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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LYNN ANN BECKSTROM,)	
)	
Plaintiff,)	
)	
v.)	CIV 10-08123 PCT MEA
)	
MICHAEL J. ASTRUE,)	MEMORANDUM & ORDER
Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	
_____)	

The parties have consented to have all proceedings in this case conducted before a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) and Rule 73, Federal Rules of Civil Procedure.

Plaintiff, Ms. Lynn Beckstrom, proceeding *pro se*, brought this action pursuant to 42 U.S.C. § 405(g), seeking judicial review of the final decision of the Commissioner of the Social Security Administration, Defendant Defendant Michael Astrue (the "Commissioner"), denying Plaintiff's claim for disability insurance benefits and for Supplemental Security income ("SSI") benefits, pursuant to Title II of the Social Security Act, codified at 42 U.S.C. §§ 401-433.

1 **I Procedural History**

2 On January 18, 2005, Plaintiff filed an application for
3 disability benefits and supplemental security income benefits,
4 alleging she became disabled on July 15, 2004. See
5 Administrative Record on Review ("R.") (Doc. 18 & Doc. 19) at 21
6 & 71. Plaintiff stated she had been living in Page, Arizona,
7 since 1994. Id. at 80. The claim was denied initially, on
8 August 5, 2005, and on appeal, on March 1, 2006. Id. at 71.

9 Plaintiff requested a hearing before an Administrative
10 Law Judge, which was conducted in Minnesota on July 16, 2007.
11 Plaintiff was represented by a non-attorney at the hearing. Id.
12 at 21. In a decision issued December 27, 2007, the ALJ
13 concluded Plaintiff was not disabled and denied benefits. Id.
14 at 18. Plaintiff sought review of this decision, which was
15 denied by the Social Security Appeals Council on May 13, 2010.
16 Id. at 7. The date that Plaintiff was last insured for
17 disability insurance benefits was March 31, 2008. Id. at 21.

18 **II Standard of review**

19 The Court's jurisdiction extends to review of the final
20 decision of Defendant denying Plaintiff's application for Social
21 Security disability benefits and SSI benefits, pursuant to 42
22 U.S.C. §§ 405(g) and 1383(c)(3).

23 Judicial review of a decision of the Commissioner is
24 based upon the pleadings and the record of the contested
25 decision. See 42 U.S.C. § 405(g) (2003 & Supp. 2010). The
26 scope of the Court's review is limited to determining whether
27 the Commissioner, i.e., the ALJ, applied the correct legal
28 standards to Plaintiff's claim and whether the record as a whole

1 contains substantial evidence to support the ALJ's findings of
2 fact. See id. § 423; Bray v. Commissioner of Soc. Sec. Admin.,
3 554 F.3d 1219, 1222 (9th Cir. 2009); Orn v. Astrue, 495 F.3d
4 625, 630 (9th Cir. 2007); Webb v. Barnhart, 433 F.3d 683, 686
5 (9th Cir. 2005); Bustamante v. Massanari, 262 F.3d 949, 953 (9th
6 Cir. 2001). However, if an ALJ's legal error was harmless,
7 i.e., if there is substantial evidence in the record to support
8 the ALJ's conclusion on the challenged issue absent the legal
9 error, the case need not be remanded for further proceedings.
10 See, e.g., Carmickle v. Commissioner, Soc. Sec. Admin., 533 F.3d
11 1155, 1162 (9th Cir. 2008); Batson v. Commissioner of Soc. Sec.
12 Admin., 359 F.3d 1190, 1197 (9th Cir. 2004).

13 Satisfying the substantial evidence standard requires
14 more than a scintilla but less than a preponderance of record
15 evidence. See, e.g., Bray, 554 F.3d at 1222; Ryan v.
16 Commissioner of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008);
17 Orn, 495 F.3d at 630; Bustamante, 262 F.3d at 953. Substantial
18 evidence has been defined as the amount of relevant evidence a
19 reasonable mind would accept as adequate to support a
20 conclusion. See, e.g., Widmark v. Barnhart, 454 F.3d 1063, 1066
21 (9th Cir. 2006); Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir.
22 1999). Evidence is insubstantial if it is overwhelmingly
23 contradicted by other evidence in the administrative record.
24 See Threet v. Barnhart, 353 F.3d 1185, 1189 (10th Cir. 2003);
25 Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983); Cullen v.
26 Astrue, 480 F. Supp. 2d 1258, 1262 (D. Kan. 2007); Robison v.
27 Barnhart, 316 F. Supp. 2d 156, 163 (D. Del. 2004); Rodriguez v.
28 Barnhart, 252 F. Supp. 2d 329, 332 (N.D. Tex. 2003); Rieder v.

1 Apfel, 115 F. Supp. 2d 496, 501 (M.D. Pa. 2000).

2 If the evidence with regard to an issue is in
3 equipoise, the Court must affirm the decision of the ALJ. See,
4 e.g., Bray, 554 F.3d at 1222, quoting Massachi v. Astrue, 486
5 F.3d 1149, 1152 (9th Cir. 2007); Burch v. Barnhart, 400 F.3d
6 676, 679 (9th Cir. 2005); Holohan v. Massanari, 246 F.3d 1195,
7 1201 (9th Cir. 2001); Gwathney v. Chater, 104 F. 3d 1043, 1045
8 (8th Cir. 1997); Books v. Chater, 91 F. 3d 972, 977-78 (7th Cir.
9 1996); Casey v. Secretary of Health & Human Servs., 987 F.2d
10 1230, 1233 (6th Cir. 1993).

11 **III Statement of the Law**

12 The Court's jurisdiction extends to review of the final
13 decision of Defendant denying Plaintiff's application for Social
14 Security disability benefits and SSI benefits, pursuant to 42
15 U.S.C. §§ 405(g). In a Social Security disability benefits
16 case, the plaintiff does not have a duty to "prosecute" their
17 claims in order to obtain judicial review of an administrative
18 decision, except to file a timely complaint. Judicial review of
19 the denial of Social Security benefits is authorized by section
20 1383(c)(3), and section 405(g), which provides in pertinent
21 part:

22 Any individual, after any final decision of
23 the Secretary made after a hearing to which
24 he was a party, ... may obtain a review of
25 such decision by civil action ... brought
26 within the district court of the United
27 States for the judicial district in which the
28 plaintiff resides.... As a part of his answer
the Secretary shall file a certified copy of
the transcript of the record including the
evidence upon which the findings and
decisions complained of are based. *The court
shall have the power to enter, upon the
pleadings and transcript of the record, a*

1 *judgment affirming, modifying, or reversing*
2 *the decision of the Secretary, with or*
3 *without remand.... The findings of the*
 Secretary as to any fact, if supported by
 substantial evidence, shall be conclusive

4
5 (emphasis added).

6 Accordingly, once the complaint and a copy of the
7 record are filed, the Court has before it all that is necessary
8 to enter a judgment on the merits. It is the Court's
9 responsibility to determine whether there is substantial
10 evidence to support the ALJ's decision and whether the ALJ
11 applied the correct legal standard when denying benefits.
12 Although the Court may afford the parties an opportunity to file
13 additional briefs or motions in support of their positions, the
14 Court is not required to order such pleading.

15 Plaintiff has filed a complaint asserting the ALJ's
16 decision was in error. In response, the Defendant Commissioner
17 of the Social Security Administration has filed the
18 Administrative Record on Review. In this particular matter, the
19 Court concludes that requiring briefing would not be helpful in
20 resolving the issue before the Court and, accordingly, in the
21 interest of judicial efficiency no briefing has been ordered or
22 filed.

23 The federal government provides disability
24 benefits under two programs administered by
25 the SSA. []. Title II (SSDI) of the Social
26 Security Act ("Act"), 42 U.S.C. §§401 *et*
27 *seq.*, provides benefits to persons with
 mental or physical disabilities, and Title
 XVI (SSI) of the Act, 42 U.S.C. § 1381 *et*
 seq., provides benefits to indigent persons
 with disabilities.

28 Kildare v. Saenz, 325 F.3d 1078, 1080 (9th Cir. 2003). The

1 statutory definitions of disability and the regulations
2 promulgated by the Social Security Administration for
3 determining disability governing these two programs are, in all
4 aspects relevant to the matter before the Court, substantively
5 identical. See, e.g., Mickles v. Shalala, 29 F.3d 918, 924 n.2
6 (4th Cir. 1994). Federal regulations prescribe the same five-
7 step "sequential evaluation" for making the SSI disability
8 determination as for a determination pursuant to Title II. See
9 20 C.F.R. §§ 404.1520, 416.920 (2010); Bowen v. City of New
10 York, 476 U.S. 467, 470, 106 S. Ct. 2022, 2025 (1986).¹

11 To establish eligibility for disability benefits under
12 the Social Security Act, the claimant must show that: (1) she
13 suffers from a medically determinable physical or mental
14 impairment that can be expected to result in death or that has
15 lasted or can be expected to last for a continuous period of not
16 less than twelve months, see 42 U.S.C. § 423(d)(1)(A) (2003 &
17 Supp. 2010); and (2) the impairment renders the claimant
18 incapable of performing the work that the claimant previously
19 performed and incapable of performing any other substantial
20 gainful employment that exists in the national economy. See id.
21 § 423(d)(2)(A). If a claimant meets both of these requirements,
22 she is by definition "disabled." See Tackett v. Apfel, 180 F.3d
23 1094, 1098 (9th Cir. 1999).

24

25

26 ¹ The primary difference between the two benefits programs is
27 that, to be eligible for Title II disability benefits, the claimant
28 must demonstrate they were "disabled" on or before the date they are
or were "last insured" for these benefits. See, e.g., McCartey v.
Massanari, 298 F.3d 1072, 1077 n.7 (9th Cir. 2002); Ball v. Massanari,
254 F.3d 817, 819 (9th Cir. 2001).

1 The Social Security Administration regulations
2 prescribe a five-step sequential process for determining whether
3 a claimant is "disabled." See 20 C.F.R. § 404.1520 (2010). If
4 a claimant is found to be "disabled" or "not disabled" at any
5 step in the sequential process, there is no need to proceed to
6 the subsequent step(s). See id.

7 First, the claimant must establish she is not gainfully
8 employed at the time of her application. See id. §
9 404.1520(a)(4)(i). Next, the claimant must be suffering from a
10 "medically severe" impairment or "combination of impairments."
11 Id. § 404.1520(a)(4)(ii). The third step is to determine
12 whether the claimant's impairment meets or equals one of the
13 "listed" impairments included in Appendix 1 to this section of
14 the Code of Federal Regulations. See id. § 404.1520(a)(4)(iii).
15 If the claimant's impairments meet or equal one of the
16 impairments listed in Appendix 1, the claimant is conclusively
17 "disabled." See id. The fourth step of the process requires
18 the ALJ to determine whether the claimant, despite her
19 impairment, can perform work similar to work she has performed
20 in the past. A claimant whose "residual functional capacity"
21 allows her to perform "past relevant work" despite her
22 impairments, will be denied benefits. See id. §
23 404.1520(a)(4)(iv).

24 The claimant bears the burden of proving disability
25 with regard to the first four steps of the evaluation. See
26 Valentine v. Social Security Admin., 574 F.3d 685, 689 (9th Cir.
27 2009); Andrews v. Shalala, 53 F.3d 1035, 1040 (9th Cir. 1995).
28 If the claimant cannot perform her past relevant work, at step

1 five the burden shifts to the Commissioner to demonstrate the
2 claimant can perform other substantial gainful work that exists
3 in the national economy, given her residual functional capacity.
4 See 20 C.F.R. § 404.1520(a)(4)(v) (2009); Valentine, 574 F.3d at
5 689; Tackett, 180 F.3d at 1098.

6 When assessing a claimant's residual functional
7 capacity, the Commissioner must consider the record opinions of
8 physicians. Social Security Administration regulations
9 distinguish among the opinions of three types of physicians
10 regarding a claimant's residual functional capacity: (1) those
11 who treat the claimant (the "treating" physicians); (2) those
12 who examine but do not treat the claimant (the "examining"
13 physicians); and (3) those who neither examine nor treat the
14 claimant, but who review the claimant's file, usually at the
15 behest of the Social Security Administration (the "nonexamining"
16 or "reviewing" physicians). See 20 C.F.R. § 404.1527(d) (2010);
17 Valentine, 574 F.3d at 692; Lester v. Chater, 81 F.3d 821, 830
18 (9th Cir. 1995). Generally, in determining whether a claimant
19 is disabled, i.e., in assessing a claimant's residual functional
20 capacity, a treating physician's opinion carries more weight
21 than an examining physician's, and an examining physician's
22 opinion carries more weight than a reviewing physician's. See
23 20 C.F.R. § 404.1527(d) (2010); Valentine, 574 F.3d at 692;
24 Lester, 81 F.3d at 830. The Social Security Administration
25 regulations also instruct adjudicators to give greater weight to
26 medical opinions that are explained than to those that are not
27 explained, see 20 C.F.R. § 404.1527(d)(3) (2010), and to the
28 opinions of specialists concerning matters relating to their

1 specialty over those of nonspecialists. See id. §
2 404.1527(d)(5). See also Holohan, 246 F.3d at 1201-02; Saelee
3 v. Chater, 94 F.3d 520, 522 (9th Cir. 1996).

4 Notably in this matter, an ALJ must provide "specific,
5 cogent reasons," supported by substantial evidence in the
6 record, for disbelieving a claimant's statements regarding the
7 claimant's own functional capacity. See Lester, 81 F.3d at 834;
8 Bunnell, 947 F.2d at 345. See also Jernigan v. Sullivan, 948
9 F.2d 1070, 1073 (8th Cir. 1991). Unless there is affirmative
10 evidence indicating that the claimant is actually malingering,
11 the ALJ's reasons for rejecting the claimant's testimony must be
12 clear and convincing. See Lester, 81 F.3d at 834; Swenson v.
13 Sullivan, 876 F.2d 683, 687 (9th Cir. 1989).

14 The ALJ must specifically identify what portion of the
15 testimony in the record is credible and what testimony
16 undermines the claimant's statements regarding the severity of
17 their limitations. See Lester, 81 F.3d at 834; Dodrill v.
18 Shalala, 12 F.3d 915, 918 (9th Cir. 1993). "To find the
19 claimant not credible the ALJ must rely either on reasons
20 unrelated to the subjective testimony (e.g., reputation for
21 dishonesty), on conflicts between [the claimant's] testimony and
22 [their] own conduct, or on internal contradictions in that
23 testimony." Light v. Social Sec. Admin., 119 F.3d 789, 792 (9th
24 Cir. 1997).

25 To determine whether the claimant's testimony
26 regarding the severity of her symptoms is
27 credible, the ALJ may consider, for example:
28 (1) ordinary techniques of credibility
evaluation, such as the claimant's reputation
for lying, prior inconsistent statements
concerning the symptoms, and other testimony

1 by the claimant that appears less than
2 candid; (2) unexplained or inadequately
3 explained failure to seek treatment or to
4 follow a prescribed course of treatment; and
5 (3) the claimant's daily activities. In
evaluating the credibility of the symptom
testimony, the ALJ must also consider the
factors set out in [Social Security Ruling]
88-13.

6 Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996) (internal
7 citations omitted).

8 An ALJ may not discredit a claimant's testimony
9 regarding her pain "solely because the degree of pain alleged by
10 the claimant is not supported by objective medical evidence."
11 Orteza v. Shalala, 50 F.3d 748, 750 (9th Cir. 1995) (citing
12 Bunnell, 947 F.2d at 346-47). See also Social Security Ruling
13 96-7p, 61 Fed. Reg. 34483, 34485 (July 2, 1996) ("An
14 individual's statements about the intensity and persistence of
15 pain or other symptoms or about the effect the symptoms have on
16 his or her ability to work may not be disregarded solely because
17 they are not substantiated by objective medical evidence.").

18 **IV Statement of Facts**

19 Plaintiff testified about her disabilities at a
20 hearing in St. Cloud, Minnesota, conducted in July of 2007. At
21 the hearing Plaintiff was represented by a Disability
22 Specialist. Plaintiff alleged she became disabled in 2004, when
23 she was 35 years of age. The ALJ noted Plaintiff had applied
24 for both SSI and disability insurance benefits and that she was
25 insured for disability benefits through March 31, 2008. R. at
26 1175.

27 Plaintiff was seen at a clinic in Onamia, Minnesota,
28 operated by the Mille Lacs Health System, from January of 2004

1 through October of 2006. Plaintiff was seen, *inter alia*, by a
2 physician's assistant, Mr. Dominick, and physicians Cathy
3 Donovan and Roger Boettcher. Plaintiff was treated for, *inter*
4 *alia*, fibromyalgia, chronic fatigue, thyroid issues, gastric
5 reflux issues, migraine headaches, and polycystic dysfunction.

6 Plaintiff's treating chiropractic physician, Dr.
7 Minser, completed a Medical Source Statement of Ability to do
8 Work-related Activities in March of 2005. At that time Dr.
9 Minser had treated Plaintiff since May of 2001. Dr. Minser
10 opined that Plaintiff's medical condition imposed limitations
11 lasting longer than 12 months. Id. at 815. The doctor opined
12 that Plaintiff could only occasionally lift 20 pounds and
13 frequently lift 10 pounds. The doctor concluded that Plaintiff
14 could stand or walk at least two hours but less than six hours
15 in an eight-hour workday and that Plaintiff could sit for four
16 or five hours in a workday. The doctor stated Plaintiff needed
17 to alternate standing and sitting every 20 or 30 minutes. The
18 doctor opined Plaintiff could frequently balance, stoop, kneel,
19 reach and grasp but only occasionally crouch and crawl. The
20 doctor further stated Plaintiff should not work around heights,
21 moving machinery, or excessive noise. Id. at 817.

22 Thomas Dominick, Plaintiff's treating physician's
23 assistant, completed a Fibromyalgia Residual Functional Capacity
24 Questionnaire on November 20, 2005. Id. at 506. He noted he
25 had examined Plaintiff once or twice a month and that she met
26 the American Rheumatological Society criteria for fibromyalgia.
27 Mr. Dominick stated that Plaintiff also suffered from chronic
28 fatigue and that her prognosis was guarded. Mr. Dominick stated

1 that Plaintiff's condition was expected to last at least twelve
2 months. In response to the question "Is your patient a
3 malingerer?" Mr. Dominick replied "No." Id. at 502. He
4 reported that Plaintiff's experience of symptoms was severe
5 enough to interfere with attention and concentration frequently
6 and that Plaintiff had moderate limitations in dealing with work
7 stress.

8 Mr. Dominick opined Plaintiff could walk for four
9 blocks and that she could sit or stand for 20 minutes at one
10 time. He stated Plaintiff could sit and stand or walk for a
11 total of four hours per eight-hour workday. He stated Plaintiff
12 would need to take unscheduled breaks hourly during the workday
13 for 10 to 20 minutes at a time. He opined Plaintiff could only
14 occasionally carry 10 pounds and never more than 10 pounds. He
15 stated Plaintiff could spend only 10 percent of the time during
16 an eight-hour workday using her hands, fingers, and arms.
17 Additionally, Mr. Dominick stated Plaintiff would have good days
18 and bad days and that she would be likely to be absent from work
19 more than three days per month. Id. at 505.

20 In December of 2005 a licensed psychologist, Ms.
21 Holden, noted she had treated Plaintiff from April of 2004
22 through July of 2005. Ms. Holden diagnosed Plaintiff as
23 suffering from Post Traumatic Stress Disorder (PTSD) and major
24 depression. Id. at 508. Ms. Holden noted that, on November 4,
25 2005, Plaintiff was assessed with severe anxiety and that she
26 was having severe memory problems and serious energy problems.
27 Id. Ms. Holden opined that she had

28 serious reservations about [Plaintiff's]

1 ability to be in regular attendance at work;
2 complete a normal workday without
3 experiencing terror that would immobilize
4 her; remember work-like procedures due to
5 her memory problems. I also have concerns
6 about her ability to perform at a
7 competitive rate; handle detailed
8 instruction; and maintain sustained
9 attention and concentration.

10 Id.

11 Ms. Holden completed a Medical Opinion Re: Ability to
12 do Work-related Activities (Mental), on November 8, 2005. Id.
13 at 512-13. She noted Plaintiff's memory problems and that
14 Plaintiff had panic attacks. She opined Plaintiff could not
15 remember work-like procedures, maintain regular attendance, or
16 complete a normal workday and workweek without interruptions
17 from psychologically-based symptoms. Id.

18 Ms. Holden's treatment notes dated May 11, 2005, state
19 that Plaintiff was

20 discouraged, lonely, fatigued and worried
21 about her health. ... She reports having
22 the anxious physical symptoms of dizziness,
23 shortness of breath, racing heart,
24 restlessness, tight muscles, shaking,
25 numbness, butterflies and sweating and hot
26 flashes. ...

27 She reports doing quite well in Arizona
28 until the father of her child showed up on
her doorstep one day and then the anxiety
increased immensely. She never returned to
the home after this man showed up at her
house.

29 Id. at 514. Treatment notes dated August 22, 2005, indicate
30 Plaintiff had lived "in multiple women's shelters for the last
31 two months." Id. at 514.

32 A reviewing psychologist, Ms. Johnson, completed a
33 Mental Status Examination Activities of Daily Living Assessment
34 for the Minnesota Social Security Disability Determination

1 Services on February 1, 2006. Id. at 529. She noted that
2 Plaintiff was being treated for fibromyalgia by Dr. Gordon and
3 Mr. Dominick, and that Plaintiff was taking Ultram. She noted
4 "A neurology consultation from CentraCare Clinic dated
5 07/30/2004 supports Ms. Beckstrom's report of fibromyalgia."
6 Id.

7 Ms. Beckstrom has a history of treatment for
8 anxiety, depression, and PTSD. Ms.
9 Beckstrom denied a history of depression or
10 of treatment for depression. She readily
11 acknowledges that she has had difficulty
12 with anxiety since 1990, and was diagnosed
13 with [PTSD]. She said she was physically
14 abused by her first husband and the father
15 of her daughter... She is in counseling with
16 Sister Marie Donahue at Catholic Charities
17 in St. Cloud, Minnesota. She currently
18 takes 50 mg of Trazodone to address her
19 interval insomnia. ...

20 Id. at 529-30.

21 Plaintiff reported to Ms. Johnson that she could only
22 sit for fifteen to twenty minutes at a time without becoming
23 "very sore" and that it was painful to hold a book. Plaintiff
24 stated that she could only look at a computer for fifteen to
25 twenty minutes before she needed to change positions. Plaintiff
26 reported that

27 laundry and vacuuming are very painful for
28 her... She stopped driving in October
because of her health problems. ... She
indicated that she has days where she has
'flare-ups' and cannot go about her daily
routine. She said she could not tell me how
often these flare-ups occur and interfere in
her schedule.

29 Id. at 530.

30 Dr. Johnson noted "[Ms. Beckstrom] has had EMDR
31 treatment for the PTSD and that her symptoms are somewhat

1 improved. She did not give any examples of the PTSD symptoms
2 interfering significantly with her daily functioning however."

3 Id. at 532. Dr. Johnson concluded:

4 Based on her level of social/emotional
5 functioning, I believe that Ms. Beckstrom
6 has the ability to understand, remember, and
7 follow through with instructions
8 consistently. I believe that she has mild
9 impairment in her ability to sustain
10 attention and concentration due to residual
11 anxiety related to [PTSD]. I believe she
12 has the ability to carry out work-like
13 mental tasks with reasonable persistence and
14 pace, interact appropriately with coworkers
15 and supervisors, and tolerate workplace
16 stress.

17 Id. at 533.

18 Dr. Boettcher, a physician at the Mille Lacs Health
19 System clinic, completed a Fibromyalgia Residual Functional
20 Capacity Questionnaire on November 20, 2006. He stated he had
21 treated Plaintiff since March 7, 2006. Id. at 1044. He opined
22 Plaintiff's impairments could be expected to last at least one
23 year. Id. at 1044. In response to the question "Is your
24 patient a malingerer?", Dr. Boettcher answered "Yes," and noted
25 "tendency esp[ecially] [with regard to] psych issue". Id. at
26 1045.

27 On February 6, 2007, Dr. Mark Gordon, a treating
28 physician who worked at th Sister Kenny Sports & Physical
Therapy Center in Minneapolis, completed a Fibromyalgia Residual
Functional Capacity Questionnaire. Id. at 1163. Dr. Gordon
noted Plaintiff had been to 41 visits at the clinic since
December of 2005. In response to the question "Is your patient
a malingerer?" Dr. Gordon answered "No." Dr. Gordon concluded:
"In my professional opinion, based on Ms. Beckstrom's chronic

1 condition, that she currently is not able to sustain competitive
2 employment, that is, work 8 hours/day, not missing 2-3
3 days/month." Id. at 1166.

4 At the hearing before the ALJ in late 2007 Plaintiff
5 testified that she has two Associates degrees, in natural
6 resource management and health education, and a Bachelor of
7 Science degree in Community Health. Plaintiff testified she had
8 worked for the United States Forest Service for "[f]ive or six
9 years which would be seasonal, maybe working six to eight months
10 out of the year.... I was hiking eight miles plus a day in the
11 Black Hills. It was very physical." Id. at 1184. Plaintiff
12 testified she had last worked as a driver for a home health
13 services organization in Minnesota, and that she could no longer
14 work this job because she could no longer drive as part of a
15 full-time job. Id. at 1180-88, 1194-95. Plaintiff also
16 previously worked for numerous organizations in numerous
17 positions. Id. at 64-75 (earning statement 1992 through 2004).

18 At the hearing Plaintiff's representative noted that
19 Plaintiff's treating physicians and physicians assistant, Dr.
20 Boettcher, Mr. Dominick, and Dr. Gordon, had all "completed
21 fibro RFCs that" indicated Plaintiff's residual functional
22 capacity "would prevent competitive employment." Id. at 1178.

23 Plaintiff testified she had not worked since July of
24 2004 and that she drove twice a week to physical therapy and
25 chiropractor appointments. Plaintiff testified that her pain
26 increased if she drove more than twice a week. Plaintiff
27 testified that she could only drive ten minutes without
28 experiencing back pain. Plaintiff stated that she had recently

1 stopped oral medication and was getting injections. Plaintiff
2 testified that "before I can go get injections, I'm kind of out
3 for a few days just resting and laying around." Id. at 1182.

4 Plaintiff testified that when she walked for ten
5 minutes her knees and feet hurt and her "left hip goes out."
6 She testified that "after walking, I get really sharp pains in
7 my hip and leg area." Id. at 1185. Plaintiff testified that
8 she had a daughter, who was seven at the time of the hearing,
9 and that she was a single parent. Plaintiff testified that she
10 needed help with house-cleaning, help with the laundry, and help
11 taking care of her daughter. Id. at 1187.

12 Plaintiff testified that pool therapy had helped and
13 that taking Geritol had helped her energy level, although her
14 doctor believed her energy level was still low. Id. at 1188.
15 Plaintiff testified that she had been taking Nexium for reflux
16 but that she thought that medication was causing migraine
17 headaches so she had ceased taking Nexium. Id. at 1190.
18 Plaintiff testified that, although she could manipulate her neck
19 through a range of motion in the doctor's office, there were
20 days when she could not keep her head up because of neck and
21 shoulder pain. Id. at 1194. Plaintiff stated that, after
22 driving, she experienced numbness in her hands and forearms.
23 Id. at 1194. Plaintiff stated that she wore braces at night to
24 address that issue. Id. at 1192.

25 Plaintiff testified that, in addition to driving,
26 writing, holding a pen, and doing laundry also aggravated the
27 pain in her hands and forearms. Id. at 1198. Plaintiff
28 testified her doctor had given her a prescription for a wheeled

1 walker with a seat because she was unable to stand in line when
2 grocery shopping. Id. at 1199.

3 Plaintiff averred: "I think with, I mean, this
4 fibromyalgia and this muscle pain exhaustion has affected
5 everything in my life and I think with almost everything I do
6 things differently than what I used to." Id. at 1199-1200.
7 Plaintiff stated that, in order to alleviate her health issues,
8 she used a TENS unit, wore tinted sunglasses, wore a thoracic
9 brace, used a device to elevate her dirty dishes when washing
10 them to avoid pain from leaning over into the sink, and used a
11 foot stool when sitting, including at the hearing, to alleviate
12 lower back pain. Plaintiff testified that she could alternate
13 sitting and standing for about two hours at a time, but then
14 needed to lay down. Id. at 1201. Plaintiff testified that, if
15 she did not nap during the day, she experienced migraine
16 headaches. Id. at 1201-02.

17 Plaintiff testified that she had decreased her hours
18 at her last employment, with the Mille Lacs Public Health
19 Department, because she had been missing work due to illness.
20 Id. at 1194. Plaintiff testified that she had experienced dizzy
21 spells and exhaustion.

22 In addition to her physical symptoms Plaintiff stated
23 that she had experienced spousal abuse and suffered from post-
24 traumatic stress syndrome. Plaintiff testified that she
25 occasionally did not feel safe and that she was often anxious.
26 Plaintiff stated that she had experienced a panic attack which
27 caused her to "pack[] up, my daughter and I, we left for two
28 weeks to stay at a hotel." Id. at 1195. Plaintiff testified

1 that in May of 2005 she had moved from Minnesota to Page,
2 Arizona, and stayed in a women's shelter. Id. at 1196.

3 The ALJ concluded that Plaintiff suffered from the
4 severe impairments of fibromyalgia, a thyroid disorder, a pain
5 disorder, headaches, post-traumatic stress disorder, and a
6 general anxiety disorder. Id. at 23. The ALJ determined that
7 none of Plaintiff's impairments or combination of impairments
8 met or equaled one of the listed impairments. Id. at 24.

9 The ALJ concluded Plaintiff had the residual
10 functional capacity to perform light work. The ALJ determined
11 Plaintiff could lift 20 pounds occasionally and 10 pounds
12 frequently, stand and walk for up to six hours out of an eight
13 hour day, sit for up to six hours out of an eight hour day, with
14 the ability to change positions from sitting to standing up
15 every 15 minutes, with no repetitive power gripping or tasks
16 that involve writing, in an environment with no gases, fumes,
17 strong fragrances, soaps, cleaning supplies, or tires, perform
18 tasks involving 3 to 4 steps, with only routine changes in the
19 work environment and only brief and superficial contact with
20 coworkers, supervisors, and the public. Id. at 25.

21 The ALJ stated:

22 ..the undersigned must evaluate the
23 intensity, persistence, and limiting effects
24 of the claimant's symptoms to determine the
25 extent to which they limit the claimant's
26 ability to do basic work activities. For
27 this purpose, whenever statements about the
28 intensity, persistence, or functionally
limiting effects of pain or other symptoms
are not substantiated by objective medical
evidence, the undersigned must make a
finding on the credibility of the statements
based on a consideration of the entire case
record.

Because a claimant's symptoms can sometimes

1 suggest a greater level of severity of
2 impairment than can be shown by the
3 objective medical evidence alone, 20 CFR
4 404.1529(c)² and 416.929(c) describe the
5 kinds of evidence, including the factors
6 below, that the undersigned must consider in
7 addition to the objective medical evidence
8 when assessing the credibility of the
9 claimant's statements...

6 Id. at 26.

7 The ALJ then reviewed Plaintiff's medical records and
8 psychological treatment records from July of 2004 through May
9 of 2007. Id. at 27-29. The ALJ determined:

10 Although the claimant alleges that she is
11 disabled secondary to fibromyalgia, a
12 thyroid disorder, chronic neck and back
13 pain, headaches, and a posttraumatic stress
14 disorder, the record documents that the
15 claimant's fibromyalgia symptoms improved
16 with treatment and physical therapy and that
17 she experienced no significant ongoing
18 neurological losses or ongoing losses in the
19 range of motion of her joints. The record
20 also documents that after her fibromyalgia
21 symptoms had improved the claimant was able
22 to stop taking her pain medication, and that
23 she experienced significant periods of time
24 when she did not experience a flair in her
25 fibromyalgia symptoms. In addition, the
26 record documents that the claimant's
27 headaches (sic) symptoms were generally well
28 controlled with medication. Furthermore, as
noted above in the evaluation of the
claimant's mental impairments, the claimant

-
- 21 ²(i) Your daily activities;
22 (ii) The location, duration, frequency, and intensity of
23 your pain or other symptoms;
24 (iii) Precipitating and aggravating factors;
25 (iv) The type, dosage, effectiveness, and side effects of
26 any medication you take or have taken to alleviate your
27 pain or other symptoms;
28 (v) Treatment, other than medication, you receive or have
received for relief of your pain or other symptoms;
(vi) Any measures you use or have used to relieve your pain
or other symptoms (e.g., lying flat on your back, standing
for 15 to 20 minutes every hour, sleeping on a board,
etc.); and
(vii) Other factors concerning your functional limitations
and restrictions due to pain or other symptoms.

1 experienced only mild to moderate symptoms
2 secondary to her mental impairments.
3 Consequently, the Administrative Law Judge
4 finds that the claimant's impairments are
5 inconsistent with total disability, but
6 rather, that they are fully consistent with
7 the residual functional capacity stated
8 above.

9 Id. at 30.

10 The ALJ gave some weight to the March 21, 2005,
11 opinion of Dr. Minser, Plaintiff's treating chiropractic
12 physician, regarding Plaintiff's residual functional capacity
13 because his opinion was generally consistent with the objective
14 evidence in the record. However, the ALJ did not give Dr.
15 Minser's opinion significant weight because the ALJ had further
16 reduced Plaintiff's residual functional capacity "to accommodate
17 the claimant's subjective complaints." Id. at 30. The ALJ did
18 not give significant weight to the opinion of Mr. Dominick,
19 Plaintiff's treating physicians assistant, dated November 30,
20 2005, because his opinion appeared "to be based largely on the
21 claimant's own reports of her symptoms and pain, and they are
22 inconsistent with the objective evidence in the record, which
23 indicates that the claimant's symptoms improved with treatment."

24 Id. at 30.

25 The ALJ did not give significant weight to the
26 November 2005 opinion of Ms. Holden, Plaintiff's treating
27 licensed psychologist, regarding Plaintiff's psychological
28 issues, because "they appear to be based largely on the
claimant's own reports of her symptoms, and they are
inconsistent with the objective evidence in the record, which
indicates that the claimant experienced only mild to moderate

1 symptoms secondary to her mental impairments." Id. at 31.

2 The ALJ did not give significant weight to Dr.
3 Boettcher's November 2006 assessment because "they appear to be
4 based largely on the claimant's own reports of her symptoms and
5 pain. In addition, they are inconsistent with the objective
6 evidence in the record, which indicates that the claimant's
7 symptoms improved with treatment." Id. at 31.

8 The ALJ did not give significant weight to the
9 February 2007 opinion of Dr. Gordon that Plaintiff was unable
10 to sustain competitive employment because "it is inconsistent
11 with the objective evidence in the record, which indicates that
12 claimant's fibromyalgia symptoms improved with treatment. ..."
13 and because the opinion was based on Plaintiff's own reports of
14 her symptoms and pain, and because the assessment was
15 inconsistent with treatment notes of October 16, 2006. Id. at
16 31.

17 The ALJ further stated:

18 [I]n the evaluation of the claimant's mental
19 impairments, the claimant's daily activities
20 are inconsistent with total disability, but
21 rather, they are fully consistent with the
22 residual functional capacity stated above.
23 The record does not document that the
24 claimant reported any ongoing medication
25 side effects to her treating physician.
26 Consequently, the Administrative Law Judge
27 did not further reduce the claimant's
28 residual functional capacity to accommodate
medication side effects.

25 Id. at 31.

26 Finally, the undersigned considered the
27 claimant's work history, as required by 20
28 C.F.R. 404.1529. The claimant's earnings
record documents earnings that are
consistent with mainly part time and minimal
part time employment. This may indicate a

1 lack of interest or need for full time
2 employment on the part of the claimant and
3 suggests that her underemployment may be
4 unrelated to her impairments.
5 After considering the evidence of record,
6 the undersigned finds that the claimant's
7 medically determinable impairments could
8 reasonably be expected to produce the
9 alleged symptoms, but that the claimant's
10 statements concerning the intensity,
11 persistence and limiting effects of these
12 symptoms are not entirely credible.

13 Id. at 31-32.

14 **V Analysis**

15 The Court concludes that there was not substantial
16 evidence in the record to support the ALJ's conclusions.
17 Additionally, the ALJ committed an error of law by discounting
18 the opinions of Plaintiff's treating physicians without
19 enunciating clear and convincing reasons for doing so. The ALJ
20 also erred by finding that Plaintiff was not credible regarding
21 the limitations that her physical and mental problems placed on
22 her ability to do work-related tasks without evidence of
23 malingering or clear and convincing reasons for rejecting her
24 testimony.

25 **The ALJ erred with regard to his determination of 26 Plaintiff's credibility regarding her residual functional 27 capacity**

28 The ALJ reviewed the evidence in the record, including
Plaintiff's statements that her problems were disabling, and the
medical evidence. The ALJ noted that Plaintiff's physical
symptoms improved with treatment, and stated:

After considering the evidence of record,
the undersigned finds that the claimant's
medically determinable impairments could
reasonably be expected to produce the

1 alleged symptoms, but that the claimant's
2 statements concerning the intensity,
3 persistence and limiting effects of these
4 symptoms are not entirely credible.

5 The ALJ did not make a specific finding that Plaintiff
6 was malingering. However, the ALJ did discount the opinions of
7 Plaintiff's treating physicians, *inter alia* because they were
8 based on Plaintiff's reports of her pain and disability.

9 In evaluating the credibility of a
10 claimant's testimony regarding subjective
11 pain, an ALJ must engage in a two-step
12 analysis. First, the ALJ must determine
13 whether the claimant has presented objective
14 medical evidence of an underlying impairment
15 which could reasonably be expected to
16 produce the pain or other symptoms alleged.
17 The claimant is not required to show that
18 her impairment could reasonably be expected
19 to cause the severity of the symptom she has
20 alleged; she need only show that it could
21 reasonably have caused some degree of the
22 symptom. If the claimant meets the first
23 test and there is no evidence of
24 malingering, the ALJ can only reject the
25 claimant's testimony about the severity of
26 the symptoms if she gives "specific, clear
27 and convincing reasons" for the rejection.

28 Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009) (internal
 citations and quotations omitted), citing Lingenfelter v.
Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007).

 The ALJ concluded that Plaintiff suffered from, *inter*
alia, the serious medical condition of fibromyalgia. Where, as
here, there is no dispute as to the claimant's underlying
physical impairments, in order to reject a claimant's subjective
testimony as to pain an ALJ must provide "clear and convincing
reasons," Carmickle v. Commissioner of the Soc. Sec. Admin.,
533 F.3d 1155, 1160 (9th Cir. 2008), that rest on findings
"sufficiently specific to allow a reviewing court to conclude

1 the adjudicator rejected the claimant's testimony on permissible
2 grounds." Bunnell, 947 F.2d at 345. See also Thomas v.
3 Barnhart, 278 F.3d 947, 958 (9th Cir. 2002).

4 When deciding whether to accept a claimant's testimony
5 concerning subjective symptoms, an ALJ must perform two stages
6 of analysis. The ALJ must determine if there is objective
7 medical evidence of an underlying impairment which could
8 reasonably produce the pain or other alleged symptoms. The ALJ
9 in this matter concluded Plaintiff did have such an impairment,
10 i.e., fibromyalgia, in addition to migraine headaches and post-
11 traumatic stress disorder. Accordingly, if there is no evidence
12 of malingering, the ALJ can reject the claimant's testimony
13 about the severity of her symptoms only by offering specific,
14 clear and convincing reasons for doing so.

15 The ALJ did not cite any evidence of malingering, and
16 the only indication of malingering was the single physician who
17 opined Plaintiff exaggerated her mental disabilities; notably,
18 this physician had not treated Plaintiff for the same length of
19 time as the other opining physicians and psychologist and this
20 physician concluded Plaintiff was physically disabled.
21 Accordingly, any implicit or less than specific findings by the
22 ALJ denigrating Plaintiff's credibility were not in accordance
23 with legal requirements. See Vasquez, 572 F.3d at at 592.
24 Because the ALJ made no finding that Plaintiff was malingering,
25 he was required to give clear and convincing reasons in support
26 of his adverse credibility finding. See Robbins, 466 F.3d at
27 883. This clear and convincing standard "is the most demanding
28 required in Social Security cases." Moore v. Commissioner of

1 the Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002). To
2 support a finding that Plaintiff's report of her limitations was
3 lacking credibility, the ALJ was required to "point to specific
4 facts in the record which demonstrate that [Plaintiff] is in
5 less pain than she claims." Dodrill v. Shalala, 12 F.3d 915,
6 918 (9th Cir. 1993).

7 The ALJ did not give specific, clear, and convincing
8 reasons for rejecting Plaintiff's testimony about the severity
9 of her symptoms. The ALJ's reasons for discounting Plaintiff's
10 testimony regarding her limitations were not convincing.
11 Neither were the ALJ's findings regarding Plaintiff's
12 credibility supported by substantial evidence.

13 The ALJ erred by finding that Plaintiff was not
14 credible regarding the extent of her symptoms because her
15 testimony was "not consistent with the objective medical
16 evidence." This is an insufficient reason for disbelieving
17 Plaintiff. "[A] finding that the claimant lacks credibility
18 cannot be premised wholly on a lack of medical support for the
19 severity of the [impairments]." Light, 119 F.3d at 792. See
20 also Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); 20
21 C.F.R. § 404.1529(c)(2); SSR 96-7p, 1996 WL 374186, at *1. An
22 ALJ may not "discredit the claimant's testimony as to subjective
23 symptoms merely because they are unsupported by objective
24 evidence." Carradine v. Barnhart, 360 F.3d 751, 753 (7th Cir.
25 2004) (quotation omitted). To evaluate credibility, an ALJ must
26 "consider the entire case record and give specific reasons for
27 the weight given to the individual's statements." SSR 96-7p.
28 The ALJ must look to a number of factors to determine

1 credibility in addition to the objective medical evidence, the
2 claimant's daily activities, allegations of pain, aggravating
3 factors, types of treatment received and medication taken, and
4 relevant character evidence. Orteza, 50 F.3d at 750; Prochaska
5 v. Barnhart, 454 F.3d 731, 738 (7th Cir. 2006).

6 Neither are the ALJ's findings saved by the citation
7 to 20 C.F.R. §§ 404.1529(c)(3) and 416.929(c)(3). Both
8 regulations deal with evidence the Commissioner should consider
9 in determining how a claimant's symptoms may affect her capacity
10 to function under the guidelines; neither describe what findings
11 are required before an ALJ can reject a claimant's allegations
12 of disabling pain. When evaluating the credibility of a
13 claimants subjective complaints of pain, an ALJ must consider
14 the factors listed in SSR 88-13:

- 15 1. The nature, location, onset, duration,
16 frequency, radiation, and intensity of any
17 pain;
- 18 2. Precipitating and aggravating factors
19 (e.g., movement, activity, environmental
20 conditions);
- 21 3. Type, dosage, effectiveness, and adverse
22 side-effects of any pain medication;
- 23 4. Treatment, other than medication, for
24 relief of pain;
- 25 5. Functional restrictions; and
- 26 6. The claimant's daily activities.

22 See Smolen, 80 F.3d at 1284. The ALJ should also consider an
23 "unexplained or inadequately explained failure to seek treatment
24 or to follow a prescribed course of treatment," in addition to
25 "ordinary techniques of credibility evaluation, such as the
26 claimant's reputation for lying, prior inconsistent statements
27 concerning the symptoms, and other testimony by the claimant
28 that appears less than candid." Id.

1 Additionally, the fact that Plaintiff's fibromyalgia
2 symptoms responded to treatment, allowing her to at least
3 occasionally discontinue use of pain medications generally in
4 favor of trigger-point injections, is not sufficient to find
5 Plaintiff's descriptions of the extent of her limitations not
6 credible at the time of the hearing. See Bauer v. Astrue, 532
7 F.3d 606, 609 (7th Cir. 2008) (noting a claimant may appear to
8 be doing better at certain points without undermining her claim
9 of disability); Sarchet v. Chater, 78 F.3d 305, 306-07 (7th Cir.
10 1996).

11 **The ALJ erred in his application of the treating**
12 **physician rule**

13 The ALJ did not accept the opinions of Plaintiff's
14 treating physicians assistant, Mr. Dominick, and the opinion of
15 Dr. Gordon, a treating physician and physical therapist, and
16 Plaintiff's treating psychologist, Ms. Holden, and Plaintiff's
17 treating chiropractor, Dr. Minser, regarding Plaintiff's
18 residual functional capacity to do work-related tasks.
19 Specifically, the ALJ did not accept these individuals' opinions
20 that Plaintiff's fibromyalgia pain, migraine headaches, chronic
21 fatigue, and her PTSD symptoms, would not allow her to achieve
22 regular attendance at competitive employment.

23 A treating physician's opinion regarding a claimant's
24 residual functional capacity is generally due controlling weight
25 in the determination of that issue. See 20 C.F.R. §
26 404.1527(d)(2). If the treating physician's opinion is not
27 contradicted by other medical opinions, the ALJ must give clear
28 and convincing reasons supported by substantial evidence in the

1 record for declining to give the treating physician's opinion
2 controlling weight on the issue of functional capacity. See
3 Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001). If
4 the treating physician's opinion is contradicted by another
5 doctor, the opinion can be rejected by the ALJ only if the ALJ
6 provides "specific and legitimate reasons supported by
7 substantial evidence in the record." Lester, 81 F.3d at 830;
8 Edlund v. Massanari, 253 F.3d 1152, 1157 (9th Cir. 2001). The
9 ALJ can meet this burden of substantial evidence by "providing
10 a detailed summary of the facts and conflicting clinical
11 evidence, along with a reasoned interpretation thereof."
12 Rodriguez v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989).

13 The ALJ failed to support his discrediting of
14 Plaintiff's treating physicians, including her physical
15 therapist and physicians assistant, with clear and convincing
16 reasons supported by substantial evidence in the record. The
17 ALJ discounted the opinions of Plaintiff's treating physicians
18 based on Plaintiff's reports to those physicians of pain and
19 disability, the same reports which the ALJ improperly discounted
20 in the context of Plaintiff's testimony at the hearing.
21 Plaintiff's complaints were not been properly discounted because
22 there are no legitimate inconsistencies in her reports of her
23 symptoms, no evidence suggesting she is lying about the
24 limitations caused by her fibromyalgia, migraine headaches,
25 gastrointestinal symptoms, severe fatigue and PTSD, and there
26 is no evidence in the record of any malingering. See Smolen,
27 80 F.3d at 1284. "[A] patient's report of complaints, or
28 history, is an essential diagnostic tool" in fibromyalgia cases,

1 and a treating physician's reliance on such complaints "hardly
2 undermines his opinion as to [the claimant's] functional
3 limitations." Green-Younger v. Barnhart, 335 F.3d 99, 107 (2d
4 Cir. 2003) (internal punctuation and citation omitted).

5 The medical opinions of Plaintiff's treating
6 physicians were supported by medically acceptable diagnostic
7 techniques and were not inconsistent with other substantial
8 evidence in the record. Dr. Gordon's, Dr. Donovan's, Dr.
9 Johnson's, Dr. Minser's and Mr. Dominick's opinions were not
10 conclusory or unsupported. The administrative record on appeal
11 runs to some 1200 pages, including extensive clinical findings
12 and progress notes regarding Plaintiff's completely consistent
13 rendition of her symptoms, medical treatments, and tests
14 undertaken in an effort for Plaintiff's physicians to identify
15 and treat her fibromyalgia pain, migraines, panic attacks,
16 fatigue, gastrointestinal reflux, and fluctuating liver enzyme
17 issues.

18 The ALJ does not proffer adequate justifications for
19 discrediting the medical opinions of Plaintiff's treating
20 physicians. The Court also finds unpersuasive the ALJ's stated
21 reason for discounting the treating physicians' opinions,
22 namely, that the limitations they suggested were based on
23 Plaintiff's subjective statements. The federal courts have
24 recognized that fibromyalgia "often lacks medical or laboratory
25 signs, and is generally diagnosed mostly on an individual's
26 described symptoms," and that the "hallmark" of fibromyalgia is
27 therefore "a lack of objective evidence." Moore v. Barnhart,
28 405 F.3d 1208, 1211 (11th Cir. 2005). See also Benecke v.

1 Barnhart, 379 F.3d 587, 594 (9th Cir. 2004) (concluding the ALJ
2 erred by "effectively requiring objective evidence for a disease
3 that eludes such measurement"); Rogers v. Commissioner of Soc.
4 Sec., 486 F.3d 234, 243 (6th Cir. 2007) (stating that
5 "fibromyalgia patients present no objectively alarming signs");
6 Green-Younger, 335 F.3d at 108; Sarchet, 78 F.3d at 306. The
7 lack of objective clinical findings is, at least in the case of
8 fibromyalgia, therefore insufficient alone to support an ALJ's
9 rejection of a treating physician's opinion as to the claimant's
10 functional capacity.

11 This is not a case in which different treating doctors
12 have offered varied opinions. Compare Hamilton v. Astrue, 518
13 F.3d 607, 611-12 (8th Cir. 2008) (treating doctor's opinion
14 conflicted with another doctor's treatment notes). Nor did the
15 ALJ rely on a consultative physician's assessment to discount
16 the treating physicians' opinions. Compare id., 518 F.3d at
17 611-12 (concluding that the findings of consultative doctor
18 served as some evidence to discredit the opinion of the treating
19 doctor's opinion).

20 The fact that on some doctor visits Plaintiff reported
21 that her pain had improved, does not mean Plaintiff retained the
22 ability to work as of the date last insured. Fibromyalgia is
23 an elusive diagnosis, "[i]ts cause or causes are unknown,
24 there's no cure, and, of greatest importance to disability law,
25 its symptoms are entirely subjective." Sarchet, 78 F.3d at 306.
26 Plaintiff has been diagnosed with fibromyalgia repeatedly and
27 her treating physicians opined that her diagnosis complied with
28 the American Rheumatological Association's criteria for

1 diagnosing this disease. Plaintiff's "subjective" complaints
2 correspond directly with the disorder's characteristics:
3 "chronic widespread aching and stiffness, involving particularly
4 the neck, shoulders, back, and hips, which is aggravated by the
5 use of the affected muscles." Stedman's Medical Dictionary 725
6 (28th ed. 2006).

7 **The Credit as True rule**

8 When the ALJ's decision is not supported by
9 substantial evidence in the record or is the result of
10 prejudicial legal error, whether to remand the matter for
11 additional proceedings or whether to order an immediate payment
12 of benefits is a matter within the Court's discretion. Benecke,
13 379 F.3d at 590. Evidence should be credited as true and an
14 action remanded for an award of benefits when: (1) the ALJ has
15 failed to provide legally sufficient reasons for rejecting
16 evidence; (2) no outstanding issues remain that must be resolved
17 before a determination of disability can be made; and (3) it is
18 clear from the record that the ALJ would be required to find the
19 claimant disabled were the rejected evidence credited as true.
20 Id. at 593; Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir.
21 2000). It is an abuse of discretion to remand for further
22 proceedings where, as in this matter, no further proceedings are
23 necessary to make a disability determination and it is clear
24 from the record that the claimant is entitled to benefits. See
25 Benecke, 379 F.3d at 596.

26 When an Administrative Law Judge ("ALJ") makes an
27 adverse credibility finding with respect to a witness' testimony
28 in a Social Security case, he "must make specific findings

1 justifying that decision." Hammock v. Bowen, 879 F.2d 498, 502
2 (9th Cir. 1989). According to the "credit-as-true rule," when
3 an ALJ fails to provide "specific, articulable reasons to
4 support an adverse credibility finding," the Court should not
5 remand solely to allow the ALJ to make specific findings
6 regarding that testimony, but should "take that testimony to be
7 established as true." Vasquez, 572 F.3d at 598 (Hawkins, J.,
8 dissenting). See also Lingenfelter, 504 F.3d at 1040-41;
9 Lester, 81 F.3d at 834. Applying the rule is not mandatory
10 when, even if the evidence at issue is credited, there are
11 "outstanding issues that must be resolved before a proper
12 disability determination can be made." Vasquez, 572 F.3d at
13 593. The Court should remand when, for example, there is a
14 dispute as to when the disability began, crediting the
15 improperly discounted evidence as true. Id. (concluding the
16 case must be remanded when "application of the [credit-as-true]
17 rule would not result in the immediate payment of benefits.").
18 See also Luna v. Astrue, 623 F.3d 1032, 1035 (9th Cir. 2010).

19 After applying the credit-as-true rule to Plaintiff's
20 improperly discredited hearing testimony and Plaintiff's
21 treating physicians' opinions regarding Plaintiff's functional
22 limitations, no outstanding issues remain to be resolved before
23 determining that Plaintiff is entitled to benefits. The ALJ
24 added facts mirroring the discredited testimony to the
25 hypothetical posed to the vocational expert ("VE") when
26 evaluating RFC. The VE responded that such a person would not
27 be able to work. Furthermore, the ALJ already had determined
28 that Plaintiff was insured for disability benefits through March

1 of 2008. Because it is clear the ALJ would be required to find
2 Plaintiff disabled, see Benecke, 379 F.3d at 593-95, the Court
3 concludes that Plaintiff is entitled to an immediate award of
4 benefits.

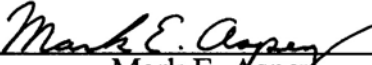
5 Accordingly,

6 **IT IS ORDERED that** judgment in this matter is hereby
7 entered in favor of Plaintiff and against Defendant.

8 The Clerk of the Court shall enter separate judgment
9 accordingly.

10 **IT IS FURTHER ORDERED that** this matter is remanded to
11 the Commissioner of the Social Security Administration for an
12 immediate award of benefits.

13 DATED this 30th day of March, 2011.

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16 _____
17 Mark E. Aspey
18 United States Magistrate Judge
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