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

CLAUDIA JUANA MADRIGAL,	)	NO. CV 16-8714-E
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM OPINION</b>
	)	
NANCY A. BERRYHILL, Acting	)	<b>AND ORDER OF REMAND</b>
Commissioner of Social Security,	)	
	)	
Defendant.	)	
	)	

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS  
HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
judgment are denied, and this matter is remanded for further  
administrative action consistent with this Opinion.

**PROCEEDINGS**

Plaintiff filed a Complaint on November 22, 2016, seeking review  
of the Commissioner's denial of benefits. The parties filed a consent  
to proceed before a United States Magistrate Judge on January 9, 2017.  
///

1 Plaintiff filed a motion for summary judgment on April 28, 2017.  
2 Defendant filed a motion for summary judgment on May 30, 2017. The  
3 Court has taken both motions under submission without oral argument.  
4 See L.R. 7-15; "Order," filed November 28, 2016.

5  
6 **BACKGROUND**  
7

8 On June 25, 2013, Plaintiff applied for disability insurance  
9 benefits and supplemental security income, alleging disability  
10 beginning December 22, 2011, when she was injured at work  
11 (Administrative Record ("A.R.") 158-72, 190, 256, 444). At the time  
12 of her injury, Plaintiff was pregnant (A.R. 256).

13  
14 A Workers' Compensation orthopedist, Dr. Kevin Pelton of  
15 "Advanced Orthopedics," treated Plaintiff for radiating pain from  
16 February of 2012 through at least August of 2014 (A.R. 384-450, 467-  
17 71, 473-88). Dr. Pelton diagnosed a lumbosacral musculoligamentous  
18 sprain/strain, and a 4-millimeter disc bulge at L4-L5 and bilateral  
19 lower extremity radiculitis (A.R. 448, 467). Because Plaintiff was  
20 pregnant, Dr. Pelton initially treated Plaintiff with only physical  
21 therapy and topical pain medication (A.R. 448). After Plaintiff  
22 delivered her baby, Dr. Pelton ordered MRI studies but prescribed no  
23 pain medications because Plaintiff was breast feeding (A.R. 441). The  
24 MRI study of Plaintiff's lumbar spine from April of 2012 showed a 2-3  
25 millimeter disc bulge at L4-5 without evidence of stenosis or neural  
26 foraminal narrowing, and "mild effacement" of the right exiting nerve  
27 root secondary to a 3-4 millimeter disc bulge at L5-S1 (A.R. 372-73;  
28 see also A.R. 378-79 (March, 2011 lumbar spine MRI showing bulges);

1 A.R. 374-75 (September, 2010 cervical spine MRI showing a 1-2  
2 millimeter disc bulge at C5-6 and C6-7 without evidence of stenosis or  
3 neural foraminal narrowing)).<sup>1</sup> In July of 2012, Dr. Pelton stated  
4 that Plaintiff was "still unable to work," and Dr. Pelton indicated  
5 that, if physical therapy did not relieve Plaintiff's symptoms  
6 adequately, Plaintiff might require an epidural injection (A.R. 428).  
7 In August of 2012, Plaintiff was still breast feeding and so was  
8 restricted to using only Tylenol for her pain (A.R. 423). During  
9 Plaintiff's next five visits, Dr. Pelton recommended a trial of  
10 acupuncture and a TENS unit for Plaintiff's pain because Plaintiff's  
11 treatment options still were limited due to the breast feeding (A.R.  
12 404, 408, 411, 414, 417). In April of 2013, Dr. Pelton prescribed 800  
13 milligrams of Motrin and Soma for muscle spasms (A.R. 398). In August  
14 of 2013, Dr. Pelton stated that he was awaiting authorization for a  
15 consultation with a pain management specialist (A.R. 385). In July of  
16 2014, Dr. Pelton stated that Plaintiff had not responded to  
17 conservative treatment so he was "formally requesting" authorization  
18 for a pain management consultation for consideration of epidural  
19 injections (A.R. 476). In August of 2014, authorization for a pain  
20 management consultation and consideration of lumbar epidural steroid  
21 injections reportedly was still pending (A.R. 474). Dr. Pelton opined  
22 that Plaintiff should remain off work, with any return to modified  
23 work occurring as permitted by a Qualified Medical Examiner's opinion  
24

