UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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| Dianna R.[1], Plaintiff, v. Kilolo Kijakazi, Acting Commissioner of Social Security, Defendant. | Case No.: 20cv1664-MSB **ORDER REGARDING JOINT MOTION FOR JUDICIAL REVIEW [ECF NO. 14]** |

On August 26, 2020, Dianna R. ("Plaintiff") filed a Complaint pursuant to 42 U.S.C.A. § 405(g) seeking judicial review of a decision by the Commissioner of Social Security ("Defendant") denying Plaintiff's application for disability insurance benefits. (ECF No. 1.) Based on all parties' consent, (see ECF Nos. 3, 5, docket), this case is before the undersigned as presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c).

Now pending before the Court is the parties' Joint Motion for Judicial Review. (ECF No. 14.) The Court has carefully reviewed the parties' Joint Motion [ECF No. 14],

[1] Under Civil Local Rule 7.1(e)(6)(b), "[o]pinions by the court in [Social Security cases under 42 U.S.C. § 405(g)] will refer to any non-government parties by using only their first name and last initial."

the Certified Administrative Record ("AR") [ECF No. 8], and the Complaint [ECF No. 1], and for the reasons set forth below, the Court **ORDERS** that judgment be entered reversing the decision of the Commissioner and remanding this matter for further administrative proceedings.

## I. PROCEDURAL BACKGROUND

On September 23, 2016, [2] Plaintiff filed her second application for disability insurance benefits, alleging inability to work since June 1, 2012. (AR 229-35, see also AR 21 (discussing prior application).) After her application was denied initially and upon reconsideration, Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (AR 144-48, 150-54, 159-60.) On September 11, 2018, ALJ Robert Iafe held an administrative hearing, at which Plaintiff testified and was represented by counsel. (AR 70-93.) At the hearing, Plaintiff amended the date of onset to February 14, 2015, the day after an unfavorable hearing decision was entered as to her first claim. (AR 74.) A vocational expert ("VE") later submitted a Vocational Interrogatory at the ALJ's request. (AR 355-59.) On September 25, 2019, the ALJ found Plaintiff was not disabled. (AR 32.)

The ALJ's decision became final on June 20, 2020, when the Appeals Council denied review. (AR 1-8.) On August 26, 2020, Plaintiff filed the instant timely civil action. (See ECF No. 1.)

## II. SUMMARY OF THE ALJ'S FINDINGS

In rendering his decision, the ALJ first established Plaintiff was last insured for purposes of her claim on December 31, 2017. (AR 24.) The ALJ then followed the Commissioner's familiar five-step sequential evaluation process. (AR 22-24); see also 20 C.F.R. § 404.1520, 416.920.

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[2] Although Plaintiff's application records indicate that she filed an application for disability insurance benefits on September 23, 2016, the ALJ stated that Plaintiff filed an application for disability and disability insurance benefits on September 12, 2016. (AR 21.)

At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity since February 13, 2015, her alleged onset date. (AR 24.)

At step two, the ALJ found Plaintiff's cervical spondylosis, lumbar degenerative disc disease, and fibromyalgia were severe impairments. (AR 24-25.) The ALJ specifically found non-severe Plaintiff's retinal detachment, borderline obesity, anxiety disorder, and depressive disorder. (Id.)

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the impairments listed in the Commissioner's Listing of Impairments. (AR 25-26.)

The ALJ found Plaintiff had the residual functional capacity ("RFC") to do the following:

> perform light work as defined in 20 CFR 404.1567(b)[3] with occasional lifting and/or carrying 20 pounds and frequent lifting and/or carrying of 10 pounds; standing and/or walking for four hours in an eight-hour workday, but for no more than 30 minutes at one time; occasional balancing, stooping, crouching, and climbing ramps and stairs; and never kneeling, crawling, or climbing ladders, ropes, or scaffolds; occasional reaching overhead with bilateral upper extremities; and frequent handling, fingering, and reaching at and below shoulder level.

(AR 26.)

At step four, the ALJ found Plaintiff could not perform her past relevant work as a daycare center teacher. (AR 30.)

At step five, the ALJ found based on the VE's interrogatory responses that Plaintiff could perform the requirements of a significant number of occupations in the national

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[3] In the Code of Federal Regulations, "[l]ight work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be every little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls." 20 CFR 404.1567(b)

economy, specifically assembler, solderer, and sorter. (AR 31-32.) The ALJ concluded Plaintiff was not disabled as defined by the Social Security Act. (AR 32.)

## III. DISPUTED ISSUE

The parties have identified one issue in their joint motion, which Plaintiff asserts supports reversal:

1. Whether the ALJ erred "in failing to find plaintiff's mental impairment 'severe.'" (ECF No. 14 at 2.)

## IV. STANDARD OF REVIEW

Section 405(g) of the Social Security Act allows unsuccessful applicants to seek judicial review of the Commissioner's final decision. 42 U.S.C. § 405(g). The scope of judicial review is limited, and the denial of benefits will not be disturbed if it is supported by substantial evidence in the record and contains no legal error. Id.; Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012) superseded on other grounds by 20 C.F.R. § 404.1502(a).

"Substantial evidence means more than a mere scintilla, but less than a preponderance. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Revels v. Berryhill, 874 F.3d 648, 654 (9th Cir. 2017) (quoting Desrosiers v. Sec'y of Health & Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988)); see also Richardson v. Perales, 402 U.S. 389, 401 (1971). Where the evidence is susceptible to more than one rational interpretation, an ALJ's decision must be upheld. Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

The ALJ's resolution of conflicts and ambiguities in medical evidence is entitled to deference. See Lewis v. Apfel, 236 F.3d 503, 509 (9th Cir. 2001). However, even if the reviewing court finds that substantial evidence supports an ALJ's conclusions, the court must set aside the decision if the ALJ failed to apply the proper legal standards in weighing the evidence and reaching his or her decision. See Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1193 (9th Cir. 2004).

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## V. DISCUSSION

### A. The ALJ Erred by Finding Plaintiff's Mental Impairments Non-severe.

Plaintiff, through counsel, specifically identifies one claim of error she believes warrants reversal of the ALJ's finding she was not disabled—the ALJ incorrectly found her mental impairments of anxiety and depression non-severe without the support of substantial evidence. (ECF No. 14 at 3.) Specifically, Plaintiff argues that the ALJ improperly rejected "[t]he only medical evidence regarding the severity of Plaintiff's mental impairment[,] the [2018] opinions of Plaintiff's treating psychiatrist, Louis Fontana, M.D., and Plaintiff's treating psychologist, Berenice Ibanez, Ph.D.," and their treatment records from 2014 to 2018, without clear and convincing reasons. (ECF No. 14 at 4-6.)

The Commissioner argues that Plaintiff failed to meet her burden to provide medical evidence that her mental impairments affected her ability to work while she was still insured, before the end of 2017, and therefore the ALJ properly found Plaintiff's mental impairments not severe. (Id. at 5-8.) Instead, the Commissioner claims the ALJ considered all medical evidence and found that the objective evidence regarding Plaintiff's impairments did not support greater functional limitations. (Id. at 9-12.)

#### 1. Legal standard

At step two, the ALJ determines whether a claimant has a severe impairment or combination of impairments. 20 C.F.R. § 404.1520(a)(4)(ii). When evaluating whether a claimant has a severe impairment or combination of impairments, the ALJ will assess whether those impairments significantly limit a claimant's ability to perform basic work activities. Webb v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005). "Basic work activities" are defined as "the abilities and aptitudes necessary to do most jobs," and as relevant to mental impairments, include "[u]nderstanding, carrying out, and remembering simple instructions"; "[u]se of judgment"; "[r]esponding appropriately to supervision, co-workers and usual work situations"; and "[d]ealing with changes in a routine work setting." 20 C.F.R. § 416.922. If an impairment or combination of impairments does not

significantly affect a claimant's mental or physical ability to do basic work activities, it will be found not severe. 20 C.F.R. § 416.922(a).

Step two functions as a "de minimis screening device to dispose of groundless claims." Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996). To find an impairment non-severe, evidence must establish the impairment is "a slight abnormality that has 'no more than a minimal effect on an individual[']s ability to work.'" Id. (citing SSR 85-28). The step two analysis is not meant to determine which impairments should be considered when determining a claimant's RFC, or how the ALJ should evaluate the impairments. Buck v. Berryhill, 869 F.3d 1040, 1048–49 (9th Cir. 2017). An ALJ's decision that a claimant does not have any severe impairment will only be affirmed where such determination is "clearly established by medical evidence." Webb, 433 F.3d at 687 (quoting S.S.R. 85-28) (emphasis added).

When evaluating mental impairments at step two, the ALJ must consider four broad categories of functioning which loosely mirror basic work activities, known as the "paragraph B" criteria: "(i) understanding, remembering and applying information; (ii) interacting with others; (iii) concentrating, persisting and maintaining pace; and (iv) adapting or managing oneself." Salina S. v. Kijakazi, Case No. 1:20-CV-00515-REP, 2022 WL 3700880, at *4 (D. Idaho Aug. 25, 2022) (citing 20 C.F.R. §§ 404.1520a(b)-(c)). The ALJ must rate the claimant's limitations in each of these categories as none, mild, moderate, marked or extreme, and only if the claimant has mild or no impairments in all four categories is an impairment non-severe. (Id.)

**2. Background relevant to mental impairments**

When Plaintiff's initial disability report related to the instant claim was submitted over the phone on September 23, 2016, the interviewer indicated that: (a) Plaintiff only alleged disability due to physical limitations, and (b) she had not seen a doctor for mental conditions. (See AR 263-64, 266, 269.) Based on this, the Disability Evaluation

Analyst submitted a request to San Ysidro Health Center[4] on September 26, 2016, requesting records related to the history, objective clinical findings, diagnosis, and prognosis of Plaintiff's alleged physical impairments. (AR 390-91.) The records returned document five office visits with Plaintiff's physician's assistant ("P.A."), Clarissa Castillo, for physical issues from July 29, 2015, to July 22, 2016, and related test results. (AR 395-433.) At each visit, Plaintiff's "Chronic Problem List" indicated she had suffered from anxiety since June 3, 2014. (AR 395, 401, 407, 413, 420.) Although P.A. Castillo noted at each visit in the "Physical Exam" section that Plaintiff's psychiatric exam was within normal limits, she assessed Plaintiff with depression on November 17, 2015 and April 19, 2016, and ordered Plaintiff to continue taking her medication (Cymbalta) and, alternately, to continue seeing her psychologist, engage in positive cognition exercises, and call 911 in case of an emergency. (Compare AR 398, 404, 410, 416, 423 with AR 405, 417.) In her July 29, 2015 "Review of Systems," P.A. Castillo noted Plaintiff suffered from depression and insomnia. (AR 423.)

Phong T. Dao, D.O. performed the physical consultative examination requested by the Department of Social Services on November 28, 2016. (AR 468-73.) One of Plaintiff's four complaints at that examination was "depression and anxiety." (AR 468.) While Dr. Dao noted that Plaintiff had a history of these conditions for many years, was taking Cymbalta and amitriptyline, was seeing a psychiatrist about every three months, and experienced decreased energy levels, memory, and concentration, he did not review Plaintiff's mental health records, and deferred to the appropriate specialist to render an opinion on Plaintiff's mental health. (AR 469, 473.) There is no indication that any mental consultative examination was requested or performed. (See AR.)

[4] The Disability Evaluation Analyst also requested records from other providers, but since both of Plaintiff's mental health care doctors provided care through San Ysidro Health Center, the Court only discusses this request here.

In Plaintiff's subsequent, January 28, 2017 Disability Report on Appeal, the interviewer only noted that Plaintiff had received additional treatment for her physical impairments, again making no mention of her mental health impairments. (AR 303.) It appears that the first time Plaintiff directly alleged her mental impairments contributed to her disability and submitted her mental health treatment records was following the denial of her claim on reconsideration, after she obtained counsel. (See AR 155, Claimant's Appointment of Representative form, dated April 19, 2017.) Her attorney first submitted the medical records in Exhibits B10F to B17F between August 7, 2018, and September 5, 2018. (See AR 500-784 (with fax headers indicating they were provided by the attorney's office on specific dates).) These records included the voluminous mental health treatment notes and medical opinions that supported her attorney's argument at the September 11, 2018 administrative hearing that her disability was largely impacted by her mental impairments. (See AR 75-80.)

These records include a list of historical results from "screening tools" administered to Plaintiff, indicating Plaintiff was assessed for anxiety and depression at San Ysidro Health Center from at least June 3, 2014, to August 14, 2018, often monthly, and sometimes multiple times in a month. (AR 532-34.) More specifically, Plaintiff responded to the PHQ-9[5] on fifty-three occasions, scoring in the severe depression category on thirty-eight of those and in the moderately severe category on eighteen more. (Id.) Plaintiff was administered the GAD7[6] anxiety assessment on forty-nine

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[5] "The Patient Health Questionnaire known as the 'PHQ-9' 'is a[n] instrument fort making criteria-based diagnoses of depressive and other mental disorders commonly encountered in primary care.'" Norman v. Berryhill, Case No. 17-cv-04108-SI, 2018 WL 4519952, at *2 n.3 (N.D. Cal. Sept. 19, 2018) (citing Kurt Kroenke, MD, et al., *The PHQ-9: Validity of a Brief Depression Severity Measure*, 16 J. Gen. Intern. Med. 606 (2001)). PHQ-9 scores are classified at follows: 0-4 indicates minimal depression; 5-9 mild depression; 10-14 moderate depression; 15-19 moderately severe depression; and 20-27 severe depression. Salina S. v. Kijakazi, Case No. 1:20-CV-00515-REP, 2022 WL 3700880, at *5 n.4 (D. Idaho Aug. 25, 2022) (citing Kurt Kroenke, MD, et al., *The PHQ-9: Validity of a Brief Depression Severity Measure*, 16 J. Gen. Intern. Med. 606 (2001)).

[6] GAD7 is the Generalized Anxiety Disorder Assessment. See Gallupe v. Sedgwick Claims Mgmt. Servs., 358 F. Supp. 3d 1183, 1193 (W.D. Wash. Feb. 14, 2019) (discussing GAD7 results in an E.R.I.S.A. case).

occasions and scored in the severe range forty times. (Id.) Also laced throughout Plaintiff's mental health records are multiple scores of her Global Assessment of Functioning[7], which was assessed as follows: 60 on June 23, 2016; 70 on September 29, 2016; 50 on January 26, 2017; and 60 on September 7, 2017 and August 14, 2018. (See AR 749, 741, 704, 638, 531-32.)

Counsel's submission also included the detailed treatment notes from Plaintiff's treating psychologist and psychiatrists for a portion of this time.[8] These indicate that Berenice Ibanez, Ph.D., Plaintiff's treating psychologist, saw Plaintiff for psychotherapy nineteen times between August 22, 2016, through August 14, 2018. (See AR 529-34, 535-40, 561-66, 577-82, 601-05, 612-16, 623-27, 636-40, 649-53, 659-63, 669-72, 687-90, 691-94, 699-702, 713-16, 720-23, 736-39, 744-50.) On all but one of these visits with Dr. Ibanez, Plaintiff reported numerous symptoms of depression and anxiety, including difficulty functioning and concentrating, difficulty falling asleep, anxious and fearful thoughts, and diminished interest and pleasure. (AR 748, 744, 736, 720, 713, 699, 691, 687, 669, 659, 649, 623, 612, 601, 577, 561, 536, 529.) Dr. Ibanez consistently noted that Plaintiff's depression was associated with her chronic pain caused by fibromyalgia and headaches and aggravated by conflict or stress. (Id.)

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The GAD7, developed in primary care, is an anxiety measure based on seven items which are scored from zero to three, with scores 15 and above indicating severe anxiety symptoms, 10-14 indicating moderate symptoms, and 5 to 9 indicating mild symptoms. Kurt Kroenke, M.D., et al., *Anxiety Disorders in Primary Care: Prevalence, Impairment, Comorbidity, and Detection*. Annals of Internal Medicine vol. 146,5 (2007): 317-25.

[7] "A GAF score is a rough estimate of an individual's psychological, social, and occupational functioning used to reflect the individual's need for treatment." Garrison v. Colvin, 759 F.3d 995, 1003 n.4 (9th Cir. 2014) (quoting Vargas v. Lambert, 159 F.3d 1161, 1164 n.2 (9th Cir. 1998). GAF scores are not determinative of disability, they can be a useful measure. Id. GAF scores between 41 and 50 describe "any serious impairment in social, occupational, or school functioning," while scores from 51 to 60 indicate moderate difficulty in those areas. Id. (quoting DSM IV).

[8] These records do not appear exhaustive, considering the assessment history described above and the indication that the August 22, 2016 visit is a follow up for continuing depression symptoms. (See AR 748.)

