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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

MARTHA O. VILLALOBOS,	)	Case No. CV 13-1119-JPR
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
vs.	)	REVERSING COMMISSIONER AND
	)	REMANDING FOR FURTHER
CAROLYN W. COLVIN, Acting	)	PROCEEDINGS
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
	)	

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**I. PROCEEDINGS**

Plaintiff seeks review of the Commissioner’s final decision denying her application for Social Security disability insurance benefits (“DIB”) and supplemental security income benefits (“SSI”). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). This matter is before the Court on the parties’ Joint Stipulation, filed February 24, 2014, which the Court has taken under submission without oral argument. For the reasons discussed below, the Commissioner’s decision is reversed and this action is remanded for further proceedings.

1 **II. BACKGROUND**

2 Plaintiff was born on April 25, 1957. (Administrative  
3 Record ("AR") 146.) She has a sixth-grade education<sup>1</sup> (AR 30) and  
4 worked for more than 20 years as a packager in a manufacturing  
5 plant (AR 30-31, 170, 180).

6 On July 19, 2010, Plaintiff filed applications for DIB and  
7 SSI, alleging she had been disabled since March 18, 2010, because  
8 of "whiplash from neck to lower back," spinal arthritis, "severe  
9 neck pain," degenerative disc disease, and lumbar spondylosis.  
10 (AR 44-47, 146-52, 179.) After Plaintiff's applications were  
11 denied, she requested a hearing before an Administrative Law  
12 Judge. (AR 75-78.) A hearing was held on December 22, 2011, at  
13 which Plaintiff, who was represented by counsel, testified, as  
14 did a vocational expert ("VE"). (AR 26-43.) On January 5, 2012,  
15 the ALJ issued a written decision finding Plaintiff not disabled.  
16 (AR 15-20.) On February 29, 2012, Plaintiff requested review of  
17 the ALJ's decision (AR 8), and she subsequently submitted  
18 additional evidence in support of her claims (AR 508-77). On  
19 December 14, 2012, after considering the new evidence, the  
20 Appeals Council denied review. (AR 1-5.) This action followed.

21 **III. STANDARD OF REVIEW**

22 Under 42 U.S.C. § 405(g), a district court may review the  
23 Commissioner's decision to deny benefits. The ALJ's findings and  
24 decision should be upheld if they are free of legal error and  
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26 <sup>1</sup>Plaintiff stated in a disability report that she completed  
27 only the first grade (AR 180), but that appears to have been a  
28 mistake because she testified at the hearing that she had  
received a "primary" education in Mexico, which was equivalent to  
completing the sixth grade (AR 30).

1 supported by substantial evidence based on the record as a whole.  
2 Id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v.  
3 Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence  
4 means such evidence as a reasonable person might accept as  
5 adequate to support a conclusion. Richardson, 402 U.S. at 401;  
6 Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It  
7 is more than a scintilla but less than a preponderance.  
8 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.  
9 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether  
10 substantial evidence supports a finding, the reviewing court  
11 "must review the administrative record as a whole, weighing both  
12 the evidence that supports and the evidence that detracts from  
13 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,  
14 720 (9th Cir. 1996). "If the evidence can reasonably support  
15 either affirming or reversing," the reviewing court "may not  
16 substitute its judgment" for that of the Commissioner. Id. at  
17 720-21.

#### 18 **IV. THE EVALUATION OF DISABILITY**

19 People are "disabled" for purposes of receiving Social  
20 Security benefits if they are unable to engage in any substantial  
21 gainful activity owing to a physical or mental impairment that is  
22 expected to result in death or which has lasted, or is expected  
23 to last, for a continuous period of at least 12 months. 42  
24 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257  
25 (9th Cir. 1992).

##### 26 A. The Five-Step Evaluation Process

27 The ALJ follows a five-step sequential evaluation process in  
28 assessing whether a claimant is disabled. 20 C.F.R.

1 §§ 404.1520(a)(4), 416.920(a)(4); Lester v. Chater, 81 F.3d 821,  
2 828 n.5 (9th Cir. 1995) (as amended Apr. 9, 1996). In the first  
3 step, the Commissioner must determine whether the claimant is  
4 currently engaged in substantial gainful activity; if so, the  
5 claimant is not disabled and the claim must be denied.

6 §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is not  
7 engaged in substantial gainful activity, the second step requires  
8 the Commissioner to determine whether the claimant has a "severe"  
9 impairment or combination of impairments significantly limiting  
10 her ability to do basic work activities; if not, a finding of not  
11 disabled is made and the claim must be denied.

12 §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant has a  
13 "severe" impairment or combination of impairments, the third step  
14 requires the Commissioner to determine whether the impairment or  
15 combination of impairments meets or equals an impairment in the  
16 Listing of Impairments ("Listing") set forth at 20 C.F.R., Part  
17 404, Subpart P, Appendix 1; if so, disability is conclusively  
18 presumed and benefits are awarded. §§ 404.1520(a)(4)(iii),  
19 416.920(a)(4)(iii). If the claimant's impairment or combination  
20 of impairments does not meet or equal an impairment in the  
21 Listing, the fourth step requires the Commissioner to determine  
22 whether the claimant has sufficient residual functional capacity  
23 ("RFC")<sup>2</sup> to perform her past work; if so, the claimant is not  
24 disabled and the claim must be denied. §§ 404.1520(a)(4)(iv),  
25 416.920(a)(4)(iv). The claimant has the burden of proving she is

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27 <sup>2</sup>RFC is what a claimant can do despite existing exertional  
28 and nonexertional limitations. §§ 404.1545, 416.945; see Cooper  
v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 unable to perform past relevant work. Drouin, 966 F.2d at 1257.  
2 If the claimant meets that burden, a prima facie case of  
3 disability is established. Id. If that happens or if the  
4 claimant has no past relevant work, the Commissioner then bears  
5 the burden of establishing that the claimant is not disabled  
6 because she can perform other substantial gainful work available  
7 in the national economy. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).  
8 That determination comprises the fifth and final step in the  
9 sequential analysis. §§ 404.1520, 416.920; Lester, 81 F.3d at  
10 828 n.5; Drouin, 966 F.2d at 1257.

11 B. The ALJ's Application of the Five-Step Process

12 At step one, the ALJ found that Plaintiff had not engaged in  
13 substantial gainful activity since March 18, 2010, the alleged  
14 onset date. (AR 17.) At step two, the ALJ concluded that  
15 Plaintiff had the severe impairment of "chronic body pain."  
16 (Id.) At step three, the ALJ determined that Plaintiff's  
17 impairments did not meet or equal any of the impairments in the  
18 Listing. (AR 18-19.) At step four, the ALJ found that Plaintiff  
19 had the RFC to perform the "full range of medium work."<sup>3</sup> (AR 19-  
20 20.) Based on the VE's testimony, the ALJ concluded that  
21 Plaintiff could perform her past relevant work as a packager, as  
22 both generally and actually performed. (AR 20.) Accordingly,  
23 the ALJ determined that Plaintiff was not disabled. (Id.)

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27 <sup>3</sup>"Medium work" involves "lifting no more than 50 pounds at a  
28 time with frequent lifting or carrying of objects weighing up to  
25 pounds." §§ 404.1567(c), 416.967(c).

1 **V. DISCUSSION**

2 Substantial Evidence Does Not Support the ALJ's RFC  
3 Assessment

4 Plaintiff alleges that evidence submitted to the Appeals  
5 Council renders the ALJ's finding that Plaintiff can perform the  
6 full range of medium work unsupported by substantial evidence.  
7 (J. Stip. at 4-10, 15-16.)

8 A. Applicable law

9 A district court must uphold an ALJ's RFC assessment when  
10 the ALJ has applied the proper legal standard and substantial  
11 evidence in the record as a whole supports the decision. Bayliss  
12 v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005). The ALJ must  
13 consider all the medical evidence in the record and "explain in  
14 [his] decision the weight given to . . . [the] opinions from  
15 treating sources, nontreating sources, and other nonexamining  
16 sources." 20 C.F.R. §§ 404.1527(e)(2)(ii), 416.927(e)(2)(ii);  
17 see also §§ 404.1545(a)(1), 416.945(a)(1) ("We will assess your  
18 residual functional capacity based on all the relevant evidence  
19 in your case record."); SSR 96-8p, 1996 WL 374184, at \*2 (July 2,  
20 1996) (RFC must be "based on all of the relevant evidence in the  
21 case record"). In making an RFC determination, the ALJ may  
22 consider those limitations for which there is support in the  
23 record and need not consider properly rejected evidence or  
24 subjective complaints. See Bayliss, 427 F.3d at 1217 (upholding  
25 ALJ's RFC determination because "the ALJ took into account those  
26 limitations for which there was record support that did not  
27 depend on [claimant's] subjective complaints"); Batson v. Comm'r  
28 of Soc. Sec. Admin., 359 F.3d 1190, 1197 (9th Cir. 2004) (ALJ not

1 required to incorporate into RFC evidence from treating-physician  
2 opinions that were "permissibly discounted").

3 Moreover, Social Security Administration regulations "permit  
4 claimants to submit new and material evidence to the Appeals  
5 Council and require the Council to consider that evidence in  
6 determining whether to review the ALJ's decision, so long as the  
7 evidence relates to the period on or before the ALJ's decision."  
8 Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157, 1162 (9th  
9 Cir. 2012); see also 20 C.F.R. §§ 404.970(b), 416.1470(b).

10 "[W]hen the Appeals Council considers new evidence in deciding  
11 whether to review a decision of the ALJ, that evidence becomes  
12 part of the administrative record, which the district court must  
13 consider when reviewing the Commissioner's final decision for  
14 substantial evidence." Brewes, 682 F.3d at 1163; accord Taylor  
15 v. Comm'r of Soc. Sec. Admin., 659 F.3d 1228, 1232 (9th Cir.  
16 2011); see also Borrelli v. Comm'r of Soc. Sec., \_\_ F. App'x \_\_,  
17 2014 WL 1492736, at \*1 (Apr. 17, 2014) (remand necessary when  
18 "reasonable possibility" exists that "the new evidence might  
19 change the outcome of the administrative hearing").

20 B. Relevant facts<sup>4</sup>

21 On December 29, 2010, Dr. Anh Tat Hoang performed a complete  
22 orthopedic evaluation of Plaintiff at the request of the Social  
23 Security Administration.<sup>5</sup> (AR 403-06.) Dr. Hoang found that  
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25 <sup>4</sup>Because the parties are familiar with the facts, they are  
26 summarized here only to the extent relevant to the contested  
27 issue.

28 <sup>5</sup>Dr. Hoang wrote that his practice was "limited to  
Orthopedics." (AR 406.)

1 Plaintiff had a normal gait, could squat and heel-toe walk, sat  
2 comfortably in a chair, and could get on and off the examination  
3 table without difficulty. (AR 404.) She had tenderness over her  
4 paracervical muscles but full range of motion of the cervical  
5 spine and no tenderness, spasm, or deformity of the thoracic  
6 spine. (Id.) She had tenderness over the right paraspinal  
7 muscles without spasm and reduced range of motion of the lumbar  
8 spine. (Id.) Straight-leg raising was negative. (Id.)  
9 Plaintiff had tenderness over the right shoulder joint but full  
10 range of motion, and she had tenderness over the lateral aspect  
11 of her right elbow but an otherwise normal elbow examination.  
12 (AR 405.) Testing showed "[m]ild tendinitis" of both wrists.  
13 (Id.) Tests for "hip pathology" were "mildly positive" in the  
14 right hip but normal in the left. (Id. (emphasis omitted).)  
15 Plaintiff's knees were tender upon palpation, but Dr. Hoang found  
16 "[n]o signs of internal derangement." (Id.) Plaintiff had "[n]o  
17 grip strength loss and no atrophy of the extremities" and intact  
18 motor strength, sensation, and reflexes. (AR 406.)

19 Dr. Hoang diagnosed "[c]ervico-thoracic sprain/strain"  
20 without radiculopathy; right-shoulder, right-hip, and bilateral  
21 knee sprain or strain; right-wrist tendinitis; history of left-  
22 wrist operation with residual tendinitis; and right-elbow sprain  
23 or strain. (Id.) Dr. Hoang believed Plaintiff could lift and  
24 carry 50 pounds occasionally and 25 pounds frequently, stand and  
25 walk for six hours in an eight-hour workday with changes in  
26 position and normal breaks, and sit for six hours in an eight-  
27 hour workday. (Id.)

28 On February 6, 2011, Dr. Craig Billinghamst, who specialized



1 in internal medicine, reviewed Plaintiff's medical records and  
2 completed a physical-residual-functional-capacity assessment.<sup>6</sup>  
3 (AR 417-24.) He listed Plaintiff's diagnoses as "disorder of the  
4 spine" and "carpal tunnel syndrome." (AR 417.) Dr. Billinghamurst  
5 believed Plaintiff could lift 50 pounds occasionally and 25  
6 pounds frequently, stand and walk for about six hours in an  
7 eight-hour workday, sit for about six hours in an eight-hour  
8 workday, perform unlimited pushing and pulling, and perform  
9 "frequent" fine manipulation with both hands. (AR 418, 420.) On  
10 May 10, 2011, Dr. F. Wilson, a general practitioner, reviewed  
11 Plaintiff's medical records and affirmed Dr. Billinghamurst's RFC  
12 assessment.<sup>7</sup> (AR 443-44.)

13 On October 22, 2011, Plaintiff saw Dr. Yi Lang at the  
14 Arthritis and Osteoporosis Center, apparently for the first time,  
15 for a "consult." (AR 479-84.) Dr. Yang noted that Plaintiff had  
16 complained of shoulder, heel, hip, and low-back pain for the  
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21 <sup>6</sup>Dr. Billinghamurst's electronic signature includes a medical  
22 specialty code of 19, indicating internal medicine. (AR 424);  
23 see Program Operations Manual System (POMS) DI 26510.089, U.S.  
24 Soc. Sec. Admin. (Oct. 25, 2011), <http://policy.ssa.gov/poms.nsf/lnx/0426510089>; POMS DI 26510.090, U.S. Soc. Sec. Admin. (Aug. 29, 2012), <http://policy.ssa.gov/poms.nsf/lnx/0426510090>.

25 <sup>7</sup>Dr. Wilson's electronic signature includes a medical  
26 specialty code of 12, indicating "Family or General Practice."  
27 (AR 444); see Program Operations Manual System (POMS) DI  
28 26510.089, U.S. Soc. Sec. Admin. (Oct. 25, 2011), <http://policy.ssa.gov/poms.nsf/lnx/0426510089>; POMS DI 26510.090, U.S. Soc. Sec. Admin. (Aug. 29, 2012), <http://policy.ssa.gov/poms.nsf/lnx/0426510090>.

1 previous 16 years and was taking the medication naproxen.<sup>8</sup> (AR  
2 479.) Upon examination, Dr. Yang found that Plaintiff had  
3 tenderness on palpation and "abnormal" motion of both shoulders  
4 and hips, tenderness on palpation of the cervical and lumbar  
5 spine, spasm of the muscles of the thoracic and lumbar spine,  
6 positive straight-leg tests on the right and left, tenderness but  
7 normal motion of the knee, and 16 positive "trigger points" out  
8 of 18.<sup>9</sup> (AR 482.) Plaintiff had normal motor strength,  
9 sensation, reflexes, gait, and stance. (Id.) Dr. Yang assessed  
10 "[l]ocalized primary osteoarthritis" of the right foot,  
11 trochanteric bursitis,<sup>10</sup> subacromial bursitis,<sup>11</sup> "possible"  
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13 <sup>8</sup>Naproxen is an NSAID used to relieve pain, tenderness,  
14 swelling, and stiffness caused by various types of arthritis.  
15 Naproxen, MedlinePlus, [http://www.nlm.nih.gov/medlineplus/  
16 druginfo/meds/a681029.html](http://www.nlm.nih.gov/medlineplus/druginfo/meds/a681029.html) (last updated Feb. 19, 2014).  
Nonprescription naproxen is used to reduce fever and relieve mild  
16 pain. Id.

