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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAIME NOEL LASHBROOK,
Plaintiff,
vs.
NANCY A. BERRYHILL,
Acting Commissioner of Social
Security,
Defendant.

} No. 2:16-CV-00255-LRS
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BEFORE THE COURT are the Plaintiff's Motion For Summary Judgment (ECF No. 14) and the Defendant's Motion For Summary Judgment (ECF No. 22).

JURISDICTION

Jaime Noel Lashbrook, Plaintiff, applied for Title XVI Supplemental Security Income benefits (SSI) on May 11, 2012. The application was denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on September 23, 2014, before Administrative Law Judge (ALJ) Moira Ausems. Plaintiff testified at the hearing, as did Vocational Expert (VE) K. Diane Kramer. On February 11, 2015, the ALJ issued a decision finding the Plaintiff not disabled. The Appeals Council denied a request for review of the ALJ's decision, making that decision the Commissioner's final decision subject to judicial review. The Commissioner's final decision is appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT- 1**

1 A decision supported by substantial evidence will still be set aside if the proper
2 legal standards were not applied in weighing the evidence and making the decision.
3 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.
4 1987).

6 ISSUES

7 Plaintiff argues the ALJ erred in: 1) failing to find at step two that Plaintiff has
8 a “severe” personality disorder; 2) rejecting Plaintiff’s symptom testimony; and 3)
9 failing to properly consider and weigh medical opinion evidence.

11 DISCUSSION

12 SEQUENTIAL EVALUATION PROCESS

13 The Social Security Act defines "disability" as the "inability to engage in any
14 substantial gainful activity by reason of any medically determinable physical or
15 mental impairment which can be expected to result in death or which has lasted or can
16 be expected to last for a continuous period of not less than twelve months." 42
17 U.S.C. § 1382c(a)(3)(A). The Act also provides that a claimant shall be determined
18 to be under a disability only if her impairments are of such severity that the claimant
19 is not only unable to do her previous work but cannot, considering her age, education
20 and work experiences, engage in any other substantial gainful work which exists in
21 the national economy. *Id.*

22 The Commissioner has established a five-step sequential evaluation process for
23 determining whether a person is disabled. 20 C.F.R. § 416.920; *Bowen v. Yuckert*,
24 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines if she is engaged
25 in substantial gainful activities. If she is, benefits are denied. 20 C.F.R. §
26 416.920(a)(4)(I). If she is not, the decision-maker proceeds to step two, which
27 determines whether the claimant has a medically severe impairment or combination

28 ORDER GRANTING DEFENDANT’S

MOTION FOR SUMMARY JUDGMENT- 3

1 of impairments. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant does not have a severe
2 impairment or combination of impairments, the disability claim is denied. If the
3 impairment is severe, the evaluation proceeds to the third step, which compares the
4 claimant's impairment with a number of listed impairments acknowledged by the
5 Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R.
6 § 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or
7 equals one of the listed impairments, the claimant is conclusively presumed to be
8 disabled. If the impairment is not one conclusively presumed to be disabling, the
9 evaluation proceeds to the fourth step which determines whether the impairment
10 prevents the claimant from performing work she has performed in the past. If the
11 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §
12 416.920(a)(4)(iv). If the claimant cannot perform this work, the fifth and final step
13 in the process determines whether she is able to perform other work in the national
14 economy in view of her age, education and work experience. 20 C.F.R. §
15 416.920(a)(4)(v).

16 The initial burden of proof rests upon the claimant to establish a prima facie
17 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
18 Cir. 1971). The initial burden is met once a claimant establishes that a physical or
19 mental impairment prevents her from engaging in her previous occupation. The
20 burden then shifts to the Commissioner to show (1) that the claimant can perform
21 other substantial gainful activity and (2) that a "significant number of jobs exist in the
22 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,
23 1498 (9th Cir. 1984).

