

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 ROBERT MCBRIDE,

8 Plaintiff,

Case No. C16-601 RSM

9 v.

**ORDER ON SOCIAL SECURITY
DISABILITY**

10 NANCY A. BERRYHILL, Acting
11 Commissioner of Social Security,¹

12 Defendant.

13 **I. INTRODUCTION**

14 Plaintiff, Robert McBride, brings this action pursuant to 42 U.S.C. §§ 405(g), and
15 1383(c)(3), seeking judicial review of a final decision of the Commissioner of Social Security
16 denying his applications for Disability Insurance Benefits (DIB) under Title II of the Social
17 Security Act and Supplemental Security Income (SSI) under Title XVI of the Social Security
18 Act. Dkt. 3. This matter has been fully briefed and, after reviewing the record in its entirety,
19 the Court **REVERSES** the Commissioner's final decision and **REMANDS** this case for further
20 administrative proceedings.

21 **II. BACKGROUND**

22 ¹ Nancy A. Berryhill is now the Acting Commissioner of the Social Security Administration. Pursuant to
23 Federal Rule of Civil Procedure 25(d), Nancy A. Berryhill is substituted for Carolyn W. Colvin as
defendant in this suit. The Clerk is directed to update the docket, and all future filings by the parties
should reflect this change.

1 In July 2013, Mr. McBride filed applications for DIB and SSI alleging disability
2 commencing on July 1, 2012. Tr. 9, 190-202. The applications were denied initially and upon
3 reconsideration. Tr. 9, 67-102. A hearing was held before Administrative Law Judge (ALJ)
4 Tom L. Morris on July 17, 2014. Tr. 9, 26-66. Mr. McBride was represented by counsel,
5 Susan Holm. Tr. 9, 26. Thomas A. Polsin, a vocational expert, also testified at the hearing. *Id.*
6 On August 21, 2014, ALJ Morris issued an unfavorable decision. Tr. 9-20. The Appeals
7 Council denied review, and the ALJ's decision became final. Tr. 1-4. Mr. McBride then
8 timely filed this judicial action.²

9 III. JURISDICTION

10 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
11 405(g) and 1383(c)(3).

12 IV. STANDARD OF REVIEW

13 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
14 social security benefits when the ALJ's findings are based on legal error or are not supported
15 by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
16 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
17 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
18 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th
19 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical
20 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d
21 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it
22 may neither reweigh the evidence nor substitute its judgment for that of the Commissioner.

23 _____
² The rest of the procedural history is not relevant to the outcome of the case and is thus omitted.

1 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to
2 more than one rational interpretation, it is the Commissioner’s conclusion that must be upheld.

3 *Id.*

4 The Court may direct an award of benefits where “the record has been fully developed
5 and further administrative proceedings would serve no useful purpose.” *McCartey v.*
6 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
7 (9th Cir. 1996)). The Court may find that this occurs when:

8 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
9 claimant’s evidence; (2) there are no outstanding issues that must be resolved
10 before a determination of disability can be made; and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled if he
considered the claimant’s evidence.

11 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
12 erroneously rejected evidence may be credited when all three elements are met).

13 **V. EVALUATING DISABILITY**

14 As the claimant, Mr. McBride bears the burden of proving that he is disabled within the
15 meaning of the Social Security Act (the “Act”). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
16 1999) (internal citations omitted). The Act defines disability as the “inability to engage in any
17 substantial gainful activity due to a medically determinable physical or mental impairment
18 which can be expected to result in death or which has lasted, or is expected to last, for a
19 continuous period of not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A
20 claimant is disabled under the Act only if his impairments are of such severity that he is unable
21 to do his previous work, and cannot, considering his age, education, and work experience,
22 engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§
23 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

1 The Commissioner has established a five step sequential evaluation process for
2 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
3 404.1520, 416.920. The claimant bears the burden of proof during steps one through four.
4 *Tackett*, at 1098-99. At step five, the burden shifts to the Commissioner. *Id.* If a claimant is
5 found to be “disabled” or “not disabled” at any step in the sequence, the inquiry ends without
6 the need to consider subsequent steps. *Id.*; 20 C.F.R. §§ 404.1520, 416.920. Step one asks
7 whether the claimant is presently engaged in “substantial gainful activity” (SGA). 20 C.F.R.
8 §§ 404.1520(b), 416.920(b).³ If he is, disability benefits are denied. *Id.* If he is not, the
9 Commissioner proceeds to step two. At step two, the claimant must establish that he has one or
10 more medically severe impairments, or combination of impairments, that limit his physical or
11 mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
12 claimant does not have such impairments, he is not disabled. *Id.* If the claimant does have a
13 severe impairment, the Commissioner moves to step three to determine whether the impairment
14 meets or equals any of the listed impairments described in the regulations. 20 C.F.R. §§
15 404.1520(d), 416.920(d). A claimant whose impairment meets or equals one of the listings for
16 the required twelve-month duration is disabled. *Id.*

17 When the claimant’s impairment neither meets nor equals one of the impairments listed
18 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
19 residual functional capacity (RFC). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
20 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work
21 to determine whether he can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
22 the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true,

23 ³ Substantial gainful employment is work activity that is both substantial, *i.e.*, involves significant
physical and/or mental activities, and gainful, *i.e.*, performed for profit. 20 C.F.R. § 404.1572.

1 then the burden shifts to the Commissioner at step five to show that the claimant can perform
2 other work that exists in significant numbers in the national economy, taking into consideration
3 the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g),
4 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the claimant is unable to perform other work,
5 then he is found disabled; if the opposite is true, he is disabled and benefits may be awarded.
6 *Id.*

7 VI. THE ALJ'S DECISION

8 Utilizing the five-step disability evaluation process,⁴ the ALJ found that:

9 **Step one:** Mr. McBride has not engaged in substantial gainful activity since July 1,
10 2012, the alleged onset date.

11 **Step two:** Mr. McBride has the following severe impairments: degenerative disc disease;
12 osteoarthritis; and allied disorders.

13 **Step three:** These impairments do not meet or equal the requirements of a listed
14 impairment.⁵

15 **Residual Functional Capacity:** Mr. McBride can perform sedentary work as defined in
16 20 C.F.R. §§ 404.1567(a) and 416.967(a). He can frequently climb ramps and stairs and
17 frequently stoop. He can occasionally climb ladders, ropes and scaffolds and
18 occasionally kneel, crouch, and crawl. He must avoid concentrated exposure to hazards
19 and vibrations. He needs to periodically alternate sitting with standing which can be
20 accomplished by any work task requiring such shifts or can be done in either position
temporarily or longer. He will need one additional 10-minute break during the work day.

21 **Step four:** Mr. McBride can perform past relevant work as a telephone solicitor and
22 sales manager and, as such, is not disabled.

23 **Step five:** Alternatively, as there are jobs that exist in significant numbers in the national
economy that Mr. McBride can perform including hand packager, small parts assembler
and cashier II, he is not disabled.

Tr. 9-20.

22 VII. ISSUES ON APPEAL

23 ⁴ 20 C.F.R. §§ 404.1520, 416.920.

⁵ 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 The parties agree this matter should be remanded, but disagree on the nature of the
2 remand. Dkt. 10; Dkt. 14. Mr. McBride argues the ALJ harmfully erred at step two “in not
3 considering [his] conditions aside from osteoarthritis and allied disorders as severe
4 impairments”, and in evaluating the treating opinion of David True, M.D., his own testimony and
5 the lay witness statements. Dkt. 10 at 1. Mr. McBride contends this evidence should be credited
6 as true and the matter should be remanded for an award of benefits or, alternatively, that the
7 matter should be remanded to a different ALJ for further proceedings.⁶ *Id.* The Commissioner
8 concedes the ALJ erred in evaluating Mr. McBride’s impairments at step two as well as the
9 credibility of Mr. McBride’s testimony and that, as a result of these errors, the ALJ’s RFC
10 assessment was unsupported. Dkt. 10 at 1. The Commissioner disagrees the ALJ erred in
11 evaluating the treating opinion of Dr. True and the lay witness statements but also contends that
12 because she concedes error in the RFC, “it is irrelevant whether the parties dispute the ALJ’s
13 evaluation of the lay witness and medical opinion evidence.” Dkt. 14 at 2. The Commissioner
14 argues this matter should be remanded for further proceedings. *Id.* As discussed below, the
15 Court **REVERSES** the Commissioner’s final decision and **REMANDS** the matter for further
16 administrative proceedings under sentence four of 42 U.S.C. § 405(g).

17 **VIII. DISCUSSION**

18 **A. Evaluating Severe Impairments at Step Two**

19 At step two of the sequential evaluation, the Commissioner must determine “whether the
20 claimant has a medically severe impairment or combination of impairments.” *See Smolen v.*

21
22 ⁶ Mr. McBride offers no explanation or argument in support of his assertion that this matter should be
23 remanded to a different ALJ. The Court will only review issues argued “specifically and distinctly” in a
party’s opening brief and Mr. McBride’s “bare assertion of an issue” here is insufficient to preserve his
claim. *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 930 (9th Cir. 2003). Accordingly, the
Court declines to further address this argument.

1 *Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); 20 C.F.R. § 404.1520(a)(4)(ii). The claimant has
2 the burden to show that (1) she has a medically determinable physical or mental impairment, and
3 (2) the medically determinable impairment is severe. *See Bowen v. Yuckert*, 482 U.S. 137, 146
4 (1987). A “‘physical or mental impairment’ is an impairment that results from anatomical,
5 physiological, or psychological abnormalities which are demonstrable by medically acceptable
6 clinical and laboratory diagnostic techniques.” 42 U.S.C. §§ 423(d)(3), 1382c(a)(3)(D); 20
7 C.F.R. § 404.1521. Thus, a medically determinable impairment must be established by objective
8 medical evidence from an acceptable medical source. 20 C.F.R. § 404.1521. An impairment or
9 combination of impairments is severe if it significantly limits the claimant’s physical or mental
10 ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 404.1521(a). “The step two
11 inquiry is a de minimus screening device to dispose of groundless claims.” *Id.* An impairment
12 or combination of impairments may be found “‘not severe’ only if the evidence establishes a
13 slight abnormality that has ‘no more than a minimal effect on an individual’s ability to work.’”
14 *Smolen*, 80 F.3d at 1290 (citing *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)). However,
15 the claimant has the burden of proving his “impairments or their symptoms affect [his] ability to
16 perform basic work activities.” *Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th Cir. 2001).

17 The ALJ found degenerative disc disease, osteoarthritis, and allied disorders to be severe
18 impairments at step two. Tr. 11. The ALJ found “obesity, gastrointestinal complaints,
19 hyperglycemia, hypertension, sleep apnea, central nervous system apnea, hypogonadism, kidney
20 disease secondary to NSAID use, left shoulder pain and history of gout” to be non-severe
21 impairments on the grounds that “these impairments, considered singly or in combination, have
22 caused only transient and mild symptoms and limitations, are well controlled with treatment, did
23 not persist for twelve continuous months, do not have greater than a minimal limitation on the

1 claimant's physical or mental ability to perform basic work activities, or are otherwise not
2 adequately supported by the medical evidence of record." Tr. 11-12.

3 Mr. McBride argues the ALJ erred in evaluating, or failing to evaluate, several of his
4 impairments at step two. Dkt. 10 at 3. Specifically, Mr. McBride contends the ALJ erred in
5 performing no evaluation of the evidence to determine whether chronic headaches, depression
6 and anxiety were severe impairments. *Id.* Moreover, Mr. McBride argues, the ALJ "only made
7 a cursory explanation" that his conditions diagnosed as chronic kidney disease, sleep apnea, and
8 gout, were not severe impairments. *Id.* Mr. McBride argues that all of the above conditions
9 resulted in more than minimal impairments to his ability to perform basic work activities and
10 should therefore have been considered severe impairments. *Id.* The Commissioner concedes,
11 generally, that the ALJ erred in evaluating Mr. McBride's impairments at step two and contends
12 these impairments should be reevaluated on remand. Dkt. 14 at 1, 7.

13 The Court reviews the ALJ's decision for legal error and to determine whether it is
14 supported by substantial evidence. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).
15 However, the Court cannot review a finding that was not made or was not sufficiently specific to
16 provide for meaningful review such as, in this case, whether the above reference impairments
17 were severe. *See, e.g., Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) ("If the ALJ
18 fails to specify his or her reasons for finding claimant testimony not credible, a reviewing court
19 will be unable to review those reasons meaningfully without improperly 'substitut[ing] our
20 conclusions for the ALJ's, or speculat[ing] as to the grounds for the ALJ's conclusions.'");
21 *Mitchell-Bettine v. Astrue*, No. 12-5279, 2013 WL 549900 at *3 (W.D. Wash. Jan. 24, 2013)
22 ("The Court may review an ALJ's decision for legal error and to determine if it is supported by
23 substantial evidence, but cannot review a finding that was not made: namely, whether Plaintiff's

1 impairments are severe”). The ALJ made no determination at all with respect to the severity of
2 some of the cited impairments and the Commissioner does not dispute Mr. McBride’s contention
3 that the “cursory” explanation for discounting the other impairments was insufficient. These are
4 determinations that should be made by the ALJ in the first instance, not the Court. Moreover, as
5 discussed below, some of the other evidence related to the impact of the cited impairments on
6 Mr. McBride’s ability to work (including Mr. McBride’s testimony, the lay testimony and Dr.
7 True’s opinion) must also be reevaluated on remand. Accordingly, on remand, the ALJ should
8 reevaluate Mr. McBride’s impairments, including chronic headaches, depression, anxiety,
9 chronic kidney disease, sleep apnea, and gout, at step two.

10 **B. Mr. McBride’s Symptom Testimony**

11 The parties also agree the ALJ harmfully erred in failing to give clear and convincing
12 reasons for discounting the credibility of Mr. McBride’s symptom testimony. Dkts. 10 at 1, 14 at
13 1. As discussed below, this matter must be remanded for further proceedings. Accordingly, on
14 remand, the ALJ should also reevaluate Mr. McBride’s symptom testimony.

15 **C. David True, M.D.**

16 Mr. McBride contends the ALJ erred in discounting the treating opinion of Dr. True.
17 Dkt. 10 at 1, 11-17. The Commissioner generally disputes this assignment of error but raises no
18 specific challenges to Mr. McBride’s arguments.⁷ Dkt. 14 at 2. The Court agrees with Mr.
19 McBride that the ALJ erred in discounting Dr. True’s opinion.

20 In general, more weight should be given to the opinion of a treating physician than to a
21

22 ⁷ The Commissioner contends this issue is irrelevant because she agrees the ALJ erred in determining the
23 RFC and that the matter must be remanded. Dkt. 14 at 2. However, the fact that the Commissioner
concedes the matter must be remanded does not moot Mr. McBride’s claim of error with respect to Dr.
True’s opinion. Rather, the Court must address this issue in order to properly fashion the scope of
remand.

1 non-treating physician, and more weight to the opinion of an examining physician than to a
2 nonexamining physician. *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where a
3 treating or examining doctor’s opinion is not contradicted by another doctor, it may be rejected
4 only for clear and convincing reasons. *Id.* Where contradicted, a treating or examining
5 physician’s opinion may not be rejected without “specific and legitimate reasons supported by
6 substantial evidence in the record for so doing.” *Id.* at 830-31. “An ALJ can satisfy the
7 ‘substantial evidence’ requirement by ‘setting out a detailed and thorough summary of the facts
8 and conflicting clinical evidence, stating his interpretation thereof, and making findings.’”
9 *Garrison v. Colvin*, 759 F.3d 995, 1011 (9th Cir. 2014) (quoting *Reddick v. Chater*, 157 F.3d
10 715, 725 (9th Cir. 1998)). “The ALJ must do more than offer his conclusions. He must set forth
11 his own interpretations and explain why they, rather than the doctors’, are correct.” *Reddick*, 157
12 F.3d at 725 (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

13 Dr. True provided several opinions regarding Mr. McBride’s functional capacity.
14 Specifically, in June 2013, Dr. True opined that Mr. McBride was “permanently disabled due to
15 chronic medical conditions including osteoarthritis and neuropathy that limit his ability to sit,
16 stand, or walk for any period of time greater than 30 minutes.” Tr. 313. In March 2014, Dr.
17 True indicated that Mr. McBride was unable to walk more than 100 feet per day, unable to climb
18 or descend stairs, unable to lift more than 3-5 pounds 3-4 times daily and [was] restricted to no
19 more than 30-45 minutes per day of any one activity including standing, sitting, walking,
20 working at a computer or speaking on the phone. Tr. 400. And in May 2014, Dr. True opined
21 that Mr. McBride was unable to sit, stand or walk for over 30 minutes each in an 8-hour work
22 day and that he could never lift up to 5 pounds and seldom carry up to 5 pounds. Tr. 401-403.
23 Dr. True also indicated that Mr. McBride was developing increasing problems with mood

1 associated with depression that was causing anxiety and limitations in concentration and
2 memory. *Id.*

3 The ALJ gave Dr. True's opinions little weight for several reasons. First, the ALJ
4 indicated that the "extreme limitations [Dr. True] identifies are not consistent with the objective
5 exam findings or the x-rays." Tr. 17. Specifically, the ALJ noted that "as to the lifting
6 limitations, the evidence shows normal strength." *Id.* However, the evidence indicates that Mr.
7 McBride's limitations are caused predominantly by pain, not by deficits in strength. Thus, the
8 fact that Mr. McBride showed "normal strength" on some exams is not necessarily inconsistent
9 with Dr. True's limitation that Mr. McBride could never lift up to 5 pounds and seldom carry up
10 to 5 pounds. Tr. 401-403. Furthermore, substantial evidence does not support the ALJ's finding
11 that Dr. True's opinion was inconsistent with the x-rays. Tr. 17. In fact, the x-rays contain
12 significant findings including: severe tri-compartmental arthritis in the left knee, degenerative
13 changes in the lumbar spine, degenerative changes and ossification of ligamentum nuchae
14 posterior to the spinous process of C5 in the cervical spine, possible avulsion fracture fragments
15 in region of superior left hip joint, possible avulsion fracture fragments medial to mid to
16 proximal left femur. Tr. 303-304. Moreover, Dr. True did not find the x-ray results inconsistent
17 with the opined limitations and the ALJ fails to explain why his own interpretation of the
18 evidence, rather than Dr. True's, is correct. *See Reddick*, 157 F.3d at 725 (In discounting a
19 treating physician's opinion, "[t]he ALJ must do more than offer his conclusions. He must set
20 forth his own interpretations and explain why they, rather than the doctors', are correct.")).
21 Accordingly, these were not sufficient reasons to discount Dr. True's opinions.

22 Second, the ALJ also discounted Dr. True's May 2014 opinion that Mr. McBride could
23 never lift up to five pound as inconsistent with his demonstrated activities. Tr. 17. Specifically,

1 the ALJ noted that, in July 2013, Mr. McBride acknowledged he was able to shop for items such
2 as pet food, litter and groceries. *Id.* However, the ALJ did not inquire about the weight of these
3 items, what specific actions were involved in “shopping” or whether Mr. McBride required
4 assistance. Moreover, Dr. True’s earlier opinion, in March 2014, is slightly less restrictive,
5 indicating Mr. McBride was unable to lift more than 3-5 pounds 3-4 times daily. Tr. 400. This
6 minor decrease in lifting ability is generally consistent with Dr. True’s opinion that Mr.
7 McBride’s condition is progressive. Tr. 401. Thus, without more or further development, Mr.
8 McBride’s ability to shop for some items of undetermined weight in July 2013 does not
9 necessarily undermine Dr. True’s May 2014 opinion that he could never lift up to five pounds.
10 *See, e.g. Durham v. Colvin*, No. 15-00567, 2015 WL 9305627 at * (C.D. Cal. Dec. 21, 2015)
11 (“[p]laintiff’s ability to shop, take care of personal needs, go out alone, and prepare simple meals
12 does not necessarily involve, as the Commissioner seems to assume, lifting over five pounds.”).

13 Third, the ALJ also discounted Dr. True’s opinion that Mr. McBride’s increasing anxiety
14 and depression were causing limitations in concentration and memory. Tr. 17. Specifically, the
15 ALJ noted there was little mention of issues associated with anxiety or concentration and
16 memory issues. *Id.* However, Mr. McBride’s anxiety and depression were observed, on several
17 occasions, by Dr. True and his difficulties with concentration were also testified to by Mr.
18 McBride and the lay witnesses. Tr. 51-52, 259, 273, 408, 425, 424, 430, 457. Accordingly,
19 substantial evidence does not support this reason for discounting Dr. True’s opinion. The ALJ
20 also notes that Mr. McBride had been taking diazepam for chronic anxiety, which he found to be
21 helpful. Tr. 17. However, it is unclear how this fact undermines Dr. True’s opinion. Rather, the
22 fact that Mr. McBride was taking diazepam would seem to support Dr. True’s opinion that Mr.
23 McBride was experiencing anxiety. The ALJ also noted that Dr. True did not recommend neuro-

1 psychological testing for Mr. McBride's alleged mental issues until he reported these issues in
2 connection with his request that Dr. True complete his disability paperwork. Tr. 17. However,
3 the mere fact that Mr. McBride may have brought up his mental health symptoms at an
4 appointment where his disability application was also a subject does not, in and of itself,
5 undermine Dr. True's opinion. There is no indication Dr. True found Mr. McBride's complaints
6 not credible and, as noted above, the ALJ also erred in discounting the credibility of Mr.
7 McBride's symptom testimony. Finally, the ALJ notes that on some occasions, after Dr. True's
8 May 2014 opinion, he found Mr. McBride to have a normal mood and affect and that he was in
9 no distress. Tr. 17. However, the record also indicates that on several occasions, both prior and
10 subsequent to the May 2014 opinion, Mr. McBride was noted by Dr. True to appear anxious and
11 depressed. Tr. 408 (patient is nervous/anxious), 429, (positive for self-injury, dysphoric mood
12 and decreased concentration), 430 (exhibits a depressed mood), 457 (patient is nervous/anxious
13 and appears distressed). Accordingly, substantial evidence also does not support this reason for
14 discounting Dr. True's opinion.

15 In sum, the ALJ erred in discounting Dr. True's opinions. This error was harmful
16 because Dr. True's opinions set forth greater limitations than were included in the ALJ's RFC.
17 *See Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015) ("ALJ errors in social security cases
18 are harmless if they are 'inconsequential to the ultimate nondisability determination' and ... 'a
19 reviewing court cannot consider [an] error harmless unless it can confidently conclude that no
20 reasonable ALJ, when fully crediting the testimony, could have reached a different disability
21 determination.'" (quoting *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56 (9th Cir.
22 2015))). As discussed below, this matter must be remanded for further proceedings.
23 Accordingly, on remand, the ALJ should reevaluate Dr. True's opinion.

1 Mr. McBride also argues the ALJ erred in giving less weight to Dr. True's treating
2 opinions than to the examining opinion of Mark Magdaleno, M.D., that Mr. McBride could
3 perform sedentary work, and the nonexamining opinion of State consultant Howard Platter,
4 M.D., that Mr. McBride could perform light work with some additional limitations. Tr. 89-92,
5 299. However, the ALJ did not cite to the opinions of Dr. Magdaleno and Dr. Platter as a basis
6 for giving Dr. True's opinion less weight and the Court will not speculate as to the validity or
7 invalidity of findings the ALJ did not make. *See Bray v. Comm'r, Soc. Sec. Admin.*, 554 F.3d
8 1219, 1225-26 (9th Cir. 2009) ("Long-standing principles of administrative law require us to
9 review the ALJ's decision based on the reasoning and factual findings offered by the ALJ—not
10 *post hoc* rationalizations that attempt to intuit what the adjudicator may have been thinking.").
11 However, as the ALJ improperly discounted Dr. True's opinions, in reevaluating those opinions
12 on remand, to the extent necessary, the ALJ should also reevaluate and reweigh the opinions of
13 Dr. Magdaleno and Dr. Platter.

14 **D. Lay Witness Testimony**

15 Mr. McBride also contends the ALJ harmfully erred in evaluating the lay witness
16 statements of Kelli Hurli, John McBride and John Meikle. Dkt. 10 at 9. The Commissioner
17 again generally disputes this assignment of error but raises no specific challenges to Mr.
18 McBride's arguments. This issue is also not mooted by the Commissioner's other concessions as
19 it is relevant to the scope of remand. The Court agrees with Mr. McBride that the ALJ erred in
20 evaluating the lay witness statements.

21 In June 2014, Ms. Hurli, Mr. McBride's friend, submitted a statement indicating that she
22 used to see Mr. McBride socially outside of their homes a couple times a month. Tr. 259-260.
23 However, as Mr. McBride's health has deteriorated over the last three to four years, Ms. Hurli

1 indicated she has had to travel to his home in order to visit him because it is difficult for him to
2 leave the house. *Id.* Ms. Hurli also indicated that whereas in the past Mr. McBride's had kept
3 his house very clean, she has observed that, due to the deterioration of his condition, he has been
4 unable to do so. *Id.* Ms. Hurli also indicated that Mr. McBride has had more difficulty
5 comprehending her emails the last few years. *Id.* She also noted that things that are simple for
6 most are physically difficult for Mr. McBride and that, as a result, he'll have to take part of the
7 next day to rest so he feels better. *Id.*

8 In July 2014, John McBride, Mr. McBride's brother, submitted a statement indicating
9 that he has watched Mr. McBride struggle with a multitude of progressive disabilities. Tr. 273.
10 He indicated that "[m]ore recently it has become evident that as a result of [Mr. McBride's]
11 physical limitations, [he] is no longer able to manage any kind of gainful employment." *Id.*
12 Specifically, "[n]egotiating cars, stairs, sidewalks, doors, sitting for short or long periods,
13 walking any distance, completing relatively simple, repetitive and routine task and even
14 answering the phone are all major challenges that require planning and accommodation and
15 recovery." *Id.* He further indicated that Mr. McBride cannot kneel, bend over or walk up a
16 flight of stairs and that he has become more isolated and seems to be spiraling into a depressive
17 state. *Id.*

18 Mr. McBride's former employer, John Meikle, also submitted a statement indicating that
19 he had witnessed Mr. McBride's health challenges when he was employed as a telemarketer. Tr.
20 274. He indicated that Mr. McBride was habitually tardy and was forced to miss several days of
21 work due to health issues. *Id.* As a result, Mr. Meikle indicated that he had arranged for Mr.
22 McBride to work on a "'flex time' schedule that allowed him to work more when he was feeling
23 better and less when he was not." *Id.* He further indicated that it was clear Mr. McBride was

1 “working hard to overcome his health challenges but was not feeling well enough to work
2 regularly.” *Id.*

3 In determining whether a claimant is disabled, an ALJ must consider lay witness
4 testimony concerning a claimant’s ability to work. *See Dodrill v. Shalala*, 12 F.3d 915, 919 (9th
5 Cir. 1993); 20 C.F.R. §§ 404.1527(f), 416.927(f). Indeed, “lay testimony as to a claimant’s
6 symptoms or how an impairment affects ability to work is competent evidence ... and therefore
7 cannot be disregarded without comment.” *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir.
8 1996) (citations omitted). “If the ALJ wishes to discount the testimony of lay witnesses, he must
9 give reasons that are germane to each witness.” *Dodrill*, 12 F.3d at 919.

10 Here, the ALJ rejected the lay witness statements on the grounds that they “are not
11 consistent with the objective medical evidence.” Tr. 17. Specifically, the ALJ indicated that,

12 [w]hile exam findings show some limitation in range of motion, the
13 claimant has normal strength and normal sensation. Further, the overall
14 treating record shows that the claimant’s pain has been adequately
15 managed with medication. The mental limitations noted in these
16 statements are also inconsistent with the evidence of record which does
17 not show concerns regarding these issues until the claimant brings them
18 up at an appointment concerning his disability application.

19 Tr. 17-18. None of these reasons is sufficient.

20 First, the ALJ fails to explain how normal findings with respect to strength and sensation
21 undermine the lay witness testimony as to Mr. McBride’s limitations. As the ALJ notes, Mr.
22 McBride did have range of motion limitations and his own symptom testimony, which the ALJ
23 improperly rejected, as well as that of the lay witnesses, indicates that his limitations are caused
predominantly by pain not lack of strength or sensation. Thus, this was not a valid reason to
discount the lay witness statements.

1 Second, the ALJ's finding that Mr. McBride's pain is "adequately managed" by
2 medication is also not a sufficient basis to reject the lay witness statements. The ALJ does not
3 identify which records supposedly demonstrate Mr. McBride's pain is "adequately managed" by
4 this medication nor does he explain what he means by the term "adequately" in the context of
5 Mr. McBride's ability to function. Tr. 17-18. Moreover, even with Mr. McBride's ongoing
6 medication use, Dr. True's opinions, which the ALJ also improperly rejected, indicate that he is
7 limited to a substantially greater extent than is provided in the RFC. Tr. 313, 400-403.

8 Accordingly, substantial evidence does not support this reason for discounting the lay witness
9 testimony.

10 Third, the mental impairments noted in the lay witness statements are not substantially
11 inconsistent with the medical evidence. The mere fact that Mr. McBride may have brought up
12 his mental health symptoms at an appointment where his disability application was also a subject
13 does not undermine the lay witness statements which are based on personal observations. This is
14 particularly true in light of the fact that the ALJ improperly discounted the credibility of Mr.
15 McBride's symptom testimony. Moreover, there is evidence in the record indicating that, on
16 several occasions, Dr. True did observe Mr. McBride to be anxious and depressed. Tr. 408
17 (patient is nervous/anxious), 429, (positive for self-injury, dysphoric mood and decreased
18 concentration), 430 (exhibits a depressed mood), 457 (patient is nervous/anxious and appears
19 distressed). Accordingly, this was also not a valid reason to discount the lay witness statements.
20 The Court also notes that the mere fact that every aspect of the lay witness statements regarding
21 the level and impact of Mr. McBride's pain may not be fully supported by medical evidence in
22 the record is not a sufficient reason, without more, to reject those opinions. *See Bruce v. Astrue*,
23 557 F.3d 1113, 1116 (9th Cir. 2009). Finally, as noted above, the lay witness statements are

1 generally consistent the opinion of Dr. True, which the ALJ also erred in discounting and must
2 be reevaluated on remand.

3 In sum, the ALJ erred in rejecting the lay witness statements. Because the lay witness
4 statements indicate Mr. McBride is more limited than provided in the RFC, this error is not
5 harmless. *See Marsh*, 792 F.3d at 1173. As discussed below, this matter must be remanded for
6 further proceedings. On remand, the ALJ should reevaluate the lay witness statements.

7 **E. Scope of Remand**

8 Mr. McBride argues that the improperly rejected evidence discussed above should be
9 credited as true and this matter should be remanded for an award of benefits. Dkt. 10. The
10 Commissioner concedes the ALJ erred in rejecting some of the above evidence but contends that
11 the record contains conflicting evidence and outstanding issues that must be resolved through
12 further proceedings on remand. Dkt. 14 at 2-9.

13 In general, the Court has “discretion to remand for further proceedings or to award
14 benefits.” *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). However, a remand for an
15 immediate award of benefits is an “extreme remedy,” and is appropriate “only in ‘rare
16 circumstances.’” *Brown–Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015) (quoting *Treichler*
17 *v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014)). In order for the Court to
18 remand a case for an award of benefits three requirements must be met. First, the Court must
19 conclude that “‘the ALJ has failed to provide legally sufficient reasons for rejecting evidence,
20 whether claimant testimony or medical opinion.’” *Brown-Hunter*, 806 F.3d at 495 (quoting
21 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014)). Second, the Court must conclude “‘the
22 record has been fully developed and further administrative proceedings would serve no useful
23 purpose.’” *Id.* In considering this second requirement the Court must evaluate whether there are

1 any “outstanding issues” that must be resolved before a disability determination can be made.
2 *Id.* (quoting *Treichler*, 775 F.3d at 1105). Third, the Court must conclude that, “if the
3 improperly discredited evidence were credited as true, the ALJ would be required to find the
4 claimant disabled on remand.” *Id.* (quoting *Garrison*, 759 F.3d at 1021); *see also Treichler*, 775
5 F.3d 1101 (“Third, if we conclude that no outstanding issues remain and further proceedings
6 would not be useful, we ... [find] the relevant testimony credible as a matter of law, and then
7 determine whether the record, taken as a whole, leaves ‘not the slightest uncertainty as to the
8 outcome of [the] proceeding [.]’”) (citations omitted).

9 Even if these three requirements are met, the Court “retains ‘flexibility’” in determining
10 the appropriate remedy.” *Brown-Hunter*, 806 F.3d at 495 (quoting *Garrison*, 759 F.3d at 1021).
11 The Court may remand for further proceedings if enhancement of the record would be useful.
12 *See Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 1990). The Court may also remand for
13 further proceedings “when the record as a whole creates serious doubt as to whether the
14 claimant is, in fact, disabled within the meaning of the Social Security Act.” *Brown-Hunter*,
15 806 F.3d at 495 (quoting *Garrison*, 759 F.3d at 1021). Moreover, if the record is “uncertain and
16 ambiguous,” or “where there is conflicting evidence, and not all essential factual issues have
17 been resolved, a remand for an award of benefits is inappropriate.” *Treichler*, 775 F.3d at 1105.

18 As noted above, the ALJ erred in evaluating several of Mr. McBride’s impairments at
19 step two, and in rejecting Mr. McBride’s testimony, Dr. True’s opinion and the lay witness
20 statements. However, the record also contains conflicting evidence from other medical experts.
21 Specifically, conflicting evidence exists in the examining opinion of Dr. Magdaleno, indicating
22 Mr. McBride could perform sedentary work, and the State consulting opinion of Dr. Platter,
23 indicating Mr. McBride could perform light work with some additional limitations. Tr. 89-92,

1 299. Mr. McBride argues that the Court should give greater weight to Dr. True's treating
2 opinion than to Dr. Madgaleno's examining opinion and Dr. Platter's nonexamining opinion.
3 Dkt. 10 at 13-15. However, it is the ALJ, not the Court, who "is responsible for determining
4 credibility, resolving conflicts in medical testimony, and resolving ambiguities." *Reddick v.*
5 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998); *see Brown-Hunter*, 806 F.3d at 492 ("Ever mindful of
6 our duty not to substitute our own discretion for that of the agency, we have emphasized that 'the
7 decision on disability rests with the ALJ and the Commissioner of the Social Security
8 Administration in the first instance, not with a district court.'" (quoting *Marsh*, 792 F.3d at
9 1173)). Here, as there is conflicting medical evidence in the record, this is not a case where there
10 are "no outstanding issues that must be resolved before a proper disability determination can be
11 made, and where it is clear from the administrative record that the ALJ would be required to
12 award benefits if the [improperly rejected evidence] ... were credited." *Varney v. Sec'y of*
13 *Health & Human Servs.*, 859 F.2d 1396, 1401 (9th Cir. 1988). Because the record does not
14 "compel a finding of disability", remand for further proceedings, not payment of benefits, is
15 warranted. *Treichler*, 775 F.3d at 1099.

16 CONCLUSION

17 For the foregoing reasons, the Commissioner's final decision is **REVERSED** and this
18 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §
19 405(g).

20 On remand, the ALJ should reevaluate: (1) Mr. McBride's impairments at step two; (2)
21 Mr. McBride's symptom testimony; (3) Dr. True's opinion; (4) the lay witness statements; and,
22 (5) proceed in evaluating steps three, four and five with the assistance of a vocational expert as
23 necessary.

1
2 DATED this 11th day of May 2017.
3

4 

5 RICARDO S. MARTINEZ
6 CHIEF UNITED STATES DISTRICT JUDGE
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23