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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Christi L Scala,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-21-00539-PHX-MTL

ORDER

15 At issue is the denial of Plaintiff's Application for Title II Disability Insurance
16 Benefits. Plaintiff filed a Complaint (Doc. 1) seeking judicial review of that denial, and the
17 Court now considers Plaintiff's Opening Brief (Doc. 23, "Pl.'s Br."), Defendant's
18 Response Brief (Doc. 27, "Def.'s Br."), and Plaintiff's Reply Brief (Doc. 30, "Reply").
19 Plaintiff also filed a Supplemental Citation to Authority (Doc. 31) to which Defendant filed
20 a Motion to Strike.¹ (Doc. 33.) The Court has reviewed the briefs and Administrative
21 Record (Doc. 22, "R.") and now reverses the Administrative Law Judge's decision and
22 remands the case to the Social Security Administration for further consideration.²

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25 ¹ Plaintiff Christ L. Scala (Scala) filed a notice of supplemental authority to call the Court's
26 attention to *Woods v. Kijakazi*, 32 F.4th 785 (9th Cir. 2022). (Doc. 31.) Without leave of
27 the Court, Plaintiff offers seven pages of additional argument and briefing. (Doc. 31.) The
Scheduling Order is clear about the page lengths and timing of briefing in this case. (Doc.
3.) The Court also makes clear it may strike a non-complying brief. (Doc. 3.) For the
forgoing reasons, Plaintiff's supplemental briefing will be stricken.

28 ² Both parties have submitted legal memoranda and oral argument would not have aided
the Court's decisional process. *See Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998);
see also LRCiv 7.2(f); Fed. R. Civ. P. 78(b).

1 **I. BACKGROUND**

2 Plaintiff, Christi Scala, filed an application for Social Security Disability Insurance
3 benefits on October 26, 2018 based on disability beginning February 1, 2018. (Pl.’s Br. at
4 2.) After state agency initial and reconsideration denials, the Administrative Law Judge
5 (“ALJ”) issued an unfavorable decision on August 28, 2020. It became the final agency
6 decision when the Social Security Administration Appeals Council denied a request for
7 review of that decision on February 11, 2021 and adopted the ALJ decision as the agency’s
8 final decision. (Pl.’s Br. at 2.) The present appeal follows.

9 **II. LEGAL STANDARD**

10 In determining whether to reverse an ALJ’s decision, the district court reviews only
11 those issues raised by the party challenging the decision. *See Lewis v. Apfel*, 236 F.3d 503,
12 517 n.13 (9th Cir. 2001). The court may set aside the Commissioner’s disability
13 determination only if the determination is not supported by substantial evidence or is based
14 on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is
15 more than a scintilla, but less than a preponderance; it is relevant evidence that a reasonable
16 person might accept as adequate to support a conclusion considering the record as a whole.
17 *Id.* To determine whether substantial evidence supports a decision, the court must consider
18 the record as a whole and may not affirm simply by isolating a “specific quantum of
19 supporting evidence.” *Id.* As a general rule, “[w]here the evidence is susceptible to more
20 than one rational interpretation, one of which supports the ALJ’s decision, the ALJ’s
21 conclusion must be upheld.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002)
22 (citations omitted).

23 To determine whether a claimant is disabled for purposes of the Act, the ALJ
24 follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the burden of
25 proof on the first four steps, but the burden shifts to the Commissioner at step five. *Tackett*
26 *v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At the first step, the ALJ determines whether
27 the claimant is presently engaging in substantial gainful activity.
28 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not disabled, and the inquiry ends. *Id.*

1 At step two, the ALJ determines whether the claimant has a “severe” medically
2 determinable physical or mental impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If not, the
3 claimant is not disabled, and the inquiry ends. *Id.* At step three, the ALJ considers whether
4 the claimant’s impairment or combination of impairments meets or medically equals an
5 impairment listed in Appendix 1 to Subpart P of 20 C.F.R. Part 404. 20 C.F.R.
6 § 404.1520(a)(4)(iii). If so, the claimant is automatically found to be disabled. *Id.* If not,
7 the ALJ proceeds to step four. *Id.* At step four, the ALJ assesses the claimant’s RFC and
8 determines whether the claimant is still capable of performing past relevant work.
9 20 C.F.R. § 404.1520(a)(4)(iv). If so, the claimant is not disabled, and the inquiry ends. *Id.*
10 If not, the ALJ proceeds to the fifth and final step, where he determines whether the
11 claimant can perform any other work in the national economy based on the claimant’s RFC,
12 age, education, and work experience. 20 C.F.R. § 404.1520(a)(4)(v). If so, the claimant is
13 not disabled. *Id.* If not, the claimant is disabled. *Id.*

14 **III. ANALYSIS**

15 The Court begins its analysis with Plaintiff’s symptom testimony and then moves
16 to the opinion evidence.

17 **A. The ALJ properly rejected Plaintiff’s symptom testimony**

18 The ALJ engages in a two-step analysis when evaluating a claimant’s symptom
19 testimony. *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014). First, the ALJ must
20 determine whether the claimant has produced objective medical evidence of an underlying
21 impairment. *Id.* Second, unless there is evidence that the claimant is malingering, the ALJ
22 must provide specific, clear, and convincing reasons for rejecting symptom testimony
23 associated with the underlying impairment. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir.
24 2005). This is the most demanding standard in Social Security cases. *Moore v. Comm’r of*
25 *Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002). Here, the ALJ found an underlying
26 impairment and cited no evidence of malingering. (R. at 13-25.) Accordingly, the ALJ
27 needed to provide specific, clear and convincing reasons to discount Plaintiff’s symptom
28 testimony.

1 In making credibility determinations, an ALJ may consider a variety of factors in
2 evaluating symptom testimony including, “[the claimant’s] reputation for truthfulness,
3 inconsistencies either in [her] testimony or between [her] testimony and [her] conduct,
4 [her] daily activities, [her] work record, and testimony from physicians and third parties
5 concerning the nature, severity, and effect of the symptoms of which [she] complains.”
6 *Light v. Soc. Sec. Admin., Comm’r*, 119 F.3d 789, 792 (9th Cir. 1997). Here, the ALJ
7 appears to present two bases for discounting Plaintiff’s testimony: (1) inconsistency with
8 Plaintiff’s daily activities/prior work history and (2) inconsistency with the objective
9 medical evidence.

10 As to the first justification, an ALJ may find that a claimant’s testimony regarding
11 her daily activities detracts from her credibility when the activities contradict other
12 testimony and meet the “threshold for transferable work skills.” *Orn*, 495 F.3d at 639. Daily
13 activities may lead to an adverse credibility finding if the activities are transferable to a
14 work setting and the claimant can engage in them for a substantial part of her day. *Id.* Even
15 if the work she has done during the relevant period does not rise to the level of substantial
16 activity, “it may show that [the claimant was] able to do more work than [she] actually
17 did.” *Id.* § 404.1571; *see also Ford*, 950 F.3d at 1156 (“An ALJ may consider any work
18 activity, including part-time work, in determining whether a claimant is disabled”)

19 As the Commissioner argues, the facts of this case are analogous to those in *Bray v.*
20 *Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219 (9th Cir. 2009). In *Bray*, the claimant “worked
21 for an ill friend as a part-time caregiver.” *Id.* at 1221. The Ninth Circuit affirmed that the
22 ALJ reasonably discounted the claimant’s subjective complaints because “she recently
23 worked as a personal caregiver for two years.” *Id.* at 1227. As in *Bray*, Scala testified that
24 since March 2018, one month after she allegedly became disabled, she has worked about
25 20 hours per week as a caregiver, which involves changing her adult client’s diaper, giving
26 baths, feeding, and socializing. (R. at 20, 38; R. at 21, 38); *see also* (R. at 15, 168.) In her
27 opening brief, Plaintiff does not challenge the ALJ’s use of Plaintiff’s work history to
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1 discount Ms. Scala's subjective complaints.³ Accordingly, Plaintiff's opportunity to do so
2 is forfeited. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir.
3 2008) (explaining that issues not "specifically and distinctly argued" in the opening brief
4 are forfeited). The Court need not discuss any inconsistency in the objective medical
5 evidence since any other error in assessing Plaintiff's subjective complaints is harmless so
6 long as a valid reason remains. *Id.* at 1162.

7 **B. The ALJ Erred by Failing to Properly Address the Medical Opinion of**
8 **NP Pierce**

9 Scala also argues that the ALJ erred by rejecting NP Pierce's assessments without
10 providing an explanation of the supportability and consistency of NP Pierce's opinion.
11 (Pl.'s Br. at 17.) In response, the Commissioner maintains that the ALJ conformed to the
12 revised regulations' articulation requirements in reasonably finding NP Pierce's opinions
13 unpersuasive. (Def.'s Br. at 13.)

14 In 2017, the Social Security Administration amended the regulations for evaluating
15 medical evidence. *See* Revisions to Rules Regarding Evaluation of Medical Evidence, 82
16 Fed. Reg. 5844, 5844 (Jan. 18, 2017). The new regulations apply to claims filed on or after
17 March 27, 2017. *Id.* Here, Plaintiff filed her application after the effective date. (Pl.'s Br.
18 at 2.) The Ninth Circuit recently addressed the effect of the new regulations, so the Court
19 begins by addressing this issue. *See Woods v. Kijakazi*, 32 F.4th 785 (9th Cir. 2022).

20 Under the old regulations, "[t]he law in the Ninth Circuit [was] that, although the
21 ALJ must consider all medical opinion evidence, there is a hierarchy among the sources of
22 medical opinions. Those who have treated a claimant are treating physicians, those who
23 examined but did not treat the claimant are examining physicians, and those who neither
24 examined nor treated the claimant are nonexamining physicians." *Latahotchee v. Comm'r*
25 *of Soc. Sec. Admin.*, 2021 WL 267909, *4 (D. Ariz. 2021) (citation omitted). Based on this
26 hierarchy, the Ninth Circuit consistently ruled that an ALJ may only reject an examining
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28 ³ The Court does acknowledge that Plaintiff does challenge the ALJ's use of Ms. Scala's
work history to discount Nurse Practitioner Pierce's ("NP Pierce") assessment. (Pl.'s Br.
at 24.)

1 physician's opinion by providing “specific and legitimate reasons that are supported by
2 substantial evidence in the record.” *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

3 The 2017 regulations provide that “[ALJs] will not defer or give any specific
4 evidentiary weight, including controlling weight, to any medical opinion The most
5 important factors [an ALJ will] consider when [evaluating] the persuasiveness of medical
6 opinions . . . are supportability . . . and consistency.” 20 C.F.R. § 404.1520c(a). Other
7 factors, which an ALJ “may, but [is] *not required to*[] explain” when evaluating the
8 persuasiveness of a medical opinion, are the medical source's “relationship with the
9 claimant,” “specialization,” “familiarity with the other evidence in the claim,” and
10 “understanding of our disability program's policies and evidentiary requirements.” *Id.*
11 § 404.1520c(b)(2), (c) (emphasis added).

12 In *Woods*, the Ninth Circuit held that these revised regulations clearly intended to
13 abrogate its precedent requiring ALJs to provide “specific and legitimate reasons” for
14 rejecting a treating or examining doctor’s opinion. *See Woods*, 32 F.4th at 792.
15 Nonetheless, in so holding, the Ninth Circuit stressed that an ALJ “must ‘articulate . . . how
16 persuasive’ it finds ‘all of the medical opinions’ from each doctor or other source, and
17 ‘explain how it considered the supportability *and* consistency factors’ in reaching these
18 findings.” *Id.* (citing 20 C.F.R. §§ 404.1520c(b), 404.1520(b)(2) (emphasis added)).

19 Here, in failing to clearly explain how he considered the supportability of NP
20 Pierce’s opinion, the ALJ failed to meet the revised regulations’ articulation standards.
21 According to the Commissioner, the ALJ’s finding that NP Pierce’s opinions conflicted
22 with her own exams shows that her opinions are unsupported. (Def.’s Br. at 13.)
23 Specifically, Commissioner argues that “NP Pierce’s belief that [Plaintiff] would have
24 problems carrying out instructions, making judgments, and interacting with others [is
25 undercut by her findings that Plaintiff] presented as cooperative, articulate, and with
26 normal thought process and attention at multiple exams.” (*Id.* at 14.) The Court finds the
27 ALJ’s explanation insufficient. While the ALJ’s explanation addresses the consistency of
28 NP Pierce’s opinions, the revised regulations clearly state that an ALJ must also explain

1 how he considered the supportability factor in reaching his findings. *See Woods*, 32 F.4th
2 at 792. Supportability is defined as how “relevant the objective medical evidence and
3 supporting explanations presented by a medical source are to support his or her medical
4 opinion(s) or prior administrative medical findings.” 20 C.F.R. § 404.1520c(c)(1); *see also*
5 *Woods*, 32 F.4th at 793 n.4 (cautioning ALJs to be clear when discussing supportability
6 and directing them to use the term of art with precision). Thus, in reaching his conclusion,
7 the ALJ needed to adequately explain how the relevant objective medical evidence and NP
8 Pierce’s proffered supporting explanations were considered. Incongruities between NP
9 Pierce’s opinions may imply that NP Pierce’s opinions are inconsistent, but this does not
10 mean they are unsupported. Merely pointing out NP Pierce’s varying clinical findings does
11 not explain specifically how her medical opinion was unsupported. As a result, the Court
12 finds that the ALJ erred by not properly addressing how he considered the supportability
13 factor in finding NP Pierce’s medical opinion to be unpersuasive.

14 **C. The Credit-as-True Rule Does Not Apply**

15 Finally, Plaintiff asks that the Court apply the “credit-as-true” rule – resulting in
16 remand of Plaintiff’s case for payment of benefits rather than for further proceedings. (Pl.’s
17 Br. at 23–24.) The credit-as-true rule only applies in cases that raise “rare circumstances”
18 which permit the Court to depart from the ordinary remand rule under which the case is
19 remanded for additional investigation or explanation. *Treichler v. Comm’r of Soc. Sec.*
20 *Admin.*, 775 F.3d 1090, 1099-1102 (9th Cir. 2014). These rare circumstances arise when
21 three elements are present. First, the ALJ must have failed to provide legally sufficient
22 reasons for rejecting medical evidence. *Id.* at 1100. Second, the record must be fully
23 developed, there must be no outstanding issues that must be resolved before a
24 determination of disability can be made, and the Court must find that further administrative
25 proceedings would not be useful. *Id.* at 1101. Further proceedings are considered useful
26 when there are conflicts and ambiguities that must be resolved. *Id.* Third, if the above
27 elements are met, the Court may “find[] the relevant testimony credible as a matter of
28 law . . . and then determine whether the record, taken as a whole, leaves ‘not the slightest

1 uncertainty as to the outcome of [the] proceeding.” *Id.* (citations omitted).

2 In this case, the ordinary remand rule applies because the ALJ did not fully develop
3 the record in support of his decision to assign little weight to the opinion of NP Pierce.
4 Evidentiary conflicts remain that must be resolved and there is still uncertainty as to the
5 outcome of the proceeding. For the foregoing reasons, the Court will remand this matter to
6 the ALJ for further development.

7 **IV. CONCLUSION**

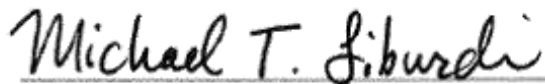
8 Accordingly,

9 **IT IS THEREFORE ORDERED** remanding this matter to the Social Security
10 Administration for further proceedings consistent with this Order.

11 **IT IS FURTHER ORDERED** granting Defendant’s Motion to Strike Plaintiff’s
12 Supplemental Citation to Authority. (Doc. 33.)

13 **IT IS FURTHER ORDERED** directing the Clerk of the Court to enter judgment
14 accordingly and close this case.

15 Dated this 30th day of August, 2022.

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18 Michael T. Liburdi
19 Michael T. Liburdi
20 United States District Judge
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