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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SUSAN P. CARR,)	Case No. EDCV 13-1046-JPR
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
vs.)	REVERSING COMMISSIONER AND
)	REMANDING FOR FURTHER
CAROLYN W. COLVIN, Acting)	PROCEEDINGS
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner’s final decision denying her application for Social Security disability insurance benefits (“DIB”). 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 July 10, 2014, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner’s decision is reversed and this action is remanded for further proceedings.

1 **II. BACKGROUND**

2 Plaintiff was born on March 19, 1958. (Administrative
3 Record ("AR") 153.) She completed two years of college (AR 163),
4 and she worked in inventory and quality control in warehouses (AR
5 158).

6 On January 25, 2010, Plaintiff submitted an application for
7 DIB, alleging that she had been unable to work since April 22,
8 2008, because of "tremors, diabetes mellitus-insulin dependent,
9 irritable bowel syndrome, anxiety disorder, obesity, [h]igh blood
10 pressure, [h]igh cholesterol, depression, [h]ypothyroidism,
11 [n]europathy shakes-[h]ands, pancreatitis [sic]." (AR 146, 149.)
12 After her application was denied initially and on
13 reconsideration, she requested a hearing before an Administrative
14 Law Judge. (AR 94-95.) A hearing was held on January 11, 2012,
15 at which Plaintiff, who had a nonattorney representative,
16 testified, as did both a medical and a vocational expert. (AR
17 42-76.) In a written decision issued February 23, 2012, the ALJ
18 found Plaintiff not disabled. (AR 28-37.) On April 24, 2013,
19 the Appeals Council denied Plaintiff's request for review. (AR
20 1.) 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
25 supported by substantial evidence based on the record as a whole.
26 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra
27 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
28 evidence means such evidence as a reasonable person might accept

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

14 **IV. THE EVALUATION OF DISABILITY**

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

22 A. The Five-Step Evaluation Process

23 An ALJ follows a five-step sequential evaluation process to
24 assess whether someone is disabled. 20 C.F.R. § 404.1520(a)(4);
25 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995) (as
26 amended Apr. 9, 1996). In the first step, the Commissioner must
27 determine whether the claimant is currently engaged in
28 substantial gainful activity; if so, the claimant is not disabled

1 and the claim must be denied. § 404.1520(a)(4)(i). If the
2 claimant is not engaged in substantial gainful activity, the
3 second step requires the Commissioner to determine whether the
4 claimant has a "severe" impairment or combination of impairments
5 significantly limiting her ability to do basic work activities;
6 if not, a finding of not disabled is made and the claim must be
7 denied. § 404.1520(a)(4)(ii). If the claimant has a "severe"
8 impairment or combination of impairments, the third step requires
9 the Commissioner to determine whether the impairment or
10 combination of impairments meets or equals an impairment in the
11 Listing of Impairments ("Listing") set forth at 20 C.F.R., Part
12 404, Subpart P, Appendix 1; if so, disability is conclusively
13 presumed and benefits are awarded. § 404.1520(a)(4)(iii).

14 If the claimant's impairment or combination of impairments
15 does not meet or equal one in the Listing, the fourth step
16 requires the Commissioner to determine whether the claimant has
17 sufficient residual functional capacity ("RFC")¹ to perform her
18 past work; if so, she is not disabled and the claim must be
19 denied. § 404.1520(a)(4)(iv). The claimant has the burden of
20 proving she is unable to perform past relevant work. Drouin, 966
21 F.2d at 1257. If the claimant meets that burden, a prima facie
22 case of disability is established. Id. If that happens or if
23 the claimant has no past relevant work, the Commissioner bears
24 the burden of establishing that the claimant is not disabled
25 because she can perform other substantial gainful work available

26
27 ¹ RFC is what a claimant can do despite existing exertional
28 and nonexertional limitations. § 404.1545; see Cooper v.
Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 in the national economy. § 404.1520(a)(4)(v). That
2 determination comprises the fifth and final step in the
3 sequential analysis. § 404.1520; Lester, 81 F.3d at 828 n.5;
4 Drouin, 966 F.2d at 1257.

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

6 At step one, the ALJ found that Plaintiff had not engaged in
7 substantial gainful activity since April 22, 2008, the alleged
8 onset date. (AR 30.) At step two, she concluded that Plaintiff
9 had the severe impairments of "morbid obesity, poorly controlled
10 type 2 diabetes mellitus, stage 1 chronic kidney disease,
11 possible diabetic peripheral neuropathy, irritable bowel
12 syndrome, and essential tremor." (Id.) At step three, the ALJ
13 determined that Plaintiff's impairments did not meet or equal any
14 of the impairments in the Listing. (AR 31.) At step four, she
15 found that Plaintiff had the RFC to perform light work except as
16 follows: "stand or walk two hours out of an eight-hour day," sit
17 with no restrictions given normal breaks, "lift 20 pounds
18 occasionally and 10 pounds frequently," "occasionally stoop and
19 bend," frequently perform fine and gross manipulation, never do
20 "very fine fingering," and climb stairs but not climb ladders,
21 work at heights, or balance. (Id.) She also found that
22 Plaintiff required "ready access to restroom facilities" and a
23 temperature-controlled work environment. (Id.) Based on the
24 VE's testimony, the ALJ concluded that Plaintiff could not
25 perform her past work in inventory and quality control. (AR 35.)
26 At step five, the ALJ found that Plaintiff could perform other
27 jobs that existed in significant numbers in the national economy.
28 (Id.) Accordingly, she found Plaintiff not disabled. (AR 36.)

1 **V. DISCUSSION**

2 Plaintiff contends that the ALJ erred in assessing her
3 credibility and the opinions of her treating physicians. (J.
4 Stip. at 3.) Remand is warranted because the ALJ failed to
5 provide clear and convincing reasons for discounting Plaintiff's
6 credibility. Any errors in assessing the opinions of Plaintiff's
7 treating sources were harmless, however, for the reasons
8 discussed below.

9 A. The ALJ Did Not Properly Assess Plaintiff's Credibility

10 1. Relevant background

11 Plaintiff testified that she stopped working in April 2008
12 because she "got sick" and became blind for a few weeks from her
13 diabetes. (AR 56.) At the time of the hearing, she claimed to
14 be unable to work for many reasons. Tremors in her hands
15 prevented her from holding things. (AR 57.) She could not type
16 because her fingers would "fall off the keyboard" when she tried.
17 (Id.) She became tired easily and needed to take naps. (Id.)
18 She could not stand because of pain in her feet, and she could
19 not sit because of pain in her back, legs, and feet. (Id.)

20 Plaintiff had seizures three or four times a day despite
21 taking Mysoline, an antiseizure medication. (AR 58.) She had a
22 driver's license but did not drive to the hearing. (AR 55.) She
23 drove "maybe once every two weeks," to get medication. (AR 56-
24 57.) No doctors had told her to stop driving because of her
25 seizures, although nurses did. (AR 57.) Her car did not have a
26 "handicap sticker." (Id.) She did not know how many seizures
27 she would have if she did not take medication. (AR 58.)
28 Plaintiff started seeing a new doctor in June 2011, about seven

1 months before the hearing. (AR 59.) Although she told the
2 doctor that she still had seizures while taking medication, the
3 doctor did not change her treatment plan. (Id.) The doctor
4 recommended that Plaintiff see a neurologist. (Id.) Although
5 Plaintiff's medical record indicated that the seizures could be
6 psychogenically² related, her doctor did not recommend that she
7 see a psychologist or psychotherapist. (AR 61.)

8 Up to three times a day, Plaintiff took tramadol³ for her
9 back and foot pain. (AR 60-61.) She also took gabapentin.⁴ (AR
10 64.) The pain was a result of peripheral neuropathy and her
11 kidneys "going bad." (AR 60.)

12 During a normal day, Plaintiff would wake up, eat breakfast,
13 watch TV, take a two-hour nap, eat dinner, and watch more TV.
14 (AR 62.) The longest amount of time she could sit before needing
15 to get up and walk was 15 or 20 minutes. (Id.) She could walk
16 only 10 minutes before needing to take a break. (AR 62-63.) She
17 could do some household chores, like vacuuming and cleaning the
18 bathroom. (AR 63.) Plaintiff had trouble sleeping and would
19 usually wake up about five or six times a night because of pain
20 in her feet or legs. (AR 63-64.) She used to be able to shop

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22 ² "Psychogenic" means "of mental origin or causation."
23 Stedman's Medical Dictionary 1476 (27th ed. 2000).

24 ³ Tramadol is prescribed to treat moderate to moderately
25 severe pain. See Tramadol, MedlinePlus, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a695011.html> (last updated Oct. 15, 2013).

26 ⁴ Gabapentin is used to help control certain types of
27 seizures in people who have epilepsy. See Gabapentin,
28 MedlinePlus, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a694007.html> (last updated July 15, 2011).

1 for groceries but stopped because of the hand tremors and
2 inability to lift more than five pounds. (AR 67-68.)

3 2. Applicable law

4 An ALJ's assessment of symptom severity and claimant
5 credibility is entitled to "great weight." See Weetman v.
6 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v. Heckler, 779
7 F.2d 528, 531 (9th Cir. 1986). "[T]he ALJ is not required to
8 believe every allegation of disabling pain, or else disability
9 benefits would be available for the asking, a result plainly
10 contrary to 42 U.S.C. § 423(d)(5)(A)." Molina v. Astrue, 674
11 F.3d 1104, 1112 (9th Cir. 2012) (internal quotation marks
12 omitted).

13 In evaluating a claimant's subjective symptom testimony, the
14 ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d
15 at 1035-36. "First, the ALJ must determine whether the claimant
16 has presented objective medical evidence of an underlying
17 impairment [that] could reasonably be expected to produce the
18 pain or other symptoms alleged." Id. at 1036 (internal quotation
19 marks omitted). If such objective medical evidence exists, the
20 ALJ may not reject a claimant's testimony "simply because there
21 is no showing that the impairment can reasonably produce the
22 degree of symptom alleged." Smolen v. Chater, 80 F.3d 1273, 1282
23 (9th Cir. 1996) (emphasis in original). When the ALJ finds a
24 claimant's subjective complaints not credible, the ALJ must make
25 specific findings that support the conclusion. See Berry v.
26 Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding or
27 affirmative evidence of malingering, the ALJ must provide "clear
28 and convincing" reasons for rejecting the claimant's testimony.

1 Lester, 81 F.3d at 834; Ghanim v. Colvin, 763 F.3d 1154, 1163 n.9
2 (9th Cir. 2014).

3 3. Analysis

4 After laying out a detailed chronology of Plaintiff's
5 medical records, the ALJ found that her medically determinable
6 impairments could reasonably be expected to cause the alleged
7 symptoms but that her "statements concerning the intensity,
8 persistence and limiting effects of these symptoms are not
9 credible to the extent they are inconsistent with" her RFC. (AR
10 33.) Apart from this brief boilerplate statement, however, the
11 ALJ's only reference to Plaintiff's credibility was neither clear
12 nor convincing. The ALJ stated that "[t]he [Plaintiff's]
13 testimony regarding her daily functioning is reasonable given her
14 medical condition, but the severity of the alleged limitations
15 are [sic] inconsistent with the objective medical findings." (AR
16 35.) The statement is ambiguous because the ALJ appears to
17 discredit Plaintiff's testimony yet also finds it "reasonable."
18 (Id.) Furthermore, the statement is located in the section of
19 the ALJ's opinion addressing Plaintiff's treating physicians'
20 opinions, not her credibility. (See AR 34-35 (paragraph begins,
21 "As for the opinion evidence," and ends, "The undersigned
22 gives little weight to Dr. Erickson's opinion because").)
23 Nowhere does the ALJ actually analyze Plaintiff's credibility.
24 Thus, the ALJ erred by failing to give clear and convincing
25 reasons for discounting Plaintiff's testimony. See Robbins, 466
26 F.3d at 884-85 (reversing Commissioner when ALJ did not provide
27 "narrative discussion" with sufficiently specific reasons for
28 discounting claimant's statements); Coronado v. Astrue, No. 1:10-

1 cv-00594-AWI-SKO, 2011 WL 3348066, at *8 (E.D. Cal. Aug. 2, 2011)
2 (finding ALJ's reasons for discrediting claimant "ambiguous" and
3 not clear and convincing because they "overlap[ped] and
4 blend[ed]" with discussion of physician opinions); SSR 96-7P,
5 1996 WL 374186, at *2 (July 2, 1996) ("It is not sufficient for
6 the adjudicator to make a single, conclusory statement that the
7 individual's allegations have been considered or that the
8 allegations are (or are not) credible." (internal quotation marks
9 omitted)).

10 Furthermore, the error was not harmless. The ALJ ultimately
11 concluded that Plaintiff was not disabled (AR 36) and had the RFC
12 to perform light work with some restrictions (AR 31). Although
13 some evidence in the record undermined Plaintiff's testimony -
14 for example, clinical tests showed no physiological basis for her
15 seizures (AR 301 (CT scan and EEG), 379 (no somatoform⁵ disorder
16 diagnosis), 412 (same), 483-84 (48-hour ambulatory EEG)) - the
17 Court cannot say that the ALJ's error was "inconsequential to the
18 ultimate disability determination." See Molina, 674 F.3d at 1115
19 (internal quotation marks omitted). The nature and degree of
20 Plaintiff's seizures and tremors were central to the ALJ's RFC
21 assessment and ultimate conclusion that Plaintiff was not
22 disabled.

23 Plaintiff is entitled to remand on this ground.
24
25

26 ⁵ A somatoform disorder is characterized by physical
27 symptoms suggesting physical disorders but for which there "are
28 no demonstrable organic findings or known physiologic
mechanisms." Stedman's Medical Dictionary 528 (27th ed. 2000).

1 B. The ALJ Properly Assessed the Medical Opinion Evidence

2 1. Relevant background

3 Plaintiff was hospitalized at Arrowhead Regional Medical
4 Center in September 2009. (AR 299.) Dr. Yen Lai was one of
5 several physicians who saw her for follow-up care after she was
6 discharged. (See AR 286, 292.) On December 12, 2009, Dr. Lai
7 completed a form entitled "Claim for Disability Insurance
8 Benefits - Doctor's Certificate." (AR 284.) She diagnosed
9 tremors and insulin-dependent diabetes mellitus and stated that
10 Plaintiff had "been incapable of performing [her] regular or
11 customary work" since May 1, 2008. (Id.) Dr. Lai noted that
12 Plaintiff suffered a "severe" "resting tremor" in both hands,
13 which made her "unable to hold, lift, . . . write legibly" or
14 "type." (Id.)

15 On December 28, 2011, "Dr. Erickson"⁶ completed forms
16 entitled "Diabetes Mellitus - 9.08" (AR 543-46) and "Exertional
17 Limitation Questionnaire" (AR 547). Plaintiff's first visit to
18 his office was on August 6, 2011. (AR 546.) Erickson diagnosed
19 type 2 diabetes mellitus, anemia, hypothyroidism, hypertension,
20 hyperlipidemia, hypertriglyceridism, and essential tremors. (AR
21 543.) He noted evidence of diabetic neuropathy affecting
22 Plaintiff's lower extremities and that she "has or presents
23 [with] tremors" in her "upper ext[remities] (Hands)," which
24 significantly interfered with her "[u]se of the fingers, hands,
25 _____

26 ⁶ The record does not identify Erickson's first name or sex.
27 For ease of discussion, male pronouns are used. Further, as
28 discussed below, Erickson does not appear to be a doctor but
rather a nurse practitioner. (See, e.g., AR 546-47 (showing "NP-
C" next to signatures).)

1 and arms." (AR 543-44.) He also noted that Plaintiff had
2 symptoms of polyuria,⁷ recurrent hyperglycemic reactions,
3 fatigue, numbness and tingling in the lower extremities, and
4 depression. (AR 545.)

5 On the "Exertional Limitation Questionnaire," Erickson
6 opined that Plaintiff was "incapable of sedentary work on a
7 sustained and full-time basis." (AR 547.) When asked whether
8 Plaintiff's symptoms and limitations had existed at the same or
9 similar degree of severity since April 22, 2008, the alleged
10 onset date of disability, Erickson circled "No" and wrote August
11 6, 2011, as the applicable date, which was the "first time our
12 office [had] seen [Plaintiff]." (AR 546.)

13 Dr. Samuel Landau, the agency's medical expert, testified
14 that Plaintiff had the following functional restrictions:

15 Standing and walking limited to two hours out of
16 eight. There's no limitation to sitting with normal
17 breaks, such as every two hours. Lifting and carrying
18 are limited to 10 pounds frequently, 20 pounds
19 occasionally. She can occasionally stoop and bend. She
20 can climb stairs, but she can't climb ladders, work at
21 heights or balance.

22 She can do gross manipulation, such as opening
23 drawers and carrying files. She can do coarse to fine
24 manipulation, such as keyboarding, but not very fine
25 manipulation, such as precise dial adjustment.

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28 ⁷ Polyuria is the "excessive excretion of urine." Stedman's
Medical Dictionary 1426 (27th ed. 2000).

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2 . . . Her work environment should be air conditioned for
3 temperature control, and she should have ready access to
4 a rest room facility.

5 (AR 53.)

6 2. Applicable law

7 Three types of physicians may offer opinions in Social
8 Security cases: (1) those who directly treated the plaintiff, (2)
9 those who examined but did not treat the plaintiff, and (3) those
10 who did not treat or examine the plaintiff. Lester, 81 F.3d at
11 830. A treating physician's opinion is generally entitled to
12 more weight than that of an examining physician, and an examining
13 physician's opinion is generally entitled to more weight than
14 that of a nonexamining physician. Id.

15 This is true because treating physicians are employed to
16 cure and have a greater opportunity to know and observe the
17 claimant. Smolen, 80 F.3d at 1285. If a treating physician's
18 opinion is well supported by medically acceptable clinical and
19 laboratory diagnostic techniques and is not inconsistent with the
20 other substantial evidence in the record, it should be given
21 controlling weight. § 404.1527(c)(2). If a treating physician's
22 opinion is not given controlling weight, its weight is determined
23 by length of the treatment relationship, frequency of
24 examination, nature and extent of the treatment relationship,
25 amount of evidence supporting the opinion, consistency with the
26 record as a whole, the doctor's area of specialization, and other
27 factors. § 404.1527(c)(2)-(6).

28 When a treating or examining physician's opinion is not

1 contradicted by other evidence in the record, it may be rejected
2 only for "clear and convincing" reasons. See Carmickle v.
3 Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1164 (9th Cir. 2008)
4 (quoting Lester, 81 F.3d at 830-31). When a treating or
5 examining physician's opinion is contradicted, the ALJ must
6 provide only "specific and legitimate reasons" for discounting
7 it. Id. The weight given an examining physician's opinion,
8 moreover, depends on whether it is consistent with the record and
9 accompanied by adequate explanation, among other things.

10 § 404.1527(c)(3)-(6).

11 When an ALJ discounts an opinion provided by a nonacceptable
12 medical source, he need only provide "germane" reasons. Molina,
13 674 F.3d at 1111. Furthermore, "[t]he ALJ need not accept the
14 opinion of any physician, including a treating physician, if that
15 opinion is brief, conclusory, and inadequately supported by
16 clinical findings." Thomas v. Barnhart, 278 F.3d 947, 957 (9th
17 Cir. 2002); accord Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d
18 1190, 1195 (9th Cir. 2004).

19 3. Analysis

20 In determining Plaintiff's RFC, the ALJ gave "great weight"
21 to Dr. Landau's assessment but "little weight" to Erickson's
22 opinion because the latter was "based on a short treatment
23 period" and was "not supported by the evidence as a whole." (AR
24 35.) She did not directly address Dr. Lai's opinion.

25 a. "Dr. Erickson"

26 Erickson opined that Plaintiff was incapable of sedentary
27 work on a sustained and full-time basis. (AR 547.) The record
28 contains notes from seven visits to Erickson's office, from

1 August 2011 to January 2012, six of them predating his December
2 28, 2011 opinion. (See AR 530-36, 548.) Having seen Plaintiff
3 six times in five months and reviewed her laboratory test
4 results, Erickson qualifies as a treating source. See § 404.1502
5 ("We may consider an acceptable medical source who has treated or
6 evaluated you only a few times . . . to be your treating source
7 if the nature and frequency of the treatment or evaluation is
8 typical for your condition(s)."). The abbreviation "NP-C" next
9 to Erickson's signature, however, suggests that he was a nurse
10 practitioner, not a physician. (AR 546-47.) It appears that
11 Plaintiff's treating physician at the Primary Care Medical Group
12 of Inland Empire – where she saw Erickson – was Dr. Sanjay
13 Kudtarkar. (See AR 511 (discharge report naming "Sanjay S.
14 Kudtarkar, M.D." as primary care provider).) Although a nurse
15 practitioner can be considered a medically acceptable source if
16 he worked under a physician's close supervision, they generally
17 do not qualify as medically acceptable sources. See
18 § 404.1513(d)(1); Molina, 674 F.3d at 1111 & n.3. Because the
19 record does not show that Erickson worked under the close
20 supervision of Dr. Kudtarkar or another physician, he does not
21 qualify as a medically acceptable source. Thus, any failure of
22 the ALJ to give specific and legitimate reasons for rejecting the
23 opinion of Erickson, whom she apparently believed to be a medical
24 doctor, was necessarily harmless. See Carmickle, 533 F.3d at
25 1162 (error harmless when inconsequential to ultimate
26 nondisability determination). The ALJ was required to give only
27 "germane" reasons for rejecting Erickson's opinion, see Molina,
28 674 F.3d at 1111, and she did so.

1 The ALJ first noted the short treatment period. (AR 35);
2 cf. § 404.1527(c)(2)(i) (“[l]ength of the treatment relationship”
3 is relevant factor in assessing opinion of treating source);
4 Edlund v. Massanari, 253 F.3d 1152, 1157 & n.6 (9th Cir.) (as
5 amended Aug. 9, 2001) (same). Although five months of treatment
6 may have been adequate to gauge the effect of Plaintiff’s
7 symptoms on her functioning, they amount to only a small portion
8 of her entire treatment period, given that she had begun
9 complaining of seizures and tremors over two years earlier (see
10 AR 299) and had complained of her other symptoms since 2008, the
11 alleged onset date (see AR 370-71 (emergency room visit on Apr.
12 16, 2008, for diabetes complications, hyperglycemia, and
13 hypothyroidism)). The short treatment period was a germane
14 reason to reject Erickson’s opinion.

15 The ALJ also properly noted that Erickson’s opinion was not
16 supported by the evidence as a whole. (AR 35.) The ALJ noted
17 that the function reports and consultative psychologists’
18 evaluations showed that Plaintiff had “little difficulty with
19 activities of daily living.” (Id.; see AR 377 (able to do
20 household chores and errands, shop, cook, dress, and bathe), 409
21 (bathing and dressing “not impaired” and household chores
22 “somewhat impaired”).) She noted that there was “only a
23 psychogenic basis for the seizures and neither consultative
24 psychological examiner found the claimant had a somatoform
25 disorder.” (AR 34-35; see AR 301 (CT scan of head and EEG in
26 Sept. 2009 showed normal results), 379 (psychologist diagnosed
27 unspecified mood disorder but not somatoform disorder despite
28 Plaintiff’s two seizures during Mar. 2010 examination), 412 (same

1 diagnosis by different psychologist in Sept. 2010), 483-84 (48-
2 hour ambulatory EEG recording in Aug. 2010 showed no epileptiform
3 discharges or electrographic seizures despite frequent tremors),
4 489 (emergency-room physician noted normal motor strength in June
5 2010).) Thus, inadequate evidentiary support was a germane
6 reason to reject Erickson's opinion. Indeed, in finding
7 Plaintiff incapable of sedentary work on a sustained and full-
8 time basis, Erickson merely checked a box without providing
9 additional comments in the space designated for them at the
10 bottom of the questionnaire (AR 547), and the boxes he checked on
11 the "Diabetes Mellitus - 9.08" form indicated only that
12 Plaintiff's tremors resulted in "significant interference" with
13 her "[u]se of the fingers, hands, and arms," without explanation
14 in the designated "Please describe" section. (AR 543-44.) Thus,
15 the ALJ properly rejected Erickson's opinion as conclusory and
16 inadequately supported. Thomas, 278 F.3d at 957; see also
17 Molina, 674 F.3d at 1111 (ALJ may "permissibly reject check-off
18 reports that do not contain any explanation of the bases of their
19 conclusions" (internal quotation marks and alterations omitted)).

20 b. Dr. Lai

21 Although the ALJ did not explicitly address Dr. Lai's
22 December 2009 disability certificate, she relied significantly on
23 the opinion of Dr. Landau, who explicitly noted and considered
24 Dr. Lai's opinion. (See AR 50.) By accepting Dr. Landau's
25 opinion, the ALJ necessarily rejected Dr. Lai's opinion, which
26 directly contradicted Dr. Landau on the issue of the limiting
27 effect of Plaintiff's tremors and seizures. (Compare AR 53 with
28 AR 284.) Further, in stating that there was "only a psychogenic

1 basis for the seizures and neither consultative psychological
2 examiner found the claimant had a somatoform disorder" (AR 34-
3 35), the ALJ implicitly reasoned that Dr. Lai's opinion was not
4 supported by the evidence as a whole.

5 In any event, on remand the ALJ can expressly explain her
6 reasons for apparently rejecting Dr. Lai's opinion.

7 C. Remand for Further Proceedings Is Appropriate

8 When, as here, an ALJ errs in denying benefits, the Court
9 generally has discretion to remand for further proceedings. See
10 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). When no
11 useful purpose would be served by further administrative
12 proceedings, however, or when the record has been fully
13 developed, it is appropriate under the "credit-as-true" rule to
14 direct an immediate award of benefits. Id. at 1179 (noting that
15 "the decision of whether to remand for further proceedings turns
16 upon the likely utility of such proceedings"); see also Garrison
17 v. Colvin, 759 F.3d 995, 1019-20 (9th Cir. 2014).

18 Under the credit-as-true framework, three circumstances must
19 be present before the Court may remand to the ALJ with
20 instructions to award benefits: "(1) the record has been fully
21 developed and further administrative proceedings would serve no
22 useful purpose; (2) the ALJ has failed to provide legally
23 sufficient reasons for rejecting evidence, whether claimant
24 testimony or medical opinion; and (3) if the improperly
25 discredited evidence were credited as true, the ALJ would be
26 required to find the claimant disabled on remand." Garrison, 759
27 F.3d at 1020. When, however, the ALJ's findings are so
28 "insufficient" that the Court cannot determine whether the

1 rejected testimony should be credited as true, the Court has
2 "some flexibility" in applying the credit-as-true rule. Connett
3 v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003); see also
4 Garrison, 759 F.3d at 1020 (noting that Connett established that
5 credit-as-true rule may not be dispositive in all cases). This
6 flexibility should be exercised "when the record as a whole
7 creates serious doubt as to whether the claimant is, in fact,
8 disabled within the meaning of the Social Security Act."
9 Garrison, 759 F.3d at 1021.

10 Here, under Connett, remand for further proceedings is
11 appropriate because the ALJ's findings concerning Plaintiff's
12 credibility were so "insufficient" that the Court cannot
13 determine whether Plaintiff's testimony should be credited as
14 true, and the Court has serious doubts as to whether she is in
15 fact disabled. Upon remand, the ALJ should also address the
16 characterization of "Dr. Erickson" as a medical source and make
17 findings concerning Dr. Lai's medical opinion.

1 **VI. CONCLUSION**

2 Consistent with the foregoing, and pursuant to sentence four
3 of 42 U.S.C. § 405(g),⁸ IT IS ORDERED that judgment be entered
4 REVERSING the decision of the Commissioner, GRANTING Plaintiff's
5 request for remand, and REMANDING this action for further
6 proceedings consistent with this Memorandum Opinion. IT IS
7 FURTHER ORDERED that the Clerk serve copies of this Order and the
8 Judgment on counsel for both parties.

9
10 DATED: December 15, 2014

JEAN ROSENBLUTH

JEAN ROSENBLUTH
U.S. Magistrate Judge

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26 _____
27 ⁸ This sentence provides: "The [district] court shall have
28 power to enter, upon the pleadings and transcript of the record,
a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."