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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CHRISTINA PALOS,	)	NO. EDCV 09-02182-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on December 3, 2009, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for a period of disability and disability insurance benefits ("DIB"). On January 6, 2010, the parties consented to proceed before the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on August 3, 2010, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits or, alternatively, for further administrative proceedings; and defendant requests that the Commissioner's decision be affirmed. The Court has taken the parties' Joint Stipulation under submission without

1 oral argument.

2  
3 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**  
4

5 Plaintiff applied for a period of disability and DIB.  
6 (Administrative Record ("A.R.") 129-31.) Plaintiff claims to have been  
7 disabled since September 21, 2003, due to bipolar disorder, attention  
8 deficit disorder ("ADD"), anxiety, nervousness, depression, poor sleep,  
9 mood swings, nausea, dizziness, shakiness, and an inability to  
10 concentrate. (See, e.g., A.R. 46, 56-57, 68, 71-72, 137, 168, 172, 193,  
11 196.) Plaintiff later alleged an inability to work due to affective  
12 mood disorder. (See, e.g., Joint Stipulation ("Joint Stip.") at 2.)  
13 Plaintiff has past relevant work experience as a nurse assistant and  
14 emergency room clerk.<sup>1</sup> (A.R. 16.)  
15

16 After the Commissioner denied plaintiff's claim initially and upon  
17 reconsideration (A.R. 51-54, 57-61), plaintiff requested a hearing  
18 (A.R. 62). On March 19, 2009, plaintiff, who was represented by  
19 counsel, appeared and testified at a hearing before Administrative Law  
20 Judge John Kays (the "ALJ"). (A.R. 18-43.) Vocational expert Susan  
21 Allison, medical expert Dr. Craig Rath (a psychologist), and plaintiff's  
22 son Javier Palos also testified. (*Id.*) On September 2, 2009, the ALJ  
23 denied plaintiff's claim (A.R. 8-17), and the Appeals Council  
24 subsequently denied plaintiff's request for review of the ALJ's decision  
25 (A.R. 1-4). That decision is now at issue in this action.  
26

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27 <sup>1</sup> Although not discussed in the ALJ's decision, it appears that  
28 plaintiff also has past relevant work experience as a clerk and  
receptionist. (See, e.g., A.R. 138.)



1 of disability, because plaintiff would not be disabled if she stopped  
2 her substance abuse. (A.R. 17.) Accordingly, the ALJ concluded that  
3 plaintiff was not disabled within the meaning of the Social Security Act  
4 from the alleged onset date through the date of his decision. (*Id.*)  
5

#### 6 STANDARD OF REVIEW

7

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

20 Although this Court cannot substitute its discretion for that of  
21 the Commissioner, the Court nonetheless must review the record as a  
22 whole, "weighing both the evidence that supports and the evidence that  
23 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
24 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*  
25 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
26 responsible for determining credibility, resolving conflicts in medical  
27 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
28 1035, 1039 (9th Cir. 1995).

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

#### 14 DISCUSSION

16 Plaintiff makes the following claims: (1) the ALJ did not consider  
17 the opinions of plaintiff's treating physicians properly; (2) the ALJ  
18 did not consider the lay witness testimony and third party statement  
19 properly; (3) the ALJ did not consider plaintiff's credibility properly;  
20 and (4) the ALJ did not assess plaintiff's RFC properly.<sup>2</sup> (Joint Stip.  
21 at 2-4.)

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26 <sup>2</sup> Within her first claim, plaintiff also asserts that the ALJ  
27 failed to develop the record fully. (See Joint Stip. at 8-9.) For  
28 purposes of clarity, the Court will address this issue separately.  
Additionally, the Court will address plaintiff's second and fourth  
claims together.

1 **I. The ALJ Failed To Develop The Record With Respect To Plaintiff's**  
2 **Drug Use.**

3  
4 An ALJ "has a special duty to fully and fairly develop the record  
5 and to assure that the claimant's interests are considered." Brown v.  
6 Heckler, 713 F.2d 441, 443 (9th Cir. 1983). Pursuant to 20 C.F.R. §  
7 404.1512(e), the Administration "will seek additional evidence or  
8 clarification from your medical source when the report from your medical  
9 source contains a conflict or ambiguity that must be resolved, [or] the  
10 report does not contain all the necessary information . . . ." See  
11 Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001)(noting that  
12 "[a]mbiguous evidence . . . triggers the ALJ's duty to 'conduct an  
13 appropriate inquiry'"); Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir.  
14 1996)(noting that "[i]f the ALJ thought he needed to know the basis of  
15 [the doctor's] opinions in order to evaluate them, he had a duty to  
16 conduct an appropriate inquiry"). "In cases of mental impairments, this  
17 duty is especially important." DeLorme v. Sullivan, 924 F.2d 841, 849  
18 (9th Cir. 1991).

19  
20 The ALJ erred by failing to develop the record regarding  
21 plaintiff's drug use. In pertinent part, the record reflects that, on  
22 May 1, 2006, plaintiff was evaluated by both staff psychiatrist Dr.  
23 Ellison Chang, M.D., and clinician Albert Fam, LCSW, at the Riverside  
24 County Medical Center. (A.R. 283-90.) Dr. Chang noted plaintiff's past  
25 methamphetamine use and her current cravings for methamphetamine;  
26 diagnosed plaintiff with, among other things, amphetamine abuse; and  
27 referred plaintiff to the Corona Substance Abuse program. (A.R. 283.)  
28 Clinician Albert Fam also noted plaintiff's past drug use (A.R. 284) and

1 that she was not using alcohol and/or street drugs currently (A.R. 286).  
2 On May 9, 2006, plaintiff was again treated by Dr. Chang and a reference  
3 was made to command hallucinations and "amph[etamines]" eight months  
4 ago.<sup>3</sup> (A.R. 314.)

5  
6 On June 10, 2006, Dr. Romualdo R. Rodriguez, M.D., an examining  
7 physician, performed a complete psychiatric evaluation on plaintiff.  
8 (A.R. 271-77.) Dr. Rodriguez noted that plaintiff was not then using  
9 drugs and supposedly had last used illegal drugs approximately two years  
10 ago.<sup>4</sup> (A.R. 273.) Dr. Rodriguez diagnosed plaintiff with, among other  
11 things, "[p]olysubstance dependence, supposedly in full sustained  
12 remission." (A.R. 275.) He further noted that, while plaintiff has  
13 some functional limitations, "[f]rom a psychiatric point of view, as  
14 long as [plaintiff] continues free of all illegal drugs and uses  
15 psychiatric medications correctly, she can easily recover within twelve  
16 months." (A.R. 276-77.)

17  
18 After reviewing plaintiff's medical records, including Dr. Chang's  
19 diagnosis of "amphetamine abuse," medical expert Craig Rath, a  
20 psychologist, implicitly noted the lack of clarity in Dr. Chang's  
21 diagnosis of plaintiff, testifying that "[i]t doesn't say dependence or  
22

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23 <sup>3</sup> Although later treatment notes from Dr. Chang do not include  
24 a discussion of plaintiff's drug use, the majority include a check box  
25 reference to plaintiff's denial of current substance abuse/dependence.  
26 (See, e.g., A.R. 311 (June 20, 2006 -- deny); A.R. 310 (August 17, 2005  
27 -- deny); A.R. 308 (September 9, 2006 -- deny); A.R. 307 (September 29,  
2006 -- deny); A.R. 305 (November 9, 2006 -- deny); A.R. 304 (December  
28 21, 2006 -- deny); A.R. 303 (January 18, 2007 -- deny); A.R. 302  
(February 20, 2007 -- deny); A.R. 301 (illegible date in 2007 -- deny).)

<sup>4</sup> At the 2009 hearing, plaintiff reported that it had been  
"years" since she last used methamphetamines. (A.R. 31.)

1 exactly what they mean or history of [amphetamine abuse]." (A.R. 23.)  
2 Curiously, and without explanation, upon seeing an identical copy of Dr.  
3 Chang's diagnosis in a later exhibit, Dr. Rath unequivocally opined that  
4 Dr. Chang's diagnosis of plaintiff's "meth[amphetamine] abuse . . .  
5 mean[t] current [abuse]." (A.R. 24.) Accordingly, Dr. Rath opined that  
6 plaintiff was abusing methamphetamines until "some date in [20]06."  
7 (A.R. 24.) Dr. Rath concluded that, absent substance abuse, plaintiff  
8 does not meet a listing and has the functional capacity for "no more  
9 than a moderate degree of stress."<sup>5</sup> (A.R. 24-25.) Dr. Rath's opinion  
10 was echoed in both the ALJ's RFC and his findings that, absent substance  
11 abuse, plaintiff does not meet a listing and is not disabled.  
12

13 The Court is not convinced, however, that substantial evidence  
14 supports Dr. Rath's determination that plaintiff abused drugs until some  
15 date in 2006. After carefully reviewing the record as well as the  
16 supplemental briefs submitted by both parties, it is still entirely  
17 unclear whether Dr. Chang's May 1, 2006 diagnosis of amphetamine abuse  
18 referred to ongoing or prior substance abuse. Dr. Chang's treatment  
19 note only indicates that plaintiff had cravings for methamphetamine and  
20 a history of methamphetamine abuse. Although Dr. Chang referred  
21 plaintiff to a substance abuse program, it is unclear whether he  
22 referred plaintiff there to avoid a relapse or because of then current  
23 methamphetamine use. Dr. Rodriguez's reference, in his June 10, 2006  
24 evaluation, to plaintiff's supposed two-year remission in her substance  
25 abuse, and his note that plaintiff was not using drugs currently --  
26

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27 <sup>5</sup> Specifically, he opined that plaintiff should avoid being in  
28 charge of the safety operations of others, using dangerous equipment,  
and stressful situations with the general public. (A.R. 25.)



1 i.e., in June 2006 -- further clouds the issue of whether substantial  
2 evidence supports the ALJ's conclusion, based on Dr. Rath's opinion,  
3 that plaintiff's substance abuse was ongoing in May 2006.

4  
5 Without knowing when plaintiff stopped using drugs, Dr. Rath and,  
6 more critically, the ALJ, who relied on Dr. Rath's opinion, could not  
7 have properly assessed plaintiff's residual functional capacity or  
8 determined whether plaintiff met a listing in the absence of drug abuse.  
9 Further, the ALJ could not have evaluated properly, as required under 20  
10 C.F.R. § 404.1535(b): (1) which of plaintiff's physical and mental  
11 limitations would remain if plaintiff refrained from drug use; and (2)  
12 whether plaintiff's remaining limitations would be disabling.  
13 Accordingly, the ALJ could not have properly determined whether  
14 plaintiff's drug abuse is a contributing factor material to the  
15 determination of disability. 20 C.F.R. § 404.1535(a). Therefore, in  
16 view of the ambiguity surrounding plaintiff's drug use and the  
17 significant role it plays in the ALJ's findings and ultimate disability  
18 determination, the ALJ's failure to develop the record further  
19 constitutes reversible error.

20  
21 **II. The ALJ Failed To Consider The Opinions Of Plaintiff's Treating**  
22 **Physicians Properly.**

23  
24 It is the responsibility of the ALJ to resolve conflicts in medical  
25 testimony and analyze evidence. Magallanes v. Bowen, 881 F.2d 747, 750  
26 (9th Cir. 1989). In the hierarchy of physician opinions considered in  
27 assessing a social security claim, "[g]enerally, a treating physician's  
28 opinion carries more weight than an examining physician's, and an

1 examining physician's opinion carries more weight than a reviewing  
2 physician's." Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir.  
3 2001); 20 C.F.R. § 404.1527(d). The opinions of treating physicians are  
4 entitled to the greatest weight, because the treating physician is hired  
5 to cure and has a better opportunity to observe the claimant.  
6 Magallanes, 881 F.2d at 751. When a treating physician's opinion is not  
7 contradicted by another physician, it may be rejected only for "clear  
8 and convincing" reasons. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.  
9 1995)(as amended). When contradicted by another doctor, a treating  
10 physician's opinion may only be rejected if the ALJ provides "specific  
11 and legitimate" reasons supported by substantial evidence in the record.  
12 *Id.* However, an ALJ "need not discuss all evidence presented to [him]."  
13 Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir. 1984)(emphasis in  
14 original); see also Howard v. Barnhart, 341 F.3d 1006, 1012 (9th Cir.  
15 2003)(noting that an ALJ need not discuss every piece of evidence). An  
16 ALJ must explain only why "significant probative evidence has been  
17 rejected." Vincent, 739 F.2d at 1395 (internal quotations and citation  
18 omitted).

19  
20 A. Dr. Isreal

21  
22 The ALJ erred by failing to discuss the opinion of plaintiff's  
23 treating physician, Dr. Isreal. Dr. Isreal diagnosed plaintiff with  
24 bipolar disorder and attention deficit hyperactivity disorder (ADHD);  
25 opined that plaintiff had mildly impaired memory and judgment; and noted  
26 that plaintiff had evidence of depression, anxiety, decreased energy,  
27 and manic syndrome. (A.R. 416.) Dr. Isreal noted that plaintiff was  
28 not able to: maintain a sustained level of concentration; sustain

1 repetitive tasks for an extended period; adapt to new or stressful  
2 situations; interact appropriately with family, strangers, coworkers, or  
3 supervisors; or complete a 40 hour work week without decompensating.  
4 (*Id.*) Dr. Isreal further noted that plaintiff needed assistance with  
5 her medications and keeping appointments and that she was unable to  
6 manage her own funds in her best interest.<sup>6</sup> (*Id.*)

7  
8 While an ALJ need not discuss every piece of evidence, an ALJ must  
9 explain why significant and probative evidence -- such as the opinion of  
10 Dr. Isreal -- is rejected. Here, the ALJ not only failed to discuss  
11 Dr. Isreal's opinion but also failed to give any reason for rejecting  
12 Dr. Isreal's opinion. Accordingly, the ALJ committed error.

13  
14 B. Dr. Chang

15  
16 Absent further inquiry, the ALJ cannot properly assess, let alone  
17 reject, the opinion of plaintiff's treating psychiatrist, Dr. Chang. In  
18 his decision, the ALJ gives diminished weight to Dr. Chang's opinion,  
19 because, among other things, his treatment notes do not even discuss  
20 plaintiff's drug use. (A.R. 15.) While an ALJ need not accept an  
21 opinion that is conclusory and brief, when there is ambiguity in the  
22 record, "authorities such as Smolen v. Chater, 80 F.3d 1273, 1288 (9th  
23 Cir. 1996) and section 404.1512(e) of 20 C.F.R. suggest that . . .  
24 further inquiry of the treating source(s) should precede a final  
25 determination of whether the opinions are not adequately explained or

26  
27 <sup>6</sup> Although not cited by plaintiff, in a later treatment note,  
28 dated November 5, 2008, Dr. Israel noted, in pertinent part, that  
plaintiff's mood was depressed and anxious and that plaintiff was obese.  
(A.R. 399.)

1 supported." Estrada v. Astrue, 2008 WL 4643866, \*2 (C.D. Cal. Oct. 20,  
2 2008).

3  
4 Moreover, and contrary to the ALJ's assertion, Dr. Chang did  
5 discuss plaintiff's drug use. Indeed, as discussed *supra*, it is the  
6 ambiguity surrounding Dr. Chang's discussion of plaintiff's drug use  
7 that should have triggered the ALJ's duty to recontact Dr. Chang and  
8 develop the record further. Critically, without further inquiry, it is  
9 unclear whether Dr. Chang's treatment notes reflect his opinion  
10 regarding plaintiff's limitations and restrictions in the absence or  
11 presence of drugs. Accordingly, further development of the record is  
12 necessary for the ALJ to consider the opinion of Dr. Chang properly.<sup>7</sup>

13  
14 <sup>7</sup> Additionally, it appears that the ALJ attempts to minimize Dr.  
15 Chang's later treatment notes by stating that they indicate plaintiff's  
16 condition is "stable and/or well controlled." (A.R. 14.) A closer  
17 review of the record, however, reveals that plaintiff's condition was  
18 anything but stable and/or well controlled. (See, e.g., A.R. 312 (June  
19 15, 2006 -- doing a lot better; situational and severe anxiety; o.k.  
20 mood; moderately low energy; severe daytime sleepiness; and improved  
21 OCD); A.R. 311 (July 20, 2006 -- doing worse; variable and irritable  
22 mood; severe daytime sleepiness; low concentration; severely low energy;  
23 moderate mind racing; moderate impulsivity; and decreased handwashing  
24 (OCD)); A.R. 310 (August 17, 2006 -- doing o.k.; situational anxiety;  
25 increased irritability; severely low energy; severe daytime sleepiness;  
26 improved cognition; low concentration; denial of mind racing,  
27 impulsivity, spending sprees, and bad decisions; decreased OCD); A.R.  
28 309 (August 24, 2006 -- decreased energy; and increased daytime  
drowsiness); A.R. 308 (September 9, 2006 -- doing worse; increased  
dysphoric and irritable mood; increased crying; severely low energy;  
poor sleep; severe daytime sleepiness; moderate mind racing; deny  
impulsivity, spending sprees, and bad decisions); A.R. 307 (September  
29, 2006 -- doing ok/better; slight anxiety; decreased irritable mood;  
moderately low energy; increased sleep; moderate daytime sleepiness;  
decreased mind racing); A.R. 305 (November 9, 2006 -- doing worse;  
increased dysphoric and irritable mood; severe generalized anxiety; low  
energy; decreased sleep; insomnia; severe daytime sleepiness; moderate  
mind racing; increased spending sprees; and OCD better); A.R. 304  
(December 21, 2006 -- "all kinds of stress"; severe generalized anxiety;  
o.k. mood; severely elevated energy; o.k. sleep; slight daytime  
sleepiness; slight mind racing; and denial of impulsivity and shopping  
sprees); A.R. 303 (January 18, 2007 - new ADHD diagnosis; severe

1 **III. The ALJ's Reasons For Rejecting Plaintiff's Credibility Are Neither**  
2 **Clear Nor Convincing.**

3  
4 Once a disability claimant produces objective evidence of an  
5 underlying impairment that is reasonably likely to be the source of her  
6 subjective symptom(s), all subjective testimony as to the severity of  
7 the symptoms must be considered. Moisa v. Barnhart, 367 F.3d 882, 885  
8 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.  
9 1991)(*en banc*); see also 20 C.F.R. § 404.1529(a) (explaining how pain  
10 and other symptoms are evaluated). "[U]nless an ALJ makes a finding of  
11 malingering based on affirmative evidence thereof, he or she may only  
12 find an applicant not credible by making specific findings as to  
13 credibility and stating clear and convincing reasons for each."  
14 Robbins, 466 F.3d at 883. The factors to be considered in weighing a  
15 claimant's credibility include: (1) the claimant's reputation for  
16 truthfulness; (2) inconsistencies either in the claimant's testimony or  
17 between the claimant's testimony and her conduct; (3) the claimant's  
18 daily activities; (4) the claimant's work record; and (5) testimony from  
19 physicians and third parties concerning the nature, severity, and effect  
20 of the symptoms of which the claimant complains. See Thomas v.  
21 Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); see also 20 C.F.R. §

22 \_\_\_\_\_  
23 anxiety; irritable and angry mood; elevated energy; severe daytime  
24 sleepiness; mind racing and spending sprees; o.k. cognition; and low  
25 concentration); A.R. 302 (February 20, 2007 -- increased focus,  
26 multitasking, alertness, energy; concentration, and irritable mood);  
27 A.R. 301 (illegible date, 2007 -- doing better; increased anxiety;  
28 irritable mood; o.k. sleep; severe daytime sleepiness; and better  
concentration); A.R. 300 (May 8, 2007 -- apathetic and dysphoric mood;  
unhappy; poor sleep; decreased concentration; decreased impulsivity; and  
becomes overwhelmed and anxious); A.R. 418 (August 20, 2007 --  
Adjustment Disorder and ADHD diagnosis; notation that plaintiff had  
cyclic presentation, not stabilized yet).)

1 404.1529(c).

2  
3 An ALJ may not rely on a plaintiff's daily activities to support an  
4 adverse credibility determination when those activities do not affect  
5 the claimant's ability to perform appropriate work activities on an  
6 ongoing and daily basis. Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th  
7 Cir. 1990). As the Ninth Circuit noted in Lester, the ALJ must evaluate  
8 claimant's "ability to work on a *sustained* basis." 81 F.3d at 833  
9 (emphasis in original)(citing 20 C.F.R. § 404.1512(a)). A claimant need  
10 not be "utterly incapacitated to be eligible for benefits . . . and many  
11 home activities are not easily transferable to what may be the more  
12 grueling environment of the workplace, where it might be impossible to  
13 periodically rest or take medication." Fair v. Bowen, 885 F.2d 597, 602  
14 (9th Cir. 1989).

15  
16 The ALJ found that plaintiff's "medically determinable impairments  
17 could reasonably be expected to produce the alleged symptoms." (A.R.  
18 15.) Further, the ALJ cited no evidence of malingering by plaintiff.  
19 Accordingly, the ALJ's reason for rejecting plaintiff's credibility must  
20 be "clear and convincing."

21  
22 In his decision, the ALJ found plaintiff to be not credible, in  
23 part, because of purported inconsistencies in plaintiff's reported drug  
24 use. Specifically, the ALJ noted that, while plaintiff had reported  
25 last using drugs in 2004, her remission was noted as "questionable" in  
26 a June 10, 2006 psychiatric consultative examination report. (A.R. 14.)  
27 The ALJ further noted that in a May 1, 2006 visit to the Riverside  
28 County Department of Mental Health, plaintiff's methamphetamine abuse

1 was noted along with a reference to "methamphetamine use eight months  
2 ago from May of 2006." (*Id.*)

3  
4 Contrary to the ALJ's suggestion, Dr. Rodriguez, who completed the  
5 June 10, 2006 psychiatric consultative examination report to which the  
6 ALJ referred, did not expressly find plaintiff's remission  
7 "questionable." Rather, Dr. Rodriguez merely noted that plaintiff  
8 "supposedly" stopped using illegal drugs in 2004, and "supposedly" was  
9 in full remission. (A.R. 273.) To the extent the ALJ found Dr.  
10 Rodriguez's statement to be unclear or ambiguous with respect to  
11 plaintiff's remission, the ALJ should have recontacted Dr. Rodriguez and  
12 conducted an appropriate inquiry. Further, as discussed in detail  
13 above, the record is ambiguous with respect to plaintiff's drug use.  
14 After carefully reviewing the record and the supplemental briefs from  
15 both parties, it is still unclear when plaintiff last used drugs and,  
16 thus, whether plaintiff's statements regarding her drug use are, in  
17 fact, inconsistent with the aforementioned medical records.  
18 Accordingly, absent further inquiry, the ALJ's reason for finding  
19 plaintiff to be not credible is neither clear nor convincing.

20  
21 Furthermore, while the ALJ proffered other reasons for finding  
22 plaintiff to be not credible -- *to wit*, that (1) the medical record did  
23 not support the alleged severity and impact of plaintiff's impairments;  
24 and (2) plaintiff's daily activities were not consistent with her  
25 alleged symptoms -- those reasons are neither clear nor convincing.  
26 (A.R. 15.) The ALJ's first ground is neither clear nor convincing,  
27 because, in view of the uncertainty surrounding plaintiff's drug use, it  
28 is not clear whether the medical record does or does not support the

1 alleged severity and impact of plaintiff's impairments. Significantly,  
2 and of concern to the Court, plaintiff's medical records appear to show  
3 that plaintiff's condition has a cyclical presentation and was not  
4 stabilized for an extended period. (See, e.g., A.R. 418.) In pertinent  
5 part, plaintiff has periods of marked lows during which she experiences,  
6 *inter alia*, severe anxiety (A.R. 304, 312), severely low energy (A.R.  
7 310), low concentration (A.R. 300, 310-311), moderate mind racing (A.R.  
8 303, 311), and severe sleepiness (A.R. 303, 305, 310, 312). See Note 7,  
9 *supra*. While the ALJ concludes that plaintiff's condition is  
10 controllable in the absence of drug abuse, his conclusion is premised on  
11 an assumption that plaintiff was abusing drugs during the relevant  
12 disability period -- an assumption which, as discussed above, does not  
13 appear to be clearly supported by substantial evidence. Further, to the  
14 extent the ALJ may have relied on Dr. Rodriguez's June 10, 2006  
15 statement that plaintiff "can easily recover within twelve months" if  
16 she stops using illegal drugs and takes her psychiatric medications,  
17 plaintiff's medical record may belie Dr. Rodriguez's prognosis. (A.R.  
18 276.) Moreover, the failure of the medical record to corroborate fully  
19 plaintiff's subjective symptom testimony is not, by itself, a legally  
20 sufficient basis for rejecting such testimony. Rollins v. Massanari,  
21 261 F.3d 853, 856 (9th Cir. 2001).

22  
23 The ALJ's second ground for discrediting plaintiff is also neither  
24 clear nor convincing. In his decision, the ALJ noted that, in a June  
25 10, 2006 psychiatric consultative examination, Dr. Rodriguez reported  
26 that plaintiff was able to drive her own car, run errands, go to the  
27 store with her husband, dress and bathe herself, participate in cooking  
28 and making snacks, perform household chores, take walks, handle her own



1 cash, pay the bills, pick up after her children, make dinner with her  
2 husband's help, and take her two children to school. (A.R. 15.)  
3 Accordingly, the ALJ determined that plaintiff's "symptoms in  
4 combination are not so disabling that she is unable to engage in  
5 activities typical of most individuals." (*Id.*) The relevant test,  
6 however, is not whether plaintiff can engage in activities typical of  
7 most individuals; but rather, whether plaintiff is able to work on a  
8 *sustained* basis. See Lester, 81 F.3d at 833. Here, the ALJ fails to  
9 explain how plaintiff's basic activities and household chores translate  
10 into the ability to perform full-time work. See Fair, 885 F.3d 602.  
11 Further, it is unclear how plaintiff's limited daily activities are  
12 inconsistent with her alleged symptoms. See Vertigan v. Halter, 260  
13 F.3d 1044, 1050 (9th Cir. 2001)(noting that "the mere fact that a  
14 plaintiff has carried on certain daily activities, such as grocery  
15 shopping, driving a car, or limited walking for exercise, does not in  
16 any way detract from [plaintiff's] credibility as to her overall  
17 disability").

18  
19 Accordingly, the ALJ erred by failing to provide clear and  
20 convincing reasons, as required, for finding plaintiff to be not  
21 credible.

22  
23 **IV. The ALJ Must Review And Reconsider The Lay Witness Testimony Of**  
24 **Plaintiff's Son, The Third Party Statement Of Plaintiff's Mother,**  
25 **And Plaintiff's Assessed RFC.**

26  
27 Based on the foregoing, there are several matters that the ALJ  
28 needs to review and reconsider on remand. As a result, the ALJ's

1 conclusion regarding the credibility of the lay witness testimony and  
2 the third party statement, as well as his RFC assessment for plaintiff,  
3 may change. Therefore, the Court does not reach plaintiff's second and  
4 fourth claims -- *to wit*, that the ALJ erred: (1) in considering both  
5 the lay witness testimony of plaintiff's son, Javier Palos, and the  
6 third party statement of plaintiff's mother, Teresa Coronado; and (2) in  
7 determining plaintiff's RFC. To properly review and reconsider these  
8 issues, the ALJ needs to develop the record to resolve the ambiguity  
9 surrounding plaintiff's drug use. Once this issue is clarified, the ALJ  
10 can determine what impact, if any, this has on his assessment of the lay  
11 witness testimony, the third party statement, and plaintiff's RFC.

12  
13 **V. Remand Is Required.**

14  
15 The decision whether to remand for further proceedings or order an  
16 immediate award of benefits is within the district court's discretion.  
17 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
18 useful purpose would be served by further administrative proceedings, or  
19 where the record has been fully developed, it is appropriate to exercise  
20 this discretion to direct an immediate award of benefits. *Id.* at 1179  
21 ("[T]he decision of whether to remand for further proceedings turns upon  
22 the likely utility of such proceedings."). However, where there are  
23 outstanding issues that must be resolved before a determination of  
24 disability can be made, and it is not clear from the record that the ALJ  
25 would be required to find the claimant disabled if all the evidence were  
26 properly evaluated, remand is appropriate. *Id.* at 1179-81.

27  
28 Remand is the appropriate remedy to allow the ALJ the opportunity

1 to remedy the above-mentioned deficiencies and errors. See, e.g.,  
2 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for  
3 further proceedings is appropriate if enhancement of the record would be  
4 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989)  
5 (remand appropriate to remedy defects in the record). On remand, the  
6 ALJ must correct the above-mentioned deficiencies and errors.

7  
8 Specifically, the ALJ needs to consider the opinion of Dr. Isreal  
9 and, if appropriate, give clear and convincing reasons for rejecting his  
10 opinion. Additionally, the ALJ needs to recontact Dr. Chang to clarify  
11 his treatment notes with respect to the timing and extent of plaintiff's  
12 drug use. In pertinent part, although Dr. Chang's later treatment notes  
13 do not discuss plaintiff's drug use, his treatment notes may reflect  
14 plaintiff's limitations and restrictions in the absence of drug use.  
15 Accordingly, further inquiry may be appropriate. Once the ALJ resolves  
16 the ambiguity surrounding plaintiff's drug use, the ALJ can properly  
17 consider plaintiff's credibility, the credibility of both the lay  
18 witness testimony and the third party statement, whether plaintiff's  
19 drug use is a contributing factor material to the determination of  
20 disability, and plaintiff's RFC. Lastly, to the extent that plaintiff's  
21 RFC may need to be reassessed, additional testimony from a vocational  
22 expert likely will be required to determine whether plaintiff can  
23 perform work other than her past relevant work.

24  
25 **CONCLUSION**


26  
27 Accordingly, for the reasons stated above, IT IS ORDERED that the  
28 decision of the Commissioner is REVERSED, and this case is REMANDED for

1 further proceedings consistent with this Memorandum Opinion and Order.

2  
3 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
4 copies of this Memorandum Opinion and Order and the Judgment on counsel  
5 for plaintiff and for defendant.

6  
7 LET JUDGMENT BE ENTERED ACCORDINGLY.

8  
9 DATED: March 1, 2011

10   
11 MARGARET A. NAGLE  
12 UNITED STATES MAGISTRATE JUDGE  
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