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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
10

11 LUISA ALVAREZ,

12 Plaintiff,

13 v.

14 COMMISSIONER OF SOCIAL  
15 SECURITY,

16 Defendant.  
17

Case No. 1:15-cv-01708-SAB

ORDER AFFIRMING IN PART AND  
DENYING IN PART PLAINTIFF’S APPEAL  
AND GRANTING IN PART AND DENYING  
IN PART DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT AND REMANDING  
APPEAL FOR FURTHER ADMINISTRATIVE  
PROCEEDINGS

(ECF Nos. 14, 17, 18)

18  
19 **I.**

20 **INTRODUCTION**

21 Plaintiff Luisa Alvarez (“Plaintiff”) seeks judicial review of a final decision of the  
22 Commissioner of Social Security (“Commissioner” or “Defendant”) denying her application for  
23 disability benefits pursuant to the Social Security Act. The matter is currently before the Court  
24 on the parties’ briefs, which were submitted, without oral argument, to Magistrate Judge Stanley  
25 A. Boone.<sup>1</sup>

26 Plaintiff suffers from depressive disorder, headaches, gastritis, alleged vision problems,  
27 multi-level degenerative disc disease, and history of neck sarcoma. For the reasons set forth

28 <sup>1</sup> The parties have consented to the jurisdiction of the United States Magistrate Judge. (See ECF Nos. 8, 10.)

1 below, Plaintiff's Social Security appeal shall be affirmed in part and remanded for further  
2 administrative proceedings.

## 3 **II.**

### 4 **FACTUAL AND PROCEDURAL BACKGROUND**

5 Plaintiff protectively filed an application for a period of disability and disability insurance  
6 benefits on October 28, 2011. (AR 77.) Plaintiff's application was initially denied on May 15,  
7 2012, and denied upon reconsideration on January 4, 2013. (AR 158-62, 165-169.) Plaintiff  
8 requested and received a hearing before Administrative Law Judge Danny Pittman ("the ALJ").  
9 Plaintiff appeared for a hearing on January 14, 2014. (AR 36-76.) On June 27, 2014, the ALJ  
10 found that Plaintiff was not disabled. (AR 11-27.) The Appeals Council denied Plaintiff's  
11 request for review on September 4, 2015. (AR 1-3.)

#### 12 **A. Hearing Testimony**

13 Plaintiff testified at the January 14, 2014 hearing with the assistance of a Spanish  
14 language interpreter. (AR 39-63, 65-66.) Plaintiff was born on April 4, 1965. (AR 39.) She  
15 was 5 foot 4 inches tall and weighed 175 pounds on the date of the hearing. (AR 39.) Plaintiff is  
16 right handed. (AR 39.)

17 Plaintiff is married and has three children ages 20, 15, and 11. (AR 39.) The minor  
18 children live with Plaintiff. (AR 39.) Plaintiff lives in a house with her son, mother and  
19 husband. (AR 40.) Plaintiff's husband is retired. (AR 40.) Plaintiff has a driver's license and  
20 drives three to four times a week to doctor's appointments and to her children's school. (AR 40.)  
21 Plaintiff completed the seventh grade in Mexico. (AR 41.) Plaintiff is able to read Spanish.  
22 (AR 41.) She is able to read, write, and speak very little English. (AR 41, 61.)

23 Plaintiff worked at Honey Baked Hams but has had a lot of jobs and did not remember  
24 what she did for them. (AR 43-44.) Plaintiff worked seasonally fulltime sorting tomatoes and  
25 almonds. (AR 44.) When she worked as a nut sorter she was able to sit or stand. (AR 65-66.)  
26 She also worked fulltime putting doors together. (AR 44.) The company closed when the  
27 economy took a down turn. (AR 44.) Plaintiff worked at Gallo Winery in 2008. (AR 45.) In  
28 her job at the winery, Plaintiff would complete reports. (AR 41.) She would count the trucks

1 that came in and put stickers on the trucks. (AR 41.) The reports would be in English, but the  
2 supervisor would write them for her. (AR 42.) Plaintiff also completed function reports in  
3 English for her disability claim, but stated that the supervisor filled them out for her and she just  
4 copied them. (AR 42.) Plaintiff also worked providing home support services. (AR 45.) She  
5 provided companionship to a man. (AR 45.) Plaintiff did not do any heavy work, but the job  
6 involved giving medication, “combing” him, and reading to him. (AR 45-46.)

7 Plaintiff does volunteer work at her church. (AR 43.) Plaintiff will go out and talk to the  
8 homeless people. (AR 43.)

9 After rehabilitation from her cancer surgery, Plaintiff had an accident and she has neck  
10 and back pain and her hands and arms swell up. (AR 46.) Plaintiff filed a lawsuit regarding the  
11 motor vehicle accident to get her medical bills paid. (AR 46.) Plaintiff received \$4,000.00 from  
12 the lawsuit. (AR 46.)

13 Plaintiff’s medication has been increased. (AR 47.) The pain medications control her  
14 pain “a little bit” but then it comes back. (AR 47.) Plaintiff is also taking medication for her  
15 depression. (AR 47.) It helps a little but she is very depressed because of her small children.  
16 (AR 47.) She wants to help her children advance. (AR 47.) Her son was studying for  
17 criminology but he had to leave school to help her so that she could have medical attention. (AR  
18 47.) Plaintiff had cancer surgery two years ago because they found some cancerous tumors.  
19 (AR 48.)

20 Sometimes her face swells up in the area that she had her cancer surgery. (AR 48.) The  
21 doctors want Plaintiff to have surgery on her back, but she has not had it because she does not  
22 have insurance. (AR 48.) Plaintiff applied under the Affordable Care Act and was denied. (AR  
23 48.) They told her to apply for Medi-Cal but they turned her down also. (AR 48.) The doctors  
24 said that surgery on her neck might help a little bit for the pain, but it could leave her as a  
25 vegetable and that she would not be able to turn her neck much to the side. (AR 62.) Sometimes  
26 Plaintiff feels as if her neck is so heavy it is putting too much pressure on her shoulders. (AR  
27 62.) It takes about an hour for Plaintiff to feel that way and then she will lie down on a massage  
28 pillow. (AR 62.) This occurs about four or five times per day. (AR 62.) About six times per

1 day, Plaintiff will move and have dizziness. (AR 62-63.) Plaintiff fell twice the day before the  
2 hearing and bruised her right forearm. (AR 63.) Plaintiff will pinch herself to see if she can feel  
3 anything because her arms are numb and leaves marks on herself. (AR 63.)

4 Plaintiff did receive injections in her back at Stanford that helped her for about two  
5 weeks. (AR 48-49.) Plaintiff's doctor recommended physical therapy but she cannot afford it  
6 because she does not have insurance. (AR 49.) Plaintiff does wear a belt for her back, a brace  
7 for her back, and patches for pain. (AR 49.) The brace helps at times but she sometimes gets  
8 swelling in her back. (AR 49.) Plaintiff uses a cane that was recommended by a doctor after her  
9 accident. (AR 49.) She has been using the cane all day long since she had the accident. (AR  
10 49.) Plaintiff's arm falls asleep a lot. (AR 49-50.) Plaintiff would like to see a doctor for her  
11 mental health issues but does not have insurance. (AR 50.)

