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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Elizabeth Jo Baldwin,

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No. CV-14-01772-TUC-BGM

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Plaintiff,

)

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vs.

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ORDER

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Carolyn W. Colvin,
Acting Commissioner of Social Security,

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Defendant.

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Currently pending before the Court is Plaintiff’s Opening Brief (Doc. 16). Defendant filed her Brief (“Response”) (Doc. 17), and Plaintiff filed her reply (Doc. 18). Plaintiff brings this cause of action for review of the final decision of the Commissioner for Social Security pursuant to 42 U.S.C. § 405(g). The United States Magistrate Judge has received the written consent of both parties, and presides over this case pursuant to 28 U.S.C. § 636(c) and Rule 73, Federal Rules of Civil Procedure.

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I. BACKGROUND

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A. Procedural History

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On May 25, 2011, Plaintiff filed an application for Social Security Disability Insurance Benefits (“DIB”) alleging disability as of September 9, 2009 due to ankle pain (left ankle injury), migraine headaches, fibromyalgia, chronic pain syndrome, fatigue, and knee pain. See Administrative Record (“AR”) at 19, 21, 59, 94-96, 103-05, 116, 124, 183, 213, 216, 239, 271. Plaintiff’s date last insured was December 31, 2014. *Id.* at 21, 95, 104, 183,

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1 213, 239. The Social Security Administration (“SSA”) denied this application on September
2 23, 2011. *Id.* at 19, 94-102, 116-19. On October 26, 2011, Plaintiff filed a request for
3 reconsideration, and on January 30, 2012, SSA denied Plaintiff’s request. *Id.* at 19, 53-54,
4 103-15, 124-26. On February 24, 2012, Plaintiff filed her request for hearing. *Id.* at 19, 128.
5 On September 11, 2012, a hearing was held before Administrative Law Judge (“ALJ”)
6 George W. Reyes. AR at 19, 56-93. The ALJ issued an unfavorable decision on October,
7 2012. *Id.* at 16-28. On November 19, 2012, Plaintiff requested review of the ALJ’s decision
8 by the Appeals Council, and on December 23, 2013, review was denied. *Id.* at 1-3, 14-15.
9 On February 14, 2014, Plaintiff filed this cause of action. Compl. (Doc. 1).

10 ***B. Factual History***

11 Plaintiff was fifty-two (52) years old at the time of the administrative hearing and
12 forty-nine (49) at the time of the alleged onset of her disability. AR at 26, 74, 95, 104, 183,
13 189, 213, 239, 271. Plaintiff obtained a high school equivalency degree, and has taken some
14 college courses. *Id.* at 26, 74, 89, 94, 103, 217. Prior to her alleged disability, Plaintiff
15 worked for Domino’s Pizza and at call centers for TeleTech and Citibank, as well as for
16 convenience stores as a cashier. *Id.* at 74-75, 101, 113, 196-210, 226-31, 259, 280.

17 On August 6, 2011, Plaintiff filled out an Exertional Daily Activities Questionnaire,
18 indicating that she “get[s] up early and ha[s] household chores to do.” *Id.* at 223. Plaintiff
19 described the chores as “mak[ing] the bed and try[ing] to sweep and/or vacuum . . . feed[ing]
20 [her] animals, wash[ing] dishes, do[ing] laundry, cook[ing] dinner, [and] water[ing] plants
21 outdoors.” *Id.* Plaintiff indicated that she walks on their acre property to do the watering and
22 feeding, and also waters a garden. AR at 223. Plaintiff reported that she does this two (2)
23 or more times per week, and if she doesn’t feel up to it, her husband takes care of the chores
24 after work. *Id.* Plaintiff reported “chronic migraines and a lot of muscle and joint pain with
25 swelling which are very tiring” and cause her to “lay down at least one or more times per
26 day.” *Id.* She also reported having difficulty sleeping. *Id.*; *see also* AR at 242. Plaintiff
27 indicated that she carries laundry and puts it away, but cannot lift things that are heavier than
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1 approximately fifteen (15) pounds, “as it creates new muscle pain and fatigue.” AR at 224.
2 Plaintiff indicated that she grocery shops once per month and cooks three (3) to four (4)
3 times per week, and her family does the rest. *Id.* Plaintiff further indicated that she only
4 does light dusting, work in the kitchen, and laundry. *Id.* She also reported that she used to
5 be able to clean thoroughly, but can no longer do so. *Id.* Plaintiff stated that she has
6 headaches and constant neck pain, as well as the Fibromyalgia[,]” in addition to “stomach
7 issues I have called irritable bowel syndrome.” *Id.* at 225.

8 On September 9, 2011, Plaintiff filled out a Headache Questionnaire indicating that
9 she has had severe headaches since 1998, and has them at least four (4) days per week. AR
10 at 235-36. Plaintiff reported that the headaches last anywhere from one (1) day to a week or
11 longer. *Id.* at 235. Plaintiff further reported that the headaches cause pain on either side of
12 her face or head, and she needs to avoid light, gets sick to her stomach with vomiting, and
13 has difficulty sleeping. *Id.* Plaintiff reported that there is no specific activity that triggers
14 her headaches, and that she must lay down in a quiet, dark room. *Id.* Plaintiff further stated
15 that her medications “simply take[] the edge off, nothing [she] [has] ever taken has
16 completely relieved the pain.” *Id.* at 236. Plaintiff further reported that she cannot drive,
17 because the pain is too severe. AR at 236.

18 On October 3, 2011, Plaintiff reported that she could “only shower every two to three
19 days a week as opposed to daily[,]” her daughter combs her hair for her, she wears only loose
20 clothing that do not have a lot of buttons or zippers, and eats “easy to get food such as yogurt
21 and jello or prepared foods that can be heated in the microwave.” *Id.* at 245.

22 **1. Plaintiff’s Testimony**

23 At the administrative hearing, Plaintiff testified that she has not worked since
24 September 9, 2009, but had looked for work in customer service since that time. AR at 59-
25 60. Plaintiff further testified that she had been unsuccessful in securing work, and had
26 received unemployment benefits through the State of Arizona. *Id.* at 59-61. Plaintiff also
27 testified that she received unemployment until the second quarter of 2011, and had told the
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1 State of Arizona that she was able to work in order to receive those benefits. *Id.* at 61.

2 More specifically, Plaintiff testified that her chronic migraines, as well as pain in her
3 legs, neck, shoulders, elbows, hips, and left ankle contributed to her inability to work. *Id.*
4 at 61-62. Plaintiff further testified that since September 9, 2009, her health has gotten
5 worse. *Id.* at 62. Plaintiff testified that her “pain has gotten worse, the swelling has become
6 more pronounced, the stiffness.” AR at 63. Plaintiff further testified that in September 2009,
7 she was able to do minimal housework, but now cannot do any housework or does very, very
8 little. *Id.* Plaintiff testified that the housework she can do includes putting clothes in the
9 laundry basket, dishes in the sink, and possibly light dusting. *Id.* Plaintiff further testified
10 that her husband and daughter, who lives with them, do most of the housework. *Id.* Plaintiff
11 testified that it is possible her decrease in health is related to stress arising from finances and
12 being in constant pain. *Id.*

13 Plaintiff testified that she sees her primary care physician approximately once per
14 month or once every other month. AR at 64. Plaintiff denied ever abusing alcohol, and
15 estimated the last time she had a drink was approximately five (5) years prior. *Id.* at 64-65.
16 When the ALJ asked about her medical records indicating that she used alcohol “rarely,”
17 Plaintiff testified that she did not recall making such a statement, but did not deny having
18 made it either. *Id.* at 72-73. Plaintiff further testified that she had used marijuana and
19 cocaine in the past, but that her last use occurred between twenty-three (23) and twenty-five
20 (25) years before. *Id.* at 65. Plaintiff also testified that she did not abuse prescription drugs,
21 but that she has a prescription for methadone for her pain. *Id.* at 66. Plaintiff admitted that
22 in June 2010 she was admitted to Tucson Medical Center (“TMC”) after taking one of her
23 husband’s vicodin for her pain, but she did not recall making the statements reflected in her
24 medical record from that date. AR at 66-68, 72-73. Plaintiff further testified that she was
25 admitted for an accidental overdose. *Id.* at 73-74.

26 Plaintiff testified that she can lift approximately eight (8) pounds with either arm
27 without hurting herself, equating this to a gallon of milk. *Id.* at 68-69. Plaintiff further
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1 testified that she has been so limited for the past year and half with her right arm, but since
2 July 2000 with her left arm. *Id.* at 69. Plaintiff testified that she rarely drives. *Id.* at 70.
3 Plaintiff further testified that she drove approximately three (3) weeks prior from her home
4 in Vail to her doctor’s office, because her husband was unavailable to take her. AR at 70.
5 Plaintiff also testified that her doctor wants her to walk as much as she can. *Id.* at 70-71.
6 Plaintiff testified that she walks around the hiking trail on her acre property two or three
7 times per week. *Id.* at 71. Plaintiff also testified that she walks for approximately twenty
8 (20) minutes, sometimes stopping to rest and sometimes not. *Id.* Plaintiff further testified
9 that she swims, which is strongly recommended by her doctor, twice per week. *Id.* Plaintiff
10 estimated that she swims for approximately twenty (20) minutes at a time. AR at 71-72.
11 Plaintiff testified that the exercise helps momentarily; however, nothing eliminates the pain
12 completely. *Id.* at 72.

13 Plaintiff testified that she obtained her high school equivalency degree and had taken
14 some college courses. *Id.* at 74, 89. Plaintiff further testified that she had worked at call
15 centers from 1999 to 2009. *Id.* Plaintiff testified that for approximately one (1) year prior
16 to that she was a manager in training for Domino’s Pizza. *Id.* at 74. Plaintiff further testified
17 that she left Domino’s Pizza to work at TeleTech, because it offered better pay and benefits.
18 *Id.* at 75. Plaintiff left TeleTech in 2004 to work at the Citibank call center, again for better
19 pay and better benefits. AR at 75. Plaintiff testified that she was terminated from Citibank
20 in 2009, because she could not minimize the time on each call below the company policy;
21 however, Plaintiff further testified that she was also using her leave under the Family and
22 Medical Leave Act (“FMLA”) for migraines. *Id.* at 75-76; *see also* AR at 222. Plaintiff
23 believes that part of why she was terminated related to her absences due to migraines. *Id.*
24 at 80; *see also* AR at 216, 236.

25 Plaintiff testified that she has been prescribed methadone for her pain, levothyroxine
26 for her thyroid disorder, alprazolam for anxiety, carisoprodol for muscle pain, citalopram for
27 depression gemfibrozil for cholesterol, and trazodone for sleep. *Id.* at 76-77. Plaintiff further
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1 testified that the medicines cause side effects such as sleepiness, dizziness, drowsiness,
2 blurred vision, and dry mouth, as well as causing her memory to be “fuzzy.” *Id.* at 77.
3 Plaintiff testified that she naps once or twice per day, usually for about twenty (20) minutes,
4 but sometimes up to an hour. AR at 77-78. On days when she cannot fall asleep, Plaintiff
5 testified that she still lays down and closes her eyes to rest. *Id.* at 78.

6 Plaintiff further testified that she has migraines on almost a daily basis, and that her
7 methadone prescription is for both her headache pain and her fibromyalgia pain. *Id.* at 78-79.
8 Plaintiff testified that her migraines last anywhere from eight (8) hours to ten (10) days. *Id.*
9 at 79. In order to treat them, she places a warm wrap around her neck and lays down in a
10 dark room. AR at 79; *see also* AR at 236. While having a migraine, Plaintiff testified that
11 she tries to move as little as possible. AR at 79-80. Plaintiff further testified that she has
12 been suffering from migraines for approximately ten (10) to fifteen (15) years. *Id.* at 80.
13 Plaintiff also testified that she was able to work, because she had an understanding manager
14 and the FMLA to protect her job, which allowed her to “go home to a dark room and rest.”
15 *Id.* at 80-81.

16 Plaintiff testified that she is not receiving any psychiatric treatment, but has been
17 prescribed alprazolam and citalopram for her anxiety and depression. *Id.* at 81. Plaintiff
18 further testified that the pain causes her depression, and that it causes her to not “feel like
19 doing anything with anyone” and “just lay around[.]” *Id.* Plaintiff also testified that she
20 wishes she could do more with her family, as well as work. AR at 81-82.

21 **2. Vocational Expert Alan Cummings’s Testimony**

22 Alan E. Cummings, Ph.D. testified as the vocational expert at the administrative
23 hearing. AR at 83. The VE asked Plaintiff for clarification regarding her work experience.
24 *Id.* at 84. Plaintiff testified that her call center experience included taking in-bound calls and
25 looking up information on the computer for the client. *Id.* at 84; *see also* AR at 227-28, 259,
26 280. Plaintiff further testified that her experience at Domino’s Pizza included both pizza
27 delivery and assistant managing. *Id.* at 85; *see also* AR at 229, 259, 280. The VE described
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1 Plaintiff's past relevant work as an assistant manager as Dictionary of Occupational Titles
2 ("DOT") code 189.167-018. *Id.* The DOT characterized that work as light, skilled, and with
3 a Specific Vocation Preparation ("SVP") of 6. AR at 85. The VE characterized the call
4 center work as an information clerk, DOT code 237.367-022, sedentary, semi-skilled, with
5 an SVP of 3. *Id.*

6 The ALJ asked the VE a hypothetical regarding an individual of the same age,
7 education, and vocational background as the Plaintiff. *See id.* at 86-89. In the hypothetical,
8 the ALJ asked about someone who was "limited to light level work[,] . . . cannot use ladders,
9 ropes or scaffolds and can only occasionally use ramps or stairs and occasionally kneel,
10 crouch or crawl[,] must avoid even moderate to [sic] hazards[,] hazards are commonly
11 defined as either unprotected heights or dangerous machinery[,] cannot perform tasks in a
12 fast paced environment[,]¹ . . . can attend and concentrate for two hours then needs to take
13 the customary 10 to 15 minute break[,] [c]an then attend and concentrate for two more hours
14 then needs to take the traditional, or . . . customary 30 to 60 minute break[,] . . . [c]an then
15 attend and concentrate for two more hours then needs to take the customary 10 to 15 minute
16 break[,] [a]nd can then attend and concentrate for two more hours[,] [a]nd that . . . ends the
17 eight hour work day[,] . . . would need a sit/stand option every hour or so for one to two
18 minutes[,] . . . [and] would need to take public transportation as needed to get to and from
19 the work site." *Id.* at 86-87. Dr. Cummings testified that such an individual would be able
20 to do Plaintiff's past relevant work at the call center. *Id.* at 87. The ALJ asked whether the
21 call center work would have a pace equivalent to a McDonald's restaurant at noon time,
22 which Dr. Cummings confirmed was possible. AR at 87-88. Accordingly, Plaintiff's past
23 relevant work was excluded. *Id.* at 88. Dr. Cummings testified that there would be other
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25 ¹The ALJ described "the kind of fast paced production environment the claimant could not
26 work at [as] the pace reflected in a McDonald's restaurant at noon time or the pace reflected in the
27 conveyor belt in the I Love Lucy episode with the chocolates on the conveyor belt whizzing by Ethel
28 and Lucy. AR at 86.

1 jobs available in the national or regional economy. *Id.* at 89. Dr. Cummings described the
2 job of packager, DOT number 559.687-074, light, unskilled, with an SVP of 2 as a
3 possibility. *Id.* at 90. Dr. Cummings further testified that there are about 434,000 jobs
4 nationally, and 5,800 in Arizona. *Id.* Dr. Cummings testified that a second possible job
5 would be that of inspector, DOT number 727.687-066, light, unskilled, with an SVP of 2.
6 AR at 90. Dr. Cummings further testified that there are approximately 400,000 inspector
7 jobs nationally, and 5,000 in the State of Arizona. *Id.* Dr. Cummings testified that a third
8 possibility would be assembler, DOT number 731.687-034, light, unskilled, with an SVP of
9 2. *Id.* at 90. The assembler job has 235,000 positions nationally, and 2,100 in Arizona. *Id.*
10 Dr. Cummings also testified that the inspector and assembler jobs are bench work, as
11 opposed to production line jobs. *Id.* Dr. Cummings confirmed that his testimony was
12 consistent with the Dictionary of Occupational Titles. AR at 90. Dr. Cummings also
13 testified that the DOT job numbers did not account for a sit/stand option; however, based on
14 his personal experience, he had selected jobs that offered a sit/stand option. *Id.* at 92.

15 The ALJ expanded his hypothetical to an individual who “for whatever reason, all
16 physical, all mental or a combination of both is unable to attend and concentrate in the two
17 hour blocks of time that I previously outlined for you in the RFC presented.” *Id.* at 90. Dr.
18 Cummings testified that such an individual would not be able to maintain employment with
19 continuity. *Id.* Dr. Cummings further testified that such an employee would not be able to
20 maintain the production pace required by most employers. *Id.* Dr. Cummings also testified
21 that for most unskilled workers, no more than one absence per month would be tolerated.
22 AR at 91. Dr. Cummings testified that he relied on a study by the International Association
23 of Rehabilitation Professionals for this information. *Id.* Dr. Cummings further testified that
24 if an individual were to miss three (3) days or more per month, there would not be any jobs
25 available. *Id.* at 92.

26 **3. Plaintiff’s Medical Records**

27 On September 3, 2009, Plaintiff was seen by Robert Smith, M.D. for an upper
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1 respiratory infection. AR at 362. Dr. Smith noted that Plaintiff had “a little fibromyalgia,
2 some hypothyroidism and insomnia.” *Id.* On January 7, 2010, Plaintiff saw Dr. Smith for
3 refills of her methadone and Xanax. *Id.* at 361, 429. Dr. Smith reported that Plaintiff was
4 between insurances “and her fibromyalgia is causing her a lot of pain.” *Id.* Dr. Smith also
5 prescribed Neurontin to Plaintiff. *Id.* On May 4, 2010, Plaintiff saw Dr. Smith for a follow-
6 up. AR at 359-60, 427-28. Plaintiff reported that she was having stomach problems. *Id.* at
7 360, 427. Dr. Smith reported that Plaintiff had “fibromyalgia as well as chronic reflux
8 esophagitis.” *Id.* Dr. Smith further reported that she was “currently much better.” *Id.*

9 On June 8, 2010, Plaintiff was admitted to Tucson Medical Center (“TMC”) and
10 discharged on June 11, 2010. *See* AR at 292-311, 314-27, 426. On June 8, 2010, Plaintiff
11 was admitted “presenting with [o]verdose.” *Id.* at 302, 314. Sean Mayo, M.D. noted that
12 “patient recently started on benzo by PCP and is taking narcotics and benzos accidentally
13 inappropriately.” *Id.* A review of Plaintiff’s systems indicated abdominal pain, confusion,
14 and decreased concentration, with all other systems negative. *Id.* at 303, 314. Plaintiff’s
15 physical exam was normal, except her speech was “delayed and slurred” and she was
16 “slowed.” *Id.* at 304, 316. A head computed tomography (“CT”) performed on the same
17 date was “unremarkable” and showed “[n]o significant interval change from prior outside
18 head CT study dated 06/19/2008.” AR at 309. On June 9, 2010, William G. Odette, M.D.
19 noted that Plaintiff “took husbands [sic] ‘vicodan’ denies other Rx but drug screen positive
20 Benzos and Narcotics.” *Id.* at 299, 320. Dr. Odette further noted that Plaintiff reported that
21 she took the prescription for three months of lower abdominal pain for which she sought no
22 evaluation or treatment. *Id.* On June 10, 2010, Sarah S. Akhunji, M.D. performed a physical
23 examination of Plaintiff, and which was unremarkable. *Id.* at 295-96, 324. On June 11,
24 2010, Dr. Akhunji reported that Plaintiff was “[s]een by behavioral health for O[ver]
25 D[ose].” *Id.* at 294, 327. Plaintiff “[r]eported that she had increased pain issues that have
26 since resolved[,] [a]gree[d] to avoid abusing narcotic medications and [would] follow closely
27 with [her primary care physician.]” AR at 294, 327. Dr. Akhunji also noted that Plaintiff was
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1 “[o]n methadone for chronic pain.” *Id.* On June 14, 2010, Plaintiff saw Dr. Smith for a
2 follow-up after her hospitalization. *Id.* at 357-58, 425. Dr. Smith reported that her hospital
3 stay was due to “irritable bowel syndrome.” *Id.* at 357, 425. Dr. Smith further reported that
4 she had progressively taken “more and more alprazolam to where she had about six pills on
5 board.” *Id.* On the same date, Plaintiff had blood drawn and analyzed. AR at 370, 424.

6 On July 30, 2010, Plaintiff saw Dr. Smith for a refill of her methadone prescription.
7 *Id.* at 356, 423. Dr. Smith reported that she “seems to be doing quite a bit better.” *Id.* Dr.
8 Smith further noted, however, that she was “very definitely having some depression right
9 now.” *Id.* Dr. Smith also noted that Plaintiff has fibromyalgia, but her physical exam was
10 unremarkable. *Id.*

11 On September 16, 2010, Plaintiff saw Dr. Smith to discuss her pain medication. AR
12 at 354-55, 422. Plaintiff had blood work done on the same date. *Id.* at 414-20. On
13 September 24, 2010, Plaintiff was again seen by Dr. Smith for a refill of her pain
14 medication, specifically oxycodone. *Id.* at 345, 412. Dr. Smith noted that Plaintiff has
15 chronic neck pain and fibromyalgia, and was also complaining of “some fatigue.” *Id.* Dr.
16 Smith’s physical examination was unremarkable, and he further noted that “she has her
17 normal [Activities of Daily Living] that she can do.” *Id.* On September 30, 2010, Plaintiff
18 had blood drawn and analyzed. AR at 364-69, 409-11.

19 On October 13, 2010, Plaintiff saw Dr. Smith to discuss her laboratory analyses. *Id.*
20 at 343-44, 407-08. Dr. Smith noted that she had hyperlipidemia and was glucose intolerant.
21 *Id.* at 343, 407. Dr. Smith further noted that she had fibromyalgia, as well as insomnia, and
22 oxycodone causes her to get very drowsy. *Id.* Dr. Smith’s physical examination was
23 unremarkable. *Id.* at 343-44. On November 16, 2010, Plaintiff’s blood work indicated the
24 presence of Morphine, as well as “evidence of taking an unprescribed Benzodiazepine
25 medication.” AR at 346-51.

26 On December 16, 2010, Plaintiff saw Dr. Smith for a methadone refill, and states that
27 she is “continuing to have trouble with her headache.” *Id.* at 342, 406. Dr. Smith also
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1 indicated that Plaintiff reported she had been taking old Soma and old morphine that she has
2 been taking for the headache, but that “[s]he guarantee[d] [him] that she [was] not getting any
3 meds from any other physicians and [he] [did] not have reason to doubt her.” *Id.* Dr.
4 Smith’s physical examination was unremarkable. *Id.* Plaintiff had blood drawn and analyzed
5 on the same date, showing positive for morphine and methadone. *Id.* at 403-05.

6 On January 19, 2011, Plaintiff saw Dr. Smith to follow-up with her laboratory results,
7 but she had not been on her thyroid medication long enough for an accurate determination.
8 AR at 341, 402. Plaintiff was scheduled to return on February 16, 2011 for a blood draw.
9 *Id.* On March 17, 2011, Plaintiff saw Dr. Smith for a refill on her methadone. *Id.* at 340,
10 401. Dr. Smith noted that “[i]t seems to be working quite well for her chronic fibromyalgia.”
11 *Id.* Dr. Smith further noted that further blood work to follow-up on her thyroid medicine was
12 necessary. *Id.* Accordingly, such laboratory analysis was done. AR at 363, 400.

13 On May 13, 2011, Plaintiff saw Dr. Smith for a refill of her pain medication. *Id.* at
14 338-39, 398-99. Dr. Smith noted that “[t]here was also some confusion about whether she
15 should be taking two pain medicines at a time when in reality she only needs to take the
16 levothyroxine 200 mcg tabs one a day.” *Id.* at 339, 399. Dr. Smith noted Plaintiff’s pain as
17 “cervicalgia and migraines[,]” and reported that “[s]he seems to be doing quite well so we
18 will keep that prescription going and that was refilled.” *Id.* On August 4, 2011, Plaintiff saw
19 Dr. Smith for a pain medication refill and ear infection. *Id.* at 397, 444. Dr. Smith’s physical
20 examination was unremarkable, except for the ear infection in Plaintiff’s right ear. AR at
21 397, 444. On August 6, 2011, Plaintiff had blood work done which indicated methadone, but
22 no other drugs. *Id.* at 396, 443.

23 Pursuant to request by the Arizona Department of Economic Security (“AZDES”),
24 Plaintiff was examined by Jerome Rothbaum, M.D. on September 14, 2011. *Id.* at 372-82.
25 Dr. Rothbaum indicated that he had reviewed Plaintiff’s medical records as part of his
26 examination. *Id.* at 374. Dr. Rothbaum reported Plaintiff’s chief complaints as fibromyalgia,
27 migraine headaches, irritable bowel syndrome, and diffuse bodily pain. *Id.* Dr. Rothbaum
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1 noted that Plaintiff reported “that the fibromyalgia was diagnosed approximately three years
2 ago, although she states that she has had symptoms of chronic diffuse bodily pain for many
3 years[,] [and] [s]he describes pain, swelling, fatigue, and associated irritable bowel type
4 symptoms.” AR at 374. Dr. Rothbaum further reported that Plaintiff also “complain[ed] of
5 pain and swelling of the right knee.” *Id.* Plaintiff had a partial right knee replacement, but
6 had not followed up with her doctor. *Id.* Plaintiff reported her neck pain as related to
7 compressed discs in the neck, and “migraine type headaches which consist of promontory
8 tearing of the eyes and usually unilateral pounding headache, either one side or the other,
9 particularly associated with phonophobia and photophobia for which she goes into a dark
10 room and lies down.” *Id.* at 375. Plaintiff reported “that these headaches occur almost every
11 day.” *Id.* Dr. Rothbaum’s review of Plaintiff’s systems was unremarkable, although Plaintiff
12 reported that “[s]he has been told she has ‘a spot on the lung,’ which has been attributed to
13 valley fever[,] [and] . . . apparently is stationary.” AR at 375. Plaintiff reported smoking “a
14 cigarette only rarely” and “apparently did consume a considerable amount of alcohol but
15 stopped in 1988.” *Id.* Plaintiff also “denie[d] the use of illicit drugs.” *Id.* Dr. Rothbaum’s
16 physical examination “disclosed fairly typical trigger points involving the right cervical
17 muscles, the right lateral trapezius, the left medial and lateral trapezius, the right sacroiliac
18 area, the pectoral areas bilaterally, the medial areas of both elbows, [and] the right knee
19 medially and laterally.” *Id.* at 376. Dr. Rothbaum further indicated that Plaintiff “mentioned
20 at the beginning that she was having a migraine during this examination.” *Id.* Dr. Rothbaum
21 reported that Plaintiff dressed and undressed normally, was able to squat approximately fifty
22 (50) percent of normal, limited by her right knee, walked with a slight antalgic gait and
23 limping on the right leg, and was able to get on and off the examining table without
24 difficulty. AR at 377. Dr. Rothbaum’s impressions included migraine headaches;
25 fibromyalgia; status post right knee replacement; status post repair of Achilles tendon tear,
26 remote, left ankle; irritable bowel syndrome; status post cholecystectomy; history of remote
27 bilateral carpal tunnel release; cervical spondylosis; and depression. *Id.* at 377. X-rays of
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1 Plaintiff's left ankle indicated "[m]oderate osteophytic formation . . . off the calcaneus at the
2 insertion of the plantar aponeurosis." *Id.* at 372. X-rays of Plaintiff knees indicated that
3 Plaintiff had "[m]oderate degenerative change identified involving the medial compartment
4 of both knees." *Id.* at 373.

5 Dr. Rothbaum completed a "Medical Source Statement of Ability to Do Work-Related
6 Activities (Physical)" regarding Plaintiff. *Id.* at 378-81. Dr. Rothbaum diagnosed Plaintiff
7 with fibromyalgia, status post right total knee arthroplasty, obesity, and cervical spondylosis.
8 AR at 378. Dr. Rothbaum opined that these would impose a limitation for twelve (12)
9 continuous months. *Id.* Dr. Rothbaum further opined that Plaintiff was limited in her ability
10 to lift and/or carry to twenty (20) pounds occasionally, and 10 pounds frequently. *Id.* at 378-
11 79. Dr. Rothbaum noted Plaintiff would be limited in her ability to stand and/or walk to at
12 least two (2) hours, but less than six (6) hours in an eight (8) hour day. *Id.* at 379. Dr.
13 Rothbaum further opined that Plaintiff had no limitation in sitting, and was unlimited in
14 seeing, hearing, and speaking. *Id.* Dr. Rothbaum indicated that Plaintiff could never climb
15 ladder, rope or scaffolds; could occasionally climb ramps and stairs, stoop, kneel, crouch, and
16 crawl; and had no limitation on reaching, handling, fingering or feeling. AR at 380. Dr.
17 Rothbaum also indicated that Plaintiff was restricted in working around heights and moving
18 machinery, but was unrestricted with regard to working around extremes in temperature,
19 chemicals, dust, fumes, gases, or excessive noise. *Id.*

20 Pursuant to request by the Commissioner, on September 22, 2011, Plaintiff's medical
21 records were reviewed by Martha A. Goodrich, M.D. *See id.* at 94-102. On September 29,
22 2011, Plaintiff saw Dr. Smith for a refill of her methadone. *Id.* at 395, 442. Dr. Smith's
23 examination was unremarkable. *Id.* On September 30, 2011, a drug screen was performed,
24 with only methadone detected. AR at 394, 441.

25 On December 13, 2011, Plaintiff saw Dr. Smith for a medication review, and "refill
26 on Xanax and Soma." *Id.* at 440, 456-57. Dr. Smith indicated that "[t]he patient does have
27 fibromyalgia and does need a refill on her methadone as of the 22nd or 23rd of this month."
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1 *Id.* at 440, 456. Dr. Smith’s examination was otherwise unremarkable. *Id.* at 440, 456-57.

2 Pursuant to request by the Commissioner, on January 26, 2012, Plaintiff’s medical
3 records were reviewed on reconsideration by Stephen S. Dickstein, M.D. *See id.* at 103-114.
4 On February 16, 2012, Plaintiff saw Dr. Smith for a medication consult and refills. AR at
5 454-55. Dr. Smith’s examination was unremarkable, and he noted Plaintiff’s “[w]ell-
6 controlled fibromyalgia.” *Id.* at 455.

7 On April 10 and 11, 2012, Plaintiff had blood work done. *Id.* at 459-61. On April 12,
8 2012, Plaintiff saw Dr. Smith for medication refills and to discuss her lab results. *Id.* at 452-
9 53. Dr. Smith noted that “[h]er labs indicate that she is not getting enough thyroid at this
10 time. *Id.* at 453. Dr. Smith further noted that Plaintiff “still suffers from chronic
11 fibromyalgia and needs a refill on her medication today . . . [s]he is on methadone and it
12 seems to be working reasonably well.” AR at 453.

13 On June 7, 2012, Plaintiff saw Dr. Smith for a refill of her methadone prescription,
14 consult regarding alprazolam, and requesting disability paperwork to be filled out. *Id.* at 450-
15 51. Dr. Smith noted that Plaintiff’s “disability is based on fibromyalgia and multiple
16 migraine headaches[,] [and] . . . [she] simply cannot work.” *Id.* at 451. Dr. Smith further
17 noted that Plaintiff “is on a great deal of medication[.]” *Id.* On June 8, 2012, Plaintiff had
18 blood work done, which indicated the presence of benzodiazepines and methadone. *Id.* at
19 458.

20 On July 30, 2012, Plaintiff again saw Dr. Smith for a prescription consult and
21 disability paperwork. AR at 471-72. Plaintiff “describe[d] her pain at usually a 4 to 5 level”
22 when taking methadone. *Id.* at 472. Plaintiff also reported that the methadone causes her to
23 be “confused at times[.]” *Id.* at 471-72. Plaintiff also had blood work done, which only
24 detected methadone. *Id.* at 473. On this same date, Dr. Smith filled out a Multiple
25 Impairment Questionnaire regarding Plaintiff. *Id.* at 462-69. Dr. Smith diagnosed Plaintiff
26 with “[f]ibromyalgia, chronic migraines, and thyroid disorder[,] . . . [and] also has insomnia
27 due to pain and anxiety disorder, as well as depression.” AR at 462. Dr. Smith noted that
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1 there is no cure for either her fibromyalgia or chronic migraines, only pain management. *Id.*
2 Dr. Smith further noted that Plaintiff “suffers with ongoing pain and swelling from
3 Fibromyalgia and has daily migraine headaches.” *Id.* at 463. Dr. Smith described the nature
4 of Plaintiff’s pain as “widespread” and including “swelling of joints.” *Id.* Dr. Smith also
5 indicated that Plaintiff’s “[m]igraines cause vomiting [sic] and leave [her] lying in a dark
6 room.” *Id.* Dr. Smith described the frequency of Plaintiff’s pain as constant, and rated her
7 pain as a 9-10, on a scale of one (1) to ten (10), with ten (10) being the most severe pain. AR
8 at 464. Dr. Smith described Plaintiff’s fatigue as a 4-6, on a scale of one (1) to ten (10), with
9 ten (10) being the most severe fatigue. *Id.* Dr. Smith opined that Plaintiff could sit for 1-2
10 hours in an eight (8) hour day, and stand or walk for 0-1 hour in an eight (8) hour day. *Id.*
11 Dr. Smith further indicated that it was not recommended for Plaintiff to sit or stand
12 continuously in a work setting. *Id.* at 464-65. Dr. Smith also indicated that Plaintiff could
13 lift or carry 0-5 pounds occasionally, but never any more than that. *Id.* at 465. Dr. Smith
14 indicated that Plaintiff’s swelling of hands and arms from the fibromyalgia limited her ability
15 to repetitively reach, handle, finger or lift. AR at 465. Dr. Smith further indicated that
16 Plaintiff was essentially precluded on both sides from grasping, turning, or twisting objects;
17 using fingers or hands for fine manipulations; and using arms for reaching, including
18 overhead. *Id.* at 465-66. Dr. Smith stated that physical therapy and injections failed. *Id.* at
19 466. Dr. Smith also stated that Plaintiff’s symptoms would likely increase in a competitive
20 work environment, and she cannot keep her neck in a constant position. *Id.* Dr. Smith
21 further opined that Plaintiff could not do full-time work, and her pain, fatigue and other
22 symptoms would frequently interfere with her attention and concentration. *Id.* at 467. Dr.
23 Smith indicated that Plaintiff’s symptoms would last at least twelve (12) months, and that
24 emotional factors, in the form of depression, contribute to the severity of her symptoms. AR
25 at 467. Dr. Smith stated that Plaintiff was not a malingerer and was “incapable of even ‘low
26 stress’” work. *Id.* Dr. Smith opined that Plaintiff would need to take frequent unscheduled
27 breaks, and would have good days and bad days. *Id.* at 467-68. Dr. Smith further opined that
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1 Plaintiff would be absent from work more than three (3) times per month. *Id.* at 468. Dr.
2 Smith indicated that Plaintiff “experiences ear infections, and flu-like symptoms up to once
3 per month or less frequently.” *Id.* Dr. Smith indicated that Plaintiff would need to avoid
4 noise, fumes, gases, temperature extremes, dust, and heights, could not push, pull, kneel,
5 bend or stoop, and had limited vision. AR at 468.

6 On August 28, 2012, Dr. Smith provided a written report indicating that he believed
7 Plaintiff’s symptoms were due to Fibromyalgia. *Id.* at 475-76. Dr. Smith listed Plaintiff’s
8 medications and noted that they have side effects, including preventing her from driving. *Id.*
9 at 475. Dr. Smith further opined that she will not recover from the Fibromyalgia “as there
10 is no way to fully treat the pain and other symptoms.” *Id.* at 476.

11 12 **II. STANDARD OF REVIEW**

13 The factual findings of the Commissioner shall be conclusive so long as they are
14 based upon substantial evidence and there is no legal error. 42 U.S.C. §§ 405(g), 1383(c)(3);
15 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008). This Court may “set aside the
16 Commissioner’s denial of disability insurance benefits when the ALJ’s findings are based
17 on legal error or are not supported by substantial evidence in the record as a whole.” *Tackett*
18 *v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999) (citations omitted); *see also Treichler v.*
19 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014).

20 Substantial evidence is “more than a mere scintilla[,] but not necessarily a
21 preponderance.” *Tommasetti*, 533 F.3d at 1038 (quoting *Connett v. Barnhart*, 340 F.3d 871,
22 873 (9th Cir. 2003)); *see also Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014).
23 Further, substantial evidence is “such relevant evidence as a reasonable mind might accept
24 as adequate to support a conclusion.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).
25 Where “the evidence can support either outcome, the court may not substitute its judgment
26 for that of the ALJ.” *Tackett*, 180 F.3d at 1098 (citing *Matney v. Sullivan*, 981 F.2d 1016,
27 1019 (9th Cir. 1992)); *see also Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007).

1 Moreover, the court may not focus on an isolated piece of supporting evidence, rather it must
2 consider the entirety of the record weighing both evidence that supports as well as that which
3 detracts from the Secretary's conclusion. *Tackett*, 180 F.3d at 1098 (citations omitted).

4 5 **III. ANALYSIS**

6 The Commissioner follows a five-step sequential evaluation process to assess whether
7 a claimant is disabled. 20 C.F.R. § 404.1520(a)(4). This process is defined as follows:

8 Step one asks is the claimant "doing substantial gainful activity[?]" If yes, the claimant is not
9 disabled; step two considers if the claimant has a "severe medically determinable physical
10 or mental impairment[.]" If not, the claimant is not disabled; step three determines whether
11 the claimant's impairments or combination thereof meet or equal an impairment listed in 20
12 C.F.R. Pt. 404, Subpt. P, App. 1. If not, the claimant is not disabled; step four considers the
13 claimant's residual functional capacity and past relevant work. If claimant can still do past
14 relevant work, then he or she is not disabled; step five assesses the claimant's residual
15 functional capacity, age, education, and work experience. If it is determined that the
16 claimant can make an adjustment to other work, then he or she is not disabled. 20 C.F.R. §
17 404.1520(a)(4)(i)-(v).

18 In the instant case, the ALJ found that Plaintiff met the insured status requirements
19 of the Social Security Act through December 31, 2014, and was not engaged in substantial
20 gainful activity since September 9, 2009. AR at 21. At step two of the sequential evaluation,
21 the ALJ found that "[t]he claimant has the following severe impairments:
22 fibromyalgia/chronic fatigue syndrome, depression and anxiety (20 CFR 404.1520(c))." *Id.*
23 At step three, the ALJ found that Plaintiff does "not have an impairment or combination of
24 impairments that meets or medically equals the severity of one of the listed impairments in
25 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525 and 404.1526)."
26 *Id.* at 22. At step four, the ALJ found that Plaintiff had:

27 the residual functional capacity (RFC) to perform light work as defined in 20
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1 CFR 404.1567(b) except that she cannot climb ladders, ropes, or scaffolds; she
2 is further limited to occasionally climbing ramps or stairs, and occasionally
3 kneeling, crouching and crawling; she should avoid even moderate exposure
4 to hazards, e.g., such as [sic] unprotected heights or dangerous machinery; she
5 cannot perform tasks in a fast-paced production environment; and she can
6 attend and concentrate for two hours at a time for a total of eight hours, with
the two customary 10-15 breaks, and a 30-60 minute lunch break. She needs
a sit-stand option every hour or so for one to two minutes or so, meaning that
if she is sitting down, she can then stand for one to two minutes before sitting
down and *vice-versa*, and she is further limited to occupations that allow her
to use public transportation to and from the work site.

7 *Id.* at 23. Accordingly, at step five, the ALJ found that “[b]ased on the testimony of the
8 vocational expert, the undersigned concludes that, considering the claimant’s age, education,
9 work experience, and residual functional capacity, the claimant is capable of making a
10 successful adjustment to other work that exists in significant number in the national
11 economy.” *Id.* at 27. As such, the ALJ found that Plaintiff was “not under a disability, as
12 defined in the Social Security Act, from September 9, 2009, through the date of this decision
13 (20 CFR 404.1520(g)).” AR at 28. Plaintiff asserts that the ALJ erred in 1) rejecting the
14 opinions of treating physician Dr. Smith and examining physician Dr. Rothbaum without
15 “specific and legitimate” reasons supported by substantial evidence in the record; and 2)
16 finding Plaintiff’s subjective complaints are not credible. Pl.’s Opening Brief (Doc. 16) at
17 10-17.

18 **A. Plaintiff’s Credibility**

19 Plaintiff asserts that the ALJ’s articulated reasons for finding her subjective
20 complaints not credible do not “approach[] the law’s stringent ‘clear and convincing’
21 standard.” Pl.’s Opening Br. (Doc. 16) at 16. The Commissioner argues that “[t]he ALJ
22 provided several valid reasons to support” his finding that Plaintiff’s statements regarding
23 the intensity, persistence, and limiting effects of her symptoms were not entirely credible.
24 Def.’s Response (Doc. 17) at 4. The Court agrees with the Commissioner.

25 “To determine whether a claimant’s testimony regarding subjective pain or symptoms
26 is credible, an ALJ must engage in a two-step analysis.” *Lingenfelter v. Astrue*, 204 F.3d
27 1028, 1035-36 (9th Cir. 2007). First, “a claimant who alleges disability based on subjective
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1 symptoms ‘must produce objective medical evidence of an underlying impairment which
2 could reasonably be expected to produce the pain or other symptoms alleged[.]’” *Smolen v.*
3 *Chater*, 80 F.3d 1273, 1281-82 (9th Cir. 1996) (quoting *Bunnell v. Sullivan*, 947 F.2d 341,
4 344 (9th Cir. 1991) (*en banc*) (internal quotations omitted)); *see also Ghanim v. Colvin*, 763
5 F.3d 1154, 1163 (9th Cir. 2014). Further, “the claimant need not show that her impairment
6 could reasonably be expected to cause the severity of the symptom she has alleged; she need
7 only show that it could reasonably have caused some degree of the symptom.” *Smolen*, 80
8 F.3d at 1282 (citations omitted). “Nor must a claimant produce ‘objective medical evidence
9 of the pain or fatigue itself, or the severity thereof.’” *Garrison v. Colvin*, 759 F.3d 995, 1014
10 (9th Cir. 2014) (quoting *Smolen*, 80 F.3d at 1282). “[I]f the claimant meets this first test, and
11 there is no evidence of malingering, ‘the ALJ can reject the claimant’s testimony about the
12 severity of her symptoms only by offering specific, clear and convincing reasons for doing
13 so.’” *Lingenfelter*, 504 F.3d 1028 (quoting *Smolen*, 80 F.3d at 1281); *see also Burrell v.*
14 *Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014) (rejecting the contention that the “clear and
15 convincing” requirement had been excised by prior Ninth Circuit case law). “This is not an
16 easy requirement to meet: ‘The clear and convincing standard is the most demanding
17 required in Social Security cases.’” *Garrison*, 759 F.3d at 1015 (quoting *Moore v. Comm’r*
18 *of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

19 “Factors that an ALJ may consider in weighing a claimant’s credibility include
20 reputation for truthfulness, inconsistencies in testimony or between testimony and conduct,
21 daily activities, and ‘unexplained, or inadequately explained, failure to seek treatment or
22 follow a prescribed course of treatment.’” *Orn v. Astrue*, 495 F.3d 625, 636 (9th Cir. 2007)
23 (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)); *see also Ghanim*, 763 F.3d at
24 1163. The Ninth Circuit Court of Appeals has “repeatedly warned[, however,] that ALJs
25 must be especially cautious in concluding that daily activities are inconsistent with testimony
26 about pain, because impairments that would unquestionably preclude work and all the
27 pressures of a workplace environment will often be consistent with doing more than merely
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1 resting in bed all day.” *Garrison*, 759 F.3d at 1016 (citations omitted). Furthermore, “[t]he
2 Social Security Act does not require that claimants be utterly incapacitated to be eligible for
3 benefits, and many home activities may not be easily transferable to a work environment
4 where it might be impossible to rest periodically or take medication.” *Smolen*, 80 F.3d at
5 1287 n. 7 (citations omitted). The Ninth Circuit Court of Appeals recently noted:

6 The critical differences between activities of daily living and activities in a
7 full-time job are that a person has more flexibility in scheduling the former
8 than the latter, can get help from other persons . . . , and is not held to a
9 minimum standard of performance, as she would be by an employer. The
10 failure to recognize these differences is a recurrent, and deplorable, feature of
11 opinions by administrative law judges in social security disability cases.

12 *Garrison*, 759 F.3d at 1016 (quoting *Bjornson v. Astrue*, 671 F.3d 640, 647 (7th Cir. 2012))
13 (alterations in original). “While ALJs obviously must rely on examples to show why they
14 do not believe that a claimant is credible, the data points they choose must *in fact* constitute
15 examples of a broader development to satisfy the applicable ‘clear and convincing’
16 standard.” *Id.* at 1018 (emphasis in original) (discussing mental health records specifically).
17 “Inconsistencies between a claimant’s testimony and the claimant’s reported activities
18 provide a valid reason for an adverse credibility determination. *Burrell*, 775 F.3d at 1137
19 (citing *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997)).

20 Here, in assessing Plaintiff’s credibility, the ALJ noted that “[s]he . . . maintains that
21 she is only able to lift, at most, eight pounds.” AR at 25. The ALJ went on to state that
22 “[t]he record, however, does not support her alleged symptoms and limitations.” *Id.* The
23 ALJ points out that Plaintiff has been maintained on her pain medication “without any
24 significant changes in her regimen[,]” that “physical examinations have not shown evidence
25 of atrophy or muscle loss, and Dr. Smith has noted on several occasions that she has been
26 doing well with medication.” *Id.*; *see also* AR at 339-40, 399, 401, 453, 455. A review of
27 the record further indicates the Plaintiff reported that she was able to lift approximately
28 fifteen (15) pounds as of August 2011. *Id.* at 224. The ALJ also noted that Plaintiff “walks
on her property’s ‘hiking trail’ 2-3 times a week for approximately 20 minutes each time, and

1 swims laps approximately two times weekly for twenty minutes or so each time.” AR at 25.
2 The ALJ further noted that the “slight antalgic gait” Plaintiff exhibited in the consultative
3 examination “has not been consistently demonstrated, including any observations by her
4 primary care provider.” *Id.* The ALJ also found Plaintiff’s testimony and contradictory
5 medical records regarding her drug and alcohol use as undermining her credibility. *Id.* at 25-
6 26. Finally, the ALJ found that Plaintiff obtaining unemployment benefits from the State of
7 Arizona, and holding herself out as capable of working and looking for work, negatively
8 impacted her credibility. *Id.* at 26; *see also Copeland v. Bowen*, 861 F.2d 536, 542 (9th Cir.
9 1988) (receipt of unemployment benefits properly included in credibility analysis).
10 Accordingly, the Court finds that the ALJ stated sufficient specific reasons for not fully
11 crediting Plaintiff’s pain testimony, supported by substantial evidence.

12 ***B. Treating and Examining Physician Opinions***

13 Plaintiff asserts that the ALJ’s rationales for rejecting the opinions of treating
14 physician Dr. Smith and examining physician Dr. Rothbaum are not “specific” and
15 “legitimate” and as such rejection of their opinions is contrary to law. Pl.’s Opening Br.
16 (Doc. 16) at 11. The Commissioner argues that “the ALJ properly gave Dr. Smith’s and Dr.
17 Rothbaum’s opinions the same weight as Plaintiff’s own credibility.” Def.’s Response (Doc.
18 17) at 10.

19 “As a general rule, more weight should be given to the opinion of a treating source
20 than to the opinion of doctors who do not treat the claimant.” *Lester v. Chater*, 81 F.3d 821,
21 830 (9th Cir. 1996) (citing *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987)); *see also*
22 *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014). “The opinion of a treating physician
23 is given deference because ‘he is employed to cure and has a greater opportunity to know and
24 observe the patient as an individual.’” *Morgan v. Comm’r of the SSA*, 169 F.3d 595, 600 (9th
25 Cir. 1999) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987) (citations
26 omitted)). “The ALJ may not reject the opinion of a treating physician, even if it is
27 contradicted by the opinions of other doctors, without providing ‘specific and legitimate
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1 reasons' supported by substantial evidence in the record." *Rollins v. Massanari*, 261 F.3d
2 853, 856 (9th Cir. 2001) (citing *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)); *see*
3 *also Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007); *Embrey v. Bowen*, 849 F.2d 418, 421
4 (9th Cir. 1988). "The ALJ can meet this burden by setting out a detailed and thorough
5 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
6 making findings." *Embrey*, 849 F.2d at 421 (quoting *Cotton v. Bowen*, 799 F.2d 1403, 1408
7 (9th Cir. 1986)). Moreover, "[e]ven if a treating physician's opinion is controverted, the ALJ
8 must provide specific, legitimate reasons for rejecting it." *Id.* (citing *Cotton*, 799 F.2d at
9 1408). Additionally, "[a] physician's opinion of disability 'premised to a large extent upon
10 the claimant's own account of his symptoms and limitations' may be disregarded where those
11 complaints have been 'properly discounted.'" *Morgan*, 169 F.3d at 602 (quoting *Fair v.*
12 *Bowen*, 885 F.2d 597, 605 (9th Cir. 1989) (citations omitted)).

13 Fibromyalgia is "a rheumatic disease that causes inflammation of the fibrous
14 connective tissue components of muscles, tendons, ligaments, and other tissue." *Benecke v.*
15 *Barnhart*, 379 F.3d 587, 589 (9th Cir. 2004) (citing *Lang v. Long-Term Disability Plan of*
16 *Sponsor Applied Remote Tech, Inc.*, 125 F.3d 794, 796 (9th Cir. 1997)). "Common
17 symptoms . . . include chronic pain throughout the body, multiple tender points, fatigue,
18 stiffness, and a pattern of sleep disturbance that can exacerbate the cycle of pain and fatigue
19 associated with this disease." *Id.* at 590. "There are no laboratory tests for the presence or
20 severity of fibromyalgia. The principal symptoms are 'pain all over,' fatigue, disturbed
21 sleep, stiffness, and 'the only symptom that discriminates between it and other diseases of
22 a rheumatic character' multiple tender spots, more precisely 18 fixed locations on the body
23 (and the rule of thumb is that the patient must have at least 11 of them to be diagnosed as
24 having fibromyalgia)[.]" *Rollins*, 261 F.3d at 855 (quoting *Sarchet v. Chater*, 78 F.3d 305,
25 306 (7th Cir. 1996)). As such, Plaintiff's physicians must rely to a large extent on her
26 reporting to assess her level of pain.

27 The ALJ rejected Drs. Smith and Rothbaum's opinions, because they were
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1 inconsistent with Plaintiff's own testimony. *Cf. Tommasetti v. Astrue*, 533 F.3d 1035, 1041
2 (9th Cir. 2008) ("An ALJ may reject a treating physician's opinion if it is based 'to a large
3 extent' on a claimant's self-reports that have been properly discounted as incredible"). The
4 ALJ noted that Plaintiff's fibromyalgia was adequately controlled with medication, which
5 her medical records support. *See, e.g.*, AR at 339-40, 399, 401, 453, 455. The ALJ also
6 noted that Dr. Smith opined that Plaintiff was "limited to lifting and carrying five pounds
7 occasionally[.]" AR at 25. As discussed in Section III.A., *supra*, this finding is not supported
8 by Plaintiff's own testimony. The ALJ further points to Plaintiff's testimony regarding her
9 ability to exercise as undermining the physician's restrictive findings. "[T]he ALJ provided
10 adequate reasons, under the appropriate legal standard, for finding that [Drs. Smith and
11 Rothbaum's] opinion[s] [were] not controlling." *Rollins*, 261 F.3d at 856. As such, the
12 ALJ's finding is affirmed.

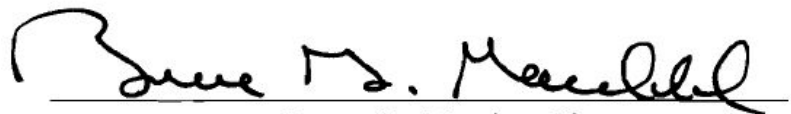
13
14 **V. CONCLUSION**

15 In light of the foregoing, the Court affirms the Commissioner's decision.

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17 Accordingly, IT IS HEREBY ORDERED that:

- 18 1) Plaintiff's Opening Brief (Doc. 16) is DENIED;
19 2) The Commissioner's decision is AFFIRMED; and
20 3) The Clerk of the Court shall enter judgment, and close its file in this matter.

21 DATED this 25th day of March, 2015.

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24 Bruce G. Macdonald
25 United States Magistrate Judge
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