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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Kathryn G Barkowski,
10 Plaintiff,

No. CV-16-02189-PHX-DLR

ORDER

11 v.

12 Commissioner of Social Security
13 Administration,
14 Defendant.

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16 Plaintiff Kathryn Barkowski applied for Social Security Disability Insurance
17 benefits in February 2012, alleging disability beginning July 29, 2010. After state agency
18 denials, Barkowski appeared for a hearing before an administrative law judge (“ALJ”).
19 A vocational expert (“VE”) also was present and testified. Following the hearing, the
20 ALJ issued a written decision finding that Barkowski is not disabled within the meaning
21 of the Social Security Act (“SSA”). The ALJ’s decision became the agency’s final
22 decision after the Social Security Administration Appeals Council denied Barkowski’s
23 request for review. Barkowski now seeks judicial review of that decision. For the
24 following reasons, the decision of the Commissioner of Social Security Administration is
25 reversed and this matter remanded for further proceedings.

26 **BACKGROUND**

27 To determine whether a claimant is disabled for purposes of the SSA, the ALJ
28 follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the burden of

1 proof on the first four steps, but at step five, the burden shifts to the Commissioner.
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At the first step, the ALJ
3 determines whether the claimant is engaging in substantial gainful activity. If so, the
4 claimant is not disabled and the inquiry ends. At step two, the ALJ determines whether
5 the claimant has a “severe” medically determinable physical or mental impairment. If
6 not, the claimant is not disabled and the inquiry ends. At step three, the ALJ considers
7 whether the claimant’s impairment or combination of impairments meets or medically
8 equals an impairment listed in Appendix 1 to Subpart P of 20 C.F.R. Pt. 404. If so, the
9 claimant is automatically found to be disabled. If not, the ALJ proceeds to step four. At
10 step four, the ALJ assesses the claimant’s residual functional capacity (“RFC”) and
11 determines whether the claimant is still capable of performing past relevant work. If so,
12 the claimant is not disabled and the inquiry ends. If not, the ALJ proceeds to the fifth and
13 final step, where he determines whether the claimant can perform any other work based
14 on the claimant’s RFC, age, education, and work experience. If so, the claimant is not
15 disabled. If not, the claimant is disabled.

16 At step one, the ALJ determined that Barkowski meets the insured status
17 requirements of the SSA through December 31, 2015, and has not engaged in substantial
18 gainful activity since her alleged disability onset date. (A.R. 17.) The ALJ found at step
19 two that Barkowski’s rheumatoid arthritis, degenerative disc disease of the lumbar and
20 cervical spine status post cervical fusion and hardware removal, peripheral neuropathy,
21 right shoulder tendinitis, carpal tunnel of the right wrist, fibromyalgia, hypertension, and
22 obesity are severe impairments, but concluded at step three that they do not meet or
23 medically equal the severity of a listed impairment. (*Id.* at 17-19.) At step four, the ALJ
24 found that Barkowski has the RFC to perform:

25 less than the full range of light work Specifically,
26 [Barkowski] could lift and/or carry ten pounds frequently,
27 twenty pounds occasionally; she could sit, stand and/or walk
28 for six hours out of an eight-hour workday; she could
occasionally climb ladders, ropes and scaffolds and crawl; she
could frequently climb ramps and stairs, balance, stoop,
crouch, kneel, handle and finger with the right upper
extremity; and she is to avoid concentrated exposure to

1 pain, Raynaud's disease, and depression. (A.R. 213.) She testified that she started
2 having memory problems after neck surgeries in 2012 and 2013, she experiences pain in
3 her right arm, neck, and shoulder, her arthritis causes her hands to swell, and she has been
4 falling lately because of problems with her right foot. (*Id.* at 46-60.) In function reports
5 from April and October 2012, Barkowski complained of neck and lower back pain that
6 made it difficult to lift or sit for long periods of time, sensitivity to cold temperatures in
7 her hands and feet, restless sleep due to pain, drowsiness from medications, and difficulty
8 remembering and concentrating. (*Id.* at 221-229, 239-247.)

9 In evaluating a claimant's symptom testimony, the ALJ is required to engage in a
10 two-step analysis: (1) determine whether the claimant presented objective medical
11 evidence of an impairment that could reasonably be expected to produce some degree of
12 the pain or other symptoms alleged; and, if so with no evidence of malingering, (2) reject
13 the claimant's testimony about the severity of the symptoms only by giving specific,
14 clear, and convincing reasons for the rejection. *Vasquez v. Astrue*, 572 F.3d 586, 591
15 (9th Cir. 2009). "This is not an easy requirement to meet: 'The clear and convincing
16 standard is the most demanding required in Social Security cases.'" *Garrison v. Colvin*,
17 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm'r of Soc. Sec. Admin.*, 278
18 F.3d 920, 924 (9th Cir.2002)). Indeed, "ALJs must be especially cautious in concluding
19 that daily activities are inconsistent with testimony about pain, because impairments that
20 would unquestionably preclude work and all the pressures of a workplace environment
21 will often be consistent with doing more than merely resting in bed all day." *Id.* at 1016.

22 Here, the ALJ found that Barkowski's medically determinable impairments
23 reasonably could be expected to cause her alleged symptoms, but concluded that her
24 statements concerning the intensity, persistence, and limiting effects of the symptoms
25 were not entirely credible. (A.R. 21.) The ALJ offered three reasons for this conclusion:
26 (1) Barkowski's daily activities "reflect a significant functional capacity and not an
27 individual unable to sustain regular and continuing work;" (2) Barkowski "has not
28 generally received the type of medical treatment one would expect for a totally disabled

1 individual;” and (3) her “alleged loss of function is not supported by objective medical
2 findings.” (*Id.* at 20-21.) The ALJ’s rationale does not comport with the clear and
3 convincing reasons standard.

4 First, the ALJ’s finding that Barkowski’s daily activities are inconsistent with the
5 alleged severity of her symptoms is unconvincing and unsupported. For example, the
6 ALJ cites the fact that Barkowski “lives with her husband” and “has a small dog.” (A.R.
7 at 20.) The Court cannot conceive of a situation in which cohabitating with another
8 person or with a small pet can conflict with allegations of disabling medical impairments.
9 Moreover, although Barkowski co-parents a small dog, she reported that her husband
10 cares for it. (*Id.* 222, 240.) The ALJ also noted that Barkowski “does knitting and
11 beading,” but ignores that she reported “I can only knit or bead for a few minutes before
12 it aggravates my neck [and] hands.” (*Id.* at 20, 225, 243.) Likewise, the ALJ stated that
13 Barkowski “goes shopping” and “shops in stores,” but fails to consider that Barkowski
14 does most of her shopping online and goes to the grocery store once per week with her
15 husband. (*Id.* at 20, 61, 225, 242.) Even then, she uses a motorized cart. (*Id.* at 242.)
16 The ALJ noted that Barkowski walks, but ignores that she does so for only 15 minutes
17 before needing to rest. (*Id.* at 20, 61, 244.) He also erroneously states that she “prepares
18 meals,” when Barkowski reported that, other than occasionally microwaving something,
19 her husband does all the cooking. (*Id.* at 20, 60, 222, 240.) Further, the ALJ discounts
20 Barkowski’s symptom testimony because she admittedly “gets dressed, brushes her teeth,
21 [and] washes her face.” (*Id.* at 20.) But “claimants should not be penalized for
22 attempting to lead normal lives.” *Garrison*, 759 F.3d at 1016.

23 The ALJ cites some activities that could, in certain context, indicate a greater level
24 of functioning, but again fails to account for the manner in which Barkowski engaged in
25 them. For example, the ALJ notes that Barkowski went on a two-week cruise, but
26 ignores that she reported lying around and watching movies for most of the trip. (A.R.
27 20, 65.) The ALJ also highlights that Barkowski reported exercising in the pool, but the
28 ALJ failed to elicit testimony concerning the frequency and manner in which Barkowski

1 did so. (*Id.* at 20.)

2 Second, although improvement with conservative treatment is a sufficient basis for
3 discrediting a claimant’s allegations of disabling symptoms, *Tommasetti v. Astrue*, 533
4 F.3d 1035, 1040 (9th Cir. 2008), the ALJ did not adequately explain this finding. He
5 devoted several pages to summarizing the medical record, which he interpreted to show
6 mild to moderate objective findings. But the ALJ did not explain why Barkowski’s
7 treatment was conservative. Notably, Barkowski underwent two cervical fusion
8 surgeries, which does not strike this Court as conservative. *See Garrison*, 759 F.3d at
9 1015 n.20 (“[W]e doubt that epidural steroid shots to the neck and lower back qualify as
10 ‘conservative’ medical treatment.”).

11 Finally, the ALJ discounted Barkowski’s testimony because he found it was not
12 supported by objective findings. But “[o]nce the claimant produces medical evidence of
13 an underlying impairment, the Commissioner may not discredit the claimant’s testimony
14 as to subjective symptoms merely because they are unsupported by objective evidence.”¹
15 *Lester*, 81 F.3d at 834. For these reasons, the ALJ erred in discounting Barkowski’s
16 symptom testimony.

17 **II. Medical Opinion Evidence**

18 On May 7, 2012, Dr. Bajpai submitted a work capacity questionnaire in which he
19 opined that Barkowski could lift less than 10 pounds, stand or walk for less than 2 hours
20 in an 8-hour workday, and sit for 6 hours in an 8-hour workday. (A.R. 318.) He reported
21 that Barkowski would need to alternate between sitting and standing depending on her
22 pain, that she could never climb, kneel, or crawl, and only occasionally balance, stoop,
23 and crouch. (*Id.* at 319.) Dr. Bajpai indicated that Barkowski has moderately severe
24 pain, precipitated by changing weather, movement, and stress. (*Id.* at 231.) He opined
25 that this pain would frequently interfere with Barkowski’s attention and concentration,

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27 ¹ Inconsistency with the medical record is a sufficient basis for rejecting a
28 claimant’s allegations of disabling symptoms. *Carmickle v. Comm’r Soc. Sec. Admin.*,
533 F.3d 1155, 1161 (9th Cir. 2008). The ALJ did not find, however, that Barkowski’s
symptoms were *inconsistent* with the medical record. Instead, he stated that her reported
symptoms and limitations were not supported by objective findings.

1 and her ability to timely complete tasks. (*Id.* at 321-22.) Likewise, Dr. Landsman opined
2 on April 13, 2014 that Barkowski is unable to lift more than 10 pounds, would need to
3 alternate between sitting and standing, cannot walk for sustained distances, and may need
4 to take pain medication while working, which may cause drowsiness. (*Id.* at 712.) His
5 opinion noted that Barkowski “is having difficulty looking up,” walking, and “even
6 lifting a gallon of milk.” (*Id.*) The ALJ assigned little weight to both of these opinions.
7 (*Id.* at 24-25.)

8 A treating physician’s opinion generally is entitled to deference. *See Lester v.*
9 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). More weight generally should be given to the
10 opinion of a treating physician than to the opinions of non-treating physicians because
11 treating physicians are “employed to cure and [have] a greater opportunity to observe and
12 know the patient as an individual.” *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir.
13 1987). Thus, where a treating physician’s opinion is not contradicted by another
14 physician it may be rejected only for “clear and convincing” reasons, and where it is
15 contradicted, it still may not be rejected without “specific and legitimate reasons”
16 supported by substantial evidence in the record. *Lester*, 81 F.3d at 830. “An ALJ can
17 satisfy the substantial evidence requirement by setting out a detailed and thorough
18 summary of the facts and conflicting clinical evidence, stating his interpretation thereof,
19 and making findings. *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (internal
20 quotation and citation omitted.)

21 Here, the opinions of Drs. Bajpai and Landsman were contradicted by state agency
22 reviewers Drs. Ernest Griffith and Michael Keer, as well as consultative examiner Dr.
23 Monte Jones. (A.R. 85-88, 103-05, 341-44.) The ALJ therefore was required to
24 articulate specific and legitimate reasons, supported by substantial evidence, for
25 discounting Barkowski’s treating physicians.

26 Some of the ALJ’s articulated reasons for discounting the treating physicians’
27 opinions do not hold water. Specifically, the ALJ stated that he assigned less weight to
28 the treating physicians’ opinions because they appeared to be based largely on

1 Barkowski's subjective complaints and are inconsistent with her reported activities of
2 daily living. (*Id.* at 25.) For reasons already discussed, however, the ALJ
3 mischaracterized Barkowski's daily activities and did not otherwise articulate clear and
4 convincing reasons for discounting her symptom complaints.

5 Nonetheless, the ALJ gave other legitimate reasons for discounting the treating
6 physicians' opinions. For example, the ALJ discounted the treating physicians' opinions
7 because he found they were inconsistent with the overall objective medical record. (*Id.* at
8 25.) Barkowski contends that the ALJ's finding lacks specificity because, other than
9 citing to a handful of records, he failed to explain why the records were inconsistent with
10 the treating physicians' opinions. (Doc. 13 at 13-14) But earlier in the decision, the ALJ
11 devoted nearly three pages to summarizing the medical record and explaining why the
12 record, overall, contained only mild to moderate objective findings. (A.R. at 21-23.)
13 Though the ALJ did not repeat this analysis later when he discussed the treating
14 physician's opinions, the Court will not "fault the agency merely for explaining its
15 decision with less than ideal clarity," so long as its "path may reasonably be discerned . . .
16 ." *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) (internal quotation and
17 citation omitted). Contrary to Barkowski's argument, the ALJ did more than state his
18 bare conclusions. He laid out a detailed summary of the medical evidence, explained
19 why it showed overall mild to moderate findings, and stated his conclusion that these
20 records were inconsistent with the more restrictive and severe limitations assessed by
21 Drs. Bajpai and Landsman. Though Barkowski advocates for a more favorable view of
22 the medical record, it is the ALJ's rational interpretation that controls.

23 The ALJ also discounted the treating physicians' opinions because they were
24 inconsistent with other opinions in the record, which the ALJ found to be more consistent
25 with the overall objective medical evidence. (A.R. 23, 25.) "The opinions of non-
26 treating or non-examining physicians may . . . serve as substantial evidence when the
27 opinions are consistent with independent clinical findings or other evidence in the
28 record." *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). The Court therefore

1 finds that the ALJ did not err in weighing the medical source evidence.

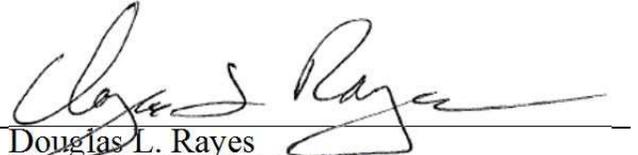
2 **III. Remedy**

3 Barkowski argues that the Court should apply the credit-as-true rule to credit her
4 symptom testimony and remand for award of benefits. The credit-as-true rule allows the
5 Court to make a finding of disability when an ALJ fails to provide legally sufficient
6 reasons for rejecting challenged evidence, there are no outstanding issues that must be
7 resolved before a determination of disability can be made, and it is clear from the record
8 that the ALJ would be required to find the claimant disabled were the evidence in
9 question credited. *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004). The Court
10 need not apply the credit-as-true rule, however, if evaluation of the record as a whole
11 creates serious doubt that the claimant is, in fact, disabled. *See Garrison*, 759 F.3d at
12 1021 (9th Cir. 2014).

13 The Court finds that a remand for further proceedings, rather than for an award of
14 benefits, is appropriate because the record as a whole creates serious doubt that
15 Barkowski is disabled. First, as previously noted, the ALJ reasonably interpreted the
16 medical record as showing only mild to moderate findings. Second, all other medical
17 sources opined to less restrictive limitations than Barkowski's treating physicians. Third,
18 the ALJ erred largely by mischaracterizing Barkowski's daily activities. Further
19 proceedings would serve a useful purpose because it is not clear how predominately
20 Barkowski's daily activities, as mischaracterized by the ALJ, factored into the decision.
21 For this reason, as well, though the Court affirms the ALJ's weighing of the medical
22 source evidence, the ALJ should feel free to reconsider the treating physicians' opinions
23 in light of the daily activities that Barkowski actually engaged in, and with due
24 consideration to the frequency, duration, and manner in which they were performed. It
25 might be that after comparing the medical source opinions to Barkowski's undistorted
26 testimony concerning her activities of daily living, the ALJ determines that the treating
27 physicians are entitled to slightly more weight, even if their opinions do not control.
28 Such findings might, in turn, bear on the ALJ's RFC finding. Accordingly,

1 **IT IS ORDERED** that the final agency decision is **REVERSED** and this matter
2 **REMANDED** for further proceedings.

3 Dated this 30th day of September, 2017.

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8 Douglas L. Rayes
 United States District Judge

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