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FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Apr 12, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KIMBERLY ANN WELLS,  
Plaintiff,  
vs.  
NANCY A. BERRYHILL,  
Acting Commissioner of Social  
Security,  
Defendant.

No. 1:17-CV-03144-LRS  
**ORDER GRANTING  
PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT,  
INTER ALIA**

**BEFORE THE COURT** are the Plaintiff's Motion For Summary Judgment (ECF No. 14) and the Defendant's Motion For Summary Judgment (ECF No. 15).

**JURISDICTION**

Kimberly Ann Wells, Plaintiff, applied for Title II Social Security Disability Insurance benefits (SSDI) and Title XVI Supplemental Security Income benefits (SSI) on May 9, 2011. The applications were denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on April 30, 2013, before Administrative Law Judge (ALJ) Wayne N. Araki. Plaintiff testified at the hearing, as did Vocational Expert (VE) Kimberly Mullinax. On June 24, 2013, the ALJ issued a decision finding the Plaintiff not disabled. The Appeals Council denied a request for review of the ALJ’s decision, making that decision the Commissioner’s final decision subject to judicial review. Plaintiff appealed to federal district court and on February 18, 2016, the court granted Plaintiff’s motion for summary judgment and

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1 remanded the matter to the Commissioner for further proceedings. (ECF No. 31 in  
2 1:15-CV-03033-JTR).

3 A second administrative hearing was held on February 13, 2017, before ALJ  
4 Araki. Plaintiff testified at the hearing, as did VE Mullinax. On June 15, 2017, the  
5 ALJ issued a decision finding the Plaintiff disabled as of April 27, 2014 and awarding  
6 her SSI benefits. Plaintiff, however, was not awarded SSDI benefits since her date  
7 last insured for those benefits was September 30, 2011. The Appeals Council denied  
8 a request for review of the ALJ's decision, making that decision the Commissioner's  
9 final decision subject to judicial review. The Commissioner's final decision is  
10 appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).  
11

## 12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative transcript, the ALJ's  
14 decision, the Plaintiff's and Defendant's briefs, and will only be summarized here.  
15 Plaintiff has a high school education and past relevant work experience as a  
16 dispatcher, night auditor, and customer service representative. She alleges disability  
17 since December 31, 2008, on which date she was 38 years old.  
18

## 19 **STANDARD OF REVIEW**

20 "The [Commissioner's] determination that a claimant is not disabled will be  
21 upheld if the findings of fact are supported by substantial evidence...." *Delgado v.*  
22 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere  
23 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less  
24 than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);  
25 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir.  
26 1988). "It means such relevant evidence as a reasonable mind might accept as  
27 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91  
28

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1 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may  
2 reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457  
3 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).  
4 On review, the court considers the record as a whole, not just the evidence supporting  
5 the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.  
6 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

7 It is the role of the trier of fact, not this court to resolve conflicts in evidence.  
8 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
9 interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749  
10 F.2d 577, 579 (9th Cir. 1984).

11 A decision supported by substantial evidence will still be set aside if the proper  
12 legal standards were not applied in weighing the evidence and making the decision.  
13 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.  
14 1987).

## 15 16 ISSUES

17 Plaintiff argues the ALJ erred in finding Plaintiff was not disabled prior to  
18 April 27, 2014, her date last insured for SSDI benefits. More specifically in that  
19 regard, Plaintiff argues the ALJ erred in: 1) improperly assessing the medical opinion  
20 evidence; and 2) failing to provide specific, clear and convincing reasons for  
21 discounting Plaintiff's testimony regarding her symptoms and limitations.

