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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

JOANNA J. CLARK,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL

SECURITY,

Defendant.

No. 2:16-cv-00248-FVS

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
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. This matter was submitted for consideration without oral argument. Plaintiff was represented by attorney Dana Madsen. Defendant was represented by Special Assistant United States Attorney Daphne Banay. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, Plaintiff's Motion, ECF No. 14, is denied and Defendant's Motion, ECF No. 15, is granted.

1 **JURISDICTION**

2 Plaintiff Joanna J. Clark protectively filed for disability insurance benefits  
3 (“DIB”) and supplemental security income (“SSI”) on September 5, 2012. Tr.  
4 147-55, 193. Plaintiff alleged an onset date of December 31, 2004. Tr. 147, 152.  
5 Benefits were denied initially (Tr. 105-11) and upon reconsideration (Tr. 117-20).  
6 Plaintiff appeared at a hearing before an administrative law judge (ALJ) on  
7 December 2, 2014. Tr. 34-61. On January 9, 2015, the ALJ denied Plaintiff’s  
8 claim (Tr. 12-27), and the Appeals Council denied review. Tr. 1. The matter is  
9 now before this court pursuant to 42 U.S.C. § 405(g); 1383(c)(3).

10 **BACKGROUND**

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

14 Joanna J. Clark (“Plaintiff”) was 49 years old at the time of the hearing. Tr.  
15 50. She graduated from high school and attended a “little bit” of college. Tr. 36,  
16 50. She has spent most of her working life doing part-time jobs such as waitress  
17 and convenience store clerk. Tr. 36, 48. She testified that she has lost jobs  
18 because she cannot concentrate, does not comprehend well, and does not get along  
19 well with other people. Tr. 41. She last worked as a baker. Tr. 39. She was fired  
20 from the bakery because she asked the same questions over and over and had to

1 stand for too long. Tr. 48. She has not attempted to get a job since 2013 because  
2 she “can’t concentrate that well” and has “really bad back pain.” Tr. 40.

3 Plaintiff’s back pain originated with a motor vehicle accident in August  
4 2013, although she alleged at the hearing that she also suffers from scoliosis and  
5 that her back pain started “a couple years ago.” Tr. 41-42. If she stands too long,  
6 there is a burning sensation in the middle of her back and her leg goes numb. Tr.  
7 42. Her right hip feels like it’s going to give out. Tr. 43-44. She cannot do chores  
8 because her back hurts. Tr. 44. Plaintiff testified she also has headaches which are  
9 improved with medication and rest. Tr. 47-48.

10 Plaintiff testified her mental health problems involve anxiety and mood  
11 swings. Tr. 46. She cannot sleep sometimes due to anxiety. Tr. 45. Her moods  
12 change frequently from happy to down and depressed within ten to 15 minutes. Tr.  
13 47. She does not like being around people and experiences anxiety when going to  
14 a store. Tr. 47.

15 Plaintiff has a history of substance abuse, but testified that she had not used  
16 cocaine in over a year. Tr. 39. The last time she used was a week-long relapse.  
17 Tr. 46. She testified that before the relapse, she had been clean for a couple of  
18 years after treatment. Tr. 46.

## STANDARD OF REVIEW

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

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id.* An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id.* at 1115 (quotation and citation omitted). The

1 party appealing the ALJ’s decision generally bears the burden of establishing that  
2 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

### 3 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

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

14 The Commissioner has established a five-step sequential analysis to  
15 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
16 404.1520(a)(4)(i),(v); 416.920(a)(4)(i),(v). At step one, the Commissioner  
17 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);  
18 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the  
19 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
20 404.1520(b); 416.920(b).

1 If the claimant is not engaged in substantial gainful activity, the analysis  
2 proceeds to step two. At this step, the Commissioner considers the severity of the  
3 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the  
4 claimant suffers from "any impairment or combination of impairments which  
5 significantly limits [his or her] physical or mental ability to do basic work  
6 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);  
7 416.920(c). If the claimant's impairment does not satisfy this severity threshold,  
8 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.  
9 §§ 404.1520(c); 416.920(c).

10 At step three, the Commissioner compares the claimant's impairment to  
11 severe impairments recognized by the Commissioner to be so severe as to preclude  
12 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
13 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more  
14 severe than one of the enumerated impairments, the Commissioner must find the  
15 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

16 If the severity of the claimant's impairment does not meet or exceed the  
17 severity of the enumerated impairments, the Commissioner must pause to assess  
18 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
19 defined generally as the claimant's ability to perform physical and mental work  
20 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§

1 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
2 analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's  
4 RFC, the claimant is capable of performing work that he or she has performed in  
5 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).  
6 If the claimant is capable of performing past relevant work, the Commissioner  
7 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).  
8 If the claimant is incapable of performing such work, the analysis proceeds to step  
9 five.

10 At step five, the Commissioner considers whether, in view of the claimant's  
11 RFC, the claimant is capable of performing other work in the national economy.  
12 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,  
13 the Commissioner must also consider vocational factors such as the claimant's age,  
14 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);  
15 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the  
16 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
17 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other  
18 work, analysis concludes with a finding that the claimant is disabled and is  
19 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

1 The claimant bears the burden of proof at steps one through four above.  
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
3 step five, the burden shifts to the Commissioner to establish that (1) the claimant is  
4 capable of performing other work; and (2) such work “exists in significant  
5 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.920(c)(2);  
6 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

### 7 **ALJ’S FINDINGS**

8 At step one, the ALJ found Plaintiff has not engaged in substantial gainful  
9 activity since December 31, 2004, the alleged onset date. Tr. 14. At step two, the  
10 ALJ found Plaintiff has the following severe impairments: asthma/recurrent upper  
11 respiratory symptoms; major depressive disorder; and generalized anxiety disorder.  
12 Tr. 14. At step three, the ALJ found that Plaintiff does not have an impairment or  
13 combination of impairments that meets or medically equals the severity of a listed  
14 impairment. Tr. 20. The ALJ then found Plaintiff has the capacity to perform a  
15 full range of work at all exertional levels with the following nonexertional  
16 limitations:

17 She should avoid concentrated exposure to extreme fumes, odors,  
18 dust, gases or poor ventilation. She has the ability to understand and  
19 remember locations and work-like procedures. She has the ability to  
20 understand, remember, and carry out short and simple instructions;  
perform activities within a schedule; maintain regular attendance and  
be punctual within customary tolerances; sustain an ordinary routine  
without special supervision; make simple work related decisions;  
complete a normal workday and workweek without interruptions from



1 psychologically based symptoms; and perform at a consistent pace.  
2 She has the ability to ask simple questions or request assistance; get  
3 along with co-workers or peers without distracting them or exhibiting  
4 behavioral extremes; maintain socially appropriate behavior and  
5 adhere to basic standards of neatness and cleanliness. She has the  
6 ability to be aware of normal hazards and take appropriate  
7 precautions; travel in unfamiliar places or use public transportation;  
8 and set realistic goals and make plans independently of others. She  
9 would work best in an environment with superficial public contact;  
10 working in proximity to but not close cooperation with co-workers or  
11 supervisors; and would work best in an environment where the routine  
12 was predictable with minimal changes.

13 Tr. 21. At step four, the ALJ found Plaintiff is unable to perform any past relevant  
14 work. Tr. 25. At step five, after considering Plaintiff's age, education, work  
15 experience, residual functional capacity, and the testimony of a vocational expert,  
16 the ALJ found there are jobs that exist in significant numbers in the national  
17 economy that Plaintiff can perform, such as production helper, mail clerk, or  
18 telephone information clerk. Tr. 25-26. Thus, the ALJ concluded that Plaintiff has  
19 not been under a disability, as defined in the Social Security Act, from December  
20 31, 2004, through the date of the decision. Tr. 26.

### ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying disability benefits under Title II and supplemental security income benefits under Title XVI of the Social Security Act. ECF No. 14. Plaintiff raises the following issues for review:

- 1 1. Whether the ALJ improperly rejected Plaintiff's testimony; and
- 2 2. Whether the ALJ improperly rejected medical opinion evidence;

3 ECF No. 14 at 10-18.

## 4 **DISCUSSION**

### 5 **A. Adverse Credibility Finding**

6 Plaintiff contends the ALJ improperly rejected Plaintiff's testimony. ECF  
7 No. 14 at 11-15. An ALJ engages in a two-step analysis to determine whether a  
8 claimant's testimony regarding subjective pain or symptoms is credible. "First, the  
9 ALJ must determine whether there is objective medical evidence of an underlying  
10 impairment which could reasonably be expected to produce the pain or other  
11 symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).

12 "The claimant is not required to show that [his] impairment could reasonably be  
13 expected to cause the severity of the symptom [h]e has alleged; [h]e need only  
14 show that it could reasonably have caused some degree of the symptom." *Vasquez*  
15 *v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

16 Second, "[i]f the claimant meets the first test and there is no evidence of  
17 malingering, the ALJ can only reject the claimant's testimony about the severity of  
18 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the  
19 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal  
20 citations and quotations omitted). "General findings are insufficient; rather, the

1 ALJ must identify what testimony is not credible and what evidence undermines  
2 the claimant's complaints." *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th  
3 Cir. 1995)); *see also Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002)  
4 ("[T]he ALJ must make a credibility determination with findings sufficiently  
5 specific to permit the court to conclude that the ALJ did not arbitrarily discredit  
6 claimant's testimony."). "The clear and convincing [evidence] standard is the most  
7 demanding required in Social Security cases." *Garrison v. Colvin*, 759 F.3d 995,  
8 1015 (9th Cir. 2014) (quoting *Moore v. Comm'r of Soc. Sec. Admin.*, 278 F.3d 920,  
9 924 (9th Cir. 2002)).

10 In making an adverse credibility determination, the ALJ may consider, *inter*  
11 *alia*, (1) the claimant's reputation for truthfulness; (2) inconsistencies in the  
12 claimant's testimony or between his testimony and his conduct; (3) the claimant's  
13 daily living activities; (4) the claimant's work record; and (5) testimony from  
14 physicians or third parties concerning the nature, severity, and effect of the  
15 claimant's condition. *Thomas*, 278 F.3d at 958-59.

16 Here, the ALJ found Plaintiff's medically determinable impairments could  
17 reasonably be expected to produce the symptoms alleged, but Plaintiff's statements  
18 concerning the intensity, persistence, and limiting effects of these symptoms are not  
19 entirely credible. Tr. 22. The ALJ gave four reasons for the negative credibility  
20 determination.

1 First, the ALJ found Plaintiff's credibility was undermined by her failure to  
2 seek mental health counseling or treatment. Tr. 22. Medical treatment received to  
3 relieve pain or other symptoms is a relevant factor in evaluating pain testimony.  
4 20 C.F.R. §§ 416.929(c)(3)(iv),(v); 404.1529(c)(3)(iv),(v) (2016).<sup>1</sup> The ALJ is  
5 permitted to consider the claimant's lack of treatment in making a credibility  
6 determination. *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). However,  
7 where the evidence suggests lack of mental health treatment is part of a claimant's  
8 mental health condition, it may be inappropriate to consider a claimant's lack of  
9 mental health treatment as evidence of a lack of credibility. *See Nguyen v. Chater*,  
10 100 F.3d 1462, 1465 (9th Cir. 1996). Notwithstanding, when there is no evidence  
11 suggesting a failure to seek treatment is attributable to a mental impairment, it is  
12 reasonable for the ALJ to conclude that the level or frequency of treatment is  
13 inconsistent with the level of complaints. *Molina*, 674 F.3d at 1113-1114. The  
14 ALJ observed that although Plaintiff testified she had recently begun seeing Dr.

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15  
16 <sup>1</sup>These regulations were revised effective March 26, 2017. Revisions to Rules  
17 Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844-01 (January 18,  
18 2017). Since the revisions were not effective at the time of the ALJ's decision,  
19 they does not apply to this case.  
20

1 Neils for mental health treatment, she did not seek that treatment until almost 10  
2 years after the alleged onset of disability. Tr. 22-23, 37. Unless there is evidence  
3 that Plaintiff's failure to seek treatment was due to her mental health issues, the  
4 ALJ's consideration of the lack of treatment was reasonable.

5 Plaintiff contends that Dr. Mabee's finding that she has limited judgment  
6 (Tr. 273) and Dr. Neils' finding that Plaintiff has limited insight (Tr. 279) establish  
7 that her condition interfered with her ability to seek treatment. ECF No. 14 at 12.  
8 However, as noted by Defendant, neither finding was tied to or identified as  
9 impacting Plaintiff's ability to seek mental health treatment. ECF No. 15 at 6.  
10 Further, Plaintiff also suggests that her lack of insurance prevented her from  
11 obtaining treatment. ECF No. 14 at 12. Disability benefits may not be denied  
12 because of the claimant's failure to obtain treatment he cannot obtain for lack of  
13 funds. *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995). Defendant observes  
14 that both records cited by Plaintiff indicate she stated she had no insurance, yet  
15 both medical providers resumed or continued medications for depression or  
16 anxiety. ECF No. 15 at 7, Tr. 251-52. This reasonably suggests that Plaintiff was  
17 both capable of seeking treatment and able to obtain treatment despite a lack of  
18 funds. There is no evidence in the record that Plaintiff inquired about or attempted  
19 to seek counseling or other mental health treatment and was turned away for lack  
20

1 of insurance. Thus, the ALJ reasonably considered Plaintiff's lack of treatment in  
2 making the credibility finding.

3         Second, the ALJ found that Plaintiff's noncompliance with medication  
4 diminishes her credibility. Tr. 22. It is well-established that unexplained non-  
5 compliance with treatment reflects on a claimant's credibility. *See Molina*, 674  
6 F.3d at 1113 -1114; *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008);  
7 *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007); *Smolen v. Chater*, 80 F.3d 1273,  
8 1284 (9th Cir.1996); *Fair v. Bowen*, 885 F.2d 597, 603 -604 (9th Cir. 1989). The  
9 ALJ cited several notes in the record indicating Plaintiff was not taking medication  
10 as prescribed. Tr. 16-17, 250, 254, 289, 318. She also admitted taking medication  
11 not belonging to her. Tr. 23, 250. This is a clear and convincing reason supported  
12 by substantial evidence for the credibility determination.

13         Third, the ALJ noted numerous inconsistencies in Plaintiff's reported  
14 history. Tr. 22. A strong indicator of credibility is the consistency of the  
15 individual's own statements with other information in the case record. S.S.R. 96-  
16 7p. In making a credibility evaluation, the ALJ may rely on ordinary techniques of  
17 credibility evaluation. *Smolen*, 80 F.3d at 1284. The ALJ noted inconsistencies  
18 between Plaintiff's testimony and the evidence regarding work history (Tr. 36,  
19 159-166, 195); education (187, 236, 262, 270, 331); and reports to medical  
20 providers about previous loss of consciousness (Tr. 262, 332). Tr. 23.

1 Additionally, the ALJ noted numerous inconsistencies in Plaintiff's reports  
2 regarding her drug use and chemical dependency treatment history. Tr. 23, 243,  
3 246, 247, 262, 270, 294, 305, 343. Conflicting or inconsistent testimony  
4 concerning alcohol or drug use can contribute to an adverse credibility finding.  
5 *Thomas*, 278 F.3d at 959; *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999).  
6 Plaintiff's explanation for these inconsistencies is that over the time period of these  
7 statements, Plaintiff was using drugs, then became clean and attended treatment,  
8 then relapsed, and finally became abstinent again. ECF No. 14. However, this  
9 explanation supports the ALJ's conclusion that Plaintiff's statements over the  
10 course of the record are not reliable. This is a clear and convincing reason for the  
11 credibility finding.

12 Fourth, the ALJ found Plaintiff's daily activities are not consistent with her  
13 claims of total disability. It is reasonable for an ALJ to consider a claimant's  
14 activities which undermine claims of totally disabling pain in making the  
15 credibility determination. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.  
16 2001). However, it is well-established that a claimant need not "vegetate in a dark  
17 room" in order to be deemed eligible for benefits. *Cooper v. Bowen*, 815 F.2d 557,  
18 561 (9th Cir. 1987). Notwithstanding, if a claimant is able to spend a substantial  
19 part of her day engaged in pursuits involving the performance of physical functions  
20 that are transferable to a work setting, a specific finding as to this fact may be

1 sufficient to discredit an allegation of disabling excess pain. *Fair*, 885 F.2d at 603.  
2 Furthermore, "Even where [Plaintiff's daily] activities suggest some difficulty  
3 functioning, they may be grounds for discrediting the claimant's testimony to the  
4 extent that they contradict claims of a totally debilitating impairment." *Molina*,  
5 674 F.3d at 1113.

6 The ALJ cited evidence indicating Plaintiff has friends and relationships  
7 with her mother and daughter (Tr. 246, 262, 293); she has no difficulty with  
8 activities of daily living and self-care (Tr. 262, 270); she babysat her  
9 granddaughter, took care of pets, prepared simple meals, cleaned, did laundry,  
10 pulled weeds, drove, shopped and played bingo (Tr. 208-10, 270). Tr. 23. Plaintiff  
11 contends, "These activities do not contradict Ms. Clark's testimony, and the ALJ  
12 does not explain how she arrived at this finding." ECF No. 14 at 13. However, the  
13 ALJ also noted that, among other testimony about her alleged limitations, Plaintiff  
14 testified she can hardly do chores because of pain, all she ever does is rest, she  
15 cannot squat, stoop or reach down, and she has bad anxiety, especially around too  
16 many people. Tr. 22, 42-47. This and other testimony was reasonably determined  
17 by the ALJ to be inconsistent with the activities Plaintiff performed. This is a clear  
18 and convincing reason for the credibility finding.

19 Based on the foregoing, the ALJ provided clear and convincing reasons  
20 supported by substantial evidence for the credibility determination.



1 **B. Medical Opinion Evidence**

2 Plaintiff contends the ALJ failed to properly consider and weigh the  
3 psychological opinions of Jeannette Higgins, Psy.D, Scott Mabee, Ph.D, and Rob  
4 Neils, Ph.D. ECF No. 14 at 15-18.

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) (brackets 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.* “In addition, the regulations give more weight to  
13 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, an ALJ may  
17 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*, 81 F.3d at 830-  
6 31.

7       1.     *Jeannette Higgins, Psy.D.*

8       Plaintiff contends the ALJ improperly rejected portions of the opinion of  
9 Jeannette Higgins, Psy.D, an examining psychologist. ECF No. 14 at 16. Dr.  
10 Higgins completed a psychological evaluation in November 2012. Tr. 261-65.  
11 She diagnosed major depressive disorder, recurrent, severe; anxiety disorder NOS;  
12 cocaine dependence in sustained full remission by client report; and deferred Axis  
13 II diagnosis but noted avoidant traits. Tr. 265. Dr. Higgins opined that Plaintiff  
14 has the ability to understand, remember, and carry out simple instructions and to  
15 make simple work-related decisions. Tr. 265. She also opined that Plaintiff has  
16 the ability to appropriately interact with a supervisor and coworkers “who are  
17 patient and supportive,” but does not have the ability to interact appropriately with  
18 the public. Tr. 265. Dr. Higgins found Plaintiff does not have the ability to  
19 respond appropriately to typical work situations and to changes in a routine work  
20 setting. Tr. 265.

1 The ALJ gave some weight to Dr. Higgins' opinion. Tr. 24. The ALJ gave  
2 weight to Dr. Higgins' opinion that Plaintiff is capable of performing simple  
3 instructions and making simple decisions but rejected Dr. Higgins' opinion that  
4 Plaintiff has significant limitations in the ability to interact appropriately with  
5 others or respond appropriately to changes in a routine work setting. Tr. 24. The  
6 ALJ gave two reasons for rejecting these two findings from Dr. Higgins' opinion.  
7 Tr. 24.

8 First, the ALJ concluded that Dr. Higgins' findings were internally  
9 inconsistent. Tr. 24. A medical opinion may be rejected by the ALJ if it contains  
10 inconsistencies. *Bray*, 554 F.3d at 1228. The ALJ observed that while Plaintiff  
11 scored in the borderline range of intellectual functioning on the WAIS-IV, the  
12 results of a mental status exam were essentially normal, and the Trail Making A  
13 and B test scores were average to high average. Tr. 263-64. Plaintiff argues the  
14 ALJ's finding is not supported by the evidence because Dr. Higgins obtained poor  
15 results on memory testing and IQ test results in the fifth percentile. ECF No. 14 at  
16 16. However, Plaintiff fails to address the findings identified by the ALJ as  
17 inconsistent with those test results. Substantial evidence therefore supports this  
18 specific, legitimate reason cited by the ALJ.

19 Second, the ALJ observed that Dr. Higgins' findings are inconsistent with  
20 other evidence in the record. Tr. 24. The consistency of a medical opinion with

1 the record as a whole is a relevant factor in evaluating a medical opinion.  
2 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn*, 495 F.3d at 631.  
3 The ALJ noted other testing in the record indicates Plaintiff's intellectual  
4 functioning was in the average range, and that other mental status exams were  
5 essentially normal. Tr. 244, 246, 273, 296. This specific, legitimate reason is  
6 supported by substantial evidence.

7 Third, the ALJ found Dr. Higgins relied on Plaintiff's statements which were  
8 determined by the ALJ to be not credible. Tr. 24. A physician's opinion may be  
9 rejected if it is based on a claimant's subjective complaints which were properly  
10 discounted. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Morgan v.*  
11 *Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999); *Fair*, 885 F.2d at  
12 604. The ALJ observed that Plaintiff's statement to Dr. Higgins that she "just  
13 can't function" is not consistent with Plaintiff's daily activities and lack of mental  
14 health treatment, discussed *supra*. Tr. 24, 261. Further, the ALJ reasonably  
15 determined Plaintiff's statements were not credible and to the extent that Dr.  
16 Higgins' findings were based on her statements, the ALJ appropriately rejected  
17 those findings. This is a reasonable conclusion based on the evidence.

18 Plaintiff contends test results regarding her memory and IQ support Dr.  
19 Higgins' findings, and therefore the opinion is not based primarily on her self-  
20 report. ECF No. 14 at 16. The test results cited by Plaintiff involve her memory

1 and cognitive function. ECF No. 14 at 16 (citing Tr. 263-64). However, the ALJ  
2 actually gave weight to that portion of Dr. Higgins' opinion involving memory and  
3 cognitive function. Tr. 24. The test results cited by Plaintiff are not relevant to the  
4 findings rejected by the ALJ: significant limitations in the ability to interact  
5 appropriately with others or respond appropriately to changes in a routine work  
6 setting. Because the ALJ found Dr. Higgins report is internally inconsistent and is  
7 inconsistent with other evidence in the record, the ALJ reasonably concluded Dr.  
8 Higgins gave weight to Plaintiff's unreliable self-report in assessing the two  
9 significant social limitations. Therefore, this is a specific, legitimate reason for  
10 rejecting that portion of Dr. Higgins' opinion.<sup>2</sup>

11 2. *Scott Mabee, Ph.D.*

12 Plaintiff contends the ALJ improperly rejected the opinion of examining  
13 psychologist Scott Mabee, Ph.D. In October 2013, Dr. Mabee completed a DSHS

14 \_\_\_\_\_  
15 <sup>2</sup> Even if the ALJ improperly determined Dr. Higgins relied on Plaintiff's self-  
16 report, any error would be harmless because the ALJ cited two other specific,  
17 legitimate reasons for rejecting the significant limitations assessed by Dr. Higgins,  
18 and those reasons are not challenged by Plaintiff. *See Parra v. Astrue*, 481 F.3d  
19 742, 747 (9th Cir. 2007); *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990);  
20 *Booz v. Sec'y of Health and Human Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984).

1 Psychological/Psychiatric Evaluation form. Tr. 270-73. He diagnosed major  
2 depressive disorder, moderate; rule out cocaine abuse; and personality disorder  
3 NOS. Tr. 271. He assessed one marked limitation in the ability to complete a  
4 normal work day and work week without interruption from psychologically based  
5 symptoms, as well as seven moderate limitations. Tr. 272.

6 The ALJ gave some weight to Dr. Mabee's opinion that Plaintiff had mild to  
7 moderate limitations in the ability to perform basic work activities. Tr. 24.

8 However, the ALJ rejected Dr. Mabee's assessment of a marked limitation in the  
9 ability to complete a normal work day and work week without interruption from  
10 psychologically based symptoms. Tr. 24.

11 First, the ALJ found that the rejected limitation is inconsistent with Dr.  
12 Mabee's exam findings. Tr. 24. A medical opinion may be rejected if it is  
13 unsupported by medical findings. *Bray*, 554 F.3d at 1228; *Batson v. Comm'r of*  
14 *Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *Thomas*, 278 F.3d at 957;  
15 *Tonapetyan*, 242 F.3d at 1149; *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th  
16 Cir.1992). The ALJ observed that Plaintiff's mental status exam and Trail Making  
17 test results were largely normal, and the abnormalities in concentration were  
18 explained by her recent drug use. Tr. 24, 273. Thus, the ALJ reasonably found  
19 there is little basis in Dr. Mabee's opinion to justify the marked limitation in the  
20 ability to complete a normal workday or work week.

1 Second, the ALJ found Dr. Mabee's assessment regarding the ability to  
2 complete a work day or work week was impacted by Plaintiff's cocaine use. Tr.  
3 24. Opinion evidence may be discounted if drug or alcohol use affects the opinion.  
4 *See Morgan*, 169 F.3d at 603; *Andrews v. Shalala*, 53 F.3d 1035, 1042-43 (1993).  
5 Plaintiff notes that Dr. Mabee specifically stated: "While there has been cocaine  
6 use, it appeared that it was concomitant with the mood disturbance rather than the  
7 cause of the mood problem. Substance abuse likely would exacerbate the above  
8 limitations." Tr. 272. The ALJ observed that while Dr. Mabee indicated cocaine  
9 would exacerbate Plaintiff's problem, and acknowledged there was cocaine use at  
10 the time of the exam, he inconsistently failed to link the errors in performing serial  
11 sevens and losing her train of thought to the impact of drug use. Tr. 24, 270, 272.  
12 This is supported by the ALJ's observation that Plaintiff had no similar difficulties  
13 during other exams in the record. Tr. 24. The consistency of a medical opinion  
14 with the record as a whole is a relevant factor in evaluating a medical opinion.  
15 *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631. This is therefore a specific,  
16 legitimate reason for rejecting the limitation on completing a normal workday and  
17 workweek assessed by Dr. Mabee.

18 3. *Rob Neils, Ph.D.*

19 Plaintiff contends the ALJ improperly rejected the opinion of Rob Neils,  
20 Ph.D., an examining psychologist. ECF No. 14 at 17-18. Dr. Neils completed a

1 psychological evaluation and a Mental Medical Source Statement form in October  
2 2014. Tr. 274-76, 278-80. He diagnosed bipolar disorder and assessed 12 marked  
3 and two severe limitations. Tr. 274-76, 278. Dr. Neils found that Plaintiff fails to  
4 stick to her assigned work routine “even with close, special, one-on-one  
5 supervision.” Tr. 279. He opined that Plaintiff is very “stress brittle” and cannot  
6 handle even minimal stress in her work or personal life. Tr. 279. The ALJ gave no  
7 weight to Dr. Neils’ opinion. Tr. 24.

8 First, the ALJ found Dr. Neils limitations to be inconsistent with the medical  
9 record. Tr. 24. As noted *supra*, the consistency of a medical opinion with the  
10 record as a whole is a relevant factor in evaluating a medical opinion.  
11 *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631. The ALJ found the  
12 limitations assessed by Dr. Neils are unsupported elsewhere in the record and are  
13 in fact so extreme that a person with those limitations could not live independently  
14 and would likely be institutionalized. Tr. 24. Further, the ALJ observed that  
15 symptoms such as hearing voice and having delusions were not noted in any other  
16 part of the record, nor were manic symptoms noted elsewhere. Tr. 24-25. This is a  
17 specific, legitimate reason supported by substantial evidence for rejecting Dr.  
18 Neils’ opinion.

19 Second, the ALJ gave no weight to Dr. Neils’ opinion because it was based  
20 primarily on Plaintiff’s and her mother’s statements. Tr. 24. As noted *supra*, a



1 medical source opinion may be rejected if it is based on subjective complaints  
2 which were properly discounted, *Tonapetyan*, 242 F.3d at 1149, and the ALJ made  
3 a legally sufficient finding to that effect in this case. The ALJ also noted that Dr.  
4 Neils indicated and Plaintiff testified he had not treated Plaintiff, and Dr. Neils  
5 identified no independent basis for his findings. Tr. 24, 278. This is a specific,  
6 legitimate reason for giving less weight to Dr. Neils' opinion.

7 Third, the ALJ noted that Dr. Neils did not discuss the impact of Plaintiff's  
8 substance use on his findings. Tr. 25. As discussed *supra*, opinion evidence may  
9 be discounted if substance use impacts the opinion. *See Morgan*, 169 F.3d at 603;  
10 *Andrews*, 53 F.3d at 1042-43. The ALJ observed that Dr. Neils did not review  
11 other evidence in the record, including relatively normal mental status exams. Tr.  
12 25. The amount of relevant evidence that supports a medical opinion is a relevant  
13 factor in weighing the opinion evidence. *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495  
14 F.3d at 631. The ALJ determined other evidence in the record does not support Dr.  
15 Neils' opinion, which reasonably suggests that his findings may have been  
16 impacted by substance use. Thus, the ALJ gave specific, legitimate reasons  
17 supported by substantial evidence for giving no weight to Dr. Neils' opinion.

## 18 CONCLUSION

19 After reviewing the record and the ALJ's findings, the Court concludes the  
20 ALJ's decision is supported by substantial evidence and free of harmful legal error.

1 To the extent the evidence could be interpreted more favorably to Plaintiff, the  
2 court must uphold the ALJ's decision where the evidence is susceptible to more  
3 than one rational interpretation. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir.  
4 1989). In this case, the ALJ's interpretation of the evidence was rational and  
5 supported by substantial evidence in the record. The ALJ's credibility  
6 determination and findings regarding the medical opinion evidence are legally  
7 sufficient. Therefore, the ALJ's decision is affirmed.

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

9 1. Plaintiff's Motion for Summary Judgment, ECF No. 14, is DENIED.

10 2. Defendant's Motion for Summary Judgment, ECF No. 15, is GRANTED.

11 The District Court Executive is directed to file this Order and forward copies  
12 to counsel. Judgment shall be entered for Defendant and the file shall be

13 **CLOSED.**

14 DATED December 4, 2017.

15 *s/Fred Van Sickle*

16 Fred Van Sickle

17 Senior United States District Judge