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2  
3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 TAMMY KRAFT,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Acting  
10 Commissioner of Social Security,

11 Defendant.

Case No. 2:15-cv-00337-KLS

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

12 Plaintiff has brought this matter for judicial review of defendant's denial of her  
13 application for supplemental security income ("SSI") benefits. Pursuant to 28 U.S.C. § 636(c),  
14 Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have  
15 this matter heard by the undersigned Magistrate Judge. After reviewing the parties' briefs and the  
16 remaining record, the Court hereby finds that for the reasons set forth below, defendant's  
17 decision to deny benefits should be reversed and this matter should be remanded for further  
18 administrative proceedings.  
19

20 FACTUAL AND PROCEDURAL HISTORY

21 On November 29, 2011, plaintiff filed an application for SSI benefits alleging disability  
22 as of February 27, 2009. *See* Dkt. 10, Administrative Record ("AR") 12. That application was  
23 denied upon initial administrative review on June 6, 2012, and on reconsideration on August 10,  
24 2012. *See id.* A hearing was held before an administrative law judge ("ALJ") on June 4, 2013, at  
25 which plaintiff, represented by counsel, appeared and testified, as did a vocational expert. *See*  
26

ORDER - 1

1 AR 29-64.

2 In a decision dated July 24, 2013, the ALJ determined plaintiff to be not disabled. *See* AR  
3 12-22. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals Council on  
4 January 15, 2015, making that decision the final decision of the Commissioner of Social Security  
5 (the “Commissioner”). *See* AR 2; 20 C.F.R. § 416.1481. On March 9, 2015, plaintiff filed a  
6 complaint in this Court seeking judicial review of the Commissioner’s final decision. *See* Dkt. 3.  
7 The administrative record was filed with the Court on May 15, 2015. *See* Dkt. 10. The parties  
8 have completed their briefing, and thus this matter is now ripe for the Court’s review.  
9

10 Plaintiff argues defendant’s decision to deny benefits should be reversed and remanded  
11 for further administrative proceedings because the ALJ erred: (1) in evaluating the opinions of  
12 treating physician, David Elkayam, M.D., and examining psychologist, Tedd Judd, Ph.D.; (2) in  
13 failing to properly consider all of the limitations imposed by plaintiff’s severe impairments; and  
14 (3) in finding plaintiff to be capable of returning to her past relevant work. For the reasons set  
15 forth below, the Court agrees the ALJ erred in evaluating Dr. Judd’s opinion and in finding  
16 plaintiff to be capable of performing her past relevant work, and thus in determining plaintiff to  
17 be not disabled. Accordingly, the Court finds that defendant’s decision should be reversed on this  
18 basis, and that this matter should be remanded for further administrative proceedings.  
19

20 DISCUSSION

21 The determination of the Commissioner that a claimant is not disabled must be upheld by  
22 the Court, if the “proper legal standards” have been applied by the Commissioner, and the  
23 “substantial evidence in the record as a whole supports” that determination. *Hoffman v. Heckler*,  
24 785 F.2d 1423, 1425 (9th Cir. 1986); *see also Batson v. Commissioner of Social Security Admin.*,  
25 359 F.3d 1190, 1193 (9th Cir. 2004); *Carr v. Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991)  
26

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

4       Substantial evidence is “such relevant evidence as a reasonable mind might accept as  
5 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation  
6 omitted); *see also Batson*, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if  
7 supported by inferences reasonably drawn from the record.”). “The substantial evidence test  
8 requires that the reviewing court determine” whether the Commissioner’s decision is “supported  
9 by more than a scintilla of evidence, although less than a preponderance of the evidence is  
10 required.” *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence  
11 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.  
12 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence  
13 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting  
14 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).<sup>1</sup>

17 I.       The ALJ’s Evaluation of Dr. Judd’s Opinion

18       The ALJ is responsible for determining credibility and resolving ambiguities and  
19 conflicts in the medical evidence. *See Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).

20 Where the medical evidence in the record is not conclusive, “questions of credibility and  
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22 <sup>1</sup> As the Ninth Circuit has further explained:

23       . . . It is immaterial that the evidence in a case would permit a different conclusion than that  
24 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by  
25 substantial evidence, the courts are required to accept them. It is the function of the  
26 [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may  
not try the case de novo, neither may it abdicate its traditional function of review. It must  
scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are  
rational. If they are . . . they must be upheld.

*Sorenson*, 514 F.2dat 1119 n.10.

1 resolution of conflicts” are solely the functions of the ALJ. *Sample v. Schweiker*, 694 F.2d 639,  
2 642 (9th Cir. 1982). In such cases, “the ALJ’s conclusion must be upheld.” *Morgan v.*  
3 *Commissioner of the Social Security Admin.*, 169 F.3d 595, 601 (9th Cir. 1999). Determining  
4 whether inconsistencies in the medical evidence “are material (or are in fact inconsistencies at  
5 all) and whether certain factors are relevant to discount” the opinions of medical experts “falls  
6 within this responsibility.” *Id.* at 603.

7  
8 In resolving questions of credibility and conflicts in the evidence, an ALJ’s findings  
9 “must be supported by specific, cogent reasons.” *Reddick*, 157 F.3d at 725. The ALJ can do this  
10 “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,  
11 stating his interpretation thereof, and making findings.” *Id.* The ALJ also may draw inferences  
12 “logically flowing from the evidence.” *Sample*, 694 F.2d at 642. Further, the Court itself may  
13 draw “specific and legitimate inferences from the ALJ’s opinion.” *Magallanes v. Bowen*, 881  
14 F.2d 747, 755, (9th Cir. 1989).

15  
16 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted  
17 opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.  
18 1996). Even when a treating or examining physician’s opinion is contradicted, that opinion “can  
19 only be rejected for specific and legitimate reasons that are supported by substantial evidence in  
20 the record.” *Id.* at 830-31. However, the ALJ “need not discuss *all* evidence presented” to him or  
21 her. *Vincent on Behalf of Vincent v. Heckler*, 739 F.3d 1393, 1394-95 (9th Cir. 1984) (citation  
22 omitted) (emphasis in original). The ALJ must only explain why “significant probative evidence  
23 has been rejected.” *Id.*; *see also Cotter v. Harris*, 642 F.2d 700, 706-07 (3rd Cir. 1981); *Garfield*  
24 *v. Schweiker*, 732 F.2d 605, 610 (7th Cir. 1984).

25  
26 In general, more weight is given to a treating physician’s opinion than to the opinions of

1 those who do not treat the claimant. *See Lester*, 81 F.3d at 830. On the other hand, an ALJ need  
2 not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and  
3 inadequately supported by clinical findings” or “by the record as a whole.” *Batson*, 359 F.3d at  
4 1195; *see also Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*,  
5 242 F.3d 1144, 1149 (9th Cir. 2001). An examining physician’s opinion is “entitled to greater  
6 weight than the opinion of a nonexamining physician.” *Lester*, 81 F.3d at 830-31. A non-  
7 examining physician’s opinion may constitute substantial evidence if “it is consistent with other  
8 independent evidence in the record.” *Id.* at 830-31; *Tonapetyan*, 242 F.3d at 1149.

10 With respect to the opinion evidence from Dr. Judd, the ALJ found as follows:

11 The record contains interrogatories that were completed in February 2013 by  
12 examining psychologist Tedd Judd, PhD, who opined that the claimant’s  
13 depression was primarily reactive to unemployment and her inability to find a  
14 job. (Exhibit 23F/4). He further opined that the claimant’s mental impairments  
15 would cause her to have difficulties in social functioning as well as  
16 inattention. (Exhibit 23F/5). This opinion is given little weight as it is based  
17 upon a one-time evaluation of the claimant that occurred in August 2012, six  
18 months prior to completing these interrogatories. (Exhibit 15F). Moreover, Dr.  
19 Judd’s opinion is inconsistent with his previous report from August 2012,  
20 which revealed that the claimant’s working memory is superior and her  
21 information processing speeds are within the average range. It was also noted  
22 that her word memory is superior. (Exhibit 15F/9). In fact, in August 2012 Dr.  
23 Judd opined in that report that the claimant would be a candidate for  
24 vocational rehabilitation once her migraines headaches symptoms are  
25 addressed. (Exhibit 15F/11). There was no mention of the effect of her mental  
26 impairments. Finally, it is also worth noting that there is a page missing from  
Dr. Judd’s August 2012 report so that it does not contain any diagnoses of the  
claimant nor does it offer any opinion. (Exhibit 15F/10-11). This renders his  
opinion in the interrogatories regarding the claimant’s depression and ADHD  
symptoms less reliable as it is unclear from the record whether Dr. Judd  
diagnosed the claimant with these impairments.

AR 19. Plaintiff argues the ALJ erred in so finding. The Court agrees.

First, the mere fact that an examining medical source conducts a “one-time evaluation” is  
not itself a valid reason for rejecting that source’s opinion, given that in general most examining

1 medical sources only evaluate a claimant on one occasion, and that the Commissioner herself on  
2 many occasions has relied on such one-time evaluations to support a finding of non-disability.  
3 Further, it is not so clear that a period of six months between an evaluation and an opinion based  
4 on that evaluation is sufficiently large to call the opinion into question. At the very least, the ALJ  
5 offered no explanation as to how such is the case here.  
6

7         Second, as plaintiff points out there is not necessarily any inconsistency between testing  
8 indicating superior memory and average information processing speeds and Dr. Judd's opinion  
9 that plaintiff was significantly limited in terms of social functioning and inattention. That is, the  
10 fact that an individual has no issues with memory or information processing does not at all  
11 necessarily indicate that person has no problems with attention or social functioning. The Court  
12 also notes that Dr. Judd's evaluation report contains additional findings that certainly could be  
13 supportive of the functional limitations he assessed. For example, in regard to attention testing  
14 also suggested "some tendency toward information overload" and revealed plaintiff to be  
15 "impaired on multitasking." AR 476-77. As for possible impact on social functioning, the mental  
16 status examination Dr. Judd performed does contain some abnormal findings, such as restricted  
17 range of affect and generally depressed appearance. *See* AR 475.  
18

19         Third, and finally, as plaintiff again points out the lack of any "mention of the effect of  
20 her mental impairments" by Dr. Judd and the missing evaluation report page, may actually have  
21 something to do with each other. That is, the missing page indeed may contain the diagnoses Dr.  
22 Judd assessed, along with possible further findings or opinions concerning the effect or impact of  
23 those impairments on plaintiff's functional capabilities. Nor is there any indication as to why the  
24 ALJ made no attempt to secure the missing page. To that extent, therefore, the Court agrees with  
25 plaintiff that the ALJ erred in failing to uphold his duty "to fully and fairly develop the record."  
26

1 *Tonapetyan*, 242 F.3d at 1150.

2 Defendant argues there is no error here, because the ALJ found the record to be adequate  
3 to evaluate plaintiff's disability claim. *See Mays v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)  
4 (duty to further develop record "is triggered only when there is ambiguous evidence or when the  
5 record is inadequate to allow for proper evaluation of the evidence"). But the ALJ' own findings  
6 concerning the evaluation report indicates he was aware of ambiguity of the evidentiary support  
7 for Dr. Judd's opinion, as the ALJ specifically noted that it was "unclear" as to whether Dr. Judd  
8 had diagnosed plaintiff with any mental impairments that might have formed the basis for the  
9 functional limitations he assessed. Had the ALJ obtained the missing report page, he may very  
10 well have found the diagnostic and/or other evidentiary support he found to be absent. In that  
11 case, the ALJ might have come to a different conclusion regarding Dr. Judd's opinion, especially  
12 since the other reasons the ALJ gave for rejecting it lack validity.  
13

14  
15 II. The ALJ's Step Four Determination

16 At step four of the Commissioner's sequential disability evaluation process,<sup>2</sup> the ALJ  
17 found plaintiff to be capable of performing her past relevant work both as a general office clerk  
18 and as a food and beverage order clerk. *See* AR 21. The ALJ explained his step four finding as  
19 follows:

20 At the hearing, the vocational expert testified that the claimant had past  
21 relevant work as a general office clerk . . . and as a food and beverage order  
22 clerk . . . At the hearing, the claimant testified that both of these positions  
23 were performed for a period of five years during which time she owned a  
24 pizza restaurant with her husband. While there is no evidence of earnings in  
25 the record, the claimant testified that all of the income from the restaurant  
was reported on her husband's records only. On a work history report that  
was completed by the claimant, she indicated that most of her time was spent

26 <sup>2</sup> The Commissioner employs a five-step "sequential evaluation process" to determine whether a claimant is disabled. *See* 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any particular step thereof, the disability determination is made at that step, and the sequential evaluation process ends. *See id.*

1 in the office doing paperwork, but that she also delivered pizzas and took  
2 phone orders as well. (Exhibit 3E/4). She reported that she did this work  
3 from August 1995 to September 1999 and that her pay varied. (Exhibit 3E/1,  
4 4). Thus, I find that this constitutes past relevant work. Accordingly, in  
5 comparing the claimant’s residual functional capacity with the physical and  
6 mental demands of this work, I find that the claimant is able to perform it as  
7 it was actually and generally performed.

8 *Id.* Plaintiff argues the ALJ erred in finding her to be capable of performing her past relevant  
9 work. Again, the Court agrees.

10 Plaintiff has the burden to show she is unable to perform her past relevant work. *Tackett*  
11 *v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999). “Although the burden of proof lies with the  
12 claimant at step four, the ALJ still has a duty to make the requisite factual findings to support his  
13 conclusion.” *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). “This is done by looking at  
14 the ‘residual functional capacity and the physical and mental demands’ of the claimant’s past  
15 relevant work.” *Id.* at 844-45 (quoting 20 C.F.R. § 416.920(e)). To be found not disabled at step  
16 four, the claimant must able to perform either “[t]he actual functional demands and job duties of  
17 a particular past relevant job; or . . . [t]he functional demands and job duties of the occupation as  
18 generally required by employers throughout the national economy.” *Id.* at 845. “This requires  
19 specific findings” on the part of the ALJ “as to the claimant’s residual functional capacity, the  
20 physical and mental demands of the past relevant work, and the relation of the residual functional  
21 capacity to the past work.” *Id.* (citing Social Security Ruling (“SSR”) 82-62, 1982 WL 31386).

22 The ALJ in this case found plaintiff had the residual functional capacity:

23 . . . to perform light work, with is defined as lifting and/or carrying up to  
24 twenty pounds occasionally and ten pounds frequently, standing and/or  
25 walking up to two hours and sitting up to six hours all within an eight  
26 hour work day with normal breaks. . . . In addition, the claimant can  
frequently stoop, crouch, kneel, balance, and crawl. She can also  
frequently climb ramps, stairs, ladders, ropes, and scaffolds. The  
claimant can handle frequent interaction with co-workers, supervisors,  
and the general public.



1 AR 17 (emphasis in original). First, it should be noted that given the ALJ’s errors in evaluating  
2 the opinion evidence from Dr. Judd, the above RFC assessment cannot be said to completely and  
3 accurately describe all of plaintiff’s mental functional limitations at this time.<sup>3</sup> Thus, on this basis  
4 alone the Court finds the ALJ’s step four determination to be in error, given that it is based on an  
5 erroneous RFC assessment.  
6

7         Second, as plaintiff notes, the ALJ failed to describe the physical and mental demands of  
8 her past relevant work. Defendant argues the ALJ accepted plaintiff’s testimony that she and her  
9 husband operated a pizza store franchise and considered her work history report, in which she  
10 indicated having spent most of her time in the office doing paperwork but also delivering pizzas  
11 and taking phone orders. *See* AR 21, 220. But neither the testimony the ALJ cites nor the work  
12 history report itself indicates the actual *physical* and *mental* demands of plaintiff’s past relevant  
13 work – as opposed to the number of hours work or nature of the tasks performed – and the ALJ  
14 made no further attempt to determine those demands. The ALJ thus erred in finding plaintiff to  
15 be capable of performing her past relevant work as it was actually performed.  
16

17         Third, again as plaintiff notes, she did not testify or report that she performed the two  
18 separate jobs of general office clerk and food and beverage order clerk while she owned a pizza  
19 restaurant with her husband, but that her job during that time was co-owner of that business. *See*  
20 AR 50-53, 217, 220. Further, although the vocational expert did testify that plaintiff performed  
21 the general office clerk and food and beverage order clerk as part of the pizza restaurant business  
22  
23

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24 <sup>3</sup> If a disability determination “cannot be made on the basis of medical factors alone at step three of the sequential  
25 disability evaluation process,” the ALJ must identify the claimant’s “functional limitations and restrictions” and  
26 assess his or her “remaining capacities for work-related activities.” SSR 96-8p, 1996 WL 374184 \*2. A claimant’s  
RFC assessment is used at step four of that process to determine whether he or she can do his or her past relevant  
work, and at step five to determine whether he or she can do other work. *See id.* Residual functional capacity is what  
the claimant “can still do despite his or her limitations.” *Id.* It is the maximum amount of work the claimant is able  
to perform based on all of the relevant evidence in the record. *See id.*

1 – and that she also performed the general office clerk “as a standalone” job (AR 63) – it is not at  
2 all clear upon what evidence in the record that testimony was based. To the extent the vocational  
3 expert, and thus the ALJ, divided the job of pizza restaurant co-owner or its equivalent into the  
4 “particular task[s] associated with” it by separating it into the jobs of general office clerk and  
5 food and beverage clerk and then determining plaintiff’s ability to perform those jobs, this was  
6 error. *See Valencia v. Heckler*, 751 F.2d 1082, 1087 (9th Cir. 1985).<sup>4</sup>

8 III. This Matter Should Be Remanded for Further Administrative Proceedings

9 The Court may remand this case “either for additional evidence and findings or to award  
10 benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when the Court  
11 reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the  
12 agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th  
13 Cir. 2004) (citations omitted). Thus, it is “the unusual case in which it is clear from the record  
14 that the claimant is unable to perform gainful employment in the national economy,” that  
15 “remand for an immediate award of benefits is appropriate.” *Id.*

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17 <sup>4</sup> In *Valencia*, the Commissioner argued that tomato sorting, “one of the many tasks” the claimant performed as a  
18 farm worker, constituted past relevant work. *Id.* at 1086. The Ninth Circuit rejected this argument, explaining that  
19 because the evidence in the record reflected that even when the majority of the claimant’s time was spent sorting  
20 tomatoes, she “also performed the other tasks customarily performed by agricultural workers, including hoeing and  
21 harvesting the fields.” *Id.* The Ninth Circuit went on to state that:

22 Every occupation consists of a myriad of tasks, each involving different degrees of physical  
23 exertion. To classify an applicant’s “past relevant work” according to the least demanding function  
24 of the claimant’s past occupations is contrary to the letter and spirit of the Social Security Act.

25 *Id.* The Ninth Circuit concluded by stating that “the [Social Security Act] and regulations direct the [Commissioner]  
26 to first determine whether a disability claimant can perform his past job or occupation *before* examining whether  
the skills and training acquired by the claimant through his previous work experience have equipped him to  
undertake other similar or related jobs,” and therefore that “[w]here an individual cannot perform any of his  
previous jobs, but only one or more tasks associated with those jobs,” the step four determination “must be resolved  
in the claimant’s favor.” *Id.* at 1086-87 (emphasis in original). In this case, while the vocational expert and ALJ did  
not parse out specific work-related tasks, they essentially appear to have done just that by dividing the job of pizza  
co-owner into the jobs of general office clerk and beverage order clerk, given that there is no evidence that plaintiff  
actually performed those jobs. Nor is it clear the extent to which any or all of the tasks required to perform those two  
separate jobs also are required to perform the job of pizza restaurant co-owner, or whether they fully and adequately  
encompass all of the tasks that a pizza restaurant co-owner does.

1 Benefits may be awarded where “the record has been fully developed” and “further  
2 administrative proceedings would serve no useful purpose.” *Smolen*, 80 F.3d at 1292; *Holohan v.*  
3 *Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded where:

4 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the  
5 claimant’s] evidence, (2) there are no outstanding issues that must be resolved  
6 before a determination of disability can be made, and (3) it is clear from the  
7 record that the ALJ would be required to find the claimant disabled were such  
8 evidence credited.

9 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

10 Because issues still remain in regard to the medical opinion evidence in the record, plaintiff’s  
11 RFC and her ability to perform her past relevant work, remand for further consideration of these  
12 issues – as well as, if necessary, the issue of whether plaintiff is capable of performing other jobs  
13 existing in significant numbers in the national economy<sup>5</sup> – is warranted.

#### 14 CONCLUSION

15 Based on the foregoing discussion, the Court hereby finds the ALJ improperly concluded  
16 plaintiff was not disabled. Accordingly, defendant’s decision to deny benefits is REVERSED  
17 and this matter is REMANDED for further administrative proceedings in accordance with the  
18 findings contained herein.

19 DATED this 13th day of August, 2015.

20  
21  
22   
23 Karen L. Strombom  
24 United States Magistrate Judge  
25

26 <sup>5</sup> If a claimant cannot perform his or her past relevant work, at step five of the sequential disability evaluation process, the ALJ must show there are a significant number of jobs in the national economy the claimant is able to do. See *Tackett*, 180 F.3d at 1098-99; 20 C.F.R. § 416.920(d), (e).