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

ROBERTA FLORES,	)	NO. CV 17-5831-E
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM OPINION</b>
	)	
NANCY A. BERRYHILL, Acting	)	<b>AND ORDER OF REMAND</b>
Commissioner of Social Security,	)	
	)	
Defendant.	)	
	)	

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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 August 7, 2017, seeking review of  
the Commissioner's denial of benefits. The parties filed a consent to  
proceed before a United States Magistrate Judge on September 1, 2017.

///

1 On January 19, 2018, Plaintiff filed a motion for summary  
2 judgment. On February 13, 2018, Defendant filed a "Memorandum in  
3 Support of Defendant's Answer," which the Court has construed as  
4 Defendant's motion for summary judgment. The Court has taken both  
5 motions under submission without oral argument. See L.R. 7-15;  
6 "Order," filed August 15, 2017.<sup>1</sup>

7  
8 **BACKGROUND**

9  
10 Plaintiff, a former medical assistant and office manager,  
11 reportedly stopped working in 2009 after she allegedly injured her  
12 back and neck on the job while lifting a patient (Administrative  
13 Record ("A.R.") 38, 55). Plaintiff filed a related Workers'  
14 Compensation case that settled (A.R. 38-39).

15  
16 On May 8, 2013, Plaintiff applied for disability insurance  
17 benefits, asserting disability beginning February 3, 2010, based on  
18 alleged physical and mental impairments (A.R. 184-85, 198-99, 226-27,  
19 245-46). Presented to an Administrative Law Judge ("ALJ") were, inter  
20 alia:

- 21  
22 1. a February 9, 2011 report authored by her Workers'  
23 Compensation treating orthopedist, Dr. Simon Lavi (A.R. 380-  
24 89). Dr. Lavi opined that Plaintiff's orthopedic  
25 impairments would preclude Plaintiff from "pushing, pulling,  
26

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27 <sup>1</sup> Defendant's motion violates paragraph VI of this  
28 Court's "Order," filed August 15, 2017. Defendant's counsel  
shall heed the Court's orders in the future.

1 gripping, grasping, forward reaching, and working at or  
2 above shoulder level" (A.R. 384-85). These impairments  
3 reportedly included right carpal tunnel syndrome per  
4 clinical evidence (A.R. 284, 289-90, 294, 349-50, 356, 363,  
5 375, 381-82, 384), cervical disc protrusion at C5-C6 and C6-  
6 C7 per MRI study (A.R. 295-96, 384-85), right shoulder  
7 impingement with labral tear per MRI study (A.R. 295-96,  
8 385), and left shoulder impingement syndrome per examination  
9 (A.R. 385, 395));

10  
11 2. a September 12, 2013 internal medicine evaluation report  
12 authored by consultative examiner Dr. Marvin Perer (A.R.  
13 417-21). Dr. Perer opined that Plaintiff's impairments  
14 (which included multiple joint pain of unknown etiology,  
15 right carpal tunnel syndrome, and degenerative disc disease  
16 of the cervical spine (by history)) would limit Plaintiff to  
17 light work with occasional gross manipulation of the right  
18 upper extremity (A.R. 421); and

19  
20 3. state agency review physicians' opinions: (a) on initial  
21 evaluation limiting Plaintiff to light work with "limited"  
22 (i.e., occasional) handling (gross manipulation) of the  
23 right side based on Dr. Perer's opinion (A.R. 71-73); and  
24 (b) on reconsideration limiting Plaintiff to medium work  
25 with "limited" (i.e., occasional) overhead reaching,  
26 bilaterally, but with "unlimited" handling, also purportedly  
27 based, at least in part, on Dr. Perer's opinion (A.R. 111-  
28 12).

1 In a February 10, 2016 decision, the ALJ found that Plaintiff has  
2 the following "severe" impairments: degenerative disc disease,  
3 bilateral shoulder pain, fibromyalgia, obesity, a mood disorder, and  
4 psoriasis (but not carpal tunnel syndrome) (A.R. 17-18). The ALJ  
5 opined that Plaintiff could perform a reduced range of light work  
6 with: (1) occasional postural activities but no climbing of ladders,  
7 ropes or scaffolds; (2) occasional over the shoulder work,  
8 bilaterally; (3) no work around unprotected heights or dangerous  
9 machinery; (4) non-complex routine tasks but no tasks requiring  
10 hypervigilance, responsibility for the safety of others, or public  
11 interaction (A.R. 21-27). The ALJ identified certain light work jobs  
12 Plaintiff assertedly could perform, and, on that basis, denied  
13 disability benefits (A.R. 28-29 (adopting vocational expert testimony  
14 at A.R. 55-57)).

15  
16 In determining Plaintiff's residual functional capacity, the ALJ  
17 purportedly gave "some weight" to Dr. Lavi's opinion as consistent  
18 with Dr. Lavi's clinical findings (A.R. 26). However, the ALJ did not  
19 adopt Dr. Lavi's preclusions from pushing, pulling, gripping,  
20 grasping, forward reaching, and working at or above shoulder level  
21 (A.R. 26). The ALJ described these preclusions as "relatively  
22 reasonable," and yet failed to adopt them, ostensibly because Dr. Lavi  
23 had "not performed any recent evaluations" of Plaintiff or reviewed  
24 additional records in evidence (A.R. 26). The ALJ gave "little  
25 weight" to Dr. Perer's opinion that Plaintiff should be limited to  
26 occasional gross manipulation of the right upper extremity (A.R. 26).  
27 The ALJ asserted that Dr. Perer's opinion was based on "only one brief  
28 encounter," that Dr. Perer failed to review all the medical records,

1 and that EMG results supposedly showed that Plaintiff does not  
2 currently have right carpal tunnel syndrome (A.R. 26). The ALJ  
3 purportedly gave "great weight" to the state agency review physicians'  
4 opinions in part because these physicians "had the opportunity to  
5 review some of the records in evidence" (A.R. 25).

6  
7 On June 19, 2017, the Appeals Council denied review (A.R. 1-4).  
8 Plaintiff had submitted to the Appeals Council additional evidence  
9 dated September 23, 2015 through February 3, 2016 (during the alleged  
10 disability period), which the Appeals Council declined to "consider  
11 and exhibit" (A.R. 2). The Appeals Council stated that the evidence  
12 did not show a reasonable possibility of changing the outcome of the  
13 decision (A.R. 2). Plaintiff also had submitted to the Appeals  
14 Council additional medical evidence post-dating the ALJ's decision,  
15 which the Appeals Council declined to include in the record, stating  
16 that the evidence did not relate to the disability period at issue  
17 (A.R. 2).

#### 18 19 **STANDARD OF REVIEW**

20  
21 Under 42 U.S.C. section 405(g), this Court reviews the  
22 Administration's decision to determine if: (1) the Administration's  
23 findings are supported by substantial evidence; and (2) the  
24 Administration used correct legal standards. See Carmickle v.  
25 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,  
26 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,  
27 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such  
28 relevant evidence as a reasonable mind might accept as adequate to

1 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401  
2 (1971) (citation and quotations omitted); see also Widmark v.  
3 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

4  
5 If the evidence can support either outcome, the court may  
6 not substitute its judgment for that of the ALJ. But the  
7 Commissioner's decision cannot be affirmed simply by  
8 isolating a specific quantum of supporting evidence.  
9 Rather, a court must consider the record as a whole,  
10 weighing both evidence that supports and evidence that  
11 detracts from the [administrative] conclusion.

12  
13 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and  
14 quotations omitted).

## 15 16 DISCUSSION

### 17 18 I. On the Present Record, Substantial Evidence Does Not Support the 19 ALJ's Decision.

20  
21 The ALJ's decision purports to rely on the opinions of the non-  
22 examining state agency physicians to find Plaintiff capable of  
23 performing occasional over the shoulder work, bilaterally, with no  
24 other manipulative limitations (A.R. 25). Plaintiff challenges the  
25 ALJ's rejection of the contrary opinions of Plaintiff's treating  
26 physician, Dr. Lavi. See Plaintiff's Motion, pp. 8-9. For the  
27 reasons discussed below, the ALJ materially erred in the evaluation of  
28 Plaintiff's alleged physical impairments.

1           **A. Summary of Dr. Lavi's Treatment Records and the Medical**  
2           **Opinion Evidence Concerning Plaintiff's Alleged Physical**  
3           **Impairments**  
4

5           Dr. Lavi first examined Plaintiff on March 15, 2010 (A.R. 280-  
6 87). Plaintiff reported she developed pain to her right wrist in  
7 2005, which she attributed to the repetitive typing and filing  
8 required by her job (A.R. 281). Plaintiff reported that she began  
9 having neck and bilateral shoulder pain in mid-2008, which she  
10 attributed to the repetitive lifting of file boxes (A.R. 281). Over  
11 time, her symptoms reportedly increased, and by 2009 Plaintiff  
12 allegedly was having headaches and difficulty sleeping (A.R. 281). In  
13 December of 2009, Plaintiff reportedly developed symptoms of  
14 depression and nausea associated with burning in her stomach, which  
15 she attributed to job-related stress (A.R. 281). On February 4, 2010,  
16 Plaintiff sought treatment with her personal physician and was taken  
17 off work secondary to stress (A.R. 281). Plaintiff reported continued  
18 numbness in her fingers and pain in her right wrist, neck, and  
19 shoulders since being off work (A.R. 281). Plaintiff complained of:  
20 (1) constant pain in the cervical spine radiating to the upper  
21 extremities and paresthesia, aggravated by repetitive motions of the  
22 neck, lifting, pushing, pulling, forward reaching, and working at or  
23 above shoulder level; (2) intermittent pain in both shoulders  
24 aggravated by forward reaching, lifting, pushing, pulling, and working  
25 at or above shoulder level; (3) intermittent pain in the right wrist  
26 associated with tingling and numbness, aggravated by gripping,  
27 grasping, pushing, pulling, and lifting, which causes difficulty with  
28 fine manipulation (A.R. 282).

1 On examination of the cervical spine, Dr. Lavi noted  
2 paravertebral muscle tension, positive axial loading compression, and  
3 positive Spurling's maneuver with symptomatology into the C5-C6 and  
4 C6-C7 dermatomes, right side more pronounced than left (A.R. 283).  
5 Examination of Plaintiff's shoulders reportedly revealed tenderness in  
6 the bilateral trapezius and deltoid regions, positive axial loading  
7 compression, tenderness around the anterior glenohumeral region and  
8 subacromial space, and positive Hawkins and impingement signs (A.R.  
9 284). Examination of Plaintiff's right wrist reportedly revealed  
10 tenderness at the volar aspect, positive Tinel and Phalen signs, pain  
11 with terminal flexion, and dysethesia at the radial digits (A.R. 284).  
12 X-rays of Plaintiff's cervical spine showed disc space height collapse  
13 at C5-C6 and C6-C7 with unconvertrebral joint arthrosis and  
14 calcification over the anterior longitudinal ligament (A.R. 284). X-  
15 rays of Plaintiff's shoulders showed no abnormalities (A.R. 284). Dr.  
16 Lavi diagnosed cervical discopathy/radiculitis, right greater than  
17 left, and clinical right carpal tunnel syndrome (A.R. 284). Dr. Lavi  
18 noted to rule out bilateral shoulder impingement/rotator cuff tear  
19 (A.R. 284). Dr. Lavi ordered further testing and prescribed  
20 acupuncture, physical therapy, and medication (A.R. 285). Dr. Lavi  
21 considered Plaintiff temporarily totally disabled and ordered follow  
22 up in several weeks (A.R. 286).

23  
24 Dr. Lavi's physician's assistant evaluated Plaintiff again in  
25 April and May of 2010 (A.R. 288-98). This assistant prepared progress  
26 reports which Dr. Lavi reviewed and approved (A.R. 288-98).  
27 Examination findings did not change (A.R. 289-90, 294).  
28 Electrodiagnostic studies of the bilateral upper extremities were



1 normal (A.R. 295; see also A.R. 495-500 (normal electrodiagnostic  
2 studies from September 2015)). An MRI of the cervical spine showed  
3 mild levoscoliosis, straightening of the cervical spine, a 2-3 mm disc  
4 protrusion at C5-C6, and a 3-4 mm disc protrusion at C6-C7  
5 compromising the nerve root on the left (A.R. 295; see also A.R. 494  
6 (September 2015 cervical spine MRI showing similar findings)). An MRI  
7 of the right shoulder showed superior and anterior labral tears,  
8 athrosis of the the acromioclavicular joint, downward sloping of the  
9 acromion, impingement, several benign cysts, fluid in the joint,  
10 anterior and posterior capsulitis, and sprain (A.R. 295). The report  
11 reflects additional diagnoses of cervical disc protrusion at C5-C6 and  
12 C6-C7, and right shoulder impingement with labral tear (A.R. 296).  
13 Plaintiff was referred for pain management (A.R. 297).

14  
15 Dr. Lavi evaluated Plaintiff again in June of 2010 and prepared a  
16 progress report (A.R. 348-54). Plaintiff complained of increasing  
17 symptomatology and progressive weakness in the upper extremities (A.R.  
18 349). Plaintiff reportedly had failed all "conservative [treatment]  
19 measures" (i.e., activity modification, physical therapy, and pain  
20 management) (A.R. 349). Physical examination revealed findings  
21 similar to the findings made during Dr. Lavi's initial examination.  
22 Compare A.R. 349-50 with A.R. 283-84. Diagnoses remained unchanged  
23 from the May visit (A.R. 350). Dr. Lavi injected Plaintiff's right  
24 shoulder with Celestone, Lidocaine, and Marcaine, and reported  
25 significant symptom relief subsequent to the injection (A.R. 350).  
26 Dr. Lavi ordered pain medication and requested approval for a C5-C6  
27 and C6-C7 anterior cervical microdiscectomy with implantation of  
28 dynamic hardware (A.R. 351-52). According to Dr. Lavi, Plaintiff

1 remained temporarily totally disabled (A.R. 353).  
2

3 Dr. Lavi's physician's assistant evaluated Plaintiff in August of  
4 2010, November of 2010, and January of 2011 (A.R. 355-67, 374-79).  
5 Findings on examinations were consistent with prior findings.  
6 Compare A.R. 356, 363, and 375 with A.R. 283-84, 349-50. By November  
7 of 2010, Plaintiff had received a cervical epidural steroid injection  
8 with some relief of her symptomatology (A.R. 363). By January of  
9 2011, Plaintiff had received a second cervical steroid injection with  
10 some improvement (A.R. 375). Plaintiff was approved to follow up with  
11 other specialists (A.R. 365, 377). Plaintiff was awaiting  
12 authorization for cervical spine surgery (A.R. 377). According to Dr.  
13 Lavi's physician's assistant, Plaintiff remained temporarily totally  
14 disabled (A.R. 378).  
15

16 Dr. Lavi prepared a "Permanent and Stationary" report dated  
17 February 9, 2011 (A.R. 380-89). Dr. Lavi stated that Plaintiff's  
18 relief from cervical steroid injections was "short-lived," and  
19 Plaintiff still was awaiting surgical authorization (A.R. 380-81).  
20 Examination findings reportedly were unchanged (A.R. 381). Dr. Lavi  
21 believed Plaintiff's condition had plateaued, and Dr. Lavi considered  
22 Plaintiff permanent and stationary based on: (1) clinical evidence of  
23 right wrist carpal tunnel syndrome (including positive Tinel and  
24 Phalen signs); (2) MRI findings consistent with examinations of the  
25 cervical spine and right shoulder; and (3) and positive signs of left  
26 shoulder impingement and tenderness over the subacromial region on  
27 examination (A.R. 384-85; see also A.R. 395 (supplemental report  
28 noting omitted diagnosis of left shoulder impingement syndrome)). Dr.

1 Lavi opined that Plaintiff should be precluded from: "repetitive  
2 and/or prolonged positioning of the cervical spine, heavy lifting,  
3 pushing, pulling, gripping, grasping, forward reaching and working at  
4 or above shoulder level" (A.R. 385). Dr. Lavi stated that Plaintiff  
5 should be considered a "Qualified Injured Worker" for vocational  
6 rehabilitation training to enable Plaintiff to resume gainful  
7 employment within Dr. Lavi's recommended guidelines (preclusions)  
8 (A.R. 386).

9  
10 Consultative examiner Dr. Perer prepared an internal medicine  
11 evaluation dated September 12, 2013 (A.R. 417-21). There is no  
12 indication whether Dr. Perer reviewed any medical records (A.R. 417).  
13 During the examination, Plaintiff complained of headaches, joint pain  
14 (shoulders, elbows, hips, and knees), and neck and back pain (A.R.  
15 417-18). Plaintiff reportedly was taking several medications (A.R.  
16 418). Examination was unremarkable but for notations that Plaintiff  
17 was obese and had a positive Tinel sign on the right wrist (A.R. 418-  
18 21). Dr. Perer diagnosed multiple joint pain of unclear etiology,  
19 right carpal tunnel syndrome, and degenerative disc disease of the  
20 cervical spine (by history) (A.R. 421). Dr. Perer opined that  
21 Plaintiff would be limited to light work with only occasional gross  
22 manipulation of the right upper extremity (A.R. 421).

23  
24 Consultative examiner Dr. Mehran Sourehnissani prepared an  
25 internal medicine evaluation dated February 20, 2014 (A.R. 448-52).  
26 There is no indication whether Dr. Sourehnissani reviewed any medical  
27 records (A.R. 449). During the examination, Plaintiff complained of  
28 generalized body aches (i.e., pain in her entire body and joints),

1 lack of energy, lack of refreshed sleep, and said she had been  
2 diagnosed with fibromyalgia (A.R. 448). Examination was unremarkable  
3 but for notations that Plaintiff was obese, had zero to two pounds of  
4 grip strength in her hands "with poor effort," and had trigger point  
5 tenderness (A.R. 449-51). Dr. Sourehnissani diagnosed fibromyalgia  
6 syndrome and right knee pain status post arthroscopic surgery (A.R.  
7 451). Dr. Sourehnissani opined that Plaintiff could perform medium  
8 work with no limitations (A.R. 452).

9  
10 On initial review in September of 2013, Dr. William Collie, a  
11 non-examining state agency review physician, reviewed portions of the  
12 medical record including treatment records from Dr. Lavi, Dr. Lavi's  
13 Permanent and Stationary Report, and Dr. Perer's opinion (A.R. 64-78).  
14 Dr. Collie reportedly gave "great weight" to Dr. Perer's opinion (A.R.  
15 71). Dr. Collie purportedly did not consider the opinions expressed  
16 in Dr. Lavi's Permanent and Stationary Report to constitute medical  
17 opinions, and Dr. Collie did not indicate whether he gave any weight  
18 to Dr. Lavi's opinions. See A.R. 67 (describing Dr. Lavi's records as  
19 containing no opinion evidence), A.R. 71 (excluding Dr. Lavi's  
20 opinions from "treating sources with medical opinions"). Dr. Collie  
21 opined that Plaintiff has a residual functional capacity for a reduced  
22 range of light work with, inter alia, "limited" (occasional) handling  
23 (gross manipulation) on the right side based on Dr. Perer's evaluation  
24 (A.R. 71-73).

25  
26 On reconsideration, Dr. H. Pham, another non-examining state  
27 agency review physician, reviewed additional medical records and  
28 opinions from doctor(s) with South Atlantic Medical Group from April

1 and May of 2014 (A.R. 97-117). These records and opinions reviewed by  
2 Dr. Pham are not a part of the Administrative Record. Dr. Pham  
3 reportedly gave "great weight" to Dr. Perer's opinion and to the  
4 missing South Atlantic Medical Group opinions (A.R. 111). Like Dr.  
5 Collie, Dr. Pham did not consider Dr. Lavi's opinions to constitute  
6 medical opinions (A.R. 104-05, 111). Dr. Pham opined that Plaintiff  
7 has a residual functional capacity for medium work with, inter alia,  
8 "limited" (occasional) overhead reaching, bilaterally, but with  
9 unlimited handling (A.R. 111-12).

10  
11 **B. Substantial Evidence Does Not Support the ALJ's Residual**  
12 **Functional Capacity Determination; the ALJ Failed to Provide**  
13 **Legally Sufficient Reasons for Discounting or Rejecting Dr.**  
14 **Lavi's Opinions.**  
15

16 The opinions of the non-examining state agency physicians, which  
17 contradict Dr. Lavi's opinions, do not constitute substantial evidence  
18 to support the ALJ's decision. "The opinion of a nonexamining  
19 physician cannot by itself constitute substantial evidence that  
20 justifies the rejection of the opinion of either an examining  
21 physician or a treating physician." Lester v. Chater, 81 F.3d 821,  
22 831 (9th Cir. 1995) (emphasis in original); see also Orn v. Astrue,  
23 495 F.3d 625, 632 (9th Cir. 2007) ("When [a nontreating] physician  
24 relies on the same clinical findings as a treating physician, but  
25 differs only in his or her conclusions, the conclusions of the  
26 [nontreating] physician are not 'substantial evidence.'"); Pitzer v.  
27 Sullivan, 908 F.2d 502, 506 n.4 (9th Cir. 1990) ("The nonexamining  
28 physicians' conclusion, with nothing more, does not constitute

1 substantial evidence, particularly in view of the conflicting  
2 observations, opinions, and conclusions of an examining physician").

3  
4 In this case, the state agency review physicians did not even  
5 consider Dr. Lavi's opinions to be medical opinions. In actuality,  
6 Dr. Lavi's opinions were the only treating source opinions of record  
7 concerning Plaintiff's physical impairments.

8  
9 The opinions of treating physicians command particular respect.  
10 "As a general rule, more weight should be given to the opinion of the  
11 treating source than to the opinion of doctors who do not treat the  
12 claimant. . . ." Lester v. Chater, 81 F.3d at 830 (citations  
13 omitted). A treating physician's conclusions "must be given  
14 substantial weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir.  
15 1988); see Rodriguez v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989) ("the  
16 ALJ must give sufficient weight to the subjective aspects of a  
17 doctor's opinion. . . . This is especially true when the opinion is  
18 that of a treating physician") (citation omitted); see also Orn v.  
19 Astrue, 495 F.3d at 631-33 (discussing deference owed to treating  
20 physicians' opinions). Even where the treating physician's opinions  
21 are contradicted, as here,<sup>2</sup> "if the ALJ wishes to disregard the  
22 opinion[s] of the treating physician he . . . must make findings  
23 setting forth specific, legitimate reasons for doing so that are based  
24 on substantial evidence in the record." Winans v. Bowen, 853 F.2d  
25 643, 647 (9th Cir. 1987) (citation, quotations and brackets omitted);

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

1 see Rodriguez v. Bowen, 876 F.2d at 762 ("The ALJ may disregard the  
2 treating physician's opinion, but only by setting forth specific,  
3 legitimate reasons for doing so, and this decision must itself be  
4 based on substantial evidence") (citation and quotations omitted).  
5 These reasons must be stated in the ALJ's decision itself; the Court  
6 "cannot affirm the decision of an agency on a ground that the agency  
7 did not invoke in making its decision." Pinto v. Massanari, 249 F.3d  
8 840, 847 (9th Cir. 2001).

9  
10 Here, the ALJ's stated reasons for discounting or rejecting Dr.  
11 Lavi's opinions are legally insufficient. First, the timing of Dr.  
12 Lavi's opinions, which post-dated the alleged onset date by a little  
13 over one year, is not a specific, legitimate reason for discounting or  
14 rejecting Dr. Lavi's opinions. Dr. Lavi's opinions were based on his  
15 treatment of Plaintiff, which began not long after Plaintiff claimed  
16 her symptoms became disabling. Dr. Lavi's opinions were directly  
17 relevant to the period of alleged disability.

18  
19 The Court is mindful of case authority indicating that, as a  
20 general matter, a more recent medical opinion may have more probative  
21 value as to a claimant's current abilities than an older opinion.  
22 See, e.g., Young v. Heckler, 803 F.2d 963, 968 (9th Cir. 1986); Stone  
23 v. Heckler, 761 F.2d 530, 532 (9th Cir. 1985); see also Hunter v.  
24 Sullivan, 993 F.2d 31, 35 (4th Cir. 1992). However, these authorities  
25 apply only if the record reflects that the claimant's condition has  
26 changed in the period between the two opinions. See Stone v. Heckler,  
27 761 F.2d at 532 (finding that the most recent medical opinion was the  
28 most probative because the claimant's condition "was progressively

1 deteriorating"); cf. Young v. Heckler, 803 F.2d at 968 (declining to  
2 afford greater weight to a more recent report when "it is far from  
3 clear that [claimant's] condition was progressively deteriorating").  
4

5 Here, contrary to the ALJ's apparent assumption, the record is  
6 far from clear that Plaintiff's conditions improved after Dr. Lavi  
7 stopped treating Plaintiff. The objective evidence in the record  
8 suggests that Plaintiff's spine, shoulder, and wrist conditions which  
9 caused Plaintiff pain persisted throughout the period of alleged  
10 disability. Compare A.R. 295-96 (Dr. Lavi's summary of the 2010  
11 diagnostic studies) with: (1) A.R. 495-500 (September, 2015 normal  
12 upper extremity electrodiagnostic study) and A.R. 609 (June, 2015  
13 bilateral wrist x-ray showing bone or calcific density in the dorsal  
14 aspect of the carpal bones at the base of the right third metacarpal);  
15 (2) A.R. 494 (September, 2015 MRI of the cervical spine showing mild  
16 disc dessication of C6-C7 with a 2 mm bulge causing mild central canal  
17 stenosis, 1 mm disc protrusions at C3-C4 and C5-C6, and mild reversal  
18 of the lordotic curvature); A.R. 604 (June, 2015 lumbar spine x-ray  
19 showing osteoporosis with spondylosis, degenerative disc disease at  
20 L5-S1, and 1 mm spondylolisthesis of L5 on S1); A.R. 633 (December,  
21 2012 lumbar spine x-ray showing mild osteoarthritic spurring but no  
22 compression or disc space narrowing); see also A.R. 543 (July 5, 2012  
23 treatment note for upper body pain finding "12/12" positive tender  
24 points and diagnosing Plaintiff with fibromyalgia). The ALJ found  
25 Plaintiff suffers from severe degenerative disc disease, bilateral  
26 shoulder pain, and fibromyalgia (A.R. 17). Moreover, as long as an  
27 opinion relates to the period of alleged disability, the opinion is  
28 material. A claimant may be entitled to benefits for a past



1 disability even if improvement has rendered the claimant able to work  
2 currently.

3  
4 Second, the fact that Dr. Lavi may not have reviewed additional  
5 (unidentified) medical records is also not a specific, legitimate  
6 reason for discounting Dr. Lavi's opinions. See, e.g., Fowler v.  
7 Berryhill, 2018 WL 566217, at \*10 (D. Or. Jan. 26, 2018) (finding ALJ  
8 did not provide specific, legitimate reasons for rejecting a treating  
9 or examining doctor's opinion in favor of another doctor's opinion who  
10 had "reviewed additional evidence and found no limitation"; "A  
11 doctor's decision is not necessarily entitled to more weight than  
12 another doctor's opinion merely because the opinion is more recent,  
13 especially when the earlier doctor was a treating or examining  
14 specialist"; the ALJ's mere reference to the fact that the treating  
15 physician had additional records that could have been considered does  
16 not justify discounting the treating physician's opinion); Barrera v.  
17 Commissioner, 2018 WL 481344, at \*10 (E.D. Cal. Jan. 19, 2018) ("The  
18 fact that [examining doctor] did not review any medical records is not  
19 in itself a specific and legitimate reason supported by substantial  
20 evidence to reject his opinion. The appropriate question is whether  
21 medical records that are part of the administrative record would have  
22 challenged or called into question the opinion."). As discussed  
23 above, Dr. Lavi based his opinions on clinical findings and testing,  
24 which the ALJ observed were consistent with the opinions (A.R. 26).  
25 The ALJ's cursory discounting or rejection of Dr. Lavi's opinions was  
26 error under the circumstances of this case.

27 ///

28 ///

1 Defendant may be arguing that Dr. Lavi's opinions properly were  
2 discounted or rejected as assertedly based on Plaintiff's subjective  
3 complaints (see Defendant's Motion, p. 9), and/or because Dr. Lavi's  
4 opinions allegedly contradicted the opinion of another Workers'  
5 Compensation examiner or the opinion of another physician (see  
6 Defendant's Motion, p. 10). However, the Court cannot uphold the  
7 ALJ's decision on the basis of reasons the ALJ did not invoke, and the  
8 ALJ did not invoke these reasons. See Pinto v. Massanari, 249 F.3d at  
9 847 (the court "cannot affirm the decision of an agency on a ground  
10 that the agency did not invoke in making its decision"). Moreover,  
11 the contradiction of a treating physician's opinion by another  
12 physician's opinion triggers rather than satisfies the requirement of  
13 stating "specific, legitimate reasons." See, e.g., Valentine v.  
14 Commissioner, 574 F.3d 685, 692 (9th Cir. 2007); Orn v. Astrue, 495  
15 F.3d at 631-33; Lester v. Chater, 81 F.3d at 830-31.

16  
17 Accordingly, the ALJ erred by discounting or rejecting the  
18 opinions of Dr. Lavi without stating legally sufficient reasons for  
19 doing so.

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21 **II. The Court is Unable to Determine that the ALJ's Errors Were**  
22 **Harmless.**

23  
24 An error "is harmless where it is inconsequential to the ultimate  
25 non-disability determination." Molina v. Astrue, 674 F.3d 1104, 1115  
26 (9th Cir. 2012) (citations and quotations omitted); see Treichler v.  
27 Commissioner, 775 F.3d 1090, 1105 (9th Cir. 2014) ("Where, as in this  
28 case, an ALJ makes a legal error, but the record is uncertain and

1 ambiguous, the proper approach is to remand the case to the agency");  
2 cf. McLeod v. Astrue, 640 F.3d 881, 887 (9th Cir. 2011) (error not  
3 harmless where "the reviewing court can determine from the  
4 'circumstances of the case' that further administrative review is  
5 needed to determine whether there was prejudice from the error").  
6

7 The ALJ's error may have prejudiced Plaintiff. In deciding that  
8 Plaintiff is not disabled, the ALJ relied on a supposed residual  
9 functional capacity for light work limited to occasional over the  
10 shoulder work, bilaterally, with no other upper extremity limitations  
11 (A.R. 21). If Plaintiff were limited to no pushing, pulling,  
12 gripping, grasping, forward reaching, or working at or above shoulder  
13 level (as Dr. Lavi opined), such limitations might well alter the  
14 ALJ's conclusion. The vocational expert (on whose testimony the ALJ  
15 relied) did not identify any jobs performable by a person with these  
16 limitations (A.R. 55-58). According to the Dictionary of Occupational  
17 Titles ("DOT"), all of the jobs the vocational expert did identify  
18 require frequent handling and fingering. See DOT 209.587-034  
19 (Marker), 1991 WL 671802 (1991); DOT 529.587-014 (Sausage Inspector),  
20 1991 WL 674625 (1991); DOT 729.687-010 (Assembler, Electrical  
21 Accessories I), 1991 WL 679733 (1991).  
22

23 **III. A Remand with a Directive for the Immediate Payment of Benefits**  
24 **Would not be an Appropriate Remedy in the Present Case.**  
25

26 The "extreme remedy" of a "remand for an immediate award of  
27 benefits is appropriate . . . only in rare circumstances." Brown-  
28 Hunter v. Colvin, 806 F.3d 487, 495 (9th Cir. 2015) (citations and

1 quotations omitted); see INS v. Ventura, 537 U.S. 12, 16 (2002)  
2 (remand without a directive for an immediate award of benefits is "the  
3 proper course, except in rare circumstances."); Leon v. Berryhill, 880  
4 F.3d 1041, 1044 (9th Cir. 2017) (reversal with a directive for the  
5 immediate calculation of benefits is a "rare and prophylactic  
6 exception to the well-established ordinary remand rule"). In the  
7 Ninth Circuit, a remand for an immediate award of benefits properly  
8 may occur only where:

- 9
- 10 (1) the record has been fully developed and further  
11 administrative proceedings would serve no useful purpose;
  - 12 (2) the ALJ has failed to provide legally sufficient reasons  
13 for rejecting evidence, whether claimant testimony or  
14 medical opinion; and (3) if the properly discredited  
15 evidence were credited as true, the ALJ would be required to  
16 find the claimant disabled on remand.

17

18 Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir. 2014); see Dominguez  
19 v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) (district court should  
20 examine whether the record "is fully developed, is free from conflicts  
21 and ambiguities, and all essential factual issues have been resolved.  
22 . . . Unless the district court concludes that further administrative  
23 proceedings would serve no useful purpose, it may not remand with a  
24 direction to provide benefits") (citations and quotations omitted);  
25 Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir.), cert. denied, 531  
26 U.S. 1038 (2000) (district court may not properly direct an immediate  
27 award of benefits unless, among other things, "there are no  
28 outstanding issues that must be resolved before a determination of

1 disability can be made, and . . . it is clear from the record that the  
2 ALJ would be required to find the claimant disabled" if the improperly  
3 rejected evidence were credited) (citations and quotations omitted).<sup>3</sup>  
4

5 In the present case, it is not clear that the ALJ would be  
6 required to find Plaintiff disabled for the entire period of claimed  
7 disability even if Dr. Lavi's opinions were credited as true. See  
8 Luna v. Astrue, 623 F.3d 1032, 1035 (9th Cir. 2010). Accordingly, the  
9 Court will not direct the immediate payment of benefits.

10  
11 **CONCLUSION**  
12

13 For all of the foregoing reasons,<sup>4</sup> Plaintiff's and Defendant's  
14 motions for summary judgment are denied and this matter is remanded

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22 <sup>3</sup> Even when these standards are met, the district court  
23 retains "some flexibility" to refuse to remand for an immediate  
24 award of benefits. See Connett v. Barnhart, 340 F.3d 871, 876  
25 (9th Cir. 2003); see also Garrison v. Colvin, 759 F.3d at 1021-22  
26 (perhaps limiting this "flexibility" to circumstances where "an  
27 evaluation of the record as a whole creates serious doubt as to  
28 whether the claimant is, in fact, disabled").

<sup>4</sup> The Court has not reached any other issue raised by  
Plaintiff except insofar as to determine that reversal with a  
directive for the immediate payment of benefits would not be an  
appropriate remedy at this time.

1 for further administrative action consistent with this Opinion.  
2

3 LET JUDGMENT BE ENTERED ACCORDINGLY.  
4

5 DATED: March 8, 2018.  
6

7 /s/  
8 CHARLES F. EICK  
9 UNITED STATES MAGISTRATE JUDGE  
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