



1 anxiety; depression; fibromyalgia; diabetes; irritable bowel syndrome’ and arthritis. (*Id.* at 398,  
2 emphasis omitted) Her applications “were denied initially on April 30, 2010, and upon reconsideration  
3 on September 21, 2010.” (*Id.* at 52) Plaintiff requested a hearing and testified before an ALJ on  
4 August 26, 2011 and December 20, 2011. (*Id.*) The ALJ determined Plaintiff was not disabled under  
5 the Social Security Act from November 13, 2005 through the date of the decision and issued an order  
6 denying benefits on February 3, 2012. (*Id.* at 52-73) The Appeals Council on denied Plaintiff’s request  
7 for review of the decision on January 4, 2013. (*Id.* at 15-17, 2311-13) Therefore, the ALJ’s  
8 determination became the decision of the Commissioner of Social Security (“Commissioner”).

9 Plaintiff sought judicial review of the ALJ’s decision by filing a complaint with this Court on  
10 March 27, 2013, thereby initiating Case No. 1:13-cv-0449-SMS. (*See* Doc. 15-5 at 2316) Plaintiff  
11 argued that “ALJ committed reversible error in finding that she can perform her past relevant work at  
12 step four and/or alternative work at step five of the sequential disability analysis in light of the assessed  
13 residual functional capacity and incomplete hypothetical” posed to the vocational expert. (*See* Case  
14 No. 1:13-cv-0449-SMS, Doc. 21 at 3) The Court determined the ALJ’s decision lacked the support of  
15 substantial evidence due to a conflict between the vocational expert’s testimony and the job  
16 descriptions provided in the *Dictionary of Occupational Titles*. (Doc. 15-5 at 2346-47) Accordingly,  
17 the matter was remanded for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g) on  
18 September 12, 2014. (*Id.* at 2347)

19 Receiving the remand from the District Court, the Appeals Council noted that in December  
20 2013—while Plaintiff’s request for review was pending before the District Court—she filed additional  
21 applications for benefits, which were denied at the initial level. (Doc. 15-5 at 2357) The Appeals  
22 Council noted that the remand “render[ed] the subsequent claims duplicate.” (*Id.*) Therefore, the  
23 Appeals Council directed the ALJ to “consolidate the claim files, create a single electronic record, and  
24 issue a new decision on the consolidated claims.” (*Id.*, citing 20 CFR §§ 404.952, 416.152, HALLEX  
25 1-10-10). Further, the Appeals Council observed: “In compliance with the above, the Administrative  
26 Law Judge will offer the claimant the opportunity for a hearing, take any further action needed to  
27 complete the administrative record and issue a new decision.” (*Id.*) With these instructions, the matter  
28 was remanded to an ALJ on November 22, 2014. (*Id.* at 2357-58)

1 With the consolidation of the applications, Plaintiff submitted additional records to the Master  
2 Docket, which included records from the period previously adjudicated, and related to the same  
3 impairments. (*See, e.g.* Doc. 15-5 at 3476) In total, the ALJ had more than 2,000 additional pages of  
4 medical evidence to review. (*See* Doc. 15-5 at 2072-74; *see also id.* at 2629-5207)

5 Following a hearing, the ALJ issued an unfavorable decision on December 1, 2015, finding  
6 Plaintiff was not disabled “from November 13, 2015, through the date of [the] decision.” (Doc. 15-5 at  
7 2062) Plaintiff filed exceptions to the ALJ decision on February 16, 2016, asserting the ALJ erred by  
8 finding she “may perform work where the demands of that work exceed the residual functional capacity  
9 as found by the ALJ.” (*Id.* at 2036-37) On June 10, 2016, the Appeals Council noted the exceptions  
10 were untimely, and concluded the ALJ’s decision was the final decision of the Commissioner. (*Id.*)

### 11 **STANDARD OF REVIEW**

12 District courts have a limited scope of judicial review for disability claims after a decision by  
13 the Commissioner to deny benefits under the Social Security Act. When reviewing findings of fact,  
14 such as whether a claimant was disabled, the Court must determine whether the Commissioner’s  
15 decision is supported by substantial evidence or is based on legal error. 42 U.S.C. § 405(g). The Court  
16 must uphold the ALJ’s determination that the claimant is not disabled if the proper legal standards were  
17 applied and the findings are supported by substantial evidence. *See Sanchez v. Sec’y of Health &*  
18 *Human Serv.*, 812 F.2d 509, 510 (9th Cir. 1987).

19 Substantial evidence is “more than a mere scintilla. It means such relevant evidence as a  
20 reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S.  
21 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The record as a whole  
22 must be considered, because “[t]he court must consider both evidence that supports and evidence that  
23 detracts from the ALJ’s conclusion.” *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985).

### 24 **DISABILITY BENEFITS**

25 To qualify for benefits under the Social Security Act, Plaintiff must establish he is unable to  
26 engage in substantial gainful activity due to a medically determinable physical or mental impairment  
27 that has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C.  
28 § 1382c(a)(3)(A). An individual shall be considered to have a disability only if:

1 his physical or mental impairment or impairments are of such severity that he is not  
2 only unable to do his previous work, but cannot, considering his age, education, and  
3 work experience, engage in any other kind of substantial gainful work which exists in  
4 the national economy, regardless of whether such work exists in the immediate area  
5 in which he lives, or whether a specific job vacancy exists for him, or whether he  
6 would be hired if he applied for work.

7 42 U.S.C. § 1382c(a)(3)(B). The burden of proof is on a claimant to establish disability. *Terry v.*  
8 *Sullivan*, 903 F.2d 1273, 1275 (9th Cir. 1990). If a claimant establishes a prima facie case of disability,  
9 the burden shifts to the Commissioner to prove the claimant is able to engage in other substantial  
10 gainful employment. *Maounois v. Heckler*, 738 F.2d 1032, 1034 (9th Cir. 1984).

### 11 **ADMINISTRATIVE DETERMINATION**

12 To achieve uniform decisions, the Commissioner established a sequential five-step process for  
13 evaluating a claimant's alleged disability. 20 C.F.R. §§ 404.1520, 416.920(a)-(f). The process requires  
14 the ALJ to determine whether Plaintiff (1) engaged in substantial gainful activity during the period of  
15 alleged disability, (2) had medically determinable severe impairments (3) that met or equaled one of the  
16 listed impairments set forth in 20 C.F.R. § 404, Subpart P, Appendix 1; and whether Plaintiff (4) had  
17 the residual functional capacity ("RFC") to perform to past relevant work or (5) the ability to perform  
18 other work existing in significant numbers at the state and national level. *Id.* The ALJ must consider  
19 testimonial and objective medical evidence. 20 C.F.R. §§ 404.1527, 416.927.

#### 20 **A. The ALJ's Findings in 2012**

21 Pursuant to the five-step process, the ALJ first determined Plaintiff did not engage in substantial  
22 gainful activity after the alleged onset date of November 13, 2005. (Doc. 15-5 at 54) Second, the ALJ  
23 found Plaintiff had the" following severe impairments: reactive obstructive airway disease, tendonitis  
24 and full tear of the rotator cuff, degenerative disc disease of the cervical spine, disc bulge of L5-S1,  
25 chronic pain syndrome, gastritis, irritable bowel syndrome, gastroesophageal reflux disease, and  
26 depressive disorder not otherwise specified." (*Id.* at 54-55) The ALJ found no impairment or  
27 combination of impairments met or medically equaled one of the listed impairments. (*Id.* at 57) Next,  
28 the ALJ determined:

[T]he claimant can and/or carry 20 pounds occasionally and 10 pounds frequently with  
the use of both arms and hands together; she can and/or carry up to 10 pounds if she is  
just using her right arm and hand; she can sit, stand and/or walk for six hours out of an  
eight-hour workday with the ability to change positions at will for comfort; she is

1 precluded from crawling or climbing ladders, ropes, and scaffolds; she can perform all  
2 other postural activities occasionally; she is restricted from performing overhead  
3 reaching or work with the right upper extremity; she is precluded from heavy grasping,  
4 gripping, or [torquing] with either hand; she is prohibited from working at unprotected  
5 heights or around hazardous moving machinery; she is restricted from concentrated  
6 exposure to dust, gases, or fumes; she requires reasonable access to a restroom; she is  
7 permitted to have one additional unscheduled break per day that is under 10 minutes in  
8 addition to the three regular breaks during a regular workday; she is limited to  
9 performing simple repetitive one to three step tasks; she can have frequent contact with  
10 co-workers and supervisors; she can have occasional contact with the general public;  
11 she can engage in normal stress work; and she may be off task up to five to 10 percent  
12 of the workday on a presumptive basis due to the combination of pain or prescription  
13 side effects.

14 (Doc. 15-5 at 58)

15 With this residual functional capacity (“RFC”), the ALJ found Plaintiff was “capable of  
16 performing past relevant work as a switchboard operator.” (Doc. 15-5 at 71) Further, the ALJ made an  
17 “alternative finding” at step five that “there are other jobs existing in the national economy that she is  
18 also able to perform.” (*Id.*) Therefore, the ALJ concluded Plaintiff was not disabled from November  
19 12, 2005 through the decision date of February 3, 2012. (*Id.* at 73)

#### 20 **B. Review by the District Court**

21 Appealing the decision of the ALJ, Plaintiff did “not challenge the ALJ’s construction of her  
22 RFC.” (Doc. 15-5 at 2338) However, the Court noted that Plaintiff “read [the] RFC as including a sit  
23 or stand at will requirement,” while the Commissioner argued “the ALJ’s RFC finding did not include a  
24 sit/stand at will requirement, only that Plaintiff requires changing positions for comfort.” (*Id.* at 2339)  
25 Thus, although Plaintiff did not directly challenge the findings of the ALJ related to her RFC, the Court  
26 reviewed the RFC and determined that the “plain language” of the RFC did “not include a sit/stand  
27 option.” (Doc. 15-5 at 2341)

28 The Court noted that the vocational expert testified an individual who needed to be able to sit or  
stand “at will” would have “to be able to perform her job standing [all the time].” (Doc. 15-5 at 2342)  
In addition, the vocational expert explained “a similarly capable individual could ‘frequently’ change  
positions,” and would be able to perform Plaintiff’s past relevant work. (*Id.*) The Court observed that  
the vocational expert “offered no testimony as to whether a similarly capable individual would have the  
necessary autonomy to change positions ‘at will’ in a telephone operator position as it is generally  
performed,” and the *Dictionary of Occupational Titles* was “likewise silent.” (*Id.*) Accordingly, the

1 Court was unable to “conclude that the ALJ’s step-four findings and conclusion [were] based on  
2 substantial evidence.” (*Id.*) Further, the Court found the ALJ failed to resolve a conflict between the  
3 vocational expert’s testimony and Plaintiff’s mental residual functional capacity. (*Id.* at 2342-43) The  
4 Court determined this was not a harmless error, because there was insufficient evidence to determine  
5 whether “a substantial number of jobs existed that could be performed by an individual with Plaintiff’s  
6 limitations.” (*Id.* at 2346)

7 The Court concluded that due to “the woefully inadequate record,” the matter needed to be  
8 remanded for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g). (Doc. 15-5 at 2347)

9 **C. The ALJ’s Findings in 2015**

10 Upon remand, the ALJ again began at step one of the sequential evaluation and “reviewed the  
11 entire medical record, including new medical evidence submitted.” (*See* Doc. 15-5 at 2047) The ALJ  
12 found Plaintiff still had not engaged in substantial gainful activity since November 12, 2005. (*Id.*) At  
13 step two, the ALJ determined Plaintiff’s severe impairments included: “reactive obstructive airway  
14 disease, tendonitis and full tear of the rotator cuff, degenerative disc disease of the cervical spine, disc  
15 bulge at L5-S1, chronic pain syndrome, gastritis, irritable bowel syndrome, gastroesophageal reflux  
16 disease (GERD), and depressive disorder, not otherwise specified.” (*Id.*) The ALJ found these  
17 impairments did not meet or medically equaled a Listing. (*Id.* at 2048-49) Next, the ALJ determined,  
18 “[a]fter careful consideration of the entire record,” that:

19 [T]he claimant has the residual functional capacity to perform light work as defined in  
20 20 CFR 404.1567(b) and 416.967(b) except the claimant can lift and/or carry 20 pounds  
21 occasionally and 10 pounds frequently with the use of both arms and hands together; lift  
22 and/or carry up to 10 pounds if just using her right arm and hand; sit, stand, and walk,  
23 each, for six hours total in an eight-hour workday, with the ability to change positions  
24 frequently for comfort; never crawl or climb ladders, ropes, and scaffolds; occasionally  
25 perform all other postural activities; never perform overhead reaching or work with the  
26 right upper extremity; never perform heavy grasping, gripping, or torquing with either  
27 hand; never work at unprotected heights or around hazardous moving machinery; and  
28 never have concentrated exposure to dust, gases, or fumes. She requires reasonable  
access to a restroom and one additional unscheduled break per day that is under 10  
minutes, in addition to the three regular breaks during a regular workday. She is limited  
to performing simple, repetitive, one- to three-step tasks; can have frequent contact with  
co-workers and supervisors and occasional contact with the general public; and may be  
off-task up to five to 10 percent of the workday on a presumptive basis, due to the  
combination of pain or prescription side effects.

(*Id.* at 2049-50)

1 With this residual functional capacity, the ALJ concluded at step four that Plaintiff was able to  
2 perform her past relevant work as a telephone operator. (Doc. 15-5 at 2060) In the alternative, the ALJ  
3 found at step five that Plaintiff could perform the requirements of other jobs in the national economy  
4 that existed in significant numbers, such as appointment clerk, business services document preparer,  
5 and addresser. (*Id.* at 2061) Consequently, the ALJ concluded Plaintiff was not disabled as defined by  
6 the Social Security Act from November 13, 2005, through the date of the decision, December 1, 2015.  
7 (*Id.* at 2062)

## 8 **DISCUSSION AND ANALYSIS**

### 9 **A. Law of the Case and Rule of Mandate**

10 Recently, the Ninth Circuit determined that “the law of the case doctrine and the rule of  
11 mandate apply to social security administrative remands from federal court in the same way they would  
12 apply to any other case.” *Stacy v. Colvin*, 825 F.3d 563, 566 (9th Cir. 2016). Plaintiff contends the  
13 ALJ violated both doctrines when he examined the medical evidence and formulated a new residual  
14 functional capacity. (Doc. 21 at 4-7)

#### 15 **1. Law of the Case**

16 “The law of the case doctrine generally prohibits a court from considering an issue that has  
17 already been decided by that same court or a higher court in the same case.” *Stacy*, 825 F.3d at 567  
18 (citing *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012)). Application of the doctrine  
19 by a court “is discretionary, not mandatory.” *Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991);  
20 *see also United States v. Mills*, 810 F.2d 907, 909 (9th Cir. 1987) (stating that law of the case is a  
21 discretionary doctrine and declining to apply the doctrine). However, the Ninth Circuit has identified  
22 only five circumstances under which a court may depart from the law of the case: “1) the first decision  
23 was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is  
24 substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise  
25 result.” *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). “Failure to apply the doctrine of  
26 the law of the case absent one of the requisite conditions constitutes an abuse of discretion.” *Id.*  
27 (citations omitted).

28 In *Stacy*, the Ninth Circuit observed there had been “two prior step 4 findings by ALJs that

1 Stacy could not perform his past work.” *Id.*, 825 at 567. The Court noted that while the step four  
2 findings were not specifically affirmed by the district court in its review, the findings were “typically  
3 the type... that should not be reconsidered under the law of the case doctrine.” *Id.* However, the  
4 Court found the ALJ did not err in re-evaluating the step four findings where the ALJ heard “new  
5 evidence” at the hearing regarding the tasks Stacy performed in his past work. *Id.* As a result of the  
6 new evidence, a vocational expert concluded Stacy could, in fact, perform his past relevant work as  
7 generally performed. *Id.* The Ninth Circuit determined that “[g]iven the new evidence on remand, the  
8 district court did not abuse its discretion in declining to apply the law of the case doctrine.” *Id.*

9 Similarly, here, there was new evidence before the ALJ on remand— including more than  
10 2,000 additional pages of medical records—at least some of which were provided to the Master  
11 Docket by Plaintiff. (*See, e.g.* Doc. 15-5 at 3476) In light of the new evidence before the ALJ upon  
12 remand, the ALJ was entitled to re-evaluate Plaintiff’s residual functional capacity.

## 13 2. Rule of Mandate

14 “The rule of mandate is similar to, but broader than, the law of the case doctrine.” *Stacy*, 825  
15 F.3d at 567-68 (quoting *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995)). Under the rule of  
16 mandate, a lower court receiving a mandate “cannot vary it or examine it for any other purpose than  
17 execution.” *Cote*, 51 F.3d at 181 (citation omitted). The Ninth Circuit explained that a “remand  
18 order must be read holistically.” *Stacy*, 825 F.3d at 568. Thus, the Court found lower courts are  
19 permitted “to reexamine any issue on remand that is not inconsistent with the mandate.” *Id.* Where a  
20 remand order does not “restrict” an ALJ to address *only* a specific deficiency, an ALJ may be  
21 permitted to review other findings related to a claimant’s application. *See id.*

22 Previously, this Court observed that the language in the RFC indicating that Plaintiff “can sit,  
23 stand and/or walk for six hours out of an eight-hour workday with the ability to change positions at will  
24 for comfort” (Doc. 15-5 at 58) was unclear, given the dispute regarding the meaning between Plaintiff  
25 and Defendant. (*See* Doc. 15-5 at 2339) After reviewing the “construction” of the RFC, the step four  
26 findings, and the alternative step finding, the Court concluded that “the record [was] not fully  
27 developed to provide substantial evidence to support the ALJ’s nondisability determination.” (*Id.* at  
28 2347) The matter was remanded “for further proceedings consisting with [the Court’s] decision.” (*Id.*)

1           Upon remand, the Appeals Council directed the ALJ to conduct “further proceedings consistent  
2 with the order of the court.” (Doc. 15-5 at 2357) In addition, the Appeals Council observed that  
3 Plaintiff “filed subsequent claims for Title II and Title XVI benefits on December 5 and December 31,  
4 2013, respectively, which were denied at the initial level.” (*Id.*) Because the matter was being  
5 remanded—based upon the order of the Court—the Appeals Council found the subsequent claims were  
6 duplicative and directed the ALJ to “consolidate the claim files, create a single electronic record, and  
7 issue a new decision on the consolidated claims.” (*Id.*, citing 20 C.F.R. §§ 404.952, 416.1452 and  
8 HALLEX 1-1-10-10). In addition, as in *Stacy*, the ALJ was faced with new evidence and its potential  
9 impact upon the residual functional capacity. Likewise, the ALJ had the order of the Court, which  
10 discussed a dispute regarding the meaning of a certain phrase in the RFC. The actions taken on remand  
11 by the ALJ—who did, in fact, review Plaintiff’s ability to perform her past relevant work as well as  
12 work in the national economy after formulating the residual functional capacity—were not inconsistent  
13 with the Court’s mandate to conduct further proceedings.

14 **B.     Wavier**

15           Plaintiff’s sole argument on appeal was that the ALJ did not abide by the law of the case or the  
16 rule of mandate. To the extent Plaintiff believes the ultimate conclusion was in error, she fails to  
17 identify how the ALJ erred in his evaluation of the evidence. The Ninth Circuit “has repeatedly  
18 admonished that [it] cannot ‘manufacture arguments for an appellant.’” *Indep. Towers of Wash. v.*  
19 *Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (quoting *Greenwood v. Fed. Aviation Admin.*, 28 F.3d  
20 971, 977 (9th Cir. 1994)). Rather, the Court will “review only issues with are argued specifically and  
21 distinctly.” *Id.* Such is also true for the trial court. Therefore, when a claim of error is not argued and  
22 explained, the argument is waived. *See, id.* at 929-30 (holding that party’s argument was waived where  
23 the party offered “little if any analysis to assist the court in evaluating its legal challenge”).

24           Plaintiff does not challenge the ALJ’s findings related to the medical record or assert the  
25 limitations articulated in the residual functional capacity assessment lack the support of substantial  
26 evidence in the record. Notably, in the Court’s Scheduling Order, Plaintiff was informed that the  
27 opening brief must include “a summary of all relevant medical evidence” as well as “argument  
28 separately addressing each claimed error.” (Doc. 4-1 at 3-4) In addition, on January 5, 2017, Plaintiff

1 was “reminded the opening brief **SHALL** include a summary of *all* relevant medical evidence,  
2 including the significance of laboratory findings; testimony; and a short statement of all claimed  
3 issues.” (Doc. 20 at 2, emphasis in original) Nevertheless, Plaintiff did not identify any medical  
4 evidence in her opening brief, and did not address any of the ALJ’s findings or the ultimate conclusion  
5 that she is not disabled. Accordingly, the Court finds that Plaintiff has waived any argument regarding  
6 these issues. *See Indep. Towers of Wash.* 350 F.3d at 929.

7 **ORDER**

8 Based upon the foregoing, the Court **ORDERS**:

- 9 1. The decision of the Commissioner of Social Security is **AFFIRMED**; and
- 10 2. The Clerk of Court **IS DIRECTED** to enter judgment in favor of Defendant Nancy A.  
11 Berryhill, Acting Commissioner of Social Security, and against Plaintiff Maryann  
12 Celedon.

13  
14 IT IS SO ORDERED.

15 Dated: August 1, 2017

/s/ Jennifer L. Thurston  
16 UNITED STATES MAGISTRATE JUDGE