

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

MAY 02 2014

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

SHIRLEY K. KLAHN,

Plaintiff - Appellant,

v.

CAROLYN W. COLVIN, Commissioner  
of Social Security,

Defendant - Appellee.

No. 12-16140

D.C. No. 3:10-cv-08201-MHB

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Arizona  
Michelle H. Burns, Magistrate Judge, Presiding

Argued and Submitted April 11, 2014  
San Francisco, California

Before: KLEINFELD, NGUYEN, and WATFORD, Circuit Judges.

We need not resolve at this time Appellant Shirley Klahn's arguments challenging the administrative law judge's (ALJ) rulings finding her not fully credible and rejecting her doctors' opinions about the extent of her disability. Even if Klahn's arguments on those issues fail, it appears she may nonetheless be

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

entitled to benefits under our holding in *Lounsbury v. Barnhart*, 468 F.3d 1111 (9th Cir. 2006). The ALJ has not yet addressed *Lounsbury*'s impact on this case, so we remand to the ALJ for further consideration of Klahn's claim in light of *Lounsbury*.

The Commissioner contends that Klahn waived any argument based on *Lounsbury* by not raising it until she submitted a Rule 28(j) letter shortly before oral argument. We may consider an argument not presented in the opening brief if "the failure to raise the issue properly did not prejudice the defense of the opposing party." *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992). The Commissioner points to no prejudice caused by *Lounsbury*'s late appearance, which is not surprising. The Commissioner was aware of *Lounsbury*, having cited the case in her own brief. If the Commissioner believes there are grounds for denying Klahn benefits even under the rule established in *Lounsbury*, she will have a full opportunity to raise those arguments before the ALJ on remand.

The parties shall bear their own costs on appeal.

**VACATED AND REMANDED.**

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*Klahn v. Colvin, 12-16140*

KLEINFELD, Senior Circuit Judge, dissenting:

I respectfully dissent. Substantial evidence supports the ALJ's findings as to Klahn's credibility and the limited weight given to Klahn's treating and examining physicians. See *Flaten v. Sec'y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995).

Klahn's argument under *Lounsbury v. Barnhart*, 468 F.3d 1111 (9th Cir. 2006) ought to be treated as waived because she did not raise it in her opening brief. Klahn first made this argument in a Rule 28(j) letter citing *Lounsbury*, but that case was decided six years before she submitted her brief on the merits. Klahn has offered no excuse for making an entirely new argument after briefing. See *United States v. Gomez-Mendez*, 486 F.3d 599, 606 n.10 (9th Cir. 2007).