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

8 Charlotte Winans,  
9

10 Plaintiff,

11 v.

12 Carolyn W. Colvin, Acting Commissioner  
13 of Social Security,

14 Defendant.

No. CV-13-00613-TUC-BPV

**ORDER**

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16 Plaintiff, Charlotte Winans, filed this action for review of the final decision of the  
17 Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). Plaintiff presents three  
18 issues on appeal: (1) whether the Administrative Law Judge (ALJ) properly evaluated the  
19 absence of diffuse muscle atrophy, muscle wasting, and weight loss; (2) whether  
20 substantial evidence supports the ALJ's evaluation of treating physician Dr. Sampson's  
21 opinions; and (3) whether substantial evidence supports the ALJ's finding that Plaintiff  
22 was not credible. (Doc. 13.) Before the court is an opening brief filed by Plaintiff (Doc.  
23 13), the Commissioner's opposition (Doc. 14), and Plaintiff's reply (Doc. 15).

24 The United States Magistrate Judge presides over this case pursuant to 28 U.S.C. §  
25 636 (c) and Fed.R.Civ.P. 73, having received the written consent of both parties. (Doc. 9,  
26 10.)

27 The Defendant's decision denying benefits is reversed and remanded for further  
28 proceedings consistent with this order.

1                   **I. Procedural History**

2                   Plaintiff filed an application for Disability Insurance Benefits (DIB) in December  
3 2010, alleging disability as of December 2006 due to neck and back pain, and numbness  
4 in her hands and arms. Transcript/Administrative Record (Tr.) 153-56, 173. The  
5 application was denied initially and on reconsideration. Tr. 77, 88, 99-102, 104-106.  
6 Plaintiff appeared with counsel and testified before an ALJ at an administrative hearing.  
7 Tr. 29-76. On May 30, 2012 the ALJ issued a decision finding Plaintiff not disabled  
8 within the meaning of the Social Security Act. Tr. 4-14. This decision became the  
9 Commissioner’s final decision when the Appeals Council denied review. Tr. 19-21.  
10 Plaintiff then commenced this action for judicial review pursuant to 42 U.S.C. § 405(g).  
11 (Doc. 1)

12                   **II. The Record on Appeal**

13                   a. Plaintiff’s Background and Statements in the Record

14                   Plaintiff was 47 years of age on the December 13, 2006 alleged disability onset  
15 date, and 52 years of age on her date late insured, December 31, 2011. Tr. 153, 169.  
16 Plaintiff has a high school education and worked in the recent past as a cashier/stocker,  
17 construction worker, and as a house cleaner. Tr. 59, 173-74.

18                   Plaintiff testified at a hearing before the ALJ on April 26, 2012 that she has had a  
19 limp for the last two years because she started getting numbness in her leg about four  
20 years prior to the hearing. Tr. 33. Plaintiff wore wrist braces to the hearing, and stated she  
21 had been wearing them “off and on” for two to three years. Tr. 34. Plaintiff testified that  
22 in December 2006, she would not have had trouble walking because she had a little bit of  
23 back pain, but no leg pain. Tr. 36-37. She would have been able to stand about 20  
24 minutes before sitting down, and then she could sit for about 15 to 20 minutes. Tr. 37.  
25 Plaintiff testified that she thought that in December 2006 she would have been able to lift  
26 15 to 20 pound with her right arm and probably 10 pounds with her left arm. Tr. 37.

27                   At the time of the hearing, Plaintiff thought she could walk maybe five to 10  
28 minutes before her pain caused her to stop and rest for probably 10 minutes. Tr. 38.

1 Plaintiff thought she probably couldn't stand more than 10 minutes before she would  
2 have to sit down. Tr. 38. She could sit for about 15 or 20 minutes as long as she kept  
3 shifting her weight from side to side. Tr. 38-39. Plaintiff thought she could currently lift  
4 three or four pounds in her right arm, and that she didn't lift anything with her left arm.  
5 Tr. 39. Plaintiff clarified that she has always carried things with her right arm, and uses  
6 her left arm to assist because she doesn't "have that much strength in [her] left hand." Tr.  
7 40. Plaintiff stated that since her onset date her problems have gotten a lot worse because  
8 she is losing feeling in her legs, her hands, and her feet due to nerve damage. Tr. 41.

9 Plaintiff testified that the numbness or weakness in her hands affects her ability to  
10 use her hands around the house, for instance, she can't open a jar, can't write or use a  
11 computer for more than five minutes because of numbness and pain in her hands, and has  
12 difficulty feeling objects. Tr. 44-46. Plaintiff explained that when she hurt her back at  
13 work in 2005 or 2006 and was sent to a workman's compensation doctor, he suggested  
14 that nerve conduction studies be performed, but workman's compensation denied the  
15 study. Tr. 48-49. Plaintiff stated that the only test they did perform was for carpal tunnel,  
16 and those tests were negative. Tr. 49.

17 Plaintiff also has numbness in her right leg, and, on a scale of zero to 10, most  
18 days she would rate her pain a nine. Tr. 52-53.

19 Plaintiff had been seeing her current physician, Dr. Matthew Sampson, for a little  
20 over a year. Tr. 43. Plaintiff lost her insurance in 2006, and paid out of pocket for her  
21 visits until she got insurance in August, 2011. Tr. 44, 50. She didn't see him any more  
22 often after she got insurance because her insurance considered her back condition to be  
23 pre-existing, and wouldn't cover it. Tr. 44.

24 Plaintiff's medical condition affects the things she does at home, for instance, she  
25 can't clean the house very much, can't stand to cook, and as a result of the medications  
26 she takes for her conditions, lorazepam, hydrocodone, and Soma, she has to lie down  
27 during the day and sleep for a couple of hours. Tr. 53-54. Sitting in a chair causes her leg  
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1 to go numb. Tr. 54. Nothing Plaintiff has tried, including physical therapy, medications,  
2 and steroid injections, has provided any long-term pain relief. Tr. 54.

3 Plaintiff testified that she also has anxiety, which causes her to cry a lot, lose  
4 patience, and avoid people. Tr. 55. She also has zero tolerance for stress because of her  
5 anxiety and her pain. Tr. 56.

6 A vocational expert (VE) testified that Plaintiff's past relevant work in  
7 construction was a heavy position; her work as cashier/stocker was a heavy, semiskilled  
8 position with an SVP of 4, and her work as a barista<sup>1</sup> was a medium, semi-skilled  
9 position with an SVP of 3 or 4. Tr. 62-65. The VE testified that a hypothetical individual  
10 would not be able to perform Plaintiff's past relevant work when the ALJ posed the  
11 following hypothetical limitations: Light level work with no use of ladders, ropes or  
12 scaffolds, but no limits in stooping. Limited to frequent use of ramps and stairs, and  
13 frequent kneeling, crouching, crawling, reaching, handling, fingering and feeling.  
14 Avoidance of exposure to unprotected heights or dangerous machinery. Cannot perform  
15 tasks in a fast paced environment. Can attend and concentrate for two hours, then needs a  
16 10 to 15 minute break, and can then attend for two more hours followed by a lunch break,  
17 with a similar afternoon schedule. Tr. 66-67.

