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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Tara Patrice Shoman Papaccio, Plaintiff, v. Carolyn W. Colvin, Acting Commissioner of Social Security, Defendant.	No. CV-16-01225-PHX DGC **ORDER**

Plaintiff Tara Patrice Shoman Papaccio seeks review under 42 U.S.C. § 405(g) of the final decision of the Commissioner of Social Security ("the Commissioner"), which denied her disability insurance benefits and supplemental security income under sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act. Because the decision of the Administrative Law Judge ("ALJ") is based on legal error, the Commissioner's decision will be vacated and the matter remanded for further administrative proceedings.

I. Background.

On August 3, 2012, Plaintiff applied for disability insurance benefits and supplemental security income, alleging disability beginning April 6, 2011. On May 14, 2014, she appeared with her attorney and testified at a hearing before the ALJ. A vocational expert also testified. On September 2, 2014, the ALJ issued a decision that Plaintiff was not disabled within the meaning of the Social Security Act. The Appeals Council denied Plaintiff's request for review of the hearing decision, making the ALJ's decision the Commissioner's final decision.

II. Legal Standard.

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

Harmless error principles apply in the Social Security Act context. *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless if there remains substantial evidence supporting the ALJ's decision and the error does not affect the ultimate nondisability determination. *Id.* The claimant usually bears the burden of showing that an error is harmful. *Id.* at 1111.

III. The ALJ's Five-Step Evaluation Process.

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

At the first step, the ALJ determines whether the claimant is engaging in substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not disabled and the inquiry ends. *Id.* At step two, the ALJ determines whether the claimant has a "severe" medically determinable physical or mental impairment. § 404.1520(a)(4)(ii). If not, the claimant is not disabled and the inquiry ends. *Id.* At step

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

At step one, the ALJ found that Plaintiff meets the insured status requirements of the Social Security Act through December 31, 2016, and that she has not engaged in substantial gainful activity since April 6, 2011. At step two, the ALJ found that Plaintiff "has the following severe impairment: disorder of the lumbar spine." A.R. 32. At step three, the ALJ determined that Plaintiff does not have an impairment or combination of impairments that meets or medically equals an impairment listed in Appendix 1 to Subpart P of 20 C.F.R. Pt. 404. At step four, the ALJ found that Plaintiff has the RFC to perform:

> a wide range of light work as defined in 20 CFR 404.1567(b) except the claimant is limited to lifting-carrying 20 pounds occasionally and 10 pounds frequently; is limited to standing-walking six hours and sitting four hours in an eight-hour workday; must have a sit-stand option; is limited to occasional climbing ramps and stairs and stooping; is limited to frequent kneeling and crawling; can never climb ropes, ladders, and scaffolds; is limited to pushing-pulling 20 pounds with the legs; and is limited to occasionally working in extreme cold.

A.R. 32-33. The ALJ further found that Plaintiff is able to perform past relevant work as an environmental supervisor of garbage collection. A.R. 36. At step five, the ALJ concluded that, considering Plaintiff's age, education, work experience, and residual

functional capacity, there are jobs that exist in significant numbers in the national economy that Plaintiff could perform. A.R. 37.

IV. Analysis.

Plaintiff argues the ALJ's decision is defective for three reasons: (1) the ALJ failed to give clear and convincing reasons for rejecting Plaintiff's testimony, (2) the ALJ failed to give legally sufficient reasons for rejecting the lay witness statements of Plaintiff's husband, priest, and friend, and (3) the ALJ failed to give any specific and legitimate reason for rejecting the opinion of Dr. Neil McPhee, M.D. Doc. 13 at 6-17. The Court will address each argument below.

A. The ALJ Erred in Evaluating Plaintiff's Credibility.

In evaluating the claimant's symptom testimony, ALJs must engage in a two-step analysis. First, the ALJ must determine whether the claimant presented objective medical evidence of an impairment that could reasonably be expected to produce the symptoms alleged. 20 C.F.R. § 404.1529(b). If the claimant presents such evidence, the ALJ proceeds to consider "all of the available evidence, including [the claimant's] history, the signs and laboratory findings, and statements from [the claimant]," her doctors, and other persons to determine the persistence and intensity of these symptoms. § 404.1529(c)(1). Second, if there is no evidence of malingering, the ALJ may reject the claimant's symptom testimony only by giving specific, clear, and convincing reasons that are supported by substantial evidence. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

At the hearing, Plaintiff testified that she left her last job in 2011 because she was laid off. A.R. 53-54. Before being laid off, Plaintiff was placed on restrictions for her back. A.R. 54, 59-60. Specifically, Plaintiff was limited in the amount of time she could sit or stand, and she "couldn't drive . . . more than 30 minutes in the driver's seat." A.R. 60. These restrictions "basically alleviated any field work that [she] could do[,]" and Plaintiff believes the restrictions contributed to her being laid off. *Id.*

After being laid off, Plaintiff began looking for another job in the engineering field. She searched for a year, but could not find anything "because [she] was in the

consulting industry, and a lot of the places wanted either a professional engineer's license or the ability to obtain one." A.R. 54. Plaintiff attempted to take an online class for web design, but testified that she "couldn't grasp it" because "when [her] back is in a bad flare . . . [she] just can't focus." A.R. 55, 58.

Plaintiff testified that her daily activities now include occasionally driving her kids to school (1.5 miles from her home), reading, and lying on the couch. A.R. 55-56. She testified that she lies on the couch "two to three hours a day in the prone position with a pillow under [her] knees" to alleviate pain. A.R. 59. Plaintiff testified that she does no household chores. A.R. 56. She also testified that when she is lying on the couch with her Ipad, she will try and help her husband with his mortgage business by looking up "information from Zillow for a home value or something to that effect." A.R. 58. Plaintiff testified that she takes painkillers at night, which sometimes keep her awake. A.R. 59. When the ALJ noted that Plaintiff's consultative exam stated she was taking only ibuprofen, Plaintiff testified that, in 2013, she was taken off ibuprofen due to a stomach ulcer, placed on tramadol, and then placed on Percocet. A.R. 61.

The ALJ found that Plaintiff's medically determinable impairments could reasonably be expected to cause the alleged symptoms, but that her statements regarding the intensity, persistence, and limiting effects of the symptoms were not credible to the extent they are inconsistent with the ALJ's residual functional capacity assessment. In other words, the ALJ found Plaintiff's statements not credible to the extent she claims she is unable to perform in a competitive work environment. The ALJ reached this conclusion for the following reasons: (1) Plaintiff "has described daily activities which are not limited to the extent one would expect, given the complaints of disabling symptoms and limitations"; (2) Plaintiff "was able to travel" across country in 2010; (3) Plaintiff "was only taking ibuprofen for her pain" and "the dosage level used suggests the symptoms are not particularly serious"; (4) Plaintiff did not appear to have difficulty during the hearing; and (5) "the objective [medical] findings in this case fail to provide

strong support for [Plaintiff's] allegations of disabling symptoms and limitations." A.R. 34.

1. Daily Activities.

An ALJ may reject a claimant's symptom testimony if it is inconsistent with the claimant's daily activities. *See Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). But "ALJs must be especially cautious in concluding that daily activities are inconsistent with testimony about pain, because impairments that would unquestionably preclude work and all the pressures of a workplace environment will often be consistent with doing more than merely resting in bed all day." *Garrison*, 759 F.3d at 1016. Thus, an ALJ may use a claimant's daily activities to discredit symptom testimony only if the claimant "spend[s] a *substantial part* of [her] day engaged in pursuits involving the performance of physical functions that are transferable to a work setting." *Orn*, 495 F.3d at 639 (emphasis added); *Reddick*, 157 F.3d at 722 ("Only if the level of activity were inconsistent with Claimant's claimed limitations would these activities have any bearing on Claimant's credibility.").

The ALJ found that Plaintiff's daily activities "are not limited to the extent one would expect, given the complaints of disabling symptoms and limitations." A.R. 34. Specifically, the ALJ relied on reports that "[Plaintiff] is able to drive her children to and from school[,] . . . [Plaintiff] tends a vegetable garden and does light chores[,] . . . [and Plaintiff] takes a walk in the evening for about 15 to 20 minutes." *Id.* But the ALJ did not find that Plaintiff spent a substantial part of her day engaged in these activities. Nor did he explain how they are inconsistent with Plaintiff's claimed limitations, or conclude that these activities demonstrate the physical and mental capabilities requisite for obtaining and maintaining employment. *See id.*

Moreover, the daily activity reports on which the ALJ relied actually document significant limitations that are consistent with Plaintiff's symptom testimony. *See, e.g.*, A.R. 55 (Plaintiff's children's school is only 1.5 miles from her home, and Plaintiff drives them only when her husband cannot); A.R. 56, 163 (Plaintiff's light chores

included vacuuming of tile and light dusting done in controlled short increments, but at her hearing Plaintiff testified she currently does no household chores); A.R. 181 (Plaintiff "cannot do any yard work," but keeps "a small garden and waters [her] plants and flowers"); *id.* (Plaintiff's daily walks are recommended by her physician, and she "usually [has] to cut it short do [sic] to pain and the heaviness [she] feels in [her] legs."). Given the limited nature of these activities and the ALJ's lack of analysis, the Court finds that the ALJ erred in discounting Plaintiff's symptom testimony based on her daily activities.

2. Travel.

In his opinion, the ALJ states that "[i]n 2010, the claimant was able to travel from Arizona to Philadelphia, and then down to Virginia (Exhibit 1F8). Although traveling and a disability are not necessarily mutually exclusive, the claimant's decision to travel tends to suggest that the alleged symptoms and limitations may have been overstated." A.R. 34. But Plaintiff does not allege that she became disabled until April 6, 2011. The Commissioner appears to concede that this reasoning by the ALJ is error (*see* Doc. 15 at 14), and the Court concludes that the ALJ's reliance on travel prior to Plaintiff's alleged onset date was clear error.

3. Medical Treatment.

In some circumstances, "evidence of 'conservative treatment' is sufficient to discount a claimant's testimony regarding severity of an impairment." *Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007). Here, the ALJ notes that "[Plaintiff] was only taking ibuprofen for her pain." A.R. 34. The ALJ then concludes, without additional explanation, that the "dosage level used suggests symptoms are not particularly serious." A.R. 34.

The record does not support this conclusion. The ALJ ignores the fact that Plaintiff has been on several different pain medications, including Naprosyn, Celebrex, Bextra, Voltaren, Relafen, ibuprofen, Medrol Dosepaks, Etodolac, Vicodin, and Percocet. A.R. 182. At the hearing, Plaintiff testified that she has not taken ibuprofen since 2013

due to a stomach ulcer, and has instead been prescribed Tramadol and Percocet. A.R. 61. The ALJ also ignores that Plaintiff has undergone epidural steroid injections. A.R. 326-29. The ALJ does not explain how he came to the conclusion that the use of the powerful pain medications listed above suggests symptoms are "not particularly serious." What is more, the Ninth Circuit has rejected arguments that epidural steroid shots qualify as conservative medical treatment. *Garrison*, 759 F.3d at 1015 n.20.

The Court does not find that the ALJ's reasoning on the level of Plaintiff's medical treatment constitutes a clear and convincing reason for discounting her credibility.

4. Appearance at Hearing.

The ALJ noted that "[d]uring the hearing, the claimant was observed without any apparent difficulty. She was able to stand and walk out of the hearing room without any problem. She also had a normal gait." A.R. 34. But the hearing only lasted 31 minutes, and Plaintiff alleges that she is able to sit for about that amount of time. Doc. 13 at 12.

An ALJ may consider a claimant's demeanor at the hearing as part of the overall credibility analysis, but not as the sole basis for the finding. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). An ALJ's reliance on his personal observations of a claimant at a hearing, however, "has been condemned as 'sit and squirm' jurisprudence." *Perminter v. Heckler*, 765 F.2d 870, 872 (9th Cir. 1985). In this case, the ALJ does not provide any explanation of his personal observations. *See* A.R. 34. Nor does the ALJ provide any indication of what weight he afforded to those observations. *Id.*

The Commissioner argues that the ALJ's observations at the hearing were properly consider because they demonstrate an inconsistency between Plaintiff's alleged severity of symptoms in the record and her capability on the day of the hearing. Doc. 15 at 14. But the ALJ articulates no such reasoning in his decision, and the Court cannot rely on reasons not stated by the ALJ. *See Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225 (9th Cir. 2009) ("Long-standing principles of administrative law require us to review the ALJ's decision based on the reasoning and factual findings offered by the

ALJ—not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking."). The Court concludes that the ALJ's reliance on personal observations of Plaintiff on the day of the hearing does not a constitute clear and convincing reason for discounting Plaintiff's credibility.

5. Objective Medical Evidence.

The ALJ states that "objective findings in this case fail to provide strong support for the claimant's allegations of disabling symptoms and limitations. More specifically, the medical findings do not support the existence of limitations greater than those [assigned in the RFC]." A.R. 34. But the Ninth Circuit has made clear that a claimant need not produce "objective medical evidence of the pain or fatigue itself, or the severity thereof." *Garrison*, 759 F.3d at 1014 (quoting *Smolen*, 80 F.3d at 1282).

The ALJ discussed the Plaintiff's back condition in medical terms, noting that a number of Plaintiff's problems are deemed "mild" or "moderate," but he provided little explanation of why he found her overall condition inconsistent with her claimed limitations. A.R. 33-34. The ALJ summarized the opinions of Drs. Plowman, McPhee, Combs, and Fina, and rejected their limitations as inconsistent with the medical evidence, again with little explanation. A.R. 34-36. Dr. Plowman, whose opinion the ALJ appears to have relied on the most, stated at Plaintiff's hearing: "I think [Plaintiff has] been truthful. I don't see in the records where she has, you know, over emphasized her symptoms actually." A.R. 52.

The ALJ seems primarily to have relied on Plaintiff's daily activities, her 2010 travel, and her use of "only" ibuprofen as the primary reasons for finding that she is not as impaired as she claims, with a discussion of the medical evidence offered in mild support. A.R. 34-35. Given the insufficiency of each of these reasons, and his general lack of explanation as to why the medical evidence contradicts Plaintiff's testimony, the Court cannot conclude that the medical evidence constitutes a clear and convincing reason, supported by substantial evidence, for rejecting Plaintiff's symptom testimony. *Vasquez*, 572 F.3d at 591.

B. The ALJ Erred in Evaluating Third-Party Credibility.

If an ALJ wishes to discount the testimony of a lay witness, he must give reasons that are germane to each witness. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). Plaintiff's husband, friend, and priest each provided statements concerning her level of functioning. A.R. 205-10, 213-19, 202. The statements are largely consistent with Plaintiff's testimony: she lives in constant, debilitating pain; needs frequent rest periods; and lies down during the day to relieve her back pain. The ALJ rejected all three statements with a single sentence: "The undersigned has considered these statements, but finds them generally not credible." A.R. 33.

The Commissioner argues that the ALJ was not required to give additional explanation because the lay witness testimony was similar to Plaintiff's own testimony and the ALJ provided clear and convincing reasons for rejecting Plaintiff's testimony. Doc. 15 at 16-17. But as discussed above, the ALJ did not provide such reasons for discounting Plaintiff's testimony. And the ALJ provided no additional reasons for finding the lay opinion evidence not credible. The ALJ failed to provide germane reasons for discounting the third-party testimony.

C. Medical Source Evidence.

Plaintiff argues that the ALJ improperly weighed the medical opinion of Neil McPhee, M.D. The Ninth Circuit distinguishes between the opinions of treating physicians, examining physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Generally, an ALJ should give greatest weight to a treating physician's opinion and more weight to the opinion of an examining physician than to one of a non-examining physician. *See Andrews v. Shalala*, 53 F.3d 1035, 1040-41 (9th Cir. 1995); *see also* 20 C.F.R. § 404.1527(c)(2)-(6) (listing factors to be considered when evaluating opinion evidence, including length of examining or treating relationship, frequency of examination, consistency with the record, and support from objective evidence). If it is not contradicted by another doctor's opinion, the opinion of a treating or examining physician can be rejected only for "clear and convincing" reasons.

Lester, 81 F.3d at 830 (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)). A contradicted opinion of a treating or examining physician "can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record." *Lester*, 81 F.3d at 830-31 (citing *Andrews*, 53 F.3d at 1043).

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

Dr. McPhee conducted a consultative examination of Plaintiff at the Commissioner's request, and provided the following opinions on Plaintiff's functional limitations: (1) Plaintiff should be limited to lifting more than 20 pounds occasionally or 10 pounds frequently; (2) Plaintiff's standing and walking should be limited to between two and six hours in an eight hour day, about four hours total in intervals; (3) Plaintiff's sitting should be limited to less than six hours per eight hour work day; (4) Plaintiff has no limitation with seeing, hearing and speaking; (5) Plaintiff may climb ramps and stairs as well as ladders, ropes and scaffolds occasionally; (6) Plaintiff may occasionally stoop, kneel, crouch and crawl; (7) Plaintiff has no limitation with upper extremity reaching, handling, fingering or feeling; (8) and Plaintiff has no environmental limitations restrictions. A.R. 292-93. Dr. McPhee also noted that Plaintiff's chronic back and leg pain with significant findings on her MRI from two years ago (2010) may be a significant factor in her inability to work for an eight hour day or a 40 hour week. *Id.*

The ALJ "afford[ed] great weight" to most of Dr. McPhee's opinion because it is "consistent with the fact that the MRIs of [Plaintiff's] spine showed only moderate

limitations." A.R. 35. But the ALJ afforded "[l]ittle weight" to Dr. McPhee's recommended limitations on Plaintiff's standing, walking, kneeling, and crawling "because the medical evidence indicates that [Plaintiff] is not as limited as what the doctor has found." *Id.* Dr. McPhee's medical opinion on Plaintiff's limitations is contradicted by the limitations recognized by Dr. Donald Plowman, and, to a lesser extent, Drs. Charles Combs and Charles Fina. Accordingly, the opinion of Dr. McPhee may be discounted only for "specific and legitimate" reasons supported by substantial evidence in the record. *Lester*, 81 F.3d at 830-31.

The ALJ gave little weight to the recommended limitations of Dr. McPhee without sufficient explanation. While ultimately it is the ALJ, and not the physicians, who is responsible for assessing the RFC, and the ALJ's assessment need not align fully with any one medical opinion (*see* 20 C.F.R. § 404.1546(c)), an "[ALJ] generally should explain the weight given to opinions from these sources or otherwise ensure that the discussion of the evidence in the determination or decision allows a claimant or subsequent reviewer to follow the adjudicator's reasoning[.]" 20 C.F.R. §404.1527(f)(2). Here, the ALJ included only conclusory explanations. *See* A.R. 35. He stated only that "the medical evidence indicates that the claimant is not as limited as what the doctor found." *Id.* And neither the ALJ nor the Commissioner attempts to explain how Dr. McPhee's statement that "[Plaintiff's] chronic back and leg pain with significant findings on her MRI from two years ago may be a significant factor in her inability to reliably work for an eight hour day or a 40 hour work week" – which appears to be included in the portion of Dr. McPhee's opinion that was afforded "great weight" – comports with the ALJ's RFC. The ALJ's conclusory analysis was not "specific" and "legitimate" as is required to reject a contradicting physician opinion. *Lester*, 81 F.3d at 830-31 (citing *Andrews*, 53 F.3d at 1043). On remand, a new RFC determination will be made, and the ALJ must provide a more thorough explanation of his reasoning behind weight given or not given to medical opinions used in reaching that determination.

D. Remand.

Where an ALJ fails to provide adequate reasons for rejecting testimony or the opinion of a physician, the Court must credit the evidence as true. *Lester*, 81 F.3d at 834. An action should be remanded for an immediate award of benefits when the following three factors are satisfied: (1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand. *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014) (citing *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1202 (9th Cir. 2008), *Lingenfelter v. Astrue*, 504 F.3d 1028, 1041 (9th Cir. 2007), *Orn*, 495 F.3d at 640, *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004), and *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). There is "flexibility" which allows "courts to remand for further proceedings when, even though all conditions of the credit-as-true rule are satisfied, an evaluation of the record as a whole creates serious doubt that a claimant is, in fact, disabled." *Garrison*, 759 F.3d at 1020.

The first factor does not appear to be satisfied. Further development of the medical record is clearly possible, and Plaintiff's condition is degenerative. Additionally, her medications and treatment changed frequently throughout the record.

The second factor is clearly satisfied. In his decision, the ALJ failed to provide legally sufficient reasons for rejecting Plaintiff's testimony and the opinion of Dr. McPhee.

The third factor is a close call, but also appears to be satisfied. The vocational expert testified that none of the jobs described as alternate work for Plaintiff would allow an individual unscheduled breaks to lie down to relieve pain. A.R. 65. Taking Plaintiff's testimony as true, those jobs no are no longer viable options.

Even if all three factors are satisfied, there is substantial reason in the record to question whether Plaintiff is disabled. For example, evidence in the record suggests that

Plaintiff regularly works out on an elliptical machine. A.R. 164-65, 175, 177. Plaintiff has stated that she uses strong pain medications sparingly and fails to obtain required refills. A.R. 291, 324, 332, 336. Plaintiff's last employment did not end due to a disability, but because she was laid off. A.R. 53-54. Plaintiff searched for another job in her field for roughly a year, but could not find anything because "[she] was in the consulting industry, and a lot of the places wanted either a professional engineer's license or the ability to obtain one." A.R. 54. Because these facts were not relied on by the ALJ, the Court may not rely on them now to uphold his decision. *See Bray*, 554 F.3d at 1225. But when considering the record as a whole, these facts "create serious doubt that [Plaintiff was], in fact, disabled" during the time period alleged. *Garrison*, 759 F.3d at 1020. Accordingly, the Court will exercise its discretion to remand for further proceedings.

IT IS ORDERED that the final decision of the Commissioner of Social Security is **vacated** and this case is **remanded** for further proceedings consistent with this opinion. The Clerk shall enter judgment accordingly and **terminate** this case.

Dated this 4th day of April, 2017.

David G. Campbell
United States District Judge