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NOT FOR PUBLICATION

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**IN THE UNITED STATES DISTRICT COURT**

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**FOR THE DISTRICT OF ARIZONA**

8

9 Thomas Sidney McInvale,

No. CV-15-08115-PCT-JJT

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Plaintiff,

**ORDER**

11

v.

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Carolyn W. Colvin,

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Defendant.

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At issue is the denial of Plaintiff Thomas Sidney McInvale's Application for Disability Insurance Benefits (DIB) by the Social Security Administration under the Social Security Act. Plaintiff filed a Complaint on June 29, 2015, asking this Court to review the denial of his benefits. (Doc. 1.) The Court has reviewed the briefs (Docs. 17, 19, 23) as well as the Administrative Record (Doc. 12, R.) and now reverses the Administrative Law Judge's decision (R. at 11–26) as upheld by the Appeals Council (R. at 1–6).

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**I. BACKGROUND**

23

Plaintiff filed an application for DIB in May 2011, initially alleging disability beginning March 1, 2009, and his date last insured is September 30, 2010. (R. at 14, 282.) After Plaintiff's application was denied initially and on reconsideration, Plaintiff requested a hearing, which an Administrative Law Judge (ALJ) held on August 21, 2013. (R. at 27–51.) On November 1, 2013, the ALJ issued a decision denying Plaintiff's application. (R. at 11–26.) After the ALJ denied Plaintiff's request, the Appeals Council

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1 (AC) denied Plaintiff's request for review of the ALJ's decision on April 30, 2015,  
2 making the ALJ decision the final decision of the Commissioner of Social Security. (R. at  
3 1–6.) The present appeal followed.

4 **A. Medical Evidence**

5 The Court has reviewed the medical evidence in its entirety and provides a short  
6 summary here. Plaintiff suffers from degenerative disc disease in the cervical and lumbar  
7 spines, neuropathy in the lower extremities, sleep apnea, and obesity. (*See, e.g.*, R. at 16,  
8 492, 508.) Plaintiff reported experiencing back pain as early as 2008 (R. at 429), and his  
9 pain has progressively worsened (R. at 372, 388).

10 In February 2008, Dr. Arthur Ford reviewed Plaintiff's MRIs and found they  
11 revealed "fairly severe lumbar degenerative disc disease and lumbar facet disease, as well  
12 as cervical degenerative disc disease." (R. at 429.) In May 2008, Plaintiff had an MRI of  
13 the cervical spine that indicated a partial fusion of the C4 and C5 vertebrae and very mild  
14 degenerative disc disease throughout the cervical spine. (R. at 521.) In August 2010,  
15 Plaintiff had an MRI of the lumbar spine that indicated the following: bilateral L5  
16 spondylolysis with grade I spondylolisthesis at L5-S1; degenerative disc disease and  
17 osteoarthritis throughout the lumbar spine; small posterior disc bulges at multiple lumbar  
18 levels; and no evidence of spinal stenosis. (R. at 520.)

19 From 2008 to 2012, Plaintiff received routine lumbar epidural steroid nerve blocks  
20 and cervical steroid nerve blocks for his chronic low back pain, lumbar degenerative disc  
21 disease, and sacroiliitis. (R. at 435–99.) Plaintiff stopped this treatment from  
22 approximately July 2008 to October 2009 before returning to treatment because of  
23 increased pain. (*See* R. at 453–56.) After receiving treatment in 2009, Plaintiff reported  
24 not having significant pain (*see* R. at 457, 459), but generally, the epidural block  
25 injections provided Plaintiff with only short-term relief (*see* R. at 490, 433, 471, 496).  
26 Dr. Ford administered and oversaw Plaintiff's epidural injections and frequently noted  
27 that because of Plaintiff's obesity and related pain, there was minimal treatment available  
28 and results would be limited. (*See, e.g.*, R. at 451, 485, 494.) On one occasion in 2008,

1 Dr. Ford stated Plaintiff's options for pain management alternatives were "pretty grim  
2 because of his weight," and that spine doctors would not even consider Plaintiff because  
3 of his weight. (R. at 445.)

4 Plaintiff also experienced pain in his right shoulder beginning around 2009, which  
5 was exacerbated when he fell in 2011, resulting in a full tear to his rotator cuff. (R. at  
6 343.) After review of x-rays and MRIs and administration of injection treatments for  
7 pain, Plaintiff underwent rotator cuff surgery in September 2011. (R. at 357.) Thereafter,  
8 he felt fully recovered with regard to his right shoulder function. (R. at 376, 380.)

9 Plaintiff continued to complain of progressive lower back pain through 2012.  
10 (R. at 376.) X-rays of the cervical and lumbar spine in June 2012 showed significant  
11 issues in the cervical spine, including degenerative disc disease, degenerative  
12 spondylosis, and uncovertebral arthrosis (osteoarthritis affecting certain joints along the  
13 cervical vertebra), and significant issues in the lumbar spine, including spondylolisthesis  
14 and advanced degenerative disc disease in nearly the entire lumbar spine. (R. at 377.) In  
15 assessments from 2012 by Physician Assistant Kirk Butler at Flagstaff Center for Bone  
16 and Joint Disorders, where Plaintiff frequently obtained treatment, PA Butler determined  
17 Plaintiff had progressive lumbosacral pain with sensory radiculopathy and degenerative  
18 spondylolisthesis with severe bilateral foraminal stenosis and degree of dynamic  
19 instability. (R. at 374, 376-78.) PA Butler initially recommended continued lumbar  
20 corticosteroid injections, physical therapy, and weight loss. (R. at 375, 378.) The  
21 injection treatments only provided Plaintiff with short-term relief, however, and PA  
22 Butler and Dr. John Hall, also at Flagstaff Center for Bone and Joint Disorders,  
23 recommended Plaintiff undergo surgery. (R. at 373-75, 378.)

24 Plaintiff took various medications for his pain, inflammation and muscle spasms  
25 including OxyContin, Tramadol, Voltaren, Ultram, Soma, Naproxen, and Ibuprofen.  
26 (R. at 434.) Plaintiff also received physical therapy treatment in 2012. (R. at 382-90.)

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1           **B.     Hearing Testimony**

2                   **1.     Plaintiff’s Testimony**

3           At Plaintiff’s hearing before the ALJ on August 21, 2013, Plaintiff testified as to  
4 his pain. Plaintiff stated that overall his pain in 2010 was moderately severe and  
5 worsened with increased activity. (R. at 39.) During the average workday hours, Plaintiff  
6 needed to spend at least three quarters of the day reclining. (R. at 39.) He stated that in  
7 2010, he could not stand for more than 10 to 15 minutes without extreme pain, and could  
8 not stand for a more than an hour total in an eight-hour workday. (R. at 34, 41–42.) He  
9 could not sit for more than two hours in a workday. (R. at 34, 41.) Plaintiff stated that his  
10 low back pain was constant and sometimes the pain went down to his legs and feet. (R. at  
11 37.) He stated he received epidural injections for his back, but that the shots did not help  
12 him. (R. at 35.) He also explained he later had spinal fusion surgery and received physical  
13 therapy for his back pain. (R. at 35.) While Plaintiff experienced some relief from his  
14 back pain after his surgery in 2013, his back pain returned at another area. (R. at 39–40.)

15           Plaintiff testified that after experiencing constant pain in 2010, he underwent a  
16 nerve conduction study in January 2011 that showed bilateral lower extremity peripheral  
17 neuropathy. (R. in 38.) He experienced pain in his feet and low back due to neuropathy,  
18 and doctors instructed him to elevate his feet to help with the pain. (R. at 40, 42.)

19           With regard to daily activities, Plaintiff testified he was able to help around the  
20 house with cooking and cleaning once or twice a week, that he cleaned his toilet every  
21 day, and that he “gather[ed] up laundry” but his mother did the laundry. (R. at 32.)  
22 Plaintiff also testified that in 2009 and 2010, he drove to his church about once a month,  
23 which was a 50 mile roundtrip drive. (R. at 33.)

24                   **2.     Vocational Expert Testimony**

25           Troy Scott, a vocational expert (VE), also testified before the ALJ at the August  
26 21, 2013 hearing. (R. at 28, 45–50.) When the ALJ asked the VE whether a hypothetical  
27 individual – one with Plaintiff’s age, education, and work experience, who can work at  
28 the light level of exertion, can stand and walk four hours during an eight-hour day, can

1 occasionally climb ladders, ropes, or scaffolds, and occasionally perform other  
2 movements – could perform any of Plaintiff’s past work, the VE said “no.” (R. at 47.)  
3 The VE did identify other occupations that would be available at the sedentary and light  
4 exertional levels. (R. at 48.) In a second hypothetical posed to the VE, the ALJ asked  
5 whether, assuming the same limitations as the first hypothetical, but adding that the  
6 individual would need to elevate his feet on an at-will basis throughout the day, would  
7 any jobs be available. (R. at 48.) The VE responded that the additional limitation would  
8 preclude all jobs available under the first hypothetical. (R. at 48.)

9 Plaintiff’s counsel asked the VE whether his opinion under the first hypothetical  
10 the ALJ posed would be impacted if added to that hypothetical was an individual’s  
11 moderately severe pain that made the individual off task for 10 to 12 percent on average.  
12 (R. at 49.) The VE responded that under those circumstances, all work would be  
13 precluded, and that assuming a person needed to lie down as frequently as Plaintiff  
14 testified to, that would also preclude all work. (R. at 49.)

15 **C. The ALJ’s Opinion**

16 ALJ James P. Nguyen issued an opinion dated November 1, 2013, in which he  
17 concluded Plaintiff was not disabled under sections 216(i) and 223(d) of the Social  
18 Security Act. (R. at 22.) The ALJ began his analysis by stating his finding that Plaintiff  
19 met the insured status requirement and had not engaged in substantial gainful activity  
20 during the period from his alleged onset date through his date last insured of  
21 September 30, 2010. (R. at 16.) The ALJ then listed degenerative disc disease in the  
22 cervical spine and lumbar spine, neuropathy in the lower extremities, rotator cuff tear,  
23 obstructive sleep apnea, and obesity as severe impairments afflicting Plaintiff. (R. at 16.)

24 Proceeding with the five-step inquiry, the ALJ found that the impairments or  
25 combination of impairments did not meet the severity of symptoms to meet or equal any  
26 of the medical listings. (R. at 17.) The ALJ then stated his finding that Plaintiff had the  
27 residual functional capacity (RFC) to perform light work as defined in 20 CFR  
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1 404.1567(b) with some exceptions, including that Plaintiff can stand and/or walk four  
2 hours during an eight-hour day and he can occasionally climb ramps and stairs. (R. at 17.)

3 The ALJ found that Plaintiff's medically determinable impairments could  
4 reasonably be expected to cause his alleged symptoms, but that Plaintiff's statements  
5 regarding the intensity, persistence and limiting effects of the symptoms was not entirely  
6 credible. (R. at 18.) The ALJ found Plaintiff's and his mother's allegations regarding the  
7 severity of Plaintiff's symptoms were not fully credible because they were greater than  
8 expected in light of the objective evidence of record of conservative treatment including  
9 epidural blocks, joint injections, pain medications and use of CPAP machine. (R. at 18.)

10 After determining Plaintiff's RFC, the ALJ found Plaintiff could not perform any  
11 past relevant work (R. at 20), but there were jobs in significant numbers in the national  
12 economy that Plaintiff could perform (R. at 21). The ALJ thus found Plaintiff was "not  
13 disabled." (R. at 22.)

## 14 **II. LEGAL STANDARDS**

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

27 To determine whether a claimant is disabled for purposes of the Social Security  
28 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the

1 burden of proof on the first four steps, but the burden shifts to the Commissioner at step  
2 five. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At the first step, the ALJ  
3 determines whether the claimant is engaging in substantial gainful activity. 20 C.F.R.  
4 § 404.1520(a)(4)(i). If so, the claimant is not disabled and the inquiry ends. *Id.* At step  
5 two, the ALJ determines whether the claimant has a “severe” medically determinable  
6 physical or mental impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If not, the claimant is not  
7 disabled and the inquiry ends. *Id.* At step three, the ALJ considers whether the claimant's  
8 impairment or combination of impairments meets or medically equals an impairment  
9 listed in Appendix 1 to Subpart P of 20 C.F.R. Pt. 404 (Listing of Impairments). 20  
10 C.F.R. § 404.1520(a)(4)(iii). If so, the claimant is automatically found to be disabled. *Id.*  
11 If not, the ALJ proceeds to step four. *Id.* At step four, the ALJ assesses the claimant’s  
12 residual functional capacity and determines whether the claimant is still capable of  
13 performing past relevant work. 20 C.F.R. § 404.1520(a)(4)(iv). If so, the claimant is not  
14 disabled and the inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and final step,  
15 where he determines whether the claimant can perform any other work based on the  
16 claimant’s residual functional capacity, age, education, and work experience. 20 C.F.R. §  
17 404.1520(a)(4)(v). If so, the claimant is not disabled. *Id.* If not, the claimant is disabled.  
18 *Id.*

### 19 **III. ANALYSIS**

20 Plaintiff argues that the ALJ committed legal error by: (1) rejecting Plaintiff’s  
21 symptom testimony in the absence of specific, clear, and convincing reasons supported  
22 by substantial evidence; (2) failing to consider the record as a whole when determining  
23 Plaintiff was disabled; and (3) failing to provide any basis for the determination of  
24 Plaintiff’s work capacities. (Doc. 17, Pl’s Br. at 1.)

#### 25 **A. The ALJ Erred By Rejecting Plaintiff’s Symptom Testimony**

26 Plaintiff argues that the ALJ erred by failing to provide clear and convincing  
27 reasons for rejecting portions of Plaintiff’s symptom testimony. (Pl.’s Br. at 13.) The ALJ  
28 discredited Plaintiff’s symptom testimony because he found it was not consistent with the

1 objective evidence of record, which showed, in the ALJ’s opinion, conservative  
2 treatment. (R. at 18.) It also appears the ALJ found Plaintiff’s testimony as to his daily  
3 activities was not consistent with his alleged symptoms. (R. at 18.) Finally, the ALJ noted  
4 there was no reliable medical source statement supporting the extent of Plaintiff’s alleged  
5 functional limitations. (R. at 18.)

6 “[U]nless an ALJ makes a finding of malingering based on affirmative evidence  
7 thereof, he or she may only find an applicant not credible by making specific findings as  
8 to credibility and stating clear and convincing reasons for each.” *Robbins v. Soc. Sec.*  
9 *Admin.*, 466 F.3d 880, 883 (9th Cir. 2006). “The clear and convincing standard is the  
10 most demanding required in Social Security cases.” *Moore v. Comm’r of Soc. Sec.*  
11 *Admin.*, 278 F.3d 920, 924 (9th Cir. 2002). When evaluating a claimant’s pain testimony  
12 where the claimant has produced objective medical evidence of an underlying  
13 impairment, “an ALJ may not reject a claimant’s subjective complaints based solely on a  
14 lack of medical evidence to fully corroborate the alleged severity of pain.” *Burch v.*  
15 *Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). “General findings are insufficient; rather,  
16 the ALJ must identify what testimony is not credible and what evidence undermines the  
17 claimant’s complaints.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting  
18 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996)).

19 Though the ALJ has provided several reasons for discrediting Plaintiff’s  
20 testimony, none satisfies the exacting clear and convincing standard that applies here  
21 where the ALJ found no evidence of malingering. For example, the ALJ found Plaintiff’s  
22 treatment “limited to epidural blocks, joint injections, pain medications, and use of CPAP  
23 machine” was conservative. (R. at 18.) Plaintiff’s doctor administering some of this  
24 treatment, however, frequently noted that because of Plaintiff’s obesity, minimal  
25 treatment was available because his weight initially precluded him from surgery or other  
26 more significant treatment. (*See, e.g.*, R. at 445, 451, 485, 494.)

27 In addition, after medical professionals determined Plaintiff’s chronic conditions  
28 persisted and were not alleviated by epidural blocks and injections, they recommended

1 surgery, which Plaintiff underwent. (R. at 373–75, 378.) Although this determination and  
2 the surgery took place after Plaintiff’s date last insured, Plaintiff’s chronic lower back  
3 issues, including degenerative disc disease, were documented prior to the date last  
4 insured and continually worsened. (See R. at 435–46, 508, 517, 520–21.) “While the ALJ  
5 must consider only impairments (and limitations and restrictions therefrom) that  
6 [Plaintiff] had prior to the DLI [date last insured], evidence post-dating the DLI is  
7 probative of [Plaintiff’s] pre-DLI disability.” *Turner v. Comm’r of Social Security*, 613  
8 F.3d 1217, 1228–29 (9th Cir. 2010). It is not evident that the ALJ considered Plaintiff’s  
9 doctor’s notations that Plaintiff was initially barred from more drastic treatment due to  
10 other risk factors and that Plaintiff later received more serious treatment after  
11 conservative treatment was ineffective. Accordingly, further development of the record is  
12 necessary.

13 The ALJ also reviewed Plaintiff’s diagnostic test results. The ALJ examined  
14 results dated August 2010 that revealed various issues including spondylosis,  
15 spondylolisthesis, degenerative disc disease, and osteoarthritis of the lumbar spine. (R. at  
16 18, 520.) However, the ALJ noted the lack of evidence of spinal stenosis, without  
17 explaining why that lack of evidence supports a finding that Plaintiff is not credible,  
18 especially in light of the evidence of Plaintiff’s other issues. (See R. at 18.) The ALJ goes  
19 on to include degenerative disc disease and neuropathy as severe impairments during the  
20 relevant period, but does not explain why the medical record does not support Plaintiff’s  
21 symptom testimony or why the testimony lacked credibility. (R. at 18–19.) Thus, the  
22 ALJ’s review of the medical record does not constitute a “clear and convincing” reason  
23 for discrediting Plaintiff’s testimony. See *Moore*, 278 F.3d at 924.

24 The ALJ relies on Plaintiff’s testimony regarding his daily activities to support his  
25 finding that Plaintiff is not credible. He notes that Plaintiff testified that he cooks, gathers  
26 laundry, and cleans his toilet every day. (R. at 18.) The ALJ erred in finding that  
27 Plaintiff’s daily activities, if performed in the manner that Plaintiff described, are  
28 inconsistent with the pain-related impairments that Plaintiff described in his testimony.

1 *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014) (“We have repeatedly warned that  
2 ALJs must be especially cautious in concluding that daily activities are inconsistent with  
3 testimony about pain, because impairments that would unquestionably preclude work and  
4 all the pressures of a workplace environment will often be consistent with doing more  
5 than merely resting in bed all day.”). The ALJ failed to develop and clarify the record as  
6 to the extent to which Plaintiff takes breaks when engaging in such activities and how  
7 long the activities take. If, for example, Plaintiff cooks in twenty minute increments once  
8 or twice a week, any abilities he employs in cooking for such a short period of time are  
9 not likely transferable to the work environment. *See Fair v. Bowen*, 885 F.2d 597, 603  
10 (9th Cir. 1989). When describing his cooking, Plaintiff stated he could cook “once or  
11 twice a week,” and with regard to laundry, he stated his mother did the laundry, though  
12 he could do so if needed. (R. at 32.) Plaintiff’s statements in context further suggest that  
13 his abilities may not be transferable to the work environment and that his statements are  
14 not inconsistent with his symptom testimony, especially as to walking and standing  
15 limitations.

16 Finally, while there is not a medical source statement endorsing the extent of  
17 Plaintiff’s alleged functional limitations, the ALJ fails to point to a statement that  
18 contradicts and makes Plaintiff’s symptom testimony not credible in any way. It is not  
19 proper for the ALJ to find Plaintiff not credible solely due to a lack of a medical source  
20 statement. To the extent the ALJ relied on Plaintiff’s intermittent reports of relief from  
21 steroid nerve blocks and epidural steroid injections, there is no evidence that Plaintiff had  
22 long-term relief from such treatment, and it is not inconsistent for Plaintiff to have  
23 experienced and reported short-term relief while still having long-term pain. Also, to the  
24 extent the ALJ found Plaintiff’s failure to lose weight made his testimony not credible,  
25 such a finding violates a Social Security Ruling and goes against the case law in this  
26 Circuit. *See Orn*, 495 F.3d at 636.

27 Accordingly, the ALJ’s basis for discrediting Plaintiff’s testimony were either  
28 improper or require further factual development. *See Robins*, 466 F.3d at 883.

1           **B.     The ALJ Must Consider the Record as a Whole When Determining**  
2           **Whether Plaintiff was Disabled**

3           Plaintiff argues that the ALJ explicitly refused to consider evidence after  
4 Plaintiff's date last insured when evaluating the severity of Plaintiff's condition. (Pl.'s Br.  
5 at 21.) Defendant contends the ALJ did not explicitly refuse to consider such evidence,  
6 but only stated he would not "discuss" certain evidence. (Doc. 19, Def.'s Br. at 14.) The  
7 disputed language from the ALJ's Opinion is:

8                           [T]he claimant underwent a rotator cuff repair in 2011 and lumbar fusion in  
9                           2013 (Ex. 3F and Testimony). However, those surgeries occurred after the  
10                          claimant's date last insured. As such, that evidence is not discussed within  
11                          this decision, and any related impairments status-post those surgeries are  
12                          not considered medically determinable impairments.

13           (R. at 16.) Although the ALJ uses the word "discuss" rather than explicitly stating he  
14 would not *consider* the evidence, the Court does not find this semantic difference  
15 precludes the possibility that by not discussing the evidence, the ALJ also did not  
16 consider the evidence in making his determination. Evidence that post-dates Plaintiff's  
17 date last insured may be probative of his impairments prior to his date last insured. *See,*  
18 *e.g., Turner*, 613 F.3d at 1228–29; *Lester*, 81 F.3d at 832 ("medical evaluations made  
19 after the expiration of a claimant's insured status are relevant to an evaluation of the pre-  
20 expiration condition") (citation omitted).

21           To the extent the ALJ did not consider evidence that post-dates Plaintiff's date last  
22 insured, the ALJ shall consider such evidence on remand. Because Plaintiff's  
23 impairments were determined prior to his date last insured and he began conservative  
24 treatment during that time, his later treatment, including surgery after successive failures  
25 of conservative treatment, is evidence that post-dates his date last insured but may be  
26 probative of his pre-expiration condition. *See Lester*, 81 F.3d at 832.

1           **C.     The ALJ Must Develop the Record in Determining Plaintiff’s Work**  
2           **Capacities**

3           Plaintiff argues that the ALJ erred because he did not articulate any rationale for  
4 his determination of Plaintiff’s RFC that Plaintiff could perform light work. (Pl.’s Br. at  
5 22.) Based on the Court’s decision above, on remand, the ALJ must develop the record as  
6 to Plaintiff’s testimony and consider medical evidence that post-dates Plaintiff’s date last  
7 insured. After such steps, the ALJ will need to make a new determination of Plaintiff’s  
8 RFC, and therefore the Court does not review the ALJ’s previous determination of  
9 Plaintiff’s RFC.

10           **D.     The Credit-As-True Rule Does Not Apply**

11           Plaintiff asks that the Court apply the “credit-as-true” rule, which would result in  
12 remand of Plaintiff’s case for payment of benefits rather than remand for further  
13 proceedings. (Pl.’s Br. at 13.) Specifically, Plaintiff states that had the ALJ not rejected  
14 Plaintiff’s symptom testimony, he should be entitled to benefits because the VE testified  
15 that a person with Plaintiff’s reported symptoms would be unable to perform any work.  
16 (Pl.’s Br. at 13, 20–21.)

17           The credit-as-true rule only applies in cases that raise “rare circumstances” that  
18 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 fails to provide legally sufficient reasons for  
22 rejecting medical evidence. *Id.* at 1100. Second, the record must be fully developed, there  
23 must be no outstanding issues that must be resolved before a determination of disability  
24 can be made, and further administrative proceedings would not be useful. *Id.* at 1101.  
25 Further proceedings are considered useful when there are conflicts and ambiguities that  
26 must be resolved. *Id.* Third, if the above elements are met, the Court may “find[] the  
27 relevant testimony credible as a matter of law . . . and then determine whether the record,  
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1 taken as a whole, leaves ‘not the slightest uncertainty as to the outcome of [the]  
2 proceeding.’” *Id.* (citations omitted).

3 In this case, the ordinary remand rule, not the credit-as-true rule, applies. Because  
4 the ALJ found Plaintiff’s symptom testimony not credible and did not fully develop the  
5 record in support of his decision to reject Plaintiff’s testimony, this case still involves  
6 evidentiary conflicts that must be resolved, and there is still uncertainty as to the outcome  
7 of the proceeding.

8 **IT IS THEREFORE ORDERED** reversing the decision of the Administrative  
9 Law Judge (R. at 11–26) as upheld by the Appeals Council (R. at 1–6). The Court  
10 remands this matter for further proceedings as to Plaintiff’s symptom testimony and  
11 evidence that post-dates Plaintiff’s date last insured.

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

14 Dated this 3<sup>rd</sup> day of June, 2016.

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17 \_\_\_\_\_  
18 Honorable John J. Tuchi  
19 United States District Judge  
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