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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Roberta Lynn Bromley,

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CIV 16-1658-PHX-MHB

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Plaintiff,

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ORDER

11

vs.

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Nancy A. Berryhill, Commissioner of
Social Security,

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Defendant.

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Pending before the Court is Plaintiff Roberta Lynn Bromley’s appeal from the Social

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Security Administration’s final decision to deny her claim for disability insurance benefits.

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After reviewing the administrative record and the arguments of the parties, the Court now

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issues the following ruling.

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I. PROCEDURAL HISTORY

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In August 2007, Plaintiff filed an application for disability insurance benefits alleging

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disability beginning January 20, 2005.¹ Her application was denied initially and on

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reconsideration. Thereafter, Plaintiff requested a hearing before an administrative law judge.

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A hearing was held on December 7, 2009, and the ALJ issued a decision on April 10, 2010,

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finding that Plaintiff was not disabled from the alleged onset date through the date last

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insured. The Appeals Council denied Plaintiff’s request for review, making the ALJ’s

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¹ After subsequent remand, Plaintiff later amended her alleged onset date to August 1, 2006 in her second hearing before the ALJ held on November 14, 2013.

1 decision the final decision of the Commissioner. Plaintiff then sought judicial review of the
2 ALJ's decision pursuant to 42 U.S.C. § 405(g) in the United States District Court – District
3 of Arizona.

4 On April 8, 2013, the district court found that the ALJ erred in failing to discuss
5 Plaintiff's mental impairments in making the RFC determination and failing to set forth clear
6 and convincing reasons for rejecting Plaintiff's subjective complaint testimony. Thus, the
7 court vacated the ALJ's decision and remanded the matter for further administrative
8 proceedings.

9 The ALJ held a second hearing pursuant to the district court's remand order and
10 issued a decision on March 18, 2014. The ALJ again found Plaintiff not under a disability
11 from August 1, 2006 (the amended alleged onset date) through the date last insured. The
12 record reflects that Plaintiff filed written exceptions to the March 18, 2014 decision and the
13 Appeals Council remanded the matter back to the ALJ for additional proceedings.

14 A third hearing was held on May 20, 2015, and on July 1, 2015, the ALJ issued a
15 decision finding that Plaintiff was not under a disability at any time from the alleged onset
16 date through the last date insured. The Appeals Council denied Plaintiff's request for review,
17 making the ALJ's decision the final decision of the Commissioner. Plaintiff then sought
18 judicial review of the ALJ's decision pursuant to 42 U.S.C. § 405(g).

19 II. STANDARD OF REVIEW

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

1 evidence is susceptible to more than one rational interpretation, one of which supports the
2 ALJ's decision, the ALJ's conclusion must be upheld." Thomas v. Barnhart, 278 F.3d 947,
3 954 (9th Cir. 2002) (citations omitted).

4 Harmless error principles apply in this context. See Molina v. Astrue, 674 F.3d 1104,
5 1115 (9th Cir. 2012). An error is harmless if there remains substantial evidence supporting
6 the ALJ's decision and the error does not affect the ultimate nondisability determination. See
7 id. The claimant usually bears the burden of showing that an error is harmful. See id. at 1111.

8 The ALJ is responsible for resolving conflicts in medical testimony, determining
9 credibility, and resolving ambiguities. See Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir.
10 1995). In reviewing the ALJ's reasoning, the court is "not deprived of [its] faculties for
11 drawing ... inferences from the ALJ's opinion." Magallanes v. Bowen, 881 F.2d 747, 755 (9th
12 Cir. 1989).

13 **III. THE ALJ'S FINDINGS**

14 In order to be eligible for disability or social security benefits, a claimant must
15 demonstrate an "inability to engage in any substantial gainful activity by reason of any
16 medically determinable physical or mental impairment which can be expected to result in
17 death or which has lasted or can be expected to last for a continuous period of not less than
18 12 months." 42 U.S.C. § 423(d)(1)(A). An ALJ determines a claimant's eligibility for
19 benefits by following a five-step sequential evaluation:

- 20 (1) determine whether the applicant is engaged in "substantial gainful activity";
- 21 (2) determine whether the applicant has a medically severe impairment or
22 combination of impairments;
- 23 (3) determine whether the applicant's impairment equals one of a number of listed
24 impairments that the Commissioner acknowledges as so severe as to preclude the
25 applicant from engaging in substantial gainful activity;
- 26 (4) if the applicant's impairment does not equal one of the listed impairments,
27 determine whether the applicant is capable of performing his or her past relevant
28 work;
- (5) if the applicant is not capable of performing his or her past relevant work,
determine whether the applicant is able to perform other work in the national
economy in view of his age, education, and work experience.

1 See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987) (citing 20 C.F.R. §§ 404.1520,
2 416.920). At the fifth stage, the burden of proof shifts to the Commissioner to show that the
3 claimant can perform other substantial gainful work. See Penny v. Sullivan, 2 F.3d 953, 956
4 (9th Cir. 1993).

5 At step one, the ALJ determined that Plaintiff had not engaged in substantial gainful
6 activity from her alleged onset date through the date last insured. (Tr. at 594.) At step two,
7 she found that Plaintiff had the following severe impairments: status post left Achilles tendon
8 transfer, fibromyalgia, and chronic obstructive pulmonary disease. (Tr. at 595-597.) At step
9 three, the ALJ stated that through the date last insured Plaintiff did not have an impairment
10 or combination of impairments that met or medically equaled the severity of one of the listed
11 impairments in 20 CFR Part 404, Subpart P, Appendix 1 of the Commissioner’s regulations.
12 (Tr. at 597-98.) After consideration of the entire record, the ALJ found that through the date
13 last insured Plaintiff retained the residual functional capacity “to perform light work as
14 defined in 20 CFR 404.1567(b) except claimant could occasionally push or pull with the
15 bilateral upper extremities. Claimant could occasionally operate foot controls with the
16 bilateral lower extremities. Claimant could never climb ladders, ropes or scaffolds, but could
17 occasionally climb ramps or stairs. Claimant could frequently balance, stoop, and kneel.
18 Claimant could occasionally crouch and crawl. Claimant could have no more than occasional
19 exposure to non-weather-related extreme temperatures, such as extreme cold and extreme
20 heat. Claimant should have no more than occasional exposure to pulmonary irritants, such
21 as fumes, odors, dusts and gases. Claimant should have no more than occasional exposure
22 to poorly ventilated areas, dangerous machinery, with moving mechanical parts and
23 unprotected heights.”² (Tr. at 598-605.) The ALJ found that Plaintiff had no past relevant
24 work, but, considering her age, education, work experience, and residual functional capacity,
25 there were jobs that existed in significant numbers in the national economy that Plaintiff

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27 ² “Residual functional capacity” (or “RFC”) is defined as the most a claimant can do
28 after considering the effects of physical and/or mental limitations that affect the ability to
perform work-related tasks.

1 could have performed. (Tr. at 605-607.) Thus, the ALJ concluded that Plaintiff has not been
2 under a disability at any time from the alleged onset date through the date last insured. (Tr.
3 at 607.)

4 **IV. DISCUSSION**

5 In her brief, Plaintiff contends that the ALJ erred by: (1) failing to properly weigh
6 medical source opinion evidence; and (2) failing to properly consider her subjective
7 complaints. Plaintiff requests that the Court remand for determination of benefits.

8 **A. Medical Source Opinion Evidence**

9 Plaintiff contends that the ALJ erred by improperly weighing medical opinion
10 evidence. Plaintiff specifically states that the ALJ failed to properly weigh the opinions of
11 her treating physician, Thomas Mertins, M.D., and improperly assigned significant and
12 partial weight to non-treating doctors.

13 The Commissioner is responsible for determining whether a claimant meets the
14 statutory definition of disability, and need not credit a physician's conclusion that the
15 claimant is "disabled" or "unable to work." 20 C.F.R. § 404.1527(d)(1). But, the
16 Commissioner generally must defer to a physician's medical opinion, such as statements
17 concerning the nature or severity of the claimant's impairments, what the claimant can do,
18 and the claimant's physical or mental restrictions. § 404.1527(a)(2), (c).

19 In determining how much deference to give a physician's medical opinion, the Ninth
20 Circuit distinguishes between the opinions of treating physicians, examining physicians, and
21 non-examining physicians. See Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). Generally,
22 an ALJ should give the greatest weight to a treating physician's opinion and more weight to
23 the opinion of an examining physician than a non-examining physician. See Andrews, 53
24 F.3d at 1040-41; see also 20 C.F.R. § 404.1527(c)(2)-(6) (listing factors to be considered
25 when evaluating opinion evidence, including length of examining or treating relationship,
26 frequency of examination, consistency with the record, and support from objective evidence).

27 If a treating or examining physician's medical opinion is not contradicted by another
28 doctor, the opinion can be rejected only for clear and convincing reasons. See Lester, 81 F.3d

1 at 830 (citation omitted). Under this standard, the ALJ may reject a treating or examining
2 physician’s opinion if it is “conclusory, brief, and unsupported by the record as a whole[] or
3 by objective medical findings,” Batson v. Commissioner, 359 F.3d 1190, 1195 (9th Cir.
4 2004), or if there are significant discrepancies between the physician’s opinion and her
5 clinical records, see Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005).

6 When a treating or examining physician’s opinion is contradicted by another doctor,
7 it can be rejected “for specific and legitimate reasons that are supported by substantial
8 evidence in the record.” Lester, 81 F.3d at 830-31 (citation omitted). To satisfy this
9 requirement, the ALJ must set out “a detailed and thorough summary of the facts and
10 conflicting clinical evidence, stating his interpretation thereof, and making findings.” Cotton
11 v. Bowen, 799 F.2d 1403, 1408 (9th Cir. 1986). Under either standard, “[t]he ALJ must do
12 more than offer his conclusions. He must set forth his own interpretations and explain why
13 they, ‘rather than the doctors’, are correct.” Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir.
14 1988).

15 Since Dr. Mertins’ opinions were contradicted by other non-treating physicians, as
16 well as, other objective medical evidence of record, the specific and legitimate standard
17 applies.

18 The record reflects that Dr. Mertins completed multiple medical physical assessments
19 – each opining that Plaintiff was unable to work. (Tr. at 412-414, 494-495, 520-538, 995-
20 996.) Specifically, Dr. Mertins opined that Plaintiff was unable to work eight hours a day,
21 five days a week on a regular and consistent basis. Plaintiff could lift and carry less than 10
22 pounds. Plaintiff would be limited in her use of her bilateral hands and feet, and would be
23 limited in her ability to bend, reach, and stoop. Plaintiff would be restricted in her ability to
24 be around moving machinery, be at unprotected heights, or be exposed to changes in
25 temperatures and humidity. Plaintiff would be restricted in her ability to drive automotive
26 equipment and in her ability to be exposed to dust, fumes, and gases. (Tr. at 412-414, 494-
27 495, 520-538, 995-996.)

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1 The ALJ assigned “little weight” to Dr. Mertins’ opinions for multiple reasons. First,
2 the ALJ found that Dr. Mertins “merely checked boxes on a form, rather than providing a
3 function-by-function analysis regarding claimant’s alleged limitations.” The ALJ found Dr.
4 Mertins’ opinions vague and imprecise, and determined that he provided no explanation for
5 the “extreme” limitations set forth in his opinions. An ALJ may properly reject the opinion
6 of a treating physician “if that opinion is brief, conclusory, and inadequately supported by
7 clinical findings.” Chaudhry v. Astrue, 688 F.3d 661, 671 (9th Cir. 2012) (quoting Bray v.
8 Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1228 (9th Cir. 2009)). An “ALJ may [also]
9 ‘permissibly reject [] ... check-off reports that [do] not contain any explanation of the bases
10 of their conclusions.’” Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012). Plaintiff,
11 however, argues that the ALJ erred by discounting medical opinions based on check-box
12 forms when there is ample support from treatment records. The Court agrees. The Ninth
13 Circuit has held that a check-box form is entitled to weight if it is based on the physician’s
14 “significant experience” with the plaintiff and “supported by numerous records.” Garrison
15 v. Colvin, 759 F.3d 995, 1013 (9th Cir. 2014). Although Plaintiff fails to cite any records
16 supporting Dr. Mertins’ conclusory opinions in this section of her brief, there is sufficient
17 support in the record establishing Dr. Mertins’ “significant experience” with Plaintiff and
18 containing “numerous” pages of treatment notes from Dr. Mertins to support his opinions.

19 Second, the ALJ found that Dr. Mertins’ opinions were not supported by his own
20 clinical findings. The ALJ gave an example stating, “Dr. Mertins’ treatment records noted
21 claimant had right shoulder tendinitis. It also showed that while physical examination
22 revealed tenderness to palpation across the supraspinatus tendons, there was no obvious,
23 ligament laxity or evidence of rotator cuff tear, and no other focal findings. The assessment
24 noted that in light of the negative x-ray, physical therapy would be recommended. (38F/3,
25 6; 33F) Yet, Dr. Mertins’ limits claimant’s ability to reach to occasionally.” Again, an ALJ
26 may only reject a treating physician’s opinion “by setting out a detailed and thorough
27 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
28 making findings.” Reddick v. Chater, 157 F.3d 715, 725 (9th Cir.1998). “The ALJ must do

1 more than offer his conclusions. He must set forth his own interpretations and explain why
2 they, ‘rather than the doctors’, are correct.” Id. (citing Embrey, 849 F.2d at 421-22). Here,
3 the ALJ concluded that Dr. Mertins’ opinions were not supported by his own findings. The
4 ALJ supported this conclusion by citing one example that the Court fails to find inconsistent.
5 The ALJ erred by not identifying specific conflicting clinical evidence, and failed to explain
6 why her interpretations, rather than Dr. Mertins’, were correct. The ALJ’s conclusory
7 statement is insufficient. See Reddick, 157 F.3d at 725.

8 Third, the ALJ found that Dr. Mertins’ opinions were inconsistent with Plaintiff’s
9 activities of daily living. The ALJ gave another example stating, “Dr. Mertins opined
10 claimant had a total restriction in her ability to be around fumes and pulmonary irritants, yet
11 the claimant was still smoking at the time he wrote the opinion.” The Court finds that the
12 ALJ’s single example without providing context of the alleged inconsistency fails. Again,
13 the ALJ did not identify specific statements made by Plaintiff regarding her activities of daily
14 living that were inconsistent with Dr. Mertins’ opinions. Nor did she explain why her
15 interpretations, rather than Dr. Mertins’, were correct. The ALJ’s conclusory statement is
16 insufficient. See Reddick, 157 F.3d at 725.

17 Lastly, the ALJ rejected Dr. Mertins’ opinions finding that statements made that a
18 claimant is “disabled”, “unable to work”, “can or cannot perform a past job”, or “meets a
19 Listing”, or the like, are not medical opinions but are administrative findings dispositive of
20 a case, requiring familiarity with the Regulations and legal standards set forth therein. The
21 ALJ found that “[s]uch issues are reserved to the Commissioner, who cannot abdicate the
22 statutory responsibility to determine the ultimate issue of disability (Social Security Ruling
23 96-5p).” However, the Court’s review of Dr. Mertins’ opinions fails to reveal administrative
24 findings dispositive of a case. Rather, said opinions consist of medical source statements
25 submitted by a treating source as to an individual’s ability to sit, stand, walk, lift, carry,
26 handle, finger, bend, balance, etc., and are entitled to special significance.

1 In sum, the Court finds that the ALJ erred by improperly weighing the opinions of
2 Plaintiff's treating physician, Thomas Mertins, M.D. The ALJ failed to provide specific and
3 legitimate reasons supported by substantial evidence in the record for rejecting said opinions.

4 **B. Plaintiff's Subjective Complaints**

5 Plaintiff argues that the ALJ erred in rejecting her subjective complaints in the
6 absence of clear and convincing reasons for doing so.

7 To determine whether a claimant's testimony regarding subjective pain or symptoms
8 is credible, the ALJ must engage in a two-step analysis. "First, the ALJ must determine
9 whether the claimant has presented objective medical evidence of an underlying impairment
10 'which could reasonably be expected to produce the pain or other symptoms alleged.' The
11 claimant, however, 'need not show that her impairment could reasonably be expected to
12 cause the severity of the symptom she has alleged; she need only show that it could
13 reasonably have caused some degree of the symptom.'" Lingenfelter v. Astrue, 504 F.3d
14 1028, 1036-37 (9th Cir. 2007) (citations omitted). "Second, if the claimant meets this first
15 test, and there is no evidence of malingering, 'the ALJ can reject the claimant's testimony
16 about the severity of her symptoms only by offering specific, clear and convincing reasons
17 for doing so.'" Id. at 1037 (citations omitted). General assertions that the claimant's
18 testimony is not credible are insufficient. See Parra v. Astrue, 481 F.3d 742, 750 (9th Cir.
19 2007). The ALJ must identify "what testimony is not credible and what evidence undermines
20 the claimant's complaints." Id. (quoting Lester, 81 F.3d at 834).

21 In weighing a claimant's credibility, the ALJ may consider many factors, including,
22 "(1) ordinary techniques of credibility evaluation, such as the claimant's reputation for lying,
23 prior inconsistent statements concerning the symptoms, and other testimony by the claimant
24 that appears less than candid; (2) unexplained or inadequately explained failure to seek
25 treatment or to follow a prescribed course of treatment; and (3) the claimant's daily
26 activities." Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996); see Orn, 495 F.3d at 637-

1 39.³ The ALJ also considers “the claimant’s work record and observations of treating and
2 examining physicians and other third parties regarding, among other matters, the nature,
3 onset, duration, and frequency of the claimant’s symptom; precipitating and aggravating
4 factors; [and] functional restrictions caused by the symptoms” Smolen, 80 F.3d at 1284
5 (citation omitted).

6 Plaintiff testified that she could not work between August 1, 2006 and December 31,
7 2009, due to back pain, muscle pain, neck pain, tension headaches, panic attacks and status
8 post-surgery on her left Achilles tendon. Her impairments became increasingly more painful.
9 She received initial pain relief of one week following left foot surgery. Her conditions have
10 continued to be the same as they were in 2006. She quit smoking in 2011. She could sit for
11 15 minutes, stand for 15 to 20 minutes, could lift approximately ten pounds and would need
12 to alternate positions. She did not believe formal mental health counseling helped her. (Tr.
13 at 618-33, 644-58, 791-807.)

14 Although the ALJ recognized that Plaintiff’s medically determinable impairments
15 could reasonably be expected to cause the alleged symptoms, she also found that Plaintiff’s
16 statements concerning the intensity, persistence, and limiting effects of the symptoms were
17 not fully credible. (Tr. at 598-602.)

18 **1. Objective Medical Evidence**

19 The ALJ first determined that Plaintiff’s allegations regarding the severity of her
20 physical symptoms and limitations were not supported by the objective medical findings of
21 record. While an ALJ may reject a Plaintiff’s testimony about the severity of her symptoms,
22 he must “point to specific facts in the record which demonstrate that [the claimant] is in less
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25 ³ With respect to the claimant’s daily activities, the ALJ may reject a claimant’s
26 symptom testimony if the claimant is able to spend a substantial part of her day performing
27 household chores or other activities that are transferable to a work setting. See Fair v.
28 Bowen, 885 F.2d 597, 603 (9th Cir. 1989). The Social Security Act, however, does not
require that claimants be utterly incapacitated to be eligible for benefits, and many home
activities may not be easily transferable to a work environment where it might be impossible
to rest periodically or take medication. See id.

1 pain than she claims.” Vasquez v. Astrue, 572 F.3d 586, 592 (9th Cir. 2009). And, as the
2 Ninth Circuit has made clear, if “the claimant produces objective medical evidence of an
3 underlying impairment, an adjudicator may not reject a claimant’s subjective complaints
4 based solely on a lack of objective medical evidence to fully corroborate the alleged severity
5 of pain.” Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991).

6 The ALJ discussed the medical evidence in the administrative record with regards to
7 Plaintiff’s complaints related to her ankle, back, knee, Chronic Obstructive Pulmonary
8 Disease (COPD), and fibromyalgia. As to Plaintiff’s ankle the ALJ found that treatment
9 records noted minimal findings stating that bilateral ankle x-rays were unremarkable with no
10 degenerative changes, no osteolysis, no fracture, and no dislocation. Citing specifically to
11 exhibits in the record, the ALJ stated that Plaintiff’s condition showed improvement. The
12 ALJ stated that treatment records also noted Plaintiff reported her mobility was improving,
13 she was feeling better, and her foot use was approximately 70% improved.

14 Regarding Plaintiff’s back complaints, the ALJ noted that treatment records showed
15 tenderness to palpation in her back, but no crepitus. She stated that diagnostic imaging
16 performed in October 2007 was unremarkable. The ALJ referred to an October 2007 physical
17 examination revealing mostly normal results.

18 As to Plaintiff’s knee pain, the ALJ stated that treatment records noted that Plaintiff’s
19 knee was doing better. The ALJ noted that recommendations were to continue using muscle
20 relaxers, to add heat, and take it easy.

21 Regarding Plaintiff’s COPD, the ALJ documented her condition citing to various
22 records from Dr. Mertins. The ALJ stated that physical examinations and diagnostic imaging
23 were normal and pulmonary function tests demonstrated non-severe findings. The ALJ found
24 that physical examinations showed Plaintiff’s chest was normal with no decreased breath
25 sounds, rales, rhonchi or wheezes; and a chest x-ray taken in April 2006 showed clear lungs
26 and no active disease. On January 10, 2007, a pulmonary function test showed a moderate
27 airway obstruction and diffusion defect that suggested emphysema. The ALJ noted that the
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1 recommendation was conservative treatment, and that the record contained little to no
2 evidence of frequent exacerbations.

3 With respect to Plaintiff's fibromyalgia, the ALJ determined that the evidence of
4 record did not corroborate Plaintiff's allegations. The ALJ considered Plaintiff's condition
5 in reference to Social Security Ruling (SSR) 12-2p, which states in order to find that an
6 individual with a fibromyalgia condition is disabled, there must be sufficient objective
7 medical evidence to support a finding that the claimant suffers from a medically determinable
8 impairment that limits her functional abilities to the extent that it precludes her from
9 performing any substantial gainful activity. Fibromyalgia is considered a medically
10 determinable impairment only if the claimant provides evidence that an acceptable medical
11 source diagnosed the claimant's fibromyalgia condition by means of either the 1990
12 American College of Rheumatology (ACR) Criteria for the Classification of Fibromyalgia
13 or the 2010 ACR Preliminary Diagnostic Criteria. These criteria are satisfied by
14 documentation of either 11 of 18 positive tender points through digital palpitation, or a
15 history of widespread pain with repeated manifestations of six or more fibromyalgia
16 symptoms, including: fatigue, cognitive or memory problems, waking unrefreshed,
17 depression, anxiety or irritable bowel syndrome. Here, the ALJ found that although
18 Plaintiff's treatment records referenced a history of fibromyalgia, the record did not contain
19 a specific tender point analysis or specific analysis of factors sufficient to satisfy the 1990
20 or the 2010 ACR criteria. The ALJ noted that although the entirety of the record did establish
21 consistent pain complaints, the record also reflected a history of various medications,
22 including narcotic pain and muscle relaxant medications. Thus, the ALJ concluded, that it
23 appeared the prescription medication was based upon Plaintiff's subjective pain complaints.
24 The ALJ also found that treatment records noted Plaintiff's medication controlled her
25 fibromyalgia complaints.

26 The Court finds that the ALJ's determination that Plaintiff's allegations were not
27 supported by the objective clinical findings erroneous for several reasons. Although the
28 decision clearly shows documentation and citation to the record, throughout her analysis the

1 ALJ failed to make a comparison between Plaintiff’s specific testimony and the medical
2 evidence that the decision summarized. The ALJ selectively chose medical records that
3 disfavored Plaintiff’s complaints, and failed to explain why these records undermined
4 Plaintiff’s testimony. Other evidence in the voluminous record, and cited to by Plaintiff in
5 her pleadings – which was disregarded by the ALJ – supports Plaintiff’s claim.

6 Thus, the ALJ’s finding that Plaintiff’s testimony is inconsistent with the objective
7 medical evidence is not supported by substantial evidence. The ALJ’s reasoning contained
8 selectively chosen evidence and did not fairly include consideration of the record as a whole.
9 See, e.g., Garrison, 759 F.3d at 1018.

10 **2. Activities of Daily Living**

11 Next, the ALJ determined that Plaintiff’s allegations regarding her physical and
12 mental impairments do not interfere with her activities of daily living. An ALJ may reject a
13 claimant’s symptom testimony if it is inconsistent with the claimant’s daily activities. See
14 Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005). But, “ALJs must be especially cautious
15 in concluding that daily activities are inconsistent with testimony about pain, because
16 impairments that would unquestionably preclude work and all the pressures of a workplace
17 environment will often be consistent with doing more than merely resting in bed all day.”
18 Garrison, 759 F.3d at 1016. Thus, an ALJ may use a claimant’s daily activities to discredit
19 symptom testimony only if the claimant “spend[s] a substantial part of [her] day engaged in
20 pursuits involving the performance of physical functions that are transferable to a work
21 setting.” Orn, 495 F.3d at 639 (emphasis added).

22 Here, after listing Plaintiff’s ability to continue her hobbies of painting and playing
23 computer games; ability to care for her son; manage finances and handle activities of
24 personal care; ability to prepare meals and do laundry; and ability to walk, drive a car, and
25 shop – the ALJ stated that “two factors weigh against considering these allegations to be
26 strong evidence in favor of finding the claimant disabled. First, allegedly limited daily
27 activities cannot be objectively verified with any reasonable degree of certainty. Secondly,
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1 even if the claimant's daily activities are truly as limited as alleged, it is difficult to attribute
2 that degree of limitation to the claimant's medical condition as it is managed by medication."

3 The Court finds that the ALJ erred in her finding. First, rather than explaining how
4 Plaintiff's activities detract from Plaintiff's testimony, and providing an analysis of why
5 Plaintiff's activities were inconsistent with the limitations asserted by Plaintiff, the ALJ
6 simply dismisses her allegations in a conclusory fashion stating that her limited activities
7 cannot be "verified." The ALJ fails to believe that Plaintiff is as limited as she alleges
8 because her "condition" is "managed by medication." This is not sufficient. Further, the
9 Court finds that the listing of activities and implying that said activities are performed
10 consistently and regularly over an eight hour day is also insufficient. See Garrison, 759 F.3d
11 at 1016.

12 **3. Treatment and Inconsistent Statements in the Record**

13 The ALJ gave two other reasons for rejecting Plaintiff's credibility finding that: (a)
14 treatment modalities have been conservative, and (b) Plaintiff has made inconsistent
15 statements.

16 With regard to treatment, "evidence of 'conservative treatment' is sufficient to
17 discount a claimant's testimony regarding severity of an impairment." Parra, 481 F.3d at 751.
18 Here, the ALJ states, "treatment modalities have been conservative and consisted of pain
19 medication, depressive medication and injection therapy.... Claimant's medication usage has
20 also been intermittent." In support, the ALJ cites one letter from Plaintiff stating that "she
21 had not been feeling well; thus, she stopped taking her medication and felt a lot better." The
22 ALJ also cites to a record stating "they were 'trying to get her off Percocet,'" and that
23 Plaintiff has "reported improved pain with treatment." The ALJ then states, "[a]rguably, with
24 claimant's alleged severity of pain and limitations, one would expect more significant
25 findings on both the diagnostic imaging and exams as well as more complex treatment.
26 Thus, the claimant's allegations regarding the severity of her symptoms and limitations are
27 not consistent with her treatment history." The Court finds the ALJ's reasoning conflicting
28 as the record as a whole reflects that Plaintiff's level of care was extensive and her treatment

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

6 As to inconsistent statements in the record, the ALJ found that Plaintiff “made
7 inconsistent and unsupported statements,” which detracted from her credibility. “In
8 determining credibility, an ALJ may engage in ordinary techniques of credibility evaluation,
9 such as considering ... inconsistencies in claimant’s testimony.” Burch, 400 F.3d at 680.
10 Here, the ALJ cites an example stating that Plaintiff “needed to lie down 2 to 3 hours each
11 day due to pain; however, this is not documented within the record.” The ALJ cites another
12 example stating Plaintiff “also sought a rheumatology opinion; however, not for fibromyalgia
13 treatment but rather because she had an attorney and was seeking disability benefits.” The
14 ALJ continued finding inconsistency in the fact that Plaintiff described herself as a
15 “homemaker.” The ALJ also found that Plaintiff’s ability to work after the alleged onset date
16 and Plaintiff’s work history raised a question as to whether Plaintiff’s continuing
17 unemployment was due to medical impairments. The ALJ stated that there was no
18 documentation supporting Plaintiff’s inability to continue working at Krispy Kreme donuts
19 due to pain complaints; and stated that while the treatment records document “some fatigue”
20 and “mild depression,” this contrasts with her testimony regarding the severity of her mental
21 symptoms.

22 The Court finds that the ALJ’s limited sample of inconsistencies is somewhat
23 selective, and is not demonstrative of the record as a whole. The ALJ’s isolated examples do
24 not clearly or convincingly support the ALJ’s conclusion that Plaintiff’s testimony should
25 be discounted.

26 In summary, the Court finds that the ALJ has failed to provide a sufficient basis to
27 find Plaintiff’s allegations not entirely credible. While perhaps any one of the individual
28 factors identified by the ALJ in her decision could arguably detract from Plaintiff’s

1 credibility, such factors viewed in isolation are not sufficient to uphold the ALJ's decision
2 to discredit Plaintiff's allegations as a whole. Thus, the Court concludes that the ALJ has
3 failed to support her decision to discredit Plaintiff's credibility with specific, clear and
4 convincing reasons and, therefore, the Court finds error.

5 V. CONCLUSION

6 Where the Commissioner fails to provide adequate reasons for rejecting the opinion
7 of a treating physician, we credit that opinion as true. See Lester, 81 F.3d at 834. Similarly,
8 where the ALJ improperly rejects a claimant's testimony regarding her limitations, and the
9 claimant would be disabled if her testimony were credited, "we will not remand solely to
10 allow the ALJ to make specific findings regarding that testimony." Id. An action should be
11 remanded for an award of benefits when the following three factors are satisfied: (1) the
12 record has been fully developed and further administrative proceedings would serve no
13 useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting
14 evidence, whether claimant testimony or medical opinion; and (3) if the improperly
15 discredited evidence were credited as true, the ALJ would be required to find the claimant
16 disabled on remand. See Garrison, 759 F.3d at 1020. Even where these conditions are met,
17 the court may, nevertheless, exercise "flexibility" in applying the credit-as-true rule and
18 remand for further proceedings where remand would permit the ALJ to make specific
19 credibility findings or otherwise resolve inconsistencies in the record. See Connett v.
20 Barnhart, 340 F.3d 871, 876 (9th Cir. 2003). However, the Ninth Circuit has made clear that
21 remand simply to permit the ALJ to decide the same issue again is inappropriate. See
22 Garrison, 759 F.3d at 1021-22.

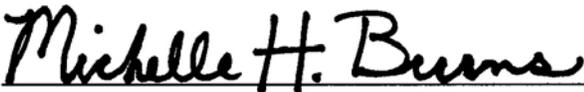
23 The Court finds that a remand for an award of benefits is appropriate in this case. The
24 record is extensive and complete, and the ALJ failed to identify clear and convincing reasons
25 for rejecting Plaintiff's credibility and failed to identify specific and legitimate reasons based
26 on substantial evidence in the record for rejecting Plaintiff's treating physician. Crediting as
27 true the opinion of the treating physician as well as the credibility of Plaintiff, the ALJ would
28 be required to find Plaintiff disabled on remand.

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Therefore,

IT IS ORDERED that the final decision of the Commissioner is vacated and this case is remanded for an award of benefits. The Clerk of Court shall enter judgment accordingly and terminate this case.

DATED this 29th day of September, 2017.



Michelle H. Burns
United States Magistrate Judge