

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF WASHINGTON

3  
4 SHARI RHYNE,

5 Plaintiff,

6 v.  
7

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

10 Defendant.  
11

No. 2:14-CV-0086-JTR

ORDER GRANTING, IN PART,  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND  
REMANDING FOR ADDITIONAL  
PROCEEDINGS

12 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF  
13 No. 13, 15. Attorney D. James Tree represents Shari Rhyne (Plaintiff); Special  
14 Assistant United States Attorney Leisa A. Wolf represents the Commissioner of  
15 Social Security (Defendant). The parties have consented to proceed before a  
16 magistrate judge. ECF No. 21. After reviewing the administrative record and the  
17 briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for  
18 Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and  
19 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to  
20 42 U.S.C. § 405(g).

21 **JURISDICTION**

22 Plaintiff filed an application for Supplemental Security Income (SSI) in  
23 August 2011, alleging disability since May 13, 2011, due to developmental hip  
24 dysplasia and arthritis. Tr. 143, 151, 163. Plaintiff's application was denied  
25 initially and upon reconsideration.

26 Administrative Law Judge (ALJ) James W. Sherry held a hearing on  
27 September 13, 2012, Tr. 53-88, and issued an unfavorable decision on October 26,  
28 2012, Tr. 20-39. The Appeals Council denied review on February 4, 2014. Tr. 1-

1 6. ALJ Sherry's September 2012 decision thus became the final decision of the  
2 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §  
3 405(g). Plaintiff filed this action for judicial review on April 3, 2014. ECF No. 1.  
4

#### 5 **STATEMENT OF FACTS**

6 Plaintiff was born on December 14, 1974, and was 36 years old on the  
7 alleged disability onset date, May 13, 2011. Tr. 143, 151. Plaintiff completed the  
8 11<sup>th</sup> grade in high school and attained a certificate as a nurse's assistant (CNA).  
9 Tr. 59, 164. She has past work as a CNA, cashier and restaurant worker. Tr. 164.  
10 Plaintiff indicates she stopped working on April 28, 2011, because the restaurant  
11 she had been working at closed for unknown reasons. Tr. 163. She testified at the  
12 administrative hearing she is unable to return to her past work because her lower  
13 extremities are not stable enough for her to be on her feet for a long period of time  
14 and she is irritable and short-tempered due to her pain. Tr. 63-64, 73-74.

15 At the administrative hearing, Plaintiff testified that, on a good day, she  
16 wakes up at 5:00 a.m., takes a shower, drinks coffee, gets her daughter off to  
17 school, runs errands and visits with a couple of friends if she has the time. Tr. 64.  
18 She stated she does the majority of chores around the house and takes care of a cat  
19 and dog. Tr. 65. She can sit for an hour-and-a-half, stand for about an hour, and  
20 walk about two-and-a-half miles at one time. Tr. 66-67. Plaintiff indicated that,  
21 on a bad day, she gets up in the morning, gets her daughter off to school, drinks a  
22 cup of coffee, and then goes back to bed. Tr. 68. She will then get up only to use  
23 the bathroom, eat and let the dog out. Tr. 68. She testified she will lay down  
24 "pretty much the whole day." Tr. 68. Plaintiff stated she has an average of 15 to  
25 20 "bad days" a month. Tr. 71.

26 Plaintiff stated that Cymbalta had been controlling her fibromyalgia well,  
27 but she would still experience achy pains in every part of her body if she gets  
28 "stressed out really bad." Tr. 75. She testified this occurred three or four times  
during the last month, and would last three or four hours each time. Tr. 75-76.

1 **STANDARD OF REVIEW**

2 The ALJ is responsible for determining credibility, resolving conflicts in  
3 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
4 1039 (9th Cir. 1995). The ALJ’s determinations of law are reviewed de novo,  
5 although deference is owed to a reasonable construction of the applicable statutes.  
6 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ  
7 may be reversed only if it is not supported by substantial evidence or if it is based  
8 on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial  
9 evidence is defined as being more than a mere scintilla, but less than a  
10 preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant  
11 evidence as a reasonable mind might accept as adequate to support a conclusion.  
12 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to  
13 more than one rational interpretation, the court may not substitute its judgment for  
14 that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec.*  
15 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). Nevertheless, a decision supported by  
16 substantial evidence will still be set aside if the proper legal standards were not  
17 applied in weighing the evidence and making the decision. *Browner v. Secretary*  
18 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If evidence  
19 supports the administrative findings, or if conflicting evidence supports a finding  
20 of either disability or non-disability, the ALJ’s determination is conclusive.  
21 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

22 **SEQUENTIAL EVALUATION PROCESS**

23 The Commissioner has established a five-step sequential evaluation process  
24 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
25 416.920(a); *see, Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one  
26 through four, the burden of proof rests upon the claimant to establish a prima facie  
27 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This  
28 burden is met once a claimant establishes that a physical or mental impairment

1 prevents him from engaging in his previous occupation. 20 C.F.R. §§  
2 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the  
3 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that  
4 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist  
5 in the national economy which claimant can perform. *Batson v. Commissioner of*  
6 *Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make  
7 an adjustment to other work in the national economy, a finding of “disabled” is  
8 made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 9 ADMINISTRATIVE DECISION

10 The ALJ found Plaintiff had not engaged in substantial gainful activity since  
11 August 26, 2011, the application date. Tr. 22. At step two, the ALJ determined  
12 Plaintiff had the severe impairments of bilateral hip dysplasia/bursitis and  
13 arthralgia. Tr. 22. The ALJ specifically determined Plaintiff evidenced no severe  
14 psychological impairments during the relevant time period and the one-time  
15 diagnosis of fibromyalgia, which was later changed by the diagnosing doctor to  
16 arthralgia, was not a severe impairment. Tr. 22.

17 At step three, the ALJ found Plaintiff did not have an impairment or  
18 combination of impairments that meets or medically equals the severity of one of  
19 the listed impairments. Tr. 22. The ALJ assessed Plaintiff’s RFC and determined  
20 she could perform a restricted range of light exertion level work. Tr. 23. The ALJ  
21 found Plaintiff could lift no more than 20 pounds at a time and frequently lift and  
22 carry 10 pounds; could stand and walk two hours in an eight-hour workday and sit  
23 six hours in an eight-hour workday; could use bilateral foot controls only  
24 occasionally; could occasionally balance, stoop, crouch, kneel, crawl, or climb  
25 ramps or stairs; could never climb ladders, ropes or scaffolds; and must avoid  
26 exposure to concentrated excessive vibration and hazards such as moving  
27 machinery and unprotected heights. Tr. 23.

28 ///

1 At step four, the ALJ found Plaintiff was unable to perform her past relevant  
2 work. Tr. 37. However, at step five, the ALJ determined that, considering  
3 Plaintiff's age, education, work experience and RFC, and based on the Medical-  
4 Vocational Guidelines, Plaintiff was capable of making a successful adjustment to  
5 other work that exists in significant numbers in the national economy. Tr. 37-38.  
6 The ALJ thus concluded Plaintiff was not under a disability within the meaning of  
7 the Social Security Act at any time from August 26, 2011, the application date,  
8 through the date of the ALJ's decision, October 26, 2012. Tr. 38-39.

### 9 ISSUES

10 The question presented is whether substantial evidence supports the ALJ's  
11 decision denying benefits and, if so, whether that decision is based on proper legal  
12 standards.

13 Plaintiff contends the ALJ erred by (1) concluding Plaintiff's fibromyalgia  
14 and psychiatric impairments were not severe impairments at step two of the  
15 sequential evaluation process; (2) rejecting the medical opinions of treating  
16 physicians Simon and Byrd; (3) improperly discrediting Plaintiff's testimony  
17 regarding the severity and limiting effects of her impairments; and (4) relying on  
18 vocational expert testimony pertaining to a hypothetical which did not accurately  
19 reflect Plaintiff's functional limitations.

### 20 DISCUSSION

#### 21 A. Step Two

22 Plaintiff first contends the ALJ erred at step two by finding Plaintiff's  
23 fibromyalgia and psychological impairments did not constitute severe medically  
24 determinable impairments. ECF No. 13 at 10-14.

25 Defendant does not dispute that Plaintiff had diagnoses of fibromyalgia,  
26 adjustment disorder, and anxiety, but argues it takes more than a diagnosis to show  
27 an impairment causes vocationally relevant functional limitations. ECF No. 15 at  
28 9. Defendant asserts the issue is not whether the ALJ properly concluded Plaintiff

1 did not have severe fibromyalgia and mental impairments, but whether the ALJ  
2 properly concluded those impairments did not cause greater functional limitations  
3 that the ALJ found. ECF No. 15 at 9.

4 The Court agrees with Defendant’s assertion that it takes more than a mere  
5 diagnosis to determine whether an impairment causes functional limitations.  
6 However, the Court disagrees with Defendant’s contention that the ALJ’s step two  
7 determination is not at issue in this case.

8 Step two is “a *de minimis* screening device [used] to dispose of groundless  
9 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). An ALJ may find  
10 a claimant lacks a medically severe impairment or combination of impairments  
11 only when this conclusion is “clearly established by medical evidence.” S.S.R. 85-  
12 28; *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir. 2005). In reviewing the  
13 claimed error, the Court must consider whether the record includes evidence of a  
14 severe impairment and, if so, whether the ALJ’s response to that evidence was  
15 legally correct. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (“Despite the  
16 deference usually accorded to the Secretary’s application of regulations, numerous  
17 appellate courts have imposed a narrow construction upon the severity regulation  
18 applied here.”); *Webb*, 433 F.3d at 687.

19 In this case, the ALJ determined Plaintiff had the severe impairments of  
20 bilateral hip dysplasia/bursitis and arthralgia; however, the ALJ concluded  
21 Plaintiff’s diagnosed fibromyalgia was not a severe impairment and that Plaintiff  
22 failed to show she had a severe psychological impairment during the relevant time  
23 period. Tr. 22.

#### 24 **1. Fibromyalgia**

25 The ALJ’s stated reason for not finding that Plaintiff’s diagnosed  
26 fibromyalgia was a severe impairment was his belief that James Byrd, M.D.,  
27 changed his “one-time diagnosis” from fibromyalgia to arthralgia. Tr. 22. This  
28 statement by the ALJ is not factually correct.

1 Dr. Byrd first diagnosed arthralgia on March 1, 2012, Tr. 469-470, and then  
2 changed his diagnosis from arthralgia to fibromyalgia on March 26, 2012, Tr. 508-  
3 509. The diagnosis of fibromyalgia was affirmed by Dr. Byrd on June 28, 2012.  
4 Tr. 509. The ALJ's basis for his determination that fibromyalgia was not a severe  
5 impairment is his inaccurate conclusion that Dr. Byrd changed his diagnosis from  
6 fibromyalgia to arthralgia. The ALJ thus erred at step two of the sequential  
7 evaluation process.

8 The ALJ has an affirmative duty to supplement Plaintiff's medical record, to  
9 the extent it is incomplete, before rejecting a claim of a severe impairment. *See* 20  
10 C.F.R. § 404.1512(d); *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983) ("In  
11 Social Security cases the ALJ has a special duty to fully and fairly develop the  
12 record and to assure that the claimant's interests are considered."). Here, the  
13 medical evidence was sufficiently ambiguous with regard to Plaintiff's diagnosed  
14 fibromyalgia to trigger the ALJ's duty to fully and fairly develop the record.  
15 Consequently, this matter shall be remanded for additional proceedings in order for  
16 the ALJ to further develop the record with respect to Plaintiff's diagnosed  
17 fibromyalgia and the limitations that impairment may have imposed on Plaintiff's  
18 functionality.

## 19 **2. Psychological Impairments**

20 The Court additionally finds the ALJ erred at step two with regard to  
21 Plaintiff's psychological impairments.

22 Plaintiff has the burden of proving she has a severe impairment at step two  
23 of the sequential evaluation process. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. §  
24 416.912. In order to meet this burden, Plaintiff must furnish medical and other  
25 evidence that shows she has a severe impairment. 20 C.F.R. § 416.912(a). The  
26 regulations, 20 C.F.R. §§ 404.1520(c), 416.920(c), provide that an impairment is  
27 severe if it significantly limits one's ability to perform basic work activities. An  
28 impairment is considered non-severe if it "does not significantly limit your

1 physical or mental ability to do basic work activities.” 20 C.F.R. §§ 404.1521,  
2 416.921. The medical evidence of record, as briefly outlined below, demonstrates  
3 Plaintiff’s mental impairments pass the *de minimis* threshold of step two of the  
4 sequential evaluation process. *See Smolen*, 80 F.3d at 1290.

5       The record reflects Plaintiff has been diagnosed and treated for mental  
6 impairments during the relevant time period in this matter. On October 3, 2011,  
7 Carol Shoemake in conjunction with Jill Simon, M.D., diagnosed Plaintiff with  
8 depression and anxiety. Tr. 247-249. An intake assessment was performed at  
9 Grant Mental Healthcare on November 17, 2011, and it was opined that claimant  
10 presented with symptoms of posttraumatic stress disorder, most likely exacerbated  
11 by her chronic pain levels, and indicators of adult ADHD. Tr. 403-409. On  
12 November 29, 2011, Dr. Simon diagnosed depression, anxiety and a possible  
13 personality disorder and noted “I am almost certain there is a conversion disorder  
14 going on here.” Tr. 309. Grant Mental Healthcare progress notes dated November  
15 30, 2011, indicate Plaintiff presented “with symptoms of severe depression and  
16 anxiety.” Tr. 424. A December 7, 2011, Medical Report authored by Dr. Simon,  
17 indicates Plaintiff’s psychological state was so poor that Plaintiff would likely miss  
18 four or more days of work per month due to her medical condition. Tr. 251. Dr.  
19 Simon noted Plaintiff’s “escalating emotional state” and opined Plaintiff was  
20 disabled based on her condition, which she felt was more psychiatric based than  
21 physical. Tr. 493. On December 8, 2011, Joyce Ninnemann, ARNP, diagnosed  
22 posttraumatic stress disorder and gave Plaintiff a Global Assessment of  
23 Functioning (GAF) score of 45, indicative of serious symptoms or serious  
24 impairment in functioning. Tr. 429. On March 15, 2012, Dr. Simon reiterated her  
25 opinion that Plaintiff was disabled more from an emotional state/mental standpoint  
26 than from physical issues. Tr. 498.

27       It is apparent from the foregoing medical evidence that Plaintiff’s claim of  
28 severe psychological impairments was not “groundless.” *Smolen*, 80 F.3d at 1290;



1 *Webb*, 433 F.3d at 688. The Court thus finds the ALJ erred at step two of the  
2 sequential evaluation process with respect to Plaintiff’s psychological impairments  
3 as well.

4 Although it is clear the ALJ erred at step two with respect to Plaintiff’s  
5 documented fibromyalgia and psychological impairments, it is not apparent from  
6 the record, as it currently stands, whether Plaintiff’s severe physical and mental  
7 impairments, either singly or in combination, would prevent her from performing  
8 substantial gainful employment. Further development is necessary for a proper  
9 determination. Accordingly, this matter must be remanded for additional  
10 proceedings in order for the ALJ to further develop the record, take into  
11 consideration Plaintiff’s psychological impairments and fibromyalgia, and assess  
12 the limitations those impairments may have on Plaintiff’s functionality.

13 **B. Treating Physician Opinions**

14 Plaintiff next contends the ALJ erred by failing to accord appropriate weight  
15 to the opinions of treating physicians Simon and Byrd. ECF No. 13 at 14-17.

16 In disability proceedings, a treating physician’s opinion is given special  
17 weight because of his familiarity with the claimant. *Fair v. Bowen*, 885 F.2d 597,  
18 604-605 (9th Cir. 1989). Thus, a treating physician’s opinion carries more weight  
19 than the opinion of an examining or non-examining physician. *Benecke v.*  
20 *Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830  
21 (9th Cir. 1995). If the treating physician’s opinions are not contradicted, they can  
22 be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If  
23 contradicted, the opinion can only be rejected for “specific” and “legitimate”  
24 reasons that are supported by substantial evidence in the record. *Andrews*, 53 F.3d  
25 at 1043. An ALJ’s decision to reject the opinion of a treating physician, may be  
26 *based in part* on the testimony of a nonexamining medical advisor. *Magallanes v.*  
27 *Bowen*, 881 F.2d 747, 751-755 (9th Cir. 1989); *Andrews*, 53 F.3d at 1043.  
28 However, the ALJ must also have other evidence to support the decision such as

1 laboratory test results, contrary reports from examining physicians, and testimony  
2 from the claimant that was inconsistent with the physician’s opinion. *Magallanes*,  
3 881 F.2d at 751-752; *Andrews*, 53 F.3d 1042-1043.

4 The ALJ discussed the reports of Drs. Simon and Byrd, as well as the other  
5 medical evidence of record, dating back to 2005.<sup>1</sup> Tr. 26-37. The ALJ addressed  
6 the opinions of these treating physicians by merely stating they were entitled to  
7 “less weight” because their opinions were inconsistent with the medical evidence  
8 of record and their own treatment records. Tr. 37. The ALJ did not, however,  
9 specifically indicate what medical evidence or treatment records were inconsistent  
10 with the opinions of Drs. Simon and Byrd. Moreover, the ALJ failed to provide  
11 other legitimate reasons, supported by substantial record evidence, for discounting  
12 the opinions.

13 As determined above, this matter will be remanded for additional  
14 proceedings. On remand, the ALJ shall additionally reassess Plaintiff’s RFC,  
15 taking into consideration the opinions of treating physicians Simon and Byrd and  
16 all other medical evidence of record relevant to Plaintiff’s claim for disability  
17 benefits. If the ALJ continues to believe the opinions of Drs. Simon and Byrd  
18 should be accorded little weight, the ALJ must substantiate the determination with  
19 specific, legitimate reasons that are supported by substantial evidence.

20 **C. Plaintiff’s Credibility**

21 Plaintiff also contends the ALJ erred by improperly discrediting her  
22 testimony regarding her impairments and limitations. ECF No. 13 at 18-22.

23 \_\_\_\_\_  
24 <sup>1</sup>Evidence from outside the relevant time period in social security cases can  
25 be deemed useful as background information; however, it is irrelevant to the extent  
26 that it does not address a claimant’s medical status during the period at issue in the  
27 case. *See Fair v. Bowen*, 885 F.2d at 600 (medical opinions that predate the  
28 alleged onset of disability are of limited relevance).

1           It is the province of the ALJ to make credibility determinations. *Andrews*,  
2 53 F.3d at 1039. However, the ALJ’s findings must be supported by specific  
3 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once  
4 the claimant produces medical evidence of an underlying medical impairment, the  
5 ALJ may not discredit testimony as to the severity of an impairment because it is  
6 unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.  
7 1998). Absent affirmative evidence of malingering, the ALJ’s reasons for rejecting  
8 the claimant’s testimony must be “specific, clear and convincing.” *Smolen*, 80  
9 F.3d at 1281; *Lester*, 81 F.3d at 834. “General findings are insufficient: rather the  
10 ALJ must identify what testimony is not credible and what evidence undermines  
11 the claimant’s complaints.” *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d  
12 915, 918 (9th Cir. 1993).

13           In this case, the ALJ considered Plaintiff “only partially credible” and  
14 provided several reasons for so finding. Tr. 25-26.

15           First, the ALJ noted “[t]he limitations the claimant attributes to her  
16 impairments are not verified in the treating source records.” Tr. 25. However, Dr.  
17 Byrd’s reports corroborate Plaintiff’s claim of symptoms resulting from  
18 fibromyalgia, and Dr. Simon opined on several occasions that Plaintiff was limited  
19 to sedentary exertion level work with additional restrictions. As noted above, the  
20 ALJ erred by failing to provide specific, clear and convincing reasons, supported  
21 by substantial record evidence, for discounting the opinions of treating physicians  
22 Simon and Byrd. *See supra*.

23           Next, the ALJ indicted there was “no evidence of any muscle atrophy  
24 reported on physical examination,” and “the evidence as a whole fails to establish  
25 any good cause for the degree of inactivity that the claimant sometimes reports  
26 except for her own preference.” Tr. 25. Plaintiff contends she has good days and  
27 bad days and regardless of whether the record specifically notes muscle atrophy, it  
28 shows Plaintiff has severe functional limitations due to her impairments. ECF No.

1 13 at 19. Nevertheless, a plaintiff's ability to present an alternative interpretation  
2 of the evidence, even if reasonable, is not a sufficient reason to overturn an ALJ's  
3 determination when that ALJ's findings are otherwise supported by inferences  
4 reasonably drawn from the record. *Batson*, 359 F.3d at 1193.

5 The ALJ also mentioned Plaintiff's reported activities of daily living were  
6 inconsistent with the level of limitation she alleged. Tr. 25. It is well-established  
7 that the nature of daily activities may be considered when evaluating credibility.  
8 *Fair v. Bowen*, 885 F.2d at 603. Plaintiff stated and testified she walks her dog,  
9 visits friends, walks to a friend's house over six miles away, performs household  
10 chores and keeps her house clean. Tr. 25. Plaintiff again asserts an alternative  
11 interpretation; i.e., that she has good and bad days and an increase in pain prevents  
12 her from walking or performing chores like she used to be able to do. ECF No. 13  
13 at 19.

14 Finally, the ALJ indicated Plaintiff has a history of substance abuse "she  
15 sometimes fails to report to medical providers." Tr. 25-26. An ALJ may properly  
16 consider evidence of a claimant's substance use in assessing credibility. *Thomas v.*  
17 *Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002) (ALJ's finding that claimant was not a  
18 reliable historian regarding drug and alcohol usage supports negative credibility  
19 determination); *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999)  
20 (conflicting or inconsistent testimony concerning alcohol or drug use can  
21 contribute to an adverse credibility finding).

22 While some of the reasons provided by the ALJ for discounting Plaintiff's  
23 testimony may be supported by the evidence of record, this matter must be  
24 remanded for additional proceedings in light of the ALJ's erroneous  
25 determinations at step two of sequential evaluation process and with respect to Drs.  
26 Simon and Byrd. On remand, the ALJ shall also reconsider Plaintiff's statements  
27 and testimony and discuss what statements, if any, are not credible and what  
28 evidence undermines those statements.

1 **CONCLUSION**

2 Plaintiff argues the ALJ’s decision should be reversed and remanded for an  
3 immediate award benefits. ECF No. 13 at 24. The Court has the discretion to  
4 remand the case for additional evidence and findings or to award benefits. *Smolen*,  
5 80 F.3d at 1292. The Court may award benefits if the record is fully developed  
6 and further administrative proceedings would serve no useful purpose. *Id.*  
7 Remand for additional proceedings is appropriate when additional proceedings  
8 could remedy defects. *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In  
9 this case, the Court finds that further development is necessary for a proper  
10 determination to be made.

11 On remand, the ALJ shall revisit step two of the sequential evaluation  
12 process and take into consideration Plaintiff’s documented fibromyalgia and  
13 mental impairments and the limitations stemming from those impairments;  
14 reexamine Plaintiff’s statements and testimony; and reassess Plaintiff’s RFC,  
15 taking into consideration the opinions of Drs. Simon and Byrd, and all other  
16 medical evidence of record relevant to Plaintiff’s claim for disability benefits. The  
17 ALJ is directed to develop the record further by requiring Plaintiff to undergo new  
18 consultative physical and psychological examinations prior to a new administrative  
19 hearing and, if warranted, by eliciting medical expert testimony to assist the ALJ in  
20 formulating a new RFC determination. The ALJ shall obtain testimony from a  
21 vocational expert and take into consideration any other evidence or testimony  
22 relevant to Plaintiff’s disability claim.

23 Accordingly, **IT IS ORDERED:**

24 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 13**, is  
25 **GRANTED, in part.**

26 2. Defendant’s Motion for Summary Judgment, **ECF No. 15**, is  
27 **DENIED.**

28 ///

1           3.     The matter is **REMANDED** to the Commissioner for additional  
2 proceedings consistent with this Order.

3           4.     An application for attorney fees may be filed by separate motion.

4           The District Court Executive is directed to file this Order and provide copies  
5 to counsel. **Judgment shall be entered in favor of Plaintiff**, and the file shall be  
6 **CLOSED**.

7           DATED November 12, 2015.



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

---

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE