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

9 Elizabeth Ann McIntyre,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin,

13 Defendant.

No. CV-14-01885-PHX-GMS

ORDER

14 Pending before the Court is the appeal of Claimant, which challenges the Social
15 Security Administration's decision to deny benefits. (Doc. 15.) Defendant
16 Commissioner concedes that the Administrative Law Judge ("ALJ") failed to support his
17 decision to deny the Claimant benefits with substantial evidence. (Doc. 19 at 2.)
18 Accordingly, the Court vacates the ALJ's decision and remands for further proceedings.

19 **BACKGROUND**

20 On February 24, 2011 and March 10, 2011, Claimant applied for a period of
21 disability, disability insurance benefits (Title II), and supplemental security income
22 benefits (Title XVI), alleging a disability onset date of December 20, 2004. (R. at 13.)
23 Claimant's date last insured ("DLI") for disability insurance benefits, and thus the date on
24 or before which he must have been disabled, was December 31, 2006. (R. at 13.)
25 Claimant's claims were denied initially, although upon reconsideration the state agency
26 revived her Title XVI claim and adjudged Claimant disabled as of November 27, 2010,
27 but not before. (R. at 13.) Claimant then appealed to an ALJ. (R. at 13.) The ALJ
28 conducted a hearing on the matter on April 30, 2012. (R. at 13.) At the hearing, the

1 Claimant amended her alleged onset date from February 14, 2001 to December 20, 2004.
2 (R. at 13.) The period of disability at issue, therefore, begins on December 20, 2004 and
3 ends on November 27, 2010. (R. at 13.)

4 In assessing whether Claimant was disabled, the ALJ undertook the five-step
5 sequential evaluation for determining disability.¹ (R. at 13–22.) Ultimately the ALJ
6 concluded that Claimant was not disabled.² (R. at 22.) The Appeals Council declined to
7 review the decision. (R. at 1.) The Council accepted the ALJ’s statements of the law, the
8 issues in the case, and the evidentiary facts, as well as the ALJ’s findings and ultimate
9 conclusions regarding whether Plaintiff was disabled. (R. at 1.) The Council thereupon
10 agreed that Claimant was not disabled. (R. at 2.)

11 Plaintiff filed the complaint underlying this action on August 25, 2014, seeking
12 this Court’s review of the ALJ’s denial of benefits.³ (Doc. 1.) Claimant filed her

13 ¹ The five-step sequential evaluation of disability is set out in 20 C.F.R. § 404.1520
14 (governing disability insurance benefits) and 20 C.F.R. § 416.920 (governing supplemental
15 security income). Under the test:

16 A claimant must be found disabled if she proves: (1) that she is not
17 presently engaged in a substantial gainful activity[,] (2) that her
18 disability is severe, and (3) that her impairment meets or equals
19 one of the specific impairments described in the regulations. If the
20 impairment does not meet or equal one of the specific impairments
21 described in the regulations, the claimant can still establish a prima
22 facie case of disability by proving at step four that in addition to
23 the first two requirements, she is not able to perform any work that
24 she has done in the past. Once the claimant establishes a prima
25 facie case, the burden of proof shifts to the agency at step five to
26 demonstrate that the claimant can perform a significant number of
27 other jobs in the national economy. This step-five determination is
28 made on the basis of four factors: the claimant’s residual functional
capacity, age, work experience and education.

25 *Hoopai v. Astrue*, 499 F.3d 1071, 1074-75 (9th Cir. 2007) (internal quotation marks
omitted) (citation omitted).

26 ² In light of the Defendant’s concession that the Claimant is entitled to judgment and the
27 ALJ’s decision must be vacated, the Court does not detail the ALJ’s path through the five-step
sequential evaluation since the whole of this appeal relates to remedies.

28 ³ Plaintiff was authorized to file this action by 42 U.S.C. § 405(g) (“Any individual, after
any final decision of the Commissioner of Social Security made after a hearing to which he was

1 opening brief on April 23, 2015. (Doc. 15.) Defendant filed its response on May 27,
2 2015. (Doc. 19.) At the outset of its response, the Defendant stated: “In the course of
3 preparing her defense, Defendant Commissioner of Social Security concluded the
4 decision of the [ALJ] is not supported by substantial evidence. Thus, the parties agree
5 the ALJ erred and that [Claimant] is entitled to judgment.” (*Id.* at 1-2.) The Claimant
6 filed his reply on June 26, 2015. (Doc. 22.) The matter is now fully briefed.

7 DISCUSSION

8 I. Standard of Review

9 The scope of judicial review is constrained by the Social Security Act and thus
10 permits a federal court to set aside a denial of disability benefits only if that denial is
11 either unsupported by substantial evidence or based on legal error. 42 U.S.C. § 405(g);
12 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When, as here, the
13 Commissioner concedes that the ALJ’s decision is unsupported by substantial evidence,
14 the Act “makes clear that courts are empowered to . . . modify[] or reverse a decision by
15 the Commissioner ‘with or without remanding the case for a rehearing.’” *Garrison v.*
16 *Colvin*, 759 F.3d 995, 1019 (9th Cir. 2014) (*quoting* § 405(g)). “While [courts] generally
17 remand to the [ALJ] for ‘additional investigation or explanation,’” *Treichler v. Comm’r*
18 *of Soc. Sec. Admin.*, 775 F.3d 1090, 1100 (9th Cir. 2014) (citation omitted), the Ninth
19 Circuit, like every other circuit, recognizes that “in appropriate circumstances courts are
20 free to reverse and remand a determination by the Commissioner with instructions to
21 calculate and award benefits.” *Garrison*, 759 F.3d at 1019 (citing cases from every
22 circuit).

23 Remanding for an award of benefits, however, is not at the full discretion of the
24 reviewing court. Rather, the Ninth Circuit devised what is known as the “three-part
25 credit-as-true standard, each part of which must be satisfied in order for a court to remand
26 to an ALJ with instructions to calculate and award benefits[.]” *Id.* at 1020. The Claimant
27 must establish: first, that the ALJ failed to provide legally sufficient reasons for rejecting

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a party . . . may obtain a review of such decision by a civil action . . .”).

1 evidence, whether claimant testimony or medical opinion; second, that the record has
2 been fully developed and further administrative proceedings would serve no useful
3 purpose; and third, whether if the improperly discredited evidence were credited as true,
4 the ALJ would be required to find the claimant disabled on remand. *See Treichler*, 775
5 F.3d at 1100–01 (*citing Garrison*, 759 F.3d at 1020). If all three conditions are met, the
6 reviewing court may remand for an award of benefits. *Id.* at 1101. Nonetheless, the
7 reviewing court retains flexibility in determining the appropriate remedy if the record as a
8 whole still creates “serious doubt as to whether the claimant is, in fact, disabled[.]” *Id.* at
9 1107 (*citing Garrison*, 759 F.3d at 1021.)

10 **II. Analysis**

11 **A. Credit-as-true**

12 **1. The ALJ failed to provide legally sufficient reasons for rejecting** 13 **both Claimant and her husband’s testimony.**

14 The ALJ rejected various sources of evidence supporting Claimant’s disability for
15 legally insufficient reasons. The ALJ first erred when it concluded that the Claimant’s
16 symptom and pain testimony lacked credibility due simply to its shortage of supporting
17 medical evidence on the record. (R. at 20 (“The claimant’s testimony is not fully credible
18 concerning the severity of her limitation, during the period in question. Neither the
19 severity nor the extent is supported by the medical evidence on the record.”).) Claimant’s
20 testimony includes, *inter alia*, that she can help around the house for about 30 minutes
21 before needing a rest, and she can stand for 20 minutes at a time, sit for 20–30 minutes at
22 a time, walk a block, and lift a gallon of milk. (R. at 48, 52.) Four times a day she needs
23 to lie down and rest for approximately 45 minutes to two hours. (R. at 49.) And finally,
24 due to her depression, Claimant cries at least once daily for 5–10 minutes. (R. at 50.) As
25 the Defendant admitted, a “lack of medical evidence cannot form the sole basis for
26 discounting pain testimony[.]” *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005).

27 Furthermore, assertions that a claimant’s testimony is incredible due to
28 inconsistencies with the medical evidence on record are insufficient unless supported by

1 specific findings undermining the claimant’s complaints. *See Treichler*, 775 F.3d at 1103
2 (“The ALJ must identify the testimony that was not credible, and specify what evidence
3 undermines the claimant’s complaints.”) (citation omitted). While certain affirmative
4 medical evidence on the record—like that of Dr. Richard Palmer who opined Claimant
5 could sit or stand for six to eight hours per day—would seem to adequately refute
6 Claimant’s testimony, because the ALJ provided only a boilerplate rejection (and
7 Defendant Commissioner concedes error), the ALJ’s basis for disregarding Claimant’s
8 testimony was legally insufficient and constitutes error.

9 The ALJ next erred when it ignored reports submitted by John McIntyre,
10 Claimant’s husband, documenting his observations of Claimant and her symptoms during
11 the relevant time period. His observations supported Claimant’s own testimony stating
12 that “she has very limited mobility [and is] unable to stand or sit for extended periods due
13 to pain.” (R. at 398.) “Lay testimony as to a claimant's symptoms is competent evidence
14 that an ALJ must take into account, unless he or she expressly determines to disregard
15 such testimony and gives reasons germane to each witness for doing so.” *Lewis v. Apfel*,
16 236 F.3d 503, 511 (9th Cir. 2001). The ALJ failed to mention, let alone reject, Mr.
17 McIntyre’s report in his decision for any specific reason germane to Mr. McIntyre.
18 Accordingly, by ignoring the report, the ALJ erred.⁴

19 **2. Further administrative proceedings would serve a useful**
20 **purpose.**

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23 ⁴ Defendant also asserts that remand for reconsideration is needed to “allow the ALJ to
24 further evaluate the physical and psychological opinion evidence of record.” (Doc. 19.) Due
25 to the nature of the briefing, this Court will only address the Claimant’s arguments in support of
26 crediting Claimant and her husband’s testimony as true. *See Lewis v. Apfel*, 236 F.3d 503, 517
27 n.13 (9th Cir. 2001) (A reviewing federal court addresses only the issues raised by the claimant
28 in the appeal from the ALJ’s decision). Because the Defendant conceded the ALJ’s error in its
response brief and then proceeded to dedicate the entirety of its response to argue for remand for
further proceedings, Claimant’s reply, in essence, served as her opening brief. As such, it was
her only opportunity to assert all of her arguments in favor of remanding for benefits. Therefore,
although Defendant raised issues related to the ALJ’s analysis of various medical opinions in its
response, the Claimant did not raise that issue in its reply, and therefore, the Court shall not
consider it.

1 The ALJ erred by failing to provide legally sufficient reasons for rejecting both the
2 Claimant and her husband’s testimony; therefore, next is to determine whether further
3 administrative proceedings would be useful. *Treichler*, 775 F.3d at 1103.

4 “Administrative proceedings are generally useful, where the record has not been
5 fully developed, . . . there is a need to resolve conflicts and ambiguities, . . . or the
6 presentation of further evidence . . . may well prove enlightening in light of the passage
7 of time” *Id.* at 1101 (internal quotation marks omitted) (modifications omitted)
8 (citations omitted). Importantly, “assess[ing] whether there are outstanding issues
9 requiring resolution [must be done] *before* considering whether to hold that the
10 claimant’s testimony is credible as a matter of law.” *Id.* at 1105 (citation omitted). As a
11 result, any conflict between salient evidence on the record and evidence improperly
12 rejected by the ALJ prohibits the reviewing court from reaching the credit-as-true step,
13 since “a reviewing court is not required to credit claimant[’s] allegations regarding the
14 extent of their impairments as true merely because the ALJ made a legal error in
15 discrediting testimony.” *See id.* at 1106, 1107; *see also Brown-Hunter v. Colvin*, 806
16 F.3d 487, 495 (9th Cir. 2015) (“The touchstone for an award of benefits is the existence
17 of a disability, not the agency’s legal error.”). Accordingly, in a case “[w]here there is
18 conflicting evidence, and not all essential factual issues have been resolved, a remand for
19 an award of benefits is inappropriate.” *Treichler*, 775 F.3d at 1101.

20 Defendant raises one piece of medical opinion evidence that conflicts with the
21 Claimant’s symptom testimony. (Doc. 19 at 10.) The Defendant cites the same piece of
22 evidence to refute Claimant’s husband’s testimony as well. (*Id.*) Specifically, Defendant
23 notes that examining physician, Dr. Palmer, retained by Defendant, “opined [that
24 Claimant] can sit or stand for six to eight hours per day.” (*Id.* (*citing* R. at 860–61).)
25 According to Defendant, this undermines Claimant’s testimony that she cannot “stand or
26 sit upright for more than five minutes at a time,” (R. at 350, 858), and her husband’s
27 testimony that she “is unable to stand or sit for extended periods (R. at 398).” This
28 evidence also apparently discredits Claimant’s testimony at the hearing that she requires

1 multiple 45–120 minute breaks throughout the day to lie down and that she can only sit in
2 an office chair for 20–30 minutes at a time. (R. at 48–49.)

3 Claimant does not offer any counter evidence in reply, but some opinion evidence
4 does suggest Claimant may need more than the average number of breaks throughout a
5 normal workday. Wayne General, Ph. D., one of Defendant’s retained examining
6 psychologists, noted that Claimant “is likely to have difficulties . . . over the course of an
7 eight-hour day and five-day work week[,]” and recommended that “[s]he may need to
8 have additional rest periods during which she can settle her nerves and collect her
9 thoughts.” (R. at 868, 871.) Additionally, James Huddleston, Ph. D., another examining
10 psychologist retained by Defendant, opined that Claimant “may be moderately limited
11 with regard to social functioning and activities of daily living.” (R. at 444.)⁵

12 Dr. Palmer’s opinion conflicts with Claimant and her husband’s testimony.
13 Because of this conflict in testimony, the record is not devoid of uncertainty and thus
14 should be remanded for further proceedings before the ALJ. *See Treichler*, 775 F.3d at
15 1105; *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) (The ALJ is responsible
16 for resolving conflicts in testimony, determining credibility, and resolving ambiguities);
17 *but see Varney*, 859 F.3d at 1399 (noting that “if grounds . . . exist [on which an ALJ may
18 discredit a claimant’s testimony], it is both reasonable and desirable to require the ALJ to
19 articulate them in the original decision.”). In *Treichler*, the Ninth Circuit affirmed a
20 District Court’s remand for reconsideration even though the court first rejected the
21 District Court’s decision to the extent it affirmed the ALJ’s determination that the

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23 ⁵ Claimant also testified at the hearing that as a result of her diagnosed depression, she
24 cried alone a few times every day for about 5–10 minutes at a time. (R. at 50.) This accords
25 with the testimony of Dr. General and Dr. Huddleston, who both diagnosed Claimant as
26 suffering from major depressive disorder, (R. at 444, 871), and is not controverted anywhere else
27 in the record. While this Court could credit the testimony as true, it does not change the need to
28 remand for reconsideration. The vocational expert (“VE”) considered a hypothetical that
accounted for Claimant’s need to take “unscheduled breaks of 5 to 10 minutes . . . throughout the
day” as well as the “need to lie down or recline on an unscheduled basis for maybe 45 minutes to
2 hours at a time throughout the day.” (R. at 57.) The VE opined that Claimant, considering
those symptoms, could not work. (R. at 58.) But the VE did not opine on whether needing only
intermittent 5–10 minute breaks would lead to the same conclusion. As such, remand for
reconsideration is still appropriate to first properly determine whether Claimant’s testimony is
credible, and then to present a complete and accurate hypothetical to the VE.

1 claimant's testimony lacked credibility. *Treichler*, 775 F.3d at 1103. While the court
2 held that the ALJ's rejection of the claimant's testimony relied on a legally insufficient
3 basis, the court refused to remand for an award of benefits citing "significant factual
4 conflicts in the record between [claimant's] testimony and objective medical evidence."
5 *Id.* at 1104. These conflicts raised "crucial questions as to the extent of [claimant's]
6 impairment[.]" and illustrated that further proceedings would serve a useful purpose. *Id.*
7 at 1105. Thus, because the court determined that "further administrative proceedings
8 [were] necessary," it did "not reach the third step of the rule, [crediting the improperly
9 disregarded evidence as true, since that only] arises where the record is fully developed
10 and free from conflicts, making it clear that the ALJ would be required to find the
11 claimant disabled if he credited the claimant's testimony as true." *Id.* at 1107. Here,
12 similar conflicts exist.

13 The fact that Claimant and her husband's testimony finds some support in other
14 parts of the record is inapposite. Again, even though the ALJ failed to articulate why he
15 rejected Claimant and her husband's testimony, and whether he accounted for the
16 supporting evidence on the record, even under the lens of the credit-as-true rule, if on
17 appeal the Defendant can highlight a conflict or ambiguity on the record, the "proper
18 approach is to remand the case to the [ALJ]" for reconsideration. *Id.* at 1105.
19 Accordingly, factoring for Dr. General and Dr. Huddleston's supporting evidence is a
20 duty reserved exclusively for the ALJ. *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882
21 (9th Cir. 2006) (The Court "may not substitute [its own] judgment for that of the ALJ.").

22 The record before this Court is not "free from conflicts." *Treichler*, 775 F.3d at
23 1107. And while a conflict free record seems unlikely in any Social Security case, the
24 law is clear that in the presence of incongruent testimony, remand for an award of
25 benefits is inappropriate regardless of the ALJ's level of legal error. *See id.* at 1106.
26 Accordingly, the ALJ will be given a second chance to decide the issue again.

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1 **B. Other issues**

2 **1. Title XVI application**

3 The ALJ seemingly intended to affirm the agency’s reconsideration and grant of
4 Claimant’s Title XVI disability benefits beginning on November 27, 2010, but not
5 before. (R. at 13.) Also, at the beginning of the hearing on this matter, in a colloquy with
6 Claimant’s attorney regarding the procedural posture of Claimant’s different social
7 security applications, the ALJ stated that in regards to the application “allowing benefits
8 as of November 27, 2010 . . . that’s going to be adjudicated period in this case.” (R. at
9 36.) Defendant argues that because the ALJ failed to provide the appropriate findings
10 with its decision to affirm the state agency’s disability determination, it is unclear
11 whether the ALJ’s decision adjudicated Claimant’s Title II or Title XVI application, and
12 therefore this Court must remand for further proceedings. Because this matter is being
13 remanded for further proceedings on other grounds, the ALJ should clarify the issue.

14 **2. Claimant’s current condition**

15 Defendant finally argues that because the ALJ issued its decision in April 2013,
16 but the record evidence ceased in late 2012, the case should be remanded to further
17 develop the record to avoid “mak[ing] a finding of disability that covers a period beyond
18 that adjudicated by the ALJ.” (Doc. 19 at 13.) The Defendant’s argument as it relates to
19 reevaluating Claimant’s condition beyond 2010 is moot. Time inevitably passes between
20 a denial of benefits and a review of that denial. If such passage of time required this
21 Court to remand the matter so the ALJ could consider the Claimant’s current medical
22 status, the social security review process would be meaningless since every case would
23 have to be remanded.

24 **III. Conclusion**

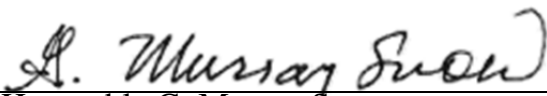
25 In sum, the Defendant conceded that the ALJ erred in its disability decision when
26 he rejected the Claimant and her husband’s testimony for legally insufficient reasons.
27 But due to a conflict in the record between a single piece of medical opinion evidence
28 and both the Claimant and her husband’s testimony, the case must be remanded back to

1 the ALJ for reconsideration.

2 **IT IS THEREFORE ORDERED** that this case is remanded back to the ALJ for
3 further proceedings on an open record.

4 Dated this 5th day of January, 2016.

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Honorable G. Murray Snow
United States District Judge