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25  
26 <sup>1</sup> Dr. Pelton noted the following findings on  
27 examinations: (1) spinal tenderness on palpation; (2) limited  
28 range of motion; (3) positive straight leg raising tests for back  
pain; and (4) sometimes radiating pain (A.R. 385, 390, 394, 398,  
404, 408, 411, 414, 417, 428, 432, 436, 440, 467, 469, 480, 484;  
see also R.T. 423 (antalgic gait)).

1 (A.R. 477, 482).<sup>2</sup>

2  
3 On June 12, 2015, an Administrative Law Judge ("ALJ") rejected  
4 Dr. Pelton's opinions that Plaintiff was "temporary totally disabled"  
5 and "must remain off work" (A.R. 26). The ALJ stated:

6  
7 The undersigned finds these conclusions have no probative  
8 value and rejects them. The term "temporarily totally  
9 disabled" and "permanent and stationary" are terms of art in  
10 workers' compensation law that are not determinative under  
11 the different criteria for a finding of disability pursuant  
12 to the Social Security Act. Therefore, a conclusion by a  
13 physician the claimant is "temporarily totally disabled" or  
14 that she must remain off work in the context of a workers'  
15 compensation case is not relevant with regard to the  
16 claimant's applications under the Social Security Act. The  
17 objective clinical and diagnostic evidence used by the  
18 claimant's physicians to come to those conclusions have been  
19 considered. This objective evidence is consistent with a  
20 determination that the claimant could do work subject to the  
21 residual functional capacity assessed herein.

22  
23 (A.R. 26).

24  
25 <sup>2</sup> Although Plaintiff reportedly saw a Qualified Medical  
26 Examiner ("QME") on March 11, 2014 (A.R. 480), and Dr. Pelton  
27 reportedly reviewed the QME's report (A.R. 478), the QME's report  
28 is not a part of the administrative record. According to Dr.  
Pelton, the QME stated that Plaintiff was "permanent and  
stationary" and should be afforded future medical care including  
pain management and epidural injections (A.R. 478).

1 The ALJ adopted a consultative examiner's opinion that Plaintiff  
2 retains the residual functional capacity to perform medium work (A.R.  
3 24-26; see A.R. 459-64). Non-examining state agency physicians  
4 concurred with the consultative examiner's opinion (A.R. 55-69). The  
5 ALJ found that, with this capacity, Plaintiff could return to her past  
6 relevant work and also that Plaintiff could perform other jobs  
7 existing in significant numbers (A.R. 27-28 (adopting vocational  
8 expert testimony at A.R. 47-48)).

9  
10 On October 7, 2016, the Appeals Council considered additional  
11 medical evidence but denied review (A.R. 1-5; see also A.R. 824-923).

#### 12 13 STANDARD OF REVIEW

14  
15 Under 42 U.S.C. section 405(g), this Court reviews the  
16 Administration's decision to determine if: (1) the Administration's  
17 findings are supported by substantial evidence; and (2) the  
18 Administration used correct legal standards. See Carmickle v.  
19 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,  
20 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,  
21 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such  
22 relevant evidence as a reasonable mind might accept as adequate to  
23 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401  
24 (1971) (citation and quotations omitted); see also Widmark v.  
25 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

26  
27 If the evidence can support either outcome, the court may  
28 not substitute its judgment for that of the ALJ. But the

1 Commissioner's decision cannot be affirmed simply by  
2 isolating a specific quantum of supporting evidence.  
3 Rather, a court must consider the record as a whole,  
4 weighing both evidence that supports and evidence that  
5 detracts from the [administrative] conclusion.

6  
7 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and  
8 quotations omitted).

9  
10 Where, as here, the Appeals Council considered additional  
11 evidence but denied review, the additional evidence becomes part of  
12 the record for purposes of the Court's analysis. See Brewes v.  
13 Commissioner, 682 F.3d at 1163 ("[W]hen the Appeals Council considers  
14 new evidence in deciding whether to review a decision of the ALJ, that  
15 evidence becomes part of the administrative record, which the district  
16 court must consider when reviewing the Commissioner's final decision  
17 for substantial evidence"; expressly adopting Ramirez v. Shalala, 8  
18 F.3d 1449, 1452 (9th Cir. 1993)); Taylor v. Commissioner, 659 F.3d  
19 1228, 1231 (2011) (courts may consider evidence presented for the  
20 first time to the Appeals Council "to determine whether, in light of  
21 the record as a whole, the ALJ's decision was supported by substantial  
22 evidence and was free of legal error"); Penny v. Sullivan, 2 F.3d 953,  
23 957 n.7 (9th Cir. 1993) ("the Appeals Council considered this  
24 information and it became part of the record we are required to review  
25 as a whole").

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1 DISCUSSION

2  
3 I. The ALJ Failed to State Legally Sufficient Reasons for Rejecting  
4 Dr. Pelton's Opinions.

5  
6 The ALJ must "consider" and "evaluate" every medical opinion of  
7 record. See 20 C.F.R. § 404.1527(b) and (c) (applying to claims filed  
8 before March 27, 2017). In this consideration and evaluation, an ALJ  
9 "cannot reject [medical] evidence for no reason or the wrong reason."  
10 Cotter v. Harris, 642 F.2d 700, 706-07 (3d Cir. 1981). Nor can the  
11 ALJ make his or her own lay medical assessment. See Day v.  
12 Weinberger, 522 F.2d 1154, 1156 (9th Cir. 1975) (a hearing examiner  
13 not qualified as a medical expert should not make his or her own  
14 exploration and assessment of a claimant's medical condition)  
15 (citation omitted).

16  
17 Under the law of the Ninth Circuit, the opinions of treating  
18 physicians command particular respect. "As a general rule, more  
19 weight should be given to the opinion of the treating source than to  
20 the opinion of doctors who do not treat the claimant." Lester v.  
21 Chater, 81 F.3d 821, 830 (9th Cir. 1995) (citations omitted). A  
22 treating physician's conclusions "must be given substantial weight."  
23 Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988); see Rodriguez v.  
24 Bowen, 876 F.2d 759, 762 (9th Cir. 1989) ("the ALJ must give  
25 sufficient weight to the subjective aspects of a doctor's opinion.  
26 . . . This is especially true when the opinion is that of a treating  
27 physician") (citation omitted); see also Orn v. Astrue, 495 F.3d 625,  
28 631-33 (9th Cir. 2007) (discussing deference owed to treating

1 physicians' opinions). Even where the treating physician's opinions  
2 are contradicted,<sup>3</sup> "if the ALJ wishes to disregard the opinion[s] of  
3 the treating physician he . . . must make findings setting forth  
4 specific, legitimate reasons for doing so that are based on  
5 substantial evidence in the record." Winans v. Bowen, 853 F.2d 643,  
6 647 (9th Cir. 1987) (citation, quotations and brackets omitted); see  
7 Rodriguez v. Bowen, 876 F.2d at 762 ("The ALJ may disregard the  
8 treating physician's opinion, but only by setting forth specific,  
9 legitimate reasons for doing so, and this decision must itself be  
10 based on substantial evidence") (citation and quotations omitted).  
11

12 Here, the ALJ apparently discounted Dr. Pelton's opinions because  
13 of the Workers' Compensation context in which Dr. Pelton rendered  
14 those opinions. However, the purpose for which a medical opinion is  
15 obtained "does not provide a legitimate basis for rejecting it."  
16 Reddick v. Chater, 157 F.3d 715, 726 (9th Cir. 1998); see Nash v.  
17 Colvin, 2016 WL 67677, at \*7 (E.D. Cal. Jan. 5, 2016) ("the ALJ may  
18 not disregard a physician's medical opinion simply because it was  
19 initially elicited in a state workers' compensation proceeding . . .")  
20 (citations and quotations omitted); Casillas v. Colvin, 2015 WL  
21 6553414, at \*3 (C.D. Cal. Oct. 29, 2015) (same); Franco v. Astrue,  
22 2012 WL 3638609, at \*10 (C.D. Cal. Aug. 23, 2012) (same); Booth v.  
23 Barnhart, 181 F. Supp. 2d 1099, 1105 (C.D. Cal. 2002) (same). By  
24 finding Dr. Pelton's opinions "not relevant," the ALJ erred. See id.;  
25 see also Brammer v. Colvin, 2015 WL 9484450, at \*5 (C.D. Cal. Dec. 29,

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26  
27 <sup>3</sup> Rejection of an uncontradicted opinion of a treating  
28 physician requires a statement of "clear and convincing" reasons.  
Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996); Gallant v.  
Heckler, 753 F.2d 1450, 1454 (9th Cir. 1984).

1 2015) ("Although workers' compensation disability ratings are not  
2 controlling in Social Security cases, an ALJ must nevertheless  
3 evaluate medical opinions stated in workers' compensation terminology  
4 just as he would evaluate any other medical opinion.").

5  
6 The ALJ's preference for the opinions of the consultative  
7 examiner and the state agency physicians cannot constitute a  
8 "specific, legitimate" reason for rejecting the opinions of Dr.  
9 Pelton. The contradiction of a treating physician's opinion by  
10 another physician's opinion triggers rather than satisfies the  
11 requirement of stating "specific, legitimate reasons." See, e.g.,  
12 Valentine v. Commissioner, 574 F.3d 685, 692 (9th Cir. 2007); Orn v.  
13 Astrue, 495 F.3d at 631-33; Lester v. Chater, 81 F.3d at 830-31.

14  
15 Defendant argues that the "objective clinical and diagnostic  
16 evidence on examination" was consistent with the residual functional  
17 capacity the consultative examiner assessed and the ALJ adopted. See  
18 Deft's Motion, p. 1. However, the consultative examiner evidently did  
19 not review any of the medical records (A.R. 459). The non-examining  
20 state agency physicians appear to have reviewed a few medical records,  
21 (A.R. 57, 64, 67), but apparently reviewed none of Dr. Pelton's  
22 records. See A.R. 51-53, 61-63 (summarizing evidence apparently  
23 reviewed and indicating that "Advanced Orthopedics" records had been  
24 requested). It is thus uncertain on the current record whether the  
25 "objective clinical and diagnostic evidence on examination" supports  
26 the ALJ's residual functional capacity assessment. No physician of  
27 record was in a position to opine whether the "objective clinical and  
28 diagnostic evidence on examination" from Dr. Pelton was consistent

1 with the assessment. Neither the ALJ nor this Court has the requisite  
2 medical expertise so to opine.

3  
4 Defendant also argues that the ALJ discounted Dr. Pelton's  
5 opinions because Dr. Pelton assertedly prescribed only conservative  
6 treatment. See Deft's Motion, p. 2. In the only paragraph of the  
7 ALJ's decision referencing Dr. Pelton, the ALJ did not mention  
8 conservative treatment as a reason to discount Dr. Pelton's opinions.  
9 See A.R. 26. The Court cannot affirm the ALJ's decision on a ground  
10 the ALJ did not specifically invoke. See Pinto v. Massanari, 249 F.3d  
11 840, 847 (9th Cir. 2001).

12  
13 The ALJ did cite "routine and conservative" treatment as a reason  
14 to discount Plaintiff's credibility (A.R. 25-26).<sup>4</sup> To the extent the  
15 ALJ also may have purported to rely on "conservative" treatment to  
16 reject Dr. Pelton's opinions, such reliance would not be legitimate  
17 under the circumstances of Plaintiff's treatment history. As  
18 indicated above, throughout much of Plaintiff's treatment with Dr.  
19 Pelton, Plaintiff was pregnant or breast feeding. These circumstances  
20 precluded the prescribing of narcotic pain medication. Later, Dr.  
21 Pelton repeatedly requested authorization for more aggressive pain  
22 management, including epidural injections, because Plaintiff had not  
23 responded well to conservative treatment. In any event, the Ninth  
24 Circuit recently has stated that "the failure of a treating physician  
25 to recommend a more aggressive course of treatment, absent more, is

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26  
27 <sup>4</sup> Similarly, the ALJ cited "the lack of aggressive  
28 treatment" as assertedly supporting the opinions of the non-  
treating physicians (A.R. 26).

1 not a legitimate reason to discount the physician's subsequent medical  
2 opinion about the extent of disability." Trevizo v. Berryhill, \_\_\_  
3 F.3d \_\_\_, 2017 WL 2925434, at \*8 (9th Cir. 2017).

4  
5 For all these reasons, the ALJ erred by rejecting the opinions of  
6 the Dr. Pelton without stating legally sufficient reasons for doing  
7 so.

8  
9 **II. The Court is Unable to Conclude that the ALJ's Error was**  
10 **Harmless; Remand is Appropriate.**

11  
12 An error "is harmless where it is inconsequential to the ultimate  
13 non-disability determination." Molina v. Astrue, 674 F.3d 1104, 1115  
14 (9th Cir. 2012) (citations and quotations omitted); see McLeod v.  
15 Astrue, 640 F.3d 881, 887 (9th Cir. 2011) (error not harmless where  
16 "the reviewing court can determine from the 'circumstances of the  
17 case' that further administrative review is needed to determine  
18 whether there was prejudice from the error"). The Court is unable to  
19 deem the error in the present case to have been harmless. See Marsh  
20 v. Colvin, 792 F.3d 1170, 1173 (9th Cir. 2015) (even though the  
21 district court had stated "persuasive reasons" why the ALJ's failure  
22 to mention the treating physician's opinion was harmless, the Ninth  
23 Circuit remanded because "we cannot 'confidently conclude' that the  
24 error was harmless"); Treichler v. Commissioner, 775 F.3d 1090, 1105  
25 (9th Cir. 2014) ("Where, as in this case, an ALJ makes a legal error,  
26 but the record is uncertain and ambiguous, the proper approach is to  
27 remand the case to the agency"). It appears that no competent medical  
28 source has considered Dr. Pelton's findings and opinions that

1 Plaintiff could not return to work or could do so only as permitted by  
2 the QME's report (which is not a part of the record) (A.R. 477, 482).

3  
4 Remand is appropriate because the circumstances of this case  
5 suggest that further administrative review could remedy the error  
6 discussed herein. See McLeod v. Astrue, 640 F.3d at 888; see also INS  
7 v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an administrative  
8 determination, the proper course is remand for additional agency  
9 investigation or explanation, except in rare circumstances); Dominquez  
10 v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) ("Unless the district  
11 court concludes that further administrative proceedings would serve no  
12 useful purpose, it may not remand with a direction to provide  
13 benefits"); Treichler v. Commissioner, 775 F.3d at 1101 n.5 (remand  
14 for further administrative proceedings is the proper remedy "in all  
15 but the rarest cases"); Garrison v. Colvin, 759 F.3d 995, 1020 (9th  
16 Cir. 2014) (court will credit-as-true medical opinion evidence only  
17 where, inter alia, "the record has been fully developed and further  
18 administrative proceedings would serve no useful purpose"); Harman v.  
19 Apfel, 211 F.3d 1172, 1180-81 (9th Cir.), cert. denied, 531 U.S. 1038  
20 (2000) (remand for further proceedings rather than for the immediate  
21 payment of benefits is appropriate where there are "sufficient  
22 unanswered questions in the record"). There remain significant  
23 unanswered questions in the present record. See Marsh v. Colvin, 792  
24 F.3d at 1173 (remanding for further administrative proceedings to  
25 allow the ALJ to "comment on" the treating physician's opinion).  
26 Moreover, it is not clear that the ALJ would be required to find  
27 Plaintiff disabled for the entire claimed period of disability even if  
28 Dr. Pelton's opinions were fully credited. See Luna v. Astrue, 623

