

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

LYNDA KLIMPEL,  
Plaintiff,  
v.  
MICHAEL J. ASTRUE,  
COMMISSIONER OF SOCIAL  
SECURITY ADMINISTRATION,  
Defendant.

No. ED CV 09-1968-PLA  
**MEMORANDUM OPINION AND ORDER**

**I.  
PROCEEDINGS**

Plaintiff filed this action on November 4, 2009, seeking review of the Commissioner’s denial of her application for Supplemental Security Income payments. The parties filed Consents to proceed before the undersigned Magistrate Judge on December 23, 2009, and December 29, 2009. Pursuant to the Court’s order, the parties filed a Joint Stipulation on August 5, 2010, that addresses their positions concerning the disputed issues in the case. The Court has taken the Joint Stipulation under submission without oral argument.

/  
/

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**II.**

**BACKGROUND**

Plaintiff was born on October 14, 1964. [Administrative Record (“AR”) at 19, 44.] She has a ninth grade education, and past work experience as a care provider and cashier. [AR at 20, 36-38, 85-87, 94, 97, 107-14.]

Plaintiff filed her application for Supplemental Security Income payments on June 25, 2007, alleging that she has been unable to work since June 1, 2007, due to bad knees, pain, and bipolar disorder. [AR at 89-98.] After her application was denied initially and upon reconsideration, plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). [AR at 46-56, 59.] A hearing was held on May 6, 2009, at which plaintiff appeared with counsel and testified on her own behalf. A vocational expert also testified. [AR at 17-43.] On July 31, 2009, the ALJ determined that plaintiff was not disabled. [AR at 6-16.] When the Appeals Council denied plaintiff’s request for review of the hearing decision on September 21, 2009, the ALJ’s decision became the final decision of the Commissioner. [AR at 1-4.] This action followed.

**III.**

**STANDARD OF REVIEW**

Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence or if it is based upon the application of improper legal standards. Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

In this context, the term “substantial evidence” means “more than a mere scintilla but less than a preponderance -- it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion.” Moncada, 60 F.3d at 523; see also Drouin, 966 F.2d at 1257. When determining whether substantial evidence exists to support the Commissioner’s decision, the Court examines the administrative record as a whole, considering adverse as well as supporting evidence. Drouin, 966 F.2d at 1257; Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Where the evidence is susceptible to more than one rational interpretation, the Court

1 must defer to the decision of the Commissioner. Moncada, 60 F.3d at 523; Andrews v. Shalala,  
2 53 F.3d 1035, 1039-40 (9th Cir. 1995); Drouin, 966 F.2d at 1258.

#### 3 4 IV.

#### 5 EVALUATION OF DISABILITY

6 Persons are “disabled” for purposes of receiving Social Security benefits if they are unable  
7 to engage in any substantial gainful activity owing to a physical or mental impairment that is  
8 expected to result in death or which has lasted or is expected to last for a continuous period of at  
9 least twelve months. 42 U.S.C. § 423(d)(1)(A); Drouin, 966 F.2d at 1257.

#### 10 11 A. THE FIVE-STEP EVALUATION PROCESS

12 The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing  
13 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lester v. Chater, 81 F.3d 821,  
14 828 n.5 (9th Cir. 1995, as amended April 9, 1996). In the first step, the Commissioner must  
15 determine whether the claimant is currently engaged in substantial gainful activity; if so, the  
16 claimant is not disabled and the claim is denied. Id. If the claimant is not currently engaged in  
17 substantial gainful activity, the second step requires the Commissioner to determine whether the  
18 claimant has a “severe” impairment or combination of impairments significantly limiting her ability  
19 to do basic work activities; if not, a finding of nondisability is made and the claim is denied. Id.  
20 If the claimant has a “severe” impairment or combination of impairments, the third step requires  
21 the Commissioner to determine whether the impairment or combination of impairments meets or  
22 equals an impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R., Part 404,  
23 Subpart P, Appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id.  
24 If the claimant’s impairment or combination of impairments does not meet or equal an impairment  
25 in the Listing, the fourth step requires the Commissioner to determine whether the claimant has  
26 sufficient “residual functional capacity” to perform her past work; if so, the claimant is not disabled  
27 and the claim is denied. Id. The claimant has the burden of proving that she is unable to perform  
28 past relevant work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a prima facie

1 case of disability is established. The Commissioner then bears the burden of establishing that the  
2 claimant is not disabled, because she can perform other substantial gainful work available in the  
3 national economy. The determination of this issue comprises the fifth and final step in the  
4 sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d  
5 at 1257.

## 6 7 **B. THE ALJ'S APPLICATION OF THE FIVE-STEP PROCESS**

8 In this case, at step one, the ALJ concluded that plaintiff has not engaged in any substantial  
9 gainful activity since June 25, 2007, the date of her application. [AR at 11.] At step two, the ALJ  
10 concluded that plaintiff "has the following severe impairments: bilateral knee disorder, morbid  
11 obesity, cervical spine disorder, adjustment disorder with mixed anxiety and depressed mood, and  
12 asthma." [Id.] At step three, the ALJ concluded that plaintiff's impairments do not meet or equal  
13 any of the impairments in the Listing. [AR at 12.] The ALJ further found that plaintiff retained the  
14 residual functional capacity ("RFC")<sup>1</sup>

15 to lift and carry 20 pounds occasionally, and 10 pounds frequently.  
16 She is able to stand and walk 2 hours in an 8 hour work day, and sit  
17 6 hours in an 8 hour workday. [Plaintiff] should be given the  
18 opportunity to alternate between sitting and standing positions every  
19 60 minutes, with the change itself to last 3 minutes maximum.  
20 [Plaintiff] must never climb ramps, stairs, ladders, scaffolds, ropes,  
21 etc. She is occasionally able to perform balancing, bending, stooping,  
22 and crouching. [Plaintiff] cannot kneel, crawl, or walk on uneven  
terrain. [Plaintiff] is unable to move her head and neck to the extreme  
ranges of motion, but is frequently able to perform less than the  
extreme ranges of motion. She should be allowed to hold her head  
in a comfortable position. [Plaintiff] is unable to perform high-quota,  
production-rate pace work, such as rapid assembly line work. She  
should not perform any work involving safety operations or  
responsibility for the safety of others.

23 [AR at 13.] At step four, the ALJ concluded that plaintiff is unable to perform her past relevant  
24 work. [AR at 14.] At step five, relying on the vocational expert's testimony and written statements  
25 [see AR at 35-42, 147, 149-53], the ALJ concluded that plaintiff is "capable of making a successful  
26

---

27 <sup>1</sup> Residual functional capacity ("RFC") is what a claimant can still do despite existing  
28 exertional and nonexertional limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n. 5 (9th Cir.  
1989).

1 adjustment to other work that exists in significant numbers in the national economy.” [AR at 15.]  
2 Accordingly, the ALJ found that plaintiff is not disabled. [Id.]

3  
4 **V.**

5 **THE ALJ’S DECISION**

6 Plaintiff contends that the ALJ failed to properly: (1) consider if plaintiff meets or equals  
7 Listing section 1.02A; (2) consider plaintiff’s testimony and credibility; (3) consider the type,  
8 dosage, effectiveness, and side effects of plaintiff’s medications; and (4) develop the medical  
9 record. [Joint Stipulation (“JS”) at 2-3.] As set forth below, the Court agrees with plaintiff, in part,  
10 and remands the matter for further proceedings.

11  
12 **A. LISTING SECTION 1.02A**

13 Plaintiff contends that the ALJ’s RFC determination and the medical evidence pertaining  
14 to her knee impairment show that she meets Listing section 1.02A, and that the ALJ failed to  
15 adequately support his conclusion that her impairments do not meet or equal that section of the  
16 Listing. [AR at 3-8.] The Court agrees that further consideration of this issue is warranted.

17 To meet or equal the Listing, a claimant has the burden of establishing that she meets each  
18 characteristic of a listed impairment. Tackett v. Apfel, 180 F.3d 1094, 1099 (9th Cir. 1999). As  
19 relevant here, Listing 1.02A pertains to the “[m]ajor dysfunction of a joint(s) ... [c]haracterized by  
20 [1.] gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability)  
21 [2.] chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion  
22 of the affected joint(s), and [3.] findings on appropriate medically acceptable imaging of joint space  
23 narrowing, bony destruction, or ankylosis of the affected joint(s)[,] [w]ith ... [4.] [i]nvolvement of one  
24 major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate  
25 effectively, as defined in [section] 1.00B2b.” 20 C.F.R., Pt. 404, Subpt. P, App. 1, § 1.02A.

26 Under section 1.00B2b, the following description is provided concerning “What [the  
27 Administration] Mean[s] by Inability to Ambulate Effectively”:

1 (1) Definition. Inability to ambulate effectively means an extreme  
2 limitation of the ability to walk; i.e., an impairment(s) that interferes  
3 very seriously with the individual's ability to independently initiate,  
4 sustain, or complete activities. Ineffective ambulation is defined  
generally as having insufficient lower extremity functioning ... to permit  
independent ambulation without the use of a hand-held assistive  
device(s) that limits the functioning of both upper extremities. ...

5 (2) To ambulate effectively, individuals must be capable of sustaining  
6 a reasonable walking pace over a sufficient distance to be able to  
7 carry out activities of daily living. They must have the ability to travel  
8 without companion assistance to and from a place of employment or  
9 school. Therefore, **examples of ineffective ambulation include, but  
10 are not limited to**, the inability to walk without the use of a walker,  
11 two crutches or two canes, **the inability to walk a block at a  
12 reasonable pace on rough or uneven surfaces**, the inability to use  
standard public transportation, the inability to carry out routine  
ambulatory activities, such as shopping and banking, and the inability  
to climb a few steps at a reasonable pace with the use of a single  
hand rail. The ability to walk independently about one's home without  
the use of assistive devices does not, in and of itself, constitute  
effective ambulation.

13 20 C.F.R., Pt. 404, Subpt. P, App. 1, § 1.00B2b (emphasis added). The Administration has further  
14 clarified that use of an assistive device(s) limiting functioning of both of a claimant's upper  
15 extremities is sufficient, but not necessary, to establish an inability to ambulate effectively  
16 according to paragraphs 1 and 2 of section 1.00B2b. Specifically, the Administration has  
17 explained, "We do not want to say that a claimant needs two hand-held assistive devices in order  
18 to exhibit inability to ambulate effectively .... The definition requires only that the claimant not be  
19 able to ambulate effectively and that effective ambulation would not occur if the only way an  
20 individual could get around would be with an assistive device that requires use of both upper  
21 extremities." 66 Fed.Reg. 58010, at \*58027 (Nov. 19, 2001). The Administration has further  
22 asserted that "[t]he criteria [under 1.00B2b] do not require an individual to use an assistive device  
23 of any kind[,]" the "explanation[s] and examples should make it clear that [the section] applies to  
24 anyone who cannot walk adequately[,]" and "we recognize that individuals with extreme inability  
25 to ambulate do not necessarily use assistive devices." Id. at \*58026-27.

26 Here, the medical evidence indicates that plaintiff suffers from pain in both of her knees.  
27 [See AR at 154, 157, 209.] Plaintiff has undergone bilateral arthroscopic knee surgery and was  
28 reportedly told that she would be a candidate for knee replacement surgery if she were to lose 100

1 pounds. [AR at 154.] According to several physicians, x-ray images of plaintiff's knees show  
2 arthritic changes, minimal degenerative disease, and small osteophytes. [AR at 157, 158, 209.]  
3 Plaintiff described her physical limitations during the hearing as including back and knee pain, but  
4 she did not state that she needs to use any assistive device to walk. [See AR at 30.] In a  
5 Function Report - Adult, plaintiff stated that she gets around by walking and using public  
6 transportation [AR at 115, 118], and that she has difficulty walking more than a block without  
7 stopping to rest for two to three minutes. [AR at 120.] However, she did not say that she needs  
8 an assistive device to walk. [Id.] Indeed, the medical evidence indicates that such a device was  
9 not medically necessary. [See, e.g., AR at 157 (examining physician Dr. Jeff Altman noted that  
10 an "[a]ssistive device is not medically necessary").]

11 To make a proper step-three finding, "an ALJ must evaluate the relevant evidence before  
12 concluding that a claimant's impairments do not meet or equal a listed impairment. A boilerplate  
13 finding is insufficient to support a conclusion that a claimant's impairment does not do so." Lewis  
14 v. Apfel, 236 F.3d 503, 512 (9th Cir. 2001) (citing Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir.  
15 1990)). "The regulations ... require the Secretary to review the symptoms, and make specific  
16 findings essential to the conclusion. ... [The ALJ's] findings should be as comprehensive and  
17 analytical as feasible and, where appropriate, should include a statement of subordinate factual  
18 foundations on which the ultimate factual conclusions are based, so that a reviewing court may  
19 know the basis for the decision." Gonzalez v. Sullivan, 914 F.2d 1197, 1200 (9th Cir. 1990)  
20 (quotations and citations omitted); see 20 C.F.R. §§ 404.1526(c), 416.926(c) ("When we  
21 determine if your impairment medically equals a listing, we consider all evidence in your case  
22 record about your impairment(s) and its effects on you that is relevant to this finding.").

23 In concluding that plaintiff did not meet or equal the Listing, the ALJ in the decision stated  
24 that he gave "particular attention to the impairments set forth in Listings 1.00 (Musculoskeletal  
25 System)" but found that plaintiff's "knee disorder does not satisfy the requirements as stated in  
26 1.02 regarding major dysfunction of a joint." [AR at 11-12.] In reaching this conclusion, the ALJ  
27 summarized some of the medical evidence pertaining to plaintiff's knee impairment, including Dr.  
28 Altman's conclusion that an assistive device was not medically necessary. [AR at 11.] However,

1 he did not discuss the evidence pertaining to plaintiff's knee surgery or the objective imaging  
2 results indicating arthritic changes, degenerative disease, and osteophytes in plaintiff's knees, and  
3 he did not say how this evidence and the RFC determination finding her unable to walk on uneven  
4 terrain impacted his step-three finding. Since the ALJ did not expressly discuss all of the relevant  
5 evidence concerning plaintiff's knee impairment, or how her impairment and functional limitations  
6 compare to the requirements of Listing section 1.02A (including whether she is unable to ambulate  
7 effectively under section 100.B2b) -- and it appears that plaintiff might meet at least some of these  
8 requirements -- the Court finds remand necessary for the ALJ to properly consider whether plaintiff  
9 should be found disabled at step three of the sequential analysis. See Dobson v. Astrue, 267  
10 Fed.Appx. 610, 612 (9th Cir. 2008) (remanding ALJ's finding that the plaintiff's knee impairment  
11 did not meet section 1.02A of the listing where the ALJ failed to analyze whether the plaintiff "could  
12 (with or without a cane) 'ambulate effectively'" according to the factors set forth in section  
13 1.00B2b) (citable for its persuasive value pursuant to Ninth Circuit Rule 36-3); Moss v. Astrue, 555  
14 F.3d 556, 562-63 (7th Cir. 2009) (in finding that plaintiff failed to establish an inability to ambulate  
15 effectively, the ALJ ALJ erred in failing to "adequately consider whether [the plaintiff] in fact me[t]  
16 the [L]isting based on the provided examples [under section 1.00B2] such as an inability to walk  
17 a block at a reasonable pace on rough or uneven surfaces, or the inability to carry out routine  
18 activities, like shopping and banking"); Dunham v. Astrue, 603 F.Supp.2d 13, 18-19 (D.D.C. 2009)  
19 (ALJ's finding that the plaintiff did not meet or equal Listing section 1.02 was not based on  
20 substantial evidence where the ALJ identified only some of the relevant evidence concerning the  
21 plaintiff's ability to ambulate, and failed to consider the plaintiff's limitations under all of the section  
22 1.00B2b ambulation factors).

## 23

### 24 **B. ALJ'S FAILURE TO DEVELOP THE MEDICAL RECORD**

25 At the hearing, the ALJ noted that the administrative record only contained treatment notes  
26 from plaintiff's primary care physician, Dr. Virgilio Naco, through approximately December 2007,  
27 and that Dr. Naco retired on February 2008. [AR at 24; see AR at 185-213.] Plaintiff testified that  
28 she started seeing "Dr. Nished," an internal medicine physician who works in a different medical



1 office than Dr. Naco, every two months after Dr. Naco retired. [AR at 24-25.] Plaintiff also testified  
2 that in January or June 2008, she starting seeing Dr. Prado (or Dr. Padua) from “Behavioral  
3 Health” every five to six weeks for mental health treatment after Dr. Naco retired. [AR at 27-28.]  
4 The ALJ noted that the administrative record did not include any medical evidence from Behavioral  
5 Health. [AR at 27.] At the end of the hearing, plaintiff’s counsel explained that he had made two  
6 requests for plaintiff’s records from “Victor Valley Mental Health, San Bernardino [C]ounty.” [AR  
7 at 42.] The ALJ stated in response, “I’ll leave the record open seven days. If ... I leave it open any  
8 longer, then I’m going to have to review the file all over, and we’ll have to have another hearing.”  
9 [AR at 42.]

10 The administrative record before the Court does not include any treatment records from Dr.  
11 Nished or Victor Valley Mental Health. There is also no indication in the record that the ALJ  
12 attempted to obtain such records. However, in an undated Disability Report - Appeal - Form,  
13 plaintiff listed her treating sources as 1) San Bernardino Behavioral Health, where she said she  
14 started receiving treatment for bi-polar disorder in March 2008 and her next appointment was on  
15 May 6, 2008, and 2) Dr. Ezzat A. Nashed, from whom she said she started receiving treatment  
16 for her knees, back pain, and asthma in April 2008 and her next appointment was on April 22,  
17 2008. [See AR at 141.] Plaintiff asserts that the ALJ failed to fulfill his duty to develop the medical  
18 evidence by not attempting to obtain the treatment records from these two sources before  
19 reaching a decision in this case. [JS at 22-27.] The Court agrees.

20 The ALJ has an affirmative “duty to fully and fairly develop the record and to assure that  
21 the claimant’s interests are considered ... even when the claimant is represented by counsel.”  
22 Celaya v. Halter, 332 F.3d 1177, 1183 (9th Cir. 2003) (ellipsis in original) (quoting Brown v.  
23 Heckler, 713 F.2d 441, 443 (9th Cir. 1983)); see Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th  
24 Cir. 2001). If evidence from a medical source is inadequate to determine if the claimant is  
25 disabled, an ALJ is required to recontact the medical source, including a treating physician, to  
26 determine if additional needed information is readily available. See 20 C.F.R. §§ 404.1512(e)(1),  
27 416.912(e)(1); see also Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005) (“[t]he ALJ’s duty to  
28 supplement a claimant’s record is triggered by ambiguous evidence [or] the ALJ’s own finding that

1 the record is inadequate”). “In cases of mental impairments,” the ALJ’s duty to clarify and develop  
2 the record “is especially important.” DeLorme v. Sullivan, 924 F.2d 841, 849 (9th Cir. 1991); see  
3 also Tonapetyan, 242 F.3d at 1150 (“The ALJ’s duty to develop the record fully is ... heightened  
4 where the claimant may be mentally ill and thus unable to protect her own interests.”). The  
5 responsibility to see that this duty is fulfilled belongs entirely to the ALJ; it is not part of the  
6 claimant’s burden. White v. Barnhart, 287 F.3d 903, 908 (10th Cir. 2001).

7 Here, the ALJ recognized during the hearing that the medical record potentially did not  
8 contain 17 months of plaintiff’s treatment records (i.e., from December 2007, when Dr. Naco last  
9 saw plaintiff, to May 2009, when the administrative hearing was held). The ALJ’s recognition that  
10 the medical evidence was incomplete prompted his duty to contact plaintiff’s current treating  
11 physicians to see if additional treatment records were available. His failure to do so was error.  
12 See Webb, 433 F.3d at 687 (the ALJ erred in failing to meet his “affirmative duty to supplement  
13 [the claimant’s] medical record, to the extent it was incomplete, before rejecting” the claimant’s  
14 application for benefits).

15 Further, it is apparent that additional treatment notes -- especially those pertaining to  
16 plaintiff’s mental health treatment -- may have impacted the ALJ’s credibility and disability  
17 determinations in this case. At the hearing, plaintiff testified that her psychiatric symptoms include  
18 auditory hallucinations impacting her ability to work. [AR at 30-35.] She explained that for the past  
19 six months to one year, she had been hearing voices telling her to kill herself, she told Dr. Naco  
20 about the voices, she was hearing the voices during the hearing, and her psychiatric medication  
21 did not stop the voices. [Id.] In the decision, the ALJ rejected plaintiff’s credibility concerning her  
22 alleged mental impairments because, among other reasons, Dr. Naco’s treatment records do not  
23 indicate that plaintiff reported experiencing auditory hallucinations.<sup>2</sup> [AR at 14.] Although Dr.

---

24  
25 <sup>2</sup> The ALJ can reject a claimant’s allegations “only upon (1) finding evidence of malingering,  
26 or (2) expressing clear and convincing reasons for doing so.” Benton v. Barnhart, 331 F.3d 1030,  
27 1040 (9th Cir. 2003); see Lester, 81 F.3d at 834. The Court finds two of the ALJ’s other reasons  
28 for rejecting plaintiff’s credibility concerning her mental impairments -- the ALJ’s conclusion that  
plaintiff “did not appear to be distracted by or responding to any internal stimuli” during the hearing;  
(continued...)

1 Naco's treatment notes do not reflect that plaintiff reported auditory hallucinations, the Court  
2 observes that plaintiff also testified that she started hearing voices up to one year before the May  
3 2009 hearing, i.e., long **after** she last saw Dr. Naco in December 2007. Further, in her Disability  
4 Report - Appeal - Form, plaintiff stated that she suffered from bi-polar disorder with the side effect  
5 of hearing voices for which she was prescribed Abilify from San Bernardino County Behavioral  
6 Health. [AR at 142.] If plaintiff's Victor Valley Mental Health, San Bernardino County treatment  
7 records reflect that she reported auditory hallucinations to her treating physicians, such evidence  
8 might impact on the ALJ's credibility determination on this point since it would help corroborate  
9 her subjective symptoms and her testimony regarding when she started experiencing (and  
10 reporting to her treating physicians) her auditory hallucinations.

11 Accordingly, the Court concludes that remand is warranted for further development of the  
12 medical treatment evidence generated after December 2007, and for the ALJ to reconsider  
13 plaintiff's subjective symptoms and credibility after the record has been developed.

14 /

15 /

16 /

17 \_\_\_\_\_

18 <sup>2</sup>(...continued)  
19 and examining physician Dr. Jason Yang's conclusion that plaintiff did not appear to be responding  
20 to internal stimuli during a September 2007 Complete Psychiatric Evaluation [AR at 13-14, citing  
21 AR at 159, 161] -- neither clear nor convincing.

22 First, an ALJ may not properly reject a claimant's credibility on the basis that he did not  
23 observe her subjective symptoms at a hearing because "[t]he fact that a claimant does not exhibit  
24 physical manifestations of [symptoms] at the hearing provides little, if any, support for the ALJ's  
25 ultimate conclusion that the claimant is not disabled or that [her] allegations ... are not credible."  
26 Gallant v. Heckler, 753 F.2d 1450, 1455 (9th Cir. 1984). Accordingly, the ALJ's personal  
27 observations at the hearing do not constitute a clear and convincing reason for rejecting plaintiff's  
28 credibility in these circumstances. Second, Dr. Yang's 2007 Evaluation occurred well before  
plaintiff said she started hearing voices and was consistent with plaintiff's statement to Dr. Yang  
that she did not have any hallucinations or suicidal ideation at that time. [AR at 161.] Notably, Dr.  
Yang found plaintiff to be a "reliable historian." [AR at 159.] As Dr. Yang's Evaluation was not  
inconsistent with plaintiff's testimony concerning her auditory hallucinations, it is not clear that the  
ALJ did not arbitrarily reject plaintiff's credibility on this basis. Orteza v. Shalala, 50 F.3d 748, 750  
(9th Cir. 1995) (to properly reject a plaintiff's credibility, the ALJ must provide reasoning  
"sufficiently specific to permit the reviewing court to conclude that the ALJ did not arbitrarily  
discredit the claimant's testimony").

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

VI.

**REMAND FOR FURTHER PROCEEDINGS**

As a general rule, remand is warranted where additional administrative proceedings could remedy defects in the Commissioner's decision. See Harman v. Apfel, 211 F.3d 1172, 1179 (9th Cir. 2000), cert. denied, 531 U.S. 1038 (2000); Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984). In this case, remand is appropriate in order for the ALJ to reconsider if plaintiff's impairments meet section 1.02A of the Listing, further develop the medical record, and reconsider plaintiff's credibility.<sup>3</sup>

Accordingly, **IT IS HEREBY ORDERED** that: (1) plaintiff's request for remand is **granted**; (2) the decision of the Commissioner is **reversed**; and (3) this action is **remanded** to defendant for further proceedings consistent with this Memorandum Opinion.

**This Memorandum Opinion and Order is not intended for publication, nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.**



DATED: August 27, 2010

\_\_\_\_\_  
PAUL L. ABRAMS  
UNITED STATES MAGISTRATE JUDGE

---

<sup>3</sup> As remand is warranted on these grounds, the Court will not address the remaining issues raised by plaintiff.