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

8  
9 B. Johnson,

10 Plaintiff,

11 v.

12 Commissioner of Social Security  
13 Administration,

14 Defendant.

No. CV-18-01230-PHX-DGC

**ORDER**

15  
16 Plaintiff B. Johnson seeks review under 42 U.S.C. § 405(g) of the final decision of  
17 the Commissioner of Social Security, which denied her disability insurance benefits and  
18 supplemental security income under sections 216(i), 223(d), and 1614(a)(3)(A) of the  
19 Social Security Act. Because the Administrative Law Judge (“ALJ”) erred as described  
20 below, and the error was not harmless, the Commissioner’s decision will be vacated and  
21 remanded for further proceedings.

22 **I. Background.**

23 Plaintiff is a 60-year-old female who previously worked as a real estate agent, a  
24 server, and in various semiskilled to skilled jobs. Doc. 12 at 2-3; A.R. 55-56. On June 10,  
25 2014, she applied for disability insurance benefits and supplemental security income,  
26 alleging disability beginning March 1, 2014. A.R. 27. On October 11, 2016, Plaintiff and  
27 a vocational expert (“VE”) testified at a hearing before the ALJ. *Id.* On November 7,  
28 2016, the ALJ held that Plaintiff was not disabled within the meaning of the Social Security

1 Act. A.R. 27-40. The Appeals Council denied Plaintiff's request for review, making the  
2 ALJ's decision the Commissioner's final decision. A.R. 1-3.

3 **II. Legal Standard.**

4 The Court reviews only those issues raised by the party challenging the ALJ's  
5 decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). The Court may set  
6 aside the Commissioner's disability determination only if it is not supported by substantial  
7 evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).  
8 Substantial evidence is more than a scintilla, less than a preponderance, and relevant  
9 evidence that a reasonable person might accept as adequate to support a conclusion. *Id.* In  
10 determining whether substantial evidence supports a decision, the Court must consider the  
11 record as a whole and may not affirm simply by isolating a "specific quantum of supporting  
12 evidence." *Id.*

13 As a general rule, "[w]here the evidence is susceptible to more than one rational  
14 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be  
15 upheld." *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citations omitted). In  
16 reviewing the ALJ's reasoning, the court is "not deprived of [its] faculties for drawing  
17 specific and legitimate inferences from the ALJ's opinion." *Magallanes v. Bowen*, 881  
18 F.2d 747, 755 (9th Cir. 1989).

19 Harmless error principles apply in the Social Security Act context. *Molina v.*  
20 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless if there remains  
21 substantial evidence supporting the ALJ's decision and the error does not affect the  
22 ultimate nondisability determination. *Id.* The claimant usually bears the burden of  
23 showing that an error is harmful. *Id.* at 1111.

24 The ALJ is responsible for resolving conflicts in medical testimony, determining  
25 credibility, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.  
26 1995).

1     **III.    The ALJ’s Five-Step Evaluation Process.**

2           To determine whether a claimant is disabled for purposes of the Social Security Act,  
3     the ALJ follows a five-step process.  20 C.F.R. § 404.1520(a).  The claimant bears the  
4     burden of proof on the first four steps, and the burden shifts to the Commissioner at step  
5     five.  *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).  To establish disability, the  
6     claimant must show that (1) she is not currently working, (2) she has a severe impairment,  
7     and (3) this impairment meets or equals a listed impairment or (4) her residual functional  
8     capacity (“RFC”) prevents her performance of any past relevant work.  If the claimant  
9     meets her burden through step three, the Commissioner must find her disabled.  If the  
10    inquiry proceeds to step four and the claimant shows that she is incapable of performing  
11    past relevant work, the Commissioner must show that the claimant is capable of other work  
12    suitable for her RFC, age, education, and work experience.  20 C.F.R. § 404.1520(a)(4).

13           At step one, the ALJ found that Plaintiff met the insured status requirements of the  
14    Social Security Act through March 31, 2018, and that she has not engaged in substantial  
15    gainful activity since March 1, 2014.  A.R. 29.  At step two, the ALJ found that Plaintiff  
16    has the following severe impairments: orthostatic tremor (intermittent) and recent  
17    diagnosis of Parkinson’s syndrome.  *Id.* at 19.  At step three, the ALJ determined that  
18    Plaintiff does not have an impairment or combination of impairments that meets or  
19    medically equals an impairment listed in Appendix 1 to Subpart P of 20 C.F.R. Pt. 404.  *Id.*  
20    At step four, the ALJ found that Plaintiff has the following RFC:

21                   [Plaintiff can] perform sedentary work as defined in 20 CFR  
22                   404.1567(a) except the claimant can occasionally lift ten  
23                   pounds and frequently lift less than ten pounds.  The claimant  
24                   can stand and walk one hour each in an eight-hour day.  The  
25                   claimant does not have any limitations for sitting.  She does not  
26                   use an assistive device for ambulating.  The claimant’s seeing,  
27                   hearing, and speaking are unlimited.  She can occasionally  
28                   climb ramps and stairs and never climb ladders, ropes, or  
                      scaffolds.  The claimant can stoop, kneel, crouch, crawl, reach,  
                      handle, finger, and feel frequently.  The claimant has  
                      restrictions for working around heights and moving machinery.  
                      The claimant does not have any restrictions for working around

1 extremes in temperature, working around or with chemicals,  
2 working around dusts, fumes, or gasses, or working around  
3 excessive noise.

4 *Id.* at 31. The ALJ found that Plaintiff is unable to perform any past relevant work. *Id.* at  
5 37. The ALJ then determined that, considering the Plaintiff's "age, education, work  
6 experience, and [RFC], the [Plaintiff] has acquired work skills from past relevant work that  
7 are transferable to other occupations with jobs existing in significant numbers in the  
8 national economy." *Id.* at 38.

#### 9 **IV. Analysis.**

10 Plaintiff argues that the ALJ's decision is defective for four reasons: (1) the ALJ  
11 improperly rejected the opinion of Plaintiff's treating physician, Dr. Christopher T. Pullins;  
12 (2) the ALJ improperly rejected the opinion of the state's consultative examiner, Dr. Brian  
13 R. Briggs; (3) the ALJ improperly discredited Plaintiff's symptom testimony; and (4) the  
14 ALJ improperly weighed lay evidence provided by Plaintiff's husband. Doc. 12 at 1-2.

#### 15 **A. Weighing of Medical Source Evidence.**

##### 16 **1. Legal Standard.**

17 The Commissioner is responsible for determining whether a claimant meets the  
18 statutory definition of disability and need not credit a physician's conclusion that the  
19 claimant is "disabled" or "unable to work." 20 C.F.R. § 404.1527(d)(1). But the  
20 Commissioner generally must defer to a physician's medical opinion, such as statements  
21 concerning the nature or severity of the claimant's impairments, what the claimant can do,  
22 and the claimant's physical or mental restrictions. § 404.1527(a)(1), (c).

23 The Ninth Circuit distinguishes between the opinions of treating physicians,  
24 examining physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821,  
25 830 (9th Cir. 1995). Generally, an ALJ should give the greatest weight to a treating  
26 physician's opinion and more weight to the opinion of an examining physician than a non-  
27 examining physician. *See Andrews*, 53 F.3d at 1040-41; *see also* 20 C.F.R.  
28 § 404.1527(c)(2)-(6) (listing factors to be considered when evaluating opinion evidence,

1 including length of examining or treating relationship, frequency of examination,  
2 consistency with the record, and support from objective evidence). If it is not contradicted  
3 by another doctor’s opinion, the opinion of a treating or examining physician can be  
4 rejected only for “clear and convincing” reasons. *Lester*, 81 F.3d at 830 (citing *Embrey v.*  
5 *Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)). Under this standard, the ALJ may reject a  
6 treating or examining physician’s opinion if it is “conclusory, brief, and unsupported by  
7 the record as a whole or by objective medical findings,” *Batson v. Comm’r Soc. Sec.*  
8 *Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004) (citation omitted), or if there are significant  
9 discrepancies between the physician’s opinion and claimant’s clinical records, *Bayliss v.*  
10 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

11 When a treating or examining physician’s opinion is contradicted by another doctor,  
12 it can be rejected only for “specific and legitimate reasons that are supported by substantial  
13 evidence in the record.” *Lester*, 81 F.3d at 830-31. To satisfy this requirement, the ALJ  
14 must set out “a detailed and thorough summary of the facts and conflicting clinical  
15 evidence, stating his interpretation thereof, and making findings.” *Revels v. Berryhill*,  
16 874 F.3d 648, 654 (9th Cir. 2017) (quotation marks and citation omitted). Under either  
17 standard, “[t]he ALJ must do more than state conclusions. He must set forth his own  
18 interpretations and explain why they, rather than the doctors’, are correct.” *Garrison v.*  
19 *Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (citation and internal quotation omitted).

20 **2. Dr. Pullins.**

21 Plaintiff’s treating physician, Dr. Pullins, provided one letter and two assessments  
22 regarding Plaintiff’s vocational limitations, opining that Plaintiff was unable to work. *See*  
23 A.R. 339; 354-55; 458-59. The ALJ gave the opinions little weight. A.R. 35.

24 **a. Dr. Pullins’s Opinions.**

25 On November 11, 2014, Dr. Pullins wrote the social security office regarding  
26 Plaintiff. A.R. 339. He stated that Plaintiff had orthostatic tremor syndrome, the condition  
27 would not allow her to stand for any prolonged period of time, and the condition would  
28 make holding any gainful employment difficult. *Id.*

1 In his November 23, 2015 opinion, Dr. Pullins stated that Plaintiff suffered from  
2 imbalance, poor endurance, weakness, tremors in the hand, and shaky leg syndrome.  
3 A.R. 354. In an eight-hour day, Plaintiff could sit for more than two hours but less than  
4 three; lift more than ten pounds but less than fifteen; stand or walk less than two hours; and  
5 carry more than ten pounds but less than fifteen. *Id.* Dr. Pullins opined that Plaintiff must  
6 alternate between sitting, standing, and walking every 45-60 minutes, and with position  
7 changes Plaintiff would need to rest for five to nine minutes. *Id.* Plaintiff could use her  
8 hands and feet occasionally and reach, bend, and stoop less than occasionally. *Id.* Dr.  
9 Pullins stated that Plaintiff's dizziness, pain, and fatigue, caused severe limitations, and she  
10 could expect to miss more than six days of work every month. *Id.* at 355.

11 In his September 1, 2016 opinion, Dr. Pullins listed Plaintiff's impairments as  
12 Parkinson's disease and orthostatic tremors. A.R. 458. He opined that in an eight-hour  
13 day Plaintiff could sit less than two hours, lift less than ten pounds, stand or walk less than  
14 two hours, and carry less than two pounds. *Id.* Dr. Pullins noted that it was medically  
15 necessary for Plaintiff to change positions every one to twenty minutes, with a one to four  
16 minute break after changing position. *Id.* Plaintiff could use her right hand occasionally,  
17 but her left hand and feet less than occasionally. *Id.* Dr. Pullins stated that Plaintiff  
18 experienced pain, fatigue, dizziness, headaches, and tremors, and that the symptoms were  
19 moderately severe. A.R. 459. Plaintiff could expect to miss more than six days of work  
20 per month. *Id.*

21 **b. The ALJ's Opinion.**

22 The ALJ provided a detailed summary of the medical records and noted conflicting  
23 evidence. *See* A.R. 32-33. The ALJ concluded that objective findings supported Plaintiff's  
24 diagnosis of orthostatic tremor (intermittent) syndrome and Parkinson's syndrome, and  
25 considered those diagnoses when forming Plaintiff's RFC. A.R. 32. But the ALJ  
26 determined that the objective medical evidence failed to support Plaintiff's alleged  
27 limitations and symptoms. *Id.*

1           The ALJ found Dr. Pullins's opinions inconsistent with the objective medical  
2 evidence. A.R. 35. Specifically, the ALJ cited Dr. Briggs's March 2013 consultative  
3 exam, which found that Plaintiff's gait was normal, she had a full range of motion in her  
4 shoulders, elbows, wrists, hips, knees, ankles, and spine, and her hands did not lack the  
5 ability to perform rapid alternating movements. *Id.*; see A.R. 340-42. The ALJ also noted  
6 a December 2015 examination where the Plaintiff was able to rise from a chair unassisted  
7 with her arms crossed, her gait was normal, and she had normal posture. A.R. 410-11.

8           Because Dr. Pullins's opinions were contradicted by the other medical opinions in  
9 the record, the ALJ could reject them for specific and legitimate reasons supported by  
10 substantial evidence in the record. *Lester*, 81 F.3d at 830-31.

11                           **c.     Discussion.**

12           Plaintiff argues that the ALJ improperly substituted his own opinion for that of the  
13 medical doctors and failed to explain why the noted findings were inconsistent with Dr.  
14 Pullins's assessments of Plaintiff's vocational limitations. See Doc. 12 at 11-12. Further,  
15 the ALJ improperly used specific notes of how Plaintiff presented at an appointment to  
16 determine that Plaintiff could sustain work over an eight-hour day. *Id.* at 13.

17           The Court agrees with Plaintiff and finds that the ALJ failed to explain why the  
18 specified appointment observations contradicted Dr. Pullins's assigned limitations. As  
19 noted by the ALJ, Plaintiff was diagnosed with orthostatic tremor syndrome based on  
20 reported symptoms and a movement neurophysiology report. A.R. 308-10. Plaintiff  
21 experiences intermittent leg tremors that come on suddenly; vary in intensity, duration, and  
22 frequency; and cause shakiness and weakness that only disappears through sitting, lying  
23 down, or changing position. See A.R. 294; 298; 306; 310; 320; 410. In her more recent  
24 records, Plaintiff reported two to three episodes per day, lasting about five minutes.  
25 A.R. 340. Plaintiff did not report any leg pain outside of these tremors. See A.R. 306.  
26 Plaintiff's symptoms are intermittent and do not appear to affect the functioning of her  
27 legs. In light of this record and the characteristics of Plaintiff's disabilities, particularly  
28 their intermittent nature, it is not clear how Plaintiff walking normally during a medical

1 appointment or having a full range of motion and the ability to get out of a chair with her  
2 arms crossed renders Dr. Pullins’s interpretation of Plaintiff’s symptoms and objective  
3 evidence untrustworthy.

4 Further, the ALJ ignored or diminished exam findings where Plaintiff demonstrated  
5 physical limitations related to her disorders. For example, in an April 2014 exam, Dr.  
6 Pullins noted that Plaintiff “gets uncomfortable [after standing for two to three minutes]  
7 and starts to mildly flex the knees and extends the knees on both legs intermittently.”  
8 A.R. 33; 307. The ALJ noted this record, but then said: “However, [Plaintiff’s]  
9 neurological examination was normal,” without explaining why a normal exam was  
10 inconsistent with Dr. Pullins’s observations. A.R. 33. The ALJ then cited Dr. Pullins’s  
11 record indicating that Plaintiff was unable to balance on one foot and became shaky after  
12 two minutes of activity. A.R. 33; 352. The ALJ followed this with: “Despite this, her  
13 upper extremity strength was intact, she did not have any shaking in her hands, and she  
14 was able to complete tandem walking with difficulty.” A.R. 33. Again, the ALJ did not  
15 explain why these upper extremity observations contradict her tremors and pain.

16 The ALJ has sufficiently set out a “detailed and thorough summary of the facts and  
17 conflicting evidence,” *Revels*, 874 F.3d at 654, but the ALJ fails to “set forth [his] own  
18 interpretations and explain why they, rather than the doctors’, are correct.” *Garrison*, 759  
19 F.3d at 1012; *see also Scott v. Astrue*, 647 F.3d 734, 740 (7th Cir. 2011) (the ALJ must  
20 build a “logical bridge” between the evidence and her conclusion). Thus, the ALJ erred by  
21 discrediting Dr. Pullins’s opinions.

22 **d. Harmless Error.**

23 The Court will not reverse an ALJ’s decision if the error is inconsequential to the  
24 ultimate nondisability determination. *Molina*, 674 F.3d at 1111. During the hearing, the  
25 VE testified that an individual who could stand and sit for less than two hours a day would  
26 not be able to find full-time work. A.R. 77. The VE also testified that an individual that  
27 needed to take a four-minute break every twenty minutes would also be precluded from  
28 working. *Id.* Dr. Pullins’s opinion indicated that Plaintiff would need to take breaks every



1 twenty minutes and could sit for less than two hours a day. *See* A.R. 458. Because the  
2 decision would have come out differently had the ALJ adopted Dr. Pullins’s limitations,  
3 the Court cannot find this error harmless.

### 4 **3. Dr. Briggs.**

5 Dr. Briggs provided a consultative examination and a medical source statement  
6 regarding Plaintiff’s ability to work. A.R. 340-46. Dr. Briggs limited Plaintiff to  
7 occasionally lifting or carrying ten pounds and frequently lifting and carrying less than ten  
8 pounds. A.R. 344. Plaintiff can stand less than two hours in an eight-hour day, but has no  
9 limitations for sitting. A.R. 344-45. Dr. Briggs also opined that Plaintiff could climb  
10 occasionally and frequently stoop, kneel, crouch, crawl, reach, handle, finger, and feel.  
11 A.R. 345. Dr. Briggs opined that Plaintiff “cannot complete an 8 hour day or a 40 hour  
12 work week.” *Id.* This conclusion was based on Plaintiff’s “orthostatic tremors which are  
13 brought on by standing and walking, [and Plaintiff’s] anxiety and the associated  
14 weakness.” *Id.*

15 The ALJ gave Dr. Briggs’s opinion partial weight. A.R. 35. He gave great weight  
16 to Dr. Briggs’s conclusions regarding lifting, carrying, walking, seeing, hearing, speaking,  
17 postural, and environmental limitations. *Id.* But he gave little weight to Dr. Briggs’s  
18 opinion that Plaintiff could not complete an eight-hour day or a forty-hour work week,  
19 finding it inconsistent with the objective medical evidence. *Id.* The opinion of an  
20 examining physician, even if contradicted, can only be rejected for specific and legitimate  
21 reasons. *Lester*, 81 F.3d at 830-31.

22 Plaintiff argues that the ALJ improperly discredited Dr. Briggs’s opinion because  
23 he cited the same evidence that he used to discredit Dr. Pullins’s opinion. Doc. 12 at 21.  
24 But the ALJ essentially adopted Dr. Briggs’s limitations as Plaintiff’s RFC. A.R. 31. The  
25 ALJ used the limitations to question the VE about Plaintiff’s vocational prospects. *See*  
26 A.R. 75.

27 The only portion of Dr. Briggs’s opinions that the ALJ did not accept was his  
28 ultimate conclusion that Plaintiff could not work an eight-hour day and forty-hour week.

1 A.R. 35; 345. The ALJ is not bound by a medical provider’s ultimate determination of a  
2 plaintiff’s disability. *Mcleod v. Astrue*, 640 F.3d 881, 884-85 (9th Cir. 2011). Medical  
3 opinions provide judgments about the nature and severity of Plaintiff’s disability, but the  
4 determination that an individual cannot work or is disabled is one that is reserved for the  
5 Commissioner. 20 C.F.R. § 404.1527(d)(1) (“An impairment is a purely medical  
6 condition. A disability is an administrative determination of how an impairment, in relation  
7 to education, age, technological, economic, and social factors, affects ability to engage in  
8 gainful activity.”). The ALJ did not err by declining to accept Dr. Briggs’s opinion on the  
9 ultimate question of disability.

10 **B. Plaintiff’s Symptom Testimony.**

11 In evaluating a claimant’s symptom testimony, the ALJ must engage in a two-step  
12 analysis. First, the ALJ must determine whether the claimant presented objective medical  
13 evidence of an impairment that could reasonably be expected to produce the symptoms  
14 alleged. *Garrison*, 759 F.3d at 1014. The claimant is not required to show that her  
15 impairment could reasonably be expected to cause the severity of the symptoms she has  
16 alleged, only that it could reasonably have caused some degree of the symptoms. *Id.*  
17 Second, if there is no evidence of malingering, the ALJ may reject the claimant’s symptom  
18 testimony only by giving specific, clear, and convincing reasons. *Id.* at 1015.

19 Plaintiff testified that she could sit for about an hour, but she would need to get up  
20 and stretch during that time. A.R. 61. Plaintiff also testified that she could not stand and  
21 she could walk about half a block. A.R. 62. She testified that she experiences tremors on  
22 a daily basis and they can last up to about five minutes. *Id.* When she experiences the  
23 tremors, she needs to sit down to make them stop. *Id.* Tremors start almost immediately  
24 upon standing or walking; Plaintiff normally can be on her feet for about five minutes.  
25 A.R. 64. Plaintiff testified that the tremors start in her legs and end in her hands. *Id.* When  
26 Plaintiff experiences tremors, she cannot write or use the phone. A.R. 65. Plaintiff stated  
27 that tremors can occur even when she is lying down. *Id.* Dealing with the tremors causes  
28 Plaintiff extreme fatigue, which she handles by lying down. A.R. 66. Plaintiff testified

1 that it can take a long time for her to get chores done. A.R. 67. She takes many breaks  
2 before finishing a task. *Id.* She testified that she takes medication for Parkinson’s and  
3 anxiety, but side effects have kept her from taking medications in the past. A.R. 68. The  
4 tremors worsen with stress and cause the Plaintiff to experience anxiety. A.R. 73-74.

5 The ALJ found that “the claimant’s medically determinable impairments could  
6 reasonably be expected to cause the alleged symptoms,” but that her statements  
7 “concerning the intensity, persistence and limiting effects of these symptoms were not  
8 entirely consistent with the medical evidence and other evidence in the record for the  
9 reasons explained in this decision.” *See* A.R. 34. The ALJ identified the following reasons:  
10 (1) the objective medical evidence does not support Plaintiff’s alleged symptoms and their  
11 limited effects; (2) the alleged severity of Plaintiff’s symptoms is not consistent with the  
12 conservative treatment she received for her impairments, consisting only of a trial of  
13 gabapentin; and (3) the ALJ did not observe Plaintiff experience any tremors during the  
14 hearing. A.R. 34.

15 Plaintiff argues that (1) the ALJ did not explain how the cited medical records  
16 rendered her testimony untrustworthy; (2) the ALJ was not qualified to provide his own  
17 interpretation of the medical evidence as a basis for discrediting Plaintiff’s testimony;  
18 (3) the ALJ improperly discredited Plaintiff’s testimony based on conservative treatment  
19 without considering Plaintiff’s reasons for conservative treatment or additional treatment  
20 that is available to Plaintiff; and (4) the ALJ’s limited observations should not reflect on  
21 the credibility of the Plaintiff’s testimony. *See* Doc. 12 at 16-19.

22 **1. The ALJ’s First Reason.**

23 As indicated above, the Court agrees that the ALJ improperly discounted Plaintiff’s  
24 symptom testimony based on evidence that her physical exams showed normal gait, full  
25 range of motion in her shoulders, elbows, wrists, hips, knees, ankles, and spine, and that in  
26 one appointment Plaintiff rose from a chair with her arms crossed. Plaintiff testified that  
27 she could walk to up to a half a block and that walking helps alleviate the tremor symptoms.  
28 A.R. 62-64. Her physical symptom testimony focused on pain that starts in her calves and

1 worsens if she does not sit down or walk around. *See* A.R. 63. The ALJ fails to explain  
2 why evidence of a normal gait, full range of motion, and the ability to rise from a chair  
3 negates Plaintiff’s testimony. *See Krier v. Colvin*, No. 2:13-CV-1898-HRH, 2015 WL  
4 159530, at \*3 (D. Ariz. Jan. 13, 2015) (“[T]he ALJ failed to build the requisite ‘logical  
5 bridge’ between the evidence and her conclusion.” (citing *Scott*, 647 F.3d at 740)).<sup>1</sup>

6 **2. The ALJ’s Second Reason.**

7 In assessing Plaintiff’s symptom testimony, the ALJ may consider “the type,  
8 dosage, effectiveness, and side effects of any medication.” 20 C.F.R. § 404.1529(c). In  
9 some circumstances, evidence of conservative treatment may be sufficient to discount a  
10 claimant’s testimony regarding the severity of an impairment. *Parra v. Astrue*, 481 F.3d  
11 742, 751 (9th Cir. 2007). An ALJ may discount testimony for “unexplained or  
12 inadequately explained failure to seek treatment or to follow a prescribed course of  
13 treatment.” *Molina*, 674 F.3d at 1112. The ALJ must consider “any explanations that the  
14 individual may provide, or other information in the case record, that may explain” the  
15 claimant’s failure to follow a treatment plan. *Orn*, 495 F.3d at 638 (quoting SSR 96-7p at  
16 7-8).

17 Plaintiff testified to taking zeligan for Parkinson’s disease and clonazepam and  
18 trying gabapentin for her orthostatic tremors. A.R. 68. The record indicates that Plaintiff  
19 initially delayed use of the gabapentin in June 2014, stating that she was concerned about  
20 the side effects and not in a lot of pain at that time. A.R. 33; 302. Plaintiff changed her  
21 mind in May 2015 as her condition worsened, but she discontinued use of gabapentin after  
22 about one month because it made her sleepy and unable to function. A.R. 351; 410. She  
23 was then started on clonazepam to help with orthostatic tremor. A.R. 411.

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24  
25 <sup>1</sup> The Commissioner argues that Plaintiff’s testimony is inconsistent with evidence  
26 that she socialized with friends by phone, went out for lunch every two months, prepared  
27 light meals, completed light household chores, and used the computer. Doc. 16 at 8. But  
28 the ALJ did not discredit Plaintiff’s testimony based on her daily activities. Therefore, the  
Court will not consider the Commissioner’s argument. *See Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225 (9th Cir. 2009) (“Long-standing principles of administrative law require us to review the ALJ’s decision based on the reasoning and factual findings offered by the ALJ – not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking.”).

1 The ALJ stated that the severity of Plaintiff’s symptoms is not consistent with the  
2 conservative treatment she received for her impairments. A.R. 34. But the ALJ did not  
3 discuss her concern about possible side effects or her explanation that the medication made  
4 her unable to function. See A.R. 68. Nor is there any indication in the record or the ALJ’s  
5 opinion that an alternative or more aggressive treatment plan could have been substituted.  
6 Indeed, Dr. Pullins’s records state that “medication is not a cure but rather present[ed] to  
7 help control symptoms.” A.R. 303.<sup>2</sup> Thus, the ALJ improperly rejected Plaintiff’s  
8 symptoms on this basis.

9 **3. The ALJ’s Third Reason.**

10 An ALJ may rely on personal observations so long as the observations are not the  
11 sole basis for discrediting Plaintiff’s testimony. *Orn*, 495 F.3d at 639. Here, by her own  
12 account, Plaintiff gets leg tremors daily and they are mostly caused by standing. See  
13 A.R. 62. There is no indication that Plaintiff was standing during the hearing. Plaintiff  
14 also testified that the tremors are usually not visible, but mainly felt on the inside. See  
15 A.R. 62. Considering the nature of Plaintiff’s disability, the ALJ has not explained why  
16 his brief observation of her in a hearing setting was a proper basis for discrediting her  
17 testimony. See *Ramirez v. Berryhill*, No.15-cv-02988-LB, 2017 WL 1196728, at \*16 (N.D.  
18 Cal. Mar. 31, 2017) (“[T]he ALJ’s observations of [the plaintiff’s] lack of discomfort  
19 during the approximately 40-minute long hearing is not clear and convincing evidence to  
20 support the ALJ’s adverse credibility finding, particularly where her testimony and the  
21 record suggests that her symptoms were intermittent.”).

22 **4. Conclusion.**

23  
24  
25 <sup>2</sup> The Commissioner argues that Plaintiff’s initial refusal of medication constituted  
26 a clear and convincing reason to discount her symptom testimony. See Doc. 16 at 9;  
27 A.R. 302. Plaintiff refused medication over concern about the side effects, and the ALJ  
28 did not discuss why that was not a valid reason for failing to take the prescribed medication.  
See *Fair v. Bowen*, 885 F.2d 597,602 (9th Cir. 1989) (“An ALJ may not rely on a claimant’s  
failure to take pain medication where evidence suggests that the claimant had a good reason  
for not taking medication.”). The Commissioner also argues that Plaintiff failed to take  
valium as directed by the Mayo clinic. But the ALJ never cited this record or discussed  
Plaintiff taking valium. Therefore, the Court will not consider this argument.

1 This error was not harmless. Plaintiff’s physical limitation testimony conflicts with  
2 the RFC that Plaintiff could stand and walk for one hour each during an eight-hour day.  
3 The improperly discredited testimony could have affected the finding of nondisability.

4 **D. Lay Witness Testimony of Mr. Johnson.**

5 The ALJ considered a third-party function report from Plaintiff’s husband. A.R. 37.  
6 The ALJ gave his opinion little weight, finding that he lacked training to make “exacting  
7 observation as to the date, frequencies, types, and degrees of medical signs and symptoms,”  
8 and that his statements were inconsistent with the objective medical evidence. *Id.*

9 Lay testimony as to a claimant’s symptoms or how an impairment affects the  
10 claimant’s ability to work is competent evidence that the ALJ must take into account.  
11 *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). To discount lay witness testimony  
12 the ALJ “must give reasons that are germane to each witness.” *Dodrill v. Shalala*, 12 F.3d  
13 915, 919 (9th Cir. 1993). An ALJ may not discredit lay witness testimony as not supported  
14 by medical evidence in the record, or because the individual is not knowledgeable in the  
15 medical or vocational fields. *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009). The  
16 ALJ erred in discrediting Mr. Johnson’s third-party function report based on lack of  
17 medical training and inconsistency with the medical record.

18 **E. Remand.**

19 The ALJ erred in his consideration of Dr. Pullins’s opinions, Plaintiff’s testimony,  
20 and Mr. Johnson’s lay opinion. Plaintiff contends that, crediting these opinions and  
21 testimony as true, the Court must remand for an award of benefits. Docs 12 at 23; 17 at 8-9.  
22 The Commissioner counters that the appropriate remedy is a remand for further  
23 proceedings. Doc. 16 at 10-13.

24 “When the ALJ denies benefits and the Court finds error, the Court ordinarily must  
25 remand to the agency for further proceedings before directing an award of benefits.” *Leon*  
26 *v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017). Under a “rare exception” to this rule,  
27 the Court may remand for an immediate award of benefits after conducting a three-part  
28 inquiry:

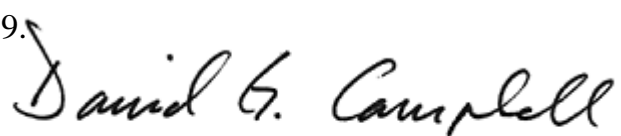
1 First, the Court asks whether the ALJ failed to provide legally sufficient  
2 reasons for rejecting evidence, whether claimant testimony or medical  
3 opinion. Next, the Court determines whether there are outstanding issues  
4 that must be resolved before a disability determination can be made, and  
5 whether further administrative proceedings would be useful. When these  
6 first two conditions are satisfied, [the Court] will then credit the discredited  
7 testimony as true for the purpose of determining whether, on the record taken  
8 as a whole, there is no doubt as to disability.

9 *Id.* (internal quotation marks and citations omitted). “Where an ALJ makes a legal error,  
10 but the record is uncertain and ambiguous, the proper approach is to remand the case to the  
11 agency.” *Id.* (quotation marks omitted).

12 The Court will remand for further proceedings because there is uncertainty in the  
13 record. The ALJ improperly discredited Plaintiff’s treating physician, who opined that  
14 Plaintiff could not sit for more than two to three hours, would need to take breaks every  
15 twenty minutes, and could not work. The ALJ also improperly discredited Plaintiff’s and  
16 her husband’s symptom testimony, which indicated that Plaintiff could stand and walk less  
17 than two hours a day. But the ALJ gave proper weight to Dr. Briggs’s examining opinion  
18 that Plaintiff had no limitations on sitting and could stand and walk one hour each per day.  
19 During the hearing, the VE testified that an individual who had Dr. Briggs’s limitations  
20 could work. A.R. 75. The VE also testified that an individual who could sit only for two  
21 hours and stand or walk for less than two hours, or who needed to change positions every  
22 twenty minutes, would not be able to find work. A.R. 76. On remand the ALJ must  
23 reweigh the properly credited, conflicting evidence. *See Carmickle v. Comm’r, Soc. Sec.*  
24 *Admin.*, 533 F.3d 1155, 1164 (9th Cir. 2008).

25 **IT IS ORDERED** that the final decision of the Commissioner of Social Security is  
26 **vacated** and this case is **remanded** for further proceedings consistent with this opinion.  
27 The Clerk shall enter judgment accordingly and **terminate** this action.

28 Dated this 4th day of February, 2019.



David G. Campbell  
Senior United States District Judge