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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BERNADETTE RUTLEDGE,
Plaintiff,
v.
NANCY A. BERRYHILL,
Defendant.

Case No. 16-cv-01689-KAW

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

Re: Dkt. Nos. 15, 16, 17

Plaintiff Bernadette Rutledge seeks judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner’s final decision, and the remand of this case for payment of benefits, or, in the alternative, for further proceedings.

Pending before the Court is Plaintiff’s motion for summary judgment and Defendant’s cross-motion for summary judgment. Having considered the papers filed by the parties, and for the reasons set forth below, the Court GRANTS Plaintiff’s motion for summary judgment, and DENIES Defendant’s cross-motion for summary judgment, and REMANDS the case for further proceedings consistent with this order.

I. BACKGROUND

On December 27, 2004, Plaintiff filed her first application for Title II Disability Insurance Benefits (“DIB”), alleging a disability onset date of March 9, 2003. Administrative Record (“AR”) 85. The claims were denied initially and on reconsideration, and, on June 8, 2007, Plaintiff had a hearing before an ALJ. AR 85. Plaintiff resumed part-time work on January 1, 2006, and began working at the substantial gainful activity (“SGA”) level on June 1, 2007. AR 87. During the oral hearing, Plaintiff testified that she was currently working as a drug and alcohol counselor, something she had done for approximately seven years. AR 41, 42. Plaintiff

1 also testified that she had not worked at all in 2004 or 2005; she could recall the sum total of her
2 employment in the last 15 years as a cashier, security guard, cook, office clerk, youth counselor,
3 and career placement counselor. AR 45, 52. Plaintiff had lumbar sprain superimposed on lumbar
4 disc disease, obesity, dysthymic disorder, and chronic knee pain at that time. AR 87-88. The ALJ
5 found that although these impairments more than minimally affected Plaintiff's ability to work,
6 she did not have an impairment or combination thereof that met or medically equaled any of the
7 listed impairments in 20 CFR Part 404, Subpart P, Appendix 1. AR 88. The ALJ found that
8 Plaintiff had a residual functional capacity ("RFC") to lift 20 pounds occasionally and 20 pounds
9 frequently; stand and/or walk about six hours in an eight-hour workday; sit for about six hours in
10 an eight-hour workday; frequently climb, balance, kneel, and crawl; and occasionally stoop and
11 crouch. AR 88. The ALJ also found that Plaintiff could perform simple repetitive tasks. AR 88.
12 On June 28, 2007, the ALJ in that proceeding determined that Plaintiff was not disabled. AR 91.

13 On April 16, 2012, Plaintiff filed a second application for Title II DIB, alleging disability
14 beginning on April 12, 2010. AR 17. Plaintiff's disability report lists medical conditions of
15 discogenic and degenerative back disorders and affective mood disorders. AR 155. The Social
16 Security Administration ("SSA") denied Plaintiff's applications initially and on reconsideration.
17 AR 121-122,155-156.

18 On April 19, 2012, Plaintiff was seen at Sausal Creek Outpatient Clinic. AR 386.
19 Insomnia, sadness, hopelessness, and homelessness were among the presenting problems noted.
20 AR 392. Plaintiff reported drinking alcohol and using cannabis for "coping." AR 393. Plaintiff's
21 medications were listed as Lovenox, Vicodin, Fish Oil, Melatonin, and an Albuterol inhaler. AR
22 392. Plaintiff was diagnosed with depressive disorder NOS and alcohol and cannabis abuse. AR
23 394.

24 On July 23, 2012, Plaintiff underwent an internal medicine consultative examination with
25 Dr. Farah Rana, M.D. AR 400. During her examination, Plaintiff complained of lower back pain,
26 pain in her right knee, depression, and asthma. *Id.* Plaintiff reported smoking marijuana and
27 drinking alcohol "occasionally," and also reported being unemployed since 2010. AR 401.
28 Plaintiff reported taking Lovenox for pulmonary embolus, Paxil for depression, Viocdin for back

1 pain, and Albuterol for asthma, which was well controlled. AR 400. Plaintiff had a generally
2 normal examination, but lower back tenderness was noted and straight leg raising test was
3 negative. AR 401. Mild tenderness in the right knee joint was also noted, though Plaintiff's range
4 of motion was within normal limits. AR 401. Dr. Rana found that Plaintiff had the ability to stand
5 and walk six hours in an eight hour work day with breaks; sit for six hours in an eight hour work
6 day with breaks; carry 25 pounds frequently and 50 pounds occasionally; push and pull devices up
7 to 50 pounds; stoop, bend, kneel, crouch, and climb occasionally given her knee and back pain;
8 handle, manipulate, feel, and finger objects without any problem. AR 402. Dr. Rana noted that
9 Plaintiff did not need any assistive devices and was able to take public transportation. AR 402.
10 Plaintiff was diagnosed with lower back pain secondary to degenerative disc/degenerative joint
11 disease, osteoarthritis in the right knee, a history of depression, and a history of asthma. AR 402.

12 On July 24, 2012, Plaintiff underwent a psychological consultative evaluation with Maria
13 Kerosky, Ph.D. AR 403. Plaintiff stated that she suffered from depression. AR 404. While going
14 through a divorce in 2003, Plaintiff claims she began having panic attacks and "couldn't be around
15 people." AR 404. Plaintiff reported that she had worked as a drug and alcohol counselor until
16 2010, and also reported other past employment. AR 404. Plaintiff also stated that she drank
17 alcohol occasionally and smoked marijuana to induce her appetite. AR 405. Plaintiff reported
18 living with a friend, being able to perform self-care and domestic activities (bathing/grooming,
19 cleaning, cooking, doing errands "sometimes", and being able to drive). AR 405. She also
20 reported being a "loner," sleeping most of the day, and "feeling in the dumps." AR 405. Plaintiff
21 stated that she had difficulty sleeping, problems with her appetite, and suffered an approximate 30
22 pound weight loss in the last three to four months. AR 406. Plaintiff also reported that "shadows
23 and voices started three to four months ago." AR 406. Plaintiff stated that she was taking
24 Paroxetine, Lovenox, Hydrocodone, and Trazodone. AR 404. Dr. Kerosky found that Plaintiff
25 was mildly impaired in her ability to maintain persistence, pace, and perform simple repetitive
26 tasks and maintain adequate sustained attention/concentration. AR 408. Dr. Kersoky also found
27 that Plaintiff was moderately to markedly impaired in her ability to maintain adequate sustained
28 attention/concentration during a routine workday; maintain adequate pace and persistence

1 performing complex tasks; adapt to changes in job routine, hazards, or stressors in a workplace
2 setting; interact appropriately with co-workers, supervisors, and the public on a regular basis; as
3 well as moderately to markedly impaired in her ability to complete a normal workday/workweek
4 without interruptions resulting from her psychiatric condition. AR 408. Plaintiff was diagnosed
5 with major depressive disorder and anxiety disorder NOS. AR 408.

6 On January 2, 2013, Plaintiff had an MRI of the lumbar spine performed by Dr. Chung
7 Lee. AR 456. The MRI showed mild diffuse disc bulge at L2-3, L3-4, and L4-5; moderate to
8 severe bilateral facet arthropathy at L2-3 and L3-4; and an appearance of moderate central spinal
9 stenosis at L2-3 due to facet patent. AR 457. Dr. Lee concluded that Plaintiff suffered from
10 moderate to severe bilateral facet arthropathy at L2-3 and L3-4 and moderate central spinal
11 stenosis at L2-3. *Id.*

12 On April 24, 2013, State agency medical examiner L. Pancho, M.D. reviewed the record.
13 AR 130. Dr. Poncho noted Plaintiff's alleged impairments as a "perturding [protruding]" disc,
14 blood clots in lungs, and lower back pain. AR 129. Dr. Pancho concluded that the ALJ ruling
15 should be adopted and that Plaintiff had the RFC to lift and carry 20 pounds occasionally and 10
16 pounds frequently; stand, walk, or sit for about six hours out of an eight our workday; climb
17 ramps/stairs frequently and ladders/ropes/scaffolds occasionally; as well as balance, stoop, kneel,
18 crouch, or crawl frequently. AR 133. On May 29, 2013, Dr. Pancho noted that additional
19 evidence was submitted that covered the years 2010 to February 2013. AR 130. Specifically, on
20 June 5, 2013, Dr. Pancho noted that an MRI of the lumbar spine revealed a mild diffuse disc bulge
21 at L2. Dr. Pancho reviewed the entire record, including the newly submitted medical evidence,
22 and opined that no change should be made to the prior assessment. AR 130.

23 On May 7, 2013, State agency medical examiner Harvey Bilik, Psy.D also reviewed the
24 record. AR 131. Dr. Bilik noted Plaintiff's impairment diagnosis as spine disorders and affective
25 disorders. AR 131. Dr. Bilik found Plaintiff moderately impaired in her ability to understand,
26 remember detailed instruction, carry out detailed instructions; maintain attention and concentration
27 for extended periods; complete a normal workday/workweek without interruptions from
28 psychological symptoms; interact appropriately with the general public and respond appropriately

1 to changes in the work setting. AR 135. Dr. Bilik further concluded that Dr. Kerosky’s opinion
2 was an “overestimate of the severity of [] [Plaintiff’s] restrictions/limitations and base
3 functioning.” AR 136.

4 On July 29, 2013, Plaintiff requested an administrative hearing, which was held on May
5 19, 2014. AR 17. Plaintiff testified to “shooting pain in her back” and that she was limited to
6 sitting for no more than 45 minutes, after which she had to stand up and walk. AR 62-81. Plaintiff
7 testified further that a typical day consisted of her waking up, showering, taking her pills, and
8 lying back down, as this activity made her “drowsy.” AR 62-81. She stated that her daughter does
9 the household chores, since she is unable, and that she rarely goes to the store. AR 62-81. She
10 testified that she is unable to stand long and frequently urinates, which she believes is related to
11 her fibroids. AR 62-81. Plaintiff stated that she was told that she needed back surgery. AR 62-81.
12 The ALJ noted that Plaintiff looked “normal”, and that she was “wearing a nice blouse with
13 glasses perched on top of her head.” AR 22.

14 On December 14, 2015, Plaintiff’s request for review was denied by the Appeals Council,
15 rendering the ALJ’s decision final. AR 5-13. Plaintiff now seeks judicial review of the final
16 decision.

17 On December 7, 2016, Plaintiff filed her motion for summary judgment. (Pl.’s Mot., Dkt.
18 No. 15.) On January 4, 2017, Defendant filed its cross-motion for summary judgment and
19 opposition to Plaintiff’s motion for summary judgment. (Def.’s Opp’n, Dkt. No. 16.) Plaintiff
20 filed a reply on January 18, 2017. (Pl.’s Reply, Dkt. No. 17.)

21 **II. LEGAL STANDARD**

22 A court may reverse the Commissioner’s denial of disability benefits only when the
23 Commissioner's findings are 1) based on legal error or 2) are not supported by substantial
24 evidence in the record as a whole. 42 U.S.C. § 405(g); *Tackett v. Apfel*, 180 F.3d 1094, 1097
25 (9th Cir. 1999). Substantial evidence is “more than a mere scintilla but less than a
26 preponderance”; it is “such relevant evidence as a reasonable mind might accept as adequate to
27 support a conclusion.” *Id.* at 1098; *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). In
28 determining whether the Commissioner's findings are supported by substantial evidence, the

1 Court must consider the evidence as a whole, weighing both the evidence that supports and the
2 evidence that detracts from the Commissioner's conclusion. *Id.* “Where evidence is susceptible
3 to more than one rational interpretation, the ALJ's decision should be upheld.” *Ryan v. Comm'r*
4 *of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008).

5 Under Social Security Administration (“SSA”) regulations, disability claims are evaluated
6 according to a five-step sequential evaluation. *Reddick v. Chater*, 157 F.3d 715, 721 (9th Cir.
7 1998). At step one, the Commissioner determines whether a claimant is currently engaged in
8 substantial gainful activity. *Id.* If so, the claimant is not disabled. 20 C.F.R. § 404.1520(b). At
9 step two, the Commissioner determines whether the claimant has a “medically severe impairment
10 or combination of impairments,” as defined in 20 C.F.R. § 404.1520(c). *Reddick*, 157 F.3d 715 at
11 721. If the answer is no, the claimant is not disabled. *Id.* If the answer is yes, the Commissioner
12 proceeds to step three, and determines whether the impairment meets or equals a listed impairment
13 under 20 C.F.R. § 404, Subpart P, Appendix 1. 20 C.F.R. § 404.1520(d). If this requirement is
14 met, the claimant is disabled. *Reddick*, 157 F.3d 715 at 721.

15 If a claimant does not have a condition which meets or equals a listed impairment, the
16 fourth step in the sequential evaluation process is to determine the claimant's residual functional
17 capacity (“RFC”) or what work, if any, the claimant is capable of performing on a sustained basis,
18 despite the claimant’s impairment or impairments. 20 C.F.R. § 404.1520(e). If the claimant can
19 perform such work, he is not disabled. 20 C.F.R. § 404.1520(f). RFC is the application of a legal
20 standard to the medical facts concerning the claimant's physical capacity. 20 C.F.R. § 404.1545(a).
21 If the claimant meets the burden of establishing an inability to perform prior work, the
22 Commissioner must show, at step five, that the claimant can perform other substantial gainful
23 work that exists in the national economy. *Reddick*, 157 F.3d 715 at 721. The claimant bears the
24 burden of proof in steps one through four. *Bustamante v. Massanari*, 262 F.3d 949, 953-954 (9th
25 Cir. 2001). The burden shifts to the Commissioner in step five. *Id.* at 954.

26 III. THE ALJ’S DECISION

27 On August 20, 2014, the ALJ denied Plaintiff’s request for benefits. AR 17-27. The ALJ
28 followed the five-step sequential process established to guide Social Security disability

1 determinations. At step one, the ALJ determined that Plaintiff had not engaged in substantial
2 gainful activity since April 12, 2010, the alleged disability onset date. AR 20. At step two, the
3 ALJ determined that Plaintiff suffers from the following severe impairments: obesity, degenerative
4 disc disease of the lumbar spine, chronic knee pain, asthma, and history of pulmonary embolism.
5 AR 20. The ALJ concluded that these impairments more than minimally affected Plaintiff's
6 ability to perform work related activities. AR 20. Additionally, the ALJ found Plaintiff's mental
7 impairments of depressive disorder and anxiety did not cause more than a minimal limitation in
8 Plaintiff's ability to work, and were, therefore, deemed "nonsevere." AR 20. At step three, the
9 ALJ determined that Plaintiff did not have an impairment or combination thereof that met or
10 medically equaled the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P,
11 Appendix 1 (20 C.F.R. 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, and 416.926). AR
12 21.

13 At step four, the ALJ determined that Plaintiff had the RFC to perform medium work, as
14 defined by 20 CFR 404.1567(c) and 416.967(c). AR 21. The ALJ further limited Plaintiff to
15 occasional climbing, balancing, kneeling, crawling, stooping, and crouching; also Plaintiff is
16 limited to no more than moderate exposure to fumes, odors, dust and poor ventilation. In her
17 consideration, the ALJ employed a two-step process where she first looked at if the alleged mental
18 impairment "could reasonably be expected to produce [Plaintiff's] . . . symptoms." AR 21. Next
19 the ALJ "evaluate[d] the intensity, persistence, and limiting effects of the [Plaintiff's] symptoms
20 to determine the extent to which they limit the [Plaintiff's] functioning." AR 21. Although the
21 ALJ determined that Plaintiff's impairments could have reasonably caused her alleged symptoms,
22 the ALJ took issue with Plaintiff's credibility regarding the "intensity, persistence, and limiting of
23 effects" of those symptoms. AR 21. First, the ALJ noted that, given Plaintiff's description of her
24 daily activities reported to Dr. Kerosky, her allegation of complete debilitation is not "generally
25 credible." AR 25. Next, the ALJ pointed to the fact that while her first disability application was
26 pending, she reported working at SGA from 2006-2010, which during the second proceeding "she
27 claim[ed] not to remember." AR 25. The ALJ also noted Plaintiff's history of non-compliance
28 with medications and her "normal" appearance at the hearing, and provided "no indication of any

1 mental or physical symptoms.” AR 25.

2 Regarding the medical opinions, the ALJ gave Dr. Rana’s opinion great weight and
 3 assigned less weight to Dr. Pancho’s opinion. AR 23. Dr. Rana’s opinion was given great weight
 4 because “it is consistent with the preponderance of the medical evidence of record as a whole.”
 5 AR 23. Dr. Rana was also given great weight because in addition to having “personally examined
 6 [] [Plaintiff]”, his findings were not “inconsistent with the x-rays and MRI of [] [Plaintiff’s]
 7 lumbar spine.” AR 23. Dr. Pancho was given less weight because he only reviewed medical
 8 records and did not have the benefit of an opinion based on physical examination. AR 23.

9 Regarding Plaintiff’s mental health, the ALJ found Plaintiff’s alleged impairments only had a
 10 minimal effect on her ability to work, and were therefore nonsevere. AR 24. Thus, the ALJ
 11 determined that, to the extent that Dr. Kerosky and Dr. Bilik found moderate to marked
 12 limitations, these findings were contradicted by Plaintiff’s “lack of intensive mental treatment.”
 13 AR 24. Additionally, the ALJ noted that even if her determinations were more in line with Dr.
 14 Kerosky and she limited Plaintiff to simple routine tasks with occasional public contact, the
 15 number of jobs in the national economy available to Plaintiff would still be significant. AR 24.

16 Finally, at step five, based on Plaintiff’s physical RFC, the ALJ determined that Plaintiff
 17 was capable of performing past relevant work including work as a counselor, social service aide,
 18 and cashier/security. AR 25. The ALJ also determined that jobs existed in significant numbers in
 19 the national economy that Plaintiff was capable of performing even if she was limited to simple
 20 repetitive tasks with occasional public contact, including work as an office helper, assembler, and
 21 stocker. AR 25. The ALJ, therefore, concluded that Plaintiff was not under a disability at any time
 22 from April 12, 2010 through August 20, 2014, the date of the ALJ’s decision. AR 27.

23 **IV. DISCUSSION**

24 In her motion for summary judgment, Plaintiff argues that the ALJ erred in denying her
 25 application for social security benefits for four reasons: 1) the ALJ erred in applying *Chavez* to
 26 show changed circumstances; 2) the ALJ erred in finding Plaintiff’s mental impairments non-
 27 severe; 3) the ALJ erred in evaluating Plaintiff’s credibility; and 4) the ALJ made factual errors
 28 that may have adversely affected Plaintiff’s claim.

1 **A. Changed Circumstances**

2 Plaintiff argues that the ALJ erred in applying *Chavez* to show changed circumstances, but
3 then found a lesser degree of disability. (Pl.’s Mot. at 7.) Plaintiff argues that a finding of
4 “changed circumstances” should necessarily indicate greater disability. *Id.* at 7-8. In *Chavez*, the
5 court found that a plaintiff, “in order to overcome the presumption of continuing nondisability
6 arising from the first administrative law judge’s findings of nondisability, must prove ‘changed
7 circumstances’ indicating a greater disability.” *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir.
8 1988)(*citation omitted*). Here, the ALJ noted that in order to show a change of circumstance,
9 Plaintiff would have to show that her impairments had become more severe. AR 17. The ALJ also
10 acknowledged that the presumption of “not disabled” determined by the first ALJ should be
11 defeated “only if the record shows deterioration in the [] [Plaintiff’s] condition since the June 28,
12 2007 decision.” AR 18. Then the ALJ found that there was a change of circumstances affecting
13 the issue of disability regarding the unadjudicated period from April 12, 2010 to August 20, 2014.
14 *Id.*

15 *Chavez* does not require a finding of disability where there is a change in circumstances.
16 844 F.2d at 694. Rather, a change in circumstances occurs only when the change is “legally
17 relevant” to the disability determination. *Id.* In short, changed circumstances require that the
18 plaintiff’s condition has worsened. *Id.* at 693. Here, the ALJ’s finding of changed circumstances
19 under *Chavez* should dictate that there has been deterioration in Plaintiff’s condition. *See* AR 18.
20 Instead, the ALJ concluded that Plaintiff had a less restrictive RFC than she had in the 2007
21 proceeding, indicating an improvement in her condition. AR 21. Since only the worsening of a
22 claimant’s condition is legally relevant under *Chavez*, any error could be harmless had the ALJ
23 made only minimal changes to the 2007 RFC or left it the same. Instead, the ALJ fails to explain
24 how her finding of changed circumstances squared with the determination that Plaintiff was now
25 capable of greater rigor in work activity.

26 Notwithstanding, it is unclear whether the ALJ’s finding is harmless, but in light of the
27 errors outlined below that warrant remand, the Court remands this issue for further proceedings to
28 reassess Plaintiff’s RFC and whether her condition has worsened since the earlier proceeding.

1 **B. Mental Impairment**

2 Plaintiff argues that the ALJ erred in finding that her mental impairments only had a mild
3 effect on her ability to work. (Pl.’s Mot. at 8-9.) Step two in the five step sequential process for
4 evaluating whether a claimant is disabled is to determine whether a claimant’s condition rises to
5 the level of impairment severity listed in 20 CFR 404.1520(c) and 416.920(c). *See Smolen v.*
6 *Chater*, 80 F.3d 1273, 1290 (9th Cir.1996). “The ruling states that ‘an impairment is found not
7 severe ... when medical evidence establishes only a slight abnormality or a combination of slight
8 abnormalities which would have no more than a minimal effect on an individual's ability to
9 work.’” *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)(quoting SSR 85–28.) “Step two. . .
10 is ‘a de minimis screening device [used] to dispose of groundless claims,’ and an ALJ may find
11 that a claimant lacks a medically severe impairment or combination of impairments only when his
12 conclusion is “clearly established by medical evidence.” *Webb v. Barnhart*, 433 F.3d 683, 687
13 (9th Cir. 2005); *See S.S.R. 85–28*

14 Here, the ALJ determined that the effect of Plaintiff’s depression was mild, because she
15 reported that the medication she was taking was effective. AR 24. Both Dr. Kerosky and Dr. Bilik
16 found that Plaintiff experienced moderate limitations in her ability to perform work activity. AR
17 135, 408. Additionally, Dr. Kerosky, the examining physician, found that Plaintiff also
18 experienced some marked limitations in her ability to work. AR 408. Notably, Dr. Kerosky found
19 that Plaintiff was moderately to markedly impaired in her ability to complete a normal
20 workday/workweek without interruptions due to her psychiatric conditions. AR 408. Dr. Bilik
21 also found Plaintiff moderately impaired in this area. AR 135. “Where the record contains
22 conflicting medical evidence, the ALJ must make a credibility determination and resolve the
23 conflict.” *Chaudhry v. Astrue*, 688 F.3d 661, 671 (9th Cir. 2012)(quotations omitted). Here, the
24 ALJ discounts the objective medical opinions of the examining and reviewing physicians as
25 merely reflecting Plaintiff’s subjective complaints. As such, the ALJ relies on Plaintiff’s
26 statements that she notices some improvement in her mood with her medications, but does not
27 take into account the professional medical opinions that Plaintiff experiences moderate to marked
28 limitations while using medication. Thus, the ALJ erred in finding Plaintiff’s mental health

1 impairments were non-severe on the basis of reported improvement with medication.

2 The ALJ also found that the moderate and marked limitations identified by the consultative
3 experts were without merit, since there was no evidence of hospitalization or therapy. AR 24.
4 This is not entirely accurate, given that Plaintiff was seen at Sausal Creek in April 2012, where she
5 received a crisis assessment. AR 386. At that time, she was assigned a GAF score of 55, which
6 indicates a moderate difficulty in mental functioning. AR 389; *see Atkinson v. Astrue*, No. 2:10-
7 cv-02072-KJN, 2011 WL 4085414, at *10 (E.D. Cal. Sept. 13, 2011). While this was the only
8 instance of mental health treatment since Plaintiff's alleged disability onset date, it was consistent
9 with the medical opinions. Therefore, it was unreasonable for the ALJ to find that the moderate to
10 marked limitations were unsupported simply because Plaintiff did not obtain additional treatment
11 nor require hospitalization.

12 In light of the foregoing, the ALJ erred in finding that Plaintiff's mental health
13 impairments were non-severe, and, at the very least, the moderate limitations agreed upon by Drs.
14 Kerosky and Bilik should be included in Plaintiff's RFC on remand.

15 **C. Credibility**

16 Here, Plaintiff argues that the ALJ erred in evaluating Plaintiff's credibility since the entire
17 record was not considered and no clear and convincing reasons supported by substantial evidence
18 were provided. (Pl.'s Mot. at 10-11.) In evaluating the credibility of a claimant's testimony
19 regarding subjective pain, an ALJ must engage in a two-step analysis. *Lingenfelter v. Astrue*, 504
20 F.3d 1028, 1035-36 (9th Cir.2007). "First, the ALJ must determine whether the claimant has
21 presented objective medical evidence of an underlying impairment which could reasonably be
22 expected to produce the pain or other symptoms alleged." *Id.* at 1036. The claimant is not required
23 to show that her impairment "could reasonably be expected to cause the severity of the symptom
24 she has alleged; she need only show that it could reasonably have caused some degree of the
25 symptom." *Id.* If the claimant meets the first test and there is no evidence of malingering, the ALJ
26 can only reject the claimant's testimony about the severity of the symptoms if he gives "specific,
27 clear and convincing reasons" for the rejection. *Id.* The ALJ must specify what testimony is not
28 credible and identify the evidence that undermines the claimant's complaints; general findings are

1 insufficient. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005).

2 First, the ALJ found Plaintiff's claim of complete debilitation not "generally credible."
3 AR 25. Although it is the ALJ's responsibility to make credibility findings, "testimony must not
4 be entirely discounted simply because there was a lack of objective findings." *Hudson v. Bowen*,
5 849 F.2d 433, 435 (9th Cir. 1988). The ALJ took issue with the fact that Plaintiff, in 2012,
6 reported "extensive activities of daily living" to Dr. Kerosky, but, at the 2014 hearing, reported
7 minimal activity. AR 25. Although these testimonies are inconsistent, an MRI done in 2013
8 showed that Plaintiff's back condition had changed since she was examined by Dr. Kerosky, and
9 so are not inconsistent with the complete record. AR 456. Furthermore, the two- year time span
10 provides ample time for changes to take place in an impaired individual's daily activities. Thus,
11 the ALJ erred in finding Plaintiff's testimony that her daily activities had worsened was not
12 credible, because she failed to consider the 2013 MRI, which showed that her back condition had
13 worsened.

14 Second, the ALJ took issue with the fact that Plaintiff claimed not to remember her work
15 history from 2006-2010. AR 25. At the 2014 hearing, Plaintiff recalled her last job as a drug and
16 alcohol counselor and another job at East Bay Recovery. AR 63-65. She recalled her duties and
17 responsibilities at these jobs and the demographic with which she worked. AR 63-65. She also
18 recalled employment at Project Pride and could generally describe the work she did within a given
19 year even without providing the specific employer's name. AR 63-65. She could also recall that
20 she was not working in 2004 or 2005. AR 63-65. Plaintiff went on to testify that she worked
21 from 2007-2010 and was terminated because she "called in sick too much." AR 63. Overall, the
22 employment history detailed by Plaintiff in the 2014 hearing was similar to and consistent with her
23 testimony in the 2007 proceedings. AR 63-65; AR 41-46. Thus, the ALJ erred in finding that
24 Plaintiff was not credible because she was unable to remember her work history from 2006-2010.

25 Third, the ALJ discredited Plaintiff's testimony based her history of non-compliance with
26 medications. AR 25. It is unclear what affect the ALJ is proposing that this history has on
27 Plaintiff's credibility because the ALJ did not elaborate. *See* AR 25. Thus, the ALJ erred only
28 insofar as she omitted further explanation of exactly what bearing this history has on Plaintiff's

1 credibility.

2 Lastly, Plaintiff claims that ALJ erred in noting her observation that Plaintiff appeared
3 “normal at the hearing, with no indication of any mental or physical symptoms.” (Pl.’s Mot. at 11.)
4 *Matney* permits the ALJ to consider plaintiff’s “demeanor and appearance at the hearing” along
5 with relevant medical evidence in a disability determination. *Matney on Behalf of Matney v.*
6 *Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992). As such, this observation alone is not error given
7 that the ALJ expressly stated that these observations were not the entire basis of the credibility
8 assessment. AR 25.

9 In light of the foregoing, the ALJ improperly discredited Plaintiff’s testimony, because she
10 failed to identify sufficient evidence to undermine the claimant’s subjective complaints. Remand
11 is not an opportunity to correct the original decision’s deficiencies outlined above in an attempt to
12 justify the original result. Specifically, the ALJ should not attempt to further discredit Plaintiff’s
13 testimony regarding the severity of her symptoms. *See Varney v. Sec’y of Health & Human Servs.*,
14 859 F.2d 1396, 1398-99 (9th Cir. 1988) (“Requiring the ALJs to specify any factors discrediting a
15 claimant at the first opportunity helps to improve the performance of the ALJs by discouraging
16 them from ‘reach[ing] a conclusion first, and then attempt[ing] to justify it by ignoring competent
17 evidence in the record that suggests an opposite result.’”).

18 **D. Factual Errors**

19 Plaintiff argues that the ALJ made factual errors that may have adversely affected
20 Plaintiff’s claim. (Pl.’s Mot. at 11-12.) Dr. Rana examined Plaintiff on July 23, 2012. AR 400.
21 The ALJ, in her decision, stated that this examination took place on July 23, 2013. AR 23.
22 Plaintiff had a MRI of the lumbar spine on January 2, 2013, which showed that Plaintiff had a
23 moderate to severe bilateral facet arthropathy at L2-3 and L4-5, and moderate central spinal
24 stenosis at L2. AR 456. Defendant argues that because Dr. Rana referred to a 2012 MRI of the
25 lumbosacral spine that noted a prolapsed disc at L4-5, and this 2012 MRI also noted degenerative
26 disc disease was present at multiple levels (although Dr. Rana did not include this information in
27 his write-up), that the error was harmless. (Def.’s Opp’n at 12-13.) The Court disagrees.

28 The results from the 2013 MRI could have influenced Dr. Rana’s evaluation in considering

1 the extent of Plaintiff's limitations and ability. The 2012 MRI, to which Defendant refers, only
2 highlights the L4-L5 levels, while the 2013 MRI shows two different conditions at levels not
3 noted by Dr. Rana. *See* AR 400; AR 456. For these reasons, the Court remands this issue for
4 further proceedings, such that all medical opinions have the benefit of evaluation based on a
5 complete record, particularly given that Dr. Rana's opinion was given great weight in the ALJ's
6 decision.

7 **V. CONCLUSION**

8 For the reasons set forth above, the Court GRANTS Plaintiff's motion for summary
9 judgment, and DENIES Defendant's cross-motion for summary judgment. Accordingly, the
10 action is REMANDED to the Commissioner, pursuant to sentence four of 42 U.S.C. § 405(g), for
11 further proceedings, including a new administrative hearing and new consultative physical
12 evaluation, consistent with this order.

13 IT IS SO ORDERED.

14 Dated: September 25, 2017

15 
16 KANDIS A. WESTMORE
17 United States Magistrate Judge