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

10 YVETTE L. LANDRY,) Case No. EDCV 11-01260-MLG
11)
12 Plaintiff,) MEMORANDUM OPINION AND ORDER
13)
14 v.)
15)
16 MICHAEL J. ASTRUE,)
17 Commissioner of the Social)
18 Security Administration,)
19)
20 Defendant.)
21 _____)
22)
23)

24 Plaintiff Yvette Landry seeks judicial review of the
25 Commissioner's final decision denying her application for Social
26 Security Disability Insurance benefits ("DIB"). For the reasons
27 discussed below, the decision of the Commissioner is REVERSED and
28 the matter REMANDED for further proceedings consistent with this
opinion.

I. Facts and Procedural Background

Plaintiff was born on November 26, 1973. (Administrative Record ("AR") at 139.) She has a high school education and has work experience as a sales representative and driver. (AR at 158, 162, 204.) Plaintiff filed her application for DIB on January 7, 2009,

1 alleging disability beginning October 22, 2008, due to
2 fibromyalgia, back and neck pain, depression, anxiety, and migraine
3 headaches. (AR at 201.) Her application was denied initially on
4 March 4, 2009, and upon reconsideration on April 22, 2009. (AR at
5 71-74, 75-80.) Administrative Law Judge ("ALJ") Mason Harrell, Jr.
6 held a de novo administrative hearing on May 20, 2010. Plaintiff,
7 represented by an attorney, testified as did a vocational expert
8 ("VE") and a medical expert. (AR at 31-66.)

9 ALJ Harrell issued an unfavorable decision on July 1, 2010.
10 (AR at 18-24.) The ALJ found that Plaintiff suffered from the
11 severe impairment of chronic pain due to fibromyalgia and
12 headaches. (AR at 20.) However, the impairment did not meet the
13 requirements of a listed impairment found in 20 C.F.R. Part 404,
14 Subpart P, Appendix 1. (Id.)

15 The ALJ further found that Plaintiff retained the residual
16 functional capacity ("RFC") to perform sedentary work as defined in
17 20 C.F.R. 404.1567(a): "She can stand/walk/sit for 6 hours of an 8-
18 hour workday with normal breaks such as every two hours. She can
19 lift and carry 10 pounds maximum, and occasionally stoop and bend.
20 She can climb stairs, but she cannot climb ladders, work at
21 heights, or balance. She should be able to lie down during the
22 lunch break and could miss work 1-2 times a month. In addition, the
23 work should consist of simple, repetitive tasks." (AR at 20.)

24 The ALJ concluded that although Plaintiff could not perform
25 any past relevant work, there were jobs in the national economy
26 which Plaintiff could perform, such as food and beverage order
27 clerk and charge account clerk. (AR at 23.) Therefore, he found
28 that Plaintiff was not disabled under the Social Security Act. (AR

1 at 24.)

2 The Appeals Council denied review on June 7, 2011 (AR at 1-3),
3 and Plaintiff commenced this action for judicial review. On May 7,
4 2012, the parties filed a Joint Stipulation ("Joint Stip.") of
5 disputed facts and issues. Plaintiff contends that the ALJ erred in
6 evaluating Plaintiff's credibility and subjective pain testimony.
7 (Joint Stip. at 4.) Plaintiff asks the Court to reverse and order
8 an award of benefits, or in the alternative, remand for further
9 administrative proceedings. (Joint Stip. at 17.) The Commissioner
10 requests that the ALJ's decision be affirmed, or in the
11 alternative, remanded for further proceedings. (Joint Stip. at 17-
12 18.)

14 **II. Standard of Review**

15 Under 42 U.S.C. § 405(g), a district court may review the
16 Commissioner's decision to deny benefits. The Commissioner's
17 decision must be upheld unless "the ALJ's findings are based on
18 legal error or are not supported by substantial evidence in the
19 record as a whole." *Tackett v. Apfel*, 180 F.3d 1094 (9th Cir.
20 1999); *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).
21 Substantial evidence means more than a scintilla, but less than a
22 preponderance; it is evidence that a reasonable person might accept
23 as adequate to support a conclusion. *Lingenfelter v. Astrue*, 504
24 F.3d 1028, 1035 (9th Cir. 2007)(citing *Robbins v. Soc. Sec. Admin.*,
25 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
26 substantial evidence supports a finding, the reviewing court "must
27 review the administrative record as a whole, weighing both the
28 evidence that supports and the evidence that detracts from the

1 Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715, 720
2 (9th Cir. 1996). "If the evidence can support either affirming
3 or reversing the ALJ's conclusion," the reviewing court "may not
4 substitute its judgment for that of the ALJ." *Robbins*, 466 F.3d at
5 882.

6 7 **III. Discussion**

8 Plaintiff contends that the ALJ failed to provide clear and
9 convincing reasons for rejecting her subjective pain testimony.
10 (Joint Stip. at 4.) To determine whether a claimant's testimony
11 about subjective pain or symptoms is credible, an ALJ must engage
12 in a two-step analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th
13 Cir. 2009) (citing *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36
14 (9th Cir. 2007)). First, the ALJ must determine whether the
15 claimant has presented objective medical evidence of an underlying
16 impairment which could reasonably be expected to produce the
17 alleged pain or other symptoms. *Lingenfelter*, 504 F.3d at 1036.
18 "[O]nce the claimant produces objective medical evidence of an
19 underlying impairment, an adjudicator may not reject a claimant's
20 subjective complaints based solely on a lack of objective medical
21 evidence to fully corroborate the alleged severity of pain."
22 *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc).
23 To the extent that an individual's claims of functional limitations
24 and restrictions due to alleged pain is reasonably consistent with
25 the objective medical evidence and other evidence in the case, the
26 claimant's allegations will be credited. SSR 96-7p, 1996 WL 374186

1 at *2 (explaining 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4)).¹

2 Unless there is affirmative evidence showing that the claimant
3 is malingering, the ALJ must provide specific, clear and convincing
4 reasons for discrediting a claimant's complaints. *Robbins*, 466 F.3d
5 at 883. "General findings are insufficient; rather, the ALJ must
6 identify what testimony is not credible and what evidence
7 undermines the claimant's complaints." *Reddick*, 157 F.3d at 722
8 (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996)). The
9 ALJ must consider a claimant's work record, observations of medical
10 providers and third parties with knowledge of claimant's
11 limitations, aggravating factors, functional restrictions caused
12 by symptoms, effects of medication, and the claimant's daily
13 activities. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 & n.8 (9th Cir.
14 1996). The ALJ may also consider an unexplained failure to seek
15 treatment or follow a prescribed course of treatment and employ
16 other ordinary techniques of credibility evaluation. *Id.* (citations
17 omitted).

18 Plaintiff testified at the administrative hearing to the
19 following symptoms and functional limitations: she feels tired and
20 exhausted most of the time; she has persistent neck, shoulder, hip,
21 and joint pain; she has hand tremors; she is prevented from working
22 at her former job as a driver because the fibromyalgia makes her
23 tired and her pain medication makes her feel drowsy; and pain in
24

25 ¹ "The Secretary issues Social Security Rulings to clarify the
26 Secretary's regulations and policy Although SSRs are not
27 published in the federal register and do not have the force of law,
28 [the Ninth Circuit] nevertheless give[s] deference to the
Secretary's interpretation of its regulations." *Bunnell*, 947 F.2d
at 346 n.3.

1 her legs and knees makes it difficult for her to stand and/or walk
2 for more than 20 minutes at a time. (AR at 39-41, 43, 46-47.)

3 The ALJ found that Plaintiff's medical impairments could
4 reasonably be expected to cause the alleged symptoms. (AR at 22.)
5 The ALJ was therefore required to provide specific, clear and
6 convincing reasons for rejecting Plaintiff's subjective allegations
7 of pain and functional limitations. The ALJ found Plaintiff only
8 "partially credible" because "[t]he alleged degree of functional
9 impairment is not fully supported by objective findings, treatment
10 records, or the claims representative's observations." (Id.)

11 Here, the ALJ had already concluded that Plaintiff's
12 fibromyalgia was a severe impairment that could be expected to
13 produce the symptoms she described. In light of those conclusions,
14 the ALJ was not entitled to discredit Plaintiff's testimony merely
15 because the objective evidence did not corroborate the severity of
16 the pain. *Reddick*, 157 F.3d at 722; *Bunnell*, 947 F.2d at 345; *Light*
17 *v. Soc. Sec. Admin*, 119 F.3d 789 (9th Cir. 1997) ("[B]ecause a
18 claimant need not present clinical or diagnostic evidence to
19 support the severity of his pain ... a finding that the claimant
20 lacks credibility cannot be premised wholly on a lack of medical
21 support for the severity of his pain.")

22 Nor is the ALJ's reliance on the claims representative's
23 failure to observe any apparent problems during the application
24 interview a specific, clear or convincing reason for rejecting
25 Plaintiff's complaints. "The fact that a claimant does not exhibit
26 physical manifestations of prolonged pain at the hearing provides
27 little, if any, support for the ALJ's ultimate conclusion that the
28 claimant is not disabled or that his allegations of constant pain

1 are not credible." *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th
2 Cir. 1984). This same reasoning applies to the observations of a
3 claims representative during the course of an application
4 interview.

5 The final reason given by the ALJ for rejecting Plaintiff's
6 credibility, that her alleged degree of impairment is not supported
7 by the treatment records, is also insufficient because the ALJ did
8 not specify what medical evidence in the treatment records
9 undermines Plaintiff's subjective complaints. (AR at 22.) As noted
10 by the Ninth Circuit, fibromyalgia "is diagnosed entirely on the
11 basis of patients' reports of pains and other symptoms," and,
12 although there is a "set of agreed-upon diagnostic criteria . . . ,
13 there are no laboratory tests to confirm the diagnosis." *Benecke v.*
14 *Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004).² The medical records
15 consistently indicate that Plaintiff has a "history" of
16 fibromyalgia. This diagnosis was made by a treating rheumatologist,
17 Dr. Bikramjit S. Ahluwalia. (AR at 52-53, 265-66, 413-426).
18 However, it is unclear whether Plaintiff has been found to have the
19 specified number of "tender points" or has met any other diagnostic
20 criteria for fibromyalgia. There is no consultative physician's
21 report, or other data, to support or reject the diagnosis of
22 fibromyalgia. Accordingly, if the ALJ believes that Plaintiff's
23 subjective complaints are unsupported or contradicted by the
24 medical evidence, he must specify on remand what that medical
25 evidence is and how it undermines Plaintiff's credibility.

26
27 ² In 1990, the American College of Rheumatology issued a set
28 of agreed-upon guidelines for diagnosing fibromyalgia, which
primarily include widespread pain in all four quadrants of the
body and at least 11 of 18 specified "tender points" on the body.


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IV. Conclusion

The decision whether to remand for further proceedings is within this Court's discretion. *Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no useful purpose would be served by further administrative proceedings, or where the record has been fully developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. *Id.* at 1179 ("[T]he decision of whether to remand for further proceedings turns upon the likely utility of such proceedings."); *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004). However, where there are outstanding issues that must be resolved before a determination of disability can be made, and it is not clear from the record that the ALJ would be required to find the claimant disabled if all the evidence were properly evaluated, remand is appropriate. *Bunnell v. Barnhart*, 336 F.3d 1112, 1115-16 (9th Cir. 2003); see also *Connett*, 340 F.3d at 876.

Here, the ALJ failed to explain with sufficient specificity the basis for his determination that Plaintiff was not fully credible regarding the intensity, persistence, and limiting effects of her symptoms. Accordingly, the case is remanded for further proceedings consistent with this opinion and order.

Dated: May 18, 2012



Marc L. Goldman
United States Magistrate Judge