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5 **IN THE UNITED STATES DISTRICT COURT**
6 **FOR THE DISTRICT OF ARIZONA**
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8 Belinda Kay Moore,

9 Plaintiff,

10 v.

11 Commissioner of Social Security
12 Administration,

13 Defendant.

No. CV-16-03445-PHX-DLR

ORDER

14
15 Plaintiff Belinda Kay Moore applied for Social Security Disability Insurance
16 benefits in June 2012 and Supplemental Security Income in April 2013, alleging
17 disability beginning December 14, 2011. After state agency denials, Moore appeared for
18 a hearing before an administrative law judge (“ALJ”). A vocational expert (“VE”) also
19 was present and testified. Following the hearing, the ALJ issued a written decision
20 finding that Moore is not disabled within the meaning of the Social Security Act
21 (“SSA”). The ALJ’s decision became the agency’s final decision after the Social
22 Security Administration Appeals Council denied Moore’s request for review. Moore
23 now seeks judicial review of that decision. For the following reasons, the decision of the
24 Commissioner of Social Security Administration is reversed and this matter remanded for
25 further proceedings.

26 **I. The ALJ’s Five-Step Sequential Evaluation**

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 Moore meets the insured status requirements
17 of the SSA through December 31, 2016, and has not engaged in substantial gainful
18 activity since her alleged disability onset date. (AR 25.) The ALJ found at step two that
19 Moore’s degenerative disc disease of the lumbar and cervical spine status post cervical
20 spine stimulator trial, fibromyalgia, obesity, and hypertension are severe impairments, but
21 concluded at step three that they do not meet or medically equal the severity of a listed
22 impairment. (*Id.* at 25-29.) At step four, the ALJ found that Moore has the RFC to
23 perform:

24 light work . . . with lifting and/or carrying 20 pounds
25 occasionally and 10 pounds frequently. [Moore] can
26 occasionally climb ramps and stairs, balance, stoop, crouch,
27 kneel, and crawl, but never climb ladders, ropes or scaffolds.
She can frequently handle and/or perform gross manipulation
bilaterally with the upper extremities.

28 (*Id.* at 29.) Based on this RFC, the ALJ found that Moore is capable of performing past

1 relevant work as a shipping checker, data entry clerk, and billing entry clerk, performed
2 at the sedentary and light exertional levels. (*Id.* at 33.) Accordingly, the ALJ found that
3 Moore is not disabled within the meaning of the SSA. (*Id.* at 34.)

4 **II. Standard of Appellate Review**

5 It is not the district court's role to review the ALJ's decision de novo or otherwise
6 determine whether the claimant is disabled. Rather, the court is limited to reviewing the
7 ALJ's decision to determine whether it "contains legal error or is not supported by
8 substantial evidence." *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial
9 evidence is more than a scintilla, less than a preponderance, and relevant evidence that a
10 reasonable person might accept as adequate to support a conclusion considering the
11 record as a whole. *Id.* As a general rule, "[w]here the evidence is susceptible to more
12 than one rational interpretation, one of which supports the ALJ's decision, the ALJ's
13 conclusion must be upheld." *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).
14 The court, however, "must consider the entire record as a whole and may not affirm
15 simply by isolating a specific quantum of supporting evidence." *Orn*, 495 F.3d at 630
16 (internal quotations and citation omitted). Nor may the court "affirm the ALJ on a
17 ground upon which he did not rely." *Id.*

18 **III. Analysis**

19 Moore argues that the ALJ erred by discounting her testimony concerning the
20 severity and effects of her symptoms, and by assigning little weight to the opinions of her
21 treating physicians, Drs. Kent D. Vosler and Ravi Bhalla. (Doc. 11.)

22 **A. Symptom Testimony**

23 Moore alleges disability due to degenerative disc disease, osteoarthritis,
24 fibromyalgia, right carpal tunnel syndrome, depression, and anxiety. (AR 51.) Moore
25 testified that her most serious health problems are caused by her back pain, which limits
26 her ability to walk, stand, sit, and lift. She also testified that she experiences pain in her
27 hips and legs, her arthritis causes her hands to swell, and she often is drowsy due to her
28 medications. (*Id.* at 57-67.) In a function report from August 2012, Moore complained

1 of lower back, hip, and thigh pain that made it difficult to sit, stand, or walk for long
2 periods of time, difficulty caring for personal hygiene, declining vision, drowsiness from
3 medications, and difficulty remembering and concentrating. (*Id.* at 264-71.)

4 In evaluating a claimant's symptom testimony, the ALJ is required to engage in a
5 two-step analysis: (1) determine whether the claimant presented objective medical
6 evidence of an impairment that could reasonably be expected to produce some degree of
7 the pain or other symptoms alleged; and, if so with no evidence of malingering, (2) reject
8 the claimant's testimony about the severity of the symptoms only by giving specific,
9 clear, and convincing reasons for the rejection. *Vasquez v. Astrue*, 572 F.3d 586, 591
10 (9th Cir. 2009). Here, the ALJ found that Moore's medically determinable impairments
11 reasonably could be expected to cause her alleged symptoms, but concluded that her
12 statements concerning the intensity, persistence, and limiting effects of the symptoms
13 were not entirely credible. (AR 31.) The ALJ offered three reasons for this conclusion.

14 First, the ALJ discounted Moore's testimony because he found it was not
15 supported by objective findings. (*Id.* at 30-31.) Although subjective pain testimony
16 cannot be rejected solely because it is not supported by objective medical evidence,
17 consistency with the objective medical evidence still is a relevant factor in determining
18 the severity of the claimant's pain. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.
19 2001). Relatedly, an ALJ may find a claimant's allegations of disabling symptoms less
20 reliable if the record shows that those symptoms improved with conservative treatment.
21 *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008). Substantial evidence
22 supports the ALJ's finding. For example, the ALJ noted that an updated MRI of Moore's
23 spine showed improvement from mild to moderate degenerative disc disease to only mild
24 degenerative disc disease. (AR 30.) Objective medical findings also confirmed that
25 Moore reported an 85 percent pain relief with cervical facet procedures and over 60
26 percent relief from a spinal cord stimulator. (*Id.* at 1044.)

27 Second, the ALJ found that Moore's testimony regarding her medications and
28 daily activities was inconsistent with previous statements in the record. An ALJ may

1 consider such inconsistencies when evaluating a claimant's testimony. Ordinarily, this
2 can be done in two ways—the claimant's activities either meet the threshold for
3 transferable work skills or contradict her other testimony. *See Orn*, 495 F.3d at 639.
4 Here, the ALJ noted inconsistent statements within the record concerning Moore's
5 symptoms and functioning. For example, as part of her disability application, Moore
6 reported significant help with activities of daily living, including household tasks,
7 driving, and shopping. (AR 267.) She also stated that showering was so difficult that she
8 would bathe as seldom as possible. (*Id.* at 264.) These statements conflicted with
9 Moore's statements to Dr. Peetom that she showered every day, completed household
10 tasks, shopped alone in grocery stores, and drove as necessary. (*Id.* at 492.) Similarly,
11 Moore stated on her disability application that her medications caused significant side
12 effects, but reported to her providers that her medications were working well without any
13 side effects. (*Id.* at 271, 858, 920.)

14 Moore acknowledges these inconsistencies, but argues that her statements only
15 appear inconsistent if interpreted literally. (Doc. 11 at 21.) The ALJ's interpretation of
16 Moore's testimony, however, is reasonable and supported by substantial evidence. It is
17 not this Court's role to second-guess it.

18 Finally, the ALJ considered the fact that Moore received unemployment insurance
19 benefits while she sought disability benefits. (AR 30.) In 2011, Moore was discharged
20 from her job as a billing clerk because she was unable to meet the required quota. (*Id.* at
21 54.) She then filed for unemployment, certifying each week that she was ready and able
22 to work. (*Id.* at 55.) The ALJ found that this was "grossly inconsistent with the
23 allegations made in connection with this application and appeal . . . and suggests a
24 financial incentive for obtaining disability benefits, rather than one based on her
25 impairments." (*Id.* at 30-31.) Although applying for unemployment benefits might,
26 alone, be an insufficient basis to discount a claimant's testimony, the ALJ reasonably
27 concluded that this inconsistency, combined with other conflicting testimony in the
28 record weakened the reliability of Moore's statements. The Court finds no error.

1 **B. Medical Opinion Evidence**

2 Dr. Vosler, Moore's treating pain management doctor, submitted several opinions
3 regarding Moore's functional capabilities. (*Id.* at 664-66, 668-70, 881-86.) Dr. Vosler
4 opined that Moore could frequently lift less than 10 pounds, occasionally lift 10 pounds,
5 and could stand, walk or sit for a total of 10 to 15 minutes a day. (*Id.* at 664.) He
6 reported that Moore would need to alternate between sitting and standing every 15 to 20
7 minutes and that she could never climb, balance, stoop, kneel, crouch, or crawl. (*Id.* at
8 665.) Dr. Vosler indicated that Moore has moderately severe pain and fatigue that would
9 frequently interfere with her attention and concentration. (*Id.* at 669-70.) He opined that
10 this pain and fatigue would cause Moore to take unscheduled breaks every 15 to 20
11 minutes, making her an unreliable employee. (*Id.* at 665, 881.) Likewise, Dr. Bhalla,
12 Moore's treating rheumatologist, opined that Moore has moderate to severe pain and
13 fatigue precipitated by changing weather, humidity, and stress. (*Id.* at 1152-53.) His
14 opinion noted that Moore's constant pain would interfere with her attention and
15 concentration, and that she would be unable to sustain work on a regular and continuing
16 basis. (*Id.*) The ALJ assigned little weight to both of these opinions. (*Id.* at 31.)

17 A treating physician's opinion generally is entitled to deference. *See Lester v*
18 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). More weight typically should be given to the
19 opinion of a treating physician than to the opinions of non-treating physicians because
20 treating physicians are "employed to cure and [have] a greater opportunity to observe and
21 know the patient as an individual." *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir.
22 1987). Thus, where a treating physician's opinion is not contradicted by another
23 physician it may be rejected only for "clear and convincing" reasons, and where it is
24 contradicted, it still may not be rejected without "specific and legitimate reasons"
25 supported by substantial evidence in the record. *Lester*, 81 F.3d at 830. "An ALJ can
26 satisfy the substantial evidence requirement by setting out a detailed and thorough
27 summary of the facts and conflicting clinical evidence, stating his interpretation thereof,
28 and making findings." *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (internal

1 quotation and citation omitted).

2 Although Moore argues for application of the clear and convincing reasons
3 standard while the Commissioner argues for application of the specific and legitimate
4 reasons standard, both parties contend that the result is the same under either test. (Doc.
5 11 at 12; Doc. 12 at 5; Doc. 15 at 3-4.) The parties' arguments demonstrate a curious
6 aspect of the standards in the Ninth Circuit to weigh competing physician opinions in
7 Social Security disability appeals.

8 An ALJ's rationale for discounting a treating physician's opinion is comprised of
9 two parts: (1) the stated reasons for discounting a treating physician's opinion and (2) the
10 evidence supporting those reasons. Error can occur in both. For example, suppose an
11 ALJ rejects a treating physician's opinion because the physician has a hyphenated last
12 name, and the ALJ irrationally believes individuals with hyphenated last names are not
13 credible. The record might contain substantial or even undisputed evidence that the
14 treating physician's last name is hyphenated, but a reviewing court nonetheless would
15 find error because the ALJ's stated reason is not valid. Similarly, suppose an ALJ
16 discounts a treating physician's opinion because he determines that the opinion is
17 inconsistent with the physician's own treatment notes, but a review of the record reveals
18 no such inconsistencies. Though the ALJ's articulated reason is a legitimate one, a
19 reviewing court would find error because the reason lacks substantial supporting
20 evidence.

21 Outside the Social Security disability context, "clear and convincing" typically is
22 used to qualify the quantum of evidence needed to support a claim. Application of the
23 clear and convincing evidence standard can have a meaningful impact because more or
24 better evidence is needed to satisfy this standard than to prove a claim by a mere
25 preponderance of the evidence. *See Sophanthavong v. Palmateer*, 378 F.3d 859, 866 (9th
26 Cir. 2004) ("Clear and convincing evidence requires greater proof than preponderance of
27 the evidence. To meet this higher standard, a party must present sufficient evidence to
28 produce in the ultimate factfinder an abiding conviction that the truth of its factual

1 contentions are [sic] highly probable.” (internal quotation and citation omitted)).

2 In the Social Security disability context, however, phrases like “clear and
3 convincing” and “specific and legitimate” do not qualify the quantum of evidence needed
4 to support an ALJ’s decision. To the contrary, an ALJ’s decision in all circumstances
5 must be supported by the same quantum of evidence: substantial evidence. *Compare*
6 *Lester*, 81 F.3d at 830 (“Even if the treating doctor’s opinion is contradicted by another
7 doctor, the Commissioner may not reject this opinion without providing ‘specific and
8 legitimate reasons’ *supported by substantial evidence in the record* for doing so.”
9 (emphasis added)), *with Snoeck v. Colvin*, 584 Fed. App’x 755, 755-56 (9th Cir. 2014)
10 (“To reject the uncontroverted opinion of a treating physician, . . . the ALJ must provide
11 clear and convincing reasons *supported by substantial evidence in the record*.”
12 (emphasis added)). Instead, these phrases qualify the nature of the reasons an ALJ must
13 articulate.

14 Yet this Court has not been presented with a case in which application of the clear
15 and convincing reasons standard instead of the specific and legitimate reasons standard
16 has been dispositive. That is, the Court has yet to encounter a case in which an ALJ’s
17 stated reasons for rejecting a treating physician’s opinion, though supported by
18 substantial evidence, were specific but not clear, or were legitimate but not convincing.
19 Rather, like this case, parties typically argue that the ALJ’s rationale is or is not sufficient
20 under both standards, either because the stated reasons simply are not valid or because
21 the reasons lack substantial evidentiary support. The Court has difficulty hypothesizing
22 examples of reasons that would be specific but not clear, or legitimate but not convincing.
23 Nor is it apparent why a reviewing court in any circumstance should be satisfied with
24 reasons that are generalized, vague, or unconvincing. Notably, some Ninth Circuit
25 decisions blend the verbiage, suggesting that the line between specific and clear or
26 between legitimate and convincing is more abstract than practical. *See, e.g., Moore v.*
27 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002) (“Where a claimant’s
28 testimony is medically supported, the ALJ can reject the claimant’s testimony about the

1 severity of [his] symptoms only by offering *specific, clear and convincing reasons* for
2 doing so. The clear and convincing standard is the most demanding required in Social
3 Security cases. It is the same as that required to reject the uncontradicted opinion of a
4 treating physician.” (emphasis added; internal quotations and citations omitted)).

5 In any event, the Court’s observations are of no moment because the parties each
6 believe they prevail under either approach. Applying the Ninth Circuit’s analytical
7 framework, the Court will assess whether the ALJ’s reasons for discounting the opinions
8 of Moore’s treating physicians are specific and legitimate because those opinions are
9 contradicted by state agency reviewers Drs. James Williams and Mikhail Bargan, as well
10 as consultative examiner Dr. Brian Briggs. (AR 87, 121-24, 496-501.)

11 The ALJ offered several reasons for assigning little weight to Dr. Vosler’s
12 opinion, none of which are adequate. First, the ALJ stated that he assigned less weight to
13 Dr. Vosler’s opinion because he was detailing “limitations outside of his area of
14 expertise.” (*Id.* at 31.) A treating doctor’s opinion, however, is accorded deference
15 because of the physician’s relationship with the patient, aside from any special
16 qualifications. *See Benton ex rel. Benton v. Barnhart*, 331 F.3d 1030, 1036 n.1 (9th Cir.
17 2003). Moreover, the ALJ failed to explain how or why Dr. Vosler, who is Moore’s
18 treating pain management doctor, is unqualified to opine on the limiting effects of
19 Moore’s conditions and the resulting pain.

20 The ALJ also discounted Dr. Vosler’s opinion because he believed that “[s]uch a
21 complete limitation in postural activities would render the claimant incapacitated;
22 however, the claimant stooped, balanced, and sat for longer than 15 minutes during the
23 course of the hearing without noticeable difficulty.” (AR 31.) Though inconsistency
24 with a claimant’s regular activities could be a legitimate reason for discounting a
25 physician’s opinion, the fact that Moore sat for longer than 15 minutes during a single
26 hearing is not substantial evidence supporting the ALJ’s conclusion.

27 Finally, the ALJ reasoned that Dr. Vosler’s opinions must be based on Moore’s
28 subjective complaints (which the ALJ did not find credible) rather than objective medical

1 findings because the opinions are inconsistent with the medical record. If properly
2 supported, these reasons could be specific and legitimate. *See Bayliss v. Barnhart*, 427
3 F.3d 1211, 1216 (9th Cir. 2005); *Tommasetti*, 533 F.3d at 1041. But the ALJ based his
4 conclusion on a mere two pages of medical records: an August 29, 2014 record that
5 noted Moore experienced 85 percent pain relief after cervical facet procedures and 60
6 percent pain relief from a spinal cord stimulator, and a September 19, 2014 treatment
7 record noting that a physical exam of Moore showed normal musculature, range, of
8 motion, gait, balance, and coordination. (AR 31, 1104, 1159.) Moreover, the records
9 relied upon by the ALJ do not necessarily undermine Dr. Vosler's opinions to the extent
10 they are based upon the effects of Moore's fibromyalgia as opposed to her back
11 problems. *See Preston v. Sec'y of Health & Human Servs.*, 854 F.2d 815, 817-18 (6th
12 Cir. 1988) (noting that fibromyalgia patients often manifest normal muscle strength,
13 neurological reactions, and have a full range of motion). "In evaluating whether a
14 claimant's residual functional capacity renders them disabled because of fibromyalgia,
15 the medical evidence must be construed in light of fibromyalgia's unique symptoms and
16 diagnostic methods." *Revels v. Berryhill*, 874 F.3d 648, 662 (9th Cir. 2017).

17 The ALJ assigned little weight to Dr. Bhalla's opinion for two reasons. First, the
18 ALJ found that Dr. Bhalla's opinion was inconsistent with his own examination findings.
19 The ALJ based this conclusion on the same September 19, 2014 treatment record noting
20 that a physical exam of Moore showed normal musculature, range, of motion, gait,
21 balance, and coordination. This single record is not itself sufficient to support the ALJ's
22 conclusion, nor does the ALJ's rationale adequately account for the unique symptoms
23 and diagnostic methods of fibromyalgia. Second, the ALJ stated that Dr. Bhalla's
24 findings were inconsistent with Moore's activities of daily living. But the ALJ failed to
25 provide any information about the exertional requirements, frequency, or duration of
26 Moore's daily activities that were at odds with her assessed limitations. Accordingly, the
27 ALJ's stated rationale is not sufficiently specific or supported. For these reasons, the
28 Court finds that the ALJ erred in discounting the opinions of Moore's treatment

1 providers.

2 **C. Remedy**

3 Having concluded that the ALJ erred in discounting the opinions of Moore's
4 treating physicians, the Court must determine the appropriate remedy. The credit-as-true
5 rule allows the Court to make a finding of disability when an ALJ fails to provide legally
6 sufficient reasons for rejecting challenged evidence, there are no outstanding issues that
7 must be resolved before a determination of disability can be made, and it is clear from the
8 record 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 Ninth
10 Circuit recently cautioned, however, that "[a]n automatic award of benefits in a disability
11 case is a rare and prophylactic exception to the well-established ordinary remand rule."
12 *Leon v. Barryhill*, 874 F.3d 1130, 1132 (9th Cir. 2017). The Court need not apply the
13 credit-as-true rule where the record is "uncertain and ambiguous." *Id.* at 1133.

14 The Court finds that a remand for further proceedings is appropriate because the
15 record as a whole is uncertain and ambiguous. As previously noted, the ALJ reasonably
16 discounted Moore's symptom testimony due to inconsistencies in the record. Further, it
17 is not clear that the ALJ appropriately considered the unique symptoms and diagnostic
18 techniques for fibromyalgia when assessing whether the opinions of Moore's treatment
19 providers are consistent with the objective medical evidence. Nor is it clear how
20 predominantly Moore's fibromyalgia diagnosis influenced the treating physicians'
21 opinions, as opposed to other impairments. Notably, Moore testified that her most
22 serious health problems are caused by her back pain. Accordingly,

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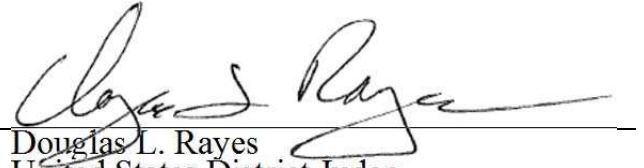
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1 **IT IS ORDERD** that the final agency decision is **REVERSED** and this matter
2 **REMANDED** for further proceedings.

3 Dated this 14th day of December, 2017.

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9 Douglas L. Rayes
10 United States District Judge
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