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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SHERRI ANN MARLETTE-McGREW,	)	Case No. SACV 14-1711-JPR
	)	
Plaintiff,	)	<b>MEMORANDUM OPINION AND ORDER</b>
	)	<b>REVERSING COMMISSIONER</b>
v.	)	
	)	
CAROLYN W. COLVIN, Acting	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
	)	

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**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). The matter is before the Court on the parties’ Joint Stipulation, filed September 21, 2015, 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 administrative proceedings.

1 **II. BACKGROUND**

2 Plaintiff was born in 1958. (Administrative Record ("AR")  
3 210.) She obtained a GED and worked as a sales service  
4 associate, office clerk, receptionist, and mail carrier. (AR 52-  
5 53, 234, 237.)

6 On February 23, 2012, Plaintiff filed an application for DIB  
7 (AR 210), alleging that she had been unable to work since March  
8 24, 2009, because of migraines, irritable bowel syndrome ("IBS"),  
9 and depression (AR 233). After her application was denied  
10 initially and on reconsideration, she requested a hearing before  
11 an Administrative Law Judge. (AR 160.) Plaintiff completed  
12 disability reports on appeal, indicating that she also suffered  
13 from osteoarthritis and had received treatment for several other  
14 conditions, including fibromyalgia, seizures, anxiety, high blood  
15 pressure, sleep difficulties, panic attacks, and a right-knee  
16 problem. (AR 297-98, 300-01, 304-07.) A hearing was held on  
17 March 25, 2014, at which Plaintiff, who was represented by  
18 counsel, testified, as did a medical expert and a vocational  
19 expert ("VE"). (AR 38-66.) In a written decision issued April  
20 17, 2014, the ALJ found Plaintiff not disabled. (AR 19-30.) On  
21 August 22, 2014, the Appeals Council denied Plaintiff's request  
22 for review. (AR 1.) This action followed.

23 **III. STANDARD OF REVIEW**

24 Under 42 U.S.C. § 405(g), a district court may review the  
25 Commissioner's decision to deny benefits. The ALJ's findings and  
26 decision should be upheld if they are free of legal error and  
27 supported by substantial evidence based on the record as a whole.  
28 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra

1 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial  
2 evidence means such evidence as a reasonable person might accept  
3 as adequate to support a conclusion. Richardson, 402 U.S. at  
4 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).  
5 It is more than a scintilla but less than a preponderance.  
6 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.  
7 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether  
8 substantial evidence supports a finding, the reviewing court  
9 "must review the administrative record as a whole, weighing both  
10 the evidence that supports and the evidence that detracts from  
11 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,  
12 720 (9th Cir. 1996). "If the evidence can reasonably support  
13 either affirming or reversing," the reviewing court "may not  
14 substitute its judgment" for the Commissioner's. Id. at 720-21.

#### 15 **IV. THE EVALUATION OF DISABILITY**

16 People are "disabled" for purposes of receiving Social  
17 Security benefits if they are unable to engage in any substantial  
18 gainful activity owing to a physical or mental impairment that is  
19 expected to result in death or has lasted, or is expected to  
20 last, for a continuous period of at least 12 months. 42 U.S.C.  
21 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.  
22 1992).

##### 23 A. The Five-Step Evaluation Process

24 The ALJ follows a five-step sequential evaluation process to  
25 assess whether a claimant is disabled. 20 C.F.R.  
26 § 404.1520(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th  
27 Cir. 1995) (as amended Apr. 9, 1996). In the first step, the  
28 Commissioner must determine whether the claimant is currently

1 engaged in substantial gainful activity; if so, the claimant is  
2 not disabled and the claim must be denied. § 404.1520(a)(4)(i).

3 If the claimant is not engaged in substantial gainful  
4 activity, the second step requires the Commissioner to determine  
5 whether the claimant has a "severe" impairment or combination of  
6 impairments significantly limiting her ability to do basic work  
7 activities; if not, the claimant is not disabled and her claim  
8 must be denied. § 404.1520(a)(4)(ii).

9 If the claimant has a "severe" impairment or combination of  
10 impairments, the third step requires the Commissioner to  
11 determine whether the impairment or combination of impairments  
12 meets or equals an impairment in the Listing of Impairments  
13 ("Listing") set forth at 20 C.F.R. part 404, subpart P, appendix  
14 1; if so, disability is conclusively presumed.

15 § 404.1520(a)(4)(iii).

16 If the claimant's impairment or combination of impairments  
17 does not meet or equal an impairment in the Listing, the fourth  
18 step requires the Commissioner to determine whether the claimant  
19 has sufficient residual functional capacity ("RFC")<sup>1</sup> to perform  
20 her past work; if so, she is not disabled and the claim must be  
21 denied. § 404.1520(a)(4)(iv). The claimant has the burden of  
22 proving she is unable to perform past relevant work. Drouin, 966  
23 F.2d at 1257. If the claimant meets that burden, a prima facie  
24 case of disability is established. Id.

25 If that happens or if the claimant has no past relevant  
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27 <sup>1</sup> RFC is what a claimant can do despite existing  
28 exertional and nonexertional limitations. § 404.1545; see Cooper  
v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 work, the Commissioner then bears the burden of establishing that  
2 the claimant is not disabled because she can perform other  
3 substantial gainful work available in the national economy.  
4 § 404.1520(a)(4)(v); Drouin, 966 F.2d at 1257. That  
5 determination comprises the fifth and final step in the  
6 sequential analysis. § 404.1520(a)(4)(v); Lester, 81 F.3d at 828  
7 n.5; Drouin, 966 F.2d at 1257.

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

9 At step one, the ALJ found that Plaintiff had not engaged in  
10 substantial gainful activity since March 24, 2009, the alleged  
11 onset date. (AR 21.) At step two, she concluded that Plaintiff  
12 had the severe impairments of "status post bilateral carpal  
13 tunnel syndrome, morbid obesity, migraines, Valium withdrawal,  
14 hypertension, fibromyalgia, left frontal encephalopathy malacia,  
15 a few small old lacunar infarcts in the cerebellum, cervical  
16 degenerative disc disease, status post right medial meniscus  
17 tear, major depressive disorder, and generalized anxiety  
18 disorder." (Id.) At step three, the ALJ determined that  
19 Plaintiff's impairments did not meet or equal any impairment in  
20 the Listing. (AR 22.) At step four, she found that Plaintiff  
21 had the RFC to perform light work with additional restrictions.  
22 (AR 24.) Specifically, Plaintiff could lift 20 pounds  
23 occasionally and 10 pounds frequently, stand or walk for six  
24 hours in an eight-hour workday with normal breaks, sit for six  
25 hours in an eight-hour workday, occasionally use her lower right  
26 extremity for foot pedals, and occasionally climb stairs, bend,  
27 balance, kneel, and crouch, but she could not perform above-the-  
28 shoulder work with either upper extremity, work at unprotected

1 heights, stoop, crawl, or climb ladders, ropes, or scaffolds.  
2 (Id.) The ALJ further found that Plaintiff could perform  
3 moderately complex tasks with a specific-vocational-preparation  
4 ("SVP") level of 3 to 4 if they involved no hypervigilance, but  
5 she should not be in charge of safety operations for others and  
6 could not "be subjected to intrusive supervision or intense  
7 personal interactions such as taking complaints or the encounters  
8 similar to those experienced by law enforcement or emergency  
9 personnel." (Id.) Based on Plaintiff's RFC and the VE's  
10 testimony, the ALJ concluded that Plaintiff could perform her  
11 past relevant work as a receptionist. (AR 28.) At step five,  
12 the ALJ further found that Plaintiff could perform jobs existing  
13 in significant numbers in the national economy. (AR 29.)  
14 Accordingly, the ALJ found Plaintiff not disabled through her  
15 date last insured, March 31, 2013. (Id.)

## 16 **V. DISCUSSION**

17 Plaintiff contends that the ALJ erred in (1) assessing her  
18 physical RFC, (2) assessing her mental RFC, and (3) rejecting her  
19 credibility. (J. Stip. at 3-4.) Because the ALJ failed to  
20 provide specific and legitimate reasons for discounting medical-  
21 opinion evidence regarding Plaintiff's physical RFC, remand is  
22 warranted.

### 23 A. The ALJ Erred in Assessing Plaintiff's Physical RFC

24 Plaintiff contends that the ALJ's physical RFC assessment  
25 was not supported by substantial evidence because the ALJ failed  
26 to set forth legally sufficient reasons for rejecting the  
27 opinions of Plaintiff's treating doctors, Daniel Kim and Gerald  
28 Ho. (J. Stip. at 6-9, 19-20.)

1           1.    Applicable law

2           A district court must uphold an ALJ's RFC assessment when  
3 the ALJ has applied the proper legal standard and substantial  
4 evidence in the record as a whole supports the decision. Bayliss  
5 v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005). The ALJ must  
6 consider all the medical evidence in the record and "explain in  
7 [her] decision the weight given to . . . [the] opinions from  
8 treating sources, nontreating sources, and other nonexamining  
9 sources." 20 C.F.R. § 404.1527(e)(2)(ii); see also  
10 § 404.1545(a)(1) ("We will assess your residual functional  
11 capacity based on all the relevant evidence in your case  
12 record."); SSR 96-8p, 1996 WL 374184, at \*2 (July 2, 1996) (RFC  
13 must be "based on all of the relevant evidence in the case  
14 record"). In making an RFC determination, the ALJ may consider  
15 those limitations for which there is support in the record and  
16 need not consider properly rejected evidence or subjective  
17 complaints. See Bayliss, 427 F.3d at 1217 (upholding ALJ's RFC  
18 determination because "the ALJ took into account those  
19 limitations for which there was record support that did not  
20 depend on [claimant's] subjective complaints"); Batson v. Comm'r  
21 of Soc. Sec. Admin., 359 F.3d 1190, 1197 (9th Cir. 2004) (ALJ not  
22 required to incorporate into RFC those findings from treating-  
23 physician opinions that were "permissibly discounted").

24           Three types of physicians may offer opinions in Social  
25 Security cases: those who directly treated the plaintiff, those  
26 who examined but did not treat the plaintiff, and those who did  
27 neither. Lester, 81 F.3d at 830. A treating physician's opinion  
28 is generally entitled to more weight than an examining

1 physician's, and an examining physician's opinion is generally  
2 entitled to more weight than a nonexamining physician's. Id.

3 When a treating or examining doctor's opinion is not  
4 contradicted by other evidence in the record, it may be rejected  
5 only for "clear and convincing" reasons. See Carmickle v.  
6 Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1164 (9th Cir. 2008)  
7 (citing Lester, 81 F.3d at 830-31). When it is contradicted, the  
8 ALJ must provide only "specific and legitimate reasons" for  
9 discounting it. Id.

10 2. Relevant background

11 a. *Treating physician Daniel Kim*

12 On March 11, 2014, Dr. Kim completed a "Physical Residual  
13 Functional Capacity Questionnaire." (AR 1108-12.) He diagnosed  
14 Plaintiff with fibromyalgia and seizure disorder "per patient  
15 report" and identified depression, anxiety, and "PTSD" as  
16 psychological conditions affecting Plaintiff's physical  
17 conditions. (AR 1108-09.) He reported that Plaintiff's symptoms  
18 included fatigue and pain in her joints, upper arms, knees, and  
19 neck. (AR 1108.) He opined that Plaintiff could lift less than  
20 10 pounds, sit continuously for 15 minutes at a time, stand  
21 continuously for five minutes at a time, and sit, stand, and walk  
22 less than two hours in an eight-hour day. (AR 1110-11.) He also  
23 found that Plaintiff would need to walk one minute every 15  
24 minutes, shift at will between sitting, standing, and walking,  
25 take unscheduled breaks, and use a cane. (Id.) Plaintiff could  
26 use her hands, fingers, or arms for repetitive activities only  
27 five percent of the time and bend and twist at the waist five  
28 percent of the time. (Id.) Dr. Kim opined that Plaintiff would



1 miss work more than three times a month due to her impairments or  
2 treatment. (AR 1109-10, 1112.) He stated that the asserted  
3 "symptoms and limitations" had existed since 2009. (AR 1112.)

4 On March 12, 2012, Dr. Kim completed a "Medical Source  
5 Statement - Physical" form. (AR 660-61.) Dr. Kim indicated that  
6 Plaintiff could lift and/or carry less than 10 pounds, stand  
7 and/or walk less than two hours in an eight-hour workday, and sit  
8 three hours in an eight-hour workday. (AR 660.) Dr. Kim cited  
9 fibromyalgia and leg pains to support these findings. (Id.) He  
10 opined that Plaintiff could occasionally stoop, reach, handle,  
11 finger, and feel but could never climb, balance, kneel, crouch or  
12 crawl. (AR 661.) He also noted environmental restrictions.  
13 (Id.)

14 b. *Treating rheumatologist Gerald Ho*

15 On March 13, 2014, Dr. Ho completed a "Physical Residual  
16 Functional Capacity Questionnaire." (AR 1113-17.) He diagnosed  
17 Plaintiff with fibromyalgia and osteoarthritis of the neck and  
18 back and identified depression and anxiety as psychological  
19 conditions affecting Plaintiff's physical conditions. (AR 1113-  
20 14.) He indicated that Plaintiff's symptoms included insomnia,  
21 widespread myalgias, fatigue, dizziness, anxiety, stiffness,  
22 nonrestorative sleep, headaches, fibromyalgia fog, and IBS. (AR  
23 1113, 1117.) He also noted that Plaintiff's fibromyalgia  
24 medication may cause seizures. (AR 1117.) Dr. Ho opined that  
25 Plaintiff could lift less than 10 pounds, sit continuously for  
26 five minutes at a time, stand continuously for five minutes at a  
27 time, and sit, stand, and walk less than two hours in an eight-  
28 hour day. (AR 1110-11.) He found that Plaintiff could use her

1 hands, fingers, or arms for repetitive activities five percent of  
2 the time and bend and twist at the waist one percent of the time.  
3 (Id.) Plaintiff would also need to walk one minute every 10  
4 minutes, shift at will between sitting, standing and walking,  
5 take unscheduled breaks, use a cane, and avoid heavy machinery,  
6 climbing, extreme temperatures, and noisy places. (AR 1110-11,  
7 1115-17.) Dr. Ho opined that Plaintiff would miss work more than  
8 three times a month due to her impairments or treatment. (AR  
9 1114-15, 1117.) He stated that these limitations had existed  
10 since November 3, 2011. (AR 1117.)

11 On March 12, 2012, Dr. Ho completed a "Medical Source  
12 Statement - Physical." (AR 663-64.) He indicated that Plaintiff  
13 could lift and/or carry less than 10 pounds, stand and/or walk  
14 less than two hours in an eight-hour workday, and sit for two to  
15 three hours in an eight-hour workday. (AR 663.) He cited  
16 fibromyalgia, pain, fatigue, insomnia, IBS, weakness, obesity,  
17 and general stiffness to support these findings. (Id.) Dr. Ho  
18 opined that Plaintiff could occasionally stoop, reach, handle,  
19 finger, and feel but could never climb, balance, kneel, crouch,  
20 or crawl. (AR 664.) He also noted environmental restrictions.  
21 (Id.) Dr. Ho cited x-rays of Plaintiff's feet, clinical  
22 observations of tender points, and sedation caused by medication  
23 to support his findings. (Id.)

24 3. Analysis

25 The ALJ gave "limited weight" to Dr. Kim's and Dr. Ho's  
26 opinions. (AR 26.) The ALJ stated:

27 Daniel J. Kim, M.D., a treating physician, completed two  
28 medical source statements. The doctor opined that the

1 claimant can perform less than sedentary work with a sit  
2 or stand option and extreme exertional, postural,  
3 manipulative, and environmental limitations. In  
4 addition, Gerald Ho, M.D., also a treating physician,  
5 opined similar results in multiple medical source  
6 statements. The opinions of the doctors are given  
7 limited weight because the medical evidence of record  
8 does not support them and they are inconsistent with the  
9 claimant's activities of daily living.

10 (AR 26 (citations omitted).)

11 The ALJ's conclusory reasoning does not provide a legally  
12 sufficient basis for rejecting these treating-physician opinions.  
13 See Tackett v. Apfel, 180 F.3d 1094, 1102 (9th Cir. 1999) ("The  
14 ALJ must set out in the record his reasoning and the evidentiary  
15 support for his interpretation of the medical evidence.");  
16 Regennitter v. Comm'r of the Soc. Sec. Admin., 166 F.3d 1294,  
17 1299 (9th Cir. 1999) ("[C]onclusory reasons will not justify an  
18 ALJ's rejection of a medical opinion"); Kinzer v. Colvin, 567 F.  
19 App'x 529, 530 (9th Cir. 2014) (ALJ's statements that treating  
20 physicians' opinions contrasted "sharply with the other evidence  
21 of record" and were "not well supported by the . . . other  
22 objective findings in the case record" were not sufficiently  
23 specific and legitimate).

24 In her summary of the medical evidence, the ALJ noted that  
25 Plaintiff's physical examinations were "relatively within normal  
26 limits" and that Plaintiff had a normal gait, good sensation,  
27 full muscle strength, and slightly decreased range of motion in  
28 some joints. (AR 25.) However, there are no laboratory tests or

1 objective findings that confirm the presence or severity of  
2 fibromyalgia. Benecke v. Barnhart, 379 F.3d 587, 590 (9th Cir.  
3 2004). Indeed, “[o]ne of the most striking aspects of this  
4 disease is the absence of symptoms that a lay person may  
5 ordinarily associate with joint and muscle pain.” Rollins v.  
6 Massanari, 261 F.3d 853, 863 (9th Cir. 2001) (Ferguson, J.,  
7 dissenting); see also Cota v. Comm’r of Soc. Sec., No.  
8 1:08-CV-00842-SMS, 2009 WL 900315, at \*9 (E.D. Cal. Mar. 31,  
9 2009) (“Joints in fibromyalgia patients appear normal;  
10 musculoskeletal examinations generally indicate no objective  
11 joint swelling or abnormality in muscle strength, sensory  
12 functions, or reflexes.”). In such cases, a treating doctor’s  
13 diagnosis may be based purely on a patient’s reports of pain and  
14 other symptoms. Benecke, 379 F.3d at 590. The Commissioner does  
15 not dispute that Plaintiff has fibromyalgia. (J. Stip. at 15.)  
16 The medical records also show Plaintiff’s complaints of  
17 generalized muscle pain, tender points, fatigue, and sleep  
18 problems, all of which are indicative of fibromyalgia. Benecke,  
19 379 F.3d at 590 (explaining that common symptoms of fibromyalgia  
20 “include chronic pain throughout the body, multiple tender  
21 points, fatigue, stiffness, and a pattern of sleep disturbance  
22 that can exacerbate the cycle of pain and fatigue associated with  
23 this disease”); (see AR 741, 798, 800, 804, 812, 815, 848, 864,  
24 866, 889, 892, 894, 905-07, 914, 961). Thus, the lack of  
25 abnormal objective findings on examination was not a sufficient  
26 basis for rejecting Dr. Kim’s and Dr. Ho’s opinions regarding the  
27 severity of Plaintiff’s fibromyalgia. See Day v. Weinberger, 522  
28 F.2d 1154, 1156 (9th Cir. 1975) (ALJ erred by relying upon “his

1 own exploration and assessment" of plaintiff's medical condition  
2 rather than medical evidence in the record).

3 Further, as discussed by the ALJ, there was objective  
4 medical evidence supporting Dr. Kim's and Dr. Ho's opinions  
5 regarding Plaintiff's other physical impairments. (AR 25.) X-  
6 rays and imaging studies showed osteoarthritis in Plaintiff's  
7 hands and feet, tendinosis of the common extensor tendon in her  
8 right elbow, spondylosis with moderate neural foraminal narrowing  
9 and mild stenosis in her cervical spine, and abnormalities in her  
10 knees. (AR 25, 46, 718-20, 724, 800, 810, 870, 906, 914, 1145,  
11 1183.) Plaintiff was also "status post bilateral carpal tunnel  
12 surgery," and the medical record documented restrictions in her  
13 ability to lift, sit, stand, and walk. (AR 25, 46, 406, 741,  
14 798, 800, 894, 907.) Consequently, it was improper for the ALJ  
15 to reject Dr. Kim's and Dr. Ho's opinions based on a lack of  
16 objective medical evidence.

17 The ALJ also erred in discounting their opinions as  
18 inconsistent with Plaintiff's activities of daily living. (AR  
19 22, 24, 26, 27.) In a function report she filled out in March  
20 2012, Plaintiff stated that she could not stand, walk, or sit  
21 more than 10 minutes, could not squat, and had difficulty  
22 bending, reaching, kneeling, climbing stairs, and using her  
23 hands. (AR 274.) Her activities included taking care of her  
24 personal needs, talking on the telephone, watching television,  
25 reading, working on crossword puzzles, preparing simple meals,  
26 and feeding her landlady's cat. (AR 269-71). She could use  
27 public transportation and go shopping for a few items on her own  
28 but needed assistance for bigger shopping trips. (AR 272.) She

1 could perform light household chores, such as washing dishes for  
2 three to five minutes a day and sweeping and dusting for three  
3 minutes every two or three weeks, but needed help with laundry  
4 and heavier household cleaning. (AR 271-72.) The ALJ cited only  
5 this function report and Plaintiff's hearing testimony (AR 22,  
6 24, 26, 27), in which Plaintiff did not really discuss her  
7 activities, failing to consider the second disability report  
8 Plaintiff filled out, in March 2013, in which she described much  
9 more limited activities and greater restrictions as the result of  
10 increased fibromyalgia pain and a slip-and-fall accident (AR 304-  
11 05). In any event, the ALJ failed to adequately explain how  
12 Plaintiff's activities of daily living conflicted with Dr. Kim's  
13 or Dr. Ho's opinions regarding her functional limitations, and "a  
14 holistic review of the record" does not reveal any such  
15 inconsistencies. Ghanim v. Colvin, 763 F.3d 1154, 1162 (9th Cir.  
16 2014).

17 The Commissioner argues that the ALJ's physical RFC  
18 assessment for a range of light work was supported by the  
19 opinions of the testifying medical expert, Dr. Arnold Ostrow, and  
20 the state-agency medical consultant, Dr. H. Han. (J. Stip. 11-  
21 14; AR 26.) "[T]he findings of a nontreating, nonexamining  
22 physician can amount to substantial evidence, so long as other  
23 evidence in the record supports those findings." Saelee v.  
24 Chater, 94 F.3d 520, 522 (9th Cir. 1996). Further, greater  
25 weight may be given to a nonexamining doctor who is subject to  
26 cross-examination. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th  
27 Cir. 1995). But the opinion of a nonexamining physician standing  
28 alone cannot constitute substantial evidence to support an ALJ's

1 rejection of a treating physician's opinion. See Morgan v.  
2 Comm'r of Soc. Sec. Admin., 169 F.3d 595, 602 (9th Cir. 1999);  
3 Lester, 81 F.3d at 831-32. A contrary medical opinion may  
4 constitute substantial evidence upon which the ALJ may rely in  
5 evaluating the weight to afford a treating physician's opinion  
6 only when the contrary opinion is based on independent clinical  
7 findings. Andrews, 53 F.3d at 1041; see also Saelee, 94 F.3d at  
8 522 (upholding ALJ's reliance on nonexamining medical  
9 consultant's opinion that was "corroborated by the opinions of  
10 other examining and consulting physicians, which in turn were  
11 based on independent clinical findings"); Stubbs-Danielson v.  
12 Astrue, 539 F.3d 1169, 1174 (9th Cir. 2008) ("an ALJ's assessment  
13 of a claimant adequately captures restrictions . . . where the  
14 assessment is consistent with restrictions identified in the  
15 medical testimony").

16 Here, the nonexamining-physician assessments of Plaintiff's  
17 physical RFC were not supported by independent clinical findings  
18 of another treating physician or consultative examiner. Although  
19 Dr. Ostrow reviewed the medical record and was subject to cross-  
20 examination, his testimony was based on the same clinical  
21 findings in Plaintiff's treatment history upon which Dr. Kim and  
22 Dr. Ho based their opinions. (AR 45-51.) Dr. Han also relied on  
23 Plaintiff's treatment history but necessarily failed to consider  
24 substantial portions of the medical record, as his opinion was  
25 issued on April 2, 2012. (AR 83, 97.) As there is no examining  
26 opinion or other independent medical opinion evidence in the  
27 record consistent with the nonexamining physicians' assessments  
28 of Plaintiff's physical RFC, their opinions did not constitute

1 substantial evidence justifying rejection of Dr. Kim's and Dr.  
2 Ho's treating-physician opinions. See Murray v. Heckler, 722  
3 F.2d 499, 501 (9th Cir. 1983) (ALJ improperly rejected treating  
4 physician's opinion based on opinion of nontreating physician  
5 when "the findings of the non-treating physician were the same as  
6 those of the treating physician" and only his conclusions  
7 differed (emphasis omitted)).

8 In sum, because the ALJ failed to provide specific and  
9 legitimate reasons for rejecting the opinions of Dr. Kim and Dr.  
10 Ho in assessing Plaintiff's physical RFC, reversal is warranted.  
11 On remand, the ALJ should specify the bases upon which she has  
12 weighed the medical-opinion evidence. As reconsideration of  
13 these medical opinions requires that the ALJ reevaluate  
14 Plaintiff's mental impairments<sup>2</sup> and credibility, the Court does  
15 not reach the remaining issues raised in the Joint Stipulation.

16 B. Remand for Further Proceedings Is Appropriate

17 When, as here, an ALJ errs in denying benefits, the Court  
18 generally has discretion to remand for further proceedings. See  
19 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). When no  
20 useful purpose would be served by further administrative  
21 proceedings, however, or when the record has been fully  
22 developed, it is appropriate under the "credit as true" rule to  
23 direct an immediate award of benefits. See id. at 1179 (noting  
24 that "the decision of whether to remand for further proceedings  
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26 <sup>2</sup> Both Dr. Kim and Dr. Ho opined that psychological  
27 factors affected Plaintiff's physical condition and that  
28 Plaintiff has significant limitations in handling work stress and  
maintaining attention and concentration. (AR 1109-10, 1112-15.)



1 turns upon the likely utility of such proceedings"); Garrison v.  
2 Colvin, 759 F.3d 995, 1019-20 (9th Cir. 2014).

3 Under the credit-as-true framework, three circumstances must  
4 be present before the Court may remand to the ALJ with  
5 instructions to award benefits:

6 (1) the record has been fully developed and further  
7 administrative proceedings would serve no useful purpose;

8 (2) the ALJ has failed to provide legally sufficient  
9 reasons for rejecting evidence, whether claimant  
10 testimony or medical opinion; and (3) if the improperly  
11 discredited evidence were credited as true, the ALJ would  
12 be required to find the claimant disabled on remand.

13 Garrison, 759 F.3d at 1020. When, however, the ALJ's findings  
14 are so "insufficient" that the Court cannot determine whether the  
15 rejected testimony should be credited as true, the Court has  
16 "some flexibility" in applying the credit-as-true rule. Connett  
17 v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003); see also  
18 Garrison, 759 F.3d at 1020 (noting that Connett established that  
19 credit-as-true rule may not be dispositive in all cases). This  
20 flexibility should be exercised "when the record as a whole  
21 creates serious doubt as to whether the claimant is, in fact,  
22 disabled within the meaning of the Social Security Act."  
23 Garrison, 759 F.3d at 1021.

24 Here, under Connett, remand for further proceedings is  
25 appropriate because the ALJ failed to provide specific and  
26 legitimate reasons for discounting the medical-opinion evidence  
27 in assessing Plaintiff's physical RFC, yet the Court has serious  
28

1 doubts as to whether she is in fact disabled.<sup>3</sup>

2 **VI. CONCLUSION**

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

10  
11 DATED: February 25, 2016

  
\_\_\_\_\_  
JEAN ROSENBLUTH  
U.S. Magistrate Judge

12  
13  
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16  
17 <sup>3</sup> These doubts spring from inconsistencies in the record  
18 suggesting that Plaintiff may not be credible. For example,  
19 Plaintiff appears to have made conflicting statements concerning  
20 memory problems. (See AR 270-71, 273-74, 276, 304, 731, 1151.)  
21 Plaintiff also reported that she stopped driving because she was  
22 experiencing seizures but admitted at the hearing that she had  
23 driven a couple of weeks earlier. (See AR 44, 272, 731.) And  
24 although Plaintiff claimed to suffer from debilitating migraines,  
25 the medical record suggests that medication helped to alleviate  
26 this problem. (See AR 233, 270, 276, 1151, 1117.) Because the  
27 record as a whole creates serious doubt as to whether Plaintiff  
28 is in fact disabled, remand for further proceedings is  
appropriate. See Burrell v. Colvin, 775 F.3d 1133, 1141-42 (9th  
Cir. 2014).

26 <sup>4</sup> That sentence provides: "The [district] court shall  
27 have power to enter, upon the pleadings and transcript of the  
28 record, a judgment affirming, modifying, or reversing the  
decision of the Commissioner of Social Security, with or without  
remanding the cause for a rehearing."