

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

PATRICIA SALAZAR,)	NO. CV 07-8173-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff filed a Complaint on December 27, 2007, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for a period of disability ("POD"), disability insurance benefits ("DIB"), and supplemental security income ("SSI"). On February 7, 2008, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on October 21, 2008, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, in the alternative, remanding the matter for further administrative proceedings; and defendant seeks an order affirming the Commissioner's decision. The Court has taken the parties' Joint Stipulation under submission without oral argument.

1 is of any severe degree." (A.R. 17.)

2
3 The ALJ stated that he considered plaintiff's obesity in
4 conjunction with Social Security Ruling 02-01p and Listings 1.01, 3.01,
5 and 4.01 relative to disorders of the musculoskeletal, respiratory, and
6 cardiovascular systems. (A.R. 18, 20.) The ALJ found that plaintiff's
7 statements concerning the intensity, persistence, and limiting effects
8 of her subjective symptoms are "not entirely credible." (A.R. 18.)

9
10 In setting forth plaintiff's residual functional capacity ("RFC"),
11 the ALJ relied upon the opinion of Joselyn Bailey, M.D., a non-
12 examining, non-testifying medical expert, and found that:

13
14 [Plaintiff] has the residual functional capacity for light
15 work with the ability to lift and carry 25 pounds occasionally
16 and 10 pounds frequently, sit for two hours at a time, stand
17 for one hour at a time, and walk for one hour at a time, for
18 a total of eight hours of sitting, four hours of standing, and
19 four hours of walking during an eight hour workday.
20 [Plaintiff] is able to use her hands for simple repetitive
21 grasping and for pushing and pulling of arm controls, and
22 occasionally for fine manipulation. She can use her feet for
23 repetitive pushing and pulling of leg controls. [Plaintiff] is
24 unable to squat or crawl, but can occasionally climb stairs
25 and frequently bend or reach. She is restricted from working
26 at unprotected heights, being around large fast moving
27 machinery and driving automotive equipment.

1 (A.R. 18.)

2
3 Based on his RFC assessment, the ALJ found that plaintiff is
4 capable of performing her past relevant work as a theater manager or
5 sales attendant. (A.R. 21.) In addition, the ALJ made the alternative
6 finding that, even if plaintiff had a more restrictive RFC for no more
7 than sedentary work, there are jobs that exist in significant numbers in
8 the national economy that plaintiff can perform. (A.R. 21-22.)
9 Accordingly, the ALJ concluded that plaintiff was not under a disability
10 from June 1, 2003, through the date of the ALJ's decision. (A.R. 22.)
11

12 **STANDARD OF REVIEW**

13
14 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
15 decision to determine whether it is free from legal error and supported
16 by substantial evidence in the record as a whole. Orn v. Astrue, 495
17 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
18 evidence as a reasonable mind might accept as adequate to support a
19 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
20 a mere scintilla but not necessarily a preponderance." Connett v.
21 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the
22 record can constitute substantial evidence, only those "'reasonably
23 drawn from the record'" will suffice. Widmark v. Barnhart, 454 F.3d
24 1063, 1066 (9th Cir. 2006)(citation omitted).
25

26 Although this Court cannot substitute its discretion for that of
27 the Commissioner, the Court nonetheless must review the record as a
28 whole, "weighing both the evidence that supports and the evidence that

1 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
2 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also
3 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
4 responsible for determining credibility, resolving conflicts in medical
5 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
6 1035, 1039-40 (9th Cir. 1995).

7
8 The Court will uphold the Commissioner's decision when the evidence
9 is susceptible to more than one rational interpretation. Burch v.
10 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
11 review only the reasons stated by the ALJ in his decision "and may not
12 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
13 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
14 the Commissioner's decision if it is based on harmless error, which
15 exists only when it is "clear from the record that an ALJ's error was
16 'inconsequential to the ultimate nondisability determination.'" Robbins
17 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
18 Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400
19 F.3d at 679.

20 21 DISCUSSION

22
23 Plaintiff alleges the following two issues: (1) whether the ALJ's
24 residual functional capacity assessment is supported by substantial
25 evidence; and (2) whether the ALJ's credibility analysis is supported by
26 substantial evidence. (Joint Stipulation ("Joint Stip.") at 3.)
27
28

1 **I. The ALJ's RFC Finding Is Not Supported By Substantial Evidence And**
2 **Should Be Re-Assessed On Remand.**

3
4 Plaintiff contends that the ALJ's RFC assessment is not supported
5 by substantial evidence. (Joint Stip. at 15.) Specifically, plaintiff
6 argues that the ALJ erred by: (A) inadequately considering the opinion
7 of plaintiff's treating physician and, instead, relying on the opinion
8 of a non-examining, non-testifying medical expert in determining
9 plaintiff's RFC; and (B) failing to consider properly plaintiff's
10 obesity in formulating the ALJ's RFC assessment. (Joint Stip. at 3-9,
11 15-16.) For the following reasons, the Court agrees.

12
13 **A. The ALJ Improperly Rejected Plaintiff's Treating Physician's**
14 **Opinion And Relied Upon The Opinion Of The Medical Expert.**

15
16 "By rule, the Social Security Administration favors the opinion of
17 a treating physician over non-treating physicians," and it is well-
18 settled that "the opinions of treating doctors should be given more
19 weight than the opinions of doctors who do not treat the claimant."
20 Orn, 495 F.3d at 631-32. Generally, a treating physician's opinion is
21 given greater weight, because "he is employed to cure and has a greater
22 opportunity to know and observe the patient as an individual."
23 Magallanes v. Brown, 881 F.2d 747, 751 (9th Cir. 1989)(citation
24 omitted). Where, as here, the treating physician's opinion is
25 contradicted by other medical evidence in the record, an ALJ may not
26 reject it without providing specific and legitimate reasons for doing so
27 which are supported by substantial evidence in the record. Embrey v.
28 Bowen, 849 F.2d 418, 422 (9th Cir. 1988).

1 If there is "substantial evidence" in the record that contradicts
2 the opinion of a treating physician, such as an examining physician's
3 opinion supported by independent clinical findings, the opinion of the
4 treating physician is no longer entitled to controlling weight. Orn,
5 495 F.3d at 632. However, a finding that the treating physician's
6 opinion "is not entitled to controlling weight does not mean that the
7 opinion is rejected." Social Security Ruling 96-29 at 1 ("In many
8 cases, a treating source's medical opinion will be entitled to the
9 greatest weight and should be adopted, even if it does not meet the test
10 for controlling weight."). In this instance, the Social Security
11 regulations still require deference to the treating physician's opinion,
12 but the weight accorded to it is governed by the factors listed in the
13 regulations, such as length, nature, and extent of the treatment
14 relationship, frequency of examination, and supportability. 20 C.F.R.
15 §§ 404.1527(d)(2), 416.927(d)(2); Orn, 495 F.3d at 632-33.

16
17 In the instant case, the ALJ rejected the opinion of plaintiff's
18 treating physician, Tenzing Wangyal, M.D., in favor of the opinion of
19 the non-examining, non-testifying medical expert, Joselyn Bailey, M.D.
20 (A.R. 21.)

21
22 Dr. Wangyal, an internal medicine physician of the Talbert Medical
23 Group, where plaintiff has regularly treated since March 2003, completed
24 a Physical Residual Functional Capacity Questionnaire, in which he
25 diagnosed plaintiff with, *inter alia*: (1) headaches - good prognosis;
26 (2) morbid obesity - poor prognosis; and (3) back pain, chronic - poor
27 prognosis due to weight. (A.R. 252.) Dr. Wangyal opined that
28 plaintiff: has bilateral pain in her lumbar and cervical spine and in

1 her feet, which is precipitated by fatigue, stress, and movement; has
2 impaired sleep affected by somatoform disorder; has emotional factors
3 that contribute to the severity of her symptoms and limitations; often
4 experiences symptoms severe enough to interfere with attention and
5 concentration and has a slight limitation in the ability to deal with
6 work stress; is not a malingerer; has impairments reasonably consistent
7 with her symptoms and functional limitations; can sit for at least six
8 hours in an eight hour work day, but can stand or walk for less than two
9 hours in an eight hour work day; is able to continuously sit for more
10 than two hours, but can stand only 15 minutes at a time; must get up and
11 walk around for five minutes, every 60 minutes; does not need a job
12 which permits shifting positions at will from sitting, standing, or
13 walking, but will sometimes need to take unscheduled five minute breaks,
14 at least once per shift, during an eight hour work day; if possible,
15 should elevate her legs with prolonged sitting, but elevation is not
16 necessary; can occasionally lift 10 pounds and frequently lift less than
17 10 pounds; has no significant limitations in doing repetitive reaching,
18 handling or fingering; can bend only 10 percent of the time during an
19 eight hour work day, and can never twist at the waist as both functions
20 are "very difficult with her weight"; and should avoid concentrated
21 exposure to extreme cold, extreme heat, high humidity, chemicals,
22 solvents/cleaners, soldering fluxes, cigarette smoke, perfumes, fumes,
23 odors, dusts, and gases. (A.R. 255-57.) In addition, Dr. Wangyal
24 opined that plaintiff's impairments are likely to cause her to
25 experience "good days" and "bad days," and plaintiff will likely be
26 absent from work as a result of her impairments or treatment about three
27 times a month. (A.R. 257.) Finally, when asked to describe any other
28 limitations (such as psychological limitations, limited vision,

1 difficulty hearing, etc.) that would affect plaintiff's ability to work
2 at a regular job on a sustained basis, Dr. Wangyal opined that "when she
3 has come in, she has had a chronic low level flat affect/depressive
4 appearance/ I suspect this will be a limiting factor to her success in
5 her work." (A.R. 258.)
6

7 By contrast, the non-examining, non-testifying medical expert, Dr.
8 Bailey, submitted a one-page response to an interrogatory sent to her by
9 the ALJ post-hearing, dated April 13, 2006, in which Dr. Bailey stated
10 that plaintiff "has the following medical diagnoses: 1. Sleep Apnea -
11 7/1/04 (3F/1) [and] 2. Morbid Obesity - 12/10/03 (8F/24) for ten years
12 with Chronic Pain Syndrome (2F/17), (5F/1) and Headaches." (A.R. 340.)
13 Dr. Bailey explained that "[a]t [plaintiff's] young age of about 30
14 years old, her physical problems are related to being overweight. At
15 this time she does not meet nor equal any of the Listings." (*Id.*) Dr.
16 Bailey also submitted a one-page Physical Capacities Evaluation, dated
17 April 13, 2006, in which she opined that plaintiff retains the residual
18 functional capacity for generally light work, except for restrictions on
19 squatting, crawling, working at unprotected heights, being around moving
20 machinery, and driving automotive equipment. (A.R. 341.) Dr. Bailey
21 further opined that plaintiff can occasionally crawl, use her hands for
22 fine manipulation, climb stairs, and frequently bend and reach. (*Id.*)
23

24 In discussing, and subsequently rejecting, Dr. Wangyal's opinion,
25 the ALJ simply stated that, "[t]he record contains an assessment
26 submitted by [plaintiff's] physician, Dr. Tenzing Wangyal[,], under
27 Exhibit 10F[,], which reflects the capacity for generally sedentary work.
28 Other restrictions noted with respect to [plaintiff's] symptomatology

1 being severe enough to often interfere with attention and concentration
2 and causing her to be absent from work three times a month is excessive
3 and found to be without any objective basis." (A.R. 21.)
4

5 The ALJ's stated reason for rejecting plaintiff's treating
6 physician's opinion falls short of the "specific, legitimate" standard
7 contemplated by Ninth Circuit precedent, because the ALJ "must do more
8 than offer his conclusions"; instead, he must "explain why" and "give
9 reasons for rejecting" Dr. Wangyal's opinion regarding plaintiff's
10 residual functional capacity. Embrey, 849 F.2d at 421-22. Moreover,
11 when examined in the light of plaintiff's treatment record from March
12 2003, through January 2006, Dr. Wangyal's opinion is consistent with the
13 objective medical record as a whole. Indeed, plaintiff's medical
14 records clearly document her morbid obesity, edema, osteoarthritis,
15 headaches, back and neck pain, shortness of breath, sleep apnea,
16 fatigue, "flat affect," and "depressive appearance."¹ (A.R. 178-79, 185-
17

18 ¹ The ALJ found that plaintiff has "some depression" but that it is
19 not "severe," because she has not "maintained any ongoing care for a
20 mental impairment except for a brief period of treatment with a
21 psychologist." (A.R. 17.) However, Carol Cole, Psy.D, the psychologist
22 with whom plaintiff treated from July 2003, through April 2004, opined
23 in a July 10, 2004 letter to the Department of Social Services that
24 plaintiff's "sustained concentration is limited," she "would have
25 problems in adaptation," and her "ability to persist in accomplishing a
26 task would be severely limited." (A.R. 156.) Moreover, and critically,
27 at the hearing, plaintiff testified that she participated in
28 psychological treatment for a approximately five months but was forced
to abandon treatment because she "had no money to pay" her therapist."
(A.R. 368.)

25 The Ninth Circuit has "proscribed the rejection of a claimant's
26 complaints for lack of treatment when the record establishes that the
27 claimant could not afford it." Regennitter v. Comm'r of Soc. Sec.
28 Admin., 166 F.3d 1294, 1297 (9th Cir. 1999); see also Smolen v. Chater,
80 F.3d 1273, 1284 (9th Cir. 1996); Gamble v. Chater, 68 F.3d 319, 322
(9th Cir. 1995)("[a]llthough progress has been made in providing
affordable medical care to the needy . . . many Americans are without

1 86, 200, 203, 210, 212, 214-15, 217, 258, 264-65.) When viewed in its
2 entirety, the record provides ample support for the opinion of Dr.
3 Wangyal, and the ALJ erred in rejecting his opinion without setting
4 forth the requisite specific and legitimate reasons based upon
5 substantial evidence for doing so. Accordingly, remand is required to
6 allow the ALJ the opportunity to remedy this error.

7
8 Furthermore, not only did the ALJ improperly reject the opinion of
9 Dr. Wangyal, but also, in assessing plaintiff's RFC, the ALJ relied on
10 the opinion of Dr. Bailey, the medical expert, whose opinion itself
11 would not constitute substantial evidence if she failed to review all
12 relevant medical records regarding plaintiff. (A.R. 21.) *Cf. Morgan v.*
13 *Comm'r of the Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir.
14 1999)("[o]pinions of a nonexamining, testifying medical advisor may
15 serve as substantial evidence when they are supported by other evidence
16 in the record and are consistent with it."); see also 20 C.F.R. §§
17 404.1545(a), 416.945(a) (RFC is an assessment based upon all of the

18 _____
19 the means or opportunity to obtain necessary medical care. Social
20 Security disability and SSI benefits exist to give financial assistance
21 to disabled persons because they are without the ability to sustain
22 themselves. It flies in the face of the patent purposes of the Social
23 Security Act to deny benefits to someone because he is too poor to
24 obtain medical treatment that may help him.")(citations omitted).

25 On remand, the ALJ should consider the impact of all of plaintiff's
26 impairments, including plaintiff's depression, whether severe or not, on
27 her ability to engage in and sustain full-time work. See 20 C.F.R. §§
28 404.1545(e), 416.945(e) ("we will consider the limiting effects of all
your impairment(s), even those that are not severe, in determining your
residual functional capacity"); see also *Smolen*, 80 F.3d at 1290 ("the
ALJ must consider the combined effect of all of the claimant's
impairments on [his] ability to function, without regard to whether each
alone was sufficiently severe."); *Erickson v. Shalala*, 9 F.3d 813 (9th
Cir. 1993)("The ALJ must consider *all factors* that might have a
'significant impact on an individual's ability to work'.")(emphasis in
original).

1 relevant evidence). Dr. Bailey did not testify at the hearing, but set
2 forth her opinion regarding plaintiff's impairments in a one-page,
3 cursory response to an interrogatory sent to her post-hearing by the
4 ALJ, and a one-page Physical Capacities Evaluation form. (A.R. 340-41.)
5 As Dr. Bailey did not testify at the hearing, plaintiff's counsel was
6 not afforded the opportunity to cross-examine her regarding what records
7 she reviewed in forming her opinion or with respect to the soundness of
8 her opinion.² It is unclear whether Dr. Bailey actually reviewed
9 plaintiff's medical records in their entirety in formulating her
10 opinion, given that Dr. Bailey cites only four exhibits in support of
11 her diagnoses.³ (A.R. 340.) The most troubling aspect of Dr. Bailey's
12 assessment is her reliance on a stale December 2003 treatment note from
13 Talbert Medical Group that she used to support her diagnosis of
14 plaintiff's morbid obesity. (A.R. 200, 340.) This December 2003

15
16 ² In a letter to the ALJ dated May 25, 2006, plaintiff's counsel
17 commented on Dr. Bailey's response and specifically requested an
18 opportunity to cross examine Dr. Bailey at a supplemental hearing.
19 (A.R. 116.) However, the ALJ ignored plaintiff's counsel's request to
20 cross-examine Dr. Bailey and adopted Dr. Bailey's opinion with respect
21 to plaintiff's RFC as his own. See Solis v. Schweiker, 719 F.2d 301,
22 302 (9th Cir. 1983) ("A claimant in a disability hearing is not entitled
23 to unlimited cross-examination, but rather 'such cross-examination as
24 may be required for a full and true disclosure of the facts.' 5 U.S.C.
25 § 556(d)."). On remand, the ALJ should, at the very least, address
26 plaintiff's counsel's request for cross-examination and, if the ALJ
27 determines the request should be denied, the ALJ should state his
28 reasons for denying plaintiff's counsel the opportunity to cross-examine
Dr. Bailey.

24 ³ In support of her diagnosis of sleep apnea, Dr. Bailey cites a July
25 2004 sleep study report by S.K. Mostafavi, M.D., F.C.C.P. from Advanced
26 Sleep Medicine Services, Inc. (A.R. 152); in support of her diagnosis of
27 morbid obesity, Dr. Bailey cites a December 2003 treatment note from
28 Talbert Medical Group that reveals no particular weight for plaintiff,
only that she was "over scale" weight (A.R. 200); in support of her
diagnosis of chronic pain syndrome, Dr. Bailey cites a June 2004
pulmonary consultation report by Ramesh R. Patel, M.D., F.C.C.P., and an
August 2004 follow-up clinic note by Babak Kasravi, M.D., from Los
Angeles Cardiology Associates (A.R. 150, 157).