24 25 **ALJ'S FINDINGS**

26 The ALJ found the following:

- 27 1) Plaintiff has "severe" medical impairments, those being polysubstance
28

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1 abuse in early remission; mixed adjustment disorder; and mild degenerative
2 spondylosis with mild dextroconvex curvature of the lumbar spine;

3 2) Plaintiff's impairments do not meet or equal any of the impairments listed
4 in 20 C.F.R. § 404 Subpart P, App. 1;

5 3) Plaintiff has the residual functional capacity (RFC) to perform light work as
6 defined in 20 C.F.R. §416.967(b) in that she is able to lift and carry 20 pounds
7 occasionally and 10 pounds frequently; she is able to stand and walk six hours in an
8 eight hour workday and sit for six hours in an eight hour workday; she is not able to
9 climb ladders, ropes or scaffolds; she can have no exposure to unprotected heights,
10 moving machinery, or commercial driving; she can perform simple and routine tasks
11 and no more than lower semiskilled (SVP-3¹) tasks; she can have brief superficial
12 contact with the general public; she can have superficial contact with coworkers, but
13 no cooperative tandem work with coworkers;

14 4) Plaintiff's RFC allows her to perform jobs existing in significant numbers
15 in the national economy as identified by the VE, including sorter, office cleaner and
16 production assembler.

17 Accordingly, the ALJ concluded the Plaintiff is not disabled.

18
19 **SEVERE IMPAIRMENT**

20 A "severe" impairment is one which significantly limits physical or mental
21 ability to do basic work-related activities. 20 C.F.R. § 416.920(c). It must result
22 from anatomical, physiological, or psychological abnormalities which can be shown
23 by medically acceptable clinical and laboratory diagnostic techniques. It must be

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27 ¹ Specific Vocational Preparation as determined by the U.S. Department of
28 Labor and found in the *Dictionary of Occupational Titles*.

1 established by medical evidence consisting of signs, symptoms, and laboratory
2 findings, not just the claimant's statement of symptoms. 20 C.F.R. § 416.908.

3 In a footnote in her opening brief (ECF No. 14 at p. 20, n. 6), Plaintiff contends
4 the ALJ erred in not finding Plaintiff has a “severe” personality disorder. In her
5 decision, the ALJ noted there was a reference in the record to a personality disorder,
6 but she found “the DSM-V² criteria are not well-established in the treatment notes.”
7 (AR at p. 18). In a “Progress Note” dated August 13, 2014, Kristie Lester, a Licensed
8 Mental Health Counselor (LMHC), diagnosed the Plaintiff on Axis 2³ with a
9 personality disorder. (AR at p. 472). There is, however, no apparent explanation for
10 that particular diagnosis and although it is Plaintiff’s burden to prove it is a “severe”
11 impairment, she cites to no medical evidence in the record supporting that diagnosis.
12 Furthermore, nurse practitioners, physicians’ assistants, and therapists (physical and
13 mental health) are not “acceptable medical sources” for the purpose of establishing
14 if a claimant has a medically determinable impairment. 20 C.F.R. § 416.913(a). Ms.
15 Lester is not an “acceptable medical source.” It is not clear why the ALJ felt
16 compelled to mention the personality disorder diagnosis. Nonetheless, the court
17 cannot find, and has not been directed to, any acceptable medical evidence in the
18 record establishing that Plaintiff has a “severe” personality disorder.

19 **MEDICAL OPINIONS**

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21 _____
22 ² *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition
(2013).

23 ³ DSM-V no longer uses the multi-axial system. In prior editions of the
24 DSM, Axis II was reserved for long-standing conditions of clinical significance,
25 like personality disorders.
26 [https://pro.psychcentral.com/dsm-5-changes-personality-disorders-axis-ii/005008.](https://pro.psychcentral.com/dsm-5-changes-personality-disorders-axis-ii/005008.html)
27 [html](https://pro.psychcentral.com/dsm-5-changes-personality-disorders-axis-ii/005008.html)

28 **ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT- 6**

1 In her decision, the ALJ noted that Plaintiff filed a prior application for Title
2 XVI benefits on August 27, 2010, which was denied upon initial determination on
3 October 4, 2010, within two years of her application dated May 11, 2012. Plaintiff
4 apparently sought to reopen the prior application. (AR at p. 34). The ALJ, however,
5 determined reopening was not warranted because the record did not “contain new and
6 material evidence or evidence establishing clear error on the face of the prior denial
7 determination that could be found to establish good cause for reopening.” (AR at p.
8 12). As such, the prior denial determination constituted a final and binding
9 determination of disability through October 4, 2010. (AR at p. 12).

