

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

QUIANA LA NAY CHASE,

Plaintiff,

vs.

CAROLYN W. COLVIN,

Defendant.

Case No.: 4:13-cv-01816-KAW

ORDER DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT; GRANTING
COMMISSIONER'S CROSS-MOTION FOR
SUMMARY JUDGMENT

United States District Court
Northern District of California

Quiana La Nay Chase ("Plaintiff") seeks judicial review, pursuant to 42 U.S.C. § 405(g), of a final decision of the Commissioner of Social Security ("Commissioner" or "Defendant"). Pending before the Court are the parties' cross-motions for summary judgment. Having considered the papers filed by the parties and the administrative record, the Court DENIES Plaintiff's motion for summary judgment and GRANTS the Commissioner's cross-motion for summary judgment.

I. BACKGROUND

A. Plaintiff's applications for Social Security benefits

Plaintiff filed a Title II application for Social Security Disability Insurance Benefits ("DIB") on January 5, 2009 and a Title XVI application for Supplemental Security Income ("SSI") on May 21, 2009. (Administrative Record ("AR") at 188-94.) She alleged that she became disabled on December 7, 2007 due to bipolar, depression, anxiety, arthritis in hands, "damaged nerve in left leg problems," and back problems. (Id. at 188, 192, 277.) The Social Security Administration ("SSA") denied Plaintiff's applications initially and on reconsideration. (Id. at 74, 84, 94, 101.)

1 **B. The administrative hearing**

2 Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (Id. at 125.) The
3 ALJ held a hearing on March 24, 2011. (Id. at 43-67.) Plaintiff, who was assisted by a non-attorney
4 representative, Andrew Ragnes, testified at the hearing. (Id. at 46, 47.) A vocational expert ("VE")
5 also testified at the hearing by telephone. (Id.)

6 1. Plaintiff's testimony

7 Plaintiff, who was 33 years old at the time of the hearing, testified that she possesses a high
8 school diploma and has completed "some college." (Id. at 48.) With respect to her work history,
9 Plaintiff testified that she was a former registered nurse and had also worked in childcare from
10 January 2009 to August 2009, watching three to five toddlers in her home. (Id. at 48-49.) She also
11 indicated that prior to 2008, she worked as an assistant nurse and in food service. (Id.) She had
12 done some clerical work before that. (Id. at 51.) She stated that she stopped working because of her
13 "bipolar and [the] arthritis" in her hands. (Id.) According to Plaintiff, "the longest job [she] had was
14 the nursing and that was about a year." (Id.)

15 She indicated that her bipolar symptoms include "outbursts and exploding." (Id. at 52.) She
16 explained that the triggers for these symptoms vary: "It depends, somebody can drop something or a
17 person could just go against me. Playing with my children,^[1] you know, targeting my children,
18 there's things of that sort. . . . Or somebody can bump me the wrong way." (Id.) Plaintiff also
19 reported that she has trouble sleeping at night and takes sleeping pills. (Id.) She stated that, with
20 respect to her depression: "Sometimes I just burst out crying. I have anxiety too, anxiety with
21 depression. So sometimes I can't breathe, it's hard for me to breathe. And sometimes I sit and rock
22 back and forth holding my chest." (Id.) She also testified that she suffers from arthritis, as a result
23 of which she "can't comb [her] hair. [She] ha[s] someone else to comb [her] hair. And [she] pays
24 people to comb [her] daughter's hair." (Id. at 53.) She stated that she takes over-the-counter Aleve
25 or Tylenol for her arthritis. (Id.)

26 Plaintiff also testified that she weighs "[a]bout three something." (Id. at 57.) She indicated
27 that walking hurts her back and that when she goes to the grocery store, she places her items on the

28 _____
¹ The record reflects that Plaintiff has five children, who are not in her care. AR at 189, 349, 335.

1 counter to avoid bending. (Id.) She also stated that she can walk up "[a] little bit of stairs, [but] not
2 that many" without experiencing shortness of breath or back pain." (Id. at 58.) She testified that she
3 "can get down on the floor but it's . . . hard to get back up." (Id.) She also stated that she can push
4 her baby's stroller, cannot pull anything, and has sensitivities to smoke and heat. (Id.) She indicated
5 that she smokes cigarettes and coughs from smoking. (Id.)

6 With respect to her ability to read, write, and do arithmetic, Plaintiff testified "I can't read
7 and write too good. I'm like on maybe like a fourth grade level of reading. I can read little kids
8 books but I can't read grown-up books." (Id. at 59.) She stated that while she graduated from
9 Western Career College in Sacramento as a registered nurse, her instructor was aware that Plaintiff
10 could not read or write too well, but she just "slid right through the cracks." (Id.)

11 2. The VE's testimony

12 A VE also testified at the hearing by telephone. (Id. at 60.) She classified Plaintiff's past
13 relevant work as a childcare provider and a registered nurse as medium work. (Id. at 61, 63.) She
14 classified Plaintiff's prior work as a fast food manager and a clerical worker as light work. (Id. at 62,
15 63.) In response to the ALJ's question of whether an individual who can't read at fourth or fifth
16 grade level can actually work as a registered nurse, the VE answered "no." (Id. at 66.)

17 **C. The ALJ's decision**

18 On August 26, 2011, the ALJ issued an unfavorable decision. (Id. at 28-36.) The ALJ
19 followed the five-step sequential process that governs Social Security disability determinations. See
20 20 C.F.R. §§ 404.1520(a); 416.920(a). At step one, the ALJ found that Plaintiff has engaged in
21 substantial gainful activity since December 7, 2007, the alleged onset date, as she performed
22 childcare from January 2009 to August 2009. (Id. at 30.) At step two, the ALJ determined that
23 Plaintiff suffers from two severe impairments: major depressive disorder and polysubstance abuse.
24 (Id.) The ALJ declined to identify obesity and hypertension as severe impairments because she
25 determined that there was no evidence that these conditions cause any functional limitations. (Id.)
26 She also declined to identify arthritis as a severe impairment despite Plaintiff's complaint that she
27 has difficulty combing her hair. (Id.) The ALJ determined that none of the medical evidence
28 confirmed any functional limitation with respect to her hands. (Id.)

1 At step three, the ALJ determined that Plaintiff does not have an impairment or combination
2 of impairments that meets or medically equals one of the listed impairments in 20 C.F.R. Pt. 404,
3 Subpt. P, App'x 1, specifically, listings 12.04 (affective disorders) and 12.09 (substance addiction
4 disorders).² (Id. at 31-32.) In reaching this determination, the ALJ found that Plaintiff did not
5 satisfy the paragraph B criteria.³ She determined that Plaintiff has no restriction in activities of daily
6 living, based on Plaintiff's own reports that she has no problems with personal care, is able to
7 prepare her own meals, can do some household chores on a regular basis, can use public
8 transportation, and is capable of handling her own funds. (Id. at 31.) The ALJ also found that
9 Plaintiff has no more than mild difficulties in the area of social functioning, based on Plaintiff's
10 reports that she attends church regularly and has no difficulty getting along with family, friends,
11 neighbors, or others. (Id.) She also found that Plaintiff has moderate difficulties in the areas of
12 concentration, persistence, or pace and found no evidence of episodes of decompensation. (Id.)

13 The ALJ further determined that Plaintiff did not satisfy the paragraph C criteria.⁴ (Id. at
14 32.) She found that the medical records did not reflect "a residual disease process that has resulted

15 ² In order to meet a listing in Appendix 1 for a mental disorder, a claimant must satisfy criteria in
16 paragraph A of the listings, which medically substantiate the presence of a mental disorder, and the
17 criteria in paragraphs B or C, which describe the functional limitations associated with the disorder
18 that are incompatible with the ability to work. 20 C.F.R. Pt. 404, Subpt. P, App'x 1, § 12.00.

19 ³ In order to satisfy the criteria in paragraph B, Plaintiff's paragraph A impairment must result in at
20 least two of the following:

- 21 1. Marked restriction in the activities of daily living; or
- 22 2. Marked difficulties in maintaining social functioning; or
- 23 3. Deficiencies of concentration, persistence, or pace resulting in frequent failure to
24 complete tasks in a timely manner (in work settings or elsewhere); or
- 25 4. Repeated episodes of decompensation, each of extended duration, meaning "three
26 episodes within 1 year, or on average of once every 4 months, each lasting for at
27 least 2 weeks."

28 20 C.F.R. Pt. 404, Subpt. P, App'x 1 § 12.04B.

⁴ In order to satisfy the criteria in paragraph C, Plaintiff's paragraph A impairment, of at least 2 years'
duration, must cause more than a minimal limitation of ability to do basic work activities, with
symptoms or signs currently attenuated by medication or psychosocial support, and one of the
following:

1. Repeated episodes of decompensation, each of extended duration; or

1 in such marginal adjustment that a minimal increase in mental demands or environment would be
2 predicted to cause decompensation, or an inability to function outside a highly supportive living
3 arrangement." (Id. at 32.)

4 Before proceeding to step four, the ALJ concluded that Plaintiff (1) has the residual
5 functional capacity to perform a full range of work at all exertional levels, (2) is able to perform
6 simple repetitive tasks, and (3) is able to accept instructions from supervisors and get along with
7 people in the workplace. (Id.) In determining Plaintiff's residual functional capacity, the ALJ
8 placed great on Dr. Shefayee's opinion, who was the only examining mental health physician to
9 examine Plaintiff and complete an assessment. (Id.) The ALJ found that the opinion was consistent
10 with the mental status examinations and the treatment records that showed that Plaintiff's symptoms
11 were well managed and stable while on medication. (Id.)

12 Dr. Shefayee completed a comprehensive psychiatric evaluation on July 17, 2009. (AR at
13 401.) In his report, he noted Plaintiff's complaints of crying for days, staying up late, fluctuating
14 moods, and inability to socialize with people. (Id.) He indicated that Plaintiff had an irritable mood
15 and was unable to perform serial sevens. (Id. at 403.) Dr. Shefayee diagnosed Plaintiff with bipolar
16 disorder and major depression, not otherwise specified. (Id.) He assigned Plaintiff a Global
17 Assessment of Functioning ("GAF") score⁵ of 50-55. (Id.) He opined that the claimant was able to

19 2. A residual disease process that has resulted in such marginal adjustment that even a
20 minimal increase in mental demands or change in the environment would be predicted
21 to cause the individual to decompensate; or

22 3. Current history of 1 or more years' inability to function outside a highly supportive
23 living arrangement, with an indication of continued need for such an arrangement.

24 20 C.F.R. Pt. 404, Subpt. P, App'x 1 § 12.04C.

25 ⁵ "A GAF score is a rough estimate of an individual's psychological, social, and occupational
26 functioning used to reflect the individual's need for treatment." *Brewes v. Comm'r of Soc. Sec.*, 682
27 F.3d 1157, 1165 n.1 (9th Cir. 2012). The score ranges from zero to 100, and it serves as a subjective
28 determination that represents the clinician's judgment of the individual's overall level of functioning.
Sigmon v. Kernan, No. CV 06-5807 AHM (JWJ), 2009 WL 1514700, at *9 n.3 (C.D. Cal. May 27,
2009). A GAF score of 51 to 60 indicates only moderate difficulty in functioning. *Atkinson v.*
Astrue, No. 2:10-cv-02072-KJN, 2011 WL 4085414, at *10 (E.D. Cal. Sept. 13, 2011). People in
that category may have flat affects, circumstantial speech, occasional panic attacks, few friends, or
conflicts with coworkers. *Id.*

1 perform simple and repetitive tasks, manage her own funds, care for her daily needs, accept
2 instructions from supervisors, and get along with people in the workplace. (Id. at 404.)

3 With respect to Plaintiff's physical impairments, the ALJ adopted the opinion of Dr. Seu,
4 who found no physical limitations, and whose conclusions were well supported by findings on
5 physical examination and consistent with the treatment records available since the alleged onset
6 date. (AR at 33, 408.) Dr. Seu completed a comprehensive internal medicine evaluation on July 23,
7 2009. (Id. at 405.) He noted Plaintiff's chief complaints of nerve damage in her left leg and arthritis.
8 (Id.) Dr. Seu's reports reflects Plaintiff's claim that the nerve damage resulted from an epidural
9 given to her approximately eight years prior to the date of the evaluation and that her arthritis causes
10 her pain when she combs her hair and cuts meat. (Id.) He noted that Plaintiff is morbidly obese, and
11 appeared physically comfortable, with no trouble walking, sitting, standing, or using her hands to
12 handle the small baby she had brought with her. (Id.) He measured Plaintiff's height at 5'1" and her
13 weight at 325 pounds. (Id. at 406.)

14 Dr. Seu's diagnoses were as follows: "1. Nonspecific left leg complaints. Despite claimant's
15 complaints of nerve damage there were no positive findings on neurologic exam today. She had a
16 normal gait and normal strength as well as sensory findings. 2. Nonspecific hand complaints. 3.
17 Hypertension." (Id. at 408.) He opined that (1) Plaintiff should be able to sit, stand, walk in an
18 eight-hour workday "without limitations," (2) Plaintiff "does not require any assistive device for
19 ambulation mobility," (3) the amount of weight Plaintiff should be able to lift and carry "is without
20 limitations," (4) there are no "postural limitations in bending, stooping or crouching," (5) there are
21 no "manipulative limitations in reaching, handling, feeling, grasping, and fingering," and (6) there
22 are no "workplace environmental limitations." (Id.)

23 The ALJ placed less weight on Dr. Brown's opinion, as he did not have the opportunity to
24 examine Plaintiff. (Id. at 34.) Dr. Brown completed a psychiatric review technique form, in which
25 he indicated that Plaintiff has mild restrictions in the areas of daily living activities and maintaining
26 social functioning, a moderate restriction in maintaining concentration, persistence, or pace, and no
27 repeated episodes of decompensation. (Id. at 422.) He also determined that there was no evidence
28 of any of the paragraph C criteria. (Id. at 423.) Dr. Brown also completed a mental residual

1 functional capacity assessment on August 27, 2009. (Id. at 426-29.) In that assessment, he indicated
2 that Plaintiff had no significant limitations in any areas except in her ability to understand and
3 remember detailed instructions, carry out detailed instructions, maintain attention and concentration
4 for extended periods, perform activities within a schedule, maintain regular attendance, be punctual
5 within customary tolerances, complete a normal workday and workweek without interruptions from
6 psychologically based symptoms, and perform at a consistent pace without an unreasonable number
7 and length of rest periods, areas in which he opined Plaintiff has a moderate limitation. (Id. at 426,
8 427.) Dr. Brown also opined that Plaintiff is able to understand and remember simple routines and
9 instructions, maintain and sustain a work schedule, be supervised, interact with coworkers, handle
10 minimal public contact, and adapt with typical stress and simple changes. (Id. at 428.)

