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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CAROLE RUIKKA,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. CV-12-3112-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 20, 26. Attorney D. James Tree represents Carole Ruikka (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 3. After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

JURISDICTION

On January 28, 2005, Plaintiff filed an application for a period of disability and disability insurance benefits, alleging disability beginning May 1, 2004. Tr.

1 130. Plaintiff has the burden of establishing disability on or prior to the expiration
2 of her insured status (or date of last insured), in this case, September 30, 2005. Tr.
3 130; *see Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.1999).

4 Plaintiff's application was denied initially and on reconsideration. (Tr. 55-
5 57; 60-69). After a hearing on May 12, 2008, in the Dalles, Oregon, the ALJ
6 issued a decision dated July 21, 2008, finding Plaintiff not disabled. Tr. 14-26;
7 508-39. The Appeals Council declined review, and Plaintiff filed an action in
8 District Court. ECF No. 1. In response, Defendant moved for remand,¹ and the
9 District Court ordered remand for further administrative action. Tr. 561-64. As a
10 result, the Appeals Council vacated the decision and remanded with specific
11 instructions for the ALJ on remand. Tr. 558-60. The Appeals Council noted that
12 in the first opinion, the ALJ failed to provide "adequate evaluation[s]" of: (1) the
13 nature and severity of Plaintiff's obesity; (2) the opinion from treating
14 neurosurgeon Jordi X. Kellogg, M.D.; (3) Plaintiff's subjective complaints; and (4)
15 lay witness testimony from Plaintiff's husband Michael Ruikka. Tr. 558-60.

16 On remand, the Appeals Council ordered the ALJ to: (1) "obtain additional
17 evidence concerning claimant's obesity and other impairments in order to complete
18 the administrative record..."; (2) "further evaluate the claimant's subjective
19 complaints and provide rationale in accordance with the disability regulations...";
20 (3) "further evaluate the other source opinions..."; (4) "give further consideration
21 to the claimant's maximum residual functional capacity during the entire period at
22 issue and provide rationale with specific references to evidence of record..."; and
23 (5) "if warranted by the expanded record, obtain supplemental evidence from a
24 vocational expert to clarify the effect of the assessed limitations on claimant's
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26 ¹The Defendant moved for remand on the basis that "the claim file and
27 recording of the administrative hearing held on May 23, 2012, cannot be located."
28 ECF No. 7 at 2.

1 occupational base....” Tr. 559-60.

2 The ALJ held the second hearing on May 23, 2012. Tr. 727-42. Plaintiff
3 appeared via video, was represented by counsel, and testified. Tr. 730-42.
4 Vocational expert Gary Jesky was present, but the ALJ did not call him to testify.
5 On June 26, 2012, the ALJ again found Plaintiff was not disabled and denied
6 benefits Tr. 543-57. The Appeals Council declined review. Tr. 6-8. The instant
7 matter is before this court pursuant to 42 U.S.C. § 405(g).

8 STATEMENT OF THE CASE

9 The facts of the case are set forth in detail in the transcript of proceedings
10 and are briefly summarized here. At the time of the second administrative hearing,
11 Plaintiff was 47 years old, five feet five inches tall, and she testified that she
12 weighed approximately 189 pounds. Tr. 738-39. She lived with her husband on a
13 20-acre farm, and had eight horses, four of which were miniatures. Tr. 524-25.
14 They also had several Chihuahua dogs. Tr. 525; 740.

15 Plaintiff’s past work included operating a daycare, receptionist, shipping and
16 receiving clerk, and real estate agent. Tr. 146; 535-36. In her application, Plaintiff
17 reported that she experienced pain in her low back, disks and “back bone,” and as a
18 result she could not sit or stand for long periods. Tr. 137-38. Plaintiff stated that
19 she stopped working because the pain became “very intense” and some of her pain
20 medication left her unable to work. Tr. 138. Plaintiff also stated she suffered
21 “very frequent migraines.” Tr. 138.

22 STANDARD OF REVIEW

23 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set
24 out the standard of review:

25 A district court’s order upholding the Commissioner’s denial of
26 benefits is reviewed de novo. *Harman v. Apfel*, 211 F.3d 1172, 1174
27 (9th Cir. 2000). The decision of the Commissioner may be reversed
28 only if it is not supported by substantial evidence or if it is based on
legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

1 Substantial evidence is defined as being more than a mere scintilla,
2 but less than a preponderance. *Id.* at 1098. Put another way,
3 substantial evidence is such relevant evidence as a reasonable mind
4 might accept as adequate to support a conclusion. *Richardson v.*
5 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to
6 more than one rational interpretation, the court may not substitute its
7 judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
8 *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599
9 (9th Cir. 1999).

10 The ALJ is responsible for determining credibility, resolving conflicts in
11 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
12 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo,
13 although deference is owed to a reasonable construction of the applicable statutes.
14 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

15 It is the role of the trier of fact, not this court, to resolve conflicts in
16 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one
17 rational interpretation, the court may not substitute its judgment for that of the
18 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
19 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will
20 still be set aside if the proper legal standards were not applied in weighing the
21 evidence and making the decision. *Browner v. Secretary of Health and Human*
22 *Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence exists to
23 support the administrative findings, or if conflicting evidence exists that will
24 support a finding of either disability or non-disability, the Commissioner's
25 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th
26 Cir. 1987).

27 **SEQUENTIAL PROCESS**

28 The Commissioner has established a five-step sequential evaluation process
for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one

1 through four, the burden of proof rests upon the claimant to establish a prima facie
2 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
3 burden is met once a claimant establishes that a physical or mental impairment
4 prevents him from engaging in his previous occupation. 20 C.F.R. §§
5 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the
6 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that
7 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist
8 in the national economy which claimant can perform. *Batson v. Commissioner of*
9 *Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004). If a claimant cannot make an
10 adjustment to other work in the national economy, a finding of “disabled” is made.
11 20 C.F.R. §§ 404.1520(a)(4)(I-v), 416.920(a)(4)(i-v).

12 **ADMINISTRATIVE DECISION**

13 At step one, ALJ Atkins found that Plaintiff had not engaged in substantial
14 gainful activity from May 1, 2004, through her date of last insured, September 30,
15 2005. Tr. 546. At step two, he found Plaintiff had the severe impairments of
16 “obesity and chronic back pain status post lumbar surgery.” Tr. 546. At step three,
17 the ALJ determined that Plaintiff does not have an impairment or combination of
18 impairments that meets or medically equal one of the listed impairments in 20
19 C.F.R., Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526,
20 416.920(d), 416.925 and 416.926). Tr. 548. The ALJ found that Plaintiff has the
21 residual functional capacity (“RFC”) to perform sedentary work except she could
22 “only occasionally engage in stooping, bending, crouching, crawling, kneeling, or
23 balancing. She was unable to engage in climbing other than ramps or stairs.” Tr.
24 548. At step four, the ALJ found that Plaintiff is able to perform past relevant
25 work as a receptionist. Tr. 554. The ALJ found that the testimony of vocational
26 expert Kathryn Heatherly from the first hearing classified receptionist as a semi-
27 skilled (SVP 4) work requiring sedentary exertion. Tr. 554. The ALJ concluded
28 that Plaintiff was not disabled as defined by the Social Security Act. Tr. 554.

1 **ISSUES**

2 Plaintiff contends that the ALJ erred by: (1) improperly rejecting the medical
3 opinion evidence; (2) finding Plaintiff was not credible; (3) improperly rejecting
4 lay witness testimony; and (4) failing to follow the Appellate Council and District
5 Court’s Order on remand.² ECF No. 20 at 3.

6 **A. Medical Opinions**

7 Plaintiff argues that the ALJ erred by rejecting the medical opinions of
8 Natalia Luera, M.D., Jordi X. Kellogg, M.D., P.C., and David A. Tuning, PAC.
9 ECF No. 20 at 7-14.

10 **1. Natalia Luera, M.D.**

11 Plaintiff argues that the ALJ erred by rejecting opinion evidence from Dr.
12 Luera. ECF No. 20 at 9-10. On April 6, 2012, Natalia Luera, M.D., completed a
13 form entitled “Medical Report.” Tr. 615-16. In the report, Dr. Luera provided the
14 first date she treated Plaintiff as August 21, 2008, and the last date of treatment as
15 April 6, 2012. Tr. 615. The report indicates Plaintiff has to lie down during the
16 day between 30 minutes to two hours to relieve her back pain, her prognosis is
17 poor, her chronic pain is unlikely to improve, and she would likely miss four or
18 more days of work per month due to her medical impairments. Tr. 615-16. The
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20 ²Plaintiff lists three additional arguments as “issues:” (1) “the ALJ
21 committed harmful reversible error by repeatedly and erroneously finding Ms.
22 Ruikka was “fixed” after different surgeries and procedures...”; (2) “[t]he ALJ
23 committed harmful reversible error by finding Ms. Ruikka’s activities of daily
24 living were inconsistent with a claim of disability”; and (3) the ALJ erred “by
25 calling and paying for a vocational expert,” but did not allow the expert to testify.
26 ECF No. 20 at 3. For clarity of organization, the court addresses these arguments
27 within the appropriate issue analyses, related to medical opinion, credibility, and
28 compliance with the Appeals Council remand order.

1 report also indicates Plaintiff has experienced these limitations since January 2005.
2 Tr. 616.

3 The ALJ gave little weight to April 2012, Medical Report from Dr. Luera for
4 two reasons:³ (1) because Dr. Luera did not treat Plaintiff prior to her date of last
5 insured, and (2) because “the records suggest that Dr. Luera actually treated
6 claimant only on March 2, 2010, and April 2, 2010, for conditions other than her
7 back pain.”⁴ Tr. 554.

8 The fact that Dr. Luera did not treat Plaintiff prior to her date of last insured
9 is an improper reason to reject the medical opinion. Medical reports "containing
10 observations made after the period for disability are relevant to assess the
11 claimant's disability." *Smith v. Bowen*, 849 F.2d 1222, 1225 (9th Cir. 1988) (citing
12 *Kemp v. Weinberger*, 522 F.2d 967, 969 (9th Cir. 1975)); see also *Lingenfelter v.*
13 *Astrue*, 504 F.3d 1028, 1034 n.3 (9th Cir. 2007) (“reports containing observations
14 made after the period for disability are relevant to assess the claimant's disability”);
15 *Lester v. Chater*, 81 F.3d 821, 832 (9th Cir. 1995). Because medical reports "are
16 inevitably rendered retrospectively," they "should not be disregarded solely on that
17 basis." *Smith*, 849 F.2d at 1225; see also *Poe v. Harris*, 644 F.2d 721, 723 n.2 (8th
18 Cir. 1981) (disabling back pain evidence subsequent to last date of eligibility "is
19 pertinent evidence in that it may disclose the severity and continuity of
20 impairments existing before the earning requirement date"). Accordingly, the
21 ALJ's rejection of Dr. Luera’s opinion because it was rendered five years after the
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23 ³The ALJ noted the form had two different handwriting styles on it and
24 commented that it was “unclear who actually completed the form,” but the ALJ
25 stated he would assume the form contained the opinion of Dr. Luera. Tr. 554.

26 ⁴The record contains two chart notes signed by Dr. Luera, from office visits
27 on March 2 and April 2, 2010. Tr. 624-25. The reason for both visits was related
28 to menopausal symptoms. Tr. 624-25.

1 expiration of Plaintiff's insured status was not a legally sufficient reason to reject
2 the opinion.

3 The ALJ also rejected Dr. Luera's opinion because the record revealed only
4 two treatment records signed by Dr. Luera. Tr. 554. The Medical Report dated
5 April 6, 2012, indicates that Dr. Luera's first treatment date for Plaintiff was
6 August 21, 2008, and her last treatment date was April 6, 2012. Tr. 615. "The
7 ALJ in a social security case has an independent 'duty to fully and fairly develop
8 the record and to assure that the claimant's interests are considered.'" *Tonapetyan*
9 *v. Halter*, 242 F.3d 1144, 1150 (citing *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th
10 Cir. 1996)). Ambiguous evidence, or the ALJ's own finding that the record is
11 inadequate to allow for proper evaluation of the evidence, triggers the ALJ's duty
12 to conduct an appropriate inquiry. *See Smolen*, 80 F.3d at 1288. "The ALJ may
13 discharge this duty in several ways, including: subpoenaing the claimant's
14 physicians, submitting questions to the claimant's physicians, continuing the
15 hearing, or keeping the record open after the hearing to allow supplementation of
16 the record." *Tonapetyan*, 242 F.3d at 1150 (citing *Tidwell*, 161 F.3d at 602).

17 In this case, the ALJ failed to resolve the apparent ambiguity between the
18 stated treatment dates and the lack of records evidencing Dr. Luera's treatment by
19 requesting additional records that reflect Dr. Luera's treatment of Plaintiff, or by
20 investigating the treating relationship between Dr. Luera and David J. Tuning, PA-
21 C, who treated Plaintiff and worked at the same clinic. See Tr. 623-24. Thus,
22 reliance upon this reason for rejecting Dr. Luera's opinion was not a legally
23 sufficient reason to reject the opinion. In sum, the ALJ failed to provide proper
24 reasoning for rejecting Dr. Luera's opinion and, thus, remand is necessary for a
25 proper analysis that includes a "detailed and thorough summary of the facts and
26 conflicting clinical evidence, stating [an] interpretation thereof, and making
27 findings." See *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998).

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1 **2. Jordi X. Kellogg, M.D., P.C.**

2 Plaintiff argues that the ALJ erred by giving little weight to Dr. Kellogg’s
3 opinion. ECF No. 20 at 13. On January 10, 2005, Dr. Kellogg examined Plaintiff
4 and noted that an MRI demonstrated “facet arthropathy at L4-L5 and L5-S1” and
5 also disc desiccation. Tr. 453. A myelogram test “did not demonstrate any nerve
6 root compromise in the cervical spine. In the lumbar spine, facet arthropathy was
7 evident, particularly on the right at L5-S1.” Tr. 452. On February 24, 2005, Dr.
8 Kellogg diagnosed Plaintiff with L5-S1 discogenic back pain with radiculopathy
9 and recommended surgery. Tr. 449-50. After surgery, on March 30, 2005,
10 Plaintiff reported “reduction of her low back pain and resolution of her lower
11 extremity radiculopathy.” Tr. 448. On June 14, 2005, Plaintiff complained of
12 persistent back pain , and she notified Dr. Kellogg that she had scheduled steroid
13 injections. Tr. 445-46. On October 28, 2005, Dr. Kellogg noted that Plaintiff had
14 “undergone epidural steroid injections and has done well.” Tr. 443.

15 On January 18, 2006, Plaintiff called Dr. Kellogg to report new pain. Tr.
16 442. On February 10, 2006, Dr. Kellogg saw Plaintiff as a follow up to her March
17 2005, back surgery. Tr. 439. During that exam, Dr. Kellogg opined that Plaintiff
18 “is unable to work because of her symptoms and inability to walk for extended
19 periods of time or stand.” Tr. 439.

20 On February 1, 2007, Dr. Kellogg found that Plaintiff’s functional
21 impairment was “severe” and interfered with most but not all of her daily
22 activities, and he found she could stand for no longer than 30 minutes and sit for no
23 longer than 40 minutes. Tr. 499. On that date, Dr. Kellogg injected Plaintiff with
24 an epidural steroid. Tr. 498-502. She had two more injections in the following
25 two months. Tr. 494-98. On May 15, 2007, Dr. Kellogg noted that Plaintiff had a
26 “very nice response” to the set of three injections, “initially getting complete
27 relief” but eventually Plaintiff was left with pain at between 6 and 7 out of 10 in
28 intensity. Tr. 494.

1 On June 13, 2007, Dr. Kellogg implanted a temporary spinal cord stimulator,
2 which initially resolved 95% of Plaintiff's pain symptoms, and Dr. Kellogg
3 reported that Plaintiff could "sleep better and walk up stairs and was even doing
4 laundry. All of these activities were nearly impossible for her in the past." Tr.
5 490. Over the next several months, Dr. Kellogg's notes indicate Plaintiff
6 continued to experience relief from back pain through December 2007, although
7 she developed insomnia, and her migraine headaches persisted. Tr. 481-90.

8 The ALJ gave little weight to Dr. Kellogg's February 10, 2006, opinion that
9 Plaintiff was unable to work for a single reason: because "it was given prior to
10 claimant's second surgery in March, 2006, which [Dr. Kellogg] noted resulted in
11 significant improvement of her condition." Tr. 553. A medical opinion may be
12 rejected when it is "unsupported by the record as a whole." *Batson*, 359 F.3d at
13 1195. Likewise, an opinion may be rejected where there is incongruity between a
14 treating doctor's assessment and his own medical records. *Tommasetti v. Astrue*,
15 533 F.3d 1035, 1041 (9th Cir. 2008).

16 However, the record does not support the ALJ's conclusion. While the
17 records reveal that immediately following Plaintiff's 2006 surgery, Plaintiff's
18 condition was "significantly better," (Tr. 438), subsequent treatment notes
19 chronicle Plaintiff's deteriorating condition. Tr. 676-726. "A single current
20 examination may not always properly describe an individual's sustained ability to
21 function. It should be viewed as one point in time in the longitudinal picture of an
22 individual impairment." *DeLorme v. Sullivan*, 924 F.2d 841, 851 (9th Cir. 1991),
23 quoting SSR 83-15. In evaluating whether the claimant satisfies the disability
24 criteria, the ALJ must evaluate the claimant's "ability to work on a sustained basis."
25 20 C.F.R. § 404.1512(a). "Occasional symptom-free periods – and even the
26 sporadic ability to work – are not inconsistent with disability." *Lester*, 81 F.3d at
27 833.

28 The ALJ's reason for giving little weight to Dr. Kellogg's opinion ignores

1 the undisputed fact established in the record that Plaintiff's second surgery
2 provided only temporary relief. Dr. Kellogg's opinion that Plaintiff's back
3 impairment left her unable to sustain work was supported by the record as a whole.
4 An ALJ may not consider only those portions of the record that favor his or her
5 ultimate conclusion. See *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975)
6 (an ALJ is not permitted to reach a conclusion "simply by isolating a specific
7 quantum of supporting evidence"); see also *Fiorello v. Heckler*, 725 F.2d 174, 176
8 (2d Cir. 1983) (while the ALJ is not obligated to "reconcile explicitly every
9 conflicting shred of medical testimony," he cannot simply selectively choose
10 evidence in the record that supports his conclusions); *Whitney v. Schweiker*, 695
11 F.2d 784, 788 (7th Cir. 1982) ("[A]n ALJ must weigh all the evidence and may not
12 ignore evidence that suggests an opposite conclusion.") .

13 Finally, the ALJ is not required to discuss each item of evidence, but the
14 record should indicate that all evidence presented was considered. *Craig v. Apfel*,
15 212 F.3d 433, 436 (8th Cir. 2000); *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th
16 Cir. 1996). In this case, it is not apparent that the ALJ adequately considered all of
17 Plaintiff's medical records. For example, the ALJ fails to discuss and analyze the
18 records from Plaintiff's 2011-2012 medical providers including Gregory Gullo,
19 M.D., P.C., Gus G. Varnavas, M.D., and Henry Y. Kim, M.D. Tr. 676-82; 694-
20 726. These medical chart notes reveal Plaintiff's consistent reports of significant
21 pain, and detail the multiple procedures she endured in an attempt to find lasting
22 relief for the pain associated with her back impairment. As noted above, medical
23 records that post-date the date of last insured are relevant to evaluating Plaintiff's
24 back impairment. See *Lester*, 81 F.3d at 832; *Smith*, 849 F.2d at 1225; see also
25 *Poe*, 644 F.2d at 723 n.2 (*Boyd v. Heckler*, 704 F.2d 1207, 1211 (11th Cir. 1983)
26 (that a doctor did not examine the claimant until two years after the expiration of
27 her insured status and then rendered an opinion about an injury which occurred
28 five years earlier "does not render his medical opinion incompetent or irrelevant");

1 *Wooldridge v. Secretary of HHS*, 816 F.2d 157, 160 (4th Cir. 1987) (medical
2 evaluations made two years subsequent to expiration of insured status are not
3 automatically barred from consideration and may be relevant to prove a previous
4 disability).

5 In rejecting Dr. Kellogg's opinion, the ALJ improperly relied upon select
6 examination notes that favored his conclusion, and failed to consider the medical
7 record as a whole. As a result, the record does not support the ALJ's
8 determination, and on remand, the ALJ should reconsider Dr. Kellogg's opinion
9 and provide a proper analysis.

10 **3. David J. Tuning, PAC**

11 Plaintiff contends that the ALJ erred by rejecting the opinion of Mr. Tuning,
12 PAC. ECF No. 20 at 7-9. Mr. Tuning began treating Plaintiff in August 2008, and
13 at that visit, he indicated he requested all Plaintiff's records from her previous
14 provider, Gregory Gullo, M.D., P.C. Tr. 634. The record indicates Mr. Tuning
15 noted Plaintiff's scars corroborated her recitation of multiple surgeries, and he
16 stated that he could feel in her back the implanted nerve stimulator device. Tr.
17 634. On October 2, 2008, Mr. Tuning saw Plaintiff and indicated by that time, he
18 had "copies of lots of her old records and I gave them to her to hand carry along"
19 to the Pain Management Clinic. Tr. 633. Mr. Tuning opined "at this point I say
20 she is definitely totally disabled and unable to work and [her husband] does need to
21 help her." Tr. 633.

22 In November 2009, Mr. Tuning noted that Plaintiff had been attending the
23 Pain Clinic, but she did not experience lasting relief. Tr. 628. On February 15,
24 2010, Plaintiff was again experiencing back pain, one month after surgery. Tr.
25 626. She was still experiencing pain in August, and December 2011. Tr. 622-23.
26 In January 2012, Plaintiff continued to complain of low back pain and migraine
27 headaches, and was considering removal of the hardware in her back. Tr. 620.

28 The ALJ gave little weight to Mr. Tuning's October 2008, opinion that

1 Plaintiff was disabled for two reasons: (1) “he did not report any objective findings
2 to support his opinion”; and (2) no evidence existed that Mr. Tuning examined
3 Plaintiff in October 2008, or at her previous visit on August 21, 2008. Tr. 553. An
4 ALJ may discredit treating physicians' opinions that are conclusory, brief, and
5 unsupported by the record as a whole, or by objective medical findings. *Batson*,
6 359 F.3d at 1195.

7 The ALJ’s reasons for rejecting Mr. Tuning’s medical opinion that Plaintiff
8 was disabled are not supported by the record. First, on October 2, 2008, Mr.
9 Tuning indicated that he had obtained “lots of” Plaintiff’s medical records. Tr.
10 633. He reported these records included “lots of x-rays and MR scans.” Tr. 633.
11 It is reasonable to infer Mr. Tuning reviewed the records and relied upon the
12 objective findings therein in making his determination about Plaintiff’s ability to
13 work. The ALJ’s conclusion that Mr. Tuning provided an opinion without an
14 objective basis is unsupported by the record.

15 The ALJ’s second reason for rejecting Mr. Tuning’s opinion was that no
16 evidence existed proving that Mr. Tuning examined Plaintiff on either August 21,
17 2008, or October 2, 2008. This reason is also contradicted by the record. Mr.
18 Tuning’s notes from the first visit on August 21, 2008, explicitly indicate that he
19 viewed Plaintiff’s scars and felt the implanted nerve stimulator in her back. Tr.
20 634. These notes indicate that Mr. Tuning examined Plaintiff, and the ALJ’s
21 contrary conclusion is not supported by the record. Whether Mr. Tuning examined
22 Plaintiff on October 2, 2008, is not a material issue. At that visit, Mr. Tuning had
23 “lots” of Plaintiff’s old records including x-rays and MR reports. Tr. 633. His
24 prior exam and possession of Plaintiff’s medical records were a sufficient basis for
25 his opinion. As such, the ALJ improperly rejected Mr. Tuning’s opinion, because
26 his reasons are unsupported by the record. On remand, Mr. Tuning’s opinion must
27 be reconsidered.

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1 **B. Credibility**

2 Plaintiff contends that the ALJ erred by finding Plaintiff only partially
3 credible. ECF No. 20 at 22-23. The ALJ is responsible for determining
4 credibility. *Andrews*, 53 F.3d at 1039. Unless affirmative evidence exists
5 indicating that the claimant is malingering, the ALJ's reasons for rejecting the
6 claimant's testimony must be "clear and convincing." *Lester*, 81 F.3d at 834. The
7 ALJ's findings must be supported by specific, cogent reasons. *Rashad v. Sullivan*,
8 903 F.2d 1229, 1231 (9th Cir. 1990). "General findings are insufficient; rather, the
9 ALJ must identify what testimony is not credible and what evidence undermines
10 the claimant's complaints." *Reddick*, 157 F.3d at 722, quoting *Lester*, 81 F.3d at
11 834. If objective medical evidence exists of an underlying impairment, the ALJ
12 may not discredit a claimant's testimony as to the severity of symptoms merely
13 because they are unsupported by objective medical evidence. *See Bunnell v.*
14 *Sullivan*, 947 F.2d 341, 347-48 (9th Cir. 1991).

15 To determine whether the claimant's testimony regarding the severity of the
16 symptoms is credible, the ALJ may consider, for example: (1) ordinary techniques
17 of credibility evaluation, such as the claimant's reputation for lying, prior
18 inconsistent statements concerning the symptoms, and other testimony by the
19 claimant that appears less than candid; (2) unexplained or inadequately explained
20 failure to seek treatment or to follow a prescribed course of treatment; and (3) the
21 claimant's daily activities. *See, e.g., Fair v. Bowen*, 885 F.2d 597, 602-04 (9th Cir.
22 1989); *Bunnell*, 947 F.2d at 346-47. Generally, when determining credibility, an
23 ALJ properly considers whether medication effectively controls the plaintiff's
24 symptoms. *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir.
25 2006) (impairments that are effectively controlled by medication are not deemed
26 disabling).

27 The ALJ found that Plaintiff's allegations of disabling back pain were
28 inconsistent with "medical evidence showing her various treatment modalities

1 including two surgeries have resulted in improvement of her overall symptoms.”
2 Tr. 551. In essence, the ALJ relies upon several instances during which Plaintiff
3 attempted a treatment, enjoyed temporary relief, only to have the pain eventually
4 return. Tr. 551-52.

5 In this case, the facts reveal that multiple attempts to relieve the pain from
6 Plaintiff’s back impairment, including physical therapy, chiropractic adjustments,
7 spinal injections, spinal fusion operations, and the implantation and later removal
8 of a nerve stimulation device, were all ineffective in controlling Plaintiff’s
9 symptoms for more than a brief period. The ALJ’s suggestion that Plaintiff’s
10 sporadic and transient relief from pain diminishes her credibility is contrary to the
11 regulations and case law. In short, Plaintiff’s medical records establish none of the
12 increasingly intensive treatments were effective in the long run at controlling her
13 symptoms, and the ALJ’s conclusion to the contrary is unsupported by the record.

14 The ALJ also found Plaintiff had little credibility because her pain
15 complaints were inconsistent with her daily activity level. Tr. 552. In determining
16 a claimant's credibility, an ALJ may consider, among other factors, inconsistencies
17 between the claimant's testimony and the claimant's daily activities, conduct and/or
18 work record. *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). The
19 ALJ found Plaintiff’s daily activities, as reported by Mr. Ruikka in the Third Party
20 Report, that undercut her credibility included house cleaning, tending chickens,
21 walking the dogs, laundry, cooking and running errands. Tr. 552. However, the
22 ALJ relied upon only selected portions of Mr. Ruikka’s statements in the Third
23 Party Report. When considered in its entirety, the Report fails to support the
24 ALJ’s reasoning.

25 For example, Mr. Ruikka indicates that Plaintiff “can’t lift heavy items,
26 can’t exercise, can’t sit or stand for long periods, has problems vacuuming, can’t
27 do yard work or gardening,” Plaintiff complained that the waistband of her
28 clothing pressed against sore spots on her back, and she awakened with headaches

1 and backaches. Tr. 155. Mr. Ruikka also reported that Plaintiff has to take breaks
2 in order to prepare a complete meal, pain restricted her activities, she can walk for
3 fifteen minutes before she must rest, and she usually required an hour of rest before
4 she can resume any activity. Tr. 156; 158A. In sum, substantial evidence does not
5 exist to support the ALJ's finding that Plaintiff lacked credibility, based upon Mr.
6 Ruikka's Third Party Report. As noted above, an ALJ may not consider only those
7 portions of the record that favor his or her ultimate conclusion. *See Day*, 522 F.2d
8 at 1156 (ALJ is not permitted to reach a conclusion "simply by isolating a specific
9 quantum of supporting evidence"); *Whitney*, 695 F.2d at 788 (ALJ may not ignore
10 evidence that suggests opposite conclusion).

11 Finally, the ALJ concluded that Plaintiff's claims that she had to lie down
12 several times per day were not credible because at the time, she was obtaining her
13 real estate license:

14 The claimant testified at the current hearing that she needed to lie
15 down multiple times per day prior to her date last insured of
16 September 30, 2005. However, this would not have been possible at
17 the same time she was going to school to obtain her real estate license
18 and working as a realtor.

19 Tr. 552. The ALJ's assumption that Plaintiff had to physically attend classes at a
20 brick-and-mortar school is directly contradicted by the record. At the May 12,
21 2008, hearing, Plaintiff testified that she took her real estate classes "at home on
22 the computer." Tr. 528. As such, the record does not support the ALJ's
23 conclusion that Plaintiff's claim she needed lie down during the day was not
24 credible. Because none of the ALJ's reasons for rejecting Plaintiff's credibility
25 were supported by the record, Plaintiff's credibility must be reconsidered on
26 remand.

27 **C. Lay Witness Testimony**

28 Plaintiff contends that the ALJ erred by giving little weight to the lay

1 witness testimony from her husband, Michael Ruikka in the Third Party Function
2 Report. ECF No. 20 at 23. As discussed in the credibility analysis, Mr. Ruikka
3 completed a Third Party Function Report in which he provided information about
4 Plaintiff's limitations due to her symptoms. See Tr. 154-60. The ALJ gave this
5 report little weight "because it was made prior to the Plaintiff's surgeries in May
6 2005 and February 2006 which resulted in overall improvement of her condition."
7 Tr. 553.

8 As discussed in depth above, the ALJ's conclusion that Plaintiff's surgeries
9 remedied her back impairment is not supported by the record. Moreover, the ALJ
10 adopted irreconcilable positions about the Third Party Report. On the one hand,
11 the ALJ relied upon the report to discredit Plaintiff's testimony, and on the other
12 hand, the ALJ found the report deserved little weight. Tr. 552-53. The ALJ's
13 reasoning relating to the lay witness testimony in the Third Party Report is not
14 supported by the record, and this evidence must be reconsidered on remand.

15 **D. Compliance with Appeals Council Remand Order**

16 The Plaintiff argues that the ALJ failed to fully comply with the Appeals
17 Council remand order. ECF No. 20 at 14-15. The remand order directed the ALJ
18 to "obtain additional evidence" about Plaintiff's obesity and other impairments,
19 reconsider Plaintiff's credibility, reconsider Mr. Ruikka's opinion, and reconsider
20 Plaintiff's maximum RFC. Tr. 559. Finally, the Appeals Council ordered that "if
21 warranted by the expanded record, [the ALJ will] obtain supplemental evidence
22 from a vocational expert to clarify the effect of the assessed limitations on the
23 claimant's occupational base." Tr. 560.

24 The ALJ's second opinion fails to full comply with the remand order. For
25 example, in the second opinion, the ALJ added a new paragraph simply
26 acknowledging the cumulative effect of obesity on other physical impairments. Tr.
27 548. The ALJ summarily concluded that Plaintiff's obesity, in combination with
28 her back impairment, did not meet or equal a Listing:

1 [E]ven considering any exacerbating effect due to obesity, the
2 claimant's spinal impairment did not meet the requirements of Listing
3 1.04 during the period at issue. The objective evidence has revealed
4 the presence of lumbar degenerative disc disease⁵ with some
5 limitation in range of motion. However, during the period at issue,
6 there was no objective evidence of nerve root compression or motor
7 loss accompanied by sensory or reflex loss.⁶

8 Tr. 548. The ALJ concluded that despite Plaintiff's obesity and back pain, the
9 evidence revealed she "was able to ambulate effectively during the period at
10 issue." Tr. 548.

11 The ALJ cited two chart notes to support this conclusion that Plaintiff was

12 ⁵The court notes here the ALJ acknowledged Plaintiff's lumbar degenerative
13 disc disease, but inexplicably failed to include this as a severe impairment at Step
14 Two. Tr. 546.

15 ⁶This assertion is not supported by the record. The ALJ failed to address and
16 resolve the ambiguity presented in Dr. Kellogg's notes regarding Plaintiff's
17 radiculopathy. On October 28, 2005, Dr. Kellogg noted that Plaintiff "has no
18 radiculopathy." Tr. 443. Yet less than four months later, on February 10, 2006,
19 after viewing a recent MRI report, Dr. Kellogg diagnosed Plaintiff with "L5-S1
20 spondylosis with radiculopathy." Tr. 441. That same month, on February 28,
21 2006, Dr. Kellogg performed surgery on Plaintiff's spine and discovered Plaintiff's
22 "nerve root was finally markedly compressed, particularly on the right side as well
23 as on the left side, and the right S1 nerve root found to be markedly erythematous."
24 Tr. 435. On remand, the ALJ should address and resolve the ambiguity, as well as
25 obtain an opinion from either Plaintiff's treating neurosurgeon or a consultative
26 physician qualified in this specialty as to whether Plaintiff's degenerative disc
27 disease met, or in combination with her other impairments equaled, a Listing prior
28 to September 30, 2005, in light of her spondylosis and radiculopathy.

1 able to walk “effectively.” The first note documents Plaintiff’s March 15, 2005,
2 office visit with Steven Matous, M.D., that contains the notation under review of
3 symptoms: “normal gait.” Tr. 376. However, the office visit was simply a
4 “surgical consult” in preparation for Plaintiff’s impending lumbar vertebral
5 surgery, and the notes do not reflect a full exam was performed. Tr. 373-75.
6 Notably, this document lacks an explanation of why lumbar vertebral surgery for
7 Plaintiff was deemed necessary, nor does it provide a detailed list of Plaintiff’s
8 existing limitations or symptoms. Tr. 373-75.

9 The second document cited by the ALJ is a September 22, 2005, chart note
10 from an office visit with Roy A. Slack, M.D. Tr. 431-32. At this office visit,
11 Plaintiff rated her back pain as between a seven and eight out of ten. Tr. 431.
12 During this visit, Dr. Slack provided two epidural steroid injections into Plaintiff’s
13 back. Tr. 431. The notes reflect that after these injections, in a section clearly
14 titled “**POST BLOCK,**” the chart note indicated Plaintiff was “ambulating without
15 difficulty.” Tr. 431. The note contains no information about Plaintiff’s ability to
16 walk immediately prior the two injections. Tr. 431.

17 The ALJ’s reliance upon these two chart notes to support the conclusion that
18 Plaintiff was able to walk without problems from her back impairment combined
19 with her obesity is untenable. When examined in full, these records reveal that
20 Plaintiff experienced such difficulty in daily living that she required surgery, and
21 later, spinal steroid injections to find pain relief. Finding otherwise can be
22 accomplished only by considering certain isolated evidence and ignoring the
23 remainder of the record. *See Day*, 522 F.2d at 1156 (ALJ is not permitted to reach
24 a conclusion "simply by isolating a specific quantum of supporting evidence").

25 The Appeals Council also ordered the ALJ to reconsider Plaintiff’s
26 credibility. Tr. 559. The ALJ’s second credibility analysis is not significantly
27 different from the first. Tr. 23-25; 550-53. As analyzed above, the ALJ’s second
28 credibility determination remains insufficient. Similarly, the remand order also

1 directed the ALJ to reconsider Mr. Ruikka’s testimony. While the ALJ
2 supplemented this analysis by providing citations to the record, as explained above,
3 his second analysis remains insufficient.

4 Finally, the remand order directed that if the “expanded record” warranted,
5 the ALJ should obtain supplemental evidence “to clarify the effect of the assessed
6 limitations on the claimant’s occupational base.” Tr. 560. In the second opinion,
7 the ALJ determined Plaintiff’s RFC was identical to the previously assigned RFC.
8 Tr. 22; 548. As a result, despite the presence of a vocational expert at the second
9 hearing, the ALJ did not ask the expert to testify. Tr. 729-42.

10 While the ALJ failed to fully comply with the Appeals Council remand
11 order, this court may not award benefits punitively. *Strauss v. Comm’r of Soc. Sec.*
12 *Admin.*, 635 F3d 1135, 1138 (9th Cir 2011). A claimant is not entitled to benefits
13 under the statute unless the claimant is, in fact, disabled, no matter how egregious
14 the ALJ’s errors may be. *Id*; *see also Briscoe ex rel. Taylor v. Barnhart*, 425 F.3d
15 345, 357 (7th Cir. 2005) (“Obduracy is not a ground on which to award benefits;
16 the evidence properly in the record must demonstrate disability.”).

17 **E. Remand to a New ALJ**

18 The decision whether to remand for further proceedings or for immediate
19 payment of benefits is within the discretion of the court. *Harman*, 211 F.3d at
20 1178. The issue turns on the utility of further proceedings. A remand for an award
21 of benefits is appropriate when no useful purpose would be served by further
22 administrative proceedings or when the record has been fully developed and the
23 evidence is insufficient to support the ALJ’s decision. *Strauss*, 635 F3d at 1138.
24 Remand for further proceedings is appropriate where additional proceedings could
25 remedy defects in the Commissioner’s decision. *See Harman*, 211 F.3d at 1179;
26 *Kail v. Heckler*, 722 F.2d 1496, 1497 (9th Cir. 1984).

27 In this case, remand to a new ALJ is warranted by the circumstances. “As a
28 general matter, courts have held that whether a case is remanded to a different ALJ

1 is a decision for the Commissioner to make." *Travis v. Sullivan*, 985 F.2d 919, 924
2 (7th Cir.1993). However, in certain circumstances, courts have ordered or
3 recommend that the Commissioner assign a case to a different ALJ on remand.
4 For example, the Second Circuit remanded to a new ALJ when the original ALJ
5 failed to adequately consider the medical evidence. *Kolodnay v. Schweiker*, 680
6 F.2d 878, 879-80 (2d Cir.1982). The Eleventh Circuit also remanded to a new ALJ
7 where the original ALJ failed to support his findings with evidence, and the court
8 concluded that this failure reflected that "the process was compromised." *Miles v.*
9 *Chater*, 84 F.3d 1397, 1401 (11th Cir.1996).

10 The Ninth Circuit remanded to a new ALJ after explicitly finding that no
11 evidence existed that the ALJ was biased, but where the ALJ indicated he
12 mistrusted the evaluations of medical specialists who performed only consultative
13 examinations. *See Reed v. Massanari*, 270 F.3d 838, 845 (9th Cir. 2001) ("We
14 remand with instructions that the matter be assigned to a different ALJ. We do not,
15 however, believe that the ALJ is biased against Reed. We therefore reverse and
16 remand to the district court for remand to the Social Security Administration with
17 instructions that the matter be assigned to a different ALJ for a new determination
18 of Reed's disability status.").

19 Additional factors the court considers in determining when to remand to a
20 new ALJ include: (1) a clear indication that the ALJ will not apply the appropriate
21 legal standard on remand; (2) a clearly manifested bias or inappropriate hostility
22 toward any party; (3) a clearly apparent refusal to consider portions of the
23 testimony or evidence favorable to a party, due to apparent hostility to that party;
24 and (4) a refusal to weigh or consider evidence with impartiality, due to apparent
25 hostility to any party. *Sutherland v. Barnhart*, 322 F.Supp.2d 282, (E.D. NY 2004);
26 see also 20 C.F.R. § 404.940.

27 In this case, it is apparent that the ALJ applied the inappropriate legal
28 standards related to whether Plaintiff's symptoms from her severe back impairment

1 were controlled and thus enabled her to sustain full time work. It is not clear that
2 on a third hearing of this case, the ALJ would apply the correct the standard,
3 particularly in light of the ALJ's failure to fully comply with the previous order
4 from the Appeals Council. Moreover, the ALJ has exhibited a disconcerting
5 pattern of isolating evidence that favors his conclusions, while ignoring evidence
6 that contradicts his conclusions.

7 As of the date of this opinion, Plaintiff has waited for more than nine years
8 for a final decision on her application for disability benefits. The court finds that
9 the present case should not be considered a third time by an ALJ who has twice
10 ruled that Plaintiff is not disabled, and has provided improper analyses related to
11 the medical opinions, Plaintiff's credibility, lay witness evidence, and who failed
12 to call a medical expert at both administrative hearings, and a vocational expert at
13 the second administrative hearing. This case should be heard by a new ALJ on
14 remand.

15 CONCLUSION

16 Having reviewed the record and the ALJ's findings, this court concludes the
17 ALJ's decision is not supported by substantial evidence and is based on legal error.
18 On remand, the new ALJ should reconsider Plaintiff's severe impairments at Step
19 Two, all medical opinion evidence, Plaintiff's credibility, lay witness testimony,
20 and Plaintiff's maximum RFC. On remand, the new ALJ should also obtain
21 testimony from an orthopedic surgeon medical expert, and a vocational expert.
22 Accordingly,

23 IT IS ORDERED:

- 24 1. Plaintiff's Motion for Summary Judgment, **ECF No. 20**, is
25 **GRANTED**.
- 26 2. Defendant's Motion for Summary Judgment, **ECF No. 26**, is
27 **DENIED**.
- 28 3. An application for attorney fees may be filed by separate motion.

1 The District Court Executive is directed to file this Order and provide a copy to
2 counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff, and the
3 file shall be CLOSED.

4 DATED February 20, 2014.



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A handwritten signature in black ink, appearing to be "M" or "Rodgers".

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE