

1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is REVERSED AND REMANDED for further proceedings
3 consistent with this Memorandum Opinion and Order of Remand.

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
5 **DECISION**

6 On June 30, 2009, plaintiff filed applications for Supplemental Security
7 Income and Disability Insurance Benefits. (Administrative Record (“AR”) 20,
8 204, 206). Plaintiff asserted that she became disabled on May 29, 2009,² due to
9 hand, neck, back, knee, shoulder, arm and upper back pain, headaches, and
10 depression. (AR 144-45, 231). The Administrative Law Judge (“ALJ”) examined
11 the medical record and heard testimony from plaintiff (who was represented by
12 counsel) on January 19, 2011, and heard testimony from plaintiff, a lay witness,
13 and a vocational expert on May 18, 2011. (AR 94-176).

14 On June 9, 2011, the ALJ determined that plaintiff was not disabled through
15 the date of the decision. (AR 20-30). Specifically, the ALJ found: (1) plaintiff
16 suffered from the following severe impairments: status post compound fracture of
17 right knee, tibia and fibula secondary to work injury in March 1995, status post
18 right wrist surgery release of ulnar nerve in February 2003, right wrist tendinitis
19 with tenosynovitis, chondromalacia of the patella, mild osteoarthritis of bilateral
20 knees, mild rotator levoscoliosis of lumbar spine, and very mild degenerative
21 narrowing of interphalangeal joints of the fingers (AR 22); (2) plaintiff’s
22 impairments, considered singly or in combination, did not meet or medically equal
23 a listed impairment (AR 24); (3) plaintiff retained the residual functional capacity
24 essentially to perform light work (20 C.F.R. §§ 404.1567(b), 416.967(b)) with
25

26
27 ²Although plaintiff originally alleged disability beginning on May 29, 2008 (AR 231), the
28 ALJ subsequently granted plaintiff’s motion to change her alleged onset date to May 29, 2009
(AR 144-45).

1 multiple additional limitations³ (AR 24-25); (4) plaintiff could perform her past
2 relevant work as a “care provider” (AR 30); and (5) plaintiff’s allegations
3 regarding her limitations were not credible to the extent they were inconsistent
4 with the ALJ’s residual functional capacity assessment (AR 25).

5 The Appeals Council denied plaintiff’s application for review. (AR 1).

6 **III. APPLICABLE LEGAL STANDARDS**

7 **A. Sequential Evaluation Process**

8 To qualify for disability benefits, a claimant must show that the claimant is
9 unable “to engage in any substantial gainful activity by reason of any medically
10 determinable physical or mental impairment which can be expected to result in
11 death or which has lasted or can be expected to last for a continuous period of not
12 less than 12 months.” Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012)
13 (quoting 42 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted). The
14 impairment must render the claimant incapable of performing the work claimant
15 previously performed and incapable of performing any other substantial gainful
16 employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094,
17 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

18 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
19 sequential evaluation process:

20
21 ³The ALJ determined that plaintiff: (i) could lift/carry 20 pounds occasionally and 10
22 pounds frequently; (ii) sit, stand and walk each for up to six hours in an eight-hour workday;
23 (iii) needed to be able to sit/stand at a minimum of one hour and then could change position;
24 (iv) could occasionally climb, balance, stoop, kneel, crouch and crawl; (v) needed to avoid
25 climbing ladders, ropes and scaffolds; (vi) needed to avoid working above shoulder height;
26 (vii) needed to avoid constant, but could do frequent pushing/pulling, reaching, fingering and
27 feeling with her hand; (viii) had pain in her entire body, head, neck, back, shoulder, hands,
28 wrists, legs and knees, and occasional numbness and tingling in her arms and legs; (ix) had
moderate pain that either (a) had a moderate effect on plaintiff’s ability to do basic work
activities, or (b) was controlled or could be controlled by appropriate medications without
significant adverse side effects; and (x) had depression, anxiety and a learning problem which
were slight impairments and had a slight effect on plaintiff’s ability to maintain attention,
concentration and memory. (AR 24-25).

- 1 (1) Is the claimant presently engaged in substantial gainful activity? If
2 so, the claimant is not disabled. If not, proceed to step two.
- 3 (2) Is the claimant's alleged impairment sufficiently severe to limit
4 the claimant's ability to work? If not, the claimant is not
5 disabled. If so, proceed to step three.
- 6 (3) Does the claimant's impairment, or combination of
7 impairments, meet or equal an impairment listed in 20 C.F.R.
8 Part 404, Subpart P, Appendix 1? If so, the claimant is
9 disabled. If not, proceed to step four.
- 10 (4) Does the claimant possess the residual functional capacity to
11 perform claimant's past relevant work? If so, the claimant is
12 not disabled. If not, proceed to step five.
- 13 (5) Does the claimant's residual functional capacity, when
14 considered with the claimant's age, education, and work
15 experience, allow the claimant to adjust to other work that
16 exists in significant numbers in the national economy? If so,
17 the claimant is not disabled. If not, the claimant is disabled.

18 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
19 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920); see also Molina, 674 F.3d at
20 1110 (same).

21 The claimant has the burden of proof at steps one through four, and the
22 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262
23 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also Burch
24 v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (claimant carries initial burden of
25 proving disability).

26 **B. Standard of Review**

27 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
28 benefits only if it is not supported by substantial evidence or if it is based on legal

1 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
2 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457
3 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
4 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
5 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
6 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
7 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

8 To determine whether substantial evidence supports a finding, a court must
9 “consider the record as a whole, weighing both evidence that supports and
10 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.
11 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d
12 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
13 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that
14 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

15 **IV. DISCUSSION**

16 Plaintiff essentially contends that the ALJ’s determination at step four – that
17 plaintiff’s past relevant work included the job of “care provider” – was not
18 supported by substantial evidence. (Plaintiff’s Motion at 7-9). The Court agrees.
19 As the Court cannot find that the ALJ’s error was harmless, a remand is warranted.

20 **A. Pertinent Law**

21 At step four of the sequential evaluation process, the Administration may
22 deny benefits when the claimant is able to perform her past relevant work as
23 “actually performed” or as “generally” performed. Pinto v. Massanari, 249 F.3d
24 840, 845 (2001). Social Security regulations define past relevant work as “work
25 that [a claimant has] done within the past 15 years, that was substantial gainful
26 activity, and that lasted long enough for [the claimant] to learn it.” 20 C.F.R.
27 §§ 404.1560(b)(1), 416.960(b)(1).

28 ///

1 “Substantial gainful activity is work done for pay or profit that involves
2 significant mental or physical activities.” Lewis v. Apfel, 236 F.3d 503, 515 (9th
3 Cir. 2001) (citing 20 C.F.R. §§ 404.1571-404.1572 & 416.971-416.975). The
4 primary factor used to determine whether a claimant was engaged in substantial
5 gainful activity (“SGA”) at a particular job is the amount of earnings a claimant
6 derived from the job. Le v. Astrue, 540 F. Supp. 2d 1144, 1149 (C.D. Cal. 2008)
7 (citing 20 C.F.R. §§ 404.1574(a)(1), 416.974(a)(1)). “There is a rebuttable
8 presumption that the employee either was or was not engaged in SGA if his or her
9 average monthly earnings are above or below a certain amount established by the
10 Commissioner’s Earnings Guidelines.” Id. (citing 20 C.F.R. §§ 404.1574(b)(2)-
11 (3), 416.974(b)(2)-(3)); Lewis, 236 F.3d at 515 (“Earnings can be a presumptive,
12 but not conclusive, sign of whether a job is substantial gainful activity.”). For
13 example, for 2008 an employee would be presumed to have engaged in work at an
14 SGA level in a particular month if her average monthly earnings exceeded \$940.
15 See 20 C.F.R. §§ 404.1574(b)(2)(ii), 416.974(b)(2)(ii); Tables of SGA Earnings
16 Guidelines and Effective Dates Based on Year of Work Activity, Social Security
17 Administration Program Operation Manual System (“POMS”) § DI
18 10501.015(B).⁴

19 A claimant may rebut the presumption that she was engaged in SGA at a
20 prior job by presenting evidence that she was employed under “special conditions”
21 which “[took] into account [her] impairment”— *i.e.*, the claimant “required and
22 received special assistance from other employees,” the claimant was “allowed to
23 work irregular hours or take frequent rest periods,” and/or the claimant was
24 permitted to work despite her impairments due to a family relationship. 20 C.F.R.
25 §§ 404.1573(c); 416.973(c).

26
27 ⁴The POMS manual is considered persuasive authority, even though it does not carry the
28 “force and effect of law.” Hermes v. Secretary of Health and Human Services, 926 F.2d 789,
791 n.1 (9th Cir.), cert. denied, 502 U.S. 817 (1991).

1 Although at step four the claimant has the burden of proving an inability to
2 perform her past relevant work, “the ALJ still has a duty to make the requisite
3 factual findings to support his conclusion.” Pinto, 249 F.3d at 844.

4 **B. Analysis**

5 Here, the Court cannot conclude on the current record that the ALJ’s
6 findings at step four of the sequential evaluation process are supported by
7 substantial evidence.

8 As defendant correctly notes, plaintiff’s certified earnings records raise a
9 presumption that in 2008 plaintiff engaged in work at an SGA level. Plaintiff
10 testified at the hearing that she worked as a care provider for her mother for about
11 three years ending on or about May 29, 2009. (AR 100-01, 143-44). The record
12 reflects that plaintiff’s average monthly earnings for 2008 (*i.e.*, while she was
13 employed as a care provider) were \$1,085.58 (\$13,027.01 annually). (AR 217,
14 225). Plaintiff does not dispute that such average monthly earnings were above
15 the SGA level established by the Commissioner for 2008 (*i.e.*, \$940 per month).
16 See 20 C.F.R. §§ 404.1574(b)(2)(ii), 416.974(b)(2)(ii); POMS § DI 10501.015(B).

17 The record contains substantial evidence, however, which suggests that
18 despite such reported earnings, plaintiff’s job as care provider did not involve
19 SGA because plaintiff worked under special conditions which accommodated her
20 impairments. For example, plaintiff (who lived with and worked for her mother)
21 testified that while working as a care provider she (i) was not required to lift more
22 than two pounds, did not make the bed or do other tasks that required moving
23 furniture, and was not required to help her mother move in/out of beds or chairs,
24 in/out of the bath tub, or on/off of the toilet (AR 100-01, 116); (ii) was permitted
25 to rest or lay down “any time” she needed and would do so “all the time” during
26 the work day for up to “a couple hours at a time” (AR 117, 119, 172); (iii) had no
27 set schedule, and could arrange each work day based on how she felt (AR 117,
28 173); and (iv) could ask her sister to help care for her mother if plaintiff was not

1 feeling well on a particular day, (AR 117-18). In addition, the vocational expert
2 testified that the manner in which plaintiff carried out her job as care provider was
3 not how a similar position would be performed in a “normal, competitive
4 situation” (e.g., plaintiff’s ability to “lay down when she wanted to” was “not
5 something . . . [that] would be allowed in a normal employment situation”). (AR
6 139-40).

7 Nonetheless, although plaintiff argued at both hearings that plaintiff’s job as
8 care provider was not SGA (AR 98, 121-22, 142, 176), the ALJ’s decision does
9 not address whether the foregoing evidence of “special conditions” rebutted the
10 presumption that it was. In his decision, the ALJ simply adopted the vocational
11 expert’s opinion that plaintiff’s past work included the job of “care provider.”
12 (AR 30, 135). Neither the ALJ nor the vocational expert explained the basis for
13 that finding. (AR 30, 135). At step four, however, the ALJ was required to set
14 forth a detailed explanation of the basis for each of his findings. See Pinto, 249
15 F.3d at 847 (“[R]equiring the ALJ to make specific findings on the record at each
16 phase of the step four analysis provides for meaningful judicial review.”) (citation
17 and quotation marks omitted). Thus, the ALJ erred by failing to articulate the
18 specific findings underlying his determination that plaintiff’s past relevant work
19 included the job of care provider. See id. (“When . . . the ALJ makes findings only
20 about the claimant’s limitations, and the remainder of the step four assessment
21 takes place in the [vocational expert’s] head, we are left with nothing to review.”)
22 (citation and quotation marks omitted). The Court cannot find the ALJ’s error
23 harmless as defendant points to no other persuasive evidence in the record which
24 could support the ALJ’s determination at step four that plaintiff was not disabled.
25 See, e.g., id. at 846 (remand warranted where ALJ found claimant not disabled at
26 step four based “largely” on inadequate vocational expert testimony and ALJ
27 otherwise “made very few findings”).

28 ///

