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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 SHEILA MARIE CHESNES,) Case No. CV 10-7535 PJW
11 Plaintiff,)
12 v.) MEMORANDUM OPINION AND ORDER
13 MICHAEL J. ASTRUE,)
14 Commissioner of the)
15 Social Security Administration,)
16 Defendant.)
_____)

17 I. INTRODUCTION

18 Plaintiff appeals the decision of Defendant Social Security
19 Administration ("the Agency"), denying her applications for
20 Disability Insurance benefits ("DIB") and Supplemental Security
21 Income ("SSI"). She claims that the Administrative Law Judge ("ALJ")
22 erred in finding that she was not credible. (Joint Stip. at 3-12.)
23 For the reasons explained below, the Agency's decision is reversed
24 and the case is remanded for further proceedings.

25 II. SUMMARY OF PROCEEDINGS

26 Plaintiff applied for DIB and SSI on November 8, 2007, alleging
27 that she had been unable to work since December 30, 2006, because of
28 fibromyalgia, migraines, severe tendon problems, and vision problems.

1 (Administrative Record ("AR") 102-07, 111, 115.) The Agency denied
2 her application initially and on reconsideration. (AR 68-77, 83-87.)
3 She then requested and was granted a hearing before an ALJ.
4 (AR 89-91.) Plaintiff appeared with counsel and testified at the
5 hearing on July 1, 2009. (AR 41-67.) The ALJ subsequently issued a
6 decision denying benefits. (AR 11-24.) Plaintiff appealed to the
7 Appeals Council, which denied review. (AR 1-7.) She then commenced
8 the instant action.

9 III. ANALYSIS

10 The ALJ found that Plaintiff's testimony that she was severely
11 impaired was not credible. Plaintiff contends that the ALJ's reasons
12 for this finding were not clear and convincing and were not supported
13 by substantial evidence in the record. (Joint Stip. at 4-12.) For
14 the following reasons, the Court agrees.

15 ALJs are tasked with judging the credibility of the witnesses.
16 In making credibility determinations, they employ ordinary
17 credibility evaluation techniques. *Smolen v. Chater*, 80 F.3d 1273,
18 1284 (9th Cir. 1996). Where a claimant has produced objective
19 medical evidence of an impairment which could reasonably be expected
20 to produce the alleged symptoms and there is no evidence of
21 malingering, the ALJ can only reject the claimant's testimony for
22 specific, clear, and convincing reasons, *id.* at 1283-84, that are
23 supported by substantial evidence in the record. *Thomas v. Barnhart*,
24 278 F.3d 947, 959 (9th Cir. 2002).

25 The ALJ found that Plaintiff's obesity, fibromyalgia, migraines,
26 and tendonitis were severe impairments. (AR 17.) She concluded that
27 these impairments could reasonably be expected to produce Plaintiff's
28 alleged symptoms and did not find that Plaintiff was malingering, but

1 determined that her statements concerning her symptoms were "not
2 entirely credible." (AR 20.) The ALJ cited four reasons for
3 questioning Plaintiff's credibility: (1) Plaintiff exaggerated her
4 claims of depression; (2) she regularly engaged in physical
5 activities that were inconsistent with her claimed limitations; (3)
6 the intensity of her alleged physical pain was inconsistent with the
7 objective medical evidence; and (4) her headache claims were
8 exaggerated. (AR 20-21.) The Court addresses each one in turn.

9 The ALJ rejected Plaintiff's testimony because she had not
10 undergone any treatment to address her alleged depression and the
11 consulting psychiatrist found that she was not limited as a result of
12 her depression. (AR 20.) Plaintiff argues that this was not a valid
13 reason to question her testimony because she never claimed that she
14 was impaired due to depression. For the reasons explained below, the
15 Court agrees.

16 Plaintiff never claimed that she was unable to work because she
17 was depressed. (AR 50, 128, 138.) She complained mostly about
18 physical ailments that caused severe pain and prevented her from
19 working, though she noted that, beginning in 2006, she began
20 experiencing panic attacks, which made it hard for her to cope.
21 (AR 47-48, 128.) Though she testified at the administrative hearing
22 that she cried a lot, she never claimed that that was the reason she
23 could not work. (AR 49.) When she went to the consultative
24 psychological examination, she told Dr. Stephan Simonian that she was
25 depressed, and he agreed, diagnosing her with depression. (AR 198,
26 201.) But Plaintiff never added depression to her list of claimed
27 impairments.

1 Thus, the Court is at a loss to understand why Plaintiff's
2 failure to seek treatment for depression establishes that she was
3 lying when she claimed that her physical ailments prevented her from
4 working. It appears that Plaintiff may not have even recognized that
5 she was suffering from depression until she was in the midst of the
6 application process. As such, the Court finds that her failure to
7 seek treatment is not a convincing reason for doubting her testimony.

8 The second reason the ALJ relied on for discounting Plaintiff's
9 testimony was that her daily activities--including taking walks,
10 preparing meals, and doing housework--were inconsistent with her
11 claimed level of impairment. (AR 21.) The record does not fully
12 support this finding.

13 A claimant's ability to perform daily activities may be grounds
14 for an adverse credibility finding where the ability to perform these
15 activities is inconsistent with the claimant's testimony or where the
16 claimant is able to "spend a substantial part of [her] day engaged in
17 pursuits involving the performance of physical functions that are
18 transferable to a work setting." *Orn v. Astrue*, 495 F.3d 625, 639
19 (9th Cir. 2007) (quotation omitted). The fact that a claimant can
20 perform a limited range of chores, however, does not mean that she
21 can work or that she is lying when she claims that she cannot. See
22 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) (holding a
23 claimant need not be "utterly incapacitated" in order to be found
24 disabled).

25 Plaintiff testified that she did "light work" and "little
26 things" around the house, including "wash[ing] a sink or . . . a
27 couple dishes just to keep moving." (AR 51-53.) She explained that
28 she did not cook like she "used to do" and instead, was confined to

1 merely microwaving her meals. (AR 53.) This testimony is consistent
2 with Plaintiff's April 1, 2008 disability report, in which she
3 explained, "[g]rocery shopping and housework are difficult due to
4 chronic pain," and with her August 26, 2008 disability report, in
5 which she stated, "it is very hard for me to clean the house." (AR
6 131, 141.) Plaintiff's roommate, Ron Parsons, corroborated
7 Plaintiff's account, testifying that Plaintiff did "minimal stuff"
8 around the house, including "put[ting] the dishes in the dishwasher."
9 (AR 58.)

10 Thus, the record establishes that Plaintiff's daily activities
11 were limited in scope, did not consume a substantial part of her day,
12 and were not necessarily transferable to the work setting. As such,
13 they do not support the ALJ's finding that Plaintiff's ability to
14 perform them establishes that she was exaggerating her claims of
15 pain. See *Orn*, 495 F.3d at 639; *Fair v. Bowen*, 885 F.2d 597, 603
16 (9th Cir. 1989)

17 The ALJ's third reason for rejecting Plaintiff's testimony was
18 that the objective medical evidence was inconsistent with Plaintiff's
19 subjective claims of back and joint pain. (AR 21.) For the
20 following reasons, the Court finds that the ALJ erred in making this
21 determination.

22 Generally speaking, where a claimant's alleged pain is
23 inconsistent with the objective medical evidence, the ALJ may
24 consider that fact in questioning a claimant's testimony. See *Parra*
25 *v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007) (upholding ALJ's adverse
26 credibility finding where claimant's complaints of knee pain were
27 contradicted by tests showing knee function within normal limits);
28 *Osenbrock v. Apfel*, 240 F.3d 1157, 1165-66 (9th Cir. 2001) (upholding

1 ALJ's credibility finding in part because evaluations revealed little
2 evidence of disabling abnormality of the claimant's spine).
3 Fibromyalgia, however, is a unique affliction. Its cause is unknown;
4 it is diagnosed entirely on the basis of a patient's reported pain
5 and other symptoms; and there are no laboratory tests to confirm the
6 diagnosis. *Benecke v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004).
7 As such, it is generally not appropriate to rely on the absence of
8 objective medical evidence alone to discredit a claimant's claims of
9 pain stemming from fibromyalgia. See, e.g., *id.* at 594 (noting ALJ
10 errs when he requires claimant to produce objective medical evidence
11 for a disease without objective measurement); *Preston v. Sec'y,*
12 *Health & Human Servs.*, 854 F.2d 815, 817-18 (6th Cir. 1988) ("In
13 stark contrast to the unremitting pain of which fibrositis patients
14 complain, physical examinations will usually yield normal results--a
15 full range of motion, no joint swelling, as well as normal muscle
16 strength and neurological reactions.").

17 Here, the ALJ relied almost entirely on such evidence to find
18 that Plaintiff's back and joint pain claims were not credible.
19 (AR 21-22.) To the extent that the ALJ mentioned Plaintiff's
20 subjective complaints or symptoms, it was only to note that they were
21 consistent from year-to-year and appointment-to-appointment. For
22 example, the ALJ pointed out that treating notes indicated that
23 Plaintiff's "check list of self[-]reported symptoms did not vary from
24 visit to visit" and that "[c]hronic pain and fibromyalgia were
25 repeatedly mentioned with few comments regarding changes in
26 symptoms." (AR 22.) But, this seems to suggest that her claims were
27 more, not less, credible. See, e.g., *Green-Younger v. Barnhart*, 335
28 F.3d 99, 108 (2d Cir. 2003) (claimant's complaints "of pain in her

1 back, legs, and upper body, fatigue, and disturbed sleep" were
2 credible, in part, because they were "internally consistent and
3 consistent with common symptoms of fibromyalgia"). The ALJ also
4 observed that the treatment notes "reveal that most [of Plaintiff's
5 doctor] visits were for refills of pain medication," (AR 21, 22),
6 another assertion that makes Plaintiff's pain complaints more, not
7 less, credible because, presumably, Plaintiff had been taking her
8 pain medications because she needed them and had returned to obtain
9 more. As such, the Court does not find this a convincing reason for
10 discounting Plaintiff's testimony.

11 Finally, the ALJ determined that Plaintiff's claims of severe
12 migraine headaches were not credible because the headaches could be
13 controlled with medication and were unaccompanied by visual symptoms
14 like photophobia. (AR 21.) The Court concludes that there is
15 substantial evidence in the record to support the first finding, but
16 not the second.

17 In determining whether a claimant's testimony is credible, an
18 ALJ may consider an unexplained or inadequately explained failure to
19 seek treatment or to follow a prescribed course of treatment for
20 allegedly disabling pain. *Orn*, 495 F.3d at 638 (citing *Fair*, 885
21 F.2d at 603).

22 In a February 2008 headache questionnaire, Plaintiff explained
23 that Imitrex "usually takes [her migraines] away" and "is the only
24 thing that works" to stop her headaches. (AR 123.) Plaintiff
25 discontinued using Imitrex in 2007, however, and was not taking it
26 when she appeared at the administrative hearing in July 2009. (AR
27 123, 145.) There is nothing in the record to explain why Plaintiff
28 stopped taking Imitrex. The Court notes, too, that Plaintiff was not

1 taking pain medication, other than Excedrin, at the time of the
2 administrative hearing. (AR 50.) When asked why, she told the ALJ,
3 "I don't want to take [pain medication] because right now I'm not
4 working, and I would rather just deal with the pain on my own and try
5 to do things like relax, lay down." (AR 50.) Though, to be fair,
6 she also claimed that the doctors had prescribed too much medication
7 and that it caused her to be "loopy" and that she was scared to "take
8 them all." (AR 51.)

9 In the Joint Stipulation, Plaintiff's lawyer argues that
10 Plaintiff stopped taking Imitrex because she lost her medical
11 insurance, (Joint Stip. at 10-11), citing a headache questionnaire
12 she submitted in 2008. (AR 122-23.) This document, however, does
13 not state that she stopped taking Imitrex because she lost her
14 insurance. Even if it did, it would still be a questionable
15 explanation since it is clear in the record that she continued to
16 receive prescription medication after she lost her insurance. (AR
17 276-77.)

18 Because it was reasonable for the ALJ to assume that, if
19 Plaintiff's migraines were as debilitating as she claimed, she would
20 have used Imitrex--the "only thing that work[ed]" to control her
21 headaches--the ALJ's finding that her headache complaints were not
22 credible due to the fact that she was not taking that medication is
23 valid and convincing. *Orn*, 495 F.3d at 638 (citing *Fair*, 885 F.2d at
24 603).

25 The record, however, does not support the ALJ's determination
26 that there were "no reports of visual problems such as photophobia"
27 associated with Plaintiff's headaches. (AR 21.) In fact, the record
28 contains references to photophobia, (AR 122, 276), and the ALJ

1 herself recognized in her decision that Plaintiff had complained to
2 her physicians about photophobia. (AR 17.)

3 In the end, of the four reasons cited by the ALJ for rejecting
4 Plaintiff's testimony, the Court finds that only one--Plaintiff's
5 failure to take medication that controlled her migraines--was a valid
6 reason that was supported by substantial evidence. The issue that
7 remains is whether this reason alone is enough to uphold the ALJ's
8 credibility finding. See *Carmickle*, 533 F.3d at 1162 (stating
9 "relevant inquiry . . . is whether the ALJ's decision remains legally
10 valid" despite errors in the credibility analysis). The Court
11 concludes that it is not. Further, and importantly, the Court is not
12 convinced that the ALJ would have rejected Plaintiff's credibility
13 for this reason alone and, therefore, remand is required to allow her
14 to reconsider the credibility finding in light of the Court's
15 ruling.

16 Plaintiff asks the Court to remand the case for an award of
17 benefits. The Court recognizes it has the authority to do so, see
18 *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989), but
19 concludes that that relief is not warranted here. It is not clear to
20 the Court from the record before it that Plaintiff is, in fact,
21 credible or that she is disabled. Further proceedings are necessary
22 to flesh this out. See *Harman v. Apfel*, 211 F.3d 1172, 1180-81 (9th
23 Cir. 2000) (holding remand for further proceedings was appropriate
24 where the record contained additional unanswered questions regarding
25 the applicant's eligibility for benefits).

1 IV. CONCLUSION

2 For these reasons, the Agency's decision is reversed and the
3 case is remanded for further proceedings consistent with this order.

4 IT IS SO ORDERED.

5 DATED: September 24, 2011.

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8 PATRICK J. WALSH
9 United States Magistrate Judge
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