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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SYNA THY,
Plaintiff,
v.
CAROLYN W. COLVIN,
Defendant.

Case No. [16-cv-03127-WHO](#)

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 14, 19

The parties cross-move for summary judgment in this Social Security appeal. I find that the ALJ failed to develop the administrative record in not determining whether records relating to plaintiff Syna Thy’s prior claim existed and erred in rejecting the opinions of Thy’s treating medical sources and her testimony for reasons unsupported by the record. Accordingly, I GRANT plaintiff’s motion, DENY defendant the Commissioner of the Social Security Administration’s motion, and REMAND for further proceedings consistent with this Order.

BACKGROUND

I. PROCEDURAL HISTORY

The procedural history of this case is complex. In 1993, Thy applied for Title XVI Supplemental Security Income (“SSI”) benefits, alleging an onset of disability of January 28, 1992 based on Post-Traumatic Stress Disorder and arthralgia. AR 13, 426. Her claim was denied on October 4, 1995 at the hearing level, and the Appeals Council denied review on November 15, 1996. AR 426. According to the SSA, ALJ John J. McCarrick denied the claim, concluding that Thy’s impairments were not severe because she lacked credibility. AR 13, 426. The records relating to Thy’s prior claim, including ALJ McCarrick’s unfavorable decision, are not part of this record. They were requested by a medical examiner (Dr. Lee) but he was not able to secure them. AR 602, 604.

1 On September 8, 2005, Thy filed applications for Title II Social Security Disability
2 Insurance (“SSDI”) and Title XVI Supplemental Security Income (“SSI”) benefits.
3 Administrative Record (“AR”) 88-89. Both applications alleged an onset of disability on March
4 15, 2002, based on Anxiety Disorders, specifically Post-Traumatic Stress Disorder (“PTSD”). AR
5 88-89, 426-27. The Disability Determination Service (“DDS”) initially approved both
6 applications on March 28, 2006, and noted in the Remarks section of the Disability Determination
7 and Transmittal Forms that Thy “may be able to handle own funds in a few months after group
8 therapy when her depression isn’t so crippling, per Lana Lechabrier, MD.” AR 88-89, 418.

9 But on April 11, 2006, Agency medical consultant Herbert Ochitill completed a Review of
10 Mental Residual Functional Capacity Assessment form and a Review of Psychiatric Review
11 Technique form, and indicated on both documents that “ME needed to clarify severity of
12 impairment.” AR 435-38. Ochitill’s recommendations were “[s]uggest the DDS attempt to
13 obtain documentation of the [claimant’s] alleged ‘multiple suicide attempts’ in ’02 to confirm the
14 [claimant’s] assertion of a traumatic event and her psychological response to such an event. Up-
15 to-date [outpatient] treatment records from Alameda Co. could clarify the ongoing severity of the
16 [claimant’s] impairment.” AR 434.

17 In a form titled “Request for Corrective Action,”¹ Agency medical reviewer J. Ho noted
18 that the DDS made its initial disability determination—“assess[ing] a current mental RFC for
19 inability to adapt successfully to the normal mental demands of competitive and unskilled labor
20 with an EOD of 3/15/02”—without considering the prior decision of ALJ McCarrick under the
21 Ninth Circuit’s *Chavez* ruling. AR 426-27 (“[T]he DDS must consider the impact of the prior ALJ
22 decision under the Chavez AR.”). The reviewer concluded that “[o]ur review of the file indicates
23 that it does not contain enough information to determine the appropriateness of this decision,” and
24 “[c]urrent treatment records from her TS (i.e., Asian Community Mental Health Services) are also
25 needed to clarify ongoing severity of the claimant’s impairments.” AR 427. The reviewer also

26 _____
27 ¹ This form is not dated and the list of exhibits from the ALJ hearing (identifying each document’s
28 source, date, etc.) does not specify its source or date. AR 32. Presumably, this document was
completed following Ochitill’s April 11, 2006 review.

1 noted that “the claimant is not fully credible since she is still alleging an inability to speak, read
2 and write English, which the ALJ found to be misrepresented.” AR 427.² The March 28, 2006
3 Disability Determination and Transmittal Forms in Thy’s file were crossed out, and new Disability
4 Determination Forms, dated August 3, 2006, were added. AR 89-90. The new forms indicate that
5 Thy was not disabled, and note in the Remarks section that the *Chavez* standard was considered.
6 AR 87-90. Yet, despite the DDS’ updated finding of no disability, the SSA continued paying Thy
7 Title XVI benefits through at least October 2015. AR 13, 120, 410.

8 On October 29, 2012, the SSA District Office realized that Thy never “had a medical
9 allowance” and was mistakenly placed in pay status. AR 117. At the District Office’s request, the
10 DDS was asked to “develop” Thy’s case and make “a new medical decision.” *Id.* That new
11 medical decision was that Thy was no longer disabled as of July 1, 2013. AR 117. On July 18,
12 2013, the SSA sent Thy a Notice of Disability Cessation explaining that her SSI payments would
13 stop in September 2013 because “medical evidence shows that your health improved in July 2013
14 and you are now able to work.” AR 91, 97-99. Thy submitted a timely request for reconsideration
15 and testified before a Disability Hearing Officer (“DHO”) on January 16, 2014. AR 100-112. In a
16 decision dated April 2, 2014, the DHO noted that there was “no evidence of significant credibility
17 issue(s) within [Thy’s] testimony,” but found that Thy did not meet the criteria for disability under
18 the SSA.³ AR 113-126.

19 On April 8, 2014, Thy filed a written request for an ALJ hearing, and a hearing was set for
20 August 19, 2015. AR 130-33, 170. On July 21, 2015 and August 11, 2015, respectively, Thy’s
21 attorney requested in writing that an endocrinologist and a psychological expert be present at the
22 hearing to provide opinion testimony regarding Thy’s medical records and diagnoses. 408-09.

23 _____
24 ² Meanwhile, the SSA sent Thy a Notice of Award dated June 16, 2006 to notify her that she was
25 eligible for SSI disability benefits beginning December 2005. AR 13.

26 ³ The DHO also concluded that based on the District Office’s error, Group I exceptions to the
27 medical improvement review standards (“MIRS”) applied. AR 113, 126. Group I exceptions
28 apply in “certain limited situations when your disability can be found to have ended even though
medical improvement has not occurred, if you can engage in substantial gainful activity,”
including when substantial evidence demonstrates that a prior disability determination was in
error. *See* 20 C.F.R. § 404.1594.

1 The hearing was held before ALJ Richard Laverdure on August 19, 2015, in Oakland, California.
2 *See* AR 44. Thy testified through a Cambodian interpreter, and the ALJ also heard testimony from
3 impartial medical expert and board certified internist Kweli J. Amusa, M.D., and impartial
4 vocational expert Joel M. Greenberg, M.S. *See* AR 44. Thy was representing at the hearing by
5 her attorney.

6 At the hearing, ALJ Laverdure noted that there was no medical evidence in the record pre-
7 dating 2011, and agreed to keep the record open for one week so that Thy's attorney could attempt
8 to get additional medical records from Thy's providers. AR 50, 84-85. Thy's attorney
9 subsequently obtained and submitted to the ALJ approximately 160 pages of additional medical
10 records relating to Thy's treatment by her mental health providers between September 2013 and
11 August 2015 (*see* AR 825-889), and her primary care providers between November 2005 and May
12 2012 (*see* AR 890-987). AR 417, 420, 422, 424.

13 On October 29, 2015, ALJ Laverdure issued an unfavorable decision, finding that Thy was
14 not under a disability as defined by the SSA since September 8, 2005 (the date Thy filed her
15 second applications for disability benefits) or since July 1, 2013 (the date that the DDS determined
16 that Thy was no longer disabled, following the request for corrective action). AR 13-27. The
17 Appeals Council denied Thy's request for review on April 4, 2016. AR 1-4. Thy filed this action
18 on June 8, 2016. Currently before me is Thy's motion for summary judgment (Dkt. No. 14) and
19 the government's cross-motion for summary judgment (Dkt. No. 19).

20 **II. THY'S BACKGROUND**

21 Thy is a 48-year-old Cambodian woman who resides in Alameda County, California. AR
22 411. She was born in 1969 in Cambodia, and had a traumatic childhood growing up under the
23 Khmer Rouge regime. AR 411, 805-806, 816-817. She was separated from her parents at eight
24 years old and sent to work in a child labor camp, where Khmer Rouge soldiers forced her and
25 other children to work 14 hour days in brutal conditions. AR 411, 805-806, 816-17. During this
26 time, she experienced constant starvation and witnessed Khmer Rouge soldiers torture and murder
27 civilians. AR 411, 805-806, 816-17. In one instance, a Khmer Rouge guard beat her in the head
28 until she lost consciousness and threw her body in a river. AR 805, 816-817. Thy believes it was

1 “pure luck” that she and her family survived, as all of her family’s friends and neighbors “were
2 taken to the killing fields.” AR 817.

3 Thy came to the United States from Cambodia in 1982 as a teenage refugee. AR 891. Her
4 primary language is Cambodian, and she reports that her ability to speak, write, and understand
5 English is limited. AR 44, 316, 429.⁴ She enrolled in Fremont High School in Oakland,
6 California in 1985. AR 313-314, 891. Thy attended special education classes during high school,
7 and she graduated in 1988 with Ds and Fs. AR 313-314, 817. Thy worked fulltime in an
8 assembly job from 1991 to 1992 and 1996 to 1998. AR 310. From 1998 until January 2002, Thy
9 worked fulltime at a bakery packing bagels into boxes. AR 310, 360, 401.⁵ This job required no
10 lifting, and Thy estimated that she spent approximately seven hours each day standing, stooping,
11 handling big objects, and/or reaching. AR 310-11.

12 In 2001, Thy was raped by a stranger while she was walking home from work at night.
13 AR 71, 800, 817, 891.⁶ She became pregnant from the rape, and quit her job in January 2002
14 because she was scared to return to work. AR 71, 800, 817, 891. In July 2002, she gave birth to
15 her daughter, and Thy’s father and step-mother became her daughter’s legal guardians. AR 83,
16 657, 806.⁷ Thy lives with her elderly father, step-mother, and daughter, and she spends most of

17 _____
18 ⁴ There is some dispute about how proficient Thy is in the English language; Thy has indicated in
19 previous SSA forms and to her providers that she speaks no English (AR 308-309, 842), she
20 consistently had a Cambodian interpreter at her medical appointments and disability hearings (AR
21 653, 857 (appointments), required services in Cambodian (AR 659), and her attorney testified at
the ALJ hearing that she “speaks a little bit” of English, but isn’t fluent and needed an interpreter.
AR 44.

22 ⁵ The record contains conflicting references regarding the year Thy began her job packing bagels
23 and when it ended. *See* AR 360 (work history report listing January 1998 start date); AR 401
24 (Office of Disability Adjudication and Review Form listing 1996 start date); AR 309-10 (October
2005 disability report states that she stopped working in March 2002, while another section of that
report states that she stopped working in 2001). Thy’s attorney clarified at the August 19, 2015
hearing that Thy stopped working in January 2002. AR 83.

