

1 if the claimant has such an impairment, the claimant is
2 presumed disabled and the claim is granted;

3 Step 4 If the claimant's impairment is not listed in the regulations,
4 determination whether the impairment prevents the
5 claimant from performing past work in light of the
6 claimant's residual functional capacity; if not, the claimant
7 is presumed not disabled and the claim is denied;

8 Step 5 If the impairment prevents the claimant from performing
9 past work, determination whether, in light of the claimant's
10 residual functional capacity, the claimant can engage in
11 other types of substantial gainful work that exist in the
12 national economy; if so, the claimant is not disabled and
13 the claim is denied.

14 See 20 C.F.R. §§ 404.1520 (a)-(f) and 416.920(a)-(f).

15 To qualify for benefits, the claimant must establish the inability to engage in
16 substantial gainful activity due to a medically determinable physical or mental impairment which
17 has lasted, or can be expected to last, a continuous period of not less than 12 months. See 42
18 U.S.C. § 1382c(a)(3)(A). The claimant must provide evidence of a physical or mental impairment
19 of such severity the claimant is unable to engage in previous work and cannot, considering the
20 claimant's age, education, and work experience, engage in any other kind of substantial gainful
21 work which exists in the national economy. See Quang Van Han v. Bower, 882 F.2d 1453, 1456
22 (9th Cir. 1989). The claimant has the initial burden of proving the existence of a disability. See
23 Terry v. Sullivan, 903 F.2d 1273, 1275 (9th Cir. 1990).

24 The claimant establishes a prima facie case by showing that a physical or mental
25 impairment prevents the claimant from engaging in previous work. See Gallant v. Heckler, 753
26 F.2d 1450, 1452 (9th Cir. 1984); 20 C.F.R. §§ 404.1520(f) and 416.920(f). If the claimant
27 establishes a prima facie case, the burden then shifts to the Commissioner to show the claimant
28 can perform other work existing in the national economy. See Burkhart v. Bowen, 856 F.2d 1335,
1340 (9th Cir. 1988); Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); Hammock v.
Bowen, 867 F.2d 1209, 1212-1213 (9th Cir. 1989).

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1 **III. DISCUSSION**

2 In her opening brief, Plaintiff argues: (1) the ALJ failed to consider whether
3 Plaintiff’s seizure disorder meets or medically equals Listing 11.02B; (2) the ALJ improperly
4 relied on the outdated opinion of a non-examining agency doctor; (3) the ALJ erred in
5 determining Plaintiff’s statements and testimony were not credible; and (4) the ALJ failed to
6 properly consider lay witness evidence from Plaintiff’s husband and daughter.

7 **A. Listing of Impairments**

8 As to the ALJ’s findings at Step 3, Plaintiff argues: (1) the ALJ failed to make
9 specific findings regarding Listing 11.02B; and (2) the ALJ failed to properly evaluate difficulties
10 Plaintiff had due to cyclical vomiting syndrome. Although the Court concludes that it would not
11 normally be error for the ALJ to neglect to explicitly list why Plaintiff did not satisfy the criteria
12 under Listing 11.02B, the Court determines that the ALJ *did* here err in failing to develop the
13 record regarding Plaintiff’s cyclical vomiting syndrome.

14 **1. Evaluating the Listings**

15 The Social Security Regulations “Listing of Impairments” is comprised of
16 impairments to fifteen categories of body systems that are severe enough to preclude a person
17 from performing gainful activity. 20 C.F.R. § 404.1520(d); Young v. Sullivan, 911 F.2d 180,
18 183-84 (9th Cir. 1990). Conditions described in the listings are considered so severe that they
19 are irrebuttably presumed disabling. 20 C.F.R. § 404.1520(d); see Lester v. Chater, 81 F.3d
20 821, 828 (9th Cir. 1995). In meeting or equaling a listing, each requirement of that listing must
21 be met. Key v. Heckler, 754 F.2d 1545, 1550 (9th Cir. 1985).

22 The claimant bears the burden of producing medical evidence that establishes all
23 of the requisite medical findings that his or her impairments meet or equal a particular listing.
24 Bowen v. Yuckert, 482 U.S 137, 146, n. 5 (1987). If the claimant is alleging equivalency to a
25 listing, the claimant must proffer a theory, plausible or otherwise, as to how his or her
26 combined impairments equal a listing. Lewis v. Apfel, 236 F.3d 503, 517 (9th Cir. 2001).

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1 **2. Listing 11.02B**

2 At Step 3, the ALJ determined that Plaintiff’s impairments do not, singly or in
3 combination, meet or medically equal any impairment outlined in the Listings, specifically
4 Listings 5.00 and 11.00. See CAR 16. The ALJ specifically stated:

5 The severity of the claimant’s physical impairments, considered singly and
6 in combination, does not meet or medically equal the criteria of any
7 impairment listed in sections 5.00 and 11.00, as demonstrated by the
8 objective findings discussed below. No treating or examining physician
9 recorded findings equivalent in severity to the criteria of any listed
10 impairment, nor does the evidence show medical findings that are the same
11 or equivalent to those of any listed impairment.

9 Id.

10 Plaintiff contends the ALJ failed to analyze her case under Listing 11.02B, which
11 relates to epilepsy. Listing 11.02B requires the following: “Dyscognitive seizures
12 (see 11.00H1b), occurring at least once a week for at least 3 consecutive months (see 11.00H4)
13 despite adherence to prescribed treatment (see 11.00C).” 20 C.F.R. pt. 404, subpt. P, app. 1, §
14 11.00 (Neurological – Adult).

15 “Dyscognitive seizures” are defined as:

16 Dyscognitive seizures are characterized by alteration of consciousness
17 without convulsion or loss of muscle control. During the seizure, blank
18 staring, change of facial expression, and automatisms (such as lip
19 smacking, chewing or swallowing, or repetitive simple actions, such as
20 gestures or verbal utterances) may occur. During its course, a dyscognitive
21 seizure may progress into a generalized tonic-clonic seizure (see
22 11.00H1a).

20 C.F.R. pt. 404, subpt. P, app. 1, § 11.00H1b.

21 With respect to counting seizures over the required periods of time specified in
22 Listing 11.02B, the regulations provide:

23 Counting seizures The period specified in 11.02A, B, or C cannot begin
24 earlier than one month after you began prescribed treatment. The required
25 number of seizures must occur within the period we are considering in
26 connection with your application or continuing disability review. When we
27 evaluate the frequency of your seizures, we also consider your adherence to
28 prescribed treatment (see 11.00C). . . .

20 C.F.R. pt. 404, subpt. P, app. 1, § 11.00H4.

1 The regulations further provide as to counting seizures during the specified time
2 period that the Commissioner will: (a) count multiple seizures occurring in a 24-hour period as
3 one seizure; (b) count status epilepticus (a continuous series of seizures without return to
4 consciousness between seizures) as one seizure; (c) count a dyscognitive seizure that progresses
5 into a generalized tonic-clonic seizure as one generalized tonic-clonic seizure; (d) not count
6 seizures that occur during a period when the claimant is not adhering to prescribed treatment; and
7 (e) not count psychogenic nonepileptic seizures or pseudoseizures under 11.02. See id.

8 Finally, the regulations state that the phrase “[d]espite adherence to prescribed
9 treatment’ means that you have taken medication(s) or followed other treatment procedures for
10 your neurological disorder(s) as prescribed by a physician for three consecutive months but
11 your impairment continues to meet the other listing requirements despite this treatment.” 20
12 C.F.R. pt. 404, subpt. P, app. 1, § 11.00C.

13 **3. Specific Findings**

14 Plaintiff contends the ALJ failed to make specific findings under Listing 11.02B.
15 According to Plaintiff, the ALJ failed to address any of the 11.02B requirements, such as the type
16 of seizures Plaintiff had, the frequency of her seizures, and whether Plaintiff followed her
17 prescribed treatment. ECF No. 12-1, pg. 15. Instead, the ALJ focused on normal neurological
18 findings and laboratory studies not required under Listing 11.02B. Id.

