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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Zelpha Tami Zimmerman,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-18-00142-TUC-EJM

ORDER

15
16 Plaintiff Zelpha Tami Zimmerman brought this action pursuant to 42 U.S.C. §
17 405(g) seeking judicial review of a final decision by the Commissioner of Social Security
18 (“Commissioner”). Plaintiff raises two issues on appeal: 1) the Administrative Law Judge
19 (“ALJ”) erred by failing to give germane reasons before rejecting the limitations
20 suggested by Karen Lunda’s functional capacity evaluation report; and 2) the ALJ erred
21 by failing to evaluate Plaintiff’s symptoms pursuant to Social Security Ruling (“SSR”)
22 16-3p. (Doc. 15).

23 Before the Court are Plaintiff’s Opening Brief, Defendant’s Response, and
24 Plaintiff’s Reply. (Docs. 15, 22, & 25). The United States Magistrate Judge has received
25 the written consent of both parties and presides over this case pursuant to 28 U.S.C. §
26 636(c) and Rule 73, Federal Rules of Civil Procedure. For the reasons stated below, the
27 Court finds that this matter should be remanded for further administrative proceedings.

28 . . .

1 **I. Procedural History**

2 Plaintiff filed an application for social security disability benefits on December 13,
3 2013. (Administrative Record (“AR”) 133). Plaintiff alleged disability beginning on
4 November 26, 2013 based on inability to walk, severed tendons in both feet, and bi-
5 lateral ankle problems. (AR 67). Plaintiff’s application was denied upon initial review
6 (AR 73) and on reconsideration (AR 80). A hearing was held on August 1, 2016 (AR 36),
7 after which ALJ Yasmin Elias found, at Step Four, that Plaintiff was not disabled because
8 she could perform her past relevant work as an optician. (AR 25). On January 24, 2018
9 the Appeals Council denied Plaintiff’s request to review the ALJ’s decision. (AR 1).

10 Plaintiff’s date last insured (“DLI”) for DIB purposes is December 31, 2018. (AR
11 19). Thus, to be eligible for benefits, Plaintiff must prove that she was disabled during the
12 time period of her alleged onset date (“AOD”) of November 26, 2013 and her DLI of
13 December 31, 2018.

14 **II. Factual History¹**

15 Plaintiff was born on February 3, 1964, making her 49 years old at the AOD of her
16 disability. (AR 67). She completed two years of college and has worked as a licensed
17 optician since 1990. (AR 164).

18 A. Treating Physicians

19 On December 18, 2012 Plaintiff was seen for evaluation of left thumb pain. (AR
20 250). X-rays showed basal joint arthritis, subluxation mild, some loss of joint space, and
21 some sclerosis, and Plaintiff opted to treat with a splint.

22 On February 8, 2012 Plaintiff reported severe headaches on a daily basis, was
23 forgetful, and losing her balance. (AR 410).

24 On February 1, 2013 Plaintiff reported an average of two headaches monthly,
25 lasting several days at time, associated with visual changes. (AR 387). She also had
26 occasional head tremor and clenching of the right arm.

27 _____
28 ¹ While the undersigned has reviewed the entirety of the record in this matter, the following summary includes only the information most pertinent to the Court’s decision on Plaintiff’s claims on appeal.

1 On March 21, 2013 Plaintiff reported severe headaches in the right temporal area
2 that come and go, not relieved with Aleve, Imitrex, or Vicodin. (AR 389).

3 On April 11, 2013 Plaintiff reported her headaches were improved with Topamax.
4 (AR 385). She also reported almost daily left arm shaking, and vague left eye visual
5 changes at night.

6 On August 2, 2013 Plaintiff was seen for left foot and ankle pain and reported
7 significant pain with weightbearing, worse with activity. (AR 248). The impression was
8 heel cord tendinitis and bilateral plantar fasciitis, and she was recommended for shoe
9 orthosis and dorsiflexion splint.

10 On September 13, 2013 Plaintiff complained of left ankle pain after rolling her
11 ankle and was referred for a MRI. (AR 246).

12 On October 8, 2013 Plaintiff reported a significant amount of pain in the feet and
13 ankles that limited her activity. (AR 244). Plaintiff rejected injections and casting and
14 was recommended to do stretching, physical therapy, wear a boot, and limit
15 weightbearing on the left.

16 On November 7, 2013 Plaintiff was doing physical therapy and was slightly better,
17 but reported right ankle problems and instability and was referred for a MRI. (AR 242).

18 On November 26, 2013 Plaintiff reported significant left foot pain. (AR 240). The
19 MRI showed some changes in the navicular joints consistent with arthritis,
20 fibrocartilaginous calcaneonavicular coalition, and some evidence of osteochondral
21 lesion. She chose to have surgery on the left foot for excision of the calcaneonavicular
22 coalition and release of the plantar fascia.

23 On December 4, 2013 Plaintiff had surgery on her left foot. (AR 254).

24 On December 16, 2013 Plaintiff had minimal complaints of pain after surgery.
25 (AR 238).

26 On January 7, 2014 Plaintiff was doing well and complained of mild pain and
27 stiffness, and was referred for physical therapy. (AR 236).

28 On February 7, 2014 Plaintiff complained of mild discomfort and had a mild limp;

1 range of motion was significantly improved with PT but she still had problems with long
2 walks. (AR 234).

3 On May 9, 2014 Plaintiff reported bilateral thumb and hand pain, and ring and
4 small fingers catching and locking. (AR 228). Plaintiff reported months to years of joint
5 pain in her thumbs, but recently getting worse and over the counter medications not
6 helping. The assessment was lateral thumb CMC arthritis, left worse than right, and
7 swan-neck deformity/locking of bilateral ring and small fingers. Plaintiff did not want an
8 injection but would try a brace and Voltaren gel.

