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5 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

6 HEATHER WILSON,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN,
Acting Commissioner of Social
Security,

10 Defendant.

No. 1:14-CV-03174-RHW

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND REMANDING
FOR ADDITIONAL PROCEEDINGS**

11 Before the Court are the parties' cross-motions for summary judgment, **ECF**
12 **Nos. 13, 15**. D. James Tree represents Heather Wilson ("Plaintiff" or "Claimant")
13 and Special Assistant United States Attorney Catherine Escobar represents
14 Defendant Commissioner of Social Security (the "Commissioner"). Plaintiff
15 brings this action seeking judicial review, pursuant to 42 U.S.C. § 405(g), of the
16 Commissioner's final decision, which denied her application for Disability
17 Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under
18 Titles II and XVI, respectively, of the Social Security Act, 42 U.S.C §§ 401-434
19 and 1381-1383F. Having reviewed the administrative record and briefs filed by
20 the parties, the Court is now fully informed. For the reasons set forth below, the

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND REMANDING FOR ADDITIONAL PROCEEDINGS ~ 1**

1 Court grants, in part, Plaintiff's Motion for Summary Judgment, remands for
2 additional proceedings, and directs entry of judgment in favor of Plaintiff.

3 **I. Jurisdiction**

4 Plaintiff filed applications for DIB payments on May 3, 2011, and SSI
5 payments on August 5, 2011, alleging onset of disability on October 1, 2008. Tr.
6 191-97, 198-204. Plaintiff's applications were initially denied on August 29, 2011,
7 Tr. 75-98, and on reconsideration on December 28, 2011, Tr. 99-124. Plaintiff
8 requested a hearing before an Administrative Law Judge on February 15, 2012.
9 Tr. 146-147. On February 13, 2013, Administrative Law Judge ("ALJ") Laura
10 Valente held a hearing in Seattle, Washington. Tr. 30-74. On April 12, 2013, the
11 ALJ issued a decision finding Plaintiff ineligible for both DIB and SSI payments.
12 Tr. 14-24. The Appeals Council denied Plaintiff's request for review on
13 September 19, 2014, Tr. 1-5, making the ALJ's ruling the "final decision" of the
14 Commissioner. Plaintiff timely filed the present action challenging the denial of
15 benefits, and accordingly, Plaintiff's claims are properly before this Court pursuant
16 to 42 U.S.C. § 405(g).

17 **II. Sequential Evaluation Process**

18 The Social Security Act defines disability as the "inability to engage in any
19 substantial gainful activity by reason of any medically determinable physical or
20 mental impairment which can be expected to result in death or which has lasted or

1 can be expected to last for a continuous period of not less than twelve months.” 42
2 U.S.C. §§ 423(d)(1)(A) & 1382c(a)(3)(A). A claimant shall be determined to be
3 under a disability only if his or her impairments are of such severity that the
4 claimant is not only unable to perform previous work, but cannot, considering
5 claimant's age, education and work experience, engage in any other substantial
6 gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A) &
7 1382c(a)(3)(B).

8 The Commissioner has established a five-step sequential evaluation process
9 for determining whether a claimant is disabled within the meaning of the Social
10 Security Act. 20 C.F.R. §§ 404.1520(a)(4) & 416.920(a)(4); *Lounsbury v.*
11 *Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006).

12 Step one inquires whether the claimant is presently engaged in “substantial
13 gainful activity.” 20 C.F.R. §§ 404.1520(b) & 416.920(b). Substantial gainful
14 activity is defined as significant physical or mental activities done or usually done
15 for profit. 20 C.F.R. §§ 404.1572 & 416.972. If the claimant is engaged in
16 substantial activity, he or she is not entitled to disability benefits. 20 C.F.R. §§
17 404.1571 & 416.920(b). If not, the ALJ proceeds to step two.

18 Step two asks whether the claimant has a severe impairment, or combination
19 of impairments, that significantly limits the claimant’s physical or mental ability to
20 do basic work activities. 20 C.F.R. §§ 404.1520(c) & 416.920(c). A severe

1 impairment is one that lasted or is expected to last for at least twelve months, and
2 must be proven by reference to objective medical evidence. 20 C.F.R. §§
3 404.1508-09 & 416.908-09. If the claimant does not have a severe impairment, or
4 combination of impairments, the disability claim is denied, and no further
5 evaluative steps are required. Otherwise, the evaluation proceeds to the third step.

6 Step three involves a determination of whether any of the claimant's severe
7 impairments "meets or equals" one of the listed impairments acknowledged by the
8 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
9 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526 & 416.920(d), 416.925, 416.926;
10 20 C.F.R. § 404 Subpt. P. App. 1 ("the Listings"). If the impairment meets or
11 equals one of the listed impairments, the claimant is *per se* disabled and qualifies
12 for benefits. *Id.* If the claimant is not *per se* disabled, the evaluation proceeds to
13 the fourth step.

14 Step four examines whether the claimant's residual functional capacity
15 enables the claimant to perform past relevant work. 20 C.F.R. §§ 404.1520(e)-(f)
16 & 416.920(e)-(f). If the claimant can still perform past relevant work, then the
17 claimant is not entitled to disability benefits and the inquiry ends there. *Id.* If the
18 claimant cannot perform past relevant work, the ALJ must proceed to step five.

19 Step five shifts the burden to the Commissioner to prove that the claimant is
20 able to perform other work in the national economy, taking into account the

1 claimant's age, education, and work experience. *See* 20 C.F.R. §§ 404.1512(f),
2 404.1520(g), 404.1560(c) & 416.912(f), 416.920(g), 416.960(c). To meet this
3 burden, the Commissioner must establish that (1) the claimant is capable of
4 performing other work; and (2) such work exists in "significant numbers in the
5 national economy." 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*,
6 676 F.3d 1203, 1206 (9th Cir. 2012).

7 **III. Standard of Review**

8 A district court's review of a final decision of the Commissioner of Social
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
10 limited, and the Commissioner's decision will be disturbed "only if it is not
11 supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698
12 F.3d 1144, 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means
13 "more than a mere scintilla but less than a preponderance; it is such relevant
14 evidence as a reasonable mind might accept as adequate to support a conclusion."
15 *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir.1997) (quoting *Andrews v.*
16 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)) (internal quotation marks omitted).
17 In determining whether the Commissioner's findings are supported by substantial
18 evidence, "a reviewing court must consider the entire record as a whole and may
19 not affirm simply by isolating a specific quantum of supporting evidence."
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1 *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock*
2 *v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989)).

3 In reviewing a denial of benefits, a district court may not substitute its
4 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
5 1992). If the evidence in the record “is susceptible to more than one rational
6 interpretation, [the court] must uphold the ALJ's findings if they are supported by
7 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104,
8 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
9 2002) (if the “evidence is susceptible to more than one rational interpretation, one
10 of which supports the ALJ’s decision, the conclusion must be upheld”). Moreover,
11 a district court “may not reverse an ALJ's decision on account of an error that is
12 harmless.” *Molina*, 674 F.3d at 1111. An error is harmless “where it is
13 inconsequential to the [ALJ's] ultimate nondisability determination.” *Id.* at 1115.
14 The burden of showing that an error is harmful generally falls upon the party
15 appealing the ALJ's decision. *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

16 **IV. Statement of Facts**

17 The facts of the case are set forth in detail in the transcript of proceedings,
18 and only briefly summarized here. Plaintiff was born on October 21, 1975, and
19 was 37 years-old on the date of the hearing. Tr. 33. Plaintiff completed high
20 school and attended two years of college, Tr. 65, 224, and has worked as an

1 accounting clerk, child monitor, job clerk, general officer clerk, shipping clerk, and
2 order clerk. Tr. 65. Plaintiff alleges she is unable to work due to significant pain
3 in her neck and back, and pain and swelling affecting all of her joints, testifying to
4 pain that radiates throughout her body and regular numbness in her extremities.
5 Tr. 61

6 **V. The ALJ's Findings**

7 The ALJ determined that Plaintiff was not disabled under the Social Security
8 Act and denied her applications for SSI and DIB benefits. Tr. 14-24.

9 **At step one**, the ALJ found that the Plaintiff had not engaged in substantial
10 gainful activity since October 1, 2008, the date on which she alleges onset of her
11 disability. Tr. 16.

12 **At step two**, the ALJ found Plaintiff had the following severe impairments:
13 fibromyalgia, possible lupus, degenerative disc disease of the cervical and lumbar
14 spine, osteoarthritis of the right knee, obesity, and "status post surgeries." Tr. 16.

15 **At step three**, the ALJ found that Plaintiff did not have an impairment or
16 combination of impairments that meets or medically equals the severity of one of
17 the listed impairments in 20 C.F.R. §§ 404, Subpt. P, App. 1. Tr. 17 (citing
18 404.1520(d), 404.1525, and 404.1526).

19 **At step four**, the ALJ found Plaintiff had the residual functional capacity to
20 perform sedentary work with the caveat that "she can lift and carry 10 pounds

1 occasionally and less than 10 pounds frequently.” Tr. 17 The ALJ also found that
2 Plaintiff can stand and walk for a total of two hours and sit for a total of six hours
3 in an eight hour workday. Tr. 17. In addition to a restriction to sedentary work,
4 the ALJ found that Plaintiff can frequently balance and occasionally climb ramps
5 and stairs, and stoop, kneel, crouch, and crawl, but must avoid climbing ladders,
6 ropes, and scaffolds; concentrated exposure to hazards such as heights and
7 dangerous moving machinery; and concentrated exposure to extreme heat. Tr. 17.
8 Vocational expert Kimberly Mullinax testified at the hearing that an individual
9 with the residual functional capacity assessed by ALJ Valente could perform
10 Plaintiff’s past relevant work as an account clerk and an order clerk. Tr. 65.

11 At **step five**, the ALJ found in the alternative, after considering her age,
12 education, work experience, and residual functional capacity, that Plaintiff is
13 capable of making a successful adjustment to other work that exists in significant
14 numbers in the national economy. Tr. 23-24.

15 VI. Issues for Review

16 Plaintiff argues that the Commissioner’s decision is not free of legal error
17 and not supported by substantial evidence. ECF No. 13 at 2. Specifically, Plaintiff
18 contends that the ALJ erred by (1) improperly according “limited weight” to the
19 opinions of treating physicians Jane Park, M.D., and Stephen P. Roesler, M.D.; (2)
20 failing to provide legally adequate reasons for rejecting Plaintiff’s testimony with

1 respect to the intensity, persistence, and limiting effect of her impairments as not
2 entirely credible; and (3) improperly assessing Plaintiff’s residual functional
3 capacity resulting in a finding that Plaintiff can perform both her past relevant
4 work and other jobs existing in significant numbers in the national economy. ECF
5 No. 13 at 13.

