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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHANNON E. SANTANA,)	Case No. CV 11-7340-MLG
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

Plaintiff Shannon Santana seeks judicial review of the Social Security Commissioner's denial of her application for disability insurance benefits ("DIB") and Social Security Disability Insurance ("SSDI") benefits. For the reasons set forth below, the decision of the Social Security Commissioner is reversed, and the matter is remanded for further proceedings consistent with this opinion.

I. Facts and Procedural Background

Plaintiff was born on October 16, 1969. (Administrative Record ("AR") at 108.) She completed high school and has work experience as a customer service representative, wardrobe assistant and telephone solicitor. (AR at 25, 142.) Plaintiff filed her

1 applications for benefits on November 21, 2008, alleging disability
2 beginning May 4, 2004, due to multiple sclerosis and affective mood
3 disorders. (AR at 69, 108, 111.) Her application was denied
4 initially on April 8, 2009. (AR at 70-75.) An administrative
5 hearing was held on April 19, 2010, before Administrative Law Judge
6 ("ALJ") Michael J. Kopicki. Plaintiff, represented by counsel,
7 testified as did a vocational expert ("VE"). (AR at 33-67.) ALJ
8 Kopicki issued an unfavorable decision on June 21, 2010. (AR 17-
9 27.) The ALJ found that Plaintiff suffered from the following
10 severe impairments: multiple sclerosis, by history; history of
11 right tibia and fibula fractures with residual osteoarthritis; and
12 a mood disorder. (AR at 19.) However, he found that these
13 impairments did not meet the requirements of a listed impairment
14 found in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR at 20.)

15 The ALJ further found that Plaintiff retained the residual
16 functional capacity ("RFC") "to perform medium work as defined in
17 20 C.F.R. 404.1567(c) and 416.967(c) (lift and/or carry 50 pounds
18 occasionally, 25 pounds frequently, stand and/or walk about six
19 hours in an eight hour workday and sit about six hours in an eight
20 hour workday) except that she must avoid moderate exposure to
21 extreme temperatures and to hazards, such as moving machinery and
22 unprotected heights, and she is limited to simple, routine tasks."
23 (AR at 22.) The ALJ concluded that, although Plaintiff could not
24 perform any past relevant work, there were jobs in the national
25 economy which Plaintiff could perform, and therefore Plaintiff was
26 not disabled. (AR at 26.)

27 The Appeals Council denied review on July 7, 2011 (AR at 1-4),
28 and Plaintiff commenced this action for judicial review. On March

1 21, 2012, the parties filed a Joint Stipulation ("Joint Stip.") of
2 disputed facts and issues, including the following claims of error:
3 (1) the ALJ failed to properly consider the opinions of the
4 treating, examining and non-examining physicians; and (2) the ALJ
5 erred in evaluating Plaintiff's credibility and subjective
6 testimony. (Joint Stip. at 3.) Plaintiff asks the Court to reverse
7 and order an award of benefits, or in the alternative, remand for
8 further administrative proceedings. (Joint Stip. at 14-15.) The
9 Commissioner requests that the ALJ's decision be affirmed. (Joint
10 Stip. at 15.)

11 After reviewing the parties' respective contentions and the
12 record as a whole, the Court finds Plaintiff's contention regarding
13 the ALJ's failure to make a proper credibility determination to be
14 meritorious and remands this matter for further proceedings
15 consistent with this opinion.

16

17 **II. Standard of Review**

18 Under 42 U.S.C. § 405(g), a district court may review the
19 Commissioner's decision to deny benefits. The Commissioner's
20 decision must be upheld unless the ALJ's findings are based on
21 legal error or are not supported by substantial evidence in the
22 record as a whole. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
23 1999); *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).
24 Substantial evidence means more than a scintilla, but less than a
25 preponderance; it is evidence that a reasonable person might accept
26 as adequate to support a conclusion. *Lingenfelter v. Astrue*, 504
27 F.3d 1028, 1035 (9th Cir. 2007)(citing *Robbins v. Soc. Sec. Admin.*,
28 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether

1 substantial evidence supports a finding, the reviewing court "must
2 review the administrative record as a whole, weighing both the
3 evidence that supports and the evidence that detracts from the
4 Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715, 720
5 (9th Cir. 1996). "If the evidence can support either affirming
6 or reversing the ALJ's conclusion," the reviewing court "may not
7 substitute its judgment for that of the ALJ." *Robbins*, 466 F.3d at
8 882. Finally, the Court may not reverse an ALJ's decision based on
9 an error that is harmless. *Molina v. Astrue*, --- F.3d ----, 2012 WL
10 1071637 at *4 (9th Cir., Apr. 2, 2012) (citing *Stout v. Comm'r,*
11 *Soc. Sec. Admin*, 454 F.3d 1050, 1055-56 (9th Cir. 2006)).

14 **III. Discussion**

15 **A. The ALJ Improperly Discredited Plaintiff's Subjective** 16 **Symptom Testimony¹**

17 Plaintiff contends that the ALJ failed to provide clear and
18 convincing reasons for discrediting her subjective symptom
19 testimony. (Joint Stip. at 9.) Plaintiff testified at the
20 administrative hearing to the following symptoms and functional
21 limitations: she has difficulty organizing and making decisions;
22 she suffers from anxiety; she has body weakness and cannot stand
23 for more than 45 minutes; she has hand cramping, double vision and
24 dizziness; her left hand frequently becomes numb; and she has left
25 foot drop that causes her to frequently stumble and fall. (AR at

27 ¹ Because the Court finds that the credibility determination
28 was erroneously made, the claim regarding the alleged mis-
evaluation of the medical evidence will not be addressed.

1 38-47.)

2 To determine whether a claimant's testimony about subjective
3 pain or symptoms is credible, an ALJ must engage in a two-step
4 analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009)
5 (citing *Lingenfelter* 504 F.3d at 1035-36). First, the ALJ must
6 determine whether the claimant has presented objective medical
7 evidence of an underlying impairment which could reasonably be
8 expected to produce the alleged pain or other symptoms.
9 *Lingenfelter*, 504 F.3d at 1036. "[O]nce the claimant produces
10 objective medical evidence of an underlying impairment, an
11 adjudicator may not reject a claimant's subjective complaints based
12 solely on a lack of objective medical evidence to fully corroborate
13 the alleged severity of pain." *Bunnell v. Sullivan*, 947 F.2d 341,
14 345 (9th Cir. 1991) (en banc). To the extent that an individual's
15 claims of functional limitations and restrictions due to alleged
16 pain is reasonably consistent with the objective medical evidence
17 and other evidence in the case, the claimant's allegations will be
18 credited. SSR 96-7p, 1996 WL 374186 at *2 (explaining 20 C.F.R. §§
19 404.1529(c)(4), 416.929(c)(4)).²

20 Unless there is affirmative evidence showing that the claimant
21 is malingering, the ALJ must provide specific, clear and convincing
22 reasons for discrediting a claimant's complaints. *Robbins*, 466 F.3d
23 at 883. "General findings are insufficient; rather, the ALJ must

25 ² "The Secretary issues Social Security Rulings to clarify the
26 Secretary's regulations and policy Although SSRs are not
27 published in the federal register and do not have the force of law,
28 [the Ninth Circuit] nevertheless give[s] deference to the
Secretary's interpretation of its regulations." *Bunnell*, 947 F.2d
at 346 n.3.

1 identify what testimony is not credible and what evidence
2 undermines the claimant's complaints." *Reddick*, 157 F.3d at 722
3 (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996)). The
4 ALJ must consider a claimant's work record, observations of medical
5 providers and third parties with knowledge of the claimant's
6 limitations, aggravating factors, functional restrictions caused
7 by symptoms, effects of medication, and the claimant's daily
8 activities. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 & n.8 (9th Cir.
9 1996). The ALJ may also consider an unexplained failure to seek
10 treatment or follow a prescribed course of treatment and employ
11 other ordinary techniques of credibility evaluation. *Id.* (citations
12 omitted).

13 Here, the ALJ concluded that Plaintiff's medically
14 determinable impairments "could reasonably be expected to cause
15 some of the alleged symptoms." (AR at 23.) However, the ALJ
16 rejected Plaintiff's description of her symptoms "to the extent
17 they [were] inconsistent" with the ALJ's assessment that Plaintiff
18 retained the RFC to perform medium work with certain limitations.
19 (*Id.*) Because there was no evidence of malingering, the ALJ was
20 therefore required to provide specific, clear and convincing
21 reasons for rejecting Plaintiff's subjective allegations of pain
22 and functional limitations.

23 The ALJ gave two reasons for rejecting Plaintiff's testimony,
24 neither of which are specific, clear and convincing. First, the ALJ
25 found that Plaintiff was not fully credible because she performed
26 some work-related activity in 2008, after the alleged onset date of
27 May 4, 2004. (AR at 23.) The ALJ noted that Plaintiff had reported
28 losing a job in January 2008 and also reported that she felt her

1 multiple sclerosis was stable and was looking for employment in
2 March 2008. (Id.)

3 In the context of determining eligibility for benefits, the
4 Commissioner is required to assess whether a claimant has the
5 ability to work on a *sustained* basis. 20 C.F.R. § 404.1512(a);
6 *Reddick v. Chater*, 157 F.3d 715, 724 (9th Cir. 1998). Here, the ALJ
7 determined that, although Plaintiff had earnings since her alleged
8 onset date, the amounts earned were well below the amount
9 considered to be substantial gainful activity. (AR at 19.)

10 Plaintiff testified that she worked for short periods of time
11 at various jobs during the relevant disability period but that she
12 generally either quit or was fired because she was unable to
13 perform the employment requirements due to her impairment. (AR at
14 37-38.) As the Ninth Circuit has noted, "[O]ccasional symptom-free
15 periods - and even the sporadic ability to work - are not
16 inconsistent with disability." *Lester v. Chater*, 81 F.3d 821, 833
17 (9th Cir. 1995). In the same vein, an unsuccessful attempt to work
18 during a remission in symptoms is not an adequate basis for
19 discrediting a claimant's testimony, particularly when the records
20 show the existence of a medically determinable impairment that
21 could cause the disabling symptoms. Therefore, the ALJ's reliance
22 on Plaintiff's unsuccessful work attempt was not a clear and
23 convincing reason for discounting Plaintiff's credibility.

24 The other reason offered by the ALJ for discrediting
25 Plaintiff's testimony is equally insufficient. The ALJ stated, "At
26 one point she attempted to receive special authorization from her
27 doctor stating she was unable to take the regular bus but rather
28 needed to get picked up by sedan. Her treating physician did not

1 see a clear reason why such an accommodation was required." (AR at
2 23, citing AR at 261.) It is entirely unclear how her request to
3 ride in a sedan, rather than a bus, has any bearing on Plaintiff's
4 credibility regarding her subjective symptoms. Moreover,
5 Plaintiff's physician did not reject Plaintiff's request for the
6 accommodation, but merely requested that Plaintiff provide more
7 information as to why it was necessary. (AR at 261.)

8 In support of the argument that the ALJ properly addressed
9 Plaintiff's subjective complaints, the Commissioner contends that
10 Plaintiff's activities of daily living were not consistent with her
11 subjective pain complaints. (Joint Stip. at 12.) Although the ALJ
12 did note that Plaintiff is able to perform certain activities, such
13 as knitting, light housecleaning, and some grocery shopping, the
14 ALJ did not specifically cite Plaintiff's activities of daily
15 living as a reason for rejecting Plaintiff's subjective complaints.
16 (AR at 23.) Nor did he cite the medical record as a basis for the
17 credibility determination. Even if these were valid reasons for
18 discounting Plaintiff's credibility, it would be error for this
19 Court to affirm the ALJ's decision based upon reasons that the ALJ
20 did not provide. *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir.
21 2003).

22 In sum, the reasons given by the ALJ for rejecting Plaintiff's
23 testimony were not supported by substantial evidence in the record
24 and were therefore insufficient to reject her testimony regarding
25 her symptoms and related limitations.

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1 **IV. Conclusion**

2 The decision whether to remand for further proceedings is
3 within this Court's discretion. *Harman v. Apfel*, 211 F.3d 1172,
4 1175-78 (9th Cir. 2000). Where no useful purpose would be served by
5 further administrative proceedings, or where the record has been
6 fully developed, it is appropriate to exercise this discretion to
7 direct an immediate award of benefits. *Id.* at 1179 ("[T]he decision
8 of whether to remand for further proceedings turns upon the likely
9 utility of such proceedings."); *Benecke v. Barnhart*, 379 F.3d 587,
10 593 (9th Cir. 2004). However, where there are outstanding issues
11 that must be resolved before a determination of disability can be
12 made, and it is not clear from the record that the ALJ would be
13 required to find the claimant disabled if all the evidence were
14 properly evaluated, remand is appropriate. *Bunnell v. Barnhart*, 336
15 F.3d 1112, 1115-16 (9th Cir. 2003); *see also Connett*, 340 F.3d at
16 876 (remanding case for reconsideration of credibility
17 determination).

18 Here, the ALJ's credibility determination was not legally
19 sufficient nor supported by substantial evidence. Accordingly, the
20 case is remanded for further proceedings consistent with this
21 opinion and order.

22 Dated: April 4, 2012



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24 Marc L. Goldman
25 United States Magistrate Judge
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