

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TARA J. ROUGHT,

Plaintiff,

V.

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

Defendant.

Case No. C16-1037-RA

ORDER REVERSING AND REMANDING CASE FOR FURTHER ADMINISTRATIVE PROCEEDINGS

Tara J. Rought seeks review of the denial of her application for Supplemental Security

Income (SSI). Ms. Rought contends the ALJ erred in: (1) misevaluating the opinions of several treating and examining doctors; and (2) giving greater weight to the opinions of non-examining doctors than treating and examining opinions. Dkt. 12. Ms. Rought contends these errors resulted in a residual functional capacity (RFC) determination that failed to account for all of her limitations. *Id.* at 15-16. As relief, Ms. Rought requests that this matter be reversed and remanded for payment of benefits or, alternatively, for further administrative proceedings. *Id.* at

1. As discussed below, the Court **REVERSES** the Commissioner's final decision and

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 **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. §
2 405(g).

3 **BACKGROUND**

4 On July 28, 2009, Ms. Rought applied for benefits, alleging disability as of May 14,
5 2009. Tr. 20, 140-43, 155. Ms. Rought's applications were denied initially and on
6 reconsideration. Tr. 103. After the ALJ conducted a hearing on January 14, 2016, the ALJ
7 issued a decision finding Ms. Rought not disabled.² Tr. 429-55.

8 **THE ALJ'S DECISION**

9 Utilizing the five-step disability evaluation process,³ the ALJ found:

10 **Step one:** Ms. Rought has not engaged in substantial gainful activity since July 28, 2009,
11 the application date.

12 **Step two:** Ms. Rought has the following severe impairments: affective disorder, post-
13 traumatic stress disorder (PTSD), obsessive compulsive disorder (OCD), and a
14 personality disorder.

15 **Step three:** These impairments do not meet or equal the requirements of a listed
16 impairment.⁴

17 **Residual Functional Capacity:** Ms. Rought can perform a full range of work at all
18 exertional levels but with the following non-exertional limitations: she can perform
19 simple, repetitive tasks. She can concentrate for two hours at a time with usual and
20 customary breaks throughout an eight-hour workday. She can work superficially and
21 occasionally with the general public. She can work in the same room with an unlimited
22 number of coworkers but not in coordination with them; with this limitation, it is
23 expected that the claimant can maintain appropriate behavior in the workplace, and not be
a distraction to her co-workers. The claimant can interact superficially with co-workers
and can interact occasionally with supervisors and, with this limitation, the claimant can
accept criticism and respond appropriately. She can make simple workplace judgments
consistent with simple, repetitive work. With these limitations, that she can tolerate the
pressures of work and maintain attendance and punctuality.

22 ² Two prior ALJ decisions were rendered in this case which were reversed and remanded for further
23 proceedings by the district court and the Appeals Council.

³ 20 C.F.R. §§ 404.1520, 416.920.

⁴ 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 **Step four:** Ms. Rought cannot perform past relevant work.

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

4 Tr. 429-45. Ms. Rought filed a complaint with this Court appealing the ALJ's decision. Dkt. 3.⁵

5 DISCUSSION

6 A. Medical Evidence

7 The ALJ must provide "clear and convincing reasons" to reject the uncontradicted
8 opinion of a treating or examining doctor. *Lester v. Chater*, 81 F.3d 821, 830, 831 (9th Cir.
9 1996). When contradicted, a treating or examining doctor's opinion may not be rejected without
10 "specific and legitimate reasons" that are supported by substantial evidence in the record. *Id.*

11 1. Cheryl O. Hart, Psy.D.

12 Dr. Hart examined Ms. Rought in 2009. Tr. 339-43. She opined Ms. Rought had
13 "sufficient persistence, pace, and concentration to succeed in a competitive workplace provided
14 that she works in a low-stress, low anxiety workplace doing non-mathematical tasks. She is
15 considered, at a minimum, capable of performing simple, repetitive tasks out of direct contact
16 with the public with minimal to moderate contact with coworkers." Tr. 343.

17 The ALJ gave "great weight" to Dr. Hart's opinion but failed to either include Dr. Hart's
18 restriction to low-stress jobs in the RFC or provide a specific and legitimate reason for rejecting
19 such limitation. Tr. 440. This was error. Contrary to the Commissioner's argument, the other
20 limitations to simple, repetitive tasks out of direct contact with the public with minimal to
21 moderate contact with coworkers does not adequately account for Dr. Hart's separate limitation
22 to a low-stress or low-anxiety workplace. As indicated in Social Security Ruling 85-15:

23

⁵ The rest of the procedural history is not relevant to the outcome of the case and is thus omitted.
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1 The reaction to the demands of work (stress) is highly individualized,
2 and mental illness is characterized by adverse responses to seemingly
3 trivial circumstances. The mentally impaired may cease to function
4 effectively when facing such demands as getting to work regularly,
5 having their performance supervised, and remaining in the workplace for
6 a full day....Any impairment-related limitations created by an individual's
7 response to demands of work... must be reflected in the RFC assessment.

8 SSR 85-15, available at 1985 WL 56857 at *6; see *Sampson v. Colvin*, 2015 WL 5024076 at *3
9 (W.D. Wash. Aug. 25, 2015) (ALJ erred in failing to address doctor's limitation to "low stress"
10 jobs, RFC limitation to simple, routine jobs did not adequately account for the limitation);
11 *Mostafavinassab v. Colvin*, 2016 WL 4547129 at *9 (W.D. Wash. Sept. 1, 2016). The ALJ erred
12 in failing to address Dr. Hart's low-stress restriction entirely. See *Marsh v. Colvin*, 792 F.3d
13 1170, 1172-73 (9th Cir. 2015) (holding that ignoring a physician's opinion entirely constitutes
14 error).

15 Moreover, the Court cannot conclude this error was harmless. An error is considered
16 harmless if it is "inconsequential to the ultimate non-disability determination." *Stout v. Comm'r,*
17 *Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006). However, a reviewing court cannot
18 consider an error in failing to discuss specific evidence harmless "unless it can confidently
19 conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a
20 different disability determination." *Stout*, 454 F.3d at 1056. Because Dr. Hart's low-stress
21 restriction was not properly rejected or included in the RFC, and because (as discussed below)
22 this case must be remanded to reevaluate other medical opinions which may result in an altered
23 RFC and hypotheticals to the VE, the Court cannot conclude the error was harmless.

24 **2. William Chalstrom, Ph.D.**

25 Dr. Chalstrom performed a psychological evaluation of Ms. Rought in December 2012.
26 Tr. 1344-48. He found Ms. Rought had difficulties with concentration but was capable of
27

1 understanding, remembering and carrying out short and simple instructions. Tr. 1348. He found
2 she might have some problems dealing with others in a work situation and that she should be
3 able to respond appropriately to changes in a workplace. *Id.*

4 Ms. Rought contends the ALJ ignored Dr. Chalstrom's limitation to understanding,
5 remembering and carrying out short and simple instructions. DKt. 12 at 7. The Commissioner
6 argues the limitation to simple, repetitive tasks in the RFC sufficiently accounts for Dr.
7 Chalstrom's opinion. Dkt. 13 at 3. The Court agrees with Ms. Rought. The Dictionary of
8 Occupational Titles (DOT) evaluates jobs in various categories including reasoning level.
9 Reasoning Level 1 and Level 2 are defined by the DOT as follows:

10 LEVEL 2

11 Apply commonsense understanding to carry out detailed but uninvolved
written or oral instructions. Deal with problems involving a few concrete
variables in or from standardized situations.

12 LEVEL 1

13 Apply commonsense understanding to carry out simple one- or two-step
instructions. Deal with standardized situations with occasional or no
variables in or from these situations encountered on the job.

14 DOT, Appendix C.

15 The limitation to understanding, remembering and carrying out short and simple
16 instructions appears consistent with Level 1 reasoning jobs but does not appear entirely
17 consistent with Level 2 reasoning jobs which require the ability to understand and carry out
18 *detailed* instructions. *Id.* However, courts in this circuit (including several unpublished Ninth
19 Circuit opinions), as well as several other circuit courts, have generally held that a limitation to
20 simple, repetitive tasks is consistent with both reasoning Level 1 and reasoning Level 2 jobs. *See*
21 *Moore v. Astrue*, 623 F.3d 599, 604 (8th Cir. 2010); *Abrew v. Astrue*, 303 Fed.Appx. 567, 569
22 (9th Cir. 2008) (unpublished); *Lara v. Astrue*, 305 Fed.Appx. 324, 326 (9th Cir. 2008)
23 (unpublished); *Hackett v. Barnhart*, 395 F.3d 1168, 1176 (10th Cir. 2005); *Money v. Barnhart*,

1 91 Fed.Appx. 210, 215 (3d Cir. 2004) (unpublished). Thus, the Court agrees that, without more,
2 it is not clear that the ALJ's limitation to simple, repetitive tasks necessarily accounts for the
3 limitation to understanding, remembering and carrying out short, simple instructions. Moreover,
4 in response to the hypothetical limiting Ms. Rought to simple, repetitive tasks, the vocational
5 expert identified two jobs which require Level 2 reasoning and only one job requiring Level 1
6 reasoning. Tr. 444. The Court cannot confidently conclude that this error harmless because this
7 case must be remanded to reevaluate other medical opinions, which may result in an altered RFC
8 and hypotheticals to the VE. Accordingly, on remand, the ALJ should address and evaluate Dr.
9 Chalstrom's opinion that Ms. Rought was limited to understanding, remembering and carrying
10 out short and simple instructions.

11 **3. Karin Barkin, M.D. and Laura Nastri, M.A.**

12 In March 2010 Ms. Nastri completed a mental medical source statement which was
13 subsequently also signed by Dr. Barkin. Tr. 1051-53. Dr. Barkin and Ms. Nastri opined Ms.
14 Rought was markedly limited in her ability to complete a normal workday and workweek
15 without interruptions from psychologically based symptoms and that she would miss four or
16 more days of work per month due to her impairments. *Id.* They explained that Ms. Rought was,

17 unable to maintain sufficient stability at this time to maintain a 40 hour
18 per week schedule. [She] would like to work part time, but experiences
19 significant mood instability and acting out behaviors, PTSD S/S
exacerbated by stress. Periodic SI w/o plan or intent. [She] is receiving
long term mental health treatment for severe and persistent mental
illness.

20 Tr. 1053.

21 The ALJ rejected Dr. Barkin and Ms. Nastri's opinions on the grounds they were
22 inconsistent with the treatment notes. Tr. 441-42. Specifically, the ALJ found:

23 The treatment notes largely contain normal mental status evaluations
showing the claimant to have intact concentration and memory, good

1 attention skills, and a pleasant demeanor with evaluators. Though Ms.
2 Rought has endorsed a history of violent behavior, she notes that this is
3 primarily in the context of her romantic relationships, which she has
4 undergone anger management for. Furthermore, as discussed in detail
5 above, the claimant's complaints are primarily due to situational
6 stressors, and not due to her impairments.

7 *Id.* These were not specific and legitimate reasons to discount Dr. Barkin's and Ms. Nastri's
8 opinions. Dr. Barkin and Ms. Nastri opined Ms. Rought would be unable to maintain a full time
9 job because of her significant mood instability and acting out behaviors and PTSD with signs
10 and symptoms exacerbated by stress. Tr. 1053. In other words, Dr. Barkin and Ms. Nastri did
11 not opine Ms. Rought could not work due to cognitive deficits such as memory or concentration
12 problems, or difficulty. *Id.* Instead, they found Ms. Rought's work limitations flowed from
13 symptoms, namely mood instability and acting out behavior, caused by her mental disorders—
14 PTSD, major depressive disorder and borderline personality disorder.⁶ Tr. 384, 1053, 1347.

15 The treatment notes also indicate that while at times Ms. Rought exhibited a pleasant
16 demeanor, she was also frequently observed as nervous and anxious, crying or becoming tearful,
17 was noted to be involved in chaotic relationships, appeared irritable, had labile mood and affect,
18 made crisis visits to the mental health clinic reporting suicidal ideation, exhibited flat or variable
19 affect, dysphoria, blunted affect, depressed mood and restricted affect, frequently appeared at
20 medical appointments in pajamas, exhibited frustration and yelled at her children during medical
21 appointments, up and down mood, and frequently reported feeling overwhelmed and overly
22 stressed by her children and household duties. Tr. 254, 256, 258, 290, 291, 294, 295, 296, 323,
23 367, 369, 372, 373, 374, 375, 377, 378, 379, 380, 384, 393, 1147. These findings tend to support

22 ⁶ The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) defines
23 borderline personality disorder as “[a] pervasive pattern of instability of interpersonal relationships, self-
image, and affects, and marked impulsivity, beginning by early adulthood and present in a variety of
contexts[.]” *Diagnostic and Statistical Manual of Mental Disorders* 663 (5th ed. 2013).

1 the limitations and explanation contained in the mental medical source statement. Accordingly,
2 the Court concludes the ALJ erred in discounting this opinion as inconsistent with the MSE
3 findings of intact concentration and memory, good attention skills, and a pleasant demeanor.

4 Moreover, it is unclear how the ALJ's finding that Ms. Rought's history of violent
5 behavior is primarily in the context of romantic relationships undermines Dr. Barkin and Ms.
6 Nastri's opinions. Dr. Barkin and Ms. Nastri indicated that Ms. Rought experienced significant
7 mood instability and "acting out" behavior. Tr. 1053. While these symptoms and behaviors are
8 evidenced in part by a history of violence in the context of Ms. Rought's romantic relationships,
9 there is also evidence in the record of mood instability and "acting out" behavior in other
10 contexts. For example, the record shows that Ms. Rought exhibited angry outbursts with her
11 children in front of her providers, she was fired from a daycare job for cursing at a child, she was
12 banned from the school district for yelling at the principal while volunteering at her children's
13 school, she was involved with Child Protective Services (CPS) three times, and she walked out
14 of her certified nursing assistant (CAN) exam due to frustration and was noted to have exhibited
15 unprofessional behavior. Tr. 58-59, 488-89, 468-69, 487-89, 1147. In light of this evidence, the
16 ALJ's finding that Ms. Rought's history of violent behavior was primarily in the context of
17 romantic relationships does not substantially undermine Dr. Barkin and Ms. Nastri's opinions.

18 The ALJ also discounts Dr. Barkin and Ms. Nastri's opinions because Ms. Rought's
19 "complaints are primarily due to situational stressors, and not due to her impairments." Tr. 442.
20 However, in making this finding the ALJ seeks to supplant his own lay opinion for the medical
21 opinion of Dr. Barkin and Ms. Nastri. "An ALJ may not render his or her own medical opinion
22 or substitute his or her own diagnosis for that of a physician's. *Herwick v. Astrue*, No. C12-489-
23 RAJ-BAT, 2012 WL 5947624, at *2 (W.D. Wash. Nov. 7, 2012), *report and recommendation*

1 *adopted*, No. C12-489RAJ, 2012 WL 5947342 (W.D. Wash. Nov. 28, 2012); *see Tackett v.*
2 *Apfel*, 180 F.3d 1094, 1102–03 (9th Cir. 1999) (ALJ erred in rejecting physicians’ opinions and
3 finding greater residual functional capacity based on claimant’s testimony about a road trip; there
4 was no medical evidence to support the ALJ’s determination); *Day v. Weinberger*, 522 F.2d
5 1154, 1156 (9th Cir. 1975) (an ALJ is forbidden from making his own medical assessment
6 beyond that demonstrated by the record.). Dr. Barkin and Ms. Nastri opined that Ms. Rought’s
7 symptoms and complaints derived from her mental disorders, not from situational factors, and
8 that her underlying mental health symptoms were exacerbated by stress. Tr. 1053. In order to
9 discount a doctor’s opinion, “[t]he ALJ must do more than offer his conclusions [...] [r]ather,
10 “he must set forth his own interpretations and explain why they, rather than the doctors’, are
11 correct.” *Reddick v. Chater*, 157 F.3d 715 (9th Cir. 1998). Here, the ALJ failed to satisfy this
12 requirement. Furthermore, the fact that Ms. Rought experienced increased mood lability and
13 symptomatology when faced with increased stressors is entirely consistent with Dr. Barkin and
14 Ms. Nastri’s opinions that Ms. Rought’s existing mental health symptoms, namely significant
15 mood instability, were exacerbated by stress.

16 The ALJ also discounts Dr. Barkin and Ms. Nastri’s opinions as inconsistent with Ms.
17 Rought’s activities. Tr. 442. Specifically, the ALJ finds the opinions inconsistent with Ms.
18 Rought’s ability “to care for three young children, engage in [Division of Vocational Rehab
19 (DVR)] services, volunteer, care for others such as her mother and neighbor, and care for her
20 own home.” *Id.* However, none of these activities demonstrate Ms. Rought can maintain
21 sufficient mental stability to maintain a 40 hour per week schedule. Although Ms. Rought was
22 responsible for caring for all three of her children at times, she frequently reported to her
23 providers that she felt overwhelmed by this responsibility. Moreover, the record shows evidence

1 of CPS involvement on three occasions. Tr. 488-89. One of Ms. Rought's children was sent to
2 live with his father in October 2012 and her other two children were removed by CPS in October
3 2014. Tr. 462-66. While one of Ms. Rought's children was returned to her in late 2015 upon her
4 completion of parenting class and compliance with court-mandated requirements, her other child
5 was also sent to live with his father. *Id.* With respect to DVR services, the record shows Ms.
6 Rought engaged in this on various occasions. Tr. 487. However, as Ms. Rought points out,
7 DVR is a resource which provides supportive counseling and assistance to individuals with
8 disabilities in overcoming various barriers to employment. The fact that Ms. Rought engaged in
9 DVR in an attempt to work does not demonstrate the ability to work full-time in a normal work
10 setting. *See, e.g., Clark v. Colvin*, 2016 WL 6958136 (W.D. Wash. Nov. 28, 2016) ("[T]he
11 ability to engage in DVR services and attend a job interview, does not alone evince an ability to
12 obtain or maintain gainful employment.").

13 With respect to volunteering, Ms. Rought did report volunteering at the food bank on a
14 part-time basis but also reported quitting at one point due to anxiety and discomfort working
15 around people. Tr. 57. Ms. Rought also reported volunteering at her children's school for a
16 period but testified she was subsequently banned from the school for yelling at the principal. Tr.
17 487. Moreover, given that mental health symptoms wax and wane, Ms. Rought's ability to
18 occasionally care for her mother or a neighbor does not substantially undermine Dr. Barkin and
19 Ms. Nastri's opinions that she would be unable to maintain sufficient stability to work full-time.
20 *See Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014) (finding it is error to reject a
21 claimant's testimony merely because mental health symptoms wax and wane in the course of
22 treatment). Finally, Ms. Rought's ability to perform chores in her own home on her own
23 schedule when she felt mentally capable of doing so does not substantially undermine Dr. Barkin

1 and Ms. Nastri's opinions that due to her mood instability and acting out behavior she was
2 unable to maintain sufficient stability to maintain a 40 hour per week schedule. *See Fair v.*
3 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) ("The Social Security Act does not require that
4 claimants be utterly incapacitated to be eligible for benefits, [...] and many home activities are
5 not easily transferable to what may be the more grueling environment of the workplace, where it
6 might be impossible to periodically rest or take medication.").

7 **4. Norma Brown, Ph.D.**

8 Dr. Brown evaluated Ms. Rought in July 2009. Tr. 1054-59. Dr. Brown opined Ms.
9 Rought was moderately limited in her ability to understand, remember, and follow complex
10 (more than two step instructions), markedly limited in her ability to learn new tasks, exercise
11 judgment and make decisions, interact appropriately in public contacts and the ability to care for
12 herself including personal hygiene and appearance. *Id.* Dr. Brown found Ms. Rought severely
13 limited in her ability to relate appropriately with co-workers and supervisors, respond
14 appropriately and tolerate the pressures and expectations of a normal work setting, and maintain
15 appropriate behavior in a work setting. *Id.*

16 The ALJ discounted Dr. Brown's opinion on the grounds that she "appears" to base her
17 assessment of marked and severe impairments largely on Ms. Rought's "presentation during her
18 evaluation, at which time Ms. Rought was sobbing and overwhelmed, however, subsequent
19 treatment notes do not document this degree of impairment." Tr. 441. However, while Ms.
20 Rought did not present sobbing and overwhelmed at every appointment, there is significant
21 evidence in the record of Ms. Rought's mood instability and there is evidence she was reported
22 on numerous occasions to be crying or tearful at medical appointments. Tr. 245-99, 367-95. As
23 the Ninth Circuit has reinforced, with respect to mental health issues, "[c]ycles of improvement

1 and debilitating symptoms are a common occurrence, and in such circumstances it is error for an
2 ALJ to pick out a few isolated instances of improvement over a period of months or years and to
3 treat them as a basis for concluding a claimant is capable of working.” *Garrison*, 759 F.3d at
4 1017; *see, e.g.*, *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001) (“[The treating
5 physician’s] statements must be read in context of the overall diagnostic picture he draws. That a
6 person who suffers from severe panic attacks, anxiety, and depression makes some improvement
7 does not mean that the person’s impairments no longer seriously affect her ability to function in a
8 workplace.”). Accordingly, substantial evidence does not support the ALJ’s reasoning that Ms.
9 Rought’s presentation on this occasion was inconsistent with the record as a whole.

10 The ALJ also discounts Dr. Brown’s opinion as inconsistent with her ability to work on
11 and off, go to school, and her statement she is able to work and is a good multi-tasker. Tr. 441.
12 Although Ms. Rought told a provider on one occasion that she thought she could “probably”
13 work, she indicated on other occasions that she did not believe she was able to work due to her
14 mood instability. Moreover, in light of the record as a whole, which shows Ms. Rought has had
15 significant difficulty sustaining employment, the Court finds the one statement that she could
16 “probably” work, with no indication of whether she meant she believed she could work full-time
17 or part-time, is not a sufficient basis on its own to discount Dr. Brown’s opinion which is based
18 on a full psychological evaluation and review of records.

19 Moreover, Ms. Rought’s ability to work for very short periods of time does not
20 substantially undermine Dr. Brown’s opinions. “In evaluating whether a claimant satisfies the
21 disability criteria, the Commissioner must evaluate the claimant’s ‘ability to work on a sustained
22 basis.’” *Reddick v. Chater*, 157 F.3d 715 (9th Cir. 1998) (quoting *Lester*, 81 F.3d at 833).
23 “Occasional symptom-free periods – and even the sporadic ability to work – are not inconsistent

1 with disability.” *Lester*, 81 F.3d at 833; *see Moore v. Comm’r of the Soc. Sec. Admin.*, 278 F.3d
2 920, 924–25 (9th Cir. 2002) (“[T]he SSA’s regulations provide for a ‘trial work period’ in which
3 a claimant may test [his] ability to work and still be considered disabled.’ ”) (citing 20 C.F.R. §
4 404.1592). Here, although there is evidence Ms. Rought was able to work in some positions for
5 a short period of time, i.e. as a Salvation Army bell ringer (for one month) this does not
6 substantially undermine Dr. Brown’s opinions that she had marked and severe limitations in her
7 ability to function in the work setting as these short-lived jobs do not demonstrate an ability to
8 work on a sustained basis. Moreover, there is also evidence that Ms. Rought was either
9 terminated from or quit several of these jobs because of her symptoms. *See* Tr. 58-59 (fired from
10 a daycare job for cursing at a child), 471-72 (quit Good Will training because she found it too
11 stressful), 475 (terminated from job housecleaning due to reports of crying on the job).
12 Similarly, although the ALJ discounts Dr. Brown’s opinion because Ms. Rought was able to go
13 to school, the record shows Ms. Rought was terminated from her CNA program for
14 unprofessional behavior and walking out of class when she became frustrated with an exam. Tr.
15 66-67. Accordingly, substantial evidence does not support these reasons for discounting Dr.
16 Brown’s opinions.

17 The ALJ also cites the same activities discussed above with respect to Dr. Barkin’s
18 opinions as a basis for discounting Dr. Brown’s opinions. Tr. 441. However, for the same
19 reasons discussed above with respect to Dr. Barkin’s opinions, these activities also do not
20 substantially undermine Dr. Brown’s opinions. In sum, the ALJ erred in discounting Dr.
21 Brown’s opinions. This error was harmful because the ALJ neither properly rejected nor
22 included all of Dr. Brown’s limitations in the RFC or in the hypothetical to the vocational expert.

23 **5. Daniel Neims, Psy.D.**

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1 Dr. Neims evaluated Ms. Rought in May 2011 and in May 2012. Tr. 1069-80, 1296-
2 1300. In May 2011 Dr. Neims diagnosed Ms. Rought with anxiety disorder NOS, major
3 depressive episode, recurrent, in partial remission by Hx, R/O ADHD adult residual, borderline
4 personality disorder with avoidant and dependent traits. Tr. 1072. Dr. Neims indicated that Ms.
5 Rought exhibited symptoms of identity instability (noting patterns of borderline, avoidant, and
6 dependent traits evidenced with historical stimulus seeing and history of negative relations with
7 others), anxiety (noting anxious with low frustration tolerance, stability seems largely dependent
8 on status of close relations and environmental factors) and mistrust (noting history of betrayal
9 and abandonment leave claimant wary and guarded). *Id.* Dr. Neims opined that these symptoms
10 would markedly impair Ms. Rought's ability to engage in work activities. *Id.* Dr. Neims opined
11 that Ms. Rought was moderately limited in her ability to learn new tasks, perform routine tasks
12 without undue supervision, be aware of normal hazards and take appropriate precautions. *Id.* He
13 found her markedly limited in her ability to communicate and perform effectively in a work
14 setting with public contact or with limited public contact, and to maintain appropriate behavior in
15 a work setting. Tr. 1073. Dr. Neims opined that, due to these limitations, Ms. Rought was
16 "disabled from SGA for the foreseeable 12 months or longer." *Id.* Dr. Neims assessed the same
17 limitations in 2012 except he found Ms. Rought severely impaired in her ability to communicate
18 and perform effectively in a work setting with public contact. Tr. 1293.

19 The ALJ discounted Dr. Neims' May 2011 opinion that Ms. Rought is "disabled from
20 SGA for the foreseeable 12 months or longer" as conclusory and as an issue reserved to the
21 Commissioner. Tr. 442. Although an ALJ "is not bound by the uncontroverted opinions of the
22 claimant's physicians on the ultimate issue of disability, ... he cannot reject them without
23 presenting clear and convincing reasons for doing so." *Matthews v. Shalala*, 10 F.3d 678, 680

1 (9th Cir. 1993); *see* SSR 95-5p (“the regulations provide that the final responsibility for deciding
2 issues such as [whether an individual is ‘disabled’] is reserved to the Commissioner.”). Here, the
3 ALJ erred in rejecting Dr. Neims’ opinion as conclusory. Dr. Neims assessed various marked
4 and severe limitations in specific areas, which the ALJ failed to address entirely and which also
5 tend to support his opinion that Ms. Rought was unable to work. This was error. *See Garrison*,
6 759 F.3d at 1012 (“Where an ALJ does not explicitly reject a medical opinion or set forth
7 specific, legitimate reasons for crediting one medical opinion over another, he errs.”); 20 C.F.R.
8 § 404.1527(c) (Regardless of its source, we will evaluate every medical opinion we receive.).

9 The ALJ also points out that Dr. Neims indicated Ms. Rought stated she felt she was
10 making gains in therapy. Tr. 442. However, it is unclear why the fact that Ms. Rought reported
11 some improvement with therapy undermines Dr. Neims’ opinion as there is no indication she
12 improved to the point of nondisability. The ALJ also finds Dr. Neims’ opinion that Ms. Rought
13 is disabled unsupported by the record and treatment notes which show she primarily complained
14 of situational stressors. Tr. 442. However, the ALJ again seeks to supplant his own lay opinion
15 for Dr. Neims’ medical opinion. *See, e.g., Tackett*, 180 F.3d at 1102–03. Dr. Neims’ opinion is
16 based on a mental status examination as well as a review of the medical records. Dr. Neims
17 opined that Ms. Rought’s symptoms and complaints derived from her mental disorders, not from
18 situational factors, and the ALJ’s lay opinion to the contrary is not sufficient grounds to discount
19 Dr. Neims’ opinion. The ALJ also noted that Ms. Rought was able to look for work, engage in
20 volunteer opportunities, care for her mother, drive a car, and babysit other people’s children. Tr.
21 442. However, the ALJ fails to explain how these activities necessarily undermine Dr. Neims’
22 opinions and, for the same reasons discussed above with respect to Dr. Barkin’s opinion, the
23 activities cited by the ALJ do not substantially undermine Dr. Neims’ opinions. Nor are the

1 additional activities cited by the ALJ, i.e., the ability to drive a car or occasionally babysit a
2 friend's children, inconsistent with Dr. Neims' opinions as to the limiting effects of Ms.
3 Rought's mental health symptoms.

4 The ALJ also discounted Dr. Neims' 2012 opinion noting that Dr. Neims did not review
5 any records prior to rendering his opinion and also opined that vocational training would
6 minimize or eliminate barriers to employment. Tr. 442. However, the ALJ fails to explain how
7 these factors undermine Dr. Neims' opinions. Moreover, Dr. Neims did review records prior to
8 rendering his May 2011 opinion which assessed many of the same limitations. Neither of these
9 reasons constitutes a specific and legitimate reason to discount Dr. Neims' opinions. The ALJ
10 also discounts Dr. Neims' opinion as unsupported by the record and treatment notes which,
11 according to the ALJ, show she primarily complained of situational stressors and despite those
12 stressors was able to look for work, attend appointments, and babysit three other children on
13 occasion. Tr. 442. For the same reasons discussed above, these are not sufficient reasons to
14 discount Dr. Neims' opinions that, due to her mental impairments, she was moderately, markedly
15 and severely limited in various cognitive and social areas affecting her ability to function in a
16 work setting.

17 In sum, the ALJ erred in discounting Dr. Neims' opinions. This error was harmful
18 because the ALJ neither properly rejected nor included all of Dr. Neims' limitations in the RFC
19 or in the hypothetical to the vocational expert.

20 **6. Nonexamining Doctors**

21 Ms. Rought contends the ALJ erred in giving greater weight to the opinions of
22 nonexamining doctors than to her treating and examining doctors. *See Garrison*, 759 F.3d at
23 1012 (As a general rule, more weight should be given to the opinion of a treating source than to a

1 non-treating source; while the opinion of a treating physician is entitled to greater weight than an
2 examining physician, the opinion of an examining physician is entitled to greater weight than a
3 non-examining physician.). Because the Court agrees the ALJ erred in evaluating the opinions
4 of the treating and examining doctors, in reevaluating those opinions on remand, to the extent
5 necessary the ALJ should also reevaluate and reweigh the opinions of the nonexamining doctors

6 **B. Scope of Remand**

7 In general, the Court has “discretion to remand for further proceedings or to award
8 benefits.” *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may remand for
9 further proceedings if enhancement of the record would be useful. *See Harman v. Apfel*, 211
10 F.3d 1172, 1178 (9th Cir. 2000). The Court may remand for benefits where (1) the record is
11 fully developed and further administrative proceedings would serve no useful purpose; (2) the
12 ALJ fails to provide legally sufficient reasons for rejecting evidence, whether claimant testimony
13 or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ
14 would be required to find the claimant disabled on remand. *Garrison*, 759 F.3d at 1020. “Where
15 there is conflicting evidence, and not all essential factual issues have been resolved, a remand for
16 an award of benefits is inappropriate.” *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090,
17 1101 (9th Cir. 2014).

18 Here, the Court finds that not all essential factual issues have been resolved. Specifically,
19 there is conflicting medical evidence in the record and the ALJ failed to address portions of
20 several medical opinions as noted above. Because the record does not compel a finding of
21 disability, the Court finds it appropriate to remand this case for further administrative
22 proceedings. *See Treichler*, 775 F.3d at 1107.

23 **CONCLUSION**

ORDER REVERSING AND REMANDING
CASE FOR FURTHER ADMINISTRATIVE
PROCEEDINGS - 17

1 For the foregoing reasons, the Commissioner's final decision is **REVERSED** and this
2 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §
3 405(g).

4 On remand, the ALJ should reevaluate the opinions of Dr. Hart, Dr. Chalstrom, Dr.
5 Brown, Dr. Neims, and Dr. Barkin and Ms. Nastri, to the extent provided above. To the extent
6 necessary the ALJ should also reevaluate and reweigh the opinions of the nonexamining doctors,
7 reassess and re-determine the RFC, and proceed with steps four and five of the sequential
8 evaluation process.

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10 DATED this 25th day of October, 2017.

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12 
The Honorable Richard A. Jones
United States District Judge

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