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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CYNTHIA KRASLOW,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

Case No. 1:14-cv-01808-SMS

ORDER REVERSING AND REMANDING
AGENCY’S DENIAL OF BENEFITS

Plaintiff Cynthia Kraslow seeks review of a final decision of the Commissioner of Social Security (“Commissioner”) denying her application for supplemental security income (“SSI”) under Title XVI of the Social Security Act (42 U.S.C. § 301 *et seq.*) (“the Act”). The matter is before the Court on the parties’ cross-briefs, which were submitted without oral argument to the Magistrate Judge. Following a review of the record and applicable law, the Court reverses the Commissioner’s determination to deny benefits and remands this action to the Administrative Law Judge (“ALJ”).

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND¹

A. Procedural History

Plaintiff applied for SSI on April 19, 2011,² alleging disability beginning on May 4, 2010.

¹ The relevant facts herein are taken from the Administrative Record (“AR”).

1 AR 168. The Commissioner denied Plaintiff's claim on August 18, 2011, and upon reconsideration
2 on March 13, 2012. AR 84-85. Thereafter, she timely requested a hearing. AR 96.

3 Plaintiff appeared and testified before an ALJ, Daniel G. Heely, on March 5, 2013.³ Also at
4 the hearing were Plaintiff's counsel and an impartial vocational expert ("VE"). AR 45. In a written
5 decision dated March 14, 2013, the ALJ found Plaintiff was not disabled under the Act. AR 26.
6 On September 16, 2014, the Appeals Council denied review of the ALJ's decision, which thus
7 became the Commissioner's final decision, and from which Plaintiff filed a timely complaint. AR 1,
8 Doc. 1.

9
10 *B. Factual Background*

11 Plaintiff was born on May 5, 1957. AR 189. In a disability report completed on the day she
12 applied for SSI, Plaintiff claimed various medical conditions limited her ability to work. They
13 included shoulder trauma, numbness of the hands, limited right hand motor skills, sharp left hand
14 pain, loss of balance, and inability to run, jog or walk quickly. AR 183.

15 On June 7, 2011, Plaintiff completed an Adult Function Report. Therein, she stated her daily
16 activities consisted of watching television, taking walks with her dog, and playing games on the
17 computer. AR 200. Plaintiff alleged she could no longer use power and hand tools for normal
18 household repairs, tie her shoes without looking, put a necklace on, and do anything that requires
19 coordination. She used her left arm mostly and struggled with personal care activities such as
20 handling buttons and zippers. AR 201. Although it took her longer to prepare daily meals, do the
21 dishes, and laundry, she did them with no help. AR 202.

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23
24 Plaintiff's hobbies and interests included watching television, using the computer,
25 landscaping, camping, helping people organize their homes, and repairing and refinishing furniture.

26 ² The ALJ's written decision states Plaintiff filed for SSI on April 11, 2011. Her Application
27 Summary reflects a date of April 19, 2011. AR 168.

28 ³ Plaintiff appeared without counsel before Judge Heely on November 13, 2012. The hearing was
canceled so that Plaintiff could obtain counsel. AR 31-34.

1 AR 204. But her engagement in these activities had changed to the extent that she could no longer
2 lift or carry anything with her right arm or use tools with precision. At least twice a month, she went
3 for walks, played computer games, and went shopping with others. Three days a week, Plaintiff also
4 helped a pregnant mom with her daily chores such as vacuuming and cleaning the bathroom. AR
5 204. Overall, Plaintiff's injuries affected her hand coordination, sense of touch, and ability to hold
6 or lift anything above her hips with her right arm. She could no longer finish what she started. AR
7 205, 207. In a pain questionnaire also completed in June 7, 2011, Plaintiff stated she could not raise
8 her right arm without assistance due to muscle loss. She no longer had normal motor skills. AR
9 199.

11 Plaintiff's second disability report, completed on October 12, 2011, reiterated how Plaintiff's
12 injuries affected her activities. She reported, "I am unable to lift due to lost muscles in my hand
13 shoulder. Rt hand is limited has no strength. I am unable to perform my daily activities." Plaintiff
14 noted that an electromyography ("EMG") showed carpal tunnel in her right hand. 213-214.

16 Plaintiff completed her last disability report on March 29, 2012. Therein, Plaintiff stated she
17 could no longer carry items, and walk or stand for long periods of time due to back pain. Her hands
18 tingled and felt "wired." She had pressure in her hands, and at times had no feeling in them. She
19 needed to use one hand to assist the other in completing a task, and would drop things. AR 219. As
20 a result of her conditions, Plaintiff took longer to complete her daily activities and needed assistance
21 at times. AR 222.

22 1. Medical Evidence

24 On March 3, 2011, Plaintiff reported to Doctors Medical Center in Modesto, CA complaining
25 of a dog bite and numbness of the hand. AR 253. Dr. Robert Kollen examined Plaintiff and found
26 soft tissue swelling at the right hand dorsum, but no displaced fracture or radiopaque foreign body.
27 AR 250. The dog bite caused right hand cellulitis, but Plaintiff's condition had stabilized and she
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1 was discharged on the same day. AR 254.

2 On July 26, 2011, Dr. Miguel Hernandez of MDSI Physician Services completed a
3 comprehensive internal medicine evaluation of Plaintiff. He had no records to review. Plaintiff
4 reported being hit with a piece of plastic about a year ago and has since developed pain in her right
5 shoulder, and numbness in her right hand which was spreading to the left hand. She had no
6 problems walking, standing, and sitting. She was able to concentrate, dress, bathe, hold utensils, and
7 open doors and jars. AR 237. Dr. Hernandez found Plaintiff had “decent generalized muscle tone
8 throughout both upper and lower extremities bilaterally,” and her motor strength was “5/5
9 throughout.” She was right hand dominant and her sensory examination showed she was “[i]ntact to
10 light touch throughout.” AR 239. Dr. Hernandez diagnosed Plaintiff with right shoulder rotator cuff
11 syndrome which was clinically stable. AR 239. Based on objective physical findings, Dr.
12 Hernandez opined that Plaintiff could stand, walk, and sit for six hours, with routine breaks, in an
13 eight-hour day. AR 239. She could lift or carry fifty pounds occasionally and twenty-five pounds
14 frequently. AR 240. Plaintiff had no postural, manipulative or environmental limitations. AR 240.

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17 On August 15, 2011, Dr. Julius Petty, a State agency physician, completed a Physical
18 Residual Functional Capacity Assessment, a check-the-box form, concerning Plaintiff. Dr. Petty
19 opined that Plaintiff could lift and/or carry twenty pounds occasionally and ten pounds frequently.
20 She could sit, stand and/or walk for about six hours in an eight-hour workday, and had no limitations
21 in pushing and/or pulling. AR 261. There were no postural, visual, communicative, and
22 environmental limitations. AR 262-264. With regard to manipulation, Plaintiff had no limitations in
23 handling, fingering, and feeling, but was, however, limited in her ability to reach in all directions.
24 AR 263. Dr. Petty reviewed a number of Plaintiff’s treatment records: a May 11, 2011, progress
25 note; a May 13, 2011, cervical spine x-ray; a May 24, 2011, cervical spine MRI; and Dr.
26 Hernandez’s evaluation. With each record, Dr. Petty recounted some of the findings or impressions.
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1 Based on the medical evidence of record, activities of daily living, and pain report, Dr. Petty
2 concluded that Plaintiff's RFC was light and that she was to avoid reaching overhead with her right
3 upper extremity. AR 267.

4 Also in 2011, Plaintiff saw Dr. Dr. Kou Yang at the Stanislaus County Hughson Medical
5 Office on three occasions: March 17, May 9, and October 26. Dr. Yang diagnosed Plaintiff with
6 spinal stenosis, right shoulder pain and atrophy, and right shoulder weakness with likely rotator cuff
7 syndrome, respectively. He found, during the March 17 examination of Plaintiff's right shoulder,
8 atrophy of the suprascapular muscle, weakness of the biceps, inability to flex and abduct greater than
9 thirty degrees, and positive extension. The May 9 examination of the right rotator muscled revealed
10 atrophy and inability to elevate beyond thirty degrees. And the October 26 examination showed
11 right shoulder and biceps atrophy. AR 273-275.

12
13 On August 10, 2011, Plaintiff underwent x-ray and computerized tomography (CT) cervical
14 myelograms, as ordered by Dr. Yang. The x-ray myelogram revealed normal alignment of the
15 cervical spine, but vigorous facet osteoarthritis. The CT myelogram revealed: normal root and
16 canal distention at C2-C3; minimal left foramina stenosis at C3-C4; mild to moderate central canal
17 stenosis circumferentially at C4-C5; facet osteoarthritis with some uncinat process hypertrophy at
18 C5-C6; moderate facet osteoarthritis without central stenosis at C6-C7; and nothing significant in
19 canal or foramen at C7-S1. Based on the findings, Dr. Yang made two impressions: there was
20 moderate central stenosis at C4-C5 and narrowing of the foramen and lateral recess with underfilling
21 of the nerve roots at C5-C6. AR 242-243.
22

23
24 On February 14, 2012, Dr. Dikran Bairamian from Stanislaus County Health Services
25 evaluated Plaintiff at Dr. Yang's request. AR 283. Dr. Bairamian recounted Plaintiff's history of
26 illness to include a trauma on May 4, 2010 which caused right sided neck and shoulder pain. The
27 pain subsided two months later, but Plaintiff reported feeling a tingling sensation in her hands
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1 thereafter, and was now feeling numbness in the hands up to the elbows. She felt right sided neck
2 pain when laying down on her right side. A physical examination of her extremities showed
3 Plaintiff possessed a full range of motion. Neurologically, Plaintiff was able to oppose with both
4 hands without difficulty. Her sensory was decreased to pinprick from the elbows down. Results of
5 electromyographic studies and nerve conduction studies showed mild carpal tunnel syndrome. On
6 impression, Plaintiff had neck pain with degenerative changes, right C4-C5 stenosis, and peripheral
7 neuropathy in the upper extremities. Dr. Bairamian opined that Plaintiff did not have radicular pain.
8 He directed Plaintiff to obtain physical therapy for her neck pain, and to bring her cervical
9 myelogram and post myelographic CT films at their next meeting. AR 283-284.

11 At the follow up on April 4, 2012, Dr. Bairamian noted Plaintiff had numbness in her
12 forearms and hands, but no radicular pain, no gait difficulty, and no bowel or bladder dysfunction.
13 He made the same neurological observations as those from their February 14, 2012 meeting. In his
14 view, Plaintiff's cervical myelogram and post myelographic CT, which she provided per his request,
15 were of suboptimal quality, and showed degenerative changes and negligible right C4-C5 and C5-C6
16 stenosis, respectively. Again, Dr. Bairamian noted on impression that Plaintiff had peripheral
17 neuropathy in the upper extremities. Importantly, he explained to Plaintiff that: (1) the stenosis had
18 no clinical significance as she had no radicular pain in her right upper extremity; (2) physical therapy
19 was unnecessary because she no longer had neck pain; (3) further neurosurgical intervention was
20 unnecessary; (4) she should see a neurologist for peripheral neuropathy; and (5) she was discharged
21 from routine neurosurgical workup. AR 322.

24 Also in 2012, Plaintiff continued to see Dr. Yang on four occasions: February 23, April 23,
25 June 14, and November 21. He diagnosed Plaintiff with spinal stenosis, sciatica, rectal bleeding, and
26 neuropathy and referred her to neurology. Dr. Yang did not note the same findings on examination
27 as he did in 2011. AR 320, 317, 305, 308.

1 2. Plaintiff's Testimony Before the ALJ

2 At the time of the hearing, Plaintiff had a twelfth grade education. She last worked as a
3 cashier for K-Mart in 2008 and had been living alone for about six years. AR 48-49. She did not
4 have a driver's license and therefore received rides from a friend. She could do light housework and
5 enjoyed gardening. On average, Plaintiff watched four hours of television and spent five hours on
6 the Internet per day. She could do simple texting. AR 54-55, 57-59.

7 Plaintiff had numbness and tingling in her hands, carpal tunnel in her right hand, and
8 weakness in her right arm from trauma to her shoulder. AR 50-51. She suffered from constant neck
9 pain and low back every two hours. She could not stand for longer than forty-five minutes at a time
10 and spent more time sitting because of pain in her upper back. She could lift and carry fifteen
11 pounds at most. She was right-handed, but could use her right hand for no longer than fifteen
12 minutes, and required a twenty-minute rest thereafter. Reaching and handling with the right arm
13 were problematic due to weakness. AR 61-65.

14 Plaintiff did not take medication for her hand and shoulder problems. AR 53. She believed
15 her struggle with standing, lifting, and using her hands—specifically that she could not manipulate
16 her fingers— would pose difficulty with full time work. AR 59-60, 66. If required to stand all day,
17 she would experience a burning sensation between her shoulder blades. She could not reach her
18 right arm across to her left and had to use the latter to control the former. AR 68-69.

19 20
21 3. Vocational Expert Testimony

22 Thomas C. Dachelet, the VE, spoke about Plaintiff's work history. Based on the record, he
23 classified Plaintiff's past jobs to include carpenter, package handler, retail clerk, night manager, and
24 groundkeeper. From these positions, the VE discussed the transferable skills associated with the
25 manager and carpenter positions. AR 70-72, 74.

26 The ALJ presented the VE with a number of hypotheticals. First, the VE was to consider a
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1 person with the same age, education, work history and transferable skills as Plaintiff, with the
2 addition that such person could sit for six hours but stand and/or walk less than two hours;
3 occasionally lift and/or carry less than ten pounds; never climb, balance, stoop, kneel, crouch or
4 crawl; and needed numerous unscheduled breaks more than an employer would normally allow.

5 When asked if such person could perform any full time job, the VE replied, “No[.]” AR 75.

6 Second, the VE was to consider the same person under the first hypothetical, but such person could
7 sit, stand and walk six out of eight hours with normal breaks for each; lift and/or carry fifty pounds
8 occasionally and twenty-five pounds frequently with the right dominant upper extremity;
9 occasionally reach above shoulder level; could never climb ladders, ropes, or scaffolds; and could
10 never work around hazards like moving dangerous machinery and unprotected heights. When asked
11 if such person could perform Plaintiff’s past jobs, the VE opined that such person could perform the
12 retail clerk and night manger jobs. AR 76. Such person could also perform some unskilled jobs in
13 the national economy, including machine packager and laundry-checker. AR 76-77.
14

15 Upon further clarification by Plaintiff regarding her prior night manager position, the VE
16 opined the position was in fact that of a retail clerk. AR 80.
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18 4. ALJ’s Decision

19 A claimant is disabled under Title XVI if she is unable to engage in substantial gainful
20 activity because of a medically determinable physical or mental impairment that can be expected to
21 result in death or has lasted or can be expected to last for a continuous period of no less than twelve
22 months. 42 U.S.C. § 1382c(a)(3)(A) (2011); 20 C.F.R. 416.905(a) (2011). To encourage uniformity
23 in decision making, the Commissioner has promulgated regulations prescribing a five-step sequential
24 process which an ALJ must employ to evaluate an alleged disability.⁴
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26 _____
27 ⁴ “In brief, the ALJ considers whether a claimant is disabled by determining: (1) whether the
28 claimant is doing substantial gainful activity; (2) whether the claimant has a severe medically
determinable physical or mental impairment or combination of impairments that has lasted for more
than 12 months; (3) whether the impairment meets or equals one of the listings in the regulations; (4)

1 In the written decision, the ALJ found that at step one, Plaintiff had not engaged in
2 substantial gainful activity since the application date. At step two, Plaintiff had the following severe
3 impairments: degenerative disc disease, arthritis, and carpal tunnel syndrome. At step three, Plaintiff
4 did not have an impairment or combination of impairments that met or equaled the severity of a
5 listed impairment in 20 C.F.R. Part 404, Subpart P, Appendix 1. Plaintiff had the RFC to perform a
6 wide range of medium work as defined in 20 C.F.R. § 416.967(c). She could lift and/or carry fifty
7 pounds occasionally and twenty-five pounds frequently, stand and/or walk six hours in an eight-hour
8 workday, sit six hours in an eight-hour workday, occasionally reach above shoulder level with the
9 right arm, and never climb ladders, ropes, or scaffolds or work around hazards such as dangerous
10 moving machinery or unprotected heights. And at step four, Plaintiff was capable of performing
11 past relevant work as a retail clerk because it did not require the performance of work-related
12 activities precluded by her RFC. Consequently, the ALJ concluded that Plaintiff was not disabled as
13 defined under the Act. AR 21-26.
14

15 II. DISCUSSION

16 A. *Legal Standards*

17 This Court reviews the Commissioner's final decision to determine if the findings are
18 supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence means "more than a
19 mere scintilla" (*Richardson v. Perales*, 402 U.S. 389, 401 (1971)), but "less than a preponderance."
20 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). It is "such relevant evidence as
21 a reasonable mind might accept as adequate to support a conclusion." *Richardson*, 402 U.S. at 401.
22 "If the evidence can reasonably support either affirming or reversing a decision, we may not
23 substitute our judgment for that of the Commissioner. However, we must consider the entire record
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27 whether, given the claimant's residual functional capacity, the claimant can still do his or her past
28 relevant work; and (5) whether the claimant can make an adjustment to other work. The claimant
bears the burden of proof at steps one through four." *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th
Cir. 2012).

1 as a whole, weighing both the evidence that supports and the evidence that detracts from the
2 Commissioner's conclusion, and may not affirm simply by isolating a specific quantum of
3 supporting evidence." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (internal citation
4 and quotations omitted). "If the evidence can support either outcome, the Commissioner's decision
5 must be upheld." *Benton v. Barnhart*, 331 F.3d 1030, 1035 (9th Cir. 2003); *see* 42 U.S.C. § 405(g)
6 (2010). But even if supported by substantial evidence, a decision may be set aside for legal error.
7 *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009).

8
9 Moreover, an ALJ's error is harmless "when it was clear from the record that [the] error was
10 inconsequential to the ultimate nondisability determination." *Robbins v. Soc. Sec. Admin.* 466 F.3d
11 880, 885 (9th Cir. 2006).

12 B. Analysis

13 1. Residual Functional Capacity

14 Plaintiff alleges the ALJ's RFC determination was based on legal error and insubstantial
15 evidence. Specifically, she questions the ALJ's rejection of Dr. Petty's opinion in favor of Dr.
16 Hernandez's where the former's opinion was based on a more complete medical record, and the
17 reasons given for rejecting his opinion were inadequate. Doc. 16, pp. 7-9. The Commissioner avers
18 the ALJ properly gave more weight to the opinion which was better supported and more consistent
19 with the record. Doc. 23, pp. 9-13.

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21 "Cases in this circuit distinguish among the opinions of three types of physicians: (1) those
22 who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant
23 (examining physicians); and (3) those who neither examine nor treat the claimant (nonexamining
24 physicians). As a general rule, more weight should be given to the opinion of a treating source than
25 to the opinion of doctors who do not treat the claimant." *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
26 1995), *as amended* (April 9, 1996) (footnote and citation omitted). Similarly, "[t]he opinion of an
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1 examining physician is, in turn, entitled to greater weight than the opinion of a nonexamining
2 physician.” *Id.* (citation omitted). But an “ALJ need not accept the opinion of any physician,
3 including a treating physician, if that opinion is brief, conclusory, and inadequately supported by
4 clinical findings.” *Chaudhry v. Astrue*, 688 F.3d 661, 671 (9th Cir. 2012) (quotations and citation
5 omitted).

6 In the case of a nonexamining and nontreating physician, their opinion “cannot by itself
7 constitute substantial evidence that justifies the rejection of the opinion of an examining or treating
8 physician.” *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (citations
9 omitted). Their opinion

11 can be given weight only insofar as they are supported by evidence in
12 the case record, considering such factors as the supportability of the
13 opinion in the evidence including any evidence received at the
14 administrative law judge and Appeals Council levels that was not
15 before the State agency, the consistency of the opinion with the record
as a whole, including other medical opinions, and any explanation for
the opinion provided

16 In appropriate circumstances, [their] opinions may be entitled to
17 greater weight than the opinions of treating or examining sources. For
18 example . . . [the] opinion is based on a review of a complete case
19 record that includes a medical report from a specialist in the
individual’s particular impairment which provides more detailed and
comprehensive information than what was available to the individual’s
treating source.

20 SSR 96-6p. Their RFC assessments are to “be evaluated considering all of the factors set out in the
21 regulations for considering opinion evidence.” *Id.*

22 The parties do not dispute that Dr. Petty was a nonexamining and nontreating physician.
23 The ALJ was therefore not required to give Dr. Petty’s opinion substantial weight or more weight
24 than Dr. Hernandez’s, absent support in the record. *See id.*

25 As an initial matter, the record showed Dr. Petty reviewed more of Plaintiff’s medical
26 records than did Dr. Hernandez, as evident by the latter’s statement that he had no records to review.
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1 But, that fact alone does not warrant giving Dr. Petty's opinion greater weight than Dr. Hernandez's.
2 *See id; see also Morgan*, 169 F.3d at 602. In his written decision, the ALJ discussed Dr. Petty's
3 August 15, 2011, RFC assessment and gave it "reduced weight," based on Plaintiff's statements to
4 Dr. Bairamian and her activities of daily living. Specifically, the ALJ stated Plaintiff "advised [Dr.
5 Bairamian] that she did not have neck pain or symptoms in her right arm" and her activities of
6 "walk[ing] with her dog, playing games on the computer, preparing meals, household chores such as
7 washing dishes, shopping for groceries twice per month, helping a pregnant mother 3 times per
8 week, landscaping, camping, repairing and restoring furniture, and helping others organize their
9 homes" exceeded her alleged reduced function. AR 23. From this, Plaintiff faults the ALJ for
10 allegedly mischaracterizing the record and for failing to explain how her activities of daily living
11 contradict Dr. Petty's opinion.
12

13 Indeed, contrary to the ALJ's account, Plaintiff made no such statement to Dr. Bairamian.
14 Rather, Plaintiff reported that while her right sided neck and shoulder pain subsided two months
15 after the trauma on May 4, 2010, she started feeling a tingling sensation in her hands, and later
16 numbness of the hands up to the elbows. Plaintiff also reported feeling right sided neck pain when
17 laying down on her right side. The ALJ therefore mischaracterized Plaintiff's statements. With
18 regard to Plaintiff's activities of daily living, the ALJ did not explicitly explain how they exceeded
19 her allegedly reduced function. Yet Plaintiff cites to no authority requiring that an ALJ explicitly
20 explain what can be reasonably inferred. In this case, the ALJ inferred, as he could in making the
21 disability determination, that an individual who engaged in activities of daily living of the kind
22 Plaintiff reported had an RFC beyond light work when viewed together with other evidence in the
23 record. *See* 20 C.F.R. § 416.920 (2011); *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989)
24 ("As a reviewing court, we are not deprived of our faculties for drawing specific and legitimate
25 inferences from the ALJ's opinion. ").
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1 But dispositive here is the fact that Dr. Petty's opinion was devoid of analysis and
2 unsupported by other medical opinions. His RFC assessment of Plaintiff appeared in a check-the-
3 box form, which was conclusory and devoid of analysis. Such a form is generally disfavored. *Cf.* 20
4 C.F.R. § 16.1927(d) (2011) ("The better an explanation a source provides for an opinion, the more
5 weight we will give that opinion.") His brief restatement of four treatment records followed by a
6 one sentence conclusion about Plaintiff's RFC contained no explanations of his conclusions. *See*
7 *SSR 96-6p*. Additionally, Plaintiff concedes that unlike the ALJ, Dr. Petty did not review Dr.
8 Bairamian's February 14, 2012, and April 4, 2012, reports.⁵ The ALJ did not rely only on Dr.
9 Hernandez's evaluation alone in making the RFC determination. *See* 20 C.F.R. 416.945 ("We will
10 assess your [RFC] based on all the relevant evidence in your case record.") (2011). The ALJ had
11 before him other medical records including Dr. Yang's treatment notes and radiology imaging
12 reports. While they set forth Plaintiff's issues with her right shoulder and arm, the evidence did not,
13 collectively, support Dr. Petty's conclusions.
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15 For example, Dr. Bairamian found in 2012 that despite her conditions, Plaintiff possessed a
16 full range of motion, could oppose with both hands without difficulty, and had no radicular pain. He
17 opined that Plaintiff no longer had neck pain, and that further neurosurgical intervention was
18 unnecessary. And in his last three examinations of Plaintiff in 2012, Dr. Yang did not make the
19 same findings regarding Plaintiff's atrophy, weakness or inability to flex, as he did in 2011.
20 From these, along with some of Plaintiff's activities of daily living, the ALJ could infer that Plaintiff
21 had the RFC to perform more than light work.
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23 Plaintiff's assertion that the ALJ was unqualified to interpret Dr. Bairamian's opinion runs
24 counter to settled law that an ALJ is tasked with evaluating medical opinion evidence. *See* 20 C.F.R.
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27 ⁵ In her reply, Plaintiff states Dr. Petty did not have the opportunity to review Dr. Bairamian's
28 February 14, 2012, report. Because Dr. Petty completed the RFC assessment on August 15, 2011, he
also did not have the opportunity to review Dr. Bairamian's April 4, 2012, report.

1 § 416.927(d) (“Regardless of its source, we will evaluate every medical opinion we receive.”)
2 (2011). And her assertion that Dr. A Nasrabi, a State agency medical consultant who recommended
3 an RFC of light work, is unpersuasive because, like Dr. Petty, Dr. Nasrabi did not review Dr.
4 Bairamian’s April 4, 2012 report.⁶

5 For these reasons, the ALJ did not err in giving reduced weight to Dr. Petty’s conclusions
6 and instead adopting Dr. Hernandez’s, in making the RFC determination.

7 2. Credibility

8 Plaintiff contends the ALJ erred in his credibility findings by failing to provide clear and
9 convincing reasons for rejecting Plaintiff’s testimony concerning numbness of her hands. Doc. 16,
10 pp. 10-12. The Commissioner avers the ALJ made specific findings, supported by the record, which
11 adequately discredited Plaintiff. Doc. 23, pp. 13-19.

12 As set forth under the Act, a claimant’s statements about pain or other symptoms will not
13 alone establish disability. *Id.* at § 416.929 (2011). “An ALJ engages in a two-step analysis to
14 determine whether a claimant’s testimony regarding subjective pain or symptoms is credible. First,
15 the ALJ must determine whether the claimant has presented objective medical evidence of an
16 underlying impairment which could reasonably be expected to produce the pain or other symptoms
17 alleged.” *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014) (quotations omitted). “If the
18 claimant satisfies the first step of this analysis, and there is no evidence of malingering, the ALJ can
19 reject the claimant’s testimony about the severity of her symptoms only by offering specific, clear
20 and convincing reasons for doing so. *Id.* at 1014-15; *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883
21 (9th Cir.2006) (“[U]nless an ALJ makes a finding of malingering based on affirmative evidence
22 thereof, he or she may only find an applicant not credible by making specific findings as to
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27 ⁶ It is unclear whether Dr. Nasrabadi in fact reviewed Dr. Petty’s July 26, 2011 RFC assessment.
28 Dr. Nasrabadi referenced findings found in Dr. Petty’s assessment (which were restatements of Dr.
Hernandez’s findings) but did not cite the July 26, 2011 date. AR 285-287.

1 credibility and stating clear and convincing reasons for each.”).

2 A finding that a claimant’s testimony is not credible must be
3 sufficiently specific to allow a reviewing court to conclude the
4 adjudicator rejected the claimant’s testimony on permissible grounds
5 and did not arbitrarily discredit a claimant’s testimony regarding pain.
6 General findings are insufficient; rather, the ALJ must identify what
7 testimony is not credible and what evidence undermines the claimant’s
8 complaints.

9 *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015) (internal quotations and citations
10 omitted); SSR 96-7p (ALJ’s decision “must be sufficiently specific to make clear to the individual
11 and to any subsequent reviewers the weight the adjudicator gave to the individual’s statements and
12 reasons for that weight.”).

13 “The ALJ must state specifically which symptom testimony is not credible and what facts in
14 the record lead to that conclusion.” *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (citation
15 omitted). Factors an ALJ may consider include: “(1) ordinary techniques of credibility evaluation,
16 such as the claimant’s reputation for lying, prior inconsistent statements concerning the symptoms,
17 and other testimony by the claimant that appears less than candid; (2) unexplained or inadequately
18 explained failure to seek treatment or to follow a prescribed course of treatment; and (3) the
19 claimant’s daily activities.” *Id.*. The ALJ must also give consideration to the factors enumerated in
20 SSR 96-7p.⁷

21 ⁷ Social Security Ruling 96-7p states, in relevant part:

22 In recognition of the fact that an individual’s symptoms can sometimes suggest a
23 greater level of severity of impairment than can be shown by the objective medical
24 evidence alone, 20 CFR 404.1529(c) and 416.929(c) describe the kinds of evidence,
25 including the factors below, that the adjudicator must consider in addition to the
26 objective medical evidence when assessing the credibility of an individual’s
27 statements:

- 28 1. The individual's daily activities;
2. The location, duration, frequency, and intensity of the individual’s
pain or other symptoms;
3. Factors that precipitate and aggravate the symptoms;

1 Because no evidence suggests Plaintiff was malingering, the ALJ was required to provide
2 specific, clear and convincing reasons for rejecting the pain evidence. Here, the ALJ concluded the
3 medical evidence of record did not support Plaintiff's "allegations regarding either the intensity and
4 persistence of her symptoms or the extent of the resulting functional limitations." AR 22. The ALJ
5 then summarized the various physicians' opinions, treatment records, and results from MRIs and x-
6 rays. AR 22-24. He then found Plaintiff "less than fully credible," and stated, as he did earlier in
7 giving Dr. Petty's opinion reduced weight, that Plaintiff advised Dr. Bairamian she had no neck pain
8 or symptoms in her right arm and that her activities of daily living exceeded her allegedly reduced
9 function. AR 23.

11 As discussed, the ALJ mischaracterized Plaintiff's statements to Dr. Bairamian. This left the
12 ALJ's summaries of the relevant medical evidence and his statements regarding Plaintiff's activities
13 of daily living as reasons for discrediting Plaintiff's testimony. The problem, however, was that
14 these amounted to general findings, sans analysis. *Brown-Hunter*, 806 F.3d at 494 ("Although the
15 ALJ summarized a significant portion of the administrative record in support of her RFC
16 determination, providing a summary of medical evidence in support of a residual functional capacity
17 finding is not the same as providing clear and convincing *reasons* for finding the claimant's
18 symptom testimony not credible.") (emphasis in original). The ALJ did not specify which of
19 Plaintiff's testimony or statements was not credible. *See id.* at 493; *see also id.* at 494 ("Because the
20 ALJ failed to identify the testimony she found not credible, she did not link that testimony to the
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- 23 4. The type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms;
 - 24 5. Treatment, other than medication, the individual receives or has received for relief of pain or other symptoms;
 - 25 6. Any measures other than treatment the individual uses or has used to relieve pain or other symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes every hour, or sleeping on a board); and
 - 26 7. Any other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms.

1 particular parts of the record supporting her non-credibility determination. This was legal error.”). It
2 is unclear how some of the specified activities of daily living undermined Plaintiff’s claim of
3 numbness of the hands. Without any reasoning to justify the ALJ’s rejection of Plaintiff’s
4 credibility, the Court cannot conduct a meaningful review. *See id.* at 492 (“A clear statement of the
5 agency’s reasoning is necessary because we can affirm the agency’s decision to deny benefits only
6 on the grounds invoked by the agency.”) And a lack of reasoning meant the ALJ did not provide
7 specific, clear and convincing reasons for rejecting Plaintiff’s testimony and statements about the
8 severity and persistence of her symptoms. The ALJ therefore erred, and such error was not
9 harmless. *See id.* at 494 (“error is harmless only if it is inconsequential to the ultimate nondisability
10 determination or if despite the legal error, the agency’s path may reasonably be discerned. . . . we
11 cannot discern the agency’s path because the ALJ made only a general credibility finding without
12 providing any reviewable reasons why she found [the] testimony to be not credible”) (internal
13 quotations and citation omitted).

14
15 Finally, in her discussion section concerning credibility, Plaintiff asserts that the ALJ failed
16 to address the severity of Plaintiff’s peripheral neuropathy at step two of the five-step sequential
17 process.⁸ Doc. 16, pg. 10. She does not provide any argument to support her assertion. *See Hibbs v.*
18 *Dep’t of Human Res.*, 273 F.3d 844, 872 (9th Cir. 2001) *aff’d sub nom. Nevada Dep’t of Human Res.*
19 *v. Hibbs*, 538 U.S. 721(2003) (“he has failed to develop the record and his argument sufficiently to
20 render it capable of assessment by this court”). Moreover, a close reading of the ALJ’s decision
21 shows the ALJ in fact considered the peripheral neuropathy. In finding that Plaintiff’s severe
22 impairments consisted of degenerative disc disease, arthritis, and carpal tunnel syndrome, the ALJ
23 incorporated by reference his discussion of the RFC determination, which included consideration of
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27 ⁸ The Court is not oblivious to Plaintiff’s tendency to sporadically raise issues with no supporting
28 argument in her briefs. Counsel’s approach raises questions about the lack of thought and
organization required for effective representation, considering the Court’s limited resources.

1 Dr. Bairamian’s diagnosis of peripheral neuropathy. AR 21 (“As discussed in detail below, these
2 impairments cause more than a minimal limitation of the claimant’s ability to perform basic work
3 activities.”); *see id.* at § 416.923 (“we will consider the combined effect of all your impairments
4 without regard to whether any such impairment, if considered separately, would be of sufficient
5 severity”). But Plaintiff presented no evidence establishing severity or duration. *See* 20 C.F.R. §§
6 416.912(c) (2011) (You must provide medical evidence showing that you have an impairment(s) and
7 how severe it is during the time you say that you are disabled.”), 416.909 (2011) (“Unless your
8 impairment is expected to result in death, it must have lasted or must be expected to last for a
9 continuous period of at least 12 months.”), 416.921(a) (2011) (“An impairment . . . is not severe if it
10 does not significantly limit your physical or mental ability to do basic work activities.”); SSR 85-28,
11 96-3p. Plaintiff’s assertion is thus meritless.

13 C. Remand

14 “We have discretion to remand for further proceedings or to award benefits. If additional
15 proceedings can remedy defects in the original administrative proceeding, a social security case
16 should be remanded. Where the Secretary is in a better position than this court to evaluate the
17 evidence, remand is appropriate.” *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990) (citations
18 and quotations omitted). Under the circumstances, the Court finds remand appropriate. *See Brown-*
19 *Hunter*, 806 F.3d at 495 (“we will not remand for an immediate award of benefits because we are not
20 satisfied that “further administrative proceedings would serve no useful purpose”).
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22 It would appear questionable that Plaintiff could engage in medium work with occasional
23 above-shoulder reaching on the right side if the allegations of numbness and loss of feeling in her
24 hands were credible. On the other hand, the record raises some doubt about the extent to which
25 Plaintiff’s symptoms rendered her disabled. *See id.* at 496. Plaintiff continued to engage in daily
26 activities even though it took her longer to complete her tasks. Her evaluation with Dr. Hernandez
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1 revealed sensation which was intact to light touch. And while he concluded Plaintiff should avoid
2 reaching overhead with her right upper extremity, Dr. Petty opined that Plaintiff had no limitations
3 in handling, fingering and feeling.

4 The Commissioner shall, on remand, properly address Plaintiff's credibility with regard to
5 her testimony of numbness in making the RFC determination.

6 III. CONCLUSION

7 Accordingly, the Court GRANTS Plaintiff's appeal from the administrative decision of the
8 Commissioner of Social Security. This action is REMANDED to the Commissioner for further
9 administrative proceedings consistent with this opinion. The Clerk of this Court shall enter judgment
10 in favor of Plaintiff, Cynthia Kraslow, and against the Commissioner of Social Security.
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14 IT IS SO ORDERED.

15 Dated: March 30, 2016

16 /s/ Sandra M. Snyder
17 UNITED STATES MAGISTRATE JUDGE
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