18 The VE testified that the same hypothetical individual with the very same  
19 functional restrictions, with the same age, vocational and educational background, as well  
20 as some further education on manicures, could perform jobs in the national or regional  
21 economies, specifically sales attendant in a self-service store, which is a light unskilled  
22 job, with an SVP of 2, and requires frequently reaching, handling, and occasional  
23 fingering. Tr. 67-68. The VE also found that the individual could perform the job of  
24 cashier, a light unskilled job with an SVP of 2, and as a storage facility rental clerk, a  
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26  
27 <sup>1</sup> Because the Dictionary of Occupational Titles (DOT) did not include a job  
28 description for barista (Plaintiff worked at a Starbucks coffee shop), the VE rejected the  
DOT's classification for coffee maker, an unskilled position, which both the VE and ALJ  
agreed did not appropriately classify the position as performed. Tr. 63-65.

1 light unskilled job with an SVP of 2 which requires frequent reaching, handling, and no  
2 fingering. Tr. 68-69.

3 The VE explained that if any individual cannot attend for up to two hours at a  
4 time, it would eliminate employment. Tr. 69-70. The VE agreed that if any individual is  
5 unable to tolerate routine work stress, so they are not working at a competitive speed,  
6 they could not work. Tr. 103.

7 The VE also testified that an individual would be precluded from performing the  
8 jobs she had identified if the individual was precluded from crouching, kneeling,  
9 squatting, reaching above shoulder level, and working with arms in front, as well as  
10 avoiding pinching, fine movements, feeling, and touching. Tr. 73. Additionally, the VE  
11 agreed that if the individual was limited to sitting or standing for 15 minute blocks of  
12 time, and then had to lie down, that would also preclude all the jobs the VE had  
13 identified. Tr. 74. If the individual had to avoid people when she's in pain, so that she  
14 would need to be totally absent from co-workers, supervisors, or the public more than  
15 two days a month, that would also preclude all the jobs identified by the VE. Tr. 74. The  
16 VE also testified that an inability to lift even seven pounds would preclude the identified  
17 jobs. Tr. 74-75.

18 b. Relevant Medical Evidence Before the ALJ

19 i. *Treating Sources*

20 In January 2005, MRI of Plaintiff's lumbar spine revealed several abnormalities,  
21 including spondylosis with broad based disc bulge and left paracentral protrusion with  
22 slight indentation of the left ventral thecal sac at L2-3; spondylosis with broad based disc  
23 bulge protrusion, contacting the S1 nerve root bilaterally without displacement at L5-S1;  
24 and mild to moderate degenerative changes at L4-5 and L5-S1. Tr. 277-78.

25 Plaintiff was seen by Dr. Michael Fairfax, a rheumatologist, in January 2006, for  
26 complaints of diffuse musculoskeletal pain, polyarthralgias, and myalgias, fatigue and  
27 non-restorative sleep. Tr. 296. The last treatment note from Dr. Fairfax in May 2006  
28 assessed Plaintiff with probable fibromyalgia, chronic insomnia, and probable carpal

1 tunnel syndrome, and recommended treatment with Vicodin, Flexeril, and recommended  
2 nerve conduction studies to further assess the carpal tunnel syndrome, and nocturnal  
3 splints. Tr. 294.

4 Plaintiff was seen for a total of seven physical therapy visits from June to July  
5 2006. Tr. 268. Plaintiff reported slow but gradual reduction in hand and arm soreness, as  
6 well as reporting on her last visit moderate gains in her strength on her arms, hand, and  
7 wrist regions, although this was accompanied by mild additional cervical spine and arm  
8 soreness. Tr. 268. Plaintiff was discharged to a home stretching and strengthening  
9 exercise program. Tr. 268.

10 In August 2006, Plaintiff saw Dr. Paul Saiz for her back and neck pain (Tr. 279).  
11 On examination, Dr. Saiz found the following: normal gait and coordination; normal  
12 posture and balance; no pain with range of motion except on one side of Plaintiff's neck;  
13 no tenderness on palpation; free movement in Plaintiff's hips, knees, ankles, shoulders,  
14 elbows, wrists, and hands; full strength (5/5) in Plaintiff's lower extremities; and full  
15 strength (5/5) in Plaintiff's upper extremities. Tr. 279. Dr. Saiz noted that x-rays showed  
16 Plaintiff had cervical spondylosis at multiple levels, minimal degenerative disc disease at  
17 C7-T1, facet arthropathy and a bone spur at C5, in addition to decreased neck curvature.  
18 Tr. 279.

19 In September 2006, MRI of the cervical spine showed mild multilevel  
20 degenerative disc disease and posterior spondyloarthropathy; mild right foraminal  
21 narrowing at C4-5; and mild left foraminal narrowing at C6-7. Tr. 282.

22 Plaintiff saw her new primary care physician Dr. Matthew Sampson for treatment  
23 of her seasonal allergies in August 2010. Tr. 319. Plaintiff reported to Dr. Sampson in  
24 February 2011 that she had tingling and numbness, and Dr. Sampson assessed Plaintiff  
25 with paresthesia and prescribed lorazepam. Tr. 318. In November 2011, Plaintiff was  
26 seen by Dr. Sampson for low back pain. Tr. 326. On examination, Dr. Sampson found  
27 normal spine curvature, no vertebral spine tenderness, normal gait, symmetrical reflexes,  
28 and no tenderness of the SI (sacroiliac) joints. Tr. 326. Dr. Sampson did observe

1 moderate paraspinal spasm, and decreased sensation. *Id.* Dr. Sampson diagnosed low  
2 back pain and, in addition to refilling her current lorazepam prescription, prescribed a  
3 pain medication and a muscle relaxer.

4 In March 2012, treating physician Dr. Sampson opined that Plaintiff could not  
5 perform part-time or full-time work at any exertional level. Tr. 324. He also reported that  
6 Plaintiff should avoid reaching, pinching with the thumb and index finger, performing  
7 fine movement, including typing and small assembly, and feeling or touching where  
8 sensation was required, but could occasionally power grip with her hands. Tr. 325.

9 In April 2012, Dr. Sampson provided a narrative report in which he stated that he  
10 had access to Plaintiff's prior medical records and studies; Plaintiff had been unable to  
11 afford treatment and had been denied insurance coverage for her pre-existing cervical  
12 spine condition. Tr. 329. Dr. Sampson explained that, due to her cervical radiculopathy  
13 resulting in numbness and weakness in her hands, Plaintiff could not use her hands to  
14 reach, handle, finger, and feel two-thirds of the workday. Tr. 329. Plaintiff could not  
15 "stand for six to eight hours because she has a documented lumbar radiculopathy with  
16 decreased sensation in her legs and ongoing paraspinal muscle spasm as noted in my  
17 clinical examinations." Tr. 329. Dr. Sampson maintained that Plaintiff's "anxiety and  
18 chronic pain would interfere with her ability to concentrate in a work environment" and  
19 that she could not "sustain concentration for two hour periods of time." Tr. 329. He  
20 concluded that Plaintiff had "multiple legitimate medical bases for pain and despite  
21 multiple interventions, such as physical therapy, epidural steroid injections, and  
22 medications, remains significantly limited by her pain." Tr. 329.

23 *ii. Examining Sources*

24 In March 2011, Dr. Palmer performed a consultative examination for the State  
25 agency. Tr. 298-304. On examination, Dr. Palmer observed subjective pain in the active  
26 range of motion of Plaintiff's neck, overhead movements of the right and left upper  
27 extremity, and low back pain in all measured movements. Tr. 300. Dr. Palmer also noted  
28 normal strength in her upper and lower extremities; subjectively diminished sensation in

1 the right and left hands; diminished sensation in the left leg; minor imbalance with toe,  
2 heel, and tandem walking; and no gait or postural abnormality. Tr. 300. Dr. Palmer  
3 diagnosed Plaintiff with cervical spondylosis, neck pain with symptoms of upper  
4 extremity radiculopathy bilaterally, lumbar spondylosis, low back pain, symptoms of  
5 sciatica bilateral lower extremities. Tr. 302. Dr. Palmer opined, among other things, that  
6 Plaintiff could lift and carry twenty pounds occasionally; lift and carry ten pounds  
7 frequently; stand and/or walk six to eight hours per workday; and frequently use her  
8 hands to reach, handle, and finger. Tr. 302-03.

9 c. The ALJ's Findings

10 The ALJ found that Plaintiff last met the insured status requirements of the Social  
11 Security Act on December 31, 2011. Tr. 6, ¶ 1. The ALJ found that Plaintiff had not  
12 engaged in substantial gainful activity from the alleged onset date of December 13, 2006  
13 through her date last insured. Tr. 6 ¶ 2. The ALJ found that Plaintiff has the severe  
14 impairments of cervical and lumbar radiculopathy and osteoarthritis. Tr. 6, ¶ 3. The ALJ  
15 found that Plaintiff's impairments did not meet or equal any of the listed impairments in  
16 20 C.F.R. 404, Subpart P, Appendix 1. Tr. 6, ¶ 4. The ALJ found that Plaintiff had the  
17 residual functional capacity (RFC) to perform light work with the following limitations:  
18 she cannot climb ladders, ropes or scaffolds; is unlimited in stooping but is limited to  
19 frequently using ramps and stairs, and frequently limited to kneeling, crouching,  
20 crawling, handling, reaching, fingering and feeling; must avoid concentrated exposure to  
21 unprotected heights and dangerous machinery; cannot perform tasks in a fast-paced  
22 production environment; and can attend and concentrate for two hours then must take a  
23 break, then can attend and concentrate for 2 more hours and then take a lunch break, and  
24 then can attend for two more hours with another 10 to 15 minute break. Tr. 7, ¶ 5. The  
25 ALJ found that Plaintiff is unable to perform any past relevant work. Tr. 12, ¶ 6. The ALJ  
26 further found that considering the claimant's age, education, work experience, and RFC,  
27 there are jobs that exist in significant numbers in the national economy that Plaintiff can  
28



1 perform and concluded that Plaintiff was not under a disability from October 1, 2006  
2 through the date of the ALJ's decision. Tr. 12-14, ¶¶ 7-11.

### 3 **III. Discussion**

#### 4 a. Standard of Review

5 The Court has the “power to enter, upon the pleadings and transcript of the record,  
6 a judgment affirming, modifying, or reversing the decision of the Commissioner of Social  
7 Security, with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). The  
8 Commissioner’s decision to deny benefits “should be upheld unless it is based on legal  
9 error or is not supported by substantial evidence.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d  
10 1194, 1198 (9<sup>th</sup> Cir. 2008). “ ‘Substantial evidence’ means more than a mere scintilla, but  
11 less than a preponderance; it is such relevant evidence as a reasonable person might  
12 accept as adequate to support a conclusion.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035  
13 (9<sup>th</sup> Cir. 2007) (citing *Robbins v. Comm’r, Soc. Sec. Admin.*, 466 F.3d 880, 882 (9<sup>th</sup> Cir.  
14 2006)). In determining whether the decision is supported by substantial evidence, the  
15 Court “must consider the entire record as a whole and may not affirm simply by isolating  
16 a ‘specific quantum of supporting evidence.’” *Id.* (quoting *Robbins*, 466 F.3d at 882). The  
17 Court reviews only the reasons provided by the ALJ in the disability determination and  
18 may not affirm the ALJ on a ground upon which he did not rely. *Garrison v. Colvin*, ---  
19 F.3d ---, 2014 WL 3397218, \*11 (9<sup>th</sup> Cir. July 14, 2014) (citing *Connett v. Barnhart*, 340  
20 F.3d 871, 874 (9<sup>th</sup> Cir. 2003)).

21 Whether a claimant is disabled is determined using a five-step evaluation process.  
22 To establish disability, the claimant must show (1) he has not worked since the alleged  
23 disability onset date, (2) he has a severe impairment, and (3) his impairment meets or  
24 equals a listed impairment or (4) his RFC precludes him from performing his past work.  
25 At step five, the Commissioner must show that the claimant is able to perform other  
26 work. *See* 20 C.F.R. § 404.1520(a).

1                                    b. Analysis

2                                    i. *The ALJ did not properly evaluate the absence of diffuse*  
3                                    *muscle atrophy, muscle wasting and weight loss.*

4                                    Plaintiff argues that the ALJ's RFC determination is not supported by substantial  
5 evidence because in making the RFC determination, the ALJ improperly relied on his  
6 own lay medical judgment about muscle wasting, muscle atrophy, and weight loss. (Doc.  
7 13, at 7-8.) The Commissioner admits that while the ALJ's observations "could have  
8 been placed in better context in the decision," the observation was consistent with the fact  
9 that several physicians observed that Plaintiff had no muscle weakness, and given the  
10 weight of the evidence that supports the ALJ's decision, the Plaintiff's argument holds  
11 little merit. (Doc. 14, at 12)

12                                    The ALJ found that "[i]f the claimant was as functionally limited in her lifting and  
13 carrying abilities as she claims then the file would probably show evidence of loss of  
14 muscle tone or possibly atrophy, but the file does not reflect such evidence." Tr. 11. The  
15 ALJ further stated that:

16                                    [t]wo common side effects of prolonged and/or chronic pervasive pain are  
17 weight loss and diffuse muscle wasting or atrophy. There is no record of the  
18 claimant having lost weight since the alleged onset date. There is also no  
19 record regarding diffuse muscle atrophy or muscle wasting. It can be  
20 inferred that, although the claimant undoubtedly experiences some degree  
21 of pain, the pain has apparently not altered the use of her muscles and joints  
22 to the extent that is has resulted in diffuse muscle atrophy.

23 Tr. 12.

24                                    The ALJ cited no medical opinion or authority to support his lay surmise about the  
25 significance of the absence of those findings. *See* Tr. 11-12. Hence, the ALJ made an  
26 improper lay medical judgment, and substantial evidence does not support his decision.  
27 "[W]hile an [ALJ] is free to resolve issue of credibility as to lay testimony or to choose  
28 between properly submitted medical opinions, he is not free to set his own expertise  
against that of a physician who [submitted an opinion to or] testified before him."  
*McBrayer v. Sec'y of Health & Human Servs.*, 712 F.2d 795, 799 (2<sup>nd</sup> Cir. 1983); *see also*

1 *Tackett v. Apfel*, 180 F.3d 1094, 1102-03 (1999) (ALJ improperly relied on his  
2 interpretation of Plaintiff’s testimony over medical opinions); *Gonzalez Perez v. Sec’y of*  
3 *Health & Human Servs.*, 812 F.2d 747, 749 (1<sup>st</sup> Cir. 1987) (“The ALJ may not substitute  
4 his own layman's opinion for the findings and opinion of a physician....”). The ALJ’s  
5 finding in this case regarding muscle atrophy and weight loss was based on the ALJ’s  
6 own lay interpretation of Plaintiff’s treatment records, and undoubtedly a medical  
7 diagnosis by a lay witness does not constitute competent evidence. *See Nguyen v. Chater*,  
8 100 F.3d 1462, 1467 (9<sup>th</sup> Cir. 1996) (citing *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9<sup>th</sup>  
9 Cir. 1984); *see also Frank v. Barnhart*, 326 F.3d 618, 622 (5<sup>th</sup> Cir. 2003) (“It would  
10 appear from this paragraph that the ALJ made his own medical conclusions about  
11 whether a patient would show signs of atrophy or muscle tone loss as a result of Frank’s  
12 alleged impairments”). The impact of the ALJ’s improper reliance on his own  
13 observations<sup>2</sup> and lay interpretation of the medical significance of the absence of weight  
14 loss, diffuse muscle wasting and muscle atrophy is not lessened by the medical evidence  
15 that Plaintiff’s physicians reported no muscle weakness.<sup>3</sup>

16 The ALJ’s error was harmful given the ALJ’s repeated and heavy reliance on his  
17 lay medical judgment in both his determination of the weight to be given Dr. Sampson’s  
18 opinion, and in making a determination of Plaintiff’s credibility. *See* Tr. 11-12 & n.1.

19 *ii. The ALJ’s evaluation of treating physician Dr. Sampson is*  
20 *not supported by substantial evidence*

21 The ALJ acknowledged Dr. Sampson as Plaintiff’s treating physician, (Tr. 9), but  
22 gave “little or no weight” to his opinions. The Court finds that the ALJ erred in

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23  
24 <sup>2</sup> The Court finds the Commissioner’s argument that the ALJ’s conclusion is  
25 supported by the ALJ’s own observations that he “did not see any evidence showing loss  
26 of muscle tone or even atrophy” in her upper extremities (Tr. 10) both improper and  
27 unsound. Without medical training and expertise, in addition to an examination of the  
28 Plaintiff in a medical setting, it is unclear how the ALJ is in any position to make such a  
finding.

<sup>3</sup> It should also go without saying that the absence of any evidence in the record  
regarding atrophy or wasting is not the same as medical evidence of a lack of atrophy or  
wasting.

1 discounting Dr. Sampson's opinion. Plaintiff argues that the ALJ's RFC assessment,  
2 credibility finding, or step-five decision is not supported by substantial evidence because  
3 the ALJ erroneously evaluated Dr. Sampson's opinions. (Doc. 13 at 9.) The  
4 Commissioner responds that the ALJ reasonably discounted Dr. Sampson's opinion.  
5 (Doc. 14 at 13.)

6 There are three types of medical opinions (treating, examining, and nonexamining)  
7 and each type is accorded different weight. *See Valentine v. Comm'r of Soc. Sec. Admin.*,  
8 574 F.3d 685, 692 (9<sup>th</sup> Cir. 2009); *Lester v. Chater*, 81 F.3d 821, 830-31 (9<sup>th</sup> Cir. 1996).  
9 Generally, more weight is given to the opinion of a treating source than the opinion of a  
10 doctor who did not treat the claimant. *See Turner v. Comm'r of Soc. Sec. Admin.*, 613  
11 F.3d 1217, 1222 (9<sup>th</sup> Cir. 2010); *Winans v. Bowen*, 853 F.2d 643, 647 (9<sup>th</sup> Cir. 1987).  
12 Medical opinions and conclusions of treating physicians are accorded special weight  
13 because these physicians are in a unique position to know claimants as individuals, and  
14 because the continuity of their dealings with claimants enhances their ability to assess the  
15 claimants' problems. *See Embrey v. Bowen*, 849 F.2d 418, 421-22 (9<sup>th</sup> Cir. 1988);  
16 *Winans*, 853 F.2d at 647; *see also Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219,  
17 1228 (9<sup>th</sup> Cir. 2009) ("A treating physician's opinion is entitled to 'substantial weight.'").  
18 If a treating doctor's opinion is not contradicted by another doctor (*i.e.*, there are no other  
19 opinions from examining or nonexamining sources), it may be rejected only for "clear  
20 and convincing" reasons supported by substantial evidence in the record. *See Ryan*, 528  
21 F.3d at 1198; *Lester*, 81 F.3d at 830. If the ALJ rejects a treating or examining  
22 physician's opinion that is contradicted by another doctor, he must provide specific,  
23 legitimate reasons based on substantial evidence in the record. *See Valentine*, 574 F.3d at  
24 692; *Ryan*, 528 F.3d at 1198; *Orn v. Astrue*, 495 F.3d 625, 632 (9<sup>th</sup> Cir. 2007); *Andrews*  
25 *v. Shalala*, 53 F.3d 1035, 1043 (9<sup>th</sup> Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9<sup>th</sup>  
26 Cir. 1983).

27 Specific and legitimate reasons are also required to reject a treating doctor's  
28 ultimate conclusions. *Cf. Lester*, 81 F.3d at 830 (citing *Embrey*, 849 F.2d at 422, and

1 *Murray*, 722 F.2d at 502); *see also Reddick v. Chater*, 157 F.3d 715, 725 (9<sup>th</sup> Cir. 1998)  
2 (stating that “reasons for rejecting a treating doctor’s credible opinion on disability are  
3 comparable to those required for rejecting a treating doctor’s medical opinion”). “ ‘The  
4 ALJ can meet this burden by setting out a detailed and thorough summary of the facts and  
5 conflicting clinical evidence, stating his interpretation thereof, and making findings.’ ”  
6 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9<sup>th</sup> Cir. 2008) (quoting *Magallanes v.*  
7 *Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989)). The Social Security Administration has  
8 explained that an ALJ’s finding that a treating source medical opinion is not well-  
9 supported by medically acceptable evidence or is inconsistent with substantial evidence  
10 in the record means only that the opinion is not entitled to controlling weight, not that the  
11 opinion should be rejected. *Orn*, 495 F.3d at 632 (citing SSR 96-2p at 4, available at 61  
12 Fed.Reg. 34,490, 34,491; 20 C.F.R. §§ 404.1527). Treating source medical opinions are  
13 still entitled to deference and, “[i]n many cases, . . . will be entitled to the greatest weight  
14 and should be adopted, even if it does not meet the test for controlling weight.” *Orn*, 495  
15 F.3d at 632; *see also Murray*, 722 F.2d at 502 (“If the ALJ wishes to disregard the  
16 opinion of the treating physician, he or she must make findings setting forth specific,  
17 legitimate reasons for doing so that are based on substantial evidence in the record.”).  
18 The ALJ rejected Dr. Sampson’s opinion for numerous reasons. The Court addresses  
19 these reasons below.

20 As previously noted, the ALJ relied on an improper and unsupported lay medical  
21 judgment in rejecting Dr. Sampson’s opinions on the grounds that Plaintiff did not have  
22 muscle atrophy or wasting.

23 The ALJ rejected also Dr. Sampson’s opinions about Plaintiff’s ability to use her  
24 upper extremities on the grounds that Dr. Sampson did not “address, much less explain  
25 away,” Plaintiff’s admission that to her knowledge, upper extremity electro-diagnostic  
26 (EMG) studies showed normal findings. Tr. 11 (referring to *id.* at 299). Dr. Fairfax had  
27 recommended nerve conduction studies to “further assess carpal tunnel syndrome.” Tr.  
28 294. Plaintiff, however, has not alleged limitations due to carpal tunnel syndrome. *See* Tr.

1 173. As Dr. Sampson explained in his medical source statement, the numbness and  
2 weakness in Plaintiff's hands is a result of "documented cervical radiculopathy", (Tr.  
3 329), a diagnosis that is supported by the objective evidence including an MRI of  
4 Plaintiff's cervical spine indicating abnormal findings. Tr. 282. Dr. Palmer, consistent  
5 with Dr. Sampson's opinion, based his conclusion that Plaintiff had cervical spondylosis  
6 and neck pain with symptoms of upper extremity radiculopathy bilaterally on abnormal  
7 findings as reported by cervical spinal imaging reports. See Tr. 302. At the time Dr.  
8 Palmer made this diagnosis, he was aware that the EMG studies were reportedly normal.  
9 Tr. 301. The ALJ's rejection of Dr. Sampson's opinion that Plaintiff had limitations in  
10 the frequent use of her hands based on the evidence suggesting negative test results for  
11 carpal tunnel syndrome is not a clear and convincing reason based on substantial  
12 evidence in the record in support of his conclusion.

13 The ALJ speculated that Dr. Sampson's assessments were the result of his  
14 sympathy for the Plaintiff and/or a result of Plaintiff's pressure and insistence in  
15 demanding such evaluations, characterizing Dr. Sampson as Plaintiff's "sympathetic"  
16 physician. See Tr. 10. Without any specific findings in support of the ALJ's suggestion  
17 that Dr. Sampson was acting out of sympathy for his patient, or at the insistence of his  
18 patient, this highly speculative assessment of Dr. Sampson's opinions is inappropriate  
19 and troubling, and does not amount to substantial evidence. The ALJ has an obligation to  
20 review, with impartiality, the facts of the case before him. This line of speculation raises  
21 a concern that the ALJ might be basing his decision on something other than the relevant  
22 evidence, and then attempting to justify that result. The Ninth Circuit has raised a  
23 caution about general assertions such as this because, without support in the record, they  
24 run "contrary to the deferential rule this court has adopted with respect to treating  
25 physicians' opinions." *Rodriguez v. Bowen*, 876 F.2d 759, 762 n.6 (9<sup>th</sup> Cir. 1989).

26 The ALJ also rejected the opinion of her "sympathetic physician" because he  
27 "evidently assumes everything his patient tells him is true, accurate and correct but there  
28 are reasons to believe the claimant magnifies her symptoms." Tr. 10. "An ALJ may reject

1 a treating physician's opinion if it is based to a *large extent* on a claimant's self-reports  
2 that have been properly discounted as incredible.” *Tommasetti*, 533 F.3d at 1041 (internal  
3 quotations omitted)(emphasis added)(citing *Morgan v. Comm'r of Soc. Sec. Admin.*, 169  
4 F.3d 595, 602 (9<sup>th</sup> Cir. 1999); *see also Sandgathe v. Chater*, 108 F.3d 978, 980 (1997)  
5 (affirming the ALJ's rejection of a treating physician's opinion when it was based upon  
6 the claimant's self-reports, which the ALJ properly found to be exaggerated and  
7 unreliable); *Fair v. Bowen*, 885 F.2d 597, 605 (9<sup>th</sup> Cir.1989) (same).

8 By contrast, in *Ryan*, the Ninth Circuit reversed the ALJ's denial of benefits  
9 because the ALJ's rationale for rejecting the examining physician's opinion, that it relied  
10 “too heavily on [the claimant's] subjective complaints,” did not constitute a clear and  
11 convincing reason where the doctor does not discredit those complaints and supports his  
12 ultimate opinion with his own observations. 528 F.3d at 1199-1200 (citing *Edlund v.*  
13 *Massanari*, 253 F.3d 1152, 1159 (9<sup>th</sup> Cir. 2001)). Just as the record in *Ryan* did not  
14 support the ALJ’s conclusion, there is nothing in the record in this case to suggest that  
15 Dr. Sampson disbelieved Plaintiff's description of her symptoms, or that Dr. Sampson  
16 relied on those descriptions more heavily than his own experience as her treating  
17 physician, including having “access to her prior records as well as the diagnostic studies  
18 and consultation that have been performed over the years” in reaching the conclusion that  
19 Plaintiff had limitations that precluded her from frequently using her hands and arms for  
20 reaching, handling, fingering and feeling based on “documented cervical radiculopathy”  
21 and the inability to stand for six to eight hours due to a “documented lumbar  
22 radiculopathy with decreased sensation in her legs and ongoing paraspinal muscle spasm  
23 as noted in [Dr. Sampson’s] clinical examinations.” *Cf. Regennitter v. Comm'r Soc. Sec.*  
24 *Admin.*, 166 F.3d 1294, 1300 (9<sup>th</sup> Cir. 1999) (substantial evidence did not support ALJ's  
25 finding that examining psychologists took claimant's “statements at face value” where  
26 psychologists' reports did not contain “any indication that [the claimant] was malingering  
27 or deceptive”). Unlike the ALJ's decisions in *Morgan* and *Tommasetti*, the ALJ here did  
28 not provide clear and convincing reasons regarding how and to what degree, Dr.

1 Sampson's opinion was based on Plaintiff's subjective complaints. *Morgan*, 169 F.3d at  
2 600; *Tommasetti*, 533 F.3d at 1041.

3 The Court does find that the ALJ's reasons for rejecting Dr. Sampson's  
4 assessment in March 2012, (Tr. 587-88), in which Dr. Sampson opined during a regular  
5 workday she could stand for "0" minutes, sit for "0" minutes, and walk for "0" minutes  
6 was inconsistent with examination findings, and "departe[ed] substantially" from the rest  
7 of the evidence of record (Tr. 10) and was "implausible on its face" (Tr. 11). In fact, the  
8 Plaintiff's own statements contradicted this assessment. (*See* Tr. 186) (Plaintiff can "walk  
9 around the block" and feels "fine unless [her] back starts hurting."). Plaintiff also testified  
10 that, at the time of hearing, she could walk maybe five to 10 minutes before her pain  
11 caused her to stop and rest for probably 10 minutes. Tr. 38. The ALJ reasonably relied on  
12 the extreme limitations expressed in Dr. Sampson's opinion in contrast to the evidence in  
13 the record and the ALJ's personal observations ("If she were as disabled as [Dr.  
14 Sampson] states, then she would be using a wheel chair or be in a hospital") to reject this  
15 opinion.

16 Furthermore, to the extent Dr. Sampson opined that he believed Plaintiff could not  
17 sustain concentration for two-hour periods of time due to pain and anxiety, the ALJ  
18 accounted for limitations in Plaintiff's ability to concentrate in his RFC analysis by  
19 limiting her concentration to two-hour periods during the workday. Tr. 7.

20 Accordingly, the Court concludes that the ALJ's rejection of Dr. Sampson's  
21 opinion of April 26, 2012 as to Plaintiff's ability to use her hands and to stand for six to  
22 eight hours a day is not supported by substantial evidence in the record. The Court further  
23 finds that the ALJ appropriately accounted for limitations found by Dr. Sampson in the  
24 April 2012 medical source statement concerning Plaintiff's ability to concentrate. Finally,  
25 the Court finds that the ALJ's rejection of Dr. Sampson's medical opinion on the ultimate  
26 issue of disability in his March 2012 assessment was supported by substantial evidence.



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*iii. The ALJ’s credibility finding is not supported by substantial evidence.*

“[Q]uestions of credibility and resolution of conflicts in the testimony are functions solely of the Secretary.” *Sample v. Schweiker*, 694 F.2d 639, 642 (9<sup>th</sup> Cir. 1982) (internal quotation marks and citation omitted); *see also Allen v. Heckler*, 749 F.2d 577, 580 n.1 (9<sup>th</sup> Cir. 1985). Plaintiff argues that the ALJ erred in Plaintiff’s credibility determination. (Doc. 13 at 16-20.) Plaintiff testified that in December 2006 she did not have trouble walking, could stand for about 20 minutes, sit for about 15 to 20 minutes, and lift 15 to 20 pounds with her right arm and 10 pounds with her left arm. Tr. 36-37. At the time of the hearing, she could walk for only five to 10 minutes, couldn’t stand for more than 10 minutes, and could sit for about 15 to 20 minutes. Tr. 38. She thought she could lift three or four pounds in her right arm, and didn’t use her left arm to lift, although she clarified that she uses her left arm to assist in lifting. Tr. 39-40. Plaintiff also testified that the numbness and weakness in her hands affects her ability to use her hands, and she can’t open a jar, write or use a computer for more than five minutes, and has difficulty feeling objects. Tr. 44-46. Plaintiff also has numbness and pain in her right leg. Tr. 52-53.

When assessing a claimant’s credibility, the “ALJ is not required to believe every allegation of disabling pain or other non-exertional impairment.” *Orn*, 495 F.3d at 635 (internal quotation marks and citation omitted). Additionally, the ALJ may disregard self-serving statements if they are unsupported by objective evidence. *Rashad v. Sullivan*, 903 F.2d 1229, 1231. Where, as here, the claimant has produced objective medical evidence of an underlying impairment that could reasonably give rise to the symptoms and there is no affirmative finding of malingering by the ALJ, the ALJ’s reasons for rejecting the claimant’s symptom testimony must be specific, clear and convincing. *Garrison*, 2014 WL 3397218, \*16; *Tommasetti*, 533 F.3d at 1039; *Orn*, 495 F.3d at 635; *Robbins*, 466 F.3d at 883. “The ALJ must state specifically which symptom testimony is not credible and what facts in the record lead to that conclusion.” *Smolen v. Chater*, 80 F.3d 1273,

1 1284 (9<sup>th</sup> Cir. 1996); *see also Orn*, 495 F.3d at 635 (the ALJ must provide specific and  
2 cogent reasons for the disbelief and cite the reasons why the testimony is unpersuasive).

3 In assessing the claimant’s credibility, the ALJ may consider ordinary techniques  
4 of credibility evaluation, such as the claimant’s reputation for lying, prior inconsistent  
5 statements about the symptoms, and other testimony from the claimant that appears less  
6 than candid; unexplained or inadequately explained failure to seek or follow a prescribed  
7 course of treatment; the claimant’s daily activities; the claimant’s work record;  
8 observations of treating and examining physicians and other third parties; precipitating  
9 and aggravating factors; and functional restrictions caused by the symptoms.  
10 *Lingenfelter*, 504 F.3d 1028 at 1040; *Smolen*, 80 F.3d at 1284. *See also Robbins*, 466  
11 F.3d at 884 (“To find the claimant not credible, the ALJ must rely either on reasons  
12 unrelated to the subjective testimony (*e.g.*, reputation for dishonesty), on conflicts  
13 between his testimony and his own conduct; or on internal contradictions in that  
14 testimony.”)

15 An ALJ's error may be harmless where the ALJ has provided one or more invalid  
16 reasons for disbelieving a claimant's testimony, but also provided valid reasons that were  
17 supported by the record. *See Bray*, 554 F.3d at 1227; *Carmickle v. Comm’r Social Sec.*  
18 *Admin*, 533 F.3d 1155, 1162–63 (9<sup>th</sup> Cir. 2008); *Batson v. Comm'r of Soc. Sec. Admin.*,  
19 359 F.3d 1190, 1195–97 (9<sup>th</sup> Cir. 2004). In this context, an error is harmless so long as  
20 there remains substantial evidence supporting the ALJ's decision and the error “does not  
21 negate the validity of the ALJ's ultimate conclusion.” *Batson*, 359 F.3d at 1197; *see also*  
22 *Carmickle*, 533 F.3d at 1162.

23 The ALJ found that “the claimant’s statements concerning the intensity,  
24 persistence and limiting effects of these symptoms are not credible to the extent they are  
25 inconsistent with the above residual functional capacity assessment.” Tr. 7. As the  
26 Seventh Circuit Court of Appeals explains, the manner in which this “boilerplate  
27 language” is used in the Commissioner’s credibility analysis “gets things backwards.”  
28 *Bjornson v. Astrue*, 671 F.3d 640, 645 (7<sup>th</sup> Cir. 2012) (Addressing identical language and

1 finding that the “problem is that the assessment of a claimant's ability to work will often  
2 ... depend heavily on the credibility of her statements concerning the ‘intensity,  
3 persistence and limiting effects’ of her symptoms, but the passage implies that ability to  
4 work is determined first and is then used to determine the claimant's credibility.”)

5 As the Court found in *Bjornson*, the statement by the ALJ that Plaintiff’s  
6 statements were “not entirely credible” yields no clue to what weight the ALJ gave that  
7 testimony, and “fails to inform us in a meaningful, reviewable way of the specific  
8 evidence the ALJ considered in determining that claimant’s complaints were not  
9 credible.” *Id.* (citations omitted).

10 If, however, “the ALJ has made specific findings justifying a decision to  
11 disbelieve an allegation ... and those findings are supported by substantial evidence in  
12 the record, our role is not to second-guess that decision.” *Morgan*, 169 F.3d at 600.  
13 Several courts in this Circuit have found that the mere use of the meaningless boilerplate  
14 language is not cause for remand if the ALJ’s conclusion is followed by sufficient  
15 reasoning. *See e.g. Jones v. Comm. of Soc. Sec.*, 2012 WL 6184941, at \* 4 (D.Or.  
16 2012)(boilerplate language is a conclusion which may be affirmed if the ALJ’s stated  
17 reasons for rejecting the plaintiff’s testimony are clear and convincing); *Bowers v. Astrue*,  
18 2012 WL 2401642, at \*9 (D.Or. 2012)(concluding that this language erroneously  
19 reverses the analysis, but finding such error harmless because the ALJ cited other clear  
20 and convincing reasons for rejecting the claimant’s testimony). The Court adopts this  
21 reasoning, and, despite the use of the boilerplate language which implies improper  
22 analysis, considers whether the ALJ’s conclusion in this case is nonetheless supported by  
23 clear and convincing evidence. The Court concludes that it is not.

24 The ALJ found Plaintiff’s testimony not credible for numerous reasons: Medical  
25 records and observations of Plaintiff demonstrated no muscle atrophy, loss of muscle  
26 tone, or weight loss (Tr. 10-12); Plaintiff’s allegations exceed the limitations expected  
27 from objective medical findings or are contradicted by or inconsistent with the medical  
28 evidence (Tr. 7, 11); Plaintiff exaggerates her symptoms and limitations (Tr. 10); Plaintiff

1 failed to seek treatment or was noncompliant with treatment (Tr. 11-12); and upon close  
2 questioning at the hearing Plaintiff revised her testimony and seemed evasive (Tr. 11.).

3 As previously noted, the ALJ relied on an improper and unsupported lay medical  
4 judgment in finding Plaintiff not credible on the grounds that Plaintiff did not have  
5 muscle atrophy or wasting (Tr. 10-12).

6 The ALJ stated that Plaintiffs allegations exceed the limitations reasonably  
7 expected from the medical findings, specifically the treating physician's characterization  
8 of her impairments as "minimal", "mild", "slight", "normal", and unremarkable", with  
9 reference to clinical and laboratory findings, which, the ALJ concluded is  
10 "disproportionate to the severity of pain the claimant has alleged." Tr. 7-8. The ALJ also  
11 considered as inconsistent with Plaintiff's allegations that the imaging reports did not  
12 indicate more severe injury such as vertebral displacement, fracture or spondylolisthesis.  
13 The ALJ may not discredit Plaintiff's allegations of pain solely on the ground that the  
14 allegations are unsupported by objective medical evidence. *See Bunnell v. Sullivan*, 947  
15 F.2d 345, 347-48 (9<sup>th</sup> Cir. 1991) (declining to conclude that Congress intended to require  
16 objective medical evidence to fully corroborate the severity of pain while aware of the  
17 inability of medical science to provide such evidence.) The rationale for this restriction is  
18 that pain testimony may establish greater limitations than can medical evidence alone.  
19 *Burch v Barnhart*, 400 F.3d 676, 680 (9<sup>th</sup> Cir 2005)(citing SSR 96-7p (1996)). With one  
20 exception, noted below, the ALJ's finding lacks the requisite specificity necessary to  
21 support the ALJ's finding and mischaracterizes the evidence, which noted mild to  
22 moderate degenerative changes, and ignores the medical evidence of spondylosis and disc  
23 bulging which the reviewing physician did not characterize as minimal or mild because  
24 the physician did not classify this finding by degree at all. Tr. 277-78. The ALJ did note,  
25 with the required specificity and supported by substantial evidence in the record, that the  
26 objective evidence, indicating full or nearly full strength in her extremities, (*see* Tr. 11,  
27 citing *id.* at 300, 318) is inconsistent with the Plaintiff's testimony.

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1           The ALJ characterized Plaintiff’s testimony at the hearing, and the appearance  
2 with bilateral wrist braces as inconsistent with reports regarding the use of wrist braces.  
3 Tr. 10. According to the ALJ, it was inconsistent for Plaintiff to allege intermittent use of  
4 bilateral wrist braces and yet have appeared at Dr. Palmer’s examination with only one  
5 brace. *Id.* To the contrary, a report of intermittent use of bilateral braces is not a report of  
6 everyday use of such braces. The ALJ’s conclusion is not supported by substantial  
7 evidence.

8           The ALJ observed that Plaintiff’s statement that she had been limping slightly for  
9 two years (Tr. 33) was inconsistent with Dr. Palmers single observation of a normal gait  
10 in March 2011. Tr. 10. This observation is supported by substantial evidence in the  
11 record, including Dr. Palmer’s observation cited by the ALJ (Tr. 300), and additionally,  
12 Dr. Sampson’s observation of normal gait in his November 2011 examination (Tr. 326).

13           Plaintiff asserts that the ALJ unreasonably determined that Plaintiff’s testimony in  
14 her 2012 hearing testimony regarding the use of her left arm was undermined because she  
15 “seemed evasive” and “revised her testimony only after close questioning about her  
16 implausible claim that she does not use her left hand.” Tr. 11 & n.1. Plaintiff testified at  
17 the 2012 hearing that, in 2006, she could lift and carry maybe ten pounds with her left  
18 hand. Tr. 37. In response to the ALJ’s inquiry about her ability to lift and carry with her  
19 left hand at the time of the 2012 hearing, Plaintiff stated she did not “lift or carry  
20 anything” with her left hand. Tr. 39. When asked if that meant that the “answer was  
21 zero?” Plaintiff replied: “Probably.” Plaintiff clarified that she was right-handed and that  
22 she used her left hand to assist, *i.e.*, to help. Tr. 39-40. The ALJ asked Plaintiff to explain  
23 when her ability to use her left hand had diminished. Tr. 40. She answered, “I guess I can  
24 lift with my left arm. I don’t know.” Tr. 40. She explained that she usually used her right  
25 hand to pick something up and her left hand to “brace.” Tr. 40. She said that if she used  
26 her left hand, she could probably lift and carry ten pounds. Tr. 39-40. Plaintiff asserts  
27 that there was no contradiction or evasion, and suggests that the ALJ’s finding is  
28 undermined by his literalism. (Doc. 13 at 18)(citing *Mendez v. Barnhart*, 439 F.3d 360,

1 363 (7<sup>th</sup> Cir. 2006) (“The [ALJ’s] finding that Mendez was not ‘particularly credible’  
2 whatever exactly that means, is undermined by his literalism. When a person says that  
3 she sleeps all day, she doesn’t mean it literally; she means that she is abnormally sleepy  
4 and listless and dozes off frequently.”)). The ALJ’s observation that Plaintiff seemed  
5 evasive during this questioning is an observation within his purview to determine. *See,*  
6 *e.g., Burch v. Barnhart*, 400 F.3d 676, 680 (9<sup>th</sup> Cir. 2005) (ALJ may engage in ordinary  
7 techniques of credibility evaluation, such as considering claimant’s reputation for  
8 truthfulness and inconsistencies in testimony). Additionally, even after Plaintiff explained  
9 that she *usually* didn’t lift with her left arm, but used it to assist, she agreed that the most  
10 weight she *could* probably lift in her left arm without hurting herself was “probably” zero  
11 (Tr. 39), and this statement was directly contradicted upon further questioning when she  
12 stated that she could lift “probably 10 pounds” with her left arm (Tr. 40-41).  
13 Accordingly, the Court finds that the ALJ’s rejection of Plaintiff’s testimony regarding  
14 the amount of weight Plaintiff can lift with her left arm is supported by substantial  
15 evidence and the ALJ’s proper application of ordinary techniques of credibility  
16 evaluation.

17 The ALJ noted that, in reviewing the record as a whole, “there are a number of  
18 inconsistencies contained therein which cast doubt regarding the credibility of the  
19 claimant’s testimony.” Tr. 8. First, the ALJ notes that Plaintiff’s treatment notes indicates  
20 she suffered from shoulder and neck pain, cervical spondylosis, and cervical degenerative  
21 disc disease in 2006. *Id.* Then, in 2011, Plaintiff was prescribed lorazepam and the  
22 claimant admitted it was helping, and exhibited tingling, numbness, limited paresthesia in  
23 her hands and neck, and normal range of motion of the spine. Tr. 8. It is not evident why  
24 the ALJ believed this to be an inconsistent statement, nor does Plaintiff’s admission that  
25 prescription medications were helping indicate that she was no longer symptomatic at all.

26 Next, the ALJ considered the lack of evidence from Palmer Family Medicine, and  
27 found that the Plaintiff had little or no evidence of recent medical issues nor impairments.  
28 Tr. 8. Later in the opinion, the ALJ also noted that “the record reflects that there are large

1 gaps of time between visits to the doctor ... seeking relief from the pain and other  
2 symptoms”, was no longer receiving any form of physical therapy for pain, or was ever  
3 prescribed or received physical therapy for pain, an observation the ALJ believed was  
4 “unusual given the nature of the complaint.” Tr. 11-12. In assessing a claimant’s  
5 credibility, the ALJ “may properly rely on ‘unexplained or inadequately explained failure  
6 to seek treatment or to follow a prescribed course of treatment.’” *Tommasetti*, 533 F.3d at  
7 1039 (quoting *Smolen*, 80 F.3d 1273, 1284 (9th Cir.1996)); *Fair*, 885 F.2d at 603; *Molina*  
8 *v. Astrue*, 674 F.3d 1104, 1113 (9<sup>th</sup> Cir. 2012). The ALJ, however, failed to consider  
9 Plaintiff’s treatment in light of her uncontradicted testimony that she could not afford  
10 medical treatment and that when she reacquired medical insurance, it excluded pre-  
11 existing conditions. Tr. 44. While “[i]n some circumstances, a failure to seek treatment or  
12 a failure to follow a prescribed treatment is properly used as evidence supporting a  
13 conclusion that the claimant is not credible in describing his or her symptoms ...  
14 ‘[d]isability benefits may not be denied because of the claimant’s failure to obtain  
15 treatment he cannot obtain for lack of funds.’ ” *Orn*, 495 F.3d at 637-398 (quoting  
16 *Gamble v. Chater*, 68 F.3d 319, 321 (9<sup>th</sup> Cir. 1995)). Thus, the Ninth Circuit has  
17 “proscribed the rejection of a claimant’s complaints for lack of treatment when the  
18 medical record establishes that the claimant could not afford it.” *Regennitter*, 166 F.3d at  
19 1297. Here, Plaintiff explained that she had no insurance, could not afford treatment, and  
20 once she obtained insurance was denied coverage for her cervical condition on a pre-  
21 existing condition exclusion. Dr. Sampson’s April 2012 narrative confirmed that Plaintiff  
22 lacked medical insurance until Fall 2011, and then was denied coverage for cervical spine  
23 treatment. Tr. 329. The ALJ did not suggest that this was not believable.

24 As to the ALJ’s statement that Plaintiff had never been prescribed physical  
25 therapy, this conclusion is simply mistaken. The record includes records of Plaintiff’s  
26 physical therapy in 2006, and her discharge to continue her treatment at home. In fact the  
27 ALJ acknowledged that Plaintiff had undergone physical therapy “with only short-term  
28 relief.” Tr. 9.

1           The ALJ stated that there are “references in the medical evidence that are  
2 indicative of the claimant’s non-compliance with the medical regimen specified by his  
3 physicians.” Tr. 12. The ALJ did not cite to any specific instances in the record in support  
4 of this conclusion that Plaintiff’s noncompliance does not support the alleged intensity  
5 and duration of pain and subjective complaints. *See id.*

6           In sum, the ALJ provide cited specific and cogent reasons, supported by  
7 substantial evidence, for his determination that Plaintiff’s testimony that she had been  
8 limping slightly for two years, could lift no weight with her left arm, and lacked strength  
9 in her extremities, was unpersuasive. The ALJ failed to base his adverse determination  
10 with respect to Plaintiff's other pain and symptom testimony on substantial evidence in  
11 the record because the evidence he has cited is either incomplete, speculative, ignores  
12 other substantial evidence, or is insufficient to support his legal conclusion. Because the  
13 ALJ did not rely on substantial evidence to discredit this portion of Plaintiff's testimony,  
14 that testimony must be deemed credible. *See Benecke v. Barnhart*, 379 F.3d 587 (9th Cir.  
15 2004).

#### 16           **IV. Remedy**

17           Where the Commissioner fails to provide adequate reasons for rejecting the  
18 opinion of a treating or examining physician this Court credits the opinion or testimony  
19 as a matter of law. *Lester*, 81 F.3d at 830; *Varney v. Sec’y of Health & Human Servs.*,  
20 859 F.2d 1396 (9<sup>th</sup> Cir. 1988). The Ninth Circuit has held that a court should remand to  
21 an ALJ with instructions to calculate and award benefits where three conditions are met:  
22 “(1) the record has been fully developed and further administrative proceedings would  
23 serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for  
24 rejecting evidence, whether claimant testimony or medical opinion; and (3) if the  
25 improperly discredited evidence were credited as true, the ALJ would be required to find  
26 the claimant disabled on remand.” *Garrison*, 2014 WL 3397218, \*20 (citations and  
27 footnote omitted). Even when all conditions of the credit-as-true rule are satisfied, a court  
28 should nonetheless remand for further proceedings when “an evaluation of the record as a



1 whole creates serious doubt that a claimant is, in fact, disabled.” *Id.* A district court  
2 abuses its discretion, however, by remanding for further proceedings where the credit-as-  
3 true rule is satisfied and the record affords no reason to believe that the claimant is not, in  
4 fact, disabled. *Id.*

5 After applying the credit-as-true rule to improperly discredited evidence,  
6 outstanding issues remain to be resolved before determining that Plaintiff is entitled to  
7 benefits. As discussed above, the ALJ failed to provide legally sufficient reasons for  
8 rejecting the April 2012 opinion of Dr. Sampson and for finding portions of Plaintiff’s  
9 testimony not credible. There is, however, no testimony by the vocational expert that the  
10 credited portions of Dr. Sampson’s opinion, that Plaintiff could not frequently use her  
11 hand and arms for reaching, handling, fingering and feeling, or stand for six to eight  
12 hours, if adopted, would preclude past work or any work. Similarly, crediting Plaintiff’s  
13 testimony as true, insofar as the ALJ did not specifically and properly reject the  
14 testimony, establishes that, in December 2006 Plaintiff had no trouble walking, could  
15 stand for 20 minutes and sit for 15 to 20 minutes, (notably, there was no statement  
16 describing the nature, frequency or duration of breaks Plaintiff required between standing  
17 and sitting); by 2012, she could walk for only five to 10 minutes, couldn’t stand for more  
18 than 10 minutes, and could sit for 15 to 20 minutes (again, no indication of the nature,  
19 duration or frequency of breaks she needed between sitting periods), has numbness and  
20 weakness in her hands affecting her ability to use her hands, and has difficulty feeling  
21 objects in addition to numbness and pain in her right leg.

22 In cases where the testimony of a vocational expert has failed to address functional  
23 limitations as established by improperly discredited evidence, this Circuit “consistently  
24 [has] remanded for further proceedings rather than payment of benefits.” *Harman v.*  
25 *Apfel*, 211 F.3d 1172, 1180 (9<sup>th</sup> Cir. 2000) (citation omitted). Thus, a remand for further  
26 proceedings is appropriate in this case.

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IT IS ORDERED:

1. Defendant's decision denying benefits is REVERSED.
2. The case is REMANDED for further proceedings consistent with this order.
3. The Clerk is directed to enter judgment accordingly.

Dated this 29th day of August, 2014.

  
Bernardo P. Velasco  
United States Magistrate Judge