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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JENNIFER PIRACHA,
Plaintiff,

v.

NANCY A. BERRYHILL,
Defendant.

Case No. 17-cv-00129-JST

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

Re: ECF Nos. 14, 17

Plaintiff Jennifer Piracha seeks judicial review of the Social Security Administration Commissioner's¹ denial of her application for Social Security Disability Insurance ("SSDI"). Before the Court are Piracha's motion for summary judgment, ECF No. 14, and the Commissioner's cross-motion for summary judgment, ECF No. 17. The Court will deny Piracha's motion for summary judgment and grant the Commissioner's cross-motion for summary judgment.

I. BACKGROUND

A. Factual History

Piracha claims that her disability and inability to work began on July 29, 2012 when she fractured her left ankle. AR 155. Piracha was then 50-years old and had been working as a preschool teacher, sales attendant, and caretaker. AR 74, 80.

Piracha attributes the majority of her disability to the osteoarthritis in her left ankle. On

¹ Although Berryhill is no longer Acting Commissioner of the agency, "[i]n accordance with the agency's Order of Succession, [she] continues to lead the Social Security Administration as [it] await[s] the nomination and confirmation of a Commissioner." Nancy A. Berryhill, Deputy Commissioner for Operations, <https://www.ssa.gov/agency/commissioner.html>. The position of Commissioner is currently vacant.

1 July 31, 2012, Piracha underwent ankle surgery, and on May 6, 2013, she had the related hardware
2 removed. AR 231, 330. The record indicates that in January 2013 her ankle’s “range of motion
3 [was] within normal limits;” in February 2013 she had “5/5 strength in all ankle quadrants
4 bilaterally;” in June 2013 her fractures were “[h]ealing or healed;” and after August 2013 she
5 rarely sought treatment for her ankle. AR 309, 318, 334, 348-372. The record indicates, however,
6 that Piracha nonetheless consistently reported pain to her physicians from November 2012 to
7 December 2013. See, e.g. AR 273, 276, 313, 322, 332, 345, 360.

8 Piracha also claims disability based on a knee injury. Shortly after her ankle surgery,
9 Piracha’s doctor advised her to try therapeutic exercises including wall squats and leg lifts against
10 a wall. AR 258. On December 5, 2012, Piracha notified her doctor that she heard a crack in her
11 knee when doing the leg exercises and started experiencing pain. AR 276-277. Piracha
12 continually reported knee pain to physicians from December 2012 to April 2013. See, e.g. AR
13 307, 313, 322.

14 The record indicates that Piracha’s daily activities during this time included yard work,
15 simple cooking, shopping, taking walks, visiting friends, using a computer, driving, reading, and
16 paying bills. AR 323, 56-59.

17 **B. Administrative History**

18 Piracha applied for SSDI on June 11, 2013. AR 74. The Commissioner denied her
19 applications both initially and upon reconsideration. AR 92, 101. Piracha timely requested a
20 hearing before an Administrative Law Judge (ALJ) and hired an attorney to appear at the hearing
21 by video. AR 106, 38.

22 After the March 3, 2015 hearing, the ALJ conducted the five-step evaluation process to
23 determine if Piracha was disabled and entitled to benefits. See, 20 C.F.R. § 404.1520.² The ALJ
24 concluded that Piracha met the first two requirements. At step one, the ALJ found that Piracha
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26 ² The ALJ will find the claimant disabled if the claimant (1) is not presently working in a
27 substantially gainful activity, (2) has a severe impairment (3) that meets or is equal to one of the
28 impairments specified in Social Security regulations, (4) is not able to do any past work, and (5) is
not able to do any other work. Bustamante v. Massanari, 262 F.3d 949, 954 (9th Cir. 2001)
(citation omitted).

