

1 Administrative Law Judge (“ALJ”) properly evaluated plaintiff’s credibility and
2 subjective symptoms.

3 Having carefully studied, inter alia, the parties’s written submissions, the
4 Administrative Record (“AR”), and the decision of the ALJ the court concludes
5 that, as detailed herein, the ALJ improperly considered plaintiff’s credibility.
6 Consequently, this court remands this matter to the Commissioner of the Social
7 Security Administration (“Commissioner”) in accordance with the principles and
8 instructions enunciated in this Memorandum Opinion and Order.

9 **II.**

10 **FACTUAL AND PROCEDURAL BACKGROUND**

11 Plaintiff, who was 40 years old on the alleged disability onset date, April 1,
12 2006, completed two years of college. AR at 47, 85, 90, 241. Her past relevant
13 work includes employment as a sales representative and an office clerk. *Id.* at 55-
14 56, 237.

15 On August 31, 2007, plaintiff protectively filed an application for SSI. *Id.*
16 at 78, 222-226. Plaintiff also protectively filed an application for DIB on
17 September 12, 2007. *Id.* at 79, 227-229. She alleged disability beginning on April
18 1, 2006, due to leukemia and hypertension. *Id.* at 222, 227, 232, 236. The
19 Commissioner denied plaintiff’s application initially and upon reconsideration,
20 after which she filed a request for a hearing. *Id.* at 112-121, 124.

21 On June 16, 2009, plaintiff, represented by counsel, appeared and testified
22 at a hearing before the ALJ. *Id.* at 44-77. Two supplemental hearings took place
23 on October 13, 2009 and January 21, 2010, at which plaintiff, represented by
24 counsel, appeared and testified. *Id.* at 5-43. A medical expert and two vocational
25 experts also variously testified at these hearings. *Id.* at 7-11, 23-25, 33-39, 48-55.
26 The ALJ denied benefits on March 3, 2010. *Id.* at 82-100.

1 Applying the well-known five-step sequential evaluation process, the ALJ
2 found, at step one, that plaintiff has not engaged in substantial gainful activity
3 since April 1, 2006, the alleged onset date. *Id.* at 88.

4 At step two, the ALJ found that plaintiff suffered from the following severe
5 impairments: treated pancytopenia, fatty liver disease, treated neuropathy possibly
6 related to alcohol dependence, alcohol dependence, and depression. *Id.* If the
7 plaintiff stopped the substance use, the ALJ found that she would continue to
8 suffer from a severe impairment or combination of impairments. *Id.* at 91.

9 At step three, the ALJ found that plaintiff's impairments, including the
10 substance use disorder, did not meet or medically equal one of the listed
11 impairments set forth in the Listings. *Id.* at 88. Furthermore, the ALJ found that
12 this would remain unchanged even if plaintiff stopped the substance use. *Id.* at 91

13 The ALJ then assessed plaintiff's residual functional capacity ("RFC")¹ and
14 determined that she had the RFC to perform light work with the following
15 limitations: plaintiff could stand/walk two hours a day; could sit eight hours a day,
16 with normal breaks; could lift/carry ten pounds frequently and twenty pounds
17 occasionally; could occasionally stoop and bend; could climb stairs; but could not
18 climb ladders, work at heights, balance, operate motorized machinery, work
19 around unprotected machinery, or operate foot pedals or controls. *Id.* at 89, 92.
20 Additionally, when the substance use disorder is considered, plaintiff would be
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23 ¹ Residual functional capacity is what a claimant can do despite existing
24 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152,
25 1155-56 n.5-7 (9th Cir. 1989). "Between steps three and four of the five-step
26 evaluation, the ALJ must proceed to an intermediate step in which the ALJ
27 assesses the claimant's residual functional capacity." *Massachi v. Astrue*, 486
28 F.3d 1149, 1151 n.2 (9th Cir. 2007).

1 off-task 20% of the time because of symptoms or absences from work, but this
2 additional limitation would not apply if plaintiff stopped the substance use. *Id.*

3 The ALJ found, at step four, that plaintiff was unable to perform her past
4 relevant work, regardless of whether she stopped the substance use. *Id.* at 90, 99.

5 At step five, the ALJ found that, with her substance abuse disorder, there
6 are no jobs existing in significant numbers that plaintiff can perform. *Id.* at 90.
7 But the ALJ further found that, if plaintiff stopped the substance use, there would
8 be a significant number of jobs in the national economy that plaintiff could
9 perform. *Id.* at 99. Consequently, the ALJ found that if plaintiff stopped the
10 substance use she would not be disabled, and therefore the substance use disorder
11 is a contributing factor material to the determination of disability. *Id.* at 100. As
12 such, the ALJ found plaintiff is deemed not disabled under the Social Security Act
13 from the alleged date of onset through the date of the ALJ's decision. *Id.* at 86,
14 100.

15 On April 15, 2010, plaintiff requested that the Appeals Council review the
16 ALJ's decision. *Id.* at 211. The Appeals Council denied plaintiff's request on for
17 review on January 23, 2012 (*id.* at 105-110), and the ALJ's decision therefore
18 stands as the final decision of the Commissioner.

19 III.

20 STANDARD OF REVIEW

21 This court is empowered to review decisions by the Commissioner to deny
22 benefits. 42 U.S.C. § 405(g). The findings and decision of the Commissioner
23 must be upheld if they are free of legal error and supported by substantial
24 evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001) (as
25 amended). But if the court determines that the ALJ's findings are based on legal
26 error or are not supported by substantial evidence in the record, the court may
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1 reject the findings and set aside the decision to deny benefits. *Aukland v.*
2 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d
3 1144, 1147 (9th Cir. 2001).

4 “Substantial evidence is more than a mere scintilla, but less than a
5 preponderance.” *Aukland*, 257 F.3d at 1035. Substantial evidence is such
6 “relevant evidence which a reasonable person might accept as adequate to support
7 a conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276
8 F.3d at 459. To determine whether substantial evidence supports the ALJ’s
9 finding, the reviewing court must review the administrative record as a whole,
10 “weighing both the evidence that supports and the evidence that detracts from the
11 [AC’s] conclusion.” *Mayes*, 276 F.3d at 459. The ALJ’s decision “cannot be
12 affirmed simply by isolating a specific quantum of supporting evidence.”
13 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th
14 Cir. 1998)). If the evidence can reasonably support either affirming or reversing
15 the ALJ’s decision, the reviewing court “may not substitute its judgment for that
16 of the ALJ.” *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.
17 1992)).

18 IV.

19 DISCUSSION

20 Plaintiff contends that the ALJ failed to properly consider plaintiff’s
21 testimony. P. Mem. at 6-11. Specifically, plaintiff argues that the reasons the ALJ
22 provided for discounting plaintiff’s credibility were not clear and convincing. *Id.*
23 at 7-11. The court agrees that the ALJ erred in discounting plaintiff’s credibility.

24 A plaintiff carries the burden of producing objective medical evidence of his
25 or her impairments and showing that the impairments could reasonably be
26 expected to produce some degree of the alleged symptoms. *Benton ex rel. Benton*

1 *v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). But once a plaintiff meets that
2 burden, medical findings are not required to support the alleged severity of pain.
3 *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (*en banc*); *see also Light v.*
4 *Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997) (“[A] claimant need not
5 present clinical or diagnostic evidence to support the severity of his pain.”)
6 (internal citation omitted).

7 Under these circumstances, an ALJ can reject a plaintiff’s subjective
8 complaint “only upon (1) finding evidence of malingering, or (2) expressing clear
9 and convincing reasons for doing so.” *Benton*, 331 F.3d at 1040. The ALJ may
10 consider the following factors in weighing a plaintiff’s credibility: (1) his or her
11 reputation for truthfulness; (2) inconsistencies either in the plaintiff’s testimony or
12 between the plaintiff’s testimony and his or her conduct; (3) his or her daily
13 activities; (4) his or her work record; and (5) testimony from physicians and third
14 parties concerning the nature, severity, and effect of the symptoms of which she
15 complains. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002).

16 The ALJ here did not expressly make a first step finding, but it is implied
17 that there was objective medical evidence of an underlying impairment that could
18 reasonably be expected to produce the symptoms alleged. *See Lingenfelter v.*
19 *Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). The ALJ did not find evidence of
20 malingering. *See generally* AR at 89-99. Thus, in rejecting plaintiff’s credibility
21 the ALJ was required to articulate clear and convincing reasons. *See Benton*, 331
22 F.3d at 1040. The court is persuaded that, of the three reasons the ALJ provided
23 for discounting plaintiff’s credibility, only one is clear and convincing.

24 First, the ALJ noted that the plaintiff had “a pecuniary interest in the
25 outcome of the hearing or is otherwise motivated by secondary gain.” *Id.* at 94.
26 Multiple courts have recognized the obvious, namely, that every claimant who
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1 applies for disability benefits does so with the intent of pecuniary gain, as that is
2 the purpose of applying for disability benefits, and therefore such interest in not a
3 valid basis to discount a claimant’s credibility. *See, e.g., Ratto v. Secretary, Dept.*
4 *of Health and Human Services*, 839 F.Supp. 1415, 1429 (D. Or. 1993) (“If the
5 desire or expectation of obtaining benefits were by itself sufficient to discredit a
6 claimant’s testimony, then no claimant (or their spouse, or friends, or family)
7 would ever be found credible.”); *Taguines v. Astrue*, No. ED CV 11–1315–PLA,
8 2012 WL 2805029, at *4 (C.D. Cal. July 6, 2012) (“[T]he ALJ’s finding that
9 plaintiff had a pecuniary interest in the outcome of his case was not a clear and
10 convincing reason to find plaintiff less than credible.”); *cf. Franklin v. Astrue*, No.
11 ED CV 09-1117-VBK, 2010 WL 330239, at *2 n.3 (C.D. Cal. Jan. 21, 2010)
12 (“The ALJ’s additionally noted reason, that Plaintiff’s husband is biased because
13 he has a financial interest in seeing Plaintiff receive Social Security benefits, is not
14 an appropriate reason to depreciate lay witness credibility.”). This court likewise
15 finds that the ALJ’s statement about plaintiff’s financial interest is not a clear and
16 convincing reason to discount plaintiff’s credibility.

17 Second, the ALJ asserted that the plaintiff’s evidence was “inconsistent with
18 or contradicted by prior statements or other evidence in the record.” AR at 94.
19 Although the ALJ fails to clearly give examples of which piece(s) of plaintiff’s
20 evidence fell short in this way, he appears to be referring to his assertion that
21 plaintiff gave “evidence which exaggerated or magnified the facts and/or the
22 [plaintiff’s] symptoms.” *Id.* Specifically, the ALJ notes plaintiff’s testimony that
23 she goes weekly to City of Hope medical facility for treatment and is there all day
24 for her appointment, when only a few treatment records reflect appointments that
25 might take a few hours. *Id.* Given a fair reading of the record, the ALJ appears to
26 have mischaracterized plaintiff’s testimony.

1 870, 871 (9th Cir. 1985) (per curiam) (“Denial of benefits cannot be based on the
2 ALJ’s observation of [plaintiff], when [plaintiff’s] statements to the contrary, as
3 here, are supported by objective evidence.”). Nonetheless, the Ninth Circuit has
4 noted that “the inclusion of the ALJ’s personal observations does not render the
5 decision improper.” *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999)
6 (citation omitted). And an ALJ’s observations that a plaintiff engaged in behavior
7 at the hearing that was inconsistent with that plaintiff’s complaints have been held
8 adequate to justify an ALJ’s discounting of plaintiff’s credibility. *See Quang Van*
9 *Han v. Bowen*, 882 F.2d 1453, 1458 (9th Cir. 1989). The observations of the ALJ
10 in the instant case concerning the inconsistency between plaintiff’s testimony and
11 her actions do appear legitimate, and may constitute a clear and convincing reason
12 supported by substantial evidence to discount plaintiff’s credibility.

13 However, because this court concludes that two of the ALJ’s three reasons
14 for his adverse credibility finding are invalid, it must determine whether the ALJ’s
15 reliance on such reasons was harmless error. *Carmickle v. Commissioner, Social*
16 *Sec. Admin.*, 533 F.3d 1155, 1162 *citing Batson v. Comm’r of Soc. Sec. Admin.*,
17 359 F.3d 1190, 1195-97 (9th Cir.2004) (applying harmless error standard where
18 one of the ALJ’s several reasons supporting an adverse credibility finding was
19 held invalid). The Ninth Circuit explained in *Batson* that reviewing the ALJ’s
20 credibility determination where the ALJ provides specific reasons supporting such
21 is a substantive analysis. “So long as there remains ‘substantial evidence
22 supporting the ALJ’s conclusions on . . . credibility’ and the error ‘does not negate
23 the validity of the ALJ’s ultimate [credibility] conclusion,’ such is deemed
24 harmless and does not warrant reversal.” *Carmickle*, 522 F.3d at 1162 (citations
25 omitted).

1 Here, the ALJ's reliance upon invalid reasons to discount plaintiff's
2 credibility outweighed his reliance upon a valid one. As such, the court cannot
3 say confidently that, excluding invalid reasons, substantial evidence remains to
4 support the ALJ's conclusion. *See Swanson v. Astrue*, No. C12-510-RSM-BAT,
5 2012 WL 5844690, at *5 (W.D. Wa. Oct. 31, 2012). The court therefore finds the
6 ALJ's errors in evaluating plaintiff's credibility were not harmless, and the issue
7 should be reconsidered on remand.

8 **V.**

9 **REMAND IS APPROPRIATE**

10 The decision whether to remand for further proceedings or reverse and
11 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
12 888 F.2d 599, 603 (9th Cir. 1989). Where no useful purpose would be served by
13 further proceedings, or where the record has been fully developed, it is appropriate
14 to exercise this discretion to direct an immediate award of benefits. *See Benecke*
15 *v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d
16 1172, 1179-80 (9th Cir. 2000) (decision whether to remand for further proceedings
17 turns upon their likely utility). But where there are outstanding issues that must be
18 resolved before a determination can be made, and it is not clear from the record
19 that the ALJ would be required to find plaintiff disabled if all the evidence were
20 properly evaluated, remand is appropriate. *See Benecke*, 379 F.3d at 595-96;
21 *Harman*, 211 F.3d at 1179-80.

22 Here, as set out above, remand is required because the ALJ erred in failing
23 to properly evaluate plaintiff's credibility. On remand, the ALJ shall reconsider
24 plaintiff's subjective complaints and the resulting limitations, and either credit
25 plaintiff's testimony or provide clear and convincing reasons supported by
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1 substantial evidence for rejecting it. The ALJ shall then proceed through steps
2 four and five to determine what work, if any, plaintiff is capable of performing.

3 **VI.**

4 **CONCLUSION**

5 IT IS THEREFORE ORDERED that Judgment shall be entered
6 REVERSING the decision of the Commissioner denying benefits, and
7 REMANDING the matter to the Commissioner for further administrative action
8 consistent with this decision.

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11 DATED: January 9, 2013



12 SHERI PYM
13 United States Magistrate Judge
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