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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

JOY LEON,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

Case No. 1:16-cv-00361-SAB

ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF’S SOCIAL  
SECURITY APPEAL AND REMANDING  
ACTION

(ECF No. 16, 21)

**I.**

**INTRODUCTION**

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

Plaintiff suffers from incontinence, pelvic and vaginal pain disorder, with history of surgeries; and obesity. For the reasons set forth below, Plaintiff’s Social Security appeal shall be granted in part and denied in part.

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<sup>1</sup> The parties have consented to the jurisdiction of the United States Magistrate Judge. (See ECF Nos. 10, 23.)

1 **II.**

2 **FACTUAL AND PROCEDURAL BACKGROUND**

3 Plaintiff protectively filed an application for a period of disability and disability insurance  
4 benefits and a Title XVI application for supplemental security income on February 27, 2012.  
5 (AR 81, 90.) Plaintiff's applications were initially denied on July 18, 2012, and denied upon  
6 reconsideration on December 31, 2012. (AR 127-130, 136-140.) Plaintiff requested and  
7 received a hearing before Administrative Law Judge Catherine R. Lazuran ("the ALJ"). Plaintiff  
8 appeared for a hearing on January 16, 2014. (AR 45-80.) On March 28, 2014, the ALJ found  
9 that Plaintiff was not disabled. (AR 17-28.) The Appeals Council denied Plaintiff's request for  
10 review on August 11, 2015. (AR 3-5.)

11 **A. Hearing Testimony**

12 Plaintiff testified at the January 16, 2014 hearing. (AR 49-67, 68-69, 76-77.) Plaintiff  
13 was born on February 18, 1977, and was 36 years old on the date of the hearing. (AR 49.)  
14 Plaintiff was 5 feet tall and weighed 183 pounds. (AR 49.) Plaintiff is right handed. (AR 49.)

15 Plaintiff is married and her husband does not work. (AR 49.) He got fired when he had  
16 to stay home and take care of their son when Plaintiff had surgery. (AR 67.) Plaintiff lives with  
17 her six children ages 17, 15, 13, 10, 9, and 7. (AR 49-50.)

18 Two of Plaintiff's children receive disability benefits and she receives welfare and food  
19 stamps. (AR 56.) Plaintiff's son is mentally and physically disabled and her daughter has  
20 ADHD with behavioral modifications. (AR 56.) Plaintiff's 15 year old son has "septal optic  
21 dysplasia; a lobar halo prolocepheli (PHONETIC) with spastic CP; and diabetes insipidus and  
22 hyperpituitarism" and is unable to walk or talk. (AR 51, 56, 67.)

23 Plaintiff has a driver's license. (AR 50.) Plaintiff graduated from high school and  
24 attended nine months of vocational training. (AR 50.) Plaintiff's training was as a medical  
25 office specialist and she finished in 2007. (AR 51.) Plaintiff's husband spends time with her son  
26 and before he was off work her 17 year old son spent time with him. (AR 67.) Her 17 year old  
27 son has been on independent studies for two years. (AR 67.)

28 Plaintiff is currently working as in-home supportive services caring for her disabled son

1 three hours per day seven days a week. (AR 51.) She makes about \$900.00 per month. (AR  
2 52.) Plaintiff lifts about five pounds. (AR 51.) She prepares her sons' meals, which are mostly  
3 microwavable meals, washes his face, makes his bed, and gives him sponge baths. (AR 51.) She  
4 has been caring for him in this capacity since 1996. (AR 51.) Previously she was paid for fewer  
5 hours per month. (AR 52.)

6 In 2009, Plaintiff worked for Kaiser Permanente as an eligibility clerk through a temp  
7 agency. (AR 52, 55.) She was working 40 hours per week. (AR 52.) In that position, she  
8 would lift files. (AR 2.) The position was the same as a secretary. (AR 68.) Plaintiff would  
9 answer phones, input data into the computer, file, and talk to clients on the phone. (AR 68-69.)  
10 She left when she started to get ill, when she had her hysterectomy. (AR 52.) She did not get a  
11 permanent job before she left. (AR 55.)

12 Plaintiff worked as a ticket and ramp agent for Continental Airlines. (AR 52.) As a  
13 ticket agent, Plaintiff would check passengers in through the computer system, tag their bags, put  
14 them on the belt and send them to the baggage room. (AR 69.) Plaintiff would lift 70 pound  
15 bags onto the tarmac, putting them into and out of the plane, flag planes in, and check in  
16 passengers. (AR 52.) She worked for three different airlines over a period of ten years from  
17 1998 to 2008. (AR 52-53.) The jobs were all fulltime and she performed similar duties at each  
18 job. (AR 53.) Plaintiff left the last job because it was getting hard for her to lift the bags in and  
19 out of the airplanes and she wanted a better education so she went to work for a department store  
20 for a year while she went back to school. (AR 53.)

21 In the department store, Plaintiff worked in the cash office keeping track of all the money  
22 and accounting. (AR 53.) She worked forty hours per week in this job. (AR 54.) She was a  
23 cash office attendant. (AR 53.) Plaintiff left after she finished school to go to an externship.  
24 (AR 54.) In 2009, Plaintiff worked at Mercy Hospital as an environmental specialist, which  
25 entailed cleaning the hospital rooms. (AR 54.) Plaintiff was working 32 to 40 hours a week and  
26 lifting about 40 pounds. (AR 54.)

27 Plaintiff left Mercy Hospital because she was offered a better paying job as a security  
28 guard. (AR 54.) Plaintiff worked full time as a security guard at the airport for about six

1 months. (AR 54-55.) In this position she lifted the passenger's suitcases, which were about 70  
2 pounds, onto the belt to scan them. (AR 55.)

3 Plaintiff has had surgery since 2012 but does not remember when. (AR 57.) Plaintiff  
4 was hospitalized for one night in July 2012, and August 2012. (AR 57-58.) Plaintiff is currently  
5 receiving pain management treatment from Dr. Parmer. (AR 58.) Dr. Parmer prescribed  
6 medication and wants Plaintiff to go to physical therapy. (AR 58.) Plaintiff is going to have  
7 another MRI of her back. (AR 58.) Plaintiff was going to have another surgery on Thursday to  
8 lift her rectum and she will be in the hospital three to four days. (AR 58.)

9 Plaintiff was referred to pain management back in 2012 but did not go because her  
10 insurance would not pay for it. (AR 59.) Plaintiff has been able to carry five to ten pounds since  
11 February 2012. (AR 59.) Plaintiff gets about four hours of sleep per night. (AR 59.) When she  
12 goes to sleep she wakes up because of the pain. (AR 59.) Plaintiff will get a heating pad or take  
13 more medication if it is time. (AR 59.) Plaintiff uses laxatives but they do not really help, they  
14 just make her stool softer. (AR 59.) Plaintiff's pain is 9 out of 10 on an average day. (AR 59.)

15 Plaintiff is currently unable to work because she cannot stand or sit for long periods of  
16 time and has to rest quite frequently. (AR 56.) When Plaintiff is in too much pain she has to lie  
17 down. (AR 56.) She became unable to work about three years prior to the hearing. (AR 56.)  
18 Her health has gotten worse since then. (AR 56.) Plaintiff takes Percocet, Celebrex, gabapentin,  
19 nortriptyline and a fentanyl patch. (AR 57.) The medications put her to sleep. (AR 57.) She  
20 told her doctor and he told her she needed to rest. (AR 57.)

21 Plaintiff rests as much as she can during the day and tries not to do anything unless she  
22 has to. (AR 60.) But she is the primary caretaker for her son and takes care of him. (AR 60.)  
23 Plaintiff has not received any counseling or psychological treatment since 2012. (AR 60.)  
24 Plaintiff does not do any household chores. (AR 60.) Her husband and children do them or her  
25 mother comes over and helps. (AR 60.) Plaintiff only cooks for her disabled son; her husband  
26 does the rest of the cooking. (AR 60.) Plaintiff's husband does all the grocery shopping because  
27 it is too painful for her to walk around the store. (AR 60-61.) Plaintiff does not shop for  
28 clothing, exercise, go to church, or travel. (AR 61.) She did go to USC for medical treatment

1 twice in 2013. (AR 61.) Her sister drove her there. (AR 61.)

2 Plaintiff has no hobbies. (AR 62.) Plaintiff plays games on her iPad in the middle of the  
3 night when she is in pain and cannot sleep. (AR 62.) Plaintiff does not use e-mail, go to movies,  
4 read, use public transport, or do laundry. (AR 62.) Plaintiff does drive, but very seldom. (AR  
5 62.) Plaintiff has two dogs but it is her sons' job to take care of them. (AR 62.) Plaintiff does  
6 not help her children with their homework, the older children help the younger children or her  
7 husband helps them. (AR 62.)

8 Plaintiff went to her son's award ceremony at school but had to leave because she was in  
9 too much pain. (AR 62-63.) Plaintiff does not pay the bills or help her children get ready for  
10 school in the morning. (AR 63.) Plaintiff cannot do any of her past work because she cannot  
11 stand or sit for long periods of time and has to have periods of rest due to pain. (AR 63-64.)  
12 Plaintiff has to go to the bathroom 12 to 13 times a day. (AR 64-65.) Plaintiff only has 30  
13 seconds to one minute notice before she has to go to the bathroom. (AR 65.) Plaintiff wears a  
14 pad and has had accidents in public. (AR 65.) The last time that happened was about three  
15 months ago at Dr. Park's office. (AR 65.) When Plaintiff has to go somewhere she uses a pad  
16 and then does not drink anything so she will not have to go the bathroom while she is out. (AR  
17 65.)

18 Plaintiff is able to sit for 10 to 15 minutes before she has to move or stand up to alleviate  
19 the pain. (AR 65.) Plaintiff lays down 4 to 6 hours per day. (AR 66.) During the middle of the  
20 night, Plaintiff is able to focus on her video games for about thirty minutes. (AR 66.) Plaintiff  
21 spends thirty minutes in the morning taking care of her son. (AR 66.) Then she will spend an  
22 hour preparing his meal. (AR 66.) She stands to microwave his food and then can sit while she  
23 feeds him. (AR 66.) Then she uses the remaining hour and one half to get him ready for bed.  
24 (AR 66.)

25 A vocational expert ("VE"), Robin Scher, also testified at the hearing. (AR 68-80.) The  
26 VE characterized Plaintiff's past work history as a guard, security, Dictionary of Occupational  
27 Titles ("DOT") 372.667-034, customarily performed as light with an SVP: 3 however, performed  
28 as heavy; home attendant, DOT 354.377-014, customarily performed as medium with an SVP: 3,

1 however performed as light; eligibility worker, DOT 195.267-010, sedentary strength level with  
2 an SVP: 6; ticket agent, DOT 238.367-026, customarily light with an SVP: 5, however  
3 performed at heavy; administrative clerk, DOT 219.362-010, light SVP: 4; and hospital cleaner,  
4 DOT 323.687-010, medium with an SVP: 2. (AR 69-70.) Plaintiff has transferrable job skills.  
5 (AR 70.)

6 The ALJ presented a hypothetical of an individual of Plaintiff's age, education, and past  
7 work experience, who is able to lift 50 pounds occasionally and 25 pounds frequently; can stand  
8 and walk 6 of 8 hours; and sit 6 of 8 hours. (AR 71.) The VE opined that this individual would  
9 be able to perform all jobs Plaintiff previously performed as they are customarily performed.  
10 (AR 71.)

11 The ALJ presented a second hypothetical of this same individual who is able to lift 20  
12 pounds occasionally and 10 pounds frequently; can stand and walk 6 of 8 hours and sit 6 of 8  
13 hours; and can occasionally bend, squat, climb, crawl and reach above the shoulder; should avoid  
14 exposure to hazards such as moving machinery and avoid moderate exposure to dust, fumes,  
15 gases, poor ventilation and is able to occasionally drive. (AR 71.) The VE opined that this  
16 individual would be able to perform Plaintiff's past relevant work as a security guard as it is  
17 customarily performed, the home attendant as performed by Plaintiff, the ticket agent as it is  
18 customarily performed, and the administrative clerk. (AR 72.)

19 The ALJ then added that the individual needs a sit or stand option and can do each for 15  
20 to 30 minutes at a time. (AR 72.) The VE opined that this individual would be able to work as a  
21 security guard, eligibility worker and administrative clerk. (AR 72-73.) The security guard  
22 position would need to be eroded by 50 to 60 percent to account for the inability to stand; there  
23 are approximately 43,000 jobs in California and 330,000 nationally. (AR 73-74.) If there was an  
24 addition of avoiding moderate exposure to extreme temperatures, it would not affect the jobs  
25 available in California. (AR 74.)

26 Counsel proffered a hypothetical of the same person in the second hypothetical who was  
27 likely to miss four days in a typical month. (AR 74.) The VE opined that this individual would  
28 be able to perform Plaintiff's past relevant work but if they consistently missed four days a

1 month they would not be able to maintain a job. (AR 74-75.)

2 Counsel proffered a second hypothetical of this same individual who would have to take  
3 restroom breaks which would remove her from the workstation for eight minutes every hour  
4 apart from normal breaks. (AR 75.) The ALJ objected that there was no evidence that Plaintiff  
5 needed eight minutes to take a restroom break. (AR 75.) The VE opined that it is required that  
6 someone who needs to be allowed to use the restroom be able to do so. (AR 75.) Especially in  
7 the office position, however, eight minutes seems like an excessive amount of time to urinate.  
8 (AR 75-76.) Counsel objected to the VE's opinion on the length of the restroom break. (AR  
9 76.) Plaintiff clarified that if she is up from 4:00 a.m. to 6:00 p.m. she would go to the bathroom  
10 12 to 13 times. (AR 77.) She gets her son ready for bed at 5:00 p.m. and then she is laid up due  
11 to pain by 6:00 p.m. (AR 77.) It takes Plaintiff two to three minutes to go to the bathroom. (AR  
12 77.)

13 The ALJ asked if an individual needed a restroom break once every 60 to 90 minutes, for  
14 2 to 3 minutes, if that would be a problem in the workplace. (AR 78.) The VE opined that it  
15 would not be a problem, especially in the office situation. (AR 78.) This individual would be  
16 able to work as an office helper, DOT 239.57-010, light with an SVP: 2, there are approximately  
17 8,200 jobs in California and 75,000 nationally. (AR 78-79.)

18 Counsel asked if there would be any erosion for the sit stand option and the VE opined  
19 there would not be. (AR 79.) Counsel then inquired how the regulations define light. (AR 79.)  
20 The VE responded that if a person might need to stand more than two hours in an eight hour day  
21 the job would be classified as light. (AR 79.) There is quite a range within the categories and a  
22 person may not have to do any lifting at all. (AR 79.) Counsel then inquired as to whether all  
23 95,000 jobs would allow for a sit stand option. (AR 80.) The VE opined that the jobs are  
24 generally in an office and an individual would be able to have a stool. (AR 80.)

## 25 **B. ALJ Findings**

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

- 27 • Plaintiff met the insured status requirements of the Social Security Act through  
28 September 30, 2013.

- 1 • Plaintiff has not engaged in substantial gainful activity since February 21, 2012, the  
2 alleged onset date.
- 3 • Plaintiff has the following severe impairments: pelvic and vaginal pain disorder, with  
4 history of surgeries; and obesity.
- 5 • Plaintiff does not have an impairment or combination of impairments that meets or  
6 medically equals the severity of one of the listed impairments.
- 7 • Plaintiff has the residual functional capacity to perform light work as defined in 20  
8 CFR 404.1567(b) and 416.967(b) except she can lift 10 pounds frequently and 20  
9 pounds occasionally; stand and walk in increments of 15 minutes and for a total of 4  
10 hours out of an 8-hour workday; sit in increments of 15 to 30 minutes and for a total  
11 of 4 hours out of an 8-hour workday; and can do occasional bending, squatting,  
12 climbing, crawling and reaching above shoulder height. She should avoid moderate  
13 exposure to workplace hazards, and unprotected heights and to marked changes in  
14 temperature; and can do no more than occasional driving.
- 15 • Plaintiff is capable of performing past relevant work as a security guard; office helper  
16 and copy machine operator. This work does not require the performance of work-  
17 related activities precluded by Plaintiff’s residual functional capacity.
- 18 • Plaintiff has not been under a disability, as defined in the Social Security Act, from  
19 February 21, 2012, through the date of this decision.

20 (AR 22-27.)

### 21 **III.**

#### 22 **LEGAL STANDARD**

23 To qualify for disability insurance benefits under the Social Security Act, the claimant  
24 must show that she is unable “to engage in any substantial gainful activity by reason of any  
25 medically determinable physical or mental impairment which can be expected to result in death  
26 or which has lasted or can be expected to last for a continuous period of not less than 12  
27 months.” 42 U.S.C. § 423(d)(1)(A). The Social Security Regulations set out a five step  
28 sequential evaluation process to be used in determining if a claimant is disabled. 20 C.F.R. §



1 404.1520; Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1194 (9th  
2 Cir. 2004). The five steps in the sequential evaluation in assessing whether the claimant is  
3 disabled are:

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

6 Step two: Is the claimant's alleged impairment sufficiently severe to limit his or  
7 her ability to work? If so, proceed to step three. If not, the claimant is not  
8 disabled.

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

12 Step four: Does the claimant possess the residual functional capacity ("RFC") to  
13 perform his or her past relevant work? If so, the claimant is not disabled. If not,  
14 proceed to step five.

15 Step five: Does the claimant's RFC, when considered with the claimant's age,  
16 education, and work experience, allow him or her to adjust to other work that  
17 exists in significant numbers in the national economy? If so, the claimant is not  
18 disabled. If not, the claimant is disabled.

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

20 Congress has provided that an individual may obtain judicial review of any final decision  
21 of the Commissioner of Social Security regarding entitlement to benefits. 42 U.S.C. § 405(g).  
22 In reviewing findings of fact in respect to the denial of benefits, this court "reviews the  
23 Commissioner's final decision for substantial evidence, and the Commissioner's decision will be  
24 disturbed only if it is not supported by substantial evidence or is based on legal error." Hill v.  
25 Astrue, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means more than a  
26 scintilla, but less than a preponderance. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996)  
27 (internal quotations and citations omitted). "Substantial evidence is relevant evidence which,  
28 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  
Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

"[A] reviewing court must consider the entire record as a whole and may not affirm  
simply by isolating a specific quantum of supporting evidence." Hill, 698 F.3d at 1159 (quoting  
Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006). However, it is not

1 this Court’s function to second guess the ALJ’s conclusions and substitute the court’s judgment  
2 for the ALJ’s. See Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (“Where evidence is  
3 susceptible to more than one rational interpretation, it is the ALJ’s conclusion that must be  
4 upheld.”).

#### 5 IV.

#### 6 DISCUSSION AND ANALYSIS

7 Plaintiff contends that the ALJ erred in the weight given to her treating physicians’  
8 opinions and in evaluating her subjective complaints of pain; and that the step four finding is not  
9 supported by substantial evidence. Defendant counters that the ALJ properly evaluated the  
10 medical evidence and provided legally sufficient reasons for the weight afforded to the treating  
11 physician opinions; correctly evaluated Plaintiff’s subjective complaints of pain and provided  
12 specific and valid reasons to determine that her complaints were not credible, and substantial  
13 evidence supports the step four and five determinations.

#### 14 A. Plaintiff Credibility

15 Plaintiff contends that the ALJ erred in finding that her complaints of pain were not fully  
16 credible. “An ALJ is not required to believe every allegation of disabling pain or other non-  
17 exertional impairment.” Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007) (internal punctuation  
18 and citations omitted). Determining whether a claimant’s testimony regarding subjective pain or  
19 symptoms is credible, requires the ALJ to engage in a two-step analysis. Molina v. Astrue, 674  
20 F.3d 1104, 1112 (9th Cir. 2012). The ALJ must first determine if “the claimant has presented  
21 objective medical evidence of an underlying impairment which could reasonably be expected to  
22 produce the pain or other symptoms alleged.” Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th  
23 Cir. 2007) (internal punctuation and citations omitted). This does not require the claimant to  
24 show that her impairment could be expected to cause the severity of the symptoms that are  
25 alleged, but only that it reasonably could have caused some degree of symptoms. Smolen, 80  
26 F.3d at 1282.

27 Second, if the first test is met and there is no evidence of malingering, the ALJ can only  
28 reject the claimant’s testimony regarding the severity of her symptoms by offering “clear and

1 convincing reasons” for the adverse credibility finding. Carmickle v. Commissioner of Social  
2 Security, 533 F.3d 1155, 1160 (9th Cir. 2008). The ALJ must specifically make findings that  
3 support this conclusion and the findings must be sufficiently specific to allow a reviewing court  
4 to conclude the ALJ rejected the claimant’s testimony on permissible grounds and did not  
5 arbitrarily discredit the claimant’s testimony. Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir.  
6 2004) (internal punctuation and citations omitted).

7 Factors that may be considered in assessing a claimant’s subjective pain and symptom  
8 testimony include the claimant’s daily activities; the location, duration, intensity and frequency  
9 of the pain or symptoms; factors that cause or aggravate the symptoms; the type, dosage,  
10 effectiveness or side effects of any medication; other measures or treatment used for relief;  
11 functional restrictions; and other relevant factors. Lingenfelter, at 1040; Thomas, 278 F.3d at  
12 958. In assessing the claimant’s credibility, the ALJ may also consider “(1) ordinary techniques  
13 of credibility evaluation, such as the claimant’s reputation for lying, prior inconsistent statements  
14 concerning the symptoms, and other testimony by the claimant that appears less than candid;  
15 [and] (2) unexplained or inadequately explained failure to seek treatment or to follow a  
16 prescribed course of treatment. . . .” Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008)  
17 (quoting Smolen, 80 F.3d at 1284).

18 In this instance, the ALJ found that Plaintiff’s impairments could be reasonably expected  
19 to cause some of the alleged symptoms, but that her statements regarding the intensity,  
20 persistence, and limiting effects were not entirely credible. (AR 24.) The ALJ cited several  
21 reasons to discredit Plaintiff’s testimony. Therefore, the Court shall address the reasons stated to  
22 determine if the ALJ provided clear and convincing reasons to find Plaintiff’s testimony not  
23 credible.

24 1. Inconsistency With Medical Record

25 The ALJ found that Plaintiff’s medical record does not show significant abnormal  
26 findings on examination or on diagnostic workup that would be expected from one with the  
27 severe pain that Plaintiff alleges. (AR 25.) Plaintiff argues that the ALJ lacked the expertise to  
28 determine what findings were to be expected to account for Plaintiff’s pain.

1 The determination that a claimant's complaints are inconsistent with clinical evaluations  
2 can satisfy the requirement of stating a clear and convincing reason for discrediting the  
3 claimant's testimony. Regennitter v. Commissioner of Social Sec. Admin., 166 F.3d 1294, 1297  
4 9th Cir. 1999). The ALJ properly considered this evidence in weighing Plaintiff's credibility.  
5 "While subjective pain testimony cannot be rejected on the sole ground that it is not fully  
6 corroborated by objective medical evidence, the medical evidence is still a relevant factor in  
7 determining the severity of the claimant's pain and its disabling effects." Rollins v. Massanari,  
8 261 F.3d 853, 857 (9th Cir. 2001) (citing 20 C.F.R. § 404.1529(c)(2)).

9 While the record does record findings of tenderness upon examination (AR 257, 269,  
10 270, 275, 280, 283, 305, 311, 312, 316, 321, 333, 383, 387, 389, 390, 406), the record also shows  
11 no or normal findings despite Plaintiff's complaints of severe pain (AR 270, 271, 275, 276, 280,  
12 282, 304, 306, 310, 365, 372, 381, 388, 390). There are a few findings of more intense pain. On  
13 July 29, 2013; and August 19, 2013; Dr. Israel examined Plaintiff and on examination of the  
14 vagina noted "exquisitely tender anteriorly." (AR 321, 406.) Further, Plaintiff has had multiple  
15 surgeries, mainly due to removal of mesh and adhesions following her initial surgery. (AR 253,  
16 259, 307-308, 314, 318, 327-328.) Most of these were outpatient surgeries, while on two  
17 occasions Plaintiff was kept overnight due to pain and nausea. (AR 259, 313.)

18 On April 26, 2012, Dr. Chowdhury did a colonoscopy with a biopsy. (AR 288-290.)  
19 Findings were internal hemorrhoids, few hyper pigmented patches in recto sigmoid, suspect  
20 prominent lymphoid follicle, status post biopsy. (AR 288.) Plaintiff's constipation was most  
21 likely related to pain medications. (AR 288.) The pathology report showed

22 A. Sigmoid colon biopsy:

- 23 -Focal active colitis with lymphoid aggregation.
- 24 -No granuloma, ulceration or ischemic change .
- 25 -No increase of intracpthaelial lymphocytes or thickening of subepithelial collagen.
- 26 -No evidence of microscopic colitis, collagenous colitis or inflammatory bowel disease.
- 27 -Melanosis coli present.
- 28 -No dysplasia.

29 B. Rectosigmoid colon biopsy:

- 30 -Mild chronic colitis with lymphoid aggregation.
- 31 -No active inflammation, granuloma, ulceration or ischemic change.
- 32 -No increase of intraepithelial lymphocytes or thickening of subepithelial collagen.
- 33 -No evidence of microscopic colitis, collagenous colitis or inflammatory bowel

1 disease.  
2 -Melanosis coli present.  
3 -No dysplasia.

4 (AR 290.) Dr. Chowdhury noted on October 26, 2012, that an upper endoscopy performed on  
5 October 10, 2012 showed superficial gastric ulcers and some gastritis, H. pylori was positive. (AR  
6 304.)

7 Plaintiff had a normal CT scan on February 10, 2013, during an emergency room visit for  
8 abdominal pain. (AR 394.) Plaintiff had an x-ray of her abdomen on February 28, 2013. The  
9 examination found foreign body noted hepatic flexure and constipation. (AR 393.) A CT scan of  
10 Plaintiff's abdomen was negative on April 9, 2013. (AR 333, 337-338.) Dr. Burson noted on  
11 June 12, 2013 that a CT scanned showed no evidence of appendicitis and there were no  
12 inflammatory changes noted in the right lower quadrant. (AR 324.) There was 2 mm  
13 nonobstructing renal calculi in the left, but Plaintiff was not complaining of pain in that area.  
14 (AR 324.) Plaintiff's MRI of the pelvis was normal. (AR 448-449.)

15 A September 13, 2013 MRI of Plaintiff's abdomen revealed 1) no evidence of ventral  
16 hernia; 2) multiple gallstones; 3) small hiatal hernia; and 4) otherwise, negative MRI scan of the  
17 abdomen. (AR 404.) A September 23, 2013, MRI of Plaintiff's pelvis showed 1) postoperative  
18 changes with no recurrent ventral hernia; 2) the rectum appeared to be displaced below the pelvic  
19 floor possibly representing a rectocele; 3) possible small right ovarian cyst; and 4) otherwise  
20 negative MRI scan of the pelvis. (AR 403.) Plaintiff had a CT of her abdomen on October 3,  
21 2013 which showed no CT evidence for appendicitis. (AR 401.) However, the appendix was not  
22 confidently identified, there were no inflammatory changes in right, but the lower quadrant had a  
23 1-2 mm nonobstructing renal calculi, 2 identified in the left kidney. (AR 401.) Plaintiff had a  
24 diffuse fatty liver. (AR 402.) Her uterus and ovaries were not visible most probably secondary  
25 to prior surgery. (AR 402.)

26 Additionally, on July 29, 2013, Dr. Israel noted that review of the medical record showed  
27 no pathologic confirmation of endometriosis; and photos reveal a relatively clean pelvis with  
28 omentum adherent to the anterior abdominal wall. (AR 321.) Given that there is no clear  
anatomic etiology for Plaintiff's chronic pain, Dr. Israel opined they must consider a neuropathic

1 etiology. (AR 321.)

2 On November 7, 2013, Dr. Ozel examined Plaintiff and his findings show a normal  
3 abdominal examination, with a little tenderness laterally to the urethra. (AR 383.) Plaintiff's  
4 vagina was well supported with tenderness over the urethra and periurethral tissues. (AR 383.)  
5 Her levaturo ani muscles were appropriately relaxed and muscle strength was decreased at 2/5.  
6 (AR 383.) There were no masses palpable at the vaginal cuff. Plaintiff's bladder was not  
7 distended and was nontender. (AR 383.) Dr. Ozel opined that it was unlikely that a small  
8 amount of mesh left in the pelvis would cause any significant problem. (AR 383-384.) On this  
9 same date, Dr. Lascano stated that Plaintiff's pain is intermittent and recurrent. (AR 432.) Most  
10 of the time it is constant, but at times can be incapacitating. (AR 432.)

11 Substantial evidence supports the ALJ's finding that Plaintiff's medical record does not  
12 show significantly abnormal findings on examination or test results to support Plaintiff's  
13 allegations regarding the severity of her pain. However, the ALJ cannot discredit Plaintiff's pain  
14 testimony solely because it is found not to be supported by the objective medical evidence.  
15 Bunnell v. Sullivan, 947 F.2d 341, 347 (9th Cir. 1991).

16 2. Lack of Compliance with Medical Treatment

17 The ALJ rejected Plaintiff's testimony on the basis that she had not always been  
18 compliant with recommended medical treatment. (AR 25.) The ALJ may consider an  
19 unexplained, or inadequately explained, failure to seek treatment or follow a prescribed course of  
20 treatment in determining the claimant's credibility. Fair v. Bowen, 885 F.2d 597, 603 (9th Cir.  
21 1989).

22 The ALJ generally referenced the medical record without pinpointing any specific record.  
23 Upon review, the only failure to comply with treatment appears to be a notation in Dr. Ozel's  
24 report that Plaintiff took nortrptyline for three months and noted no improvement in her  
25 symptoms. (AR 382, duplicated at AR 454.) She discontinued the medication when it ran out.  
26 (AR 382.) Where a claimant provides good reasons for not taking medication for her symptoms,  
27 the failure to take the medication cannot be used to reject her symptom testimony. Smolen, 80  
28 F.3d at 1284. Plaintiff's failure to renew the medication after using it for three months and

1 finding that it did not improve her symptoms is not a valid reason to discredit Plaintiff's  
2 credibility. There is not substantial evidence to support the finding that Plaintiff has not been  
3 compliant with recommended treatment.

4 3. Daily Activities

5 The ALJ also found that Plaintiff described a fairly active life that includes being a  
6 caregiver for her child, driving a car, shopping for groceries, cleaning her home in five to ten  
7 minute increments, walking inside stores while shopping, travelling to Los Angeles, visiting with  
8 friends, and playing computer games on her iPad. (AR 25.) There are two ways for an ALJ to  
9 “use daily activities to form the basis of an adverse credibility determination: if the claimant's  
10 activity contradicts his testimony or if the claimant's activity meets the threshold for transferable  
11 work skills.” Phillips v. Colvin, 61 F. Supp. 3d 925, 944 (N.D. Cal. 2014).

12 The ALJ relied on Plaintiff's activities described in an exertion questionnaire on May 23,  
13 2012, in which Plaintiff stated that she cleaned the house, took care of her children, went to the  
14 grocery store twice a month, and drives her children to school. (AR 25, 233-234.) At the  
15 January 16, 2014 hearing, Plaintiff stated that her health has gotten worse since 2012 when she  
16 stopped working. (AR 56.) When asked by the ALJ if she had engaged in these activities since  
17 2012, Plaintiff responded that she had not. (AR 60-63.) Although Plaintiff is the primary  
18 caretaker for her disabled son, she stated that she rests as much as she can during the day and  
19 tries not to do anything that she does not have to. (AR 60.) Plaintiff stated that she is paid for  
20 taking care of her son for three hours per day. (AR 51.) She prepares his meals, which are  
21 mostly microwavable meals, washes his face, makes his bed, and gives him sponge baths. (AR  
22 51.) Plaintiff spends thirty minutes in the morning taking care of her son. (AR 66.) Then she  
23 will spend an hour preparing his meal. (AR 66.) She stands to microwave his food and then can  
24 sit while she feeds him. (AR 66.) Then she uses the remaining hour and one half to get him  
25 ready for bed. (AR 66.)

26 While Plaintiff is able to drive she stated that she drives very seldom. (AR 62.) She did  
27 go to USC twice in 2013 for medical appointments and was driven by her sister. (AR 61.)  
28 Plaintiff plays on her iPad for about half an hour during the night when she is unable to sleep due

1 to pain. (AR 62.) While the ALJ asked Plaintiff specifically if she performed certain activities,  
2 the Court notes that the ALJ never inquired of Plaintiff what she did during the day. Plaintiff  
3 testified that she rests for four to six hours per day and spends three hours caring for her son.  
4 The Court finds that substantial evidence does not support the ALJ's finding that Plaintiff  
5 described a fairly active life.

6 4. Inconsistent Statements

7 The ALJ also found that Plaintiff made inconsistent statements. (AR 25.) A claimant's  
8 inconsistent statements can contribute to an adverse credibility finding. Robbins, 466 F.3d at  
9 884. Here, the ALJ identified two statements which were found to be inconsistent.

10 First, the ALJ noted that Plaintiff alleged a loss of appetite and weight change, but the  
11 record shows that Plaintiff's weight has been consistent at 183 pounds. (AR 25.) However, the  
12 record demonstrates that Plaintiff's weight has fluctuated between 176 to 183 pounds over the  
13 four year medical record. (AR 269, 270, 271, 275, 276, 280, 305, 306, 310, 311, 312, 316, 381,  
14 387, 388, 389, 390, 442, 443.) Substantial evidence does not support the finding that Plaintiff's  
15 weight has been consistent at 183 pounds.

16 Second, the ALJ stated that Plaintiff testified that she has been unable to work for the  
17 past three years, but she alleged a disability onset date of February 21, 2012. (AR 25.) In filing  
18 her application, Plaintiff stated that she stopped working due to her condition on February 21,  
19 2012. (AR 215.) While Plaintiff testified that she probably became unable to work about three  
20 years prior to the hearing (AR 56), she testified that she did not go permanent with Kaiser  
21 because she became ill. (AR 55.) She has not looked for any work since February of 2012. (AR  
22 55.) The Court does not find this statement to be so inconsistent that it would constitute  
23 substantial evidence to support the adverse credibility finding.

24 While the Court does note inconsistent statements based on Plaintiff's assertions that she  
25 has not done household chores, took care of her children, or shopped for groceries, and has only  
26 driven very seldom since February 2012 (AR 60-62) based on the exertion questionnaire that  
27 Plaintiff completed on May 23, 2012 (AR 233-235), the ALJ did not cite this as a reason for the  
28 adverse credibility finding.



1           5.       The ALJ Did Not Provide Clear and Convincing Reasons for the Adverse  
2                    Credibility Determination

3           Based on the foregoing, the Court finds that the ALJ did not provide clear and convincing  
4 reasons, supported by substantial evidence in the record, to find that Plaintiff's symptom  
5 testimony was not credible. On remand, the ALJ should reconsider the credibility finding.

6           **B.       Physician Opinion**

7           Plaintiff also challenges the weight given to the opinions of her treating physicians, Dr.  
8 Park and Dr. Lascano. The weight to be given to medical opinions depends upon whether the  
9 opinion is proffered by a treating, examining, or non-examining professional. See Lester v.  
10 Chater, 81 F.3d 821, 830-831 (9th Cir. 1995). In general a treating physician's opinion is  
11 entitled to greater weight than that of a nontreating physician because "he is employed to cure  
12 and has a greater opportunity to know and observe the patient as an individual." Andrews v.  
13 Shalala, 53 F.3d 1035, 1040-41 (9th Cir. 1995) (citations omitted). If a treating physician's  
14 opinion is contradicted by another doctor, it may be rejected only for "specific and legitimate  
15 reasons" supported by substantial evidence in the record. Ryan v. Commissioner of Social Sec.,  
16 528 F.3d 1194, 1198 (9th Cir.) (quoting Bayless v. Barnhart, 427 F.3d 1121, 1216 (9th Cir.  
17 2005)).

18           Where the treating physician's opinion is contradicted by the opinion of an examining  
19 physician who based the opinion upon independent clinical findings that differ from those of the  
20 treating physician, the nontreating source itself may be substantial evidence, and the ALJ is to  
21 resolve the conflict. Andrews, 53 F.3d at 1041. The contrary opinion of a non-examining expert  
22 is not sufficient by itself to constitute a specific, legitimate reason for rejecting a treating or  
23 examining physician's opinion, however, "it may constitute substantial evidence when it is  
24 consistent with other independent evidence in the record." Tonapetyan v. Halter, 242 F.3d 1144,  
25 1149 (9th Cir. 2001).

26           The opinions of Drs. Park and Lascano are contradicted by the opinions of Drs. Frye and  
27 Frankel. (AR 81-121.) Further, Dr. Park and Dr. Lazano's opinions regarding Plaintiff's  
28 functional capacity are contradictory. Therefore, the ALJ needed to provide legitimate and

1 specific reasons to reject the treating physicians' opinions and is to resolve any conflicts in the  
2 testimony.

3 1. Dr. Park

4 Plaintiff contends that the ALJ erred by finding that the basis for Dr. Park's opinion  
5 regarding the extreme limitations imposed was vague and if it was vague than the ALJ was  
6 required to further development the record. Defendant argues that the ALJ properly provided  
7 little weight to Dr. Park's statements in his August 2012 letter because the opinion that Plaintiff  
8 was unable to sit or stand for long periods of time and that she had difficulties walking, bending  
9 and working did not provide specific information useful to the RFC assessment. Defendant also  
10 counters that the ALJ properly found that Dr. Park's 2014 Physical Capacities Evaluation lacked  
11 support.

12 The ALJ rejected a letter in the record dated August 2012 from Dr. Park. (AR 26.) The  
13 letter stated:

14 To whom may concern,

15 This letter is to inform you that my patient named above has been under my care  
16 for the following medical conditions:

- 17 -Chronic Pelvic pain and inflammation
- 18 -Urinary Stress Incontinence
- Chronic Vaginal Pain
- Irregular Vaginal Bleeding

19 These conditions have caused my patient difficulties to manage her daily routine  
20 on a daily basis. She is unable to sit or stand for long period of time, she  
21 constantly is complaining of severe pain that causing difficulties to walk or bend  
22 which makes it very hard to function and to carry out her job duties at her  
employment. At this time my patient is waiting/pending two more medical  
surgical procedures. She has already underwent several surgical procedures.

23 (AR 303.)

24 The ALJ found that this was vague because Dr. Park did not indicate how long he  
25 thought Plaintiff could stand or sit and did not say whether he thought that she was limited in  
26 walking or bending, therefore, this was not useful in determining Plaintiff's functional  
27 limitations. (AR 26.) Because Dr. Park did not set forth any specific limitations, the ALJ could  
28 properly determine that the lack of any specific limitations did not assist in determining

1 Plaintiff's functional capacity.

2           The ALJ also addressed Dr. Park's January 14, 2014 opinion and found that the basis for  
3 the extreme limitations was vague and the opinion appeared to be based on Plaintiff's subjective  
4 complaints and was not supported by the medical record or the evidence of Plaintiff's daily  
5 activities. (AR 26, 435-438.) Dr. Park indicated that Plaintiff's symptoms consisted of pain,  
6 nausea, fatigue, vomiting, irregular bleeding, constipation, mood swings, and hot flashes. (AR  
7 435.) He stated that Plaintiff symptoms associated with her impairments would be severe  
8 enough to constantly interfere with her attention and concentration required to perform simple  
9 work-related tasks. (AR 435.) Dr. Park opined that Plaintiff could sit for less than 30 minutes,  
10 could not stand for more than 15 minutes, and could walk for 1 hour. (AR 436.) Plaintiff needed  
11 to constantly keep moving to adjust posture. (AR 436.) Plaintiff had limitations in reaching,  
12 handling, and fingering and could only perform these actions less than 5% each in an 8 hour  
13 work day. (AR 436.) Plaintiff was unable to use her feet for repetitive movements. (AR 436.)  
14 She could use her right, left, or both feet for less than 15 minutes in an 8 hour work day. (AR  
15 436.) Plaintiff could never lift or carry any weight. (AR 437.) Plaintiff was able to occasionally  
16 bend but could never squat, crawl, climb, or reach above shoulder level. (AR 437.) Plaintiff did  
17 not have any limitations in being exposed to unprotected heights, being around moving  
18 machinery, or exposure to changes in temperature and humidity or exposure to dust, fumes and  
19 gases. (AR 437.) Plaintiff had mild restricting in driving automotive equipment. (AR 437.)  
20 Plaintiff could need unscheduled breaks in an eight hour work day due to chronic pain. (AR  
21 438.) Plaintiff's impairments would not cause good and bad days. (AR 438.) Plaintiff is unable  
22 to work. (AR 438.)

23           As to the Dr. Park's opinion that Plaintiff is unable to work, "[t]he treating physician's  
24 opinion is not, however, necessarily conclusive as to either physical condition or the ultimate  
25 issue of disability." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). While the ALJ is  
26 not bound by the treating physician's opinion on disability, to reject an uncontroverted opinion  
27 the ALJ must provide clear and convincing reasons, and if the opinion is controverted the  
28 reasons must be specific and legitimate. Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998).

1 The ALJ noted that despite finding Plaintiff had severe limitations, Dr. Park opined that  
2 Plaintiff had no restrictions in exposure to unprotected heights; being around moving machinery;  
3 exposure to dust, fumes and gases; and exposure to marked changes in temperature and  
4 humidity. (AR 25-26, 435-436.) Dr. Park opined that Plaintiff would be constantly impaired in  
5 attention and concentration; could sit for less than 30 minutes; stand for only 15 minutes; walk  
6 for 1 hour; can occasionally bend but never squat, crawl, climb, or reach above shoulder level.  
7 (AR 435-437.) Yet, Dr. Park opined that Plaintiff had no restrictions in exposure to unprotected  
8 heights; being around moving machinery; exposure to dust, fumes and gases; and exposure to  
9 marked changes in temperature and humidity. (AR 435-436.) Plaintiff cannot use her feet for  
10 repetitive movements for 15 minutes yet she is able to walk for an hour. (AR 436.) The ALJ  
11 properly considered that Dr. Park's opinion was internally inconsistent. Morgan v. Comm'r of  
12 Soc. Sec. Admin., 169 F.3d 595, 603 (9th Cir. 1999).

13 The ALJ also found that the opinion was not supported by the objective medical evidence  
14 and was vague as to the basis for the extreme limitations. (AR 26.) Dr. Park stated that  
15 Plaintiff's diagnosis was chronic vaginal pain, pelvic, pain and lower back pain. (AR 450.)  
16 However, Dr. Park did not provide any diagnosis as to the reasons for Plaintiff's pain. Her  
17 symptoms included pain, nausea, fatigue, vomiting, irregular bleeding, constipation, mood  
18 swings, and hot flashes. (AR 450.)

19 While Plaintiff argues that the ALJ had a duty to develop the record if the opinion was  
20 vague, the ALJ has a duty to further develop the record where the evidence is ambiguous or the  
21 ALJ finds that the record is inadequate to allow for proper evaluation of the evidence. Mayes v.  
22 Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001); Tonapetyan, 242 F.3d at 1150. In this  
23 instance, the ALJ did not find the evidence inadequate or ambiguous, but found that Dr. Park had  
24 not adequately stated the basis for the extreme limitations he opined.

25 Plaintiff argues that the record demonstrates that Plaintiff consistently complained of  
26 severe pain at office visits. Review of the record demonstrates some objective findings. (AR  
27 269, 270, 275, 280, 283, 305, 306, 311, 316, 387, 389, 390.) However, the record also reflects  
28 no examination or a normal examination by Dr. Park. (AR 270, 271, 275, 276, 280, 282, 306,

1 310, 312, 381, 388, 390.) Further, as discussed above, Plaintiff's colonoscopy, endoscopy,  
2 MRIs, CTs, and x-rays were generally unremarkable. (AR 288-290, 304, 324, 333, 337-338,  
3 393, 394, 401-402, 403, 404, 448-449.)

4 Dr. Park also opined that Plaintiff was restricted in reaching, handling, and fingering and  
5 was able to perform less than 5% each in an 8 hour workday. (AR 436.) Dr. Parks' medical  
6 records are devoid of any findings to support such limitations. The ALJ need not accept the  
7 opinion of any physician that is brief, conclusory, and unsupported by clinical findings. Thomas,  
8 278 F.3d at 957.

9 The ALJ also found that Dr. Park's opinion was not supported by Plaintiff's daily  
10 activities. (AR 26.) While Dr. Park opined that Plaintiff was unable to lift or carry any weight at  
11 all (AR 452), Plaintiff testified that she was able to lift five to ten pounds (AR 59.) Also,  
12 Plaintiff's ability to be the primary care provider for her disabled son contradicts the severe  
13 limitations opined by Dr. Park. Plaintiff testified that she prepares his meals by microwaving  
14 them and then taking them into the bedroom where she sits on the bed to feed him. (AR 66.)  
15 Additionally, Plaintiff bathes her disabled son, although he does not get in the bathtub, but  
16 receives sponge baths. (AR 51.) She changes his bed. (AR 51.) Plaintiff spends thirty minutes  
17 in the morning getting her son ready. (AR 66.) When he returns home she spends another  
18 twenty to thirty minutes caring for him. (AR 66.) Then in the evening she spends an hour  
19 preparing his meal and feeding him and then gets him ready for bed. (AR 66.) While Plaintiff  
20 testified to very limited daily activities, they were inconsistent with the extreme limitations  
21 opined by Dr. Park.

22 Finally, Dr. Park opined that Plaintiff's symptoms associated with her impairments would  
23 be severe enough to constantly interfere with her attention and concentration required to perform  
24 simple work-related tasks (AR 435), but when Plaintiff is unable to sleep due to pain she plays  
25 video games on her iPad for a half an hour (62, 66). Plaintiff's ability to concentrate on video  
26 games during times when she is in too pain to sleep is inconsistent with Dr. Park's finding that  
27 her symptoms constantly interfere with her attention and concentration..

28 The ALJ provided legitimate and specific reasons that are supported by substantial

1 evidence in the record to reject the opinion of Dr. Park.

2           2.     Dr. Lascano

3           The ALJ provided more weight to the November 2013 opinion of Dr. Lascano because it  
4 was more consistent with the medical evidence and Plaintiff’s daily activities. (AR 26.) Dr.  
5 Lascano opined that Plaintiff could sit, stand or walk 4 hours each out of an 8-hour workday; she  
6 has no problems using her feet for operating foot controls; she could frequently lift and carry 0-  
7 20 pounds; and she can do occasional bending, squatting, crouching, crawling and reaching  
8 above shoulder level. (AR 26, 432.) Dr. Lascano opined that Plaintiff had no fingering,  
9 reaching, or handling limitations and was able to use her feet for repetitive movements. (AR  
10 432.)

11           However, Dr. Lascano also opined that Plaintiff’s symptoms would frequently impair the  
12 attention and concentration needed to perform simple work related task and she would likely  
13 miss four or more days per month due to her treatment or impairments. (AR 431, 434.) The ALJ  
14 did not address these limitations in her opinion. Upon remand, the ALJ should address the  
15 opinion of Dr. Lascano including the findings that Plaintiff would be limited in attention and  
16 concentration and that she would be likely to miss work due to her treatment or impairments.

17           **C.     Step Four Findings**

18           Plaintiff argues that the ALJ erred at step four in finding that Plaintiff was able to  
19 perform her past relevant work because the hypotheticals presented to the VE addressed an  
20 individual who could stand, sit, or walk 6 hours in an 8 hour workday and the ALJ found that  
21 Plaintiff could stand, sit, or walk 4 hours in an 8 hour workday. Defendant responds that the  
22 ALJ does not need to rely on VE testimony to find that Plaintiff can perform her past relevant  
23 work. Defendant contends that based upon the VE’s testimony, the ALJ could reasonably  
24 conclude that Plaintiff could perform her past relevant work.

25           “Under [20 C.F.R. § 404.1520(e) and 416.920(e)] of the regulations, a claimant will be  
26 found to be ‘not disabled’ when it is determined that he or she retains the RFC to perform: 1. The  
27 actual functional demands and job duties of a particular past relevant job; or 2. The functional  
28 demands and job duties of the occupation as generally required by employers throughout the

1 national economy.” Titles II and XVI: Past Relevant Work — The Particular Job or the  
2 Occupation as Generally Performed, SSR 82-61 (S.S.A. 1982); see also Pinto v. Massanari, 249  
3 F.3d 840, 845 n.3 (9th Cir.2001) (recognizing Social Security Rulings are “binding on all  
4 components of the Social Security Administration”). While the burden claimant has the burden  
5 of proof at step four, “the ALJ still has a duty to make the requisite factual findings to support his  
6 conclusion.” Pinto, 249 F.3d at 844. This requires the ALJ to carefully consider “the  
7 interaction of the limiting effects of the person’s impairment(s) and the physical and mental  
8 demands of his or her [past relevant work] to determine whether the individual can still do that  
9 work.” Titles II & XVI: A Disability Claimant’s Capacity to Do Past Relevant Work, in Gen.,  
10 SSR 82-62 (S.S.A. 1982).

11 The DOT description for security guard states:

12 Physical demand requirements are in excess of those for Sedentary Work. Even  
13 though the weight lifted may be only a negligible amount, a job should be rated  
14 Light Work: (1) when it requires walking or standing to a significant degree; or  
15 (2) when it requires sitting most of the time but entails pushing and/or pulling of  
16 arm or leg controls; and/or (3) when the job requires working at a production rate  
17 pace entailing the constant pushing and/or pulling of materials even though the  
18 weight of those materials is negligible.

19 372.667-034 GUARD, SECURITY, DICOT 372.667-034.

20 The claimant is the primary source for vocational documentation, and statements  
21 by the claimant regarding past work are generally sufficient for determining the  
22 skill level; exertional demands and nonexertional demands of such work.  
23 Determination of the claimant’s ability to do [past relevant work] requires a  
24 careful appraisal of (1) the individual’s statements as to which past work  
25 requirements can no longer be met and the reason(s) for his or her inability to  
26 meet those requirements; (2) medical evidence establishing how the impairment  
27 limits ability to meet the physical and mental requirements of the work; and (3) in  
28 some cases, supplementary or corroborative information from other sources such  
as employers, the Dictionary of Occupational Titles, etc., on the requirements of  
the work as generally performed in the economy.

The decision as to whether the claimant retains the functional capacity to perform  
past work which has current relevance has far-reaching implications and must be  
developed and explained fully in the disability decision. Since this is an  
important and, in some instances, a controlling issue, every effort must be made to  
secure evidence that resolves the issue as clearly and explicitly as circumstances  
permit.

Sufficient documentation will be obtained to support the decision. Any case  
requiring consideration of [past relevant work] will contain enough information  
on past work to permit a decision as to the individual’s ability to return to such  
past work (or to do other work).

1 SSR 82-62.

2 The ALJ determined that Plaintiff was able to perform her past relevant work as a  
3 security guard as well as other jobs that exist in the economy. (AR 27.) At step four the  
4 claimant has the burden of demonstrating that she is incapable of performing her past relevant  
5 work. Reddick, 157 F.3d at 721. The ALJ premised her decision in part on the opinion of Dr.  
6 Lascano who opined that Plaintiff was able to sit, stand, and walk 4 hours each in 8 hour  
7 workday. (AR 432.) Plaintiff had no reaching, fingering, or handling limitations and was able to  
8 use feet for repetitive movements. (AR 432.) Dr. Lascano opined that Plaintiff could frequently  
9 lift and carry 20 pounds, and never lift or carry over 20 pounds. (AR 433.) She could  
10 occasionally bend, squat, crawl, climb, and reach above shoulder level. (AR 433.) Plaintiff had  
11 moderate restrictions to exposure to unprotected heights and exposure to dust, fumes, and gases;  
12 could never be around moving machinery or exposed to marked changes in temperatures; and  
13 had mild restrictions in driving automotive equipment. (AR 434.) Plaintiff would need  
14 unscheduled breaks during an 8 hour workday. (AR 434.) However, the ALJ did not address  
15 that Dr. Lascano found Plaintiff's symptoms would frequently impair the attention and  
16 concentration required to perform simple and repetitive tasks or that she would be likely to miss  
17 four days per month due to her impairments or symptoms. (AR 433, 434.)

18 Plaintiff testified that she worked full time as a security guard for about six months. (AR  
19 54.) She was working at the airport, lifting the passenger's suitcases, which were about 70  
20 pounds, on to the belt to scan them. (AR 55.) Since the residual functional capacity assessment  
21 provides that Plaintiff is only able to lift 10 pounds frequently and 20 pounds occasionally,  
22 Plaintiff is unable to perform her past relevant work as a security guard as it was actually  
23 performed.

24 Further, the ALJ only presented a hypothetical to the VE of an individual who could  
25 stand, sit, or walk six out of eight hours in a typical workday. Therefore, the VE was not  
26 presented with a hypothetical involving an individual with the limitations the ALJ found  
27 applicable to Plaintiff. In addressing the sit/stand option, the VE was asked about an individual  
28 who would be able to sit or stand each for about 15 to 30 minutes at a time. (AR 72.). The VE



1 stated that the security jobs would still be available but the number of jobs would be eroded due  
2 to security jobs that require standing. (AR 72.) The ALJ stated that the person can sit more  
3 easily than stand, and could sit for 30 minutes at a time and stand for two or three minutes and  
4 then sit again. (AR 72.) The VE stated that many security positions involve working the front  
5 desk of an office building which would involve sitting. (AR 73.) The VE opined that for the  
6 security positions 50 to 60 percent of the positions would require an individual to stand. (AR  
7 73.) However, this hypothetical would require that the person sit for more than four hours per  
8 day.

9 The VE was asked how the regulations define light work. (AR 79.) The VE responded  
10 that if a person might need to stand more than two hours in an eight-hour workday it would place  
11 that person in the light category rather than the sedentary category. (AR 80.) The VE's  
12 testimony was based upon an individual who was able to stand, sit, or walk six hours in an eight  
13 hour day. The DOT description itself appears to indicate that the individual would walk or stand  
14 to a significant degree or sit most of the time.

15 The DOT description for security guard states:

16 Physical demand requirements are in excess of those for Sedentary Work. Even  
17 though the weight lifted may be only a negligible amount, a job should be rated  
18 Light Work: (1) when it requires walking or standing to a significant degree; or  
19 (2) when it requires sitting most of the time but entails pushing and/or pulling of  
arm or leg controls; and/or (3) when the job requires working at a production rate  
pace entailing the constant pushing and/or pulling of materials even though the  
weight of those materials is negligible.

20 372.667-034 GUARD, SECURITY, DICO 372.667-034.

21 Based upon review of the DOT and the testimony that was presented at the January 14,  
22 2014 hearing, the Court does not find substantial evidence to support the ALJ's finding that an  
23 individual who is limited to Plaintiff's residual functional capacity as stated in the decision could  
24 perform the job of security guard.

#### 25 **D. Step Five Findings**

26 The ALJ alternately found that there was other work that Plaintiff could perform in the  
27 economy. However, the VE was never presented with a hypothetical of an individual with  
28 Plaintiff's residual functional capacity. Therefore, there is not substantial evidence to support

1 the finding that Plaintiff was able to perform other work. The ALJ’s finding that Plaintiff was  
2 able to perform other work in the economy is not supported by substantial evidence.

3 **E. Remand**

4 The parties request that if the Court finds the ALJ erred that this action be remanded to  
5 the Commissioner for further consideration. The ordinary remand rule provides that when “the  
6 record before the agency does not support the agency action, ... the agency has not considered all  
7 relevant factors, or ... the reviewing court simply cannot evaluate the challenged agency action  
8 on the basis of the record before it, the proper course, except in rare circumstances, is to remand  
9 to the agency for additional investigation or explanation.” Treichler v. Comm’r of Soc. Sec.  
10 Admin., 775 F.3d 1090, 1099 (9th Cir. 2014). This applies equally in Social Security cases.  
11 Treichler, 775 F.3d at 1099. Under the Social Security Act “courts are empowered to affirm,  
12 modify, or reverse a decision by the Commissioner ‘with or without remanding the cause for a  
13 rehearing.’ ” Garrison v. Colvin, 759 F.3d 995, 1019 (9th Cir. 2014) (emphasis in original)  
14 (quoting 42 U.S.C. § 405(g)). The decision to remand for benefits is discretionary. Treichler,  
15 775 F.3d at 1100. In Social Security cases, courts generally remand with instructions to calculate  
16 and award benefits when it is clear from the record that the claimant is entitled to benefits.  
17 Garrison, 759 F.3d at 1019.

18 The Ninth Circuit has “devised a three-part credit-as-true standard, each part of which  
19 must be satisfied in order for a court to remand to an ALJ with instructions to calculate and  
20 award benefits: (1) the record has been fully developed and further administrative proceedings  
21 would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for  
22 rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly  
23 discredited evidence were credited as true, the ALJ would be required to find the claimant  
24 disabled on remand.” Garrison, 759 F.3d at 1020. The credit as true doctrine allows “flexibility”  
25 which “is properly understood as requiring courts to remand for further proceedings when, even  
26 though all conditions of the credit-as-true rule are satisfied, an evaluation of the record as a  
27 whole creates serious doubt that a claimant is, in fact, disabled. Id. at 1021. Even when the  
28 circumstances are present to remand for benefits, “[t]he decision whether to remand a case for

1 additional evidence or simply to award benefits is in our discretion.” Treichler, 775 F.3d at 1102  
2 (quoting Swenson v. Sullivan, 876 F.2d 683, 689 (9th Cir. 1989)).

3 In this instance, the record is unclear as to what Plaintiff does during the day. However,  
4 Plaintiff is the primary caretaker seven days a week for her disabled 15 year old son who is  
5 unable to walk. Therefore, it is unclear whether Plaintiff has the residual functional capacity to  
6 work. The Court finds that the action should be remanded to the agency for further consideration  
7 regarding how Plaintiff’s residual functional capacity affects her ability to perform work.  
8 Accordingly, this action shall be remanded for further consideration.

9 V.

10 **CONCLUSION AND ORDER**

11 Based on the foregoing, the Court finds that the ALJ’s decision is not supported by  
12 substantial evidence in the record.

13 Accordingly, IT IS HEREBY ORDERED that

- 14 1. Plaintiff’s appeal from the decision of the Commissioner of Social Security is  
15 GRANTED IN PART AND DENIED IN PART;
- 16 2. The Court REMANDS this action back to the Commissioner for further  
17 administrative proceedings consistent with this opinion;
- 18 3. The Clerk of the Court is DIRECTED to enter judgment be entered favor of  
19 Plaintiff Joy Leon and against Defendant Commissioner of Social Security; and
- 20 4. The Clerk of the Court is directed to CLOSE this action.

21 IT IS SO ORDERED.

22 Dated: April 26, 2017

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25 UNITED STATES MAGISTRATE JUDGE  
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