1 had not engaged in substantial gainful activity since July 29, 2012. AR 27. At step two, she found
2 that Piracha’s osteoarthritis with a history of fracture and surgery amounted to a severe
3 impairment, but disregarded Piracha’s knee injury because “there [was] no evidence it cause[d]
4 more than minimal work-related limitations.” *Id.* The ALJ then concluded that Piracha did not
5 meet the last three requirements because her impairment did not meet or equal a listed impairment,
6 she could perform her past relevant work, and she could work other jobs. AR 27-28, 30-32. The
7 ALJ determined that Piracha’s residual functional capacity (RFC) included light work as defined
8 in 20 C.F.R. § 404.1567(b) with some exceptions.³ AR 28.

9 The ALJ denied Piracha benefits on June 22, 2015 and Piracha timely appealed to the
10 Appeals Council on December 15, 2016. AR 32, 1. Piracha submitted new medical evidence to
11 the Appeals Council, but the Appeals Council denied Piracha’s appeal in part because the new
12 evidence was dated two months after the ALJ’s decision. AR 2. Having exhausted all
13 administrative remedies, Piracha filed this action seeking judicial review of the Commissioner’s
14 decision. ECF No. 1 at 1.

15 **II. JURISDICTION**

16 The Court has jurisdiction to review final decisions of the Social Security Administration
17 Commissioner. 42 U.S.C. § 405(g).

18 **III. LEGAL STANDARD**

19 A reviewing court can set aside the Commissioner’s decision only if the decision is “not
20 supported by substantial evidence in the record or if it is based on legal error.” *Merrill ex rel.*
21 *Merrill v. Apfel*, 224 F.3d 1083, 1084-1085 (9th Cir. 2000) (citation omitted). “Substantial
22 evidence is such relevant evidence as a reasonable mind might accept as adequate to support a
23 conclusion.” *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005) (citation omitted). “Where
24 evidence exists to support more than one rational interpretation, the Court must defer to the
25 decision of the ALJ.” *Drouin v. Sullivan*, 966 F.2d 1255, 1258 (9th Cir. 1992) (citation omitted).
26 Additionally, courts “cannot affirm the decision of an agency on a ground that the agency did not
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28 ³ A residual functional capacity is defined by regulation as “the most you can still do despite your limitations.” 20 C.F.R. § 404.1545(a)(1).

1 invoke in making its decision.” Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001) (citation
2 omitted).

3 **IV. ANALYSIS**

4 Piracha files a motion for summary judgment with remand for another hearing with claims
5 that (1) the ALJ failed to develop the record, (2) the ALJ erroneously discredited Piracha’s
6 testimony, and (3) the Appeals Council erroneously rejected new evidence. ECF No. 14 at 4-9.
7 The Commissioner filed a cross-motion for summary judgment and in opposition to Piracha’s
8 motion for remand. ECF No. 17 at 1.

9 **A. The ALJ’s Duty to Develop the Record**

10 The ALJ “has an independent ‘duty to fully and fairly develop the record’”
11 Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001) (citation omitted).⁴ The duty “is
12 triggered only when there is ambiguous evidence or when the record is inadequate to allow for
13 proper evaluation of the evidence.” Mayes v. Massanari, 276 F.3d 453, 459-460 (9th Cir. 2001)
14 (citation omitted); see, e.g., Rios v. Berryhill, No. 14-CV-00654-JCS, 2018 WL 905849, at *21
15 (N.D. Cal. Feb. 15, 2018) (holding that ALJ should have developed record when ALJ minimally
16 relied on records with redacted, crossed out, or obscured items). “ALJ can satisfy this duty in a
17 variety of ways, including “subpoenaing the claimant’s physicians, submitting questions to the
18 claimant’s physicians, continuing the hearing, or keeping the record open after the hearing to allow
19 supplementation of the record.” Tonapetyan, 242 F.3d at 1150.

20 Piracha argues that the record is ambiguous because it includes a benefits determination
21 from the California Public Employees’ Retirement System (“CalPERS”), but does not include the
22 record CalPERS reviewed to make that determination. ECF No. 14 at 4-5. Plaintiff argues that
23 the medical reports CalPERS relied on “likely contain facts that are needed for a complete
24 evaluation of” Piracha’s eligibility for benefits. Because Piracha has not obtained these records
25 and placed them before the Court, her argument is speculative. Moreover, “it is only where the
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27 ⁴ This duty is heightened when the claimant is “unrepresented . . . [or] mentally ill and thus unable
28 to protect her own interests.” Id. Piracha was represented by a lawyer and there is no evidence
that she suffers from a mental illness.

1 record contains ambiguous evidence or the ALJ himself has found the record is inadequate to
2 allow for proper evaluation of the evidence that the ALJ's duty to "conduct an appropriate inquiry"
3 is triggered. Cuestas v. Astrue, No. 3:11-CV-05480-RJB, 2012 WL 1536251, at *7 (W.D. Wash.
4 Apr. 9, 2012), report and recommendation adopted, No. 3:11-CV-05480-RJB, 2012 WL 1537605
5 (W.D. Wash. Apr. 30, 2012).

6 Also, the ALJ actively sought whatever information Piracha thought might be helpful.
7 When the ALJ admitted the record into evidence, the ALJ asked Piracha's counsel "[i]s there
8 anything additional?" and Piracha's counsel responded "[n]o, Your Honor." AR 39. On these
9 facts, the Court cannot find that the ALJ failed to comply with the duty to develop the record. See
10 Johnson v. Barnhart, 449 F.3d 804, 808 (7th Cir. 2006).

11 Therefore, the Court denies Piracha's motion for summary judgment on her claim that the
12 ALJ failed to develop the record. The Commissioner's cross motion for summary judgment is
13 granted.

14 **B. The ALJ's Credibility Determination**

15 To evaluate subjective pain and symptoms, an ALJ must find objective medical evidence
16 of an underlying impairment "which could reasonably be expected to produce the pain or other
17 symptoms alleged." Garrison v. Colvin, 759 F.3d 995, 1014 (9th Cir. 2014) (quoting Lingenfelter
18 v. Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007)). Then, if "there is no evidence of malingering,
19 'the 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. at 1014-1015 (quoting Smolen v. Chater,
21 80 F.3d 1273, 1281 (9th Cir. 1996)).

22 The reviewing court must determine whether the ALJ met the specific, clear, and
23 convincing standard. Burrell v. Colvin, 775 F.3d 1133, 1136 (9th Cir. 2014) (citations omitted).
24 However, even if the ALJ errs, "[s]o long as there remains substantial evidence supporting the
25 ALJ's conclusions on credibility and the error does not negate the validity of the ALJ's ultimate
26 credibility conclusion, such is deemed harmless and does not warrant reversal." Carmickle v.
27 Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1162 (9th Cir. 2008) (citations and internal quotation
28 marks omitted).

1 Here, the ALJ found objective medical evidence of an underlying impairment and did not
2 conclude that there was evidence of malingering. AR 29. Then, the ALJ rejected Piracha’s
3 testimony about the severity of her symptoms based on (1) the ALJ’s observations during the
4 hearing, (2) Piracha’s daily activities, (3) Piracha’s inconsistent statements, (4) objective medical
5 evidence, (5) Piracha’s medication use, and (6) Piracha’s minimal treatment. AR 28-30. Piracha
6 claims that the reasons for discrediting her testimony were not specific, clear, or convincing. ECF
7 No. 14 at 6-8.

8 **1. Personal Observations**

9 The ALJ may point to personally observed “symptoms that were inconsistent both with the
10 medical evidence and with other behavior [] exhibited at the hearing.” Verduzco v. Apfel, 188
11 F.3d 1087, 1090 (9th Cir. 1999). However, “[t]he fact that a claimant does not exhibit physical
12 manifestations of prolonged pain at the hearing provides little, if any, support for the ALJ’s
13 ultimate conclusion” Gallant v. Heckler, 753 F.2d 1450, 1455 (9th Cir. 1984) (citation
14 omitted).

15 The ALJ observed that Piracha “had one crutch at the hearing but did not seem to use it
16 much. She was observed to be able to open the door on her own and held her coat in her other
17 arm. She did not appear to have a complete inability to ambulate effectively” AR 29.
18 However, the ALJ did not explain how these observations were inconsistent with the medical
19 evidence nor other symptoms observed at the hearing. Instead, the ALJ seemed to rely on these
20 observations as if to prove that Piracha did not exhibit manifestations of pain at the hearing.
21 These types of observations are not specific, clear, and convincing reasons for making an adverse
22 credibility determination. Therefore, the ALJ erred when providing personal observations as a
23 reason for discrediting Piracha’s pain testimony.

24 **2. Daily Activities**

25 An ALJ may assess the claimant’s daily activities but “must make specific findings
26 relating to [the daily] activities and their transferability to conclude that a claimant’s daily
27 activities warrant an adverse credibility determination.” Orn v. Astrue, 495 F.3d 625, 639 (9th
28 Cir. 2007) (citation and internal quotation marks omitted). The ALJ can satisfy this requirement

1 by explaining how daily activities suggest the claimant could participate in a certain type of work.
2 See e.g., Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1175 (9th Cir. 2008) (upholding ALJ’s
3 finding when ALJ listed daily activities and stated “[t]hese activities tend to suggest that the
4 claimant may still be capable of performing the basic demands of competitive, remunerative,
5 unskilled work on a sustained basis.”).

6 Piracha primarily argues that the ALJ erroneously discredited her testimony based on her
7 history of doing leg presses. ECF No. 14 at 7-8. There is no support for this argument because
8 there is no indication that the ALJ considered this observation in her credibility assessment. See,
9 AR 27 (finding that Piracha exercised “despite her history of ankle fracture” when
10 concluding that her knee injury was not a severe impairment).

11 However, the ALJ did assess Piracha’s daily activities and how they could transfer to a
12 workplace setting. The ALJ found that daily activities such as simple cooking, shopping, taking
13 walks, using a computer, driving, and paying bills “do not comport with the claimant’s assertions
14 that she has disabling pain, limitation in walking and standing.” AR 29. She also found that these
15 “activities are generally consistent with the assigned light residual functional capacity (RFC) I
16 have found in this case.” Id. By referencing the RFC finding, the ALJ explained that activities
17 such as simple cooking, shopping, and paying bills are transferrable activities to light work as
18 defined in 20 C.F.R. § 404.1567(b) with some exceptions.⁵ Because “daily activities may be
19 grounds for an adverse credibility finding ‘if a claimant is able to spend a substantial part of his
20 day engaged in pursuits involving the performance of physical functions that are transferable to a
21 work setting,’” Orn, 495 F.3d at 639 (quoting Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)),

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23 ⁵ “Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of
24 objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this
25 category when it requires a good deal of walking or standing, or when it involves sitting most of
26 the time with some pushing and pulling of arm or leg controls. To be considered capable of
27 performing a full or wide range of light work, you must have the ability to do substantially all of
28 these activities. If someone can do light work, we determine that he or she can also do sedentary
work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for
long periods of time.” 20 C.F.R. § 404.1567(b). Additionally, the ALJ specified exceptions
including: “she can lift and carry 20-pounds occasionally and 10-pounds frequently. The claimant
can stand and walk 6-hours in an 8-hour day and sit 6-hours in an 8-hour day. She can frequently
climb stairs and ramps, and can occasionally climb ladders. She is able to occasionally balance,
kneel, crouch and crawl.” AR 28.

1 the ALJ did not err.

2 **3. Inconsistent Statements**

3 An ALJ may assess general credibility by considering prior inconsistent statements.
4 Thomas v. Barnhart, 278 F.3d 947, 959 (9th Cir. 2002) (finding claimant lacked candor because of
5 two inconsistent statements made to doctors about alcohol use). After Piracha’s hearing, the ALJ
6 concluded that “[t]he claimant was inconsistent with some details in her testimony.” AR 29. The
7 ALJ specified that “[i]nitially, she denied using her boyfriend’s pain medication. However, when
8 confronted with evidence in the record that she had previously admitted to doing so [], she said
9 she used his Oxycodone twice.” Id. Considering this line of questioning resulted in several
10 differing answers, the ALJ may properly have inferred “that [Piracha’s] lack of candor carries over
11 to her description of physical pain.” See Thomas, 278 F.3d at 959. The ALJ did not err in basing
12 an adverse credibility in part on a line of questioning where Piracha’s answers revealed a lack of
13 candor.

14 **4. Objective Medical Evidence**

15 “While subjective pain testimony cannot be rejected on the sole ground that it is not fully
16 corroborated by objective medical evidence, the medical evidence is still a relevant factor in
17 determining the severity of the claimant’s pain and its disabling effects.” Rollins v. Massanari,
18 261 F.3d 853, 857 (9th Cir. 2001) (citing 20 C.F.R. § 404.1529(c)(2)). An ALJ cannot conclude
19 there is a conflict between subjective complaints and objective medical evidence without
20 specifying reasons. Compare, Brown-Hunter v. Colvin, 806 F.3d 487, 494 (9th Cir. 2015)
21 (finding for claimant when ALJ “simply stated her non-credibility conclusion and then
22 summarized the medical evidence supporting her RFC determination”) with Bennett v. Colvin,
23 202 F. Supp. 3d 1119, 1129 (N.D. Cal. 2016) (finding for Commissioner when ALJ listed medical
24 evidence in support of the ALJ’s RFC determination and then summarized reasons for discrediting
25 the claimant’s testimony).

26 When discussing Piracha’s medical history, the ALJ concluded that Piracha “testified that
27 she cannot walk on her left foot, but the medical evidence does not show that such a limitation
28 lasted for a year or more.” AR 28. The ALJ then thoroughly summarized Piracha’s medical

1 history from her ankle surgery in July 2012, to her x-ray examination in June 2013 that showed
2 “the fracture had healed.” AR 29. The ALJ identified specific medical testimony that conflicted
3 with specific parts of Piracha’s testimony and did not commit legal error.

4 **5. Effectiveness of Medication**

5 The ALJ may consider “[t]he type, dosage, effectiveness, and side effects of any
6 medication you take or have taken to alleviate your pain or other symptoms.” 20 C.F.R. §
7 404.1529(c)(3)(iv) (2015).⁶ The ALJ found that Piracha “testified that with the use of Tylenol her
8 pain decreases, going from a 7 to a 8 to a 5 out of 10, on a scale of 0 to 10, with 10 being the
9 worst. This indicates her pain is tolerable.” AR 28. Furthermore, the ALJ concluded that “[t]here
10 is no ongoing history of pain management treatment to substantiate the claimant’s allegations of
11 disabling pain.” *Id.* The ALJ offered specific, clear, and convincing evidence suggesting that
12 Piracha’s mild medication was effective in reducing her pain. This was not error.

13 **6. Unexplained Minimal Treatment**

14 ALJ’s are encouraged to consider “[t]reatment, other than medication, you receive or have
15 received for relief of your pain or other symptoms.” 20 C.F.R. § 404.1529(c)(3)(v) (2015). That a
16 claimant’s pain was “not severe enough to motivate her to seek [certain] forms of treatment, even
17 if she sought some treatment, is powerful evidence regarding the extent to which she was in pain.”
18 Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) (internal citation and internal quotation
19 marks omitted) (upholding ALJ’s finding because claimant did not receive surgery, chiropractic
20 services, nor physical therapy for three to four months). “While there are any number of good
21 reasons for not [seeking treatment], a claimant’s failure to assert one . . . can cast doubt on the
22 sincerity of the claimant’s pain testimony.” Fair, 885 F.2d at 603 (internal citations omitted).

23 The ALJ found that “[t]here has been minimal medical treatment since August 2013 [], and
24 this indicates that the claimant’s ankle fracture has healed completely and she has not had pain and
25 symptoms severe enough to seek further, ongoing and regular treatment.” AR 29. The ALJ
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27 _____
28 ⁶ This regulation was amended on January 18, 2017. The version cited was controlling when
Piracha applied for benefits.

1 accurately points to a five month period where Piracha did not seek surgery, physical therapy, nor
2 regular medical treatment.⁷ AR 348-372. Moreover, Piracha does not contend, nor does the ALJ
3 find, that Piracha offered a good reason for not seeking treatment. There is no legal error because
4 the ALJ pointed to an unexplained five month period without substantial nor regular treatment.

5 **7. Harmless Error**

6 The ALJ did not meet the applicable standard when assessing Piracha’s behavior during
7 the hearing. However, she properly assessed Piracha’s daily activities, inconsistent statements,
8 objective medical evidence, medication use, and minimal treatment. Because she gave five
9 specific, clear, and convincing reasons for discrediting Piracha’s pain testimony, her single
10 erroneous finding is harmless and does not warrant reversal. See, Carmickle, 533 F.3d at 1162.
11 Thus, the ALJ’s ultimate credibility determination is still valid. The Court denies Piracha’s
12 motion for summary judgment on her claim that the ALJ’s adverse credibility finding was legal
13 error. The Commissioner’s cross motion for summary judgment is granted.

14 **C. The Appeals Council’s Rejection of New Evidence**

15 “When a claimant submits evidence for the first time to the Appeals Council, which
16 considers that evidence in denying review of the ALJ’s decision, the new evidence is part of the
17 administrative record, which the district court must consider in determining whether the
18 Commissioner’s decision is supported by substantial evidence.” Brewes v. Comm’r of Soc. Sec.
19 Admin., 682 F.3d 1157, 1159-60 (9th Cir. 2012). However, the Appeals Council is only required
20 “to evaluate the new evidence ‘if it relates to the period on or before the date of the administrative
21 law judge hearing decision.’” Martinez v. Astrue, No. 12-CV-02997-JCS, 2014 WL 310387, at
22 *19 (N.D. Cal. Jan. 28, 2014) (quoting 20 C.F.R. § 404.970(b) (2015)).⁸

23 Here, the claimant submitted an August 25, 2015 doctor’s letter with bone density exam
24 results to the Appeals Council. AR 225. The Appeals Council stated that the new evidence did
25 not affect the ALJ’s decision because the “new information [wa]s about a later time.” AR 2.

26 ⁷ In December 2013, Piracha sought a prescription for a few oxycodone and indicated that she had
27 an upcoming orthopedic appointment. AR 368. However, medication is not the same as
28 treatment, and one orthopedic appointment does not amount to regular treatment.

⁸ This regulation was amended on December 16, 2016. The version cited was controlling when
Piracha applied for benefits.

1 However, osteoarthritis does not suddenly develop. While this report is dated two months after
2 the hearing decision, it relates to the time period before the hearing decision. See, Martinez, 2014
3 WL 310387, at *19 (finding evidence relating to period because later MRIs allowed for a
4 comparison of the changes to claimant’s degenerative disc disease); Oliver v. Astrue, No. 11-
5 04354-LB, 2013 WL 211131 (N.D. Cal. Jan. 16, 2013) (finding evidence related to the period
6 because Asperger’s Disorder is “a developmental disorder, not a condition which suddenly
7 appeared after hearing.”). Therefore, the doctor’s letter with attached bone density exam results
8 relates to the period.

9 The Court would therefore be required to consider this new evidence if it could, but it does
10 not appear in the record and Piracha has supplied it.⁹ Therefore, the Court denies Piracha’s motion
11 for summary judgment on her claim that the error made by the Appeals Council warrants remand.
12 The Commissioner’s cross-motion for summary judgment is granted.

13 **CONCLUSION**

14 The Court concludes that the ALJ did not err in developing the record. The ALJ made one
15 harmless error when making the adverse credibility determination, but her ultimate credibility
16 determination is still valid. The Court also concludes that while the Appeals Council should not
17 have rejected the new evidence offered by Piracha, the ALJ’s decision is supported by substantial
18 evidence. The Court therefore DENIES Piracha’s motion for summary judgment and GRANTS
19 the Commissioner’s cross-motion for summary judgment.

20 **IT IS SO ORDERED.**

21 Dated: April 18, 2018

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23 _____
24 JON S. TIGAR
25 United States District Judge

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27 _____
28 ⁹ The Commissioner found that the letter would likely “do no more than confirm impairments the
ALJ already found to be severe.” ECF No. 17 at 10. The Court does not adopt this speculative
finding.