (“DDS”) Medical Consultant Dr. Bill Payne
3 examined Ms. Nguyen and reviewed her records.⁶⁷ He found that she had severe degenerative disc
4 disease of the lumbar spine; it was severe because it limited her to light work, with no additional
5 limitations (and thus she was not disabled).⁶⁸ She had “limited motion of the cervical/lumbar
6 spine,” good motor strength, an antalgic gait, and was “able to heel/toe but ha[d] some
7 unsteadiness.”⁶⁹ In December 2013, DDS Medical Consultant Dr. J.R. Saphir agreed with this
8 assessment.⁷⁰

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10 **2.1.3 Mental-Health Treatment Records**

11 As discussed above, Ms. Nguyen had some psychological issues in January 2012 when she
12 first had her back issues. She had panic attacks when she was admitted to the hospital; she was
13 prescribed Lorazepam, Lyrica, and Zoloft.⁷¹ Dr. Chan diagnosed her with Somatization Disorder
14 and Anxiety Disorder.⁷² Dr. Lam did an assessment at the skilled nursing facility and found
15 depression (manifested by insomnia and sad facial expressions) and anxiety (manifested by the
16 inability to relax).⁷³

17 From March 2014 to September 2014, Ms. Nguyen saw a trauma therapist named Anna Clark
18 weekly, based on a history of sexual assaults directed at her.⁷⁴ Ms. Clark is a Marriage and Family
19 Therapist Intern and California State certified Sexual Assault Counselor at Rape Trauma Services:
20 A Center for Healing and Violence Prevention.⁷⁵ The following describes Ms. Clark’s letter to the
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22 ⁶⁷ AR 102–10.

23 ⁶⁸ AR 109.

24 ⁶⁹ AR 108.

25 ⁷⁰ AR 111–20

26 ⁷¹ AR 268, 277, 279, 447.

27 ⁷² AR 479–83.

28 ⁷³ AR 320.

⁷⁴ AR 559.

⁷⁵ Id.

1 SSA regarding Ms. Nguyen. As a result of the sexual assaults, Ms. Nguyen struggles “with strong
2 feelings of anxiety, panic, depression, and anger.”⁷⁶ She has “intense insomnia, intrusive thoughts,
3 distrust of others, and loss of concentration and focus.”⁷⁷ The trauma greatly affects her “ability to
4 manage everyday tasks such as work, household responsibilities[,] and inter-personal
5 relationships.”⁷⁸ “She experiences strong social anxiety and paranoia related to applying for a
6 work position” and working with colleagues and clients.⁷⁹ “She experienced workplace bullying in
7 the past due to her trauma,” had “great anxiety and paranoia that it [would] happen again,” and is
8 easily triggered and “can experience intense anxiety[] when she is reminded of her trauma or has
9 to explain it.”⁸⁰ She felt she was unable “to protect herself from sexual harassment or workplace
10 violations [for] fear of retribution” or retaliation for standing up for herself, which she experienced
11 in the past.⁸¹ “Experiencing workplace stress would most likely be very overwhelming. . .
12 [because] her daily level of stress is already high”; she probably would “have difficulty
13 concentrating and focusing on her work[] due to [her] intense anxiety . . . in social situations.”⁸²
14 Treatment notes reflect that Ms. Nguyen “presents with symptoms of sadness often,” had
15 problems trusting others, and was dealing with feelings of humiliation and rejection.⁸³ While Ms.
16 Nguyen was “[e]ngaged in the session,” her “affect matches [the] subject matter.”⁸⁴ The notes
17 refer repeatedly to Ms. Nguyen’s suffering from depression, anger, anxiety, humiliation, and
18 nightmares.⁸⁵

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21 ⁷⁶ Id.

22 ⁷⁷ Id.

23 ⁷⁸ Id.

24 ⁷⁹ Id.

25 ⁸⁰ Id.

26 ⁸¹ Id.

27 ⁸² Id.

28 ⁸³ AR 561.

⁸⁴ Id.

⁸⁵ AR 560–80.

1 In September 2014, in a residual-functional-capacity questionnaire, the chiropractor Dr. Lee
2 reported that depression was contributing to Ms. Nguyen’s symptoms but noted that she could
3 tolerate “low stress jobs.”⁸⁶ Also in September 2014, the acupuncturist Ms. Nakamura opined that
4 depression and anxiety contributed to Ms. Nguyen’s physical symptoms related to her herniated
5 disc.⁸⁷

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7 **2.2 Ms. Nguyen’s Testimony**

8 Ms. Nguyen testified at the October 3, 2014 hearing.⁸⁸

9 The ALJ examined her first, asking general background questions and questions about Ms.
10 Nguyen’s educational background and work history.⁸⁹ Ms. Nguyen testified that she completed a
11 total of three semesters of community college, where she studied fashion merchandising.⁹⁰ She
12 worked as a waitress from 2005 to 2006.⁹¹ From June 2007 to February 2008, she worked as an
13 applied behavior analysis therapist, and from May 2009 to May 2010 she worked for Virgin
14 America as a flight attendant.⁹² She was able to lift between 25 and 70 pounds during this period.⁹³
15 She then worked as a Network Operation Center Analyst for Walmart.⁹⁴ Ms. Nguyen recently
16 spent four months working at Bridal Project, working 15 to 25 hours a week and lifting at most 15
17 pounds.⁹⁵ Since December 2011, she volunteered at her church.⁹⁶ At the time of the hearing, she

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⁸⁶ AR 548–49.

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⁸⁷ AR 632.

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⁸⁸ AR 49.

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⁸⁹ AR 53.

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⁹⁰ Id.

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⁹¹ AR 58.

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⁹² AR 56.

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⁹³ Id.

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⁹⁴ AR 54.

⁹⁵ AR 60.

⁹⁶ AR 61.

1 worked 15 to 20 hours a week as a nanny caring for three children, ages four, six, and seven.⁹⁷ The
2 most she lifted at work was 15 pounds.⁹⁸

3 The ALJ asked Ms. Nguyen if she was currently capable of performing any kind of work.⁹⁹
4 Ms. Nguyen responded that she was working as a nanny but could not do the job fulltime and
5 similarly could not do the fulltime work she did at Bridal Project.¹⁰⁰ Her inability to work began in
6 December 2011, and her health “comes and goes.”¹⁰¹

7 The ALJ asked Ms. Nguyen about the medications she had taken since December 2011.¹⁰² Ms.
8 Nguyen listed codeine, Valista Pharmaceutical Medicines, Adderall, and Albuterol, and she
9 mentioned others given to her at Kaiser but could not remember the names.¹⁰³ The ALJ asked
10 about negative side effects from any medications, and Ms. Nguyen responded that she stopped
11 taking Vicodin because it gave her a rash.¹⁰⁴ Ms. Nguyen uses melatonin as a sleep aid.¹⁰⁵

12 The ALJ asked about Ms. Nguyen’s history of counseling.¹⁰⁶ Ms. Nguyen testified that she had
13 “a lot of anxiety” and gets “really stressed around people.”¹⁰⁷ She then became upset, and the ALJ
14 asked her to try to calm down.¹⁰⁸ Ms. Nguyen said that since she lost her job at Walmart, she tried
15 to avoid people.¹⁰⁹

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⁹⁷ AR 53.
⁹⁸ Id.
⁹⁹ AR 62.
¹⁰⁰ AR 63.
¹⁰¹ AR 64.
¹⁰² Id.
¹⁰³ Id.
¹⁰⁴ Id.
¹⁰⁵ AR 65–66.
¹⁰⁶ AR 66.
¹⁰⁷ Id.
¹⁰⁸ Id.
¹⁰⁹ AR 67.

1 The ALJ asked about Ms. Nguyen’s general living situation and ability to care for herself.¹¹⁰
2 Ms. Nguyen said that she had a limited ability to do household chores, had no permanent home,
3 and stayed at her brother’s and boyfriend’s houses.¹¹¹ She typically grocery shops once every two
4 weeks with help from another person, but was capable of going by herself.¹¹² She has been
5 exercising since 2011 and tries to swim three times per week.¹¹³ She used to attend church but
6 stopped going about three months prior due to anxiety.¹¹⁴ Ms. Nguyen needed help doing laundry,
7 specifically, moving wet, heavy laundry from the washer to the dryer.¹¹⁵

8 The ALJ asked if Ms. Nguyen had done any traveling since December 2011.¹¹⁶ Ms. Nguyen
9 flew to Laguna Beach for a wedding a few weeks before and took a two-day trip to San Diego to
10 visit her best friend a few weeks before that.¹¹⁷

11 The ALJ asked Ms. Nguyen if she had any hobbies.¹¹⁸ She said that she liked to draw, which
12 was therapeutic for her when she was stressed.¹¹⁹ She uses a computer for about an hour every day
13 but rarely watched television.¹²⁰ She testified that she had not had money to pay bills since 2011,
14 and was not capable of doing any of the types of work that she had done before December 2011,
15 including work as a bridal consultant.¹²¹

16 Ms. Nguyen’s attorney Katherine Siegfried then asked Ms. Nguyen about the frequency of her
17 back pain.¹²² She said that the pain was triggered by stress or by sitting or standing for too long,
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19 ¹¹⁰ AR 68.

20 ¹¹¹ Id.

21 ¹¹² AR 69.

22 ¹¹³ Id.

23 ¹¹⁴ AR 70.

24 ¹¹⁵ AR 72.

25 ¹¹⁶ AR 70.

26 ¹¹⁷ Id.

27 ¹¹⁸ Id.

28 ¹¹⁹ AR 72.

¹²⁰ Id.

¹²¹ AR 74.

¹²² AR 75.

1 and that it affected her ability to concentrate on and remember things.¹²³ Ms. Siegfried asked if
2 Ms. Nguyen ever experienced depression and anxiety.¹²⁴ Ms. Nguyen said that she felt depressed
3 during “any down time [she] had” and had experienced depression since before she worked at
4 Walmart.¹²⁵ She stated that she sometimes felt anxiety throughout the day, and that her anxiety
5 would be triggered by certain smells, colors, and images of guns.¹²⁶ She occasionally has panic
6 attacks.¹²⁷

7 Ms. Siegfried asked whether she had any help at her nanny job.¹²⁸ Ms. Nguyen replied that she
8 needed help lifting and moving the children.¹²⁹ She can sit for only 45 minutes before having to
9 stand up or reposition herself and could stand for only two to five minutes before “feeling a
10 strain.”¹³⁰ Ms. Nguyen said that she needed some type of income to get medical treatment, she was
11 without health insurance, and she was in debt to her chiropractor and acupuncturist.¹³¹

12 13 **2.3 Kenneth Nguyen’s Testimony**

14 Ms. Nguyen’s brother, Kenneth Nguyen, testified at the October 2014 hearing.¹³² Before
15 December 2011, he testified, Ms. Nguyen was a happy, outgoing person; since “the incident
16 happened,” she is not the same: she is not as physical as she used to be, and she is
17 “psychologically not all there like we used to have her.”¹³³ She goes to school and does
18 homework, and spends some of her time painting and drawing; he noted that she “draws quite a
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20 ¹²³ Id.

21 ¹²⁴ AR 76.

22 ¹²⁵ Id.

23 ¹²⁶ AR 77.

24 ¹²⁷ Id.

25 ¹²⁸ AR 78.

26 ¹²⁹ Id.

27 ¹³⁰ Id.

28 ¹³¹ AR 79.

¹³² AR 82.

¹³³ AR 83.

1 lot.”¹³⁴ He testified that Ms. Nguyen lost a lot of friends and rarely saw the friends she had
2 remaining.¹³⁵ He keeps in close contact with his sister, they are best friends, and the rest of their
3 family had little contact with her due to “family problems.”¹³⁶ He said that she required help with
4 chores such as preparing food and was unable to stand for long before needing to lie down on the
5 floor to stretch her back.¹³⁷

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2.4 Vocational Expert Testimony

Vocational expert (“VE”) Corrine Porter testified at the October 2014 hearing.¹³⁸ The VE first
asked Ms. Nguyen about her job at Walmart.¹³⁹ Ms. Nguyen said that her job as a network
operations analyst consisted of supporting the website with engineers in her department.¹⁴⁰ The
VE then classified Ms. Nguyen’s past work, stating that Ms. Nguyen had worked as a sales person
for women’s apparel, a waitress (informal), a tutor, a flight attendant, and a network control
operator.¹⁴¹ The ALJ asked the VE if Ms. Nguyen had any skills that were transferable to other
jobs, and the VE replied that she was in the low range of skills, which included “data entry from
the network control” and “teacher’s aide at a low semiskilled range from the tutor.”¹⁴²

The ALJ posed a hypothetical question to the VE, asking whether an individual of Ms.
Nguyen’s age, education, and past relevant work experience could perform any of Ms. Nguyen’s
past work with the following limitations: (1) able to lift 20 pounds occasionally and 10 pounds
frequently, and (2) can stand and walk six of eight hours and sit six of eight hours.¹⁴³ The VE

¹³⁴ AR 84.
¹³⁵ Id.
¹³⁶ AR 86.
¹³⁷ AR 87–88.
¹³⁸ AR 88.
¹³⁹ AR 89.
¹⁴⁰ Id.
¹⁴¹ AR 90.
¹⁴² AR 91.
¹⁴³ Id.

1 responded that this hypothetical person would be able to work as a network analyst, tutor,
2 waitress, or salesperson.¹⁴⁴

3 The ALJ asked Ms. Nguyen about her earnings in 2012 and 2013.¹⁴⁵ In 2012, Ms. Nguyen
4 received unemployment benefits, and in 2013, her earnings were from the bridal job.¹⁴⁶ The ALJ
5 asked Ms. Nguyen how often she had seen Dr. Navani.¹⁴⁷ Ms. Nguyen saw Dr. Navani “possibly
6 twice” and stopped going because she did not have money, and her insurance denied her claim.¹⁴⁸
7 The VE then testified about the number of tutor positions and network analyst jobs in the nation
8 and in California.¹⁴⁹

9 The ALJ then added to the hypothetical that the person could frequently climb, stoop, bend,
10 kneel and crouch, and asked if said person would still be able to do those jobs.¹⁵⁰ The VE
11 responded, “yes.”¹⁵¹ The ALJ then altered the hypothetical so that the person could lift 15 pounds
12 at most, could bend and twist at the waist occasionally, and could do overhead work with the arms
13 occasionally.¹⁵² The VE responded, “No. Past work is not performable.”¹⁵³ The ALJ asked
14 whether the person could do other work, and the VE responded that the person could do sedentary
15 work of data entry.¹⁵⁴ The VE also noted the availability of sedentary unskilled positions such as
16 addresser, telephone quotation clerk, or document preparer.¹⁵⁵ The ALJ then added a limitation
17 that the person needed an option to alternate sitting and standing every thirty minutes, with
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20 ¹⁴⁴ AR 92.

21 ¹⁴⁵ Id.

22 ¹⁴⁶ Id.

23 ¹⁴⁷ AR 93.

24 ¹⁴⁸ Id.

25 ¹⁴⁹ AR 93–94.

26 ¹⁵⁰ AR 94.

27 ¹⁵¹ Id.

28 ¹⁵² Id.

¹⁵³ Id.

¹⁵⁴ AR 96.

¹⁵⁵ Id.

