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2 UNITED STATES DISTRICT COURT  
3 WESTERN DISTRICT OF WASHINGTON  
4 AT TACOMA

5 SHEILA JONES,

6 Plaintiff,

7 v.

8 NANCY A. BERRYHILL, Acting  
9 Commissioner of Social Security,

10 Defendant.

CASE NO. C17-05089BHS

ORDER REVERSING AND  
REMANDING THE  
COMMISSIONER'S DECISION

11 **I. BASIC DATA**

12 Type of Benefits Sought:

13 (X) Disability Insurance

14 ( ) Supplemental Security Income

15 Plaintiff's:

16 Sex: Female

17 Age: 37 at alleged onset date

18 Principal Disabilities Alleged by Plaintiff: Obsessive compulsive disorder, depression,  
19 anxiety, chronic fatigue, spherocytosis, right arm numbness, and leg and ankle pain

20 Disability Allegedly Began: August 1, 2013

21 Principal Previous Work Experience: Food sales clerk, stock clerk, cashier, waitress,  
22 laundry worker

Education Level Achieved by Plaintiff: 10th grade

1 **II. PROCEDURAL HISTORY—ADMINISTRATIVE**

2 Before ALJ James W. Sherry:

3 Date of Hearing: June 5, 2015; hearing transcript AR 29-64

4 Date of Decision: July 10, 2015

5 Appears in Record at: AR 12-23

6 Summary of Decision:

7 The claimant has not engaged in substantial gainful activity since  
8 August 1, 2013, the alleged onset date. The claimant has the  
9 following severe impairments: mild degenerative disc disease of the  
10 lumbar spine, multiple sclerosis, leukocytosis, thrombocytosis,  
11 obesity, major depressive disorder, anxiety disorder, and alcohol  
12 abuse. The claimant does not have an impairment or combination of  
13 impairments that meets or medically equals the severity of one of the  
14 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1.

15 The claimant has the residual functional capacity (“RFC”) to  
16 perform light work as defined in 20 C.F.R. § 404.1567(b) except she  
17 can lift no more than 20 pounds at a time; frequently lift and/or carry  
18 10 pounds; stand and walk for six hours in an eight-hour workday;  
19 sit for six hours in an eight-hour workday; push and pull with the  
20 upper extremities within the lifting restrictions; never climb ladders,  
21 ropes, or scaffolds; occasionally climb ramps or stairs, balance,  
22 stoop, crouch, kneel, and crawl; and frequently handle, perform  
gross manipulation bilaterally, and finger. The claimant should  
avoid concentrated exposure to hazards, such as working around  
moving machinery or at unprotected heights. The claimant can  
understand and remember simple job instructions and perform  
simple, routine, and repetitive tasks. She can perform jobs that  
require only occasional decision making and changes in the work  
setting. The claimant can maintain attention and concentration for  
two-hour intervals to complete those tasks without more than the  
normally expected brief interruptions or being off task less than 10  
percent of the time. She can have occasional, superficial interaction  
with the public and superficial interaction with coworkers and  
supervisors.

1 The claimant is unable to perform any past relevant work.  
2 Considering the claimant's age, education, work experience, and  
3 RFC, there are jobs existing in significant numbers in the national  
4 economy that the claimant can perform. Therefore, the claimant has  
5 not been under a disability, as defined in the Social Security Act,  
6 from August 1, 2013, through the date of the decision.

7 Before Appeals Council:

8 Date of Decision: December 9, 2016

9 Appears in Record at: AR 1-7

10 Summary of Decision: Declined review

### 11 **III. PROCEDURAL HISTORY—THIS COURT**

12 Jurisdiction based upon: 42 U.S.C. § 405(g)

13 Brief on Merits Submitted by (X) Plaintiff (X) Commissioner

### 14 **IV. STANDARD OF REVIEW**

15 Pursuant to 42 U.S.C. § 405(g), the Court may set aside the Commissioner's  
16 denial of Social Security benefits when the ALJ's findings are based on legal error or not  
17 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d  
18 1211, 1214 n.1 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than  
19 a preponderance, and is such relevant evidence as a reasonable mind might accept as  
20 adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971);  
21 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for  
22 determining credibility, resolving conflicts in medical testimony, and resolving any other  
ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

While the Court is required to examine the record as a whole, it may neither reweigh the

1 evidence nor substitute its judgment for that of the ALJ. *See Thomas v. Barnhart*, 278  
2 F.3d 947, 954 (9th Cir. 2002). “Where the evidence is susceptible to more than one  
3 rational interpretation, one of which supports the ALJ’s decision, the ALJ’s conclusion  
4 must be upheld.” *Id.*

## 5 **V. EVALUATING DISABILITY**

6 The claimant, Sheila Jones (“Jones”), bears the burden of proving that she is  
7 disabled within the meaning of the Social Security Act (“Act”). *Meanel v. Apfel*, 172  
8 F.3d 1111, 1113 (9th Cir. 1999). The Act defines disability as the “inability to engage in  
9 any substantial gainful activity” due to a physical or mental impairment which has lasted,  
10 or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C.  
11 § 423(d)(1)(A). A claimant is disabled under the Act only if her impairments are of such  
12 severity that she is unable to do her previous work, and cannot, considering her age,  
13 education, and work experience, engage in any other substantial gainful activity existing  
14 in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d  
15 1094, 1098-99 (9th Cir. 1999).

16 The Commissioner has established a five-step sequential evaluation process for  
17 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R.  
18 § 416.920. The claimant bears the burden of proof during steps one through four.  
19 *Valentine v. Comm’r, Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). At step five,  
20 the burden shifts to the Commissioner. *Id.*

1 **VI. ISSUES ON APPEAL**

- 2 1. Did the ALJ err in assessing Jones’s testimony?  
3 2. Did the ALJ err in assessing the lay witness testimony in the record?

4 **VII. DISCUSSION**

5 Jones appeals the Commissioner’s decision denying her disability benefits,  
6 arguing that the ALJ committed several errors requiring reversal. Dkt. 11. The Court  
7 addresses the alleged errors in turn.

8 **A. Jones’s Testimony**

9 Jones argues that the ALJ erred in evaluating her testimony. *See* Dkt. 11 at 3-10.  
10 The Court agrees.

11 Questions of credibility are solely within the control of the ALJ. *See Sample v.*  
12 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). The Court should not “second-guess” this  
13 credibility determination. *Allen v. Heckler*, 749 F.2d 577, 580 (9th Cir. 1984). Unless  
14 affirmative evidence shows the claimant is malingering, an ALJ’s reasons for rejecting  
15 the claimant’s testimony must be “clear and convincing.” *Lester v. Chater*, 81 F.3d 821,  
16 834 (9th Cir. 1996).

17 Here, the ALJ discounted Jones’s testimony regarding both her physical and  
18 mental symptoms because her complaints were not substantiated by the objective medical  
19 evidence. *See* AR 18-19. However, a claimant’s pain testimony may not be rejected  
20 “solely because the degree of pain alleged is not supported by objective medical  
21 evidence.” *Orteza v. Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1995) (quoting *Bunnell v.*  
22 *Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991) (*en banc*)) (emphasis added); *see also*

1 | *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001); *Fair v. Bowen*, 885 F.2d 597,  
2 | 601 (9th Cir. 1989). The same is true with respect to a claimant’s other subjective  
3 | complaints. *See Byrnes v. Shalala*, 60 F.3d 639, 641-42 (9th Cir. 1995) (finding that  
4 | while holding in *Bunnell* was couched in terms of subjective complaints of pain, its  
5 | reasoning extended to claimant’s non-pain complaints as well). The Ninth Circuit found  
6 | that to allow otherwise “‘would render meaningless’ the requirement that” the ALJ  
7 | “consider all relevant evidence,” not just that which is medical. *Bunnell*, 947 F.2d at 347  
8 | (citation omitted).

9 |         The ALJ in fact stated in his opinion that “ whenever statements about the  
10 | intensity, persistence, or functionally limiting effects of pain or other symptoms are not  
11 | substantiated by objective medical evidence, the undersigned must make a finding on the  
12 | credibility of the statements based on a consideration of the entire case record.” AR 18.  
13 | Therefore, the ALJ erred by failing to provide any reason to discount Jones’s testimony  
14 | other than the inconsistency between that testimony and the medical evidence.<sup>1</sup>

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17 |         <sup>1</sup> In the course of discussing how the objective medical evidence did not support the level of  
18 | debilitation to which Jones testified, the ALJ stated that “[i]t is also of note that the claimant rarely  
19 | received emergency treatment and never received extended inpatient treatment for exacerbation of any  
20 | physical or mental impairments.” *See* AR 21. Even were to the Court to infer that the ALJ here provided  
21 | a distinct reason to discount Jones’s testimony, that reason is not legitimate and supported by substantial  
22 | evidence. A claimant’s statements “may be less credible if the level or frequency of treatment is  
inconsistent with the level of complaints.” Social Security Ruling (“SSR”) 96-7p, 1996 WL 374186 \*7.  
However, the Ninth Circuit has recognized that mental illness itself can be an impediment to seeking or  
following treatment, one for which the claimant should not be discredited. *See Nguyen v. Chater*, 100 F.3d  
1462, 1465, 1467 (9th Cir. 1996). Here, Jones described how her anxiety prevented her from seeking  
counseling in addition to taking medication. *See* AR 53. Regarding her physical impairments, the ALJ  
outlined Jones’s repeated attempts to receive effective treatment. *See* AR 18-19. For the ALJ then to  
expect more intense treatment is simply another way of saying that Jones’s complaints are inconsistent  
with the medical evidence, which is not alone a permissible reason to discount her complaints.

1 The Ninth Circuit has “recognized that harmless error principles apply in the  
2 Social Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)  
3 (citing *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006)  
4 (collecting cases)). The Ninth Circuit noted that “in each case we look at the record as a  
5 whole to determine [if] the error alters the outcome of the case.” *Id.* The Ninth Circuit  
6 has “adhered to the general principle that an ALJ’s error is harmless where it is  
7 ‘inconsequential to the ultimate nondisability determination.’” *Id.* (quoting *Carmickle v.*  
8 *Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)) (other citations  
9 omitted). The court noted the necessity to follow the rule that courts must review cases  
10 “‘without regard to errors’ that do not affect the parties’ ‘substantial rights.’” *Id.* at 1118  
11 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

12 Had the ALJ fully credited Jones’s testimony, the RFC would have included  
13 additional limitations, as would the hypothetical questions posed to the vocational expert.  
14 As the ALJ’s ultimate determination regarding disability was based on the testimony of  
15 the vocational expert on the basis of an improper hypothetical question, this error affected  
16 the ultimate disability determination and is not harmless.

#### 17 **B. Lay Witness Evidence**

18 Jones argues that the ALJ erred in evaluating the lay witness testimony of her  
19 husband, her father, and her friend. *See* Dkt. 11 at 10-12. The Court agrees.

20 The Commissioner argues only that any error in the ALJ’s evaluation of the lay  
21 witness testimony was harmless because each of the witnesses testified to the same  
22 limitations to which Jones testified, and when that occurs, the ALJ’s valid reasons for

1 rejecting the claimant’s testimony apply equally well to the lay witness testimony. *See*  
2 Dkt. 12 at 7-8 (citing *Molina*, 674 F.3d at 1117). However, as described above, the ALJ  
3 did not provide a valid reason for discounting Jones’s testimony. *See supra* § VII.A.  
4 Therefore, the ALJ must re-evaluate the lay witness testimony on remand as well.

5 **C. The RFC and Step-Five Finding**

6 Jones argues that the ALJ’s RFC assessment and step-five finding are not  
7 supported by substantial evidence due to the aforementioned errors. *See* Dkt. 11 at 12.  
8 As discussed above, because the ALJ erred in assessing Jones’s testimony and the lay  
9 testimony, the RFC analysis was not complete, and the ALJ’s step-five determination is  
10 not supported by substantial evidence and is in error.

11 The Court may remand this case “either for additional evidence and findings or to  
12 award benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when  
13 the Court reverses an ALJ’s decision, “the proper course, except in rare circumstances, is  
14 to remand to the agency for additional investigation or explanation.” *Benecke v.*  
15 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). Thus, it is “the unusual  
16 case in which it is clear from the record that the claimant is unable to perform gainful  
17 employment in the national economy,” that “remand for an immediate award of benefits  
18 is appropriate.” *Id.*

19 Benefits may be awarded where “the record has been fully developed” and  
20 “further administrative proceedings would serve no useful purpose.” *Smolen*, 80 F.3d at  
21 1292; *Holohan v. Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits  
22 should be awarded where:



1 (1) the ALJ has failed to provide legally sufficient reasons for rejecting  
2 [the claimant's] evidence, (2) there are no outstanding issues that must  
3 be resolved 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.

4 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir.  
5 2002). Here, issues still remain regarding conflicts between the medical evidence and  
6 other testimony over Jones's functional capabilities and her ability to perform work  
7 despite any additional functional limitations. Accordingly, remand for further  
8 consideration is warranted in this matter.

9 **VIII. ORDER**

10 Therefore, it is hereby **ORDERED** that the Commissioner's final decision  
11 denying Jones disability benefits is **REVERSED AND REMANDED**.

12 Dated this 9<sup>th</sup> day of August, 2017.

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BENJAMIN H. SETTLE  
15 United States District Judge