19 Plaintiff also contends that the facts summarized by the ALJ “support a finding
20 that Listing 11.02B is met in this case. (Tr. 18-22).” Id. Plaintiff listed evidence that she contends
21 supports a finding that Listing 11.02B is satisfied. Id. She contends that the ALJ did not
22 appropriately state why the evidence did not satisfy Listing 11.02B. Id. Plaintiff’s listed the
23 following evidence:

- 24 • “Medical records prior to the alleged onset date noted a history of
25 cyclical vomiting and seizures as well as emergency room visits for
26 cyclical vomiting symptoms.” (Tr. 18).
- 27 • “Emergency room records on January 30, 2016 showed she
28 presented with complaints of abdominal pain, nausea, vomiting and
 loose stools for four days as well as being unable to keep her
 Keppra down[.]” Id. (*citing* (Tr. 548)).
- “Emergency room visits in May 2016 showed similar findings” Id.
 (*citing* (Tr. 529, 535-36)).

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- “She presented with her primary provider on September 20, 2016 for a follow up after being at the hospital that day for vomiting and seizures. The physical examination” noted that she had a “chronically ill and too thin appearance as well as neck tenderness[.]” *Id.* (citing (Tr. 680-81)).
- “Emergency room records on June 27, 2016 showed she presented with cyclic vomiting flare for two days with abdominal pain and diarrhea as well as reports of a grand mal seizure that day because she had been unable to keep her seizure medication down[.]” *Id.* (citing (Tr. 518)).
- “[E]mergency room records on September 1, 2016 noted her spouse reported she had a grand mal seizure while in triage that lasted forty- five seconds.” *Id.* (citing (Tr. 573)).
- At a “medical visit with her primary provider on October 13, 2016, she reported no bad seizures since her last emergency room visit but that she had small ones once or twice a week with constant headaches[.]” *Id.* (citing Tr. 676)).
- “She did present at the emergency room on August 12, 2017 with complaints of a seizure-like episode that occurred earlier in the afternoon that lasted for ten minutes as well as multiple episodes of vomiting over the prior five days.” *Id.* (citing Tr. 774)).
- “She presented again at the emergency room on August 14, 2017 with complaints of seizure and one episode of vomiting after taking Keppra as well as complaints of paresthesias in her left side” and a “physical examination showed generalized tenderness” (Tr. 21) (citing Tr. 769, 771)).
- “An examination on August 22, 2017, when she presented with persistent seizure activity for two hours, showed she was confused and post ictal[.]” *Id.* (citing Tr. 766)).
- “She returned to the emergency room on August 28, 2017 with complaints of seizures as well as anxiety and paranoia after[.]” *Id.* (citing Tr. 754)).
- “[N]otes showed she had several seizures while in the emergency room[.]” *Id.* (citing Tr. 755)).
- Another emergency room visit for seizures occurred on “January 17, 2018, when she reported having six seizures that day despite tolerating her anti-epileptic medications[.]” (Tr. 22) (citing (Tr. 864)).
- She presented to the emergency room again on January 20, 2018 with complaints of vomiting and multiple grand mal seizures, stating she had not been able to keep down Keppra for two days. *Id.* (citing (Tr. 854)).

1 Defendant first replies that substantial evidence supports the ALJ's determination
2 that Plaintiff did not have an impairment meeting or equaling the criteria under Listing 11.02B.
3 ECF No. 13, pg. 14. Defendant then discusses the evidence that the ALJ summarized. Id. at 14–
4 16. Most pointedly, Defendant responds that an ALJ does not need to specifically state what
5 evidence supports their conclusion that a claimant's impairments did not meet or equal a listed
6 impairment. Id. at 16–17. So long as the ALJ's determination is supported by an adequate
7 statement of the foundations on which the factual conclusions are based (e.g., a summary and
8 explanation of all the relevant evidence), the ALJ's decision may stand. ECF No. 13, pg. 16–17.

9 Defendant's point is a fair one. The Ninth Circuit has specifically held that it is
10 unnecessary for an ALJ to explicitly state why a claimant failed to satisfy *every* different section
11 of the listing of impairments. Gonzalez v. Sullivan, 914 F.2d 1197, 1200–01 (9th Cir. 1990).
12 Though, the Court notes that the Ninth Circuit's holding does not stand for the proposition that an
13 ALJ can permissibly provide *no* explanation. Laborin v. Berryhill, 692 F. App'x 959, 961–62 (9th
14 Cir. 2017); James F. v. Saul, No. 1:19-CV-00486-CWD, 2021 WL 816729, at *6 (D. Idaho Mar.
15 3, 2021). An ALJ must still discuss and evaluate evidence that supports her conclusion, and a
16 single, bare conclusion is likely insufficient. See, e.g., Laborin, 692 F. App'x at 961–62.

17 Here Plaintiff co argues that the ALJ failed in not explicitly explaining, at Step 3,
18 why Plaintiff's impairments did not meet Listing 11.02B. Gonzalez, 914 F.2d at 1200–01; see
19 Delgado v. Berryhill, No. 1:16-cv-00578-GSA, 2017 WL 2930847, at *5 (E.D. Cal. July 10,
20 2017). Gonzalez is instructive. There, an ALJ did not overtly state what evidence supported the
21 conclusion that appellant's impairments did not meet or exceed the Listing of Impairments.
22 Gonzalez, 914 F.2d at 1200. But the ALJ issued an extensive, five-page summary of the record.
23 Id. at 1200. The ALJ summarized both the information from the doctors and the claimant's
24 testimony. Id. The ALJ concluded the record substantiated some of the claimant's complaints. Id.
25 The Ninth Circuit held that the ALJ's multi-page evaluation of the medical evidence was a
26 satisfactory statement of the foundations on which the ALJ's factual conclusions were based (i.e.,
27 the ALJ's determination that the meet listing criteria). Id. at 1201.

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1 The ALJ’s opinion is similar here. CAR at 16–23. The ALJ did not, under Step 3,
2 specifically state what evidence indicated Plaintiff did not meet or equal Listing 11.02B’s criteria.
3 CAR 16. But the ALJ did note that no treating or examining physician had recorded no equivalent
4 findings, and that the medical evidence indicated no findings meeting or equaling the criteria. Id.
5 Then, the ALJ spent six pages meticulously explaining the medical evidence. Id.

6 Under normal circumstances, the Court would be inclined to resolve whether, even
7 if not ideally explicit, the ALJ’s decision is sufficient under Gonzalez. See Gonzalez, 914 F.2d at
8 1200–01. But, as explained below, because the Court determines that the ALJ did not adequately
9 resolve ambiguities in the record, she must also reassess the criteria under Listing 11.02B.

10 **4. Cyclical Vomiting Syndrome and its Effects**

11 As stated just above, although the Court concludes that the ALJ’s lack of an
12 explicit explanation at Step 3 would not usually be error given the ALJ’s extensive discussion of
13 Plaintiff’s medical history, the Court determines that the ALJ’s decision cannot stand due to
14 ambiguities and inadequacies in the evidence that required the ALJ to develop the record.

15 Plaintiff argues that the ALJ failed to properly address difficulties she experienced
16 following prescribed treatment due to cyclic vomiting syndrome. According to Plaintiff:

17 Another aspect of the case the ALJ should be instructed to properly
18 consider relates to the interaction between Ms. Facey’s conditions. The ALJ
19 noted without discussion that Ms. Facey has vomited up her Keppra on
20 multiple occasions. (Tr. 20-21). Vomiting up a drug and potentially
21 preventing it from taking effect provides a valid basis for not being able to
22 comply with prescribed treatment. Indeed, the ALJ related that an
23 emergency room examiner in August 2017 noted Ms. Facey was “most
24 likely having a seizure secondary to her running out of Clonazepam and
25 throwing up her Keppra.” (Tr. 21).

26 Despite this evidence, the ALJ claimed that Ms. Facey’s “seizures
27 are under control when her medications are at a therapeutic level.” (Tr. 23).
28 This finding is neither substantiated by the record nor consistent with the
ALJ’s discussion of the evidence, discussed above. The ALJ’s own
summary of evidence also shows that emergency room visits for seizures
continued to occur, such as on January 17, 2018, when six seizures were
reported that day despite Ms. Facey tolerating her anti-epileptic
medications. (Tr. 864); *see also, e.g.*, (Tr. 474) (May 12, 2016 recounting
that when Ms. Facey “misses medication [she] gets actual grand mal
seizures” but “[e]ven with Keppra [she] has small seizure[s]”); (Tr. 847-48)
(September 5, 2017, notation from Dr. Rabiee that Ms. Facey’s
“overall condition has been worse” since her last visit and describing her
seizures as “intractable” and her convulsions refractory to the medication
she was being given, leading to referral to Stanford Epilepsy Center).

1 The ALJ’s reliance on the presumed effectiveness of intravenous
2 Keppra administered in an emergency room setting is also misplaced since
3 intravenous administration was not established as a regular treatment
4 option. Notably, on January 20, 2018, three days after she continued with
5 seizures or seizure-like episodes despite tolerating her anti-epileptic
6 medications, Ms. Facey presented to the emergency room again with
7 complaints of vomiting and multiple grand mal seizures, noting that she had
8 not been able to keep down Keppra for two days. (Tr. 854). The ALJ’s
9 assertion is thus undermined by the record which does [not] show that her
10 condition can be controlled successfully by an anti-epileptic drug.

11 ECF No. 12-1, pgs. 17-18.

12 Defendant responds that Plaintiff does not explain how the above argument relates
13 to Listing 11.02B. ECF No. 13, pgs. 17–18. Although 11.02B requires adherence to prescribed
14 treatment, the ALJ did not find that Plaintiff failed to comply with any treatment. Id. at 17.

15 Rather, the ALJ found Plaintiff simply did not meet the Listing’s criteria. Id.

16 The record is inadequate, or at best ambiguous, as to Plaintiff’s ability to control
17 her seizures with Keppra. To the ALJ’s credit, she highlights an instance from the record
18 indicating that intravenous Keppra had positive effects in managing Plaintiff’s seizures while
19 Plaintiff was in the emergency room. CAR 21. But she notes a greater number of instances—at
20 least seven just in the summary—in which Plaintiff cannot keep her Keppra down because of her
21 vomiting. CAR 18–22. In closing her summary of the evidence, the ALJ then concludes a few
22 things about Keppra. CAR 23–24. She states both that a physician had attributed Plaintiff’s
23 seizures to an inability to keep down Keppra, *and* that Plaintiff does not have seizures when she
24 receives intravenous Keppra. CAR 23. The ALJ noted that the Plaintiff’s seizures are controlled
25 when her Keppra is kept at a therapeutic level. Id. The ALJ also stated that there were no
26 laboratory studies demonstrating whether Plaintiff’s Keppra was consistently at therapeutic levels.
27 CAR 23–24.

28 The ALJ erred. First, it is unclear whether the ALJ relies on Keppra’s ostensible
29 management of Plaintiff’s seizures generally or only intravenously. See CAR 23–24. It is true that
30 that impairments controlled effectively with medication are not disabling for the purposes of
31 determining eligibility for SSI benefits. Warre v. Cmm’r of Soc. Sec. Admin., 439 F.3d 1001,
32 1006 (9th Cir. 2006); see Henry v. Saul, 835 F. App’x 924, 924 (9th Cir. 2021). But the ALJ did

1 not explain with sufficient precision her reasoning on how Plaintiff is able to control her seizures
2 with medication in the light of her cyclic vomiting. See CAR 23–24.

3 Even though the ALJ was not required at Step 3 to explicitly state why Plaintiff did
4 not meet every section of Listing 11.02B, that exception does not vitiate the ALJ’s more general
5 duty to explain her reasoning in a manner that permits meaningful review. See Brown-Hunter v.
6 Colvin, 806 F.3d 487, 492 (9th Cir. 2015). The ALJ’s most definitive conclusion was that
7 Plaintiff’s seizures are controlled once her Keppra is at a therapeutic level. CAR 23. Be that as it
8 may, the ALJ did not resolve the apparent discrepancy between Plaintiff’s inability to keep
9 Keppra in her stomach due to cyclic vomiting, and the possibility that Keppra can *only* manage
10 Plaintiff’s seizures if Plaintiff receives it intravenously. Id. at 23–24. Nor does the ALJ actually
11 explain whether Plaintiff is able to access and follow an effective treatment of intravenous Keppra
12 such that a finding of disability within the meaning of the Social Security Act is precluded. See
13 Warre, 439F.3d at 1006. The ALJ’s lone cited instance of intravenous Keppra’s positive
14 management of Plaintiff’s seizures in the emergency room, and her brief conclusion, that Keppra
15 at therapeutic levels manages Plaintiff’s seizures, does not lend itself to meaningful review under
16 the circumstances that the Court has identified.

17 Second, in the above regard, there is an open question of whether Plaintiff can
18 manage her seizures with Keppra either orally or intravenously. If she cannot, and her seizures
19 remain unchecked, that fact could affect Plaintiff’s impairments and the determination of residual
20 functional capacity. E.g., 20 C.F.R. §§ 416.920, .945. There is thus an ambiguity in the record that
21 the ALJ was required to address. ALJs have a duty to further and fully develop the record that is
22 triggered by ambiguous evidence or to identify whether the record is inadequate to permit proper
23 evaluation of evidence. McLeod v. Astrue, 640 F.3d 881, 885 (9th Cir. 2011); Tonapetyan v.
24 Halter, 242 F.3d 1144, 1150 (9th Cir. 2001); Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir.
25 2001).

26 It is the ALJ's duty to investigate facts and develop the arguments both for and
27 against granting benefits. E.g., Sims v. Apfel, 530 U.S. 103, 111 (2000). An ALJ may not merely
28 assume the role of umpire; the ALJ must scrupulously and conscientiously probe into the matter

1 and actively explore for all relevant facts. See Garcia v. Comm’r of Soc. Sec., 768 F.3d 925, 930–
2 31 (9th Cir. 2014); Widmark v. Barnhart, 454 F.3d 1063, 1068 (9th Cir. 2006). If there is an
3 ambiguity in the evidence or the record is inadequate for proper evaluation of evidence, the ALJ
4 must undertake appropriate inquiry. See Tonapetyan, 242 F.3d at 1151 (citing Smolen v. Chater,
5 80 F.3d 1273, 1288 (9th Cir. 1996)).

6 Although it is Plaintiff who bears the initial burden of proving disability, the
7 burden of proof should not be confused with the ALJ’s duty to develop an appropriate record
8 where the record is otherwise ambiguous. See, e.g., Hilliard v. Barnhart, 442 F. Supp. 813, 817
9 (N.D. Cal. 2006). Too, a specific finding of ambiguity or inadequacy is not required to trigger the
10 duty develop the record if the record itself establishes ambiguity or inadequacy. McLeod, 640
11 F.3d at 885. The ALJ may discharge the duty in any number of ways, including subpoenaing the
12 claimant's physicians, submitting questions to physicians, continuing the hearing, or ordering a
13 consultative examination. E.g., Armstrong v. Comm'r of Soc. Sec. Admin., 160 F.3d 587, 590
14 (9th Cir. 1998); Hilliard, 442 F. Supp. 2d at 817.

15 In the instant case, the ALJ ostensibly relied heavily on Kepra’s effects on
16 Plaintiff’s seizures in arriving at her determination of Plaintiff’s residual functional capacity (and
17 possibly in determining whether Plaintiff satisfied Listing 11.02B). CAR 23–24. That reliance is
18 unwarranted because there is currently insufficient clarity as to Plaintiff’s ability to control her
19 seizures with Kepra. The ALJ concluded that Plaintiff can control her seizures with Kepra at
20 therapeutic levels, but the record shows more complicated circumstances than that conclusion
21 credits. The finding that Plaintiff can control her seizures with therapeutic levels of Kepra is not
22 supported by the one cited instance of effective intravenous Kepra administered in an emergency
23 room.² There is no indication or determination of whether Plaintiff has had regular access to
24 intravenously administered Kepra as a treatment, and the discrepancy of whether Plaintiff can
25 tolerate Kepra any other way due to cyclic vomiting remains outstanding. The ALJ herself

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27 ² To the extent that the record might offer additional evidence, it is unclear that the ALJ relied upon it and the Court
28 can only uphold the ALJ’s decision on the grounds upon which she relied. Revels v. Berryhill, 874 F.3d 648, 654
(9th Cir. 2017). More generally, too, the Court may not affirm the Commissioner’s decision simply by isolating a
specific quantum of supporting evidence. See Garrison, 759 F.3d at 1009.

