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NOT FOR PUBLICATION

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**IN THE UNITED STATES DISTRICT COURT**

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**FOR THE DISTRICT OF ARIZONA**

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9 Patricia Ann Simmons,

No. CV-14-02286-PHX-JJT

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Plaintiff,

**ORDER**

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v.

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Carolyn W. Colvin,

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Defendant.

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**I. BACKGROUND**

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At issue is the denial of Plaintiff Patricia Ann Simmons's Application for Disability Insurance Benefits by the Social Security Administration ("SSA") under the Social Security Act ("the Act"). Plaintiff filed a Complaint (Doc. 1) with this Court seeking judicial review of that denial, and the Court now considers Plaintiff's Opening Brief (Doc. 15, "Pl.'s Br."), and Defendant Social Security Administration Commissioner's Opposition (Doc. 16, "Def.'s Br.>").

Plaintiff filed an Application for a Period of Disability and Disability Insurance Benefits under Titles II and XVIII of the Act on August 10, 2011, for a Period of Disability beginning January 28, 2011. (Docs. 12-13, R. at 168-69.) The parties do not dispute that Plaintiff's Last Date Insured for purposes of determining benefits under the Act is June 30, 2016. (R. at 22.) Plaintiff's claim was denied initially on December 14, 2011, (R. at 114), and on reconsideration on July 18, 2012, (R. at 122). Plaintiff testified at a hearing held before an Administrative Law Judge ("ALJ") on February 20, 2014. (R. at 35-80.) On April 18, 2014, the ALJ issued a decision denying Plaintiff's claim.

1 (R. at 22-29.) The Appeals Council upheld the ALJ’s decision on August 28, 2014. (R. at  
2 1-6.) The present appeal followed.

3 **A. Medical Evidence**

4 **1. Medical Treatment**

5 On February 21, 2011, Plaintiff went for a new patient visit to a cardiologist,  
6 Dr. Monica Escarzaga. (R. at 404.) Dr. Escarzaga noted Plaintiff’s history of coronary  
7 artery disease and a 2009 stent placement. (R. at 404.) In her last stress echocardiogram,  
8 in 2010, Plaintiff had excellent exercise tolerance and no angina—chest pain caused by  
9 inadequate blood supply to the heart. (R. at 404.) Dr. Escarzaga “strongly advised”  
10 Plaintiff to quit smoking because of the increased risk of heart attack and stroke. (R. at  
11 407.) On March 21, 2011, Plaintiff underwent another stress echocardiogram, and the  
12 results were normal with no evidence of infarction. (R. at 378.)

13 On May 8, 2011, upon experiencing chest pain, Plaintiff went to the emergency  
14 room of Banner Thunderbird Medical Center. (R. at 332-34.) The examining physician  
15 noted that Plaintiff has a “known history of coronary artery disease, but she continues to  
16 smoke.” (R. at 332.) The physician also noted Plaintiff’s history of diabetes mellitus and  
17 hypertension. (R. at 332.) The results of the electrocardiogram were normal. (R. at 332.)  
18 On May 10, 2011, Plaintiff underwent a CT scan of her chest, and no evidence of  
19 pulmonary embolism was found. (R. at 331.) The physician recommended that Plaintiff  
20 follow-up with a cardiologist. (R. at 331.)

21 Plaintiff followed up with Dr. Escarzaga, on May 12, 2011. (R. at 394.)  
22 Dr. Escarzaga noted Plaintiff’s recent visit to the hospital and Plaintiff’s reports of neck  
23 and shoulder discomfort and occasional spasms. (R. at 394.) She also noted that the CT  
24 scan of Plaintiff’s chest revealed a lung nodule and prominent lymph nodes. (R. at 394.)  
25 Dr. Escarzaga noted that Plaintiff’s recent episode of chest discomfort occurred after she  
26 fell in the bathtub and concluded that it appeared to be musculoskeletal. (R. at 396.) She  
27 found Plaintiff’s heart was functioning normally, treated Plaintiff with medication and  
28 strongly advised her to quit smoking. (R. at 396.)

1 On June 4, 2011, Plaintiff visited Arizona Pain Specialists (APS) for a  
2 consultation. (R. at 422.) She reported pain in her neck radiating to her right shoulder and  
3 upper right arm with numbness, tingling, and occasional weakness in her right hand.  
4 (R. at 422.) She had previously visited APS in January 2010, when APS ordered medial  
5 branch blocks but Plaintiff did not complete them. (R. at 422.) A 2009 MRI of the  
6 cervical spine revealed mild disc bulging at C5-C6 and C6-C7, and a 2009 EMG study  
7 revealed mild carpal tunnel syndrome. (R. at 422.) Plaintiff reported that the pain in her  
8 neck and shoulder began five years ago and is improved with hot/cold packs and  
9 medications. (R. at 422.) The APS nurse practitioner ordered an MRI, x-rays, physical  
10 therapy and epidural steroid injections. (R. at 424.)

11 A June 7, 2011 x-ray of the lumbar spine revealed “slight hypertrophic bony  
12 changes” but “[disc] spaces and body heights maintained” and lumbar spine “otherwise  
13 intact.” (R. at 426.) A June 10, 2011 x-ray and MRI of the cervical spine revealed mild  
14 arthropathy at several disc levels but no disc herniation present and otherwise  
15 unremarkable and unchanged from the previous x-ray. (R. at 427, 429.) Plaintiff went to  
16 APS for epidural injections in her back on August 9 and 18, and September 20, 2011.  
17 (R. at 419-21.)

18 On account of her history of coronary artery disease, the prior stent placement, and  
19 her reports of prolonged episodes of chest discomfort, Plaintiff underwent a cardiac  
20 catheterization on June 16, 2011. (R. at 300-02.) Plaintiff exhibited “mild-to-moderate  
21 coronary artery disease in all of the lesions” but “no flow-limiting lesion.” (R. at 302.)  
22 The examining physician concluded that “it is likely that her nonexertional prolonged  
23 chest discomfort is nonanginal.” (R. at 302.)

24 Upon a report of stress urinary incontinence, Plaintiff underwent a pelvic exam  
25 and cystoscopy—an examination of the inside of the bladder—on July 20, 2011. (R. at  
26 317-18.) The exam did not indicate any serious injury or condition. (R. at 318.)

27 On August 24, 2011, Plaintiff returned to the emergency room of Banner  
28 Thunderbird Medical Center, reporting chest pain, shortness of breath, palpitations and

1 lightheadedness. (R. at 358.) In addition to noting Plaintiff’s history of Type 2 diabetes,  
2 hypertension, coronary artery disease, hyperlipidemia, sleep apnea and exogenous  
3 obesity, the physician noted that Plaintiff was “undergoing a short sale of her home and  
4 she feels very stressed and has been going about frequently and having muscle spasms in  
5 the musculature of her upper back and shoulders, as well as the neck.” (R. at 358-59.)  
6 The physician also stated that Plaintiff “says for the past 20 years each night if she has  
7 been busy, she gets pain in her back and legs, but this has not changed.” (R. at 358.) The  
8 physician’s initial clinical impression was “atypical chest pain, probably pleurisy”—  
9 inflammation of the lung membrane—or a musculoskeletal problem. (R. at 359.) After  
10 admission to the hospital, an examination revealed Plaintiff’s heart was functioning  
11 normally. (R. at 365, 371.) Plaintiff’s chest pain was relieved by pain medications and,  
12 upon release, Plaintiff was instructed to follow-up with her physician. (R. at 362-64,  
13 374.)

14 Plaintiff followed up with Dr. Escarzaga on September 12, 2011. (R. at 380.)  
15 Dr. Escarzaga reported that Plaintiff takes pain medication as needed, “is doing well and  
16 is not having any more episodes of chest or neck discomfort,” and “is trying to quit  
17 smoking.” (R. at 380.) Dr. Escarzaga noted Plaintiff’s previously mentioned medical  
18 history and again strongly advised Plaintiff to stop smoking. (R. at 382.) Dr. Escarzaga  
19 ordered Plaintiff to try yoga or acupuncture for her neck and shoulder pain and to follow-  
20 up in six months. (R. at 383-84.)

21 On September 14, 2011, Plaintiff saw a neurologist, Dr. Mark Winograd. (R. at  
22 414-16.) Dr. Winograd concluded that, “neurologically she appears to be intact with one  
23 exception,” “she probably had mild carpal tunnel [syndrome].” (R. at 415.) For Plaintiff’s  
24 reports of shoulder pain, Dr. Winograd concluded she likely has “impingement or  
25 inflammation” at one of the deltoid muscles and was going to try epidural injections.  
26 (R. at 416.) With regard to Plaintiff’s reports of pain all over, Dr. Winograd stated he  
27 would “defer to the rheumatologist in the management of the inflammatory  
28 polyarthropathy.” (R. at 416.)

1 On October 13, 2011, Plaintiff saw a rheumatologist, Dr. Sheetal Chhaya,  
2 reporting chronic pain. (R. at 443-45.) Dr. Chhaya ordered blood tests and prescribed  
3 medication, concluding that the “clinical picture [was] more toward fibromyalgia.” (R. at  
4 445.)

5 On October 17, 2011, Plaintiff had an MRI of her lumbar spine, and the results  
6 were normal. (R. at 478.) Plaintiff then saw Dr. Bryan Wall at the Core Institute on  
7 November 2, 2011, still reporting neck pain. (R. at 481.) Dr. Wall noted that Plaintiff  
8 reported having the pain for more than ten years and that it was the result of several car  
9 accidents. (R. at 481.) After examining Plaintiff, Dr. Wall concluded that there was “no  
10 obvious explanation for the pain” and that “there isn’t much that [he] can do for this  
11 patient,” but that “the pain is closer to the spine and may be related to the patient’s  
12 recently diagnosed fibromyalgia.” (R. at 485.)

13 On November 3, 2011, Plaintiff visited Dr. Escarzaga for a follow-up. (R. at 491.)  
14 Dr. Escarzaga reported Plaintiff continued to smoke and made no new observations.  
15 (R. at 492.)

16 On December 13, 2011, Plaintiff visited another rheumatologist, Dr. Viji  
17 Mahadevan, reporting the previous diagnoses of fibromyalgia and Sjogren’s syndrome,  
18 which is characterized by dry eyes and mouth. (R. at 547.) Dr. Mahadevan noted that  
19 Dr. Chhaya had prescribed medication in the previous visit but Plaintiff never started it.  
20 (R. at 547.) Dr. Mahadevan ordered treatment of Plaintiff for fibromyalgia, including a  
21 regular exercise program and medication. (R. at 550.)

22 On December 28, 2011, Plaintiff visited APS again, reporting neck pain. (R. at  
23 519.) APS recommended additional branch blocks in the cervical spine, which had  
24 relieved Plaintiff’s pain in the past, and disc decompression by way of physical therapy.  
25 (R. at 521.) On December 30, 2011, Plaintiff went to Banner Health Center for an office  
26 visit regarding her diabetes. (R. at 526.) The physician concluded that Plaintiff’s diabetes  
27 mellitus type 2 was well controlled and continued her present management. (R. at 527.)  
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1 Plaintiff saw her primary care physician, Dr. Christine Harter, throughout 2011  
2 and early 2012. (R. at 556-600.) On January 16, 2012, among Plaintiff's conditions,  
3 Dr. Harter noted that Plaintiff said the fibromyalgia medication made her feel better but  
4 that aquatic exercise made her feel worse. (R. at 562.) Dr. Harter recommended physical  
5 therapy. (R. at 564.) Plaintiff saw another primary care physician, Dr. Usma Ahmad, on  
6 February 27, 2012, and the report of Plaintiff's conditions was unchanged apart from a  
7 new report of urinary hesitancy. (R. at 556-58.)

8 A two-year gap in care by Plaintiffs' physicians ensued because Plaintiff "ran out  
9 of her insurance," but she went to Maricopa County Clinic. (R. at 628, 642, 659-792.) On  
10 January 7, 2014, Dr. Ahmad examined Plaintiff again and made no new observations,  
11 generally observing that Plaintiff was stable. (R. at 624-26.) On January 9, 2014,  
12 Dr. Mahadevan examined Plaintiff again. (R. at 627-29.) He found Plaintiff had  
13 tenderness in seven trigger points. (R. at 629.) As he had in Plaintiff's previous visit,  
14 Dr. Mahadevan prescribed medication for fibromyalgia and recommended Plaintiff begin  
15 regular exercise. (R. at 629.)

## 16 **2. Medical Examinations**

17 On June 15, 2012, a nurse practitioner, Alina Stanca, completed a Fibromyalgia  
18 Residual Functional Capacity (RFC) Questionnaire. (R. at 601-03.) In checklist form,  
19 Ms. Stanca concluded that Plaintiff had multiple tender points, numbness and tingling of  
20 upper extremities, severe fatigue, morning stiffness, depression and anxiety. (R. at 601.)  
21 She summarized Plaintiff's pain as "moderately severe" that could "frequently" interfere  
22 with attention and concentration and "constantly" result in failure to complete tasks in a  
23 timely manner. (R. at 603.)

24 On July 10, 2012, Plaintiff underwent a psychological examination by Dr. Greg  
25 Peetoom. (R. at 604-09.) Dr. Peetoom noted that Plaintiff drove to her appointment and  
26 regularly drives short distances, independently showers and changes clothing, does light  
27 housework, shops for groceries weekly, watches television, spends time on the computer,  
28 and manages her own finances. (R. at 604-05.) Plaintiff stated her chief complaint was

1 her physical issues. (R. at 604.) She reported that she was in three or four “whiplash-  
2 type” car accidents and she suffers from neck and shoulder pain, which her doctors say is  
3 fibromyalgia. (R. at 605.) Plaintiff felt her pain began to interfere with her work in 2008.  
4 (R. at 605.) She was diagnosed with depression some 12 years before, but she felt better  
5 with her medication. (R. at 605.) Plaintiff still smoked one pack of cigarettes per day but  
6 was trying to stop. (R. at 606.) Plaintiff scored 29 out of 30 on the mini-mental state  
7 examination and was generally able to complete the other tests administered. (R. at 606-  
8 07.) Dr. Peetoom noted Plaintiff was preoccupied with her medical issues. (R. at 606.) In  
9 sum, Dr. Peetoom found Plaintiff to be of average intelligence and gave her a  
10 psychological prognosis of “fair,” noting that her psychological symptoms were well  
11 managed with medication and she can maintain normal activities of daily living. (R. at  
12 607.)

13 On January 10, 2014, Dr. Ahmad completed a Pain Functional Capacity  
14 Questionnaire. (R. at 636-37.) In checklist form, Dr. Ahmad concluded that Plaintiff has  
15 moderate to moderately severe pain that would frequently interfere with attention and  
16 concentration and frequently result in failure to complete tasks in a timely manner. (R. at  
17 636-37.) On January 14, 2014, Dr. Ahmad completed a Medical Assessment of Ability to  
18 Do Work Related Physical Activities Questionnaire. (R. at 638-40.) In checklist form,  
19 Dr. Ahmad concluded that Plaintiff could occasionally lift or carry less than ten pounds,  
20 stand and/or walk less than two hours in an eight hour day, sit for only two hours in an  
21 eight hour day, never crouch or crawl and occasionally climb, balance, stoop or kneel,  
22 and either never or only occasionally use her hands for various purposes. (R. at 638-39.)

### 23 3. Non-Examining Physicians

24 On August 10, 2011, at the time of filing a claim for disability benefits, the  
25 interviewer found that Plaintiff was a hypochondriac based on Plaintiff’s report of  
26 numerous disabilities and that she saw many doctors only once because she did not have  
27 time or was too busy to go back for follow-up appointments. (R. at 201.) On  
28 December 12, 2011, Dr. Terry Ostrowski noted Plaintiff’s medical history and that

1 Plaintiff worked as an accountant until January 2011, when her assignment came to an  
2 end. (R. at 82-92.) Dr. Ostrowski noted the doctors' observations that Plaintiff does her  
3 own housework, fixes meals, shops, drives a car and manages her finances and that  
4 medical treatment improved many of Plaintiff's symptoms. (R. at 82-92.) Dr. Ostrowski  
5 stated, "Medical records show that [Plaintiff experiences] some difficulty and  
6 discomfort" but that she is "not significantly restricted in [her] ability to get about and  
7 perform ordinary daily activities." (R. at 92.) Upon his examination of the medical  
8 evidence, he concluded that Plaintiff could lift 20 pounds occasionally and ten pounds  
9 frequently, stand about six hours in an eight-hour workday and sit for the same amount of  
10 time. (R. at 89.) He did not find that Plaintiff had other significant limitations, and he  
11 concluded that Plaintiff was able to perform her past work as an accountant and was  
12 therefore not disabled. (R. at 89-92.)

13 On July 16, 2012, after a review of additional records of Plaintiff's medical care,  
14 Dr. Erika Wavak reached essentially the same conclusions as Dr. Ostrowski. (R. at 94-  
15 112). Dr. Wavak found that Plaintiff's conditions resulted in some limitations but they  
16 were not severe enough to prevent Plaintiff from performing her past work as an  
17 accountant. (R. at 112.)

### 18 **B. Hearing Testimony**

19 At the hearing held on February 20, 2014, in response to the ALJ's questions,  
20 Plaintiff testified that she is 58 years old, stands five feet three inches tall, and weighs  
21 189 pounds. (R. at 42, 55.) She no longer works other than helping her daughter, a  
22 beautician, about once a month by sweeping hair off the floor in her work area. (R. at 43.)  
23 She last worked as an accountant through a temporary agency until January 28, 2011—  
24 the alleged onset date. (R. at 44-45.) She had quit her prior full-time job with Xerox a  
25 month before in the hope that the new temporary position would become full-time, but  
26 the project she was working on changed in scope and she was no longer needed. (R. at  
27 45-48.) She testified that, had the new position been the job she had been told about, she  
28 would have taken a full-time position because, at the time, she hoped she could continue

1 working. (R. at 48-49.) She applied for and received unemployment compensation for the  
2 whole year of 2011 and three quarters of 2012. (R. at 50.) She interviewed for several  
3 jobs during that period but did not get any offers. (R. at 51.)

4 Plaintiff testified that she drives a car at least once a week for shopping, doctor  
5 appointments and the like. (R. at 53-54.) She does the few household chores that are  
6 required, such as cooking, dishes and laundry, and she dresses and bathes herself. (R. at  
7 54-56.) She is overweight, particularly on account of the medication she takes and her  
8 less active lifestyle. (R. at 55.) On a typical day, she spends time outside smoking, on the  
9 internet, and watching movies on television. (R. at 56, 58-59.) She, her daughters and her  
10 sister visit each other regularly and her grandchildren visit her. (R. at 59-62.) She  
11 travelled to Flagstaff in December 2012 for her son's graduation. (R. at 63.) She smokes  
12 three-quarters of a pack to a full pack of cigarettes a day and drinks alcohol occasionally.  
13 (R. at 63-64.) She and her children go out for dinner about twice a month. (R. at 64.) She  
14 manages her own finances and pays her bills online. (R. at 66.)

15 With regard to pain, Plaintiff testified that, on and off, she has a sharp pain in her  
16 shoulder or upper shoulder blade. (R. at 67-68.) She has fibromyalgia with pain that  
17 "could be anywhere," including the big toe, knee, neck, shoulder and hip, and she takes  
18 medication. (R. at 68-69.) She has pain in her feet from neuropathy that might be caused  
19 by diabetes, for which she also takes medication. (R. at 69.) Her hands fall asleep, which  
20 might be from carpal tunnel syndrome but for which she has not had surgery. (R. at 71.)  
21 She has "trigger finger" in one thumb, for which she gets cortisone shots. (R. at 71.)  
22 Sometimes she can walk for half an hour at a time, and other times she can walk for five  
23 minutes. (R. at 73.) She can grocery shop for about an hour at a time with the help of a  
24 cart. (R. at 74.)

25 The ALJ also examined Shirley Ripp, a Vocational Expert (VE), at the hearing.  
26 The VE testified that Plaintiff's previous work as an accountant was sedentary. (R. at 75.)  
27 Plaintiff's counsel asked the VE if Plaintiff could do her past work as an accountant with  
28 the limitations identified by Dr. Ahmad in her functional assessment of Plaintiff, and the

1 VE answered, “No.” (R. at 77.) The ALJ pointed out that Dr. Ahmad had found Plaintiff  
2 to be less than sedentary such that, if Dr. Ahmad’s findings were supported by the record,  
3 Plaintiff would be ruled disabled. (R. at 77.)

4 **C. The ALJ’s Opinion**

5 In his opinion, for the period from the alleged onset date of January 28, 2011  
6 onward, the ALJ concluded that Plaintiff was not engaged in substantial gainful activity  
7 and had impairments of “fibromyalgia, osteoarthritis, coronary artery disease post stent  
8 placement in 2009 and heart catheterization in 2011, basilar atelectasis/asthma with  
9 tobacco dependence, and obesity,” which in combination caused “more than minimal  
10 impact on the claimant’s ability to perform basic work activities” but did not equal any  
11 listing under the pertinent regulations. (R. at 25.) The ALJ concluded that Plaintiff had  
12 the RFC to perform light work except only occasionally climb, kneel or crawl; never  
13 climb ladders, ropes or scaffolds; frequently stoop and crouch; and avoid extreme  
14 temperatures and hazards. (R. at 26.)

15 The ALJ found that Plaintiff’s impairments could reasonably be expected to cause  
16 the alleged symptoms, but that her statements regarding the intensity, persistence and  
17 limiting effects of these symptoms were not entirely credible because (1) Plaintiff  
18 stopped working on the alleged onset date because her job came to an end, not because  
19 she was unable to work; (2) she interviewed for other jobs and collected unemployment  
20 for almost two years after the alleged onset date; (3) her activity level—including helping  
21 her daughter at work, regularly driving a car, using a computer for e-mails, games and  
22 bill-paying, cooking, doing the dishes, doing the laundry, cleaning, making her bed,  
23 visiting and hosting her family, and traveling—was inconsistent with her allegations of  
24 disability; and (4) treatment records showed that the coronary artery disease and diabetes  
25 were under control, only mild musculoskeletal problems were present, her fibromyalgia  
26 symptoms were not disabling, and her condition was exacerbated by obesity and smoking  
27 but not to the point of precluding work activities altogether. (R. at 27.)

28

1           The ALJ gave great weight to the assessment of state examining physician  
2 Dr. Wavak and significant weight to the assessment of Dr. Ostrowski, because they were  
3 consistent with the medical treatment records and Plaintiff’s ability to perform the  
4 activities of daily living. (R. at 28.) The ALJ gave little weight to the assessment of  
5 treating physician Dr. Ahmad because it was in checklist form with little supporting  
6 objective evidence; indeed, it was inconsistent with Plaintiff’s treatment records, which  
7 did not suggest significant limitations in functional capacity, and Plaintiff scored 29 out  
8 of 30 in the Mini Mental Status examination. (R. at 28.) Likewise, the ALJ gave little  
9 weight to the fibromyalgia assessment of Ms. Stanca, because she is a nurse practitioner.  
10 (R. at 28-29.) Moreover, the assessment was in checklist form and inconsistent with  
11 Plaintiff’s ability to perform daily activities and the examining psychologist’s findings of  
12 Plaintiff’s ability to maintain attention and concentration. (R. at 28.)

13           The ALJ concluded that Plaintiff was not disabled under the Act from the alleged  
14 onset date to the date of the ALJ’s opinion because, considering Plaintiff’s RFC, Plaintiff  
15 could perform her past relevant work as an accounting clerk, which requires only  
16 sedentary exertion and has no postural requirements. (R. at 29.)

## 17   **II. ANALYSIS**

18           The district court reviews only those issues raised by the party challenging the  
19 ALJ's decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). The court  
20 may set aside the Commissioner's disability determination only if the determination is not  
21 supported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625,  
22 630 (9th Cir. 2007). Substantial evidence is more than a scintilla, but less than a  
23 preponderance; it is relevant evidence that a reasonable person might accept as adequate  
24 to support a conclusion considering the record as a whole. *Id.* In determining whether  
25 substantial evidence supports a decision, the court must consider the record as a whole  
26 and may not affirm simply by isolating a “specific quantum of supporting evidence.” *Id.*  
27 As a general rule, “[w]here the evidence is susceptible to more than one rational  
28 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be

1 upheld.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citations omitted).

2 To determine whether a claimant is disabled for purposes of the Act, the ALJ  
3 follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the burden of  
4 proof on the first four steps, but the burden shifts to the Commissioner at step five.  
5 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At the first step, the ALJ  
6 determines whether the claimant is presently engaging in substantial gainful activity.  
7 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not disabled and the inquiry ends. *Id.*  
8 At step two, the ALJ determines whether the claimant has a “severe” medically  
9 determinable physical or mental impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If not, the  
10 claimant is not disabled and the inquiry ends. *Id.* At step three, the ALJ considers whether  
11 the claimant's impairment or combination of impairments meets or medically equals an  
12 impairment listed in Appendix 1 to Subpart P of 20 C.F.R. Part 404. 20 C.F.R.  
13 § 404.1520(a)(4)(iii). If so, the claimant is automatically found to be disabled. *Id.* If not,  
14 the ALJ proceeds to step four. *Id.* At step four, the ALJ assesses the claimant's RFC and  
15 determines whether the claimant is still capable of performing past relevant work.  
16 20 C.F.R. § 404.1520(a)(4)(iv). If so, the claimant is not disabled and the inquiry ends.  
17 *Id.* If not, the ALJ proceeds to the fifth and final step, where he determines whether the  
18 claimant can perform any other work in the national economy based on the claimant's  
19 RFC, age, education, and work experience. 20 C.F.R. § 404.1520(a)(4)(v). If so, the  
20 claimant is not disabled. *Id.* If not, the claimant is disabled. *Id.*

21 **A. The ALJ Assigned Proper Weight to the Assessments of Plaintiff's**  
22 **Treating Physicians and Properly Considered the Record as a Whole**

23 Plaintiff disputes the ALJ's findings at step four of the five-step process,  
24 specifically, that when considering the combination of Plaintiff's impairments, Plaintiff's  
25 RFC allowed her to perform her past relevant work. Plaintiff's first argument is that the  
26 ALJ committed reversible error by assigning inadequate weight to the assessments of  
27 Plaintiff's medical care providers. (Pl.'s Br. at 12-18.) Defendant argues that the ALJ  
28 properly weighed the treating professionals' assessments, giving specific and legitimate

1 reasons supported by substantial evidence in the record for giving little weight to certain  
2 assessments. (Def.’s Br. at 4-15.)

3 An ALJ “may only reject a treating or examining physician’s uncontradicted  
4 medical opinion based on ‘clear and convincing reasons.’” *Carmickle v. Comm’r of Soc.*  
5 *Sec.*, 533 F.3d 1155, 1164 (9th Cir. 2008) (citing *Lester v. Chater*, 81 F. 3d 821, 830-31  
6 (9th Cir. 1996)). “Where such an opinion is contradicted, however, it may be rejected for  
7 specific and legitimate reasons that are supported by substantial evidence in the record.”  
8 *Id.*

9 In this instance, the ALJ found that the assessments of one of Plaintiff’s treating  
10 physicians, Dr. Ahmad, and of a treating nurse practitioner, Ms. Stanca, are contradicted  
11 by the assessments of Drs. Wavak and Ostrowski. (R. at 28-29.) The ALJ first found that  
12 the assessments were inconsistent with Plaintiff’s treatment records, citing the  
13 cardiologist’s reports that Plaintiff’s coronary artery disease had been treated and did not  
14 result in significant physical limitations, evidence that Plaintiff’s diabetes was under  
15 control, mental test results indicating no significant limitations, evidence that Plaintiff’s  
16 posture and gait did not indicate disabling pain, and evidence that, while Plaintiff’s  
17 obesity exacerbated her condition, it did not preclude physical activity. (R. at 27-28.)  
18 With regard to Ms. Stanca, the ALJ also properly considered the fact that she is a nurse  
19 practitioner and thus not the “most qualified health professional.” (R. at 29.) Under the  
20 relevant regulations, a nurse practitioner does not qualify as an “acceptable treating  
21 source” but is instead defined as an “other source,” 20 C.F.R. § 404.1513(d)(1), and, as  
22 such, an ALJ may if justified give less weight to the opinion of a nurse practitioner,  
23 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

24 The ALJ also found that the medical professionals’ assessments were inconsistent  
25 with Plaintiff’s ability to exert herself to do her household work, drive and shop. (R. at  
26 28.) While a claimant need not be “utterly incapacitated” to be considered disabled under  
27 the Act, *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005), Plaintiff’s testimony  
28 supports the conclusion that she had the functional capacity to regularly clean, cook, use

1 a computer, watch television, help her daughter at work, visit family, and occasionally  
2 travel. This testimony is inconsistent with, for example, the significant physical  
3 limitations Dr. Ahmad attributed to Plaintiff. Considering the record as a whole, the  
4 Court finds the ALJ's reasons for assigning little weight to the functional capacity  
5 assessments of Dr. Ahmad and Ms. Stanca were specific, legitimate, and supported by  
6 substantial evidence.

7 **B. The ALJ Properly Weighed Plaintiff's Testimony**

8 Plaintiff also argues that the ALJ erred in his consideration of Plaintiff's symptom  
9 testimony. (Pl.'s Br. at 18-22.) In response, Defendant contends that the ALJ gave  
10 Plaintiff's testimony the proper weight because some of her testimony was not supported  
11 by objective medical evidence, Plaintiff was successful in controlling her symptoms with  
12 medication and other treatment, Plaintiff engaged in physical activity despite her claimed  
13 limitations, Plaintiff's last job ended not because of a disability but for business reasons,  
14 and Plaintiff collected unemployment and searched for another job for almost two years  
15 of the claimed disability period. (Def.'s Br. at 17-23.)

16 While credibility is the province of the ALJ, an adverse credibility determination  
17 requires the ALJ to provide "specific, clear and convincing reasons for rejecting the  
18 claimant's testimony regarding the severity of the claimant's symptoms." *Treichler v.*  
19 *Comm'r of Soc. Sec.*, 775 F.3d 1090, 1102 (9th Cir. 2014) (citing *Smolen v. Chater*, 80  
20 F.3d 1273, 1281 (9th Cir. 1996)). The ALJ generally credited Plaintiff's testimony that  
21 she could help her daughter in the beauty salon, work on her computer for an hour at a  
22 time with breaks, do housework, watch television, and visit with family. (*See R.* at 53-  
23 66.) However, the ALJ disagreed with certain statements of Plaintiff regarding the  
24 intensity, persistence and limiting effects of her conditions and her conclusion that she  
25 was "less than sedentary." (*R.* at 27, 41.)

26 In the instances in which the ALJ assigned little value to Plaintiff's statements, the  
27 Court finds the ALJ gave sufficient justification. For example, the ALJ pointed out that  
28 Plaintiff applied and interviewed for other jobs during the alleged period of disability,

1 which does not disqualify Plaintiff from seeking disability benefits but is at least  
2 inconsistent with Plaintiff's statement that she was incapable of working. (*See R. at 27.*)  
3 Moreover, Plaintiff's testimony as to the limiting effects of her conditions was  
4 inconsistent with her medical treatment, in which doctors either found no physical  
5 limitations or, when Plaintiff went to a follow-up checkup, that her condition improved  
6 with medication and other treatment. (*See R. at 27.*) In addition, as the Court has already  
7 discussed, Plaintiff's claim that she was "less than sedentary" is inconsistent with her  
8 own testimony regarding her ability to perform daily activities, work on the computer, or  
9 visit family and travel. (*See R. at 27.*) For all these reasons, the Court finds the ALJ  
10 properly weighed Plaintiff's testimony as to her limitations. *See* 20 C.F.R. §  
11 404.1529(c)(3); *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175 (9th Cir. 2008); *Warre*  
12 *ex rel. E.T. IV v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006).

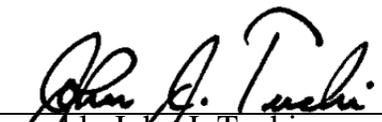
13 **III. CONCLUSION**

14 Plaintiff raises no error on the part of the ALJ, and the SSA's decision denying  
15 Plaintiff's Application for a Period of Disability and Disability Insurance Benefits under  
16 the Act was supported by substantial evidence in the record.

17 IT IS THEREFORE ORDERED affirming the April 18, 2014, decision of the  
18 Administrative Law Judge, (R. at 22-29), as upheld by the Appeals Council on August  
19 28, 2014 (R. at 1-6).

20 IT IS FURTHER ORDERED directing the Clerk to enter final judgment  
21 consistent with this Order and close this case.

22 Dated this 4<sup>th</sup> day of March, 2016.

23  
24   
25 Honorable John J. Tuchi  
26 United States District Judge  
27  
28