

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CYNTHIA R.,

Plaintiff,

v.

ANDREW M. SAUL, Commissioner of
Social Security Administration,

Defendant.

Case No. ED CV 19-920-SP

MEMORANDUM OPINION AND
ORDER

I.

INTRODUCTION

On May 16, 2019, plaintiff Cynthia R. filed a complaint against defendant, the Commissioner of the Social Security Administration (“Commissioner”), seeking a review of a denial of a period of disability and disability insurance benefits (“DIB”). The parties have fully briefed the issues in dispute, and the court deems the matter suitable for adjudication without oral argument.

Plaintiff presents two disputed issues for decision: (1) whether the Administrative Law Judge (“ALJ”) properly considered the opinion of a nurse practitioner; and (2) whether the ALJ properly rejected plaintiff’s subjective

1 symptom testimony. Memorandum in Support of Plaintiff’s Complaint (“P.
2 Mem.”) at 4-13; *see* Defendant’s Brief (“D. Mem.”) at 3-7.

3 Having carefully studied the parties’ memoranda on the issues in dispute, the
4 Administrative Record (“AR”), and the decision of the ALJ, the court concludes
5 that, as detailed herein, the ALJ failed to properly consider the opinion of
6 plaintiff’s nurse practitioner, and the ALJ erred in rejecting plaintiff’s subjective
7 symptom testimony. The court therefore remands this matter to the Commissioner
8 in accordance with the principles and instructions enunciated in this Memorandum
9 Opinion and Order.

10 II.

11 FACTUAL AND PROCEDURAL BACKGROUND

12 Plaintiff, who was 36 years old on the alleged disability onset date, is a high
13 school graduate. AR at 73, 98. Plaintiff has past relevant work experience as a
14 stock clerk. *Id.* at 87.

15 On January 8, 2015, plaintiff filed an application for DIB, alleging an onset
16 date of April 22, 2014 due to lupus, scleroderma, and rheumatoid arthritis. *Id.* at
17 98. The Commissioner denied plaintiff’s application initially and upon
18 reconsideration, after which she filed a request for a hearing. *Id.* at 118-129.

19 On May 4, 2017, plaintiff appeared and testified at a hearing before the ALJ.
20 *Id.* at 49-97. The ALJ also heard testimony from David Rinehart, a vocational
21 expert. *Id.* at 86-92. On January 11, 2018, plaintiff appeared and testified at a
22 supplemental hearing before the ALJ. *Id.* at 27-48. The ALJ also heard testimony
23 from Dr. Joseph Gaeta, a medical expert. *Id.* at 34-43. On April 30, 2018, the ALJ
24 denied plaintiff’s claim for benefits. *Id.* at 10-21.

25 Applying the well-known five-step sequential evaluation process, the ALJ
26 found, at step one, that plaintiff had not engaged in substantial gainful activity
27 since April 22, 2014, the alleged onset date. *Id.* at 13.

1 At step two, the ALJ found plaintiff suffered from the following severe
2 impairments: connective tissue disorder, rheumatoid arthritis (with positive
3 antinuclear antibodies (ANA) test), scleroderma, degenerative disc disease of the
4 lumbar spine, lordotic straightening of the spine and spondylosis, osteoarthritis of
5 the left knee, and right knee meniscus degeneration and strain. *Id.* at 13.

6 At step three, the ALJ found plaintiff’s impairments, whether individually or
7 in combination, did not meet or medically equal one of the listed impairments set
8 forth in 20 C.F.R. part 404, Subpart P, Appendix 1. *Id.* at 17.

9 The ALJ then assessed plaintiff’s residual functional capacity (“RFC”),¹ and
10 determined plaintiff had the RFC to perform a wide range of light work, with the
11 limitations that she: could lift and carry up to 20 pounds occasionally and up to 10
12 pounds frequently; could stand or walk up to six hours in an eight-hour workday;
13 could sit up to six hours in an eight-hour workday; could push or pull bilaterally
14 with her upper extremities on a frequent basis; could handle, finger, or feel
15 bilaterally on a frequent basis; could not climb ropes, ladders, or scaffolds; could
16 perform positional tasks such as stooping, crouching, crawling, kneeling,
17 balancing, and climbing stairs or ramps on an occasional basis; and must avoid
18 concentrated exposure to extremes of cold, and common workplace hazards such
19 as unprotected heights, open flames, or fast or dangerous machinery. *Id.* at 17.

20 The ALJ found, at step four, that plaintiff was unable to perform any past
21 relevant work. *Id.* at 19.

22 At step five, the ALJ found – based on plaintiff’s age, education, work
23

24 ¹ Residual functional capacity is what a claimant can do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-
26 56 n.5-7 (9th Cir. 1989). “Between steps three and four of the five-step evaluation,
27 the ALJ must proceed to an intermediate step in which the ALJ assesses the
28 claimant’s residual functional capacity.” *Massachi v. Astrue*, 486 F.3d 1149, 1151
n.2 (9th Cir. 2007).

1 experience, and RFC – there were jobs that existed in significant numbers in the
2 national economy that plaintiff could perform, including garment sorter, office
3 helper, and small products assembler. *Id.* at 20. Consequently, the ALJ concluded
4 that plaintiff did not suffer from a disability as defined by the Social Security Act.
5 *Id.* at 21.

6 Plaintiff filed a timely request for review of the ALJ’s decision, which was
7 denied by the Appeals Council. *Id.* at 1-6. The ALJ’s decision stands as the final
8 decision of the Commissioner.

9 III.

10 STANDARD OF REVIEW

11 This court is empowered to review decisions by the Commissioner to deny
12 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security
13 Administration must be upheld if they are free of legal error and supported by
14 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001)
15 (as amended). But if the court determines the ALJ’s findings are based on legal
16 error or are not supported by substantial evidence in the record, the court may
17 reject the findings and set aside the decision to deny benefits. *Aukland v.*
18 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d
19 1144, 1147 (9th Cir. 2001).

20 “Substantial evidence is more than a mere scintilla, but less than a
21 preponderance.” *Aukland*, 257 F.3d at 1035. Substantial evidence is such
22 “relevant evidence which a reasonable person might accept as adequate to support
23 a conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276
24 F.3d at 459. To determine whether substantial evidence supports the ALJ’s
25 finding, the reviewing court must review the administrative record as a whole,
26 “weighing both the evidence that supports and the evidence that detracts from the
27 ALJ’s conclusion.” *Mayes*, 276 F.3d at 459. The ALJ’s decision “cannot be
28

1 affirmed simply by isolating a specific quantum of supporting evidence.”
2 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th
3 Cir. 1998)). If the evidence can reasonably support either affirming or reversing
4 the ALJ’s decision, the reviewing court ““may not substitute its judgment for that
5 of the ALJ.”” *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.
6 1992)).

7 IV.

8 DISCUSSION

9 A. The ALJ Did Not Properly Consider NP Allen’s Opinion

10 Plaintiff argues the ALJ erred by rejecting the opinion of Shannon Allen, a
11 nurse practitioner. P. Mem. at 4-8. Specifically, plaintiff argues the ALJ did not
12 provide a germane reason for rejecting NP Allen’s opinion when formulating
13 plaintiff’s RFC determination, even though NP Allen had an extensive and long-
14 standing treating relationship with plaintiff. *Id.*

15 In determining whether a claimant has a medically determinable impairment,
16 among the evidence the ALJ considers is medical evidence. 20 C.F.R.
17 § 404.1527(b).² In evaluating medical opinions, the regulations distinguish among
18 three types of physicians: (1) treating physicians; (2) examining physicians; and (3)
19 non-examining physicians. 20 C.F.R. § 404.1527(c), (e); *Lester v. Chater*, 81 F.3d
20 821, 830 (9th Cir. 1996) (as amended). “Generally, a treating physician’s opinion
21 carries more weight than an examining physician’s, and an examining physician’s
22 opinion carries more weight than a reviewing physician’s.” *Holohan v. Massanari*,
23 246 F.3d 1195, 1202 (9th Cir. 2001); 20 C.F.R. § 404.1527(c)(1)-(2). The opinion
24 of the treating physician is generally given the greatest weight because the treating
25 physician is employed to cure and has a greater opportunity to understand and

26
27 ² All citations to the Code of Federal Regulations refer to regulations
28 applicable to claims filed before March 27, 2017.

1 observe a claimant. *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996);
2 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

3 An ALJ must also consider evidence from those who are not acceptable
4 medical sources. *See* 20 C.F.R. §§ 404.1527(f)(1), 416.927(f)(1). An ALJ may
5 only reject the opinion of a non-acceptable medical source by providing a germane
6 reason. *See Britton v. Colvin*, 787 F.3d 1011, 1013 (9th Cir. 2015).

7 **1. NP Shannon Allen**

8 Plaintiff received treatment from NP Shannon Allen at Hemet Family Care
9 Center from approximately March 2016 through at least September 2017. *See* AR
10 at 631-38, 646-47, 650-53, 656-98, 702-05, 752-54, 817. Over the course of
11 treating plaintiff, NP Allen diagnosed plaintiff with a variety of conditions,
12 including obesity, iron deficiency anemia due to chronic blood loss, rheumatoid
13 arthritis, scleroderma, chest pain at rest, uterine leiomyoma, abnormal EKG,
14 menorrhagia with regular cycle, sleep disturbances, a need for oxygen, low blood
15 pressure, allergic sinusitis, and a history of dizziness. *Id.*

16 In September 2017, NP Allen submitted a reference letter on behalf of
17 plaintiff stating that plaintiff had been diagnosed with rheumatoid arthritis,
18 scleroderma, chronic anemia, and lupus. *Id.* at 817. NP Allen opined that plaintiff
19 was unable to work because of these chronic conditions, which cause symptoms
20 such as joint pain, fatigue, fever, chronic chest pain at rest, and generalized
21 weakness. *Id.*

22 **2. Other Opinions Regarding Plaintiff's RFC**

23 Dr. Vicente Bernabe, a consultative examiner, examined plaintiff on April
24 15, 2015. *Id.* at 343-49. Dr. Bernabe opined that plaintiff had degenerative disc
25 disease of the lumbar spine and medial osteoarthritis of the left knee, but that
26 plaintiff could essentially perform a full range of medium level work. *Id.* Dr.
27 Joseph Gaeta, a medical expert witness, testified at a supplemental hearing that the
28

1 medical record established arthritis but not lupus, and there was nothing in the
2 record to substantiate plaintiff's need for home oxygen. *Id.* at 34-43. Dr. Gaeta
3 opined that plaintiff is capable of: lifting, carrying, and pulling 50 or 20 pounds
4 occasionally and 10 pounds frequently; sitting for six hours; standing and walking
5 for six hours; and crouching, bending, and crawling but not kneeling. *Id.* at 42-43.
6 Dr. Gaeta further opined that no lung disease was established, but if it were,
7 plaintiff would need to avoid concentrated exposure to pulmonary irritants and
8 temperature extremes. *Id.* at 43.

9 State Agency physicians Dr. R. Jacobs and Dr. E. Cooper opined that
10 plaintiff had severe inflammatory arthritis and severe degenerative disc disease, but
11 did not address plaintiff's scleroderma. *Id.* at 98-116. These physicians opined
12 that plaintiff could perform a wide range of medium-level tasks with some
13 positional and environmental restrictions. *Id.*

14 Plaintiff was treated by doctors in the Riverside County Health System,
15 Inland Eye Specialists, Hemet Heart Medical Center, Southland Arthritis, Hemet
16 Valley Medical Center, Arrowhead Orthopedics, Southland
17 Hematology/Oncology, and Charter Health Care Group for various conditions. *Id.*
18 at 293-816. Plaintiff was diagnosed with conditions including scleroderma,
19 spondylosis, osteoarthritis of the left knee, degenerative disc disease of the thoracic
20 spine, bilateral trochanteric bursitis, right bicep tendonitis, anemia, and moderate to
21 severe canal stenosis. *Id.* at 365-429, 473-522, 604-12. These doctors did not
22 opine on plaintiff's RFC. *Id.*

23 **3. The ALJ's Findings**

24 The ALJ determined plaintiff had the RFC to perform a wide range of light
25 work, with the limitations that she: could lift and carry up to 20 pounds
26 occasionally and up to 10 pounds frequently; could stand or walk up to six hours in
27 an eight-hour workday; could sit up to six hours in an eight-hour workday; could
28

1 push or pull bilaterally with her upper extremities on a frequent basis; could
2 handle, finger, or feel bilaterally on a frequent basis; could not climb ropes,
3 ladders, or scaffolds; could perform positional tasks such as stooping, crouching,
4 crawling, kneeling, balancing, and climbing stairs or ramps on an occasional basis;
5 and must avoid concentrated exposure to extremes of cold, and common workplace
6 hazards such as unprotected heights, open flames, or fast or dangerous machinery.
7 *Id.* at 17.

8 In reaching his RFC determination, the ALJ gave some but not great weight
9 to Dr. Bernabe's opinion that plaintiff has degenerative disc disease and medial
10 osteoarthritis of the left knee, in that the ALJ found plaintiff better suited to light
11 rather than medium work. *Id.* at 14. The ALJ gave partial but not great weight to
12 Dr. Gaeta's opinion that plaintiff's treatment records did not reflect any history of
13 lupus, but gave great weight to his opinion that plaintiff's coronary artery disease
14 was not severe and posed no more than minimal restrictions. *Id.* at 14-16. The
15 ALJ gave some but not significant weight to the State Agency physicians' opinions
16 that plaintiff is capable of a wide range of medium-level tasks. *Id.* at 18. The ALJ
17 gave no weight to NP Allen's opinion that plaintiff is disabled. *Id.* at 18-19.
18 Plaintiff only challenges the ALJ's discounting of NP Allen's opinion.

19 Nurse practitioners are not acceptable medical sources.³ *Britton*, 787 F.3d at
20 1013; 20 C.F.R. §§ 404.1513(d)(1), 416.913(d)(1). Instead, a nurse practitioner is
21 an "other source," and an ALJ only needs to cite germane reasons for discounting
22 the opinion. *Id.*

23 The ALJ stated that he considered NP Allen's assessment as part of
24

25 ³ The Social Security Administration has issued new regulations. Although a
26 nurse practitioner is considered an acceptable medical source under the new
27 regulations, this case was filed prior to March 27, 2017 and, as such, the previous
28 definition of acceptable medical sources applies. *See* 20 C.F.R. §§ 404.1502(a)(7);
416.902(a)(7) (effective March 27, 2017).

1 plaintiff's overall, longitudinal treatment record, but provided two possible reasons
2 for rejecting NP Allen's opinion. First, NP Allen was not an acceptable medical
3 source. *Id.* at 18-19. Second, although NP Allen opined that plaintiff is disabled,
4 the ultimate determination of disability is reserved to the Commissioner. *Id.*

5 The ALJ's first possible reason for rejecting NP Allen's opinion was that her
6 opinion cannot be given the same weight as an opinion from an acceptable medical
7 source. *Id.* Although it is proper to give the opinions of acceptable medical
8 sources greater weight than the opinions of non-acceptable medical sources, the
9 opinion of a non-acceptable medical source may, depending on the facts of a
10 particular case, be given greater weight than the opinion of an acceptable medical
11 source. *See* 20 C.F.R. §§ 404.1527(f)(1), 416.927(f)(1). The mere fact that NP
12 Allen is a nurse practitioner was not a germane reason to reject her opinion. It
13 does not appear, however, that the ALJ actually rejected her opinion on this basis.
14 Rather, the ALJ correctly noted a nurse practitioner is a non-acceptable treating
15 source, but stated he considered her assessment as part of the treatment record.
16 This was proper.

17 The ALJ's second – and, in fact, only actual – reason given for rejecting NP
18 Allen's opinion was that the ultimate determination of disability is reserved to the
19 Commissioner. AR at 19. The ALJ correctly noted that it is within his purview,
20 and not NP Allen's, to make the ultimate disability determination. *See* 20 C.F.R.
21 § 404.1527(d); *see also* *McLeod v. Astrue*, 640 F.3d 881 (9th Cir. 2011) (a treating
22 physician's opinion is not binding on an ALJ with respect to the existence of an
23 impairment or the ultimate determination of disability). This was a proper reason
24 to give no weight to the ultimate disability determination by NP Allen. But it is
25 not a germane reason with respect to other aspects of NP Allen's opinion. The
26 question is whether there were other pertinent aspects.

27 Defendant argues NP Allen failed to assess any specific functional
28

1 limitations in sitting or standing ability, or otherwise state how plaintiff's
2 symptoms impacted her ability to function in a work setting. D. Mem. at 4. This is
3 only partially correct. While NP Allen did not assess functional limitations, she
4 did note that plaintiff's chronic conditions cause her significant joint pain, fatigue,
5 fever, chest pain at rest, and generalized weakness, and require plaintiff to see
6 doctors and other specialists several times a month. As plaintiff argues, this
7 assessment is relevant to formulating plaintiff's RFC, and it appears the ALJ
8 rejected it, along with the assessment that plaintiff is unable to work, without
9 giving any reason apart from the non-germane reason that the ultimate disability
10 determination is up to the ALJ. This was error. *See Reddick*, 157 F.3d at 725 (ALJ
11 not bound by physicians' opinions on ultimate issue of disability, but cannot reject
12 them without providing legally adequate reason) (citations omitted).

13 In sum, the ALJ failed to provide a germane reason to reject NP Allen's
14 opinion as a whole. As such, the ALJ erred in discounting the opinion.

15 **B. The ALJ Failed to Properly Consider Plaintiff's Subjective Complaints**

16 Plaintiff also argues the ALJ improperly found her testimony regarding her
17 symptoms to be less than fully credible on the grounds that it was not supported by
18 the objective medical evidence and her stated activities of daily living. P. Mem. at
19 8-13. Plaintiff argues the ALJ failed to articulate clear and convincing reasons to
20 discount the credibility of her testimony. *Id.*

21 The ALJ must make specific credibility findings, supported by the record.
22 Social Security Ruling ("SSR") 96-7p. To determine whether testimony
23 concerning symptoms is credible, the ALJ engages in a two-step analysis.
24 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, the ALJ
25 must determine whether a claimant produced objective medical evidence of an
26 underlying impairment "which could reasonably be expected to produce the pain
27 or other symptoms alleged." *Id.* at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d
28

1 341, 344 (9th Cir. 1991) (en banc)). Second, if there is no evidence of
2 malingering, an “ALJ can reject the claimant’s testimony about the severity of her
3 symptoms only by offering specific, clear and convincing reasons for doing so.”
4 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *accord Benton v. Barnhart*,
5 331 F.3d 1030, 1040 (9th Cir. 2003). The ALJ may consider several factors in
6 weighing a claimant’s credibility, including: (1) ordinary techniques of credibility
7 evaluation such as a claimant’s reputation for lying; (2) the failure to seek
8 treatment or follow a prescribed course of treatment; and (3) a claimant’s daily
9 activities. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Bunnell*,
10 947 F.2d at 346.

11 At the first step, the ALJ here found plaintiff’s medically determinable
12 impairments could reasonably be expected to cause the symptoms alleged. AR at
13 18. At the second step, because the ALJ did not find any evidence of malingering,
14 the ALJ was required to provide clear and convincing reasons for discounting
15 plaintiff’s testimony. Here, the ALJ discounted plaintiff’s subjective complaints
16 because: (1) the objective medical evidence did not support plaintiff’s allegations
17 as to the intensity, persistence, and limiting effects of her symptoms; and (2)
18 plaintiff’s activities of daily living are consistent with a finding that she is capable
19 of a wide range of sedentary tasks. *Id.* at 18-19.

20 At the May 4, 2017 hearing, plaintiff testified that she has heart problems,
21 experiences pain in her hands, finds it difficult to walk long distances, cannot lift
22 heavy objects or sit for long, and experiences shortness of breath. *Id.* at 76-81.
23 Plaintiff also stated at an orthopedic consultation that she injured her back and left
24 knee due to repetitive bending at work, and she experiences “sharp, throbbing and
25 burning” back and left knee pain that is exacerbated by prolonged sitting, standing,
26 walking, bending, and lifting. *Id.* at 344. Although the ALJ notes that plaintiff
27 states she cannot be in the heat because of her lupus and experiences nausea and
28

1 vomiting (*see id.* at 18), it is unclear when plaintiff made these statements, as they
2 do not appear in either of the hearing transcripts or in her consultation notes.

3 As for plaintiff's activities of daily living, plaintiff stated at the May 4, 2017
4 hearing that she spends the majority of her time taking care of her four children as
5 a single mother. *Id.* at 69-70, 81-85. Plaintiff is assisted by a caregiver who is
6 paid for by the In-Home Supportive Services Program, a social services program
7 funded by the state of California. *Id.* at 70-72. Plaintiff described a typical day for
8 her as getting up, getting her children ready for school, trying to clean the house
9 with the assistance of her caretaker, and helping her children with homework after
10 school. *Id.* at 81-85. Plaintiff stated that she also went grocery shopping with her
11 caretaker and would watch her son at football practice. *Id.* at 83.

12 The ALJ found plaintiff's testimony regarding the intensity, persistence, and
13 limiting effects of her symptoms not entirely credible. *Id.* at 18. The first reason
14 he provided was that the objective medical evidence did not support her symptom
15 testimony. *Id.* The ALJ found that although plaintiff has a caretaker, plaintiff's
16 coronary and pulmonary tests do not support the need for plaintiff having a
17 dedicated oxygen tank. *Id.* The ALJ further found that there was no medical
18 evidence to support plaintiff's claims of disabling lupus, rheumatoid arthritis, or
19 scleroderma. *Id.*

20 As the ALJ observed at the hearings, plaintiff's medical history is
21 fragmented, which may be due to plaintiff's decision to proceed pro se. The record
22 includes references to plaintiff being diagnosed with lupus, rheumatoid arthritis,
23 and scleroderma. *See, e.g. id.* at 521, 604. The record also includes several
24 references to plaintiff using home oxygen therapy (*see id.* at 670), but it is not clear
25 when plaintiff was prescribed oxygen or by whom. Plaintiff stated at the January
26 11, 2018 hearing that the Loma Linda University Hospital "sent [her] home with
27 the oxygen." *Id.* at 39. Plaintiff also stated at the same hearing that NP Allen told
28

1 plaintiff she cannot take her off oxygen and “[i]t’s up to the pulmonologist to take
2 [her] off.” *Id.* at 40. It appears plaintiff was prescribed home oxygen after
3 reporting to the emergency room at Loma Linda University Medical Center in
4 October 2016 with abdominal pain, flank pain, a urinary tract infection, and sepsis.
5 *Id.* at 441-59. But no other medical records support a prescription for home
6 oxygen. Indeed, a March 2015 record from a physician who performed a lung
7 volume test on plaintiff included only a recommendation that they “evaluate for
8 anemia.” *Id.* at 478.

9 Yet, even if the ALJ’s discounting of plaintiff’s testimony was supported by
10 a lack of objective medical evidence, this cannot be the sole reason for discounting
11 her testimony. *See Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)
12 (“Although lack of medical evidence cannot form the sole basis for discounting
13 pain testimony, it is a factor that the ALJ can consider in his credibility analysis.”);
14 *see also Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (lack of
15 corroborative objective medicine may be one factor in evaluating credibility);
16 *Bunnell*, 947 F.2d at 345 (an ALJ “may not reject a claimant’s subjective
17 complaints based solely on a lack of objective medical evidence to fully
18 corroborate the alleged severity of pain”).

19 The second reason the ALJ gave for discounting plaintiff’s testimony was
20 that she testified to engaging in “decent activities of daily living.” *Id.* at 19. The
21 ALJ explained that these activities included getting her children ready for school,
22 doing light household chores, going to her children’s extracurricular activities,
23 visiting with family, and going to parent conferences. *Id.* Based on these stated
24 activities, the ALJ found that there was no evidence showing that plaintiff would
25 not be able to perform a wide range of sedentary-level tasks. *Id.* A claimant’s
26 ability “to spend a substantial part of [her] day engaged in pursuits involving the
27 performance of physical functions that are transferable to a work setting” may be
28

1 sufficient to discredit her. *Morgan v. Comm’r*, 169 F.3d 595, 600 (9th Cir. 1999).
2 The ALJ here does not explain, however, how plaintiff’s claimed daily activities
3 translate into a work setting.

4 Furthermore, the ALJ’s recounting of plaintiff’s activities is inconsistent
5 with her hearing testimony. At the May 4, 2017 hearing, plaintiff testified that she
6 rarely visits family. *Id.* at 84. Although the ALJ appears to characterize plaintiff
7 as a mother of four children who is “active with the kids,” plaintiff testified that
8 many of her daily activities are only possible with the assistance of her caretaker.
9 For instance, plaintiff testified that her caretaker is responsible for driving her
10 children to school, doing at least some cleaning and cooking, and taking plaintiff
11 grocery shopping. *Id.* at 81-83. Plaintiff also testified that her involvement in her
12 son’s extracurricular activities consists of her caretaker taking plaintiff to the park
13 or a practice, and plaintiff “sit[ting] there and watch him play.” *Id.* at 83. In short,
14 plaintiff testified that she relies heavily on her caretaker to accomplish many of her
15 daily activities.

16 Given plaintiff’s explanation of how her caretaker assists her on a daily
17 basis, characterizing plaintiff as a mother who is “active with the kids” is a stretch.
18 A claimant does not need to be “utterly incapacitated.” *Fair v. Bowen*, 885 F.2d
19 597, 603 (9th Cir. 1989). “[T]he mere fact a [claimant] has carried on certain daily
20 activities, such as grocery shopping, driving a car, or limited walking for exercise,
21 does not in any way detract from her credibility as to her overall disability.”
22 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001). It may be that plaintiff’s
23 ability to do some of these tasks with the assistance of a caretaker shows she could
24 perform a sedentary job, although the ALJ in fact determined plaintiff could
25 perform a wide range of light work. But in any event, for the ALJ to discount
26 plaintiff’s testimony based on her reported daily activities, he must explain how
27 those activities are transferable to a work setting or otherwise undercut the
28

1 credibility of her testimony regarding her subjective symptoms. The ALJ fails to
2 give such an explanation, and on their face, plaintiff’s reported activities do not
3 show she is able to work.

4 Because plaintiff’s daily activities do not clearly undercut the credibility of
5 her symptom testimony, and lack of objective medical evidence cannot be the sole
6 basis for discounting a plaintiff’s testimony, the ALJ failed to articulate clear and
7 convincing reasons to discount plaintiff’s testimony.

8 **V.**

9 **REMAND IS APPROPRIATE**

10 The decision whether to remand for further proceedings or reverse and
11 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
12 888 F.2d 599, 603 (9th Cir. 1989). It is appropriate for the court to exercise this
13 discretion to direct an immediate award of benefits where: “(1) the record has been
14 fully developed and further administrative proceedings would serve no useful
15 purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting
16 evidence, whether claimant testimony or medical opinions; and (3) if the
17 improperly discredited evidence were credited as true, the ALJ would be required
18 to find the claimant disabled on remand.” *Garrison v. Colvin*, 759 F.3d 995, 1020
19 (9th Cir. 2014) (setting forth three-part credit-as-true standard for remanding with
20 instructions to calculate and award benefits). But where there are outstanding
21 issues that must be resolved before a determination can be made, or it is not clear
22 from the record that the ALJ would be required to find a plaintiff disabled if all the
23 evidence were properly evaluated, remand for further proceedings is appropriate.
24 *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*,
25 211 F.3d 1172, 1179-80 (9th Cir. 2000). In addition, the court must “remand for
26 further proceedings when, even though all conditions of the credit-as-true rule are
27 satisfied, an evaluation of the record as a whole creates serious doubt that a
28

1 claimant is, in fact, disabled.” *Garrison*, 759 F.3d at 1021.

2 Here, remand is required to resolve two outstanding issues. On remand, the
3 ALJ shall reconsider NP Allen’s opinion, and either credit it or provide germane
4 reasons for rejecting it. The ALJ shall also reconsider plaintiff’s subjective
5 symptom testimony, and either credit it or articulate clear and convincing reasons
6 for discounting it. The ALJ shall then reassess plaintiff’s RFC, and proceed
7 through steps four and five to determine what work, if any, plaintiff is capable of
8 performing.

9 **VI.**

10 **CONCLUSION**

11 IT IS THEREFORE ORDERED that Judgment shall be entered
12 REVERSING the decision of the Commissioner denying benefits, and
13 REMANDING the matter to the Commissioner for further administrative action
14 consistent with this decision.

15
16 DATED: November 30, 2020



17
18 SHERI PYM
United States Magistrate Judge