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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

DIANE D. HARVEY,
Plaintiff,
v.
CAROLYN W. COLVIN,¹ Acting
Commissioner of Social Security,
Defendant.

NO. CV 12-2507-MAN
MEMORANDUM OPINION
AND ORDER

Plaintiff filed a Complaint on March 30, 2012, seeking review of the denial by the Social Security Commissioner (“Commissioner”) of plaintiff’s application for supplemental security income (“SSI”). On October 9, 2012, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on December 7, 2012, in which: plaintiff seeks an order reversing the Commissioner’s decision and awarding benefits or, alternatively, remanding for further administrative proceedings; and the Commissioner requests that his decision be affirmed or, alternatively, remanded for further administrative proceedings.

¹ Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013, and is substituted in place of former Commissioner Michael J. Astrue as the defendant in this action. (*See* Fed. R. Civ. P. 25(d).)

1 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

2
3 On April 30, 2009, plaintiff filed an application for SSI, alleging an inability to work since
4 April 1, 2009, due to hypertension, back problems, and stress. (A.R. 14, 109-11, 126.)
5

6 The Commissioner denied plaintiff’s application on July 23, 2009. (A.R. 68-73.) On August
7 25, 2010, plaintiff, who was represented by counsel, appeared and testified at a hearing before
8 Administrative Law Judge Christine Long (the “ALJ”). (A.R. 27-57.) Frank Corso, a vocational
9 expert, also testified. (*Id.*) On January 26, 2011, the ALJ denied plaintiff’s claim (A.R. 11-26), and
10 the Appeals Council subsequently denied plaintiff’s request for review of the ALJ’s decision (A.R.
11 1-5). That decision is now at issue in this action.
12

13 **SUMMARY OF ADMINISTRATIVE DECISION**

14
15 The ALJ found that plaintiff had not engaged in substantial gainful activity since April 30,
16 2009, the date his application was filed. (A.R. 16.) The ALJ further determined that plaintiff has
17 the severe impairments of “degenerative disc disease of the spine with cervical and lumbosacral
18 spine stenosis,” but does not have an impairment or combination of impairments that meets or
19 medically equals one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20
20 C.F.R. §§ 416.920(d), 416.925, 416.26). (A.R. 16, 18.)
21

22 After reviewing the record, the ALJ determined that plaintiff has the residual functional
23 capacity (“RFC”) to perform sedentary work as defined in 20 C.F.R. § 416.967(a) with the
24 following limitations:
25

- 26 lifting and carrying and pushing and pulling 10 pounds occasionally and frequently;
27 sitting 6 hours total in an 8 hour workday; standing and walking 2 hours total in an
28 8 hour workday and must be able to alternate sitting and standing briefly every 30

1 minutes; occasional balancing, stooping, kneeling, crouching, crawling and climbing
2 stairs or ramps; no climbing ladders, ropes or scaffolds; and frequently handling
3 and fingering with the left hand.

4
5 (A.R. 18-19.)
6

7 The ALJ found that plaintiff was unable to perform her past relevant work (“PRW”) as a
8 child monitor, home attendant, and bus driver. (A.R. 21.) However, based upon plaintiff’s age,
9 education, work experience, and RFC, the ALJ found that other jobs exist in the national economy
10 that plaintiff could perform, including “charge account clerk,” “call out operator,” and “order
11 clerk.” (A.R. 22.) Accordingly, the ALJ concluded that plaintiff has not been under a disability,
12 as defined in the Social Security Act, since April 30, 2009, the date the application was filed. (*Id.*)
13

14 STANDARD OF REVIEW

15
16 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to determine
17 whether it is free from legal error and supported by substantial evidence. Orn v. Astrue, 495 F.3d
18 625, 630 (9th Cir. 2007). Substantial evidence is “such relevant evidence as a reasonable mind
19 might accept as adequate to support a conclusion.” *Id.* (citation omitted). The “evidence must
20 be more than a mere scintilla but not necessarily a preponderance.” Connett v. Barnhart, 340
21 F.3d 871, 873 (9th Cir. 2003). “While inferences from the record can constitute substantial
22 evidence, only those ‘reasonably drawn from the record’ will suffice.” Widmark v. Barnhart, 454
23 F.3d 1063, 1066 (9th Cir. 2006) (citation omitted).
24

25 Although this Court cannot substitute its discretion for that of the Commissioner, the Court
26 nonetheless must review the record as a whole, “weighing both the evidence that supports and
27 the evidence that detracts from the [Commissioner’s] conclusion.” Desrosiers v. Sec’y of Health
28 and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also* Jones v. Heckler, 760 F.2d 993, 995

1 (9th Cir. 1985). “The ALJ is responsible for determining credibility, resolving conflicts in medical
2 testimony, and for resolving ambiguities.” Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir.
3 1995).

4
5 The Court will uphold the Commissioner’s decision when the evidence is susceptible to
6 more than one rational interpretation. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).
7 However, the Court may review only the reasons stated by the ALJ in his decision “and may not
8 affirm the ALJ on a ground upon which he did not rely.” Orn, 495 F.3d at 630; *see also* Connett,
9 340 F.3d at 874. The Court will not reverse the Commissioner’s decision if it is based on harmless
10 error, which exists only when it is “clear from the record that an ALJ’s error was ‘inconsequential
11 to the ultimate nondisability determination.’” Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th
12 Cir. 2006)(*quoting* Stout v. Comm’r, 454 F.3d 1050, 1055 (9th Cir. 2006)); *see also* Burch, 400
13 F.3d at 679.

14 DISCUSSION

15
16
17 Plaintiff alleges the following five issues: (1) the ALJ improperly failed to find plaintiff’s
18 depression, headaches, high blood pressure, upper left extremity pain, and obesity as severe
19 impairments; (2) the ALJ and Appeals Council failed to find that plaintiff met or equaled Listing
20 1.04; (3) the ALJ failed to consider plaintiff’s side effect of frequent urination from her
21 medications; (4) the ALJ failed to consider plaintiff’s subjective complaints; and (5) the Appeals
22 Council failed to consider properly newly submitted evidence.² (Joint Stip. at 2-3.)
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² The Court will address plaintiff’s claims in a different order than that in which they
are presented in the Joint Stipulation.

1 **I. The ALJ Properly Considered The Side Effects Of Plaintiff's**
2 **Medication (Ground Three).**

3
4 Under Ninth Circuit law, the ALJ must “consider *all* factors that might have a ‘significant
5 impact on an individual’s ability to work.” Erickson v. Shalala, 9 F.3d 813, 817 (9th Cir. 1993)
6 (citation omitted). Such factors “may include side effects of medications as well as subjective
7 evidence of pain.” *Id.* at 818. When the ALJ disregards the claimant’s testimony regarding
8 limitations arising from the side effects of medication, the ALJ must support that decision with
9 specific findings similar to those required for excess pain testimony, provided the side effects are,
10 in fact, associated with the claimant’s medications. *See Varney*, 846 F.2d at 545. However,
11 medication side effects must be medically documented to be considered. *See Miller v. Heckler*,
12 770 F.2d 845, 849 (9th Cir.1985).

13
14 While plaintiff states that she suffers from, and her ability to work is limited by, frequent
15 urination that is a side effect of prescribed diuretics, there is no evidence that she reported this
16 side effect of her medication to her treating physicians or that her treating physicians reported
17 any functional limitations due to the alleged side effect. Further, plaintiff fails to cite any evidence
18 in the medical record that she complained of frequent urination to any physician. Moreover,
19 plaintiff fails to cite to any medical evidence that frequent urination caused her any functional
20 limitations. *See Osenbrock v. Apfel*, 240 F.3d 1157, 1164 (9th Cir. 2001) (Side effects not “severe
21 enough to interfere with [plaintiff’s] ability to work” are properly excluded from consideration).
22 Thus, because there is little evidence to support plaintiff’s assertion, the ALJ was not required to
23 specifically address this symptom. *See Howard v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003)
24 (“in interpreting the evidence . . . the ALJ does not need to ‘discuss every piece of evidence’”);
25 *see also Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006) (finding that, because the claimant
26 had never raised the issue of fatigue with his doctors, the ALJ properly limited his hypothetical
27 questions to medical assumptions with objective support in the record).

1 Based on the foregoing, the Court finds that the ALJ did not err by failing to consider the
2 frequent urination caused by plaintiff's medications.³

3
4 **II. The New Evidence Submitted To The Appeals Council Materially**
5 **Undermines The ALJ's Decision (Ground Five).**
6

7 Following the ALJ's adverse ruling, plaintiff submitted additional medical evidence to the
8 Appeals Council. (A.R. 5.) Specifically, plaintiff submitted a February 14, 2011 "Spinal
9 Impairment Questionnaire" and "Independent Medical Evaluation – Neurology" completed by Dr.
10 David L. Edelman, M.D. (A.R. 5; 270-280.) Plaintiff also submitted a May 14, 2011 lumbar spine
11 MRI from Harbor/UCLA Medical Center. (A.R. 5; 283-84.)
12

13 The Appeals Council considered the new evidence but determined that there was "no
14 reason under our rules to review the [ALJ's] decision" and, thus, denied plaintiff's request for
15 review. (A.R. 1.) Because the Appeals Council considered the newly submitted evidence in
16 deciding whether to review the ALJ's decision, this Court also must consider such evidence in
17 determining whether the ALJ's decision was supported by substantial evidence and free from legal
18 error. *See Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012) ("when
19 the Appeals Council considers new evidence in deciding whether to review a decision of the ALJ,
20 that evidence becomes part of the administrative record, which the district court must consider
21 when reviewing the Commissioner's final decision for substantial evidence"); *Warner v. Astrue*,
22 859 F. Supp. 2d 1107, 1114–15 (C.D. Cal. 2012) (though the Appeals Councils is not required to
23