1 conceded that there were no series of laboratory studies demonstrating whether Plaintiff's Keppra
2 had been maintained at therapeutic levels. CAR 23–24. The record as it stands is inadequate to
3 determine Plaintiff's seizures may be controlled medicinally, thereby precluding disability.

4 The Court concludes that the evidence the ALJ relied on was incomplete and the
5 ALJ did not fully develop the record. Although the ALJ may consider the effects of medication on
6 Plaintiff's impairments, under the circumstances here the ALJ's reliance on ambiguous evidence
7 warrants remand. The Court will thus remand to the ALJ for further development of the record
8 concerning Plaintiff's ability to take Keppra and Keppra's effects on Plaintiff's seizures. The ALJ
9 must reassess Plaintiff's impairments and residual functional capacity as appropriate.

10 **B. Medical Opinions**

11 **1. Standard for Reviewing Medical Opinions**

12 “The ALJ must consider all medical opinion evidence.” Tommasetti v. Astrue, 533
13 F.3d 1035, 1041 (9th Cir. 2008) (citing 20 C.F.R. § 404.1527(b)). If an ALJ rejects a medical
14 opinion, they err by not doing so explicitly. See Garrison v. Colvin, 759 F.3d 995, 1012 (9th Cir.
15 2014). The ALJ also errs by failing to set forth sufficient reasons for crediting one medical
16 opinion over another. See id.

17 Under the regulations, only “licensed physicians and certain qualified specialists”
18 are considered acceptable medical sources. 20 C.F.R. § 404.1513(a); see also Molina v. Astrue,
19 674 F.3d 1104, 1111 (9th Cir. 2012). Where the acceptable medical source opinion is based on an
20 examination, the “physician’s opinion alone constitutes substantial evidence, because it rests on
21 his own independent examination of the claimant.” Tonapetyan v. Halter, 242 F.3d 1144, 1149
22 (9th Cir. 2001). The opinions of non-examining professionals may also constitute substantial
23 evidence when the opinions are consistent with independent clinical findings or other evidence in
24 the record. See Thomas, 278 F.3d at 957. Social workers are not considered an acceptable
25 medical source. See Turner v. Comm’r of Soc. Sec. Admin., 613 F.3d 1217, 1223-24 (9th Cir.
26 2010). Nurse practitioners and physician assistants also are not acceptable medical sources. See
27 Dale v. Colvin, 823 F.3d 941, 943 (9th Cir. 2016). Opinions from “other sources” such as nurse
28 practitioners, physician assistants, and social workers may be discounted provided the ALJ

1 provides reasons germane to each source for doing so. See Popa v. Berryhill, 872 F.3d 901, 906
2 (9th Cir. 2017), but see Revels v. Berryhill, 874 F.3d 648, 655 (9th Cir. 2017) (quoting 20 C.F.R.
3 § 404.1527(f)(1) and describing circumstance when opinions from “other sources” may be
4 considered acceptable medical opinions).

5 The weight given to medical opinions depends in part on whether they are
6 proffered by treating, examining, or non-examining professionals. See Lester v. Chater, 81 F.3d at
7 830–31. Ordinarily, more weight is given to the opinion of a treating professional, who has a
8 greater opportunity to know and observe the patient as an individual, than the opinion of a non-
9 treating professional. See id.; Smolen, 80 F.3d at 1285; Winans v. Bowen, 853 F.2d 643, 647 (9th
10 Cir. 1987). The least weight is given to the opinion of a non-examining professional. See Pitzer v.
11 Sullivan, 908 F.2d 502, 506 & n.4 (9th Cir. 1990).

12 In addition to considering its source, to evaluate whether the Commissioner
13 properly rejected a medical opinion the court considers whether: (1) contradictory opinions are in
14 the record; and (2) clinical findings support the opinions. The Commissioner may reject an
15 uncontradicted opinion of a treating or examining medical professional only for “clear and
16 convincing” reasons supported by substantial evidence in the record. See Lester, 81 F.3d at 831.
17 While a treating professional’s opinion generally is accorded superior weight, if it is contradicted
18 by an examining professional’s opinion which is supported by different independent clinical
19 findings, the Commissioner may resolve the conflict. See Andrews v. Shalala, 53 F.3d 1035, 1041
20 (9th Cir. 1995).

21 A contradicted opinion of a treating or examining professional may be rejected
22 only for “specific and legitimate” reasons supported by substantial evidence. See Lester, 81 F.3d
23 at 830. This test is met if the Commissioner sets out a detailed and thorough summary of the facts
24 and conflicting clinical evidence, states her interpretation of the evidence, and makes a finding.
25 See Magallanes v. Bowen, 881 F.2d 747, 751-55 (9th Cir. 1989). Absent specific and legitimate
26 reasons, the Commissioner must defer to the opinion of a treating or examining professional. See
27 Lester, 81 F.3d at 830-31. The opinion of a non-examining professional, without other evidence,
28 is insufficient to reject the opinion of a treating or examining professional. See id. at 831. In any

1 event, the Commissioner need not give weight to any conclusory opinion supported by minimal
2 clinical findings. See Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999) (rejecting treating
3 physician’s conclusory, minimally supported opinion); see also Magallanes, 881 F.2d at 751.

4 **2. The ALJ’s Weighing of Medical Opinions**

5 The ALJ evaluated medical opinion evidence to determine Plaintiff’s residual
6 functional capacity. See CAR 22–23. The ALJ gave great weight to the limitations opined by
7 State agency medical consult, Dr. Jaituni.³ Id. Describing Dr. Jaituni’s opinion, the ALJ wrote:

8 [Dr. Jaituni] opined severe impairments of gastrointestinal system disorder
9 and epilepsy (Exhibit 3A, p. 8). He opined the claimant was limited to lifting
10 and/or carrying 20 pounds occasionally and 10 pounds frequently, standing
11 and/or walking a total of four hours, sitting a total of six hours, occasionally
12 climbing ramps/stairs, never climbing ladders/ropes/ scaffolds, frequently
balancing, occasionally stooping, frequently kneeling, frequently
crouching, occasionally crawling, and avoiding moderate exposure to
hazards (Exhibit 3A, pp. 11-12).

13 CAR 22–23. The ALJ gave Dr. Jaituni’s opinion great weight because State agency medical
14 consultants are highly qualified physicians. Id. at 22. The ALJ also noted that agency medical
15 consultants are also experts in Social Security disability programs, the rules listed under 20 C.F.R.
16 § 416.927(e), and in evaluation of medical issues for disability claims under the Social Security
17 Act. Id. The ALJ noted that agency consultants review medical evidence in disability case make
18 findings of facts on medical issues; for example, on the severity of a claimant’s impairments and
19 residual functional capacity. Id. at 22–23.

20 The ALJ determined that the limitations that Dr. Jaituni concluded were manifest
21 with Plaintiff were consistent with the medical records in the light of emergency room visits and
22 complaints, balanced with typically unremarkable exams and imaging reports. Id. at 23. The ALJ
23 specifically gave Dr. Jaituni greater weight than the opinion of the agency consultant who
24 reviewed Plaintiff’s case at the initial level. Id. Dr. Jaituni, the ALJ noted, had the benefit of
25 reviewing records that had been unavailable at the time of the initial review. See id.

26 The ALJ also gave partial weight to the opinion of Guy Corkill, M.D., who
27 performed a consultative examination on October 27, 2015, and opined that Plaintiff could

28

³ The ALJ referred to Dr. Jaituni only as the State agency medical consultant, but the parties do not dispute his identity.

1 generally perform medium work. CAR 23. In finding Plaintiff is more appropriately limited to
2 light work, the ALJ took Plaintiff's subjective complaints into account. Id. The ALJ noted that
3 Dr. Corkill's limitation of Plaintiff to medium activity was consistent with the unremarkable
4 nature of his physical examination. Id. But the ALJ ultimately concurred with the agency's
5 examining consultant, Dr. Jaituni, who restricted Plaintiff to light activity because of Plaintiff's
6 complaints of headache and fatigue as documented in her medical records. Id.

7 Plaintiff challenges the ALJ's reliance at Step 4 on the opinion of non-examining
8 agency physician, Dr. Jaituni, because it is based on only part of the record and is outdated. See
9 ECF No. 12-1, pgs. 18–19. According to Plaintiff, an ALJ is not entitled to rely on “selected
10 portions of the record to deny a claim but must review the record as whole and account for
11 aspects favorable to a claimant.” Id. at 19 (citing Widmark v. Barnhart, 454 F.3d 1063 (9th Cir.
12 2006)). In Plaintiff's view, it follows from the ALJ's duty to review the entire record that the ALJ
13 cannot defer to an opinion based on only a portion of the record, unless an ALJ explains how the
14 rest of the record would not alter the opinion. Id. Because the ALJ offered no such explanation,
15 and because additional evidence was added to the record after Dr. Jaituni's review, the ALJ erred
16 in relying on Dr. Jaituni's outdated opinion. Id. The new evidence exceeded 300 pages of
17 emergency room and treatment records documents seizures, increased cyclical vomiting, and
18 significant indications of pseudoseizures. Id. (citing CAR 573–902). The evidence postdates the
19 conclusions of other agency reviews and precludes any determination that the ALJ justifiably
20 relied on their conclusions in calculated Plaintiff's RFC. Id.

21 To Plaintiff's point on the ALJ's reliance on “outdated” opinions, Defendant
22 contends that Plaintiff merely speculates that a physician—e.g., Dr. Jaituni—would have made
23 different findings about her functional limitations had the physician reviewed later evidence. ECF
24 No. 13, pgs. 20–21. In Defendant's view, Plaintiff overstates the later evidence, which includes
25 numerous benign findings. Id. Providers documented Plaintiff's complaints and self-reports but
26 also reported normal objective findings that did not suggest significant limitations; for example,
27 Plaintiff in several instances denied having seizures or vomiting episodes for significant periods
28 of time, and providers questions whether Plaintiff was truly experience seizures. Id. (citing CAR

1 764, 769, 780, 867). Plaintiff’s speculation that any physician’s opinion might have been different
2 based upon later evidence is speculation that does not warrant reversal. Id. (citing Findley v. Saul,
3 No. 1:18-cv-00341-BAM, 2019 WL 4072364, at *6 (E.D. Cal. Aug. 28, 2019) (“Plaintiff’s
4 suggestion that the records post-dating their opinions would have changed the opinions of the
5 state agency physicians is mere speculation and not persuasive.”)).

6 Plaintiff is correct that ALJs may not simply selectively focus on aspects of the
7 record supporting a determination of nondisability. See Ghanim v. Colvin, 763 F.3d 1154, 1164
8 (9th Cir. 2014); Widmark, 454 F.3d at 1164; Holohan v. Massanari, 246 F.3d 1195, 1205–08 (9th
9 Cir. 2001). But this is not what the ALJ did in this instance. Plaintiff’s specific argument that, as a
10 necessary consequence of an ALJ’s inability to cherry-pick the record, the ALJ cannot give
11 significant weight to earlier opinions just because they did not have access to records later added
12 to the record, is a nonstarter. First, Plaintiff cites no authority supporting that proposition. Second,
13 calculation of a claimant’s residual functional capacity is based upon all the evidence on record,
14 not just a single medical opinion. See 20 C.F.R. § 416.945(a)(1); Garrison, 759 F.3d at 1012;
15 Robbins v. Soc. Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006); Findley, 2019 WL 4072364, at
16 *5. An ALJ’s calculation of a claimant’s RFC need not exactly reflect any one medical provider’s
17 assessment. See Turner v. Comm’r Soc. Sec. Admin., 613 F.3d 1217, 1222–23 (9th Cir. 2010)
18 (stating that the ALJ permissibly incorporate physician’s observations into RFC while rejecting
19 the implication that plaintiff was unable to perform certain repetitive tasks); Findley, 2019 WL
20 4072364, at *5

21 The ALJ here considered all the relevant evidence.⁴ Indeed, the ALJ considered—
22 in multiple instances—*all* of the evidence postdating Plaintiff’s Dr. Jaituni’s opinion. See CAR
23 19–22 (citing Exs. 9F–15F). That evidence, in Plaintiff’s favor, indicated factors weighing in
24 favor of disability, such as reports of multiple seizures and related twitching and lethargy, a
25 chronically ill appearance, and visits to the emergency because of severe vomiting and
26 consequent dehydration and gastrointestinal tenderness. Id. But as the ALJ repeatedly described,
27 the new evidence variously indicated the absence of abnormalities, normal memory, normal

28 _____
⁴ The ALJ properly considered all relevant evidence with the exception of other errors identified.

1 attention and cooperation, normal and unremarkable neurologic findings, improvements with
2 medication, and the absence of neurological deficits. Id. The Court does itemize the postdated
3 evidence piece by piece here. It is sufficient to say that the ALJ considered the postdated
4 evidence, and that it generally indicated normal examinations. See id.

5 Plaintiff's argument that the ALJ impermissibly deferred to Dr. Jaituni's opinion is
6 simply untrue. See CAR 19–23. The ALJ considered the record as a whole, including the
7 evidence submitted after Dr. Jaituni rendered his opinion. Id. The ALJ noted evidence both
8 weighing for and against Plaintiff. Id. Moreover, although Plaintiff gave Dr. Jaituni's opinion
9 great weight, she did not give it *controlling* weight, which necessarily means that the ALJ did not
10 merely acquiesce to the opinion. See CAR 23.

11 To the extent that Plaintiff argues that the records would have altered Dr. Jaituni's
12 opinion, the suggestion is speculative at best. This is so especially considering the largely
13 unremarkable nature of the records postdating Dr. Jaituni's opinion. See id. The argument is
14 unpersuasive. E.g., Findley, 2019 WL 4072364, at *5.

15 Insofar as Plaintiff suggests that the ALJ did not give valid reasons to afford great
16 weight to Dr. Jaituni's opinion, the Court disagrees. Generally, the opinion of an examining
17 physician is entitled to greater weight than that of a non-examining physician. Garrison, 759 F.3d
18 at 1012. If an examining physician's opinion is contradicted by another doctor's opinion, an ALJ
19 may only reject it by providing specific and legitimate reasons that are supported by substantial
20 evidence. Id. The weight given to the opinion of a non-examining physician depends on the
21 degree to which the physician provides supporting explanations for their conclusions. Id.

22 Unless an ALJ gives the opinion of a treating physician controlling weight, ALJs
23 must consider regulatory factors governing how much weight to give an opinion. E.g., 20 C.F.R. §
24 416.927(c). Factors to consider include the extent of an examining relationship, how well
25 conclusions are supported, consistency with the record, and how familiar a physician is with
26 Social Security programs. 20 C.F.R. § 416.927(c)(1)–(6). The findings of a non-treating, non-
27 examining physician can amount to substantial evidence provided that the opinions are consistent
28

1 with independent clinical findings or other evidence on the record. Thomas, 278 F.3d at 957;
2 Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1996); see Lester, 81 F.3d at 831–32.

3 When rejecting a medical opinion, an ALJs must explicitly set forth the rejection
4 of that medical opinion. Garrison, 759 F.3d at 1012. An ALJ errs in rejecting an opinion by
5 ignoring it or by crediting one medical opinion over another without offering specific and
6 legitimate reasons (e.g., specifically explaining that other evidence is more persuasive). See id.
7 An ALJ can satisfy the substantial evidence requirement by “setting out a detailed and thorough
8 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
9 making findings.” Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998)). “The ALJ must do more
10 than state conclusions. He must set forth his own interpretations and explain why they, rather than
11 the doctors', are correct.” Id.

12 Although the ALJ could have been more exhaustive in explaining her weighing of
13 medical opinions, the Court concludes that her conclusions are legally sufficient. Substantial
14 evidence supports the ALJ’s assignment of significant weight to Dr. Jaituni’s opinion. First, she
15 gave specific and legitimate reasons for giving less weight to Dr. Corkill’s examining opinion.
16 See CAR 23. The ALJ gave his opinion less weight because she found it to be less consistent with
17 the medical record than was Dr. Jaituni’s opinion.⁵ See id. Dr. Jaituni’s opinion more completely
18 accounted for Plaintiff’s complaints of headaches and fatigue, and thus a more appropriate
19 limitation to light activity, than did Dr. Corkill’s. Id. Rejection of an opinion for inconsistency
20 with the medical record or contradiction by the reports of another physician are valid specific and
21 legitimate reasons. See, e.g., 20 C.F.R. § 416.927(c)(4); Ford v. Saul, 950 F.3d 1141, 1154 (9th
22 Cir. 2020); Thomas, 278 F.3d at 956–57; see Garrison, 759 F.3d at 1012.

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26 ⁵ The ALJ did not use any “magic words” stating that Dr. Corkill’s opinion was less consistent with the record. See
27 CAR 23. But, in stating that Dr. Corkill’s opinion did not fully account for Plaintiff’s complaints of headache and
28 fatigue, inconsistency with the record is the necessary implication of the ALJ’s conclusion. See id. Although the Court
cannot uphold an ALJ’s decision based upon grounds on which the ALJ did not rely, nor is the Court deprived of ability
to draw specific and legitimate inferences from the ALJ’s decision if those inferences are sufficiently there to be drawn.
Revels v. Berryhill, 874 F.3d 648, 654 (9th Cir. 2017); Magallenes v. Bowen, 881 F.2d 747, 755 (9th Cir. 1989).

1 Second, the ALJ considered factors from the regulations.⁶ See Hamm v. Saul, 804
2 F. App'x 810, 811 (9th Cir. 2020). She credited Dr. Jaituni's opinion because he was qualified
3 and an expert in Social Security disability programs, and because his determinations of Plaintiff's
4 limitations were consistent with the medical records when considering Plaintiff's complains
5 balanced against generally unremarkable findings. CAR 22–23. The ALJ also found Dr. Jaituni's
6 opinion to be consistent with the medical record, specifically in the light of Plaintiff's
7 documented emergency room visits and recorded complaints as balanced against typically
8 unremarkable examinations. CAR 23. The ALJ's reasons are expressly valid reasons for giving a
9 non-examining physician's opinion significant weight. 20 C.F.R. § 416.927(c)(4), (6).

10 The ALJ did not err in assigning great weight to Dr. Jaituni's opinion.

11 **C. Credibility**

12 Plaintiff contends that the ALJ erred in her assessment of weight to Plaintiff's
13 subjective complaints because the ALJ's reasoning for discounting her complaints are not
14 supported by substantial evidence. ECF No. 12-1 at 19–23.

15 **1. Standard for Weighing a Claimant's Credibility:**

16 The Commissioner determines whether a disability applicant is credible, and the
17 Court defers to the Commissioner's discretion if the Commissioner used the proper process and
18 provided proper reasons. See Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1996). An explicit
19 credibility finding must be supported by specific, cogent reasons. See Rashad v. Sullivan, 903
20 F.2d 1229, 1231 (9th Cir. 1990). General findings are insufficient. See Lester v. Chater, 81 F.3d
21 821, 834 (9th Cir. 1995). Rather, the Commissioner must identify what testimony is not credible
22 and what evidence undermines the testimony. See id. Moreover, unless there is affirmative
23 evidence in the record of malingering, the Commissioner's reasons for rejecting testimony as not
24 credible must be “clear and convincing.” See id.; see also Carmickle v. Commissioner, 533 F.3d

26
27 ⁶ To the extent it was error for the ALJ to fail to explicitly list and assess *every* regulatory factor in considering Dr.
28 Jaituni's opinion (see 20 C.F.R. § 416.927(c)), any such error was harmless. Tommasetti, 533 F.3d at 1038 (Harmless
error exists “when it is clear from the record that the ALJ's error was inconsequential to the ultimate nondisability
determination.” (citation and internal quotation marks omitted)); see also Marsh v. Colvin, 792 F.3d 1170, 1172–73
(9th Cir. 2015); Castillo v. Saul, No. 19-35159, 2021 WL 981429, at *1 (9th Cir. Mar. 16, 2021).

1 1155, 1160 (9th Cir. 2008) (citing Lingenfelter v Astrue, 504 F.3d 1028, 1936 (9th Cir. 2007),
2 and Gregor v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006)).

3 If there is objective medical evidence of an underlying impairment, the
4 Commissioner may not discredit a claimant’s testimony as to the severity of symptoms merely
5 because they are unsupported by objective medical evidence. See Bunnell v. Sullivan, 947 F.2d
6 341, 347-48 (9th Cir. 1991) (en banc). As the Ninth Circuit explained in Smolen v. Chater:

7 The claimant need not produce objective medical evidence of the
8 [symptom] itself, or the severity thereof. Nor must the claimant produce
9 objective medical evidence of the causal relationship between the medically
10 determinable impairment and the symptom. By requiring that the medical
impairment “could reasonably be expected to produce” pain or another
symptom, the Cotton test requires only that the causal relationship be a
reasonable inference, not a medically proven phenomenon.

11 80 F.3d 1273, 1282 (9th Cir. 1996) (referring to the test established in Cotton v. Bowen,
12 799 F.2d 1403 (9th Cir. 1986)).

13 The Commissioner may, however, consider the nature of the symptoms alleged,
14 including aggravating factors, medication, treatment, and functional restrictions. See Bunnell, 947
15 F.2d at 345-47. In weighing credibility, the Commissioner may also consider: (1) the claimant’s
16 reputation for truthfulness, prior inconsistent statements, or other inconsistent testimony; (2)
17 unexplained or inadequately explained failure to seek treatment or to follow a prescribed course
18 of treatment; (3) the claimant’s daily activities; (4) work records; and (5) physician and third-
19 party testimony about the nature, severity, and effect of symptoms. See Smolen, 80 F.3d at 1284
20 (citations omitted). It is also appropriate to consider whether the claimant cooperated during
21 physical examinations or provided conflicting statements concerning drug and/or alcohol use. See
22 Thomas, 278 F.3d 947, 958–59. If the claimant testifies as to symptoms greater than would
23 normally be produced by a given impairment, the ALJ may disbelieve that testimony provided
24 specific findings are made. See Carmickle, 533 F.3d at 1161 (citing Swenson v. Sullivan, 876
25 F.2d 683, 687 (9th Cir. 1989)).

26 **2. The ALJ’s Decision:**

27 Plaintiff raises a few specific issues in challenging the ALJ’s discrediting of
28 Plaintiff’s symptom testimony. See ECF No. 12-1 at 19–23. Plaintiff contends that: (1) contrary

1 to the ALJ’s finding, Plaintiff’s subjective complaints during medical visits show an inability to
2 sustain full-time work; (2) the ALJ’s analysis fails to account for evidence satisfying Listing No.
3 11.02B or a proper evaluation of opinion evidence; and (3) the ALJ improperly referenced “drug-
4 seeking behavior.” ECF No. 12-1 at 19–23. See id. at 21-23.

5 But, in the Court’s reading, Plaintiff also raises the general argument that the
6 ALJ’s analysis is insufficient because it does not sufficiently reveal her consideration of
7 Plaintiff’s testimony and fails to link the testimony found not credible to the evidence found to
8 undermine it. See ECF No. 12-1, pgs. 20-21. For example, Plaintiff writes: “[A]fter [summarizing
9 the evidence,] the ALJ turned to the opinions and the lay witness evidence, then went directly to a
10 concluding paragraph summarizing the ALJ’s already stated reasoning . . . the ALJ failed to
11 reveal consideration of most of the relevant regulatory factors.” Id. at 21. Plaintiff’s point is well-
12 taken.

13 At Step 4, the ALJ evaluated Plaintiff’s credibility in order to determine her
14 residual functional capacity (RFC). See CAR 17-22. The ALJ broadly summarized Plaintiff’s
15 statements, laying out her testimony in significant detail. CAR 17–18. By way of brief example,
16 the ALJ notes that Plaintiff testified “epilepsy and cyclic vomiting syndrome limited her ability to
17 work . . . she does not know when her cyclic vomiting symptoms will occur . . . She reported she
18 has petite mal seizures almost daily but when she vomits, she is unable to keep her medications
19 down and she has grand mal seizures.” CAR 17. The ALJ’s summary of Plaintiff’s subjective
20 testimony continues on in that manner. CAR 17–18

21 The ALJ then separately outlined the medical record, including the opinion
22 evidence discussed above. See CAR 18–23. The ALJ, for example, summarized Plaintiff’s
23 extensive history of emergency rooms visit for cyclical vomiting symptoms and seizures. Id. She
24 observed instances of both severe and unremarkable symptoms. Id. The ALJ noted significant
25 dehydration and distress from vomiting, but also generally normal neurological findings and an
26 absence of neurological deficits when seeking treatment after seizures. CAR 19–20. The ALJ
27 made a point of detailing Plaintiff’s contemporaneous subjective reports of symptoms that
28 Plaintiff’s physicians recorded. E.g., CAR 18–22. She observed Plaintiff’s reports of multiple

1 seizures per week, and her reports of an inability to keep her seizure medication down because of
2 vomiting. Id. She noted evidence of drug-seeking behavior. CAR 19, 23.

3 The ALJ then concluded that, in sum, Plaintiff's medical records mainly revealed
4 emergency room visits for cyclic vomiting, seizure control, and narcotics. CAR 23. There was
5 evidence of drug-seeking behavior, controlled seizures when Plaintiff has taken Keppra, refusal to
6 stop using marijuana despite recommendations, and no evidence of malnutrition. CAR 22–23.
7 Almost all of Plaintiff's physical examinations have been normal and imaging reports generally
8 showed no abnormalities. CAR 23.

9 To the ALJ's credit, her summary of Plaintiff's medical history is detailed. See
10 CAR 18–22. The ALJ summarized Plaintiff's subjective reports, determined that Plaintiff's
11 testimony was not entirely substantiated by the medical evidence, and then meticulously
12 summarized the medical evidence. See id. But the separate summaries of Plaintiff's subjective,
13 inferentially tied together with a brief conclusion are insufficient. See CAR 22–23; Lambert v.
14 Saul, 980 F.3d 1266, 1277–78 (9th Cir. 2020); Brown-Hunter, 806 F.3d at 492–94; see also
15 Holcomb v. Saul, 832 F. App'x 505, 506 (9th Cir. 2020). An ALJ need not undertake a line-by-
16 line deconstruction of a claimant's testimony, but under Ninth Circuit precedent, summary and
17 implied discrediting of testimony is not enough. See Lambert, 980 F.3d 1277–78; Holcomb, 832
18 F. App'x at 506; Brown-Hunter, 806 F.3d at 492–94. Although the ALJ included Plaintiff's
19 historical subjective complaints, she does not adequately link Plaintiff's testimony to portions of
20 the record supporting the adverse credibility decision. See, e.g., Brown-Hunter, 806 F.3d at 492–
21 94; Holcomb, 832 F. App'x at 506.

22 The ALJ must provide clear and convincing reasons to discount Plaintiff's
23 testimony. See Brown-Hunter, 806 F.3d at 493. A summary of medical evidence, even preceded
24 by a summary of testimony and then followed by a conclusion restating what the evidence shows,
25 is not the same as offering clear and convincing *reasons* for discounting testimony. Id. at 494;
26 Holcomb, 832 F. App'x at 506. Although ALJ concluded that the record shows largely normal
27 exams, inferentially undermining Plaintiff's testimony, the ALJ neglected to link Plaintiff's
28 testimony to *specific* medical records and explain why those records contradicted Plaintiff's

1 testimony. CAR 18–23. Indeed, the ALJ did not discuss Plaintiff’s symptom testimony while
2 summarizing the medical evidence. Id.

3 The Court is constrained to review only those reasons that the ALJ asserted for her
4 decision. Brown-Hunter, 806 F.3d at 492; Holcomb, 832 F. App’x at 506. Because the ALJ did
5 not specify her reasons for discrediting Plaintiff’s testimony, the Court is unable to meaningfully
6 review her apparent reasons without improperly substituting its conclusions for the ALJ’s or
7 speculating as to what the basis of her conclusions were. E.g., Brown-Hunter, 806 F.3d at 492–
8 95. The Court cannot review whether the ALJ provided specific, clear, and convincing reasons for
9 rejecting Plaintiff’s testimony because the ALJ never identified *which* testimony she found not
10 credible, and never explained *which* evidence contradicted that testimony. Lambert, 980 F.3d at
11 1277; Brown-Hunter, 806 F.3d at 494. The ALJ’s failure to specify the reasons for discrediting
12 Plaintiff’s testimony was reversible error. See Brown-Hunter, 806 F.3d at 493–94; Holcomb, 832
13 F. App’x at 506.

14 For the same reasons, the Court cannot say that the error was harmless. See
15 Brown-Hunter, 806 F.3d at 494–95; Lambert, 980 F.3d at 1277–78. “An error harmless only if it
16 is ‘inconsequential to the ultimate non-disability determination,’ or if despite the legal error, ‘the
17 agency’s path may reasonably be discerned.’” Brown-Hunter, 806 F.3d at 494 (citation omitted).
18 But here, the Court can neither discern the ALJ’s path nor definitively say that the error was
19 inconsequential to her ultimate determination of non-disability. See id. As stated, the ALJ did not
20 provide reviewable reasons indicating why Plaintiff’s testimony is not credible. See id.; CAR 18–
21 23. The ALJ did not specify which testimony she found not credible and why. See Lambert, 980
22 F.3d at 1277; Brown-Hunter, 806 F.3d at 494. This “falls short of meeting the ALJ’s
23 responsibility to provide reasons for which she made an adverse determination. Brown-Hunter,
24 806 F.3d at 494; Treichler v. Comm’r of Soc. Sec. Admin., 775 F.3d 1090, 1103 (9th Cir. 2014).

25 The Court accordingly remands to the ALJ for appropriate, specific reasoning in
26 reviewing Plaintiff’s testimony consistent with the above.⁷

27
28 ⁷ The Court reviewed Defendant’s brief and arguments. Defendant disagrees with the clear and convincing standard. ECF No. 13, pg. 22 n.9. But, as Defendant notes, the Court is bound by Ninth Circuit precedent. Id.

1 **D. Lay Witness Evidence**

2 In determining whether a claimant is disabled, an ALJ generally must consider lay
3 witness testimony concerning a claimant's ability to work. See Dodrill v. Shalala, 12 F.3d 915,
4 919 (9th Cir. 1993); 20 C.F.R. §§ 404.1513(d)(4) & (e), 416.913(d)(4) & (e). Indeed, “lay
5 testimony as to a claimant's symptoms or how an impairment affects ability to work is competent
6 evidence . . . and therefore cannot be disregarded without comment.” See Nguyen v. Chater, 100
7 F.3d 1462, 1467 (9th Cir. 1996). Consequently, “[i]f the ALJ wishes to discount the testimony of
8 lay witnesses, he must give reasons that are germane to each witness.” Dodrill, 12 F.3d at 919.
9 When rejecting third party statements which are similar in nature to the statements of plaintiff, the
10 ALJ may cite the same reasons used by the ALJ in rejecting the plaintiff’s statement. See
11 Valentine v. Commissioner Soc. Sec. Admin., 574 F.3d 685, 694 (9th Cir. 2009) (approving
12 rejection of a third-party family member’s testimony, which was similar to the claimant’s, for the
13 same reasons given for rejection of the claimant’s complaints).

14 At Step 4, the ALJ considered third-party statements from Plaintiff’s husband and
15 daughter, Ms. McCracken. As to this lay witness evidence, the ALJ stated:

16 The undersigned considered the third-party statements by the claimant’s
17 husband and daughter, and gave these statements less weight. While the
18 record shows the existence of some of the symptoms observed by them, the
19 undersigned gave greater weight to the objective medical evidence as well
20 as the opinions and observations by medical doctors in this case. The
21 doctors are medically trained to make exacting observations as to dates,
22 frequencies, types, and degrees of medical signs and symptoms, or of the
23 frequency or intensity off unusual moods or mannerisms. Indeed, one doctor
24 at an emergency room visit described being unsure of what her seizure-like
25 activity was, and the examiner from Stanford Epilepsy Center noted these
26 events as neurobehavioral.

27 CAR 23.

28 Plaintiff’s husband submitted a brief statement in support of Plaintiff’s case,
writing that cyclical vomiting syndrome and epilepsy impose significant limitations on Plaintiff.
CAR 284. He writes that Plaintiff has no way to tell when an epileptic or vomiting episode will
interrupt her life, and that Plaintiff may feel fine one moment and suddenly have grand mal
seizures or start vomiting uncontrollably. Id. Her vomiting exacerbates her grand mal seizures
because she is unable to keep down her epilepsy medication. Id. At one point, Plaintiff’s seizures

1 caused her to lose all her memories, which took months to resurface. Id. She still does not
2 recollect significant portions of her past. Id. She could not recall her husband or children. Id.
3 Plaintiff's seizures are debilitating because they can render her unable to continue with regular
4 life for months at a time. Id. She is unable to drive. Id. Plaintiff must frequently go to the
5 emergency room. Id.

6 Plaintiff's daughter submitted a similar statement. Id. at 285–86. She writes that
7 Plaintiff's symptoms are significantly limiting. Id. at 285. Plaintiff has several petit mal seizures
8 per week, and her cyclical vomiting intensifies her seizures because she cannot keep medicine
9 down. Id. Seizures leave Plaintiff tired and fog her memory. Id. Even after getting fluids in the
10 emergency room after vomiting, it can take a month before Plaintiff can do anything like walk
11 normal distances, cook, or eat. Id. When sick, Plaintiff loses significant weight and becomes
12 weak. Id. Plaintiff has missed important family events because of her symptoms. Id. at 285–86.

13 Concerning her family's statements and the ALJ's discrediting of their content,
14 Plaintiff argues:

15 In a disability claim bases [*sic*] on seizures, lay witness such as
16 that provided forms key evidence bearing on the frequency and impact of
17 Ms. Facey's seizures as well as her grand mal seizures is particularly
18 important. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 11.00B)(1)
19 (stating that both medical and non-medical evidence is needed, including
20 "statements you or others make about your impairments, your restrictions,
21 your daily activities, or your efforts to work). Accordingly, the ALJ's
22 suggestion that evidence about the frequency or intensity of a claimant's
23 symptoms provided by lay witnesses should be disregarded in favor of
24 evidence from doctors, who are "trained to make exacting observations as
25 to dates, frequencies, types and degrees" of symptoms is not well taken.
26 (Tr. 23). In fact, doctors have very limited time available to spend with
27 each patient, and thus often have much less opportunity to observe the
28 frequency and intensity of a patient's symptoms compared to a lay
witness. In any event, a number of Ms. Facey's seizures have been
observed by medical staff as described above, the lay witness information
from her husband and daughter remains very important evidence in
determining the frequency and severity of these episodes. It is thus not
necessarily a matter of choosing to credit medical sources or lay witnesses,
as the ALJ assumed, but of using the lay witness evidence in conjunction
with the other evidence to ascertain the full effect of Ms. Facey's
conditions.

The lay evidence from Ms. Facey's husband and daughter is key
evidence that should have been discussed and properly evaluated by the
ALJ. This was not harmless error. *Robbins v. Soc. Sec. Admin.*, 466 F.3d
880 (9th Cir. 2006) (refusing to find the ALJ's failure to discuss and
properly evaluate lay testimony harmless because "the ALJ, when fully

1 crediting the testimony, could have reached a different disability
2 determination”). To the contrary, the evidence indicates disabling
3 limitations flowing from Ms. Facey’s combination of cyclic vomiting and
4 seizures, while crediting the lay witness testimony as to seizure frequency
5 alone would support a finding of disability. Hence, to the extent the instant
6 case is not remanded with instructions for an award of benefits, the Court
7 should remand with directions to fully and properly consider the lay
8 evidence.

9 ECF No. 12-1, pgs. 25-26.

10 The Court is not persuaded by Plaintiff’s specific positions. Nor, however, is the
11 Court persuaded by Defendant’s rebuttal. In pertinent sum, Defendant replies that the ALJ
12 permissibly rejected the third-party statements from Plaintiff’s husband and daughter because
13 ALJs may reject lay witness testimony that is inconsistent with the record. See ECF No. 13 at 26
14 (citing Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005)). But this is not what the ALJ
15 did. The ALJ rejected the testimony because the record substantiated “some of the conditions
16 observed by them.” CAR 23. The ALJ did not state that she found the third-party statements
17 inconsistent with the record, she gave them less weight because they were only partially
18 corroborated by the overall record. Id.

19 A lack of corroboration by the record is not an adequate reason to reject lay
20 witness testimony. Diedrich v. Berryhill, 874 F.3d 634, 640 (9th Cir. 2017); Bruce v. Astrue, 557
21 F.3d 1113, 1116 (9th Cir. 2009). The Court notes a distinction here. An ALJ *can* reject lay
22 testimony that is *inconsistent* with the record. Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir.
23 2006); Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005); Lewis v. Apfel, 236 F.3d 503,
24 511 (9th Cir. 2001). But lack of support from the overall medical evidence is an improper basis on
25 which to disregard lay opinions. Diedrich, 874 F.3d at 640; Bruce, 557 F.3d at 1116. The Ninth
26 Circuit has recognized the difference. Burkett v. Saul, 806 F. App’x 509, 512–13 (9th Cir. 2020).

27 Here, the ALJ’s stated reasons for rejecting the statements from Plaintiff’s husband
28 and daughter fall closer to cases like Diedrich and Bruce than to cases like Bayliss or Lewis. Cf.
Burkett, 806 F. App’x at 512–13. That the ALJ determined, moreover, that the opinions of
medical doctors were entitled to greater weight is not a reason *germane to each witness* that

1 supports disregard of Plaintiff's husband's and daughter's statements. The Court concludes that
2 the ALJ erred in failing to provide germane reasons for discounting the third-party statement.⁸

3 The Court concludes that remand to the ALJ is warranted for any appropriate
4 consideration of lay testimony that is consistent with the above analysis.

5 IV. CONCLUSION

6 After having found error, the Court retains discretion to remand a case for additional
7 evidence or simply direct an award of benefits. Trevizo v. Berryhill, 871 F.3d 664, 682 (9th Cir.
8 2017). A case may be remanded under the applicable "credit-as-true" rule for an award of benefits
9 where: (1) the record has been fully developed and further administrative proceedings would not
10 be useful; (2) the ALJ has not provided legally adequate reasons for rejecting evidence, whether
11 claimant testimony or medical opinion; and (3) if improperly discredited evidence were credited as
12 true, the ALJ would be required to find the claimant disabled. Garrison, 759 F.3d at 1020.

13 Even if all the conditions of the "credit-as-true" rule are met, the Court retains
14 flexibility to remand if the overall record creates serious doubt about whether a claimant is disabled
15 within the meaning of the Social Security Act. Id. at 1020–21; see also Dominguez v. Colvin, 808
16 F.3d 403, 407 (9th Cir. 2015) ("Unless the district court concludes that further administrative
17 proceedings would serve no useful purpose, it may not remand with a direction to provide
18 benefits."); Treichler, 775 F.3d at 1105 ("Where . . . an ALJ makes a legal error, but the record is
19 uncertain and ambiguous, the proper approach is to remand the case to the agency.").

20 Here, remand is appropriate to allow the ALJ to reanalyze Plaintiff's claims in the
21 light of the evidence and errors noted above. This matter will be remanded under sentence four of
22 42 U.S.C. § 405(g) for further development of the record and/or further findings addressing the
23 deficiencies noted above.

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25
26 ⁸ Considering the record as a whole, that corroboration is not a permissible reason to reject lay testimony, and
27 considering the nature of Plaintiff's husband's and daughter's testimony, the Court determines that it cannot conclude
28 that the ALJ's error in weighing their testimony was inconsequential to the ultimate disability determination. The Court
thus concludes that the error in failing to provide germane reasons for discrediting the lay testimony was not harmless.
See, e.g., Carmickle, 533 F.3d at 1161–63; see also Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1195–97
(9th Cir. 2004)

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Accordingly, IT IS HEREBY ORDERED that:

- 1. Plaintiff’s motion for summary judgment (ECF No. 12-1) is **GRANTED**.
- 2. Defendant’s motion for summary judgment (ECF No. 13) is **DENIED**.
- 3. The Commissioner’s final decision is **REVERSED**.
- 4. This case is remanded for further proceedings consistent with this order.
- 4. The Clerk of the Court is directed to enter judgment and close this file.

Dated: March 30, 2021



DENNIS M. COTA
UNITED STATES MAGISTRATE JUDGE