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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

DOMITILA LEMUS,)
)
Plaintiff,)
)
v.)
)
MICHAEL J. ASTRUE,)
Commissioner of Social Security,)
)
Defendant.)
_____)

Case No. 07-cv-01773 -TAG

MEMORANDUM DECISION AND ORDER
ON PLAINTIFF’S APPEAL FROM
ADMINISTRATIVE DECISION

ORDER REMANDING CASE PURSUANT TO
SENTENCE FOUR OF 42 U.S.C. § 405(g)

ORDER DIRECTING CLERK TO ENTER
JUDGMENT IN FAVOR OF PLAINTIFF AND
AGAINST DEFENDANT

16 Plaintiff Domitila Lemus (“Plaintiff”) seeks judicial review of the final administrative
17 decision denying her concurrent applications for disability insurance benefits (“disability benefits”)
18 and for widow’s insurance benefits under Title II and Title XVIII, Part A, 42 U.S.C. §§ 401 *et seq.*
19 and §§ 1395c *et seq.* of the Social Security Act (“the Act”). Plaintiff filed her complaint on
20 December 5, 2007. (Doc. 1). The matter has been fully briefed by the parties. (Docs. 15, 17, 18).

21 Pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, the parties consented to proceed
22 before a United States Magistrate Judge for all further proceedings in this case, including trial and
23 entry of final judgment. (Docs. 3, 8). By order dated January 15, 2008 and docketed January 16,
24 2008, this action was assigned to the United States Magistrate Judge for all further proceedings.
25 (Doc. 9).

INTRODUCTION

27 On October 14, 2002, Plaintiff, then a 53-year-old widow and field laborer, was working in
28 an orchard in the Central Valley of California, picking olives. The tree she was picking gave way

1 and she fell from the ladder on which she had been standing, hitting the ground about ten feet below.
2 The right side of Plaintiff's body sustained the impact, resulting in injuries to her ribs, back, upper
3 right extremity and her neck. Plaintiff reported that she lost consciousness for a brief period of time.
4 Supervisors immediately responded and took Plaintiff for medical attention to a local clinic. As a
5 result of injuries sustained during that fall, Plaintiff did not return to work.

6 After brief treatment from generalists at the local health care clinic that did not relieve her
7 continuing discomfort, Plaintiff chose to be treated primarily through the complementary and
8 alternative health care services of a chiropractor, Dr. Ronald Ybarra. From the documentation and
9 treatment provided to Plaintiff, it appears that Dr. Ybarra possessed a chiropractic degree, was
10 licensed to practice in California, and was a fellow of the Academy of Forensic and Industrial
11 Chiropractic Consultants.¹ He was also a state appointed Qualified Medical Evaluator² as well as a
12 Certified Industrial Disability Evaluator.

13 Plaintiff's first contact with Dr. Ybarra came two months after the accident and continued
14 regularly thereafter throughout the pendency of the administrative proceedings in this matter. After
15 initially examining Plaintiff in December of 2002, Dr. Ybarra began a treatment program of
16 chiropractic manipulative treatments and physical therapy one to three times per week for the next
17 four to six weeks. Through mid-to-late fall of 2003, Plaintiff continued to see Dr. Ybarra for
18 treatment and evaluation about once each week, if not more frequently. After that, her chiropractic
19 treatment with Dr. Ybarra occurred once or twice a month. By early July 2007, Dr. Ybarra had seen
20 and treated Plaintiff on approximately 75 occasions.

21
22 ¹ This information is published in, or can be derived from, his written Permanent and Stationary Report to the
23 State Compensation Insurance Fund dated June 19, 2003. (AR 271-276).

24 ² According to the California Department of Industrial Relations, "[q]ualified medical evaluators (QMEs) are
25 qualified physicians certified by the Division of Workers' Compensation - Medical Unit to examine injured workers to
26 evaluate disability and write medical-legal reports. The reports are used to determine an injured worker's eligibility for
27 workers' compensation benefits. QMEs include medical doctors, doctors of osteopathy, doctors of chiropractic, dentists,
28 optometrists, podiatrists, psychologists and acupuncturists." California Department of Industrial Relations
http://www.dir.ca.gov/dwc/MedicalUnit/QME_page.html (last visited March 23, 2009). The Department further explains
that "A qualified medical evaluator (QME is a physician who evaluates [an injured worker] when there are questions
about what benefits [the injured worker] should receive. A physician must meet educational and licensing requirements
to qualify as a QME. They must also pass a test and participate in ongoing education on the workers' compensation
evaluation process." (*Id.* at <http://www.dir.ca.gov/dwc/medicalunit/faqiw.html#3>) (last visited March 23, 2009).

1 Plaintiff filed a worker's compensation claim for disability benefits with California's State
2 Compensation Insurance Fund. As her treating physician and a Qualified Medical Evaluator,
3 Dr. Ybarra prepared a Permanent and Stationary Report dated June 19, 2003 for use in assessing
4 Plaintiff's disability status by the State Compensation Insurance Fund claim's manager. A second
5 medical evaluation dated September 2, 2003, done after an independent examination of Plaintiff in
6 August of 2003, was prepared by Dr. Randy Willis, another doctor of chiropractic medicine and
7 state appointed Qualified Medical Evaluator, for use in determining various workers' compensation
8 issues, including that of the degree to which injuries resulted in permanent disability, if any. Both
9 concluded Plaintiff was permanently disabled and to a substantial degree. The stipulated award,
10 based on the evaluations and opinions of Drs. Ybarra and Willis, provided that the injuries sustained
11 in Plaintiff's fall from the ladder in October of 2002 caused her to suffer a permanent disability of
12 55 ½% in her occupational abilities as a field laborer.

13 Before her workers' compensation claim was finally resolved, Plaintiff filed for disability
14 insurance benefits and widow's insurance benefits under the Act. Plaintiff submitted these same
15 medical evaluation reports of Drs. Ybarra and Willis as part of her proof of disability, along with a
16 physical residual functional capacity assessment done by Dr. Ybarra after treating Plaintiff for nearly
17 five years. In his initial decision, the Administrative Law Judge (ALJ) found these opinions and
18 information of little use in adjudicating Plaintiff's disability claims under the Act, largely because
19 chiropractors are not acceptable medical sources under the Act's regulatory rules. The Appeals
20 Council suggested in its March 2007 remand order that more attention and consideration of these
21 opinions was warranted than had been demonstrated in the ALJ's original written decision and sent
22 the matter back. Among other things, Plaintiff argues in this case that the decision after remand
23 remains impermissibly flawed mostly due to the ALJ's inadequate analysis and improper application
24 of the law and regulations to the opinions of Drs. Ybarra and Willis, most especially
25 Dr. Ybarra.

26 PROCEDURAL HISTORY

27 Plaintiff filed her application for disability insurance benefits on April 19, 2004.
28 (Administrative Record ("AR") 74, 156, 186) and her application for widow's insurance benefits on

1 April 15, 2005 (AR 438-440). Plaintiff alleged a disability onset date of October 14, 2002 (AR 153)
2 and claimed that injuries to her right side and lower back limited her ability to work (AR 190).
3 Plaintiff said that these injuries rendered her unable to work because she could not stand, sit, or walk
4 for very long due to pain. (AR 190). The Commissioner initially denied Plaintiff's application on
5 August 27, 2004 (AR 106-110) and her subsequently filed request for reconsideration in December
6 of 2004 (AR 112-116).

7 On January 14, 2005, Plaintiff filed a request for a hearing before an ALJ. (AR 117).
8 The hearing was conducted on September 18, 2006 and testimony was taken from Plaintiff and a
9 vocational expert. (AR 36-53). Counsel represented Plaintiff at that hearing (*id.*) and at all other
10 times throughout these proceedings since June 29, 2006. (AR 34-35).

11 On October 19, 2006, the ALJ issued his written findings and orders in this matter,
12 concluding that Plaintiff was not disabled and therefore not eligible for disability insurance benefits
13 under the Act. (AR 88-97, 97). On or about December 7, 2006, Plaintiff requested the Appeals
14 Council to review the ALJ's decision. (AR 146). The Appeals Council did so, vacating the initial
15 hearing decision of October 19, 2006, and remanding the matter to the ALJ for resolution of certain
16 issues in the manner described in the Appeals Council's order. (AR 103-105).

17 Because of its importance to the Court's ruling in this case, some additional attention to the
18 Appeals Council's remand order is appropriate. That order indicated the sources of the ALJ's errors
19 were several, i.e., the ALJ's failure to consider the opinions of the chiropractic practitioners properly
20 with the Appeals Council referencing the policies and guidelines contained in Social Security Ruling
21 06-3p as instructive on this issue; the ALJ's apparent misunderstanding of the evidence from
22 Dr. Ybarra, Plaintiff's chiropractor, on the issue of whether he opined that Plaintiff had been
23 "cured" on July 31, 2003; the ALJ's failure to acknowledge or evaluate Plaintiff's apparent obesity or
24 the effects that such an impairment might have on Plaintiff's ability to work, referencing another
25 Social Security Ruling, No. 02-1p, on this issue; and the ALJ's apparently inadequate evaluation of
26 Plaintiff's credibility regarding her subjective complaints. (AR 103-104).

27 In reaching these conclusions, the Appeals Council pointed to a number of evidentiary
28 matters that appear to have been critical to its analysis, including the following:

1 The Administrative Law Judge found that the claimant has the residual
2 functional capacity to lift and carry 50 pounds occasionally and 25 pounds
3 frequently, and to stand, sit or walk 6 hours in an 8-hour workday. He
concluded that the claimant was not disabled on the basis that she can
perform her past work as a harvest worker.

4 The evidence of record includes opinions of chiropractors Willis and
5 Ybarra (Exhibits 3F and 4F). Chiropractor Ybarra reported in connection
6 with his June 2003 Permanent and Stationary Report that the claimant's
7 problems with her neck preclude heavy lifting and prolonged neck flexion,
8 and that her low back problems preclude "substantial work," heavy lifting,
9 repetitive bending, and prolonged standing and sitting. (Exhibit 3F, p. 8.)
10 Chiropractor Willis reported permanent work restrictions of no repetitive
11 motions of the neck, no heavy lifting, and no "substantial work" (Exhibit
12 4F, pg. 30). He further reported that the claimant was unable to perform
13 the usual and customary duties of an olive picker (or the same job the
14 Administrative Law Judge determined that the claimant retains the
15 capacity to perform).

16 20 CFR 404.1527 explains how medical opinions from "acceptable
17 medical sources" are evaluated. However, chiropractors are not
18 considered acceptable medical sources (20 CFR 404.1513(d)). Yet,
19 evidence from other sources can still be used to evaluate the severity of a
20 person's impairments and needs to be addressed in accordance with the
21 latter regulation and Social Security Ruling 06-3p. The Administrative
22 Law Judge did state that chiropractor Ybarra discharged the claimant as
23 cured on July 31, 2003, but he did not otherwise discuss or evaluate the
24 information provided by him. Moreover, the reference cited by the
25 Administrative Law Judge (or Exhibit 14F, pg. 33) did not confirm his
26 statement that Dr. Ybarra discharged the claimant as cured. Rather, he
27 determined that the claimant was permanent and stationary effective June
28 19, 2003 according to that citation.

(AR 103-104).

Among the other provisions of its order, the Appeals Council instructed that, upon remand
for further hearing,

The Administrative Law Judge ... will obtain updated medical information
from any treating sources. As appropriate, he will also obtain one or more
consultative examinations regarding the claimant's condition. The
Administrative Law Judge will consider the entire record, provide
discussion and rationale for conclusions reached concerning the specific
limitations resulting from the claimant's impairments. In addition, he will
provide rationale regarding the weight he accords to the medical
opinions/assessments in accordance with 20 CFR 404.1527 and Social
Security Rulings 96-2p, 96-5p, 96-6p, and 06-3p. The credibility of
claimant's subjective complaints will be addressed within the guidelines of
20 CFR 404.1529 and Social Security Ruling 96-7p.

(AR 104).

