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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KAREN E. SOPER,)	NO. CV 10-04521-MAN
)	
Plaintiff,)	
)	MEMORANDUM OPINION
v.)	
)	AND ORDER
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff filed a Complaint on June 25, 2010, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for Disabled Widow's Benefits. On August 2, 2010, the parties consented to proceed, pursuant to 28 U.S.C. § 636(c), before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on February 23, 2011, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits; and defendant requests that the Commissioner's decision be affirmed or, alternatively, remanded for further administrative proceedings. The Court has taken the parties' Joint Stipulation under submission without oral argument.

1 should not work in an environment with concentrated exposure
2 to extreme heat or cold; she should not work at unprotected
3 heights; and she is precluded from using hazardous
4 equipment.

5
6 (A.R. 15.)
7

8 The ALJ concluded that transferability of job skills is not an
9 issue, because plaintiff does not have past relevant work. (A.R. 20.)
10 Having considered plaintiff's age, education, work experience, RFC, as
11 well as the testimony of the vocational expert, the ALJ found that jobs
12 exist in the national economy that plaintiff can perform, including
13 those of mail clerk, furniture rental consultant, and garment sorter.
14 (A.R. 20.) Accordingly, the ALJ concluded that plaintiff has not been
15 under a disability within the meaning of the Social Security Act from
16 June 19, 2006, through the date of his decision. (A.R. 21.)
17

18 **STANDARD OF REVIEW**
19

20 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
21 decision to determine whether it is free from legal error and supported
22 by substantial evidence in the record as a whole. Orn v. Astrue, 495
23 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
24 evidence as a reasonable mind might accept as adequate to support a
25 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
26 a mere scintilla but not necessarily a preponderance." Connett v.
27 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the
28 record can constitute substantial evidence, only those 'reasonably drawn

1 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,
2 1066 (9th Cir. 2006)(citation omitted).

3
4 Although this Court cannot substitute its discretion for that of
5 the Commissioner, the Court nonetheless must review the record as a
6 whole, "weighing both the evidence that supports and the evidence that
7 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
8 Health & Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also Jones
9 v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is responsible
10 for determining credibility, resolving conflicts in medical testimony,
11 and for resolving ambiguities." Andrews v. Shalala, 53 F.3d 1035, 1039
12 (9th Cir. 1995).

13
14 The Court will uphold the Commissioner's decision when the evidence
15 is susceptible to more than one rational interpretation. Burch v.
16 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
17 review only the reasons stated by the ALJ in his decision "and may not
18 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
19 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
20 the Commissioner's decision if it is based on harmless error, which
21 exists only when it is "clear from the record that an ALJ's error was
22 'inconsequential to the ultimate nondisability determination.'" Robbins
23 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
24 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d
25 at 679.

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1 DISCUSSION

2
3 Plaintiff alleges the following two issues: (1) whether the ALJ
4 erred in his analysis of the medical and vocational evidence; and (2)
5 whether the ALJ erred in his evaluation of plaintiff's credibility and
6 subjective symptoms. (Joint Stipulation ("Joint Stip.") at 2-3.) The
7 Court addresses these issues, in reverse order, below.

8
9 **I. The ALJ Failed to Give Clear And Convincing Reasons For Finding**
10 **Plaintiff's Testimony To Be Only Partially Credible.**

11
12 Once a disability claimant produces objective evidence of an
13 underlying impairment that is reasonably likely to be the source of her
14 subjective symptom(s), all subjective testimony as to the severity of
15 the symptoms must be considered. Moisa v. Barnhart, 367 F.3d 882, 885
16 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.
17 1991)(en banc); see also 20 C.F.R. § 404.1529(a)(explaining how pain and
18 other symptoms are evaluated). "[U]nless an ALJ makes a finding of
19 malingering based on affirmative evidence thereof, he or she may only
20 find an applicant not credible by making specific findings as to
21 credibility and stating clear and convincing reasons for each."
22 Robbins, 466 F.3d at 883. The factors to be considered in weighing a
23 claimant's credibility include: (1) the claimant's reputation for
24 truthfulness; (2) inconsistencies either in the claimant's testimony or
25 between the claimant's testimony and his conduct; (3) the claimant's
26 daily activities; (4) the claimant's work record; and (5) testimony from
27 physicians and third parties concerning the nature, severity, and effect
28 of the symptoms of which the claimant complains. See Thomas v.

1 Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); see also 20 C.F.R. §
2 404.1529(c).

3
4 The ALJ found that "after careful consideration of the evidence
5 . . . [plaintiff]'s medically determinable impairments could reasonably
6 be expected to cause the alleged symptoms" (A.R. 17.) Further,
7 the ALJ cited no evidence of malingering by plaintiff. Accordingly, the
8 ALJ's reason for rejecting plaintiff's credibility must be "clear and
9 convincing."

10
11 The ALJ does not dispute that plaintiff has demonstrated objective
12 evidence of severe physical impairments. However, the ALJ found that
13 plaintiff's subjective testimony regarding the severity of her pain
14 symptoms was not credible. The ALJ generally stated two grounds, and
15 implied two others, for rejecting plaintiff's credibility about the
16 severity of her pain. (A.R. 15-19.) The ALJ stated that: (1)
17 plaintiff's allegations about when her pain began were inconsistent; and
18 (2) plaintiff's allegations concerning the intensity, persistence, and
19 limiting effects of her symptoms were not supported by "the clinical and
20 diagnostic medical evidence." (A.R. 17.) The ALJ also implied that:
21 (3) plaintiff's daily activities appear to be inconsistent with her
22 alleged limitations; and (4) the fact that she "admitted no doctor has
23 reported her to the Department of Motor Vehicles (DMV) to restrict her
24 driving privileges due to physical impairments" appears to be
25 inconsistent with her alleged limitations. (A.R. 16.) These reasons,
26 while specific, do not constitute clear and convincing reasons based on
27 substantial evidence as required.

1 The ALJ's first ground is not clear and convincing, because he
2 isolates three words -- "no prior problems" -- from a report by one
3 doctor -- Brent R. Davis, M.D., an orthopedic surgeon -- to
4 mischaracterize the record. See Reddick v. Chater, 157 F.3d 715, 722-23
5 (9th Cir. 1998)(reversing and remanding case, because ALJ's
6 characterization of the record was "not entirely accurate regarding the
7 content or tone"); see also Gallant v. Heckler, 753 F.2d 1450, 1456 (9th
8 Cir. 1984)(holding that it was error for an ALJ to ignore or misstate
9 competent evidence in the record to justify his conclusion). The ALJ
10 asserts that plaintiff's "allegations that her pain began as early as
11 2002 are inconsistent with her statements in the treatment record."
12 (A.R. 16.) This is not the case.

13
14 When, on March 6, 2007, plaintiff saw Dr. Davis for an orthopedic
15 surgery consultation as a result of her right shoulder pain, Dr. Davis
16 noted "no prior problems" in plaintiff's history. (A.R. 168.) However,
17 the consultation with Dr. Davis was only to examine the need for surgery
18 on her right shoulder; it was not for a general assessment of her
19 fibromyalgia, degenerative disc disease of the lumbar/cervical spine, or
20 any other condition that might cause plaintiff to experience pain. Dr.
21 Davis' notation of "no prior problems" thus should be read in context as
22 referring only to her right shoulder about which she sought his opinion.
23 In fact, Dr. Davis noted plaintiff had a history of chronic pain in the
24 neck and shoulder area, and he noted a recent diagnosis of fibromyalgia
25 in plaintiff's medical history. (A.R. 168.) As plaintiff did not claim
26 to have pain in her shoulder before May 2006, Dr. Davis' and plaintiff's
27 statements are not inconsistent.

1 Plaintiff claimed to have pain in her foot and knee starting in
2 2002; in her neck, rib cage, and back starting in January 2005; in her
3 hips since January 2007; and in her hands since her 20s. (A.R. 119.)
4 On November 21, 2006, plaintiff saw Dr. Pearly Lim, M.D., a
5 rheumatologist, for a consultation. (A.R. 170.) Dr. Lim noted that
6 plaintiff developed knee, lower back, and neck pain with associated
7 stiffness "several years ago." (A.R. 170.) While Dr. Lim was not
8 specific as to the exact onset date of plaintiff's pain, plaintiff's
9 treatment records may not fairly be said to contradict plaintiff's
10 statement that her pain began in 2002. The ALJ's isolation of three
11 words from one doctor's opinion is a mischaracterization of the record
12 and, therefore constitutes error.

13
14 The ALJ's second ground is not clear and convincing, because he
15 relies on a lack of clinical and diagnostic evidence to support his
16 disbelief in the severity of plaintiff's pain allegations when, by the
17 very nature of fibromyalgia, there generally is very little, if any,
18 objective clinical or diagnostic evidence upon which the fibromyalgia
19 diagnosis is based. See Sarchet v. Chater, 78 F.3d 305, 306 (7th Cir.
20 1996)("Fibromyalgia . . . [is an] elusive and mysterious disease";
21 "[it]s cause or causes are unknown, there is no cure, and, of great
22 importance to disability law, its symptoms are entirely subjective").
23 Because of its nature, "there are no laboratory tests for the presence
24 and severity of fibromyalgia." *Id.*² The ALJ relies on physical

25
26 ² "[T]he only symptom that discriminates between [fibromyalgia] and
27 other diseases of a rheumatic character' [are] multiple tender spots,
28 more precisely 18 fixed locations on the body (and the rule of thumb is
that the patient has to have at least 11 of them to be diagnosed as
having fibromyalgia) that when pressed firmly cause the patient to

1 examinations of plaintiff performed by various doctors, which found only
2 limited or mild degenerative problems in the spine and moderate to
3 severe degenerative changes in the right shoulder, to assert that the
4 pain caused by plaintiff's fibromyalgia could not be as severe as
5 claimed. (A.R. 17-18.) This is not a legitimate ground for
6 discrediting plaintiff's credibility, because there are no objective
7 tests that could have been performed to prove plaintiff's subjective
8 claims regarding her degree of pain.

9
10 Further, the failure of the medical record to corroborate fully
11 plaintiff's subjective symptom testimony is not, by itself, a legally
12 sufficient basis for rejecting such testimony. Rollins, 261 F.3d at
13 856; Bunnell, 947 F.2d at 347 (noting that "[i]f an adjudicator could
14 reject a claim of disability simply because [plaintiff] fails to produce
15 evidence supporting the severity of the pain there would be no reason
16 for an adjudicator to consider anything other than medical findings").
17 Accordingly, the ALJ's finding that the objective evidence does not
18 support the extent of plaintiff's symptoms cannot, by itself, constitute
19 a clear and convincing reason for discrediting plaintiff's testimony.
20 See Varney v. Secretary, 846 F.2d 581, 584 (9th Cir. 1988); Cotten v.
21 Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986); see also Burch, 400 F.3d at
22 681.

23
24
25 flinch." Rollins v. Massanari, 261 F.3d 853, 855 (9th Cir.
26 2001)(quoting Sarchet, 78 F.3d at 306). On February 5, 2007, when
27 examined by Dr. Thang T. Le, a rheumatologist, plaintiff exhibited
28 tenderness in 14 out of the possible 18 fixed locations (A.R. 250); and
on August 8, 2007, when examined by Dr. Parke King Chang, also a
rheumatologist, plaintiff exhibited tenderness in 12 out of the possible
18 fixed locations (A.R. 243).

1 The ALJ's third ground is not clear and convincing, because
2 plaintiff's daily activities are not inconsistent with her reported pain
3 or limitations. An ALJ may not rely on a plaintiff's daily activities
4 to support an adverse credibility determination when those activities do
5 not suggest that the claimant has the ability to perform work activities
6 on an ongoing and daily basis. Gonzalez v. Sullivan, 914 F.2d 1197,
7 1201 (9th Cir. 1990). As the Ninth Circuit noted in Lester, the ALJ
8 must evaluate claimant's "'ability to work on a *sustained* basis.'" Lester v. Chater,
9 81 F.3d 821, 833 (9th Cir. 1995) (citing 20 C.F.R. §
10 404.1512(a)). A claimant need not be "utterly incapacitated to be
11 eligible for benefits, . . . and many home activities are not easily
12 transferable to what may be the more grueling environment of the
13 workplace, where it might be impossible to periodically rest or take
14 medication." Fair v. Bowen, 885 F.2d 597, 602 (9th Cir. 1989).

15
16 To support his adverse credibility finding on this ground, the ALJ
17 stated that plaintiff "admitted her bedroom was on the second floor
18 where she lived and she had to walk down the stairs daily"; "she
19 reported being able to wash dishes, wipe the counters, and sort
20 laundry"; "[she] admitted she fed her two cats and fish"; "[and] she
21 conceded she was able to take care of her own personal hygiene." (A.R.
22 16.) While the ALJ did not directly state that plaintiff's daily
23 activities were inconsistent with her subjective pain testimony, the
24 language used to describe plaintiff's statements, *i.e.* "admitted" and
25 "conceded", along with their placement directly following his finding
26 that plaintiff is only "partially credible," indicate that the ALJ used
27 plaintiff's daily activities, in part, as a ground to discredit her
28 statements. The Court finds this ground unconvincing, because

1 plaintiff's limited daily activities do not show that she would be able
2 to work on a "sustained basis" in the workplace. See Lester, 81 F.3d
3 at 833. Indeed, as the ALJ noted, plaintiff testified that while she
4 may be able to perform these several tasks, she has to "take breaks
5 every fifteen minutes," "[cannot] clean the litter box," and "drop[s]
6 things a lot." (A.R. 16.) The ALJ fails to explain how plaintiff's
7 ability to undertake basic activities and light household chores, with
8 frequent breaks, translates into the ability to perform full-time work.
9 See Fair, 885 F.3d 602. This constitutes error.

10
11 The ALJ's fourth ground also is not clear and convincing, because
12 the fact that "upon further questioning, plaintiff admitted no doctor
13 has reported her to the Department of Motor Vehicles (DMV) to restrict
14 her driving privilege due to physical impairments" (A.R. 16) is not a
15 factor which the ALJ is allowed to consider in weighing a claimant's
16 credibility. See Thomas v. Barnhart, 278 F.3d at 958-59 (9th Cir.
17 2002); see also 20 C.F.R. § 404.1529(c). As with ground three, the ALJ
18 did not specifically articulate that this was a ground on which he based
19 his decision to discredit plaintiff's credibility, but from his
20 questioning of plaintiff in the record (A.R. 34); the language used in
21 his decision, *i.e.* "she admitted"; and the placement of this ground
22 directly following his finding that plaintiff is only "partially
23 credible," it is apparent that the ALJ considered this ground, at least
24 in part, in determining plaintiff's credibility. This constitutes
25 error.

26
27 Accordingly, for the aforementioned reasons, the ALJ failed to give
28 clear and convincing reasons, as required, for discrediting plaintiff's

1 subjective pain testimony.

2
3 **II. The ALJ Erred In His Analysis Of The Medical Evidence.**

4
5 Plaintiff claims that the ALJ: (1) improperly discredited the
6 Functional Capacity Questionnaire completed by plaintiff's treating
7 physician, Jennifer Magalong, an internist; (2) improperly relied on the
8 medical expert, Dr. Lorber, because he is not qualified to testify
9 regarding the diagnosis of fibromyalgia; and, (3) went outside the
10 record and offered his own medical opinion about fibromyalgia.³ (Joint
11 Stip. at 4.)

12
13 **A. On Remand, The ALJ Must Reconsider The Physical Residual Functional**
14 **Capacity Questionnaire Completed By Plaintiff's Treating Physician.**

15
16 It is the responsibility of the ALJ to resolve conflicts in medical
17 testimony and analyze evidence. Magallanes v. Bowen, 881 F.2d 747, 750
18 (9th Cir. 1989). In the hierarchy of physician opinions considered in
19

20 ³ While not raised by plaintiff, the Court notes that the ALJ must
21 also consider all the side effects of plaintiff's pain medication and
22 their impact on plaintiff's ability to work. See Erickson v. Shalala,
23 9 F.3d 813, 817-18 (9th Cir.1993)(noting that an ALJ must consider all
24 factors, including the side effects of medications, that might have a
25 "'significant impact on an individual's ability to work'")(citation
26 omitted); see also Soc. Sec. Ruling 96-7p, 1996 WL 374186, at *2-*3,
27 1996 SSR LEXIS 4, at *7-*8 (noting that the type, dosage, effectiveness,
28 and side effects of any medication the individual takes or has taken to
alleviate pain or other symptoms should be considered in the disability
evaluation); 20 C.F.R. § 404.1529(c)(3)(iv). The ALJ casually mentions
that plaintiff had hot flashes from ibuprofen (A.R. 16), but plaintiff
testified that she has severe hot flashes that cause her to "wake up
every 20 minutes all night long drenched in sweat" (A.R. 37).
Plaintiff also testified that "the Amitrypilline will knock [her] out
for maybe an hour or so." (A.R. 38.) The ALJ's failure to consider
these side effects constitutes error.

1 assessing a social security claim, “[g]enerally, a treating physician’s
2 opinion carries more weight than an examining physician’s, and an
3 examining physician’s opinion carries more weight than a reviewing
4 physician’s.” Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir.
5 2001); 20 C.F.R. § 404.1527(d). The opinions of treating physicians are
6 entitled to the greatest weight, because the treating physician is hired
7 to cure and has a better opportunity to observe the claimant.
8 Magallanas, 881 F.2d at 751. When a treating physician’s opinion is not
9 contradicted by another physician, it may be rejected only for “clear
10 and convincing” reasons. Lester, 81 F.3d at 830. When contradicted by
11 another doctor, a treating physician’s opinion may only be rejected if
12 the ALJ provides “specific and legitimate” reasons supported by
13 substantial evidence in the record. *Id.*

14
15 On February 4, 2009, plaintiff’s treating physician, Dr. Magalong,
16 completed a Physical Residual Functional Capacity Questionnaire
17 (“questionnaire”) in which she diagnosed plaintiff with fibromyalgia and
18 cervical radiculopathy, with an onset date of 2005. (A.R. 399-403.)
19 Significantly, Dr. Magalong opined that, as a result of plaintiff’s
20 fibromyalgia, plaintiff would have numerous functional limitations in a
21 competitive work place.⁴ (*Id.*)

22 _____
23 ⁴ Specifically, Dr. Magalong opined that: plaintiff was not a
24 malingerer; her depression affected her physical condition; her
25 impairments are reasonably consistent with the symptoms and functional
26 limitations described in the questionnaire; her pain is frequently
27 severe enough to interfere with attention and concentration needed to
28 perform even simple work tasks; she is capable of low stress jobs; she
can walk only half a city block without rest or severe pain; she can sit
or stand for 15 minutes at a time; she can sit and stand/walk for 2
hours with normal breaks in an 8-hour workday; she must get up to walk
every 15 minutes for 10 minutes; plaintiff needs a job at which she can
shift positions from sitting to standing at will; she will have to take

1 The ALJ reviewed Dr. Magalong's questionnaire but discredited it,
2 because: (1) Dr. Magalong relied almost entirely on plaintiff's
3 subjective complaints, which the ALJ found to be only partially
4 credible; (2) the ALJ found the treating relationship between Dr.
5 Magalong and plaintiff to be brief; (3) the ALJ found the questionnaire
6 to be internally inconsistent; and (4) the ALJ found the questionnaire
7 to be without substantial support from the other evidence of record.
8 (A.R. 18.) The Court does not find these grounds to be specific and
9 legitimate reasons to discredit the questionnaire completed by
10 plaintiff's treating physician.

11
12 The ALJ's first ground is not legitimate, because as discussed
13 above, the ALJ's rejection of plaintiff's subjective testimony was not
14 well-founded, and the principle means of diagnosing fibromyalgia is
15 through subjective symptoms. Sarchet, 78 F.3d at 306. Because of its
16 nature, "there are no laboratory tests for the presence and severity of
17 fibromyalgia." *Id.*

18
19 The ALJ's second ground is not legitimate, because he incorrectly
20 described the length and extent of the treating relationship between Dr.
21 Magalong and plaintiff. The ALJ stated that "Dr. Magalong began
22 treating the claimant on February 4, 2008, and completed the
23 questionnaire on August 4, 2008." (A.R. 18.) This is not the case. In
24 actuality, Dr. Magalong did begin treating plaintiff on February 4,

25 _____
26 unscheduled breaks every 2-4 hours for around 30 minutes each; she can
27 rarely lift less than 10 pounds and should never lift more than 10; she
28 can occasionally twist, but can only rarely bend, crouch, climb ladders,
or climb stairs; she has significant limitations reaching, handling, or
fingering; and she will likely miss more than four days of work a month.
(A.R. 399-403.)

1 2008, but she completed the questionnaire on *February 4, 2009*, and she
2 stated on the questionnaire that plaintiff saw her every three months
3 during that period. (A.R. 266, 398, 403.) The ALJ erred when he
4 incorrectly characterized the length and extent of the treating
5 relationship between Dr. Magalong and plaintiff.

6
7 The ALJ's third ground is not legitimate, because the Court does
8 not find the questionnaire to be inconsistent. The ALJ states that "Dr.
9 Magalong noted the [plaintiff]'s symptoms as 'numbness/tingling from
10 neck into below arms [and] fingers'" and that "Dr. Magalong did not even
11 mention [plaintiff] felt any pain, yet she diagnosed [plaintiff] as
12 having fibromyalgia" (A.R. 18.) While Dr. Magalong did not
13 include pain as a symptom in her response to question four of the
14 questionnaire, which asked about symptoms, she included plaintiff's pain
15 symptoms directly below in response to question five, which specifically
16 asked about pain. (A.R. 399.) The Court does not find the fact that
17 Dr. Magalong chose to write about plaintiff's pain only in response to
18 question five, and not also in response to question four, to be a
19 legitimate reason to find the questionnaire internally inconsistent and,
20 therefore, not credible.

21
22 The ALJ's fourth ground is not legitimate, because plaintiff's lack
23 of *objectively* determinable physical ailments does not mean that Dr.
24 Magalong's opinion is not supported by the record. The ALJ asserts that
25 Dr. Magalong's "opinion is without substantial support from the other
26 evidence of record, which obviously renders it less persuasive." (A.R.
27 18-19.) To support his finding, the ALJ lists findings of doctors and
28 surgeons who had previously examined plaintiff and found only minimal

1 objectively determinable physical ailments. (A.R. 17-18.) However,
2 fibromyalgia is a diagnosis of last resort. It is not well-understood,
3 its symptoms are subjective, and it is difficult to diagnose. See
4 Jordan v. Northrop Grumman Corp. Welfare Plan, 370 F.3d 869, 872 (9th
5 Cir. 2004)(*overruled on other grounds in Abatie v. Alta Health & Life*
6 *Ins.*, 458 F.3d 955, 970 (2006)(noting that "fibromyalgia's cause or
7 causes are unknown, there is no cure, and of greatest importance to
8 disability law, its symptoms are entirely subjective"). The fact that
9 plaintiff has only minimal objectively determinable ailments does not
10 mean that Dr. Magalong's opinion is unsupported. As discussed above,
11 there generally is very little, if any, objective clinical or diagnostic
12 evidence upon which the fibromyalgia diagnosis is based. As plaintiff's
13 treating physician, Dr. Magalong is in the best position to determine
14 the severity of plaintiff's fibromyalgia and is best situated to
15 determine plaintiff's limitations. Also, Dr. Magalong is not the only
16 physician of record who diagnosed plaintiff with fibromyalgia. Dr. Le
17 Thang, M.D., diagnosed plaintiff with fibromyalgia in 2007 (A.R.
18 164-166), and Dr. Parke King Chang, M.D., also diagnosed plaintiff with
19 fibromyalgia in 2007 (A.R. 243). Given plaintiff's fibromyalgia
20 diagnoses, the lack of objective medical evidence is not a legitimate
21 reason to discredit plaintiff's treating physician's assessment.
22

23 Furthermore, none of the doctors the ALJ listed opined about
24 plaintiff's ability to sustain employment. The ALJ examined the medical
25 records and came to his own conclusion that the assessment of
26 plaintiff's limitations by Dr. Magalong was not credible, because he
27 thought the record only supported minimal limitations in her ability to
28 sustain employment. (A.R. 17.) The ALJ is not a doctor, and he is not

1 qualified to make his own determinations on the physical capabilities of
2 plaintiff. His choice to do so constitutes error.

3
4 On remand, because the ALJ failed to give legitimate reasons to
5 discredit the questionnaire of plaintiff's treating physician, the ALJ
6 must provide such reasons or give the questionnaire controlling weight.
7 The ALJ must also refrain from asserting his own lay opinion about
8 plaintiff's physical abilities.

9
10 **B. The ALJ Should Not Rely On The Opinions Of The Medical Expert And**
11 **Medical Consultant Over The Opinion Of Plaintiff's Treating**
12 **Physician.**

13
14 In making his determination, and posing hypothetical questions to
15 the vocational expert, Ms. Porter, the ALJ relied on the opinions of the
16 medical expert, Dr. Lorber, and the RFC assessment by Dr. F. Kalmar,
17 M.D. (A.R. 24-43.) This constitutes error because: (1) the evaluation
18 by Dr. Magalong should have been given more weight than either Dr.
19 Lorber's or Dr. Kalmar's opinion; (2) Dr. Lorber did not factor
20 fibromyalgia into his assessment, even though plaintiff has been
21 diagnosed with fibromyalgia by multiple treating physicians, because he
22 "[does not] give much weight to the diagnosis of fibromyalgia" (A.R.
23 29); and, (3) the assessment by Dr. Kalmar was not based on plaintiff's
24 full medical record.

25
26 Regarding the first reason, as discussed above, the questionnaire
27 completed by Dr. Magalong should have been given controlling weight, or
28 the ALJ should have given specific and legitimate reasons for not doing

1 so. Neither Dr. Lorber nor Dr. Kalmar ever actually examined plaintiff.
2 The ALJ's reliance on their opinions rather than on the opinion of
3 plaintiff's treating physician, Dr. Magalong, without a specific and
4 legitimate reason for doing so, constitutes error.

5
6 Regarding the second reason, the ALJ relied almost exclusively on
7 the opinion of Dr. Lorber, largely because the ALJ appears to share Dr.
8 Lorber's skepticism about the legitimacy of a diagnosis of fibromyalgia.
9 During plaintiff's hearing before the ALJ, Dr. Lorber mentioned that
10 plaintiff had been diagnosed with fibromyalgia on multiple occasions,
11 and that he had seen the questionnaire submitted by plaintiff's treating
12 physician, but Dr. Lorber then proceeded to ignore those facts when
13 giving his assessment of plaintiff's limitations. (A.R. 27-28.) When
14 asked about fibromyalgia by plaintiff's attorney, Dr. Lorber said, "I
15 don't give much weight to the diagnosis of fibromyalgia[,] and I'll
16 leave that decision up to the judge as to further consideration of
17 fibromyalgia." (A.R. 29.)

18
19 The ALJ expressed his belief that it was impossible for plaintiff
20 to have fibromyalgia along with other ailments, because fibromyalgia is
21 a "garbage can disorder" (A.R. 40), even though plaintiff had been
22 diagnosed with fibromyalgia several times by several doctors. When
23 plaintiff's attorney asked him to consider plaintiff's diagnosis of
24 fibromyalgia the ALJ responded by saying, "Well, let's argue about it.
25 Yeah, it's recognized as a syndrome. It's not a disease. . . . And I
26 don't need you to lecture me. I've read every website there is on
27 fibromyalgia. . . . Well, it's never there to start with according to
28 the journals just because of complaints." (A.R. 40-42.)

1 While the ALJ gives lip service to plaintiff's diagnosed
2 fibromyalgia by listing it as a severe impairment, he relies heavily on
3 the evaluation of a doctor who does not believe in fibromyalgia, and he
4 himself expresses hostility to the idea that plaintiff has fibromyalgia.
5 This is error. The Ninth Circuit has recognized that fibromyalgia is a
6 legitimate disease, the existence of which is accepted by medical
7 professionals. See Rollins, 261 F.3d at 855 (stating that fibromyalgia
8 is "a syndrome that has been widely recognized in the medical community
9 for only about 10 years"). The ALJ's use of the medical expert's
10 opinion, and his own opinion about fibromyalgia, to justify not
11 considering the limitations imposed by plaintiff's fibromyalgia,
12 constitutes error.

13
14 Regarding the third reason, in posing questions to the vocational
15 expert, the ALJ greatly favored the RFC completed by a medical
16 consultant, Dr. Kalmar, who, it seems, did not actually treat plaintiff,
17 but completed the RFC in 2007, based on medical records then available.
18 (A.R. 189-94.) The ALJ did not mention Dr. Kalmar in his decision, but
19 it is clear from the transcripts of the proceedings that the ALJ used
20 Dr. Kalmar's assessment much more heavily than that of Dr. Magalong's in
21 posing hypothetical questions to the vocational expert and in making his
22 decision. (A.R. 24-43.) Dr. Kalmar made his assessment in 2007, and so
23 did not have the medical records for the period after April 4, 2007.
24 (A.R. 189-94.) Therefore, Dr. Kalmar's RFC is based on incomplete
25 medical records. The ALJ's use of Dr. Kalmar's assessment from 2007,
26 over plaintiff's treating physician's assessment from 2009, constitutes
27 error.

1 Accordingly, the Court finds that the ALJ should either use Dr.
2 Magalong's assessment over those of Dr. Lorber and Dr. Kalmar in posing
3 hypotheticals to the vocational expert, or he should give specific and
4 legitimate reasons for not doing so.

5
6 **III. Remand Is Required.**

7
8 The decision whether to remand for further proceedings or order an
9 immediate award of benefits is within the district court's discretion.
10 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
11 useful purpose would be served by further administrative proceedings, or
12 where the record has been fully developed, it is appropriate to exercise
13 this discretion to direct an immediate award of benefits. *Id.* at 1179
14 ("[T]he decision of whether to remand for further proceedings turns upon
15 the likely utility of such proceedings."). However, where there are
16 outstanding issues that must be resolved before a determination of
17 disability can be made, and it is not clear from the record that the ALJ
18 would be required to find the claimant disabled if all the evidence were
19 properly evaluated, remand is appropriate. *Id.* at 1179-81.

20
21 On remand, the ALJ must correct the above-mentioned deficiencies
22 and errors. The ALJ needs to reconsider plaintiff's testimony regarding
23 her pain and ability to work and, if appropriate, give clear and
24 convincing reasons for rejecting it. In addition, the ALJ must give
25 plaintiff's treating physician's opinion its deserved weight or give
26 specific and legitimate reasons for not doing so. Additional testimony
27 from a vocational expert to determine what work, if any, plaintiff can
28 perform will likely be required.

1
2 **CONCLUSION**

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 **LET JUDGMENT BE ENTERED ACCORDINGLY.**
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12 DATED: July 26, 2011
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Margaret A. Nagle

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15 MARGARET A. NAGLE
16 UNITED STATES MAGISTRATE JUDGE
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