



1 Plaintiff Casey B. Sheldon filed for disability insurance benefits on January  
2 11, 2011, alleging an onset date of January 8, 2010 Tr. 156-157. Benefits were  
3 denied initially and upon reconsideration. Tr. 94-96, 100-101. Plaintiff requested a  
4 hearing before an administrative law judge (“ALJ”), which was held before ALJ  
5 Helen Francine Strong on January 26, 2012. Tr. 29-66. Plaintiff was represented by  
6 counsel and testified at the hearing. Tr. 37-38, 51-58. Medical expert Dr. Wil B.  
7 Nelp and vocational expert William H. Weiss also testified. Tr. 39-50, 59-66. The  
8 ALJ denied benefits (Tr. 10-28) and the Appeals Council denied review (Tr. 1).  
9 The matter is now before this court pursuant to 42 U.S.C. § 405(g).

#### 10 **STATEMENT OF FACTS**

11 The facts of the case are set forth in the administrative hearing and  
12 transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner,  
13 and will therefore only be summarized here.

14 Plaintiff was 48 years old at the time of the hearing. Tr. 37. She testified that  
15 she completed four years of college. Tr. 37. For thirteen years before the alleged  
16 disability onset date Plaintiff was employed as president of the “NW & Tech  
17 Practice” of a global public relations firm. Tr. 181, 198. Previous to that she was  
18 the brand marketing manager for a computer manufacturer. *Id.* Plaintiff alleges she  
19 is disabled due to chronic fatigue syndrome. *See* Tr. 100. Plaintiff testified that she  
20 liked her job and anticipated going back until her symptoms got worse. Tr. 52. She

1 testified that she goes grocery shopping “when [she] can” and has a housekeeper  
2 come in to help with cleaning. Tr. 53. Plaintiff testified that she can usually run  
3 errands or go to doctor’s appointments three or four times a week, but “most of the  
4 time” she cannot leave her apartment. Tr. 54. As recommended by her doctor,  
5 Plaintiff does yoga and stretching and walks three or four blocks when she able,  
6 which “ends up being three or four days” a week. Tr. 55-56.

### 7 **STANDARD OF REVIEW**

8 A district court's review of a final decision of the Commissioner of Social  
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
10 limited: the Commissioner's decision will be disturbed “only if it is not supported  
11 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,  
12 1158–59 (9th Cir.2012) (citing 42 U.S.C. § 405(g)). “Substantial evidence” means  
13 relevant evidence that “a reasonable mind might accept as adequate to support a  
14 conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently,  
15 substantial evidence equates to “more than a mere scintilla[,] but less than a  
16 preponderance.” *Id.* (quotation and citation omitted). In determining whether this  
17 standard has been satisfied, a reviewing court must consider the entire record as a  
18 whole rather than searching for supporting evidence in isolation. *Id.*

19 In reviewing a denial of benefits, a district court may not substitute its  
20 judgment for that of the Commissioner. If the evidence in the record “is susceptible

1 to more than one rational interpretation, [the court] must uphold the ALJ’s findings  
2 if they are supported by inferences reasonably drawn from the record.” *Molina v.*  
3 *Astrue*, 674 F.3d 1104, 1111 (9th Cir.2012). Further, a district court “may not  
4 reverse an ALJ’s decision on account of an error that is harmless.” *Id.* at 1111. An  
5 error is harmless “where it is inconsequential to the ultimate nondisability  
6 determination.” *Id.* at 1115 (quotation and citation omitted). The party appealing  
7 the ALJ’s decision generally bears the burden of establishing that it was harmed.  
8 *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

#### 9 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

10 A claimant must satisfy two conditions to be considered “disabled” within  
11 the meaning of the Social Security Act. First, the claimant must be “unable to  
12 engage in any substantial gainful activity by reason of any medically determinable  
13 physical or mental impairment which can be expected to result in death or which  
14 has lasted or can be expected to last for a continuous period of not less than twelve  
15 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be  
16 “of such severity that he is not only unable to do his previous work[,] but cannot,  
17 considering his age, education, and work experience, engage in any other kind of  
18 substantial gainful work which exists in the national economy.” 42 U.S.C. §  
19 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential analysis to  
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
3 404.1520(a)(4)(i)-(v); 416.920(a)(4) (i)-(v). At step one, the Commissioner  
4 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);  
5 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the  
6 Commissioner must find that the claimant is not disabled. 20 C.F.R. § §  
7 404.1520(b); 416.920(b).

8 If the claimant is not engaged in substantial gainful activities, the analysis  
9 proceeds to step two. At this step, the Commissioner considers the severity of the  
10 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the  
11 claimant suffers from “any impairment or combination of impairments which  
12 significantly limits [his or her] physical or mental ability to do basic work  
13 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);  
14 416.920(c). If the claimant's impairment does not satisfy this severity threshold,  
15 however, the Commissioner must find that the claimant is not disabled. *Id.*

16 At step three, the Commissioner compares the claimant's impairment to  
17 several impairments recognized by the Commissioner to be so severe as to  
18 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§  
19 404.1520(a)(4)(iii); 416.920(a) (4)(iii). If the impairment is as severe or more  
20

1 severe than one of the enumerated impairments, the Commissioner must find the  
2 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

3       If the severity of the claimant's impairment does meet or exceed the severity  
4 of the enumerated impairments, the Commissioner must pause to assess the  
5 claimant's "residual functional capacity." Residual functional capacity ("RFC"),  
6 defined generally as the claimant's ability to perform physical and mental work  
7 activities on a sustained basis despite his or her limitations (20 C.F.R. §§  
8 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the  
9 analysis.

10       At step four, the Commissioner considers whether, in view of the claimant's  
11 RFC, the claimant is capable of performing work that he or she has performed in  
12 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).

13 If the claimant is capable of performing past relevant work, the Commissioner  
14 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).

15 If the claimant is incapable of performing such work, the analysis proceeds to step  
16 five.

17       At step five, the Commissioner considers whether, in view of the claimant's  
18 RFC, the claimant is capable of performing other work in the national economy. 20  
19 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination, the  
20 Commissioner must also consider vocational factors such as the claimant's age,

1 education and work experience. *Id.* If the claimant is capable of adjusting to other  
2 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § §  
3 404.1520(g)(1); 416.920(g) (1). If the claimant is not capable of adjusting to other  
4 work, the analysis concludes with a finding that the claimant is disabled and is  
5 therefore entitled to benefits. *Id.*

6 The claimant bears the burden of proof at steps one through four above.  
7 *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir.2010). If  
8 the analysis proceeds to step five, the burden shifts to the Commissioner to  
9 establish that (1) the claimant is capable of performing other work; and (2) such  
10 work “exists in significant numbers in the national economy.” 20 C.F.R. § §  
11 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

#### 12 ALJ’S FINDINGS

13 At step one, the ALJ found Plaintiff has not engaged in substantial gainful  
14 activity since January 8, 2010, the alleged onset date. Tr. 15. At step two, the ALJ  
15 found Plaintiff has the following severe impairments: chronic fatigue syndrome  
16 (“CFS”) and disorders of [the] back (discogenic, degenerative). Tr. 15. At step  
17 three, the ALJ found that Plaintiff does not have an impairment or combination of  
18 impairments that meets or medically equals the severity of one of the listed  
19 impairments in 20 C.F.R. Part 404, Subpt. P, App’x 1. Tr. 15. The ALJ then  
20 determined that Plaintiff has the RFC

1 to perform sedentary work as defined in 20 CFR 404.1567(a) except for the  
2 following limitations. The claimant is able to occasionally climb ramps and  
3 stairs, but never climb ladders, ropes, and scaffolds, and only rarely balance,  
4 stoop, kneel, crouch, and crawl. Additionally, she must avoid concentrated  
5 exposure to extreme cold, extreme heat, humidity, vibration, fumes, odors,  
6 dusts, gases, areas with poor ventilation, hazardous machinery, and  
7 unprotected heights.

8 Tr. 16. At step four, the ALJ found Plaintiff is capable of performing past relevant  
9 work as a company president. Tr. 21. In the alternative, at step five, considering the  
10 Plaintiff's age, education, work experience, and RFC, the ALJ determined that  
11 Plaintiff has also acquired work skills from past relevant work that are transferable  
12 to other occupations with jobs existing in significant numbers in the national  
13 economy. Tr. 22. The ALJ concluded that Plaintiff has not been under a disability,  
14 as defined in the Social Security Act, from January 8, 2010, through the date of the  
15 decision. Tr. 22.

### 16 **ISSUES**

17 The question is whether the ALJ's decision is supported by substantial  
18 evidence and free of legal error. Specifically, Plaintiff asserts: (1) the ALJ erred in  
19 assessing Plaintiff's credibility; (2) the ALJ erred in rejecting evidence from  
20 Plaintiff's treating physicians and "other sources;" (3) the ALJ erred in rejecting  
the statements of lay witnesses; and (4) the ALJ erred in finding that Plaintiff could  
perform past relevant work. ECF No. 12 at 3-20. Defendant argues: (1) Plaintiff's  
subjective allegations were not credible; (2) the ALJ properly weighed the medical



1 opinion evidence; (3) the ALJ properly rejected the lay statements; and (4) the  
2 ALJ's uncontested finding that Plaintiff could perform other work existing in  
3 significant numbers in the national economy rendered harmless any error regarding  
4 her past relevant work. ECF No. 14 at 3-20.

## 5 DISCUSSION

### 6 A. Credibility

7 In social security proceedings, a claimant must prove the existence of  
8 physical or mental impairment with "medical evidence consisting of signs,  
9 symptoms, and laboratory findings." 20 C.F.R. §§ 416.908; 416.927. A claimant's  
10 statements about his or her symptoms alone will not suffice. *Id.* Once an  
11 impairment has been proven to exist, the claimant need not offer further medical  
12 evidence to substantiate the alleged severity of his or her symptoms. *Bunnell v.*  
13 *Sullivan*, 947 F.2d 341, 345 (9th Cir.1991) (en banc). As long as the impairment  
14 "could reasonably be expected to produce [the] symptoms," the claimant may offer  
15 a subjective evaluation as to the severity of the impairment. *Id.* This rule  
16 recognizes that the severity of a claimant's symptoms "cannot be objectively  
17 verified or measured." *Id.* at 347 (quotation and citation omitted).

18 If an ALJ finds the claimant's subjective assessment unreliable, "the ALJ  
19 must make a credibility determination with findings sufficiently specific to permit  
20 [a reviewing] court to conclude that the ALJ did not arbitrarily discredit claimant's

1 testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.2002). In making this  
2 determination, the ALJ may consider, *inter alia*: (1) the claimant's reputation for  
3 truthfulness; (2) inconsistencies in the claimant's testimony or between his  
4 testimony and his conduct; (3) the claimant's daily living activities; (4) the  
5 claimant's work record; and (5) testimony from physicians or third parties  
6 concerning the nature, severity, and effect of the claimant's condition. *Id.* Absent  
7 any evidence of malingering, the ALJ's reasons for discrediting the claimant's  
8 testimony must be “specific, clear and convincing.” *Chaudhry v. Astrue*, 688 F.3d  
9 661, 672 (9th Cir.2012) (quotation and citation omitted).<sup>1</sup>

10 Here, the ALJ “[did] not find the claimant’s allegations of disability entirely  
11 credible.” Tr. 17. Plaintiff argues the ALJ erred in assessing Plaintiff’s credibility.

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12 <sup>1</sup> Defendant argues that the court should apply a more deferential “substantial  
13 evidence” standard of review to the ALJ’s credibility findings. ECF No. 14 at 3-4.  
14 The court declines to apply this lesser standard. The Ninth Circuit recently  
15 reaffirmed in *Garrison v. Colvin* that “the ALJ can reject the claimant’s testimony  
16 about the severity of her symptoms only by offering specific, clear and convincing  
17 reasons for doing so;” and further noted that “[t]he governments suggestion that we  
18 should apply a lesser standard than ‘clear and convincing’ lacks any support in  
19 precedent and must be rejected.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir.  
20 2014).

1 ECF No. 12 at 16-18. The court agrees. Notably, the ALJ acknowledged that “the  
2 medical record establishes diagnoses of chronic fatigue syndrome, with  
3 documented complaints of persistent tiredness and fatigue, sleepiness, headaches,  
4 joint discomfort, and disrupted sleep. The record further documents findings of  
5 degenerative disease of the spine with associated pain and tenderness and  
6 decreased range of motion.” Tr. 17 (citing Tr. 401, 426-428, 441, 445-461, 466-  
7 495, 617-618, 632-635, 653, 683, 685, 696-700, 704). Nevertheless, the ALJ found  
8 “the objective medical evidence of record does not support finding a more  
9 restrictive [RFC] than for a limited range of sedentary work”; and “treatment  
10 records and exam findings do not support the degree of severity alleged.” Tr. 17.  
11 Subjective pain testimony may not be rejected solely because it is not corroborated  
12 by objective medical findings, however, medical evidence is a relevant factor in  
13 determining the severity of a claimant’s disabling effects. *Rollins v. Massanari*,  
14 261 F.3d 853, 857 (9th Cir. 2001). In support of this reasoning, the ALJ relied on a  
15 single medical record documenting Plaintiff’s October 2010 visit with treating  
16 physician Dr. Steven Overman, during which Dr. Overman reported symmetric  
17 motor and sensory function, found mild spinal tenderness and mild right pelvic  
18 pain on examination, and noted that x-rays indicated mild degenerative changes of  
19 the cervical and thoracic spine. Tr. 653. However, while not noted by the ALJ, at  
20 this same visit Dr. Overman assessed limitations in 18 out of 20 activities of daily

1 living; noted that the imaging results indicated “[p]ossible sacroiliac abnormalities  
2 bilaterally;” and noted abnormal laboratory results including vitamin D deficiency,  
3 IgG antibodies consistent with HSV2 infection, and Epstein-Barr virus infection.  
4 Tr. 653-54. Thus, while properly considered by the ALJ, this single visit with Dr.  
5 Overman indicating the results of a few discrete tests were “mild” or “symmetric”  
6 does not rise to the level of substantial evidence supporting a clear and convincing  
7 reason to discount Plaintiff’s credibility, particularly in light of the abundance of  
8 evidence that supports Plaintiff’s primary ongoing complaint of debilitating  
9 fatigue. *See* Tr. 400-401, 441, 518, 520-522, 529, 542, 550, 556, 560, 568, 624-  
10 635, 651-654, 671, 683, 685, 698-700. Moreover, as discussed below, the ALJ’s  
11 only other reasons for rejecting Plaintiff’s testimony are not clear, convincing, and  
12 supported by substantial evidence. As such, even if the objective medical evidence  
13 does not support the level of impairment claimed, the negative credibility finding is  
14 inadequate because a lack of objective evidence cannot be the sole basis for  
15 discrediting Plaintiff’s testimony.

16 First, the ALJ found that “treatment records indicate steady improvement in  
17 symptoms with medication and physical therapy/chiropractic care.” Tr. 17. An ALJ  
18 may rely on the effectiveness of treatment to support an adverse credibility  
19 finding.” *See Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 599-600 (9th  
20 Cir. 1999) (ALJ relied on report that Plaintiff’s symptoms improved with the use

1 of medication). In support of this finding, the ALJ relies on “[p]rogress notes  
2 indicat[ing] the claimant’s consistent reports of improvement in back and joint pain  
3 and range of motion with chiropractic care, as well as a care provider’s assessment  
4 of a good progress (e.g. ‘reported feeling better after the treatment ... showing  
5 improvement’). Tr. 17 (citing 446-458, 471-478). However, as noted by Plaintiff,  
6 these reports of improvement were largely temporary and occurred only  
7 immediately after treatment sessions. ECF No. 12 at 7. While not acknowledged by  
8 the ALJ, Plaintiff reported only a 20% improvement since the start of care (Tr.  
9 478), and her reported functioning and pain level remained severely limited (Tr.  
10 481-482). Moreover, in December 2010 Plaintiff’s chiropractor Dr. Scott Mindel  
11 reported that despite “diligence with treatment and participation,” Plaintiff made  
12 “minimal progress” over nine months of treatment; and Dr. Mindel opined that  
13 Plaintiff “is not able to engage in any form of work at this time.” Tr. 492.

14         The ALJ also relied on a progress note from treating physician Dr. Steven  
15 Overman in January 2011 indicating that Plaintiff experienced a “bit of an energy  
16 lift” and “is not fatiguing post breakfast” after taking Alpha ENF in the morning.  
17 Tr. 17, 709. At the same visit, Plaintiff’s reported that she experienced less  
18 headaches and joint pain, and her use of NSAID’s had declined. Tr. 17, 709.  
19 However, as noted by Plaintiff, this apparent improvement is belied by notes from  
20 the next visit with Dr. Overman showing that Plaintiff experienced headaches

1 when trying certain doses of alpha ENF, and overall “[h]as had a difficult time  
2 with any sort of physical activity.” Tr. 708. It is at this visit that Dr. Overman  
3 recommends that Plaintiff engage in “small doses of smaller movements” such as  
4 walking around the block or some yoga. Tr. 708. However, despite the ALJ’s  
5 suggestion that this recommendation was evidence of improvement in Plaintiff’s  
6 condition, she failed to consider Dr. Overman’s caution that this daily exercise  
7 must not raise Plaintiff’s heart rate because it “stimulates response in her.” Tr. 17,  
8 708. Finally, the ALJ referred to Dr. Overman’s notes that Plaintiff had “definite  
9 benefits from [the pain medication] Mobic” (Tr. 702) and “finds [Mobic] helpful  
10 for controlling her symptoms” (Tr. 704). Tr. 17. However, as noted by Plaintiff,  
11 Mobic is a pain medication, and while the court notes the documented relief from  
12 this symptom, there is no evidence that it affected her primary complaint of  
13 debilitating fatigue. ECF No. 12 at 6. Moreover, the most recent record available  
14 from Dr. Overman referenced ongoing “drug strategies” and “combination  
15 therapies,” including a trial of prednisone, presumably to address Plaintiff’s  
16 ongoing treatment needs despite any benefit experienced by using Mobic. Tr. 702.

17       After considering all of this evidence offered in support of the ALJ’s  
18 reasoning that Plaintiff experienced “steady improvement in symptoms,” the court  
19 finds the ALJ appears to rely only on portions of the record that favored her  
20 ultimate conclusion that Plaintiff was not credible. *See Gallant v. Heckler*, 753

1 F.2d 1450, 1456 (9th Cir. 1984) (an ALJ “cannot reach a conclusion first, and then  
2 attempt to justify it by ignoring competent evidence in the record that suggests an  
3 opposite result”). Further, the ALJ fails to specifically identify the testimony she  
4 finds is not credible or explain why the cited examples of “improvement”  
5 undermine Plaintiff’s testimony. *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th  
6 Cir. 2001) (in making a credibility finding, the ALJ “must specifically identify the  
7 testimony she or he finds not to be credible and must explain what evidence  
8 undermines the testimony.”). Plaintiff testified that her symptoms are unpredictable  
9 and she has “good days” when she can get “most of the things I want to get done,  
10 done,” while on other days she cannot get out of bed. Tr. 38. This is consistent  
11 with progress notes indicating intermittent “improvement” of symptoms. Tr. 17.  
12 For all of these reasons, and after an exhaustive independent review of the record,  
13 the court finds the ALJ’s reasoning regarding alleged improvement in Plaintiff’s  
14 symptoms is not supported by substantial evidence.

15 Second, the ALJ found “the claimant’s daily functioning and other reported  
16 activities are inconsistent with assertions of disabling impairment.” Tr. 19. There  
17 are two grounds for using daily activities to form the basis of an adverse credibility  
18 determination. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). First, the  
19 daily activities may contradict a claimant’s other testimony. *Id.*; *Molina*, 674 F.3d  
20 at 1113 (“Even where those activities suggest some difficulty functioning, they

1 may be grounds for discrediting the claimant’s testimony to the extent that they  
2 contradict claims of a totally debilitating impairment.”). Second, as found by the  
3 ALJ in this case, daily activities may be grounds for an adverse credibility finding  
4 if a claimant is able to spend a substantial part of his or her day engaged in pursuits  
5 involving the performance of physical functions that are transferable to a work  
6 setting. *Orn*, 495 F.3d at 639. In support of this reasoning, the ALJ cited claimant’s  
7 function report indicating that she prepares her own meals, lives alone, attends  
8 medical appointments, handles business affairs, attends to personal care/hygiene,  
9 does her own laundry, walks, and drives a car. Tr. 19, 205-208. Plaintiff reported  
10 that she shops for groceries and household needs once or twice per week; and goes  
11 out with friends once or twice a month. Tr. 19, 207-208. The ALJ also cited  
12 Plaintiff’s testimony that she tries to do yoga, and walk three to four blocks when  
13 she can. Tr. 19, 55.

14 Plaintiff argues that the ALJ erred in finding Plaintiff’s activities were  
15 inconsistent with disability because periods of sporadic activity “punctuated with  
16 rest” are consistent with a CFS diagnosis and with Plaintiff’s claims of disabling  
17 fatigue. ECF No. 12 at 8-9 (citing *Reddick v. Chater*, 157 F.3d 715, 722-23 (9th  
18 Cir. 1998). The court agrees. Here, the record as a whole does not support the  
19 ALJ’s characterization of Plaintiff’s activities, which are limited and often require  
20 accommodation. For example, in the disability report Plaintiff states that household



1 chores such as preparing meals and doing housework are only done as tolerated  
2 and with frequent rest. Tr. 206. She has a housekeeper, buys prepared food, and  
3 has started having most of her groceries delivered. Tr. 206-207. She pays bills and  
4 fills out paperwork only when she has energy and with frequent rest periods. Tr.  
5 205. She can walk only 5-10 minutes before needing to stop and rest for anywhere  
6 from five minutes to several hours. Tr. 209. Plaintiff testified that she tries to do  
7 yoga and walking as recommended by her doctor when she is able, but is only able  
8 to walk three or four blocks. Tr. 55. She also testified that she grocery shops “when  
9 I can” but “can’t always do it the day I planned to do it” due to fatigue; and she  
10 does errands three or four days a week but “probably most of the time, it’s just  
11 more, more – would take more energy than I have.” Tr. 53-54. As in *Reddick*, the  
12 court finds Plaintiff’s reported activities are fully consistent with the episodic  
13 nature of a CFS diagnosis, and the ALJ’s reasoning is unsupported by the record as  
14 a whole. *Reddick*, 157 F.3d at 722-23 (finding the ALJ’s “paraphrasing of record  
15 material is not entirely accurate regarding the content or tone of the record” and  
16 concluding that the ALJ’s “approach and conclusions do not fully account for the  
17 nature of CFS and its symptoms”).

18       Moreover, the mere fact that Plaintiff engages in basic maintenance  
19 activities such as grocery shopping and driving a car does not detract from  
20 credibility as to overall disability. It is well-settled that a claimant need not be

1 utterly incapacitated in order to be eligible for benefits. *Fair v. Bowen*, 885 F.2d  
2 597, 603 (9th Cir. 1989); *see also Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir.  
3 1987) (claimant need not “vegetate in a dark room” to be found disabled). Finally,  
4 the ALJ did not identify activities that approach the level of effort required to  
5 maintain the demands of full time work. “In evaluating whether the claimant  
6 satisfies the disability criteria, the Commissioner must evaluate the claimant’s  
7 ability to work on a *sustained* basis.” *Lester*, 81 F.3d at 833 (emphasis added). Nor  
8 does the ALJ elaborate on how Plaintiff spends a “substantial part” of any day  
9 engaged in activities that are transferable to a work setting. *See Thomas*, 278 F.3d  
10 at 958 (“the ALJ must make a credibility determination with findings sufficiently  
11 specific to permit the court to conclude that the ALJ did not arbitrarily discredit  
12 claimant’s testimony.”). Thus, while the ALJ did identify a number of daily  
13 activities, when reviewed in the context of the entire record they show a person  
14 accomplishing limited tasks that would not transfer to the ability to maintain  
15 ongoing fulltime employment.

16 Finally, the ALJ appears to rely heavily on medical expert Dr. Wil B. Nelp’s  
17 interpretation of the objective evidence in the record and opinion that “based on the  
18 objective findings of exercise and her medical records,” the Plaintiff is capable of  
19 work at the sedentary level. Tr. 18, 46-47. In evaluating credibility, an ALJ may  
20 consider testimony from physicians and third parties concerning the nature,

1 severity, and effect of the symptoms . *Thomas*, 278 F.3d at 959. However, as  
2 discussed in detail below, reliance on this non-treating physician’s opinion does  
3 not constitute substantial evidence, as it is not based on independent evidence in  
4 the record. *See infra*, section B.1. Therefore, the ALJ’s rejection of Plaintiff’s  
5 treating and examining medical professional’s opinions in favor of Dr. Nelp’s  
6 interpretation of the medical evidence was error; and Dr. Nelp’s opinion cannot  
7 serve as a clear and convincing reason to discount Plaintiff’s credibility.

8         Based on the foregoing, the court finds the ALJ failed to cite specific, clear  
9 and convincing reasons, supported by substantial evidence, for the adverse  
10 credibility finding. On remand, the ALJ should reconsider the credibility finding.

## 11         **B. Medical Opinion Evidence**

12         There are three types of physicians: “(1) those who treat the claimant  
13 (treating physicians); (2) those who examine but do not treat the claimant  
14 (examining physicians); and (3) those who neither examine nor treat the claimant  
15 [but who review the claimant's file] (nonexamining [or reviewing] physicians).”  
16 *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir.2001) (citations omitted).  
17 Generally, a treating physician's opinion carries more weight than an examining  
18 physician's, and an examining physician's opinion carries more weight than a  
19 reviewing physician's. *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th  
20 Cir.2001)(citations omitted). If a treating or examining physician's opinion is

1 uncontradicted, the ALJ may reject it only by offering “clear and convincing  
2 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d  
3 1211, 1216 (9th Cir.2005). Conversely, “[i]f a treating or examining doctor's  
4 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by  
5 providing specific and legitimate reasons that are supported by substantial  
6 evidence.” *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830–831 (9th Cir.1995)).  
7 Plaintiff argues the ALJ improperly rejected the medical opinions of treating  
8 physicians and “other sources.” ECF No. 12 at 3-16.

9 **1) Dr. Steven Overman and Dr. Gary Schuster, treating physicians**<sup>2</sup>

10 In December 2010 Dr. Overman reported that he initially diagnosed Plaintiff  
11 with CFS of “unclear etiology,” and possible sero-negative spondylarthritis  
12 causing back and leg pain. Tr. 401. Dr. Overman reviewed the results of objective  
13 testing and found that Plaintiff’s “metabolic systems no longer work normally, and  
14 she has limitations in cardiovascular, pulmonary, and metabolic output, and this  
15 affects her cognitive function as well as her significant symptoms of fatigue,  
16 headaches, concentration problems, and weakness.” Tr. 401-402. Ultimately, he  
17 opined that Plaintiff “is work disabled based on objective measures and evidence  
18 of underlying medical conditions that are associated with inflammatory

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19 <sup>2</sup> The ALJ considered these opinions and rejected them for the exact same reasons,  
20 so the court will also analyze them together. *See* Tr. 20.

1 spondyloarthropathy white matter lesions in her brain, and cardiopulmonary  
2 limitations on exercise testing.” Tr. 402. Also in December 2010, Plaintiff’s  
3 primary physician Dr. Schuster diagnosed CFS, elevated Epstein-Barr virus titers,  
4 physiologic hypersomnia, abnormal physiologic testing, myalgias/artralgias  
5 involving the neck and upper extremity, Brain MRI with white matter vasculitis,  
6 B12 deficiency, and depression secondary to the development of her physical  
7 disease. Tr. 632-634. Dr. Schuster opined that Plaintiff “has demonstrated an  
8 unquestionable loss of physical capability to work even at a sedentary level;” and  
9 is not capable of working predictively eight hours daily. Tr. 634. He also opined  
10 that Plaintiff’s “prognosis is poor for improvement enough to be alert for work;”  
11 and due to chronic pain, fatigue and other diagnoses, Plaintiff is not capable of  
12 work on a more probable than not basis. Tr. 635.

13         The ALJ accorded the opinions of Dr. Schuster and Dr. Overman “little  
14 weight.” Tr. 20. Plaintiff argues the ALJ erred in rejecting the opinions of these  
15 treating physicians without providing specific, legitimate reasons. ECF No. 12 at  
16 3-10. The court agrees. First, the ALJ generally cites the same objective evidence  
17 she relied on in her credibility evaluation, namely, findings from Plaintiff’s  
18 October 2010 visit with Dr. Overman of symmetric motor and sensory function,  
19 mild spinal tenderness and mild right pelvic pain on examination, and mild  
20 degenerative changes of the cervical and thoracic spine. Tr. 653. “[A]n ALJ may

1 discredit treating physicians’ opinions that are conclusory, brief, and unsupported  
2 by the record as a whole, or by objective medical findings.” *Batson v. Comm’r of*  
3 *Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2003) (citations omitted).

4 However, when explaining his reasons for rejecting medical opinion evidence, the  
5 ALJ must do more than state a conclusion; instead, the ALJ must “set forth his  
6 own interpretations and explain why they, rather than the doctors’, are correct.”  
7 *Reddick*, 157 F.3d at 725. “This can be done by setting out a detailed and thorough  
8 summary of the facts and conflicting clinical evidence, stating his interpretation  
9 thereof, and making findings.” *Id.* Here, Plaintiff correctly argues that the discrete  
10 objective findings cited by the ALJ entirely fail to address “the existence or  
11 severity of the symptoms Dr. Overman identified as significant: fatigue, headaches,  
12 and concentration problems.” ECF No. 12 at 3 (citing Tr. 402). In fact, the ALJ  
13 failed to provide any explanation or description of how Dr. Overman’s or Dr.  
14 Schuster’s opinions are unsupported by objective medical findings. Nor did the  
15 ALJ reconcile this reasoning with her own findings earlier in the decision  
16 acknowledging that the medical record as a whole repeatedly confirms a diagnosis  
17 of CFS; findings of degenerative disease of the spine with associated pain and  
18 tenderness and decreased range of motion; and persistent complaints of debilitating  
19 fatigue, headaches, joint discomfort, and disrupted sleep. Tr. 17 (citing Tr. 401,  
20 426-428, 441, 445-461, 466-495, 617-618, 632-635, 653, 683, 685, 696-700, 704).

1 Thus, the court finds this reason for rejecting the opinions of Dr. Overman and Dr.  
2 Schuster is not specific, legitimate, or supported by substantial evidence.

3 Next, the ALJ rejects the opinions of Dr. Overman and Dr. Schuster for the  
4 same reasons he found Plaintiff not credible, namely: “these opinions are not  
5 consistent with progress notes indicating improvement with medication and  
6 treatment, and [Plaintiff’s] ability to exercise and perform activities of daily living,  
7 as discussed above.” Tr. 20. These types of inconsistencies may be legitimate  
8 reasons for discounting medical opinions. *See Batson*, 359 F.3d at 1195 (ALJ may  
9 discredit treating source’s medical opinion that is unsupported by the record as a  
10 whole); *Bayliss*, 427 F.3d at 1216 (discrepancy between treating physician’s  
11 opinion and clinical notes justified rejection of opinion); *Morgan*, 169 F.3d at 601-  
12 602 (an ALJ may discount a medical source opinion to the extent it conflicts with  
13 claimant’s report of daily activities). However, as discussed in detail above, the  
14 ALJ’s findings regarding Plaintiff’s daily activities, and her alleged improvement  
15 with medication and chiropractic care, was not supported by substantial evidence  
16 in the record. *See supra*, section A. Moreover, the ALJ fails to explain how  
17 Plaintiff’s alleged improvement of symptoms or reported daily activities were not  
18 consistent with any specific aspect of the medical opinion evidence offered by Dr.  
19 Overman or Dr. Schuster. *See Reddick*, 157 F.3d at 725 (ALJ must “set forth his  
20 own interpretations and explain why they, rather than the doctors’, are correct”).

1 The court concludes that these reasons for rejecting Dr. Overman and Dr.  
2 Schuster's opinions were not specific and legitimate.

3 Finally, the ALJ found that "the opinions of Dr. Schuster and Dr. Overman  
4 are not consistent with the opinion of [non-examining] medical expert Dr. Nelp  
5 and the opinions of [non-examining] state agency physicians Dr. Thuline and Dr.  
6 Peril, who concluded that the medical record, as a whole, demonstrates that the  
7 claimant is capable of at least sedentary duty." Tr. 20. The ALJ relied heavily on  
8 the testimony of Dr. Nelp, who reviewed the entire record and confirmed that the  
9 evidence was consistent with diagnoses of CFS, based on Plaintiff's allegations of  
10 persistent fatigue and tiredness. Tr. 42. Dr. Nelp also testified that CFS has no  
11 known cause and there is no specific laboratory test used to diagnosis CFS. Tr. 43,  
12 48. He opined that "based on the objective findings of exercise in her medical  
13 records" and "taking into consideration the fatigue aspect of the case," that  
14 Plaintiff's has an RFC to perform at the sedentary level with additional postural  
15 and environmental limitations. Tr. 46-49. The ALJ accorded Dr. Nelp's opinion  
16 "great weight." In addition, state agency reviewing medical consultants Dr. Dale  
17 Thuline and Dr. Michael Perll both opined that Plaintiff could perform a limited  
18 range of light work with additional postural and environmental limitations. Tr. 19-  
19 20, 218-219, 239-241. The ALJ granted these non-treating and non-examining



1 opinions “limited weight,” but cited them as support for Dr. Nelp’s conclusion that  
2 Plaintiff could perform sedentary work. Tr. 20.

3 “Although the contrary opinion of a non-examining medical expert does not  
4 alone constitute a specific, legitimate reason for rejecting a treating or examining  
5 physician’s opinion, it may constitute substantial evidence when it is consistent  
6 with other independent evidence in the record.” *Tonapetyan v. Halter*, 242 F.3d  
7 1144, 1149 (9th Cir. 2001) (citing *Magallanes v. Bowen*, 881 F.2d 747, 752 (9th  
8 Cir. 1989)). Thus, in addition to the testimony of a non-examining medical expert,  
9 the ALJ must have other evidence to support a decision to reject the opinion of a  
10 treating physician, such as laboratory test results, contrary reports from examining  
11 physicians, or testimony from the Plaintiff that was inconsistent with the treating  
12 physician’s opinion. *See Magallanes*, 881 F.2d at 751-52; *Andrews v. Shalala*, 53  
13 F.3d 1042-43 (9th Cir. 1995). Plaintiff argues that the ALJ improperly rejected the  
14 opinions of Plaintiff’s treating physicians “based on the contrary opinions of  
15 doctors who had never treated or even examined [Plaintiff].” ECF No. 12 at 4-5.

16 The court agrees.

17 First, the ALJ fails to support his rejection of Dr. Overman and Dr. Schuster  
18 in favor of Dr. Nelp’s, with independent evidence in the record. *See Tonapetyan*,  
19 242 F.3d at 1149. The ALJ noted that “as Dr. Nelp testified, the claimant’s brain  
20 MRI showed ‘very minor abnormalities not considered to be significant,’ and her

1 exercise performance testing indicated normal EKG and an exercise capacity  
2 (based on her treadmill performance) sufficient for sedentary level of exertion.” Tr.  
3 20, 44. However, the radiologist who first interpreted the results of the MRI did not  
4 evaluate the white matter tracts as “minor” or “not significant;” nor did any other  
5 medical opinion in the record. Tr. 425. Dr. Nelp also referred to the physical  
6 capacities tests as an “elaborate evaluation,” but his testimony did not address the  
7 consistently “abnormal” results of those tests (Tr. 297-339), rather, he testified  
8 only that Plaintiff had a normal EKG in one set of tests, and was able to walk at a  
9 “very significant speed” of 2.5 miles an hour for ten minutes three times in  
10 succession for a total of 45 minutes. Tr. 18, 45. However, while not discussed by  
11 the ALJ, these tests were also reviewed by Plaintiff’s treating physicians and  
12 referenced at length in their opinions as to her ability to work. In direct contrast to  
13 Dr. Nelp’s assessment of the exercise tests as “normal,” Dr. Overman referenced  
14 Plaintiff’s increased heart rate response; swelling of hands, wrists, ankles, and feet;  
15 reduction of anaerobic threshold; inadequate ventilatory reserve during exercise;  
16 and impaired reaction time and cognitive function. Tr. 401-402. Accordingly, Dr.  
17 Overman found Plaintiff was “work disabled *based on objective measures* and  
18 evidence of underlying medical conditions that are associated with inflammatory  
19 spondyloarthritis, white matter lesions in her brain, and cardiopulmonary  
20 limitations on exercise testing.” Tr. 402 (emphasis added). Similarly, Dr. Schuster

1 diagnosed Plaintiff with “abnormal physiologic testing” and “brain MRI with  
2 white matter;” and opined that Plaintiff

3 has demonstrated an unquestionably loss of physical capability to work even  
4 at a sedentary level based on her marked diminution in exercise capacity,  
5 decreased anaerobic threshold, decreased aerobic capacity, decreased  
6 primary function capacity, anemia of triple origin, folate, B12, and iron  
deficiency contributed to her disability and inability to work based on the  
fact that they markedly limit her physical capabilities of performing minimal  
activities of daily living.

7 Tr. 632-635.

8 Defendant argues generally that the ALJ properly gave Dr. Nelp’s opinion  
9 greater weight than the treating physician’s opinions because it “was better  
10 supported by objective evidence.”<sup>3</sup> ECF No. 14 at 13 (citing 20 C.F.R. §

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11 <sup>3</sup> Defendant also argues that the treating physician’s opinions were properly  
12 rejected by the ALJ because (1) their respective opinions that Plaintiff was  
13 “disabled” or “unable to work” (Tr. 402, 635) was an opinion reserved to the  
14 Commissioner alone; and (2) as opposed to Dr. Nelp, their opinions “did not  
15 outline specific limitations (i.e. how long [Plaintiff] could sit, stand, or walk, or  
16 how much [Plaintiff] could lift) that would reflect consideration of the objective  
17 evidence.” ECF No. 14 at 12-13. However, Plaintiff correctly notes that these  
18 reasons are not offered by the ALJ as part of the decision, and the court “review[s]  
19 the ALJ’s decision based on the reasoning and factual findings offered by the ALJ  
20 – not post hoc rationalizations that attempt to intuit what the adjudicator may have

1 404.1527(c)(3)) As an initial matter, Plaintiff correctly notes that the ALJ failed to  
2 provide any explanation as to why Dr. Nelp’s interpretation of the objective testing  
3 should be given more weight than Plaintiff’s treating providers. *See Reddick*, 157  
4 F.3d at 725 (ALJ must do more than offer conclusions, rather, he or she must “set  
5 forth his own interpretations and explain why they, rather than the doctors’, are  
6 correct”). Moreover, Defendant’s reliance on this regulation is misplaced.  
7 “Supportability” is only one of many factors to be considered in deciding the  
8 weight accorded to a medical opinion; and all three of these physicians relied on  
9 the same objective evidence to support their opinions so the requisite “degree to  
10 which they provide[d] supporting explanations for their opinions” was presumably  
11 identical despite the differences in their respective conclusions. See 20 C.F.R. §  
12 404.1527(c)(3). Finally, and dispositive on this issue,

13 [w]hen an [non-treating] physician relies on the same clinical findings as a  
14 treating physician, but differs only in his or her conclusions, the conclusions  
15 of the [non-treating] physician are not ‘substantial evidence.’ ... By contrast,  
16 when a [non-treating] physician provides ‘independent clinical findings that  
17 differ from the findings of a treating physician,’ such findings are  
18 ‘substantial evidence.’ Independent clinical findings can be either (1)  
19 diagnoses that differ from those offered by another physician and that are  
20 supported by substantial evidence, or (2) findings based on objective  
medical tests that the treating physician has not [himself] considered.

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19 been thinking.” ECF No. 15 at 2 (citing *Bray v. Comm’r of Soc. Sec. Admin.*, 554  
20 F.3d 1219, 1226 (9th Cir. 2009)).

1 *Orn*, 495 F.3d at 632 (internal citations omitted). As discussed in detail above, the  
2 non-treating and non-examining doctors Dr. Nelp, Dr. Thuline, and Dr. Perll relied  
3 on the same clinical findings and objective medical testing as treating physicians  
4 Dr. Overman and Dr. Schuster. Thus, the ALJ’s reliance on the differing  
5 conclusions of these non-treating physicians does not constitute substantial  
6 evidence necessary to support the ALJ’s rejection of Plaintiff’s treating physician’s  
7 opinions.

8 For all of these reasons, the court finds the ALJ did not give specific and  
9 legitimate reasons, supported by substantial evidence, to reject Dr. Overman’s and  
10 Dr. Schuster’s opinions. The court must reconsider these opinions on remand.

11 **2) Theodore Becker, Ph.D., Christopher Snell, Ph.D., Staci Stevens,**  
12 **M.A., Elizabeth Thybulle, N.D., Scott Mindell, D.C., and Kathryn**  
13 **Reid, M.A.**

14 The opinion of an “acceptable medical source” is given more weight than  
15 that of an “other source.” SSR 06-03p, 2006 WL 2329939 at \*2; 20 C.F.R. §  
16 416.927(a). The ALJ need only provide “germane reasons” for disregarding an  
17 “other source” opinion. *Molina*, 674 F.3d at 1111. However, the ALJ is required to  
18 “consider observations by nonmedical sources as to how an impairment affects a  
19 claimant's ability to work.” *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir.  
20 1987). Moreover, “the adjudicator generally should explain the weight given to

1 opinions from these ‘other sources,’ or otherwise ensure that the discussion of the  
2 evidence in the determination or decision allows a claimant or subsequent reviewer  
3 to follow the adjudicator’s reasoning, when such opinions may have an effect on  
4 the outcome of the case.” SSR 06-03p (Aug. 9, 2006), *available at* 2006 WL  
5 2329939 at \*4.

6 As noted by the ALJ, “[t]hese examiners and/or treating providers opined  
7 that the claimant is incapable of performing any work, including, even sedentary or  
8 light duty.” Tr. 20. In a report dated November 2010, Christopher Snell, Ph.D. and  
9 Staci Stevens, M.A. administered a cardiopulmonary exercise test and found  
10 Plaintiff was “less efficient at low levels of work in the post-exertional state. This  
11 day to day variability will prevent her from reliability [sic] and consistently  
12 performing light sedentary work.” Tr. 297 (citing “abnormal” results in categories  
13 including reproducibility, metabolic responses, cardiovascular responses,  
14 sympathetic response, pulmonary function, cognitive function, and recovery  
15 response). In November 2010 Theodore Becker, Ph.D. completed an extensive  
16 performance-based physical capacity evaluation and found Plaintiff “should be  
17 considered work intolerant.” Tr. 310-339. Chiropractor Scott Mindel, D.C. treated  
18 Plaintiff on a regular basis for nine months in 2010, and opined that “[d]ue to the  
19 chronicity of [Plaintiff’s] pain and fatigue and the worsening of her symptoms with  
20 activity, it is my professional opinion that [Plaintiff] is not able to engage in any

1 form of work at this time.” Tr. 492. In December 2010 Kathryn Reid, M.A.  
2 conducted a vocational assessment of Plaintiff, including an interview, and opined  
3 that she “does not have the physical tolerance for a full work day or work week,  
4 even within the confines of sedentary office work.” Tr. 501. Dr. Elizabeth  
5 Thybulle, Plaintiff’s treating naturopathic doctor, opined on several occasions that  
6 she was unable to work for eight hours per day, five days a week. Tr. 525, 529,  
7 573-574. The ALJ granted all of these “other source” treating or examining  
8 providers’ opinions “little weight” for same reason he found Plaintiff not credible  
9 and rejected the opinions of her treating physicians, namely: they are inconsistent  
10 with evidence that Plaintiff’s symptoms improved with medication and therapy;  
11 they “do not correlate with the Plaintiff’s range of activities;” and they are not  
12 consistent with the medical opinions of Dr. Nelp and the state agency physicians  
13 “who concluded, based on the overall medical record, that the claimant is able to  
14 perform work at the sedentary level.” Tr. 20.

15 Plaintiff argues the ALJ erred in rejecting opinion evidence from “other  
16 sources.” ECF No. 12 at 10-16. As discussed in detail above, the ALJ’s findings  
17 regarding Plaintiff’s daily activities, and her alleged improvement with medication  
18 and chiropractic care, was not supported by substantial evidence in the record, and  
19 therefore is not a germane reason to generally reject the “other source” opinion  
20 evidence. *See supra*, sections A & B. The ALJ also found that “these [other source]

1 opinions are not consistent with the medical opinion of medical expert Dr. Nelp,  
2 and the opinions of the state agency reviewing medical consultants, who concluded  
3 based on the overall medical record, that the claimant is able to perform work at  
4 least at the sedentary level.” Tr. 20. Defendant argues that as a “licensed physician,  
5 Dr. Nelp’s opinion warranted greater weight.” ECF No. 14 at 15 (citing SSR 06-  
6 03p, *available at* 2006 WL 2329939). However, while the SSR cited by Defendant  
7 in support of this argument indicates that “[t]he fact that a medical opinion is from  
8 an ‘acceptable medical source’ is a factor that may justify giving that opinion  
9 greater weight;” it also emphasizes that opinions from all medical sources must be  
10 weighed “depending on the particular facts in a case, and after applying the factors  
11 for weighing opinion evidence .... For example, it may be appropriate to give more  
12 weight to the opinion of a medical source who is not an ‘acceptable medical  
13 source’ if he or she has seen the individual more often than the treating source and  
14 has provided better supporting evidence and a better explanation for his or her  
15 opinion.” SSR 06-03p, *available at* 2006 WL 2329939 at \*5. The “other sources”  
16 listed above actually treated or examined Plaintiff , sometimes on an ongoing and  
17 consistent basis, as opposed to Dr. Nelp who never treated or examined Plaintiff.  
18 *See Lester*, 81 F.3d at 831 (“[t]he opinion of a nonexamining physician cannot *by*  
19 *itself* constitute substantial evidence that justifies the rejection of the opinion of  
20 either an examining or a treating physician”). The ALJ did not appear to consider



1 this or other factors for weighing “other source” opinions. This is particularly  
2 glaring in the case of Dr. Becker, Dr. Snell, and Ms. Stevens, who provided  
3 extensive and specialized supporting evidence “indicating that even light work will  
4 demand more energy than can be aerobically generated” (Tr. 303) and showing  
5 that Plaintiff should be considered “work intolerant” (Tr. 310). Regardless, their  
6 opinions were summarily rejected in favor of Dr. Nelp’s selective interpretation of  
7 those same results as “show[ing] capacity for sedentary exertional work.” Tr. 20.

8 As a final matter, the court is compelled to note that every single practitioner  
9 that actually examined or treated the Plaintiff, including the treating physicians  
10 addressed above, found Plaintiff was unable to sustain gainful employment due to  
11 her limitations. For these reasons and those discussed in the previous sections,  
12 these were not germane reasons to reject the opinion of Plaintiff’s treating and  
13 examining “other sources.” The Commissioner should reevaluate these “other  
14 source” opinions on remand.

### 15 **C. Lay Testimony**

16 An ALJ must consider the testimony of lay witnesses in determining  
17 whether a claimant is disabled. *Stout v. Comm’r of Soc. Sec.*, 454 F.3d 1050, 1053  
18 (9th Cir. 2006). “[I]n order to discount competent lay witness testimony, the ALJ  
19 ‘must give reasons that are germane to each witness.’” *Molina*, 674 F.3d at 1114  
20 (citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993)). Here, the record

1 contains statements in support of Plaintiff's application from her mother, father,  
2 sister, friends, employer, and co-workers. Tr. 253-261. As noted by the ALJ,  
3 "[t]hese reports reiterated many of the claimant's allegations such as constant  
4 fatigue, low energy/deterioration in stamina, and loss of weight, as well as  
5 difficulties engaging in various physical activities." Tr. 21, 253-261. The ALJ  
6 found these statements supported that Plaintiff had "some limitations," however,  
7 she concluded that the lay witness evidence "generally reflect[s] the same  
8 allegations made by the claimant that she is completely disabled from working,  
9 allegations that the undersigned finds to be inconsistent with the opinions of Dr.  
10 Nelp and the state agency medical consultants, as well as the claimant's range of  
11 activities, as discussed above." Tr. 21.

12 Defendant argues that the ALJ did not err in rejecting the lay statements  
13 because they repeated the same allegations made by Plaintiff, and thus the ALJ's  
14 reasons for rejecting Plaintiff's credibility applied "equally well" to lay statements.  
15 ECF No. 14 at 15 (citing *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694  
16 (9th Cir. 2009) ("In light of our conclusion that the ALJ provided clear and  
17 convincing reasons for rejecting [Plaintiff's] own subjective complaints, and  
18 because [lay witness's] testimony was similar to complaints, it follows that the  
19 ALJ also gave germane reasons for rejecting her testimony.")). However, in this  
20 case, as discussed above, the ALJ's rejection of Plaintiff's subjective complaints

1 was *not* supported by clear and convincing reasons. Thus, in keeping with the  
2 reasoning in *Valentine*, it does not “follow” that the ALJ gave germane reasons for  
3 rejecting the lay statements, and they must be reconsidered on remand.

#### 4 **D. Step Four / Step Five**

5 Plaintiff argues that the ALJ erred in finding Plaintiff could perform past  
6 relevant work at step four. ECF No. 12 at 18-20. Defendant responds that the  
7 ALJ’s unchallenged alternative finding that Plaintiff can perform work existing in  
8 significant numbers in the national economy rendered harmless any error at step  
9 four. Tr. 21-22; ECF No. 14 at 16-18 (citing *Molina*, 674 F.3d at 1115 (ALJ’s  
10 error is harmless where it is “inconsequential to the ultimate nondisability  
11 determination”)). Because of errors in considering the medical opinion evidence  
12 and in the credibility determination, the RFC is not properly supported and the  
13 subsequent findings at steps four and five are in question. On remand, the  
14 Commissioner should make a new step four and step five findings as is  
15 appropriate.

#### 16 **CONCLUSION**

17 The ALJ’s decision was not supported by substantial evidence and free of  
18 legal error. Remand is appropriate when, like here, a decision does not adequately  
19 explain how a conclusion was reached, “[a]nd that is so even if [the  
20 Commissioner] can offer proper post hoc explanations for such unexplained

