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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SHARON GREEN,
Plaintiff,
v.
CAROLYN W. COLVIN,
Defendant.

Case No. 16-cv-04716-WHO

**ORDER GRANTING PLAINTIFF'S
MOTION AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 19, 20

INTRODUCTION

Plaintiff Sharon Green appeals the denial of disability and supplemental security income benefits by the Social Security Administration, arguing that the Administrative Law Judge (“ALJ”) erred in failing to consider or adequately consider Green’s severe impairments and impermissibly discounting treating sources and her subjective testimony. The SSA Commissioner cross-moves for summary judgment, arguing that the ALJ’s denial should be affirmed. I agree with Green that the ALJ failed to consider several of her impairments and improperly rejected the opinions of her treating therapist and examining psychologist, misread the notes of the doctors and physician’s assistant who treated her chronic pain syndrome, and erroneously discounted her testimony about the significance of her pain and extent of her limitations. Green’s motion is GRANTED, the Commissioner’s motion is DENIED, and this case is remanded for further proceedings consistent with this Order.

BACKGROUND

I. PROCEDURAL BACKGROUND

Green filed Tile II and Title XVI applications for benefits on September 21, 2012, for disabilities she claims began on August 1, 2009. Administrative Record (“AR”) 18. Her application was denied initially on March 6, 2013 and denied on reconsideration on September 23, 2013. *Id.* Green filed a request for a hearing, and on December 15, 2014, she testified at and was represented by counsel at the hearing before Administrative Law Judge Nancy Lisewski. *Id.* The

1 ALJ denied Green’s claim in a decision dated January 22, 2015. AR 18-30. On August 17, 2016,
2 Green commenced this action seeking judicial review pursuant to 42 U.S.C. §§ 405(g) and
3 1383(c)(3). AR 19.

4 **II. PLAINTIFF’S CONDITIONS**

5 Green is a 46-year-old woman who lives with her two young sons in Alameda County. AR
6 39-44. She has no record of gainful employment since August 1, 2009. AR 58. She was
7 previously employed as a security guard, data entry clerk, collections clerk, and hair braider. AR
8 28. She contends that she suffers from several severe physical impairments, including chronic
9 back, neck, and shoulder pain and debilitating headaches. AR 317-18, 324-25, 532-34, 577-78,
10 809. She also asserts that she suffers severe mental impairments, including depression, bulimia,
11 and posttraumatic stress disorder (“PTSD”). AR 796, 810. She endured several traumatic events
12 from her childhood and her first marriage, including repeated episodes of physical and emotional
13 abuse, along with psychological trauma and head trauma. AR 309, 421-23, 578, 780, 786, 795,
14 809-810.

15 **A. Physical Medical Evidence**

16 Green saw Dr. Aubrey A. Swartz, an orthopedic surgeon, from March through September
17 2007. AR 285-94. During her visits, Green complained of chronic pain related to a bus accident.
18 AR 286, 290. Dr. Swartz was not able to “corroborate” the subjective complaints but referred her
19 for physical therapy and then chiropractic treatments. AR 287, 288. In his last treatment note
20 from September 14, 2007, Dr. Swartz concluded that Green’s primary problem was depression
21 and that there was no further treatment she could provide her. *Id.*

22 In 2008, Dr. Judy Bertelsen examined Green, concluding that Green was limited
23 (occasionally, frequently) in her physical capacities based on plaintiff’s own reports. Dr.
24 Bertelsen was unable to fully evaluate Green because of the limited time allowed for clinical
25 appointments. AR 296-98.

26 There are extensive records of Green being treated through the Alameda County Medical
27 Center (“ACMC”) at the Alameda Ambulatory Care Eastmont Wellness Center and at Highland
28 Hospital from 2008 to 2012, and starting again in 2014. AR 352-614. Green went to the ACMC

1 irregularly, sometimes several times in a month and other times not for months.¹ During her
2 visits, Green generally complained about chronic pain due to various accidents, and was
3 prescribed pain medications, acupuncture, and physical therapy. AR 339, 352 (October 2012), AR
4 354 (September 2012), AR 356 (July 2012), AR 359 (April 2012), AR 363 (January 2012), AR
5 343 (November 2011), AR 372 (September 2011), AR 317 (April 2011), 318-19 (January 2010),
6 AR 534-38 (October through December 2009), 321-25 (March 2009), 327 (June 2008), AR 328
7 (January 2008).

8 In September 2008, severe degenerative disk disease was present at L5-S1. AR 472-73.
9 Throughout 2011 and 2012 Green saw Amy Smith, a physician's assistant (PA) whose clinic notes
10 were signed off by Dr. Howard Kornfeld in the pain clinic. Green was consistently prescribed
11 Vicodin, Depakote, and Butrans patches among other pain medications, as well as anti-anxiety
12 medicines. *See, e.g.*, AR 352, 525, 558, 559, 567. In August 2011, Dr. Kornfeld diagnosed Green
13 with a severe degenerate disc disease but opined that her extreme level of pain likely was
14 connected to her psychological impairments. AR 581. By mid-2012, Green was suspected of
15 having fibromyalgia, with the first indications being recognized by Dr. Kornfeld in September
16 2011. *See, e.g.*, AR 352, 558, 559, 563, 570, 572, 658, 670, 673, 703, 740, 780. At the inception
17 of her treatment with the pain clinic in 2011, Green was referred to and apparently frequently
18 received "psychoeducational" services. AR 574-75 (September 2011), 663 (July 2012). Green
19 stopped visiting the pain clinic in late 2012 when she was pregnant with her second son because
20 she didn't want to continue on the pain medications, but she resumed treatment there in 2014. AR
21 770; *see also* AR 740 (May 2013 note).