10 An ALJ necessarily considers the record of the prior decision in determining
11 whether there has been a substantial change in the claimant’s condition since that
12 time that would warrant reopening. *Krumpelman v. Heckler*, 767 F.2d 586, 589 (9th
13 Cir. 1985). A decision not to reopen a previously adjudicated claim for social
14 security benefits is discretionary and therefore, not considered a “final” decision
15 within the meaning of 42 U.S.C. §405(g). *Id.* at 588. District courts have no
16 jurisdiction to review a refusal to reopen a claim for disability benefits or a
17 determination that such a claim is res judicata. *Id.*

18 Plaintiff cannot challenge the ALJ’s determination to not reopen her prior
19 claim. Nevertheless, she asserts that medical reports from prior to October 4, 2010
20 “support [her] consistent symptom claims and observations of these providers.” The
21 ALJ addressed these reports in her decision:

22 The Department of Social and Health Services opinions from
23 James Goodwin, Psy.D., Caitilin Newman, M.S., and Dr. Arnold,
24 dated October 7, 2008, December 14, 2009, and July 22, 2010,
25 respectively, are given little weight. These opinions are for the
26 period covered under the prior adjudication ending October 4,
27 2010, and are relevant to the claimant’s functioning for that
28 period. Moreover, these opinions are too remote in time to
show the claimant’s level of functioning for the current
adjudicatory period. In addition, examining mental health
professionals performed perfunctory evaluations of the claimant
and provided limited details as to the basis for the opinions.

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1 (AR at p. 23).

2 In October 2008, Plaintiff was referred to Dr. Goodwin for evaluation and
3 treatment. He noted that Plaintiff was “currently taking prescriptions of methadone
4 and a benzodiazepine (not good).” (AR at p. 296). Plaintiff reported a history of
5 problems with illicit drug use and “current problems with illicit drug use in early full
6 remission.” (*Id.*) Her previous psychological/psychiatric contacts included two times
7 in inpatient drug treatment. (*Id.*) Dr. Goodwin diagnosed “Major Depressive
8 Disorder Recurrent Moderate-Severe” and “Opioid Dependence Early Full Remission
9 x8 mos.” (*Id.*). His recommendation was drug and alcohol evaluation and treatment;
10 re-evaluation of the need for benzodiazepines; and starting treatment with
11 antidepressants. (*Id.*) Dr. Goodwin completed a Department of Social and Health
12 Services (DSHS) “Psychological/Psychiatric Evaluation” form in which he opined
13 that drug and alcohol evaluation and treatment was likely to decrease the severity of
14 Plaintiff’s condition (AR at p. 290), and that drug and alcohol abuse significantly
15 exacerbated the Plaintiff’s condition. (AR at p. 291). Dr. Goodwin performed a
16 mini-mental status exam (MMSE) of Plaintiff (AR at pp. 293-94), but there was no
17 other testing. He opined that Plaintiff had a number of “marked” and “severe”
18 cognitive and social limitations. (AR at p. 291). A “marked” limitation constitutes
19 a “very significant interference” with the ability to perform basic work-related
20 activities, while a “severe” limitation constitutes an inability to perform one or more
21 basic work-related activities.

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28 **ORDER GRANTING DEFENDANT’S
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1 LMHC Caitilin Newman performed a MMSE of Plaintiff in December 2009,
2 as well as a PHQ-9⁴ and a GAD-7⁵ to evaluate depression and anxiety respectively.
3 (AR at pp. 285-288). She diagnosed Plaintiff with “Major Depression, severe” and
4 “Adjustment DX w/ mixed anxiety and depression.” (AR at p. 281). She indicated
5 that Plaintiff’s mental health symptoms were affected by substance abuse, specifically
6 OxyContin, and that Plaintiff had been in treatment for seven months and “clean”
7 since December 2008. (*Id.*). She opined that Plaintiff had a number of “marked”
8 cognitive and social limitations. (AR at p. 282). She recommended Plaintiff undergo
9 mental health therapy. (AR at p. 283). She indicated that Plaintiff presented with a
10 “very flat affect, tearful, very depressed.” (AR at p. 284).

