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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Danielle Shermae Arcadi,
10 Plaintiff,

No. CV-11-1780-PHX-GMS

ORDER

11 v.

12 Michael J. Astrue, Commissioner of Social
13 Security Administration,
14 Defendant.

15
16 Pending before the Court is Defendant's Motion to Remand. (Doc. 14). For the
17 reasons discussed below, the motion is denied.

18 **BACKGROUND**

19 **I. Procedural Background**

20 Plaintiff applied for disability benefits on February 25, 2008, alleging disability
21 beginning on November 14, 2006. (Doc. 9-3 at 14). She claimed to be disabled because
22 of anal fissures, fistula, stenosis, and seven surgeries to the rectum. (*Id.*). After her
23 application was denied upon request and consideration, a hearing was held before
24 Administrative Law Judge John W. Wojciechowski on April 9, 2010. (Doc. 9-3 at 25–
25 52). On June 9, 2010, the ALJ applied the five-step sequential evaluation process found
26 in 20 C.F.R. § 404.1520 and concluded that Plaintiff was not disabled because her
27 residual functional capacity ("RFC") allowed her to return to her past work. (Doc. 9-3 at
28

1 17–19). The Appeals Council denied her request for review on July 13, 2011. (Doc. 9-3
2 at 1). Plaintiff then filed suit in this Court. (Doc. 1).

3 After Plaintiff filed her opening brief, Defendant filed a Motion to Remand (Doc.
4 14), which has been fully briefed.

5 **II. Factual Background**

6 Plaintiff was injured in a fall in 2003, which caused a significant hematoma; from
7 the hematoma she developed an abscess and a fistula. (Doc. 9-11 at 456). She
8 subsequently underwent multiple fistulotomies, two sphincteroplasties, and “9 or 10”
9 other procedures, according to a doctor who treated her in 2009. (*Id.*). According to
10 another treating physician, one result of her condition was incontinence, and another was
11 that the procedures had left her with “a large hole in the anterior skin of the sphincter
12 mechanism;” after bowel movements “stool would deposit in the hole and she couldn’t
13 get it out.” (Doc. 9-3 at 430).

14 During her hearing, Plaintiff testified that because of her injuries and her surgeries,
15 she must clean herself after every bowel movement in a special toilet in her home, and
16 that if she does not use the special toilet, she risks both an abscess and an infection. (Doc.
17 9-3 at 32–37). She testified that she cannot clean herself adequately in a standard
18 restroom or in a shower, that the special toilet was recommended by a doctor, and that
19 hospital personnel are unfamiliar with it. (Doc. 9-3 at 46–47). She testified that she has
20 five or six bowel movements a day, and that during the period in which she was working
21 and did not yet have the special toilet in her home, she could not fully clean herself and a
22 as a result would “sit in my own feces at work” afterwards. (Doc. 9-3 at 44). The
23 Vocational Expert testified that a person who is required to leave the premises of a
24 workplace and travel home five or six times a day would not be able to sustain “either
25 [Plaintiff’s] past relevant work or other work.” (Doc. 9-3 at 51). The Vocational Expert
26 further testified that Plaintiff’s special toilet is not generally available in the work
27 environment. (*Id.*). No testimony was offered contradicting Plaintiff’s description of the
28 special toilet, her need to clean herself in that toilet, or the adequacy of other methods of

1 cleaning herself.

2 In his decision, the ALJ noted that Plaintiff “has to use the bathroom five or six
3 times a day,” and that she “also has to constantly keep that area clean.” (Doc. 9-3 at 17).
4 The decision does not mention the special toilet, and does not discuss Plaintiff’s
5 testimony that only the special toilet can adequately clean her after she has a bowel
6 movement. The ALJ stated that factors relevant to an individual’s symptoms include “the
7 individual’s daily activities, . . . and any other factors concerning the individual’s
8 functional limitations.” (Doc. 9-3 at 18). Without discussing the special toilet or
9 Plaintiff’s testimony as to the inadequacy of other means of staving off infection after a
10 bowel movement, the ALJ stated that Plaintiff’s statements concerning the “limiting
11 effects of these symptoms are not credible to the extent they are inconsistent with the
12 residual functional capacity assessment.” (Doc. 9-3 at 18).

13 In her opening brief, Plaintiff argued that the ALJ rejected Plaintiff’s testimony
14 regarding the toilet and her inability to clean herself in an ordinary restroom without
15 providing “clear and convincing reasons” for doing so. *Taylor v. Comm’r of Social Sec.*
16 *Admin.*, 659 F.3d 1228, 1234 (9th Cir. 2011). Rather than file a response, Defendant has
17 moved to remand the case for further administrative proceedings, including a new
18 hearing, to “enable an administrative law judge (‘ALJ’) to fully evaluate the evidence in
19 this voluminous record and make the necessary finding to determine whether Plaintiff is
20 disabled.” (Doc. 15 at 2). Elsewhere, Defendant suggests that, after remand an ALJ will
21 have the opportunity to “re-evaluat[e] Plaintiff’s subjective complaints.” (Doc. 15 at 8).

22 DISCUSSION

23 I. Legal Standard

24 In a claim seeking review of denial of social security benefits, “[t]he court shall
25 have power to enter, upon the pleadings and transcript of the record, a judgment
26 affirming, modifying, or reversing the decision of the Commissioner of Social Security,
27 with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). “If additional
28 proceedings can remedy defects in the original administrative proceeding, a social

1 security case should be remanded.” *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir.
2 1990). On the other hand, when “the question of whether [a claimant] is eligible for
3 benefits turns entirely on the credibility” of a plaintiff’s testimony, and the district court
4 finds that the ALJ improperly discredited that testimony, remand for further proceedings
5 is inappropriate, and the court should instead remand for a calculation of benefits. *Moisa*
6 *v. Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004).

7 **II. Analysis**

8 The Ninth Circuit follows the “credit-as-true” rule, in which a court credits a
9 plaintiff’s evidence and remands a case for an award of benefits when “(1) the ALJ has
10 failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no
11 outstanding issues that must be resolved before a determination of disability can be made,
12 and (3) it is clear from the record that the ALJ would be required to find the claimant
13 disabled were such evidence credited.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir.
14 1996).¹ Even when “there may exist valid grounds on which to discredit a claimant’s pain
15 testimony” in the record, the Ninth Circuit invokes the credit-as-true rule because “it is
16 both reasonable and desirable to require the ALJ to articulate them *in the original*
17 *decision.*” *Harman v. Apfel*, 211 F.3d 1172, 1179 (9th Cir. 2000) (quoting *Varney v.*
18 *Sec’y of Health and Human Svc’s (Varney II)*, 859 F.2d 1396, 1398–99 (9th Cir. 1988))
19 (emphasis in original).

20 Defendant argues that the record here presents outstanding issues that must be
21 resolved, and that it is not clear the ALJ would be required to find disability because “the
22 record contains evidence inconsistent with a finding of disability under Social Security
23 criteria.” (Doc. 15 at 4). Defendant notes that one doctor, after treating Plaintiff for

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25 ¹ The Court is aware of the Commissioner’s position regarding the credit-as-true
26 rule, but notes that even a Ninth Circuit judge who shares some skepticism of the rule’s
27 validity has noted that “because the crediting-as-true rule is part of our circuit’s law, only
28 an en banc court can change it.” *Vasquez v. Astrue*, 572 F.3d 586, 602 (9th Cir. 2009)
(O’Scannlain, J. dissenting). A district court is not at liberty to ignore the rule based upon
Defendant’s claims that it conflicts with the Social Security Act and “improperly usurps
the ALJ’s role as finder of fact.” (Doc. 15 at 5).

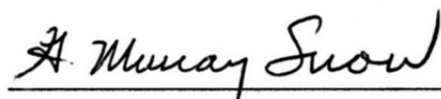
1 incontinence, wrote that Plaintiff could return to work if she wore a diaper. (Doc. 9-8 at
2 243). Defendant also cites to testimony from the doctor detailing numerous treatments
3 that Plaintiff was given for incontinence. (Doc. 9-11 at 430–439). In this testimony, the
4 doctor details incontinence treatments, but answers affirmatively when asked “if
5 [Plaintiff] doesn’t have these optimal stools, even though your surgery was successful,
6 she will have this wiping issue, potentially, for the rest of her life?” (*Id.* at 439). Finally,
7 Defendant claims that Plaintiff herself has “reported that she had special toilet paper that
8 helped clean and drain the area.” (Doc. 15 at 6). In support of this supposed report by
9 Plaintiff, Defendant cites to a medical evaluation that reads, “She relates that she has an
10 internal opening and cavity that she has a special toilet that helps clean the area and drain
11 the area, and so there is no soiling.” (Doc. 9-11 at 456). Nothing in the cited report
12 mentions toilet paper at all; the report only mentions the special toilet that Plaintiff
13 testified about at her hearing.

14 Defendant has not provided evidence demonstrating that a remand for further
15 evidentiary proceedings is appropriate. Defendant has not responded to Plaintiff’s
16 opening brief, so the Court need not determine whether to apply the “credit-as-true” rule.
17 Defendant will be provided an opportunity to respond to Plaintiff’s brief, and the Court
18 will not rule on the merits until the matter is fully briefed.

19 **IT IS THEREFORE ORDERED:**

- 20 1. Defendant’s Motion to Remand (Doc. 15) is **denied**.
21 2. Defendant shall have to and including **July 23, 2012**, to respond to
22 Plaintiff’s Opening Brief (Doc. 11).

23 Dated this 22nd day of June, 2012.

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26 G. Murray Snow
27 United States District Judge
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