

1 well as supporting evidence. *Green v. Heckler*, 803 F.2d 528, 929-30 (9th Cir. 1986).
2 Where evidence is susceptible to more than one rational interpretation, the
3 Commissioner's decision must be upheld. *Gallant v. Heckler*, 753 F.2d 1450, 1452
4 (9th Cir. 1984).

6 DISCUSSION

7 Claims relating to the paucity of medical records.

8 Plaintiff asserts that the record is lacking all of the records of plaintiff's mental
9 treatment and many physical treatment records from her treating physician. Plaintiff
10 contends that the ALJ should have made a greater effort to locate these records.
11 Defendant argues that the agency contacted plaintiff's treating physician on three
12 separate occasions, but the physician did not respond. Moreover, plaintiff's counsel
13 obtained some records and provided them in the administrative proceedings.
14 Defendant also argues that the agency contacted Kaiser (where plaintiff received
15 mental treatment) on three occasions. Kaiser responded that it had no records. The
16 agency also arranged for a consultative examination of plaintiff regarding her physical
17 condition.

18 The claimant has the burden of proving disability. 20 CFR ¶ 404.1512(a)
19 (“[Y]ou have to prove to us that you are . . . disabled.”) However, the ALJ has an
20 independent duty to fully and fairly develop the record and to assure that the
21 claimant's interests are considered, even when the claimant is represented.
22 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001); *Crane v. Shalala*, 76 F.3d
23 251, 255 (9th Cir. 1996) (citing *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983)).
24 Here, although the record admittedly lacked any treatment records from plaintiff's
25 psychiatrist and many records from plaintiff's treating physician, the ALJ took every
26 reasonable step to develop a complete record. Pursuant to 20 CFR ¶ 404.1512(d), the
27 agency will contact a claimant's treating sources twice to obtain records; here,
28 plaintiff's sources were both contacted three times. Moreover, given the paucity of

1 medical records, the ALJ obtained a consultative examination of plaintiff. These
2 actions were sufficient to comply with the ALJ's duty to develop the record with
3 respect to plaintiff's physical complaints.

4 With respect to plaintiff's alleged mental impairment, as far as the Court can tell
5 from the AR, it appears that the ALJ obtained a non-examining doctor to review
6 records and fill out the "Psychiatric Review Technique" form. It is unclear what
7 records this doctor reviewed, given that records from plaintiff's treating psychiatrist
8 were never obtained. Ordinarily, an ALJ may not decide an issue against a claimant
9 based on an absence of evidence in the record. *See Armstrong v. Comm'r of Soc. Sec.*
10 *Admin.*, 160 F.3d 587, 589-90 (9th Cir. 1998). Despite requesting records, the ALJ
11 had no mental treatment medical records available to him. Therefore, the ALJ had a
12 duty to develop the record. "The ALJ may discharge [the duty to develop the record]
13 in several ways, including: subpoenaing the claimant's physicians, submitting
14 questions to the claimant's physicians, continuing the hearing, or keeping the record
15 open after the hearing to allow supplementation of the record." *Tonapetyan*, 242 F.3d
16 at 1150; *see also Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996). Alternatively,
17 the ALJ may request that the claimant undergo a consultative examination. 20 C.F.R.
18 §§ 404.1512(e), 416.912(e). Thus, remand is required with respect to development of
19 the record regarding plaintiff's alleged mental impairment.

20 Claim relating to failure to update the medical record.

21 Plaintiff contends that because of the nearly two year lag between the date of
22 the consultative examination of plaintiff and the hearing as well as the existence of
23 several MRI's taken after the date of the consultative examination, the ALJ should
24 have updated the record. Defendant argues that the ALJ satisfied his duty to develop
25 the record by ordering the consultative examination.

26 Although it appears that as of 2006 the ALJ complied with his duty to develop
27 the record with respect to plaintiff's physical condition, the length of time between the
28 examination and the hearing, combined with the availability of additional medical

1 records (at least the MRI's, if not additional treating records) required the ALJ to
2 update the medical record. Therefore, remand is required on this issue as well.

3 Plaintiff's claim regarding the ALJ's credibility determination.

4 Plaintiff contends that the ALJ improperly discredited her testimony regarding
5 her subjective symptoms. Defendant contends that the ALJ provided clear and
6 convincing reasons for rejecting plaintiff's testimony.

7 A claimant who alleges disability based on subjective symptoms "must produce
8 objective medical evidence of an underlying impairment which could reasonably be
9 expected to produce the pain or other symptoms alleged" (the *Cotton* test).
10 *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (internal quotation marks
11 omitted); *Smolen v. Chater*, 80 F.3d 1273, 1281-82 (9th Cir. 1996). Once a claimant
12 produces medical evidence of an underlying impairment that is reasonably likely to
13 cause the alleged symptoms, medical findings are not required to support their alleged
14 severity. *Bunnell*, 947 F.2d at 345; *see also Light v. Social Sec. Admin.*, 119 F.3d 789,
15 792 (9th Cir. 1997) ("[B]ecause a claimant need not present clinical or diagnostic
16 evidence to support the severity of his pain . . . , a finding that the claimant lacks
17 credibility cannot be premised wholly on a lack of medical support for the severity of
18 his pain") (internal citation omitted); *Byrnes v. Shalala*, 60 F.3d 639, 641-42 (9th Cir.
19 1995) (applying *Bunnell* to subjective physical complaints). However, an ALJ may
20 reject a claimant's allegations upon: (1) finding evidence of malingering; or (2)
21 providing clear and convincing reasons for so doing. *Benton v. Barnhart*, 331 F.3d
22 1030, 1040 (9th Cir. 2003).

23 The following factors may be considered in weighing the claimant's credibility
24 in the absence of evidence of malingering: (1) his reputation for truthfulness; (2)
25 inconsistencies either in the claimant's testimony or between the claimant's testimony
26 and his conduct; (3) his daily activities; (4) his work record; and (5) testimony from
27 physicians and third parties concerning the nature, severity, and effect of the
28 symptoms of which he complains. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th

1 Cir. 2002); *see also* 20 C.F.R. §§ 404.1529(c), 416.929(c); Social Security Ruling 96-
2 7p, 1996 WL 374186 (S.S.A.). The ALJ may also use “ordinary techniques of
3 credibility evaluation.” *Thomas*, 278 F.3d at 960. “General findings are insufficient.”
4 *Reddick v. Chater*, 157 F.3d 715, 722 (1998). The ALJ must state which testimony is
5 not credible and identify the evidence that undermines the plaintiff’s complaints. *Id.*;
6 *Benton*, 331 F.3d at 1041. The ALJ’s credibility determination is entitled to deference
7 if his reasoning is supported by substantial evidence in the record and is “sufficiently
8 specific to allow a reviewing court to conclude the adjudicator rejected the claimant’s
9 testimony on permissible grounds and did not arbitrarily discredit a claimant’s
10 testimony” *Bunnell*, 947 F.2d at 345 (internal quotation marks omitted); *see also*
11 *Vasquez v. Astrue*, 572 F.3d 586, 592 (9th Cir. 2009) (ALJ must “point to specific
12 facts in the record which demonstrate that [the claimant] is in less pain than she
13 claims”).

14 Here, the ALJ found that the objective medical evidence demonstrated an
15 underlying impairment which could reasonably be expected to produce the pain or
16 other symptoms alleged by plaintiff. However, the ALJ found that plaintiff’s
17 “statements concerning the intensity, persistence and limiting effects of these
18 symptoms are not credible to the extent they are inconsistent with the . . . residual
19 functional capacity assessment.” (AR 15.) Therefore, the ALJ was required to specify
20 clear and convincing reasons for discounting plaintiff’s testimony.

21 The ALJ specified nine reasons for finding plaintiff not entirely credible:

22 First, the claimant is able to take care of her activities of daily living,
23 which include care of all her personal needs, take care of her two year old
24 granddaughter, cooking, light house keeping, shopping and she continues
25 to drive a car. These activities do not indicate a disabling level of
26 impairment.

27 Second, there is no medical basis for any assistive devices prescribed by a
28 doctor and she uses it intermittently.

1 Third, the claimant does not exhibit any severe weight loss or severe
2 sleep deprivation, which is indicative of severe and disabling pain.

3 Fourth, there are no recent x-rays performed since 2003. It is further
4 noted that the claimant was able to work for several hours [sic] following
5 the spinal findings noted in these x-rays from 2003.

6 Fifth, on October 10, 2006, Dr. Sophon reported the claimant had a
7 normal curvature and no swelling, no tenderness or spasms, inflammation
8 or deformity in her back. The claimant was able to sit and stand with
9 normal posture. The claimant was able to rise from a chair without
10 difficulty. Dr. Sophon opined the claimant could sit, stand and walk six
11 hours out of an eight-hour workday (Exhibit 1F/2, 3).

12 Sixth, Dr. Sophon reported the shoulder examination showed the
13 claimant's condition improved. There was no evidence of tenderness or
14 muscle atrophy. The claimant had a full range of motion in her shoulders.
15 Dr. Sophon opined the claimant would be able to lift and carry twenty-
16 five pounds occasionally and ten pounds frequently (Exhibit 1F).

17 Seventh, on April 10, 2008, the claimant underwent shoulder surgery,
18 which she tolerated the procedure well. After undergoing physical
19 therapy, the claimant's shoulder pain continued to improve (Exhibits
20 12F/2 and 13F/3).

21 Eighth, the State agency found the claimant could perform a light level of
22 exertion (Exhibit 2F).

23 Ninth, the State agency found the claimant's mental impairment is not
24 severe (Exhibit 7F).

25 AR 15.

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1 Reason one simply misstates the record. Plaintiff testified that she encountered
2 difficulties in performing the most minor daily activities. She never testified that she
3 regularly takes care of her granddaughter; she testified that one night she took the
4 granddaughter to her house for the night.

5 Reason two is not clear and convincing. Plaintiff testified that she had been
6 prescribed a cane and there was no contrary evidence.

7 Reason three also is not clear and convincing. There is no evidence in the
8 record that plaintiff's symptoms should have been accompanied by weight loss or
9 severe sleep deprivation.

10 Reason four is only half correct. Although there were no more recent X-rays,
11 there were more recent MRI's which were not reviewed by any doctor.

12 Reasons five and six describe medical records, but do not take into account any
13 post-2006 examinations of plaintiff.

14 Reason seven is not supported by the record.

15 Reasons eight and nine are not convincing given the need to further develop the
16 record for the reasons described above.

17 Finally, the ALJ added the following as an example of how capable plaintiff is:

18 [Plaintiff] described a recent trip to Sacramento where in one day she was
19 able to catch a flight from San Bernardino California to Sacramento
20 California to attend an event at the State Capitol. The claimant was able
21 to participate in the event that included a significant amount of walking
22 and meeting with members of the legislature. The claimant was able to
23 fly back to San Bernardino and picked-up her two-year old grand
24 daughter and brought her home to baby sit. This was, by her testimony,
25 an active fifteen-hour day that she tolerated without a significant
26 problem.

27 AR 16.

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1 Although attending the event in Sacramento, including traveling to and from
2 Sacramento by airplane in the same day, walking extensively and meeting with
3 members of the legislature, seems inconsistent with plaintiff's description of her
4 symptoms, the Court does not find that a day trip in itself provides a clear and
5 convincing reason for disbelieving plaintiff. The Court is somewhat troubled by the
6 ALJ's comment that plaintiff testified that she "tolerated [the trip, event and taking her
7 granddaughter for the evening] without a significant problem." (AR 16.) Plaintiff
8 actually testified that "By 10:00 that night, by the time I got home and I put my
9 grandbaby to bed – she's two years old – my back gave out and I literally could not
10 get off the bed, because my legs gave out and I couldn't move. And I was actually
11 terrified because I didn't know how I was going to be able to, to get even just to the
12 bathroom, use the bathroom." (AR 33.) To the extent the ALJ based his finding on
13 plaintiff's testimony that she "tolerated well" the expedition, the finding is clearly
14 erroneous. Therefore, remand is required for the ALJ, after considering the additional
15 medical evidence mentioned above, to re-evaluate plaintiff's credibility.

16 To the extent plaintiff has asserted any sub-issues with respect to the foregoing,
17 the Court need not address such sub-issues given the Court's order of remand.

18 For the foregoing reasons, the judgement of the Commissioner is reversed and
19 the matter is remanded pursuant to sentence 4 of 42 U.S.C. § 405(g) for further
20 proceedings consistent with this order.

21 **IT IS SO ORDERED.**

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23 DATED: October 26, 2010

24 /S/ FREDERICK F. MUMM
25 FREDERICK F. MUMM
26 United States Magistrate Judge
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