11 John Arnold, Ph.D., completed a DSHS evaluation form regarding Plaintiff in
12 July 2010. He indicated he had been presented with no records to review, that
13 Plaintiff had been in counseling and had made progress and had never been
14 hospitalized for psychiatric reasons. (AR at p. 269). He diagnosed Plaintiff with
15 “Opioid Dependence (OxyContin), “Early Full Remission (per client
16 report)/Dysthymic Disorder.” (AR at p. 271). He indicated that Plaintiff’s mental
17 health symptoms were affected by substance abuse or dependence in that OxyContin
18 might increase her symptoms of loss of motivation and interest, sadness/crying, and
19 worrying, nervousness and being antsy. (*Id.*). He opined that Plaintiff had, at most,
20 some “moderate” cognitive and social limitations (significant interference with ability
21 to perform basic work-related activities). (AR at p. 272). According to Dr. Arnold
22 at the time:

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24
25 ⁴ The Patient Health Questionnaire-9 objectifies and assesses degree of
26 depression severity. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1495268/>

27 ⁵ The General Anxiety Disorder-7 measures severity of anxiety, mainly in
28 outpatients. <https://www.ncbi.nlm.nih.gov/pubmed/16717171>

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1 [Plaintiff] will be able to remember locations and simple work
2 like procedures. She will be able to understand, remember
3 and carry out simple verbal and written instructions. She will
4 be able to make simple work related decisions. She will be
5 able to ask simple questions and request assistance. She will be
6 able to adhere to basic standards of neatness and cleanliness.
7 She will be aware of normal hazards and take appropriate
8 precautions. She will be able to travel in unfamiliar places
9 and use public transportation.

6 (Tr. at p. 272).

7 Among other things, Dr. Arnold recommended Plaintiff undergo cognitive
8 behavioral therapy and individual counseling, have the WAIS-IV⁶ administered to
9 her, and that she continue with drug and alcohol treatment. (AR at p. 273).

10 Dr. Arnold also administered the PAI (Personality Assessment Inventory) to
11 Plaintiff “to add information regarding her emotional functioning.” The doctor
12 deemed Plaintiff’s profile valid and indicated “[s]he did not respond in a more
13 negative or positive [way] than the clinical picture would warrant.” Per Dr. Arnold,
14 the PAI revealed Plaintiff to be suffering from significant distress, with particular
15 concern about her physical functioning. He indicated Plaintiff was likely to be
16 plagued by thoughts of worthlessness, hopelessness and personal failures, and that
17 she was “also likely to be plagued by worry to the degree that her ability to
18 concentrate and attend are significantly compromised.” (AR at p. 274).

19 W. Scott Mabee, Ph.D., completed a DSHS evaluation form regarding Plaintiff
20 in March 2011. Dr. Mabee indicated there were no records to review and that
21 Plaintiff had not been in counseling. (AR at p. 336). Dr. Mabee performed a Mental
22 Status Examination (MSE). (AR at pp. 341-43). He diagnosed Plaintiff with “Opioid
23 Dependence (OxyContin), Sustained Full Remission (per client report)/Dysthymic
24 Disorder/Adjustment Disorder with Anxiety.” (AR at p. 337). He indicated that
25 opioids might increase certain of Plaintiff’s symptoms, including increase in
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27 ⁶ Wechsler Adult Intelligence Scale-Fourth Edition.
28

1 agitation, anxiety and confusion, and decrease in concentration, attention, motivation.
2 (AR at p. 338). He opined that Plaintiff had mild to moderate cognitive and social
3 limitations. (*Id.*). According to Dr. Mabee’s “Medical Source Statement:”

4 [Plaintiff] will be able to remember locations and work like
5 procedures. She will be able to understand, remember and
6 carry out simple verbal and written instructions. She will
7 be able to concentrate for limited periods. She will be able
8 to make very simple work related decisions. She will be able
to ask simple questions, request assistance and accept
instructions. She will be able to adhere to basic standards of
neatness and cleanliness. She will be able to use the bus but
is very nervous on it.

9 (AR at p. 339).

10 Dr. Mabee indicated that mental health intervention was likely to restore or
11 substantially improve Plaintiff’s ability. (AR at p. 339).

12 In September 2011, Dr. Arnold completed another DSHS evaluation form
13 regarding the Plaintiff. He reviewed the prior assessment by Dr. Mabee. (AR at p.
14 356). He diagnosed Plaintiff with “Dysthymic Disorder/Bereavement GAD.” (AR
15 at p. 357). Based on Plaintiff’s self-report, Dr. Arnold indicated there were no mental
16 health symptoms affected by substance abuse or dependence. (AR at p. 358).
17 Plaintiff told Dr. Arnold she had “maintained her clean and sober lifestyle, since her
18 last GAU⁷ assessment.” He opined that Plaintiff had mild to moderate cognitive and
19 social limitations, with one exception being a marked limitation in ability to
20 communicate and perform effectively in a work setting with public contact. (AR at
21 p. 358). He repeated verbatim, however, the “Medical Source Statement” contained
22 in Dr. Mabee’s earlier evaluation. (AR at p. 359). He concurred with Dr. Mabee that
23 mental health intervention was likely to restore or substantially improve Plaintiff’s
24 ability to work. (AR at p. 359). He noted that Plaintiff reported a significant increase

26 ⁷ General Assistance Unemployable. A Washington DSHS program
27 providing cash and medical assistance to adults with temporary incapacities.

1 in anxiety/depression since she was last seen (presumably by Dr. Mabee in March
2 2011). (*Id.*).

3 At the September 2014 hearing, Plaintiff's counsel presented a hypothetical to
4 the VE based on the limitations opined by Dr. Arnold in his September 2011
5 evaluation: moderate limitation in ability to understand, remember and persist in tasks
6 by following complex instructions, ability to learn new tasks, ability to perform
7 routine tasks without undue supervision, ability to communicate and perform
8 effectively in a work setting with limited public contact, ability to maintain
9 appropriate behavior in a work setting; and marked limitation in ability to
10 communicate and perform effectively in a work setting with public contact. The VE
11 responded that such an individual would not be capable of performing any work. (AR
12 at p. 62).

13 At the hearing, the ALJ indicated she would be sending the Plaintiff out for a
14 consultative examination. (AR at p. 50). Jay M. Toews, Ed.D., conducted this
15 examination on November 4, 2014. Dr. Toews reviewed Plaintiff's mental health
16 record, including the March 2011 and September 2011 evaluations by Drs. Mabee
17 and Arnold. (AR at pp. 485-86). Plaintiff denied having had any mental health
18 treatment. Dr. Toews found Plaintiff to be inconsistent in reporting about anxiety and
19 depression, and found she exhibited no signs of depression or anxiety. (AR at p.
20 486). Plaintiff indicated she had completed substance abuse treatment two months
21 ago and was not presently using drugs or alcohol. (AR at p. 487). Dr. Toews
22 assessed Plaintiff's mental health functioning as follows:

23 Her cognitive functioning appears to be in the Low Average
24 range by MSE [Mental Status Examination]. Memory
25 functioning is in the Low Average Range.⁸ Anxiety and
depression associated with polysubstance cessation is

26 ⁸ Plaintiff was administered the WMS-IV (Wechsler Memory Scale) by Dr.
27 Toews.

1 treatable. She need[s] to be encouraged to remain clean,
2 and assisted to develop a solid support system. Additional
3 psychosocial treatment such as vocational rehabilitation
4 training should be made available.

5 She is capable of remembering and executing detailed
6 instructions. She is capable of at least superficial
7 interactions with co-workers. She would have moderate
8 to marked limitations in ability to interact with the general
9 public. She is able to make routine decisions and judgments
10 in a work situation. She would function best in a low stress
11 environment. She is capable of managing funds as long as
12 she remains clean.

13 (AR at p. 488).

