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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

KIMBERLY A. RIVERA,)	Case No. SACV 09-0468-MLG
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the)	
Social Security)	
Administration,)	
)	
Defendant.)	
)	

Plaintiff Kimberly A. Rivera ("Plaintiff") seeks review of the Commissioner's final decision denying her application for disability insurance benefits ("DIB") pursuant to Title II of the Social Security Act. For the reasons stated below, this action is remanded for further proceedings.

I. Factual and Procedural Background

Plaintiff was born on March 8, 1968. (Administrative Record ("AR") at 65). She has a tenth grade education and past relevant work experience as a medical biller. (AR at 35, 65-66).

1 Plaintiff filed an application for DIB on July 27, 2007, alleging
2 that she has been disabled since April 27, 2002, due to porphyria
3 (disorders of certain enzymes in the biosynthetic pathway),
4 encephalitis, chronic obstructive pulmonary disease ("COPD"), shortness
5 of breath, back pain causing difficulty with sitting, standing and
6 walking, and a vision impairment. (AR at 136, 156). The Social Security
7 Administration denied Plaintiff's application at the initial and
8 reconsideration levels. (AR at 77-80, 83-87).

9 A *de novo* hearing was held before Administrative Law Judge ("ALJ")
10 Keith Dietterle on July 30, 2008. (AR at 62-74). Plaintiff opted to
11 proceed without representation from counsel. (AR at 62-63). A vocational
12 expert and a medical expert testified at the hearing. (AR at 64-65, 70).
13 On October 7, 2008, the ALJ issued a decision denying benefits. (AR at
14 30-37). The ALJ found that Plaintiff: (1) has not engaged in substantial
15 gainful activity since her alleged onset date of disability (step 1);
16 (2) suffers from the severe impairments of COPD, chronic pain syndrome,
17 porphyria, and back problems (step 2); (3) does not have any impairments
18 that meet or equal a listed impairment (step 3); (4) has the residual
19 functional capacity ("RFC") to perform a range of light work;¹ (5) is
20 unable to perform her past relevant work as a medical biller; but (6) is
21 capable of performing other work that exists in significant numbers in
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24 ¹ Specifically, the ALJ found that Plaintiff is able to lift and
25 carry 15 pounds occasionally and 10 pounds frequently; stand for one
26 hour at a time for a total of three hours during an eight-hour workday;
27 walk for two hours at a time for a total of three hours in an eight-hour
28 workday; sit for two hours at a time for a total of four hours in an
eight-hour workday; use lower extremities for guidance; and occasionally
climb stairs, bend, stoop, kneel, crouch, and crawl. (AR at 33).
Plaintiff must avoid unprotected heights, dangerous or fast-moving
machinery, hot or cold environments and exposure to dust, fumes or
gases, and climbing ladders and scaffolds. (AR at 33).

1 the economy. (AR at 32-33, 35-36).

2 Plaintiff sought Appeals Council review and submitted new evidence
3 from her treating physician in support of the request. (AR at 13). The
4 Appeals Council considered the new evidence, but declined to reopen
5 Plaintiff's case, and denied review on January 21, 2009. (AR at 1-3, 9-
6 11).

7 Plaintiff commenced this action for judicial review on April 16,
8 2009. On October 19, 2009, the parties filed a Joint Stipulation
9 addressing the disputed issues. Those issues are whether: (1) the
10 Appeals Council failed to properly consider new and material evidence
11 from Plaintiff's treating physician; and (2) the ALJ failed to properly
12 consider Plaintiff's subjective complaints. Plaintiff seeks remand for
13 payment of benefits or, in the alternative, remand for further
14 administrative proceedings. (Joint Stipulation at 24). The Commissioner
15 requests that the ALJ's decision be affirmed. (Joint Stipulation at 25).
16 The Joint Stipulation has been taken under submission without oral
17 argument.

18
19 **II. Standard of Review**

20 Under 42 U.S.C. § 405(g), a district court may review the
21 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
22 findings and decision should be upheld if they are free from legal error
23 and are supported by substantial evidence based on the record as a
24 whole. 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401
25 (1971); *Holohan v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001).
26 Substantial evidence means such evidence as a reasonable person might
27 accept as adequate to support a conclusion. *Richardson*, 402 U.S. at 401;
28 *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). It is more than a

1 scintilla, but less than a preponderance. *Reddick*, 157 F.3d at 720. To
2 determine whether substantial evidence supports a finding, the reviewing
3 court "must review the administrative record as a whole, weighing both
4 the evidence that supports and the evidence that detracts from the
5 Commissioner's conclusion." *Id.* "If the evidence can reasonably support
6 either affirming or reversing," the reviewing court "may not substitute
7 its judgment" for that of the Commissioner. *Id.* at 720-721.

8
9 **III. Discussion**

10 Plaintiff reported that she is unable to sit or stand for long
11 periods, needs to use oxygen due to shortness of breath, has a vision
12 impairment causing difficulty reading, and does not walk nor lift
13 anything. (AR at 144-45, 156). Plaintiff also testified that she has
14 pain on a daily basis and severe pain in her back and lower extremities
15 three to four times a week. (AR at 67). Plaintiff contends that the ALJ
16 failed to give proper consideration to her testimony concerning the
17 nature and extent of her pain and functional limitations. (Joint
18 Stipulation at 11-18, 21-23).

19 The determination of credibility and the resolution of conflicts in
20 the testimony are functions of the ALJ acting on behalf of the
21 Commissioner. *Morgan v. Commissioner of Social Security*, 169 F.3d 595,
22 599 (9th Cir. 1999); *Saelee v. Chater*, 94 F.3d 520, 522 (9th Cir. 1996).
23 In general, an ALJ's assessment of credibility should be given great
24 weight. *Nyman v. Heckler*, 779 F.2d 528, 531 (9th Cir. 1985). The ALJ may
25 employ ordinary techniques of credibility evaluation and may take into
26 account prior inconsistent statements or a lack of candor by the
27 witness. *Fair v. Bowen*, 885 F.2d 597, 604 n. 5 (9th Cir. 1989). However,
28 once a claimant has presented medical evidence of an underlying

1 impairment, the ALJ may not discredit the claimant's testimony regarding
2 subjective pain and other symptoms merely because the symptoms, as
3 opposed to the impairments, are unsupported by objective medical
4 evidence. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir.
5 2007); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998); *Light v.*
6 *Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). "[T]he ALJ can
7 reject the claimant's testimony about the severity of her symptoms only
8 by offering specific, clear and convincing reasons for doing so."
9 *Lingenfelter*, 504 F.3d at 1036 (quoting *Smolen v. Chater*, 80 F.3d 1273,
10 1281 (9th Cir. 1996)).

11 Here, the ALJ discounted Plaintiff's credibility because Plaintiff
12 stopped working to care for her ailing mother. (AR at 34, 156). The ALJ
13 attributed too much weight to Plaintiff's reason for leaving her
14 previous job in assessing credibility. A review of the record reveals
15 that Plaintiff stopped working in July 2001, a full nine months before
16 her alleged onset date. (AR at 136, 156). Thus, the fact that Plaintiff
17 stopped working for non-medical reasons was not a proper basis for the
18 adverse credibility determination.

19 The ALJ also found that the medical evidence did not support
20 Plaintiff's subjective complaints. (AR at 34). The ALJ noted that the
21 greater portion of the medical records pertained to treatment after
22 Plaintiff's date last insured and that the records preceding Plaintiff's
23 date last insured did "not establish there was ever a 12-month period of
24 time during which she would have been unable to perform work." (AR at
25 34). The asserted lack of objective medical evidence in support of
26 Plaintiff's subjective symptom testimony is not an acceptable reason for
27 rejecting Plaintiff's subjective testimony. *Lingenfelter*, 504 F.3d at
28 1035-36; *Reddick*, 157 F.3d at 722; *Light*, 119 F.3d at 792. Further, the

1 question of whether the medical evidence established that Plaintiff was
2 precluded from working for a continuous 12-month period relates to the
3 ultimate determination of disability, and is not a proper basis for
4 rejecting credibility. Accordingly, the ALJ's credibility determination
5 is not supported by substantial evidence in the record.

6 In general, the choice whether to reverse and remand for further
7 administrative proceedings, or to reverse and simply award benefits, is
8 within the discretion of the court. *See Harman v. Apfel*, 211 F.3d 1172,
9 1178 (9th Cir. 2000) (holding that the district court's decision whether
10 to remand for further proceedings or for payment of benefits is
11 discretionary and is subject to review for abuse of discretion)). The
12 Ninth Circuit has observed that "the decision whether to remand for
13 further proceedings turns upon the likely utility of such proceedings."
14 *Id.* at 1179; *see Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004)
15 (noting that a remand for further administrative proceedings is
16 appropriate "if enhancement of the record would be useful").

17 When an ALJ fails to articulate sufficient reasons for rejecting a
18 claimant's pain testimony, courts "have some flexibility" in determining
19 whether to remand for further proceedings. *Vasquez v. Astrue*, 572 F.3d
20 586, 593 (9th Cir. 2009); *Connett v. Barnhart*, 340 F.3d 871, 876 (9th
21 Cir. 2003) (discussing the Ninth Circuit's conflicting case law and
22 holding that the doctrine is not mandatory because the court has "some
23 flexibility in applying the 'crediting as true' theory"). In this case,
24 it is unclear whether Plaintiff's testimony should be credited, and if
25 so, to what extent. Therefore, further administrative proceedings would
26 be useful. *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 1993) (remanding
27 "for the ALJ to repeat the step four analysis, articulating specific
28 findings for rejecting [the plaintiff's] pain testimony . . . " among

1 other things).²

2 **ORDER**

3 Accordingly, **IT IS HEREBY ORDERED** that this action is remanded
4 for further proceedings consistent with this Memorandum Opinion and
5 Order.

6 DATED: November 10, 2009

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9 **MARC L. GOLDMAN**

10 MARC L. GOLDMAN
11 United States Magistrate Judge

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13 ² The Court finds that on remand the Commissioner should also
14 consider the letter received from Plaintiff's treating physician, Howard
15 K. Bland, M.D. (AR at 13). On October 2008, after the ALJ issued the
16 decision denying benefits, Dr. Bland prepared a letter discussing
17 Plaintiff's impairments. (AR at 13). Dr. Bland opined that Plaintiff has
18 been unable to maintain any gainful employment since she was
19 hospitalized in June 2004. (AR at 13). The Appeals Council declined to
20 reopen Plaintiff's case. (AR at 2-3). The Appeals Council reasoned that
21 Dr. Bland's opinion lacked "any specificity" with respect to Plaintiff's
22 limitations prior to her date last insured of September 30, 2004. (AR at
23 2). The Court disagrees with the Appeals Council's conclusion.

24 Dr. Bland's letter is properly considered on appeal, as the Appeals
25 Council examined it in the context of denying review. *See Ramirez v.*
26 *Shalala*, 8 F.3d 1449, 1451-52 (9th Cir. 1993) (considering on appeal
27 "both the ALJ's decision and the additional material submitted to the
28 Appeals Council"); *see also Harman*, 211 F.3d 1172, 1180 (9th Cir. 2000)
("We properly may consider the additional materials because the Appeals
Council addressed them in the context of denying Appellant's request for
review"); *Lingenfelter*, 504 F.3d 1028, 1030 n. 2 (9th Cir. 2007); *Gomez*
v. Chater, 74 F.3d 967, 971 (9th Cir. 1996). Dr. Bland summarized
Plaintiff's impairments and directly addressed Plaintiff's ability to
work during the relevant period. (AR at 13). Thus, there is a reasonable
possibility that Dr. Bland's letter could have affected the disability
determination, had it been presented to the ALJ. *See Booz v. Sec'y of*
Health & Human Servs., 734 F.2d 1378, 1380-81 (9th Cir. 1984) (new
evidence is material when it creates a reasonable possibility that the
outcome of the case would be different). Thus, Plaintiff should have an
opportunity to present this new evidence at the administrative level in
support of her application.