



1 **JURISDICTION**

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);  
3 1383(c)(3).

4 **STANDARD OF REVIEW**

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

16 In reviewing a denial of benefits, a district court may not substitute its  
17 judgment for that of the Commissioner. If the evidence in the record “is  
18 susceptible to more than one rational interpretation, [the court] must uphold the  
19 ALJ’s findings if they are supported by inferences reasonably drawn from the  
20 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”  
2 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate  
3 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The  
4 party appealing the ALJ’s decision generally bears the burden of establishing that  
5 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

### 6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within  
8 the meaning of the Social Security Act. First, the claimant must be “unable to  
9 engage in any substantial gainful activity by reason of any medically determinable  
10 physical or mental impairment which can be expected to result in death or which  
11 has lasted or can be expected to last for a continuous period of not less than twelve  
12 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s  
13 impairment must be “of such severity that he is not only unable to do his previous  
14 work[,] but cannot, considering his age, education, and work experience, engage in  
15 any other kind of substantial gainful work which exists in the national economy.”  
16 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to  
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
19 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner  
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the  
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
3 404.1520(b); 416.920(b).

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

13 At step three, the Commissioner compares the claimant’s impairment to  
14 severe impairments recognized by the Commissioner to be so severe as to preclude  
15 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
16 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more  
17 severe than one of the enumerated impairments, the Commissioner must find the  
18 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

19 If the severity of the claimant’s impairment does not meet or exceed the  
20 severity of the enumerated impairments, the Commissioner must pause to assess

1 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),  
2 defined generally as the claimant’s ability to perform physical and mental work  
3 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
4 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
5 analysis.

6 At step four, the Commissioner considers whether, in view of the claimant’s  
7 RFC, the claimant is capable of performing work that he or she has performed in  
8 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).  
9 If the claimant is capable of performing past relevant work, the Commissioner  
10 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).  
11 If the claimant is incapable of performing such work, the analysis proceeds to step  
12 five.

13 At step five, the Commissioner considers whether, in view of the claimant’s  
14 RFC, the claimant is capable of performing other work in the national economy.  
15 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,  
16 the Commissioner must also consider vocational factors such as the claimant’s age,  
17 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);  
18 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the  
19 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
20 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other

1 work, analysis concludes with a finding that the claimant is disabled and is  
2 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

3 The claimant bears the burden of proof at steps one through four above.  
4 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
5 step five, the burden shifts to the Commissioner to establish that (1) the claimant is  
6 capable of performing other work; and (2) such work “exists in significant  
7 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2);  
8 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

### 9 **ALJ’S FINDINGS**

10 Plaintiff applied for Title II disability insurance benefits and Title XVI  
11 supplemental security income benefits on February 19, 2013, with an alleged onset  
12 date of January 1, 2004. Tr. 166-85. The applications were denied initially, Tr.  
13 104-10, and on reconsideration, Tr. 112-20. Plaintiff appeared at a hearing before  
14 an administrative law judge (ALJ) on October 7, 2014. Tr. 35-54. On November  
15 26, 2014, the ALJ denied Plaintiff’s claim. Tr. 17-34.

16 At step one of the sequential evaluation analysis, the ALJ found Plaintiff has  
17 not engaged in substantial gainful activity since January 1, 2004, her alleged onset  
18 date. Tr. 22. At step two, the ALJ found Plaintiff has the following severe  
19 impairments: learning disorder, dysthymic disorder, attention deficit hyperactivity  
20 disorder, moderate destrorscoliosis of the thoracic spine, and mild spondylosis of

1 the cervical spine. Tr. 23. At step three, the ALJ found Plaintiff does not have an  
2 impairment or combination of impairments that meets or medically equals the  
3 severity of a listed impairment. Tr. 23. The ALJ then concluded that Plaintiff has  
4 the RFC to perform light work with the following additional limitations:

5 (1) [t]he claimant must avoid concentrated exposure to vibrations and  
6 hazards such as working at heights or near moving machinery; (2) the  
7 claimant is limited to unskilled work; (3) the claimant is limited to only  
8 superficial contact with the public; and (4) the claimant is limited to jobs  
9 with a reasoning level of 1.

10 Tr. 24.

11 At step four, the ALJ found Plaintiff is capable of performing past relevant  
12 work as a commercial cleaner. Tr. 27. Alternatively, at step five, the ALJ found  
13 Plaintiff is capable of performing other jobs that exist in significant numbers in the  
14 national economy, including hand packager and igniter/capper. Tr. 28.

15 On February 24, 2016, the Appeals Council denied review of the ALJ's  
16 decision, Tr. 1-6, making that decision the Commissioner's final decision for  
17 purposes of judicial review. *See* 42 U.S.C. § 405(g).

## 18 ISSUES

19 Plaintiff seeks judicial review of the Commissioner's final decision denying  
20 her disability insurance benefits under Title II and supplemental security income  
benefits under Title XVI of the Social Security Act. Plaintiff raises the following  
issues for review:

- 1 1. Whether the ALJ properly developed the record at step three;
- 2 2. Whether the ALJ properly weighed the lay opinion evidence;
- 3 3. Whether the ALJ properly weighed Plaintiff's symptom claims; and
- 4 4. Whether the ALJ properly weighed the medical opinion evidence.

5 ECF No. 28 at 12-19.

## 6 DISCUSSION

### 7 A. Duty to Develop Record and Listing 12.05

8 Plaintiff argues the ALJ erred by failing to develop the record regarding  
9 Plaintiff's IQ score, which in turn caused the ALJ to err in failing to consider  
10 whether Plaintiff meets the criteria of Medical Listing 12.05. ECF No. 28 at 12-  
11 16.

12 At step three, the ALJ must determine if a claimant's impairments meet or  
13 equal a listed impairment. 20 C.F.R. § 404.1520(a)(4)(iii); 20 C.F.R.  
14 § 416.920(a)(4)(iii). The Listing of Impairments "describes each of the major  
15 body systems impairments [which are considered] severe enough to prevent an  
16 individual from doing any gainful activity, regardless of his or her age, education  
17 or work experience." 20 C.F.R. §§ 404.1525; 416.925. To meet a listed  
18 impairment, a claimant must establish that she meets each characteristic of a listed  
19 impairment relevant to her claim. 20 C.F.R. §§ 404.1525(d); 416.925(d). The  
20 claimant bears the burden of establishing she meets a listing. *Burch v. Barnhart*,



1 400 F.3d 676, 683 (9th Cir. 2005). If a claimant meets the listed criteria for  
2 disability, she will be found to be disabled. 20 C.F.R. §§ 404.1520(a)(4)(iii),  
3 416.920(a)(4)(iii).

4 In her pre-hearing briefing, Plaintiff explicitly raised the issue of Listing  
5 12.05, Intellectual Disorder. Tr. 256-57. The ALJ did not address Listing 12.05  
6 during the hearing or in his decision. Tr. 23-24, 38-43. Plaintiff contends the ALJ  
7 failed to develop the record by not considering the argument or ordering additional  
8 IQ testing. ECF No. 28 at 12-16.

9 A disability claimant bears the burden to prove that he is disabled. *See*  
10 *Ukolov v. Barnhart*, 420 F.3d 1002, 1004 (9th Cir. 2005) (“[t]he claimant carries  
11 the initial burden of proving a disability.”). However, an ALJ has a duty to  
12 develop the record further that is triggered when there is ambiguous evidence or  
13 when the record is inadequate to allow for proper evaluation of the evidence.  
14 *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) (citing *Tonapetyan v.*  
15 *Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001)). Additionally, where an ALJ relies  
16 on a medical expert who indicates the record is insufficient to render a diagnosis,  
17 the ALJ must develop the record further.” *Reed v. Berryhill*, No. 3:16-cv-5675,  
18 2017 WL 684154, at \*3 (W.D. Wash. Feb. 21, 2017) (citing *Tonapetyan*, 242 F.3d  
19 at 1150). The duty to develop the record exists even when the claimant is  
20 represented by counsel, and is heightened in cases involving mental impairments.

1 *DeLorme v. Sullivan*, 924 F.2d 841, 849 (9th Cir. 1991); *see also Hilliard v.*  
2 *Barnhart*, 442 F. Supp. 2d 813, 817 (N.D. Cal. 2006) (ALJ’s duty to develop  
3 record triggered when plaintiff “raised a suspicion” of cognitive impairment).

4 Here, the ALJ found that Plaintiff has the severe impairment of learning  
5 disorder. Tr. 23. Plaintiff raised the possibility of intellectual disorder by specific  
6 reference to Listing 12.05 in her opening brief to the ALJ. Tr. 256-57. *See*  
7 *Hilliard*, 442 F. Supp. 2d at 817. Plaintiff testified at the administrative hearing  
8 that she had undergone IQ testing in the past and the results were low.<sup>1</sup> Tr. 43.  
9 The record also indicates Plaintiff was on an IEP from second grade through  
10 graduation, Tr. 284, and does not drive because she does not understand the  
11 driver’s exam. Tr. 40-41.

12 Furthermore, the ALJ credited the opinion of a medical provider who opined  
13 Plaintiff needed further cognitive testing to determine the extent of her cognitive  
14 abilities. “Where an ALJ relies on a medical expert who indicates the record is  
15 insufficient to render a diagnosis, the ALJ must develop the record further.” *Reed*,

16 \_\_\_\_\_  
17 <sup>1</sup>The school district that conducted the testing no longer has the results available  
18 for review. Tr. 281-82. The record indicates Plaintiff obtained a copy of her  
19 school file in 2013, however, the record does not specify whether that file  
20 contained Plaintiff’s prior IQ testing scores. Tr. 281.

1 2017 WL 684154, at \*3; *Tonapetyan*, 242 F.3d at 1150-51 (“the ALJ was not free  
2 to ignore [the medical expert’s] equivocations and his concern over the lack of a  
3 complete record”); *Gray v. Colvin*, No. CV 15-795-PLA, 2015 WL 7069289 at \*5  
4 (C.D. Cal. Nov. 12, 2015) (record ambiguous where Plaintiff’s impairments  
5 included neurological component and medical expert recommended additional  
6 neurological evaluation); *Dschaak v. Astrue*, No. CV 10-1010-PK, 2011 WL  
7 4498832 at \*20 (D. Or. Aug. 15, 2011) (ALJ failed to develop record by assigning  
8 “great weight,” without further inquiry, to two medical opinions that called for  
9 additional testing).

10 Here, the ALJ assigned great weight to Dr. Rubin’s opinion and some  
11 weight to Dr. Marks’ opinion. Tr. 26. Dr. Rubin’s report notes Plaintiff “may in  
12 fact have some learning disabilities. These can only be ruled out with further  
13 testing.” Tr. 392. Dr. Marks noted some of Plaintiff’s symptoms were “likely  
14 more due to some fairly severe learning disabilities.” Tr. 286. Dr. Marks also  
15 found Plaintiff likely “continues to have learning disabilities, inattentiveness and  
16 likely some cognitive deficits,” but her prognosis is “[u]nclear as further testing is  
17 needed to determine her exact level of cognitive abilities and learning deficits.”  
18 Tr. 287-88. The ALJ assigned weight to both of these medical providers’ opinions,  
19 but both providers opined that additional testing was needed to render a full  
20 assessment of Plaintiff’s cognitive abilities.

1 On this particular record, the lack of IQ scores establishes the kind of  
2 ambiguity or inadequacy that triggers the ALJ's duty to inquire. *McLeod v. Astrue*,  
3 640 F.3d 881, 885 (9th Cir. 2011). The ALJ is instructed on remand to develop the  
4 record by obtaining IQ scores and to evaluate whether Plaintiff meets Listing  
5 12.05.

6 **B. Lay Opinion Evidence**

7 Plaintiff challenges the ALJ's failure to discuss the lay witness testimony of  
8 Plaintiff's mother, Joni Fredriksen. ECF No. 28 at 17. Defendant responds that  
9 this error, if any, should be disregarded as harmless. ECF No. 29 at 18-19.

10 An ALJ must consider the testimony of lay witnesses in determining  
11 whether a claimant is disabled. *Stout v. Comm'r of Soc. Sec.*, 454 F.3d 1050, 1053  
12 (9th Cir. 2006). If lay testimony is rejected, the ALJ "must give reasons that are  
13 germane to each witness." *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996)  
14 (citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993)).

15 Ms. Fredriksen submitted an eight-page function report assessing her  
16 daughter's capabilities. Tr. 220-27. Ms. Fredriksen discussed Plaintiff's pain  
17 levels, activities of daily living, and physical and mental capabilities. *Id.* The ALJ  
18 failed to give any reasons, germane or otherwise, for rejecting Ms. Fredriksen's  
19 opinion; indeed, the ALJ's opinion does not address Ms. Fredriksen's opinion at  
20 all. Tr. 20-29. This was error. *See Molina*, 674 F.3d at 1114 ("under our rule that

1 lay witness testimony ‘cannot be disregarded without comment,’ the ALJ erred in  
2 failing to explain her reasons for disregarding the lay witness testimony, either  
3 individually or in the aggregate.”) (citing *Nguyen*, 100 F.3d at 1467)).

4 Defendant urges this error is harmless because Ms. Fredriksen’s testimony is  
5 duplicative of Plaintiff’s testimony. ECF No. 29 at 18-19. Where lay testimony  
6 does not describe any limitations not already described by the claimant, and the  
7 ALJ’s well-supported reasons for rejecting the claimant’s testimony apply equally  
8 well to the lay witness testimony, failure to discuss the lay witness testimony is not  
9 prejudicial *per se*. *Molina*, 674 F.3d at 1117. However, as discussed *supra*, the  
10 case is being remanded to further develop the record. On remand, the ALJ is  
11 instructed to evaluate Ms. Fredriksen’s opinion.

### 12 **C. Plaintiff’s Symptom Claims**

13 An ALJ engages in a two-step analysis to determine whether a claimant’s  
14 testimony regarding subjective pain or symptoms is credible. “First, the ALJ must  
15 determine whether there is objective medical evidence of an underlying  
16 impairment which could reasonably be expected to produce the pain or other  
17 symptoms alleged.” *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).  
18 “The claimant is not required to show that her impairment could reasonably be  
19 expected to cause the severity of the symptom she has alleged; she need only show

1 that it could reasonably have caused some degree of the symptom.” *Vasquez v.*  
2 *Astrue*, 572 F.3d 586, 591(9th Cir. 2009) (internal quotation marks omitted).

3 Second, “[i]f the claimant meets the first test and there is no evidence of  
4 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
5 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
6 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting  
7 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)). “General findings are  
8 insufficient; rather, the ALJ must identify what testimony is not credible and what  
9 evidence undermines the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81  
10 F.3d 821, 834 (9th Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.  
11 2002) (“[T]he ALJ must make a credibility determination with findings sufficiently  
12 specific to permit the court to conclude that the ALJ did not arbitrarily discredit  
13 claimant’s testimony.”). “The clear and convincing [evidence] standard is the most  
14 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,  
15 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,  
16 924 (9th Cir. 2002)).

17 In making an adverse credibility determination, the ALJ may consider, *inter*  
18 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the  
19 claimant’s testimony or between her testimony and her conduct; (3) the claimant’s  
20 daily living activities; (4) the claimant’s work record; and (5) testimony from

1 physicians or third parties concerning the nature, severity, and effect of the  
2 claimant's condition. *Thomas*, 278 F.3d at 958-59.

3 Here, the ALJ concluded that although Plaintiff "appeared to be a credible  
4 witness, the objective medical evidence and opinion evidence in the record does  
5 not support her allegations of disabling impairments." Tr. 27. This Court finds the  
6 ALJ did not provide specific, clear, and convincing reasons for finding that  
7 Plaintiff's statements concerning the intensity, persistence, and limiting effects of  
8 her symptoms were unsupported. Tr. 27.

9 *1. Objective Medical Evidence*

10 First, the ALJ found that the objective medical evidence did not support her  
11 allegations of disabling impairments. Tr. 27. An ALJ may not discredit a  
12 claimant's pain testimony and deny benefits solely because the degree of pain  
13 alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261  
14 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.  
15 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). However, the medical  
16 evidence is a relevant factor in determining the severity of a claimant's pain and its  
17 disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2). Minimal  
18 objective evidence is a factor which may be relied upon in discrediting a claimant's  
19 testimony, although it may not be the only factor. *See Burch*, 400 F.3d at 680.

20 Here, the Court has ordered that the ALJ develop the record with IQ testing.

1 Whether the ALJ's existing adverse credibility determination can be reconciled  
2 with the medical evidence on remand is for the Commissioner to decide in the first  
3 instance.

#### 4 **D. Medical Opinion Evidence**

5 Finally, Plaintiff faults the ALJ for discounting the opinion of Dr. Evelyn  
6 Rodriguez. ECF No. 28 at 16. Dr. Rodriguez examined Plaintiff twice and  
7 assessed Plaintiff's limitations due to back pain. Tr. 384-86; 394-96. Dr.  
8 Rodriguez opined Plaintiff did not have the physical capacity for full-time work.  
9 Tr. 394. Dr. Rodriguez also assessed Plaintiff's functional capacity as sedentary,  
10 severely limited, and light. Tr. 384-86; Tr. 394-96; Tr. 403.

11 There are three types of physicians: "(1) those who treat the claimant  
12 (treating physicians); (2) those who examine but do not treat the claimant  
13 (examining physicians); and (3) those who neither examine nor treat the claimant  
14 [but who review the claimant's file] (nonexamining [or reviewing] physicians)."  
15 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).  
16 Generally, a treating physician's opinion carries more weight than an examining  
17 physician's, and an examining physician's opinion carries more weight than a  
18 reviewing physician's. *Id.* at 1202. "In addition, the regulations give more weight  
19 to opinions that are explained than to those that are not, and to the opinions of  
20



1 specialists concerning matters relating to their specialty over that of  
2 nonspecialists.” *Id.* (citations omitted).

3         If a treating or examining physician’s opinion is uncontradicted, the ALJ  
4 may reject it only by offering “clear and convincing reasons that are supported by  
5 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
6 “However, the ALJ need not accept the opinion of any physician, including a  
7 treating physician, if that opinion is brief, conclusory and inadequately supported  
8 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228  
9 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or  
10 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ  
11 may only reject it by providing specific and legitimate reasons that are supported  
12 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830–  
13 831).

14         Dr. Rodriguez’s assessment of Plaintiff’s back pain and the consequential  
15 limits on Plaintiff’s physical RFC was contradicted by Dr. Bernardez-Fu. Tr. 96-  
16 97. Therefore, the ALJ needed specific and legitimate reasons to reject Dr.  
17 Rodriguez’s opinion. *Bayliss*, 427 F.3d at 1216.

18         The ALJ found Dr. Rodriguez provided no explanation for her opinion,  
19 including an explanation of why her opinion changed over time. Tr. 26. On  
20 October 17, 2013, Dr. Rodriguez evaluated Plaintiff and assessed her functioning

1 as being able to regularly perform sedentary work. Tr. 386. On October 30, 2013,  
2 Dr. Rodriguez again evaluated Plaintiff, and on this occasion assessed her  
3 functioning as “severely limited,” meaning she is unable to lift at least two pounds  
4 or unable to stand or walk. Tr. 395. On September 25, 2014, Dr. Rodriguez  
5 completed a medical questionnaire that assessed Plaintiff’s functioning as regularly  
6 able to perform light work. Tr. 403. Dr. Rodriguez did not explain the changes in  
7 her findings in any of these reports. Because Dr. Rodriguez’s inconsistent  
8 opinions were not explained, the ALJ had a specific and legitimate reason to reject  
9 Dr. Rodriguez’s opinion.

10 **E. Remand**

11 The decision whether to remand for further proceedings or reverse and  
12 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
13 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate  
14 where “no useful purpose would be served by further administrative proceedings,  
15 or where the record has been thoroughly developed,” *Varney v. Sec’y of Health &*  
16 *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by  
17 remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280  
18 (9th Cir. 1990); *see also Garrison*, 759 F.3d at 1021 (noting that a district court  
19 may abuse its discretion not to remand for benefits when all of these conditions are  
20 met). This policy is based on the “need to expedite disability claims.” *Varney*,

1 859 F.2d at 1401. But where there are outstanding issues that must be resolved  
2 before a determination can be made, and it is not clear from the record that the ALJ  
3 would be required to find a claimant disabled if all the evidence were properly  
4 evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96  
5 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

6 In this case, it is not clear from the record that the ALJ would be required to  
7 find Plaintiff disabled if all the evidence were properly evaluated. Further  
8 proceedings are necessary for the ALJ to develop the record as to Plaintiff's IQ  
9 score and consider whether she meets Listing 12.05. The ALJ must also properly  
10 determine Plaintiff's credibility regarding her symptom reporting and properly  
11 address the opinions of lay witnesses, which may require the ALJ to formulate a  
12 new RFC. The ALJ will also need to supplement the record with any outstanding  
13 medical evidence and potentially elicit testimony from a medical or vocational  
14 expert.

## 15 CONCLUSION

### 16 IT IS ORDERED:

- 17 1. Plaintiff's motion for summary judgment (ECF No. 28) is **GRANTED**,  
18 **in part**, and the matter is **REMANDED** to the Commissioner for  
19 additional proceedings consistent with this Order.
- 20 2. Defendant's motion for summary judgment (ECF No. 29) is **DENIED**.

1 3. Application for attorney fees may be filed by separate motion.

2 The District Court Executive is directed to file this Order, enter

3 **JUDGMENT FOR THE PLAINTIFF**, provide copies to counsel, and **CLOSE**  
4 **THE FILE.**

5 DATED September 26, 2017.

6 *s/Mary K. Dimke*

7 MARY K. DIMKE

8 UNITED STATES MAGISTRATE JUDGE