

1 **PROCEDURAL BACKGROUND**

2 In October of 2012, plaintiff filed an application for Disability Insurance Benefits (“DIB”)
3 under Title II of the Social Security Act (“the Act”) alleging disability beginning on May 10,
4 2007. (Transcript (“Tr.”) at 142-44.) Plaintiff’s alleged impairments included Lyme disease,
5 fibromyalgia, and cervical arthritis. (Id. at 56.) Plaintiff’s application was denied initially, (id. at
6 80-84), and upon reconsideration. (Id. at 87-91.)

7 Plaintiff requested an administrative hearing and a hearing was held before an
8 Administrative Law Judge (“ALJ”) on June 24, 2014. (Id. at 33-55.) In a decision issued on
9 October 28, 2014, the ALJ found that plaintiff was not disabled. (Id. at 28.) On April 15, 2016,
10 the Appeals Council denied plaintiff’s request for review of the ALJ’s October 28, 2014 decision.
11 (Id. at 1-5.) Plaintiff sought judicial review pursuant to 42 U.S.C. § 405(g) by filing a complaint
12 in this court on June 15, 2016. (Id. at 1675.) On September 8, 2017, the court granted plaintiff’s
13 motion for summary judgement and remanded the matter for further proceedings. (Id. at 1687.)

14 On remand, another hearing was held before an ALJ on June 18, 2018. (Id. 1593-1639.)
15 Plaintiff was represented by an attorney and testified at the administrative hearing. (Id. at 1593-
16 97.) In a decision issued on November 28, 2018, the ALJ again found that plaintiff was not
17 disabled. (Id. at 1586.) The ALJ entered the following findings:

- 18 1. The claimant last met the insured status requirements of the
19 Social Security Act on December 31, 2007.
- 20 2. The claimant did not engage in substantial gainful activity
21 during the period from her alleged onset date of May 10, 2007
22 through her date last insured of December 31, 2007 (20 CFR
23 404.1571 *et seq.*).
- 24 3. Through the date last insured, the claimant had the following
25 severe impairments: cervical spine degenerative disc disease;
26 lumbar spine degenerative disc disease; vertigo (20 CFR
27 404.1520(c)).
- 28 4. Through the date last insured, the claimant did not have an
impairment or combination of impairments that met or medically
equaled the severity of one of the listed impairments in 20 CFR Part
404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525 and
404.1526).
5. After careful consideration of the entire record, the undersigned
finds that, through the date last insured, the claimant had the residual

1 functional capacity to perform medium work as defined in 20 CFR
2 404.1567(c) in that she could lift and carry fifty pounds occasionally
3 and twenty-five pounds frequently, sit for six hours of an eight hour
4 day, and stand and walk for six hours of an eight hour day. However
5 she could only frequently, not constantly, balance, stoop, kneel,
6 crouch, crawl and climb stairs; she must avoid ladders and hazards
7 (dangerous machinery, unprotected heights etc.). She was limited to
8 work in moderate noise levels, such as a business office, department
9 store, grocery store or light traffic.

6. Through the date last insured, the claimant was capable of
performing past relevant work as an assistant vice president,
banking. This work did not require the performance of work-
related activities precluded by the claimant's residual functional
capacity (20 CFR 404.1565).

7. In the alternative, considering the claimant's age, education,
work experience, and residual functional capacity, the claimant has
also acquired work skills from past relevant work that were
transferable to other occupations with jobs existing in significant
numbers in the national economy (20 CFR 404.1569, 404.1569(a)
and 404.1568(d)).

8. The claimant was not under a disability, as defined in the Social
Security Act, at any time from May 10, 2007, the alleged onset
date, through December 31, 2007, the date last insured (20 CFR
404.1520(f)).

(Id. at 1570-86.)

Plaintiff sought judicial review pursuant to 42 U.S.C. § 405(g) by filing the complaint in
this action on March 27, 2019. (ECF No. 1.)

LEGAL STANDARD

"The district court reviews the Commissioner's final decision for substantial evidence,
and the Commissioner's decision will be disturbed only if it is not supported by substantial
evidence or is based on legal error." Hill v. Astrue, 698 F.3d 1153, 1158-59 (9th Cir. 2012).
Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to
support a conclusion. Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Sandgathe v.
Chater, 108 F.3d 978, 980 (9th Cir. 1997).

"[A] reviewing court must consider the entire record as a whole and may not affirm
simply by isolating a 'specific quantum of supporting evidence.'" Robbins v. Soc. Sec. Admin.,
466 F.3d 880, 882 (9th Cir. 2006) (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.
1989)). If, however, "the record considered as a whole can reasonably support either affirming or

1 reversing the Commissioner’s decision, we must affirm.” McCartey v. Massanari, 298 F.3d
2 1072, 1075 (9th Cir. 2002).

3 A five-step evaluation process is used to determine whether a claimant is disabled. 20
4 C.F.R. § 404.1520; see also Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). The five-step
5 process has been summarized as follows:

6 Step one: Is the claimant engaging in substantial gainful activity? If
7 so, the claimant is found not disabled. If not, proceed to step two.

8 Step two: Does the claimant have a “severe” impairment? If so,
9 proceed to step three. If not, then a finding of not disabled is
10 appropriate.

11 Step three: Does the claimant’s impairment or combination of
12 impairments meet or equal an impairment listed in 20 C.F.R., Pt. 404,
13 Subpt. P, App. 1? If so, the claimant is automatically determined
14 disabled. If not, proceed to step four.

15 Step four: Is the claimant capable of performing his past work? If
16 so, the claimant is not disabled. If not, proceed to step five.

17 Step five: Does the claimant have the residual functional capacity to
18 perform any other work? If so, the claimant is not disabled. If not,
19 the claimant is disabled.

20 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

21 The claimant bears the burden of proof in the first four steps of the sequential evaluation
22 process. Bowen v. Yuckert, 482 U.S. 137, 146 n. 5 (1987). The Commissioner bears the burden
23 if the sequential evaluation process proceeds to step five. Id.; Tackett v. Apfel, 180 F.3d 1094,
24 1098 (9th Cir. 1999).

25 APPLICATION

26 Plaintiff’s pending motion asserts the following two principal claims: (1) the ALJ erred at
27 step two of the sequential evaluation; and (2) the ALJ improperly rejected plaintiff’s testimony.

28 (Pl.’s MSJ (ECF No. 13) at 13-24.³)

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³ Page number citations such as this one are to the page number reflected on the court’s CM/ECF system and not to page numbers assigned by the parties.

1 **I. Step Two Error**

2 Plaintiff argues that the ALJ erred at step two of the sequential evaluation by finding that
3 plaintiff’s fibromyalgia and Lyme disease were not severe impairments. (Id. at 13-21.) At step
4 two of the sequential evaluation, the ALJ must determine if the claimant has a medically severe
5 impairment or combination of impairments. Smolen v. Chater, 80 F.3d 1273, 1289-90 (9th Cir.
6 1996) (citing Yuckert, 482 U.S. at 140-41). The Commissioner’s regulations provide that “[a]n
7 impairment or combination of impairments is not severe if it does not significantly limit [the
8 claimant’s] physical or mental ability to do basic work activities.” 20 C.F.R. §§ 404.1521(a) &
9 416.921(a). Basic work activities are “the abilities and aptitudes necessary to do most jobs,” and
10 those abilities and aptitudes include: (1) physical functions such as walking, standing, sitting,
11 lifting, and carrying; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying
12 out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to
13 supervision, co-workers, and usual work situations; and (6) dealing with changes in a routine
14 work setting. 20 C.F.R. §§ 404.1521(b) & 416.921(b).

15 The Supreme Court has recognized that the Commissioner’s “severity regulation increases
16 the efficiency and reliability of the evaluation process by identifying at an early stage those
17 claimants whose medical impairments are so slight that it is unlikely they would be found to be
18 disabled even if their age, education, and experience were taken into account.” Yuckert, 482 U.S.
19 at 153. However, the regulation must not be used to prematurely disqualify a claimant. Id. at 158
20 (O’Connor, J., concurring). “An impairment or combination of impairments can be found not
21 severe only if the evidence establishes a slight abnormality that has no more than a minimal effect
22 on an individual[’]s ability to work.” Smolen, 80 F.3d at 1290 (internal quotation marks and
23 citation omitted).

24 “[A]n ALJ may find that a claimant lacks a medically severe impairment or combination
25 of impairments only when his conclusion is ‘clearly established by medical evidence.’” Webb v.
26 Barnhart, 433 F.3d 683, 687 (9th Cir. 2005) (quoting Social Security Ruling (“SSR”) 85-28); see
27 also Ukolov v. Barnhart, 420 F.3d 1002, 1006 (9th Cir. 2005) (claimant failed to satisfy step two
28 burden where “none of the medical opinions included a finding of impairment, a diagnosis, or

1 objective test results”). “Step two, then, is ‘a de minimis screening device [used] to dispose of
2 groundless claims[.]’” Webb, 433 F.3d at 687 (quoting Smolen, 80 F.3d at 1290); see also
3 Edlund v. Massanari, 253 F.3d 1152, 1158-59 (9th Cir. 2001) (discussing this “de minimis
4 standard”); Tomasek v. Astrue, No. C-06-07805 JCS, 2008 WL 361129, at *13 (N.D. Cal.
5 Feb.11, 2008) (describing claimant’s burden at step two as “low”).

6 With respect to plaintiff’s fibromyalgia, SSR 12-p provides that a claimant can establish
7 fibromyalgia as a medically determinable impairment if a doctor diagnosed fibromyalgia and the
8 claimant meets either the 1990 American College of Rheumatology (“ACR”) Criteria for the
9 Classification of Fibromyalgia or the 2010 ACR Preliminary Diagnostic Criteria for
10 fibromyalgia.⁴ See SSR 12-2p, 2012 WL 3104869, at *2-3. However, “[f]ibromyalgia’s cause is
11 unknown, there is no cure, and it is poorly-understood within much of the medical community.
12 The disease is diagnosed entirely on the basis of patients’ reports of pain and other symptoms.”
13 Benecke v. Barnhart, 379 F.3d 587, 590 (9th Cir. 2004). “What is unusual about the disease is
14 that those suffering from it have ‘muscle strength, sensory functions, and reflexes [that] are
15 normal.’” Revels v. Berryhill, 874 F.3d 648, 656 (9th Cir. 2017) (quoting Rollins v. Massanari,
16 261 F.3d 853, 863 (9th Cir. 2001)). “Indeed, ‘[t]here is an absence of symptoms that a lay person
17 may ordinarily associate with joint and muscle pain.’” Id.

18 In this regard, fibromyalgia’s “symptoms are entirely subjective. There are no laboratory
19 tests for [its] presence or severity.” Jordan v. Northrup Grumman Corp. Welfare Benefit Plan, 370
20 F.3d 869, 872 (9th Cir. 2004), overruled on other grounds by Abatie v. Alta Health & Life Ins.
21 Co., 458 F.3d 955, 970 (9th Cir. 2006) (en banc); see also Welch v. UNUM Life Ins. Co. of Am.,
22 382 F.3d 1078, 1087 (10th Cir. 2004) (fibromyalgia presents conundrum for insurers and courts
23 because no objective test exists for proving the disease, its cause or causes are unknown, and its
24 symptoms are entirely subjective).

25 Here, the ALJ acknowledged that plaintiff’s “treating primary care provider Dr. Coburn
26 diagnosed fibromyalgia in April 2012.” (Tr. at 1570.) Dr. William Mora, a “[t]reating provider

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28 ⁴ The 2010 ACR was not in effect during the period at issue—May 10, 2007 through December
31, 2007—and plaintiff’s argument does not reference the 2010 ACR.

1 since January 17, 2012 . . . opined the claimant had fibromyalgia prior to December 31, 2007
2 meeting the 1990 American College of Rheumatology Criteria for Classification of
3 Fibromyalgia.”⁵ (Id.) On February 16, 2012, Rheumatologist Michael Thelen examined plaintiff
4 and found “diffuse muscle tenderpoints consistent with fibromyalgia.”⁶ (Id. at 626, 1572.) And
5 plaintiff “testified to symptoms suggestive of this condition.” (Id. at 1571.)

6 The ALJ, however, rejected this evidence and found that plaintiff’s fibromyalgia was not a
7 severe impairment. The ALJ’s finding relied on the decision to give “great weight” to the opinion
8 of testifying medical expert Dr. Minh Vu, who opined that plaintiff’s fibromyalgia was “a non-
9 medically determinable impairment during the period at issue[.]” (Id. at 1571-72.) The ALJ also
10 found that “the needed objective findings in the medical records are not present.” (Id. at 1571.)

11 However, Dr. Vu’s nonexamining opinion was not based on independent clinical findings
12 or clinical findings not considered by the treating or examining physicians. See Andrews v.
13 Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995) (“Where . . . a nontreating source’s opinion
14 contradicts that of the treating physician but is not based on independent clinical findings, or rests
15 on clinical findings also considered by the treating physician, the opinion of the treating physician
16 may be rejected only if the ALJ gives specific, legitimate reasons for doing so that are based on
17 substantial evidence in the record.”). In this regard, rejecting the opinions of treating and
18 examining physicians simply because “they conflicted with the testimony of a nonexamining
19 medical advisor” is “an error of law.” Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995).

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22 ⁵ The ALJ stated that Dr. Mora failed to “check the box of the opinion for 11/18 specific
23 tenderpoints.” (Tr. at 1570.) While true, the ALJ neglected to note that when prompted to
24 “[c]ircle your patient’s tender points,” Dr. Mora circled 12 of 18 specific tenderpoints. (Id. at
25 1546.) Rejecting a treating physician’s opinion “simply because the doctor[] failed to checkoff or
26 delineate the 18 trigger points identified by the American College of Rheumatology, does not
satisfy the requirement of citing specific and legitimate reasons supported by substantial evidence
in the record[.]” Galvan v. Astrue, No. 08-cv-1271 JLT, 2010 WL 529440, at *10 (E.D. Cal. Feb
9, 2010).

27 ⁶ The ALJ noted that Dr. Thelen’s findings “post-dated the date last insured[.]” (Tr. at 1572.)
28 However, “reports containing observations made after the period for disability are relevant to
assess the claimant’s disability.” Smith v. Bowen, 849 F.2d 1222, 1225 (9th Cir. 1988).

1 Likewise, “it is error for an ALJ to require objective evidence for a disease that eludes
2 such measurement.” Sharpe v. Colvin, No. CV 13-1557 SS, 2013 WL 6483069, at *4 (C.D. Cal.
3 Dec. 10, 2013) (reversing an ALJ’s conclusion that the plaintiff did not suffer from the severe
4 medically determinable impairment of fibromyalgia); see also Benecke, 379 F.3d at 594 (“The
5 ALJ erred by effectively requiring objective evidence for a disease that eludes such
6 measurement.”); Tully v. Colvin, 943 F. Supp.2d 1157, 1167-68 (E.D. Wash. 2013) (“The lack of
7 objective clinical findings in this case of fibromyalgia is insufficient to support the ALJ’s
8 rejection of Dr. Stevenson’s opinions regarding Plaintiff’s functional capacity.”).

9 With respect to Lyme disease, the ALJ found that it was “a medically determinable
10 impairment because, even though [plaintiff] was not diagnosed until 2012, the claimant’s lab
11 results in May of 2007 showed evidence of infection.” (Tr. at 1572.) And “[t]reating provider
12 since January 17, 2012, William Mora MD opined that claimant had Lyme disease prior to
13 December 31, 2007.” (Id. at 1572-73.)

14 The ALJ again, however, rejected Dr. Mora’s treating opinion in favor of the
15 nonexamining opinion of Dr. Vu, even though Dr. Vu did “not argue with the **diagnosis** of Dr.
16 Mora,” and “accepted that the claimant might have had [Lyme disease] back in 2007,” but simply
17 disagreed with “the severity of the Lyme disease symptoms present during the period at issue.”
18 (Id. at 1573) (emphasis in original). Again, this was an error of law. See Morgan v.
19 Commissioner of Social Sec. Admin., 169 F.3d 595, 602 (9th Cir. 1999) (“The opinion of a
20 nonexamining medical advisor cannot by itself constitute substantial evidence that justifies the
21 rejection of the opinion of an examining or treating physician.”).

22 As noted above, the ALJ’s conclusion that the claimant lacks a medically severe
23 impairment or combination of impairments is valid only when that conclusion is “clearly
24 established by medical evidence.” Webb, 433 F.3d at 687. On this record, the court cannot say
25 that it was clearly established by the medical evidence that plaintiff’s fibromyalgia and Lyme
26 disease were not severe medical impairments during the period at issue. See Ortiz v.
27 Commissioner of Social Sec., 425 Fed. Appx. 653, 655 (9th Cir. 2011) (“This is not the total
28 absence of objective evidence of severe medical impairment that would permit us to affirm a

1 finding of no disability at step two.”); Webb, 433 F.3d at 687 (“Although the medical record
2 paints an incomplete picture of Webb’s overall health during the relevant period, it includes
3 evidence of problems sufficient to pass the de minimis threshold of step two.”); Russell v. Colvin,
4 9 F.Supp.3d 1168, 1186-87 (D. Or. 2014) (“On review, the court must determine whether the ALJ
5 had substantial evidence to find that the medical evidence clearly established that Ms. Russell did
6 not have a medically severe impairment or combination of impairments.”); cf. Ukolov, 420 F.3d
7 at 1006 (“Because none of the medical opinions included a finding of impairment, a diagnosis, or
8 objective test results, Ukolov failed to meet his burden of establishing disability.”).

9 Nor can the court find the ALJ’s errors harmless. An error is harmless only if it is
10 “inconsequential” to the ALJ’s “ultimate nondisability determination.” Stout v. Comm’r, Soc.
11 Sec. Admin., 454 F.3d 1050, 1055 (9th Cir. 2006); see also Molina v. Astrue, 674 F.3d 1104,
12 1115 (9th Cir. 2012) (error harmless if “there remains substantial evidence supporting the ALJ’s
13 decision and the error does not negate the validity of the ALJ’s ultimate conclusion.”). An ALJ’s
14 failure to consider an impairment “severe” at step two is harmless if the ALJ considers all
15 impairments – regardless of severity – in the subsequent steps of the sequential analysis. See
16 Lewis v. Astrue, 498 F.3d 909, 911 (9th Cir. 2007) (finding step two error harmless as the ALJ
17 specifically discussed plaintiff’s bursitis and its effects when identifying the basis for limitations
18 in plaintiff’s RFC). Here, the ALJ did not consider fibromyalgia or Lyme disease in the
19 subsequent steps of the sequential evaluation.

20 Accordingly, the court finds that plaintiff is entitled to summary judgment on the claim
21 that the ALJ erred at step two of the sequential evaluation by finding that plaintiff’s fibromyalgia
22 and Lyme disease were not severe impairments.

23 **II. Plaintiff’s Subjective Testimony**

24 The Ninth Circuit has summarized the ALJ’s task with respect to assessing a claimant’s
25 credibility as follows:

26 To determine whether a claimant’s testimony regarding subjective
27 pain or symptoms is credible, an ALJ must engage in a two-step
28 analysis. First, the ALJ must determine whether the claimant has
presented objective medical evidence of an underlying impairment
which could reasonably be expected to produce the pain or other

1 symptoms alleged. The claimant, however, need not show that her
2 impairment could reasonably be expected to cause the severity of the
3 symptom she has alleged; she need only show that it could
4 reasonably have caused some degree of the symptom. Thus, the ALJ
5 may not reject subjective symptom testimony . . . simply because
6 there is no showing that the impairment can reasonably produce the
7 degree of symptom alleged.

8 Second, if the claimant meets this first test, and there is no evidence
9 of malingering, the ALJ can reject the claimant’s testimony about the
10 severity of her symptoms only by offering specific, clear and
11 convincing reasons for doing so[.]

12 Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007) (citations and quotation marks
13 omitted). “The clear and convincing standard is the most demanding required in Social Security
14 cases.” Moore v. Commissioner of Social Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002). “At
15 the same time, the ALJ is not required to believe every allegation of disabling pain, or else
16 disability benefits would be available for the asking[.]” Molina v. Astrue, 674 F.3d 1104, 1112
17 (9th Cir. 2012).

18 “The ALJ must specifically identify what testimony is credible and what testimony
19 undermines the claimant’s complaints.”⁷ Valentine v. Commissioner Social Sec. Admin., 574
20 F.3d 685, 693 (9th Cir. 2009) (quoting Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d 595,
21 599 (9th Cir. 1999)). In weighing a claimant’s credibility, an ALJ may consider, among other
22 things, the “[claimant’s] reputation for truthfulness, inconsistencies either in [claimant’s]
23 testimony or between [her] testimony and [her] conduct, [claimant’s] daily activities, [her] work
24 record, and testimony from physicians and third parties concerning the nature, severity, and effect
25 of the symptoms of which [claimant] complains.” Thomas v. Barnhart, 278 F.3d 947, 958-59
26 (9th Cir. 2002) (modification in original) (quoting Light v. Soc. Sec. Admin., 119 F.3d 789, 792

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28 ⁷ In March 2016, Social Security Ruling (“SSR”) 16-3p went into effect. “This ruling makes clear what our precedent already required: that assessments of an individual’s testimony by an ALJ are designed to ‘evaluate the intensity and persistence of symptoms after the ALJ finds that the individual has a medically determinable impairment(s) that could reasonably be expected to produce those symptoms,’ and not to delve into wide-ranging scrutiny of the claimant’s character and apparent truthfulness.” Trevizo v. Berryhill, 871 F.3d 664, 679 (9th Cir. 2017) (quoting SSR 16-3p) (alterations omitted).

1 (9th Cir. 1997)). If the ALJ’s credibility finding is supported by substantial evidence in the
2 record, the court “may not engage in second-guessing.” Id.

3 Here, the ALJ recounted plaintiff’s testimony at length noting, in relevant part, that
4 plaintiff “alleges a combination of impairments causing weakness, fatigue and chronic pain,
5 limiting activities of daily living, social functioning, and the capacity to understand, remember or
6 apply information as well as maintain concentration, persistence and pace.” (Tr. at 1577.) That
7 plaintiff’s “symptoms are severe flu symptoms, muscle pain and spasms, cramping, fatigue,
8 headaches, stiff neck, weakness in legs, swallowing difficulty, anxiety, and difficulty
9 concentrating.” (Id.)

10 After recounting plaintiff’s testimony the ALJ found that plaintiff’s medically
11 determinable impairments could reasonably be expected to cause the symptoms alleged, but that
12 plaintiff’s statements concerning the intensity, persistence, and limiting effects of those symptoms
13 were “not entirely consistent with the objective medical evidence and other evidence in the record
14 for the reason explained in [the] decision.”⁸ (Id. at 1578.)

15 Although the ALJ’s analysis of plaintiff’s testimony is lengthy, ultimately the ALJ offered
16 only two reasons for rejecting plaintiff’s testimony. First the ALJ relied on an asserted lack of
17 medical evidence in support. In this regard, the ALJ stated that “physical exams and [] medical
18 imagery do not correspond to the level of pain and limitation alleged while symptoms are
19 controlled and improved with the treatment received.” (Id.) The ALJ went on to cite to an
20 “unremarkable” chemistry panel, “a normal abdomen ultrasound examination,” a normal
21 “esophagram,” etc. (Id.)

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23 ⁸ “ALJs routinely include this statement in their written findings as an introduction to the ALJ’s
24 credibility determination” before “identify[ing] what parts of the claimant’s testimony were not
25 credible and why.” Treichler v. Comm’r of Soc. Sec. Admin., 775 F.3d 1090, 1103 (9th Cir.
26 2014). “The use of this generic language is not itself reversible error . . . but it inverts the
27 responsibility of an ALJ, which is first to determine the medical impairments of a claimant based
28 on the record and the claimant’s credible symptom testimony and only then to determine the
claimant’s RFC. By rejecting a claimant’s subjective symptoms ‘to the extent they are
inconsistent with the above residual functional capacity assessment,’ the agency indicates that it
is failing properly to incorporate a claimant’s testimony regarding subjective symptoms and pain
into the RFC finding, as it is required to do.” Trevizo, 871 F.3d at 679 n.6.

1 After continuing a lengthy recounting of various items of medical evidence, the ALJ
2 concluded:

3 In light of these objective findings showing few significant and
4 recurrent symptoms of abnormalities, upon physical examination and
5 in the diagnostic testing and medical imagery, the claimant's alleged
6 symptoms are not consistent with and supported by the evidence of
7 record. Subjective complaints are outweighed by the objective
8 findings in this medical record.

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10 Based on this record the undersigned finds the evidence does not
11 fully support the functional limitations alleged by the claimant.

12 (Id. at 1582.)

13 However, "after a claimant produces objective medical evidence of an underlying
14 impairment, an ALJ may not reject a claimant's subjective complaints based solely on a lack of
15 medical evidence to fully corroborate the alleged severity" of the symptoms. Burch v. Barnhart,
16 400 F.3d 676, 680 (9th Cir. 2005); see also Putz v. Astrue, 371 Fed. Appx. 801, 802-03 (9th Cir.
17 2010) ("Putz need not present objective medical evidence to demonstrate the severity of her
18 fatigue."); Bunnell v. Sullivan, 947 F.2d 341, 347 (9th Cir. 1991) ("If an adjudicator could reject
19 a claim for disability simply because a claimant fails to produce medical evidence supporting the
20 severity of the pain, there would be no reason for an adjudicator to consider anything other than
21 medical findings.").

22 The second reason offered by the ALJ for rejecting plaintiff's testimony was a reliance on
23 Dr. Vu's testimony that plaintiff, "while facing some limits in working capacities, retains
24 significant functionality to work."⁹ (Tr. at 1582.) As noted above, however, Dr. Vu was a
25 nonexamining physician whose opinion cannot constitute a clear and convincing reason to reject
26 plaintiff's testimony. See Moore v. Commissioner of Social Sec. Admin., 278 F.3d 920, 924 (9th
27 Cir.2002) ("The clear and convincing standard is the most demanding required in Social Security

28 ⁹ The ALJ's decision to reject plaintiff's testimony may have also been influenced by the
erroneous finding that plaintiff's fibromyalgia and Lyme disease were not severe impairments.
See Buell v. Berryhill, 716 Fed. Appx. 600, 602 (9th Cir. 2017) ("If the ALJ had in front of him a
valid diagnosis of fibromyalgia, it stands to reason that Buell's symptoms and behavior would
have appeared in a different and more favorable light.").

1 cases. It is the same as that required to reject the uncontradicted opinion of a treating
2 physician.”); Reed v. Astrue, No. 2:10-cv-2282 DAD, 2013 WL 599950, at *5 (E.D. Cal. Feb. 14,
3 2013) (“Dr. Jaituni, however, was a nonexamining physician and his opinion cannot constitute a
4 clear and convincing reason to reject plaintiff’s testimony about the severity of her symptoms.”).

5 For the reasons stated above, the court finds that the ALJ failed to offer a clear and
6 convincing reason for rejecting plaintiff’s testimony. Accordingly, plaintiff is also entitled to
7 summary judgment on this claim.

8 CONCLUSION

9 After having found error, “[t]he decision whether to remand a case for additional
10 evidence, or simply to award benefits[,] is within the discretion of the court.” Trevizo, 871 F.3d
11 at 682 (quoting Sprague v. Bowen, 812 F.2d 1226, 1232 (9th Cir. 1987)). A case may be
12 remanded under the “credit-as-true” rule for an award of benefits where:

13 (1) the record has been fully developed and further administrative
14 proceedings would serve no useful purpose; (2) the ALJ has failed to
15 provide legally sufficient reasons for rejecting evidence, whether
16 claimant testimony or medical opinion; and (3) if the improperly
discredited evidence were credited as true, the ALJ would be
required to find the claimant disabled on remand.

17 Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir. 2014).

18 Even where all the conditions for the “credit-as-true” rule are met, the court retains
19 “flexibility to remand for further proceedings when the record as a whole creates serious doubt as
20 to whether the claimant is, in fact, disabled within the meaning of the Social Security Act.” Id. at
21 1021; see also Dominguez v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) (“Unless the district court
22 concludes that further administrative proceedings would serve no useful purpose, it may not
23 remand with a direction to provide benefits.”); Treichler v. Commissioner of Social Sec. Admin.,
24 775 F.3d 1090, 1105 (9th Cir. 2014) (“Where . . . an ALJ makes a legal error, but the record is
25 uncertain and ambiguous, the proper approach is to remand the case to the agency.”).

26 Here, plaintiff’s claim has been pending for almost eight years. Having previously
27 erroneously evaluated plaintiff’s claim the ALJ again erred. Under these circumstances the court
28 is reluctant to send this matter back to the ALJ for yet a third bite at the apple. See, e.g., Benecke

1 v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (“Allowing the Commissioner to decide the issue
2 again would create an unfair ‘heads we win; tails, let’s play again’ system of disability benefits
3 adjudication.”); Moisa v. Barnhart, 367 F.3d 882, 887 (9th Cir. 2004) (“The Commissioner,
4 having lost this appeal, should not have another opportunity to show that Moisa is not credible
5 any more than Moisa, had he lost, should have an opportunity for remand and further proceedings
6 to establish his credibility.”).

7 Moreover, not only has the ALJ repeatedly erred but the ALJ has repeatedly committed
8 the same errors. In this regard, in remanding this matter the first time the court found that the
9 ALJ improperly rejected Dr. Mora’s opinion at step two of the sequential evaluation and
10 improperly rejected plaintiff’s subjective testimony. (Tr. at 1685-87.) Additionally, at the June
11 18, 2018 hearing a Vocational Expert testified that if Dr. Mora’s opinion were credited there
12 would be no jobs that plaintiff could perform. (Id. at 1634.)

13 For these reasons, the court finds that the record has been fully developed and further
14 administrative proceedings would serve no useful purpose. The ALJ failed to provide legally
15 sufficient reasons for rejecting Dr. Mora’s opinion and plaintiff’s testimony. If that evidence
16 were credited as true, the ALJ would be required to find plaintiff disabled on remand. And the
17 record as a whole does not create serious doubt as to whether plaintiff is, in fact, disabled within
18 the meaning of the Social Security Act.

19 Accordingly, IT IS HEREBY ORDERED that:

- 20 1. Plaintiff’s motion for summary judgment (ECF No. 13) is granted;
- 21 2. Defendant’s cross-motion for summary judgment (ECF No. 14) is denied;
- 22 3. The Commissioner’s decision is reversed;
- 23 4. This matter is remanded for the payment of benefits; and
- 24 5. The Clerk of the Court shall enter judgment for plaintiff and close this case.

25 Dated: September 14, 2020

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DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE