

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

May 31, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HEATHER R.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 1:18-CV-3069-FVS

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

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 12, 14. This matter was submitted for consideration without oral argument. The plaintiff is represented by Attorney D. James Tree. The defendant is represented by Special Assistant United States Attorney Jeffrey E. Staples. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the court **GRANTS** Plaintiff's Motion for Summary Judgment, ECF No. 12, and **DENIES** Defendant's Motion for Summary Judgment, ECF No. 14.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~ 1

1 **JURISDICTION**

2 Plaintiff Heather R.¹ protectively filed for supplemental security income and
3 disability insurance benefits on March 20, 2014, alleging an onset date of July 11,
4 2013. Tr. 229-43. Benefits were denied initially, Tr. 125-31, and upon
5 reconsideration, Tr. 132-42. Plaintiff requested a hearing before an administrative
6 law judge (“ALJ”), which was held before ALJ Mary Gallagher Dilley on March 14,
7 2017. Tr. 51-79. Plaintiff had representation and testified at the hearing. *Id.* The
8 ALJ denied benefits, Tr. 13-35, and the Appeals Council denied review. Tr. 1. The
9 matter is now before this Court pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

10 **BACKGROUND**

11 The facts of the case are set forth in the administrative hearing and
12 transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner.
13 Only the most pertinent facts are summarized here.

14 Plaintiff was 27 years old at the time of the hearing. *See* Tr. 56. She
15 graduated from high school and had “some college.” Tr. 57. Plaintiff lives with
16 her parents. Tr. 56. She has work history as a housekeeper, caregiver, fast food
17 worker, and kitchen supervisor. Tr. 61-62, 74-75. Plaintiff testified that she

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¹ In the interest of protecting Plaintiff’s privacy, the Court will use Plaintiff’s first
20 name and last initial, and, subsequently, Plaintiff’s first name only, throughout this
21 decision.

1 cannot do any of her past work because the stressful environment “brings on a
2 manic episode and a manic attack basically and brings me to being back to being
3 unstable.” Tr. 62.

4 Plaintiff testified that she has a clean and sober date of May 31, 2014. Tr.
5 58. She reported that after becoming clean and sober, her mental health symptoms
6 “became more prevalent” but she has since developed better coping mechanisms.
7 Tr. 64. Plaintiff testified that she suffers from anxiety, seizures, manic and
8 depressive episodes, conversion disorder, PTSD, and joint pain. Tr. 63-67, 72.
9 She testified that she lives with her parents and they are her caregivers, including:
10 cooking for her, taking care of her money, disbursing her medications, and
11 reminding her to do self-care. Tr. 68. Plaintiff “stay[s] close to home,” aside from
12 going to NA meetings, and counseling twice a month. Tr. 70-73.

13 **STANDARD OF REVIEW**

14 A district court’s review of a final decision of the Commissioner of Social
15 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
16 limited; the Commissioner’s decision will be disturbed “only if it is not supported
17 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
18 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a
19 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159
20 (quotation and citation omitted). Stated differently, substantial evidence equates to
21 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and

1 citation omitted). In determining whether the standard has been satisfied, a
2 reviewing court must consider the entire record as a whole rather than searching
3 for supporting evidence in isolation. *Id.*

4 In reviewing a denial of benefits, a district court may not substitute its
5 judgment for that of the Commissioner. If the evidence in the record “is
6 susceptible to more than one rational interpretation, [the court] must uphold the
7 ALJ’s findings if they are supported by inferences reasonably drawn from the
8 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district
9 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
10 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
11 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The
12 party appealing the ALJ’s decision generally bears the burden of establishing that
13 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

14 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

15 A claimant must satisfy two conditions to be considered “disabled” within
16 the meaning of the Social Security Act. First, the claimant must be “unable to
17 engage in any substantial gainful activity by reason of any medically determinable
18 physical or mental impairment which can be expected to result in death or which
19 has lasted or can be expected to last for a continuous period of not less than twelve
20 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
21 impairment must be “of such severity that he is not only unable to do his previous

1 work[,] but cannot, considering his age, education, and work experience, engage in
2 any other kind of substantial gainful work which exists in the national economy.”
3 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

4 The Commissioner has established a five-step sequential analysis to
5 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
6 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
7 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
8 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
10 404.1520(b), 416.920(b).

11 If the claimant is not engaged in substantial gainful activity, the analysis
12 proceeds to step two. At this step, the Commissioner considers the severity of the
13 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
14 claimant suffers from “any impairment or combination of impairments which
15 significantly limits [his or her] physical or mental ability to do basic work
16 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
17 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
18 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
19 §§ 404.1520(c), 416.920(c).

20 At step three, the Commissioner compares the claimant’s impairment to
21 severe impairments recognized by the Commissioner to be so severe as to preclude

1 a person from engaging in substantial gainful activity. 20 C.F.R. §§
2 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
3 severe than one of the enumerated impairments, the Commissioner must find the
4 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

5 If the severity of the claimant's impairment does not meet or exceed the
6 severity of the enumerated impairments, the Commissioner must pause to assess
7 the claimant's "residual functional capacity." Residual functional capacity (RFC),
8 defined generally as the claimant's ability to perform physical and mental work
9 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
10 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
11 analysis.

12 At step four, the Commissioner considers whether, in view of the claimant's
13 RFC, the claimant is capable of performing work that he or she has performed in
14 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
15 If the claimant is capable of performing past relevant work, the Commissioner
16 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
17 If the claimant is incapable of performing such work, the analysis proceeds to step
18 five.

19 At step five, the Commissioner considers whether, in view of the claimant's
20 RFC, the claimant is capable of performing other work in the national economy.
21 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,

1 the Commissioner must also consider vocational factors such as the claimant’s age,
2 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
3 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
4 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
5 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
6 work, analysis concludes with a finding that the claimant is disabled and is
7 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).
8 The claimant bears the burden of proof at steps one through four above. *Tackett v.*
9 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,
10 the burden shifts to the Commissioner to establish that (1) the claimant is capable
11 of performing other work; and (2) such work “exists in significant numbers in the
12 national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*,
13 700 F.3d 386, 389 (9th Cir. 2012).

14 A finding of “disabled” does not automatically qualify a claimant for
15 disability benefits. *Bustamante v. Massanari*, 262 F.3d 949, 954 (9th Cir. 2001).

16 When there is medical evidence of drug or alcohol addiction (“DAA”), the ALJ
17 must determine whether the DAA is a material factor contributing to the disability.
18 20 C.F.R. § 416.935(a). It is the claimant’s burden to prove substance addiction is
19 not a contributing factor material to her disability. *Parra v. Astrue*, 481 F.3d 742,
20 748 (9th Cir. 2007).

1 **ALJ'S FINDINGS**

2 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
3 activity since July 11, 2013, the alleged onset date. Tr. 18. At step two, the ALJ
4 found Plaintiff has the following severe impairments: substance abuse with
5 psychosis; affective disorders variously diagnosed as bipolar, depressive, and
6 unspecified mood disorders; anxiety; borderline personality disorder; and
7 posttraumatic stress disorder. Tr. 18-19. At step three, the ALJ found that
8 Plaintiff's impairments, including the substance use disorder, meet Listing 12.03 of
9 20 C.F.R. Part 404, Subpt. P, App'x 1. Tr. 20. However, the ALJ found that if
10 Plaintiff stopped the substance use, she would continue to have a severe
11 impairment or combination of impairments at step two, but the impairments would
12 not meet or medically equal the severity of a listed impairment at step three. Tr.
13 21. The ALJ then determined that if the Plaintiff stopped the substance use, she
14 would have the RFC

15 to perform a full range of work at all exertional levels. In terms of
16 nonexertional limitations, she must avoid concentrated exposure to
17 hazards such as moving machinery and heights. She can perform
simple, routine tasks. She can have superficial contact with the public
and coworkers.

18 Tr. 22. At step four, the ALJ found that if Plaintiff stopped substance use, she
19 would be able to perform her past relevant work as a cleaner, housekeeping. Tr.

20 28. At step five, the ALJ found that if Plaintiff stopped substance abuse,
21 considering Plaintiff's age, education, work experience, and RFC, there would be a

1 significant number of jobs in the national economy that Plaintiff could perform,
2 such as industrial cleaner, kitchen helper, and laundry worker II. Tr. 28-29.

3 Finally, the ALJ found that substance use disorder is a contributing factor material
4 to the determination of disability because Plaintiff would not be disabled if she
5 stopped the substance use. Tr. 29-30. Thus, the ALJ concluded that Plaintiff has
6 not been disabled within the meaning of the Social Security Act at any time from
7 the alleged onset date through the date of the decision. Tr. 30.

8 ISSUES

9 Plaintiff seeks judicial review of the Commissioner's final decision denying
10 her disability insurance benefits under Title II of the Social Security Act and
11 supplemental security income benefits under Title XVI of the Social Security Act.
12 ECF No. 12. Plaintiff raises the following issues for this Court's review:

- 13 1. Whether the ALJ properly weighed the medical opinion evidence;
- 14 2. Whether the ALJ erred by finding substance use was a factor material to the
15 finding of disability;
- 16 3. Whether the ALJ improperly discredited Plaintiff's symptom claims; and
- 17 4. Whether the ALJ erred at step three.

18 DISCUSSION

19 A. Medical Opinions

20 There are three types of physicians: "(1) those who treat the claimant
21 (treating physicians); (2) those who examine but do not treat the claimant

1 (examining physicians); and (3) those who neither examine nor treat the claimant
2 [but who review the claimant's file] (nonexamining [or reviewing] physicians).”
3 *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001) (citations omitted).
4 Generally, a treating physician's opinion carries more weight than an examining
5 physician's, and an examining physician's opinion carries more weight than a
6 reviewing physician's. *Id.* If a treating or examining physician's opinion is
7 uncontradicted, the ALJ may reject it only by offering “clear and convincing
8 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d
9 1211, 1216 (9th Cir.2005). Conversely, “[i]f a treating or examining doctor's
10 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by
11 providing specific and legitimate reasons that are supported by substantial
12 evidence.” *Id.* (citing *Lester*, 81 F.3d at 830–831). “However, the ALJ need not
13 accept the opinion of any physician, including a treating physician, if that opinion
14 is brief, conclusory and inadequately supported by clinical findings.” *Bray v.*
15 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009) (quotation and
16 citation omitted).

17 Plaintiff argues the ALJ erroneously considered the 2013 and 2014 opinions
18 of treating provider Mara Fusfield, ARNP, “along with the accompanying
19 disability/incapacity determinations and reviews of medical evidence”; the opinion
20 of examining psychologist, R.A. Cline, Ph.D.; and the opinion of agency reviewing
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1 psychologist Beth Fitterer, Ph.D. ECF No. 12 at 12-14. The ALJ and Plaintiff's
2 briefing considered these opinions together; thus, the Court will do the same.

3 In November 2014, agency reviewing psychologist Beth Fitterer, Ph.D.
4 opined that Plaintiff "would be able to perform simple and some difficulty with
5 complex tasks for a normal work day/week [with] occasional interruptions from
6 [her psychological symptoms]." Tr. 26, 105, 118.

7 In August 2013, Mara Fusfield, ARNP, Plaintiff's treating provider, opined
8 that due to "sudden change [in] mental status," she had marked to severe
9 limitations in her ability to sit, stand, walk, lift, carry, handle, push, pull, reach,
10 stoop, crouch, and communicate. Tr. 393. Ms. Fusfield noted that Plaintiff
11 required direction to "keep her tracking," and "can't find words or finish
12 sentences." Tr. 393. While not specifically identified by the ALJ, this opinion was
13 reviewed by DSHS physician J. Dalton, M.D. who opined that Plaintiff had a
14 marked limitation in "environmental/non-exertional restrictions" and a severe
15 limitation in her ability to perform activities within a schedule, maintain regular
16 attendance and be punctual within customary tolerances. Tr. 399-400.

17 In December 2013, Ms. Fusfield opined that Plaintiff had marked to severe
18 limitations in her ability to hear and communicate; marked limitations in her ability
19 to walk, lift, carry, handle, push, pull, reach, stoop, and crouch; and was capable of
20 only sedentary work. Tr. 397-98. Again, while not specifically identified by the
21 ALJ, Ms. Fusfield's August and December 2013 opinions were reviewed by Myrna

1 Palasi, M.D., who found marked limitation in postural restrictions and gross or fine
2 motor skill restrictions, and limited Plaintiff to sedentary work. Tr. 402-03. All of
3 the above referenced opinions specifically noted that the effect on Plaintiff's work
4 activity was not "due primarily to alcohol or drug abuse/addiction." Tr. 394, 398,
5 401, 404. Finally, in August 2014, Ms. Fusfield noted that Plaintiff continued to
6 have difficulty following directions, focusing on topics, reading, comprehending,
7 and retaining information; and she opined that Plaintiff was capable of light work.
8 Tr. 405-07.

9 In July 2016, Dr. R.A. Cline examined Plaintiff and opined that she had
10 moderate limitations in six basic work activities, and marked limitations in her
11 ability to (1) communicate and perform effectively in a work setting, and (2)
12 maintain appropriate behavior in a work setting. Tr. 973-77.

13 The ALJ collectively assigned little weight to (1) the portion of Dr. Fitterer's
14 opinion indicating that Plaintiff would have occasional interruptions from her
15 psychological symptoms; (2) the marked limitations assessed by Dr. Cline; and (3)
16 "Ms. Fusfield's assessments, along with the accompanying disability/incapacity
17 determinations and reviews of medical evidence, indicating that the claimant was
18 limited to sedentary or light exertion with postural and motor skill restrictions, that
19 she had some neurobehavioral problem resulting in marked to severe functional
20 limitations, and that she was severely limited in performing activities within a
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1 schedule, maintaining regular attendance, and being punctual within customary
2 tolerances.” Tr. 26.

3 First, as to her physical capacity, the ALJ generally found, without citation
4 to the record, that Ms. Fusfield’s assessments and “the accompanying
5 disability/incapacity determinations and reviews of medical evidence indicating
6 [Plaintiff] was limited to sedentary or light exertion with postural and motor skill
7 restrictions are inconsistent with [Plaintiff’s] physical treatment history and the
8 objective clinical findings.” Tr. 27. Similarly, as to her mental capacity, in the
9 absence of substance abuse, the ALJ found the above cited “portion of Dr.
10 Fitterer’s opinion, Ms. Fusfield’s opinions and the accompanying
11 disability/incapacity determinations and reviews of medical evidence, Dr. Cline’s
12 opinion, and the low GAF scores are inconsistent with [Plaintiff’s] longitudinal
13 mental health treatment history and performance on mental status examinations
14 during periods of sobriety.” Tr. 27. In support of this finding, the ALJ generally
15 found that with one possible relapse in May 2015, Plaintiff “has maintained her
16 sobriety since mid-2014 with largely unremarkable mental status and tolerable if
17 any side effects of medication.” Tr. 27 (citing Tr. 445, 518-19, 537-50, 558, 562,
18 566-70, 586, 800, 889, 908, 923, 936, 946-48, 1080, 1106, 1227, 1231-57).

19 Plaintiff argues that the ALJ failed to explain with requisite specificity how
20 the marked to severe portions of the opinions cited by the ALJ were inconsistent
21 with the medical record and objective medical findings. ECF No. 12 at 12-13.

1 The Court agrees. The consistency of a medical opinion with the record as a whole
2 is a relevant factor in evaluating that medical opinion. *See Orn v. Astrue*, 495 F.3d
3 625, 631 (9th Cir. 2007). *Batson v. Comm’r Soc. Sec. Admin.*, 359 F.3d 1190,
4 1195 (9th Cir. 2004) (ALJ may discount an opinion that is conclusory, brief, and
5 unsupported by the record as a whole, or by objective medical findings).

6 However, when explaining his reasons for rejecting medical opinion evidence, the
7 ALJ must do more than state a conclusion; rather, the ALJ must “set forth his own
8 interpretations and explain why they, rather than the doctors’, are correct.”

9 *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). “This can be done by setting
10 out a detailed and thorough summary of the facts and conflicting clinical evidence,
11 stating his interpretation thereof, and making findings.” *Id.* Here, the Court finds
12 the ALJ failed to summarize and interpret the entirety of the clinical findings in
13 each of the seven distinct medical opinions that were assigned little weight. Tr.
14 26-27. Thus, the ALJ’s wholesale rejection of the marked to severe findings by
15 these treating, examining, and reviewing providers as generally inconsistent with
16 the mental status examination results, without the requisite interpretations of the
17 “facts and conflicting clinical evidence,” is not supported by substantial evidence.
18 This was not a specific and legitimate reason for the ALJ to reject the opinions of
19 Dr. Fitterer, Ms. Fusfield, Dr. Dalton, Dr. Palasi, and Dr. Cline.

20 Second, the ALJ found that Ms. Fusfield’s opinions and the accompanying
21 disability/incapacity determinations and reviews of medical evidence, and Dr.

1 Cline’s opinion, were “based in part” on Plaintiff’s self-report; “however,
2 [Plaintiff’s] statements concerning the intensity, persistence, and limiting effects of
3 her symptoms in the absence of substance use are not entirely consistent with the
4 evidence.” Tr. 27. An ALJ may reject a physician’s opinion if it is based “to a
5 large extent” on Plaintiff’s self-reports that have been properly discounted as not
6 credible. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). Here, the
7 only evidence cited by the ALJ in support of this finding was Dr. Cline’s indication
8 that he did not review any records as part of his evaluation of Plaintiff. Tr. 27
9 (citing Tr. 973). However, the ALJ entirely failed to consider Dr. Cline’s mental
10 status examination, which included findings of abnormal thought process and
11 content, abnormal perception, abnormal memory, abnormal abstract thought, and
12 abnormal insight and judgment. Tr. 977. Similarly, the ALJ failed to consider
13 portions of Ms. Fusfield’s opinions that referenced objective test results, and
14 corresponding treatment notes from Ms. Fusfield that included mental status
15 findings of impaired insight and judgment, agitated and apathetic affect, and
16 impaired thinking, attention, and concentration. *See* Tr. 392 (negative CT and
17 lumbar puncture, and elevated white blood cell count), 394 (negative drug
18 screens), 411, 422, 589, 600. Neither the ALJ, nor the Defendant, offers any
19 evidence that Dr. Cline and Ms. Fusfield relied “to a large extent” on Plaintiff’s
20 subjective complaints as opposed to these clinical findings. Moreover, as
21 conceded by Defendant, “an ALJ may not reject an opinion about a claimant’s

1 mental health for its ‘partial reliance’ on the claimant’s unreliable self-reports.”
2 ECF No. 14 at 8; *Cf. Tommasetti*, 533 F.3d at 1041 (ALJ may reject a physician’s
3 opinion if it is based “to a large extent” on Plaintiff’s self-reports). Based on the
4 foregoing, the ALJ’s rejection of these opinions because they were based only “in
5 part” on Plaintiff’s self-report was not a specific and legitimate reason, supported
6 by substantial evidence.

7 For all of these reasons, the ALJ did not properly consider Ms. Fusfield,² Dr.
8 Fitterer, Dr. Dalton, Dr. Palasi, and Dr. Cline’s opinions, and they must be
9 reconsidered on remand.

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12 ² The ALJ also noted that Ms. Fusfield “may not have been fully aware of
13 [Plaintiff’s] drug use.” Tr. 27. In support of this finding, the ALJ cited Ms.
14 Fusfield’s January 2014 treatment note indicating that Plaintiff had not used heroin
15 in “more than a year, but in mid-2013 [Plaintiff] was noted to be possibly attending
16 to hallucinations and her providers suspected that she was not being entirely
17 forthright about her drug use.” Tr. 27 (citing Tr. 347, 369, 497-98). Defendant
18 argues the “ALJ reasonably concluded that Plaintiff’s willingness to mislead Ms.
19 Fusfield on the subject of her impairments reflected negatively on the value of Ms.
20 Fusfield’s opinions.” ECF No. 14 at 8. However, as noted by Plaintiff, the
21 evidence cited by the ALJ does not support a conclusion that Plaintiff intentionally
misled Ms. Fusfield about her heroin use, and therefore “does not undermine the

1 **B. DAA**

2 A social security claimant is not entitled to benefits “if alcoholism or drug
3 addiction would . . . be a contributing factor material to the Commissioner's
4 determination that the individual is disabled.” 42 U.S.C. § 423(d)(2)(C),
5 1382c(a)(3)(J). Therefore, when there is medical evidence of drug or alcohol
6 addiction, the ALJ must conduct a DAA analysis and determine whether drug or
7 alcohol addiction is a material factor contributing to the disability. 20 C.F.R. §§
8 404.1535(a), 416.935(a). In order to determine whether drug or alcohol addiction
9 is a material factor contributing to the disability, the ALJ must evaluate which of
10 the current physical and mental limitations would remain if the claimant stopped
11 using drugs or alcohol, then determine whether any or all of the remaining
12 limitations would be disabling. 20 C.F.R. §§ 404.1535(b)(2), 416.935(b)(2). If the
13 remaining limitations without DAA would still be disabling, then the claimant's
14 drug addiction or alcoholism is not a contributing factor material to his disability.
15 If the remaining limitations would not be disabling without DAA, then the
16 claimant's substance abuse is material and benefits must be denied. *Parra v.*
17 *Astrue*, 481 F.3d 742, 747-48 (9th Cir. 2007). “The claimant bears the burden of
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19 _____
20 validity of her opinions.” ECF No. 15 at 6-7. Regardless, as discussed above, the
21 ALJ’s rejection of Ms. Fusfield’s opinions was not supported by substantial
evidence, and they must be reconsidered on remand.

