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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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Michelle D. Butler,

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No. CV-09-2536-PHX-DGC

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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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Plaintiff Michelle Butler applied for disability insurance benefits on February 10, 2005, claiming to be disabled since July 19, 2004. Doc. 23, Tr. 118, 125. The application was denied. Tr. 106-13. A hearing before an Administrative Law Judge (“ALJ”) was held on April 30, 2007. Tr. 46-87. The ALJ issued a written decision on July 26, 2007, finding Plaintiff not disabled within the meaning of the Social Security Act. Tr. 15-26. This decision became Defendant’s final decision when the Appeals Council denied review. Tr. 3-6. Plaintiff then commenced this action for judicial review pursuant to 42 U.S.C. §§ 405(g) and 1383(c). Doc 1. For reasons that follow, the Court will reverse Defendant’s decision and remand the case for an award of benefits.

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**I. Standard of Review.**

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The Court has the “power to enter, upon the pleadings and transcript of record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). The

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1 Commissioner’s decision to deny benefits “should be upheld unless it is based on legal error  
2 or is not supported by substantial evidence.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194,  
3 1198 (9th Cir. 2008). In determining whether the decision is supported by substantial  
4 evidence, the Court “must consider the entire record as a whole and may not affirm simply  
5 by isolating a ‘specific quantum of supporting evidence.’” *Id.*

6 **II. Analysis.**

7 Whether a claimant is disabled is determined using a five-step evaluation process.  
8 To establish disability, the claimant must show (1) she is not currently working, (2) she  
9 has a severe impairment, and (3) her impairment meets or equals a listed impairment or  
10 (4) her residual functional capacity (“RFC”) precludes her from performing her past work.  
11 At step five, the Commissioner must show that the claimant is able to perform other work.  
12 20 C.F.R. § 404.1520.

13 Plaintiff has met her burden. She has not worked since the alleged disability onset  
14 date. Tr. 17, ¶ 2. She has multiple severe impairments: lumbar degenerative disc disease,  
15 status post spinal fusion, fibromyalgia, history of lupus, seizure disorder, major depressive  
16 disorder, and pain disorder. Tr. 17, ¶ 3. While those impairments do not meet or equal a  
17 listed impairment (Tr. 17-18, ¶ 4), they do preclude Plaintiff from performing her past work  
18 as a senior claims examiner and benefits coordinator (Tr. 24, ¶ 6). At step five, the ALJ  
19 concluded that Plaintiff is not disabled because she has the RFC to perform light work with  
20 certain limitations. Tr. 18-24, ¶ 5.

21 Plaintiff argues that the ALJ erred in determining RFC (Doc. 17 at 27-29), failed to  
22 properly weigh medical source opinions (*id.* at 29-38), failed to properly evaluate her  
23 credibility and daily activities (*id.* at 38-42), ignored the testimony of her mother (*id.* at  
24 42-43), and failed to resolve conflicts between the dictionary of occupational titles and  
25 vocational expert testimony (*id.* at 43-45). Defendant contends that the ALJ did not err and  
26 her decision is supported by substantial evidence. Doc. 18. After careful review of the  
27 record, the parties’ briefs, and relevant legal authority, the Court finds the ALJ’s decision to  
28 be rife with error and unsupported conclusions.

1           **A.     RFC Determination.**

2           RFC is the most a claimant can do despite her physical and mental limitations.  
3     20 C.F.R. § 404.1545(a)(1). Before determining RFC, the ALJ must “first identify the  
4     individual’s functional limitations or restrictions and assess [her] work-related abilities on  
5     a function-by-function basis[.]” SSR 96-8p, 1996 WL 374184, at \*1 (July 2, 1996). Only  
6     after an appropriate function-by-function assessment “may RFC be expressed in terms of the  
7     exertional levels of work[.]” *Id.*; see *Reed v. Massanari*, 270 F.3d 838, 843 n.2 (9th Cir.  
8     2001); *Washnieski v. Astrue*, No. 07-CV-598, 2008 WL 3981987, at \*6 (E.D. Wis. Aug. 22,  
9     2008) (“Under SSR 96-8p, the ALJ must find the claimant’s functional limitations on a  
10    function-by-function basis *before* determining the RFC.”). This sequential evaluation  
11    process is important because absent “careful consideration of an individual’s functional  
12    capacities to support an RFC assessment based on an exertional category, the [ALJ] may . . .  
13    overlook limitations or restrictions that would narrow the ranges and types of work an  
14    individual may be able to do[.]” SSR 96-8p, at \*4. Failure to perform a function-by-function  
15    assessment ultimately “could make the difference between a finding of ‘disabled’ and ‘not  
16    disabled.’” *Id.*

17           The ALJ failed to perform a function-by-function assessment of Plaintiff’s work-  
18    related abilities before determining her RFC in terms of the exertional level of work, that is,  
19    the ability to perform a range of light work (Tr. 18, ¶ 5). That failure renders the ALJ’s  
20    “decision susceptible of the errors described in SSR 96-8p.” *Edwards v. Astrue*, No. 07-  
21    2157-KHV, 2008 WL 1766948, at \*8 (D. Kan. Apr. 15, 2008); see *Washnieski*, 2008 WL  
22    3981987, at \*6 (“the ALJ erred by failing to conduct a function-by-function assessment of  
23    Washnieski’s abilities”); *Shafer v. Astrue*, 518 F.3d 1067, 1070-72 (9th Cir. 2008) (the  
24    Commissioner is not substantially justified in defending the ALJ’s erroneous determination  
25    of RFC in terms of exertional categories of work instead of on a function-by-function basis).

26           Defendant asserts that a functional assessment is implicit in the ALJ’s finding that  
27    Plaintiff can perform light work, but SSR 96-8p requires more than implicit findings. The  
28    ALJ “must *discuss* the individual’s ability to perform sustained work activities in an ordinary

1 work setting on a regular and continuing basis . . . and *describe* the maximum amount of each  
2 work-related activity the individual can perform[.]” SSR 96-8p, at \*7 (emphasis added).  
3 Merely citing the regulation defining exertional categories of work “is insufficient to fulfill  
4 the function-by-function and narrative requirements under SSR 96-8p.” *Sharma v. Astrue*,  
5 No. C 07-4906 MEJ, 2008 WL 4540992, at \*6 (N.D. Cal. Oct. 6, 2008).

6 **B. Lay Witness Testimony.**

7 “In determining whether a claimant is disabled, an ALJ must consider lay witness  
8 testimony concerning a claimant’s ability to work.” *Stout v. Comm’r, Soc. Sec. Admin.*, 454  
9 F.3d 1050, 1053 (9th Cir. 2006); *see* 20 C.F.R. §§ 404.1513(d)(4), 404.1545(a)(3). Indeed,  
10 because statements from family members may provide insight into the severity of the  
11 impairments and how they affect the claimant’s ability to function, *see* SSR 06-03p, 2006  
12 WL 2329939, at \*2 (Aug. 9, 2006), such statements constitute ““competent evidence and  
13 therefore *cannot* be disregarded without comment.”” *Stout*, 454 F.3d at 1053 (quoting  
14 *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996)); *see Lewis v. Apfel*, 236 F.3d 503,  
15 511 (9th Cir. 2001) (the ALJ must consider lay witness testimony unless she “expressly  
16 determines to disregard such testimony and gives reasons germane to each witness for  
17 doing so”).

18 Plaintiff’s mother, Lynda Butler, completed a report describing how Plaintiff’s  
19 impairments limit her ability to function. Consistent with Plaintiff’s hearing testimony  
20 (Tr. 52-65), Ms. Butler stated that her daughter engages in only minimal daily activities due  
21 to the severity of her physical and mental impairments (Tr. 162-68). The ALJ committed  
22 reversible error in failing to consider this evidence. *Stout*, 454 F.3d at 1056 (“[W]e, along  
23 with our sister circuits, have consistently reversed the Commissioner’s decision for failure  
24 to comment on [lay witness] testimony.”); *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir.  
25 1996) (“Disregard of the testimony of friends and family members violates 20 C.F.R. §  
26 404.1513[.]”).

27 Defendant asserts that the error is harmless because the testimony of Plaintiff’s mother  
28 can be discounted for the same reasons the ALJ rejected Plaintiff’s own testimony. Doc. 18

1 at 16. But the ALJ, not this Court, “is required to provide specific reasons for rejecting lay  
2 testimony.” *Stout*, 454 F.3d at 1054. Indeed, the Court “cannot affirm the decision of [the  
3 ALJ] on a ground that the [ALJ] did not invoke in making [her] decision.” *Pinto v.*  
4 *Massanari*, 249 F.3d 840, 847 (9th Cir. 2001). The Court cannot “confidently conclude that  
5 no reasonable ALJ, when fully crediting the testimony [of Plaintiff’s mother], could have  
6 reached a different disability determination.” *Stout*, 454 F.3d at 1056. The ALJ’s error,  
7 therefore, was not harmless. *See id.*; *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th  
8 Cir. 2006).

9 **C. Medical Source Opinions.**

10 Dr. Carolyn Pace, a treating physician, provided a letter stating that she believes  
11 Plaintiff is completely and permanently disabled. Tr. 379. Treating physician Angelo  
12 Chirban completed a medical assessment of Plaintiff’s ability to do work-related activities.  
13 He opined, among other things, that Plaintiff is able to sit, stand, and walk less than 2 hours  
14 in an 8-hour workday and lift and carry 10 pounds occasionally. Tr. 332-34. Plaintiff argues  
15 that the ALJ erred in rejecting those medical opinions. She is correct with respect to the  
16 opinion of Dr. Chirban.

17 The ALJ need not accept the opinion of any medical source, including a treating  
18 source, “if that opinion is brief, conclusory, and inadequately supported by clinical findings.”  
19 *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *see Bayliss v. Barnhart*, 427 F.3d  
20 1211, 1216 (9th Cir. 2005). The opinion of Dr. Pace is set forth in a brief letter without  
21 explanation. The ALJ did not err in finding her opinion to be “quite conclusory.” Tr. 23.

22 Dr. Chirban, however, provided specific opinions as to Plaintiff’s work-related  
23 abilities and RFC, and those opinions were based on medical findings that Plaintiff suffers  
24 from lumbar degenerative disc disease, fibromyalgia, and lupus. Tr. 332-34. As Plaintiff’s  
25 treating physician, Dr. Chirban is “employed to cure and has a greater opportunity to know  
26 and observe [Plaintiff] as an individual.” *McCallister v. Sullivan*, 888 F.2d 599, 602 (9th Cir.  
27 1989). His opinions regarding the severity of Plaintiff’s impairments are therefore entitled  
28 to “special weight,” and if the ALJ chooses to disregard them, she must, at a minimum,

1 “set forth specific, legitimate reasons for doing so, and this decision itself must be supported  
2 by substantial evidence.” *Embrey v. Bowen*, 849 F.2d 418, 421 (9th Cir. 1988)) (quoting  
3 *Cotton v. Bowen*, 799 F.2d 1403, 1408 (1986)). The ALJ can meet this burden “by setting  
4 out a detailed and thorough summary of the facts and conflicting clinical evidence, stating  
5 [her] interpretation thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th  
6 Cir. 1998) (citing *Embrey*, 849 F.2d at 421).

7 The ALJ rejected Dr. Chirban’s opinions on the ground that “[t]he course of treatment  
8 pursued by [him] is not what one would expect if the claimant were truly disabled as the  
9 claimant and the doctors have alleged[.]” Tr. 23 But the ALJ does not identify the missing  
10 treatment, nor does she explain why the treatment Plaintiff did receive fails to support  
11 Dr. Chirban’s opinions on Plaintiff’s functional limitations.

12 The ALJ asserts that “it appears that [Dr. Chirban] relied quite heavily on the  
13 subjective report of symptoms and limitations, provided by the claimant, and seemed to  
14 uncritically accept as true most, if not all, of what the claimant reported.” Tr. 23. No  
15 evidence is cited in support of this assertion.

16 The ALJ notes (Tr. 23-24) that Dr. Chirban’s opinions are significantly inconsistent  
17 with the opinion of no disabling limitation offered by physician’s assistant Peter Tretheway  
18 (Tr. 273). But the ALJ does not explain why the conclusory opinion of Mr. Tretheway, who  
19 is not an “acceptable medical source,” *see* 20 C.F.R. 404.1513(a), should be credited over  
20 that of Plaintiff’s treating physician. When an ALJ “determines that an opinion from an  
21 [‘other source’] is entitled to greater weight than a medical opinion from a treating source,  
22 the [ALJ] must explain the reasons in the notice of decision.” SSR 06-03p, 2006 WL  
23 2329939, at \*6 (Aug. 9, 2006).

24 To properly reject Dr. Chirban’s opinions about Plaintiff’s work-related abilities,  
25 the ALJ must do more than offer her own conclusions. She must set forth her own  
26 “interpretations and explain why they, rather than [the treating physician’s], are correct.”  
27 *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007). The ALJ has failed to provide the requisite  
28 “detailed, reasoned, and legitimate rationales for disregarding [Dr. Chirban’s] findings.”

1 *Embrey*, 849 F.2d at 422. Her rejection of his opinions was erroneous.

2 Dr. James Huddleston, a licensed psychologist, examined Plaintiff in October 2005  
3 at the request of the state agency. Tr. 299-309. He completed a medical assessment of  
4 Plaintiff's ability to do work-related activities, opining, among other things, that Plaintiff was  
5 moderately limited in her ability to understand, remember, and carry out detailed instructions,  
6 to maintain attention and concentration for extended periods, to perform activities within a  
7 schedule, maintain regular attendance, and be punctual, to complete a normal workday and  
8 workweek, to interact appropriately with the general public, to accept instructions and  
9 respond appropriately to criticism, and to get along with coworkers. Tr. 306-09. Plaintiff  
10 argues that the ALJ erroneously rejected Dr. Huddleston's opinion. Doc. 17 at 37-38.  
11 Defendant does not address this argument.

12 The ALJ rejected all functional limitations identified by Dr. Huddleston on the ground  
13 that they are "somewhat inconsistent" with the information provided in his narrative report.  
14 Tr. 21-22. The only example the ALJ gives is that "although formal assessment of memory  
15 revealed no weaknesses in immediate or short-term memory, Dr. Huddleston concluded  
16 that the claimant had only a fair ability to remember locations and work like procedures."  
17 Tr. 22. But this says nothing about the numerous other functional limitations found by  
18 Dr. Huddleston, many of which were also found by the state agency consulting physicians.  
19 Tr. 259, 263-64, 295-296. The ALJ asserts that "mental health treatment notes do not fully  
20 support the limitations provided by Dr. Huddleston" (Tr. 22), but cites no evidence in support  
21 of this assertion. Considering the entire record as a whole, *see Ryan.*, 528 F.3d at 1198, the  
22 Court concludes that the ALJ failed to provide legitimate reasons supported by substantial  
23 evidence for rejecting Dr. Huddleston's opinion.

24 **III. Remedy.**

25 The decision to remand for further development of the record or for an award benefits  
26 is within the discretion of the Court. 42 U.S.C. § 405(g); *see Harman v. Apfel*, 211 F.3d  
27 1172, 1173-74 (9th Cir. 2000). This Circuit has held that an action should be remanded for  
28 an award of benefits where the ALJ has failed to provide legally sufficient reasons for

1 rejecting evidence, no outstanding issue remains that must be resolved before a determination  
2 of disability can be made, and it is clear from the record that the ALJ would be required to  
3 find the claimant disabled were the rejected evidence credited as true. *See, e.g., Varney v.*  
4 *Sec’y of HHS*, 859 F.2d 1396, 1400 (9th Cir. 1988).

5 After applying the credit-as-true rule to improperly discredited evidence, no  
6 outstanding issue remains to be resolved before determining that Plaintiff is entitled to  
7 benefits. The impartial vocational expert testified that the functional limitations found by  
8 Dr. Huddleston, if adopted, would preclude sustained work. Tr. 83-84. Defendant does not  
9 disagree with this conclusion. Because it is clear that the ALJ would be required to find  
10 Plaintiff disabled, *see Benecke v. Barnhart*, 379 F.3d 587, 593-95 (9th Cir. 2004), the Court  
11 will remand the case for an award of benefits. *See Orn v. Astrue*, 495 F.3d 625, 640 (9th Cir.  
12 2007) (remanding for an award of benefits where it was “clear from the record that the ALJ  
13 would be required to determine the claimant disabled”) (citation omitted); *D’Angelo v.*  
14 *Astrue*, No. CV-06-3055-PHX-EHC, 2007 WL 4617186, at \*9 (D. Ariz. Dec. 27, 2007)  
15 (remanding for an award of benefits where the vocational expert testified that the claimant’s  
16 limitations would preclude all work). Given this ruling, the Court need not address  
17 Plaintiff’s arguments that the ALJ failed to properly evaluate her credibility and daily  
18 activities and failed to resolve conflicts between the dictionary of occupational titles and  
19 vocational expert testimony.

20 **IT IS ORDERED:**

- 21 1. Defendant’s decision denying benefits is **reversed**.  
22 2. The case is remanded for an award of benefits.

23 DATED this 1<sup>st</sup> day of December, 2010.

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David G. Campbell  
United States District Judge