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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARY JANE NEWELL,)	NO. CV 10-08370-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff filed a Complaint on November 8, 2010, seeking review of the denial of plaintiff's application for supplemental security income ("SSI"). On December 28, 2010, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on November 30, 2011, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, alternatively, remanding for further administrative proceedings; and the Commissioner requests that his decision be affirmed or, alternatively, remanded for further administrative proceedings. The Court has taken the parties' Joint Stipulation under submission without oral argument.

1 C.F.R. §§ 416.925, 416.926). (*Id.*)

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3 After reviewing the record, the ALJ determined that plaintiff has
4 the residual functional capacity ("RFC") to perform the full range of
5 sedentary work as defined in 20 C.F.R. § 416.967(a). (A.R. 19.) The
6 ALJ concluded that, with this RFC, plaintiff would not be able to
7 perform any past relevant work. (*Id.*) However, after considering
8 plaintiff's age, education,² work experience, and RFC, as well as the
9 testimony of the vocational expert, the ALJ found that plaintiff could
10 perform jobs in the national economy, including order clerk, call-out
11 operator, or assembler. (*Id.*) Accordingly, the ALJ concluded that
12 plaintiff has not been disabled within the meaning of the Social
13 Security Act since October 16, 2007, the date the application was filed.
14 (*Id.*)

15
16 **STANDARD OF REVIEW**

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

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² The ALJ determined that plaintiff has a high school education
and is able to communicate in English. (A.R. 19.)

1 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,
2 1066 (9th Cir. 2006)(citation omitted).

3
4 Although this Court cannot substitute its discretion for that of
5 the Commissioner, the Court nonetheless must review the record as a
6 whole, "weighing both the evidence that supports and the evidence that
7 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
8 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*
9 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
10 responsible for determining credibility, resolving conflicts in medical
11 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
12 1035, 1039 (9th Cir. 1995).

13
14 The Court will uphold the Commissioner's decision when the evidence
15 is susceptible to more than one rational interpretation. Burch v.
16 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
17 review only the reasons stated by the ALJ in his or her decision "and
18 may not affirm the ALJ on a ground upon which he [or she] did not rely."
19 Orn, 495 F.3d at 630; *see also* Connett, 340 F.3d at 874. The Court will
20 not reverse the Commissioner's decision if it is based on harmless
21 error, which exists only when it is "clear from the record that an ALJ's
22 error was 'inconsequential to the ultimate nondisability
23 determination.'" Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th
24 Cir. 2006)(*quoting* Stout v. Comm'r, 454 F.3d 1050, 1055 (9th Cir.
25 2006)); *see also* Burch, 400 F.3d at 679.

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1 DISCUSSION

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3 Plaintiff claims that the ALJ did not reject her subjective symptom
4 testimony properly. (Joint Stipulation ("Joint Stip.") at 4-13, 18.)

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6 **I. The ALJ Failed To Give Clear And Convincing Reasons For Rejecting**
7 **Plaintiff's Testimony.**

8
9 Once a disability claimant produces objective medical evidence of
10 an underlying impairment that is reasonably likely to be the source of
11 claimant's subjective symptom(s), all subjective testimony as to the
12 severity of the symptom(s) must be considered. Moisa v. Barnhart, 367
13 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345
14 (9th Cir. 1991)(*en banc*); see also 20 C.F.R. § 416.929(a) (explaining
15 how pain and other symptoms are evaluated). "[U]nless an ALJ makes a
16 finding of malingering based on affirmative evidence thereof, he or she
17 may only find an applicant not credible by making specific findings as
18 to credibility and stating clear and convincing reasons for each."
19 Robbins, 466 F.3d at 883. The factors to be considered in weighing a
20 claimant's credibility include: (1) the claimant's reputation for
21 truthfulness; (2) inconsistencies either in the claimant's testimony or
22 between the claimant's testimony and her conduct; (3) the claimant's
23 daily activities; (4) the claimant's work record; and (5) testimony from
24 physicians and third parties concerning the nature, severity, and effect
25 of the symptoms of which the claimant complains. See Thomas v.
26 Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); see also 20 C.F.R. §
27 416.929(c).

1 An ALJ may not rely on a plaintiff's daily activities to support an
2 adverse credibility determination when those activities do not affect
3 the claimant's ability to perform appropriate work activities on an
4 ongoing and daily basis. Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th
5 Cir. 1990). The ALJ must evaluate the claimant's "ability to work on
6 a *sustained* basis.'" Lester v. Chater, 81 F.3d 821, 833 (9th Cir.
7 1995)(emphasis in original)(*citing* 20 C.F.R. § 404.1512(a)). A claimant
8 need not be "utterly incapacitated to be eligible for benefits . . . and
9 many home activities are not easily transferable to what may be the more
10 grueling environment of the workplace, where it might be impossible to
11 periodically rest or take medication." Fair v. Bowen, 885 F.2d 597, 602
12 (9th Cir. 1989).

13
14 The ALJ made no specific finding as to whether plaintiff's
15 impairment could reasonably be expected to produce the symptoms of which
16 she complains -- *to wit*, abdominal pain and limitations in, *inter alia*,
17 sitting, standing, bending, stooping, crawling, crouching, lifting, and
18 carrying. However, based on the ALJ's finding that plaintiff's
19 impairment of cirrhosis of the liver is severe (A.R. 16) and the medical
20 record, which includes, *inter alia*, findings of ascitis, macrocytic
21 anemia, and hernias (*see, e.g.*, A.R. 210, 236-37, 246-49), it appears
22 that plaintiff's impairment(s) could reasonably be expected to produce
23 such symptoms. Further, the ALJ cites no evidence of malingering by
24 plaintiff. Accordingly, the ALJ's reason for rejecting plaintiff's
25 testimony must be clear and convincing.

26
27 At the administrative hearing, plaintiff testified that her
28 cirrhosis of the liver causes her to retain fluids. (A.R. 26-27.)

1 Plaintiff testified that the fluids she retains settle in her stomach³
2 and cause her to have difficulty bending, sitting, laying down, and
3 sleeping. (A.R. 27.) Specifically, plaintiff testified that she only:
4 can sit for half an hour before she must get up and walk; can sit for a
5 total of two hours in an eight hour day; can stand or walk for "maybe an
6 hour, hour and a half" total in an eight hour day; and cannot stoop,
7 crouch, or crawl, because she cannot "get back up without help." (A.R.
8 32.)

9
10 Plaintiff also testified that she has an abdominal hernia for which
11 she wears a brace. (A.R. 28.) She testified that she wears the brace
12 to prevent injury from "lifting things" and "hitting" objects, such as
13 a table. (A.R. 28.) Plaintiff further testified that she cannot do any
14 lifting or carrying, "[b]ecause the [d]octor tells [her] not to." (A.R.
15 26-27.)

16
17 With respect to her daily activities, plaintiff testified that she
18 crochets to build strength in her hands, shops, drives, "might cook
19 dinner," and goes to medical appointments and the American Legion, a
20 veteran's organization, twice or three times a week. (A.R. 30, 32-33.)
21 Plaintiff testified that she does not perform any housework, such as
22 laundry or cleaning. (A.R. 33.)

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24 The ALJ found that plaintiff was not credible, because: (1) "[t]he
25 record showed that her condition is stable with medications"; (2) at the
26 administrative hearing, plaintiff "appeared alcohol-looking with a

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28 ³ Plaintiff testified that she had excess fluids from her
stomach drained on two separate occasions. (A.R. 27.)

1 height of 62 inches and a weight of 104 pounds"; (3) plaintiff
2 "exaggerated her pain and symptoms"; and (4) plaintiff's "daily
3 activities are . . . inconsistent with her allegations." (A.R. 18.)
4

5 The ALJ's first ground for finding plaintiff to be not credible --
6 *to wit*, that plaintiff's condition is stable with medications -- is not
7 clear and convincing. While impairments that are controlled effectively
8 with medications are not considered disabling, the medical finding that
9 plaintiff's impairment is "stable" does not necessarily mean that her
10 symptoms are controlled in a manner that would allow her to work. In
11 fact, despite notations that plaintiff's cirrhosis of the liver is
12 "stable," a May 30, 3008 treatment note states that plaintiff "will
13 likely require [a liver] transplant" (A.R. 249), a July 2, 2008
14 treatment note states that plaintiff is "pending referral to UCLA for
15 [a] liver transplant" (A.R. 248), and a September 25, 2008 treatment
16 note states that plaintiff "will be referred to UCLA" (A.R. 246).
17 Accordingly, when plaintiff's treatment notes are read as a whole, her
18 referral for a liver transplant belies a finding that her impairment is
19 effectively controlled with medications. As such, the ALJ's reasoning
20 cannot constitute a clear and convincing reason for finding plaintiff to
21 be not credible.
22

23 The ALJ's second reason for finding plaintiff to be not credible --
24 *to wit*, that plaintiff "appeared alcohol-looking with a height of 62
25 inches and a weight of 104 pounds" -- is unpersuasive. As an initial
26 matter, it is not permissible for the ALJ to rely solely on the
27 claimant's appearance at the hearing (sometimes called "sit and squirm"
28 jurisprudence) as a basis for an adverse credibility finding. Verduzco

1 v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999); Perminster v. Heckler, 15
2 F.3d 870, 872 (9th Cir. 1985). Moreover, beyond commenting on
3 plaintiff's height and weight, the ALJ does not explain, at either the
4 hearing or in his decision, what he means by his description of
5 plaintiff as, or his basis for believing plaintiff to be, "alcohol-
6 looking." Accordingly, this reason is not a clear and convincing reason
7 for rejecting plaintiff's subjective symptom testimony.

8
9 The ALJ's third reasons for finding plaintiff to be not credible is
10 equally unpersuasive. The ALJ rejects plaintiff's testimony, because
11 "[i]t was . . . noted that plaintiff exaggerated her pain and symptoms."
12 (A.R. 18.) However, without any supporting evidence, the ALJ's vague
13 and boilerplate statement cannot constitute a clear and convincing
14 reason for finding plaintiff's testimony to be not credible. Further,
15 although not entirely clear, to the extent the ALJ rejects plaintiff's
16 testimony because there is no evidence supporting the degree of
17 plaintiff's alleged pain and symptoms, the ALJ errs. It is well
18 established that the failure of the medical record to corroborate
19 plaintiff's subjective symptom testimony fully is not, by itself, a
20 legally sufficient basis for rejecting such testimony. Rollins v.
21 Massanari, 261 F.3d 853, 856 (9th Cir. 2001); Bunnell, 947 F.2d at 347
22 (noting that "[i]f an adjudicator could reject a claim of disability
23 simply because [plaintiff] fails to produce evidence supporting the
24 severity of the pain there would be no reason for an adjudicator to
25 consider anything other than medical findings"). Accordingly, for the
26 aforementioned reasons, the ALJ's statement cannot, by itself,
27 constitute a clear and convincing reason for rejecting plaintiff's
28 testimony.

1 The ALJ's last reason for finding plaintiff to be not credible --
2 *to wit*, that plaintiff's daily activities are inconsistent with her
3 allegations -- is also neither clear nor convincing. In support of his
4 finding, the ALJ states that plaintiff "portrayed herself as being
5 practically non-functional; alleging that she mostly sat on the couch
6 and crochets, she grocery shopped, drove her car and goes to the
7 American Legion, where she used to work, three times a week (per
8 testimony)."⁴ (A.R. 18.) Significantly, the ALJ fails to explain how
9 plaintiff's minimal daily activities and home activities translate into
10 the ability to perform *sustained* work. See Fair, 885 F.2d at 602
11 (noting that "many home activities are not easily transferable to what
12 may be the more grueling environment of the workplace"); see also
13 Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001)(noting that "the
14 mere fact that a plaintiff has carried on certain daily activities, such
15 as grocery shopping, driving a car, or limited walking for exercises,
16 does not in any way detract from [plaintiff's] credibility as to her
17 overall disability"). Accordingly, the ALJ's last reason for rejecting
18 plaintiff's testimony is neither clear nor convincing.⁵

21
22 ⁴ The Court notes that the Commissioner presents additional
23 reasons for rejecting plaintiff's subjective complaints, which the ALJ
24 did not provide in his decision. This Court may not rely on reasons the
25 ALJ did not provide in his decision. Connett, 340 F.3d at 874 ("We are
26 constrained to review the reasons the ALJ asserts"); Pinto v. Massanari,
27 249 F.3d 840, 847 (9th Cir. 2001)(noting that the Court "cannot affirm
28 the decision of an agency on a ground that the agency did not invoke in
making its decision").

26 ⁵ In discussing plaintiff's daily activities, the ALJ also notes
27 that plaintiff "does not appear to be too motivated to work." (A.R.
28 18.) While the ALJ's opinion regarding plaintiff's motivation to work
is entitled to some deference, this reason alone is not sufficient to
reject plaintiff's testimony.

1 Accordingly, for the aforementioned reasons the ALJ failed to give
2 clear and convincing reasons, as required, for finding plaintiff's
3 testimony to be not credible. This constitutes error.
4

5 **II. Remand Is Required.**
6

7 The decision whether to remand for further proceedings or order an
8 immediate award of benefits is within the district court's discretion.
9 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
10 useful purpose would be served by further administrative proceedings, or
11 where the record has been fully developed, it is appropriate to exercise
12 this discretion to direct an immediate award of benefits. *Id.* at 1179
13 ("[T]he decision of whether to remand for further proceedings turns upon
14 the likely utility of such proceedings."). However, where there are
15 outstanding issues that must be resolved before a determination of
16 disability can be made, and it is not clear from the record that the ALJ
17 would be required to find the claimant disabled if all the evidence were
18 properly evaluated, remand is appropriate. *Id.* at 1179-81.
19

20 Remand is the appropriate remedy to allow the ALJ the opportunity
21 to remedy the above-mentioned deficiencies and errors. *See, e.g.,*
22 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for
23 further proceedings is appropriate if enhancement of the record would be
24 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989)
25 (remand appropriate to remedy defects in the record).⁶ On remand, the
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27 ⁶ Plaintiff has requested that this Court credit her testimony
28 as true and remand for the payment of benefits and/or further
administrative proceedings. In the Ninth Circuit, courts have the

1 ALJ must revisit plaintiff's testimony and must either credit
2 plaintiff's testimony or give clear and convincing reasons why
3 plaintiff's testimony is not credible. After so doing, the ALJ may need
4 to reassess plaintiff's RFC, in which case, testimony from a vocational
5 expert likely will be needed to determine what work, if any, plaintiff
6 can perform.

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15 discretion to "credit as true" the testimony of claimants when the ALJ
16 has failed to provide legally sufficient reasons for rejecting the same.
17 See, e.g., Connett, 340 F.3d at 876 (holding that "[i]nstead of being a
18 mandatory rule, we have some flexibility in applying the 'credit as
19 true' theory"). In cases where there are no outstanding issues that
20 must be resolved before a proper disability determination can be made,
and where it is clear from the administrative record that the ALJ would
be required to award benefits if the claimant's excess pain testimony
were credited, applying the "credit as true" rule is appropriate.
Vasquez v. Astrue, 572 F.3d 586, 593 (9th Cir. 2009).

21 Here, if plaintiff's testimony were credited as true, it is
22 unclear whether plaintiff would be considered disabled under the Social
23 Security Act. At the hearing, plaintiff's counsel asked the vocational
24 expert whether "a hypothetical person with plaintiff's age, education,
25 and past relevant work experience who can lift and carry less than ten
26 [pounds]," "[s]tand and walk an hour, sit for about two," and cannot do
27 any "bending, stooping, crouching, and crawling" would be able to
28 perform the jobs identified by the vocational expert. (A.R. 35.) In
reply, the vocational expert stated that such an individual "would not
be able to sustain full time employment at any exertional level." (*Id.*)
Critically, however, plaintiff testified that she could stand and/or
walk for one to *one and a half* hours at a time -- a range which was not
included in the hypothetical to the vocational expert. Accordingly,
because it is unclear whether plaintiff's testimony, if credited as
true, would require a finding of disability, the Court declines to
credit her testimony as true.

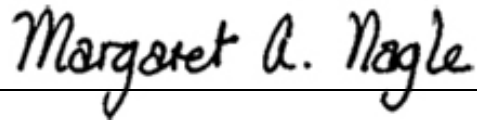
1 **CONCLUSION**

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3 Accordingly, for the reasons stated above, IT IS ORDERED that the
4 decision of the Commissioner is REVERSED, and this case is REMANDED for
5 further proceedings consistent with this Memorandum Opinion and Order.
6

7 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
8 copies of this Memorandum Opinion and Order and the Judgment on counsel
9 for plaintiff and for defendant.
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11 **LET JUDGMENT BE ENTERED ACCORDINGLY.**
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13 DATED: January 5, 2012
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17 MARGARET A. NAGLE
18 UNITED STATES MAGISTRATE JUDGE
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