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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

CATHERINE L. WALKER,

No. C 07-03184 SBA

Plaintiff,

ORDER

v.

[Docket Nos. 12, 13]

MICHAEL J. ASTRUE, *Commissioner of
Social Security*

Defendant.

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REQUEST BEFORE THE COURT

Before the Court is plaintiff Catherine Walker's Motion for Summary Judgment (the "Motion") [Docket No. 12] and defendant's Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment (the "Cross-Motion") [Docket No. 13]. Walker appeals defendant's decision that she is neither disabled nor eligible for disability benefits under Subchapter II of the Social Security Act, 42 U.S.C. § 301 *et seq.* For the reasons discussed below, the Court finds there is substantial evidence to support the residual functional capacity (the "RFC") it determined for Walker. But, the Court finds defendant applied the wrong legal standard in determining her RFC and in determining her past relevant work. The Court thus GRANTS in part and DENIES in part the Motion, GRANTS in part and DENIES in part the Cross-Motion, REVERSES defendant's decision regarding whether Walker is eligible for disability benefits, and REMANDS this matter to defendant to make findings and redetermine her RFC.

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BACKGROUND

I. 1961 through 2003

Plaintiff Catherine Walker was born on April 20, 1961, and is 47 years old. Docket No. 11 (Admin. R. ("AR")) at 65. She has a high school education and work experience as a bookkeeper, a clerical-file clerk, and a clerical worker. AR at 79. Around August 1999, she began experiencing pain in her neck and shoulders which was exacerbated by lifting a heavy garbage bag. AR at 140. She subsequently had a cervical x-ray on September 27, 1999, with normal results. AR at 140, 190.

1 Heidi Shale, M.D. of East Bay Neurology examined Walker and wrote a report on October 5, 1999.
2 AR at 192. Dr. Shale, a neurologist, found no neurological abnormalities, but recommended
3 medication and physical therapy for pain control. AR at 194. Subsequently, physiatrist Mark Chan,
4 M.D. diagnosed fibromyalgia and prescribed continued physical therapy. AR at 140-141. The
5 treating evidence notes from her primary physician, Andrew Wallach, M.D., dated June 7, 2000,
6 state that Walker's pain recurred after she returned from a trip and resumed bookkeeping. AR
7 at 198.

8 In May 2001, rheumatologist Brian Kaye, M.D., examined Walker and diagnosed chronic
9 musculoligamentous pain. AR at 151. Dr. Kaye stated it could also be called fibromyalgia,
10 myofacial pain syndrome, or chronic cervical strain. AR at 151. In June 2004, Dr. Kaye examined
11 Walker once again and affirmed his diagnosis of chronic nonspecific musculoskeletal pain. AR
12 at 149. Orthopedist Mathias Masem, M.D., performed a consultative examination on September 28,
13 2001, pursuant to a referral from Dr. Wallach. AR at 140. Dr. Masem reported there was no clinical
14 evidence of impingement or rotator cuff pathology and no evidence of a neurological cause for her
15 symptoms. AR at 142. Pain specialist Brendon Morley, M.D. examined Walker in October 2001
16 and diagnosed "probable myofascial pain syndrome." AR at 145. He noted that Walker reported
17 pain, but felt further neurologic or discogenic testing would likely be negative. AR at 146.

18 On April 21, 2003, Dr. Wallach's chart notes state Walker's fibromyalgia symptoms had
19 increased because she was selling her house after a separation from her husband and had a deadline
20 to move furniture. AR at 227. She pushed herself to do more physical labor and had symptoms.
21 AR at 227. On May 21, 2003, Walker moved into a new apartment. AR at 225. From June 9
22 through June 24, 2003, she attended a religious retreat, and she cancelled a June 26, 2003 visit with
23 Dr. Wallach. AR at 223, 225.

24 **II. 2004**

25 Dr. Wallach noted that in February 2004, Walker was taking 14 units at school towards an
26 AA degree. AR at 213. In March 2004, she was much more active, but increased activity caused
27 flares. AR at 210. During a visit with Dr. Wallach in March 2004, Walker requested a reevaluation
28 by Dr. Kaye regarding her pain issues. AR at 209.

1 On or about April 5, 2004, Walker filed an application for Disability Insurance Benefits
2 (“DIB”) with the Social Security Administration (the “SSA”) alleging disability based pain or
3 fibromyalgia. AR at 31, 34-38, 78. In a disability report the SSA found that Walker met the insured
4 status requirements for Title II benefits as of her alleged onset of disability on December 31, 1999.
5 AR at 85. She was insured for DIB until September 2004. AR at 85.

6 In a Pain Questionnaire dated April 15, 2004, Walker indicated she suffered from pain in her
7 neck, both sides, right arm, right hand, left upper-arm, left hand, right shoulder, front right breast rib
8 cage, and both hips. AR at 88. She said her pain could be brought on by walking, carrying, sitting,
9 typing, writing, lifting, cleaning, jerky transportation, and bending tasks. *Id.* She also stated she
10 experienced flares which lasted 12-24 hours and adhered to strict bed rest and extra medication to
11 treat them. *Id.* Walker indicated rest did not relieve her pain. *Id.* Walker was prescribed Valium,
12 hydrocodone, Iodine, and synthroid and stated it kept her pain in check unless she “moves wrong.”
13 *Id.* Due to her pain, she said she could only walk about six blocks and could do one or two
14 household chores daily, such as laundry, changing the bedding, and dusting. *Id.* She said she could
15 spend one to one-and-a-half hours studying daily, and was a full-time student attending night
16 classes. *Id.* She said she found it difficult to sit, lie down, walk, hold, push, pull, bend, type, carry,
17 or perform any repetitive tasks. *Id.* Lastly, she indicated she was able to stand 15 minutes at a time
18 and could sit in ergonomic chairs for one to two hours with frequent breaks. AR at 90. In June
19 2004, Dr. Kaye examined Walker again and affirmed his diagnosis of chronic nonspecific
20 musculoskeletal pain. AR at 149.

21 On June 29, 2004, the SSA sent Walker to consultative examiner Calvin Pon, M.D. who
22 examined Walker and diagnosed: (1) by history, that she was diagnosed as having fibromyalgia by a
23 rheumatologist in 2001; (2) chronic neck pain possibly related to her history of fibromyalgia, or
24 alternatively, possible cervical disc disease and/or degenerative changes of the cervical facet joints;
25 (3) cervical radicular symptoms, but upon examination, no hard objective evidence of right cervical
26 root impingement; (4) chronic shoulder pain, possible bursitis or tendinitis possibly related to her
27 history of fibromyalgia or any combination of these; and (5) chronic bilateral hip pain possibly
28 related to her history of fibromyalgia or bursitis, and possible degenerative changes. AR at 155.

1 Dr. Pon found Walker had a capacity for light work or sedentary work, could occasionally climb
2 ladders and reach bilaterally, and could perform pushing/pulling with right arm hand controls on an
3 occasional to frequent basis. AR at 155.

4 On July 26, 2004, the SSA referred Walker for an RFC physical assessment to B. Camille
5 Williams, M.D. AR at 156-163. Dr. Williams found Walker could occasionally lift or carry
6 20 pounds, could frequently lift or carry 10 pounds, could stand or walk about six hours in an eight-
7 hour day, could sit for a total of about six hours in an eight-hour day, and was unlimited in her
8 ability to push and pull. AR at 157. Dr. Williams also determined that Walker's symptoms were
9 attributable to a medically determinable impairment. AR at 161.

10 **III. 2005**

11 On March 29, 2005, Dr. Wallach filled out a fibromyalgia RFC questionnaire. AR at 248.
12 Question 11 asked, "Are your patient's impairments (physical impairments plus any emotional
13 impairments) reasonably consistent with the symptoms and functional limitations described in this
14 evaluation?" AR at 250. Dr. Wallach's response was "subjective answer." *Id.* In his March 29,
15 2005 treatment notes, Dr. Wallach explained that he answered the questions with Walker's
16 assistance, and stated, "I do not see how I could answer these. They are her subj [sic] responses."
17 AR at 246.

18 Walker also traveled to Arkansas for 30 days in October 2005 to help at shelters after
19 hurricane Katrina. AR at 283. She worked approximately four or five days a week for one or two
20 hours a day. *Id.* She traveled by train with a sleeper because it was easier for her to move around on
21 a train than on an airplane. AR at 285.

22 **IV. 2006**

23 After the SSA affirmed its denial on reconsideration, on November 5, 2004, Walker timely
24 requested a hearing before an Administrative Law Judge ("ALJ"), and had one on March 8, 2006.
25 AR at 41-45, 46-47. Joel Roberts, Esq. represented her. AR at 257. In addition, an impartial
26 vocational expert testified.

27 At her hearing, Walker testified she has difficulty sleeping and experiences excessive pain
28 one or two days a week, causing her to take higher doses of medication to knock herself out until the

1 pain subsides. AR at 274, 276. She also testified she has limited range of motion of her head and
2 can only move it “a quarter in each direction to the side” and half way down. AR at 277. Walker
3 stated she can hold her head steady in one position for 10 to 15 minutes and can lift up to a pound.
4 AR at 277, 281. She also stated she felt she could sit for half an hour and can comfortably walk four
5 or five blocks. AR at 287, 288. And, she said she can drive for approximately 20 minutes, but
6 cannot parallel park. AR at 280.

7 Walker also testified she has not worked since 1999 except for volunteering at two facilities:
8 twice a week at one, and five hours once a week at another. AR at 268-269. Walker testified she
9 was currently enrolled in community college. AR at 269. She spent six or seven hours in class per
10 week and was enrolled in three classes a semester. AR at 270. She performed activities in pieces,
11 and used disabled student services when she had flare-ups of pain once or twice a week. AR at 271.
12 She took Valium for muscle spasms, Norco for chronic pain, and wore a Fentanyl duragesic patch.
13 AR at 271. She used a laptop instead of handwriting and could not sit for long periods or sustain
14 repetitive activities. AR at 272. On a daily basis, Walker could perform 15 to 20 minutes of light
15 chores, an hour to an hour-and-a-half of homework, and took an evening class. AR at 275, 281. She
16 left her house for classes, to buy groceries, and sometimes went to church or a movie. AR at 276.

17 Walker testified she had pain in her right shoulder, right arm, part of her left arm, her neck,
18 hips, and lower back. AR at 286. She additionally experienced mild headaches on a daily basis and
19 was depressed a couple of times a month. AR at 287. She was able to care for her personal needs,
20 but noted if she did not have a washer and dryer she would need to go to a laundromat, which would
21 be difficult for her. AR at 282. She was hypersensitive to weather. AR at 283.

22 On June 27, 2006, the ALJ affirmed the SSA’s denial of her disability benefits. AR at 28.
23 Walker requested a review by the SSA’s Appeals Council. AR at 17. On April 20, 2007, the
24 Council denied her request. AR at 7-9.

25 **V. 2007**

26 On June 18, 2007, Walker timely sued the SSA for judicial review under 42 U.S.C. § 405(g).
27 See Docket No. 1. On November 19, 2007, Walker filed her motion for summary judgment alleging
28 five errors for review. Specifically, she claimed the ALJ did not give adequate weight to her treating

1 physician’s opinions when assessing her residual functional capacity (“RFC”), erred in claiming the
2 RFC was unsupported by the physician’s medical records, did not apply the criteria set forth in
3 Social Security Ruling (SSR”) 96-7p in evaluating Walker’s credibility, failed to properly apply
4 SSR 96-6p and 96-8p in evaluating Walker’s ability to work, and improperly relied on the testimony
5 of the vocational expert. Mot. at 6-7.

6 LEGAL STANDARD

7 I. Summary Judgment

8 Summary judgment is appropriate if no genuine issue of material fact exists and the moving
9 party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*,
10 477 U.S. 317, 322-23 (1986). The party moving for summary judgment must demonstrate that there
11 are no genuine issues of material fact. See *Horphag v. Research Ltd. v. Garcia*, 475 F.3d 1029,
12 1035 (9th Cir. 2007). An issue is “genuine” if the evidence is such that a reasonable jury could
13 return a verdict for the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
14 (1986); *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005). An issue is “material” if
15 its resolution could affect the outcome of the action. *Anderson*, 477 U.S. at 248; *Rivera*, 395 F.3d
16 at 1146.

17 In responding to a properly supported summary judgment motion, the non-movant cannot
18 merely rely on the pleadings, but must present specific and supported material facts, of significant
19 probative value, to preclude summary judgment. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith*
20 *Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th
21 Cir. 2002); *Fed. Trade Comm’n v. Gill*, 265 F.3d 944, 954 (9th Cir. 2001). In determining whether a
22 genuine issue of material fact exists, the court views the evidence and draws inferences in the light
23 most favorable to the non-moving party. See *Anderson*, 477 U.S. at 255; *Sullivan v. U.S. Dep’t of*
24 *the Navy*, 365 F.3d 827, 832 (9th Cir. 2004); *Hernandez v. Hughes Missile Sys. Co.*, 362 F.3d 564,
25 568 (9th Cir. 2004).

26 These same standards apply when parties file cross-motions for summary judgment. See
27 *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001); *ACLU of N.M. v.*
28 *Santillanes*, 506 F. Supp. 2d 598, 624 (D.N.M. 2007).

1 **II. Standard of Review**

2 The “substantial evidence” standard governs a district court’s review of a final decision made
3 by the Commissioner of the SSA. As 42 U.S.C. § 405(g) states:

4 Any individual, after any final decision of the Commissioner of Social
5 Security made after a hearing to which he was a party . . . may obtain a review of
6 such decision by a civil action As part of the Commissioner’s answer the
7 Commissioner of Social Security shall file a certified copy of the transcript of the
8 record including the evidence upon which the findings and decision complained of
9 are based. The court shall have power to enter, upon the pleadings and transcript of
10 the record, a judgment affirming, modifying, or reversing the decision of the
11 rehearing. The findings of the Commissioner of Social Security as to any fact, *if*
12 *supported by substantial evidence*, shall be conclusive

13 42 U.S.C. § 405(g) (emphasis added); *Udd v. Massanari*, 245 F.3d 1096, 1100 (9th Cir. 2001);
14 *Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1989).

15 When the Appeals Council declines to review an ALJ’s decision, it stands as the Commissioner’s
16 final decision. *Bass v. Social Sec. Admin.*, 872 F.2d 832, 832 (9th Cir. 1989).

17 A court may reverse an ALJ if his or her findings “are based on legal error or are not
18 supported by substantial evidence.” *McCartney v. Massanari*, 298 F.3d 1072, 1075 (9th Cir. 2002).
19 “Substantial evidence is relevant evidence which, considering the record as a whole, a reasonable
20 person might accept as adequate to support a conclusion.” *Evans*, 110 F.2d at 1483 (quoting
21 *Flaten v. Sec’y of Health and Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995)). “Substantial
22 evidence is ‘more than just a mere scintilla,’ but ‘less than a preponderance.’ ” *Evans*, 110 F.2d
23 at 1483 (quoting *Young v. Sullivan*, 911 F.2d 180, 183 (9th Cir. 1990) (citations omitted)). “If the
24 record considered as a whole can reasonably support either affirming or reversing the
25 Commissioner’s decision [a court] must affirm.” *McCartney*, 298 F.3d at 1075.

26 **III. The Five-Step Disability Inquiry**

27 To establish a claimant’s eligibility for disability benefits under the Social
28 Security Act, it must be shown that: (a) the claimant suffers from a medically

1 disabled. *See* 20 C.F.R. § 404.1520. At step one, the ALJ found Walker had not engaged in a
2 substantial gainful activity during the relevant period. AR at 24. At step two, the ALJ concluded
3 Walker “has a medically determinable impairment that limits her ability to function more than
4 minimally: fibromyalgia v. chronic pain.” *Id.* At step three, the ALJ found Walker did not have an
5 impairment that met or equaled one of the listed impairments in the regulations. *Id.* At step four,
6 the ALJ concluded that Walker was not able to perform past relevant work. AR at 26. At step five,
7 the ALJ found Walker could still perform other work in the national and local economy as a hostess,
8 lobby/security guard, or an information clerk, based on a residual functional capacity (the “RFC”)
9 determination of light work. AR at 28.

10 **I. The ALJ erred in determining Walker’s residual functional capacity.**

11 For the following reasons, the Court holds the ALJ erred in determining Walker’s RFC.

12 **A. Legal Standard**

13 In assessing whether a claimant is disabled, the SSA determines his or her RFC and his or
14 her past relevant work. 20 C.F.R. § 416.920(a)(4)(iv). If he or she can still do his or her past
15 relevant work, the SSA will find he or she is not disabled. *Id.* The RFC determination precedes the
16 past relevant work determination. *Id.* § 416.945(a)(5). In this case, the ALJ performed these
17 determinations separately, first determining Walker’s RFC.

18 A claimant’s RFC is the most they can still do despite their limitations. *Id.*
19 § 404.1545(a)(1). The SSA assesses a claimant’s RFC based on all the relevant evidence in their
20 case record. *Id.* §§ 404.1520(e), 404.1545(a)(1). The determination, however, turns solely on a
21 claimant’s medically determinable impairments, whether severe or not. *Id.* § 404.1545(a)(2); SSR
22 96-8p paras. 7, 17-18. It does not turn on a claimant’s age, body build, e.g., height or weight, or
23 prior activities. SSR 96-8 para. 1 ¶ 2, para. 7. While the claimant bears the burden of producing
24 evidence for determining their RFC, the SSA will make reasonable efforts to develop a complete
25 medical history for the pertinent twelve-month period, by contacting the claimant’s providers or
26 arranging for a consultative examination, if necessary. 20 C.F.R. §§ 404.1512(c)-(f),
27 404.1545(a)(3). More specific legal standards are provided as needed below.

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2 **B. The ALJ's Findings**

3 After considering Walker's entire record, the ALJ concluded she had an RFC for light work,
4 could lift no more than 20 pounds at a time, could frequently lift or carry objects weighing up to 10
5 pounds, and could occasionally crouch, crawl, and kneel. AR at 26. He also found that she could
6 not climb ladders, ropes, or scaffolds, and could not perform overhead work with her bilateral upper
7 extremities. *Id.* The ALJ determined she could occasionally push, pull, perform full extension
8 reaching, do repetitive fingering, and was limited to simple repetitive tasks at an average pace. *Id.*

9 Under these sections and rulings, the ALJ made seven sets of factual findings. AR at 24-26.
10 First, he considered Dr. Kaye's May 2001 examination and diagnosis of chronic musculo-
11 ligamentous pain. AR at 24. The ALJ noted Dr. Kaye did not include a description of particular
12 trigger points, but found Walker's condition could be called fibromyalgia or chronic cervical strain.
13 *Id.* Second, he considered Dr. Masem's September 28, 2001 consultative examination, finding no
14 clinical evidence of impingement or rotator cuff pathology. *Id.* Third, the ALJ considered pain
15 specialist Dr. Morley's October 2001 examination diagnosing probable myofascial pain syndrome,
16 noting that Walker reported pain, but that further neurologic or discogenic testing would likely be
17 negative in regards to a fibromyalgia diagnosis. *Id.* Fourth, the ALJ considered consultative
18 examiner Dr. Pon's June 29, 2004 examination, including his five findings, and his determination
19 that Walker had a capacity for light or sedentary work with occasional climbing ladders, reaching
20 bilaterally, and frequent to occasional pushing, pulling, or using hand controls with the right arm.
21 AR at 24-25.

22 Fifth, he considered treating evidence notes from June 2000 through March 2004. He noted
23 Walker's pain recurred after she returned from a trip and resumed bookkeeping in June 2000. *Id.*
24 He considered April 21, 2003 treating notes, stating Walker had increased fibromyalgia symptoms
25 because she was selling her house after a separation from her husband, had a deadline to move
26 furniture, was pushing herself to do more physical labor and had symptoms. *Id.* The ALJ also noted
27 May 2003 medical charts that stated Walker was going on vacation and would be gone 18 days. *Id.*
28 And, he considered March 2004 treating notes stating Walker was taking 14 units in school towards

1 an AA degree and was active, but that increased activity caused flares. *Id.*

2 Sixth, the ALJ accorded little weight to the fibromyalgia RFC questionnaire dated March 25,
3 2005, because Dr. Wallach answered the questions with Walker’s assistance, stating, “I do not see
4 how I could answer these, they are her subj[ective] responses.” *Id.* The ALJ also found
5 unpersuasive Dr. Wallach’s assessment that Walker had a capacity for less than a sedentary work, as
6 it was unsupported by his own treating records, attached to the administrative record as Exhibits 13F
7 and 14F. *Id.*, *see* AR at 202-47.

8 Lastly, the ALJ considered Walker’s hearing testimony, finding her only partially credible,
9 AR at 25, for reasons discussed below.

10 **C. The ALJ properly weighed all of the medical sources’ opinions.**

11 **1. Treating, Non-Treating, and Non-Examining Sources**

12 Title 20 C.F.R. § 404.1527 states, “In deciding whether you are disabled, we will always
13 consider the medical opinions in your case record together with the rest of the relevant evidence we
14 receive.” 20 C.F.R. § 404.1527(b). “Medical opinions are statements from physicians and
15 psychologists or other acceptable medical sources” *Id.* § 404.1527(a)(2). An “[a]cceptable
16 medical source . . . includes treating sources, nontreating sources, and nonexamining sources.” *Id.*
17 § 404.1502 para. 1; *see Lester v. Chater*, 81 F.3d 821, 830, 830 n.7 (9th Cir. 1995).

18 A “treating source” means a physician, psychologist, or other acceptable medical source who
19 provides or has provided a claimant with medical treatment or evaluation and who has, or has had,
20 an ongoing treatment relationship with them. 20 C.F.R. § 404.1502 para. 7. An “ongoing
21 relationship” has “a frequency consistent with accepted medical practice for the type of treatment
22 and/or evaluation required for [their] medical condition(s).” *Id.* A physician who supervises a team
23 of persons who together have an “ongoing relationship” with a claimant, qualifies as a “treating
24 physician.” *Benton v. Barnhart*, 331 F.3d 1030, 1037-39 (9th Cir. 2003).

25 In contrast, a “nontreating source” means a physician, psychologist, or other acceptable
26 medical source who has examined a claimant, but does not have nor ever had an ongoing treatment
27 relationship with them. 20 C.F.R. § 404.1502 para. 6. This includes any acceptable medical source
28 with whom the claimant’s only relationship is or was not based on their need for treatment or

1 evaluation but only for obtaining a report to support a disability claim. *Id.* A “nonexamining
2 source” means a physician, psychologist, or other acceptable medical source who has not examined
3 a claimant, but who provides a medical or other opinion. *Id.* para. 5.

4 In this case, Walker had near monthly visits to the El Cerrito Medical Group from 2003
5 through 2005 and usually met with Dr. Wallach. Dr. Wallach was also designated her primary care
6 physician at the onset of her alleged disability in 1999. Because of Dr. Wallach’s ongoing treating
7 relationship with Walker, he qualifies as a *treating* source. In contrast, Dr. Kaye only saw Walker
8 twice, and Drs. Masem, Morley, Pon, and Williams only saw her once. Thus, they were *non-*
9 *treating* sources. Regardless, all these *physicians* could provide *acceptable medical opinions*.

10 **2. A treating source is not automatically controlling.**

11 Regardless of its source, the SSA evaluates every medical opinion received. *Id.*
12 § 404.1527(d). If a treating source opinion meets certain criteria, the SSA will give it controlling
13 weight. *Id.* § 404.1527(d)(2). Certain decisions, however such as determining a claimant’s RFC,
14 are *reserved* to the SSA only, and may not be controlled by any acceptable medical source. *Id.*
15 § 404.1527(e)(2); SSR 96-5p paras. 6, 8; *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001).
16 In this case, even though Dr. Wallach was a treating source, his opinion did not control the ALJ’s
17 determination of Walker’s RFC.

18 **3. The six-factor weighing process.**

19 In determining a reserved issue, an ALJ may *never* ignore medical opinions, and *must* apply
20 the following six factors to them. SSR 96-5p paras. 7, 9-10. (1) Examining Relationship: The SSA
21 generally accords more weight to an examining source, than a non-examining source. 20 C.F.R.
22 § 404.1527(d)(1). (2) Treating Relationship: The SSA generally accords more weight to a treating
23 source, than a non-treating source. *Id.* § 404.1527(d)(2). In weighing such a source, the SSA will
24 consider the length, frequency, and nature of treatment, including whether any testing was done. *Id.*
25 (3) Supportability: The SSA generally accords more weight to a medical source who presents
26 greater relevant evidence to support their opinion, particularly medical signs, laboratory findings,
27 explanations, or reviews of other source’s records and opinions. *Id.* § 404.1527(d)(3).
28 (4) Consistency: The SSA generally accords more weight to an opinion consistent with the record as

1 a whole. *Id.* § 404.1527(d)(4). (5) Specialization: The SSA generally accords more weight to a
2 specialist’s opinion in their area, than a non-specialist’s opinion on the same topic. *Id.*
3 § 404.1527(d)(5). (6) The SSA will also consider other relevant factors, such as how well the source
4 understands how the SSA’s disability programs operate. *Id.* § 404.1527(d)(6).

5 Further, the Ninth Circuit has held:

6 As a general rule, more weight should be given to the opinion of a treating
7 source than to the opinion of doctors who do not treat the claimant. At least where
8 the treating doctor’s opinion is not contradicted by another doctor, it may be rejected
9 only for “clear and convincing” reasons. We have also held that “clear and
10 convincing” reasons are required to reject the treating doctor’s ultimate conclusions.
11 Even if the treating doctor’s opinion is contradicted by another doctor, the
12 Commissioner may not reject this opinion without providing “specific and legitimate
13 reasons” supported by substantial evidence in the record for so doing.

14 *Benton*, 331 F.3d at 1037-39 (quoting *Lester*, 81 F.3d at 830 (citations omitted)).

15 In this case, Walker first argues the ALJ improperly rejected Dr. Wallach’s opinion in favor
16 of those of Drs. Pon and Williams, without providing specific, legitimate reasons supported by
17 substantial evidence. Mot. at 11-14. Walker argues the ALJ should have given Dr. Wallach’s RFC
18 assessment more weight, because he was her treating source and his assessment was supported by
19 his treatment records. *Id.* The SSA argues the ALJ provided several specific reasons for reaching
20 his findings all of which were supported by substantial evidence. Cross-Mot. at 5-6.

21 The Court first notes that Walker has identified the correct standard the ALJ must meet, in
22 order to reject Dr. Wallach’s medical opinion, because, as discussed below, it was contradicted by
23 other physicians. Thus, the ALJ need not provide clear and convincing reasons for doing so, but
24 must provide specific and legitimate reasons supported by substantial evidence in the record.

25 *Benton*, 331 F.3d at 1037-39.

26 The Court next notes, though he did not describe them expressly, the ALJ properly used the
27 factors under 20 C.F.R. § 404.1527(d) to weigh the medical opinions expressed by Drs. Pon,
28 Williams, and Wallach, in favoring the first two over the third. With regards to the first and second

1 factors, the ALJ noted which doctors treated or examined Walker, and considered the length,
2 frequency, and nature of their services, in weighing their opinions. AR at 24-25. In regards to the
3 third and fourth factors, the ALJ noted that Dr. Pon evaluated Walker and made independent clinical
4 findings that contradicted those in Dr. Wallach's RFC questionnaire. AR at 153-155. And, in
5 regards to the fifth and sixth factors, the ALJ accorded more weight to Dr. Pon, a specialist in
6 orthopedics, than Dr. Wallach, a general physician. The ALJ also gave more weight to
7 Dr. Williams, as a disability determination provider, due to her familiarity with the operation of the
8 SSA's disability program.

9 In weighing the factors and thus the doctors' opinions, The ALJ explained that he gave more
10 weight to Dr. Pon's opinion, because he presented more relevant evidence supporting it, than
11 Dr. Wallach did for his, and Dr. Pon reviewed other source's records and opinions. *Id.* The ALJ
12 also noted that Dr. Williams made independent findings and determined the same RFC as Dr. Pon.
13 AR at 156-163. The opinion of a nontreating source may itself be substantial evidence where it is
14 based on independent clinical findings that differ from those of the treating physician. *Andrews v.*
15 *Shalala*, 53 F.3d 1035, 1041 (1995). And, it is within the ALJ's province to resolve the conflict. *Id.*

16
17 In contrast, the ALJ noted that Dr. Wallach found that Walker could do nothing, a conclusion
18 contradicted by every other medical opinion in the record. *See, e.g.,* AR at 153-155, 156-163,
19 185-188. And, Dr. Wallach's opinion, including the RFC checklist, was determined with Walker's
20 assistance and unsupported by his own treating notes, noting Walker's increased physical labor,
21 vacations, and school course load. *See* AR at 25, 202-247. The ALJ properly discredited the
22 checklist evaluation. *See Batson v. Comm'r Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004)
23 (ALJ properly discredited conclusory, brief medical opinion unsupported by objective medical
24 findings or record as a whole). Based on the foregoing, the Court finds substantial evidence
25 supports the ALJ's weighing Drs. Pon's and Williams' opinions over Dr. Wallach's, in determining
26 Clay's RFC, because the ALJ provided specific and legitimate reasons for doing so. The Court
27 AFFIRMS the ALJ's weighing of these doctors' opinions.

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3 **D. The ALJ provided specific findings stating clear and convincing reasons for his**
4 **credibility determinations but erred in disregarding lay testimony.**

5 Walker argues the ALJ improperly concluded she was partially credible, based solely on her
6 testimony regarding her activities, instead of considering the record as a whole. Mot. at 14-17. The
7 SSA argues the ALJ properly considered Walker’s daily activities and medical evidence in the
8 record when making his credibility determination. Cross-Mot. at 7-8.

9 **1. Legal Standard**

10 According to the SSA, “[a] symptom is an individual’s own description of his or her physical
11 or mental impairment(s).” SSR 96-7p para. 4. To admit symptom testimony, an ALJ uses a two-
12 step process. 20 C.F.R. § 404.1529(a); SSR 96-7p para. 4; *Batson*, 359 F.3d at 1196. First the
13 claimant must identify one or more medically determinable impairments through objective medical
14 evidence which could reasonably be expected to produce the alleged symptom. 20 C.F.R.
15 § 404.1529(a); SSR 96-7p para. 5 sub-para. 1; *Batson*, 359 F.3d at 1196.

16 Second, once an underlying physical or mental impairment(s) that could
17 reasonably be expected to produce the individual’s pain or other symptoms has been
18 shown, the adjudicator must evaluate the intensity, persistence, and limiting effects of
19 the individual’s symptoms to determine the extent to which the symptoms limit the
20 individual’s ability to do basic work activities. For this purpose, whenever the
21 individual’s statements about the intensity, persistence, or functionally limiting
22 effects of pain or other symptoms are not substantiated by objective medical
23 evidence, the adjudicator must make a finding on the credibility of the individual’s
24 statement based on a consideration of the entire case record.

25 SSR 96-7p para. 5 sub-para. 2; *see* 20 C.F.R. § 404.1529(a), (c); *see Batson*, 359 F.3d at 1196.

26 “The entire case record” includes medical opinions, the claimant’s statements, *et seq.* SSR 96-7p
27 para. 5 sub-para. 2.

28 “When additional information is needed to assess the credibility of the individual’s

1 statements about symptoms and their effects, the adjudicator must make every reasonable effort to
2 obtain available information that could shed light on the credibility of the individual’s statements.”
3 SSR 96-7p para. 6. SSR 96-7p also indicates additional factors that an ALJ should consider when
4 assessing a claimant’s credibility. Specifically, SSR 96-7p requires the ALJ to consider (1) the
5 claimant’s daily activities, (2) the location, duration, frequency, and intensity of the claimant’s
6 symptoms/pain, (3) factors that could aggravate the symptoms, (4) the effects of medication,
7 (5) treatment other than medication, (6) any measures the claimant has taken other than treatment,
8 and (7) any other factors concerning the claimant’s functional limitations and restrictions. *Id.* The
9 ALJ must specify what testimony is not credible and identify the evidence that undermines the
10 claimant’s complaints. *Id.*

11 If an ALJ determines a claimant’s statements are not credible, he or she must provide
12 “specific reasons for the finding on credibility, supported by the evidence in the case record, and
13 must be sufficiently specific to make clear to the individual and to any subsequent reviewers the
14 weight the adjudicator gave to the individual’s statements and the reasons for that weight.” SSR
15 96-7p para. 2 ¶ 5. The Ninth Circuit requires “specific findings stating clear and convincing
16 reasons.” *Batson*, 359 F.3d at 1196 (*quoting Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996)).

17 2. Walker’s Testimony

18 The ALJ made two credibility determinations regarding Walker’s testimony. AR at 25. In
19 his first determination, he found her asserted limitations were overstated because she was very active
20 with school, travel, volunteer work, and daily activities. *Id.* He made this determination using the
21 factors under SSR 96-7p. AR at 24-25. Thus, he found she could sit for half an hour, did not know
22 how long she could walk, felt she could lift one pound, could hold her neck steady for ten to fifteen
23 minutes, and performed activities in pieces. *Id.* He noted she could drive for about 20 minutes but
24 could not parallel park. *Id.* He also found she took Valium, Norco, and wore a Fentanyl duragesic
25 patch. *Id.* He also noted she was hypersensitive to the weather. *Id.* And, he noted she alleged she
26 could not sit or sustain repetitive activities for long. AR at 25.

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3 At the same time, however, he noted Walker daily performed one half hour of light chores
4 and one half hour of homework.¹ *Id.* He also noted she took evening classes at a community
5 college for six to seven hours per week, but missed about one class per week, and used disabled
6 student services when she had flare-ups of pain once or twice a week. *Id.* He found she used a
7 laptop rather than write by hand. *Id.* He also found that she had volunteered at two facilities since
8 1999, spending four hours a day twice a week, at one, and five hours once a week at the other. *Id.*
9 He further found she traveled to Arkansas by train, in October 2005, to help at shelters after
10 hurricane Katrina, where she worked for 30 days, four-to-five days a week, for one-to-two hours a
11 day. AR at 26.

12 An ALJ must state specifically which symptom testimony is not credible and what facts in
13 the record lead to that conclusion. *Smolen*, 80 F.3d at 1284. “To determine whether a claimant’s
14 testimony regarding the severity of their symptoms is credible, the ALJ may consider, for example:
15 (1) ordinary techniques of credibility evaluations, such as . . . other testimony by the claimant that
16 appears less than candid; (2) unexplained or inadequately explained failure to seek treatment . . . and
17 (3) the claimant’s daily activities. *Id.*

18 In this case, the ALJ was sufficiently specific. For example, he found that her assertion that
19 “she cannot do anything repetitively so no one would hire her,” as well as her alleged inability to lift
20 more than one pound, were not credible based on her daily activities and her ability to attend school,
21 travel, and do volunteer work. AR at 25-26. During the hearing, the ALJ also noted that Walker
22 could care for her personal needs, engaged in physical labor, and took vacations. *Id.* He further
23 found her participation in school, travel, volunteer work, and daily activities were well documented
24 in the record and demonstrated that her asserted limitations were overstated. AR at 26.

25 For his second credibility determination, the ALJ found Walker tended to over-explain her
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27 ¹ The ALJ is mistaken. Walker consistently indicated she could do homework for up to an
28 hour-and-a-half per day. *See* AR at 89, 273, 274. The error was in her favor, however, as the ALJ
found a mere half hour of homework caused him to question her alleged limitations.

1 answers during the hearing and respond to questions which had not been asked. *Id.* The ALJ
2 specifically identified Walker's response to a question, that she could use a laptop but not hand-
3 write, as one provided without being asked. *Id.* The Court finds this determination valid because it
4 is based on the ordinary technique of credibility evaluation and the ALJ's assessment that Walker's
5 answers during her hearing were less than candid. *See Smolen*, 80 F.3d at 1284.

6 Walker asserts the ALJ did not consider SSR 96-7p's factors in evaluating the credibility of
7 her statements regarding her symptoms. Mot. at 15-16. Walker argues the ALJ should have
8 considered the variability of her daily activities, her use of pain medications, and her chiropractic
9 treatment. *Id.* The Court has already found that the ALJ adequately weighed and considered her
10 daily and weekly activities, and her use of medications.

11 Walker is correct, however, in asserting that the ALJ should have, but failed to consider her
12 chiropractic treatment. The Court considers whether the error was harmless. The Court must
13 determine whether the ALJ's decision remains legally valid, despite the error. *Carmickle v. Comm'r*
14 *of Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008). An error is harmless when the remaining
15 reasoning and ultimate credibility determinations are adequately supported by substantial evidence
16 in the record. *Id.*

17 Here, the ALJ's decision finding Walker only partially credible is valid, despite his error.
18 The ALJ did not wholly reject Walker's allegations regarding her symptoms, activities, and
19 disabilities, and considered them when making his credibility determination. In contrast, Walker
20 only treated with a chiropractor for *three months* in 1999 and/or 2000, shortly after she lifted the
21 heavy garbage bag in 1999. AR at 198. Thus, the addition of this medical treatment to her evidence
22 pool would not have altered the ALJ's findings. *See Batson*, 359 F.3d at 1197. As such, the ALJ's
23 error in failing to consider Walker's chiropractic treatment was harmless. The Court AFFIRMS the
24 ALJ's credibility determination regarding Walker testimony.

25 3. Lay Witness Testimony

26 Walker argues the ALJ failed to consider lay testimony from her ex-husband and Luciana
27 Sandoval, a supervisor at one of her volunteer positions. Mot. at 16. Sandoval provided a letter
28 dated February 24, 2006, which purports to support Walker's assertions that due to chronic pain she

1 had difficulty performing repetitive telephoning and typing, needed a special chair for sitting, often
2 missed work, or if she came in, could not perform her duties and would have to go home early. AR
3 at 135. Her ex-husband declared to Walker’s daily activities and in particular that she could not lift
4 more than two or three pounds. AR at 105-13. The SSA did not respond to this issue.

5 “An ALJ is required to account for all lay witness testimony in the discussion of his or her
6 findings.” *Robbins v. Social Sec. Admin.*, 466 F.3d 880, 885 (9th Cir. 2006) (internal citation
7 omitted)). The Ninth Circuit further clarified that “we have never found harmless an ‘ALJ’s silent
8 disregard of lay testimony about how an impairment limits a claimant’s ability to work.’ ” *Id.*
9 (citing *Stout v. Comm’r*, 454 F.3d 1050, 1055-56 (9th Cir. 2006)).

10 The ALJ completely disregarded Sandoval’s and the ex-husband’s testimony. “[W]here the
11 ALJ’s error lies in a failure to properly discuss competent lay testimony favorable to the claimant, a
12 reviewing court cannot consider the error harmless unless it can confidently conclude that no
13 reasonable ALJ, when fully crediting the testimony, could have reached a different disability
14 determination.” *Stout*, 454 F.3d at 1056.

15 The Court finds the ALJ did not disregard any competent lay testimony favorable to Walker.
16 With regards to the supervisor, although she did provide a letter addressed “To Whom It May
17 Concern,” AR at 135, in which she opined about her perceptions of Walker’s abilities, she did not
18 provide a declaration or an affidavit or any other evidence in a form that would constitute testimony.
19 Moreover, even if it were considered testimony for purposes of this analysis, it would not be
20 testimony she is competent to provide. Thus, it was not error for the ALJ to disregard this evidence.

21 As for Walker’s ex-husband, although his evidence testimonial, he is incompetent to provide
22 testimony to much of what he opines, i.e., that Walker “can’t lift more than 2 or 3 lbs.” AR at 110.
23 As for those statements to which he is competent to testify, such as those discussing Walker’s daily
24 activities, their value is mitigated by the fact his exposure to her is of an extremely limited duration.
25 AR at 105. It is thus difficult to comprehend how he can provide evidence of Walker’s daily
26 activities when by his own admission, he sees her less than daily. Moreover, had the ALJ
27 considered the ex-husband’s statements, his daily activities testimony would have been merely
28 cumulative to what Walker testified. And, as for his opinion concerning her maximum capacity for

1 lifting, the ALJ would have likely given it no more weight than he gave Walker’s statement that she
2 could only lift one pound, which he disregarded in the face of substantial objective medical evidence
3 to the contrary. Thus, the Court can confidently conclude that a reasonable ALJ could not have
4 reached a different disability determination for Walker after considering the ex-husband’s
5 declaration. As such, it was harmless error for the ALJ to disregard the ex-husband’s declaration.
6 The Court AFFIRMS the ALJ’s RFC determination which did not involve considering Sandoval’s or
7 the ex-husband’s statements.

8 **E. The ALJ applied the wrong legal standards in determining Walker’s RFC.**

9 **1. Legal Standard**

10 When a claimant requests a hearing before an ALJ to review a determination of their RFC,
11 the ALJ determines it, rather than deferring to an earlier determination below. 20 C.F.R.
12 § 404.1546(c). The ALJ determines a claimant’s RFC by considering their ability to meet certain
13 physical, mental, sensory, or other requirements of work. *Id.* § 404.1545(a)(4). The goal is to assess
14 the claimant’s ability to do sustained work-related activities, on a regular and continuing basis, for
15 eight hours a day, for five days a week, or an equivalent work schedule. SSR 96-8p para. 1 ¶ 1,
16 para. 6. Thus, the ALJ considers any inability to sit, stand, walk, lift, carry, push, pull, or perform
17 other physical functions, including manipulative or postural functions like reaching, handling,
18 stooping, or crouching. *Id.* § 404.1545(b). The SSA also considers any inability to understand,
19 remember, follow instructions, or respond appropriately to supervision, co-workers, or work
20 pressures. *Id.* § 404.1545(c). And, the SSA considers any environmental impairments, e.g., visual
21 or auditory, skin disorders, epilepsy which affect a person’s ability to function within certain types
22 of environments, such as those with extreme temperatures, *et seq.* *Id.* § 404.1545(d). The ALJ *must*
23 consider each strength demand separately, and consider how each identified *medical* impairment or
24 symptom, like pain, causes a *functional* limitation or impairment in a claimant’s “exertional
25 capacity.” SSR 96-8p para. 1 ¶ 6, paras. 10, 20-21. This is true, even if the final RFC assessment
26 will combine activities, such as considering a claimant’s exertional capacity to walk/stand, lift/carry,
27 or push/pull. *Id.* para. 20. The ALJ *must* do the same analysis for each non-strength and mental
28 demand, and for any applicable environmental demands, to determine if a claimant has any “non-

1 exertional” limitations or impairments. *Id.* para. 1 ¶ 6, paras. 10, 22-23. The ALJ must keep in mind

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3 some symptoms, like pain, may affect both strength demands and other demands, such as
4 manipulation or concentration. *Id.* para. 24.

5 Lastly:

6 The RFC assessment must include a narrative discussion describing how the
7 evidence supports each conclusion, citing specific medical facts (e.g., laboratory
8 findings) and nonmedical evidence (e.g., daily activities, observations). In assessing
9 RFC, the adjudicator must discuss the individual’s ability to perform sustained work
10 activities in an ordinary work setting on a regular and continuing basis . . . and
11 describe the maximum amount of work-related activity the individual can perform
12 based on the evidence available in the case record. The adjudicator must also explain
13 how any material inconsistencies or ambiguities in the evidence in the case record
14 were considered and resolved.

15 *Id.* para. 24; *Taylor v. Barnhart*, 425 F.3d 345, 352 (7th Cir. 2005); *Butler v. Barnhart*, 353 F.3d
16 992, 1000-04 (D.C. Cir. 2004); *Russell v. Astrue*, No. C07-2000-RAJ, slip op., 2008 WL 4542439,
17 *9-10 (W.D. Wash. Oct. 08, 2008); *Sharma v. Astrue*, No. C 07-4906 MEJ, slip op., 2008 WL
18 4540992, *6-7 (N.D. Cal. Oct. 6, 2008); *Crisman v. Astrue*, No. CV06-280S-MHW, slip op. 2008
19 WL 782606, *5-6 (D. Idaho Mar. 21, 2008).

20 This includes discussing all symptoms, such as pain, any supporting evidence for them, resolving
21 any inconsistencies therein, and logically explaining how the symptoms affect the claimant’s ability
22 to work. SSR 96-8p paras. 25-26.

23 **b. Analysis**

24 Walker argues that the ALJ did not consider SSR 96-6p and 96-8p in determining her RFC.
25 Mot. at 17-18. Walker specifically notes the ALJ did not consider her ability to perform “sustained
26 work-related physical and mental activities in a work setting on a regular and continuing basis.”
27 Mot. at 17 (*citing* SSR 96-8p). The SSA argues that this consideration is implicit within an RFC
28 determination. Cross-Mot. at 3. The Court disagrees and notes that the ALJ did not sufficiently

1 address Walker’s capabilities concerning each strength demand or her ability to perform sustained
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3 activities, and erroneously left out narrative discussions describing how the evidence fits each
4 conclusion.

5 The Court first considers whether the ALJ properly considered the seven strength demands.
6 Turning first to sitting, the ALJ noted Walker felt she could sit for half hours, but did not connect
7 this observation to his RFC determination, discuss it in a narrative, nor discuss how it impacted her
8 functional capabilities. AR at 25. In regards to standing, the ALJ failed to address it. In regards to
9 walking, the ALJ referenced Walker’s own assertion that she did not know for how long she could
10 walk, but failed to analyze it. *Id.* With regards to pushing and pulling, the ALJ did not separate
11 these strength demands. AR at 26. He stated only that she could occasionally perform these
12 activities but failed to provide any narrative discussion. *Id.*

13 For lifting and carrying, the ALJ concluded Walker had the RFC to lift 20 pounds at most,
14 10 pounds repetitively, was limited to simple repetitive tasks at an average pace, and could
15 occasionally crouch, crawl, and kneel. AR at 26. While Drs. Pon’s and Williams’ evaluations
16 support the ALJ’s assessment, the ALJ did not include a narrative discussion nor address
17 contradictory evidence in the record.

18 The ALJ found Walker had an RFC for “light” work. Applying a harmless error analysis, the
19 Court is unable to find a reasonable ALJ could not have made a different determination for Walker,
20 had they properly considered her seven strength demands. *See Stout*, 454 F.3d at 1056.² The Court
21 REVERSES the ALJ’s RFC determination and REMANDS this matter for a redetermination
22 consistent with this Order.

23 **II. The ALJ applied the incorrect legal standard in determining Walker’s past relevant**
24 **work.**

25 In assessing whether a claimant is disabled, the SSA determines his or her RFC and his or

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27 ² Although the Ninth Circuit has never expressly adopted a harmless error analysis for an error
28 made in assessing the seven strength demands, harmless error has been used in a variety of contexts
involving Social Security hearings, and is generally applied to errors arising in them. *See Batson*,
359 F.3d at 1197; *Stout*, 454 F.3d at 1056; *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990).

1 her past relevant work. 20 C.F.R. § 416.920(a)(4)(iv). If he or she can still do his or her past
2 relevant work, the SSA will find he or she is not disabled. *Id.* The RFC determination precedes the
3 past relevant work determination. *Id.* § 416.945(a)(5). Once the ALJ had determined Walker’s
4 RFC, he proceeded to determine her past relevant work. AR at 26. “Past relevant work” is work a
5 claimant performed within the past 15 years, that was a “substantial gainful activity,” and that lasted
6 long enough for them to learn to do it.³ *Id.* § 404.1560(b)(1). The determination may involve
7 evidence provided by the claimant, persons familiar with their work, vocational experts, or
8 Department of Labor materials, such as the Dictionary of Occupational Titles. *Id.* § 404.1560(b)(2).
9 The determination does not involve a claimant’s “vocational factors of age, education, and work
10 experience or whether [their] past relevant work exists in significant numbers in the national
11 economy.” *Id.* § 404.1560(b)(3).

12 At Walker’s hearing, the ALJ asked the vocational expert whether a person of Walker’s “age,
13 education and work experience” would be able to perform her past relevant work. AR at 26, 290.
14 The vocational expert testified he believed Walker could not perform her previous jobs. AR at 291.
15 The ALJ credited the vocational expert’s testimony and found that Walker could not perform her
16 past relevant work. AR at 26.

17 While vocational factors may be considered for the fifth-step determination of “other work,”
18 *see* 20 C.F.R. § 404.1560(c), *this is absolutely prohibited for the fourth step determination of “past*
19 *relevant work,” see id.* § 404.1560(b)(3) (determination does not involve a claimant’s vocational
20 factors of age, education, or work experience). The ALJ applied the wrong legal standard when he
21 used vocational factors to determine Walker’s past relevant work. However, the ALJ ultimately
22 determined that Walker was *unable to perform any past relevant work*. Thus, as the error was to her
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26 ³ A person who performs substantial gainful activity (“SGA”) is not disabled. 20 C.F.R.
27 § 404.1520(b). “Substantial gainful activity is work activity that is both substantial, i.e., involves
28 significant physical or mental activities, and gainful, i.e., work activity performed for pay or profit.
See 20 C.F.R. § 404.1572.” *Tackett*, 180 F.3d at 1098 n.4. It involves doing significant physical or
mental activities. 20 C.F.R. § 404.1572(a). Actual pay or profit is not required. *Id.* § 404.1572(b).

1 benefit, it was harmless. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1042 (9th Cir. 2008).⁴

2 **III. The Court remands for further development of the Administrative Record**

3 Walker requests as relief that the Court remand for an immediate determination of benefits,
4 alleging there is no need to further develop the Administrative Record, under *Benecke v. Barnhart*,
5 379 F.3d 587, 593 (9th Cir. 2004). Mot. at 20-21. The SSA opposes. Cross-Mot. at 3. As there is
6 clearly a need to further develop the record, the Court declines Walker's request to remand for an
7 immediate award of benefits.

8 **CONCLUSION**

9 Accordingly, the Court GRANTS in part and DENIES in part plaintiff Catherine Walker's
10 Motion for Summary Judgment [Docket No. 12] and GRANTS in part and DENIES in part
11 defendant's Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for
12 Summary Judgment [Docket No. 13], REVERSES defendant's decision regarding whether Walker is
13 eligible for disability benefits, and REMANDS this matter to defendant for findings and to
14 redetermine Walker's RFC consistent with this Order.

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16 IT IS SO ORDERED.

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18 September 30, 2008

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Saundra Brown Armstrong
United States District Judge

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27 ⁴ In her administrative hearing, after determining her RFC, the ALJ determined Walker could
28 not perform her past relevant work, *see* 20 C.F.R. § 416.945(a)(5); AR at 26-28, but he then
determined she could perform some other work, *see* 20 C.F.R. § 416.920(e); AR at 26-28, finding
her not disabled. As the Court is remanding for a redetermination of her RFC, the Court need not
address whether to remand for a redetermination of "past relevant work" or "other work." On
remand, defendant shall make this decision after redetermining Walker's RFC.