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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARIA RODRIGUEZ,)	Case No. EDCV 10-1371-OP
)	
Plaintiff,)	
v.)	MEMORANDUM OPINION; ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	

The Court¹ now rules as follows with respect to the disputed issues listed in the Joint Stipulation (“JS”).²

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¹ Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the United States Magistrate Judge in the current action. (See Dkt. Nos. 8, 9.)

² As the Court stated in its Case Management Order, the decision in this case is made on the basis of the pleadings, the Administrative Record, and the Joint Stipulation filed by the parties. In accordance with Rule 12(c) of the Federal Rules of Civil Procedure, the Court has determined which party is entitled to judgment under the standards set forth in 42 U.S.C. § 405(g).

1 I.

2 **DISPUTED ISSUES**

3 As reflected in the Joint Stipulation, the disputed issues that Plaintiff raises
4 as the grounds for reversal and/or remand are as follows:

- 5 (1) Whether the administrative law judge (“ALJ”), F. Keith Varni, should
6 have obtained vocational expert testimony in light of the presence of
7 nonexertional limitations; and
8 (2) Whether the ALJ made proper credibility findings and properly
9 considered Plaintiff’s subjective symptoms.

10 (JS at 2.)

11 II.

12 **STANDARD OF REVIEW**

13 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision
14 to determine whether the Commissioner’s findings are supported by substantial
15 evidence and whether the proper legal standards were applied. DeLorme v.
16 Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence means “more
17 than a mere scintilla” but less than a preponderance. Richardson v. Perales, 402
18 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971); Desrosiers v. Sec’y of
19 Health & Human Servs., 846 F.2d 573, 575-76 (9th Cir. 1988). Substantial
20 evidence is “such relevant evidence as a reasonable mind might accept as adequate
21 to support a conclusion.” Richardson, 402 U.S. at 401 (citation omitted). The
22 Court must review the record as a whole and consider adverse as well as
23 supporting evidence. Green v. Heckler, 803 F.2d 528, 529-30 (9th Cir. 1986).
24 Where evidence is susceptible of more than one rational interpretation, the
25 Commissioner’s decision must be upheld. Gallant v. Heckler, 753 F.2d 1450,
26 1452 (9th Cir. 1984).

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1 **III.**

2 **DISCUSSION**

3 **A. The ALJ's Findings.**

4 The ALJ found that Plaintiff has a severe impairment of the musculoskeletal
5 system. (Administrative Record ("AR") at 11.) The ALJ also found that Plaintiff
6 has the residual functional capacity ("RFC") to perform a full range of medium
7 work. (Id. at 13.) Relying on Rule 203.21 of the Medical-Vocational Guidelines,
8 the ALJ concluded that there are jobs that exist in significant numbers in the
9 national economy that Plaintiff can perform. (Id. at 13-14.) The ALJ noted that
10 even if Plaintiff were limited to light work, she would not be disabled under Rule
11 202.13 of the Medical-Vocational Guidelines. (Id. at 14.)

12 **B. The ALJ's Credibility Determination and Consideration of Plaintiff's**
13 **Subjective Symptoms.**

14 Plaintiff contends that the ALJ erred in finding that her reported symptoms
15 and limitations were not credible and failing to provide sufficient reasons for
16 rejecting her subjective complaints of impairment. (JS at 8-15.) Specifically, at
17 the administrative hearing, Plaintiff testified about the nature and extent of her
18 condition. She testified that: she suffers from lower back pain (AR at 18-19); her
19 back pain runs down to her legs and increases during cold temperatures, if she sits
20 too long, walks too far, does "any kind of bending," or stands for long periods of
21 time (id. at 19, 27, 32); she can sit for only thirty to forty-five minutes at a time
22 and stand for only one hour at a time, can walk "probably a block or less," can lift
23 only about ten pounds, and has to lie down for four to six hours during the day (id.
24 at 18, 22-23, 26, 29-31); she wears a back brace and takes Naproxen and Robaxin
25 to relieve her symptoms (id. at 19-22); she expects she would miss two days a
26 week of work because of her pain (id. at 26-27); and her pain has become worse in
27 recent years (id. at 28).

28 In his decision, the ALJ found that Plaintiff's medically determinable

1 impairment “could reasonably be expected to cause the alleged symptoms,” but
2 that Plaintiff’s “statements concerning the intensity, persistence and limiting
3 effects” of her symptoms were not credible “to the extent they are inconsistent
4 with the above residual functional capacity assessment.” (Id. at 12.) In support of
5 his credibility determination, the ALJ summarized the internal medicine
6 evaluation performed by consultative examiner Dr. Rocely Ella-Tamayo, M.D.,
7 noting that “[t]he physical examination was unremarkable.” (Id. at 12-13.)

8 An ALJ’s assessment of pain severity and claimant credibility is entitled to
9 “great weight.” Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v.
10 Heckler, 779 F.2d 528, 531 (9th Cir. 1986). An ALJ’s credibility finding must be
11 properly supported by the record and sufficiently specific to ensure a reviewing
12 court that the ALJ did not arbitrarily reject a claimant’s subjective testimony.
13 Bunnell v. Sullivan, 947 F.2d 341, 345-47 (9th Cir. 1991). When, as here, an
14 ALJ’s disbelief of a claimant’s testimony is a critical factor in a decision to deny
15 benefits, the ALJ must make explicit credibility findings. Rashad v. Sullivan, 903
16 F.2d 1229, 1231 (9th Cir. 1990); Lewin v. Schweiker, 654 F.2d 631, 635 (9th Cir.
17 1981); see also Albalos v. Sullivan, 907 F.2d 871, 874 (9th Cir. 1990) (an implicit
18 finding that claimant was not credible is insufficient).

19 Under the “Cotton test,” where the claimant has produced objective medical
20 evidence of an impairment which could reasonably be expected to produce some
21 degree of pain and/or other symptoms, and the record is devoid of any affirmative
22 evidence of malingering, the ALJ may reject the claimant’s testimony regarding
23 the severity of the claimant’s pain and/or other symptoms only if the ALJ makes
24 specific findings stating clear and convincing reasons for doing so. See Cotton v.
25 Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986); see also Smolen v. Chater, 80 F.3d
26 1273, 1281 (9th Cir. 1996); Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993);
27 Bunnell, 947 F.2d at 343.

28 To determine whether a claimant’s testimony regarding the severity of her

1 symptoms is credible, the ALJ may consider, *inter alia*, the following evidence:
2 (1) ordinary techniques of credibility evaluation, such as the claimant's reputation
3 for lying, prior inconsistent statements concerning the symptoms, and other
4 testimony by the claimant that appears less than candid; (2) unexplained or
5 inadequately explained failure to seek treatment or to follow a prescribed course of
6 treatment; (3) the claimant's daily activities; and (4) testimony from physicians
7 and third parties concerning the nature, severity, and effect of the claimant's
8 symptoms. Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); see also
9 Smolen, 80 F.3d at 1284.

10 Here, because the ALJ made no finding that the Plaintiff was malingering,
11 the ALJ was required to justify his credibility determination with clear and
12 convincing reasons. See Benton v. Barnhart, 331 F.3d 1030, 1040 (9th Cir. 2003).
13 The ALJ found only that the results of Dr. Ella-Tamayo's evaluation of Plaintiff
14 was unremarkable. (AR at 13.) The Court understands this statement to mean that
15 the ALJ discounted Plaintiff's credibility because he believed the objective
16 medical findings did not support her subjective symptoms.

17 An ALJ cannot rely solely on an absence of supporting objective medical
18 findings to reject a claimant's credibility. See Lester v. Chater, 81 F.3d 821, 834
19 (9th Cir. 1995) ("Once the claimant produces medical evidence of an underlying
20 impairment, the Commissioner may not discredit the claimant's testimony as to
21 subjective symptoms merely because they are unsupported by objective
22 evidence."). A claimant need not produce evidence of subjective symptoms other
23 than her own testimony. Bunnell, 947 F.2d at 344 ("The claimant must produce
24 objective medical evidence of an underlying impairment which could reasonably
25 be expected to produce the pain or other symptoms alleged.") (internal quotations
26 omitted).

27 Here, Plaintiff testified, and/or reported to physicians, that she experiences
28 significant lower back pain. (Id. at 18-32, 99, 101, 113, 150, 166, 185, 203.) The

1 objective medical evidence demonstrates that Plaintiff suffers from residual back
2 pain due to her prior back surgery and compression of her L2 vertebrae. (Id. at
3 149-50, 191, 204, 217, 224-25.) Because Plaintiff produced medical evidence of
4 an underlying impairment that the ALJ determined could reasonably be expected
5 to cause her alleged symptoms, objective medical findings are not required to
6 support their alleged severity. Bunnell, 947 F.2d at 344-45. Thus, a lack of
7 corroborating objective evidence was an insufficient reason, on its own, for the
8 ALJ to find Plaintiff’s testimony to be not credible.

9 In explaining that “[t]he physical examination was unremarkable[,]” the
10 ALJ conceivably may have meant that Plaintiff’s testimony was inconsistent with
11 the objective medical evidence, rather than merely not supported by the evidence.³
12 However, the ALJ did not explain how any of Plaintiff’s specific testimony was
13 supposedly inconsistent with any objective evidence. Rather, the ALJ stated:

14 On October 8, 2007, the claimant underwent an internal medicine
15 evaluation by Rocely Ella-Tamayo, M.D. Then, the claimant
16 complained of back pain and history of heart murmur. She reported she
17 fell and injured her back in 1978. She had back surgery with bone graft
18 and 2 Harrington rods put in. She has back pain now with prolonged
19 walking, sitting or standing. Occasionally her right leg gets numb. She
20 takes pain medication, uses a heating pad, changes positions or does bed
21 rest, which helps. She reported a history of heart murmur diagnosed as

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24 ³ The Court cannot discern any other reason provided by the ALJ to justify
25 his credibility determination and will not attempt to do so. See Pinto v. Massanari,
26 249 F.3d 840, 847 (9th Cir. 2001) (court “cannot affirm the decision of an agency
27 on a ground that the agency did not invoke in making its decision”); Barbato v.
28 Comm’r of Soc. Sec. Admin., 923 F. Supp. 1273, 1276 n.2 (C.D. Cal. 1996)
 (“Commissioner’s decision must stand or fall with the reasons set forth in the
 ALJ’s decision . . .”).

1 a teenager. She was not put on any medication for it. She denies any
2 cardiopulmonary symptoms. She walks 1 ½ blocks. She picks up about
3 20 pounds. She takes the bus to go out or gets a ride. She fixes the bed
4 and she goes to the main house and has breakfast there. She has been
5 living in a drug and alcohol program for the past 5 months. She does
6 book work, reading and answering questions, writing down the answers.
7 She goes to meetings in the morning and afternoon. She lies down at
8 noon for a nap. She cleans up her area and her bathroom. The claimant
9 states that she was an assembler until she stopped in the 1980s because
10 of back pain. She smoked 5 cigarettes a day for 15 years and quit 3
11 years ago. The physical examination was unremarkable. Range of
12 motion is within normal limits. A lumbar spine x-ray revealed two rods
13 along the dorsal aspect from T12 to L4, with anterior compression of L2.
14 There is disc degeneration at L1-L2, L2-L3 and L3-L4. Dr. Ella-
15 Tamayo set forth a diagnosis of status post back surgery with residual
16 back pain, soft heart murmur, and past chronic nicotine, alcohol and
17 methamphetamine abuse. The claimant is restricted in pushing, pulling,
18 lifting, and carrying to about 50 pounds occasionally and about 25
19 pounds frequently. Sitting is unrestricted. In terms of standing and
20 walking, the claimant is able to stand and walk 6 hours out of an 8-hour
21 workday with normal breaks. There are no postural restrictions
22 including kneeling and squatting. There is no functional impairment
23 observed on both hands”

24 (Id. at 13.)

25 Plaintiff’s reported lower back pain does not necessarily conflict with this
26 objective evidence. The ALJ merely summarized the medical evidence and drew a
27 conclusion as to Plaintiff’s credibility without providing any analysis. “While an
28 ALJ may certainly find testimony not credible and disregard it . . . , [courts] cannot

1 affirm such a determination unless it is supported by specific findings and
2 reasoning.” Robbins v. Soc. Sec. Admin., 466 F.3d 880, 884-85 (9th Cir. 2006).

3 In the absence of sufficient reasons for rejecting Plaintiff’s testimony, the
4 ALJ’s credibility determination was error. Accordingly, this action should be
5 remanded to allow the ALJ to set forth legally sufficient reasons for rejecting
6 Plaintiff’s testimony, if the ALJ again determines rejection is warranted.

7 **C. The ALJ’s Reliance on the Medical-Vocational Guidelines.**

8 In her remaining claim, Plaintiff contends that the ALJ erroneously relied on
9 the Medical-Vocational Guidelines and failed to obtain vocational expert (“VE”)
10 testimony regarding Plaintiff’s ability to perform jobs that exist in significant
11 numbers in the national economy in light of her “significant non-exertional
12 limitations.” (JS at 3-5.) Any conclusions as to the applicability of the Medical-
13 Vocational Guidelines are dependent upon findings relating to her impairment as
14 reflected in her subjective complaints. Accordingly, on remand to reconsider
15 Plaintiff’s credibility, the ALJ also shall determine whether application of the
16 Medical-Vocational Guidelines is appropriate, and/or whether he should elicit
17 testimony from a VE.

18 **D. This Case Should Be Remanded for Further Administrative**
19 **Proceedings.**

20 The law is well established that remand for further proceedings is
21 appropriate where additional proceedings could remedy defects in the
22 Commissioner’s decision. Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984).
23 Remand for payment of benefits is appropriate where no useful purpose would be
24 served by further administrative proceedings, Kornock v. Harris, 648 F.2d 525,
25 527 (9th Cir. 1980); where the record has been fully developed, Hoffman v.
26 Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); or where remand would
27 unnecessarily delay the receipt of benefits, Bilby v. Schweiker, 762 F.2d 716, 719
28 (9th Cir. 1985).

1 Here, the Court concludes that further administrative proceedings would
2 serve a useful purpose and remedy the administrative defects discussed above.

3 **IV.**

4 **ORDER**

5 Pursuant to sentence four of 42 U.S.C. § 405(g), IT IS HEREBY
6 ORDERED THAT Judgment be entered reversing the decision of the
7 Commissioner of Social Security and remanding this matter for further
8 administrative proceedings consistent with this Memorandum Opinion.

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10 Dated: May 3, 2011



11 **HONORABLE OSWALD PARADA**
12 United States Magistrate Judge
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