24 ³ Plaintiff also asserts that, although the ALJ included a limitation to occasional
25 fingering and handling in a hypothetical posed to the VE, the ALJ failed to consider this limitation
26 in determining the work that plaintiff could perform. (Joint Stip. at 13.) While the ALJ may pose
27 to the expert a range of hypothetical questions, based on alternate interpretations of the
28 evidence, substantial evidence must support the hypothetical that ultimately serves as the basis
for the ALJ's determination. *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988). There was no
evidence in the record, and plaintiff fails to cite to any, supporting a limitation of occasional
fingering and handling. Thus, the ALJ was not required to adopt any such limitation in
determining the type of work plaintiff could perform.

1 provide reasons for discounting additional evidence, the Court reviews “the ALJ’s decision in light
2 of the record as a whole, including the evidence submitted for the first time to the Appeals
3 Council”)(*citing Taylor v. Comm’r v. Soc. Sec. Admin.*, 659 F.3d 1228, 1231–32 (9th Cir. 2011)).
4 The Court may remand upon finding that “there is a substantial likelihood the ALJ’s consideration
5 of the additional evidence submitted to the Appeals Council will materially alter the ALJ’s disability
6 analysis.” *Id.* at 1117.

7
8 The Court finds there is a substantial likelihood that the newly submitted evidence to the
9 Appeals Council could have altered the ALJ’s RFC and disability analysis.

10
11 On February 14, 2011, after reviewing plaintiff’s medical records and physically examining
12 plaintiff, examining physician Dr. Edelman diagnosed plaintiff with cervical and lumbar stenosis.
13 (A.R. 270.) He opined that plaintiff: could sit two hours and stand/walk up to one hour in an
14 eight-hour work day; can lift up to five pounds frequently, up to twenty pounds occasionally, and
15 carry up to ten pounds; and should do no pushing, pulling, kneeling, bending or stooping. (A.R.
16 273-74, 276.) As a result, Dr. Edelman opined that plaintiff could not work a full time competitive
17 job on a sustained basis, that she would be absent from work more than three times a month,
18 and that her prognosis was guarded. (A.R. 270, 275.)

19
20 As an initial matter, and contrary to the Commissioner’s contention, Dr. Edelman’s opinion
21 is relevant to the determination of whether plaintiff was disabled during the relevant disability
22 period at issue. Dr. Edelman notes that plaintiff’s symptoms and limitations assessed in his
23 Questionnaire began in April 2009 -- during the disability time period at issue. (A.R. 276.) Dr.
24 Edelman’s opinion thus relates to the disability period at issue and is relevant to plaintiff’s
25 disability determination.

26
27 The ALJ gave little weight to the opinions of consultative examiner Dr. Mehran
28 Sourehnissani and state agency medical reviewer Dr. J. Preston, the only medical opinions before

1 the ALJ assessing the physical and functional limitations caused by plaintiff's impairments. (A.R.
2 20-21.) Both Dr. Sourehnissani and Dr. Preston assessed plaintiff as capable of performing light
3 level exertional work.⁴ The ALJ, giving plaintiff the benefit of the doubt based on some of her
4 subjective complaints, assessed an even more restrictive RFC of sedentary⁵ work with additional
5 limitations beyond those found by Dr. Sourehnissani and Dr. Preston. However, Dr. Edelman
6 assessed plaintiff with functional limitations more severe than those the ALJ found and
7 incorporated into her RFC assessment. Indeed, Dr. Edelman's assessed limitations suggest a
8 totally disabling level of impairment. Thus, had Dr. Edelman's opinion been credited, the ALJ
9 could have found plaintiff to have more significant limitations than those specified by the ALJ in
10 her decision or, perhaps, could have found plaintiff to be disabled.

11
12 Further, there is no vocational expert evidence concerning whether work exists that could
13 be performed by plaintiff if she were found to have the limitations with which she was assessed
14 by Dr. Edelman. Therefore, in view of the evidence before the ALJ and the additional evidence
15 submitted only to the Appeals Council, this Court cannot conclude that the ALJ's decision is
16 supported by substantial evidence, or that any error in failing to consider Dr. Edelman's
17 assessment of plaintiff's limitations is harmless. Accordingly, this case must be remanded to
18 permit the ALJ to evaluate Dr. Edelman's opinion in the light of all the medical evidence.

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23 ⁴ On June 26, 2009, Dr. Sourehnissani completed an internal medicine evaluation of
24 plaintiff. (A.R. 164-69.) Dr. Sourehnissani diagnosed plaintiff with hypertension, chest pain with
25 atypical features, and low back pain. (A.R. 167.) Dr. Sourehnissani opined that plaintiff could
26 lift and carry twenty pounds occasionally and ten pounds frequently, and that she could stand,
27 walk, and sit for six hours. (A.R. 168.) On July 21, 2009, Dr. Preston concurred with Dr.
28 Sourehnissani's RFC assessment of plaintiff. (A.R. 170-74.)

⁵ Sedentary work involves lifting no more than ten pounds at a time. Although sitting
is involved, a certain amount of walking and standing is often necessary in carrying out job duties.
Jobs are sedentary if walking and standing are required occasionally. "Occasional" means very
little, up to one third of the time (about two hours of an eight hour work day). Social Security
Ruling ("SSR") 83-10, 1983 WL 31251, * 5.

1 **III. On Remand, The ALJ Must Reconsider Her Step Two Analysis With**
2 **Respect To One Of Plaintiff’s Allegedly Severe Impairments (Ground**
3 **One).**

4
5 At step two of the sequential evaluation process, the ALJ is tasked with identifying a
6 claimant’s “severe” impairments. 20 C.F.R. § 416.920(a)(4)(ii) and (c). A severe impairment is
7 one that “significantly limits [a claimant’s] physical or mental ability to do basic work activities.”⁶
8 20 C.F.R. § 416.920(c). Despite use of the term “severe,” most circuits, including the Ninth
9 Circuit, have held that “the step-two inquiry is a *de minimis* screening device to dispose of
10 groundless claims.” Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996). Accordingly, “[a]n
11 impairment or combination of impairments may be found ‘not severe *only if* the evidence
12 establishes a slight abnormality that has no more than a minimal effect on [a claimant’s] ability
13 to work.’ ” Webb v. Barnhart, 433 F.3d 683, 686–87 (9th Cir. 2005) (citation omitted; emphasis
14 in original). When determining whether an impairment is severe, a claimant’s age, education, and
15 work experience will not be considered. 20 C.F.R. § 416.920(c).

16
17 Plaintiff argues that the ALJ erred by failing to find her depression, left upper extremity
18 pain, headaches, high blood pressure, and obesity to be severe impairments at step two. (Joint
19 Stip. at 3.) In her decision, the ALJ determined that plaintiff only has the severe impairments of
20 “degenerative disc disease of the spine with cervical and lumbosacral spine stenosis.” (A.R. 16.)
21 The Court finds that the ALJ erred in finding that plaintiff’s obesity was not a severe impairment.

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25 ⁶ Basic work activities are “the abilities and aptitudes necessary to do most jobs.” 20
26 C.F.R. § 416.921(b). Examples of such activities include: (1) “[p]hysical functions such as walking,
27 standing, sitting, lifting, pushing, pulling, reaching, carrying or handling”; (2) the capacity for
28 “seeing, hearing, and speaking”; (3) “[u]nderstanding, carrying out, and remembering simple
Id. instructions”; (4) the “[u]se of judgment”; (5) “[r]esponding appropriately to supervision,
co-workers and usual work situations”; and (6) “[d]ealing with changes in a routine work setting.”

1 **1. Depression**

2
3 In finding that plaintiff’s depression was not severe, the ALJ relied on the consultative
4 psychiatric examination by Dr. Sohini P. Parikh and the state agency medical consultant’s
5 psychiatric review, both conducted in July 2009. (A.R. 17-18; 175-81, 182-92.) Dr. Parikh found
6 that plaintiff suffered from “Mood disorder, not otherwise specified” and “alcohol abuse (last used
7 last year).” (A.R. 179-80.) Dr. Parikh opined that plaintiff’s “prognosis is expected to improve
8 if her medical condition improves,” and he advised that plaintiff “stay away from alcohol.” (A.R.
9 180.) Dr. Parikh assessed plaintiff a Global Assessment of Functioning (“GAF”) score of 70⁷ and
10 assessed no functional limitations. (A.R. 180-81.)

11
12 The state agency reviewing medical consultant agreed that plaintiff’s mental impairment
13 was not severe. (A.R. 192.) Moreover, Dr. Parikh’s report is the only psychiatric examination of
14 plaintiff in the record. Thus, the medical evidence amply supports the ALJ’s finding that plaintiff’s
15 depression was not a severe impairment.

16
17 **2. Hypertension, Headaches And Left Upper Extremity Pain**

18
19 Although plaintiff was diagnosed as suffering from hypertension (A.R. 164), the mere fact
20 that she has been diagnosed with an impairment -- or even has received treatment for it -- is not
21 sufficient to establish severity, especially, as here, when plaintiff fails to cite to any evidence in
22 the record that she has any actual work-related limitations stemming from her hypertension. *See*
23 Matthews v. Shalala, 10 F.3d 678, 680 (9th Cir. 1993) (“The mere existence of an impairment is
24

25 ⁷ A GAF score is the clinician’s judgment of the individual’s overall level of functioning.
26 It is rated with respect only to psychological, social, and occupational functioning, without regard
27 to impairments in functioning due to physical or environmental limitations. DIAGNOSTIC AND
28 STATISTICAL MANUAL OF MENTAL DISORDERS, at 32 (4th Ed. 2000) (“DSM”). A GAF score
within the range of 61–70 indicates “[s]ome mild symptoms (*e.g.*, depressed mood or mild
insomnia) OR some difficulty in social, occupational, or school functioning . . . , but generally
functioning pretty well, has some meaningful interpersonal relationships.” *Id.*

1 insufficient proof of a disability”).

2
3 There is no objective evidence in the record that either plaintiff’s headaches or her left
4 upper extremity pain is a severe impairment that affects her ability to perform basic work
5 activities. While it is true that the ALJ must take into account a claimant’s pain and other
6 symptoms at step two, the severity determination is made solely on the basis of the objective
7 medical evidence in the record. SSR 85–28, 1985 WL 56856 *4. Plaintiff can only establish an
8 impairment if the record includes signs -- the results of “medically acceptable clinical diagnostic
9 techniques” --as well as symptoms.⁸ See Ukolov v. Barnhart, 420 F.3d 1002, 1005 (9th Cir.
10 2005). With these standards in mind, plaintiff cannot establish that her headaches and left upper
11 extremity pain amount to medically determinable impairments (severe or otherwise). Instead,
12 it is plaintiff’s subjective complaints of headaches and left upper extremity pain she cites in
13 support of her condition. These records, standing alone, do not and cannot establish a finding
14 of a medically determinable impairment under the Act.

15
16 Even assuming, *arguendo*, the ALJ erred in neglecting to consider plaintiff’s hypertension,
17 headaches, and upper left extremity pain at step two, plaintiff fails to show the error was harmful.
18 Where an ALJ fails to find an asserted impairment severe at Step Two, but nonetheless accounts
19 for that impairment at Step Four in the residual functioning capacity analysis, any alleged error
20 in failing to find the disorder “severe” at Step Two is harmless. See Lewis v. Astrue, 498 F.3d 909,
21 911 (9th Cir. 2007) (finding that any error the ALJ committed in failing to list plaintiff’s bursitis
22 at step 2 was harmless, because the ALJ “extensively discussed” plaintiff’s bursitis and
23 “considered any limitations posed by the bursitis at [s]tep 4”). In determining plaintiff’s RFC, the
24 ALJ stated that she considered the “totality of the record and, to an extent, [plaintiff’s]

25
26 _____
27 ⁸ A medical “sign” is “an anatomical, physiological, or psychological abnormality that
28 can be shown by medically acceptable clinical and laboratory diagnostic techniques[.]” Ukolov,
420 F.3d at 1005(*quoting* SSR 96–4p, 1996 WL 374187, at *1). A “symptom” is “an individual’s
Id. own perception or description of the impact of his or her physical or mental impairment(s)[.]”

1 testimony.” (A.R. 19.) The ALJ then discussed, *inter alia*, plaintiff’s complaints of headaches,
2 high blood pressure, and left shoulder pain. (*Id.*) Thus, any error in failing to include plaintiff’s
3 hypertension, headaches, and upper left extremity pain at step two was harmless error.
4

5 **3. Obesity**

6

7 Although obesity was removed from the Listing of Impairments in 1999, “[o]besity may still
8 enter into a multiple impairment analysis, but only by dint of its impact upon the claimant’s
9 musculoskeletal, respiratory, or cardiovascular system.” Celaya v. Halter, 332 F.3d 1177, 1181
10 n.1 (9th Cir. 2003). In Celaya, the ALJ’s failure to consider evidence of the claimant’s obesity in
11 a multiple impairments analysis was held to constitute reversible error because: (1) it was raised
12 implicitly in the claimant’s report of symptoms; (2) it was clear from the record that the claimant’s
13 obesity was at least close to the listing criterion and was a condition that could exacerbate her
14 reported illnesses; and (3) in light of the claimant’s *pro se* status, the ALJ’s observation of the
15 claimant and the information in the record should have alerted him to the need to develop the
16 record in respect to her obesity. *Id.* at 1182. Where a multiple impairment analysis is not
17 required, the ALJ properly considers obesity by acknowledging the plaintiff’s weight in making
18 determinations throughout the sequential analysis. *See Burch v. Barnhart*, 400 F.3d 676, 684 (9th
19 Cir. 2005).
20

21 Here, the ALJ does not reference obesity or plaintiff’s weight at any point in any stage of
22 the disability analysis. Upon review of the record, the Court finds several significant references
23 to plaintiff’s obesity. The record indicates plaintiff was assessed as being “obese” and
24 “moderately obese” on two occasions. (A.R. 165, 278.) Additionally in February 2010, plaintiff
25 was reported to be 5 feet, 5 inches tall and 200 pounds, and on June 2010, plaintiff was 220
26 pounds. (A.R. 239, 242.) These weights yield a body mass index (“BMI”) ranging from 33.3 to
27 36.6. Social Security Ruling 02-1p notes that a BMI of 30.0 or above reflects “obesity.” *See SSR*
28 *02-1p*, 2000 WL 628049, * 2.

1 Further, there was a treatment note linking plaintiff's weight to her back problems. On July
2 31, 2009, a treating physician noted that plaintiff was encouraged to "decrease caloric intake and
3 exercise as losing weight will help with back pain." (A.R. 207.) Thus, this progress note indicates
4 a connection between plaintiff's musculoskeletal problems and her obesity.

5
6 Plaintiff's initial filings with the Social Security Administration did not raise obesity as an
7 impairment, and mentioned only her hypertension, back problems, and stress. Subsequently, her
8 counsel sent a letter to the ALJ and Appeals Council, pointing out that plaintiff's "morbid obesity"
9 should be considered a severe impairment. (A.R. 107, 161.)

10
11 Although there are only a few reports discussing plaintiff's weight and no record of a BMI,
12 there was sufficient evidence and argument to put the ALJ on notice that obesity should be
13 considered it as a limiting factor, especially in view of the fact that plaintiff's severe back problems
14 likely were affected by her obesity. A consideration of the impact of plaintiff's obesity on her
15 other impairments may make a difference to the assessment of her limitations. As explained by
16 Social Security Ruling 02-01p:

17
18 When the evidence in a case does not include a diagnosis of obesity, but does
19 include clinical notes or other medical records showing consistently high body
20 weight or BMI, we may ask a medical source to clarify whether the individual has
21 obesity. However, in most such cases we will use our judgment to establish the
22 presence of obesity based on the medical findings and other evidence in the case
23 record, even if a treating or examining source has not indicated a diagnosis of
24 obesity.

25
26 *See* SSR 02-1p.

27
28 Furthermore, although SSR 02-01p makes clear that obesity is a disease that must be

1 considered when evaluating disability, and the “combined effects of obesity with other
2 impairments can be greater than the effects of each of the impairments considered separately,”
3 the ALJ “will evaluate each case based on the information in the case record.” Because the ALJ
4 did not identify obesity as a medically determinable impairment or consider the effects of obesity,
5 alone or in combination with other impairments, at any step of the sequential process, her failure
6 to consider obesity in assessing plaintiff's ability to perform work constituted reversible error.
7 Celaya, 332 F.3d at 1183–84.

8
9 Because there is no evidence that the ALJ actually considered plaintiff's obesity in her
10 disability analysis, the Court cannot conclude that the ALJ's error was harmless. *See, e.g., Morris*
11 *v. Barnhart*, 2004 WL 1238397 * 4 (E.D. Pa. May 10, 2004) (“As the ALJ did not provide an
12 explanation in her report as to whether Plaintiff's obesity was considered, the Magistrate Judge
13 could not make a factual finding that the Plaintiff's obesity did not have an impact”). Thus, on
14 remand, the ALJ must consider whether plaintiff's obesity exacerbates an impairment as an
15 additive, impairing factor. Accordingly, the matter will be remanded for further consideration by
16 the ALJ, and further development of the record if necessary.

17
18 **IV. On Remand, The ALJ Also Should Reconsider Whether Plaintiff Met**
19 **Or Equaled Listing 1.04 In Light Of Plaintiff's Obesity (Ground Two).**

20
21 Plaintiff argues that the ALJ erred by failing to obtain a medical
22 expert opinion on medical equivalence at step three of the sequential evaluation process. 20
23 C.F.R. § 416.926. Plaintiff also asserts that the record now includes new medical reports
24 establishing that she meets the criteria for Listing 1.04.

25
26 Plaintiff bears the burden of proving that her impairment or combination of impairments
27 meets or equals the criteria of a Listing. Tackett v. Apfel, 180 F.3d 1094, 1100 (9th Cir. 1999);
28 *see Sullivan v. Zebley*, 493 U.S. 521, 530-31, 110 S. Ct. 885, 107 L. Ed. 2d 967 (1990) (burden

1 is on the claimant to show that his or her impairment meets all of the specified medical criteria
2 for a Listing or to present medical findings equal in severity to all the criteria for the one most
3 similar listed impairment). The physical and mental conditions contained in the Listings are
4 considered so severe that “they are irrebuttably presumed disabling, without specific finding as
5 to the claimant’s ability to perform his past relevant work or any other jobs.” Lester v. Chater,
6 81 F.3d 821, 828 (9th Cir. 1995); *see* Zebley, 493 U.S. at 532, 110 S. Ct. at 891 (noting that the
7 Listings were “designed to operate as a presumption of disability that makes further inquiry
8 unnecessary”).

9
10 Here, plaintiff failed to carry her burden with respect to establishing that her impairments
11 meet the impairments set forth in Listing 1.04. Plaintiff presented no evidence of nerve root
12 compression or spinal arachnoiditis, which are necessary impairments to support a Listing 1.04A
13 or a Listing 1.04B finding, respectively. Zebley, 493 U.S. at 530 (noting that “[f]or a claimant to
14 show that his impairment matches a listing, it must meet all of the specified medical criteria”).
15 Plaintiff, relying on the requirements of Listing 1.04A when “there is involvement of the lower
16 back,” argues that the new evidence submitted to the Appeals Council includes a report by Dr.
17 Edelman, who found that plaintiff’s straight leg test was positive. (Joint Stip. at 9; A.R. 278.)
18 Indeed, Dr. Edelman found that plaintiff’s “[s]traight leg raising produced low back pain at 45
19 [degrees] on the left and was negative on the right.” (A.R. 278.) However, Dr. Edelman did not
20 note a positive straight leg-raising test in the *supine* position, which is also a requirement to meet
21 Listing 1.04A “if there is involvement of the lower back.” *See* 20 C.F.R. Part 404, Subpart P, App.
22 1, § 1.04.

23
24 Moreover, in other examinations in the record where a straight leg-raising test was
25 performed, the examining physician noted that plaintiff’s “[s]traight-leg-raising test [wa]s negative
26 in the sitting and supine positions,” and negative for “[straight leg raising].” (A.R. 166, 204.)
27 Plaintiff does not assert that Dr. Edelman’s examination was evidence of a positive straight
28 leg-raising test in the supine position, and the Court cannot conclude that it was clear evidence

1 of such.

2
3 With respect to Listing 1.04C, even if the Court were to accept all of plaintiff's alleged
4 impairments, plaintiff, at best, meets some, but not all, of the requisite medical criteria. Although
5 there is evidence that plaintiff suffers from lumbar spinal stenosis, critically, plaintiff fails to
6 present any evidence that she has an "inability to ambulate effectively"⁹ -- a specified medical
7 criteria for a Listing 1.04C finding. *Id.* (noting that "[a]n impairment that manifests only some of
8 [the specified medical] criteria, no matter how severely, does not qualify").

9
10 Additionally, plaintiff fails to proffer a theory or evidence showing that her combined
11 impairments equal a Listing. Accordingly, plaintiff did not meet her burden.

12
13 However, as obesity is a medically determinable impairment, SSR 02-01p reminds
14 adjudicators to "consider its effects when evaluating disability. . . . [ALJs are] to consider the
15 effects of obesity not only under the listings but also when assessing a claim at other steps of the
16 sequential evaluation process." *See* SSR 02-1p. Thus, as the ALJ failed to consider plaintiff's
17 obesity in her decision, on remand, the ALJ must consider how plaintiff's obesity may interact with
18 her other impairments in determining whether she meets or equals Listing 1.04.

19
20
21
22
23
24 ⁹ As defined by Section 1.00B2 of the Listings, an "inability to ambulate effectively"
25 means an "extreme limitation of the ability to walk; i.e., an impairment(s) that interferes very
26 seriously with the individual's ability to independently initiate, sustain, or complete activities."
27 Ineffective ambulation is "defined generally as having insufficient lower extremity functioning . . .
28 to permit independent ambulation without the use of a hand-held assistive device(s) that limits
the functions of both upper extremities." *See* Section 1.00B2b(1). This provision cites as
"examples," *inter alia*, an "inability to walk without the use of a walker, two crutches or two
canes" or an "inability to use standard public transportation" or an "inability to carry out routine
ambulatory activities, such as shopping" or an "inability to climb a few steps at a reasonable pace
with the use of a single hand rail." *See* Section 1.00B2b(2)

1 **V. On Remand, The ALJ Must Reassess Plaintiff's Credibility Regarding**
2 **Her Subjective Symptoms And Pain (Ground Four).**

3
4 Once a disability claimant produces objective medical evidence of an underlying impairment
5 that is reasonably likely to be the source of claimant's subjective symptom(s), all subjective
6 testimony as to the severity of the symptoms must be considered. Moisa v. Barnhart, 367 F.3d
7 885 (9th Cir. 2204); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991); *see also* 20 C.F.R. §
8 416.929(a)(explaining how pain and other symptoms are evaluated). “[U]nless an ALJ makes a
9 finding of malingering based on affirmative evidence thereof, he or she may only find an applicant
10 not credible by making specific findings as to credibility and stating clear and convincing reasons
11 for each.” Robbins, 466 F.3d at 883. The factors to be considered in weighing a claimant's
12 credibility include: (1) the claimant's reputation for truthfulness; (2) inconsistencies either in the
13 claimant's testimony or between the claimant's testimony and her conduct; (3) the claimant's daily
14 activities; (4) the claimant's work record; and (5) testimony from physicians and third parties
15 concerning the nature, severity, and effect of the symptoms of which the claimant complains.
16 *See* Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); *see also* 20 C.F.R. § 416.929(c).

17
18 Here, the ALJ found that “[a]fter careful consideration of the evidence . . . [plaintiff]'s
19 medically determinable impairments could reasonably be expected to cause the alleged
20 symptoms.” (A.R. 23.) Further, the ALJ cited no evidence of malingering by plaintiff.
21 Nonetheless, the ALJ concluded that plaintiff's “statements concerning the intensity, persistence
22 and limiting effects of these symptoms are not credible” to the extent they varied from the ALJ's
23 own RFC assessment. (*Id.*) Accordingly, the ALJ's reasons for finding that plaintiff was not
24 credible with respect to her subjective symptom and pain testimony must be “clear and
25 convincing.”

26
27 As acknowledged by the ALJ, plaintiff testified at the hearing that she is unable to work due
28 to “chronic pain in her lower back that radiates up to her neck and left shoulder.” (A.R. 19, 41.)

1 The pain is mainly on her left side but it goes down both legs. (A.R. 19, 42.) Plaintiff allegedly
2 experiences constant pain. (A.R. 19, 43.) Additionally, she experiences headaches as a side
3 effect from pain medication and her high blood pressure. (A.R. 19, 41, 47-48.) Plaintiff testified
4 that her medication makes her drowsy. (A.R. 45, 47.) She also testified that her diuretics cause
5 frequent urination. (A.R. 47.)

6
7 Plaintiff testified that she receives help from her sister and daughter including getting
8 dressed and cooking meals. (A.R. 44-45.) Plaintiff does not drive or use public transportation,
9 but occasionally visits friends and relatives. (A.R. 45.) Plaintiff testified that she is able to stand
10 and walk for five minutes. (A.R. 44-45.) She could sit for 10 to 15 minutes without getting up
11 and lift less than five pounds. (A.R. 46.) Plaintiff has particular problems with her left hand, and
12 she is left handed. (*Id.*)

13
14 As this case is being remanded for the ALJ to consider Dr. Edelman's opinion and plaintiff's
15 obesity, which may support plaintiff's complaints and her alleged limitations which the ALJ
16 deemed to be unsupported by the objective medical evidence, the Court does not reach plaintiff's
17 claim that the ALJ erred in finding plaintiff to be not credible, but directs that plaintiff's credibility
18 be carefully reassessed on remand.

19
20 **VI. Remand Is Required.**

21
22 The decision whether to remand for further proceedings or order an immediate award of
23 benefits is within the district court's discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir.
24 2000). Where no useful purpose would be served by further administrative proceedings, or where
25 the record has been fully developed, it is appropriate to exercise this discretion to direct an
26 immediate award of benefits. *Id.* at 1179 ("[T]he decision of whether to remand for further
27 proceedings turns upon the likely utility of such proceedings."). However, where there are
28 outstanding issues that must be resolved before a determination of disability can be made, and

1 it is not clear from the record that the ALJ would be required to find the claimant disabled if all
2 the evidence were properly evaluated, remand is appropriate. *Id.* at 1179-81.

3
4 Remand is the appropriate remedy to allow the ALJ the opportunity to remedy the above-
5 mentioned deficiencies and errors. On remand, the ALJ needs to evaluate all the new evidence
6 submitted to the Appeals Council to determine what impact, if any, it has on her ultimate disability
7 determination. Further, should the ALJ reject that evidence, the ALJ shall give appropriate
8 reasons for so doing that are supported by substantial evidence of record. The ALJ must also
9 consider the effects of plaintiff's obesity in connection with her other impairments. Once these
10 issues are properly addressed and clarified, the ALJ can determine what impact, if any, this has
11 on her assessment of plaintiff's credibility. After correcting the above errors and deficiencies, the
12 ALJ may need to reassess plaintiff's RFC, in which case, additional testimony from a vocational
13 expert likely will be needed to determine what work, if any, plaintiff can perform.

14
15 **CONCLUSION**

16
17 Accordingly, for the reasons stated above, IT IS ORDERED that the decision of the
18 Commissioner is REVERSED, and this case is REMANDED for further proceedings consistent with
19 this Memorandum Opinion and Order.

20
21 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this
22 Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for defendant.

23
24 LET JUDGMENT BE ENTERED ACCORDINGLY.

25
26 DATED: July 29, 2013

27
28 

MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE