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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA/ SEATTLE

KELLY H.,

Plaintiff,

v.

ACTING COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

Case No. 2:22-cv-00751-TLF

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of plaintiff's application for Supplemental Security Income disability benefits.

The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13. For the reasons set forth below, the Court REVERSES and REMANDS defendant's decision to deny benefits.

ISSUES FOR REVIEW

- A. Did the ALJ err in assessing the medical source evidence?
- B. Did the ALJ err in assessing plaintiff's subjective symptom testimony?
- C. Did the ALJ err in addressing new evidence?
- D. Did the ALJ err in assessing lay witness testimony?

BACKGROUND

On July 27, 2012, ALJ David J. DeLaitre found plaintiff disabled as of September 1, 2009. AR 136-140. On July 13, 2016, it was determined that plaintiff was no longer

1 disabled as of July 13, 2016. AR 144. On July 25, 2018, a hearing was held in front of  
2 ALJ Eric S. Basse where plaintiff appeared *pro se*, and on January 24, 2019, the  
3 decision became final. AR 144-151. Plaintiff did not appeal this decision and it became  
4 final and binding.

5 Plaintiff filed her current applications on July 29, 2019. AR 18. On March 22,  
6 2021, a hearing was conducted by ALJ William Leland and plaintiff again appeared *pro*  
7 *se*. AR 103-131. On May 4, 2021, ALJ Leland issued a decision finding that plaintiff was  
8 not disabled. AR. 18-33.

#### 9 STANDARD OF REVIEW

10 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's  
11 denial of Social Security benefits if the ALJ's findings are based on legal error or not  
12 supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874  
13 F.3d 648, 654 (9th Cir. 2017). Substantial evidence is “such relevant evidence as a  
14 reasonable mind might accept as adequate to support a conclusion.” *Biestek v.*  
15 *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted).

#### 16 DISCUSSION

17 In this case, the ALJ concluded that plaintiff had the severe, medically  
18 determinable impairments of fibromyalgia, migraines, plantar spur of the left foot, small  
19 amount of osteoarthritis in the left knee, post sleeve resection for bronchial carcinoid,  
20 asthma, irritable bowel syndrome, gastroesophageal reflux disease, polycystic ovarian  
21 syndrome, post-viral fatigue syndrome, obesity, depressive disorder, borderline  
22 personality disorder, anxiety disorder, panic disorder, selective mutism and sensory  
23 processing disorder, attention deficit hyperactivity disorder. AR 21.

1 Based on the limitations stemming from these impairments, the ALJ found that  
2 plaintiff could perform a reduced range of sedentary work. AR 24. Relying on the  
3 vocational expert (“VE”) testimony, the ALJ found that plaintiff could not perform past  
4 relevant work but could perform jobs existing in significant numbers in the national  
5 economy. AR 31-32. The ALJ found that plaintiff was not disabled. AR 32-33.

6 A. Medical Opinion Evidence

7 Plaintiff filed the claim on July 29, 2019, so the ALJ applied the 2017 regulations.  
8 See AR 18. Under the 2017 regulations, the Commissioner “will not defer or give any  
9 specific evidentiary weight . . . to any medical opinion(s) . . . including those from [the  
10 claimant’s] medical sources.” 20 C.F.R. §§ 404.1520c(a), 416.920c(a). The ALJ must  
11 nonetheless explain with specificity how he or she considered the factors of  
12 supportability and consistency in evaluating the medical opinions. 20 C.F.R. §§  
13 404.1520c(a)-(b), 416.920c(a)-(b).

14 The Ninth Circuit considered the 2017 regulations in *Woods v. Kijakazi*, 32 F.4th  
15 785 (9th Cir. 2022). The Court found that “the requirement that ALJ’s provide ‘specific  
16 and legitimate reasons’<sup>1</sup> for rejecting a treating or examining doctor’s opinion...is  
17 incompatible with the revised regulations” because requiring ALJ’s to give a “more  
18 robust explanation when discrediting evidence from certain sources necessarily favors  
19 the evidence from those sources.” *Id.* at 792. Under the new regulations,

20 an ALJ cannot reject an examining or treating doctor’s opinion as  
21 unsupported or inconsistent without providing an explanation supported by  
22 substantial evidence. The agency must “articulate ... how persuasive” it  
23 finds “all of the medical opinions” from each doctor or other source, 20

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24 <sup>1</sup> See *Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983) (describing the standard of “specific and legitimate  
25 reasons”).

1 C.F.R. § 404.1520c(b), and “explain how [it] considered the supportability  
2 and consistency factors” in reaching these findings, *id.* § 404.1520c(b)(2).

3 *Id.* “Even under the new regulations, an ALJ cannot reject an examining or treating  
4 doctor’s opinion as unsupported or inconsistent without providing explanation supported  
5 by substantial evidence.” *Id.* at 792.

6 **1. Dr. Margret Cunningham.**

7 Margret Cunningham, Ph.D., examined plaintiff on March 12, 2019. AR 435-440.  
8 Dr. Cunningham’s evaluation consisted of a clinical interview and a mental status  
9 examination. *Id.* Dr. Cunningham diagnosed plaintiff with major depressive disorder,  
10 recurrent, severe without psychotic features, generalized anxiety disorder, and panic  
11 disorder. AR 437. She noted that plaintiff presented as anxious and her thought process  
12 and content, concentration, and insight and judgment were not within normal limits. AR  
13 436, 440. Dr. Cunningham completed a medical source statement where she opined  
14 that plaintiff had marked social and cognitive limitations in the following areas: perform  
15 activities within a schedule, maintain regular attendance, and be punctual within  
16 customary tolerances without special supervision, adapt to changes in a routine work  
17 setting, maintain appropriate behavior in a work setting, complete a normal workday and  
18 work week without interruptions from psychologically based symptoms, and set realistic  
19 goals and plan independently. AR 438. She rated an overall severity limitation of  
20 marked. *Id.* She additionally opined that plaintiff is unable to function in several areas  
21 including social and occupational. AR 437.

22 The ALJ found Dr. Cunningham’s observations unpersuasive because, (1) the  
23 “marked” limitations were a significant overstatement based on plaintiff’s own reporting  
24 during the exam, (2) Dr. Cunningham based her opinion on this singular examination,  
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1 and (3) her opinion was inconsistent with contemporaneous treatment records from  
2 Compass Health that evidenced that plaintiff was experiencing some benefit from  
3 therapy and medication management. AR 29-30.

4       Regarding the ALJ's first reason, Dr. Cunningham utilized objective measures  
5 such as a clinical interview and a mental status examination in forming her opinion, and  
6 there is no evidence she relied largely on plaintiff's self-reports. *See Buck v. Berryhill*,  
7 869 F.3d 1040, 1049 (9th Cir. 2017) (a psychiatrist's clinical interview and MSE are  
8 "objective measures" which "cannot be discounted as a self-report.").

9       The ALJ's second reason for rejecting Dr. Cunningham's opinion — that it was  
10 based on a single examination — is not a valid reason on its own. An ALJ may consider  
11 the extent of the relationship between a doctor and the claimant — but must provide a  
12 substantive explanation as to how that factors into the ALJ's assessment of the  
13 provider's opinions. *See Garrison v. Colvin*, 759 F.3d 995, 1012-1013 (9th Cir. 2014)  
14 (citing *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996) ("[A]n ALJ errs when he  
15 rejects a medical opinion or assigns it little weight while doing nothing more than  
16 ignoring it, asserting without explanation that another medical opinion is more  
17 persuasive, or criticizing it with boilerplate language that fails to offer a substantive basis  
18 for his conclusion.")). The mere fact that Dr. Cunningham saw plaintiff a single time  
19 does not undermine her opinions, particularly where the ALJ relied on opinions from  
20 doctors who did not see plaintiff at all. *See* AR 30-31.

21       As to the ALJ's third reason, a finding that an impairment is successfully  
22 managed with treatment can serve as a clear and convincing reason for discounting a  
23 claimant's testimony. *See* 20 C.F.R. §§ 404.1529(c)(3)(iv), 416.929(c)(3)(iv) (the  
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1 effectiveness of medication and treatment are relevant to the evaluation of a claimant's  
2 alleged symptoms); *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th Cir. 2017) (evidence  
3 of medical treatment successfully relieving symptoms can undermine a claim of  
4 disability).

5 Here, the record reflects that plaintiff's symptoms were better on some days and  
6 worse on others. For example, at times plaintiff reported that her depression symptoms  
7 were better or she presented with a euthymic mood. See AR 1002, 1016, 1083, 1088.  
8 However, during this time plaintiff also reported heightened anxiety symptoms, and it  
9 was reported that she was not making improvement in her mental health. See AR 1010,  
10 1021, 1088. Therefore, Dr. Cunningham's opinion is not inconsistent with plaintiff's  
11 improvement with medication, but rather the ALJ failed to take into account the waxing  
12 and waning nature of plaintiff's mental health symptoms. See *Garrison*, 759 F.3d at  
13 1009 (claimants who suffer from mental conditions may have symptoms that wax and  
14 wane, with downward cycles, cycles of improvement, and mixed results from treatment).  
15 Accordingly, this was not a specific and legitimate reason to discount Dr. Cunningham's  
16 opinion.

## 17 **2. Dr. Jaswinder Kumar, MD, Ph.D.**

18 Jaswinder Kumar, MD, Ph.D., performed a Comprehensive Psychiatric  
19 Evaluation of plaintiff on February 10, 2020, and completed a Medical Source  
20 Statement. AR 918-923. Dr. Kumar's evaluation consisted of an assessment and a  
21 review of available records. AR 918. Dr. Kumar found no evidence of malingering and  
22 diagnosed plaintiff with unspecified depressive disorder and unspecified anxiety  
23 disorder. *Id.*

1 Dr. Kumar opined that plaintiff had a limited ability to perform work duties at a  
2 sufficient pace, and had a poor ability to maintain regular attendance in the workplace  
3 and complete a normal workday without interruptions. AR 918. He opined that plaintiff  
4 had a fair ability to interact with coworkers, superiors and the public and adapt to the  
5 usual stresses encountered in the workplace, perform simple and repetitive tasks,  
6 perform detailed and complex tasks, and perform work activities on a consistent basis  
7 without special or additional instructions. *Id.*

8 The ALJ discounted Dr. Kumar's opinion that plaintiff would have "poor" ability to  
9 maintain attendance with her ongoing treatment interventions because it was  
10 inconsistent with plaintiff's relatively normal mental status exams, her response to  
11 treatment, and her work history. AR 30. The ALJ found Dr. Kumar's conclusions that  
12 plaintiff would have some limitations tolerating stress, dealing with interactions, and  
13 maintaining work pace to be persuasive. *Id.*

14 As to the ALJ's first two reasons, for the reasons discussed above, relatively  
15 normal mental status examinations and response to treatment are not specific and  
16 legitimate reasons for rejecting Dr. Kumar's opinion. *See supra* Section 1.

17 As to the ALJ's third reason, a claimant's participation in everyday activities  
18 indicating capacities that are transferable to a work setting may constitute a clear and  
19 convincing reason for discounting that claimant's testimony. *See Morgan v. Comm'r*  
20 *Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir.1999). Here, the ALJ fails to explain how  
21 plaintiff's "history of work activity in the past subsequent to childhood issues and the  
22 trauma her mother described" undermines Dr. Kumar's opinion that plaintiff would have  
23 a "poor" ability to maintain work attendance with her ongoing treatment interventions.

1 AR 30. Therefore, this is not a specific and legitimate reason for discounting Dr.  
2 Kumar's opinion.

3 An error that is inconsequential to the non-disability determination is harmless.  
4 *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006)). But if the  
5 errors of the ALJ result in a residual functional capacity (RFC) that does not include  
6 relevant work-related limitations, the RFC is deficient and the error is not harmless. *Id.*;  
7 *see also Carmickle v. Comm'r, Social Sec. Admin.*, 533 F.3d 1155, 1160 (9th Cir. 2008);  
8 *Embrey v. Bowen*, 849 F.2d 418, 422-423 (9th Cir. 1988); *Stramol-Spirz v. Saul*, 848  
9 Fed. Appx. 715, 718 (9th Cir. 2021) (unpublished). The ALJ's error here is not harmless,  
10 because had the ALJ properly evaluated the medical opinions of Dr. Cunningham and  
11 Dr. Kumar, this would potentially result in a different RFC and would potentially change  
12 the ALJ's determination of nondisability.

13 B. Subjective Symptom Testimony

14 Plaintiff asserts that the ALJ failed in assessing her mental health conditions. Dkt.  
15 10 at 12. Plaintiff testified that her selective mutism and sensory processing disorder  
16 make it hard for her to cope with work environments. AR 114. She testified that stress  
17 causes her to freeze up, retreat, and cover her head with her arms. AR 320. Plaintiff  
18 additionally testified that her daily activities include watching TV, reading books, and  
19 attending medical appointments, and she is no longer able to attend school or church or  
20 ride the bus, as she once was before the onset of her conditions. AR 315.

21 The ALJ's determinations regarding a claimant's statements about limitations  
22 "must be supported by specific, cogent reasons." *Reddick v. Chater*, 157 F.3d 715, 722  
23 (9th Cir. 1998) (*citing Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990)). In  
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1 assessing a plaintiff's credibility, the ALJ must determine whether plaintiff has presented  
2 objective medical evidence of an underlying impairment. If such evidence is present and  
3 there is no evidence of malingering, then the ALJ may only reject plaintiff's statements  
4 about severity of symptoms if the ALJ provides specific, clear and convincing reasons.  
5 *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citing *Lingenfelter v. Astrue*, 504  
6 F.3d 1028, 1036 (9th Cir. 2007)). The clear and convincing "standard isn't whether our  
7 court is convinced, but instead whether the ALJ's rationale is clear enough that it has  
8 the power to convince." *Smartt v. Kijakazi*, 53 F.4th 489, 499 (9th Cir. 2022).

9 The ALJ determined that plaintiff's medically determinable impairments could  
10 reasonably be expected to cause the alleged symptoms, however, he discounted her  
11 statements concerning the intensity, persistence, and limiting effects of these symptoms  
12 as not entirely consistent with the medical record and other evidence in the record. AR  
13 25. Specifically, the ALJ noted that plaintiff's selective mutism and sensory processing  
14 disorder were only presented in progress notes by history, plaintiff's speech was noted  
15 to be within normal limits, plaintiff was able to respond to questions and convey basic  
16 information regarding her history and daily functioning during the hearing, strong  
17 evidence in the record suggested that plaintiff was seeking an autism diagnosis for the  
18 purpose of her disability claim and no diagnosis was offered by a provider in the record,  
19 evidence in the record suggested that plaintiff retains the basis to communicate and  
20 interact with others in her work setting on a superficial and occasional basis, plaintiff's  
21 anxiety and depression were controlled with her outpatient treatment regimen, and there  
22 were no clinical signs or symptoms to suggest disabling symptoms of ADHD. AR 27-29.

### 23 **Selective Mutism and Sensory Processing Disorder**

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1 With respect to plaintiff's allegations of selective mutism and sensory processing  
2 disorder, the ALJ found that "a review of the entire record for the period fails to  
3 demonstrate that the source of the diagnosis of these impairments, as they were  
4 presented in progress notes by history only." AR 27. The ALJ also found that although  
5 plaintiff presented with stuttering and minor word finding issues at times, other times her  
6 speech was noted to be within normal limits. *Id.* The ALJ additionally noted that there  
7 was no evidence of a referral to speech-language pathology or other treatment. *Id.*

8 "Contradiction with the medical record is a sufficient basis for rejecting the  
9 claimant's subjective testimony." *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d  
10 1155, 1161 (9th Cir. 2008) (citing *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th  
11 Cir.1995)). However, individual treatment records cannot be interpreted in a vacuum;  
12 the ALJ must consider a particular record of treatment in light of the overall diagnostic  
13 record. *Ghanim v. Colvin*, 763 F.3d at 1164

14 As for the source of diagnosis, while there is no evidence to suggest where  
15 plaintiff was diagnosed with sensory processing disorder other than an "outside  
16 psychologist," the record reflects that plaintiff was diagnosed with mutism, stutter, and  
17 tremor at the Everett Clinic neurology, where she was receiving treatment. AR 625; See  
18 AR 553, 560, 596. In a mental health evaluation dated December 29, 2016, Emily  
19 Ellison, MS, MHP, LMHC, CDPT diagnosed plaintiff with selective mutism and noted  
20 that plaintiff reported that she was originally diagnosed with sensory processing disorder  
21 in October of 2014. AR 986-987. Additionally at times in plaintiff's records from the  
22 Everett Clinic it was noted that plaintiff had been diagnosed with "sensory  
23 hypersensitivity." See AR 823, 834, 939, 1112. The entire record reflects that plaintiff  
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1 was being treated for these conditions and this was not a valid basis for rejecting her  
2 testimony.

3 As for a referral to speech language pathology, an ALJ may reject symptom  
4 testimony “if the level or frequency of treatment is inconsistent with the level of  
5 complaints.” See *Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012). Here the record  
6 shows that plaintiff was treated for difficulties with speech through counseling. See AR  
7 492, 508. Additionally, treatment notes reflect that plaintiff was using earphones to  
8 manage her selective processing deficits, which slightly improved her symptoms. See  
9 717, 727, 730. Thus, in discounting plaintiff’s testimony for these reasons, the ALJ  
10 erred.

### 11 **Autism**

12 The Ninth Circuit has held that it is proper for an ALJ to consider evidence of  
13 secondary gain when considering a plaintiff’s symptom testimony. *Matney ex rel.*  
14 *Matney v. Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992). The ALJ found that “there was  
15 a strong implication in the record that the claimant was seeking a diagnosis of autism for  
16 the purpose of her disability claim.” AR 28. As support for this finding, the ALJ cited  
17 multiple treatment notes from plaintiff’s providers, particularly where providers indicate  
18 that they were attempting to reframe plaintiff’s thinking to focus less on the label and  
19 more on plaintiff’s symptoms, and a note where plaintiff is quoted as saying “it is hard  
20 thinking that maybe if people understood my symptoms in the context of autism that  
21 things could have been different with school. I guess now I am just hoping it will mean  
22 something for my disability.” AR 1009-1010; 472.

1 Drawing an inference of secondary gain from this scant evidence is speculative.  
2 See *Tommasetti v. Astrue*, 533 F.3d 1035, 1042 (2008) (finding error where an ALJ  
3 relied on her own speculation about the claimant's ability to return to his past work  
4 instead of persuasive evidence in the record). Plaintiff's lone statement is less than a  
5 scintilla and therefore not substantial evidence. See, *Revels v. Berryhill*, 874 F.3d 648,  
6 654 (9th Cir. 2017). Additionally, even if the evidence did support this finding, this on its  
7 own would not be a sufficient reason to discount plaintiff's symptom testimony. *Ghanim*  
8 763 F.3d at 1165 (desire to obtain disability benefits, standing alone, is not enough to  
9 discount the plaintiff's testimony).

#### 10 **Depression and Anxiety**

11 A finding that a claimant's condition improved or was controlled with treatment  
12 can serve as a clear and convincing reason for discounting her testimony. See 20  
13 C.F.R. § 404.1529(c)(3)(iv) (the effectiveness of medication and treatment are relevant  
14 to the evaluation of a claimant's alleged symptoms); *Wellington v. Berryhill*, 878 F.3d  
15 867, 876 (9th Cir. 2017) (evidence of medical treatment successfully relieving  
16 symptoms can undermine a claim of disability). Here, the ALJ discounted plaintiff's  
17 testimony because progress notes indicated that her depression and anxiety symptoms  
18 improved with antidepressant and anti-anxiety medication. AR 28.

19 For the same reasons this Court has determined that the ALJ improperly  
20 considered the medical opinion evidence, the ALJ also erred by improperly discounting  
21 plaintiff's testimony, while failing to take into account the waxing and waning nature of  
22 mental health symptoms. See Section A. Therefore, improvement with treatment is not  
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1 a clear and convincing reason to discount plaintiff's testimony with respect to her  
2 allegations of depression and anxiety.

### 3 **ADHD**

4 The ALJ discounted plaintiff's testimony regarding her ADHD symptoms because  
5 "there were no clinical signs or symptoms during the relevant period to suggest  
6 disabling limitations." AR 28-29. The record supports this conclusion, however,  
7 an ALJ may not reject a claimant's subjective symptom testimony "*solely* because the  
8 degree of pain alleged is not supported by objective medical evidence." *Orteza v.*  
9 *Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1995) (internal quotation marks omitted, and  
10 emphasis added); *Byrnes v. Shalala*, 60 F.3d 639, 641-42 (9th Cir. 1995) (applying rule  
11 to subjective complaints other than pain). Therefore, considering that the ALJ did not  
12 provide any other clear and convincing reasons to discount plaintiff's testimony, this  
13 reason on its own is insufficient.

14 In sum, the ALJ erred in discounting certain portions of plaintiff's testimony. While  
15 substantial evidence supports the ALJ's finding that plaintiff's testimony regarding her  
16 ADHD is inconsistent with the record, the ALJ did not provide a rationale to discount the  
17 balance of plaintiff's testimony. An error that is inconsequential to the non-disability  
18 determination is harmless. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054  
19 (9th Cir. 2006). But if the errors of the ALJ result in an RFC that does not include  
20 relevant work-related limitations, the RFC is deficient and the error is not harmless. *Id.*;  
21 *see also Carmickle v. Comm'r, Social Sec. Admin.*, 533 F.3d 1155, 1160 (9th Cir. 2008);  
22 *Embrey v. Bowen*, 849 F.2d 418, 422-423 (9th Cir. 1988); *Stramol-Spirz v. Saul*, 848  
23 Fed. Appx. 715, 718 (9th Cir. 2021) (unpublished).

1 The ALJ's error here is not harmless, because had the ALJ properly evaluated  
2 plaintiff's symptom testimony, the ALJ may have assessed a different RFC and thus it  
3 would potentially change the ALJ's determination on nondisability.

4 C. New Evidence

5 Plaintiff asserts that new evidence submitted to the Appeals Council after the  
6 ALJ's decision, a medical opinion from Noah O'Donnell, DO (AR 8-9), undermines the  
7 ALJ's decision in this case. Dkt. 10 at 10-11. The Appeals Council determined that Dr.  
8 O'Donnell's opinion did not impact the disability determination because it was dated July  
9 30, 2021, and the period at issue was through May 4, 2021. AR 2. On request of the  
10 Court, the parties have submitted supplemental briefing on the admissibility of Dr.  
11 O'Donnell's opinion under sentence four of 42 U.S.C. § 405(g).

12 The Court may review new evidence presented first to the Appeals Council when  
13 determining whether or not "in light of the record as a whole, the ALJ's decision was  
14 supported by substantial evidence and was free of legal error." *Taylor v. Comm'r of*  
15 *SSA*, 659 F.3d 1228, 1232 (9th Cir. 2011) (*citing Ramirez v. Shalala*, 8 F.3d 1449,  
16 1451-54 (9th Cir. 1993)). Plaintiff is not required to show good cause for failing to  
17 produce the new evidence earlier. *See Ramirez*, 8 F.3d at 1451-55; *see also Taylor*,  
18 659 F.3d at 1232.

19 The Ninth Circuit has held that "when a claimant submits evidence for the first  
20 time to the Appeals Council, which considers that evidence in denying review of the  
21 ALJ's decision, the new evidence is part of the administrative record, which the district  
22 court *must* consider in determining whether [or not] the Commissioner's decision is  
23 supported by substantial evidence." *Brewes v. Comm'r of SSA*, 682 F.3d 1157, 1159-60  
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1 (9th Cir. 2012) (emphasis added); *see also Shalala v. Schaefer*, 509 U.S. 292, 297 n.2  
2 (1993) (“[s]entence-six remands may be ordered in only two situations: where the  
3 Secretary requests a remand before answering the complaint, or where new, material  
4 evidence is adduced that was for good cause not presented *before the agency*”)  
5 (emphasis added) (*citing* 42 U.S.C. § 405(g) (sentence six); *Melkonyan v. Sullivan*, 501  
6 U.S. 89, 99-100 (1991)).

7 Here, the new evidence was an opinion from plaintiff’s primary care provider, Dr.  
8 Noah O’Donnell, DO, dated July 30, 2021. AR 8-9. The opinion from Dr. O’Donnell  
9 states that plaintiff’s condition would cause her to be absent from work “most days” of  
10 the month, AR 8. Dr. O’Donnell opined that plaintiff’s ability to work a full-time sedentary  
11 job would be impacted by her inability to focus on tasks for 30 minutes to an hour, her  
12 frequent need to isolate, her mutism which is triggered by being asked too many  
13 questions, her intolerance to clothes, her fear of interacting/ talking to strangers, and her  
14 IBS (irritable bowel syndrome) which sometimes restricts her ability to be away from the  
15 restroom. *Id.*

16 Additionally, Dr. O’Donnell opined that plaintiff would have trouble staying on task  
17 for a two-hour period “[m]ore than once a day,” and that these lapses in concentration  
18 would last “[m]ore than 20 percent of the day.” AR. 9. The Appeals Council found that  
19 this new evidence did not provide a basis for changing the ALJ’s decision, reasoning  
20 that it did not relate to the period at issue because it was rendered after the ALJ’s May  
21 4, 2021 decision. AR 2.

22 Dr. O’Donnell’s letter does not, however, describe plaintiff’s functioning only at a  
23 snapshot in time after the relevant period. Rather, Dr. O’Donnell based his letter on his  
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1 treatment and observations of plaintiff over two years that she was his patient. See AR  
2 9, 639, 752, 1105. Thus, the Commissioner's finding that this opinion does not relate to  
3 the relevant period is inaccurate.

4 In addition, this evidence undermines the ALJ's decision as the ALJ discounted  
5 plaintiff's testimony partially because her selective mutism and sensory processing  
6 disorder presented only in treatment notes and there were no clinical signs or symptoms  
7 to suggest disabling symptoms of ADHD; but Dr. O'Donnell's opinion is an assessment  
8 from a medical treating source that indicates that he had diagnosed her with selective  
9 mutism, and he opined that her ADHD would severely limit her ability to maintain  
10 concentration for any extended period of time throughout the day. See AR 27-29; AR 8-  
11 9. Additionally, this opinion is consistent with that of Dr. Cunningham and Dr. Kumar's  
12 opinions regarding the limitations stemming from plaintiff's mental impairments. See AR  
13 435; AR 918.

14 D. Lay Witness Testimony

15 Finally, plaintiff asserts that the ALJ erred in failing to provide germane reasons  
16 for rejecting plaintiff's mother's lay witness testimony. Dkt. 10 at 17. Plaintiff's mother  
17 testified that plaintiff gets overwhelmed very easily by noise and visual stimuli. AR 121.  
18 She testified that plaintiff is unable to go in the grocery store because she becomes  
19 overwhelmed and breaks down. *Id.* She testified that plaintiff has never been able to  
20 drive because of the stress of it and had to drop out of school because of her selective  
21 mutism and sensory processing disorder. *Id.*

22 For cases filed after March 27, 2017, such as this one, an ALJ is "not required to  
23 articulate" how he or she evaluated evidence from non-medical sources such as  
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1 educational personnel, public and private social welfare agency personnel, and other  
2 lay witnesses. 20 C.F.R. § 404.1502(e). Yet, the Ninth Circuit has suggested that its  
3 pre-2017 standard requiring “germane” reasons to reject lay witness testimony applies  
4 to an ALJ’s evaluation of lay witness testimony post-2017. *Muntz v. Kijakazi*, No. 22-  
5 35174, 2022 WL 17484332, at \* 2 (9th Cir. Dec. 7, 2022) (applying “germane reasons”  
6 standard to ALJ’s evaluation of third-party function report from claimant’s husband);  
7 *Weitman v. Kijakazi*, No. 21-35748, 2022 WL 17175060, at \* 4 n. 4 (9th Cir. Nov. 23,  
8 2022).

9 Here, the ALJ rejected plaintiff’s mother’s statements that plaintiff has dealt with  
10 social difficulties since age three as inconsistent with evidence that plaintiff was able to  
11 work full time in the past, had had friends, dated, and left home to attend parties and  
12 other events. AR 28. The ALJ may “draw inferences logically flowing from the  
13 evidence.” *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). Therefore, this was  
14 a germane reason to discount plaintiff’s mother’s testimony.

#### 15 E. Remedy

16 “The decision whether to remand a case for additional evidence, or simply to award  
17 benefits[,] is within the discretion of the court.” *Trevizo v. Berryhill*, 871 F.3d 664, 682  
18 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If an  
19 ALJ makes an error and the record is uncertain and ambiguous, the court should  
20 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045  
21 (9th Cir. 2017). Likewise, if the court concludes that additional proceedings can remedy  
22 the ALJ’s errors, it should remand the case for further consideration. *Revels*, 874 F.3d  
23 at 668.

1 The Ninth Circuit has developed a three-step analysis for determining when to  
2 remand for a direct award of benefits. Such remand is generally proper only where

3 “(1) the record has been fully developed and further administrative proceedings  
4 would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient  
5 reasons for rejecting evidence, whether claimant testimony or medical opinion;  
6 and (3) if the improperly discredited evidence were credited as true, the ALJ  
7 would be required to find the claimant disabled on remand.”

8 *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th  
9 Cir. 2014)).

10 The Ninth Circuit emphasized in *Leon* that even when each element is satisfied,  
11 the district court still has discretion to remand for further proceedings or for award of  
12 benefits. *Leon*, 80 F.3d at 1045.

13 Here, plaintiff asks that the Court remand this case for further proceedings. Dkt.  
14 10. The Court has found several errors in the ALJ’s evaluation of the medical opinions  
15 of Dr. Cunningham and Dr. Kumar, and plaintiff’s testimony. The Court has also found  
16 that new evidence submitted by plaintiff further undermines the ALJ’s decision. The  
17 Commissioner is directed to reevaluate all relevant steps of the disability evaluation  
18 process and conduct all proceedings necessary to reevaluate the disability  
19 determination in light of this order.  
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1 Based on a review of the record, the Court concludes that the record is not free  
2 from important and relevant conflicts, such as conflicts in the medical evidence.  
3 Therefore, this matter should be reversed for further administrative proceedings,  
4 including a *de novo* hearing. See *Leon*, 80 F.3d at 1045.

5  
6 CONCLUSION

7 Based on the foregoing discussion, the Court concludes the ALJ improperly  
8 determined plaintiff to be not disabled. Therefore, the ALJ's decision is reversed and  
9 remanded for further administrative proceedings

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11 Dated this 22<sup>nd</sup> day of May, 2023.

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13 Theresa L. Fricke  
14 Theresa L. Fricke  
15 United States Magistrate Judge  
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