

1 WO
2
3
4
5

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Carrie L Davis,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin, Acting Commissioner
13 of Social Security Administration,

14 Defendant.

No. CV-12-01795-PHX-BSB

ORDER

15 Carrie Davis (Plaintiff) seeks judicial review of the final decision of the
16 Commissioner of Social Security (the Commissioner), denying her applications for
17 disability insurance benefits and supplemental security income benefits under the Social
18 Security Act. The parties have consented to proceed before a United States Magistrate
19 Judge pursuant to 28 U.S.C. § 636(b) and have filed briefs in accordance with Local Rule
20 of Civil Procedure 16.1. For the following reasons, the Court reverses the
21 Commissioner's decision and remands for further proceedings.

22 **I. Procedural Background**

23 In January 2010, Plaintiff applied for disability insurance benefits and
24 supplemental security income under Titles II and XVI of the Social Security Act (the
25 Act). (Tr. 20.)¹ Plaintiff alleged that she was disabled due to psoriatic arthritis,
26 fibromyalgia, degenerative disc disease, and liver, skin, and nerve disorders. (Tr. 20, 43,
27

28 ¹ Citations to "Tr." are to the certified administrative transcript of record.
(Doc. 11.)

1 222.) She initially alleged that her disability began on October 14, 2009, but she later
2 amended her alleged disability onset date to March 10, 2010. (*Id.*) After the Social
3 Security Administration (SSA) denied Plaintiff's initial application and her request for
4 reconsideration, she requested a hearing before an administrative law judge (ALJ). (Tr.
5 2.) After conducting a hearing, the ALJ issued a decision finding Plaintiff not disabled
6 under the Act. (Tr. 20-30.) This decision became the final decision of the Commissioner
7 when the Social Security Administration Appeals Council denied Plaintiff's request for
8 review. (Tr. 1-5); *see* 20 C.F.R. § 404.981 (explaining the effect of a disposition by the
9 Appeals Council).

10 **II. Medical Record**

11 The record before the Court establishes the following history of diagnosis and
12 treatment related to Plaintiff's physical health. The record also includes opinions from
13 State Agency Physicians who examined Plaintiff, but did not provide treatment.

14 **A. Michael J. Fairfax, D. O., Treating Physician**

15 Plaintiff received treatment from rheumatologist Michael J. Fairfax, D.O. at
16 Arthrocare Arthritis Care and Research P.C. (AAC&R), starting in January 2010, for
17 complaints of generalized musculoskeletal pain and polyarthralgias. (Tr. 532-34.)
18 Plaintiff received treatment approximately every one to two months. She had symptoms
19 of psoriatic arthritis and fibromyalgia. (Tr. 533.) Plaintiff complained of fatigue and
20 non-restorative sleep. She also reported pain in her knees, elbows, hands, shoulders,
21 neck, low back, hips, and ankles. (*Id.*) She reported stiffness in her joints for
22 approximately thirty minutes every morning. Plaintiff reported night sweats, a history of
23 psoriasis, easy bruising, a history of Raynaud's phenomenon, dry eyes, dry mouth,
24 tinnitus, muscle weakness, a history of depression, intermittent anorexia, and
25 constipation. (*Id.*) A physical examination revealed scattered psoriasiform lesions, nail
26 pitting, and oncholysis. (*Id.*) Plaintiff had abdominal tenderness and Dr. Fairfax noted
27 that she was receiving treatment for a questionable mass. (*Id.*) Plaintiff had lumbar
28 paravertebral tenderness and multiple tender points with light palpation over major

1 muscle, bursal, and tendon groups. (Tr. 533.) Dr. Fairfax did not note any gross motor
2 or sensory deficits or objective signs of muscle weakness. (*Id.*) Dr. Fairfax diagnosed
3 Plaintiff with cutaneous psoriasis, polyarthralgias with a history of psoriatic arthritis,
4 degenerative disk disease of the cervical spine, ulnar neuropathy, a history of pelvic mass
5 and right upper quadrant mass of questionable significance. (*Id.*) He recommended
6 hand, knee, and ankle/foot x-rays. (*Id.*)

7 Bilateral hand x-rays revealed normal bone anatomy, normal joint spacing, and
8 normal soft tissue based on Plaintiff's age. (Tr. 537.) Bilateral foot/ankle x-rays
9 revealed mild symmetrical osteoarthritis. (Tr. 538.) Bilateral knee x-rays revealed mild
10 symmetrical loss of joint space height, representing mild osteodegenerative changes.
11 (Tr. 539.) After reviewing the x-rays, in February 2010, Dr. Fairfax diagnosed cutaneous
12 psoriasis, questionable psoriatic arthritis, and fibromyalgia. (Tr. 681.) He recommended
13 medication for arthritis. (*Id.*)

14 Dr. Fairfax examined Plaintiff again on April 10, 2010. (Tr. 684-686.) Plaintiff
15 reported that she could dress herself, lift a cup, and turn regular faucets without any
16 difficulty. (Tr. 684.) She also reported that she could get in and out of bed, walk on flat
17 ground, wash and dry her entire body, get in and out of a car with "some" difficulty, and
18 bend to the floor to pick up clothing with "much" difficulty. (*Id.*) Dr. Fairfax diagnosed
19 fibromyalgia and questionable psoriatic arthritis and recommended that Plaintiff continue
20 her current treatment. (Tr. 685.)

21 Dr. Fairfax saw Plaintiff on July 27, 2010 for a follow-up appointment. (Tr. 730-
22 731.) Plaintiff reported increased pain and swelling in her feet and radiating back pain.
23 (Tr. 730.) Examination revealed the absence of joint synovitis. (*Id.*) Plaintiff reported
24 that she could turn regular faucets without any difficulty, dress herself, lift a cup, wash
25 and dry her entire body with "some" difficulty, walk on flat ground and bend to the floor
26 to pick up clothing with "much" difficulty, get in and out of bed and in and out of a car
27 with "some" to "much" difficulty. (Tr. 731.) Dr. Fairfax diagnosed questionable
28 psoriatic arthritis. (Tr. 730.)

1 Dr. Fairfax examined Plaintiff again on September 2, 2010. (Tr. 727-729.)
2 Plaintiff presented with “arthralgias of the ankles and knees and worsening low back
3 pain.” (Tr. 727.) Dr. Fairfax noted that on examination Plaintiff had lumbar spine and
4 paravertebral tenderness, but no joint synovitis. (*Id.*) Plaintiff reported that she could lift
5 a cup without any difficulty, get in and out of bed, wash and dry her entire body, turn
6 regular faucets, and get in and out of a car with “some” difficulty. (Tr. 729.) She also
7 reported that she could walk on flat ground and bend to the floor to pick up clothing with
8 “much” difficulty, and dress herself with varying degrees of difficulty. (*Id.*) Dr. Fairfax
9 again diagnosed questionable psoriatic arthritis. (Tr. 727.) He ordered lumbar spine x-
10 rays, which revealed mild abnormalities. (Tr. 737.)

11 Dr. Fairfax examined Plaintiff again on November 24, 2010. (Tr. 723-724.)
12 Plaintiff reported that medication was somewhat effective in treating her symptoms.
13 (Tr. 723.) Examination revealed the absence of joint synovitis. (*Id.*) Dr. Fairfax
14 diagnosed generalized osteoarthritis and fibromyalgia and concluded there was no
15 evidence of psoriatic arthritis. He recommended that Plaintiff continue her current
16 treatment. (Tr. 723.)

17 On December 6, 2010, Dr. Fairfax completed a Medical Assessment of Ability to
18 do Work-Related Physical Activities (Physical Assessment). (Tr. 739.) Among other
19 limitations, Dr. Fairfax found that Plaintiff could sit, stand, and walk less than two hours
20 in an eight hour day. (Tr. 739.) He further found that she could not crawl or kneel.
21 (Tr. 739-740.) Dr. Fairfax completed a second Physical Assessment on April 2, 2011.
22 He noted that Plaintiff had shortness of breath, chronic fatigue, and chronic pain. He
23 noted that medication and rest with reclining or lying down reduced her symptoms, and
24 that stress or physical activity increased them. (Tr. 742-43.)

25 Dr. Fairfax saw Plaintiff on July 20, 2011. (Tr. 829.) He reported that
26 examination revealed tenderness with light palpation over major muscle, bursal, and
27 tendon groups, reduced shoulder ranges of motion, and the absence of joint synovitis.

28

1 (Tr. 829.) Dr. Fairfax diagnosed psoriatic arthropathy and fibromyalgia, and continued
2 her current treatment. (Tr. 829.)

3 **B. Elizabeth Ottney, D.O., Examining Physician**

4 Dr. Elizabeth Ottney, a consultative osteopath, examined Plaintiff in March 2010
5 in relation to her disability applications. (Tr. 572-574, 578-579, 588.) Plaintiff reported
6 a history of fibromyalgia, arthritis, degenerative spinal disc disease, and ulnar
7 neuropathy. (Tr. 572.) Plaintiff reported that she performed household chores, took
8 walks, and was taking college classes. (*Id.*) On examination, Dr. Ottney found that
9 Plaintiff had regular cardiac rate and rhythm without abnormal sounds, non-labored
10 breathing, and the absence of peripheral edema, including lower extremity edema.
11 (Tr. 573.) She also found that Plaintiff had present deep tendon reflexes throughout, the
12 absence of extremity atrophy or deformity throughout, normal extremity muscle strength
13 throughout, including normal grip strength, normal upper extremity fine and gross motor
14 functioning, the absence of lower extremity joint instability, the ability to
15 mount/dismount the examination table without assistance, normal straight leg raise
16 testing, and normal gait and stance. (*Id.*) Dr. Ottney noted that Plaintiff could heel and
17 toe walk, tandem walk, squat, and hop. (*Id.*) Dr. Ottney concluded that Plaintiff's
18 condition would not impose any limitations that would persist for twelve consecutive
19 months. (Tr. 575.)

20 **C. Melissa L. Finch, Ph.D, Examining Physician**

21 Dr. Melisa L. Finch, a consulting clinical psychologist, examined Plaintiff on
22 April 24, 2010 in relation to her disability applications. (Tr. 595-597, 600.) Plaintiff
23 reported that she had been employed until February 2010, when she was laid off due to
24 downsizing. (Tr. 596.) She also reported applying for jobs unsuccessfully due to "hiring
25 freeze[s]." (*Id.*) Plaintiff stated that she was attending college to obtain a bachelor's
26 degree in business. (Tr. 595-596.) She further reported that she was able to maintain
27 appropriate personal grooming with effort, maintain a budget and pay bills, use
28 transportation, and make everyday decisions without difficulty. (Tr. 596-597.) Plaintiff

1 reported occasional difficulty dressing herself due to pain and limited mobility, difficulty
2 preparing meals and doing housework due to “poor motivation,” and difficulty shopping,
3 running errands, remembering to take medication, and caring for her pets due to poor
4 memory and concentration. (Tr. 596.)

5 On examination, Dr. Finch noted that Plaintiff had normal posture and gait,
6 adequate grooming, a logical, coherent, and goal-directed thought process, adequate
7 attention, concentration, and memory for current tasks, intact cognitive functioning with
8 estimated average intellectual functioning, and adequate judgment. (Tr. 596-597.)
9 Dr. Finch noted that Plaintiff drove an automobile and attended the examination
10 independently. (Tr. 596.) She concluded that Plaintiff’s condition would not impose any
11 limitations that would persist for twelve consecutive months. (Tr. 598-599.) She also
12 noted that Plaintiff had no limitations in comprehension and memory, sustained
13 concentration and persistence, social interaction, or adaptation. (Tr. 598.)

14 **D. Matthew Benjamin, M.D., Treating Physician**

15 Dr. Matthew Benjamin of Vista Medical Group (Vista) saw Plaintiff on May 26,
16 2010, for complaints of low back pain and lower extremity pain. (Tr. 646.) He examined
17 Plaintiff and noted the absence of leg weakness. (Tr. 646.) Dr. Benjamin diagnosed
18 psoriatic arthritis currently treated with medication and possible lumbago. He prescribed
19 additional medication. (Tr. 646.) On March 7, 2011, Plaintiff reported to Physician
20 Assistant Paul Bratcher at Vista that she had experienced improvement with her current
21 medication. (Tr. 819.)

22 **E. Banner Baywood Medical Center**

23 Plaintiff was treated at Banner Baywood Medical Center (Banner) on May 31,
24 2010. (Tr. 612-629, 653-660.) Examination revealed the absence of back tenderness
25 (Tr. 618, 656), normal range of motion in her extremities (Tr. 618, 654, 656), and the
26 absence of focal motor or sensory deficits. (Tr. 618, 656.)

27
28

1 **F. W. Richard Horn, FNP-C**

2 W. Richard Horn, a certified Nurse Practitioner (NP Horn) at Dr. Fairfax’s office,
3 examined Plaintiff on June 9, 2010, at a rheumatological follow-up appointment.
4 (Tr. 687-689.) On examination, he reported that Plaintiff had tenderness with light
5 palpation over major muscle, bursal, and tendon groups, reduced shoulder ranges of
6 motion, questionable joint synovitis, and normal wrist, elbow, and hip ranges of motion.
7 (Tr. 88.) Plaintiff reported that she could lift a cup, wash and dry her entire body, and
8 turn regular faucets without any difficulty. (Tr. 687.) She also reported that she could
9 dress herself, get in and out of bed, bend to the floor to pick up clothing, get in and out of
10 a car with “some” difficulty, and walk on flat ground with “much” difficulty. (*Id.*)

11 Shortly after her June 9, 2010 appointment with NP Horn, Plaintiff had bilateral
12 hip and left pelvic x-rays, which revealed minimal abnormalities. (Tr. 701.) NP Horn
13 examined Plaintiff again on June 28, 2010. (Tr. 690-692.) He noted that Plaintiff had
14 tenderness with light palpation over major muscle, bursal, and tendon groups, reduced
15 hip ranges of motion, and slightly reduced ankle ranges of motion. (Tr. 691.) He also
16 noted that Plaintiff had no obvious joint synovitis, normal wrist, elbow, shoulder, and
17 knee ranges of motion, and the absence of pedal edema. (*Id.*) Plaintiff reported that she
18 could wash and dry her entire body and turn regular faucets without any difficulty, dress
19 herself, lift a cup, get in and out of a car with “some” difficulty, and get in and out of bed,
20 walk on flat ground, and bend to the floor to pick up clothing with “much” difficulty.
21 (Tr. 690.)

22 NP Horn examined Plaintiff again on September 23, 2010. (Tr. 725-726.) He
23 reported that this examination revealed hand, lumbar spine, and paravertebral tenderness,
24 and the absence of joint synovitis. (Tr. 725.) NP Horn diagnosed questionable psoriatic
25 arthritis and recommended that Plaintiff continue her current treatment. (Tr. 725.) In a
26 Medical Assessment of Ability to do Work-Related Physical Activities, dated July 29,
27 2011, NP Horn indicated that Plaintiff had significant physical functional limitations.
28 (Tr. 810-811.)

1 **G. Bogdan Anghel, M.D., Treating Physician**

2 Bogdan Anghel, M.D., a specialist in pain management and rehabilitation
3 medicine, saw Plaintiff on April 15, 2011. (Tr. 771-773.) Plaintiff reported chronic leg
4 pain that was aggravated by standing and walking. (Tr. 771.) She also reported chronic
5 back pain that radiated into her hips and that was aggravated by “standing up straight,
6 walking, lifting, driving, and working overhead.” (Tr. 771.) She reported that sitting or
7 bending forward eased her back pain “somewhat,” but that no position relieved her leg
8 pain. (Tr. 771.) On examination, Dr. Anghel found that Plaintiff had an antalgic gait and
9 lumbar paraspinal tenderness. He also noted that she had difficulty walking on her heels
10 and toes, and had weakness with toe raises. (Tr. 772.) Dr. Anghel’s examination also
11 revealed the absence of lower extremity focal atrophy or muscle deficits, the absence of
12 upper extremity motor deficits, including normal muscle tone, and straight leg raise
13 testing that was positive for back pain but not for radicular pain. (Tr. 772.) He diagnosed
14 lumbar degenerative disc disease and mechanical back pain, and prescribed medication
15 and recommended lower extremity electrodiagnostic studies. (Tr. 772-773.) On April
16 26, 2011, he examined Plaintiff again and reported that she had a mildly antalgic gait, and
17 difficulty heel and toe walking. (Tr. 766.) He prescribed physical therapy for lumbar
18 spine pain, which she received between April 26 and July 6, 2011. (Tr. 795-809.)

19 Dr. Anghel examined Plaintiff again on June 2, 2011. (Tr. 764-765.) Plaintiff
20 reported constant back pain that was exacerbated by standing or walking. She also
21 reported that she could stand for ten to fifteen minutes before needing to sit down or lean
22 forward. (Tr. 764.) Dr. Anghel reported that Plaintiff was in “mild distress,” had an
23 antalgic gait, had “severe” lumbar paraspinal tenderness, and straight leg raise testing that
24 was positive for back pain but not for radicular pain. (Tr. 764.) Dr. Anghel diagnosed
25 lumbar spondylosis with facet syndrome and chronic mechanical back pain. (*Id.*) He
26 continued oral medication and recommended a lumbar spine injection. (*Id.*) Dr. Anghel
27 administered lumbar spine injections to Plaintiff on June 13 and July 18, 2011. During
28

1 the July 18, 2011 appointment, Plaintiff reported that the previous lumbar spine injection
2 had been somewhat effective at reducing her pain. (Tr. 761-763.)

3 **III. Administrative Hearing Testimony**

4 Plaintiff was in her mid-forties at the time of the August 30, 2011 administrative
5 hearing. (Tr. 75, 194.) She had the equivalent of a high school education. (Tr. 223.)
6 Plaintiff's past relevant work included sales clerk, cashier, radio dispatcher, and
7 telephone solicitor. (Tr. 206, 224, 270, 308.) Plaintiff testified that she could not work
8 because she had a back disorder that caused her "excruciating" pain. (Tr. 50-52, 58.)
9 She stated that the pain was aggravated by "anything from doing dishes to daily routine
10 laundry." (Tr. 51.) She testified that she also had fibromyalgia that caused back and leg
11 muscle pain and difficulty concentrating. (Tr. 62.)

12 She further testified that she had lower extremity numbness, swelling, and that she
13 occasionally fell. (Tr. 58.) To relieve the swelling, she elevated her legs above her heart
14 for one hour, six times daily. (Tr. 58-61.) She also stated that she had bilateral hand
15 numbness causing dropping, difficulty writing, and occasional difficulty buttoning or
16 tying shoes. (Tr. 58, 61-62.) Plaintiff stated that she performed limited household
17 chores, and went shopping for brief periods. (Tr. 66-67.) She testified that she could sit
18 for thirty to forty minutes, but had to constantly shift position due to back pain and
19 numbness in her legs. (Tr. 67.) She also testified that she could stand for two to thirty
20 minutes, that she could walk about a half block on "bad days," and could walk one-and-a-
21 half blocks on "good days" before her legs "stopped working." (Tr. 67-68.) She testified
22 that she had difficulty sleeping more than one hour due to pain, and that she could lift no
23 more than six pounds. (Tr. 68.) She also stated that she quit attending school in May or
24 June 2010 because "[her] mind wasn't working." (Tr. 64-65.)

25 Steven B. Gerber, M.D., a medical expert, testified telephonically at the
26 administrative hearing. He did not ask Plaintiff any questions or listen to Plaintiff's
27 testimony. (Tr. 42, 48 (indicating that the telephone call ended before Plaintiff testified).)
28 He testified that the record was consistent with a residual functional capacity (RFC) that

1 would allow Plaintiff to lift twenty pounds occasionally and ten pounds frequently, stand
2 and walk four hours and sit six hours in an eight-hour workday, perform all postural
3 movements, push/pull bilaterally occasionally, and perform work not requiring the use of
4 ladders or scaffolds. (Tr. 44-45.)

5 Kathy Atha, a vocational expert, testified that Plaintiff's past work as a sales clerk
6 and as a cashier, as typically performed in the national economy, were light jobs. (Tr. 69-
7 70.) She also testified that Plaintiff's past work as a radio dispatcher and a telephone
8 solicitor, as typically performed in the national economy, were sedentary jobs. (*Id.*) She
9 testified that an individual with the RFC that Dr. Gerber described could perform those
10 jobs. (Tr. 70.) Finally, she testified that an individual with the limitations that by
11 Dr. Fairfax and NP Horn assessed could not perform competitive work. (Tr. 70-72.)

12 **IV. The ALJ's Decision**

13 A claimant is considered disabled under the Social Security Act if he is unable "to
14 engage in any substantial gainful activity by reason of any medically determinable
15 physical or mental impairment which can be expected to result in death or which has
16 lasted or can be expected to last for a continuous period of not less than 12 months."
17 42 U.S.C. § 423(d)(1)(A); *see also* 42 U.S.C. § 1382c(a)(3)(A) (nearly identical standard
18 for supplemental security income disability insurance benefits). To determine whether a
19 claimant is disabled, the ALJ uses a five-step sequential evaluation process. *See*
20 20 .F.R. §§ 404.1520, 416.920.

21 In the first two steps, a claimant seeking disability benefits must initially
22 demonstrate (1) that he is not presently engaged in a substantial gainful activity, and
23 (2) that his impairment is severe. 20 C.F.R. § 404.1520(a) (c). If a claimant meets steps
24 one and two, he may be found disabled in two ways at steps three through five. At step
25 three, he may prove that his impairment or combination of impairments meets or equals
26 an impairment in the Listing of Impairments found in Appendix 1 to Subpart P of 20
27 C.F.R. pt. 404. 20 C.F.R. § 404.1520(a)(4)(iii). If so, the claimant is presumptively
28 disabled. If not, the ALJ proceeds to step four. At step four, a claimant must prove that

1 his RFC precludes him from performing his past work. 20 C.F.R. § 404.1520(a)(4)(iv).
2 If the claimant establishes this prima facie case, the burden shifts to the government at
3 step five to establish that the claimant can perform other jobs that exist in significant
4 number in the national economy, considering the claimant’s RFC, age, work experience,
5 and education. If the government does not meet this burden, then the claimant is
6 considered disabled within the meaning of the Act.

7 Applying the five-step sequential evaluation process, the ALJ found that Plaintiff
8 had not engaged in substantial gainful activity during the relevant period. (Tr. 22.) At
9 step two, the ALJ found that Plaintiff had the following severe impairments:
10 “degenerative disc disease of the lumbar spine, fibromyalgia, obesity, possible early onset
11 of arthritis, and bilateral cubital tunnel syndrome.” (Tr. 22.) At the third step, the ALJ
12 found that the severity of Plaintiff’s impairments did not meet or medically equal the
13 criteria of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Tr. 25.)
14 The ALJ next concluded that Plaintiff retained the RFC to perform light work reduced by
15 limitations on standing and walking no more than four hours in an eight-hour workday,
16 and sitting for no more than six hours in an eight-hour workday. (Tr. 25.) The ALJ
17 further found Plaintiff limited to “lift[ing] and carry[ing] [ten] pounds occasionally and
18 twenty pounds frequently.” (*Id.*) He also found Plaintiff limited to occasional climbing,
19 balancing, stooping, kneeling, crouching, crawling, pushing, and pulling. (*Id.*) The ALJ
20 found that Plaintiff was precluded from climbing ladders or scaffolds. (*Id.*) At step four,
21 the ALJ concluded that Plaintiff could perform her past relevant work as a sales clerk,
22 cashier, radio dispatcher, and telephone solicitor because such work does not require the
23 performance of any work-related activities precluded by Plaintiff’s RFC. (Tr. 29.) The
24 ALJ concluded that Plaintiff was not disabled within the meaning of the Act. (Tr. 30.)

25 **V. Standard of Review**

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

1 court reviews the Commissioner’s final decision under the substantial evidence standard
2 and must affirm the Commissioner’s decision if it is supported by substantial evidence
3 and it is free from legal error. *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996);
4 *Ryan v. Comm’r of Soc. Sec. Admin.*, 528 F.3d 1194, 1198 (9th Cir. 2008). Even if the
5 ALJ erred, however, “[a] decision of the ALJ will not be reversed for errors that are
6 harmless.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

7 Substantial evidence means more than a mere scintilla, but less than a
8 preponderance; it is “such relevant evidence as a reasonable mind might accept as
9 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
10 (citations omitted); *see also Webb v Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005). In
11 determining whether substantial evidence supports a decision, the court considers the
12 record as a whole and “may not affirm simply by isolating a specific quantum of
13 supporting evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (internal
14 quotation and citation omitted). The ALJ is responsible for resolving conflicts in
15 testimony, determining credibility, and resolving ambiguities. *See Andrews v. Shalala*,
16 53 F.3d 1035, 1039 (9th Cir. 1995). “When the evidence before the ALJ is subject to
17 more than one rational interpretation, [the court] must defer to the ALJ’s conclusion.”
18 *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1198 (9th Cir. 2004) (citing
19 *Andrews*, 53 F.3d at 1035).

20 **VI. Plaintiff’s Claims**

21 Plaintiff argues that the ALJ erred in assigning weight to the medical source and
22 lay opinions and in discrediting her subjective complaints. (Docs. 14, 29.) The
23 Commissioner argues that the ALJ’s decision is free from legal error and supported by
24 substantial evidence in the record. (Doc. 20.) For the reasons below, the Court reverses
25 the Commissioner’s decision and remands for further proceedings.

26 **A. Weight Assigned to Nurse Practitioner Horn’s Opinion**

27 As set forth above, Plaintiff received treatment from NP Horn at AAC&R.
28 (Tr. 776-778, 829-832, 723-31, 687-92, 837-38.) In a July 29, 2011 Medical Assessment

1 of Ability to do Work-Related Physical Activities, NP Horn opined that Plaintiff could
2 sit, stand, and walk less than two hours each in an eight-hour workday, lift/carry between
3 ten and fifteen pounds, but that she could not crawl or kneel. (Tr. 810.) Plaintiff argues
4 that the ALJ erred because he did not specifically discuss this opinion or explain his
5 assessment of it. (Doc. 14 at 13.) The Commissioner argues that the ALJ was not
6 required to consider NP Horn’s opinion because a nurse practitioner is not an “acceptable
7 medical source,” and that any error was harmless because NP Horn’s opinion was
8 essentially the same as Dr. Fairfax’s opinion, which the ALJ rejected. (Doc. 20 at 19-
9 20.)

10 Nurse practitioners are not considered “acceptable medical sources” under the
11 Social Security regulations. 20 C.F.R. § 404.1513(d)(1), 416.913(d)(1). Rather, these
12 medical professionals are considered “other medical sources.” *Id.* However, in
13 determining whether a claimant is disabled, an ALJ must consider lay witness testimony,
14 including “other medical source” opinions, concerning a claimant’s ability to work.² *See*
15 *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (citations omitted) (stating that
16 “[l]ay testimony as to a claimant’s symptoms or how an impairment affects ability to
17 work is competent evidence . . . and therefore cannot be disregarded without comment”);
18 *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993) (ALJ must give reasons that are
19 germane to each witness for rejecting lay witness testimony); 20 C.F.R.
20 §§ 404.1513(d)(4) & (e), 416.913(d)(4) & (e); SSR 06–03p, 2006 WL 2329939, at * 2
21 (Aug. 9, 2006) (opinions from other medical sources who are not acceptable medical

22 ² The distinction between “other sources” and “acceptable medical sources” is
23 significant because only an “acceptable medical source” may be considered a “treating
24 source.” 20 C.F.R. §§ 404.1502, 416.902, 404.1513(a). However, when there is an
25 agency relationship between an “acceptable medical source” and an “other source,”
26 evidence from that “other source” may be ascribed to the supervising “acceptable medical
27 source.” *Buck v. Astrue*, 2010 WL 2650038, * 5 (D. Ariz. July 1, 2010) (discussing
28 *Gomez v. Chater*, 74 F.3d 967, 970–71 (9th Cir. 1996) (affording great weight to a nurse
practitioner’s opinion because she worked closely on an interdisciplinary team with a
doctor)).

1 sources “may provide insight into the severity of the impairment(s) and how it affects the
2 individual’s ability to function.”). The ALJ may discount testimony from these “other
3 sources” if the ALJ ““gives reasons germane to each witness for doing so.”” *See Turner*
4 *v. Comm’r of Soc. Sec.*, 613 F.3d 1217, 1224 (9th Cir. 2010) (quoting *Lewis v. Apfel*, 236
5 F.3d 503, 511 (9th Cir. 2001) (“Lay testimony as to a claimant’s symptoms is competent
6 evidence that an ALJ must take into account, unless he or she expressly determines to
7 disregard such testimony and gives reasons germane to each witness for doing so.”)).

8 Thus, the ALJ was required to consider and comment upon NP Horn’s opinion as
9 it concerned how Plaintiff’s impairments impacted her ability to work. The ALJ
10 mentioned that on March 23, 2011, NP Horn “provided the same assessments of claimant
11 [as Dr. Fairfax had given].” (Tr. 27 (citing hearing exhibit 33F3).) The March 23, 2011
12 document to which the ALJ referred is a treatment note signed by Dr. Fairfax and
13 NP Horn stating that Plaintiff complained of extreme pain in her lumbar spine region,
14 noting Plaintiff’s continuing diagnoses, including fibromyalgia, and stating that Plaintiff
15 should continue her treatment program. (Tr. 831.) The treatment note also referred
16 Plaintiff to a spine specialist. (*Id.*) The ALJ did not mention NP Horn’s July 2011
17 assessment of Plaintiff’s work-related physical activities, identify the weight he afforded
18 that opinion, or give any reason for his apparent rejection of that opinion. The ALJ’s
19 failure to do so was error. *See Lewis*, 236 F.3d at 511.

20 The Commissioner argues that any error was harmless because NP Horn’s opinion
21 regarding Plaintiff’s functional limitations was the same as Dr. Fairfax’s opinion that the
22 ALJ rejected. The Court rejects this argument for two reasons. First, the ALJ did not
23 state that he was rejecting NP Horn’s opinion on the same basis as he rejected Dr.
24 Fairfax’s opinion. The ALJ is required to provide specific reasons for rejecting lay
25 testimony and the district court cannot provide reasons for the ALJ’s decision. *See*
26 *Dodrill*, 12 F.3d at 919. Indeed, the court “cannot affirm the decision of an agency on a
27 ground that the agency did not invoke in making its decision.” *Pinto v. Massanari*, 249
28 F.3d 840, 847 (9th Cir. 2001) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

1 Second, the ALJ's failure to discuss the other source medical opinion was not
2 harmless. The Ninth Circuit has consistently reversed the Commissioner's decisions for
3 failure to comment on such competent testimony. *See, e.g., Merrill ex rel. Merrill v.*
4 *Apfel*, 224 F.3d 1083, 1085-86 (9th Cir. 2000) (remanding to ALJ to consider lay
5 testimony); *Nguyen*, 100 F.3d at 1467 (finding that ALJ's disability determination was
6 not supported substantial evidence when ALJ did not provide any reasons for discounting
7 lay witness testimony and remanding for further proceedings); *Dodrill*, 12 F.3d at 919
8 (remanding for ALJ to articulate specific reasons for rejecting lay witness testimony).
9 Following these decisions, the Ninth Circuit held that when "the ALJ's error lies in a
10 failure to properly discuss competent lay testimony favorable to the claimant, a reviewing
11 court cannot consider the error harmless unless it can confidently conclude that no
12 reasonable ALJ, when fully crediting the testimony, could have reached a different
13 disability determination." *Stout v. Comm'r Soc. Sec. Admin.*, 454 F.3d at 1050, 1056 (9th
14 Cir. 2006) (finding that ALJ's error in failing to provide reasons for rejecting lay
15 testimony was not harmless when that testimony supported a finding of disability).

16 In this case, the Court cannot reach such a conclusion. If fully credited,
17 NP Horn's opinion supports a conclusion that, due to her physical impairments, Plaintiff
18 was unable to sit, stand, or walk for more than two hours in an eight-hour workday.
19 When NP Horn's opinion is considered with the vocational expert's testimony, a
20 reasonable ALJ could find that Plaintiff cannot return to gainful employment.³
21 Consequently, the ALJ's error in failing to address this opinion and provide germane
22 reasons for rejecting it was not harmless.

23 **B. Conclusion**

24 Because the ALJ erred in failing to discuss and provide germane reasons for
25 rejecting NP Horn's opinion, and because that error was not harmless, the Court

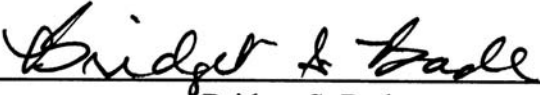
26
27 ³ The vocational expert testified that an individual the same age as Plaintiff, and
28 with the same educational profile, and who could sit/stand and walk less than two hours
in an eight-hour workday, and lift/carry between ten and fifteen pounds, would be
precluded from competitive employment. (Tr. 70-71.)

1 concludes that substantial evidence does not support the Commissioner's decision that
2 Plaintiff can perform her previous work. Consequently, the Commissioner's
3 determination is reversed, and this matter is remanded to the Commissioner for further
4 administrative proceedings consistent with this opinion.⁴

5 Accordingly,

6 **IT IS ORDERED** that the decision of the Commissioner is **REVERSED** and this
7 matter is remanded to the Commissioner for further proceedings consistent with this
8 Order. The Clerk of Court is directed to enter judgment accordingly and to terminate this
9 case.

10 Dated this 24th day of January, 2014.

11
12
13 
14 Bridget S. Bade
15 United States Magistrate Judge
16
17
18
19
20
21
22
23
24

25 _____
26 ⁴ Because remand is appropriate based on the ALJ's error in failing to properly
27 consider the other source medical opinion, the Court does not reach Plaintiff's other
28 claims of error. On remand, the ALJ may reconsider his assessment of the record as a
whole and is not limited to his consideration of NP Horn's opinion. Indeed, the ALJ
should consider revisiting his assessment of Dr. Fairfax's opinion, which is consistent
with the NP Horn's opinion.