25 ⁶ The details of Thy’s rape are generally reported consistently throughout the record, with the
26 exception of the year it occurred, *see* AR 638 (“sexually assaulted by an unknown stranger in
27 2000”); AR 651-52 (“Thy required no psychiatric care until she was raped in 2003”); AR 800
28 (“raped in 2001 at 1:00 am after leaving her workplace”); AR 802 (raped in 2011). Thy testified
at the ALJ hearing that she was raped in 2001, but could not remember the month. AR 71.

⁷ Thy’s medical records inconsistently report the gender and date of birth of Thy’s child. Thy

1 the day at home. AR 638, 657. She is able to cook, shop for groceries, take her daughter places,
2 independently take the bus, and perform minimal house chores. AR 116, 487, 817. In 2013, Thy
3 attended temple “once every few months,” and in July 2015 she reported going to temple “almost
4 every Saturday and Sunday.” AR 638, 806. She has not worked since 2002, and says she has no
5 plans to seek employment because of her recurring health issues. AR 638, 647. In a SSA
6 Function Report dated March 1, 2013, Thy reported that she goes outside “1 time a week” and can
7 walk for 2 blocks before needing to rest, and that she has “diabetes, blood pressure, cholesterol,
8 dizzy so that’s why I can’t go to work.” AR 331. Thy has a driver’s license, but takes the bus
9 because she gets dizzy and is afraid to drive. AR 487, 490.

10 **III. THY’S MEDICAL HISTORY**

11 **A. Mental Health Records**

12 Thy received mental health treatment at Asian Community Mental Health Services
13 (“ACMHS”) from November 2005 to August 2006, and July 2013 to April 2015, and primary care
14 treatment at Asian Health Services (“AHS”) from November 2005 to August 2015. *See* AR 635-
15 83, 825-987. Records detailing Thy’s mental health treatment at ACMHS from 2005 to 2006
16 could not be located and are not included in the record.⁸ However, Thy’s characterization of her
17 mental health issues as recorded by the SSA as well as the Agency’s comments on Thy’s records
18 SSA reviewers considered are in the record. AR 636.

19 In an October 13, 2005⁹ Adult Disability Report, Thy reported that she stopped working
20 because of “morning sickness, nightmares, afraid of men after the raped trauma.” AR 309. She
21 sought treatment for “raped trauma events” at ACMHS in August 2005, where she “talked to
22 someone to reduce my anger and fears,” and was prescribed Paxil for depression. AR 309, 312-
23

24 testified at the ALJ hearing that her daughter was born on July 31, 2002. AR 83.

25 ⁸ Following the ALJ hearing, Thy’s attorney informed the ALJ that ACMHS “did not have copies
26 of any records prior to 2013.” AR 417. She notes that as a result of Thy’s concurrent treatment at
27 AHS and ACMHS, her 2005 to 2006 medical records from AHS contain little information about
28 Thy’s mental health. Mot. at 9; *see also* AR 9.

⁹ This document is not dated, however the exhibit list indicates it was completed on October 13,
2005. AR 30.

1 13. Thy also reported that she was admitted to the emergency room at Summit Medical Center on
2 May 5, 2003, where she was kept overnight for “stomach problem, overdosing, suicidal attempt.”
3 AR 312.

4 The Quality Assurance Reviewer who completed the request for corrective action noted in
5 his findings that “claimant reports a new traumatic event when she was raped and assaulted in
6 2001 with subsequent suicide attempts in 2002 (see 9/02/05 admit note from Asian Community
7 MHS), but there are no records to substantiate her suicide attempts.” AR 427. He further noted
8 that “medical evidence in the current file includes a 5/03 report from Summit Medical Center for
9 abdominal pain, which was resolved, the 9/05-10/05 notes from Asian Community Mental Health
10 Services and the 12/05 psychiatric CE for posttraumatic stress disorder.” AR 427. He concluded
11 that “[f]urther medical development is needed to establish a basis for changed circumstance. That
12 is, there is an increase in the severity of the claimant’s PTSD and depression, which in turn
13 requires an assessment of her credibility. It is necessary to document the claimant’s alleged
14 multiple suicide attempts in 2002 to confirm her assertion of a traumatic event.” AR 427.

15 Similarly, in an April 11, 2006 medical evaluation form, state agency medical consultant
16 Herbert Ochitill recommended that “the DDS attempt to obtain documentation of [Thy’s] alleged
17 ‘multiple suicide attempts’ in ‘02 to confirm [Thy’s] assertion of a traumatic event and her
18 psychological response to such an event. Up-to-date out[patient] treatment records from Alameda
19 Co. [ACMHS] could clarify the ongoing severity of [Thy’s] impairment.” AR 434.

20 **B. Treating Medical Sources**

21 In November 2005, ACMHS referred Thy to AHS for primary care treatment. AR 782-89,
22 890-989. At her initial appointment on November 3, 2005, Thy told her treating physician and
23 internist, Dr. Yee-Buh Lui, about her history of depression and that she had stopped taking Paxil
24 and started taking Zoloft, which made her dizzy. AR 891. Thy reported that she was raped in
25 2001, which led to an onset of mental illness, and that her depression presented a barrier to her
26 working. AR 891-93. Dr. Lui diagnosed Thy with Depression, Hypertension, uncontrolled
27 Diabetes Mellitus, and Hyperlipidemia. AR 782-89, 900, 955-62. Thy continued to receive
28 primary care treatment at AHS from Dr. Lui and other treating clinicians, including nurse

1 practitioner Le Thai (“NP Thai”), and Dr. Daveena Ma. AR 782-89, 793-798, 890-989. In March
2 2006, Thy saw a dietitian who noted Thy’s “knowledge deficit in [diabetes] care,” and helped her
3 develop a nutrition care plan. AR 900. In January 2009, Dr. Lui switched Thy’s depression
4 medication from Lexapro to Fluoxetine (aka Prozac) for “formulary reasons,” and his progress
5 notes from May 2009 to November 2009 indicate that Thy’s depression was “stable.” AR 933,
6 935, 937, 939.

7 In 2008, Dr. Lui referred Thy to endocrinologist Dr. Frank Hsu for treatment of her
8 diabetes. AR 971. On November 16, 2008, Dr. Hsu completed an initial diabetes evaluation of
9 Thy and noted that she was taking medication for diabetes (metformin, glipizide, novolin, and
10 insulin), hyperlipidemia (Simvastatin), hypertension (Cozaar), and anxiety (Lexapro). AR 971-72.
11 Thy’s physical examination indicated that she was in “no distress,” and her “pulmonary, cardiac
12 and abdominal examinations were normal.” AR 972. Dr. Hsu found no thyromegaly,
13 lymphadenopathy, retinopathy, nephropathy, or leg edema, and noted that Thy had normal
14 sensation in her legs. AR 972. He concluded that “[b]ased on the elevated serum glucose and
15 HbA1c values, the patient does have poorly controlled diabetes,” and diagnosed Thy with
16 hyperlipidemia, hypertension, obesity, and anxiety syndrome. AR 972-73. He adjusted Thy’s
17 insulin regimen and instructed her to work on her diet and exercise. AR 972-73. Thy continued to
18 see Dr. Hsu every two to three months for diabetes treatment through February 2015. AR 556-85,
19 616-17, 685, 681, 749-76, 932-51.

20 Thy’s laboratory reports and Dr. Hsu’s progress notes from October 2009 to May 2014
21 indicate that Thy had high HbA1c levels and struggled to manage her diabetes, but note no eye,
22 cardiac, renal or leg complications. AR 556-585, 762-64, 972-87. In November 2011, Dr. Hsu
23 showed Thy how to properly draw and inject her insulin, as it appeared she was not adequately
24 filling her syringe. AR 556. In November 2012, he noted that Thy “still has moderate insulin
25 resistance,” and had “run out” of her oral diabetes medication “for several months.” AR 564.

26 On May 21, 2014, Dr. Hsu diagnosed Thy with diabetes mellitus with neurological
27 manifestations, obesity, benign essential hypertension, nontoxic multinodular goiter, and
28 depressive disorder, and noted that she was still taking Amblify which may worsen her glucose

1 control. AR 762-63. On July 2, 2014, Dr. Hsu found that Thy had “2+ leg edema” but no
2 hyperglycemic reactions, and noted that she reported feeling “fine” was “eating better and has
3 lower glucose values.” AR 765. On September 3, 2014, Dr. Hsu noted “occasional hypoglycemic
4 reactions due to fair eating and more exercise,” and he found that Thy still had mild leg edema
5 (2+) and “poor glyceimic control due to poor adherence to diet from psychiatric illness.” AR 768.
6 Dr. Hsu’s appointment notes from January 2013 and February 2013 also noted mild leg edema and
7 “rare mild hypoglycemic reactions.” AR 771-72, 774-75.

8 In a Physical Medical Source Statement dated June 1, 2015, Thy’s treating clinicians NP
9 Thai and Dr. Ma confirmed Thy’s diagnoses of hypertension, uncontrolled diabetes, depression,
10 and hyperlipidemia, and opined her prognosis was “fair-good.” AR 783-89.¹⁰ They noted that
11 Thy suffered from dizziness (for which she took Medizine daily), fatigue, and sadness, and
12 experiences impaired sleep “mostly due to meds, uncontrolled [diabetes], depression.” AR 784.
13 NP Thai and Dr. Ma indicated that Thy’s tiredness could be from diabetes, and noted that she was
14 still working with her endocrinologist (Dr. Hsu) and a psychiatrist for depression. AR 784. They
15 indicated that Thy’s depression, anxiety, Somatoform disorder, and psychological factors affected
16 her physical condition, and that emotional factors contributed to the severity of her symptoms and
17 functional limitations. AR 784. NP Thai and Dr. Ma opined that Thy’s ongoing impairments
18 would cause her to miss work more than 4 days per month, take unscheduled breaks “very often”
19 (because of chronic fatigue), be “off task” more than thirty percent of the time, have “good days”
20 and “bad days,” and that she would need 4 hours of rest in an 8 hour work day (to relieve fatigue
21 from dizziness). AR 784-89.¹¹ NP Thai and Dr. Ma found that Thy could perform manipulative
22 activities such as reaching, handling, and fingering occasionally, lift/carry 10 pounds occasionally
23 and 50 pounds rarely, stand/walk about for one hour in an eight hour work day (but for no longer
24

25 ¹⁰ NP Thai signed the statement on January 15, 2015; Dr. Ma signed it on June 1, 2015. AR 789.
26 I will refer to it as the 2015 Medical Source Statement.

27 ¹¹ It is unclear from the statement whether NP Thai and Dr. Ma meant to indicate that Thy needed
28 an assistive device for walking (the handwritten “x” crosses both the “yes” and “no” boxes). See
AR 786.

1 than 15 minutes at a time), sit for 4 hours day (but for no more than 30 minutes consecutively),
2 climb stairs and ladders rarely, and balance, twist, stoop, crouch, and squat occasionally. AR 787-
3 88.

4 In July 2013, Thy resumed mental health treatment at ACMHS, after she reported having
5 suicidal thoughts to her providers at AHS. AR 635, 655. Thy received ongoing treatment from
6 licensed clinical social workers (“LCSW”) Bunthy Prum and Katherine Chun, Ph.D., case
7 manager Catherine Meas-Powell (“CM Meas-Powell”),¹² Approved Social Worker Nary Pech, and
8 psychiatrist Dr. Tim Lukaszewski through April 2015. AR 635-83, 790-92.

9 On July 25, 2013, LCSW Prum completed an initial assessment of Thy, and noted Thy’s
10 symptoms as feeling worthless and worried, being unable to sleep at night, having nightmares of
11 the Cambodian civil war five days a week, feeling fatigued during the day, and experiencing
12 hypervigilance. AR 635, 639. Thy told Prum that she had attempted to stab herself in the chest
13 with a knife “on a few occasions” in March 2013, and ranked her current desire to harm herself “at
14 an 8 on a scale of 1 to 10.” AR 636, 640. Prum found that Thy’s mental processes were
15 “[r]elevant, logical, and linear,” and observed that she appeared sad, lethargic, and tearful. AR
16 639. Prum noted that Thy’s current medications, Fluoxetine, Novolog, Metformin,
17 Hydrochlorothiazide, Acarbose, Simvastatin, Pioglitazone, Losartan, Aspir-low, were prescribed
18 by Drs. Lui and Hsu, and nurse practitioners Christina Ng and Gina Nguyen. AR 636, 655. Prum
19 indicated that Thy was misusing her medication by taking it in the afternoon to alleviate
20 symptoms, rather than at night as directed. AR 635-36. Prum concluded that Thy had passive
21 suicidal ideation and needed a high level of clinical care “to prevent high risks of returning to
22 former impairments and prevent hospitalization.” AR 635. On August 7, 2013, Prum diagnosed
23 Thy with “Major Depressive Disorder, Recurrent, Severe Without Psychotic Features,” and
24 assigned her a Global Assessment of Functioning (“GAF”) score of 46. AR 641.

25 Prum developed a 6-month treatment plan (for the period of July 26, 2013 to January 31,
26

27 ¹² The record indicates that CM Meas-Powell speaks Khmer (Cambodian), and that she interpreted
28 for Thy at many of her appointments and group therapy sessions. *See* AR 653, 857.

1 2014), to reduce Thy's risks of suicide and self-harm and to help her improve sleep habits, self-
2 image, and ability to process depressive feelings. AR 643-46. Thy's treatment plan included a
3 diagnosis of "r/o PTSD." AR 643. Per the treatment plan, Thy attended individual bi-monthly
4 therapy sessions with CM Meas-Powell and LCSW Chun. AR 643-46, 825-51. Thy also attended
5 wellness and support groups aimed at diabetes management and healthy eating from September
6 2013 to April 2015. AR 672, 825-889.

7 On December 30, 2013, Thy was discharged from ACCESS because she no longer met the
8 criteria for the level of care and services offered under that program. AR 647. Thy's case
9 manager Meas-Powell and LCSW Chun noted that Thy "partially achieved [treatment] goals" but
10 "continues to struggle to manage anxiety [symptoms] as triggered by hypervigilance or when in
11 the presence of African American males," and is "encouraged to continue [treatment] services
12 under lower level of care to maintain stability and to prevent onset of decompensation," as she
13 "has a [history] of [suicide ideation] and violent rape." AR 647-49. The form listed a current
14 GAF score of 46, and a highest past year score of 50. AR 648.

15 On January 16, 2014, Thy enrolled in an integrated primary care program (ACMHS'
16 "Level 3 Adult Program"), which offered less intensive care than ACCESS, but allowed her
17 mental health providers at AMCHS to coordinate with her primary care providers at AHS. AR
18 853-884. On January 17, 2014, LCSW Chun completed an initial mental health assessment of
19 Thy under the Level 3 Adult program, and diagnosed her with major depressive disorder,
20 recurrent, severe without psychotic features. AR 654-61.¹³ Chun also noted that Thy had
21 diabetes, high blood pressure, high cholesterol, and anemia, but indicated that depression was the
22 focus of clinical attention. AR 660. Thy reported that she had last thought about suicide "during
23 early December when the holiday was approaching and she felt numb and depressed," and that her
24 father had "hid sharp objects and ropes from her." AR 655. Thy said she did not intend to follow
25 through with hurting herself "due to thinking about her daughter's welfare if she was gone." AR
26

27 ¹³ Chun signed the initial assessment on January 21, 2014; Dr. Lukaszewski signed it on March 5,
28 2014. AR 661.

1 659. Thy also reported being dizzy, lightheaded, and having blurry vision, and complained of
2 sitting for too long, and Chun observed that although Thy appeared anxious and stressed when
3 answering questions about her past trauma, she was overall open and forthcoming with answers.
4 AR 658. Thy continued individual therapy sessions with CM Meas-Powell approximately once a
5 month until January 2015. *See* AR 858-88.¹⁴

6 At a January 24, 2014 appointment with CM Meas-Powell, Thy reported being “scared
7 when I leave my home. I always feel that I may be attack anytime. I feel so week and stupid,” and
8 said her anxiety about her sexual assault impacted her motivation to connect with others. AR 859.
9 CM Meas-Powell noted that Thy appeared depressed but oriented, and diagnosed her with PTSD.
10 AR 858.

11 The majority of CM Meas-Powell’s session notes from January 2014 to December 2015
12 show that Thy’s diabetes and mental health symptoms fluctuated, with periods of improvement
13 followed by recurrent dizziness, anxiety, weight gain, and trouble sleeping. *See e.g.*, AR 856
14 (noting Thy’s “[d]epressed and sad” mood and “ashamed and tearful” affect); AR 860 (noting
15 Thy’s “depressed” mood); AR 862 (reporting Thy “feel scare all the time”); AR 864 (noting that
16 Thy wakes up at night with “body sweats, [] increased heart rate, and feeling scared”, and
17 reporting that Thy received psychoeducation on signs and symptoms of PTSD; AR 867 (noting
18 Thy felt “less motivated and has increased fatigue,” and that her “anxiety-like” symptoms are
19 exacerbated by her frequently waking up at night); AR 869 (noting Thy is exercising daily and
20 taking her medication as prescribed, feeling “fine and good today” and “is getting along and
21 feeling the support of her family”); AR 871 (reporting Thy is “feeling happy and well today, but
22 worried,” and was “experiencing increased headaches and dizziness for the past week,” that she
23 was taking her medications as prescribed, and doing household chores daily, and noting that Thy’s
24 cousin died the week prior, and she “tried to cope” with the death by “eating and sleeping”); AR
25 873 (noting Thy reported “feeling well, but worries a lot more than usual,” feeling “frustrated that

26
27 ¹⁴ Thy saw LCSW Soojung Han and Approved Social Worker Nary Pech in April 2015; the
28 session notes from this appointment indicate that Thy’s primary case manager was unavailable,
and that she was struggling to cope with the grief and sadness of the recent loss of her cousin, who
she was close with. AR 888-89.

1 her weight and dia[betes] symptoms continue to increase and her overall health continue to
2 decline,” and experiencing an “increased sense of hopelessness, helplessness, and lack [of] interest
3 in doing things she used to find enjoyable”); AR 875 (noting Thy felt “‘desperate’ as she
4 continues to manage diabetes problems and weight”); AR 877 (noting Thy felt “fine” today); AR
5 879 (noting Thy “worries about her diabetes symptoms despite managing it as best she can,”
6 “feel[s] hopeless and helpless intermittently when she has a difficult time managing her diabetes
7 problems,” and “feels more anxious and is easily startled when the sun begin to set”); AR 881
8 (noting Thy reported “feeling well today despite experiencing daily struggle to manage chronic
9 diabetes symptoms,” and is “so mad at [herself] for not knowing how to stop feeling scared when
10 [she is] alone,” and “feel[s] like someone will be out to get [her] or [she] may be hurt by someone”
11 when it gets dark outside); AR 883 (noting Thy “worried most of the day every day” since she
12 received notice of potential discontinuation of her SSI benefits, and that she feels that she is
13 “worthless, a beggar, useless to nobody” and “may experience an anxiety attack”); AR 885
14 (reporting Thy felt anxious because her HbA1c was “over 200 this morning,” and that she
15 “experienced anxiety-like symptoms when she was at temple” around male parishioners, including
16 dizziness, shortness of breath, and feeling upset at herself); AR 887 (reporting Thy is “feeling
17 upset at herself for dealing with chronic diabetes and poor health” and that she “feel[s] so hopeless
18 everyday [she has] to deal with this illness”).

19 On February 13, 2014, Thy began seeing Dr. Lukaszewski for “help dealing with her fear
20 of going outside, general fear of being harmed and recurrent recollection of having been raped in
21 2003.”¹⁵ AR 651. Lukaszewski noted that Thy “required no psychiatric care until she was raped”
22 and that since her rape, she “has suffered near-continual recollection,” and is “often anxious” and
23 “fearful of leaving her home.” AR 652. Thy reported that fluoxetine 20 mg daily, which she had
24 taken for the past five years without any dosage adjustments or augmentation, “hasn’t helped.”
25 AR 652. Lukaszewski diagnosed Thy with chronic PTSD and doubled her fluoxetine dosage to
26

27 ¹⁵ Dr. Lukaszewski (incorrectly) references 2003 as the date of Thy’s rape in all of his
28 appointment notes. AR 667, 670, 675, 678, 681, 791.

1 40 mg daily, finding that her “ongoing PTSD [was] not adequately treated with current
2 fluoxetine.” AR 653. He assigned her a GAF score of 47 and noted PTSD criteria “target
3 symptoms” as intrusive recollection of rape, avoidance of thinking about rape, fear of leaving
4 home, r/o nightmares, arousal, anxiety, and affective numbing. AR 651-52.

5 Thy saw Lukaszewski for the second time on March 20, 2014, and reported “no change in
6 her status since the last session” and that she continued to suffer from nightmares, intrusive rape
7 recollections, and debilitating worries. AR 666. Lukaszewski noted that Thy was having trouble
8 sleeping, but eating well, exercising regularly, and “taking good care of [her]self.” AR 667. He
9 found Thy “not to be at imminent risk of harming self,” assigned her a GAF score of 47, and
10 began her on a trial of Aripiprazole (Abilify) 5 mg nightly in addition to her fluoxetine 40 mg each
11 morning. AR 668. On April 10, 2014, Lukaszewski assigned Thy a GAF score of 49, and
12 doubled her dosage of Aripiprazole to 10 mg nightly. AR 669. Lukaszewski saw Thy again on
13 August 4, 2014, and noted that she was engaged, pleasant, and calm, and that her mood was
14 euthymic and stable. AR 675. He noted that she was “making good efforts to attend to nutrition
15 and regular exercise, but recently gained weight after death of a family member,” and assigned her
16 a GAF score of 55. AR 676. Lukaszewski found that Thy’s intrusive recollections of rape “have
17 abated,” and her avoidance of thinking about the rape had “also diminished,” and he concluded
18 that her current fluoxetine and aripiprazole regimen was efficacious. AR 675. Lukaszewski’s
19 appointment notes from October 27, 2014 and January 12, 2015 indicate similar findings and an
20 increased GAF score of 58. AR 677-82. On April 6, 2015, Lukaszewski concluded that Thy’s
21 chronic PTSD was “in near-full remission,” and assigned her a GAF score of 60. AR 792. With
22 respect to Thy’s physical health, Lukaszewski noted that her diabetes was not in control, and
23 discussed nutrition and exercise with her “at length.” AR 791.

24 In June 2015, Thy began receiving mental health treatment at Center for Empowering
25 Refugees and Immigrants (“CERI”) from psychiatrists James Gracer and Mona Afary. AR 799-
26 824.¹⁶ At her initial appointment on June 30, 2015, Thy told Afary about her rape in 2001 and

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28 ¹⁶ CM Meas-Powell and Thy’s attorney referred her to CERI. AR 800.

1 resulting that her “life has never been the same since I was raped.” AR 800-01. Thy reported
2 being chronically depressed since her sexual assault, and that she has flashbacks every day,
3 “continually lives in fear and panics easily,” and is “not able to focus on her actions and drops
4 things.” AR 800-01. Afary described Thy’s psychological status as “suffers from PTSD
5 symptoms with panic attacks,” and referred Thy to Gracer for medication management.” AR 800-
6 01.

7 On July 9, 2015, Afary and Gracer administered the Harvard Trauma Questionnaire, a
8 checklist of trauma events and symptoms developed by the Harvard Program in Refugee Trauma
9 to assist in the diagnosis of PTSD. AR 808-816. Thy’s results indicated that she was
10 symptomatic for PTSD. AR 815. Gracer prescribed her Remeron 30 mg daily for insomnia and
11 depression. AR 799, 807.

12 During a July 14, 2015 appointment with Afary, Thy “opened up” about her childhood in
13 Cambodia under the Khmer Rouge and her 2001 rape and resulting pregnancy. AR 805. Afary
14 noted that Thy does not trust or feel safe around men, except for her father, and that she blames
15 herself and feels ashamed about being raped. AR 806. Thy also reported having nightmares and
16 flashbacks of the rape scene and feeling anxious, panicky, fearful, and depressed because she was
17 unable “to get rid of those images.” AR 802. Thy told Afary, “I hear this voice in my head telling
18 me I will kill you,” which is what Khmer Rouge soldiers had said to her as a child. AR 802. Thy
19 reported that this voice “came back loud and clear” after her rape, and said she can’t do anything
20 to stop it, which “is why she wishes death.” AR 802.¹⁷ Afary confirmed that Thy did not have a
21 suicide plan. AR 802.

22 On July 28, 2015, Gracer and Afary conducted a psychological evaluation of Thy and
23 diagnosed her with PTSD and Dysthymic disorder and assigned her a prognosis of “poor.” AR
24 816-18. Thy reported that it is “very hard for her to complete a task as she is not able to let go of
25 her obsessive thoughts,” and that she “burns food, drops things and forgets what she was supposed
26 to do.” AR 818. Her psychiatrists concluded that Thy “would not be able to complete a normal
27

28 ¹⁷ Dr. Afary’s notes from this appointment list 2011 as the date of Thy’s rape (AR 802), however
her notes from other appointments list 2001 as the date of the rape. *See* AR 800, 806.

1 work day without being interrupted by mood disturbances and intrusive recollections of her
2 traumatic experiences,” that she “cannot maintain a regular daily schedule due to her fatigue and
3 exhaustion,” and that she “has a short attention span and would be easily distracted by those
4 working around her.” AR 818.

5 In August 2015, Gracer and Afary completed a Mental Impairment Questionnaire, and
6 found that Thy’s ability to understand and remember detailed instructions and maintain attention
7 and concentration for a two-hour period were extremely limited, and that Thy had experienced
8 “three or more episodes of decompensation within 12 months, each at least two weeks long.” AR
9 822-23. They found that Thy “struggles with panic attacks, obsessive thoughts, flashbacks and
10 auditory hallucinations,” “won’t be able to keep a regular daily schedule due to her sleep
11 problem,” “is unable to have a professional relationship with her male colleagues, as she is
12 petrified of men [and] has been staying away from men in the past 10 years” and “cannot handle
13 criticism and needs to take breaks throughout the day as her attention span is less than 45
14 minutes.” AR 824. Based on these impairments, they determined that Thy would miss five or
15 more days of work per month and would be off-task more than thirty percent of the time. AR 824.

16 **C. Examining Medical Sources**

17 On June 14, 2013, state agency psychiatric examiner Dr. Patricia Spivey completed a
18 psychological disability examination and evaluation of Thy. AR 486-87. Spivey did not review
19 any documents relating to Thy’s medical history, and based her findings and diagnoses on
20 “today’s evaluation including test scores, mental status exam and clinical interview.” AR 488. At
21 the examination, Thy said (through a Cambodian interpreter) that she worked for five years at a
22 bakery, that she also worked at an assembly job that ended in 2009. AR 487.¹⁸ Thy stated that she
23 takes the bus, “feels faint and is afraid to drive,” and that she is able to shop, cook, and take her
24 daughter places. She complained of fainting spells, and reported that she has diabetes,
25 hypertension, and high cholesterol. AR 487. Thy also reported being depressed in the past,
26 having nightmares, and previously attempting to kill herself. AR 487. Spivey noted that “more

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28 ¹⁸ Thy testified at the ALJ hearing that the last time she worked was in January 2002. *See* AR 70-71.

1 information [was] needed regarding Thy's depression, as she was "very vague about details." AR
2 487. Spivey found "[n]o signs of acute mental illness, mood disorder, or thought disorder," and
3 noted that Thy was "[c]ooperative but quiet and not forthcoming with information" and "avoided
4 many questions. AR 488. With respect to Thy's "present functioning," Spivey concluded that
5 Thy "was unable to produce details about psychiatric history, either due to cultural differences or
6 unwillingness to elaborate. On intake forms and in verbal response she was only describing
7 medical issues. She was in no apparent distress." AR 488. Spivey also noted that Thy was unable
8 to complete calculations correctly or interpret a metaphor, that her general knowledge was "poor,"
9 and that she only "[r]ecalled 2 of 3 items after a brief delay," but her long term memory was good.
10 AR 488. Spivey's diagnostic impressions ruled out malingering and "Depressive Disorder NOS
11 [not otherwise specified]," but she was "unable to determine" a prognosis, as "no collateral
12 information was available." AR 489. As to Thy's work-related abilities, Spivey found mild
13 impairment in Thy's ability to maintain adequate attention and concentration, withstand the stress
14 of a routine work day, and maintain emotional stability and predictability were mildly impaired,
15 but no impairment in her ability to follow simple or complex instructions, maintain adequate pace
16 to complete simple repetitive tasks or complex tasks, adapt to changes in job routine,
17 communicate with others verbally or in writing, and interact appropriately with coworkers,
18 supervisors, and the public on a daily basis. AR 489.

19 On June 19, 2013, Dr. Farah M. Rana, a non-treating examining neurologist, completed a
20 one-time internal medicine evaluation of Thy. AR 490-42. Thy reported being diagnosed in 2005
21 with type two diabetes and hypertension, for which "she has been on medications all along," and
22 denied having retinal or renal complications from diabetes or having any numbness or paresthesia
23 in her hands and feet. AR 490. Thy also reported that "[s]he has issues with depression and has
24 been on antidepressants for a while," but that her "mood is stable as long as she takes her
25 medication," and that "she can do her day-to-day activities, but she gets tired easily." AR 490.
26 Rana noted that "[t]here are a couple of progress notes available when [Thy] has been followed for
27 diabetes type 2, hypertension, and depression," and listed "losartan, simvastatin, baby aspirin,
28 metformin, glipizide, Actos, fluoxetine, hydrochlorothiazide, Lantus, and NovoLog" as Thy's

1 current medications. AR 490-91. Rana did not find any dependent edema or localized
2 inflammation or swelling in Thy's extremities, and noted that Thy had full range of motion in her
3 joints. AR 491. Rana rated Thy's motor strength as a "5/5 throughout," and found no gait
4 abnormalities, sensory deficits, or aphasia or dysarthria. AR 491. She wrote that Thy was
5 "cooperative with the examination," and concluded that Thy presented with diabetes type two, had
6 a history of hypertension, and had a reported history of depression. AR 491. Rana found that Thy
7 had no sitting or postural limitations, did not need an assistive device, and that she could take
8 public transportation, stand and walk for 6 hours with breaks in an 8 hour day, carry 25 pounds
9 frequently and 50 pounds occasionally, and push and pull devices up to 50 pounds. AR 492.

10 **D. Non-Examining Medical Sources**

11 On July 15, 2013, non-examining agency psychological consultant Dr. P.M. Balson
12 completed a Psychiatric Review Technique based on a review of Spivey's and Rana's June 2013
13 examinations. AR 493-504.¹⁹ Balson concluded that Thy's mental impairments (12.04 Affective
14 Disorders) were not severe, and found that Thy's allegations were "partially credible," as her
15 "[v]ague statements that she is unable to work are not fully supported by the evidence in file" and
16 "some level of fatigue is expected with [Thy's] condition but not to the extent reported." AR 503.
17 Balson agreed with Spivey and Rana that Thy was capable of medium RFC with mild limitations.
18 AR 503.

19 On July 18, 2013, V. Phillips MD, a non-examining state agency medical consultant,
20

21 _____
22 ¹⁹ The "Consultant's Notes" section of the Psychiatric Review Technique refers to an undated
23 "Comparison Point Decision" (presumably from 2005, as it lists Thy's age of 36), which Dr.
24 Balson summarized as follows:

25 Comparison Point Decision

26 Age: 36 EOD [Established Onset Date]: n/a

27 Basis/Type of Decision: n/a

28 Allegations: Shaky, dizziness, headaches, insomnia, fatigue

Findings: At initial level, claim was allowed by DDS. Case was reviewed by [Disability
Quality Branch] and returned to DDS for additional development. After reviewing the
additional evidence and considering a prior ALJ unfavorable affirmation, DDS determined
that the ALJ decision would be adopted and claim should be denied. The [Field Office]
mistakenly inputted [sic] the case as an allowance and clmt was erroneously placed in pay
status.

AR 503. Balson noted that "[g]iven the information under comparison point decision above, there
is an exception to MI [Medical Improvement]." AR 503.

1 completed a “Physical Residual Functional Capacity Assessment,” and determined that Thy had a
2 medium RFC. AR 505-510. Phillips listed a primary diagnosis of Diabetes Mellitus and
3 secondary diagnoses of obesity, hypertension, and hyperlipidemia. AR 505. He endorsed the
4 same exertional limitations as Rana (that Thy could stand and walk for 6 hours with breaks in an 8
5 hour day, carry 25 pounds frequently and 50 pounds occasionally, and push and pull devices up to
6 50 pounds), and additionally determined that Thy could sit for 6 hours with normal breaks in an 8
7 hour day. AR 506. Phillips found no evidence of postural, manipulative, visual, communicative,
8 or environmental limitations, and he noted that the conclusions of the other treating/examining
9 sources regarding Thy’s limitations or restrictions were not significantly different from his own
10 findings. AR 510.

11 On October 25, 2013, non-examining agency psychological consultant Dr. R. Lee
12 reviewed the record for a “Mental Residual Functional Capacity Assessment” (AR 586-89), a
13 “Psychiatric Review Technique” (AR 590-600), and a “Case Analysis” (AR 601-606). Lee
14 determined that Thy was “mentally capable of adapting to and performing sustained simple tasks,
15 with limited public interactions.” AR 588. Thy was moderately limited in her ability to
16 understand, remember, and carry out detailed instructions, maintain attention and concentration for
17 extended periods, work in coordination with or proximity to others without being distracted by
18 them, “complete a normal workday and workweek without interruptions from psychologically
19 based symptoms,” interact appropriately with the public, and respond appropriately to changes in
20 the work setting. AR 586-87. Lee also indicated that Thy had an affective disorder, specifically
21 “depressive syndrome,” characterized by symptoms of appetite disturbance with change in weight,
22 sleep disturbance, decreased energy, and thoughts of suicide. AR 952. Lee concluded that Thy
23 had moderate functional limitations, including restriction of activities of daily living, and
24 difficulties in maintaining social functioning, concentration, persistence or pace. AR 598. Lee
25 found that there was insufficient evidence to determine whether Thy had repeated episodes of
26 decompensation. AR 598.

27 On October 29, 2013, non-examining medical consultant Joan Bradus MD reviewed Thy’s
28 records and completed a “Physical Residual Functional Capacity Assessment.” AR 607-614.

1 Bradus determined that Thy had a RFC to perform medium work, with some postural limitations
2 due to Thy’s reported dizziness and “poor control” of her diabetes and hypertension. AR 609,
3 614. Specifically, Bradus concluded that Thy could occasionally balance and stoop and climb
4 ladders, ropes, and stairs, and frequently climb ramps and stairs, stoop, kneel, crouch and crawl.
5 AR 609.

6 **IV. DISABILITY DETERMINATION**

7 A claimant is “disabled” if: (1) “[s]he is unable to engage in any substantial gainful
8 activity by reason of any medically determinable physical or mental impairment which can be
9 expected to result in death or which has lasted or can be expected to last for a continuous period of
10 not less than twelve months,” and (2) the impairment is “of such severity the [s]he is not only
11 unable to do h[er] previous work but cannot, considering h[er] age, education, and work
12 experience, engage in any other kind of substantial gainful work which exists in the national
13 economy.” 42 U.S.C. §§ 1382c(a)(3)(A)-(B); *see Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir.
14 2012).

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

16 An ALJ engages in a five-step sequential analysis to determine whether a claimant is
17 disabled. *See* 20 C.F.R §§ 404.1520(a) and 416.920(a). In the first step, the ALJ determines
18 whether the claimant is engaged in substantial gainful activity (“SGA”).²⁰ 20 C.F.R. §§
19 404.1520(a)(4)(i) and 416.920(a)(4)(i). If the claimant is not engaging in SGA, the ALJ
20 determines in step two whether the claimant suffers from a severe impairment or combination of
21 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii) and 416.920(a)(4)(ii). An impairment must have
22 lasted or be expected to last 12 months in order to be considered “severe.” *Id.* § 416.909.²¹ In step

23 _____
24 ²⁰ Substantial activity is defined as work requiring significant physical or mental activity. 20
25 C.F.R. §§ 404.1572(a) and 416.972(a). Gainful activity is “work usually done for pay or profit,”
26 regardless of whether the claimant is actually compensated. 20 C.F.R. §§ 404.1572(b) and
27 416.972(b).

28 ²¹ In addition, a “severe” impairment or combination of impairments significantly limits an
individual’s ability to perform basic work activities. *Id.* § 416.920(c). Conversely, an impairment
or combination of impairments that is “not severe” within the meaning of the regulations is only a
slight abnormality that has no more than a minimal effect on an individual’s ability to work. *Id.* §
416.921.

1 three, the ALJ determines whether the claimant’s impairment or combination of impairments
2 meets or medically equals the criteria of an impairment listed in the administrative regulations.
3 *See* 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. Part 404, Subpart P, App. 1; *see*
4 *also* 20 C.F.R. §§ 404.1525 and 416.925. If the claimant satisfies the criteria of a listed
5 impairment, she is disabled; if not, the ALJ proceeds to the next step.

6 Before step four, the ALJ determines the claimant’s Residual Functional Capacity
7 (“RFC”), which is his ability to perform physical and mental work activities on a sustained basis
8 despite the limiting effects of his impairments. 20 C.F.R. §§ 404.1520(e) and 416.920(e). In
9 making this finding, the ALJ considers all the evidence in the record including the claimant’s
10 severe and non-severe impairments. 20 C.F.R. §§ 404.1520(e), 404.1545; 416.920(e), and
11 416.945. At step four, the ALJ determines whether the claimant has the RFC to perform the
12 requirements of his “past relevant work.”²² 20 C.F.R. §§ 404.1520(a)(4)(iv) and
13 416.920(a)(4)(iv). If the claimant cannot perform her past work, the ALJ determines in step five
14 whether the claimant can perform any other work existing in the national economy considering her
15 RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(a)(4)(v) and 416.920(a)(4)(v).
16 If the claimant is able to do other work, she is not disabled.

17 **B. ALJ’s Decision**

18 At step one, the ALJ found that Thy had not engaged in any “substantial gainful activity”
19 since 2001. AR 16. At step two, the ALJ found that Thy had severe impairments of “uncontrolled
20 diabetes mellitus, obesity, an anxiety disorder, and an affective disorder,” which “more than
21 minimally affect the claimant’s ability to perform basic work functions.” AR 16-17. With
22 respect to Thy’s other alleged impairments, the ALJ concluded:

23 Medically determinable impairments such as benign hypertension, possibly a
24 history of obstructive sleep apnea, well-controlled hyperlipidemia, iron deficiency
25 anemia, resolved hypokalemia, resolved indigestion, history of vertigo, and likely
many other impairments are not severe because there is no probative evidence that

26
27 ²² “Past relevant work” means substantial gainful activity performed (either as the claimant
28 actually performed it or as it is generally performed in the national economy) within the last
fifteen years or fifteen years prior to the alleged disability onset date. 20 C.F.R. §§ 404.1560(b),
404.1565, 416.960(b), and 416.965.

1 these impairments more than minimally affect the claimant’s ability to perform
2 basic work functions. All impairments, however, regardless of severity, as well as
3 the claimant’s self-described limitations and subjective pain, have been considered
4 in combination in assessing the claimant’s residual functional capacity.

5 AR 17.

6 At step three, the ALJ found that these impairments did not meet or medically
7 equal the criteria for disability listed in the administrative regulations. AR 17. With
8 regard to diabetes mellitus, the ALJ concluded that the record lacked the “necessary
9 objective findings” to satisfy SSA criteria—namely, evidence of “neuropathy
10 demonstrated by significant and persistent disorganization of motor function in two
11 extremities” or evidence that Thy “has experienced end organ damage or an impairment
12 secondary to diabetes.” AR 18. Similarly, the ALJ determined that the record did not
13 contain adequate evidence of anemia. AR 17. The ALJ determined that obesity, which is
14 not a listed impairment, did not sufficiently limit Thy’s “ability to perform routine
15 movement and necessary physical activity within the work environment.” AR 17.

16 With respect to Thy’s anxiety and affective disorders, the ALJ found that “[t]he
17 severity of the claimant’s mental impairments, considered singly and in combination, do
18 not meet or medically equal the criterial of listings 12.04 and 12.06.” AR 18.

19 At step four, the ALJ determined that Thy had the RFC to “perform medium work
20 as defined in 20 C.F.R. § 416.967(c). Non-exertionally, she should not climb ladders,
21 ropes, or scaffolding. She can frequently climb ramps and stairs, and frequently balance,
22 stoop, kneel, crouch and crawl. The claimant can interact with the public occasionally.”
23 AR 20. The ALJ found that while Thy’s “medically determinable impairments could
24 reasonably be expected to cause some of the alleged symptoms and limitations,” her
25 “statements concerning the intensity, persistence and limiting effects of these symptoms
26 are not entirely credible.” AR 20.

27 In reaching this determination, the ALJ found that objective diagnostic imaging—
28 consisting of a July 2012 bilateral screening mammogram and a June 2013 pelvic
ultrasound—did not support a finding of disability or severe impairment. AR 20-21. The

1 ALJ also determined that “a preponderance of the objective of evidence of record does not
2 support a finding of disability.” AR 21. He noted that “the record is replete with evidence
3 of daily activities that are not limited to the extent one would expect, given the complaints
4 of disabling symptoms and limitations,” and that Thy “has not received the type of medical
5 treatment one would expect for a totally disabled individual.” AR 24-25.

6 The ALJ accorded “great weight” to the opinions of one-time examining
7 neurologist Rana, non-examining medical consultants Phillips and Bradus, and non-
8 examining psychological consultant Lee. AR 21, 23. The ALJ also accorded “great
9 weight” to the opinion of non-examining agency medical consultant Dr. Kweli Amusa,
10 who testified at the ALJ hearing that Thy’s physical impairments did not meet or equal a
11 listed impairment. AR 24.²³ ALJ Laverdure gave “very little weight” to the June 2015
12 medical source statement of Thy’s treating physicians NP Thai and Dr. Ma because their
13 opinion “is brief, conclusory, and inadequately supported by clinical findings,” and
14 inconsistent with RFC assessment of “two non-examining sources, an examining source,
15 and a medical expert.” AR 22.

16 As to Thy’s mental impairments, the ALJ found that “the record is quite benign and
17 mostly lacking prior to June 2013, when the SSA determined that the claimant had been
18 erroneously paid benefits.” AR 22. In determining that “there is no credible objective
19 evidence showing [Thy] suffers from disabling symptoms,” the ALJ gave “very little
20 weight” to the opinions of CERI psychologists Gracer and Afary, who “relied heavily on
21 the subjective report of symptoms and limitations provided by [Thy], and seemed to accept
22 uncritically as true most, if not all, of what [Thy] reported.” AR 24. The ALJ opined that
23 doctors Gracer and Afary “were either unaware of—or chose to ignore—all other evidence
24 . . . that shows a long history of no mental health treatment, followed by brief treatment
25 and rapid improvement in [Thy’s] alleged symptoms.” AR 24. The ALJ similarly gave
26 “little weight” to the July 2013 opinion of non-examining agency psychological consultant
27

28 ²³ At the ALJ hearing, Dr. Amusa testified that “I’m not an expert in mental health.” AR 59.

1 Balson, who concluded that Thy had no severe mental impairments, because “the record as
2 a whole supports severe mental impairments.” AR 22. The ALJ accorded “some weight”
3 to the opinion of agency psychiatric examiner Dr. Spivey—who ruled out depressive
4 disorder and concluded that Thy had no significant limitations from a mental
5 impairment—but found that Spivey “did not give enough consideration to [Thy’s] self-
6 reported limitations and feelings of anxiety.” AR 22. Additionally, the ALJ concluded
7 that there “is ample reason to find the claimant not entirely credible.” AR 24. Among
8 those reasons was that Thy “apparently sought no mental health treatment until after the
9 SSA initiated proceedings in 2013,” and that it is “doubtful that the claimant does not have
10 some capacity to communicate in English” as she graduated from high school. AR 24-25.

11 At step five, the ALJ determined that Thy is capable of performing past relevant
12 work as a hand packager, which a Vocational Expert (“VE”) testified at the hearing “is an
13 unskilled, exertionally medium occupation.” AR 25. The ALJ also made “alternative
14 findings” as to step five, and determined that there are other jobs in the national economy
15 Thy could perform. AR 25. Specifically, he considered Thy’s “age, education, work
16 experience, and residual functional capacity,” and determined that she could perform
17 “unskilled work at the medium, light and sedentary exertional levels,” as these jobs
18 “ordinarily involve dealing primarily with objects, rather than with data or people.” AR
19 26. In making this finding, the ALJ found that Thy “has at least a high school education
20 and is able to communicate in English to some undisclosed degree.” AR 25.

21 LEGAL STANDARD

22 I. SUMMARY JUDGMENT

23 Summary judgment on a claim or defense is appropriate “if the movant shows that there is
24 no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
25 law.” FED. R. CIV. P. 56(a). In order to prevail, a party moving for summary judgment must show
26 the absence of a genuine issue of material fact with respect to an essential element of the non-
27 moving party's claim, or to a defense on which the non-moving party will bear the burden of
28 persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has

1 made this showing, the burden then shifts to the party opposing summary judgment to identify
2 “specific facts showing there is a genuine issue for trial.” *Id.* The party opposing summary
3 judgment must then present affirmative evidence from which a jury could return a verdict in that
4 party’s favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

5 **II. STANDARD OF REVIEW**

6 Under 42 U.S.C. § 405(g), district courts have jurisdiction to review the final decisions of
7 the Commissioner of Social Security. The Commissioner’s decision must be upheld unless the
8 determination is not supported by substantial evidence or is based on legal error. *See* 42 U.S.C. §
9 405(g); *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir.1996).

10 Substantial evidence is “more than a mere scintilla, but less than a preponderance.” *Saelee*
11 *v. Chater*, 94 F.3d 520, 522 (9th Cir.1996) (internal quotations and citations omitted). Substantial
12 evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a
13 conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (internal quotations and citations
14 omitted). A court must review the record as a whole and consider adverse as well as supporting
15 evidence. *See Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (a reviewing court
16 “may not affirm simply by isolating a specific quantum of supporting evidence.”) (internal
17 quotations and citations omitted). Where “evidence is susceptible to more than one rational
18 interpretation,” the ALJ’s decision must be upheld. *See Morgan v. Comm’r of the Soc. Sec.*
19 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

20 Legal error occurs when an ALJ “breaches its special duty to fully and fairly develop the
21 record and to assure that the claimant’s interests are considered, resulting in non-harmless legal
22 error to the applicant.” *Hassan v. Colvin*, No. 12-cv-05821-RS, 2015 WL 2358023, at *1 (N.D.
23 Cal. May 15, 2015) (internal quotations and citations omitted). Reversal is not warranted if the
24 legal error is “inconsequential to the ultimate nondisability determination.” *Molina v. Astrue*, 674
25 F.3d 1104, 1115 (9th Cir. 2012) (internal quotations omitted).

26 **DISCUSSION**

27 Thy makes several challenges to the ALJ’s conclusions. She argues that the ALJ erred by:
28 (1) failing to fully develop the administrative record from Thy’s prior claims and by refusing to

1 hear testimony from a psychiatric medical expert; (2) rejecting the opinions of Thy’s treating
2 medical sources without clear and convincing reasons; (3) discrediting Thy’s subjective
3 complaints without clear and convincing reasons; (4) relying on a RFC finding that is not
4 supported by substantial evidence; and (5) relying on an incomplete hypothetical, vocational
5 expert testimony, and medical-vocational guidelines that do not accurately reflect all of Thy’s
6 limitations. Pl. Mot. at 8-9.

7 **I. NEED TO FULLY DEVELOP THE ADMINISTRATIVE RECORD**

8 Thy contends that the ALJ erred by (1) failing to obtain and consider evidence from her
9 prior claim file, and (2) failing to call a psychiatric medical expert to testify, despite “substantial
10 evidence of mental impairment and non-exertional limitations.” Pl. Mot. at 9. She asserts that
11 these errors are particularly harmful in light of the ALJ’s finding that “as for mental impairments,
12 the record is quite benign and mostly lacking prior to June 2013,” even though there is evidence in
13 the record indicating that Thy had received mental health treatment prior to June 2013. Pl. Mot. at
14 9; AR 22.

15 The Ninth Circuit has explained that “[i]n Social Security cases, the ALJ has a special duty
16 to develop the record fully and fairly and to ensure that the claimant’s interests are considered,
17 even when the claimant is represented by counsel.” *Mayes v. Massanari*, 276 F.3d 453, 459 (9th
18 Cir. 2001). This duty “is triggered only when there is ambiguous evidence or when the record is
19 inadequate to allow for proper evaluation of the evidence.” *Id.* at 459-60. “The ALJ may
20 discharge this duty in several ways, including: subpoenaing the claimant’s physicians, submitting
21 questions to the claimant’s physicians, continuing the hearing, or keeping the record open after the
22 hearing to allow supplementation of the record.” *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th
23 Cir. 2001).

24 As to the prior claim file, Thy argues that the ALJ’s failure to fully develop the
25 administrative record by not obtaining and incorporating evidence from her prior claim constitutes
26 reversible error. Pl. Mot. at 9; Reply at 4. Plaintiff asserts that evidence from her prior claim file
27 is necessary because: (1) the evidence of disability from 2006 is relevant to a determination of
28 whether she is disabled now and (2) whether she was disabled prior to her date of last insured in

1 2007 is relevant as to whether she is entitled to Title II benefits. Reply at 3. Thy further contends
2 that “[t]here is no notice or other explanation in the record for the determination that she was
3 erroneously found disabled in 2006, and therefore she has not been provided with due process to
4 challenge that determination.” Reply at 2. The Commissioner responds that the ALJ had no duty
5 to include Thy’s prior claim file because the “Group 1 exception” applies to this case, meaning the
6 only question before the ALJ was whether Thy is currently disabled. Def. Mot. at 13. The
7 Commissioner also contends that any duty to develop the record was satisfied when the ALJ kept
8 the record open after the hearing, allowing plaintiff to submit additional information. *Id.* at 14.
9 Plaintiff agrees that the Group 1 exception applies, and thus “the starting point for determining
10 disability should be July 2013, when she was first found not disabled during the CDR process.”
11 AR 419. However, Thy argues the claim file is nonetheless relevant to why she was (or was not)
12 found disabled in 2006, especially in light of the ALJ’s reliance on the fact a record of mental
13 health treatment and mental health issues is absent prior to 2013.

14 The status of Thy’s prior claim file—including the entirety of its contents—is unclear from
15 the record. ALJ Laverdure notes that “[w]e do not have Judge McCarrick’s decision,” and at the
16 hearing he remarked, “[a]t this point, I don’t know what [the DDS] based the initial determination
17 on that she wasn’t disabled” and “[w]e don’t know what records they had to make that
18 determination.” AR 49-50; *see* AR 601. Thy’s attorney testified at the hearing, “I tried to get the
19 prior file to see if there were any records in the prior file, but they weren’t included.” AR 49. The
20 ALJ responded that “[t]here is a prior file here. Let me see if there’s anything in there. It might
21 have only been a paper file at the time. The prior file consisted of those three documents
22 [exhibits] 1, 2, and 3F.” AR 49. The three exhibits referred to by the ALJ are agency medical
23 consultant Ochitill’s half-page “Case Analysis” notes from April 11, 2006, in which he
24 recommended that the DDS obtain Thy’s medical records to confirm her reported suicide attempts
25 (AR 434), and the Review of Mental Residual Functional Capacity Assessment form (AR 437-38)
26 and Review of Psychiatric Review Technique form (AR 435-36), also dated April 11, 2006, in
27 which he indicated that “ME needed to clarify severity of impairment.” AR 435-38. The ALJ
28

1 further commented that “[t]here might have been other paper records that didn’t get incorporated
2 along the way.” AR 49.

3 However, J. Ho, the Agency medical reviewer who completed the 2006 Request for
4 Corrective Action of Thy’s initial disability determination, noted in his findings that “[t]he
5 medical evidence in the current file includes a 5/03 report from Summit Medical Center for
6 abdominal pain, which was resolved, the 9/05-10/05 notes from Asian Community Mental Health
7 Services and the 12/05 psychiatric CE for posttraumatic stress disorder.” AR 427. Not only were
8 these documents not part of the prior file referenced by the ALJ at the hearing, but there do not
9 appear to be any documents in the current record matching that description.

10 At least one agency consultant attempted to obtain Thy’s prior file, apparently without
11 success. Dr. Lee, the non-examining psychological consultant who reviewed Thy’s medical
12 records in October 2013, twice requested the prior claim file (on October 1, 2013 and October 29,
13 2013) from the SSA, noting that there “[h]as to be a prior file somewhere . . . as there is no
14 medical evidence in eView from CPD [Comparison Point Decision].” AR 601. However, he later
15 notes, “unable to locate a copy of decision, despite MC at IN suggesting to adopt ALJ.” AR 604.

16 Neither side persuasively shows that the ALJ’s failure to secure the prior claim file, or
17 establish that it could not be secured/located, is or is not error. While both sides agree that the
18 main legal question before the ALJ was whether Thy is *currently* disabled, the ALJ’s decision did
19 not rest solely on that conclusion. Instead, as phrased by the ALJ, he concluded that Thy “has not
20 been under a disability within the meaning of the Social Security Act since September 8, 2005, the
21 date the application was filed, or since July 1, 2013, when the State agency against determined that
22 the claimant was not disabled.” AR 15, 27. He also relied on the fact that “the record is quite
23 benign and mostly lacking prior to June 2013.” AR 22. In these circumstances, the ALJ’s failure
24 to secure the prior claim file or establish that the prior claim file could not be secured is
25 problematic. As plaintiff points out, in other circumstances (for example in cases of alleged
26 medical improvement), the absence of a file or the ability to reconstruct a file can carry with it
27 different consequences. *See, e.g.*, 20 C.F.R. § 404.1579(c)(3) (if prior file cannot be located or
28 reconstructed, current medical records used to establish baseline).

1 On remand (as required by the errors identified below), the ALJ shall attempt to secure the
2 prior claim file or document that it does not exist and why it does not exist.

3 Plaintiff also argues in her motion (but not in reply) that the ALJ had a duty to secure a
4 psychiatric expert to testify at the hearing. Pl. Mot. at 9-10. On August 11, 2015, eight days
5 before the hearing, counsel requested that a psychological expert also appear at the hearing to
6 testify as to Thy's medical records and diagnoses of PTSD and Major Depressive Disorder. AR
7 409.²⁴ However, a psychological expert could not be scheduled to testify at the hearing because
8 counsel's requests "came too late in the process." AR 51. Instead, the ALJ heard testimony from
9 medical expert and internist Dr. Amusa, who testified, "I'm not an expert in mental health. I can
10 only go on what's documented in the medical record with regards to [Thy's] compliance with
11 medications." AR 59. The ALJ did state, however, "[i]f it's necessary to obtain a mental health
12 expert, we'll do that, if I think that's necessary." AR 51. The ALJ did not ultimately determine it
13 necessary to obtain a mental health expert.

14 Plaintiff does not show that the failure to secure a psychiatric expert for the hearing, given
15 the date on which the request was made, constitutes a failure *by the ALJ* to adequately develop the
16 record.

17 **II. THE ALJ'S REJECTION OF THE OPINIONS OF THY'S TREATING MEDICAL**
18 **SOURCES**

19 Thy argues that the ALJ erred by rejecting the opinions of her treating medical sources—
20 Drs. Ma (and NP Thai), Lukaszewski, Gracer, and Afary—without clear and convincing or
21 specific and legitimate reasons. Pl. Mot. at 4.

22 The Ninth Circuit distinguishes between three types of physicians that provide information
23 about a claimant: "(1) those who treat the claimant (treating physicians); (2) those who examine
24 but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat
25 the claimant (non examining physicians)." *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).

26 _____
27 ²⁴ On July 21, 2015, Thy's counsel also requested the presence of an endocrinologist at the
28 hearing, to evaluate Thy's records and provide a medical opinion regarding Thy's diagnosis of
Diabetes Mellitus Type 2 and her hypoglycemia and leg edema. AR 408. Plaintiff does not argue
that the lack of an endocrinologist at the hearing was reversible error.

1 Generally, the opinion of a treating physician is entitled to greater weight than the opinion of a
2 non-treating physician. *Id*; 20 C.F.R. § 404.1527(d)(2). However, a treating physician’s opinion
3 “is not binding on an ALJ with respect to the existence of an impairment or the ultimate
4 determination of disability.” *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (citation
5 omitted). In order to properly reject the opinion of a treating or examining doctor when it is
6 uncontradicted by another doctor, the ALJ must state “clear and convincing reasons” for doing so.
7 *Lester*, 81 F.3d at 830. If the treating or examining physician’s opinion is contradicted by another
8 physician, however, an ALJ may reject the treating or examining physician’s opinion if she states
9 “specific and legitimate reasons” that are supported by substantial evidence. *Id.* at 830-31.

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

16 **A. Physical Medical Source Statement from Dr. Ma and NP Thai**

17 Thy’s treating clinicians Dr. Ma and NP Thai submitted a Physical Medical Source
18 Statement (dated respectively in June and January 2015) opining that Thy’s ongoing impairments,
19 including dizziness, fatigue, sadness, impaired sleep, depression, and anxiety, would cause her to
20 (1) miss work more than 4 days per month, (2) take unscheduled breaks “very often,” (3) be “off
21 task” more than thirty percent of the time, (4) have “good days” and “bad days,” and (5) need 4
22 hours of rest in an 8 hour work day. AR 784-89. Thai and Ma further opined that Thy could
23 perform manipulative activities such as reaching, handling, and fingering occasionally, lift/carry
24 10 pounds occasionally and 50 pounds rarely, stand/walk about for one hour in an eight hour work
25 day (but for no longer than 15 minutes at a time), sit for 4 hours day (but for no more than 30
26 minutes consecutively), climb stairs and ladders rarely, and balance, twist, stoop, crouch, and
27 squat occasionally. AR 787-88.

28 Without identifying either Dr. Ma or NP Thai by name, the ALJ gave “very little weight”

1 to their opinions in the Medical Source Statement “because it is, brief, conclusory, and
2 inadequately supported by clinical findings,” and “the opinions of two non-examining sources, an
3 examining source, and a medical expert are quite inconsistent with the ‘less than sedentary’
4 residual functional capacity opined by those providers.” AR 22.²⁵ The ALJ’s rejection of the
5 findings in the Physical Medical Source Statement was not warranted.

6 As a threshold matter, the Ninth Circuit has held that although a nurse practitioner working
7 alone does not constitute an acceptable medical source, a nurse practitioner working under a
8 physician constitutes an acceptable medical source. *Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir.
9 1996); *Taylor v. Commissioner of Social Security Administration.*, 659 F.3d 1228, 1234 (9th Cir.
10 2011).²⁶ “Critically, [the doctor’s] endorsement establishes that [the nurse practitioner] worked in
11 conjunction with a treating physician.” *Green v. Colvin*, No. 13-cv-05105-WHO, 2014 WL
12 6066187, at *9 (N.D. Cal. Nov. 13, 2014). It appears from the record that the relationship
13 between NP Thai and Dr. Ma (and other treating medical doctors at AMCHS) is sufficient to
14 demonstrate the supervision necessary to deem NP Thai an “acceptable medical source,” as most
15 of Thai’s appointment notes were signed/endorsed by Dr. Ma or other doctors.

16 Substantively, the record shows that Ma and/or Thai provided medical treatment at
17 AMCHS from February 2014 through June 2015,²⁷ and their appointment notes detailing that
18 treatment are detailed and thorough, and include information relating to Thy’s current medication
19 regimen, blood work and other labs, and current and chronic symptoms. Moreover, the findings

21 ²⁵ The ALJ also appeared to take issue with the fact that “[a] nurse completed [the] form in
22 January, which was countersigned by a medical doctor in June 2015.” AR 22; *see* AR 789. As
discussed in more detail below, both of these providers had a treating relationship with Thy during
this time period; that Dr. Ma signed the statement at a later date does not undermine the opinions.

23 ²⁶ In *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012), the Ninth Circuit preserved *Gomez*’s
24 narrow exception allowing nurse practitioners to be treated as acceptable medical sources when
they work closely under the supervision of a doctor, despite the repeal of 20 C.F.R. §
25 416.913(a)(6), which the *Gomez* court partially relied upon and which provided that “[a] report of
26 an interdisciplinary team that contains the evaluation and signature of an acceptable medical
source is also considered acceptable medical evidence.”

27 ²⁷ Ma also prescribed Thy various medications as early as 2012. *See* AR 452-53 (February 2012
28 refill authorization request listing Dr. Ma as the prescribing clinician); AR 515, 517, 629, 631
(same, prescriptions written on May 20, 2013) AR 535, 537 (same, prescriptions written on
January 2, 2013);

1 listed in those notes generally support their conclusions listed in the Source Statement: that Thy’s
2 chronic dizziness, fatigue caused by her uncontrolled diabetes, and depression would impose
3 limits on her functional abilities.

4 While the records from AMCHS show stability for some of her conditions with
5 medication, the ALJ apparently equated “stability” with improvement sufficient to allow work,
6 without explaining his basis for doing so. Those same treatment notes show that Thy’s conditions
7 and symptoms fluctuated and frequently worsened. *See* AR 685-90 (February 20, 2014
8 comprehensive preventative medicine examination by NP Thai, noting an onset of depression on
9 February 2012, noting her depression as “stable per CM/Dr. Tim” and directing her to continue to
10 follow up with her providers at ACMHS); AR 695-98 (April 17, 2014 appointment with NP Thai,
11 noting that Thy was “doing well” and “no complaint today”); AR 703 (June 23, 2014 appointment
12 for follow-up regarding “hyperglycemia and dizziness last week”; notes taken by NP Thai and Dr.
13 Ma); AR 704-707 (June 30, 2014 appointment with NP Thai noting uncontrolled diabetes
14 symptoms improved); AR 712-16 (July 15, 2014 appointment for dizziness “occur[ring] daily,”
15 notes taken by NP Thai and signed by MD); AR 717-721 (August 5, 2014 appointment noting
16 dizziness symptoms “improved and stable, cont[inue] meclizine”; notes taken by NP Thai and
17 signed by MD); AR 722-26 (September 18, 2014 appointment with NP Thai, noting Thy “feels
18 better now, no more dizziness, no longer needs meclizine”); AR 733-37 (November 19, 2014
19 appointment noting Thy’s depressive disorder as stable and listing meclizine as current medication
20 for dizziness); AR 738-43 (January 15, 2015 appointment, NP Thai notes “still depressed but
21 stable” and lists meclizine as current medication); AR 793-98 (April 21, 2015 appointment with
22 Dr. Ma noting Thy’s chronic depressive disorder was “stable”).

23 That the Medical Source Statement signed by Ma and Thai was “brief and conclusory” is
24 not a valid reason to discredit it because it was based on their prior extensive treatment history
25 with Thy. *See, e.g., Popa v. Berryhill*, No. 15-16848, 2017 WL 4160041, at *5 (9th Cir. Aug. 18,
26 2017) (“Simply put, the fact Dr. Sorrell, an ‘other source,’ provided information in a check-box
27 form provides no reason to reject her opinions, much less a germane reason.”). While the ALJ
28 also discounted the opinion as “inadequately supported by clinical findings,” the ALJ did not

1 suggest why the treatment notes from February 2014 through June 2015 were not sufficient
2 support or why those notes contradicted the January 2015 Medical Source Statement.

3 The ALJ also found the opinion of Dr. Ma and NP Thai regarding Thy's "less than
4 sedentary" RFC to be "quite inconsistent" with the "the opinions of two non-examining sources,
5 an examining source, and a medical expert are quite inconsistent with the 'less than sedentary'
6 residual functional capacity opined by those providers." AR 22. While the ALJ does not specify
7 which providers' opinions he is referring to, presumably he means Dr. Phillips (non-examining
8 source in 2013), Dr. Bradus (non-examining source in 2013), Dr. Rana (examining source in
9 2013), and Dr. Amusa (medical expert who testified at the hearing).

10 With respect to the examiners and non-examining sources from 2013, those doctors not
11 only did not have a treating relationship with Thy, they did not have the opportunity to review the
12 Ma/Thai treatment notes. With respect to Amusa (who presumably had the opportunity to review
13 the Ma/Thai treatment records and Medical Source Statement prior to the hearing), a contradictory
14 opinion about whether sedentary work was appropriate would be a valid basis to decrease the
15 weight given to Ma/Thai. But the ALJ did not identify which portions of Amusa's testimony were
16 contradictory on *this issue*.²⁸

17 Additionally, if ALJ could discount Dr. Ma and NP Thai's opinion because it was "brief,
18 conclusory, and inadequately supported by clinical findings," and contradictory to the likewise
19 brief opinions provided by the non-treating examiners, it still merits special weight pursuant to the
20 factors identified in *Orn*. Dr. Ma and/or NP Thai saw Thy regularly for over a year, starting in
21 February 2014, and they were also involved in other aspects of Thy's treatment, as they
22 coordinated with Dr. Hsu, Thy's endocrinologist, who saw Thy every two to three months for
23 diabetes management from November 2008 to February 2015. *See* AR 762-76 (Dr. Hsu's
24 appointment notes from May 2014 to February 2015, cc'ing NP Thai and/or Dr. Ma).

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26 _____
27 ²⁸ In Opposition, the Commissioner relies on evidence from the record showing that Thy regularly
28 exercised as support for the ALJ's discounting of Ma/Thai's limitations. Oppo. at 17. However, a
"reviewing court may not make independent findings based on the evidence before the ALJ to
conclude that the ALJ's error was harmless" but must instead "review the reasons the ALJ
asserts." *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015).

1 Given this established treatment history, the ALJ improperly discounted the Ma/Thai
2 opinion.

3 **B. Opinions of Drs. Gracer and Afary**

4 Plaintiff also challenges the ALJ’s decision to give “very little weight” to the opinions of
5 James Gracer and Mona Afary from July and August 2015 “because they are brief, conclusory,
6 and inadequately supported by clinical findings.” AR 24.²⁹ Thy started receiving treatment from
7 Gracer and Afary at CERI in June 2015, and those doctors evaluated plaintiff using different
8 trauma and psychological evaluation tools from June through August 2015. AR 815, 816-818.
9 They also completed a Mental Impairment Questionnaire in August 2015, confirming her
10 diagnosis with PTSD and Dysthymic Disorder, giving her a poor prognosis, and opining that she
11 was significantly limited in her functioning in ways that would prevent her from working. AR
12 819-824. It is unclear why the ALJ believed the Gracer/Afary opinions to be “brief and
13 conclusory” given that their opinions were based not only on their intake analysis but also
14 additional, significant psychological testing and evaluations. Prior to giving their opinion in
15 August 2015, Gracer and/or Afary had seen Thy for five sessions. AR 819. The allegedly brief
16 and conclusory nature of the Gracer/Afary opinions are not a valid ground on which to discount
17 their opinions. *See, e.g., Popa v. Berryhill*, No. 15-16848, 2017 WL 4160041, at *5.

18 The ALJ called the Gracer and Afary opinions “wildly inconsistent” with the treatment
19 notes from Lukaszewski that showed Thy was improving on medication and noted a steady
20 increase in Thy’s GAF from 47 in February 2014 up to 60 as of April 2015. AR 651, 790-92.
21 However, as plaintiff points out, a GAF of 60 still indicates moderate (as opposed to mild)
22 symptoms. Pl. Mot. at 5. There was no opinion from Lukaszewski, for example, that as a result of
23

24 ²⁹ Plaintiff in passing also argues that the ALJ rejected the opinion of Dr. Lukaszewski – that Thy
25 had moderate to marked non-exertional limitations secondary to chronic PTSD – without
26 providing clear and convincing or specific and legitimate reasons. Pl. Mot. at 12. But plaintiff
27 does not indicate where Lukaszewski made that opinion. Plaintiff points out that her GAF score
28 during her treatment from February 2014 through April 2015 rose, but never exceeded 60, and
argues that a GAF of 60 still indicates moderate (as opposed to mild) symptoms. AR 790-92, Pl.
Mot. at 5. The ALJ actually relied on Lukaszewski’s progress notes, characterizing them as
generally positive and showing progress, in order to discount the later notes and opinions from
James Gracer and Mona Afary. AR 23.

1 her improvement and as of April 2015, Thy was *not* limited in her ability to function or that Thy
2 could handle the requirements of regular work.

3 The ALJ concluded that Gracer and Afary relied too heavily on Thy’s subjective reports of
4 symptoms and limitations and chose to ignore (or were unaware) that Thy received no mental
5 health treatment between 2006 and 2013 and that treatment notes by Lukaszewski showed
6 significant improvement. But there is evidence from 2009 and then again in April 2012 (and well
7 prior to the June/July 2013 notification by the SSA that Thy might lose her benefits) that Thy was
8 receiving psychotropic medication from her primary care physician, although there is no evidence
9 that she was seeing a psychiatrist during this time. AR 465 (identifying fluoxetine prescriptions
10 from April through August 2012); AR 514 (identifying fluoxetine prescriptions from May 2013
11 through September 2013); AR 540 (identifying fluoxetine prescriptions from December 2012
12 through March 2013); *see* AR 933 (January 28, 2009 AHS progress note noting Thy’s depression
13 medication changed from Lexapro to Fluoxetine “for formulary reasons”). And as noted above,
14 while Thy improved during her treatment with Lukaszewski (at the same time she was receiving
15 therapy twice a month and case management services from Prum and Meas-Powell), there is no
16 analysis that her PTSD or major depression had stabilized as of April 2015 *at a level* that allowed
17 her to work or did not severely impair her daily life functioning.

18 The ALJ also believed Gracer and Afary ignored, or were unaware of, inconsistencies
19 between Thy’s allegations and her functional abilities. He never identified any functional abilities
20 that were contrary to the Gracer and Afary opinions.³⁰ He also asserted that Gracer and Afary
21 should not have relied on Thy’s subjective statements because Thy had significant credibility
22 issues. Specifically, the ALJ discounted Thy’s credibility because she only sought mental health
23 treatment in or just after June 2013, when the SSA questioned whether she was currently disabled
24 and because the source of claimant’s alleged trauma shifted from the rape to her childhood

25 _____
26 ³⁰ The ALJ did not actually identify Thy’s “actual” functional abilities that undermined her
27 reported limitations, but presumably the ALJ meant his prior recognition that plaintiff could
28 independently perform her own grooming, feed herself and prepare simple meals, engage in some
limited household chores over an extended period of time, shop for groceries, and take the bus.
AR 18; *see also* AR 72-75 (hearing transcript).

1 experiences in Cambodia only when she began seeing Gracer and Afary and “shortly before” the
2 ALJ hearing. AR 22, 24. Neither reason for discounting her credibility is accurate. As discussed
3 earlier, Thy sought mental health treatment in 2005 through 2006, and was being prescribed
4 psychotropic medication by her primary care physician well before June 2013. *See, e.g.*, AR 933,
5 935, 937, 939 (2009), AR 465 (April through August 2012); AR 514 (May 2013 through
6 September 2013); AR 540 (December 2012 through March 2013); *see also* AR 891 (change from
7 Paxil to Zoloft in 2005). And there is evidence that at least since July 2013 (and not shortly before
8 the hearing as characterized by the ALJ), that she identified the traumatic events from her
9 childhood in Cambodia as a source of her current mental health issues. AR 635 (July 2013).

10 In sum, the ALJ made numerous factual misstatements as support for discounting the
11 Gracer and Afary opinions.

12 **III. THE ALJ ERRED BY DISCREDITING THY’S STATEMENTS CONCERNING**
13 **THE INTENSITY, PERSISTENCE, AND LIMITING EFFECTS OF HER**
14 **SYMPTOMS**

15 The ALJ must engage in a two-step analysis when evaluating a claimant’s credibility.
16 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, the ALJ determines
17 “whether the claimant has presented objective medical evidence of an underlying impairment
18 which could reasonably be expected to produce the pain or other symptoms alleged.” *Id.* at 1036
19 (internal quotations omitted). Second, if the claimant has met the first step and there is no
20 evidence of malingering, “the ALJ can reject the claimant’s testimony about the severity of her
21 symptoms only by offering specific, clear and convincing reasons for doing so.” *Id.* (internal
22 quotations omitted); *Burrell v. Colvin*, 775 F.3d 1133, 1136 (9th Cir. 2014); *Garrison v. Colvin*,
23 759 F.3d 995, 1014-15 (9th Cir. 2014). An ALJ must “specifically identify what testimony is
24 credible and what testimony undermines claimant’s complaints.” *Morgan*, 169 F.3d at 599.

25 The ALJ may consider many factors when weighing credibility, including “reputation for
26 truthfulness, inconsistencies in testimony or between testimony and conduct, daily activities, and
27 unexplained, or inadequately explained, failure to seek treatment or follow a prescribed course of
28 treatment.” *Orn v. Astrue*, 495 F.3d 625, 636 (9th Cir. 2007) (internal quotations omitted). An
ALJ’s assessment of a claimant’s credibility and pain severity is entitled to great weight. *See*

1 *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989).

2 Here, the ALJ concluded that there “is ample reason to find the claimant not
3 entirely credible, as discussed herein.” AR 24. “Foremost” of these reasons is that Thy
4 “apparently sought no mental health treatment until after the SSA initiated proceedings in
5 2013,” even though the source of her trauma was “a rape that allegedly occurred in 2000,
6 or 2001, or 2002, or 2003.” AR 24. However, as discussed above, that is not accurate.

7 Second, the ALJ found it suspicious that Thy saw CERI psychologists Gracer and
8 Afary only “shortly before the hearing,” and that “the focus suddenly shifted to the history
9 of the Khmer Rouge and the ‘killing fields.’” AR 24. Again, that is not accurate.

10 Third, the ALJ asserted that there are “many inconsistencies between the claimant’s
11 allegations and her actual functional abilities.” AR 24. However, those alleged functional
12 abilities were never specifically identified.

13 Fourth, the ALJ relied on the fact that Thy’s “earnings history shows that the
14 claimant worked only sporadically since she reached adulthood, which raises a question as
15 to whether her continuing unemployment is actually due to medical impairments.” AR 25.
16 But that, standing alone, is not clear and convincing evidence sufficient to discredit her
17 testimony.

18 Finally, the ALJ questioned Thy’s alleged limited English proficiency, finding it
19 “doubtful that the claimant does not have some capacity to communicate in English”
20 because she “has at least a high school education and is able to communicate in English to
21 some undisclosed degree.” AR 25.³¹ However, there is no evidence that Thy contends she
22 cannot comprehend *some* English. Instead, her consistent position in the record is that she
23 is not fluent, and has consistently relied on Cambodian interpreters at her appointments,
24

25 ³¹ ALJ Laverdure also noted that ALJ McCarrick, in denying Thy’s 1993 claim, apparently found
26 that she lacked credibility because she misrepresented her alleged inability to speak, read, and
27 write English. *See* AR 14. He also noted that the Quality Assurance reviewer made the same
28 finding in 2006, that Thy’s credibility was doubtful because she still alleged an inability to speak,
read and write English. AR 13, 427. However, because of the lack of records from those claim
files, including the lack of ALJ McCarrick’s *actual* opinion, ALJ Laverdure cannot simply
incorporate those alleged prior conclusions as a basis for his determination as to Thy’s credibility
as of 2013.

1 evaluations, and at the ALJ hearing. AR 487, 640, 653, 792, 799.

2 Given my conclusions concerning the errors made by the ALJ with respect to the
3 discrediting of Thy’s treating sources and the treatment of her credibility, I need not reach
4 the additional errors asserted with respect to the ALJ’s RFC determination and use of an
5 allegedly incomplete hypothetical.

6 **IV. REMAND FOR FURTHER PROCEEDINGS**

7 Plaintiff argues that in light of the errors made by the ALJ here, remand for an award of
8 benefits is warranted. When reviewing courts find that an ALJ has erred, they typically follow the
9 “ordinary remand rule,” which states that courts should remand to the agency for additional
10 proceedings where “the record before the agency does not support the agency action, . . . the
11 agency has not considered all relevant factors, or . . . the reviewing court simply cannot evaluate
12 the challenged agency action on the basis of the record before it.” *Treichler v. Comm’r of Soc.*
13 *Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014). However, courts may depart from this practice
14 in “rare circumstances.” *Id.*

15 The Ninth Circuit has articulated a three-part standard for determining when departures
16 from the ordinary remand rule are appropriate. Courts may remand to an ALJ with instructions to
17 award benefits when the following requirements are satisfied: “(1) the record has been fully
18 developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has
19 failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or
20 medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ
21 would be required to find the claimant disabled on remand.” *Garrison v. Colvin*, 759 F.3d 995,
22 1020 (9th Cir. 2014); *see also Treichler*, 775 F.3d at 1101. No further proceedings are necessary
23 where “it is clear from the record that a claimant is entitled to benefits” and “the record has been
24 developed fully and further administrative proceedings would serve no useful purpose.” *Garrison*,
25 759 F.3d at 1019; *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004).

26 While plaintiff asks me to remand this case for an award of benefits, as opposed to
27 further proceedings consistent with this opinion, I decline to do so. I am not convinced
28 that further development of the record – including the testimony of a psychiatric expert and

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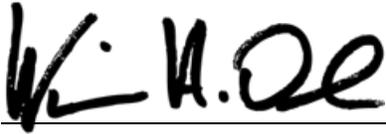
a determination of whether the records from Thy prior claims can be located – would serve no useful purpose.³²

CONCLUSION

For the foregoing reasons, plaintiff’s motion for summary judgment is GRANTED, the Commissioner’s motion for summary judgment is DENIED, and this case is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Dated: September 28, 2017



William H. Orrick
United States District Judge

³² Plaintiff’s alternative request, for remand for further proceedings before a different ALJ based on potential bias of the ALJ and under the authority of 20 C.F.R. § 404.940, is DENIED. If this case is reassigned to ALJ Laverdure on remand, plaintiff may object under the procedures of § 404.940.