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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Dianne Osborn,

No. CV-22-00959-PHX-DJH

Plaintiff,

ORDER

V.

Commissioner of Social Security Administration,

Defendant.

Ms. Dianne Osborn (“Plaintiff”) seeks this Court’s review of the Social Security Administration (“SSA”) Commissioner’s (the “Commissioner”) denial of her applications for Social Security Disability Insurance (“SSDI”) and Supplemental Security Income (“SSI”). (Doc. 14 at 1). This matter is fully briefed. (*See* Docs. 13; 16; 17). Upon review of the briefs and the Administrative Record (Doc. 11, “AR”), the Court reverses the decision of the Administrative Law Judge and remands this case for further proceedings consistent with this Order. (AR at 772–785).

I. Background

Plaintiff filed for SSDI and SSI benefits on May 10, 2018, alleging a disability beginning May 1, 2017. (*Id.* at 192–207). On June 24, 2020, Plaintiff appeared and testified at a telephone hearing before Administrative Law Judge Christina Young Mein (“ALJ Mein”). (*Id.* at 30-55). On June 30, 2020, ALJ Mein issued an unfavorable decision (the “June Decision”). (*Id.* at 12–27). Plaintiff appealed the unfavorable decision to this Court, and the Court granted a Joint Motion for Voluntary Remand and ordered the Appeals

1 Council to direct the ALJ to take any steps necessary to fully develop the administrative
 2 record and, specifically, to “consider claimant’s past relevant work and whether it met the
 3 regulatory requirements to constitute past relevant work as outlined in Social Security
 4 Ruling 82-62.” (Doc. 13 at 2).

5 Administrative Law Judge Paul Isherwood (the “ALJ”) was assigned Plaintiff’s case
 6 upon remand, and he held a telephonic hearing on February 14, 2022, to determine if
 7 Plaintiff was disabled under the Social Security Act (the “Act”).¹ (AR at 772–73). After
 8 the hearing, the ALJ found that Plaintiff was not disabled under the Act and denied her
 9 claims for SSDI and SSI benefits. (*Id.* at 785). To reach this finding, the ALJ followed a
 10 five-step process that the SSA has established for disability hearings.

11 **II. The ALJ’s Five Step Process**

12 To be eligible for Social Security benefits, a claimant must show an “inability to
 13 engage in any substantial gainful activity by reason of any medically determinable physical
 14 or mental impairment which can be expected to result in death or which has lasted or can
 15 be expected to last for a continuous period of not less than 12 months.”
 16 42 U.S.C. § 423(d)(1)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).
 17 The ALJ follows a five-step process² to determine whether a claimant is disabled for
 18 purposes of the Act:

19 The five-step process for disability determinations begins, at the first and
 20 second steps, by asking whether a claimant is engaged in “substantial gainful
 21 activity” and considering the severity of the claimant’s impairments.
See 20 C.F.R. § 416.920(a)(4)(i)–(ii). If the inquiry continues beyond the
 22 second step, the third step asks whether the claimant’s impairment or
 23 combination of impairments meets or equals a listing under
 24 20 C.F.R. pt. 404, subpt. P, app. 1 and meets the duration requirement.
See id. § 416.920(a)(4)(iii). If so, the claimant is considered disabled and

25 ¹ Disability is defined as the inability to engage in any substantial gainful activity by reason
 26 of any medically determinable physical or mental impairment or combination of
 27 impairments that can be expected to result in death or that has lasted or can be expected to
 28 last for a continuous period of not less than 12 months. (AR at 773).

² The claimant bears the burden of proof on the first four steps, but the burden shifts to the
 Commissioner at step five. *Tackett*, 180 F.3d at 1098.

1 benefits are awarded, ending the inquiry. *See id.* If the process continues
 2 beyond the third step, the fourth and fifth steps consider the claimant's
 3 “residual functional capacity”^[3] in determining whether the claimant can
 4 still do past relevant work or make an adjustment to other work.
See id. § 416.920(a)(4)(iv)–(v).

5 *Kennedy v. Colvin*, 738 F.3d 1172, 1175 (9th Cir. 2013); *see also* 20 C.F.R. § 404.1520(a)–
 6 (g). If the ALJ determines no such work is available, the claimant is disabled.
 7 *Id.* § 404.1520(a)(4)(v).

8 After applying this five-step process, the ALJ found that Plaintiff was not disabled
 9 under the Act, and as such, was not entitled to benefits. (AR at 785). At steps one and
 10 two, the ALJ concluded that Plaintiff had not engaged in substantial gainful activity since
 11 the alleged onset date of disability and that Plaintiff had several severe impairments,
 12 including: degenerative disc disease, chronic pain syndrome, complex regional pain
 13 syndrome, and occipital neuralgia/headaches. (*Id.* at 775). At the third step, the ALJ found
 14 that Plaintiff does not have an impairment or combination of impairments that meets or
 15 medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart
 16 P, Appendix 1. (*Id.* at 776).

17 At step four, the ALJ concluded that Plaintiff has the residual functional capacity
 18 (“RFC”) to perform “light work” as defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b)
 19 except that “she can frequently climb ramps and stairs and frequently balance. She can
 20 occasionally climb ladders, ropes, scaffolds. She can occasionally stoop, kneel, crouch, and
 21 crawl. She can have no exposure to unprotected heights and moving mechanical parts or
 22 other workplace hazards.” (*Id.* at 777). To reach this decision, the ALJ found that
 23 Plaintiff’s testimony “concerning the intensity, persistence and limiting effects of these
 24 symptoms [were] not entirely consistent with the medical evidence and other evidence in
 25 the record.” (*Id.* at 778). The ALJ also considered several medical opinions and prior
 26 administrative medical findings in the record, which the Court will discuss where relevant.

27 ³ A claimant's “residual functional capacity” is defined as their ability to do physical and
 28 mental work activities on a sustained basis despite limitations from their impairments. *See*
20 C.F.R. §§ 404.1520(e), 416.920(e).

1 (Id. at 783).

2 Finally, at step five, the ALJ found that Plaintiff is “capable of performing past
 3 relevant work as a receptionist and as a housekeeper/cleaner” as this work “does not require
 4 the performance of work-related activities precluded by [Plaintiff’s] residual functional
 5 capacity.” (Id. at 784). The Court must now determine whether these findings are
 6 supported by substantial evidence.

7 **III. Standard of Review**

8 In determining whether to reverse a decision by an ALJ, the district court reviews
 9 only those issues raised by the party challenging the decision. *See Lewis v. Apfel*, 236 F.3d
 10 503, 517 n.13 (9th Cir. 2001). The court may set aside the Commissioner’s disability
 11 determination only if the determination is not supported by “substantial evidence” or is
 12 based on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial
 13 evidence is more than a scintilla, but less than a preponderance; it is relevant evidence that
 14 a reasonable person might accept as adequate to support a conclusion considering the
 15 record as a whole. *Id.* Substantial evidence is the type of evidence that would suffice, at
 16 trial, to avoid a directed verdict. *See Nat’l Labor Relations Bd. v. Columbian Enameling*
 17 & *Stamping Co.*, 306 U.S. 292, 300 (1939).

18 To determine whether substantial evidence supports a decision, the Court must
 19 consider the record as a whole and may not affirm simply by isolating a “specific quantum
 20 of supporting evidence.” *Orn*, 495 F.3d at 630. The ALJ must “set forth the reasoning
 21 behind its decisions in a way that allows for meaningful review.” *Brown-Hunter v. Colvin*,
 22 806 F.3d 487, 492 (9th Cir. 2015). The ALJ is responsible for resolving conflicts,
 23 ambiguity, and determining credibility. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
 24 1995); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). While the Court is
 25 required to examine the record as a whole, it may neither reweigh the evidence nor
 26 substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947,
 27 954 (9th Cir. 2002). Generally, “[w]here the evidence is susceptible to more than one
 28 rational interpretation, one of which supports the ALJ’s decision, the ALJ’s conclusion

1 must be upheld.” *Id.* at 954 (citations omitted).

2 Even when the ALJ commits legal error, the Court will still uphold the ALJ’s
 3 decision where that error is harmless. *See Treichler v. Comm’r of Soc. Sec. Admin.*, 775
 4 F.3d 1090, 1099 (9th Cir. 2014). An error is harmless if it is “inconsequential to the
 5 ultimate nondisability determination,” or “if the agency’s path may reasonably be
 6 discerned,” even if the agency “explains its decision with less than ideal clarity.” *Id.*

7 **IV. Discussion**

8 Plaintiff argues on appeal that the ALJ’s decision is not supported by substantial
 9 evidence for three reasons: (1) the ALJ erred by failing to provide clear and convincing
 10 reasons for discrediting Plaintiff’s symptom testimony; (2) the ALJ erred by classifying
 11 work performed for her spouse, Roy Osborn, as past relevant work; and (3) the ALJ erred
 12 in failing to support the assigned RFC with substantial evidence. (Doc. 13 at 6). Plaintiff
 13 asks this Court to remand for an award of benefits, or in the alternative, to remand for
 14 further proceedings. (*Id.* at 18–20).

15 The Commissioner concedes that remand is warranted here but argues the Court
 16 should remand for further proceedings rather than with an instruction to award benefits.
 17 The Commissioner claims the record is insufficient to demonstrate that Plaintiff is disabled.
 18 (Doc. 16 at 2). Thus, the narrow issue on appeal is whether the Court should remand for
 19 further proceedings or with instructions to award benefits.

20 **A. Legal Standards for Remand**

21 A reviewing court has the discretion to remand a case either for further
 22 administrative proceedings or for a finding of disability and award of benefits. *Rodriguez*
 23 *v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989); *see also* 42 U.S.C. §405(g) (stating that
 24 “courts are empowered to affirm, modify, or reverse a decision by the Commissioner ‘with
 25 or without remanding the cause for a rehearing.’”). Although a court should generally
 26 remand to the agency for additional investigation or explanation (sometimes referred to as
 27 the “ordinary remand rule”), a court has discretion to remand for an award of benefits when
 28 no useful purpose would be served by further administrative proceedings or when the

1 record has been fully developed and the evidence is insufficient to support the
 2 Commissioner's decision. *Treichler*, 775 F.3d at 1100; *Garrison v. Colvin*, 759 F.3d 995,
 3 1017, 1020 (9th Cir. 2014).

4 The Ninth Circuit has set out a three-part test, sometimes referred to as the “credit-
 5 as-true rule,” to determine whether the Court should depart from the “ordinary remand
 6 rule.” *Treichler*, 775 F.3d at 1100-1102; *Varney v. Sec'y of Health & Hum. Servs.*, 859
 7 F.2d 1396, 1401 (9th Cir. 1988) (“*Varney II*”). That rule states that a district court may
 8 credit evidence that was rejected during the administrative process and remand for an
 9 immediate award of benefits if: (1) the ALJ failed to provide legally sufficient reasons for
 10 rejecting evidence; (2) there are no outstanding issues that must be resolved before a
 11 determination of disability can be made; and (3) it is clear from the record that the ALJ
 12 would be required to find the claimant disabled were such evidence credited. *Treichler*,
 13 775 F.3d at 1100; *Garrison*, 759 F.3d at 1020. It is also “an abuse of discretion for a district
 14 court not to remand for an award of benefits when all of these conditions are met.”
 15 *Garrison*, 759 F.3d at 1021 (internal citations omitted).

16 **B. The Credit-As-True Rule Does Not Apply**

17 Plaintiff argues remand for benefits is warranted because the ALJ did not provide
 18 legally sufficient reasons for rejecting her symptom testimony. (Doc. 13 at 6). At the
 19 hearing below, the ALJ found that Plaintiff had the RFC to perform light work with certain
 20 exceptions. (AR at 777). To reach this finding, the ALJ “considered all symptoms and the
 21 extent to which these symptoms can reasonably be accepted as consistent with the objective
 22 medical evidence and other evidence” and also “considered the medical opinion(s) and
 23 prior administrative medical finding(s).” (*Id.*) Plaintiff testified on her own behalf and the
 24 ALJ was required to follow a two-step process to evaluate her testimony regarding pain
 25 and symptoms. *Garrison*, 759 F.3d at 1014.

26 An ALJ must perform a two-step analysis when determining whether a claimant’s
 27 testimony regarding subjective pain or symptoms is credible. *Lingenfelter v. Astrue*, 504
 28 F.3d 1028, 1035–1036 (9th Cir. 2007). First, the ALJ evaluates whether the claimant has

1 presented objective medical evidence of an impairment “which could reasonably be
 2 expected to produce the pain or symptoms alleged.” *Lingenfelter v. Astrue*, 504 F.3d 1028,
 3 1035–36 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)
 4 (*en banc*) (internal quotation marks omitted)). Second, absent evidence of malingering, an
 5 ALJ may only discount a claimant’s allegations for reasons that are “specific, clear and
 6 convincing” and supported by substantial evidence. *Molina v. Astrue*, 674 F.3d 1104, 1112
 7 (9th Cir. 2012). “The clear and convincing standard is the most demanding required in
 8 Social Security cases.” *Garrison*, 759 F.3d at 1015.

9 Here, the ALJ found that Plaintiff’s “medically determinable impairments could
 10 reasonably be expected to cause some of the alleged symptoms; however, the claimant’s
 11 statements concerning the intensity, persistence and limiting effects of these symptoms are
 12 not entirely consistent with the medical evidence and other evidence in the record.”
 13 (AR at 778). After discounting Plaintiff’s testimony, the ALJ supported his decision by
 14 discussing the other evidence in the record as to each of her impairments. For instance, the
 15 ALJ noted that Plaintiff underwent a surgery to place a stimulator on her spine which “fixed
 16 her back pain.” (*Id.* at 779). The ALJ also found that Plaintiff’s testimony was inconsistent
 17 with the other evidence in the record because she remained able to perform a wide range
 18 of daily activities that were inconsistent with her allegations. (*Id.* at 783). The ALJ further
 19 found that Plaintiff’s activities support an ability to stand, walk, lift, and move consistent
 20 with the residual functional capacity assessment. (*Id.*)

21 Based on this, the Court concludes that the ALJ provided legally sufficient reasons
 22 for rejecting Plaintiff’s symptom testimony. The ALJ discussed, at length, the other
 23 evidence in the record which he found to contradict Plaintiff’s testimony. (*Id.* at 778–783).
 24 Indeed, it is the ALJ’s responsibility to determine credibility and resolve conflicts in the
 25 evidence. *Andrews*, 53 F.3d at 1039. The ALJ sufficiently articulated his reasons for
 26 rejecting Plaintiff’s symptom testimony on this basis. The Court will not reweigh the
 27 evidence nor substitute its judgment for that of the ALJ. *Thomas*, 278 F.3d at 954. The
 28 Court generally remands for an award of benefits only in “rare circumstances,” where “no

1 useful purpose would be served by further administrative proceedings and the record has
2 been thoroughly developed.” *Treichler*, 775 F.3d at 1101. This is not such a case, because
3 the first factor of the credit-as-true rule is not satisfied.

4 Even if the first factor were satisfied, under the second factor of the credit-as-true
5 rule, there are also outstanding issues that must be resolved before a determination of
6 disability can be made, such as the ALJ’s misstatement of Plaintiff’s earnings at step four.
7 (Doc. 16 at 8). Further, the Court also concludes that it is not entirely clear from the record
8 that the ALJ would be required to find Plaintiff disabled if all the evidence were properly
9 evaluated. Thus, because the credit-as-true rule is not satisfied, remanding for further
10 proceedings is appropriate here. *See Connett v. Barnhart*, 340 F.3d 871, 874–76 (9th Cir.
11 2003) (citing cases and reaffirming that the reviewing court retains discretion to remand
12 for further proceedings even when the ALJ fails “to assert specific facts or reasons to reject
13 [the claimant]’s testimony”); *see also Garrison*, 759 F.3d at 1021 (noting that a district
14 court retains the flexibility to “remand for further proceedings when the record as a whole
15 creates serious doubt as to whether the claimant is, in fact, disabled within the meaning of
16 the Social Security Act”).

17 **V. Conclusion**

18 The Court, in its discretion, will remand Plaintiff’s case for further proceedings
19 rather than for an award of benefits. On remand, the ALJ must (1) properly evaluate
20 Plaintiff’s non-severe impairments of carpal tunnel syndrome, depression, and anxiety; (2)
21 properly evaluate the prior administrative medical findings; (3) correct the misstatement of
22 earnings at step four; and (4) explain his rationale with regard to Plaintiff’s RFC.

23 Accordingly,

24 **IT IS ORDERED** that Administrative Law Judge’s March 21, 2022, decision is
25 reversed in part and remanded for additional proceedings consistent with the directives of
26 this Order.

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1 **IT IS FURTHER ORDERED** that the Clerk of Court is kindly directed to enter
2 judgment accordingly and terminate this action.

3 Dated this 29th day of September, 2023.

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Honorable Diane J. Humetewa
United States District Judge

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