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

May 15, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

ELIZABETH K.,¹
Plaintiff,

vs.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 1:19-cv-03244-MKD

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

ECF Nos. 14, 15

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 14, 15. The parties consented to proceed before a magistrate judge. ECF No. 6. The Court, having reviewed the administrative record and the parties' briefing,

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. See LCivR 5.2(c).

1 is fully informed. For the reasons discussed below, the Court grants Plaintiff's
2 motion, ECF No. 14, and denies Defendant's motion, ECF No. 15.

3 JURISDICTION

4 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);
5 1383(c)(3).

6 STANDARD OF REVIEW

7 A district court's review of a final decision of the Commissioner of Social
8 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
9 limited; the Commissioner's decision will be disturbed "only if it is not supported
10 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
11 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
12 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
13 (quotation and citation omitted). Stated differently, substantial evidence equates to
14 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
15 citation omitted). In determining whether the standard has been satisfied, a
16 reviewing court must consider the entire record as a whole rather than searching
17 for supporting evidence in isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its
19 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
20 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one

1 rational interpretation, [the court] must uphold the ALJ's findings if they are
2 supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674
3 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an
4 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless
5 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."
6 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's
7 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
8 *Sanders*, 556 U.S. 396, 409-10 (2009).

9 **FIVE-STEP EVALUATION PROCESS**

10 A claimant must satisfy two conditions to be considered "disabled" within
11 the meaning of the Social Security Act. First, the claimant must be "unable to
12 engage in any substantial gainful activity by reason of any medically determinable
13 physical or mental impairment which can be expected to result in death or which
14 has lasted or can be expected to last for a continuous period of not less than twelve
15 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant's
16 impairment must be "of such severity that he is not only unable to do his previous
17 work[,] but cannot, considering his age, education, and work experience, engage in
18 any other kind of substantial gainful work which exists in the national economy."
19 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential analysis to
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
3 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
4 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
5 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
6 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
7 404.1520(b), 416.920(b).

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

17 At step three, the Commissioner compares the claimant’s impairment to
18 severe impairments recognized by the Commissioner to be so severe as to preclude
19 a person from engaging in substantial gainful activity. 20 C.F.R. §§
20 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more

1 severe than one of the enumerated impairments, the Commissioner must find the
2 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

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

10 At step four, the Commissioner considers whether, in view of the claimant's
11 RFC, the claimant is capable of performing work that he or she has performed in
12 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

13 If the claimant is capable of performing past relevant work, the Commissioner
14 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
15 If the claimant is incapable of performing such work, the analysis proceeds to step
16 five.

17 At step five, the Commissioner considers whether, in view of the claimant's
18 RFC, the claimant is capable of performing other work in the national economy.
19 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
20 the Commissioner must also consider vocational factors such as the claimant's age,

1 At step one of the sequential evaluation process, the ALJ found Plaintiff,
2 who meets the insured status requirements through December 31, 2021, has not
3 engaged in substantial gainful activity since August 27, 2016. Tr. 17-18. At step
4 two, the ALJ found that Plaintiff has the following severe impairments: affective
5 related disorder and anxiety related disorder. Tr. 18.

6 At step three, the ALJ found Plaintiff does not have an impairment or
7 combination of impairments that meets or medically equals the severity of a listed
8 impairment. Tr. 19. The ALJ then concluded that Plaintiff has the RFC to perform
9 the full range of work at all exertional levels with the following nonexertional
10 limitations:

11 [Plaintiff] could perform simple, routine tasks and follow short,
12 simple instructions. [Plaintiff] could do work that needs little or no
13 judgment and could perform simple duties that can be learned on the
14 job in a short period. She requires a work environment that is
15 predictable and with few work setting changes, i.e., a few routine and
16 uninvolved tasks according to set procedures, sequence, or pace.
17 Finally, there can be no requirement to set goals independently but she
18 is able to understand and follow employer set goals.

19 Tr. 20.

20 At step four, the ALJ found Plaintiff is capable of performing her past
relevant work as a housekeeper. Tr. 24. In the alternative, at step five, the ALJ
found that, considering Plaintiff's age, education, work experience, RFC, and
testimony from the vocational expert, there were jobs that existed in significant

1 numbers in the national economy that Plaintiff could perform, such as small
2 products assembler, marker, hand packager, and housekeeper. Tr. 25-26.

