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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LINDA OSTALAZA,)	Case No. CV 08-2183 PJW
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the)	
Social Security Administration,)	
)	
Defendant.)	

I. INTRODUCTION

Before the Court is Plaintiff's appeal of a decision by Defendant Social Security Administration ("the Agency"), denying her application for Supplemental Security Income benefits ("SSI"). Plaintiff claims that the Administrative Law Judge ("ALJ") erred in: (1) failing to follow the directives of Social Security Ruling 99-2p in evaluating Plaintiff's fibromyalgia; (2) failing to properly analyze the effect of Plaintiff's obesity on her other impairments, as required under SSR 02-1p; (3) improperly rejecting the treating physicians' opinions; (4) improperly discrediting the testimony of Plaintiff and of her daughter, Yolindita Abbott; and (5) failing to obtain testimony from a

1 vocational expert. (Joint Stip. at 16.¹) For the reasons explained
2 below, the Court concludes that the ALJ did err and that remand is
3 warranted for further consideration.

4 II. BACKGROUND

5 On April 9, 2004, Plaintiff applied for SSI, claiming that she
6 had been disabled since March 3, 1992, due to "osteoarthritis, knee,
7 fibromyalgia, shortness of breath, ulcer, chipped tailbone,
8 osteoporosis, depression, back, muscle spasm, tail bone, asthma."
9 (Administrative Record ("AR") 49, 67-69.)² The Agency denied the
10 application initially and on reconsideration. (AR 49-60.) Plaintiff
11 then requested and was granted a hearing before an ALJ. (AR 34, 61.)
12 On May 17, 2007, Plaintiff appeared at the hearing without counsel and
13 testified. (AR 382-413.) On July 16, 2007, the ALJ issued a decision
14 denying the application. (AR 15-27.) Following denial of review, (AR
15 4-6), Plaintiff filed the instant action.

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21 ¹ The Court has presented Plaintiff's claims in the order that
22 it will address them herein. It is not the same order that Plaintiff
23 presented them in the Joint Stipulation.

24 ² Plaintiff first applied for SSI on June 29, 1998, but, after
25 her application was denied by the Agency on October 28, 1999, she did
26 not appeal. (AR 36-43.) Though the Agency applied a presumption of
27 continuing non-disability to Plaintiff's second SSI application in
28 2004, the ALJ found that Plaintiff had successfully rebutted that
presumption. (AR 18-19, 138.) The Court notes that the ALJ's finding
was based, in part, on an alleged disability onset date of March 3,
2004, whereas the record shows that the onset date in Plaintiff's SSI
application was amended, in handwriting, from March 2004 to March
1992. (AR 67.) Regardless, this discrepancy has no bearing on the
issues raised in the current proceeding.

1 III. ANALYSIS

2 A. Application of Social Security Ruling 99-2p

3 Plaintiff contends that the ALJ failed to follow the directives
4 of Social Security Ruling ("SSR") 99-2p. (Joint Stip. at 32-37.)³
5 Plaintiff argues that, under SSR 99-2p, the ALJ could not reject the
6 functional limitations opined by Plaintiff's treating physician, Dr.
7 Bora Kim, without first recontacting Dr. Kim for "further
8 clarification of the severity of her fibromyalgia and what functional
9 restrictions would reasonably be expected to result therefrom[.]"
10 (Joint Stip. at 35.)⁴ For the following reasons, the Court disagrees.

11 SSR 99-2p, which ostensibly addresses the evaluation of cases
12 involving chronic fatigue syndrome but also appears to be applicable
13 to cases involving fibromyalgia, provides guidance for "developing and
14 evaluating [disability] claims . . . on the basis of Chronic Fatigue
15 Syndrome (CFS)[.]" The ruling sets forth a definition of CFS and
16 provides guidelines to aid the adjudicator in determining whether CFS
17 is a medically-determinable impairment at step two of the sequential
18 disability analysis. The ruling also states that "[i]f the
19 adjudicator finds that the evidence is inadequate to determine whether
20 the individual is disabled . . . she must first recontact the

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22 ³ The SSR's are not published in the federal register and "do
23 not have the force of law." *Quang Van Han v. Bowen*, 882 F.2d 1453,
24 1457 & n.6 (9th Cir. 1989). The Court does, however, defer to the
25 Agency's interpretation of its regulations "unless they are plainly
erroneous or inconsistent with [the Social Security] Act or
regulations." *Id.* at 1457.

26 ⁴ Plaintiff also argues that the ALJ violated the precepts of
27 SSR 99-2p more generally by failing to provide sufficient and
28 legitimate grounds for rejecting the treating physician's opinion.
(Joint Stip. at 36-37.) The Court separately addresses that
contention below.

1 individual's treating or other medical source(s)" before arranging for
2 a consultative examination to obtain additional information.

3 SSR 99-2p, and case authority, suggests that the most common
4 issue in CFS or fibromyalgia cases is establishing whether a medically
5 determinable impairment exists in the first place. See, e.g., *Benecke*
6 *v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004) (noting that
7 "[f]ibromyalgia's cause is unknown, there is no cure, and it is
8 poorly-understood within much of the medical community", and that "to
9 date there are no laboratory tests to confirm the diagnosis.") That
10 is not the issue here.

11 In her decision, the ALJ accepted, without discussion, that
12 Plaintiff's fibromyalgia was a severe impairment. (AR 21.) Indeed,
13 the ALJ clearly rejected examining physician Leoni's opinion that
14 Plaintiff had "no signs of fibromyalgia and no functional restrictions
15 at all." (AR 24.) In determining her residual functional capacity,
16 however, the ALJ rejected Plaintiff's subjective account of her
17 limitations, some of which were allegedly caused by her fibromyalgia.
18 (AR 23-26.)⁵ Thus, the only issue raised specifically with respect to
19 SSR 99-2p is whether it imposed a separate and additional obligation
20 on the ALJ to recontact Dr. Kim or other physicians before determining
21 that, while Plaintiff's fibromyalgia was a severe impairment, she
22 would be able to work. Plaintiff has not shown that SSR 99-2p imposes
23 such an obligation, and the Court finds that it does not.

24 The governing regulations provide that the Agency must recontact
25 an applicant's treating physician where the evidence is inadequate to
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27 ⁵ As discussed below, the ALJ also rejected Dr. Kim's opinion
28 regarding Plaintiff's functional limitations.

1 make a disability determination or is ambiguous. See 20 C.F.R.
2 §§ 404.1512(e), 416.912(e), 416.927(c)(3).⁶ SSR 99-2p incorporates
3 those provisions, requiring the adjudicator to recontact medical
4 sources if the evidence of CFS is inadequate, "in accordance with 20
5 C.F.R. 404.1512 and 416.912." Here, though she disagrees with the
6 ALJ's interpretation of the evidence, Plaintiff fails to show that the
7 evidence was inadequate or ambiguous.

8 Further, the ALJ did not reject Dr. Kim's opinion because it was
9 ambiguous or inadequate. She rejected it because it was inconsistent
10 with the "greater objective record" and Plaintiff's subjective
11 complaints and because it was based on a single visit. (AR 24-25.)
12 Because the records were neither inadequate or ambiguous, there was no
13 need to recontact Dr. Kim under SSR 99-2p. For this reason, this
14 claim does not warrant remand.

15 B. Application of Social Security Ruling 02-1p

16 In her next claim, Plaintiff contends that the ALJ failed to
17 follow the directives of SSR 02-1p. Plaintiff argues that the ALJ

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19 ⁶ 20 C.F.R. §§ 404.1512(e) and 416.912(e) provide:

20 When the evidence we receive from your treating physician or
21 psychologist or other medical source is inadequate for us to
22 determine whether you are disabled, we will need additional
information to reach a determination of a decision . . .

23 (1) . . . We will seek additional evidence or clarification from
24 your medical source when the report from your medical source
25 contains a conflict or ambiguity that must be resolved, the
report does not contain all the necessary information, or does
not appear to be based on medically acceptable clinical and
laboratory diagnostic techniques.

26 20 C.F.R. § 416.927(c)(3) provides that if the ALJ does not have
27 sufficient evidence to make a disability determination, he will "try
28 to obtain additional evidence" under the provisions just cited.

1 "failed to perform a full and complete analysis of the effects of" her
2 obesity, as required by SSR 02-01p, first, by failing to explain why
3 her obesity was not medically equivalent to a listed impairment and,
4 second, by failing to specifically address the effect of her obesity
5 on her functional limitations. (Joint Stip. at 42-44.) For the
6 following reasons, this claim does not warrant remand, either.

7 SSR 02-01p directs the adjudicator to consider a claimant's
8 obesity in determining whether the claimant has a medically
9 determinable impairment; whether that impairment is severe; whether
10 the impairments meets a listing; and whether the impairment prevents
11 the claimant from doing past relevant work or any other work. This
12 ruling also provides that "[w]e may also find that obesity, by itself,
13 is medically equivalent to a listed impairment . . . [and] [w]e will
14 also find equivalence if an individual has multiple impairments,
15 including obesity, no one of which meets or equals the requirements of
16 a listing, but the combination of impairments is equivalent in
17 severity to a listed impairment." SSR 02-01p. The ruling cautions,
18 however, that "we will not make assumptions about the severity or
19 functional effects of obesity combined with other impairments.
20 Obesity in combination with another impairment may or may not increase
21 the severity or functional limitations of the other impairment. We
22 will evaluate each case based on the information in the case record."
23 SSR 02-1p.

24 Here, the ALJ found that Plaintiff's obesity was a severe
25 impairment. (AR 21.) The ALJ also found, without further discussion,
26 that none of Plaintiff's impairments met or equaled a listed
27 impairment. (AR 21.) The ALJ then determined that Plaintiff had the
28 residual functional capacity to perform a "full range of light work,"

1 but "[a]s a result of her obesity and knee problems, she cannot climb
2 ladders, ropes, or scaffolds, but she can occasionally climb ramps and
3 stairs, and occasionally balance, stoop, kneel, crouch, and crawl."
4 (AR 21-22.) In reaching this determination, the ALJ rejected the full
5 extent of Plaintiff's subjective complaints. With respect to
6 Plaintiff's obesity, the ALJ stated that, "[w]hile [it] could impact
7 her back and knee pain, she continues to receive only conservative
8 care for those problems, as she has for the last fifteen years, with
9 the exception of right knee surgery in August, 2006." (AR 23.)

10 Plaintiff has not shown how the ALJ failed to comply with SSR 02-
11 01p. Though the ALJ did not provide an explanation as to why
12 Plaintiff's impairments did not combine to equal a listed impairment,
13 SSR 02-01p does not require her to do so. Moreover, where, as here,
14 Plaintiff offered no theory as to how her obesity, which the ALJ found
15 did not impact her other physical impairments, combined with those
16 other impairments to equal a listed impairment, the ALJ's failure to
17 consider the "combined" effect of the impairments was not error. See
18 *Lewis v. Apfel*, 236 F.3d 503, 514 (9th Cir. 2001)(finding no error
19 where claimant "offered no theory, plausible or otherwise, as to how
20 his [impairments] combined to equal a listed impairment[.]").
21 Likewise, because the ALJ found that Plaintiff's obesity was a severe
22 impairment, and specifically determined that it would restrict her
23 ability to climb, balance, stoop, kneel, crouch, and crawl, Plaintiff
24 has failed to show that the ALJ ignored the directives of SSR 02-01p
25 in determining her residual functional capacity. For these reasons,
26 the Court finds that this claim is without merit.

1 C. Rejection of Treating Physician's Opinion

2 Plaintiff next contends that the ALJ improperly rejected the
3 opinion of her treating physician, Dr. Bora Kim, who opined on a
4 functional capacity evaluation form that Plaintiff would be severely
5 impaired in her ability to work. (Joint Stip. at 46-49.) For the
6 following reasons, the Court concludes that the ALJ did not provide an
7 adequate justification for rejecting Dr. Kim's opinion.

8 Dr. Kim treated Plaintiff from March 2003 until November 2004.
9 (AR 203-23.) On March 4, 2004, Dr. Kim diagnosed Plaintiff with
10 fibromyalgia and prescribed Pamelor, an antidepressant.⁷ (AR 222.)
11 On March 18, 2003, Plaintiff complained of chronic pain "all over."
12 (AR 223.) In the same progress record, Dr. Kim noted that Plaintiff
13 "reports she's applying for disability." (AR 222.) Dr. Kim referred
14 to fibromyalgia again on April 1 and 29, 2004, and mentioned
15 Plaintiff's complaints of chronic pain with muscle spasms. (AR 220,
16 221.)

17 On June 18, 2004, Dr. Kim stated that Plaintiff had come in with
18 her daughter, who reported that her mother was in "constant pain,
19 [complaining of] muscle spasms at night, and can't sleep at night."
20 (AR 219.) Dr. Kim also stated, however, that "[Plaintiff] is really
21 here to have disability paperwork filled out." (AR 219.) That same
22 day, Dr. Kim completed a "Medical Source Statement - Physical," in
23 which she indicated that Plaintiff could lift no more than ten pounds
24 occasionally; stand or walk no more than two hours in an eight-hour
25 workday; sit no more than six hours in an eight-hour workday; and
26 could never climb, stoop, kneel, crouch, or crawl, and only

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28 ⁷ See www.drugs.com/mtm/pamelor.html.

1 occasionally balance. (AR 253-54.) Dr. Kim described the following
2 basis for these limitations: "[Plaintiff] has morbid obesity,
3 previously [diagnosed with] fibromyalgia, has chronic low back pain
4 and osteoarthritis of lumbar spine, chronic knee pain, [illegible],
5 [history of] anxiety and depression - all of these conditions
6 contribute to [Plaintiff]'s impairment to do work." (AR 253.)

7 In her decision, the ALJ noted that Dr. Kim's June 18, 2004
8 functional capacity assessment "place[d] [Plaintiff] at a less than
9 sedentary exertion level." (AR 24.) But she gave this assessment
10 less weight because "it is inconsistent with the greater objective
11 record and because Dr. Kim said he relied on [Plaintiff]'s reported
12 subjective complaints such as requiring alternate sitting and standing
13 every five minutes, which is not an objective measure of her
14 functional capacity and because this assessment was based on a one-
15 time visit with [Plaintiff]." (AR 24-25.) The ALJ also rejected Dr.
16 Kim's opinion regarding Plaintiff's mental impairments because Dr. Kim
17 "is not a mental health practitioner, and both the State agency's
18 reviewing psychologist and psychiatrist found [Plaintiff]'s mental
19 impairments were non-severe." (AR 25.)

20 The ALJ also rejected Dr. Kim's October 4, 2005 opinion that
21 Plaintiff had been unable to work since 1992 due to a history of
22 chronic back, neck, and joint pains secondary to osteoarthritis,
23 conditions which Dr. Kim stated were permanent. (AR 301.) The ALJ
24 noted that Dr. Kim also stated that Plaintiff's condition had improved
25 and that her chronic pain was controlled with Celebrex, which
26 contradicted his opinion that she was permanently disabled. (AR 25.)

1 "By rule, the [Agency] favors the opinion of a treating physician
2 over non-treating physicians." *Orn v. Astrue*, 495 F.3d 625, 631 (9th
3 Cir. 2007). In order to reject a treating physician's opinion in
4 favor of a non-treating physician's opinion, the ALJ must set forth
5 specific and legitimate reasons. *Id.* at 632; see also *Lester v.*
6 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995).

7 The ALJ offered three reasons for rejecting Dr. Kim's physical
8 limitations assessment. First, she found that the opinion was
9 "inconsistent with the greater objective record." (AR 25.) The ALJ
10 did not explain what she meant by "the greater objective record," and
11 failed to specify what part of that record was in conflict with Dr.
12 Kim's assessment.⁸ This generalized finding is not enough to support
13 the ALJ's rejection of the opinion. See *Regennitter v. Comm'r, Soc.*
14 *Sec. Admin.*, 166 F.3d 1294, 1299 (9th Cir. 1999). Further, "in light
15 of the unique evidentiary difficulties associated with the diagnosis
16 and treatment of fibromyalgia, opinions that focus solely upon
17 objective evidence are not particularly relevant." *Rogers v. Comm'r,*
18 *Soc. Sec. Admin.*, 486 F.3d 234, 245 (6th Cir. 2007); see also *Sarchet*
19 *v. Chater*, 78 F.3d 305, 306 (7th Cir. 1996) (noting that fibromyalgia
20 symptoms are "entirely subjective"). Thus, this justification was not
21 a legitimate reason for discounting the opinion.

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23 ⁸ To the extent the ALJ intended to contrast examiner Leoni's
24 findings that Plaintiff had no functional limitations at all with the
25 more restrictive findings of Dr. Kim, such a rationale would not be
26 legitimate. The ALJ expressly discounted Dr. Leoni's opinion because
27 "the greater objective medical record fails to support a finding that
28 [Plaintiff] has no signs of fibromyalgia and no functional
restrictions at all." (AR 24.) The ALJ thus appeared to accept that
Plaintiff had *some* restrictions as a result of her fibromyalgia, yet,
as further discussed below, she did not include any in her residual
functional capacity assessment.

1 Second, the ALJ rejected Dr. Kim's opinion on the ground that it
2 was premised on Plaintiff's subjective complaints, rather than on "an
3 objective measure of her functional capacity." (AR 25.) Generally
4 speaking, the ALJ is entitled to reject a treating physician's opinion
5 for this reason. See, e.g., *Tonapetyan v. Halter*, 242 F.3d 1144, 1149
6 (9th Cir. 2001); *Morgan v. Comm'r, Soc. Sec. Admin.*, 169 F.3d 595, 602
7 (9th Cir. 1999) (affirming ALJ's rejection of treating physicians'
8 unsupported and inconsistent opinions that relied on claimant's own
9 testimony). But, in the world of fibromyalgia, the story is slightly
10 different. In such cases, a treating doctor's opinion may be based
11 purely on a patient's subjective complaints. See, e.g., *Green-Younger*
12 *v. Barnhart*, 335 F.3d 99, 108 (2d Cir. 2003) (reversing where the "ALJ
13 effectively required 'objective' evidence for a disease [i.e.,
14 fibromyalgia] that eludes such measurement."); *Glenn v. Apfel*, 102 F.
15 Supp. 2d 1252, 1260 (D. Kan. 2000) (finding that ALJ improperly
16 rejected treating doctors' opinions regarding claimant's functional
17 limitations based on the "lack of objective medical evidence and the
18 doctors' reliance on [the claimant]'s subjective complaints" where
19 there was ample evidence that claimant suffered from fibromyalgia).
20 Thus, this justification, too, was not a legitimate basis standing on
21 its own to reject the treating doctor's opinion.

22 The ALJ's third reason for discounting Dr. Kim's assessment was
23 that it was based on "a one-time visit with claimant." (AR 25.)
24 Though literally true, in the sense that any individual assessment is
25 based on "a one-time visit," the ALJ apparently failed to give any
26 weight to Dr. Kim's treatment history with Plaintiff, which the record
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1 shows began in March 2003 and continued to at least June 2004, when he
2 filled out the form that contained his opinion. Thus, this rationale
3 is not supported by substantial evidence in the record.⁹

4 In sum, the ALJ did not provide specific and legitimate reasons,
5 supported by substantial evidence in the record, to reject the opinion
6 of Plaintiff's treating doctor that her fibromyalgia resulted in
7 significant limitations on her ability to work. Remand is appropriate
8 to allow the ALJ the opportunity to discuss the medical evidence
9 regarding Plaintiff's fibromyalgia in accordance with the proper legal
10 standards.

11 D. Testimony of Plaintiff and Plaintiff's Daughter

12 Plaintiff contends that the ALJ failed to provide specific,
13 clear, and convincing reasons for rejecting her testimony regarding
14 the pain and other symptoms she claims to experience. (Joint Stip. at
15 49-55.) Moreover, she contends that the ALJ failed to provide
16 legitimate reasons for rejecting the testimony of her daughter,
17 Yolindita Abbott. (Joint Stip. at 55-56.) For the following reasons,
18 the Court agrees.

19 ALJ's are tasked with judging the credibility of witnesses. In
20 making a credibility determination, an ALJ may take into account

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22 ⁹ Furthermore, the Court notes that the ALJ did not appear to
23 assign any particular weight to the opinion of rheumatologist Dr. Alan
24 Peter--who diagnosed Plaintiff with fibromyalgia on several occasions
25 in 2006, and noted specific areas of tenderness--merely recounting his
26 findings without adopting or rejecting them. (AR 25, 346, 351-54.)
27 "Rheumatology is the relevant specialty for fibromyalgia[," *Benecke*
28 *v. Barnhart*, 379 F.3d 587, 594 n.4 (9th Cir. 2004), and the opinion of
a specialist about medical issues related to his specialization is
given more weight than the opinion of a non-specialist. *Smolen v.*
Chater, 80 F.3d 1273, 1285 (9th Cir. 1996); 20 C.F.R. § 416.927(d)(5).
On remand, the ALJ should indicate the weight to be given Dr. Peter's
opinion.

1 ordinary credibility evaluation techniques. *Smolen*, 80 F.3d at 1284.
2 Where, as here, the ALJ accepted that the claimant's medically
3 determinable impairments could reasonably be expected to produce the
4 symptoms alleged and found no evidence of malingering, (AR 23), the
5 ALJ could only reject her testimony for specific, clear, and
6 convincing reasons. *Smolen*, 80 F.3d at 1283-84.

7 Here, the ALJ noted that Plaintiff allegedly could "do very
8 little during an average day. She spends much of her time either in
9 bed or in a recliner. She frequently cries due to pain. Her
10 medications allegedly help 'a little,' but do not provide long-term
11 pain relief." (AR 23.) The ALJ also noted that Plaintiff claims to
12 need help bathing and dressing, wears adult diapers because she is
13 incontinent, "cannot lift anything due to pain, weakness, and swelling
14 in her hands," has difficulty climbing stairs, and cannot sit or stand
15 for longer than two minutes. (AR 23.) Additionally, she found that
16 Plaintiff alleges she wakes up throughout the night, coughs all of the
17 time, finds it hard to breathe, and experiences daily headaches. (AR
18 23.)

19 The ALJ offered a long list of reasons why Plaintiff was not
20 credible: (1) Plaintiff received only "conservative care" for her back
21 and knee pain, with the exception of her knee surgery in 2006; (2) no
22 evidence supported Plaintiff's allegations regarding the limited use
23 of her hands and hand X-rays taken in April 2006 were negative; (3)
24 Plaintiff's medications did not appear to cause drowsiness; (4) no
25 evidence of weakness or muscle wasting supported Plaintiff's
26 allegation that she was limited to sedentary activity; (5) Dr. Kim
27 reported that Celebrex improved Plaintiff's arthritis symptoms; (6)
28 there was no evidence of emergency room or hospital treatment for any

1 breathing impairment, and Plaintiff continues to smoke half a pack of
2 cigarettes a day; and (7) Plaintiff's blood sugar is controlled, and
3 there is no evidence of any impairments caused by diabetes. (AR 23-
4 24.) The Court finds that these reasons are largely adequate with
5 respect to the specific ailments addressed. Thus, for example, the
6 record supports the ALJ's findings that Plaintiff's arthritis and
7 diabetes appear to be controlled, that hand x-rays were negative, and
8 that her breathing impairment does not result in functional
9 limitations. (AR 270, 296, 307, 318-19). And there is no objective
10 medical evidence to establish that Plaintiff's incontinence or
11 headaches cause any specific limitations. Nevertheless, the ALJ's
12 credibility analysis is inadequate in two respects.

13 First, the ALJ's finding that Plaintiff had received only
14 conservative care for her back and knee pain is belied by her knee
15 surgery in August 2006, surgery that the ALJ acknowledged but
16 seemingly gave no weight to. (AR 23, 362-69.) In addition, the ALJ
17 did not consider Plaintiff's testimony that she was denied Medi-Cal
18 insurance in 2004 and, in fact, married in order to get medical
19 insurance. (AR 392-93.) She also testified that in 2006 and 2007 her
20 Blue Cross doctors "moved to Kaiser." (AR 393.) The ALJ was required
21 to address this testimony before discounting her credibility on the
22 ground that she had received only conservative care. *See Orn*, 495
23 F.3d at 638 (reaffirming that "disability benefits may not be denied
24 because of the claimant's failure to obtain treatment he cannot obtain
25 for lack of funds.") (quotation omitted); *see also* SSR 96-7p ("[T]he
26 adjudicator must not draw any inferences about an individual's
27 symptoms and their functional effects from a failure to seek or pursue
28 regular medical treatment without first considering any explanations

1 that the individual may provide . . . that may explain infrequent or
2 irregular medical visits or failure to seek medical treatment.”)

3 Second, the ALJ did not discuss Plaintiff’s fibromyalgia and the
4 extent to which it caused her complaints of generalized pain,
5 weakness, and postural limitations. As noted above, the ALJ
6 specifically rejected examiner Leoni’s opinion that Plaintiff had no
7 signs of fibromyalgia and no functional restrictions at all, and
8 accepted that Plaintiff’s fibromyalgia was a severe impairment. (AR
9 24.) Moreover, as just discussed, the ALJ failed to offer specific
10 and legitimate reasons for rejecting Dr. Kim’s functional assessment,
11 and failed to either adopt or reject the opinion of specialist Dr.
12 Peter. In short, the ALJ accepted that Plaintiff suffers from
13 fibromyalgia, but implicitly found that the condition would impose no
14 additional functional limitations above and beyond those imposed by
15 Plaintiff’s physical impairments and obesity.

16 In the end, the Court is left to guess the extent to which the
17 ALJ considered how Plaintiff’s fibromyalgia might cause any of the
18 symptoms she alleges. For this reason, the Court finds that the
19 credibility analysis is inadequate and remand is required for further
20 clarification. *See, e.g., Glenn*, 102 F. Supp. 2d at 1258-59 (holding
21 that ALJ’s credibility determination was not supported by record where
22 ALJ accepted that claimant suffered from fibromyalgia and where her
23 complaints of pain and fatigue were supported by treating physicians);
24 *see also Rogers*, 486 F.3d at 248 (“[G]iven the nature of fibromyalgia,
25 where subjective pain complaints play an important role in the
26 diagnosis and treatment of the condition, providing justification for
27 discounting a claimant’s statements is particularly important.”).

1 The ALJ also failed to properly address the testimony of
2 Plaintiff's daughter Yolindita Abbott. At the administrative hearing,
3 Ms. Abbott testified that her mother "really can't do nothing during
4 the day. She's in pain constantly. She's from the bed to the
5 recliner. . . . She's always in pain. She's crying. And the
6 medications, it helps for a little bit, but it's not helping her long-
7 term and that's a bad thing." (AR 408.) Ms. Abbott also testified
8 that Plaintiff "has to keep her legs up, but she can't lay flat on the
9 bed because it hurts her back. She wakes up with sweats." (AR 408.)
10 In addition to her testimony at the hearing, Ms. Abbott submitted
11 written reports documenting Plaintiff's difficulties. (AR 99-107,
12 114-30.)

13 An ALJ is required to consider the testimony of a lay witness.
14 *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir.
15 2006). This requirement applies equally to written "testimony." See,
16 e.g., *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993) (holding
17 that ALJ must give germane reasons to discount written testimony and
18 affidavits of lay witnesses). Failure to consider such testimony
19 constitutes error. *Stout*, 454 F.3d at 1055-56.

20 In her decision, the ALJ specifically discounted the written
21 reports that Ms. Abbott had submitted in support of Plaintiff's
22 application, finding that "their perceptions of [Plaintiff]'s
23 limitations are adversely influenced by that very concern for [her]
24 well being. Close relatives most often accept, without critical and
25 objective examination, the subjective complaints of loved ones." (AR
26 26.) The ALJ did not address Ms. Abbott's hearing testimony.

27 Even were the Court to construe the ALJ's comments regarding Ms.
28 Abbott's written reports as applying equally to her hearing testimony,

1 it would still find that the ALJ erred in discounting the testimony
2 order remand. It is not proper to discount a relative's testimony
3 based solely on the fact that the testimony came from a relative, who
4 might be inclined to see things the claimant's way. See, e.g.,
5 *Regennitter*, 166 F.3d at 1298 (explaining that "the fact that a lay
6 witness is a family member cannot be a ground for rejecting his or her
7 testimony. To the contrary, testimony from lay witnesses who see the
8 claimant everyday is of particular value . . . such lay witnesses will
9 often be family members.") (quoting *Smolen*, 80 F.3d at 1289); *Johnson*
10 *v. Astrue*, 2008 WL 4553141, at *6 (C.D. Cal. Oct. 9, 2008) (noting
11 that "the Ninth Circuit has consistently held that bias cannot be
12 presumed from a familial relationship."). Because the ALJ's
13 justification for rejecting Ms. Abbott's testimony was inadequate, her
14 testimony must be reconsidered on remand.

15 E. Failure to Obtain Vocational Expert Testimony

16 Finally, Plaintiff contends that her non-exertional limitations
17 precluded the ALJ from relying exclusively on the Medical-Vocational
18 Guidelines (the "Grids") at step five of the sequential disability
19 analysis and required the ALJ to obtain the testimony of a vocational
20 expert. (Joint Stip. at 16-25.) This claim is contingent on
21 Plaintiff's claims that the ALJ failed to properly consider the
22 medical evidence and the testimony of Plaintiff and her daughter, as
23 discussed above. In light of the Court's conclusion that the matter
24 must be remanded for further consideration of the treating doctors'
25 opinions and the testimony of Plaintiff and her daughter, the ALJ may
26 well need to make a new residual functional capacity analysis to
27 determine the extent to which Plaintiff's fibromyalgia and her alleged
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1 pain and fatigue stemming from it limit her ability to work, and then
2 conduct a new step-five analysis.

3 To provide additional guidance on remand, however, the Court
4 notes that the postural limitations, as found by the ALJ in her
5 decision, and the mild and moderate mental limitations assessed by the
6 examining psychologist, (AR 22, 251), would not necessarily preclude
7 use of the Grids, nor would the impairments that Plaintiff testified
8 to but which lacked support in the record. See SSR 85-15 (noting that
9 "there are nonexertional limitations or restrictions which have very
10 little or no effect on the unskilled light occupational base," such as
11 climbing and crawling); *Hoopai v. Astrue*, 499 F.3d 1071, 1077 (9th
12 Cir. 2007) (holding that step-two findings that claimant was
13 moderately limited in several areas of mental functioning did not
14 preclude ALJ's reliance on Grids without use of vocational expert);
15 *Tackett v. Apfel*, 180 F.3d 1094, 1102 (9th Cir. 1999) (holding that
16 "the fact that a non-exertional limitation is alleged does not
17 automatically preclude application of the grids.").

18 F. Plaintiff's Request For An Award Of Benefits

19 Plaintiff seeks reversal for an award of benefits. (Joint Stip.
20 at 62). The decision whether to remand for further proceedings is
21 within this Court's discretion. *Harman v. Apfel*, 211 F.3d 1172,
22 1177-1178 (9th Cir. 2000). Where no useful purpose would be served by
23 further administrative proceedings, or where the record has been fully
24 developed, the Court can remand with instructions to award benefits.
25 *Id.* at 1179 ("[T]he decision of whether to remand for further
26 proceedings turns upon the likely utility of such proceedings").
27 Where, as here, however, there are outstanding issues that must be
28 resolved before a determination of disability can be made and it is

1 not clear from the record that Plaintiff is disabled, remand for
2 further proceedings is appropriate. *Id.* at 1180-81; see also *Bunnell*
3 *v. Barnhart*, 336 F.3d 1112, 1116 (9th Cir. 2003). Because the record
4 remains undeveloped with respect to the treating doctors' opinions and
5 the testimony of Plaintiff and her daughter, the Court is not in a
6 position to say with certainty whether the medical and other evidence
7 of record compels the conclusion that Plaintiff is or is not disabled
8 under the regulations. Thus, remand for further proceedings is
9 appropriate.

10 For these reasons, the Agency's decision is reversed and the case
11 is remanded for further proceedings consistent with this Opinion.

12 IT IS SO ORDERED.

13 DATED: September 30, 2009.

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17 PATRICK J. WALSH
18 UNITED STATES MAGISTRATE JUDGE
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