

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

Sep 19, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ELIZABETH PARKER,

No. 2:16-CV-0087-SMJ

Plaintiff,

**ORDER GRANTING PLAINTIFF’S  
SUMMARY JUDGMENT  
MOTION, DENYING  
DEFENDANT’S SUMMARY  
JUDGMENT MOTION, AND  
REMANDING FOR FURTHER  
ADMINISTRATIVE  
PROCEEDINGS**

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

**I. INTRODUCTION**

Before the Court, without oral argument, are the parties’ cross-motions for summary judgment. ECF Nos. 15 & 20. Plaintiff Elizabeth Parker appeals the Administrative Law Judge’s (ALJ) denial of Social Security disability insurance and supplemental security income benefits. ECF No. 1. Plaintiff contends the ALJ erred by disregarding medical opinions, discrediting her testimony, and failing to subpoena witnesses. Plaintiff also argues the ALJ displayed an impermissible bias against her based on her mental health and indigent status. The Commissioner of Social Security (“Commissioner”) asks the Court to affirm the ALJ’s decision.

1 After reviewing the record and relevant authority, the Court is fully informed.  
2 For the reasons set forth below, the Court finds that the ALJ failed to provide  
3 specific, clear and convincing reasons supported by substantial evidence to reject  
4 the medical opinion of Dr. Sanchez and the Veterans Affairs (VA) disability rating.  
5 Further, the Court cannot find that these were harmless errors. Accordingly, the  
6 Court denies both motions and remands the case for reconsideration consistent with  
7 this Order.

## 8 II. BACKGROUND<sup>1</sup>

9 At the time of her hearing before the ALJ, Plaintiff was fifty-five years old  
10 and lived in Seattle. ECF No. 8-2 at 45, 49. Plaintiff suffers from a number of  
11 conditions including major depressive disorder, anxiety related disorders, and post  
12 traumatic stress disorder (PTSD). *Id.* at 19. Plaintiff is a veteran of the United States  
13 Army and has a degree in journalism from Western Washington University and a  
14 paralegal certificate from Edmonds Community College. *Id.* at 45–46. She has not  
15 worked since 2011. *Id.* at 46.

16 Plaintiff filed applications for disability benefits and supplemental security  
17 income on October 10, 2012, alleging that her psychological symptoms became  
18 disabling beginning August 28, 2012. *Id.* at 15. The claims were denied on March  
19

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20 <sup>1</sup> The facts are only briefly summarized. Detailed facts are contained in the administrative hearing transcript, the ALJ's decision, and the parties' briefs.

1 5, 2013, and on reconsideration on May 14, 2013. *Id.* Plaintiff filed a request for  
2 hearing on June 17, 2013, and a hearing before ALJ Larry Kennedy was held  
3 February 3, 2014. *Id.*

4 The ALJ issued his decision on April 2, 2014, concluding that Plaintiff was  
5 not disabled within the meaning of the Social Security Act during the relevant time  
6 period. *Id.* at 12. Plaintiff requested review by the Social Security Appeals Counsel.  
7 *Id.* at 10. The Appeals Counsel denied Plaintiff's request for review of the ALJ's  
8 decision on January 28, 2016. *Id.* at 2.

9 Plaintiff filed this action on March 24, 2016. ECF No. 1.

### 10 **III. DISABILITY DETERMINATION**

11 A "disability" is defined as the "inability to engage in any substantial gainful  
12 activity by reason of any medically determinable physical or mental impairment  
13 which can be expected to result in death or which has lasted or can be expected to  
14 last for a continuous period of not less than twelve months." 42 U.S.C.  
15 §§ 423(d)(1)(A), 1382c(a)(3)(A). The decision-maker uses a five-step sequential  
16 evaluation process to determine whether a claimant is disabled. 20 C.F.R.  
17 §§ 404.1520, 416.920.

18 Step one assesses whether the claimant is engaged in substantial gainful  
19 activities. If so, benefits are denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If not,  
20 the decision-maker proceeds to step two.

1 Step two assesses whether the claimant has a medically severe impairment  
2 or combination of impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the  
3 claimant does not, the disability claim is denied. If the claimant does, the evaluation  
4 proceeds to the third step.

5 Step three compares the claimant's impairment with a number of listed  
6 impairments acknowledged by the Commissioner to be so severe as to preclude  
7 substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 404 Subpt. P App. 1,  
8 416.920(d). If the impairment meets or equals one of the listed impairments, the  
9 claimant is conclusively presumed to be disabled. If the impairment does not, the  
10 evaluation proceeds to the fourth step.

11 Step four assesses whether the impairment prevents the claimant from  
12 performing work he has performed in the past by examining the claimant's residual  
13 functional capacity. 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant is able  
14 to perform his or her previous work, the claimant is not disabled. If the claimant  
15 cannot perform this work, the evaluation proceeds to the fifth step.

16 Step five, the final step, assesses whether the claimant can perform other  
17 work in the national economy in view of his or her age, education, and work  
18 experience. 20 C.F.R. §§ 404.1520(f), 416.920(f); *see Bowen v. Yuckert*, 482 U.S.  
19 137 (1987). If the claimant can, the disability claim is denied. If the claimant  
20 cannot, the disability claim is granted.



1 omitted). Even where the evidence supports more than one rational interpretation,  
2 the Court must uphold an ALJ's decision if it is supported by inferences reasonably  
3 drawn from the record. *Id.*; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

#### 4 **V. DISCUSSION**

5 The ALJ found that (1) Plaintiff has not engaged in substantial gainful  
6 activity since August 28, 2012; (2) Plaintiff has the following severe impairments:  
7 major depressive disorder and anxiety related disorders/PTSD; (3) Plaintiff's  
8 impairments did not meet or medically equal the severity of any impairment listed  
9 by the Commissioner as so severe as to preclude substantial gainful activity; (4)  
10 Plaintiff has the residual functional capacity to perform work at all exertional  
11 capacity with certain nonexertional limitations; and (5) Plaintiff is capable of  
12 performing many jobs available in the national economy. ECF No. 8-2 at 19–32.

13 Plaintiff challenges only the ALJ's decision at step four that Plaintiff has the  
14 residual functional capacity (RFC) to work at all exertional levels with certain  
15 nonexertional limitations. Specifically, Plaintiff poses the following questions for  
16 review:

- 17 1. Did the ALJ commit reversible error by disregarding the opinions of  
18 Plaintiff's treating and examining physicians?
- 19 2. Did the ALJ commit reversible error by disregarding Plaintiff's VA  
20 disability rating?

1 3. Did the ALJ commit reversible error by dismissing Plaintiff's  
2 complaints as not credible?

3 4. Was the ALJ's refusal to subpoena Plaintiff's experts an abuse of  
4 discretion?

5 5. Did the ALJ display impermissible bias against Plaintiff?

6 **A. The ALJ failed to provide specific and legitimate reasons to reject the**  
7 **medical opinions of Drs. Sanchez and Levitt.**

8 Plaintiff contends that the ALJ improperly rejected the opinions of Doctors  
9 Sanchez and Levitt as well as the Global Assessment Functioning (GAF) scores  
10 assigned by various treating and examining physicians. These medical opinions are  
11 conflicted by the State evaluations conducted by Drs. Comrie and Reade. When a  
12 treating or examining doctor's opinion is contradicted by the opinion of another  
13 doctor, the ALJ may reject the treating doctor's opinion if the ALJ cites "specific  
14 and legitimate reasons" that are supported by substantial evidence in the record.  
15 *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir.2014). "When evaluating  
16 conflicting medical opinions, an ALJ need not accept the opinion of a doctor if it is  
17 brief, conclusory, or inadequately supported by clinical findings." *Thomas v.*  
18 *Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).

19 **1. The ALJ failed to provide specific legitimate reasons supported by**  
20 **substantial evidence to reject Dr. Sanchez's medical opinion.**

Plaintiff argues that the ALJ erred by giving little to no weight to the opinion

1 of Doctor Sanchez, a psychologist employed by the Department of Health and  
2 Social Services (DSHS). Dr. Sanchez conducted a psychological evaluation of  
3 Plaintiff in October of 2012. ECF No. 8-7 at 2–6. Dr. Sanchez opined that Plaintiff  
4 suffered from marked PTSD and found a range of limitations from none to marked  
5 in her cognitive abilities. *Id.* Dr. Sanchez concluded that Plaintiff would have  
6 limitations performing work activities within a schedule, maintaining regular  
7 attendance at work, and completing a normal workday/week without interruptions  
8 from psychologically based symptoms. *Id.* at 4.

9       The ALJ gave three reasons for assigning little to no weight to Dr. Sanchez’s  
10 opinion. ECF No. 8-2 at 27. First, the ALJ noted that the medical history was based  
11 on the claimant’s self-reporting and not an independent review of the medical  
12 evidence in the record. Second, the mini-mental status examination revealed that  
13 Plaintiff was within normal limits except for her concentration with a score of  
14 28/30. Third, the ALJ found Dr. Sanchez’s description of “marked” PTSD was  
15 “beyond the diagnoses descriptions in DSM IV and inconsistent with [Plaintiff’s]  
16 activities of daily living.” ECF no. 8-2 at 28.

17       Substantial evidence does not support the ALJ’s finding that Dr. Sanchez’s  
18 opinion should be discounted because she relied upon Plaintiff’s subjective  
19 complaints. “[W]hen an opinion is not more heavily based on a patient’s self-reports  
20 than on clinical observations, there is no evidentiary basis for rejecting the opinion.”



1 *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014). The record shows that Dr.  
2 Sanchez conducted a mental status examination and clinical interview. ECF No. 8-  
3 7 at 2–6. Dr. Sanchez provided a medical opinion based on her observations during  
4 the clinical interview, the objective results of Plaintiff’s mental status examinations  
5 and Plaintiff’s self-reported symptoms. The ALJ’s decision discounting Dr.  
6 Sanchez’s assessment to the extent it was based on Plaintiff’s subjective complaints  
7 is therefore not supported by substantial evidence.

8         The ALJ also rejected Dr. Sanchez’s opinion because he found that Dr.  
9 Sanchez’s assessment of Plaintiff’s symptoms was inconsistent with the mental-  
10 status examination. Specifically, the ALJ noted that the mental status examination  
11 was “within limits” on all categories except for concentration. ECF No. 8-2 at 28.  
12 A discrepancy in the clinical record is a specific and legitimate reason to discount  
13 Dr. Sanchez’s opinion regarding Plaintiff’s mental status limitations. *See Bayliss v.*  
14 *Barnhart*, 427 F.3d 1211 (9th Cir. 2005) (ALJ properly rejected doctor’s statement  
15 that claimant could stand or walk for only fifteen minutes when clinical notes taken  
16 that same day contradicted that statement). Here, the mini-mental status test  
17 revealed few problems and Plaintiff scored a 28/30. However, the mental status  
18 examination is only one factor in Dr. Sanchez’s assessment. Dr. Sanchez also  
19 reviewed Plaintiff’s social worker notes and conducted a clinical interview with  
20 Plaintiff. During this interview, Plaintiff revealed that she suffered sexual trauma

1 and abuse, she has been hospitalized twice for suicidal ideation, and that she has  
2 struggled to maintain steady employment despite her higher education. ECF No. 8-  
3 7 at 4. These reports are corroborated in the record. Accordingly, to the extent the  
4 ALJ rejected Dr. Sanchez's opinion because it conflicted with the clinical evidence,  
5 the ALJ's determination is not supported by substantial evidence.

6 The ALJ also rejected Dr. Sanchez's opinion because the "description of  
7 'marked' posttraumatic stress disorder and depression [is] beyond the diagnoses  
8 descriptions in DSM IV and inconsistent with her activities of daily living." ECF  
9 No. 8-2 at 28. These reasons also are not supported by substantial evidence. It is  
10 true that the DSM-IV does not provide for a specification of "marked" PTSD.  
11 However, the DSM-IV does not preclude a provider from noting the severity of a  
12 condition, and the evaluation form Dr. Sanchez completed does not require strict  
13 adherence to DSM-IV terms. *See* ECF No. 8-7 at 3 (section E of the form directs  
14 providers to list the DSM-IV code as well as how it is supported by clinical  
15 evidence). Accordingly, the ALJ erred to the extent that he dismissed Dr. Sanchez's  
16 opinion based on the supposed discrepancy with the DSM-IV.

17 The ALJ's finding that a diagnosis of PTSD is inconsistent with Plaintiff's  
18 activities of daily living is also not supported by substantial evidence. Persistent  
19 symptoms of PTSD include difficulty concentrating and irritability and outbursts of  
20 anger. *The Diagnostic and Statistical Manual of Mental Disorders*, § 309.81 (Am.

1 Psychiatric Ass'n 4th ed.) (1994). These are consistent with Plaintiff's behavior and  
2 reported feelings described in the record. Symptoms associated with the avoidance  
3 of stimuli associated with the trauma include a restricted range of affect, feelings of  
4 detachment, and diminished participation in significant activities. *Id.* These, too, are  
5 supported in the record. The ALJ has failed to specify how making and selling  
6 jewelry specifically contradicts Plaintiff's individual symptoms. The ALJ's  
7 determination that Plaintiff's activities of daily living are inconsistent with her  
8 PTSD diagnosis is therefore unsupported by evidence in the record.

9 Finally, the ALJ appears to discount Dr. Sanchez's opinion because Plaintiff  
10 did not disclose her marijuana use. An ALJ may consider inconsistent statements  
11 about a claimant's drug use to discount credibility. *See, e.g., Thomas v. Barnhart*,  
12 278 F.3d 947, 959 (9th Cir. 2002); *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir.  
13 1999). However, the ALJ does not explain why Plaintiff's marijuana use  
14 undermines Dr. Sanchez's opinion regarding Plaintiff's mental impairments, and  
15 Defendant does not attempt to illuminate this comment in its brief. Accordingly, the  
16 Court finds this is not a specific and legitimate reason to discredit Dr. Sanchez's  
17 opinion.

18 The Court also concludes that the error in evaluating Dr. Sanchez's opinion  
19 is not harmless. *See Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2011)  
20 (“[H]armless error principles apply in the Social Security Act context.”). ALJ errors

1 are harmless only if they are “inconsequential to the ultimate nondisability  
2 determination” such that the reviewing court “can confidently conclude that no  
3 reasonable ALJ, when fully crediting the testimony, could have reached a different  
4 disability determination.” *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015)  
5 (citing *Stout v. Comm’r Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006)).  
6 Here, because the ALJ improperly disregarded the opinion of Dr. Sanchez in  
7 forming the RFC and Plaintiff was found capable of performing work at all  
8 exertional levels with certain nonexertional limitations based on that RFC, the error  
9 affected the ultimate disability determination and is not harmless.

10 **2. The ALJ’s finding that Dr. Levitt’s opinion is contradicted by the**  
11 **record is a specific legitimate reason to reduce the weight given to the**  
**opinion, but it is not sufficient to reject the evidence entirely.**

12 Plaintiff argues that the ALJ improperly rejected Dr. Levitt’s assessment and  
13 opinion that Plaintiff was unable to work due to her disabilities. Dr. Levitt submitted  
14 a letter stating that he had treated Plaintiff for over two years and follows up with  
15 her regarding various mood disorders and symptoms. ECF No. 8-9 at 135. Based  
16 on his experience with Plaintiff, Dr. Levitt believed Plaintiff would experience  
17 marked to severe limitation in future employment efforts. The ALJ provided three  
18 reasons for rejecting Dr. Levitt’s opinion. ECF No. 8-2 at 28. First, the ALJ  
19 reasoned that Dr. Levitt’s opinion is not credible “because Dr. Levitt is a resident,  
20 as a ‘women’s health provider.’” *Id.* Second, the ALJ stated record does not indicate

1 that Dr. Levitt has directly treated Plaintiff for mental health symptoms. Finally, the  
2 ALJ noted that Dr. Levitt did not refer to Plaintiff's marijuana use, jewelry selling  
3 or the fact that he referred Plaintiff to a compensated work therapy program.

4 20 C.F.R. § 404.1527(c) sets out the basis for assigning weight to medical  
5 opinions. ALJs are to examine the relationship between the claimant and the source  
6 of the medical opinion, assigning greater weight to treating physicians than  
7 examining physicians. ALJ's also consider the treating relationship, including the  
8 nature and length of the relationship. Support for the opinion based on evidence in  
9 the medical records, consistency of the opinion with the record as a whole, and the  
10 specialty of the provider are also considerations ALJs should account for when  
11 assigning weight to a medical opinion. Finally, 20 C.F.R. § 404.1527(c)(6) provides  
12 that ALJs can consider any other information which tends to support or contradict  
13 the medical opinion.

