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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Dana Jo Buona,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-17-00176-TUC-BPV

ORDER

15 Plaintiff Dana Jo Buona filed the instant action pursuant to 42 U.S.C. § 405(g)
16 seeking review of the final decision of the Commissioner of Social Security. The
17 Magistrate Judge has jurisdiction over this matter pursuant to the parties consent under 28
18 U.S.C. § 636(c). (Doc. 11). The matter is now fully briefed before this Court (Docs. 14,
19 18, 21). For the following reasons, the Court vacates the Commissioner's decision and
20 remands for consideration in accordance with this Order.

21 **I. PROCEDURAL HISTORY**

22 On February 1, 2013, Plaintiff filed an application for Social Security Disability
23 Insurance Benefits, and on February 22, 2013 filed an application for Supplemental
24 Security Insurance Benefits. (Administrative Record ("AR") 230-33, 238-43). Plaintiff
25 alleged disability as of June 1, 2012 (AR 230, 238) due to: sciatica, fibromyalgia, chronic
26 pain syndrome, back injury, chronic interstitial cystitis, irritable bowel constipation,
27 chronic fatigue syndrome, sleep apnea, depression, cervical discitis, and chronic
28 migraines. (AR 257). Plaintiff's application was initially denied on May 24, 2013 (AR

1 110, 159), and upon reconsideration on November 27, 2013 (AR 171). On May 19, 2015,
2 Plaintiff appeared with counsel and testified at an administrative hearing in front of an
3 Administrative Law Judge (“ALJ”). (AR 48). The ALJ issued an unfavorable decision on
4 August 26, 2015. (AR 16-47). Following Plaintiff’s Request for Review (AR 14), on
5 March 6, 2017, the Appeals Counsel denied Plaintiff’s request (AR 1) making the ALJ’s
6 decision the Commissioner’s final decision for the purposes of judicial review.

7 Plaintiff filed the instant action on April 20, 2017, arguing that the ALJ erred
8 because she: (1) failed to provide clear and convincing reasons for discrediting Plaintiff’s
9 testimony, (2) did not give germane reasons for not considering reports by third-party lay
10 persons, (3) erroneously excluded consulting physician Fred Wiggins’ opinion that
11 Plaintiff’s physical ailments would cause missed work, and (4) improperly determined
12 that other work existed for Plaintiff in the national economy. (Doc. 1). Because the Court
13 finds that the ALJ erred when evaluating Plaintiff and third-party’s testimony, and this
14 error was not harmless to the determination of disability, it does not reach Plaintiff’s
15 other arguments.

16 **II. PLAINTIFF’S BACKGROUND, STATEMENTS IN THE RECORD, AND** 17 **VOCATIONAL EXPERT’S FINDINGS**

18 Plaintiff was 38 years old on the date of the alleged onset of disability. (Doc. 18 at
19 2). She completed high school and one semester at a junior college. (AR 52).

20 Plaintiff testified at the administrative hearing that from approximately 2000-2007
21 she worked part-time for a business owned by her ex-husband. (AR 53). Plaintiff
22 answered phones, created invoices, input data into a computer, and scheduled
23 appointments. (AR 53-54). She worked from home between two to four hours a day, half
24 sitting and half walking or standing. (AR 54). Petitioner left this job when she left her ex-
25 husband. (AR 55).

26 From 2008-2011, Petitioner stated that she worked at a relative’s law firm as a
27 receptionist answering phones and obtaining information from clients. (AR 55-56). At
28 work she spent one-third of her workday standing, one-third walking, and one-third

1 sitting. (AR 57). Petitioner was scheduled to work 5 days a week for 35 hours, but often
2 missed work due to migraines. (AR 57). On the days she did not feel well, Plaintiff had
3 the option to lie down on a futon at the office. (AR 58). Petitioner lost this job because
4 she frequently missed work and committed clerical errors. (AR 57).

5 Last, Petitioner worked as a teacher's aide at a charter school run by another
6 family member from August 2011 to June 2012. (AR 58-59). At this job, she helped
7 second grade students with math five days a week for a total of 27 hours. (AR 59). She
8 was able to sit, stand, and walk as needed. (AR 59). She discontinued this work because
9 the school year had ended and she was scheduled for a spinal fusion. (AR 60).