9 On May 12, 2014 Plaintiff had an ankle sprain and contusion after she rolled her
10 ankle and a trashcan fell on her. (AR 224). X-rays of the ankle showed no abnormalities.

11 On June 13, 2014 Plaintiff was doing significantly better after surgery and with
12 PT, complaining of less pain, and walking better. (AR 221).

13 On July 3, 2014 Plaintiff had improved hand arthritis and de Quervain's after
14 injections, no numbness and tingling, no locking or clicking, and no sharp pains. (AR
15 219).

16 On October 6, 2014 Plaintiff reported pain in both ankles, worse with activity, and
17 episodes of popping and rolling. (AR 273). On exam she had some tenderness with
18 palpation, full range of motion, no swelling on the right, and walked with a slight limp.

19 On October 9, 2014 Plaintiff reported headaches for the past 3–4 months. (AR
20 367).

21 On October 16, 2014 Plaintiff had a MRI of the right ankle which showed
22 calcaneonavicular coalition, mild posterior tibialis tendinosis, moderate middle and
23 anterior subtalar joint degenerative arthrosis, mild/moderate plantar fasciitis, and mild
24 sinus tarsi edema. (AR 265–67). A MRI of the left ankle showed bifurcate ligament
25 sprain, low-grade extensor digitorum brevis strain, and mild insertional posterior tibialis
26 tendinosis. (AR 269–71).

27 On November 14, 2014 Plaintiff had pain in the left ankle after a twisting injury
28 and was recommended to continue using her ankle brace, icing, and inflammatory

1 medication. (AR 263).

2 On November 25, 2014 Plaintiff had increased pain in the right foot and was
3 recommended for surgery. (AR 261). The impression was bilateral foot and ankle pain,
4 tarsal coalition, plantar fasciitis, and heel cord tendinitis.

5 On December 10, 2014 Plaintiff had surgery on her right foot and got steroid
6 injections in the right foot and both thumbs. (AR 251).

7 On December 23, 2014 Plaintiff was doing well after surgery with minimal
8 complaints of pain and was referred for PT. (AR 259).

9 On February 10, 2015 Plaintiff's right foot was doing well after surgery, but she
10 had pain in the left foot and received an injection. (AR 257).

11 On May 21, 2015 Plaintiff reported a four-year history of pain in her thumbs and
12 intermittent locking of the fingers, and that she had some relief with injections in the past.
13 (AR 328). She was using ring splints and attempting to use large thumb braces but had
14 significant discomfort. The impression was markedly symptomatic stage III osteoarthritis
15 of the bilateral thumb CMC joints, marked MCP hyperextension instability with early
16 osteoarthritis, and significant ligamentous hyperlaxity with very mild swan neck
17 deformities. (AR 329). Plaintiff received injections and was recommended to use hand
18 braces.

19 On July 16, 2015 Plaintiff reported two months of relief after injections in her
20 thumb joints, but now had severe pain and requested repeat injections. (AR 327).

21 On August 26, 2015 Plaintiff reported a mass in her right hand, extremely tender
22 to palpation, and had significant triggering of the right ring finger. (AR 324).

23 On September 22, 2015 Plaintiff had right ring trigger finger release surgery and
24 excision of arterial thrombosis. (AR. 318).

25 On October 13, 2015 Plaintiff reported joint pain and left hand pain, and no
26 headaches or migraines. (AR 303). On exam she appeared healthy, walked normally, and
27 had normal motor strength and tone. (AR 303–04). At another appointment that same
28 date, Plaintiff reported migraines 4–5 times per month. (AR 349).

1 On November 10, 2015 Plaintiff was seen for weight gain and reported moderate
2 physical activity. (AR 299). She also reported leg pain with exercise, and no muscle pain
3 or weakness, joint pain, swelling, migraines, or headaches. (AR 300). On exam she
4 appeared healthy, walked normally, and had normal motor strength and tone. (AR 301).

5 On December 15, 2015 Plaintiff had arthroplasty and arthrodesis surgery on her
6 left thumb. (AR 309).

7 On June 29, 2016 Plaintiff had a MRI of the cervical and lumbar spine. (AR 445).
8 Findings showed degenerative disc disease and the impression was multilevel disk
9 desiccation indicating intervertebral disk degeneration with disk displacements. (AR 446,
10 449).

11 B. Additional Medical Information

12 Plaintiff saw physical therapist Karen Lunda for a functional capacity evaluation
13 (“FCE”) on November 23 and 24, 2015. (AR 425). Plaintiff was using a knee walker and
14 brace on the left hand. She uses the walker or a cane to walk any distance from her car to
15 inside a building, and uses the cane and furniture for support at home because her ankles
16 roll and she might fall. (AR 426–27). Subjectively, Plaintiff reported the following: She
17 sprained her right ankle in 2011 or 2012, then the left foot also became painful and got
18 worse; her husband and son help her into the tub because it hurts to take weight in her
19 feet and hands; she hasn’t felt like exercising but tries to do the stationary bike 10
20 minutes per day; she has back, hip, and knee pain which she attributes to her abnormal
21 gait; she has severe migraines 3–5 times a month, each lasting 2–3 days or up to a week;
22 her feet are stiff, her ankles roll, and she falls; she doesn’t walk well or have balance; she
23 can’t cook, clean, or do yard work; she used to drive a motorcycle and ride horses but
24 can’t do those things anymore; she drops plates and can’t put on jewelry or makeup, and
25 doesn’t write anymore because holding a pen is too painful. (AR 431–33).

26 Lunda reported that Plaintiff was pleasant and cooperative during testing:

27 During the fine motor testing on day one, she demonstrated
28 much greater difficulty than would be expected with
extremely slow pacing. Although she may have signs and
symptoms on physical exam . . . there was nothing to indicate

1 such significant deficits with fine motor control. This was
2 discussed at length with the client. She stated "I'm
3 compensating so it doesn't hurt so much." She was told that
4 the manner in which she was compensating was actually
5 making it more difficult for her because she was applying
6 more force with greater range of motion and sustaining a
7 movement for a longer period of time. She asked if we could
8 try the tests again. These were repeated and the client
9 improved significantly. She then stated "I figured out how to
10 do it so it doesn't hurt so bad."

11 Effort and pain were discussed again on day 2 prior to the
12 fine motor testing. The client did even better than she did on
13 day one. The client stated she tends to be cautious because
14 she is afraid of hurting herself.

15 (AR 427–28). Lunda used multiple consistency checks and stated that Plaintiff
16 demonstrated a consistently reliable performance. (AR 434). Specifically, Plaintiff's
17 functional abilities and limitations were consistent with her diagnoses, medical history,
18 and findings on exam; performance was consistent among FCE items; multiple activities
19 were performed on both days and Plaintiff did better on day two, which was much more
20 representative of her abilities; and Plaintiff ultimately gave good effort on all test items.
21 (AR 434–35).

22 Lunda reported that Plaintiff had above average fine motor skills, and her scores
23 were obtained without the use of a brace on either hand. (AR 436). Lunda completed a
24 medical work tolerance form and opined that Plaintiff could not perform sedentary work
25 because she could not lift 10 pounds and could not carry. (AR 443). She recommended
26 the following limitations: stand 5–10 minutes at a time for 1–2 hours total; sit for 30–60
27 minutes at a time for 7–8 hours total; walk 5–10 minutes at a time for 5–10 minutes total;
28 would need to change from sitting to standing/walking every 30–60 minutes; cannot use
feet for frequent movements; cannot climb ladders or stairs; never crouch or kneel; can
frequently work in a clerical position; can occasionally to frequently reach above
shoulder level and work with arms extended in front; can never grip, push, or pull; and
can occasionally to frequently pinch, feel/touch, and perform fine movements like
assembly/typing. (AR 443–44). Lunda stated that if employment with these restrictions
was available, Plaintiff could work full time. (AR 444). Lunda did not opine how many

1 days of work Plaintiff would be expected to miss a month. (AR 443).

2 C. Plaintiff's Testimony

3 On a disability report dated May 20, 2014 Plaintiff reported she had lost mobility
4 in her right foot and in her left foot after surgery, which made it harder for her to walk.
5 (AR 169). She re-injured her left foot on May 7, 2014. Plaintiff reported difficulty getting
6 out of bed, getting dressed, and doing chores because of difficulty standing and lack of
7 balance, and needed help getting in and out of the bathtub. (AR 173). She was using a
8 knee walker, hand braces, and finger splints, and was having difficulty at physical
9 therapy due to swelling. (AR 174).

10 On a disability report dated October 21, 2014 Plaintiff reported her hands were
11 worse and she had to wear braces at night. (AR 178). Her feet were worse and a MRI
12 showed she needed more surgery. Her headaches were also worse and lasting 5 days.
13 Plaintiff reported she was dropping plates because of difficulty holding things and had to
14 cut her hair because she couldn't brush it. She could only walk for half an hour before her
15 feet would swell. Plaintiff also reported new problems in her right knee, back, and
16 bursitis in her right hip. (AR 179). She had trouble getting in and out of the tub because
17 her ankles roll and she falls, and her feet swell so badly she is limited in what shoes she
18 can wear. (AR 183). It is too difficult to brush her hair or put on makeup and she can't
19 wear her wedding ring because her hands are swollen. It is harder for her to get out of
20 chairs because her muscles and joints are stiff and painful, and her son drives her more
21 because it is hard for her to operate the foot pedals in the car. Plaintiff also reported she
22 tried to take the trash out, fell, and was trapped under the trashcan for an hour.

23 At the hearing before the ALJ, Plaintiff testified that when she worked as an
24 optician she was on her feet for 90 percent of the day and used her hands 90 to 95 percent
25 of the time. (AR 42). When her disability began she was having pain in her wrists and
26 thumbs, dropping things, unable to hold things, swollen feet, and severe pain in her feet
27 when walking. (AR 44). Since her evaluation with Lunda in 2015, Plaintiff reported her
28 problems had gotten worse. (AR 47). It was very uncomfortable to walk, move around,

1 and get up and down; her left heel pain was excruciating; and it was hard to pick things
2 up and carry things. She takes pain medication, anti-inflammatories, and seizure
3 medication for her migraines. (AR 48). Plaintiff gets migraines three to four times a
4 week, they vary in duration, and they sometimes put her into a seizure or small stroke.
5 She loses sight in her right eye, tremors, vomits, and lies down in a dark room. (AR 49).
6 She was referred to a neurologist but they were still doing testing to figure out the cause.
7 Her headaches are not very controllable; medication helps sometimes but sometimes it
8 does not. (AR 52).

9 On a typical day Plaintiff gets up and takes medication, her husband helps her
10 bathe, then she lies in bed or tries to sit and watch a movie with her son but she usually
11 doesn't make it through the movie. (AR 53). Her son will help her back to bed and make
12 lunch; her husband makes dinner and then they go to bed. She drives to appointments if
13 she needs to, but she doesn't venture too far.

14 D. Lay Witness Testimony

15 Plaintiff's husband, Bryan Salzman, submitted a letter dated June 27, 2016. (AR
16 212). He described Plaintiff as someone who was always very independent and a hard
17 worker, but that all of her physical abilities have deteriorated. She has problems getting
18 around the house and going out in public; she cannot get in and out of the tub alone and
19 has fallen twice so he always helps her. Because of her hand weakness and pain, Plaintiff
20 cannot carry a full pot or use a knife, and Bryan cuts all of her food. She also needs both
21 hands to hold a glass of water and has dropped several glasses. Bryan has to support
22 Plaintiff when going up or down stairs; she stands behind him and puts her hands on his
23 shoulders. Staircases cause her to be very fearful of traveling outside the home. (AR 212–
24 213). Plaintiff's ability to walk and use her hands has degraded, and she has difficulty
25 writing or typing for long periods of time. (AR 213). She also has body tremors and her
26 wrists and hands curl up. Plaintiff also has migraines that cause vomiting and are
27 becoming more common. They used to walk their dog every night but now Plaintiff is
28 afraid of falling and has pain in her feet and ankles.

1 Plaintiff's son, Philip Zimmerman, also submitted a letter. (AR 214). He described
2 Plaintiff as formerly very active but now she cannot use the stairs or walk from room to
3 room, has bad migraines, and cannot hold utensils, brush her hair, or put on lipstick.
4 Plaintiff used to be very independent but now needs someone to care for her daily. Philip
5 described one incident where Plaintiff was in tears because she was unable to zip and
6 button her pants and had to get help from her granddaughter. Philip was making breakfast
7 that day and had to cut Plaintiff's pancakes for her, then help her to her room when she
8 became too uncomfortable from sitting.

9 E. Vocational Testimony

10 At the hearing before the ALJ, Gretchen Bakkenson testified as a vocational
11 expert. She stated that Plaintiff's past work as an optician was classified as skilled and
12 light exertional level, but that Plaintiff described it as medium. (AR 56).

13 The ALJ asked Bakkenson to assume an individual with Plaintiff's education and
14 work experience who could perform light work with the following limitations: never
15 climbing ladders, ropes, or scaffolds; occasionally climb ramps or stairs, stoop, kneel,
16 crouch, or crawl; moderate exposure to hazards; and frequent handling or feeling. (AR
17 57). Bakkenson testified such a person could do Plaintiff's past work as an optician.

18 For the second hypothetical, the ALJ added a limitation to sedentary work. (AR
19 57). Bakkenson testified such a person could not return to the optician job. (AR 58).
20 Bakkenson stated Plaintiff would have transferrable skills from working in a medical type
21 office, so she could do other work as a medical receptionist. There were no other jobs
22 Plaintiff could do that wouldn't require vocational training longer than 30 days. (AR 59).

23 Bakkenson stated that the highest amount of time an employer would tolerate
24 someone being off task per day was 10 percent, and the highest amount of absenteeism
25 would be one to two days per month. (AR 59).

26 On questioning by Plaintiff's attorney, Bakkenson testified that a medical
27 receptionist job would require frequent reaching and handling, and occasional fingering.
28 (AR 60). If an individual was limited to occasional reaching and handling, they could not

1 do the medical receptionist job. Plaintiff's attorney asked Bakkenson to assume an
2 individual with the following limitations: stand 5–10 minutes at a time, 1–2 hours a day;
3 sit 30–60 minutes at a time, 7–8 hours a day; walk 5–10 minutes at a time, 5–10 minutes
4 a day; would need to change positions from sitting to standing or walking every 30–60
5 minutes; occasional bilateral pinching, fine movements, feeling, and touching; and no
6 exposure to unprotected heights or moving machinery. (AR 61). Bakkenson testified such
7 an individual could not do Plaintiff's past work as she described it or as defined in the
8 DOT.

9 Bakkenson stated Plaintiff would have transferrable skills of appointment setting,
10 general office skills such as medical filing, and customer service, all of which could be
11 learned in 30 days. (AR 62–63). Plaintiff's attorney disputed that if something can be
12 learned in 30 days, it is not a skill, so no transferrable skills had been identified. (AR 65).

13 F. ALJ's Findings

14 The ALJ found that Plaintiff had the severe impairments of migraine headaches,
15 degenerative disc disease, and disorders of muscle, ligaments, and fascia. (AR 21).

16 The ALJ found that Plaintiff's statements and the lay witness statements
17 concerning the intensity, persistence, and limiting effects of her symptoms were not
18 entirely consistent with the medical and other evidence of record. (AR 23).

19 The ALJ gave some weight to Karen Lunda's opinion because the record did not
20 show clinical findings consistent with the limitations assessed and Lunda seemed to
21 uncritically endorse Plaintiff's subjective complaints, because Lunda observed that
22 Plaintiff's movements were at first exaggerated and dramatic but subsequently improved,
23 because Lunda was not an acceptable medical source, and because Lunda conducted
24 extensive testing. (AR 24).

25 The ALJ gave limited weight to the non-examining state agency physicians
26 because their opinions underestimated the degree of potential limitations that could
27 reasonably be expected from Plaintiff's medically determinable impairments. (AR 24–
28 25).

1 The ALJ found that Plaintiff had the RFC to perform light work with the following
2 limitations: unable to climb ladders, ropes, or scaffolds; occasionally climb, crouch,
3 crawl, stoop, and kneel; moderate exposure to hazards; and frequent feeling and handling.
4 (AR 22). The ALJ determined that Plaintiff could perform her PRW as an optician as
5 generally performed. (AR 25). The ALJ therefore concluded that Plaintiff was not
6 disabled.

7 **III. Standard of Review**

8 The Commissioner employs a five-step sequential process to evaluate SSI and
9 DIB claims. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); *see also Heckler v. Campbell*,
10 461 U.S. 458, 460–462 (1983). To establish disability the claimant bears the burden of
11 showing he (1) is not working; (2) has a severe physical or mental impairment; (3) the
12 impairment meets or equals the requirements of a listed impairment; and (4) the
13 claimant’s RFC precludes him from performing his past work. 20 C.F.R. §§
14 404.1520(a)(4), 416.920(a)(4). At Step Five, the burden shifts to the Commissioner to
15 show that the claimant has the RFC to perform other work that exists in substantial
16 numbers in the national economy. *Hoopai v. Astrue*, 499 F.3d 1071, 1074 (9th Cir. 2007).
17 If the Commissioner conclusively finds the claimant “disabled” or “not disabled” at any
18 point in the five-step process, she does not proceed to the next step. 20 C.F.R. §§
19 404.1520(a)(4), 416.920(a)(4).

20 Here, Plaintiff was denied at Step Four of the evaluation process. Step Four
21 requires a determination of whether the claimant has sufficient RFC to perform past
22 work. 20 C.F.R. §§ 404.1520(e), 416.920(e). RFC is defined as that which an individual
23 can still do despite her limitations. 20 C.F.R. §§ 404.1545, 416.945. A RFC finding is
24 based on the record as a whole, including all physical and mental limitations, whether
25 severe or not, and all symptoms. SSR 96-8p. If the ALJ concludes the claimant has the
26 RFC to perform past work, the claim is denied. 20 C.F.R. §§ 404.1520(f), 416.920(f).

27 The findings of the Commissioner are meant to be conclusive. 42 U.S.C. §§
28 405(g), 1383(c)(3). The court may overturn the decision to deny benefits only “when the

1 ALJ's findings are based on legal error or are not supported by substantial evidence in the
2 record as a whole." *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001). As set
3 forth in 42 U.S.C. § 405(g), "[t]he findings of the Secretary as to any fact, if supported by
4 substantial evidence, shall be conclusive." Substantial evidence "means such relevant
5 evidence as a reasonable mind might accept as adequate to support a conclusion,"
6 *Valentine*, 574 F.3d at 690 (internal quotations and citations omitted), and is "more than a
7 mere scintilla, but less than a preponderance." *Aukland*, 257 F.3d at 1035. The
8 Commissioner's decision, however, "cannot be affirmed simply by isolating a specific
9 quantum of supporting evidence." *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir.
10 1998) (citations omitted). "Rather, a court must consider the record as a whole, weighing
11 both evidence that supports and evidence that detracts from the Secretary's conclusion."
12 *Aukland*, 257 F.3d at 1035 (internal quotations and citations omitted).

13 The ALJ is responsible for resolving conflicts in testimony, determining
14 credibility, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
15 1995). "When the evidence before the ALJ is subject to more than one rational
16 interpretation, [the court] must defer to the ALJ's conclusion." *Batson v. Comm'r Soc.*
17 *Sec. Admin.*, 359 F.3d 1190, 1198 (9th Cir. 2004). This is so because "[t]he [ALJ] and not
18 the reviewing court must resolve conflicts in evidence, and if the evidence can support
19 either outcome, the court may not substitute its judgment for that of the ALJ." *Matney v.*
20 *Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992) (citations omitted).

21 Additionally, "[a] decision of the ALJ will not be reversed for errors that are
22 harmless." *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). The claimant bears the
23 burden to prove any error is harmful. *McLeod v. Astrue*, 640 F.3d 881, 888 (9th Cir.
24 2011) (citing *Shinseki v. Sanders*, 556 U.S. 396 (2009)). An error is harmless where it is
25 "inconsequential to the ultimate nondisability determination." *Molina v. Astrue*, 674 F.3d
26 1104, 1115 (9th Cir. 2012) (citations omitted); *see also Stout v. Comm'r Soc. Sec.*
27 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006). "[I]n each case [the court] look[s] at the
28 record as a whole to determine whether the error alters the outcome of the case." *Molina*,

1 674 F.3d at 1115. In other words, “an error is harmless so long as there remains
2 substantial evidence supporting the ALJ’s decision and the error does not negate the
3 validity of the ALJ’s ultimate conclusion.” *Id.* (internal quotations and citations omitted).
4 Finally, “[a] claimant is not entitled to benefits under the statute unless the claimant is, in
5 fact, disabled, no matter how egregious the ALJ’s errors may be.” *Strauss v. Comm’r*
6 *Soc. Sec. Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011).

7 **IV. Discussion**

8 Plaintiff argues that the ALJ erred by failing to give germane reasons to reject the
9 limitations assessed by Lunda’s FCE report, which limited Plaintiff’s ability to sit, stand,
10 walk, and use her upper extremities for pinching, fine movements, lifting, and carrying.
11 Plaintiff also argues that the ALJ erred in failing to evaluate her subjective symptom
12 testimony in accordance with SSR 16-3p. Plaintiff requests that the Court remand this
13 matter for rehearing.

14 The Commissioner argues that the ALJ’s evaluation of Lunda’s opinion was
15 reasonable where the ALJ discounted the opinion to the extent that it was inconsistent
16 with the other medical evidence. The Commissioner further argues that the ALJ
17 reasonably evaluated Plaintiff’s subjective symptom testimony where it was inconsistent
18 with the objective medical findings and where there was evidence that Plaintiff’s
19 conditions improved with treatment.

