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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MARTHA PEREZ,	)	Case No. CV 10-9218-JEM
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
v.	)	REVERSING DECISION OF THE
	)	COMMISSIONER OF SOCIAL SECURITY
MICHAEL J. ASTRUE,	)	AND REMANDING FOR FURTHER
Commissioner of Social Security,	)	PROCEEDINGS
	)	
Defendant.	)	
_____	)	

**PROCEEDINGS**

On December 6, 2010, Martha Perez (“Plaintiff” or “Claimant” or “Perez”) filed a complaint seeking review of the decision by the Commissioner of the Social Security Administration (“Commissioner”) denying Plaintiff’s application for Social Security Disability Insurance benefits. The Commissioner filed an Answer to the Complaint on June 24, 2011. On August 29, 2011, the parties filed a Joint Stipulation (“JS”).

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before the undersigned Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision should be reversed and remanded for further proceedings in accordance with this Memorandum Opinion and Order and with law.

1 **BACKGROUND**

2 Plaintiff Perez is a 38 year old female who filed an application for Social Security  
3 disability and disability insurance benefits on October 1, 2007, alleging disability beginning  
4 November 17, 2006. (AR 11.) Plaintiff has not engaged in substantial gainful activity since  
5 that date. (AR 13.)

6 Plaintiff's claim was denied initially on July 25, 2008. (AR 11.) Plaintiff filed a timely  
7 request for a hearing, which was held on July 9, 2009, in Los Angeles, California, before  
8 Administrative Law Judge ("ALJ") Alexander Weir III. (AR 11-21.) Plaintiff appeared and  
9 testified at the hearing. (AR 11.) Vocational expert ("VE") Heidi Paul also appeared at the  
10 hearing. (AR 11.) Claimant was represented by counsel. (AR 11.)

11 The ALJ issued an unfavorable decision on September 25, 2009. (AR 11-21.)  
12 Plaintiff timely filed a request for review, which was denied by the Appeals Council on  
13 September 24, 2010. (AR 1-3.)

14 **DISPUTED ISSUES**

15 As reflected in the Joint Stipulation, the issues Plaintiff raises as grounds for reversal  
16 and remand are as follows:

- 17 1. Whether the ALJ erred in failing to evaluate whether Plaintiff met or equaled  
18 listing 1.02.
- 19 2. Whether the ALJ failed to provide clear and convincing reasons to reject  
20 Plaintiff's subjective complaints.
- 21 3. Whether the ALJ's hypothetical to the vocational expert included all of the  
22 limitations found by the ALJ.

23 **STANDARD OF REVIEW**

24 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether  
25 the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v.  
26 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846

1 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and  
2 based on the proper legal standards).

3 Substantial evidence means “‘more than a mere scintilla,’ but less than a  
4 preponderance.” Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson  
5 v. Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a  
6 reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S.  
7 at 401 (internal quotation marks and citation omitted).

8 This Court must review the record as a whole and consider adverse as well as  
9 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).  
10 Where evidence is susceptible to more than one rational interpretation, the ALJ's decision  
11 must be upheld. Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir.  
12 1999). “However, a reviewing court must consider the entire record as a whole and may not  
13 affirm simply by isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at  
14 882 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue,  
15 495 F.3d 625, 630 (9th Cir. 2007).

## 16 THE SEQUENTIAL EVALUATION

17 The Social Security Act defines disability as the “inability to engage in any substantial  
18 gainful activity by reason of any medically determinable physical or mental impairment which  
19 can be expected to result in death or . . . can be expected to last for a continuous period of  
20 not less than 12 months.” 42 U.S.C. §§ 423(d) (1)(A), 1382c(a)(3)(A). The Commissioner  
21 has established a five-step sequential process to determine whether a claimant is disabled.  
22 20 C.F.R. §§ 404.1520, 416.920.

23 The first step is to determine whether the claimant is presently engaging in substantial  
24 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is  
25 engaging in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert,  
26 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether the claimant has a  
27 severe impairment or combination of impairments. Parra, 481 F.3d at 746. An impairment is  
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1 not severe if it does not significantly limit the claimant’s ability to work. Smolen, 80 F.3d  
2 1273, 1290 (9th Cir. 1996). Third, the ALJ must determine whether the impairment is listed,  
3 or equivalent to an impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I of the  
4 regulations. Parra, 481 F.3d at 746. If the impediment meets or equals one of the listed  
5 impairments, the claimant is presumptively disabled. Bowen v. Yuckert, 482 U.S. at 141.  
6 Fourth, the ALJ must determine whether the impairment prevents the claimant from doing  
7 past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001).

8 Before making the step four determination, the ALJ first must determine the claimant’s  
9 residual functional capacity (“RFC”)<sup>1</sup>. 20 C.F.R. § 416.920(e). RFC is what one “can still do  
10 despite [his or her] limitations” and represents an assessment “based on all the relevant  
11 evidence.” 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The RFC must account for all of the  
12 claimant’s impairments, including those that are not severe. 20 C.F.R. §§ 416.920(e),  
13 416.945(a)(2); Social Security Ruling (“SSR”) 96-8p.

14 If the claimant cannot perform his or her past relevant work or has no past relevant  
15 work, the ALJ proceeds to the fifth step and must determine whether the impairment  
16 prevents the claimant from performing any other substantial gainful activity. Moore v. Apfel,  
17 216 F.3d 864, 869 (9th Cir. 2000). The claimant bears the burden of proving steps one  
18 through four, consistent with the general rule that at all times the burden is on the claimant to  
19 establish his or her entitlement to benefits. Parra, 481 F.3d at 746. Once this prima facie  
20 case is established by the claimant, the burden shifts to the Commissioner to show that the  
21 claimant may perform other gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114  
22 (9th Cir. 2006). If the Commissioner cannot meet this burden, then the claimant is disabled  
23 and entitled to benefits. Id.

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27 <sup>1</sup> Residual functional capacity (“RFC”) is what one “can still do despite [his or her]  
28 limitations” and represents an assessment “based on all the relevant evidence.” 20 C.F.R.  
§§ 404.1545(a)(1), 416.945(a)(1).

1 **THE ALJ DECISION**

2 In this case, the ALJ determined at step one of the sequential process that Plaintiff  
3 has not engaged in substantial gainful activity since November 17, 2006, the alleged onset  
4 date. (AR 13.)

5 At step two, the ALJ found that Plaintiff has the medically determinable severe  
6 impairments of an ankle injury, back disorder, and mental depression. (AR 13. )

7 At step three, the ALJ determined that Plaintiff does not have an impairment that  
8 meets or medically equals one of the listed impairments. (AR 16.)

9 The ALJ then found that the Plaintiff had the RFC to perform light work with  
10 limitations:

11 She can lift and carry 20 pounds occasionally and 10 pounds frequently.

12 She can stand and walk for 4 hours out of an 8 hour day. She requires  
13 the ability to sit and stand as needed. She requires a cane to ambulate.

14 She also is moderately limited in performing detailed or complex tasks  
15 and in maintaining concentration and attention. She is thus capable of a  
16 reduced range of light work.

17 (AR 17.) In determining this RFC, the ALJ also appears to have made an adverse credibility  
18 determination regarding Plaintiff's subjective pain symptoms. (AR 17-19.)

19 At step four, the ALJ found that Plaintiff is not capable of performing her past relevant  
20 work as a grocery store manager and cashier. (AR 19.) The ALJ, however, found at step  
21 five that there were other jobs in the national economy that exist in significant numbers that  
22 Plaintiff can perform, including fundraiser, survey worker and blood donor assistant. (AR  
23 20.)

24 Consequently, the ALJ concluded that Claimant is not disabled within the meaning of  
25 the Social Security Act. (AR 20.)

1 **DISCUSSION**

2 The ALJ decision must be reversed. The ALJ's RFC is incomplete and unsupported  
3 by substantial evidence. The ALJ opinion fails to evaluate Plaintiff's diagnosed medical  
4 impairments of reflex sympathetic dystrophy and chronic pain syndrome, and the ALJ also  
5 failed to develop the record fully by not obtaining RFC assessments from Plaintiff's treating  
6 physicians. Additionally, the ALJ improperly rejected Plaintiff's credibility regarding her pain  
7 symptoms.

8 **I. RELEVANT EVIDENCE OF RECORD**

9 The ALJ found that Plaintiff suffers from the medically determinable severe  
10 impairments of ankle injury, back disorder, and mental depression. (AR 13.) On November  
11 12, 2006, Plaintiff experienced a slip and fall accident that resulted in a grade 3 posterior  
12 tibial tendon tear in her Achilles tendon. (AR 14, 158, 165, 232, 236.) Ultimately, in March  
13 2009, Plaintiff had surgery on the tendon in her left ankle. (AR 341-43, 406-08, 420.) Also in  
14 November 2006, Claimant complained of a low back pain sharp and radiating to the left leg  
15 after lifting something heavy and was diagnosed with lumbar radiculopathy. (AR 14, 164-  
16 65.) She underwent physical therapy for these impairments and was prescribed Tylenol,  
17 vicodin and prednisone. (AR 14.) Currently, she is taking Neurontin, Motrin and morphine  
18 three times daily. (AR 36.) Kaiser medical records also indicated evidence of mental  
19 impairment, and Plaintiff was prescribed Wellbutrin, Xanax, Atavan, Nortipuline, Bupropion,  
20 Lorazepam, and other medications. (AR 14.)

21 The ALJ opinion relies heavily on Dr. Augustine Conduah, a consulting orthopedist  
22 who evaluated Plaintiff's ankle and back impairments. (AR 14, 18, 19.) In a February 10,  
23 2008, report, Dr. Conduah opined that Claimant could perform light work but limited to sitting,  
24 standing and walking for four hours in an eight hour workday. (AR 14, 236.) He specified  
25 that a cane is necessary for all ambulation, and that Plaintiff cannot walk on uneven terrain.  
26 (AR 236-37.) State agency physician Dr. Joanne Zheutlin reviewed the medical evidence of  
27 record on March 5, 2008, and generally concurred in Dr. Conduah's RFC except that she  
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1 opined that Plaintiff should be limited to standing and walking for 2 hours in an 8 hour day.  
2 (AR 14, 241.)

3 In a report dated September 25, 2008, Kaiser pain management physician Dr. Khalid  
4 Ahmed diagnosed Claimant with left foot and ankle strain, herniated lumbar disc, reflex  
5 sympathetic dystrophy (RSD) in the left lower extremity, and severe anxiety and depression.  
6 (AR 14, 428-35.) SSR 03-02p indicates that RSD is a chronic pain syndrome most often  
7 resulting from trauma to a single extremity; patients typically report persistent, burning,  
8 aching or searing pain. Dr. Ahmed found sharp, burning pain. (AR 18.) He opined Plaintiff  
9 would require extensive physical therapy, medication, epidural injection, and possible  
10 surgical intervention. (AR 14, 434-35.)

11 On May 29, 2009, Kaiser physician Dr. Ahangar diagnosed Plaintiff with chronic pain  
12 syndrome and repeated the diagnosis of RSD. (AR 341, 343.) Chronic pain syndrome “has  
13 both a physical and psychological component” and the components are “not neatly  
14 separable.” Lester v. Chater, 81 F.3d 821, 829 (9th Cir. 1995). Kaiser psychologists and  
15 psychiatrists also made diagnoses of chronic pain syndrome in their treatment notes in late  
16 2008. (AR 460, 464, 467, 470, 472.)

17 State agency reviewing psychiatric consultants reviewed the medical evidence and  
18 diagnosed affective disorder and mental depression of moderate severity, findings which  
19 were supported by similar findings of other mental health professionals. (AR 14-16.) The  
20 ALJ concluded that Claimant’s mental depression results in mild limitations in daily living  
21 activities and moderate limitations in her social functioning and ability to maintain  
22 concentration, persistence and pace. (AR 16.)

23 **II. THE ALJ’S STEP THREE DETERMINATION WAS**  
24 **NOT ERRONEOUS**

25 Plaintiff asserts that Plaintiff should have been found disabled at step three of the  
26 sequential evaluation process. Specifically, Plaintiff contends that Ms. Perez met or equaled  
27 both Listing 1.02 and 1.04, and also failed to consider Plaintiff’s diagnosis of RSD as possibly  
28 disabling. Plaintiff’s argument lacks legal merit.

1           **A.     Relevant Federal Law**

2           Social Security regulations provide that a claimant is disabled if he or she meets or  
3 medically equals a listed impairment. Section 416.920(a)(4)(iii) (“If you have an impairment  
4 that meets or equals one of our listings . . . we will find that you are disabled”); Section  
5 416.920(d) (“If you have an impairment(s) which . . . is listed in Appendix 1 or is equal to a  
6 listed impairment(s), we will find you disabled without considering your age, education, and  
7 work experience”). In other words, if a claimant meets or equals a listing, he or she will be  
8 found disabled at this step “without further inquiry.” Tackett v. Apfel, 180 F.3d 1094, 1099  
9 (9th Cir. 1999). There is no need for the ALJ to complete steps four and five of the  
10 sequential process. Lewis v. Apfel, 236 F.3d 503, 512 (9th Cir. 2001).

11           The listings in Appendix 1 describe specific impairments considered “severe enough  
12 to prevent an individual from doing gainful activity, regardless of his or her age, education, or  
13 work experience.” Section 404.1525. An impairment that meets a listing must satisfy all the  
14 medical criteria required for that listing. Section 404.1525(c)(3). An impairment cannot meet  
15 a listing based only on a diagnosis. Section 404.1525(d).

16           Medical equivalence will be found if the impairment “is at least equal in severity and  
17 duration to the criteria of any listed impairment.” (Section 404.1526(a). Medical equivalence  
18 is based on symptoms, signs and laboratory findings, but not subjective symptoms. Section  
19 404.1529(d)(3).

20           **B.     Analysis**

21           At the hearing, Plaintiff’s counsel presented argument that Ms. Perez met or equaled  
22 Listings 1.02 and 1.04. The ALJ opinion does not address these listings, only Listing 12.04  
23 for Plaintiff’s mental impairments. Plaintiff claims that the ALJ erred in failing to evaluate or  
24 even mention Listings 1.02 and 1.04. To be sure, “[a]n ALJ must evaluate the relevant  
25 evidence before concluding that a claimant’s impairments do not meet or equal a listed  
26 impairment. A boilerplate finding is insufficient to support a conclusion that a claimant’s



1 impairment does not do so.” Lewis, 236 F.3d at 512, citing Marcia v. Sullivan, 900 F.2d 172,  
2 176 (9th Cir. 1990).

3 In this case, however, the ALJ fully discussed all of the relevant medical evidence of  
4 record at step two in finding that Plaintiff can perform light work with limitations. (AR 13-16.)  
5 The Ninth Circuit in Lewis held that an ALJ is required to discuss and evaluate the evidence  
6 that supports his or her conclusions but “Marcia does not specify that the ALJ must do so  
7 under the heading ‘Findings.’” Lewis, 236 F.3d at 513; see also Kruchek v. Barnhart, 125  
8 Fed. Appx. 825, 827 (9th Cir. 2005) (adequately analyzed evidence elsewhere in decision);  
9 Harns v. Astrue, 2009 WL 801347, at \*7 (N.D. Cal. March 25, 2009) (discussion and  
10 evaluation of evidence at step four supported ALJ’s step three conclusion that impairments  
11 did not equal Listing 1.04; “Lewis does not require that support for the ALJ’s conclusions be  
12 placed in a specific section of the report”).

13 Here, the ALJ cites medical evidence that Plaintiff’s functional limitations are not  
14 disabling, evidence that clearly is inconsistent with a disabling impairment. (AR 14.) No  
15 physician provided a contrary RFC assessment. Plaintiff presented no medical evidence that  
16 Plaintiff’s impairments, singly or in combination, meet or equal Listing 1.02, 1.04 or any other  
17 listing. Indeed, Plaintiff relies on Dr. Conduah’s assessment that she should not walk on  
18 uneven terrain, but Dr. Conduah provided an RFC that Plaintiff nonetheless could perform  
19 light work. Section 1.02 requires proof of an inability to ambulate effectively which means  
20 “an extreme limitation of the ability to walk.” Section 1.00 B2b(i). Dr. Conduah found Plaintiff  
21 could walk 4 hours out of an 8 hour day. (AR 236.)

22 There was no error here. “An ALJ is not required to discuss the combined effects of a  
23 claimant’s impairments or compare them to any listing in an equivalency determination,  
24 unless the claimant presents evidence in an effort to establish equivalence.” Burch v.  
25 Barnhart, 400 F.3d 676, 683 (9th Cir. 2005). The Burch Court went on to fault the claimant in  
26 that case for failing even to offer a plausible theory (id.) and Plaintiff here contends that she  
27 did so, but Burch and Lewis make clear that a claimant also must present medical evidence  
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1 that he or she meets or equals a listing. Plaintiff did not present any medical evidence that  
2 she met or equaled a listing. A theory like that presented by Plaintiff or a diagnosis like RSD  
3 is insufficient to establish medical equivalence. Section 404.1525(d).

### 4 **III. THE ALJ'S RFC ASSESSMENT WAS ERRONEOUS**

5 The ALJ assessed Claimant with an RFC for light work with limitations. All of the  
6 limitations are exertional except for moderate limitations in performing detailed or complex  
7 tasks and in maintaining concentration based on her mental impairments. The ALJ's RFC  
8 does not recognize any nonexertional limitations due to her alleged pain.

9 An RFC is not a medical determination but an administrative finding or legal decision  
10 reserved to the Commissioner based on consideration of all the relevant evidence, including  
11 medical evidence, lay witnesses and subjective symptoms. See SSR 96-5p; 20 C.F.R.  
12 § 1527(e)(2). In determining a claimant's RFC, an ALJ must consider all relevant evidence  
13 in the record, including medical records, lay evidence, and the effects of symptoms, including  
14 pain reasonably attributable to the medical condition. Robbins, 466 F.3d at 883.

#### 15 **A. The RFC Fails To Consider All Relevant Medical Evidence**

16 The ALJ mentions Dr. Ahmed's diagnosis of RSD in the left lower extremity and that  
17 Dr. Ahmed found burning, sharp pain (AR 14, 18), but the ALJ fails to discuss and evaluate  
18 the impairment. The ALJ opinion does not mention SSR 03-02p. The medical evidence of  
19 the impairment is undisputed. The ALJ may not reject a treating physician's uncontradicted  
20 opinion without clear and convincing reasons supported by substantial evidence. Reddick v.  
21 Chater, 157 F.3d 715, 725 (9th Cir. 1998). Even if the ALJ opinion is read as implicitly  
22 rejecting this diagnosis or any functional limitations due to the impairment, the ALJ  
23 nonetheless would have to present specific, legitimate reasons supported by substantial  
24 reasons for doing so. Id. More generally, the ALJ may not ignore relevant medical evidence  
25 without giving specific, legitimate reasons for doing so. Smolen, 80 F.3d at 1282; Reddick,  
26 157 F.3d at 722-23 (impermissible for ALJ to develop evidentiary basis by "not fully  
27 accounting for the context of materials or all parts of the testimony and reports"). The ALJ  
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1 erred in not presenting clear and convincing reasons or specific, legitimate reasons for  
2 rejecting Dr. Ahmed's diagnosis.

3         The Commissioner (not the ALJ) argues that Dr. Ahmed failed to provide an RFC, but  
4 Dr. Ahmed was assessing industrial causation. (AR 434.) An ALJ may not ignore such  
5 opinions but must translate them into corresponding Social Security terminology. Booth v.  
6 Barnhart, 181 F. Supp. 2d 1099, 1105 (C.D. Cal. 2002). The ALJ, moreover, had a duty to  
7 obtain or at least request an RFC assessment from Dr. Ahmed. In Social Security cases, the  
8 ALJ has a special independent duty to develop the record fully and fairly and to assure that  
9 the claimant's interests are considered. Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir.  
10 2001); Smolen, 80 F.3d at 1288; Brown v. Heckler, 713 F.2d at 441, 443 (9th Cir. 1983).  
11 Ambiguous evidence or the ALJ's own finding that the record is inadequate to allow for  
12 proper evaluation of the evidence triggers the ALJ's duty to conduct an appropriate inquiry.  
13 Smolen, 80 F.3d at 1288; Tonapetyan, 242 F.3d at 1150. The ALJ may discharge this duty  
14 by subpoenaing the claimant's physicians, submitting questions to them, continuing the  
15 hearing or keeping the record open after hearing to allow supplementation of the record.  
16 Smolen, 80 F.3d at 1288; Tonapetyan, 242 F.3d at 1150. The ALJ's failure to address the  
17 diagnosis of RSD as a separate impairment and to develop the record properly was error.

18         The ALJ opinion, moreover, does not discuss or even acknowledge Plaintiff's chronic  
19 pain syndrome as a separate impairment. Plaintiff's treating physicians, both physical and  
20 mental, repeatedly presented this diagnosis. (AR 343, 460, 464, 467, 470, 472.) The  
21 medical evidence of the impairment is undisputed. The ALJ offers no explanation for its  
22 omission from his discussion of the medical evidence. The ALJ does not offer clear and  
23 convincing or specific, legitimate reasons supported by substantial evidence for rejecting the  
24 opinions of Plaintiff's treating physicians who diagnosed this impairment. The ALJ's failure to  
25 address these repeated diagnoses of chronic pain syndrome as a separate impairment was  
26 error.

1 It is an error that undermines the Commissioner’s arguments that none of Plaintiff’s  
2 treating physicians followed up on the RSD diagnosis and that Plaintiff did not receive any  
3 follow-up treatment for the condition. Both RSD and chronic pain syndrome are different  
4 diagnoses of the same chronic pain impairment. There are numerous diagnoses of both  
5 impairments and Plaintiff was prescribed morphine three times daily. (AR 36.) The  
6 Commissioner’s arguments misstate and are unsupported by the evidence.

7 The ALJ’s RFC is incomplete and not supported by substantial evidence, and the ALJ  
8 failed to develop the record fully.

9 **B. The ALJ Improperly Discounted Plaintiff’s Credibility**

10 The ALJ’s failure to evaluate Plaintiff’s diagnoses of RSD and chronic pain syndrome  
11 is of special significance because both of these diagnoses are supportive of Plaintiff’s  
12 subjective pain symptoms, which the ALJ does not credit. For this and other reasons, the  
13 ALJ’s adverse credibility determination was not based on clear and convincing reasons  
14 supported by substantial evidence.

15 The test for deciding whether to accept a claimant’s subjective symptom testimony  
16 turns on whether the claimant produces medical evidence of an impairment that reasonably  
17 could be expected to produce the pain or other symptoms alleged. Bunnell v. Sullivan, 947  
18 F.2d 341, 346 (9th Cir. 1991); see also Reddick, 157 F.3d at 722; Smolen, 80 F.3d at  
19 1281-82 & n.2. The Commissioner may not discredit a claimant’s testimony on the severity  
20 of symptoms merely because it is unsupported by objective medical evidence. Reddick, 157  
21 F.3d at 722; Bunnell, 947 F.2d at 343, 345. If the ALJ finds the claimant’s symptom  
22 testimony not credible, the ALJ “must specifically make findings which support this  
23 conclusion.” Bunnell, 947 F.2d at 345. These findings must be “sufficiently specific to permit  
24 the court to conclude that the ALJ did not arbitrarily discredit [the] claimant’s testimony.”  
25 Thomas v. Barnhart, 278 F.3d 947, 958 (9th Cir. 2002); see also Rollins v. Massanari, 261  
26 F.3d 853, 856-57 (9th Cir. 2001); Bunnell, 947 F.2d at 345-46. Unless there is evidence of  
27 malingering, the ALJ can reject the claimant’s testimony about the severity of her symptoms  
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1 only by offering “specific, clear and convincing reasons for doing so.” Smolen, 80 F.3d at  
2 1283-84; see also Reddick, 157 F.3d at 722. The ALJ must identify what testimony is not  
3 credible and what evidence discredits the testimony. Reddick, 157 F.3d at 722; Smolen, 80  
4 F.3d at 1284.

5 In determining Plaintiff’s RFC, the ALJ appears to have made an adverse credibility  
6 determination regarding Plaintiff’s subjective pain symptoms. The ALJ did not make any  
7 finding of malingering. Thus, he was required to provide clear and convincing reasons  
8 supported by substantial evidence to discount Plaintiff’s credibility. Smolen, 80 F.3d at 1283-  
9 84. The ALJ’s reasons here do not satisfy that standard.

10 In rejecting Plaintiff’s subjective pain symptoms, the ALJ relies heavily on the medical  
11 evidence, citing the opinions of Dr. Conduah, and State agency reviewing physician  
12 Dr. Joanne Zheutlin. (AR 18-19.) There are two problems with the ALJ’s reliance on the  
13 medical evidence. First, as a matter of law a claimant’s testimony on the severity of  
14 symptoms cannot be discredited solely because it is unsupported by objective medical  
15 evidence, Reddick, 157 F.3d at 722.<sup>2</sup> Second, the diagnoses of RSD and chronic pain  
16 syndrome were made after the RFC assessments of Dr. Conduah and Dr. Zheutlin who did  
17 not consider these impairments and thus their opinions cannot be relied on as a basis for  
18 rejecting these diagnoses. The Ninth Circuit gives limited weight to an opinion based on a  
19 one-time examination without review of medical records. Reddick, 157 F.3d at 727.  
20 Because the ALJ failed to consider Plaintiff’s medical impairments of RSD and chronic pain  
21 syndrome in discounting her credibility and had no medical evidence to reject those  
22 impairments, the medical evidence cannot be a clear and convincing reason supported by  
23 substantial evidence for rejecting Plaintiff’s subjective symptoms.

24 The ALJ’s next argument for rejecting Plaintiff’s subjective pain symptoms is that  
25 Plaintiff stated that “she could work if she were able to alternate sitting or standing as  
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27 <sup>2</sup> Medical evidence, however, is relevant even if not determinative. Smolen, 80 F.3d  
28 at 1285.

1 needed.” (AR 18, 19.) Plaintiff made no such statement. This is what Plaintiff said at the  
2 hearing:

3 Q. What about a job where you could sit, not your old job but some  
4 other job where you could sit and you wouldn't have to lift anything or be on  
5 your feet too long, what do you think would be the problem with that?

6 A. If I could sit and stand, it would be, you know - -, it's just - -

7 Q. You need to - - do you need to stand up after a while from sitting?

8 A. And, too, the problem is my medication. I'm right now - - I did not  
9 take my morphine. I only took one of the Neurontins because I - - it's just  
10 that I'm groggy. I'm sleepy.

11 Q. Do you sleep during the day?

12 A. I actually sleep - - probably I fall asleep maybe at 6:00 in the  
13 morning and I'll sleep probably until like 10:00. And I try to stay awake but  
14 it's just too hard.

15 (AR 39-40.) This is not a statement that the Claimant can work. The Commissioner argues  
16 that the ALJ interpreted Plaintiff's remarks to mean she might be able to do other work and  
17 the Court should not second guess the ALJ's interpretation of the evidence if reasonable.  
18 Rollins, 261 F.3d at 857. In this case, however, the ALJ's interpretation was not reasonable,  
19 particularly in view of the Claimant's testimony that taking morphine three times a day makes  
20 her sleepy and unable to work.

21 The ALJ's conclusory statement that Claimant "reported only minor adverse side  
22 effects from prescribed medication" is plainly contrary to the evidence. Claimant testified that  
23 her morphine medication prevented her from working and that she had to skip it to be able to  
24 attend the hearing. The Commissioner tries to justify the ALJ's finding by citing evidence  
25 from the record supporting that finding. Those citations, however, refer to medications other  
26 than morphine. (AR 18, 128, 140.) The ALJ's medication finding is not supported by  
27 substantial evidence.

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1 The ALJ's next reason for rejecting Plaintiff's subjective pain symptoms is that she  
2 performs a "plethora of activities of daily living and has not had to curtail those activities due  
3 to pain." (AR 18.) An ALJ properly may discount a claimant's credibility if his daily activities  
4 contradict his other testimony or demonstrate the capacity for work. Orn, 495 F.3d at 639;  
5 Burch, 400 F.3d at 680-81 (upholding ALJ's determination that daily activities detracted from  
6 plaintiff's credibility). Here, however, the ALJ misstates the record again in stating that  
7 Claimant admitted that she is able to care for two young children and never actually stopped  
8 caring [*sic*] for them." (AR 18.) The record is clear that Claimant's mother and father live  
9 with her and they and her husband help with her daughter and take her to school and help  
10 with chores. (AR 39-45.) Also, the "plethora" of activities cited is actually quite small and not  
11 particularly probative of the ability to work. For example, the ALJ says Claimant remains  
12 capable of shopping but inconsistently says that "she hangs on a cart at the store and only  
13 shops for 10 minutes." (AR 18.) SSR 96-8p (1996) provides, "Ordinarily, RFC is the  
14 individual's maximum remaining ability to do sustained work activities in an ordinary work  
15 setting on a regular and continuing basis . . . A regular and continuing basis "means 8 hours  
16 a day, for 5 days a week." None of Claimant's daily activities cited by the ALJ evidence the  
17 ability to work on a regular, continuing basis. The Commissioner correctly observes that a  
18 reviewing court should not second guess an ALJ's interpretation of the evidence if it is  
19 reasonable. Rollins, 261 F.3d at 857. The ALJ's interpretation of the evidence here  
20 regarding Plaintiff's daily activities, however, is simply not reasonable.

21 The Commissioner argues that Plaintiff received only conservative treatment but this  
22 was not a reason advanced by the ALJ and thus cannot be considered. Connett v. Barnhart,  
23 340 F.3d 871, 874 (9th Cir. 2003) (Court cannot base its ruling on considerations not  
24 addressed in the ALJ decision).

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1 In sum, the ALJ's reasons for discounting Plaintiff's credibility are neither clear and  
2 convincing nor supported by substantial evidence.<sup>3</sup>

3 **ORDER**

4 IT IS HEREBY ORDERED that the decision of the Commissioner of Social Security is  
5 REVERSED and REMANDED for further proceedings in accordance with this Memorandum  
6 Opinion and Order and with law.

7 LET JUDGMENT BE ENTERED ACCORDINGLY.

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9 DATED: November 17, 2011

/s/ John E. McDermott  
JOHN E. MCDERMOTT  
UNITED STATES MAGISTRATE JUDGE

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27 <sup>3</sup> Based on the Court's rulings that will require further development of the record and  
28 reevaluation of the ALJ's RFC, there is no reason to reach Plaintiff's third contention that the  
ALJ's hypothetical to the VE did not include all relevant limitations.