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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TABITHA MARIE MARTINEZ,
Plaintiff,
v.
NANCY A. BERRYHILL,
Defendant.

Case No. [16-cv-04960-JSC](#)

**ORDER RE:
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

Re: Dkt. Nos. 24 & 25

Plaintiff Tabitha Marie Martinez (“Plaintiff”) seeks social security benefits for a combination of mental and physical impairments, including: bipolar disorder, depressive disorder, anxiety disorder, post-traumatic stress disorder (“PTSD”), morbid obesity, and coronary artery disease. (Administrative Record (“AR”) 121, 270.) Pursuant to 42 U.S.C. § 405(g), Plaintiff filed this lawsuit for judicial review of the final decision by the Commissioner of Social Security (“Commissioner”) denying her benefits claim. Now before the Court are Plaintiff’s and Defendant’s Motions for Summary Judgment.¹ (Dkt. Nos. 24 & 25.) Because the Administrative Law Judge (“ALJ”) improperly weighed the medical evidence and erred in her credibility determination of Plaintiff, the Court GRANTS Plaintiff’s motion, DENIES Defendant’s cross-motion, and REMANDS for further proceedings.

LEGAL STANDARD

A claimant is considered “disabled” under the Social Security Act if she meets two requirements. *See* 42 U.S.C. § 423(d); *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). First, the claimant must demonstrate “an inability to engage in any substantial gainful activity by

¹ Both parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 9 & 11.)

1 reason of any medically determinable physical or mental impairment which can be expected to
2 result in death or which has lasted or can be expected to last for a continuous period of not less
3 than 12 months.” 42 U.S.C. § 423(d)(1)(A). Second, the impairment or impairments must be
4 severe enough that she is unable to do her previous work and cannot, based on her age, education,
5 and work experience “engage in any other kind of substantial gainful work which exists in the
6 national economy.” 42 U.S.C. § 423(d)(2)(A). To determine whether a claimant is disabled, an
7 ALJ is required to employ a five-step sequential analysis, examining: (1) whether the claimant is
8 “doing substantial gainful activity”; (2) whether the claimant has a “severe medically determinable
9 physical or mental impairment” or combination of impairments that has lasted for more than 12
10 months; (3) whether the impairment “meets or equals” one of the listings in the regulations; (4)
11 whether, given the claimant’s “residual functional capacity,” the claimant can still do her “past
12 relevant work”; and (5) whether the claimant “can make an adjustment to other work.” *Molina v.*
13 *Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012); *see* 20 C.F.R. §§ 404.1520(a), 416.920(a).

PROCEDURAL HISTORY

14
15 In May 2014, Plaintiff filed an application for Supplemental Security Income (“SSI”) under Title II of the Social Security Act. (AR 342.) In March 2015, Plaintiff filed a Title XVI application for SSI benefits to be heard along with the Title II claim. (*Id.*) Plaintiff alleged disability beginning October 1, 2013 caused by mental illness, heart problems, and morbid obesity. (AR 250.) The applications were denied initially and on reconsideration. (AR 151–55, 159–63.) Plaintiff then filed a request for a hearing before an ALJ. (AR 165–66.)

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21 On October 26, 2015, a hearing was held before ALJ K. Kwon in San Rafael, California, during which both Plaintiff and a vocational expert (“VE”) Lynda Berkeley testified. (AR 53.)
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23 On February 3, 2016, the ALJ issued a written decision denying Plaintiff’s application and finding that Plaintiff was not disabled within the meaning of the Social Security Act and its regulations and, therefore, was not entitled to SSI benefits. (AR 35–7.) On May 24, 2016, the Appeals Council considered Plaintiff’s request for review as well as the additional evidence she submitted, and denied review, making the ALJ’s decision final. (AR 5–11.) Plaintiff commenced this action
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28 for judicial review on October 19, 2016 pursuant to 42 U.S.C. §§ 405(g), 1383(c). (Dkt. No. 1.)

1 **ADMINISTRATIVE RECORD**

2 Plaintiff was born on July 8, 1981. (AR 60.) Plaintiff suffers from mental illness, a heart
3 problem, and morbid obesity. (AR 250.) At the time of the hearing, Plaintiff was 5’4” and
4 weighed approximately 436 pounds. (AR 69.) She is currently a resident of Lake County and is
5 living with her three children. (AR 1, 60.) She attended Yuba College and Mendocino
6 Community College and worked with children and adults with special needs. (AR 63–8.) In
7 2014, Plaintiff stopped working because of mental and physical issues and she has not worked
8 since. (AR 64, 66–7.) Plaintiff alleges that her weight and bipolar disorder make it difficult for
9 her to work and be around people, and that she relies on her daughter to assist her with activities of
10 self-care and daily living. (AR 79–80, 97–8.)

11 **I. Medical Evidence**

12 Plaintiff has seen a variety of physicians as a result of her medical conditions. A
13 discussion of the relevant medical evidence follows.

14 **A. Medical History**

15 The earliest records date back to February 2012, when Plaintiff began as a regular patient
16 of Clearlake Family Health Center. (AR 382.) Plaintiff also occasionally obtained treatment at
17 the Lucerne Community Clinic and Lake County Behavioral Health.

18 **i. 2012 Medical History**

19 In September 2012, Plaintiff was initially assessed with severe depression and extreme
20 anxiety or panic. (AR 627.) Nurse practitioner Sandra Peeke, who conducted Plaintiff’s initial
21 exam, noted that Plaintiff complained of “pain all over” following a car accident. (AR 629.) Ms.
22 Peeke observed the following: myofascial pain and hematoma due to the car accident, morbid
23 obesity with a BMI of 59, deconditioned, depression, anxiety, and PTSD. (AR 630–31.) In her
24 appointments with Dr. Ronald Walker, who would later become Plaintiff’s primary care physician,
25 Plaintiff also reported migraines, depression, and anxiety. (AR 412–14.)

26 **ii. 2013 Medical History**

27 Throughout 2013, Plaintiff continued to see Dr. Walker, to whom she reported insomnia,
28 tongue pain, shaking related to Lithium intake, depression/anxiety, and “getting aggressive,” amid

1 other related health issues. (AR 383, 393, 407, 408, 411.) Among visits to other physicians,
2 Plaintiff saw Dr. Daniel Lewis for a gynecology consultation in November. (AR 477.) Dr. Lewis
3 noted Plaintiff’s life-long struggle with weight, her weight of 383 pounds, and quoted Plaintiff as
4 saying “I experienced rapid weight gain when on Seroquel and I don’t exercise as I should.” (*Id.*)

5 In March 2013, Plaintiff was transferred from St Helena Hospital Clearlake to St Helena
6 Hospital Napa Valley to see Dr. Elliot Wade and obtain higher-level care for chest pain. (AR 429,
7 691.) Dr. Wade noted that at the time, Plaintiff had also begun workup with Dr. Richard Parent
8 (surgery) and Dr. Park (cardiology) for possible gastric bypass surgery in the future. (*Id.*)

9 In June 2013, Plaintiff began bi-monthly 30-minute therapy sessions with licensed clinical
10 social worker Norman Bigelman for relapse prevention and recovery support. (AR 893–99.) In
11 August, Plaintiff admitted to Mr. Bigelman that she was dependent on opioids prescribed by her
12 doctor. (AR 897.) The next month, Plaintiff advised him that she had recently withdrawn from
13 her college courses because she felt “overwhelmed with the schedule that she created.” (AR 896.)
14 Two months later, however, Mr. Bigelman noted that Plaintiff was “excited about being hired by a
15 behavioral program for adolescents,” and had had “several other interviews that ‘seemed
16 positive.’” (AR 894.)

17 Around the same time, Plaintiff was receiving mental health services at Lucerne
18 Community Clinic for opioid dependence, PTSD, bipolar affective disorder, and depression. (AR
19 368–77.) There, Plaintiff saw Dr. Robert Gardner, whose notes indicate problems with opiates,
20 using non-prescribed medication, body pain, bad menstrual cramps, 12 Vicodin, Percodan,
21 Morphine for four years, and a history of methamphetamines. (AR 368.) The medical reports
22 from this time period state that Plaintiff weighed 350 pounds with a BMI of 58. (AR 368–77.)

23 In September, Plaintiff sought to replace her therapist at Lucerne Community Clinic with
24 someone from Lake County Behavioral Health Department because Plaintiff could “no longer
25 afford to drive to Lucerne.” (AR 455.) Plaintiff was seen by therapist Daniel Sleeth who noted
26 that Plaintiff had depression, intrusive thoughts, low self-esteem, “hard time coping,” insecurity,
27 co-dependency, continued suicidal ideation, and some cutting (although Plaintiff denied a plan or
28 intent). (AR 455–56.) The treatment notes describe a history of childhood bullying and an

1 abusive relationship with her husband. (AR 463.) Therapist Sleeth also noted Plaintiff was in an
2 on-going abusive relationship and that she was voluntarily getting “AODS treatment” and going to
3 “AA and NA.” (*Id.*) The notes indicate that Plaintiff’s driver’s license had been suspended for
4 tickets and that she could not drive. (*Id.*) Finally, the diagnosis form states that the following
5 clinical disorders began in 2013: PTSD, depressive disorder, cocaine abuse, and a personality
6 disorder noted as “DIAG DEFERRED ON AXIS II OR I.” (AR 468.)

7 **iii. 2014 Medical History**

8 In 2014, Plaintiff began seeing Dr. Moizeau at Clearlake Family Health Center. (AR 480.)
9 At the beginning of the year, Dr. Moizeau noted Plaintiff’s active problems as bipolar depression,
10 chronic generalized pain, chest pain, elevated transaminase level, and morbid obesity. (AR 481,
11 492.) She referred Plaintiff to the Live Well program to address her morbid obesity, which she
12 qualified as “life threatening.” (AR 482, 494.) In July, Plaintiff requested In-Home Supportive
13 Services (“IHSS”) paperwork from Dr. Moizeau because she reported she was “so heavy that it is
14 getting hard to do housework.” (AR 568.) During one of Plaintiff’s visits, Dr. Moizeau examined
15 her for knee and back pain and concluded that Plaintiff’s knees were normal and that her back had
16 normal alignment with the vertebral bodies and posterior elements intact, but that there was a mild
17 disc space narrowing at L4-5 and L5-S1. (AR 386–88.) Plaintiff saw Dr. Moizeau in May and
18 August for medication refills. (AR 545, 776.)

19 Throughout early 2014, Plaintiff saw nurse practitioner Sandra Peeke again for nutritional
20 consults regarding her obesity. During these visits, Ms. Peeke noted that Plaintiff “present[ed] for
21 obesity/weight loss” (AR 485); Plaintiff’s general health status was “good” or “fair” (*Id.*, 519,
22 526); but that Plaintiff was shaking, which may have been due to her Lithium level being too high.
23 (AR 507.) In February, nurse Peeke made the following diagnosis: obesity, foot pain (bilateral),
24 SI joint arthritis, snores, pes planus, lumbar facet arthropathy, trochanteric bursitis of both hips,
25 chest pain NOS, swelling of extremity, depression screening, depression, and anxiety. (AR 505.)
26 In March, Ms. Peeke made the following diagnosis: degenerative disc disease (lumbar), lumbago,
27 morbid obesity, pes planus. (AR 531.)
28

1 One month later, Plaintiff began regularly seeing nurse practitioner Myrna Filman for
2 bipolar depression. (AR 533.) With Ms. Filman, Plaintiff worked to taper herself off of anxiety
3 medication Ativan. (AR 534.) In all sessions, nurse Filman noted that Plaintiff was stable. (AR
4 534, 538, 541, 544, 554, 557, 567, 585, 785, 795, 799, 833, 836, 842.) During some of these same
5 sessions, however, nurse Filman also noted that Plaintiff’s medication was not helpful in
6 decreasing her anxiety, and instead, that the medication caused Plaintiff to feel angry, and that the
7 course of her diagnosis was worsening. (AR 836, 840, 842.)

8 When her mother passed away in April, Plaintiff told Ms. Filman that she had an episode
9 of cutting. (AR 542.) One month later, Plaintiff was feeling better on a reduced dose of Xanax,
10 and stated that she was “holding the family together” after her mother passed away, and although
11 her daughter was recently hospitalized for suicidal ideation. (AR 552.) In July, Plaintiff reported
12 she was no longer taking pain opioids, and was seeing a private therapist to work on anger issues.
13 (AR 565, 583.) But later in October, Plaintiff reported to Ms. Filman that she was feeling “more
14 depressed due to lack of money and second suicide attempt by her ten year old daughter.” (AR
15 793.) Plaintiff then started a new job as a phone dispatcher, a “sit down” job that she was “very
16 happy with.” (AR 797.) In December, however, Plaintiff stated she was having “increased
17 anxiety.” (AR 831.) Plaintiff also stated she had obtained an IHSS worker who had been helping
18 her with cleaning, and that she quit her job because she “couldn’t keep up.” (AR 831.)

19 In the meantime, psychologist Dr. Alexandra Clarfield evaluated Plaintiff for pre-bariatric
20 surgery in September. (AR 786.) Dr. Clarfield reported that Plaintiff was morbidly obese at 393
21 pounds and had several health complications associated with her obesity. (*Id.*) Dr. Clarfield
22 diagnosed the following: anxiety, bipolar 1 disorder, and morbid obesity. (AR 788.)

23 As Plaintiff mentioned to nurse Filman, she was also receiving mental health treatment at
24 Lucerne Community Clinic for her bipolar disorder. (AR 890–925.) In May, social worker
25 Bigelman noted that Plaintiff relapsed on crystal. (AR 902.) In June, he noted that “[d]espite
26 saying that she isn’t taking substances, [Plaintiff] stated that she ran out of Ativan early and has
27 been drinking ‘some.’” (AR 903.) In August 2014, Plaintiff began seeing social worker Deborah
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1 Johnson instead of Mr. Bigelman. (AR 905.) During her sessions with Ms. Johnson, Plaintiff
2 recognized she had a “cycle of using/relapsing every 4-5 months.” (AR 910.)

3 Plaintiff’s weight over this time period fluctuated from 401 pounds in January 2014 to 436
4 pounds in October 2014. (AR 484, 69.)

5 **iv. 2015 Medical History**

6 Plaintiff saw various physicians for different health issues in 2015, including sinusitis (AR
7 851), leg swelling and degenerative disc disease (AR 876), bronchitis (AR 837, 926, 930), and
8 headaches (AR 932, 941). Dr. Bloom also diagnosed paresthesias in Plaintiff’s right hand,
9 explaining that Plaintiff was feeling numbness in her fourth and fifth fingers because she “is
10 working on her computer quite a bit and uses her right hand to control a mouse on a desk.” (AR
11 26–7.)

12 Plaintiff continued to see social worker Deborah Johnson (AR 912), as well as nurse
13 practitioner Myrna Filman to follow up on her bipolar disorder. (AR 843–82.) In January 2015,
14 Plaintiff described her anxiety as “sweaty palms, increased heart rate and a feeling of impending
15 doom.” (AR 834.) Plaintiff reported this happened nearly every day. (*Id.*) Plaintiff stated her
16 medication had been working for panic attacks, but she felt moody and more depressed. (*Id.*)

17 The treatment records end in late 2015, indicating that until at least September 2015,
18 Plaintiff was continuing to see Ms. Filman for symptoms of bipolar disorder and generalized
19 anxiety disorder. (AR 882.) In late 2015, Plaintiff was also still seeing Ms. Johnson weekly to
20 monitor her bipolar disorder. (AR 921–25.)

21 **B. Medical Evaluations**

22 In addition to routine and emergency medical visits, Plaintiff underwent several
23 examinations to determine her functional capacity in support of her application for disability
24 benefits. Below is a summary of these evaluations.

25 **i. Treating Social Worker Deborah Johnson**

26 In September, social worker Johnson filled out a mental impairment questionnaire. (AR
27 801.) In Ms. Johnson’s professional opinion, Plaintiff was not capable of performing a full-time
28 job, working eight hours a day, five days per week, on a regular and continuing basis. (*Id.*) Ms.

1 Johnson further noted that Plaintiff’s mental impairments markedly imposed on the following
2 functional limitations: the ability to remember locations and work-like procedures; the ability to
3 understand, remember and carry out simple instructions; the ability to maintain attention and
4 concentration for extended periods; the ability to work in coordination with or proximity to others
5 without being distracted; the ability to make a simple work related decision; the ability to accept
6 instructions and respond appropriately to criticism from supervisors; the ability to respond
7 appropriately to changes in the work setting. (AR 802–03.) Finally, Ms. Johnson stated that on
8 average, she anticipated Plaintiff’s impairments or treatment would cause her to be absent from
9 work more than three times a month. (AR 803.)

10 **ii. Psychological Consultative Examiner Dr. Bonnie Yee**

11 On August 23, 2014, Dr. Yee assessed the mental impairments affecting Plaintiff’s
12 functioning at the request of the Social Security Administration (“SSA”). (AR 646.) Dr. Yee’s
13 findings were gathered during a one-time mental status evaluation. (*Id.*) In this evaluation,
14 Plaintiff reported depression and PTSD as a result of domestic violence in her marriage. (AR
15 647.) She also reported a family history of bipolar disorder, manic episodes, and a history of
16 depression since childhood. (*Id.*) She stated that she began to have suicidal ideations at 12 years
17 of age. (*Id.*) Her medications at the time included: Xanax, Abilify, Buspar, Cymbalta, Desyrel,
18 Lithium carbonate, and Klonopin. (*Id.*)

19 Dr. Yee noted that Plaintiff is able to complete most activities of daily living. (*Id.*) She is
20 able to drive a car, dress and bathe herself, and do light household chores such as grocery
21 shopping. (*Id.*)

22 In her mental status evaluation, Dr. Yee’s diagnostic impressions were the following: signs
23 or symptoms of trauma based disorder evidenced by Plaintiff’s physical scars of self-mutilation
24 and Plaintiff’s low mood. (AR 648.) As a result, Dr. Yee recommended counseling for
25 psychiatric dysfunction. (*Id.*) However, from a psychological standpoint, Dr. Yee stated that
26 Plaintiff should have no difficulty performing simple and repetitive tasks, although she may have
27 mild difficulty performing complex and detailed tasks. (*Id.*) In particular, Dr. Yee noted that
28 Plaintiff may not regularly attend work. (*Id.*) She also stated that Plaintiff may have moderate

1 difficulty working with the public, supervisors, and co-workers, and that Plaintiff would most
2 likely have difficulty handling the stress of employment. (*Id.*)

3 **iii. *Psychiatric Consultative Examiner Dr. Kang***

4 Dr. Kang reviewed Plaintiff’s problem list from St Helena Hospital, as well as Dr. Yee’s
5 report. (AR 128.) Dr. Kang noted that Plaintiff had a history of depression and PTSD, but
6 mentioned Plaintiff’s unremarkable mental status exam and the fact that Plaintiff was not in
7 treatment. (*Id.*) Dr. Kang concluded that Plaintiff had no severe mental impairment, and that she
8 had the residual functional capacity for medium work with some postural and environment
9 limitations. (*Id.*) Dr. Kang also found that Plaintiff could perform her past relevant work as a
10 caregiver as generally performed in the national economy. (AR 132.)

11 **iv. *Consultative Examiner DEA A. Bailey***

12 DEA Bailey reviewed Dr. Yee and Dr. Kang’s reports, as well as Plaintiff’s function
13 report, and concluded that Plaintiff had severe obesity, but no severe mental impairment. (AR
14 127.) DEA Bailey suggested that Plaintiff should be able to do simple, repetitive tasks with
15 limited public contact. (*Id.*)

16 **v. *Consulting Physician Dr. K. Beig***

17 Dr. Beig completed a physical residual functional capacity assessment on behalf of the
18 SSA. (AR 129.) Dr. Beig concluded that Plaintiff could occasionally lift 50 pounds, frequently
19 lift 25 pounds, and stand or walk for a total of six hours in an eight-hour work day. (AR 130.) Dr.
20 Beig found that Plaintiff had additional limitations based on her morbid obesity: (1) postural
21 limitations (Plaintiff may only occasionally climb ladders, ropes, and scaffolds, stoop, kneel,
22 crouch, and crawl); and (2) environmental limitations (Plaintiff must avoid concentrated exposure
23 to extreme cold and heat). (AR 130–31.)

24 **C. Other Evidence**

25 **i. *Friend Devon Lemmenes***

26 Devon Lemmenes, Plaintiff’s friend, completed an evaluation on July 24, 2014 at the
27 SSA’s request. At the time, Ms. Lemmenes had known Plaintiff for a year and a half. (AR 303.)
28 Ms. Lemmenes commented that she felt Plaintiff was capable of working but was “too lazy to do

1 so.” (*Id.*) Ms. Lemmenes noted that Plaintiff had worked for her company and was fired “for
2 taking naps on people’s couches while she was supposed to be working with her clients.” (*Id.*)
3 She thought that a receptionist job would suit Plaintiff well “because it doesn’t require her to stand
4 or be physical.” (AR 310.) Ms. Lemmenes also stated that Plaintiff’s kids and fiancé helped to
5 take care of household responsibilities. (AR 304.)

6 **ii. Letter by Ms. Young**

7 Nearly a year later, on April 14, 2015, Ms. Sheri Young, Shelter Manager at Freedom
8 House, wrote a letter on Plaintiff’s behalf after she entered the shelter on March 28, 2015 with her
9 two children. (AR 341.) Ms. Young stated that Freedom House only offers refuge to domestic
10 violence or sexual assault victims and their children. (AR 341.) Ms. Young noted that Plaintiff
11 participated in all of the shelter’s programming, including weekly support groups, such as the
12 domestic violence group, nurturing parenting class, and seeking safety group. (AR 341.) Plaintiff
13 also attended one-on-one counseling and case management with her assigned domestic violence
14 advocate. (AR 341.)

15 **iii. Letter by Plaintiff**

16 On April 21, 2015, Plaintiff submitted a letter as proof of homelessness, exhausted
17 payments, and income. (AR 345.) Plaintiff stated that payments she received from State
18 Disability were exhausted in July 2014, and that she was receiving cash aide and food stamps
19 since then. (AR 345.) Plaintiff also stated she and her family were homeless because of her
20 disability. (AR 345.)

21 **II. The ALJ Hearing**

22 On October 26, 2015, Plaintiff appeared with counsel at her scheduled hearing before ALJ
23 Kwon in San Rafael, California. (AR 55.) Plaintiff and VE Lynda Berkeley both testified at the
24 hearing. (*Id.*)

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A. Plaintiff’s Testimony

i. Mental Condition

Plaintiff has been seeing two psychiatrists, nurse practitioner Filman² since around 2010 or 2011 (AR 73), and social worker Johnson since around 2013 or 2014. (AR 75.) Plaintiff sees Ms. Filman once a month, or every other week, to obtain prescribed medication. (AR 72, 74.) She used to see her once a week until 2014, when Medi-Cal changed the required number of visits. (AR 74.) Plaintiff sees Ms. Johnson twice a month for longer sessions to receive psychotherapy. (AR 73.) Ms. Johnson makes sure that Plaintiff is taking her required medication, including Lithium, and administers blood tests. (AR 75.)

Plaintiff experiences anxiety, depression, mood swings, and post-traumatic disorder. (AR 80.) For example, Plaintiff recounts “scar[ing] to death” a young boy who threw a football at her child’s stomach because she “overreacted.” (AR 81.) Plaintiff also remembers that when someone accused her of doing something she had not done at work, she responded by “tell[ing] her off in text messaging,” which later resulted in losing her job. (AR 84.) Plaintiff also “took three boulder rocks, and [] smashed out [her boyfriend’s] windshield” when she thought he was cheating on her. (AR 85.) Plaintiff explains that her therapist has referred to these incidents as “manic episode[s].” (*Id.*) With regards to domestic violence, Plaintiff has been both a victim and a perpetrator. (AR 87.) Her anxiety also makes it impossible to take public transportation because of the people around her on the bus. (AR 102.) When asked about pain infliction, Plaintiff noted her piercings and episodes of cutting. (AR 109.) As to drugs and alcohol, the last time Plaintiff drank was in 2014, when her mother passed away. (AR 90.) Before then, Plaintiff was drinking hard liquor around once a month (two or three times at the most). (AR 91.) At the time of the hearing, Plaintiff was depending on benefits from cash aide and food stamps. (AR 76.)

ii. Physical Condition

Plaintiff sees Dr. Park for her heart. (AR 77.) Dr. Park advised Plaintiff that she has high blood pressure, for which she is taking two medications, and has diagnosed her with angina, which

² Although the transcript refers to “Mirna Feldman,” the Court assumes this refers to Myrna Filman, whose name appears through Plaintiff’s treatment records.

1 mimics a heart attack. (AR 77–8.) Since 2013 or 2014, Plaintiff has been experiencing heart
2 symptoms when she is anxious up to a few times a day. (AR 78.)

3 Plaintiff also has difficulty putting her shoes on, bathing, showering and getting dressed,
4 going to the bathroom, and clipping her toenails. (AR 79, 107, 108.) Currently, Plaintiff’s
5 daughter helps her with these activities and with personal care. (AR 97.) Before her daughter, in
6 2014, Plaintiff had IHSS workers help with laundry, dishes, garbage, and household chores. (AR
7 102–03.) Sitting is generally okay for Plaintiff, but standing up for more than around five minutes
8 is difficult on her feet and hips due to her weight. (AR 104.) Plaintiff can only carry around eight
9 pounds at a time, or the equivalent of a milk carton, and maybe a bag in the other hand. (AR 105.)

10 Plaintiff spends her days reading and conducting research on the Internet. (AR 98.) She is
11 active in her church, which she attends every Sunday. (AR 96.) Until 2015, Plaintiff drove every
12 day, although she had trouble getting out of the car. (AR 100, 105.) Since July 2015, however,
13 Plaintiff has been unable to drive because she lost her license due to unpaid tickets. (AR 99.)

14 **iii. Devon Lemmenes**

15 Plaintiff testified that Ms. Lemmenes’ evaluation was inaccurate and written to be
16 “vindictive” because of a falling out the two of them had over a dispute regarding Ms. Lemmenes’
17 boyfriend. (AR 110.)

18 **B. Vocational Expert’s Testimony**

19 At the ALJ’s request, VE Lynda Berkeley, who reviewed Plaintiff’s file and was present
20 for Plaintiff’s testimony, testified regarding Plaintiff’s ability to perform her past work. The ALJ
21 classified Plaintiff’s past relevant work as an instructional aide and home health aide as
22 “caregiver” (DOT 3 354.377-014), which required performing at medium strength levels. (AR
23 114.) The VE noted Plaintiff’s work was not that of a regular teacher’s aide because she was
24 required to perform physical activities beyond the classroom. (AR 115.)

25 The ALJ then posed several hypotheticals to the VE to determine whether there were jobs
26 existing in significant numbers in the national economy that Plaintiff could perform given her
27 impairments. (*Id.*) The ALJ began with a hypothetical that considers an individual with the
28 Plaintiff’s age, education, and background, along with the following characteristics:

1 Individual can perform sedentary work. She can occasionally
2 perform postural activities, but never climb any ladders, ropes,
3 scaffolding, for safety reasons. She should avoid working at heights
4 or with heavy or hazardous machinery. Also avoid driving. The
work should not include regular interaction with the general public
or regular teamwork, projects with co-workers. So, a job that one
can do pretty much on their own.

5 (*Id.*) The VE responded that Plaintiff could not perform her past caregiver job. (AR 115.) The
6 VE was asked about and suggested three examples of jobs that would fit the criteria advanced by
7 the ALJ: (1) document preparer (DOT 2 249.587-018), which requires performing at sedentary
8 strength level (AR 116); (2) addressing clerk (2 209.587-010); and (3) tube clerk (2 239.687-014).
9 (AR 116.) The VE noted that most sedentary jobs have phone contact, but these, and a few others,
10 have no public contact. (AR 117.)

11 Next, the ALJ posed a slightly modified hypothetical to the VE. She asked the VE “if I
12 added to hypothetical number one the need to miss work because of medical issues, and the
13 frequency of the absences from work – let’s say it’s, on average, two days or more every single
14 month because of medical problems – what does that do to those representative three jobs, and any
15 competitive work, for that matter?” (*Id.*) The VE responded that under such conditions, and
16 based on her professional experience, not the DOT, all employment would be precluded. (*Id.*)
17 Plaintiff’s attorney then asked the VE her opinion on people who are off-task ten percent of the
18 time. The VE specified that ten percent is their benchmark, that is, anything above that would
19 generally preclude employment, again based on the VE’s professional experience, not the DOT.
20 (AR 118.)

21 **III. The ALJ’s Findings**

22 In a February 2016 written decision, the ALJ found Plaintiff not disabled under sections
23 216(i), 223(d) and 1614(a)(3)(A) of the Social Security Act, taking into consideration the
24 testimony and evidence, and using the SSA’s five-step sequential evaluation process for
25 determining disability. (AR 38–9); *see* 20 C.F.R. §§ 404.1520(a), 416.920(a).

26 At step one, the ALJ concluded that Plaintiff was disabled because she has not engaged in
27 substantial gainful activity since October 1, 2013, the alleged onset date. (AR 40); *see* 20 C.F.R.

1 §§ 404.1571 *et seq.*, 416.971 *et seq.* While the ALJ noted that Plaintiff earned \$3,741.77 in 2014,
2 the ALJ concluded that this amount did not constitute substantial gainful activity. (*Id.*)

3 At step two, the ALJ determined that the objective medical evidence indicates that
4 Plaintiff's depressive disorder, anxiety disorder, PTSD, morbid obesity, and coronary artery
5 disease constitute "severe impairments" within the meaning of the regulations. (*Id.*); *see* 20
6 C.F.R. §§ 404.1520(c), 416.920(c).

7 At the third step, the ALJ concluded that Plaintiff did not have an impairment or a
8 combination of impairments that meet or medically equals the severity of one of the listed
9 impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR 41.) At this step, the ALJ noted
10 that obesity was not a listed impairment. (*Id.*) The ALJ then considered whether Plaintiff's
11 mental impairments met the listing of Sections 12.04 and 12.06, paragraphs (B) and (C). (*Id.*)
12 With regards to paragraph (B), she concluded that they did not, on the grounds that Plaintiff's
13 mental impairments do not cause (1) at least two "marked" limitations, where a marked limitation
14 means more than moderate but less than extreme, or (2) one "marked" limitation and "repeated"
15 episodes of decompensation, each of extended duration, which means three episodes within one
16 year, or an average of once every four months, each lasting for at least two weeks. (*Id.*) With
17 regards to paragraph (C), the ALJ concluded that Plaintiff's mental impairments did not satisfy the
18 criteria because the evidence fails to establish Plaintiff's complete inability to function
19 independently outside her home. (*Id.*)

20 The ALJ found that Plaintiff retained the residual functional capacity ("RFC") to perform
21 sedentary work (20 C.F.R. §§ 404.1567(a), 416.967(a)) except with occasional posturals, and that
22 Plaintiff may not "climb ladders, ropes, or scaffolds; [] work at heights or with heavy hazardous
23 machinery as safety precautions; [or] [] interact[] with the general public." (AR 42.) At this step,
24 the ALJ noted that Plaintiff's impairments could reasonably be expected to cause the symptoms
25 she reported, but that her "statements concerning the intensity, persistence and limited effects of
26 these symptoms are not entirely credible..." (*Id.*)

27 To reach this conclusion, the ALJ gave great weight to the diagnosis of Dr. Bonnie Yee,
28 psychological CE, based on the fact that her findings were consistent with the record as a whole.

1 (AR 44.) The ALJ gave “less weight” to Ms. Johnson’s mental impairment questionnaire on
2 grounds that it appears to be based primarily on Plaintiff’s subjective complaints, and because Ms.
3 Johnson is “not an acceptable medical source and the questionnaire was not co-signed by a
4 supervising psychologist or psychiatrist.” (AR 45.) The ALJ also gave little weight to Ms. Devon
5 Lemmenes’ July 27, 2014 statement because it was not necessary to reach a decision. (*Id.*)
6 Lastly, the ALJ noted that Ms. Young’s April 14, 2015 letter was “taken into account.” (*Id.*)

7 At step four, the ALJ found that Plaintiff is unable to perform any past relevant work based
8 on the VE’s testimony that the instructional aide and home health aide both exceeded the RFC.
9 (*Id.*)

10 At step five, the ALJ concluded that Plaintiff can perform jobs that exist in significant
11 numbers in the national economy, such as document preparer, and tube clerk. (AR 46.)

12 **IV. Appeals Council**

13 Plaintiff filed a request for review on March 16, 2016, arguing that the ALJ committed
14 errors of law and that her decision was not supported by substantial evidence. (AR 19.) The
15 Appeals Council denied Plaintiff’s appeal on May 24, 2016, concluding that Plaintiff’s additional
16 evidence did not provide a basis for changing the ALJ’s decision, and that there was therefore no
17 reason to grant review. (AR 5–6.) The Appeals Council’s decision rendered the ALJ’s opinion
18 final.

19 **DISCUSSION**

20 Plaintiff challenges several aspects of the ALJ’s decision. The first two pertain to the
21 ALJ’s consideration of the medical evidence related to Plaintiff’s alleged impairments: (1) the
22 ALJ failed to properly weigh the medical opinions insofar as she “cherry-picked” from CE Dr.
23 Yee’s opinion, and assigned little weight to treating source Ms. Johnson’s assessment, and (2) the
24 ALJ failed to properly weigh the medical evidence and improperly concluded that Plaintiff’s
25 bipolar disorder was non-severe at Step 2. Plaintiff also maintains that the ALJ incorrectly
26 evaluated Plaintiff’s subjective complaints and credibility. Lastly, Plaintiff contends that the ALJ
27 erred as a matter of law by failing to include all of Plaintiff’s impairments in the RFC analysis,
28

1 including the limiting effects of Plaintiff’s “morbid obesity,” which rendered the VE hypotheticals
2 incomplete.

3 **I. The ALJ’s Consideration of Medical Opinion Evidence**

4 **A. Legal Standard**

5 In the Ninth Circuit, courts must “distinguish among the opinions of three types of
6 physicians: (1) those who treat the claimant (treating physicians); (2) those who examine but do
7 not treat the claimant (examining physicians); and (3) those who neither examine nor treat the
8 claimant (nonexamining physicians).” *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (as
9 amended (Apr. 9, 1996)). “A treating physician’s opinion is entitled to more weight than that of
10 an examining physician, and an examining physician’s opinion is entitled to more weight than that
11 of a nonexamining physician.” *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). If a treating
12 doctor’s opinion is not contradicted by another doctor, it may be rejected only for “clear and
13 convincing” reasons. *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). And “even if the
14 treating doctor’s opinion is contradicted by another doctor, the Commissioner may not reject this
15 opinion without providing ‘specific and legitimate reasons’ supported by substantial evidence in
16 the record for so doing.” *Lester*, 81 F.3d at 830 (internal citations omitted). Likewise, “the
17 opinion of an examining doctor, even if contradicted by another doctor, can only be rejected for
18 specific and legitimate reasons that are supported by substantial evidence in the record.” *Id.* at
19 830–31.

20 “The ALJ can meet this burden by setting out a detailed and thorough summary of the facts
21 and conflicting medical evidence, stating his interpretation thereof, and making findings.” *Cotton*
22 *v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986). “The opinion of a nonexamining physician cannot
23 by itself constitute substantial evidence that justifies the rejection of the opinion of either an
24 examining physician or a treating physician.” *Lester*, 81 F.3d at 831 (internal citation omitted).
25 Ultimately, “the ALJ must do more than offer his conclusions. He must set forth his own
26 interpretations and explain why they, rather than the doctors’, are correct.” *Embrey v. Bowen*, 849
27 F.2d 418, 421–22 (9th Cir. 1988).

28

1 “When an ALJ does not explicitly reject a medical opinion or set forth specific, legitimate
2 reasons for crediting one medical opinion over another, he errs. In other words, an ALJ errs when
3 he rejects a medical opinion or assigns it little weight while doing nothing more than ignoring it,
4 asserting without explanation that another medical opinion is more persuasive, or criticizing it
5 with boilerplate language that fails to offer a substantive basis for his conclusion.” *Garrison v.*
6 *Colvin*, 759 F.3d 995, 1012–13 (9th Cir. 2014) (internal citation omitted). In conducting its
7 review, the ALJ “must consider the entire record as a whole and may not affirm simply by
8 isolating a ‘specific quantum of supporting evidence.’” *Hill v. Astrue*, 388 F.3d 1144, 1159 (9th
9 Cir. 2012) (internal citations omitted). “An ALJ may not cherry-pick and rely on portions of the
10 medical record which bolster his findings.” *See, e.g., Holohan v. Massanari*, 246 F.3d 1195,
11 1207–08 (9th Cir. 2001) (holding that an ALJ may not selectively rely on some entries and ignore
12 others “that indicate continued, severe impairment”). “Particularly in a case where the medical
13 opinions of the physicians differ so markedly from the ALJ’s[.]” “it is incumbent on the ALJ to
14 provide detailed, reasoned, and legitimate rationales for disregarding the physicians’ findings.”
15 *Embrey*, 849 F.2d at 422.

16 **B. Analysis**

17 To reject the opinions of Plaintiff’s examining psychological specialist Dr. Yee and long-
18 term treating social worker Ms. Johnson, the ALJ was required to provide specific and legitimate
19 reasons supported by substantial evidence for doing so. *See Lester*, 81 F.3d at 830–31. The ALJ
20 did not do so.

21 **a. Psychological CE Dr. Bonnie Yee**

22 The ALJ gave significant weight to the psychological assessment of examining physician
23 Dr. Yee because it was consistent with the record as a whole. In her assessment, Dr. Yee
24 concluded that Plaintiff is able to complete most activities of daily living, and that she should have
25 no difficulty performing simple and repetitive tasks, although she may have mild difficulty
26 performing complex and detailed tasks. (AR 647–48.) However, Dr. Yee also noted that Plaintiff
27 may not regularly attend work, that she may have moderate difficulty working with the public,
28

1 supervisors, and co-workers, and that Plaintiff would most likely have difficulty handling the
2 stress of employment. (AR 648.)

3 Plaintiff argues that the ALJ’s summary ignores the portions of Dr. Yee’s opinion which
4 reflect limitations on Plaintiff’s ability to work. In particular, Plaintiff points to the ALJ’s failure
5 to consider Dr. Yee’s opinion that (1) Plaintiff’s functional capacity was limited because of her
6 bipolar disorder and PTSD; (2) Plaintiff could not handle the stress of employment; and (3)
7 Plaintiff “may not regularly attend work.” *Compare* AR 648–49 (Dr. Yee’s psychiatric
8 evaluation), *with* AR 44 (ALJ’s February 2016 decision). The Commissioner maintains that the
9 ALJ was not required to adopt the entirety of Dr. Yee’s function assessment because some of it
10 was cast as “recommendations,” not “imperatives.” (Dkt. No. 25 at 5:8-12 (citing *Carmickle v.*
11 *Comm’r Soc. Sec. Admin.*, 533 F.3d 1155 (9th Cir. 2008).) In particular, the Commissioner
12 emphasizes that while Dr. Yee stated that “claimant should have no difficulty performing simple
13 and repetitive tasks,” the remainder of Dr. Yee’s recommendation was framed as Plaintiff “may
14 have difficulty” and “would most likely have difficulty.” According to the Commissioner, the
15 ALJ was free to disregard these non-imperative recommendations based on *Carmickle v. Comm’r*
16 *Soc. Sec. Admin.*, 533 F.3d 1155 (9th Cir. 2008). The Court disagrees.

17 In *Carmickle*, the Ninth Circuit found that the ALJ did not err in rejecting one treating
18 physician’s recommendation that the plaintiff use a reclining desk chair while working in light of
19 a subsequent opinion by another treating physician that concluded that the plaintiff could only sit
20 for short periods of time and needed the option to alternate positions frequently. *Carmickle*, 533
21 F.3d at 1165. The plaintiff had argued that this was in error because the second physician’s
22 opinion also stated that he agreed with the first physician’s opinion, which plaintiff insisted would
23 necessarily include the reclining chair option. *Id.* The Ninth Circuit rejected this argument
24 concluding that the ALJ’s decision was rational since the first physician’s opinion “was offered as
25 a recommendation, not an imperative.” Here, in contrast, the ALJ was not weighing the opinions
26 of two treating physicians; rather, she was cherry-picking portions of the opinion of one treating
27 physician. *See Diedrich v. Berryhill*, 874 F.3d 634 (9th Cir. 2017) (“It was improper for the ALJ
28 to discount Diedrich’s testimony by “cherry pick[ing]” the absence of certain symptoms from this

1 report.”); *Williams v. Colvin*, No. ED CV 14–2146–PLA, 2015 WL 4507174, at *6 (C.D. Cal. July
2 23, 2015) (“An ALJ may not cherry-pick evidence to support the conclusion that a claimant is not
3 disabled, but must consider the evidence as a whole in making a reasoned disability
4 determination”) (internal citation omitted). The Commissioner’s argument that the ALJ was
5 entitled to ignore portions of Dr. Yee’s diagnosis based on semantics is unpersuasive. Dr. Yee
6 was assessing Plaintiff’s mental impairments—she cannot necessarily know that Plaintiff will miss
7 three or more days of work per month, but she can prognosticate that she may, based on her
8 examination and the weight of the medical evidence.

9 The Commissioner’s alternative suggestion that the ALJ did not err because she did not
10 rely solely on the opinion of Dr. Yee in assessing Plaintiff’s RFC, but also discussed the opinion
11 of at least six other medical sources, is equally unpersuasive. An ALJ errs when she fails to offer
12 “specific and legitimate reasons that are supported by substantial evidence in the record” for
13 rejecting the opinion of an examining physician. *Lester*, 81 F.3d at 830–31 (internal citations
14 omitted). The question of whether that error was harmless because other medical sources
15 supported the ALJ’s RFC is discussed below.

16 In sum, the ALJ erred in failing to provide specific and legitimate reasons for discounting
17 portions of Dr. Yee’s opinion while giving the remainder of her opinion great weight.

18 **b. *Social Worker Deborah Johnson***

19 Next, Plaintiff argues that the ALJ erred in assigning “little weight” to the opinion of
20 Plaintiff’s social worker Ms. Johnson. The ALJ gave her opinion less weight because: (1) as a
21 social worker, she was not a medically acceptable source, and (2) her opinion was inconsistent
22 with the objective findings and appeared to be based primarily on Plaintiff’s subjective
23 complaints. Although the ALJ stated she was giving “little weight” to Ms. Johnson’s opinion, she
24 effectively gave it no weight as she discredited all the functional limitations it recommended. The
25 ALJ’s decision to do so is not supported by substantial evidence.

26 The ALJ’s first reason for discounting the assessment of Ms. Johnson—that she was not a
27 medically acceptable source—is unavailing. The relevant SSA regulations state that “[o]nly
28 physicians and certain other qualified specialists are considered [medically acceptable sources.]”

1 *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014) (internal citations and quotations omitted);
 2 20 C.F.R §§ 404.1513(a), 404.1513(d). Therapists and social workers do not qualify as acceptable
 3 medical sources, and thus are considered “other sources.” *See* 20 C.F.R. § 416.913(d)(1);
 4 *Stephens v. Colvin*, No. 13-cv-05156-RS, 2014 WL 6982680, at *4 (N.D. Cal. Dec. 9, 2014)
 5 (holding that “[t]estimony from a treating therapist constitute[d] an ‘other source’”); *Casner v.*
 6 *Colvin*, 958 F. Supp. 2d 1087, 1097 (C.D. Cal. 2013) (finding that a treating licensed clinical
 7 social worker was not an acceptable medical source). Even if Ms. Johnson is not an “acceptable
 8 medical source,” given her long-term and close treating relationship with Plaintiff, the ALJ was
 9 not entitled to simply disregard her opinion. *See Revels v. Berryhill*, 874 F.3d 648, 655 (9th Cir.
 10 2017) (citing 20 C.F.R. § 404.1527(c)(1)–(2), (f) (“an ALJ must consider the opinions of medical
 11 providers who are not within the definition of “acceptable medical sources.”); *id.* §
 12 404.1527(c)(2)(ii) (in determining the weight that should be given to an opinion, the ALJ should
 13 look at “the treatment the source has provided and . . . the kinds and extent of examinations and
 14 testing the source has performed or ordered from specialists”).

15 In *Revels*, the Ninth Circuit found that a nurse practitioner who saw the plaintiff ten times
 16 in the span of two years, assisted in treating plaintiff’s chronic pain, and referred her to various
 17 specialists, was an “other source” to whom the ALJ should have assigned weight. *See Revels*, 874
 18 F.3d at 665. So too here. The record reflects that Plaintiff was seen at Lucerne Community
 19 Clinic, where Ms. Johnson works, since November 2010, and that Ms. Johnson personally saw
 20 Plaintiff 20 times from August 2014 to October 2015. (AR 801, 905–25.) During these visits,
 21 Ms. Johnson led 30-minute psychotherapy sessions with Plaintiff. (*Id.*) Ms. Johnson made
 22 referrals for Plaintiff and connected her to resources, monitored Plaintiff’s mood, and worked on a
 23 relapse prevention plan. (*Id.*)

24 The ALJ found that Ms. Johnson nevertheless remained an unacceptable medical source
 25 because Dr. Gardner, her supervisor, did not co-sign Ms. Johnson’s functional capacity
 26 assessment, and because nothing in the record suggests Ms. Johnson worked so closely with Dr.
 27 Gardner as to be considered his agent. This is unpersuasive. In *Revels* the fact that the nurse
 28 practitioner’s assessment was co-signed by an acceptable medical source in her clinic was only

1 one of various elements considered by the Ninth Circuit in determining the weight to give to the
2 nurse practitioner’s opinion. *Revels* , 874 F.3d at 665. Moreover, the cases cited by the
3 Commissioner in support of the ALJ’s finding do not address the question at issue—whether the
4 opinion of “other sources” may be given no weight if they are not co-signed by an acceptable
5 medical source.

6 For example, in *Britton v. Colvin*, 787 F.3d 1011 (9th Cir. 2015), the Ninth Circuit was
7 concerned with whether the opinion of an “other source” should be accorded deference as medical
8 testimony under certain circumstances. The court concluded that the ALJ did not improperly
9 weigh the testimony of a nurse practitioner because nothing in the record indicated that the nurse
10 worked so closely under a physician as to be considered his or her agent. *Id.* at 1013 (citing
11 *Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir. 1996)). Here, in contrast, Plaintiff is not arguing that
12 the ALJ should have elevated Ms. Johnson’s assessment to that of an “acceptable medical source,”
13 but only that it should be assigned *some* weight in light of Ms. Johnson’s long-term relationship
14 with Plaintiff.

15 Likewise, *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996), discussed the distinction
16 between lay witness testimony from the plaintiff and his wife regarding whether the plaintiff’s
17 symptoms testimony limited his ability to work, which was permissible, and lay witnesses
18 testimony which sought to provide medical diagnoses, which was not permissible. *See also*
19 *Denison v. Colvin*, No. 2:16-CV-00021 JRC, 2016 WL 3610835, at *2 (W.D. Wash. July 6, 2016)
20 (“[T]here are “other sources,” such as friends and family members, who are defined as “other non-
21 medical sources” and “other sources” such as nurse practitioners, physician assistants, therapists
22 and “social welfare agency personnel,” who are considered other medical sources.”) (citing 20
23 C.F.R. § 404.1513 (d)). Here, Ms. Johnson is not a lay witness, but an “other source” under the
24 regulations.

25 An ALJ may only discount the opinion of an “other source,” such as a social worker, if she
26 provides “reasons germane to each witness for doing so.” *Popa v. Berryhill*, 872 F.3d 901, 906
27 (9th Cir. 2017). That is, an ALJ may properly discredit a social worker’s opinion if it is
28 inconsistent with evidence in the record. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir.

