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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 APRIL MARIE WENTZ,

9 Plaintiff,

10 v.

11 NANCY A BERRYHILL, Acting
Commissioner of Social Security,

12 Defendant.

CASE NO. 2:17-CV-01089-DWC

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

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14 Plaintiff April Marie Wentz, proceeding *pro se*, filed this action, pursuant to 42 U.S.C. §
15 405(g), for judicial review of Defendant's denial of her applications for disability insurance
16 benefits ("DIB") and supplemental security income ("SSI"). Pursuant to 28 U.S.C. § 636(c),
17 Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have
18 this matter heard by the undersigned Magistrate Judge. *See* Dkt. 8.

19 After considering the record, the Court concludes Plaintiff failed to show the
20 Administrative Law Judge ("ALJ") erred when she found Plaintiff had no physical
21 impairments at Step Two of the sequential evaluation process. The Court, however, finds the
22 ALJ erred when she failed to provide specific, legitimate reasons supported by substantial
23 evidence for giving little weight to the opinion of Dr. Dana Harmon, Ph.D. Had the ALJ given
24 great weight to Dr. Harmon's opinion, the residual functional capacity ("RFC") may have

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1 included additional limitations or the ALJ may have found Plaintiff disabled. The ALJ's error is
2 therefore harmful, and this matter is reversed and remanded pursuant to sentence four of 42
3 U.S.C. § 405(g) to the Acting Commissioner of Social Security ("Commissioner") for further
4 proceedings consistent with this Order.

5 FACTUAL AND PROCEDURAL HISTORY

6 On June 20, 2013, Plaintiff filed applications for DIB and SSI, alleging disability as of
7 January 8, 2012. *See* Dkt. 10, Administrative Record ("AR") 27. The application was denied
8 upon initial administrative review and on reconsideration. *See* AR 27. A hearing was held before
9 ALJ Laura Valente on October 1, 2015. *See* AR 59-117. In a decision dated December 22, 2015,
10 the ALJ determined Plaintiff to be not disabled. AR 27-38. Plaintiff's request for review of the
11 ALJ's decision was denied by the Appeals Council, making the ALJ's decision the final decision
12 of the Commissioner. *See* AR 8-13, 20 C.F.R. § 404.981, § 416.1481.

13 In the Opening Brief, it appears Plaintiff is arguing the ALJ erred by: (1) failing to
14 consider Plaintiff's severe impairments at Step Two; (2) discounting Plaintiff's activities of daily
15 living when considering her subjective symptom testimony; (3) improperly considering Dr. Dana
16 Harmon's opinion; (4) improperly discounting the lay opinions; and (5) improperly relying on
17 the vocational expert's testimony. Dkt. 16. Plaintiff also contends the ALJ failed to consider the
18 opinion of "Dr. Yun, Ph.D." and asserts she has attached a copy of the opinion for the Court's
19 consideration. *Id.*¹

22 ¹ Defendant asserts Plaintiff raised the following grounds: (1) Did the ALJ reasonably evaluate Plaintiff's
23 subjective complaints?; (2) Did the ALJ reasonably evaluate the medical opinion evidence?; (3) Did the ALJ
24 reasonably evaluate the lay witness testimony; and (4) Did the vocational expert properly determine that Plaintiff
could perform work existing in significant numbers in the national economy? Dkt. 18. The Court recognizes it is
difficult to discern the alleged errors raised in Plaintiff's Opening Brief. However, the Court finds the assignments
of error are as listed in the body of this Order.

1 (quoting *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (adopting Social Security Ruling
2 “SSR” 85-28)).

3 Here, the ALJ found Plaintiff suffered from the following severe impairments: organic
4 mental disorder, affective disorder, and anxiety disorder. AR 30. The ALJ did not find Plaintiff
5 had any severe physical impairments. *See* AR 30.

6 Plaintiff states she suffers from MRSA and PCOS. Dkt. 16, p. 4. However, in her
7 Opening Brief, Plaintiff fails to provide record citations showing she has been diagnosed with
8 MRSA and PCOS or allege these two conditions cause significant limitations in her ability to
9 perform basic work activities. *See id.* As Plaintiff failed to explain how these impairments are
10 severe or cite to any evidence supporting her assertion, the Court finds Plaintiff has not shown
11 the ALJ erred at Step Two. *See Shinseki v. Sanders*, 556 U.S. 396, 410 (2009) (finding the
12 plaintiff has the burden of demonstrating there are harmful errors in the ALJ’s decision).

13 **II. Whether the ALJ improperly discounted the opinion of Dr. Dana Harmon.**

14 In the Opening Brief, Plaintiff argues the ALJ failed to properly consider the opinion of
15 Dr. Dana Harmon, Ph.D., Plaintiff’s examining psychologist. Dkt. 16, p. 2.

16 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
17 opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
18 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d
19 502, 506 (9th Cir. 1990)). When a treating or examining physician’s opinion is contradicted, the
20 opinion can be rejected “for specific and legitimate reasons that are supported by substantial
21 evidence in the record.” *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035,
22 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can
23 accomplish this by “setting out a detailed and thorough summary of the facts and conflicting
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1 clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157
2 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

3 Dr. Harmon completed a Psychological/Psychiatric Evaluation of Plaintiff on September
4 16, 2013. AR 613-636. She found Plaintiff has severe limitations in communicating and
5 performing effectively in a work setting and completing a normal work day and work week
6 without interruptions from psychologically based symptoms. AR 615. Dr. Harmon also found
7 Plaintiff is markedly limited in her ability to understand, remember, and persist in tasks
8 following detailed instructions; perform activities within a schedule, maintain regular attendance,
9 and be punctual within customary tolerances without special supervision; adapt to changes in a
10 routine work setting; maintain appropriate behavior in a work setting; and set realistic goals and
11 plan independently. AR 615. She found Plaintiff moderately limited in all other areas of mental
12 functioning. AR 615.

13 The ALJ discussed Dr. Harmon’s findings and gave the opinion minimal weight because:

14 (1) [I]t should be noted that when recording the symptoms of depressed mood,
15 anxiety, fearfulness and difficulty with social functioning, Dr. Harmon described
16 them as “reportedly marked/chronic,” indicating heavy reliance on self-report.
17 Then when addressing the validity of the test results, Dr. Harmon wrote “there are
18 subtle suggestions that the client attempted to portray herself in a negative or
19 pathological manner in particular areas. Some concern about distortion of the
20 clinical picture must be raised as a result. . . .” The combination of the claimant’s
21 presentation and the seriousness of the self-reported symptoms can reasonably
22 lead to a lower assessment of functioning than the maximum capacity. (2)
23 Moreover, when the claimant was evaluated by Dr. Harmon, the claimant was not
24 taking any medication (“April has also been treated with different antidepressants
in the past, but she is not currently taking any psychiatric medications”).
Subsequent record shows (sic) that once the claimant is on medication and
receives counseling, her functioning improves.

AR 33-34 (internal citations omitted, numbering added).

First, the ALJ gave little weight to Dr. Harmon’s opinion because it was heavily based on
Plaintiff’s unreliable statements. AR 33-34. An ALJ may reject a physician’s opinion “if it is

1 based ‘to a large extent’ on a claimant’s self-reports that have been properly discounted as
2 incredible.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (quoting *Morgan v.*
3 *Comm’r. Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999)). This situation is distinguishable
4 from one in which the doctor provides her own observations in support of her assessments and
5 opinions. *See Ryan v. Comm’r of Soc. Sec. Admin.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008).
6 “[W]hen an opinion is not more heavily based on a patient’s self-reports than on clinical
7 observations, there is no evidentiary basis for rejecting the opinion.” *Ghanim v. Colvin*, 763 F.3d
8 1154, 1162 (9th Cir. 2014) (citing *Ryan*, 528 F.3d at 1199-1200). Notably, a psychiatrist’s
9 clinical interview and mental status evaluation are “objective measures” which “cannot be
10 discounted as a self-report.” *See Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017).

11 In *Buck*, the Ninth Circuit noted “[p]sychiatric evaluations may appear subjective,
12 especially compared to evaluation in other medical fields.” 869 F.3d at 1049. “Diagnoses will
13 always depend in part on the patient’s self-report, as well as on the clinician’s observations of the
14 patient. But such is the nature of psychiatry. Thus, the rule allowing an ALJ to reject opinions
15 based on self-reports does not apply in the same manner to opinions regarding mental illness.”
16 *Id.* (internal citations omitted).

17 Here, the ALJ noted that Dr. Harmon found Plaintiff’s symptoms of depressed mood,
18 anxiety, fearfulness, and difficulties in social functioning were “reportedly” marked and chronic,
19 indicating Dr. Harmon relied on Plaintiff’s self-reports in rendering her opinion. *See AR 33, 614.*
20 However, the record does not show Dr. Harmon relied more heavily on Plaintiff’s self-reported
21 symptoms than other information and objective evidence. *See AR 614.* Rather, in reaching her
22 opinion, Dr. Harmon observed Plaintiff and conducted a clinical interview and mental status
23 examination. *See AR 613-26.* Dr. Harmon did not discredit Plaintiff’s subjective reports and
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1 supported her ultimate opinion with objective testing, personal observations, and a clinical
2 interview. Therefore, the ALJ's finding that Dr. Harmon heavily relied on Plaintiff's self-
3 reported symptoms in reaching her opinion is not supported by substantial evidence.

4 The ALJ also found Dr. Harmon wrote "there are subtle suggestions that the client
5 attempted to portray herself in a negative or pathological manner in particular areas," which
6 undermines Dr. Harmon's findings. AR 33-34. A review of the record shows that a Personality
7 Assessment Inventory ("PAI") was included in the exhibit containing Dr. Harmon's report. *See*
8 AR 627-36. The PAI was completed by Dr. Leslie C. Morey, Ph.D. on September 9, 2013, and
9 the report states it was prepared for the Department of Social and Health Services ("DSHS"). AR
10 627.² Within the PAI, Dr. Morey did note that "there are subtle suggestions that the client
11 attempted to portray herself in a negative or pathological manner in particular areas." AR 632.
12 There is no indication, however, that Dr. Harmon relied on the PAI or that the PAI was even
13 reviewed by Dr. Harmon. In fact, Dr. Harmon stated no previous DSHS psychological
14 evaluations were available for her review. AR 613. As there is no evidence showing Dr. Harmon
15 wrote, reviewed, or considered the PAI when rendering her opinion, the ALJ's finding that Dr.
16 Harmon's opinion is unsupported because she found Plaintiff portrayed herself in a negative way
17 during testing is not supported by substantial evidence.

18 In sum, the Court finds Dr. Harmon's opinion was not more heavily based on Plaintiff's
19 negatively portrayed self-reports. Therefore, this is not a specific and legitimate reason supported
20 by substantial evidence for giving little weight to Dr. Harmon's opinion.

21 Second, the ALJ gave little weight to Dr. Harmon's opinion because the subsequent
22 records show Plaintiff's functioning improves when she is on medication and receives

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24 ² While unclear, it appears Dr. Morey's opinion may have been incorrectly included in the exhibit
containing Dr. Harmon's report.

1 counseling. AR 34. This finding is conclusory. The ALJ failed to explain how or what results
2 contained in the subsequent treatment records conflicted with Dr. Harmon's opinion. *See*
3 *Embrey*, 849 F.2d at 421-22 (conclusory reasons do "not achieve the level of specificity"
4 required to justify an ALJ's rejection of an opinion). Additionally, in finding Plaintiff showed
5 improvement with medication and counseling, the ALJ cited to twelve pages of treatment notes
6 from Plaintiff's counseling sessions with Plaintiff's mental health counselor, Katherine Shimada.
7 *See* AR 34, 809-20. The treatment notes, however, do not state Plaintiff is taking any
8 medications. *See* AR 809-20. The treatment notes also fail to show Plaintiff was improving.
9 While some treatment notes state Plaintiff's anxiety had decreased, the treatment notes also
10 indicate her anxiety increased. *See* AR 810-14. Further, Ms. Shimada only assessed Plaintiff as
11 maintaining her current level, despite the fact the treatment note form allowed Ms. Shimada to
12 find Plaintiff "improved" or "greatly improved." AR 809-820. Ms. Shimada stated treatment
13 should continue because Plaintiff's symptoms were persisting. AR 809-20. The ALJ's finding
14 that Dr. Harmon's opinion is inconsistent with subsequent records is both conclusory and
15 unsupported by the record. Thus, the Court concludes the ALJ's second reason for assigning
16 little weight to Dr. Harmon's opinion is not specific and legitimate.

17 For the above stated reasons, the Court finds the ALJ failed to provide specific and
18 legitimate reasons supported by substantial evidence for giving little weight to Dr. Harmon's
19 opinion. Therefore, the ALJ erred.

20 "[H]armless error principles apply in the Social Security context." *Molina v. Astrue*, 674
21 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the
22 claimant or "inconsequential" to the ALJ's "ultimate nondisability determination." *Stout v.*
23 *Commissioner, Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674
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1 F.3d at 1115. The Ninth Circuit has stated ““a reviewing court cannot consider an error harmless
2 unless it can confidently conclude that no reasonable ALJ, when fully crediting the testimony,
3 could have reached a different disability determination.”” *Marsh v. Colvin*, 792 F.3d 1170, 1173
4 (9th Cir. 2015) (quoting *Stout*, 454 F.3d at 1055-56). The determination as to whether an error is
5 harmless requires a “case-specific application of judgment” by the reviewing court, based on an
6 examination of the record made “‘without regard to errors’ that do not affect the parties’
7 ‘substantial rights.’” *Molina*, 674 F.3d at 1118-1119 (quoting *Shinseki v. Sanders*, 556 U.S. 396,
8 407 (2009)).

9 Had the ALJ given great weight to Dr. Harmon’s opinion, the RFC may have included
10 additional mental limitations or the ALJ may have found Plaintiff disabled. For example, Dr.
11 Harmon found Plaintiff was severely limited in her ability to communicate and perform
12 effectively in the workplace and complete a normal work day and work week without
13 interruptions from her symptoms. AR 615. In the RFC, the ALJ did not account for severe
14 limitations in Plaintiff’s ability to communicate or perform work or account for absences due to
15 an inability to complete a normal work day or work week. *See* AR 31. Therefore, if Dr.
16 Harmon’s opined limitations were included in the RFC and in the hypothetical questions posed
17 to the vocational expert, William Weiss, the ultimate disability determination may have changed.
18 Accordingly, ALJ’s error is not harmless and requires reversal.

19 **III. Whether the ALJ provided proper reasons for discounting Plaintiff’s subjective**
20 **symptom testimony and lay witness evidence.**

21 Plaintiff contends the ALJ failed to give clear and convincing reasons for rejecting
22 Plaintiff’s testimony about her symptoms and limitations and alleges the ALJ failed to provide
23 germane reasons for discounting the lay witness opinions of Plaintiff’s mother, Leanne Spooner,
24 Plaintiff’s grandmother, Elsie Wentz, Plaintiff’s aunt, Michelle Wentz, and Plaintiff’s friend,

1 Tanya Stern. Dkt. 16, pp. 1-3. The Court concludes the ALJ committed harmful error in
2 assessing the medical opinion of Dr. Harmon. *See* Section II, *supra*. Because the ALJ’s
3 reconsideration of the medical evidence may impact her assessment of Plaintiff’s subjective
4 testimony and the lay witness opinions, on remand, the ALJ must reconsider Plaintiff’s
5 subjective testimony and the testimony and statements from the four lay witnesses.

6 The Court also notes, on March 28, 2016, the Social Security Administration changed the
7 way it analyzes a claimant’s credibility. *See* SSR 16-3p, 2016 WL 1119029 (Mar. 16, 2016);
8 2016 WL 1237954 (Mar. 24, 2016). The term “credibility” will no longer be used. 2016 WL
9 1119029, at *1. Further, symptom evaluation is no longer an examination of a claimant’s
10 character. *See id.* at *10 (“adjudicators will not assess an individual’s overall character or
11 truthfulness”). The ALJ’s decision here – dated December 22, 2015 – was issued before SSR 16-
12 3p became effective. Thus, the ALJ did not err by failing to apply SSR 16-3p. However, on
13 remand, the ALJ is directed to apply SSR 16-3p when evaluating Plaintiff’s subjective symptom
14 testimony.

15 **IV. Whether the ALJ erred in finding Plaintiff not disabled at Step 5.**

16 Plaintiff contends the ALJ erred in finding her not disabled at Step 5 because the
17 vocational expert (“VE”) testified that Plaintiff would be unable to work. Dkt. 16, p. 4.
18 Regardless of whether the ALJ properly relied on testimony provided by the VE when finding
19 Plaintiff could perform jobs found in the national economy, the Court concludes the ALJ
20 committed harmful error when she failed to properly consider Dr. Harmon’s opinion. *See* Section
21 II, *supra*. The ALJ must therefore reassess the RFC on remand. *See* Social Security Ruling 96-8p
22 (“The RFC assessment must always consider and address medical source opinions.”); *Valentine*
23 *v. Commissioner Social Sec. Admin.*, 574 F.3d 685, 690 (“an RFC that fails to take into account a
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1 claimant's limitations is defective"). As the ALJ must reassess Plaintiff's RFC on remand, she
2 must also re-evaluate the findings at Step 5 to determine if there are jobs existing in significant
3 numbers in the national economy Plaintiff can perform in light of the re-evaluated RFC. *See*
4 *Watson v. Astrue*, 2010 WL 4269545, *5 (C.D. Cal. Oct. 22, 2010) (finding the ALJ's RFC
5 determination and hypothetical questions posed to the vocational expert defective when the ALJ
6 did not properly consider a doctor's findings).

7 **V. Whether the case should be remanded for an award of benefits.**

8 Plaintiff argues this matter should be remanded with a direction to award benefits. *See*
9 Dkt. 16, p. 4. The Court may remand a case "either for additional evidence and findings or to
10 award benefits." *Smolen*, 80 F.3d at 1292. Generally, when the Court reverses an ALJ's decision,
11 "the proper course, except in rare circumstances, is to remand to the agency for additional
12 investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations
13 omitted). However, the Ninth Circuit created a "test for determining when evidence should be
14 credited and an immediate award of benefits directed[.]" *Harman v. Apfel*, 211 F.3d 1172, 1178
15 (9th Cir. 2000). Specifically, benefits should be awarded where:

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

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

20 The Court has determined, on remand, the ALJ must re-evaluate the medical opinion
21 evidence, Plaintiff's symptom testimony, and the testimony and statements of four lay witnesses
22 to determine if Plaintiff is capable of performing jobs existing in significant numbers in the
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1 national economy. Therefore, there are outstanding issues which must be resolved and remand
2 for further administrative proceedings is appropriate.

3 **VI. Whether the Court should remand this case pursuant to sentence six.**

4 Plaintiff also requests the Court consider the opinion of Dr. Yun, Ph.D., which she stated
5 she attached to her Opening Brief, but which was not filed with the Court. Dkt. 16, p. 2. Because
6 the Court finds remand is appropriate under sentence four of 42 U.S.C. § 405(g), the Court will
7 not analyze Plaintiff's sentence six argument.³ However, the Court notes Plaintiff did not attach
8 Dr. Yun's opinion to her Opening Brief or Reply Brief or meet the requirements for remand
9 under sentence six. *See* Dkt. 16, 19. On remand, the Court directs the Commissioner to determine
10 if the record should be reopened to allow Plaintiff the opportunity to submit additional evidence.

11 CONCLUSION

12 Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded
13 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and
14 this matter is remanded for further administrative proceedings in accordance with the findings
15 contained herein.

16 Dated this 14th day of February, 2018.

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18 _____
19 David W. Christel
20 United States Magistrate Judge

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23 ³ Sentence six of 42 U.S.C. § 405(g) authorizes a reviewing court to remand a case to the Commissioner
24 "upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate
such evidence into the record in a prior proceeding." 42 U.S.C. § 405(g); *see Melkonyan v. Sullivan*, 501 U.S. 89
(1991).