



1 Based on the record as a whole and the applicable law, the decision of the  
2 Commissioner is REVERSED AND REMANDED for further proceedings  
3 consistent with this Memorandum Opinion and Order of Remand.

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**  
5 **DECISION**

6 On May 30, 2006, plaintiff filed an application for Disability Insurance  
7 Benefits. (Administrative Record (“AR”) 10, 82). Plaintiff asserted that she  
8 became disabled on January 31, 1999, due to lupus, diabetes, back problems, pain  
9 throughout her body, and knee problems. (AR 103). The Administrative Law  
10 Judge (“ALJ”) examined the medical record and heard testimony from plaintiff  
11 (who was represented by counsel) and a vocational expert on January 31, 2008.  
12 (AR 16).

13 On April 18, 2008, the ALJ determined that plaintiff was not disabled  
14 through the date last insured (*i.e.*, December 31, 2003). (AR 15). Specifically, the  
15 ALJ found: (1) plaintiff suffered from the following severe impairments:  
16 fibromyalgia and polymyalgia rheumatica (AR 12); (2) plaintiff’s impairments,  
17 considered singly or in combination, did not meet or medically equal one of the  
18 listed impairments (AR 12); (3) plaintiff retained the residual functional capacity  
19 to perform the full range of medium work (20 C.F.R. § 404.1567(c)) (AR 13);  
20 (4) plaintiff could perform her past relevant work (AR 15); and (5) plaintiff’s  
21 allegations regarding her limitations were not credible to the extent they were  
22 inconsistent with the ALJ’s residual functional capacity assessment (AR 14).

23 The Appeals Council denied plaintiff’s application for review. (AR 1).

24 **III. APPLICABLE LEGAL STANDARDS**

25 **A. Sequential Evaluation Process**

26 To qualify for disability benefits, a claimant must show that she is unable to  
27 engage in any substantial gainful activity by reason of a medically determinable  
28 physical or mental impairment which can be expected to result in death or which

1 has lasted or can be expected to last for a continuous period of at least twelve  
2 months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C.  
3 § 423(d)(1)(A)). The impairment must render the claimant incapable of  
4 performing the work she previously performed and incapable of performing any  
5 other substantial gainful employment that exists in the national economy. Tackett  
6 v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

7 In assessing whether a claimant is disabled, an ALJ is to follow a five-step  
8 sequential evaluation process:

- 9 (1) Is the claimant presently engaged in substantial gainful activity? If  
10 so, the claimant is not disabled. If not, proceed to step two.
- 11 (2) Is the claimant's alleged impairment sufficiently severe to limit  
12 her ability to work? If not, the claimant is not disabled. If so,  
13 proceed to step three.
- 14 (3) Does the claimant's impairment, or combination of  
15 impairments, meet or equal an impairment listed in 20 C.F.R.  
16 Part 404, Subpart P, Appendix 1? If so, the claimant is  
17 disabled. If not, proceed to step four.
- 18 (4) Does the claimant possess the residual functional capacity to  
19 perform her past relevant work? If so, the claimant is not  
20 disabled. If not, proceed to step five.
- 21 (5) Does the claimant's residual functional capacity, when  
22 considered with the claimant's age, education, and work  
23 experience, allow her to adjust to other work that exists in  
24 significant numbers in the national economy? If so, the  
25 claimant is not disabled. If not, the claimant is disabled.

26 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th  
27 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

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1 The claimant has the burden of proof at steps one through four, and the  
2 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262  
3 F.3d 949, 954 (9th Cir. 2001) (citing Tackett); see also Burch, 400 F.3d at 679  
4 (claimant carries initial burden of proving disability).

#### 5 **B. Standard of Review**

6 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of  
7 benefits only if it is not supported by substantial evidence or if it is based on legal  
8 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.  
9 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457  
10 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable  
11 mind might accept as adequate to support a conclusion.” Richardson v. Perales,  
12 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a  
13 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing  
14 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

15 To determine whether substantial evidence supports a finding, a court must  
16 “consider the record as a whole, weighing both evidence that supports and  
17 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.  
18 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d  
19 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming  
20 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that  
21 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

#### 22 **IV. DISCUSSION**

23 Plaintiff contends that the ALJ improperly evaluated the credibility of  
24 plaintiff’s subjective complaints. (Plaintiff’s Motion at 15-18). The Court agrees.  
25 As the Court cannot find that the ALJ’s error was harmless, a remand is warranted.

#### 26 **A. Pertinent Law**

27 “To determine whether a claimant’s testimony regarding subjective pain or  
28 symptoms is credible, an ALJ must engage in a two-step analysis.” Lingenfelter v.

1 Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, “the ALJ must determine  
2 whether the claimant has presented objective medical evidence of an underlying  
3 impairment ‘which could reasonably be expected to produce the pain or other  
4 symptoms alleged.’” Id. (quoting Bunnell v. Sullivan, 947 F.2d 341, 344 (9th Cir.  
5 1991) (en banc)).

6 “Second, if the claimant meets this first test, and there is no evidence of  
7 malingering, ‘the ALJ can reject the claimant’s testimony about the severity of her  
8 symptoms only by offering specific, clear and convincing reasons for doing so.’”

9 Lingenfelter, 504 F.3d at 1036 (citations omitted). “In making a credibility  
10 determination, the ALJ ‘must specifically identify what testimony is credible and  
11 what testimony undermines the claimant’s complaints.’” Greger v. Barnhart, 464  
12 F.3d 968, 972 (9th Cir. 2006) (citation omitted). “The ALJ must cite the reasons  
13 why the claimant’s testimony is unpersuasive.” Orn v. Astrue, 495 F.3d 625, 635  
14 (9th Cir. 2007) (citation and quotation marks omitted). In weighing credibility,  
15 the ALJ may consider factors including: the nature, location, onset, duration,  
16 frequency, radiation, and intensity of any pain; precipitating and aggravating  
17 factors (e.g., movement, activity, environmental conditions); type, dosage,  
18 effectiveness, and adverse side effects of any pain medication; treatment, other  
19 than medication, for relief of pain; functional restrictions; the claimant’s daily  
20 activities; and “ordinary techniques of credibility evaluation.” Bunnell, 947 F.2d  
21 at 346 (citing Social Security Ruling (“SSR”) 88-13; quotation marks omitted).

22 The ALJ may consider (a) inconsistencies or discrepancies in a claimant’s  
23 statements; (b) inconsistencies between a claimant’s statements and activities;  
24 (c) exaggerated complaints; and (d) an unexplained failure to seek treatment.

25 Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If properly supported,  
26 the ALJ’s credibility determination is entitled to “great deference.” See Green v.  
27 Heckler, 803 F.2d 528, 532 (9th Cir. 1986).

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1           **B.     Analysis**

2           In this case, the ALJ stated that plaintiff’s allegations regarding her  
3 subjective symptoms were “not credible to the extent they [were] inconsistent with  
4 the residual functional capacity assessment for the reasons explained below.” (AR  
5 14). The only reason the ALJ “explained below” for discounting plaintiff’s  
6 credibility was that plaintiff’s subjective complaints were “largely unsupported.”  
7 (AR 14) (emphasis added). Assuming the ALJ properly determined that plaintiff’s  
8 statements were not supported by the objective medical evidence, such a  
9 determination may not serve as the ALJ’s only ground for discrediting plaintiff’s  
10 statements. Burch, 400 F.3d at 681; Rollins v. Massanari 261 F.3d 853, 857 (9th  
11 Cir. 2001) (“While subjective pain testimony cannot be rejected on the sole ground  
12 that it is not fully corroborated by objective medical evidence, the medical  
13 evidence is still a relevant factor in determining the severity of the claimant’s pain  
14 and its disabling effects.”) (citing 20 C.F.R. § 404.1529(c)(2)). Accordingly, the  
15 Court concludes that the ALJ erred in the assessment of plaintiff’s credibility. The  
16 Court cannot find such error to be harmless error since, as the ALJ points out,  
17 plaintiff testified essentially that she was unable to perform even sedentary work  
18 on a full time basis. (AR 13).

19           Defendant correctly notes that the ALJ may have properly discredited  
20 plaintiff’s subjective complaints because they were inconsistent with conservative  
21 medical treatment plaintiff received and plaintiff did not explain her failure to seek  
22 more aggressive treatment, or because plaintiff’s alleged limitations were  
23 materially inconsistent with her daily activities.<sup>1</sup> See, e.g., Tommasetti v. Astrue,

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26           <sup>1</sup>Earlier in the ALJ’s decision, during a summary of the medical evidence and a  
27 discussion of Dr. Tang’s opinions, the ALJ referenced plaintiff’s “history of conservative  
28 treatment” and receipt of “intermittent conservative care.” (AR 13, 14). In discussing Dr. Tang’s  
opinions, the ALJ also noted that plaintiff “did not consult Dr. Tang until September 2003, after  
allegedly having suffered six years of severe joint and muscle pain.” (AR 14). The ALJ pointed

(continued...)

1 533 F.3d 1035, 1040 (9th Cir. 2008) (evidence that claimant “responded favorably  
2 to conservative treatment” and failed to seek alternative/more aggressive treatment  
3 undermines plaintiff’s reports of disabling pain); Parra v. Astrue, 481 F.3d 742,  
4 750-51 (9th Cir. 2007) (“evidence of ‘conservative treatment’ is sufficient to  
5 discount a claimant’s testimony regarding severity of an impairment”), cert.  
6 denied, 552 U.S. 1141 (2008); Thomas, 278 F.3d at 958-59 (inconsistency  
7 between the claimant’s testimony and the claimant’s conduct supported rejection  
8 of the claimant’s credibility). As currently written, however, the administrative  
9 decision does not adequately specify which, if any, of such grounds supported the  
10 ALJ’s credibility determination. See supra note 1. See Greger, 464 F.3d at 972.  
11 Accordingly, the Court cannot affirm the ALJ on such grounds. Orn, 495 F.3d at  
12 630 (9th Cir. 2007) (“We review only the reasons provided by the ALJ in the  
13 disability determination and may not affirm the ALJ on a ground upon which he  
14 did not rely.”); see also Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003)  
15 (“We are constrained to review the reasons the ALJ asserts.”).

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27 <sup>1</sup>(...continued)

28 to the foregoing factors as reasons for discounting Dr. Tang’s opinions but did not reference such factors in the later discussion regarding plaintiff’s credibility. (AR 14).

1 **V. CONCLUSION<sup>2</sup>**

2 For the foregoing reasons, the decision of the Commissioner of Social  
3 Security is reversed in part, and this matter is remanded for further administrative  
4 action consistent with this Opinion.<sup>3</sup>

5 LET JUDGMENT BE ENTERED ACCORDINGLY.

6 DATED: June 3, 2011

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/s/

8 Honorable Jacqueline Chooljian  
9 UNITED STATES MAGISTRATE JUDGE

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22 <sup>2</sup>The Court need not, and has not adjudicated plaintiff's other challenges to the ALJ's  
23 decision, except insofar as to determine that a reversal and remand for immediate payment of  
benefits would not be appropriate. On remand, however, the ALJ may wish to articulate more  
clearly his reasons for discrediting Dr. Tang's opinions. (Plaintiff's Motion at 8-13).

24 <sup>3</sup>When a court reverses an administrative determination, "the proper course, except in rare  
25 circumstances, is to remand to the agency for additional investigation or explanation."  
26 Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and  
27 quotations omitted). Remand is proper where, as here, additional administrative proceedings  
28 could remedy the defects in the decision. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.  
1989); see also Connett, 340 F.3d at 876 (remand is an option where the ALJ stated invalid  
reasons for rejecting a claimant's excess pain testimony).