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

8 Sandi Leigh Mashburn,

9 Plaintiff,

10 vs.

11 Michael J. Astrue, Commissioner of Social
12 Security,

13 Defendant.

No. CV-09-00241-TUC-CRP

ORDER

14
15 Sandi Mashburn suffers from various blood and breathing disorders. She has
16 painful blood clots in her legs and lungs. She uses bottled oxygen to help her breathe.

17 Ms. Mashburn applied for disability insurance benefits and supplemental security
18 income in December 2006, claiming to be disabled as of January 30, 2006. Doc. 14,
19 Tr. 44, 97-102. The applications were denied initially and on reconsideration. Tr. 57-63,
20 66-72. A hearing before an administrative law judge (“ALJ”) was held on March 13,
21 2008. Tr. 21-56. The ALJ issued a written decision on May 3, 2008, finding
22 Ms. Mashburn not to be disabled within the meaning of the Social Security Act.
23 Tr. 10-18. This decision became the Commissioner’s final decision when the Appeals
24 Council denied review. Tr. 1-3.

25 Ms. Mashburn then brought this action for judicial review pursuant to 42 U.S.C.
26 § 405(g). Doc. 1. The issues are fully briefed. Docs. 17, 18, 21. Oral argument has not
27 been requested. For reasons stated below, the Court will reverse Defendant’s decision
28 and remand for an award of benefits.

1 **I. Standard of Review.**

2 The Court has the “power to enter, upon the pleadings and transcript of record, a
3 judgment affirming, modifying, or reversing the decision of the Commissioner of Social
4 Security, with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). The
5 decision denying benefits “should be upheld unless it is based on legal error or is not
6 supported by substantial evidence.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198
7 (9th Cir. 2008). In determining whether the decision is supported by substantial
8 evidence, the Court “must consider the entire record as a whole and may not affirm
9 simply by isolating a ‘specific quantum of supporting evidence.’” *Id.* (citation omitted).

10 **II. Discussion.**

11 Whether a claimant is disabled is determined using a five-step evaluation process.
12 To establish disability, the claimant must show she has not worked since the alleged
13 disability onset date, she has a severe impairment, and her impairment meets or equals a
14 listed impairment or her residual functional capacity (“RFC”) precludes her from
15 performing past work. Where this showing is made, the Commissioner must prove that
16 the claimant is able to perform other work. 20 C.F.R. § 404.1520.

17 Plaintiff has met her burden. She has not worked since January 30, 2006, the
18 alleged onset date. Tr. 12, ¶ 2. She has several severe impairments: deep venous
19 thrombosis, pulmonary emboli, Hughes syndrome, and chronic obstructive pulmonary
20 disease. Tr. 12, ¶ 3. While those impairments do not meet or equal a listed impairment
21 (Tr. 12, ¶ 4), they do preclude Plaintiff from performing her past jobs which ranged from
22 light semi-skilled work to medium skilled work (Tr. 16, ¶ 6). Plaintiff is not disabled, the
23 ALJ found at step five, because she has the RFC to perform sedentary work and certain
24 light work that exists in significant numbers in the national economy. Tr. 13-17, ¶¶ 5, 10.

25 Plaintiff claims that the ALJ committed several errors. Specifically, Plaintiff
26 argues that the ALJ erroneously adopted vocational expert testimony (Doc. 17 at 7-11),
27 failed to properly evaluate and weigh medical source opinions (*id.* at 11-14), failed to
28 properly evaluate the credibility of her symptom testimony (*id.* at 14-15), and erroneously

1 rejected the testimony of her husband (*id.* at 15). Defendant contends that the ALJ did
2 not err and his decision is supported by substantial evidence. Doc. 18. The Court
3 concludes that the ALJ committed reversible error with respect to the medical opinions
4 and the testimony of Plaintiff and her husband.

5 **A. Medical Opinions.**

6 Dr. Richard Rosenberg is a hematology and oncology physician with Arizona
7 Oncology Associates. Tr. 303. Karen LaMaster is Dr. Rosenberg’s medical assistant.
8 Tr. 39, 303. Dr. Rosenberg and Ms. LaMaster have treated Plaintiff since at least
9 February 2006. Tr. 302-34, 395-401. They have opined that Plaintiff’s impairments and
10 functional limitations render her disabled. Tr. 402-05.

11 Dr. Jeri Hassman, a state-agency physician, examined Plaintiff on March 13, 2007.
12 Tr. 279-83. He diagnosed deep venous thrombosis times two (2001 and 2006) and noted
13 a history of Hughes syndrome and persistent right calf pain that worsened with standing
14 and walking. Tr. 282, 284. With respect to the ability to do work related activities,
15 Dr. Hassman opined that Plaintiff has the RFC to perform sedentary work with
16 restrictions. Tr. 284-88.

17 The ALJ gave no consideration to the opinion of Dr. Rosenberg, gave little weight
18 to the opinion of Ms. LaMaster (Tr. 15), and gave controlling weight to that of
19 Dr. Hassman (Tr. 14). Plaintiff argues that the ALJ erred in evaluating and weighing the
20 medical opinions. Doc. 17 at 11-14. She is correct.

21 The sole reason the ALJ gave for adopting the opinion of Dr. Hassman is that
22 “it is well-supported by objective findings and is not inconsistent with the other
23 substantial evidence[.]” Tr. 14. The ALJ summarizes certain medical records (Tr. 15),
24 but does not explain, and it otherwise is not clear to the Court, how those records support
25 Dr. Hassman’s opinion. The ALJ references progress notes from Arizona Oncology
26 Associates showing treatment for right deep venous thrombosis (Tr. 302-34), emergency
27 room records showing treatment for left calf pain (Tr. 347-49), treatment records for right
28 knee effusion (Tr. 362-66, 369), and a venous Doppler ultrasound showing chronic deep

1 venous occlusive disease (Tr. 371). The ALJ does not discuss the specific work-related
2 activities found by Dr. Hassman (Tr. 284-88) or explain how the cited medical records
3 support those activities.

4 With respect to the assertion that Dr. Hassman's opinion "is not inconsistent with
5 the other substantial evidence" (Tr. 14), Plaintiff notes, correctly, that the opinion clearly
6 is inconsistent with those of her treating providers, Dr. Rosenberg and Ms. LaMaster.
7 Doc. 17 at 11.

8 As Plaintiff's treating physician, Dr. Rosenberg is "employed to cure and has a
9 greater opportunity to know and observe [Plaintiff] as an individual." *McCallister v.*
10 *Sullivan*, 888 F.2d 599, 602 (9th Cir. 1989). His opinion regarding the severity and
11 limiting effects of Plaintiff's impairments is therefore entitled to "special weight," and if
12 the ALJ chooses to disregard the opinion, he must "set forth specific, legitimate reasons
13 for doing so, and this decision itself must be supported by substantial evidence."
14 *Embrey v. Bowen*, 849 F.2d 418, 421 (9th Cir. 1988)) (quoting *Cotton v. Bowen*, 799 F.2d
15 1403, 1408 (1986)).

16 Based on a diagnosis of deep venous thrombosis, pulmonary embolism, and
17 hypoxia, Dr. Rosenberg opined that Plaintiff is totally and permanently disabled. Tr. 405.
18 The ALJ completely ignored Dr. Rosenberg's opinion. This constitutes legal error. *See*
19 20 C.F.R. §§ 404.1527, 416.927; *Lingenfelter v. Astrue*, 504 F.3d 1028, 1037 & n.10 (9th
20 Cir. 2007) (the ALJ erred where he only briefly mentioned one treating physician's
21 opinion and ignored another opinion that the claimant was disabled).

22 Asserting that there are no medical records showing an examination on the part of
23 Dr. Rosenberg, Defendant contends that the ALJ did not error by ignoring the doctor's
24 opinion. Doc. 18 at 16. This contention is without merit for multiple reasons. First, the
25 ALJ did not reject Dr. Rosenberg's opinion for lack of examination records. This Court
26 must review the adequacy of the reasons specified by the ALJ, not the *post hoc*
27 contentions of Defendant. *See Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003).

28 Second, the fact that Dr. Rosenberg treated Plaintiff only "occasionally" (Tr. 39)

1 does not preclude a finding that he is an acceptable treating source. *See* 20 C.F.R. §§
2 404.1502, 416.902 (defining treating source); *Benton v. Barnhart*, 331 F.3d 1030, 1035
3 (9th Cir. 2003) (Section 404.1502’s “language suggests that ‘a few times’ or contact as
4 little as twice a year would suffice”).

5 Finally, even if Dr. Rosenberg did not qualify as a treating source, the ALJ was
6 still required to consider and evaluate his opinion. Opinions from any medical source,
7 even on issues reserved to the Commissioner, “must never be ignored.” SSR 96-5p, 1996
8 WL 374183, at *3 (July 2, 1996). Instead, the ALJ “is required to evaluate all evidence
9 in the case record that may have a bearing on the determination or decision of
10 disability[.]” *Id.*; *see* 20 C.F.R. §§ 404.1527(d), 416.927(d). The opinion of Dr.
11 Rosenberg (Tr. 405) clearly is material to the question whether Plaintiff is disabled. The
12 ALJ erred in giving the opinion no consideration.

13 Ms. LaMaster opined in a medical work tolerance form that Plaintiff has a less
14 than sedentary RFC due to bilateral leg pain, the need to elevate her legs, oxygen
15 dependence, and chronic blood clotting. Tr. 402-03. The ALJ rejected this opinion on
16 the ground that it “appears to rest at least in part” on an assessment of impairments
17 outside Ms. LaMaster’s area of expertise. Tr. 15. The ALJ asserted that it is “not clear”
18 that Ms. LaMaster was familiar with the relevant definition of disability and it is
19 “possible” that she was referring solely to an inability to perform past work. *Id.*

20 But the AJL provides no factual basis for those assumptions. He fails to consider
21 Ms. LaMaster’s credentials, her treating relationship with Plaintiff, and her association
22 with Dr. Rosenberg. Nor does the ALJ provide a basis for rejecting the specific
23 functional limitations found by Ms. LaMaster. Tr. 402-03.

24 Because Ms. LaMaster is a physician’s assistant, Defendant asserts, she is not
25 an “acceptable medical source.” Doc. 18 at 16. Under the relevant regulations,
26 physicians’ assistants are listed among the examples of “medical sources.” 20 C.F.R. §§
27 404.1513(d)(1), 416.913(d)(1). To the extent Ms. LaMaster “was working closely with,
28 and under the supervision of, [Dr. Rosenberg], her opinion is to be considered that of an

1 ‘acceptable medical source.’” *Taylor v. Comm’r of Soc. Sec. Admin*, 659 F.3d 1228,
2 1234 (9th Cir. 2011).

3 There is no dispute that Ms. LaMaster is Dr. Rosenberg’s medical assistant.
4 Plaintiff has testified that Ms. LaMaster works along side Dr. Rosenberg and discusses
5 Plaintiff’s condition with him. Tr. 39. Contrary to Defendant’s assertion (Doc. 18 at 16),
6 Ms. LaMaster’s opinion is to be considered that of an acceptable medical source. *See*
7 *Taylor*, 659 F.3d at 1234.¹

8 Dr. Rosenberg and Ms. LaMaster are Plaintiff’s treating medical providers. To
9 properly reject their opinions about Plaintiff’s impairments and work-related abilities, the
10 ALJ “must do more than offer his own conclusions. He must set forth his own
11 interpretations and explain why they, rather than [the treating providers’], are correct.”
12 *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007). The ALJ has failed to provide the
13 requisite “detailed, reasoned, and legitimate rationales for disregarding [Dr. Rosenberg
14 and Ms. LaMaster’s] findings.” *Embrey*, 849 F.2d at 422. His rejection of their opinions
15 was erroneous.

16 The ALJ gave weight to the RFC assessment of consulting physician John Spriggs
17 (Tr. 290) based solely on his purported “expertise in the evaluation of medical issues in
18 disability claims” (Tr. 16). This general finding does not suffice. The ALJ failed to
19 provide the requisite “specific and legitimate reasons” for crediting Dr. Spriggs, a non-
20 treating, non-examining doctor, over Plaintiff’s treating providers. *Andrews v. Shalala*,
21 53 F.3d 1035, 1043 (9th Cir. 1995).

22 In summary, the ALJ committed legal error in weighing medical opinions, and his
23 decision concerning those opinions is not supported by substantial evidence.

24 **B. Plaintiff’s Testimony.**

25 A claimant’s subjective complaints, including pain, must be considered when

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27 ¹ It is worth noting that under Arizona law, physician supervision is required for
28 all certified physicians’ assistants. AAC § R4-17-305. Defendant does not dispute that
Ms. LaMaster is a certified physician’s assistant. *See* Doc. 17 at 11. Nor does Defendant
assert that Ms. LaMaster is provided inadequate supervision by Dr. Rosenberg.

1 making a disability determination. 20 C.R.F. § 404.1529. “Pain of sufficient severity
2 caused by a medically diagnosed ‘anatomical, physiological, or psychological
3 abnormality’ may provide the basis for determining that a claimant is disabled.” *Light v.*
4 *Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997) (quoting 42 U.S.C. § 423(d)(5)(A)).
5 “Once a claimant produces objective medical evidence of an underlying impairment, an
6 ALJ may not reject a claimant’s subjective complaints based solely on lack of objective
7 medical evidence to fully corroborate the alleged severity of pain.” *Moisa v. Barnhart*,
8 367 F.3d 882, 885 (9th Cir. 2004); *see Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir.
9 1996); 20 C.F.R. § 404.1529(c)(2); SSR 96-7p, 1996 WL 374186, at *1 (July 2, 1996).

10 Plaintiff testified that she has constant swelling and pain in her legs. While
11 prescribed Percocet helps for an hour or two, she can take the medication only several
12 times a day. Tr. 31. She can sit for thirty minutes and stand and walk for a couple
13 minutes at a time, but walking makes the swelling and pain worse. Tr. 31-32. She began
14 oxygen treatment in February 2006 for shortness of breath and needs oxygen while
15 sleeping or doing “anything besides sitting down watching TV.” Tr. 32-33, 41. She must
16 elevate her right leg several times a day for at least an hour to prevent blood pooling and
17 alleviate pain and numbness. Tr. 40. She spends her day watching television, doing
18 crossword puzzles, reading, and sleeping. Tr. 36; *see* Tr. 164-71.

19 The ALJ evaluated Plaintiff’s testimony using the two-step analysis established by
20 the Ninth Circuit. *See Smolen*, 80 F.3d at 1281. Applying the test of *Cotton v. Bowen*,
21 799 F.2d 1403 (9th Cir. 1986), he determined that Plaintiff’s medically determinable
22 impairments could reasonably produce her alleged symptoms. Tr. 14. Given this
23 conclusion, and because he found no evidence of malingering, the ALJ was required to
24 present “specific, clear and convincing reasons” for finding Plaintiff’s testimony not
25 credible. *Smolen*, 80 F.3d at 1281; *Taylor*, 659 F.3d at 1234. This standard is “the most
26 demanding required in Social Security cases.” *Moore v. Comm’r of Soc. Sec. Admin.*,
27 278 F.3d 920, 924 (9th Cir. 2002).

28 Plaintiff argues that the reasons the ALJ provided for finding her not fully credible

1 are neither convincing nor supported by substantial evidence. Doc. 17 at 14-16. The
2 Court agrees.

3 The ALJ discusses certain medical evidence (Tr. 14), most of which is consistent
4 with the impairments found to be severe. The ALJ states that in terms of the “blood clots
5 in the right leg which cause pain, the medical evidence shows that [Plaintiff] has a history
6 of treatment for DVT of the right lower extremity” and was hospitalized for “acute pain
7 in her right lower extremity of three days duration[.]” Tr. 14. The medical evidence
8 further shows a “pulmonary embolism on CAT scan,” a history of treatment for
9 pulmonary emboli, and prescribed oxygen treatment and anticoagulants Coumadin and
10 Lovenox. *Id.* The ALJ notes that certain studies revealed no deep venous thrombosis, no
11 acute deep venous occlusive disease, and no sleep apnea syndrome (*id.*), but does not
12 explain how those findings undermine Plaintiff’s symptom testimony.

13 Once a claimant has presented medical evidence of an underlying impairment, as
14 Plaintiff has done in this case, “the ALJ may not discredit the claimant’s testimony
15 regarding subjective pain and other symptoms merely because the symptoms, as opposed
16 to the impairments, are unsupported by objective medical evidence.” *Perez v. Astrue*,
17 No. CV 09-4600-MLG, 2010 WL 1051128, at *4 (C.D. Cal. Mar. 18, 2010); *see Robbins*
18 *v. Soc. Sec. Admin.*, 466 F.3d 880, 884 (9th Cir. 2006). The ALJ himself recognizes that
19 the credibility determination was necessary *because* Plaintiff’s “statements about the
20 intensity, persistence, or functionally limiting effects of pain or other symptoms are not
21 substantiated by objective medical evidence[.]” Tr. 13; *see* SSR 96-7p, at *2. In short,
22 the ALJ’s discussion of medical evidence does not constitute a clear and convincing
23 reason for discrediting Plaintiff’s symptom testimony.²

24 The ALJ found Plaintiff not credible on the ground that she has “described daily
25 activities which are not limited to the extent one would expect, given the complaints of

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27 ² For reasons stated above, the ALJ erred to the extent he discredited Plaintiff’s
28 testimony based on the opinion of Dr. Hassman. *See* Tr. 14, 279-83.

1 disabling symptoms and limitations.” Tr. 15. The ALJ states that Plaintiff is able to
2 drive, shop, prepare meals, do household chores, care for her personal needs, care for her
3 dogs, and handle the finances. Tr. 14-16. But the ALJ ignores the limited nature of those
4 activities.

5 Plaintiff can drive vehicles with automatic transmissions, but not those with a
6 manual stick-shift. Tr. 167. It takes Plaintiff a long time to shop and she uses an electric
7 cart when she is able to go shopping. Because it hurts her leg too much to stand at the
8 stove and make a “real meal,” Plaintiff makes only “quick, easy meals,” such as toast,
9 cereal, sandwiches, and microwave dishes. Tr. 34, 165-66. Her friends come over once
10 or twice a week to help with the housecleaning. Tr. 34. Plaintiff does some “light
11 cleaning” and a couple loads of laundry each week, but it takes her all day to complete
12 those chores. Tr. 166. She does not make her bed, vacuum, or do yard work or other
13 chores that require standing or walking for more than five minutes. Tr. 34, 166, 171. She
14 is able to dress and do her hair, but she must take baths instead of showers. Tr. 165. She
15 is no longer able to walk her dogs. *Id.* With respect to the finances, Plaintiff made clear
16 that due to her alleged disability she has no money to handle. Tr. 168.

17 “Several courts, including [this Circuit], have recognized that disability claimants
18 should not be penalized for attempting to lead normal lives in the face of their
19 limitations.” *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (citations omitted).
20 Stated differently, the mere fact that a claimant engages in normal daily activities “does
21 not in any way detract from her credibility as to her overall disability. One does not need
22 to be ‘utterly incapacitated’ in order to be disabled.” *Vertigan v. Halter*, 260 F.3d 1044,
23 1050 (9th Cir. 2001) (quoting *Fair*, 885 F.2d at 603). An ALJ may consider a claimant’s
24 activities in assessing credibility, but “[t]his line of reasoning clearly has its limits[.]”
25 *Fair*, 885 F.2d at 603. Because “many home activities are not easily transferrable to what
26 might be the more grueling environment of the workplace,” an ALJ may reject symptom
27 testimony based on activities only where the ALJ makes a “specific finding” that they
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1 “are transferrable to the work setting” and form a “substantial part” of the claimant’s day.
2 *Id.* (emphasis in original).

3 The ALJ has not met his burden. He fails to account for the limited nature of
4 Plaintiff’s daily activities. He notes (Tr. 15) that Plaintiff visits with others, plays bingo
5 watches television, does crossword puzzles, and reads (Tr. 35-36, 168), but fails to
6 explain how those activities translate into an ability to perform regularly in the
7 workplace. *See* 20 C.F.R. § 404.1572(c) (hobbies generally are not to be considered
8 substantial gainful activity).

9 Nor does the ALJ properly evaluate Plaintiff’s statements concerning her ability to
10 lift, squat, kneel, and climb. Tr. 16. Plaintiff qualified those abilities by making clear
11 that she can lift things under 20 pounds but not carry them, can squat and kneel for only a
12 few seconds, and can climb a few stairs. Tr. 169.

13 The ALJ failed to provide a convincing reason for concluding that Plaintiff’s
14 activities render her symptom testimony not credible. *See Lewis v. Apfel*, 236 F.3d 503,
15 517 (9th Cir. 2001) (the claimant’s limited activities did not constitute convincing
16 evidence that he could function regularly in a work setting); *Benecke v Barnhart*, 379
17 F.3d 587, 594 (9th Cir. 2004) (rejecting the ALJ’s credibility finding where it was based
18 in large part on the claimant’s ability to carry out certain routine tasks); *Orn v. Astrue*,
19 495 F.3d 625, 639 (9th Cir. 2007) (the ALJ erred where the claimant’s activities did not
20 contradict his symptom testimony and failed to meet the threshold for transferable work
21 skills).

22 The Court recognizes that questions of credibility are the province of the
23 Commissioner. *See Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 693 (9th Cir.
24 2009). Absent evidence of malingering, however, “the Commissioner’s reasons for
25 rejecting the claimant’s testimony must be clear and convincing.” *Id.* (citation omitted).
26 Considering the entire record as a whole and in the proper context, *see Ryan*, 528 F.3d
27 at 1198, the Court concludes that the reasons the ALJ provided for finding Plaintiff not
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1 credible are neither convincing nor supported by substantial evidence.

2 Defendant asserts that Plaintiff is able to perform “significant” activities. Doc. 18
3 at 18. This assertion is belied not only by the record as a whole, but also by Defendant’s
4 own brief. Defendant recognizes that Plaintiff prepares “simple” meals and does
5 “limited” housecleaning and shopping. *Id.* at 18-19. Watching television, doing
6 crossword puzzles, playing bingo, and reading are not reasonably construed as
7 “significant” activities that are transferrable to the workplace.

8 Plaintiff stated that she still travels and camps for “short times only” (Tr. 168), but
9 the ALJ did not cite those activities as a reason for rejecting Plaintiff’s testimony. The
10 Court “cannot affirm the decision of an agency on a ground the agency did not invoke in
11 making its decision.” *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001). The ALJ,
12 not this Court, “is required to provide reasons for rejecting [symptom] testimony.” *Stout*
13 *v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006).

14 Defendant notes that Plaintiff has lived alone since her husband passed away on
15 May 6, 2007. Doc. 18 at 19. Defendant, however, presents no argument or legal
16 authority showing that living alone renders a claimant not credible or not disabled.

17 Finally, Defendant claims that Plaintiff was noncompliant with treatment. *Id.* The
18 ALJ, however, did not assert this as reason for finding Plaintiff incredible. Nor did the
19 ALJ specifically discredit Plaintiff’s symptom testimony on the ground that she smoked
20 cigarettes and occasionally drinks alcohol. Tr. 13.

21 In summary, the ALJ committed legal error in finding Plaintiff’s symptom
22 testimony is not credible.

23
24 **C. Lay Witness Testimony.**

25 Bryan Mashburn, now deceased, completed a functional capacity report in January
26 2007. Tr. 175-82. At the time, he had known Plaintiff for four years. Tr. 175.
27 Consistent with his wife’s testimony, Mr. Mashburn stated, among other things, that
28 Plaintiff prepares only sandwiches and other quick meals, no longer can take showers,

1 does laundry twice a week while mostly sitting down, and shops for small items while
2 using an electric cart. Tr. 176-78. Mr. Mashburn further stated that Plaintiff experiences
3 pain and is limited in her ability to stand, squat, climb, walk, and lift. Tr. 180-82.

4 The ALJ commented on Mr. Mashburn's testimony only by noting that "he works
5 and is not with the claimant 'all the time.'" Tr. 14. Mr. Mashburn actually stated that he
6 was with Plaintiff "all the time except when at work." Tr. 175. Before his passing, Mr.
7 Mashburn lived with Plaintiff and saw her every day. Tr. 164, 175.

8 This Circuit has made clear that "testimony from lay witnesses who see the
9 claimant every day is of particular value." *Smolen*, 80 F.3d at 972. Indeed, because
10 testimony from spouses and other family members may provide insight into the severity
11 of the impairments and how they affect the claimant's ability to function, *see* SSR 06-
12 03p, 2006 WL 2329939, at *2 (Aug. 9, 2006), such testimony constitutes "'competent
13 evidence'" and therefore cannot be disregarded without comment. *Stout*, 454 F.3d at
14 1053 (citation omitted); *see* 20 C.F.R. §§ 404.1513(d)(4), 404.1545(a)(3). If the ALJ
15 wishes to discount the testimony of lay witnesses, he must give legitimate reasons that
16 are germane to each witness. *See id.*; *Taylor*, 659 F.3d at 1234.

17 The fact that Mr. Mashburn worked outside the home is not a legitimate reason for
18 discounting his testimony concerning Plaintiff's symptoms and functional limitations.
19 Plaintiff's husband, "though not a vocational or medical expert, was not disqualified from
20 rendering an opinion as to how [his wife's] condition affects [her] ability to perform basic
21 work activities." *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009). The Court
22 concludes that the ALJ erred in rejecting the testimony of Mr. Mashburn. *See Smolen*, 80
23 F.3d at 972.

24 **III. Remedy.**

25 The decision to remand for further development of the record or for an award
26 benefits is within the discretion of the Court. 42 U.S.C. § 405(g); *see Harman v. Apfel*,
27 211 F.3d 1172, 1173-74 (9th Cir. 2000). This Circuit has held that evidence is to be
28 credited as true, and the action remanded for an award of benefits, where the ALJ has

1 failed to provide legally sufficient reasons for rejecting evidence, no outstanding issue
2 remains that must be resolved before a determination of disability can be made, and it is
3 clear from the record that the ALJ would be required to find the claimant disabled were
4 the rejected evidence credited as true. *See, e.g., Varney v. Sec’y of HHS*, 859 F.2d 1396,
5 1400 (9th Cir. 1988).

6 After applying the credit-as-true rule to the improperly rejected evidence, it is
7 clear that Plaintiff is disabled. The impartial vocational expert testified that the
8 functional limitations found by Ms. LaMaster, if accepted, would preclude Plaintiff from
9 performing all work. Tr. 51-52. Defendant does not disagree with this conclusion. Ms.
10 LaMaster’s opinion is consistent with that of Dr. Rosenberg, the testimony of Plaintiff
11 and Mr. Mashburn, and the record as a whole. Because it is clear that the ALJ would be
12 required to find Plaintiff disabled as of the alleged onset date (*see* Tr. 403, 405), the
13 Court will exercise its discretion and remand the case for an award of benefits. *See Orn*,
14 495 F.3d at 640 (remanding for an award of benefits where it was “‘clear from the record
15 that the ALJ would be required to determine the claimant disabled’”) (citation omitted).
16 Given this ruling, the Court need not address Plaintiff’s arguments concerning the ALJ’s
17 adoption of vocational expert testimony.

18 **IT IS ORDERED:**

- 19 1. Plaintiff’s motion for summary judgment (Doc. 17) is granted.
- 20 2. Defendant’s decision denying benefits is reversed.
- 21 3. The case is remanded for an award of benefits.
- 22 4. The Clerk is directed enter judgment accordingly.

23 Dated this 2nd day of February, 2012.

24 
25 **CHARLES R. PYLE**
26 **UNITED STATES MAGISTRATE JUDGE**
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28