20 The Court finds that the ALJ failed to provide legally sufficient reasons to
21 discount Lunda’s opinion. This error impacted the ALJ’s RFC assessment and the
22 hypotheticals posed to the VE, as well as the ALJ’s evaluation of Plaintiff’s subjective
23 symptom testimony. Consequently, the error was not harmless because it ultimately
24 impacted the ALJ’s Step Four nondisability finding. Because questions remain regarding
25 whether in fact Plaintiff was disabled within the meaning of the SSA during the relevant
26 time period, and because Plaintiff’s subjective symptom testimony is best reassessed in
27 light of the record as a whole, the Court finds that remand for further administrative
28

1 proceedings is appropriate.²

2 A. Law

3 In weighing medical source opinions in Social Security cases, the Ninth Circuit
4 distinguishes among three types of physicians: (1) treating physicians, who actually treat
5 the claimant; (2) examining physicians, who examine but do not treat the claimant; and
6 (3) non-examining physicians, who neither treat nor examine the claimant. *Lester v.*
7 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). “As a general rule, more weight should be
8 given to the opinion of a treating source than to the opinion of doctors who do not treat
9 the claimant.” *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (quoting *Lester*, 81
10 F.3d at 830). “Courts afford the medical opinions of treating physicians superior weight
11 because these physicians are in a better position to know plaintiffs as individuals, and
12 because the continuity of their treatment improves their ability to understand and assess
13 an individual’s medical concerns.” *Potter v. Colvin*, 2015 WL 1966715, at *13 (N.D. Cal.
14 Apr. 29, 2015). “While the opinion of a treating physician is thus entitled to greater
15 weight than that of an examining physician, the opinion of an examining physician is
16 entitled to greater weight than that of a non-examining physician.” *Garrison*, 759 F.3d at
17 1012.

18 Here, Plaintiff argues that the ALJ failed to give proper weight to the opinion of
19 Karen Lunda, a physical therapist who conducted Plaintiff’s two-day FCE. While Lunda
20 is not considered an acceptable medical source, opinions from other sources must still be
21 evaluated and the ALJ may discount their testimony only by giving reasons germane to
22 each witness. *Revels v. Berryhill*, 874 F.3d 648, 655 (9th Cir. 2017); *see also Ghanim v.*
23 *Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014) (“Only physicians and certain other qualified
24 specialists are considered acceptable medical sources.”). Nurse practitioners, physician
25 assistants, and therapists are considered “other sources.” 20 C.F.R. § 404.1513(d).
26 Pursuant to SSR 06-03p, “[i]nformation from these ‘other sources’ cannot establish the

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28 ² Because the Court will remand this matter for further administrative proceedings on an open record, the Court declines to address the other issues raised by Plaintiff in her appeal.

1 existence of a medically determinable impairment. . . . However, information from such
2 ‘other sources’ may be based on special knowledge of the individual and may provide
3 insight into the severity of the impairment(s) and how it affects the individual’s ability to
4 function.” Thus, as one of Plaintiff’s medical providers, Lunda qualifies as an “other
5 source” that can provide evidence about the severity of Plaintiff’s impairments and how
6 they affect her ability to work, and the ALJ was required to evaluate Lunda’s opinion and
7 “give[] reasons germane to each witness” for discounting the opinion. *Ghanim*, 763 F.3d
8 at 1161; 20 C.F.R. § 404.1513(a). The Court finds that the ALJ failed to meet that
9 standard here.

10 B. Analysis

11 The ALJ gave some weight to Lunda’s opinion and noted that Lunda had
12 conducted extensive testing. (AR 24). However, the ALJ also gave several reasons for not
13 assigning Lunda’s opinion greater weight. The ALJ first stated that the record did not
14 seem to show clinical findings consistent with the limitations assessed, and in particular,
15 Plaintiff’s foot and thumb surgeries seemed to have been successful. The Court finds that
16 this was not a legally sufficient reason to assign reduced weight to Lunda’s opinion. The
17 ALJ failed to cite to any specific record that contradicted Lunda’s opinion, and the Court
18 cannot meaningfully review the ALJ’s reasoning with such a broad citation. Further, the
19 record documents that Plaintiff continued to report pain and problems in her feet and
20 hands despite receiving surgery and injections. While the Commissioner is not required
21 to “discuss *all* evidence[,]” the Commissioner is required to “make fairly detailed
22 findings in support of administrative decisions to permit courts to review those decisions
23 intelligently” and “must explain why significant probative evidence has been rejected.”
24 *Vincent on Behalf of Vincent v. Heckler*, 739 F.2d 1393, 1394 (9th Cir. 1984) (emphasis
25 in original) (internal quotations and citation omitted).

26 The ALJ also stated that Lunda seemed “to have uncritically endorsed the
27 claimant’s subjective complaints to a significant extent.” (AR 24). This assertion is belied
28 by Lunda’s report. While a section of the report does detail Plaintiff’s subjective

1 complaints, Lunda’s opinion and the limitations she assessed were based on the findings
2 she observed on examination of Plaintiff over two days of testing. For example, while
3 Plaintiff reported that she would drop plates and could not put on makeup or jewelry,
4 Lunda’s testing actually showed that Plaintiff had above average fine motor skills, with
5 average scores falling between 70–100 and Plaintiff scoring 112 on the right and 102 on
6 the left. (AR 436). This finding is reflected in Lunda’s recommendation that Plaintiff
7 could use her hands for fine motor work on an occasional to frequent basis. (AR 438).

8 The ALJ also stated that the evaluation was performed over two days and Lunda
9 observed that Plaintiff’s movements were at first exaggerated and dramatic, “albeit with
10 subsequent improvement.” (AR 24). The Court finds that this is not a legally sufficient
11 reason to discount Lunda’s opinion. Lunda explained that during the fine motor testing on
12 day one, Plaintiff demonstrated much greater difficulty than would be expected with
13 extremely slow pacing. (AR 427). Lunda addressed these behaviors with Plaintiff and
14 Plaintiff stated that she was compensating and being cautious so she didn’t hurt herself.
15 (AR 427–28). Plaintiff asked if she could repeat the tests and improved significantly, and
16 performed even better on day two. *Id.* Lunda also thoroughly explained the use of
17 multiple consistency checks to assess the reliability of Plaintiff’s performance³ and stated
18 that Plaintiff was consistently reliable and ultimately gave good effort. (AR 434–35). No
19 where did Lunda opine that Plaintiff was malingering, or that she continued to exhibit
20 exaggerated responses.

21 Finally, the ALJ commented that Lunda was not an acceptable medical source.
22 While information from “‘other sources’ cannot establish the existence of a medically
23 determinable impairment. . . . information from such ‘other sources’ may be based on

24 ³ Performance was verified by the following: Plaintiff’s functional abilities and
25 limitations were consistent with her diagnoses, medical history, and findings on exam;
26 performance was consistent among FCE items (similar items had similar performance);
27 multiple activities were performed on both days and Plaintiff did better on day two,
28 which was much more representative of her abilities; and Plaintiff “ultimately gave good
effort on all test items as evidenced by predictable patterns of movement including
increased accessory muscle recruitment, counterbalancing and attempts to
counterbalance, gait changes, and physiological responses such as increased heart rate
and respiration rate.” (AR 434–35).

1 special knowledge of the individual and may provide insight into the severity of the
2 impairment(s) and how it affects the individual's ability to function." SSR 06-03p. Thus,
3 the fact that Lunda is a physical therapist and therefore not an acceptable medical source
4 is not a sufficient reason to discount her opinion because the ALJ was still required to
5 evaluate her opinion according to the requirements set out in 20 C.F.R. § 404.1527(c).
6 *See* 20 C.F.R. § 404.1527(f) (opinions from sources who are not acceptable medical
7 sources are considered using the same factors that are applied to opinions from
8 acceptable medical sources). Thus, in determining what weight to afford Lunda's
9 opinion, the ALJ was required to consider (1) the frequency of examination and the
10 length, nature, and extent of the treatment relationship; (2) the evidence in support of
11 Lunda's opinion; (3) the consistency of the opinion and the record as a whole; (4)
12 whether Lunda is a specialist; and (5) other factors that would support or contradict
13 Lunda's opinion. Here, though Lunda only examined Plaintiff once, she conducted
14 testing over a two-day period and wrote an extensive report detailing the tests
15 administered, Plaintiff's performance, and recommended limitations. *See Revels*, 874
16 F.3d at 666–67 (ALJ erred by failing to state germane reasons to reject physical
17 therapist's FCE in part where although physical therapist only examined claimant once,
18 he did so for 3 ½ hours, extensively reviewed medical records from other doctors, and
19 produced a 9-page report).

20 In sum, the Court finds that the ALJ erred by failing to provide legally sufficient,
21 germane reasons to assign reduced weight to Lunda's opinion. Particularly in a case such
22 as this where there are no opinions from Plaintiff's treating physicians recommending
23 specific limitations on her ability to work, Lunda's opinion likely provides the best
24 estimation of Plaintiff's physical capabilities and workplace limitations. However, the
25 ALJ's RFC assessment fails to incorporate the majority of Lunda's recommendations.
26 Accordingly, the Court finds that this matter should be remanded for further
27 administrative proceedings to reassess Lunda's opinion and continue the five-step
28 sequential evaluation process.

1 **V. Remedy**

2 A federal court may affirm, modify, reverse, or remand a social security case. 42
3 U.S.C. § 405(g). Absent legal error or a lack of substantial evidence supporting the ALJ’s
4 findings, this Court is required to affirm the ALJ’s decision. After considering the record
5 as a whole, this Court simply determines whether there is substantial evidence for a
6 reasonable trier of fact to accept as adequate to support the ALJ’s decision. *Valentine*,
7 574 F.3d at 690.

8 “[T]he decision whether to remand the case for additional evidence or simply to
9 award benefits is within the discretion of the court.” *Rodriguez v. Bowen*, 876 F.2d 759,
10 763 (9th Cir. 1989) (quoting *Stone v. Heckler*, 761 F.2d 530, 533 (9th Cir. 1985)).
11 “Remand for further administrative proceedings is appropriate if enhancement of the
12 record would be useful.” *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004).
13 Conversely, remand for an award of benefits is appropriate where:

- 14 (1) the record has been fully developed and further
15 administrative proceedings would serve no useful purpose;
16 (2) the ALJ has failed to provide legally sufficient reasons for
17 rejecting evidence, whether claimant testimony or medical
18 opinion; and (3) if the improperly discredited evidence were
19 credited as true, the ALJ would be required to find the
20 claimant disabled on remand.

21 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). “Even if those requirements are
22 met, though, we retain ‘flexibility’ in determining the appropriate remedy.” *Burrell v.*
23 *Colvin*, 775 F.3d 1133, 1141 (9th Cir. 2014) (quoting *Garrison*, 759 F.3d at 1021).

24 “[T]he required analysis centers on what the record evidence shows about the
25 existence or non-existence of a disability.” *Strauss v. Comm’r Soc. Sec. Admin.*, 635 F.3d
26 1135, 1138 (9th Cir. 2011). “Administrative proceedings are generally useful where the
27 record has not been fully developed, there is a need to resolve conflicts and ambiguities,
28 or the presentation of further evidence may well prove enlightening in light of the
passage of time.” *Treichler v. Comm’r Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir.
2014) (internal quotations and citations omitted). “Where there is conflicting evidence,
and not all essential factual issues have been resolved, a remand for an award of benefits

1 is inappropriate.” *Id.* “In evaluating [whether further administrative proceedings would be
2 useful, the Court considers] whether the record as a whole is free from conflicts,
3 ambiguities, or gaps, whether all factual issues have been resolved, and whether the
4 claimant’s entitlement to benefits is clear under the applicable legal rules.” *Id.* at 1103–
5 04. “This requirement will not be satisfied if ‘the record raises crucial questions as to the
6 extent of [a claimant’s] impairment given inconsistencies between his testimony and the
7 medical evidence in the record,’ because ‘[t]hese are exactly the sort of issues that should
8 be remanded to the agency for further proceedings.’” *Brow-Hunter v. Colvin*, 806 F.3d
9 487, 495 (9th Cir. 2015) (quoting *Treichler*, 775 F.3d at 1105).

10 Here, the Court finds remand for further administrative proceedings is appropriate.
11 The ALJ erred by failing to provide legally sufficient, germane reasons for assigning
12 Lunda’s opinion reduced weight. Consequently, issues remain regarding Plaintiff’s RFC
13 and her ability to perform work existing in significant numbers in the national economy
14 during the relevant time period. *See Hill v. Astrue*, 698 F.3d 1153, 1162–63 (9th Cir.
15 2012). Further, there seems to be a dispute in the record as to whether the VE correctly
16 identified any transferrable skills. And, because the ALJ determined that Plaintiff was not
17 disabled at Step Four, there was no Step Five finding made. If Plaintiff cannot perform
18 her PRW but does have transferrable skills, then VE testimony is required to determine
19 whether those skills are readily transferrable to a significant range of other work existing
20 in the national economy. *See Tackett v. Apfel*, 180 F.3d 1094, 1100–01 (9th Cir. 1999)
21 (“There are two ways for the Commissioner to meet the burden of showing that there is
22 other work in ‘significant numbers’ in the national economy that claimant can perform:
23 (a) by the testimony of a vocational expert, *or* (b) by reference to the Medical-Vocational
24 Guidelines . . .”). While “[t]estimony of a VE . . . as to the claimant’s particular
25 limitations is not an absolute-requirement if it is clear from the record that the claimant is
26 unable to perform gainful employment in the national economy,” in this case the Court
27 finds that the record is not clear and further administrative proceedings are required.
28 *Stewart v. Colvin*, 16 F.Supp.3d 1209, 1217 (D. Or. April 15, 2014) (internal quotations

1 and citation omitted); *see also Bunnell v. Barnhart*, 336 F.3d 1112, 1116 (9th Cir. 2003)
2 (“[N]o vocational expert has been called upon to consider all of the testimony that is
3 relevant to the case . . . [and] in cases where the vocational expert has failed to address a
4 claimant’s limitations as established by improperly discredited evidence, we consistently
5 have remanded for further proceedings rather than payment of benefits.” (internal
6 quotations and citation omitted)); *Johnson v. Shalala*, 60 F.3d 1428, 1436 (9th Cir. 1995)
7 (“the use of vocational experts is particularly important where ‘the issue in determining
8 whether you are disabled is whether your work skills can be used in other work and the
9 specific occupations in which they can be used, or there is a similarly complex issue’”
10 (quoting 20 C.F.R. § 404.1566(e))); *Treichler*, 775 F.3d at 1105 (“Where, as in this case,
11 an ALJ makes a legal error, but the record is uncertain and ambiguous, the proper
12 approach is to remand the case to the agency.”).

13 This Court offers no opinion as to whether Plaintiff is disabled within the meaning
14 of the Act. “The touchstone for an award of benefits is the existence of a disability, not
15 the agency’s legal error.” *Brown-Hunter*, 806 F.3d at 495. Plaintiff’s RFC and subjective
16 symptom testimony are best reassessed in consideration of the entire record, and on
17 remand the ALJ shall give further consideration to all of the previously submitted
18 medical testimony and lay testimony and continue the sequential evaluation process to
19 determine whether Plaintiff is in fact disabled. Additionally, the ALJ is required to
20 consider all of Plaintiff’s alleged impairments, whether severe or not, in the assessment
21 on remand. SSR 86–8p, 1996 WL 374184, at *5 (“In assessing RFC, the adjudicator must
22 consider limitations imposed by all of an individual’s impairments, even those that are
23 not ‘severe.’”). “Viewing the record as a whole [this Court] conclude[s] that Claimant
24 may be disabled. But, because the record also contains cause for serious doubt, [the
25 Court] remand[s] . . . to the ALJ for further proceedings on an open record.” *Burrell*, 775
26 F.3d at 1142. The Court expresses no view as to the appropriate result on remand.

27 **VI. Conclusion**

28 In light of the foregoing, **IT IS HEREBY ORDERED** that the Commissioner’s

1 decision is remanded back to an ALJ on an open record with instructions to issue a new
2 decision regarding Plaintiff's eligibility for disability insurance benefits.

3 The Clerk of Court shall enter judgment accordingly and close its file on this
4 matter.

5 Dated this 14th day of August, 2019.

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Eric J. Markovich
United States Magistrate Judge