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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-SOUTHERN DIVISION

JOSEFINA OCHOA ZERTUCHE,)	Case No. SA CV 16-00539-AS
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND
v.)	ORDER OF REMAND
)	
CAROLYN W. COLVIN,)	
Acting Commissioner of the)	
Social Security Administration,)	
)	
Defendant.)	
_____)	

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter is remanded for further administrative action consistent with this Opinion.

PROCEEDINGS

On March 23, 2016, Plaintiff filed a Complaint seeking review of the denial of her application for Disability Insurance Benefits. (Docket Entry No. 1). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Docket Entry Nos. 11-12).

1 On August 4, 2016, Defendant filed an Answer along with the
2 Administrative Record ("AR"). (Docket Entry Nos. 13-14). The parties
3 filed a Joint Stipulation ("Joint Stip.") on November 3, 2016, setting
4 forth their respective positions regarding Plaintiff's claims. (Docket
5 Entry No. 15).

6
7 The Court has taken this matter under submission without oral
8 argument. See C.D. Cal. L.R. 7-15; "Order Re: Procedures In Social
9 Security Case," filed March 24, 2016, 2016 (Docket Entry No. 8).

10
11 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
12

13 On December 3, 2012, Plaintiff, formerly employed as a home
14 caregiver and a cashier in a market (see AR 38, 42, 159), filed an
15 application for Disability Insurance Benefits, alleging an inability to
16 work because of her disabling condition since November 30, 2011. (See
17 AR 142-43). On January 23, 2014, the Administrative Law Judge ("ALJ"),
18 John Kays, heard testimony from Plaintiff and vocational expert Alan
19 Boroskin. (See AR 36-64). On September 26, 2014, the ALJ issued a
20 decision denying Plaintiff's application. (See AR 21-29). After
21 determining that Plaintiff had a severe impairment -- anxiety disorder
22 (AR 23) -- but did not have an impairment or combination of impairments
23 that met or medically equaled the severity of one of the Listed
24 Impairments (AR 23-25), the ALJ found that Plaintiff had the residual
25 functional capacity ("RFC")¹ to perform a full range of work at all
26 exertional levels with the following nonexertional limitations:
27

28

¹ A Residual Functional Capacity is what a claimant can still do despite existing exertional and nonexertional limitations. See 20 C.F.R. § 404.1545(a)(1).

1 moderately complex tasks (4 to 5 steps); frequent but not constant
2 interaction with supervisors, peers, and the public; and frequent but
3 not constant changes in the work setting. (AR 25-29). Finding that
4 Plaintiff was capable of performing her past relevant work as a
5 companion, the ALJ found that Plaintiff was not disabled within the
6 meaning of the Social Security Act. (AR 29).

7
8 Plaintiff requested that the Appeals Council review the ALJ's
9 decision. (AR 9). The request was denied on February 17, 2016. (AR 1-
10 5). The ALJ's decision then became the final decision of the
11 Commissioner, allowing this Court to review the decision. See 42 U.S.C.
12 §§ 405(g), 1383(c).

13 14 **PLAINTIFF'S CONTENTIONS**

15
16 Plaintiff alleges that the ALJ erred in failing to properly
17 consider: (1) the statements of lay witness Linda Romero; (2)
18 Plaintiff's testimony regarding her pain and limitations; (3) the
19 opinions of Plaintiff's treating physician, Dr. Elliot Romero; and (4)
20 Plaintiff's limitation in maintaining and sustaining concentration,
21 persistence and pace; and (5) that the ALJ erred in finding that
22 Plaintiff was capable of performing her past relevant work. (See Joint
23 Stip. at 2-12, 19-24, 29-32, 36-40, 43-45).

24 25 **DISCUSSION**

26
27 After consideration of the record as a whole, the Court finds that
28 Plaintiff's second claim of error warrants a remand for further

1 consideration. Since the Court is remanding the matter based on
2 Plaintiff's second claim of error, the Court will not address
3 Plaintiff's first, third, fourth or fifth claims of error.

4
5 **A. The ALJ Did Not Properly Assess Plaintiff's Credibility**

6
7 Plaintiff asserts that the ALJ failed to properly find that
8 Plaintiff's testimony was not fully credible. (See Joint Stip. at 8-
9 12). Defendant asserts that the ALJ provided proper reasons for finding
10 Plaintiff not fully credible. (See Joint Stip. at 12-19).

11
12 Plaintiff made the following statements in a "Function Report -
13 Adult" dated March 11, 2013 (see AR 164-72):

14
15 She lives with her family in a house. Her day consists
16 of sitting around a lot, thinking, and being sad, moody and
17 complaining. She does not take of anyone else or any pets.
18 Her impairment limits her ability to work because she lacks
19 desire and interest, gets irritated immediately, has constant
20 headaches, anxiety and stress. Her condition affects her
21 sleep. (See AR 164-65).

22
23 She has no problem with her personal care, does not need
24 any special reminders to take care of her personal needs and
25 grooming, and does not need help or reminders taking medicine.
26 (See AR 166).

1 She prepares her own meals daily, which takes 30 minutes,
2 but she does not "cook with interest." She does cleaning and
3 laundry daily for 2 hours, at most, without needing help. She
4 goes outside daily, either walking or driving a car. She can
5 drive a car alone. She shops in stores for food, which takes
6 1 hour a week, and for clothing and shoes for herself and her
7 children (not often). (See AR 166-67).

8
9 She can pay bills, handle a savings account and use a
10 checkbook. Her ability to handle money has changed since the
11 condition began. (See AR 167-68).

12
13 Her hobbies and interests are watching television and
14 going to see her dad at his house, both of which she does
15 daily. She spends time talking in person and on the phone
16 with others on a daily basis. She sometimes goes alone to the
17 church (where her dad is). She does not have any problems
18 getting along with others. Since her condition began, she
19 does not enjoy interacting with others as much as she did.
20 (See AR 168-69).

21
22 Her condition affects her squatting, kneeling, talking,
23 stair-climbing, seeing, memory, completing tasks,
24 concentration, understanding, following instructions, and
25 getting along with others. Her back hurts when she bends, and
26 she has a short attention span and a problem concentrating.
27 (See AR 169).

1 She can walk 2 blocks before needing to rest. She can
2 pay attention for 10 to 15 minutes. She cannot finish what
3 she starts. She does not follow written instructions very
4 well because she loses interest. When asked how well she
5 follows spoken instructions, she stated she prefers simple
6 instructions or else she loses interest. She gets along okay
7 with authority figures. She has not been fired or laid off
8 from a job because of problems getting along with other
9 people. (See AR 169-70).

10
11 She does not handle changes in routine very well. Her
12 unusual fears are a fear of life all day and night. (See AR
13 170).

14
15 Plaintiff testified at the August 11, 2014 administrative hearing
16 as follows (see AR 37-47):

17
18 She is married and has two children, ages 14 and 16. Her
19 husband works. She grew up in Southern California. (See AR
20 40-41).

21
22 She last worked full-time at the market on October 11,
23 2011. She initially worked as a cashier. Two months to one
24 year prior to October 11, 2011, she was removed as a cashier
25 because she made a lot of mistakes. While she originally
26 stated that post-cashiering she did deli work, did playing
27 cards, and helped in different departments, she later stated
28 she cleaned restrooms, gutters and shelves, got the carts out,

1 and took out trash. She stopped working on October 11, 2011
2 because of severe stress, anxiety, panic attacks and
3 depression. The cause of her panic attacks and anxiety was
4 her childhood, her mental illness which runs in her
5 dysfunctional family (her mother), and her inability to focus.
6 She attempted to go back to work in the market as a cashier
7 for two days in November 2011, but she was not able to work
8 because she was panicked, stressed, and could not stand being
9 around other people. She worked as a caretaker at one time
10 (she could not remember when). (See AR 38-42, 44-45, 48-49).
11

12 She takes her children to school, but does not help out
13 in any of their activities. During the day, she wakes up,
14 brushes her teeth, takes a shower, tries to do a "little bit
15 of housework," and then sits down. (See AR 40).
16

17 She no longer interacts with anybody besides her husband
18 and two children. She avoids contact with everybody else
19 (including her three sisters and two brothers) because every
20 day she is depressed and does not feel good about herself.
21 She sometimes asks herself, "Why am I alive?" and "Why am I
22 here?" She has told people she felt suicidal. She never has
23 had any real friends. (See AR 41-43, 46).
24

25 Although she is still married, she and her husband have
26 been sleeping in separate rooms for two years. Her father,
27 who has dementia and Alzheimer's, is in a facility. (See AR
28 42-43).

1 She takes Ativan, 2 mg, twice a day, and Lithium for her
2 condition. Ativan was originally prescribed by Dr. Romero,
3 but Dr. Patara requested that she increase it to 4 a day
4 (which was too much for her based on her having to drive her
5 children to school) and then to 3 a day. Ativan makes her
6 drowsy (it relaxes her "too much") and affects her
7 concentration and memory. Ativan only works for approximately
8 half an hour before her panic attacks and phobias (fears)
9 resume. She takes Cymbalta for her condition only when Dr.
10 Romero gives her samples; it is expensive and she cannot
11 afford it. At some time she was taking Xanax (prior to
12 Ativan) and Elavil. She takes Seroquel once a day to help her
13 sleep, but she wakes up often during the night because of her
14 panic attacks and anxiety. She takes Lunesta to help her
15 sleep only when Dr. Romero gives her samples. (See AR 58-62).

16
17 After briefly summarizing Plaintiff's testimony (see AR 25)²,

18
19 ² The ALJ wrote:

20 The claimant alleged that she is unable to work because
21 of anxiety, stress, depression and sleep problems (Exhibit
22 2E/2). She reported that she does not have desire or
23 interest. She gets irritated and has anxiety all of the time.
24 She is always stressed (Exhibit 3E/1). She has lost interest
25 in socializing, cooking, and spending time with her own
26 family. She has no desire of walking as she used to walk
27 (Exhibit 8E/1). Her voice changes when she becomes anxious
28 and fearful (Exhibit 10E/1). At the hearing, the claimant
testified that she cannot work anymore because of severe
stress, anxiety, panic attacks and depression. She does not
want to go out or see anybody. She hardly interacts with her
siblings. She has never had any friends. She has no hobbies
or interests. Side effects from her medications include
drowsiness.

(AR 25).

1 the ALJ wrote, "The evidence of record does not fully support the
2 claimant's allegations." (AR 25). After summarizing the medical
3 evidence (see AR 26-27), the ALJ addressed Plaintiff's credibility as
4 follows:

5
6 After careful consideration of the evidence, I find that
7 the claimant's medically determinable impairment could
8 reasonably be expected to cause the alleged symptoms; however,
9 the claimant's and her aunt's statements concerning the
10 intensity, persistence and limiting effects of these symptoms
11 are not entirely credible for the reasons explained in this
12 decision.

13 In terms of the claimant's credibility, I find the
14 claimant's allegations less than fully credible. The claimant
15 has not generally received the type of medical treatment one
16 would expect for a totally disabled individual. The record
17 reflects significant gaps in the claimant's history of
18 treatment and relatively infrequent trips to the doctor for
19 the allegedly disabling symptoms. Furthermore, the claimant's
20 use of medications does not suggest the presence of
21 impairments which is more limiting than found in this
22 decision.

23 Despite her impairments, the claimant has also engaged in
24 a somewhat normal level of daily activity and interaction.
25 The claimant admitted activities of daily living including
26 personal care, childcare, cooking, cleaning, laundry, paying
27 bills, watching television, walking, driving shopping,
28 spending time with others, talking on the telephone, and going

1 to church and her father's center (Exhibits 3E, 2F/3-4, and
2 Testimony). Some of the physical and mental abilities and
3 social interactions required in order to perform these
4 activities are the same as those necessary for obtaining and
5 maintaining employment. I find the claimant's ability to
6 participate in such activities diminishes the credibility of
7 the claimant's allegations of functional limitations.

8
9 (AR 27-28).

10
11 A claimant initially must produce objective medical evidence
12 establishing a medical impairment reasonably likely to be the cause of
13 the subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir.
14 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991). Once a
15 claimant produces objective medical evidence of an underlying impairment
16 that could reasonably be expected to produce the pain or other symptoms
17 alleged, and there is no evidence of malingering, the ALJ may reject the
18 claimant's testimony regarding the severity of her pain and symptoms
19 only by articulating specific, clear and convincing reasons for doing
20 so. Brown-Hunter v. Colvin, 798 F.3d 749, 755 (9th Cir. 2015)(citing
21 Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007)); see also
22 Smolen v. Chater, supra; Reddick v. Chater, 157 F.3d 715, 722 (9th Cir.
23 1998); Light v. Social Sec. Admin., 119 F.3d 789, 792 (9th Cir. 1997).
24 Because the ALJ does not cite to any evidence in the record of
25 malingering, the "clear and convincing" standard stated above applies.

1 Here, the ALJ failed to provide clear and convincing reasons for
2 finding that Plaintiff's testimony about the intensity, persistence and
3 limiting effects of her symptoms was not fully credible.³

4
5 First, the ALJ failed to "specifically identify 'what testimony is
6 not credible and what evidence undermines [Plaintiff's] complaints.'" Parra v. Astrue, 481 F.3d 742, 750 (9th Cir. 2007) (quoting Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995)); see also Smolen v. Chater, supra, 80 F.3d at 1284 ("The ALJ must state specifically what symptom
7 testimony is not credible and what facts in the record lead to that
8 conclusion").
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13 Second, the ALJ's partial discrediting of Plaintiff's testimony
14 based on Plaintiff's "significant gaps in [her] history of treatment and
15 relatively infrequent trips to the doctor for the allegedly disabling
16 symptoms" was improper, because the ALJ did not ask Plaintiff why there
17 were gaps in her treatment or why she did not seek more medical
18 treatment. See Social Security Ruling 96-7p (" . . . [I]f the frequency
19 or extent of the treatment sought by an individual is not comparable
20 with the degree of the individual's subjective complaints, or if the
21 individual fails to follow prescribed treatment that might improve
22 symptoms, we may find the alleged intensity and persistence of an
23 individual's symptoms are inconsistent with the overall evidence of
24 record. We will not find an individual's symptoms inconsistent with the
25 evidence in the record on this basis without considering possible

26
27 ³ The Court will not consider reasons for finding Plaintiff not
28 fully credible that were not given by the ALJ in the Decision. See Pinto v. Massanari, 249 F.3d 840, 847-48 (9th Cir. 2001); SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

1 reasons he or she may not comply with treatment or seek treatment
2 consistent with the degree of his or her complaints. We may need to
3 contact the individual regarding the lack of treatment or, at an
4 administrative proceeding, ask why he or she has not complied with or
5 sought treatment in a manner consistent with his or her complaints.").
6 The gaps in Plaintiff's treatment or Plaintiff's failure to seek more
7 medical treatment may have been the result of her financial issues (see
8 AR 56 [At the hearing, Plaintiff testified that she does not have
9 medical insurance and that she was able to obtain treatment from Dr.
10 Patara only because her daughter had asked Plaintiff's husband for money
11 for such treatment, and that the lack of money limited the frequency of
12 her visits to Dr. Patara], 61 [At the hearing, Plaintiff testified that
13 because of the expense she took Cymbalta and Elavil only when Dr. Romero
14 gave her samples]). See Smolen v. Chater, supra ("Where a claimant
15 provides evidence of a good reason for not taking medication for her
16 symptoms [such as Plaintiff's testimony that "she had not sought
17 treatment (and therefore was not taking medication) for her chronic
18 fatigue and pain because, as a result of not being able to maintain a
19 job, she had no insurance and could not afford treatment"], her symptom
20 testimony cannot be rejected for not doing so."); see also Regennitter
21 v. Commissioner of Soc. Sec. Admin., 166 F.3d 1294, 1297 (9th Cir.
22 1998)(" . . . [W]e have proscribed the rejection of a claimant's
23 complaints for lack of treatment when the record establishes that the
24 claimant could not afford it[.]"); Gamble v. Chater, 68 F.3d 319, 322
25 (9th Cir. 1995)("It flies in the face of the patent purposes of the
26 Social Security Act to deny benefits to someone because he is too poor
27 to obtain medical treatment that may help him.")(quoting Gordon v.
28 Schweiker, 725 F.2d 231, 237 (4th Cir. 1984)).

1 Third, the ALJ's partial discrediting of Plaintiff's testimony
2 based on her use of medications was improper. The ALJ has failed to
3 explain how Plaintiff's use of the prescribed medications she is taking
4 for her condition -- Ativan, Seroquel, Cymbalta, Elavil -- were not
5 suggestive of limitations greater than those found by the ALJ. To the
6 extent that the ALJ's credibility determination was based on Plaintiff's
7 failure to take certain medications, Plaintiff's alleged inability to
8 afford such medications, as discussed above, may have constituted a
9 valid explanation for her failure to take such medications. See Smolen
10 v. Chater, supra.

11
12 Fourth, to the extent the ALJ partially discredited Plaintiff's
13 testimony based on the conservative nature of her treatment, the ALJ's
14 reason was not clear and convincing. Evidence of conservative treatment
15 may be considered in a credibility determination. Parra v. Astrue, 481
16 F.3d 742, 750-51 (9th Cir. 2007) ("[E]vidence of 'conservative
17 treatment' is sufficient to discount a claimant's testimony regarding
18 severity of an impairment[.]"). However, the ALJ has failed to show
19 that Plaintiff only obtained a conservative course of treatment for her
20 mental impairment. See Childress v. Colvin, 2014 WL 4629593, *12 (N.D.
21 Cal. Sept. 16, 2014) ("There is no guiding authority on what exactly
22 constitutes 'conservative' or 'routine' treatment."); Boitnott v.
23 Colvin, 2016 WL 362348, *4 (S.D. Cal. January 29, 2016) (explaining that
24 "[t]here was no medical testimony at the hearing or documentation in the
25 medical record that the prescribed medication constituted 'conservative'
26 treatment of [the plaintiff's] conditions," and that the ALJ "was not
27 qualified to draw his own inference regarding whether more aggressive
28 courses of treatments were available for Plaintiff's conditions"). At

1 the hearing, the ALJ did not ask Plaintiff why her treatment for her
2 anxiety disorder was conservative, or why she had not obtained other
3 kinds of treatment for her anxiety disorder.
4

5 Fifth, the ALJ's partial discrediting of Plaintiff's testimony
6 based on her ability to perform certain daily activities, such as
7 personal care, child care, cooking, cleaning, laundry, paying bills,
8 watching television, walking, driving, shopping, spending time with
9 others, talking on the telephone, and going to church and her father's
10 center, was not a clear and convincing reason. See Vertigan v. Halter,
11 260 F.3d 1044, 1050 (9th Cir. 2001) ("[T]he mere fact that a plaintiff
12 has carried on certain daily activities . . . does not in any way
13 detract from her credibility as to her overall disability. One does not
14 need to be 'utterly incapacitated' in order to be disabled."); Reddick
15 v. Chater, supra ("Only if the level of activity were inconsistent with
16 the Claimant's claimed limitations would these activities have any
17 bearing on Claimant's credibility.").

18
19 It is not clear whether the ALJ considered Plaintiff's testimony
20 about her limited abilities to perform such daily activities (see AR
21 165-66 [although Plaintiff testified that she does not have any problem
22 with personal care, she did not state how long it took her]; AR 166
23 [Plaintiff testified that she cooks for a half an hour but lacks
24 interest]; Id. [Plaintiff testified that she cleans and does laundry
25 every day for 2 hours at most]; AR 40 [at the hearing, Plaintiff
26 testified that she "tr[ies] to do a little bit of housework"]; AR 167
27 [Plaintiff testified that she shops for food every week for one hour];
28 AR 168 [although Plaintiff testified that she watches television and

1 sees her dad at his residence every day, she did not state for how long,
2 and she appeared to state she lacks interest in those activities); AR
3 167-68 [Plaintiff testified that she talks with others in person and/or
4 on the telephone every day (but she did not say for how long, but she
5 does not enjoy interacting with others as much as before); AR 41-42 [at
6 the hearing, Plaintiff testified she hardly interacts with her sisters
7 and brother]); AR 168 [Plaintiff testified that she regularly goes to
8 church (but she did not state when or for how long); and AR 40 [at the
9 hearing, Plaintiff testified that she drives her children to school, but
10 she does not help them with their extracurricular activities]].
11 Therefore, the degree to which Plaintiff could perform such daily
12 activities may not have been inconsistent with her testimony regarding
13 her limitations. See Reddick v. Chater, supra; see also Morgan v.
14 Commissioner of Social Sec. Admin., 169 F.3d 595, 600 (9th Cir.
15 1999)("If a claimant is able to spend a substantial part of his day
16 engaged in pursuits involving the performance of physical functions that
17 are transferable to a work setting, a specific finding as to this fact
18 may be sufficient to discredit a claimant's allegations.").

19
20 Sixth, although the ALJ also found that there was a lack of
21 objective medical evidence supporting Plaintiff's testimony concerning
22 her symptoms and limitations, the lack of supporting objective medical
23 evidence cannot, by itself, support an adverse credibility finding. See
24 Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001); Tidwell v.
25 Apfel, 161 F.3d 599, 602 (9th Cir. 1998).

26
27 **B. Remand Is Warranted**
28

1 The decision whether to remand for further proceedings or order an
2 immediate award of benefits is within the district court's discretion.
3 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
4 useful purpose would be served by further administrative proceedings, or
5 where the record has been fully developed, it is appropriate to exercise
6 this discretion to direct an immediate award of benefits. Id. at 1179
7 ("[T]he decision of whether to remand for further proceedings turns upon
8 the likely utility of such proceedings."). However, where, as here, the
9 circumstances of the case suggest that further administrative review
10 could remedy the Commissioner's errors, remand is appropriate. McLeod
11 v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); Harman v. Apfel, supra,
12 211 F.3d at 1179-81.

13
14 Since the ALJ failed to properly assess Plaintiff's credibility,
15 remand is appropriate. Because outstanding issues must be resolved
16 before a determination of disability can be made, and "when the record
17 as a whole creates serious doubt as to whether the [Plaintiff] is, in
18 fact, disabled within the meaning of the Social Security Act," further
19 administrative proceedings would serve a useful purpose and remedy
20 defects. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir.
21 2014)(citations omitted).⁴

22
23 ⁴ The Court has not reached any other issue raised by Plaintiff
24 except insofar as to determine that reversal with a directive for the
25 immediate payment of benefits would not be appropriate at this time.
26 "[E]valuation of the record as a whole creates serious doubt that
27 Plaintiff is in fact disabled." See Garrison v. Colvin, 759 F.3d 995,
28 1021 (2014). Accordingly, the Court declines to rule on Plaintiff's
claims regarding the ALJ's failure to properly consider the statements
of a lay witness (see Joint Stip. at 3-5, 6-8), the opinions of
Plaintiff's treating physician (see Joint Stip. at 21-24, 29-30), and
Plaintiff's limitation in maintaining and sustaining concentration,
(continued...)

1 ORDER

2
3 For the foregoing reasons, the decision of the Commissioner is
4 reversed, and the matter is remanded for further proceedings pursuant to
5 Sentence 4 of 42 U.S.C. § 405(g).

6
7 LET JUDGMENT BE ENTERED ACCORDINGLY.

8
9 DATED: January 19, 2017

10 _____ /s/
11 ALKA SAGAR
12 UNITED STATES MAGISTRATE JUDGE
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25 _____
26 ⁴ (...continued)
27 persistence and pace (see Joint Stip. at 31-32, 36-37), and the ALJ's
28 error in finding that Plaintiff was capable of performing her past
relevant work (see Joint Stip. at 38-40, 43-45). Because this matter is
being remanded for further consideration, these issues should also be
considered on remand.