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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON

8 MISTY L.E. CLINE,

9 Plaintiff,

10 v.

11 NANCY A. BERRYHILL, Acting
12 Commissioner of Social Security,

13 Defendant.¹

NO. C16-5722-JPD

ORDER AFFIRMING THE
COMMISSIONER

14 Plaintiff Misty L.E. Cline appeals the final decision of the Commissioner of the Social
15 Security Administration (“Commissioner”) which denied her applications for Disability
16 Insurance Benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-33,
17 after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below,
18 the Commissioner’s decision is AFFIRMED.

19 I. FACTS AND PROCEDURAL HISTORY

20 At the time of the administrative hearing, plaintiff was a thirty-five year old woman
21 with a college education. Administrative Record (“AR”) at 27, 41. Her past work experience
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23 ¹ Nancy A. Berryhill is now the Acting Commissioner of the Social Security
24 Administration. Pursuant to Federal Rule of Civil Procedure 25(d), Nancy A. Berryhill is
substituted for Carolyn W. Colvin as defendant in this suit. The Clerk is directed to update the
docket, and all future filings by the parties should reflect this change.

1 includes employment as a sales clerk, loss prevention/store detective, customer sales clerk, and
2 receptionist. 42-46, 56. Plaintiff was last gainfully employed in April 2012. AR at 42.

3 On July 4, 2013, plaintiff filed an application for DIB, alleging an onset date of May 1,
4 2011. AR at 13. The Commissioner denied plaintiff's claim initially and on reconsideration.
5 AR at 13, 63-72, 74-84. Plaintiff requested a hearing, which took place on February 3, 2015.
6 AR at 34-61. During the hearing, plaintiff amended her alleged onset date to May 1, 2012.
7 AR at 37. Plaintiff asserts that she is disabled due to fibromyalgia, obesity, asthma, status post
8 left knee surgery with chondromalacia of the patella, depression, and headaches/migraines.
9 AR at 15-16.

10 On May 12, 2015, the ALJ issued a decision finding plaintiff not disabled and denied
11 benefits based on her finding that plaintiff could perform a specific job existing in significant
12 numbers in the national economy. AR at 10-28. The Appeals Council denied plaintiff's
13 request for review, AR at 1-6, making the ALJ's ruling the "final decision" of the
14 Commissioner as that term is defined by 42 U.S.C. § 405(g). On August 22, 2016, plaintiff
15 timely filed the present action challenging the Commissioner's decision. Dkt. 3.

16 II. JURISDICTION

17 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
18 405(g) and 1383(c)(3).

19 III. STANDARD OF REVIEW

20 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
21 social security benefits when the ALJ's findings are based on legal error or not supported by
22 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
23 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
24 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

1 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
2 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
3 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
4 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
5 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
6 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
7 susceptible to more than one rational interpretation, it is the Commissioner’s conclusion that
8 must be upheld. *Id.*

9 The Court may direct an award of benefits where “the record has been fully developed
10 and further administrative proceedings would serve no useful purpose.” *McCartey v.*
11 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
12 (9th Cir. 1996)). The Court may find that this occurs when:

13 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
14 claimant’s evidence; (2) there are no outstanding issues that must be resolved
15 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 if he
considered the claimant’s evidence.

16 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
17 erroneously rejected evidence may be credited when all three elements are met).

18 IV. EVALUATING DISABILITY

19 As the claimant, Ms. Cline bears the burden of proving that she is disabled within the
20 meaning of the Social Security Act (the “Act”). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th
21 Cir. 1999) (internal citations omitted). The Act defines disability as the “inability to engage in
22 any substantial gainful activity” due to a physical or mental impairment which has lasted, or is
23 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§
24 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments

1 are of such severity that she is unable to do her previous work, and cannot, considering her age,
2 education, and work experience, engage in any other substantial gainful activity existing in the
3 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-
4 99 (9th Cir. 1999).

