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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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10 BIANCA MONROE LARSON,

11 Plaintiff,

12 v.

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

15 Defendant.

CASE NO. 2:17-CV-00029-DWC

ORDER ON PLAINTIFF'S
COMPLAINT

16 Plaintiff filed this action, pursuant to 42 U.S.C § 405(g), seeking judicial review of the
17 denial of Plaintiff's applications for Disability Insurance Benefits ("DIB"). The parties have
18 consented to proceed before a United States Magistrate Judge. *See* 28 U.S.C. § 636(c), Fed. R. Civ.
19 P. 73 and Local Magistrate Judge Rule MJR 13. *See also* Consent to Proceed before a United
20 States Magistrate Judge, Dkt. 5.

21 After reviewing the record, the Court concludes the Administrative Law Judge ("ALJ")
22 erred by failing to properly evaluate the medical opinion evidence. Therefore, the ALJ's decision is
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1 vacated, and this case is reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) for
2 further proceedings.

3 **PROCEDURAL & FACTUAL HISTORY**

4 On August 20, 2015, Plaintiff filed an application for DIB. *See* Dkt. 7, Administrative
5 Record (“AR”) 144-45. Plaintiff alleges she became disabled on June 30, 2012, due to recurrent
6 patellar dislocations/subluxations, arthritis, and obsessive-compulsive disorder (“OCD”). *See* AR
7 144, 168. Plaintiff’s application was denied upon initial administrative review and on
8 reconsideration. *See* AR 61-83. A hearing was held before an ALJ on July 1, 2015, at which
9 Plaintiff, represented by counsel, appeared and testified. *See* AR 37.

10 On October 18, 2015, the ALJ found Plaintiff was not disabled within the meaning of
11 Sections 216(i) and 223(d) of the Social Security Act. AR 28. Plaintiff’s request for review of the
12 ALJ’s decision was denied by the Appeals Council on December 13, 2016, making that decision
13 the final decision of the Commissioner of Social Security (the “Commissioner”). *See* AR 1, 20
14 C.F.R. § 404.981, § 416.1481. On January 7, 2017, Plaintiff filed a complaint in this Court seeking
15 judicial review of the Commissioner’s final decision.

16 Plaintiff argues the denial of benefits should be reversed and remanded for further
17 proceedings, because the ALJ improperly evaluated the opinions of two treating physicians, one
18 examining physician, and two state agency medical consultants. Dkt. 9, p. 1.

19 **STANDARD OF REVIEW**

20 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social
21 security benefits only if the ALJ's findings are based on legal error or not supported by substantial
22 evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005)
23 (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)). “Substantial evidence” is more than a
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1 scintilla, less than a preponderance, and is such ““relevant evidence as a reasonable mind might
2 accept as adequate to support a conclusion.”” *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir.
3 1989) (quoting *Davis v. Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)).

4 DISCUSSION

5 I. Whether the ALJ Properly Evaluated the Medical Opinion Evidence.

6 A. Standard

7 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
8 opinion of either a treating or examining physician or psychologist. *Lester v. Chater*, 81 F.3d 821,
9 830 (9th Cir. 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*,
10 908 F.2d 502, 506 (9th Cir. 1990)). However, “[i]n order to discount the opinion of an examining
11 physician in favor of the opinion of a nonexamining medical advisor, the ALJ must set forth
12 specific, *legitimate* reasons that are supported by substantial evidence in the record.” *Nguyen v.*
13 *Chater*, 100 F.3d 1462, 1466 (9th Cir. 1996) (citing *Lester*, 81 F.3d at 831). The ALJ can
14 accomplish this by “setting out a detailed and thorough summary of the facts and conflicting
15 clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157
16 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751). In addition, the ALJ must
17 explain why the ALJ’s own interpretations, rather than those of the doctors, are correct. *Reddick*,
18 157 F.3d at 725 (citing *Embrey*, 849 F.2d at 421-22). The ALJ “may not reject ‘significant
19 probative evidence’ without explanation.” *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995)
20 (quoting *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (quoting *Cotter v. Harris*, 642
21 F.2d 700, 706-07 (3d Cir. 1981))). The “ALJ’s written decision must state reasons for disregarding
22 [such] evidence.” *Flores*, 49 F.3d at 571.

1 **B. Application of Standard**

2 *1. Morgan Carlson, M.D.*

3 Dr. Carlson examined Plaintiff on May 4, 2014. AR 263. Dr. Carlson noted Plaintiff had a
4 history of bilateral knee pain secondary to dislocating patella and chondromalacia, with positive
5 MRI findings for chondromalacia. AR 263. Plaintiff experienced bilateral patella dislocations
6 every few months, with increasing frequency and duration of symptoms as she aged. AR 263. On
7 examination, Plaintiff demonstrated full range of motion and 5/5 strength in all upper and lower
8 extremities, except for 4/5 hip flexion/knee extension bilaterally. AR 265. Plaintiff demonstrated
9 tenderness to palpation in her medial and lateral joint lines, however Dr. Carlson was unable to
10 conduct additional testing such as assessment of ligament laxity, patella grind test, or meniscus
11 provoking tests, due to Plaintiff's severe anxiety surrounding any knee examination. AR 266.

12 Dr. Carlson diagnosed Plaintiff with chronic bilateral knee pain with a history of chronic
13 bilateral patella dislocation, exacerbated by anxiety. AR 266. As a result of these impairments, Dr.
14 Carlson opined Plaintiff would be limited to standing and walking for no more than four hours in
15 an eight-hour day, with the ability to go from standing to seated position every 30 minutes as
16 needed. AR 266. Dr. Carlson also opined Plaintiff could sit eight hours in an eight-hour day,
17 provided she was able to go from sitting to standing every 30 minutes as needed, could lift 20
18 pounds occasionally and 10 pounds frequently, and should not crawl, crouch, kneel, balance, or
19 climb. AR 266-67. Dr. Carlson also noted Plaintiff might benefit from the use of a walking stick
20 over uneven surfaces. AR 266.

21 The ALJ gave Dr. Carlson's opinion significant weight. AR 25. However, the ALJ
22 discounted Dr. Carlson's opinion Plaintiff would need a sit-stand option for three reasons:

23 The claimant does not need a sit-stand option in performing her maximum
24 functional capacity, [1] as no such requirement has been noted in the treatment

1 record, and [2] the claimant does not require any assistive device for ambulation
2 [AR 268,¹ 303]. [3] on the other hand, the claimant reported being able to dust,
3 vacuum, wash dishes, prepare meals and do laundry, [AR 198] activities whose
4 exertional level is consistent with the [residual functional capacity (“RFC”)].

5 AR 25 (numbering added). Further, despite otherwise giving Dr. Carlson’s opinion significant
6 weight, the ALJ did not include Dr. Carlson’s opinion that Plaintiff should not crawl, crouch,
7 kneel, balance, or climb in the RFC or in his hypotheticals to the vocational expert. AR 23
8 (including no limitations in these areas in the RFC), 54 (propounding a hypothetical to the
9 vocational expert which included “occasional climbing . . . unlimited balance . . . frequent stoop . .
10 . no kneeling . . . occasional crouch . . . occasional crawl”). Plaintiff argues the ALJ’s failure to
11 include the sit-stand and postural limitations in the RFC was harmful error, and the Court agrees.

12 While an ALJ is not necessarily bound by the opinion of any physician or psychologist, the
13 ALJ must still offer specific reasons, supported by substantial evidence, for giving less than full
14 weight to their opinions. *See Sousa v. Callahan*, 143 F.3d 1240, 1244 (9th Cir. 1998). *See also*
15 Social Security Ruling (“SSR”) 96-6P, *available at* 1996 WL 374180, at *2. Though the ALJ
16 purportedly gave significant weight to Dr. Carlson’s opinion, the ALJ otherwise propounded a
17 hypothetical to the vocational expert which assumed Plaintiff was capable of at least occasional
18 crawling, balancing, climbing, and crouching. AR 54.² By failing to offer any reasons whatsoever
19 for not incorporating Dr. Carlson’s opined limitations in crouching, crawling, balancing, or
20 climbing in the RFC, the ALJ committed harmful error. *See Hill v. Astrue*, 698 F.3d 1153, 1162
21 (9th Cir. 2012). *Cf. Betts v. Colvin*, 531 Fed.Appx. 799, 800 (9th Cir. 2013) (finding the ALJ

22 ¹ The ALJ cites to Exhibit 5F/6 (AR 268) for this proposition; however, Exhibit 5F/6 is
23 an invoice for Dr. Carlson’s examination, rather than any treatment record or note.

24 ² Though it was not included in the written RFC, the ALJ propounded a hypothetical to
the vocational expert which indicated “no kneeling.” AR 54.

1 committed reversible error by purporting to give great weight to an examining physician, yet
2 failing to include many of the physician’s opined limitations in the RFC).

3 Further, the ALJ failed to offer specific and legitimate reasons, supported by substantial
4 evidence, for discounting Dr. Carlson’s opinion Plaintiff would require a sit-stand option. First, an
5 ALJ may properly consider whether a medical opinion is inconsistent with the record as a whole.
6 *See* 20 C.F.R. §§ 404.1527(c)(4), 416.927(c)(4) (noting consistency with the record as a whole is
7 an important factor when an ALJ weighs a medical opinion). However, “[t]he primary function of
8 medical records is to promote communication and recordkeeping for health care personnel—not to
9 provide evidence for disability determinations.” *Orn v. Astrue*, 495 F.3d 625, 634 (9th Cir. 2007).
10 The limitation to a sit-stand option is an accommodation designed to address a claimant’s
11 functional limitations, rather than a medical sign or symptom which would be documented in
12 treatment notes. That treatment records which identify Plaintiff’s symptoms and diagnoses do not
13 otherwise reflect such a specific limitation³ is not substantial evidence a sit-stand limitation is
14 unwarranted. *See Kane v. Heckler*, 776 F.2d 1130, 1135 (3d Cir. 1985) (noting an ALJ erred by
15 relying on a consultative examination report to discount a treating physician’s opinion, where the
16 examining physician “did not express any view on how Kane’s musculoskeletal impairments
17 affected his work ability.”). The ALJ’s conclusion that a sit-stand option was inconsistent with the
18 remaining treatment record was unwarranted speculation. *See* SSR 86-8, 1986 WL 68636 at *8.

19 Second, the ALJ fails to explain how Dr. Carlson’s opinion Plaintiff would require a sit-
20 stand option is undermined by the fact Plaintiff did not require an assistive device for ambulation.

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22 ³ Notably, the ALJ gave significant weight to the balance of Dr. Carlson’s opinion, such
23 as Dr. Carlson’s opinion Plaintiff could lift no more than twenty pounds occasionally and ten
24 pounds frequently, despite the fact the remainder of Dr. Carlson’s opined limitations are
similarly absent from the treatment record. *See, e.g.*, AR 242-57 (Plaintiff’s treatment notes from
Plaintiff’s primary care physician and pain management specialist).

1 The ALJ must do more than state his conclusions, he must “set forth his own interpretations and
2 explain why they, rather than the doctors’ are correct.” *Reddick*, 157 F.3 at 725. There is no
3 evidence in the record to suggest the use of a sit-stand option, which addresses limitations in sitting
4 and standing, is at all correlated to a need to use an assistive device to ambulate. In fact, Social
5 Security Regulations specify that an ability to ambulate without an assistive device only “provides
6 information as to whether, or the extent to which, the individual is able to ambulate without
7 assistance.” 20 C.F.R. Pt. 404, Subpt. P, App. 1, §1.00(J)(4).⁴ Further, as Plaintiff correctly notes,
8 Dr. Carlson noted Plaintiff uses rails whenever possible and opined Plaintiff would benefit from
9 the use of a walking stick over uneven surface. AR 263-64, 266. The ALJ’s failure to explain his
10 reasoning here is error.

11 Finally, Plaintiff’s activities of daily living do not constitute a specific and legitimate
12 reason for discounting Dr. Carlson’s opinions. The ALJ found Plaintiff’s ability to dust, vacuum,
13 wash dishes, prepare meals, and do laundry to be inconsistent with a sit-stand option. AR 25.
14 However, Plaintiff reported on several occasions that she was unable to do these tasks without
15 taking rest breaks and changing positions. AR 44, 198. Indeed, Plaintiff noted she uses these
16 breaks to change between sitting and standing positions. AR 44. In short, Plaintiff’s activities of
17 daily living do nothing but support Dr. Carlson’s opinion Plaintiff needs a sit-stand option in order
18 to work.

19 Because the ALJ failed to offer specific and legitimate reasons for discounting Dr.
20 Carlson’s opinion concerning sit-stand limitations, the ALJ erred. Further, the ALJ’s failure to
21 consider all of Dr. Carlson’s opined limitations, despite purportedly giving them great weight, was

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23 ⁴ Even then, the regulations note “[t]he ability to walk independently about one’s home
24 without the use of assistive devices does not, in and of itself, constitute effective ambulation.” 20
C.F.R. Pt. 404, Subpt. P, App. 1, §1.00(B)(2)(b)(2).

1 harmful error requiring remand. Thus, on remand, the ALJ should reevaluate the entirety of Dr.
2 Carlson's opinion, including Dr. Carlson's opined sit-stand limitations.⁵

3 *2. Catherine Smith, M.D.*

4 Dr. Smith was Plaintiff's treating physician. AR 243. On June 12, 2015, Dr. Smith opined
5 Plaintiff's knee condition would lead to a variety of physical limitations. AR 302-308. Specifically,
6 Dr. Smith opined Plaintiff would be able to lift and carry no more than 10 pounds on an occasional
7 basis, could sit and stand for no more than 45-60 minutes at one time, could walk for no more than
8 30 minutes at one time, would rarely be able to climb stairs and ramps, occasionally stoop, and
9 never climb ladders and scaffolds, kneel, crouch, or crawl. AR 302-05.

10 The ALJ gave Dr. Smith's opinion little weight for three reasons: "[Dr. Smith's] opinion is
11 contrary to [1] the longitudinal record, [2] X-ray results, [3] and the claimant's self-reported
12 activities discussed throughout this decision." Plaintiff argues this was not a specific and legitimate
13 reason, supported by substantial evidence, for discounting the only treating physician opinion in
14 the record. The Court agrees.

15 Here, the ALJ's reasoning for each of the three reasons is conclusory, with no attempt to
16 explain the nature of the purported inconsistencies with the record. As noted above, the ALJ was
17 obligated to "set forth his own interpretations and explain why they, rather than the doctors' are
18 correct." *Reddick*, 157 F.3 at 725. Simply reciting factors which could constitute reasons for
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21 ⁵ Defendant correctly observes that two of the four jobs opined to by the Vocational
22 Expert contained a sit-stand option. AR 55-57. Further, the Vocational Expert explained why his
23 opinion deviated from the Dictionary of Occupational Titles. *See* AR 57 (noting the job of small
24 products assembler, DOT # 706.684-022, as performed in Washington State, is more consistent
with a sedentary job with a sit-stand option, as Washington's manufacturing base is different
from the national profile). However, as the ALJ's other errors in evaluating Dr. Carlson's
opinion warrant remand, the Court need not consider whether the ALJ's error in evaluating Dr.
Carlson's sit-stand opinion, on its own, would have been harmless.

1 | discounting physician opinions *generally*, without any attempt to explain why those factors apply
2 | to *this physician*, fails to achieve the requisite level of specificity mandated by our case law. *See*
3 | *McAllister v. Sullivan*, 888 F.2d 599, 602-03 (9th Cir. 1989) (finding similar reasoning for
4 | rejecting a treating physician’s opinion was “broad and vague, failing to specify why the ALJ felt
5 | the treating physician’s opinion was flawed”).

6 | Even if the Court were to attempt to intuit from the ALJ’s decision what medical records or
7 | activities of daily living were inconsistent with Dr. Smith’s opinion, the ALJ’s reasons would not
8 | constitute specific and legitimate reasons supported by substantial evidence. The ALJ’s earlier
9 | discussion of Plaintiff’s activities of daily living, for example, is limited to noting Plaintiff can
10 | cook, do laundry, and vacuum, though she requires several breaks to do so. AR 22, 25. However,
11 | Plaintiff consistently reported she was unable to sustain performance on these tasks, but instead
12 | required frequent breaks to rest and change positions from sitting to standing or vice versa. AR 44,
13 | 198. The mere fact Plaintiff performed some activities in a manner consistent with that of the
14 | treating physician’s opinion is not a specific and legitimate reason for discounting Dr. Smith’s
15 | opined limitations. *See Bjornson v. Astrue*, 671 F.3d 640, 647 (7th Cir. 2012) (“The critical
16 | differences between activities of daily living and activities in a full-time job are that a person has
17 | more flexibility in scheduling the former than the latter, can get help from other persons . . . , and is
18 | not held to a minimum standard of performance, as she would be by an employer. The failure to
19 | recognize these differences is a recurrent, and deplorable, feature of opinions by administrative law
20 | judges in social security disability cases.”)

21 | Further, the ALJ’s discussion of the treatment record and X-ray reports is incomplete.
22 | While the ALJ notes Plaintiff wished to “hold off” on treatment until after her honeymoon, the
23 | ALJ has no basis in the record to characterize this as “stopping treatment.” AR 25. In fact, Dr.
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1 Tomski advised her she would be able to wait until after her honeymoon to begin treatment, “given
2 the chronicity of the problem.” AR 258. The record does not indicate whether Plaintiff actually
3 failed to pursue this treatment. As for Plaintiff’s X-rays, the ALJ stated “Dr. Smith cited the
4 claimant’s knee condition as the basis of her opinion [AR 303]. However, there is little support for
5 these limitations as opined, especially when the knee X-rays were normal [AR 261-62].” AR 26.
6 The ALJ notes the X-ray examination report in the record was essentially normal; however, Dr.
7 Smith did not rely on X-rays. Instead, the ALJ fails to mention that Dr. Smith relied on MRI scans
8 which were consistent with chronic medial retinacular sprain and chondromalacia.⁶ AR 246, 254.
9 As Dr. Smith relied on imaging techniques better suited to assessing damage to soft tissues, the
10 ALJ’s use of X-ray scans to discount Dr. Smith’s opinion does not constitute a specific and
11 legitimate reason supported by substantial evidence.

12 Because the ALJ failed to offer specific and legitimate reasons for discounting Dr. Smith’s
13 opinion, the ALJ erred. On remand, the ALJ should reevaluate Dr. Smith’s opinion.

14 3. Dr. James Basinski, M.D.

15 Dr. Basinski was Plaintiff’s treating psychiatrist from September, 2013 until May 8, 2015.
16 AR 269-301. Dr. Basinski diagnosed Plaintiff with chronic obsessive compulsive disorder, and
17 noted Plaintiff’s symptoms waxed and waned over a year-long period. AR 284-85. Over the course
18 of Plaintiff’s treatment, Dr. Basinski conducted numerous mental status examinations, which

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20 ⁶ Plaintiff had the severe impairments of Chondromalacia patella and Chronic bilateral
21 patella dislocation. Chondromalacia patella is, in essence, damage to the cartilage under the
22 kneecap. *Kellner v. Colvin*, 2013 WL 3200581, at *4 (C.D. Cal. June 24, 2013) (*citing*
23 *Chondromalacia patella*, Mayo Clinic, <http://www.mayoclinic.com/health/chondromalacia-patella/DS00777> (last visited June 13, 2017) (“Mayo Clinic”). While X-rays are effective at
24 imaging bone, they are “less effective at viewing soft tissues”—such as cartilage—than MRI or
CT scans. *Chondromalacia patella*, Diagnosis, Mayo Clinic, <http://www.mayoclinic.com/health/chondromalacia-patella/DS00777> (last visited June 13, 2017)).

1 revealed anxious affect and compulsions, obsessions, and agoraphobia. *See, e.g.*, AR 270. At the
2 conclusion of every examination, Dr. Basinski included the same treatment assessment:

3 Continuing Fairly clearcut OCD symptoms and OCD diagnosis, exacerbated the
4 last couple years of dating back the milder degree and childhood. Some
5 agoraphobia tendencies. Of note, very difficult childhood with a very difficult
Mother or Fa [sic] to internalize or identify with, which itself would be enough of a
problem to warrant psychotherapy. No acute/chronic safety concerns.

6 AR 270, 272, 274, 276, 278, 280, 283, 284, 286, 288, 289, 291, 294, 297, 300. However, Dr.
7 Basinski did not complete a mental RFC evaluation, or otherwise opine to any functional
8 limitations arising out of Plaintiff's mental health impairments. Instead, the ALJ discussed the
9 contents of Dr. Basinski's treatment notes and concluded they reflect a "sustained period of
10 improvement" in her symptoms. AR 24.

11 Plaintiff first argues the ALJ erred by citing Dr. Basinski's treatment notes to find
12 Plaintiff's condition had improved, despite Dr. Basinski's treatment notes reflecting Plaintiff was
13 still experiencing OCD symptoms. "[R]eports of improvement in the context of mental health
14 issues must be interpreted with an understanding of the patient's overall well-being and the nature
15 of her symptoms." *Garrison v. Colvin*, 759 F.3d 995, 1017-18 (9th Cir. 2014). However, the ALJ
16 is responsible for resolving ambiguities and conflicts in the medical evidence, and assessing
17 whether inconsistencies in the evidence "are material (or are in fact inconsistencies at all) and
18 whether certain factors are relevant to discount [medical opinion evidence] falls within this
19 responsibility." *Morgan v. Comm'r, Soc. Sec. Admin.*, 169 F.3d 595, 603 (9th Cir. 1999). In this
20 case, the Court agrees the notes which reflect Plaintiff's anxiety or OCD symptoms have improved
21 are qualified, with Dr. Basinski documenting improvement on some days, and noting increased
22 anxiety or OCD symptoms in subsequent appointments. *See, e.g.*, AR 284-85 (summarizing
23 improvements and worsening of symptoms between January, 2014 and May, 2015). Nonetheless,
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1 given the repeated documentation of improvement in symptoms over time, the ALJ could
2 rationally interpret these treatment notes as reflecting a longitudinal pattern of improvement with
3 treatment.

4 Plaintiff also argues the ALJ erred by failing to develop the record to obtain a functional
5 capacity evaluation from Dr. Basinski. The ALJ “has an independent duty to fully and fairly
6 develop the record.” *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (internal citations
7 and quotations omitted). This duty exists even when the claimant is represented by counsel. *Brown*
8 *v. Heckler*, 713 F.2d 411, 443 (9th Cir. 1983). “An ALJ’s duty to develop the record further is
9 triggered only when there is ambiguous evidence or when the record is inadequate to allow for
10 proper evaluation of the evidence.” *Mayes v. Massanari*, 276 F.3d 453, 460 (9th Cir. 2001). For
11 example, this Court has previously found that, where a treating rheumatologist’s notes were
12 indecipherable and illegible, the ALJ had a duty to re-contact the physician to determine whether
13 Plaintiff’s fibromyalgia constituted a medically determinable impairment pursuant to SSR 12-2p.
14 See *Williams v. Colvin*, 2015 WL 7018724, at **3-4 (W.D. Wash. Nov. 10, 2015). Also, where an
15 ALJ relies on a medical expert who indicates the record is insufficient to render a diagnosis, the
16 ALJ must develop the record further. See *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir.
17 2001). But, where the record, taken as a whole, is adequate to evaluate a claimant’s alleged
18 impairment, the ALJ’s duty to develop the record is not implicated. See, e.g., *Baghoomian v.*
19 *Astrue*, 319 Fed.Appx. 563, 566 (9th Cir. 2009); *H’Oar v. Barnhart*, 51 Fed.Appx. 731, 732 (9th
20 Cir. 2002).

21 While Dr. Basinski did not complete a RFC assessment, the ALJ was able to rely on the
22 opinion of non-examining medical consultant Eugene Kester, M.D., as the basis for his RFC
23 finding. The ALJ noted Dr. Kester’s opinion of no more than moderate limitations in most
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1 functional areas was consistent with Dr. Basinski's notes and the rest of the record. AR 26.
2 Plaintiff argues this was improper, as Dr. Kester completed his evaluation in June, 2014—only one
3 month after Plaintiff began treatment with Dr. Basinski—and thus did not have an opportunity to
4 review most of Dr. Basinski's treatment notes. Dkt. 9, p. 14. However, Dr. Basinski began treating
5 Plaintiff in September, 2013, rather than May, 2014, and Dr. Kester's report indicates he reviewed
6 Dr. Basinski's medical records as part of his evaluation. AR 70, 270-83. Further, while a
7 nonexamining physician's opinion on its own is not considered substantial evidence, it may
8 constitute substantial evidence if it is *consistent* with (rather than if it relied upon) other evidence in
9 the record. *Lester*, 81 F.3d at 830-31; *Tonapetyan*, 242 F.3d at 1149. Here, Dr. Kester noted the
10 medical evidence did not indicate a worsening of Plaintiff's mental health symptoms, which is
11 consistent with Dr. Basinski's assessments and documentation of improvements in Plaintiff's OCD
12 and anxiety symptoms. AR 74-75, 80 270, 272, 274, 276, 278, 280, 283, 284-85, 286, 288, 289,
13 291, 294, 297, 300. Thus, the ALJ's duty to develop the record was not triggered, as the ALJ had
14 substantial evidence on which to base his conclusions as to Plaintiff's mental RFC: namely, the
15 uncontradicted report of Dr. Kester, and the corroborating treatment notes of Dr. Basinski.

16 Nonetheless, as the case must be remanded for further consideration of the medical opinion
17 evidence, Plaintiff should have an opportunity to obtain additional medical opinion evidence and
18 present it to the ALJ.

19 4. *Nonexamining Medical Sources*

20 Plaintiff also argues the ALJ erred by giving significant weigh to the opinions of two non-
21 examining medical sources, Dr. Kester and Robert Handler, M.D. But, an ALJ is only required to
22 offer specific and legitimate reasons for *discounting* a medical opinion. *See Lester*, 81 F.3d at 831.
23 Moreover, the ALJ has sole responsibility to resolve ambiguities and determine the credibility of
24 medical evidence. *See Reddick*, 157 F.3d at 722. *See also Ortez v. Shalala*, 50 F.3d 748, 750 (9th Cir.

1 1995) (drawing a distinction between an ALJ *discounting* a medical opinion, and an ALJ *interpreting* a
2 medical opinion). Provided an ALJ's reasoning is supported by substantial evidence, the Court is not
3 permitted to reweigh the evidence. Nonetheless, as the ALJ's errors in evaluating the opinions of Dr.
4 Carlson and Dr. Smith require remand, the ALJ will have to reweigh all of the medical opinion
5 evidence on remand, including the opinions of Dr. Kester and Dr. Handler. Thus, the Court need not
6 address Plaintiff's arguments as to Dr. Kester and Dr. Handler.

7 **CONCLUSION**

8 Based on the foregoing reasons, the Court finds the ALJ committed harmful error by failing
9 to properly evaluate the medical opinion evidence. Therefore, the Court orders the Commissioner's
10 final decision be vacated in its entirety and this matter remanded pursuant to sentence four of 42
11 U.S.C. § 405(g) for a *de novo* hearing. On remand, the ALJ should reevaluate the medical opinion
12 evidence, reevaluate Plaintiff's subjective symptom testimony, and proceed on to Step Four and/or
13 Step Five of the sequential evaluation as appropriate. The ALJ should also develop the record as
14 needed. Judgment should be for Plaintiff and the case should be closed.

15 Dated this 16th day of June, 2017.

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17 David W. Christel
18 United States Magistrate Judge
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