14 Dr. Toews diagnosed Plaintiff with “Opioid Dependence in self-reported full
15 remission” and “Adjustment Disorder, Mixed, related to life changes associated with
16 early recovery.” (AR at p. 488). He opined that Plaintiff was moderately limited in
17 her ability to interact appropriately with the public and respond appropriately to usual
18 work situations and to changes in a routine work setting. (AR at p. 491). He opined
19 that Plaintiff was moderately limited in her ability to understand and remember
20 complex instructions and carry out complex instructions, and that she was markedly
21 limited in her ability to make judgments on complex work-related decisions. (AR at
22 p. 492).

23 The ALJ gave “significant” weight to the opinions of Dr. Toews. (AR at p.
24 21). She deemed her RFC finding consistent with his opinions, with the exception
25 that she found Plaintiff capable of brief superficial contact with the general public
26 based on Plaintiff’s testimony that she used public transportation six days a week and
27 her frequenting of the grocery store and the library. (*Id.*). The ALJ also found that
28 Plaintiff’s RFC for simple and routine tasks and no more than lower semi-skilled
29 tasks, brief superficial contact with the general public, superficial contact with
30 coworkers, and no cooperative tandem work with coworkers, was consistent with the
31 limitation regarding a low stress work environment. (*Id.*). The ALJ noted that Dr.
32 Toews’ evaluation was the only one in the record that relied on clinical testing (Trail

1 Making Test and WMS-IV) other than a mini-mental status examination. Therefore,
2 according to the ALJ, this supported giving Dr. Toews' evaluation more weight than
3 the other evaluations. (*Id.*). Furthermore, because Dr. Toews' evaluation was made
4 after the Plaintiff was purportedly in remission from illicit substances, the ALJ found
5 that the limitations opined by him could be viewed as Plaintiff's level of functioning
6 absent substance abuse. (*Id.*).

7 It is settled law in the Ninth Circuit that in a disability proceeding, the opinion
8 of a licensed treating or examining physician or psychologist is given special weight
9 because of his/her familiarity with the claimant and his/her condition. If the treating
10 or examining physician's or psychologist's opinion is not contradicted, it can be
11 rejected only for clear and convincing reasons. *Reddick v. Chater*, 157 F.3d 715, 725
12 (9th Cir. 1998); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If contradicted, the
13 ALJ may reject the opinion if specific, legitimate reasons that are supported by
14 substantial evidence are given. *Id.* “[W]hen evaluating conflicting medical opinions,
15 an ALJ need not accept the opinion of a doctor if that opinion is brief, conclusory,
16 and inadequately supported by clinical findings.” *Bayliss v. Barnhart*, 427 F.3d 1211,
17 1216 (9th Cir. 2005).

18 Initially, it is not readily apparent that the opinions of Dr. Toews diverges
19 significantly from those rendered previously by Drs. Mabee and Arnold. The
20 identical “Medical Source Statement” of Drs. Mabee and Arnold does not appear
21 manifestly contrary to the assessment of Dr. Toews that Plaintiff is capable of
22 remembering and executing detailed instructions and capable of superficial
23 interactions with co-workers; would have moderate to marked limitations in ability
24 to interact with the general public; is able to make routine decisions and judgments;
25 would function best in a low stress environment; and is capable of managing funds
26 as long as she remains clean. Nevertheless, it is true that Dr. Toews conducted a
27 more thorough evaluation of the Plaintiff. Furthermore, in all of the evaluations pre-

28
**ORDER GRANTING DEFENDANT'S
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1 dating Dr. Toews' evaluation, with one exception⁹, it was the opinion of the evaluator
2 that Plaintiff's substance abuse was clearly a significant factor exacerbating her
3 mental health symptoms, recognizing that even Dr. Toews, like the previous
4 evaluators, relied on Plaintiff's self-reporting as to whether she was currently using
5 illicit substances.

6 Without substance abuse, a legitimate inference by the ALJ was that Plaintiff's
7 mental health symptoms, and her resulting functional limitations, are not as severe.
8 To the extent that Dr. Toews' opinions in fact contradicted the opinions of Drs.
9 Mabee and Johnson (and the opinions of the evaluators prior to October 2010), the
10 ALJ offered specific and legitimate reasons for according more weight to the opinions
11 of Dr. Toews.

12 13 **SYMPTOM TESTIMONY**

14 Where, as here, the Plaintiff has produced objective medical evidence of an
15 underlying impairment that could reasonably give rise to some degree of the
16 symptoms alleged, and there is no affirmative evidence of malingering, the ALJ's
17 reasons for rejecting the Plaintiff's testimony must be clear and convincing. *Burrell*
18 *v. Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014); *Garrison v. Colvin*, 759 F.3d 995,
19

20 ⁹ In his July 2010 evaluation, Dr. Arnold indicated that Plaintiff's mental
21 health symptoms were affected by substance abuse, but he indicated to the
22 contrary in his September 2011 evaluation. He did so, however, based on the
23 Plaintiff's self-report that she had been clean and sober since her last assessment,
24 presumably the one by Dr. Mabee. The record, as discussed above and set forth in
25 the ALJ's decision (AR at pp. 19-20) bears out that Plaintiff consistently
26 experienced substance abuse issues from 2008 to 2014, notwithstanding her
27 professing on several different occasions to be "clean."
28

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1 1014 (9th Cir. 2014). If an ALJ finds a claimant’s subjective assessment unreliable,
2 “the ALJ must make a credibility determination with findings sufficiently specific to
3 permit [a reviewing] court to conclude that the ALJ did not arbitrarily discredit [the]
4 claimant’s testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.2002).
5 Among other things, the ALJ may consider: 1) the claimant's reputation for
6 truthfulness; 2) inconsistencies in the claimant's testimony or between her testimony
7 and her conduct; 3) the claimant’s daily living activities; 4) the claimant's work
8 record; and 5) testimony from physicians or third parties concerning the nature,
9 severity, and effect of claimant's condition. *Id.* Subjective testimony cannot be
10 rejected solely because it is not corroborated by objective medical findings, but
11 medical evidence is a relevant factor in determining the severity of a claimant’s
12 impairments. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

13 Plaintiff asserts it “is only the ALJ’s theory that [Plaintiff’s] mental diagnoses
14 and mental limitations are due to substance abuse” and asserts “[t]he ALJ’s
15 conclusion that her drug and alcohol abuse are material to her disability are
16 incorrect.” (ECF No. 23 at p. 6). As the discussion of the medical evidence reveals,
17 it is not merely the ALJ’s theory that Plaintiff’s mental health limitations are
18 exacerbated by substance abuse. It is the near unanimous opinion of the examining
19 mental health evaluators that Plaintiff’s substance abuse is material to her claimed
20 disability. Their evaluations, in themselves, constitute clear and convincing reasons
21 to reject any assertion by Plaintiff that her mental health symptoms are of disabling
22 severity, independent of substance abuse. Accordingly, even if the other reasons
23 cited by the ALJ for discounting Plaintiff’s symptom testimony (e.g., failure to seek
24 regular treatment for mental health symptoms, inconsistent reporting of substance
25 abuse history, drug seeking behavior, daily living activities) are not clear and
26 convincing, there is still substantial evidence supporting the ALJ’s discounting of
27 ///

28 **ORDER GRANTING DEFENDANT’S
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1 Plaintiff's symptom testimony. *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d
2 1155. 1162-63 (9th Cir. 2008).

3
4 **CONCLUSION**

5 The ALJ's mental RFC determination is supported by substantial evidence in
6 the record. Therefore, she posed a proper and complete hypothetical to the VE
7 pursuant to which the VE opined Plaintiff could perform jobs existing in significant
8 numbers in the national economy. The ALJ rationally interpreted the evidence and
9 "substantial evidence"- more than a scintilla, less than a preponderance- supports her
10 decision that Plaintiff is not disabled.

11 Defendant's Motion For Summary Judgment (ECF No. 22) is **GRANTED** and
12 Plaintiff's Motion For Summary Judgment (ECF No. 14) is **DENIED**. The
13 Commissioner's decision is **AFFIRMED**.

14 **IT IS SO ORDERED.** The District Executive shall enter judgment
15 accordingly and forward copies of the judgment and this order to counsel of record.

16 **DATED** this 12th day of October, 2017.

17 *s/Lonny R. Suko*

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19 _____
20 LONNY R. SUKO
21 Senior United States District Judge

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28 **ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT- 17**