22 On April 27, 2010, Green had a comprehensive medical evaluation performed by Dr. Siar
23 Ayoubi at the Eastbay Medical Evaluation Service. AR 299-307. At the evaluation, Green
24 complained of back, neck, shoulder, foot, and knee pain and asthma. AR 299. She reported that
25 she had chronic pain due to a past bus accident and was receiving treatment, including steroid
26

27 ¹ There are additional medical records from Highland Hospital from 2001 through 2007, including
28 records of injuries stemming from an assault by Green's boyfriend in 2005, but those are not relied
on in support of her claim at this juncture. AR 377 – 465.

1 injections, from a pain specialist. She was taking a number of pain medicines. AR 299-300. Dr.
2 Ayoubi was unable to conduct a full examination, and considered some of his observations
3 unreliable, because plaintiff's pain prevented him from testing range of motion and because Green
4 was sensitive to palpitations. However, he saw that Green was able to bear weight on a crutch and
5 able to negotiate stairs in and out of the clinic. AR 300-301. Dr. Ayoubi found Green mildly
6 limited in her activities and concluded that Green could sit for 6 hours in an 8-hour work day and
7 could only stand for less than two hours. AR 301.

8 In January 2013, Green was evaluated at the Bayview Medical Clinic Internal Medicine by
9 Dr. Eugene McMillan. AR 620. Her main complaint was back pain, that she stated was worsened
10 by her pregnancy, and Dr. McMillan reported that she was using a cane. AR 620-22. Dr.
11 McMillan made a functional capacity assessment that Green was limited in her ability to move,
12 could not carry more than 10 pounds, would need a cane when leaving her home, and could walk
13 for about two hours during an eight-hour workday and could sit for six hours. AR 623. Dr.
14 McMillan reported that Green was not limited in moving machinery or with reaching in all
15 directions. *Id.*

16 On March 5, 2013, Dr. Patty Rowley, a Disability Determination Service ("DDS") medial
17 consultant, reviewed Green's records. AR 66-76. Dr. Rowley opined that Green could
18 occasionally lift and/or carry 20 pounds, frequently lift and/or carry 10 pounds, and stand and/or
19 walk for six hours in an eight-hour workday. AR 72-73. Dr. Rowley also opined that Green was
20 not disabled, but was limited to sedentary work. AR 75.

21 On September 18, 2013, Dr. Jonathan F. Nordlicht, a DDS medial consultant, performed a
22 second functional capacity assessment based on a review of Green's medical records. AR 105-
23 116. *Id.* Dr. Nordlicht diagnosed Green with severe fibromyalgia and reported that Green had an
24 exertional limitation of chronic back pain, without providing details of how Green was limited.
25 AR 111, 113. Dr. Nordlicht opined that Green could occasionally lift and/or carry 20 pounds,
26 could frequently lift and/or carry 10 pounds, could stand and/or walk for four hours in an eight-
27 hour workday, and could sit for six hours in an eight-hour workday. AR 113. Dr. Nordlicht
28 concluded that Green was not disabled and could adjust to other work, and stated that Green was

1 limited to sedentary work. AR 115.

2 On April 29, 2014, Dr. Bruce Fitzgerald at the ACMC examined Green. He documented
3 Green's complaints of suffering from chronic body pain, including pain in her neck, back, and
4 upper extremities. AR 770. Dr. Fitzgerald documented that she wanted a referral to go back to the
5 pain clinic, and that she had stopped going there a little over a year prior when she was pregnant.
6 AR 770. Dr. Fitzgerald referred her to the pain clinic and prescribed her Tramadol, Neurontin,
7 Vicodin, and Robaxin. *Id.*

8 On September 8, 2014, Dr. Fitzgerald reported that Green complained of chronic body
9 pain. AR 754. Dr. Fitzgerald also reported that Green had a history of fibromyalgia, and suffered
10 from chronic depression, chronic emotional stress, and anxiety. *Id.* Dr. Fitzgerald opined that
11 Green's pain had a psychological component. *Id.* Dr. Fitzgerald prescribed her Motrin, Robaxin,
12 Tramadol, and Norco. *Id.* Dr. Fitzgerald again referred Green to the pain clinic for evaluation and
13 treatment. AR 755.

14 **B. Psychiatric Medical Evidence**

15 **a. Dr. Kollath**

16 On June 06, 2010, Green underwent a Mental Status Evaluation performed by Dr. Ute
17 Kollath, a clinical psychologist. AR 308-13. Dr. Kollath's diagnostic impression was that Green
18 had a depressive disorder. AR 311. Through checking boxes, Dr. Kollath found that Green was
19 mildly impaired in her ability to interact with others in a work environment on a regular basis and
20 in her ability to "adapt to changes, hazards, or stressors in workplace setting," and opined that
21 Green was unimpaired in her other work-related abilities. AR 311-12. Dr. Kollath found Green to
22 have "[n]o functional disruption due to a cognitive disorder" and to be cooperative. AR 311.
23 Under level of functioning, Dr. Kollath noted that Green stated she was not independent for her
24 basic activities of daily living ("ADL"), she needed help preparing meals, was unable to drive, was
25 able to make change, and that she spends her days resting at home. AR 310.

26 On January 28, 2013, Green underwent a second Mental Status Evaluation performed by
27 Dr. Kollath. AR 615-19. In this evaluation, Green reported being depressed and stated that she
28 attempted suicide when she was 15 years-old. AR 616. She also reported that she suffered from

1 chronic back pain, experienced “acute physical pain,” had trouble sleeping, was anxious, and was
2 prone to mood swings. *Id.* Dr. Kollath reported that Green was obese, was friendly and
3 cooperative, had good eye contact, and that “she interacted appropriately with the examiner.” AR
4 615-16. Dr. Kollath marked that Green had fair intelligence and that her attention and
5 concentration were average. AR 617. Dr. Kollath found that Green was independent for basic
6 ADLs, as she described preparing meals, being able to drive, and being able to make change. AR
7 617. Dr. Kollath also considered that Green was the primary caretaker for her two young children
8 and that she had adequate concentration. *Id.* Dr. Kollath opined through checking boxes that
9 Green was unimpaired in her ability to perform mental work-related activities and in social
10 functioning. AR 617-18. Dr. Kollath’s opinion was based on his clinical interview, observation,
11 Green’s personal history, and unspecified accompanying documents. AR 618.

12 **b. Dr. Combs and Ms. Wong**

13 On October 3, 2014, Green had a health psychology intake evaluation at ACMC performed
14 by attending psychologist Dr. Hilary Combs and Ms. Joanne Wong, an M.A. psychology trainee.
15 AR 780. Green reported being depressed and suffering from sleeping issues and bulimia that she
16 believed were caused by trauma, including being sexually assaulted. AR 780. Dr. Combs and
17 Wong reported that Green had a history of chronic pain and fibromyalgia. *Id.* Green was
18 diagnosed with bulimia, PTSD, depression, cannabis dependence, chronic pain, and fibromyalgia.
19 *Id.*

20 On October 31, 2014, Green underwent a follow-up psychiatric evaluation with Dr.
21 Demedick Anton Bland with Dr. Combs attending. AR 782. Dr. Bland reported that Green was
22 present with her toddler son. *Id.* She reported being depressed, had problems sleeping, and was
23 using cannabis daily. *Id.* Dr. Combs marked that she had average intelligence, was average in her
24 eye contact, her cognition was within normal limits, but that her judgment was impaired “to make
25 reasonable decisions.” *Id.* Dr. Combs stated that Green would likely benefit from taking anti-
26 depressants but that it would be difficult to determine a dosage given her daily use of cannabis and
27 indifference to stopping, and that she should be encouraged to seek addiction counseling. AR 783.
28 Dr. Combs noted that Green had been receiving “Health Psychology” therapy and recommended

1 that it continue. *Id.* Dr. Combs had no opinion of Green’s level of disability due to her mental
2 health conditions. *Id.*

3 **c. Dr. Thomsen**

4 In November 13, 2014, Green underwent a psychological evaluation by Dr. Ede Thomsen.
5 AR 785-99. Green reported being homeless for five years, beginning in 2008. AR 786. She
6 disclosed that she was sexually assaulted by her half-brother from the age of eight to sixteen or
7 seventeen years-old and had experienced psychological symptoms since she was a child. *Id.* She
8 reported being hit in the head with a hammer several times by her half-brother in her early
9 twenties, being abused by her ex-husband, and that she felt threatened by others. *Id.*

10 Dr. Thomsen opined that due to Green’s traumatic experiences she has symptoms of
11 PTSD, including hypervigilance, flashbacks, nightmares, stimuli avoidance, and intrusive thoughts
12 about the abuse. AR 795. Dr. Thomsen also diagnosed Green with major depressive disorder,
13 cannabis abuse, bulimia, dependent personality disorder, schizotypal personality disorder, chronic
14 pain, and a deficit in ability to concentrate. AR 795-96. Dr. Thomsen found that “psychiatric
15 symptoms, in conjunction with [Green’s] cognitive deficits, interfere with her ability to make
16 decisions, resolve problems, and effectively manager her daily affairs.” AR 795.

17 Thomsen further opined that due to Green’s “severe mental health problems . . . her ability
18 to be successful at a job site [is] limited.” AR 795. The doctor also discussed Green’s noticeable
19 social impairments, noting that she has difficulty interacting with others, few close relationships,
20 an “indifference to the actions and feelings of others,” and difficulty being in a relationship. AR
21 793. Dr. Thomsen stated that Green’s severe mental health problems caused her to be limited in
22 her ability to work and “could not sustain complex tasks for up to eight hours.” AR 795-96. Dr.
23 Thomsen indicated that Green is severely limited in her judgment/insight and activities of daily
24 living. AR 798.

25 Dr. Thomsen expressly criticized the 2010 finding by Dr. Kollath that Green was not or
26 was only mildly impaired in work activities because that was contrary to the results of the
27 intelligence and memory tests administered by Dr. Kollath. Dr. Thomsen also disagreed with Dr.
28 Kollath’s 2013 opinion that Green was not limited because Dr. Kollath did not run any

1 psychological tests in 2013 to support his opinion. AR 787. In contrast, Dr. Thomsen ran eight
2 different tests, performed two additional evaluations, reviewed all of Green’s records, and issued
3 an eleven-page, thorough assessment of Green’s abilities and impairments. AR 786-96.

4 **d. Ms. McKenzie, MFT**

5 On November 20, 2014, Alison McKenzie, a Marriage and Family Therapist (MFT) at the
6 Alameda County Department of Public Health, wrote a detailed letter based on her bi-weekly
7 counselling and psychotherapy sessions with Green that began in February, 2014. AR 800-802.
8 McKenzie also completed a Mental Health Questionnaire. AR 803-809. McKenzie diagnosed
9 Green with the severe bulimia nervosa, PTSD, and recurrent major depressive disorder. AR 800.
10 McKenzie opined that these issues “make it very difficult” for Green to function in a work
11 environment. *Id.* McKenzie opined that Green’s mental health issues began in adolescence
12 because of sexual abuse and being in a dysfunctional family, and that her experience of domestic
13 violence as an adult exacerbated her PTSD and depression. AR 800. McKenzie characterized
14 Green’s bulimia as “life-threatening and chronic.” *Id.*

15 McKenzie stated that Green’s PTSD symptoms, such as hypervigilance, would also make
16 it difficult to function in a work setting, and that due to Green’s “severe mental health issues,” if
17 she were in a “competitive work environment” she would likely have frequent absences and
18 tardiness due to bulimia-related symptoms. AR 801. McKenzie concluded that Green suffers
19 from “chronic and debilitating pain due to her history of domestic violence, including head
20 trauma, neck and back injuries; as well as fibromyalgia.” AR 801. McKenzie reported that Green
21 uses cannabis three to four times a day to cope with mental health issues, such as stress and
22 trouble sleeping, but that this does not contribute to her mental health symptoms. AR 801.

23 Additionally, McKenzie opined that Green would be precluded from working 30 percent of
24 a five-day, 40-hour work week due to her mental limitations. AR 808. McKenzie found that
25 Green suffered from several marked impairments in socially interacting, performing daily
26 activities, and maintaining concentration and pace. AR 805-807. She also marked that Green’s
27 impairments are expected to last at least 12 months. AR 808.

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e. **Dr. McShane**

On November 5, 2014, Dr. Johanna Marie McShane performed an assessment of Green to determine treatment options. AR 809-13. Green reported suffering from chronic pain and taking Vicodin daily. AR 809. Green also reported having a history of sexual abuse and a dysfunctional family, bulimia, problems with alcoholism when she was fifteen years-old, and an eating disorder, which she stated was triggered by her being sexually assaulted by her half-brother. AR 809. McShane opined that Green would benefit from anti-depressants, that her bulimia is serious, and that she suffers from PTSD and depression. AR 812.

Dr. McShane recommended that Green join a therapy group for her trauma, her eating disorder, and for general help. AR 811-13. Dr. McShane indicated that Green would be a good candidate for psychotherapy, that she needs help changing her diet, and that she should seek treatment for her bulimia. AR 811-13. Dr. McShane noted that besides Green's fear, her chronic pain and having to use public transportation create the biggest obstacles for Green obtaining the treatment she needs, and recommended that she receive in-home care. AR 813.

III. ALJ DECISION

The ALJ found that Green met the insured status requirements of the Social Security Act through December 21, 2015, and that Green had not engaged in substantial gainful activity since August 1, 2009. AR 20. The ALJ, however, concluded that Green had only the following severe impairments: degenerate disc disease of the lumber spine and obesity. *Id.* The ALJ concluded that Green had not provided enough medical evidence to establish that she suffered from "severe" fibromyalgia.² The ALJ also found that Green's pregnancy and gestational diabetes caused by the pregnancy only created a minimal and temporary limitation. AR 21.

The ALJ concluded that the record does not support Green's allegations of severe depression (including allegations of hopelessness, staying in bed after she has sent her children to school, being suicidal at times, not sleeping well, complications with memory and concentration, and not being able to get along with others). Nor did she accept Green's allegations of having an

² Under SSA regulations, evidence of a fibromyalgia diagnosis must come from an acceptable medical source based on evidence of at least 11 positive tender points on physical examination. The ALJ believed that evidence was missing from the record.

1 eating disorder. AR 21. The ALJ found that except for “very recent” treatment in October 2014,
2 “there is no evidence of any mental health treatment for counseling in the record.” *Id.*

3 The ALJ, instead, focused on the June 2010 and January 2013 psychological examinations
4 by Dr. Kollath that concluded that Green was not limited by her “mild” depressive disorder. AR
5 21-22. The ALJ noted Green’s October 2014 intake examination at the ACMC and the
6 psychological evaluations by Dr. Thomsen and MFT McKenzie from November 2014, AR 22, but
7 concluded that while the record suggests that Green’s depressive disorder symptoms “might have
8 worsened” in October 2014, “there is insufficient evidence to show that it caused more than a
9 minimal limitation on her ability to perform basic work activities for a continuous period of 12
10 months.” *Id.* Instead, the ALJ reiterated her opinion that there is no record of “mental health
11 treatment” of any kind prior to 2014. AR 22.

12 The ALJ considered Dr. Thomsen’s diagnosis that Green suffers from cannabis abuse and
13 Green’s self-reports regarding her use. AR 22. However, the ALJ determined that there is “no
14 medical evidence that suggests that the claimant’s cannabis abuse cause more than a minimal
15 limitation” to perform work activities. *Id.* The ALJ concluded that Green’s depressive disorder,
16 PTSD, and cannabis abuse, whether considered individually or in combination, do not cause
17 Green to be more than minimally limited to perform work activities. AR 23.

18 The ALJ then considered the four broad functional areas set out in the SSA regulations for
19 evaluating mental disorders. As to “activities of daily living,” the ALJ found no limitation in
20 Green’s ability. AR 23. The ALJ compared Green’s report to Dr. Kollath in June 2010 that she
21 needed her family’s help with caring for her child and household chores to Green’s 2013 statement
22 to Kollath that she was independent for daily living, could prepare meals, and could drive. *Id.* The
23 ALJ also pointed out that Green has two children for whom she is the primary caretaker, and that
24 she does so with little help. *Id.* Therefore, the ALJ found Green was not limited in daily living.
25 *Id.*

26 As to “social functioning,” ALJ found that Green had no limitation. AR 23. She
27 supported her finding by dismissing Dr. Thomsen’s contrary opinion because Thomsen’s opinion
28 was supported by “little evidence.” Instead, the ALJ relied on the fact that “Dr. Kollath and Hilary

1 Combs both observed that the claimant had good eye contact and a cooperative attitude during
2 their examinations” and that Dr. Kollath opined that Green was not impaired in social
3 functioning. *Id.*

4 As to “concentration, persistence or pace,” the ALJ found that Green had no impairment.
5 AR 23. The ALJ acknowledged the opinion of Dr. Thomsen that Green was impaired in this
6 regard, but instead relied again on Dr. Kollath and Dr. Combs’ observations that Green was not
7 impaired in her ability to pay attention and concentrate and found her to have average intelligence,
8 as well as Dr. Kollath’s opinion that Green was not impaired in this area. *Id.*

9 Finally as to decompensation, the ALJ noted that claimant had no history of periods of
10 decompensation or hospitalizations or emergency treatment for mental health issues. AR23.

11 She concluded that Green’s “medically determinable mental impairments” caused no more
12 than “mild” limitations, and therefore were nonsevere. AR 23. In reaching that determination, the
13 ALJ gave “great weight to the 2010 and 2013 opinions of Dr. Kollath” who found that Green has
14 no impairments or mild impairments. AR 24. The ALJ justified the weight she gave to Dr.
15 Kollath because he examined Green twice. She believed that Dr. Kollath’s examinations were the
16 most thorough in the record and were well supported by the record. She further found that Green
17 did not receive mental health treatment until October 2014. AR 24.

18 The ALJ gave no weight to Dr. Thomsen’s November 2014 opinion that Green had a
19 “marked and extreme impairment” in work-related functioning. AR 24. The ALJ concluded that
20 Dr. Thomsen’s opinion was uncorroborated by the record (including the “dearth” of treatment
21 before October 2014), and as it was contradicted by Dr. Kollath’s opinions and the opinion of Dr.
22 Combs from October 3, 2014. *Id.* The ALJ discounted Dr. Thomsen’s opinions as “advocacy”
23 given that Green was referred to him by her legal representative. *Id.*

24 The ALJ dismissed the opinions of MFT McKenzie, concluding that she was not “an
25 acceptable medical source” and her opinion was not supported “by the objective findings of the
26 record and course of medical treatment.” AR 24. The ALJ doubted that McKenzie acted as
27 Green’s psychotherapist because of the lack of treatment records from McKenzie. *Id.*

28 Next, the ALJ concluded that Green has the “residual functional capacity to perform light

1 work” and that Green can stand and walk for four hours in an eight-hour work day and can
2 occasionally “climb ramps and stairs, climb ladders, ropes and scaffolds, balance, stoop, kneel,
3 crouch and crawl.” AR 24. The ALJ rejected Green’s own testimony about her limitations
4 (including that she can only walk about two to three blocks, uses a cane daily, uses walls to help
5 her walk, has migraines three times a week that last for hours, has chronic pain, does not engage in
6 physical activities, that her medication causes fatigue and nausea) because in the ALJ’s view that
7 testimony was inconsistent with Green’s hearing testimony regarding her daily activities
8 (including caring for her two children by herself, getting them to school, cleaning her house “a
9 little bit,” going out to doctor appointments or the liquor store three blocks away, and doing little
10 household chores such as washing dishes, although she uses plastic and paper plates). AR 25, 27.³

11 While finding that Green’s medically determinable impairments could be expected to
12 cause her symptoms, the ALJ rejected Green’s testimony about the intensity, persistence, and
13 limiting effects of them as not credible. Regarding the medical evidence, the ALJ concluded that,
14 while noting a history of complaints about chronic pain, since October 2012 there is only evidence
15 of intermittent treatment for that pain and that Green did not seek treatment for her chronic pain
16 between October 2012 and April 2014. The pause in seeking treatment for her pain condition
17 during this time, while she was pregnant, raised “doubts regarding [Green’s] allegations of
18 disabling chronic pain.” AR 26. The ALJ further concluded that the objective findings in the
19 record did not support Green’s allegations regarding her physical limitations and chronic pain, as
20 x-rays were generally negative and showed no or limited evidence of disease, with only one
21 showing a limited but severe case of lumbar degenerate disc disease. That one finding did not
22 prove to the ALJ that Green was as limited as she contended. *Id.*

23 The ALJ considered the two consultative examinations by Dr. Ayoubi and Dr. McMillan
24 that showed minimal limitations, other than temporal ones caused by her second pregnancy in
25

26 ³ At the hearing, Green testified that her kids are picked up and dropped off by a shuttle, although
27 she can occasionally make it the two blocks to one of her son’s schools for occasional meetings, as
28 long as he supports her on the way home. AR 44-46. She also testified that the family “lives out”
of paper and plastic (to avoid washing dishes) and eats pre-cooked meals. AR 48. She also
testified that she relies on transportation to get to her doctors and agency appointments. AR 51.

1 2013. AR 26. The ALJ found that Green’s obesity limits her abilities to work, but is not disabling.
2 AR 27.

3 In determining her RFC, the ALJ gave great weight to the DDS consultants who reviewed
4 the record and concluded that Green could stand and walk four hours in a work day, and sit up to
5 six hours, occasionally climb and frequently balance, stoop, kneel. AR 27. She gave no weight to
6 Dr. Berteksen’s 2008 exam and Dr. Aroubi’s 2012 exam, both of which found her more limited,
7 given their own conclusions that the examinations were incomplete and unreliable. AR 28.

8 After reviewing Green’s past work, and with the assistance of the Vocational Expert’s
9 testimony, the ALJ concluded that Green was capable of performing past work as a collection
10 clerk and a data entry clerk, as well as work as an order caller, blueprint trimmer, and a laundry
11 sorter. AR 29-30.

12 **LEGAL STANDARD**

13 **I. ALJ EVALUATION OF DISABILITY**

14 A claimant is “disabled” as defined by the Social Security Act if: (1) “he is unable to
15 engage in any substantial gainful activity by reason of any medically determinable physical or
16 mental impairment which can be expected to result in death or which has lasted or can be expected
17 to last for a continuous period of not less than twelve months,” and (2) the impairment is “of such
18 severity that he is not only unable to do his previous work but cannot, considering his age,
19 education, and work experience, engage in any other kind of substantial gainful work which exists
20 in the national economy.” 42 U.S.C. §§ 1382 c(a)(3)(A)-(B); *Hill v. Astrue*, 698 F.3d 1153, 1159
21 (9th Cir.2012). To determine whether a claimant is disabled, an ALJ engages in a five-step
22 sequential analysis as required under 20 C.F.R § 404.1520(a)(4)(i)-(v).

23 In the first two steps of the evaluation, the claimant must establish that he or she (1) is not
24 performing substantial gainful activity, and (2) is under a “severe” impairment. *Id.* §
25 416.920(a)(4)(i)-(ii). An impairment must have lasted or be expected to last 12 months in order to
26 be considered severe. *Id.* § 416.909. In the third step, the claimant must establish that his or her
27 impairment meets or medically equals a listed impairment described in the administrative
28 regulations. *Id.* § 416.920(a)(4)(iii). If the claimant’s impairment does not meet or equal one of

1 the listed impairments, before proceeding to the fourth step, the ALJ is to make a RFC
2 determination based on all the evidence in the record; this determination is used to evaluate the
3 claimant’s work capacity for steps four and five. *Id.* § 416.920(e).

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

11 At step five, the Commissioner considers the RFC assessment, the claimant’s age,
12 education, and work experience in order to determine if the claimant is able to perform other work.
13 20 C.F.R. § 416.920(a). The RFC assessment consists of the “physical and mental” limitations on
14 what a claimant can do as a result of his impairments. 20 C.F.R. § 416.945(a)(1). Then the ALJ
15 evaluates potential occupations that a claimant can perform. *See* 20 C.F.R. § 416.966.

16 **II. STANDARD OF REVIEW**

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

26 I must review the record as a whole and consider adverse as well as supporting evidence.
27 *See Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir.2006). Where evidence is susceptible
28 to more than one rational interpretation, the ALJ’s decision must be upheld. *See Morgan v.*

1 *Comm'r of the Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir.1999). “However, a reviewing court
2 must consider the entire record as a whole and may not affirm simply by isolating a ‘specific
3 quantum of supporting evidence.’” *Robbins*, 466 F.3d at 882 (quoting *Hammock v. Bowen*, 879
4 F.2d 498, 501 (9th Cir.1989)); *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir.2007). Finally, if the
5 legal error is harmless, then a reversal is unwarranted. *See Molina v. Astrue*, 674 F.3d 1104, 1111
6 (9th Cir.2012) (“We may not reverse an ALJ’s decision on account of an error that is harmless”).
7 An error is harmless when it is “inconsequential to the ultimate non-disability determination.”
8 *Molina*, 674 F.3d at 1115 (citing *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162
9 (9th Cir.2008)).

10 **DISCUSSION**

11 Green contends that the ALJ erred in five significant ways: (i) failing to include Green’s
12 chronic pain, PTSD, Bulimia, and major depression among her severe impairments; (ii) rejecting
13 the opinions of Green’s treating, examining, and non-examining sources for insufficient reasons
14 that are not supported by substantial evidence; (iii) failing to provide specific, clear, or convincing
15 reasons for rejecting Green’s subjective testimony; (iv) due to the previous three errors, the ALJ’s
16 RFC findings do not accurately reflect Green’s limitations and are not supported by substantial
17 evidence; and (v) the step five finding as to past and other work are erroneous and not based on
18 substantial evidence.

19 **I. THE ALJ’S FAILURE TO CONSIDER SEVERAL OF GREEN’S IMPAIRMENTS**

20 I agree that the ALJ ignored the evidence of Green’s diagnosed chronic pain, PTSD,
21 bulimia, and major depression that severely impact her ability to perform work activities and will
22 last for more than 12 months. Pl. Mot. 10.

23 **A. The ALJ Failed to Adequately Address Green’s Chronic Pain Syndrome**

24 As to her chronic pain, Green contends that the ALJ “conflated” fibromyalgia, a specific
25 type of pain syndrome, with chronic pain. *Id.* Green asserts that she did not allege fibromyalgia
26 as the basis of her claim for benefits; rather, fibromyalgia was only a possible diagnosis by
27 Green’s medical providers. *Id.* She did, however, assert chronic pain as a severe impairment and
28 that it hinders “her abilities to perform basic work activities.” Green argues that her chronic pain

1 is well documented in the record, including the diagnoses of and treatment by Dr. Kornfeld/P.A.
2 Smith at Highland Hospital’s chronic pain clinic from 2008 through 2012, and Dr. Fitzgerald from
3 2014 on. AR 363-373 (2011-2012), 374-375, 534-535 (2005-2009). In each of plaintiff’s
4 treatment notes, the doctors report how Green’s pain limits her activities. The Commissioner
5 responds that even if the ALJ erred by not identifying Green’s chronic pain as a severe
6 impairment, the ALJ did discuss Green’s chronic pain later in the decision, and therefore at worst
7 committed a harmless error. Oppo. 3.

8 There is no doubt the ALJ erred in failing to consider plaintiff’s chronic pain syndrome as
9 severe, despite the record containing numerous statements and opinions by treating physicians
10 Drs. Fitzgerald and Kornfeld, as well as PA Smith, who observed that Green’s chronic pain limits
11 her abilities to care for herself and her children. To be sure, later in her opinion the ALJ
12 considered Green’s complaints of chronic pain but discounted their severity because Green was
13 not treated for chronic pain from October 2012 through April 2014 when Green stopped taking
14 pain medications during her pregnancy and during the first year after her child was born. AR 25-
15 26. According to the ALJ, this raised “doubts” regarding Green’s allegations of disabling pain.
16 However, the ALJ conducted no analysis and sought no input on the significant levels of
17 medication Green had been taking and physical therapy Green had been receiving from the pain
18 management clinic as of October 2012 and then resumed in 2014. That Green stopped taking the
19 *narcotic* medicines during this time (which is all the evidence and her testimony shows) does not
20 mean she was not taking other medications and that did not still have chronic pain syndrome.
21 Green’s post-partum records state that she *had* “[c]hronic pain syndrome without narcotics during
22 this pregnancy.” AR 741.

23 The ALJ also discounted Green’s complaints of chronic pain because of a lack of objective
24 evidence, including mostly negative MRIs except for degenerative disc disease and two
25 consultative evaluations that were either inconclusive or found her to be mildly limited. AR 26-
26 27. But the ALJ never fully engaged with an analysis of the treatments and significant levels of
27 medications she received from the pain management clinic.

28 Finally, the ALJ discounted the allegations of chronic pain because of Green’s daily life

1 activities. But the ALJ mischaracterized the extent of Green’s daily life activities, as discussed
2 below. The ALJ’s failure to assess Green’s chronic pain syndrome as severe and to fully engage
3 with that diagnosis was error.⁴

4 **B. The ALJ Failed to Address Green’s Diagnoses of Depression, Bulimia, and**
5 **PTSD.**

6 Even more problematic, the ALJ erred by failing to include Green’s major depression,
7 bulimia, and PTSD as severe impairments, despite the fact that there is significant if not
8 uncontested evidence in the record that these long-standing impairments are not only severe but
9 also impact Green’s ability to perform work activities and will last for more than 12 months.

10 The Commissioner argues that the ALJ did acknowledge that Green had been diagnosed
11 with depression, bulimia, and PTSD but appropriately discounted them and found them non-
12 severe because “the record shows that prior to October 2014, Plaintiff had not received any mental
13 health treatment” and that plaintiff had at most “mild limitations” caused by her mental
14 impairments. The Commissioner (and the ALJ) are simply wrong concerning the record as of
15 October, 2014. Plaintiffs’ depression and bulimia were acknowledged in 2007 (AR 582 [noting
16 history of depression and bulimia in 2007]), and consistent diagnoses of depression and bulimia
17 were noted in 2011 through 2013. *See, e.g.*, AR 740. The evidence also shows that plaintiff *had*
18 been receiving mental health treatment well before 2014. This included prescriptions for valium
19 and other anti-anxiety medications. AR 560, 564, 568 (valium and chlordiazepoxide in 11/2011,
20 4/2012, 9/2012). Green also received “psychoeducational” counselling in connection with the
21 services she received at the pain management clinic. AR 578 (August 2011), AR 574-75
22 (September 2011), AR 580 (August 2011), 663 (July 2012).⁵ Finally, MFT McKenzie had been
23 seeing Green on every two weeks since February 2014 to provide mental health treatment. AR

24 ⁴ The facts of this case distinguish it from *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007)
25 relied on by the Commissioner. In *Lewis*, although the ALJ failed to consider the claimant’s
26 bursitis as a severe impairment, the ALJ nonetheless “extensively discussed” it at Step 4 and took
into account the limitations from that condition in setting the RFC. *Id.* at 911.

27 ⁵ As plaintiff notes, the Ninth Circuit has “criticized the use of a lack of treatment to reject mental
28 complaints” as “mental illness is notoriously underreported.” *Regennitter v. Comm’r of Soc. Sec.*
Admin., 166 F.3d 1294, 1299–300 (9th Cir. 1999).

1 800.

2 As to the “mild” limitations resulting from any mental health conditions the ALJ failed to
3 consider severe, the Commissioner relies on the two consultative evaluations by Dr. Kollath in
4 2010 and 2013, assessing GAF scores of 65 and 75 respectively. *Oppo.* at 4. Green’s consultative
5 examiner, Dr. Thomsen, made numerous important criticisms of Kollath’s testing and conclusions.
6 AR 787. For example, Thomsen noted that Kollath’s 2010 intelligence testing shows only
7 “borderline,” not average, functioning, and that Kollath did not test emotional functioning, and the
8 2013 Kollath examination did not involve any psychological testing. AR 787. The ALJ did not
9 address these criticisms in her wholesale acceptance of Kollath’s findings.⁶ Moreover, the
10 Commissioner cites to no evidence in the record to show that plaintiff’s mental health conditions
11 were in fact mild as demonstrated by her daily life activities (or reports to physicians, etc.).

12 Finally, the Commissioner argues that the opinions from October and November 2014 that
13 Green had serious mental health conditions, including depression, bulimia, and PTSD, did not
14 satisfy the durational limit because those opinions only indicated that Green’s mental health
15 condition had worsened recently. To the contrary, both Dr. Thomsen and MFT McKenzie
16 explained in depth their opinions that Green had suffered continued to suffer from these severe
17 conditions for many years. AR 795-796, 800-801.

18 The ALJ committed multiple errors in failing to address and engage with Green’s severe
19 chronic pain syndrome, depression, bulimia, and PTSD. Remand is warranted for further
20 proceedings on this ground alone.

21 **II. REJECTING OPINIONS OF GREEN’S TREATING AND EXAMINING**
22 **SOURCES AND GREEN’S OWN TESTIMONY**

23 **A. Treating and Examining Sources**

24 Although I need not reach this issue and may remand for further proceedings based on the
25 ALJ’s significant errors addressed above, I briefly address some of Green’s additional arguments

26 _____
27 ⁶ The Commissioner also relies on the “unremarkable” mental status examinations from three
28 Emergency Department visits Green made during 2011 and 2012, which note only that Green had
clear speech, was oriented, with a normal affect, and appropriately responded to questions.
Compare *Oppo.* at 4 *with* AR 626, 627, 632.

1 that the ALJ also erred in rejecting the opinions of her treating and examining sources. Mot. at
2 11-16.

3 Generally, with respect to the doctors and physician assistant Green saw for her chronic
4 pain syndrome (Kornfeld, Fitzgerald, Smith), the Commissioner attempts to draw a distinction
5 between the treatment notes from those sources and the lack of opinions from them that Green's
6 pain limited her ability to work. *See, e.g.,* Oppo. at 7-9. That none of those sources submitted a
7 formal opinion concerning whether Green was able to work given her pain syndrome does not
8 mean that the ALJ (and the Commissioner here) can ignore the notes in those treatment records
9 that indicate that Green was significantly limited in her daily life activities by her pain syndrome.

10 More specifically, the ALJ improperly discredited the opinions of treating therapist MFT
11 McKenzie and examining psychologist Thomsen. With respect to MFT McKenzie, the ALJ
12 rejected McKenzie's December 2014 opinions that Green had marked limitations in her abilities to
13 function (including ability to understand, remember and carry out detailed instructions, ability to
14 maintain attention and concentration for a two-hour segment, ability to adhere to a schedule and
15 complete a normal workday). AR 803-808. While McKenzie, as a therapist, is not entitled to as
16 much deference as "an acceptable medical source," the ALJ was still required to provide
17 "germane" reasons for discrediting her opinions. *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir.
18 2012). The reasons the ALJ gave for discrediting McKenzie's opinions were that there that her
19 opinion was "unsupported by the objective findings of record and course of medical treatment"
20 and that there were no "treatment records" to show she was Green's psychotherapist. AR 24.
21 However, McKenzie's opinions were consistent with Thomsen's. Moreover, McKenzie provided
22 a detailed letter explaining the psychotherapy services she had been providing to Green every two
23 weeks since February 2014. AR 800. There is nothing in the record contradicting those facts.
24 Nor does the ALJ point to *any evidence* in the record, either from February through November
25 2014 or before, that contradicts any of McKenzie's opinions based on her treatment of Green. The
26 ALJ did not provide germane reasons to discount McKenzie's opinions.

27 The ALJ rejected Thomsen's detailed psychological report and opinions finding that Green
28 had significant and marked limitations because they were "uncorroborated" by the record, namely

1 the dearth of mental health treatment prior to 2014. However, as noted above, Green received
2 mental health treatment before 2014; that a claimant was not in active treatment cannot be used to
3 discount diagnosed mental health conditions. *Regennitter*, 166 F.3d at 1299–1300. The ALJ also
4 discounted Thomsen’s opinions because they were contradicted by Kollath. AR 23-24. But
5 Thomsen made specific criticisms about Kollath’s opinions (and lack of testing). Thomsen also
6 performed a more thorough examination. Neither of these points was addressed, much less
7 analyzed and resolved, by the ALJ. The ALJ also discounted Thomsen’s opinions that Green was
8 limited in social functioning because Kollath and Combs’ observed that Green had good eye
9 contact and was cooperative during their examinations. AR 24. Those limited observations of eye
10 contact and cooperativeness are no substitute for Thomsen’s more thorough analysis of the issue.⁷

11 **B. Green’s Testimony**

12 Finally, the ALJ erred in discounting Green’s testimony about her daily activities and
13 limitations. Green asserts that the “ALJ’s proffered reasons for discrediting [Green’s] testimony
14 are difficult to discern, are not clear and convincing and not supported by substantial evidence
15 from the record.” Mot. 17. The Commissioner responds generally and states that the ALJ’s
16 discrediting Green is supported by the record. Oppo. 9-10.

17 Repeatedly, the ALJ discounted Green’s testimony about the significance of her pain and
18 the extent of her limitations, specifically discrediting Green’s testimony that she can only walk a
19 few blocks, uses a cane, has significant migraines weekly, and suffers from nausea and fatigue as a
20 result of her medications. AR 25. The ALJ seemed to find significant that Green admitted that
21 she is the sole caretaker of her two children and has little outside support. AR 23, 25. The ALJ
22 also noted that Green “gets the children to school,” cleans the house “a little bit,” is able to wash
23 dishes, and goes out to doctor’s appointments or the liquor store. AR 25, 27. The ALJ also noted
24

25 ⁷ The ALJ’s last point, that Thomsen’s opinion must be discounted because it is “advocacy” as
26 Green was referred to Thomsen by counsel, is likewise without basis absent some evidence that
27 Thomsen’s opinions are cut from whole cloth. The ALJ points to no specific evidence in the
28 record to undermine Thomsen’s opinions, other than Kollath’s opinions which were challenged
but not addressed by the ALJ. *Reddick v. Chater*, 157 F.3d 715, 726 (9th Cir. 1998) (“the mere
fact that a medical report is provided at the request of counsel or, more broadly, the purpose for
which an opinion is provided, is not a legitimate basis for evaluating the reliability of the report”).

1 that at one appointment, Green had her toddler son with her, “suggesting that she was watching
2 him even during the day.” AR 27. The ALJ mischaracterizes Green’s testimony.

3 At the hearing, Green testified that her kids are picked up and dropped off by a shuttle for
4 their school and daycare. She testified that she can occasionally make it the two blocks to one of
5 her son’s schools for meetings, as long as he “supports” her on the way home. AR 44-46. She
6 also testified that the family “lives out” of paper and plastic (to avoid washing dishes) and eats
7 pre-cooked meals. AR 48. She relies on transportation to get to her doctor’s and agency
8 appointments. AR 51. The liquor store, where she goes occasionally, is three blocks away. AR
9 47. This testimony is not, on its face, inconsistent with her testimony regarding her own
10 limitations.⁸ The ALJ did not identify “specific, clear and convincing reasons” for rejecting
11 Green’s testimony as to her limitations based on her own testimony. *Reddick*, 157 F.3d at 722.

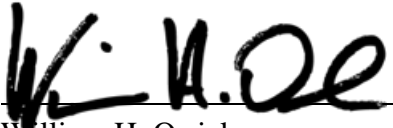
12 **CONCLUSION**

13 Because the ALJ’s errors – in failing to recognize and analyze all of Green’s severe
14 conditions and impermissibly discounting of Green’s sources – led to an incorrect RFC
15 determination and Step 5 analysis, I need not reach plaintiff’s arguments on those grounds.

16 The ALJ committed reversible error by not considering Green’s chronic pain, PTSD,
17 bulimia, and depression, as well as rejecting Green’s treating and examining sources. I GRANT
18 Green’s motion, DENY the Commissioner’s motion, and REMAND this case for further
19 proceedings consistent with this Order.

20 **IT IS SO ORDERED.**

21 Dated: September 21, 2017

22
23 

24 William H. Orrick
25 United States District Judge

26
27 ⁸ The ALJ also noted that Green testified that she has to lie down and stays in bed for multiple
28 days during the week, but does not provide a cite to that testimony. AR 27. At the hearing, Green
testified that when she was depressed/exhausted, she would be able to get the kids up and ready
for school and then she goes back to bed. AR 50.