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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARY DELORES BADILLO,
Plaintiff,
v.
NANCY BERRYHILL,
Acting Commissioner of Social Security,
Defendant.

Case No. 16-cv-06823-JCS

**ORDER REGARDING CROSS
MOTIONS FOR SUMMARY
JUDGMENT**

Re: Dkt. Nos. 14, 17

I. INTRODUCTION

Plaintiff Mary Badillo brings this action appealing the final decision of Defendant Nancy Berryhill, Acting Commissioner of Social Security (the “Commissioner”), denying Badillo’s application for disability benefits. The parties have filed cross motions for summary judgment pursuant to Civil Local Rule 16-5. For the reasons discussed below, Badillos’s motion is GRANTED, the Commissioner’s motion is DENIED, and the matter is REMANDED for an award of benefits.¹

II. BACKGROUND

A. Badillo’s Medical Records

Badillo is a fifty-year-old woman with a long history of mental and physical health impairments including bipolar disorder, mood disorder, generalized anxiety disorder, polysubstance abuse in remission, gastroparesis with episodic nausea and vomiting, and chronic low back pain. AR (dkt. 13) at 23. She reports a difficult childhood marked by sexual, physical, and emotional abuse, and at least one suicide attempt at age fifteen. *Id.* at 588–89. According to

¹ The parties have consented to the jurisdiction of the undersigned magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c).

1 Badillo’s friend and roommate, Marcelino Enriquez, Badillo started experiencing extreme anxiety
2 and panic attacks in the year 2000. *Id.* at 306–07. In April 2007, Badillo began receiving
3 psychiatric treatment from Dr. Hiawatha Harris, M.D. at Pathways to Wellness. *Id.* at 1347–52.
4 Dr. Harris diagnosed Badillo with bipolar disorder and began seeing her on a monthly or
5 bimonthly basis. *Id.* at 383–96, 424–34, 563–67, 1315–53, 1888–1916. Notes from each visit
6 show some improvement and stabilization from medication and therapy, but Badillo’s symptoms
7 continue to fluctuate, particularly in response to external stressors. *Id.*

8 Several doctors have provided opinions documenting Badillo’s functional limitations
9 resulting from her psychiatric impairments. Dr. Harris provided four opinions—in 2012 (*id.* at
10 474), January 2014 (*id.* at 563–66), August 2014 (*id.* at 567), and 2015 (*id.* at 1714–22). All of
11 Dr. Harris’ opinions express that Badillo’s psychiatric symptoms would create functional
12 limitations such that she would not be able to work on a consistent basis. In October 2014, Dr.
13 Ahmed El Sokyary, Ph.D., conducted a consultative examination, including psychological testing,
14 at the request of Social Security. *Id.* at 450–54. His opinion noted that Badillo “demonstrated a
15 capacity to understand, remember, and perform simple to moderately difficult tasks,” and that she
16 “was able to maintain a sufficient level of concentration, persistence, and pace to do basic to
17 moderately complex work.” *Id.* at 453. However, Dr. El Sokyary also noted that Badillo “would
18 have difficulty keeping a regular workday/workweek schedule without interruptions from
19 psychiatric symptoms.” *Id.* Finally, Dr. Michael Lace, M.D. reviewed Badillo’s medical records
20 in December 2014 and found that she would have mild to moderate restrictions for carrying out
21 work activities such as understanding, remembering, and executing instructions and making
22 judgments on work-related decisions. *Id.* at 1703. Dr. Lace found that Drs. Harris and El
23 Sokyary’s opinions that Badillo’s “condition is severe and precludes working” are supported by
24 “little evidence from the treatment records.” *Id.*

25 Badillo has also presented with physical limitations. Her primary physical limitation is
26 gastroparesis, a condition that prevents stomach muscles from functioning properly, causes the
27 stomach to empty at an abnormally slow rate, and causes abdominal pain, nausea, incontinence,
28 constipation, diarrhea, and vomiting. *Id.* at 488–501, 548, 679–82, 821–22, 904–06, 938-40,

1 1187–96, 1361–75. Badillo’s medical records first document gastroparesis in 2008 and she has
2 been to the hospital several times due to her symptoms. *Id.* Furthermore, Badillo had a cancerous
3 colon polyp removed in late 2008; there are no recurrences in the record. *Id.* at 1699. Finally,
4 Badillo suffers from chronic lower back pain. *Id.* at 1699. Her primary care physician, Dr. Laura
5 Miller, M.D., completed a questionnaire in December 2013, opining that Badillo would miss work
6 at least twice per month due to her physical limitations. *Id.* at 560–62. After reviewing Badillo’s
7 record in late 2014, Dr. Lynne Jahnke, M.D. agreed that Badillo could miss work due to her
8 abdominal issues, but she opined that Badillo has few physical restrictions regarding workplace
9 activities.² *Id.* at 1697. Dr. Jahnke also opined that Badillo’s primary limitations were due to her
10 psychiatric impairments. *Id.* at 1697.

11 **B. Administrative Hearings**

12 **1. Initial Hearing**

13 Administrative Law Judge Philip Callis (the “ALJ”) held a hearing on October 15, 2014.
14 AR at 40. In response to the ALJ’s questions, Badillo confirmed that she is forty-six years old,
15 she attended high school through the second half of tenth grade, and she can read and write simple
16 English. *Id.* at 42–43. The ALJ determined that all of Badillo’s past work experience was before
17 the relevant time period. *Id.* at 43. Badillo testified that she lives with her friend who also serves
18 as a caretaker, that she wakes up around noon, and that she spends most of the day in her room.
19 *Id.* at 44, 48–49. She can prepare simple foods on her own, but needs someone available when she
20 bathes in case she falls because her medicine makes her dizzy. *Id.* Badillo then testified that she
21 has been receiving psychiatric care at Pathway to Wellness with Dr. Harris. *Id.* at 46. The ALJ
22 asked which psychiatric medications she is taking, to which Badillo replied that she takes
23 Seroquel, lithium, Geodon, and Xanax. *Id.* She also takes Temazepam in the summer because she
24 becomes more depressed during that time of year. *Id.*

25 The ALJ then asked what Badillo does alone in the house when her roommate is at work.

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27 ² For example, Dr. Jahnke opined that Badillo would have no restrictions standing or walking,
28 could frequently lift and carry up to 10 pounds, could occasionally lift and carry up to 20 pounds,
and had no restrictions on the use of hands or feet. AR at 1692–94.

1 *Id.* at 47. Badillo testified that she sleeps most of the day (eighteen to twenty-two hours) because
2 of her medicine. *Id.* at 48. She leaves the television on in the background and does not use her
3 computer. *Id.* at 47–48. Sometimes, she finds activities to keep her fingers busy such as
4 untangling necklaces. *Id.* at 47. The ALJ then asked whether Badillo goes shopping, to which she
5 responded that she sometimes goes with her roommate when he cannot find the specific item she
6 wants. *Id.* at 49.

7 Next, the ALJ asked Badillo questions about family activities. Badillo responded that she
8 only attends “very special” family activities, such as her aunt’s eightieth birthday, and that she had
9 to take “a lot of Xanax to get there.” *Id.* at 50. Badillo then testified that her three daughters come
10 to visit her once or twice a month. *Id.* at 50–51. When they visit, Badillo spends at most ten
11 minutes with them and the rest of the time she is in her room. *Id.* Badillo also testified that she
12 went to Texas for the end of her father’s life. *Id.* at 51–52. She explained that in order to keep
13 herself alert and focused while in transit she took a capsule that her friend gave to her. *Id.* Badillo
14 testified that she informed her doctor about the capsule but she did not remember the name of the
15 substance inside. *Id.* Badillo also testified that she is a recovering cocaine addict but has not
16 taken it since her trip to Texas. *Id.* at 51. The ALJ asked if Badillo used marijuana, to which
17 Badillo responded that she had used it once or twice last year because she was not eating due to
18 her cancer, but that her doctor did not want to prescribe it to her. *Id.* at 53.

19 The ALJ then asked Badillo about her gastroparesis. *Id.* at 54. Badillo testified that it is “a
20 form of immobility to push the fecal out.” *Id.* She testified it takes her system ten days to digest
21 what normally takes a few hours. *Id.* The ALJ asked no further questions of Badillo and turned
22 the hearing over to Linnea Forsythe, Badillo’s attorney. *Id.* at 55.

23 In response to questions from Forsythe, Badillo testified that she and Dr. Harris decided it
24 would be best to lower her dosage of medicine for one month so that she could be coherent
25 through the hearing. *Id.* at 55–56. Badillo attested that the dosage she usually takes sedates her
26 such that she cannot speak or walk around. *Id.* at 56. She testified that she needs help using the
27 bathroom and wears diapers when her roommate is not around. *Id.* In order to leave the house,
28 Badillo testified that she cannot leave alone and that she takes a Xanax to keep calm. *Id.* at 57–58.

1 Badillo described her anxiety symptoms as heart racing, scattered thoughts, crying, and eventually
2 the inability to move. *Id.* at 58. Forsythe then asked Badillo the reason she becomes depressed in
3 the summers. Badillo attested that she was raped by her grandfather and her mother’s boyfriend
4 from age five to age twelve, and that the summer is the most traumatic time of year because she
5 was left home alone. *Id.*

6 Forsythe next asked how gastroparesis affects Badillo’s eating. *Id.* at 59. Badillo testified
7 that she eats only once per week, except that on a daily basis she eats a small butter roll and drinks
8 lots of liquids. *Id.* Badillo also testified that she takes three different medications to treat the
9 gastroparesis. *Id.* at 60. Next, in response to a question regarding her joint pains, Badillo
10 explained that if she sits still for more than twenty to thirty minutes, her bones “lock up” and she
11 needs help to stand. *Id.* She has pain throughout her body including her left hip bone, right
12 shoulder, and neck. *Id.* at 61. Badillo testified that she takes muscle relaxers to alleviate these
13 pains. *Id.*

14 After Forsythe finished with her questions, the ALJ questioned vocational expert Mr. Van
15 Winkle (“VE Van Winkle”). *Id.* at 62–65. The ALJ first presented the hypothetical scenario of
16 someone with Badillo’s age, education, and work experience, who was able to “sustain
17 concentration, persistence and pace for three to four . . . step routine tasks over a workday,” accept
18 supervision, interact but not collaborate with coworkers, and briefly interact with the public. *Id.* at
19 63. VE Van Winkle testified that such a person could work in several jobs that are relatively
20 common nationally. *Id.* at 63–64.

21 The ALJ then added a series additional of limitations to the original hypothetical. *Id.* at
22 64–65. First, the ALJ described an individual who could not consistently work an eight hour
23 workday or a forty hour work week. *Id.* at 64. Next, the ALJ asked whether jobs would be
24 available for an individual who missed work two to three times per month on a regular basis. *Id.*
25 Third, the ALJ described an individual who consistently leaves work for a day or two at a time
26 without notice and who suffers panic attacks. *Id.* at 64–65. Finally, the ALJ asked whether there
27 would be jobs available for an individual who cannot stay on task 25% of the time due to a lack of
28 “concentration, persistence, and pace.” *Id.* VE Van Winkle testified that there would be no jobs

1 available for a person with any of the additional limitations described by the ALJ. *Id.* at 64–65.
2 Forsythe declined to question VE Van Winkle.

3 **2. Supplemental Hearing**

4 On May 6, 2015 the ALJ held a supplemental hearing at Forsythe’s request in order to
5 address additional medical evidence.³ *Id.* at 69. Based on this evidence, Forsythe had additional
6 questions for a vocational expert, with a Mr. Clark (“VE Clark”), rather than Van Winkle, serving
7 in that role for the supplemental hearing. *Id.* at 70. First, the ALJ presented a hypothetical to VE
8 Clark, describing an individual of the same age,⁴ education, and work experience as Badillo, who
9 is limited to light work, cannot climb unprotected heights, and cannot be exposed to respiratory
10 irritants, extreme heat or cold, or vibrations. *Id.* at 71–72. In addition, the individual is limited to
11 below average emphasis on production quotas and speeded tasks, and brief superficial and
12 infrequent contact with supervisors, coworkers, and the public. *Id.* VE Clark testified that such a
13 person could work in a number of jobs that are common nationally and in California.⁵ *Id.* at 72–
14 75.

15 Next, Forsythe presented two hypotheticals. *Id.* at 77–80. In the first scenario, Forsythe
16 described an individual with Badillo’s age, education, and work experience, who was limited to
17 brief contact with supervisors and coworkers, could not accept instructions ten percent of the time,
18 and could not respond appropriately to criticism from supervisors. *Id.* at 77–78. VE Clark
19 testified that these additional restrictions would not change job availability for the hypothetical
20 person. *Id.* at 78–79. In the next hypothetical, Forsythe described a person of Badillo’s age,
21

22 ³ The ALJ sent requests for medical interrogatories to Dr. Jahnke and Dr. Lace. AR at 69.
23 Forsythe submitted “some memo impairment question and office treatment records” from
24 Badillo’s treating psychiatrist, Dr. Harris. *Id.* at 69, 81.

25 ⁴ During the first hearing, Badillo testified that she was forty-six years old. AR at 42. By the
26 second hearing, Badillo had turned forty-seven. *Id.* at 71.

27 ⁵ VE Clark listed surveillance system monitor as a possible job, but there were some issues with it.
28 AR at 74–76. It is unclear how many of these jobs actually exist in the private sector since the
particular entry refers only to government jobs. *Id.* at 75–76. Furthermore, it is unclear whether
this job exists on a full-time basis or if it is part of another job with a different classification. *Id.* at
76. Regardless, VE Clark also identified jobs such as a cleaner or production line inspector as
suitable for someone meeting the ALJ’s hypothetical, and each of those titles accounts for
hundreds of thousands of jobs in the national economy and tens of thousands in California. *Id.* at
72–74.

1 education, and work experience, who “cannot respond appropriately to changes in the work
2 setting.” *Id.* at 80. VE Clark testified there would be no jobs available for this person. *Id.*

3 **C. Regulatory Framework for Determining Disability**

4 The Commissioner uses a “five-step sequential evaluation process” to determine if a
5 claimant is disabled. 20 C.F.R. § 404.1520(a)(4). At step one, the ALJ must determine if the
6 claimant is engaged in “substantial gainful activity.” 20 C.F.R. § 404.1520(a)(4)(I). If so, the
7 ALJ determines that the claimant is not disabled and the evaluation process stops. If the claimant
8 is not engaged in substantial gainful activity, then the ALJ proceeds to step two.

9 At step two, the ALJ must determine if the claimant has a “severe” medically determinable
10 impairment. An impairment is “severe” when it “significantly limits [a person’s] physical or
11 mental ability to do basic work activities.” 20 C.F.R. § 404.1520(c). If the claimant does not have
12 a “severe” impairment, then the ALJ will find that the claimant is not disabled. If the claimant has
13 a severe impairment, the ALJ proceeds to step three.

14 At step three, the ALJ compares the claimant’s impairment with a listing of severe
15 impairments (the “Listing”). *See* 20 C.F.R. § 404, subpt. P, app. 1. If the claimant’s impairment
16 is included in the Listing, then the claimant is disabled. The ALJ will also find a claimant
17 disabled if the claimant’s impairment or combination of impairments equals the severity of a listed
18 impairment. If a claimant’s impairment does not equal a listed impairment, then the ALJ proceeds
19 to step four.

20 At step four, the ALJ must assess the claimant’s residual function capacity (“RFC”). An
21 RFC is “the most [a person] can still do despite [the] limitations” caused by that person’s
22 impairments and related symptoms. 20 C.F.R. § 404.1545(a)(1). The ALJ then determines
23 whether, given the claimant’s RFC, the claimant would be able to perform the claimant’s past
24 relevant work. 20 C.F.R. § 404.1520(a)(4)(iv). Past relevant work is “work that [a person] has
25 done within the past fifteen years, that was substantial gainful activity, and that lasted long enough
26 for [the person] to learn how to do it.” 20 C.F.R. § 404.11560(b)(1). If the claimant is able to
27 perform past relevant work, then the ALJ finds that the claimant is not disabled. If the claimant is
28 unable to perform past relevant work, then the ALJ proceeds to step five.

1 At step five, the burden shifts from the claimant to the Commissioner. *Johnson v. Chater*,
2 101 F.3d 178, 180 (9th Cir. 1997). The Commissioner has the burden to “identify specific jobs
3 existing in substantial numbers in the national economy that the claimant can perform despite her
4 identified limitations.” *Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999). If the
5 Commissioner is able to identify such work, then the claimant is not disabled. If the
6 Commissioner is unable to do so, then the claimant is disabled. 20 C.F.R. § 404.1520(g)(1).

7 **D. The ALJ’s Decision**

8 In his June 11, 2015 decision, the ALJ determined that Badillo has not been disabled
9 within the meaning of the Social Security Act since she filed her application on January 9, 2013.
10 AR at 21. At the first two steps, the ALJ determined that Badillo had not engaged in substantial
11 gainful activity since the date of her application, and that she “has the following severe
12 impairments: bipolar disorder; mood disorder, not otherwise specified; anxiety disorder, not
13 otherwise specified; rule out personality disorder, not otherwise specified and generalized anxiety
14 disorder; history of polysubstance abuse in apparent remission; status post cancerous colonic
15 polyp removal with no recurrence; gastroparesis with resulting episodic nausea and vomiting
16 spells; and chronic low back pain.” *Id.* at 23.

17 Next, the ALJ turned to the third step and determined that Badillo’s impairments did not
18 meet or equal the severity of any listed impairments, specifically considering 1.04 (disorders of the
19 spine), 5.08 (digestive disorders), 12.04 (affective disorders), and 12.06 (anxiety related
20 disorders). *Id.* at 23. In considering 12.04 and 12.06, the ALJ considered “paragraph B” criteria
21 and determined that Badillo has mild restrictions in daily living activities, moderate difficulties in
22 social functioning and concentration, and that “[a]t most, her symptoms would result in some
23 limitations in the ability to perform complex tasks.” *Id.* at 24. The ALJ also found that the
24 evidence did not establish “paragraph C” criteria because there is no history of decompensation
25 and no evidence that small changes would lead to decompensation. *Id.*

26 In assessing Badillo’s residual functional capacity (RFC), the ALJ described the
27 appropriate two-step procedure. *Id.* at 25. First, he determined whether Badillo had medically
28 determinable impairments that could reasonably be expected to produce her symptoms; next, the

1 ALJ considered the credibility of any statements as to the intensity, persistence, and limiting
2 effects of those symptoms to the extent those qualities cannot be established by medical evidence
3 alone. *Id.* at 25. The ALJ found that Badillo’s “medically determinable impairments could
4 reasonably be expected to cause the alleged symptoms.” *Id.* Nonetheless, the ALJ doubted the
5 credibility of “the claimant’s statements concerning the intensity, persistence and limiting effects
6 of these symptoms.” *Id.*

7 To support that conclusion, the ALJ discussed the medical history of Badillo’s physical
8 and mental impairments, beginning with her gastrointestinal and abdominal issues. *Id.* at 25–26.
9 The ALJ noted that, while initial testing in January 2009 “indicated gastritis and some gastric
10 content consistent with gastroparesis, subsequent testing [upper GI series, an abdominal x-ray, and
11 lab work] have not revealed any significant findings to account for her complaints.” *Id.* The ALJ
12 acknowledged Badillo’s assertion that she did not eat a lot during the week; however, he was
13 unable to find evidentiary support of severe weight loss or malnutrition. *Id.* He then noted that,
14 “at one point, doctors indicated the need to rule out malingering or a factitious disorder, and she
15 had left against medical advance [sic⁶] during [a] visit, despite alleging intractable vomiting and
16 severe abdominal pain.” *Id.* at 25–26. In concluding his discussion of Badillo’s abdominal issues,
17 the ALJ noted that Badillo’s “complaints appear episodic and variable but [she] has been generally
18 stable on her current medication regime.” *Id.* at 26.

19 The ALJ briefly summarized the medical history of Badillo’s back pain, which he says she
20 has been managing with medication. *Id.* He discussed the lack of evidence supporting spinal
21 abnormalities, and the fact that “doctors also felt she was feigning pain to obtain more pain
22 medication.” *Id.*

23 Next, the ALJ turned to Badillo’s psychiatric impairments, stating that “the longitudinal
24 treatment records are not supportive of the claimant’s alleged disabling disposition.” *Id.* He
25 supported this conclusion by noting that Badillo “has been considered clinically stable,” that her
26 medication regimen has remained almost unchanged, and that psychometric testing revealed a

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28 ⁶ This appears to have been intended as “medical advice.”

1 high level of cognitive functioning. *Id.*

2 The ALJ also discussed the opinion evidence given by various medical and psychological
3 consultants. *Id.* He assigned significant weight to most of the opinions given by state agency
4 medical and psychological consultants regarding Badillo’s physical limitations. *Id.* While the
5 ALJ acknowledged that Badillo has managed her condition well with treatment, he found that “the
6 claimant’s physical complaints are sufficient to constitute severe impairments based on her
7 narcotic pain medication prescriptions and her history of periodic nausea and vomiting.” *Id.*

8 Next, the ALJ discussed the opinions of each individual doctor. *Id.* at 26–27. The ALJ
9 placed “considerable weight” on consultative examiner Dr. El Sokkary’s opinions to the extent
10 that the ALJ determined they were consistent with the record. *Id.* However, he found that,
11 because “the claimant’s symptoms [have] stabilized with treatment, there is little evidence to
12 indicate that she would have difficulty keeping a regular schedule without interruptions from
13 psychological symptoms.” *Id.* The ALJ also assigned “great probative weight” to the opinions of
14 the non-examining consultants Drs. Lace and Jahnke. *Id.* at 26–27. However, the ALJ declined to
15 place controlling weight on medical source statements by Badillo’s treating physician and
16 psychiatrist because “neither their clinical notes nor the overall evidence supports the opinions”
17 and “the providers appear to base their opinions largely on the claimant’s subjective complaints.”
18 *Id.* at 27.

19 The ALJ placed minimal weight on the global assessments of functioning (GAF) in the
20 record because “they do not accurately reflect the claimant’s overall functioning.” *Id.* He also
21 placed minimal weight on the third party function reports by Badillo’s friends because they “are
22 inconsistent with the objective evidence” and they are not medical opinions. *Id.* To complete the
23 RFC, the ALJ considered Badillo’s statements and testimony and determined that “with regard to
24 the severity and functional consequences of her symptoms [it] is not fully credible.” *Id.* To
25 support this conclusion he noted several discrepancies, such as the minimal changes in her
26 treatment despite her severe complaints, periods of noncompliance, and incorrect reporting
27 regarding her drug use. *Id.*

28 Finally, the ALJ found that “there are jobs that exist in significant numbers in the national

1 economy that the claimant can perform” based on VE Clark’s testimony. *Id.* at 28. The ALJ
2 explained that when he asked VE Clark whether there were jobs in the national economy for an
3 individual with Badillo’s education, work experience, age, and RFC, VE Clark listed three
4 possible occupations. *Id.* Thus, the ALJ found that Badillo is not disabled. *Id.* at 29.

5 **E. The Parties’ Arguments**

6 **1. Badillo’s Motion for Summary Judgment**

7 Badillo argues that the ALJ erred in: (1) rejecting the opinions of treating and examining
8 medical sources Dr. Miller, Dr. El Sokkary, and Dr. Harris; (2) rejecting nonexamining medical
9 expert Dr. Lynne Jahnke’s opinion; (3) failing to include limitations caused by Badillo’s
10 gastroparesis; (4) failing to support his assessment with substantial evidence; and (5) basing his
11 decision on an incomplete hypothetical. *See generally* Pl’s Mot. (dkt 14).

12 Badillo argues that the ALJ erred in rejecting, in whole or in part, the opinions of several
13 treating and examining medical sources. *Id.* at 6. She contends that Dr. Miller, her primary care
14 physician, opined that Badillo’s physical impairments would cause her to miss work several days
15 per month. *Id.* at 7. According to Badillo, the ALJ grouped together his reasons for dismissing
16 Dr. Miller’s physical opinion and Dr. Harris’s psychiatric opinions. *Id.* Badillo understands the
17 ALJ’s rejection of Dr. Miller’s opinion to be based on the ALJ’s view that: (1) it is not supported
18 by evidence or Dr. Miller’s own notes; (2) it is largely based on Badillo’s subjective complaints;
19 and (3) Badillo has only required medication to treat her complaints. *Id.* Badillo argues that Dr.
20 Miller’s opinion is supported by her treatment notes, which are based on years of treatment
21 including objective testing. *Id.* at 7–8. Badillo contends these treatment notes support the
22 conclusions that medication did not improve her gastroparesis and that this impairment would
23 disrupt work attendance. *Id.* at 8. Furthermore, Badillo argues that Dr. Miller’s opinion was
24 consistent with Dr. Jahnke’s opinion. *Id.*

25 Badillo also argues that the ALJ erred by dismissing consultative psychological examiner
26 Dr. El Sokkary’s opinion. *Id.* at 8. She contends that Dr. El Sokkary opined that Badillo’s
27 psychiatric impairments would lead to difficulties maintaining regular work hours. *Id.* at 8.
28 According to Badillo, the ALJ erroneously rejected this part of Dr. El Sokkary’s opinion because

1 he claimed treatment stabilized her symptoms. *Id.* at 9. Badillo contends that due to the
2 fluctuating nature of bipolar disorder, it is improper to highlight examples of improvement to
3 support the conclusion that a claimant has been treated. *Id.* (citing *Garrison v. Colvin*, 759 F.3d
4 995, 1017 (9th Cir. 2015)). Furthermore, Badillo argues that Dr. El Sokkary’s opinion is
5 consistent with the opinions of her longtime treating psychiatrist, Dr. Harris, who has documented
6 Badillo’s fluctuating symptoms over time and opines that she would be unable to maintain a
7 normal work schedule. *Id.*

8 Furthermore, Badillo contends that the ALJ’s dismissal of Dr. Harris’s opinions was also
9 in error. *Id.* at 10. According to Badillo, Dr. Harris completed five mental health questionnaires
10 over the course of eight years, which continuously diagnosed Badillo with bipolar disorder and
11 noted symptoms that would seriously affect her ability to work. *Id.* at 10–11. Badillo explains
12 that the ALJ did not differentiate between these five opinions, and instead rejected all of them
13 because: (1) the opinions are not supported by the record or Dr. Harris’s own notes; (2) Badillo’s
14 mental condition improved with treatment; and (3) Dr. Harris’s opinion was based on Badillo’s
15 subjective complaints. *Id.* at 11. Badillo argues that Dr. Harris’s clinical notes support his
16 opinion because they show that Badillo’s symptoms fluctuate over time, and it is error for the ALJ
17 to pick moments of improvement and declare that the patient has improved. *Id.* at 11–13.
18 Furthermore, Badillo argues that because Dr. Harris’ own observations are the primary basis for
19 his opinion, it is improper to dismiss his opinion as solely based on Badillo’s subjective
20 complaints. *Id.* at 13–14.

21 According to Badillo, even though the ALJ purported to assign “great weight” to
22 nonexamining medical expert Dr. Jahnke’s opinion, the ALJ rejected the portion of Dr. Jahnke’s
23 opinion that Badillo could miss work due to her gastroparesis. *Id.* at 14. Badillo contends that,
24 although Dr. Jahnke carefully reviewed the record and explained how Badillo’s symptoms would
25 affect her ability to work, the ALJ dismissed Dr. Jahnke’s opinion without providing any reason or
26 reference to specific evidence in the record. *Id.*

27 Next, Badillo contends that, although the ALJ found her gastroparesis to be a severe
28 limitation at step two, he did not include limitations from this impairment in his RFC findings as

1 he was required to do. *Id.* at 15 (citing *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
2 (9th Cir. 2009) (citing 20 C.F.R. §§ 404.1523, 416.923)). According to Badillo, the ALJ omitted
3 these limitations because her complaints were “episodic but have been generally stable with
4 medication.” *Id.* Badillo argues that the ALJ cannot disregard limitations solely because they are
5 episodic, particularly when the limitations are supported by opinions that are assigned “great
6 weight.” *Id.* at 16. Because the ALJ assigned “great weight” to Dr. Jahnke’s opinion, and Dr.
7 Jahnke opined that Badillo could miss work due to her symptoms, Badillo insists that this
8 omission was in error. *Id.* Due to this error, as well as the ALJ’s rejection of the opinions of
9 several medical providers, Badillo argues the RFC is not based on substantial evidence and “must
10 be set aside.” *Id.* Furthermore, Badillo contends that because the ALJ relied on an RFC that did
11 not adequately reflect her functional limitations, the ALJ also erred when he relied on VE
12 testimony based on that RFC. *Id.* at 17–18.

13 To remedy the above-mentioned errors, Badillo requests that the Court remand for an
14 award of benefits. *Id.* at 18. She contends that an award of benefits is appropriate because the
15 record is complete, because there is no useful purpose for further proceedings, and because the
16 rejected opinions would compel a finding of disability. *Id.* at 19.

17 **2. The Commissioner’s Cross-Motion for Summary Judgment**

18 The Commissioner argues that the ALJ’s decision should be affirmed because it was based
19 on substantial, properly evaluated evidence. *See generally* Comm’r’s Mot. (dkt. 17). Starting
20 with medical opinion evidence, the Commissioner contends that Dr. Miller’s opinion was
21 contradicted by clinical evidence in the record including her own treatment notes, state agency
22 physician opinions, and treatment notes from Lifelong Medical Care. *Id.* at 4, 7. The
23 Commissioner points to several examples of clinical evidence that did not support Badillo’s
24 complaints of gastroparesis symptoms and back pain, including the fact that “clinicians suspected
25 she was malingering to obtain pain medication.” *Id.* at 5. According to the Commissioner, these
26 examples of clinical evidence, as well as an absence of clinical findings supporting Dr. Miller’s
27 opinion, show that the ALJ properly concluded Dr. Miller’s opinion was based on Badillo’s
28 subjective complaints. *Id.* at 6. In a footnote, the Commissioner cites the ALJ’s reasons for

1 discounting Badillo’s subjective complaints, and claims that because she did not dispute these
2 reasons, “she has waived any argument to the contrary.” *Id.* at 4 (citing *Wikoff v. Atrue*, 388 F.
3 App’x 735, 736 (9th Cir. 2010)). The Commissioner argues that, because the ALJ properly
4 discredited Badillo’s subjective complaints, and he properly concluded that Dr. Miller’s opinion
5 was based on these discredited complaints, the ALJ properly disregarded Dr. Miller’s opinion. *Id.*
6 at 4–8. Furthermore, the Commissioner contends that Badillo cites records of her gastroparesis
7 diagnosis to support Dr. Miller’s opinion, but the opinion does not list gastroparesis as one of
8 Badillo’s diagnoses. *Id.* at 8.

9 Next, the Commissioner argues that the ALJ properly gave little weight to Dr. El
10 Sokkary’s opinion that Badillo’s psychological symptoms would cause her to have trouble
11 maintaining a regular work schedule because it was inconsistent with substantial evidence in the
12 record. *Id.* at 9. The Commissioner contends that Badillo’s mental health treatment records
13 “showed that she was stable, clinicians kept her medication regimen largely unchanged, and she
14 possessed a high level of cognitive functioning.” *Id.* According to the Commissioner, Badillo’s
15 medical records show “benign” symptoms that do not fluctuate to the degree she claims, and that
16 fluctuations corresponded to external stressors such as family problems or days without medicine.
17 *Id.* at 10–11 & n.9. The Commissioner concludes that substantial evidence in the record
18 undermines Dr. El Sokkary’s opinion that Badillo would not be able to work, and that opinion was
19 therefore properly disregarded. *Id.* at 11.

20 The Commissioner then contends that the ALJ properly rejected Dr. Harris’s opinion
21 because it was based on Badillo’s subjective complaints rather than clinical evidence. *Id.* at 11–
22 15. According to the Commissioner, Badillo “greatly overstates what the treatment notes show
23 about her symptoms” and that the record shows improvement over time. *Id.* at 12–13. The
24 Commissioner argues that the ALJ is not required to heavily weigh a treating physician’s opinion
25 when that opinion is based on the claimant’s discredited subjective complaints. *Id.* at 14 (citing
26 *Gertsch v. Colvin*, 589 F. App’x 381, 381 (9th Cir. 2015)). The Commissioner reasons that,
27 because the clinical record does not support Dr. Harris’s findings of extreme limitations, these
28 findings must have been based on Badillo’s subjective complaints and can therefore be reasonably

1 discounted. *Id.* at 15.

2 Furthermore, the Commissioner argues that the ALJ did not err in his evaluation of Dr.
3 Jahnke’s opinion. *Id.* at 15–16. The Commissioner explains that Dr. Jahnke noted that Badillo
4 “might” miss work, but that her “alleged problems were ‘quite variable.’” *Id.* at 15 (citing AR at
5 1697). The Commissioner contends that Dr. Jahnke’s note is “entirely speculative and does not
6 set forth a specific limitation that the ALJ was obligated to address.” *Id.* at 15–16. To the extent
7 this statement is a specific limitation, the Commissioner argues that the ALJ properly dismissed it
8 for the same reasons as he dismissed Dr. Miller’s opinion. *Id.* at 16.

9 The Commissioner points to medical expert Dr. Lace’s opinion that Dr. Harris’s opinions
10 were not strongly supported by evidence in the record. *Id.* According to the Commissioner, the
11 ALJ reasonably assigned “great weight” to Dr. Lace’s opinion, and Badillo does not dispute this
12 evaluation. *Id.* The Commissioner argues that the ALJ is responsible for evaluating and weighing
13 evidence, and in this case the ALJ did so properly. *Id.*

14 Next, the Commissioner contends that the ALJ did not err in his RFC assessment. *Id.* at
15 17. First, the Commissioner argues that the ALJ is not required to find functional limitations from
16 impairments found to be severe at step two, and that the ALJ’s conclusion that Badillo’s
17 symptoms were not disabling was reasonable. *Id.* Second, the Commissioner contends that a
18 diagnosis alone is not enough to establish a functional limitation, and that Badillo was required to
19 identify specific functional limitations rather than rely solely on the gastroparesis diagnosis. *Id.* at
20 18. According to the Commissioner, the fact that the ALJ did not to rely on Drs. Jahnke and
21 Miller’s medical opinions does not show error because those opinions were properly rejected. *Id.*
22 at 19. Furthermore, the Commissioner argues that because the ALJ did not err by leaving out any
23 credible functional limitations, the ALJ did not err in relying on VE Clark’s testimony. *Id.* at 20.
24 The Commissioner contends that VE Clark’s testimony was based on a complete hypothetical, and
25 therefore the ALJ reasonably relied on the testimony. *Id.*

26 Finally, the Commissioner argues that if the Court finds that the ALJ erred, remand for
27 further proceedings, rather than an award of benefits, is the appropriate remedy. *Id.* at 20.

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3. Badillo’s Reply

In her reply brief, Badillo renews her arguments that the ALJ erred in rejecting the consistent opinions of Drs. Miller, El Sockary, Harris, and Jahnke. Reply (dkt. 18) at 4–11. She also contends that the Commissioner provided no justification for her argument that a limitation to light work would account for Badillo’s gastroparesis symptoms and allow her to work. *Id.* at 11. Further, Badillo reasserts her arguments that the RFC was not supported by substantial evidence and the ALJ erred by relying on VE testimony based on this RFC. *Id.* at 12.

III. ANALYSIS

A. Legal Standard

District courts have jurisdiction to review the final decisions of the Commissioner and have the power to affirm, modify, or reverse the Commissioner’s decisions, with or without remanding for further hearings. 42 U.S.C. § 405(g); *see also* 42 U.S.C. § 1383(c)(3).

When asked to review the Commissioner’s decision, the Court takes as conclusive any findings of the Commissioner which are free from legal error and supported by “substantial evidence.” 42 U.S.C. § 405(g). Substantial evidence is “such evidence as a reasonable mind might accept as adequate to support a conclusion,” and it must be based on the record as a whole. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). “‘Substantial evidence’ means more than a mere scintilla,” *id.*, but “less than a preponderance.” *Desrosiers v. Sec’y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988) (citation omitted). Even if the Commissioner’s findings are supported by substantial evidence, the decision should be set aside if proper legal standards were not applied when weighing the evidence. *Benitez v. Califano*, 573 F.2d 653, 655 (9th Cir. 1978) (quoting *Flake v. Gardner*, 399 F.2d 532, 540 (9th Cir. 1978)). In reviewing the record, the Court must consider “both the evidence that supports and the evidence that detracts from the Commissioner’s conclusion.” *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985)).

Although the Court may “review only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which [the ALJ] did not rely,” *Garrison*, 759 F.3d at 1010, “harmless error analysis applies in the social security context.”

1 *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015). “[W]here the circumstances of the case
2 show a substantial likelihood of prejudice, remand is appropriate so that the agency can decide
3 whether re-consideration is necessary. By contrast, where harmlessness is clear and not a
4 borderline question, remand for reconsideration is not appropriate.” *McLeod v. Astrue*, 640 F.3d
5 881, 888 (9th Cir. 2011) (footnotes, citations, and internal quotation marks omitted).

6 If the Court identifies defects in the administrative proceeding or the ALJ’s conclusions,
7 the Court may remand for further proceedings or for a calculation of benefits. *See Garrison*, 759
8 F.3d at 1019–21.

9 **B. The ALJ Erred in Failing to Credit Medical Opinions Regarding Badillo’s**
10 **Psychiatric Impairments**

11 Three doctors provided opinions regarding Badillo’s mental impairments. Two of the
12 three doctors, Drs. Harris and El Sokyary, opined that Badillo would miss work more than twice
13 per month due to her psychiatric impairments. AR at 450–54, 474, 563–66, 567, 1714–22. The
14 ALJ rejected the opinions from Drs. Harris and El Sokyary, and instead assigned “great weight” to
15 Dr. Lace’s opinion. *Id.* at 26–27. For the reasons discussed below, the Court concludes that the
16 ALJ erred in failing to credit opinions from Drs. Harris and El Sokyary.

17 Dr. Harris is Badillo’s treating psychiatrist, and has been treating her since April 2007.⁷
18 *Id.* at 1341–46. Dr. El Sokyary is a psychiatrist hired by Social Security to examine and test
19 Badillo’s cognitive and emotional capabilities. *Id.* at 450–54. As treating and examining

21 ⁷ The record submitted to the ALJ included notes from Badillo’s visits to Pathway to Wellness
22 during 2011, 2013, and 2014. AR at 383–96, 424–34, 1315–53, 1713–22. The record did not
23 contain any notes from 2007 through 2010, aside from Badillo’s April 25, 2007 intake assessment,
24 *id.* at 1347–53, but it did contain Outpatient Drug Records from Pathways to Wellness bearing Dr.
25 Harris’s name during those years. *Id.* at 1341–46. Notes from 2015 were submitted to the
26 Appeals Council and thus are also included in the record. *Id.* at 1888–1916. The Commissioner
27 contends that because these notes were submitted on appeal, they are not relevant to this motion.
28 Comm’r’s Mot. at 10 n.4. Ninth Circuit precedent dictates that a district court should, in at least
some circumstances, consider materials submitted to the Appeals Council. *See Ramirez v.*
Shalala, 8 F.3d 1449, 1451–52 (9th Cir. 1993); *see also Taylor v. Comm’r of Soc. Sec.*, 659 F.3d
1228, 1231–32 (9th Cir. 2011). Nonetheless, the additional materials submitted to the Appeals
Council do not alter the outcome that the ALJ erred in discrediting Dr. Harris’ opinion. They
demonstrate additional instances of fluctuations in Badillo’s psychiatric symptoms, providing a
stronger basis for Dr. Harris’ opinions, but the Court would reach the same conclusion without the
evidence from 2015.

1 physicians, Drs. Harris and El Sokkary’s opinions are “entitled to greater weight than that of a
2 non-examining physician.” *Garrison*, 759 F.3d at 1012 (citing *Lester v. Chater*, 81 F.3d 821, 830
3 (9th Cir. 1995)). Because Drs. Harris and El Sokkary’s opinions are contradicted, the ALJ can
4 reject their opinions “by providing specific and legitimate reasons that are supported by substantial
5 evidence.” *Id.* (quoting *Ryan v. Comm’r. of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008)). To
6 satisfy this “substantial evidence” requirement, the ALJ must set out “a detailed and thorough
7 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
8 making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). The ALJ errs when “he
9 rejects a medical opinion or assigns it little weight while doing nothing more than ignoring it,
10 asserting without explanation that another medical opinion is more persuasive, or criticizing it
11 with boilerplate language that fails to offer a substantive basis for his conclusions.” *Garrison*, 759
12 F.3d at 1012–13 (citation omitted).

13 In his decision, the ALJ “decline[s] to place controlling weight” on Dr. Harris’ opinion
14 because “neither [his] own clinical notes nor the overall evidence supports [his] opinion[.]” AR at
15 27. According to the ALJ, “[t]he claimant’s medical condition has improved with medication and
16 therapy.” *Id.* at 27. Furthermore, while the ALJ placed great weight on most of Dr. El Sokkary’s
17 opinion, he disregarded the part stating that Badillo would have difficulty keeping a regular
18 schedule, reasoning that “the claimant’s symptoms [have] stabilized with treatment” *Id.* at
19 26. These reasons for rejecting Drs. Harris and El Sokkary’s opinions are not supported by
20 substantial evidence. While the record shows some improvement since 2011,⁸ this improvement
21 does not mean that her symptoms have stabilized to the point where she could consistently attend
22 work. A thorough examination of the record reveals fluctuations in Badillo’s mood, affect,
23 behavior, and speech, AR at 383–96, 424–34, 1315–53, 1888–1916, lending support to Drs. Harris
24 and El Sokkary’s opinions. For example, on June 4, 2013 a Pathway to Wellness provider noted

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26 ⁸ During the first few sessions, Dr. Harris noted that Badillo’s memory was “impaired,” and that
27 her attention, judgment, and insight were “poor” or “impaired.” AR at 1347–52. Since then, Dr.
28 Harris has generally noted that Badillo’s memory is intact and her attention, judgment, and insight
have been “fair.” *Id.* at 383–96, 424–34, 1319–36, 1902–16.

1 that Badillo was “clinically stable,” her mood was “mixed” and her affect “appropriate.” *Id.* at
2 432–33. However, on June 26, 2013 Dr. Harris noted that Badillo was “tearful” and “angry” and
3 that her speech was “pressured.” *Id.* at 430–31.

4 The Commissioner addresses these fluctuations by arguing that “[w]hen Plaintiff lost her
5 medication or experienced stressors such as financial problems or family concerns, providers
6 documented appropriate responses to such stressors.” Comm’r’s Mot at 11 n.9. However, this
7 argument does not discredit Drs. Harris and El Sokkary’s opinions. When evaluating reports of
8 “improvement” “in the context of mental health issues . . . they must . . . be interpreted with an
9 awareness that improved functioning while being treated and while limiting environmental
10 stressors does not always mean that a claimant can function effectively in a workplace.”
11 *Garrison*, 759 F.3d at 1017; *see Ryan*, 528 F.3d at 1200–01 (“Nor are the references in [a
12 doctor’s] notes that [a claimant’s] anxiety and depression were ‘improving’ sufficient to
13 undermine the repeated diagnosis of those conditions.”); *see also Hutsell v. Massanari*, 259 F.3d
14 707, 712 (8th Cir. 2001) (“We also believe that the Commissioner erroneously relied too heavily
15 on indications in the medical record that [the claimant] was ‘doing well,’ because doing well for
16 the purposes of a treatment program has no necessary relation to a claimant’s ability to work or to
17 her work-related functional capacity.”) Here, the fact that Badillo’s condition deteriorated in
18 response to external stressors suggests that the added stress of a regular work schedule might also
19 cause increased symptoms. Regardless, Badillo’s significant increase in symptoms in response to
20 occasional difficulties in her personal life supports the conclusion that she would occasionally
21 miss work as a result of those symptoms. Badillo’s treating and examining psychiatrists both
22 agreed that she would be unable to maintain a regular work schedule. The ALJ is not free to
23 conclude, without substantial evidence and in contrast to the opinions of treating and examining
24 physicians, that because treatment has helped Badillo maintain periods of stability she would be
25 able to function consistently under the added stresses of employment.

26 Moreover, the ALJ rejected Dr. Harris’ opinion because he claims it was “based largely on
27 the claimant’s subjective complaints,” which he found to not be fully credible. AR at 27. It is
28 unnecessary for the Court to determine whether the ALJ properly discredited Badillo’s testimony

1 because the record reveals that Dr. Harris’ opinion is based on his own observations and those of
2 other members of his treatment team. While visit notes include comments about Badillo’s
3 complaints, the form Dr. Harris and other Pathway to Wellness providers use includes a place for
4 written provider impressions and a place to check boxes that describe their observations of
5 Badillo’s mood, speech, behavior, etc. By examining only these sections of the record, it is clear
6 that Badillo’s symptoms fluctuate over time. While providers note that Badillo’s behavior is
7 generally “calm,” at times she is “tense” or “agitated.” AR at 383–96, 424–34, 1315–53, 1888–
8 1916. Her mood ranges from “mixed” to “anxious,” “angry,” “sad” and “hypo manic.” *Id.*
9 Providers observe that Badillo’s affect can be “appropriate,” but it is often “tearful,” “anxious,” or
10 “labile.” *Id.* Such observations correspond to notes by medical providers that Badillo’s symptoms
11 caused impairment and that her treatment was ineffective. *E.g., id.* at 389–90 (notes from a 2011
12 visit indicating that Badillo’s mood and affect were “sad,” “anxious,” “irritable,” and “angry”; her
13 behavior was “agitated”; her speech was “pressured”; her thought process was “circumstantial”;
14 her memory, attention, judgment, and insight were “impaired”; the response of her symptoms to
15 medication was “inadequate”; and her prognosis was “guarded”). These observations are
16 consistent with Badillo’s diagnosis of bipolar disorder, and they support Drs. Harris and El
17 Sokkary’s opinion that Badillo would be unable to attend work regularly. Thus, the ALJ has not
18 supported his reasons for rejecting examining and treating physician opinions with substantial
19 evidence.

20 The ALJ assigned “great weight” to the opinion of nonexamining psychiatrist Dr. Lace.
21 “The weight afforded a non-examining physician’s testimony depends ‘on the degree to which
22 [he] provide[s] supporting explanations for [his] opinions.’” *Ryan*, 528 F.3d at 1198 (quoting 20
23 C.F.R. § 404.1527(d)(3)). Dr. Lace opined that there is “little evidence from treatment records to
24 suggest [the] assertion” that Badillo’s “condition is severe and precludes working.” *Id.* As
25 explained above, the record in fact supports Drs. Harris and El Sokkary’s opinions. Furthermore,
26 Dr. Lace supports his assertion with the results of Badillo’s cognitive testing, which determined
27 that she had a “high level” of cognitive functioning. AR at 1703. It is unclear how a high level of
28 cognitive functioning is inconsistent with missing work several days per month. Simply pointing

1 to one data point in the record is not enough to discredit opinions from treating and examining
2 physicians that are supported by the record. *See Ryan*, 528 F.3d at 1201 (holding that the opinions
3 of two nonexamining physicians did not outweigh an examining opinion where the nonexamining
4 physicians provided only a bare conclusion with no explanation). For his opinion to be credited
5 over the others, Dr. Lace needed to explain why the other opinions were not supported, and why
6 high cognitive functioning means Badillo would not miss work.

7 The ALJ erred in failing to credit Dr. Harris’ opinion because it was supported by his
8 clinical notes and did not solely rely on Badillo’s complaints. The ALJ also erred in failing to
9 credit Dr. El Sokkary’s opinion because it was also supported by the record. Slight improvements
10 and stabilization of symptoms do not indicate a claimant will be able to attend work regularly,
11 especially when the record shows that external stressors exacerbate those symptoms. Dr. Lace’s
12 opinion to the contrary, lacking meaningful explanation of how he reached his conclusion, is not a
13 sufficient basis to discredit the opinions of the treating and examining doctors. Thus, the ALJ
14 erred in disregarding opinions of Drs. Harris and El Sokkary that Badillo would miss work more
15 than twice per month.⁹

16 **C. The Appropriate Remedy is Remand for Award of Benefits**

17 Once a district court has determined that an ALJ has erred, the court must decide whether
18 to remand for further proceedings or to remand for immediate award of benefits. *Harman v. Apfel*,
19 211 F.3d 1172, 1177–78 (9th Cir. 2000). Under this Circuit’s “credit as true” rule, a court must
20 credit as true evidence that was rejected and remand for an immediate award of benefits if “(1) the
21 ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no
22 outstanding issues that must be resolved before a determination of disability can be made, and
23 (3) it is clear from the record that the ALJ would be required to find the claimant disabled were

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25 ⁹ The ALJ assigned “great weight” to the opinion of nonexamining physician Dr. Lynne Jahnke.
26 AR at 26. While Dr. Jahnke opined that Badillo “might miss several days per month due to her
27 abdominal problems,” she also found that “[p]sychiatric disease is her primary problem.” *Id.* at
28 1697. This opinion highlights the severity of Badillo’s mental health issues. Although Dr. Jahnke
is not a psychiatrist, it is illuminating that these issues were so apparent to her that she noted them
in her opinion.

1 such evidence credited.” *Harman*, 211 F.3d at 1178 (quoting *Smolen*, 80 F.3d at 1292). A court
2 may remand for further proceedings when “the record as a whole creates serious doubt as to
3 whether the claimant is, in fact, disabled within the meaning of the Social Security Act,” *Garrison*,
4 759 F.3d at 1021, or where “there is a need to resolve conflicts and ambiguities,” *Treichler v.*
5 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014). A court may also remand for
6 the limited purpose of determining when a claimant’s disability began if that date is not clear from
7 the credited-as-true opinion. *See Dominguez v. Colvin*, 808 F.3d 403, 409 (9th Cir. 2015).
8 Outside of those circumstances, remand for further proceedings is an abuse of discretion if the
9 credit-as-true rule establishes that a claimant is disabled. *Garrison*, 759 F.3d at 1020.

10 Here, the credit as true rule reveals that Badillo should be awarded benefits. As explained
11 above, the ALJ failed to provide legally sufficient reasons for rejecting Drs. Harris and El
12 Sökkary’s opinions that Badillo would not be able to consistently attend work. Their opinions,
13 therefore, must be credited as true under the Ninth Circuit’s rule. Furthermore, there are no
14 outstanding issues to be resolved, and the record makes it clear that the ALJ is required to find
15 Badillo disabled after crediting these opinions. VE Van Winkle testified that there would be no
16 jobs available in the economy for a hypothetical claimant with Badillo’s age, education, previous
17 work experience, and mental limitations if that person could not maintain a consistent, eight hour
18 workday, forty hour work week and had to miss work two or three times per month. AR at 63–65.
19 In addition, nothing in the record casts serious doubt on Badillo’s disability, indicating that
20 remanding for further proceedings is unnecessary and would be an abuse of discretion. Thus, an
21 award of benefits is appropriate.

22 **D. The Court Need Not Reach Arguments Regarding Badillo’s Physical**
23 **Impairments**

24 Badillo also contends that the ALJ erred by rejecting opinions regarding her physical
25 impairments, omitting a severe physical limitation from the ALJ’s RFC assessment, and relying on
26 incomplete vocational expert testimony. Pl’s. Mot. at 6–8, 14–18. Because the Court finds that
27 the appropriate remedy is to remand for an award of benefits based on the ALJ’s errors regarding
28 Badillo’s psychiatric impairments, the Court declines to reach the issues regarding Badillo’s

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physical impairments.

IV. CONCLUSION

For the reasons discussed above, Badillo’s motion is GRANTED, the Commissioner’s motion is DENIED, and the matter is REMANDED with instructions to award benefits. The Clerk is instructed to enter judgment in favor of Badillo and close the file.

IT IS SO ORDERED.

Dated: July 27, 2018



JOSEPH C. SPERO
Chief Magistrate Judge