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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAMANTHA ELIZABETH BIDAD,
Plaintiff,
v.
NANCY A. BERRYHILL,
Defendant.

Case No. [17-cv-00679-JSC](#)

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

Re: Dkt. Nos. 18, 19

Plaintiff Samantha Elizabeth Bidad seeks social security benefits for a combination of mental and physical impairments, including: extreme pain, cystic hygroma, neck and arm pain, stiffness, fatigue, and mental health issues. (Administrative Record (“AR”) 104, 175, 511.) Pursuant to 42 U.S.C. § 405(g), Ms. Bidad filed this lawsuit for judicial review of the final decision by the Commissioner of Social Security denying her benefits claim. Now before the Court are Plaintiff and Defendant’s Motions for Summary Judgment. (Dkt. Nos. 18 & 19.) Because the Administrative Law Judge (“ALJ”) improperly weighed the medical opinion evidence, 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 reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). Second, the impairment or impairments must be

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

11 **PROCEDURAL BACKGROUND**

12 In 2010, Ms. Bidad first filed for Supplemental Security Income (“SSI”) under Title XVI
13 of the Social Security Act, alleging disability beginning in 2006 caused by a cystic hygroma and
14 neck problems. (AR 74, 511.) Ms. Bidad’s initial application and request for reconsideration
15 were denied. (AR 273.) Ms. Bidad requested a hearing, and following a hearing before an ALJ,
16 the ALJ denied benefits in 2011. (AR 74, 273.) Ms. Bidad thereafter sought judicial review of the
17 denial under 42 U.S.C. § 405(g) and the district court affirmed. *See Bidad v. Colvin*, No. 12-CV-
18 06384-NJV, 2013 WL 4488695 (N.D. Cal. Aug. 20, 2013).

19 Concurrent with her request for judicial review, Ms. Bidad filed a new application for SSI
20 under Title XVI on November 29, 2012, amending her disability onset date to that same day. (AR
21 547.) That application was denied initially on March 1, 2013, and on reconsideration on August,
22 19, 2013. (AR 74.) Ms. Bidad requested a hearing before the ALJ and in August 2014 Ms. Bidad
23 appeared before ALJ Alberto Gonzalez. (AR 150.) The hearing was continued to schedule a
24 consultative psychologist evaluation. (AR 177.) A supplemental hearing occurred on November
25 18, 2014. (AR 126.) ALJ Gonzalez again continued the hearing to allow Ms. Bidad’s
26 representative to gather mental health records. (AR 148.)

27 In April 2015, ALJ Serena Hong presided over the hearing that gave rise to the underlying
28 decision here. (AR 470-74.) In a written decision, ALJ Hong found that Ms. Bidad was not

1 disabled within the meaning of the Social Security Act and its regulations and, therefore, was not
2 entitled to SSI benefits. (AR 71-87.) On December 9, 2016, the Appeals Council considered and
3 denied Ms. Bidad’s request for review, making the ALJ’s decision final. (AR 1-7.) Ms. Bidad
4 commenced this action for judicial review on February 9, 2017 pursuant to 42 U.S.C. §§ 405(h),
5 1383(c). (Dkt. No. 1.)

6 **ADMINISTRATIVE RECORD**

7 Ms. Bidad was born on October 31, 1964. (AR 97.) She resides in Rohnert Park,
8 California. (AR 97.) She attended school through the 11th grade, but did not complete a GED.
9 (AR 99.) Following surgery in 2005, Ms. Bidad alleges that pain prevented her from returning to
10 work and she has not been able to work since. (AR 100, 108.)

11 **I. Medical Evidence**

12 **A. Medical History: Treatment Records**

13 Ms. Bidad’s history of mental health problems dates back to 2006. (AR 796.) Physically,
14 Ms. Bidad has a history of cystic hygroma, neck problems, stiffness, and fatigue. (AR 619, 770.)
15 She alleges that her ailments began after a surgery where a three-pound cyst was removed from
16 her neck and a lipoma was taken from the back of her head. (*Id.*) Ms. Bidad has sought continued
17 treatment for chronic neck pain and her resulting lack of mobility. (*See, e.g.* AR 572, 578, 588.)

18 **B. Medical Evaluations**

19 **1. Examining Psychologist Albert Kastl, Ph.D.**

20 On October 15, 2010, Dr. Kastl examined Ms. Bidad at the request of the Agency. (AR
21 660.) Ms. Bidad presented with a dysthymic affect and appeared to be in a great deal of pain.
22 (AR 663.) Dr. Kastl’s impressions were that Ms. Bidad was “well oriented to time, place and
23 person,” “extremely cooperative and friendly and displayed a full range of affect.” (*Id.*) He
24 concluded that she had a “mood disorder due to physical condition.” (*Id.*)

25 Dr. Kastl administered several tests to evaluate Ms. Bidad’s cognitive ability, memory, and
26 visual-motor skills. He found that Ms. Bidad performed “exactly average caliber” on processing
27 speed, average on visual-motor functioning, and “entirely average caliber” on overall memory.
28 (AR 661-62.) In the remaining areas—conceptual similarities, perceptual reasoning, working

1 memory, connecting scattered numbers, and alternating between numbers and letters—Ms. Bidad
2 “fell in the low-average range.” (AR 661.)

3 **2. Examining Physician Soheila Benrazavi, M.D.**

4 On March 9, 2013, Dr. Soheila Benrazavi examined Ms. Bidad at the request of the
5 Agency. (AR 619-24). Dr. Benrazavi conducted a complete internal medicine evaluation, but
6 qualified that it was “not meant to be and must not be construed to be a complete physical
7 examination.” (AR 619.) Dr. Benrazavi reported “no acute distress at the time of the
8 examination” and that Ms. Bidad was “cooperative.” (AR 620.) Ms. Bidad’s flexion was in the
9 normal range for her neck, back, and shoulders. (AR 621.) Dr. Benrazavi noted that Ms. Bidad
10 presented with some tenderness “on palpitation of the midline cervical spine and area of the right
11 trapezius.” (AR 623.) Dr. Benrazavi reported that Ms. Bidad was able “to lift and carry 50
12 pounds occasionally, and 25 pounds frequently, stand and walk for six hours and sit for six hours
13 per eight-hour workday.” (*Id.*)

14 **3. Treating Physician Joel Lewis, D.O.**

15 On September 24, 2013, treating physician Dr. Joel Lewis completed a “Residual
16 Functional Capacity Questionnaire.” (AR 647-52.) He reported monthly treatments over four
17 years, but there are no records of his treatment in the application period. (AR 647.) Dr. Lewis
18 notes Ms. Bidad had “[b]urning pain” and a significant limitation of motion. (*Id.*) He also
19 reported that Ms. Bidad’s exhaustion, impaired sleep, malaise, and depression were “reasonably
20 consistent with symptoms and functional limitations.” (AR 645, 649.) Dr. Lewis did not find that
21 Ms. Bidad suffered from either psychological factors affecting physical conditions or anxiety.
22 (AR 649.) He noted Ms. Bidad could sit an hour at one time with a two-hour daily maximum;
23 stand for 15 minutes, and stand/walk for less than two hours in a day. (AR 649-50.) Dr. Lewis
24 concluded that Ms. Bidad could only rarely lift less than ten pounds in a competitive work
25 environment. (AR 650.) Similarly, he opined that Ms. Bidad could rarely look down and up, turn
26 her head right or left, or hold her head static. (*Id.*) Dr. Lewis found that Ms. Bidad had significant
27 limitation with reaching, handling and fingering. (AR 651.) He also reported that Ms. Bidad’s
28 symptom would frequently interfere with her attention and concentration. (AR 649.)

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4. Examining Psychologist Jennifer Eggert, Ph.D.

On September 27, 2014, Dr. Jennifer Eggert examined Ms. Bidad at the request of the Agency. (AR 729.) Dr. Eggert reviewed 63 pages of Ms. Bidad’s medical records and submitted a psychological evaluation and a “Medical Source Statement of Ability to Do Work-Related Activities (Mental).”

Dr. Eggert observed that Ms. Bidad made adequate eye contact and interacted appropriately. (AR 729.) Ms. Bidad also “appeared sedated secondary to her medication regimen,” “mildly dissociative” with “psychomotor retardation,” “anxious-depressed” mood, and “constricted and blunted affect.” (*Id.*) Dr. Eggert opined that Ms. Bidad had moderate limitations in (1) her ability to understand, remember, and carry out and make judgments on complex instructions and work-related decisions, and (2) in her ability to interact appropriately with the public, supervisors, and co-workers. (AR 726-27.) Dr. Eggert reported that Ms. Bidad’s “thought process was linear and mildly impoverished,” her working and immediate memory were mildly impaired, and her delayed memory was moderately impaired. (AR 731.)

Dr. Eggert administered two tests where Ms. Bidad “worsened on timed tasks due to her slowed pace.” (AR 731-32.) In all but two categories, Ms. Bidad performed below average. (AR 732.) Ms. Bidad’s Perceptual Reasoning was average, and her Delayed Memory was Borderline, indicating mild impairment in immediate memory and moderately impaired in short-term delayed memory. (*Id.*)

Dr. Eggert diagnosed Ms. Bidad with Persistent Depressive Disorder (Pure Dysthymic Syndrome), Mild Neurocognitive Disorder Due to Multiple Etiologies, Rule-out Delirium due to Multiple Etiologies, and Medication Induced Movement Disorder. (AR 733.) She noted Ms. Bidad’s was “significantly limited in her ability to deal with the stress encountered in competitive work environments . . . [and] to maintain an efficient pace at work.” (AR 734.)

5. Examining Psychologist Marion Zipperle, Ph.D.

On November 10, 2014, Psychologist Marion Zipperle examined Ms. Bidad at the request of her representative and completed both a “Psychological Evaluation” as well as a “Mental Residual Functional Capacity Questionnaire.” (AR 774-83.) Ms. Bidad was accompanied by her

1 significant other, Carl Bachli, who provided much of the medical history information because Ms.
2 Bidad had “problems with linear memory.” (AR 774.) Mr. Bachli reported that Ms. Bidad cannot
3 be left alone, so he takes her everywhere with him including to work. (*Id.*)

4 Dr. Zipperle administered several tests wherein Ms. Bidad scored well with respect to her
5 ability to learn and recall symbols, numbers and letters in their proper order, but scored high for
6 depression and anxiety. (*Id.*) Ms. Bidad had problems with concentration, appeared confused,
7 disorganized, nonlinear, illogical, anxious, angry, depressed, and endorsed suicidal ideation,
8 negative and paranoid thoughts, auditory hallucinations, and a flat, restricted affect. (AR 777.)
9 Dr. Zipperle further opined that Ms. Bidad distrusted therapists and the mental health system, and
10 was ashamed of her mental health problems, and tried to hide them. (AR 824, 827.)

11 Dr. Zipperle diagnosed Ms. Bidad with Schizoaffective Disorder, Bipolar Type, ADHD,
12 Cognitive Impairment NOS, Polysubstance Abuse in remission, and Panic Disorder without
13 Agoraphobia. (AR 776.) Dr. Zipperle found Ms. Bidad “capable of simple/repetitive tasks,” but
14 markedly limited in her ability to: “do complex/detailed tasks,” get “along with supervisors, peers,
15 and public,” “remain stable over an 8 hour day,” “handle the normal stress of the work world” and
16 “handle time pressure.” (*Id.*)

17 Dr. Zipperle gave Ms. Bidad a poor prognosis and found that she was unable to meet
18 competitive standards of skilled work or particular jobs save “adhere to basic standards of neatness
19 and cleanliness,” where Ms. Bidad is “seriously limited, but not precluded.” (AR 782.) Dr.
20 Zipperle noted Ms. Bidad will likely be absent from work three or more days per month. (AR
21 783.)

22 **II. ALJ Hearing**

23 On April 23, 2015, Ms. Bidad appeared with her representative at her scheduled hearing
24 before ALJ Serena Hong in San Rafael, California. (AR 93.) Ms. Bidad and Vocational Expert
25 (“VE”) Robert Cottle both testified at the hearing. (*Id.*)

26 **A. Ms. Bidad’s Testimony**

27 On November 29, 2012, Ms. Bidad applied for social security benefits. (AR 99-100.) Ms.
28 Bidad became disabled on June 1, 2005 following an operation to remove a cyst from her neck.

1 (AR 99, 104.) After the operation, the Ms. Bidad’s right side became stiff and she experienced
2 extreme pain. (AR 104.)

3 Prior to Ms. Bidad’s 2005 surgery, she worked as a fast food cashier, as a cashier and
4 dressing room attendant at Marshalls, and as a telemarketer. (AR 101-03.) After her surgery, Ms.
5 Bidad attempted to work at a restaurant and a grocery store but was unable to maintain the pace of
6 work. (AR 108-09.) For the past two years, Ms. Bidad has worked watering flowers for the
7 county at the Town Recycle and the County Building for two hours a day. (AR 98, 100, 108.)
8 She otherwise spends her time at homeless day centers where she participates in arts and crafts
9 activities. (AR 107-08.)

10 Ms. Bidad has problems standing and walking as her back goes out on her. (AR 114.) She
11 has a limited ability to lift things and can only lift up to four pounds using both her hands. (AR
12 114.) Ms. Bidad is not receiving ongoing mental health treatment and she has not used
13 methamphetamine or any illegal drugs since 2006. (AR 110-11, 116.) Ms. Bidad takes Percocet,
14 muscle relaxers, Ibuprofen, and other medications that address her sinuses, constipation, and
15 diarrhea. (AR 112-113.)

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

17 At the ALJ’s request, VE Robert Cottle, who reviewed Ms. Bidad’s file and was present
18 for Ms. Bidad’s testimony, testified regarding Ms. Bidad’s ability to perform her past work. The
19 VE classified Ms. Bidad’s past relevant work as cashier, fitting room attendant, and telemarketer
20 as (1) “Cashier II” (DOT 211.462-010), requiring light strength, (2) “Sales Clerk” (DOT 290.433-
21 014) requiring light strength, and (3) “Telephone Solicitor” (DOT 299.357-014) a sedentary job.
22 (AR 117.) The VE did not consider Ms. Bidad’s flower watering. (*Id.*)

23 The ALJ posed several hypotheticals to the VE to determine whether there were jobs
24 existing in significant numbers in the national economy that Ms. Bidad could perform given her
25 impairments. (*Id.*) The ALJ’s first hypothetical considered an individual with Ms. Bidad’s age,
26 education, and background, along with the following limitations: light exertional levels, the
27 “ability to change positions, from sit to stand at will,” and the individual can only perform simple
28 routine tasks. (*Id.*) The VE responded that the individual could not perform Ms. Bidad’s past

1 work as cashier, sales clerk, or telephone solicitor. (AR 118.)

2 Next, the ALJ's second hypothetical adopted the same limitations as above, except that the
3 individual could sit and stand, as a cafeteria worker. (AR 119.) The VE responded that the
4 individual could perform Ms. Bidad's past job as a Cashier II along with the position of
5 Laminating-machine Operator (DOT 569.686-046), requiring light strength. (AR 119-20.) The
6 VE further noted that the national availability of jobs was reduced by half to reflect positions that
7 have the option to sit or stand. (*Id.*)

8 The ALJ's third hypothetical limited the second hypothetical to only performing postural
9 maneuvers (e.g. stooping, crouching, and crawling occasionally), but the individual could not
10 reach overhead with the right upper extremity, or bilaterally. (AR 120.) The individual was
11 limited to frequent handling and fingering. (*Id.*) The VE responded that the individual could still
12 work as a Cashier II and Laminating-machine Operator. (AR 120-21.)

13 The ALJ further modified the second hypothetical so that the same individual could only
14 rarely look down or rotate the neck. (AR 121.) The VE responded that the individual could not
15 perform any jobs. (*Id.*) The ALJ further modified the second hypothetical individual to the
16 sedentary level. (AR 121.) The VE responded that the individual could work as Final Assembler
17 (DOT 713.687-018), sedentary; and Toy Stuffer (DOT 731.685-014), sedentary. (AR 122.)

18 Then, Ms. Bidad's counsel asked the VE whether the individual in any of the hypotheticals
19 could perform these jobs with the limitation of being off-task fifty percent of the time. (AR 122.)
20 The VE responded no. Ms. Bidad's counsel modified the hypothetical such that the individual
21 was off-task twenty percent of the time, and the VE still found such an individual would be unable
22 to perform any jobs. (AR 123.)

23 **III. ALJ's Findings**

24 In a June 2015 written decision, the ALJ found Ms. Bidad not disabled under section
25 1614(a)(3)(A) of the Social Security Act, taking into consideration the testimony and evidence,
26 and using the SSA's five-step sequential evaluation process for determining disability. (AR 87);
27 *see* 20 C.F.R. § 416.920(g).

28 At step one, the ALJ determined that the Ms. Bidad had not engaged in substantial gainful

1 activity since the application date of November 29, 2012. (AR 77.) The ALJ noted that the Ms.
2 Bidad worked after this date watering the town flowers and earning \$100 a week, but that this did
3 not “rise to the level of substantial gainful activity.” (*Id.*)

4 At step two, the ALJ found that the Ms. Bidad had three severe impairments: (1) status
5 post excision of a cystic hygroma with neck pain; (2) history of headaches; and (3) a mood
6 disorder. (*Id.*) The ALJ determined that the record did not support a finding of medical severity
7 for irritable bowel syndrome, medically determinable mental impairment of hypertension, or sleep
8 apnea. (AR 77.)

9 At the third step, the ALJ concluded that the Ms. Bidad does not have an impairment or
10 combinations of impairments that meet or medically equal the severity of one of the listed
11 impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR 78.) Specifically, the ALJ
12 considered the criteria of listings 12.04 and 12.06, paragraphs (B) and (C). (*Id.*) With regard to
13 paragraph (B), the ALJ concluded that Ms. Bidad’s mental impairments do not cause (1) at least
14 two “marked” limitations, meaning more than moderate but less than extreme, or (2) one
15 “marked” limitation and “repeated” episodes of decompensation, each of extended duration,
16 meaning three episodes within one year, or an average of once every four months, each lasting at
17 least two weeks. (*Id.*) With regard to paragraph (C), the ALJ concluded that Ms. Bidad’s mental
18 impairments did not satisfy the criteria. (*Id.*) In order to satisfy paragraph (C) there must be
19 evidence that the mental disorder is “serious and persistent,” meaning that there is “medically
20 documented history of the existence of the disorder over a period of at least 2 years, and evidence
21 of both:” (1) medical treatment or health therapy, psychological support or a highly structured
22 setting, and (2) marginal adjustment. *See* 20 C.F.R. Part 404, Subpart P, Appendix 1 §§ 12.04(C),
23 12.06(C).

24 The ALJ found that Ms. Bidad had the residual functional capacity (“RFC”) to perform
25 light work, was limited to simple, routine work, and requires the option to change positions from
26 sitting to standing at will. (AR 79.) In considering Ms. Bidad’s dizziness, diarrhea, and cramps in
27 her arms and legs, the ALJ found that Ms. Bidad’s medically determinable impairments could
28 reasonably be expected to cause the alleged symptoms. (AR 79.) However, Ms. Bidad’s

1 testimony regarding the intensity, persistence, and limiting effects of the symptoms was not
2 credible, based on conflicting testimony Ms. Bidad gave regarding her history of illegal drug use
3 as well as the lack of connection between Ms. Bidad’s alleged pain and her medical history. (*See*
4 AR 79-80.)

5 The ALJ concluded that there were conflicting medical opinions regarding Ms. Bidad’s
6 mental functioning. (AR 82-85.) The ALJ gave substantial weight to the opinion of examiner
7 Albert Kastl, Ph.D., as Dr. Kastl’s findings were consistent with the record. (AR 85.) The ALJ
8 also afforded great weight to the opinion of examiner Soheila Benrazavi, M.D., as her findings
9 were consistent with the record, and supported by her examination. (AR 83.) The ALJ gave little
10 weight to the opinion of treating physician Joel Lewis, D.O., as the record showed no treatment or
11 examinations by Dr. Lewis since the application date. (AR 82.) The ALJ also afforded little
12 weight to the opinion of examining physician Marion Zipperle, Ph.D. because Dr. Zipperle (1)
13 gave a one-time assessment of Ms. Bidad, (2) was referred by Ms. Bidad’s representative “without
14 any indication the examiner would remain unbiased,” (3) was based “almost entirely on the
15 claimant’s (and her significant other’s) reported history,” and (4) was not “fully consistent with
16 the treatment record or assessment and observations by other treating and examining sources.”
17 (AR 84.) Finally, the ALJ assigned partial weight to the opinion of Jennifer Eggert, Ph.D. (AR
18 85.) The ALJ determined that Dr. Eggert’s finding that Ms. Bidad was limited to simple,
19 repetitive tasks was consistent with the record and supported by Ms. Bidad’s mild cognitive
20 limitations. (*Id.*) However, the ALJ rejected Dr. Eggert’s opinion that Ms. Bidad was limited
21 interacting with others, managing stress, or maintaining an efficient pace, as the ALJ found no
22 support for this opinion. (*Id.*)

23 At the fourth step, the ALJ found that Ms. Bidad was unable to perform any past relevant
24 work based on the VE’s testimony that the RFC exceeds the requirements of fast food cashier and
25 sales clerk. (AR 86.)

26 At the fifth step, the ALJ concluded that Ms. Bidad could perform jobs that exist in
27 significant numbers in the national economy, including Cashier II and laminating machine
28 operator. (AR 87.)

1 **DISCUSSION**

2 Ms. Bidad challenges only one aspect of the ALJ’s decision: her treatment of the opinion
3 of examining psychologist Jennifer Eggert, Ph.D. Ms. Bidad insists that the ALJ committed legal
4 error by rejecting Dr. Eggert’s opinion. The ALJ, however, did not reject all of Dr. Eggert’s
5 opinion; rather she afforded it partial weight, and determined that the record did support all of Dr.
6 Eggert’s limitations. Neither substantial nor clear and convincing evidence supports the ALJ’s
7 decision.

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

9 **A. Legal Standard**

10 In the Ninth Circuit, courts must “distinguish among the opinions of three types of
11 physicians: (1) those who treat the claimant (treating physicians); (2) those who examine but do
12 not treat the claimant (examining physicians); and (3) those who neither examine nor treat the
13 claimant (nonexamining physicians).” *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (as
14 amended (Apr. 9, 1996)). “A treating physician’s opinion is entitled to more weight than that of
15 an examining physician, and an examining physician’s opinion is entitled to more weight than that
16 of a nonexamining physician.” *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). If a treating
17 doctor’s opinion is not contradicted by another doctor, it may be rejected only for “clear and
18 convincing” reasons. *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). And “even if the
19 treating doctor’s opinion is contradicted by another doctor, the Commissioner may not reject this
20 opinion without providing ‘specific and legitimate reasons’ supported by substantial evidence in
21 the record for so doing.” *Lester*, 81 F.3d at 830 (internal citations omitted). Likewise, “the
22 opinion of an examining doctor, even if contradicted by another doctor, can only be rejected for
23 specific and legitimate reasons that are supported by substantial evidence in the record.” *Id.* at
24 830–31.

25 “The ALJ can meet this burden by setting out a detailed and thorough summary of the facts
26 and conflicting medical evidence, stating his interpretation thereof, and making findings.” *Cotton*
27 *v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986). Ultimately, “the ALJ must do more than offer his
28 conclusions. He must set forth his own interpretations and explain why they, rather than the

1 doctors’, are correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

2 “When an ALJ does not explicitly reject a medical opinion or set forth specific, legitimate
3 reasons for crediting one medical opinion over another, he errs. In other words, an ALJ errs when
4 he rejects a medical opinion or assigns it little weight while doing nothing more than ignoring it,
5 asserting without explanation that another medical opinion is more persuasive, or criticizing it
6 with boilerplate language that fails to offer a substantive basis for his conclusion.” *Garrison v.*
7 *Colvin*, 759 F.3d 995, 1012-13 (9th Cir. 2014) (internal citation omitted). In weighing medical
8 opinions, the ALJ may consider (1) the examining relationship, (2) the treatment relationship, (3)
9 the supportability, (4) the consistency, (5) the specialization, and (6) other factors brought to the
10 ALJ’s attention. 20 C.F.R. § 416.927(c)(5). In conducting its review, the ALJ “must consider the
11 entire record as a whole and may not affirm simply by isolating a ‘specific quantum of supporting
12 evidence.’” *Hill v. Astrue*, 388 F.3d 1144, 1159 (9th Cir. 2012) (internal citations omitted).
13 “Particularly in a case where the medical opinions of the physicians differ so markedly from the
14 ALJ’s[.]” “it is incumbent on the ALJ to provide detailed, reasoned, and legitimate rationales for
15 disregarding the physicians’ findings.” *Embrey*, 849 F.2d at 422.

16 **B. Analysis**

17 To reject the opinion of state Agency examining psychologist Dr. Eggert the ALJ was
18 required to provide specific and legitimate reasons supported by substantial evidence for doing so.
19 *See Lester*, 81 F.3d at 830-31. The ALJ gave partial weight to Dr. Eggert’s opinion that Ms.
20 Bidad was limited to simple, repetitive tasks because Ms. Bidad’s cognitive limitations supported
21 the opinion. (AR 85.) However, she gave no weight to Dr. Eggert’s opinion that Ms. Bidad was
22 moderately limited in her interactions with others, and significantly limited her ability to deal with
23 stress and work at an efficient pace, determining that the opinion “was not supported by the
24 record.” (*Id.*) The ALJ’s decision was not supported by substantial evidence.

25 First, there is no contradiction in the findings of the three examining psychologists
26 regarding Ms. Bidad’s functional limitations. Both Dr. Zipperle and Dr. Eggert reported that Ms.
27 Bidad is moderately or markedly impaired in her interactions with supervisors, coworkers, and the
28 public. (AR 727, 827.) Both Dr. Eggert and Dr. Zipperle noted that Ms. Bidad is significantly or

1 markedly impaired in dealing with work stress and maintaining pace/handling time pressure. (AR
2 734, 827.) As the ALJ noted, Dr. Kastl did not address whether Ms. Bidad had any functional
3 limitations; thus, the only opinions regarding Ms. Bidad’s functional limitations are those of Dr.
4 Zipperle and Dr. Eggert. The ALJ nonetheless rejected their opinions regarding Ms. Bidad’s
5 functional limitations and adopted less restrictive interaction, stress management, and pace
6 restrictions despite the absence of contradictory opinion evidence. An ALJ may reject an
7 uncontradicted opinion of an examining medical professional only for “clear and convincing”
8 reasons. *Lester*, 81 F.3d at 831. Here, the ALJ failed to provide any reasons, let alone, clear and
9 convincing reasons for rejecting the functional limitations of Drs. Eggert and Zipperle.

10 Second, among the consultative psychologists, the ALJ gave great weight to the opinion of
11 Dr. Kastl and less or no weight to the other opinions. The ALJ did so because she found Dr.
12 Kastl’s opinion “generally consistent with the record.” (AR 85.) However, the ALJ ignored that
13 Dr. Kastl examined Ms. Bidad *four years* before Dr. Eggert. Generally, opinions that are more
14 recent in time are favored over those that are more remote. *Johnson v. Astrue*, 303 Fed. Appx.
15 543, 545 (9th Cir. 2008) (holding that “[t]he ALJ properly rejected medical opinions that were
16 more remote in time, relying more heavily on more recent opinions”). The ALJ did not
17 acknowledge the time deferential between the two opinions or consider the possibility that Ms.
18 Bidad’s mental health may have changed or deteriorated in the interim.

19 Third, the opinion evidence as a whole is also not inconsistent with Dr. Eggert’s finding
20 regarding Ms. Bidad’s functional limitations. Dr. Kastl diagnosed Ms. Bidad with a mood
21 disorder due to a physical condition and dysthymic affect. (AR 663.) Dr. Lewis—Ms. Bidad’s
22 treating physician—noted Ms. Bidad’s depression, and that her symptoms would frequently
23 interfere with her attention and concentration. (AR 649.)¹

24 Finally, as noted above, Dr. Eggert’s finding was consistent with that of Dr. Zipperle,
25 another examining psychologist. Drs. Eggert and Zipperle both reported Ms. Bidad was limited in
26 her interactions, in stress management, and in maintaining pace. (AR 727, 734, 827.) The ALJ
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28 ¹ Dr. Benrazavi’s opinion does not address Plaintiff’s mental health. (AR 618-624.)

1 nonetheless wholesale rejected Dr. Zipperle’s opinion because it was (1) based on a one-time
2 assessment ordered by her representative, (2) based on Ms. Bidad’s own statements, and (3) not
3 “fully” supported by the record of other treating and examining sources. However, that Dr.
4 Zipperle, as the consultative examiner, only examined Ms. Bidad one-time “is hardly surprising
5 and does not by itself provide a legitimate basis to reject [Dr. Zipperle’s] medical opinion.”
6 *Raven-Jones v. Berryhill*, No. 3:16-CV-03766-LB, 2017 WL 1477128, at *15 (N.D. Cal. Apr. 25,
7 2017) (collecting cases re: same). Indeed, Dr. Kastl only examined Ms. Bidad one time. Nor is it
8 proper to reject an opinion simply because Ms. Bidad’s representative referred the examiner.
9 *Lester v. Chater*, 81 F.3d 821, 832 (9th Cir. 1995), as amended (Apr. 9, 1996) (“The purpose for
10 which medical reports are obtained does not provide a legitimate basis for rejecting them. An
11 examining doctor’s findings are entitled to no less weight when the examination is procured by the
12 claimant than when it is obtained by the Commissioner”). Finally, Dr. Zipperle based her opinion
13 on direct examination and objective testing, not just Ms. Bidad’s reported history. *See Buck v.*
14 *Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017) (holding that an opinion could not be rejected when
15 based in part on the Ms. Bidad’s self-report when the opinion was also based on a clinical
16 interview and a mental status evaluation). Thus, the ALJ’s reasons for rejecting Dr. Zipperle’s
17 opinion regarding Ms. Bidad’s functional limitations—which was consistent with the opinion of
18 Dr. Eggert—are not supported by substantial evidence.

19 In sum, the ALJ’s rejection of Dr. Eggert’s opinion regarding Ms. Bidad’s interactional,
20 stress management, and pace maintenance was not supported by substantial evidence. Because
21 Dr. Eggert’s opinion was uncontradicted, the ALJ was required to provided clear and convincing
22 reasons for rejecting it. *Lester*, 81 F.3d at 830. Even under the lesser specific and legitimate
23 standard, the ALJ failed to adequately articulate her reasoning. Beyond citing to the fact that the
24 medical evidence referenced Ms. Bidad as having “pleasant, alert, with appropriate mood and
25 affect,” with “no thought disorder” the ALJ does not point to any evidence that contradicts Dr.
26 Eggert’s impressions. (AR 82.) Thus, the ALJ’s determination that Dr. Eggert’s opined
27 limitations in Ms. Bidad’s interacting, managing stress, and maintaining pace was not supported
28 by the record is not supported by substantial evidence.

1 The ALJ’s error in rejecting Dr. Eggert’s opinion without legitimate reasons for doing so
2 cannot be considered harmless error because the error is neither nonprejudicial nor inconsequential
3 to the ultimate disability determination. *See Molina v. Astrue*, 674 F.3d 1104, 1122 (9th Cir.2012)
4 (an error is harmless if it is “inconsequential to the ultimate nondisability determination”). If the
5 ALJ had accepted Dr. Eggert’s interaction, pace, and stress limitations, it seems probable that this
6 would have changed the RFC and thus the ultimate disability determination. Accordingly, the
7 Court cannot conclude that the ALJ’s error was harmless, and instead, remands for further
8 proceedings consistent with this Order.

9 **II. The Scope of Remand**

10 Ms. Bidad asks the Court to remand for immediate benefits under the credit-as-true rule.
11 Generally, when the Court reverses an ALJ’s decision, “the proper course, except in rare
12 circumstances, is to remand to the agency for additional investigation or explanation.” *Benecke v.*
13 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004). However, a court may remand for an immediate
14 award of benefits where “(1) the record has been fully developed and further administrative
15 proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient
16 reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the
17 improperly discredited evidence were credited as true, the ALJ would be required to find the
18 claimant disabled on remand.” *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). Each part
19 of this three-part standard must be satisfied for the court to remand for an award of benefits, *id.*,
20 and “[i]t is the ‘unusual case’ that meets this standard.” *Williams v. Colvin*, No. 12-cv-6179-YGR,
21 2014 WL 957025, at *14 (N.D. Cal. Mar. 6, 2014) (quoting *Benecke*, 379 F.3d at 595); *see Leon v.*
22 *Berryhill*, No. 15-15277, 2017 WL 5150294, at *2 (9th Cir. Nov. 7, 2017) (“where [...] an ALJ
23 makes a legal error, but the record is uncertain and ambiguous, the proper approach is to remand
24 the case to the agency”) (citing *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1105 (9th
25 Cir. 2014)).

26 Here, even if the record was fully developed and the improperly discredited evidence is
27 credited as true, it is not certain that the ALJ would be required to find Ms. Bidad legally disabled
28 under the third part of the credit-as-true standard. *Leon*, 2017 WL 5150294, at *4. That is, even if

1 Dr. Eggert's opinion was credited as true, Ms. Bidad did not question the VE regarding whether an
2 individual with moderate and significant interaction, stress management, and pace maintenance
3 limitations would be able to find a job. While Ms. Bidad's representative asked the VE whether
4 there were any jobs for a hypothetical individual who is off-task twenty percent of the time, it is
5 not clear that this is a direct corollary to the limitations proposed by Dr. Eggert. Because this
6 information is necessary to determine whether Ms. Bidad is in fact disabled, the rare
7 circumstances that result in a direct award of benefits are not present in this case. *See id.* The
8 Court thus remands for further proceedings consistent with this Order.

9 **CONCLUSION**

10 For the reasons stated above, Ms. Bidad's motion for summary judgment is GRANTED
11 and Defendant's cross-motion for summary judgment is DENIED. (Dkt. Nos. 18, 19.) The ALJ's
12 decision to reject Dr. Eggert's opinion regarding Ms. Bidad's functional limitations was not
13 supported by substantial or clear and convincing evidence. The ALJ's decision is therefore
14 VACATED and the matter is REMANDED for reconsideration consistent with this Order.

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16 **IT IS SO ORDERED.**

17 Dated: March 20, 2018

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20 JACQUELINE SCOTT CORLEY
21 United States Magistrate Judge
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