IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PENNY GARTNER

Plaintiff,

v.

NANCY A. BERRYHILL, Commissioner of Social Security,

Defendant.

Case No. 6:16-cv-01505-SI

OPINION AND ORDER

Tim D. Wilborn, WILBORN LAW OFFICE, P.C., P.O. Box 370578, Las Vegas, NV 89137. Of Attorneys for Plaintiff.

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Michael H. Simon, District Judge.

Penny Gartner ("Plaintiff") seeks judicial review of the final decision of the Commissioner of the Social Security Administration ("Commissioner") denying Plaintiff's application for Supplemental Security Income ("SSI") disability benefits under Title II of the

Social Security Act. For the following reasons, the Court reverses the Commissioner's decision and remands for further proceedings.

STANDARD OF REVIEW

The district court must affirm the Commissioner's decision if it is based on the proper legal standards and the findings are supported by substantial evidence. 42 U.S.C. § 405(g); see also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). "Substantial evidence" means "more than a mere scintilla but less than a preponderance." Bray v. Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995)). It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. (quoting Andrews, 53 F.3d at 1039).

Where the evidence is susceptible to more than one rational interpretation, the Commissioner's conclusion must be upheld. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). Variable interpretations of the evidence are insignificant if the Commissioner's interpretation is a rational reading of the record, and this Court may not substitute its judgment for that of the Commissioner. See Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1193, 1196 (9th Cir. 2004). "[A] reviewing court must consider the entire record as a whole and may not affirm simply by isolating a specific quantum of supporting evidence." Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007) (quoting Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006) (quotation marks omitted)). A reviewing court, however, may not affirm the Commissioner on a ground upon which the Commissioner did not rely. Id.; see also Bray, 554 F.3d at 1226.

BACKGROUND

A. Plaintiff's Application

Plaintiff was born on April 20, 1964, to a woman addicted to many different medications, and was adopted by her mother's sister at an early age. AR 447. Plaintiff dropped out of school in the tenth grade because she had trouble concentrating. Since then, Plaintiff has struggled to maintain employment and relationships. Following an abusive marriage, Plaintiff became homeless and currently lives off of food stamps and $50 per month that her adopted mother sends her. Id. On the date of the hearing, Plaintiff was living out of a tent in Bend, Oregon. AR 48.

On May 21, 2014, Plaintiff filed her second application alleging disability beginning the date of the application. AR 171. Plaintiff requested a hearing after the application was denied. After the hearing on January 7, 2015, Administrative Law Judge ("ALJ") John Michaelsen found Plaintiff not disabled. AR 17-30. Plaintiff timely appealed ALJ Michaelsen's decision to the Appeals Council and her appeal was denied review on May 24, 2016, making the ALJ's decision final. AR 1-7. This appeal followed.

B. The Sequential Analysis

A claimant is disabled if he or she is unable to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months[.]" 42 U.S.C. § 423(d)(1)(A). "Social Security Regulations set out a five-step sequential process for determining whether an applicant is disabled within the meaning of the Social Security Act." Keyser v. Comm'r Soc. Sec. Admin., 648 F.3d 721, 724 (9th Cir. 2011); see also 20 C.F.R. §§ 404.1520 (DIB), 416.920 (SSI); Bowen v. Yuckert, 482 U.S. 137, 140 (1987). Each step is

potentially dispositive. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). The five-step sequential process asks the following series of questions:

1. Is the claimant performing "substantial gainful activity?" 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). This activity is work involving significant mental or physical duties done or intended to be done for pay or profit. 20 C.F.R. §§ 404.1510, 416.910. If the claimant is performing such work, she is not disabled within the meaning of the Act. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is not performing substantial gainful activity, the analysis proceeds to step two.

2. Is the claimant's impairment "severe" under the Commissioner's regulations? 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). An impairment or combination of impairments is "severe" if it significantly limits the claimant's physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). Unless expected to result in death, this impairment must have lasted or be expected to last for a continuous period of at least 12 months. 20 C.F.R. §§ 404.1509, 416.909. If the claimant does not have a severe impairment, the analysis ends. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant has a severe impairment, the analysis proceeds to step three.

3. Does the claimant's severe impairment "meet or equal" one or more of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so, then the claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment does not meet or equal one or more of the listed impairments, the analysis continues. At that point, the ALJ must evaluate medical and other relevant evidence to assess and determine the claimant's "residual functional capacity" ("RFC"). This is an assessment of work-related activities that the claimant may still perform on a regular and continuing basis, despite any limitations imposed by his or her impairments. 20 C.F.R. §§ 404.1520(e), 404.1545(b)-(c), 416.920(e), 416.945(b)-(c). After the ALJ determines the claimant's RFC, the analysis proceeds to step four.

4. Can the claimant perform his or her "past relevant work" with this RFC assessment? If so, then the claimant is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the claimant cannot perform his or her past relevant work, the analysis proceeds to step five.

5. Considering the claimant's RFC and age, education, and work experience, is the claimant able to make an adjustment to other work that exists in

> significant numbers in the national economy? If so, then the claimant is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v), 404.1560(c), 416.960(c). If the claimant cannot perform such work, he or she is disabled. Id.

See also Bustamante v. Massanari, 262 F.3d 949, 954 (9th Cir. 2001).

The claimant bears the burden of proof at steps one through four. Id. at 953; see also Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999); Yuckert, 482 U.S. at 140-41. The Commissioner bears the burden of proof at step five. Tackett, 180 F.3d at 1100. At step five, the Commissioner must show that the claimant can perform other work that exists in significant numbers in the national economy, "taking into consideration the claimant's residual functional capacity, age, education, and work experience." Id.; see also 20 C.F.R. §§ 404.1566, 416.966 (describing "work which exists in the national economy"). If the Commissioner fails to meet this burden, the claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). If, however, the Commissioner proves that the claimant is able to perform other work existing in significant numbers in the national economy, the claimant is not disabled. Bustamante, 262 F.3d at 953-54; Tackett, 180 F.3d at 1099.

C. The ALJ's Decision

The ALJ denied Plaintiff's claim for benefits using the sequential analysis. At step one, the ALJ noted that Plaintiff has not engaged in substantial gainful activity since the application date. AR 22. At step two, the ALJ found the following severe impairments: anxiety disorder; depressive disorder; post-traumatic stress disorder ("PTSD"); attention deficit hyperactivity disorder ("ADHD"); and a history of polysubstance abuse. AR 22-23. At step three, the ALJ found that Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. AR 23. The ALJ next assessed Plaintiff's RFC, concluding that Plaintiff could

perform work as follows: "full range of work at all exertional levels. In addition, the claimant is limited to simple, repetitive, routine tasks requiring no more than occasional, brief interaction with co-workers and the general public." AR 25. At step five, the ALJ, with the testimony of a vocational expert ("VE"), determined that Plaintiff could not perform any past relevant work, but is able to perform the job of hand packager, laundry sorter, or basket filler. AR 29-30.

