

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JACQUELINE K. HAMILTON JOHNSON,

Plaintiff,

V.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,¹

Defendant.

Case No. C16-205-JCC

ORDER REVERSING AND REMANDING CASE FOR FURTHER ADMINISTRATIVE PROCEEDINGS

Jacqueline K. Hamilton Johnson seeks review of the denial of her application for

Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB). Ms. Johnson

contends the ALJ erred in evaluating the medical opinions of: (1) Jamie Phifer, M.D.; (2)

Jennifer Azen, M.D.; and, (3) Jay Wellington, M.S.W. Dkt. 12. Ms. Johnson contends these

errors resulted in a residual functional capacity (RFC) determination that failed to account for

of her limitations. *Id.* Ms. Johnson contends this matter should be reversed and remanded for

further proceedings. Dkt. 12 at 18. As discussed below, the Court **REVERSES** the

Commissioner's final decision and **REMANDS** the matter for further administrative proceedings.

¹ Nancy A. Berryhill is now the Acting Commissioner of the Social Security Administration. Pursuant to Federal Rule of Civil Procedure 25(d), Nancy A. Berryhill is substituted for Carolyn W. Colvin as defendant in this suit. The Clerk is directed to update the docket, and all future filings by the parties should reflect this change.

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1 under sentence four of 42 U.S.C. § 405(g).

2

3 BACKGROUND

4 In December 2012, Ms. Johnson applied for benefits, alleging disability as of November
5 29, 2012. Tr. 14, 217-226. Ms. Johnson's applications were denied initially and on
6 reconsideration. Tr. 14, 144-147, 151-155. After the ALJ conducted a hearing on March 17,
7 2014, the ALJ issued a decision finding Ms. Johnson not disabled. Tr. 14-27.

8

9 THE ALJ'S DECISION

10 Utilizing the five-step disability evaluation process,² the ALJ found:

11 **Step one:** Ms. Johnson has not engaged in substantial gainful activity since November
12 29, 2012, the alleged onset date.

13 **Step two:** Ms. Johnson has the following severe impairments: major depressive disorder
14 vs. depressive disorder; anxiety disorder; history of bilateral rotator cuff tears, status-post
15 distal clavicle excision of right shoulder and bilateral open acromioplasties; and cervical
16 degenerative disc disease.

17 **Step three:** These impairments do not meet or equal the requirements of a listed
18 impairment.³

19 **Residual Functional Capacity:** Ms. Johnson can perform light work as defined in 20
20 C.F.R. 404.1567(b) and 416.967(b) except she cannot reach overhead. Ms. Johnson
21 cannot climb ladders, ropes, or scaffolds, or crawl. She should avoid concentrated
22 exposure to vibrations and hazards. She can perform simple, routine tasks and follow
23 short simple instructions. Ms. Johnson can do work that needs little or no judgment and
can perform simple duties that can be learned on the job in a short period. Ms. Johnson
would have an average ability to perform sustained work activities (i.e. can maintain
attention and concentration; persistence and pace) in an ordinary work setting on a
regular and continuing basis (i.e., 8 hours a day, for 5 days a week, or an equivalent work
schedule) within customary tolerances of employers rules regarding sick leave and
absence. Ms. Johnson needs a work environment that is predictable and with few work
setting changes.

22

23² 20 C.F.R. §§ 404.1520, 416.920.

³ 20 C.F.R. Part 404, Subpart P. Appendix 1.
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1 **Step four:** Ms. Johnson cannot perform past relevant work.

2 **Step five:** As there are jobs that exist in significant numbers in the national economy that
3 Ms. Johnson can perform, she is not disabled.

4 Tr. 14-27. The Appeals Council denied Ms. Johnson's request for review making the ALJ's
5 decision the Commissioner's final decision. Tr. 1-6.⁴

6 DISCUSSION

7 A. Medical Opinion Evidence

8 In general, more weight should be given to the opinion of a treating physician than to a
9 non-treating physician, and more weight to the opinion of an examining physician than to a
10 nonexamining physician. *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where a
11 treating or examining doctor's opinion is not contradicted by another doctor, it may be rejected
12 only for clear and convincing reasons. *Id.* Where contradicted, a treating or examining
13 physician's opinion may not be rejected without "specific and legitimate reasons supported by
14 substantial evidence in the record for so doing." *Id.* at 830-31. "An ALJ can satisfy the
15 'substantial evidence' requirement by 'setting out a detailed and thorough summary of the facts
16 and conflicting clinical evidence, stating his interpretation thereof, and making findings.'"

17 *Garrison v. Colvin*, 759 F.3d 995, 1011 (9th Cir. 2014) (quoting *Reddick v. Chater*, 157 F.3d
18 715, 725 (9th Cir. 1998)). In order to reject the opinion of a provider who is not an acceptable
19 medical source, the ALJ must give reasons germane to that opinion. *See Molina v. Astrue*, 674
20 F.3d 1104, 1111 (9th Cir. 2012) ("The ALJ may discount testimony from these 'other sources' if
21 the ALJ 'gives reasons germane to each witness for doing so.'") (internal citations omitted)).

22 1. **Jamie Michel Phifer, M.D.**

23 Ms. Johnson contends the ALJ harmfully erred in evaluating the treating opinion of Dr.

⁴ The rest of the procedural history is not relevant to the outcome of the case and is thus omitted.
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1 Phifer. Dkt. 12 at 4-5. The Court agrees.

2 On examination in March 2012, Dr. Phifer indicated that Ms. Johnson presented with
3 shoulder pain and that her examination was consistent with impingement. Tr. 865. She further
4 indicated that Ms. Johnson had previously had surgery on both shoulders for rotator cuff injuries
5 secondary to repetitive use. *Id.* Based on her examination, Dr. Phifer opined that Ms. Johnson
6 should not continue work as a meat wrapper. Tr. 866. She further opined that it was “not
7 appropriate” for Ms. Johnson to be “doing further upper body repetitive motions at this time” as
8 “[f]urther repetitive movement of her shoulders will likely worsen her symptoms.” Tr. 865-866.
9 In April 2013, Dr. Phifer completed a Physical Functional Evaluation form. Tr. 876-879. Dr.
10 Phifer indicated Ms. Johnson had pain with passive range of motion in her left shoulder above
11 110 degrees of abduction and pain with active abduction bilaterally. Tr. 877. She indicated Ms.
12 Johnson had positive subscapular lift bilaterally and mild positive “empty can test” left greater
13 than right bilaterally. *Id.* Dr. Phifer opined that Ms. Johnson was capable of light work but
14 should perform no overhead reaching and was moderately limited in her ability to lift, carry,
15 push, pull and reach. Tr. 877-878.

16 The ALJ gave some weight to Dr. Phifer’s March 2012 opinion that Ms. Johnson should
17 not work as a meat packer. Tr. 23. Specifically, the ALJ agreed that “the claimant’s residual
18 functional capacity would preclude her from performing past work but it would not preclude the
19 claimant from performing other types of work that exist in the national economy.” *Id.* However,
20 the ALJ failed to specifically address Dr. Phifer’s opinion that it was “not appropriate” for Ms.
21 Johnson to be “doing further upper body repetitive motions at this time.” Tr. 865-866. The ALJ
22 does generally indicate that Dr. Phifer’s examination findings “were mostly normal”, which, the
23 ALJ indicates, “suggests” she relied on Ms. Johnson’s subjective complaints, which the ALJ

1 found not fully credible. Tr. 23. A “physician’s opinion of disability ‘premised to a large extent
2 upon the claimant’s own accounts of [her] symptoms and limitations’ may be disregarded where
3 those complaints have been ‘properly discounted.’” *Morgan v. Comm’r Soc. Sec. Admin*, 169
4 F.3d 595, 602 (9th Cir. 1999) (quoting *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989)).
5 However, an ALJ may not reject an examining physician’s opinion by questioning the credibility
6 of a claimant’s complaints, “where the doctor does not discredit those complaints and supports
7 his ultimate opinion with his own observations.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194,
8 1200 (9th Cir. 2008). Here, contrary to the ALJ’s finding, Dr. Phifer’s examination findings
9 were not “mostly normal.” *Id.* Rather, Dr. Phifer performed a full examination of Ms. Johnson
10 which she found consistent with impingement. Tr. 865. Dr. Phifer specifically noted that Ms.
11 Johnson had both a positive Neer’s sign and a positive Hawkins sign indicating rotator cuff
12 impingement. *Id.* Dr. Phifer also noted that Ms. Johnson had some “give way” weakness due to
13 pain at abduction, was tender to palpation at the subacromial area and that her active and passive
14 range of motion was limited above 180 degrees due to pain. *Id.* Dr. Phifer also indicated that
15 Ms. Johnson had aching pain at rest that was worse with overhead movement. Tr. 838. In light
16 of these objective findings supporting Dr. Phifer’s opinion, substantial evidence does not support
17 the conclusion that Dr. Phifer relied more heavily on Ms. Johnson’s self-reports than on her own
18 clinical findings. Accordingly, to the extent the ALJ intended to discount Dr. Phifer’s opinion
19 prohibiting upper body repetitive motions on this basis, he erred. Moreover, this error was not
20 harmless as the ALJ failed to either properly reject or include this limitation in the RFC or in the
21 hypothetical to the vocational expert (VE), thereby affecting the ALJ’s step five determination.
22 See *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015) (“ALJ errors in social security cases
23 are harmless if they are ‘inconsequential to the ultimate nondisability determination’” (quoting

1 *Stout*, 454 F.3d at 1055-56)).

2 The Commissioner argues that the ALJ reasonably gave greater weight to Dr. Phifer's
3 more recent April 2013 opinion that Ms. Johnson was limited to "light work with no overhead
4 reaching" than to Dr. Phifer's March 2012 opinion. Dkt. 18 at 3. However, the ALJ did not
5 offer this as a rationale for rejecting Dr. Phifer's March 2012 limitation on upper body repetitive
6 motions and, as such, it constitutes an improper post-hoc rationalization which the Court cannot
7 rely upon in order to reject Dr. Phifer's opinion. *See Bray v. Comm'r of SSA*, 554 F.3d 1219,
8 1225 (9th Cir. 1995) (The Court reviews the ALJ's decision "based on the reasoning and
9 findings offered by the ALJ—not *post hoc* rationalizations that attempt to intuit what the
10 adjudicator may have been thinking.").⁵ Moreover, the Commissioner neglects to mention that
11 Dr. Phifer's April 2013 opinion did not only limit Ms. Johnson to light work with no overhead
12 lifting but that she also found moderate⁶ limitations in Ms. Johnson's ability to push, pull and
13 reach due to bilateral rotator cuff tears. Tr. 877-878. Thus, Dr. Phifer's March 2012 limitation
14 on upper body repetitive motions is not substantially inconsistent or undermined by her April
15 2013 opinion. Tr. 863-866, 876-879. Moreover, the ALJ separately erred in failing to address
16 entirely Dr. Phifer's April 2013 opinion that Ms. Johnson was moderately limited in her ability
17 to push, pull and reach. Tr. 877-878. This error was also not harmless as the ALJ failed to either
18 properly reject or include these limitations in the RFC or in the hypothetical to the VE, thereby
19 impacting the ALJ's step five determination. *See Marsh*, 792 F.3d at 1173 ("ALJ errors in social
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21 ⁵ The Commissioner also offered several other post-hoc rationalizations for the ALJ's rejection of Dr.
22 Phifer's March 2012 opinion including that Dr. Phifer did not indicate the limitation would be ongoing
23 and that there were other conflicting medical opinions which the ALJ gave more weight. Dkt. 18 at 4.
However, the ALJ did not cite these reasons as a basis for rejecting Dr. Phifer's March 2012 opinion and
the Court will not speculate as to what the ALJ may have been thinking. *See Bray*, 554 F.3d at 1225.

6 "Moderate" is defined as "significant interference with the ability to perform one or more basic work-related activities." Tr. 877.

1 security cases are harmless if they are ‘inconsequential to the ultimate nondisability
2 determination’” (quoting *Stout*, 454 F.3d at 1055-56).

3 The ALJ indicates in a footnote that he had posed an alternative hypothetical to the VE in
4 which he added the limitation of frequent reaching below shoulder level, frequent handling, and
5 frequent fingering. Tr. 26, n. 5. The VE indicated that, with these additional limitations, an
6 individual could still perform the jobs of production line solderer and bench assembler. *Id.*
7 Based on this testimony the ALJ found that, in the alternative, “even if the claimant were further
8 limited a finding of not disabled is therefore appropriate ...” *Id.* The Commissioner argues that
9 even if the ALJ erred in evaluating Dr. Phifer’s opinions any error is harmless as “a requirement
10 to reach or handle frequently is not necessarily inconsistent with an inability to perform
11 repetitive arm movements.” Dkt. 18 at 6. However, in the first instance, it is unclear whether
12 the ALJ even intended these additional restrictions to account for Dr. Phifer’s limitations of no
13 repetitive upper extremity movement and/or moderate limitation on reaching, as the ALJ fails to
14 address those opinions entirely. “A reviewing court may not make independent findings based
15 on the evidence before the ALJ to conclude that the ALJ’s error was harmless.” *Brown-Hunter*
16 v. *Colvin*, 80 F.3d 487, 492 (9th Cir. 2015); *see also Marsh*, 792 F.3d at 1172 (a district court
17 may not find harmless error by “affirm[ing] the agency on a ground not invoked by the ALJ”).
18 Rather, “[w]e are constrained to review the reasons the ALJ asserts.” *Connett v. Barnhart*, 340
19 F.3d 871, 874 (9th Cir. 2003). The ALJ made no finding at all with respect to these portions of
20 Dr. Phifer’s opinions. Thus, in order to find this error harmless, the Court would be required to
21 make independent findings beyond those made by the ALJ.

22 Moreover, the ALJ’s alternative hypothetical does not directly incorporate the limitations
23 expressed in Dr. Phifer’s opinions but employs different terminology. *See Gardner v. Astrue*,

1 257 Fed.Appx. 28, 30 (9th Cir. 2007). Without additional evidence or development of Dr.
2 Phifer's opinion, substantial evidence does not support the conclusion that a *limitation* to
3 frequent reaching and handling would account for a *prohibition* on performing repetitive upper
4 body motions. *See id.* (noting that a hypothetical *limitation* to frequent (or repetitive) use of the
5 hands would not necessarily account for a restriction *precluding* repetitive use of the hands).⁷
6 Thus it is unclear from the VE's testimony whether a person who was precluded from
7 performing upper body repetitive motions could perform the jobs of production line solderer and
8 bench assembler. Tr. 26. As such, the Court cannot properly conclude that the ALJ's error in
9 failing to address these opinions was harmless.⁸ *See Marsh*, 792 F.3d at 1173 ("ALJ errors in
10 social security cases are harmless if they are 'inconsequential to the ultimate nondisability
11 determination' ...[and] 'a reviewing court cannot consider [an] error harmless unless it can
12 confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have
13 reached a different disability determination.'" (quoting *Stout*, 454 F.3d at 1055-56)).

14 Accordingly, on remand, the ALJ should evaluate the portion of Dr. Phifer's March 2012
15 opinion that it was "not appropriate" for Ms. Johnson to be "doing further upper body repetitive
16 motions at this time", as well as the portion of Dr. Phifer's April 2013 opinion that Ms. Johnson
17 was moderately limited in her ability to push, pull and reach. Tr. 865-866, 877-878.

18 **2. Jennifer Azen, M.D.**

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⁷ The Court in *Gardner*, 257 Fed.Appx. at 30, n. 5, also noted, in dicta, that "repetitively" may refer to a
20 qualitative characteristic whereas "constantly" and "frequently" may describe a quantitative
21 characteristic. 257 Fed.Appx. at 30, n. 5. The Court further reasoned that "[u]nder this reading, a job
22 might require that an employee use his hands in a repetitive manner *frequently*, or it might require him to
use his hands in a repetitive manner *constantly*. *Id.* This is another reason that a limitation to "frequent"
23 reaching and handling does not necessarily account for a prohibition on "repetitive" upper body motion.

⁸ Even if the Court were to find that this second hypothetical adequately accounted for Dr. Phifer's
limitations of no repetitive upper extremity movement and moderate limitations on reaching, neither the
RFC nor the hypotheticals to the VE account for the moderate limitation on pushing and pulling. Here,
the jobs identified by the VE foreseeably require the ability to push and/or pull to some degree.

1 Ms. Johnson contends the ALJ erred in evaluating the treating opinion of Dr. Azen
2 regarding her physical limitations. Dkt. 12 at 5. The Court agrees in part and disagrees in part.

3 In March 2014, Dr. Azen completed a Physical Impairment Questionnaire. Tr. 1079-
4 1082. Dr. Azen indicated that Ms. Johnson had constant burning, tingling, sharp pain and
5 warmth in her shoulders, elbow, wrist, fingers and the left side of her neck. Tr. 1079. Dr. Azen
6 noted clinical findings and objective signs of “swelling of wrist/shoulders, slight decrease in
7 range of motion in shoulders, decreased strength with abduction of shoulders.” *Id.* Dr. Azen
8 opined that Ms. Johnson’s impairments would interfere with attention and concentration on a
9 constant basis and that she was unable to do repeated activity with her upper body. Tr. 1080.
10 Dr. Azen opined that Ms. Johnson could sit twenty to thirty minutes at a time, stand thirty to
11 forty-five minutes at a time, and walk ten to twenty minutes at a time, or two and a half blocks,
12 and stand/walk for one hour total in an eight-hour day. Tr. 1081. Dr. Azen indicated that Ms.
13 Johnson would be unable to lift or carry any weight. Tr. 1082. Dr. Azen opined that Ms.
14 Johnson would need to take unscheduled breaks every thirty minutes during an eight-hour
15 workday, would need to lie down or rest every thirty minutes in an eight-hour workday, and had
16 significant limitations in doing repetitive reaching, handling or fingering. Tr. 1081-1082. Dr.
17 Azen further estimated that, on average, Ms. Johnson would be absent from work more than
18 three times a month. Tr. 1082.

19 The ALJ gave little to no weight to Dr. Azen’s opinion. Tr. 24. Specifically, the ALJ
20 notes that Dr. Azen found only a slight decrease in Ms. Johnson’s shoulder range of motion,
21 which would not support such significant limitations. *Id.* The ALJ notes that during
22 examinations Ms. Johnson has demonstrated some shoulder range of motion loss, but that the
23 loss generally occurred only above-shoulder height. *Id.* The ALJ further notes that the objective

1 medical evidence does not support the limitations in sitting, standing and walking. *Id.* He notes
2 that Ms. Johnson's gait is normal and she does not have a severe impairment that limits her lower
3 extremity functioning. *Id.* The ALJ also discounts Dr. Azen's opinion on the grounds that she
4 relied heavily on Ms. Johnson's self-reports but that Ms. Johnson has a history of symptom
5 magnification. *Id.*

6 Substantial evidence does not support the ALJ's reasons for discounting Dr. Azen's
7 limitations that Ms. Johnson is unable to do repeated activity with her upper body, unable to lift
8 or carry any weight, and that she has significant limitations in doing repetitive reaching, handling
9 or fingering. Tr. 24. Dr. Azen indicates that these limitations are based upon clinical findings
10 and objective signs of "swelling of wrist/shoulders, slight decrease in range of motion in
11 shoulders, and decreased strength with abduction of shoulders." Tr. 1079. The ALJ notes that
12 Ms. Johnson's range of motion is only slightly decreased but does not address the other objective
13 findings of swelling in the wrists and shoulders as well as decreased strength with shoulder
14 abduction. Tr. 24, 1079. These objective findings appear to directly and logically relate to and
15 support the limitations assessed and there is no indication Dr. Azen relied more heavily on Ms.
16 Johnson's self-reports in forming her opinions than on these objective findings. *See Ryan*, 528
17 F.3d at 1200 (An ALJ may not reject an examining physician's opinion by questioning the
18 credibility of a claimant's complaints, "where the doctor does not discredit those complaints and
19 supports his ultimate opinion with his own observations."). Accordingly, the ALJ erred in
20 rejecting these aspects of Dr. Azen's opinion.

21 However, the ALJ reasonably discounted Dr. Azen's limitations on walking, standing and
22 sitting as unsupported by objective medical evidence and premised largely on Ms. Johnson's
23 self-reports. Tr. 24. "[A]n ALJ may discredit treating physicians' opinions that are conclusory,

1 brief, and unsupported by the record as a whole or by objective medical findings.” *Batson v.*
2 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004) (internal citation omitted). An
3 ALJ may also discount an opinion that consists solely of check-off reports without explanation of
4 the bases for the conclusions. *See Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996).
5 Furthermore, as noted above, a physician’s opinion that is ““premised to a large extent upon the
6 claimant’s own accounts of [her] symptoms and limitations’ may be disregarded where those
7 complaints have been ‘properly discounted.’” *Morgan*, 169 F.3d at 602 (quoting *Fair*, 885 F.2d
8 at 605). Here there is no evidence Dr. Azen performed any objective testing regarding Ms.
9 Johnson’s ability to walk, stand or sit, nor does Dr. Azen explain the bases for her conclusions
10 aside from indicating that the limitation on walking is “due to pain.” Tr. 1081. As such, the
11 Court finds the ALJ reasonably rejected these limitations as unsupported by objective medical
12 evidence and based to a large extent on Ms. Johnson’s self-reports which the ALJ properly
13 discounted as not fully credible.⁹ For the same reasons the ALJ also properly discounted Dr.
14 Azen’s opinion that Ms. Johnson needed to take unscheduled breaks every thirty minutes during
15 an eight-hour workday, that she would need to lie down or rest every thirty minutes in an eight-
16 hour workday, and that she would likely miss three or more days per month. Tr. 1081-1082. Dr.
17 Azen offers no explanation of the bases for these limitations nor does the objective evidence
18 appear to support them. *Id.* As such, the ALJ reasonably discounted these opinions as
19 unsupported by objective medical findings and based largely on Ms. Johnson’s self-reports.

20 The ALJ also reasonably discounted Dr. Azen’s finding that Ms. Johnson’s symptoms
21 would “constantly” interfere with attention and concentration. Tr. 24, 1080. As noted below,
22 during a period of worsening depression, on some psychological examinations Ms. Johnson was
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⁹ Ms. Johnson does not challenge the ALJ’s finding that her symptom testimony is not fully credible.
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1 observed to have difficulty in maintaining concentration and attention. Tr. 59-61. However, on
2 several other examinations, particularly prior to this period of worsening depression, although
3 complaining of ongoing physical pain, Ms. Johnson was noted to exhibit fair or normal attention
4 span and concentration. Tr. 837, 840, 875, 901. Accordingly, the ALJ reasonably discounted
5 Dr. Azen's finding that Ms. Johnson's symptoms would "constantly" interfere with her attention
6 and concentration.

7 In sum, the ALJ erred in discounting Dr. Azen's opinions that Ms. Johnson was unable to
8 do repeated activity with her upper body, unable to lift or carry any weight, and that she had
9 significant limitations in doing repetitive reaching, handling or fingering. Tr. 1079-1082. These
10 errors were not harmless as the ALJ failed to either properly reject or include these limitations in
11 the RFC or in the hypothetical to the VE, thereby impacting the ALJ's step five determination.

12 *See Marsh*, 792 F.3d at 1173.

13 **3. Jay Wellington, MSW, and Jennifer Azen, M.D.**

14 Ms. Johnson also contends the ALJ erred in evaluating the treating opinions of Dr. Azen
15 and Mr. Wellington with respect to her mental health limitations. Dkt. 12 at 8-11. The Court
16 agrees in part and disagrees in part.

17 In March 2014, Mr. Wellington and Dr. Azen completed a Mental Impairment
18 Questionnaire. Tr. 1074-1078. The form reflects a diagnosis of major depressive disorder and a
19 current GAF of 47. Tr. 1074. The form also indicates that Ms. Johnson is moderately impaired
20 in her activities of daily living, markedly limited in maintaining social functioning, experienced
21 frequent deficiencies of concentration, persistence or pace resulting in failure to complete tasks
22 in a timely manner (in work settings or elsewhere), and repeated (three or more) episodes of
23 "deterioration or decompensation in work or work-like settings which cause the individual to

1 withdraw from that situation or to experience exacerbation of signs and symptoms (which may
2 include deterioration of adaptive behavior).” Tr. 1073. The form further indicates that, on
3 average, Ms. Johnson’s mental impairments or treatment would cause her to be absent from work
4 more than three times a month. Tr. 1071.

5 The ALJ gave little to no weight to Dr. Azen’s and Mr. Wellington’s opinions. Tr. 24.
6 Specifically, the ALJ discounts the opinion that Ms. Johnson is markedly limited in social
7 functioning as unsupported by the record, noting that Ms. Johnson lives with her son, spends
8 time with her grandson, and attends church. Tr. 25. A conflict between a doctor’s opinion and
9 the claimant’s daily activities may justify rejecting that opinion. *See Morgan*, 169 F.3d at 600-
10 02. In this case, however, a holistic review of the record does not reveal a meaningful
11 inconsistency between Dr. Azen’s and Mr. Wellington’s opinion and Ms. Johnson’s daily
12 activities. *See Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) (explaining that the record
13 must be read holistically when assessing whether a claimant’s activities are inconsistent with a
14 doctor’s opinion). The ALJ does not explain why the fact that Ms. Johnson lives with her son
15 and spends time with her grandson undermines Dr. Azen’s and Mr. Wellington’s opinion. The
16 fact that Ms. Johnson lives with her son and the fact that she is able to spend time with her
17 grandson does not mean she is able to function socially in public or in a work environment.
18 Moreover, during the period Ms. Johnson was being treated by Dr. Azen and Mr. Wellington,
19 which was also when she indicated a worsening in her depressive symptoms, the record appears
20 to indicate that Ms. Johnson had not, in fact, been attending church. Tr. 996. Moreover, Ms.
21 Johnson testified at the hearing that she mostly stayed at home and looked at the TV. Tr. 47.
22 She testified that she left the house only three or four times a month to attend her own doctor’s
23 appointments or to accompany her son and grandson to the pediatrician. Tr. 48, 67. Thus, when

1 viewing the record as a whole, substantial evidence does not support the conclusion that Ms.
2 Johnson's daily activities are inconsistent in any significant way with Dr. Azen's and Mr.
3 Wellington's opinions.

4 The ALJ also rejects this portion of Dr. Azen's and Mr. Wellington's opinions as based
5 largely on Ms. Johnson's subjective complaints, which the ALJ finds not fully credible. *See*
6 *Morgan*, 169 F.3d at 602. However, Dr. Azen's and Mr. Wellington's opinions appear to be
7 supported by their own observations. *Ryan*, 528 F.3d at 1200 (An ALJ may not reject an
8 examining physician's opinion by questioning the credibility of a claimant's complaints, "where
9 the doctor does not discredit those complaints and supports his ultimate opinion with his own
10 observations."). Specifically, Dr. Azen and Mr. Wellington's treatment notes indicate that, on
11 some occasions, Ms. Johnson exhibited poor eye contact on examination, was withdrawn, and
12 that her thought process, while linear and sequential, was also persecutory, grandiose and
13 paranoid. Tr. 1049. Moreover, the treatment notes consistently reflect clinical observations that
14 Ms. Johnson was "severely depressed", tearful, and exhibited flat affect. Tr. 981-982, 986, 990-
15 991, 1005, 1007, 1036, 1041, 1049, 1063, 1085, 1087, 1088. In light of these observations,
16 substantial evidence does not support the ALJ's conclusion that Dr. Azen and Mr. Wellington's
17 opinions were based to a large extent on Ms. Johnson's self-reports rather than on their own
18 clinical observations.

19 The ALJ also discounts Dr. Azen and Mr. Wellington's opinion that Ms. Johnson has
20 frequent deficiencies of concentration, persistence or pace resulting in a failure to complete tasks
21 in a timely manner on the grounds that "during multiple examinations" Ms. Johnson's
22 concentration has been described as fair or adequate and she is capable of following
23 conversations and instructions. Tr. 25. This was not a sufficient reason to discount this portion

1 of the opinion. First, the ALJ fails to identify which examinations he is referring to which he
2 believes undermine Dr. Azen and Mr. Wellington's opinion. Tr. 25. Moreover, while it is true
3 that on some occasions Ms. Johnson's concentration was noted to be "fair", on other occasions
4 Ms. Johnson was noted to be easily distracted and needed guidance to move the visit forward, or
5 that she exhibited psychomotor retardation. Tr. 1036, 1087. Moreover, as noted above, Ms.
6 Johnson was frequently observed by Mr. Wellington and Dr. Azen to be severely depressed,
7 tearful, and to exhibit flattened affect. Tr. 981-982, 986, 990-991, 1005, 1007, 1036, 1041, 1049,
8 1063, 1085, 1087, 1088. Dr. Azen and Mr. Wellington's clinical observations of such significant
9 signs and symptoms tend to support their opinions that Ms. Johnson would experience frequent
10 deficiencies of concentration, persistence and pace.

11 The ALJ also discounts the opinion that the deficiencies in concentration, persistence and
12 pace, would result in a failure to complete tasks in a timely manner as inconsistent with Dr. Azen
13 and Mr. Wellington's findings that Ms. Johnson could manage her funds. Tr. 25. However, it is
14 not necessarily inconsistent for Dr. Azen and Mr. Wellington to find Ms. Johnson capable of
15 managing a small amount of money to buy food or perhaps pay rent once a month but find her
16 incapable of completing tasks in a timely manner on a daily basis as might be required in a work
17 environment with deadlines or production demands. *Id.* Accordingly, substantial evidence does
18 not support this finding. Moreover, the ALJ also erred in failing to specifically address the
19 opinion that Ms. Johnson would be absent from work more than three times a month. Tr. 1071.

20 However, the ALJ does reasonably discount Dr. Azen's and Mr. Wellington's opinion
21 that Ms. Johnson has had repeated episodes of deterioration or decompensation in work or work-
22 like setting as unsupported by the record. Tr. 25. "[A]n ALJ may discredit treating physicians'
23 opinions that are conclusory, brief, and unsupported by the record as a whole or by objective

1 medical findings.” *Batson*, 359 F.3d at 1195 (internal citation omitted); *see also Crane*, 76 F.3d
2 at 253 (ALJ may “permissibly reject[] ... check-off reports that [do] not contain any explanation
3 of the bases of their conclusions”). Here, the ALJ notes that the record reflects Ms. Johnson was
4 hospitalized once for suicidal ideation but had no other periods of hospitalization. Tr. 25, 1083-
5 1089. Moreover, neither the opinion nor the treatment notes adequately explain the opinion with
6 respect to repeated episodes of deterioration or decompensation in a work or work-like setting.
7 Ms. Johnson also does not directly challenge the ALJ’s finding on this issue in her Opening
8 Brief. Dkt. 12. Accordingly, the Court finds the ALJ properly discounted this branch of Dr.
9 Azen’s and Mr. Wellington’s opinions.

10 In sum, the ALJ erred in discounting the opinions of Dr. Azen and Mr. Wellington that
11 Ms. Johnson was markedly limited in maintaining social functioning, experienced frequent
12 deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a
13 timely manner (in work settings or elsewhere), and would be absent from work more than three
14 times per month. These errors were harmful as the ALJ neither properly rejected nor included
15 these limitations in the RFC or in the hypothetical to the VE thereby impacting the ALJ’s step
16 five finding. *See Marsh*, 792 F.3d at 1173. On remand, the ALJ should reevaluate these
17 opinions.

18

19 CONCLUSION

20 For the foregoing reasons, the Commissioner’s final decision is **REVERSED** and this
21 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §
22 405(g).

23 On remand, the ALJ should reevaluate Dr. Phifer’s, Dr. Azen’s and Mr. Wellington’s

1 opinions to the extent provided above, re-determine the RFC, and reevaluate steps four and five
2 with the assistance of a VE as necessary.

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4 DATED this 1st day of June, 2017.

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JOHN C. COUGHENOUR
United States District Judge

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ORDER REVERSING AND REMANDING
CASE FOR FURTHER ADMINISTRATIVE
PROCEEDINGS - 17