

O

1  
2  
3  
4  
5 UNITED STATES DISTRICT COURT  
6 CENTRAL DISTRICT OF CALIFORNIA  
7 SOUTHERN DIVISION  
8

9 JEANETTE RAMIREZ, ) Case No. SACV 12-00698-MLG  
10 Plaintiff, ) MEMORANDUM OPINION AND ORDER  
11 v. )  
12 MICHAEL J. ASTRUE, )  
13 Commissioner of the )  
14 Social Security )  
15 Administration, )  
Defendant. )  
\_\_\_\_\_ )

16  
17 Plaintiff Jeanette Ramirez seeks judicial review of the  
18 Commissioner's final decision denying her applications for disability  
19 insurance benefits ("DIB") and Supplemental Security Income ("SSI")  
20 benefits. For the reasons stated below, the decision of the Commissioner  
21 is reversed, and the matter is remanded for further proceedings  
22 consistent with this opinion.

23  
24 **I. Background**

25 Plaintiff was born on October 16, 1950, and was 58 years old at the  
26 time she filed her applications for benefits. (Administrative Record  
27 ("AR") at 101.) She has a high school education and has relevant work  
28 experience as a bank teller and legal secretary. (AR at 116, 121.)

1 Plaintiff filed her benefits applications on November 26, 2008, alleging  
2 disability beginning July 1, 2003, due to kidney disease, high blood  
3 pressure, fatigue, and depression. (AR at 21, 57.)

4 Plaintiff's applications were denied on March 27, 2009. (AR at 57-  
5 61.) An administrative hearing was held on October 25, 2010, before  
6 Administrative Law Judge ("ALJ") John Kays. Plaintiff, represented by  
7 counsel, testified, as did medical expert Dr. Sami Nafosi, and a  
8 vocational expert. (AR at 35-55.) On January 7, 2011, the ALJ issued an  
9 unfavorable decision. (AR at 21-28.) He found that the medical evidence  
10 established that Plaintiff suffered from the following severe  
11 impairments: chronic obstructive pulmonary disease, peripheral vascular  
12 disease, hypertension, diverticulosis, and neurodermatitis. (Id.) The  
13 ALJ determined that Plaintiff's impairments did not meet, or were not  
14 medically equal to, one of the listed impairments in 20 C.F.R., Part  
15 404, Subpart P, Appendix 1. (Id.) The ALJ further found that Plaintiff  
16 retained the residual functional capacity ("RFC") to perform light work  
17 as defined in 20 C.F.R. 404.1567(b) with the following exceptions:  
18 "stand and walk for thirty minutes at a time for a maximum of four hours  
19 in an eight-hour workday, and avoid exposure to dust, fumes, gases, air  
20 pollutants, and extreme temperatures." (AR at 24.) In doing so, he found  
21 that Plaintiff's testimony regarding her limitations was not fully  
22 credible. (AR at 32.) The ALJ concluded that Plaintiff was capable of  
23 performing her past relevant work as a legal secretary and was therefore  
24 not disabled within the meaning of the Social Security Act. See 20  
25 C.F.R. § 416.920(f). (AR at 27-28.)

26 On February 22, 2012, the Appeals Council denied review. (AR at 1-  
27 5.) Plaintiff then timely commenced this action for judicial review. On  
28 October 2, 2012, the parties filed a Joint Stipulation ("Joint Stip.")

1 of disputed facts and issues. Plaintiff contends that the ALJ erred by:  
2 (1) failing to perform a proper credibility analysis; (2) improperly  
3 relying on the testimony of the medical expert, Dr. Sami Nafsoosi, M.D.;  
4 and (3) failing to properly consider the medical evidence in the record.  
5 (Joint Stip. at 4.) Plaintiff seeks reversal of the Commissioner's  
6 denial of her applications and payment of benefits or, in the  
7 alternative, remand for a new administrative hearing. (Joint Stip. at  
8 26.) The Commissioner requests that the ALJ's decision be affirmed.  
9 (Joint Stip. at 28.)

10 After reviewing the parties' contentions and the record as a whole,  
11 the Court finds Plaintiff's contention regarding the ALJ's failure to  
12 properly evaluate Plaintiff's credibility to be meritorious and remands  
13 this matter for further proceedings consistent with this opinion.<sup>1</sup>

## 14 15 **II. Standard of Review**

16 Under 42 U.S.C. § 405(g), a district court may review the  
17 Commissioner's decision to deny benefits. The Commissioner's or ALJ's  
18 decision must be upheld unless "the ALJ's findings are based on legal  
19 error or are not supported by substantial evidence in the record as a  
20 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Batson v.*  
21 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Parra*  
22 *v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means  
23 such evidence as a reasonable person might accept as adequate to support  
24 a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Widmark*  
25 *v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more than a  
26 scintilla, but less than a preponderance. *Robbins v. Soc. Sec. Admin.*,  
27 466 F.3d 880, 882 (9th Cir. 2006). To determine whether substantial

28  

---

<sup>1</sup> The Court does not reach the remaining claims of error and will not decide whether these issues would independently warrant relief. The ALJ may wish to consider these other claims of error upon remand.

1 evidence supports a finding, the reviewing court "must review the  
2 administrative record as a whole, weighing both the evidence that  
3 supports and the evidence that detracts from the Commissioner's  
4 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If  
5 the evidence can support either affirming or reversing the ALJ's  
6 conclusion," the reviewing court "may not substitute its judgment for  
7 that of the ALJ." *Robbins*, 466 F.3d at 882.

### 8 9 **III. Discussion**

10 Plaintiff contends that the ALJ erred by failing to provide clear  
11 and convincing reasons for rejecting her subjective symptom testimony.  
12 (Joint Stip. at 5.) To determine whether a claimant's testimony about  
13 subjective pain or symptoms is credible, an ALJ must engage in a two-  
14 step analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009)  
15 (citing *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007)).  
16 First, the ALJ must determine whether the claimant has presented  
17 objective medical evidence of an underlying impairment which could  
18 reasonably be expected to produce the alleged pain or other symptoms.  
19 *Lingenfelter*, 504 F.3d at 1036. "[O]nce the claimant produces objective  
20 medical evidence of an underlying impairment, an adjudicator may not  
21 reject a claimant's subjective complaints based solely on a lack of  
22 objective medical evidence to fully corroborate the alleged severity of  
23 pain." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc).  
24 To the extent that an individual's claims of functional limitations and  
25 restrictions due to alleged pain is reasonably consistent with the  
26 objective medical evidence and other evidence in the case, the  
27 claimant's allegations will be credited. SSR 96-7p, 1996 WL 374186 at \*2

1 (explaining 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4)).<sup>2</sup>

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

17 Plaintiff claims to suffer from the following symptoms and  
18 functional limitations: she has frequent panic attacks during which she  
19 becomes dizzy and finds it difficult to breathe, for which she has been  
20 prescribed Xanax; she feels depressed and unable to cope; she is unable  
21 to walk for more than 10 minutes due to pain; she can walk no more than  
22 one block before needing to stop and rest due to pain and shortness of  
23 breath; and she suffers from kidney disease, high blood pressure and  
24 fatigue. (AR at 50-52, 115, 143-80.)

---

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

1 The ALJ found that Plaintiff's medical impairments could reasonably  
2 be expected to produce the alleged symptoms. (AR at 25.) He was  
3 therefore required to provide specific, clear and convincing reasons for  
4 rejecting Plaintiff's subjective allegations of pain and functional  
5 limitations. The ALJ provided the following reasons for finding  
6 Plaintiff's testimony not fully credible:

7 Although the record shows that the claimant suffers from a  
8 number of impairments, I find that the claimant's credibility  
9 regarding the alleged severity of her symptoms and resulting  
10 limitations is diminished by her refusal to quit smoking and  
11 alcohol use. Dr. Hawkins and Dr. Ho diagnosed the claimant  
12 with tobacco use disorder on numerous occasions and  
13 recommended that the claimant quit smoking, as it poses as a  
14 risk factor for chronic kidney disease. Although Dr. Weil, the  
15 vascular surgeon, also strongly recommended smoking cessation,  
16 the claimant had not quit smoking as of September 2008, and  
17 Dr. Ho reported in his most recent treatment note of March  
18 2010 that the claimant's smoking remains a "main issue" and he  
19 would continue to encourage cessation. Additionally, despite  
20 the claimant's allegations that she suffered from disabling  
21 depression, the record shows that the claimant reported that  
22 she drank wine socially. I note that alcohol is a well-known  
23 depressant, and drinking alcohol on even a social basis may  
24 exacerbate the claimant's depressive symptoms.

25 (AR at 32.) (Internal citations omitted.)

26 With respect smoking cessation, the ALJ failed to make adequate  
27 underlying findings as required by *Bunnell*, 947 F.2d at 345. An ALJ may  
28 consider a claimant's continued smoking in evaluating her credibility

1 with respect to the limitations of an impairment directly caused by  
2 smoking. *Bray v. Commissioner*, 554 F.3d 1219, 1227 (9th Cir. 2009); *but*  
3 *see Shramek v. Apfel*, 226 F.3d 809, 812-13 (7th Cir. 2000) (noting, in  
4 dicta, that nicotine's addictive properties made it "extremely tenuous"  
5 to discredit a claimant's description of her impairments based on the  
6 claimant's continued smoking). However, "before basing a denial of  
7 benefits on noncompliance, the ALJ must 'examine the medical conditions  
8 and personal factors that bear on whether [a claimant] can reasonably  
9 remedy' her impairment and must make specific findings." *Byrnes v.*  
10 *Shalala*, 60 F.3d 639, 641 (9th Cir. 1995) (citing *Dodrill v. Shalala*, 12  
11 F.3d 915, 919 (9th Cir. 1993)). The ALJ "must develop a record  
12 establishing by substantial evidence that the claimant's impairment is  
13 reasonably remediable by the particular individual involved, given ...  
14 her social or psychological situation, and that [she] lacks good cause  
15 for failing to follow a prescribed treatment program." *Byrnes*, 60 F.3d  
16 at 641 (citing *Preston v. Heckler*, 769 F.2d 988, 990 (4th Cir. 1985)).  
17 Also "[e]ssential to a denial of benefits ... is a finding that if the  
18 claimant followed her prescribed treatment she could return to work."  
19 *Id.* (citing *Rousey v. Heckler*, 771 F.2d 1065, 1069 (7th Cir. 1985)).

20 Here, the ALJ failed to make adequate findings regarding whether  
21 Plaintiff was in fact not complying with a prescribed treatment program  
22 to quit smoking, that she lacked good cause for failing to comply, or  
23 that if she stopped smoking she could return to work. The ALJ did not  
24 ask Plaintiff any questions at the administrative hearing regarding her  
25 smoking, such as whether she had quit or was making a serious effort to  
26 do so. Although there is a notation in the record in September 2006 that  
27 Plaintiff was "currently not too motivated" to quit smoking, the other  
28 medical records cited by the ALJ indicate that Plaintiff at least had

1 expressed interest in quitting smoking and was discussing with her  
2 physicians various cessation aids, such as Nicoderm, Chantix, Zyban, and  
3 even possibly hypnosis. (See, e.g., AR at 299, 341, 612, 665.) Nor is it  
4 clear from the record whether any or all of Plaintiff's subjective  
5 complaints of pain and functional limitations are related to her  
6 smoking. See *Kral v. Astrue*, 2011 WL 4383111, \*7 (E.D.Cal. 2011)  
7 (finding that where only some of the claimant's complaints and  
8 impairments were related to smoking, the ALJ's general reliance on the  
9 claimant's smoking as a reason to discredit her credibility was  
10 insufficient).

11 The other reason the ALJ relied on for finding Plaintiff less than  
12 credible, her use of alcohol, is also unsupported by substantial  
13 evidence in the record. The ALJ chides Plaintiff for social drinking  
14 because "alcohol is a well-known depressant," yet the ALJ found that  
15 Plaintiff's depression was non-severe. (AR at 23, 26.) Moreover, it is  
16 entirely unclear from the record how often or how much Plaintiff drinks.  
17 The notations in the medical record upon which the ALJ relies merely  
18 state "alcohol: socially, wine." There does not appear to be any  
19 indication in the record that Plaintiff's doctors believed that she had  
20 a drinking problem or that alcohol consumption contributed in any way to  
21 her impairments. Nor did the ALJ question Plaintiff regarding her  
22 alcohol consumption. Thus, the mere fact that Plaintiff occasionally  
23 drinks wine in social settings does not provide a reason supported by  
24 substantial evidence in the record for discrediting her testimony.

25 In support of the argument that the ALJ properly addressed  
26 Plaintiff's subjective complaints, the Commissioner points to other  
27 evidence in the record which allegedly undermines Plaintiff's  
28 credibility. First, the Commissioner argues that the ALJ "noted that



1 the objective medical evidence did not support the degree of disability  
2 alleged by Plaintiff." (Joint Stip. at 13, citing AR at 25-27.) An ALJ's  
3 finding that there is no objective medical evidence corroborating  
4 Plaintiff's subjective pain testimony is not, without more, a sufficient  
5 reason for discrediting Plaintiff. See *Burch v. Barnhart*, 400 F.3d 676,  
6 681 (9th Cir. 2005) (noting that "lack of medical evidence cannot form  
7 the sole basis for discounting pain testimony"). Although "the medical  
8 evidence is a relevant factor in determining the severity of the  
9 claimant's pain and its disabling effects," once a claimant produces  
10 objective medical evidence of an underlying impairment, an ALJ "may not  
11 reject a claimant's subjective complaints based solely on lack of  
12 objective medical evidence to fully corroborate the alleged severity of  
13 pain." *Rollins v. Massanari*, 261 F.3d 853, 856-57 (9th Cir. 2001).

14 The Commissioner also contends that the ALJ relied upon Plaintiff's  
15 conservative treatment regimen in support of his adverse credibility  
16 determination. (Joint Stip. at 14, citing AR at 17.) The Court notes  
17 that the page cited by the Commissioner in support of this contention is  
18 not actually part of the ALJ's written opinion. Nevertheless, although  
19 a conservative course of treatment may be a reason to discredit a  
20 claimant's allegations of severe pain, see *Parra v. Astrue*, 481 F.3d  
21 742, 750-51 (9th Cir. 2007), the ALJ did not clearly and explicitly cite  
22 this as a reason for rejecting Plaintiff's testimony. It would be error  
23 for this Court to affirm the ALJ's decision based upon reasons that the  
24 ALJ did not discuss. *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir.  
25 2003).

26 The Commissioner also contends that the "ALJ observed that  
27 Plaintiff's subjective pain complaints and her statements concerning her  
28 daily activities were not consistent." (Joint Stip. at 14, citing AR at

1 25.) Again, although this may be an acceptable reason for discounting a  
2 claimant's credibility, the ALJ did not specifically note Plaintiff's  
3 activities of daily living as a reason for his adverse credibility  
4 determination. See *Connett*, 340 F.3d at 874. Accordingly, the Court  
5 cannot affirm the ALJ's decision based upon the reasons proposed post  
6 hoc by the Commissioner.<sup>3</sup>

7 In sum, the reasons given by the ALJ were not supported by  
8 substantial evidence in the record and were therefore insufficient to  
9 reject Plaintiff's testimony regarding her symptoms and related  
10 limitations.

#### 11 12 **IV. Conclusion**

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

---

25  
26  
27 <sup>3</sup> The Court notes that the Commissioner fails to address the  
28 sufficiency of the two reasons actually proffered by the ALJ, that is,  
that Plaintiff did not quit smoking and that she drank alcohol on social  
occasions.

1 *Bunnell v. Barnhart*, 336 F.3d 1112, 1115-16 (9th Cir. 2003); see also  
2 *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding case  
3 for reconsideration of credibility determination).

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

9  
10 DATED: October 25, 2012



---

11  
12  
13 Marc L. Goldman  
United States Magistrate Judge  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28