12 Plaintiff has constant pain from her neck to her waist, sometimes it is less because of the  
13 medication, but it always comes back. (AR 50.) Sometimes she is unable to sleep because the  
14 pain is so bad. (AR 50.) Her legs go numb a lot and her feet swell. (AR 50.) Moving her arms  
15 helps the pain and her sons will massage her. (AR 51.) Plaintiff's pain is worse with a lot of  
16 movement or if she sits or walks too long. (AR 51.) Plaintiff can sit for about 20 minutes before  
17 needing to stand up. (AR 51.) She can stand for about 15 minutes. (AR 51.) Plaintiff can walk  
18 around the block slowly, starting and stopping. (AR 51.) Plaintiff can lift 10 pounds. (AR 52.)  
19 Plaintiff has problems with both arms since her surgery, but her right arm is worse. (AR 52.)  
20 Plaintiff cannot lift her arm overhead. (AR 52.) She can lift the right arm in front of her slowly.  
21 (AR 52.) But her right hand goes numb and she drops things. (AR 53.) Plaintiff is unable to  
22 bend over to pick something up if she drops it. (AR 53.) Plaintiff is able to button or zip things  
23 and can use a pen or pencil to write but it takes her some time. (AR 53.) Plaintiff does dishes  
24 with her left hand and only moves her right hand a little bit. (AR 63.)

25 Since her surgery, Plaintiff's right eye is very cloudy. (AR 53.) Sometimes when she is  
26 in pain she has difficulty remembering recent things. (AR 54.) Plaintiff has difficulty  
27 concentrating and gets dizzy when she tries to concentrate. (AR 54.) Sometimes Plaintiff has  
28 difficulty making decisions. (AR 54.) When she tries to make a decision she gets dizzy. (AR

54.) Plaintiff does not have problems getting along with people. (AR 54.)

On a typical day, Plaintiff will talk with her mother, and sleep for about 20 to 30 minutes. (AR 55.) She has trouble sleeping at night and only sleeps for two to three hours. (AR 55.) Plaintiff needs help if she has to tie her shoes and with her hair because she cannot lift her arm very much. (AR 55-56.) Plaintiff does not cook, but she does the dishes. (AR 56.) She does not vacuum, mop, sweep or do laundry. (AR 56.) Plaintiff uses the hose to water outside. (AR 57.) She cleans around the house with water. (AR 57.) Plaintiff goes grocery shopping and to church. (AR 57.) Plaintiff is able to follow the sermon at church. (AR 57.) Plaintiff tells her children when the bills need to be paid and helps them with paying the bills. (AR 57.)

Plaintiff has friends and they go to the movies, but usually they rent movies at home. (AR 57.) They spend a lot of time with the children and her mother. (AR 57.) Plaintiff sometimes goes out to restaurants. (AR 57.) Plaintiff attends her son's basketball, baseball and football games. (AR 58.) Plaintiff goes to the mall and walks a while and then she will sit and wait for her children to do their shopping. (AR 58.) Plaintiff is starting to learn how to use the computer. (AR 58.) Plaintiff uses Facebook and plays games. (AR 58.) Plaintiff enjoys reading, but when her eyes get tired she stops. (AR 58.) Plaintiff has birds and she and her family take care of them. (AR 58.)

Plaintiff was cleared as a foster home in 2011 but does not currently have a foster child. (AR 59.) Plaintiff had been a foster parent for 16 years but when she had cancer surgery she took a break for a year. (AR 59.) Plaintiff had a five year old foster child until four days prior to the hearing. (AR 60.) Plaintiff helped the child to get dressed. (AR 60.) The child was like another member of the family. (AR 60-61.) They are looking for a child to adopt. (AR 60.)

A vocational expert ("VE"), Judith L. Najarian, also testified at the hearing. (AR 64-75.) The VE characterized Plaintiff's past work history as a nut sorter, Dictionary of Occupational Titles ("DOT") 521.687-086, sedentary, SVP 2; sorter, agricultural produce, DOT 529.687-186, light, SVP 2; door assembler I, DOT 762.684-034, medium, SVP 3; foster parent, DOT 309.677-014, light, SVP 3; inspector-grader, agricultural establishment, DOT 409.687-010, light, SVP 2. (AR 65-67.)

1 The ALJ proffered a hypothetical of an individual of Plaintiff's age, education, and past  
2 work experience who is limited to occasionally lifting and carrying 50 pounds and frequently 25  
3 pounds; standing and/or walking 6 hours and sitting for 6 to 8 hours in an 8 hour workday;  
4 frequent balancing, stooping, kneeling, crouching, crawling, and climbing; occasional overhead  
5 reaching with the upper right extremity; and able to perform frequent manipulative activities  
6 with the upper right extremity. (AR 67.) The VE opined that this individual would be able to  
7 perform Plaintiff's past work as a foster parent, inspector, door assembly, and nut sorting. (AR  
8 68.) The only past job she would not be able to perform is the tomato sorter. (AR 68-69.) She  
9 would also be able to work as a machine feeder, DOT 699.686-010, medium, SVP, with a  
10 twenty-five percent reduction for the hand limitation there would be 2, 217 jobs in California and  
11 9 times that amount in the United States. (AR 69.) The individual would also be able to work as  
12 a carton forming machine operator, DOT 641.685-022, medium, SVP 2, with a twenty percent  
13 reduction for the hand limitation there would be 7,959 jobs in California and 9 times that many  
14 in the United States. (AR 69-70.) A third job would be a package sealer, DOT 920.685-074,  
15 medium, SVP 2, with a twenty-five percent reduction for the hand limitation there would be  
16 4,222 jobs in California. (AR 70.)

17 The ALJ proffered a second hypothetical of the same individual who is limited to  
18 occasionally lifting and carrying 20 pounds and frequently 10 pounds; standing and/or walking  
19 for 6 hours; sitting for 6-8 hours in an 8 hour day; frequent pushing and pulling and occasional  
20 overhead reaching with the right upper extremity; frequent balancing, stooping, crouching, and  
21 occasional crawling and climbing. (AR 70.) The VE opined that this individual would be able  
22 to perform the job of nut sorter and foster parent as Plaintiff described it. (AR 71.) This  
23 individual would also be able to work as a bottle-line attendant, DOT 920.687-042, light, SVP 1.  
24 (AR 71.) With a fifty percent reduction for the hand limitation there would be 23,003 jobs in  
25 California; vacuum-bottle assembler, DOT 739.687-194, light, SVP 1, with a sixty percent  
26 reduction there would be 8,759 jobs in California; and a box sealing inspector, DOT 641.687-  
27 014, light, SVP 2, with a twenty-five percent reduction there would be 11,439 jobs in California.  
28 (AR 71-72.)

1 The ALJ proffered a third hypothetical of this same individual who is limited to  
2 occasional lifting and carrying of 10 pounds and frequently less than 10 pounds; standing and or  
3 walking for 2 hours and sitting for 6 to 8 hours in an 8 hour day; occasional balancing, stooping,  
4 kneeling, crouching, crawling, and climbing; frequent pushing and pulling; and occasional  
5 overhead reaching with the right upper extremity. (AR 72.) The VE opined that this individual  
6 would be able to perform Plaintiff's past work as a nut sorter. (AR 72.) This individual would  
7 also be able to work as a hand bander, DOT 920.687-030, sedentary, SVP 2, with 3,173 jobs in  
8 California; compact assembler, DOT 739.687-066, sedentary, SVP 2, with 2812 jobs in  
9 California; and table worker, DOT 739.687-182, sedentary, SVP, with 1,582 jobs in California.  
10 (AR 73.) If occasional manipulative activities were included in the hypothetical it would  
11 eliminate all work. (AR 73.)

12 The ALJ asked the VE about the handling requirements for the job of nut sorter. The  
13 DOT states that the job has frequent handling and fingering. (AR 73.) The VE opined that this  
14 was not reasonable. (AR 73.) About a year prior, the ALJ did a job analysis at a pistachio plant  
15 just south of town. (AR 74.) They did have seating and could sit and stand as they wanted. (AR  
16 74) The job required constant fingering and handling. (AR 74.)

17 The ALJ presented a fourth hypothetical of the same individual who was limited to  
18 occasional lifting and carrying of 10 pounds and frequently less than 10 pounds; standing and or  
19 walking for less than 1 hour and sitting for less than 1 hour in an 8 hour day. (AR 74.) The VE  
20 opined that there would be no jobs that this individual could perform. (AR 74.) Similarly if the  
21 additional limitation were made to the first three hypotheticals that the individual would miss  
22 two or more days of work per month there would be no work the individual could perform. (AR  
23 74.) (AR 74.)

24 Plaintiff's counsel proffered the first hypothetical with the additional limitation of  
25 occasional reaching, handling, and fingering with the right dominant upper extremity, and no  
26 more than frequent with the left in all directions, and a non-English speaker. (AR 75.) The VE  
27 opined that there would be no jobs available for that individual. (AR 75.)  
28

1       **B.     ALJ Findings**

2       The ALJ made the following findings of fact and conclusions of law.

- 3       •     Plaintiff last met the insured status requirements of the Social Security Act on  
4           December 31, 2013.
- 5       •     Plaintiff did not engage in substantial gainful activity during the period from her  
6           alleged onset date of November 1, 2008 through her date last insured of  
7           December 31, 2013.
- 8       •     Through the date last insured, Plaintiff had the following severe impairments:  
9           multi-level degenerative disc disease and history of neck sarcoma.
- 10      •     Plaintiff did not have an impairment or combination of impairments that met or  
11           medically equaled the severity of one of the listed impairments through the date  
12           last insured.
- 13      •     Through the date last insured, Plaintiff had the residual functional capacity to lift  
14           and carry 20 pounds occasionally, 10 pounds frequently, stand and walk 6 hours  
15           cumulatively, and sit 6 to 8 hours total in an 8-hour workday. She was limited to  
16           frequent pushing and pulling and occasional overhead reaching with the right  
17           upper extremity. Lastly, she was limited to frequent balancing, stooping, kneeling,  
18           crouching, and occasional crawling and climbing.
- 19      •     Plaintiff was capable of performing past relevant work as a Nut Sorter through the  
20           date last insured. This work did not require the performance of work-related  
21           activities precluded by her residual functional capacity.
- 22      •     The claimant was not under a disability, as defined in the Social Security Act, at  
23           any time from November 1, 2008, the alleged onset date, through December 31,  
24           2013, the date last insured.

25                               **III.**

26                               **LEGAL STANDARD**

27           To qualify for disability insurance benefits under the Social Security Act, the claimant  
28   must show that she is unable “to engage in any substantial gainful activity by reason of any

1 medically determinable physical or mental impairment which can be expected to result in death  
2 or which has lasted or can be expected to last for a continuous period of not less than 12  
3 months.” 42 U.S.C. § 423(d)(1)(A). The Social Security Regulations set out a five step  
4 sequential evaluation process to be used in determining if a claimant is disabled. 20 C.F.R. §  
5 404.1520; Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1194 (9th  
6 Cir. 2004). The five steps in the sequential evaluation in assessing whether the claimant is  
7 disabled are:

8 Step one: Is the claimant presently engaged in substantial gainful activity? If so,  
9 the claimant is not disabled. If not, proceed to step two.

10 Step two: Is the claimant’s alleged impairment sufficiently severe to limit his or  
11 her ability to work? If so, proceed to step three. If not, the claimant is not  
12 disabled.

13 Step three: Does the claimant’s impairment, or combination of impairments, meet  
14 or equal an impairment listed in 20 C.F.R., pt. 404, subpt. P, app. 1? If so, the  
15 claimant is disabled. If not, proceed to step four.

16 Step four: Does the claimant possess the residual functional capacity (“RFC”) to  
17 perform his or her past relevant work? If so, the claimant is not disabled. If not,  
18 proceed to step five.

19 Step five: Does the claimant’s RFC, when considered with the claimant’s age,  
20 education, and work experience, allow him or her to adjust to other work that  
21 exists in significant numbers in the national economy? If so, the claimant is not  
22 disabled. If not, the claimant is disabled.

23 Stout v. Commissioner, Social Sec. Admin., 454 F.3d 1050, 1052 (9th Cir. 2006).

24 Congress has provided that an individual may obtain judicial review of any final decision  
25 of the Commissioner of Social Security regarding entitlement to benefits. 42 U.S.C. § 405(g).  
26 In reviewing findings of fact in respect to the denial of benefits, this court “reviews the  
27 Commissioner’s final decision for substantial evidence, and the Commissioner’s decision will be  
28 disturbed only if it is not supported by substantial evidence or is based on legal error.” Hill v.  
Astrue, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means more than a  
scintilla, but less than a preponderance. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996)  
(internal quotations and citations omitted). “Substantial evidence is relevant evidence which,  
considering the record as a whole, a reasonable person might accept as adequate to support a  
conclusion.” Thomas v. Barnhart, 278 F.3d 947, 955 (9th Cir. 2002) (quoting Flaten v. Sec’y of

1 Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

2 “[A] reviewing court must consider the entire record as a whole and may not affirm  
3 simply by isolating a specific quantum of supporting evidence.” Hill, 698 F.3d at 1159 (quoting  
4 Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006). However, it is not  
5 this Court’s function to second guess the ALJ’s conclusions and substitute the court’s judgment  
6 for the ALJ’s. See Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (“Where evidence is  
7 susceptible to more than one rational interpretation, it is the ALJ’s conclusion that must be  
8 upheld.”).