14 The ALJ's first reason for rejecting Dr. Levitt's opinion is unsupported by  
15 substantial evidence in the record. The record shows that Dr. Levitt was one of  
16 Plaintiff's treating physicians. He examined and treated her on numerous occasions  
17 for over two years. *See, e.g.*, ECF Nos. 8-8 at 2, 169; 8-9 at 27, 36. The Court notes  
18 that the fact that Dr. Levitt is a resident in the women's health clinic does not  
19 necessarily mean that his practice is limited to the female anatomy. The transcripts  
20 from the hearing appear to indicate the ALJ believed Dr. Levitt was the equivalent

1 of an OB/GYN,<sup>2</sup> but this is not the case. The record shows that the medical staff in  
2 the VA Women’s Clinic operated a general practice. Specifically, several instances  
3 in the record indicate Plaintiff’s discussion of her mood and prescriptions for  
4 antidepressants with providers housed in the Women’s Clinic. *See, e.g.*, ECF No.  
5 8-9 at 65–67 (discusses taking citalopram with Dr. Levitt); *id.* at 100–01 (discussing  
6 possible medication change with Women’s Clinic physician Maryann Overland);  
7 ECF No. 8-8 at 82–83 (discussing increasing citalopram dosage with Women’s  
8 Clinic resident Michael Lenaeus).

9 The fact that Dr. Levitt has not performed a mental status examination on  
10 Plaintiff is a specific, legitimate reason to reduce the weight given to Dr. Levitt’s  
11 opinion. However, it does not support discrediting his opinion entirely. When  
12 evaluating the weight to give a medical opinion, an ALJ may “look at the treatment  
13 the source has provided and at the kinds and extent of examinations and testing the  
14 source has performed or ordered from specialists and independent laboratories.” 20  
15 C.F.R. § 404.1527(c). Here, the record indicates that Dr. Levitt has a reasonable  
16 knowledge of Plaintiff’s psychological symptoms. The physician team at the VA

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17  
18 <sup>2</sup> ALJ: “And then Dr. Levitt, what does he—is he in the Women’s Health Side?”  
19 Plaintiff: “Yes.” ALJ: “Ok. Is he—for physical health?” Plaintiff: “They work as a  
20 team there.” ALJ: “Like OBY—OB-GYN?” Plaintiff: “So they work as a team. So  
they, they talk to each other through emails.” ALJ: “Well, what is his specialty?”  
Plaintiff: “He is, he’s a resident so I’m not sure what his specialty is, but he does  
work in the Women’s Clinic there, and I guess it would be general practice.” ECF  
No. 8-2 at 54.

1 communicated regularly across departments regarding Plaintiff's treatment and  
2 care. As the ALJ also acknowledged, the team at the VA worked collaboratively,  
3 and Dr. Levitt had access to Plaintiff's entire record. ECF No. 8-2 at 28.  
4 Accordingly, the record does not support rejecting Dr. Levitt's opinion based on the  
5 treatment relationship alone.

6 Dr. Levitt's referral of Plaintiff to a compensated work therapy (CWT)  
7 program at the VA is likewise insufficient to discredit his opinion. The ALJ  
8 concluded that Dr. Levitt's referral of Plaintiff to the CWT was not consistent with  
9 a finding that she is totally disabled, however this is not supported by substantial  
10 evidence in the record. Dr. Levitt wrote to SSA on January 30, 2014, considerably  
11 after he first referred Plaintiff to the CWT program. The record shows that multiple  
12 VA counselors and providers noted Plaintiff struggled with the CWT program. *See*  
13 ECF No. 8-8 at 98; ECF No. 8-9 at 72 (noting Plaintiff quit the CWT program due  
14 to overwhelming anxiety).

15 Finally, the ALJ noted that Dr. Levitt "did not discuss [Plaintiff's] jewelry  
16 business" and "did not mention [Plaintiff's] marijuana use." ECF No. 8-2 at 28. The  
17 Court interprets this as a finding that Dr. Levitt's opinion was inconsistent with the  
18 record. Unlike the other reasons proffered by the ALJ, this is a specific legitimate  
19 reason to reject a medical opinion. Dr. Levitt's letter contained a description of her  
20 diagnoses and how those diagnoses and symptoms impacted Plaintiff's ability to

1 maintain employment. Dr. Levitt concluded the letter by stating that he did not  
2 believe Plaintiff could work at this time. The potentially conflicting instances in the  
3 record cited by the ALJ support rejecting the final statement in Dr. Levitt's letter.  
4 However, the ALJ has failed to explain why these support rejecting Dr. Levitt's  
5 medical opinion in its entirety. As one of Plaintiff's treating physicians, Dr. Levitt's  
6 opinion should normally be accorded great weight. Accordingly, the ALJ's  
7 proffered reasons for finding Dr. Levitt's opinion conflicts with the record is  
8 insufficient to reject his medical opinion in its entirety.

9       The Court cannot conclude that the ALJ's error was harmless and therefore  
10 instructs the ALJ to reconsider this evidence on remand.

11       **3. The ALJ gave specific legitimate reasons for rejecting the GAF  
12 scores.**

13       Finally, Plaintiff argues that the ALJ erred by rejecting the Global  
14 Assessment Functioning (GAF) scores in the record. ECF No. 15 at 13-14. The  
15 GAF is a numeric scale used by mental health clinicians to subjectively assess an  
16 individual's overall functioning level. Like other medical opinions, GAF scores are  
17 relevant evidence that should be considered and can only be rejected for specific  
18 reasons.

19       Here, the ALJ stated two reasons for rejecting the GAF scores. The first  
20 amounted to a boilerplate recitation of what GAF scores are and why, as a matter  
of course, they are not particularly probative of disability. ECF no. 8-2 at 27. This



1 opinion is at odds with SSA regulations. A GAF score that is assigned by an  
2 acceptable medical source is a medical opinion as defined in 20 C.F.R.  
3 §§ 404.1527(a)(2) and 516.927(a)(2).

4 However, the ALJ also noted that the GAF scores were inconsistent with the  
5 record as a whole. ECF no. 8-2 at 27. The record contains GAF scores of 45, ECF  
6 No. 8-8 at 115, 49, ECF No. 8-7 at 2, and 50, ECF No. 8-8 at 155. Scores in this  
7 range indicate serious symptoms or serious impairment in social, occupational or  
8 school functioning. The ALJ found that these scores did not comport with his  
9 findings that Plaintiff was able to complete her activities of daily living with few  
10 limitations. ECF no. 8-2 at 27. Although the record in this case is voluminous, the  
11 ALJ evaluated and weighed the evidence. The ALJ's conclusion is supported by  
12 substantial evidence.

13 **B. The ALJ failed to give specific, persuasive grounds for rejecting**  
14 **Plaintiff's VA disability score.**

15 Plaintiff next argues that the ALJ erred by rejecting her 70% VA disability  
16 rating. Although a VA disability rating does not necessarily compel an ALJ to reach  
17 an identical result, "an ALJ must ordinarily give great weight to a VA determination  
18 of disability." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002). An  
19 ALJ may give less weight to a VA disability rating only if he or she gives  
20 persuasive, specific, valid reasons for doing so that are supported by the record. *Id.*  
An ALJ may not merely rely on the "general ground that the VA and SSA disability

1 inquiries are different.” *Valentine*, 574 F.3d at 695. Instead, the distinction must be  
2 specific to the individual case such as when the SSA has information that the VA  
3 did not. *Id.*

4 The ALJ here failed to give any valid persuasive reasons for refusing to afford  
5 “great weight” to the determination of the VA that Plaintiff was 70% disabled. In  
6 support of his decision, the ALJ stated only:

7 [T]he Veterans Administration has not opined that the claimant was  
8 unemployable in these rating decisions. Although they provided a  
9 basis for their determination and recited GAF scores, they also did not  
10 provide provides [sic.] an individualized assessment that focuses on a  
11 claimant’s ability to perform work in the national economy. Thus, I  
12 give these numeric ratings little to no weight.

13 ECF No. 8-2 at 30.

14 The ALJ’s stated reasons are little more than generalized critiques  
15 applied to a specific situation. The fact that the VA and SSA disability ratings  
16 differ in the disability calculation—basing the calculation on a “hypothetical  
17 person” versus the specific claimant, respectively—is merely a general  
18 differentiating feature between the two inquiries. This is also true of the fact  
19 that the VA does not account for a claimant’s ability to perform work in the  
20 national economy. Neither of these grounds are specific or persuasive under  
*McCartey* and *Valentine*.

Again, the Court cannot conclude that this error was harmless. Like  
the medical opinions, the VA score could have been an important factor in

1 determining Plaintiff's RFC. Because the Court cannot say with certainty that  
2 no reasonable ALJ could reach a different conclusion if this evidence were  
3 considered, the Court instructs the ALJ to reconsider the VA disability rating  
4 on remand.

5 **C. The ALJ provided specific, clear and convincing reasons for rejecting**  
6 **Plaintiff's symptom testimony.**

7 Where a claimant presents objective medical evidence of impairments that  
8 could reasonably produce the symptoms complained of, an ALJ may reject the  
9 claimant's testimony about the severity of her symptoms only for "specific, clear  
10 and convincing reasons." *Burrell v. Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014).

11 An ALJ must make sufficiently specific findings "to permit the court to conclude  
12 that the ALJ did not arbitrarily discredit [the] claimant's testimony." *Tommasetti v.*  
13 *Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (citations omitted). General findings  
14 are insufficient. *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). ALJs may  
15 consider many factors in weighing a claimant's credibility, including prior  
16 inconsistent statements, unexplained failures to seek treatment, and claimant's daily  
17 activities, among others. *Tommasetti*, 533 F.3d at 1039. Courts may not second-  
18 guess an ALJ's findings that are supported by substantial evidence. *Id.*

19 The ALJ provided specific instances to support his determination that  
20 Plaintiff's testimony was not credible. For example, Plaintiff failed to disclose that  
she was selling jewelry at markets and online. At the hearing, Plaintiff told the ALJ

1 that she had no other sources of income other than her VA benefits. ECF No. 8-2 at  
2 46. However, Plaintiff told a VA vocational rehab counselor that she makes up to  
3 \$600 per week selling her jewelry. ECF No. 8-8 at 79. Plaintiff was also somewhat  
4 evasive when questioned by the ALJ about her use of marijuana. ECF No. 8-2 at  
5 52. The ALJ pointed to these instances when making his findings that Plaintiff's  
6 testimony was not credible.

7         The ALJ also noted that Plaintiff's testimony was inconsistent with the facts  
8 in the record. Specifically, he noted that Plaintiff had worked and looked for work  
9 during the time Plaintiff alleged she was disabled. *See Bray v. Comm'r of Soc. Sec.*  
10 *Admin.*, 544 F.3d 1219 (9th Cir. 2009) (upholding ALJ's findings claimant was not  
11 credible in part because she continued to work and seek employment after the  
12 alleged onset of her disability). After the alleged onset of her disability, Plaintiff  
13 continued to make and sell jewelry and to participate in the CWT program until she  
14 voluntarily withdrew.

15         Based on the specified inconsistencies in Plaintiff's testimony and the  
16 conflicting evidence in the record, the ALJ's decision to discredit Plaintiff's  
17 testimony regarding her symptoms is supported by substantial evidence in the  
18 record.

1       **D. The ALJ did not abuse his discretion in denying Plaintiff’s request to**  
2       **subpoena non-examining physicians.**

3               Plaintiff next assigns error to the ALJ’s refusal to subpoena Drs. Comrie and  
4       Reade, both non-examining State agency doctors. An ALJ may issue subpoenas for  
5       the appearance and testimony of witnesses when “necessary for the full presentation  
6       of a case.” 20 C.F.R. § 404.950(d)(1), 416.1450(d)(1). It is an abuse of discretion  
7       to deny the claimant’s request for a subpoena and, consequently, her right to cross-  
8       examine where the witness is a “crucial witness” whose findings “substantially  
9       contradict the other medical testimony.” *Solis v. Schwieker*, 719 F.2d 301, 302 (9th  
10       Cir. 1983). If a party wishes to subpoena a witness, rather than conduct cross  
11       examination through interrogatories, the party must submit a statement of important  
12       facts the witness is expected to prove as well as an indication as to why these facts  
13       could not be proven without issuing a subpoena. 20 C.F.R. § 404.950(d)(2),  
14       416.1450(d)(2).

15               Prior to the hearing, Plaintiff’s attorney, Mr. Rutzick, submitted a written  
16       request to subpoena Drs. Comrie and Reade. Mr. Rutzick stated that he planned to  
17       question the doctors about discrepancies between their opinions and medical/other  
18       evidence of other examining medical professionals as well as their credentials. Mr.  
19       Rutzick also indicated that he “expect[ed] to ask questions inter alia touching on  
20       their bias.” ECF No. 8-6 at 83. The ALJ denied this subpoena request, stating that

1 it did not meet the regulatory requirements to issue a subpoena under 20 C.F.R.  
2 404.950(d)(2).

3 The ALJ did not abuse his discretion in denying Mr. Rutzick's petition to  
4 subpoena Drs. Comrie and Reade. The witnesses were undoubtedly crucial  
5 witnesses within the contemplation of *Solis*. However, the holding in *Solis* does not  
6 require an ALJ to issue subpoenas for every crucial witness. It requires only that  
7 claimants have the opportunity to meaningfully cross examine those witnesses. Mr.  
8 Rutzick failed to demonstrate why interrogatories would be insufficient to cross  
9 examine the doctors on their experience and factual determinations.

10 The Court notes that Mr. Rutzick indicated he planned to ask questions  
11 "touching on [the doctors'] bias." The *Solis* court recognized that bias is most  
12 properly elicited through cross examination. However bias is not a talismanic word  
13 triggering the ALJ's duty to subpoena a witness. Under 20 C.F.R. 404.950(d)(2),  
14 parties requesting a subpoena must specify facts they expect to establish through  
15 cross examination and explain why interrogatories are insufficient. Mr. Rutzick  
16 made no attempt to do so here. Accordingly, the ALJ's denial of the subpoena  
17 request was not an abuse of discretion.

18 **E. Plaintiff has failed to establish that ALJ Kennedy is biased against**  
19 **claimants like Plaintiff.**

20 Finally, Plaintiff submits to the Court for review numerous records in support  
of her allegation that ALJ Kennedy is biased against Plaintiff and claimants like

1 Plaintiff. Defendant disputes the submission of these materials as outside the scope  
2 of permissible evidence in 42 U.S.C. § 405(g) and moves to strike Plaintiff's  
3 declaration. ECF No. 21. Because these materials are outside the scope of the  
4 administrative record, the Court finds these materials are not proper for  
5 consideration and grants Plaintiff's motion to strike.

6 42 U.S.C. § 405 governs the judicial review of SSA benefits decisions. The  
7 statute limits a federal court's review to "the pleadings and a transcript of the  
8 record." *Id.* Sentence Six of 42 U.S.C. § 405(g) provides that the court "may at any  
9 time order additional evidence to be taken before the Commissioner of Social  
10 Security, but only upon a showing that there is new evidence which is material and  
11 that there is good cause for the failure to incorporate such evidence into the record  
12 in a prior proceeding."

13 Here, Plaintiff's proffered evidence is not part of the administrative record.  
14 Plaintiff asserts that she submitted this evidence to the Appeals Council, but that  
15 the council did not accept the evidence. ECF No. 15 at 18. If materials that were not  
16 before the ALJ are presented to the Appeals Council, the Council must consider  
17 them only if they are "new and material." 20 C.F.R. § 404.970(b), 416.1470(b).  
18 Unlike the medical evidence at issue in *Taylor v. Comm'r of Soc. Sec. Admin.*, 659  
19 F.3d 1228, 1233 (9th Cir. 2011) the evidence submitted here does not appear to be  
20 "new and material" as defined by § 404.970. Moreover, "in rejecting [new]


1 evidence, the Appeals Council is not required to make any particular evidentiary  
2 finding.” *Gomez v. Chater*, 74 F.3d 967, 972 (9th Cir. 1996) *superseded by*  
3 *regulation on other grounds as stated in Boyd v. Colvin*, 524 F. App’x 334 (9th Cir.  
4 2013). Plaintiff does not argue that the evidence should be considered on remand  
5 under Sentence Six of 42 U.S.C. § 405. Accordingly, the Court will not consider  
6 the materials and will grant Defendant’s motion to strike.

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

- 8 **1.** Plaintiff’s Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**.
- 9 **2.** Defendant’s Motion for Summary Judgment, **ECF No. 20**, is **DENIED**.
- 10 **3.** Defendant’s Motion to Strike the Declaration of Becky Lieferman, **ECF No.**  
11 **21**, is **GRANTED**.
- 12 **4.** The case is **REMANDED** to the Commissioner of Social Security pursuant  
13 to 42 U.S.C. § 405(g) for further proceedings consistent with this order.
- 14 **5.** **JUDGMENT** is to be entered in Plaintiff’s favor.
- 15 **6.** The case shall be **CLOSED**.

16 **IT IS SO ORDERED.** The Clerk’s Office is directed to enter this Order and  
17 provide copies to all counsel.

18 DATED this 19<sup>th</sup> day of September, 2017.

19   
20 **SALVADOR MENDOZA, JR.**  
United States District Judge