

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

Aug 16, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHELLE W.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

No. 1:18-CV-03188-JTR

ORDER GRANTING, IN PART,
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 13, 15. Attorney D. James Tree represents Michelle W. (Plaintiff); Special Assistant United States Attorney Jeffrey Eric Staples represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, IN PART**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and

¹ Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. See Fed. R. Civ. P. 25(d).

ORDER GRANTING, IN PART, PLAINTIFF'S MOTION . . . - 1

1 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
2 42 U.S.C. § 405(g).

3 **JURISDICTION**

4 Plaintiff filed applications for Disability Insurance Benefits and
5 Supplemental Security Income on February 19, 2015, alleging disability since
6 February 6, 2014, due to PTSD, bipolar disorder, depression, anxiety, panic
7 attacks, a back injury, and migraines. Tr. 92-93. The applications were denied
8 initially and upon reconsideration. Tr. 153-70, 174-89. Administrative Law Judge
9 (ALJ) Glenn Meyers held a hearing on May 16, 2017, Tr. 49-89, and issued a
10 partially favorable decision on October 2, 2017, Tr. 16-29. Plaintiff requested
11 review from the Appeals Council. Tr. 247. The Appeals Council denied
12 Plaintiff's request for review on August 24, 2018. Tr. 1-6. The ALJ's October
13 2017 decision thus became the final decision of the Commissioner, which is
14 appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this
15 action for judicial review on September 26, 2018. ECF No. 1, 4.

16 **STATEMENT OF FACTS**

17 Plaintiff was born in 1961 and was 53 years old as of her alleged onset date.
18 Tr. 21. She has a high school education and some college classes. Tr. 683. She
19 worked for many years as a legal assistant and in the county probation office. Tr.
20 84. In early 2014, facing declining mental capabilities and poor performance in
21 her job, she resigned her position. Tr. 535, 799-800, 977. She began receiving
22 mental health treatment for bipolar disorder. Tr. 520-45. In March 2015 she was
23 psychiatrically hospitalized for a week due to suicidal ideation. Tr. 585, 609-33.

24 In terms of her physical problems, in August 2014 Plaintiff fell down her
25 stairs and fractured her lumbar spine. Tr. 471-72. Her back problems were further
26 exacerbated by a car accident the following year, and a fall in a store in January
27 2016. Tr. 1209, 1277-78. She underwent lumbar surgery in October 2016, which
28

1 relieved much of her back pain but resulted in left leg radiating pain and numbness.
2 Tr. 845-46, 918, 1182.

3 **STANDARD OF REVIEW**

4 The ALJ is responsible for determining credibility, resolving conflicts in
5 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
6 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo, with
7 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
8 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
9 only if it is not supported by substantial evidence or if it is based on legal error.
10 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
11 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
12 1098. Put another way, substantial evidence is such relevant evidence as a
13 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
14 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
15 rational interpretation, the Court may not substitute its judgment for that of the
16 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
17 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
18 administrative findings, or if conflicting evidence supports a finding of either
19 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
20 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
21 supported by substantial evidence will be set aside if the proper legal standards
22 were not applied in weighing the evidence and making the decision. *Brawner v.*
23 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

24 **SEQUENTIAL EVALUATION PROCESS**

25 The Commissioner has established a five-step sequential evaluation process
26 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
27 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
28 four, the burden of proof rests upon the claimant to establish a prima facie case of

1 entitlement to disability benefits. Tackett, 180 F.3d at 1098-1099. This burden is
2 met once a claimant establishes that a physical or mental impairment prevents the
3 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
4 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
5 to step five, and the burden shifts to the Commissioner to show (1) the claimant
6 can make an adjustment to other work; and (2) the claimant can perform specific
7 jobs that exist in the national economy. Batson v. Commissioner of Social Sec.
8 Admin., 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make an
9 adjustment to other work in the national economy, the claimant will be found
10 disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

11 **ADMINISTRATIVE DECISION**

12 On October 2, 2017, the ALJ issued a decision finding Plaintiff was not
13 disabled prior to her attainment of advanced age on December 14, 2016, but
14 became disabled on that date.

15 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
16 activity since the alleged onset date. Tr. 19.