1 standing breaks that lasted about five to ten minutes.¹⁵⁶ The VE responded that the person would
2 be capable of performing the document preparer and telephone quotation clerk jobs.¹⁵⁷

3 Attorney Katherine Siegfried asked whether a person would be able to perform either of those
4 positions if “no contact with the general public” was added to the hypothetical.¹⁵⁸ The VE
5 responded that the telephone quotation clerk position would not be performable, but the document
6 preparer position would.¹⁵⁹ Ms. Siegfried asked if that position would still be performable if at
7 least two unexcused absences per month were added to the hypothetical.¹⁶⁰ The VE responded that
8 it would, but that any more than two would render it not performable.¹⁶¹ Ms. Siegfried then asked
9 if a hypothetical individual with concentration or memory issues that would cause them to make
10 mistakes up to 15% of the time would be capable of maintaining the position.¹⁶² The VE
11 responded that the hypothetical person would be unable to maintain employment.¹⁶³

12 The ALJ asked the VE whether there were any other jobs that the hypothetical person would
13 be able to do with the requirements to avoid contact with the public, occasionally lift 15 pounds,
14 and alternate sitting or standing.¹⁶⁴ The VE responded that positions other than document preparer
15 included tube operator (a mail-sorting position) and surveillance systems monitor.¹⁶⁵

17 **2.5 Administrative Findings**

18 The ALJ held that Ms. Nguyen was not disabled within the meaning of the Social Security Act
19 from December 29, 2011, through the date of the decision.¹⁶⁶

20 ¹⁵⁶ Id.

21 ¹⁵⁷ Id.

22 ¹⁵⁸ AR 97.

23 ¹⁵⁹ Id.

24 ¹⁶⁰ Id.

25 ¹⁶¹ AR 97–98.

26 ¹⁶² AR 98.

27 ¹⁶³ AR 99.

28 ¹⁶⁴ Id.

¹⁶⁵ AR 99–100.

¹⁶⁶ AR 27.

1 The ALJ set forth the SSA’s five-step evaluation process.¹⁶⁷ At step one, the ALJ must
2 determine whether the individual is engaging in “substantial gainful activity.”¹⁶⁸ At step two, the
3 ALJ must determine whether the individual has a “medically determinable impairment” or
4 combination of impairments that is “severe.”¹⁶⁹ At step three, the ALJ must determine whether the
5 individual’s impairments are severe enough to meet a listed impairment.¹⁷⁰ At step four, the ALJ
6 must determine the individual’s “residual functional capacity” and determine whether the
7 individual can perform “past relevant work.”¹⁷¹ At step five, the ALJ must determine whether the
8 individual can perform any other work.¹⁷²

9 At step one, the ALJ found that Ms. Nguyen had not engaged in substantial gainful activity
10 since the alleged onset date in December 2011, although she noted that there was some ambiguity
11 regarding recent earnings.¹⁷³ She found that recent work as a bridal consultant did not rise to the
12 level of substantial gainful activity.¹⁷⁴ She found that it was unclear whether the recent work as a
13 nanny had been performed at substantial gainful activity levels and then proceeded to step two.¹⁷⁵

14 At step two, the ALJ found that Ms. Nguyen had the following severe impairments:
15 degenerative disc disease of the cervical and lumbar spine.¹⁷⁶ The ALJ found that because these
16 impairments had more than a minimal effect on her ability to perform work-related activities, they
17 were severe.¹⁷⁷ But the ALJ found that Ms. Nguyen’s asthma, anxiety, and depression were not
18 severe impairments because, considered singly or in combination, they either had not lasted a year

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20 ¹⁶⁷ Id.

21 ¹⁶⁸ AR 28.

22 ¹⁶⁹ Id.

23 ¹⁷⁰ Id.

24 ¹⁷¹ AR 28–29.

25 ¹⁷² AR 29.

26 ¹⁷³ AR 29–30.

27 ¹⁷⁴ AR 30.

28 ¹⁷⁵ Id.

¹⁷⁶ Id.

¹⁷⁷ Id.

1 or more or had not caused more than a minimal limitation on Ms. Nguyen’s ability to perform
2 basic mental-work activities.¹⁷⁸ The ALJ cited Ms. Nguyen’s asthma as an example: it was not a
3 severe impairment because it was controlled with medication.¹⁷⁹

4 Ms. Nguyen’s attorney alleged that she suffered from severe mental impairments, including
5 anxiety and depression.¹⁸⁰ The ALJ discounted the allegations on several grounds. Ms. Nguyen
6 did not allege disabling mental impairments in her initial or reconsideration disability reports, and
7 in January 2012, denied any depression, hopelessness, or concentration difficulties in the previous
8 two weeks.¹⁸¹ In June 2012, Dr. Navani “observed that [Ms. Nguyen] had a normal affect, good
9 eye contact, good judgment, and no pressured speech, flight of ideas, or auditory or visual
10 hallucinations.”¹⁸² He did not diagnose Ms. Nguyen with any mental impairment.¹⁸³ In July 2013,
11 Ms. Nguyen “voiced no complaints of mental problems.”¹⁸⁴

12 The ALJ noted that Ms. Nguyen sought treatment from March to September 2014 “for a
13 history of sexual assault with residual feelings of anxiety, depression[,] and anger,” and also
14 intrusive thoughts, insomnia, distrust of others, paranoia, and loss of concentration and focus.¹⁸⁵
15 Her trauma therapist Anna Clark “opined that [Ms. Nguyen] would likely have difficulty
16 concentrating and focusing on her work.”¹⁸⁶ But Ms. Nguyen did not allege disabling mental
17 impairments in her initial or reconsideration disability reports.¹⁸⁷ (These were in January 2013 and
18 December 2013.)¹⁸⁸ Her “treatment with Ms. Clark overlapped with her work as a nanny,” and the

20 ¹⁷⁸ Id.

21 ¹⁷⁹ Id.

22 ¹⁸⁰ Id.

23 ¹⁸¹ Id.

24 ¹⁸² Id.

25 ¹⁸³ Id.

26 ¹⁸⁴ Id.

27 ¹⁸⁵ Id.

28 ¹⁸⁶ Id.

¹⁸⁷ Id.

¹⁸⁸ See supra p. 2.

1 letter from her employers gave no indication of her suffering from “paranoia, intrusive thoughts,
2 or loss of concentration or focus.”¹⁸⁹ This “demonstrated ability to work without incident from
3 July 2014 to October 2014, undermine[d]” Ms. Clark’s opinion, and the ALJ thus gave little
4 weight to it.¹⁹⁰

5 In September 2014, Ms. Nguyen’s acupuncturist said that Ms. Nguyen’s depression and
6 anxiety, in combination with her physical impairments, would frequently disrupt her “attention
7 and concentration and cause her to miss more than 4 days of work monthly.”¹⁹¹ The ALJ gave the
8 opinion little weight because the acupuncturist was not an acceptable medical source and the
9 opinion was outside her expertise.¹⁹²

10 The ALJ considered the four broad functional areas in the disability regulations in finding that
11 the claimant’s symptoms of anxiety and depression were not severe.¹⁹³ The four areas are (1)
12 activities of daily living, (2) social functioning, (3) concentration, persistence, and pace, and (4)
13 extended periods of decompression.¹⁹⁴ 20 C.F.R. § 404.1520a(d)(1). Ms. Nguyen had mild
14 limitations for the first three functional areas, and no episodes of decompensation in the fourth.¹⁹⁵

15 For activities of daily living, Ms. Nguyen’s mild limitations were some difficulties with
16 household chores such as vacuuming and washing dishes, but she attributed those to her back, not
17 mental impairments.¹⁹⁶ Moreover, she worked as a nanny from July 2014 to October 2014 for
18 three children ages 4 to 7, and her responsibilities included grocery shopping.¹⁹⁷ She told
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22 ¹⁸⁹ AR 30.

23 ¹⁹⁰ AR 31.

24 ¹⁹¹ Id.

25 ¹⁹² Id.

26 ¹⁹³ Id.

27 ¹⁹⁴ AR 31–32.

28 ¹⁹⁵ Id.

¹⁹⁶ AR 31.

¹⁹⁷ Id.

1 neurologist Dr. Rana in 2012 that her back pain “comes and goes” and that she could do “all her
2 activities otherwise.”¹⁹⁸

3 For social functioning, she alleged distrust and paranoia, but her current employers’ letter gave
4 no indication of anxiety, paranoia, distrust of others, or intrusive thoughts.¹⁹⁹ Similarly, during her
5 stint at Project Bridal from October 2013 to January 2014, she interacted with clients and
6 management.²⁰⁰ Since her onset date, she enrolled in college and interacted with professors and
7 other students.²⁰¹ She lived with her brother.²⁰² These social functions were “extensive” and
8 showed that any limitations are minimal.²⁰³

9 For the third functional area of concentration, pace, and persistence, her activity since the
10 onset date (including working at Project Bridal) showed an ability to maintain attention and
11 concentration.²⁰⁴ She draws and paints a lot, completes homework, and visits with family, and she
12 did not exhibit difficulty focusing at the hearing or responding appropriately to questions.²⁰⁵

13 For the fourth functional area, Ms. Nguyen experienced no episodes of extended periods of
14 decompensation.²⁰⁶ She had no inpatient or outpatient hospitalization for mental-health issues.²⁰⁷

15 The ALJ concluded that the mental impairments were non-severe under 20 C.F.R.
16 § 404.1520a(d)(1).

17 The ALJ acknowledged that Ms. Nguyen alleged that she had a somatoform disorder but
18 concluded that the record did not support that this was a medically determinable impairment.²⁰⁸

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¹⁹⁸ Id.

¹⁹⁹ Id.

²⁰⁰ Id.

²⁰¹ Id.

²⁰² Id.

²⁰³ Id.

²⁰⁴ Id.

²⁰⁵ Id.

²⁰⁶ AR 32.

²⁰⁷ Id.

²⁰⁸ Id.

1 The January 2012 records showed that diagnosis but it was not clear who made it.²⁰⁹ A physical
2 therapist signed most notes; she was not an acceptable medical source and lacked expertise for
3 psychological conditions.²¹⁰

4 At step three, the ALJ found that Ms. Nguyen did not have an impairment or combination of
5 impairments that met or medically equaled the severity of one of the listed impairments in the
6 disability regulations.²¹¹ Ms. Nguyen alleged that her impairment met Listings 1.04A and 12.07.²¹²

7 Listing 1.04A requires a disorder of the spine resulting in compromise of a nerve root or of the
8 spinal cord with evidence of nerve root compression (characterized by certain pain or certain
9 motor issues).²¹³ The ALJ found that Ms. Nguyen did not meet the requirements of Listing 1.04A
10 because there was “no indication that [she] ha[d] spinal arachnoiditis or lumbar spine stenosis
11 resulting in pseudoclaudication or other conditions of sufficient severity to meet listing 1.04B or
12 C.”²¹⁴

13 For listing 12.07, the ALJ found the following:

14 For the reasons previously outlined, the claimant also fails to meet the criteria for
15 listing 12.07. I note that she has had only mild limitations in activities of daily
16 living, mild social limitations, and mild limitations in concentration, and no
17 episodes of decompensation of extended duration. Thus, she cannot satisfy the
18 requirements of listing 12.07. Additionally, a somatoform disorder has not been
19 conclusively demonstrated to be one of claimant’s medically determinable
20 impairments.²¹⁵

21 At step four, the ALJ determined that Ms. Nguyen was unable to perform any of her past
22 relevant work.²¹⁶

23 ²⁰⁹ Id.

24 ²¹⁰ Id.

25 ²¹¹ Id.

26 ²¹² Id.

27 ²¹³ Id.

28 ²¹⁴ AR 32–33.

²¹⁵ AR 33.

²¹⁶ AR 38.

1 At step five, the ALJ found that Ms. Nguyen had the residual functional capacity to perform
2 light work, as defined in the regulations, with limitations of (1) lifting 20 pounds occasionally and
3 10 pounds frequently, (2) standing and walking for 6 hours in an 8-hour day, (3) sitting for 6 hours
4 in an 8-hour day, and (4) sitting for 30 minutes at a time before needing to stand for 5 to 10
5 minutes.²¹⁷ The ALJ found that Ms. Nguyen could (1) frequently stoop, kneel, crouch, and climb,
6 (2) occasionally bend or twist at the waist, and (3) occasionally do overhead work with her
7 arms.²¹⁸

8 The ALJ followed a two-step process to determine (1) whether there were “underlying
9 medically determinable physical or mental impairment(s) . . . that could reasonably be expected to
10 produce [Ms. Nguyen’s] pain or other symptoms,” and (2) if so, the intensity, persistence, and
11 limiting effect of her symptoms.²¹⁹

12 The ALJ noted that Ms. Nguyen previously worked as a computer network analyst (a job that
13 required her to sit all day), apparently did not suffer a specific workplace injury, and instead
14 alleged that the cumulative effect of the sitting eventually resulted in severe back pain.²²⁰ She
15 alleged that the pain was unbearable and prevented her from sitting or standing for prolonged
16 periods, walking lengthy distances, and lifting more than 15 pounds, and required her to lie down
17 periodically during the day.²²¹ She “denied being able to cook full meals or vacuum, but from July
18 2013 to October 2014, she was working as a nanny for three children,” ages 4 to 7.²²²

19 The ALJ found that Ms. Nguyen’s “medically determinable impairments could reasonably be
20 expected to cause some of the symptoms” but her “statements concerning the intensity,
21 persistence[,] and limiting effects of [her] symptoms [were] not entirely credible.”²²³

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²¹⁷ AR 33.

24 ²¹⁸ Id.

25 ²¹⁹ AR 34.

26 ²²⁰ Id.

27 ²²¹ Id.

28 ²²² Id.

²²³ Id.

1 The ALJ said that the medical evidence failed “to provide strong support” for Ms. Nguyen’s
2 allegations of disabling symptoms and limitations.²²⁴ The 2012 back records showed hospital
3 admission for constant back pain, her complaints of being unable to move, and the MRI and other
4 evidence from January 2012 to February 2012 (discussed above).²²⁵ Dr. Navani examined Ms.
5 Nguyen during the worker’s compensation process in May 2012 (again described above); the ALJ
6 described Dr. Navani’s opinion as vague because she (1) did not address how long Ms. Nguyen
7 could stand, walk, or sit, (2) did not clarify what he meant by limited bending, twisting, and
8 overhead reaching, and (3) summarized the January 2012 MRI incorrectly.²²⁶ The ALJ thus
9 accorded the opinion little weight.²²⁷ He accorded D.O. Hana’s March 2014 opinion limited
10 weight because it was part of a worker’s compensation process, which involves different rules and
11 regulations than the SSI scheme.²²⁸

12 The ALJ gave the chiropractor’s opinion little weight because she was not an acceptable
13 medical source under the Social Security rules and lacked the expertise of an M.D., and her
14 opinion was inconsistent with the MRI and the claimant’s testimony about her daily activities such
15 as swimming and working as a nanny.²²⁹ He gave her opinion about Ms. Nguyen’s ability to work
16 no weight because that administrative finding is reserved for the Commissioner.²³⁰ Similarly, the
17 ALJ gave limited weight to the acupuncturist’s opinion because she was not an acceptable medical
18 source, opined limitations more severe than those in the claimant’s testimony, addressed mental
19 limitations outside of her expertise, and varied significantly from an opinion she gave six months
20 earlier.²³¹ The ALJ nonetheless included a limitation for sitting and standing.²³²

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²²⁴ Id.

²²⁵ Id.

²²⁶ AR 35.

²²⁷ Id.

²²⁸ AR 37.

²²⁹ AR 35.

²³⁰ Id.

²³¹ AR 37.

²³² Id.

1 Ms. Nguyen consulted Dr. Rana, a neurologist, in July 2012.²³³ The ALJ afforded her opinion
2 — that Ms. Nguyen “could sit, stand[,] and walk up to 6 hours in an 8-hour day; carry 10 [pounds]
3 frequently and 20 pounds occasionally; push and pull up to 20 pounds; and frequently stoop, bend,
4 kneel, crouch[,] and climb” — great weight, given her specialty and in neurology and the
5 consistency of her opinion with the MRI findings.²³⁴ The ALJ also gave some weight to the
6 opinions of DDS medical consultants Dr. Payne and Dr. Saphir, but found that Ms. Nguyen was
7 more limited than they had determined.²³⁵

8 The ALJ then addressed Ms. Clark’s opinion about Ms. Nguyen’s mental health.

9 The record also contains an opinion from a marriage and family therapy intern, Ms.
10 Clark, who opined in September 2014, that the claimant would probably have
11 difficulty concentrating and focusing on her work and that she is anxious in social
12 situations (Ex. 16F). This is given little weight for several reasons. Ms. Clark is not
13 an acceptable medical source under the Social Security rules and lacks the expertise
14 to evaluate psychological limitations. Also, she was vague about claimant’s
15 limitations. As discussed above, the record shows that the claimant does not have a
16 severe psychological impairment.²³⁶

17 The ALJ next evaluated Ms. Nguyen’s credibility:²³⁷

18 As for the issue of the claimant’s credibility, I note that she has made inconsistent
19 statements and that hurts her credibility. Though the claimant has alleged
20 experiencing disabling impairments which prevented her from working after
21 December 29, 2011, at the hearing, she acknowledged that she had worked as a
22 bridal consultant at Bridal Project from October 2013 to January 2014 (Ex. 8D).
23 She testified that she worked between 8 to 25 hours weekly. After the claimant’s
24 employment with Bridal Project ended, she admitted looking for other employment
25 and doing volunteer work weekly at church. She also testified that she began
26 working as a nanny in July 2014, work that she was still performing as of October
27 3, 2014. She testified that she worked only 15 to 20 hours monthly in this position,
28 but her employer stated that she worked up to 40 hours monthly (Ex. 11E).²³⁸ The
claimant said that she earned below \$920 monthly, but her employer stated that in
addition to this income, she received “a stipend for work-related expenses” and “a

24 ²³³ AR 35.

25 ²³⁴ AR 36.

26 ²³⁵ Id.

27 ²³⁶ AR 37.

28 ²³⁷ Id.

²³⁸ Ms. Nguyen testified that she worked 15 to 20 hours a week. AR 53.

1 small advance to help her financially” (Ex. 11E). In this position, she cared for
2 three young children whose ages ranged from 4 to 7.²³⁹

3 The ALJ concluded that (1) Ms. Nguyen was capable of making a successful
4 adjustment to other work that exists in significant numbers in the national economy, and
5 (2) a finding of “not disabled” was appropriate.²⁴⁰

6 ANALYSIS

7 8 **1. Standard of Review**

9 Under 42 U.S.C. § 405(g), district courts have jurisdiction to review any final decision of the
10 Commissioner if the claimant initiates the suit within 60 days of the decision. District courts may
11 set aside the Commissioner’s denial of benefits only if the ALJ’s “findings are based on legal error
12 or are not supported by substantial evidence in the record as a whole.” *Vasquez v. Astrue*, 572 F.3d
13 586, 591 (9th Cir. 2009) (internal quotations omitted); 42 U.S.C. § 405(g). “Substantial evidence
14 means more than a mere scintilla but less than a preponderance; it is such relevant evidence as a
15 reasonable mind might accept as adequate to support a conclusion.” *Andrews v. Shalala*, 53 F.3d
16 1035, 1039 (9th Cir. 1995). If the evidence in the administrative record supports both the ALJ’s
17 decision and a different outcome, the court must defer to the ALJ’s decision and may not
18 substitute its own decision. See *id.* at 1039–40; *Tackett v. Apfel*, 180 F.3d 1094, 1097–98 (9th Cir.
19 1999).

20 21 **2. Applicable Law**

22 An SSI claimant is considered disabled if he or she suffers from a “medically determinable
23 physical or mental impairment which can be expected to result in death or which has lasted or can
24 be expected to last for a continuous period of not less than twelve months,” and the “impairment
25 or impairments are of such severity that he is not only unable to do his previous work but cannot,
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27 ²³⁹ AR 37.

28 ²⁴⁰ AR 39.

1 considering his age, education, and work experience, engage in any other kind of substantial
2 gainful work which exists in the national economy.” 42 U.S.C. § 1382c(a)(3)(A), (B).

3 There is a five-step analysis for determining whether a claimant is disabled within the meaning
4 of the Social Security Act. See 20 C.F.R. § 404.1520. The five steps are as follows:

5 **Step One.** Is the claimant presently working in a substantially gainful activity? If
6 so, then the claimant is “not disabled” and is not entitled to benefits. If the claimant
7 is not working in a substantially gainful activity, then the claimant’s case cannot be
8 resolved at step one, and the evaluation proceeds to step two. See 20 C.F.R.
9 § 404.1520(a)(4)(i).

10 **Step Two.** Is the claimant’s impairment (or combination of impairments) severe? If
11 not, the claimant is not disabled. If so, the evaluation proceeds to step three. See 20
12 C.F.R. § 404.1520(a)(4)(ii).

13 **Step Three.** Does the impairment “meet or equal” one of a list of specified
14 impairments described in the regulations? If so, the claimant is disabled and is
15 entitled to benefits. If the claimant’s impairment does not meet or equal one of the
16 impairments listed in the regulations, then the case cannot be resolved at step three,
17 and the evaluation proceeds to step four. See 20 C.F.R. § 404.1520(a)(4)(iii).

18 **Step Four.** Considering the claimant’s residual functional capacity (“RFC”), is the
19 claimant able to do any work that he or she has done in the past? If so, then the
20 claimant is not disabled and is not entitled to benefits. If the claimant cannot do any
21 work he or she did in the past, then the case cannot be resolved at step four, and the
22 case proceeds to the fifth and final step. See 20 C.F.R. § 404.1520(a)(4)(iv).

23 **Step Five.** Considering the claimant’s RFC, age, education, and work experience,
24 is the claimant able to “make an adjustment to other work?” If not, then the
25 claimant is disabled and entitled to benefits. See 20 C.F.R. § 404.1520(a)(4)(v). If
26 the claimant is able to do other work, the Commissioner must establish that there
27 are a significant number of jobs in the national economy that the claimant can do.
28 There are two ways for the Commissioner to show other jobs in significant
numbers in the national economy: (1) by the testimony of a vocational expert or (2)
by reference to the Medical-Vocational Guidelines at 20 C.F.R., part 404, subpart
P, app. 2. See 20 C.F.R. § 404.1520(a)(4)(v).

For steps one through four, the burden of proof is on the claimant. Tackett, 180 F.3d at 1098. At
step five, the burden shifts to the Commissioner to show that the claimant can do other kinds of
work. Id.

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3. Application

Ms. Nguyen challenges the ALJ’s determination on several grounds: (1) substantial evidence did not justify the ALJ’s finding at step two that Ms. Nguyen’s mental-health impairments were not severe, and the ALJ erred in her evaluation of “other source” evidence; (2) the ALJ did not have clear and convincing reasons to discredit Ms. Nguyen’s testimony; and (3) the ALJ erred by not engaging a psychiatric expert.²⁴¹

3.1 No Severe Mental-Health Impairment and “Other Source” Evidence

Ms. Nguyen asserts that by finding that she did not have any severe mental limitations, the ALJ applied a too-strict legal standard at stage two of the five-step analysis.²⁴² She argues that the step two inquiry “is a de minimis screening device to dispose of groundless claims.”²⁴³ And, she says, the “record as a whole did not provide the ALJ with substantial evidence to conclude that [—] despite repeated references to mental-health limitations, such as depression, anxiety, [and] Somatoform disorder [—] Ms. Nguyen’s mental[-]health conditions caused no more than minimal limitations in work-related functioning.”²⁴⁴

At step two of the five-step sequential inquiry, the ALJ determines whether the claimant has a medically severe impairment or combination of impairments. *Smolen v. Chater*, 80 F.3d 1273, 1290 (1996). The ALJ must consider the record as a whole, including evidence that both supports and detracts from their final decision. *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). An impairment is not severe if it does not significantly limit the claimant’s mental or physical abilities to do basic work activities. 20 C.F.R. § 404.1521(a).²⁴⁵ Basic work activities are “abilities and aptitudes necessary to do most jobs,” including, for example, “walking, standing, sitting, lifting,

²⁴¹ Motion for Summary Judgment – ECF No. 13 at 6.
²⁴² *Id.* at 14.
²⁴³ *Id.* (citing *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996)).
²⁴⁴ *Id.* (record citations omitted); Reply – ECF No. 17 at 3–4.
²⁴⁵ The Social Security Administration promulgated new regulations, including a new § 404.1521, effective as of March 27, 2017. The previous version, effective to March 26, 2017, was in effect as of the date of the ALJ’s hearing.

1 pushing, pulling, reaching, carrying, or handling.” 20 C.F.R. § 404.1521(b).²⁴⁶ To determine the
2 severity of a mental impairment specifically, the ALJ must consider four broad functional areas:
3 activities of daily living; social functioning; concentration, persistence, and pace; and episodes of
4 decompensation. 20 C.F.R. § 404.1520a.²⁴⁷

5 The ALJ discounted Ms. Nguyen’s allegations of severe mental-health impairments on several
6 grounds. Collectively, they establish error and grounds for remand.

7 First, the ALJ acknowledged a diagnosis of somatoform disorder in January 2012 but
8 concluded that the record did not support that this was a medically determinable impairment
9 because it was not clear who made the diagnosis.²⁴⁸ The ALJ noted that a physical therapist —
10 who is not an acceptable medical source and lacked expertise for psychological conditions —
11 signed most notes.²⁴⁹ But Dr. Chan diagnosed Ms. Nguyen with (among other things) somatization
12 disorder.²⁵⁰ This mistake prevented the ALJ from giving the appropriate weight to a treating
13 physician’s diagnosis.

14 In weighing and evaluating the evidence, the ALJ must consider the entire case record,
15 including each medical opinion in the record, together with the rest of the relevant evidence. 20
16 C.F.R. § 416.927(b); see also *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (“[A] reviewing
17 court must [also] consider the entire record as a whole and may not affirm simply by isolating a
18 specific quantum of supporting evidence.”) (internal quotations omitted)).

19 Social Security regulations distinguish between three types of physicians: treating physicians;
20 examining physicians; and non-examining physicians. 20 C.F.R. § 416.927(c), (e); *Lester v.*
21 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). “Generally, a treating physician’s opinion carries more
22 weight than an examining physician’s, and an examining physician’s opinion carries more weight
23 than a reviewing [non-examining] physician’s.” *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th
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25 ²⁴⁶ See supra n.245.

26 ²⁴⁷ *Id.*

27 ²⁴⁸ AR 32.

28 ²⁴⁹ *Id.*

²⁵⁰ AR 448.

1 Cir. 2001) (citing Lester, 81 F.3d at 830); see also Sprague v. Bowen, 812 F.2d 1226, 1231 (9th
2 Cir. 1987) (the opinion of a treating physician is generally given the greatest weight because the
3 treating physician “is employed to cure and has a greater opportunity to know and observe the
4 patient as an individual”); Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996).

5 Accordingly, “[i]n conjunction with the relevant regulations, [the Ninth Circuit has] developed
6 standards that guide [the] analysis of an ALJ’s weighing of medical evidence.” *Ryan v. Comm’r of*
7 *Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (citing 20 C.F.R. § 404.1527). “To reject [the]
8 uncontradicted opinion of a treating or examining doctor, an ALJ must state clear and convincing
9 reasons that are supported by substantial evidence.” *Id.* (alteration in original) (internal quotations
10 omitted). If the ALJ finds that the opinion of a treating physician is contradicted, the ALJ must
11 provide “specific and legitimate reasons supported by substantial evidence in the record.” *Reddick*
12 *v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (internal quotations omitted); see also *Garrison*, 759
13 F.3d at 1012 (“If a treating or examining doctor’s opinion is contradicted by another doctor’s
14 opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported
15 by substantial evidence.”) (internal quotations omitted). “Where an ALJ does not explicitly reject
16 a medical opinion or set forth specific, legitimate reasons for crediting one medical opinion over
17 another, he errs.” *Id.*; see also 20 C.F.R. § 404.1527(c)(2) (“If we find that a treating source’s
18 opinion on the issue(s) of the nature and severity of [the claimant’s] impairment(s) is well-
19 supported by medically acceptable clinical and laboratory diagnostic techniques and is not
20 inconsistent with the other substantial evidence in [the claimant’s] case record, we will give it
21 controlling weight.”).

22 “If a treating physician’s opinion is not given ‘controlling weight’ because it is not ‘well-
23 supported’ or because it is inconsistent with other substantial evidence in the record, the [Social
24 Security] Administration considers specified factors in determining the weight it will be given.”
25 *Orn*, 495 F.3d at 631. “Those factors include the ‘[l]ength of the treatment relationship and the
26 frequency of examination’ by the treating physician; and the ‘nature and extent of the treatment
27 relationship’ between the patient and the treating physician.” *Id.* (quoting 20 C.F.R.
28 § 404.1527(b)(2)(i)–(ii)) (alteration in original). “Additional factors relevant to evaluating any

1 medical opinion, not limited to the opinion of the treating physician, include the amount of
2 relevant evidence that supports the opinion and the quality of the explanation provided[,] the
3 consistency of the medical opinion with the record as a whole[, and] the specialty of the physician
4 providing the opinion” Id. (citing 20 C.F.R. § 404.1527(d)(3)–(6)). Even if the treating
5 physician’s opinion is not entitled to controlling weight, it still is entitled to deference. See id. at
6 632 (citing SSR 96-02p at 4 (Cum. Ed. 1996), 61 Fed. Reg. 34,490, 34,491 (July 2, 1996)).
7 Indeed, “[i]n many cases, a treating source’s medical opinion will be entitled to the greatest weight
8 and should be adopted, even if it does not meet the test for controlling weight.” Id. (quoting SSR
9 96-02p at 4).

10 Finally, an “ALJ errs when he rejects a medical opinion or assigns it little weight” without
11 explanation or without explaining why “another medical opinion is more persuasive, or criticiz[es]
12 it with boilerplate language that fails to offer a substantive basis for his conclusion.” Garrison,
13 759 F.3d at 1012–13.

14 Here, the ALJ’s record error prevented this analysis. Moreover, based on her discounting of
15 the source, she did not consider the somatization disorder at all. Other courts have held that an
16 ALJ’s failure to consider a somatization disorder is reversible error.

17 Somatoform disorders are “characterized by somatic symptoms that are either very distressing
18 or result in significant disruption of functioning, as well as excessive and disproportionate
19 thoughts, feelings[,] and behaviors regarding those symptoms.”²⁵¹ “[S]omatoform and
20 somatization disorders also are characterized by the absence of objective physical findings to
21 explain a patient’s subjective complaints.” King v. Barnhart, No. C 03-0835 MJJ, 2004 WL
22 1949497, at *3 (N.D. Cal. Aug. 16, 2004). A somatoform disorder is potentially disabling and can
23 be a severe impairment. Blevins v. Colvin, No. 12-CV-5493-JRC, 2013 WL 1192403, at *7 (W.D.
24 Wash. Mar. 22, 2013). Moreover, “complaints of pain cannot be dismissed . . . merely because
25 they stem in part from a psychological abnormality[.]” Id. at *4.

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28 ²⁵¹ AR 555.

1 In *Dunn v. Colvin*, the court found “that the ALJ erred [at step two] in failing to consider [the]
2 plaintiff’s hypochondriasis diagnosis.” No. 13-CV-05088 JRC, 2014 WL 1053273, at *1 (W.D.
3 Wash. Mar. 19, 2014). The ALJ “noted that one psychologist indicated that [the] plaintiff had a
4 possible somatization disorder,” but, “[b]ased on the lack of a firm diagnosis of somatization
5 disorder, the ALJ found that it was not a medically determinable impairment.” *Id.* at *3. An
6 examining psychologist, however, had diagnosed the plaintiff with hypochondriasis, “which is a
7 type of somatoform disorder.” *Id.* The court found that the ALJ erred by failing to consider this
8 diagnosis and directed the ALJ to reconsider it on remand “to determine whether [the] plaintiff’s
9 hypochondriasis is severe.” *Id.*

10 Similarly, in *Blevins v. Colvin*, the court found that the ALJ had erred by failing to include a
11 “‘detailed and thorough summary of the facts and conflicting clinical evidence’ regarding [the]
12 plaintiff’s somatoform pain disorder.” 2013 WL 1192403 at *7. An examining psychologist
13 “diagnosed the plaintiff with somatoform pain disorder secondary to physical and psychological
14 factors.” *Id.* at *4. The ALJ found that the psychologist “was able to review records up to January
15 2007 only” and assigned the opinion “only minimal weight.” *Id.* In making this determination, the
16 ALJ relied on a typographical error. *Id.* The court found that “[t]his reason was the only reason
17 provided by the ALJ when he rejected the opinions of [the psychologist],” and that “as this finding
18 is not supported by substantial evidence in the record as a whole, and based on the relevant
19 record . . . the ALJ erred in his review of the medical evidence.” *Id.* at *6.

20 Here, as in *Dunn* and *Blevins*, the ALJ’s misreading of the record resulted in the ALJ
21 improperly ignoring Ms. Nguyen’s somatization disorder diagnosis.²⁵² “[It is] legal error where
22 the ALJ’s findings completely ignore medical evidence without giving specific, legitimate reasons
23 for doing so.” *Smolen*, 80 F.3d at 1282.

24 Second, a compounding effect of this error meant that ALJ did not consider the medical record
25 as a whole, including this evidence in the context of diagnoses of depression and anxiety starting
26 in January 2012. See *Reddick*, 157 F.3d at 720.

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²⁵² AR 32.

1 Third, a related point is that the ALJ gave little weight to “other source” evidence. For
2 example, she gave little weight to Ms. Nguyen’s therapist Anna Clark — who treated her for
3 sexual assault — on the ground that she was not an “acceptable medical source.”²⁵³ Similarly, the
4 ALJ discounted evidence from her chiropractor and acupuncturist, and she did not consider Ms.
5 Nguyen’s brother’s testimony about her mental health at all.²⁵⁴

6 “Only physicians and certain other qualified specialists are considered ‘[a]cceptable medical
7 sources.’” *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014) (alteration in original) (citing
8 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012)); see also 20 C.F.R. § 404.1513(a).
9 Chiropractors and therapists are considered “other sources.” See 20 C.F.R. § 404.1513(d)(1).²⁵⁵ So
10 too are educational personnel (such as teachers, counselors, early-intervention team members, and
11 daycare workers) and social-welfare personnel. *Id.* § 404.153(d)(2)–(3). Other sources include
12 spouses, parents, siblings, other caregivers, other relatives, friends, neighbors, and clergy. *Id.*
13 § 404.153(d)(4). “While their opinions must still be evaluated, 20 C.F.R. § 404.1527(c), the ALJ
14 may discount testimony from these ‘other sources’ if the ALJ gives reasons germane to each
15 witness for doing so.” *Ghanim*, 763 F.3d at 1161 (internal quotations omitted); see also *Molina*,
16 674 F.3d at 1111–12; 20 C.F.R. §§ 404.1513, 416.913; SSR 06-03p, available at 2006 WL
17 2329939 (“[A]n opinion from a medical source who is not an ‘acceptable medical source’ may
18 outweigh the opinion of an ‘acceptable medical source.’”); *Greger v. Barnhart*, 464 F.3d 968, 972
19 (9th Cir. 2006) (ALJ must take into account lay testimony but may discount that testimony by
20 providing reasons germane to that witness).

21 Here, the ALJ discounted Ms. Clark’s opinion because (i) Ms. Clark was not an “acceptable
22 medical source” and (ii) the opinion was — essentially — inconsistent with the fact that Ms.
23 Nguyen worked as a nanny during the period without incident, and her employer’s letter did not
24 show the asserted issues.²⁵⁶ The first reason, while accurate, is circular and not a “germane” reason

25 ²⁵³ AR 36.

26 ²⁵⁴ AR 35–37.

27 ²⁵⁵ See *supra* n.245.

28 ²⁵⁶ AR 37.

1 to discount such evidence. See *Haagenson v. Colvin*, 656 F. App'x. 800, 802 (9th Cir. 2016)
2 (holding that the ALJ failed to provide a germane reason for rejecting “other source” opinion
3 evidence when “[t]he only reason that the ALJ offered for rejecting their opinions is that they are
4 not ‘acceptable medical sources’ within the meaning of the federal regulation . . . [because] the
5 regulation already presumes that nurses and counselors are non-acceptable medical sources, yet
6 still requires the ALJ to consider them as ‘other sources’”). The ALJ’s second reason for rejecting
7 the “other source” opinion also is insufficient. While inconsistency with objective evidence is a
8 germane reason to reject “other source” evidence, see *Molina*, 674 F.3d at 1111–12, here, the ALJ
9 did not cite specific inconsistencies between the opinion about Ms. Nguyen’s mental health and
10 Ms. Nguyen’s “daily functioning” at her part-time job as a nanny.²⁵⁷ See *Ghanim*, 763 F.3d at
11 1162; see also *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009) (the reasons for rejecting
12 other source witness testimony must be “germane” and “must be specific”).

13 Similarly, the ALJ discounted reports about Ms. Nguyen’s mental state by her chiropractor and
14 acupuncturist because their opinions were outside their expertise and were inconsistent with Ms.
15 Nguyen’s part-time work.²⁵⁸ But lay opinions are relevant, and the ALJ did not specify how the
16 opinions were inconsistent with part-time work. Similarly, the ALJ cited Ms. Nguyen’s ability to
17 live with her brother, visit family, draw, take community college courses, and do homework as
18 evidence of her ability to function socially and maintain concentration, persistence, and pace.²⁵⁹
19 But she did not address the brother’s testimony about his sister’s psychological state²⁶⁰ and thus
20 did not provide germane or specific reasons for rejecting it. She also did not specify how the daily
21 activities were inconsistent with the allegations regarding her mental health. And the record does
22 provide a basis for reaching this conclusion.

23 While a claimant’s daily activities may provide a specific and legitimate basis for a finding of
24 inconsistency with her disabling conditions, see *Molina*, 674 F.3d at 1113; *Curry v. Sullivan*, 925

25 ²⁵⁷ *Id.*

26 ²⁵⁸ AR 36–37.

27 ²⁵⁹ AR 31.

28 ²⁶⁰ AR 83–84, 88.

1 F.2d 1127, 1130 (9th Cir. 1991), the Ninth Circuit has “repeatedly warned that ALJs must be
 2 especially cautious in concluding that daily activities are inconsistent with testimony about pain,”
 3 and thus with eligibility for disability benefits. *Garrison*, 759 F.3d at 1016. In *Garrison*, the Court
 4 recognized that disability claimants should not be penalized for attempting to lead normal lives in
 5 the face of their limitations, finding that “only if [her] level of activity were inconsistent with [a
 6 claimant’s] claimed limitations would these activities have any bearing on her credibility.” *Id.*
 7 (alterations in original) (internal quotations omitted); see also *Smolen*, 80 F.3d at 1284 n.7 (“The
 8 Social Security Act does not require that claimants be utterly incapacitated to be eligible for
 9 benefits, and many home activities may not be easily transferable to a work environment where it
 10 might be impossible to rest periodically or take medication.”); *Fair v. Bowen*, 885 F.2d 597, 603
 11 (9th Cir. 1989) (“[M]any home activities are not easily transferable to what may be the more
 12 grueling environment of the workplace, where it might be impossible to periodically rest or take
 13 medication.”).

14 The ALJ also noted that Ms. Nguyen did not exhibit any difficulty focusing at the hearing or
 15 responding to questions.²⁶¹ The Ninth Circuit has repeatedly rejected the ALJ’s denial of benefits
 16 “based on the ALJ’s observation of [the claimant], when [the claimant’s] statements . . . are
 17 supported by objective evidence.” *Perminster v. Heckler*, 765 F.2d 870, 872 (9th Cir. 1985) (the
 18 court “condemned” “[t]he ALJ’s reliance on his personal observations . . . at the hearing,”
 19 characterizing it “as ‘sit and squirm’ jurisprudence”) (quoting *Freeman v. Schweiker*, 681 F.2d
 20 727, 731 (11th Cir. 1982)). The ALJ’s observations of Ms. Nguyen’s “lack of difficulty” during
 21 the approximately 70-minute long hearing²⁶² is not “clear and convincing” evidence supporting the
 22 ALJ’s adverse credibility finding, particularly where her testimony and the record suggests that
 23 her symptoms were intermittent.²⁶³ See *Perminster*, 765 F.2d at 872; *Garrison*, 759 F.3d at 1014–
 24 15; see also *Gallant v. Heckler*, 753 F.2d 1450, 1455 (9th Cir. 1984) (even when claimant alleges
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 27 ²⁶¹ AR 31.

28 ²⁶² AR 49 & 101 (start and end times of the hearing).

²⁶³ See, e.g., AR 108.

1 constant pain, “[t]he fact that a claimant does not exhibit physical manifestations of prolonged
2 pain at the hearing provides little, if any, support for the ALJ’s ultimate conclusion that the
3 claimant is not disabled or that his allegations of constant pain are not credible.”).

4 Here, the ALJ did not engage in the necessary specific analysis of any inconsistencies between
5 the severity of Ms. Nguyen’s reported mental-health limitations and her daily activities to enable
6 appropriate review. Moreover, the ALJ’s record error about the somatoform diagnosis meant that
7 ALJ did not consider the record as a whole. See *Reddick*, 157 F.3d at 720. These errors require
8 remand.

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10 **3.2 Ms. Nguyen’s Testimony**

11 In assessing a claimant’s credibility, an ALJ must make two determinations. *Garrison*, 759
12 F.3d at 1014. “First, the ALJ must determine whether the claimant has presented objective
13 medical evidence of an underlying impairment which could reasonably be expected to produce the
14 pain or other symptoms alleged.” *Id.* (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035–36
15 (9th Cir. 2007) (internal quotations omitted)). Second, if the claimant has produced that evidence,
16 and “there is no evidence of malingering,” the ALJ must provide “specific, clear and convincing
17 reasons for” rejecting the claimant’s testimony regarding the severity of the claimant’s symptoms.
18 *Id.* at 1014–15 (quoting *Smolen*, 80 F.3d at 1281). In order to have meaningful appellate review,
19 the ALJ must explain its reasoning and “specifically identify the testimony [from a claimant] she
20 or he finds not to be credible and . . . explain what evidence undermines the testimony.” *Treichler*
21 *v. Comm’r of Soc. Sec.*, 775 F.3d 1090, 1102, 1103 (9th Cir. 2014) (“Credibility findings must
22 have support in the record, and hackneyed language seen universally in ALJ decisions adds
23 nothing.”) (internal quotations omitted). “That means ‘[g]eneral findings are insufficient.’” *Id.* at
24 1102 (quoting *Lester*, 81 F.3d at 834); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002)
25 (“[T]he ALJ must make a credibility determination with findings sufficiently specific to permit the
26 court to conclude that the ALJ did not arbitrarily discredit claimant’s testimony.”) (citing *Bunnell*
27 *v. Sullivan*, 947 F.2d 341, 345–46 (9th Cir. 1991) (en banc)). Moreover, the court will “review
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1 only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ
2 on a ground upon which he did not rely.” Garrison, 759 F.3d at 1010.

3 In Dunn, the plaintiff argued that the ALJ had erred in considering whether he had exaggerated
4 his symptoms and whether objective medical evidence supported his allegations in forming his
5 credibility determination, because he had ignored the diagnosis of a somatoform disorder that “by
6 definition, requires physical symptoms that are not fully explained by a medical condition.” 2014
7 WL 1053273 at *4 (internal quotations omitted). The court found that “the ALJ overlooked a
8 hypochondriasis diagnosis and failed to address whether this disorder could have explained the
9 lack of objective medical support for plaintiff’s complaints” and held that “[o]n remand, the ALJ
10 shall reconsider her credibility findings in light of her assessment of plaintiff’s hypochondriasis
11 diagnosis and symptoms.” Id.

12 Here, the ALJ discounted Ms. Nguyen’s testimony about her impairments because she found
13 them inconsistent with her part-time work as a nanny and her daily activities.²⁶⁴ As discussed in
14 the last section, the ALJ overlooked Dr. Chan’s diagnosis of somatization disorder (by definition
15 characterized by the absence of objective physical findings to explain a patient’s subjective
16 complaints, see King, 2004 WL 1949497 at *3). Evaluating a claimant’s credibility turns in part
17 on the assessment of the medical evidence, including Dr. Chan’s diagnosis. See 20 C.F.R.
18 § 404.1529(c). The failure to consider the diagnosis “infected the ALJ’s assessment of the
19 plaintiff’s credibility.” Dunn, 2014 WL 1053273 at *1. Ms. Nguyen’s ability to engage in some
20 daily activities, including part-time work, is not on this record specific or germane. The result is
21 that the ALJ did not consider the entire record when evaluating Ms. Nguyen’s credibility.
22 Moreover, the ALJ did not identify the specific portions of Ms. Nguyen’s testimony that he found
23 not fully credible and explain why they were not credible with “specific, clear and convincing
24 evidence.” Garrison, 759 F.3d at 1014–15; *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir.
25 2001); see also 42 U.S.C. § 405(b)(1) (noting the ALJ’s responsibility to provide “a discussion of
26 the evidence”). This is error, and remand is appropriate.

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²⁶⁴ AR 37.

1 **3.3 Developing the Record**

2 Ms. Nguyen argues that the ALJ failed to retain an expert to evaluate ambiguous evidence and
3 resolve inconsistencies in the record.²⁶⁵ The Commissioner responds that the duty is triggered only
4 when the evidence is ambiguous or inadequate to allow evaluation of the evidence.²⁶⁶

5 The “ALJ has an independent duty to fully and fairly develop the record and to assure that the
6 claimant’s interests are considered.” *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001)
7 (internal quotations omitted). “Ambiguous evidence, or the ALJ’s own finding that the record is
8 inadequate to allow for proper evaluation of the evidence, triggers the ALJ’s duty to conduct an
9 appropriate inquiry.” *Id.* (internal quotations omitted). The “ALJ is the final arbiter with respect to
10 resolving ambiguities in the medical evidence.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th
11 Cir. 2008). When there is conflicting medical evidence, it is the ALJ’s role to determine credibility
12 and resolve the conflict. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992); *Magallanes v.*
13 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ likewise is responsible for resolving
14 ambiguities. *Id.*

15 Given that the ALJ did not consider Dr. Chan’s diagnosis under the “treating physician
16 standard,” the court cannot say that the ALJ had a duty to call a medical expert to resolve (for
17 example) any differences in opinion between Dr. Rana and Dr. Navani.²⁶⁷ Moreover, given that
18 the diagnosis affects the ALJ’s assessment of “other source” evidence and Ms. Nguyen’s
19 testimony, remand is appropriate. The ALJ can assess on remand whatever steps it needs to
20 resolve any conflicts in the record, including any medical or psychological expert.

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²⁶⁵ Motion for Summary Judgment – ECF No. 13 at 20.

27 ²⁶⁶ Cross-Motion for Summary Judgment – ECF No. 16 at 13 (citing *Mayes v. Massanari*, 276 F.3d
28 453, 450–60 (9th Cir. 2001)).

²⁶⁷ Motion for Summary Judgment – ECF No. 16 at 21.

1 **CONCLUSION**

2 The court grants Ms. Nguyen’s motion for summary judgment, denies the Commissioner’s
3 cross-motion for summary judgment, and remands the case for further proceedings.

4 **IT IS SO ORDERED.**

5 Dated: March 31, 2017

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7 LAUREL BEELER
8 United States Magistrate Judge
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