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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 STEPHANIE L. ENGER,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, Acting  
14 Commissioner of the Social Security  
Administration,

15 Defendant.  
16

CASE NO. 14-cv-05317 JRC

ORDER ON PLAINTIFF'S  
COMPLAINT

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, ECF No. 3; Consent to Proceed Before a United  
20 States Magistrate Judge, ECF No. 4). This matter has been fully briefed (*see* ECF Nos.  
21 11, 12, 13).

22 After considering and reviewing the record, the Court finds that the ALJ failed to  
23 provide a specific and legitimate reason for her failure to credit fully the opinions of an  
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1 examining doctor and a treating doctor. The ALJ indicated that she was not crediting  
2 fully the opinion of the examining doctor because of a finding that the doctor relied on a  
3 “snapshot” of plaintiff’s functioning, as the examining doctor only examined plaintiff on  
4 one occasion. However, as the ALJ discounted this doctor’s opinion in favor of the  
5 opinions of doctors who never examined plaintiff at all, this reason is not legitimate.  
6 Similarly, the ALJ discounted the treating doctor’s opinion in favor of non-examining  
7 state agency medical consultants with a finding that “it was based on a brief treatment  
8 relationship, which was insufficient to assess the claimant’s functional limitations” (Tr.  
9 23). As the opinions relied on by the ALJ were provided by doctors with no treatment  
10 relationship with plaintiff, and as plaintiff’s impairments are mental impairments most  
11 effectively evaluated with an in-person evaluation, this reason is not legitimate. The ALJ  
12 also erred by finding that both of these doctors relied heavily on plaintiff’s self-report  
13 without citing any substantial evidence in the record to support such findings.  
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15 Therefore, this matter is reversed and remanded pursuant to sentence four of 42  
16 U.S.C. § 405(g) to the Acting Commissioner for further administrative proceedings.

### 17 BACKGROUND

18 Plaintiff, STEPHANIE L. ENGER, was born in 1973 and was 36 years old on the  
19 amended alleged date of disability onset of February 12, 2010 (*see* Tr. 34, 200, 206).  
20 Plaintiff graduated from high school (Tr. 37). She has work experience as a floral  
21 manager in a grocery store, shift supervisor in a fast food restaurant, cashier in a gas  
22 station, housekeeper/laundry in a nursing home, waitress, bartender and cook at a bar and  
23 grill, and sorter/stocker in a clothing store. Her last employment ended when it became  
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1 too hard to be around people and she was having a hard time keeping track of what she  
2 had done (Tr. 38-42).

3 According to the ALJ, plaintiff has at least the severe impairments of “bipolar  
4 disorder and anxiety disorder with panic and with agoraphobia (20 CFR 404.1520(c) and  
5 416.920(c))” (Tr. 16).

6 At the time of the hearing, plaintiff was living with her husband, 14 year-old son  
7 and 5 year-old daughter (Tr. 53-54).

### 8 PROCEDURAL HISTORY

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10 Plaintiff’s applications for disability insurance (“DIB”) benefits pursuant to 42  
11 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42  
12 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and  
13 following reconsideration (*see* Tr. 136-38, 139-42, 144-48, 149-55). Plaintiff’s requested  
14 hearing was held before Administrative Law Judge Mattie Harvin Woode (“the ALJ”) on  
15 November 8, 2012 (*see* Tr. 31-81). On November 27, 2012, the ALJ issued a written  
16 decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social  
17 Security Act (*see* Tr.11-30).

18 In plaintiff’s Opening Brief, plaintiff raises the following issues: (1) Whether or  
19 not the ALJ erred in rejecting the medical opinions of Mary Lemberg, M.D. and Michael  
20 W. Johnson, M.D.; and (2) Whether or not the ALJ’s errors were harmless (*see* ECF No.  
21 11, p. 1).

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1 A. Examining Psychiatrist, Dr. Mary Lemberg, M.D.

2 Dr. Lemberg examined plaintiff at the request of the Administration (*see* Tr. 376-  
3 83). She indicated that she reviewed a psychiatric evaluation from May, 2010 (*see* Tr.  
4 376). Dr. Lemberg took a detailed history (*see* Tr. 376-79). She also conducted a mental  
5 status examination (*see* Tr. 379-80). For example, she observed that plaintiff was  
6 nervous, more so at the beginning of the examination, and also observed that plaintiff's  
7 hands were shaking (*see* Tr. 379). Dr. Lemberg observed that plaintiff correctly followed  
8 a 3-step command, but demonstrated "some worry that she was performing it incorrectly"  
9 (Tr. 380). Regarding her ability to spell world backwards, she had a "score of 3/5 on her  
10 first attempt; [but] she ma[de] two other attempts after self-correcting herself and does  
11 finally do this correctly" (*see id.*). Regarding plaintiff's activities of daily living, among  
12 other things, Dr. Lemberg noted that plaintiff "only shops at one store where she knows  
13 all the employees" (*see id.*). She also noted that plaintiff reported that "she does not  
14 watch TV because it overwhelms her and does not make sense" (*see* Tr. 381).

16 Among other diagnoses, Dr. Lemberg diagnosed plaintiff with "Bipolar I disorder,  
17 most recent episode depressed, severe, rule out schizoaffective disorder;" panic disorder  
18 with agoraphobia; and, social phobia (*see id.*). Dr. Lemberg opined that plaintiff was  
19 suffering from "fairly significant symptoms that limit her ability to function at times"  
20 (*see id.*). Dr. Lemberg also opined that plaintiff's "condition will not likely improve  
21 further within the next 12 months" (*id.*). Dr. Lemberg opined that plaintiff "would find it  
22 difficult to adapt to new environments" and Dr. Lemberg specified that this opinion was  
23 "based on our interview today and mental status exam" (*see* Tr. 382). Dr. Lemberg  
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1 further opined that plaintiff “cannot perform work activities on a consistent basis or  
2 complete a normal workweek without problematic interruption from her psychiatric  
3 conditions after working for a period of time” (*see id.*). Dr. Lemberg indicated that she  
4 anticipated that plaintiff “would have significant difficulty dealing with the usual stress  
5 encountered in a competitive work environment” (*see id.*).

6 The ALJ gave “little weight to Dr. Lemberg’s statements that the claimant would  
7 not be able to work on a consistent basis and would have significant difficulty dealing  
8 with the stress of a competitive work environment” (*see Tr. 23*). The ALJ provided two  
9 reasons for giving little weight to these opinions by Dr. Lemberg (*see id.*). First, the ALJ  
10 indicated that these opinions from Dr. Lemberg appear to be an “overstatement of the  
11 claimant’s limitations based on a snapshot of the claimant’s individual functioning” (*see*  
12 *id.*).

14 If the ALJ was discrediting the opinions from Dr. Lemberg on the basis of a  
15 “snapshot” of plaintiff’s functioning at one examination in favor of a doctor who  
16 examined plaintiff more than once, or in favor of a treating doctor, this reason would  
17 have some legitimacy. However, for her RFC determination, the ALJ relied on two state  
18 agency psychological consultants who never examined plaintiff, but only reviewed her  
19 records (*see Tr. 22-23; see also Tr. 19*). In addition, plaintiff’s impairments are mental  
20 impairments, which are more amenable to evaluation by an in-person examination. *See*  
21 Paula T. Trzepacz and Robert W. Baker, *The Psychiatric Mental Status Examination 3*  
22 (Oxford University Press 1993) (“experienced clinicians attend to detail and subtlety in  
23 behavior, such as the affect accompanying thought or ideas, the significance of gesture or  
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1 mannerism, and the unspoken message of conversation”). Therefore, the fact that Dr.  
2 Lemberg examined plaintiff only once and had only a “snapshot” of her functioning is  
3 not a legitimate reason for the ALJ’s failure to credit fully the opinion of examining  
4 psychiatrist Dr. Lemberg in favor of opinions from nonexamining doctors. According to  
5 the Ninth Circuit, an examining physician’s opinion is “entitled to greater weight than the  
6 opinion of a nonexamining physician.” *Lester, supra*, 81 F.3d at 830 (citations omitted);  
7 *see also* 20 C.F.R. § 404.1527(c)(1) (“Generally, we give more weight to the opinion of a  
8 source who has examined you than to the opinion of a source who has not examined  
9 you”).

11 The second reason provided by the ALJ for her failure to credit fully some of the  
12 opinions of Dr. Lemberg was the ALJ’s finding that Dr. Lemberg’s opinion “relies  
13 heavily on the claimant’s subjective report of her symptoms” (*see* Tr. 23). The ALJ  
14 provides no evidence for this finding. Based on a review of the relevant record, there  
15 does not appear to be substantial evidence in support of this finding by the ALJ of a  
16 heavy reliance by Dr. Lemberg on plaintiff’s subjective report. Furthermore, the Court  
17 notes that when opining that plaintiff “would find it difficult to adapt to new  
18 environments,” Dr. Lemberg specified that this opinion was “based on our interview  
19 today and mental status exam” (*see* Tr. 382). Although Dr. Lemberg did not indicate  
20 specifically the basis for her opinions regarding plaintiff’s inability to work on a  
21 consistent basis and her significant difficulty dealing with stress and competitive work  
22 environment, the finding by the ALJ that these opinions were “heavily” based on  
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1 | plaintiff's subjective report is not a logical inference based on the record, but appears to  
2 | be mere speculation.

3 |         An ALJ may "draw inferences logically flowing from the evidence." *Sample v.*  
4 | *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1999) (citing *Beane v. Richardson*, 457 F.2d 758  
5 | (9th Cir. 1972); *Wade v. Harris*, 509 F. Supp. 19, 20 (N.D. Cal. 1980)). However, an ALJ  
6 | may not speculate. *See* SSR 86-8, 1986 SSR LEXIS 15 at \*22.

7 |         Furthermore, the MSE is not generally considered "subjective." "Like the physical  
8 | examination, the Mental Status Examination is termed the *objective* portion of the patient  
9 | evaluation." Paula T. Trzepacz and Robert W. Baker, *The Psychiatric Mental Status*  
10 | *Examination 4* (Oxford University Press 1993) (emphasis in original). Therefore,  
11 | characterizing Dr. Lemberg's conclusions as largely based on plaintiff's subjective  
12 | statements fails to account for the objective finding in the MSE.

14 |         B. Treating physician, Dr. Michael W. Johnson. M.D.

15 |         Dr. Johnson provided an opinion regarding plaintiff's ability to function on June 3,  
16 | 2011 (*see* Tr. 394-95; *see generally* Tr. 392-95). He indicated his opinion that she  
17 | suffered from anxiety; panic attacks; agoraphobia; and bipolar disorder (*see* Tr. 394). He  
18 | indicated that she had specific limitations with respect to following instructions and he  
19 | specified that her limitation with respect to interacting with people was "severe" (*see id.*).  
20 | When asked to indicate on the form how many hours per week that plaintiff was capable  
21 | of working, he checked the box for 0 hours, indicating that she was "unable to  
22 | participate" (*see id.*). He also indicated that plaintiff suffered from limitations in activities  
23 | related to preparing for work and looking for work, including her agoraphobia and her  
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1 memory issues (*see id.*). Again, he indicated that the amount of time that she could  
2 engage in these activities was zero hours, indicating that she was “unable to participate”  
3 (*see id.*). Dr. Johnson opined that plaintiff’s condition likely would limit her ability to  
4 work and look for work on a permanent basis (*see Tr. 395*).

5         The ALJ gave “less weight” to the opinions of Dr. Johnson for two stated reasons  
6 (*see Tr. 23*). First, the ALJ found that Dr. Johnson’s opinion “was based on a brief  
7 treatment relationship, which was insufficient to assess the claimant’s functional  
8 limitations,” noting that Dr. Johnson rendered his opinion at his first office visit (*see id.*).

9         Again, as the ALJ relied for her RFC determination on the opinions of state  
10 agency medical consultants who had no opportunity to assess firsthand plaintiff’s  
11 limitations, and because plaintiff’s impairments are mental impairments, this reason is  
12 not a legitimate reason to discount the opinions of plaintiff’s treating physician in favor  
13 of the opinions of nonexamining doctors. *See Lester, supra*, 81 F.3d at 830 (citations  
14 omitted) (an examining physician’s opinion is “entitled to greater weight than the opinion  
15 of a nonexamining physician”); *see also* 20 C.F.R. § 404.1527(c)(1) (“Generally, we give  
16 more weight to the opinion of a source who has examined you than to the opinion of a  
17 source who has not examined you”).

18         The only other reason offered by the ALJ for her failure to credit fully the  
19 opinions of Dr. Johnson was her finding that “[b]ecause the treatment relationship was so  
20 brief, Dr. Johnson must have relied heavily on the claimant’s subjective report of her  
21 symptoms” (*see Tr. 23*). Again, the ALJ provides no evidence for her finding that  
22 plaintiff’s treating physician relied heavily on plaintiff’s subjective reports other than the  
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1 fact that he provided his opinion on his first examination of plaintiff. This is not  
2 substantial evidence in support of this finding. Again, the ALJ appears not to have made  
3 a logical inference, but instead appears to be speculating. *See* SSR 86-8, 1986 SSR  
4 LEXIS 15 at \*22 (an ALJ may not speculate).

5 (2) **Whether or not the ALJ's errors were harmless.**

6 A. Dr. Lemberg

7 Dr. Lemberg opined that plaintiff "cannot perform work activities on a consistent  
8 basis or complete a normal workweek without problematic interruption from her  
9 psychiatric conditions after working for a period of time" (*see* Tr. 382). Dr. Lemberg  
10 indicated that she anticipated that plaintiff "would have significant difficulty dealing with  
11 the usual stress encountered in a competitive work environment" (*see id.*).

12 The ALJ failed to incorporate these limitations into plaintiff's RFC (*see* Tr. 19).  
13 Had the ALJ done so, plaintiff's RFC would have been determined to be very different  
14 and likely would have led to a finding of disability. Therefore, the ALJ's error in her  
15 review of the opinions of Dr. Lemberg is not harmless error.

16 B. Dr. Johnson

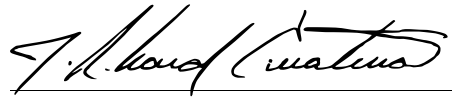
17 Dr. Johnson opined that plaintiff was not capable of working any hours per week  
18 due to her inability to follow instructions and her severe limitation interacting with  
19 people (*see* Tr. 394). Obviously, had these opinions been credited fully, plaintiff's RFC  
20 would have been determined to be very different, and she likely would have been found  
21 to be disabled. Therefore the ALJ's error in the evaluation of the opinions of Dr. Johnson  
22 is not harmless error.  
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1 CONCLUSION

2 Based on the stated reasons and the relevant record, the Court **ORDERS** that this  
3 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §  
4 405(g) to the Acting Commissioner for further proceedings consistent with this Order.

5 **JUDGMENT** should be for plaintiff and the case should be closed.

6 Dated this 23<sup>rd</sup> day of September, 2014.

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9 J. Richard Creatura  
10 United States Magistrate Judge  
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