## 22 23 24 DISCUSSION

### 25 SEQUENTIAL EVALUATION PROCESS

26 The Social Security Act defines "disability" as the "inability to engage in any  
27 substantial gainful activity by reason of any medically determinable physical or

### 28 ORDER GRANTING PLAINTIFF'S

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1 mental impairment which can be expected to result in death or which has lasted or can  
2 be expected to last for a continuous period of not less than twelve months." 42  
3 U.S.C. § 423(d)(1)(A) and § 1382c(a)(3)(A). The Act also provides that a claimant  
4 shall be determined to be under a disability only if her impairments are of such  
5 severity that the claimant is not only unable to do her previous work but cannot,  
6 considering her age, education and work experiences, engage in any other substantial  
7 gainful work which exists in the national economy. *Id.*

8 The Commissioner has established a five-step sequential evaluation process for  
9 determining whether a person is disabled. 20 C.F.R. §§ 404.1520 and 416.920;  
10 *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines  
11 if she is engaged in substantial gainful activities. If she is, benefits are denied. 20  
12 C.F.R. §§ 404.1520(a)(4)(i) and 416.920(a)(4)(i). If she is not, the decision-maker  
13 proceeds to step two, which determines whether the claimant has a medically severe  
14 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii) and  
15 416.920(a)(4)(ii). If the claimant does not have a severe impairment or combination  
16 of impairments, the disability claim is denied. If the impairment is severe, the  
17 evaluation proceeds to the third step, which compares the claimant's impairment with  
18 a number of listed impairments acknowledged by the Commissioner to be so severe  
19 as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii) and  
20 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or  
21 equals one of the listed impairments, the claimant is conclusively presumed to be  
22 disabled. If the impairment is not one conclusively presumed to be disabling, the  
23 evaluation proceeds to the fourth step which determines whether the impairment  
24 prevents the claimant from performing work she has performed in the past. If the  
25 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §§  
26 404.1520(a)(4)(iv) and 416.920(a)(4)(iv). If the claimant cannot perform this work,  
27 the fifth and final step in the process determines whether she is able to perform other

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1 work in the national economy in view of her age, education and work experience. 20  
2 C.F.R. §§ 404.1520(a)(4)(v) and 416.920(a)(4)(v).

3 The initial burden of proof rests upon the claimant to establish a prima facie  
4 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th  
5 Cir. 1971). The initial burden is met once a claimant establishes that a physical or  
6 mental impairment prevents her from engaging in her previous occupation. The  
7 burden then shifts to the Commissioner to show (1) that the claimant can perform  
8 other substantial gainful activity and (2) that a "significant number of jobs exist in the  
9 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,  
10 1498 (9th Cir. 1984).

## 11 12 **ALJ'S FINDINGS**

13 The ALJ found the following:

14 1) Between December 31, 2008 and December 31, 2011, Plaintiff had  
15 "severe" medically determinable impairments of obesity and degenerative disc  
16 disease of the cervical spine;

17 2) Beginning on January 1, 2012 through April 26, 2014, Plaintiff had  
18 "severe" medically determinable impairments of obesity and degenerative disc  
19 disease of the cervical spine, depressive disorder, somatoform disorder, and  
20 personality disorder;

21 3) Beginning April 27, 2014, Plaintiff had "severe" medically determinable  
22 impairments of obesity and degenerative disc disease of the cervical spine, hip  
23 disorder, chronic otitis media, depressive disorder, somatoform disorder, and  
24 personality disorder;

25 4) Plaintiff's impairments do not meet or equal any of the impairments listed  
26 in 20 C.F.R. § 404 Subpart P, App. 1;

27 ///

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1           5) Between December 31, 2008 and December 31, 2011, Plaintiff had the  
2 Residual Functional Capacity (RFC) to perform light work, defined as lifting and/or  
3 carrying up to 20 pounds occasionally and 10 pounds frequently, standing/walking  
4 up to two hours, and sitting up to two hours at a time; able to occasionally stoop,  
5 kneel, crouch, balance and climb ramps and stairs; unable to crawl or climb ladders,  
6 ropes or scaffolds; able to frequently reach, finger, and handle bilaterally.

7           6) Between January 1, 2012 and April 26, 2014, Plaintiff had the same physical  
8 RFC and her mental RFC was such that she was able to remember and carry out  
9 instructions for tasks generally required of occupations with a specific vocational  
10 preparation (SVP) of one or two<sup>1</sup>; should be able to complete job tasks without the  
11 assistance of others, but occasional assistance would be tolerated; could have  
12 occasional, superficial interaction with the general public and occasional interaction  
13 with co-workers and supervisors.

14           7) Beginning April 27, 2014, Plaintiff has the RFC to perform sedentary work  
15 defined as lifting and/or carrying up to 10 pounds occasionally and 10 pounds  
16 frequently<sup>2</sup>, standing and/or walking for 15 minute intervals for up to two hours a day,  
17 and sitting for one to two hour intervals for up to eight hours a day. Her postural and  
18 manipulative capacities remained as before, as did her mental RFC, but she would  
19

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20           <sup>1</sup> An SVP of 1 requires only a short demonstration. An SVP of 2 requires  
21 anything beyond short demonstration up to and including one month. *Dictionary*  
22 *of Occupational Titles* (Rev. 4<sup>th</sup> ed.)(U.S. Dept. of Labor, 1991). See also  
23 <https://www.onetonline.org/help/online/svp>.

24           <sup>2</sup> The lifting requirements recited by the ALJ for sedentary work are not in  
25 accord with those specified in 20 C.F.R. §404.1567(a) and 416.967(a) which are  
26 lifting no more than 10 pounds at a time and occasionally lifting or carrying  
27 articles like docket files, ledgers and small tools.

1 likely miss at least 16 hours of work per month on a sustained basis; would likely  
2 need to take rest breaks in addition to normally scheduled breaks as needed for up to  
3 15 to 30 minutes; and would need to change positions after standing for 15 minutes  
4 or after sitting for one to two hours.

5 8) Between December 31, 2008 and December 31, 2011, Plaintiff was capable  
6 of performing her past relevant work as a dispatcher, night auditor, and customer  
7 service representative.

8 9) Between January 1, 2012 and April 26, 2014, Plaintiff was not capable of  
9 performing the aforementioned past relevant work, but she was capable of performing  
10 other jobs existing in significant numbers in the national economy as testified to by  
11 the VE, including cleaner/housekeeper, production assembler and outside deliverer.

12 10) Beginning on April 27, 2014, the Plaintiff's RFC precluded her from  
13 performing her past relevant work and other jobs existing in significant numbers in  
14 the national economy.

15 Accordingly, Plaintiff became disabled on April 27, 2014 so as to be eligible  
16 for SSI benefits, but was not disabled prior thereto and therefore, ineligible for SSDI  
17 benefits.

## 18

### 19 **SYMPTOM TESTIMONY**

20 Where, as here, the Plaintiff has produced objective medical evidence of an  
21 underlying impairment that could reasonably give rise to some degree of the  
22 symptoms alleged, and there is no affirmative evidence of malingering, the ALJ's  
23 reasons for rejecting the Plaintiff's testimony must be clear and convincing. *Burrell*  
24 *v. Colvin*, 775 F.3d 1133, 1137 (9<sup>th</sup> Cir. 2014); *Garrison v. Colvin*, 759 F.3d 995,  
25 1014 (9<sup>th</sup> Cir. 2014). If an ALJ finds a claimant's subjective assessment unreliable,  
26 "the ALJ must make a credibility determination with findings sufficiently specific to  
27 permit [a reviewing] court to conclude that the ALJ did not arbitrarily discredit [the]

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1 claimant's testimony." *Thomas v. Barnhart*, 278 F.3d 947, 958 (9<sup>th</sup> Cir.2002).  
2 Among other things, the ALJ may consider: 1) the claimant's reputation for  
3 truthfulness; 2) inconsistencies in the claimant's testimony or between her testimony  
4 and her conduct; 3) the claimant's daily living activities; 4) the claimant's work  
5 record; and 5) testimony from physicians or third parties concerning the nature,  
6 severity, and effect of claimant's condition. *Id.* Subjective testimony cannot be  
7 rejected solely because it is not corroborated by objective medical findings, but  
8 medical evidence is a relevant factor in determining the severity of a claimant's  
9 impairments. *Rollins v. Massanari*, 261 F.3d 853, 857 (9<sup>th</sup> Cir. 2001).

10 As in his June 2013 decision, the ALJ in his June 2017 decision found the  
11 Plaintiff was less than fully credible regarding the intensity, persistence and limiting  
12 effects of her symptoms. (ECF No. 31 in CV-15-3033-JTR at p. 12 and AR at p. 792)  
13 And as in his June 2013 decision, the ALJ in his June 2017 decision found Plaintiff's  
14 physical symptom reporting was not supported by longitudinal examination findings.  
15 (*Id.*). While acknowledging Plaintiff "has a longstanding history of complaints of  
16 pain related to her neck and upper extremities," the ALJ found that "[d]espite  
17 [Plaintiff's] ongoing complaints of pain during this time, the findings upon physical  
18 examination have been generally unremarkable." (AR at p. 792). As Magistrate  
19 Judge Rodgers pointed out in his order granting Plaintiff's motion for summary  
20 judgment and remanding for further administrative proceedings, objective medical  
21 evidence cannot be the sole reason supporting an adverse credibility finding. (ECF  
22 No. 31 in CV-15-3033-JTR at p. 12, citing *Rollins v. Massanari*, 261 F.2d 853, 857  
23 (9<sup>th</sup> Cir. 2001)).

24 According to the Commissioner, the ALJ provided other reasons for  
25 discounting Plaintiff's symptom testimony. For example, the ALJ noted that Plaintiff  
26 was able to engage in a group class for chronic pain and "was able to fully participate  
27 and engage in the classes, providing insight to other participants." (AR at p. 795).

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1 The ALJ concluded that this suggested Plaintiff's "mental health issues did not cause  
2 more than moderate limitations during this time." (*Id.*). It does not appear, however,  
3 that Plaintiff takes issue with what the ALJ concluded regarding Plaintiff's mental  
4 RFC. Plaintiff's focus is on her physical RFC and the ALJ's conclusion that  
5 beginning on April 27, 2014, there was a worsening of Plaintiff's physical  
6 impairments such as to limit her to sedentary work and rendering her disabled after  
7 that date, as compared to the period prior to April 27, 2014, during which the ALJ  
8 concluded the Plaintiff was not disabled because she was capable of performing light  
9 work. That the ALJ found Plaintiff's participation in chronic pain classes suggested  
10 she had no more than moderate mental limitations is not a reason for discounting  
11 Plaintiff's testimony regarding the severity of her physical symptoms.

12 In his June 2017 decision, the ALJ found the Plaintiff has certain non-severe  
13 impairments including hypertension, hyperlipidemia and diabetes mellitus for which  
14 she has been treated with medication. (AR at p. 790). According to the ALJ, it  
15 appeared Plaintiff had not always been "compliant" in taking these medications.  
16 (*Id.*). This is not a clear and convincing reason for discounting Plaintiff's testimony  
17 about symptoms related to her severe physical impairments- obesity and degenerative  
18 disease of the cervical spine. The ALJ apparently recognized this because he did not  
19 cite Plaintiff's failure to take medication for hypertension, hyperlipidemia and  
20 diabetes mellitus as a reason for discounting Plaintiff's complaints about pain related  
21 to degenerative disease of her cervical spine.

22 In sum then, as in his June 2013 decision, the only reason the ALJ essentially  
23 offered for discounting Plaintiff's physical symptom testimony was that it was not  
24 supported by the objective medical evidence. As a matter of law, this is insufficient.

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28 **ORDER GRANTING PLAINTIFF'S  
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1 **MEDICAL OPINIONS**

2 It is settled law in the Ninth Circuit that in a disability proceeding, the opinion  
3 of a licensed treating or examining physician or psychologist is given special weight  
4 because of his/her familiarity with the claimant and his/her condition. If the treating  
5 or examining physician's or psychologist's opinion is not contradicted, it can be  
6 rejected only for clear and convincing reasons. *Reddick v. Chater*, 157 F.3d 715, 725  
7 (9<sup>th</sup> Cir. 1998); *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). If contradicted, the  
8 ALJ may reject the opinion if specific, legitimate reasons that are supported by  
9 substantial evidence are given. *Id.* “[W]hen evaluating conflicting medical opinions,  
10 an ALJ need not accept the opinion of a doctor if that opinion is brief, conclusory,  
11 and inadequately supported by clinical findings.” *Bayliss v. Barnhart*, 427 F.3d 1211,  
12 1216 (9<sup>th</sup> Cir. 2005). The opinion of a non-examining medical advisor/expert need  
13 not be discounted and may serve as substantial evidence when it is supported by other  
14 evidence in the record and consistent with the other evidence. *Andrews v. Shalala*,  
15 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995).

16 Nurse practitioners, physicians' assistants, and therapists (physical and mental  
17 health) are not “acceptable medical sources” for the purpose of establishing if a  
18 claimant has a medically determinable impairment. 20 C.F.R. §§ 404.1513(a);  
19 416.913(a). Their opinions are, however, relevant to show the severity of an  
20 impairment and how it affects a claimant's ability to work. 20 C.F.R. §§ 404.1513(d);  
21 416.913(d).

22 In his June 2013 decision, the ALJ gave “little weight” to the opinions of John  
23 Naiden, M.D., Andres Laufer, M.D., Paula Renzi, D.O., and occupational therapist,  
24 Terri James, all of whom limited the Plaintiff to a sedentary work level. (ECF No. 31  
25 in CV-15-3033-JTR at p. 9). He did so on the asserted basis that their opinions were  
26 inconsistent with the imaging findings and the physical examination findings. (*Id.*).  
27 In his order granting Plaintiff's motion for summary judgment, Magistrate Judge

1 Rodgers noted that stating “medical opinions are not supported by objective findings  
2 or are contrary to the preponderant conclusions mandated by the objective findings”  
3 does not meet the “specific and legitimate” standard. (ECF No. 31 in CV-15-3033-  
4 JTR at p. 10, quoting *Embrey v. Bowen*, 849 F.2d 418, 421 (9<sup>th</sup> Cir. 1988)). The ALJ  
5 must do more than offer conclusions and is required to “set forth his interpretations  
6 and explain why they, rather than the doctors’, are correct.” (*Id.* at p. 11, quoting  
7 *Embrey*). Magistrate Judge Rodgers found the ALJ “simply repeated the objective  
8 findings, but did not explain why these objective findings merited weight, but the  
9 doctors’ other conclusions and opinions did not.” (*Id.*).

10 In reviewing the ALJ’s June 2013 decision (ECF No. 11-2 to CV-15-3033-JTR  
11 at pp. 34-35), it does not appear to be significantly different from his June 2017  
12 decision which again accorded little weight to the opinions of treating physicians,  
13 Drs. Laufer and Renzi, and occupational therapist Ms. James, on the basis the  
14 limitations opined by them are not supported by the physical and objective findings.  
15 (AR at pp. 73-74). As in his June 2013 decision, the ALJ, in his June 2017 decision,  
16 accorded great weight to the opinion of William Drenguis, M.D., who in November  
17 2011, performed a consultative examination of the Plaintiff. He reviewed the medical  
18 record, including presumably the records of Drs. Laufer and Renzi. Dr. Drenguis  
19 opined that Plaintiff’s maximum standing and walking capacity was six hours a day  
20 in an eight hour day; her maximum sitting capacity was six hours a day in an eight  
21 hour day, and her maximum lifting/carrying capacity was “20 pounds occasionally  
22 and 10 pounds frequently, **limited because of the sensory findings in the left arm.**”  
23 (AR at p. 556)(emphasis added). Dr. Drenguis confirmed that Plaintiff had a limited  
24 cervical range of motion. (AR at p. 555). He also confirmed Plaintiff’s diagnosis of  
25 fibromyalgia, finding Plaintiff was “tender in all the major muscle groups” (AR at p.  
26 555) and would have a number of postural limitations due to “weakness and pain  
27 from the fibromyalgia.” (AR at p. 556).

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1 It would have been appropriate for the ALJ to rely on Dr. Drenguis for the  
2 ALJ's physical RFC conclusion, but for three reasons: 1) Dr. Drenguis seemingly  
3 suggests Plaintiff cannot perform the lifting requirements of light work  
4 (lifting/carrying 20 pounds occasionally and 10 pounds frequently) because of  
5 sensory issues regarding her left arm; 2) no adequate reason was given by the ALJ for  
6 discounting Plaintiff's symptom testimony; and 3) it is not readily apparent that  
7 Plaintiff's physical condition worsened after April 26, 2014, so as to materially  
8 distinguish it from her physical condition as it existed in March 2009.

9 As mentioned above, the ALJ found that after April 26, 2014, Plaintiff's  
10 physical RFC was reduced from light to sedentary work. He reached this conclusion  
11 because:

12 I find that beginning on April 27, 2014, the [Plaintiff's]  
13 allegations regarding her symptoms and limitations are  
14 consistent with the evidence. The medical evidence of  
15 record from this time demonstrates worsening of the  
16 [Plaintiff's] physical impairments. Imaging of the cervical  
17 spine in February 2015 showed multi-level degenerative  
18 disc disease with neural foraminal narrowing at the C5-C7  
19 levels. [Citation omitted]. The [Plaintiff] also began to  
20 receive treatment for referred otalgia from severe arthritis  
21 in her neck. This condition worsened such that [Plaintiff]  
22 began to experience dizziness and a spinning sensation.  
23 [Citation omitted]. . . . In addition to her chronic neck pain,  
24 the [Plaintiff] also began to endorse, and be treated for hip  
25 pain. [Citation omitted]. She underwent injections as well  
26 as therapy for her pain complaints. [Citation omitted].

27 (AR at p. 797).

28 The "Impression" from the February 2015 MRI of Plaintiff's cervical spine was  
as follows:

Multilevel degenerative disc disease and uncovertebral  
hypertrophy most evident at the C4-C5, C5-C6 and  
C6-C7 levels. A mild degree of encroachment upon the  
neural foramina at C5-C6 and C6-C7 are **again identified**.  
Minimal narrowing of the spinal canal is identified at this  
level. **No interval change from the prior study of 05/23/  
2012 is observed.**

(AR at p. 1169)(emphasis added).

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1 The “Impression” of the May 2012 MRI was “[s]mall central protrusions of C5-  
2 6 and C6-7 discs with mild stenosis of the canal similar to prior exam.” (AR at p.  
3 666). The “prior exam” was the one conducted in May 2009. (AR at pp. 388-89).  
4 The results of all three MRIs were essentially the same and therefore, the February  
5 2015 MRI did not demonstrate a worsening of Plaintiff’s cervical spine impairment.

6 As Plaintiff notes, her otalgia diagnosis (otherwise known as ear pain) dates  
7 back to December 2012 (AR at p. 775), and the medical record indicates complaints  
8 of dizziness dating back to April 2009 (AR at p. 463), with intermittent complaints  
9 of dizziness thereafter. As the ALJ pointed out, it was surmised that Plaintiff’s  
10 otalgia was probably the result of severe arthritis in her neck. (AR at p. 1350).  
11 Plaintiff’s complaints of hip pain date back to at least early 2012. (e.g, AR at p. 719).

12 There is not substantial evidence in the record justifying the ALJ’s finding of  
13 a less limited physical RFC for the Plaintiff for the periods between December 31,  
14 2008 and December 31, 2011, and between January 1, 2012 and April 26, 2012,  
15 compared to the period beginning April 27, 2014. Instead, substantial evidence in the  
16 record establishes that the physical RFC the ALJ found for the period beginning April  
17 27, 2014, should be the same physical RFC that existed for Plaintiff beginning on  
18 March 24, 2009, when her treating physician, Dr. Laufer, opined Plaintiff was limited  
19 to sedentary work and to working only 1 to 10 hours per week. (AR at p. 619).

## 20 21 **REMAND**

22 Social security cases are subject to the ordinary remand rule which is that when  
23 “the record before the agency does not support the agency action, . . . the agency has  
24 not considered all the relevant factors, or . . . the reviewing court simply cannot  
25 evaluate the challenged agency action on the basis of the record before it, the proper  
26 course, except in rare circumstances, is to remand to the agency for additional  
27 investigation or explanation.” *Treichler v. Commissioner of Social Security*

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1 *Administration*, 775 F.3d 1090, 1099 (9<sup>th</sup> Cir. 2014), quoting *Fla. Power & Light Co.*  
2 *v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598 (1985).

3 In “rare circumstances,” the court may reverse and remand for an immediate  
4 award of benefits instead of for additional proceedings. *Treichler*, 775 F.3d at 1099,  
5 citing 42 U.S.C. §405(g). Three elements must be satisfied in order to justify such  
6 a remand. The first element is whether the “ALJ has failed to provide legally  
7 sufficient reasons for rejecting evidence, whether claimant testimony or medical  
8 opinion.” *Id.* at 1100, quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9<sup>th</sup> Cir. 2014).  
9 If the ALJ has so erred, the second element is whether there are “outstanding issues  
10 that must be resolved before a determination of disability can be made,” and whether  
11 further administrative proceedings would be useful. *Id.* at 1101, quoting *Moisa v.*  
12 *Barnhart*, 367 F.3d 882, 887 (9<sup>th</sup> Cir. 2004). “Where there is conflicting evidence,  
13 and not all essential factual issues have been resolved, a remand for an award of  
14 benefits is inappropriate.” *Id.* Finally, if it is concluded that no outstanding issues  
15 remain and further proceedings would not be useful, the court may find the relevant  
16 testimony credible as a matter of law and then determine whether the record, taken  
17 as a whole, leaves “not the slightest uncertainty as to the outcome of [the]  
18 proceedings.” *Id.*, quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n. 6  
19 (1969). Where all three elements are satisfied- ALJ has failed to provide legally  
20 sufficient reasons for rejecting evidence, there are no outstanding issues that must be  
21 resolved, and there is no question the claimant is disabled- the court has discretion  
22 to depart from the ordinary remand rule and remand for an immediate award of  
23 benefits. *Id.* But even when those “rare circumstances” exist, “[t]he decision whether  
24 to remand a case for additional evidence or simply to award benefits is in [the court’s]  
25 discretion.” *Id.* at 1102, quoting *Swenson v. Sullivan*, 876 F.2d 683, 689 (9<sup>th</sup> Cir.  
26 1989).

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28 **ORDER GRANTING PLAINTIFF’S**  
**MOTION FOR SUMMARY JUDGMENT- 14**

1 The court finds all three elements are satisfied in this case. In light of the fact  
2 this case has already been remanded once to the Commissioner, the court exercises  
3 it discretion to award benefits to the Plaintiff.

4  
5 **CONCLUSION**

6 Plaintiff's Motion For Summary Judgment (ECF No. 14) is **GRANTED** and  
7 Defendant's Motion For Summary Judgment (ECF No. 15) is **DENIED**. The  
8 Commissioner's decision is **REVERSED**. Pursuant to sentence four of 42 U.S.C. §§  
9 405(g) and 1383(c)(3), this matter is **REMANDED** to the Commissioner for an  
10 award of Title II SSDI benefits based on Plaintiff becoming disabled as of March 24,  
11 2009. An application for attorney fees may be filed by separate motion.

12 **IT IS SO ORDERED.** The District Executive shall enter judgment  
13 accordingly and forward copies of the judgment and this order to counsel of record.

14 **DATED** this 12th day of April, 2018.

15  
16 *s/Lonny R. Suko*

17 \_\_\_\_\_  
18 LONNY R. SUKO  
19 Senior United States District Judge