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

8 Diane Carol Roberts,  
9

10 Plaintiff,

11 v.

12 Acting Commissioner of the Social Security  
13 Administration,

14 Defendant.  
15  
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No. CV-17-00195-PHX-GMS

**ORDER**

17  
18 Pending before the Court is Diane Carol Roberts' ("Plaintiff") appeal of the Social  
19 Security Administration's ("Social Security") denial of her application for supplemental  
20 security income. The Court has jurisdiction to decide Plaintiff's appeal pursuant to 42  
21 U.S.C. §§ 405(g), 1383(c). Under 42 U.S.C. § 405(g), the Court has the power to enter,  
22 based upon the pleadings and transcript of the record, a judgment affirming, modifying,  
23 or reversing the decision of the Commissioner of Social Security, with or without  
24 remanding the case for a rehearing. Both parties have consented to the exercise of U.S.  
25 Magistrate Judge jurisdiction. (Doc. 11).

26 After reviewing the Administrative Record ("A.R.") and the parties' briefing  
27 (Docs. 18, 19, 21), the Court finds that the Administrative Law Judge's ("ALJ") decision  
28 contains harmful legal error. For the reasons explained in Section II, the decision is

1 reversed and the case is remanded to the Commissioner of Social Security for an  
2 immediate award of benefits.

### 3 I. LEGAL STANDARDS

#### 4 A. Disability Analysis: Five-Step Evaluation

5 The Social Security Act (the “Act”) provides for Supplemental Security Income to  
6 certain individuals who are aged 65 or older, blind, or disabled and have limited income.  
7 42 U.S.C. § 1382. To be eligible for benefits based on an alleged disability, the  
8 claimant must show that he or she suffers from a medically determinable physical or  
9 mental impairment that prohibits him or her from engaging in any substantial gainful  
10 activity. 42 U.S.C. § 1382c(A)(3)(A). The claimant must also show that the impairment  
11 is expected to cause death or last for a continuous period of at least 12 months. *Id.*

12 To decide if a claimant is entitled to Social Security benefits, an ALJ conducts an  
13 analysis consisting of five questions, which are considered in sequential steps. 20 C.F.R.  
14 § 416.920(a). The claimant has the burden of proof regarding the first four steps:<sup>1</sup>

15 **Step One:** Is the claimant engaged in “substantial gainful  
16 activity”? If so, the analysis ends and disability benefits are  
17 denied. Otherwise, the ALJ proceeds to step two.

18 **Step Two:** Does the claimant have a medically severe  
19 impairment or combination of impairments? A severe  
20 impairment is one which significantly limits the claimant’s  
21 physical or mental ability to do basic work activities. 20  
22 C.F.R. § 416.920(c). If the claimant does not have a severe  
23 impairment or combination of impairments, disability benefits  
24 are denied at this step. Otherwise, the ALJ proceeds to step  
25 three.

26 **Step Three:** Is the impairment equivalent to one of a number  
27 of listed impairments that the Commissioner acknowledges  
28 are so severe as to preclude substantial gainful activity? 20  
C.F.R. § 416.920(d). If the impairment meets or equals one

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<sup>1</sup> *Parra v. Astrue*, 481 F.3d 742,746 (9th Cir. 2007).

1 of the listed impairments, the claimant is conclusively  
2 presumed to be disabled. If the impairment is not one that is  
3 presumed to be disabling, the ALJ proceeds to the fourth step  
4 of the analysis.

5 **Step Four:** Does the impairment prevent the claimant from  
6 performing work which the claimant performed in the past?  
7 If not, the claimant is “not disabled” and disability benefits  
8 are denied without continuing the analysis. 20 C.F.R. §  
9 416.920(f). Otherwise, the ALJ proceeds to the last step.

10 If the analysis proceeds to the final question, the burden of proof shifts to the  
11 Commissioner:<sup>2</sup>

12 **Step Five:** Can the claimant perform other work in the  
13 national economy in light of his or her age, education, and  
14 work experience? The claimant is entitled to disability  
15 benefits only if he or she is unable to perform other work. 20  
16 C.F.R. § 416.920(g). Social Security is responsible for  
17 providing evidence that demonstrates that other work exists in  
18 significant numbers in the national economy that the claimant  
19 can do, given the claimant’s residual functional capacity, age,  
20 education, and work experience. *Id.*

## 21 **B. Standard of Review Applicable to ALJ’s Determination**

22 The Court must affirm an ALJ’s decision if it is supported by substantial evidence  
23 and is based on correct legal standards. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir.  
24 2012); *Marcia v. Sullivan*, 900 F.2d 172, 174 (9th Cir. 1990). “Substantial evidence” is  
25 less than a preponderance, but more than a “mere scintilla.” *Richardson v. Perales*, 402  
26 U.S. 389, 401 (1971) (quoting *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938)).  
27 It is “such relevant evidence as a reasonable mind might accept as adequate to support a  
28 conclusion.” *Id.*

29 In determining whether substantial evidence supports the ALJ’s decision, the  
30 Court considers the record as a whole, weighing both the evidence that supports and  
31 detracts from the ALJ’s conclusions. *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir.

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<sup>2</sup> *Parra*, 481 F.3d at 746.

1 1998); *Tylitzki v. Shalala*, 999 F.2d 1411, 1413 (9th Cir. 1993). If there is sufficient  
2 evidence to support the ALJ's determination, the Court cannot substitute its own  
3 determination. See *Morgan v. Comm'r of the Social Sec. Admin.*, 169 F.3d 595, 599 (9th  
4 Cir. 1999) ("Where the evidence is susceptible to more than one rational interpretation, it  
5 is the ALJ's conclusion that must be upheld."); *Magallanes v. Bowen*, 881 F.2d 747, 750  
6 (9th Cir. 1989). The ALJ, not the Court, is responsible for resolving conflicts and  
7 ambiguities in the evidence and determining credibility. *Magallanes*, 881 F.2d at 750;  
8 see also *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

9 Finally, the Court considers the harmless error doctrine when reviewing an ALJ's  
10 decision. An ALJ's decision need not be remanded or reversed if it is clear from the  
11 record that the error is "inconsequential to the ultimate nondisability determination."  
12 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (citations omitted); *Molina*,  
13 674 F.3d at 1115 (an error is harmless so long as there remains substantial evidence  
14 supporting the ALJ's decision and the error "does not negate the validity of the ALJ's  
15 ultimate conclusion") (citations omitted).

## 16 **II. PLAINTIFF'S APPEAL**

### 17 **A. Procedural Background**

18 Plaintiff, who was born in 1962, has no past relevant work. (A.R. 35, 84). In  
19 October 2014, Plaintiff filed an application for supplemental security income. (A.R. 188-  
20 95). Plaintiff's application alleged that on March 31, 2001, she became unable to work  
21 due to major depression and anxiety disorder. (A.R. 84). Plaintiff subsequently amended  
22 the alleged disability onset date to October 14, 2014. (A.R. 49). Social Security denied  
23 the application on March 12, 2015. (A.R. 117-20). In September 2015, upon Plaintiff's  
24 request for reconsideration, Social Security affirmed the denial of benefits. (A.R. 125-  
25 31). Plaintiff sought further review by an ALJ, who conducted a hearing in July 2016.  
26 (A.R. 45-83, 133-35).

27 In a September 19, 2016 decision, the ALJ found that Plaintiff is not disabled  
28 within the meaning of the Social Security Act. (A.R. 24-37). The Appeals Council

1 denied Plaintiff's request for review, making the ALJ's decision the final decision of the  
2 Social Security Commissioner. (A.R. 1-6, 14-20). On January 20, 2017, Plaintiff filed a  
3 Complaint (Doc. 1) requesting judicial review and reversal of the ALJ's decision.

4 **B. The ALJ's Application of the Five-Step Disability Analysis**

5 **1. Step One: Engagement in "Substantial Gainful Activity"**

6 The ALJ determined that Plaintiff has not engaged in substantial gainful activity  
7 since October 14, 2014, the alleged disability onset date. (A.R. 26). Neither party  
8 disputes this determination.

9 **2. Step Two: Presence of Medically Severe Impairment/Combination**  
10 **of Impairments**

11 The ALJ found that Plaintiff has the following severe impairments: (i)  
12 osteoarthritis; (ii) anxiety disorder; (iii) "affective disorder (a.k.a depression)";  
13 and (iv) personality disorder. (A.R. 26). This determination is undisputed.

14 **3. Step Three: Presence of Listed Impairment(s)**

15 The ALJ determined that Plaintiff does not have an impairment or combination of  
16 impairments that meets or medically equals an impairment listed in 20 C.F.R. Part 404,  
17 Subpart P, Appendix 1 of the Social Security regulations. (A.R. 27-29). Neither party  
18 challenges the ALJ's determination at this step.

19 **4. Steps Four and Five: Capacity to Perform Work**

20 The ALJ found that Plaintiff retained the residual functional capacity ("RFC") to  
21 perform light work as defined in 20 C.F.R. § 416.967(b), except that  
22 there are no limits on amount of time sitting and the claimant  
23 could stand for 6 hours, alternating to sitting for 10 minutes  
24 after every 1 hour of standing. Claimant could walk for 6  
25 hours, alternating to sitting for 10 minutes after every 1 hour  
26 of walking. Claimant could frequently reach overhead,  
27 bilaterally and could frequently handle, bilaterally. Claimant  
28 could frequently climb ramps and stairs but could  
occasionally climb ladders, ropes or scaffolds. Claimant  
should never be at unprotected heights. Claimant could  
maintain attention, pace, and persistence to carry out at least  
simple instructions. Claimant could have occasional contact

1 with coworkers and the public. Claimant could make simple  
2 work-related decisions.

3 (A.R. 29). As Plaintiff has no past relevant work, the ALJ proceeded to Step Five and  
4 determined whether Plaintiff could perform any work existing in significant numbers in  
5 the national economy. (A.R. 35).

6 Based on the assessed RFC and the testimony of the Vocational Expert (“VE”),  
7 the ALJ concluded that Plaintiff is capable of performing the requirements of  
8 representative occupations such as cashier, document preparer, and addressing clerk.  
9 (A.R. 36). Plaintiff disputes this determination.

10 **C. The ALJ Failed to Provide Valid Reasons for Discounting the Opinions of**  
11 **Treating Psychiatrist Diane Papke, M.D.**

12 In weighing medical source opinions in Social Security cases, there are three  
13 categories of physicians: (i) treating physicians, who actually treat the claimant; (2)  
14 examining physicians, who examine but do not treat the claimant; and (3) non-examining  
15 physicians, who neither treat nor examine the claimant. *Lester*, 81 F.3d at 830. An ALJ  
16 must provide clear and convincing reasons that are supported by substantial evidence for  
17 rejecting the uncontradicted opinion of a treating or examining doctor. *Id.* at 830-31;  
18 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). An ALJ cannot reject a  
19 treating or examining physician’s opinion in favor of another physician’s opinion without  
20 first providing specific and legitimate reasons that are supported by substantial evidence.  
21 *Bayliss*, 427 F.3d at 1216; 20 C.F.R. § 404.1527(c)(4) (an ALJ must consider whether an  
22 opinion is consistent with the record as a whole); *see also Batson*, 359 F.3d at 1195;  
23 *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tommasetti*, 533 F.3d at 1041  
24 (finding it not improper for an ALJ to reject a treating physician’s opinion that is  
25 inconsistent with the record).

26 On April 20, 2015, Plaintiff’s treating psychiatrist, Diane Papke, M.D., completed  
27 a “Medical Assessment of Claimant’s Ability to Perform Work Related Activities  
28 (Mental)” (the “Medical Assessment”). (A.R. 526-27). Dr. Papke opined that Plaintiff

1 has “moderately severe”<sup>3</sup> limitations with respect to Plaintiff’s ability to relate to other  
2 people, complete daily activities, and understand, carry out, and remember instructions.  
3 (Bates No. 526). Dr. Papke also opined that Plaintiff has (i) “severe” deterioration in  
4 personal habits and constriction of interests; (ii) “moderate” limitations in responding  
5 appropriately to supervision and co-workers and in performing simple tasks; (iii)  
6 “severe” limitations in responding to customary work pressures; and (iv) “moderately  
7 severe” limitations resulting from the side effects of Plaintiff’s medications. (A.R. 526-  
8 27). In addition, Dr. Papke stated that Plaintiff’s psychiatric symptoms would severely  
9 affect the sustainability of work pace. (A.R. 527). Dr. Papke’s opinions may not be  
10 discounted without specific and legitimate reasons supported by substantial evidence in  
11 the record.<sup>4</sup>

12 The ALJ gave Dr. Papke’s Medical Assessment “partial weight.” (A.R. 32). The  
13 ALJ first explained that Dr. Papke’s opinion

14 is internally inconsistent, in that her treating notes do not  
15 indicate the level of severity she opined. For example, Dr.  
16 Papke identified side effects to medication that included  
17 sedation, hypertension, sweating and dry mouth. However,  
18 Dr. Papke’s medical records do not support his assertion.  
Specifically, there is little to no evidence of any side effects.  
(4F; 10F; 14F).

19 (*Id.*). Although Dr. Papke’s treatment notes indicate that Dr. Papke explained the side  
20 effects of Plaintiff’s medications, Dr. Papke’s notes expressly state that Plaintiff did not  
21 report any side effects. (*See, e.g.*, A.R. 377-78, 519-20, 522-23, 560-61). The Court  
22 finds that substantial evidence supports the ALJ’s rejection of Dr. Papke’s opinion that  
23 Plaintiff’s medications cause side effects that impose “moderately severe” limitations.

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26 <sup>3</sup> The form Dr. Papke completed defined “moderately severe” as “[o]ff task 11-15”  
of an 8-hour work day” and “severe” as “[o]ff task greater than 21% of an 8-hour work  
27 day.” (A.R. 527)

28 <sup>4</sup> The specific and legitimate standard, not the clear and convincing standard,  
applies because Dr. Papke’s opinions are contradicted by other acceptable medical  
sources (A.R. 91-93, 111-12, 720-26).

1 However, as explained below, the Court finds that the ALJ did not provide valid reasons  
2 for discounting Dr. Papke’s remaining opinions.

3 After discussing Dr. Papke’s opinion regarding medication side effects, the ALJ  
4 stated the following: “Additionally, in April 2015, claimant reported that she was feeling  
5 a lot better with her medication increase, and did not feel her medication needed to be  
6 changed. She stated she was sleeping better, her mood was ‘pretty good’, and her anxiety  
7 was not too bad.” (A.R. 32). The Court finds that these statements mischaracterize the  
8 record. The April 2015 treatment note reflects that Dr. Papke conducted a mental status  
9 examination and found that Plaintiff’s “[m]ood is depressed, dysphoric, dysthmic[.]”  
10 (A.R. 548). Dr. Papke stated that Plaintiff was “displaying low energy” and although  
11 Plaintiff’s affect was “brighter,” it was “blunted.” (*Id.*). In addition, Dr. Papke noted  
12 improvement in Plaintiff’s thought content, but found that it was “still problematic.”  
13 (*Id.*). The Court does not find that the April 2015 treatment note contradicts the opinions  
14 expressed in Dr. Papke’s Medical Assessment. Moreover, when “a person who suffers  
15 from severe panic attacks, anxiety, and depression” improves, that “does not mean that  
16 the person’s impairments no longer seriously affect her ability to function in a  
17 workplace.” *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001); *see also Lester*  
18 *v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995) (“Occasional symptom-free periods—and  
19 even—the sporadic ability to work—are not inconsistent with disability.”). “Cycles of  
20 improvement and debilitating symptoms are a common occurrence [in mental illness],  
21 and it is error for an ALJ to pick out a few isolated instances of improvement over a  
22 period of months or years and to treat them as a basis for concluding a claimant is  
23 capable of working.” *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014); *see also*  
24 *Attmore v. Colvin*, 827 F.3d 872, 877 (9th Cir. 2016) (ALJ may not focus on isolated  
25 periods of improvement without examining broader context of claimant’s condition).

26 Next, the ALJ stated that “[i]t appears Dr. Papke based her opinion on claimant’s  
27 subjective complaints rather than the objective clinical findings, thus, is a sympathetic  
28 opinion.” (A.R. 32). The Court does not find that this is a specific and legitimate reason



1 supported by substantial evidence for discounting Dr. Papke’s opinions. First, Dr.  
2 Papke’s treatment records do not indicate that Dr. Papke was acting as Plaintiff’s agent  
3 or was so sympathetic to Plaintiff as to impair her professional judgment. *See Haulot v.*  
4 *Astrue*, 290 F. App’x 53, 54 (9th Cir. 2008) (holding that an ALJ’s statement that  
5 treating doctor was “sympathetic” to a claimant did not constitute substantial evidence  
6 for rejecting the doctor’s diagnosis where the ALJ did not point to evidence that the  
7 doctor “was so sympathetic to [the claimant] as to impair his sound professional opinion,  
8 or was acting as [the claimant’s] agent to aid him in collecting disability benefits”);  
9 *Lester v. Chater*, 81 F.3d 821, 832 (9th Cir. 1995) (“The purpose for which medical  
10 reports are obtained does not provide a legitimate basis for rejecting them. An  
11 examining doctor’s findings are entitled to no less weight when the examination is  
12 procured by the claimant than when it is obtained by the Commissioner.”); *Ratto v.*  
13 *Secretary*, 839 F.Supp. 1415, 1426 (D. Or. 1993) (“The Secretary may not assume that  
14 doctors routinely lie in order to help their patients collect disability benefits.”).

15 Second, Dr. Papke’s treatment notes indicate that she conducted mental status  
16 examinations at each appointment. (*See, e.g.,* A.R. 377, 519, 522, 560). Dr. Papke  
17 indicated on the Medical Assessment that her opinions regarding Plaintiff’s limitations  
18 result from documented objective, clinical, or diagnostic findings. (A.R. 527). There is  
19 no evidence in the record suggesting that Dr. Papke relied on  
20 Plaintiff’s subjective complaints, rather than on Dr. Papke’s own mental status  
21 examinations, in completing the Medical Assessment. *See Ryan v. Commissioner*  
22 *of Social Security*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008) (reversing an  
23 ALJ’s decision and ordering payment of benefits where the ALJ improperly rejected the  
24 opinion of the examining psychiatrist whose opinions were based on the psychiatrist’s  
25 mental status examination). In addition, the ALJ did not rely “explicitly upon  
26 substantial objective evidence of [Plaintiff’s] lack of credibility” when explaining why  
27 Dr. Papke’s opinions were discounted. *Calkins v. Astrue*, 384 F. App’x 613, 615 (9th  
28 Cir. 2010) (concluding that “an ALJ must be permitted to discount an opinion based

1 principally upon a claimant’s self-reporting if the record contains objective evidence that  
2 the self-reporting is not credible”).<sup>5</sup>

3 Finally, the ALJ stated: “Additionally, Dr. Papke opined on a matter left to the  
4 Commissioner of Social Security when she opined that claimant was unable to complete  
5 a normal 8 hour workday.” (A.R. 32). The ultimate disability determination is an issue  
6 reserved to the Commissioner. 20 C.F.R. § 404.1527(d). Dr. Papke, however, did not  
7 opine as to whether Plaintiff met the statutory definition of disability. Dr. Papke  
8 expressed medical opinions in the Medical Assessment as to the severity of Plaintiff’s  
9 limitations. *See Boardman v. Astrue*, 286 F. App’x 397, 399 (9th Cir. 2008) (concluding  
10 that an ALJ erroneously found that a physician opined on the ultimate disability  
11 determination, explaining that the physician “clearly expressed a medical opinion” when  
12 he described the claimant’s “symptoms, including ‘moderate to severe’ chronic back  
13 pain”); 20 C.F.R. § 404.1527(a)(1) (a medical opinion “‘reflect[s] judgments about the  
14 nature and severity of [a claimant’s] impairment(s), including [a claimant’s] symptoms,  
15 diagnosis and prognosis, what [a claimant] can still do despite impairment(s), and [a  
16 claimant’s] physical or mental restrictions”). The Court does not find that the ALJ’s final  
17 reason for discounting Dr. Papke’s opinion is supported by substantial evidence.

18 Based on the foregoing, the Court finds that the ALJ properly discounted Dr.  
19 Papke’s opinion regarding medication side effects, but improperly discounted Dr.  
20 Papke’s remaining opinions. This error is harmful and alone requires remand. The Court  
21 therefore does not address Plaintiff’s arguments regarding the other alleged errors in the  
22 ALJ’s decision.

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24 <sup>5</sup> Defendant cites *Calkins* to support Defendant’s argument that the ALJ properly  
25 discounted Dr. Papke’s opinions on the basis that they were based on Plaintiff’s  
26 subjective complaints. (Doc. 19 at 9). Because *Calkins* is an unpublished decision, it is  
27 only persuasive authority, not binding precedent. Ninth Cir. Rule 36-3. Further, the  
28 Ninth Circuit panel in *Calkins* noted that the case was distinguishable from *Ryan*. Unlike  
the ALJ’s decision in *Ryan*, the ALJ’s decision in *Calkins* “relied explicitly upon  
substantial objective evidence of Calkin’s lack of credibility as a basis for rejecting” a  
treating physician’s opinions. *Calkins*, 384 F. App’x at 615. The panel explained that  
“*Ryan* did not address the extent to which an ALJ may consider such evidence when  
determining what weight to accord a medical opinion.” *Id.*

1                   **D. The Case Will Be Remanded for an Award of Benefits**

2                   Ninth Circuit jurisprudence “requires remand for further proceedings in all but the  
3 rarest cases.” *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 n.5 (9th Cir.  
4 2014). The Ninth Circuit, however, has adopted a test to determine when a case should  
5 be remanded for payment of benefits in cases where an ALJ has improperly rejected  
6 claimant testimony or medical opinion evidence. *Id.* at 1100-01; *Garrison*, 759 F.3d at  
7 1020. This test is commonly referred to as the “credit-as-true” rule, which consists of the  
8 following three factors:

- 9                   1. Has the ALJ failed to provide legally sufficient reasons for  
10                   rejecting evidence, whether claimant testimony or medical  
11                   opinion? *Treichler*, 775 F.3d at 1100-01.
- 12                   2. Has the record been fully developed, are there outstanding  
13                   issues that must be resolved before a disability  
14                   determination can be made, or would further administrative  
15                   proceedings be useful? *Id.* at 1101. To clarify this factor,  
16                   the Ninth Circuit has stated that “[w]here there is  
17                   conflicting evidence, and not all essential factual issues  
18                   have been resolved, a remand for an award of benefits is  
19                   inappropriate.” *Id.*
- 20                   3. If the improperly discredited evidence were credited as true,  
21                   would the ALJ be required to find the claimant disabled on  
22                   remand? *Id.*; *Garrison*, 759 F.3d at 1020.

23                   Where a court has found that a claimant has failed to satisfy one of the factors of  
24                   the credit-as-true rule, the court does not need to address the remaining factors.  
25                   *Treichler*, 775 F.3d at 1107 (declining to address final step of the rule after determining  
26                   that the claimant has failed to satisfy the second step). Moreover, even if all three factors  
27                   are met, a court retains the discretion to remand a case for additional evidence or to  
28                   award benefits. *Id.* at 1101-02. A court may remand for further proceedings “when the  
record as a whole creates serious doubt as to whether the claimant is, in fact, disabled  
within the meaning of the Social Security Act.” *Garrison*, 759 F.3d at 1021. In  
*Treichler*, the Ninth Circuit noted that “[w]here an ALJ makes a legal error, but the

1 record is uncertain and ambiguous, the proper approach is to remand the case to the  
2 agency.” 775 F.3d at 1105.

3 After examining the record, the Court finds no outstanding issues of fact to be  
4 resolved through further proceedings. Dr. Papke opined that Plaintiff would be off task  
5 greater than 21% of an 8-hour work day. (A.R. 527). At the administrative hearing, the  
6 VE testified that Plaintiff could be off task “[o]nly about 10 percent” of a workday in  
7 order to maintain employment. (A.R. 80). The Court finds that if Dr. Papke’s opinions  
8 were credited-as-true, the ALJ would be required to find that Plaintiff is disabled. The  
9 Court does not find any material evidence in the record that creates serious doubt that  
10 Plaintiff is in fact disabled. Therefore, based on the record, the Court finds it  
11 inappropriate to remand the case for further proceedings. *See Benecke v. Barnhart*, 379  
12 F.3d 587, 595 (9th Cir. 2004) (“Allowing the Commissioner to decide the issue again  
13 would create an unfair ‘heads we win; tails, let’s play again’ system of disability benefits  
14 adjudication.”); *Moisa v. Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004) (“The  
15 Commissioner, having lost this appeal, should not have another opportunity to show that  
16 Moisa is not credible any more than Moisa, had he lost, should have an opportunity for  
17 remand and further proceedings to establish his credibility.”) (citation omitted). The  
18 Court will remand the case for an immediate award of benefits effective October 14,  
19 2014 (the disability onset date).

### 20 III. CONCLUSION

21 Based on the foregoing,

22 **IT IS ORDERED** reversing the decision of the Commissioner of Social Security  
23 and remanding this case to the Commissioner for an immediate award of benefits  
24 effective October 14, 2014.

25 **IT IS FURTHER ORDERED** directing the Clerk of Court to enter judgment  
26 accordingly.

27 Dated this 29th day of December, 2017.

28   
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Eileen S. Willett  
United States Magistrate Judge