1 treatment note failed to document any particular weight for plaintiff,
2 mentioning only that plaintiff's weight was "over scale," *i.e.*, more
3 than 350 pounds. (A.R. 200.) In February 2006, however, plaintiff
4 testified at the hearing that her weight had increased to 490 pounds,
5 *i.e.*, a possible weight increase of 139 pounds over the weight reflected
6 on the December 2003 treatment note. (A.R. 357.) Given the brevity of
7 Dr. Bailey's interrogatory response, it is unclear whether Dr. Bailey
8 was aware of plaintiff's significant weight increase to 490 pounds as of
9 the date of the hearing in February 2006 -- a critical fact that must
10 be, and should have been, considered in formulating plaintiff's RFC.

11
12 Accordingly, remand is required for proper consideration of the
13 physicians' opinions in accordance with the governing legal standards,
14 and for re-assessment of plaintiff's RFC.

15
16 **B. The ALJ Failed To Assess Plaintiff's Obesity Properly In**
17 **Formulating His RFC Assessment.**

18
19 Social Security Ruling ("SSR") 02-1p provides that the
20 Administration should consider "the effect obesity has upon the
21 individual's ability to perform routine movement and necessary physical
22 activity within the work environment. . . . The combined effects of
23 obesity with other impairments may be greater than might be expected
24 without obesity. . . . [W]e will explain how we reached our conclusions
25 on whether obesity caused any physical or mental limitations."

26
27 While obesity itself is not a "disabling" impairment, Listings
28 1.00Q, 3.00I, and 4.00F describe muscular, respiratory, and

1 cardiovascular problems that can result in limitations arising from
2 obesity. Applicable regulations provide that:⁴

3
4 Obesity is a medically determinable impairment that is often
5 associated with disturbance of the [musculoskeletal,
6 respiratory, and cardiovascular] system, and disturbance of
7 this system can be a major cause of disability in individuals
8 with obesity. The combined effects of obesity with
9 [musculoskeletal, respiratory, and cardiovascular] impairments
10 can be greater than the effects of each of the impairments
11 considered separately. Therefore, when determining whether an
12 individual with obesity has a listing-level impairment or
13 combination of impairments, and when assessing a claim at
14 other steps of the sequential evaluation process, including
15 when assessing an individual's residual functional capacity,
16 adjudicators must consider any additional and cumulative
17 effects of obesity.

18
19 20 C.F.R. Pt. 404, Subpt. P, Appx. I, § 1.00Q, 3.00I, and 4.00F.

20
21 In addition to the Commissioner's regulations, SSR 02-01p
22 recognizes obesity as a "medically-determinable impairment" and states
23 that administrative law judges should consider the combined effects of
24 obesity with other impairments under the Listing of Impairments when
25

26
27 ⁴ Listing 1.00Q addresses musculoskeletal impairments; Listing 3.00I
28 addresses respiratory impairments; and Listing 4.00F addresses
cardiovascular impairments.

1 assessing a claimant's RFC.⁵ SSR 02-01p, adopting the National
2 Institutes of Health's (NIH) classification and diagnosis of obesity
3 according to Body Mass Index (BMI), considers anyone with a BMI over 30
4 to be "obese." The Clinical Guidelines recognize three levels of
5 obesity. Level I includes BMIs of 30.0-34.9. Level II includes BMIs of
6 35.0-39.9. Level III, termed "extreme" obesity and representing the
7 greatest risk for developing obesity-related impairments, includes BMIs
8 greater than or equal to 40. Soc. Sec. R. 02-01p.

9
10 In the present case, the ALJ failed to discharge the
11 Administration's responsibilities under SSR 02-1p. The medical evidence
12 conclusively establishes that plaintiff suffers from "extreme" obesity,
13 also termed "morbid obesity," a finding that is well-documented by the
14 record and uncontested by the Commissioner.⁶ At the hearing, plaintiff
15 testified that she weighs 490 pounds and is approximately 5'8" tall.
16 (A.R. 357.) Using plaintiff's weight of 490 pounds and height of 5'8",
17 plaintiff's BMI is 74.5.⁷ Although the BMI levels are flexible
18 guidelines and "do not correlate with any specific degree of functional
19 loss," plaintiff's resulting BMI calculation suggests that her extreme
20 obesity likely has a profound impact on her ability to perform work

21
22
23 ⁵ Social Security Ruling 02-01p superseded Social Security Ruling 00-
24 3p, although it did not alter Social Security Ruling 00-3p in any
substantive part. 20 C.F.R. Pt. 404, Subpt. P, Appx. I, § 1.00Q, 3.00I,
and 4.00F.

25 ⁶ The ALJ found that plaintiff suffers from "severe" morbid obesity,
26 along with "severe" osteoarthritis, headaches, and sleep apnea. (A.R.
17.)

27 ⁷ Plaintiff's BMI was calculated by using the BMI calculator found at
28 the Centers for Disease Control and Prevention website
<<http://www.cdc.gov/healthyweight/assessing/bmi/>>.