17 <sup>9</sup>Trigger points, or tender points, "are pain points or  
18 localized areas of tenderness around joints, but not the joints  
19 themselves," that "hurt when pressed with a finger."  
20 Fibromyalgia Tender Points, WebMD, [http://www.webmd.com/  
21 fibromyalgia/guide/fibromyalgia-tender-points-trigger-points](http://www.webmd.com/fibromyalgia/guide/fibromyalgia-tender-points-trigger-points)  
22 (last updated May 24, 2014). In the past, a fibromyalgia  
23 diagnosis was based on whether a person had pain when tender  
24 points were pressed firmly, but "[n]ewer guidelines don't require  
25 a tender point exam"; "[i]nstead, a fibromyalgia diagnosis can be  
26 made if a person has had widespread pain for more than three  
27 months - with no underlying medical condition that could cause  
28 the pain." Fibromyalgia, Mayo Clinic, [http://www.mayoclinic.org/  
/diseases-conditions/fibromyalgia/basics/tests-diagnosis/con-2001  
9243](http://www.mayoclinic.org/diseases-conditions/fibromyalgia/basics/tests-diagnosis/con-20019243) (last updated Feb. 20, 2014). Plaintiff mistakenly states  
that Dr. Yang found that Plaintiff had 18 positive trigger  
points, rather than 16, at several of her examinations. (See J.  
Stip. at 4-5.)

<sup>10</sup>"Bursitis is an inflammation of the small sacs of fluid  
(bursae) that cushion and lubricate the areas between tendons and  
bones." Trochanteric Bursitis - Topic Overview, WebMD,

1 fibromyalgia, insomnia, and chronic lower-back pain. (AR 483.)  
2 Her treatment plan included physical therapy, hip and shoulder  
3 steroid injections, and x-rays; the medications baclofen and  
4 amitriptyline;<sup>12</sup> and exercise and weight loss. (AR 483-84.)

5 On November 5, 2011, Dr. Yang's examination findings and  
6 assessment were consistent with her findings on October 22. (See  
7 AR 475-76.) She administered steroid injections in Plaintiff's  
8 right hip and shoulder and recommended that she continue taking  
9 baclofen and amitriptyline. (AR 477.)

10 On January 5, 2012, the ALJ found Plaintiff not disabled.  
11 (AR 15-20.) In doing so, the ALJ summarized the opinions of the  
12 consulting doctors and examining physician Hoang. (AR 18.) He  
13 gave "significant weight" to Dr. Hoang's assessment "because he  
14 examined [Plaintiff] and his conclusions are not rebutted by any  
15 treating source." (Id.) The ALJ did not address Dr. Yang's

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[http://www.webmd.com/pain-management/tc/trochanteric-bursitis-top](http://www.webmd.com/pain-management/tc/trochanteric-bursitis-topic-overview)  
19 [ic-overview](http://www.webmd.com/pain-management/tc/trochanteric-bursitis-topic-overview) (last updated Aug. 2, 2012). "The trochanteric bursa  
20 is a large sac separating the greater trochanter of the hip and  
21 the muscles and tendons of the thighs and buttock." Id.

22 <sup>11</sup>The subacromial bursa is a sac of fluid that separates the  
23 acromion from the rotator cuff in the shoulder. See What is  
24 subacromial bursitis?, UNC School of Medicine, [http://www.med.](http://www.med.unc.edu/fammed/fammedcenter/about-us/services/sportsmedicine/)  
25 [unc.edu/fammed/fammedcenter/about-us/services/sportsmedicine/](http://www.med.unc.edu/fammed/fammedcenter/about-us/services/sportsmedicine/)  
26 (last accessed June 12, 2014).

27 <sup>12</sup>Baclofen acts on the spinal cord nerves and decreases the  
28 number and severity of muscle spasms caused by multiple sclerosis  
or spinal cord diseases; it also relieves pain and improves  
muscle movement. Baclofen Oral, MedlinePlus, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682530.html> (last updated Sept. 1,  
2010). Amitriptyline is a tricyclic antidepressant used to treat  
symptoms of depression. Amitriptyline, MedlinePlus,  
<http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682388.html>  
(last updated Aug. 1, 2010).

1 treatment notes (see AR 15-20), which were already in the record  
2 (AR 25, 472-84).

3 Plaintiff requested review of the ALJ's decision and  
4 submitted several additional medical records to the Appeals  
5 Council. (AR 8, 508-77.) The council reviewed the new evidence  
6 and ordered that it be made part of the administrative record but  
7 concluded that it "d[id] not provide a basis for changing the  
8 [ALJ's] decision." (AR 1-5.) The new evidence included, among  
9 other things, additional treatment records and a "Physical  
10 Residual Functional Capacity Questionnaire" from Dr. Yang. (See  
11 AR 508-77.) The treatment records show that Dr. Yang saw  
12 Plaintiff on December 29, 2011, and March 8, April 5, and May 17,  
13 2012. (AR 525-48.) On those dates, physical exams revealed  
14 tenderness and abnormal range of motion of both shoulders (AR  
15 527, 533, 539, 546), tenderness on palpation of the cervical and  
16 lumbar spine (AR 527-28, 533-34, 539, 546), spasm of the  
17 thoracic- and lumbar-spine muscles (AR 527-28, 533-34, 539, 546),  
18 positive straight-leg-raising tests bilaterally (AR 528, 534,  
19 539, 546), tenderness on palpation and abnormal range of motion  
20 of the hips (AR 528, 534, 539, 546), tenderness on palpation of  
21 the right foot (AR 528, 534, 540, 546), and positive findings at  
22 16 of 18 trigger points (AR 528, 534, 540, 546). Plaintiff had  
23 normal sensation, motor strength, gait, stance, and reflexes.  
24 (AR 528, 534, 540, 546.) Dr. Yang also noted the results of a  
25 January 12, 2012 lumbar-spine MRI, which showed "multiple disc  
26 protrusions, worse in L4-L5, and mild to mod[erate] facet joint  
27 effusion in L3-4 and L2-3." (AR 529, 535; see also AR 575-77  
28 (MRI report).)

1 Dr. Yang recommended that Plaintiff continue physical  
2 therapy (AR 536, 541, 548) and prescribed additional medications,  
3 including a Lidoderm patch<sup>13</sup> (AR 548), Neurontin "for lower back  
4 pain and [fibromyalgia]"<sup>14</sup> (id.), and Cymbalta for fibromyalgia<sup>15</sup>  
5 (AR 535). She also administered an additional steroid injection  
6 (AR 529, 536) and noted that Plaintiff should have an "ortho  
7 spine consult if her back pain persists" (AR 541, 536) and would  
8 be "refer[red] to epidural inj[ection] if her back pain persists  
9 after" physical therapy (AR 530).

10 Dr. Yang's physical-RFC questionnaire, dated April 5, 2012,  
11 listed Plaintiff's diagnoses as degenerative disc disease of the  
12 lumbar spine, fibromyalgia, and "b. trochanteric bursitis." (AR  
13 517.) She noted that her assessment was supported by "trigger  
14 point 18/18," tenderness on palpation of the trochanteric bursa,  
15 tenderness in the lumbar spine, and positive straight-leg-raising  
16 tests. (Id.) She believed Plaintiff could walk two blocks  
17 without resting, sit for 30 minutes and stand for 15 minutes at a

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19 <sup>13</sup>Lidoderm, or lidocaine, is a local anesthetic used to  
20 relieve the pain of postherpetic neuralgia. Lidocaine  
21 Transdermal Patch, MedlinePlus, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a603026.html> (last updated June 13, 2013).

22 <sup>14</sup>Neurontin, or gabapentin, is an anticonvulsant used to  
23 treat seizures, postherpetic neuralgia, and restless leg  
24 syndrome. Gabapentin, MedlinePlus, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a694007.html> (last updated July 15, 2011).

25 <sup>15</sup>Cymbalta, or duloxetine, is a selective serotonin and  
26 norepinephrine reuptake inhibitor used to treat depression,  
27 generalized anxiety disorder, bone and muscle pain, and pain and  
28 tingling caused by diabetic neuropathy and fibromyalgia.  
Duloxetine, MedlinePlus, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a604030.html> (last updated Feb. 15, 2013).

1 time, sit for four hours and stand for four hours total in an  
2 eight-hour day, lift and carry less than 10 pounds frequently and  
3 10 to 20 pounds occasionally, and never lift or carry 50 pounds.  
4 (AR 519-20.) Dr. Yang believed that in an eight-hour workday,  
5 Plaintiff would need to walk five minutes every 30 minutes; shift  
6 at will from sitting, standing, or walking; and take unscheduled  
7 15-minute breaks every two hours. (Id.) She believed Plaintiff  
8 could reach, perform fine manipulations, and grasp or turn  
9 objects each for only 20 percent of the workday and could bend or  
10 twist at the waist each for only 10 percent of the workday. (AR  
11 520.) Dr. Yang believed that Plaintiff's pain and other symptoms  
12 would "[c]onstantly" interfere with her attention and  
13 concentration (AR 518) and that her impairments or treatment  
14 would cause her to be absent from work about three times a month  
15 (AR 521). She stated that her description of Plaintiff's  
16 symptoms and limitations applied as early as "2 years ago."  
17 (Id.)

18 C. Discussion

19 Remand is necessary because Dr. Yang's questionnaire renders  
20 the ALJ's RFC assessment unsupported by substantial evidence.  
21 See Brewes, 682 F.3d at 1163. The ALJ credited the opinion of  
22 examining physician Hoang for two reasons: he had examined  
23 Plaintiff and his conclusions were "not rebutted by any treating  
24 source." (AR 18.) Dr. Yang, however, also examined Plaintiff,  
25 and her opinion differed in material respects from Dr. Hoang's.  
26 Because the ALJ explicitly relied on an absence of any contrary  
27 treating-physician opinion in adopting Dr. Hoang's opinion, Dr.  
28 Yang's findings might have changed the outcome of the case. See

1 Borrelli, 2014 WL 1492736, at \*1 (remanding when ALJ "explicitly  
2 based his decision on the absence of recent medical records" and  
3 thus new records that "reflect consistent and ongoing efforts to  
4 resolve [plaintiff's] symptoms . . . might have changed the  
5 outcome of the case").

6       Indeed, Dr. Yang's opinion of Plaintiff's functional  
7 capacity - such as her finding that Plaintiff could stand and  
8 walk only four hours in an eight-hour day, lift and carry only 20  
9 pounds occasionally and less than 10 pounds frequently, bend and  
10 twist at the waist each only 10 percent of the workday, and reach  
11 only 20 percent of the workday - is inconsistent with the ALJ's  
12 finding that Plaintiff could perform a "full range" of medium  
13 work. See §§ 404.1567(c), 416.967(c) (medium work involves  
14 "lifting no more than 50 pounds at a time with frequent lifting  
15 or carrying of objects weighing up to 25 pounds"); SSR 83-10,  
16 1983 WL 31251, at \*6 (Jan. 1, 1983) ("full range of medium work  
17 requires standing or walking, off and on, for a total of  
18 approximately 6 hours in an 8-hour workday" and "usually requires  
19 frequent bending-stooping"). Such limitations, if credited,  
20 could potentially lead the ALJ to find Plaintiff disabled,  
21 although it is impossible to determine that for certain because  
22 they were not all presented to the VE in any hypothetical. See  
23 Borrelli, 2014 WL 1492736, at \*1 (remanding in part because "the  
24 new evidence suggests that neither the judge nor the vocational  
25 expert posed a hypothetical that accurately reflects  
26 [plaintiff's] abilities and limitations").

27       Moreover, as a treating physician, Dr. Yang's opinion is  
28 generally entitled to more weight than the opinion of an

1 examining doctor, see Lester, 81 F.3d at 830; §§ 404.1527(c)(2),  
2 416.927(c)(2) (“[g]enerally, we give more weight to opinions from  
3 your treating sources”); further, unlike Dr. Hoang, Dr. Yang  
4 reviewed several of Plaintiff’s test results, including x-rays  
5 and a January 12, 2012 lumbar-spine MRI, before rendering her  
6 opinion (see AR 483, 534-35, 540, 547, 575; see also AR 403 (Dr.  
7 Hoang’s report stating “REVIEW OF MEDICAL RECORDS: None”));  
8 §§ 404.1527(c)(6), 416.927(c)(6) (“the extent to which an  
9 acceptable medical source is familiar with the other information  
10 in your case record [is a] relevant factor[] that we will  
11 consider in deciding the weight to give to a medical opinion”).  
12 And although Dr. Yang’s assessment postdates the ALJ’s decision  
13 by three months, she treated Plaintiff three times before the ALJ  
14 issued his decision and stated that her assessment of Plaintiff’s  
15 limitations applied as of two years earlier. As such, it relates  
16 to the period on or before the date of the ALJ’s decision.<sup>16</sup> See  
17 Taylor 659 F.3d at 1232-33 (treating physician opinion that  
18 postdated ALJ decision “related to the period . . . before the  
19 ALJ’s decision” because it “concerned his assessment of  
20 [plaintiff’s] mental health since his alleged disability onset  
21 date” and before expiration of disability insurance, during which  
22 time physician examined plaintiff twice, supervised treating

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24 <sup>16</sup>As the Commissioner notes, Dr. Yang checked a box on the  
25 RFC questionnaire indicating that Plaintiff’s impairments had not  
26 lasted or could not be expected to last for at least 12 months  
27 (J. Stip. at 12 (citing AR 518)), but that appears to be an error  
28 because it conflicts with her express opinion that Plaintiff’s  
limitations had existed as described for up to two years (AR  
521). In any event, the ALJ can consider that contradiction when  
determining on remand the weight to be accorded Dr. Yang’s  
opinion.



1 nurse practitioner, and approved nurse practitioner's  
2 prescriptions).

3 Considering the evidence as a whole, including the evidence  
4 submitted to the Appeals Council and made part of the  
5 administrative record, the ALJ's RFC assessment is not supported  
6 by substantial evidence. As such, remand is warranted. See  
7 Bayliss, 427 F.3d at 1217.

#### 8 **VI. CONCLUSION**

9 When error exists in an administrative determination, "the  
10 proper course, except in rare circumstances, is to remand to the  
11 agency for additional investigation or explanation." INS v.  
12 Ventura, 537 U.S. 12, 16 (2002) (per curiam) (internal quotation  
13 marks omitted); Moisa v. Barnhart, 367 F.3d 882, 886 (9th Cir.  
14 2004). Accordingly, remand, not an award of benefits, is the  
15 proper course in this case. See Strauss v. Comm'r of Soc. Sec.  
16 Admin., 635 F.3d 1135, 1136, 1138 (9th Cir. 2011) (remand for  
17 automatic payment of benefits inappropriate unless evidence  
18 unequivocally establishes disability). On remand, the ALJ should  
19 determine the weight to be accorded Dr. Yang's opinion and  
20 reassess Plaintiff's RFC in light of the evidence made part of  
21 the administrative record by order of the Appeals Council.

#### 22 **ORDER**

23 Accordingly, **IT IS HEREBY ORDERED** that (1) the decision of  
24 the Commissioner is REVERSED; (2) Plaintiff's request for remand  
25 is GRANTED; and (3) this action is REMANDED for further  
26 proceedings consistent with this Memorandum Opinion.

1           **IT IS FURTHER ORDERED** that the Clerk of the Court serve  
2 copies of this Order and the Judgment on all parties or their  
3 counsel.

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6 DATED: June 18, 2014

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JEAN ROSENBLUTH  
8 U.S. Magistrate Judge  
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