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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DIANE GIBSON,	)	NO. ED CV 12-459-E
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM OPINION</b>
	)	
MICHAEL J. ASTRUE, COMMISSIONER	)	<b>AND ORDER OF REMAND</b>
OF SOCIAL SECURITY,	)	
	)	
Defendant.	)	
	)	
_____	)	

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS  
HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
judgment are denied and this matter is remanded for further  
administrative action consistent with this Opinion.

**PROCEEDINGS**

Plaintiff filed a complaint on April 16, 2012, seeking review of  
the Commissioner's denial of benefits. The parties filed a consent to  
proceed before a United States Magistrate Judge on April 26, 2012.

1 Plaintiff filed a motion for summary judgment on September 14, 2012.  
2 Defendant filed a motion for summary judgment on October 15, 2012.  
3 Plaintiff filed a Reply on October 18, 2012. The Court has taken the  
4 motions under submission without oral argument. See L.R. 7-15;  
5 "Order," filed April 18, 2012.

6  
7 **BACKGROUND**  
8

9 Plaintiff asserts disability based on a combination of alleged  
10 impairments (Administrative Record ("A.R.") 1168, 1262-72, 1583-84,  
11 1595-1603). Plaintiff testified to pain of allegedly disabling  
12 severity (A.R. 1583-84, 1598).

13  
14 An Administrative Law Judge ("ALJ") found Plaintiff suffers from  
15 severe impairments with which some pain may be associated, including  
16 "diabetes mellitus II" (with related peripheral neuropathy<sup>1</sup>), and  
17 "degenerative disc disease of the lumbar spine" (A.R. 1168-70). The  
18 ALJ denied disability benefits, however, after finding Plaintiff's  
19 testimony "only partially credible" (A.R. 1171-72). The credibility  
20 analysis set forth in the ALJ's decision reads in full:

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22 ///

23 \_\_\_\_\_  
24 <sup>1</sup> The ALJ's reference to "peripheral Iraqi" at page 1169  
25 of the Administrative Record is understood to be a reference to  
26 peripheral neuropathy. Although the ALJ did not list peripheral  
27 neuropathy as a separate severe impairment at page 1168 of the  
28 Administrative Record, Defendant concedes that Plaintiff's  
neuropathy is a symptom of her severe impairment of diabetes  
mellitus, which results in significant functional limitation  
(Defendant's Motion at 2). The medical expert testified that  
peripheral neuropathy is consistent with pain (A.R. 1590-92).

1 The claimant's allegations are considered to be only  
2 partially credible as there is little in the way of  
3 objective signs, symptoms and findings in the record to  
4 support her allegations to the extent alleged. Moreover,  
5 the severity of these allegations, however, is not  
6 commensurate with the finding of disability based on meeting  
7 or equaling the listings and these findings do not support  
8 any limitations that are more restrictive than what is found  
9 herein.

10  
11 (A.R. 1171). The Appeals Council denied review (A.R. 1158-60).

12  
13 **STANDARD OF REVIEW**

14  
15 Under 42 U.S.C. section 405(g), this Court reviews the  
16 Administration's decision to determine if: (1) the Administration's  
17 findings are supported by substantial evidence; and (2) the  
18 Administration used correct legal standards. See Carmickle v.  
19 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,  
20 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such  
21 relevant evidence as a reasonable mind might accept as adequate to  
22 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401  
23 (1971) (citation and quotations omitted); see Widmark v. Barnhart,  
24 454 F.3d 1063, 1067 (9th Cir. 2006).

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1           The ALJ's decision appears to assert that unspecified "objective  
2 signs, symptoms and findings in the record" do not fully corroborate  
3 Plaintiff's testimony regarding the severity of her pain. The absence  
4 of fully corroborative medical evidence cannot form the sole basis for  
5 rejecting the credibility of a claimant's subjective complaints. See  
6 Varney v. Secretary, 846 F.2d at 584; Cotton v. Bowen, 799 F.2d 1403,  
7 1407 (9th Cir. 1986); see also Burch v. Barnhart, 400 F.3d 676, 681  
8 (9th Cir. 2005) ("lack of medical evidence" can be "a factor" in  
9 rejecting credibility, but cannot "form the sole basis"). The ALJ's  
10 claim that "the severity of these allegations . . . is not  
11 commensurate with the finding of disability based on meeting or  
12 equaling the listings . . ." adds nothing material to the credibility  
13 analysis. A claimant who does not meet or equal any of the listings  
14 nevertheless may be found disabled at the last step in the sequential  
15 analysis. See Bowen v. Yuckert, 482 U.S. 137, 146 n.5 (1987); 20  
16 C.F.R. § 416.920; see also A.R. 1168.

17  
18           In an effort to support the ALJ's conclusion regarding  
19 Plaintiff's credibility, Defendant cites Plaintiff's alleged daily  
20 activities and failure to stop smoking (Defendant's Motion at 5-6).  
21 The ALJ did not expressly rely on either of these considerations in  
22 deeming Plaintiff's pain testimony "only partially credible." The ALJ  
23 did not mention Plaintiff's alleged daily activities in any part of  
24 the decision (A.R. 1166-72). A prior (different) ALJ mentioned  
25 Plaintiff's alleged daily activities in an earlier decision, but the  
26 present decision does not incorporate the earlier decision. In fact,  
27 the present ALJ found that Plaintiff had alleged "a change in her  
28 medical condition since the initial decision manifested by the

1 development of additional physical complaints," which prevented an  
2 application of administrative res judicata to Plaintiff's "physical  
3 medical conditions" (A.R. 1171). The present decision mentions  
4 smoking, but only in connection with gauging the severity of  
5 Plaintiff's alleged respiratory problems (A.R. 1170).<sup>3</sup> Because the  
6 present ALJ did not invoke Plaintiff's daily activities or smoking as  
7 reasons for rejecting Plaintiff's credibility, this Court cannot  
8 affirm the ALJ's decision on the basis of these considerations. See  
9 Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001) (court "cannot  
10 affirm the decision of an agency on a ground that the agency did not  
11 invoke in making its decision").

12  
13 Because the circumstances of the case suggest that further  
14 administrative review could remedy the ALJ's error, remand is  
15 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see  
16 Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) ("Connett")  
17 (remand is an option where the ALJ fails to state sufficient reasons  
18 for rejecting a claimant's excess symptom testimony); but see Orn v.  
19 Astrue, 495 F.3d 625, 640 (9th Cir. 2007) (appearing, confusingly, to  
20 cite Connett for the proposition that "[w]hen an ALJ's reasons for  
21 rejecting the claimant's testimony are legally insufficient and it is  
22 clear from the record that the ALJ would be required to determine the

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23  
24 <sup>3</sup> In the Ninth Circuit, it may be an open issue whether a  
25 claimant's failure to stop smoking ever can support an adverse  
26 credibility finding. Compare Reeves v. Astrue, 2012 WL 1032778,  
27 at \*6 (W.D. Wash. March 6, 2012), adopted, 2012 WL 1029669 (W.D.  
28 Wash. March 27, 2012) with Collins v. Astrue, 2011 WL 4345860, at  
\*13 (E.D. Cal. Sept. 15, 2011); see also Bray v. Commissioner,  
554 F.3d 1219, 1227 (9th Cir. 2009). The Court need not and does  
not reach this issue in the present case.

1 claimant disabled if he had credited the claimant's testimony, we  
2 remand for a calculation of benefits") (quotations omitted); see also  
3 Vasquez v. Astrue, 572 F.3d 586, 600-01 (9th Cir. 2009) (agreeing that  
4 a court need not "credit as true" improperly rejected claimant  
5 testimony where there are outstanding issues that must be resolved  
6 before a proper disability determination can be made); see generally  
7 INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an  
8 administrative determination, the proper course is remand for  
9 additional agency investigation or explanation, except in rare  
10 circumstances).

11  
12 **CONCLUSION**

13  
14 For all of the foregoing reasons,<sup>4</sup> Plaintiff's and Defendant's  
15 motions for summary judgment are denied and this matter is remanded  
16 for further administrative action consistent with this Opinion.

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18 LET JUDGMENT BE ENTERED ACCORDINGLY.

19  
20 DATED: October 19, 2012.

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23 \_\_\_\_\_/S/\_\_\_\_\_  
CHARLES F. EICK  
24 UNITED STATES MAGISTRATE JUDGE

25  
26 \_\_\_\_\_  
27 <sup>4</sup> The Court has not reached any other issue raised by  
28 Plaintiff except insofar as to determine that reversal with a  
directive for the payment of benefits would not be appropriate at  
this time.