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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Catherine Moreno,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin,

13 Defendant.

No. CV-14-02419-PHX-JZB

ORDER

14
15 Plaintiff Catherine Moreno seeks review of the Social Security Administration
16 Commissioner's decision denying her social security and disability benefits under the
17 Social Security Act. (Doc. 1; Doc. 16.) For reasons below, the Court will vacate the
18 Commissioner's final decision and remand this matter for an award of benefits.

19 **I. Background**

20 On February 4, 2011, Plaintiff filed an application for a period of disability and
21 disability insurance benefits under Title II of the Social Security Act. (AR¹ 12.) On
22 September 14, 2011, Plaintiff filed an application for supplemental security income (SSI)
23 benefits under Title XVI of the Social Security Act. (*Id.*) Plaintiff asserts disability
24 beginning on January 31, 2011. (*Id* at 226, 229.) Plaintiff's applications were initially
25 denied on July 15, 2011, and upon reconsideration on November 28, 2011. (*Id* at 136,
26 138.) On January 24, 2012, Plaintiff requested a hearing. (*Id* at 150.) Subsequently,
27 Plaintiff's applications were set for hearing. (*Id* at 174.) In a decision dated October 22,

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¹ Citations to "AR" are to the administrative record.

1 2012, Administrative Law Judge (“ALJ”) Earl C. Cates, Jr. found Plaintiff is not
2 disabled. (*Id.* at 12-25.) On September 3, 2014, the Appeals Council denied Plaintiff’s
3 request for review of the ALJ’s decision, making it the final decision of the
4 Commissioner of the Social Security Administration. (*Id.* at 1-8.)

5 Having exhausted the administrative review process, on October 31, 2014,
6 Plaintiff sought judicial review of the ALJ’s decision by filing a Complaint in this Court
7 pursuant to 42 U.S.C. § 405(g). (Doc. 1.) On July 21, 2015, Plaintiff filed an Opening
8 Brief, seeking remand of this case to the Social Security Administration for an award of
9 benefits, or alternatively, for further proceedings. (Doc. 16.) On August 20, 2015,
10 Defendant filed a Response Brief in support of the Commissioner’s decision. (Doc. 17.)
11 On September 23, 2015, Plaintiff filed a Reply Brief. (Doc. 23.)

12 **II. Legal Standards**

13 **a. Standard of Review**

14 The Social Security Act, 42 U.S.C. § 405(g), provides for judicial review of the
15 Commissioner’s disability benefits determinations. The Court may set aside the
16 Commissioner’s disability determination only if the determination is not supported by
17 substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir.
18 2007); *Marcia v. Sullivan*, 900 F.2d 172, 174 (9th Cir. 1990). “‘Substantial evidence’
19 means more than a mere scintilla, but less than a preponderance; it is such relevant
20 evidence as a reasonable person might accept as adequate to support a conclusion.”
21 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007); *see also Reddick v. Chater*,
22 157 F.3d 715, 720 (9th Cir. 1998).

23 In determining whether substantial evidence supports the ALJ’s decision, the
24 Court considers the record as a whole, weighing both the evidence that supports and that
25 which detracts from the ALJ’s conclusions. *Reddick*, 157 F.3d at 720; *Tylitzki v. Shalala*,
26 999 F.2d 1411, 1413 (9th Cir. 1993). The ALJ is responsible for resolving conflicts,
27 ambiguity, and determining credibility. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
28 1995); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The Court “must

1 uphold the ALJ’s decision where the evidence is susceptible to more than one rational
2 interpretation.” *Andrews*, 53 F.3d at 1039. “However, a reviewing court must consider
3 the entire record as a whole and may not affirm simply by isolating a ‘specific quantum
4 of supporting evidence.’” *Orn*, 495 F.3d at 630 (quoting *Robbins v. Soc. Sec. Admin.*, 466
5 F.3d 880, 882 (9th Cir. 2006)). The Court reviews only those issues raised by the party
6 challenging the ALJ’s decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir.
7 2001). Similarly, the Court reviews “only the reasons provided by the ALJ in the
8 disability determination and may not affirm the ALJ on a ground upon which he did not
9 rely.” *Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir. 2014).

10 **b. The ALJ’s Five-Step Evaluation Process**

11 To be eligible for Social Security benefits, a claimant must show an “inability to
12 engage in any substantial gainful activity by reason of any medically determinable
13 physical or mental impairment which can be expected to result in death or which has
14 lasted or can be expected to last for a continuous period of not less than 12 months.” 42
15 U.S.C. § 423(d)(1)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). A
16 person is under a disability only:

17 if his physical or mental impairment or impairments are of
18 such severity that he is not only unable to do his previous
19 work but cannot, considering his age, education, and work
experience, engage in any other kind of substantial gainful
work which exists in the national economy.

20 42 U.S.C. § 423(d)(2)(A).

21 The ALJ follows a five-step evaluation process to determine whether an applicant
22 is disabled under the Social Security Act:

23 The five-step process for disability determinations begins, at
24 the first and second steps, by asking whether a claimant is
25 engaged in “substantial gainful activity” and considering the
severity of the claimant’s impairments. *See* 20 C.F.R. §
26 416.920(a)(4)(i)-(ii). If the inquiry continues beyond the
second step, the third step asks whether the claimant’s
27 impairment or combination of impairments meets or equals a
listing under 20 C.F.R. pt. 404, subpt. P, app. 1 and meets the
duration requirement. *See id.* § 416.920(a)(4)(iii). If so, the
28 claimant is considered disabled and benefits are awarded,
ending the inquiry. *See id.* If the process continues beyond
the third step, the fourth and fifth steps consider the

1 claimant's "residual functional capacity" in determining
2 whether the claimant can still do past relevant work or make
an adjustment to other work. *See id.* § 416.920(a)(4)(iv)-(v).

3 *Kennedy v. Colvin*, 738 F.3d 1172, 1175 (9th Cir. 2013). "The burden of proof is on the
4 claimant at steps one through four, but shifts to the Commissioner at step five." *Bray v.*
5 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009).

6 Applying the five-step evaluation process, the ALJ found that Plaintiff is not
7 disabled and is not entitled to benefits. (*Id.* at 25.) At step one, the ALJ found that
8 Plaintiff meets the insured status requirements of the Social Security Act through
9 December 31, 2016, and Plaintiff has not engaged in substantial gainful activity since
10 January 31, 2011, the alleged onset date. (*Id.* at 16.) At step two, the ALJ determined
11 that Plaintiff has the following severe impairments: lumbar degenerative disc disease,
12 cervical degenerative disc disease, obesity, fibromyalgia, depression, anxiety, and use of
13 medical marijuana. (*Id.*) At step three, the ALJ found that Plaintiff does not have an
14 impairment or combination of impairments that meets or medically equals the severity of
15 one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR §§
16 404.1520(d), 404.1525, 416920(d), 416.925, and 416.926). (*Id.* at 17.)

17 At step four, the ALJ found the following:

18 [Plaintiff] has the [RFC] to perform light work as defined in
19 20 CFR 404.1567(b) and 416.967(b). The [Plaintiff] can
20 occasionally lift twenty pounds. She can frequently lift less
21 than ten pounds. She can stand or walk for six hours in an
22 eight hour day. She uses an assistive device to maintain
23 balance. She has no limits in her ability to sit. Her ability to
24 see, speak and hear is unlimited. She can occasionally climb
25 ramps and stairs but can never climb ladders, ropes, or
26 scaffolds. She can frequently stoop, crouch, and reach. She is
27 limited to occasional kneeling. She can never crawl. Her
28 ability to handle, finger, and feel is not limited. She is limited
in her ability to work around heights and extremes in
temperature. The [Plaintiff] has the ability to understand and
remember simple instructions, detailed instructions and work-
like procedures and she can perform the same. The [Plaintiff]
can carry out simple instructions, maintain attention and
concentration, and maintain regular attendance. The
[Plaintiff] is able to engage with coworkers and get along
with coworkers, respond appropriately to supervision,
maintain socially appropriate behavior, and adhere to basic
standards of neatness. She can respond appropriately to
changes in the work setting, be aware of normal hazards and

1 take appropriate action.
2 (*Id.* at 19.) Finally, the ALJ found that Plaintiff “is capable of performing past relevant
3 work as a customer service representative and accounts payable clerk.” (*Id.* at 25.)

4 **III. Analysis**

5 Plaintiff argues that the ALJ erred in weighing the opinions of Dr. Ravi Bhalla and
6 Physician’s Assistant Brady Nelson, weighing the opinions of the two physicians who
7 conducted psychiatrist assessments, rejecting Plaintiff’s symptom testimony, rejecting lay
8 witnesses opinions, and failing to set forth a complete analysis at step two. (Doc. 16 at
9 12-18.) Plaintiff further contends that the Vocational Expert (VE) offered a vocational
10 conclusion that is not supported by the record. (*Id.* at 24-25.) As detailed below, the
11 Court finds that the ALJ failed to provide clear and convincing reasons supported by
12 substantial evidence for discounting Plaintiff’s testimony. Further, the Court finds it is
13 appropriate to remand for an immediate award of benefits under the credit-as-true
14 analysis. Therefore, the Court does not reach Plaintiff’s other arguments of error.

15 **a. The ALJ failed to provide clear and convincing reasons supported by
16 substantial evidence for rejecting Plaintiff’s symptom testimony.**

17 Plaintiff argues that the ALJ erred in evaluating Plaintiff’s symptom testimony.
18 (Doc. 16 at 19.) The ALJ may reject a claimant’s testimony regarding the severity of his
19 or her symptoms only if the ALJ “makes a finding of malingering based on affirmative
20 evidence,” *Lingenfelter*, 504 F.3d at 1036 (quoting *Robbins*, 466 F.3d at 883), or if the
21 ALJ offers “clear and convincing reasons” for finding the claimant not credible.
22 *Carmickle*, 533 F.3d at 1160 (quoting *Lingenfelter*, 504 F.3d at 1036). ““The clear and
23 convincing standard is the most demanding required in Social Security Cases.”
24 *Garrison*, 793 F.3d at 1015 (quoting *Moore v. Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th
25 Cir. 2002)).

26 The ALJ rejected Plaintiff’s symptom testimony because (1) her daily activities
27 are not as limited as one would expect, (2) her treatment has been essentially routine
28 and/or conservative in nature, and Plaintiff reported improvement in her pain and mental
impairments with treatment, (3) Plaintiff cancelled or failed to show up for some of her

1 mental health appointments, suggesting that her symptoms may not have been as serious
2 as alleged, (4) objective medical findings do not fully support Plaintiff's allegations, and
3 (5) Plaintiff took a trip to Puerto Rico in April 2012. (*Id.* at 20-23.)

4 The Court finds that Plaintiff's daily activities are not a clear and convincing
5 reason supported by substantial evidence for discrediting Plaintiff's testimony. While an
6 ALJ may discredit a claimant's allegations if a claimant has "engaged in numerous daily
7 activities involving skills that could be transferred to the workplace," *Burch v. Barnhart*,
8 400 F.3d 676, 681 (9th Cir. 2005), "the mere fact that a plaintiff has carried on certain
9 daily activities, such as grocery shopping, driving a car, or limited walking for exercise,
10 does not in any way detract from her credibility as to her overall disability. One does not
11 need to be utterly incapacitated in order to be disabled." *Vertigan v. Halter*, 260 F.3d
12 1044, 1049-50 (9th Cir. 2001) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989))
13 (finding "only a scintilla of evidence in the record to support the ALJ's finding that [the
14 claimant] lacked credibility about her pain" where the claimant was able "to go grocery
15 shopping with assistance, walk approximately an hour in the malls, get together with her
16 friends, play cards, swim, watch television, . . . read . . . and exercise at home.").

17 Here, the ALJ asserts that with regard to Plaintiff's back and neck pain, Plaintiff
18 lives alone in a second story apartment, she can drive, shop, prepare meals, do laundry,
19 and she reads and watches television. (AR 21.) However, the ALJ does not make any
20 finding as to how often Plaintiff conducts these activities other than noting her testimony
21 that these activities are limited due to Plaintiff's "persistent pain." (*Id.*) Accordingly,
22 Plaintiff's daily activities are an insufficient basis upon which to discredit her testimony.

23 The ALJ also found that Plaintiff's treatment was conservative and routine, and
24 she showed improvement with that treatment. *Tommasetti v. Astrue*, 533 F.3d 1035,
25 1040 (9th Cir. 2008) (an ALJ may infer that a claimant's "response to conservative
26 treatment undermines [claimant's] reports regarding the disabling nature of his pain").
27 With regard to Plaintiff's physical impairments, the Court does not find that this is a clear
28 and convincing reason supported by substantial evidence for discrediting Plaintiff's

1 testimony. As Plaintiff notes, the Ninth Circuit has indicated that at least some of the
2 treatment Plaintiff received for her physical impairments (injections) may not be
3 conservative. *See Garrison*, 759 F.3d at 1015 (“we doubt that epidural steroid shots to
4 the neck and lower back qualify as ‘conservative’ medical treatment”).

5 Further, although the ALJ cited to records that indicate Plaintiff’s symptoms may
6 have improved, record evidence indicates relief from pain was not sustained. For
7 example, the ALJ cited medical record evidence that Plaintiff’s pain symptoms improved
8 with treatment, including aquatic therapy and a lumbar facet joint nerve block. (*Id.* at 21,
9 1103.) However, treatment notes from a follow up visit on August 6, 2012 indicate that
10 “more conservative treatment” of pain medication and physical therapy had “failed” after
11 two sets of nerve blocks. (*Id.* at 1051.) And, other record evidence supports that Plaintiff
12 continued to suffer from pain and fatigue that impacted her ability to function. (*Id.* at
13 915-17, 1108.) Notably, Dr. Cunningham’s examination² states that Plaintiff suffers
14 from “intense pain in the shoulders.” (*Id.* at 738.) Dr. Cunningham further found 16 of
15 18 trigger points, Plaintiff’s muscles are tender throughout her arms and legs, and
16 Plaintiff “is limited due to pain.” (*Id.* at 738-89.) Although Dr. Cunningham found that
17 Plaintiff could walk, turn, and face him in a hallway, his examination results do not
18 reflect any observations or findings regarding the length of time that Plaintiff can sit or
19 stand, or Plaintiff’s need to take naps for two to three hours per day due to fatigue. (*Id.*)
20 Finally, although the ALJ pointed to a July 23, 2012 record that showed normal straight
21 leg raise results, at least one subsequent record indicates positive straight leg raise results.
22 (*Id.* at 943, 1157.)

23 The ALJ also rejected Plaintiff’s symptom testimony regarding her mental
24 impairments because she cancelled or failed to show up for mental health appointments
25 on a number of occasions. (AR 23.) As the Ninth Circuit Court explained in *Molina*:

26 We have long held that, in assessing a claimant’s credibility, the ALJ may
27 properly rely on “unexplained or inadequately explained failure to seek

28 ² The ALJ gave Dr. Cunningham’s opinions regarding Plaintiff’s functional
limitations “great weight.” (*Id.* at 24.)

1 treatment or to follow a prescribed course of treatment.” *Tommasetti*, 533
2 F.3d at 1039 (quoting *Smolen*, 80 F.3d at 1284); *Fair*, 885 F.2d at 603.
3 According to agency rules, “the individual’s statements may be less
4 credible if the level or frequency of treatment is inconsistent with the level
5 of complaints, or if the medical reports or records show that the individual
6 is not following the treatment as prescribed and there are no good reasons
7 for this failure.” SSR 96-7p, 1996 SSR LEXIS 4. Moreover, a claimant’s
8 failure to assert a good reason for not seeking treatment, “or a finding by
9 the ALJ that the proffered reason is not believable, can cast doubt on the
10 sincerity of the claimant’s pain testimony.” *Fair*, 885 F.2d at 603.

11 674 F.3d at 1113-14. Here, the ALJ cited to records that indicate Plaintiff missed some
12 of her counseling appointments. (*Id.* at 23, 716, 984-85, 1000.) However, the ALJ did
13 not identify any other prescribed treatment for Plaintiff’s fibromyalgia or physical
14 conditions that Plaintiff failed to follow. Further, the ALJ failed to identify any possible
15 treatment for fibromyalgia that Plaintiff’s treating physician could have prescribed. *See*
16 *Benecke v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004) (“Fibromyalgia’s cause is
17 unknown, there is no cure, and it is poorly-understood within much of the medical
18 community. The disease is diagnosed entirely on the basis of the patients’ reports of pain
19 and other symptoms. . . . there are no laboratory tests to confirm the diagnosis.”); *Rollins*
20 *v. Massanari*, 261 F.3d 853, 855 (9th Cir. 2001) (“There are no laboratory tests for the
21 presence or severity of fibromyalgia. The principal symptoms are ‘pain all over,’ fatigue,
22 disturbed sleep, stiffness, and ‘the only symptom that discriminates between it and other
23 diseases of a rheumatic character’ [are] multiple tender spots, more precisely 18 fixed
24 locations on the body.”) (quoting *Sarchet v. Chater*, 78 F.3d 305, 306 (7th Cir. 1996)).

25 The ALJ also found that Plaintiff’s symptoms were not fully corroborated by the
26 objective medical evidence. Although the lack of supporting medical evidence cannot
27 form the sole basis for discounting pain testimony, it is a factor that the ALJ can consider
28 in his or her credibility analysis. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.
2001) (while subjective pain testimony cannot be rejected on the sole ground that it is not
fully corroborated by objective medical evidence, the evidence is still a relevant factor in
determining the severity of the claimant’s pain and its disabling effects). Here, the ALJ
cited to a normal nerve conduction study, normal results during an April 2011 exam with

1 Podiatrist Daniel Schulman, Dr. Cunningham’s examination findings regarding normal
2 coordination, and a motor examination that revealed normal muscle bulk and tone
3 throughout. However, these normal results do not reflect the impact of Plaintiff’s
4 fibromyalgia. *See Benecke*, 379 F.3d at 590.

5 Finally, the ALJ noted that Plaintiff took one trip to Puerto Rico in April 2012.
6 (AR 23.) However, the ALJ fails to explain how this one trip contradicts any of
7 Plaintiff’s specific symptom testimony. Further, the Court finds that one trip is an
8 insufficient basis on which to reject Plaintiff’s testimony regarding her pain and fatigue.

9 **b. Remand for an award of benefits is appropriate.**

10 If the ALJ’s decision is not supported by substantial evidence or suffers from legal
11 error, the court has discretion to reverse and remand either for an award of benefits or for
12 further administrative proceedings. *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir.
13 1996). Under the Ninth Circuit’s credit-as-true standard, courts may credit as true
14 improperly rejected medical opinions or claimant testimony and remand for an award of
15 benefits if each of the following are satisfied: “(1) the record has been fully developed
16 and further administrative proceedings would serve no useful purpose; (2) the ALJ has
17 failed to provide legally sufficient reasons for rejecting evidence, whether claimant
18 testimony or medical opinion; and (3) if the improperly discredited evidence were
19 credited as true, the ALJ would be required to find the claimant disabled on remand.”
20 *Garrison*, 759 F.3d at 1020 (citing *Ryan*, 528 F.3d at 1202, *Lingenfelter v. Astrue*, 504
21 F.3d 1028, 1041 (9th Cir. 2007), *Orn v. Astrue*, 495 F.3d 625, 640 (9th Cir. 2007),
22 *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004), and *Smolen*, 80 F.3d at 1292). If
23 the “credit-as-true rule” is satisfied, the Court may remand for further proceedings,
24 instead of for an award of benefits, only “when the record as a whole creates serious
25 doubt as to whether the claimant is, in fact, disabled within the meaning of the Social
26 Security Act.” *Garrison*, 759 F.3d at 1021.

27 Here, the Court finds that the record has been fully developed and further
28 administrative proceedings would serve no useful purpose. Further, as detailed above,

1 the Court finds that the ALJ has failed to provide legally sufficient reasons for rejecting
2 Plaintiff's symptom testimony. Finally, according to the VE's testimony, if Plaintiff's
3 symptom testimony is credited as true, Plaintiff would be disabled under the Act. (AR
4 82-83.)

5 Defendant argues that if the Court finds legal error, it should remand for further
6 proceedings instead of an award of benefits. More specifically, Defendant argues that
7 "the credibility determination is exclusively the ALJ's to make, and [the Court's] only to
8 review." (Doc. 17 at 21.) However, Defendant fails to identify any ambiguities in the
9 evidence or outstanding issues that the ALJ must resolve before a disability determination
10 can be made. Further, Defendant fails to point to evidence that indicates the Court should
11 have "serious doubt" that Plaintiff is disabled. To the contrary, the record as a whole
12 supports a finding that Plaintiff's fibromyalgia rendered her disabled. *See Benecke*, 379
13 F.3d at 595 ("Allowing the Commissioner to decide the issue again would create an
14 unfair 'heads we win; tails, let's play again' system of disability benefits adjudication.");
15 *Moisa v. Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004) ("The Commissioner, having lost
16 this appeal, should not have another opportunity to show that Moisa is not credible any
17 more than Moisa, had he lost, should have an opportunity for remand and further
18 proceedings to establish his credibility.").

19 Accordingly,

20 **IT IS ORDERED** that the final decision of the Commissioner of the Social
21 Security Administration is reversed and this case is remanded for an award of benefits.
22 The Clerk shall enter judgment accordingly and terminate this case.

23 Dated this 30th day of March, 2016.

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26 
27 Honorable John Z. Boyle
28 United States Magistrate Judge