10 The Vocational Expert ("VE") testified that Plaintiff's prior work included
11 teacher's aide, clerical receptionist, and administrative clerk. (AR 80). The ALJ asked the
12 VE what work was possible for an individual limited to light work at a non-production
13 pace; occasional climbing, stairs, stooping, kneeling, crouching, crawling, and overhead
14 reaching bilaterally; with no exposure to extreme cold, vibration, or unprotected heights
15 the VE determined that an individual could not perform Plaintiff's past work, but could
16 still perform the work of mail clerk, storage facility rental clerk, charge clerk, food and
17 beverage order clerk, and telemarketer. (AR 83-84). However, the VE added that if the
18 hypothetical individual also needed to miss two or three days of work per month "it
19 would preclude all jobs." (AR 85-88).

20 **III. SUMMARY OF ALJ'S FINDINGS**

21 Whether a claimant is disabled is determined pursuant to a five-step sequential
22 process. *See* 20 C.F.R. §§ 404.1520, 416.920. To establish disability, the claimant must
23 show: (1) she has not performed substantial gainful activity since the alleged disability
24 onset date ("step one"); (2) she has a severe impairment(s) ("step two"); and (3) her
25 impairment(s) meets or equals the listed impairment(s) ("step three"). *Id.* "If the claimant
26 satisfies these three steps, then the claimant is disabled and entitled to benefits. If the
27 claimant has a severe impairment that does not meet or equal the severity of one of the
28 ailments listed[,] . . . the ALJ then proceeds to step four, which requires the ALJ to
determine the claimant's residual functioning capacity (RFC)." *Dominguez v. Colvin*, 808

1 F.3d 403, 405 (9th Cir. 2015). At this step, the ALJ considers (a) whether there is an
2 impairment that would reasonably be expected to cause the claimant's symptoms, and (b)
3 the severity of claimant's ailments, including intensity, persistence, and limiting effects
4 of alleged symptoms. SSR 96-7p. If the claims of intensity, persistence and limiting
5 effects are not supported by the evidence, the ALJ needs to determine, based on the
6 record, whether plaintiff's claims are credible. *Id.* Then, at step five, "[a]fter developing
7 the RFC, the ALJ must determine whether the claimant can perform past relevant work."
8 *Dominguez*, 808 F.3d at 405. At this stage, "the government has the burden of showing
9 that the claimant could perform other work existing in significant numbers in the national
10 economy given the claimant's RFC, age, education, and work experience." *Id.*; 20 C.F.R.
11 §§ 404.1520, 416.920.

12 In this case, at step one, the ALJ found that Plaintiff had not engaged in substantial
13 gainful activity since June 1, 2012. (AR 23).

14 At step two, the ALJ determined that Plaintiff had severe impairments, including
15 "degenerative disc disease of cervical spine variously diagnosed as cervical
16 radiculopathy, post-laminectomy syndrome in the cervical region, cervical spondylosis,
17 cervicalgia, cervical spinal stenosis, and cervical spondylosis with facet syndrome, status
18 post cervical discectomy and fusion at C6-C7; lumbar degenerative disc disease variously
19 diagnosed as thoracic/lumbosacral neuritis/radiculitis, lumbosacral spondylosis without
20 myelopathy, lumbar radiculopathy, lumbar facet syndrome; labral tear and trochanteric
21 bursitis of the left hip; chronic pain syndrome; and affective and anxiety disorders." (AR
22 23).

23 But the ALJ decided, at step three, that the Plaintiff's impairments did not meet or
24 equal the listed impairments, either singularly or in combination. (AR 23-24).

25 The ALJ found that while Plaintiff's impairments could cause the purported
26 symptoms, the evidence did not support Plaintiff's claims of the limiting effects of these
27 impairments. (AR 31-32). She further found that Plaintiff's subjective claims of the
28 intensity, frequency, and limiting effects of her impairments were not credible. (AR 31).

1 The ALJ found that given the limiting effects of her ailments, Plaintiff's RFC
2 included performing simple, unskilled, light work at below a production pace. (AR 26,
3 31). The RFC included occasional walking of stairs and ramps, as well as stooping,
4 kneeling, crouching, crawling, and reaching overhead. (AR 26) However, the RFC
5 provided that Plaintiff should not be exposed to "extreme cold, vibrations, and hazards."
6 (AR 26).

7 At step five, the ALJ concluded that Plaintiff was not disabled; and given
8 Plaintiff's RFC, age, education, and work experience she could not perform past relevant
9 work, but could perform the occupations of office helper, mail clerk, storage facility
10 rental clerk, food and beverage order clerk, and telemarketer. (AR 37-40).

11 **IV. STANDARD OF REVIEW**

12 The Court has the "power to enter, upon the pleadings and the transcript of the
13 record, a judgment affirming, modifying, or reversing the decision of the Commissioner
14 of Social Security, with or without remanding the cause for a rehearing." 42 U.S.C. §
15 405(g). The factual findings of the Commissioner shall be conclusive so long as the
16 findings are based upon substantial evidence and there is no legal error. 42 U.S.C. §§
17 405(g), 1383(c)(3); *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).
18 Substantial evidence is "more than a mere scintilla[,] but not necessarily a
19 preponderance," *Tommasetti*, 533 F.3d at 1038 (quoting *Connett v. Barnhart*, 340 F.3d
20 871, 873 (9th Cir. 2003)). Further, substantial evidence is "such relevant evidence as a
21 reasonable mind might accept as adequate to support a conclusion." *Parra v. Astrue*, 481
22 F.3d 742, 746 (9th Cir. 2007). Where "the evidence can support either outcome, the court
23 may not substitute its judgment for that of the ALJ." *Tackett v. Apfel*, 180 F.3d 1094,
24 1098 (9th Cir. 1999) (citing *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)).
25 Moreover, the Commissioner, not the Court, is charged with the duty to weigh the
26 evidence, resolve material conflicts in the evidence, and determine the case accordingly.
27 *Matney*, 981 F.2d at 1019.

28 However, the Commissioner's decision "cannot be affirmed simply by isolating a
specific quantum of supporting evidence. . . . Rather, the Court must consider the record

1 as a whole, weighing both evidence that supports and evidence that detracts from the
2 [Commissioner's] conclusion." *Id.* (internal citations and quotations omitted).

3 **V. DISCUSSION**

4 **a. The ALJ Failed to Provide Clear and Convincing Reasons for**
5 **Discrediting Plaintiff's Testimony.**

6 *i. Plaintiff's Subjective Impairments*

7 In the administrative hearing, Plaintiff stated she had constant headaches with
8 debilitating migraines approximately 1-2 times per week. (AR 64). Plaintiff contended
9 that these headaches frequently caused vomiting and light sensitivity. (AR 64). Plaintiff
10 stated that a failed cervical fusion caused her head to tilt forward and down creating
11 tension. (AR 61-62). She also claimed that she suffered from radiating pain down her left
12 arm, and pseudoarthrosis in the cervical spine. (AR 60-61). Furthermore, her upper body
13 symptoms were aggravated by her fibromyalgia, which resulted in muscle spasms and
14 tension. (AR 64, 784). Plaintiff also purported that she has been unable to shower
15 because of her neck and shoulder pain. (AR 73).

16 Plaintiff also contended the fibromyalgia also caused pain and muscle spasms in
17 her low back and hips. (AR 64-65). She said she suffered from edema, labral tears,
18 piriformis syndrome, and bursitis in her hips. (AR 64-65).

19 Furthermore, Plaintiff complained of gastrointestinal pain which began after four
20 abdominal surgeries. (AR 66). This resulted in an inability to control her bowel
21 movements, causing explosive diarrhea, or in the alternate, constipation. (AR 67-69). At
22 times, the diarrhea would force her to spend up to three hours in the bathroom with
23 severe cramping. (AR 67-69). At other times, constipation prevented her from defecating
24 for several days in a row. (AR 67-69). No matter what, Plaintiff claims she is constantly
25 nauseous. (AR 67).

26 Finally, Plaintiff testified that she had sleep apnea and took various medications
27 that affected her sleep habits. (AR 69-70). Because of this, she was often tired during the
28 day and needed to take naps. (AR 72).

1 In combination, she claimed these impairments caused her to spend several days a
2 week at home in pain. (AR 77). When asked how many days a week she thought she
3 would miss of work due to the various impairments, Plaintiff responded, “Two or three.”
4 (AR 77).

5 *ii. ALJ’s Credibility Assessment*

6 The ALJ stated that the medical evidence supported Plaintiff’s claims that she
7 suffered from “chronic interstitial cystitis, chronic migraines, constant headaches,
8 irritable bowel constipation, chronic fatigue syndrome, sleep apnea, gastric paresis,
9 paralytic ileus, and explosive diarrhea and leakage due to medication.” (AR 32). The
10 ALJ also said the evidence supported “a finding of fibromyalgia, degenerative disc
11 disease of the cervical and lumbar spine, a labral tear and trochanteric bursitis in the left
12 hip, and chronic pain syndrome.” (AR 27). She conceded that Plaintiff was treated during
13 the pendency of disability for pain associated with the fibromyalgia, low back, and neck
14 pain with potent medications such as codeine, fentanyl, and oxycodone. (AR 27). Also,
15 since Plaintiff’s anterior discectomy and fusion, she saw a neurosurgeon for “persistent
16 neck pain associated with headaches and reported radiation into the left upper extremity.”
17 (AR 27). The ALJ’s RFC even limited Plaintiff to occasional overhead reaching “given
18 evidence of pain and limited range of motion in the shoulders” and found that the cold
19 could irritate Plaintiff’s chronic pain. *Id.*

20 Despite the ALJ’s admission that the record supported functional limitations in the
21 spine and hips, the ALJ found that it did not support the level of severity for which
22 Plaintiff complained, and found her testimony was not credible. (AR 29-31, 34). The ALJ
23 stated that Plaintiff’s activity and medical records belied her complaints, and the ALJ did
24 not believe that the impairments “significantly interfered with the ability to perform basic
25 work related activities.” (AR 77).

26 The Court finds that the ALJ has not supported her credibility determination with
27 clear and convincing reasons or substantial evidence from the record. Moreover, the
28 ALJ’s stated reasons for questioning credibility do not establish that Plaintiff is capable
of engaging in sustained work as stated in the RFC.

1 transfer to the workplace)); *see Reddick v. Chater*, 157 F.3d 715, 724 (9th Cir. 1998)
2 (housework, trips, and exercise do not preclude disability); *see also Magallanes v.*
3 *Bowen*, 881 F.2d 747, 756 (9th Cir. 1989) (claimant may assist with household chores
4 and still be disabled). However, if an ALJ shows that a claimant ““is able to spend a
5 *substantial part* of [her] day engaged in pursuits involving the performance of physical
6 functions that are transferable to a work setting, a specific finding as to this fact may be
7 sufficient to discredit a claimant’s allegations.”” *Vertigan*, 260 F.3d at 1049 (citing
8 *Morgan v. Comm’r Soc. Sec.*, 169 F.3d 595, 600 (9th Cir. 1998)) (emphasis in original).

9 However, Plaintiff provided several written statements describing how her
10 activities were limited. Plaintiff stated that she only prepared a part of the holiday meals
11 (e.g. deviled eggs), received help with grocery shopping and transportation when her pain
12 was severe, and required special accommodations and assistance from her family on trips.
13 (AR 265-272, 313-323, 373-377). In addition, Plaintiff’s testimony and the medical
14 evidence indicated that although she did take her child to school, she immediately
15 returned home to rest and was able to do little else throughout the day. (AR 72, 793, 811).

16 A reasonable mind would not conclude that the activities mentioned by the ALJ
17 conflicted with Plaintiff’s claims of constant pain and an intermittent inability to
18 participate in daily activities. The meals were simple, infrequent, and for special
19 occasions. Plaintiff reasonably strived to participate in Thanksgiving and Christmas for
20 the benefit of her child. In addition, Plaintiff’s driving was limited in both time and
21 frequency. Plaintiff provided evidence that the driving often required assistance.
22 Furthermore, Plaintiff testified that after she takes her daughter to school, she
23 immediately returns home to sleep. (AR 72). The ALJ did not indicate why she did not
24 believe this to be true.

25 Furthermore, Plaintiff’s commitment to attending her various medical
26 appointments for pain relief is not indicative of the credibility of her subjective
27 complaints. Her medical records show that she is attending her appointments *despite*
28 being in intense pain during the examinations. The District of Oregon offered an apt
explanation as to why Plaintiff’s attendance does not weigh on her credibility. It stated,

1 “[T]his court suspects that had plaintiff failed to attend her various appointments, the ALJ
2 would have criticized her for failing to comply with treatment as evidence of
3 malingering. Her tenacity in seeking out treatment, in spite of her severe limitations,
4 bolsters her credibility and does not contradict her physicians’ serious diagnoses.”
5 *Hernandez-Devereaux v. Astrue*, 614 F. Supp. 2d 1125, 1147 (D. Or. 2009); *but see*
6 *Remmers v. Colvin*, CV-14-01028-PHX-JAT, 2015 WL 6502109, at *7 (D. Ariz. Oct. 28,
7 2015) (failing to seek treatment may weigh on credibility). Plaintiff has been an active
8 and reliable participant in her recovery, and this does not detract from her credibility.

9 Likewise, the ALJ did not provide clear and convincing reasons why Plaintiff’s
10 participation in an exercise regimen contradicted her allegations of pain. The ALJ did not
11 explain whether it was the types of activities or the amount of time required for the
12 exercises that she found inconsistent. Moreover, the ALJ asked no clarifying questions
13 during the administrative hearing. However, the physical therapy records show that the
14 therapeutic exercises during sessions lasted, at maximum, 15 minutes. (AR 1154, 1159,
15 1199, 1164, 1174, 1179, 1184, 1189, 1194, 1199). In addition, the physical therapist’s
16 home exercise program included simple muscle strengthening and flexibility movements
17 for the neck and core, as well as proper postural techniques. (AR 1155-56, 1161, 1171,
18 1176, 1181, 1196, 1199, 1201, 1205). These records do not state how frequent or how
19 long exercises lasted.

20 This evidence of exercise is not inconsistent with Plaintiff’s allegation that she
21 cannot sit or stand for more than 30 minutes without pain. There is no evidence that her
22 exercise was more strenuous than her physical therapy sessions or of longer duration than
23 15 minutes.

24 Finally, the Court cannot find that one mention of slipping in the shower
25 contradicts Plaintiff’s testimony either. Plaintiff stated that she had not taken a shower in
26 a long time because she could not lean her head back to wash her hair or bend to shave
27 her legs. (AR 73). In her medical records Plaintiff stated she slipped when “getting out of
28 the shower.” (AR 1103). This could just be a description of the area of the bathroom—i.e.
bath/shower area—rather than an indicator that her testimony was false. A single

1 ambiguous statement does not undermine Plaintiff's credibility. *See Popa v. Berryhill*,
2 872 F.3d 901, 906 (9th Cir. 2017).

3 Nonetheless, even if the Court concluded that the ALJ was correct and Plaintiff is
4 capable of engaging in these activities and the subjective statements on impairment were
5 not credible, the ALJ's ruling does not explain how these short activities, which often
6 required assistance, translate into Plaintiff's ability to work a full workday 5 days a week.

7 ***v. Location, Duration, Frequency, and Intensity of Symptoms***

8 ***1. Physician's Inability to Pinpoint Cause of Pain***

9 The ALJ found Plaintiff's claims incredible in part because Dr. Sipos and Dr.
10 Cristiano could not determine the precise cause of the pain. (AR 31).

11 A failure to pinpoint the cause of pain is not a valid reason for discrediting a
12 Plaintiff's subjective symptoms of pain. *Carradine v. Barnhart*, 360 F.3d 751, 754-55
13 (7th Cir. 2004); *Wirth v. Barnhart*, 318 F. Supp. 2d 726, 742 (E.D. Wis. 2004).
14 Furthermore, when a claimant consistently seeks treatment, has sustained pain, complies
15 with suggested medical treatment, and there is no finding of malingering, it weighs
16 heavily in support of claimant's credibility. *Albertson v. Colvin*, 659 Fed. Appx. 372, 374
17 (9th Cir. 2016).

18 The ALJ erred by discrediting Plaintiff's subjective complaints based on doctor's
19 inability to pinpoint the cause of Plaintiff's pain. Dr. Cristiano did acknowledge that
20 Plaintiff suffered physical impairments in the neck and back, including pseudoarthrosis, a
21 narrowing of the foramen between C6-C7, and a failed fusion in the cervical spine. (AR
22 1218, 1221). Dr. Cristiano stated that the reason he could not locate the exact cause of
23 pain was because her ailments were complicated, not that they were fabricated. *Id.* It is
24 unclear how the doctor's inability to pinpoint the cause of pain means that Plaintiff's
25 subjective testimony is not credible. There is no suggestion throughout the medical
26 records that Plaintiff was malingering. (*See, e.g.,* AR 833 (Plaintiff was a "reliable
27 historian")). Finally, Plaintiff consistently attended medical appointments, actively
28 participated in her own medical treatment program, and her long-term pain was
substantially supported by the evidence.

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2. *Pain and Medication*

The ALJ discounted Plaintiff's claims that headaches and migraines prevented her from working. She reasoned that Plaintiff's migraine headaches only appear in the records sporadically and are addressed as secondary to other complaints. (AR 32). Also, she stated that Plaintiff had not undergone diagnostic testing to determine the cause of the headaches. (AR 33). Finally, there was no real change in treatment throughout the period of disability and treatment was not aggressive. (AR 32).

However, a significant portion of the evidence indicates that Plaintiff reported and sought treatment for pain associated with headaches. Although addressed in conjunction with her back, hip, fibromyalgia, and intestinal pain, the headaches and migraines are consistently included in the overall pain that Plaintiff seeks to resolve during medical visits. (AR 639, 641, 644, 647, 650-51, 653, 657, 661, 664, 666, 671, 676, 686, 690, 706, 742-783, 775-76 789, 878, 1162, 1172, 1218, 1226, 1277, 1414). Furthermore, the ALJ concedes that Plaintiff's persistent neck pain is related her headaches. (AR 27). Separating the headache and migraine pain from the neck and shoulder pain creates a distinction that was never delineated by Plaintiff's treating physicians.

Admittedly, Plaintiff did not submit to a progressive increase medication or additional surgery. However, Plaintiff was taking so many pain medications she needed to be supervised by one physician for all medications and a more aggressive medication protocol was not warranted. The opinion neglects the fact that the severity of Plaintiff's pain necessitated a large quantity of heavy-duty pain medication including, at different times: Oxycodone (328, 330-32, 386-87, 390); Codeine (328, 330-32, 379); Fentanyl (305, 330-32,387, 389); Morphine (AR 679); Diclofenac (305, 329-32, 379); Baclofen (305, 329-32, 379); Gabapentin (305, 332, 379); Percocet (306, 379, 390, 680); Lidocaine cream (306, 329, 379); Voltaren gel (306); and Flector patches (307). Medical examiners noted that Plaintiff's narcotic use was heavy and expressed concerns about long-term use. (AR 399, 684, 1090, 768). For instance, at one point, the Pain Center determined that Plaintiff was developing a tolerance to Fentanyl, but the physician was reluctant to

1 change her medication because a new medication may cause rebound headaches. (AR
2 669, 884).

3 Surgery was a poor option for Plaintiff as well. As recently as March 2015,
4 Plaintiff's use of medications precluded her from surgery. (AR 768, 1090-91, 1209). In
5 addition, Dr. Cristiano found that spinal intervention would not be successful, and
6 Plaintiff was not "a good candidate for invasive pain management." (AR 1209, 1221).
7 Plaintiff also consulted with Dr. John Wild about surgery, but the doctor was concerned
8 that Plaintiff's insurance would not cover the physical therapy necessary for a successful
9 recovery. (AR 67).

10 In addition surgery and medication, Plaintiff was subjected to various other
11 treatments, with little to no affect. Plaintiff treated her pain with trigger point therapy
12 (AR 643, 673, 772, 781), radiofrequency ablation (AR 673), Lidocaine injections (AR
13 674), steroid injections (AR 764), Epsom salts and hot baths (AR 73), massage (AR 743),
14 biofeedback (AR 791, 833), physical therapy (AR 1151-1205), Kinesio-taping (1161,
15 1166), and dry needling (AR 1162, 1168, 1172, 1177-78). She has been an active
16 participant in her attempted recovery.

17 "[A] conservative course of treatment can undermine allegations of debilitating
18 pain, [but] such [a] fact is not a proper basis for rejecting the claimant's credibility where
19 the claimant has a good reason for not seeking more aggressive treatment." *Carmickle v.*
20 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008). Plaintiff presented
21 substantial evidence that she had chronic, constant pain that limited her ability to
22 participate in sustained activity, and gave valid reasons for not treating it more
23 aggressively.

24 The ALJ pointed to limited statements that Plaintiff had full range of motion in the
25 neck, as well as normal arm strength, but ignored other statements within these
26 evaluations that support Plaintiff's contention how pain and neuropathy limited her
27 functioning. (AR 641-42, 683-84, 845, 1152-56, 1345, 1389-90). This short period of
28 time in which Plaintiff was able to move freely is not inconsistent with Plaintiff's
testimony of the pain she experienced, nor the described intermittent exacerbation of her

1 symptoms. *See Reddick v. Chater*, 157 F.3d 715, 724 (9th Cir. 1998) (“[O]ccasional
2 symptom-free periods—and even the sporadic ability to work—are not inconsistent with
3 disability.” (quoting *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1996))).

4 Even though these citations claim she is able to move her body, the ALJ does not
5 explain how the cited medical records support her contention that Plaintiff’s pain is not as
6 bad as she alleges. But there is substantial evidence demonstrating functional limitations
7 and the Court finds it cannot support the ALJ’s determination by isolating a small
8 quantum of evidence. Again, the ALJ does not explain how the evidence she cites
9 demonstrates that Plaintiff can spend a substantial amount of her day in work related
10 activities.

11 3. *Insomnia*

12 Plaintiff testified that she could sleep approximately 1-1 ½ hours before the pain
13 woke her. (AR 75). Because of her restless sleep, Plaintiff claimed that soon after
14 dropping off her daughter at school, she would return to bed to nap. (AR 72). Plaintiff
15 participated in a sleep study, which indicated she suffered from sleep apnea and her level
16 of daytime sleepiness was significant. (AR 613, 897).

17 In her RFC, the ALJ granted that claimant had “some level of chronic pain, loss of
18 sleep and the side effects of her medications—particularly narcotic medications—[which]
19 would limit her ability to sustain concentration, persistence, and pace.” (AR 35). The
20 ALJ also explained that Plaintiff’s long history of narcotic use contributed to her sleep
21 apnea. (AR 29). But, the ALJ stated that Plaintiff’s claims that insomnia limited her
22 ability to concentrate were not credible because she was able to maintain good
23 concentration during mental status evaluations. (AR 35).

24 The ALJ’s reasoning did not clearly articulate how a short, limited evaluation
25 could translate to sustained concentration throughout an entire workday. If credited,
26 Plaintiff’s need to rest for most of the day and inability to sleep at night reasonably
27 affects Plaintiff’s ability to spend a substantial part of her day engaged in work activity.
28 The ALJ’s explanation did not provide clear and convincing evidence of Plaintiff’s

1 ability to remain wakeful throughout the day, or why her testimony that she was drowsy
2 during the day was inconsistent.

3 Taken as a whole, the ALJ failed to provide clear and convincing reasons why
4 Plaintiff's claim that her physical ailments would cause her to miss, at least, two days of
5 work per month was not credible. The Court finds that given all of the evidence,
6 Plaintiff's testimony was not credible. Furthermore, even if the Court found that the
7 ALJ's conclusion that the extent of Plaintiff's claims were exaggerated, it still cannot find
8 that this demonstrated Plaintiff was capable of the sustained work required in the ALJ's
9 RFC.

10 **b. The ALJ did not give germane reasons for rejecting reports by third-**
11 **party lay persons**

12 Plaintiff submitted third-party statements from three individuals. The first was a
13 function report filled out by Plaintiff's mother that indicated the mother needed to assist
14 with several of Plaintiff's routine tasks, including Plaintiff's shopping and household
15 chores. (AR 265, 267). The mother indicated that Plaintiff needs assistance so often that
16 she has retired in order to help her daughter. (AR 268). She claimed that when Plaintiff
17 attempted to do heavy cleaning or chores she remained in bed for days in pain. (AR 268).
18 In addition, the mother stated that while Plaintiff can participate in daily activities on
19 some days, the mother often needed to transport Plaintiff's daughter to school and to
20 appointments on days Plaintiff was unable to do so because of pain or sleepless nights.
21 (AR 265). Mother noted that at times the pain was so excruciating Plaintiff was unable to
22 move to retrieve her pain pills. (AR 266). The mother admitted that Plaintiff was able to
23 prepare meals; however, when her pain was intense, she required assistance from her
24 mother or daughter because she was sometimes unable to grasp objects. (AR 267).
25 Mother describes her daughter as a person who tries to remain positive, but has suffered
26 from intermittent, debilitating pain, which has hampered her positivity. (AR 271).

27 Plaintiff's counsel also provided a separate letter from Plaintiff's mother. (AR
28 313). While this letter does discuss alleged medical conditions, the takeaway from the
letter is that Plaintiff suffers from intermittent, debilitating pain. The mother stated that

1 Plaintiff tries to keep her daily life as normal as possible for the sake of Plaintiff's
2 daughter, but she has days where the pain makes her completely immobile. (AR 315-16).
3 The letter reinforces Plaintiff's allegation that she has difficulty raising her hands above
4 her head, cannot carry heavy objects, has pain sitting and standing, and her bowel
5 movements can take several hours in the morning. (AR 314-15). It also alleges that when
6 the pain is intense, Plaintiff's attention can be limited, and she may spend the entire day
7 unable to leave the house. (AR 315-316).

8 Lifelong friend Brett Watins also submitted an opinion letter. (AR 318-19).
9 Watins' letter stated that he often helped Plaintiff with her daily tasks such as yardwork,
10 chores, and loading her car. (AR 318). It also details one severe pain episode during the
11 planning of Plaintiff's daughter's birthday, where Mr. Watins observed that Plaintiff had
12 difficulty concentrating and communicating. (AR 318-19).

13 The final opinion is a letter from Plaintiff's sister. The letter described how a drive
14 to Phoenix caused Plaintiff so much pain that it prevented her from enjoying a trip to the
15 zoo with the family. Plaintiff could not keep up with the family, sat crying in pain, and
16 had to leave the zoo after only seeing a fraction of the exhibits. (AR 321). Plaintiff's
17 sister also stated that Plaintiff declined an invitation to her niece's high school graduation
18 because she was worried the drive to Phoenix would have caused pain. (AR 321). The
19 sister also expressed that when she drives to Tucson to visit Plaintiff, she never knows if
20 she will be able to visit her sister because it may be a day Plaintiff has a migraine or
21 severe pain. (AR 322). The letter describes how the sister observed Plaintiff's frustration
22 with her level of functioning, as well as the despair and grief Plaintiff experienced
23 because of how her incapacity affects her child. (AR 322-23).

24 The ALJ considered these statements, and afforded them some weight as far as
25 "their observations of symptoms and functional limitations . . . are consistent with the
26 preponderance of the evidence." (AR 36). But, the ALJ stated that the medical evidence
27 did not support their statements. (AR 37). The ALJ also discredited their opinions
28 because they were close to the Plaintiff and could not be considered disinterested parties.

1 (AR 37). Finally, the ALJ commented that since the third parties were merely lay
2 witnesses, they could not diagnose Plaintiff's impairments. (AR 37).

3 "[I]n evaluating a claimant's subjective complaints of pain [or other symptoms],
4 the adjudicator must give full consideration to all of the available evidence, medical *and*
5 *other*, that reflects on the impairment and any attendant limitations of function." *Smolen*
6 *v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996) (emphasis in original). "Lay testimony as
7 to a claimant's symptoms or how an impairment affects the claimant's ability to work is
8 competent [other] evidence that the ALJ must take into account." *Molina v. Astrue*, 674
9 F.3d 1104, 1114 (9th Cir. 2012); *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).
10 Layperson testimony may be used "to show the severity of [the claimant's] impairment(s)
11 and how it affects [her] ability to work." 20 C.F.R. § 404.1513(d) (2015). Laypersons are
12 capable evaluators of impairments because "friends and family members [are] in a
13 position to observe a claimant's symptoms and daily activities [and] are competent to
14 testify as to her condition." *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993).

15 To discount testimony of lay witnesses, the ALJ must provide germane reasons for
16 doing so. *Id.* at 919. The ALJ's reasons must be specifically stated. *Bruce v. Astrue*, 557
17 F.3d 1113, 1115 (9th Cir. 2009). Furthermore, the ALJ may not simply rely on the lay
18 witnesses' close relationship to the claimant to discredit the testimony. *Lohmeier v.*
19 *Colvin*, 2016 WL 825850 825850, at 14 (D. Ariz. Mar. 3, 2016); *cf.*, *Greger v. Barnhart*,
20 464 F.3d 968, 972 (9th Cir. 2006) (family prejudice in conjunction with specific
21 inconsistencies between layperson's statements and claimant's medical records can
22 provide germane reasons for discrediting lay testimony). Nor may an ALJ discredit a
23 layperson's testimony simply because the individual is not a medical practitioner and is
24 incapable of drawing medical conclusions. *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir.
25 2009); *see also Powers v. Comm'r of Soc. Sec. Admin.*, No. CV-16-03427-PHX-GMS,
26 2018 WL 1182554, at *5 (D. Ariz. Mar. 7, 2018) (discounting lay testimony based on
27 both general inconsistency with medical records and family relationship not germane
28 reasons).

1 The Court agrees with Plaintiff that the ALJ did not give germane reasons for
2 doubting the third party testimony. The ALJ's opinion gives weight to the testimony
3 about symptoms and functional limitations, but states the alleged severity and functional
4 ability to work are inconsistent with the record. (AR 36-37). However, the ALJ does not
5 connect any assertion by the lay people to contradictions in the record. The lay testimony
6 claims that Plaintiff is intermittently debilitated by pain, which manifests in headaches,
7 overall aching, and an inability to function. Between episodes she is pleasant and
8 attempts to take on as much of her daily routine independently as possible. As explained
9 previously, Plaintiff's chronic and episodic pain is not inconsistent with a substantial
10 portion of the record. In addition, the third-parties' support is not from a medical
11 diagnosis, but rather their observation of the frequency and intensity of Plaintiff's pain.
12 The lay person testimony indicates that Plaintiff is attempting to normalize her child's
13 life to the greatest extent possible; however, unexpected pain often circumvents her plans
14 and requires assistance from family members. Furthermore, the ALJ does not explanation
15 which third-party statements are supported by clinical and diagnostic medical evidence
16 and which were not.

17 Because the Court finds the ALJ committed harmful legal error by discrediting
18 Plaintiff's and third party testimony, the Court does not address Plaintiff's two other
19 arguments. Plaintiff's third argument is that the ALJ committed legal error because she
20 excluded physician Fred Wiggins' opinion that Plaintiff's physical impairments would
21 cause missed work. The Court notes that while it does not reach this issue, if Dr.
22 Wiggins' opinion was credited, it would further support Plaintiff's alleged intensity and
23 effects of her impairments.

24 **VI. CONCLUSION**

25 The ALJ legally erred when she discredited Plaintiff's subjective testimony that
26 the intensity and frequency of her pain and insomnia would cause her to miss work. The
27 ALJ further erred when evaluating the opinions of laypersons, because she failed to give
28 germane reasons for discounting the laypersons' testimony.