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1 The remand hearing was held July 10, 2007 before the ALJ who had conducted the earlier
2 hearing. (AR 36, 54-73). Plaintiff was again present and assisted by counsel as well as a Spanish
3 language interpreter. (AR 36, 38). Plaintiff testified, as did vocational expert, Jose Chaparro. (AR
4 37). On July 20, 2007, the ALJ issued his written decision, again concluding that Plaintiff was not
5 under a disability from and after October 14, 2002, the alleged onset date, and, therefore, not eligible
6 for disability income benefits or widow's insurance benefits under the Act. (AR 27). On or about
7 August 28, 2007, Plaintiff asked the Appeals Council to review this second decision (AR 12), which
8 request was denied on October 15, 2007 (AR 7-9) because the Appeals Council found "no reason
9 under our rules to review the Administrative Law Judge's decision." (*Id.*) The ALJ's decision
10 became the Commissioner's final decision in the matter. Plaintiff timely filed this action for judicial
11 review pursuant to 42 U.S.C. § 405(g).

12 SCOPE AND STANDARD OF REVIEW

13 Congress has provided a limited scope of judicial review of a Commissioner's decision to
14 deny benefits under the Social Security Act. *See* 42 U.S.C. § 405(g). A court must uphold the
15 Commissioner's decision (made through the ALJ) when the determination is not based on legal error
16 and is supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985);
17 *Sanchez v. Secretary of Health & Human Services*, 812 F.2d 509, 510 (9th Cir. 1987). "The
18 [Commissioner's] determination that a claimant is not disabled will be upheld if the findings of fact
19 are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)
20 (citing 42 U.S. C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v.*
21 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v.*
22 *Sullivan*, 888 F.2d 559, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health & Human*
23 *Services*, 846 F.2d 573, 576 (9th Cir. 1988.) And it "means such evidence as a reasonable mind
24 might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.
25 Ct. 1420 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may
26 reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th
27 Cir. 1965). On review, the Court will consider the record as a whole, not just the evidence
28 supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)

1 (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

2 It is the role of the trier of fact, not the Court, to resolve conflicts in the evidence.
3 *Richardson*, 402 U.S. at p. 400. If the evidence supports more than one rational interpretation, one
4 of which supports the Commissioner's decision, that decision must be upheld. *Allen v. Heckler*, 749
5 F.2d 577, 579 (9th Cir. 1984). Moreover, if there is substantial evidence to support the
6 administrative findings, or if there is conflicting evidence that will support a finding of either
7 disability or non-disability, the finding of the Commissioner is conclusive (*Sprague v. Bowen*, 812
8 F.2d 1226, 1229-1230 (9th Cir. 1987)) unless an improper standard was applied in weighing the
9 evidence and making the decision. *Brawner v. Secretary of Health & Human Services*, 839 F.2d
10 432, 433 (9th Cir. 1987).

11 **RELEVANT LEGAL AND REGULATORY FRAMEWORK**

12 Disability insurance benefits under Title II of the Act are available to individuals who have
13 worked in recent years and who are determined to be disabled due to a physical and/or mental
14 impairment. 42 U.S.C. §§ 401 *et seq.* In order to qualify, the person seeking disability benefits must
15 demonstrate that he is "unable to engage in any substantial gainful activity by reason of any
16 medically determinable physical or mental impairment which can be expected to result in death or
17 which has lasted or can be expected to last for a continuous period of not less than twelve months."
18 42 U.S.C. § 423(d)(1)(A). The Act also provides that a claimant shall be determined to be under a
19 disability only if his impairments are of such severity that he "is not only unable to do his previous
20 work but cannot, considering his age, education, and work experience, engage in any other
21 substantial gainful work which exists in the national economy." 42 U.S.C. § 423(d)(2)(A).

22 To be eligible for benefits for disability insurance benefits, a worker must, among other
23 things, be insured for disability purposes and be disabled on that date. 42 U.S.C. § 416(i). 20 C.F.R.
24 § 404.101(a) provides, in pertinent part, that an applicant's "insured status" is a basic factor in
25 determining if someone is entitled to disability insurance benefits and that if the person seeking those
26 benefits is neither fully nor currently insured, no benefits are payable.

27 The Commissioner uses a five-step sequential evaluation process for determining whether a
28 person is disabled under Title II of the Act. 20 C.F.R. § 404.1520. Step one determines whether the

1 claimant is engaged in substantial gainful activities. If he is, benefits are denied. If he is not, the
2 decision maker proceeds to step two, which determines whether the claimant has a medically severe
3 impairment or combination of impairments that meet the duration requirements, i.e. the
4 impairment(s) are expected to result in death, or have continuously lasted or are expected to last at
5 least twelve months. If the claimant does not have a severe impairment, a combination of
6 impairments, or meet the duration requirement, the disability claim is denied. If the impairment is
7 severe, the evaluation proceeds to the third step, which compares the claimant's impairment with a
8 number of listed impairments acknowledged by the Commissioner to be so severe as to preclude
9 substantial gainful activity. *See* 20 C.F.R. Part 404, Subpart P, Appendix 1. If the impairment meets
10 or equals one of the listed impairments and satisfies the duration requirement, the claimant is
11 conclusively presumed to be disabled. If the impairment does not, the evaluation proceeds to the
12 fourth step, which determines whether the impairment prevents the claimant from doing work
13 performed in the past. If the claimant is able to perform his previous work, he is not disabled. If the
14 claimant cannot perform this work, the fifth and final step in the process determines whether he is
15 able to perform other work in the national economy in view of his age, education and work
16 experience. *See Bowen v. Yuckert*, 482 U.S. 137, 107 S. Ct. 2287 (1987).

17 The initial burden of proof rests upon a claimant to establish that he "is entitled to the
18 benefits claimed under the Act." *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)(citations
19 omitted). In terms of the five step sequential evaluation process, the Ninth Circuit has held that
20 "[t]he burden of proof is on the claimant as to steps one to four," while at the same time noting that
21 an ALJ's "*affirmative duty* to assist a claimant to develop the record . . . complicates the allocation of
22 burdens" such that "the ALJ shares the burden at each step." *Tackett v. Apfel*, 180 F.3d 1094, 1098
23 & n.3 (9th Cir. 1999)(italics in original). The initial burden is met once a claimant establishes that a
24 physical or mental impairment prevents her from engaging in her previous occupation. The burden
25 then shifts to the Commissioner to show (1) that the claimant can perform other substantial gainful
26 activity and (2) that a "significant number of jobs exist in the national economy" which claimant can
27 perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

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1 To be eligible for widow's insurance benefits, the claimant must prove, among other things,
2 that she is the widow of an individual who was fully insured upon death. 42 U.S.C.A. 402(e); 20
3 C.F.R. 404.335(a). The claimant must also prove that she is at least 60 years old, or at least 50 years
4 old and under a disability that started no later than seven years after the insured died or seven years
5 after the claimant was last entitled to survivor's benefits based upon a disability, whichever occurred
6 last. 42 U.S.C. § 402(e); 20 C.F.R. 404.335(c).

7 **RELEVANT FACTUAL INFORMATION**

8 ***A. Medical Evidence***

9 1. Diagnostic and Treatment Information. As noted earlier, Plaintiff was a 53-year-old
10 widow engaged in her traditional job as a fruit harvest worker when she was hurt in an employment-
11 related fall on October 14, 2002. (AR 248, 58-59). Plaintiff injured her lower back, neck, right ribs
12 and right shoulder. (AR 59-60). She was immediately taken to Family Health Care Network, a local
13 medical clinic and seen by Dr. Christopher Gillespie. (AR 248, 288). Plaintiff complained of pain
14 around her right ribs and to her right side. (*Id.*) Dr. Gillespie ordered x-rays to assess for fractures
15 and prescribed pain medication and cool compresses to affected area. (*Id.*) The x-ray findings were
16 normal. (AR 246, 249). Plaintiff saw Dr. Gillespie several more times over the course of the next
17 month and continued to complain of pain to her right side and ribs as well as her lower back,
18 although she demonstrated some improvement with regard to the rib injury. (AR 242-248).
19 Plaintiff's treatment was relatively conservative over the course of her care by Dr. Gillespie and he
20 released her to return to work on November 16, 2002. (AR 242). However, Plaintiff continued to
21 experience pain that left her feeling unable to work and, approximately one month later, Plaintiff
22 consulted with Dr. Ronald Ybarra, a licensed chiropractor, for evaluation of her pain and treatment
23 options. (AR 271).

24 Plaintiff's complaints at that time included persistent neck, low back, right shoulder, right
25 arm, right leg, and right ribs injured as a result of the work-related accident. (*Id.*) Dr. Ybarra's
26 physical examination of Plaintiff on that date showed positive orthopedic signs of injury as well as
27 some negative indicators. (AR 272). Dr. Ybarra had x-rays done on that same date by radiologist,
28 Mario Deguchi, M.D., of Plaintiff's right lower ribs, cervical spine, thoracic spine. (AR 356, 357,

1 358). Diagnostic impressions showed a misalignment of right seventh rib, minimal degenerative
2 disc disease of the cervical spine; degenerative disc disease at the thoracic spine level; S-shaped
3 scoliosis of the thoracic/lumbar spine hypolordosis bordering on a lordosis of the cervical spine; and
4 dextroconvex scoliosis of the cervical/thoracic spine. (*Id.*) Dr. Ybarra concluded that Plaintiff had
5 suffered a moderate neuromusculo-skeletal ligamentous injury. (AR 272). Conservative
6 chiropractic treatment of her condition began on December 17, 2002, with spinal manipulative
7 therapy and physiotherapy. (AR 253, 272). For the first four to six weeks, Plaintiff was treated by
8 Dr. Ybarra one to three times per week. (AR 289). From sometime in February 2003 through mid-
9 to-late fall of that same year, Plaintiff continued to see Dr. Ybarra for treatment and evaluation about
10 once each week, if not more frequently. (AR 416-421).

11 Due to the persistent nature of Plaintiff's neck, shoulder and low back pain, Dr. Ybarra
12 thought it advisable to consult with several other licensed medical doctors, Sanjay Chauhan, a
13 neurologist, William Glenn, a radiologist, and G. B. Ha'Eri, an orthopedist. (AR 272). On February
14 22, 2003, Dr. Ha'Eri examined Plaintiff for ongoing subjective complaints of neck pain, right
15 shoulder pain, right rib pain, and back pain. (AR 289, 296). He conducted an orthopedic
16 examination of Plaintiff and diagnosed her with a cervical, thoracic and lumbar myoligamentous
17 strain. Dr. Ha'Eri recommended ongoing chiropractic treatment and physiotherapy over the course
18 of the next twelve weeks and prescribed Vicodin. (AR 289).

19 On March 20, 2003, Plaintiff was examined by Dr. Sanjay Chauhan, a board certified
20 neurologist and also a state appointed Qualified Medical Examiner. (AR 252). At that time, Plaintiff
21 described her complaints as neck pain with radiating pain, tingling and numbness with spasms to the
22 right shoulder to right hand; headaches; low back pain with radiating pain, tingling and numbness
23 with spasms to right leg to foot. (AR 253, 261). In conjunction with his neurologic examination,
24 Dr. Chauhan performed a nerve conduction study on Plaintiff. (AR 261, 263). The results of that
25 testing were negative for compressive neuropathy; negative for cervical radiculopathy; and slight
26 right S1 radiculopathy. (AR 263).

27 As a result of his examination of Plaintiff, Dr. Chauhan diagnosed Plaintiff with cervical
28 strain with right cervical radiculopathy; lumbar strain with right lumbar radiculopathy; right shoulder

1 strain; right forearm and hand strain; secondary muscle contraction headaches due to cervical and
2 lumbar strains. (AR 258). In a portion of his written report, Dr. Chauhan observed that the current
3 treatment Plaintiff was receiving from Dr. Ybarra was appropriate and that Plaintiff needed to
4 continue that course of treatment. (*Id.*) Dr. Chauhan also recommended that Plaintiff “undergo
5 further work-up with an MRI scan of the cervical spine and lumbar spine due to continued radicular
6 symptoms and signs.... For the right shoulder and right upper extremity the patient may benefit from
7 orthopedic evaluation if it has not been accomplished yet. Continue conservative chiropractic and
8 physical therapy per Dr. Ybarra. Continue current pain medication with Vicodin, Sonata, and
9 Tylenol 500 mg. t.i.d. Follow up with Dr. Chauhan as needed.” (AR 259).

