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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Kay Jean Banda,

10 Plaintiff,

11 v.

12 Commissioner of Social Security  
13 Administration,

14 Defendant.

No. CV-18-01428-PHX-SPL

**ORDER**

15 Plaintiff Kay Jean Banda seeks judicial review of the denial of her application for  
16 disability insurance benefits under the Social Security Act, 42 U.S.C. § 405(g).

17 Plaintiff argues that: (1) the Administrative Law Judge (“ALJ”) erred in finding  
18 Plaintiff’s gastrointestinal disorders were not severe; (2) the ALJ accorded inadequate  
19 weight to the opinions of Plaintiff’s treating physicians; (3) the vocational expert’s  
20 testimony was not supported by substantial evidence; and (4) the ALJ erred in discrediting  
21 Plaintiff’s symptom testimony (Doc. 13 at 2).

22 A person is considered “disabled” for the purpose of receiving social security  
23 benefits if he or she is unable to “engage in any substantial gainful activity by reason of  
24 any medically determinable physical or mental impairment which can be expected to result  
25 in death or which has lasted or can be expected to last for a continuous period of not less  
26 than 12 months.” 42 U.S.C. § 423(d)(1)(A). The Social Security Administration’s decision  
27 to deny benefits should be upheld unless it is based on legal error or is not supported by  
28 substantial evidence. *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008).

1 “Substantial evidence is more than a mere scintilla but less than a preponderance.” *Bayliss*  
2 *v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citation omitted). “It means such  
3 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”  
4 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation omitted). The Court must review  
5 the record as a whole and consider both the evidence that supports and the evidence that  
6 detracts from the ALJ’s determination. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985).

## 7 I. DISCUSSION

### 8 A. IMPAIRMENT ANALYSIS

9 Plaintiff first argues that the ALJ erred in finding her gastrointestinal disorder was  
10 not severe (Doc. 13 at 16-19). At step two of the sequential evaluation process, the ALJ  
11 considers the medical severity of the claimant’s impairments. 20 C.F.R. § 404.1520(a)(ii).  
12 This step is essentially “a de minimis screening device [used] to dispose of groundless  
13 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation omitted). “An  
14 impairment or combination of impairments can be found ‘not severe’ only if the evidence  
15 establishes a slight abnormality that has ‘no more than a minimal effect on an individual’s  
16 ability to work.’” *Id.*

17 To support the finding that Plaintiff’s diverticulitis was not severe, the ALJ found  
18 as follows (AR<sup>1</sup> 20-21):

19 In terms of the claimant’s diverticulitis, the records indicate  
20 that the claimant was diagnosed with acute diverticulitis, after  
21 reporting severe diarrhea and abdominal pain. However, the  
22 records stated that the claimant was prescribed a 10-day  
23 medication regime that improved her symptoms by 80%.  
24 Specifically, the treatment records reflect that while on  
25 medication, the claimant was able to tolerate solid foods, no  
26 longer had blood in her stool, and experienced minimal  
27 abdominal pain. This indicates to the undersigned that the  
28 claimant’s diverticulitis is being managed medically and  
should be amendable to proper control by adherence to  
recommended medical management and medication  
compliance. Secondary to the claimant’s diverticulitis, the  
records show that the claimant is status post laparoscopic  
sigmoid colectomy, left hemicolectomy, diverting ileostomy,  
and ileostomy reversal (Exhibits 13F/29 & 35, 19F/10).  
However, the records show that all of these procedures  
occurred in late 2014 and have not been performed on the

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<sup>1</sup> Administrative Record (*see* Doc. 12).

1 claimant again since then. The records also indicate that the  
2 claimant handled the procedures well (Exhibit 13F/51). This  
3 indicates to the undersigned that the claimant's status post  
4 laparoscopic sigmoid colectomy, left hemicolectomy,  
diverting ileostomy, and ileostomy reversal are isolated  
incidences that have since resolved with no further issues.

5 The ALJ thus found that Plaintiff's diverticulitis appeared to be resolved after various  
6 medical procedures performed in late 2014, or was otherwise managed by medication.

7 To support the decision, the ALJ primarily relies on evidence that Plaintiff's  
8 symptoms were properly managed when she adhered to a recommended medication  
9 regimen (AR 20). The ALJ, however, failed to include any citation to the record to support  
10 this finding, and Defendant has entirely ignored Plaintiff's assertion that this conclusion is  
11 baseless in the Response Brief. Moreover, to the extent the ALJ found that Plaintiff  
12 handled her hospital treatments well, suggesting that her issues were resolved, the record  
13 indicates that she continued to suffer from recurrent nausea (AR 826, 828), vomiting (AR  
14 826, 828), abdominal pain (AR 828), diarrhea (AR 824), and blood in her stool or rectal  
15 bleeding (AR 824, 828). It is also unclear to this Court, how tolerating a surgical procedure  
16 is any indication of its actual success in remedying the underlying problem. The Court  
17 thus finds that the evidence demonstrates Plaintiff's diverticulitis constituted more than a  
18 "slight abnormality," and will remand the issue for further proceedings.

### 19 **B. PLAINTIFF CREDIBILITY**

20 Plaintiff next argues the ALJ erred in rejecting Plaintiff's subjective complaints. In  
21 evaluating a claimant's testimony, the ALJ is required to engage in a two-step analysis.  
22 *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). First, the ALJ must decide whether  
23 the claimant has presented objective medical evidence of an impairment reasonably  
24 expected to produce some degree of the symptoms alleged. *Id.* If the first test is met and  
25 there is no evidence of malingering, the ALJ can reject the testimony regarding the severity  
26 of the symptoms only by providing specific, clear, and convincing reasons for the rejection.  
27 *Id.* Here, the ALJ found Plaintiff's medical impairments could reasonably be expected to  
28 cause some of the alleged symptoms, but concluded that her statements as to the intensity

1 or limiting effects of those symptoms were not entirely credible (AR 24).

2 Plaintiff alleges that the ALJ rejected Plaintiff's testimony solely based on a lack of  
3 objective medical evidence to support her allegations (Doc. Doc. 16 at 2-4). Plaintiff  
4 further claims that Defendant's argument that the ALJ discounted her symptoms based on  
5 her inconsistent use of an assistive device, a lack of more aggressive treatment or referral  
6 to a specialist, and "controlled" diabetes are impermissible ad hoc rationalizations (Doc.  
7 16 at 2). The Court disagrees with Plaintiff's characterization, and finds those reasons were  
8 explicitly discussed by the ALJ.

9 In rejecting Plaintiff's testimony, the ALJ found, in part, that Plaintiff's testimony  
10 that she was prescribed an ambulatory device was contradicted by the record, which failed  
11 to mention any need for a walker or cane (AR 24). The ALJ also noted that Plaintiff did  
12 not use an assistive device at the hearing or during her physical examination. In her Reply  
13 Brief, Plaintiff only argues that an ALJ cannot reject subjective complaints based solely on  
14 a lack of objective medical evidence (Doc. 16 at 3-4). The ALJ can, however, consider  
15 "testimony that appears less than candid." *See Smolen*, 80 F.3d at 1284. Nevertheless,  
16 upon review, this Court finds that Plaintiff's testimony is not, in fact, inconsistent with the  
17 record. Plaintiff stated that Dr. Bhalla "told [her] to get a walker," she obtained one from  
18 her father, and she primarily uses it immediately after taking medication or when walking  
19 on the tile floor in her home (AR 59-60). Although it may not have been medically  
20 necessary, and the use of a non-prescribed ambulatory device might be omitted from  
21 Plaintiff's residual functional capacity ("RFC"), the Court does not find her testimony was  
22 such that it was inconsistent with the record.

23 Similarly, the ALJ also found that Plaintiff's testimony as to the side effects of her  
24 medication were inconsistent with her questionnaire (AR 24). The ALJ stated that Plaintiff  
25 testified that her medication caused her to "experience excessive sleepiness" (AR 24), but  
26 noted her questionnaire indicated that she only slept four or five hours a night, "which may  
27 also account for her need to nap frequently throughout the day" (AR 24). How much of  
28 Plaintiff's nap schedule is due to medication as opposed to the hours of sleep she gets at

1 night is speculative at best, and the Court finds this reasoning to discount Plaintiff's  
2 testimony to be insufficient.

3 The ALJ also found that "the lack of more aggressive treatment, surgical  
4 intervention, or even a referral to a specialist again suggests the claimant's symptoms and  
5 limitations were not as severe as she alleged" (AR 23). In considering a claimant's  
6 treatment record, however, "the adjudicator must not draw any inferences about an  
7 individual's symptoms and their functional effects from a failure to seek or pursue regular  
8 treatment without first considering any explanations the individual may provide, or other  
9 information in the case record, that may explain infrequent or irregular medical visits or  
10 failure to seek medical treatment." SSR 96-7P, 1996 WL 374186, at \*7-8 (1996). Here,  
11 as even noted by the ALJ (AR 23), one of Plaintiff's treating physicians opined that  
12 Plaintiff did not necessarily need surgical treatment for her meniscus tear as it was  
13 degenerative in nature (AR 787), and this advice provides a legitimate reason for not  
14 pursuing surgical intervention. *See id.* In addition, it is unclear to the Court what other  
15 aggressive treatment the ALJ believes Plaintiff should have pursued for her fibromyalgia,  
16 diabetes with neuropathy, and osteoarthritis. Accordingly, this reason, as presented, is  
17 insufficient.

18 Finally, the ALJ discredited Plaintiff's subjective testimony as her allegations of  
19 disabling symptoms were inconsistent with the medical evidence. First, the Court notes  
20 that any alleged lack of corroborating medical evidence, and the alleged severity of pain,  
21 is not inconsistent with fibromyalgia, which the ALJ took into consideration in determining  
22 Plaintiff's RFC. Moreover, although the lack of medical evidence can be considered in a  
23 credibility analysis, it cannot be the only basis for discounting subjective symptom  
24 testimony. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) ("[O]nce the claimant  
25 produces objective medical evidence of an underlying impairment, [the ALJ] may not  
26 reject a claimant's subjective complaints based solely on a lack of objective medical  
27 evidence to fully corroborate the alleged severity of pain."). Having found the ALJ's other  
28 justifications for discounting Plaintiff's symptom testimony were reached in error, this

1 reason alone cannot suffice.

### 2 C. MEDICAL OPINIONS

3 Plaintiff argues that the ALJ accorded inadequate weight to the opinion of Plaintiff's  
4 treating physicians, Dr. Rajesh Bhakta and Dr. Ravi Bhalla (Doc. 13 at 19-23).

5 To reject an uncontradicted opinion of a treating or examining  
6 doctor, an ALJ must state clear and convincing reasons that are  
7 supported by substantial evidence. If a treating or examining  
8 doctor's opinion is contradicted by another doctor's opinion, an  
ALJ may only reject it by providing specific and legitimate  
reasons that are supported by substantial evidence.

9 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (internal citation omitted). "The  
10 ALJ can meet this burden by setting out a detailed and thorough summary of the facts and  
11 conflicting clinical evidence, stating his interpretation thereof, and making findings."  
12 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

13 Here, Dr. Bhakta opined that Plaintiff could only sit, stand, and walk for an hour or  
14 less in a work day, would need to change positions every 30 minutes, could occasionally  
15 grasp or reach, could occasionally lift and carry up to ten pounds, and that Plaintiff's  
16 impairments would interfere with her ability to concentrate (AR 25). The ALJ gave little  
17 weight to Dr. Bhakta's medical opinion because "his assessment contrasts sharply with the  
18 medical evidence and is not supported by the treatment records" (AR 25). The ALJ,  
19 however, failed to explain how the record undermines Dr. Bhakta's conclusions regarding  
20 Plaintiff's medical conditions. *See Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)  
21 ("The ALJ must do more than offer his conclusions. He must set forth his own  
22 interpretations and explain why they, rather than the doctors', are correct."). Because the  
23 ALJ's statement was conclusory in nature, it cannot serve as a specific and legitimate  
24 reason for rejecting Dr. Bhakta's opinion.

25 The ALJ further rejected Dr. Bhakta's opinion because "it appears that Dr. Bhakta  
26 may have relied quite heavily on the subjective reports of symptoms and limitations  
27 provided by the claimant, and seemed to uncritically accept as true most, if not all, of what  
28 the claimant reported," despite good reasons to question Plaintiff's reliability (AR 25-26).

1 “A physician’s opinion of disability ‘premised to a large extent upon the claimant’s own  
2 accounts of [her] symptoms and limitations’ may be disregarded where those complaints  
3 have been ‘properly discounted.’” *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595,  
4 602 (9th Cir. 1999) (quotation omitted). As already discussed above, the ALJ erred in  
5 discrediting Plaintiff’s symptom testimony and there is no evidence of malingering. In  
6 addition, there is nothing to indicate Dr. Bhakta relied on Plaintiff’s statements more  
7 heavily than his own clinical observations (*see* AR 344 (clinical and laboratory findings),  
8 407 (clinical and laboratory findings), 673 (clinical and laboratory findings, including  
9 review of rheumatology records), 777 (MRI Right Femur), 778-79 (MRI Right Knee, 780  
10 (MRI Right Femur)). *See Regennitter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1300  
11 (9th Cir. 1999). Accordingly, the Court finds the ALJ erred in rejecting Dr. Bhakta’s  
12 opinion for the reasons provided and will remand the issue to the ALJ for further  
13 consideration.<sup>2</sup>

14 The ALJ also afforded little weight to Dr. Bhalla’s medical opinion, finding his  
15 report contained inconsistencies and the course of treatment he proscribed was not  
16 consistent with what one would expect if Plaintiff were truly disabled. First, the Court  
17 finds the inconsistencies relied on by the ALJ are not, in fact, true inconsistencies. The  
18 ALJ found that in 2015, Dr. Bhalla opined that Plaintiff’s condition limited her ability to  
19 grasp, lift weights, stand, sit for prolonged periods, walk, reach, bend, and kneel (AR 672).  
20 The ALJ further found that opinion to be inconsistent with a 2017 questionnaire, in which  
21 Dr. Bhalla stated he could not determine for how long or to what extent Plaintiff was  
22 limited in those same areas (AR 678-682). Upon closer review, however, Dr. Bhalla’s

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24 <sup>2</sup> Although not argued, the Court notes that reliance on subjective symptoms is customary  
25 with fibromyalgia. Fibromyalgia is “a rheumatic disease that causes inflammation of the  
26 fibrous connective tissue components of muscles, tendons, ligaments, and other tissue.”  
27 *Benecke v. Barnhart*, 379 F.3d 587, 589 (9th Cir. 2004). Common symptoms include  
28 “chronic pain throughout the body, multiple tender points, fatigue, stiffness, and a pattern  
of sleep disturbance that can exacerbate the cycle of pain and fatigue associated with the  
disease.” *Id.* at 590. Important here, however, is that “there are no laboratory tests to  
confirm the diagnosis.” *Id.* In fact, “[p]atients with [fibromyalgia] usually look healthy.”  
*Rollins v. Massanari*, 261 F.3d 853, 863 (9th Cir. 2001). As a result, “[t]he disease is  
diagnosed entirely on the basis of patients’ reports of pain and other symptoms.” *Benecke*,  
379 F.3d at 590.

1 2015 opinion, although acknowledging her limitations, explicitly states that “[t]he exact  
2 number of hours for sitting, standing and the amount of weight the patient can lift is not  
3 within the scope of this practice” (AR 672). Accordingly, based on that statement, it is  
4 unsurprising that Dr. Bhalla’s 2017 evaluation states that Plaintiff is generally restricted,  
5 but declines to opine as to the exact number of hours she can sit or stand in a workday, or  
6 the number of pounds she can lift or carry. Because the reports are not, in fact, inconsistent,  
7 the Court finds that reasoning to be insufficient. To the extent the ALJ notes that the course  
8 of treatment pursued by Dr. Bhalla was inconsistent with what one would expect for a  
9 disabled individual, the Court finds that reasoning to be conclusory, vague, and deficient.  
10 *See Trevizo v. Berryhill*, 871 F.3d 664, 677 (9th Cir. 2017) (“[T]he failure of a treating  
11 physician to recommend a more aggressive course of treatment, absent more, is not a  
12 legitimate reason to discount the physician’s subsequent medical opinion about the extent  
13 of disability.”). Accordingly, the Court finds the ALJ erred in rejecting Dr. Bhalla’s  
14 opinion for the reasons provided and will remand the issue to the ALJ for further  
15 consideration.

#### 16 **D. VOCATIONAL EXPERT TESTIMONY**

17 Finally, Plaintiff argues that the ALJ erred in failing to include Plaintiff’s limited  
18 ability to reach in claimant’s RFC (Doc. 13 at 23-24). At step four of the sequential  
19 analysis, the ALJ assesses the claimant’s RFC and determines whether the claimant is still  
20 capable of performing past relevant work. 20 C.F.R. § 404.1520(a)(4)(iv). If so, the  
21 claimant is not disabled and the inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and  
22 final step, where he determines whether the claimant can perform any other work in the  
23 national economy based on the claimant’s RFC, age, education, and work experience. 20  
24 C.F.R. § 404.1520(a)(4)(v). Vocational testimony provides the ALJ with evidence to help  
25 determine whether a claimant is capable of performing past relevant work in light of their  
26 RFC.

27 Plaintiff argues that the ALJ’s determination that Plaintiff is capable of performing  
28 past relevant work was based on an erroneous hypothetical to the vocational expert which



1 included, and turned on, the ability to “frequently reach.” Defendant argues that the ALJ  
2 did not err in relying on the hypothetical because there were competing opinions on the  
3 reaching issue, and the ALJ had assigned those opinions supporting Plaintiff’s alleged  
4 limitation little weight. Because the Court has already found the ALJ’s reasons for  
5 rejecting Dr. Bhakta and Dr. Bhalla’s opinions to be insufficient, the Court will remand  
6 this issue for further consideration.


7 **II. CONCLUSION**

8 It is in this Court’s discretion to reverse and remand for an award of benefits or  
9 further proceedings. *Holohan v. Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). In this  
10 case, remand is appropriate to properly consider Plaintiff’s diverticulitis, the medical  
11 opinions of Plaintiff’s treating physicians, and Plaintiff’s subjective complaints.  
12 Accordingly,

13 **IT IS ORDERED** that the final decision of the Commissioner of Social Security is  
14 **vacated and remanded** to the Commissioner of the Social Security Administration for  
15 further proceedings consistent with this order.

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

18 Dated this 29th day of August, 2019.

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20   
21 Honorable Steven P. Logan  
22 United States District Judge  
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