1 activities and presents a significant issue that the ALJ should have
2 carefully explored in greater detail in assessing her RFC. SSR 02-01p.

3
4 In assessing plaintiff's RFC, the ALJ concluded, in reliance on the
5 medical expert's opinion, that plaintiff is capable of engaging in light
6 work and retains the capacity to walk for four hours and stand for four
7 hours daily. (A.R. 18, 21.) Without the benefit of cross-examination
8 of Dr. Bailey or a detailed analysis by the ALJ of the impact of
9 plaintiff's morbid obesity on her ability to perform work activities, it
10 is difficult to accept the conclusion that plaintiff, who weighs nearly
11 500 pounds, suffers from severe osteoarthritis and significant pain in
12 her neck, back, and knees, and suffers from medically documented edema
13 in her lower extremities, is capable of walking for four hours a day and
14 standing for four hours a day on a regular and continuing basis. See
15 Barrett v. Barnhart, 355 F.3d 1065, 1068 (7th Cir. 2004)(stating that
16 "many people who are not grossly obese and do not have arthritic knees
17 find it distinctly uncomfortable to stand for two hours at a time. To
18 suppose that [the plaintiff] could do so day after day on a factory
19 floor borders on the fantastic.").

20
21 The ALJ is required to do more than simply state that he
22 "considered" the effects of plaintiff's morbid obesity on her other
23 impairments; rather, the ALJ must "explain how [he] reached [his]
24 conclusions," and his failure to do so constitutes error. Accordingly,
25 remand is appropriate to allow the ALJ to re-assess his RFC finding,
26 paying particular attention to the significant impact plaintiff's
27 extreme obesity may have on her other impairments and on her ability to
28 perform work activities on a competitive and sustained basis.

1 **II. The ALJ Failed To Provide The Requisite Clear And Convincing**
2 **Reasons For Rejecting Plaintiff's Subjective Pain Testimony.**

3
4 Plaintiff alleges that the ALJ erred in his consideration of
5 plaintiff's subjective symptom testimony. (Joint Stip. at 16-18, 21.)
6 For the reasons set forth below, the Court agrees.

7
8 Once a disability claimant produces objective evidence of an
9 underlying physical impairment that is reasonably likely to be the
10 source of her subjective symptom(s), all subjective testimony as to the
11 severity of the symptoms must be considered. Moisa v. Barnhart, 367
12 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345
13 (9th Cir. 2001)(*en banc*); see also 20 C.F.R. § 416.929(a)(explaining how
14 pain and other symptoms are evaluated). "[U]nless an ALJ makes a
15 finding of malingering based on affirmative evidence thereof, he or she
16 may only find an applicant not credible by making specific findings as
17 to credibility and stating clear and convincing reasons for each."
18 Robbins, 466 F.3d at 883. Further, an ALJ may not rely solely on the
19 absence of objective medical evidence supporting the *degree* of pain
20 alleged as a basis for finding that a plaintiff's testimony regarding
21 subjective symptoms is not credible. Fair v. Bowen, 885 F.2d 597,
22 601-02 (9th Cir. 1989); Stewart v. Sullivan, 881 F.2d 740, 743-44 (9th
23 Cir. 1989).

24
25 Both in her filings with the Commissioner and in her testimony,
26 plaintiff described various subjective symptoms from which she claims to
27 suffer. At the hearing, plaintiff testified that prior to her
28 "difficulties," she weighed 300 pounds, but that her weight had

1 increased to 490 pounds as of February 2006. (A.R. 357.) Plaintiff
2 stated that she intends to undergo gastric bypass surgery as soon as the
3 surgery is approved, because she is "320 pounds over weight and surgery
4 will save [her] life." (A.R. 90.) Plaintiff further stated that she
5 "can't wipe [her] own feces, can't shower [her]self, can't stand on
6 [her] feet or legs longer than a minute, [has] shortness of breath, [and
7 has] constant headaches." (A.R. 79.) Plaintiff stated that she "can't
8 do much of anything [because she is] becoming immobile," is tired "all
9 the time," and "can't care for [her]self the way normal people do."
10 (A.R. 80, 83.) Plaintiff complained of "a lot of pain" in her back and
11 legs, including her feet, ankles, and toes, and right arm. (A.R. 90,
12 360-61.) Plaintiff stated that she "can barely move and walk around"
13 and spends approximately nine hours lying down during the day. (A.R.
14 100, 368.) Plaintiff also testified that she gets headaches every day,
15 has kidney stones, and suffers from shortness of breath. (A.R. 362.)
16 Plaintiff further testified that she has sleep apnea, which causes her
17 to stop breathing in the middle of the night and is treated with a
18 breathing machine, but she cannot afford the machine. (A.R. 363.)
19 Plaintiff stated that she feels depressed most of the time, has
20 difficulty concentrating, cannot take care of her personal hygiene and
21 grooming, and no longer socializes as she did in the past. (A.R. 363-
22 64.) Plaintiff further testified that she suffers from diarrhea,
23 dizziness, stomach pain, and slurring words as a result of the
24 prescription medication she takes to relieve her pain. (A.R. 365.)
25 Plaintiff also testified that she has not been able to drive a car for
26 the past three years, because her right foot is "extremely swollen" and
27 falls asleep. (A.R. 366.) Plaintiff testified that she does not
28 perform housework, does not participate in any recreational activities,

1 requires assistance dressing herself, and cannot go shopping by herself.
2 (A.R. 367.) Plaintiff further testified that she has treated with a
3 psychologist in the past, but she was forced to stop her treatment
4 because she "had no money to pay" the psychologist. (A.R. 368.)
5

6 In his written decision, the ALJ found that plaintiff suffers from
7 "severe" morbid obesity, osteoarthritis, headaches, and sleep apnea, all
8 of which are medically determinable impairments that reasonably could
9 cause the subjective pain and attendant limitations about which
10 plaintiff complains. (A.R. 17.) However, the ALJ rejected plaintiff's
11 statements concerning the "intensity, persistence and limiting effects"
12 of her limitations, setting forth the following reasons for doing so:
13 (1) plaintiff's "symptoms in combination are managed conservatively,
14 primarily with medications" and plaintiff is "not described as a
15 surgical candidate relative to her complaints, nor has she required a
16 series of hospitalizations, participation in physical therapy or a pain
17 clinic, or other aggressive treatment commonly utilized for chronic and
18 debilitating pain"; (2) her symptoms related to sleep apnea appear to be
19 amenable to treatment with use of a CPAP; (3) plaintiff's subjective
20 complaints are inconsistent with the assessment made by her treating
21 physician; and (4) the objective medical evidence does not support
22 plaintiff's claims of disabling limitations to the degree alleged.
23 (A.R. 20.) When examined in the light of the record as a whole, these
24 reasons do not withstand scrutiny.
25

26 The ALJ's rejection of plaintiff's subjective complaints based, in
27 part, on the fact that plaintiff's symptoms are "managed conservatively,
28 primarily with medications," that plaintiff has not been described as a

1 "surgical candidate relative to her complaints," and that plaintiff has
2 not required "other aggressive treatment," are not convincing reasons to
3 reject plaintiff's credibility. The ALJ's conclusion that plaintiff's
4 symptoms are "managed" with medication is not a proper reason to reject
5 her credibility, because the majority of plaintiff's subjective
6 complaints, namely her swollen lower extremities, inability to care for
7 her personal hygiene, shortness of breath, and virtual immobility, are
8 directly related to her morbid obesity and persist with or without pain
9 medication. Moreover, there is no substantial evidence in the record to
10 support the ALJ's inference that plaintiff's debilitating pain and
11 symptoms would be alleviated if she were to secure more aggressive
12 treatment. While it is permissible for an ALJ to evaluate the
13 credibility of allegations of pain based, in part, on plaintiff's record
14 of receiving minimal and conservative treatment, he must make detailed
15 findings of fact so that a reviewing court may determine whether
16 substantial evidence supports the ALJ's conclusion. The ALJ failed to
17 meet his burden here. See Fair, 885 F.2d at 601-02; Lewin v.
18 Schwieker, 654 F.2d 631, 634-635 (9th Cir. 1981).

19
20 A second reason cited by the ALJ for rejecting plaintiff's
21 subjective symptom testimony -- that plaintiff's symptoms related to
22 sleep apnea appear to be amenable to treatment with use of a CPAP -- is
23 not a convincing basis upon which to reject plaintiff's testimony.
24 While the ALJ's statement appears to be true to the extent that the
25 medical evidence demonstrates that with the use of CPAP titration
26 plaintiff's sleep apnea may be treatable (A.R. 152-54), plaintiff
27 testified that she is unable to afford such a CPAP machine. (A.R. 363.)
28 While an unexplained failure to seek treatment may cast doubt on a

1 claimant's credibility, such an inference is unreasonable where
2 plaintiff is indigent. See Fair, 885 F.2d at 602. Indeed, the Ninth
3 Circuit has "proscribed the rejection of a claimant's complaints for
4 lack of treatment when the record establishes that the claimant could
5 not afford it." Regennitter, 166 F.3d at 1297; see also Smolen, 80 F.3d
6 at 1284; Gamble, 68 F.3d 319 at 322. Accordingly, this reason for
7 rejecting plaintiff's subjective complaints also is not convincing.

8
9 The ALJ also rejected plaintiff's subjective pain testimony
10 because, in his view, the objective evidence did not support plaintiff's
11 claims of disabling limitations to the degree alleged. It is well-
12 settled that an ALJ may not discredit a claimant's subjective claims of
13 disabling pain for the sole reason that the alleged degree of pain is
14 not fully supported by objective medical evidence. See Fair, 885 F.2d
15 at 601-02; Stewart, 881 F.2d at 743-44. Indeed, in Cotton v. Bowen, 799
16 F.2d 1403, 1407 (9th Cir. 1986), the Ninth Circuit stated explicitly
17 that excess pain, by definition, is "pain that is not supported by
18 objective medical findings." Thus, the ALJ erred by requiring plaintiff
19 to adduce medical evidence sufficient to corroborate the severity of her
20 alleged pain and other symptoms. See Bunnell, 947 F.2d at 346.

21
22 Accordingly, the ALJ's rejection of plaintiff's credibility,
23 without setting forth clear and convincing reasons for the rejection,
24 constitutes reversible error.⁸ On remand, the ALJ must provide reasons,
25

26 ⁸ Another reason stated by the ALJ for rejecting plaintiff's
27 credibility was that plaintiff's subjective complaints were inconsistent
28 with the her treating physician's assessment. (A.R. 20.) While this
assertion is not entirely incorrect, this reason alone is not sufficient
to reject plaintiff's credibility.

1 if they exist and in accordance with the requisite legal standards, for
2 discrediting plaintiff's pain testimony.

3
4 **III. Remand Is Required.**

5
6 The decision whether to remand for further proceedings or order an
7 immediate award of benefits is within the district court's discretion.
8 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
9 useful purpose would be served by further administrative proceedings, or
10 where the record has been fully developed, it is appropriate to exercise
11 this discretion to direct an immediate award of benefits. *Id.* at 1179
12 ("the decision of whether to remand for further proceedings turns upon
13 the likely utility of such proceedings"). However, where there are
14 outstanding issues that must be resolved before a determination of
15 disability can be made, and it is not clear from the record that the ALJ
16 would be required to find the claimant disabled if all the evidence were
17 properly evaluated, remand is appropriate. *Id.* Here, remand is the
18 appropriate remedy to allow the ALJ the opportunity to remedy the above-
19 mentioned deficiencies and errors. *See, e.g., Benecke v. Barnhart*, 379
20 F.3d 587, 593 (9th Cir. 2004)(remand for further proceedings is
21 appropriate if enhancement of the record would be useful); McAllister v.
22 Sullivan, 888 F.2d 599, 603 (9th Cir. 1989)(remand appropriate to remedy
23 defects in the record).

24
25 Plaintiff contends, and the Court agrees that, because plaintiff
26 has non-exertional limitations, it was improper for the ALJ to rely on
27 the Medical-Vocational Guidelines (the "Grids") without seeking
28 testimony from a vocational expert to make the alternative finding that,

1 even if plaintiff is incapable of performing light work, she is capable
2 of performing sedentary jobs that exist in significant numbers in the
3 national economy that plaintiff can perform. (A.R. 21-22.) When a
4 claimant suffers only from exertional limitations, but not non-
5 exertional limitations, the ALJ may apply the Grids, at step five, to
6 match the claimant with appropriate work. Holohan v. Apfel, 246 F.3d
7 1195, 1208 (9th Cir. 2000); Reddick v. Chater, 157 F.3d 715, 729 (9th
8 Cir. 1998); Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988).
9 However, an ALJ "may apply the grids in lieu of taking testimony of a
10 vocational expert only when the grids accurately and completely describe
11 the claimant's abilities and limitations" and not in cases where the
12 Grids do not accurately account for a claimant's limitations. Reddick,
13 157 F.3d at 729 (emphasis added); see also Holohan, 246 F.3d at 1208 (as
14 the Grids "are based only on strength factors," they are sufficient to
15 meet the Commissioner's burden at step five "only when a claimant
16 suffers only from exertional limitations"). Accordingly, the ALJ erred
17 by failing to seek testimony from a vocational expert and further
18 proceedings are required. See Reddick, 157 F.3d at 729 (because the
19 claimant had non-exertional limitations, it was error not to seek the
20 testimony of a vocational expert).

21
22 **CONCLUSION**

23
24 Accordingly, for the reasons stated above, IT IS ORDERED that the
25 decision of the Commissioner is REVERSED, and this case is REMANDED for
26 further proceedings consistent with this Memorandum Opinion and Order.

27
28 IT IS FURTHER ORDERED that the Clerk of the Court shall serve

1 copies of this Memorandum Opinion and Order and the Judgment on counsel
2 for plaintiff and for defendant.

3

4

LET JUDGMENT BE ENTERED ACCORDINGLY.

5

6 DATED: August 17, 2009

Margaret A. Nagle

7

MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28