



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 because the  
4 Administrative Law Judge (“ALJ”) failed properly to evaluate plaintiff’s  
5 credibility and the Court cannot find that the ALJ’s error was harmless.

6 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**  
7 **DECISION**

8 On December 15, 2008, plaintiff filed an application for Disability  
9 Insurance Benefits. (Administrative Record (“AR”) 12, 112). Plaintiff asserted  
10 that she became disabled on April 9, 2008, due to a fractured lower back and a  
11 degenerative disc and bulging disc. (AR 135). The ALJ examined the medical  
12 record and heard testimony from plaintiff (who was represented by counsel) and a  
13 vocational expert on August 24, 2010. (AR 24-48).

14 On August 27, 2010, the ALJ determined that plaintiff was not disabled  
15 through the date of the decision. (AR 12-19). Specifically, the ALJ found:  
16 (1) plaintiff suffered from the following severe impairments: severe degenerative  
17 disc disease at L4-L5 with mild L4-L5 radiculopathy affecting the left lower  
18 extremity (AR 14); (2) plaintiff’s impairments, considered singly or in  
19 combination, did not meet or medically equal a listed impairment (AR 15-16);  
20 (3) plaintiff retained the residual functional capacity to perform the full range of  
21 medium work (20 C.F.R. § 404.1567(c) (AR 16); (4) plaintiff could perform her  
22 past relevant work as a private secretary/secretary (AR 18); and (5) plaintiff’s  
23 allegations regarding her limitations were not credible to the extent they were  
24 inconsistent with the ALJ’s residual functional capacity assessment (AR 16).

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

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1 **III. APPLICABLE LEGAL STANDARDS**

2 **A. Sequential Evaluation Process**

3 To qualify for disability benefits, a claimant must show that the claimant is  
4 unable to engage in any substantial gainful activity by reason of a medically  
5 determinable physical or mental impairment which can be expected to result in  
6 death or which has lasted or can be expected to last for a continuous period of at  
7 least twelve months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing  
8 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of  
9 performing the work claimant previously performed and incapable of performing  
10 any other substantial gainful employment that exists in the national economy.  
11 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C.  
12 § 423(d)(2)(A)).

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

- 15 (1) Is the claimant presently engaged in substantial gainful activity? If  
16 so, the claimant is not disabled. If not, proceed to step two.
- 17 (2) Is the claimant’s alleged impairment sufficiently severe to limit  
18 the claimant’s ability to work? If not, the claimant is not  
19 disabled. If so, proceed to step three.
- 20 (3) Does the claimant’s impairment, or combination of  
21 impairments, meet or equal an impairment listed in 20 C.F.R.  
22 Part 404, Subpart P, Appendix 1? If so, the claimant is  
23 disabled. If not, proceed to step four.
- 24 (4) Does the claimant possess the residual functional capacity to  
25 perform claimant’s past relevant work? If so, the claimant is  
26 not disabled. If not, proceed to step five.

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1 (5) Does the claimant’s residual functional capacity, when  
2 considered with the claimant’s age, education, and work  
3 experience, allow the claimant to adjust to other work that  
4 exists in significant numbers in the national economy? If so,  
5 the claimant is not disabled. If not, the claimant is disabled.

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

8 The claimant has the burden of proof at steps one through four, and the  
9 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262  
10 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also  
11 Burch, 400 F.3d at 679 (claimant carries initial burden of proving disability).

12 **B. Standard of Review**

13 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of  
14 benefits only if it is not supported by substantial evidence or if it is based on legal  
15 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.  
16 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457  
17 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable  
18 mind might accept as adequate to support a conclusion.” Richardson v. Perales,  
19 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a  
20 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing  
21 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

22 To determine whether substantial evidence supports a finding, a court must  
23 “consider the record as a whole, weighing both evidence that supports and  
24 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.  
25 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d  
26 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming  
27 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that  
28 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

1 **IV. DISCUSSION**

2 Plaintiff contends that the ALJ failed properly to evaluate the credibility of  
3 her subjective complaints. (Plaintiff’s Motion at 9-16). The Court agrees. As the  
4 Court cannot find that the ALJ’s error was harmless, a remand is warranted.

5 **1. Pertinent Law**

6 Questions of credibility and resolutions of conflicts in the testimony are  
7 functions solely of the Commissioner. Greger v. Barnhart, 464 F.3d 968, 972 (9th  
8 Cir. 2006). If the ALJ’s interpretation of the claimant’s testimony is reasonable  
9 and is supported by substantial evidence, it is not the court’s role to “second-  
10 guess” it. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

11 An ALJ is not required to believe every allegation of disabling pain or other  
12 non-exertional impairment. Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007)  
13 (citing Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). If the record establishes  
14 the existence of a medically determinable impairment that could reasonably give  
15 rise to symptoms assertedly suffered by a claimant, an ALJ must make a finding as  
16 to the credibility of the claimant’s statements about the symptoms and their  
17 functional effect. Robbins, 466 F.3d 880 at 883 (citations omitted). Where the  
18 record includes objective medical evidence that the claimant suffers from an  
19 impairment that could reasonably produce the symptoms of which the claimant  
20 complains, an adverse credibility finding must be based on clear and convincing  
21 reasons. Carmickle v. Commissioner, Social Security Administration, 533 F.3d  
22 1155, 1160 (9th Cir. 2008) (citations omitted). The only time this standard does  
23 not apply is when there is affirmative evidence of malingering. Id. The ALJ’s  
24 credibility findings “must be sufficiently specific to allow a reviewing court to  
25 conclude the ALJ rejected the claimant’s testimony on permissible grounds and  
26 did not arbitrarily discredit the claimant’s testimony.” Moisa v. Barnhart, 367  
27 F.3d 882, 885 (9th Cir. 2004).

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1 To find the claimant not credible, an ALJ must rely either on reasons  
2 unrelated to the subjective testimony (*e.g.*, reputation for dishonesty), internal  
3 contradictions in the testimony, or conflicts between the claimant’s testimony and  
4 the claimant’s conduct (*e.g.*, daily activities, work record, unexplained or  
5 inadequately explained failure to seek treatment or to follow prescribed course of  
6 treatment). Orn, 495 F.3d at 636; Robbins, 466 F.3d at 883; Burch, 400 F.3d at  
7 680-81; SSR 96-7p. Although an ALJ may not disregard such claimant’s  
8 testimony solely because it is not substantiated affirmatively by objective medical  
9 evidence, the lack of medical evidence is a factor that the ALJ can consider in his  
10 credibility assessment. Burch, 400 F.3d at 681.

## 11 2. Analysis

12 Here, plaintiff testified that she was unable to work essentially because  
13 (1) she experienced constant back pain and numbness in her left leg as a result of  
14 her injuries from when she was struck by an automobile in April 2008; (2) she had  
15 difficulty sitting or standing for any length of time; and (3) she needed to lay down  
16 six or more times a day, for 30 minutes at a time to relieve her pain. (AR 16, 37-  
17 41). The ALJ provided several reasons for discounting the credibility of plaintiff’s  
18 subjective symptom testimony. The Court finds none of them to be clear and  
19 convincing.

20 First, the ALJ discounted the alleged severity of plaintiff’s subjective  
21 complaints based upon alleged inconsistencies in plaintiff’s statements. (AR 16-  
22 17). For example, the ALJ asserted that although “a report dated April 10, 2010  
23 [sic] reflect [sic] that [plaintiff] was under a lot of stress at work, and she was  
24 thinking about filing a Workers’ Compensation claim alleging that the headaches  
25 she had been experiencing were work-related,” plaintiff had not included  
26 headaches in her Social Security claim. (AR 16-17) (citing Exhibit 2F at 45 [AR  
27 289]). Preliminarily, although the report the ALJ cited (which was actually dated  
28 April 10, 2008) reflects that plaintiff felt her migraine headache was work-related,

1 it does not reflect that plaintiff herself had been contemplating filing a workers'  
2 compensation claim for headaches. To the contrary, the treating physician  
3 suggested that plaintiff should contact her employer about filing such a claim.<sup>1</sup>  
4 (AR 289). The ALJ's incorrect characterization of the medical evidence calls into  
5 question the validity of both the ALJ's evaluation of plaintiff's credibility and the  
6 ALJ's decision as a whole. See, e.g., Regennitter v. Commissioner, 166 F.3d  
7 1294, 1297 (9th Cir. 1999) (A "specific finding" that consists of an "inaccurate  
8 characterization of the evidence" cannot support an adverse credibility  
9 determination); see also Valenzuela v. Astrue, 2007 WL 2693679 \*1 (9th Cir.  
10 Sept. 10, 2007) (unpublished opinion) (finding ALJ's credibility determination  
11 unsupported by substantial evidence where it was based in part on "inaccurate  
12 characterization" of claimant's testimony);<sup>2</sup> Lesko v. Shalala, 1995 WL 263995 \*7  
13 (E.D.N.Y. Jan. 5, 1995) ("inaccurate characterizations of the Plaintiff's medical  
14 record" found to constitute reversible error). Moreover, the April 10, 2008 report  
15 reflects that plaintiff was prescribed, *inter alia*, Imitrex and Vicodin, and that her  
16 headache had, in any event, been "resolved" by the time plaintiff left the doctor's  
17 office. (AR 289). The Court cannot reasonably infer that plaintiff's complaints of  
18 back pain lack credibility simply because plaintiff did not allege migraine  
19 headaches as an impairment in her Social Security application submitted eight  
20 months later (*i.e.*, December 15, 2008). Cf. Tommasetti v. Astrue, 533 F.3d 1035,  
21 1040 (9th Cir. 2008) (evidence that claimant "responded favorably to conservative  
22 treatment" undermines plaintiff's reports of disabling pain).

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24 <sup>1</sup>The physician stated in the April 10, 2008 report "[Plaintiff] was advised I can treat her  
25 current headache but she probably needs to go to her employer and indicate to them that she is a  
26 workman comp [sic] injury and requires [sic] to see [sic] a workmen comp [sic] doctor." (AR  
27 289).

28 <sup>2</sup>The Court may cite unpublished Ninth Circuit opinions issued on or after January 1,  
2007. See U.S. Ct. App. 9th Cir. Rule 36-3(b); Fed. R. App. P. 32.1(a).

1 In addition, the ALJ discredited plaintiff's allegations because when she  
2 was treated at Hoag Hospital emergency room after her accident on April 13,  
3 2008, plaintiff reported only right knee and left elbow pain, but x-rays of  
4 plaintiff's right leg at that time were negative, and on April 16, 2008, plaintiff told  
5 a doctor at the Riverside Medical Clinic that she had "a lot more pain in her hips  
6 and back." (AR 17) (citing Exhibit 1F at 7, 16 [AR 228, 237]; Exhibit 6F at 10  
7 [AR 382]). Nonetheless, evidence that three days after being hit by a car plaintiff  
8 sought additional treatment at a local medical clinic for back and hip pain does  
9 not, as the ALJ suggested, reasonably "raise suspicion" about plaintiff's  
10 credibility. (AR 16-17).

11 Second, to the extent the ALJ discounted plaintiff's credibility based on the  
12 conclusory statement by a consultative examining physician that plaintiff "did  
13 display Waddell's sign," the ALJ has not presented a convincing rationale for  
14 doing so. See, e.g., Barrios v. Astrue, 2009 WL 413128, \*4 (C.D. Cal. Feb. 17,  
15 2009) (Commissioner conceding Waddell's signs "do not signify malingering")  
16 (citation omitted).

17 Third, the ALJ suggested that plaintiff was not fully credible because  
18 physical therapy had helped to reduce plaintiff's symptoms. (AR 17); see Smolen  
19 v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996) (ALJ may properly consider  
20 plaintiff's failure to "seek treatment or to follow a prescribed course of treatment"  
21 in assessing credibility). As the ALJ acknowledged, however, plaintiff testified  
22 that she was unable to afford such treatment. (AR 17) (citing AR 38-39). An ALJ  
23 may not reject symptom testimony where, like here, a claimant provides "evidence  
24 of a good reason for not [seeking treatment]." Smolen, 80 F.3d at 1284 (citations  
25 omitted).

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1 Fourth, the ALJ noted that, at the hearing plaintiff “did not move around  
2 very much and she appeared to be sitting comfortably although the hearing lasted  
3 more than an hour.” (AR 17). However, the ALJ was not permitted to discredit  
4 plaintiff based on the absence of the manifestation of external symptoms. See,  
5 e.g., Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999) (ALJ’s reliance on  
6 observations of claimant proper where ALJ pointed to plaintiff’s affirmative  
7 exhibition of symptoms which were inconsistent with both medical evidence and  
8 plaintiff’s other behavior but did not point to the absence of the manifestation of  
9 external symptoms to discredit plaintiff, referring to the latter as disapproved “sit  
10 and squirm” jurisprudence).

11 Finally, the ALJ also discounted plaintiff’s credibility because the objective  
12 medical evidence does not support plaintiff’s subjective complaints. (AR 16-18).  
13 As detailed above, the ALJ did not provide any other valid reason for discounting  
14 plaintiff’s credibility. Lack of objective medical evidence to support subjective  
15 symptom allegations alone is not sufficient to discount a claimant’s credibility.  
16 See Burch, 400 F.3d at 681.

17 The Court cannot conclude that the above errors were harmless because it  
18 cannot “confidently conclude that no reasonable ALJ, when fully crediting the  
19 [plaintiff’s] testimony, could have reached a different disability determination.”  
20 Stout, 454 F.3d at 1055-56. Therefore, remand is warranted for the ALJ to  
21 reassess plaintiff’s credibility.

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1 **V. CONCLUSION<sup>3</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>4</sup>

5 LET JUDGMENT BE ENTERED ACCORDINGLY.

6 DATED: April 3, 2012

7 /s/

8 Honorable Jacqueline Chooljian  
9 UNITED STATES MAGISTRATE JUDGE

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23 <sup>3</sup>The Court need not, and has not adjudicated plaintiff's other challenges to the ALJ's  
24 decision, except insofar as to determine that a reversal and remand for immediate payment of  
benefits would not be appropriate.

25 <sup>4</sup>When a court reverses an administrative determination, "the proper course, except in rare  
26 circumstances, is to remand to the agency for additional investigation or explanation."  
27 Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and  
28 quotations omitted). Remand is proper where, as here, additional administrative proceedings  
could remedy the defects in the decision. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.  
1989).