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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

IRMA PEREZ,	)	NO. CV 07-06726-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on October 25, 2007, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's applications for a period of disability ("POD"), disability insurance benefits ("DIB"), and supplemental security income ("SSI"). On February 28, 2008, the parties consented to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on December 9, 2008, in which: plaintiff seeks an order remanding the matter for the consideration of evidence not properly addressed by the ALJ; and defendant seeks an order affirming the Commissioner's decision. The Court has taken the parties' Joint Stipulation under submission without oral argument.

1 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

2  
3 On August 30, 2005, plaintiff filed applications for a POD, DIB,  
4 and SSI. (Administrative Record ("A.R.") 60-62, 245-46.) Plaintiff  
5 alleges an inability to work since December 1, 2002, due to diabetes,  
6 high blood pressure, high cholesterol, obesity, arthritis, kidney  
7 problem(s), back injury, leg pain, depression, and anxiety. (A.R. 41,  
8 49, 120.) She has past relevant work experience as an "in-home aid."<sup>1</sup>  
9 (A.R. 69, 120.)

10  
11 The Commissioner denied plaintiff's applications initially (A.R.  
12 49-53) and upon reconsideration (A.R. 41-46). Thereafter, plaintiff  
13 filed a written request for hearing, and on October 11, 2006, plaintiff,  
14 who was not represented by counsel, testified, with the assistance of a  
15 Spanish language interpreter, at a hearing before Administrative Law  
16 Judge Robert A. Evans ("ALJ"). (A.R. 10, 248-57.) On October 23, 2006,  
17 the ALJ denied plaintiff's claims, and the Appeals Council subsequently  
18 denied plaintiff's request for review of the ALJ's decision. (A.R. 3-5,  
19 21-27.)

20  
21 **SUMMARY OF ADMINISTRATIVE DECISION**

22  
23 In his written decision, the ALJ found that plaintiff met the  
24 insured status requirements of the Social Security Act through December  
25 31, 2007, and plaintiff has not engaged in substantial gainful activity  
26 since December 1, 2002, her alleged disability onset date. (A.R. 23.)

27  
28 <sup>1</sup> Plaintiff worked as an "in-home aid" from June 1986, through  
December 1, 2002. (A.R. 69.)

1 The ALJ further found that plaintiff suffers from "severe" back pain and  
2 obesity, but she does not have an impairment or combination of  
3 impairments that meets or medically equals one of the listed impairments  
4 set forth in 20 C.F.R. Part 404, Subpart P, Appendix 1. (A.R. 23-24.)  
5

6 The ALJ determined that plaintiff retains the residual functional  
7 capacity ("RFC") to perform work that would require her to: lift and  
8 carry 50 pounds occasionally and 25 pounds frequently; stand and/or walk  
9 for 6 hours out of an 8 hour workday; stand every 2 hours to stretch for  
10 5 to 10 minutes, secondary to back pain; perform no fine manipulation,  
11 secondary to her allegations of neuropathy; and secondary to her  
12 obesity, never climb, occasionally balance, stoop, kneel, crouch, crawl,  
13 and not perform work that would require her to walk on uneven terrain or  
14 work at heights. (A.R. 24.) The ALJ further found that plaintiff's  
15 statements concerning the intensity, persistence, and limiting effects  
16 of her subjective pain symptoms were "not entirely credible." (A.R.  
17 26.)  
18

19 Based on the ALJ's RFC assessment and the testimony of a vocational  
20 expert, the ALJ found that plaintiff is capable of performing her past  
21 relevant work as a home attendant. (A.R. 26.) Accordingly, the ALJ  
22 concluded that plaintiff has not been under a disability, as defined in  
23 the Social Security Act, from December 1, 2002, through the date of the  
24 ALJ's decision. (A.R. 27.)  
25

#### 26 STANDARD OF REVIEW

27

28 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's

1 decision to determine whether it is free from legal error and supported  
2 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
3 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is “such relevant  
4 evidence as a reasonable mind might accept as adequate to support a  
5 conclusion.” *Id.* (citation omitted). The “evidence must be more than  
6 a mere scintilla but not necessarily a preponderance.” Connett v.  
7 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the  
8 record can constitute substantial evidence, only those “reasonably  
9 drawn from the record” will suffice. Widmark v. Barnhart, 454 F.3d  
10 1063, 1066 (9th Cir. 2006)(citation omitted).

11  
12 Although this Court cannot substitute its discretion for that of  
13 the Commissioner, the Court nonetheless must review the record as a  
14 whole, “weighing both the evidence that supports and the evidence that  
15 detracts from the [Commissioner’s] conclusion.” Desrosiers v. Sec’y of  
16 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also  
17 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). “The ALJ is  
18 responsible for determining credibility, resolving conflicts in medical  
19 testimony, and for resolving ambiguities.” Andrews v. Shalala, 53 F.3d  
20 1035, 1039-40 (9th Cir. 1995).

21  
22 The Court will uphold the Commissioner’s decision when the evidence  
23 is susceptible to more than one rational interpretation. Burch v.  
24 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may  
25 review only the reasons stated by the ALJ in his decision “and may not  
26 affirm the ALJ on a ground upon which he did not rely.” Orn, 495 F.3d  
27 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse  
28 the Commissioner’s decision if it is based on harmless error, which

1 exists only when it is "clear from the record that an ALJ's error was  
2 'inconsequential to the ultimate nondisability determination.'" Robbins  
3 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.  
4 Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400  
5 F.3d at 679.

## 7 DISCUSSION

9 Plaintiff alleges the following five issues: (1) whether the ALJ  
10 properly apprised plaintiff of her right to counsel and whether her  
11 waiver of counsel was properly obtained; (2) whether the ALJ fully and  
12 fairly developed the record; (3) whether the ALJ erred by failing to  
13 find that plaintiff's diabetes with neuropathy was a "severe"  
14 impairment; (4) whether the ALJ erred in determining that plaintiff is  
15 capable of returning to her past relevant work; and (5) whether the ALJ  
16 properly evaluated plaintiff's subjective symptom testimony. (Joint  
17 Stipulation ("Joint Stip.") at 3-4.) The Court addresses plaintiff's  
18 first and second issues together, because they are interrelated.

19  
20 **I. The ALJ Failed To Develop The Record Adequately And To Ensure That**  
21 **Plaintiff's Interests Were Protected, Despite The Fact That**  
22 **Plaintiff Was Proceeding Without Counsel.**

23  
24 Plaintiff had a statutory right to counsel at the administrative  
25 hearing, which she could knowingly and intelligently waive. Duns v.  
26 Heckler, 586 F.Supp. 359, 364 (N.D. Cal. 1984)(citing Ware v. Schweiker,  
27 651 F.2d 408 (5th Cir. 1982)); Floyd v. Schweiker, 550 F.Supp. 863 (N.D.  
28 Ill. 1982). Even if her waiver was deficient, plaintiff must

1 demonstrate prejudice or unfairness in the proceedings to obtain a  
2 remand. Hall v. Sec'y of Health, Educ. & Welfare, 602 F.2d 1372, 1378  
3 (9th Cir. 1979). The real issue, however, is not whether the waiver was  
4 knowing or intelligent, but whether, without the representation, the ALJ  
5 met his heightened duty "to conscientiously and scrupulously probe into,  
6 inquire of, and explore for all the relevant facts" to protect  
7 plaintiff's interests. Vidal v. Harris, 637 F.2d 710, 713 (9th Cir.  
8 1981); Cox v. Califano, 587 F.2d 988 (9th Cir. 1978). This duty  
9 includes diligently ensuring that both favorable and unfavorable facts  
10 and circumstances are elicited at the administrative hearing. Key v.  
11 Heckler, 754 F.2d 1545, 1551 (9th Cir. 1985). The ALJ must fully and  
12 fairly develop the record, and when a claimant is not represented by  
13 counsel, an ALJ must be "especially diligent in exploring for all the  
14 relevant facts." Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir.  
15 2001). Only if plaintiff can demonstrate prejudice or unfairness in the  
16 administrative proceeding, as a result of not having counsel present, is  
17 remand warranted. Vidal, 637 F.2d at 713.

18  
19 The Manual on Social Security Administration Hearings, Appeals and  
20 Litigation Law (HALLEX) I-2-6-52 sets forth the procedures ALJs are to  
21 follow to ensure that a plaintiff proceeding without counsel has made an  
22 informed choice to waive representation. HALLEX I-2-6-52 states:

23  
24 [I]f the claimant is unrepresented, the ALJ must ensure that  
25 the claimant is capable of making an informed choice about  
26 representation. For example, the ALJ should ask an  
27 unrepresented claimant the following questions *on the record*:  
28

1 • Did you receive the hearing acknowledgment letter  
2 and its enclosure(s)? (If not, the ALJ will provide  
3 the claimant with a copy and the opportunity to  
4 read the letter.) The ALJ will enter into the  
5 record the acknowledgment letter and enclosure(s)  
6 sent to the unrepresented claimant.

7  
8 • Do you understand the information contained in  
9 that letter concerning representation? (If not, the  
10 ALJ will explain the claimant's options regarding  
11 representation, as outlined in the acknowledgment  
12 letter. Specifically, the ALJ will explain the  
13 availability of both free legal services and  
14 contingency representation as well as access to  
15 organizations that assist individuals in obtaining  
16 representation. See I-2-0-20 C., Unrepresented  
17 Claimant, I-2-0-91 Sample - Acknowledgment Letter -  
18 Oral Hearing Requested - Unrepresented Claimant,  
19 and I-2-0-92 Sample - Enclosure to Letter to  
20 Unrepresented Claimant.)

21  
22 *Once the ALJ has determined that the claimant is capable of*  
23 *making an informed choice, he or she will either secure on the*  
24 *record the claimant's decision concerning representation, or*  
25 *obtain from the claimant a written waiver of the claimant's*  
26 *right to representation, which will be marked as an exhibit.*  
27 See I-2-6-98 WAIVER OF REPRESENTATION.  
28

1 (Id; emphasis added.)

2  
3 In the present case, it is unclear whether plaintiff knowingly and  
4 intelligently waived her right to counsel at the administrative hearing.  
5 Although the record contains a one-page "Waiver of Representation,"<sup>2</sup>  
6 dated October 11, 2006, signed by plaintiff, and marked as an exhibit by  
7 the ALJ, there was no dialogue on the record between the ALJ and  
8 plaintiff regarding whether plaintiff understood her right to  
9 representation and had made an informed decision about waiving her right  
10 to representation. Critically, plaintiff required the assistance of a  
11 Spanish language interpreter at the hearing, yet there is nothing in the  
12 record to indicate that the written waiver was translated for plaintiff  
13 from English into Spanish. The record reflects only that, at the  
14 commencement of the hearing, the ALJ stated to plaintiff that "[you]  
15 have waived your rights to representation. You're here representing  
16 yourself." (A.R. 250.) There was no reply from plaintiff. As it  
17 cannot be determined from the record that plaintiff knew and understood  
18 the right she relinquished, plaintiff's waiver of her right to  
19 representation was not obtained properly.

20  
21 An invalid waiver of representation alone is not enough, however,  
22 to require a remand of this case. Vidal, 637 F.2d at 713. As defendant

23  
24 <sup>2</sup> The Waiver of Representation states:

25 I have been informed in writing of my right to be represented  
26 at today's hearing by an attorney or other qualified person.  
27 I am presently not represented, and it is my wish to proceed  
without representation. I understand that following this  
hearing, I may obtain representation to pursue my appeal or  
further proceedings.

28 (A.R. 57.)



1 correctly points out, to merit remand, plaintiff must show that, as a  
2 result of not having counsel present, she was prejudiced in the  
3 administrative proceeding. (Joint Stip. at 9-11.)  
4

5 Plaintiff argues (Joint Stip. at 12) that she was prejudiced by the  
6 ALJ's failure to meet his heightened duty, given the absence of counsel  
7 for plaintiff, to develop the record by investigating the facts fully  
8 and fairly and probing conscientiously to elicit all relevant  
9 information. Tonapetyan, 242 F.3d at 1150. Specifically, plaintiff  
10 argues that she was prejudiced because, if represented, her counsel  
11 would have delved into her medical history, treatment, and medications  
12 for diabetes, anxiety, depression, and lower extremity pain and  
13 attendant limitations, none of which were adequately explored by the  
14 ALJ. (Joint Stip. at 16.) For the reasons set forth below, the Court  
15 agrees.  
16

17 As an initial matter, plaintiff directs the Court's attention to  
18 the fact that the entire administrative hearing lasted only 14 minutes.  
19 (Joint Stip. at 12-13.) This brief, 14-minute time-frame included the  
20 ALJ's questions to plaintiff, which were translated from English to  
21 Spanish, plaintiff's testimony, which was translated from Spanish to  
22 English, and the ALJ's examination of the vocational expert. (A.R. 250-  
23 57.) This fact alone calls into question whether the ALJ met his  
24 heightened duty to fully and fairly develop the record to ensure that  
25 plaintiff's interests were protected.  
26

27 Moreover, plaintiff argues that, had counsel been present,  
28 questions regarding the myriad medications plaintiff was taking and

1 their side-effects would have been asked.<sup>3</sup> (Joint Stip. at 12.)  
2 Although plaintiff indicated on a "Medications" form that she was taking  
3 16 different medications for several conditions (A.R. 130-32), the ALJ  
4 asked only two questions regarding plaintiff's medication. First, the  
5 ALJ asked plaintiff what medication she takes to relieve her back pain,<sup>4</sup>  
6 to which plaintiff responded that she was taking Ibuprofen. (A.R. 151-  
7 52.) Second, the ALJ asked whether plaintiff was taking medication for  
8 high blood pressure, to which plaintiff responded, "Yes. But there's  
9 times that the doctor has told me that I have it very high although I'm  
10 taking the medication." (A.R. 253-54.) Not only did the ALJ fail to  
11 ask follow-up questions about these particular medications and their  
12 side effects, but the ALJ also failed to ask any questions whatsoever  
13 regarding the other 14 medications plaintiff was taking.

14  
15 Moreover, plaintiff argues, counsel would have inquired into  
16 plaintiff's psychiatric treatment, specifically plaintiff's anxiety and  
17 depression, which cause significant non-exertional limitations affecting  
18 plaintiff's ability to engage in substantial gainful activity. (Joint  
19 Stip. at 16.) For instance, on March 1, 2006, Dianne L. DeFreece,

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21  
22 <sup>3</sup> The record reflects that plaintiff was taking the following  
23 medications: (1) neurontin for nerve pain; (2) legatrin for lower body  
24 pain; (3) alprazolam for anxiety; (4) fluoxetine for depression; (5)  
25 hydrochlorothiazide for kidney disease; (6) cozaar for high blood  
26 pressure; (7) pravachol for high cholesterol; (8) nifedipine for angina;  
27 (9) ranitidine for heartburn; (10) calcium carbonate for osteoporosis;  
28 (11) metformin for diabetes; (12) glyburide for diabetes; (13) humulin  
for diabetes; (14) docusate sodium for bowel movements; (15) glucosamine  
for joint health; and (16) aspirin for heart health. (A.R. 78, 130-32.)

<sup>4</sup> Critically, the ALJ's only inquiry regarding plaintiff's pain was  
directed to her *back* pain, despite the fact that plaintiff indicated on  
the Disability Report - Appeal form that she was taking two medications,  
*i.e.*, neurontin and legatrin, for her *leg* pain. (A.R. 78.)

1 Psy.D., noted that plaintiff exhibited suicidal ideation with  
2 deprecating thoughts, and plaintiff was tearful, depressed, irritable,  
3 and anxious. (A.R. 211.) Dr. DeFreece diagnosed plaintiff with  
4 depressive disorder, not otherwise specified, and noted that plaintiff  
5 was taking Xanax and Prozac. (*Id.*) However, the ALJ failed to ask any  
6 questions regarding the impact of plaintiff's depression and anxiety on  
7 her ability to work or to inquire whether plaintiff received any follow-  
8 up psychiatric treatment for her conditions.

9  
10 In addition, plaintiff suggests that there could be additional,  
11 pertinent medical evidence regarding plaintiff's diabetes with  
12 neuropathy and attendant lower extremity pain that the ALJ failed to  
13 investigate. (Joint Stip. at 15, 19-20.) For instance, while there is  
14 evidence that, on December 9, 2004, an EMG was performed of plaintiff's  
15 lower extremities, which produced normal results, it was recommended  
16 that plaintiff undergo nerve conduction studies of "both lower  
17 extremities to rule-out peripheral neuropathy." (A.R. 178.) There is  
18 no evidence that any nerve conduction study was performed, and if it  
19 was, the results are not in the current record. Additionally, although  
20 the ALJ recognized that plaintiff "has neuropathy" and took into account  
21 plaintiff's upper extremity neuropathy in assessing plaintiff's RFC (see  
22 A.R. 23-24 -- no fine manipulation, secondary to neuropathy), the ALJ  
23 failed to consider adequately plaintiff's lower extremity neuropathy and  
24 leg pain, which is well-documented in the record. (See, e.g., A.R. 147-  
25 48, 154, 156-57, 204, 216.) Clearly, additional investigation into  
26 these matters could bear directly on plaintiff's disability  
27 determination.

1 Had the ALJ explored these issues at the hearing, the additional  
2 evidence adduced might have altered the ALJ's decision. In the Court's  
3 view, plaintiff has met her burden to demonstrate that, if represented  
4 at the hearing, counsel could and would have adduced evidence that may  
5 have altered the result.

6  
7 Accordingly, the ALJ's failure to meet his heightened duty to  
8 "conscientiously and scrupulously probe into, inquire of, and explore  
9 all the relevant facts" at the hearing so as to protect plaintiff's  
10 interests, especially in view of the fact that plaintiff was  
11 unrepresented at the hearing, constitutes reversible error. Vidal, 637  
12 F.2d at 713. On remand, the ALJ should further develop the record by  
13 conducting a proper inquiry of the aforementioned issues, and the ALJ  
14 should obtain any and all outstanding medical records so that a proper  
15 disability determination may be made on a complete record.<sup>5</sup>

16  
17 **II. In Concluding That Plaintiff's Diabetes With Neuropathy Is Not A**  
18 **"Severe" Impairment, The ALJ Failed To Consider Medical Evidence Of**  
19 **Record, And His Conclusion Is Not Adequately Supported By**  
20 **Substantial Evidence.**

21  
22 Under the Commissioner's five-step process for evaluating  
23

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24 <sup>5</sup> Defendant notes in his portion of the Joint Stipulation that,  
25 although plaintiff retained counsel two weeks after receiving the ALJ's  
26 unfavorable decision, there is no indication in the record that counsel  
27 attempted to secure any additional information or medical records that  
28 might help plaintiff's case. (Joint Stip. at 23.) While defendant is  
correct that counsel should have endeavored to supplement the record,  
counsel's failure to do so does not absolve the ALJ from his failure to  
develop the record while plaintiff was unrepresented during the  
administrative process.

1 disability claims, an impairment can be found not severe at step two  
2 only if the evidence establishes a slight abnormality that has no more  
3 than a minimal effect on an individual's ability to do basic work  
4 activities. Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996). The  
5 severity requirement at this point in the analysis is nothing more than  
6 a *de minimus* screening device to dispose of groundless claims. *Id.* at  
7 1290; Bowen v. Yuckert, 482 U.S. 137, 153 (1987). In assessing whether  
8 this threshold has been met, the ALJ must consider the combined effects  
9 of all claimed impairments, as well as a claimant's subjective symptoms.  
10 Smolen, 80 F.3d at 1290.

11  
12 In finding that plaintiff's diabetes with neuropathy was not  
13 "severe," the ALJ stated that:

14  
15 [Plaintiff] has diabetes with early nephropathy<sup>6</sup> and possible  
16 neuropathy.<sup>7</sup> However, [plaintiff's] early nephropathy does  
17 not impose any functional limitations upon her ability to  
18 perform basic work-related activities. Although she has  
19 neuropathy, she is able to use her hands and walks with a  
20 normal gait. *She has full motor power and normal sensation*  
21 *and reflexes of all extremities.*

22  
23 <sup>6</sup> According to <http://diabetes.webmd.com>, diabetic nephropathy is  
24 "damage to your kidneys caused by diabetes. In severe cases, it can  
lead to kidney failure."

25 <sup>7</sup> According to <http://diabetes.webmd.com>, neuropathy is defined as  
26 "nerve disease or damage." According to <http://medical-dictionary.com>,  
27 diabetic neuropathy includes "any of several clinical types of  
peripheral neuropathy (sensory, motor autonomic, and mixed) occurring  
28 with diabetes mellitus; the most common is a chronic, symmetrical  
sensory polyneuropathy affecting first the nerves of the lower limbs and  
often affecting autonomic nerves."

1 (A.R. 23; emphasis added.)  
2

3 After reviewing the record as a whole, substantial evidence  
4 undermines the ALJ's conclusion that plaintiff's diabetes with  
5 neuropathy is not a "severe" impairment. The ALJ's brief discussion of  
6 the evidence regarding plaintiff's neuropathy, especially plaintiff's  
7 lower extremity neuropathy, mischaracterizes the medical evidence and  
8 does not fairly represent the significance of this impairment and the  
9 limitations arising from it, as reflected in the record.<sup>8</sup> For instance,  
10 as plaintiff correctly notes, plaintiff's medical records document that  
11 she has diabetes mellitus with neuropathy (A.R. 156, 210), lower leg  
12 paresthesia,<sup>9</sup> paresthesia left foot (A.R. 156, 210), shin numbness right  
13 greater than left and burning sensation to left greater toe and medial  
14 side of foot (A.R. 157), decreased sensation to front of lower legs and  
15 left medial side of foot, capillary refill greater than three seconds,  
16 prescribed diabetic shoes (A.R. 202, 204-08), abnormal sensation in her  
17 feet (A.R. 163) leg cramps (A.R. 154), and bilateral leg pain (A.R.  
18 148). The ALJ's interpretation of this evidence -- that plaintiff has  
19 "normal sensation . . . of all extremities" -- does not accurately  
20

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21 <sup>8</sup> Even if viewed as an implicit rejection of plaintiff's treating  
22 physician's opinions, rather than a mischaracterization of the medical  
23 evidence, the ALJ's failure to set forth specific and legitimate reasons  
24 for the rejection still constitutes error. See Lester v. Chater, 81  
25 F.3d 821, 830 (9th Cir. 1995)(when the ALJ rejects the opinion of a  
26 treating physician, even if it is contradicted, the ALJ may reject that  
27 opinion only by providing specific and legitimate reasons for doing so,  
28 supported by substantial evidence in the record); Gallant v. Heckler,  
753 F.2d 1450, 1456 (9th Cir. 1984)(it is error for an ALJ to ignore or  
misstate the competent evidence in the record to justify his  
conclusion).

<sup>9</sup> According to <http://medical-dictionary.com>, paresthesia is defined  
as an "abnormal tactile sensation, described as burning, pricking,  
tickling, tingling, or creeping, which indicates nerve irritation."

1 reflect the medical evidence of record. (A.R. 23.)

2  
3 Indeed, the numbness, pain, cramping, and burning sensation in  
4 plaintiff's lower extremities, about which she complained to her  
5 treating physicians and which caused loss of feeling in her lower legs  
6 and left foot and required her to wear prescription shoes, would likely  
7 have "more than a minimal effect" on plaintiff's ability to work,  
8 particularly with respect to plaintiff's ability to stand and walk,  
9 which the ALJ determined plaintiff could do for six hours out of an  
10 eight-hour workday. (A.R. 24.) A more conscientious inquiry into these  
11 areas should have been performed by the ALJ to determine properly  
12 whether plaintiff retains the RFC to perform her past relevant work.

13  
14 Accordingly, the record as a whole demonstrates that plaintiff's  
15 diabetes with neuropathy would have more than a minimal effect on  
16 plaintiff's ability to function in the workplace, and the ALJ's finding  
17 to the contrary is not based on substantial evidence and constitutes  
18 error.

19  
20 **III. The ALJ Failed To Address Adequately The Impact Of Plaintiff's**  
21 **Obesity On Her Ability To Perform Her Past Relevant Work.**

22  
23 Plaintiff contends that the ALJ failed to analyze the impact of  
24 plaintiff's obesity on her other impairments, including her diabetes  
25 mellitus. (Joint. Stip. at 36.) Plaintiff further contends that "the  
26 ALJ should have assessed, per SSR 02-1p, whether or not the impact of  
27 the combined effect of obesity and [d]iabetes [m]ellitus, including  
28 neuropathy, paresthesia, leg cramps, leg pain, numbness and burning of

1 her shin and feet, would affect the [p]laintiff's ability to perform  
2 exertional functions, including standing and walking, lifting, carrying,  
3 pushing, and pulling, as well as whether it would affect her ability to  
4 function in the work environment and sustain a function over time."  
5 (Joint Stip. at 36-37.) The Court agrees.

6  
7 Social Security Ruling ("SSR") 02-1p provides that the  
8 Administration should consider "the effect obesity has upon the  
9 individual's ability to perform routine movement and necessary physical  
10 activity within the work environment. . . . The combined effects of  
11 obesity with other impairments may be greater than might be expected  
12 without obesity. . . . [W]e will explain how we reached our conclusions  
13 on whether obesity caused any physical or mental limitations."

14  
15 While obesity itself is not a "disabling" impairment, Listings  
16 1.00Q, 3.00I, and 4.00F describe muscular, respiratory, and  
17 cardiovascular problems that can result in limitations arising from  
18 obesity. Applicable regulations provide that:<sup>10</sup>

19  
20 Obesity is a medically determinable impairment that is often  
21 associated with disturbance of the [musculoskeletal,  
22 respiratory, and cardiovascular] system, and disturbance of  
23 this system can be a major cause of disability in individuals  
24 with obesity. The combined effects of obesity with  
25 [musculoskeletal, respiratory, and cardiovascular] impairments

26  
27 <sup>10</sup> Listing 1.00Q addresses musculoskeletal impairments; Listing 3.00I  
28 addresses respiratory impairments; and Listing 4.00F addresses  
cardiovascular impairments.



1 can be greater than the effects of each of the impairments  
2 considered separately. Therefore, when determining whether an  
3 individual with obesity has a listing-level impairment or  
4 combination of impairments, and when assessing a claim at  
5 other steps of the sequential evaluation process, including  
6 when assessing an individual's residual functional capacity,  
7 adjudicators must consider any additional and cumulative  
8 effects of obesity.

9  
10 20 C.F.R. Pt. 404, Subpt. P, Appx. I, § 1.00Q, 3.00I, and 4.00F.

11  
12 In addition to the Commissioner's regulations, SSR 02-01p  
13 recognizes obesity as a "medically-determinable impairment" and states  
14 that administrative law judges should consider the combined effects of  
15 obesity with other impairments under the Listing of Impairments when  
16 assessing a claimant's RFC.<sup>11</sup> SSR 02-01p, adopting the National  
17 Institutes of Health's (NIH) classification and diagnosis of obesity  
18 according to Body Mass Index (BMI), considers anyone with a BMI over 30  
19 to be "obese." The Clinical Guidelines recognize three levels of  
20 obesity. Level I includes BMIs of 30.0-34.9. Level II includes BMIs of  
21 35.0-39.9. Level III, termed "extreme" obesity and representing the  
22 greatest risk for developing obesity-related impairments, includes BMIs  
23 greater than or equal to 40. Soc. Sec. R. 02-01p.

24  
25 In the present case, the ALJ failed to discharge the

26  
27 <sup>11</sup> Social Security Ruling 02-01p superseded Social Security Ruling 00-  
28 3p, although it did not alter Social Security Ruling 00-3p in any  
substantive part. 20 C.F.R. Pt. 404, Subpt. P, Appx. I, § 1.00Q, 3.00I,  
and 4.00F.

1 Administration's responsibilities under SSR 02-1p. The medical evidence  
2 conclusively establishes that plaintiff suffers from "extreme" obesity,  
3 a finding that is well-documented by the record and uncontested by the  
4 Commissioner.<sup>12</sup> (See, e.g., A.R. 137, 140, 145, 148, 154, 161-63, 214,  
5 216-17.) At the hearing, plaintiff testified that she weighs 253 pounds  
6 and is 5 feet tall.<sup>13</sup> (A.R. 251.) Using plaintiff's weight of 253  
7 pounds and height of 5 feet, plaintiff's BMI is 49.4.<sup>14</sup> Although the  
8 BMI levels are flexible guidelines and "do not correlate with any  
9 specific degree of functional loss," plaintiff's resulting BMI  
10 calculation suggests that her "extreme" obesity likely has a profound  
11 impact on her ability to perform work activities and presents a  
12 significant issue that the ALJ should have carefully explored in greater  
13 detail in assessing her RFC. SSR 02-01p.

14  
15 In assessing plaintiff's RFC, the ALJ concluded that plaintiff is  
16 capable of engaging in medium work, i.e., capable of lifting and  
17 carrying 50 pounds occasionally and 25 pounds frequently and capable of  
18 standing and/or walking for 6 hours out of an 8 hour workday. (A.R.  
19 24.) Without the benefit of a detailed analysis by the ALJ of the  
20 impact of plaintiff's extreme obesity on her ability to perform work  
21 activities, it is difficult to accept the conclusion that plaintiff --  
22 who stands only 5 feet tall, weighs over 250 pounds, suffers from

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24 <sup>12</sup> The ALJ found that plaintiff suffers from "severe" obesity, along  
25 with "severe" back pain. (A.R. 23.)

26 <sup>13</sup> In an August 16, 2006 Disability Report, plaintiff stated that she  
was 5 feet tall and weighed 285 pounds. (A.R. 119.)

27 <sup>14</sup> Plaintiff's BMI was calculated by using the BMI calculator found at  
28 the Centers for Disease Control and Prevention website  
<<http://www.cdc.gov/healthyweight/assessing/bmi/>>.

1 "severe" back pain (A.R. 23), and suffers from medically documented  
2 diabetes with neuropathy in her lower extremities (A.R. 156, 210), shin  
3 numbness (A.R. 157), burning sensation in left greater toe (A.R. 157),  
4 leg cramps (A.R. 154), and bilateral leg pain (A.R. 148) -- is capable  
5 of standing and/or walking for six hours out of an eight-hour workday on  
6 a regular and continuing basis. See Barrett v. Barnhart, 355 F.3d 1065,  
7 1068 (7th Cir. 2004)(stating that "many people who are not grossly obese  
8 and do not have arthritic knees find it distinctly uncomfortable to  
9 stand for two hours at a time. To suppose that [the plaintiff, who  
10 weighed more than 300 pounds and was only 5 feet 1 inch tall,] could do  
11 so day after day on a factory floor borders on the fantastic").  
12

13 The ALJ is required to do more than simply state that he  
14 "considered all symptoms and the extent to which these symptoms can  
15 reasonably be accepted as consistent with the objective medical  
16 evidence." (A.R. 24.) Rather, the ALJ must specifically take into  
17 account the impact of plaintiff's obesity on her other impairments,  
18 whether severe or not, and the ALJ must "explain how [he] reached [his]  
19 conclusions." SSR 02-1p. His failure to do so here constitutes error.  
20

21 Accordingly, remand is appropriate to allow the ALJ to re-assess  
22 his RFC finding, paying particular attention to the significant impact  
23 plaintiff's extreme obesity may have on her other impairments and on her  
24 ability to perform work activities on a sustained and competitive basis.

25 ///

26 ///

27 ///

28 ///

1 **IV. The ALJ Failed To Provide The Requisite Clear And Convincing**  
2 **Reasons For Rejecting Plaintiff's Subjective Pain Testimony.**

3  
4 Plaintiff alleges that the ALJ erred in his consideration of  
5 plaintiff's subjective symptom testimony. (Joint Stip. at 41-44, 47-  
6 48.) For the reasons set forth below, the Court agrees.

7  
8 Once a disability claimant produces objective evidence of an  
9 underlying physical impairment that is reasonably likely to be the  
10 source of her subjective symptom(s), all subjective testimony as to the  
11 severity of the symptoms must be considered. Moisa v. Barnhart, 367  
12 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345  
13 (9th Cir. 2001)(*en banc*); see also 20 C.F.R. § 404.1529(a) (explaining  
14 how pain and other symptoms are evaluated). "[U]nless an ALJ makes a  
15 finding of malingering based on affirmative evidence thereof, he or she  
16 may only find an applicant not credible by making specific findings as  
17 to credibility and stating clear and convincing reasons for each."  
18 Robbins, 466 F.3d at 883. Further, an ALJ may not rely solely on the  
19 absence of objective medical evidence supporting the *degree* of pain  
20 alleged as a basis for finding that a plaintiff's testimony regarding  
21 subjective symptoms is not credible. Fair v. Bowen, 885 F.2d 597,  
22 601-02 (9th Cir. 1989); Stewart v. Sullivan, 881 F.2d 740, 743-44 (9th  
23 Cir. 1989).

24  
25 In her filings with the Commissioner and in her testimony, and  
26 throughout the medical evidence of record, plaintiff described various  
27 subjective symptoms from which she claims to suffer. Plaintiff  
28 testified that she stopped working because of her back pain, diabetes,

1 and arthritis. (A.R. 251.) Plaintiff further testified that she gets  
2 "very tired" and has "a lot of pain on [sic] [her] back," for which she  
3 takes medication. (A.R. 251-52.) Throughout the medical records, there  
4 is evidence of plaintiff's complaints of: neuropathy in her lower  
5 extremities (A.R. 156, 210); lower leg paresthesia (*id.*); burning  
6 sensation in her left greater toe and medial side of foot (A.R. 157);  
7 shin numbness (*id.*); leg cramps (A.R. 154); decreased sensation to front  
8 of lower legs (A.R. 202, 204-08); and bilateral leg pain (A.R. 148). In  
9 a Function Report - Adult, plaintiff stated that before her illnesses,  
10 injuries, or conditions, she could "bend over, do full house chores,  
11 [and] walk long distances." (A.R. 93.) She further stated that she  
12 cooks and irons while seated, and is able to perform limited cleaning,  
13 with breaks, approximately two to three times weekly. (A.R. 26, 94.)  
14 Plaintiff claimed that she cannot go grocery shopping without  
15 assistance. (A.R. 95.) Plaintiff further claimed that she has  
16 difficulty talking to people, because she feels depressed, is unable to  
17 handle stress, and gets scared easily. (A.R. 97-98.) Plaintiff stated  
18 that she can lift less than 25 pounds, walk "a few blocks," stand for a  
19 "limited time," and "while standing, [she] need[s] to take breaks [to]  
20 sit" every "15 minutes or so." (A.R. 97.) In a Pain Questionnaire,  
21 plaintiff claimed that she has pain daily in her back and legs, and her  
22 "legs get numb but hurt at the same time [and her] back [has] just sharp  
23 pain," which lasts "sometimes a few hours, sometimes it's all day."  
24 (A.R. 126.) Plaintiff stated that she takes cyclobenzaprine and  
25 gabapentin daily for the pain, but the medications make her sleepy.  
26 (A.R. 126-27.)

27

28 In his written decision, the ALJ found that plaintiff suffers from

1 the "severe" impairments of obesity and back pain, both of which are  
2 medically determinable impairments that reasonably could cause the  
3 subjective pain symptoms and attendant limitations about which plaintiff  
4 complains.<sup>15</sup> (A.R. 23.) However, the ALJ rejected plaintiff's  
5 statements regarding the nature and extent of her pain, without making  
6 any specific findings regarding plaintiff's credibility. (A.R. 26.)  
7 Indeed, the entirety of the ALJ's analysis of plaintiff's credibility is  
8 as follows:

9  
10 [Plaintiff] alleges difficulty standing and walking for  
11 prolonged periods. She claims she can lift less than 25  
12 pounds and walk 3 to 4 blocks before needing to rest for 10  
13 minutes. [Plaintiff] also alleges that she needs to sit while  
14 cooking and ironing and must take breaks while performing the  
15 household chores that she does two to three times weekly.

16  
17 After considering the evidence of record, the undersigned  
18 finds that [plaintiff's] medically determinable impairments  
19 could reasonably be expected to produce the alleged symptoms,  
20 but that [plaintiff's] statements concerning the intensity,  
21 persistence and limiting effects of these symptoms are not  
22 entirely credible.

23  
24 . . . .

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25  
26 <sup>15</sup> Although the ALJ found that plaintiff's diabetes with neuropathy  
27 was not a "severe" impairment, that finding was, as discussed *supra*,  
28 erroneous. (A.R. 24.) The record evidence establishes that plaintiff's  
diabetes with neuropathy is a medically determinable impairment that  
reasonably could cause the pain and attendant limitations about which  
plaintiff complains. (A.R. 156-57, 202, 204-08, 210.)

1 In her Function Report - Adult, [plaintiff] stated that she  
2 cooks and irons while seated and takes breaks while doing  
3 household chores. She reported that her hobbies are reading  
4 and watching television.

5  
6 (A.R. 26.) The ALJ's rejection of plaintiff's subjective complaints of  
7 pain and attendant limitations, without setting forth any clear and  
8 convincing reasons for doing so, constitutes error.

9  
10 Although the Commissioner now attempts to justify the ALJ's  
11 insufficient credibility analysis by offering post-hoc rationale to  
12 support it (Joint Stip. at 44-47), a reviewing court cannot affirm the  
13 denial of benefits based on a reason not stated or a finding not made by  
14 the ALJ, and defendant's after-the-fact attempt to supply an acceptable  
15 basis for the ALJ's decision to reject the credibility of plaintiff's  
16 subjective symptom statements is unavailing. See, e.g., Connett at 874  
17 (noting that a reviewing court is "constrained to review the reasons the  
18 ALJ asserts," and an ALJ's decision cannot be affirmed on the basis of  
19 evidence he did not discuss); Pinto v. Massanari, 249 F.3d 840, 847-48  
20 (9th Cir. 2001)(an agency decision cannot be affirmed based on a ground  
21 that the agency did not invoke in making its decision); see also Barbato  
22 v. Comm'r of Soc. Sec. Admin., 923 F. Supp. 1273, 1276 n.2 (C.D. Cal.  
23 1996)(remand is appropriate when a decision does not adequately explain  
24 how a decision was reached, "[a]nd that is so even if [the Commissioner]  
25 can offer proper post hoc explanations for such unexplained  
26 conclusions," for "the Commissioner's decision must stand or fall with  
27 the reasons set forth in the ALJ's decision, as adopted by the Appeals  
28 Council")(citation omitted).

1           Accordingly, the ALJ's rejection of plaintiff's credibility,  
2 without setting forth clear and convincing reasons for the rejection,  
3 constitutes reversible error. On remand, the ALJ must provide reasons,  
4 if they exist and are in accordance with the requisite legal standards,  
5 for discrediting plaintiff's pain testimony.

6  
7 **V.   Remand Is Required.**

8  
9           The decision whether to remand for further proceedings or order an  
10 immediate award of benefits is within the district court's discretion.  
11 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
12 useful purpose would be served by further administrative proceedings, or  
13 where the record has been fully developed, it is appropriate to exercise  
14 this discretion to direct an immediate award of benefits. *Id.* at 1179  
15 ("the decision of whether to remand for further proceedings turns upon  
16 the likely utility of such proceedings"). However, where there are  
17 outstanding issues that must be resolved before a determination of  
18 disability can be made, and it is not clear from the record that the ALJ  
19 would be required to find the claimant disabled if all the evidence were  
20 properly evaluated, remand is appropriate. *Id.*

21  
22           Here, remand is appropriate to allow the ALJ an opportunity to  
23 remedy the above-mentioned deficiencies and errors. *See, e.g., Benecke*  
24 *v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004)(remand for further  
25 proceedings is appropriate if enhancement of the record would be  
26 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.  
27 1989)(remand appropriate to remedy defects in the record).



1 **CONCLUSION**

2  
3 Accordingly, for the reasons stated above, IT IS ORDERED that the  
4 decision of the Commissioner is REVERSED, and this case is REMANDED for  
5 further proceedings consistent with this Memorandum Opinion and Order.  
6

7 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
8 copies of this Memorandum Opinion and Order and the Judgment on counsel  
9 for plaintiff and for defendant.

10  
11 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

12  
13 DATED: September 29, 2009

14 *Margaret A. Nagle*  
15 \_\_\_\_\_  
16 MARGARET A. NAGLE  
17 UNITED STATES MAGISTRATE JUDGE  
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