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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CAROL LEE JOHNSON,	)	NO. EDCV 12-00435-MAN
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION
v.	)	
	)	AND ORDER
CAROLYN W. COLVIN, <sup>1</sup>	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on April 4, 2012, seeking review of the denial of plaintiff's application for a period of disability, disability insurance benefits ("DIB"), and supplemental security income benefits ("SSI"). On May 15, 2012, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on February 8, 2013, in which: plaintiff seeks an order reversing the Commissioner's decision

<sup>1</sup> Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013, and is substituted in place of former Commissioner Michael J. Astrue as the defendant in this action. (See Fed. R. Civ. P. 25(d).)

1 and remanding this case for the payment of benefits or, alternatively,  
2 for further administrative proceedings; and the Commissioner requests  
3 that his decision be affirmed or, alternatively, remanded for further  
4 administrative proceedings.

5  
6 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**  
7

8 On August 25, 2009, plaintiff filed an application for a period of  
9 disability and DIB; and on August 31, 2009, plaintiff filed an  
10 application for SSI. (Administrative Record ("A.R.") 33.) Plaintiff  
11 claims to have been disabled since July 10, 2008 (*id.*), due to: "back  
12 and neck pain[;] pain in the shoulders, elbows, wrists, hands, and  
13 hips[;] headaches[;] diarrhea[;] and mental problems" (A.R. 37).  
14 Plaintiff has past relevant work experience as an assistant manager  
15 (mobile home park), waitress, and cashier/checker. (A.R. 39-40.)  
16

17 After the Commissioner denied plaintiff's claims initially and upon  
18 reconsideration (A.R. 33, 117-20, 128-33), plaintiff requested a hearing  
19 (A.R. 135). On February 9, 2011, plaintiff, who was represented by  
20 counsel, appeared and testified at a hearing before Administrative Law  
21 Judge Milan M. Dostal (the "ALJ"). (A.R. 33, 75-112.) Vocational  
22 expert Susan Allison also testified. (*Id.*) On March 4, 2011, the ALJ  
23 denied plaintiff's claims (A.R. 33-40), and the Appeals Council  
24 subsequently denied plaintiff's request for review of the ALJ's decision  
25 (A.R. 5-7). That decision is now at issue in this action.

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1 kneel, crouch and crawl; avoid climbing ladders, ropes and  
2 scaffolds; avoid working above shoulder height bilaterally;  
3 and avoid working at unprotected heights and [with] hazardous  
4 moving machinery. [Plaintiff] has pain generally in the  
5 joints, head, neck, back, shoulders, elbows, wrists, hands,  
6 hips and abdomen and she has hypertension, osteoporosis,  
7 diarrhea, sleep disorder and hemorrhoids, with pain and  
8 conditions of moderate nature [that] would have a moderate  
9 affect on her ability to perform back work activities;  
10 however, these conditions are or can be controlled by  
11 appropriate medications without significant adverse side  
12 effects. She also has some psychiatric illnesses such as  
13 depression, anxiety, panic attacks and stress, which would be  
14 of a slight nature and would have a slight affect on her  
15 ability to perform basic work activities or those conditions  
16 are or can be controlled by appropriate medications without  
17 significant adverse side effects.

18  
19 (A.R. 36-37.)  
20

21 The ALJ found that plaintiff's past relevant work "do[es] not  
22 require the performance of work-related activities precluded by  
23 [plaintiff's RFC]." (A.R. 39.) Accordingly, the ALJ concluded that  
24 plaintiff has not been under a disability, as defined in the Social  
25 Security Act, from July 10, 2008, through the date of the ALJ's  
26 decision. (A.R. 40.)

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28 ///



1 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d  
2 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse  
3 the Commissioner's decision if it is based on harmless error, which  
4 exists only when it is "clear from the record that an ALJ's error was  
5 'inconsequential to the ultimate nondisability determination.'" Robbins  
6 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.  
7 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d  
8 at 679.

## 10 DISCUSSION

11  
12 Plaintiff claims the ALJ erred by not considering  
13 properly plaintiff's subjective symptom testimony. (Joint Stipulation  
14 ("Joint Stip.") at 4-10, 21-25.)

### 16 I. The ALJ Failed To Provide Clear And Convincing Reasons 17 For Finding Plaintiff's Subjective Symptom Testimony To 18 Be Not Credible.