10 On April 9, 2003, MRI scans of Plaintiff’s cervical and lumbar spine and right shoulder were
11 done at Dr. Ybarra’s request. (AR 364-369). Dr. William Glenn, a radiologist with Key Health
12 Medical Group, read those scans. (AR 365, 367, 369). The MRI of the cervical spine revealed
13 objective findings of cervical curvature less lordotic (i.e., more straightened) than usually seen;
14 multiple disc spaces show loss of signal; and multiple minor levels of disc bulging vs. endplate
15 ridging, slightly indenting thecal sac as noted. (AR 366, 367, 307). The MRI of the right shoulder
16 showed only a tiny amount of joint fluid noted. (AR 364, 365). The MRI of the lumbar spine
17 revealed T12/L1 shows loss of disc space signal; L4/5 shows subtle loss of disc space signal, slightly
18 reduced left foramen, and 1-2 mm disc/annulus bulge with endplate ridging slightly indenting the
19 thecal sac; L5/S1 shows loss of disc space signal and 2-3 mm disc annulus bulge in conjunction with
20 endplate ridging minimally indenting thecal sac, if at all. (AR 368, 369).

21 On June 19, 2003, Dr. Ybarra ordered computerized testing of Plaintiff’s range of motion.
22 (AR 359-363). That testing produced objective findings of impaired range of motion in areas of
23 Plaintiff’s cervical and lumbar spines. (AR 273, 274). On June 19, 2003, Dr. Ybarra also issued a
24 Permanent and Stationary Report about Plaintiff’s condition to the Disability Evaluation Unit claims
25 staff at the State Compensation Insurance Fund. (AR 271-276). In that report, Dr. Ybarra concluded
26 that Plaintiff had sustained a moderate neuromusculo-skeletal ligamentous injury and diagnosed her
27 with cervical alordosis; shoulder tendonitis; myofascitis; 2mm L4/L5 disc bulge; 3mm L5/S1 disc
28 herniation; lumbar radiculitis; lumbar myofascitis; and a healed rib contusion. (AR 272).

1 Dr. Ybarra reviewed a fairly long list of objective factors indicating disability , i.e., signs detected by
2 medically acceptable clinical diagnostic techniques as well as laboratory findings, identified work-
3 related impairments that would preclude Plaintiff from performing her previous work, and discussed
4 the future medical care treatment of Plaintiff's condition would likely entail. (AR 273-275). In that
5 regard, Dr. Ybarra noted:

6 Since the principal injury was moderate neuromusculo-skeletal
7 ligamentous in nature, occasional exacerbations are probable. Therefore,
8 future medical care would be appropriate; occasional
9 chiropractic/physiotherapy visits, supported by medical with follow-up
 ortho-surgical evaluation with any significant exacerbation should suffice.
 [¶] Mrs. Lemus' exacerbations are admittedly best relieved with spinal
 manipulative therapy, physiotherapy and medication. ...

10 (AR 275).

11 On July 1, 2003, Plaintiff was seen by Bharati H. Shah, M.D., anesthesiologist and pain
12 management specialist at the request of Dr. Ybarra. (AR 319). Dr. Shah conducted orthopedic and
13 neurologic examinations of Plaintiff as part of this consultative process. (AR 321-322). At that
14 time, Plaintiff described her neck pain as constant aching and burning and reported experiencing
15 headaches three to four times a day. (AR 319). Plaintiff also described numbness in the back of her
16 neck. She said that bending her head or making any abrupt movement increased her pain level. She
17 also noted that medication helped to decrease it. Plaintiff further described right shoulder cramping
18 and aching pain, radiating down to her fingers. She said her right arm pain was a constant stabbing
19 pain with numbness, tingling, and with weakness of the right arm. Lifting her arm increased her pain
20 level; medication and chiropractic treatment decreased it. (*Id.*) Plaintiff also reported low back pain,
21 a constant severe aching pain, radiating down the right leg causing cramping in calf and knee. (AR
22 320). Prolonged sitting, prolonged standing, lying and bending increased her pain level; medication
23 and chiropractic treatment decreased it. (*Id.*)

24 Dr. Shah independently examined Plaintiff and also reviewed the results of the MRI scans
25 done in April of 2003. (AR 321-323). His clinical impressions were: (1) musculo ligamentous
26 sprain/strain cervical spine and lumbar spine; (2) degenerative disc disease; (3) lumbar
27 radiculopathy; (4) bilateral sacro-ileitis and sacro-iliac dysfunction; (5) rule out discogenic pain; and
28 (6) post traumatic headaches. (AR 323). Dr. Shah recommended lumbar and epidural steroid

1 blocks; right suprascapular nerve block; sacro-iliac joint injection; and lumbar facet blocks. He also
2 recommended that Plaintiff continue her chiropractic treatment, physical therapy and exercise
3 program as well as her present pain medications (then 500 milligrams of aspirin). (*Id.*)

4 On August 14, 2003, Dr. Randy Willis, a licensed chiropractor and another state appointed
5 Qualified Medical Evaluator, examined Plaintiff at his Visalia, California office in connection with
6 the injuries sustained in her October 2002 work-related accident.³ (AR 286-309.) Dr. Willis noted
7 that Plaintiff's then current complaints included persistent lower back pain, radiating down both
8 lower limbs to the ankles. (AR 291). Plaintiff rated the lower back pain severity as a seven on a
9 scale of one to ten, ten being the most severe. Her symptoms increased with periods of prolonged
10 walking, sitting or standing. Plaintiff also described radiating pain down into her right leg that
11 Plaintiff claimed were always present and included cramping; the pain radiating down her lower left
12 leg was sometimes there. Plaintiff also described persistent neck pain, rated as a seven, and
13 explained that the pain increased when she rotated or extended her neck. She also experienced
14 headaches which started in the back of her neck and radiate to her temples. And she reported pain in
15 her right shoulder and forearm, along with right lower rib pain. As part of his evaluation, Dr. Willis
16 also reviewed the symptoms, signs and laboratory findings generated in Plaintiff's medical case
17 record to that date. (AR 293-297).

18 Dr. Willis's independent diagnostic impressions of Plaintiff's condition included right rib
19 contusion, secondary to the accident, resolved; cervicothoracic myofascial syndrome with muscle
20 tension headaches, secondary to the industrial injury, chronic; right shoulder sprain, secondary,
21 chronic; C4/5, C5/6, C6/7, and C7/T1 one to two millimeter disc bulges, secondary, chronic; L4/5
22 one to two millimeter disc bulge, secondary, chronic; L5/S1 two to three millimeter disc bulge with
23 slight right S1 radiculopathy, secondary, chronic; lumbrosacral myofascial syndrome, secondary,
24 chronic. (AR 304-305). Dr. Willis identified objective factors of disability, noting the April 2003
25 MRI scans revealed small disc bulges at C4-5, C5-6, C6-7, C7-T1, L4-5, and L5-S1, which "ha[d]

26
27 ³ Dr. Willis had been asked to do so by an administrative panel as part of the adjudication of Plaintiff's pending
28 workers' compensation disability claim and would prepare a report for the Disability Evaluation Unit for the State
Insurance Compensation Fund claim. (AR 286, 286-309).

1 probability in contributing to the current symptomatology.” (AR 305, 307). The March 2003 nerve
2 conduction study revealed some slight right S1 radiculopathy, which he found “correlate[d] with the
3 increased symptomatology to the right lower limb.” (AR 306, 307).

4 As for Plaintiff’s future medical care, Dr. Willis concluded that it “will be an issue,” noting:

5 Post-traumatic musculoligamentous and vertebral disc injuries of this
6 nature can result in exacerbations and flare-ups that with reasonable
7 medical probability will necessitate periodic treatment. Exacerbations and
8 recurrences are to be reasonably expected from this industrial injury.
9 Treatment should consist of chiropractic manipulation treatment; deep
10 tissue massage; physical therapy for pain modalities; non-supervised
11 therapeutic progressive stretching/strengthening exercise program... . [¶]
It is my opinion that Ms. Lemus is currently not a candidate for any
surgical procedures. If Ms. Lemus’ symptomatology should progressively
deteriorate and produce the need for further investigation to determine the
exact cause of said symptomatology, I recommend a future medical
provision to allow for prescription medication for pain, referrals for
diagnostic, orthopedic, neurological or pain management consultations... .

12 (AR 308).

13 Plaintiff continued to see Dr. Ybarra regularly for chiropractic care relating to her original
14 injuries. (AR 416-421). She received approximately sixteen treatments from Dr. Ybarra in 2005,
15 eleven treatments in 2006 and at least seven through early July, 2007, including massage and
16 electrical muscle stimulation. (AR 416, 417, 433). Much of the treatment was necessitated by
17 episodic exacerbations of Plaintiff’s condition. (AR 370-372, 375-378, 380-385, 387, 389-393, 395-
18 397).

19 Some of these episodes apparently prompted additional consultative referrals. (AR 318).

20 On January 26, 2004, Plaintiff was again examined by Dr. Shah, upon Dr. Ybarra’s recommendation.
21 (*Id.*) Plaintiff continued to describe her low back pain as constant, severe, ache that radiated down
22 her right leg causing cramping in calf and knee and numbness sensation. She also reported problems
23 with pain in her right shoulder that “radiates to her upper extremity with numbness sensation.” (*Id.*)
24 Prolonged sitting, prolonged standing, lying and bending increased her pain level; medication and
25 chiropractic treatment helped decrease it. Plaintiff reportedly slept five hours per night.

26 Dr. Shah’s objective findings from this examination included increased lumbar lordosis;
27 moderate tenderness over the right lumbar spinous processes, the right sacro-iliac joints, right gluteal
28 and paravertebral regions and both pelvic brims; and right paraspinal spasm. “Straight leg raising

1 was positive at 70 degrees in the right and negative on the left. Patrick's test was positive on the
2 right and negative on the left. Pelvic tilt test was positive. Flexion was limited to 3 feet from the
3 ground and was painful. Deep tendon reflexes [were] normal. Sensation to touch and pinprick [was]
4 decreased on the right leg." (*Id.*) Dr. Shah's diagnoses were (a) musculo ligamentous sprain/strain
5 cervical spine; (2) musculoligamentous sprain/strain lumbar spine; (3) lumbar and cervical
6 radiculopathy; and (4) myofascial sprain/strain of the lumbar spine. The pharmaceutical plan
7 Dr. Shah recommended was Motrin 800 mg., twice each day; Soma 350 mg. once at bedtime; and
8 continuation of chiropractic treatment, physical therapy, and exercise program. (*Id.*)

9 Having initiated the Social Security Act disability claims process in April 2004 (AR 74, 156,
10 186), Plaintiff underwent a consultative examination on July 7, 2004, at the agency's request. (AR
11 325-327). Dr. Gurdin, an orthopedist, conducted the examination and prepared his written report of
12 the same date. (*Id.*) He noted that Plaintiff's chief complaint was constant aching throughout the
13 entire spine which worsened with activity, including standing, walking, sitting, bending, lifting, and
14 twisting. (AR 325). Plaintiff also reported constant pain in her right arm and right leg. (*Id.*)
15 Dr. Gurdin's report also acknowledged that Plaintiff had been "diagnosed with myofascial pain
16 syndromes involving the neck, upper back, and lumbar area. Her only treatment has been from a
17 chiropractor and she still goes twice a month. There has ... been no improvement." (*Id.*) This
18 consultative examiner noted that Plaintiff's stated limitations were an ability to walk one-quarter
19 mile, to stand for one hour a time, and to sit for one hour. Plaintiff also explained that she could
20 climb one flight of stairs slowly and could lift 25 pounds, 15 pounds more easily. In his report.
21 Dr. Gurdin also recorded that Plaintiff's condition was currently treated with chiropractic care, Advil,
22 and an analgesic gel.

23 Dr. Gurdin's physical examination of Plaintiff included evidence of a positive Wadell sign,
24 i.e., low back pain complained of with light pressure over the head. (AR 326). Plaintiff also
25 complained of some worsening of her back pain with gentle trunk rotation which did not appear to
26 move the spine. (*Id.*) His examination appears to have produced some evidence of both positive and
27 negative findings. (AR 325-326). Dr. Gurdin did diagnose Plaintiff with cervical, thoracic, and
28 lumbar myofascitis; minimal degenerative disc disease in the cervical and lumbar areas; possible

1 myofascial pain syndrome; and obesity. (AR 327). He concluded that “[i]n spite of the patient’s
2 complaints, the objective physical findings were minimal. There did not appear to be significant
3 impairment related physical restrictions.” (*Id.*)

4 Plaintiff was referred to Dr. Boota Chahil, a neurologist, by Dr. Ybarra for a further
5 consultative examination. (AR 376, 408). Dr. Chahil initially examined Plaintiff on October 20,
6 2005. (AR 408). Her chief complaint at that time was back and neck pain. Plaintiff reported to
7 Dr. Chahil that she “gets a little better with the therapy” but continues to have pain. (*Id.*) At that
8 time, Plaintiff reported not taking any medication for the pain. Dr. Chahil conducted a neurological
9 examination of Plaintiff and noted, under “Impression,” a “[h]istory of fall with right sided injury.
10 No focal deficit is noted on the examination.” (AR 408, 409). Dr. Chahil prescribed Topamax, at
11 25 mg. per day, apparently anticipating a slow increase in dosage. (AR 409).

12 Dr. Chahil saw Plaintiff again on November 9, 2005, noting some improvement but still
13 some pain. (AR 407). He recommended that the Topamax continue to be increased slowly.

14 At Plaintiff’s next appointment about a month later, Plaintiff reported to Dr. Chahil she had
15 discontinued taking medication for reasons that are not disclosed in the record and that she had some
16 pain again. (AR 406). Dr. Chahil restarted the Topamax and again planned to increase the dosage
17 slowly. In August 2006, at her follow up visit, Dr. Chahil noted that Plaintiff was taking the
18 medication and “doing fairly well.” (AR 405). Dr. Chahil’s impression continued to be “chronic
19 pain” and his treatment plan for her headache pain included continuation of Topamax and “observe
20 closely.” (*Id.*) Plaintiff returned to see Dr. Chahil for another follow up visit in January 2007. (AR
21 410). She reported still having some pain. Dr. Chahil recommended that she “continue all meds and
22 observe closely.” (*Id.*)

23 2. Medical/Health Care Provider Opinion Relating to Severity of Impairment and
24 Residual Functional Capacity.

25 As noted above, Dr. Ronald Ybarra prepared his June 19, 2003 Permanent and Stationary
26 Report for use in adjudicating the appropriate disposition of Plaintiff’s State Compensation
27 Insurance claim. (AR 271-276). Part of that report included a discussion about “work preclusions,”
28 limitations on Plaintiff’s ability to work resulting from her industrial accident. (AR 275). In that

1 section, Dr. Ybarra noted that Plaintiff was a farm laborer whose work duties included heavy lifting.
2 He found that Plaintiff's injuries to her neck precluded her from heavy lifting or prolonged neck
3 flexion and that injuries involving her lower back resulted in work preclusions of no heavy lifting; no
4 prolonged standing or sitting; and no repetitive bending. Here, Dr. Ybarra concluded that Plaintiff
5 would not be capable of any "substantial work" because of her lower back injuries. (*Id.*) Dr. Ybarra
6 also concluded that Plaintiff's shoulder injuries did not result in any work preclusions.

7 On September 2, 2003, Dr. Randy Willis prepared a report for the Disability Evaluation Unit
8 for the State Insurance Compensation Fund claim. (AR 286-309). Under "Work Restrictions,"
9 Dr. Willis notes:

10 In regards to work restrictions, while incorporating information from
11 medical records, history of the industrial injury given by Ms. Lemus
12 during the interview and information reported on the DEU Form 100 and
13 Job Description of Employee's Job Duties, Ms. Lemus is unable to
14 perform the usual and customary duties as an "Olive Picker." It is my
15 opinion that Ms. Lemus has permanent work restrictions referable to the
16 cervical spine and lumbar spine.

17 Ms. Lemus' permanent work restriction to the cervical spine ranges
18 between a "no repetitive motions of the neck to no heavy lifting."

19 Ms. Lemus' permanent work restriction to the lumbar spine ranges
20 between a "no heavy lifting to no substantial work."

21 Ms. Lemus has not permanent work restrictions related to the right
22 shoulder, as there are essentially no objective findings.

23 (AR 307).

24 On August 12, 2004, State Agency physician, D. Sharbaugh, a board certified orthopedist,
25 rendered an opinion about Plaintiff's residual functional capacities. (AR 328-335, 353-355).
26 Dr. Sharbaugh reviewed a summary of the medical evidence in the record, but did not examine
27 Plaintiff. The summary was prepared by a disability evaluator analyst with the Social Security
28 Administration and dated August 5, 2004. (AR 353-355). Although the summary contained a brief
description of much of the medical evidence in the case record to that date, it did not include all of it.
Missing is information about the examination conducted by Dr. Ha'Eri; the various prescription
medications given to Plaintiff for pain, including dosage and frequency; and other treatment Plaintiff
had received for her condition, i.e., chiropractic and physiotherapy, including frequency, duration,

1 and results. Under “Conclusions/Recommendations,” the disability examiner noted:

2 No meets or equals. Pain is a consistent complaint by the claimant, but the
3 location of her pain varies. ... I believe that the claimant’s subjective
4 complaints of pain and functional limitations are inconsistent and not fully
5 credible. Various chiropractors offer MSO’s that preclude heavy lifting
6 and repetitive motions of the neck. These statements are consistent with a
medium level of exertion. The ortho CE MD opined that the claimant has
no significant work-related limitations. There was a positive Waddell’s at
the ortho ce. Recommend a full range medium RFC, which takes into
consideration the mildly abnormal imaging studies.

7 (AR 355). Under what appears to be Dr. Sharbaugh’s signature, the words, “Agree” and “physical”
8 appear. (*Id.*)

9 Dr. Sharbaugh completed a Physical Residual Functional Capacity Assessment on August 12,
10 2004. (AR 328-335). He described Plaintiff’s primary diagnosis as minimal degenerative disc
11 disease of the cervical spine and lumbar spine. (AR 328). Dr. Sharbaugh concluded Plaintiff was
12 able to lift and/or carry, including upward pulling, of up to 50 pounds occasionally and 25 pounds
13 frequently; she could stand and/or walk with normal breaks about six hours in an eight-hour
14 workday; she could sit with normal breaks for six hours in an eight- hour workday; there would be
15 no limitations on her ability to push or pull other than as shown for lift and carry. (AR 329).
16 No postural, manipulative, visual, communicative or environmental limitations were imposed.
17 (AR 330-332).

18 In Dr. Sharbaugh’s opinion, the severity or duration of Plaintiff’s symptoms were
19 disproportionate to the expected severity or expected duration based on Plaintiff ’s medically
20 determinable impairments. (AR 333). As part of his explanation, he referenced the “continuation
21 sheet,” i.e., the disability examiner’s August 5th report. (*Id.*) Dr. Sharbaugh also noted that, in his
22 opinion, “MRIs show no significant findings which could reasonably [produce] symptoms. Positive
23 Waddells. Tender all over. Above support not fully credible allegations of sit/stand ½ hour.”⁴ (*Id.*)
24 Dr. Sharbaugh acknowledged that there were treating or examining source statements in the case
25 record, i.e., Drs. Willis and Ybarra, both noted to be chiropractors, regarding Plaintiff’s physical
26

27 ⁴ It is not clear from this record that Dr. Sharbaugh reviewed the actual diagnostic imaging reports prepared by
28 the radiologists or whether he relied on a reference to the “imaging studies” and a very limited description of their results
in the continuation sheet. See AR 353.

1 capacities that differed significantly from his findings. (AR 334). He reported giving consideration
2 to those opinion but essentially minimized their value on the basis that they were “not acceptable
3 medical sources.” (*Id.*) In explaining why their conclusions were not supported by evidence in the
4 file, Dr. Sharbaugh stated, “DC’s precluded heavy lifting and prolonged neck flexion. Dr. Ybarra
5 precluded substantial work due to low back, prolonged stand/sit and no repetitive bending. Ortho
6 CE exam unremarkable with [positive] Waddell sign.” (*Id.*)

7 On December 1, 2004, State Agency physician, Ernest Wong, reviewed the medical evidence
8 in the record, as summarized in the discussion and analysis prepared by the SSA’s disability
9 evaluator analysts. (AR 336-337). The second of these reports was dated November 22, 2004, is
10 one page in length, adds no substantive information or analysis to the previous agency report⁵, and
11 concludes with a handwritten notation by Dr. Wong, “affirm initial RFC.” (AR 336). Under
12 “Conclusions/Recommendations,” the agency’s disability analyst notes “per review of initial case
13 eor, agree with determination. MED RFC which is consistent w/ TS MSO [this reference is to the
14 alleged opinions of Drs. Ybarra and Willis] precluding heavy work. ...” (AR 336).

15 In addition to his comment “MER reviewed and affrm initial RFC,” Dr. Wong notes on the
16 final page of the August 2004 Physical Residual Functional Capacity Assessment form initially
17 completed by Dr. Sharbaugh that “I have reviewed all the evidence in file, and the assessment of
18 8/12/04 is affirmed as written.” Dr. Wong’s signature follows that notation, along with the date of
19 December 1, 2004. (AR 335).

20 On July 9, 2007, Dr. Ybarra, who had continued to provide chiropractic treatment and
21 evaluation to Plaintiff regularly and with relative frequency over the three years following
22 Dr. Wong’s opinion, completed a Residual Functional Capacity Questionnaire describing Plaintiff’s
23 status on as of July 2007. (AR 433-437). Dr. Ybarra described Plaintiff’s prognosis as guarded, that
24 she had suffered a permanent partial impairment and episodes of acute exacerbation to the affected
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26
27 ⁵ The Disability Determination Rationale form on which these notations by Dr. Wong appear reports that
28 agency had received duplicate copy of the Permanent and Stationary Report prepared by Dr. Ybarra; notes “recon” on the
top of the form; reports no prior ALJ decision; and refers the State Agency physician reviewer to the medical history and
objective findings contained in the August 12, 2004 continuation sheet. (AR 336).

1 areas since the initial accident. (AR 433). In that report, he stated that Plaintiff's last visit was July
2 5, 2007, that he had begun seeing her on December 17, 2002, and that he had seen Plaintiff
3 approximately 75 times in his professional capacity. (*Id.*) The listed diagnoses were cervical
4 intervertebral disc [*sic*], cervical radiculitis/neuritis, lumbar intervertebral disc syndrome, lumbar
5 radiculitis. (*Id.*)

6 In his questionnaire/report, Dr. Ybarra stated that Plaintiff's experience of pain, fatigue or
7 other symptoms was occasionally⁶ severe enough to interfere with attention and concentration
8 needed to perform even simple tasks; Plaintiff was capable of tolerating moderate stress; in a
9 competitive work situation, Plaintiff could walk for ½ hour without rest or severe pain; sit for 30-45
10 minutes before needing to get up or otherwise reposition; and stand for 30-45 minutes before needing
11 to change postural positions. (AR 434-436). Dr. Ybarra reported that Plaintiff could sit about two
12 hours total out of an eight-hour workday; stand and/or walk between four and six hours in an eight-
13 hour workday; and that Plaintiff would need to walking around and/or resting several times each
14 hour in order to accommodate her impairments. (AR 436). Dr. Ybarra also stated that Plaintiff
15 would require a job that permitted shifting positions at will (from sitting, standing, or walking) and
16 that she would need to take unscheduled breaks every hour of about 10 minutes. (*Id.*) Dr. Ybarra
17 reported that Plaintiff could lift and carry a maximum of 15 pounds in a competitive work situation
18 and that she could do no heavy lifting. (*Id.*) She could look down occasionally; turn her head right
19 or left occasionally; look up occasionally and hold her head in a static position occasionally. (*Id.*)
20 According to Dr. Ybarra, Plaintiff could rarely crouch or climb ladders but could occasionally stoop,
21 bend, twist and climb stairs. (*Id.*) Dr. Ybarra did not suggest any manipulative limitations. (AR
22 437). He did explain that Plaintiff's impairments were likely to produce "good days" and "bad days"
23 and that he anticipated Plaintiff would be absent from work as result of her impairments or her need
24 for treatment more than four days per month. (*Id.*)

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26 ///

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28 ⁶ Occasionally here means 6%-33% of an 8-hour workday. (AR 434).

1 **B. Other Non-Medical “Other Source” Evidence Regarding Severity of Impairment**
2 **and Work-Related Disability Status**

3 Plaintiff filed a workers’ compensation claim for injuries sustained in the October 14, 2002
4 work-related accident with California’s State Compensation Insurance Fund. (AR 175-177).
5 Ultimately, that claim was resolved in Plaintiff’s favor, resulting in an award for temporary and
6 permanent disabilities. (*Id.*) The SSA case record in this matter contains a copy of the executed
7 “Stipulations with Request for Award” in the Workers’ Compensation Appeal Board matter of
8 Domitila Lemus, Applicant vs. Jose Eduardo Real and State Compensation Insurance Fund,
9 Defendants (case no. FRE 0226213). (AR 175-176). That document relates to the industrial
10 accident producing the injuries for which Plaintiff now claims disability insurance benefits under
11 the Act. It stipulates that Plaintiff was a field laborer on October 14, 2002 and that she sustained
12 injuries to her right upper extremity, back, right shoulder during the course of her employment as a
13 field laborer on that date. (AR 175). The stipulation further provides that, “[t]he injury caused
14 permanent disability of 55 ½%” and that “[t]here is a need for medical treatment to cure or relieve
15 the effects of said injury.” (*Id.*) The award itself is dated August 3, 2004, signed by a judge of the
16 Workers’ Compensation Appeals Board, and grants Plaintiff permanent disability indemnity based
17 on the 55 ½ % permanent disability finding. (AR 177).

18 **C. Testimony Given at July 190, 1007 Remand Hearing**

19 1. Plaintiff’s Testimony.

20 Plaintiff testified through use of a Spanish language interpreter and was represented by
21 counsel. (AR 56).

22 Plaintiff was 58 years old at the time of the second hearing. (AR 57). She had received little
23 formal education, learning to read and write in Spanish at a relatively simple level as a child in
24 Mexico. (AR 58). Plaintiff was not able to read or write in English and had a very limited
25 understanding of the spoken English language. (*Id.*) Her employment history over past 15 years had
26 been that of a harvest worker, picking primarily fruit. (*Id.*) She was a widow, her husband having
27 died some time earlier. (AR 67).

28 ///

1 Plaintiff testified to experiencing constant pain as a result of an injury she sustained on
2 October 14, 2002. At the time of the injury, Plaintiff had been working harvesting an orchard. (AR
3 58-60). Because of the pain resulting from these injuries, Plaintiff now had trouble bending, could
4 not sit in a chair and lean back, or the pain would worsen. (AR 59). Her right leg goes numb. (AR
5 59-60). There was pain in right shoulder, the back of her neck, and her lower back. (AR 60, 63).
6 Plaintiff testified that she sees a chiropractor for treatment of her pain, explaining that she had been
7 authorized to go twice each month but because of transportation problems, she was currently able to
8 see the chiropractor only once per month. (AR 60). Plaintiff testified she was able to receive this
9 care because her workers' compensation claim remained open for medical care. (*Id.*) Plaintiff also
10 testified to receipt of disability payments as part of a workers' compensation award. (AR 67).

11 As for existing exertional and non-exertional capacities, Plaintiff said she could pick up 20 to
12 30 pounds but could not carry it any distance. (AR 61). She also said that her treating chiropractor
13 had told her not to pick up more than 18 pounds. (*Id.*) When asked about her ability to lift weight
14 for two to three hours in an eight- hour workday, she answered that she could pick things up and
15 move them for some distance, but she "could not do this constant." (*Id.*) When asked how long
16 Plaintiff would be able to stand at any one time, she testified that it varied. Sometimes she could
17 stand for an hour and at other times, she could not. (*Id.*) On average, Plaintiff estimated that she
18 could stand for 25 minutes at a time. (*Id.*) With regard to the total amount of time Plaintiff could
19 stand over the course of an 8-hour workday, Plaintiff's answer was, "Maybe for a little while then."
20 (AR 62).

21 Plaintiff estimated that she could sit about 40 minutes at a time and could bear it for an hour
22 but that it would be very difficult. (*Id.*) She also estimated she could sit about three hours total.
23 (*Id.*) When asked how far she could walk at any one time, Plaintiff indicated that she could walk for
24 some unspecified distance but that she would have to sit down after that. (*Id.*) Plaintiff testified that
25 she had to rest frequently during an average day; out of every hour, she estimated needing to rest 20
26 to 30 minutes. (AR 63). Plaintiff explained that she had trouble sleeping on her right side so she
27 slept about 25 minutes in the morning. (*Id.*) She also testified that her need to rest with such
28 frequency was the result of the pain she experienced. (*Id.*) In a normal week, Plaintiff has about

1 three days which she described as “real bad days where [she] doesn’t do much of anything” because
2 of the pain. (AR 63-64).

3 Plaintiff addressed her pain through regular chiropractic treatment. Her chiropractor
4 provided massage therapy and what appears to be some kind of electrical muscle stimulation.⁷ (AR
5 64, 417). He also gave her topical analgesics for the affected areas. (AR 64). Plaintiff testified that
6 this treatment helped quite a bit with the pain for several days. Plaintiff also took medication
7 prescribed by Dr. Chahil. (*Id.*) She had been taking Topamax but Dr. Chahil had recently changed
8 her prescription to Lyrica. (AR 65). Plaintiff was now taking a 50 mg. dose of Lyrica three times
9 per day and reported that it was helping to manage the pain. (*Id.*) The medication had been
10 prescribed for persistent headaches Plaintiff began to experience after industrial injury. (AR 68).

11 With respect to her ability to perform the routine tasks of daily living, Plaintiff testified that
12 in a normal day, she did housework, a little at a time, interspersed with periods of rest. (AR 66).
13 Plaintiff would also make calls to people that she feels need company. Plaintiff did not have a
14 drivers license and had not driven in over 10 years. Plaintiff cooked meals and did her laundry. (AR
15 66-67). Plaintiff also testified to problems with urinary incontinence. (AR 67).

16 2. Vocational Expert, Jose Chaparro.

17 Vocational expert Jose Chaparro testified that he listened to Plaintiff’s testimony and
18 reviewed the work-related background material submitted to him. (AR 69). As a result, he believed
19 he had sufficient information to form an opinion as to the type of work in which Plaintiff had been
20 previously engaged. Mr. Chaparro described that occupation as a fruit harvest worker, rated medium
21 work unskilled by the Dictionary of Occupational Titles. (*Id.*) However, based upon his analysis,
22 Mr. Chaparro believed that Plaintiff performed this job as heavy work. (AR 69-70).

23
24
25 ⁷ Dr. Ybarra’s charting entries (AR 416-421) contain the designation “EMS” in the therapy section of the
26 charting form. This reference appears to describe electrical muscle stimulation, a process where “electrical impulses
27 applied to muscles using pads that conduct the impulses through the skin, producing a soothing, tingling sensation. The
28 treatment is used to increase circulation, decrease pain and muscle spasm, and facilitate healing of injured soft tissues.”
Glossary of Chiropractic Terms, <http://chiropracticcenter.googlepages.com/templatedonotpublish5> (last visited on March
23, 2009).

1 The ALJ posed two hypotheticals to Mr. Chaparro. In the first one, Mr. Chaparro was asked
2 to assume an individual 58 years of age, “illiterate, and [with] past relevant work as you’ve described
3 ... with a combination of severe impairments⁸[, ...] and retains residual functional capacity to lift and
4 carry 50 pounds occasionally, 25 pounds frequently. This individual retains the ability to stand,
5 walk and sit for 6 hours each. Given these limitations, can such an individual perform claimant’s
6 past work?” (AR 70). Mr. Chaparro testified that “she could do it as described in the DOT but not
7 as actually performed by [Plaintiff].” (*Id.*)

8 In his second hypothetical, the ALJ asked Mr. Chaparro to “assume a hypothetical individual
9 with the same vocational perimeters [*sic*] as in [the] previous question. This individual also has a
10 combination of severe impairments [*sic*]. Further assume that [this person] retains the residual
11 functional capacity to stand three hours total, walk approximately one hour, sit three hours total.
12 This individual retains the ability to lift occasionally 20 to 30 pounds. Given these limitations, can
13 such an individual perform the claimant’s past work?” (*Id.*) Mr. Chaparro’s response is “no.” (*Id.*)

14 Plaintiff’s counsel posed a series of hypotheticals to the vocational expert. In the first one, he
15 asked Mr. Chaparro to assume a person of the same age, education, work experience as the Plaintiff.
16 Mr. Chaparro was to further assume that this person could sit about two hours in an eight- hour
17 workday, and could stand and walk about four hours in that same workday. (AR 70-71). According
18 to Mr. Chaparro, that hypothetical person could not perform Plaintiff’s past relevant work. (*Id.*)
19 Plaintiff’s second hypothetical asked the vocational expert to assume an individual of the same age,
20 education, and work experience as Plaintiff and who needed to take unscheduled breaks during an
21 eight-hour day once each hour for 10-20 minutes. (AR 71). Mr. Chaparro replied that those
22 limitations would preclude that individual from performing Plaintiff’s past relevant work. (*Id.*) The
23 third hypothetical asked the vocational expert to again assume a person of the same age, with the
24 same education and work experience as Plaintiff, and someone who would likely be absent from
25 work for more than four days a month due to her impairments or her need for treatment. (*Id.*)
26 Again, it was the expert’s opinion that such a person could not perform Plaintiff’s past relevant
27

28 ⁸ Nowhere is the “combination of severe impairments” actually specified for purposes of these hypotheticals.

1 work. (*Id.*)

2 The last in Plaintiff's series of hypotheticals asked Mr. Chaparro to assume a person who
3 could do "no heavy lifting, no prolonged neck flexion." (*Id.*) This person was "precluded from
4 substantial work. No prolonged standing or sitting. No repetitive bending. With those limitations,
5 could this person perform [Plaintiff's] past relevant work?" (*Id.*) His answer was "no." (AR 72).
6 Plaintiff's counsel followed up with the question, "Could that person perform any other work in the
7 national economy?" (*Id.*) Mr. Chaparro's answer was, again, "no." (*Id.*) The expert did explain
8 that, in answering these last two questions, he assumed that the phrase, "precluded from substantial
9 work," meant that this person was unable to work on a consistent basis. (*Id.*)

10 **THE ALJ'S FINDINGS AND CONCLUSIONS AFTER REMAND HEARING**

11 The ALJ determined that Plaintiff's earning records showed that Plaintiff had acquired
12 sufficient quarters of coverage to remain insured through December 31, 2007 (AR 23); that Plaintiff
13 had not engaged in substantial gainful activity from October 14, 2002, the date on which Plaintiff
14 claimed her disability began, through the date of the ALJ's decision (AR 23, 27); and that Plaintiff
15 had degenerative disc disease, a severe impairment that caused significant limitations in her abilities
16 to perform basic work activities but that this impairment did not meet or medically equal one of the
17 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (AR 25). Addressing the issue of
18 obesity raised by the Appeals Council (AR 104), the ALJ found that Plaintiff's obesity was a slight
19 impairment which had only minimal, if any, effect on her ability to work. (AR 24).

20 With respect to Plaintiff's residual functional capacity, the ALJ found that Plaintiff could sit,
21 stand, and/or walk in combination for six hours in an eight-hour workday and could lift and carry 50
22 pounds occasionally and 25 pounds frequently. (*Id.*) The ALJ made no findings regarding other
23 exertional or non-exertional residual functional capacities Plaintiff may have had. (AR 24-27).
24 However, the ALJ did find that Plaintiff was capable of performing her past relevant work as a fruit
25 harvest worker, work that did not require the performance of work-related activities precluded by
26 Plaintiff's residual functional capacity. (AR 27). Here, the ALJ noted:

27 In comparing the claimant's residual functional capacity with the physical
28 and mental demands of this work, I find that the claimant is able to
perform it as generally performed. [Vocational expert] Mr. Chaparro

1 testified that the claimant's work as a fruit harvest worker is classified by
2 the Dictionary of Occupational Titles as unskilled medium work, but is
3 unskilled heavy work as the claimant performed it. Mr. Chaparro also
4 testified that an individual with claimant's residual functional capacity
5 would be able to perform this work as it is performed in the national
6 economy.

7 (Id.)

8 Consequently, the ALJ found that Plaintiff had not been under a disability as defined in the
9 Act, from October 14, 2002 through the date of his decision and concluded that Plaintiff was not
10 entitled to disability insurance benefits or widow's insurance benefits under the Act. (Id.)

11 ISSUES

12 In her Opening Brief ("AOB" (Doc.15)), Plaintiff asserts the following errors:

- 13 1. The ALJ failed to properly consider the chiropractic opinions and assessments in this
14 record.
- 15 2. The ALJ's failure to obtain one or more consultative examinations regarding
16 Plaintiff's allegedly disabling condition was error.
- 17 3. The ALJ's findings with regard to the credibility of Plaintiff's subjective complaints
18 are not supported by substantial evidence.

19 DISCUSSION

20 A. THE ALJ DID NOT PROPERLY EVALUATE THE MEDICAL SOURCE OPINION 21 EVIDENCE OR THE NEED FOR FURTHER CONSULTATIVE EXAMINERS

22 Plaintiff challenges the analysis and weight given to the opinions and assessments of Drs.
23 Ybarra and Willis, the two chiropractic practitioners central to issues and evidence involving the
24 evaluation of Plaintiff's disability in this case. Both professionals provided evidence about the
25 severity of Plaintiff's impairments and the impact of those impairments on her continuing ability to
26 do the fruit harvest laborer work she had done throughout her employment career. Although her
27 argument is not sharply focused, it does seem that the provisions of the Appeals Council's remand
28 order is the touchstone of many of the points she raises here. Consequently, the Appeals Council's
remand order is standard that will guide the analysis and discussion of error on this issue.

In discussing the bases of its remand order, the Appeals Council noted evidence tending to
show that both chiropractors Ybarra and Willis had assessed Plaintiff to have exertional limitations
inconsistent with the residual functional capacity established by the ALJ, i.e., medium, unskilled,

1 with no postural, communicative, manipulative, visual or environmental limitations. (AR 103-104).
2 The Appeals Council observed, “20 CFR 404.1527 explains how medical opinions from ‘acceptable
3 medical sources’ are evaluated. However, chiropractors are not considered acceptable medical
4 sources (20 CFR 404.1513(d)). Yet, evidence from other sources can still be used to evaluate the
5 severity of a person’s impairments and needs to be addressed in accordance with the latter regulation
6 and Social Security Ruling 06-3p.” (AR 104). Apparently finding the ALJ’s explanation given for
7 disregarding or discounting these opinions inadequate,⁹ the Appeals Council ordered the ALJ to
8 “provide rationale regarding the weight he accords to the medical opinions/assessments in
9 accordance with 20 CFR 404.1527 and Social Security Rulings 96-2p, 96-5p, 96-6p, and 06-3p.”
10 (*Id.*) In doing so, the ALJ was cautioned to consider the entire record and to provide discussion and
11 rationale for the conclusions reached concerning the specific limitations resulting from the
12 claimant’s impairments. Moreover, in an apparent recognition the current state of the medical
13 evidence might not be sufficient to reach a reliable and accurate result, the Appeals Council
14 instructed the ALJ “to obtain one or more consultative examinations regarding the claimant’s
15 condition,” “as appropriate.” (*Id.*)

16 Examining the record before this Court, the ALJ failed to comply with these provisions of the
17 Appeals Council’s remand order. There is very little discussion and rationale about the bases upon
18 which the ALJ found Plaintiff to have a residual functional capacity to lift and carry 50 pounds
19 occasionally and 25 pounds frequently and sit, stand and/or walk six hours in an eight-hour workday.
20 And what little there is does not satisfy the requirements for legal sufficiency.

21 Although the ALJ’s subsequent opinion contains references to the opinions of Dr. Gillespie,
22 Dr. Chauhan, Dr. Ybarra, Dr. Shah, Dr. Willis, Dr. Gurdin, Dr. Chahil, and the “state agency
23 consultants,” the ALJ does not provide this Court with sufficient information to permit the Court to
24 know with reasonable certainty the bases upon which he concluded that Plaintiff had the residual
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27 ⁹ The Appeals Council also pointed out with some emphasis that the ALJ’s reliance on evidence indicating that
28 Dr. Ybarra discharged the Plaintiff as “cured” on July 31, 2003 was, simply put, wrong. The Appeals Council instructed
that this evidence merely stated that Plaintiff was “permanent and stationary” as of June 19, 2003. (AR 104).

1 abilities to perform her past relevant work as a fruit harvest worker.¹⁰ From the ALJ's remand
2 decision, it is apparent that he discounted the opinions of Dr. Ybarra and Dr. Gurdin. (AR 25, 26).
3 The ALJ does not tell us what, if any, weight he gave to the medical evidence provided by Drs.
4 Gillespie, Shah, Chauhan, and Chahil.¹¹ Curiously, the ALJ does not discount the assessment of
5 Dr. Willis, another chiropractor, on the basis that he is not an acceptable medical source – a disparity
6 fundamentally at odds with the ALJ's treatment of Dr. Ybarra's opinion. Instead, the ALJ states that
7 Dr. Willis's assessed limitations regarding Plaintiff's functional capacities "essentially represent[ed]
8 a medium residual functional capacity" (AR 26), an erroneous conclusion, as discussed more fully
9 below.

10 The only evidence which is "afforded significant weight" by the ALJ are the opinions of the
11 State Agency consultants. (AR 27). In this regard, the ALJ's full discussion and rationale for
12 reliance on those opinions is, "[a]s for the opinion evidence, the state agency consultants evaluated
13 the evidence of record and determined that claimant was limited to a full range of medium exertional
14 activity [citations to exhibits omitted], which is afforded significant weight." (AR 27). 20 C.F.R.
15 § 404.1527(f)(2)(ii) requires the ALJ to *explain* the weight given to the opinions of a State Agency
16 non-examining medical consultant, not simply quantify it.

17 Even had he done so, the record does not support a finding of sufficiency, based upon
18 substantial evidence. A careful examination of the record in connection with the opinions of the
19 State Agency physicians upon which the ALJ principally relies shows that neither doctor examined
20 Plaintiff and both rendered opinions as to her residual functional capacity that were quite stale, those

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22 ¹⁰ Distilling a rationale for the ALJ's residual functional capacity determination from this record and identifying
23 the evidence supporting that rationale would require the Court affirm the ruling on grounds the ALJ did not consider and
24 analyze. That is impermissible. "We are constrained to review the reasons the ALJ asserts. *SEC v. Chenery Corp.*, 332
25 U.S. 194, 196, 67 S.Ct. 1575 (1947); *Pinto v. Massanari*, 249 F.3d 840, 847-848 (9th Cir. 2001). It [is] error for the
district court to affirm the ALJ's ... decision based on evidence that the ALJ did not discuss." *Connett v. Barnhart*, 340
F.3d 871, 874 (9th Cir. 2003).

26 ¹¹ It is also significant here that these various opinions were mentioned and analyzed not in the context of
27 articulating a basis for his determination of residual functional capacity but, rather, in discounting the credibility of
28 Plaintiff's subjective complaints. In the ALJ's words, "for all of the above and foregoing reasons, the claimant's
testimony and written statements are not credible to the effect [that] she is totally precluded from all sustained work
activity (SSR 96-7p)." (AR 27).

1 opinions having been given three years earlier and made on the basis of even older medical evidence.
2 Dr. Wong had no known specialty (see 20 C.F.R. § 404.1527(d)(5) where knowledge of a particular
3 doctor's specialty is essential to assignment of weight) and his opinion is best characterized as
4 cursory. *Cf. Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983) (expressing preference for
5 individualized medical opinions over check-off reports).

6 Dr. Sharbaugh, who was a specialist in orthopedic medicine, did provide some relevant
7 evidentiary support for his opinion, at least as of the time it was rendered. However, there are
8 significant problems with that support.¹² First, Dr. Sharbaugh essentially dismissed the opinions of
9 Drs. Ybarra and Willis on the ground that they were not acceptable medical sources. (AR 333, 334).
10 The order of the Appeals Council indicates that minimizing these opinions in such a way was not
11 consistent with the guidelines contained in Social Security Ruling No. 06-3p. Second,
12 Dr. Sharbaugh's opinion relies, in part, on the conclusions and findings of consulting examiner
13 Dr. Gurdin, whose opinion was specifically not given substantial weight by the ALJ in the remand
14 decision because "it [was] not entirely consistent with the objective evidence." (AR 26). Third,
15 Dr. Sharbaugh's conclusions appear to rely, in part, on summaries of medical evidence, including
16 laboratory finding and clinical signs, that were not comprehensive in scope or content. Those
17 summaries do not appear to include information that might well have been critical to the accuracy
18 and reliability of the doctor's assessment. Fourth, Dr. Sharbaugh's opinion was based exclusively on
19 information about Plaintiff's health and functional status gathered and compiled three years earlier.

20 Although cautioned to provide a better analysis and discussion of the opinions of the
21 chiropractic practitioners and to do so in a manner that comports with Social Security 06-3p, there is
22 insufficient evidence the ALJ did so. With respect to the discussion of the medical opinions and
23 assessments in this record, the *only* change in the language between the first and second decisions is
24 found in the discussion of Dr. Ybarra's assessment.¹³ In the decision that formed the basis for the

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26 ¹² The Court reiterates the prohibition against affirming the ALJ's ruling on grounds he did not consider and
27 analyze. "It [is] error for the district court to affirm the ALJ's ... decision based on evidence that the ALJ did not
discuss." *Connett*, 340 F.3d at p.874.

28 ¹³ The ALJ did not alter his discussion of Dr. Willis's assessment in any way.

1 remand, the ALJ's discussion of Dr. Ybarra's professional involvement with Plaintiff consisted
2 almost entirely of the following:

3 Ms. Lemus also received treatment from Dr. Ybarra, a chiropractor,
4 consisting of conservative chiropractic and physical therapy modalities of
5 treatment (Exhibit 3F; 5F, pp. 4, 6; Exhibit 14F). Dr. Ybarra opined that
6 work preclusions with regard to the neck included no heavy lifting or
7 prolonged neck flexion. He felt her low back condition precluded heavy
8 lifting, prolonged standing or sitting, and repetitive bending (Exhibit 3F, p.
9 8). On July 31, 2003, Dr. Ybarra discharged the claimant as "cured"
10 (Exhibit 14F, p. 33).

11 (AR 95, 94-96).

12 Upon remand, the ALJ expanded his discussion of Dr. Ybarra's assessment and treatment to
13 include a fuller disquisition.

14 Dr. Ybarra, a chiropractor, appears to have been selected as the claimant's
15 primary Worker's Compensation medical source, and his treatment has
16 consisted of conservative chiropractic and physical therapy modalities of
17 treatment. Dr. Ybarra opined initially that work preclusions with regard to
18 the neck included no heavy lifting or prolonged neck flexion. He felt her
19 low back condition precluded heavy lifting, prolonged standing or sitting,
20 and repetitive bending. On July 31, 2003, Dr. Ybarra discharged the
21 claimant as "cured" (Exhibit 14F, p. 33 [AR 402]). However, subsequent
22 records from his office show medication management from February 2006
23 through January 2007 and consists of brief comments that the claimant is
24 "deconditioned" or "improved." Nonetheless, in a July 9, 2007 Medical
25 Source Statement, Dr. Ybarra stated that since October 14, 2002, the
26 claimant has been able to lift and carry 5 pounds, sit, stand and/or walk 30-
27 40 minutes at a time, and sit 2 hours and stand and/or walk 4 hours in an
28 8-hour workday (Exhibit 20F). She would have occasional interference
with attention and concentration, but could maintain them for more than 2
hours at a time. The claimant could perform jobs with moderate stress, but
her limitations would interfere with her activities more than 4 days a
month. I do not assign much weight to Dr. Ybarra's opinion, as it is not
supported by the objective medical evidence and is contrary to his
acceptance of the Agreed Medical Examiner's Permanent and Stationary
Report (Exhibit 14F, p. 33), he is not an accepted medical source, and the
other opposing medical sources are physician specialists, whose opinions
are entitled to greater weight. [Most of the ALJ's citations to exhibits in
the record are omitted.]

(AR 25).

There are several problems with the ALJ's revised discussion and analysis. First, the fact that
Dr. Ybarra is not an "acceptable medical source" for purposes of establishing an impairment does
not render his opinions irrelevant or unhelpful in determining the severity of Plaintiff's impairments
or the effects those impairments have on her ability to work. 20 C.F.R. § 404.1513(d) provides that,

1 in addition to evidence from acceptable medical sources, the Commissioner may also use evidence
2 from other sources to show the severity of impairment and how it impacts work-related abilities.
3 Social Security Ruling No. 06-3p states that information from sources who are not “acceptable
4 medical sources,” i.e., “other sources,” “may be based on special knowledge of the individual and
5 may provide insight into the severity of the impairment(s) and how it affects the individual’s ability
6 to function.” The ruling further advice that “[o]pinions from these medical sources, who are not
7 technically deemed ‘acceptable medical sources’ under our rules, are important and should be
8 evaluated on key issues such as impairment severity and functional effects” And, “[t]he weight
9 to which ... evidence [from medical sources who are not ‘acceptable medical sources’] may be
10 entitled will vary according to the particular facts of the case, the source of that opinion, including
11 that source’s qualifications, the issue(s) that the opinion is about, and many other factors” (*Id.*)
12 Included factors are (1) how long the source has known and how frequently the source has seen the
13 individual; (2) how consistent the opinion is with other evidence; (3) the degree to which the source
14 presents relevant evidence to support an opinion; (4) how well the source explains the opinion; (5)
15 whether the source has a specialty or area of expertise related to the individual's impairment(s), and
16 (6) any other factors that tend to support or refute the opinion. (*Id.*)

17 It is clear from this record that no such evaluation of Dr. Ybarra’s assessments appears in this
18 record on remand. That was the order of the Appeals Council and the ALJ did not comply with that
19 directive in rendering his remanded decision. The fact that Dr. Ybarra has treated Plaintiff
20 throughout the pendency of this matter is not the subject of comment. The fact that Plaintiff has seen
21 Dr. Ybarra for treatment 75 times between her first contact and the remanded administrative hearing
22 goes unmentioned. Dr. Ybarra’s comprehensive and detailed Permanent and Stationary Report
23 wherein he describes the severity of Plaintiff’s impairments and their functional impacts on her
24 work-related abilities, i.e., her pertinent work duties included heavy lifting which she could no longer
25 do, are noted but followed with the discredited statement that, on July 31, 2003, Dr. Ybarra
26 discharged Plaintiff as cured.

27 The ALJ noted that Dr. Ybarra saw Plaintiff for medication management after that, from
28 February 2006 through January 2007. (AR 25). In fact, the medical record the ALJ cites shows that

1 Plaintiff was actually treated by Dr. Ybarra throughout that period with massage and other
2 physiotherapy. (AR 417). The medical record also shows that Plaintiff suffered a series of
3 exacerbations to her underlying injuries throughout this period – exacerbations reasonably
4 foreseeable given the nature of her injuries – which were treated by Dr. Ybarra. (AR 370-372, 375-
5 378, 380-385, 387, 389-393, 395-397). Those exacerbations may account for whatever deterioration
6 in Plaintiff’s condition the ALJ deduced from Dr. Ybarra’s July 2007 Residual Functional Capacity
7 Questionnaire. The fact that Drs. Ybarra and Willis were both Qualified Medical Evaluators,
8 appointed by California’s workers’ compensation regulatory bodies after demonstrating the ability to
9 evaluate disability claims in industrial injury cases,¹⁴ was not a factor considered by the ALJ in
10 assigning weight to their opinions about the severity of Plaintiff’s impairments or work-related
11 limitations. These oversights and/or omissions are significant and undermine the ability of this
12 Court to conclude that the ALJ reasonably complied with the terms of the Appeals Council’s remand
13 order.

14 The ALJ also discounts Dr. Ybarra’s assessment because “it is not supported by the objective
15 medical evidence.” Unfortunately, the ALJ does not identify the objective medical evidence to
16 which he refers. (AR 25). Much of the objective medical evidence in this record supports
17 Dr. Ybarra’s and Dr. Willis’s conclusions about the severity of Plaintiff’s impairments and their
18 functional limitations. Among other results, there are x-rays showing degenerative disc disease and
19 misalignment of a rib; there is a nerve conduction study showing radiculopathy; there is diagnostic
20 imaging showing abnormalities in the lumbar and cervical areas of Plaintiff’s spine; there are
21 computerized range of motion studies showing some impairment; and there are results from several
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25 ¹⁴ Plaintiff testified to receipt of a workers’ compensation disability award for the injury that underlying her
26 SSA claims. The administrative record contains documentation of that award, including the fact that it was rated a 55 ½
27 % permanent disability. (AR 175-177). While the ALJ’s decision upon remand acknowledges some concurrent
28 adjudication involving the state’s workers’ compensation claims process (*see* AR 25), the ALJ’s decision makes no
mention of the final award. Although 20 C.F.R. § 404.1504 provides that a disability determination made by another
governmental or non-governmental agency is not binding on the Commissioner, SSR No. 06-34p clearly states that,
although not binding, “evidence of a disability decision by another governmental or nongovernmental agency *cannot be
ignored and must be considered*”[emphasis added]. It was not considered here.

1 physical examinations showing evidence of injury consistent with the one Plaintiff suffered. (*See*
2 AR 272-275, 306-307).

3 Other objective medical evidence in this record *may* not have supported Plaintiff's claims.
4 But given the considerable amount of medical and other evidence supporting Plaintiff's claim that
5 she was unable to perform her past relevant work, the amount of time that had elapsed between the
6 date of the decision and the last consultative examination ordered by the SSA (three years), and
7 evidence from her treating doctor of some further deterioration of Plaintiff's condition, it was clearly
8 unreasonable for the ALJ not to order additional consultative examinations, as Plaintiff has argued.
9 The ALJ was directed to do so by the Appeals Council "as appropriate." (AR 104). Title 20 C.F.R.
10 § 404.1519a(b)(4) and (5) provide direction here – situations that normally require a consultative
11 examination include cases where (1) the medical evidence is ambiguous or insufficient and which
12 cannot be resolved by re-contacting the claimant's medical source, or (2) there is an indication of a
13 change in the claimant's condition likely to affect the ability to work and the current severity of the
14 claimant's condition has not been established. At the time of the remand hearing, both of these
15 situations were present. It was clearly "appropriate" to obtain updated medical opinions from
16 consultative examiners based on the facts contained in this record and the failure to adhere to the
17 instructions of the Appeals Council in this regard was error.

18 The ALJ also explained that he gave little weight to Dr. Ybarra's opinion because "the other
19 opposing medical sources are physician specialists, *whose opinions are entitled to greater weight*"¹⁵
20 [emphasis added]. (AR 25). The problem with this rationale is that it is not supported by the
21 policies of the Commissioner. The opinions of a physician specialist are not entitled to greater
22 weight than other source opinions *in every case*. The facts of the individual case are determinative.
23 Social Security Ruling No. 96-03p provides, in part:

24 The fact that a medical opinion is from an "acceptable medical source" is a
25 factor that may justify giving that opinion greater weight than an opinion
26 from a medical source who is not an "acceptable medical source" because,
as we previously indicated in the preamble to our regulations at 65 FR
34955, dated June 1, 2000, "acceptable medical sources" "are the most

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28 ¹⁵ This Court is uncertain who these opposing medical specialist sources are. The ALJ does not specifically identify them and the Court is left to guess.

1 qualified health care professionals.” However, depending on the particular
2 facts in a case, and after applying the factors for weighing opinion
3 evidence, an opinion from a medical source who is not an “acceptable
4 medical source” may outweigh the opinion of an “acceptable medical
5 source,” including the medical opinion of a treating source. For example, it
6 may be appropriate to give more weight to the opinion of a medical source
7 who is not an “acceptable medical source” if he or she has seen the
8 individual more often than the treating source and has provided better
9 supporting evidence and a better explanation for his or her opinion. Giving
10 more weight to the opinion from a medical source who is not an
11 “acceptable medical source” than to the opinion from a treating source
12 does not conflict with the treating source rules in 20 CFR 404.1527(d)(2)
13 and 416.927(d)(2) and SSR 96-2p, “Titles II and XVI: Giving Controlling
14 Weight To Treating Source Medical Opinions.”

15 Other factual misstatements and misinterpretation of the evidence create problems in any
16 “substantial evidence” analysis of the ALJ’s opinion. First, Dr. Ybarra did not say in his July 2007
17 report that Plaintiff had the ability to lift and carry 5 pounds; he said she could lift and carry a
18 maximum of 15 pounds. Second, Dr. Ybarra did not say that Plaintiff’s “limitations would interfere
19 with her activities more than 4 days a month” (AR 25); he said that he anticipated Plaintiff would be
20 absent from work as result of her impairments or her need for treatment more than four days per
21 month (AR 437). The difference is potentially significant in terms of the vocational expert’s
22 testimony regarding Plaintiff’s ability to perform her past relevant work. Third, this Court’s review
23 of the record does not show any statement by Plaintiff or anyone else that she could as far as a mile,
24 an ability the ALJ found her to have. (AR 25). Fourth, there is no genuine discrepancy between the
25 residual functional capacities Dr. Ybarra found Plaintiff to have in July 2007 and the work
26 preclusions he identified in June 2003.

27 In June 2003, Dr. Ybarra said that Plaintiff’s work duties as a farm laborer included heavy
28 lifting and that her neck and back impairments precluded her from performing that work. (AR 25).
As indicated in the vocational expert testimony, Plaintiff’s previous work was described as a fruit
harvest worker with an exertional level of medium work. (AR 50, 69-70). In concluding that
Plaintiff could not do her past work, Dr. Ybarra was saying that Plaintiff could not do work at
medium exertional level in June of 2003. There is nothing in the July 2007 description of Plaintiff’s
exertional levels that contradicts Dr. Ybarra’s earlier assessment. This later assessment appears to
quantify the limitations described in his Permanent and Stationary Report rather than alter them.

1 Even assuming there was a disparity between the two reports, that disparity would not, in
2 itself, justify the unexplained dismissal of Dr. Ybarra's opinions. Four years had elapsed between
3 the two assessments and there is evidence that Plaintiff had experienced several episodes of
4 exacerbation of the earlier injury during the intervening period. Additionally, Plaintiff had aged and,
5 apparently, lost some degree of physical fitness over those years. (AR 370, 372, 380, 387, 389).
6 It is difficult for this Court to find an inherent conflict between the two reports of Dr. Ybarra, either
7 specifically or generally. However, had there been one in the ALJ's mind, a judicious approach to
8 compliance with the Appeals Council's order should have indicated that additional consultative
9 examinations were appropriate.

10 What is puzzling to this Court is the ALJ's treatment of the opinion of Dr. Willis.¹⁶ The ALJ
11 appears to find Dr. Willis's opinion useful insofar as the ALJ characterizes it as supporting a finding
12 of "medium residual functional capacity:"

13 Dr. Willis, another chiropractor, conducted a Qualified Medical
14 Examination in August 2003. He noted the objective factors of disability
15 included positive musculoskeletal and neurological findings to the cervical
16 spine and lumbosacral spine regions; radiographic examination which
17 revealed dextroconvex scoliosis of the cervical/thoracic spine and
18 hypolordosis; electrodiagnostic studies showing right S1 radiculopathy;
19 cervical hypolordosis and multiple levels of disc bulging as noted on MRI
20 of the cervical spine; and 1 to 2 mm disc/annulus bulge at L4-5 and mildly
reduced central canal and 2 to 3 mm disc/annulus bulge at L5-S1 of the
lumbar spine as documented by MRI of the lumbar spine. Dr. Willis
concluded that these limitations restrict the claimant from repetitive
motions of the neck and well as the heavy lifting, and substantial
work/heavy lifting of the lumbar spine. These limitations essentially
represent a medium residual functional capacity. [Citations to the exhibits
in the record omitted.]

21 (AR 26).

22 No reasonable understanding of Dr. Willis's report supports such a characterization.
23 Dr. Willis explicitly stated that Plaintiff's impairments resulted in her inability to perform her past
24 work as an olive picker and that Plaintiff was unable to return to that work (i.e., her past relevant
25 work). (AR 307). That work, a fruit harvest worker, was defined by the Dictionary of Occupational
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27 ¹⁶ The Court finds it difficult to ignore the jarring dissonance between dismissing Dr. Ybarra's opinion on the
28 basis that he was not an acceptable medical source and citing Dr. Willis's opinion to support, however indirectly, a
residual functional capacity finding.

1 Titles as medium and unskilled. (AR 69). To the extent that the ALJ concluded Dr. Willis's
2 opinion was part of the evidence supporting his finding of medium residual functional capacity and
3 the capacity of Plaintiff to perform her past relevant work, the ALJ was mistaken.¹⁷

4 The Court mentions this for two reasons. First, the Appeals Council order singled it out for
5 comment and then ordered the ALJ to consider the "entire record" when arriving at a subsequent
6 decision on remand. (AR 104). Moreover, the subsequent decision was to provide rationale for the
7 weight accorded to the medical opinions and assessments contained in the record. (*Id.*) Second, this
8 confused characterization of the exertional levels that Drs. Ybarra and Willis described in their
9 respective reports appears to have created a situation where the only medical evidence not discounted
10 or rejected by the ALJ (i.e., the stale opinions of the State Agency physicians) relied on a
11 fundamentally inaccurate understanding of Plaintiff's functional capacities. These circumstances
12 demanded fresh expertise (i.e., additional consultative examinations), but that was not obtained.

13 The assurances and procedures for adjudication of disability insurance benefits claims are set
14 forth in the Code of Federal Regulations. The Appeals Council may remand a case to an
15 administrative law judge to hold a hearing and issue a decision; it may also remand because
16 additional evidence is needed or additional action by the administrative law judge is required. (20
17 C.F.R. § 404.977(a).) "The administrative law judge shall take any action that is ordered by the
18 Appeals Council and may take any additional action that is not inconsistent with the Appeals
19 Council's remand order." (20 C.F.R. § 404.977(b).) "When a Federal court remands a case to the
20 Commissioner for further consideration, the Appeals Council, acting on behalf of the Commissioner,
21 may make a decision, or it may remand the case to an administrative law judge with instructions to
22 take action and issue a decision or return the case to the Appeals Council with a recommended
23 decision. If the case is remanded by the Appeals Council, the procedures explained in §416.1477
24 will be followed. ..." (20 C.F.R. § 404.983.) The ALJ's various failures to comply with the remand

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26 ¹⁷ The ALJ was not alone in this misplaced reliance. Both SSA disability evaluator analysts reported that
27 "[v]arious chiropractors offer MSO's that preclude heavy lifting and repetitive motions of the neck. These statements are
28 consistent with a medium level of exertion" (AR 355) and "MED RFC which is consistent w/ TS MSO precluding hvy
work" (AR 336).

1 orders, as discussed above, were error under the provisions of the Social Security Administration's
2 regulatory framework and warrant remand.

3 B. **SUBSTANTIAL EVIDENCE SUPPORTS THE ALJS' CONCLUSIONS REGARDING**
4 **THE CREDIBILITY OF PLAINTIFF'S SUBJECTIVE COMPLAINTS**

5 Plaintiff's argument on this issue is multi-pronged. Part of her argument recites the objective
6 medical evidence in the record that supports the credibility of her excess pain complaints. (AOB at
7 pp. 18-19, 21). She also points to the persistence and length of her efforts to obtain relief from that
8 pain. (AOB at pp. 19-20). These are factors to be considered by the ALJ in assessing the credibility
9 of a claimant's subjective symptoms under Social Security Ruling No. 96-7p. However, the problem
10 with challenging the ALJ's decision in this fashion is that its premise is basically unsound. This
11 Court does not review the record to determine whether some other set of evidentiary facts might
12 constitute substantial evidence of the finding Plaintiff would like to have seen. Rather, this Court
13 reviews the record to determine whether the ALJ's ruling is based upon substantial evidence in the
14 record and the application of correct legal standards. *Morgan v. Commissioner*, 169 F.3d 595, 603
15 (9th Cir. 1999.)

16 Plaintiff also argues that the ALJ did not provide clear and convincing reasons to reject
17 Plaintiff's claims of excess pain. (AOB 20.) Plaintiff is on more solid ground here.

18 "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness,
19 inconsistencies either in his testimony or between his testimony and his conduct, his daily activities,
20 his work record, and testimony from physicians and third parties concerning the nature, severity, and
21 effect of the symptoms of which he complains. An AL's finding that a claimant generally lacked
22 credibility is a permissible basis to reject excess pain testimony." *Light v. Soc. Sec. Admin.*, 119
23 F.3d 789, 792 (9th Cir. 1997). But, absent affirmative evidence showing that the claimant is
24 malingering, "the [ALJ]'s reasons for rejecting the claimant's testimony must be clear and
25 convincing. General findings are insufficient; rather, the ALJ must identify what testimony is not
26 credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821,
27 834, (9th Cir. 1995) (citations and internal quotations omitted).

28 ///

1 The ALJ found that Plaintiff's medically determinable impairment, i.e., degenerative disc
2 disease, could reasonably be expected to produce some of the alleged symptoms. (AR 24-25).
3 Neither party suggests that there is affirmative evidence in this record of malingering on Plaintiff's
4 part. Therefore, the ALJ could properly reject or discount Plaintiff's testimony and other statements
5 concerning her subjective symptoms only if clear and convincing reasons were given. *Lester*, 81
6 F.3d at p. 834.

7 There is substantial evidence in this record to show that the ALJ did so here. His rationale
8 for discounting the weight of this evidence was quite clear – “the claimant's statements concerning
9 the intensity, persistence and limiting effects of these symptoms are not entirely credible.” (AR 25).
10 In support of that rationale, the ALJ explained that the physical findings that might support her
11 subjective complaints of excess pain were negligible; her subjective complaints were
12 disproportionate to the objective medical findings in the record; her course of treatment was
13 essentially a relatively conservative one, i.e., chiropractic treatment once or twice a month, anti-
14 inflammatory over-the-counter analgesics, and prescription for Lyrica; none of the physicians
15 Plaintiff saw advised her not to participate in substantial gainful activity; Plaintiff was not considered
16 a surgical candidate; she had required no hospital or emergency care as a result of her impairments;
17 and the preponderance of the credible medical evidence in the record documents only a preclusion
18 from heavy work. (AR 26). Additionally, the ALJ noted that Plaintiff tended to “elaborate” with
19 respect to her symptoms and that Plaintiff's engaged in a level of daily activities (housework,
20 laundry, meal preparation, community volunteerism) that is consistent with someone able to perform
21 basic work-related activities. (*Id.*)

22 One or two of the foregoing reasons are of questionable validity – the credible medical
23 evidence of record precludes Plaintiff from at least a medium level of physical exertion (see above
24 discussion) and the disproportionality of the objective medical evidence to the complaints of
25 excessive pain is suspect (see Social Security Ruling No. 96-7p – “Because symptoms, such as pain,
26 sometimes suggest a greater severity of impairment than can be shown by objective medical evidence
27 alone, the adjudicator must carefully consider the individual's statements about symptoms with the
28 rest of the relevant evidence in the case record in reaching a conclusion about the credibility of the

1 individual's statements if a disability determination or decision that is fully favorable to the
2 individual cannot be made solely on the basis of objective medical evidence.”). However, the other
3 considerations are valid. The ALJ did not discredit or discount Plaintiff’s subjective complaint of
4 excess pain solely on the ground that it was not fully corroborated by objective medical findings. A
5 relatively conservative course of treatment can be relied on in rejecting subjective complaints.
6 *Johnson v. Shalala*, 60 F.3d 1428, 1433-1434 (9th Cir. 1995). The ALJ considered the ability of
7 Plaintiff to perform routine tasks of daily living in a competent and regular manner, activities that he
8 found consistent with basic work-related tasks. The ALJ also found that Plaintiff tended to
9 “elaborate” with respect to some of her symptomatology, a legitimate ground for discounting the
10 weight to be given to Plaintiff’s subjective complaints. Amplification of symptoms can constitute
11 substantial evidence to support discounting or discrediting a claimant’s subjective complaints of
12 severity. *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993).

13 In this case, although there were two factors relied upon impermissibly by the ALJ, the ALJ
14 nevertheless articulated clear and convincing reasons, supported by substantial evidence in the
15 record, for discrediting Plaintiff’s subjective complaints of excess pain. *Cf. Batson v. Commissioner*
16 *of the Social Security Administration*, 359 F.3d 1190, 1196 (9th Cir. 2004). Moreover, the ALJ’s
17 reasons for rejecting Plaintiff’s claim of total disability based on her subjective complaints were
18 sufficiently specific to allow this Court to conclude that the ALJ rejected Plaintiff’s testimony on
19 largely permissible grounds and not for arbitrary reasons.

20 CONCLUSION AND ORDER

21 Based on the foregoing, the Court finds that the ALJ’s decision is not supported by
22 substantial evidence and is not free of legal error. Therefore, this Court ORDERS that:

- 23 1. Plaintiff’s social security complaint, Doc. 1, IS GRANTED;
- 24 2. This matter IS REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further
25 proceedings consistent with this opinion, to determine whether Plaintiff has the ability to perform her
26 past relevant work, with particular attention to a better informed assessment of Plaintiff’s residual
27 functional capacity, which must involve obtaining one or more consultative examinations regarding
28 the status of Plaintiff’s current physical impairment(s) and the functional impacts of her current

1 condition on her ability to perform basic work-related activities; obtaining updated medical
2 information from any and all of Plaintiff's treating medical sources, including the severity of
3 Plaintiff's impairment(s) and how it affects her ability to function; considering the entire record,
4 providing discussion and rationale for conclusions reached concerning the specific limitations
5 resulting from Plaintiff's impairments; providing a rationale regarding the weight the ALJ accords to
6 all the medical opinions/assessments in accordance with 20 CFR 404.1527 and Social Security
7 Rulings 96-2p, 96-5p, 96-6p, and 06-3p; considering the Workers' Compensation Appeals Board
8 permanent disability decision in Plaintiff's case in compliance with the requirements of SSR No.
9 06-34p; reviewing the continuing viability of the ALJ's previous finding as to the credibility of
10 Plaintiff's subjective complaints in light of any new, revised, or updated medical evidence,
11 addressing that issue according to the guidelines of 20 CFR § 404.1529 and Social Security Ruling
12 96-7p; and obtaining evidence from a vocational expert to clarify the effect any assessed limitations
13 have on Plaintiff's ability to return to her past relevant work, as necessary, and if the ALJ finds that
14 she cannot, whether Plaintiff can engage in other types of substantial gainful work that exist in
15 significant numbers in the national economy; and

16 3. The Clerk of Court is DIRECTED TO ENTER judgment for Plaintiff Domitila Lemus and
17 against Defendant Michael J. Astrue, Commissioner of Social Security, and to close this case.

18
19 IT IS SO ORDERED.

20 Dated: March 27, 2009

/s/ Theresa A. Goldner
UNITED STATES MAGISTRATE JUDGE