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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 TINA MARIE JOHNSON,

9 Plaintiff,

10 v.

11 NANCY A. BERRYHILL, Deputy
Commissioner of Social Security for
Operations,

12 Defendant.

CASE NO. C17-5623-MAT

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

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14 Plaintiff Tina Marie Johnson proceeds through counsel in her appeal of a final decision of
15 the Commissioner of the Social Security Administration (Commissioner). The Commissioner
16 denied Plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an
17 Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative
18 record (AR), and all memoranda of record, this matter is REVERSED and REMANDED for
19 further administrative proceedings.

20 **FACTS AND PROCEDURAL HISTORY**

21 Plaintiff was born on XXXX, 1967.¹ She has a GED, and previously worked as an
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23 ¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

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1 accountant and data entry operator. (AR 256.)

2 Plaintiff applied for DIB in November 2013. (AR 234-37.) That application was denied
3 and Plaintiff timely requested a hearing. (AR 156-62, 164-73.)

4 On November 19, 2015, ALJ Marilyn Mauer held a hearing, taking testimony from
5 Plaintiff and a vocational expert (VE). (AR 38-75.) On February 18, 2016, the ALJ issued a
6 decision finding Plaintiff not disabled between March 14, 2012 (the day after entrance of Plaintiff's
7 prior administratively final ALJ decision finding her not disabled) and September 3, 2014, but
8 disabled as of September 4, 2014. (AR 31-48.) Plaintiff timely appealed. The Appeals Council
9 denied Plaintiff's request for review on June 13, 2017 (AR 1-6), making the ALJ's decision the
10 final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to
11 this Court.

12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
17 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not
18 engaged in substantial gainful activity since the alleged onset date. (AR 33.) At step two, it must
19 be determined whether a claimant suffers from a severe impairment. The ALJ found severe
20 Plaintiff's obstructive sleep apnea, degenerative disc disease of the lumbar and thoracic spine,
21 status post cervical fusion, depressive disorder, and posttraumatic stress disorder. (AR 34-35.)
22 Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ
23 found that Plaintiff's impairments did not meet or equal the criteria of a listed impairment. (AR

1 35-36.)

2 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
3 residual functional capacity (RFC) and determine at step four whether the claimant has
4 demonstrated an inability to perform past relevant work. The ALJ found that before September 4,
5 2014 (the onset of disability), Plaintiff had the RFC to perform sedentary work with additional
6 limitations. She could lift 10 pounds occasionally and less than 10 pounds frequently. She could
7 sit, stand, and walk for six hours each in an eight-hour workday, but required the option to alternate
8 between sitting and standing every two hours. She could never climb ladders, ropes, or scaffolds.
9 She could occasionally climb ramps and stairs. She could frequently balance. She could
10 occasionally stoop, crouch, kneel, and crawl. She could occasionally reach overhead. She must
11 avoid all exposure to hazards, such as unprotected heights and large, moving equipment. She
12 could perform simple instructions in a setting that allows for variable concentration, attention, and
13 pace throughout the day (i.e., she could "work in a setting with no strict production pace so long
14 as adequate work is completed by the end of the workday or workweek"). (AR 36.) She could
15 work in a setting with no public contact or teamwork assignments, and occasional co-worker and
16 supervisory contact. (*Id.*) Beginning on September 4, 2014, she would have the same RFC as
17 described above, but could only perform simple instructions for up to 2/3 of a workday, and would
18 be off-task for the remainder of the day. (AR 44.) The ALJ found that since her alleged onset
19 date, Plaintiff had been unable to perform any past work. (AR 45.)

20 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to
21 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an
22 adjustment to work that exists in significant levels in the national economy. The ALJ found that
23 before September 4, 2014, Plaintiff could perform representative occupations such as surveillance

1 system monitor and document preparer. (AR 46.) Beginning on September 4, 2014, Plaintiff
2 could not perform any jobs that exist in significant levels in the national economy. (AR 47.)

3 This Court's review of the ALJ's decision is limited to whether the decision is in
4 accordance with the law and the findings supported by substantial evidence in the record as a
5 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
6 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
7 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
8 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
9 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
10 2002).

11 Plaintiff argues the ALJ erred in (1) discounting opinions written by examining providers,
12 (2) discounting lay statements written by Plaintiff's mother, and (3) discounting her own testimony
13 that she needed to recline during a workday and was unable to sustain concentration for two-hour
14 increments.² The Commissioner argues that the ALJ's decision is supported by substantial
15 evidence and should be affirmed.

16 Medical opinions

17 Plaintiff challenges the ALJ's assessment of two medical opinions, each of which the
18 Court will address in turn.

19 Legal standards

20 In general, more weight should be given to the opinion of a treating physician than to a
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22 ² Plaintiff's opening brief also challenges the ALJ's RFC assessment and step-five findings, but
23 this challenge is based entirely on the assignments of error enumerated above. Dkt. 14 at 17. Accordingly,
these issues need not be analyzed separately.

1 non-treating physician, and more weight to the opinion of an examining physician than to a non-
2 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted
3 by another physician, a treating or examining physician’s opinion may be rejected only for “clear
4 and convincing” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).
5 Where contradicted, a treating or examining physician’s opinion may not be rejected without
6 “specific and legitimate reasons’ supported by substantial evidence in the record for so doing.”
7 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ may reject
8 physicians’ opinions “by setting out a detailed and thorough summary of the facts and conflicting
9 clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157
10 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751). Rather than merely stating
11 her conclusions, the ALJ “must set forth [her] own interpretations and explain why they, rather
12 than the doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

13 Thomas L. Gritzka, M.D.

14 Dr. Gritzka performed a physical examination of Plaintiff in December 2012, and his
15 opinion report was submitted to the Appeals Council after a prior ALJ found Plaintiff not disabled.
16 (AR 654-66.) The Appeals Council found that Dr. Gritzka’s opinion and other submitted evidence
17 did “not provide a basis for changing the [ALJ’s] decision” and denied review. (AR 208.) In the
18 current decision, the ALJ summarized Dr. Gritzka’s findings and explained why she gave his
19 opinion limited weight:

20 Dr. Gritzka found the claimant had reduced range of motion throughout her spine
21 and pain upon exam. It was the doctor’s opinion the claimant “on a more probable
22 than not basis” would be unable to engage on a sustained basis sedentary, light or
23 medium work. The doctor also opined regarding the claimant’s cardiovascular,
pulmonary, and psychiatric condition, even though he admitted he was not a
specialist in any of these areas. This evidence is given limited weight. It is noted
that this report was submitted to the Appeals Council with review of the previous

1 [ALJ] decision that denied the claimant benefits. The Appeals Council did not find
2 it contained anything to merit remand, nor do I find any reason to give it any more
3 weight than the Appeals Council. Dr. Gritzka is a forensic examiner selected by
4 the claimant's attorney and is not a treating provider. He examined the claimant
one time and it was over three years ago. There is nothing in Dr. Gritzka's report
that is persuasive the claimant could not work within her [RFC] that considers her
severe impairments.

5 (AR 38-39.)

6 Plaintiff argues that the ALJ erred in "assert[ing] the authority of the Appeals Council for
7 the proposition in question[,]" namely a determination of the probative value of Dr. Gritzka's
8 opinion. Dkt. 14 at 6. The Court agrees that this portion of the ALJ's reasoning does not provide
9 a specific, legitimate basis for discounting Dr. Gritzka's opinion, because the Appeals Council did
10 not indicate any specific reason that Dr. Gritzka's opinion failed to support reversing the prior
11 ALJ's decision. The Appeals Council's denial of review does not amount to a specific reason to
12 discount Dr. Gritzka's opinion.

13 The other reasons provided by the ALJ also fail. Although the ALJ correctly noted that
14 Dr. Gritzka was an examining physician, rather than a treating physician, the ALJ did not rely on
15 any treating opinions in formulating her RFC. (*See* AR 41 (ALJ's decision noting that the record
16 contains no treating opinions regarding Plaintiff's functionality).) The ALJ then went on to
17 emphasize that Dr. Gritzka was selected by Plaintiff's attorney, which suggests an improper focus
18 on the purpose for which the opinion was obtained. *See Lester*, 81 F.3d at 830 ("The purpose for
19 which medical reports are obtained does not provide a legitimate basis for rejecting them.").

20 While the ALJ negatively referenced Dr. Gritzka's opining as to the impact of Plaintiff's
21 cardiovascular, pulmonary, and psychiatric conditions (AR 39), Dr. Gritzka emphasized that he
22 did not specialize in those areas. The core of Dr. Gritzka's opinion was based on his detailed
23 findings regarding Plaintiff's orthopedic condition, within his expertise as a board-certified

1 orthopedist. (AR 665-66.)

2 Dr. Gritzka's opinion references restrictions that are not accounted for in the ALJ's RFC
3 assessment, which are arguably inconsistent with the jobs identified at step five. Because the ALJ
4 failed to provide legally sufficient reasons to discount Dr. Gritzka's opinion, the ALJ must
5 reconsider this opinion on remand.³ The ALJ should also reconsider the impact of Dr. Gritzka's
6 opinion on the findings at steps four and five, to the extent necessary.

7 Terilee Wingate, Ph.D.

8 Dr. Wingate performed a psychological examination of Plaintiff in March 2014, and
9 completed a DSHS form opinion describing her symptoms and limitations. (AR 587-95.) Dr.
10 Wingate also noted that Plaintiff reported such severe symptoms that she had either exaggerated
11 her symptoms or had made a cry for help. (AR 588, 595.)

12 The ALJ discounted Dr. Wingate's opinion as inconsistent with Plaintiff's lack of mental
13 health treatment for the majority of the adjudicated period, and found that the increased symptoms
14 that Plaintiff described to Dr. Wingate following several deaths in her family constituted temporary
15 exacerbations of symptoms that would not be expected to meet the 12-month durational
16 requirement. (AR 40.) The ALJ also noted that Dr. Wingate did not review many records, and
17 that the treatment record contains many normal mental status examinations. (*Id.*) Lastly, the ALJ
18 found that Dr. Wingate's opinion depended heavily on Plaintiff's self-report, which was not
19 entirely reliable. (*Id.*)

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22 ³ Although Plaintiff requests a remand for a finding of disability, the Court finds that this remedy
23 is inappropriate in light of the uncertainties in the record due to the interaction between the disputed medical
opinions and the ALJ's assessment of Plaintiff's testimony and the lay statements, as discussed *infra*. Under
these circumstances, the Court cannot find that further administrative proceedings would be useless. *See*
Brown-Hunter v. Colvin, 806 F.3d 487, 495 (9th Cir. 2015).

1 The Court finds that the ALJ's reasons to discount Dr. Wingate's opinion do not pass
2 muster. That Plaintiff did not engage in mental health treatment during some of the adjudicated
3 period does not bear on whether Dr. Wingate accurately described Plaintiff's symptoms and
4 limitations. The ALJ also engaged in mere speculation regarding the impact of Plaintiff's grief at
5 the loss of multiple family members: the ALJ simply assumed that the exacerbation of Plaintiff's
6 symptoms due to grief would have subsided in less than 12 months, and yet found that Plaintiff's
7 disability onset six months after Dr. Wingate's evaluation. (AR 40.) The ALJ's speculative
8 assessment of the extent and duration of Plaintiff's grief is not a legitimate reason to discount Dr.
9 Wingate's opinion.

10 Furthermore, the ALJ did not acknowledge the extent to which Dr. Wingate's mental status
11 examination ("MSE") revealed abnormal findings; the existence of other normal findings does not
12 negate Dr. Wingate's examination. Even if Dr. Wingate relied to some degree on Plaintiff's self-
13 report in formulating her opinion, the MSE findings constitute objective evidence supporting Dr.
14 Wingate's conclusions.

15 Thus, because the ALJ's reasons for discounting Dr. Wingate's opinion are not specific
16 and legitimate, this opinion must be reconsidered on remand. Dr. Wingate's Global Assessment
17 of Functioning score is consistent with the entirety of her opinion report, and it should be
18 reconsidered along with the remainder of the opinion, on remand.

19 Because the ALJ discounted Plaintiff's own testimony (and by logical extension, the
20 statements written by Plaintiff's mother) in part due to conflicts with the medical record, and the
21 Court has found error in the ALJ's assessment of parts of the medical opinion record, the ALJ
22 must reconsider Plaintiff's testimony and the lay statements on remand. To the extent that this
23 reconsideration impacts the ALJ's RFC assessment, the ALJ should also reconsider the subsequent

1 findings at steps four and five.

2 **CONCLUSION**

3 For the reasons set forth above, this matter is REVERSED and REMANDED for further
4 administrative proceedings.

5 DATED this 15th day of June, 2018.

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8 Mary Alice Theiler
9 United States Magistrate Judge

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