



1                   **I.       OVERVIEW OF SOCIAL SECURITY CLAIM PROCEEDINGS**

2                   Pursuant to the Act, the Social Security Administration (“SSA”) administers  
3 the SSI program. 42 U.S.C. § 901. The Social Security Act authorizes the SSA to  
4 create a system by which it determines who is entitled to benefits and by which  
5 unsuccessful claimants may obtain review of adverse determinations. *Id.* §§ 423 *et*  
6 *seq.* Defendant, as Acting Commissioner of the SSA, is responsible for the Act’s  
7 administration. *Id.* § 902(a)(4), (b)(4).

8                   **A.       SSA’s Sequential Five-Step Process**

9                   The SSA employs a sequential five-step evaluation to determine whether a  
10 claimant is eligible for benefits. 20 C.F.R. §§ 416.920, 404.1520. To qualify for  
11 disability benefits under the Act, a claimant must show that (1) he or she suffers  
12 from a medically-determinable impairment<sup>1</sup> that can be expected to result in death  
13 or that has lasted or can be expected to last for a continuous period of twelve months  
14 or more and (2) the impairment renders the claimant incapable of performing the  
15 work that he or she previously performed or any other substantially gainful  
16 employment that exists in the national economy. *See* 42 U.S.C. §§ 423(d)(1)(A),  
17 (2)(A); 1382(c)(3)(A).

18                   A claimant must meet both of these requirements to qualify as “disabled”  
19 under the Act, *id.* § 423(d)(1)(A), (2)(A), and bears the burden of proving that he  
20 or she “either was permanently disabled or subject to a condition which became so  
21 severe as to create a disability prior to the date upon which [his or] her disability  
22 insured status expired.” *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995).  
23 An administrative law judge (“ALJ”) presides over the five-step process to  
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25 <sup>1</sup> A medically-determinable physical or mental impairment “is an impairment that  
26 results from anatomical, physiological, or psychological abnormalities, which can  
be shown by medically acceptable clinical and laboratory diagnostic techniques.”  
42 U.S.C. § 423(d)(3).

1 determine disability. *See Barnhart v. Thomas*, 540 U.S. 20, 24-25 (2003)  
2 (summarizing the five-step process). If the Commissioner finds that a claimant is  
3 disabled or not disabled at any step in this process, the review process is terminated  
4 at that step. *Corrao v. Shalala*, 20 F.3d 943, 946 (9th Cir. 1994).

5 Step one in the sequential evaluation considers a claimant’s “work activity,  
6 if any.” 20 C.F.R. § 404.1520(a)(4)(i). An ALJ will deny a claimant disability  
7 benefits if the claimant is engaged in “substantial gainful activity.” *Id.*  
8 §§ 404.1520(b), 416.920(b).

9 If a claimant cannot provide proof of gainful work activity, the ALJ proceeds  
10 to step two to ascertain whether the claimant has a medically severe impairment or  
11 combination of impairments. The so-called “severity regulation” dictates the course  
12 of this analysis. *Id.* §§ 404.1520(c), 416.920(c); *see also Bowen v. Yuckert*, 482  
13 U.S. 137, 140-41 (1987).

14 An ALJ will deny a claimant’s disability claim if the ALJ does not find that  
15 a claimant suffers from a severe impairment or combination of impairments which  
16 significantly limits the claimant’s physical or mental ability to do “basic work  
17 activities.” 20 C.F.R. § 404.1520(c). The ability to do “basic work activities”  
18 means “the abilities and aptitudes necessary to do most jobs.” *Id.* §§ 404.1521(b),  
19 416.921(b).

20 However, if the impairment is severe, the evaluation proceeds to step three.  
21 At step three, the ALJ determines whether the impairment is equivalent to one of  
22 several listed impairments that the SSA acknowledges are so severe as to preclude  
23 substantial gainful activity. *Id.* §§ 404.1520(d), 416.920(d). An ALJ conclusively  
24 presumes a claimant is disabled so long as the impairment meets or equals one of  
25 the listed impairments. *Id.* §§ 404.1520(d).

1           If the ALJ has not yet deemed a claimant disabled, but before formally  
2 proceeding to step four, the ALJ must establish the claimant’s Residual Functional  
3 Capacity (“RFC”). *Id.* §§ 404.1520(e), 404.1545(a). An individual’s RFC is his or  
4 her ability to do physical and mental work activities on a sustained basis despite  
5 limitations from his or her impairments. *Id.* §§ 404.945(a)(1), 404.1545(a)(1). The  
6 RFC analysis considers “whether [the claimant’s] impairment(s), and any related  
7 symptoms, such as pain, may cause physical and mental limitations that affect what  
8 [the claimant] can do in a work setting.” *Id.* §§ 404.1545(a)(1), 416.945(a)(1). In  
9 establishing a claimant’s RFC, the ALJ must assess relevant medical and other  
10 evidence, as well as consider all of the claimant’s impairments, including  
11 impairments categorized as non-severe. *Id.* § 404.1545(a)(3), (e). If an ALJ does  
12 not conclusively determine a claimant’s impairment or combination of impairments  
13 is disabling at step three, the evaluation advances to step four.

14           At step four, the ALJ uses the claimant’s RFC to determine whether the  
15 claimant has the RFC to perform the requirements of their past relevant work. *Id.*  
16 § 404.1520(f). So long as a claimant has the RFC to carry out his or her past relevant  
17 work, the claimant is not disabled. *Id.* §§ 404.1560(b)(3). Conversely, if the  
18 claimant either cannot perform or does not have any past relevant work, the analysis  
19 presses onward.

20           At the fifth and final step of the SSA’s evaluation, the ALJ must verify  
21 whether the claimant is able to do *any* other work in light of his or her RFC, age,  
22 education, and work experience. *Id.* § 404.1520(g). If the claimant is able to do  
23 other work, the claimant is not disabled. However, if the claimant is not able to do  
24 other work and meets the duration requirement, the claimant is disabled. *Id.*  
25 Although the claimant generally continues to have the burden of proving disability  
26 at step five, a limited burden of going forward with the evidence shifts to the SSA.

1 At this stage, the SSA must present evidence demonstrating that other work that the  
2 claimant can perform—allowing for his RFC, age, education, and work  
3 experience—exists in significant numbers in the national economy. *Id.*  
4 §§ 404.1520, 1560(c), 416.920, 404.1512(f).

5 **B. SSA Hearings and Appeals Process**

6 In accordance with Defendant’s delegation, the Office of Disability  
7 Adjudication and Review administers a nationwide hearings and appeals program.  
8 SSA regulations provide for a four-step process for administrative review of a  
9 claimant’s application for disability payments. *See id.* §§ 416.1400, 404.900. Once  
10 the SSA makes an initial determination, three more levels of appeal exist:  
11 (1) reconsideration, (2) hearing by an ALJ, and (3) review by the Appeals Council.  
12 *See id.* §§ 416.1400, 404.900. If the claimant is not satisfied with the decision at  
13 any step of the process, the claimant has sixty days to seek administrative review.  
14 *See id.* §§ 404.933, 416.1433. If the claimant does not request review, the decision  
15 becomes the SSA’s—and hence Defendant’s—binding and final decree. *See id.*  
16 §§ 404.905, 416.1405.

17 A network of SSA field offices and state disability determination services  
18 initially process applications for disability benefits. The processing begins when a  
19 claimant completes both an application and an adult disability report, and submits  
20 those documents to one of the SSA’s field offices. If the SSA denies the claim, the  
21 claimant is entitled to a hearing before an ALJ in the SSA’s Office of Disability  
22 Adjudication and Review. *Id.* §§ 404.929, 416.1429. A hearing before an ALJ is  
23 informal and non-adversarial. *Id.* § 404.900(b).

24 If the claimant receives an unfavorable decision by an ALJ, the claimant may  
25 request review by the Appeals Council. *Id.* §§ 404.967, 416.1467. The Appeals  
26 Council will grant, deny, dismiss, or remand a claimant’s request. *Id.* §§ 416.1479,

1 404.979. If a claimant disagrees with the Appeals Council’s decision or the Appeals  
2 Council declines to review the claim, the claimant may seek judicial review in a  
3 federal district court pursuant to 42 U.S.C. § 405(g) or § 1383(c). *See id.*  
4 §§ 404.981, 416.1481. If a district court remands the claim, the claim is sent to the  
5 Appeals Council, which may either make a decision or refer the matter to another  
6 ALJ. *Id.* § 404.983.

## 7 **II. BACKGROUND**

### 8 **A. Administrative Proceedings**

9 In June 2012, Plaintiff protectively filed an application for SSI, alleging  
10 disability as of February 12, 2011. (AR 178-87.) Also in June 2012, the SSA denied  
11 Plaintiff’s initial application. (AR 61-87.) In December 2012, Plaintiff was again  
12 denied benefits upon reconsideration. (AR 88-101.)

13 On July 2, 2014, the ALJ held a hearing to review Plaintiff’s claim. (AR 35-  
14 59.) Plaintiff and a vocational expert (“VE”) testified at the hearing. (AR 36.) The  
15 ALJ issued her written decision on September 9, 2014. (AR 16-29.) At step one of  
16 the sequential evaluation process described above, the ALJ found Plaintiff had not  
17 engaged in substantial gainful activity since her alleged onset date of February 12,  
18 2011. (AR 18.)

19 At step two, the ALJ found Plaintiff had severe impairments of (1) a spine  
20 disorder, (2) right shoulder disorder, and (3) cystitis (an inflammation of the  
21 bladder), but found various other claimed impairments were either not severe or  
22 lacked medical support.<sup>2</sup> (AR 18-22.)

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25 <sup>2</sup> These included an episode of syncope (the temporary loss of consciousness caused  
26 by a fall in blood pressure), cardiac disorder, carpal tunnel, depressive disorder, pain  
disorder with psychological factors, and personality disorder with borderline  
features.

1 At step three, the ALJ concluded that Plaintiff did not have an impairment or  
2 combination of impairments that met or medically equaled one of the listed  
3 impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR 22.)

4 Between steps three and four, in her RFC assessment, the ALJ found Plaintiff  
5 could perform light work, except that she was limited to lifting and carrying no  
6 more than 20 pounds occasionally and 10 pounds frequently; pushing and pulling  
7 within the same weight limits; standing and walking six out of eight hours with no  
8 prolonged walking for more than approximately 60 minutes at a time; sitting for six  
9 out of eight hours with the ability to stand and stretch for no more than 10 percent  
10 of the day; avoiding ladders, ropes, or scaffolds; no work hazards; occasional  
11 overhead reaching with the right extremity; unskilled work; and close proximity to  
12 a restroom facility. (*Id.*)

13 At step four, the ALJ found Plaintiff was able to perform her past relevant  
14 work as a caregiver. (AR 27.) The ALJ concluded the caregiver work qualified as  
15 past relevant work because Plaintiff had performed it within the prior 15 years, had  
16 done so for a sufficient period of time to learn the position and to provide average  
17 performance, and she had performed it “at the level of substantial gainful activity.”  
18 (*Id.*) However, the ALJ did not explain the specific bases behind each of these  
19 findings.

20 At step five, based on the VE’s testimony, the ALJ made an alternative  
21 finding that considering Plaintiff’s age, education, work experience, and RFC, there  
22 were jobs in significant numbers in the national economy that Plaintiff could  
23 perform. (AR 27-28.) These jobs were “mail clerk,” “small parts assembler,” and  
24 “garment folder.” (AR 28.)  
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1           Accordingly, the ALJ found that Plaintiff was not disabled from February 12,  
2 2011, her alleged onset of disability date, through the date of the decision. (AR 28-  
3 29.)

4           Plaintiff thereafter requested a review of the ALJ's decision (AR 7-12), but  
5 the Appeals Council denied her request for review (AR 1-6). The ALJ's decision  
6 thereafter became the SSA's final and definitive determination in Plaintiff's case.  
7 42 U.S.C. § 405(g).

8           On February 18, 2016, Plaintiff commenced the instant action for judicial  
9 review. (Doc. No. 1.)<sup>3</sup> Plaintiff thereafter filed a motion for summary judgment  
10 ("MSJ") (Doc. No. 14), and Defendant filed a cross-motion for summary judgment  
11 ("Cross-MSJ") and opposition to Plaintiff's MSJ (Doc. No. 16). Plaintiff did not  
12 file an opposition to Defendant's Cross-MSJ or a reply to Defendant's opposition  
13 to her MSJ.

14 **B. Summary of Medical Records Submitted to the ALJ for Review**

15           On January 23, 2009, more than two years before the date Plaintiff alleged  
16 she became disabled, Luis C. Maas, III, M.D., conducted an MRI on Plaintiff's right  
17 shoulder. (AR 324-27.) The MRI indicated tears in her tendon, moderate  
18 degenerative change, and trace bursal fluid, but otherwise the findings were  
19 unremarkable. (AR 324.) Dr. Maas also investigated Plaintiff's complaint of pain  
20 in her neck and arm, and diagnosed her with mild diffuse degenerative spondylosis  
21 (degeneration) of the cervical spine, mild central canal stenosis (narrowing), and  
22 mild to moderate bilateral neural foraminal narrowing at multiple levels. (AR 326-  
23 27.) Later, on November 20, 2009, Plaintiff had an orthopedic evaluation of her  
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25 <sup>3</sup> Unless otherwise noted, references to page numbers in documents filed on the  
26 Court's CM/ECF system are to electronically-stamped page numbers created by the  
CM/ECF system, not to the document's original pagination.

1 right shoulder with and was diagnosed with impingement syndrome and subcromial  
2 bursitis (inflammation). (AR 449.)

3 On June 24, 2011, Diana Sandoval-Cortez, M.D., examined Plaintiff for  
4 chronic lower back pain and determined that Plaintiff had mild degenerative  
5 changes in her lower lumbar spine. (AR 383-84.) There was mild bilateral  
6 neuroforaminal narrowing, moderate left paravertebral bridging osteophyte (bony  
7 outgrowth), and mild disc space narrowing but no other abnormalities. (AR 383.)  
8 Then on January 17, 2012, Plaintiff saw Dr. Sandoval-Cortez again for back pain,  
9 and the doctor determined that Plaintiff had multi-level degenerative changes in her  
10 thoracic spine. (AR 381.)

11 On March 6, 2012, Facika Tafara, M.D. completed a Supplemental  
12 Certification. (AR 556.) Dr. Tafara opined that the Plaintiff was disabled based on  
13 lumbar degenerative disc disease, cervical degenerative disc disease, and rotator  
14 cuff tear and that Plaintiff would be able to return to her regular or customary work  
15 on June 30, 2012.

16 On July 9, 2012, Plaintiff was hospitalized for chest pains. (AR 329-35.)  
17 Plaintiff performed a treadmill test, where she essentially had normal results. (AR  
18 329.) Plaintiff did not have further chest pain after admission, and the doctor  
19 recommended that she exercise and cease tobacco use. Plaintiff was discharged in  
20 stable condition and diagnosed with chest pain, dyslipidemia, hypertension, and  
21 depression. The doctor prescribed Baclofen, Diphenhydramine, Prozac, Fluticasone  
22 nasal spray, Percocet, and Simvastatin, and advised her to take aspirin. (AR 330.)  
23 Also, on the same date, another doctor examined Plaintiff and found minimal  
24 atelectasis (collapsed lung) or scarring but found no abnormalities. (AR 376-77.)  
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1 Plaintiff was then referred to Alborz Hassankhani, M.D., on July 16, 2012,  
2 who found that Plaintiff had a negative (normal) exercise treadmill test, a slightly  
3 elevated level of LDL and total cholesterol, and palpitations. (AR 339.)

4 On October 8, 2012, Jaga Glassman, M.D. performed a psychiatric  
5 evaluation. (AR 385-91.) Dr. Glassman noted that Plaintiff was clean and well-  
6 dressed, maintained good eye contact, and had a calm, cooperative, polite, and  
7 respectful attitude and demeanor, though she showed some mild depressed mood.  
8 (AR 388-89.) She exhibited average intellectual functioning, repeating and  
9 remembering three words; correctly solving a money-changing problem;  
10 appropriately interpreting a proverb; stating Sacramento as the current capital of  
11 California; knowing that the sun rose from the east; and naming the current and  
12 previous presidents. (AR 389.) Dr. Glassman diagnosed her with pain disorder  
13 with medical and psychological factors, probable personality disorder, and  
14 musculoskeletal/orthopedic problems. (AR 390.) Dr. Glassman assessed a Global  
15 Assessment of Functioning (GAF)<sup>4</sup> score of 60, and opined that Plaintiff was  
16 capable of behaving in a socially appropriate manner, getting along with others,  
17 adapting to changes and stresses in the workplace; maintaining concentration,  
18 persistence, and pace for simple and complex tasks; and managing her own funds.  
19 (AR 390-91.)

20 The following day, Vicente R. Bernabe, D.O., conducted an orthopedic  
21 evaluation. (AR 392-96.) Dr. Bernabe did not observe any abnormal curvatures or  
22 scoliosis in Plaintiff's spine or deformities, scars, or masses in her shoulders. (AR  
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24 <sup>4</sup> A GAF score of 51-60 indicates moderate symptoms (*e.g.*, flat affect and  
25 circumstantial speech, occasional panic attacks) or moderate difficulty in social,  
26 occupational, or school functioning (*e.g.*, few friends, conflicts with peers or co-  
workers). Am. Psychiatry Assoc., *Diagnostic and Statistical Manual of Mental  
Health Disorders*, Fourth Ed. Text Revision (DSM-IV-TR), 34 (2000).

1 394.) The range of motion in her left shoulder was within normal limits, though  
2 she had a positive impingement sign and pain in her right shoulder. She was able  
3 to walk on her toes and heels without difficulty, and her alternating hand  
4 movements were normal. (AR 395.) Dr. Bernabe opined, among other things, that  
5 Plaintiff did not have any restrictions for fine and gross manipulative movements,  
6 but overhead motion was limited to an occasional basis due to her right upper  
7 extremity secondary to a rotator cuff tear and impingement syndrome. (AR 396.)

8 On October 30, 2012, S. Lee, M.D., a State agency physician, reviewed the  
9 medical evidence of record, and found, among other things, that Plaintiff's ability  
10 to reach to the right overhead was limited, but she could handle, finger, and feel  
11 without limitations. (AR 71.)

12 On November 1, 2012, State agency physician Nicole Lazowitz, Psy.D.,  
13 found that Plaintiff had mild restrictions in activities of daily living, but had no  
14 difficulties in maintaining social functioning or concentration, persistence, or pace  
15 and no repeated episodes of decompensation of extended duration. (AR 81.) Dr.  
16 Lazowitz noted that Plaintiff seemed frustrated but otherwise was independent and  
17 could engage in basic activities of daily living. (AR 82.)

18 During the reconsideration phase, State agency physician R. Bitonte, M.D.,  
19 reviewed the medical evidence on March 29, 2013. (AR 98-100.) His findings as  
20 to Plaintiff's manipulative limitations mirrored those of Dr. Lee. (AR 98-99.) On  
21 April 8, 2013, Richard Kaspar, Ph.D., another State agency physician, also  
22 reviewed the medical evidence. (AR 95-97.) He confirmed Dr. Lazowitz's  
23 findings and the functional capacity assessed on October 30, 2012. (AR 95.)

24 On October 2, 2014, after the ALJ's decision, Plaintiff had an appointment  
25 with Akther Kotha, M.D. (AR 569-73.) Dr. Kotha found that Plaintiff had  
26 tenderness in the PIP and MCP joints, wrists, elbows, and ankles. (AR 572.) In a

1 section titled, “Discussion,” Dr. Kotha stated that Plaintiff had fibromyalgia and  
2 pain, swelling, and stiffness in her joints. (AR 573.) Dr. Kotha determined that  
3 Plaintiff possibly had rheumatoid arthritis and prescribed Lyrica.<sup>5</sup> (*Id.*)

#### 4 **C. Plaintiff’s Testimony**

5 Plaintiff testified at the hearing before the ALJ that she suffered from a  
6 number of conditions. She confirmed her application for benefits was based on  
7 osteoarthritis, tendinitis, carpel tunnel syndrome, right shoulder impingement,  
8 sciatica, chronic obstructive pulmonary disease, migraines, depression, high blood  
9 pressure, and high cholesterol. (AR 40-41.) In addition to those ailments, she  
10 reported plaque buildup in her heart and carotid arteries and weight gain. (AR 40.)  
11 She reported difficulty sleeping, staying focused, and felt nervous. (AR 42.) She  
12 reported that her chronic pain was the most problematic physical ailment she  
13 suffered and that the pain spread from the top of her neck to the bottom of her spine.  
14 (AR 42.) Her right shoulder and arm also caused her significant problems with  
15 maintaining strength. (AR 45.) She wore a back brace every day and was required  
16 to elevate her feet periodically throughout the day to alleviate pain, which became  
17 worse by lifting and by general exertion. (AR 48-49.) She believed she could lift  
18 no more than 10 pounds. (AR 51.) She reported constant, periodic spasms in her  
19 neck, legs, feet, and even stated her feet were becoming numb during the hearing.  
20 (AR 49-50.) She took a variety of medications for her ailments, and her side effects  
21 included diarrhea, swelling, and problems with memory and concentration. (AR  
22 51.)

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24 <sup>5</sup> Generically known as “pregabalin,” Lyrica “is a prescription medicine approved . . .  
25 to treat fibromyalgia, diabetic nerve pain, spinal cord injury nerve pain and pain after  
26 shingles. [It] is also indicated to treat partial onset seizures in adults with epilepsy  
who take 1 or more drugs for seizures.” <https://www.lyrica.com/about-lyrica> (last  
visited July 5, 2017).

1 Plaintiff reported she lived alone in an apartment, washed dishes but did so  
2 with difficulty and while taking frequent breaks, did laundry, possessed a driver's  
3 license, and drove herself to the hearing. (AR 45-47.)

4 As for her employment history, Plaintiff confirmed she had worked as a  
5 caregiver for the prior 15 years. (AR 52.) In that capacity, she cooked for a client,  
6 assisted with hygienic needs, cleaned the house, and attended to other necessities.  
7 (*Id.*)

8 **D. Vocational Expert's Testimony**

9 A vocational expert also testified at the hearing. (AR 52-58.) The VE  
10 classified Plaintiff's caregiver position as light work that involved lifting up to 10  
11 pounds and standing and walking for four hours. (AR 54.)

12 The ALJ presented the VE a hypothetical where the worker was limited to  
13 lifting and carrying no more than 20 pounds occasionally and 10 pounds frequently;  
14 pushing and pulling within those same limits; standing and walking for six hours  
15 out of an eight-hour workday, with no prolonged walking for more than about an  
16 hour at a time; sitting six out of eight hours with the ability to stand and stretch for  
17 no more than 10 percent of the day; no work hazards; and a restroom facility in  
18 close proximity. (AR 54-55.) This hypothetical, based on Plaintiff's RFC, also  
19 limited her overhead reaching with her right extremity to occasional reaching. (AR  
20 55.)

21 In response, the VE testified that there would be past work as actually  
22 performed but not as generally performed. (AR 55.) As for other unskilled light  
23 jobs in the national economy, the VE testified that other available jobs would  
24 include a mail clerk, a small parts assembler, and a garment folder. (AR 56.)  
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1 that remand, the ALJ should also consider the new medical evidence and develop  
2 the record.

3 **A. Substantial Evidence Does Not Support the ALJ’s Finding that**  
4 **Plaintiff’s Past Work Was Performed at a Substantial Gainful Activity**  
5 **Level; the Error Was Not Harmless; and the Matter Should be**  
6 **Remanded**

7 So long as a claimant has the RFC to carry out her past relevant work, she is  
8 not disabled. 20 C.F.R. § 404.1560(b)(3). In order for prior jobs to qualify as “past  
9 relevant work,” they must have been “substantial gainful activity.” *Lewis v. Apfel*,  
10 236 F.3d 503, 515 (9th Cir. 2001). Substantial gainful activity is defined as “work  
11 activity that involves doing significant physical or mental activities . . . that [a  
12 claimant does] for pay or profit.” 20 C.F.R. §§ 404.1572, 416.972. “Earnings can  
13 be a presumptive, but not conclusive, sign of whether a job is substantial gainful  
14 activity.” *Lewis*, 236 F.3d at 515. A presumption that a person engaged in  
15 substantial gainful activity is made if that person’s average monthly income  
16 attributable to that activity exceeds a certain average amount that is designated for  
17 each applicable calendar year and which vary depending on the year. 20 C.F.R.  
18 §§ 404.1574, 416.974; *Keyes v. Sullivan*, 894 F.2d 1053, 1056 (9th Cir. 1990).

19 In her decision, the ALJ found Plaintiff’s past work as a caregiver qualified  
20 as “past relevant work” in part because she performed it “at the level of substantial  
21 gainful activity.”<sup>6</sup> (AR 27.) Plaintiff petitioned the Appeals Council to review the  
22 ALJ’s SGA finding, contending that her past work did not meet the minimum

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24 <sup>6</sup> The ALJ found: “Based on the evidence of record, the undersigned finds . . .  
25 [Plaintiff’s work as a caregiver] is past relevant work because the claimant  
26 performed it within 15 years of the date of this decision, for a sufficient length of  
time to learn and provide average performance, *and at the level of substantial gainful  
activity.*” (AR 27 (emphasis added).)

1 monthly earnings thresholds to qualify as such.<sup>7</sup> (AR 8.) The Appeals Council  
2 denied her request for review, and Plaintiff now again contends the ALJ erred in  
3 finding her past work was performed at SGA levels.

4 Defendant contends Plaintiff waived this issue because she failed to raise it  
5 before the ALJ. In the alternative, Defendant contends the ALJ did not err and, in  
6 any event, error, if any, was harmless because the ALJ made an alternative finding  
7 at step five that Plaintiff could perform three jobs that are available in the national  
8 economy. Plaintiff preemptively addressed this harmless error argument in her  
9 MSJ, arguing that the ALJ's step five findings were not based on substantial  
10 evidence and thus do not save the ALJ's error at step four. Plaintiff is correct

11 This Court first finds that Plaintiff did not waive the SGA issue. Second,  
12 substantial evidence does not support the ALJ's conclusory finding that Plaintiff  
13 performed the caregiver work at SGA levels. Third, this error was not harmless.  
14 Finally, the Court recommends remand for further proceedings rather than ordering  
15 that disability benefits be granted.

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22 <sup>7</sup> Between 2001 and 2011, Plaintiff had earnings as a caregiver in nine years out of  
23 eleven years. (AR 8.) The minimum average monthly earnings thresholds for each  
24 year are as follows (with Plaintiff's corresponding average monthly earnings in  
25 parentheses): 2001 \$740 (\$353.87); 2002 \$780 (\$765.61); 2004 \$810 (\$595.50);  
26 2005 \$830 (\$520.55); 2006 \$860 (\$616.58); 2008 \$940 (\$408.85); 2009 \$980  
(\$591.15); 2010 \$1,000 (\$961.84); and 2011 \$1,000 (\$537.66). (*Id.*) Plaintiff  
duplicated the earnings comparison chart she provided to the Appeals Council in the  
MSJ now pending before the Court. (Doc. No. 13-1 at 8.)

1           **1. Plaintiff Did Not Waive the SGA Issue**

2           Although Defendant is correct that Plaintiff failed to raise the SGA issue  
3 before the ALJ, Plaintiff nonetheless did not waive it because she presented it to the  
4 Appeals Council when she sought review of the ALJ’s decision.<sup>8</sup>

5           Defendant contends that under *Meanel v. Apfel*, 172 F.3d 1111 (9th Cir.  
6 1999), Plaintiff waived the SGA issue because she did not raise it at the  
7 administrative hearing. In *Meanel*, the plaintiff argued that, contrary to the  
8 vocational expert’s testimony, the jobs the vocational expert identified did not exist  
9 in sufficient numbers in the local economy. 172 F.3d at 1115. In support, the  
10 plaintiff relied on new statistical evidence not provided to the ALJ at the hearing or  
11 to the Appeals Council. *Id.* The Ninth Circuit held that the plaintiff had not  
12 preserved this argument, explaining that “when claimants are represented by  
13 counsel, they must raise all issues and evidence at their administrative hearings in  
14 order to preserve them on appeal.” *Id.*

15           However, district courts in the Ninth Circuit have distinguished and declined  
16 to apply *Meanel* where the claimant failed to present an argument or issue to the  
17 ALJ but presented it to the Appeals Council in a subsequent request for review of

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19 <sup>8</sup> It appears Plaintiff may have implicitly agreed or at least assumed that the caregiver  
20 position was past relevant work and later ambushed the ALJ in her review request  
21 to the Appeals Council. Although she later protested to the Appeals Council that the  
22 work did not qualify (AR 8), in her initial letter-brief to the ALJ, she identified her  
23 prior work under the heading, “Past Relevant Work,” and simply contended she  
24 could “no longer perform past relevant work” due to her then-RFC. (AR 308.) This  
25 statement to the ALJ necessarily acknowledged or assumed that her past work was  
26 “past relevant work” in the first place, and she never argued otherwise to the ALJ.  
Indeed, at the hearing, her attorney sat silently as the ALJ told the vocational expert  
that Plaintiff “worked as a caregiver. *That’s the only occupation she’s had at SGA  
level . . .*,” and she never challenged this statement at any point in the hearing. (AR  
53-54 (emphasis added).) Nonetheless, there was no waiver here due to Plaintiff’s  
post-hearing letter-brief to the Appeals Council.

1 the ALJ’s decision. *See, e.g., Gomez v. Berryhill*, 2017 U.S. Dist. LEXIS 95882, at  
2 \*5-6 (C.D. Cal. June 21, 2017); *Ruiloba v. Colvin*, 2016 U.S. Dist. LEXIS 70846,  
3 at \*13-15 (C.D. Cal. May 31, 2016); *Chin v. Colvin*, 2015 U.S. Dist. LEXIS 43876,  
4 at \*18-19 (D. Haw. Apr. 2, 2015). When district courts have applied *Meneal*, the  
5 claimant had failed to present the issue to *both* the ALJ and Appeals Council. *See,*  
6 *e.g., Guerrero v. Colvin*, 2017 U.S. Dist. LEXIS 64248, at \*18-19 (S.D. Cal. Apr.  
7 26, 2017); *Simpson v. Colvin*, 2016 U.S. Dist. LEXIS 71648, at \*3-4 (C.D. Cal.  
8 May 31, 2016); *Harhaw v. Colvin*, 2014 U.S. Dist. LEXIS 32256, at \*13 (E.D. Cal.  
9 Mar. 10, 2014). Here, although Plaintiff failed to raise the SGA issue both in her  
10 letter-brief to the ALJ and during the hearing, she did raise it in her letter-brief to  
11 the Appeals Council. (AR 8.) Accordingly, the SGA issue is not waived.

12 **2. Substantial Evidence Does Not Support the ALJ’s Conclusory**  
13 **Finding that Plaintiff’s Past Work Was Performed at SGA Levels**

14 Without in-depth analysis or explanation, and in a conclusory fashion, the  
15 ALJ found Plaintiff’s past work as a caregiver qualified as “past relevant work” in  
16 part because she performed it “at the level of substantial gainful activity.” (AR 27;  
17 *see also* AR 53.) But she did not explain the specific bases behind this conclusion.  
18 Then for the first time, and after the ALJ had issued her decision, Plaintiff argued  
19 she did not perform her past work as the SGA level because her average monthly  
20 pay fell well below the presumptive minimum thresholds. (*See* Doc. No. 13-1 at 8  
21 (chart depicting SGA levels and shortfalls).) Defendant does not directly dispute  
22 that Plaintiff’s average monthly income fell below the average amounts for any of  
23 the nine years Plaintiff identified in her MSJ. *See* Doc. No. 15-1 at 17-18 (arguing  
24 that earnings are not presumptive proof of SGA but not challenging Plaintiff’s  
25 chart); *see also* Tables of SGA Earnings Guidelines and Effective Dates Based on  
26 Year of Work Activity, Social Security Administration Program Operations Manual

1 System (“POMS”) § DI 10501.015(B), *available at* [https://secure.ssa.gov/](https://secure.ssa.gov/poms.nsf/lnx/0410501015)  
2 [poms.nsf/lnx/0410501015](https://secure.ssa.gov/poms.nsf/lnx/0410501015) (last visited July 11, 2017) (listing threshold earnings  
3 levels for years listed in Plaintiff’s chart). Instead, Defendant argues other factors—  
4 the *Lewis* factors below—qualify the caregiver work as SGA. However, the ALJ  
5 did not address these factors—indeed, Defendant does not contend she did so—and  
6 the Court cannot affirm an ALJ’s decision based on reasons the ALJ did not cite.  
7 *Stout v. Comm’r, SSA*, 454 F.3d 1050, 1054 (9th Cir. 2006) (“[W]e cannot affirm  
8 the decision of an agency on a ground that the agency did not invoke in making its  
9 decision”); *see also Steele v. Barnhart*, 290 F.3d 936, 941 (7th Cir. 2002)  
10 (“[R]egardless whether there is enough evidence in the record to support the ALJ’s  
11 decision, principles of administrative law require the ALJ to rationally articulate the  
12 grounds for her decision and [courts] confine [their] review to the reasons supplied  
13 by the ALJ.”) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 93-95 (1943) (other  
14 citations omitted)).

15 Although it indeed appears Plaintiff did not meet the minimum average  
16 monthly income, *see supra* footnote 7, the ALJ stated that she had past relevant  
17 work as a caregiver without developing the record on, or even addressing, the SGA  
18 issue.<sup>9</sup> The ALJ could not have done so because the presumption that the position  
19 was SGA was no triggered by sufficient earnings. This was error. However, the  
20 SGA earnings consideration is merely one factor in the overall determination  
21 whether past work qualifies as past relevant work that a claimant may continue to  
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23 <sup>9</sup> To be fair, Plaintiff provided the ALJ no reason to believe she contested this issue.  
24 She assumed her past work was “past relevant work” in her letter-brief to the ALJ  
25 and simply stated she could no longer perform that work. And she never contested  
26 the ALJ’s representation to the VE that the caregiver work was “the only occupation  
she’s had at SGA level.” (AR 53.) Plaintiff essentially allowed the ALJ to proceed  
down the path of error and then sprung the issue upon the Appeals Council after the  
ALJ’s decision issued.

1 perform—it is not the sole factor. As the Ninth Circuit has explained, when a  
2 claimant’s earnings fall below the presumptive SGA thresholds,

3           The presumption that arises from low earnings shifts the step-  
4 four burden of proof from the claimant to the Commissioner. Without  
5 the presumption, the claimant must produce evidence that he or she has  
6 not engaged in substantial gainful activity; if there is no such evidence,  
7 the ALJ may find that the claimant has engaged in such work. With the  
8 presumption, the claimant has carried his or her burden unless the ALJ  
9 points to substantial evidence, aside from earnings, that the claimant  
10 has engaged in substantial gainful activity. The regulations list five  
11 factors: the nature of the claimant’s work, how well the claimant does  
12 the work, if the work is done under special conditions, if the claimant  
is self-employed, and the amount of time the claimant spends at work.  
Generally, an ALJ should not consider activities like taking care of  
oneself, household tasks, hobbies, school attendance, club activities, or  
social programs to be substantial gainful activities.

13 *Lewis v. Apfel*, 236 F.3d 503, 515-16 (9th Cir. 2001) (citations omitted). Because  
14 Plaintiff’s earnings did not exceed the minimum thresholds in the regulations, the  
15 presumption that the past work was SGA did not arise. It simply meant that the  
16 ALJ could not properly have concluded that the caregiver position was done at SGA  
17 levels and that she had the duty to inquire further and develop the record. At that  
18 point, the burden shifted to the ALJ to further inquire about Plaintiff’s past work,  
19 develop the record, and provide other reasons to explain how the past work was  
20 SGA despite the low earnings. The ALJ did not do so here and thus could not have  
21 found that the factors above favored an SGA determination despite insufficient  
22 earnings. Accordingly, substantial evidence does not support the ALJ’s finding that  
23 the caregiver position was “past relevant work” based, in part, on Plaintiff  
24 performing it at SGA levels.

1           **3.     The Error Was Not Harmless**

2           Defendant contends that any error at step four was harmless because the ALJ  
3 made alternative findings at step five that Plaintiff could perform three other jobs  
4 that are available in the national economy. (Doc. No. 15-1 at 18-19.) Thus, even if  
5 the ALJ erred at step four, the error was inconsequential to her ultimate finding that  
6 Plaintiff was not disabled. Plaintiff argues the ALJ relied on suspect testimony  
7 because the VE (1) stated there was no conflict between Plaintiff’s RFC and the  
8 Dictionary of Occupational Titles’ (“DOT”) description of these three jobs when  
9 (2) such a conflict in fact existed and was never resolved. (Doc. No. 13-1 at 10-  
10 13.) As a result, she argues, the VE’s testimony is not substantial evidence for the  
11 ALJ’s step five findings. (*Id.*) Plaintiff is correct. Although the ALJ made  
12 alternative findings at step five, those findings do not find support in substantial  
13 evidence. As a result, the ALJ’s error at step four was not harmless because the  
14 ALJ also erred at step 5.

15           Harmless error principles apply in the context of the Social Security Act.  
16 *Marsh v. Colvin*, 792 F.3d 1170, 1172 (9th Cir. 2015). Error is harmless “where  
17 the mistake was nonprejudicial to the claimant or irrelevant to the ALJ’s ultimate  
18 disability conclusion,” *Stout*, 454 F.3d at 1055, or where it is “clear from the record  
19 that ‘the ALJ’s error was inconsequential to the ultimate nondisability  
20 determination.’” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008); *see*  
21 *Parra v. Astrue*, 481 F.3d 742, 747 (9th Cir. 2007); *see also Batson v. Comm’r of*  
22 *SSA*, 359 F.3d 1190, 1197 (9th Cir. 2004) (finding an error harmless where it did  
23 not negate the validity of the ALJ’s ultimate conclusion). Specifically relevant to  
24 the SGA issue in this case, if an ALJ errs at step four, the error is harmless when  
25 the ALJ makes alternative findings based on substantial evidence at step 5.  
26 *Tommasetti*, 533 F.3d at 1042-43.

1           At step five of the disability analysis, the burden shifts to the Commissioner  
2 to show the existence of other work in the national economy that a claimant can  
3 perform. *See Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001) (citing 20  
4 C.F.R. §§ 404.1520(f), 416.920(f)). To meet this burden, the Commissioner “must  
5 ‘identify specific jobs existing in substantial numbers in the national economy that  
6 [the claimant] can perform despite [her] identified limitations.’” *Zavalin v. Colvin*,  
7 778 F.3d 842, 845 (9th Cir. 2015) (quoting *Johnson v. Shalala*, 60 F.3d 1428, 1432  
8 (9th Cir. 1995)). In making this determination, the ALJ relies on the DOT, which  
9 is the SSA’s “primary source of reliable . . . information” about jobs that exist in  
10 the national economy. *Id.* at 845-46 (citations omitted). In addition to the DOT,  
11 the ALJ relies on the testimony of vocational experts with respect to specific  
12 occupations that a claimant can perform in light of her RFC. *Id.* at 846 (citations  
13 omitted). The ALJ then determines “whether, given the claimant’s [RFC], age,  
14 education, and work experience, [the claimant] actually can find some work in the  
15 national economy.” *Id.* at 846 (citations omitted). Before relying on the testimony  
16 of a VE, an ALJ has an “affirmative responsibility to ask about any possible conflict  
17 between [the VE’s testimony] and information provided in the DOT.” Social  
18 Security Ruling (“SSR”) 00-4p, 2000 SSR LEXIS 8, at \*8.

19           The ALJ in this case considered at step five whether there were other jobs in  
20 the national economy that Plaintiff could perform. At the outset, the ALJ asked the  
21 VE to explain any conflict between her testimony and the DOT, and she agreed to  
22 do so. (AR 53.) The VE then testified—that taking Plaintiff’s RFC into account—  
23 Plaintiff could perform the jobs of a “mail clerk” (DOT 209.687-026), a “small parts  
24 assembler” (DOT 929.587-010), and a garment folder (DOT 789.687-066). (AR  
25 56.) Based on the VE’s testimony, the ALJ found Plaintiff could perform these  
26 three jobs, that they existed in the national economy in sufficient numbers, and

1 accordingly found Plaintiff was not disabled. However, the three occupations the  
2 VE identified all had a key physical demand that plainly exceeded the RFC  
3 determined by the ALJ and given in the hypothetical questions propounded to the  
4 VE. (AR 54-55, 57-58.)

5 Plaintiff's RFC explicitly limited her to "reaching overhead with the right  
6 extremity" on only an occasional basis. (AR 55.) Reaching "occasionally" means  
7 the activity is done only "up to 1/3 of the day." See SSR 83-10, 1983 SSR LEXIS  
8 30, at \*13. However, all three jobs the VE identified exceeded Plaintiff's RFC  
9 limitations. DOT 209.687-026 (mail clerk; frequent reaching, where "[a]ctivity or  
10 condition exists from 1/3 to 2/3 of the time"), DOT 929.587-010 (same for small  
11 parts assembler), DOT 789.687-066 (garment folder; constant reaching, where  
12 "[a]ctivity or condition exists 2/3 of the time or more"). Additionally, since Social  
13 Security Ruling 85-15 notes that "reaching" is "extending the hands and arms *in*  
14 *any direction*," 1985 SSR LEXIS 20, at \*18-19 (emphasis added), the necessary  
15 implication is that all three jobs required frequent or constant reaching in all  
16 directions—a requirement Plaintiff cannot fulfill with her right arm. Thus, the  
17 reaching requirements of the three jobs the VE identified plainly conflicted with the  
18 reaching limitation in Plaintiff's RFC.<sup>10</sup> Additionally, the requirement that Plaintiff  
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21 <sup>10</sup> Numerous other district courts in this Circuit have found an apparent conflict  
22 existed where the ALJ limited a claimant to "occasional reaching" but a VE testified  
23 a worker with the limitation was able to perform work the DOT indicated required  
24 constant or frequent reaching. See, e.g., *Murry v. Colvin*, 2016 U.S. Dist. LEXIS  
25 12345, at \*20-21 (E.D. Cal. Feb. 1, 2016); *Lang v. Comm'r of Soc. Sec.*, 2014 U.S.  
26 Dist. LEXIS 48558, at \*19-20 (E.D. Cal. Apr. 8, 2014); *Giles v. Colvin*, 2013 U.S.  
Dist. LEXIS 132188, at \*9-11 (C.D. Cal. Sep. 10, 2013); *Ricker v. Colvin*, 2013 U.S.  
Dist. LEXIS 107372, at \*17-19 (D. Or. May 24, 2013); *Richardson v. Astrue*, 2012  
U.S. Dist. LEXIS 138633, at \*17-19 (N.D. Cal. Sept. 25, 2012); *Duff v. Astrue*, 2012  
U.S. Dist. LEXIS 122442, at \*10-13 (C.D. Cal. Aug. 28, 2012); *Bentley v. Astrue*,

1 be able to reach in all directions conflicted with her inability to do so with her right  
2 arm.

3         Given the above conflicts, the ALJ had a duty to ask follow-up questions to  
4 resolve the conflicts. The ALJ did not fulfill this duty. *Cf. Lidster v. Astrue*, 2012  
5 U.S. Dist. LEXIS 555, at \*8-9 (S.D. Cal. Jan. 3, 2012) (Sabraw, J.) (“In her RFC  
6 determination, the ALJ had found that Plaintiff was limited by ‘no reaching above  
7 the shoulder level on the right.’ *The ALJ questioned [the VE] about the reaching*  
8 *requirement, and determined that the reaching was not repetitive and could be done*  
9 *with either hand. Plaintiff had no limitations on reaching with his left hand. [¶]*  
10 *[T]he ALJ fulfilled her duty of questioning the vocational expert regarding any*  
11 *conflict between the DOT definition and Plaintiff’s limitations.”) (emphasis added).*

12 Neither the ALJ nor the VE discussed the evident inconsistencies between the  
13 reaching requirements listed in the DOT and the reaching limitation imposed in the  
14 RFC. The ALJ’s failure to do so meant that her findings at step five were not based  
15 on substantial evidence, and, as a result, her SGA error in step four was not  
16 harmless.<sup>11</sup>

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18 2011 U.S. Dist. LEXIS 77042, at \*9-11 (C.D. Cal. July 14, 2011); *Hernandez v.*  
19 *Astrue*, 2011 U.S. Dist. LEXIS 6377, at \*4-6 (C.D. Cal. Jan. 21, 2011).

20 <sup>11</sup> The Court acknowledges that under some circumstances, the Court may rely on  
21 its common experience and find that no apparent conflict exists between a DOT  
22 occupation and a claimant’s limitation. *See, e.g., Gutierrez v. Colvin*, 844 F.3d 804,  
23 808-09 (9th Cir. 2016). In *Gutierrez*, the court relied on common experience with  
24 the “familiar” occupation of cashiering to find that the occupation did not require  
25 overhead reaching. *Id.* at 808. As a result, the court reasoned that the ALJ did not  
26 have an obligation to ask follow-up questions where the “frequency or necessity of  
a task is unlikely and unforeseeable” as it was “with cashiers having to reach  
overhead.” *Id.* Here, the Court cannot do the same with the occupations the VE  
identified because they are not readily familiar occupations.

1 Defendant contends that no conflict exists here because the VE agreed to  
2 identify any conflicts at the beginning of her testimony and then did not identify  
3 any conflicts, the implication being that a conflict must not have existed since the  
4 VE did not identify one. This is unpersuasive given that a conflict is plainly evident  
5 from the text of the DOT and Social Security Ruling 85-15. The VE not identifying  
6 a conflict either means that no conflict existed or she failed to recognize and identify  
7 one. The latter is a much more reasonable interpretation under the circumstances  
8 of this case. Even if no conflict existed in the view of the VE, one certainly seems  
9 apparent given the DOT requirements for the three jobs, Plaintiff's RFC, and the  
10 ALJ's hypothetical. It was therefore incumbent upon either the ALJ or the VE to  
11 affirmatively identify the conflict and address it rather than leave the record  
12 uncertain about what the VE actually believed about the conflict and whether  
13 Plaintiff could perform the jobs she identified despite the apparent conflict.

14 Defendant also notes that the ALJ's RFC assessment "did not endorse a  
15 limitation to frequent or constant reaching *in general*, but only to *overhead* reaching  
16 with the right extremity." (Doc. No. 15-1 at 14-15 (emphasis in general).) This  
17 simply underscores the fact that the VE should have identified and then been asked  
18 about the conflict between the reaching requirements in the DOT and Plaintiff's  
19 reaching limitation given that the ALJ specifically informed the VE about Plaintiff's  
20 overhead reaching limitation. The VE indeed may have excluded all jobs that  
21 required significant overhead reaching, but that is not at all evident from the record.  
22 The ALJ did not expressly instruct the VE to exclude such jobs, and the VE did not  
23 state she had done so.

#### 24 **4. Remand for Further ALJ Proceedings**

25 In social security cases, remand may be for additional proceedings or for an  
26 award of benefits. *Garrison v. Colvin*, 759 F.3d 995, 1019 (9th Cir. 2014)

1 (explaining that if “additional proceedings can remedy defects in the original  
2 administrative proceeding, a social security case should be remanded[,]” but “in  
3 appropriate circumstances courts are free to reverse and remand a determination by  
4 the Commissioner with instructions to calculate and award benefits”) (internal  
5 quotation marks omitted). “Courts have generally exercised this power [to grant  
6 benefits] when it is clear from the record that a claimant is entitled to benefits,  
7 observing on occasion that inequitable conduct on the part of the Commissioner can  
8 strengthen, though not control, the case for such a remand.” *Id.*

9 To determine which type of remand is appropriate, the Ninth Circuit uses a  
10 three-part test. *Id.* at 1020. First, the record must be fully developed and further  
11 administrative proceedings would serve no useful purpose. *Garrison*, 759 F.3d at  
12 1020. Second, the ALJ must fail to provide legally sufficient reasons for rejecting  
13 evidence, whether claimant testimony or medical opinion. *Id.* Third, if the case is  
14 remanded and the improperly discredited evidence is credited as true, the ALJ  
15 would be required to find the claimant disabled. *Id.* To remand for an award of  
16 benefits, each part of this test must be satisfied. *Id.* If the record is “uncertain and  
17 ambiguous,” the matter is properly remanded for further proceedings. *Treichler v.*  
18 *Comm’r of SSA*, 775 F.3d 1090, 1105 (9th Cir. 2014).

19 As explained above, the mere fact that Plaintiff’s earnings appear to be below  
20 the SGA thresholds is not dispositive of whether her caregiver work qualifies as  
21 past relevant work. The pertinent error in this case is the ALJ’s step four finding  
22 that Plaintiff’s caregiver work was performed at the SGA level and the subsequent  
23 failure to inquire into various relevant SGA factors. *See Lewis v. Apfel*, 236 F.3d  
24 503, 515-16 (9th Cir. 2001) (identifying factors). Although the ALJ erred when she  
25 did not develop the record and consider the factors in *Lewis*, the error does not  
26 conclusively favor Plaintiff or compel the automatic grant of benefits. Moreover,

1 the apparent conflict between the VE's opinion and the DOT also merit further  
2 exploration and clarification. It is not clear from such an undeveloped record that  
3 Plaintiff is entitled to benefits. Accordingly, the Court cannot proceed past the first  
4 step of the test in *Garrison* because the record is uncertain, not fully developed, and  
5 additional administrative proceedings are required. This Court recommends  
6 remand for further proceedings and findings by the ALJ on the SGA issue.

7 **B. On Remand the ALJ Should Also Consider Dr. Kotha's Assessment**

8 Plaintiff's challenge to the ALJ's RFC assessment is very narrow and based  
9 solely on a single medical report generated after the hearing and submitted to the  
10 Appeals Council after the ALJ's decision had already issued.<sup>12</sup> (*See* AR 569-73.)  
11 Rather than argue that the ALJ erred in finding that many of her claimed  
12 impairments were non-severe, she appears to acknowledge that this finding was  
13 correct at the time the ALJ made her findings, but argues that the new medical  
14 assessment by Dr. Akther Kotha explains why no objective medical evidence  
15 existed to support those impairments. (*See* Doc. No. 13-1 at 5 ("The ALJ found  
16 many of the impairments non[-]severe because of [the] lack of objective medical  
17 evidence. The diagnosis of Fibromyalgia a month after the unfavorable decision[]  
18 *reasonably answers the question . . . why no objective evidence exists.*") (emphasis  
19 added).) She contends that this new evidence renders the ALJ's RFC assessment  
20 unsupported by substantial evidence and asks the Court to remand the matter to  
21 allow the ALJ to consider Dr. Kotha's assessment as part of her RFC analysis. This  
22 is an appropriate course of action.

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23  
24 <sup>12</sup> Plaintiff also does not challenge the ALJ's RFC assessment based on the evidence  
25 the ALJ actually had before her and was able to consider. Her challenge of the ALJ's  
26 RFC finding is limited to reliance on post-hearing medical evidence that she claims  
undermines the RFC finding.

1           Although Dr. Kotha did not generate her assessment until after the ALJ's  
2 decision issued, that evidence is part of the record in this case because the Appeals  
3 Council considered it in its decision to deny Plaintiff's request for review. *Brewes*  
4 *v. Comm'r of SSA*, 682 F.3d 1157, 1160-61, 1163 (9th Cir. 2012) (holding that when  
5 a claimant submits evidence for the first time to the Appeals Council, which  
6 considers that evidence in denying review of the ALJ's decision, the new evidence  
7 is part of the administrative record, which the district court must consider in  
8 determining whether the Commissioner's decision is supported by substantial  
9 evidence." ).<sup>13</sup> Defendant contends that the record as a whole supports the ALJ's  
10 findings even when Dr. Kotha's assessment is considered. That, however, is not  
11 readily apparent to this Court given the nature of Fibromyalgia and Plaintiff's  
12 claimed impairments. *See generally Benecke v. Barnhart*, 379 F.3d 587, 589-90  
13 (9th Cir. 2004) ("fibromyalgia . . . [is] a rheumatic disease that causes inflammation  
14 of the fibrous connective tissue components of muscles, tendons, ligaments, and  
15 other tissue. Common symptoms . . . include chronic pain throughout the body,  
16 multiple tender points, fatigue, stiffness, and a pattern of sleep disturbance that can  
17 exacerbate the cycle of pain and fatigue associated with this disease."). Although  
18 Plaintiff appears to experience some of the symptoms of Fibromyalgia, Dr. Kotha's  
19 report is ambiguous and is not conclusive. For example, it is unclear whether Dr.

20  
21 \_\_\_\_\_  
22 <sup>13</sup> Defendant contends the Court lacks jurisdiction to review the Appeals Council's  
23 decision denying review of the ALJ's decision because the Council's decision is an  
24 unreviewable non-final agency action. (Doc. No. 15-1 at 12.) However, the Court  
25 is not reviewing the Appeals Council's decision and acknowledges that the ALJ's  
26 decision is the only agency action being reviewed in this matter. Yet, that doesn't  
place Dr. Kotha's report out of this Court's reach. As Defendant acknowledges,  
*Brewes* clearly requires the Court to consider Dr. Kotha's report as part of its review  
of the ALJ's decision—Dr. Kotha's report is part of the administrative record under  
the circumstances of this case.

1 Kotha’s report is actually a Fibromyalgia *diagnosis*. While it appears she concludes  
2 that Plaintiff has this condition (*see* AR 573), it also appears she may have believed  
3 Plaintiff had been diagnosed with the condition in the past (*see* AR 569  
4 (summarizing that Plaintiff “was dx [or diagnosed] with Fibro as well” and had been  
5 taking Lyrica)). But the record does not reflect Plaintiff being diagnosed with  
6 Fibromyalgia before Dr. Kotha’s assessment.<sup>14</sup> Given these observations, the Court  
7 is reluctant to fully credit Dr. Kotha’s report on a cold record. There may be factors  
8 or circumstances that affect the report’s reliability or credibility. However, the  
9 Court is not in the best position to evaluate these concerns and determine this  
10 report’s ultimate import. The ALJ, who made the initial RFC decision after a full  
11 hearing and based on the medical record, is in the best position to consider the  
12 ultimate impact of Dr. Kotha’s assessment on the ALJ’s own RFC findings. *See*  
13 *Allen v. Sec’y of Health & Human Servs.*, 726 F.2d 1470, 1473 (9th Cir. 1984) (“It  
14 is the ALJ’s role to resolve evidentiary conflicts.”). Not having had the benefit of  
15 Dr. Kotha’s assessment, the ALJ should be afforded the opportunity to consider it  
16 given the recommendation above that the matter be remanded for further  
17 proceedings.

18       Ultimately, although Dr. Kotha’s report may support Plaintiff’s claimed  
19 impairments, there may be qualitative issues with the report itself. This Court  
20 should not be the first to resolve these issues. That initial analysis should be left to  
21 the ALJ, who will have the benefit of being able to further explore Dr. Kotha’s

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22  
23 <sup>14</sup> Even assuming that Dr. Kotha’s assessment was a formal Fibromyalgia diagnosis,  
24 a diagnosis alone is not dispositive. *See Matthews v. Shalala*, 10 F.3d 678, 680 (9th  
25 Cir. 1993) (mere existence of impairment is insufficient proof of a disability;  
26 claimant bears the burden of proving that an impairment is disabling). The mere  
existence of this report does not necessarily mean that Plaintiff is disabled, and the  
Court is not persuaded that this report conclusively has the meaning Plaintiff assigns  
it.

1 report and possibly seek medical expert testimony at the remand hearing if  
2 necessary. Remand is therefore appropriate because the record is not fully  
3 developed with respect to Dr. Kotha's report, any Fibromyalgia diagnosis, and their  
4 impact on the ALJ's assessment. Additional administrative proceedings would  
5 therefore be helpful both to the proceedings below and an eventual second judicial  
6 review, if any, by this Court.

7 **C. Defendant is Not Entitled to Summary Judgment**

8 Based on the foregoing recommendation that Plaintiff's MSJ be granted and  
9 this matter be remanded for further proceedings, this Court necessarily recommends  
10 that Defendant's Cross-MSJ be DENIED.

11 **VI. CONCLUSION**

12 This Court RECOMMENDS that Plaintiff's MSJ be GRANTED, that  
13 Defendant's Cross-MSJ be DENIED, and the matter be REMANDED for further  
14 proceedings by the ALJ.

15 This Report and Recommendation is submitted to the United States District  
16 Judge assigned to this case, pursuant to the provisions of 28 U.S.C § 636(b)(1) and  
17 Federal Rule of Civil Procedure 72(b).

18 **IT IS ORDERED** that **no later than July 25, 2017**, any party to this action  
19 may file written objection with the Court and serve a copy on all parties. The  
20 document shall be captioned "Objections to Report and Recommendation." The  
21 parties are advised that failure to file objections within the specific time may waive  
22 the right to raise those objections on the appeal.

23 ///

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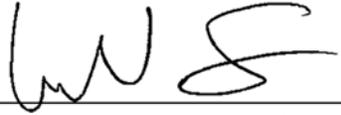
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1           **IT IS FURTHER ORDERED** that, in consultation with the District Judge  
2 assigned to this matter, **no reply briefs will be accepted.**

3 **IT IS SO ORDERED.**

4 DATED: July 11, 2017

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7 \_\_\_\_\_  
8 Hon. William V. Gallo  
9 United States Magistrate Judge  
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