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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Christina D. Murillo,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin,

13 Defendant.

No. CV-13-01569-PHX-DGC

**ORDER**

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15 Plaintiff Christina D. Murillo seeks review under 42 U.S.C. § 405(g) of the final  
16 decision of the Commissioner of Social Security (“the Commissioner”), which denied her  
17 disability insurance benefits and supplemental security income under sections 216(i),  
18 223(d), and 1614(a)(3)(A) of the Social Security Act. Because the decision of the  
19 Administrative Law Judge (“ALJ”) is based on legal error, the Commissioner’s decision  
20 will be vacated and the matter remanded for an award of benefits.

21 **I. Background.**

22 Plaintiff was born in December 1975. She has a bachelor’s degree in social work  
23 and has previously worked as a benefits administrator and a benefits specialist.

24 On September 3, 2009, Plaintiff applied for disability insurance benefits. On  
25 July 13, 2010, she applied for supplemental security income. She alleged disability  
26 beginning July 29, 2009 in both applications. On October 17, 2011, she appeared with  
27 her attorney and testified at a hearing before the ALJ. A vocational expert also testified.  
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1 On November 10, 2011, the ALJ issued a decision finding that Plaintiff was not  
2 disabled within the meaning of the Social Security Act. The Appeals Council denied  
3 Plaintiff's request for review of the hearing decision, making the ALJ's decision the  
4 Commissioner's final decision.

## 5 **II. Standard of Review.**

6 The district court reviews only those issues raised by the party challenging the  
7 ALJ's decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). The court  
8 may set aside the Commissioner's disability determination only if the determination is  
9 not supported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d  
10 625, 630 (9th Cir. 2007). Substantial evidence is more than a scintilla, less than a  
11 preponderance, and relevant evidence that a reasonable person might accept as adequate  
12 to support a conclusion considering the record as a whole. *Id.* In determining whether  
13 substantial evidence supports a decision, the court must consider the record as a whole  
14 and may not affirm simply by isolating a "specific quantum of supporting evidence." *Id.*  
15 As a general rule, "[w]here the evidence is susceptible to more than one rational  
16 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be  
17 upheld." *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citations omitted).

## 18 **III. ALJ's Five-Step Sequential Evaluation Process.**

19 To determine whether a claimant is disabled for purposes of the Social Security  
20 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears  
21 the burden of proof on the first four steps, but at step five, the burden shifts to the  
22 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

23 At the first step, the ALJ determines whether the claimant is engaging in  
24 substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not  
25 disabled and the inquiry ends. *Id.* At step two, the ALJ determines whether the claimant  
26 has a "severe" medically determinable physical or mental impairment.  
27 § 404.1520(a)(4)(ii). If not, the claimant is not disabled and the inquiry ends. *Id.* At step  
28 three, the ALJ considers whether the claimant's impairment or combination of

1 impairments meets or medically equals an impairment listed in Appendix 1 to Subpart P  
2 of 20 C.F.R. Pt. 404. § 404.1520(a)(4)(iii). If so, the claimant is automatically found to  
3 be disabled. *Id.* If not, the ALJ proceeds to step four. At step four, the ALJ assesses the  
4 claimant’s residual functional capacity (“RFC”) and determines whether the claimant is  
5 still capable of performing past relevant work. § 404.1520(a)(4)(iv). If so, the claimant  
6 is not disabled and the inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and final  
7 step, where he determines whether the claimant can perform any other work based on the  
8 claimant’s RFC, age, education, and work experience. § 404.1520(a)(4)(v). If so, the  
9 claimant is not disabled. *Id.* If not, the claimant is disabled. *Id.*

10 At step one, the ALJ found that Plaintiff meets the insured status requirements of  
11 the Social Security Act through December 31, 2014, and that she has not engaged in  
12 substantial gainful activity since July 29, 2009. At step two, the ALJ found that Plaintiff  
13 has the following severe impairments: fibromyalgia, migraine headaches, and obesity.  
14 The ALJ also found that Plaintiff has mild sleep apnea. At step three, the ALJ  
15 determined that Plaintiff does not have an impairment or combination of impairments that  
16 meets or medically equals an impairment listed in Appendix 1 to Subpart P of 20 C.F.R.  
17 Pt. 404. At step four, the ALJ found that Plaintiff has the RFC to perform:

18 [L]ight work as defined in 20 CFR 404.1567(b) and  
19 416.967(b), with the ability to lift and carry 10 pounds  
20 frequently and 20 pounds occasionally, sit, stand and walk for  
21 6 out of 8 hours per day with a sit-stand option required at  
22 will, unlimited pushing and pulling with the upper and lower  
23 extremities as long as within these weight limits, occasional  
24 balancing, climbing, crouching and crawling, frequent  
25 stooping and kneeling, and the need to avoid extremely cold  
temperatures, dust, fumes and gases, humidity, hazardous  
heights and moving machinery, and no more than moderate  
noise levels, and the ability to tolerate office-level noise.

26 A.R. 23-24. The ALJ further found that Plaintiff is able to perform her past relevant  
27 work as a benefits administrator or benefits specialist because such work does not require  
28 the performance of work-related activities precluded by Plaintiff’s RFC.

1 **IV. Analysis.**

2 Plaintiff argues the ALJ's decision is defective for two reasons: (1) the ALJ  
3 erroneously weighed medical source evidence, and (2) the ALJ improperly evaluated  
4 Plaintiff's credibility and discounted her subjective testimony. Because the Court finds  
5 that the ALJ erroneously weighed medical source evidence, it need not address Plaintiff's  
6 assertion that the ALJ improperly evaluated her credibility.

7 **A. Weighing of Medical Source Evidence.**

8 Plaintiff argues that the ALJ improperly weighed the medical opinions of the  
9 following medical sources: treating physicians Drs. Dai, Bhalla, and Tran; examining  
10 psychologist Dr. Walter; licensed professional counselor Mr. Tucker; and examining  
11 physical therapist and disability specialist Mr. Randall. Doc. 10 at 5. Because the Court  
12 finds that the ALJ erroneously weighed Dr. Dai's medical opinion, it will not address  
13 Plaintiff's arguments regarding the other medical sources.

14 **1. Legal Standard.**

15 The Ninth Circuit distinguishes between the opinions of treating physicians,  
16 examining physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821,  
17 830 (9th Cir. 1995). Generally, an ALJ should give greatest weight to a treating  
18 physician's opinion and more weight to the opinion of an examining physician than to  
19 one of a non-examining physician. *See Andrews v. Shalala*, 53 F.3d 1035, 1040-41 (9th  
20 Cir. 1995); *see also* 20 C.F.R. § 404.1527(c)(2)-(6) (listing factors to be considered when  
21 evaluating opinion evidence, including length of examining or treating relationship,  
22 frequency of examination, consistency with the record, and support from objective  
23 evidence). If it is not contradicted by another doctor's opinion, the opinion of a treating  
24 or examining physician can be rejected only for "clear and convincing" reasons. *Lester*,  
25 81 F.3d at 830 (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)). A  
26 contradicted opinion of a treating or examining physician "can only be rejected for  
27 specific and legitimate reasons that are supported by substantial evidence in the record."  
28 *Lester*, 81 F.3d at 830-31 (citing *Andrews*, 53 F.3d at 1043).

1 An ALJ can meet the “specific and legitimate reasons” standard “by setting out a  
2 detailed and thorough summary of the facts and conflicting clinical evidence, stating his  
3 interpretation thereof, and making findings.” *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th  
4 Cir. 1986). But “[t]he ALJ must do more than offer [her] conclusions. [She] must set  
5 forth [her] own interpretations and explain why they, rather than the doctors’, are  
6 correct.” *Embrey*, 849 F.2d at 421-22. The Commissioner is responsible for determining  
7 whether a claimant meets the statutory definition of disability and does not give  
8 significance to a statement by a medical source that the claimant is “disabled” or “unable  
9 to work.” 20 C.F.R. § 416.927(d).

## 10 2. Anita Dai, M.D.

11 Plaintiff’s treating physician, Anita Dai, M.D., specializes in internal medicine.  
12 Doc. 10 at 5. On November 6, 2010, Dr. Dai opined that Plaintiff suffered from frequent  
13 migraine headaches lasting three hours or more. A.R. 541. She opined that Plaintiff’s  
14 headaches were accompanied with vertigo/dizziness, nausea, fatigue, and pain, and that  
15 the headaches occurred 15 times per month. *Id.* She further opined that Plaintiff had  
16 moderate restrictions on exposure to unprotected heights, moving machinery, marked  
17 changes in temperature and humidity, and dust, fumes and gases. *Id.* The ALJ did not  
18 accord Dr. Dai’s opinion about Plaintiff’s migraine headaches “greater weight” because,  
19 the ALJ explained, “the greater objective record fails to show [Plaintiff’s] headaches  
20 have occurred as frequently or with the severity of those cited by Dr. Dai, or that  
21 [Plaintiff] is otherwise unable to sustain at least sedentary work activity.” A.R. 27.

22 Dr. Dai’s medical opinion was contradicted by the opinions of Drs. Marc  
23 Wasserman, M.D. and D. Fruchtman, D.O., examining physicians who opined that  
24 Plaintiff had greater abilities than those identified in Dr. Dai’s opinion. A.R. 25-26. The  
25 ALJ therefore could discount Dr. Dai’s opinion for specific and legitimate reasons  
26 supported by substantial evidence. *Lester*, 81 F.3d at 830-31.

27 Unfortunately, the ALJ’s reason for discounting Dr. Dai’s opinion was limited to a  
28 single phrase – “the greater objective record fails to show the claimant’s headaches have

1 occurred as frequently or with the severity of those cited by Dr. Dai” – and no citations to  
2 the record. AR 27.<sup>1</sup> If the Court looks elsewhere in the ALJ’s opinion to try and  
3 determine the reasons for the ALJ’s conclusion, little support can be found.

4 The ALJ’s discussion of the record provides only two references to migraine  
5 headaches that plausibly contradict Dr. Dai’s opinion. First, the ALJ cites Dr.  
6 Wasserman’s statement that Plaintiff’s migraines were “under decent control.” A.R. 25,  
7 716. But Dr. Wasserman did not explain what he meant by “decent control,” and his  
8 opinion states that Plaintiff suffers from migraine headaches three times per week.  
9 AR 716. Second, the ALJ states that “[a]s of April 28, 2011, [Plaintiff] reported  
10 improvement in her headaches.” Unfortunately, the ALJ provides no citation to the  
11 1,095-page record for this statement. A.R. 25.

12 That’s it. The ALJ’s opinion cites no other portions of the “greater objective  
13 record” to support her conclusion that Plaintiff’s headaches occur less frequently and  
14 with less severity than described by Dr. Dai. Mere references to an unclear statement by  
15 Dr. Wasserman and an incited report by Plaintiff, neither of which is even mentioned in  
16 the ALJ’s discussion of Dr. Dai’s opinion, certainly do not constitute specific and  
17 legitimate reasons supported by substantial evidence in the record. Nor do they satisfy  
18 the Ninth Circuit’s requirement that the ALJ provide a “detailed and thorough summary  
19 of the facts and conflicting clinical evidence, stating [her] interpretation thereof, and  
20 making findings.” *Cotton*, 799 F.2d at 1408.

21 The Commissioner admits “that Plaintiff had ‘severe’ migraine headaches,” but  
22 argues that Plaintiff’s neurological exams were consistently normal and provides  
23 numerous supporting citations. Doc. 14 at 9. The Court cannot, however, consider  
24 reasons or factual findings not provided by the ALJ. “Long-standing principles of  
25 administrative law require us to review the ALJ’s decision based on the reasoning and  
26 factual findings offered by the ALJ – not post hoc rationalizations that attempt to intuit

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28 <sup>1</sup> The only two citations in this paragraph of the ALJ’s opinion are to Dr. Dai’s  
opinions. AR 27.

1 what the adjudicator may have been thinking.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554  
2 F.3d 1219, 1225 (9th Cir. 2009). The same is true for the Commissioner’s assertion that  
3 Plaintiff denied headaches, that Plaintiff reported fewer headaches, or that Drs.  
4 Wasserman, Mantey, and Johnson – and Dr. Dai herself – all concluded that Plaintiff’s  
5 headaches were controlled or stable with treatment. Doc. 14 at 10, 13. None of these  
6 reasons was cited by the ALJ, and the Court cannot “intuit” from her vague reference to  
7 “the greater objective record” that she relied on them.<sup>2</sup>

8 Because the ALJ clearly failed to provide specific and legitimate reasons  
9 supported by substantial evidence for discounting Dr. Dai’s opinion, the Court concludes  
10 that the ALJ committed legal error. Her decision must therefore be vacated.<sup>3</sup>

11 **B. Remand.**

12 Where an ALJ fails to provide adequate reasons for rejecting the opinion of a  
13 physician, the Court must credit that opinion as true. *Lester*, 81 F.3d at 834. An action  
14 should be remanded for an immediate award of benefits when the following three factors  
15 are satisfied: (1) the ALJ has failed to provide legally sufficient reasons for rejecting  
16 evidence, (2) there are no outstanding issues that must be resolved before a determination  
17 of disability can be made, and (3) it is clear from the record that the ALJ would be  
18 required to find the claimant disabled were such evidence credited as true. *Smolen v.*  
19 *Chater*, 80 F.3d 1273, 1292 (9th Cir.1996).

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22 <sup>2</sup> Defendant’s brief included a thorough and careful review of the record, as well  
23 as detailed arguments. Defendant is reminded, however, of the need to comply with the  
24 Court’s local rules on lines per page and font size in text and footnotes. *See* LRCiv  
7.1(b)(1).

25 <sup>3</sup> Although the Court need not address them, the ALJ discounted the opinions of  
26 Drs. Bhalla and Tran for the same cryptic reason – that their opinions were not supported  
27 by “the greater objective record.” AR 28. When the Ninth Circuit has repeatedly  
28 instructed that treating physician opinions may be discounted by ALJs only for clear and  
convincing or specific and legitimate reasons, the Court finds it very frustrating to see  
opinions such as the one in this case. Such opinions invite reversal and remand for an  
award of benefits under the established credit-as-true doctrine, when simple compliance  
with the Ninth Circuit’s longstanding instructions for writing decisions might well result  
in different outcomes.

1 At Plaintiff's hearing, a vocational expert testified that an individual who suffered  
2 from less severe and less frequent headaches than those described in Dr. Dai's opinion  
3 would be disabled. A.R. 57. When Dr. Dai's opinion is credited as true, therefore, the  
4 expert opinion makes clear that the Court must remand for an award of benefits.

5 **IT IS ORDERED:**

- 6 1. The final decision of the Commissioner of Social Security is **vacated** and  
7 this case is **remanded** for an award of benefits.  
8 2. The Clerk shall enter judgment accordingly and **terminate** this action.

9 Dated this 28th day of May, 2014.

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14 David G. Campbell  
15 United States District Judge  
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