6 **VII. Discussion**

7 **A. The ALJ Properly Discounted Plaintiff’s Testimony Concerning her** 8 **own Limitations as not Entirely Credible**

9 An ALJ engages in a two-step analysis to determine whether a claimant’s
10 testimony regarding subjective pain or symptoms is credible. *Tommasetti v.*
11 *Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). First, the claimant must produce
12 objective medical evidence of an underlying impairment or impairments that could
13 reasonably be expected to produce some degree of the symptoms alleged. *Id.*
14 Second, if the claimant meets this threshold, and there is no affirmative evidence
15 suggesting malingering, “the ALJ can reject the claimant’s testimony about the
16 severity of her symptoms only by offering specific, clear and convincing reasons
17 for doing so.” *Id.*

18 In weighing a claimant's credibility, the ALJ may consider many factors,
19 including, “(1) ordinary techniques of credibility evaluation, such as the claimant's
20 reputation for lying, prior inconsistent statements concerning the symptoms, and

1 other testimony by the claimant that appears less than candid; (2) unexplained or
2 inadequately explained failure to seek treatment or to follow a prescribed course of
3 treatment; and (3) the claimant's daily activities.” *Smolen v. Chater*, 80 F.3d 1273,
4 1284 (9th Cir.1996).

5 The ALJ found that the claimant’s medically determinable impairments
6 could reasonably be expected to cause some of the alleged symptoms, but that the
7 claimant’s statements concerning the intensity, persistence, and limiting effects of
8 these symptoms were not entirely credible. Tr. 18. Plaintiff testified that she could
9 sit for fifteen to twenty minutes and stand for only fifteen minutes at one time. Tr.
10 47-48. Plaintiff testified further that she had difficulty lifting, Tr. 46, would need
11 to rest for fifteen to twenty minutes after standing, Tr. 48, and would miss four to
12 six days of work per month because of lupus or fibromyalgia “flare ups.” Tr. 62.

13 Plaintiff argues that the ALJ failed to provide legally adequate reasons for
14 finding that Plaintiff’s account of her own limitations was not entirely credible.
15 ECF No. 13 at 25-30. Contrary to Plaintiff’s arguments, however, the ALJ
16 provided several legally sufficient reasons for discounting Plaintiff’s account of
17 her own limitations, each of which is supported by substantial evidence in the
18 record.

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1 **1. Activities During the Period of Disability**

2 As the Commissioner notes, ECF No. 15 at 8, the ALJ discussed a number
3 of activities which were inconsistent with Plaintiff’s account of her own
4 limitations. Tr. 18-19. First, although Plaintiff testified that she had difficulty
5 lifting, Tr. 46, Plaintiff reported that she was working as a childcare provider
6 throughout much of the period of disability. Tr. 39-40, 215, 244, & 601. In a work
7 history report dated August 24, 2011, Plaintiff indicated that she provided
8 childcare services including bathing, cooking, cleaning, prepping bottles, changing
9 diapers, running errands, and picking up kids. Tr. 244. In that same work history
10 report, she indicated that was able to lift and carry a small child off and on
11 throughout the day. Tr. 244.

12 Plaintiff gives varying accounts of the frequency and duration of her
13 childcare activities in 2009, ranging from as much as four days per week for four
14 to six hours per day, Tr. 244, to as little twelve hours per month, Tr. 215.
15 Regardless of the frequency and duration of these activities, however, Plaintiff’s
16 ability to lift even very small children to bathe and change them on a regular basis
17 undermines her assertion that she has significant difficulty lifting. Moreover, the
18 record reflects that as recently as October of 2011, Plaintiff was caring for a two-
19 year-old boy on a daily basis. Tr. 601. Contrary to Plaintiff’s complaints that
20 these activities are not inconsistent with her testimony that she has difficulty using

1 her hands, ECF No. 13 at 26, the fact that Plaintiff was able to bathe, cook, and
2 clean for a small child for several hours at a time contravenes her claims that
3 difficulty using her hands contributes to an inability to work.

4 Plaintiff also contends that the activities cited by the ALJ are not
5 inconsistent with Plaintiff's testimony that she could only sit and stand for brief
6 periods of time. ECF No. 13 at 26. Despite her claims that she could only stand
7 for fifteen minutes, however, records from 2009 indicate that Plaintiff was walking
8 two miles per day for exercise. Tr. 336. Moreover, notwithstanding Plaintiff's
9 claim that she could sit for a maximum of twenty minutes at one time, she was able
10 to travel significant distances from her residence in Yakima, Washington. Plaintiff
11 traveled to Portland in August of 2009, Tr. 386, and again in September of 2010,
12 Tr. 589, New Orleans in November of 2011, Tr. 438, and to the beach for a family
13 reunion, Tr. 57. Plaintiff also took annual trips to Lake Roosevelt, most recently
14 during the summer of 2011, Tr. 56-57, and commuted to Seattle for medical
15 appointments. Tr. 732. Plaintiff's testimony at the hearing indicated that Lake
16 Roosevelt is approximately a four-hour drive from Plaintiff's residence, Tr. 56-57,
17 and that the drive to the family reunion was two and a half to three hours, Tr. 57.
18 This length of trip is clearly inconsistent with an inability to sit for more than
19 twenty minutes at a time.

1 Although Plaintiff argues that the ALJ disregarded her testimony that she
2 has good and bad days, Tr. 62, the extensive activities in which Plaintiff engaged
3 are inconsistent with her most positive assessment of her own functioning.
4 Plaintiff testified that even on a good day, she could only sit or stand for, at most,
5 twenty minutes at a time. Tr. 48. Plaintiff provides no explanation, however, for
6 how she was able to travel to New Orleans, take long car trips, or walk two miles
7 per day given her assessment that, on a good day, she was unable to sit or stand for
8 even a small fraction of the time it takes to engage in these activities. In light of
9 Plaintiff's extensive activities during the period of disability, the ALJ reasonably
10 concluded that Plaintiff's level of activity was inconsistent with her allegations
11 concerning the intensity, persistence, and limiting effects of her impairments.

12 **2. Lupus and Fibromyalgia Diagnoses**

13 The ALJ also noted that the medical evidence does not substantiate
14 Plaintiff's allegations concerning the extent of her limitations. Tr. 19. With
15 respect to Plaintiff's fibromyalgia and lupus, the ALJ pointed out that the record
16 does not reflect significant change in either of these diagnoses that would
17 precipitate a decline in Plaintiff's functional ability. *Id.* Prior to Plaintiff's
18 October 1, 2008 onset date, records indicate that Plaintiff was "doing fairly well"
19 with stable symptoms including mild polyarthralgia and approximately thirty
20 minutes of stiffness in the morning. Tr. 317, 320, & 323. A treatment note from

1 Yong Zhu M.D. dated April 18, 2008, indicates that Plaintiff presented with mild
2 lupus, including persistent polyarthralgia and very minimal morning stiffness, but
3 was otherwise doing fine. Tr. 321.

4 Records from after Plaintiff's alleged onset date reveal little, if any, decline
5 in Plaintiff's condition. On December 2, 2008, Jun Lu M.D. noted that Plaintiff's
6 symptoms included nothing more than morning stiffness and tenderness to
7 palpation in her hands, ankles, and shoulder. Tr. 329. Dr. Lu also indicated that
8 Plaintiff's lupus diagnosis was questionable given her "serologies." *Id.* Records
9 from March of 2009 indicate that Plaintiff was doing very well overall, despite
10 occasional redness and swelling in her hands and toes. In June of 2009, despite
11 Plaintiff's reports of "all-over body pain" and positive tenderness at fibromyalgia
12 tender points, there was no synovitis, swelling, or erythema. Tr. 334. In
13 September, Plaintiff still complained of "overall body pain" but reported that she
14 was still able walk two miles per day. Tr. 336.

15 Treatment notes from January of 2010 indicate that although Plaintiff
16 reported some decreased energy, her symptoms were stable and her lupus was
17 "well controlled." Tr. 338. Evaluations by Jane Park M.D. on September 13,
18 2011, Tr. 1013-17, February 7, 2012, Tr. 1018-22 and July 24, 2012, Tr. 1023-27,
19 again questioned whether Plaintiff actually suffered from lupus, and indicate that at
20 worst that her lupus was "quiescent," Tr. 1015. In her most recent evaluation at

1 the University of Washington Medical Center, Dr. Park indicated that Plaintiff's
2 grip was normal, and that she exhibited only mild soft tissue swelling in her hands.
3 Tr. 1024. The consistency of Plaintiff's fibromyalgia and lupus symptoms both
4 before and after her alleged onset date weakens her claims that she became
5 disabled on October 1, 2008.

6 Although Plaintiff is correct that the record also contains some evidence
7 regarding her lupus and fibromyalgia diagnoses that is consistent with her
8 symptom testimony, the Court cannot substitute its judgment for the ALJ's. *See*
9 *Matney*, 981 F.2d at 1019. Where, as here, the evidence is susceptible to more
10 than one rational interpretation, one of which supports the ALJ's conclusion, the
11 ALJ's conclusion must be upheld. *See Thomas*, 278 F.3d at 954.

12 **3. Inconsistent Statements**

13 In addition to the inconsistencies between the Plaintiff's treatment records
14 and activities on the one hand, and Plaintiff's testimony on the other, the ALJ also
15 pointed to Plaintiff's inconsistent statements regarding the extent of her work
16 activity during the alleged period of disability. Tr. 21.

17 In particular, the ALJ noted several inconsistencies concerning Plaintiff's
18 account of her work activity as a childcare provider. Plaintiff testified at the
19 hearing that she worked as a self-employed babysitter for "a six-month time
20 period," Tr. 39, but in an August 24, 2011, work history report Plaintiff indicated

1 that she was a daycare provider from January of 2009 until December of 2009, Tr.
2 244. Although, Plaintiff's testimony suggested that she did little more than change
3 diapers and provide snacks, Tr. 40, the same 2011 work history report indicated
4 that her tasks included bathing, prepping bottles, changing diapers, cooking,
5 cleaning, picking up kids, and running errands, Tr. 244.

6 In addition, the ALJ pointed to discrepancies between Plaintiff's accounts of
7 the extent and duration of her childcare activities during the period of disability.
8 Although Plaintiff initially reported that she provided childcare for a couple of
9 days per month with approximately twelve hours of monthly work activity, Tr.
10 215, she subsequently related that she did so four days a week for four to six hours
11 per day, Tr. 244. Moreover, Plaintiff claimed at the hearing that she did not work
12 after 2009, but medical records from 2011 indicate that she reported caring for a
13 two-year-old boy on a daily basis.

14 In light of these inconsistent statements, the ALJ's conclusion that the
15 "inconsistencies surrounding [Plaintiff's] work activity reduce her overall
16 credibility" is entirely reasonable. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1148
17 (9th Cir. 2001) ("In assessing the claimant's credibility, the ALJ may use ordinary
18 techniques of credibility evaluation, such as considering the claimant's reputation
19 for truthfulness and any inconsistent statements in her testimony.") (internal
20 quotation marks omitted); *see also Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir.

1 2002) (holding that a “lack of candor” regarding drug and alcohol abuse was
2 relevant to the credibility of the claimant’s allegations concerning her physical
3 pain).

4 In short, the discrepancy between Plaintiff’s level of activity and her account
5 of her own limitations, the lack of noticeable decline in Plaintiff’s lupus and
6 fibromyalgia diagnoses around the alleged onset date, and Plaintiff’s inconsistent
7 statements regarding the extent and duration of her childcare services renders the
8 ALJ’s adverse credibility finding appropriate. Although standing alone each of
9 these justifications might be insufficient, when considered together they constitute
10 the requisite “clear and convincing” reasons required to find that a Plaintiff was not
11 entirely credible. *See Rogal v. Colvin*, 590 F. App’x 667, 670 (9th Cir. 2014)
12 (holding that the appellant’s return to work shortly after his first car crash,
13 although not dispositive, was sufficient to support the ALJ’s finding that he was
14 not credible when considered in conjunction with evidence that both his activities
15 and his course of treatment were inconsistent with his alleged limitations).

16 **B. The Opinions of Dr. Park and Dr. Roesler**

17 As an initial matter, Plaintiff contends that the ALJ erred by failing to accord
18 “controlling weight” to the opinions of Dr. Park and Dr. Roesler. ECF No. 13 at
19 16-19. Pursuant to SSR 96-2p, 1996 WL 374188 (1996), “[i]f a treating source’s
20 medical opinion is well-supported and not inconsistent with the other substantial

1 evidence in the case record, it must be given controlling weight; i.e., it must be
2 adopted.” Here, as discussed in greater detail below, *see infra* pp. 19-24, the
3 limitations assessed by Dr. Park are inconsistent with Plaintiff’s treatment history
4 and account of her own activities during the period of disability. Similarly, the
5 limitations assessed by Dr. Roesler conflict, to a degree, with Plaintiff’s testimony
6 regarding the extent of her own limitations. *See infra* p. 27. Moreover, non-
7 examining physician Guthrie Turner, M.D. supplied an opinion that reflects
8 significantly less limitation than assessed by Dr. Park and Dr. Roesler. Tr. 107-09,
9 119-21. Because the opinions of Dr. Park and Dr. Roesler are “inconsistent with
10 other substantial evidence in the case record,” the ALJ did not err in refusing to
11 accord them controlling weight. *See* SSR 96-2p, 1996 WL 374188 (1996).

12 Plaintiff also claims that the ALJ failed to set forth adequate reasons for
13 according limited weight to Dr. Park’s and Dr. Roesler’s opinions, and that in any
14 case, the ALJ’s conclusion is not supported by substantial evidence. ECF No. 13
15 at 19-24.

16 The Ninth Circuit has distinguished between three classes of physicians in
17 defining the weight to be given to their opinions: (1) treating physicians, who
18 actually treat the claimant; (2) examining physicians, who examine but do not treat
19 the claimant; and (3) non-examining physicians, who neither treat nor examine the
20 claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). A treating

1 physician's opinion is given the most weight, followed by an examining physician,
2 and then by a non-examining physician. *Id.* at 803-831. In the absence of a
3 contrary opinion, a treating or examining physician's opinion may not be rejected
4 unless "clear and convincing" reasons are provided. *Id.* at 830. If contradicted, a
5 treating or examining doctor's opinion can be discounted for "specific and
6 legitimate reasons that are supported by substantial evidence in the record." *Id.* at
7 830-31. The controverting opinion of a non-examining physician, however, does
8 not by itself constitute substantial evidence justifying the rejection of a treating or
9 examining physician's opinion. *Id.* at 831.

10 **1. The ALJ Properly Accorded Limited Weight to Dr. Park's**
11 **Opinion**

12 Dr. Park prepared two medical source statements in January of 2013
13 providing opinions regarding Plaintiff's work-related physical limitations arising
14 from her lupus and fibromyalgia diagnoses. Tr. 936-44. Dr. Park opined that
15 Plaintiff could walk for one block without rest, and could only sit for fifteen
16 minutes and stand for fifteen to twenty minutes at one time. Tr. 938. Dr. Park
17 opined further that Plaintiff could stand for less than two hours and could only sit
18 for approximately two hours total in an eight-hour workday. *Id.* As indicated by
19 vocational expert testimony, these limitations alone would preclude Plaintiff's full
20 time employment. Tr. 69. Dr. Park also assessed a number of additional work-

1 related limitations each of which, according to vocational expert testimony, Tr. 68-
2 69, would preclude all employment: (1) limitations on handling, grasping, and fine
3 manipulation to less than 5% of the workday, Tr. 939; (2) Plaintiff would be “off-
4 task” approximately 25% of the day, Tr. 940; and (3) Plaintiff would miss
5 approximately four days of work per month, Tr. 940.

6 In according “limited weight” to Dr. Park’s opinion, ALJ Valente reasons that
7 (1) Dr. Park saw Plaintiff on “only four occasions between September 2011 and
8 January 2013,” (2) Dr. Park’s treatment records are inconsistent with her opinion
9 regarding the severity of Plaintiff’s limitations, (3) the limitations assessed by Dr.
10 Park in her opinion are inconsistent with Plaintiff’s testimony concerning her own
11 activities, and (4) Dr. Park’s assessments of Plaintiff’s limitations are based on
12 Plaintiff’s self-reports which the ALJ found to be “not entirely credible.” Tr. 18,
13 21-22.

14 Plaintiff contends that in reaching this conclusion the ALJ “mischaracterized
15 the record” by cherry-picking evidence supporting a finding of nondisability and
16 thus, failed to properly evaluate the record as a whole. ECF No. 13 at 19. Plaintiff
17 argues that the ALJ disregarded extensive treatment records from Dr. Park, which
18 document Plaintiff’s severe symptoms, in an attempt to minimize Plaintiff’s
19 limitations. *Id.* at 20. Plaintiff’s argument is unavailing, however, because the
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1 ALJ provided the requisite specific and legitimate reasons for discounting her
2 opinion, each of which is supported by substantial evidence in the record.

3 To begin, Dr. Park's treatment records reveal relatively mild assessments of
4 Plaintiff's condition that belie the significant limitations described in her opinion.
5 Although Dr. Park does note some soft-tissue swelling in Plaintiff's hands, Tr.
6 1019, 1024, Dr. Park's treatment notes indicate that Plaintiff consistently had "no
7 synovitis" in her extremities, Tr. 598, 1019, & 1024, and that she is not suffering
8 from carpal tunnel syndrome despite a positive Tinel's sign, Tr. 1028. In addition,
9 Dr. Park's notation that Plaintiff had normal grip strength, Tr. 1024, stands in stark
10 contrast to her opinion that Plaintiff should be limited to handling, grasping, and
11 fine manipulation less than 5% of the workday. Tr. 939. Dr. Park's treatment
12 notes also indicate on several occasions that, contrary to her opinion that Plaintiff's
13 lupus contributed to significant limitations, there was no objective evidence
14 corroborating a lupus diagnosis. Tr. 598, Tr. 1019, & 1024. Given the relatively
15 benign assessment of Plaintiff's condition contained in Dr. Park's records, it was
16 not unreasonable for the ALJ to conclude that the significant work-related
17 restrictions imposed by Dr. Park's opinion, including an inability to sit for longer
18 than 15 to 20 minutes consecutively, were inconsistent with Dr. Park's
19 examinations of Plaintiff.

1 Dr. Park's opinion is similarly inconsistent with Plaintiff's own testimony
2 concerning her activity during the period of disability. In particular, Plaintiff's
3 ability to travel significant distances conflicts with Dr. Park's opinion that Plaintiff
4 can only sit for 15-20 minutes at a time. As discussed above, *see supra* p. 12, the
5 fact that Plaintiff traveled to New Orleans, and was able to take four-hour car trips
6 is simply incompatible with an assessment that she cannot sit for more than twenty
7 minutes at a time.

8 Moreover, Plaintiff's activities of daily living suggest that Plaintiff is less
9 limited than opined by Dr. Park. Specifically, Plaintiff walked two miles a day in
10 2009, Tr. 336, and through October of 2011, was able to care for a two-year-old
11 boy on a daily basis, Tr. 601. Plaintiff's ability to carry on these activities serves
12 to further undermine Dr. Park's opinion that Plaintiff suffers from the significant
13 limitations identified in the medical source statements.

14 Finally, it is clear that Dr. Park's assessment of Plaintiff's limitations is based
15 largely on Plaintiff's self-reports, which, as discussed above, *see supra* pp. 9-17,
16 the ALJ properly dismissed as not entirely credible. To begin, review of Dr. Park's
17 treatment records reveals that the majority of her notations concerning Plaintiff's
18 condition during examinations, in particular those which indicate a negative
19 prognosis, are based on Plaintiff's self-reports rather than objective testing. *See,*
20 *e.g.*, Tr. 1013 (“[Plaintiff] does state she has had a couple of ‘flares’), Tr. 1018

1 (“[Plaintiff] reports she has been doing very poorly”), & Tr. 1023 (“[Plaintiff]
2 states that she has had 2 ‘flares’ since her last visit.”). Moreover, and perhaps
3 more importantly, Dr. Park’s assessment of Plaintiff’s limitations with respect to
4 durational restrictions on standing, sitting and walking, the number of days
5 Plaintiff would be away from work per month, and the need for unscheduled
6 breaks aligns almost perfectly with Plaintiff’s suspect account of her own
7 limitations. *Compare* Tr. 936-940 *and* Tr. 941-944 (indicating that Plaintiff (1)
8 could stand for fifteen to twenty minutes and sit for fifteen minutes at one time, (2)
9 would need to take a ten or fifteen minute break every fifteen minutes, and (3)
10 could walk only a block before needing rest) *with* Tr. 47-48 (Plaintiff’s testimony
11 that she could stand for fifteen or twenty minutes but would need to rest for 15 or
12 20 minutes after doing so), Tr. 53 (Plaintiff’s testimony that she could sit for 15 to
13 20 minutes at a time), *and* Tr. 60 (Plaintiff’s testimony indicating that she could
14 walk “a little less than a block” before needing to stop and rest). Because ALJ
15 Valente reasonably discounted Plaintiff’s credibility, her rejection of the
16 significant portions of Dr. Park’s opinion based upon Plaintiff’s self-reports was
17 legally proper. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008)
18 (“An ALJ may reject a treating physician’s opinion if it is based ‘to a large extent’
19 on a claimant’s self-reports that have been properly discounted as incredible.”).

1 In sum, the record supports ALJ Valente’s conclusion that Dr. Park’s
2 opinion should be accorded limited weight. The significant limitations contained
3 in Dr. Park’s opinion are not only inconsistent with Plaintiff’s testimony regarding
4 her activities during the period of disability, but also with Dr. Park’s own treatment
5 notes, which reveal a relatively mild assessment of Plaintiff’s condition. The
6 inconsistencies identified by ALJ Valente constitute the requisite “specific and
7 legitimate” reasons required to discount a treating physician’s opinion where, as
8 here, that opinion is contradicted. Accordingly, the ALJ’s decision to accord
9 limited weight to the opinion of Dr. Park is free of error.

10 **2. The ALJ Improperly Accorded Limited Weight to the Opinion of Dr.**
11 **Roesler**

12 Dr. Roesler completed a medical source statement in which he opined that
13 Plaintiff could barely walk with a walker—indicating that she could walk only a
14 quarter block before needing rest—and could sit for only one hour and stand for
15 only five minutes at one time. Tr. 946. Dr. Roesler also opined that Plaintiff could
16 sit for only two hours and stand for less than two hours in an eight-hour workday,
17 would need hourly breaks, and would be off-task for 25% of the day. *Id.*

18 The ALJ accorded little weight to the opinion of Dr. Roesler because his
19 opinion (1) is inconsistent with Plaintiff’s treatment history and performance on
20 physical examinations, (2) is inconsistent with Plaintiff’s daily activities, and (3)

1 was given immediately after Plaintiff's right knee surgery in January of 2013 with
2 no indication that the limitations were expected to last for twelve months. Tr. 21-
3 22. Plaintiff is correct, to a degree, in arguing that the ALJ's reasoning is not free
4 of legal error or supported by substantial evidence.

5 Dr. Roesler began treating Plaintiff after an MRI in August of 2012 revealed
6 a possible tear of the anterior cruciate ligament and noted osteoarthritic changes in
7 the medial and lateral joint compartments of Plaintiff's right knee. Tr. 842.
8 Following up on this assessment, Plaintiff visited Dr. Roesler in October of 2012,
9 who, based on his findings, recommended a second knee surgery which occurred
10 in January of 2013. Tr. 950.

11 Although there is some indication that Dr. Roesler's opinion is inconsistent
12 with Plaintiff's performance on physical examinations conducted around the time
13 he treated Plaintiff, *see* Tr. 817 (Plaintiff was ambulatory without assistance upon
14 discharge) and Tr. 829 (Plaintiff's physical examination revealed normal range of
15 motion in her lower extremities), other records, including those directly related to
16 Plaintiff's knee condition, provide a more serious prognosis, *see* Tr. 837
17 (tenderness to palpitation in Plaintiff's right knee), Tr. 845 (limited range of
18 motion and moderate effusion of right knee). Dr. Roesler's own records, unlike
19 Dr. Park's, corroborate the significant limitations assessed in his opinion,
20 indicating that Plaintiff has reduced range of motion, marked tenderness of the

1 patella, and experienced “pain with any motion.” Tr. 950. In fact, Dr. Roesler’s
2 examinations of Plaintiff’s right knee led him to conclude that it was of sufficient
3 severity to warrant a knee replacement. Tr. 949. Although Dr. Roesler ultimately
4 determined during surgery that a knee replacement was unnecessary, the surgery
5 revealed arthritic degeneration of the patella and the lateral compartment of the
6 knee, as well as a lateral meniscal tear. Tr. 954. These findings are completely
7 uncontradicted, and could certainly result in the significant limitations assessed by
8 Dr. Roesler when considered together with limitations arising from Plaintiff’s other
9 maladies.

10 Furthermore, despite the ALJ’s suggestion that Dr. Roesler’s opinion
11 conflicts with Plaintiff’s activities during the period of disability, none of the
12 activities cited in her decision occurred during the time period in which Plaintiff
13 was being treated by Dr. Roesler. *See* Tr. 18-19. While certainly activities such as
14 walking two miles a day, providing daily childcare services, and engaging in
15 significant travel would tend to contradict Dr. Roesler’s assessment of the
16 significant limitations contained in his medical source statement, there is no
17 evidence that any of these activities were undertaken during the time he treated
18 Plaintiff. Accordingly, Plaintiff’s participation in these activities has little, if any,
19 bearing on the accuracy of Dr. Roesler’s opinion, at least as it applies to the time
20 period during which he treated Plaintiff.

1 Finally, the ALJ completely fails to explain the basis for her conclusion that
2 “there [was] no indication that the limitations [assessed by Dr. Roesler] were
3 expected to last for twelve months.” It is true that the ALJ’s point regarding the
4 duration of the limitations assessed by Dr. Roesler is not completely baseless, as
5 Plaintiff’s own testimony at the hearing only a month later suggests some
6 improvement in her ability to stand. *Compare* Tr. 47-48 (Plaintiff’s testimony that
7 she could stand for a maximum of twenty minutes) *with* Tr. 946 (indicating that
8 Plaintiff is limited to standing for only five minutes at one time). ALJ Valente,
9 however, does not even discuss this discrepancy, and offers only her conclusion
10 that Plaintiff’s limitations would not last for twelve months. This conclusion is
11 directly contradicted by the content of Dr. Roesler’s opinion, which specifically
12 indicates that Plaintiff’s impairments lasted or could be expected to last for at least
13 twelve months. Tr. 945.