3 Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the
4 Social Security Act, from the alleged onset date of August 27, 2016, through the
5 date of the decision. Tr. 26.

6 On August 16, 2019, the Appeals Council denied review of the ALJ's
7 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
8 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

9 ISSUES

10 Plaintiff seeks judicial review of the Commissioner's final decision denying
11 her disability insurance benefits under Title II and supplemental security income
12 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
13 issues for review:

- 14 1. Whether the ALJ properly evaluated the medical opinion evidence;
- 15 2. Whether the ALJ properly evaluated lay witness evidence;
- 16 3. Whether the ALJ properly evaluated Plaintiff's symptom claims; and
- 17 4. Whether the ALJ conducted a proper step-five analysis.

18 ECF No. 14 at 2.

1 **DISCUSSION**

2 **A. Medical Opinion Evidence**

3 Plaintiff contends the ALJ erred in his consider of the opinions of Pedro
4 Fernandez, M.D. and Jenifer Schultz, Ph.D. ECF No. 14 at 7-11.

5 There are three types of physicians: “(1) those who treat the claimant
6 (treating physicians); (2) those who examine but do not treat the claimant
7 (examining physicians); and (3) those who neither examine nor treat the claimant
8 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”
9 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).

10 Generally, a treating physician’s opinion carries more weight than an examining
11 physician’s, and an examining physician’s opinion carries more weight than a
12 reviewing physician’s. *Id.* at 1202. “In addition, the regulations give more weight
13 to opinions that are explained than to those that are not, and to the opinions of
14 specialists concerning matters relating to their specialty over that of
15 nonspecialists.” *Id.* (citations omitted).

16 If a treating or examining physician’s opinion is uncontradicted, the ALJ
17 may reject it only by offering “clear and convincing reasons that are supported by
18 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
19 “However, the ALJ need not accept the opinion of any physician, including a
20 treating physician, if that opinion is brief, conclusory and inadequately supported

1 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
2 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
3 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
4 may only reject it by providing specific and legitimate reasons that are supported
5 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
6 F.3d 821, 830-31 (9th Cir. 1995)). The opinion of a nonexamining physician may
7 serve as substantial evidence if it is supported by other independent evidence in the
8 record. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

9 *1. Dr. Fernandez*

10 Dr. Fernandez, a treating provider, opined Plaintiff’s bipolar disorder “has
11 interfered with her functioning in more than one area of functioning in life. She is
12 disable [sic] because of the condition but she is very motivated to seek treatment
13 and follow the MD indications.” Tr. 1007. The ALJ did not address Dr.
14 Fernandez’s statement. As Dr. Fernandez’s opinion is contradicted by the opinions
15 of Kent Reade, Ph.D., Tr. 86-89, and John Robinson, Ph.D., Tr. 113-15, the ALJ
16 was required to give specific and legitimate reasons, supported by substantial
17 evidence, to reject the opinion. *See Bayliss*, 427 F.3d at 1216.

18 While Plaintiff contends Dr. Fernandez’s statement is an opinion that must
19 be addressed, ECF No. 14 at 9-10, Defendant argues Dr. Fernandez’s statement is a
20 recitation of Plaintiff’s self-report that she is disabled, and as such, the statement

1 was not an opinion and the ALJ did not need to address it, ECF No. 15 at 11.
2 Defendant further argues that the note was written at an initial consult in which
3 Plaintiff had a generally normal mental status examination, which supports the
4 contention that the statement was based on Plaintiff’s self-report and was not an
5 opinion that Plaintiff is disabled. *Id.* at 11-12.

6 Dr. Fernandez’s notes are broken down into several sections, and contains
7 notes that re-state Plaintiff’s statements with clear indications they are based on
8 self-report, such as statements Plaintiff “reported” the history of her present illness,
9 she “stated” she had a prior plan to commit suicide, she “does not feel” her
10 grandmother was diagnosed with bipolar disorder, and she “describes” her
11 upbringing as happy and sad. Tr. 1003-06. Under the “formulation”² section at

12
13 ² Formulation is the co-construction between the practitioner and patient of a
14 description of the patient’s difficulties and a hypothesis for the origin of the
15 patient’s difficulties, which is used as a basis for working to understand the
16 patient’s difficulties and to create a treatment plan. *See* Johnstone, L.,
17 *Psychological Formulation as an Alternative to Psychiatric Diagnosis*, 58(1)
18 *Journal of Humanistic Psychology*, 30–46 (2018); *see also* Sperry, M.D., Ph.D.,
19 *Len*, 10(2) *Demystifying the Psychiatric Case Formulation*, *Jefferson Journal of*
20 *Psychiatry*, Article 4 (1992).

1 Plaintiff's initial consult, Dr. Fernandez wrote Plaintiff's functioning is impacted
2 by her condition and she is disabled because of her condition; the statement is then
3 repeated verbatim under impression/recommendation. Tr. 1007-08. The statement
4 at issue does not include explicit language that it is based on Plaintiff's self-report.
5 *See id.* As there is no clear indication Dr. Fernandez's statement was solely a
6 restatement of Plaintiff's reports, the ALJ erred in failing to address Dr.
7 Fernandez's opinion. A statement by a medical source that a claimant is "unable to
8 work" is not a medical opinion and is not due "any special significance." 20
9 C.F.R. § 416.927(d). Nevertheless, the ALJ is required to consider medical source
10 opinions about any issue, including issues reserved to the Commissioner, by
11 evaluating the opinion in light of the evidence in the record and applying the
12 applicable 20 C.F.R. § 416.927(d) factors. SSR 96-5p at *2-3. As such, the ALJ
13 committed harmful error by not addressing Dr. Fernandez's opinion.

14 On remand, the ALJ is directed to reconsider Dr. Fernandez's opinion and
15 incorporate the limitations into the RFC or give specific and legitimate reasons,
16 supported by substantial evidence, to reject the opinion. The ALJ is further
17 directed to take testimony from a psychological expert.

18 *2. Dr. Schultz*

19 Dr. Schultz, a psychological consultative examiner, diagnosed Plaintiff with
20 bipolar disorder. Tr. 436. Dr. Schultz opined Plaintiff has a poor prognosis; she is

1 capable of managing her own funds; she can think in an abstract manner and
2 reason; she has intact memory; she has poor concentration; she has good social
3 interaction; she has not adapted to not working; and she has trouble focusing which
4 would impact her ability to learn and work. Tr. 436-37. The ALJ gave Dr.
5 Schultz's opinion slight weight. Tr. 23. As Dr. Schultz's opinion is contradicted
6 by the opinions of Kent Reade, Ph.D., Tr. 86-89, and John Robinson, Ph.D., Tr.
7 113-15, the ALJ was required to give specific and legitimate reasons, supported by
8 substantial evidence, to reject the opinion. *See Bayliss*, 427 F.3d at 1216.

9 The ALJ found Dr. Schultz rendered her opinion during a period Plaintiff
10 was not engaged in treatment, and Plaintiff later had improvement with treatment.
11 Tr. 23. A medical opinion may be rejected if it is unsupported by medical
12 findings. *Bray*, 554 F.3d at 1228; *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
13 1190, 1195 (9th Cir. 2004); *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir.
14 2002); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Matney v.*
15 *Sullivan*, 981 F.2d 1016, 1019 (9th Cir.1992).

16 The ALJ noted that at the time of Dr. Schultz's January 2017 examination,
17 Plaintiff was not receiving any mental health treatment. Tr. 23. After the
18 examination, Plaintiff began receiving treatment and reported doing well with
19 medications. *Id.* (citing Tr. 457-78, 501-17, 1015). Plaintiff reported gardening
20 and volunteering with her church in May 2017, and she had a normal mental status

1 examination at that time. Tr. 23 (citing Tr. 514). While Plaintiff made errors on
2 the serial sevens test at Dr. Schultz's examination, the ALJ noted Plaintiff
3 completed serial sevens with no errors in March 2018. Tr. 23 (citing Tr. 1007).

4 Plaintiff acknowledges that she regained insurance coverage in February
5 2017 and reinitiated mental health treatment at that time. ECF No. 14 at 5 (citing
6 Tr. 439). Plaintiff was discharged from mental health treatment in August 2017
7 when her treatment was deemed complete. ECF No. 14 at 6 (citing Tr. 505).

8 Plaintiff then did not have mental health treatment again for a period but in March
9 2018 Plaintiff attended an appointment with Dr. Fernandez who opined Plaintiff
10 was disabled at that time. Tr. 1006-07. While the ALJ reasoned Dr. Schultz's
11 opinion was inconsistent with Plaintiff's symptom improvements, the ALJ failed to
12 consider a disabling opinion rendered after the period the ALJ found there was
13 improvement. As such, the ALJ erred in rejecting Dr. Schultz's opinion. On
14 remand, the ALJ is instructed to reconsider Dr. Schultz's opinion and incorporate
15 the limitations into the RFC or give specific and legitimate reasons, supported by
16 substantial evidence, to reject the opinion.

17 **B. Lay Opinion Evidence**

18 Plaintiff contends the ALJ erred in his consideration of the lay witness
19 opinions of Joe Stearns and Karl Knudsen. ECF No. 14 at 11-14. An ALJ must
20 consider the statement of lay witnesses in determining whether a claimant is

1 disabled. *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir.
2 2006). Lay witness evidence cannot establish the existence of medically
3 determinable impairments, but lay witness evidence is “competent evidence” as to
4 “how an impairment affects [a claimant’s] ability to work.” *Id.*; 20 C.F.R. §§
5 416.913, 404.1513; *see also Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir.
6 1993) (“[F]riends and family members in a position to observe a claimant’s
7 symptoms and daily activities are competent to testify as to her condition.”). If a
8 lay witness statement is rejected, the ALJ ““must give reasons that are germane to
9 each witness.”” *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (citing
10 *Dodrill*, 12 F.3d at 919).

11 Mr. Stearns, Plaintiff’s friend, stated Plaintiff takes two hours to complete
12 what should be a twenty-minute task, she has difficulty following instructions,
13 requires constant supervision and is likely not employable. Tr. 288-89. Mr.
14 Knudsen, Plaintiff’s former supervisor, stated Plaintiff was late thirty-five percent
15 of the time she worked for him, she struggled to handle more than one task at a
16 time, and she did not handle stress well, but was very detail-oriented with numbers.
17 Tr. 292. The ALJ gave both statements slight weight. Tr. 24. The ALJ is not
18 required “to discuss every witness’s testimony on a[n] individualized, witness-by-
19 witness basis. Rather, if the ALJ gives germane reasons for rejecting testimony by
20 one witness, the ALJ need only point to those reasons when rejecting similar

1 testimony by a different witness.” *Molina*, 674 F.3d at 1114. If the ALJ gives
2 germane reasons for rejecting testimony by one witness, the ALJ need only point
3 to those reasons when rejecting similar testimony by a different witness. *Id.*

4 The ALJ found the lay witness’ statements are inconsistent with the
5 treatment records which demonstrated improvement in Plaintiff’s symptoms with
6 treatment. Tr. 24. An ALJ may reject lay testimony if it is *inconsistent* with
7 medical evidence, but not if it is simply *unsupported* by medical evidence.”
8 *Carlos L. v. Berryhill*, No. ED CV 17-122-SP, 2019 WL 1433723, at *11 (C.D.
9 Cal. March 28, 2019) (emphasis in original); *compare Lewis v. Apfel*, 236 F.3d
10 503, 511 (9th Cir. 2001) (“One reason for which an ALJ may discount lay
11 testimony is that it conflicts with medical evidence.”) *and Bayliss*, 427 F.3d at
12 1218 (“Inconsistency with medical evidence is one [germane] reason [to discredit
13 the testimony of lay witnesses].”) *with Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th
14 Cir. 2009) (“Nor under our law could the ALJ discredit her lay testimony as not
15 supported by medical evidence in the record.”) *and Diedrich v. Berryhill*, 874 F.3d
16 634, 640 (9th Cir. 2017) (“[A] lack of support from the ‘overall medical evidence’
17 is also not a proper basis for disregarding [the lay witness’] observations”)
18 (internal citation omitted).

19 The ALJ noted that the treatment records demonstrated Plaintiff had
20 significant improvement in her symptoms when she received treatment; after

1 reinitiating treatment, she had generally normal mental status examinations and
2 reported engaging in volunteer work. Tr. 23 (citing Tr. 993). The ALJ also
3 referenced the earlier sections of his decision in which he discussed Plaintiff's
4 improvement with treatment. Tr. 23. As discussed *supra*, the Court finds the
5 ALJ's analysis regarding Plaintiff's improvement was flawed given the ALJ's
6 failure to consider Dr. Fernandez's disabling opinion. As such, the ALJ erred in
7 his consideration of the lay opinion evidence. On remand, the ALJ is directed to
8 reconsider Mr. Stearns and Mr. Knudsen's opinions and incorporate the opinions
9 into the RFC or give germane reasons to reject the opinions.

10 **C. Plaintiff's Symptom Claims**

11 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
12 convincing in discrediting her symptom claims. ECF No. 14 at 14-16. An ALJ
13 engages in a two-step analysis to determine whether to discount a claimant's
14 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
15 "First, the ALJ must determine whether there is objective medical evidence of an
16 underlying impairment which could reasonably be expected to produce the pain or
17 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
18 "The claimant is not required to show that [the claimant's] impairment could
19 reasonably be expected to cause the severity of the symptom [the claimant] has

1 alleged; [the claimant] need only show that it could reasonably have caused some
2 degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

3 Second, “[i]f the claimant meets the first test and there is no evidence of
4 malingering, the ALJ can only reject the claimant’s testimony about the severity of
5 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
6 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
7 omitted). General findings are insufficient; rather, the ALJ must identify what
8 symptom claims are being discounted and what evidence undermines these claims.
9 *Id.* (quoting *Lester*, 81 F.3d at 834; *Thomas*, 278 F.3d at 958 (requiring the ALJ to
10 sufficiently explain why it discounted claimant’s symptom claims)). “The clear
11 and convincing [evidence] standard is the most demanding required in Social
12 Security cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting
13 *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

14 Factors to be considered in evaluating the intensity, persistence, and limiting
15 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
16 duration, frequency, and intensity of pain or other symptoms; 3) factors that
17 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
18 side effects of any medication an individual takes or has taken to alleviate pain or
19 other symptoms; 5) treatment, other than medication, an individual receives or has
20 received for relief of pain or other symptoms; 6) any measures other than treatment

1 an individual uses or has used to relieve pain or other symptoms; and 7) any other
2 factors concerning an individual's functional limitations and restrictions due to
3 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
4 416.929 (c). The ALJ is instructed to "consider all of the evidence in an
5 individual's record," to "determine how symptoms limit ability to perform work-
6 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

7 The ALJ found that Plaintiff's medically determinable impairments could
8 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
9 statements concerning the intensity, persistence, and limiting effects of her
10 symptoms were not entirely consistent with the evidence. Tr. 21.

11 The ALJ found Plaintiff's symptoms improved with treatment. Tr. 21-22.
12 The effectiveness of treatment is a relevant factor in determining the severity of a
13 claimant's symptoms. 20 C.F.R. §§ 404.1529(c)(3), 416.929; *see Warre v.*
14 *Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006); *Tommasetti v.*
15 *Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (a favorable response to treatment can
16 undermine a claimant's complaints of debilitating pain or other severe limitations).

17 The ALJ noted that Plaintiff's symptoms significantly improved when she
18 began counseling and medication in February 2017. Tr. 21. Through 2017,
19 Plaintiff had generally normal mental status examinations, in which she reported
20 improvement, gardening, attending church and volunteering. Tr. 21-22 (citing Tr.

1 439, 446, 472-73, 508-10, 512, 514). In August 2017, Plaintiff closed her case
2 with her counselor. Tr. 22 (citing Tr. 503, 506). Plaintiff re-engaged in services in
3 February 2018, when she reported stressors related to her son. Tr. 22 (citing Tr.
4 847). As discussed *supra*, the ALJ failed to consider Dr. Fernandez’s March 2018
5 disabling opinion. While the ALJ offered another reason to reject Plaintiff’s
6 symptom complaints, the Court finds the ALJ erred in his consideration of
7 Plaintiff’s symptom claims. On remand, the ALJ is directed to reconsider
8 Plaintiff’s symptom claims and incorporate the reported limitations into the RFC or
9 give clear and convincing reasons, supported by substantial evidence, to reject
10 Plaintiff’s symptom complaints.

11 **D. Step Five**

12 Plaintiff contends the ALJ erred in his step five analysis. ECF No. 14 at 16-
13 17. “[I]f a claimant establishes an inability to continue her past work, the burden
14 shifts to the Commissioner in step five to show that the claimant can perform other
15 substantial gainful work.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)
16 (citing *Swenson v. Sullivan*, 876 F.2d 683, 687 (9th Cir. 1989)). At step five, “the
17 ALJ ... examines whether the claimant has the [RFC] ... to perform any other
18 substantial gainful activity in the national economy.” *Id.* “If the claimant is able to
19 do other work, then the Commissioner must establish that there are a significant
20 number of jobs in the national economy that claimant can do.” *Tackett*, 180 F.3d

1 at 1099. “There are two ways for the Commissioner to meet the burden of
2 showing that there is other work in ‘significant numbers’ in the national economy
3 that claimant can do: (1) by the testimony of a [VE], or (2) by reference to the
4 Medical-Vocational Guidelines...” *Id.* “If the Commissioner meets this burden,
5 the claimant is not disabled and therefore not entitled to ... benefits.” *Id.* (citation
6 omitted). “If the Commissioner cannot meet this burden, then the claimant is
7 disabled and therefore entitled to ... benefits.” *Id.* (citation omitted).

8 The ALJ found that given Plaintiff’s RFC, she would be able to perform the
9 requirements of occupations including small products assembler, marker, hand
10 packager, and housekeeper. Tr. 25-26. Plaintiff contends the ALJ erred in finding
11 Plaintiff capable of performing the hand packager and marker positions, as both
12 require a GED reasoning level of two and Plaintiff’s RFC is not consistent with the
13 ability to perform reasoning level two work. ECF No. 14 at 16-17. As the case is
14 being remanded for reconsideration of the medical evidence, Plaintiff’s symptom
15 claims, and the lay opinion evidence, the ALJ is directed to perform the five-step
16 sequential analysis anew, including reconsidering Plaintiff’s ability to perform
17 work at step-four and step-five.

1 **E. Remedy**

2 Plaintiff urges this Court to remand for an immediate award of benefits.
3 ECF No. 14 at 2, 18.

4 “The decision whether to remand a case for additional evidence, or simply to
5 award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d
6 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)).

7 When the Court reverses an ALJ’s decision for error, the Court “ordinarily must
8 remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041,
9 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“the

10 proper course, except in rare circumstances, is to remand to the agency for
11 additional investigation or explanation”); *Treichler v. Comm’r of Soc. Sec. Admin.*,

12 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security

13 cases, the Ninth Circuit has “stated or implied that it would be an abuse of

14 discretion for a district court not to remand for an award of benefits” when three

15 conditions are met. *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014)

16 (citations omitted). Under the credit-as-true rule, where (1) the record has been

17 fully developed and further administrative proceedings would serve no useful

18 purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting

19 evidence, whether claimant testimony or medical opinion; and (3) if the improperly

20 discredited evidence were credited as true, the ALJ would be required to find the

1 claimant disabled on remand, the Court will remand for an award of benefits.
2 *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). Even where the three
3 prongs have been satisfied, the Court will not remand for immediate payment of
4 benefits if “the record as a whole creates serious doubt that a claimant is, in fact,
5 disabled.” *Garrison*, 759 F.3d at 1021.

6 Here, the Court finds further proceedings are necessary to determine the
7 appropriate weight to afford to Dr. Fernandez’s opinion, and reconsider the other
8 evidence in light of Dr. Fernandez’s opinion and any opinion rendered by the
9 testifying psychological expert. As such, the case is remanded for further
10 proceedings consistent with this Order.

11 **CONCLUSION**

12 Having reviewed the record and the ALJ’s findings, the Court concludes the
13 ALJ’s decision is not supported by substantial evidence and is not free of harmful
14 legal error. Accordingly, **IT IS HEREBY ORDERED:**

- 15 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 14**, is **GRANTED**.
16 2. Defendant’s Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.
17 3. The Clerk’s Office shall enter **JUDGMENT** in favor of Plaintiff

18 **REVERSING** and **REMANDING** the matter to the Commissioner of Social
19 Security for further proceedings consistent with this recommendation pursuant to
20 sentence four of 42 U.S.C. § 405(g).

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The District Court Executive is directed to file this Order, provide copies to counsel, and **CLOSE THE FILE.**

DATED May 15, 2020.

s/Mary K. Dimke
MARY K. DIMKE
UNITED STATES MAGISTRATE JUDGE