DISCUSSION

Plaintiff argues that the ALJ erred by: (1) failing to provide clear and convincing reasons supported by substantial evidence to discredit Plaintiff's symptom testimony; (2) failing properly to credit the opinions of treating and examining medical sources; (3) failing fully to credit the lay witness statement; (4) failing properly to calculate Plaintiff's RFC in regards to concentration, persistence, and pace; and (5) failing to give a proper hypothetical question to the VE. The Court addresses each issue in turn.

A. Plaintiff's Symptom Testimony

Plaintiff argues that the ALJ improperly discounted her subjective symptom testimony when the ALJ determined that the evidence suggests Plaintiff is not as limited as she alleges. There is a two-step process for evaluating the credibility of a claimant's testimony about the severity and limiting effect of the claimant's symptoms. Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009). First, the ALJ "must determine whether the claimant has presented objective medical evidence of an underlying impairment 'which could reasonably be expected to produce the pain or other symptoms alleged.'" Lingenfelter v. Astrue, 504 F.3d 1029, 1036 (9th Cir. 2007) (quoting Bunnell v. Sullivan, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). When doing so, the claimant "need not show that her impairment could reasonably be expected to cause the severity of the symptom she has alleged; she need only show that it could reasonably have caused some degree of the symptom." Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996).

Second, "if the claimant meets this first test, and there is no evidence of malingering, 'the ALJ can reject the claimant's testimony about the severity of her symptoms only by offering specific, clear and convincing reasons for doing so.'" Lingenfelter, 503 F.3d at 1036 (quoting Smolen, 80 F.3d at 1281). It is "not sufficient for the ALJ to make only general findings; he must state which pain testimony is not credible and what evidence suggests the complaints are not credible." Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Those reasons must be "sufficiently specific to permit the reviewing court to conclude that the ALJ did not arbitrarily discredit the claimant's testimony." Ortez v. Shalala, 50 F.3d 748, 750 (9th Cir. 1995) (citing Bunnell, 947 F.2d at 345-46).

Effective March 16, 2016, the Commissioner superseded Social Security Ruling ("SSR") 96-7p, governing the assessment of a claimant's "credibility," and replaced it with SSR 16-3p. See SSR 16-3p, available at 2016 WL 1119029. SSR 16-3p eliminates the reference to "credibility," clarifies that "subjective symptom evaluation is not an examination of an individual's character," and requires the ALJ to consider all of the evidence in an individual's record when evaluating the intensity and persistence of symptoms. Id. at *1-2. The Commissioner recommends that the ALJ examine "the entire case record, including the objective medical evidence and individual's statements about the intensity, persistence, and limiting effects of symptoms statements and other information provided by medical sources and other persons; and any other relevant evidence in the individual's case record." Id. at *4. The Commissioner recommends assessing: (1) the claimant's statements made to the Commissioner, medical providers, and others regarding the claimant's location, frequency and duration of symptoms, the impact of the symptoms on daily living activities, and other methods used to alleviate symptoms; (2) medical source opinions, statements, and medical reports regarding the

claimant's history, treatment, responses to treatment, prior work record, efforts to work, daily activities, and other information concerning the intensity, persistence, and limiting effects of an individual's symptoms; and (3) non-medical source statements, considering how consistent those statements are with the claimant's statements about his or her symptoms and other evidence in the file. See id. at *6-7.

The ALJ's credibility decision may be upheld overall even if not all of the ALJ's reasons for discounting the claimant's testimony are upheld. See Batson, 359 F.3d at 1197. The ALJ may not, however, make a negative credibility finding "solely because" the claimant's symptom testimony "is not substantiated affirmatively by objective medical evidence." Robbins, 466 F.3d at 883.

At the administrative hearing, Plaintiff testified that she is not able to work because she is paranoid and does not do well around a lot of people. AR 49. Plaintiff testified that she suffers from concentration issues, is always paranoid that someone is behind her, she hears voices, is always stressed, and has constant mood swings. AR 60-64. She testified she has been on and off her medication because she cannot afford it without insurance. AR 52-53. Plaintiff also testified to hand and back numbness issues that have been untreated because she cannot afford care. AR 66-67. With visible bruises and abrasions, Plaintiff testified she had been beaten by an ex-boyfriend two days before the hearing. AR 43, 64. Regarding Plaintiff's drinking problem, she testified that she drank to help her sleep and to calm herself. AR 64-65.

The ALJ did not fully credit Plaintiff's statements regarding the extent, severity, and limiting effects of her impairments. AR 26-27. The ALJ gave three reasons for discrediting Plaintiff's claimed limitations: (1) Plaintiff's testimony was inconsistent with the scope of the her reported activities of daily living; (2) Plaintiff's treatment history and medication are

inconsistent with her poverty and disability claims; and (3) Plaintiff's alcohol abuse likely affected her functioning. Plaintiff argues that the ALJ's reasons were not specific, clear, or convincing enough to discount Plaintiff's symptom testimony.

1. Plaintiff's Daily Living Activities

The ALJ did not fully credit Plaintiff's testimony, in part because of her daily living activities. Even though Plaintiff is homeless, the ALJ found that Plaintiff "is able to complete her activities of daily living in spite of her difficult living conditions." AR 26. An ALJ may discount a claimant's testimony if it is inconsistent with the claimant's daily activities, or to show that the activities "meet the threshold for transferable work skills[.]" Orn, 495 F.3d at 639; Molina v. Astrue, 674 F.3d 1104, 1112-13 (9th Cir. 2012). Although "disability claimants should not be penalized for attempting to lead normal lives in the face of their limitations," a level of activity that is inconsistent with claimed limitations has a bearing on the credibility of a claimant's symptom testimony. Reddick v. Chater, 157 F.3d 715, 722 (1998).

Plaintiff's daily living activities include going to the community center and the post office, going to the shelter for food, attending appointments to find housing, spending time with friends, word searches, reading, helping another homeless gentleman who has only one leg, caring for a cat, and riding public transportation. AR 26. The ALJ found these activities to be inconsistent with Plaintiff's (1) alleged limitations from mental health symptoms; (2) alleged limitations from cognitive impairments; and (3) alleged social limitations. Id.

a. Alleged Limitations from Mental Health Symptoms

The ALJ concluded Plaintiff's mental health symptoms are not as limiting as she claims because of what she can accomplish on a daily basis. Plaintiff's ability to go to the community center, post office, and ride public transportation are not inconsistent with her mental health symptoms. Plaintiff testified she has issues concentrating, suffers from paranoia, and becomes

stressed out easily. AR 62-63. The ability to walk at her desired pace to the community center and post office is not inconsistent with her reported mental health symptoms. Additionally, Plaintiff helping another homeless gentleman and caring for a cat does not indicate Plaintiff's symptom testimony is not credible. In Plaintiff's application for SSI, the section regarding daily activities describes her interactions with the man and the cat. Plaintiff emptied the gentleman's "porta potty" and made sure he was fed by going to the shelter and bringing back food, or even having her boyfriend cook for him. AR 218. Plaintiff also fed the camp cat she named "Baby Girl" and walked her. Id. This level of activity is not inconsistent with Plaintiff's claimed mental health symptoms and the ALJ erred in so finding.

b. Alleged Limitations from Cognitive Impairments

The ALJ also found that Plaintiff's ability to do word searches, read, and attend appointments to obtain housing indicate Plaintiff's alleged cognitive limitations are less not disabling than reported. AR 26. Plaintiff testified that she takes about three days to complete one word search puzzle and that it is sometimes hard for her to concentrate because her mind wanders. AR 62, 221. Another reason the ALJ found for concluding Plaintiff's cognitive limitation testimony is not credible is because she has "regularly attend[ed] appointments related to obtaining housing." AR 26. Plaintiff has, however, missed three out of her 22 appointments with the mental health associate that was helping her obtain housing, and eighteen out of her 31 mental health and group appointments at Deschutes County. AR 398-419, 441-59. Plaintiff's daily living activities are not clear and convincing reasons for discrediting Plaintiff's symptom testimony regarding her limitations from cognitive impairments.

c. Alleged Social Limitations

Finally, the ALJ concluded that Plaintiff's alleged social limitations are not consistent with her activities of eating meals at the shelter, going to Alcoholics Anonymous meetings and

the community center, spending time with friends and family, interacting with doctors, and a "pleasant" and "cooperative" demeanor with healthcare treatment providers. AR 26-27. Plaintiff's ability "to maintain close relationships with [her] family members and friends is not the same as being able to work with people who are less likely to know about or understand [her] limitations." Lewis v. Apfel, 236 F.3d 503, 517 (9th Cir. 2001). Plaintiff, however, has demonstrated she is able to minimally interact with the general public by going to the community center, post office, and riding public transportation. The ALJ thus gave a clear and convincing reason for discounting Plaintiff's testimony regarding her social limitations when he assessed her able "to tolerate occasional and brief interaction with co-workers and the general public." AR 25.

2. Plaintiff's Treatment and Poverty

The ALJ also discounted Plaintiff's credibility because he found Plaintiff's statement that she cannot consistently take her medication because she cannot afford it, even though her symptoms improved with medication, is contradicted by the fact she "was able to attend appointments for other reasons, such as leg pain, acute sickness, etc. (Exhibits 4F; 9F; 12F; 13F)." AR 26. The ALJ cited to appointments that Plaintiff had for breathing and allergy issues (AR 348-56), extreme knee pain resulting from an ACL tear (AR 369-96), finger fracture and twisted ankle (AR 423-25), and follow ups regarding her finger fracture and cast removal (AR 427-35).

Plaintiff testified "I hurt my knee and my hand, I knew it was serious, so I went to Immediate Care, and then they sent me to the Center." AR 67. The Emergency Medical and Treatment Labor Act forbids public and private hospitals from denying emergency care to indigent or uninsured patients. 42 U.S.C.A. § 1395dd (2011). Additionally, when Plaintiff was treated for breathing and allergy issues, she went to Mosaic Medical, a clinic that "proudly serve[s] individuals and families throughout Central Oregon regardless of income or insurance

status."[1] The fact that these providers will treat either emergencies or a medical issue despite a lack of insurance does not mean that they would have given Plaintiff ongoing prescription medication without insurance.

Plaintiff also testified that she is homeless, eats meals at the local shelter, and when she does not have insurance she is not able to pay for her medication. AR 53, 58. Although it is possible that Plaintiff's impairments could be controlled with medication, she has been unable to secure consistent treatment with her unstable financial situation. AR 52-53. Poverty is a legitimate reason for a claimant to forego medical treatment. Gamble v. Chater, 68 F.3d 319, 321 (9th Cir. 1995); Crosby v. Colvin, 2013 WL 2433335, at *5 (D. Idaho June 3, 2013) ("If there is a good reason, such as not being able to afford treatment, then the fact that a claimant is not taking medication is not a clear and convincing reason for discrediting symptom testimony.") Attending appointments for other reasons does not contradict Plaintiff's statement about not being able to afford medication, and the ALJ erred in so finding.

3. Plaintiff's Alcohol Consumption

Finally, the ALJ did not find all of Plaintiff's symptom testimony credible, in part because "the claimant's alcohol use, which she has downplayed throughout the record, also likely affects her functioning." AR 25-26. Although the Commissioner identified post hoc potential inconsistencies in Plaintiff's records and testimony, the ALJ failed to cite where Plaintiff "downplayed" her alcohol use. The Ninth Circuit is clear that a court "may not take a general finding—an unspecified conflict between Claimant's testimony . . . and her reports to doctors—and comb the administrative record to find specific conflicts." Burrell v. Colvin, 775 F.3d 1133, 1138-39 (9th Cir. 2014) (finding that the ALJ committed legal error because he

[1] Mosaic Medical, http://mosaicmedical.org (last visited June 22, 2017)

"never connected the medical record to Claimant's testimony" nor made "a specific finding linking a lack of medical records to Claimant's testimony about the intensity of her . . . pain"); see also Brown-Hunter, 806 F.3d at 494 (finding legal error because the ALJ "failed to identify the testimony she found not credible because she did not link that testimony to the particular parts of the record supporting her non-credibility determination"). The ALJ erred when he did not link Plaintiff's "downplay[ing]" with incidents in her record, and that error cannot be corrected by the district court or the Commissioner. Id.

The ALJ erred in considering Plaintiff's activities of daily living, Plaintiff's treatment history and medication efficacy, and Plaintiff "downplay[ing]" her alcohol consumption to discount Plaintiff's claimed limitations. With the exception of Plaintiff's social limitations as expressed in the ALJ's RFC, the ALJ failed to give clear and convincing reasons for not fully crediting Plaintiff's symptom testimony regarding her cognitive and mental health limitations.

B. Medical Evidence

Plaintiff argues the ALJ improperly rejected the opinions of treating and examining medical sources when the ALJ gave Dr. Marianne Straumfjord, Ms. Megan West, and Dr. William Trueblood's opinions little weight. Plaintiff discusses the ALJ's consideration of the opinions of Dr. Straumfjord and Ms. West separately, but the Court considers their opinions together as part of one collaborative treating team.

1. Legal Standard

The ALJ is responsible for resolving conflicts in the medical record, including conflicts among physicians' opinions. Carmickle v. Comm'r, 533 F.3d 1155, 1164 (9th Cir. 2008). The Ninth Circuit distinguishes between the opinions of three types of physicians: treating physicians, examining physicians, and non-examining physicians. Generally, "a treating physician's opinion carries more weight than an examining physician's, and an examining

physician's opinion carries more weight than a reviewing physician's." Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001). If a treating physician's opinion is supported by medically acceptable techniques and is not inconsistent with other substantial evidence in the record, the treating physician's opinion is given controlling weight. Id.; see also 20 C.F.R. § 404.1527(d)(2). A treating doctor's opinion that is not contradicted by the opinion of another physician can be discounted only for "clear and convincing" reasons. Ryan v. Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008). If a treating doctor's opinion is contradicted by the opinion of another physician, the ALJ must provide "specific and legitimate reasons" for discrediting the treating doctor's opinion. Id.

In addition, the ALJ generally must accord greater weight to the opinion of an examining physician than that of a non-examining physician. Orn, 495 F.3d at 631. As is the case with the opinion of a treating physician, the ALJ must provide "clear and convincing" reasons for discounting the uncontradicted opinion of an examining physician. Pitzer v. Sullivan, 908 F.2d 502, 506 (9th Cir. 1990). If the opinion of an examining physician is contradicted by another physician's opinion, the ALJ must provide "specific, legitimate reasons" for discrediting the examining physician's opinion. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). An ALJ may reject an examining, non-treating physician's opinion "in favor of a nonexamining, nontreating physician when he gives specific, legitimate reasons for doing so, and those reasons are supported by substantial record evidence." Roberts v. Shalala, 66 F.3d 179, 184 (9th Cir. 1995), as amended (Oct. 23, 1995).

Specific, legitimate reasons for rejecting a physician's opinion may include its reliance on a claimant's discredited subjective complaints, inconsistency with medical records, inconsistency with a claimant's testimony, and inconsistency with a claimant's daily activities.

Tommasetti v. Astrue, 533 F.3d 1035, 1040 (9th Cir. 2008); Andrews, 53 F.3d at 1042-43. An ALJ effectively rejects an opinion when he or she ignores it. Smolen, 80 F.3d at 1286.

2. Dr. Straumfjord and Ms. West

The Court considers Dr. Straumfjord, along with her treating team, including Plaintiff's mental health counselor Ms. West, to be Plaintiff's treating psychiatrist. There is no bright-line test defining who qualifies as a "treating" physician; a single visit may suffice. Benton v. Barnhart, 331 F.3d 1030, 1037-38 (9th Cir. 2003) (finding that supervising psychiatrist could be considered a treating source where psychiatrist oversaw a team of therapists, even though the psychiatrist only saw the claimant once; other members of the treatment team had sufficient contact with the claimant; the psychiatrist completed an assessment of the claimant's Mental Residual Functional Capacity based on information provided by those on the team with more direct contact, and the psychiatrist continued to manage the claimant's medications). Dr. Straumfjord saw Plaintiff six times between July 1, 2014, and April 14, 2015. Dr. Straumfjord supervised Ms. West, who Plaintiff saw many times during that time period.

The ALJ discounted Dr. Straumfjord's and Ms. West's opinions regarding Plaintiff's limitations. Dr. Straumfjord and Ms. West determined that Plaintiff would be unproductive or "off-task" for 30 percent of an eight-hour work day and absent from work for four days each month. AR 440. The assessment of the State agency's reviewing psychological consultants, Bill Hennings, Ph. D., and Kordell Kennemer, Psy. D., assessed Plaintiff with differing limitations. AR 27-28. Thus the ALJ must give specific and legitimate reasons for giving a treating psychiatrist's opinion little weight. Lester, 81 F.3d at 830.

The ALJ gave the opinion regarding the amount of time Plaintiff would be "off task" little weight because Dr. Straumfjord's records did not include:

> any support for the significant limitations assessed in the medical source statement. For example, the doctor has only seen the claimant on two occasions. While she indicated that the claimant was anxious during the first appointment, she added that the claimant's symptoms appeared to have improved with the medication during the second appointment. In addition, the extreme limitations assessed by these providers are inconsistent with the claimant's testimony at the hearing and her previously reported activities, discussed in detail above.

AR 27 (citations omitted).

For the first reason, because Dr. Straumfjord had only seen Plaintiff twice, the ALJ did not have all of the relevant records. At the time the ALJ wrote his decision, Plaintiff had only submitted two treatment notes from Dr. Straumfjord for consideration. To the Appeals Council, however, Plaintiff submitted four additional treatment notes from appointments with Dr. Straumfjord between October 15, 2014 and April 14, 2015, plus a letter describing the severity of Plaintiff's symptoms. AR 450-61.[2] Because this new evidence is part of the record the Court must consider, the ALJ's reason for discounting the opinion because Dr. Straumfjord had only seen Plaintiff on two occasions is not supported by substantial evidence in the record.

As a second reason for discounting Dr. Straumfjord's opinion, the ALJ found that Plaintiff's testimony and her activities are inconsistent with the limitations Dr. Straumfjord assessed. Dr. Straumfjord and Ms. West found that Plaintiff would be either precluded from performing or off-task for 30 percent of an eight-hour work day because of her limitations in understanding and memory, sustained concentration and persistence, and adaptation. As discussed above, the ability to go to the community center and the post office, to get food from the shelter, attend appointments to find housing, spend time with friends, complete word

[2] "[W]hen the Appeals Council considers new evidence in deciding whether to review a decision of the ALJ, that evidence becomes part of the administrative record, which the district court must consider when reviewing the Commissioner's final decision for substantial evidence." Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157, 1163 (9th Cir. 2012).

searches, read, help another homeless gentleman, care for a cat, and ride public transportation are not inconsistent with the limitations Dr. Straumfjord assessed. Plaintiff's activities are not a legitimate reason to give "little weight" to Dr. Straumfjord's opinion.

The ALJ also noted:

> Ms. West and Dr. Straumfjord provided no supporting explanation for these extreme limitations. Moreover, a review of the treatment notes from Ms. West reveals that the claimant's primary complaints centered around situational stressors, such as homelessness and her inability to secure housing despite being granted housing vouchers. Additionally, Ms. West does not provide any explanation regarding the effects of the claimant's alcohol use.

AR 27.

Regarding the ALJ's reason of "no supporting explanation," Dr. Straumfjord and Ms. West provided treatment notes that explained the symptoms and signs they relied on in making their diagnoses, medication prescriptions, and assessing Plaintiff's limitations. AR 443-59. Although much of this evidence was provided to the Appeals Council and was not before the ALJ, the Court must consider it as part of the record in considering whether the ALJ's conclusion is supported by substantial evidence. Brewes, 682 F.3d at 1163. Thus, the ALJ's reason for giving the limitations assessment little weight is not legitimate in light of these treatment notes and explanations.

The next reason the ALJ cited for discounting the collaborative opinion is because Ms. West's treatment of Plaintiff centered on her "situational stressors." At Plaintiff's appointments, she discussed her homelessness, her abusive partner, and her drinking. AR 402, 404, 407, 410; see Long v. Comm'r, Soc. Sec. Admin., 2011 WL 589121, at *7 (D. Or. Feb. 9, 2011) (finding the ALJ gave specific and legitimate reasons for rejecting a treating physician's opinion because "the treatment records reflect that Long's condition was controlled when she

was medicated and that her down periods were almost always associated with situational stressors or lack of medication"). As discussed in the following paragraph, however, the collaborative opinion did not include limitations caused by Plaintiff's alcohol use. Additionally, as discussed below, the record is not fully developed regarding how much of Plaintiff's limitations are associated with situational stressors such as homelessness and abuse, or whether she has a cognitive impairment from head trauma, long term alcohol abuse, or some other cause. Thus, this is not a legitimate reason for discounting Dr. Straumfjord's and Ms. West's collaborative opinion.

The final reason the ALJ provided for discrediting the collaborative opinion is because it failed to consider Plaintiff's alcohol consumption. At the top of the assessment, however, is a list of instructions on how to fill out the check-box form. Those instructions include the statement:

> In responding to the ratings on this form, please do not include any limitations which you believe the individual has as a result of his or her alcoholism or drug addiction, if any. In other words, do not include limitations which would go away if the individual stopped using alcohol or drugs.

AR 437 (emphasis in original).

Dr. Straumfjord and Ms. West were instructed to not put in any limitations that would result from alcohol on Plaintiff's assessment. Thus, an "explanation regarding the effects of the claimant's alcohol use" was not necessary because Plaintiff's limitations from alcohol use were not included. There is no evidence in the record supporting an assumption that Dr. Straumfjord and Ms. West failed to follow instructions. To the contrary, in the letter provided to the Appeals Council, Dr. Straumfjord and Ms. West stated "[i]t is very clear to us that her symptoms are not a result of her alcohol usage, but rather, the complete opposite. The limitations identified in the initial medical source statement that we provided were independent of any alcohol usage."

AR 461. A lack of an explanation for Plaintiff's alcohol use is not a legitimate reason to discount the opinion because Plaintiff's limitations were assessed "independent of any alcohol usage."

3. Dr. Trueblood

Plaintiff argues that the ALJ improperly discounted the opinion of Dr. Trueblood, Plaintiff's examining psychologist. The ALJ found Dr. Trueblood's opinion unreliable for several reasons: (1) it is unsubstantiated by the findings of Dr. Trueblood's evaluation; (2) it is inconsistent with his observations of Plaintiff; (3) it suggests Plaintiff was exaggerating her symptoms; (4) Dr. Trueblood did not appear to factor Plaintiff's alcohol use into her functional capacity; and (5) Dr. Trueblood relied on Plaintiff's reports as a basis for Dr. Trueblood's conclusions. AR 27-28.

Rather than giving full credit to the examining psychologist's interpretation of the screening, the ALJ gave great weight to the interpretation of Dr. Trueblood's cognitive screening by the State agency's reviewing psychological consultants, Drs. Hennings and Kennemer. Based on Plaintiff's results on the screening, Drs. Hennings and Kennemer opined that Plaintiff would be capable of maintaining concentration, persistence, and pace for two-to-three step tasks for normal two-hour work periods. AR 28.

An ALJ may discount an examining, non-treating physician's opinion "in favor of a nonexamining, nontreating physician when he gives specific, legitimate reasons for doing so, and those reasons are supported by substantial record evidence." Roberts, 66 F.3d at 184. "The opinion of a nonexamining medical advisor," however, "cannot by itself constitute substantial evidence that justifies the rejection of the opinion of an examining or treating physician." Morgan v. Comm'r, Soc. Sec. Admin., 169 F.3d 595, 602 (9th Cir. 1999) (citations omitted). In other words, the ALJ must identify conflicting medical evidence and "set forth his own

interpretations and explain why they, rather than the doctors, are correct." Reddick, 157 F.3d at 725 (internal quotation omitted).

The ALJ first reasoned Dr. Trueblood's opinion is unreliable because it is unsubstantiated by the findings of the evaluation. During his examination, Dr. Trueblood performed a brief cognitive screening of Plaintiff. Based on Plaintiff's performance on the screening, Dr. Trueblood determined Plaintiff has

> impaired performance on a memory screening task and significantly impaired performances on working memory tasks . . . .While some degree of the impairment of cognitive screening may be accounted for by ADHD and possibly also intellectual level . . . the cognitive screening results also are considered strongly suggestive of the presence of significant acquired cognitive impairment . . . . Regarding ability to remember instructions, performance was impaired on a memory screening task, and there is strongly suggestive evidence for significant impairment in working memory . . . . Overall tentative impression is of substantial impairment in the patient's ability to sustain attention/concentration and persist . . . . Adaptive functioning seems likely to be significantly compromised by judgment impairment and also by attention and memory impairment.

AR 344-45.

Although the ALJ identified the conflicting medical evidence, the opinions by the State agency's reviewing psychological consultants, the ALJ did not "set forth his own interpretations and explain why they, rather than the doctors,' are correct" as required by Reddick. The ALJ erred by not explaining why the reviewing psychological consultants' opinions were the correct interpretation, rather than Dr. Trueblood's interpretation. Additionally, the reviewing psychological consultants' opinions cannot, by themselves, constitute a specific and legitimate reason to discredit Dr. Trueblood's opinion.

The ALJ also found Dr. Trueblood's opinion deserving of little weight because it is not consistent with Dr. Trueblood's observations of the claimant. Specifically, the ALJ refers to

Dr. Trueblood's descriptions of Plaintiff as "presenting with appropriate hygiene and grooming, with coherent and logical statements, with an appropriate affect, and as pleasant." AR 27. Dr. Trueblood, however, opined that Plaintiff suffers from impairments in memory, concentration, and adaptation. AR 344-45. The ability to groom oneself at a shelter, speak coherently, and be pleasant is not inconsistent with impairments in memory, concentration, and adaptation, and thus is not a specific and legitimate reason to discredit Dr. Trueblood's opinion.

The ALJ further supported his finding by noting that Plaintiff may have been exaggerating her symptoms to Dr. Trueblood because "there is no other report of [auditory hallucinations] in the record, aside from a vague reference in 2014." AR 27-28. The ALJ, however, was mistaken. In the record the ALJ reviewed, Plaintiff noted her auditory hallucinations four times. The first was in April 9, 2013, on Plaintiff's disability report. The second mention was in Dr. Trueblood's examination on June 24, 2013. The third mention was to Dr. Straumfjord in September of 2014, which is the only instance the ALJ cited to. The fourth mention was also to Dr. Straumfjord in October of 2014. Additionally, there were three other notes of auditory hallucinations from Dr. Straumfjord, from November 2014 to April 2015, in the materials submitted to the Appeals Council. AR 453, 457-58. Because Plaintiff has reported hallucinations to her mental health doctors consistently from 2013 to 2015, and because Dr. Trueblood found no evidence of malingering, AR 345, this reason provided by the ALJ is not supported by substantial evidence in the record.

The ALJ's fourth reason for giving Dr. Trueblood's opinion little weight is because "he did not appear to factor the claimant's alcohol use into her functional capacity." AR 28. Dr. Trueblood, however, noted that his conclusions are tentative because only a cognitive screening was performed and that

> If further information is needed about the patient's cognitive functioning, a neuropsychological screening examination could be performed. Note that long-term alcohol abuse which continues to the present would be a very plausible contributing factor to acquired cognitive impairment.

AR 344-45.

Dr. Trueblood then noted that Plaintiff's history of head trauma is the other most likely contributing factor of her acquired cognitive impairment, while PTSD and Hepatitis C could contribute as well. Id. When Dr. Trueblood explained the relevant factors that went into his diagnosis, such as Plaintiff's performance on the screening, her tangential speech, her anxiety and avoidance, her homelessness, and frequent burns, he did not list alcohol as a reason for these limitations. He did, however, note in that same section that Plaintiff may not be capable of handling her disability funds because of her drinking. Id. The ALJ concluded that this likely meant Dr. Trueblood did not consider Plaintiff's alcohol in regards to her limitations, and because of that, the opinion should be given little weight. Plaintiff argues, however, that the ALJ's reason indicates his failure to fully develop the record, per his duty, which is discussed further below. Ultimately, because the ALJ erred by not fully developing the record, this reason for discounting Dr. Trueblood's opinion is not a specific and legitimate reason.

The last reason the ALJ gives for discrediting Dr. Trueblood's opinion is because Dr. Trueblood relies on Plaintiff's reports as a basis for his conclusions. To support this, the ALJ gives the example that Plaintiff's reported "inability to concentrate on reading, [is] inconsistent with her own statements on a function report." AR 28. Plaintiff's attempt to read is not inconsistent with Plaintiff's difficulty of concentrating while reading. The Ninth Circuit has recognized that "disability claimants should not be penalized for attempting to lead normal lives in the face of their limitations." Reddick, 157 F.3d at 722; see, e.g., Cooper v. Bowen, 815 F.2d 557, 561 (9th Cir. 1987) (noting that a disability claimant need not "vegetate in a dark

room" in order to be deemed eligible for benefits). Additionally, the ALJ erred in discounting Plaintiff's subjective symptom testimony, as discussed above. Dr. Trueblood's reliance on Plaintiff's reports is not a specific and legitimate reason to discount Dr. Trueblood's medical opinion, and the ALJ erred in so finding.

4. The ALJ's Duty to Develop the Record

Plaintiff argues that the ALJ failed his duty of developing the record in regard to Dr. Trueblood's opinion and by not ordering the neuropsychological exam. The ALJ has an affirmative duty to ensure the adequate development of the record. Celaya v. Halter, 332 F.3d 1177, 1183 (9th Cir. 2003). The duty to fully and fairly to develop the record ensures that the claimant's interests are considered, even when the claimant is represented by counsel. Smolen, 80 F.3d at 1283. The ALJ's duty to develop the record fully is "heightened where the claimant may be mentally ill and thus unable to protect [his or] her own interests." Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001). The responsibility to develop the record "rests with the ALJ in part because disability hearings are inquisitorial rather than adversarial in nature." Loeks v. Astrue, 2011 WL 198146, at *5 (D. Or. Jan. 18, 2011) (citing Sims v. Apfel, 530 U.S. 103, 110-11 (2000)).

The duty to develop the record is not triggered in the event of a silent record that does not support disability. Armstrong v. Comm'r, Soc. Sec. Admin., 160 F.3d 587, 589 (9th Cir. 1998). The ALJ's duty to develop the record is triggered only by "ambiguous evidence or when the record is inadequate for proper evaluation of the evidence." Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001). Where the duty to develop the record is triggered, such supplementation can include subpoenaing physicians, submitting questions to the physicians, continuing the hearing, or keeping the record open after the hearing to allow the record to be supplemented.

Tonapetyan, 242 F.3d at 1150. The ALJ may also order a consultative examination in certain circumstances. 20 C.F.R. §§ 404.1519a, 416.919a.

Here, the record is not silent on the issue of the need for neuropsychological testing for Plaintiff. On June 24, 2013, Dr. Trueblood recommended a neuropsychological examination to fully understand Plaintiff's cognitive functioning and the reasons for it, whether it be alcohol abuse (which could lead to an improvement with abstinence), head trauma, PTSD, or Hepatitis C. AR 344-45. Because Dr. Trueblood did not expressly distinguish Plaintiff's limitations from alcohol abuse in her functional capacity, as the ALJ points out, this creates an ambiguity when considered with Dr. Staumfjord and Ms. West's assessment and letter. Dr. Straumfjord and Ms. West's assessment did not include any limitations from Plaintiff's alcohol abuse. Thus, the record has one doctor that explicitly states alcohol is not included in Plaintiff's limitations, with a second doctor that does not state explicitly if alcohol abuse is included in Plaintiff's limitations. The record is ambiguous as to whether Plaintiff's symptoms and limitations are caused by alcohol abuse, traumatic brain injury, PTSD, Hepatitis C, or some combination thereof.

Because significant evidence in the record suggests the possibility of a medically determinable mental impairment—i.e., cognitive disorder—the ALJ had a duty to fully develop the record. See Allen v. Astrue, 2010 WL 5146526 (W.D. Wash. Nov. 19, 2010), (finding that the ALJ erroneously failed to develop the record by not obtaining a neuropsychological assessment where the record is unclear as to whether the plaintiff's mental limitations were the result of a cognitive disorder, learning disorder, or both, and examining psychologist recommended the assessment), report and recommendation adopted, 2010 WL 5146522, at *6 (W.D. Wash. Dec. 10, 2010); Gama v. Colvin, 2013 WL 5200025, at *10 (W.D. Wash. Sept. 16, 2013) (holding that "the ALJ erred by failing to obtain the additional neuropsychological testing that [an examining

physician] stated was needed to assess plaintiff's cognitive deficits" and noting that the "opinion triggered the ALJ's duty to order a supplemental neuropsychological evaluation that includes objective testing necessary to properly evaluate the evidence of record").

The ALJ declined Plaintiff's request for a neuropsychological examination because "a consultative examination would be unnecessary given that there is sufficient evidence in the record to make a finding regarding the claimant's mental health condition" and because Plaintiff "was less than truthful with [Dr. Trueblood] . . . it [is] unlikely that another evaluation would prove fruitful." AR 20. With regard to the first reason, there is not sufficient evidence in the record to determine the reason for Plaintiff's mental impairment, whether the impairment can improve with abstinence from alcohol, and the extent of Plaintiff's limitations. Additionally, as discussed above, there is not substantial evidence in the record suggesting that Plaintiff was exaggerating her auditory hallucinations to Dr. Trueblood because Plaintiff's consistent reporting of the hallucinations, the new evidence submitted to the Appeals Council, and because Dr. Trueblood did not "have the impression that she was attempting to overstate her psychological problems." AR 345. The ALJ did not give compelling or legitimate reasons for rejecting Plaintiff's request.

C. Lay Witness Testimony

Plaintiff argues that the ALJ improperly discounted Ms. Michelle Binder's lay opinion without providing a germane reason. "In determining whether a claimant is disabled, an ALJ must consider lay witness testimony concerning a claimant's ability to work." Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1053 (9th Cir. 2006). Lay witness testimony regarding a claimant's symptoms or how an impairment affects her ability to work is competent evidence. Id. Thus, an ALJ may not reject such testimony without comment. Id. In rejecting lay testimony, the ALJ need not "discuss every witness's testimony on an individualized, witness-by-witness basis.

Rather, if the ALJ gives germane reasons for rejecting testimony by one witness, the ALJ need only point to those reasons when rejecting similar testimony by a different witness." Molina v. Astrue, 674 F.3d 1104, 1114 (9th Cir. 2012).

An ALJ errs by failing to "explain her reasons for disregarding . . . lay witness testimony, either individually or in the aggregate." Id. at 1115 (citing Nguyen, 100 F.3d at 1467 (9th Cir. 1996)). This error may be harmless "where the testimony is similar to other testimony that the ALJ validly discounted, or where the testimony is contradicted by more reliable medical evidence that the ALJ credited." See id. at 1118-19. Additionally, "an ALJ's failure to comment upon lay witness testimony is harmless where 'the same evidence that the ALJ referred to in discrediting [the claimant's] claims also discredits [the lay witness's] claims.'" Id. at 1122 (quoting Buckner v. Astrue, 646 F.3d 549, 560 (8th Cir. 2011)). Where an ALJ ignores uncontradicted lay witness testimony that is highly probative of a claimant's condition, "a reviewing court cannot consider the error harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination." Stout, 454 F.3d at 1056.

If an ALJ rejects lay witness evidence, at least in part, on the same clear and convincing reasons the ALJ discounted the claimant's allegations, the ALJ, thus, also gave germane reasons for discounting the lay witness testimony. Valentine v. Comm'r, Soc. Sec. Admin., 574 F.3d 685, 694 (9th Cir. 2009) ("In light of our conclusion that the ALJ provided clear and convincing reasons for rejecting Valentine's own subjective complaints, and because Ms. Valentine's testimony was similar to such complaints, it follows that the ALJ also gave germane reasons for rejecting her testimony.")

The ALJ gave Ms. Binder's function report little weight because "the alleged limitations are not entirely consistent with the claimant's relatively normal activities of daily living." AR 28. In Valentine, the court found the ALJ's clear and convincing reasons for discounting the claimant's allegations were germane for discounting the similar allegations of the lay witness testimony. 574 F.3d at 694. Here, the only reason the ALJ gave for discounting Ms. Binder's function report is because it is inconsistent with Plaintiff's daily living activities. AR 28. As discussed above, the Court does not find Plaintiff's daily activities to be inconsistent with her alleged limitations. The ALJ did not give a clear and convincing reason for discounting Plaintiff's symptom testimony based on her activities. It follows that because Plaintiff's "not entirely consistent" activities were the only reason cited by the ALJ, and because that was not a clear and convincing reason to discount Plaintiff's alleged limitations, it is not a germane reason for discounting Ms. Binder's lay witness testimony.

D. Plaintiff's Mental RFC

Plaintiff argues that the ALJ erred by not incorporating her step three finding that Plaintiff has "moderate difficulties" with regard to "concentration, persistence or pace" into the RFC. See AR 24. Plaintiff contends that the error was not harmless because a limitation to simple work does not account for the fact that her ADHD and cognitive impairments not only limit her ability to understand a task, but also limit her ability to stay focused on a task. See Amanti v. Comm'r, Soc. Sec. Admin., 2012 WL 5879530, *7 (D. Or. Nov. 19, 2012) ("The question with regard to [the simple work] limitation is not whether Plaintiff can understand instructions, but whether she has the mental capacity to stay on task such that employment is available.").

When an ALJ makes a finding of moderate limitations in concentration, persistence, or pace in step three, those limitations must be reflected in the RFC assessment. Saucedo v. Colvin, 2014 WL 4631225, at *17-18 (D. Or. Sept. 15, 2014) (failure to include limitations

regarding concentration, persistence, or pace in the RFC is reversible error if the ALJ found such limitations at step three); see also Lubin v. Comm'r, Soc. Sec. Admin., 507 F. App'x 709, 712 (9th Cir. 2013) ("The ALJ must include all restrictions in the [RFC] determination . . . including moderate limitations in concentration, persistence, or pace").

An ALJ's assessment may "adequately capture[ ] restrictions related to concentration, persistence, and pace where the assessment is consistent with restrictions identified in the medical testimony." Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1174 (9th Cir. 2008). The medical testimony relied upon by the ALJ in Stubbs-Danielson found that the plaintiff retained the ability to perform simple tasks, notwithstanding some evidence that the plaintiff had deficiencies in pace. Id. Stubbs-Danielson is inapplicable, however, to cases where the medical evidence establishes that the plaintiff has restrictions in concentration, persistence, or pace that are not captured in the RFC. See Brink v. Comm'r Soc. Sec. Admin., 343 F. App'x 211, 212 (9th Cir. 2009) ("The medical testimony in Stubbs-Danielson, however, did not establish any limitations in concentration, persistence, or pace. Here, in contrast, the medical evidence establishes, as the ALJ accepted, that Brink does have difficulties with concentration, persistence, or pace. Stubbs-Danielson, therefore, is inapposite."); Lee v. Colvin, 80 F. Supp. 3d 1137, 1151 (D. Or. 2015) (finding the ALJ erred when he concluded that Plaintiff has moderate difficulties in concentration, persistence, and pace but did not include those limitations in Plaintiff's RFC); Graybeal v. Astrue, 2011 WL 6019434, at *4 (D. Or. Nov. 2, 2011) ("[W]here medical testimony identifies more significant restrictions related to concentration, persistence or pace, an ALJ errs by formulating an RFC limiting claimant only to simple, repetitive work.").

In this case, the medical evidence establishes, and the ALJ accepted, that Plaintiff has, at least, moderate limitations in concentration, persistence, and pace. AR 24; 345 (Dr. Trueblood's

opinion that Plaintiff has a "substantial impairment" in her ability to sustain attention and concentration and to persist); 438 (Dr. Straumfjord and Ms. West's conclusion that Plaintiff would either be unable to maintain concentration for two-hour segments, or be off-task 30 percent of those two hour segments); 444 (Dr. Straumfjord noted Plaintiff's concentration is still poor, despite medication); 461 (Dr. Straumfjord and Ms. West's letter stating Plaintiff's "PTSD, paired with her ADHD, make it so that she has much difficulty concentrating or focus and cannot stick to things that need to get done.").

The issue, then, is whether the ALJ's RFC assessment sufficiently translates the medical evidence into functional limitations in the RFC. The RFC limits Plaintiff to "simple, repetitive, routine tasks" without a further limitation related to concentration, persistence, and pace. AR 25. An RFC that limits Plaintiff to simple work does not incorporate Plaintiff's moderate difficulty with concentration, persistence, and pace. Therefore, the ALJ failed fully to capture Plaintiff's limitations, as the jobs identified by the VE (hand packager, laundry sorter, and basket filler) may still require focus and concentration despite being "simple, repetitive, routine tasks."

E. Step Five Findings

Finally, Plaintiff argues that the ALJ's step five finding is erroneous because the dispositive hypothetical question posed to the VE did not account for all of Plaintiff's limitations. A hypothetical posed to the VE must be complete and "include all of the claimant's functional limitations, both physical and mental." Flores v. Shalala, 49 F.3d 562, 570 (9th Cir. 1995); see also Matthews v. Shalala, 10 F.3d 678, 681 (9th Cir. 1993) ("If a vocational expert's hypothetical does not reflect all the claimant's limitations, then the . . . testimony has no evidentiary value." (citations and quotation marks omitted)); Brink, 343 F. App'x at 212 ("The hypothetical question to the vocational expert should have included not only the limitation to 'simple, repetitive work,' but also Brink's moderate limitations in concentration, persistence, or

pace."). Because the ALJ failed to incorporate Plaintiff's moderate limitations in concentration, persistence, and pace into Plaintiff's RFC and the hypothetical posed to the VE, the ALJ erred in relying upon the VE testimony that there were significant jobs in the economy that Plaintiff could perform.

F. Remand

Within the Court's discretion under 42 U.S.C. § 405(g) is the "decision whether to remand for further proceedings or for an award of benefits." Holohan v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001) (citation omitted). Although a court should generally remand to the agency for additional investigation or explanation, a court has discretion to remand for immediate payment of benefits. Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1099-1100 (9th Cir. 2014). The issue turns on the utility of further proceedings. A remand for an award of benefits is appropriate when no useful purpose would be served by further administrative proceedings or when the record has been fully developed and the evidence is insufficient to support the Commissioner's decision. Id. at 1100. A court may not award benefits punitively and must conduct a "credit-as-true" analysis on evidence that has been improperly rejected by the ALJ to determine if a claimant is disabled under the Act. Strauss v. Comm'r of the Soc. Sec. Admin., 635 F.3d 1135, 1138 (9th Cir. 2011).

In the Ninth Circuit, the "credit-as-true" doctrine is "settled" and binding on this Court. Garrison v. Colvin, 759 F.3d 995, 999 (9th Cir. 2014). The United States Court of Appeals for the Ninth Circuit articulates the rule as follows:

> The district court must first determine that the ALJ made a legal error, such as failing to provide legally sufficient reasons for rejecting evidence. If the court finds such an error, it must next review the record as a whole and determine whether it is fully developed, is free from conflicts and ambiguities, and all essential factual matters have been resolved. In conducting this review, the district court must consider whether there are inconsistencies

> between the claimant's testimony and the medical evidence in the record, or whether the government has pointed to evidence in the record that the ALJ overlooked and explained how that evidence casts into serious doubt the claimant's claim to be disabled. Unless the district court concludes that further administrative proceedings would serve no useful purpose, it may not remand with a direction to provide benefits.
>
> If the district court does determine that the record has been fully developed and there are no outstanding issues left to be resolved, the district court must next consider whether the ALJ would be required to find the claimant disabled on remand if the improperly discredited evidence were credited as true. Said otherwise, the district court must consider the testimony or opinion that the ALJ improperly rejected, in the context of the otherwise undisputed record, and determine whether the ALJ would necessarily have to conclude that the claimant were disabled if that testimony or opinion were deemed true. If so, the district court may exercise its discretion to remand the case for an award of benefits. A district court is generally not required to exercise such discretion, however. District courts retain flexibility in determining the appropriate remedy and a reviewing court is not required to credit claimants' allegations regarding the extent of their impairments as true merely because the ALJ made a legal error in discrediting their testimony.

Dominguez v. Colvin, 808 F.3d 403, 407-08 (9th Cir. 2015) (internal citations and quotation marks omitted).

As discussed above, the ALJ erred in discounting Plaintiff's symptom testimony, did not give specific and legitimate reasons supported by substantial evidence in the record to discount the medical opinions of Dr. Straumfjord and Ms. West, and Dr. Trueblood, improperly discounted lay witness testimony, and failed to develop the record with regard to Plaintiff's cognitive impairments. Because the record needs further development, the Court concludes that there are outstanding issues that must be resolved before a determination of disability can be made. Upon remand, the ALJ shall properly develop the record, consider the medical and lay witness evidence, and consider Plaintiff's symptom testimony.

CONCLUSION

The Commissioner's decision that Plaintiff is not disabled is REVERSED and this case is REMANDED for further proceedings consistent with this opinion.

IT IS SO ORDERED.

DATED this 28th day of July, 2017.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge