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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Mary A. Miller,

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No. CV 09-01871-PHX-JAT

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Plaintiff,

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**ORDER**

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vs.

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Michael J. Astrue, Commissioner of Social Security,

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Defendant.

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Pending before the Court is Plaintiff Mary A. Miller’s appeal from the Administrative Law Judge’s (“ALJ”) denial of Plaintiff’s application for Social Security disability benefits. For the reasons that follow, the Court remands this matter to the ALJ for further consideration.

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**I. PROCEDURAL HISTORY**

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On December 29, 2004, Plaintiff filed an Application for Disability Insurance Benefits, alleging a disability onset date of July 22, 2004. Record Transcript (“TR”) 69. Plaintiff asserts that she is disabled due to migraine headaches, a back disorder, and a thyroid disorder. TR 18. Plaintiff’s claim was initially denied on September 1, 2005, and Plaintiff timely requested a hearing, which was held on August 28, 2007. TR 18. The Social Security Administration (“SSA”) denied Plaintiff’s application, and found that Plaintiff was capable

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1 of performing her past work as a credit collector. TR 15, 25. After Plaintiff's request for  
2 review by the SSA Appeals Counsel was denied on July 10, 2009, Plaintiff commenced an  
3 action before the District Court. (Doc. # 25 at p. 15; Doc. # 26 at p. 2.)

4 Plaintiff filed a second application for disability benefits with the SSA (Doc. # 21 at  
5 p. 2), and was found disabled as of October 24, 2007, due to migraine headaches and chronic  
6 neck and back pain with bilateral upper extremity weakness (Doc. # 27 at p. 1). By reason  
7 of the SSA's subsequent decision that Plaintiff was disabled as of October 24, 2007, the  
8 period in dispute in this appeal is limited to July 22, 2004 through October 23, 2007. (Doc.  
9 # 21.) On November 15, 2010, the Court granted Plaintiff's motion to amend her complaint  
10 to reflect that the period of Plaintiff's alleged onset date of disability as July 22, 2004  
11 through October 23, 2007. (Doc. # 22.) The Court also set a new briefing schedule for the  
12 parties. (*Id.*) Plaintiff subsequently moved for submission of the briefs on file (Doc. # 24);  
13 however, the Court did not address this motion prior to the briefing deadlines, and the parties  
14 filed their briefs according the Court's revised briefing schedule.

## 15 **II. FACTUAL BACKGROUND**

### 16 **A. Plaintiff's Disability Claim**

17 Plaintiff has not performed substantial gainful activity since July 22, 2004. (Doc. #  
18 25 at p. 16.) Plaintiff alleges that she is disabled due to the following severe impairments  
19 considered by the ALJ: amblyopia of the right eye with vision loss, migraine headaches,  
20 hyperthyroidism (status: post thyroidectomy), degenerative dis disease (status: post remote  
21 surgery in 1969), left hydronephrosis with impaired kidney function, a history of carpal  
22 tunnel syndrome, and hypertension. (*Id.* at p. 17.)

### 23 **B. Plaintiff's Background**

24 Plaintiff was born on August 17, 1952, stands at 5 feet, 8 inches tall, and weighs 160  
25 pounds. TR 80, 89. She lives alone in an efficiency apartment next door to her son. TR  
26 406-07. Plaintiff does not have a college degree or post-secondary certification; however,  
27 she did complete some college courses. TR 108, 404. Before applying for disability  
28 benefits, Plaintiff worked as a credit collector on and off from 1988 to July 22, 2004. TR

1 108. Plaintiff smokes cigarettes, and testified that she has tried to quit. She also testified that  
2 she cannot smoke when she has a bad headache. TR 409.

3 On May 22, 2007, Plaintiff, representing herself, appeared before the ALJ for a  
4 hearing. TR 394. Plaintiff brought additional documentation of her conditions, which the  
5 ALJ added to the record. TR 394–95. The ALJ stated that he “might have to send [Plaintiff]  
6 out for a consultative examination in light of all this new evidence.” TR 395. Based on the  
7 receipt of new evidence, the ALJ continued the hearing. TR 396.

8 A second hearing before the ALJ was conducted on August 28, 2007, at which time  
9 Plaintiff, representing herself, testified about her alleged disability. TR 399–416. Plaintiff  
10 testified that she takes prescription drugs for her headaches and for the side effects of her  
11 headaches, including Fluoxetine (generic Prozac), Premarin, Vicodin, Zomig, and  
12 Propranolol. TR 407. Plaintiff testified that she also takes Flexeril for pain in her back. TR  
13 408. Plaintiff testified that in 1998, her vision and headaches got worse, and she started  
14 taking leave from her employment under the Family Medical Leave Act. TR 404. Plaintiff  
15 testified that she has headaches every day, all day with varying severity. TR 408.  
16 Sometimes her headaches are so severe that she vomits and must administer her medicine  
17 through a nasal spray. TR 405. Plaintiff testified that she was born with a lazy eye, and that  
18 despite initial accommodations by her employer, her decreasing eyesight in her “good eye”  
19 could no longer be accommodated. TR 405. Plaintiff testified that she had a “bad back”  
20 since she was 15 years old, but that over the years it was getting worse. TR 406, 408.  
21 Plaintiff testified that she has been treated for depression for the past two years, and that  
22 Prozac helps. TR 408.

23 Additionally, Plaintiff testified that she has constant pain from her head down her  
24 back, arthritis in her left hip, sciatica down her right leg, neuropathy in her arms and legs,  
25 numbness and tingling in her hands and fingers, sore feet, carpal tunnel in both arms, flank  
26 pain, a bladder disorder, severe hydronephrosis, and the need to have her left kidney  
27 removed. TR 409–10. Plaintiff testified that even though she is in pain every day, she varies  
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1 her medications and does not take pain medication every day to avoid potential  
2 ineffectiveness. TR 411.

3 According to Plaintiff, she cannot lift things due to a herniated disc in her thoracic  
4 spine and bulging discs in her mid-back. TR 408. Plaintiff testified that she has difficulty  
5 walking and difficulty sleeping. TR 408, 409. Plaintiff testified that she has a driver's  
6 license and drove herself to the hearing. TR 406. Plaintiff testified that she was an avid  
7 reader, but no longer reads unless required, and that she no longer sews or uses a computer.  
8 TR 410. Finally, Plaintiff testified that when she goes grocery shopping, she must lean on  
9 the grocery cart, and when she washes dishes, she leans "like an old woman," because she  
10 cannot stand up straight. TR 415.

### 11 **C. Record Evidence**

#### 12 **1. Plaintiff's Impairments**

13 Plaintiff alleges that she became disabled on July 22, 2004, due to severe migraine  
14 headaches with vision problems, dizziness, a bad back, back surgery, and thyroid surgery.  
15 TR 80–81. The medical records indicate that Plaintiff has a history of headaches, TR 133,  
16 a history of sinus infections causing frontal sinus pain, TR 132, 147, right amblyopia and left  
17 presbyopia, TR 133, and chronic back pain following surgery in 1969, TR 133, 169.

18 On March 25, 2003, Dr. Jeffrey L. Shy of Neurological Physicians of Arizona, Inc.,  
19 examined Plaintiff for complaints of "lifetime headaches" that had been particularly  
20 problematic over the prior five years. TR 133. Plaintiff claimed that, at least two times per  
21 week, she had a diffuse severe throbbing headache with nausea, vomiting, light and sound  
22 sensitivity, exertional increase, and problematic dizziness and blurry vision. TR 133.  
23 Plaintiff informed Dr. Shy that during her headaches, she was often incapacitated and unable  
24 to work or function. TR 133. The results of Dr. Shy's neurological examination were  
25 normal. TR 134. The impression was intractable chronic daily headache with intermittent  
26 migraine without aura. TR 134. Plaintiff was prescribed Topamax, Imitrex, and Tramadol,  
27 instructed to keep a headache diary, and asked to follow-up in eight weeks. TR 134. There  
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1 are no records indicating that Plaintiff returned for an eight-week follow-up examination or  
2 kept the headache diary.

3 On October 9, 2003, over seven months after the initial consultation, Plaintiff returned  
4 to Dr. Shy for a follow-up visit. TR 132. Plaintiff complained of chronic daily headaches  
5 with a “full-blown migraine episode” occurring one to two times per week. TR 132.  
6 Plaintiff admitted that she had ceased taking prescription Topamax before its effectiveness  
7 could be measured, even though her headaches were persistent and unchanged. TR 132.  
8 Plaintiff reported that oral triptans provided some relief from headaches, but she had  
9 problems vomiting up her medications. TR 132. Dr. Shy restarted Plaintiff’s Topamax  
10 prescription and prescribed Imitrex. TR 132.

11 Between April and June 2004, Plaintiff was treated at Mesa Family Medical Center  
12 for sinusitis and headaches affecting her vision and causing dizziness and nausea. TR  
13 140–44. X-rays of Plaintiff’s hip and lumbar spine were normal. TR 142–43. A CT of  
14 Plaintiff’s sinuses revealed no significant paranasal sinus disease. TR 139.

15 On June 12, 2004, Plaintiff was treated at the Southwestern Eye Center for her  
16 amblyopia, migraine headaches, and visual disturbances. Clinical notes indicate that Plaintiff  
17 was instructed to see a neurologist. TR 153.

18 On June 24, 2004, Plaintiff was treated at the Valley Lutheran Medical Center  
19 emergency room with a chief complaint of cephalgia with sinus pain and hypertension. TR  
20 147–50. CT scan was negative. TR 147, 150. It was noted that Plaintiff had a chronic  
21 headache and chronic cephalgia. TR 148. Plaintiff responded to intravenous labetalol for  
22 her high blood pressure, and improved with narcotics for her cephalgia. TR 148. Plaintiff  
23 was discharged with instructions to follow-up with her regular care provider the next week.  
24 TR 148.

25 On July 14, 2004, Dr. Gilbert J. Toffol at Desert Neurocare, LLP, saw Plaintiff for a  
26 neurological consultation regarding her severe headaches. TR 206–10. Plaintiff reported  
27 that in the last three months her headaches were becoming more frequent, lasted longer, and  
28 were more severe. TR 206. She reported that she experienced dizziness, nausea, vomiting,

1 and blurred vision with her headaches, which generally lasted several days and resolved on  
2 their own. TR 206. Plaintiff stated that she is rarely pain free, and complained of balance  
3 difficulties, lack of coordination, and forgetfulness when she is in pain. TR 207. The  
4 impression was transformed migraines with and without aura, with further diagnostic studies  
5 necessary. TR 209. Plaintiff was diagnosed and treated for depression secondary to her  
6 chronic pain. TR 209.

7 On August 17, 2004, Plaintiff was seen by Dr. Toffol to review the results of her  
8 diagnostic exams. TR 203–05. Plaintiff reported that she had minimal improvement of her  
9 migraine headaches over the past month, and that she had been off work lately and not  
10 exposed to reading on the computer. TR 203. Plaintiff reported taking the hormonal  
11 replacements and nutritional supplements recommended by Dr. Toffol. TR 203. An MRI  
12 of Plaintiff’s brain revealed minimal, nonspecific white matter hyperintensity, which occurs  
13 in individuals with migraines. TR 204. An MRA of the Circle of Willis was normal. TR  
14 204. An MRI of Plaintiff’s spine revealed some degenerative disc disease at C3-C4 with  
15 anterior osteophyte formation and anterior disc bulging, but no focal disc herniation, spinal  
16 canal stenosis or neural foramen narrowing. TR 204. An ultrasound revealed an enlarged  
17 left thyroid lobe with a dominant 3.7 centimeter nodule and a nodule on the right thyroid  
18 lobe. Plaintiff was referred to an endocrinologist for follow-up. TR 204. An EMG with  
19 nerve conduction studies was normal. TR 204. Laboratory studies were within normal  
20 range. TR 204. Dr. Toffol prescribed Topamax, as an additional medication for prophylactic  
21 treatment of Plaintiff’s migraine headaches, and instructed Plaintiff to continue with Zomig  
22 and Vicodin for abortive treatment. TR 205. Finally, Plaintiff was referred to an  
23 ophthalmologist for her persistent blurred vision, and instructed to return for a follow-up in  
24 four weeks. TR 205.

25 Plaintiff returned to Dr. Toffol on September 21, 2004, and reported that her  
26 migraines were essentially unchanged in frequency or intensity. TR 201–02. Plaintiff  
27 reported that her mood was more relaxed, and that with her prescription for Lexapro, she was  
28 less anxious. TR 201. Dr. Toffol increased Plaintiff’s prescription for Topamax in hopes

1 that it would be more efficacious in preventing migraine headaches. TR 202. On October  
2 19, 2004, Plaintiff returned for a follow-up exam, and reported that she continues to have  
3 migraine headaches. TR 200. Plaintiff reported that her severe migraine headaches occurred  
4 several times per week, and her severe low-grade headaches occurred daily. TR 200. Dr.  
5 Toffol increased Plaintiff's prescriptions of Lexapro and Topamax. TR 200.

6 On November 23, 2004, Plaintiff returned to Desert Neurocare, and complained of a  
7 very severe migraine headache that occurred twice the prior week, which included nausea  
8 and vomiting. TR 199. Plaintiff reported that her thyroid nodule would be removed after her  
9 ophthalmology evaluation. TR 199. Plaintiff also reported significant blood pressure  
10 fluctuations trending more towards the high side, regardless of the headache pain. TR 199.

11 Plaintiff was seen by an ophthalmologist in December 2004. TR 197. According to  
12 ophthalmologist, Plaintiff's blurred vision was not due to any major eye pathology, but likely  
13 due to Plaintiff's migraine headaches. TR 197.

14 On January 27, 2005, Plaintiff had a total thyroidectomy, due to a thyroid gland cyst.  
15 TR 164–80. During a follow-up appointment on February 22, 2005, Dr. Thomas J. Ketterer  
16 noted that Plaintiff failed to keep multiple post-operative appointments, but that overall, she  
17 was doing “extremely well” and on thyroid replacement. TR 181.

18 On March 22, 2005, Plaintiff reported to Dr. Toffol that she still experienced severe  
19 recurrent headaches. TR 195. Dr. Toffol noted that Plaintiff's next appointment with the  
20 endocrinologist was scheduled to occur in two weeks, and that he would like to re-evaluate  
21 her after that post-thyroidectomy evaluation. TR 195. Dr. Toffol stated that in the meantime,  
22 Plaintiff “should not return back to work since her headaches are still very incapacitating.”  
23 TR 195. Two weeks later, Plaintiff reported to Dr. Toffol that she was “around 50%  
24 improved on Topamax 100 mg once daily.” TR 192. Dr. Toffol increased Plaintiff's  
25 Topamax prescription and ordered monthly evaluations of Plaintiff. TR 192. On May 15,  
26 2005, Dr. Toffol stated that he was “happy to report that [Plaintiff] is perhaps more than 50%  
27 improved while on Topamax,” and that Plaintiff was “doing very well at this point in time.”  
28 TR 191. Plaintiff reported that she was relocating to Missouri. TR 191.

1 On July 27, 2005, Plaintiff was evaluated by Dr. Michael E. Somers in Kansas City,  
2 Missouri. TR 237. Dr. Somers performed an eye examination, and informed Plaintiff that  
3 a neurologist would be trained to determine which medications would be most beneficial for  
4 her migraine headaches. TR 237.

5 On or about August 31, 2005, a “Physical Residual Functional Capacity Assessment”  
6 of Plaintiff was performed by the State Agency Medical Consultants. TR 238–45. The  
7 primary diagnosis listed was “vision loss” with “bad back, thyroid” listed as other alleged  
8 impairments. TR 238. According to the report, no exertional, manipulative or  
9 communicative limitations were established. TR 239, 241, 242. Postural limitations  
10 included climbing ramp/stairs (occasionally) and ladders/ropes/scaffolds (never). TR 240.  
11 Visual limitations included depth perception and field of vision, with limited accommodation  
12 necessary. TR 241. Environmental limitations included concentrated exposure to hazards,  
13 such as machinery and heights. TR 242. With respect to Plaintiff’s symptoms, it was  
14 reported that Plaintiff “does have some headaches,” but that she was “doing very well.” TR  
15 243.

16 On September 13, 2005, Plaintiff was seen by Dr. John H. Amick for a new patient  
17 evaluation. TR 276–77. Dr. Amick’s review of symptoms included severe chronic  
18 migraines, hypertension, and depression. TR 276.

19 A November 2005 MRI of Plaintiff’s thoracic spine showed central/left paracentral  
20 disc herniation with cord deviation and compression, and minimal annular disc bulge. TR  
21 279. Electrodiagnostic testing of Plaintiff in November 2005 showed moderate bilateral  
22 carpal tunnel syndrome and early bilateral ulnar neuropathy at the elbow, but no evidence  
23 of radiculopathy, peripheral neuropathy or other entrapment syndrome. TR 280. A physical  
24 examination of Plaintiff was negative for Hoffman’s, Froment’s and Tinel’s signs, and  
25 Phalen’s maneuver. TR 280. A January 18, 2006 CT of Plaintiff’s spine showed very mild  
26 rounded kyphosis, and scattered areas of degenerative change, including a large calcified  
27 anterolateral extradural defect extending into the neural canal consistent with a calcified disc  
28 fragment. TR 281.

1 In February 2006, Plaintiff was treated at Kansas City Urology Care for  
2 hydronephrosis, and instructed to return in one year for an evaluation. TR 283–86.

3 On May 8, 2006 and June 6, 2006, Plaintiff was examined by Dr. Gail Francis at the  
4 Minneapolis Clinic of Neurology, Ltd., for migraine headaches and chronic pain issues. TR  
5 342–47. Plaintiff reported being incapacitated and in bed for two to three days at a time due  
6 to headache symptoms. TR 344. Dr. Francis’s assessment was intractable headaches,  
7 probably vascular in nature. TR 347. Dr. Francis administered an occipital nerve block, but  
8 Plaintiff did not respond, and was referred to a headache specialist. TR 342–43.

9 In June and July 2006, Plaintiff was treated for left-sided hydronephrosis at the  
10 Northeast Urology Clinic, P.A. TR 348–49, 358–62, 379–82, 387–88. It was determined  
11 that Plaintiff had a non-functioning left kidney, and removal of the kidney was discussed.  
12 TR 348.

## 13 2. Recent Medical Assessments

14 During the initial hearing before the ALJ on May 22, 2007, the ALJ indicated that in  
15 light of the additional medical records presented by Plaintiff at the hearing, the ALJ “might  
16 have to send [Plaintiff] out for a consultative examination.” TR 395. The ALJ stated that  
17 he would continue the hearing, review the new evidence, and determine whether it would be  
18 necessary to obtain a consultative examination. TR 396. A consultative examination was  
19 not obtained.

20 Prior to the second hearing before the SSA, on August 18, 2007, Plaintiff’s treating  
21 physician Dr. Jennifer Auge completed a medical opinion form, in which she diagnosed  
22 Plaintiff with the following conditions: back pain, a kidney disorder, migraines, depression,  
23 and vision problems. TR 391. Dr. Auge opined that Plaintiff’s conditions would last more  
24 than 30 days, and that Plaintiff was following the prescribed treatment plan. TR 391. Dr.  
25 Auge indicated that Plaintiff “*will not* be able to perform any employment in the foreseeable  
26 future,” and stated that Plaintiff has been unable to work since 2004. TR 391. Finally, Dr.  
27 Auge indicated that Plaintiff suffered from mental illness. TR 391.

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1                                   **3. Vocational Expert**

2                   During the August 28, 2007 hearing before the SSA, the Vocational Expert (“VE”)  
3 testified to Plaintiff’s past work history and potential for future employment. TR 412–15.  
4 The VE testified that he had reviewed Plaintiff’s vocational history. TR 412.

5                   The ALJ’s first hypothetical concerned a woman of Plaintiff’s educational and  
6 vocational background. TR 412. This hypothetical person suffered from ophthalmic  
7 migraine headaches, amblyopia of the right eye with vision loss, a history of amblyopia of  
8 the left eye, hyperthyroidism status post-thyroidectomy, depression, bilateral carpal tunnel  
9 syndrome, and left-sided hydronephrosis with impaired kidney functioning. TR 412. This  
10 hypothetical person also had degenerative disc disease of the lumbosacral spine. TR 412.  
11 This hypothetical person was receiving treatment for a temporomandibular joint disorder or  
12 dysfunction. TR 412. This hypothetical person had a history of degenerative disc disease  
13 with surgery, neuropathy of the hands and feet, and degenerative joint disease of the hip. TR  
14 412–13. The ALJ asked if this combination of impairments would limit the hypothetical  
15 person to light work, which included occasionally lifting of 20 pounds and frequently lifting  
16 10 pounds or less. TR 413. The hypothetical person would spend six hours during the eight  
17 hour day on her feet, occasionally climbing stairs or ramps, and occasionally stooping,  
18 kneeling, crouching or crawling. TR 413. The hypothetical person would not climb ladders,  
19 ropes or scaffolds, and would not be exposed to unprotected heights or dangerous moving  
20 machinery. TR 413.

21                   The VE found that this hypothetical person could perform Plaintiff’s past work as a  
22 credit collector. TR 413. The VE reminded the ALJ that Plaintiff’s past work as a credit  
23 collector was at the sedentary level. TR 413. The VE seemed to state that the hypothetical  
24 person described above would be performing light work, not sedentary work. TR 413. The  
25 ALJ then asked the VE if the hypothetical person was limited to sedentary work, whether she  
26 could perform Plaintiff’s past work as a credit collector. TR 413. The VE stated she could  
27 perform that work. TR 413.

1 The ALJ then posed a second hypothetical to the VE in which the hypothetical person  
2 needed the ability to leave the workplace or be absent from the workplace for four or more  
3 days [each month] without scheduling the absences in advance. TR 413. The hypothetical  
4 person also needed the ability to take additional unscheduled breaks for unspecified durations  
5 of time due to headaches. TR 413. The VE testified that the hypothetical person would not  
6 be able to perform Plaintiff's past work, or any other jobs in the national economy. TR 413.

7 Plaintiff was then given the opportunity to question the VE. TR 414. Plaintiff  
8 expressed some confusion as to the meaning of the VE's testimony.<sup>1</sup> TR 414, 415. The ALJ  
9 explained sedentary work as lifting only 10 pounds occasionally, lifting less than 10 pounds  
10 frequently, and sitting six out of eight hours during the work day. TR 415. Plaintiff stated  
11 that she could not perform sedentary work, because she needed to change positions all the  
12 time. TR 415.

### 13 **III. LEGAL STANDARD**

14 To qualify for disability benefits under the Social Security Act, a claimant must show,  
15 among other things, that the claimant is "under a disability." 42 U.S.C. § 423(a)(1)(E). The  
16 Social Security Act defines "disability" as the "inability to engage in any substantial gainful  
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18 <sup>1</sup> Based on the hearing transcript, it appears that Plaintiff neither understood the VE's  
19 testimony, nor her right to present additional hypothetical questions to the VE:

20 **ALJ:** And, Ms. Miller, well, did you have any questions about Mr. Ogren's  
21 testimony?

21 **Plaintiff:** Yeah. What did all that mean?

22 **ALJ:** Well, like I said —

23 **Plaintiff:** Because at first it sounded like, you know, yes and a no. . . . Because  
24 I understand the second part of it because no, you couldn't go get hired at a job  
25 and basically pick your own schedule. . . . So the first part of it I didn't  
26 understand about she is able to do the sedentary meaning?

25 **ALJ:** Oh, well, sedentary work means lifting only 10 pounds, only up to 10  
26 pounds occasionally and frequent lifting of less than 10 pounds, and sitting six  
27 out of eight hours.

27 **Plaintiff:** Oh, no. I would not be, I have to change positions all the time.

28 **ALJ:** Okay.

28 TR 414–15.

1 activity by reason of any medically determinable physical or mental impairment which can  
2 be expected to result in death or which has lasted or can be expected to last for a continuous  
3 period of not less than 12 months.” *Id.* § 423(d)(1)(A). A person is “under a disability only  
4 if his physical or mental impairment or impairments are of such severity that he is not only  
5 unable to do his previous work but cannot, considering his age, education, and work  
6 experience, engage in any other kind of substantial gainful work which exists in the national  
7 economy.” *Id.* § 423(d)(2)(A). The Social Security regulations set forth a five-step  
8 sequential process for evaluating disability claims. 20 C.F.R. § 404.1520; *see Reddick v.*  
9 *Chater*, 157 F.3d 715, 721 (9th Cir. 1998) (describing the sequential process). A finding of  
10 “not disabled” at any step in the sequential process will end the ALJ’s inquiry. 20 C.F.R. §  
11 404.1520(a)(4). The claimant bears the burden of proof at the first four steps, but the burden  
12 shifts to the ALJ at the final step. *Reddick*, 157 F.3d at 721. The five steps are as follows:

13 1. First, the ALJ determines whether the claimant is “doing substantial gainful  
14 activity.” 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not disabled.<sup>2</sup>

15 2. If the claimant is not gainfully employed, the ALJ next determines whether the  
16 claimant has a “severe medically determinable physical or mental impairment.” 20 C.F.R.  
17 § 404.1520(a)(4)(ii). The “step-two inquiry is a de minimis screening device to dispose of  
18 groundless claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). If the claimant  
19 does not have a severe impairment, the claimant is not disabled.<sup>3</sup>

20 3. Having found a severe impairment or impairments, the ALJ next determines  
21 whether the impairment “meets or equals” one of the impairments listed in the regulations.

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23 <sup>2</sup> Here, Plaintiff does not challenge the ALJ’s finding that Plaintiff did not engage in  
24 substantial gainful activity during the period of July 22, 2004 through October 23, 2007. TR  
25 20; Doc. # 25 at p. 16.

26 <sup>3</sup> Here, Plaintiff does not challenge the ALJ’s finding that Plaintiff suffers from the  
27 following severe impairments: amblyopia of the right eye with vision loss, migraine  
28 headaches, hyperthyroidism (status: post thyroidectomy), degenerative disc disease (status:  
post remote back surgery in 1969), left hydronephrosis with impaired kidney function, a  
history of carpal tunnel syndrome, and hypertension. TR 20, Doc. # 25 at p. 17.

1 20 C.F.R. § 404.1520(a)(4)(iii). If so, the claimant is found disabled without considering the  
2 claimant's age, education, and work experience. *Id.* § 404.1520(d). If the impairment or  
3 impairments do not meet or equal a listed impairment, before proceeding to the next step, the  
4 ALJ will make a finding regarding the claimant's "residual functional capacity based on all  
5 the relevant medical and other evidence in [the] record." *Id.* § 404.1520(e). A claimant's  
6 "residual functional capacity" is the most the claimant can do despite all her impairments,  
7 including those that are not severe, and any related symptoms. *Id.* § 404.1545(a)(1-2).

8 4. At step four, the ALJ determines whether, despite the impairments, the  
9 claimant can still perform "past relevant work." *Id.* § 404.1520(a)(4)(iv). To make this  
10 determination, the ALJ compares its "residual functional capacity assessment . . . with the  
11 physical and mental demands of [the claimant's] past relevant work." *Id.* § 404.1520(f). If  
12 the claimant can still perform the kind of work she previously did, the claimant is not  
13 disabled. Otherwise, the ALJ proceeds to the final step.

14 5. At the final step, the ALJ determines whether the claimant "can make an  
15 adjustment to other work" that exists in the national economy. *Id.* § 404.1520(a)(4)(v). In  
16 making this determination, the ALJ considers the claimant's residual functional capacity,  
17 together with vocational factors (age, education, and work experience). *Id.* § 404.1520(g)(1).  
18 If the claimant can make an adjustment to other work, then she is not disabled. If the  
19 claimant cannot perform other work, she will be found disabled. As previously noted, the  
20 Commissioner has the burden of proving the claimant can perform other substantial gainful  
21 work that exists in the national economy. *Reddick*, 157 F.3d at 721.

#### 22 **IV. THE ALJ'S DECISION**

23 The ALJ evaluated Plaintiff's alleged disability according to the five-step evaluation  
24 process set forth above. TR 15-26. As an initial matter, the ALJ determined that Plaintiff  
25 has not engaged in substantial gainful activity since the alleged onset of her disability, July  
26 22, 2004. TR 20. Next, the ALJ found Plaintiff suffered from the following severe  
27 impairments: amblyopia of the right eye with vision loss, migraine headaches,  
28 hyperthyroidism (status: post thyroidectomy), degenerative disc disease (status: post remote

1 back surgery in 1969), left hydronephrosis with impaired kidney function, a history of carpal  
2 tunnel syndrome, and hypertension. TR 20. However, the ALJ concluded that Plaintiff's  
3 impairments failed to meet the criteria of the third step. TR 21.

4 The third step requires the ALJ to determine whether a claimant's impairment or  
5 combination of impairments "meets or equals one of the SSA's listings in appendix 1 to  
6 subpart P of part 404 of this chapter and meets the duration requirement." 20 C.F.R. §  
7 416.920(a)(4)(iii); *see id.* § 404.1520(d). The ALJ reviewed Plaintiff's severe impairments  
8 under Sections 1.00 (Musculoskeletal System), 2.00 (Special Senses), 6.00 (Genitourinary  
9 Impairments), and 9.00 (Endocrine System). TR 21 The ALJ found that Plaintiff "does not  
10 have an impairment or combination of impairments that meets or medically equals one of the  
11 listed impairments in 20 C.F.R. 404, Subpart P, Appendix 1, Regulations No. 4." TR 21.

12 Next, as part of step four, the ALJ found that Plaintiff had the residual functional  
13 capacity ("RFC") to perform light exertional level tasks. TR 21. The RFC is defined as "the  
14 most [Plaintiff] can still do despite [her] limitations." 20 C.F.R. § 416.945(a)(1). The ALJ  
15 reduced Plaintiff's RFC to allow for a credible degree of pain, but found that the objective  
16 medical records did not support a finding that Plaintiff's pain or functional limitations were  
17 so severe as to keep her from working. TR 25. The ALJ stated that the wide range of  
18 Plaintiff's daily activities were inconsistent with disability, but within the realm of the RFC  
19 for light work. TR 25. According to the ALJ, the objective medical evidence, the lack of  
20 treatment, and the lack of significant pain medications, as well as other factors, failed to  
21 support Plaintiff's allegations of her inability to work. TR 25.

22 The ALJ did not reduce Plaintiff's RFC due to her hyperthyroidism, because she was  
23 stable following the thyroidectomy and did not suffer complications. TR 22. The ALJ found  
24 that because Plaintiff suffered from chronic back pain since 1969, but still sustained  
25 substantial gainful activity, this strongly suggested that Plaintiff's back pain currently would  
26 not prevent work. TR 23. The ALJ also found that the RFC did not need to be reduced due  
27 to Plaintiff's degenerative disc disease, because Plaintiff did not have neurological deficits,  
28 mobility limitations, sensory deficits, or strength losses related to this impairment. TR 24.

1 According to the ALJ, the RFC of light exertional tasks accommodated Plaintiff's pain  
2 complaints and symptoms of degenerative disc disease. TR 24. The ALJ found Plaintiff's  
3 alleged significant vision problems to be inconsistent with her ability to drive, her  
4 ophthalmologist's report, and the fact that Plaintiff's right eye amblyopia did not prevent her  
5 from working prior to July 22, 2004. TR 24. According to the ALJ, this strongly suggested  
6 that Plaintiff's vision impairments would not prevent her from working currently. TR 24.  
7 However, the ALJ's RFC limits work around heights or dangerous moving machinery in  
8 order to accommodate Plaintiff's vision loss in her right eye and her episodic complaints of  
9 dizziness. TR 24. With respect to Plaintiff's diagnosis of left hydronephrosis with impaired  
10 kidney function, the ALJ did not reduce the RFC, because Plaintiff denied urinary problems  
11 on July 11, 2006, and her right kidney and bladder were functioning normally. TR 24.  
12 Finally, the ALJ did not reduce the RFC to accommodate Plaintiff's hypertension, because  
13 it had been successfully treated. TR 24.

14 Before determining the RFC, the ALJ found Plaintiff's statements concerning the  
15 intensity, duration and limiting effects of her medically determinable impairments were "not  
16 entirely credible." TR 22. Plaintiff testified that she was unable to smoke cigarettes when  
17 she had a bad headache. The ALJ found the fact that Plaintiff continued to smoke despite  
18 her numerous complaints, diminished her credibility. TR 23. Further, the ALJ stated that  
19 because Plaintiff did not take any steps to obtain different medication, then it could be  
20 reasonably inferred that Plaintiff was satisfied with the effects of her present medications.  
21 TR 25.

22 The ALJ gave little weight to the opinions of the State Agency Medical Consultants,  
23 who found Plaintiff was capable of performing work at all levels of exertional activity,  
24 because these non-examining, non-treating physicians did not review Plaintiff's most recent  
25 medical evidence or hear her testimony. TR 24. The ALJ also gave little weight to the  
26 opinion evidence of Dr. Jennifer Auge, because Dr. Auge's conclusion that Plaintiff would  
27 be unable to perform any employment in the foreseeable future was supported only by the  
28 conclusory comment that "patient has been unable to work since 2004." Further, Dr. Auge

1 did not set forth specific functional limitations, and, according to the ALJ, her opinion was  
2 “clearly inconsistent with other more persuasive and substantive evidence of record.” TR  
3 24. The ALJ gave substantial weight to the “objective medical evidence,” including  
4 Plaintiff’s x-ray, EMG with nerve conduction studies, laboratory studies, CT scan, MRIs, and  
5 direct motor testing. TR 22–23.

6 The ALJ concluded his decision at step four of the sequential process, and found that  
7 Plaintiff was not disabled. Based on the RFC and the testimony of the VE, the ALJ found  
8 that Plaintiff was capable of performing her past work as a credit collector, as such work was  
9 actually and generally performed. TR 25. Accordingly, the ALJ held that Plaintiff was not  
10 disabled under sections 216(i) and 223(d) of the Social Security Act. TR 26.

## 11 **V. STANDARD OF REVIEW**

12 A district court

13 may set aside a denial of disability benefits only if it is not supported  
14 by substantial evidence or if it is based on legal error. Substantial  
15 evidence means more than a mere scintilla but less than a  
16 preponderance. Substantial evidence is relevant evidence which,  
17 considering the record as a whole, a reasonable person might accept as  
adequate to support a conclusion. Where the evidence is susceptible to  
more than one rational interpretation, one of which supports the ALJ’s  
decision, the ALJ’s decision must be upheld.

18 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (internal citation and quotation  
19 omitted). This standard of review exists, because “[t]he trier of fact and not the reviewing  
20 court must resolve conflicts in the evidence, and if the evidence can support either outcome,  
21 the court may not substitute its judgment for that of the ALJ.” *Matney ex rel. Matney v.*  
22 *Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992). Also under this standard, the Court will  
23 uphold the ALJ’s findings “if supported by inferences reasonably drawn from the record.”  
24 *Batson v. Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). However, the Court must  
25 consider the entire record as a whole and “may not affirm simply by isolating a ‘specific  
26 quantum of supporting evidence.’” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (quoting  
27 *Robbings v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)).  
28

1 **VI. ANALYSIS**

2 On appeal, Plaintiff argues that the ALJ committed legal errors in his assessment at  
3 steps three and four of the sequential process, and that this matter should be remanded either  
4 for further proceedings or a determination of benefits. Asserting the SSA’s final decision is  
5 supported by substantial evidence and free of harmful legal error, the Commissioner asks the  
6 Court to affirm the decision of the ALJ.

7 Plaintiff first argues that the ALJ erred at step three of the sequential process by not  
8 considering Listing 11.03 (Epilepsy), 20 C.F.R. pt. 404, Subpt. P, App’x 1, in connection  
9 with Plaintiff’s migraine headaches and history. Plaintiff also argues that the ALJ erred at  
10 step four of the sequential process by not setting forth a function-by-function assessment of  
11 Plaintiff’s impairments and restrictions in determining Plaintiff had the RFC to perform a  
12 range of light work. Plaintiff further objects to the ALJ’s failure to consider the effect of  
13 Plaintiff’s migraines on the RFC. Plaintiff finally argues that the ALJ erred in not properly  
14 considering Plaintiff’s subjective complaints and the opinions of Plaintiff’s treating  
15 physicians. Plaintiff argues, and the Court agrees, that the ALJ did not fully develop the  
16 record prior to denying Plaintiff’s application for disability benefits.

17 **A. Consideration of Listing 11.03 in Step 3 Analysis**

18 In order for a claimant’s impairment or combination of impairments to meet the  
19 requirements of a listed impairment, all of the criteria of that listing and the duration  
20 requirement must be satisfied. *See* 20 C.F.R. §§ 404.1525(c)(1–3), 416.925(c)(1–3).  
21 Medical equivalence will be found “if the medical findings are at least equal in severity and  
22 duration to the listed findings.” 20 C.F.R. § 404.1526(a); *see Marcia v. Sullivan*, 900 F.2d  
23 172, 175 (9th Cir. 1990). “*Marcia* simply requires an ALJ to discuss and evaluate the  
24 evidence that supports his or her conclusion.” *Lewis v. Apfel*, 236 F.3d 503, 513 (9th Cir.  
25 2001). A claimant must offer a plausible theory of how her combination of impairments  
26 equals a listing before the failure to consider the issue will be error. *Id.* at 514; *see Burch v.*  
27 *Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005) (“An ALJ is not required to discuss the  
28 combined effects of a claimant’s impairments or compare them to any listing in an

1 equivalency determination, unless the claimant presents evidence in an effort to establish  
2 equivalence.”).

3 Plaintiff argues that the ALJ’s failure to evaluate her severe impairments under Listing  
4 11.03 constitutes legal error. According to the ALJ’s decision, the ALJ considered and  
5 rejected Plaintiff’s impairments under Sections 1.00, 2.00, 5.00 and 9.00 of the Listing of  
6 Impairments. TR 21. The ALJ did not consider Listing 11.03. Plaintiff argues that her  
7 migraine headaches meet or equal Listing 11.03, and, therefore, she is disabled. *See* 20  
8 C.F.R. § 404.1520(d).

9 The Commissioner refers to the SSA’s Question and Answer (“Q&A”) 09-036, which  
10 is attached to Plaintiff’s reply brief, as the SSA’s current guidance for determining whether  
11 migraine headaches are a medically determinable impairment. (Doc. # 27-1, App’x 4.)  
12 According to the SSA, Listing 11.03 (Epilepsy - nonconvulsive epilepsy)<sup>4</sup> “is still the most  
13 analogous listing for considering medical equivalence [of migraine headaches].” Q&A 09-  
14 036. The Q&A describes the essential components of Listing 11.03, as those components  
15 apply to migraine headaches: typical headache event pattern that is documented by detailed  
16 descriptions, including all associated phenomena (*e.g.*, premonitory symptoms, aura,  
17 duration, intensity, treatment), that occurs more frequently than once weekly with alteration  
18 of awareness or an effect that significantly interferes with activity during the day (*e.g.*, need  
19 for a darkened quiet room, lying down without moving, or sleep disturbance that impacts  
20 daytime activities). *Id.*

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24 <sup>4</sup> Listing 11.03 of the SSA’s Listing of Impairments provides, in full:  
25 Epilepsy - nonconvulsive epilepsy (petit mal, psychomotor, or focal),  
26 documented by detailed description of a typical seizure pattern, including all  
27 associated phenomena; occurring more frequently than once weekly in spite  
28 of at least 3 months of prescribed treatment. With alteration of awareness or  
loss of consciousness and transient postictal manifestations of unconventional  
behavior or significant interference with activity during the day.

20 C.F.R. Pt. 404, Subpt. P, App’x 1.

1 The Commissioner argues that Plaintiff has not met her burden to present medical  
2 findings satisfying all the criteria of Listing 11.03 over 12 months. (Doc. # 26 at p.10.)  
3 Plaintiff disagrees, and refers the Court to the record, wherein Plaintiff’s long history of  
4 migraine headaches is discussed. (Doc. # 27 at p. 2–3.) The record contains sufficient  
5 evidence that Plaintiff’s migraine headaches may be analogous to the listing for epilepsy.  
6 For instance, Plaintiff cites to medical evidence describing Plaintiff’s typical headache  
7 pattern, including associated phenomena, TR 199, 206–10, frequency of her migraine  
8 headaches, TR 132, 200, 203–05, interference with daily activity caused by her migraine  
9 headaches, TR 197–98, 237, 344–47, and existence of her migraine headaches for a period  
10 of at least 12 months, TR 133–34, 195, 370–72. The credibility of this medical evidence,  
11 which is largely anecdotal, must be determined by the ALJ upon remand.

12 The Court will not go so far as to determine whether Plaintiff meets Listing 11.03, but  
13 finds that there is sufficient evidence in the record for the ALJ to evaluate Plaintiff’s  
14 migraine headaches under Listing 11.03. Accordingly, it was error for the ALJ not to  
15 consider Listing 11.03 in evaluating whether Plaintiff is disabled at step three of the  
16 sequential process. For this, and the additional reasons set forth below, the Court will  
17 remand this matter to the ALJ for further determination.

18 **B. Residual Functional Capacity Determination in Step Four Analysis**

19 Plaintiff argues that the ALJ’s failure to set forth a function-by-function assessment  
20 of Plaintiff’s residual functional capacity or RFC makes the ALJ’s decision legally deficient.  
21 The Court agrees, and remands this matter to the ALJ for a thorough RFC assessment,  
22 provided that the ALJ’s inquiry on remand reaches step four of the sequential process.

23 As described above, at step four of the sequential process the ALJ determines whether,  
24 despite Plaintiff’s impairments, Plaintiff can still perform her “past relevant work.” 20  
25 C.F.R. § 420.1520(a)(4)(iv). This determination is made by comparing the RFC assessment  
26 with the physical and mental demands of Plaintiff’s past relevant work. *Id.* § 404.1520(f).  
27 The RFC is determined by the relevant medical and other evidence in a claimant’s case  
28 record, and is considered to be the most the claimant is able to do despite her limitations. *Id.*

1 § 404.1545(a)(1). Before making an RFC assessment, the ALJ is responsible for developing  
2 a claimant’s complete medical history, including arranging for consultative examinations,  
3 if necessary. *Id.* § 404.1545(a)(3).

4 A relevant Social Security Ruling<sup>5</sup> provides that “[t]he RFC assessment must first  
5 identify the individual’s functional limitations or restrictions and assess his or her work-  
6 related abilities on a function by function basis.” Soc. Sec. Rul. 96-8p, 1996 WL 374184,  
7 at \*1 (July 2, 1996); *see Reed v. Massanari*, 270 F.3d 838, 843 n.2 (9th Cir. 2001) (“Notably  
8 absent from the record before the ALJ was any assessment of Reed’s RFC on a function-by-  
9 function basis . . . . A Social Security Administration ruling specifically warns against this  
10 practice of determining a claimant’s ability to perform past work on the sole basis of a  
11 categorical RFC assessment.”). Accordingly,

12 At step 4 of the sequential evaluation process, the RFC must not be expressed  
13 initially in terms of the exertional categories of ‘sedentary,’ ‘light,’ ‘medium,’  
14 ‘heavy,’ and ‘very heavy’ work because the first consideration at this step is  
whether the individual can do past relevant work as he or she actually  
performed it.

15 Soc. Sec. Rul. 96-8p, at \*3. The Social Security Ruling states that “without the initial  
16 function-by-function assessment of the individual’s physical and mental capacities, it may  
17 not be possible to determine whether the individual is able to do past relevant work as it is  
18 generally performed in the national economy.” *Id.* The Social Security Ruling further  
19 recognized that the “[i]nitial failure to consider an individual’s ability to perform the specific  
20 work-related functions could be critical to the outcome of a case.” *Id.*; *see Pinto v.*  
21 *Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (stating that the ALJ has the “burden to make

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24 <sup>5</sup> Social Security Rulings constitute the SSA’s interpretations of the statutes it  
25 administers and of its own regulations. *Chavez v. Dep’t of Health & Human Servs.*, 103 F.3d  
26 849, 851 (9th Cir.1996). Although Social Security Rulings do not have the force of law, *id.*,  
27 once published, these rulings are binding upon ALJs and the Commissioner, *Holohan v.*  
28 *Massanari*, 246 F.3d 1195, 1202–03 n.1 (9th Cir.2001); *Gatliff v. Comm’r of Soc. Sec.*  
*Admin.*, 172 F.3d 690, 692 n.2 (9th Cir.1999).

1 the appropriate findings to insure that the claimant really can perform his or her past relevant  
2 work”).

3 Here, the ALJ failed to set forth a function-by-function assessment of Plaintiff’s  
4 physical and mental capabilities. The ALJ stated that Plaintiff had the RFC for “light  
5 exertional level tasks with occasional climbing of stairs and ramps; occasional stooping,  
6 crawling and kneeling; and, no work around heights or dangerous moving machinery.” TR  
7 21. The ALJ further defined “light work” by its generic definition as “work lifting 20 pounds  
8 occasionally and frequent lifting or carrying of objects weighing 10 pounds, standing and/or  
9 walking 6 of 8 hours, or sitting most of the time with some pushing and pulling arm or leg  
10 controls.” TR 21. In reaching the conclusion that Plaintiff’s RFC is for “light work,” the  
11 ALJ did not make findings as to the functions that Plaintiff could perform in consideration  
12 of her impairments, and the functions Plaintiff performed or was expected to perform on a  
13 day to day basis as a credit collector. It is unclear how the ALJ came to the conclusion that  
14 Plaintiff is suited for “light work” despite her impairments, because the ALJ did not make  
15 any findings as to Plaintiff’s functional limitations or restrictions.

16 Even though the ALJ reported that Plaintiff’s RFC would not preclude work in the  
17 credit collection field, because it is a skilled sedentary occupation, TR 26, the ALJ failed to  
18 make any specific findings as to the duration and frequency of the specific functions that  
19 Plaintiff could perform. The ALJ states that “[i]n comparing the claimant’s residual  
20 functional capacity with the physical and mental demands of this work, the [ALJ] finds that  
21 the claimant is able to perform this past work as actually and generally performed.” TR 26.  
22 However, the ALJ did not provide a function-by-function assessment before reaching this  
23 conclusion. Further, the ALJ did not describe of the functions of a credit collector.

24 Plaintiff further argues that the ALJ did not properly consider the effect of Plaintiff’s  
25 migraine headaches on her RFC. Specifically, Plaintiff argues that, “[a]t a minimum, the  
26 ALJ was required to identify the frequency, duration and severity of migraine headaches as  
27 Defendant’s vocational expert affirmed that migraine headaches causing unscheduled  
28 absences or missed work at a rate of 4 or more per month is work precluding.” (Doc. # 25

1 at pp. 21–22.) While there is no authority requiring the ALJ to make a specific frequency,  
2 duration and severity finding, the Court agrees that an assessment of Plaintiff’s RFC  
3 invariably should include an assessment of Plaintiff’s ability to attend work on a regular and  
4 continuous basis.<sup>6</sup> The ALJ’s decision does not appear to take into account the effect of  
5 Plaintiff’s unscheduled absences on her ability to engage in substantial gainful activity. The  
6 ALJ states that the RFC “accommodates the claimant’s pain complaints and symptoms of  
7 degenerative disc disease,” TR 24; however, the RFC does not account for unscheduled  
8 absences of any duration or frequency. On remand, and assuming the ALJ reaches step four  
9 of the sequential process, the ALJ must address the VE’s testimony that four or more days  
10 of unscheduled absences and the need to take unscheduled breaks for unspecified durations  
11 would not permit a person to perform any jobs that exist in the national economy. TR 413.

12 As cautioned by the Social Security Ruling, without an initial function-by-function  
13 assessment of the claimant’s physical and mental capacities, it may not be possible to  
14 determine whether the claimant is able to do past relevant work as it is generally performed  
15 in the national economy. *See* Soc. Sec. Rul. 96-8p, at \*3. The ALJ’s conclusory statement  
16 of Plaintiff’s RFC and recitation of the generic definition of “light work” is not the  
17 equivalent of this assessment. On remand, and assuming the ALJ reaches step four of the  
18 sequential process, the ALJ must identify Plaintiff’s functional limitations or restrictions, and  
19 assess her work-related abilities on a function-by-function basis.

20 **C. Consideration of Plaintiff’s Subjective Complaints**

21 With respect to Plaintiff’s subjective complaints, the ALJ concluded “the claimant’s  
22 statements concerning the intensity, duration and limiting effects of these symptoms are not  
23 entirely credible.” TR 22. Plaintiff argues that the ALJ failed to properly consider her  
24 subjective complaints.

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27 <sup>6</sup> RFC is an individual’s maximum remaining ability to do sustained work activities  
28 in an ordinary work setting on a regular and continuing basis, where “regular and continuing  
basis” means eight hours a day for five days a week. Soc. Sec. Rul. 96-8p, at \*2.

1 If a claimant produces objective medical evidence of an underlying impairment, as  
2 Plaintiff did here, then the ALJ cannot reject the claimant's subjective complaints based  
3 solely on a lack of objective medical support for the alleged severity of the pain. *Rollins v.*  
4 *Massanari*, 261 F.3d 853, 856 (9th Cir. 2001). When the ALJ finds the claimant's subjective  
5 pain testimony not credible, the ALJ must make findings sufficiently specific to allow the  
6 reviewing court to conclude that the ALJ rejected the testimony on permissible grounds and  
7 did not arbitrarily discredit the claimant's testimony. *Id.* at 856–57. If no affirmative  
8 evidence of malingering exists, then the ALJ must provide clear and convincing reasons for  
9 rejecting the claimant's testimony about the severity of her symptoms. *Id.* at 857.

10 The Court concludes that the ALJ provided clear and convincing reasons supported  
11 by substantial evidence for not fully crediting Plaintiff's testimony. The ALJ found  
12 Plaintiff's treatment was conservative and consisted primarily of medication with minimal  
13 side-effects, which the ALJ considered was persuasive evidence that Plaintiff was not totally  
14 disabled. TR 25. The ALJ also found that the battery of tests performed were all negative  
15 and/or normal, which was objective evidence that Plaintiff's impairments were not as severe  
16 as Plaintiff claimed. TR 22–23. The ALJ stated that the fact that Plaintiff continued "to  
17 smoke [cigarettes] despite her numerous complaints diminished her credibility," because it  
18 "is well known that smoking is a contradiction for good health." TR 23. The ALJ also noted  
19 that Plaintiff suffered from chronic back pain since 1969, and yet the record reflects  
20 Plaintiff's ability to sustain substantial gainful activity despite this pain. TR 23 ("The fact  
21 that the chronic pain did not prevent the claimant from working prior to the onset date  
22 strongly suggests that it would not currently prevent work."). The ALJ also pointed out that  
23 Plaintiff's alleged vision problems were undermined by her ability to drive herself to the  
24 hearing. TR 24. While the ALJ stated that he recognized Plaintiff was suffering pain, the  
25 wide range of Plaintiff's daily activities was inconsistent with disability. TR 24 ("The  
26 claimant is self-sufficient in her activities of daily living. She is able to manager her self-care  
27 and household chores and living arrangements independently."). The ALJ considered  
28 Plaintiff's anticipation of the receipt of disability benefits, employer-based benefits, and

1 proceeds from the sale of her house to be economic disincentives to return to work. TR 25.  
2 The ALJ concluded his analysis of the credibility of Plaintiff's subjective complaints by  
3 stating that "[t]he objective medical evidence, the lack of treatment and/or need for  
4 significant pain medications, the claimant's daily activities and other factors all fail to  
5 support the claimant's allegations of inability to work." TR 25.

6 Contrary to Plaintiff's briefs, the ALJ gave "little weight" to the opinions of the State  
7 Agency Medical Consultants, because these non-examining, non-treating physicians did not  
8 review Plaintiff's recent medical records or hear Plaintiff's testimony, which the ALJ stated  
9 supported a reduction of Plaintiff's RFC. TR 24.

10 Despite Plaintiff's testimony concerning the severity of her impairments, the ALJ's  
11 interpretation is reasonable and supported by substantial evidence. It is not the Court's role  
12 to second guess the ALJ's fact findings. *See Rollings*, 261 F.3d at 857. Consequently, the  
13 Court rejects Plaintiff's argument that the ALJ improperly discredited her subject complaints.  
14 The ALJ gave clear and convincing reasons for discounting the severity and effect of her  
15 impairments based on Plaintiff's subjective complaints, and those reasons were supported  
16 by substantial evidence.

#### 17 **D. Consideration of Treating Physician Opinions**

18 "The ALJ is responsible for resolving conflicts in the medical record." *Carmickle v.*  
19 *Soc. Sec. Admin.*, 533 F.3d 1155, 1164 (9th Cir. 2008). Generally, "more weight should be  
20 given to the opinion of a treating source than to the opinion of doctors who do not treat the  
21 claimant." *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (citing *Winans v. Bowen*, 853  
22 F.2d 643, 647 (9th Cir. 1987)). However, where an opinion is contradicted, the ALJ may  
23 reject it for "specific and legitimate reasons that are supported by substantial evidence in the  
24 record." *Carmickle*, 533 F.3d at 1164 (quoting *Lester*, 81 F.3d at 830–31).

25 Plaintiff argues that the ALJ improperly ignored the opinions of Plaintiff's treating  
26 physicians concerning the severity of Plaintiff's headaches. Specifically, Plaintiff contends  
27 the ALJ's decision failed to address the opinion of Dr. Toffol that Plaintiff should not return  
28 to work during a two week period due to incapacitating headaches, TR 195, the opinion of

1 Dr. Michael Somers that Plaintiff “has disabling ophthalmic migraine headaches,” TR 237,  
2 and the opinion of Dr. Gail Francis that Plaintiff did not respond to a nerve block and has  
3 intractable headaches, TR 342–47.<sup>7</sup> While the ALJ does not have to accept a treating  
4 physician’s opinion as true, the ALJ is required to provide specific and legitimate reasons for  
5 rejecting a contradicted opinion. Based on the ALJ’s decision, it appears that the ALJ  
6 ignored or summarily dismissed these opinions. The Court does not quarrel with the  
7 Commissioner’s argument that the Social Security Act has a very specific standard for  
8 determining disability, and that a doctor’s use of the word “disabled” or a finding of  
9 disability by another agency does not carry significant weight. However, the opinions of  
10 treating physicians do carry at least *some* weight, and the ALJ must set forth legitimate and  
11 specific reasons for discounting these opinions.

12 A treating physician’s opinion can be discounted based on the results and findings of  
13 an independent consultative examination. *Batson*, 359 F.3d at 1194–95. On remand, if the  
14 ALJ finds it necessary to obtain a consultative examination, which was not previously  
15 obtained, the ALJ can potentially and reasonably discount the opinions of Plaintiff’s treating  
16 physicians. However, the ALJ is required to compare the records and reports prepared by  
17 various treating and consulting physicians, before concluding that the evidence, as a whole,  
18 supports a finding that Plaintiff had the ability to perform light work during the relevant time  
19 period. If the ALJ finds an opinion to be contradicted by other parts of the record, then the  
20 ALJ must set for the specific and legitimate reasons for rejecting the medical opinion.  
21 *Lester*, 81 F.3d at 830–31; *see* 20 C.F.R. § 404.1527(d)(2) (“We [the ALJ] will always give

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22  
23 <sup>7</sup> Plaintiff also cites the medical opinion prepared by Dr. Jennifer Auge, which states  
24 that Plaintiff could not perform work in the foreseeable future, TR 391, as an improperly  
25 ignored medical source opinion. (Doc. # 25 at p. 29.) However, the ALJ did review this  
26 opinion and concluded that Dr. Auge’s opinion “is quite conclusory, providing very little  
27 explanation of the evidence relied on in forming that opinion.” TR 24–25. The ALJ goes  
28 on to state that this opinion “contrasts sharply with the other contemporaneous evidence of  
record.” TR 25. On remand, the ALJ is instructed to set for the “other contemporaneous  
evidence of record” he is referring to, because the Court, based on its review of the record,  
does not find contemporaneous records to *contrast sharply* with Dr. Auge’s opinion.

1 good reasons in our notice of determination or decision for the weight we give your treating  
2 source’s opinion.”). Accordingly, on remand, the ALJ is required to consider and weigh the  
3 opinions of Plaintiff’s treating physicians.

4 **E. ALJ’s Duty to Fully Develop the Record**

5 “The ALJ in a social security case has an independent ‘duty to fully and fairly develop  
6 the record and to assure that the claimant’s interests are considered.’” *Tonapetyan v. Halter*,  
7 242 F.3d 1144, 1150 (9th Cir. 2001) (quoting *Smolen*, 80 F.3d at 1288). When a claimant  
8 is not represented “the ALJ must be especially diligent,” *id.*, and “scrupulously and  
9 conscientiously probe into, inquire of, and explore all the relevant facts,” *Cox v. Califano*,  
10 587 F.2d 988, 991 (9th Cir. 1978) (quoting *Gold v. Sec’y of Health, Educ. & Welfare*, 463  
11 F.2d 38, 43 (2d Cir. 1972)). When “the heavy burden imposed by *Cox*” is not met, and the  
12 claimant may have been prejudiced, “the interests of justice demand that the case be  
13 remanded.” *Vidal v. Harris*, 637 F.2d 710, 714–15 (9th Cir. 1981).

14 In *Celaya v. Halter*, the Ninth Circuit outlined the ALJ’s heightened duty to fully  
15 develop the record when the claimant is not represented by counsel. 332 F.3d 1177 (9th Cir.  
16 2003). There, the ALJ found that the claimant was not disabled because she could perform  
17 light work, including her past work as a presser for a dry cleaners, despite her impairments.  
18 *Id.* at 1180. The Ninth Circuit required the ALJ to “probe into, inquire of, and explore for  
19 all the relevant facts.” *Id.* at 1183 (citing *Higbee v. Sullivan*, 975 F.2d 558, 561 (9th Cir.  
20 1992)). The Court of Appeals remanded the case for development of the record on the  
21 claimant’s obesity. *Id.* at 1184.

22 Plaintiff argues that the ALJ failed to fully develop the record when the ALJ failed  
23 to obtain a consultative examination. Plaintiff misreads the record. During the May 22, 2007  
24 hearing, the ALJ stated that he “might have to send [Plaintiff] out for a consultative  
25 examination in light of all this new evidence.” TR 395. The ALJ then continued the hearing  
26 to August 28, 2007, TR 399, but did not obtain a consultative examination.

27 Based on the reasoning throughout this Order, the Court finds that the ALJ has not  
28 met his burden of “assur[ing] that the claimant’s interests are considered.” *Tonapetyan*, 242

1 F.3d at 1150. Specifically, the Court finds that the ALJ failed to fully develop the record  
2 with regard to the consideration of Plaintiff's migraine headaches under Listing 11.03,  
3 Plaintiff's functional limitations and restrictions in connection with determining Plaintiff's  
4 RFC, and the weight of her treating physician's opinions. On remand, the ALJ also may find  
5 it necessary to obtain a consultative examination.

6 **VII. CONCLUSION**

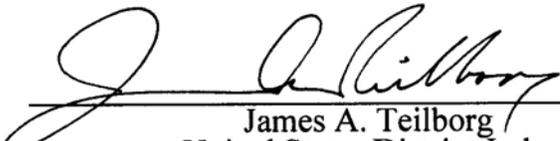
7 Because the Court finds that there are outstanding issues that must be resolved before  
8 a proper disability determination can be made, and because the ALJ has not fully and fairly  
9 developed the record in the manner described above, this matter must be remanded for a new  
10 determination regarding Plaintiff's entitlement to disability benefits.

11 Accordingly,

12 **IT IS ORDERED** that the decision of the ALJ is vacated and the case is remanded  
13 for further proceedings.

14 **IT IS FURTHER ORDERED** that Plaintiff's Motion fo Submission on Briefs Filed  
15 is **DENIED** as moot.

16 DATED this 17th day of February, 2011.

17  
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20 James A. Teilborg  
21 United States District Judge  
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