

1 I.

2 BACKGROUND

3 On August 12, 2016, Plaintiff protectively applied for DIB, alleging
4 disability beginning August 1, 2016. Administrative Record (“AR”) 9, 427, 620-
5 21, 648.² On May 6, 2019, after her application was denied (AR 473, 489),
6 Plaintiff, represented by counsel, appeared in Moreno Valley, California, and
7 testified via video before Administrative Law Judge (“ALJ”)³, as did a
8 vocational expert (“VE”) telephonically. AR 424-58.

9 On June 6, 2019, the ALJ issued a written decision finding Plaintiff was
10 not disabled. AR 9-19. The ALJ found Plaintiff last met the insurance status
11 requirements of the Social Security Act (“SSA”) on June 30, 2017. AR 11. The
12 ALJ found that Plaintiff did not engage in substantial gainful activity during the
13 period from her amended alleged-onset date of August 1, 2016, through the
14 date she was last insured. AR 11. The ALJ concluded Plaintiff had the
15 following severe impairments: degenerative disc disease; history of cervical
16 fusion; history of right carpal tunnel release procedure; gastroesophageal reflux
17 disease; hyperthyroidism; major depressive disorder; and bipolar disorder. AR
18 11-12. The ALJ also found Plaintiff did not have an impairment or
19 combination of impairments that met or medically equaled a listed impairment
20 (AR 12-13), and she had the RFC to perform light work⁴ except (AR 13):

21
22 ² The application listed August 1, 2016 as the alleged onset date, but Plaintiff
23 later indicated in disability reports that her disability began April 1, 2014. AR 620,
24 648, 653, 719, 738. At the administrative hearing, Plaintiff amended her alleged onset
date back to August 1, 2016. AR 9, 427-28.

25 ³ The ALJ’s decision indicates the ALJ presided from Dallas, Texas. However,
26 the transcript indicates he was in Albuquerque, New Mexico. AR 9, 424, 426.

27 ⁴ “Light work” is defined as
28 lifting no more than 20 pounds at a time with frequent lifting or

1 [Plaintiff] can frequently climb ramps and stairs, never climb
2 ladders, ropes[,] or scaffolds; [Plaintiff] can occasionally balance,
3 stop, kneel, crouch, and crawl. Reaching overhead bilaterally is
4 limited to occasional. Handling and fingering with the right hand is
5 limited to frequent. [Plaintiff] can perform simple, unskilled work.

6 The ALJ next found that Plaintiff was unable to perform her past relevant
7 work as an administrative assistant (Dictionary of Occupational Titles [“DOT”]
8 169.167-010) or purchasing assistant (DOT 162.157-022), as actually or
9 generally performed. AR 1106-07. The ALJ also found that Plaintiff is closely
10 approaching advanced age, has at least a high school education, and can
11 communicate in English. AR 18.

12 The ALJ then found that, if Plaintiff had the RFC to perform a full range
13 of light work, a Medical-Vocational rule would direct a finding of not disabled.
14 AR 18. But, as Plaintiff’s ability to perform the requirements of light work was
15 impeded by additional limitations, the ALJ consulted the testimony of the VE.
16 AR 18. Considering Plaintiff’s age, education, work experience, RFC, and the
17 VE’s testimony, the ALJ concluded Plaintiff was capable of performing jobs
18 that exist in significant numbers in the national economy, including: assembler
19 of small products (DOT 706.684-022), inspector, light (DOT 559.687-074), and
20 garment sorter (DOT 222.687-014). AR 19. Thus, the ALJ found Plaintiff was
21 not under a “disability,” as defined in the SSA, from the amended alleged onset
22 date, through June 30, 2017, the date last insured. AR 19.

23
24 carrying of objects weighing up to 10 pounds. Even though the weight
25 lifted may be very little, a job is in this category when it requires a good
26 deal of walking or standing, or when it involves sitting most of the time
27 with some pushing and pulling of arm or leg controls. To be considered
28 capable of performing a full or wide range of light work, [a claimant]
must have the ability to do substantially all of these activities.
20 C.F.R. § 404.1567(b); see also Aide R. v. Saul, 2020 WL 7773896, *2 n.6 (C.D.
Cal. Dec. 30, 2020).

1 Plaintiff submitted additional evidence before the Appeals Council in
2 support of her claim of disability and requested review of the ALJ's decision,
3 specifically challenging the ALJ's assessment of her subjective testimony. AR
4 28, 34-423, 770-72. The Appeals Council found the evidence did not show a
5 reasonable probability that it would change the outcome and denied review,
6 making the ALJ's decision the agency's final decision. AR 27-30.

7 II.

8 LEGAL STANDARDS

9 A. Standard of Review

10 Under 42 U.S.C. § 405(g), this court may review the Commissioner's
11 decision to deny benefits. The ALJ's findings and decision should be upheld if
12 they are free from legal error and supported by substantial evidence based on
13 the record as a whole. Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir.
14 2015) (as amended); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007).
15 Substantial evidence means such relevant evidence as a reasonable person
16 might accept as adequate to support a conclusion. Lingenfelter v. Astrue, 504
17 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla, but less than a
18 preponderance. Id. To assess whether substantial evidence supports a finding,
19 the court "must review the administrative record as a whole, weighing both the
20 evidence that supports and the evidence that detracts from the Commissioner's
21 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). "If the
22 evidence can reasonably support either affirming or reversing," the reviewing
23 court "may not substitute its judgment" for that of the Commissioner. Id. at
24 720-21; see also Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012) ("Even
25 when the evidence is susceptible to more than one rational interpretation, [the
26 court] must uphold the ALJ's findings if they are supported by inferences
27 reasonably drawn from the record."), superseded by regulation on other
28 grounds as stated in Thomas v. Saul, 830 F. App'x 196, 198 (9th Cir. 2020).

1 Lastly, even if an ALJ errs, the decision will be affirmed where such
2 error is harmless (Molina, 674 F.3d at 1115), that is, if it is “inconsequential to
3 the ultimate nondisability determination,” or if “the agency’s path may
4 reasonably be discerned, even if the agency explains its decision with less than
5 ideal clarity.” Brown-Hunter, 806 F.3d at 492 (citation omitted).

6 **B. The Five-Step Sequential Evaluation**

7 When a claim reaches an ALJ, the ALJ conducts a five-step sequential
8 evaluation to determine at each step if the claimant is or is not disabled. See
9 Ford v. Saul, 950 F.3d 1141, 1148-49 (9th Cir. 2020); Molina, 674 F.3d at
10 1110.

11 First, the ALJ considers whether the claimant currently works at a job
12 that meets the criteria for “substantial gainful activity.” Molina, 674 F.3d at
13 1110. If not, the ALJ proceeds to a second step to determine whether the
14 claimant has a “severe” medically determinable physical or mental impairment
15 or combination of impairments that has lasted for more than twelve months.
16 Id. If so, the ALJ proceeds to a third step to determine whether the claimant’s
17 impairments render the claimant disabled because they “meet or equal” any of
18 the “listed impairments” set forth in the Social Security regulations at 20
19 C.F.R. Part 404, Subpart P, Appendix 1. See Rounds v. Comm’r Soc. Sec.
20 Admin., 807 F.3d 996, 1001 (9th Cir. 2015). If the claimant’s impairments do
21 not meet or equal a “listed impairment,” before proceeding to the fourth step
22 the ALJ assesses the claimant’s RFC, that is, what the claimant can do on a
23 sustained basis despite the limitations from her impairments. See 20 C.F.R.
24 § 404.1520(a)(4); Social Security Ruling (“SSR”) 96-8p.

25 After determining the claimant’s RFC, the ALJ proceeds to the fourth
26 step and determines whether the claimant has the RFC to perform her past
27 relevant work, either as she “actually” performed it when she worked in the
28 past, or as that same job is “generally” performed in the national economy. See

1 Stacy v. Colvin, 825 F.3d 563, 569 (9th Cir. 2016). If the claimant cannot
2 perform her past relevant work, the ALJ proceeds to a fifth and final step to
3 determine whether there is any other work, in light of the claimant’s RFC, age,
4 education, and work experience, that the claimant can perform and that exists
5 in “significant numbers” in either the national or regional economies. See
6 Tackett v. Apfel, 180 F.3d 1094, 1100-01 (9th Cir. 1999). If the claimant can
7 do other work, she is not disabled; but if the claimant cannot do other work
8 and meets the duration requirement, the claimant is disabled. See id. at 1099.

9 The claimant generally bears the burden at steps one through four to
10 show she is disabled or meets the requirements to proceed to the next step and
11 bears the ultimate burden to show she is disabled. See, e.g., Ford, 950 F.3d at
12 1148; Molina, 674 F.3d at 1110. However, at Step Five, the ALJ has a
13 “limited” burden of production to identify representative jobs that the claimant
14 can perform and that exist in “significant” numbers in the economy. See Hill v.
15 Astrue, 698 F.3d 1153, 1161 (9th Cir. 2012); Tackett, 180 F.3d at 1100.

16 **III.**
17 **DISCUSSION**

18 The parties present one disputed issue: did the ALJ properly consider
19 Plaintiff’s subjective symptom testimony.⁵

20 ⁵ Before the ALJ’s decision, SSR 16-3p went into effect. See SSR 16-3p, 2016
21 WL 1119029 (Mar. 16, 2016). SSR 16-3p provides that “we are eliminating the use of
22 the term ‘credibility’ from our sub-regulatory policy, as our regulations do not use this
23 term.” Id. Moreover, “[i]n doing so, we clarify that subjective symptom evaluation is
24 not an examination of an individual’s character” and requires that the ALJ consider
25 all of the evidence in an individual’s record when evaluating the intensity and
26 persistence of symptoms. Id.; see also Trevizo v. Berryhill, 871 F.3d 664, 678 n.5 (9th
27 Cir. 2017) (as amended). Thus, the adjudicator “will not assess an individual’s overall
28 character or truthfulness in the manner typically used during an adversarial court
litigation. The focus of the evaluation of an individual’s symptoms should not be to
determine whether he or she is a truthful person.” SSR 16-3p, 2016 WL 1119029, *10.
SSR 16-3p’s elimination of the word “credibility” from the Agency’s subjective-

1 **A. Applicable Law**

2 Where a claimant produces objective medical evidence of an impairment
3 that could reasonably be expected to produce the pain or other symptoms
4 alleged, the ALJ may discount the claimant’s subjective symptom testimony
5 only upon making specific findings that support the conclusion. Berry v.
6 Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent evidence of malingering,
7 “the ALJ may reject the claimant’s testimony about the severity of those
8 symptoms only by providing specific, clear, and convincing reasons for doing
9 so.” Lambert v. Saul, 980 F.3d 1266, 1277 (9th Cir. 2020) (citations and
10 internal quotation marks omitted); Moisa v. Barnhart, 367 F.3d 882, 885 (9th
11 Cir. 2004). The ALJ’s findings “must be sufficiently specific to allow a
12 reviewing court to conclude that the [ALJ] rejected [the] claimant’s testimony
13 on permissible grounds and did not arbitrarily discredit the claimant’s
14 testimony.” Moisa, 367 F.3d at 885 (citation omitted). But if the ALJ’s
15 assessment of the claimant’s testimony is reasonable and is supported by
16 substantial evidence, it is not the Court’s role to “second-guess” it. See Rollins
17 v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001). Finally, the ALJ’s finding
18 may be upheld even if not all the ALJ’s reasons for rejecting the claimant’s
19 testimony are upheld. See Batson v. Comm’r Soc. Sec. Admin., 359 F.3d
20 1190, 1197 (9th Cir. 2004).

21 **B. Hearing Testimony**

22 The May 2019 hearing is summarized as follows. Plaintiff last worked
23 for four or five months in 2016 as a purchasing assistant for a shipping and
24 receiving company. AR 430-31. She mostly sat at this job and did no lifting. Id.

26 symptom evaluation “does not, however, alter the standards by which courts will
27 evaluate an ALJ’s reasons for discounting a claimant’s testimony.” Elizabeth B. v.
28 Comm’r Soc. Sec., 2020 WL 1041498, *3 (W.D. Wash. Mar. 4, 2020).

1 Before that Plaintiff worked in 2010 as a management assistant, which
2 she described as “a personal assistant to a family.” AR 431. She paid the bills
3 for the family, did their personal work, and answered and made calls on their
4 behalf. AR 431. Her job ended when one of the family members developed
5 Alzheimer’s and couldn’t work anymore. AR 432. This job also involved
6 primarily sitting and no lifting. AR 432.

7 From 2010 to 2015, Plaintiff tried to start her own shipping business, but
8 she wasn’t successful and reported no income from the business. AR 432-33.

9 When she stopped working in 2016, her doctor “wrote [her] off” as
10 disabled. AR 433. Through the Employment Development Department, she
11 received unemployment benefits and then state disability benefits after her
12 August 2016 hand surgery. AR 433-35. Plaintiff has had a total of two
13 surgeries on her right hand: an August 2016 carpal tunnel release and then a
14 trigger-thumb surgery about five or six months before the hearing. AR 435.

15 Plaintiff states she is unable to work because she has trouble moving her
16 neck in all directions; for example, it is very hard for her to look down at a
17 desk or use a telephone. AR 436, 438, 444-46, 450. She experiences pain in her
18 neck, the worst being in the left side and in the base toward the back of her
19 neck. AR 436-37. This pain never goes away, and she experiences migraine
20 headaches all the time because of it. AR 437, 439. Her neck pain radiates down
21 into her shoulders and affects her ability to reach. AR 439, 445. She probably
22 could not change a light bulb due to the pain. AR 445.

23 About 10 years ago, she had a major operation on her neck. AR 437,
24 439. Doctors removed a herniated disc, inserted a piece of cadaver bone, and
25 then fused three levels of her neck together with screws and plates. AR 438.
26 Following neck surgery, she experienced a gradual worsening of her condition.
27 AR 440-41. The surgery caused stress above and below the fusion points, and
28 now she has degenerative, bulging discs at those points. AR 441.

1 Plaintiff also experiences pain throughout her whole spine, from her
2 neck down to her lower back. AR 436. She also has sciatic pain caused by
3 nerve root impingement, which goes down her leg, around her whole thigh,
4 culminating in the top of her foot. AR 436. She has pain in her hand that also
5 never goes away. AR 445. She has trouble holding a mouse and writing due to
6 numbness in her thumb. AR 445-46. Her hand condition has affected her grip,
7 such as her ability to open jars and bottles. AR 446.

8 She has a neurogenic bladder, which causes frequent use of the restroom.
9 AR 448. This affects her ability to sleep, and she takes medication for it. AR
10 448. She also has a low thyroid, which is controlled by medication. AR 449.
11 She experiences fatigue due to the medication and needing to go to the
12 restroom during the night. AR 449. One of her medications causes
13 constipation, so she in turn takes medication to treat that. AR 449.

14 To treat her neck, doctors have been giving her facet nerve block
15 injections. AR 436, 439. Since August 2016, she believes she has had three
16 such injections. AR 436. She has also received injections in her thoracic and
17 lumbar spine. AR 436-37, 442. She has taken part in physical therapy, except
18 for a period when her doctors said she shouldn't because of her neck problems.
19 AR 439. Physical therapy has not helped. AR 439. She also takes pain
20 medication, such as Percocet, Lyrica for nerve pain, and Tizanidine for muscle
21 pain, and Elavil to improve her mood but also to help with pain. AR 439-40,
22 447. She has also used a TENS⁶ unit. AR 443.

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24
25 ⁶ "TENS" stands for "transcutaneous electric nerve stimulator" (see Int'l
26 Rehabilitative Sci. Inc. v. Sebelius, 688 F.3d 994, 998 (9th Cir. 2012)) and is "used to
27 relieve pain in an injured or diseased part of the body in which electrodes applied to
28 the skin deliver intermittent stimulation to surface nerves, blocking the transmission
of pain signals." Alter v. Colvin, 2013 WL 6080179, *5 n.1 (D. Or. Nov. 19, 2013)
(internal quotation marks and citation omitted).

1 Doctors do not recommend further surgery because it would eliminate
2 all motion in her neck. AR 441. Recently, doctors inserted leads into her spine
3 that stimulate her neck. AR 441.

4 Plaintiff had surgery to her right knee in 1980, and her left knee in 2006.
5 AR 451-52. Her knee pain continues to this day, with her right knee being
6 worse. AR 452. She has trouble stepping. AR 452.

7 Regarding her mental health, Plaintiff takes “a lot of medication” for
8 depression, anxiety, bipolar disorder, schizoaffective disorder, and paranoia.
9 AR 443-44, 453. These medications affect her memory. AR 443, 447-48. Her
10 condition was “really bad” in 2014, when her mother died, her business was
11 failing, and her husband filed for divorce. AR 443-44. Her mental health issues
12 still exist. AR 444. Plaintiff sees a doctor for therapy, as well as a psychiatrist.
13 AR 447. For her mental condition, she takes Alprazolam for anxiety, Lexapro
14 for depression, Lamotrigine for bipolar disorder, and Elavil. AR 447-48.
15 Plaintiff used to drink alcohol, but she stopped when she was admitted to a
16 psychiatric ward sometime between 2010 and 2014. AR 453. Medical
17 professionals at the ward gave her medicine to help her with her drinking, had
18 she hasn’t drunk since. AR 453.

19 She can lift a bucket of water or two gallons of milk, but it would hurt
20 her back. AR 450-51. She can sit for about an hour before her back hurts. AR
21 451. She can stand for about 15 minutes before she must sit down due to her
22 knee pain. AR 451-52. She does not need to lay down during the day. AR 452.
23 She doesn’t exercise or even walk during the day. AR 452. She does not know
24 how far she can walk because she “tend[s] to not do things.” AR 452. If
25 something requires a lot of walking, she will not do it. AR 452. Neck pain is
26 her worst symptom, and the most prohibitive of her ability to work. AR 436,
27 438, 444-46, 450. She cannot work an eight-hour workday, five days a week
28 due to her condition. AR 452.

1 **C. Analysis**

2 The ALJ provided a brief summary of the hearing testimony and then
3 found that Plaintiff's medically determinable impairments could reasonably be
4 expected to cause the alleged symptoms, but her statements "concerning the
5 intensity, persistence[,] and limiting effects of [the] symptoms" were not
6 entirely consistent with the medical evidence and other evidence in the record.
7 AR 14. The ALJ provided a summary of the medical evidence and found
8 Plaintiff's subjective complaints inconsistent with: (1) mild objective physical
9 examination findings; (2) routine and conservative mental health treatment
10 and "essentially" conservative physical treatment; and (3) Plaintiff's activities
11 of daily living. AR 16-17.

12 The ALJ's assessment of Plaintiff's testimony is insufficient for the
13 following reasons.

14 First, the ALJ's reasoning does not identify which specific testimony was
15 allegedly inconsistent with "the medical evidence and other evidence in the
16 record." AR 14; see Brown-Hunter, 806 F.3d at 494 ("we require the ALJ to
17 specify which testimony she finds not credible, and then provide clear and
18 convincing reasons, supported by evidence in the record, to support that
19 credibility determination"); Burrell v. Colvin, 775 F.3d 1133, 1138 (9th Cir.
20 2014) ("General findings are insufficient; rather the ALJ must identify what
21 testimony is not credible and what evidence undermines the claimant's
22 complaints." (citation omitted)). Without more, the ALJ's rejection of
23 Plaintiff's testimony is unreviewable. See Lambert, 980 F.3d at 1277 ("We
24 cannot review whether the ALJ provided specific, clear, and convincing
25 reasons for rejecting . . . testimony where, as here, the ALJ never identified
26 which testimony she found not credible, and never explained which evidence
27 contradicted that testimony.") (citation and internal quotation marks omitted,
28 emphasis in original). The ALJ's overview of Plaintiff's medical history was

1 insufficient to discount Plaintiff's subjective complaints because "providing a
2 summary of medical evidence . . . is not the same as providing clear and
3 convincing reasons for finding the claimant's symptom testimony not
4 credible." Id. at 1278 (citation and internal quotation marks omitted).

5 Second, the ALJ improperly characterized Plaintiff's physical treatment
6 as "essentially conservative." AR 16. Even giving the ALJ's decision the
7 benefit of the doubt in its failure to consider Plaintiff's two knee surgeries, neck
8 fusion, and second hand surgery as non-conservative because those surgeries
9 fell outside the narrow relevant period,⁷ Plaintiff's first hand surgery in August
10 2016 was not conservative.⁸ See Wojtowicz v. Saul, 2021 WL 165086, *7
11 (E.D. Cal. Jan. 19, 2021) ("[Claimant] had carpal tunnel surgery during the
12 adjudicated period, which is not properly characterized as 'conservative.'");
13 Jean R. v. Saul, 2020 WL 1505720, *3 (C.D. Cal. Mar. 30, 2020) ("[Claimant]
14 had carpal tunnel release surgery, which is indisputably not conservative.");

15 _____
16 ⁷ Medical evidence before or after the relevant period may be relevant in
17 assessing a claim of disability, particularly in a situation such as here where the
18 applicable period was short, Plaintiff's condition progressively worsened, and she
19 received significant, surgical treatment both before and after the applicable period.
20 See e.g., Smith v. Bowen, 849 F.2d 1222, 1225 (9th Cir. 1988) ("[M]edical
21 evaluations made after the expiration of a claimant's insured status are relevant to an
22 evaluation of the pre-expiration condition."); DeBoard v. Comm'r of Soc. Sec., 211
23 F. App'x 411, 414 (6th Cir. 2006) ("We recognize that evidence . . . predating the
24 onset of disability, when evaluated in combination with later evidence, may help
25 establish disability. This is particularly true when the disabling condition is
26 progressive."); Kimberly S. v. Comm'r of Soc. Sec., 2021 WL 1827680, *2 (W.D.
27 Wash. May 7, 2021) ("A plaintiff's claim does not exist in a vacuum; evidence from
28 before or after the relevant period can inform the ALJ's assessment of the claim."); 42
U.S.C. § 423(d)(5)(B) ("the Commissioner . . . shall consider all evidence available in
[an] individual's case record . . .").

⁸ Just prior to this surgery, Plaintiff's treating physician explained that Plaintiff
was in "acute pain," and that "[s]o far, nothing has worked." AR 1324, 1471-72.
Accordingly, the doctor stated he "will proceed with the surgical option" and
scheduled Plaintiff's carpal tunnel release to her right wrist. Id.

1 Sanchez v. Colvin, 2013 WL 1319667, *4 (C.D. Cal. Mar. 29, 2013) (“Surgery
2 is not conservative treatment.”). Moreover, after surgery, in 2017 alone,
3 Plaintiff had at least 13 injections, six of them occurring before June 30, 2017,
4 the date she last met the insured status requirements and marking the end of
5 the relevant period. AR 11, 1259, 1263, 1268, 1273, 1277, 1280, 1286, 1289-90,
6 1293, 1297, 1301, 1305, 1309; See, e.g., Garrison v. Colvin, 759 F.3d 995,
7 1015 n.20 (9th Cir. 2014) (expressing doubt that “shots to the neck and lower
8 back qualify as ‘conservative’ medical treatment”); Contreras v. Berryhill, 2020
9 WL 619792, at *4 (N.D. Cal. Feb. 10, 2020) (stating “[n]umerous courts have
10 rejected the argument that injections are ‘conservative’”; collecting cases). This
11 was not conservative treatment, especially in conjunction with the of strong
12 medication she used during the relevant period for her physical⁹ and mental¹⁰
13 symptoms. See Lapierre-Gutt v. Astrue, 382 F. App’x 662, 664 (9th Cir. 2010)
14 (treatment including narcotic pain medication and cervical fusion surgery
15 deemed not conservative); Christine G. v. Saul, 402 F. Supp. 3d 913, 926
16 (C.D. Cal. 2019) (“Many courts have previously found that strong narcotic
17 pain medications and spinal epidural injections are not considered to be
18 ‘conservative’ treatment.”; collecting cases).

19 Third, and finally, the ALJ found that Plaintiff’s “reported activities of
20 daily living do not support her allegations of disabling symptoms.” AR 17. The
21 ALJ specifically cited Plaintiff’s reported ability to prepare meals, do

22 ⁹ See AR 1280 (listing three medications for physical symptoms by end of
23 relevant period, including Neurontin, Baclofen, and Norco), 1323 (listing at least 10
24 different medications total just before alleged onset date, including Baclofen,
25 Gabapentin, and Oxycodone).

26 ¹⁰ See AR 1097 (listing five psychotropic medications just before alleged onset
27 date, Wellbutrin, Lamictal, Alprazolam, Buspirone HCL, and Hydroxyzine HCL),
28 1548 (listing five psychotropic near end of relevant period, Wellbutrin, Lamictal,
Alprazolam, Hydroxyzine HCL, and Lexapro).

1 household chores without help or encouragement, shop, and drive. AR 17.

2 Preliminarily, the Ninth Circuit has “repeatedly warned that ALJs must
3 be especially cautious in concluding that daily activities are inconsistent with
4 testimony about pain, because impairments that would unquestionably
5 preclude work and all the pressures of a workplace environment will often be
6 consistent with doing more than merely resting in bed all day.” Garrison, 759
7 F.3d at 1016; Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001) (“This
8 court has repeatedly asserted that the mere fact that a plaintiff has carried on
9 certain daily activities, such as grocery shopping, driving a car, or limited
10 walking for exercise, does not in any way detract from her [testimony] as to
11 her overall disability.”). “[O]nly if [the] level of activity [was] inconsistent with
12 [a claimant’s] claimed limitations would . . . activities have any bearing on . . .
13 [subjective testimony].” Garrison, 759 F.3d at 1016. A claimant’s daily
14 activities may be grounds for discounting testimony “if a claimant is able to
15 spend a substantial part of [her] day engaged in pursuits involving the
16 performance of physical functions” Orn v. Astrue, 495 F.3d 625, 639 (9th
17 Cir. 2007); see also Childress v. Colvin, 2015 WL 2380872, *15 (C.D. Cal.
18 May 18, 2015) (ALJ erred in finding claimant’s daily activities were
19 inconsistent with the alleged severity of impairments where there was no
20 indication that the activities either comprised a “substantial” portion of
21 claimant’s day).

22 Moreover, the ALJ must when appropriate make findings about the
23 transferability of daily activities to the workplace. See Martinez v. Berryhill,
24 721 F. App’x 597, 600 (9th Cir. 2017) (ALJ improperly “discounted
25 [claimant]’s testimony based on her daily activities . . . [without] support[ing]
26 the conclusions as to the frequency of those activities or their transferability to
27 the workplace.”); Orn, 495 F.3d at 630 (ALJ must make “specific findings
28 related to [the daily] activities and their transferability to conclude that a

1 claimant’s daily activities warrant” discounting testimony). This is particularly
2 important because “many home activities are not easily transferable to what
3 may be the more grueling environment of the workplace, where it might be
4 impossible to periodically rest or take medication.” Trevizo, 871 F.3d at 682
5 (internal quotation marks and citation omitted).

6 Here, the four, minimal daily activities listed by the ALJ are not
7 inconsistent with Plaintiff’s claim that her impairments preclude her from
8 performing a full-time job in the rigors of a workplace setting. As the
9 Commissioner concedes, “Plaintiff’s activities were not particularly
10 extensive . . .” Jt. Stip. at 23. And there is no evidence these activities
11 comprised a “substantial” portion of her day. See Orn, 495 F.3d at 639;
12 Childress, 2015 WL 2380872 at *15.

13 Furthermore, the ALJ failed to make adequate findings about the
14 transferability of Plaintiff’s activities to the workplace. The ALJ’s conclusory
15 statement that Plaintiff “has described daily activities that are not limited to the
16 extent one would expect, given the complaints of disabling symptoms and
17 limitations” (AR 17), does not identify which activities translate into what
18 workplace activities. The ALJ did not explain the frequency of any of the
19 activities cited or relate how they translated to the workplace environment. See
20 Brown-Hunter, 806 F.3d at 492 (federal courts “demand that the agency set
21 forth the reasoning behind its decisions in a way that allows for meaningful
22 review”); Blakes v. Barnhart, 331 F.3d 565, 569 (7th Cir. 2003) (“We require
23 the ALJ to build an accurate and logical bridge from the evidence to her
24 conclusions so that we may afford the claimant meaningful review of the
25 SSA’s ultimate findings.”). As such, reliance upon this factor here does not
26 constitute a specific, clear, and convincing reason supported by substantial
27 evidence for discredit Plaintiff’s symptom testimony. Martinez, 721 F. App’x
28 at 600; Trevizo, 871 F.3d at 682; Orn, 495 F.3d at 630; Dickinson v. Saul,

1 2019 WL 3837652, *9 (D. Idaho Aug. 13, 2019) (ALJ’s conclusion that
2 claimant could perform light work because she could handle a checkbook,
3 cook, walk for exercise twice a week, and care for herself, insufficient because
4 ALJ did not explain how the activities, “which are not performed on a
5 sustained basis,” involved the same tasks required in a work setting); Swanson
6 v. Colvin, 2017 WL 8897144, *21 (D. Ariz. Feb. 7, 2017) (claimant’s daily
7 activities of “simple meal preparation, light housekeeping, driving short
8 distances, and caring for her children are so undemanding that they cannot be
9 said to bear a meaningful relationship to the activities of the workplace”
10 (internal quotation marks omitted)).

11 The Commissioner posits a fourth reason in support of the ALJ’s
12 decision: the ALJ’s summary of the medical opinion evidence. Jt. Stip. at 16,
13 24-25. However, nowhere in the decision does the ALJ state that this is a
14 reason for discounting Plaintiff’s testimony or explain which of her statements
15 is inconsistent with which aspect of what opinion. AR 17; See Garrison, 759
16 F.3d at 1010 (district court’s review is limited to only grounds relied upon by
17 ALJ); Orn, 495 F.3d at 630 (the court may review only “the reasons provided
18 by the ALJ in the disability determination and may not affirm the ALJ on a
19 ground upon which he did not rely.” (citation omitted)). The ALJ was required
20 to discuss each medical opinion and state the weight he gave it. See 20 C.F.R.
21 § 404.1527(c). “If doing so constituted a clear and convincing reason for
22 discounting claimants’ subjective symptom testimony, then the rule articulated
23 in Berry, Ghanim, and other case law would be rendered meaningless.”
24 Cassandra E. L. v. Saul, 2020 WL 2556348, *6 (C.D. Cal. May 20, 2020).

25 The only other rationale offered by the ALJ was the inconsistency
26 between the mild objective findings and Plaintiff’s testimony. This, alone, is
27 not a sufficient basis to support the determination. See Rollins, 261 F.3d at
28 856-57; Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) (lack of objective

1 medical evidence to support subjective symptom allegations cannot form the
2 sole basis for discounting pain testimony); Dschaak v. Astrue, 2011 WL
3 4498835, *1 (D. Or. Sept. 27, 2011) (“[O]nce the[] other bases for the ALJ’s
4 decision were discarded as erroneous, the ALJ’s credibility determination
5 could not rely solely on conflicts with the medical evidence.”).

6 Thus, assuming without deciding that the ALJ properly discounted the
7 symptom testimony based on inconsistency with the objective medical
8 evidence, as such ground cannot be the sole basis to do so, the ALJ erred.
9 Here, the undersigned cannot conclude the ALJ’s error was harmless. See,
10 e.g., Brown-Hunter, 806 F.3d at 492-93 (ALJ’s failure adequately to specify
11 reasons for discrediting claimant testimony “will usually not be harmless”). In
12 light of the significant functional limitations reflected in Plaintiff’s subjective
13 statements, the undersigned cannot “confidently conclude that no reasonable
14 ALJ, when fully crediting the claimant’s testimony, could have reached a
15 different disability determination.” Stout v. Comm’r, Soc. Sec. Admin., 454
16 F.3d 1050, 1055-56 (9th Cir. 2006).

17 **D. Remand is appropriate.**

18 The Court has discretion to remand the matter for further proceedings.
19 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000) (as amended). When
20 further proceedings would serve no useful purpose or when the record has been
21 fully developed, a court may direct an immediate award of benefits. See
22 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004); Harman, 211 F.3d at
23 1179 (noting “the decision of whether to remand for further proceedings turns
24 upon the likely utility of such proceedings”). Remand for further proceedings is
25 appropriate where issues must be resolved before a determination of disability
26 can be made and it is not clear from the record that the claimant is disabled.
27 See Bunnell v. Barnhart, 336 F.3d 1112, 1115-16 (9th Cir. 2003).

28 Here, the Court concludes remand for further proceedings is warranted.

1 On this record it is not entirely clear whether Plaintiff was actually disabled
2 during the narrow relevant period. See Bunnell, 336 F.3d at 1115-16. Notably,
3 all four State agency doctors concluded Plaintiff could work, a point which
4 Plaintiff does not dispute. AR 17, 463-70, 479-86. Moreover, Plaintiff appears
5 to have testified that she continued to look for work and received
6 unemployment benefits even after she alleged she was unable to work,
7 although she was not sure of the precise dates. See AR 429-30; Merritt v.
8 Colvin, 572 F. App'x 468, 470 (9th Cir. 2014) (ALJ properly reasoned that
9 claimant's "'interest in starting a new job is not consistent with [the] marked
10 limitations in the ability to tolerate work pressures' about which [claimant]
11 testified"); Lenhart v. Astrue, 252 F. App'x 787, 789 (9th Cir. 2007) (ALJ
12 reasonably determined claimant exaggerated symptoms in part because he
13 applied for a job and collected unemployment benefits); Copeland v. Bowen,
14 861 F.2d 536, 542 (9th Cir. 1988) (ALJ properly discredited claimant's
15 testimony in part because he held himself out as available for work). Further,
16 although not fully explored during the hearing, Plaintiff also testified she
17 stopped working her last job in 2016 because the position was temporary and
18 the work was no longer available, not because she was disabled. AR 432-33;
19 See, e.g., Brackett v. Comm'r Soc. Sec. Admin., 468 F. App'x 754, 755 (9th
20 Cir. 2012) (ALJ properly rejected subjective limitations in part because
21 claimant stopped working when he was laid off and said that was the reason he
22 stopped working).

23 Because it is unclear whether Plaintiff was in fact disabled, remand here
24 is on an "open record." See Brown-Hunter, 806 F.3d at 495; Bunnell, 336 F.3d
25 at 1115-16; Garrison, 759 F.3d at 1021 (noting that credit-as-true rule should
26 not be applied where an "evaluation of the record as a whole creates serious
27 doubt that a claimant is, in fact, disabled"); Cassandra E. L., 2020 WL
28 2556348 at *7 (remanding, even where claimant challenged only the ALJ's

1 assessment of her testimony, because the Court still had doubts about
2 claimant's disability in light of other evidence in record, including other
3 aspects of her testimony, third-party testimony, and conflicting evidence in the
4 record). The parties may freely take up the issue raised in the Joint Stipulation,
5 and any other issues relevant to resolving Plaintiff's claim of disability, before
6 the ALJ.


7 Accordingly, on remand, the ALJ should reassess Plaintiff's subjective
8 testimony, conducting a new hearing if necessary, then reassess Plaintiff's RFC
9 if warranted, and proceed through the remaining steps of the disability analysis
10 to determine whether Plaintiff is under a "disability" as defined in the SSA.

11 **IV.**

12 **ORDER**

13 Pursuant to sentence four of 42 U.S.C. § 405(g), IT THEREFORE IS
14 ORDERED that Judgment be entered reversing the decision of the
15 Commissioner of Social Security and remanding this matter for further
16 administrative proceedings consistent with this Order.

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18 Dated: June 21, 2021

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20 JOHN D. EARLY
21 United States Magistrate Judge
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