17 At step two, the ALJ determined Plaintiff had the following severe
18 impairments: lumbar degenerative disc disease, status-post surgery on the lumbar
19 spine; headaches; depression; anxiety; bipolar disorder vs. borderline personality
20 disorder; and post-traumatic stress disorder. Id.

21 At step three, the ALJ found Plaintiff did not have an impairment or
22 combination of impairments that met or medically equaled the severity of one of
23 the listed impairments. Tr. 19-20.

24 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
25 she could perform light exertion level work with the following limitations:

26 She is capable of engaging in unskilled, repetitive, routine tasks in 2-
27 hour increments. She can occasionally stoop, squat, crouch, crawl,
28 and kneel. She can occasionally climb ramps and stairs. She cannot

1 climb ropes, ladders, or scaffolds. She would have up to 6
2 unscheduled absences from work per year. She could be off task at
3 work up to 10 percent of the time but still meeting minimum
4 production requirements of the job. She can have occasional contact
5 with the public, coworkers, and supervisors.

6 Tr. 20.

7 At step four, the ALJ found Plaintiff was unable to perform her past relevant
8 work as a court clerk or paralegal. Tr. 27.

9 At step five, the ALJ determined that, based on the testimony of the
10 vocational expert, and considering Plaintiff's age, education, work experience, and
11 RFC, prior to her attainment of age 55 Plaintiff was capable of making a successful
12 adjustment to other work that existed in significant numbers in the national
13 economy, including the jobs of housekeeping cleaner, packing line worker, and
14 production assembler. Tr. 27-28.

15 As of December 14, 2016, Plaintiff attained an older age category, and the
16 ALJ found her disabled based on the Medical Vocational Guidelines. Tr. 28.

17 The ALJ thus concluded Plaintiff was not under a disability within the
18 meaning of the Social Security Act at any time prior to December 14, 2016, but
19 that she became disabled on that date. Tr. 29.

20 ISSUES

21 The question presented is whether substantial evidence supports the ALJ's
22 decision denying benefits and, if so, whether that decision is based on proper legal
23 standards.

24 Plaintiff contends the ALJ erred by (1) failing to consider Plaintiff's cervical
25 spine impairment; (2) failing to properly consider the lay opinions; (3) improperly
26 assessing the medical opinions; and (4) not fully crediting Plaintiff's testimony.

27 DISCUSSION

28 1. Plaintiff's subjective statements

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1 Plaintiff contends the ALJ erred by improperly rejecting her subjective
2 statements. ECF No. 13 at 18-21.

3 It is the province of the ALJ to make credibility determinations. *Andrews v.*
4 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be
5 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
6 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying
7 medical impairment, the ALJ may not discredit testimony as to the severity of an
8 impairment merely because it is unsupported by medical evidence. *Reddick v.*
9 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of
10 malingering, the ALJ's reasons for rejecting the claimant's testimony must be
11 "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
12 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "General findings are
13 insufficient: rather the ALJ must identify what testimony is not credible and what
14 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
15 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

16 The ALJ concluded Plaintiff's medically determinable impairments could
17 reasonably be expected to cause her alleged symptoms; however, Plaintiff's
18 statements concerning the intensity, persistence and limiting effects of those
19 symptoms were not fully supported. Tr. 21. The ALJ offered the following
20 reasons for disregarding Plaintiff's subjective complaints: (1) the record showed
21 her mental health impairments and physical problems had improved with
22 treatment; (2) the longitudinal history of treatment did not support the alleged
23 disabling impairments; (3) mental status exams throughout the record showed
24 largely normal findings; (4) Plaintiff's physical problems did not prevent her from
25 tending to self-care or attending medical appointments unaccompanied; and (5) she
26 had been able to apply for part-time work and care for a child and her adult
27 daughter. Tr. 21-24. Defendant argues these were all legitimate factors for the
28 ALJ to consider in assessing the reliability of Plaintiff's symptom allegations.

1 ECF No. 15 at 10-11. The Court finds the ALJ’s interpretation of the record and
2 conclusions are not supported by substantial evidence.

3 a. Improvement with treatment

4 The ALJ repeatedly noted that Plaintiff’s mental health and physical
5 problems responded to treatment and improved with medication. Tr. 21-24.

6 That a person who suffers from severe panic attacks, anxiety, and depression
7 makes some improvement does not mean that the person’s impairments no longer
8 seriously affect her ability to function in a workplace. *Holohan v. Massanari*, 246
9 F.3d 1195, 1205 (9th Cir. 2001). Improvement of impairments does not equate
10 with elimination of symptoms. Furthermore, “while ALJs obviously must rely on
11 examples to show why they do not believe that a claimant is credible, the data
12 points they choose must in fact constitute examples of a broader development to
13 satisfy the applicable “clear and convincing” standard.” *Garrison v. Colvin*, 759
14 F.3d 995, 1018 (9th Cir. 2014)(emphasis in original).

15 A review of the record shows that Plaintiff’s periods of improvement with
16 medication and therapy were either not supported by the record or the ALJ omitted
17 evidence of significant increases in symptoms. The records of Plaintiff’s mental
18 health treatment reflect nearly as many reports of worsening symptoms as they do
19 reports of improvement in symptoms. Tr. 509, 543, 634, 708, 714, 902, 1071,
20 1089 (worsening symptoms); 514, 517, 525, 530, 597, 1085, 1100, 1101, 1213
21 (symptoms improving). Unsurprisingly for an individual with bipolar disorder,
22 Plaintiff reported significant cycling of her moods. Tr. 505, 517, 689, 706, 720.
23 The importance of reading chart notes in context of the entire diagnostic picture is
24 clearly demonstrated in the records, such as in August 2016 when Plaintiff reported
25 her current status was better than her previous visit, but she reported she had
26 recently been in bed for three days, and stated “If you would have seen me
27 yesterday or during the three days I was down in pain then my answer would be
28 different.” Tr. 722. Similarly, upon her discharge from a week-long psychiatric

1 hold for suicidal ideation in March 2015, Plaintiff was described as demonstrating
2 improvement, showing a “huge turnaround” and “doing much better.” Tr. 604,
3 610, 957. These notes were made in the same month as, but in stark contrast to,
4 Plaintiff’s involuntary detention in a psychiatric facility as a danger to herself. Tr.
5 585.²

6 Similarly, the ALJ’s characterization of the record showing improvement in
7 Plaintiff’s back pain initially with medication and more recently with surgery as a
8 basis for discounting Plaintiff’s symptom complaints is not supported by
9 substantial evidence. The ALJ is correct that, in the immediate aftermath of
10 Plaintiff’s lumbar fracture, she experienced some improvement from her acute
11 stage of pain. Tr. 960, 962. In the two years from the initial injury until her
12 surgery, Plaintiff occasionally reported improvement in her back pain, or some
13 relief from medication use. Tr. 941, 958, 1194, 1209, 1228. However, she more
14 frequently reported worsening of her pain, or fluctuating pain levels in light of
15 frequent flares. Tr. 851, 857, 1189, 1225, 1209 (worsening pain); Tr. 556, 571,
16 642, 1194, 1206, 1228, 1231, 1238 (fluctuating pain). Plaintiff testified at her
17 hearing that her back surgery relieved much of her back pain, but resulted in
18 significant pain and numbing of her left leg that continued to cause problems
19 through to the time of the hearing. Tr. 69-71. This testimony is consistent with the
20 records. Tr. 860, 918, 1182.

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24 ² Notably, the ALJ failed to acknowledge this incident at all, summarizing
25 the records from this month as showing Plaintiff to be doing better and
26 demonstrating no significant changes in her mental status exams. Tr. 21. The
27 records cited by the ALJ for these propositions are from her in-patient
28 hospitalization and just after her release. Tr. 605-12.

1 Therefore, the ALJ’s rationale that Plaintiff’s pain and other symptom
2 complaints are not supported by the record because the record demonstrates
3 improvement in her conditions is not supported by substantial evidence.

4 b. Activities

5 A claimant’s daily activities may support an adverse credibility finding if the
6 claimant’s activities contradict her other testimony. *Orn v. Astrue*, 495 F.3d 625,
7 639 (9th Cir. 2007). However, the mere fact that a claimant is capable of
8 performing some basic daily activities needed for everyday survival does not
9 necessarily detract from her overall credibility. *Garrison*, 759 at 1016; *Benecke v.*
10 *Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004). The Ninth Circuit has repeatedly
11 found that the ability to perform some basic activities is not necessarily
12 inconsistent with disability:

13 We have repeatedly warned that ALJs must be especially cautious in
14 concluding that daily activities are inconsistent with testimony about pain,
15 because impairments that would unquestionably preclude work and all the
16 pressures of a workplace environment will often be consistent with doing
17 more than merely resting in bed all day.

18 *Garrison*, 759 F.3d at 1016; see also *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
19 1989) (“[M]any home activities are not easily transferable to what may be the more
20 grueling environment of the workplace, where it might be impossible to
21 periodically rest or take medication.”).

22 The ALJ pointed to a number of actions that he found to undermine
23 Plaintiff’s symptom assertions. Specifically, the ALJ found Plaintiff’s physical
24 impairments did not interfere with her ability to tend to self-care or attend medical
25 appointments alone, and further noted Plaintiff had been able to apply for part-time
26 work, care for a small child, and care for her adult daughter. Tr. 24. The Court
27 finds the ALJ failed to indicate how any of the identified activities are inconsistent
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1 with Plaintiff’s pain and limitation testimony, or how an ability to go to the doctor
2 or tend to basic care undermines her assertions.

3 The record contains no details about any of the specific activities that the
4 ALJ pointed to. There is no information about the part-time job Plaintiff applied
5 for, including hours, responsibilities, or whether she was even granted an
6 interview. Tr. 1085. The record contains no information as to Plaintiff’s
7 responsibilities when she was babysitting her roommate’s child, and Plaintiff found
8 the work tiring and only did it for a month. Tr. 57, 593. See *Trevizo v. Berryhill*,
9 871 F.3d 664, 681 (9th Cir. 2017) (“the mere fact that she cares for small children
10 does not constitute an adequately specific conflict with her reported limitations.”).
11 Similarly, the record contains no information about the time Plaintiff was caring
12 for her daughter after a surgery, other than the fact that her daughter healed
13 quickly. Tr. 1071, 1077. These temporary arrangements, without any additional
14 detail, do not demonstrate any clearly articulated inconsistency with Plaintiff’s
15 asserted limitations.

16 c. Objective medical evidence

17 An ALJ may cite inconsistencies between a claimant’s testimony and the
18 objective medical evidence in discounting the claimant’s symptom statements.
19 *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). But this
20 cannot be the only reason provided by the ALJ. See *Lester*, 81 F.3d at 834 (the
21 ALJ may not discredit the claimant’s testimony as to subjective symptoms merely
22 because they are unsupported by objective evidence). “[A]n ALJ does not provide
23 specific, clear, and convincing reasons for rejecting a claimant’s testimony by
24 simply reciting the medical evidence in support of his or her residual functional
25 capacity determination.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 489 (9th Cir.
26 2015). Furthermore, the treatment records must be viewed in light of the overall
27 diagnostic record. See *Holohan*, 246 F.3d at 1205, 1208; *Ryan v. Comm’r of Soc.*
28 *Sec.*, 528 F.3d 1194, 1200-01 (9th Cir. 2008).

1 Because none of the ALJ's other reasons satisfy the clear and convincing
2 standard, a lack of support from the medical records alone is an insufficient basis.
3 Furthermore, as discussed above, the ALJ's selective reading of the record did not
4 adequately acknowledge the context and cyclical nature of Plaintiff's impairments.

5 **2. Medical opinion evidence**

6 Plaintiff argues the ALJ erred by improperly assessing the medical evidence.
7 ECF No. 13 at 11-18. Specifically, she asserts the ALJ improperly rejected
8 opinions from Dr. Kim and Dr. Cline; failed to address Dr. Mitchell; and offered
9 no explanation for his failure to incorporate limitations opined by Ms. Damstedt
10 and Ms. Robinson, to whom he gave great weight. *Id.*

11 a. Dr. Kim

12 Plaintiff argues the ALJ erred by giving "little weight" to the opinion from
13 Dr. Joe Kim. ECF No. 13 at 13-15.

14 When a treating physician's opinion is contradicted by another physician,
15 the ALJ is required to provide "specific and legitimate reasons," based on
16 substantial evidence, to reject the opinion. *Andrews v. Shalala*, 53 F.3d 1035, 1041
17 (9th Cir. 1995). The specific and legitimate standard can be met by the ALJ setting
18 out a detailed and thorough summary of the facts and conflicting clinical evidence,
19 stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
20 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer his
21 conclusions, he "must set forth his interpretations and explain why they, rather
22 than the doctors', are correct." *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir.
23 1988).

24 Dr. Kim offered an opinion of Plaintiff's functional status in November
25 2015. Tr. 668-70. He assessed her with low back pain and degenerative arthritis
26 in her lumbar spine, noting symptoms of pain in her low back that radiated into the
27 back of her legs and caused tingling in both legs. Tr. 668. He opined she was
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1 limited to sedentary work and would miss four or more days of work per month
2 due to severe exacerbations that limited her ability to concentrate. Tr. 669.

3 The ALJ gave this opinion little weight. He found it inconsistent with
4 contemporaneous treatment notes showing improvement with treatment,
5 inconsistent with Plaintiff's full range of daily activities, and unsupported by the
6 consultative exam performed a few months earlier. The ALJ also noted Dr. Kim
7 had only been treating Plaintiff for a few months. Tr. 25-26.

8 Consistency with the record as a whole is a relevant factor for the ALJ to
9 consider. 20 C.F.R. § 404.1527(c)(4). However, as this claim is being remanded
10 on other bases, the ALJ will reconsider the entire record, including Dr. Kim's
11 opinion.

12 b. Dr. Cline

13 Plaintiff asserts the ALJ erred in rejecting two psychological evaluations
14 from consultative examiner Rebekah Cline, Psy.D. ECF No. 13 at 15-16.

15 As with treating sources, when an examining physician's opinion is
16 contradicted by another physician, the ALJ is required to provide "specific and
17 legitimate reasons" to reject the opinion. *Lester v. Chater*, 81 F.3d 821, 830-31
18 (9th Cir. 1995).

19 Dr. Cline performed two evaluations for the Washington State Department
20 of Social and Health Services (DSHS). Tr. 688-92, 693-98. Dr. Cline assessed
21 numerous moderate and marked limitations on Plaintiff's ability to perform work-
22 related activities. *Id.*

23 The ALJ gave little weight to each of the exams, noting Dr. Cline relied on
24 her own evaluations and Plaintiff's subjective complaints, and that she did not
25 review significant treatment notes which generally showed Plaintiff did well with
26 treatment. Tr. 24. The ALJ further found the records generally showed Plaintiff
27 performed well on mental status exams, was able to live alone and with a
28 roommate, and could maintain focus during appointments, and thus the records did

1 not support the degree of limitation opined by Dr. Cline. Id. Finally, the ALJ
2 noted the second opinion was offered after the established onset date, and thus
3 would not change the outcome of the decision even if it had been adopted. Id.

4 The Court finds the ALJ failed to offer specific and legitimate reasons for
5 rejecting these opinions. As was discussed above regarding Plaintiff's subjective
6 allegations, the ALJ's summary of the medical evidence did not accurately address
7 the cyclical nature of Plaintiff's impairments, and indications of "doing well" were
8 not addressed in the greater context of her bipolar disorder. Furthermore, the ALJ
9 failed to indicate how Plaintiff's living arrangements or ability to focus during
10 medical appointments were inconsistent with Dr. Cline's opinions.

11 An ALJ may reject an opinion that is "based to a large extent on a claimant's
12 self-reports that have been properly discounted as incredible." *Tommasetti v.*
13 *Astrue*, 533 F.3d 1035, 1041 (9th Cir.2008). However, here, the ALJ did not
14 properly discount Plaintiff's self-reports, and failed to offer any evidence that Dr.
15 Cline's opinions were based largely on Plaintiff's reports, as opposed to Dr.
16 Cline's professional judgment and objective observations. Therefore, the ALJ's
17 analysis does not constitute specific and legitimate reasons and is not based on
18 substantial evidence.

19 c. Dr. Mitchell

20 Dr. Melanie Mitchell, PsyD, offered an opinion for DSHS in February 2015.
21 Tr. 500-501. She agreed with the limitations assessed by Dr. Cline. The ALJ
22 failed to mention this opinion in his decision.

23 Defendant asserts the ALJ was not required to address this opinion, because
24 it was identical to Dr. Cline's opinion, which the ALJ gave sufficient reasons to

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1 reject. ECF No. 15 at 8. Because the Court finds the ALJ erred in his rejection of
2 Dr. Cline, reconsideration of Dr. Mitchell’s opinion is also warranted.³

3 d. Ms. Damstedt and Ms. Robinson

4 An ALJ may discount the opinion of an “other source,” such as a nurse
5 practitioner, if he provides “reasons germane to each witness for doing so.”
6 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

7 Plaintiff argues the ALJ erred when he gave great weight to parts of Ms.
8 Damstedt and Ms. Robinson’s opinions, yet failed to account for the severity of
9 those opinions. ECF No. 13 at 17-18.

10 Suzanne Damstedt, Plaintiff’s therapist, opined Plaintiff was moderately
11 limited in several work-related functions, including the ability to maintain attention
12 and concentration for extended periods, the ability to complete a normal workweek
13 without interruptions from psychologically-based symptoms and perform without
14 an unreasonable number and length of rest periods, the ability to accept
15 instructions and respond appropriately to criticism from supervisors, and the ability
16 to get along with coworkers or peers without distracting them or exhibiting
17 behavioral extremes. Tr. 672-73. Carole Robinson, MSW, offered similar
18 limitations, finding Plaintiff moderately limited in sustaining an ordinary routine
19 without supervision, making simple work-related decisions, accepting instructions
20 and responding to criticism, and responding appropriately to changes in the work
21 setting. Tr. 1139-40. Each of the forms completed defined “moderate” limitation
22 as “significant interference with basic work-related activities i.e., unable to
23 perform the described mental activity for at least 20% of the work day up to 33%
24 of the work day.” Tr. 672, 1139. The ALJ gave great weight to the moderate

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26 ³ The Court also notes that Dr. Mitchell reviewed a 2014 opinion from Dr.
27 Renee Low, and thus had additional evidence upon which she based her
28 concurrence with Dr. Cline. Tr. 500.

1 limitations included in each of these opinions, finding them consistent with the
2 treatment notes and other evidence. Tr. 24, 25.

3 Plaintiff argues that the ALJ failed to fully account for the severity of the
4 assessed limitations, as the definition of moderate on the completed forms
5 indicates an inability to complete the work functions for 20-33% of the workday.
6 ECF No. 13 at 17-18. Defendant asserts the forms use a “non-standard” definition
7 of the word moderate, and argues the ALJ relied on a definition of moderate
8 endorsed by caselaw, and not the definition contained in the fine print of the forms.
9 ECF No. 15 at 9-10.

10 The Court finds Defendant’s argument to be unsupported. The forms
11 completed by the medical sources define the term and there is no indication that
12 Ms. Damstedt or Ms. Robinson were interpreting the word differently than defined
13 on the form. Most importantly, there is no indication that the ALJ interpreted the
14 opinions as argued by Defendant in briefing. The Court reviews only the reasons
15 provided by the ALJ in his decision and will not affirm the ALJ on “a ground upon
16 which he did not rely.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).

17 The RFC as formulated by the ALJ does not account for many of the
18 limitations assessed by Ms. Damstedt and Ms. Robinson, despite the ALJ assigning
19 them great weight. Remand is warranted for further consideration of the opinions.

20 **3. Third party evidence**

21 Plaintiff argues the ALJ erred by failing to offer any meaningful discussion
22 of any of the third-party opinions from Plaintiff’s friends and family, and by failing
23 to acknowledge the letters of reprimand from Plaintiff’s former employer at the
24 end of her tenure. ECF No. 13 at 6-11. Defendant asserts that the ALJ’s legally
25 sufficient reasons for rejecting Plaintiff’s subjective allegations served to reject the
26 similar allegations of the third-party witnesses. ECF No. 15 at 3-4.

27 Lay witness testimony is “competent evidence” as to “how an impairment
28 affects [a claimant’s] ability to work.” *Stout v. Comm’r, Soc. Sec. Admin.*, 454

1 F.3d 1050, 1053 (9th Cir. 2006); see also *Dodrill v. Shalala*, 12 F.3d 915, 918-19
2 (9th Cir. 1993) (“[F]riends and family members in a position to observe a
3 claimant’s symptoms and daily activities are competent to testify as to her
4 condition.”). An ALJ must give “germane” reasons to discount evidence from
5 these “other sources.” *Dodrill*, 12 F.3d at 919.

6 The ALJ noted the various statements and found they “all generally mirror
7 the claimant’s subjective complaints.” Tr. 26. Because this claim is being
8 remanded for further consideration of Plaintiff’s subjective complaints, the ALJ
9 will have the opportunity to reassess the evidence from the various lay witnesses.
10 The ALJ should consider these witnesses individually and provide germane
11 reasons for discounting any testimony.

12 **4. Step two findings**

13 Plaintiff asserts the ALJ erred in failing to consider her cervical spine
14 condition at step two. ECF No. 13 at 5-6. Plaintiff contends the condition is
15 medically established and contributes to Plaintiff’s inability to work, and could
16 have resulted in further limitations on her RFC. *Id.*

17 The step-two analysis is “a de minimis screening device used to dispose of
18 groundless claims.” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). An
19 impairment is “not severe” if it does not “significantly limit” the ability to conduct
20 “basic work activities.” 20 C.F.R. § 404.1522(a). Basic work activities are
21 “abilities and aptitudes necessary to do most jobs.” 20 C.F.R. § 404.1522(b). “An
22 impairment or combination of impairments can be found not severe only if the
23 evidence establishes a slight abnormality that has no more than a minimal effect on
24 an individual’s ability to work.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.
25 1996) (internal quotation marks omitted). Step two is merely a threshold
26 determination meant to screen out weak claims. *Bowen v. Yuckert*, 482 U.S. 137,
27 146-47 (1987).

28 Even if the ALJ’s failure to list Plaintiff’s cervical spine disorder was error,

1 the error would be harmless because step two was resolved in Plaintiff's favor, and
2 Plaintiff fails to identify any credited limitation associated with her cervical spine
3 condition that was not considered by the ALJ and incorporated into the RFC
4 finding. *See Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir.
5 2006); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005). However, because
6 the claim is being remanded on other bases, the ALJ will reconsider the entire
7 record and make additional step two findings as warranted.

8 CONCLUSION

9 Plaintiff argues the ALJ's decision should be reversed and remanded for the
10 payment of benefits. The Court has the discretion to remand the case for additional
11 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292
12 (9th Cir. 1996). The Court may award benefits if the record is fully developed and
13 further administrative proceedings would serve no useful purpose. *Id.* Remand is
14 appropriate when additional administrative proceedings could remedy defects.
15 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court
16 finds that further development is necessary for a proper determination to be made.

17 The ALJ's RFC determination is not supported by substantial evidence in
18 this case and must be reevaluated. On remand, the ALJ shall reevaluate Plaintiff's
19 subjective complaints and the record as a whole, formulate a new RFC, obtain
20 supplemental testimony from a vocational expert, if necessary, and take into
21 consideration any other evidence or testimony relevant to Plaintiff's disability
22 claim.

23 The Court notes that neither party has disputed the ALJ's establishment of
24 disability as of Plaintiff's attainment of age 55 on December 14, 2016. Therefore,
25 this order pertains only to the period prior to the established onset date.

26 Accordingly, **IT IS ORDERED:**

27 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
28 **GRANTED, IN PART.**

1 2. Defendant’s Motion for Summary Judgment, **ECF No. 15**, is
2 **DENIED.**

3 3. The matter is **REMANDED** to the Commissioner for additional
4 proceedings consistent with this Order.

5 4. An application for attorney fees may be filed by separate motion.

6 The District Court Executive is directed to file this Order and provide a copy
7 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
8 the file shall be **CLOSED.**

9 **IT IS SO ORDERED.**

10 DATED August 16, 2019.

A handwritten signature in black ink, appearing to be "M" or "Rodgers".

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE