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6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 HEAVEN H.,

9 Plaintiff,

Case No. C17-5957JLR

10 v.

ORDER REVERSING AND  
REMANDING DENIAL OF  
BENEFITS

11 NANCY A. BERRYHILL,

12 Defendant.

13 **I. INTRODUCTION**

14 Plaintiff Heaven H. seeks review of the partial denial of her applications for  
15 disability insurance (“DI”) and supplemental security income (“SSI”) benefits. (*See* Pl.  
16 Op. Br. (Dkt. # 11) at 1.) Plaintiff contends the Administrative Law Judge (“ALJ”) erred  
17 by (1) improperly discounting Plaintiff’s testimony; (2) improperly weighing the medical  
18 evidence; (3) improperly evaluating the lay testimony; and (4) improperly assessing  
19 Plaintiff’s residual functional capacity (“RFC”) and ability to work. (*Id.*) As discussed  
20 below, the court REVERSES the final decision of Defendant Nancy A. Berryhill, Deputy  
21 Commissioner of the Social Security Administration for Operations (the  
22 “Commissioner”), and REMANDS the matter for further administrative proceedings  
23

ORDER REVERSING AND REMANDING  
DENIAL OF BENEFITS - 1

1 under sentence four of 42 U.S.C. § 405(g).

## 2 **II. BACKGROUND**

### 3 **A. Procedural History**

4 This is the second time this case is before the court. Plaintiff filed for DI benefits  
5 in 2011, and SSI benefits in early 2012, alleging that her disability began on November 7,  
6 2010. (*See* Admin. Record (“AR”) (Dkt. # 7) at 190-202.) Her claims were denied on  
7 initial administrative review and on reconsideration. (*Id.* at 20, 114-15, 126-27.) ALJ  
8 Scott Morris conducted a hearing on September 5, 2013, at which Plaintiff, lay witness  
9 Jared Dulores, and a vocational expert testified. (*See id.* at 39-91.)

10  
11 On January 17, 2014, ALJ Morris issued a partially favorable decision. (*Id.* at  
12 20-32.) He found that Plaintiff was disabled as of June 1, 2012, but that Plaintiff had not  
13 been disabled between November 7, 2010, and May 31, 2012. (*See id.* at 31.) The  
14 Appeals Council denied review, and Plaintiff sought relief in this court. (*See id.* at 1,  
15 996-98.)

16 On May 18, 2016, pursuant to a stipulation from the parties, Magistrate Judge  
17 Mary Alice Theiler entered an order affirming in part, reversing in part, and remanding  
18 this matter for further review. (*Id.* at 986-87.) On remand, the ALJ was instructed to  
19 “provide Plaintiff the opportunity for a new hearing, complete the sequential evaluation  
20 process, and issue a new decision for the period prior to June 1, 2012.” (*Id.* at 986.)

21  
22 On March 2, 2017, ALJ David Johnson conducted a second hearing, at which he  
23 took testimony from Plaintiff, medical expert John Kwock, M.D., and a vocational

1 expert. (*See id.* at 911-57.) ALJ Johnson issued a decision on July 21, 2017, in which he  
2 found that Plaintiff had not been under a disability as defined in the Social Security Act  
3 from November 7, 2010, through May 31, 2012. (*Id.* at 884-900.)

4 **B. The ALJ's Decision**

5 Utilizing the five-step disability evaluation process,<sup>1</sup> the ALJ found:

6 **Step one:** Plaintiff did not engage in substantial gainful activity from November  
7 7, 2010, the alleged onset date, through May 31, 2012, the day before Plaintiff  
8 became disabled. *See* 20 C.F.R. §§ 404.1571 *et seq.* & 416.971 *et seq.*

9 **Step two:** Plaintiff had the following severe impairments: degenerative disc  
10 disease, degenerative joint disease, obesity, fibromyalgia, ankylosing spondylitis,  
11 and headaches. *See* 20 C.F.R. §§ 404.1520(c) & 416.920(c).

12 **Step three:** Plaintiff did not have an impairment or combination of impairments  
13 that met or medically equaled the severity of one of the listed impairments in 20  
14 C.F.R. Part 404, Subpart P, Appendix 1. *See* 20 C.F.R. §§ 404.1520(d), 404.1525,  
15 404.1526, 416.920(d), 416.925 & 416.926.

16 **Residual Functional Capacity:** Between November 7, 2010, and May 31, 2012,  
17 Plaintiff could perform light work as defined in 20 C.F.R. §§ 404.1567(b) &  
18 416.967(b), except that she was limited to frequent climbing of ramps or stairs;  
19 occasional climbing of ladders, ropes, or scaffolds; frequent balancing; occasional  
20 stooping or kneeling; never crouching or crawling; frequent overhead reaching;  
21 and avoidance of concentrated exposure to vibrations or hazards.

22 **Step four:** Plaintiff could perform past relevant work as a waitress, bartender, and  
23 short order cook. This work does not require the performance of work-related  
activities precluded by Plaintiff's RFC. *See* 20 C.F.R. §§ 404.1565 & 416.965.

**Step five:** In the alternative, considering Plaintiff's age, education, work  
experience, and RFC, there were jobs that existed in significant numbers in the  
national economy that Plaintiff could have performed. *See* 20 C.F.R. §§ 404.1569,  
404.1569(a), 416.969 & 416.969(a). Therefore, Plaintiff was not under a  
disability, as defined in the Social Security Act, from November 7, 2010, through  
May 31, 2012. *See* 20 C.F.R. §§ 404.1520(f) & 416.920(f).

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<sup>1</sup> 20 C.F.R. §§ 404.1520 & 416.920.

1 (AR at 884-900.) The Appeals Council did not assume jurisdiction of the case, nor did  
2 Plaintiff file written exceptions to the ALJ's decision within 60 days of the ALJ's  
3 decision. (*See generally* AR.) The ALJ's decision thus became the Commissioner's final  
4 decision. *See* 20 C.F.R. §§ 404.984(d) & 416.1484(d).  
5

### 6 **III. ANALYSIS**

7 Plaintiff, as the claimant, bears the burden of proving she is disabled within the  
8 meaning of the Act. *See Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Pursuant  
9 to 42 U.S.C. § 405(g), the court may only set aside a denial of social security benefits  
10 when the ALJ's findings are based on legal error or not supported by substantial evidence  
11 in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005).

12 The ALJ is responsible for determining credibility, resolving conflicts in medical  
13 testimony, and resolving any other ambiguities that exist. *Andrews v. Shalala*, 53 F.3d  
14 1035, 1039 (9th Cir. 1995). Although the court is required to examine the entire record,  
15 it may neither reweigh the evidence nor substitute its judgment for that of the ALJ. *See*  
16 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).  
17

#### 18 **A. The ALJ Did Not Commit Harmful Error in Evaluating Plaintiff's Testimony**

19 Plaintiff contends that the ALJ harmfully erred in evaluating her symptom  
20 testimony. (Pl. Op. Br. at 9-15.) Although the ALJ did commit errors in his analysis,  
21 they were ultimately harmless.

22 The Ninth Circuit has "established a two-step analysis for determining the extent  
23 to which a claimant's symptom testimony must be credited." *Trevizo v. Berryhill*, 871

1 F.3d 664, 678 (9th Cir. 2017). The ALJ must first determine whether the claimant has  
2 presented objective medical evidence of an impairment that “could reasonably be  
3 expected to produce the pain or other symptoms alleged.” *Id.* (quoting *Garrison v.*  
4 *Colvin*, 759 F.3d 995, 1014-15 (9th Cir. 2014)). At this stage, the claimant need only  
5 show that the impairment could reasonably have caused some degree of the symptoms;  
6 she does not have to show that the impairment could reasonably be expected to cause the  
7 severity of the symptoms alleged. *Id.* The ALJ found that Plaintiff met this first step  
8 because her medically determinable impairments could reasonably be expected to cause  
9 some of the symptoms she alleged. (AR at 891.)

11 If the claimant satisfies the first step, and there is no evidence of malingering, the  
12 ALJ may only reject the claimant’s testimony “by offering specific, clear and convincing  
13 reasons for doing so. This is not an easy requirement to meet.” *Trevizo*, 871 F.3d at 678  
14 (quoting *Garrison*, 759 F.3d at 1014-15).

15 Although the ALJ found no evidence of malingering, he found that inconsistencies  
16 between Plaintiff’s testimony and the evidence in the record “undermine[d] the weight  
17 that [could] be given to [Plaintiff’s] symptom reports.” (AR at 891.)

18 The ALJ first addressed Plaintiff’s testimony as compared to the objective medical  
19 evidence. “[A]n [ALJ] may not reject a claimant’s subjective complaints based solely  
20 on a lack of objective medical evidence to fully corroborate the alleged severity of pain.”  
21 *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001) (quoting *Bunnell v. Sullivan*, 947  
22 F.2d 341, 345 (9th Cir. 1991)) (alteration in original); *see also* 20 C.F.R. § 416.929(c)(2).  
23

1 The objective medical findings the ALJ cited could not alone support rejecting Plaintiff's  
2 symptom testimony, but they were relevant to the weight the ALJ gave to that testimony.

3 The ALJ next weighed Plaintiff's subjective statements about her capabilities  
4 against her doctors' medical findings. (AR at 891-96.) "Contradiction with the medical  
5 record is a sufficient basis for rejecting the claimant's subjective testimony." *See*  
6 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) (citing  
7 *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir.1995)). Among other things, the ALJ  
8 reasonably rejected Plaintiff's testimony that she could only walk a few blocks because  
9 several of her doctors noted that she had normal gait and full strength in her lower  
10 extremities. (*See* AR at 70, 334, 421, 458, 532, 579, 590, 892-94.) While Plaintiff has  
11 pointed to places in the medical record that support her symptom testimony, she has not  
12 established that the ALJ's interpretation of the evidence was irrational, and consequently  
13 has not demonstrated error. *See Thomas*, 278 F.3d at 954.

15 The ALJ last determined that Plaintiff's subjective complaints were inconsistent  
16 with her daily activities. An ALJ may consider a claimant's daily activities in assessing  
17 her testimony. *See Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). But daily activities  
18 that do not contradict a claimant's testimony or meet the threshold for transferrable work  
19 skills cannot form the basis of an adverse credibility determination. *Orn v. Astrue*, 495  
20 F.3d 625, 639 (9th Cir. 2007). Here, the ALJ noted that Plaintiff cares for herself,  
21 prepares meals, performs basic household chores, reads, works on the computer, and  
22 interacts with family and friends. (AR at 895.) These activities cannot be considered  
23

1 anything more than the basic activities of a normal life. As such, they do not supply a  
2 reasonable basis for discounting Plaintiff's testimony. See *Vertigan v. Halter*, 260 F.3d  
3 1044, 1050 (9th Cir. 2001) (“[T]he mere fact that a plaintiff has carried on certain daily  
4 activities, such as grocery shopping, driving a car, or limited walking for exercise, does  
5 not in any way detract from her credibility as to her overall disability. One does not need  
6 to be ‘utterly incapacitated’ in order to be disabled.”) (quoting *Fair*, 885 F.2d at 603);  
7 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (“[D]isability claimants should not  
8 be penalized for attempting to lead normal lives in the face of their limitations.”).

9  
10 Although the ALJ gave an erroneous reason for discounting Plaintiff's symptom  
11 testimony, Plaintiff has failed to show harmful error. See *Ludwig v. Astrue*, 681 F.3d  
12 1047, 1054 (9th Cir. 2012) (holding that the party challenging an administrative decision  
13 bears the burden of proving harmful error) (citing *Shinseki v. Sanders*, 556 U.S. 396,  
14 407-09 (2009)). An error is harmless “where it is ‘inconsequential to the ultimate  
15 disability determination.’” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)  
16 (quoting *Carmickle*, 533 F.3d at 1162). The ALJ legitimately explained his reasons for  
17 discounting Plaintiff's symptom testimony when compared to the medical evidence, so  
18 his erroneous analysis of Plaintiff's daily activities has harmless.

19 **B. The ALJ Committed a Harmful Error in Weighing the Medical Evidence**

20 Plaintiff also contends that the ALJ erred in evaluating the medical evidence. (Pl.  
21 Op. Br. at 3-8.) In particular, Plaintiff argues that the ALJ erred in evaluating the  
22 opinions of (1) Ezra Rabie, M.D.; (2) Gary Gaffield, D.O.; (3) John Kwock, M.D.; and  
23

1 (4) Robert Hander, M.D. (*Id.*) Plaintiff has failed to demonstrate that the ALJ erred in  
2 evaluating the opinions of Dr. Rabie, Dr. Gaffield, and Dr. Kwock, but has shown that  
3 the ALJ harmfully erred in evaluating Dr. Hander's opinions.

4 Plaintiff also provides a recitation of the other medical evidence, and summarily  
5 concludes that it supports her alleged symptoms. (*See id.* at 4-8.) The court does not  
6 reweigh the evidence, so this medical evidence recitation with no substantive legal  
7 argument is of little value. *See Thomas*, 278 F.3d at 954. Because Plaintiff has not  
8 explained any specific errors with respect to the other medical opinions she mentions, the  
9 court will not separately address those opinions. *See Carmickle*, 533 F.3d at 1161 n.2  
10 (citing *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1164 (9th Cir. 2003)).  
11

12 1. The ALJ Did Not Err in Weighing the Opinions of Dr. Rabie

13 Dr. Rabie examined Plaintiff on May 13, 2010. (*See* AR at 331-36.) She  
14 diagnosed Plaintiff with a thoracic strain and preexisting compression fractures at T7, T8,  
15 and T9. (*Id.* at 335.) Dr. Rabie opined that Plaintiff was capable of performing her prior  
16 work as a truck driver. (*See id.* at 336.)

17 The ALJ gave Dr. Rabie's opinions great weight, finding that they were consistent  
18 with the objective medical evidence and Plaintiff's statements regarding her abilities. (*Id.*  
19 at 896.) Plaintiff argues that the ALJ erred because Dr. Rabie put forth his opinions six  
20 months before Plaintiff's alleged onset date of November 7, 2010. (Pl. Op. Br. at 3.)  
21

22 Plaintiff has failed to show that the ALJ committed harmful error. *See Ludwig*,  
23 681 F.3d at 1054. The ALJ is charged with weighing the probative value of evidence,



1 and does not err simply by giving weight to a doctor's opinion issued before the  
2 claimant's alleged onset date. *See Williams v. Astrue*, 493 F. App'x 866, 867 (9th Cir.  
3 2012). Plaintiff's conclusory argument fails to demonstrate that the ALJ's decision was  
4 unsupported by substantial evidence or based on legal error, and thus she has failed to  
5 show harmful error. *See Thomas*, 278 F.3d at 954.

6           2.     The ALJ Did Not Err in Weighing the Opinions of Dr. Gaffield

7           Dr. Gaffield examined Plaintiff on July 20, 2011. (*See* AR at 418-22.) He  
8 diagnosed Plaintiff with low back pain and cervical pain by history. (*Id.* at 422.) Dr.  
9 Gaffield opined, among other things, that Plaintiff could walk or stand "six hours out of  
10 an eight-hour day with adequate breaks and rest periods limited by her lumbar spasms."  
11 (*Id.*)

12           The ALJ gave Dr. Gaffield's opinions great weight. (*Id.* at 896.) Plaintiff argues  
13 that the ALJ erred because (a) he failed to acknowledge that Dr. Gaffield did not review  
14 November 2011 images that revealed a large lumbar disc herniation; and (b) he failed to  
15 include Dr. Gaffield's walking/standing limitation in the RFC. (Pl. Op. Br. at 3.)

16           Plaintiff has failed to carry her burden with respect to her first argument. *See*  
17 *Ludwig*, 681 F.3d at 1054. The ALJ was entitled to weigh Dr. Gaffield's opinions in light  
18 of the overall medical evidence, and Plaintiff has not shown that the ALJ's determination  
19 here was unreasonable or irrational. *See Thomas*, 278 F.3d at 954.

20           Plaintiff's second argument also fails. Plaintiff argues that Dr. Gaffield meant that  
21 Plaintiff needed rest breaks beyond those normally allowed when Dr. Gaffield opined  
22  
23

1 that she could walk/stand for six hours “with adequate breaks and rest periods limited by  
2 her lumbar spasms.” (See Pl. Reply Br. (Dkt. # 16) at 2-3; AR at 422.) The ALJ  
3 interpreted Dr. Gaffield’s opinion as meaning that Plaintiff could walk and/or stand for  
4 six hours, with customary rest breaks. (AR at 896.)

5 Plaintiff has not shown that the ALJ’s interpretation of Dr. Gaffield’s opinion was  
6 unreasonable. She has simply proposed an alternate reading of that opinion. “Where the  
7 evidence is susceptible to more than one rational interpretation, one of which supports the  
8 ALJ’s decision, the ALJ’s conclusion must be upheld.” *Thomas*, 278 F.3d at 954 (citing  
9 *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999)). The ALJ  
10 reasonably interpreted Dr. Gaffield’s opinion by finding that “adequate breaks and rest  
11 periods” meant the type of breaks employers normally provide. Plaintiff has thus failed  
12 to show that the ALJ harmfully erred in evaluating Dr. Gaffield’s opinions. See *Ludwig*,  
13 681 F.3d at 1054; *Thomas*, 278 F.3d at 954.

14  
15 3. The ALJ Did Not Err in Weighing the Opinions of Dr. Kwock

16 Dr. Kwock testified as a medical expert at Plaintiff’s administrative hearing in  
17 2017. (See AR at 918-33.) He reviewed Plaintiff’s medical records, but did not examine  
18 her. (See *id.* at 918-19.) Dr. Kwock testified that Plaintiff had two medically  
19 determinable impairments: “mild early degenerative disc and degenerative joint disease  
20 of the cervical spine,” and a large disc herniation at L4, for which she underwent a  
21 decompression procedure. (*Id.* at 920.) Dr. Kwock opined that Plaintiff could perform  
22 only light work, with several more specific limitations. (See *id.* at 922-23.)  
23

1 The ALJ gave Dr. Kwock’s opinions great weight. (*Id.* at 895.) He reasoned that  
2 Dr. Kwock had “the greatest familiarity with information in the record” based on his  
3 longitudinal review, and that his opinions were consistent with the other medical  
4 evidence. (*Id.* at 895-96.)

5 Plaintiff contends that the ALJ erred in giving Dr. Kwock’s opinions great weight  
6 because he “did not consider or account for [Plaintiff’s] testimony about her symptoms  
7 and limitations,” nor adequately explain his opinions in light of other doctors’ clinical  
8 findings. (Pl. Op. Br. at 8.)

9  
10 Plaintiff has again not met her burden of showing harmful error. *See Ludwig*, 681  
11 F.3d at 1054. First, the ALJ did not err in discounting Plaintiff’s symptom testimony, so  
12 Dr. Kwock’s failure to consider this testimony is of little relevance. *See supra* § III.A.  
13 Second, Plaintiff has done nothing more than state a conclusion in arguing that Dr.  
14 Kwock did not adequately explain his opinions. That is not enough; Plaintiff needed to  
15 demonstrate that the ALJ’s decision was irrational or unsupported by substantial  
16 evidence, and she has failed to meet that burden. *See Ludwig*, 681 F.3d at 1054.

17 4. The ALJ Harmfully Erred in Applying the Opinions of Dr. Hander

18 Dr. Hander did not examine Plaintiff, but reviewed her medical records. (*See AR*  
19 at 104-15.) He opined, among other things, that Plaintiff could stand and/or walk for a  
20 total of four hours in a normal eight-hour work day. (*Id.* at 112.)

21  
22 The ALJ gave Dr. Hander’s opinions great weight. (*Id.* at 896.) Plaintiff contends  
23 that the ALJ erred, though, because (a) Dr. Hander opined that Plaintiff was improving,

1 yet she was found to be disabled two months later; and (b) the ALJ only limited Plaintiff  
2 to six hours standing and/or walking, rather than four. (Pl. Op. Br. at 8.)

3 Plaintiff's first argument fails. ALJ Morris—the ALJ who issued the first decision  
4 in this matter—found that Plaintiff's RFC "significantly declined starting on June 1,  
5 2012, as she experienced a progressive worsening in physical health impacting her  
6 overall ability to engage in even basis activities of daily living." (AR at 28.) This  
7 determination is not at issue before the court. (*See id.* at 884, 986-89, 1001-02.) That  
8 Plaintiff's condition significantly deteriorated two months after Dr. Hander issued his  
9 opinions does not mean that Dr. Hander's opinions were less valid at the time they were  
10 issued. Plaintiff has not demonstrated that the ALJ's acceptance of Dr. Hander's  
11 opinions was unsupported by substantial evidence or irrational, and accordingly has not  
12 shown harmful error. *See Ludwig*, 681 F.3d at 1054; *Thomas*, 278 F.3d at 954.

14 Plaintiff's second argument, however, requires the court to reverse. The ALJ gave  
15 Dr. Hander's opinions great weight, but failed to include Dr. Hander's four-hour  
16 standing/walking limitation in the RFC or hypotheticals to the vocational expert, and  
17 failed to explain if or why he discounted this portion of Dr. Hander's opinion. (*See AR at*  
18 *890, 896.*) The failure to include all of a claimant's limitations in the RFC or  
19 hypotheticals to the vocational expert is harmful error, as it deprives the ALJ's decision  
20 of sufficient evidentiary support. *See Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012)  
21 (holding that "[i]f a vocational expert's hypothetical does not reflect all the claimant's  
22 limitations, then the expert's testimony has no evidentiary value to support a finding that  
23

1 the claimant can perform jobs in the national economy,” which in turn deprives the  
2 ALJ’s determination of non-disability of evidentiary support) (quoting *Matthews v.*  
3 *Shalala*, 10 F.3d 678, 681 (9th Cir. 1993)). The ALJ did not explain his rationale, so the  
4 court cannot affirm his decision. *See Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d  
5 1219, 1226 (9th Cir. 2009) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

6           The Commissioner argues that the ALJ’s error was harmless because he identified  
7 a sedentary job Plaintiff could perform that would accommodate the lower  
8 standing/walking limitation. (*See Def. Resp. Br. (Dkt. # 15) at 8-9.*) The ALJ found that  
9 the sedentary job, touchup screener, had 11,304 jobs available nationally, and 266 in  
10 Washington. (AR at 899.) The Commissioner’s argument fails because the ALJ erred in  
11 finding that the sedentary job of touchup screener existed in significant numbers in the  
12 national or regional economy.

14           A claimant who cannot perform past work may nonetheless be found not disabled  
15 if the Commissioner proves that the claimant can perform other work that exists in  
16 significant numbers in the national economy or the region in which the claimant lives.  
17 *See 42 U.S.C. § 423(d)(2)(A); Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).  
18 The Ninth Circuit “ha[s] never set out a bright-line rule for what constitutes a ‘significant  
19 number’ of jobs.” *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). But the Ninth  
20 Circuit “has never found” that numbers similar to 12,600 jobs nationwide are significant.  
21 *Lemauga v. Berryhill*, 686 F. App’x 420, 422 (9th Cir. 2017); *see also De Rivera v.*  
22 *Berryhill*, 710 F. App’x 768, 769 (9th Cir. 2018) (finding that 5,000 jobs nationwide may  
23

1 not be significant); *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d 519, 529 (9th Cir. 2014)  
2 (noting that that 25,000 jobs nationwide is “a close call”). The Ninth Circuit has also  
3 found that 1,266 jobs regionally is significant, *Barker v. Secretary of Health & Human*  
4 *Services*, 882 F.2d 1474, 1479 (9th Cir. 1989), while 135 jobs regionally is not, *Beltran*,  
5 700 F.3d at 389-90.

6           Despite the lack of a bright line rule, Ninth Circuit case law makes clear that  
7 touchup screener jobs do not exist in significant numbers in the national or regional  
8 economy. *See Lemauga*, 686 F. App’x at 422. Therefore, even though the touchup  
9 screener job may have accommodated the limitations about which Dr. Hander opined, it  
10 was too uncommon, meaning the ALJ failed to identify jobs that exist in significant  
11 numbers in the national or regional economy that Plaintiff could have performed  
12 considering all of her limitations. As a result, the ALJ harmfully erred. *See Beltran*, 700  
13 F.3d at 390 (finding harmful error where the ALJ identified only one job that the claimant  
14 could perform, and that job did not exist in significant numbers in the national or regional  
15 economy); *De Rivera*, 710 F. App’x at 769 (finding harmful error where the one job the  
16 ALJ appropriately determined the claimant could perform did not clearly exist in  
17 significant numbers in the regional or national economy).

18  
19 **C. The ALJ Did Not Harmfully Err in Evaluating the Lay Witness Testimony**

20           Plaintiff contends that the ALJ erred in evaluating the lay witness statements of  
21 Jared Dulores and James Wood, Jr. (Pl. Op. Br. at 15-16.) In determining disability, ““an  
22 ALJ must consider lay witness testimony concerning a claimant’s ability to work.””  
23

1 *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009) (quoting *Stout v. Comm’r, Soc. Sec.*  
2 *Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006)). The ALJ must “give reasons germane to  
3 each witness” before he can reject lay witness evidence. *Molina v.*, 674 F.3d at 1111  
4 (internal citations and quotation marks omitted). “Further, the reasons ‘germane to each  
5 witness’ must be specific.” *Bruce*, 557 F.3d at 1115 (quoting *Stout*, 454 F.3d at 1054).

6 1. The ALJ Did Not Harmfully Err in Failing to Address Mr. Dulores’s  
7 Testimony

8 Mr. Dulores testified during Plaintiff’s first hearing in September 2013. (*See AR*  
9 at 76-81.) He reported that Plaintiff was “in a lot of pain.” (*Id.* at 76.) He further  
10 testified that Plaintiff had trouble walking, and had been using a wheelchair for about  
11 four to five months. (*Id.* at 78-79.)

12 ALJ Morris addressed Mr. Dulores’s testimony in the first ALJ decision, dated  
13 January 17, 2014, and found it consistent with Plaintiff’s physical deterioration. (*See id.*  
14 at 29.) Based on that testimony and other evidence, ALJ Morris thus found that Plaintiff  
15 was disabled as of June 1, 2012. (*See id.* at 28-29.) ALJ Johnson—whose decision is at  
16 issue here—did not mention Mr. Dulores’s testimony. (*See id.* at 896-97.)

17 Although the ALJ should have addressed Mr. Dulores’s testimony, his error was  
18 harmless. “Where lay witness testimony does not describe any limitations not already  
19 described by the claimant, and the ALJ’s well-supported reasons for rejecting the  
20 claimant’s testimony apply equally well to the lay witness testimony, . . . the ALJ’s  
21 failure to discuss the lay witness testimony [is not] prejudicial per se.” *Molina*, 674 F.3d  
22 at 1117; *see also Valentine v. Comm’r, Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir.  
23

1 2009); *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001). Plaintiff testified about her pain  
2 and walking limitations, and the ALJ adequately addressed that testimony. *See supra*  
3 § III.A. The ALJ’s reasons for discounting Plaintiff’s symptom testimony apply equally  
4 to Mr. Dulores’s testimony, so any error here was harmless.

5 2. The ALJ Did Not Harmfully Err in Rejecting Mr. Wood’s Testimony

6 Mr. Wood submitted two witness statements in support of Plaintiff’s claims. (*See*  
7 AR at 255-65.) In a third-party function report dated January 10, 2012, Mr. Wood stated  
8 that Plaintiff was suffering from pain and depression. (*See id.* at 255-62.) In a separate  
9 hand-written statement, Mr. Wood reported that Plaintiff had trust issues stemming from  
10 the handling of her social security and workplace injury claims. (*See id.* at 263-65.) He  
11 also reported that Plaintiff had significant pain and difficulty walking. (*See id.*)

12 The ALJ gave Mr. Wood’s statements little weight. (*Id.* at 897.) He reasoned that  
13 Mr. Wood “largely reiterated [Plaintiff’s] claimed allegations regarding her limitations”  
14 and his statements—like those of Plaintiff—were contradicted by the medical evidence  
15 and doctors’ opinions. (*Id.* at 896-97.)

16 The ALJ gave sufficiently germane reasons for rejecting Mr. Wood’s statements.  
17 Mr. Wood’s statements generally addressed the same limitations Plaintiff alleged, and, as  
18 discussed previously, the ALJ reasonably discounted Plaintiff’s testimony. *See supra*  
19 § III.A. That reasoning applies equally well to Mr. Wood’s statements, so the ALJ did  
20 not commit harmful error in giving Mr. Wood’s statements little weight. *See Molina*, 674  
21 F.3d at 1117; *Valentine*, 574 F.3d at 694; *Lewis*, 236 F.3d at 512.  
22  
23



1 **D. The ALJ Harmfully Erred in Assessing Plaintiff’s RFC and Ability to Work**

2 Plaintiff argues that the ALJ erred in his RFC determination, and consequently  
3 erred in basing his findings at steps four and five on that RFC. (Pl. Op. Br. at 16-17.)  
4 This argument is derivative of her other arguments regarding the ALJ’s assessment of the  
5 evidence. (*See id.*) Because the court has found that the ALJ erred in assessing Dr.  
6 Hander’s opinion, *see supra* § III.B.4, the court agrees that the ALJ erred in his RFC  
7 determination, and in basing his findings at steps four and five on that RFC. *See Robbins*  
8 *v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th Cir. 2006) (holding that the ALJ’s RFC  
9 determination was not supported by substantial evidence where he failed to properly  
10 account for all of the evidence).  
11

12 **E. Scope of Remand**

13 Plaintiff asks the court to remand for an award of benefits. (Pl. Op. Br. at 17-19.)  
14 Remand for an award of benefits “is a rare and prophylactic exception to the well-  
15 established ordinary remand rule.” *Leon v. Berryhill*, 880 F.3d 1041, 1044 (9th Cir.  
16 2017). The Ninth Circuit has established a three-step framework for deciding whether a  
17 case may be remanded for an award of benefits. *Id.* at 1045. First, the court must  
18 determine whether the ALJ has failed to provide legally sufficient reasons for rejecting  
19 evidence. *Id.* (citing *Garrison*, 759 F.3d at 1020). Second, the court must determine  
20 “whether the record has been fully developed, whether there are outstanding issues that  
21 must be resolved before a determination of disability can be made, and whether further  
22 administrative proceedings would be useful.” *Treichler v. Comm’r of Soc. Sec. Admin.*,  
23

1 775 F.3d 1090, 1101 (9th Cir. 2014) (internal citations and quotation marks omitted). If  
2 the first two steps are satisfied, the court must determine whether, “if the improperly  
3 discredited evidence were credited as true, the ALJ would be required to find the  
4 claimant disabled on remand.” *Garrison*, 759 F.3d at 1020. “Even if [the court]  
5 reach[es] the third step and credits [the improperly rejected evidence] as true, it is within  
6 the court’s discretion either to make a direct award of benefits or to remand for further  
7 proceedings.” *Leon*, 880 F.3d at 1045 (citing *Treichler*, 773 F.3d at 1101).

8  
9 The appropriate remedy here is to remand for further proceedings. While the first  
10 step of the Ninth Circuit’s framework has been met, the second and third have not. There  
11 are conflicts in the medical evidence that the court is not in a position to decide. *See*  
12 *Andrews*, 53 F.3d at 1039. Dr. Kwock and Dr. Gaffield, whose opinions the ALJ gave  
13 great weight, opined that Plaintiff could stand and/or walk for six hours in a normal  
14 eight-hour work day, while Dr. Hander, whose opinions the ALJ also gave great weight,  
15 opined that Plaintiff could only stand and/or walk for four hours. (*See* AR at 112, 422,  
16 923.) And even if the ALJ accepted Dr. Hander’s lower standing/walking limitation, the  
17 record does not conclusively establish that there are no jobs other than the touchup  
18 screener existing in significant numbers in the national or regional economy that Plaintiff  
19 could perform. (*See id.* at 939-53.) Without resolution of these evidentiary issues, the  
20 court cannot conclude that the ALJ would be required to find Plaintiff disabled here. *See*  
21 *Leon*, 880 F.3d at 1046-48 (affirming the district court’s decision to remand for further  
22 proceedings, rather than to remand for the payment of benefits, where the record revealed  
23

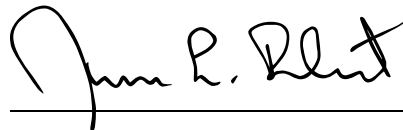
1 conflicts, ambiguities, or gaps in the evidence).

2 On remand, the ALJ must reevaluate Dr. Hander's opinions; reassess the medical  
3 evidence as necessary; reassess Plaintiff's RFC, as well as the findings at steps four and  
4 five of the disability evaluation process; and conduct further proceedings as necessary to  
5 reevaluate the disability determination in light of this opinion.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Commissioner's final decision is REVERSED and  
8 this case is REMANDED for further administrative proceedings under sentence four of  
9 42 U.S.C. § 405(g).

10 DATED this 29th day of October, 2018.

11  
12 

13  
14 JAMES L. ROBART  
United States District Judge