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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Raquel Alina Cervantez,  
10 Plaintiff,

No. CV-16-02914-PHX-JZB

11 v.

**ORDER**

12 Commissioner of Social Security  
13 Administration,  
14 Defendant.

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

19 **I. Background**

20 On July 16, 2014, Plaintiff filed a Title XVI application for disability benefits.  
21 (AR<sup>1</sup> 141.) Plaintiff asserts disability beginning on December 30, 2005. Plaintiff's  
22 application was initially denied on December 22, 2014, and upon reconsideration on June  
23 1, 2015. (*Id.* at 98-101, 104-07.) Plaintiff requested a hearing which took place on March  
24 24, 2016. (*Id.* at 119.) Administrative Law Judge (ALJ) Laura S. Havens denied  
25 Plaintiff's application for benefits in a decision dated April 26, 2016. (*Id.* at 13-40.) On  
26 July 26, 2016 the Appeals Council denied Plaintiff's request for review of the ALJ's  
27 decision, making the ALJ's decision the final decision of the Commissioner of the Social

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<sup>1</sup> Citations to "AR" are to the administrative record.

1 Security Administration. (*Id.* at 1-3.)

2 On August 30, 2016, having exhausted the administrative review process, Plaintiff  
3 sought judicial review of the ALJ's decision by filing a Complaint in this Court pursuant  
4 to 42 U.S.C. §§ 405(g) and 1383(c). (Doc. 1.) On January 16, 2017, Plaintiff filed an  
5 Opening Brief, seeking remand of this case to the Social Security Administration for an  
6 award of benefits. (Doc. 17.) Defendant filed a Response Brief in support of the  
7 Commissioner's decision on February 15, 2017. (Doc. 18.) On February 28, 2017,  
8 Plaintiff filed a reply brief. (Doc. 19.)

## 9 **II. Legal Standard**

### 10 **a. Standard of Review**

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

20 In determining whether substantial evidence supports the ALJ's decision, the  
21 Court considers the record as a whole, weighing both the evidence that supports and that  
22 which detracts from the ALJ's conclusions. *Reddick*, 157 F.3d at 720; *Tylitzki v. Shalala*,  
23 999 F.2d 1411, 1413 (9th Cir. 1993). The ALJ is responsible for resolving conflicts,  
24 ambiguity, and determining credibility. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.  
25 1995); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The Court "must uphold  
26 the ALJ's decision where the evidence is susceptible to more than one rational  
27 interpretation." *Andrews*, 53 F.3d at 1039. "However, a reviewing court must consider  
28 the entire record as a whole and may not affirm simply by isolating a 'specific quantum

1 of supporting evidence.” *Orn*, 495 F.3d at 630 (quoting *Robbins v. Soc. Sec. Admin.*, 466  
2 F.3d 880, 882 (9th Cir. 2006)). The Court reviews only those issues raised by the party  
3 challenging the ALJ’s decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir.  
4 2001). Similarly, the Court reviews “only the reasons provided by the ALJ in the  
5 disability determination and may not affirm the ALJ on a ground upon which he did not  
6 rely.” *Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir. 2014).

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

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

14 if his physical or mental impairment or impairments are of  
15 such severity that he is not only unable to do his previous  
16 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.

17 42 U.S.C. § 423(d)(2)(A).

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

20 The five-step process for disability determinations begins, at  
21 the first and second steps, by asking whether a claimant is  
22 engaged in “substantial gainful activity” and considering the  
23 severity of the claimant’s impairments. *See* 20 C.F.R. §  
416.920(a)(4)(i)-(ii). If the inquiry continues beyond the  
24 second step, the third step asks whether the claimant’s  
25 impairment or combination of impairments meets or equals a  
26 listing under 20 C.F.R. pt. 404, subpt. P, app. 1 and meets the  
27 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  
claimant’s “residual functional capacity” in determining  
whether the claimant can still do past relevant work or make  
an adjustment to other work. *See id.* § 416.920(a)(4)(iv)-(v).

*Kennedy v. Colvin*, 738 F.3d 1172, 1175 (9th Cir. 2013). “The burden of proof is on the

1 claimant at steps one through four, but shifts to the Commissioner at step five.” *Bray v.*  
2 *Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009).

3 Applying the five-step evaluation process, the ALJ found that Plaintiff was not  
4 disabled and not entitled to benefits (AR 35.) At step one, the ALJ concluded the Plaintiff  
5 did not engage in substantial gainful activity since the application date. (*Id.* at 18.) At step  
6 two, the ALJ determined the Plaintiff has the following severe impairments:  
7 “degenerative disc disease, fibromyalgia syndrome, reflex sympathetic dystrophy of the  
8 right lower extremity, depression, anxiety, [and] bipolar disorder (20 CFR 404.1520(c)).”  
9 (*Id.*)

10 At step three, the ALJ found that the Plaintiff “does not have an impairment or  
11 combination of impairments that meets or medically equals the severity of one of the  
12 listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 416.920(d),  
13 416.925, and 416.926).” (*Id.*) At step four, the ALJ determined that Plaintiff has the  
14 residual functional capacity to perform sedentary work as defined in 20 CFR 416.967(a)  
15 except:

16 [S]he can sit six hours out of an eight-hour work day; she can  
17 stand or walk two hours out of an eight-hour workday. She  
18 requires a sit/stand option every thirty minutes. She can lift,  
19 carry, push and pull ten pounds frequently and twenty pounds  
20 occasionally. She can never climb ladders, ropes or scaffolds,  
21 but can occasionally climb ramps and stairs. She can  
22 occasionally balance, stoop, kneel, crouch, and crawl. She can  
23 have only occasional exposure to heights, moving machinery,  
24 humidity, temperature extremes, and vibrations. She can  
25 occasionally understand, remember, and carry out complex  
26 and detailed job instructions. She can only occasionally  
27 interact with coworkers and the public.

28 (*Id.* at 20.)

29 The ALJ further found that Plaintiff has no past relevant work. (*Id.* at 34.) At step  
30 five, the ALJ found that “[c]onsidering the claimant’s age, education, work experience,  
31 and residual functioning capacity, there are jobs that exist in significant numbers in the  
32 national economy that the claimant can perform.” (*Id.*) The ALJ concluded that Plaintiff  
33 “has not been under a disability, as defined in the Social Security Act, since . . . the date

1 the application was filed.” (*Id.* at 35.)

### 2 **III. Analysis**

3 Plaintiff alleges that the ALJ erred in weighing medical opinion evidence and by  
4 discounting Plaintiff’s symptom testimony. (Doc. 17.) Specifically, Plaintiff contends the  
5 ALJ erred by (1) failing to provide specific and legitimate reasons for not assigning  
6 controlling weight to the treating physician’s opinion, and (2) by failing to provide clear  
7 and convincing reasons for finding Plaintiff not credible. (*Id.*) The Court addresses  
8 Plaintiff’s arguments below.

#### 9 **a. Weighing of Medical Opinion Evidence**

10 Plaintiff contends that the ALJ failed to provide specific and legitimate reasons for  
11 not assigning controlling weight to the opinions of Dr. Ajay Narwani, Plaintiff’s treating  
12 pain specialist. (Doc. 17 at 10.) Below, the Court addresses the ALJ’s treatment of Dr.  
13 Narwani’s opinions.

#### 14 **i. Legal Standard**

15 In weighing medical evidence, the Ninth Circuit distinguishes between the  
16 opinions of treating physicians, examining physicians, and non-examining physicians.  
17 *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Generally, the ALJ should give  
18 the greatest weight to a treating physician’s opinion and more weight to the opinion of an  
19 examining physician than to one of a non-examining physician. *See Andrews*, 53 F.3d at  
20 1040-41; *see also* 20 C.F.R. § 404.1527(c)(2)-(6). If it is not contradicted by another  
21 doctor’s opinion, the opinion of a treating or examining physician can be rejected only  
22 for “clear and convincing” reasons. *Lester*, 81 F.3d at 830 (citing *Embrey v. Bowen*, 849  
23 F.2d 418, 422 (9th Cir. 1988)). “If a treating or examining doctor’s opinion is  
24 contradicted by another doctor’s opinion, an ALJ may only reject it by providing specific  
25 and legitimate reasons that are supported by substantial evidence.” *Garrison*, 759 F.3d at  
26 1012 (quoting *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008)).

27 An ALJ can meet the “specific and legitimate reasons” standard “by setting out a  
28 detailed and thorough summary of the facts and conflicting clinical evidence, stating his

1 interpretation thereof, and making findings.” *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th  
2 Cir. 1986). But, “[t]he ALJ must do more than offer his conclusions. He must set forth his  
3 own interpretations and explain why they, rather than the doctors’, are correct.” *Embrey*,  
4 849 F.2d at 421-22. “The opinion of a non-examining physician cannot by itself  
5 constitute substantial evidence that justifies the rejection of the opinion of either an  
6 examining *or* a treating physician.” *Lester*, 81 F.3d at 831 (emphasis in original).  
7 However, a non-treating or non-examining physician’s opinions may serve as substantial  
8 evidence “when the opinions are consistent with independent clinical findings or other  
9 evidence of record.” *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).

10 **ii. Dr. Narwani’s Opinions**

11 Plaintiff sought treatment from Dr. Narwani from December 2012 to March 2016.  
12 (See AR 308-405, 614-712, 1125-1221.) On April 4, 2016, Dr. Narwani completed a  
13 treating source statement (*Id.* at 1229-32.) In this treating source statement, Dr. Narwani  
14 opined Plaintiff suffers moderate to extreme pain that causes sleep disturbance, mood  
15 swings, difficulty concentrating or thinking, appetite disturbance, and decreased energy  
16 or stamina. (*Id.* at 1229.) Dr. Narwani opined that Plaintiff’s use of morphine for chronic  
17 pain causes side effects that would interfere with regular work activity. (*Id.*) Dr. Narwani  
18 further opined that Plaintiff’s daily living activities are moderately affected by her  
19 condition, and that Plaintiff’s limitation in completing tasks in a timely manner due to  
20 deficiencies in concentration, persistence, or pace is extreme. (*Id.* at 1230.) Dr. Narwani  
21 opined that Plaintiff would require breaks every 20 to 30 minutes, would be able to lift  
22 and carry five pounds occasionally,<sup>2</sup> and would never be able to lift and carry ten pounds  
23 or greater. (*Id.*) Dr. Narwani also opined that Plaintiff would be able to climb stairs and  
24 ramps and balance occasionally, and that the Plaintiff would never be able to climb  
25 ladders or scaffolds, stoop, kneel, crouch, or bend at the waist. (*Id.* at 1232.) Finally, Dr.  
26 Narwani opined that Plaintiff would have to miss work more than four times a month as a

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28 <sup>2</sup> The form used by Dr. Narwani defines “occasionally” as one-third of the day.  
(AR 1230.)

1 result of her impairments. (*Id.*)

2 Dr. Narwani's opinions were contradicted by the opinions' of consultative  
3 examining physicians, Dr. Paul Bendheim and Dr. Matthew Khumalo. (AR 532-37,  
4 1095-1106.) Therefore, the ALJ could discount Dr. Narwani's opinions only for specific  
5 and legitimate reasons supported by substantial evidence. *Lester*, 81 F.3d at 830-31;  
6 *Garrison*, 759 F.3d at 1015.

7 **iii. The ALJ erred by assigning the opinions of Plaintiff's treating pain**  
8 **specialist, Dr. Narwani, little weight.**

9 The ALJ gave Dr. Narwani's opinions "little weight" because the severity opined  
10 "is not supported by the medical evidence of record," and "is not likely to last for the  
11 requisite twelve-month period." (AR 30.) The Court finds that the ALJ failed to provide  
12 specific and legitimate reasons supported by substantial evidence for giving Dr.  
13 Narwani's opinions little weight.

14 First, the ALJ does not cite to specific evidence or provide any explanation for  
15 why the severity opined by Dr. Narwani is "not supported by the medical evidence of  
16 record." (*Id.*) The ALJ references a number of Dr. Narwani's treatment notes that  
17 document Plaintiff's visits, but fails to explain why these treatment notes inadequately  
18 support Dr. Narwani's opinions. The ALJ further fails to specify or explain which  
19 medical records do not support Dr. Narwani's findings. (*Id.* at 22-26.) In fact, a number  
20 of Dr. Narwani's treatment notes reflect findings that are consistent with his opinions  
21 regarding Plaintiff's limitations. (*Id.* at 308-405, 614-712, 1125-1221.) For example,  
22 Plaintiff frequently reported her pain to Dr. Narwani as "continuous" and "constant," and  
23 reported worsening factors such as increased activity, movement, walking, going up  
24 stairs, going down stairs, prolonged sitting, and prolonged standing. (*See, e.g., id.* at 348,  
25 397, 644, 687, 1130, 1161, 1208.) Plaintiff also consistently rated her current pain at  
26 appointments as seven out of ten or above. (*See, e.g., id.* at 365, 382, 397, 648, 709, 1137,  
27 1180.) Numerous treatment notes from Dr. Narwani identify positive straight leg raise  
28 tests, antalgic gait, limited range of motion, and lower spine musculature tenderness,

1 tightness, and trigger points in physical examinations dating back to March 2013. (*See*,  
2 *e.g.*, *id.* at 388-89, 649-50, 683-84, 1138-39, 1199-1200.) Also, Dr. Narwani  
3 recommended Plaintiff for Trigger Point Injections for her pain—at times on a weekly  
4 basis—from 2013 to 2016. (*Id.* at 308-405, 614-712, 1125-1221.) The records reveal five  
5 appointments for Trigger Point Injections in October 2015 alone, which is consistent with  
6 Dr. Narwani’s opinions that Plaintiff would be absent from work more than four times a  
7 week. (*Id.* at 1161-64, 1165-68, 1169-72, 1173-75, 1176-79, 1229-32.)

8         The ALJ gave “substantial weight” to Dr. Bendheim’s November 2014 findings  
9 because they are “consistent with the medical evidence of record, and Dr. Bendheim is a  
10 qualified expert who had the opportunity to evaluate the Plaintiff face to face.” (AR 29.)  
11 However, other than these conclusory statements, the ALJ does not provide any basis for  
12 giving Dr. Bendheim’s opinion more weight than Plaintiff’s treating pain management  
13 specialist. Importantly, Dr. Bendheim did not opine regarding Plaintiff’s specific  
14 functional limitations. (*Id.* at 532-37.) Also, Dr. Bendheim only had a portion of  
15 Plaintiff’s psychiatric records and no medical or radiographic procedures to review to  
16 inform him of Plaintiff’s condition. (*Id.* at 533.) Dr. Bendheim even recommended  
17 Plaintiff seek “evaluation by a pain specialist regarding her anterior groin pain and  
18 possible reflex sympathetic dystrophy,” when at the time, Plaintiff had been treated by  
19 Dr. Narwani—a pain specialist—for nearly two years. (*Id.* at 400, 536-37.) The ALJ  
20 omitted specific discussion of how Dr. Bendheim’s findings contradict Dr. Narwani’s  
21 opinions or how Dr. Bendheim’s findings may be consistent with Dr. Narwani’s findings,  
22 including positive straight leg raising testing, decreased lumbar lordosis, tenderness upon  
23 palpitation in the lumbar spine, antalgic gait, decreased sensation, and chronic groin pain.  
24 (*Id.* at 535-36.)

25         The ALJ also gave “substantial weight” to Dr. Khumalo’s February 2016 opinions  
26 because they are “consistent with the medical evidence of record, and Dr. Khumalo is a  
27 qualified expert who had the opportunity to evaluate, test, observe, and examine the  
28 claimant face to face.” (AR 30.) Again, aside from these brief conclusions, the ALJ



1 provides no other specific reasoning for giving Dr. Khumalo’s opinions substantial  
2 weight, while giving Dr. Narwani’s opinions little weight. Dr. Khumalo was even more  
3 limited in his examination than Dr. Bendheim because he had no past records to review at  
4 all. (*Id.* at 1095.) Based on his examination, Dr. Khumalo opined that Plaintiff can stand  
5 or walk for two hours in a work day, sit for six hours in a work day, climb stairs or ramps  
6 occasionally, and balance, stoop, kneel, crouch, and crawl occasionally. (*Id.* at 1098-  
7 1102.) The ALJ does not explain how Dr. Khumalo’s findings are consistent with other  
8 medical evidence or inconsistent with Dr. Narwani’s opinions. Also, the ALJ omits  
9 specific discussion of Dr. Khumalo’s examination findings that are consistent with Dr.  
10 Narwani’s opinions, including muscular tenderness in the lumbothoracic region  
11 bilaterally, diminished range of motion, diagnosis of reflex sympathetic dystrophy, and  
12 chronic pain. (*Id.* at 1096.)

13 The ALJ gave “partial weight” to the opinions of non-examining state-agency  
14 physician Dr. Combs because they are “generally consistent with the medical evidence of  
15 record.” (*Id.* at 29.) The ALJ awarded Dr. Combs’ opinion only partial weight because  
16 she found that, “based on evidence adduced at the hearing level ... the [Plaintiff] is more  
17 restricted in standing and walking than Dr. Combs opined.” (*Id.*) Dr. Combs opined that  
18 Plaintiff can occasionally lift and carry twenty pounds, frequently lift and carry ten  
19 pounds, stand or walk for six hours in an eight hour work day, and sit for six hours in an  
20 eight hour work day. (*Id.* at 90.) Dr. Combs also opined Plaintiff can occasionally climb  
21 ramps, stairs, ladders, ropes, and scaffolds, can occasionally stoop, kneel, crouch, and  
22 crawl, and can frequently balance. (*Id.*) The ALJ provides no further explanation or  
23 analysis as to why she gave Dr. Combs’ opinions partial weight, while giving Dr.  
24 Narwani’s opinions little weight.

25 The ALJ summarized the treating, examining, and non-examining doctors’  
26 opinions and gave Dr. Narwani’s opinions little weight without giving any specific  
27 reasons for discounting the treating specialist’s opinions and without clarifying which  
28 evidence she relied on to support her conclusions. Rather, the ALJ simply gives a

1 conclusory statement of her opinion. But “[t]he ALJ must do more than offer [her]  
2 conclusions. [She] must set forth [her] own interpretations and explain why they, rather  
3 than the doctors’, are correct.” *Embrey*, 849 F.2d at 421-22. Therefore, the Court finds  
4 this conclusory reasoning is not supported by substantial evidence and constitutes an  
5 insufficient basis on which to give little weight to Dr. Narwani’s opinions.

6 Second, the ALJ does not explain how she came to the conclusion that “the  
7 severity opined . . . is not likely to last for the requisite twelve-month period.” (AR 30.)  
8 Instead, she gives substantial weight to the medical testimony of the consultative  
9 examining doctors who were not able to reach a consensus about the duration of  
10 Plaintiff’s condition. The most recent examining physician, Dr. Khumalo, opined in 2016  
11 that the limitations he found lasted or will last for twelve consecutive months. (*Id.* at  
12 1105.) However in 2014, over one year prior, examining physician Dr. Paul Bendheim  
13 opined that Plaintiff’s condition would not “impose any limitations for twelve continuous  
14 months.” (*Id.* at 536.) The ALJ entirely fails to clarify the examiners’ contradicting  
15 opinions or to relate these medical opinions to the rejected opinions of Dr. Narwani who  
16 had been seeing Plaintiff for her chronic condition since December 2012 and most likely  
17 could better adduce a longitudinal picture of Plaintiff’s condition. Therefore, the Court  
18 finds this reason is also not specific, legitimate, or supported by substantial evidence.

19 **b. Plaintiff’s Symptom Testimony**

20 Plaintiff also argues that the ALJ erred by failing to provide clear and convincing  
21 reasons for discounting Plaintiff’s symptom testimony. (Doc. 17 at 16-24.) The Court  
22 addresses this argument below.

23 **i. Legal Standard**

24 An ALJ engages in a two-step analysis to determine whether a claimant’s  
25 testimony regarding subjective pain or symptoms is credible. *Garrison*, 759 F.3d at 1014-  
26 15 (citing *Lingenfelter*, 504 F.3d at 1035-36). “First, the ALJ must determine whether the  
27 claimant has presented objective medical evidence of an underlying impairment ‘which  
28 could reasonably be expected to produce the pain or other symptoms alleged.’”

1 *Lingenfelter*, 504 F.3d at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir.  
2 1991) (en banc)). The claimant is not required to show objective medical evidence of the  
3 pain itself or of a causal relationship between the impairment and the symptom. *Smolen v.*  
4 *Chater*, 80 F.3d 1273,1282 (9th Cir. 1996). Instead, the claimant must only show that an  
5 objectively verifiable impairment “could reasonably be expected to produce his pain.”  
6 *Lingenfelter*, 504 F.3d at 1036 (quoting *Smolen*, 80 F.3d at 1282); *see also Carmickle v.*  
7 *Comm’r, SSA*, 533 F.3d 1155, 1160-61 (9th Cir. 2008) (“[R]equiring that the medical  
8 impairment ‘could reasonably be expected to produce’ pain or another symptom ...  
9 requires only that the causal relationship be a reasonable inference, not a medically  
10 proven phenomenon”).

11 Second, if a claimant shows that she suffers from an underlying medical  
12 impairment that could reasonably be expected to produce her pain or other symptoms, the  
13 ALJ must “evaluate the intensity and persistence of [the] symptoms” to determine how  
14 the symptoms, including pain, limit the claimant’s ability to do work. *See* 20 C.F.R. §  
15 404.1529(c)(1). General assertions that the claimant’s testimony is not credible are  
16 insufficient. *See Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007). The ALJ must  
17 identify “what testimony is not credible and what evidence undermines the claimant’s  
18 complaints.” *Id.* (quoting *Lester*, 81 F.3d at 834).

19 In weighing a claimant’s credibility, the ALJ may consider many factors,  
20 including, “(1) ordinary techniques of credibility evaluation, such as the claimant’s  
21 reputation for lying, prior inconsistent statements concerning the symptoms, and other  
22 testimony by the claimant that appears less than candid; (2) unexplained or inadequately  
23 explained failure to seek treatment or to follow a prescribed course of treatment; and (3)  
24 the claimant’s daily activities.” *Smolen*, 80 F.3d at 1284; *see Orn*, 495 F.3d at 637-39.  
25 The ALJ also considers “the claimant’s work record and observations of treating and  
26 examining physicians and other third parties regarding, among other matters, the nature,  
27 onset, duration, and frequency of the claimant’s symptom; precipitating and aggravating  
28 factors; [and] functional restrictions caused by the symptoms . . . .” *Smolen*, 80 F.3d at

1 1284 (citation omitted).

2 At this second step, the ALJ may reject a claimant’s testimony regarding the  
3 severity of his or her symptoms only if the ALJ “makes a finding of malingering based on  
4 affirmative evidence,” *Lingenfelter*, 504 F.3d at 1036 (quoting *Robbins*, 466 F.3d at 883),  
5 or if the ALJ offers “clear and convincing reasons” for finding the claimant not credible.  
6 *Carmickle*, 533 F.3d at 1160 (quoting *Lingenfelter*, 504 F.3d at 1036). ““The clear and  
7 convincing standard is the most demanding required in Social Security Cases.”  
8 *Garrison*, 793 F.3d at 1015 (quoting *Moore v. Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th  
9 Cir. 2002)).

10 **ii. Plaintiff’s Testimony**

11 Plaintiff testified that she has degenerative disc disease, fibromyalgia, reflex  
12 sympathetic dystrophy of the right lower extremity, depression, bipolar disorder, and  
13 anxiety. (AR 46-47.) Plaintiff testified that she can usually dress and bathe herself except  
14 she sometimes needs help putting her underwear on. (*Id.* at 47.) Plaintiff claimed that she  
15 does not do many chores except that she will wash her own dish if she makes herself  
16 something to eat, does her own laundry, and buys her own groceries. (*Id.* at 48.) Plaintiff  
17 testified that she cannot mop, do any yard work or gardening, or exercise. (*Id.*) Plaintiff  
18 further claimed that she watches television for seven hours a day on average. (*Id.*)  
19 Plaintiff testified that she does not drive and claims she goes “absolutely nowhere.” (*Id.*  
20 at 49.) Plaintiff also testified that her medication makes her sleepy and nauseated. (*Id.* at  
21 50.) Plaintiff also claimed that she can only walk for five to ten minutes before she has to  
22 sit down. (*Id.* at 51.) Plaintiff claimed that she visits her pain doctor on a weekly basis  
23 and her mental health doctor once every two to three months—sometimes every six to  
24 eight weeks. (*Id.*) On average, Plaintiff rated her pain at a seven out of ten and claims that  
25 she has to lie down every day for a couple of hours to relieve the pain—sometimes  
26 multiple times a day. (*Id.* at 52, 55.)

1                   **iii. The ALJ failed to provide clear and convincing reasons supported by**  
2                   **substantial evidence for rejecting Plaintiff’s symptom testimony.**

3                   The ALJ found that Plaintiff’s medically determinable impairments could  
4 reasonably be expected to cause the alleged symptoms. (AR 21.) However, the ALJ  
5 found Plaintiff’s “statements concerning the intensity, persistence and limiting effects of  
6 these symptoms are not entirely consistent with the medical evidence and other evidence  
7 in the record ...” (*Id.*) Here, because there was no affirmative evidence of malingering,  
8 the ALJ was required to provide clear and convincing reasons supported by substantial  
9 evidence for rejecting Plaintiff’s testimony regarding the severity of her symptoms.

10                  The ALJ determined Plaintiff’s testimony was “not entirely consistent” with the  
11 medical evidence and other evidence because (1) Plaintiff’s “activities of daily living are  
12 not consistent with her allegations of complete disability;” and (2) Plaintiff made  
13 inconsistent statements. (AR 34.) The Court finds these are not sufficient reasons for  
14 discounting Plaintiff’s testimony.

15                  First, while an ALJ may discredit a claimant’s allegations if a claimant has  
16 “engaged in numerous daily activities involving skills that could be transferred to the  
17 workplace,” *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005), “the mere fact that a  
18 plaintiff has carried on certain daily activities, such as grocery shopping, driving a car, or  
19 limited walking for exercise, does not in any way detract from her credibility as to her  
20 overall disability. One does not need to be utterly incapacitated in order to be disabled.”  
21 *Vertigan v. Halter*, 260 F.3d 1044, 1049-50 (9th Cir. 2001).

22                  Here, the ALJ asserts that Plaintiff’s activities of daily living include the ability to  
23 “bathe, groom, toilet, and take care of her personal hygiene without assistance, except  
24 that she needs help to put on pants.” (AR 34.) The ALJ also cites to Plaintiff’s ability to  
25 prepare simple meals, feed herself, do household chores such as laundry, and shop in the  
26 store for necessities. (*Id.*) Lastly, the ALJ notes that Plaintiff can “sort, hand [sic], and  
27 use paper files.” (*Id.*) The ALJ never specifies how often or long Plaintiff can engage in  
28 these activities or if the activities comprise a substantial part of Plaintiff’s day. The ALJ

1 also never specifies how engaging in these activities is inconsistent with Plaintiff's  
2 allegations of complete disability. Also, the ALJ makes no finding as to how limited  
3 Plaintiff is in these activities or whether these activities are transferrable to the  
4 workplace. The ALJ only lists Plaintiff's activities and does not clearly detail which part  
5 of Plaintiff's testimony is not credible or what evidence undermines Plaintiff's  
6 complaints. The ALJ's conclusory findings do not equate to clear and convincing reasons  
7 supported by substantial evidence for discrediting Plaintiff's symptom testimony.

8         Second, the ALJ points to a discrepancy between claims Plaintiff made about her  
9 high school completion status. (*Id.*) The ALJ identifies a statement Plaintiff made to  
10 consultative examiner Dr. Steven Hirdes that she dropped out of high school, which  
11 contradict records from Dr. Narwani that indicate Plaintiff completed high school. (*Id.*)  
12 The ALJ also asserts that Plaintiff has made inconsistent statements regarding self-harm  
13 behavior. (*Id.*) The ALJ compares a record from Aurora Hospital reporting Plaintiff never  
14 engaged in self-harm behavior against statements Plaintiff made to Dr. Hirdes claiming  
15 she cut herself, pulled her hair and eyelashes out, and burned herself with an iron. (*Id.*)  
16 Notably, multiple pages in the same record from Aurora Hospital confirm Plaintiff's self-  
17 harming behavior and record it in more detail than the general form on the first page that  
18 indicated no history of self-harming behavior. (*Id.* at 807, 813, 821, 823.)

19         However, the ALJ makes no effort to explain how these inconsistencies undermine  
20 Plaintiff's specific testimony about the severity of her pain symptoms. The ALJ must  
21 identify "what testimony is not credible and what evidence undermines the claimant's  
22 complaints." *Lester*, 81 F.3d at 834; *see also Brown-Hunter v. Colvin*, 806 F.3d 487, 493  
23 (9th Cir. 2015) (finding error where the ALJ's conclusory statement that "the functional  
24 limitations from the claimant's impairments were less serious than she has alleged" was  
25 based on "unspecified claimant testimony and a summary of medical evidence.").  
26 Without further analysis regarding whether the inconsistent statements undermine  
27 Plaintiff's claims about the intensity and persistence of her pain, the Court finds that  
28 simply pointing out these inconsistencies is not a sufficient basis on which to discredit

1 Plaintiff's symptom testimony about the severity of her pain.

2 The Commissioner argues that the ALJ "reasonably considered that Plaintiff's  
3 evasiveness and apparent symptom magnification during Dr. Bendheim's examination  
4 detracted from the reliability of Plaintiff's allegations." (Doc. 18 at 6.) More specifically,  
5 Defendant cites to the giveaway weakness of Plaintiff's right quadriceps noted in Dr.  
6 Bendheim's examination. (AR 534.) Defendant theorizes the giveaway weakness noted  
7 by Dr. Bendheim is a sign of symptom magnification and malingering. (Doc. 18 at 6.)  
8 However, the ALJ did not make a finding of malingering, and does not specifically cite to  
9 the giveaway weakness during Dr. Bendheim's examination as a basis for giving  
10 Plaintiff's symptom testimony little weight. Also, the ALJ does not specifically rely on  
11 any portion of Dr. Bendheim's medical opinions as support for her decision to discount  
12 Plaintiff's symptom testimony. "[T]he Court reviews only the reasons provided by the  
13 ALJ in the disability determination and may not affirm the ALJ on a ground upon which  
14 [s]he did not rely." *Orn*, 495 F.3d at 630 (citing *Connett v. Barhart*, 340 F.3d 871, 874  
15 (9th Cir. 2003)).

16 **IV. Remand for an award of benefits is appropriate here.**

17 Having determined that the ALJ's decision is not supported by substantial  
18 evidence, the Court must vacate the Commissioner's decision. The remaining issue for  
19 the Court is whether to remand this matter for an award of benefits or for further  
20 proceedings. The Court has discretion to remand for an award of benefits or for further  
21 proceedings. *Smolen*, 80 F.3d at 1292.

22 "When an ALJ's denial of benefits is not supported by the record, the proper  
23 course, except in rare circumstances, is to remand to the agency for additional  
24 investigation or explanation." *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012)  
25 (quotation omitted); *see also Treichler v. Comm'r, SSA*, 775 F.3d 1090, 1101 (9th Cir.  
26 2014) (noting that a remand for further administrative proceedings is generally useful  
27 where the record has not been fully developed, there are outstanding conflicts and  
28 ambiguities to be resolved, or the presentation of further evidence may "prove

1 enlightening.”). Conversely, in appropriate circumstances “courts are free to reverse and  
2 remand a determination by the Commissioner with instructions to calculate and award  
3 benefits.” *Garrison*, 759 F.3d at 1019. The case can be remanded to an ALJ with  
4 instructions to award benefits when each of the following are satisfied:

- 5 (1) the record has been fully developed and further  
6 administrative proceedings would serve no useful purpose;  
7 (2) the ALJ has failed to provide legally sufficient reasons for  
8 rejecting evidence, whether claimant testimony or medical  
9 opinion; and (3) if the improperly discredited evidence were  
10 credited as true, the ALJ would be required to find the  
11 claimant disabled on remand.

12 *Garrison*, 759 F.3d at 1020. If all three criteria are met the case should be remanded for  
13 award of benefits unless an “evaluation of the record as a whole creates serious doubt as  
14 to whether the claimant is, in fact, disabled within the meaning of the Social Security  
15 Act.” *Id.* at 1021.

16 First, the Court finds the record as a whole is fully developed. The ALJ had an  
17 opportunity to review Plaintiff’s medical record and testimony, and further administrative  
18 proceedings would serve no useful purpose. Second, as the Court discussed in detail  
19 above, the ALJ failed to provide legally sufficient reasons for giving the opinions of  
20 Plaintiff’s treating pain specialist, Dr. Narwani, little weight. The ALJ further erred by  
21 failing to provide legally sufficient reasons for discrediting Plaintiff’s symptom  
22 testimony. Finally, the vocational expert testified that in order to maintain work only two  
23 absences would be tolerated per month, and an individual could only be off task up to  
24 fifteen percent of the work day. (AR 60-65.) If the limitations opined by Dr. Narwani  
25 were credited as true—that Plaintiff would have to miss work more than four times a  
26 month—Plaintiff would be unable to maintain work due to her absences and the ALJ  
27 would be required to find Plaintiff disabled. (*Id.* at 63, 1229-34.) Also, if Plaintiff’s  
28 symptom testimony were credited as true—that due to the severity of the pain she cannot  
stand for more than five to ten minutes and she has to lie down every day for a couple of  
hours (sometimes multiple times a day)—Plaintiff would be unable to maintain work due  
to her inability to stay on task for multiple hours per day and the ALJ would be required



1 to find Plaintiff disabled. (*Id.* at 51, 55, 64.) Under these circumstances, the Court finds  
2 remanding for an award of benefits is appropriate.

3 Defendant argues that remanding for an award of benefits is improper because the  
4 requirements of the credit-as-true doctrine are not satisfied. (Doc. 18 at 14.) Defendant  
5 argues that the contradictory examining opinions of Dr. Bendheim and Dr. Khumalo  
6 prohibit application of the doctrine and require remand for further proceedings. (*Id.*)  
7 However, the ALJ had the full opportunity to review the records and resolve any  
8 contradictions. Also, the Commissioner does not provide any arguments or explanations  
9 for how the medical evidence casts serious doubt on Plaintiff’s claim to be disabled. The  
10 opinions of examining physicians’ Dr. Bendheim and Dr. Khumalo—who each only  
11 examined Plaintiff once and both without relevant medical records—conform with Dr.  
12 Narwani’s medical opinions that Plaintiff experiences chronic pain, muscular tenderness,  
13 limited range of motion, and reflex sympathetic dystrophy.<sup>3</sup> (AR 532-37, 1095-1106.) As  
14 shown in the record, Plaintiff has been afflicted with a number of severe impairments  
15 since at least 2012 and has been receiving pain management treatment for these  
16 impairments on a regular basis. (AR 308-405, 614-712, 1125-1221). After reviewing the  
17 record, this Court sees no reason to seriously doubt that Plaintiff is disabled. Allowing the  
18 ALJ “to decide the issue again would create an unfair ‘heads we win; tails, let’s play  
19 again’ system of disability benefits adjudication.” *Benecke v. Barnhart*, 379 F.3d 587,  
20 595 (9th Cir. 2004). *See also Moisa v. Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004) (“The  
21 Commissioner, having lost this appeal, should not have another opportunity to show that  
22 [Plaintiff] is not credible any more than [Plaintiff], had [s]he lost, should have an  
23 opportunity for remand and further proceedings to establish [her] credibility.”).

24 In addition, Plaintiff applied for benefits three years ago. (AR 141-46.) Applicants  
25 for disability benefits “... can experience tremendous financial difficulties while awaiting

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27 <sup>3</sup> Dr. Bendheim’s report recommends Plaintiff seek “evaluation by a pain  
28 specialist regarding ... *possible* reflex sympathetic dystrophy.” (AR 536-37) (emphasis  
added). At that time, Plaintiff had been treated by a pain specialist for reflex sympathetic  
dystrophy since December 2012—nearly two years. (*Id.* at 400.)

1 the outcome of their appeals and proceedings on remand.” *Varney v. Sec’y of Health &*  
2 *Human Servs.*, 859 F.2d 1396, 1398 (9th Cir. 1988). The Court does not wish to further  
3 delay the benefits to Plaintiff as a result of the agency’s denial of her application.

4 The ALJ provided legally insufficient reasons for giving the opinions of Plaintiff’s  
5 treating pain management specialist, Dr. Narwani, little weight. The ALJ also provided  
6 legally insufficient reasons for discrediting Plaintiff’s symptom testimony. Because no  
7 remaining issues exist to be resolved and no serious doubt exists about Plaintiff’s  
8 disability, this Court concludes that Plaintiff is entitled to remand for an immediate award  
9 of benefits.

10 Accordingly,

11 **IT IS ORDERED** that the decision of the Commissioner is vacated and this  
12 matter is remanded back to the Social Security Administration for an award of benefits.

13 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment  
14 accordingly and terminate this action.

15 Dated this 6th day of July, 2017.

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19 Honorable John Z. Boyle  
20 United States Magistrate Judge  
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