1 proving that drug or alcohol addiction is not a contributing factor material to his
2 disability.” *Id.* at 748.

3 Plaintiff argues the ALJ failed to “clearly distinguish[] between periods of
4 use and abstinence” and “failed to consider the context of [Plaintiff’s] treatment
5 setting and that any improvement to her co-occurring mental disorders was due to
6 this treatment.” ECF No. 12 at 8. Social Security Ruling (“SSR”) 13-2p, which
7 explains the Commissioner’s policy on “the analysis of substance abuse (or
8 ‘DAA’) in a case involving co-occurring mental disorders,” directs, in pertinent
9 part, that the ALJ must consider periods of abstinence from drug and alcohol use
10 that are

11 long enough to allow the acute effects of drug and alcohol use to abate.
12 Especially in cases involving co-occurring mental disorders, the
13 documentation of a period of abstinence should provide information
about what, if any, medical findings and impairment-related limitations
remained after the acute effects of drug and alcohol use abated.

14 SSR 13-2p (February 20, 2013), *available at* 2013 WL 621536 at *12. Moreover,
15 SSR 13-2p explicitly directs that if “the case record does not demonstrate the
16 separate effects of the treatment for DAA and for the co-occurring mental
17 disorder(s), we will find that DAA is not material.” SSR 13-2p at *12.

18 Defendant argues the ALJ properly found that Plaintiff’s impairments,
19 including substance abuse, satisfied the requirements of Listing 12.03; and, based
20 on “evidence from a period when Plaintiff was not using drugs,” the ALJ
21 “reasonably concluded that when Plaintiff was not using drugs, she did not have

1 marked limitations in any area of functioning.” ECF No. 14 at 3-4; Tr. 21-22
2 (citing Tr. 416, 434-36, 518-19, 537, 539, 541, 545, 558, 974, 1221). In finding
3 that Plaintiff met the Listing “including substance use,” the ALJ relied heavily on
4 evidence of Plaintiff’s “psychotic break in July/August 2014” and “exhibit[ion]
5 [of] increased symptoms in May/June 2015.” Tr. 20. However, as noted by
6 Plaintiff, the ALJ failed to consider evidence that “exacerbations in her symptoms
7 were not wholly due to substance use, but persisted during periods of sobriety,”
8 including: (1) treatment notes indicating Plaintiff was abstinent from substance use
9 after her admitted relapse in May 2014; (2) treatment notes indicating that Plaintiff
10 had been incarcerated “for at least 3-4 weeks prior to her removal from jail and
11 placement as an inpatient at Fairfax Hospital” for a psychotic break in July 2014,
12 during which time she was sober and refused to take her medication; and perhaps
13 most notably, (3) Plaintiff had negative urine and blood drug screens in May 2014,
14 July 2014, May 2015, and July 2015. Tr. 7, 58, 524-29, 658, 959, 968, 1045, 1171,
15 1247. Moreover, while the ALJ correctly noted that treatment providers
16 “suspected” Plaintiff’s increased mental health symptoms in May 2015 were due to
17 substance use, and Plaintiff refused to provide a urine sample at that time, those
18 same providers also acknowledged it was “unclear” whether Plaintiff’s symptoms
19 were due to mental health issues or substance use. Tr. 864-77, 1056. An ALJ may
20 not “cherry-pick[]” aspects of the medical record and focus only on those aspects
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1 that fail to support a finding of disability. *Ghanim v. Colvin*, 763 F.3d 1154, 1164
2 (9th Cir. 2014).

3 Finally, the ALJ’s decision and Defendant’s briefing acknowledge that prior
4 to Plaintiff’s increased mental health symptoms in May 2015, as cited by the ALJ
5 to support the DAA finding, the record also indicates that Plaintiff was not taking
6 her medications. Tr. 20, 579, 584, 862, 865, 877, 958-59, 969, 1149, 1154.

7 Notably, Defendant recognized that “[a]fter being back on medication for a few
8 weeks, Plaintiff’s symptoms were only mild,” and Defendant appears to concede
9 that “[t]his shows that Plaintiff’s psychotic episode occurred . . . because she
10 temporarily stopped taking her medication.” ECF No. 14 at 5-6 (citing Tr. 568,
11 579, 860). As noted by Plaintiff, the improvement in Plaintiff’s symptoms after
12 periods of sobriety coincided with “participating in a myriad of intensive treatment
13 programs, aimed at treating both her DAA and her co-occurring mental disorders”;
14 thus, Plaintiff contends that when “there is no evidence demonstrating the separate
15 effects of [Plaintiff’s] DAA treatment and her treatment for her co-occurring
16 mental impairments, . . . [the] SSA directs a finding of non-materiality in such
17 instances, because there is no clear evidence demonstrating that sobriety was the
18 sole factor in [Plaintiff’s] relative improvement.” ECF No. 12 at 9.

19 Based on the foregoing, and in light of the need to reconsider the medical
20 opinion evidence, which included findings that Plaintiff’s impairments were not
21 “primarily the result of alcohol or drug use within the past 60 days” (Tr. 394, 398,

1 401, 404, 976), the ALJ should reevaluate on remand whether substance use
2 disorder was a contributing factor material to the determination of disability.

3 **C. Additional Assignments of Error**

4 Plaintiff also challenges the ALJ's consideration of Plaintiff's symptom
5 claims and the ALJ's conclusions at step three if Plaintiff stopped the substance
6 use. ECF No. 12 at 9-12, 14-20. Because the analysis of these questions is
7 dependent on the ALJ's evaluation of the medical opinion evidence and alleged
8 improvement during periods of sobriety, which the ALJ is instructed to reconsider
9 on remand, the Court declines to address these challenges here. On remand, the
10 ALJ is instructed to conduct a new sequential analysis after reconsidering the
11 medical opinion evidence and DAA analysis.

12 **REMEDY**

13 The decision whether to remand for further proceedings or reverse and
14 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
15 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
16 where “no useful purpose would be served by further administrative proceedings,
17 or where the record has been thoroughly developed,” *Varney v. Sec’y of Health &*
18 *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by
19 remand would be “unduly burdensome[.]” *Terry v. Sullivan*, 903 F.2d 1273, 1280
20 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (noting that a
21 district court may abuse its discretion not to remand for benefits when all of these

1 conditions are met). This policy is based on the “need to expedite disability
2 claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that
3 must be resolved before a determination can be made, and it is not clear from the
4 record that the ALJ would be required to find a claimant disabled if all the
5 evidence were properly evaluated, remand is appropriate. *See Benecke v.*
6 *Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172,
7 1179-80 (9th Cir. 2000).

8 The Court finds that further administrative proceedings are appropriate. *See*
9 *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014)
10 (remand for benefits is not appropriate when further administrative proceedings
11 would serve a useful purpose). Here, the ALJ improperly considered medical
12 opinion evidence and the DAA analysis, which calls into question whether the step
13 three analysis, rejection of Plaintiff’s symptom claims, and assessed RFC, are
14 supported by substantial evidence. “Where,” as here, “there is conflicting evidence,
15 and not all essential factual issues have been resolved, a remand for an award of
16 benefits is inappropriate.” *Treichler*, 775 F.3d at 1101.

17 The Court remands this case for further proceedings. On remand, the ALJ
18 must reconsider the medical opinion evidence, and provide legally sufficient reasons
19 for evaluating each of the opinions, supported by substantial evidence. If necessary,
20 the ALJ should order additional consultative examinations and, if appropriate, take
21 additional testimony from medical experts. The ALJ must reexamine whether

1 substance use disorder was a contributing factor to the determination of disability.
2 The ALJ also should reconsider the step three analysis, Plaintiff's symptom claims,
3 and the remaining steps in the sequential evaluation analysis. Finally, the ALJ
4 should reassess Plaintiff's RFC and, if necessary, take additional testimony from a
5 vocational expert which includes all of the limitations credited by the ALJ.

6 **ACCORDINGLY, IT IS ORDERED:**

- 7 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **GRANTED**,
8 and the matter is **REMANDED** to the Commissioner for additional
9 proceedings consistent with this Order.
- 10 2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.
- 11 3. Application for attorney fees may be filed by separate motion.

12 The District Court Clerk is directed to enter this Order and provide copies to
13 counsel. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

14 **DATED** May 31, 2019.

15
16 *s/ Rosanna Malouf Peterson*
17 ROSANNA MALOUF PETERSON
18 United States District Judge
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