11 The ALJ placed little weight on Dr. Lee's opinion, whose findings she described as
12 consistent with a range of light exertional activity. (Id. at 34.) The ALJ determined that Dr. Lee's
13 opinion was not supported by clinical findings of any treating or examining medical source in the
14 record. (Id.) In his physical residual functional capacity assessment, Dr. Lee indicated that
15 Plaintiff's body mass index is 61.5, and he noted "arthritis in both hands" as one of Plaintiff's alleged
16 impairments. (Id. at 430.) Dr. Lee believed that the consultative examiner's finding of no physical
17 limitations was "overly ambitious when th[e] claimant's extreme obesity alone is considered." (Id. at
18 435.)

19 The ALJ also examined treatment records from Pathways to Wellness. (Id. at 32-33.) She
20 considered a November 2008 assessment that was completed in connection with a child custody
21 matter. (Id.) The initial assessment form noted no psychiatric history, no psychiatric medications, a
22 history of using crack cocaine, and recent marijuana use. (Id. at 32-33.) The mental status
23 examination indicated that Plaintiff exhibited a depressed mood and flat affect, but the ALJ noted
24 that findings were otherwise unremarkable. (Id.) The assessment included a diagnosis of major
25 depressive disorder (recurrent), mild limitations in activities of daily living, social
26 functioning/relationships, maintaining concentration, persistence, or pace, and no episodes of
27 decompensation. (Id. at 33.) In addition, the ALJ considered treatment notes indicating that
28 Plaintiff returned to the facility in May and June, reporting increased depression and anxiety, and

1 Plaintiff's June 25, 2009 report that she felt better on medication. (Id.) The ALJ also considered a
2 mental impairment questionnaire completed by Dr. Tom, who treated Plaintiff on a monthly basis
3 since November 17, 2008. (Id. at 442.) In that questionnaire, Dr. Tom listed diagnoses of major
4 depressive disorder, a history of polysubstance abuse, morbid obesity, and arthritis. (Id.) He noted
5 Plaintiff's symptoms of sleep disturbance, mood disturbance, emotional lability, hostility, and
6 irritability. (Id. at 443.) He also indicated that Plaintiff's medications include Geodon, Ativan,
7 Cymbalta, and Ambien. (Id. at 444.) He opined that Plaintiff's prognosis was good. (Id.)

8 In response to the questions of whether Plaintiff (1) has a low I.Q. or reduced intellectual
9 functioning, (2) would be absent from work as a result of her impairments, (3) would have difficulty
10 working at a regular job on a sustained basis, or (4) would be able to manage benefits in her best
11 interest, Dr. Tom stated "unknown." (Id. at 445.) He also explained that his facility was a
12 medication management clinic and that Plaintiff needs a referral for a therapist. (Id. at 445.) He did
13 not complete the mental residual functional capacity assessment. (Id. at 447.)

14 In light of all of the above, the ALJ found that Plaintiff's medically determinable
15 impairments could reasonably be expected to cause the alleged symptoms but that her complaints
16 about the intensity, persistence, and limiting effects of those symptoms were not credible to the
17 extent they were inconsistent with the ALJ's residual functional capacity assessment. (Id.) The ALJ
18 noted that after the hearing, Plaintiff failed to attend two scheduled consultative examinations,
19 claiming that she overslept the first time and was attending a drug program during the time
20 scheduled for the second examination. (Id.) The ALJ determined that this failure to cooperate
21 undermined Plaintiff's credibility, as did her ability to care for three to five toddlers from January
22 2009 to August 2009, her past incarceration for fraud,⁶ and her conservative treatment despite
23 reports that Plaintiff improved when she complied with medication. (Id.)

24 With respect to the notes of child welfare worker Pat Cripe, the ALJ rejected Plaintiff's
25 argument that the notes were entitled to great weight on the issue of Plaintiff's general mental health
26 condition because they reflected Plaintiff's capacity to care for her children or get along with others.

27 ⁶ The record indicates that Plaintiff was arrested on or about December 10, 2006 for check forgery.
28 AR at 502.

1 (Id. at 34-35.) An interim review report by Ms. Cripe indicated that Plaintiff had threatened her and
2 an individual in a drug treatment program. (Id. at 343.) Ms. Cripe noted that Plaintiff was in great
3 need of completing a substance abuse program and maintaining compliance with her case plan,
4 which included medication compliance and fully engaging in therapy. (Id. at 345.) The ALJ
5 determined that Plaintiff's child welfare worker was not an acceptable medical source, that Plaintiff's
6 behavior toward her was not probative of Plaintiff's ability to perform work-related activities, and
7 that the notes concerned custody issues, not medical evidence. (Id. at 35.)

8 The ALJ also rejected Plaintiff's argument that she is clean and sober, noting that in August
9 2010, Plaintiff had tested positive for methamphetamine and cocaine, had reported that she regularly
10 smoked marijuana, and had been terminated from court ordered drug testing due to noncompliance.
11 (Id. at 35.) The ALJ further stated: "Though it is not confirmed by treating sources, I find it likely
12 that her mental health symptoms are related to her drug use." (Id.)

13 At step four, the ALJ concluded that Plaintiff is unable to perform her past relevant work,
14 which the vocational expert who testified at the hearing identified as childcare, fast food service
15 manager, sales manager, registered nurse, and office clerk. (Id.)

16 At step five, the ALJ identified Plaintiff as a younger individual, based on her age (30) as of
17 the alleged onset date. (Id.) She also found that Plaintiff has at least a high school education and is
18 able to communicate in English. (Id.) The ALJ considered transferability of job skills immaterial to
19 the determination of disability because the Medical-Vocational Rules ("grids") supported a finding
20 that Plaintiff is "not disabled" irrespective of transferable job skills. (Id.) The ALJ thus concluded
21 that considering Plaintiff's age, education, work experience, and residual functional capacity, there
22 are jobs that exist in significant numbers in the national economy Plaintiff can perform. (Id.) The
23 ALJ noted that Plaintiff's "ability to perform work at all exertional levels has been compromised by
24 nonexertional limitations. However, [b]ased on [her] experience, [she determined that] these
25 limitations have little or no effect on the occupational base of unskilled work at all exertional
26 levels." (Id.) On this basis, she determined that section 204.00 of the Medical-Vocational
27 Guidelines directed a finding of "not disabled." (Id.) The ALJ thus concluded that Plaintiff has not
28

1 been under a disability from December 7, 2007, the alleged onset set, through August 26, 2011, the
2 date of her decision. (Id.)

3 Plaintiff requested that the Appeals Council review the ALJ's unfavorable decision. (Id. at 3-
4 6.) She also submitted additional evidence with her request for review, including a November 10,
5 2010 Social Services Agency Report, a July 11, 2011 status review from Alameda County Social
6 Services, and a list of halfway houses. (Id. at 7, 496-527.) The Appeals Council denied review on
7 December 13, 2012, and the ALJ's decision became the final decision of the Commissioner. (Id. at
8 3-6.)

9 **D. Plaintiff's action for judicial review**

10 Plaintiff filed her complaint on April 22, 2013, seeking judicial review of the
11 Commissioner's final decision pursuant to 42 U.S.C. § 405(g). (Compl., Dkt. No. 1.) Her motion
12 for summary judgment followed on January 5, 2014. (Pl.'s Mot. Summ. J., Dkt. No. 22.) The
13 Commissioner filed her cross-motion and opposition on March 5, 2014. (Def.'s Mot. Summ. J., Dkt.
14 No. 31.) On March 18, 2014, the parties stipulated to extending the due date for Plaintiff's reply to
15 April 18, 2014, which the Court approved on March 19, 2014. (Stipulation & Order, Dkt. No. 33.)
16 Plaintiff did not file her reply until May 7, 2014. (Pl.'s Reply, Dkt. No. 34.)

17 On May 22, 2014, the Commissioner filed an objection to Plaintiff's reply, arguing that it
18 was untimely and presented new issues not raised in Plaintiff's original motion for summary
19 judgment. (Def.'s Objection, Dkt. No. 36.) The Court deemed the filing as a motion to strike, and in
20 the alternative, for leave to file a sur-reply. (May 28, 2014 Order, Dkt. No. 37.) Plaintiff filed a
21 response, in which she indicated that the purportedly "new and material evidence submitted was
22 unknown at the time Plaintiff's motion for summary judgment was filed" (Pl.'s Response, Dkt.
23 No. 38.) Though Plaintiff did not address why her reply should not be stricken as untimely, the
24 Court nonetheless declined to strike the pleading and granted the Commissioner leave to file a sur-
25 reply by August 8, 2014. (July 9, 2014 Order, Dkt. No. 39.) The Commissioner did not file her sur-
26 reply by that date. Instead, on August 19, 2014, the parties filed a stipulation to extend the deadline
27 for the Commissioner's sur-reply, which was attached to the stipulation, to that same date.

28

1 (Stipulation, Dkt. No. 41.) The Court approved the stipulation on August 20, 2014. (Stipulation &
2 Order, Dkt. No. 42.)

3 **II. ANALYSIS**

4 **A. Remand pursuant to sentence six of 42 U.S.C. § 405(g)**

5 In her reply brief, Plaintiff argues, for the first time, that new and material evidence warrants
6 a remand pursuant to sentence six of 42 U.S.C. § 405(g). (Pl.'s Reply at 1.) In a supporting
7 declaration, Plaintiff's non-attorney representative asserts that he also represents Plaintiff in
8 connection with another application she submitted on April 22, 2013. (Pl.'s Reply, Ragnes Decl. ¶¶
9 2-6.) He explains that he downloaded the purported new and material evidence at issue in this case
10 on March 31, 2014, after being granted access on or about March 18, 2014. (Pl.'s Reply, Ragnes
11 Decl. ¶¶ 3, 6.)

12 The documents Plaintiff describes as new and material evidence are as follows: various
13 records from John George Psychiatric Pavilion, which relate to visits that occurred on August 6,
14 2011, September 8, 2011, and May 27, 2012, a psychological disability evaluation completed by Dr.
15 Faith Tobias on October 17, 2013, an internal medicine evaluation completed by Dr. Frank Chen on
16 October 2, 2013, and various materials the SSA produced in connection with a subsequent benefits
17 application that Plaintiff submitted in May 2013. (Ragnes Decl., Exs. A-E.)

18 Sentence six of 42 U.S.C. § 405(g) provides:

19 The court may, on motion of the Commissioner of Social Security made for good cause
20 shown before the Commissioner files the Commissioner's answer, remand the case to the
21 Commissioner of Social Security for further action by the Commissioner of Social Security,
22 and it may at any time order additional evidence to be taken before the Commissioner of
23 Social Security, but only upon a showing that there is new evidence which is material and
that there is good cause for the failure to incorporate such evidence into the record in a prior
proceeding

24 See *Akopyan v. Barnhart*, 296 F.3d 852, 854-55 (9th Cir. 2002) ("Sentence six remands may be
25 ordered in only two situations: where the Commissioner requests a remand before answering the
26 complaint, or where new, material evidence is adduced that was for good cause not presented before
27 the agency.") (citation omitted).

1 New evidence is material when "it bears directly and substantially on the matter in dispute,
2 and if there is a reasonable possibility that the new evidence would have changed the outcome of the
3 determination." *Luna v. Astrue*, 623 F.3d 1032, 1034 (9th Cir. 2010). A subsequent ALJ's decision
4 is material and warrants remand "where an initial denial and subsequent award [are not] easily
5 reconcilable on the record before the court." *Id.* at 1035. To demonstrate good cause, a claimant
6 must show that the new evidence was unavailable earlier. *Mayes v. Massanari*, 276 F.3d 453, 463
7 (9th Cir. 2001). A claimant does not meet the good cause requirement by merely obtaining a more
8 favorable report once his or her claim has been denied. *Id.* The claimant must also establish good
9 cause for not having sought an expert's opinion earlier. *Id.* (citation omitted).

10 Here, Plaintiff argues that the new evidence she describes as material warrants a remand
11 because it shows (1) that the ALJ failed to address each of Plaintiff's severe impairments established
12 "by the record of impairments in her [subsequent] application," (2) the ALJ's determination that
13 Plaintiff had a high school diploma and worked as a registered nurse is contradicted by Plaintiff's
14 borderline IQ of 72, which also satisfies the listing for intellectual disability, and (3) that the
15 objective measure of Plaintiff's writing, computational, and memory skills establish "her inability to
16 perform tasks commensurate with such an elevated skill level." (Pl.'s Reply at 2, 3.) These
17 arguments are unavailing.

18 The Commissioner persuasively argues that the evidence Plaintiff offers in support of her
19 motion for a sentence six remand is not material. (See Def.'s Sur-Reply at 3, 5, 6.) First, while
20 Plaintiff's allegations of additional impairments constituted changed circumstances, which warranted
21 a departure from the ALJ's decision, the SSA still denied Plaintiff's subsequent application. (Ragnes
22 Decl., Exs. C, D.) Second, the treatment records from John George Psychiatric Pavilion reveal
23 diagnoses of bipolar disorder NOS, psychotic disorder NOS, amphetamine abuse, amphetamine
24 dependence, amphetamine intoxication. (Ragnes Decl., Ex. A.) The Commissioner correctly asserts
25 that Plaintiff has failed to articulate why this evidence is material. (See generally Pl.'s Reply.)
26 Indeed, it appears that these diagnoses are not inconsistent with the ALJ's findings that Plaintiff
27 suffers from polysubstance abuse and a major depressive disorder. (See AR at 30, 31.)
28

1 Third, the consultative psychological evaluation Dr. Faith Tobias completed reflected
2 Plaintiff's reports that she is able to complete all activities of daily living, with restrictions related to
3 her physical health problems, manages her own finances, attends doctor's appointments, eats at
4 shelters, watches television, and listens to music. (Ragnes Decl., Ex. B.). Dr. Tobias measured
5 Plaintiff's full scale IQ at 72, assigned a GAF score of 61, ruled out bipolar disorder NOS, and
6 diagnosed psychotic disorder NOS, amphetamine dependence in sustained full remission (as per
7 Plaintiff's reports), and cannabis abuse versus dependence in sustained full remission (also as per
8 Plaintiff's reports). (Id.) While Dr. Tobias described Plaintiff as a short, obese, right-handed
9 African-American woman, who looked her stated age, obesity was not included as a diagnosis. (Id.)
10 Dr. Tobias also opined that Plaintiff has no impairments to mild impairments in the areas of
11 following and remembering simple instructions and maintaining adequate pace or persistence in
12 performing one or two step simple repetitive tasks. (Id.) She further opined that Plaintiff has a mild
13 impairment in the areas of following and remembering complex or detailed instructions, maintaining
14 adequate persistence or pace in performing complex tasks, maintaining adequate attention and
15 concentration, adapting to changes in job routine, withstanding the stress of a routine work day,
16 maintaining emotional stability and predictability, and appropriately interacting with co-workers,
17 supervisors, and the public on a regular basis. (Id.)

18
19 Dr. Tobias' assessment does not disturb the ALJ's decision. The ALJ determined that
20 Plaintiff has no restriction in daily living activities, no more than mild difficulties in social
21 functioning, and moderate difficulties with regard to concentration, persistence, or pace. (AR at 31.)
22 The ALJ determined that Plaintiff is able to perform simple repetitive tasks, accept instructions from
23 supervisors, and get along with people in the workplace. (Id. at 32.)

24 Dr. Tobias' assessment of Plaintiff's IQ also does not disturb the ALJ's findings that Plaintiff
25 had at least a high school diploma, worked as a registered nurse, and could read and understand
26 English. At the administrative hearing, Plaintiff testified that she possessed a diploma and worked
27 as a registered nurse for a year. (Id. at 51.) The VE also testified that a person who did not read at
28 fourth or fifth grade level could not actually work as a registered nurse. (Id. at 66.) In light of this,

1 the Court is not convinced that a single contrary assessment would be sufficient to rebut Plaintiff's
2 own testimony and that of a VE.

3 Moreover, Plaintiff's argument that Dr. Tobias' measurement of her IQ, which she identified
4 as 72, meets the listing for intellectual disability also fails. (Pl.'s Reply at 2.) Individuals with an IQ
5 higher than 70 do not meet the listing. See 20 C.F.R. Pt. 404, Subpt. P, App'x 1, § 12.05 C. In
6 addition, as Plaintiff has not argued how she might equal the listing, she has waived any such
7 argument. See *Schlegal v. Wells Fargo Bank, N.A.*, 720 F.3d 1204, 1210 n.4 (9th Cir. 2013)
8 (assertions unsupported by argument deemed waived).

9 Nonetheless, even if Plaintiff could show that the evidence at issue was material, Plaintiff
10 still fails to explain why she could not have obtained it prior to the completion of the briefing in this
11 case. As the Commissioner argues, the records from John George Psychiatric Pavilion date back to
12 August 6, 2011, September 8, 2011, and May 27, 2012, well before the Appeals Council denied
13 review on December 13, 2012. (Def.'s Sur-Reply at 3, 4.) The fact Plaintiff's representative failed
14 to obtain these records, chose not to access them until March 2014, or that Plaintiff herself delayed
15 reporting this information to the SSA until she applied for benefits a third time in 2013, does not
16 support a finding of good cause. See *Allen v. Sec'y of Health & Human Servs.*, 726 F.2d 1470, 1473
17 (9th Cir. 1984) (no good cause where claimant failed to submit evidence of a condition of which he
18 was aware at the time of the administrative proceedings); see also 20 C.F.R. § 404.1740 ("A
19 representative must . . . [a]ct with reasonable promptness to obtain information and evidence that the
20 claimant wants to submit in support of his or her claim"), 20 C.F.R. § 404.1710(a)(1) ("Your
21 representative may, on your behalf . . . obtain information about your claim to the same extent that
22 you are able to . . ."). Moreover, while Plaintiff asserts that an assessment of Plaintiff's impaired
23 intellectual functioning was not available until after the initial briefing was completed in this case, if
24 Plaintiff had attended either of the psychological consultative examinations scheduled in May 2011
25 or June 2011, see AR at 366, such evidence could have been available.⁷ In light of this, Plaintiff has
26

27 ⁷ In her decision, the ALJ noted that Plaintiff missed the first consultative examination because she
28 overslept and the second consultative examination because she was allegedly attending a residential
treatment program. The record does not show that Plaintiff's alleged attendance at such a program

1 failed to demonstrate good cause justifying a sentence six remand. Cf. *Key v. Heckler*, 754 F.2d
2 1545, 1551 (9th Cir. 1985) ("If new information surfaces after the Secretary's final decision and the
3 claimant could not have obtained that evidence at the time of the administrative proceeding, the
4 good cause requirement is satisfied.") (citation omitted). That relief is, therefore, denied.

5 **B. Remand pursuant to sentence four of 42 U.S.C. § 405(g)**

6 Pursuant to sentence four of 42 U.S.C. § 405(g), the court's jurisdiction is limited to
7 determining whether the SSA's denial of benefits is supported by substantial evidence and free of
8 legal error. A court may reverse the Commissioner's denial of disability benefits only when the
9 decision is 1) based on legal error or 2) not supported by substantial evidence in the record as a
10 whole. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is "more than a
11 mere scintilla but less than a preponderance." *Id.* at 1098. It is "such relevant evidence as a
12 reasonable mind might accept as adequate to support a conclusion." *Smolen v. Chater*, 80 F.3d
13 1273, 1279 (9th Cir. 1996). In determining whether the Commissioner's findings are supported by
14 substantial evidence, the court must consider the evidence as a whole, weighing both the evidence
15 that supports, and the evidence that undermines, the Commissioner's decision. *Id.* "Where evidence
16 is susceptible to more than one rational interpretation, the [Commissioner's] decision should be
17 upheld." *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008). The court, however,
18 may not affirm the Commissioner's decision "simply by isolating a specific quantum of supporting
19 evidence." *Id.* (internal quotations and citations omitted). Furthermore, the court's review is limited
20 to the reasons the ALJ provided in the disability determination. *Connett v. Barnhart*, 340 F.3d 871,
21 874 (9th Cir. 2003); see also *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (The court "may not
22 affirm the ALJ on a ground upon which the he did not rely.").

23
24 Plaintiff moves for summary judgment, seeking reversal of the Commissioner's final
25 decision, and remand for further proceedings or, in the alternative, for payment of benefits, pursuant
26 to sentence four of 42 U.S.C. § 405(g). (Pl.'s Mot. Summ. J. at 7-8.) She argues that reversal of the
27

28 was ever confirmed. See AR at 368 ("Claimant's representative has called the Mandela House II and has not been provided with any information as to Claimant's stay.").

1 Commissioner's decision is warranted because the ALJ erred (1) by failing to properly weigh the
2 opinions of consultative and non-examining physicians and the report of social worker Pat Cripe, (2)
3 by failing to properly develop the record, (3) by improperly determining that Plaintiff's drug use was
4 material without following the proper framework, and (4) by failing to carry the Commissioner's
5 burden of proof at step five. The Court addresses each of these arguments in turn.

6 1. The ALJ properly weighed the medical and non-medical evidence in the
7 record.

8 a. Medical evidence

9 The opinion of an examining physician is entitled to greater weight than the opinion of a
10 nonexamining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (internal quotations and
11 citation omitted). When the opinion of an examining doctor is contradicted by another doctor, an
12 ALJ may reject it only by giving "specific and legitimate reasons that are supported by substantial
13 evidence in the record." *Id.* at 830-31 (internal quotations and citation omitted). "The ALJ can meet
14 this burden by setting out a detailed and thorough summary of the facts and conflicting clinical
15 evidence, stating [her] interpretation thereof, and making findings." *Magallanes v. Bowen*, 881 F.2d
16 747, 751 (9th Cir. 1989) (internal quotations and citation omitted).

17 Plaintiff argues that the ALJ erred by placing great weight on Dr. Shefayee's opinion without
18 weighing all the factors set out in 20 C.F.R. § 416.927(c). (Pl.'s Mot. Summ. J. at 8.) Specifically,
19 Plaintiff claims that the ALJ ignored the fact that the opinion "is internally inconsistent as [Dr.
20 Shefayee] found [Plaintiff] with a GAF functioning of 50-55 where a GAF score of 41 to 50
21 indicates 'serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting)
22 or any serious impairment in social occupational, or school functioning (e.g., no friends, unable to
23 keep a job)." (*Id.* at 8-9.) She also contends that the ALJ "did not evaluate the supportability and
24 consistency of Dr. Shefayee's opinion in light of his GAF 50 score of the severity of [Plaintiff's]
25 mental impairments and Dr. Brown's more restrictive opinion." (*Id.*) According to Plaintiff, "[t]he
26 weight given Dr. Shefayee's opinion is more troubling still when considered against the background
27 of Defendant's failure to provide her consulting physician with all records relevant to the assessment
28 being made." (*Id.*)

1 Plaintiff also argues that the ALJ erred when he did not identify her obesity as a severe
2 impairment, did not consider her obesity-related limitations when he determined her residual
3 functional capacity, and did not determine that her extreme obesity equaled Listing 1.02. (Pl.'s Mot.
4 Summ. J. at 12, 13.) She contends that instead of relying on the opinion of Dr. Sue, a consultative
5 examiner, he should have relied on the opinion of Dr. Lee, who opined that Plaintiff was extremely
6 obese and who criticized Dr. Sue's opinion as "overly ambitious when this claimant's extreme
7 obesity alone is considered." (AR at 435.) According to Plaintiff, the ALJ's determination "that
8 obesity medical evidence failed to set forth evidence of effects of obesity" was erroneous. (Pl.'s
9 Mot. Summ. J. at 13.)

10 Despite Plaintiff's arguments to the contrary, the ALJ did not err when weighing the medical
11 evidence. As the Commissioner argues, the ALJ reviewed all of the medical opinion evidence,
12 assigned weight to each opinion, and gave reasons supported by substantial evidence. (Def.'s Mot.
13 Summ. J. at 2.) The ALJ placed great weight on Dr. Shefayee's opinion, as she was the only
14 examining mental health physician to complete an assessment. (Id.) The ALJ found that the opinion
15 was consistent with the mental status examinations and the treatment records that showed that
16 Plaintiff's symptoms were well managed and stable while on medication. (Id.) This is consistent
17 with Ninth Circuit law, which provides that the opinion of an examining physician is entitled to
18 greater weight than the opinion of a nonexamining physician, in this case, Dr. Brown.⁸ See Lester,
19 81 F.3d at 830-31. Thus, the argument that the ALJ erred by not weighing all of the factors in 20
20 C.F.R. § 416.927⁹ lacks merit. True, the ALJ focused entirely on Dr. Brown's status as a
21 nonexamining physician without considering the supportability of his diagnosis, its consistency, or
22 any of the other factors in § 416.927. Even if the ALJ had weighed each and every factor, however,
23

24 ⁸ Plaintiff argues that the ALJ failed to articulate the weight, if any, she assigned to Dr. Brown's
25 opinion and that she failed to explain the reasons "for assigning that weight or for rejecting the
26 opinion altogether." Pl.'s Mot. Summ. J. at 11. This is incorrect. The ALJ placed "less weight" on
27 Dr. Brown's opinion "because he did not have the opportunity to examine the claimant." AR at 34.

28 ⁹ These factors include: (1) length of treatment relationship, (2) frequency of examination, (3) nature
and extent of treatment relationship, (4) supportability of diagnosis, (5) consistency, and (6)
specialization. 20 C.F.R. § 416.927.

1 Plaintiff does not explain how that would have altered the ALJ's decision. On this record, the Court
2 is not convinced that if the ALJ had done so, she would have found Plaintiff to be disabled. Indeed,
3 Dr. Brown opined that Plaintiff "is able to maintain/sustain a work schedule." (AR at 428.) For this
4 reason, even assuming that the ALJ's failure to weigh each and every factor in 20 C.F.R. § 416.927
5 constitutes error, it is harmless error. See *Molina*, 674 F.3d at 1115 (error harmless where it would
6 not alter the ALJ's decision). Plaintiff's argument that the ALJ should have favored Dr. Brown's
7 opinion over that of Dr. Shefayee is, therefore, unavailing.¹⁰

8 With respect to Plaintiff's arguments concerning her alleged obesity, the Court also declines
9 to assign error to the ALJ. She noted that "the medical record includes diagnoses of obesity and
10 hypertension, [but] there is no evidence that these conditions cause any functional limitations." (AR
11 at 31.) For this reason, she concluded that Plaintiff's obesity and hypertension are not severe. (*Id.*)
12 In reaching this conclusion, the ALJ adopted the opinion of Dr. Seu, who found no limitations and
13 whose "conclusions are well supported by his findings on physical exam and consistent with the
14 treatment records since the alleged onset date." (AR at 34.) That Dr. Lee, a state agency consultant,
15 who did not examine Plaintiff, categorized Dr. Seu's opinion as "overly ambitious when this
16 claimant's extreme obesity alone is considered" does not permit this Court to second guess the ALJ.
17 See *Lester*, 81 F.3d at 821 (opinion of a nonexamining medical advisor cannot by itself constitute
18 substantial evidence that justifies the rejection of the opinion of an examining or treating physician).
19 Moreover, Plaintiff's reliance on a 2006 orthopedic evaluation is also misplaced. Plaintiff claims
20 that report "contains evidence indicating both that plaintiff has a decreased ability to ambulate
21

22 ¹⁰ The basis for Plaintiff's argument that Dr. Shefayee's opinion is inconsistent is unclear. Dr.
23 Shefayee assigned Plaintiff a GAF score of 50-55, not 41-50 as Plaintiff suggests. AR at 403. A
24 GAF score of 51 to 60 indicates only moderate difficulty in functioning. *Atkinson*, 2011 WL
25 4085414, at *10. This is consistent with Dr. Shefayee's findings. In addition, the Commissioner
26 correctly argues that while a GAF score may be helpful in the disability determination, it is not
27 necessary. *Howard v. Comm'r of Soc. Sec.*, 276 F.3d 235, 241 (6th Cir. 2002) ("While a GAF score
28 may be of considerable help to the ALJ in formulating the RFC, it is not essential to the RFC's
accuracy. Thus, the ALJ's failure to reference the GAF score in the RFC, standing alone, does not
make the RFC inaccurate."). With respect to Plaintiff's argument that Dr. Shefayee reached a
conclusion based on an incomplete record, Plaintiff had the opportunity to, but did not, attend two
consultative examinations which would have mitigated any claimed deficiency.

1 effectively and that her extreme obesity has exacerbated her current difficulties in chronic back pain,
2 which restrict her ability to ambulate." (Pl.'s Mot. Summ. J. at 16.) The report, however, indicates
3 that Plaintiff "ambulated with normal gait and without assistive device. She is able to do tiptoe and
4 heel walking without difficulty. Sitting, standing, walking, and changing position without any
5 difficulty and comfortably." (AR at 371.) It does not support Plaintiff's assertion that her alleged
6 obesity restricts her ability to ambulate.

7 On this record, the Court is satisfied that the ALJ did not err in weighing the medical
8 evidence in the record. It follows, then, that the ALJ did not err when, based on this evidence, she
9 declined to identify Plaintiff's obesity as a severe impairment or determined that Plaintiff failed to
10 meet or equal a listed impairment.¹¹ See, e.g., *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005)
11 (ALJ did not err by failing to consider claimant's obesity in determining whether she met or equaled
12 a listed impairment where "the only evidence in the record relating to her obesity [were] notes from
13 doctors who observed weight gain, indicated that [claimant was] obese, and recommended that she
14 participate in a medically supervised weight loss program.").

15 b. Pat Cripe's report

16 Plaintiff also challenges the ALJ's determination that the report of Plaintiff's child welfare
17 worker, Pat Cripe, is not probative of her ability to perform work-related activities. (Pl.'s Mot.
18 Summ. J. at 19, 20.) She argues (1) that rejecting the report was improper because it is probative of
19 Plaintiff's ability to work with supervisors or the public, (2) that "ALJ Parnow is not a psychologist
20 or a psychiatrist and cannot make such a determination without calling a psychiatrist or a
21 psychiatrist to render an opinion based on this document of Plaintiff's ability to work with
22 supervisors or people in the workplace," (3) that Plaintiff did not give reasons germane to the
23 witness, and (4) that an opinion of a non-medical source who has seen the plaintiff in his or her
24

25
26 ¹¹ Plaintiff's contention that the ALJ failed to incorporate the limitations related to her hypertension
27 and obesity when determining her residual functional capacity, Pl.'s Mot. Summ. J. at 2, is also
28 unpersuasive, as the ALJ determined that Plaintiff had no such limitations, AR at 31. See *Burch*, 400
F.3d at 684 (ALJ's RFC determination was not erroneous where administrative record did not contain
any functional limitations resulting from her obesity that the ALJ failed to consider).

1 professional capacity may outweigh the opinion of a medical source under certain circumstances.
2 (Id. at 20.) All of these arguments lack merit.

3 Plaintiff's first argument that rejecting Pat Cripe's report was improper because it is probative
4 of Plaintiff's ability to work with supervisors or the public is not persuasive. The ALJ explained that
5 the report concerns custody issues, not Plaintiff's ability to work. (AR at 35.) The ALJ's description
6 of Pat Cripe's report is accurate. Plaintiff's second argument that it was improper for the ALJ to
7 determine her residual functional capacity also fails. The residual functional capacity assessment is
8 a determination reserved to the Commissioner, see 20 C.F.R. § 404.1527(e)(2) (identifying residual
9 functional capacity as an issue reserved to the Commissioner), and in this case, that assessment is
10 supported by substantial evidence. Plaintiff's third argument is also unpersuasive. Here, the ALJ
11 explained that Plaintiff's behavior toward her child welfare worker is not probative of her ability to
12 perform work-related activities. (Id. at 35.) She noted that a child welfare worker is not an
13 acceptable medical source. (Id.) She also indicated that the report's content concerned custody
14 issues, not medical evidence. (Id.) This satisfies the requirement that in order to reject a lay
15 witness's testimony or testimony from "other sources," the ALJ must give reasons germane to the
16 witness. See *Molina v. Astrue*, 674 F.3d 1104, 1114 (9th Cir. 2012). Plaintiff's fourth argument is
17 similarly unavailing. Plaintiff asserts that under certain circumstances, the opinion of a non-medical
18 source may outweigh the opinion of a medical source. Plaintiff does not explain what these
19 circumstances are or whether such circumstances are present in this case. Absent any such
20 explanation, the Court need not entertain this argument. See *Schlegal*, 720 F.3d at 1210 (declining
21 to consider assertions unsupported by argument).

22 For these reasons, the ALJ did not err in rejecting the report of child welfare worker Pat
23 Cripe.

24 2. The ALJ fulfilled her duty to develop the record.

25 Plaintiff argues that the ALJ failed to properly develop the record, both as to her ability to
26 read and write and as to the limitations related to her obesity. (Pl.'s Mot. Summ. J. at 15, 19.) These
27 arguments fail.

28

1 The ALJ has an independent duty to fully and fairly develop the record in a Social Security
2 case. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). "Ambiguous evidence, or the
3 ALJ's own finding that the record is inadequate to allow for proper evaluation of the evidence,
4 triggers the ALJ's duty to conduct an appropriate inquiry." *Id.*

5 Even assuming that the ALJ's duty to develop the record was triggered in this case, the
6 Commissioner's argument on this point is persuasive. (Def.'s Mot. Summ. J. at 7.) In this case, the
7 ALJ satisfied that duty by holding the record open after the hearing. *Tonapetyan*, 242 F.3d at 1150
8 ("The ALJ may discharge this duty in several ways, including: subpoenaing the claimant's
9 physicians, submitting questions to the claimant's physicians, continuing the hearing, or keeping the
10 record open after the hearing to allow supplementation of the record.") (citations omitted). The fact
11 that Plaintiff failed to attend the two consultative examinations that were scheduled to take place
12 after the hearing is not the fault of the ALJ, and thus, cannot serve as a basis to reverse her decision.
13 See 20 C.F.R. § 404.1518(a) ("If you are applying for benefits and do not have a good reason for
14 failing or refusing to take part in a consultative examination or test which we arrange for you to get
15 information we need to determine your disability or blindness, we may find that you are not disabled
16 or blind.").

17 3. The ALJ did not err in evaluating the impact of Plaintiff's drug use.

18 In her motion, Plaintiff advances the following argument on the issue of the ALJ's finding
19 with respect to her drug use:

20 ALJ Parnow found it likely that [Plaintiff's] mental health symptoms are related
21 to her drug use. (AR 35.) The materiality determination requires a finding of what
22 residual functional limitations are attributable to meeting the listings as compared with
23 what limitation remains once Chase is without drug issues. Because ALJ Parnow's
24 decision fails to include the required logic, remand for rehearing is required. See also
25 SSR 13-2P, 2013 WL 122979, (S.S.A.), March 22, 2013.

26 Plaintiff's argument fails. While the Court agrees that the propriety of the ALJ's
27 comment is questionable, see AR at 35("Though it is not confirmed by treating sources, I find
28 it likely that her mental health symptoms are related to her drug use."), it is not grounds for
remand.

1 Ninth Circuit law requires that an ALJ "first conduct the five-step inquiry without
2 separating out the impact of alcoholism or drug addiction." *Bustamante v. Massanari*, 262
3 F.3d 949, 955 (9th Cir. 2001). The ALJ only proceeds to determining whether any alcoholism
4 or drug addiction is material only if that inquiry results in a finding of disability, and "there is
5 medical evidence of [the claimant's] drug addiction or alcoholism." *Id.*

6 Here, the ALJ completed the five-step inquiry without separating out the impact of
7 alcoholism or drug addiction. That inquiry, however, resulted in a finding of no disability.
8 See AR at 36. Thus, as the Commissioner argues, the ALJ was not required to engage in the
9 materiality determination. See *Bustamante*, 262 F.3d at 955; see also 20 C.F.R. § 404.1535(a)
10 ("If we find that you are disabled and have medical evidence of your drug addiction or
11 alcoholism, we must determine whether your drug addiction or alcoholism is a contributing
12 factor material to the determination of disability."). Even if the ALJ's speculation that
13 Plaintiff's mental health symptoms are related to her drug use could be considered tantamount
14 to a finding that such drug use is material, such a finding would invite a harmless error
15 analysis. See *Molina*, 674 F.3d at 1115 (error harmless where it would not alter the ALJ's
16 decision). Once the ALJ determined that Plaintiff is not disabled even with her drug use, the
17 materiality determination would not have altered the ALJ's determination that Plaintiff is not
18 disabled.

19 Accordingly, the ALJ's finding that Plaintiff's mental health symptoms are related to
20 her drug use is not grounds for remand. See *id.* (A Court "may not reverse an ALJ's decision
21 on account of an error that is harmless.") (citation omitted).

22
23 4. The ALJ did not err at step five by relying on the grids instead of vocational
expert testimony.

24 At step five, the burden of proof shifts to the Commissioner to show that the claimant, based
25 on her residual functional capacity, age, education, and work experience, can perform other work
26 that exists in significant numbers in the national economy. 20 C.F.R. § 404.1560(b)(3). The
27 Commissioner can satisfy this burden in one of two ways, either by taking the testimony of a
28

1 vocational expert or by applying the grids. *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d
2 573, 578 (9th Cir. 1988).

3 The grids were adopted to facilitate the disposition of "cases that involve substantially
4 uniform levels of impairment." 20 C.F.R. Pt. 404, Subpt. P, App'x 2. They "present various
5 combinations of the factors [i.e., residual functional capacity, age, education, and work experience]
6 the [Commissioner] must consider in determining the availability of other work." *Desrosiers*, 846
7 F.2d at 578. "For each combination, the tables direct a finding of either 'disabled' or 'not disabled.'"
8 *Id.*

9 While the grids are intended to encourage the Commissioner to "treat like cases alike" and to
10 streamline the administrative process, "there are strict limits" that govern when the Commissioner
11 may properly rely on them. *Id.* The Ninth Circuit "has clearly delineated when it is appropriate for
12 the Commissioner to rely on the grids in meeting the burden under Step Five of the five-part
13 disability inquiry." *Bruton v. Massanari*, 268 F.3d 824, 827 (9th Cir. 2011). The Commissioner
14 may apply the grids "'in lieu of taking the testimony of a vocational expert only when the grids
15 accurately and completely describe the claimant's abilities and limitations.'" *Desrosiers*, 846 F.2d
16 at 578 (citation omitted; emphasis in original). "In other words, a claimant must be able to perform
17 the full range of jobs in a given category in order for the Commissioner to appropriately rely on the
18 grids". *Bruton*, 268 F.3d at 827 (internal quotations and citation omitted).

19 The grids "are based only on strength factors" and "are sufficient only when a claimant
20 suffers only from exertional limitations." *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir.
21 2001). "The functional limitations caused by anxiety, depression, concentration, and memory
22 impairments are nonexertional limitations." *Id.* "[T]he grids are inapplicable when a claimant's non-
23 exertional limitations are 'sufficiently severe' so as to significantly limit the range of work permitted
24 by the claimant's exertional limitations." See *Hoopai*, 499 F.3d 1071, 1075 (9th Cir. 2007).

25 Plaintiff argues that the ALJ erred by relying on the grids instead of VE testimony, even
26 though Plaintiff has non-exertional limitations, and by relying entirely on her experience to
27 determine that Plaintiff's non-exertional limitations have little or no effect on the occupational base
28 of unskilled work at all exertional levels. (Pl.'s Mot. Summ. J. at 20, 21; Pl.'s Reply at 2.) An ALJ,

1 however, is required to obtain vocational expert testimony only when there are "sufficiently severe"
2 non-exertional limitations that significantly limit the range of work otherwise permitted by a
3 claimant's exertional capacity in such a way that is not accounted for by the grids. See Hoopai, 499
4 F.3d at 1075.

5 In this case, the ALJ determined that Plaintiff "has the residual functional capacity to
6 perform a full range of work at all exertional levels and is able to perform simple repetitive tasks,
7 accept instructions from supervisors, and get along with people in the workplace." (AR at 32.) The
8 also ALJ found that Plaintiff has no restriction in activities of daily living, no more than mild
9 difficulties in the area of social functioning, and moderate difficulties in the areas of concentration,
10 persistence, or pace, and no evidence of episodes of decompensation. (Id.) In light of these
11 limitations, which are supported by substantial evidence in the record, Plaintiff's non-exertional
12 limitations were not sufficiently severe to prohibit the ALJ from relying on the grids at step five.
13 See Hoopai, 499 F.3d at 1075 (mild or moderate limitations resulting from depression did not
14 prohibit use of the grids). Thus, the ALJ did not err when she declined to hear vocational expert
15 testimony at this step.

16 Plaintiff's additional argument—that the ALJ erred by relying on her own experience in
17 finding that Plaintiff's nonexertional limitations have little or no effect on the occupational base of
18 unskilled work at all exertional levels—also lacks merit. As the Commissioner argues, the grids
19 reflect the number of unskilled jobs in the national economy at various exertional levels (sedentary,
20 light, medium, heavy, and very heavy). 20 C.F.R. Pt. 4, App'x 2, § 200(b). Unskilled work is
21 defined as "work which needs little or no judgment to do simple duties that can be learned on the job
22 in a short period of time." 20 C.F.R. § 404.1568(a). It includes "handling, feeding and offbearing
23 (that is, placing or removing materials from machines which are automatic or operated by others), or
24 machine tending, and a person can usually learn to do the job in 30 days, and little specific
25 vocational preparation and judgment [is] needed." Id. This type of work, then, by definition,
26 accommodates a limitation to simple, repetitive tasks. See Lopez v. Astrue, No. C-09-03483 RMW,
27 2011 WL 3206958, at *9 (N.D. Cal. July 27, 2011). In light of this, the ALJ did not err when, even
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

though she relied entirely on her own experience, she concluded that Plaintiff's nonexertional limitations have little or no effect on the occupational base of unskilled work at all exertional levels.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's motion for summary judgment is DENIED, and the Commissioner's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

DATE: September 12, 2014


KANDIS A. WESTMORE
United States Magistrate Judge