Between August 2016 and January 2017, Dr. Ibanez generally assessed Plaintiff with symptomatic depressive disorder. (AR 714, 721, 737, 745, 749.) From February 2017 to June 2017, Dr. Ibanez generally assessed Plaintiff's depressive disorder as major, recurrent, severe, and symptomatic. (AR 700, 692, 688, 670, 661.) Dr. Ibanez indicated that Plaintiff's major depressive disorder improved to some degree in August and September of 2017, when alternative therapies provided some pain relief. (AR 637, 650-51.) In November of 2017, Plaintiff reported making mistakes and missing appointments, which made her worry about her memory and attention. (AR 625.) In December 2017, Dr. Ibanez stated Plaintiff "presented as overwhelmed by the daily demands of her children, welfare documentation, and her [appointments with] doctors." (AR 613.) From January to August 2018, Dr. Ibanez consistently assessed Plaintiff with either anxiety, depressive order, or both. (AR 603, 579, 563, 531, 537.)

On August 16, 2018, Dr. Ibanez completed a Mental Residual Functional Capacity Assessment for Plaintiff. (AR 776-79.) While Dr. Ibanez indicated Plaintiff had only moderate limitations that permitted her to function satisfactorily in several areas, she also found "marked" limitation that substantially decreased effective functioning in other categories, including her abilities to: (a) understand, remember and carry our detailed instructions; (b) maintain attention and concentration for extended periods, perform within a schedule with acceptable punctuality and regular attendance; (c) work with others without distracting them or being distracted by them; (d) accept instruction and criticism; (e) maintain socially appropriate behavior and cleanliness; (f) be aware of and respond to normal hazards; (g) travel in unfamiliar places; and (h) set realistic goals and make plans independently of others. (Id.) She further explained that Plaintiff's "ability to function depends on level of pain due to fibromyalgia and it affects her attention and concentration[,] mental status [and] mood." (AR 778.)

From September 29, 2016, to July 6, 2017, Plaintiff saw her treating psychiatrist, Leon Fajerman, M.D., five times for medication management. (AR 654-58, 664-68, 695-98, 703-06, 740-43.) From other San Ysidro Health Center records, it appears that

Plaintiff was taking Cymbalta in 2016 to treat her depression. (See, e.g., AR 405 (assessing depressive disorder and noting that Plaintiff intended to continue counseling and taking her Cymbalta).) In September 2016, Dr. Fajerman assessed Plaintiff with "major depressive disorder, recurrent severe without psychotic features," and noted Plaintiff reported adequate effects from her medications. (AR 741.) In January 2017, Dr. Fajerman assessed the same diagnosis, and made no changes to Plaintiff's medication. (AR 704.) Dr. Fajerman continued Plaintiff's medication and assessed her with "anxiety, improved," in February 2017. (AR 696.) However, in June 2017, Dr. Fajerman stated that Plaintiff was "suffering with increase in depressive symptoms with anxiety. Dysfunctional at home and no response to meds." (AR 666.) In response, Plaintiff consented to a trial change to Paxil and Remeron. (Id.) In July 2017, Plaintiff reported good levels of relief and Dr. Fajerman did not change her medications. (AR 656.)

After Dr. Fajerman left San Ysidro Health Center, Plaintiff began to see a new psychiatrist for medication management, Louis A. Fontana, M.D. (See AR 76-77 (Plaintiff's counsel explaining that Plaintiff's new psychiatrist submitted a medical source statement after her old psychiatrist lost his license); see also AR 631-35.) Dr. Fontana saw Plaintiff in October 2017, noted she was "somewhat dysphoric," assessed her with depression with anxiety, and planned to transition Plaintiff from Remeron back to Cymbalta. (AR 633.) In December 2017, Plaintiff reported that she had a fibromyalgia crisis, and Cymbalta lessened the depression and anxiety. (AR 606.) Dr. Fontana assessed anxiety, planned to continue, and possibly increase her Cymbalta, and to taper and discontinue Remeron, if possible. (AR 608.) The following month, after noting Plaintiff's mood was "okay," Dr. Fontana continued her Cymbalta at the same dose and gave Plaintiff Remeron with a plan to taper and discontinue it. (AR 597.) After an uneventful visit in March 2018, Dr. Fontana noted in June 2018 that Plaintiff was no longer using Remeron, and she was feeling better with Cymbalta in 60 and 30 mg. (AR 541.) He noted Plaintiff was mainly euthymic with a full affect, though she was tearful

when discussing certain topics. (Id.) At this point, Dr. Fontana determined to transfer her back to her primary doctor for care. (AR 548.)

Dr. Fontana also completed a Mental Residual Functional Capacity Assessment on August 21, 2018. (AR 781-84.) He found Plaintiff less limited than Dr. Ibanez had, though he still found she had some limitations and agreed with Dr. Ibanez that Plaintiff had substantial losses in: (a) "the ability to perform activities within a schedule, maintain regular attendance, and be punctual within ordinary tolerances"; and (b) "the ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods." (Compare AR 781-82 with AR 776-77.) Dr. Fontana further explained that Plaintiff is "unable to sustain activity normally." (AR 784.)

At the administrative hearing, Plaintiff's counsel focused his argument on how Plaintiff's mental impairments impacted her residual functional capacity. (See AR 75 (counsel focusing on the mental impairments and referencing the "over 100 pages of treating records" and medical source statements he had submitted).) He noted that the assessment tools consistently showed her depression and anxiety were severe, and that Drs. Ibanez and Fontana both agreed her impairments would interfere with Plaintiff's ability to get through a workday. (AR 75-79.)

The ALJ denied Plaintiff's disability application in a written decision on September 25, 2019. (AR 15-37.) Although the ALJ found Plaintiff had certain severe physical impairments at step two, He concluded that Plaintiff's "medically determinable mental impairments of anxiety disorder and depressive disorder," were nonsevere. (See AR 24-25.) After acknowledging Plaintiff's history of anxiety and depression, the ALJ noted that Plaintiff reported to her consultative examiner in 2016 that she had never been hospitalized due to these conditions, (AR 25 (citing AR 469)), that she reported improvement in her symptoms in February 2017, (AR 25 (citing AR 699)), that her mood was euthymic, her affect full, and her judgment and insight within normal limits in July

2018, (AR 25 (citing AR 537)), and her medication helped her depression in April 2018, (AR 25 (citing AR 524)). The ALJ then recited his findings regarding the B criteria without further explanation, finding Plaintiff had no limitations in (a) understanding, remembering, or applying information, (b) interacting with others, and (c) adapting or managing oneself. (AR 25.) He determined Plaintiff was mildly limited in concentrating, persisting, or maintaining pace. (Id.) These observations, the ALJ concluded, rendered Plaintiff's mental impairments nonsevere. When crafting Plaintiff's RFC, the ALJ briefly discussed the mental RFC opinions of Drs. Ibanez and Fontana, as well as Plaintiff's GAF scores before reiterating that Plaintiff's mental impairments were not severe and excluding any mental limitations from the RFC. (AR 29-30.)

**3. Analysis**

The Court finds the ALJ's finding that Plaintiff's mental impairments were not severe was not supported by substantial evidence. The relevant question when reviewing the ALJ's step-two severity finding is whether "the medical evidence clearly established that [the claimant] did not have a medically severe impairment or combination of impairments." Webb, 433 F.3d at 687. The only evidence discussed by the ALJ regarding the severity of Plaintiff's mental impairments was the Plaintiff's mental health treatment records and the opinions of her treating doctors, which both indicate Plaintiff's mental impairments were severe.

Significantly, both of Plaintiff's long-standing mental healthcare providers opined that Plaintiff had substantial losses in her ability to perform activities within a schedule, maintain regular attendance, be punctual within ordinary tolerances, and complete a normal work schedule without issue. (AR 781-82, 776-77.) Though Respondent claims these opinions were contradicted by the agency consultants at the initial and reconsideration levels, (ECF No. 14 at 12), those determinations did address Plaintiff's mental RFC because the agency consultants only considered physical impairments. (See AR 124-28 and 137-40.) As detailed earlier in this opinion, at the time of the agency determinations, Plaintiff had not yet alleged any mental health impairment, submitted

mental health treatment records, or undergone a consultative examination of her mental health. (See AR 118-43) see also Beecher v. Heckler, 756 F.2d 693, 695 (9th Cir. 1985) ([B]ecause the reports of [certain doctors] considered [only] physical impairments, whereas [another] report took into account psychological problems as well, 'we cannot conclude that the opinions conflict, but only that they are not drawn from the same facts.'") (quoting Dressel v. Califano, 558 F.2d 508 n.6 (8th Cir. 1977)); Tadesse v. Kijakazi, No. 20-16064, 2021 WL 5600149, at *1 (9th Cir. Nov. 30, 2021) (unpublished) (finding a treating mental health doctor's opinion regarding mental function could not be juxtaposed against state examiner's evaluation of physical function).

To the extent Respondent suggests the opinions of Drs. Ibanez and Fontana rendered in 2018 are not relevant to Plaintiff's impairments before December 31, 2017 (when Plaintiff was last insured), (see ECF No. 14 at 7-8), the Court first notes that the opinions do not explicitly state when Plaintiff's limitations began. (AR 776-84.) Next, the ALJ did not claim to discount them based on the date they were issued. (See AR 25-30); Luther v. Berryhill, 891 F.3d 872, 875 (9th Cir. 2018) ("A reviewing court may only consider the reasons provided by the ALJ in the disability determination and 'may not affirm the ALJ on a ground upon which he did not rely.'") (quoting Garrison v. Colvin, 759 F.3d 995, 1010 (9th Cir. 2014)). Finally, failure to consider opinions rendered after the date last insured is error. See Norman v. Berryhill, Case No. 1-cv-04108-SI, 2018 WL 4519952, at *15 (N.D. Cal. Sept. 19, 2018) (finding ALJ erred by failing to consider medical opinion after date last insured where plaintiff was diagnosed with depression and anxiety disorder prior to her last insured date, her symptoms grew worse over time, and plaintiff's depression could have been disabling before it was diagnosed as such).

These opinions were supported by the entire mental health treatment record on which the opinions were based, and which include further opinions. See Marsh v. Colvin, 792 F.3d 1170, 1172 n.1 (approving determination that clinical progress notes were medical opinions). As described in detail above, Plaintiff's San Ysidro Health

Center Treatment records demonstrate that she received routine mental health treatment and medication for her depression and anxiety from before August 2016 to at least August of 2018. Throughout this time, Plaintiff frequently reported difficulty functioning, concentrating, falling asleep, as well as having anxious, fearful thoughts, feelings of guilt, depressed mood, and fatigue. (AR 748, 744, 736, 720, 713, 699, 691, 687, 669, 659, 649, 623, 612, 601, 577, 561, 536, 529.) The ALJ did not discuss Plaintiff's complaint or diagnoses in his opinion. (See AR 25-30.)

Plaintiff's GAD7, PHQ-9, and GAF scores, also detailed above, all reflect a longstanding struggle with depression and anxiety that impacted Plaintiff's functioning. See Salina S., 2022 WL 3700880, at *8 ("[D]istrict courts have generally treated PHQ-9 scores as probative evidence that an ALJ should consider.") (collecting cases); see also Gallupe v. Sedgwick Claims Mgmt. Servs., 358 F. Supp. 3d 1183, 1193 (W.D. Wash. Feb. 14, 2019) (finding plan administrator's rejection of PHQ-9 and GAD7 scores without explanation was an abuse of discretion); Garrison, 759 F.3d at 1002-05 (discussing claimant's GAF scores at length as probative evidence regarding his mental impairments); Zaldana v. Astrue, No. 11–7728, 2012 WL 3307007, at *5 (C.D. Cal. Aug.13, 2012) (GAF score of 60, as well as physician's opinions of moderate limitations, indicated a severe mental impairment). However, the ALJ quickly dismissed Plaintiff's GAF scores as "mere snapshots in time," and he never mentioned Plaintiff's PHQ-9 and GAD7 scores. (AR 30.)

The ALJ's few citations to the record do not overcome the totality of this mental health evidence. First, the ALJ noted that Plaintiff told consultative examiner Dr. Dao that she had "never been hospitalized for depression or anxiety." (AR 29.) But the diagnoses and uncontradicted opinions of Drs. Ibanez and Fontana do not suggest hospitalization was indicated—there is a significant difference between difficulty maintaining a schedule, for instance, and impairment requiring hospitalization. Furthermore, "[f]ailure to seek treatment is not a substantial basis on which to conclude that a claimant's mental impairment is not severe." Allen v. Comm'r, No. 11–16628,

2012 WL 5857269, at *2 (9th Cir. Nov.19, 2012). Lack of hospitalization for a mental impairment is not "clearly established evidence" to support a finding of nonseverity. See Chou v. Astrue, Case No. ED cv12-376-SP, 2012 U.S. Dist. LEXIS 177065, *12 (finding Plaintiff's never having been hospitalized, not taking psychotropic medication, and not receiving ongoing treatment, were not substantial evidence to conclude that Plaintiff's impairments were not severe). Oddly, the ALJ ignored Dr. Dao's notes that would support a severity finding. (See AR 28-29.) Dr. Dao also noted Plaintiff's history of depression and anxiety lasted many years, she was taking medications, and seeing a psychiatrist quarterly. (AR 469-73.) She experienced decreased energy levels, concentration, and memory, and Dr. Dao deferred any opinion about her mental RFC to an appropriate specialist. (See AR 24-30, 469-73.)

Next, the ALJ relied on two incidents when Plaintiff reported improvements in her depression to show that Plaintiff's symptoms improved with treatment and medication.[9] (AR 25 (citing AR 699 and AR 524), AR 29.) But the fact that a person experienced non-descript "improvement" in symptoms of depression and anxiety does not mean that the person has no functional impairment. Holohan v. Massanari, 246 F.3d 1195, 1205 (9th Cir. 2001). "Cycles of improvement and debilitating symptoms are a common occurrence [with mental health issues], and in such circumstances it is error for an ALJ to pick out a few isolated instances of improvement over a period of months or years and to treat them as a basis for concluding claimant is capable of working." Garrison, 759 F.3d at 1017.

When viewed holistically, Plaintiff's mental health treatment records do not support the ALJ's conclusion that Plaintiff stabilized with treatment. For instance, on February 3, 2017, the same day Plaintiff reported to Dr. Ibanez that she was

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[9] Dr. Ibanez' notes from February 3, 2017, indicate Plaintiff reported "improving," specifically that she was sleeping better after receiving a new prescription from Dr. Fajerman. (AR 699.) Akther Kotha, M.D., wrote a report of his rheumatology follow-up consult to Plaintiff's Physician's Assistant on April 27, 2018, wherein he noted Plaintiff "has depression and Cymbalta is helping." (AR 524.)

"improving," (AR 699), she also reported that functioning was "extremely difficult," and she still presented with "anxious/fearful thoughts, depressed mood, difficulty concentrating, difficulty falling asleep, diminished interest or pleasure, excessive worry, fatigue, feelings of guilt, loss of appetite and restlessness." (Id.) Her PHQ-9 score indicated severe depression, and her GAD7 score indicated severe anxiety. (AR 701.) Dr. Ibanez assessed Plaintiff with "major depressive disorder, recurrent severe without psychotic features[], recurrent." (AR 700.) The Court notes that Plaintiff's statement about improvement was made after she had been assessed with a GAF of 50 at a medication management appointment with Dr. Fajerman approximately one week prior, indicating serious impairment in social, occupational, or school functioning. (AR 704;) see Garrison, 759 F.3d at 1002 n.4. And at her previous psychotherapy appointment with Dr. Ibanez on January 2, 2017, Plaintiff had reported "increased depression," frustration that her impairments did not allow her to work, and worry about various challenges in her life. (AR 713.) During the mental status exam, Dr. Ibanez observed Plaintiff's mood was depressed, anxious and irritable, with "overproductive" speech. (AR 714.) Plaintiff's thought content had "preoccupations/ruminations" and was depressive and self-deprecatory. (Id.) In the "cognition" category, Dr. Ibanez noted issues with "attention/concentration" and "erratic/inconsistent memory." (Id.)

Not long after the reported February 2017 improvement, Dr. Fajerman noted on June 13, 2017 that Plaintiff was suffering from increased symptoms of depression and anxiety, was dysfunctional at home, and had no response to medications. (AR 666.) To address this, he changed Plaintiff's medications to Paxil and Remeron. (Id.) On June 20, 2017, Plaintiff saw Dr. Ibanez for psychotherapy, and reported "a crisis of depression in which she could not tolerate any noise and did not want anyone around her." (AR 660.) Her PHQ-9 score indicated severe depression, and her GAD7 score indicated severe anxiety. (AR 533.) Dr. Ibanez assessed Plaintiff with "major depressive disorder, recurrent severe without psychotic features[], worse." (AR 661.)

Additionally, though Plaintiff evidently told her rheumatologist that Cymbalta was "helping" her depression on or around April 27, 2018, (AR 524), she again saw her psychologist for depression three days later, on April 30, 2018. (AR 561-66.) She reported to Dr. Ibanez that functioning was "very difficult," and presented with multiple depressive symptoms. (AR 561.) Dr. Ibanez, in a "review of systems," noted Plaintiff was positive for fatigue, pain, restlessness, change in appetite, difficulty failing asleep, headache, anxiety, difficulty concentrating, feeling down, depressed or hopeless, feelings of guilt, and little interest or pleasure in doing things. (AR 562.) A mental status exam noted observations that Plaintiff had a depressed and anxious mood, overproductive speech, preoccupations and ruminations, and issues with attention and concentration. (AR 563.) Plaintiff's PHQ-9 score indicated moderately severe depression and her GAD7 score indicated severe anxiety. (AR 566.) The mental health treatment records demonstrate that the ALJ here "[r]ather than describ[ing Plaintiff's] symptoms, course of treatment, and bouts of remission, and thereby charting a course of improvement, . . . improperly singled out a few periods of temporary well-being from a sustained period of impairment." Garrison, 759 F.3d at 1018.

Finally, the ALJ noted that in July 2018, Dr. Ibanez observed Plaintiff's "mood was euthymic and her affect was full. Both her insight and judgment were within normal limits." (AR 25 (citing AR 537).) The ALJ's selection of this note is especially perplexing, since the ALJ failed to discuss other findings from the same mental status exam demonstrating Plaintiff's severe mental impairments: Plaintiff's thought content was depressive and had preoccupations and ruminations, while cognitive issues were noted with "attention/concentration," "reading and writing," and "erratic/inconsistent memory." (AR 537.) Plaintiff noted she "gets desperate when she finds herself unable to do house chores." (AR 536.) Plaintiff's PHQ-9 score indicated severe depression, and her GAD 7 score indicated severe anxiety. (AR 540.) The ALJ's lop-sided citation to this record is the kind of "cherry-picking examples from the record where the claimant is experiencing an absence of symptoms" that has been rejected by the Courts. See

Diedrich v. Berryhill, 874 F.3d 634, 642 (9th Cir. 2017) (citing Attmore v. Colvin, 827 F.3d 872, 877 (9th Cir. 2016)).

In summary, the medical record reflects that Plaintiff regularly complained about significant depressive symptoms, including decreased ability to function and concentrate from at least 2016 to 2018, and her doctors believed her disorders were severe and interfered with her functional ability. The ALJ erred by failing to acknowledge this mental health treatment history and these opinions, and his resulting determination is not supported by substantial evidence. See, e.g., Malkin v. Saul, 818 F. App'x 738, 741-42 (9th Cir. 2020) (ALJ's step two finding that claimant lacked any severe impairment was not supported by substantial evidence where for several years, the claimant was regularly treated for mental illness, she was assessed with a GAF score of 50, and her treating doctor opined she had a decreased capacity to work); Magwood v. Comm'r of Soc. Sec., 417 F. App'x 130, 132 (3d Cir. 2008) (where claimant presented evidence that she received psychiatric services regularly and therapeutic counseling weekly, took antidepressants, was assessed with a GAF of 55-60, and her treating physician opined she could not work on a sustained basis, such evidence "was more than sufficient" to satisfy the step two threshold).

Further, to conclude Plaintiff's mental impairments "did not cause more than minimal limitation in her ability to perform basic mental work activities," (AR 25), the ALJ rejected the uncontradicted mental RFCs from Drs. Ibanez and Fontana. The treating physician rule then in effect required the ALJ to provide clear and convincing reasons, supported by substantial evidence, for doing so. See Woods v. Kijakazi, 32 F.4th 785, 789–90 (9th Cir. 2022). An ALJ cannot merely offer conclusions, but must set forth her own interpretations and explain why those interpretations are more correct than the treating doctor's. Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007). "[A]n ALJ errs when he rejects a medical opinion or assigns it little weight while doing nothing more than ignoring it, asserting without explanation that another medical opinion is more persuasive, or criticizing it with boilerplate language that fails to offer a

substantive basis for his conclusion." Garrison, 759 F.3d at 1012–13 (finding that the ALJ failed to offer specific and legitimate reasons where he largely ignored medical treatment and opinion evidence).

The ALJ assigned little weight to Dr. Ibanez' mental RFC:

> because it is not supported by or consistent with the objective medical evidence. The claimant does not have a moderate or marked mental limitation. Her mental symptoms and [sic] stabilized with treatment. She has never been hospitalized for depression or anxiety. She was cooperative at the consultative exam and her hearing demeanor was appropriate.

(AR 29.) The ALJ recited identical reasons for assigning little weight to Dr. Fontana's opinion, and added that Plaintiff's daily activities of driving, shopping, and caring for her children suggested a higher level of functioning. (AR 29-30.)

The Court has already addressed the insufficiency of the ALJ's claims that Plaintiff stabilized with treatment and was never hospitalized for her mental health. The ALJ's claim that the mental health opinions were inconsistent with objective evidence also fails. When an ALJ discounts a treating physician's opinion because it is inconsistent with the medical record, the ALJ must identify the notes establishing the inconsistency. See Stewart v. Colvin, 575 F. App'x 775, 777 (9th Cir. 2014). Not only did the ALJ fail to identify specific inconsistencies or cite to any support for his conclusion that Plaintiff is without moderate or marked mental limitation, the ALJ completely overlooked the treating physicians' clinical notes and years' worth of PHQ-9 and GAD7 results. (See AR 25-30.) Similarly, the ALJ does not explain how Plaintiff's cooperation at a medical examination or appropriate hearing demeanor conflict with the opined difficulty maintaining a work schedule.

Finally, the ALJ's purported conflict with Plaintiff's activities of daily living does not reach the clear and convincing standard. Though inconsistency between a treating physician's opinion and a plaintiff's daily activities can be a sufficient reason to discount the treating physician's opinion, the ALJ must develop the record with specific detail to

demonstrate how the daily activities are inconsistent with the physician's opinion. See Trevizo v. Berryhill, 871 F.3d 664, 676 (9th Cir. 2017). Here, the ALJ did not sufficiently demonstrate such a conflict, particularly where he relied on Plaintiff's testimony for her activities of daily living. (See AR 27.) Plaintiff testified before the ALJ that she received significant help from her mother, husband, and teenaged sons. (AR 88-94.) She said she only occasionally went to the store by herself or drove her children to school, when her pain and medications permitted her to do so safely. (Id.) Her husband went to the store and did the laundry on weekends. (Id.) She stated she "would like to be fine for her kids, but [she couldn't]," and that it was uncomfortable for her kids to touch or hug her. (Id.); see Trevizo, 871 F.3d at 676 ("Absent specific details about [claimant's] childcare responsibilities, those tasks cannot constitute 'substantial evidence' inconsistent with [the treating physician's] informed opinion, and thus the ALJ improperly relied on [claimant's] childcare activities to reject the treating physician opinion."); Martinez v. Berryhill, 721 F. App'x at 599-600 ("And the ALJ cited some evidence that [claimant] was engaged in daily activities, but it appears those activities were largely aspirational and, in any event, the activities do not suggest that [claimant] could function in the workplace.").

**B. The ALJ's Step-Two Error Was Not Harmless**

An ALJ's error will be harmless if it is inconsequential to the ultimate decision. Basto v. Comm'r of Soc. Sec., Case No. 2:18cv3140-DMC, 2020 WL 5702242, at *6 (E.D. Cal. Sept. 24, 2020). Assuming the ALJ finds an applicant suffers from at least one severe impairment and continues beyond step two in the five-step analysis, the ALJ must consider limitations caused by all of a claimant's impairments, whether severe or not. Burch v. Barnhart, 400 F.3d 676, 683 (9th Cir. 2005) (citing SSR 96-8p (1996)); Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1164 (9th Cir. 2008) (citing SSR 96-8p (1996)). "The RFC therefore should be exactly the same regardless of whether certain impairments are considered 'severe' or not." Buck, 869 F.3d at 1049.

Therefore, any error finding a certain impairment non-severe can only prejudice a claimant if it improperly impacts an ALJ's determination of whether the claimant meets a listing impairment at step three, or the ALJ's determination of the claimant's RFC. Burch, 400 F.3d at 682. Otherwise, when an ALJ finds that the claimant meets the step two threshold, any failure to find a specific impairment severe is harmless. Lewis v. Astrue, 498 F.3d 909, 912 (9th Cir. 2007); see also Groburg v. Astrue, 415 F. App'x 65, 69 (10th Cir. 2011) ("An error at step two concerning the severity of a particular impairment is usually harmless when the ALJ, as here, finds another impairment is severe and proceeds to the remaining stapes of the evaluation. . . . The real problem occurs later in the analysis, where the ALJ is required to consider the effect of all medically determinable impairments, severe or not, in calculating the claimant's RFC.").

The Court finds that the ALJ erred at step two by finding Plaintiff's depression and anxiety not severe without substantial evidence, and by rejecting the opinions of Drs. Ibanez and Fontana without clear and convincing reasons for doing so. Because these errors also affected the ALJ's RFC analysis when the ALJ reiterated at the RFC phase that Plaintiff's mental health impairments were not severe and failed to assess any limitations resulting therefrom, the Court cannot say the step two error was harmless. See Tadesse, 2021 WL 5600149, at *1 ("Although an error at step two may be considered harmless where, as here, the ALJ moves to the next step in the analysis, the decision must reflect that the ALJ considered any limitation posed by the impairment at either step four or step five. . . .[T]hat is not the case here."); Salina S., 2022 WL 3700880, at *8 (step two errors could not be harmless because the ALJ's treatment of the evidence at step two was flawed and the ALJ did not further consider mental impairments when crafting the RFC); Basto, 2020 WL 5702242, at *6 (finding that because the ALJ's error finding Plaintiff's headaches not severe affected steps four and five, it was not harmless).

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## VI. CONCLUSION

The reviewing court may enter a "judgment affirming, modifying, or reversing" the Commissioner's decision. 42 U.S.C. § 405(g). The reviewing court may also remand the case to the Social Security Administration for further proceedings. Id. Whether to remand for further proceedings or award benefits is within the discretion of the Court. See Salvador v. Sullivan, 917 F.2d 13, 15 (9th Cir. 1990); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989). Remand for further proceedings is warranted where additional administrative proceedings could remedy defects in the decision. See Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984). Remand for the payment of benefits is appropriate where no useful purpose would be served by further administrative proceedings, where the record has been fully developed, or where remand would unnecessarily delay the receipt of benefits to which the disabled plaintiff is entitled. See Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); Bilby v. Schweiker, 762 F.2d 716, 719 (9th Cir. 1985); Kornock v. Harris, 648 F.2d 525, 527 (9th Cir. 1980).

Here, Plaintiff contends that the Court should "reverse and remand for payment of benefits" or in the alternative, remand for further proceedings. (ECF No. 14 at 14.) Defendant maintains that if this Court finds the ALJ erred, "the proper remedy would be to remand for further proceedings based on the existing record." (Id. at 14-15.) Here, further administrative proceedings are appropriate to remedy the ALJ's errors, consistent with this ruling. On remand, the ALJ should reevaluate all the mental health evidence, including the opinions of Drs. Ibanez and Fontana to determine whether Plaintiff's mental impairments are severe, and to incorporate any credible limitations arising from Plaintiff's mental impairments, regardless of severity, into the RFC.

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For the foregoing reasons, the Court **ORDERS** that Judgment be entered **reversing** the ALJ's decision and **remanding** this matter for further administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g). The Clerk shall enter judgment accordingly and **terminate** this case.

**IT IS SO ORDERED.**

Dated: September 30, 2022

Honorable Michael S. Berg
United States Magistrate Judge