

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

KATHLEEN KUTZ,

Plaintiff,

v.

CAROLYN W. COLVIN,
ACTING COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,

Defendant.

No. ED CV 12-1794-PLA

MEMORANDUM OPINION AND ORDER

I.

PROCEEDINGS

Plaintiff filed this action on October 23, 2012, seeking review of the Commissioner’s denial of her application for Supplemental Security Income payments. The parties filed Consents to proceed before the undersigned Magistrate Judge on November 5, 2012, and December 4, 2012. Pursuant to the Court’s Order, the parties filed a Joint Stipulation on June 17, 2013, that addresses their positions concerning the disputed issues in the case. The Court has taken the Joint Stipulation under submission without oral argument.

/
/

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II.

BACKGROUND

Plaintiff was born on October 24, 1959. [Administrative Record (“AR”) at 63.] She completed one year of college [AR at 140], and has past relevant work experience as a substance abuse prevention specialist and a youth advocate. [AR at 136, 150-57.]

On February 4, 2009, plaintiff filed an application for Supplemental Security Income payments, alleging that she has been unable to work since January 29, 2009, due to cirrhosis of the liver, chronic obstructive pulmonary disease, and hepatitis C. [AR at 63-64, 122-26, 134-41.] After her application was denied initially and on reconsideration, plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). [AR at 65-79.] A hearing was held on July 28, 2010, at which time plaintiff appeared with counsel and testified on her own behalf. [AR at 47-60.] On September 22, 2010, the ALJ determined that plaintiff was not disabled. [AR at 33-38.] On August 20, 2012, the Appeals Council granted plaintiff’s request for review, but then affirmed the ALJ’s conclusion that plaintiff was not disabled. [AR at 6-12, 28.] This action followed.

III.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence or if it is based upon the application of improper legal standards. Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

In this context, the term “substantial evidence” means “more than a mere scintilla but less than a preponderance -- it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion.” Moncada, 60 F.3d at 523; see also Drouin, 966 F.2d at 1257. When determining whether substantial evidence exists to support the Commissioner’s decision, the Court examines the administrative record as a whole, considering both adverse and supporting evidence. Drouin, 966 F.2d at 1257; Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.

1 1989). Where the evidence is susceptible to more than one rational interpretation, the Court must
2 defer to the decision of the Commissioner. Moncada, 60 F.3d at 523; Andrews v. Shalala, 53 F.3d
3 1035, 1039-40 (9th Cir. 1995); Drouin, 966 F.2d at 1258.

4 5 IV.

6 THE EVALUATION OF DISABILITY

7 Persons are “disabled” for purposes of receiving Social Security benefits if they are unable
8 to engage in any substantial gainful activity owing to a physical or mental impairment that is
9 expected to result in death or which has lasted, or is expected to last, for a continuous period of
10 at least twelve months. 42 U.S.C. § 423(d)(1)(A); Drouin, 966 F.2d at 1257.

11 12 A. THE FIVE-STEP EVALUATION PROCESS

13 The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing
14 whether a claimant is disabled. 20 C.F.R. § 416.920; Lester v. Chater, 81 F.3d 821, 828 n.5 (9th
15 Cir. 1995, as amended April 9, 1996). In the first step, the Commissioner must determine whether
16 the claimant is currently engaged in substantial gainful activity; if so, the claimant is not disabled
17 and the claim is denied. Id. If the claimant is not currently engaged in substantial gainful activity,
18 the second step requires the Commissioner to determine whether the claimant has a “severe”
19 impairment or combination of impairments significantly limiting her ability to do basic work
20 activities; if not, a finding of nondisability is made and the claim is denied. Id. If the claimant has
21 a “severe” impairment or combination of impairments, the third step requires the Commissioner
22 to determine whether the impairment or combination of impairments meets or equals an
23 impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R., Part 404, Subpart P,
24 Appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id. If the
25 claimant’s impairment or combination of impairments does not meet or equal an impairment in the
26 Listing, the fourth step requires the Commissioner to determine whether the claimant has sufficient
27 “residual functional capacity” to perform her past work; if so, the claimant is not disabled and the

1 claim is denied. Id. The claimant has the burden of proving that she is unable to perform past
2 relevant work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a prima facie case
3 of disability is established. The Commissioner then bears the burden of establishing that the
4 claimant is not disabled, because she can perform other substantial gainful work available in the
5 national economy. The determination of this issue comprises the fifth and final step in the
6 sequential analysis. 20 C.F.R. § 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

7
8 **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

9 In this case, at step one, the ALJ determined that plaintiff had not engaged in any
10 substantial gainful activity since the application date, February 4, 2009. [AR at 35.] At step two,
11 the ALJ concluded that plaintiff has the following severe impairments: gastrointestinal disorder;
12 renal disorder; and disorder of the endocrine system. [Id.] At step three, the ALJ determined that
13 plaintiff’s impairments do not meet or medically equal any of the impairments in the Listing. [Id.]
14 The ALJ further determined that plaintiff retained the residual functional capacity (“RFC”)¹ to
15 perform “medium work” as defined in 20 C.F.R. § 416.967(c),² except that she “is restricted from
16 extremes of temperature, moisture, fumes or dust particles along with working with heavy and
17 moving machineries.” [Id.] At step four, the ALJ concluded that plaintiff can perform her past
18 relevant work as a youth advocate. [AR at 38.] Accordingly, the ALJ determined that plaintiff has
19 not been under a disability from February 4, 2009, to September 22, 2010, the date of the
20 decision. [Id.]

21
22 **C. THE APPEALS COUNCIL’S DECISION**

23 After granting plaintiff’s request for review of the ALJ’s decision, the Appeals Council
24 adopted the ALJ’s findings at steps one, two, and three of the sequential evaluation process,

25 _____
26 ¹ RFC is what a claimant can do despite existing exertional and nonexertional limitations.
See Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

27 ² 20 C.F.R. § 416.967(c) defines “medium work” as work that involves “lifting no more than 50
28 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds.”

1 except that it also found plaintiff's obesity to be a "severe impairment" at step two. [AR at 9-10.]
2 The Appeals Council then found that plaintiff retained the RFC to "lift and/or carry 50 pounds
3 occasionally and 25 pounds frequently as well as stand, walk or sit for six hours in an eight-hour
4 workday." [AR at 9-10.] It added: "She also was precluded from concentrated exposure to
5 extreme temperatures, moisture, and pulmonary irritants. Additionally, she was unable to be
6 exposed to unprotected heights or moving machinery. Furthermore, she was restricted to frequent
7 climbing of ramps and stairs, bending, kneeling, stooping, crawling, and crouching[;] and was
8 limited to occasional climbing of ladders, ropes, and scaffolds." [AR at 10.] At step four, the
9 Appeals Council adopted the ALJ's determination that plaintiff can perform her past relevant work
10 as a youth advocate. [AR at 10-11.] The Appeals Council therefore concluded that plaintiff was
11 not under a disability from February 4, 2009, to September 22, 2010. [AR at 10-11.]

12 13 **V.**

14 **THE COMMISSIONER'S DECISION**

15 Plaintiff contends that the ALJ: (1) improperly determined that plaintiff's cirrhosis of the liver,
16 hepatitis C, and back pain are non-severe; (2) failed to properly consider plaintiff's obesity at step
17 two and step three of the five-step evaluation process; (3) should have called a vocational expert
18 to testify; and (4) failed to properly evaluate plaintiff's credibility. [Joint Stipulation ("JS") at 3.] As
19 set forth below, the Court agrees with plaintiff, in part, and remands the matter for further
20 proceedings.

21 22 **A. PLAINTIFF'S SUBJECTIVE SYMPTOM TESTIMONY**

23 "To determine whether a claimant's testimony regarding subjective pain or symptoms is
24 credible, an ALJ must engage in a two-step analysis." Lingenfelter v. Astrue, 504 F.3d 1028,
25 1035-36 (9th Cir. 2007). "First, the ALJ must determine whether the claimant has presented
26 objective medical evidence of an underlying impairment 'which could reasonably be expected to
27 produce the pain or other symptoms alleged.'" Id. (quoting Bunnell v. Sullivan, 947 F.2d 341, 344
28

1 (9th Cir. 1991) (en banc)). Second, if the claimant meets the first test, the ALJ may only reject the
2 claimant's testimony about the severity of her symptoms upon (1) finding evidence affirmatively
3 suggesting that the claimant was malingering, or (2) offering specific, clear and convincing reasons
4 for doing so. See Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1999); see also Lingenfelter, 504
5 F.3d at 1036; Benton v. Barnhart, 331 F.3d 1030, 1040 (9th Cir. 2003). The factors to be
6 considered in weighing a claimant's credibility include: (1) the claimant's reputation for
7 truthfulness; (2) inconsistencies either in the claimant's testimony or between the claimant's
8 testimony and her conduct; (3) the claimant's daily activities; (4) the claimant's work record; and
9 (5) testimony from physicians and third parties concerning the nature, severity, and effect of the
10 symptoms of which the claimant complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th
11 Cir. 2002); see also 20 C.F.R. §§ 404.1529(c), 416.929(c). If properly supported, the ALJ's
12 credibility determination is entitled to "great deference." See Green v. Heckler, 803 F.2d 528, 532
13 (9th Cir. 1986).

14 In a March 7, 2009, exertion questionnaire, plaintiff stated that she cannot sit or stand for
15 more than twenty-five to thirty minutes without experiencing swelling in her legs and ankles. [AR
16 at 158-60.] She also stated that she "grow[s] short of breath just sitting still." [AR at 158.] Plaintiff
17 reported that with respect to walking, she grows tired and "worn out" after walking "only a few
18 feet," and that walking fifty feet "leaves[] [her] breathless." [Id.] She further reported that she can
19 perform chores for only fifteen minutes at a time because of her shortness of breath and the pain
20 in her "back legs." [AR at 160.]

21 At her July 28, 2010, administrative hearing, plaintiff testified that she cannot "sit, stand, lay,
22 walk, do anything for more than 15 to 20 minutes before [she] [has] to get up and change positions
23 or it causes [her] a lot of pain." She stated that when she last worked, these limitations were
24 causing her to miss work, "so [her employer] chose to lay [her] off." [AR at 50.] When counsel
25 asked plaintiff to what condition she attributed these limitations, she testified that she attributed
26 them to her liver problems, as she had been diagnosed with hepatitis C in 2002, which "had
27 advanced to cirrhosis of the liver" by the time she was laid off, and was considered "liver failure"
28

1 by the time of the hearing. [AR at 50-51.] Plaintiff stated that she has never had Interferon
2 treatments for her liver because when she was initially diagnosed with liver problems in 2002, she
3 was receiving treatment for a substance abuse addiction. She stated that during her first job after
4 that time -- where she worked for two years -- “[t]hey were running the tests and determining what
5 they wanted to do.” [AR at 53.] Thereafter, she began working for a non-profit organization that
6 “[did not] offer any medical insurance” [AR 53-54] -- the same job from which she was laid off in
7 2009. [AR at 136, 150.] Plaintiff explained, “So I haven’t had medical insurance and any way to
8 get anything done.” [AR at 54.] Plaintiff testified that at the time of the hearing, she had “MIA
9 insurance” (i.e., medically indigent adult insurance), and as a result was not taking anything for
10 her liver. She explained that MIA insurance “[does not] do too much for [the] liver,” and that she
11 was “awaiting [a] referral[] from MIA to go to ... a hepatitis clinic,” but had not yet received that
12 referral. [AR at 53.] She also stated that she had been waiting “probably ten weeks” to hear from
13 one treating physician about being put on a list for a liver transplant. [AR at 55.] Plaintiff stated
14 that she “need[s] ... medical insurance [so] that [she] can get something done for [her] liver.” [AR
15 at 56-57.]

16 In addition to her liver problems, plaintiff testified that she has congestive heart failure,
17 which results in her heart “beating really fast for no reason,” dizziness, vertigo, and swelling in her
18 legs and feet. [AR at 55, 57.] Plaintiff stated that she also has kidney failure and frequent
19 diarrhea, and is not able to sleep through the night. [AR at 52, 56.] She stated that she has good
20 periods of anywhere from several days to two weeks, but “then it’s like [she] hit[s] a wall and
21 literally, just to get from [her] bed to [her] bathroom, which is just a few feet, it takes every ounce
22 of energy [she has].” [AR at 52.] She noted that in May of 2010, she was in a coma and
23 hospitalized for three days, and that she had lost seventy pounds since that hospitalization. [Id.]
24 Plaintiff testified that she cannot lift more than “maybe five pounds” because anything more than
25 that “would put a real bad strain on [her] back.” [AR at 56.]

26 In his decision, the ALJ discounted plaintiff’s credibility for several reasons. [See AR at 36-
27 37.] In requesting review of the ALJ’s decision, plaintiff requested that the Appeals Council review,
28

1 among other issues, the ALJ’s evaluation of plaintiff’s credibility. [AR at 187-90.] Nevertheless,
2 the Appeals Council did not discuss plaintiff’s credibility in its decision, nor did it explicitly assign
3 any weight to plaintiff’s credibility. [See AR at 9-11.] As discussed infra, to the extent that the
4 Appeals Council implicitly adopted the ALJ’s findings with respect to plaintiff’s credibility, that
5 adoption was improper, as the ALJ’s reasons for discounting plaintiff’s subjective symptom
6 testimony were not supported by substantial evidence. Further, to the extent the Appeals Council
7 did *not* adopt the ALJ’s credibility finding, it did not specify what weight it assigned to plaintiff’s
8 credibility, and this Court “decline[s] to review the record to ascertain whether substantial evidence
9 might support these findings not made.” See Byrnes v. Shalala, 60 F.3d 639, 641 (9th Cir. 1995)
10 (quoting Preston v. Heckler, 769 F.2d 988, 990 (4th Cir. 1985)). Under either scenario, remand
11 is warranted.

12 With respect to the first scenario, the Court notes that at step one of the two-step credibility
13 analysis, the ALJ found that plaintiff’s “medically determinable impairment could reasonably be
14 expected to cause the alleged symptoms.” [AR at 37.] The ALJ nevertheless concluded that
15 plaintiff’s “statements concerning the intensity, persistence and limiting effects of these symptoms
16 are not credible to the extent they are inconsistent with the [ALJ’s RFC findings for plaintiff].” [Id.]
17 Thus, at step two, as the record contains no evidence of malingering by plaintiff,³ the ALJ was
18 required to offer “specific, clear and convincing reasons” for rejecting her subjective symptom
19 testimony. See Lingenfelter, 504 F.3d at 1036. “General findings are insufficient; rather, the ALJ
20 must identify what testimony is not credible and what evidence undermines the claimant’s
21 complaints.” Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998) (quoting Lester, 81 F.3d at
22 834); see also Dodrill, 12 F.3d at 918.

23 The ALJ rejected plaintiff’s subjective symptom testimony because he found that: (1) “her
24 records do not support” her allegation that she is unable to perform work activity; (2) she was
25 “never treated for her diagnosis of hepatitis C although she obviously has access to good medical
26

27 ³ The ALJ made no finding that plaintiff was malingering, nor does the evidence suggest
28 plaintiff was doing so.

1 care,” and a treating physician “recommended conservative treatment for [her] condition”; and (3)
2 her “treatment providers have not opined she requires greater work restrictions for a 12 month
3 period.”⁴ [AR at 37.]

4 With respect to the first reason, once a claimant has produced objective medical evidence
5 of an impairment or impairments, she “need not produce objective medical evidence of the pain
6 or fatigue itself, or the severity thereof.” Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996);
7 see Johnson v. Shalala, 60 F.3d 1428, 1433 (9th Cir. 1995) (“once an impairment is medically
8 established, the ALJ cannot require medical support to prove the severity of the pain”). The case
9 law holding that “[a] claimant need not produce objective medical evidence of the pain or fatigue
10 itself, or the severity thereof,” reflects the rationale that “pain testimony may establish greater
11 limitations than can medical evidence alone.” Smolen, 80 F.3d at 1282 (internal citations omitted);
12 Burch v. Barnhart, 400 F.3d 676, 680 (9th Cir. 2005) (citing Social Security Ruling⁵ 96-7p). The
13 Ninth Circuit has noted that “the nature of pain and other such symptoms” is “highly subjective and
14 idiosyncratic” such that “[t]he amount of pain [or fatigue] caused by a given physical impairment
15 can vary greatly from individual to individual.” Smolen, 80 F.3d at 1282 (internal citations omitted).
16 Thus, while an ALJ may consider whether a lack of objective medical evidence supports the
17 degree of limitation, this “cannot form the sole basis for discounting pain testimony.” Burch, 400
18 F.3d at 681. Accordingly, even if the ALJ’s characterization of the medical evidence were
19 supported by substantial evidence, he can only rely upon this rationale to discount plaintiff’s

21
22 ⁴ While the ALJ also stated that plaintiff’s “records do not establish an inability to perform
23 work activity for any twelve month period of time,” the ALJ did not identify any gap in plaintiff’s
24 medical records, or state that her records established an inability to work for a period of *less* than
25 twelve months. Thus, it does not appear from the ALJ’s decision that he rejected her subjective
26 symptom testimony on the principal basis that her records did not support the *duration* of her
27 alleged disability.

28 ⁵ Social Security Rulings (“SSR”) do not have the force of law. Nevertheless, they
“constitute Social Security Administration interpretations of the statute it administers and of its
own regulations,” and are given deference “unless they are plainly erroneous or inconsistent with
the Act or regulations.” Han v. Bowen, 882 F.2d 1453, 1457 (9th Cir. 1989).

1 subjective symptom testimony if either of his other reasons are proper. As discussed infra, they
2 are not.

3 Second, it appears that the ALJ rejected plaintiff's pain testimony because she was "never
4 treated for her diagnosis of hepatitis C although she obviously has access to good medical care,"
5 and because during a hospitalization in April, 2010, a treating physician -- Dr. Menon A.
6 Moothedath -- "recommended conservative treatment for [plaintiff's] condition." [AR at 37.] Neither
7 of these statements by the ALJ is a convincing reason to discount plaintiff's credibility on the basis
8 of conservative treatment, however.

9 With respect to her hepatitis C, plaintiff testified that she has not received treatment
10 because she has only had medical insurance that would provide such treatment during her first
11 job -- which she held from December 2003 to December 2005 [AR at 136] -- and during that period
12 the doctors "were running the tests and determining what they wanted to do." She further testified
13 that from December 2005 to January 2009 -- i.e., during her second job -- she did not have
14 medical insurance at all. Finally, although at the time of the hearing she had what she referred
15 to as "MIA insurance," she also stated that that coverage had not "do[ne] too much" for her liver.
16 She testified that as of the time of the hearing, she was awaiting referral to a hepatitis clinic, as
17 well as possible placement on an eligibility list to receive a liver transplant. The ALJ did not
18 acknowledge any of this testimony in concluding that plaintiff was "never treated for her diagnosis
19 of hepatitis C although she obviously has access to good medical care." Thus, that statement by
20 the ALJ was a mischaracterization of the evidence contained in the record concerning plaintiff's
21 treatment for her hepatitis C, which was error. See Gallant v. Heckler, 753 F.2d 1450, 1456 (9th
22 Cir. 1984) (error for an ALJ to ignore or misstate the competent evidence in the record in order
23 to justify her conclusion); see also Reddick, 157 F.3d at 722-23 (it is impermissible for the ALJ to
24 develop an evidentiary basis by "not fully accounting for the context of materials or all parts of the
25 testimony and reports"); Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir. 1975) (an ALJ is not
26 permitted to reach a conclusion "simply by isolating a specific quantum of supporting evidence").

27
28

1 With respect to Dr. Moothedath's recommendation, that doctor examined plaintiff on April
2 26, 2010, and found that she had end-stage liver disease as well as "[c]oagulopathy, with
3 decreased platelets and abnormal coagulation, could be the factor for the perinephric hematoma,
4 which may have to be corrected." [AR at 433-34.] Dr. Moothedath recommended "[c]onservative
5 treatment for the hematoma," and also stated that he would "recommend transfer to a referral
6 center for transplant, even though [plaintiff] is an unlikely candidate" because of her history of
7 substance abuse. He concluded his recommendations by stating that plaintiff's "overall prognosis
8 [was] guarded" and that he "[would] recommend conservative treatment and see the response."
9 [AR at 434.] While it is not clear from this last statement for *which* condition or conditions Dr.
10 Moothedath stated he was recommending conservative treatment, he characterized plaintiff's liver
11 disease as "end-stage," and did not discuss any treatment options other than a possible liver
12 transplant. Thus, from the context of Dr. Moothedath's overall statements, it does not appear that
13 he found only "conservative treatment" appropriate for plaintiff's liver problems. Indeed, he found
14 that a transplant may have been warranted.

15 As to his third reason to discount plaintiff's credibility, the ALJ stated that her "treatment
16 providers have not opined she requires greater work restrictions for a 12 month period." [AR at
17 37.] However, neither did any of plaintiff's treatment providers opine that she does *not* require
18 greater work restrictions than those in the ALJ's RFC determination. The Court does not find the
19 fact that there is no treating opinion in the record setting forth more limited work restrictions than
20 those in the RFC -- when the record does not contain *any* treating opinion concerning plaintiff's
21 limitations -- to be a convincing reason to discredit plaintiff's pain testimony. See Lingenfelter, 504
22 F.3d at 1036. Moreover, the Court notes that the majority of plaintiff's treatment history in the
23 Administrative Record consists of records from her visits to the emergency room [see, e.g., AR
24 at 223-24, 237-38, 243-46, 319, 369-71, 400-05, 434], and the ALJ does not explain why he would
25 expect plaintiff's emergency treatment records to reflect any long-term work restriction opinions.

26 The ALJ failed to offer any legally adequate reasons for discounting plaintiff's credibility.
27 Accordingly, whether the Appeals Council adopted the ALJ's credibility finding or was silent on the
28

1 issue of what weight is due plaintiff's subjective symptom testimony, remand is warranted on this
2 issue.

3
4 **B. PLAINTIFF'S OBESITY AT STEP TWO AND STEP THREE**

5 Next, plaintiff asserts that "the ALJ failed to determine that plaintiff's obesity was a severe
6 impairment[,] nor did he properly determine the effect of [] plaintiff's obesity upon her other
7 impairments, ability to work, and general health." [JS at 8-12.]

8 A "severe" impairment, or combination of impairments, is defined as one that significantly
9 limits physical or mental ability to do basic work activities. 20 C.F.R. § 416.920. "The Supreme
10 Court has recognized that including a severity inquiry at the second stage of the evaluation
11 process permits the [Commissioner] to identify efficiently those claimants whose impairments are
12 so slight that they are unlikely to be found disabled even if the individual's age, education, and
13 experience are considered." Corrao v. Shalala, 20 F.3d 943, 949 (9th Cir. 1994) (citing Bowen
14 v. Yuckert, 482 U.S. 137, 153, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987)). However, an overly
15 stringent application of the severity requirement would violate the statute by denying benefits to
16 claimants who meet the statutory definition of "disabled." Corrao, 20 F.3d at 949 (citing Bowen
17 v. Yuckert, 482 U.S. at 156-58). Despite use of the term "severe," most circuits, including the
18 Ninth Circuit, have held that "the step-two inquiry is a de minimis screening device to dispose of
19 groundless claims." Smolen, 80 F.3d at 1290 (citing Bowen v. Yuckert, 482 U.S. at 153-54); see
20 Hawkins v. Chater, 113 F.3d 1162, 1169 (10th Cir. 1997) ("[a] claimant's showing at level two that
21 he or she has a severe impairment has been described as 'de minimis'"); see also Hudson v.
22 Bowen, 870 F.2d 1392, 1396 (8th Cir. 1989) (evaluation can stop at step two only when there is
23 no more than minimal effect on ability to work).

24 An impairment or combination of impairments should be found to be "non-severe" only
25 when the evidence establishes merely a slight abnormality that has no more than a minimal effect
26 on an individual's physical or mental ability to do basic work activities. See Corrao, 20 F.3d at
27 949 (citing Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988)); see also 20 C.F.R. §
28

1 416.921(a). “Basic work activities” mean the abilities and aptitudes necessary to do most jobs,
2 including “physical functions ...,” “[u]nderstanding, carrying out, and remembering simple
3 instructions,” “[u]se of judgment,” “[r]esponding appropriately to supervision, co-workers and usual
4 work situations,” and “[d]ealing with changes in a routine work setting.” 20 C.F.R. § 416.921(b).

5 In determining a claimant’s disability status, an ALJ has the responsibility to determine the
6 claimant’s RFC after considering “all of the relevant medical and other evidence” in the record.
7 20 C.F.R. §§ 416.945(a)(3), 416.946(c). Thus, at step three, “an RFC that fails to take into
8 account a claimant’s limitations is defective.” Valentine v. Comm’r of Social Sec. Admin., 574 F.3d
9 685, 690 (9th Cir. 2009).

10 Defendant contends that “there is no cause for remand” on this issue because the Appeals
11 Council’s decision is the final decision of the Commissioner, and the Appeals Council found
12 plaintiff’s obesity to be a severe impairment at step two and limited her RFC accordingly at step
13 three. [JS at 12-13.] The Court agrees. 20 C.F.R. § 422.210(a) states that: “A claimant may
14 obtain judicial review of a decision by an administrative law judge if the Appeals Council has
15 denied the claimant’s request for review, or of a decision by the Appeals Council when that is the
16 final decision of the Commissioner.” Here, the Appeals Council granted plaintiff’s request for
17 review and issued its own decision, and thus the Court reviews the Appeals Council’s decision as
18 the final decision of the Commissioner.⁶ Further, as defendant points out, the Appeals Council
19 found that plaintiff’s obesity is a severe impairment and also rendered an RFC determination that
20 is more restrictive than the ALJ’s RFC determination. [Compare AR at 9-10 with AR at 35.] The
21 Appeals Council stated that in reaching its conclusion concerning plaintiff’s RFC, it had
22 “considered the combined effects of [plaintiff’s] obesity on her other impairments in accordance
23 with SSR 02-1p.” [AR at 10.] As plaintiff does not challenge the obesity findings of the *Appeals*
24 *Council* at steps two and three, and as the Appeals Council found plaintiff’s obesity to be “severe”
25

26
27 ⁶ For this reason, to the extent plaintiff argues that the *ALJ* erred by making certain findings,
28 the Court herein only addresses plaintiff’s arguments to the extent that the Appeals Council
adopted or did not explicitly disagree with any of those findings of the ALJ.

1 and considered its effects in rendering an RFC determination, remand is not warranted on
2 plaintiff's second contention of error.⁷

3
4 **C. PLAINTIFF'S OTHER STEP TWO CONTENTIONS**

5 In her first contention of error, plaintiff asserts that the ALJ erred in concluding that certain
6 other of her alleged impairments were not severe impairments at step two.

7 1. *Hepatitis C and Cirrhosis of the Liver*

8 Plaintiff argues that the ALJ improperly concluded that her hepatitis C and cirrhosis of the
9 liver are not severe impairments. [JS at 3-6.] The Appeals Council likewise found that plaintiff's
10 hepatitis C and cirrhosis of the liver are not severe impairments at step two. [AR at 9-10.]

11 In determining plaintiff's RFC, the Appeals Council stated that it was "persuaded by the
12 physical and neurological examinations" of examining physician Bryan To, "as well as the opinions
13 of Dr. To, [nonexamining physician] F. Kalmar [] and [nonexamining physician] J. Ross []." [AR
14 at 10 (citing AR at 192-205, 217-18).] All three of these physicians either diagnosed plaintiff with
15 hepatitis C and cirrhosis of the liver, or acknowledged treating medical records reflecting these
16 diagnoses. [See AR at 195, 204, 218.] CT scans and ultrasounds on various occasions in 2009
17 and 2010 revealed cirrhosis of the liver. [See AR at 242, 251, 335, 343, 356, 392-93, 425.]
18 Further, plaintiff was consistently and frequently diagnosed with both hepatitis C and cirrhosis of
19 the liver. [See, e.g., AR at 209-11, 216, 221, 223-24, 237-38, 243-46, 327, 369-71, 402-05, 434,
20 436.]

21 Moreover, as noted supra, plaintiff testified that due to her liver problems, she cannot "sit,
22 stand, lay, walk, do anything for more than 15 to 20 minutes before [she] [has] to get up and
23 change positions or it causes [her] a lot of pain." [AR at 50-51.] While it does not appear that
24 plaintiff is in a position to definitively attribute these functional limitations to her liver problems, at
25 least a few of her medical records may support her testimony. [See AR at 209, 223-24.] Thus,

26
27

⁷ The Court does not hereby affirm the Appeals Council's RFC determination, since the
28 issues for which the Court remands this case (supra and infra) may impact on that determination.

1 as discussed herein, to the extent the Appeals Council implicitly adopted the ALJ's legally
2 inadequate findings concerning plaintiff's credibility, the Appeals Council's conclusion -- that
3 plaintiff's hepatitis C and cirrhosis of the liver have no more than a minimal effect on her physical
4 ability to do basic work activities -- may not be supported by substantial evidence. On the other
5 hand, to the extent the Appeals Council did not adopt the ALJ's credibility finding, the Court is
6 unable to review whether the Appeals Council properly found plaintiff's hepatitis C and cirrhosis
7 of the liver non-severe in light of the medical evidence in the record and plaintiff's testimony that
8 her liver disease prevents her from sitting, standing, laying, or walking for more than fifteen to
9 twenty minutes at a time. See Byrnes, 60 F.3d at 641. Thus, remand is warranted on this portion
10 of plaintiff's first contention of error.

11 2. *Back Pain*

12 Plaintiff also argues that the ALJ erred in concluding that plaintiff's back pain is not a severe
13 impairment. [JS at 5-6.] Like the ALJ, the Appeals Council found at step two that plaintiff's back
14 pain was not a severe impairment. [AR at 9-10.]

15 The record reflects the following evidence of plaintiff's back problems: a February 2, 2009,
16 x-ray revealed "[d]egenerative change of the spine" [AR at 276]; plaintiff went to the emergency
17 room on April 1, 2010, complaining of lower back pain and was diagnosed with "[l]ow [b]ack [p]ain"
18 and prescribed medications [AR at 400-01]; the next day, she visited the emergency room again,
19 still complaining of lower back pain -- but this time with pain "radiating down [her left] leg" -- and
20 was diagnosed with lumbago and sciatica [AR at 319, 324]; and two CT scans taken on May 21,
21 2010, and May 26, 2010, revealed "degenerative change in the spine." [AR at 343, 356.]

22 Plaintiff testified at the administrative hearing that she cannot lift more than "maybe five
23 pounds" because anything more than that "would put a real bad strain on [her] back." Accordingly,
24 for the same reasons remand is warranted for the Appeals Council to reconsider whether

25 /

26 /

27 /

28

1 plaintiff's hepatitis C and cirrhosis of the liver are severe, remand is warranted for this portion of
2 plaintiff's first contention of error.⁸ See Byrnes, 60 F.3d at 641.

3
4 **VI.**

5 **REMAND FOR FURTHER PROCEEDINGS**

6 As a general rule, remand is warranted where additional administrative proceedings could
7 remedy defects in the Commissioner's decision. See Harman v. Apfel, 211 F.3d 1172, 1179 (9th
8 Cir.), cert. denied, 531 U.S. 1038 (2000); Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984).
9 In this case, remand is appropriate for the ALJ to properly evaluate plaintiff's credibility and
10 whether her impairments of hepatitis C, cirrhosis of the liver, and back pain are "severe."

11 Accordingly, **IT IS HEREBY ORDERED** that: (1) plaintiff's request for remand is **granted**;
12 (2) the decision of the Commissioner is **reversed**; and (3) this action is **remanded** to defendant
13 for further proceedings consistent with this Memorandum Opinion.

14 **This Memorandum Opinion and Order is not intended for publication, nor is it**
15 **intended to be included in or submitted to any online service such as Westlaw or Lexis.**

16
17 DATED: August 7, 2013



18 _____
19 PAUL L. ABRAMS
20 UNITED STATES MAGISTRATE JUDGE

21
22
23
24
25
26
27 _____
28 ⁸ In light of the remand of this action, the Court exercises its discretion not to address plaintiff's
third contention of error.