1 2005) (noting that “[i]nconsistency with medical evidence” is a “germane” reason for rejecting lay
2 witness testimony); *Casner*, 958 F. Supp. 2d at 1098 (holding that the ALJ provided specific and
3 legitimate reasons for rejecting a social worker’s opinion because her opinion was inconsistent
4 with four other medical opinions). Here, while the ALJ concluded that Ms. Johnson’s assessment
5 was contradicted by the record, she failed to cite any specific examples or evidence in support of
6 this conclusion. (AR 45.) Although the Commissioner seeks to remedy this defect in her
7 opposition brief offering a string cite to portions of the record which she contends contradict Ms.
8 Johnson’s findings (Dkt. No. 25 at 6:19–22), a reviewing court is “constrained to review the
9 reasons the ALJ asserts.” *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003).

10 “[A]n ALJ errs when he rejects a medical opinion or assigns it little weight while doing
11 nothing more than ignoring it, asserting without explanation that another medical opinion is more
12 persuasive, or criticizing it with boilerplate language that fails to offer a substantive basis for his
13 conclusion.” *Garrison*, 759 F.3d at 1012–13 (citing *Nguyen*, 100 F.3d at 1464). Here, the ALJ
14 failed to offer any reasons let alone specific and legitimate reasons for rejecting Ms. Johnson’s
15 opinion that Plaintiff’s impairments would cause her to be absent from work more than three times
16 a month. Rather, the record shows this opinion is consistent with Plaintiff’s functional capacity
17 evaluation, and in particular with the opinion of the expert consultative psychologist, Dr. Yee,
18 who noted that Plaintiff “may not regularly attend work.” (AR 649, 803.)

19 The Court thus concludes that the ALJ erred in assigning little weight to the opinion of Ms.
20 Johnson, Plaintiff’s long term treating social worker.

21 **c. *The Severity of Plaintiff’s Bipolar Disorder***

22 Finally, Plaintiff argues that the ALJ erred in failing to consider the medical evidence
23 regarding her bipolar disorder and consider whether this was a “severe impairment” at step two of
24 her analysis. An impairment is found “not severe” at step two of the ALJ’s analysis “when
25 medical evidence establishes only a slight abnormality or a combination of slight abnormalities
26 which would have no more than a minimal effect on an individual’s ability to work.” SSR 85–28;
27 *see Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005).

1 Here, there is substantial evidence documenting Plaintiff’s diagnosis and treatment of
 2 bipolar disorder. At Lucerne Community Clinic, Dr. Gardner repeatedly diagnosed Plaintiff’s
 3 bipolar affect between August and September 2013. (AR 368–69, 372–75.) Similarly, at St
 4 Helena Hospital, Dr. Wade noted “bipolar disorder, likely” in Plaintiff’s history and physical
 5 examination (AR 430), and Dr. Mark Rose highlighted bipolar disorder in his final diagnosis.
 6 (AR 434.) In her visits with nurse practitioner Filman and Dr. Moizeau at Clearlake Family
 7 Health Center, Plaintiff’s bipolar 1 disorder and bipolar depression were also continuously noted
 8 as “active problems.” (AR 553, 843–82.) Long-term treating social worker Ms. Johnson also
 9 specifically noted signs and symptoms of Plaintiff’s diagnosed bipolar 1 disorder and PTSD. (AR
 10 890–925.) Lastly, Dr. Yee assessed the mental impairments affecting Plaintiff’s functioning at the
 11 request of the SSA, and included bipolar disorder in her diagnostic impressions. (AR 648.)
 12 Plaintiff’s testimony corroborates the record: she testified about her “manic episodes,” anger
 13 outbursts, and difficulty in getting along with people. (AR 80–5.)

14 The ALJ, however, did not list bipolar disorder among Plaintiff’s severe impairments.
 15 Instead, she listed: depressive disorder, anxiety disorder, PTSD, morbid obesity, and coronary
 16 artery disease. (AR 40.) The ALJ offered no rationale for her decision to omit bipolar disorder
 17 from Plaintiff’s list of severe impairments, and the Commissioner offers none on appeal. Instead,
 18 the Commissioner argues that the ALJ’s error was harmless. The Court disagrees.

19 While omissions at step two are often harmless error if step two is decided in plaintiff’s
 20 favor, that is not the case here. *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005). The ALJ’s
 21 RFC failed to account for the specific, distinctive functional limitations of bipolar disorder. *See*
 22 *Hill*, 388 F.3d at 1151–53 (“Because the ALJ excluded panic disorder from Hill’s list of
 23 impairments and instead characterized her diagnosis as anxiety alone, the residual functional
 24 capacity determination was incomplete, flawed, and not supported by substantial evidence in the
 25 record.”). Although the ALJ found severe psychological impairments of depressive disorder,
 26 anxiety disorder, and PTSD (AR 40), and accounted for a psychological limitation in the RFC by
 27 limiting Plaintiff to the full range of sedentary work with some postural and non-exertional
 28 limitations, specifically having no work with the general public (AR 42–5), the ALJ failed to

1 consider the extent to which Plaintiff’s bipolar disorder would cause her to regularly miss work.
2 At Lucerne Community Clinic, Ms. Johnson determined that Plaintiff’s diagnoses of bipolar 1
3 disorder and PTSD rendered her unable to “perform a full-time job, working 8 hours a day, 5 days
4 a week on a regular and continuing basis” (AR 801), and would cause Plaintiff to be absent from
5 work “more than 3 times a month.” (AR 802–03.) Likewise, Dr. Yee diagnosed Plaintiff with
6 bipolar disorder and concluded that she may not regularly attend work. (AR 649.)

7 Because the ALJ did not account for the fact that Plaintiff’s bipolar disorder could prevent
8 her from regularly attending work, the ALJ erroneously failed to account for restrictive aspects of
9 well-supported, treating and examining assessments of the specific, disabling limitations of
10 Plaintiff’s bipolar disorder.³ As such, the ALJ’s error at step two was not harmless.

11 **II. The ALJ’s Credibility Determination**

12 **A. Standard for Assessing Credibility**

13 To “determine whether a claimant’s testimony regarding subjective pain or symptoms is
14 credible,” an ALJ must use a “two-step analysis.” *Garrison*, 759 F.3d at 1014. “First, the ALJ
15 must determine whether the claimant has presented objective medical evidence of an underlying
16 impairment which could reasonably be expected to produce the pain or other symptoms alleged.”
17 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (internal citations and quotation marks
18 omitted). “Second, if the claimant meets the first test, and there is no evidence of malingering, the
19 ALJ can reject the claimant’s testimony about the severity of her symptoms only by offering
20 specific, clear and convincing reasons for doing so.” *Id.* (internal citations and quotation marks
21 omitted). The clear and convincing standard is “the most demanding required in Social Security
22 cases.” *Moore v. Comm’r of the Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002). “General
23 findings are an insufficient basis to support an adverse credibility determination.” *Holohan*, 246
24 F.3d at 1208. Rather, the ALJ “must state which pain testimony is not credible and what evidence
25 suggests the claimant[] is not credible.” *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993); *see*

26 _____
27 ³ Plaintiff argues that the ALJ also erred in failing to consider the relationship between Plaintiff’s
28 morbid obesity and her mental impairments in formulating her RFC. Given the Court’s
conclusion that the ALJ failed to consider the severity of her mental impairments generally, it is
unnecessary to reach Plaintiff’s specific argument regarding her obesity.

1 *also Ghanim*, 763 F.3d at 1163 (“General findings are insufficient; rather, the ALJ must identify
2 what testimony is not credible and what evidence undermines the claimant’s complaints.”)
3 (citation omitted).

4 **B. Analysis**

5 Applying a two-step analysis, the ALJ found that Plaintiff’s “medically determinable
6 impairments could reasonably be expected to cause the type of alleged symptoms,” but Plaintiff’s
7 testimony “concerning the intensity, persistence and limiting effects of these symptoms” was not
8 entirely credible for several reasons. (AR 42.) Since Plaintiff met the first part of the test, the ALJ
9 could only reject Plaintiff’s testimony regarding the severity of her symptoms due to evidence of
10 malingering or by offering specific, clear and convincing reasons for doing so. *See Lingenfelter*,
11 504 F.3d at 1036. The ALJ erred in rejecting Plaintiff’s testimony regarding the severity of her
12 pain because there is no evidence of malingering, and the ALJ failed to meet the demanding clear
13 and convincing reasons standard. *See Moore*, 278 F.3d at 924. The ALJ’s finding that Plaintiff is
14 not entirely credible was in error.

15 First, the ALJ failed to identify which testimony she found not credible. In *Brown-Hunter*
16 *v. Colvin*, 806 F.3d 487 (9th Cir. 2015), the Ninth Circuit held that where an ALJ made a similar
17 “conclusory statement”—that Plaintiff’s “statements concerning the intensity, persistence, and
18 limiting effects of these symptoms are not credible to the extent they are inconsistent with the
19 above residual functional capacity assessment” (AR 42)—the ALJ was required to specifically
20 identify which of the plaintiff’s statements she found incredible and why. *Brown-Hunter*, 806
21 F.3d at 493. As in *Brown-Hunter*, the ALJ here erred because she found “based on unspecified
22 claimant testimony and a summary of medical evidence, that ‘the functional limitations from
23 claimant’s impairment were less serious than she alleged.’” *Id.*; *see also Reddick v. Chater*, 157
24 F.3d 715, 722 (9th Cir. 1998) (“[T]he ALJ must identify what testimony is not credible and what
25 evidence undermines the claimant’s complaints.”) (internal quotation marks and citation omitted).

26 The ALJ’s only reference to a contradiction in Plaintiff’s testimony is that “Claimant has a
27 fairly active lifestyle despite her complaints.” (AR 43.) The ALJ seems to base this conclusion on
28 Plaintiff’s testimony that she attends a Live Well program, is active in her church, takes care of

1 her daughter, does household chores, spends time on a computer, attended Yuba Community
2 College, and worked as a phone dispatcher. (*Id.*) “Yet it is not inconsistent with disability that
3 [Plaintiff] was not entirely incapacitated by fatigue at all times.” *Trevizo v. Berryhill*, 862 F.3d
4 987, 1002 (9th Cir. 2017).

5 The Commissioner’s reliance on *Molina v. Astrue*, 674 F.3d 1104 (9th Cir. 2012) for the
6 proposition that “[e]ven where those activities suggest some difficulty in functioning, they may be
7 grounds for discrediting the claimant’s testimony to the extent that they contradict claims of a
8 totally debilitating impairment,” is unavailing. In *Molina*, the Ninth Circuit found that “[t]he ALJ
9 could reasonably conclude that Molina’s activities, including walking her two grandchildren to
10 and from school, attending church, shopping, and taking walks, undermined her claims that she
11 was incapable of being around people without suffering from debilitating panic attacks. *Molina*,
12 674 F.3d at 1113. Here, neither the ALJ nor the Commissioner point to any specific
13 contradictions of the sort by Plaintiff. Rather, (1) the medical evidence is consistent with
14 Plaintiff’s allegations of disability, and (2) Plaintiff’s activities of daily living are consistent with
15 her allegations of disability.

16 First, the medical evidence is consistent with Plaintiff’s allegations. The ALJ points only
17 to one purported inconsistency in the record, finding that Plaintiff’s statement in a function report
18 dated July 16, 2014 that she can barely walk or bend over and needs help with personal care was
19 not credible because it was not in accordance with knee and lumbar spine x-rays performed in the
20 same month. (AR 45, 592–97, 720–22.) In so concluding, the ALJ ignored the extensive degree
21 of physical limitation caused by Plaintiff’s morbid obesity apparent in the record. (*See, e.g.*, AR
22 130–31, 494, 502, 516, 629 (noting chronic generalized musculoskeletal pain and cardiac
23 problems due to the need for weight loss).) The ALJ may not “cherry-pick evidence to support the
24 conclusion that a claimant is not disabled,” instead of consider[ing] the evidence as a whole in
25 making a reasoned disability determination.” *Williams*, 2015 WL 4507174, at *6.

26 Second, Plaintiff’s activities do not contradict her allegations of disability. The ALJ
27 ignored Plaintiff’s testimony that she (1) receives significant help from her mother and oldest
28 daughter (AR 98, 103, 108–09); (2) qualifies for home-aid assistance from IHSS for 63 hours per

1 month (AR 245, 568); (3) had to withdraw from multiple classes at Yuba Community College
2 (AR 352); and (4) began work as a phone dispatcher, but couldn't keep up" two weeks later (AR
3 831). *See Holohan*, 246 F.3d at 1207–08 (holding that an ALJ may not selectively rely on some
4 entries and ignore others "that indicate continued, severe impairment").

5 As such, the specific reasons the ALJ gave for disbelieving Plaintiff's testimony about the
6 severity of her pain symptoms are not "clear and convincing."

7 ***

8 Given that the ALJ's consideration of the medical evidence and adverse credibility finding
9 of Plaintiff are not supported by substantial evidence, the Court finds error in Plaintiff's RFC.
10 Because this error goes to the heart of the disability determination, it is not harmless. *See*
11 *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014) ("An error is
12 harmless if it is inconsequential to the ultimate nondisability determination," or "if the agency's
13 path may reasonably be discerned"); *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th
14 Cir. 2006) ("[A] reviewing court cannot consider the error harmless unless it can confidently
15 conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a
16 different disability determination.").

17 Because the Court concludes that the ALJ's analysis at step four was in error, the Court
18 need not consider Plaintiff's additional arguments regarding the ALJ's formulation of Plaintiff's
19 RFC. As discussed below, the Court concludes that this case must be remanded for further
20 proceedings.

21 **III. The Scope of Remand**

22 Plaintiff asks the Court to remand for immediate benefits under the credit-as-true rule.
23 Generally, when the Court reverses an ALJ's decision, "the proper course, except in rare
24 circumstances, is to remand to the agency for additional investigation or explanation." *Benecke v.*
25 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004). However, a court may remand for an immediate
26 award of benefits where "(1) the record has been fully developed and further administrative
27 proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient
28 reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the

1 improperly discredited evidence were credited as true, the ALJ would be required to find the
2 claimant disabled on remand.” *Garrison*, 759 F.3d at 1020. Each part of this three-part standard
3 must be satisfied for the court to remand for an award of benefits, *id.*, and “[i]t is the ‘unusual
4 case’ that meets this standard.” *Williams v. Colvin*, No. 12–CV6179, 2014 WL 957025, at *14
5 (N.D. Cal. Mar. 6, 2014) (quoting *Benecke*, 379 F.3d at 595); *see Leon v. Berryhill*, No. 15-15277,
6 2017 WL 5150294, at *2 (9th Cir. Nov. 7, 2017) (“where [...] an ALJ makes a legal error, but the
7 record is uncertain and ambiguous, the proper approach is to remand the case to the agency.”
8 (citing *Treichler*, 775 F.3d at 1105)). Moreover, if “an evaluation of the record as a whole creates
9 serious doubt that a claimant is, in fact, disabled,” a court should remand for further proceedings
10 “even though all conditions of the credit-as-true rule are satisfied.” *Garrison*, 759 F.3d at 1021;
11 *see also Treichler*, 775 F.3d at 1106 (“[A] reviewing court is not required to credit claimants’
12 allegations regarding the extent of their impairments as true merely because the ALJ made a legal
13 error in discrediting their testimony.”).

14 Here, even if the record was fully developed and the improperly discredited evidence is
15 credited as true, it is not certain that the ALJ would be required to find Plaintiff legally disabled
16 under the third part of the credit-as-true standard. *Leon*, 2017 WL 5150294, at *4. Because the
17 record creates serious doubts as to whether Plaintiff is in fact disabled, the rare circumstances that
18 result in a direct award of benefits are not present in this case. *See id.* The Court thus declines to
19 reach the credit-as-true rule and must instead remand for further proceedings.

20 CONCLUSION

21 For the reasons stated above, the Court GRANTS Plaintiff’s Motion for Summary
22 Judgment (Dkt. No. 25) and DENIES Defendant’s Cross-Motion for Summary Judgment (Dkt.
23 No. 26). The Court VACATES the ALJ’s final decision and REMANDS for reconsideration
24 consistent with this Order.

25 This Order terminates Docket Nos. 24 and 25.

26 **IT IS SO ORDERED.**

27 Dated: November 30, 2017

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Jacqueline Scott Corley
JACQUELINE SCOTT CORLEY
United States Magistrate Judge