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

SANDRA M. H.,

Plaintiff,

v.

ANDREW M. SAUL, COMMISSIONER
OF SOCIAL SECURITY
ADMINISTRATION,

Defendant.

No. SA CV 18-1933-PLA

MEMORANDUM OPINION AND ORDER

I.

PROCEEDINGS

Sandra M. H.¹ (“plaintiff”) filed this action on October 29, 2018, seeking review of the Commissioner’s denial of her application for Disability Insurance Benefits (“DIB”). The parties filed Consents to proceed before a Magistrate Judge on November 21, 2018, and December 4, 2018. Pursuant to the Court’s Order, the parties filed a Joint Submission (alternatively “JS”) on September 3, 2019, that addresses their positions concerning the disputed issue in the case. The

¹ In the interest of protecting plaintiff’s privacy, this Memorandum Opinion and Order uses plaintiff’s (1) first name and middle and last initials, and (2) year of birth in lieu of a complete birth date. See Fed. R. Civ. P. 5.2(c)(2)(B), Local Rule 5.2-1.

1 Court has taken the Joint Submission under submission without oral argument.

2
3 **II.**

4 **BACKGROUND**

5 Plaintiff was born in 1968. [Administrative Record (“AR”) at 38, 159.] She has past relevant
6 work experience as a delivery route truck driver, a grocery manager, a grocery clerk, and in the
7 combination job of checker, bakery products and bakery sales clerk. [Id. at 37-38, 60-67.]

8 On July 23, 2015, plaintiff protectively filed an application for a period of disability and DIB,
9 alleging that she has been unable to work since May 13, 2013. [Id. at 25; see id. at 159.] After
10 her application was denied initially, plaintiff timely filed a request for a hearing before an
11 Administrative Law Judge (“ALJ”). [Id. at 91-92.] A hearing was held on September 13, 2017, at
12 which time plaintiff appeared represented by an attorney, and testified on her own behalf. [Id. at
13 44-72.] A vocational expert (“VE”) also testified. [Id. at 60-71.] On October 12, 2017, the ALJ
14 issued a decision concluding that plaintiff was not under a disability from May 13, 2013, the
15 alleged onset date, through October 12, 2017, the date of the decision. [Id. at 25-40.] Plaintiff
16 requested review of the ALJ’s decision by the Appeals Council. [Id. at 148.] When the Appeals
17 Council denied plaintiff’s request for review on August 29, 2018 [id. at 1-6], the ALJ’s decision
18 became the final decision of the Commissioner. See Sam v. Astrue, 550 F.3d 808, 810 (9th Cir.
19 2008) (per curiam) (citations omitted). This action followed.

20
21 **III.**

22 **STANDARD OF REVIEW**

23 Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s
24 decision to deny benefits. The decision will be disturbed only if it is not supported by substantial
25 evidence or if it is based upon the application of improper legal standards. Berry v. Astrue, 622
26 F.3d 1228, 1231 (9th Cir. 2010) (citation omitted).

27 “Substantial evidence . . . is ‘more than a mere scintilla[.]’ . . . [which] means -- and means
28 only -- ‘such relevant evidence as a reasonable mind might accept as adequate to support a

1 conclusion.” Biestek v. Berryhill, 139 S. Ct. 1148, 1154, 203 L. Ed. 2d 504 (2019) (citations
2 omitted); Revels v. Berryhill, 874 F.3d 648, 654 (9th Cir. 2017). “Where evidence is susceptible
3 to more than one rational interpretation, the ALJ’s decision should be upheld.” Revels, 874 F.3d
4 at 654 (internal quotation marks and citation omitted). However, the Court “must consider the
5 entire record as a whole, weighing both the evidence that supports and the evidence that detracts
6 from the Commissioner’s conclusion, and may not affirm simply by isolating a specific quantum
7 of supporting evidence.” Id. (quoting Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014)
8 (internal quotation marks omitted)). The Court will “review only the reasons provided by the ALJ
9 in the disability determination and may not affirm the ALJ on a ground upon which he did not rely.”
10 Id. (internal quotation marks and citation omitted); see also SEC v. Chenery Corp., 318 U.S. 80,
11 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943) (“The grounds upon which an administrative order must
12 be judged are those upon which the record discloses that its action was based.”).

13 14 IV.

15 THE EVALUATION OF DISABILITY

16 Persons are “disabled” for purposes of receiving Social Security benefits if they are unable
17 to engage in any substantial gainful activity owing to a physical or mental impairment that is
18 expected to result in death or which has lasted or is expected to last for a continuous period of at
19 least twelve months. Garcia v. Comm’r of Soc. Sec., 768 F.3d 925, 930 (9th Cir. 2014) (quoting
20 42 U.S.C. § 423(d)(1)(A)).

21 22 A. THE FIVE-STEP EVALUATION PROCESS

23 The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing
24 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lounsbury v. Barnhart, 468
25 F.3d 1111, 1114 (9th Cir. 2006) (citing Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999)).
26 In the first step, the Commissioner must determine whether the claimant is currently engaged in
27 substantial gainful activity; if so, the claimant is not disabled and the claim is denied. Lounsbury,
28 468 F.3d at 1114. If the claimant is not currently engaged in substantial gainful activity, the

1 second step requires the Commissioner to determine whether the claimant has a “severe”
2 impairment or combination of impairments significantly limiting her ability to do basic work
3 activities; if not, a finding of nondisability is made and the claim is denied. Id. If the claimant has
4 a “severe” impairment or combination of impairments, the third step requires the Commissioner
5 to determine whether the impairment or combination of impairments meets or equals an
6 impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R. § 404, subpart P,
7 appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id. If the
8 claimant’s impairment or combination of impairments does not meet or equal an impairment in the
9 Listing, the fourth step requires the Commissioner to determine whether the claimant has sufficient
10 “residual functional capacity” to perform her past work; if so, the claimant is not disabled and the
11 claim is denied. Id. The claimant has the burden of proving that she is unable to perform past
12 relevant work. Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992). If the claimant meets
13 this burden, a prima facie case of disability is established. Id. The Commissioner then bears
14 the burden of establishing that the claimant is not disabled because there is other work existing
15 in “significant numbers” in the national or regional economy the claimant can do, either (1) by
16 the testimony of a VE, or (2) by reference to the Medical-Vocational Guidelines at 20 C.F.R. part
17 404, subpart P, appendix 2. Lounsbury, 468 F.3d at 1114. The determination of this issue
18 comprises the fifth and final step in the sequential analysis. 20 C.F.R. §§ 404.1520, 416.920;
19 Lester v. Chater, 81 F.3d 721, 828 n.5 (9th Cir. 1995); Drouin, 966 F.2d at 1257.

20

21 **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

22 At step one, the ALJ found that plaintiff had not engaged in substantial gainful activity since
23 May 13, 2013, the alleged onset date.² [AR at 28.] At step two, the ALJ concluded that plaintiff
24 has the severe impairments of obesity; bilateral shoulder impingement; degenerative disc disease
25 of the cervical spine with a history of radiculopathy; carpal tunnel syndrome; degenerative disc

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27 ² The ALJ concluded that plaintiff met the insured status requirements of the Social
28 Security Act through December 31, 2017. [AR at 28.]

1 disease of the lumbar spine with radiculopathy; degenerative changes of the knees; and
2 uncomplicated diabetes mellitus. [Id.] At step three, the ALJ determined that plaintiff does not
3 have an impairment or a combination of impairments that meets or medically equals any of the
4 impairments in the Listing. [Id.] The ALJ further found that plaintiff retained the residual functional
5 capacity (“RFC”)³ to perform sedentary work as defined in 20 C.F.R. § 404.1567(a),⁴ as follows:

6 [She] can frequently reach. She can occasionally push and pull with both arms.
7 She can frequently handle and finger bilaterally. She can occasionally climb,
balance, stoop, kneel, crouch, and crawl.

8 [Id. at 29.] At step four, based on plaintiff’s RFC and the testimony of the VE, the ALJ concluded
9 that plaintiff is unable to perform her past relevant work as a delivery route truck driver, a grocery
10 manager, a grocery clerk, and the combination job involving checker, bakery products and bakery
11 sales clerk. [Id. at 37.] At step five, based on plaintiff’s RFC, vocational factors, and the VE’s
12 testimony, the ALJ found that there are jobs existing in significant numbers in the national
13 economy that plaintiff can perform, including work as a “document preparer” (Dictionary of
14 Occupational Titles (“DOT”) No. 249.587-018), as an “election clerk” (DOT No. 205.367-030), and
15 as an “addressing clerk” (DOT No. 209.587-010).⁵ [AR at 39.] Accordingly, the ALJ determined

16
17 ³ RFC is what a claimant can still do despite existing exertional and nonexertional
18 limitations. See Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). “Between steps
19 three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which
the ALJ assesses the claimant’s residual functional capacity.” Massachi v. Astrue, 486 F.3d 1149,
1151 n.2 (9th Cir. 2007) (citation omitted).

20 ⁴ “Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or
21 carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as
22 one which involves sitting, a certain amount of walking and standing is often necessary in carrying
out job duties. Jobs are sedentary if walking and standing are required occasionally and other
23 sedentary criteria are met.” 20 C.F.R. § 404.1567(a).

24 ⁵ Some courts have found that the occupations of “addressing clerk” and “document
25 preparer” are obsolete. See, e.g., Skinner v. Berryhill, 2018 WL 1631275, at *5 (C.D. Cal. Apr.
2, 2018); Rhoades v. Comm’r of Soc. Sec., 2019 WL 3035517, at *1 (E.D. Cal. July 11, 2019)
26 (noting that defendant “largely” agreed with plaintiff that the jobs of “addresser” and “document
preparer” are obsolete on their face). In this case, the VE also testified that there were 7,300
27 addressing clerk jobs in the national economy, which does not constitute a significant number of
available jobs. See Gutierrez v. Comm’r of Soc. Sec., 740 F.3d 519, 527-29 (9th Cir. 2014)
28 (noting that 25,000 jobs nationwide constitutes a significant amount of work in the national

(continued...)

1 that plaintiff was not disabled at any time from the alleged onset date of May 13, 2013, through
2 October 12, 2017, the date of the decision. [Id. at 39-40.]

3
4 **V.**

5 **THE ALJ'S DECISION**

6 Plaintiff contends that the ALJ erred when he rejected the uncontradicted January 2015
7 opinion of agreed orthopedic medical examiner David Heskiaoff, M.D. [JS at 4.] As set forth
8 below, the Court agrees with plaintiff and remands for payment of benefits.

9
10 **A. LEGAL STANDARD**

11 “There are three types of medical opinions in social security cases: those from treating
12 physicians, examining physicians, and non-examining physicians.” Valentine v. Comm’r Soc. Sec.
13 Admin., 574 F.3d 685, 692 (9th Cir. 2009); see also 20 C.F.R. §§ 404.1502, 404.1527. The Ninth
14 Circuit has recently reaffirmed that “[t]he medical opinion of a claimant’s treating physician is given
15 ‘controlling weight’ so long as it ‘is well-supported by medically acceptable clinical and laboratory
16 diagnostic techniques and is not inconsistent with the other substantial evidence in [the claimant’s]
17 case record.” Trevizo v. Berryhill, 871 F.3d 664, 675 (9th Cir. 2017) (quoting 20 C.F.R. §
18 404.1527(c)(2)) (second alteration in original). Thus, “[a]s a general rule, more weight should be
19 given to the opinion of a treating source than to the opinion of doctors who do not treat the
20 claimant.” Lester, 81 F.3d at 830; Garrison, 759 F.3d at 1012 (citing Bray v. Comm’r Soc. Sec.
21 Admin., 554 F.3d 1219, 1221, 1227 (9th Cir. 2009)); Turner v. Comm’r of Soc. Sec., 613 F.3d
22 1217, 1222 (9th Cir. 2010). “The opinion of an examining physician is, in turn, entitled to greater
23 weight than the opinion of a nonexamining physician.” Lester, 81 F.3d at 830; Ryan v. Comm’r

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25 _____
26 ⁵(...continued)

27 economy). With respect to the election clerk occupation, at least one court has found that the
28 DOT description of the election clerk position, which references that the job is available “during
elections,” is inconsistent with evaluating a claimant’s ability to perform work activity on a regular
and continuing basis. Arguello v. Berryhill, 2019 WL 121192, at *4 (C.D. Cal. Jan. 7, 2019) (citing
cases).

1 of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008).

2 “[T]he ALJ may only reject a treating or examining physician’s uncontradicted medical
3 opinion based on clear and convincing reasons.” Trevizo, 871 F.3d at 675 (citing Ryan, 528 F.3d
4 at 1198). “Where such an opinion is contradicted, however, it may be rejected for specific and
5 legitimate reasons that are supported by substantial evidence in the record.” Id. (citing Ryan, 528
6 F.3d at 1198). When a treating physician’s opinion is not controlling, the ALJ should weigh it
7 according to factors such as the nature, extent, and length of the physician-patient working
8 relationship, the frequency of examinations, whether the physician’s opinion is supported by and
9 consistent with the record, and the specialization of the physician. Trevizo, 871 F.3d at 676; see
10 20 C.F.R. § 404.1527(c)(2)-(6). The ALJ can meet the requisite specific and legitimate standard
11 “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
12 stating his interpretation thereof, and making findings.” Reddick v. Chater, 157 F.3d 715, 725 (9th
13 Cir. 1998). The ALJ “must set forth his own interpretations and explain why they, rather than the
14 [treating or examining] doctors’, are correct.” Id.

15 Although the opinion of a non-examining physician “cannot by itself constitute substantial
16 evidence that justifies the rejection of the opinion of either an examining physician or a treating
17 physician,” Lester, 81 F.3d at 831, state agency physicians are “highly qualified physicians,
18 psychologists, and other medical specialists who are also experts in Social Security disability
19 evaluation.” 20 C.F.R. §§ 404.1527(e)(2)(i), 416.927(e)(2)(i); Soc. Sec. Ruling 96-6p; Bray, 554
20 F.3d at 1221, 1227 (the ALJ properly relied “in large part on the DDS physician’s assessment” in
21 determining the claimant’s RFC and in rejecting the treating doctor’s testimony regarding the
22 claimant’s functional limitations). Reports of non-examining medical experts “may serve as
23 substantial evidence when they are supported by other evidence in the record and are consistent
24 with it.” Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995).

25
26 **B. ANALYSIS**

27 Dr. Heskiaoff, the agreed upon medical examiner in relation to plaintiff’s Worker’s
28 Compensation claim, examined plaintiff a number of times between January 10, 2014, and

1 January 16, 2015, and prepared several reports. [JS at 4-8 (citations omitted).]

2 On January 10, 2014, Dr. Heskiaoff examined plaintiff and noted, among other things, that
3 she had tenderness and spasm in the trapezius area on the left side and tenderness in the right
4 trapezius; decreased range of motion of the cervical spine and left shoulder, with a positive
5 impingement sign; and decreased range of motion in the lumbar area and positive straight leg
6 raising. [AR at 350-51.] He ordered additional testing: MRIs of the cervical spine, lumbar spine,
7 and left knee; and EMG/nerve conduction studies of the cervical and lumbar spines. [Id. at 351.]
8 In his January 10, 2014, report, Dr. Heskiaoff determined that plaintiff was to remain on temporary
9 total disability, had not reached maximum medical improvement, and required additional
10 treatment. [Id. at 322-53.]

11 On March 5, 2014, after reviewing additional diagnostic studies, including (1) May 3, 2013,
12 MRI scans of plaintiff's cervical spine, lumbar spine, right shoulder, and left shoulder, and (2) a
13 January 28, 2014, MRI of the left knee, and January 28, 2014, EMG/NCV studies of plaintiff's
14 bilateral upper extremities and bilateral lower extremities, Dr. Heskiaoff issued a supplemental
15 report. [Id. at 314-20.] He noted that the MRI of the left knee "is abnormal," and opined that
16 plaintiff is a candidate for arthroscopic surgery on that knee. He also noted that the 2013 MRI of
17 the left shoulder showed "significant findings of impingement, a biceps tendon tear, and a labral
18 tear," and that despite August 5, 2013, surgery on her left shoulder, there was a "worsening of the
19 left shoulder during therapy." [Id. at 318.] He discussed plaintiff's "significant limitation in range
20 of motion," and stated that she "may require manipulation under anesthesia and possibly revision
21 surgery." [Id.] With respect to plaintiff's right shoulder, he stated that the findings were consistent
22 with impingement and that she should be offered cortisone injections and may require right
23 shoulder surgery if the condition does not improve or continues to worsen. [Id. at 319.] The
24 EMG/nerve conduction studies revealed "acute and chronic left S1 radiculopathy as well as left
25 acute and chronic C5 radiculopathy." [Id.] He stated that plaintiff should remain on temporary
26 total disability "until the recommended treatment has been completed." [Id.]

27 Dr. Heskiaoff again examined plaintiff on August 28, 2014. [Id. at 283-313.] He reviewed
28 additional medical and other diagnostic records and conducted a physical examination. [Id. at

1 292-308.] Among other things, Dr. Heskiaoff noted decreased range of motion of the left shoulder,
2 despite a left shoulder injection in May 2014, “which helped for a short period of time”; tenderness
3 of both sides of the neck; decreased range of motion of the cervical and lumbar spines; continued
4 pain in the neck, left upper extremity, left lower extremity, and left knee; positive straight leg
5 raising; mild carpal tunnel syndrome of the right wrist; and moderate left carpal tunnel syndrome.
6 [Id. at 309-10.] He again stated that plaintiff had not yet reached maximum medical improvement
7 and that she should remain on temporary total disability. [Id. at 311.]

8 Finally, on January 16, 2015, Dr. Heskiaoff prepared a Supplemental Report of Agreed
9 Orthopedic Medical Evaluator. [Id. at 274-82.] He noted that the parties requested he prepare
10 a “final ratable report,” and stated that plaintiff had reached maximum medical improvement and
11 “from a practical standpoint the patient’s condition be declared permanent and stationary.” [Id. at
12 275-76.] He asserted the following work restrictions: (1) with regard to her cervical spine, plaintiff
13 should be “precluded from repetitive flexion and extension”; (2) with regard to her shoulders, she
14 should be precluded from repetitive work at or above shoulder level as well as from pushing and
15 pulling more than five pounds; (3) with regard to the lumbar spine, she should be precluded from
16 heavy lifting and repetitive bending or stooping; and (4) with regard to the left knee, she is
17 precluded from repetitive squatting, kneeling and climbing, and advised to avoid working at
18 heights. [Id. at 276.] He also stated that he believed surgical intervention may be necessary with
19 respect to plaintiff’s lumbar spine, left knee, left hand, and left shoulder. [Id. at 276-77.]

20 The ALJ gave “partial weight” to Dr. Heskiaoff’s January 2015 opinion as follows:

21 Dr. Heskiaoff indicated that [plaintiff] should not perform repetitive flexion and
22 extension of the cervical spine, repetitive work at or above shoulder level, or pushing
23 and pulling more than five pounds. He indicated that she should not perform heavy
24 lifting, repetitive bending, stooping, squatting, kneeling or climbing, and was
25 generally advised to avoid working at heights. This opinion is generally consistent
26 with the longitudinal record detailing grossly intact physical functioning despite a
27 variety of musculoskeletal complaints. However, the limitation regarding lifting
28 exceeds every other function-by-function assessment in the record, as well as
[plaintiff’s] own reports that she carries her own groceries and takes care for her
own physical needs. This is also reflected by the fact that Dr. Heskiaoff offered this
opinion somewhat reluctantly because he anticipated improvement in [plaintiff’s]
functioning with additional treatment.

[Id. at 36 (citations omitted).]

1 Plaintiff observes that after finding Dr. Heskiaoff's opinion "generally consistent" with the
2 record, the ALJ only specifically rejected Dr. Heskiaoff's finding "regarding lifting" as exceeding
3 any other assessment in the record and plaintiff's own reports. [JS at 11.] Thus, she argues,
4 "[n]owhere does the ALJ address Dr. Heskiaoff's opinion regarding [plaintiff's cervical] neck
5 movement or working at or above shoulder level" and, because the ALJ made no finding with
6 respect to plaintiff's cervical movement, he plainly rejected Dr. Heskiaoff's opinion regarding the
7 preclusion from repetitive (*i.e.*, more than 50% of the time) flexion and extension of the cervical
8 spine. [*Id.* at 12.] She also asserts that despite Dr. Heskiaoff's opinion that she cannot engage
9 in repetitive work at or above shoulder level, which, again, would be the equivalent of no more
10 than 50% of the time, the ALJ instead determined that plaintiff could *frequently* (*i.e.*, up to two-
11 thirds of the time) reach, without explaining how he arrived at that conclusion. [*Id.*] Plaintiff
12 submits that to the extent the ALJ rejected Dr. Heskiaoff's findings because he offered his opinion
13 "somewhat reluctantly," this was not a clear and convincing (or even a specific and legitimate)
14 reason to discount that opinion and, in any event, Dr. Heskiaoff's report does not in any way
15 indicate "reluctance" to provide his opinions; instead, he merely noted that there was still additional
16 treatment available to plaintiff for her multiple complaints. [*Id.* at 13 (citations omitted).] Plaintiff
17 argues that this "reason" given by the ALJ to discount Dr. Heskiaoff's opinion is merely
18 "speculation about the thoughts and beliefs of an author of a medical report, [and] does not
19 constitute a clear and convincing reason [or a specific and legitimate reason] supported by
20 substantial evidence to reject the uncontradicted limitations with respect to [plaintiff's] neck
21 limitations and ability to work at or above shoulder level." [*Id.* (citations omitted).]

22 Defendant responds that the ALJ properly gave the "most weight" to the opinion of the
23 internal medicine consultative examiner John S. Godes, M.D.⁶ [*Id.* at 14 (citing AR at 35, 614-

24
25 ⁶ Like the ALJ, defendant argues that workers' compensation-related assessments are
26 "developed under a legal framework distinct from that of the Social Security Act," and involve
27 "administrative conclusions involving differing criteria and terms of art, unique to the rules and
28 regulations of workers' compensation." [*Id.* at 15; AR at 35.] However, an ALJ "may not disregard
a . . . medical opinion simply because it was initially elicited in a state workers' compensation
proceeding" Booth v. Barnhart, 181 F. Supp. 2d 1099, 1105 (C.D. Cal. 2002). Instead, an
(continued...)

23.] Defendant notes (as did the ALJ) that Dr. Godes' opinion was "broadly consistent with the evidence as a whole," which "detailed a variety of musculoskeletal complaints concerning the neck, upper extremities, back, and knees, but also indicated grossly intact mobility, strength, sensorimotor and neurovascular functioning, and the ability to ambulate independently, rise from a seated position, and make fists." [Id. at 14-15 (citations omitted).] Defendant notes (as did the ALJ) that Dr. Godes' opinion was not adopted verbatim, because "Dr. Godes was not able to review the longitudinal record and consider additional evidence that noted greater ranges of motion in the shoulders, significant improvement in active range of motion and strength with physical therapy, and reports of symptom magnification." [Id. at 15 (citations omitted).] Defendant submits, therefore, that the ALJ "properly rejected [Dr. Heskiaoff's five-pound] lifting limitation as *not* consistent with the record evidence, e.g., the opinion of another examining physician -- Dr. Godes," and that "[e]ven Plaintiff's treating physician, Dr. Mays, opined that [plaintiff] could lift ten pounds."⁷ [Id. at 16 (citations omitted).]

Defendant agrees with plaintiff that in addition to explicitly rejecting Dr. Heskiaoff's lifting limitation, "it is plain to see" that the ALJ [implicitly] rejected other aspects of Dr. Heskiaoff's functionality opinions -- the limitations on cervical spine flexion and extension and work at or above shoulder level," but argues that "these too were inconsistent with the record evidence," including

⁶(...continued)

ALJ must evaluate the medical records prepared in the context of workers' compensation in the same way he would evaluate records obtained otherwise. *Id.* (citing *Coria v. Heckler*, 750 F.2d 245, 248 (3d Cir. 1984)) ("[T]he ALJ should evaluate the objective medical findings set forth in the medical reports for submission with the workers' compensation claim by the same standards that s/he uses to evaluate medical findings in reports made in the first instance for the Social Security claim"). Further, an ALJ is not entitled to reject a medical opinion based "on the purpose for which medical reports are obtained." *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1200 n.5 (9th Cir. 2004) (citing *Lester*, 81 F.3d at 830). Here, the ALJ did not provide any evidence that *any* of plaintiff's workers' compensation physicians, including Dr. Heskiaoff, was anything but unbiased in conducting examinations and writing reports.

⁷ Plaintiff does not appear to be arguing that the ALJ failed to provide a specific and legitimate reason for rejecting Dr. Heskiaoff's lifting limitation and, indeed, notes that "the ALJ's rejection of those [lifting] limitations is irrelevant because the ALJ did not articulate any basis for rejecting other important limitations found by Dr. Heskiaoff." [JS at 11.] Because this "lifting" issue is discussed by defendant, in an abundance of caution, the Court will also address it herein.

1 the opinions of Dr. Godes and Dr. Mays. [Id. at 16 (citations omitted).] He argues that the ALJ's
2 failure to explicitly reject these aspects of Dr. Heskiaoff's opinion is not reversible error, "because
3 the Court may 'draw specific and legitimate inferences' from the ALJ's discussion of the conflicting
4 reports and evidence in the record that show his rationale." [Id. at 16-17 (citing Magallanes v.
5 Bowen, 881 F.2d 747, 753-55 (9th Cir. 1988)).] However, this argument ignores the fact the ALJ
6 did *not* state that he was discounting Dr. Heskiaoff's opinions regarding these other limitations as
7 inconsistent with other opinions in the record. In fact, the ALJ specifically stated that Dr.
8 Heskiaoff's opinion was "*generally consistent* with the longitudinal record" -- only expressly
9 pointing to the lifting limitation as being inconsistent with other record evidence. [AR at 36
10 (emphasis added).] "Long-standing principles of administrative law require [this Court] to review
11 the ALJ's decision based on the reasoning and factual findings offered *by the ALJ* -- not post hoc
12 rationalizations that attempt to intuit what the adjudicator may have been thinking." Bray, 554 F.3d
13 at 1225-26 (emphasis added, citation omitted); Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir.
14 2001) ("[W]e cannot affirm the decision of an agency on a ground that the agency did not invoke
15 in making its decision."). The Court will not consider reasons for rejecting Dr. Heskiaoff's opinions
16 that were not given by the ALJ in the Decision, especially where -- as in this case -- the ALJ
17 appears to have specifically disavowed the very reason suggested by defendant. See Trevizo,
18 871 F.3d at 677 & nn. 2, 4 (citation omitted).

19 After review of the record, the Court finds that the ALJ failed to provide specific and
20 legitimate reasons for discounting Dr. Heskiaoff's opinions regarding plaintiff's preclusion from
21 repetitive flexion and extension of the cervical spine, repetitive work at or above shoulder level,
22 or lifting.

23 With respect to Dr. Heskiaoff's lifting limitations, the ALJ -- somewhat ambiguously -- stated
24 that Dr. Heskiaoff's "limitation regarding lifting exceeds every other function-by-function
25 assessment in the record," as well as plaintiff's testimony that she carries her own groceries and
26 takes care of her own physical needs. [Id. at 36.] Dr. Heskiaoff, however, arguably made two
27 separate "lifting" findings: (1) because of plaintiff's shoulder impairments, she "should be
28 precluded from . . . pushing and pulling of more than five pounds"; and (2) because of her lumbar

1 spine impairments, plaintiff “is precluded from heavy lifting.” [AR at 276.] Dr. Heskiaoff did not
2 define what he meant by “heavy” lifting. In any event, the fact that plaintiff admits that she carries
3 her own groceries, “which are not packed heavy”⁸ [*id.* at 197], is neither inconsistent with Dr.
4 Heskiaoff’s opinion that plaintiff should be precluded from heavy lifting, nor obviously inconsistent
5 with Dr. Godes’ finding that plaintiff can lift 10 pounds occasionally and less than 10 pounds
6 frequently [*id.* at 619], nor with Dr. Mays’ finding that plaintiff “should not lift[] loads greater than
7 10 pounds.” [*id.* at 1792.] Additionally, the ALJ’s finding that Dr. Heskiaoff’s lifting limitation is
8 inconsistent with plaintiff’s ability to “take[] care for her own physical needs” [*id.* at 36 (citations
9 omitted)], is completely contradicted by the one record he cites to that even remotely discusses
10 plaintiff’s ability to take care of her physical needs. That one record actually reflects that while
11 plaintiff “admits to doing some light grocery shopping,” she also states that she “has *difficulty*
12 taking a shower, tending to her grooming, hygiene and getting dressed” -- the polar opposite of
13 the proposition for which the ALJ cites to it. [*id.* at 1826 (emphasis added).]

14 With respect to Dr. Heskiaoff’s opinion that plaintiff should be precluded from repetitive
15 flexion and extension of the cervical spine or repetitive work at or above shoulder level (*i.e.*, a form
16 of “reaching”), Dr. Godes also specifically noted that due to plaintiff’s cervical discogenic disease
17 with radiculopathy, plaintiff should be *precluded* from overhead lifting and should be limited to
18 *occasional* reaching. [*id.*] Dr. Godes’ reaching limitation, while less restrictive than Dr. Heskiaoff’s
19 preclusion from repetitive work at or above shoulder level, nevertheless lends support to Dr.
20 Heskiaoff’s findings. Likewise, Dr. Mays stated that plaintiff should be precluded from “repetitive
21 use of her upper extremities particularly on the left side, no pushing, pulling, torquing or twisting,
22 and no lifting loads greater than 10 pounds.” [*id.* at 1792.] Without providing a specific and
23 legitimate reason for discounting these opinions of Dr. Heskiaoff (as supported by Dr. Godes and
24 Dr. Mays), however, the ALJ found plaintiff could *frequently* reach. The ALJ’s failure to provide

25
26 ⁸ Logically, just because a medical professional states that an individual should be precluded
27 from heavy lifting, or should only occasionally lift or carry ten pounds, does not mean that the
28 individual could not -- should they need to do so -- lift or carry in excess of that weight. It simply
means that lifting more than the suggested weight might exacerbate the individual’s symptoms or
impairments and should be avoided.

1 any reason -- let alone a specific and legitimate one -- for discounting Dr. Heskiaoff's opinion that
2 plaintiff should be precluded from repetitive flexion and extension of the spine, and repetitive work
3 at or above shoulder level (or to at least limit such activity to occasionally), constitutes reversible
4 error. This is especially true in light of the VE's testimony that if the hypothetical individual, limited
5 to sedentary work, was also limited to reaching in all directions *occasionally*, there would be no
6 available work because "sedentary, unskilled work, . . . requires frequent reaching in order to
7 perform the duties." [id. at 69-70.]

8 Finally, after stating that "the limitation regarding lifting exceeds every other function-by-
9 function assessment in the record, as well as [plaintiff's] own reports that she carries her own
10 groceries and takes care for her own physical needs," the ALJ asserts that "[t]his is also reflected
11 by the fact that Dr. Heskiaoff offered his opinion somewhat reluctantly because he anticipated
12 improvement in [plaintiff's] functioning with additional treatment." [id. at 36 (citing id. at 276, 983,
13 1150).] In addition to not logically following from the ALJ's previous statement, nothing in this
14 finding is supported by the record. Dr. Heskiaoff did state that in requesting his "final ratable
15 report," the parties noted his "previous opinions with regard to [plaintiff's] need for additional
16 treatment, [but] requested [him] to simply place these opinions as part of her future medical needs
17 and issue a final report." [id. at 275.] He stated, therefore, that "from a practical standpoint,
18 [plaintiff's] condition be declared permanent and stationary." [id.] He noted her diagnoses of
19 myofascial sprain of the cervical spine; cervical radiculopathy; left carpal tunnel syndrome;
20 myofascial sprain of the lumbar spine; spondylolisthesis, lumbar spine; lumbar radiculopathy; torn
21 medial meniscus, left knee; impingement syndrome, right shoulder; arthrofibrosis, left shoulder;
22 and status post-operative arthroscopy decompression, Mumford procedure, left shoulder. [id. at
23 275-76.] He discussed plaintiff's "Impairment[s] Per AMA Guidelines" in even more detail later in
24 his report [see id. at 279-80] and stated his opinion that plaintiff had reached maximum medical
25 improvement. [id. at 276.] He then noted her work-related restrictions as discussed above. [id.]
26 Dr. Heskiaoff also offered his opinion as to plaintiff's future medical care: she should have access
27 to a trial of epidural blocks for her cervical and lumbar spine; she should have access to
28 medication, physical therapy treatment, acupuncture, and bracing for her cervical and lumbar

1 spine; he specifically did not recommend surgery for her cervical spine; she should receive
2 surgical intervention as necessary for the lumbar spine if there is deterioration in her lumbar spine
3 symptoms; she is a candidate for operative arthroscopy with partial medial meniscectomy for her
4 left knee, along with post-operative physical therapy, medication, and bracing; she is a candidate
5 for carpal tunnel release to her left hand, with post-operative physical therapy, bracing, and
6 medication; and, with respect to her left shoulder, she is a candidate for manipulation under
7 anesthesia, with post-operative physical therapy treatment and medication. [Id. at 276-77.]
8 Contrary to the ALJ's suggestion, Dr. Heskiaoff did not specifically state (or even imply) that any
9 "anticipated improvement in [plaintiff's] functioning with additional treatment," made him "reluctant"
10 to issue his report. Indeed, any purported "reluctance" to write this report is certainly not evident
11 from the very thorough and professional report provided by Dr. Heskiaoff and did not in any way
12 detract from his findings, work-related limitations, and suggested future treatment options, which
13 were based on his review of plaintiff's medical records, diagnostic testing, and his own physical
14 examinations.

15 Accordingly, the Court finds that the ALJ failed to provide specific and legitimate reasons
16 for discounting and/or rejecting the opinions of Dr. Heskiaoff and the error was not harmless.

17 18 VI.

19 **REMAND FOR PAYMENT OF BENEFITS**

20 The Court has discretion to remand or reverse and award benefits. Trevizo v. Berryhill, 871
21 F.3d 664, 681 (9th Cir. 2017) (citation omitted). Where (1) the record has been fully developed
22 and further administrative proceedings would serve no useful purpose; (2) the ALJ failed to provide
23 legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion;
24 and (3) if the improperly discredited evidence were credited as true, the ALJ would be required
25 to find the claimant disabled on remand, it is appropriate to exercise this discretion to direct an
26 immediate award of benefits. Garrison, 759 F.3d at 1020 (setting forth the three-part credit-as-true
27 standard for exercising the Court's discretion to remand with instructions to calculate and award
28 benefits); see also Lingenfelter, 504 F.3d at 1041; Benecke v. Barnhart, 379 F.3d 587, 595-96 (9th

1 Cir. 2004). Where there are outstanding issues that must be resolved before a determination can
2 be made, and it is not clear from the record that the ALJ would be required to find plaintiff disabled
3 if all the evidence were properly evaluated, remand is appropriate. See Benecke, 379 F.3d at 593-
4 96; see also Connett v. Barnhart, 340 F.3d 871 (9th Cir. 2003) (cautioning that the credit-as-true
5 rule may not be dispositive of the remand question in all cases, even where all three conditions
6 are met and recognizing that “the credit-as-true doctrine envisions ‘some flexibility’”). In Garrison,
7 the Ninth Circuit, noting that it had never exercised the flexibility set forth in Connett in a published
8 decision, clarified that the nature of that flexibility is “properly understood as requiring courts to
9 remand for further proceedings when, even though all conditions of the credit-as-true rule are
10 satisfied, an evaluation of the record as a whole creates serious doubt that a claimant is, in fact,
11 disabled.” Garrison, 759 F.3d at 1020-21.

12 In this case, there is no need to develop the record or convene further administrative
13 proceedings. First, although defendant generally argues that “Plaintiff’s symptom and limitation
14 allegations were indisputedly inconsistent with the record evidence,” her symptom and limitation
15 allegations with respect to her neck/cervical and shoulder limitations were consistent with the
16 opinions of Dr. Heskiaoff, Dr. Godes, and Dr. Mays. Additionally, as explained above, the ALJ
17 failed to provide a legally sufficient reason to reject the medical opinions of Dr. Heskiaoff related
18 to plaintiff’s neck/cervical movement and reaching limitations, which were generally consistent with
19 the opinions of Dr. Godes and Dr. Mays who also found plaintiff limited to lifting no more than ten
20 pounds occasionally, precluded from overhead lifting or from repetitive use of her upper
21 extremities, and limited to only occasional reaching. Finally, if Dr. Heskiaoff’s improperly
22 discredited opinion evidence were credited as true, it is clear that the ALJ would be required to find
23 plaintiff disabled on remand. This follows from the strength of the improperly discredited evidence,
24 which reflected a wide array of physical impairments as well as limitations relating to neck
25 movement and only occasional reaching in any direction with the upper extremities, and the fact
26 that the VE explicitly testified that there would be no work available for an individual such as
27 plaintiff, who was limited to sedentary work and who also was limited to *occasional* reaching in all
28 directions as described by Dr. Heskiaoff (and as generally supported by the opinions of Dr. Godes

1 and Dr. Mays).

2
3 **VII.**

4 **CONCLUSION**

5 **IT IS HEREBY ORDERED** that: (1) plaintiff's request for remand is **granted**; (2) the
6 decision of the Commissioner is **reversed**; and (3) this action is **remanded** to defendant for the
7 payment of benefits, consistent with this Memorandum Opinion.

8 **IT IS FURTHER ORDERED** that the Clerk of the Court serve copies of this Order and the
9 Judgment herein on all parties or their counsel.

10 **This Memorandum Opinion and Order is not intended for publication, nor is it**
11 **intended to be included in or submitted to any online service such as Westlaw or Lexis.**

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13 DATED: October 16, 2019

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15 PAUL L. ABRAMS
16 UNITED STATES MAGISTRATE JUDGE
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