14 As the above discussion illustrates, the reasons identified by ALJ Valente for
15 rejecting Dr. Roesler’s opinion—as far as it applies to the period during which
16 Plaintiff was treated by Dr. Roesler—are not supported by substantial evidence.
17 Moreover, the limited explanation provided by ALJ Valente as to why the
18 limitations assessed by Dr. Roesler would not last for twelve months fails to offer a
19 substantive basis for her assignment of limited weight to his opinion, and
20 accordingly is similarly in error. *See Garrison v. Colvin*, 759 F.3d 995, 1012-13

1 (9th Cir. 2014) (“[A]n ALJ errs when he rejects a medical opinion or assigns it
2 little weight while doing nothing more than . . . criticizing it with boiler plate
3 language that fails to offer a substantive basis for his conclusion.”).

4 **C. The ALJ Improperly Assessed Plaintiff’s Residual Functional Capacity**

5 Because the ALJ improperly accorded limited weight to the opinion of Dr.
6 Roesler, the ALJ’s residual functional capacity assessment does not accurately
7 reflect Plaintiff’s limitations, and consequently is in error. *See* 20 C.F.R. §
8 404.1545(a)(2) (requiring an ALJ to consider all medically determinable
9 impairments when assessing a claimant’s residual functional capacity). As a result,
10 the vocational expert’s testimony in response to the hypotheticals posed by the
11 ALJ does not adequately address the functional limitations associated with
12 Plaintiff’s impairments. Accordingly, the ALJ’s conclusions—in reliance upon
13 vocational expert testimony in response to the flawed hypotheticals—that Plaintiff
14 is capable of performing her past relevant work, and adjustment to other work that
15 exists in significant numbers in the national economy is similarly in error.

16 **D. The Court Remands for Further Administrative Proceedings**

17 Given the ALJ’s error in rejecting Dr. Roesler’s opinion, the only remaining
18 question is whether to remand for further administrative proceedings or simply for
19 payment of benefits. “Where the Commissioner fails to provide adequate reasons
20 for rejecting the opinion of a treating or examining physician, we credit that

1 opinion ‘as a matter of law.’” *Lester*, 81 F.3d at 834 (quoting *Hammock v. Bowen*,
2 879 F.2d 498, 502 (9th Cir. 1989)). Similarly, “where the ALJ improperly rejects
3 the claimant’s testimony regarding his limitations, and the claimant would be
4 disabled if his testimony were credited, ‘[the court] will not remand solely to allow
5 the ALJ to make specific findings regarding that testimony.’” *Id.* (quoting *Varney*
6 *v. Secretary of Health and Human Services*, 859 F.2d 1396, 1401 (9th Cir. 1988)).

7 Case law dictates that remand for an award of benefits is appropriate when:

- 8 (1) the ALJ has failed to provide legally sufficient reasons for rejecting
a medical opinion;
- 9 (2) there are no outstanding issues that must be resolved before a
determination of disability can be made; and
- 10 (3) it is clear from the record that the ALJ would be required to find the
claimant disabled were such evidence credited.

11
12 *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (quoting *Smolen v. Chater*,
13 80 F.3d 1273, 1292 (9th Cir. 1996)).

14 Here, although crediting Dr. Roesler’s opinion would result in a finding that
15 Plaintiff is disabled, *see* Tr. 69-70 (indicating that a hypothetical claimant who was
16 off task 25% percent of the work day, would miss four days a week per month, and
17 could not sit and stand for a total eight-hours in one day would be precluded from
18 full time employment), the question remains as to when those disabling limitations
19 arose. Dr. Roesler’s treatment of Plaintiff appears to stem from an MRI conducted
20 in August of 2012 which revealed additional problems with the right knee, Tr. 842,

1 but his opinion is blatantly inconsistent with many of the activities Plaintiff herself
2 indicates she undertook prior to receiving treatment from Dr. Roesler. Given this
3 inconsistency, in conjunction with the fact that Dr. Roesler's first examination of
4 Plaintiff was four years after her alleged onset date, it is evident that Dr. Roesler's
5 opinion is inapplicable to Plaintiff's condition at the alleged onset of disability in
6 October of 2008. However, after the MRI in August of 2012 identifying additional
7 knee problems, there is little evidence that would warrant discounting of Plaintiff's
8 treating orthopedic surgeon. In light of the remaining question regarding when the
9 limitations assessed by Dr. Roesler arose, this Court remands the case for proper
10 consideration of his opinion, and for a determination of whether, in light of
11 limitations assessed by that opinion, an amended onset date would be appropriate.

12 **VIII. Conclusion**

13 For the foregoing reasons, the Court finds the Commissioner's decision is
14 not free of legal error or supported by substantial evidence. Therefore, Plaintiff's
15 Motion for Summary Judgment is granted in part, and this matter is remanded for
16 additional proceedings.

17 Accordingly, **IT IS HEREBY ORDERED:**

18 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **GRANTED**
19 **in part and DENIED in part.**

20 2. Defendant's Motion for Summary Judgment, **ECF No. 15**, is **DENIED.**

