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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Tammy Klatz,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-17-02119-PHX-JAT

ORDER

15 Pending before the Court is Plaintiff Tammy Klatz’s (“Plaintiff”) appeal from the
16 Social Security Commissioner’s (“Commissioner”) finding that Plaintiff was not disabled
17 from her alleged onset date of June 20, 2012 until March 20, 2014. (Docs. 1 & 22). Both
18 Plaintiff and the Commissioner agree that the Administrative Law Judge (“ALJ”) erred;
19 therefore, the only question before the Court is whether it should remand for further
20 proceedings or for an award of benefits.

21 **I. Background**

22 On June 25, 2012, Plaintiff protectively filed for Title II disability benefits
23 alleging a disability onset of June 20, 2012. (Doc. 17 (citing AR 218–19)). After holding
24 a hearing, the ALJ issued an unfavorable decision. (*Id.* (citing AR 38–48, 95–108)).
25 Plaintiff appealed the ALJ’s decision to the Appeals Council, who vacated the ALJ’s
26 decision and remanded the case. (*Id.* (citing AR 109–114)). On remand, the ALJ was:

27 to update the record with additional available evidence relevant to the
28 claimant’s irritable bowel syndrome, give further consideration to the
claimant’s maximum residual functional capacity, reassess the claimant’s

1 need for unlimited access to a restroom in proximity, indicate with
2 specificity the time the claimant may need to be in the restroom for each
3 break, reassess the step four finding that the claimant is capable of
4 performing her past relevant work, and obtain evidence from a vocational
5 expert.

6 (Id.)

7 On remand, the ALJ held a second hearing, at which Plaintiff testified that she
8 returned to “work after undergoing a permanent end colostomy” and, as a result,
9 “requested a closed period of disability from her alleged onset date of June 20, 2012
10 through April 20, 2015.” (Id. (citing AR 49–69)). The ALJ’s decision was partially
11 favorable, “establishing disability from March 20, 2014 through April 20, 2015.” (Id.
12 (citing AR 7–32)). Following Plaintiff’s unsuccessful intra-agency appeals, the
13 Commissioner adopted the ALJ’s decision. (Id. (citing AR 1–6, 217, 338–43)).

14 Plaintiff appealed to this Court, arguing that the ALJ erred and that the appropriate
15 remedy was remand for an award of benefits for the period of June 20, 2012 through
16 March 19, 2014 (for which the ALJ denied benefits), in addition to the March 20, 2014 to
17 April 20, 2015 period (for which the ALJ awarded benefits). (Id.) The Commissioner
18 agrees that the ALJ erred, and that the case should be remanded, but contends that the
19 ALJ should conduct further proceedings, rather than award benefits. (Doc. 21).

20 **II. Legal Standard**

21 Ordinarily, where an ALJ errs in denying benefits, the Court remands for further
22 proceedings. *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099–1100 (9th
23 Cir. 2014). In “rare circumstances,” however, the Court may remand for an award of
24 benefits. *Id.* (quoting *Moisa v. Barnhart*, 367 F.3d 882, 886 (9th Cir. 2004) (internal
25 quotation marks omitted)). Under the “credit-as-true” rule, remand for award of benefits
26 is appropriate where three factors are satisfied. *Id.* at 1100–01. First, the ALJ must have
27 “failed to provide legally sufficient reasons for rejecting evidence, whether claimant
28 testimony or medical opinion.” *Id.* Second, there must not be “outstanding issues that
must be resolved before a determination of disability can be made” and “further
administrative proceedings . . . [must not be] useful.” *Id.* at 1101. “Administrative

1 proceedings are generally useful where the record has [not] been fully developed, there is
2 a need to resolve conflicts and ambiguities, or the presentation of further evidence . . .
3 may well prove enlightening in light of the passage of time.” *Id.* (alterations in original)
4 (internal quotation marks and citations omitted). Third, if both prior factors are satisfied,
5 the Court will find “the relevant testimony credible as a matter of law,” and then must
6 “determine whether the record, taken as a whole, leaves not the slightest uncertainty as to
7 the outcome of the proceeding.” *Id.* (internal quotation marks and citations omitted). If
8 all three factors are satisfied, the Court then has the discretion to remand for an award of
9 benefits or for further proceedings. *Id.* at 1101–02.

10 In conducting this analysis, the Court will “review only issues which are argued
11 specifically and distinctly in a party’s opening brief.” *Indep. Towers of Wash. v.*
12 *Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (internal quotation marks and citation
13 omitted); *accord Klain v. Comm’r of Soc. Sec. Admin.*, No. CV-16-04390-PHX-DGC,
14 2017 WL 6276370, at *2 (D. Ariz. Dec. 11, 2017) (compiling district court cases
15 applying the *Independent Towers* standard to social security matters).

16 **III. Analysis**

17 Both parties agree that this case should be remanded to the ALJ. The only issue in
18 dispute is whether it should be remanded for further proceedings, as advanced by the
19 Commissioner, or remanded for an award of benefits, as argued by Plaintiff.

20 The Commissioner contends that Plaintiff waived her claim that the case should be
21 remanded for an award of benefits because her opening brief failed to argue that further
22 proceedings would not be useful. (Doc. 21 at 4–5). Plaintiff responds by arguing that “if
23 there were any gaps or conflicts in the record, [P]laintiff would not argue that [remand for
24 computation of benefits] was appropriate and her legal argument supports this
25 contention.” (Doc. 22 at 4).

26 While Plaintiff is correct that one could implicitly read her opening brief as raising
27 the issue of whether further administrative proceedings would be useful, the Court will
28 not permit such argument-by-implication. Requiring the Commissioner to divine

1 Plaintiff's potential argument—in an effort to not waive its sole chance to respond—
2 diminishes the efficiency and efficacy of the adversarial process. The requirement that
3 Plaintiff explicate all necessary arguments in her opening brief is intensified here, where
4 Plaintiff seeks for the Court to deviate from the normal practice of remanding for further
5 proceedings. Accordingly, the Court finds that Plaintiff has waived the argument that
6 remand for a computation of benefits is appropriate, because her opening brief did not
7 specifically argue that further proceedings would not be useful.

8 The Commissioner provides a concise statement of what proceedings are required
9 on remand:

10 [T]he Appeals Council will affirm the finding that Klatz was disabled for
11 the period of March 20, 2014, to April 20, 2015, limiting the scope of the
12 remand to June 20, 2012, through March 19, 2014. The Appeals Council
13 will direct the ALJ to reevaluate Klatz's symptom testimony, reassess
14 Klatz's residual functional capacity, and, if warranted, obtain vocational
15 expert testimony to help determine whether Klatz can return to any past
16 relevant work or if she can perform other work existing in significant
17 numbers. Additionally, the Appeals Council will direct the ALJ to obtain
18 medical expert testimony to ensure that there is a medical basis for March
19 20, 2014, as the onset of Klatz's established disability.

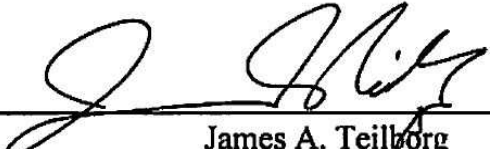
20 (Doc. 21 at 2).

21 **IV. Conclusion**

22 Based on the foregoing,

23 **IT IS ORDERED** reversing the Commissioner and remanding for further
24 administrative proceedings in accordance with this Order, and the Clerk of the Court shall
25 enter judgment accordingly.

26 Dated this 28th day of August, 2018.

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James A. Teilborg
Senior United States District Judge