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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

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10 ELIZABETH ROSE FREEMAN,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Acting  
14 Commissioner of the Social Security  
Administration,

15 Defendant.

CASE NO. 2:16-cv-01826 JRC

ORDER ON PLAINTIFF'S  
COMPLAINT

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17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and  
18 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.  
19 Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States  
20 Magistrate Judge, Dkt. 7). This matter has been fully briefed. *See* Dkt. 11, 12, 13.

21 After considering and reviewing the record, the Court concludes that the ALJ  
22 erred when evaluating the medical evidence. Although the ALJ found that examining  
23 doctor, Dr. Colby, relied heavily on plaintiff's self-reports, the ALJ did not cite any  
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1 evidence from the record substantiating this finding. Rather, the record reveals that Dr.  
2 Colby performed a formal mental status examination, and explicitly indicated reliance on  
3 the objective evidence gleaned therefrom when providing opinions regarding plaintiff's  
4 demonstrated abilities, which were not within normal limits. This is not harmless error.

5 Therefore, this matter is reversed and remanded pursuant to sentence four of 42  
6 U.S.C. § 405(g) to the Administration for further administrative proceedings consistent  
7 with this Order.

### 8 BACKGROUND

9 Plaintiff, ELIZABETH ROSE FREEMAN, was born in 1969 and was 43 years old  
10 on the amended alleged date of disability onset of September 15, 2012. *See* AR. 44, 233-  
11 35, 236-41. Plaintiff completed one and one-half years of high school and has not  
12 obtained a GED. AR. 49. Plaintiff has work experience as a home health aide and  
13 certified nursing assistant. AR. 274-77. Plaintiff last worked as a home health aide but it  
14 ended when "there was an issue with a client and apparently did not follow a direct order  
15 which I do not recall hearing." AR. 49.

16 According to the ALJ, plaintiff has at least the severe impairments of  
17 "fibromyalgia; lumbar degenerative disc disease; obesity; chronic pain disorder; affective  
18 disorder; anxiety disorder; and personality disorder (20 CFR 404.1520(c) and  
19 416.920(c))." AR. 23.

20 At the time of the hearing, plaintiff was living with her adult daughter and her  
21 wife. AR. 48.  
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1 Defendant contends that there is no error; however, defendant simply reiterates in a  
2 conclusory manner the ALJ's rationale for failing to credit fully these opinions and  
3 provides no analysis. *See* Dkt. 12, p. 4 (“The ALJ permissibly discounted Dr. Epp’s  
4 opinion and Dr. Colby’s opinion because they were premised on the self-reporting of a  
5 less than credible claimant ‘both examiners relied heavily on the claimant’s subjective  
6 report, which is not fully credible’”). Neither the ALJ, nor defendant, offers any evidence  
7 from the record demonstrating that the examining doctors relied heavily on plaintiff’s  
8 subjective report.

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10 When an opinion from an examining doctor is contradicted by other medical  
11 opinions, the examining doctor’s opinion can be rejected only “for specific and legitimate  
12 reasons that are supported by substantial evidence in the record.” *Lester v. Chater*, 81  
13 F.3d 821, 830-31 (9th Cir. 1996) (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir.  
14 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)); *see also* 20 C.F.R. §§  
15 404.1527(a)(2) (“Medical opinions are statements from physicians and psychologists or  
16 other acceptable medical sources that reflect judgments about the nature and severity of  
17 your impairment(s), including your symptoms, diagnosis and prognosis, what you can  
18 still do despite impairment(s), and your physical or mental restrictions”).

19 Here, the ALJ discussed the opinions of examining doctors, Dr. Faulder Colby,  
20 Ph.D. and Dr. Carl Epp, Ph.D., together and gave them both “little weight.” AR. 32. The  
21 ALJ noted that, for example, Dr. Colby opined that plaintiff suffered from severe  
22 limitation in her ability to complete a normal workday/workweek and marked limitations  
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1 in her abilities to perform activities within a schedule and maintain regular attendance. *Id.*  
2 (citing AR. 358).

3 First, when rejecting these medical opinions, the ALJ relied on a finding that  
4 “these opinions are inconsistent with the overall record, which, as discussed above,  
5 shows generally normal mental status findings.” *Id.* Just before this discussion, the ALJ  
6 had noted some normal mental status examination (“MSE”) findings observed by treating  
7 doctor, Dr. Jeffrey Nelson, M.D., including “normal concentration, attention, memory,  
8 [and] orientation.” *Id.* Although the ALJ also indicated there was normal speech, such  
9 finding is contrary to Dr. Nelson’s note that plaintiff had slow speech, demonstrating  
10 cognitive slowing. *See* AR. 745. Even if the ALJ’s finding that Dr. Nelson observed  
11 normal concentration, attention, memory, and orientation is supported by substantial  
12 evidence in the record, the ALJ does not explain how these particular aspects of the MSE  
13 are inconsistent with a severe limitation in the ability to complete a normal  
14 workday/workweek and marked limitations in the abilities to perform activities within a  
15 schedule and maintain regular attendance. *See* AR. 358. It is not clear how normal  
16 concentration, attention, memory and orientation are inconsistent with limitations on  
17 performing work activities within a schedule, and maintaining regular full time work  
18 attendance for full eight hour days and 40 hour weeks. *See id.* (the medical opinions of  
19 limitations are “based on the individual’s ability to sustain the activity over a normal  
20 workday and workweek on an ongoing, appropriate, and independent basis”). The  
21 findings noted by the ALJ do not appear relevant necessarily to persistence or pace, for  
22 example.  
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1           When an ALJ seeks to discredit a medical opinion, she must explain why her own  
2 interpretations, rather than those of the doctors, are correct. *Reddick, supra*, 157 F.3d at  
3 725 (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)); *see also*  
4 *Blankenship v. Bowen*, 874 F.2d 1116, 1121 (6th Cir. 1989) (“When mental illness is the  
5 basis of a disability claim, clinical and laboratory data may consist of the diagnosis and  
6 observations of professional trained in the field of psychopathology. The report of a  
7 psychiatrist should not be rejected simply because of the relative imprecision of the  
8 psychiatric methodology or the absence of substantial documentation”) (quoting *Poulin v.*  
9 *Bowen*, 817 F.2d 865, 873-74 (D.C. Cir. 1987)).  
10

11           Furthermore, it is not clear how these “normal” MSE findings were assessed, as  
12 Dr. Nelson simply indicated, for example, that plaintiff’s orientation, long term memory  
13 and short term memory were “grossly intact.” AR. 745. In contrast, Dr. Colby performed  
14 a formal MSE, opined that plaintiff’s memory and concentration were not within normal  
15 limits, and furthermore indicated exactly what his opinions regarding these limitations  
16 were based on:

17           Memory: [Taken from the Luria-Nebraska Neuropsychological Battery,  
18 Form-I, the first three words are, MAN, BACK, DOOR, and the second  
19 three are LIGHT, STOVE, CAKE. The first sentence is, ‘The sun rises in  
20 the East,’ and the second is, ‘In May, the apple trees blossom.’  
21 Immediate recall was given right after the respective recitations, and  
22 delayed recall is given 10-12 minutes later. There are no objective  
23 scoring criteria for delayed recall.] On learning trials, the Claimant  
24 recited all the words in both sentences, for perfect registration. On  
immediate recall, she remembered none of the first three words, none of  
the second three words, and neither of the sentences. Using Luria-  
Nebraska scoring criteria (where “0” is a perfect score and “2” is  
impaired), she earned scores of two (2) for both the words and the

1 sentences. On delayed recall, she remembered none of the words and  
2 neither sentence.

3 . . .  
4 Concentration: She spelled ‘world’ forward and backward on her first  
5 tries. Counting aloud from 1-25 (Oral Trails A) took her 8.19 seconds  
6 with one error, putting her at the 4<sup>th</sup> percentile (borderline range) for  
7 persons in their early 30s (Ricker & Axelrod, 1994). She then recited the  
8 alphabet in 5.71 seconds with no errors. She completed none out of six  
9 differences on her first tries within 30 seconds on serial 7 subtractions,  
10 starting from 100, and none out of six differences on her first tries within  
11 45 seconds on serial 13 subtractions, starting from 100. Using scoring  
12 criteria from the Luria-Nebraska, she earned scores of two (2) for both  
13 serial 7 and serial 13 subtractions. Then, she completed two out of six  
14 differences on her first try within 30 seconds on serial three subtractions,  
15 starting from 40. There are no objective scoring criteria for serial three  
16 subtractions. The sample for Oral Trails B took her 4.59 seconds, and the  
17 full Oral Trails B took her 180 seconds with one error [she got to “I” by  
18 48 seconds without an error and then could not remember that she was  
19 supposed to go to “13,” next]; this put her at less than the 1<sup>st</sup> percentile  
20 for persons in their 30s and early 80s (Ricker & Axelrod, 1994).

21 AR. 359-60.

22 Regarding the ALJ’s finding of “normal” MSE results, the Court also notes that  
23 the ALJ acknowledged that plaintiff’s counselor “Marybeth Bently, BSW, often noted  
24 that the claimant had a flat affect, poor memory, and slow motor activity and was  
irritable.” AR. 29 (internal citations omitted). Plaintiff also directed the Court to  
numerous citations from the record demonstrating abnormal mental status findings, and  
the Court finds persuasive plaintiff’s contention that “the nature of bipolar disorder has to  
be considered because bipolar disorder presents on an episodic basis.” Dkt. 11, p. 11.

Therefore, the Court concludes that the ALJ’s finding that Dr. Colby’s opinions  
regarding plaintiff’s limitations on performing work activities within a schedule and  
maintaining regular full time work attendance are inconsistent with Dr. Nelson’s

1 “normal” MSE findings regarding memory, concentration and orientation does not entail  
2 specific and legitimate rationale based on substantial evidence in the record for failing to  
3 credit fully Dr. Colby’s opinions. *See Lester*, 81 F.3d at 830-31 (citing *Andrews*, 53 F.3d  
4 at 1043; *Murray*, 722 F.2d at 502).

5 The ALJ also relied on a finding that the opinions of the examining doctors are  
6 heavily based on plaintiff’s subjective self-report, however, this finding is not based on  
7 substantial evidence in the record as a whole.

8 According to the Ninth Circuit, “[an] ALJ may reject a treating physician’s  
9 opinion if it is based ‘to a large extent’ on a claimant self-reports that have been properly  
10 discounted as incredible.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008)  
11 (quoting *Morgan v. Comm’r. Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (citing  
12 *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989))). This situation is distinguishable from  
13 one in which the doctor provides his own observations in support of his assessments and  
14 opinions. *See Ryan v. Comm’r of Soc. Sec. Admin.*, 528 F.3d 1194, 1199-1200 (9th Cir.  
15 2008) (“an ALJ does not provide clear and convincing reasons for rejecting an examining  
16 physician’s opinion by questioning the credibility of the patient’s complaints where the  
17 doctor does not discredit those complaints and supports his ultimate opinion with his own  
18 observations”); *see also Edlund v. Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001).

19 According to the Ninth Circuit, “when an opinion is not more heavily based on a patient’s  
20 self-reports than on clinical observations, there is no evidentiary basis for rejecting the  
21 opinion.” *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) (citing *Ryan v. Comm’r*  
22 *of Soc. Sec. Admin.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008)).  
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1           Although the ALJ made the conclusory finding that Dr. Colby’s opinions are  
2 heavily based on plaintiff’s self-reports, the ALJ did not cite any evidence substantiating  
3 this finding. *See* AR. 32. Indeed, as the Court just cited above, Dr. Colby performed a  
4 formal MSE and clearly indicated that his opinions regarding plaintiff’s abnormal  
5 memory and concentration abilities was based on specific objective testing results. As the  
6 ALJ did not point to any evidence that Dr. Colby relied heavily on plaintiff’s self-reports,  
7 and as Dr. Colby explicitly indicated reliance on his formal MSE and the resultant  
8 objective evidence derived therein for some of his opinions, the Court concludes that the  
9 ALJ’s finding that Dr. Colby relied heavily on plaintiff’s subjective reports is not a  
10 finding based on substantial evidence in the record as a whole.  
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12           The Court notes that “experienced clinicians attend to detail and subtlety in  
13 behavior, such as the affect accompanying thought or ideas, the significance of gesture or  
14 mannerism, and the unspoken message of conversation. The Mental Status Examination  
15 allows the organization, completion and communication of these observations.” Paula T.  
16 Trzepacz and Robert W. Baker, *The Psychiatric Mental Status Examination 3* (Oxford  
17 University Press 1993). “Like the physical examination, the Mental Status Examination is  
18 termed the *objective* portion of the patient evaluation.” *Id.* at 4 (emphasis in original).  
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20           The Mental Status Examination generally is conducted by medical professionals  
21 skilled and experienced in psychology and mental health. Although “anyone can have a  
22 conversation with a patient, [] appropriate knowledge, vocabulary and skills can elevate  
23 the clinician’s ‘conversation’ to a ‘mental status examination.’” Trzepacz and Baker,  
24 *supra*, *The Psychiatric Mental Status Examination 3*. A mental health professional is

1 trained to observe patients for signs of their mental health not rendered obvious by the  
2 patient's subjective reports, in part because the patient's self-reported history is "biased  
3 by their understanding, experiences, intellect and personality" (*id.* at 4), and, in part,  
4 because it is not uncommon for a person suffering from a mental illness to be unaware  
5 that her "condition reflects a potentially serious mental illness." *Van Nguyen v. Chater*,  
6 100 F.3d 1462, 1465 (9th Cir. 1996) (citation omitted).

7  
8 The ALJ did not explain the basis for his finding regarding Dr. Colby's heavy  
9 reliance on subjective self-reports in light of the explicit objective evidence derived from  
10 the MSE by this trained psychological doctor. The ALJ also did not explain the basis for  
11 the finding that Dr. Epp relied heavily on plaintiff's self-report, and he also conducted a  
12 MSE. *See* AR. 891-92.

13 For the reasons stated and based on the overall record, the Court concludes that the  
14 ALJ erred when evaluating the medical evidence provided by Dr. Colby, and that Dr.  
15 Epp's opinion requires further evaluation. Furthermore, the Court concludes that the error  
16 is not harmless.

17 The Ninth Circuit has "recognized that harmless error principles apply in the  
18 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)  
19 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th  
20 Cir. 2006) (collecting cases)). Recently the Ninth Circuit reaffirmed the explanation in  
21 *Stout* that "ALJ errors in social security are harmless if they are 'inconsequential to the  
22 ultimate nondisability determination' and that 'a reviewing court cannot consider [an]  
23 error harmless unless it can confidently conclude that no reasonable ALJ, when fully  
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1 crediting the testimony, could have reached a different disability determination.” *Marsh*  
2 *v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015) (citing *Stout*, 454 F.3d at 1055-56). In  
3 *Marsh*, even though “the district court gave persuasive reasons to determine  
4 harmless,” the Ninth Circuit reversed and remanded for further administrative  
5 proceedings, noting that “the decision on disability rests with the ALJ and the  
6 Commissioner of the Social Security Administration in the first instance, not with a  
7 district court.” *Id.* (citing 20 C.F.R. § 404.1527(d)(1)-(3)).

8  
9 Dr. Colby opined that plaintiff suffered from severe limitation in her ability to  
10 complete a normal workday/workweek and marked limitations in her abilities to perform  
11 activities within a schedule and maintain regular attendance. AR. 358. Severe limitation  
12 “means the inability to perform the particular activity in regular competitive employment  
13 or outside of a sheltered workshop,” while marked limitation “means a very significant  
14 limitation on the ability to perform one or more basic work activity.” AR. 357. If plaintiff  
15 is not able to complete a normal workday/workweek, it is highly likely that she is  
16 disabled. Therefore, the Court cannot conclude with confidence ““that no reasonable ALJ,  
17 when fully crediting [Dr. Colby’s opinion], could have reached a different disability  
18 determination.”” *Marsh*, 792 F.3d at 1173 (citing *Stout*, 454 F.3d at 1055-56).

19 Because the ALJ erred when evaluating the medical evidence, the Court concludes  
20 that all of the medical evidence should be evaluated anew following remand of this  
21 matter, including the medical opinion offered by plaintiff’s treating physician, Dr. Jeffrey  
22 Nelson, whose opinion plaintiff contends was rejected improperly by the ALJ. However,  
23 the Court notes that there is some support for the ALJ’s finding that Dr. Nelson’s notes  
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1 show that plaintiff often exhibited findings that Dr. Nelson opined to be “grossly intact,”  
2 such as her concentration and memory. Therefore, the Court concludes that there are  
3 sufficient ambiguities in this record to warrant further administrative review, as opposed  
4 to warranting a direction from this Court for the Administration to award benefits. As  
5 stated by the Ninth Circuit, regarding the question of whether to award benefits or to  
6 remand for further proceedings:

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8 Second, we turn to the question whether [or not] further administrative  
9 proceedings would be useful. In evaluating this issue, we consider [if]  
10 the record as a whole is free from conflicts, ambiguities, or gaps, [if] all  
11 factual issues have been resolved, and [if] the claimant’s entitlement to  
12 benefits is clear under the applicable legal rules.

11 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014)  
12 (citations omitted). The Court concludes that further administrative proceedings would be  
13 useful. *See id.*; *see also* AR. 30 (ALJ’s discussion of Dr. Sylvia Thorp, Ph.D.’s opinion).

14  
15 **(2) Whether the ALJ’s light residual functional capacity (“RFC”) is  
16 supported by substantial evidence.**

16 The Court already has concluded that the ALJ erred in reviewing the medical  
17 evidence and that this matter should be reversed and remanded for further consideration,  
18 *see supra*, section 1. Therefore, as a necessity, plaintiff’s RFC should be assessed anew  
19 following remand of this matter.

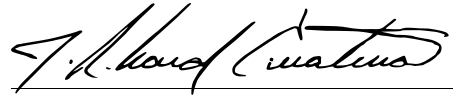
20 **CONCLUSION**

21 The ALJ erred when evaluating the medical opinion of Dr. Colby. Therefore,  
22 based on this reason and the relevant record, the Court **ORDERS** that this matter be  
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1 **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the  
2 Acting Commissioner for further consideration consistent with this order.

3 **JUDGMENT** is for plaintiff and the case shall be closed.

4 Dated this 10th day of July, 2017.

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7 J. Richard Creatura  
8 United States Magistrate Judge  
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