#### 9 IV.

#### 10 DISCUSSION AND ANALYSIS

11 Plaintiff argues that the ALJ erred by failing to resolve an apparent conflict between the  
12 VE’s testimony and the DOT; making errors regarding Plaintiff’s education; failing to provide  
13 legally sufficient reasons to reject Dr. Vesali and Dr. Devireddy’s medical opinions; and failing  
14 to provide clear and convincing reasons to find Plaintiff not credible. Defendant moves for  
15 summary judgment arguing that the ALJ properly relied on the VE’s testimony; made no errors  
16 regarding Plaintiff’s education; properly evaluated the physician opinions, and properly  
17 evaluated Plaintiff’s subjective complaints.

##### 18 A. The ALJ Provided Clear and Convincing Reason for the Credibility Finding

19 Plaintiff argues that the ALJ failed to provide clear and convincing reasons to find her not  
20 credible. Defendant counters that the ALJ properly evaluated Plaintiff’s subjective complaints  
21 and found her testimony to not be credible.

22 “An ALJ is not required to believe every allegation of disabling pain or other non-  
23 exertional impairment.” Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007) (internal punctuation  
24 and citations omitted). Determining whether a claimant’s testimony regarding subjective pain or  
25 symptoms is credible, requires the ALJ to engage in a two-step analysis. Molina v. Astrue, 674  
26 F.3d 1104, 1112 (9th Cir. 2012). The ALJ must first determine if “the claimant has presented  
27 objective medical evidence of an underlying impairment which could reasonably be expected to  
28 produce the pain or other symptoms alleged.” Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th

1 Cir. 2007) (internal punctuation and citations omitted). This does not require the claimant to  
2 show that her impairment could be expected to cause the severity of the symptoms that are  
3 alleged, but only that it reasonably could have caused some degree of symptoms. Smolen, 80  
4 F.3d at 1282.

5 Second, if the first test is met and there is no evidence of malingering, the ALJ can only  
6 reject the claimant's testimony regarding the severity of her symptoms by offering "clear and  
7 convincing reasons" for the adverse credibility finding. Carmickle v. Commissioner of Social  
8 Security, 533 F.3d 1155, 1160 (9th Cir. 2008). The ALJ must specifically make findings that  
9 support this conclusion and the findings must be sufficiently specific to allow a reviewing court  
10 to conclude the ALJ rejected the claimant's testimony on permissible grounds and did not  
11 arbitrarily discredit the claimant's testimony. Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir.  
12 2004) (internal punctuation and citations omitted). Factors that may be considered in assessing a  
13 claimant's subjective pain and symptom testimony include the claimant's daily activities; the  
14 location, duration, intensity and frequency of the pain or symptoms; factors that cause or  
15 aggravate the symptoms; the type, dosage, effectiveness or side effects of any medication; other  
16 measures or treatment used for relief; functional restrictions; and other relevant factors.  
17 Lingenfelter, at 1040; Thomas, 278 F.3d at 958. In assessing the claimant's credibility, the ALJ  
18 may also consider "(1) ordinary techniques of credibility evaluation, such as the claimant's  
19 reputation for lying, prior inconsistent statements concerning the symptoms, and other testimony  
20 by the claimant that appears less than candid; [and] (2) unexplained or inadequately explained  
21 failure to seek treatment or to follow a prescribed course of treatment. . . ." Tommasetti v.  
22 Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008) (quoting Smolen, 80 F.3d at 1284).

23 Plaintiff argues that the ALJ did not identify any specific statement that Ms. Alvarez  
24 stated that was inconsistent with her daily activities and therefore the finding is unreviewable.  
25 However, the Court finds that the ALJ provided reasons for the credibility finding which are  
26 reviewable. There are two ways for an ALJ to "use daily activities to form the basis of an  
27 adverse credibility determination: if the claimant's activity contradicts his testimony or if the  
28 claimant's activity meets the threshold for transferable work skills." Phillips v. Colvin, 61

1 F.Supp.3d 925, 944 (N.D. Cal. 2014).

2 Here, the ALJ found that Plaintiff described daily activities that are not as limited as one  
3 would expect given her complaints of disabling pain and limitations. (AR 25.) Plaintiff stated  
4 that she is unable to stand, walk, or sit. (AR 22, 337-338.) Yet, Plaintiff testified that she was  
5 able to wash dishes, shop for groceries, attend church, visit with friends, watch television, attend  
6 her children's athletic events, and care for pet birds. (AR 25, 56, 57, 58.) Further, the ALJ  
7 found that Plaintiff had cared for foster children since 2008 and had cared for a five year-old  
8 foster child until four days before the January 14, 2014 hearing, including helping him change  
9 his clothing, which is evidence that she has more functional ability than she alleges and this  
10 weakens her credibility. (AR 19, 25, 60, 295-298, 307-310, 327, 329-330.)

11 The Court finds that the ALJ provided clear and convincing reasons to find that Plaintiff  
12 had more functional ability than she alleged thus weakening her credibility which are supported  
13 by substantial evidence in the record.

14 **B. The ALJ Provided Specific and Legitimate Reasons to Reject Dr.**  
15 **Devireddy's Opinion**

16 Plaintiff contends that the ALJ erred by failing to adopt the opinion of her treating  
17 physician, Dr. Devireddy, which was more restrictive than the limitations adopted by the ALJ.  
18 Defendant argues that the ALJ properly found that Dr. Devireddy's opinion was not supported  
19 by her treatment records and was inconsistent with the medical evidence as a whole.

20 The weight to be given to medical opinions depends upon whether the opinion is  
21 proffered by a treating, examining, or non-examining professional. See Lester v. Chater, 81 F.3d  
22 821, 830-831 (9th Cir. 1995). In general a treating physician's opinion is entitled to greater  
23 weight than that of a nontreating physician because "he is employed to cure and has a greater  
24 opportunity to know and observe the patient as an individual." Andrews v. Shalala, 53 F.3d  
25 1035, 1040-41 (9th Cir. 1995) (citations omitted). If a treating physician's opinion is  
26 contradicted by another doctor, it may be rejected only for "specific and legitimate reasons"  
27 supported by substantial evidence in the record. Ryan v. Commissioner of Social Sec., 528 F.3d  
28 1194, 1198 (9th Cir.) (quoting Bayless v. Barnhart, 427 F.3d 1121, 1216 (9th Cir. 2005)).

1 Where the treating physician's opinion is contradicted by the opinion of an examining  
2 physician who based the opinion upon independent clinical findings that differ from those of the  
3 treating physician, the nontreating source itself may be substance evidence, and the ALJ is to  
4 resolve the conflict. Andrews, 53 F.3d at 1041. However, if the nontreating physician's opinion  
5 is based upon clinical findings considered by the treating physician, the ALJ must give specific  
6 and legitimate reasons for rejecting the treating physician's opinion that are based on substantial  
7 evidence in the record. Andrews, 53 F.3d at 1041.

8 Here, there are contradictory opinions in the record so the ALJ is to determine credibility  
9 and resolve any conflicts. Batson, 359 F.3d at 1195. In order to reject Dr. Devireddy's opinion  
10 the ALJ must set forth legitimate and specific reasons. In addressing Dr. Devireddy's opinion,  
11 the ALJ found,

12 On September 21, 2010 and December 9, 2013, treating physician Katihikeya  
13 Devireddy, M.D. completed Physician Medical Source Statements and opined the  
14 claimant was unable to perform work activity even at the sedentary level (Exhibits  
15 11F, pp. 4-7; 22F, pp. 2-6). I give Dr. Devireddy's opinions limited weight  
16 because they are overly restrictive using the objective findings she based her  
17 opinions upon and they are inconsistent with the medical evidence as a whole. For  
18 instance, her medical reports showed the claimant's objective findings were  
19 generally normal (Exhibits 15F, pp. 3-31; 19F, pp. 6-21). In addition, diagnostic  
20 images showed some degenerative changes, but there was no nerve root  
impingement. Moreover, symptoms, such as pain, fatigue, or weakness will not be  
found to affect a person's ability to do basic work activities unless medical signs  
or laboratory findings show that a medically determinable impairment(s) is  
present (20 CFR 404.1529(b). Because Dr. Devireddy does not support her  
opinions with diagnostic findings or objective evidence to support the level of  
pain alleged, I do not accept her opinion with regard to the claimant's residual  
functional capacity.

(AR 24-25.)

21 1. Dr. Devireddy's Objective Findings Do Not Support the Stated Limitations

22 Dr. Devireddy's examination notes from March 3, 2009 through September 16, 2011,  
23 demonstrate generally normal physical examinations. (AR 584, 585, 586, 587, 588, 589, 919,  
24 920, 921, 922, 923, 924, 925, 928, 929, 930, 931, 932, 934, 935, 936, 937, 938, 939.)

25 The first objective findings of neck pain and limited movement in right arm in Dr.  
26 Devireddy's notes is on August 22, 2011. (AR 918.) Plaintiff had an otherwise normal  
27

1 examination. (AR 918.) On this same date, Dr. Devireddy filed a medical source statement.<sup>2</sup>  
2 Dr. Devireddy listed Plaintiff's symptoms as headache, dizziness, neck pain, back pain,  
3 numbness right side of face. (AR 803.) The clinical findings and objective signs identified were  
4 movements in neck and upper back are painful and twitching of right side of face. (AR 803.)  
5 Vicodin made Plaintiff drowsy. (AR 803.) Plaintiff's impairments had or could be expected to  
6 last at least 12 months.<sup>3</sup> (AR 803.)

7 Dr. Devireddy opined that Plaintiff could sit for 15 minutes at one time; stand for 15  
8 minutes at one time before needing to get up. (AR 804.) Plaintiff was able to sit less than two  
9 hours and stand/walk less than two hours in an eight hour workday. (AR 804) During an eight  
10 hour workday, Plaintiff would need to walk every fifteen minutes for three to four minutes. (AR  
11 805.) Plaintiff would need a job that allows her to shift from sitting, standing, or walking due to  
12 pain, paresthesia, adverse effects of medication, muscle weakness, and chronic fatigue. (AR  
13 805.) Plaintiff would need unscheduled breaks every fifteen minutes for ten minutes before she  
14 could return to work. (AR 805.) Plaintiff could never lift or carry less than 10 pounds and rarely  
15 carry 10, 20, or 50 pounds. (AR 805.) Plaintiff could occasionally look down, rarely turn her  
16 head to the right or left, look up or hold head in a static position, twist, bend/stoop, crouch/squat,  
17 climb ladders or stairs. (AR 805-806.)

18 Plaintiff had significant limitations reaching, handling, or fingering. (AR 806.) During  
19 an 8 hour work day, Plaintiff could grasp, turn or twist objects 10 percent of the time with her  
20 right hand and 20 percent of the time with her left; she can do fine manipulations 10 percent of  
21 the time with her right hand and 20 percent with the left; and can reach, including overhead, 5  
22 percent of the time with her right arm and 20 percent of the time with her left arm. (AR 806.)  
23 Plaintiff's impairments are likely to produce good and bad days. (AR 806.) Plaintiff would be  
24 absent about one day per month due to her impairments or treatment. (AR 806.) The earliest

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25 <sup>2</sup> The ALJ stated the ALJ completed the statement on September 21, 2010, however this was the date that the  
26 limitations were stated to have begun. (AR 806.)

27 <sup>3</sup> While Plaintiff argues findings relevant to Dr. Devireddy's psychological limitations, the Court does not address  
28 the psychological findings since Plaintiff has not challenged the finding that Plaintiff did not have a severe mental  
impairment. Further, the ALJ relied on the opinion of two consultative examiners which is significant evidence to  
support the finding that Plaintiff did not have a severe mental impairment. (AR 20-21, 597-600, 957-962.)

1 date these limitations apply is September 21, 2010. (AR 806.)

2 Plaintiff had a normal examination on September 16, 2011. (AR 917.) Plaintiff was  
3 found to have painful neck with limited movement on September 21, 2011; October 19, 2011,  
4 and November 2, 2011. (AR 913, 914, 915, 916.) Plaintiff had a normal examination except for  
5 her throat and ears on December 5, 2011. (AR 912.) On December 23, 2011, the record shows  
6 movement of the neck is painful. (AR 911.) On January 24, 2012, Plaintiff had tenderness all  
7 over her body, mainly to the spine area. (AR 1027.) Plaintiff had a normal examination on  
8 February 8, 2012. (AR 1026.) On March 21, 2012, Plaintiff's examination was normal except  
9 for some erythema. (AR 1025.)

10 On May 3, 2012, Plaintiff was seen complaining of back pain radiating to the buttocks.  
11 (AR 1023.) Plaintiff had normal tone and motor strength. (AR 1024.) She had no contractures  
12 or bony abnormalities and normal movement of all extremities and tenderness; movements of  
13 lower back were painful and limited with pain radiating down legs. (AR 1024.) Examination of  
14 the extremities showed no cyanosis, edema, varicosities, or palpable cord. (AR 1024)

15 On June 13, 2012, Plaintiff was seen complaining of headaches and neck pain that  
16 radiated to her shoulders. (AR 1021.) Plaintiff reported muscle aches and arthralgia/joint pain  
17 but no muscle weakness, no back pain, and no swelling of extremities, and no arm pain on  
18 exertion. (AR 1021.) Plaintiff was in moderate distress and was ambulating normally. (AR  
19 1021.) Plaintiff had normal tone and motor strength. (AR 1021.) Plaintiff had no contractures,  
20 malalignment, tenderness or bony abnormalities, and normal movement of all extremities. (AR  
21 1021.) Movements of neck were painful and limited. (AR 1021.)

22 Plaintiff was seen on June 26, 2012, complaining of neck pain that radiated down both  
23 shoulders and arms. (AR 1018.) Plaintiff reported no muscle aches, no muscle weakness, no  
24 arthralgia/joint pain, no back pain and no swelling in the extremities. (AR 1018). Plaintiff was  
25 in moderate distress, and was ambulating normally. (AR 1019.) Plaintiff had neck pain with  
26 motion. (AR 1019.) She had normal tone and motor strength. (AR 1019.) There were no  
27 contractures, malalignment, tenderness or bony abnormalities, and normal movement of all  
28 extremities. (AR 1019.) Movements of neck were painful and limited. (AR 1019).

1 Plaintiff was seen on July 13, 2012, and was ambulating normally. (AR 1016.) Plaintiff  
2 had normal tone and motor strength. (AR 1016.) Examination found no contractures,  
3 malalignment, tenderness, or bony abnormalities and limited ROM; movements of neck are  
4 painful and limited with pain radiating to both shoulders. (AR 1016.) Examination of the  
5 extremities showed no cyanosis, edema, varicosities, or palpable cord. (AR 1016.)

6 Plaintiff was seen on August 21, 2012 having fallen five days prior when her knee  
7 buckled. (AR 1013) Plaintiff was ambulating normally. (AR 1014.) Plaintiff's gait was not  
8 antalgic with no pes planus. (AR 1014.) Glut medius strength was /5 bilateral. (AR 1014.)  
9 Plaintiff had full range of motion in her hips without pain. (AR 1014.) No FADIR, no FABER,  
10 no tenderness over greater trochanter area. (AR 1014.) Hip flexor strength was 5/5, and  
11 extensor was 5/5. (AR 1014.) Plaintiff had no pain with resisted hip adduction. (AR 1014.)  
12 Bilateral knee examination was done for comparison. (AR 1014.) Plaintiff was diagnosed with  
13 an MCL sprain. (AR 1014.)

14 Plaintiff was seen on March 13, 2013; September 18, 2013; and December 9, 2013; but  
15 there are no objective findings in the record. (AR 1072, 1076, 1079.) On December 9, 2013, Dr.  
16 Devireddy completed a second medical source statement. (AR 1061-1065.) Dr. Devireddy  
17 identified Plaintiff's chronic pain/paresthesia as chronic neck pain and pain radiates to both arms.  
18 (AR 1061.) Plaintiff's symptoms were tenderness, muscle weakness, chronic fatigue, sensory  
19 changes, impaired sleep, and reduced grip strength. (AR 1061.) Plaintiff had no significant  
20 limitation of motion. (AR 1061.) Plaintiff gets persistent headaches. (AR 1061.) The  
21 symptoms associated with the headaches were malaise, inability to concentrate, impaired sleep,  
22 exhaustion, mood changes. (AR 1062.) Plaintiff had headaches three times per week that last  
23 two hours and thirty minutes. (AR 1062.) Plaintiff had nausea and dizziness due to treatment.  
24 (AR 1062.) Plaintiff is not a malingerer. (AR 1062.)

25 Dr. Devireddy opined that Plaintiff could walk 1 block, sit 20 minutes, and stand 15  
26 minutes. (AR 1063.) In a total workday, Plaintiff could sit, stand, and walk one hour each, and  
27 would need to walk for 10 minutes every 15 minutes in an 8 hour workday. (AR 1063.) Plaintiff  
28 would need to be permitted to shift positions due to pain, paresthesia, muscle weakness and

1 chronic fatigue. (AR 1063.) Plaintiff would need an unscheduled 15 minute break every 30  
2 minutes in an 8 hour workday. (AR 1063.) Plaintiff did not need to elevate legs or use an  
3 assistive device. (AR 1063.)

4 Plaintiff could never lift 20 or 30 pounds, could occasionally look down or turn head, and  
5 rarely look up or hold head in static position. (AR 1064.) Plaintiff could rarely twist, stoop,  
6 crouch/squat, climb ladders or stairs. (AR 1064.) Plaintiff had significant reaching handling and  
7 fingering limitations; and could grasp, turn or twist objects 20 percent bilaterally; perform fine  
8 manipulation 30 percent bilaterally; and reach 30 percent right and 50 percent left. (AR 1064.)  
9 Plaintiff's condition would be likely to produce good and bad days. (AR 1064.) Plaintiff was  
10 likely to be absent more than 4 days per month due to impairments or treatment. (AR 1065.)  
11 Plaintiff's limitations identified began in 2009. (AR 1065.)

12 Review of the record demonstrates that substantial evidence supports the ALJ's finding  
13 that Dr. Devireddy's medical reports showed the Plaintiff's objective findings were generally  
14 normal and Dr. Devireddy's opinion was not supported with diagnostic findings or objective  
15 evidence to support the level of impairment alleged. The ALJ need not accept the opinion of any  
16 physician that is brief, conclusory, and unsupported by clinical findings. Thomas, 278 F.3d at  
17 957.<sup>4</sup>

18 2. The Opinions of the Agency Physicians are Substantial Evidence to Reject Dr.  
19 Devireddy's Opinion

20 The ALJ gave great weight to the State Agency physician's opinion because the weight  
21 of the medical evidence supported them. (AR 24.). The contrary opinion of a non-examining  
22 expert is not sufficient by itself to constitute a specific, legitimate reason for rejecting a treating  
23 or examining physician's opinion, however, "it may constitute substantial evidence when it is

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24 <sup>4</sup> Plaintiff argues that Dr. Devireddy's opinion is entitled to controlling weight, however, where the ALJ finds that  
25 "a treating source's medical opinion on the issue(s) of the nature and severity of [the claimant's] impairment(s) is  
26 well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the  
27 other substantial evidence in your case record," it will be given controlling weight. 20 C.F.R. § 404.1527(c)(2).  
28 Here, the ALJ found that Dr. Devireddy's opinion was not well supported and there was other substantial evidence  
in the record that was inconsistent. Accordingly, Dr. Devireddy's opinion was not entitled to controlling weight.  
Further, while Plaintiff argues that other evidence in the record support's Dr. Devireddy's opinion, it is for the ALJ  
to resolve the conflicts in the record, and the ALJ's opinion will be upheld where evidence is subject to more than  
one rational interpretation. Burch, 400 F.3d at 679.

1 consistent with other independent evidence in the record.” Tonapetyan v. Halter, 242 F.3d 1144,  
2 1149 (9th Cir. 2001).

3 State agency physical medical consultant, Robert Estes, M.D., reviewed the medical  
4 records on April 23, 2012, and opined that Plaintiff could lift and carry 20 pounds occasionally,  
5 10 pounds frequently, stand and walk 6 hours cumulatively, and sit 6 hours total in an 8-hour  
6 workday with normal breaks. (AR 24, 86.) Dr. Estes also opined that Plaintiff was limited to  
7 frequent pushing and pulling and overhead reaching with the right upper extremity. (AR 24, 86.)  
8 Dr. Estes found that Plaintiff was limited to frequent balancing, stooping, kneeling, crouching,  
9 and crawling as well as occasional climbing. (AR 24, 86-87.) P. Frye, M.D., another State  
10 agency physical medical consultant, reviewed the medical records on January 4, 2013, and  
11 provided a similar opinion. (AR 24, 122-123.)

12 Dr. Estes found that Plaintiff “exhibited minimal evidence of any physical deficit. Pain is  
13 exaggerated, visual loss alleged with no objective evidence to support same, and imaging the  
14 only objective evidence suggesting cervical and lumbar spine degenerative disease. Evidence of  
15 weakness is underwhelming, concluding aside from pain claimant probably does not demonstrate  
16 a significant functional loss.” (AR 87.) Further, Dr. Estes stated that “[t]his assessment may be  
17 generous but is believed to be appropriate as written.” (AR 87.)

18 Dr. Frye reviewed the record on reconsideration and found that the consultative examiner  
19 gave a clearer picture of Plaintiff’s overall capability, but giving her the benefit of the doubt she  
20 would be reduced to light with postural and some manipulative limitations. (AR 122.) Dr. Frye  
21 affirmed the residual functional capacity assessment of Dr. Estes. (AR 125-126.)

22 These opinions also constitute substantial evidence to reject the opinion of Dr. Devireddy  
23 as they are consistent with, but more restrictive than, the opinion of Dr. Vesali which is  
24 discussed below.

25 **C. The ALJ Did Not Provide Reasons to Reject Dr. Vesali’s Fingering**  
26 **Limitations**

27 Plaintiff argues that substantial evidence does not support the residual functional capacity  
28 assessment or step four decision because the ALJ did not give legally sufficient reasons for

1 implicitly rejecting the consultative examiner's December 2012 opinion that Plaintiff could  
2 perform frequent manipulations with the right hand. Defendant counters that the ALJ properly  
3 evaluated Dr. Vesali's opinion and limited Plaintiff to occasional overhead reaching. Further,  
4 Defendant contends that even if the ALJ erred by not including frequent fingering as a limitation  
5 the error would be harmless because the ALJ identified other jobs that Plaintiff could perform  
6 with such a limitation.

7         The ALJ considered the December 13, 2012 consultative examination findings of Fariba  
8 Vesali, M.D., who performed a comprehensive orthopedic evaluation by reviewing the record  
9 and examining Plaintiff. (AR 24, 1036-1039.) Plaintiff told Dr. Vesali that her chief complaints  
10 were neck pain, low back pain, and right arm pain. (AR 24, 1036.) Dr. Vesali noted that  
11 Plaintiff had no difficulties taking off her shoes and putting them back on. (AR 1036.) She was  
12 able to pick up a paperclip off the desk with her right hand, but asked for help taking off her  
13 sweater due to right arm pain. (AR 1036.) She held onto the wall and walked on her heels and  
14 toes but did not have an assistive device. (AR 1036.)

15         The physical examination showed normal ranges of motion of all extremities and joints  
16 except for slight decrease in the lumbar spine and right shoulder. (AR 24, 1037-1038.) There  
17 were negative straight leg raising tests bilaterally in the seated position, but positive in the supine  
18 position. (AR 24, 1037.) Plaintiff had a normal gait, normal motor strength, some decreased  
19 sensation in the right upper and right lower extremity and normal reflexes. (AR 24, 1036-1037-  
20 1038.) Plaintiff had had tenderness with superficial palpation of the right upper extremity and  
21 entire upper, mid, and lower back. (AR 24, 1037.) It was also noted that axial compression  
22 exacerbated the back pain and rotation of the trunk was positive. (AR 24, 1038.)

23         Dr. Vesali opined that Plaintiff should be able to walk, stand, and sit six hours in an  
24 eight-hour day with normal breaks; did not need an assistive device for ambulation; should be  
25 able to lift and carry 50 pounds occasionally, 25 pounds frequently; should be able to do frequent  
26 postural activities; should be able to do manipulative activities with the left hand with no  
27 limitations; and should be able to do occasional overhead activities with the right hand,  
28 otherwise frequent manipulative activities with the right hand. (AR 1039.)

1 The ALJ found that:

2 Dr. Vesali opined the claimant could perform work activity at the medium  
3 exertional level with frequent postural activities. He also opined she could  
4 perform occasional overhead activities with the right hand, otherwise frequent  
5 manipulative activities with the right hand. I give Dr. Vesali's opinion limited  
6 weight because it is not restrictive enough and I find it is appropriate to limit the  
7 claimant's exertional activity to light work activity due to decreased ranges of  
8 motion in the right shoulder and decreased sensation of the right upper and lower  
9 extremities.

10 (AR 24.)

11 While recognizing that Dr. Vesali found that Plaintiff was limited to frequent  
12 manipulative activities with the right hand, which was due to decreased sensation in the right  
13 upper extremity, the ALJ did not include the limitation or provide any reason to reject the  
14 limitation. The Court finds that the ALJ erred by failing to provide any reason to reject Dr.  
15 Vesali's limitation of frequent fingering.

16 **D. The Action Shall be Remanded for Further Administrative Proceedings**

17 While Defendant argues that any error in including the frequent fingering requirement is  
18 harmless, Plaintiff argues that the ALJ made this error and several other errors at steps four and  
19 five.

20 1. Frequent Fingering Limitation

21 First, Plaintiff argues that the VE testified that the job of nut sorter requires constant  
22 fingering in conflict with the DOT which states that it would require frequent fingering.  
23 Defendant cites to no authority in support of the position that the ALJ can rely on the DOT  
24 description because it is an acceptable vocational source once the VE has identified a conflict.  
25 Therefore, the Court finds that there is not substantial evidence in the record to support the  
26 finding that Plaintiff can perform her prior work as a nut sorter.

27 2. Occasional Overhead Reaching Limitation

28 Defendant contends that, even if the ALJ erred in finding that Plaintiff can perform her  
prior work, the ALJ identified alternative jobs that Plaintiff could perform which only require  
occasional fingering. Plaintiff counters that the other jobs identified by the VE all require  
frequent reaching; and therefore, the DOT conflicts with Plaintiff's ability to only occasionally

1 reach overhead. Defendant replies that since Plaintiff is only limited in overhead reaching with  
2 her right arm the Court should find no conflict with the DOT.

3 The DOT does not address overhead reaching, but provides the requirement for reaching  
4 in general. (See Dictionary of Occupational Titles, 641.687-014 Box-Sealing Inspector,  
5 739.687-194 Vacuum-Bottle Assembler, 920.687-042 Bottling-Line Attendant, ECF No. 14-2.)  
6 The Ninth Circuit recently addressed this issue regarding when an overhead reaching limitation  
7 conflicts with the DOT in Gutierrez v. Colvin, 844 F.3d 804 (9th Cir. 2016). In Gutierrez, the  
8 plaintiff was arguing that the ALJ's finding that she was able to work as a cashier conflicted with  
9 the DOT's frequent reaching requirement because she could not lift her right arm above the  
10 shoulder. Id. at 807. The Ninth Circuit held that an ALJ only need to follow up on those  
11 conflicts that are obvious or apparent. Id. at 807-808. In order to be in conflict with the DOT  
12 the testimony must be at odds with the "job requirements that are essential, integral, or  
13 expected." Id. at 808. Since the DOT addresses a large category of occupations that would fall  
14 with a particular listing, the ALJ need not address conflicts that are not essential, integral, or  
15 expected parts of the job, and where a job itself is a familiar one less scrutiny is required. Id. In  
16 the case of a cashier, the Ninth Circuit found that it is uncommon for a cashier to reach overhead  
17 and therefore there was no apparent or obvious conflict with the DOT. Id.

18 If this was the only error raised by Plaintiff, the Court would address the specific  
19 occupations identified and whether there was an apparent conflict. However, as discussed  
20 below, the Court finds that the ALJ also erred in failing to address Plaintiff's literacy. Therefore  
21 on remand, the ALJ should address the reaching limitations for any job identified by the VE if  
22 the reaching requirements would be apparent or in obvious conflict with the DOT.

23 3. Plaintiff's Illiteracy in English

24 Additionally, Plaintiff argues that the ALJ erred in failing to address Plaintiff's illiteracy  
25 in English. The Ninth Circuit has held "only literacy in English is considered, since literacy in  
26 other languages has little effect on the number of jobs in the national economy available to the  
27 claimant. 20 C.F.R. §§ 404.1564(b)(5), 416.964(b)(5). 'Illiterate' therefore means illiterate in  
28 English." Chavez v. Dep't of Health and Human Services, 103 F.3d 849, 852 (9th Cir. 1996);

1 see also Silveira v. Apfel, 204 F.3d 1257, 1261 (9th Cir. 2000) (illiteracy is the inability to read  
2 or write in English). However, “[w]hile illiteracy or the inability to communicate in English may  
3 significantly limit an individual’s vocational scope, the primary work functions in the bulk of  
4 unskilled work relate to working with things (rather than with data or people) and in these work  
5 functions at the unskilled level, literacy or ability to communicate in English has the least  
6 significance.” 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.00(I) “Thus, the functional capability  
7 for a full range of sedentary work represents sufficient numbers of jobs to indicate substantial  
8 vocational scope for those individuals age 18–44 even if they are illiterate or unable to  
9 communicate in English.” Id.

10 In Pinto v. Massanari, 249 F.3d 840 (9th Cir. 2001), the ALJ found that the claimant was  
11 able to perform her past job duties which required a Language Level 2, although she was  
12 illiterate in English. Pinto, 249 F.3d at 847. The Ninth Circuit reversed in part because in order  
13 for an ALJ to rely on a job description in the DOT that fails to comport with a claimant’s noted  
14 limitations, the ALJ must definitively explain this deviation. Id. Neither the ALJ nor the VE had  
15 addressed the impact of the claimant’s illiteracy on her ability to find and perform a similar job.  
16 Id.

17 In this instance, Plaintiff’s attorney addressed her illiteracy in English in his hypothetical  
18 to the VE. However, the hypothetical presented was significantly more restrictive than  
19 Plaintiff’s residual functional capacity. Defendant argues that the ALJ provided an alternate  
20 finding of jobs which Plaintiff could perform which would encompass the limitation of frequent  
21 fingering with the right hand, however, the ALJ did not inquire if Plaintiff’s illiteracy in English  
22 would impact her ability to find and perform these jobs. Accordingly, on remand, the ALJ shall  
23 inquire into how Plaintiff’s illiteracy in English will impact her ability to find and perform any  
24 jobs which the VE opines that she could perform.

#### 25 4. Remand for Further Administrative Proceedings

26 Plaintiff seeks a remand for benefits, or alternately a remand for further administrative  
27 proceedings. Defendant contends that remand for benefits is not appropriate. The ordinary  
28 remand rule provides that when “the record before the agency does not support the agency

1 action, ... the agency has not considered all relevant factors, or ... the reviewing court simply  
2 cannot evaluate the challenged agency action on the basis of the record before it, the proper  
3 course, except in rare circumstances, is to remand to the agency for additional investigation or  
4 explanation.” Treichler v. Comm’r of Soc. Sec. Admin., 775 F.3d 1090, 1099 (9th Cir. 2014).  
5 This applies equally in Social Security cases. Treichler, 775 F.3d at 1099.

6 Under the Social Security Act “courts are empowered to affirm, modify, or reverse a  
7 decision by the Commissioner ‘*with or without* remanding the cause for a rehearing.’ ” Garrison  
8 v. Colvin, 759 F.3d 995, 1019 (9th Cir. 2014) (emphasis in original) (quoting 42 U.S.C. §  
9 405(g)). The decision to remand for benefits is discretionary. Treichler, 775 F.3d at 1100. In  
10 Social Security cases, courts generally remand with instructions to calculate and award benefits  
11 when it is clear from the record that the claimant is entitled to benefits. Garrison, 759 F.3d at  
12 1019.

13 In this instance, it is not clear that Plaintiff would be entitled to benefits as there is no  
14 evidence in the record regarding whether the additional limitation of frequent manipulation with  
15 the right hand and Plaintiff’s illiteracy in English will preclude work activities. Accordingly, this  
16 action shall be remanded for further administrative proceedings.

## 17 V.

### 18 CONCLUSION AND ORDER

19 Based on the foregoing, the Court finds that the ALJ did not err in making an adverse  
20 credibility finding against Plaintiff or in rejecting the opinion of Dr. Devireddy. However, the  
21 ALJ did err in failing to include that Plaintiff was limited to frequent handling with her right  
22 hand in her functional capacity assessment, and not addressing conflicts with the DOT. This  
23 action is remanded for further proceedings consistent with this opinion.

24 Accordingly, IT IS HEREBY ORDERED that:

- 25 1. Plaintiff’s appeal from the decision of the Commissioner of Social Security is  
26 GRANTED IN PART AND DENIED IN PART;
- 27 2. Defendant’s motion for summary judgment is GRANTED IN PART AND  
28 DENIED IN PART;

1           3.     The Court REMANDS this action back to the Commissioner for further  
2                 administrative proceedings consistent with this opinion;

3           4.     The Clerk of the Court is DIRECTED to enter judgment be entered favor of  
4                 Plaintiff Luisa Alvarez and against Defendant Commissioner of Social Security;  
5                 and

6           5     The Clerk of the Court is directed to CLOSE this action.

7  
8     IT IS SO ORDERED.

9     Dated: February 23, 2017

  
UNITED STATES MAGISTRATE JUDGE