19  
20 Once a disability claimant produces objective medical evidence of  
21 an underlying impairment that is reasonably likely to be the source of  
22 claimant's subjective symptom(s), all subjective testimony as to the  
23 severity of the symptom(s) must be considered. Moisa v. Barnhart, 367  
24 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 346  
25 (9th Cir. 1991); see also 20 C.F.R. §§ 404.1529(a), 416.929(a)  
26 (explaining how pain and other symptoms are evaluated). "[U]nless an  
27 ALJ makes a finding of malingering based on affirmative evidence  
28 thereof, he or she may only find an applicant not credible by making

1 specific findings as to credibility and stating clear and convincing  
2 reasons for each." Robbins, 466 F.3d at 883. The factors to be  
3 considered in weighing a claimant's credibility include: (1) the  
4 claimant's reputation for truthfulness; (2) inconsistencies either in  
5 the claimant's testimony or between the claimant's testimony and her  
6 conduct; (3) the claimant's daily activities; (4) the claimant's work  
7 record; and (5) testimony from physicians and third parties concerning  
8 the nature, severity, and effect of the symptoms of which the claimant  
9 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.  
10 2002); see also 20 C.F.R. §§ 404.1529(c), 416.929(c).

11  
12 An ALJ may not rely on a claimant's daily activities to support an  
13 adverse credibility determination when those activities do not:  
14 (1) contradict claimant's other testimony; or (2) meet the threshold for  
15 transferable work skills. See Orn, 495 F.3d at 639. With respect to  
16 the second ground, the Ninth Circuit has noted that "daily activities  
17 may be grounds for an adverse credibility finding 'if a claimant is able  
18 to spend a substantial part of his day engaged in pursuits involving the  
19 performance of physical functions that are transferrable to a work  
20 setting.'" *Id.* (citation omitted). A claimant need not be "utterly  
21 incapacitated to be eligible for benefits . . . and many home activities  
22 are not easily transferable to what may be the more grueling environment  
23 of the workplace, where it might be impossible to periodically rest or  
24 take medication." Fair v. Bowen, 885 F.2d 597, 602 (9th Cir. 1989).

25  
26 At the February 9, 2011 Administrative Hearing, plaintiff  
27 testified that she has: "bone degeneration in [her] neck"; "arthritis  
28 in [her] entire back"; scoliosis; a steel rod, occupying "the entire

1 length of [her] left femur"; migraines; chronic diarrhea; depression;  
2 and panic attacks two to three times a week. (A.R. 85-86, 97.)  
3 Plaintiff testified that, since 2007, she has been taking care of her  
4 elderly mother, who was 82 years old at the time of the Administrative  
5 Hearing. (A.R. 87-88.) Specifically, plaintiff testified that she:  
6 "fix[es] her meals"; "do[es] her laundry"; and "cleans the house,"  
7 because her mother "can't do anything" -- "[s]he can't even carry a cup  
8 of tea." (A.R. 87.) Plaintiff testified, however, that she does not  
9 bathe or dress her mother and is not capable of lifting her mother if  
10 she were to fall. (A.R. 92-93.) When plaintiff does the laundry, she  
11 testified that it "takes [her] pretty much all day." (A.R. 93.) When  
12 plaintiff vacuums, she testified that it "takes [her] all day long, and  
13 sometimes [she] ha[s] to do it in two days." (A.R. 94.) Plaintiff  
14 testified that she can vacuum for 30 to 45 minutes "at the very most"  
15 before she needs to rest her back. (*Id.*) Plaintiff further testified  
16 that when she rests, she generally rests for "20 minutes . . . 'cause  
17 [she] tr[ies] to get [the vacuuming] done." (*Id.*) Plaintiff testified  
18 that she shops for groceries and can pick up a five-pound bag of  
19 potatoes, but she cannot pick up a gallon of milk (just over eight  
20 pounds). (A.R. 95.) Plaintiff stated that she does not go out with her  
21 friends, because "[she] do[es]n't like to leave [her] mo[ther] alone,  
22 'cause [her mother] falls a lot." (A.R. 88.)

23  
24 In addition to taking care of her mother, plaintiff also testified  
25 that she takes care of her dog and cat. (A.R. 90.) Specifically, in  
26 addition to presumably feeding her animals, plaintiff testified that she  
27 opens the door a few times a day so that the dog can go outside.  
28 Plaintiff testified, however, that she does not walk her dog. (A.R. 90,



1 97.) With respect to sitting and standing, plaintiff testified that she  
2 can sit for 45 minutes before she needs to change positions and can  
3 stand for one hour before needing to change positions.<sup>2</sup> (A.R. 96-97.)  
4 Plaintiff testified that she is depressed, "cr[ies] a lot," and has two  
5 to three panic attacks a week. (A.R. 97-98.) To treat her panic  
6 attacks, plaintiff takes a Xanax and "lay[s] down." (A.R. 97.)

7  
8 As noted *supra*, the ALJ found that plaintiff has the severe  
9 impairments of: "moderate degenerative joint and disc disease of the  
10 cervical and lumbar spine; osteoporosis; mild bilateral epicondylitis;  
11 diarrhea; hemorrhoids; and sleep disorder." (A.R. 35.) The ALJ also  
12 found that "[plaintiff]'s medically determinable impairments could  
13 reasonably be expected to cause the alleged symptoms." (A.R. 37.)  
14 Further, the ALJ cited no evidence of malingering by plaintiff.  
15 Accordingly, the ALJ's reason for discrediting plaintiff's subjective  
16 complaints must be clear and convincing.

17  
18 In his decision, the ALJ found that "[plaintiff]'s statements  
19 concerning the intensity, persistence and limiting effects of  
20 [plaintiff]'s alleged symptoms are not credible to the extent they are  
21 inconsistent with [his RFC assessment for plaintiff]." (*Id.*)  
22 Specifically, the ALJ found plaintiff to be not credible, because:  
23 (1) the medical evidence does not support plaintiff's allegations of  
24 totally disabling limitations; and (2) plaintiff's daily activities "are  
25 inconsistent with her complaints of totally disabling physical and  
26

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27 <sup>2</sup> In her Disability Report, plaintiff indicated that she is  
28 limited in her ability to stand because of the "pain [she experiences  
and] the metal rod [in her leg]." (A.R. 177.)

1 mental impairments." (A.R. 38-39.)

2  
3 With respect to the ALJ's first ground, even assuming *arguendo* that  
4 the medical evidence did not corroborate the degree of plaintiff's  
5 allegations of disabling limitations, this factor cannot form the sole  
6 basis for discounting plaintiff's subjective symptom testimony. Burch,  
7 400 F.3d at 681; see Bunnell, 947 F.2d at 347 (noting that "[i]f an  
8 adjudicator could reject a claim of disability simple because  
9 [plaintiff] fails to produce evidence supporting the severity of the  
10 pain, there would be no reason for an adjudicator to consider anything  
11 other than medical findings"). Accordingly, because the ALJ's first  
12 ground cannot, by itself, constitute a clear and convincing reason for  
13 discrediting plaintiff's testimony, the ALJ's credibility determination  
14 rises or falls with the ALJ's second ground for discrediting plaintiff.

15  
16 The ALJ's second ground for finding plaintiff to be not credible --  
17 *to wit*, that plaintiff's daily activities are inconsistent with her  
18 complaints of "totally disabling physical and mental impairments" -- is  
19 unavailing. In his decision, the ALJ states the following:

20  
21 At the hearing, [plaintiff] testified that she had moved from  
22 Colorado, specifically, to take care of her 82-year old  
23 mother. Since 2007, she testified that she did everything for  
24 her, she fixed her meals, did her laundry and cleaned the  
25 house. [Plaintiff] also takes care of her dog and cat.  
26 [Plaintiff] testified she was capable of driving and maintains  
27 a drivers' license.

1 (A.R. 39.) Critically, however, the ALJ fails to identify how  
2 plaintiff's minimal daily activities are inconsistent with her allegedly  
3 disabling limitations, particularly her alleged sitting, standing, and  
4 lifting limitations. This constitutes error.

5  
6 While the Commissioner cites, *inter alia*, Rollins v. Massanri, 261  
7 F.3d 853, 857 (9th Cir. 2001), to support her argument that caring for  
8 others and performing household chores, including shopping, undermines  
9 a claimant's disability claim, Rollins is distinguishable from the  
10 present case. (Joint Stip. at 20.) In Rollins, the ALJ "pointed out  
11 ways in which Rollins' claim to have totally disabling pain was  
12 undermined by her own testimony about her daily activities, such as  
13 attending to the needs of her two young children, cooking, housekeeping,  
14 laundry, shopping, attending therapy and various other meetings every  
15 week, and so forth." 261 F.3d at 857. In her daily activities  
16 questionnaire, for example, "Rollins stated that she attended to 'all of  
17 [her] children's needs; meals, bathing, emotional, discipline, etc.'  
18 because her husband worked six days a week, usually from early in the  
19 morning until 10 p.m." *Id.* Rollins also stated, in the same  
20 questionnaire, that "she left the house 'daily' to go to places such as  
21 her son's school, taekwondo lessons and soccer games, doctor's  
22 appointments, and the grocery store." *Id.*

23  
24 In this case, while plaintiff testified that she takes care of her  
25 mother by preparing meals, going to the grocery store, and performing  
26 minimal household chores (albeit with rests), plaintiff also testified  
27 that she does not bathe or dress her mother and could not lift her  
28 mother if she were to fall. In addition, although plaintiff testified

1 that she takes care of her cat and dog, she also testified that she does  
2 not walk her dog and, instead, opens the door a few times a day to let  
3 him go in and out of the house. In fact, plaintiff indicated in her  
4 Disability Report - Appeal that taking care of her animals "is almost  
5 too much for [her] to do." (A.R. 196.) Further, while plaintiff  
6 testified that she can drive, she also indicated in her Disability  
7 Report - Appeal that her "neck and back are continual[ly] getting  
8 worse[,] . . . [and i]t is getting to the point that [she] can hardly  
9 drive [her] car any[]more . . . ." (A.R. 190.) Clearly, plaintiff's  
10 activities in this case are distinguishable from the claimant's  
11 activities in Rollins.

12  
13 Moreover, the ALJ did not explain how plaintiff's ability to  
14 perform the above-noted activities translates into the ability to  
15 perform full-time work. See Vertigan v. Halter, 260 F.3d 1044, 1050  
16 (9th Cir. 2001)(noting that the "mere fact that a plaintiff has carried  
17 on certain daily activities, such as grocery shopping, driving a car, or  
18 limited walking for exercise, does not in any way detract from her  
19 credibility as to her overall disability"). "The Social Security Act  
20 does not require that claimants be utterly incapacitated to be eligible  
21 for benefits, and many home activities may not be easily transferable to  
22 a work environment where it might be impossible to rest periodically or  
23 take medication." Smolen v. Chater, 80 F.3d 1273, 1283 n.7 (9th Cir.  
24 1996).

25  
26 Accordingly, because the ALJ failed to articulate how plaintiff's  
27 daily activities are at odds with her subjective symptom testimony, the  
28 ALJ's reasoning cannot constitute a clear and convincing reason for

1 rejecting plaintiff's credibility. Thus, the ALJ's adverse credibility  
2 determination constitutes reversible error.<sup>3</sup>

3  
4 **II. Remand Is Required.**

5  
6 The decision whether to remand for further proceedings or order an  
7 immediate award of benefits is within the district court's discretion.  
8 *Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
9 useful purpose would be served by further administrative proceedings, or  
10 where the record has been fully developed, it is appropriate to exercise  
11 this discretion to direct an immediate award of benefits. *Id.* at 1179  
12 ("[T]he decision of whether to remand for further proceedings turns upon  
13 the likely utility of such proceedings."). However, where there are  
14 outstanding issues that must be resolved before a determination of  
15 disability can be made, and it is not clear from the record that the ALJ  
16 would be required to find the claimant disabled if all the evidence were  
17 properly evaluated, remand is appropriate. *Id.* at 1179-81.

18  
19 Remand is the appropriate remedy to allow the ALJ the opportunity  
20 to remedy the above-mentioned error. See *Dodrill v. Shalala*, 12 F.3d  
21 915, 918 (9th Cir. 1993)(ordering remand so that the ALJ could  
22 articulate specific and appropriate findings, if any existed, for  
23 rejecting the claimant's subjective pain testimony). On remand, the ALJ  
24 must revisit plaintiff's testimony and must either credit plaintiff's

25  
26 

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<sup>3</sup> While the Commissioner now offers other reasons to explain the  
27 ALJ's credibility determination, the Court cannot entertain these post  
28 hoc rationalizations. See, e.g., *Connett*, 340 F.3d at 874 (finding that  
"[i]t was error for the district court to affirm the ALJ's credibility  
decision based on evidence that the ALJ did not discuss").

1 testimony or give clear and convincing reasons why plaintiff's testimony  
2 is not credible. After so doing, the ALJ may need to reassess  
3 plaintiff's RFC, in which case additional testimony from a vocational  
4 expert likely will be needed to determine what work, if any, plaintiff  
5 can perform.<sup>4</sup>

6  
7 **CONCLUSION**  
8

9 Accordingly, for the reasons stated above, IT IS ORDERED that the  
10 decision of the Commissioner is REVERSED, and this case is REMANDED for  
11 further proceedings consistent with this Memorandum Opinion and Order.  
12

13 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
14 copies of this Memorandum Opinion and Order and the Judgment on counsel  
15 for plaintiff and for defendant.  
16

17 **LET JUDGMENT BE ENTERED ACCORDINGLY.**  
18

19 DATED: July 1, 2013

20   
21 MARGARET A. NAGLE  
22 UNITED STATES MAGISTRATE JUDGE  
23

24 <sup>4</sup> Although plaintiff does not challenge the ALJ's finding that  
25 her mental impairments are not severe, on remand the ALJ should  
26 "consider the combined effect of all of [plaintiff]'s impairments on her  
27 ability to function, without regard to whether each alone was  
28 sufficiently severe." *Smolen*, 80 F.3d at 1290 (emphasis added); see 20  
C.F.R. §§ 404.1545(a)(2), 416.945(a)(2) (noting that "[w]e will consider  
all of your medically determinable impairments . . . , including your  
medically determinable impairments that are not 'severe,' . . . when we  
assess your residual functional capacity").