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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JUANITA MORENO,)	Case No. CV 09-3644-JEM
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	REVERSING DECISION OF THE
)	COMMISSIONER OF SOCIAL SECURITY
MICHAEL J. ASTRUE,)	AND REMANDING FOR IMMEDIATE
Commissioner of Social Security,)	AWARD OF BENEFITS
)	
Defendant.)	
_____)	

PROCEEDINGS

On May 22, 2009, Juanita Moreno (“Plaintiff” or “Claimant” or “Moreno”) filed a complaint seeking review of the decision by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for Supplemental Security Income (“SSI”) disability benefits. The Commissioner filed an Answer on August 11, 2009. On December 7, 2009, the parties filed a Joint Stipulation (“JS”). The matter is now ready for decision.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision should be reversed and remanded for an immediate award of benefits.

1 **BACKGROUND**

2 Plaintiff Juanita Moreno is a 63 year old female who was determined to have the
3 medically determinable severe impairments of type II diabetes mellitus and degenerative disc
4 disease of the lower thoracic, lumbar and cervical spine. (AR 14.) She also was determined
5 to have the medically determinable but nonsevere mental impairment of depressive disorder.
6 (AR 15.) Plaintiff has not engaged in substantial gainful activity since the August 25, 2006,
7 application date. (AR 14.)

8 Plaintiff’s claim was denied initially on May 15, 2007, and on reconsideration on
9 August 12, 1007. (AR 12.) She filed a timely request for hearing, which was held before
10 Administrative Law Judge (“ALJ”) Mary L. Everstine on December 1, 2008, in Santa Barbara,
11 California. (AR 12.) Claimant appeared and testified. (AR 12.) Vocational expert Elizabeth
12 Cerezo also testified. (AR 12.)

13 The ALJ issued an unfavorable decision on January 14, 2009. (AR 12-19.) The ALJ
14 determined that Plaintiff had the residual functional capacity (“RFC”)¹ to perform the full
15 range of medium work (AR 15), including her past relevant work as a caregiver and driver
16 (AR 18), and other jobs in the national economy in the light work category, such as a
17 companion for domestic care. (AR 18-19.) The ALJ also determined that Claimant has a
18 limited education but is able to communicate in English. (AR 18.)

19 **DISPUTED ISSUES**

20 As reflected in the Joint Stipulation, the disputed issues that Plaintiff is raising as
21 grounds for reversal and remand are as follows:

- 22 1. Whether the ALJ properly considered the medical evidence to find that Plaintiff
23 does not suffer from a severe mental impairment.
- 24 2. Whether the ALJ properly considered the subjective pain testimony of Plaintiff.

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¹ Residual functional capacity is what one “can still do despite [his or her]
28 limitations” and represents an assessment “based on all the relevant evidence.” 20 C.F.R.
§§ 404.1545(a)(1), 416.945(a)(1).

1 **STANDARD OF REVIEW**

2 Under 42 U.S.C. § 405(g), this Court reviews the ALJ’s decision to determine whether
3 the ALJ’s findings are supported by substantial evidence and whether the proper legal
4 standards were applied. DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991).
5 Substantial evidence means “‘more than a mere scintilla’ but less than a preponderance.”
6 Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v. Perales, 402
7 U.S. 389, 401 (1971)).

8 Substantial evidence is “such relevant evidence as a reasonable mind might accept as
9 adequate to support a conclusion.” Richardson, 402 U.S. at 401 (internal quotations and
10 citations omitted). This Court must review the record as a whole and consider adverse as
11 well as supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir.
12 2006). Where evidence is susceptible to more than one rational interpretation, the ALJ’s
13 decision must be upheld. Morgan v. Comm’r, 169 F.3d 595, 599 (9th Cir. 1999). “However,
14 a reviewing court must consider the entire record as a whole and may not affirm simply by
15 isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882 (quoting
16 Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495 F.3d
17 625, 630 (9th Cir. 2007). If the Commissioner cannot meet this burden, then the claimant is
18 entitled to benefits.

19 **SEQUENTIAL EVALUATION**

20 The Social Security Act defines disability as the “inability to engage in any substantial
21 gainful activity by reason of any medically determinable physical or mental impairment which
22 can be expected to result in death or . . . can be expected to last for a continuous period of
23 not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner
24 has established a five-step sequential process to determine whether a claimant is disabled.
25 20 C.F.R. §§ 404.1520, 416.920.

26 The first step is to determine whether the claimant is presently engaging in
27 substantially gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the
28 claimant is engaging in substantially gainful activity, disability benefits will be denied. Bowen

1 v. Yuckert, 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether the claimant
2 has a severe impairment or combination of impairments. Parra, 481 F.3d at 746. Third, the
3 ALJ must determine whether the impairment is listed, or equivalent to an impairment listed,
4 in Appendix I of the regulations. Id. If the impediment meets or equals one of the listed
5 impairments, the claimant is presumptively disabled. Bowen, 482 U.S. at 141. Fourth, the
6 ALJ must determine whether the impairment prevents the claimant from doing past relevant
7 work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001). Before making the step four
8 determination, the ALJ first must determine the claimant's RFC. 20 C.F.R. § 416.920(e).
9 The RFC must consider all of the claimant's impairments, including those that are not
10 severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling ("SSR") 96-8p. If the
11 claimant cannot perform his or her past relevant work, the ALJ proceeds to the fifth step and
12 must determine whether the impairment prevents the claimant from performing any other
13 substantial gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

14 The claimant bears the burden of proving steps one through four, consistent with the
15 general rule that at all times the burden is on the claimant to establish his or her entitlement
16 to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the
17 claimant, the burden shifts to the Commissioner to show that the claimant may perform other
18 gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). If the
19 Commissioner cannot meet this burden, then the claimant is disabled and entitled to
20 benefits. Id.

21 In this case, the ALJ determined that the Claimant had the medically determinable
22 severe impairments of type II diabetes mellitus and degenerative disc disease. The ALJ,
23 however, concluded at step four of the sequential process that Plaintiff could perform her
24 prior work and at step five that she could perform other jobs in the national economy.

25 The ALJ also determined that Plaintiff had a medically determinable mental
26 impairment of depressive disorder with anxiety but concluded at step two of the sequential
27 process that this impairment was not severe.

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1 **DISCUSSION**

2 **A. The ALJ Failed To Consider Properly**
3 **Plaintiff's Mental Impairment**

4 The ALJ concluded at step two of the sequential process that Plaintiff's medically
5 determinable mental impairment of depression disorder was not severe. Substantial
6 evidence supports the ALJ's determination. The ALJ erred nonetheless in finding that
7 Plaintiff's mental impairments imposed no limitations and by failing to consider Plaintiff's
8 mental impairments in combination with her other impairments in determining her RFC and
9 assessing what jobs she can perform.

10 At step two of the five step sequential inquiry, the ALJ determines whether the
11 claimant has a medically severe impairment or combination of impairments. Bowen, 482
12 U.S. at 140-41. An impairment is not severe if it does not significantly limit the claimant's
13 ability to work. Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996). The ALJ, however,
14 must consider the combined effect of all the claimant's impairments on his or her ability to
15 function, regardless of whether each alone was sufficiently severe. Id. Also, the ALJ must
16 consider the claimant's subjective symptoms in determining severity. Id.

17 The step two inquiry is a de minimis screening device to dispose of groundless claims.
18 Bowen, 482 U.S. at 153-54. An impairment or combination of impairments can be found
19 nonsevere only if the evidence establishes a slight abnormality that has no more than a
20 minimal effect on an individual's ability to work. Smolen, 80 F.3d at 1290; SSR 85-28;
21 Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988) (adopting SSR 85-28).

22 In this case, the ALJ determined that Claimant suffers from the medically
23 determinable mental impairment of depressive disorder with anxiety over her medical
24 condition. At the request of the Social Security Administration, Dr. Jeannette Townsend,
25 Ph.D. performed a comprehensive mental evaluation of Plaintiff on January 27, 2007. (AR
26 14-15, 328-31.) Claimant reported "problems with back, body pain and muscle spasms" (AR
27 278) and was unable to sit, stand or lie down too long. (AR 279.) She felt depressed about
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1 her medical condition. (AR 278.) She reported two years of outpatient therapy but no
2 psychiatric hospitalizations. (AR 278.)

3 Dr. Townsend diagnosed Plaintiff with depressive disorder with anxiety in reaction to
4 medical condition. (AR 280.) According to Dr. Townsend, Plaintiff could “understand simple
5 and detailed instructions” and “some complex instructions.” (AR 281.) She was able to do
6 “simple repetitive tasks.” (AR 281.) She was assessed a GAF of 55. (AR 15, 281.)
7 Dr. Townsend observed that Plaintiff was “interrupted by pain during the evaluation and she
8 had to stand up several times.” (AR 281.) Dr. Townsend recommended outpatient treatment
9 for Plaintiff’s depression. (AR 281.)

10 State agency reviewing psychiatrist Dr. McAuley diagnosed Plaintiff with affective
11 disorder (AR 318) and depressive disorder with anxiety in reaction to medical condition. (AR
12 328.) He failed to mark the box that this impairment was not severe. (AR 328.) Dr. McAuley
13 indicated mild limitations in functioning (AR 326) and moderate limitations in ability to
14 maintain attention, perform activities within a schedule, and complete a normal weekday
15 without interruptions from psychologically based symptoms. (AR 329-30.) He also indicated
16 that Plaintiff is able to do “simple repetitive tasks” (AR 328) and semi-complex tasks. (AR
17 331.) He opined that her depression is stable with Zoloft. (AR 328.) Dr. McAuley added that
18 most of Plaintiff’s limitations are due to physical complaints. (AR 328.) He found her
19 credible. (AR 331.)

20 Both sides mischaracterize the mental evaluation evidence. The ALJ found no
21 limitations due to her depressive disorder (AR 15), which is contrary to Dr. McAuley’s
22 evaluation in which he found both mild and moderate limitations in functioning. (AR 326,
23 329-30.) The ALJ also said that Plaintiff testified at the hearing that medication for her
24 depression controls her symptoms. (AR 15.) This misstates Plaintiff’s testimony. When
25 asked if medication controlled her depression, Plaintiff stated, “I can’t say. I don’t. I don’t
26 know.” (AR 77-78.)

1 Likewise, Plaintiff mistakenly interprets the evidence to contain a simple repetitive
2 tasks limitation that precludes semi-skilled work. Neither Dr. Townsend nor Dr. McAuley
3 ever said Plaintiff was limited to simple repetitive tasks. Dr. Townsend said Plaintiff could
4 understand simple and complex instructions. Dr. McAuley said Plaintiff could do semi-
5 complex tasks. Neither said Plaintiff was limited to unskilled work. Substantial evidence
6 supports the ALJ's determination that Plaintiff's medically determinable mental impairment of
7 depression was nonsevere.

8 The ALJ erred nonetheless. After determining that Plaintiff's mental impairment was
9 not severe, the ALJ decision thereafter never mentions Plaintiff's mental impairment or the
10 limitations resulting from that impairment in determining her RFC and assessing what jobs
11 she can perform. This is probably the result of the ALJ's factually inaccurate conclusion that
12 Plaintiff has no limitations due to her mental impairment. (AR 15.)

13 The ALJ's failure to consider Plaintiff's mental impairments at steps four and five of
14 the sequential process was legal error. Social Security regulations mandate that an ALJ
15 must "consider the limiting effects of all your impairment(s), even those that are not severe,
16 in determining your residual functional capacity." 20 C.F.R. § 416.945(e). Social Security
17 Ruling 96-8p also provides:

18 In assessing RFC, the adjudicator must consider limitations and
19 restrictions imposed by all of an individual's impairments, even those that
20 are not "severe." While a "not severe" impairment(s) may not significantly
21 limit an individual's ability to do basic work activities, it may — when
22 considered with limitations or restrictions due to other impairments — be
23 critical to the outcome of a claim.

24 Thus, Plaintiff's mental impairment should have been considered in assessing Plaintiff's RFC
25 and in determining what, if any, jobs she can perform. The Commissioner argues that the
26 outcome here would have been the same even if limitations resulting from her mental
27 impairment were included in her RFC. This is post hoc reasoning that the Court cannot
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1 consider. Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003). This contention also
2 assumes no other error.

3 The ALJ erred in yet another way. Ninth Circuit cases make clear that a claimant's
4 impairments "must be considered in combination and must not be fragmented in evaluating
5 their effects." Beecher v. Heckler, 756 F.2d 693, 694 (9th Cir. 1985) (internal quotations and
6 citation omitted). The ALJ must consider the combined effect of all of a claimant's
7 impairments on his or her ability to function "without regard to whether each alone was
8 sufficiently severe." Smolen, 80 F.3d at 1290.

9 Here, Plaintiff's mental impairment was integrally related to her medical condition.
10 The ALJ determined on competent medical evidence that Plaintiff suffers from depressive
11 disorder with anxiety in reaction to medical condition. Nowhere does the ALJ decision
12 consider Plaintiff's mental and physical impairments in combination with each other in
13 determining Plaintiff's RFC and deciding the disability issue.

14 **B. The ALJ Erred In Rejecting Plaintiff's**
15 **Subjective Pain Testimony**

16 The ALJ found that Plaintiff has the severe medical impairments of type II diabetes
17 mellitus and degenerative disc disease of the lower thoracic, lumbar and cervical spine. (AR
18 14.) The ALJ determined that these medical impairments reasonably could be expected to
19 cause Plaintiff's subjective pain symptoms. (AR 16.) Nonetheless, the ALJ decision
20 concluded that Claimant's symptoms are not credible to the extent they are inconsistent with
21 the assessed RFC. (AR 16.) This finding is unsupported by the evidence and in legal error.

22 The test for deciding whether to accept a claimant's subjective symptom testimony
23 turns on whether the claimant produces medical evidence of an impairment that reasonably
24 could be expected to produce the pain or other symptoms alleged. Bunnell v. Sullivan, 947
25 F.2d 341, 346 (9th Cir. 1991); see also Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998);
26 Smolen v. Chater, 80 F.3d at 1281-82 esp. n.2. The Commissioner may not discredit a
27 claimant's testimony on the severity of symptoms merely because they are unsupported by
28 objective medical evidence. Reddick, 157 F.3d at 722; Bunnell, 947 F.2d at 343, 345. If the

1 ALJ finds the claimant's pain testimony not credible, the ALJ "must specifically make findings
2 which support this conclusion." Bunnell, 947 F.2d at 345. The ALJ must set forth "findings
3 sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit
4 claimant's testimony." Thomas v. Barnhart, 278 F.3d 949, 958 (9th Cir. 2002); see also
5 Rollins v. Massanari, 261 F.3d 853, 856-57 (9th Cir. 2001); Bunnell, 947 F.2d at 345-46.
6 Unless there is evidence of malingering, the ALJ can reject the claimant's testimony about
7 the severity of a claimant's symptoms only by offering "specific, clear and convincing reasons
8 for doing so." Smolen, 80 F.3d at 1283-84; see also Reddick, 157 F.3d at 722. The ALJ
9 must identify what testimony is not credible and what evidence discredits the testimony.
10 Reddick, 157 F.3d at 722; Smolen, 80 F.3d at 1284.

11 In this case, Plaintiff Juanita Moreno alleges disabling back and neck pain from her
12 degenerative disc disease that makes it difficult for her to sit or stand more than 30-45
13 minutes (AR 78) or to lift, bend or carry heavy things. (AR 76, 141.) Plaintiff's daughter
14 Maria Salazar confirmed these symptoms. (AR 16.) So did Dr. Townsend, who observed
15 that Plaintiff was interrupted by pain during the mental evaluation and had to stand up
16 several times. (AR 281.) The ALJ decision never mentions this important observational
17 evidence. Also confirming Plaintiff's pain symptoms was chiropractor Ted Garcia, who
18 indicated that Plaintiff was unable to bend and stoop, lift more than 10 pounds, or stand more
19 than 2 hours. (AR 497; see also AR 419-96.)

20 As the ALJ concedes, Plaintiff's degenerative disc disease reasonably could cause
21 her pain symptoms. On May 16, 2008, a cervical spine CT exam revealed chronic
22 degenerative disc disease, moderately severe spinal stenosis with cord infringement and/or
23 compression, posterior disc bulge, and bridging anterior endplate osteophytes. (AR 498-99.)
24 A lumbar spine CT on the same date revealed severe degenerative change of the facet joints
25 and a broad degenerative concentric-type bulge which produces mild central stenosis. (AR
26 500-02.) These findings by St. John's Regional Imaging Center confirm earlier radiographs
27 in March of 2007 at Clinicas Del Camino Real that indicated mild to moderate
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1 spondyloarthritic and degenerative disc disease in the thoracic and lumbar spine. (AR 408,
2 411.)

3 There is no evidence of malingering nor does the ALJ assert malingering.
4 Dr. Townsend found her cooperative and an adequate historian. (AR 278.) Dr. McAuley
5 found her credible. (AR 331.) The ALJ did not dispute the statements of Plaintiff's daughter
6 regarding Plaintiff's pain. (AR 116.) Thus, the ALJ can reject Claimant's testimony on the
7 severity of her pain only with "specific, clear and convincing reasons for doing so." Smolen,
8 80 F.3d at 1284.

9 The ALJ decision does not meet this high standard. The ALJ advances several
10 reasons for finding Claimant's pain symptoms "not credible." (AR 16.) None of these
11 reasons are clear and convincing.

12 First, the ALJ found that Plaintiff lacks credibility because the objective medical
13 evidence does not support her symptoms. (AR 16.) The lack of objective medical evidence,
14 even if true, would not be dispositive as a matter of law. Bunnell, 947 F.2d at 345 ("once the
15 claimant produces objective evidence of an underlying impairment, an adjudicator may not
16 reject a claimant's subjective complaints based solely on a lack of objective evidence");
17 Rollins, 261 F.3d at 857 (subjective testimony cannot be rejected on "sole" ground that
18 objective medical evidence is lacking). There must be other evidence to support Plaintiff's
19 subjective symptoms. In particular, the ALJ plainly erred in his treatment of Maria Salazar's
20 testimony. Not offering any legitimate reasons for disputing it, the ALJ decision simply "gives
21 greater weight to the documented medical evidence of record." (AR 16.) The ALJ did
22 exactly what case law and regulations forbid. She disregarded important lay witness
23 testimony based solely on the medical evidence.

24 Even though not determinative of the severity of pain, the medical evidence is
25 nonetheless a relevant factor in determining the severity of a claimant's pain. Rollins, 261
26 F.3d at 857; Smolen, 80 F.3d at 1285. Here, though, the ALJ's characterization of the
27 medical evidence is inaccurate and unfair. The ALJ primarily relies on consulting examiner
28 Dr. Michaelson and state agency reviewing physician Dr. Tambellini. (AR 17.) Both of these

1 physicians were internists, not orthopedists; Dr. Michaelson explicitly states that his report is
2 an internal medicine assessment. (AR 272.) Dr. Michaelson neither conducted nor ordered
3 radiographs or CT scans, and he did not know the extent of Plaintiff's degenerative disc
4 disease. Even so, he found a 50% decreased range of motion when examining for back
5 pain. (AR 275-76.) The ALJ erred in favoring the testimony of Dr. Michaelson and
6 Dr. Tambellini "based on supportability with medical signs and laboratory tests." (AR 16.)
7 Both Dr. Michaelson and Dr. Tambellini completed their reports before the CT scans were
8 done. Nor is it clear that either saw or was aware of the chiropractic evidence. Their
9 assessment that Plaintiff can perform medium exertional work and lift 50 pounds occasionally
10 and 25 pounds frequently is simply not credible.

11 The ALJ also unfairly discounts the chiropractor's opinion because it purportedly is
12 based primarily on the subjective statements of the claimant. (AR 17.) There is no evidence
13 to support this assertion, which is contrary to the record. Mr. Garcia provided physical
14 therapy for two years and was in a position to observe Claimant over a long period of time.
15 (AR 419-96.) Also, the radiographs done at Clinicas Del Camino Real where Mr. Garcia
16 works were consistent with the later CT scans. He clearly did not rely primarily on Plaintiff's
17 own subjective statements.

18 Second, the ALJ asserts that Plaintiff did not receive treatment consistent with her
19 claims of disabling pain. (AR 17.) More specifically, the medical records indicated that
20 Plaintiff received only limited and conservative treatment consisting of physical therapy and
21 pain medication. (See AR 17, 189, 212, 219.) Conservative treatment has been found to
22 suggest a lower level of pain and functional limitation than alleged by the claimant. Johnson
23 v. Shalala, 60 F.3d 1428, 1434 (9th Cir. 1995). The simple answer to this contention is that a
24 definitive diagnosis of degenerative disc disease was not made until May of 2008 and no one
25 ever took Plaintiff's pain seriously before then. Thus, there is no basis for putting the
26 responsibility for more aggressive treatment on Plaintiff, who has a limited education and
27 limited financial means. An ALJ may not draw inferences about an individual's symptoms
28 from a failure to pursue medical treatment without first considering any explanations that a

1 claimant may provide. SSR 96-7p at *7; 1996 WL 374186 at *7. In this case, no effort was
2 made to obtain an explanation. The ALJ's conservative treatment ground for rejecting
3 Plaintiff's subjective pain symptoms is not clear and convincing.

4 Third, the ALJ asserts that Plaintiff's depression improved with medication. (AR 15.)
5 This is not quite accurate, as already noted, and in any event has nothing to do with
6 Plaintiff's pain from degenerative disc disease.

7 Fourth, the ALJ found that Plaintiff complained of sleep problems but "was hesitant to
8 take pills." (AR 17.) This fact, even if true, does not mean that Plaintiff was not experiencing
9 pain from degenerative disc disease. Plaintiff already was taking several medications. (AR
10 212.)

11 Plaintiff has the medically determinable severe impairment of degenerative disc
12 disease. Her subjective pain symptoms are consistent with the CT scans, the chiropractic
13 evidence, her own testimony, her daughter's testimony, and Dr. Townsend's observation of
14 her pain during the mental evaluation. Her physical pain has resulted in a medically
15 determinable mental impairment that imposes additional limitations. In combination,
16 Plaintiff's degenerative disc disease, her subjective pain symptoms, which must be credited,
17 and her mental impairments that the ALJ and vocational expert did not consider, undermine
18 the ALJ's medium exertion RFC and render the vocational expert's testimony of no
19 evidentiary value. It is not credible that someone with Plaintiff's physical impairments,
20 subjective pain symptoms, and depression could or should perform the functions of a
21 caregiver or domestic companion or could handle the responsibility that goes with those
22 positions.

23 Indeed, the ALJ decision reflects uncertainty as to Plaintiff's occupational capacity and
24 implicitly credits Plaintiff's subject pain symptoms. Initially, the ALJ assigns Plaintiff a full
25 range medium work RFC and concludes that Plaintiff can perform her prior relevant work as
26 a caregiver and bus driver. (AR 18.) The ALJ further concludes that, with additional
27 exertional limitations, Plaintiff could perform her prior work as a caregiver but not as a bus
28 driver. (AR 18.) The ALJ then says that, "if some credit is given to Claimant's testimony and

1 she is limited to light work,” she can perform the job of domestic companion. (AR 17-18.)
2 The problem with the ALJ’s analysis, however, is that no one ever asked the vocational
3 expert to accept Plaintiff’s subjective pain symptoms or to consider her mental impairments
4 in assessing whether she was capable of performing the caregiver and domestic companion
5 or other jobs. The ALJ also erred in only giving “some credit” to Plaintiff’s subjective
6 symptoms and no consideration at all to her mental impairments in assessing Plaintiff’s
7 occupational capacity.

8 Plaintiff’s subjective pain symptoms must be credited. As a result, the ALJ’s
9 determination that Plaintiff is not disabled is unsupported by substantial evidence and in legal
10 error and must be reversed.

11 **DISPOSITION**

12 The only remaining question is whether this case should be remanded for further
13 proceedings or an immediate award of benefits. The choice of whether to reverse and
14 remand for further proceedings or for an immediate award of benefits is within the discretion
15 of the Court. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989). Remand is
16 appropriate where additional proceedings would remedy defects in the ALJ’s decision and
17 where the record should be developed more fully. Marcia v. Sullivan, 900 F.2d 172, 176 (9th
18 Cir. 1990).²

19 Where the record has been developed fully and further administrative proceedings
20 would serve no useful purpose, the case should be remanded for an immediate award of
21 benefits. Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004). More specifically, a court
22 should credit the evidence improperly rejected by the ALJ and remand for an award of
23 benefits if: (1) the ALJ failed to provide legally sufficient reasons for rejecting Plaintiff’s
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25 ² See also, generally, INS v. Orlando Ventura, 537 U.S. 12, 16 (2002), holding in
26 an asylum proceeding that the proper course is generally remand to an agency of a matter
27 that states place primarily in agency hands, except in “rare circumstances.” In Orlando
28 Ventura, however, the Attorney General retained ultimate discretion whereas in Social
Security cases benefits are mandatory if a claimant is disabled. Moisa v. Barnhart, 367
F.3d 882, 887 (9th Cir. 2004).

1 evidence; (2) there are no outstanding issues to be resolved; and (3) it is clear that the ALJ
2 would be required to find Claimant disabled if Plaintiff's evidence was credited. Id.

3 This case is similar to Moisa, 367 F.3d at 887. Moisa turned entirely on the credibility
4 of the claimant's subjective pain testimony, which was improperly discounted. Taken as true,
5 his pain testimony established his inability to work. The case required no further agency
6 expertise and was remanded for an immediate award of benefits. Moisa held that the
7 Commissioner, having lost his appeal, should not have another opportunity to prove that
8 Moisa was not credible. Id.

9 Here too, the Court sees no purpose in remanding for further proceedings. Just as
10 occurred in Moisa, the ALJ erred in rejecting Plaintiff's subjective pain symptom evidence
11 which must be credited. The ALJ also erred in failing to consider Plaintiff's mental
12 impairments in the RFC and occupational assessments. The ALJ concedes that, if Plaintiff's
13 subjective pain symptoms were fully credited, she would be disabled. (AR 17.)

14 Additionally, the vocational expert never considered Plaintiff's subjective pain
15 symptoms or mental impairments. As a result, the vocational testimony is of no evidentiary
16 value. The vocational expert's occupational assessments at steps four and five of the
17 sequential process are unsupported by substantial evidence and in legal error. Thus, the
18 ALJ did not meet the Commissioner's burden at step five to prove that Claimant is able to
19 work. The Claimant is disabled. Lounsbury, 468 F.3d at 1114.

20 There are no outstanding issues. Therefore, the case will be reversed and remanded
21 for an immediate award of benefits.

ORDER

IT IS HEREBY ORDERED that the Decision of the Commissioner of Social Security is reversed and remanded for immediate award of benefits.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: August 11, 2010

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

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