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6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

7
8 MELANIE STIPANOVICH
VALDEZ,

9 Plaintiff,

10 v.

11 CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

12 Defendant.
13

NO. CV-11-3065-RHW

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT;
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

14
15 Before the Court are Plaintiff's Motion for Summary Judgment, ECF No.
16 19, and Defendant's Motion for Summary Judgment, ECF No. 21. The motions
17 were heard without oral argument. Plaintiff is represented by D. James Tree.
18 Defendant¹ is represented by Assistant United States Attorney Pamela De Rusha
19 and Special Assistant United States Attorney M. Thayne Warner.

20 **I. Jurisdiction**

21 On December 3, 2007, Plaintiff protectively filed a Title II application for
22 disability insurance benefits (DIB) and a Title XVI application for supplemental
23

24 ¹Carolyn W. Colvin became the Acting Commissioner of Social Security on
25 February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure,
26 Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this
27 suit. No further action need be taken to continue this suit by reason of the last
28 sentence of 42 U.S.C. § 405(g).

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

1 security income (SSI). Plaintiff alleged she had been disabled beginning January
2 1, 2007. At the hearing, Plaintiff amended her alleged disability onset to July 1,
3 2007.

4 Her application was denied initially and again denied on reconsideration. A
5 timely request for a hearing was made. On September 2, 2009, Plaintiff appeared
6 at a hearing in Yakima, Washington before Administrative Law Judge (ALJ)
7 Douglas S. Stults. Plaintiff was represented by Chad Hatfield. Polly Peterson, a
8 vocational expert, also participated.

9 The ALJ issued a decision on January 13, 2010, finding that Plaintiff was
10 not disabled. Plaintiff timely requested review by the Appeals Council, which
11 granted her request for review. Upon review, the Appeals Council adopted the
12 ALJ's findings and conclusions that Plaintiff was not disabled. The Appeals
13 Council's decision became the final decision of the Commissioner. *See* 20 C.F.R.
14 §§ 404.981, 422.10.

15 Plaintiff filed a timely appeal with the U.S. District Court for the Eastern
16 District of Washington on June 6, 2011. The instant matter is before this Court
17 pursuant to 42 U.S.C. § 405(g).

18 **II. Sequential Evaluation Process**

19 The Social Security Act defines disability as the “inability to engage in any
20 substantial gainful activity by reason of any medically determinable physical or
21 mental impairment which can be expected to result in death or which has lasted or
22 can be expected to last for a continuous period of not less than twelve months.”
23 42 U.S.C. § 423(d)(1)(A). A claimant shall be determined to be under a disability
24 only if her impairments are of such severity that the claimant is not only unable to
25 do her previous work, but cannot, considering claimant's age, education and work
26 experiences, engage in any other substantial gainful work which exists in the
27 national economy. 42 U.S.C. §423(d)(2)(A).

28 The Commissioner has established a five-step sequential evaluation process

1 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a)(4); *Bowen*
2 *v. Yuckert*, 482 U.S. 137, 140-42 (1987).

3 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R. §
4 404.1520(b). Substantial gainful activity is work done for pay and requires
5 compensation above the statutory minimum. 20 C.F.R. § 404.1574; *Keyes v.*
6 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in
7 substantial activity, benefits are denied. 20 C.F.R. § 404.1571. If he is not, the ALJ
8 proceeds to step two.

9 Step 2: Does the claimant have a medically-severe impairment or
10 combination of impairments? 20 C.F.R. § 404.1520(c). If the claimant does not
11 have a severe impairment or combination of impairments, the disability claim is
12 denied. A severe impairment is one that lasted or must be expected to last for at
13 least 12 months and must be proven through objective medical evidence. 20
14 C.F.R. § 404.1508-09. If the impairment is severe, the evaluation proceeds to the
15 third step.

16 Step 3: Does the claimant's impairment meet or equal one of the listed
17 impairments acknowledged by the Commissioner to be so severe as to preclude
18 substantial gainful activity? 20 C.F.R. § 404.1520(d); 20 C.F.R.
19 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed
20 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the
21 impairment is not one conclusively presumed to be disabling, the evaluation
22 proceeds to the fourth step.

23 Step 4: Does the impairment prevent the claimant from performing work she
24 has performed in the past? 20 C.F.R. § 404.1520(e). If the claimant is able to
25 perform her previous work, she is not disabled. *Id.* If the claimant cannot perform
26 this work, proceed to the fifth and final step.

27 Step 5: Is the claimant able to perform other work in the national economy
28 in view of her age, education, and work experience? 20 C.F.R. § 404.1520(f).

1 The initial burden of proof rests upon the claimant to establish a prima facie
2 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
3 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
4 mental impairment prevents her from engaging in her previous occupation. *Id.* At
5 step five, the burden shifts to the Commissioner to show that the claimant can
6 perform other substantial gainful activity. *Id.*

7 **III. Standard of Review**

8 The Commissioner's determination will be set aside only when the ALJ's
9 findings are based on legal error or are not supported by substantial evidence in
10 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
11 (citing 42 .S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
12 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
13 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
14 evidence is "such relevant evidence as a reasonable mind might accept as adequate
15 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
16 ALJ's denial of benefits if the evidence is susceptible to more than one rational
17 interpretation, one of which supports the decision of the administrative law judge.
18 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the evidence can
19 support either outcome, the court may not substitute its judgment for that of the
20 ALJ." *Matney*, 981 F.2d at 1019.

21 A decision supported by substantial evidence will be set aside if the proper
22 legal standards were not applied in weighing the evidence and making the
23 decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
24 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are
25 immaterial to the ultimate nondisability determination." *Stout v. Comm'r, Soc. Sec.*
26 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

27 **IV. Statement of Facts**

28 The facts have been presented in the administrative transcript and the ALJ's

1 decision and will only be summarized here.

2 At the time of the hearing, Plaintiff was 38 years old. She has three minor
3 children living with her, ages 12, 10, and 6. Plaintiff completed the 11th grade, and
4 attended one semester at the community college. She testified she does not do any
5 yard work or gardening, does not take out the trash, but does laundry and
6 occasionally cooks. She drives only when she has to. She reported that sometimes
7 she has panic attacks when she is driving and she has to pull over to the side of the
8 road. Her hobbies include swimming. She reports having difficulty being in the
9 public.

10 Plaintiff has worked in the past as a retail sales clerk and a fast food worker.

11 She has a history of depression, anxiety, ADHD, panic attacks, bipolar
12 disorder, and asthma. In 2009, her foot was operated on to correct a hammer toe.
13 She does not have any computer skills, does not use the internet or email, and does
14 not own a cell phone.

15 **V. The ALJ's findings**

16 The ALJ noted that Plaintiff last met the insured status requirements of the
17 Social Security Act through December 31, 2011. (Tr. 23.)

18 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
19 activity since July 1, 2007, the amended alleged onset date. (Tr.23.)

20 At step two, the ALJ found Plaintiff has the following severe physical and
21 mental impairments: asthma, bipolar II disorder, posttraumatic stress disorder
22 (PTSD), cannabis dependence, and borderline personality disorder (Tr. 24.)

23 At step three, the ALJ found Plaintiff did not have an impairment or
24 combination of impairments that meets or medically equals one of the listed
25 impairments in 20 CFR Part 404, Subpart P, Appendix 1. (Tr. 26.) He considered
26 impairments listed under Listing 3.00 (Respiratory System) and Listing 3.03
27 (*Asthma*). (Tr. 26.) With respect to Plaintiff's mental impairments, he considered
28 12.04, 12.08, 12.09. (Tr. 26.) He concluded that because Plaintiff's mental

1 impairments do not cause at least two “marked” limitations or one “marked”
2 limitation and “repeated” episodes of decompensation, the paragraph B criteria
3 was not satisfied, and the evidence failed to establish the presence of “paragraph
4 C” criteria. (Tr. 26.)

5 The ALJ determined Plaintiff had the residual functional capacity to
6 perform less than the full range of light work as defined in 20 C.F.R. §
7 404.1567(b);² except she was limited to no more than occasional exposure to
8 pulmonary irritants, such as smoke, fumes, dusts, gases, and poor ventilation;
9 understand, remember, and carry out simple repetitive tasks, make only simple
10 work related decisions; deal with only rare changes in work processes or
11 environment; have no contact with general public; and have only incidental work-
12 related contact with co-workers (not working in close proximity to or in
13 conjunction with co-workers). (Tr. 27.)

14 At step four, the ALJ concluded Plaintiff was unable to perform past
15 relevant work. (Tr. 31.)

16 At step five, the ALJ considered Plaintiff’s age, education, work experience,
17 and residual functional capacity and concluded there are jobs that exist in

18 ²(b) Light work involves lifting no more than 20 pounds at a time with frequent
19 lifting or carrying of objects weighing up to 10 pounds. Even though the weight
20 lifted may be very little, a job is in this category when it requires a good deal of
21 walking or standing, or when it involves sitting most of the time with some
22 pushing and pulling of arm or leg controls. To be considered capable of
23 performing a full or wide range of light work, you must have the ability to do
24 substantially all of these activities. If someone can do light work, we determine
25 that he or she can also do sedentary work, unless there are additional limiting
26 factors such as loss of fine dexterity or inability to sit for long periods of time.
27 20 C.F.R. § 404.1567(b).
28

1 significant numbers in the national economy that Plaintiff can perform. (Tr. 32.)
2 Specifically, the ALJ found Plaintiff could work as a cannery worker, peeled
3 potato inspector, and silver wrapper.³ (Tr. 33.) The ALJ found Plaintiff not
4 disabled because she is capable of making a successful adjustment to other work
5 that exists in significant numbers in the national economy. (Tr. 33.)

6 **VI. The Appeals Council's Decision**

7 The Appeals Council reviewed the ALJ's decision that Plaintiff was not
8 disabled. It adopted the ALJ's statements regarding the pertinent provisions of the
9 Social Security Act, the SSA's regulations and rulings, the issues in the case, and
10 the evidentiary facts. (Tr. 4.) It adopted the ALJ's findings and conclusions
11 regarding whether Plaintiff is disabled: findings at step one, two, and three of the
12 sequential evaluation, and findings that Plaintiff had mild restriction in activities
13 of daily living, moderate difficulty maintaining social functioning, moderate
14 difficulty maintaining concentration, persistence or pace, and had experienced no
15 episodes of decompensation. (Tr. 4.) It also adopted the ALJ's credibility findings.
16 The Council adopted the ALJ's residual functional capacity findings. (Tr. 5.)

17 The Appeals Council noted the ALJ erred in rejecting the opinion of
18 Kathleen A. Mack, ARNP, because the Exhibit in question was also signed by Dr.
19 Philip Rodenberger, who is an acceptable medical source. (Tr. 5.) The Appeals
20 Council then rejected Dr. Rodenberger's assessment that Plaintiff is moderately
21 limited in her ability to accept instructions and respond appropriately to criticism
22 from supervisors because it believed this opinion was not supported by the
23 longitudinal record and was contradicted by Dr. Warren's conclusion that Plaintiff

24
25 ³The vocational expert testified that a silver wrapper works in hotels and
26 basically takes silverware and wraps it in napkins and places it on the table. (Tr.
27 56.)

1 was able to relate appropriately to supervisors, and Dr. Montoya’s opinion⁴ that
2 Plaintiff had only mild difficulty in maintaining social functioning and is able to
3 understand, remember, and carry out short and simple instructions under ordinary
4 supervision. (Tr. 5.)

5 The Appeals Council found the vocational expert’s testimony to be
6 persuasive and that the jobs cited by the vocational expert existed in significant
7 number in the national economy. (Tr. 5.)

8 **VII. Issues for Review**

9 Plaintiff presents the following issues for review:

- 10 1. The ALJ’s rejection of Plaintiff’s treating and examining medical
11 providers’ opinions; and
- 12 2. The ALJ’s step five identification of specific jobs available in
13 significant numbers.

14 **VIII. Discussion**

15 **A. The ALJ’s Rejection of Plaintiff’s Treating and Examining** 16 **Medical Providers’ Opinions**

17 Plaintiff argues the ALJ and the Appeals Council erred in rejecting Dr.
18 Rodenberger’s opinion; erred in rejecting Dr. Keane’s opinion; and erred in
19 rejecting the opinions of Therapists Mack and Rapisarda.

20 “When there is conflicting medical evidence, the Secretary must determine
21

22 ⁴The ALJ rejected Dr. Montoya’s “Not severe” conclusions, and gave less
23 weight to her opinion because it did not adequately consider Plaintiff’s subjective
24 complaints, or the combined effect of Plaintiff’s impairments and medical
25 evidence received at the hearing that revealed Plaintiff was more limited than
26 previously evaluated. (Tr. 31.) The Court notes that Dr. Montoya’s opinion was
27 dated February 2, 2008, one week later than Dr. Warren’s opinion.
28

1 credibility and resolve the conflict.” *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th
2 Cir. 1992). More weight is given to a treating physician’s opinion than to the
3 opinion of a non-treating physician because a treating physician is employed to
4 cure and has greater opportunity to know and observe the patient as an individual.
5 20 C.F.R. § 416.927(d)(1); *see also Andrews v. Shalala*, 53 F.3d 1035, 1040-41
6 (9th Cir. 1995). Likewise, greater weight is given to the opinion of an examining
7 physician than a non-examining physician. *Andrews*, 53 F.3d at 1041. Opinions
8 of physicians who examined the claimant only once should be given less weight
9 than the physicians who treated her. 20 C.F.R. § 404.1527; *Benecke v. Barnhart*,
10 379 F.3d 587, 592 (9th Cir. 2004).

11 In his order, the ALJ summarily considered, but rejected the opinions of
12 PA-C Carmen Magistro (Ex. 1F) (Tr. 201-213.); the Mental RFC Assessment
13 from K. Mack, ARNP (Ex. 12F) (Tr. 340-342.)⁵, and the Mental RFC

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17 _____
18 ⁵Ms. Mack noted that Plaintiff was *moderately* limited in her ability to:
19 remember locations and work-like procedures, understand and remember detailed
20 instructions, carry out detailed instructions, maintain attention and concentration
21 for extended period, sustain an ordinary routine without special supervision, make
22 simple work-related decisions, and complete a normal work-day and work-week
23 without interruptions from psychologically based symptoms and to perform at a
24 consistent pace without an unreasonable number and length of rest periods,
25 interact appropriately with the general public, accept instructions and respond
26 appropriately to criticism from supervisors, be aware of normal hazards and take
27 appropriate precautions, and set realistic goals or make plans independently of
28 others. (Tr. 340-341.) Dr. Rodenberger signed the evaluation. (Tr. 342.)

1 Assessment from Therapist Diane Repishana (Ex. 16F) (Tr. 421-424).⁶ (Tr. 31.)
2 He also summarily rejected the ARNP and MSW opinions contained in Exhibit
3 17F and 19F because they are not acceptable medical sources, and because they
4 were not consistent with Dr. Keane's opinion, who is an acceptable medical
5 source. (Tr. 31.)⁷ Notably, the ALJ failed to identify the weight given to Dr.

7 ⁶Ms. Repishana noted that Plaintiff is *markedly* limited in the following: ability
8 to understand and remember detailed instructions; ability to maintain attention and
9 concentration, ability to complete a normal work-day and work-week without
10 interruptions from psychologically based symptoms and to perform at a consistent
11 pace without an unreasonable number and length of rest periods, ability to interact
12 appropriately with the general public; and travel in unfamiliar places or use public
13 transportation. (Tr. 422-423.) She noted that Plaintiff was *moderately* limited in
14 her ability to: remember locations and work-like procedures; understand and
15 remember very short and simple instructions; carry out detailed instructions; work
16 in coordination with or proximity to others without being distracted by them, and
17 make simple work-related decisions, accept instructions and respond appropriately
18 to criticism from supervisors, maintain socially appropriate behavior and to adhere
19 to basic standards of neatness and cleanliness, respond appropriately to changes in
20 the work setting, and set realistic goals or make plans independently of others. (Tr.
21 422-423.) She commented that Plaintiff has significant problems with self-esteem
22 and has severe PTSD that significantly interferes with her functioning, including
23 frequent intrusive thoughts, significant distrust of others, as well as suffering from
24 anxiety and depression.

25 ⁷The Court reviewed the administrative record and believes the ALJ was
26 referring to the following opinions:

- 27 a. the Psychiatric Evaluation from Kathleen Mack (Tr. 425-427);
28

1 Keane's opinion.

2 The ALJ erred in rejecting the opinions of Therapists Mack and Parisarda,
3 and Gabriela Mondragon, M.S.W., who are considered "other sources" by the
4 regulations. Instead of rejecting these opinions, the ALJ may only discount
5 testimony from these "other sources" if the ALJ "gives reasons germane to each
6 witness for doing so." *Moline v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). The
7 ALJ committed legal error by failing to give germane reasons for summarily
8 rejecting these "other sources."

9 Also, the ALJ's conclusions that the therapist's opinions were contrary to
10 Dr. Keane's opinions is not supported by the substantial evidence. Dr. Keane was
11 Plaintiff's treatment provider in Nebraska. It appears he treated Plaintiff from
12 August, 2007 to sometime in 2008. In August, 2007, therapist William Holtmeyer,
13 MS, NCC, LPC, evaluated and diagnosed Plaintiff with "Adjustment Disorder
14 with mixed disturbance of emotions and noted her primary problem was anxiety
15 and depressive features. (Tr. 359.) He rated her stress severity at moderate, and
16 determined her current functioning level at 65, but noted her last year function at
17 75. (Tr. 369.) He identified the following behavioral definitions: excessive worry,
18 anxiety, mood swings, depressed, sadness, obsessive thinking, compulsive
19 behavior, restlessness, unable to concentrate and problems staying focused,

20 b. the 10/20/2008 Assessment completed by Gabriela Mondragon (Tr. 428-
21 435, 481);

22 c. the Treatment Plan coordinated by Nina Rapisarda, M.S.W. (Tr. 436-438,
23 Tr. 495-96);

24 d. treatment records from Kathleen Mack, ARNP (Tr. 443-444, 447-449.
25 453-455, 458-460, 466-468, 472-473.); and

26 e. treatment notes by Nina Rapisarda, M.S.W. (Tr. 445-446, 450-51, 457,
27 464-465, 469-471, 474-475, 477, 480).

1 forgetfulness, and trouble with sleep. Dr. Keane, O.D. signed off on the
2 evaluation. (Tr. 360.)

3 In November 26, 2007, Dr. Keane evaluated Plaintiff regarding her mood
4 swings. He noted that her degree of functional impairment is such that she was
5 having severe difficulties in keeping employment and having severe mood swings,
6 difficulty concentrating, as well as difficulties in her relationship with her oldest
7 child, and having financial constraints. (Tr. 296.) She reported a history of taking a
8 variety of psychiatric medications, including sertraline, clonazepam, mirtazapine,
9 Prozac, Wellbutrin, Lexapro, Effexor, Seroquel, and Xanax. He diagnosed her
10 with bipolar disorder, NOS, anxiety disorder, NOS, PTSD, history of
11 polysubstance dependence in reported remission (Tr. 299.)

12 Dr. Keane set out five goals: 1. Stabilize mood swings; 2. Decrease anxiety;
13 3. Discontinue the ineffective medications; 4. Resolve Plaintiff's past history of
14 trauma; and 5. Maintain a clean and sober lifestyle; and he set the following
15 discharge criteria: 1. Able to stay on task to successful completion; 2. Consistent
16 abstinence from mood-altering illicit drugs and alcohol; 3. Demonstrates
17 responsible and consistent medication-taking behavior; 4. Depression and anxiety
18 are adequately controlled to function well in daily living; 5. No violent outbursts
19 of temper; 6. Delusions controlled so as not to interfere with daily living; and 7.
20 Verbalize plans for seeking continued emotional support after discharge (Tr. 300.)

21 On April 4, 2008, Dr. Keane completed a Physicians Confidential Report.
22 He noted her present illness was mood instability, anxiety and marijuana
23 dependence. (Tr. 281.) He described the following physical/mental conditions that
24 would restrict work or training activities: chronic problems with tolerating and
25 regulating emotional distress (anger, frustration, anxiety, stress), as well as
26 difficulty interacting with others when under stress. (Tr. 282.)

27 Plaintiff then moved to Yakima, Washington and began treatment for her
28 depression, mood swings, irritability, and anxiety with ARNP Mack and Nina

1 Rapisarda, Therapist. The records reflect that Plaintiff and her providers were
2 trying various medications to address her impairments, as well as implementing
3 strategies to reduce her anxiety, anger, and depression. Her therapists consistently
4 reported that she appeared anxious, tearful, and irritable during the sessions.
5 Notably, by 2009, Plaintiff was involved in AA and was abstaining from
6 marijuana use. Also, at the hearing, Plaintiff testified she had been clean and sober
7 for nine months. (Tr. 46.) Even so, the records reflect Plaintiff continued to have
8 significant impairments that affected her ability to work.

9 The ALJ rejection of the opinions of Plaintiff's therapists is not supported
10 by substantial evidence because, as demonstrated above, they are not inconsistent
11 with Dr. Keane's opinion. Rather, the record is clear that Plaintiff has severe
12 anxiety, irritability, depression and mood swings that drastically affect her ability
13 to work.

14 Moreover, Dr. Jane Warren's opinion is contrary to Dr. Keane's opinions
15 and is contrary to the longitudinal treatment records. Dr. Warren only examined
16 Plaintiff one time. She completed the consultative examination on January 24,
17 2008. She concluded Plaintiff had the ability to sustain concentration and attention
18 needed for task completion, understand and remember short and simple
19 instructions, carry out short and simple instructions under ordinary supervision,
20 relate appropriately to co-workers and supervisors, and adapt to change in her
21 environment (Tr. 251.) It does not appear Dr. Warren conducted any psychological
22 tests. She also believed Plaintiff had found a good combination of medications to
23 control her symptoms.⁸ Substantial evidence does not support the ALJ's decision

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25 ⁸Subsequent medical records reveal Plaintiff's struggles to find a good
26 combination of medications to control her symptoms. *Compare* Tr. 427 (ARNP
27 Mack's medication plan on November 17, 2008 included stopping Seroquel,
28 Cymbalta, and Lithium; starting citalopram and straterra, and continuing

1 to give Dr. Warren’s greater weight than Dr. Keane, a treating physician, or Dr.
2 Rodenberger, nor is Dr. Warren’s opinion supported by the medical evidence.
3 Notably, when Dr. Warren completed her evaluation, she did not have the benefit
4 of the medical records from Plaintiff’s Yakima providers, *i.e.* ARNP Mack and
5 Nina Rapisarda.⁹

6 Also, the Appeals Council erred in rejecting Dr. Rodenberger and ARNP
7 Mack’s opinion, concluding it was not supported by the longitudinal record and it
8 conflicted with Dr. Jane Warren’s opinion that Plaintiff was able to appropriately
9 relate to supervisors. (Tr. 66-67). Simply noting that an opinion is contrary to
10 another opinion does not meet the standard for rejecting an opinion. *See Lester v.*
11 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995) (explaining that the existence of a
12 contrary opinion lowers the standard for rejecting an opinion from requiring “clear
13 and convincing” reasons to requiring “specific and legitimate reasons.”). Likewise,
14 the Appeals Council erred in not providing specific, legitimate reasons for
15 rejecting the treating doctor’s opinion in favor of an examining doctor’s contrary
16 opinion. Additionally, contrary to the Appeals Council’s determination, Dr.
17 Rodenberger’s and ARNP Mack’s opinion is supported by the longitudinal record,
18 not contrary to it.

19 The ALJ concluded that Plaintiff was not motivated to work full time, based
20 on one statement made to Dr. Warren in 2008, and this appears to have influenced

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22 clonazepam) with Tr. 442-43 (ARNP Mack’s June 30, 2009 treatment plan
23 including stopping citalopram, trazodone; starting paroxetine and hydroxyzine,
24 and continuing clonazepam and lithium.).

25 ⁹As set forth above, the ALJ rejected the 2008 state agency psychological
26 consultants’ mental assessments due in part because the combined effect of
27 Plaintiff’s impairments and medical evidence received at the hearing level
28 revealed that Plaintiff was more limited than previously evaluated. (Tr. 31.)

1 the ALJ's decision. He questioned her belief that she is unable to work because
2 she can drive her car, go to the pharmacy, swim twice a week, goes to the movies,
3 has friends, can do household cleaning, can balance the checkbook, and pay her
4 bills on time. (Tr. 28.) In that same report, however, Plaintiff indicated that she has
5 anxiety, panic attacks and little patience with friends and family. (Tr. 161.) More
6 important, beginning in 2009, Plaintiff repeatedly told her treatment providers that
7 she wanted to get better and began attending AA.

8 The ALJ erred in failing to account for her mental impairments in assessing
9 her ability to work. In that same report, Plaintiff indicated that she could not sit
10 still long enough to watch a full television program. (Tr. 162.) She reported being
11 overwhelmed around people. (Tr. 162.) The ALJ credited Plaintiff when she
12 described her daily activities, but ignored her statements regarding her limitations,
13 even then these statements were consistent with the treatment notes from 2008 to
14 2009. (Tr. 28.)

15 The ALJ committed legal error in not providing germane reasons for
16 rejecting Plaintiff's treatment providers' opinions, both acceptable and other
17 source opinions. The ALJ chose to credit the opinion of Dr. Warren, yet her
18 opinion was contrary to the longitudinal medical records.¹⁰ This was also error.
19 Consequently, the ALJ's RFC determination is not supported by substantial
20 evidence because it does not accurately reflect Plaintiff's limitations caused by her
21 depression, anxiety, irritability, PTSD, mood swings, and her inability to accept
22 instructions and respond appropriately to criticism from supervisors.

23 If the ALJ properly considered her treatment providers' opinions, the
24 residual functional capacity would have incorporated her mental impairments.

25
26 ¹⁰In addition to the medical records contained in the Administrative Record,
27 Plaintiff reported she has been in treatment for her depression and anxiety since
28 the age of 18.

1 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (holding that when an ALJ fails
2 to provide adequate reasons for rejecting a treating or examining doctor’s opinion,
3 that opinion is credited as a matter of law). At the hearing, Plaintiff’s counsel
4 proffered two hypotheticals to the vocational expert that were consistent with Dr.
5 Keane’s, Rodenberger’s and the ARNP’s opinions:

6 1. Assume Plaintiff age, education, past relevant work experience, with
7 moderate limitation, meaning significant interference with basic work
8 related activities, unable to perform the following mental activity for
9 at least 20 percent of work day up to 33 percent of work day,
10 including the ability to understand and remember very short and
11 simple instructions, ability to understand and remember detailed
12 instructions, ability to carry out detailed instructions, ability to
13 maintain attention and concentration for extended periods, ability to
14 sustain an ordinary routine without special supervision, ability to
15 make simple work-related decisions, the ability to complete a normal
16 work day and work week without interruption from psychologically-
17 based symptoms and to perform at a consistent pace without an
18 unreasonable number and length of rest period, ability to interact
19 appropriately with the general public, the ability to accept instructions
20 and respond appropriately to criticism from supervisors, the ability to
21 be aware of normal hazards and take appropriate precautions, and the
22 ability to set realistic goals or make plans independently of others.¹¹

(Tr. 57.)

23 2. Assume Plaintiff’s age, education, past relevant work experience,
24 with significant interference with basic work related activities, that is,
25 unable to perform mental activity for more than 33 percent of the
26 work day, markedly limited in ability to understand and remember
27 detailed instructions, ability to maintain attention and concentration
28 for extended periods, ability to complete a normal work day, and
work week without interruptions from psychologically-based
symptoms and to perform at a consistent pace without unreasonable
number and length of rest periods, and the ability to interact
appropriately with the general public and the ability to travel in
unfamiliar places or use public transportation.¹²

(Tr. 58.)

29 The vocational expert responded that the individual would not be able to
30 perform past work, or any work in the national or regional economy. If the ALJ

31 ¹¹This hypothetical is consistent with the assessment completed by Dr.
32 Rodenberger and ARNP Mack. *See* Footnote 5.

33 ¹²This hypothetical is consistent with the assessment completed by Nina
34 Repishana. *See* Footnote 6.

1 had properly considered the opinions of Plaintiff’s “other sources,” he would have
2 incorporated the above-described limitations into the residual functional capacity.
3 Based on the vocational expert’s testimony, it is clear from the record that if the
4 ALJ would have properly credited the treating and other source opinions, he
5 would be required to find the claimant disabled.

6 **IX. Conclusion**

7 Remand for further administrative proceedings is appropriate if
8 enhancement of the record would be useful. *See Harman v. Apfel*, 211 F.3d 1172,
9 1178 (9th Cir. 2000). Conversely, where the record has been developed fully and
10 further administrative proceedings would serve no useful purpose, the district
11 court should remand for an immediate award of benefits. *Benecke*, 379 F.3d at
12 587. As the *Benecke* court instructed: the district court should credit evidence that
13 was rejected during the administrative process and remand for an immediate award
14 of benefits if (1) the ALJ failed to provide legally sufficient reasons for rejecting
15 the evidence; (2) there are no outstanding issues that must be resolved before a
16 determination of disability can be made; and (3) it is clear from the record that the
17 ALJ would be required to find the claimant disabled were such evidence credited.
18 *Id.*

19 Here, the ALJ failed to provide legally sufficient reasons for rejecting the
20 opinions of Plaintiff’s “other sources,” not identifying the weight given to Dr.
21 Keane, and not properly considering Dr. Keane’s opinion, and relying on Dr.
22 Warren’s opinion, which did not account for the 2009 records and was not
23 consistent with the longitudinal record. If these opinions were properly credited
24 and considered, the ALJ would be required to find Plaintiff disabled. *See Orn v.*
25 *Astrue*, 495 F.3d 625, 640 (9th Cir. 2007) (finding ALJ erred in not crediting
26 opinions of claimant’s treating physicians and after crediting such opinions,
27 concluding the claimant was disabled).

28 ///

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment, ECF No. 19, is **GRANTED**.

3 2. Defendant's Motion for Summary Judgment, ECF No. 21, is **DENIED**.

4 3. The decision of the ALJ denying benefits is **reversed** and the case is
5 **remanded** to the ALJ for an immediate award of benefits.

6 4. The District Court Executive is directed to enter judgment in favor of
7 Plaintiff and against Defendant.

8 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
9 file this Order and provide copies to counsel, and **close the file**.

10 **DATED** this 18th day of October, 2013.

11
12
13 *s/Robert H. Whaley*
14 **ROBERT H. WHALEY**
United States District Judge

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