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6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

7  
8 ANNIE ISABEL KOCH,

9 Plaintiff,

10 v.

11 NANCY A. BERRYHILL, Deputy  
Commissioner of Social Security for  
Operations

12 Defendant.

NO. C17-1701-JPD

ORDER

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14 Plaintiff Annie Isabel Koch appeals the final decision of the Commissioner of the  
15 Social Security Administration (“Commissioner”) which denied her applications for Disability  
16 Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI  
17 of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an  
18 administrative law judge (“ALJ”). For the reasons set forth below, the Commissioner’s  
19 decision is reversed and remanded for further proceedings.

20 I. FACTS AND PROCEDURAL HISTORY

21 Plaintiff is a 57 year-old woman, whose past work experience includes employment as  
22 a data entry clerk and order clerk. AR at 26. On September 16, 2015, plaintiff filed a claim for  
23 disability benefits and disabled widow’s benefits, claiming an onset date of date of March 15,  
24 2009. AR at 15. Plaintiff asserts that she is disabled due to degenerative disc disease of the

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1 cervical spine, degenerative disc disease of the lumbar spine, and carpal tunnel syndrome  
2 status post release. AR at 18.

3 The Commissioner denied plaintiff's claim initially and on reconsideration. Plaintiff  
4 requested a hearing which took place on January 20, 2017. AR at 15. On March 8, 2017, the  
5 ALJ issued a decision finding plaintiff not disabled and denied benefits based on his/her  
6 finding that plaintiff could perform her past relevant work as a data entry clerk or an order  
7 clerk. The ALJ's decision was denied by the Appeals Council, AR at 12-27, making the ALJ's  
8 ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g).  
9 Plaintiff timely filed the present action challenging the Commissioner's decision.

## 10 II. STANDARD OF REVIEW

11 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
12 social security benefits when the ALJ's findings are based on legal error or not supported by  
13 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
14 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is  
15 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
16 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750  
17 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in  
18 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,  
19 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a  
20 whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
21 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is  
22 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
23 must be upheld. *Id.*

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

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

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

### 12 III. EVALUATING DISABILITY

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

23 The Commissioner has established a five step sequential evaluation process for  
24 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at

1 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step  
2 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.  
3 §§ 404.1520(b), 416.920(b).<sup>1</sup> If she is, disability benefits are denied. If she is not, the  
4 Commissioner proceeds to step two. At step two, the claimant must establish that she has one  
5 or more medically severe impairments, or combination of impairments, that limit her physical  
6 or mental ability to do basic work activities. If the claimant does not have such impairments,  
7 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
8 impairment, the Commissioner moves to step three to determine whether the impairment meets  
9 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),  
10 416.920(d). A claimant whose impairment meets or equals one of the listings for the required  
11 twelve-month duration requirement is disabled. *Id.*

12 When the claimant’s impairment neither meets nor equals one of the impairments listed  
13 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s  
14 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520I, 416.920I. Here, the  
15 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work  
16 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If  
17 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is  
18 true, then the burden shifts to the Commissioner at step five to show that the claimant can  
19 perform other work that exists in significant numbers in the national economy, taking into  
20 consideration the claimant’s RFC, age, education, and work experience. 20 C.F.R. §§  
21 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the

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23 <sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §  
404.1572.

1 claimant is unable to perform other work, then the claimant is found disabled and benefits may  
2 be awarded.

#### 3 IV. ISSUES ON APPEAL

4 The principal issues on appeal are:

- 5 1. Did the ALJ err at Step four by failing to reconcile conflicts between the  
6 vocational expert testimony and the *Dictionary of Occupational Titles*  
7 (“DOT”)?
- 8 2. Did the ALJ err in the credibility assessment?
- 9 3. Did the ALJ err in assessing the medical opinions?

#### 9 V. DISCUSSION

##### 10 A. The ALJ Erred at Step Four.

11 In her decision, the ALJ found that plaintiff had the RFC to perform sedentary work,  
12 except that she cannot sit consistently for 6 hours out of an 8-hour day and requires an option  
13 to alternate between sitting and standing approximately every 30 minutes, and can occasionally  
14 reach overhead with both upper extremities and can frequently handle, finger and feel with the  
15 dominant right hand and can feel with the non-dominant left hand. AR at 21. At Step Four,  
16 the ALJ concluded the plaintiff could perform her past relevant work as an order clerk (DOT  
17 §249.362-026) or data entry clerk (DOT §203.582-054), However, pursuant to the DOT, both  
18 of these positions require the plaintiff to have greater reaching, handling and fingering abilities  
19 than the found RFC. A data entry clerk job requires frequent (1/2 to 2/3 of the time) reaching  
20 and handling, and constant (2/3 or more of the time) fingering. These are substantially greater  
21 requirements than the plaintiff was able to perform pursuant to the ALJ’s RFC determination.

22 In addition, the ALJ’s RFC restrictions with seating are not compatible with the  
23 definition of sedentary work. *See Rodriguez v. Astrue*, 2012 WL 6917605\*5-6 (W.D. Wash).  
24 The ALJ failed to acknowledge the conflict between the DOT and the VE’s testimony. The

1 ALJ failed to ask the VE about the conflicts, a point conceded by the Commissioner. Thus, the  
2 finding that plaintiff could perform her past relevant work is not supported by substantial  
3 evidence, and the decision must be reversed.

4 B. The ALJ Erred in Assessing the Medical Evidence.

5 Plaintiff argues the ALJ erred in assessing the medical evidence offered by the  
6 testifying medical evidence, particularly evidence and opinions offered by Drs. Smiley (the  
7 testifying medical expert) and Oh (plaintiff's long-term treating physician) and physician's  
8 assistant Beth Blankenship. Plaintiff is correct. On remand, the ALJ will reconsider all of the  
9 medical evidence, including that of the former medical expert Dr. Smiley.

10 I. *Standards for Assessing Medical Evidence.*

11 As a matter of law, more weight is given to a treating physician's opinion than to that  
12 of a non-treating physician because a treating physician "is employed to cure and has a greater  
13 opportunity to know and observe the patient as an individual." *Magallanes*, 881 F.2d at 751;  
14 *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating physician's opinion,  
15 however, is not necessarily conclusive as to either a physical condition or the ultimate issue of  
16 disability, and can be rejected, whether or not that opinion is contradicted. *Magallanes*, 881  
17 F.2d at 751. If an ALJ rejects the opinion of a treating or examining physician, the ALJ must  
18 give clear and convincing reasons for doing so if the opinion is not contradicted by other  
19 evidence, and specific and legitimate reasons if it is. *Reddick*, 157 F.3d at 725. "This can be  
20 done by setting out a detailed and thorough summary of the facts and conflicting clinical  
21 evidence, stating his interpretation thereof, and making findings." *Id.* (citing *Magallanes*, 881  
22 F.2d at 751). The ALJ must do more than merely state his/her conclusions. "He must set forth  
23 his own interpretations and explain why they, rather than the doctors', are correct." *Id.* (citing  
24

1 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)). Such conclusions must at all times  
2 be supported by substantial evidence. *Reddick*, 157 F.3d at 725.

3 The opinions of examining physicians are to be given more weight than non-examining  
4 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Like treating physicians, the  
5 uncontradicted opinions of examining physicians may not be rejected without clear and  
6 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining  
7 physician only by providing specific and legitimate reasons that are supported by the record.  
8 *Bayliss*, 427 F.3d at 1216.

9 2. *Dr. Smiley.*

10 Dr. Smiley was called as a medical expert at the administrative hearing. Dr. Smiley  
11 initially testified that although the plaintiff did meet or equal a listing, taking into account all of  
12 her back pain, neck and forearm pain, and her hand problems, “I don’t think she can function  
13 even at the sedentary level on a regular basis.” AR at 43-44, AR 47-48. Then when asked  
14 directly “is it probable, then, that because of her conditions, she would be absent one to two  
15 times per month if working at this RFC that you gave us?” He answered “I think she’d  
16 probably be absent more often than that, probably at least four times a month, once a week – at  
17 least.” AR at 48.

18 Even though Dr. Smiley was present (on the telephone), the ALJ asked no follow up  
19 questions of the medical expert on the issue. Instead, the ALJ chose to give this portion of Dr.  
20 Smiley’s opinion “little weight” even after attributing great weight to the balance of his  
21 opinion, noting the doctor’s ability to review the entire medial file and his expertise. To justify  
22 her decision, the ALJ cherry-picked medical reports and concluded that the doctor was simply  
23 speculating.

1 The ALJ erred. Plaintiff has been consistently diagnosed with chronic pain syndrome  
2 or complex regional pain syndrome by multiple treating doctors. The doctor's opinion is  
3 hardly speculative. The ALJ cannot simply substitute her opinion for trained medical  
4 physicians, and that is what she did in this case. On remand, the ALJ will revisit Dr. Smiley's  
5 testimony and either credit it or give proper reasons for discounting it.

6 3. *Dr. Oh.*

7 Dr. Oh is plaintiff's long-term physician. He has consistently treated plaintiff for  
8 chronic pain and restricted motion. She is able to get some relief, but only by using opioids.  
9 None of this is discussed by the ALJ, nor are the test results documenting her pain. Dr. Oh  
10 determined that plaintiff should receive a permanent disability parking permit, as she did not  
11 have the capability of walking 200 feet without stopping for a rest or having help from an  
12 assistive device. The ALJ assigned only "some weight" to this opinion because of a later note  
13 finding.

14 This single treatment note hardly outweighs the balance of the treatment plan by  
15 Dr. Oh, which consistently mentioned and dealt with chronic pain limitations faced by  
16 plaintiff. The ALJ is directed to review all medical evidence de novo on remand,  
17 including the reports of the physicians' assistants.<sup>2</sup>

18 C. On Remand, the ALJ Will Reconsider Plaintiff's Testimony.

19 As noted above, it is the province of the ALJ to determine what weight should be  
20 afforded to a claimant's testimony, and this determination will not be disturbed unless it is not  
21 supported by substantial evidence. A determination of whether to accept a claimant's  
22 subjective symptom testimony requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929;

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24 <sup>2</sup> The ALJ, for example, mischaracterized the report of Beth Blankenship, PA-C. On remand, the ALJ is directed to consider this evidence as well.



1 *Smolen*, 80 F.3d at 1281. First, the ALJ must determine whether there is a medically  
2 determinable impairment that reasonably could be expected to cause the claimant’s symptoms.  
3 20 C.F.R. §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82. Once a claimant produces  
4 medical evidence of an underlying impairment, the ALJ may not discredit the claimant’s  
5 testimony as to the severity of symptoms solely because they are unsupported by objective  
6 medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc); *Reddick v.*  
7 *Chater*, 157 F.3d 715, 722 (9th Cir. 1988). Absent affirmative evidence showing that the  
8 claimant is malingering, the ALJ must provide “clear and convincing” reasons for rejecting the  
9 claimant’s testimony.<sup>3</sup> *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014) (citing  
10 *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012)). See also *Lingenfelter v. Astrue*, 504  
11 F.3d 1028, 1036 (9th Cir. 2007).

12 When evaluating a claimant’s subjective symptom testimony, the ALJ must specifically  
13 identify what testimony is not credible and what evidence undermines the claimant’s  
14 complaints; general findings are insufficient. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at  
15 722. The ALJ may consider “ordinary techniques of credibility evaluation,” including a  
16 claimant’s reputation for truthfulness, inconsistencies in testimony or between testimony and  
17 conduct, daily activities, work record, and testimony from physicians and third parties  
18 concerning the nature, severity, and effect of the alleged symptoms. *Thomas*, 278 F.3d at 958-  
19 59 (citing *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997)).

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22 <sup>3</sup> In Social Security Ruling (“SSR”) 16-3p, the Social Security Administration  
23 rescinded SSR 96-7p, eliminated the term “credibility” from its sub-regulatory policy, clarified  
24 that “subjective symptom evaluation is not an examination of an individual’s character[,]” and  
indicated it would more “more closely follow [its] regulatory language regarding symptom  
evaluation.” SSR 16-3p. The Court continues to cite to relevant case law utilizing the term  
credibility, however.

1 The ALJ erred in her treatment of plaintiff's testimony. First, the ALJ cited to evidence  
2 from a psychologist occurring prior to the onset date and a report occurring one year prior to  
3 the onset date to reject plaintiff's claims of limitations. Medical opinions predating the onset  
4 are of limited relevance. See *Carmickle v. Astrue*, 533 F.3d 1155, 1165 (9th Cir. 2008).  
5 Moreover, as a psychologist, Dr. Havellana's opinions regarding plaintiff's gait and physical  
6 abilities and pain observation are entitled to no more weight than any other non-medical  
7 observer. This is not an area of her medical expertise. Second, the ALJ mischaracterized the  
8 record regarding Beth Blankenship's report, an issue not discussed by the Commissioner.  
9 Third, the ALJ's statements about walking into the hospital without assistance fails to  
10 acknowledge that plaintiff used a cane from at least February 2011 through August 2016, and,  
11 as alleged by plaintiff in her brief, at the administrative hearing. The fact that plaintiff was,  
12 during certain periods, able to ambulate without a cane does not provide a "clear and  
13 convincing" reason to reject her pain testimony regarding the need for medical assistance,  
14 which was supported by Dr. Oh's authorization for a permanent disability placard.

15  
16 VI. CONCLUSION

17 For the foregoing reasons, this case is REVERSED and REMANDED to the to the  
18 Commissioner to conduct a full *de novo* hearing not inconsistent with the Court's instructions.

19 DATED this 28th day of September, 2018.

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21   
22 JAMES P. DONOHUE  
23 United States Magistrate Judge  
24