5 The Commissioner has established a five step sequential evaluation process for
6 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
7 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
8 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
9 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
10 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
11 §§ 404.1520(b), 416.920(b).² If she is, disability benefits are denied. If she is not, the
12 Commissioner proceeds to step two. At step two, the claimant must establish that she has one
13 or more medically severe impairments, or combination of impairments, that limit her physical
14 or mental ability to do basic work activities. If the claimant does not have such impairments,
15 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
16 impairment, the Commissioner moves to step three to determine whether the impairment meets
17 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
18 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
19 twelve-month duration requirement is disabled. *Id.*

20 When the claimant’s impairment neither meets nor equals one of the impairments listed
21 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s

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23 ² Substantial gainful activity is work activity that is both substantial, i.e., involves
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §
404.1572.

1 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
2 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work
3 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
4 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is
5 true, then the burden shifts to the Commissioner at step five to show that the claimant can
6 perform other work that exists in significant numbers in the national economy, taking into
7 consideration the claimant’s RFC, age, education, and work experience. 20 C.F.R. §§
8 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the
9 claimant is unable to perform other work, then the claimant is found disabled and benefits may
10 be awarded.

11 V. DECISION BELOW

12 On May 12, 2015, the ALJ issued a decision finding the following:

- 13 1. The claimant meets the insured status requirements of the Social
14 Security Act through June 30, 2016.
- 15 2. The claimant has not engaged in substantial gainful activity since May
16 1, 2012, the alleged onset date.
- 17 3. The claimant has the following severe impairments: obesity, asthma,
18 fibromyalgia, status post left knee surgery with chondromalacia of the
19 patella, and depression.
- 20 4. The claimant does not have an impairment or combination of
21 impairments that meets or medically equals the severity of one of the
22 listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 23 5. After careful consideration of the entire record, the undersigned finds
24 that the claimant has the residual functional capacity to perform less
than the full range of light work, which is defined in 20 CFR
404.1567(b) as work involving lifting no more than 20 pounds at a
time with frequent lifting or carrying of objects weight up to 10
pounds, even though the weight lifted may be very little, a job is in
this category when it requires a good deal of walking or standing, or
when it involves sitting most of the time with some pushing and
pulling of arm or leg controls. The claimant can occasionally climb
ramps and stairs. She can have work that does not require climbing

1 ladders, ropes, or scaffolds. She can occasionally balance, stoop,
2 crouch, crawl, or kneel. The claimant can perform simple routine
3 tasks. She can have occasional public contact. She should avoid
concentrated exposure to extreme cold, vibration, fumes, gases, dust,
odors, and hazards.

4 6. The claimant is unable to perform any past relevant work.

5 7. The claimant was born on XXXXX, 1979 and was 31 years old, which
6 is defined as a younger individual age 18-49, on the alleged disability
onset date.³

7 8. The claimant has at least a high school education and is able to
communicate in English.

8 9. Transferability of job skills is not material to the determination of
9 disability because using the Medical-Vocational Rules as a framework
10 supports a finding that the claimant is “not disabled,” whether or not
the claimant has transferable job skills.

11 10. Considering the claimant’s age, education, work experience, and
12 residual functional capacity, there are jobs that exist in significant
numbers in the national economy that the claimant can perform.

13 11. The claimant has not been under a disability, as defined in the Social
Security Act, from May 1, 2012, through the date of this decision.

14 AR at 15-28.

15 VI. ISSUE ON APPEAL

16 The sole issue on appeal is:

17 1. Did the ALJ err by rejecting the opinion of plaintiff’s treating physician, Jamie
18 Gerber, M.D.?

19 Dkt. 11 at 1; Dkt. 12 at 1.

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24 ³ The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.

1 VII. DISCUSSION

2 A. The ALJ Did Not Err in Evaluating the Medical Opinion Evidence

3 I. *Standards for Reviewing Medical Evidence*

4 As a matter of law, more weight is given to a treating physician’s opinion than to that
5 of a non-treating physician because a treating physician “is employed to cure and has a greater
6 opportunity to know and observe the patient as an individual.” *Magallanes v. Bowen*, 881 F.2d
7 747, 751 (9th Cir. 1989); *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating
8 physician’s opinion, however, is not necessarily conclusive as to either a physical condition or
9 the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted.
10 *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining
11 physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not
12 contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*,
13 157 F.3d 715, 725 (9th Cir. 1988). “This can be done by setting out a detailed and thorough
14 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
15 making findings.” *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than
16 merely state his/her conclusions. “He must set forth his own interpretations and explain why
17 they, rather than the doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22
18 (9th Cir. 1988)). Such conclusions must at all times be supported by substantial evidence.
19 *Reddick*, 157 F.3d at 725.

20 The opinions of examining physicians are to be given more weight than non-examining
21 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Like treating physicians, the
22 uncontradicted opinions of examining physicians may not be rejected without clear and
23 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining
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1 physician only by providing specific and legitimate reasons that are supported by the record.
2 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

3 Opinions from non-examining medical sources are to be given less weight than treating
4 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
5 opinions from such sources and may not simply ignore them. In other words, an ALJ must
6 evaluate the opinion of a non-examining source and explain the weight given to it. Social
7 Security Ruling (“SSR”) 96-6p, 1996 WL 374180, at *2. Although an ALJ generally gives
8 more weight to an examining doctor’s opinion than to a non-examining doctor’s opinion, a
9 non-examining doctor’s opinion may nonetheless constitute substantial evidence if it is
10 consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947,
11 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632-33.

12 2. *Jamie Gerber, M.D.*

13 Dr. Gerber has been plaintiff’s treating primary care physician since June 2012, when
14 she began treating plaintiff for conditions unrelated to her disability. AR at 470 (treatment
15 note for heartburn and a dermatological issue). However, in October 2013 plaintiff reported
16 increasing pain in her back, knees, and neck in the last two months. AR at 530. She reported
17 that her pain “depends on the day the pain moves around and the weather is killing me.” AR at
18 530. With respect to her knee pain, she reported that it felt like “someone is screwing a screw
19 into her knee” and “when she walks it feels like her knee caps are shattering.” AR at 530. She
20 also reported occasional muscle spasms in her mid-back and neck. AR at 531. Dr. Gerber
21 noted that plaintiff has gained 26 pounds since January, and she does her “daily routine:
22 shopping getting the mail but no set physical activity.” AR at 531. However, plaintiff’s
23 physical examination was normal. AR at 532. Dr. Gerber assessed chondromalacia of patella,
24 arthritis of the knee, but noted her “primary encounter diagnosis” was “morbid obesity.” AR at

1 532-33. Dr. Gerber prescribed Vicodin as needed for pain, and referred plaintiff to physical
2 therapy. AR at 532.

3 In December 2013, plaintiff reported worsening back, knee, and neck pain, and new
4 head, arm, leg, and hand pain. AR at 523. She reported worse pain in her lower back, and
5 more mid-back muscle spasms. AR at 524. Plaintiff reported that she had not attended
6 physical therapy due to “transportation issues.” AR at 524. Plaintiff reported the pain, on a
7 scale of one to ten, was five on average with a maximum of eight due to “spikes” in pain. AR
8 at 524. Dr. Gerber did not perform a physical examination on this visit. AR at 525.

9 In February 2014, plaintiff reported continuing pain and wanted to discuss
10 fibromyalgia. AR at 581. She reported that she had done some research and believed she was
11 tender in the sites that were noted on a website discussing fibromyalgia, and was also having
12 trouble sleeping, staying asleep, and was experiencing overall body stiffness, low energy, and
13 headaches. AR at 582. Dr. Gerber performed a tender point exam, and found that “all tender
14 points except on the breast bone bilaterally are tender.” AR at 583. As a result, Dr. Gerber
15 found that plaintiff “does meet the criteria” and diagnosed fibromyalgia. AR at 584.

16 In May 2014, plaintiff reported continued pain complaints even on her Gabapentin
17 medication, which did not help on her “bad days.” AR at 576. Plaintiff stated she “would like
18 to get Vicodin in hands as needed.” AR at 578. Dr. Gerber did not conduct a physical
19 examination on this visit. AR at 578. Plaintiff reported that she has symptoms of anxiety and
20 depression, and has days she does not want to do anything. AR at 577. Plaintiff reported she
21 “has not worked in about 3 years. Applying for disability and needs paperwork filled out today
22 for lawyer.” AR at 577.

23 On May 15, 2014, Dr. Gerber completed a medical source statement. AR at 552-53. In
24 response to written questions by plaintiff’s lawyer, Dr. Gerber opined that plaintiff has chronic

1 pain in the low back, knees, and neck, and diagnoses of fibromyalgia and depression. AR at
2 552. Dr. Gerber wrote, “Due to this, she cannot sit or stand for prolonged periods (cannot sit
3 for more than 15-30 minutes at a time.” AR at 552. Dr. Gerber then circled that she
4 “agree[d]” with the statement that since taking Gabapentin, plaintiff has two or three “bad
5 days” every two weeks but on those days, her pain can reach a “10” and she cannot take care of
6 her own needs and must focus on getting comfortable and sleeping due to pain and fatigue.
7 AR at 553. She further opined that plaintiff’s depression contributes to fatigue and inability to
8 focus or maintain concentration and persistence, and that in addition to customary work breaks,
9 plaintiff would require unscheduled breaks of fifteen minutes or more. AR at 553. Dr. Gerber
10 indicated that plaintiff’s “clinically demonstrated impairments/diagnoses” that could be
11 expected to produce these symptoms included her fibromyalgia, morbid obesity, depression
12 with anxiety, and that her complaints are reasonable/credible in light of her diagnoses. AR at
13 553. Finally, Dr. Gerber opined that plaintiff would be absent from even sedentary work three
14 or more days per month. AR at 553.⁴

15 Plaintiff’s last visit with Dr. Gerber prior to the administrative hearing was on
16 December 11, 2014, when plaintiff continued to complain of knee, low back, and neck pain.
17 AR at 559. She reported that she bent down earlier that morning and hurt her back, and
18 although Zoloft was helping her depression she was still having down days and experiencing
19 pain in multiple sites over her body. AR at 559-60. She did report that taking 200mg of
20 Gabapentin three times daily was better for her, “definitely a difference,” although she
21 experiences some fatigue during the day. AR at 559. Dr. Gerber performed a physical
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23 ⁴ Plaintiff visited Dr. Gerber on July 28, 2014 due to sinus problems and ear pain, AR
24 at 569, and was not seen again for several months, until September 22, 2014 for a Vicodin
refill. AR at 564.

1 examination which revealed “mild paraspinal lumbar and thoracic spasms on the right,” no
2 spinal tenderness, normal range of motion, and pain with extension and lateral flexion. AR at
3 561.

4 The next month, in January 2015, Dr. Gerber updated her previous May 15, 2014
5 medical source statement by stating that “Misty’s pain frequency of flares can vary with time
6 of year and weather. In cold weather, pain days can be 4-6 times per 2 wks. In warmer
7 weather, it can decrease to 2-3 times per 2 weeks. Otherwise, no significant change in above
8 statement.” AR at 608.

9 The ALJ considered Dr. Gerber’s May 15, 2014 opinion and January 15, 2015
10 addendum, but ultimately gave them “very little weight” because “Dr. Gerber placed too much
11 reliance on the claimant’s less than credible complaints. As discussed throughout this
12 decision, the claimant is not an entirely credible source. Dr. Gerber did not examine the
13 claimant when giving her initial opinion, and appears to have instead relied on the claimant’s
14 allegations in the form of a letter prepared by the claimant’s representative.” AR at 26. By
15 contrast, the ALJ pointed out that when examining consultative physician Dr. Gaffield
16 provided his opinion, he had performed a detailed examination of plaintiff, reviewed treatment
17 notes, and reviewed medical imaging, and his opinion was largely consistent with that of non-
18 examining physician Dr. Thuline. AR at 26.⁵ As discussed below, the ALJ’s reasons for
19 rejecting Dr. Gerberg’s opinions were specific, legitimate, and supported by substantial
20 evidence in the record. The ALJ also did not err by affording more weight to the opinion of
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22 ⁵ The ALJ adopted Dr. Thuline’s opinion only in part because she rejected his opinion
23 that plaintiff could lift fifty pounds occasionally and twenty-five pounds frequently. AR at 25.
24 Instead, the ALJ adopted Dr. Gaffield’s opinion that plaintiff could lift no more than twenty
pounds occasionally and ten pounds frequently due to her obesity and back and shoulder
conditions, as Dr. Gaffield was an examining source and Dr. Thuline was not. AR at 25.

1 examining physician Dr. Gaffield, who opined that plaintiff could perform light work despite
2 her impairments.

3 First, the ALJ pointed out that Dr. Gerber's opinion that plaintiff could not stand or sit
4 for more than 15 to 30 minutes at a time was more limiting than even some of plaintiff's own
5 reports to providers. Specifically, the ALJ noted that this opinion conflicted with plaintiff's
6 report to Dr. Gaffield only a few months earlier that she could sit for an hour before moving
7 around. AR at 25, 512. The ALJ also noted that this opinion conflicted with Dr. Gaffield's
8 findings on physical examination, as Dr. Gaffield "did not observe this extreme degree of
9 dysfunction." AR at 25, 514-16. Second, the ALJ noted that "Dr. Gerber is not actually a
10 witness to any of [the] allegations" in the report regarding the severity of plaintiff's "bad days"
11 every two weeks, such as plaintiff's statement that on bad days she could not take care of
12 basic needs such as getting dressed and spends the whole day sleeping. AR at 25. The ALJ
13 found that "the claimant's allegations do not become credible simply because Dr. Gerber
14 agrees that the claimant does these things at home." AR at 25. Moreover, the ALJ noted that
15 plaintiff's reported functional limitations were "inconsistent with many of the earlier treatment
16 records," where plaintiff was treated for ear pain, a cough, and managing her obesity, but "did
17 not describe debilitating pain that precluded her from handling even basic care for entire days."
18 AR at 25.

19 The Court finds that, especially when Dr. Gerber's May 15, 2014 opinion is compared
20 with her treatment notes, the ALJ could reasonably conclude that Dr. Gerber failed to
21 adequately explain and support her opinions regarding plaintiff's physical limitations, and was
22 therefore presumably relying heavily on the claimant's statements regarding her limitations in
23 standing, walking, and self-care, rather than Dr. Gerber's own clinical findings on
24 examination. This was a specific and legitimate reason for the ALJ to reject Dr. Gerber's

1 opinion, because the ALJ declined to adopt plaintiff's testimony and plaintiff does not assign
2 error to this aspect the ALJ's decision. As noted above, Dr. Gerber often did not conduct
3 physical examinations of plaintiff during her appointments, and even when Dr. Gerber did
4 examine plaintiff, plaintiff's physical examinations often showed only "mild" or "normal"
5 results. The ALJ could also reasonably conclude that if plaintiff was unable to manage her
6 personal care for days due to her pain symptoms, she likely would have reported her struggles
7 during one of plaintiff's earlier visits with Dr. Gerber. AR at 25.


8 With respect to Dr. Gerber's opinion that depression and fatigue made plaintiff unable
9 to focus her attention or maintain concentration or task persistence, the ALJ found that "Dr.
10 Gerber deferred on performing an examination of the claimant on the date that she filled out
11 this form. Dr. Gerber does not adequately explain the basis for this opinion." AR at 25.

12 Moreover, the ALJ found this conclusion inconsistent with other record evidence, such as the
13 fact that plaintiff "reported improvement in her mental functioning with Zoloft within 12
14 months. The claimant did not seek mental counseling. The claimant was also taking college
15 level courses in photography." AR at 25. As a result, the ALJ found that "Dr. Gerber's
16 finding is inconsistent with the treatment records and the claimant's activities." AR at 25. The
17 ALJ did not err in reaching this conclusion, as inconsistency with the treatment records and
18 plaintiff's activities are specific and legitimate reasons to reject a physician's opinions.

19 Finally, with respect to Dr. Gerber's January 15, 2015 addendum, the ALJ noted that
20 Dr. Gerber had examined plaintiff "only weeks prior to giving this addendum," and "it was in
21 that visit that the claimant reported improvement with Zoloft and she also reported that she had
22 only used pain medication once in the preceding month." AR at 26. Thus, the ALJ found that
23 Dr. Gerber failed to provide an explanation as to the basis of her opinion, which appeared
24 inconsistent with her own treatment notes. The ALJ noted that when Dr. Gerber examined

1 interpretation. For the foregoing reasons, the Commissioner's decision is AFFIRMED.

2 DATED this 5th day of April, 2017.

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5 JAMES P. DONOHUE
6 Chief United States Magistrate Judge
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