

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
WESTERN DIVISION**

SANDRA KAY WALKER,)
)
 Plaintiff,)
)
 v.)
)
 CAROLYN W. COLVIN,)
 Acting Commissioner of the Social)
 Security Administration,)
)
 Defendant.)

**Case No. CV 12-2248 AJW
MEMORANDUM OF DECISION**

Plaintiff filed this action seeking reversal of the decision of defendant, the Commissioner of the Social Security Administration (the “Commissioner”),¹ denying plaintiff’s application for supplemental security income (“SSI”) benefits. The parties have filed a Joint Stipulation (“JS”) setting forth their contentions with respect to each disputed issue.

Administrative Proceedings

The parties are familiar with the procedural facts. [See JS 2-3]. On July 17, 2007, plaintiff filed an application for SSI benefits alleging that she had been disabled since April 29, 2006. [Administrative Record (“AR”) 20, 68, 104]. In a December 10, 2009 written hearing decision that constitutes the Commissioner’s final decision in this matter, an administrative law judge (the “ALJ”) found that plaintiff

¹ Carolyn W. Colvin, who became the Acting Commissioner on February 14, 2013, is substituted for her predecessor, Michael J. Astrue. See Fed. R. Civ. P. 25(d).

1 had severe impairments consisting of tendonitis and depression. [AR 22, 26]. The ALJ further found that
2 plaintiff retained the residual functional capacity (“RFC”) to perform light work, except that she can
3 occasionally climb, balance, stoop, kneel, crouch and crawl, and can only perform entry level work. [AR
4 23]. Relying on the testimony of a vocational expert, the ALJ determined that plaintiff’s RFC precluded
5 performance of her past work, but did not preclude her from performing light, unskilled jobs available in
6 significant numbers in the national economy. [AR 25-26]. Accordingly, the ALJ concluded that plaintiff
7 not was disabled at any time through the date of his decision. [AR 20, 26].

8 **Standard of Review**

9 The Commissioner’s denial of benefits should be disturbed only if it is not supported by substantial
10 evidence or is based on legal error. Stout v. Comm’r, Soc. Sec. Admin., 454 F.3d 1050, 1054 (9th Cir.
11 2006); Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). “Substantial evidence” means “more than
12 a mere scintilla, but less than a preponderance.” Bayliss v. Barnhart, 427 F.3d 1211, 1214 n.1 (9th Cir.
13 2005). “It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
14 Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005)(internal quotation marks omitted). The court is
15 required to review the record as a whole and to consider evidence detracting from the decision as well as
16 evidence supporting the decision. Robbins v. Soc. Sec. Admin, 466 F.3d 880, 882 (9th Cir. 2006);
17 Verduzco v. Apfel, 188 F.3d 1087, 1089 (9th Cir. 1999). “Where the evidence is susceptible to more than
18 one rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld.”
19 Thomas, 278 F.3d at 954 (citing Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir.1999)).

20 **Credibility finding**

21 Plaintiff contends that the ALJ failed properly to consider plaintiff’s testimony about her subjective
22 symptoms. [JS 15-20].

23 During the administrative hearing, plaintiff testified as follows. [See AR 23-24, 50-59]. She was 42
24 years old, left school in the ninth grade, and did not have a driver’s license. [AR 50-51, 53]. She was
25 advised not to drive because her medications for Parkinson’s disease make her dizzy. [AR 51]. Although
26 she had not been diagnosed with Parkinson’s disease by a medical doctor, she was waiting for an
27 appointment to see a neurologist. [AR 52]. She was paying out of pocket for her treatment because she did
28 not have medical insurance, but she had applied to an insurance assistance program and was waiting to hear

1 back. [AR 52-53]. The only income plaintiff and her husband received was his unemployment insurance.
2 [AR 51, 57]. Plaintiff's treatment providers think she has Parkinson's disease because of the tremors in her
3 hands, legs and feet. [AR 53]. Plaintiff stopped working because the Parkinson's disease and tendonitis
4 made her susceptible to illness, and she progressively got worse. [AR 60]. She took Paroxetine,² for muscle
5 spasms, Metformin³ for diabetes, and Vicodin⁴ and Flexeril⁵ for pain. [AR 53, 55, 58]. Her pain
6 medications lessened her pain a little, but not enough. [AR 58]. Plaintiff did not check her blood sugar, but
7 got lab work done to monitor her diabetes. [AR 54]. The diabetes medication only helped her symptoms
8 a little bit. [AR 61]. Her weight had fluctuated both up and down in the last few years. [AR 54]. She had
9 hepatitis C that was dormant due to treatment, but she experienced some residual difficulty breathing as a
10 result and was supposed to be on oxygen, but could not afford to pay for it. [AR 61]. Plaintiff experienced
11 pain in her hands, feet, back, legs, and neck caused by Parkinson's disease and bone spurs in her neck that
12 were turning into arthritis. [AR 55]. She was unable to get down on her hands and knees, experienced
13 dizziness and numbness in her arms, and could walk or stand for 5 to 10 minutes before needing to sit down.
14 [AR 62]. She also was depressed because she was unable to care for herself, and was being treated with
15 medication, but was not attending counseling. [AR 55]. The medication to treat her depression had helped

16
17 ² Paroxetine (the generic form of Paxil) is a selective serotonin-reuptake inhibitor that is used
18 to treat depression, panic disorder, social anxiety disorder, obsessive-compulsive disorder,
19 generalized anxiety disorder, and post-traumatic stress disorder. See United States National Library
20 of Medicine and National Institutes of Health, MedlinePlus website, Paroxetine, available at
21 <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a698032.html> (last accessed Mar. 18, 2013).

22 ³ Metformin is in a class of drugs called biguanides that help to control the amount of glucose
23 (sugar) in a person's blood and is used to treat type 2 diabetes. See United States National Library
24 of Medicine and National Institutes of Health, MedlinePlus website, Metformin, available at
25 <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a696005.html> (last accessed Mar. 18, 2013).

26 ⁴ Vicodin is the brand name for a combination of hydrocodone, an opioid pain medicine, and
27 the analgesic acetaminophen. Vicodin is used for the relief of moderate to moderately severe pain.
28 See Abbott Laboratories, Vicodin website, available at <http://www.vicodin.com/patient/index.cfm>
(last accessed Mar. 18, 2013).

⁵ Flexeril (the generic form is called Cyclobenzaprine) is a muscle relaxant that is used with
rest, physical therapy, and other measures to relax muscles and relieve pain and discomfort caused
by strains, sprains, and other muscle injuries. See United States National Library of Medicine and
National Institutes of Health, MedlinePlus website, Cyclobenzaprine, available at
<http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682514.html> (last accessed Mar. 18, 2013).

1 reduce her symptoms a little, but she continued to feel depressed because her medical condition was
2 worsening. [AR 56]. She and her husband had to move in with her in-laws four months before the hearing
3 because of their financial situation. [AR 57]. Plaintiff's daily routine consisted of waking up, eating
4 breakfast, taking her medications, and then either lying down or sitting up and watching television for a little
5 while before lying down. [AR 57]. Her mother-in-law then made her lunch, after which she sat down or
6 went to sleep. [AR 58]. After dinner, plaintiff again watched a little television and then went back to bed.
7 [AR 58]. She could not do any of her previous hobbies anymore, and only goes to church once in awhile.
8 [AR 58-59]. She did not do any housework or wash the clothes, but she went shopping once a week with
9 someone to assist her. [AR 59].

10 The ALJ summarized plaintiff's hearing testimony as follows:

11 At the hearing, the claimant testified that she does not drive as she was advised she should
12 not due to medication and Parkinson's disease. She said this was diagnosed by John Batton,
13 a physician's assistant about one year ago. She is still waiting to see a neurologist. The
14 same PA diagnosed diabetes and she takes medication twice a day. She does not check her
15 blood sugar. She has gained and lost weight in the last year. She takes Vicodin for pain in
16 multiple areas. [¶]. She has 3 bone spurs in her neck. She started having depression about
17 8 months ago when she could not help herself. She takes medication but has not had any
18 counseling. She lives with her in-laws for financial reasons. She gets up in the morning, has
19 breakfast then watches TV for awhile, and lays back down again. Pain medication helps a
20 little. Muscle relaxants do not help. Her mother-in-law makes meals. She goes to church
21 occasionally, shops once a week, does no housework. She has had Hepatitis C and had
22 interferon treatment. She is supposed to be on oxygen to help breathing but cannot afford
23 it. She also has numbness in her arms. She could walk for 5 to 10 minutes then has to sit.
24 She can stand for 5 to 10 minutes. She gets dizzy from the medication and has fallen twice
25 when getting out of bed.

26 [AR 23-24].

27 The ALJ summarized the objective medical evidence as follows. [AR 24-24]. The Commissioner's
28 consultative physician, Kristol Siciarz, M.D., found bilateral tremor in the hands but concluded that it was

1 not significant enough to interfere with fine manipulation. Plaintiff had grip strengths of 45 pounds on the
2 right and 35 pounds on the left, with full range of motion of both wrists and hands. Dr. Siciarz opined that
3 plaintiff was capable of medium work. [AR 24, 186-190]. The nonexamining state agency physicians
4 subsequently reviewed plaintiff's file and concurred with Dr. Siciarz's conclusions. [AR 24, 223-224]. The
5 nonexamining state agency psychiatric consultants indicated that plaintiff can perform unskilled, non-
6 detailed, simple repetitive work tasks, had adequate pace and persistence to perform the above work tasks
7 for a normal workday and work week, can relate in an appropriate, socially effective manner with
8 coworkers, supervisors, and the general public and can adapt appropriately to a variety of work settings,
9 situations, requirements, and changes. [AR 24, 191-204].

10 The ALJ found that plaintiff's tendonitis and depression could reasonably be expected to cause her
11 alleged symptoms, but that plaintiff's statements concerning their intensity, persistence, and limiting effects
12 of her pain were not credible to the extent that they were inconsistent with the ALJ's RFC finding. [AR 24].

13 Once a disability claimant produces evidence of an underlying physical or mental impairment that
14 is reasonably likely to be the source of her subjective symptoms, the adjudicator is required to consider all
15 subjective testimony as to the severity of the symptoms. Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir.
16 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991) (en banc); see also 20 C.F.R. §§ 404.1529(a),
17 416.929(a) (explaining how pain and other symptoms are evaluated). Although the ALJ may then disregard
18 the subjective testimony he considers not credible, he must provide specific, convincing reasons for doing
19 so. Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th Cir. 2001); see also Moisa, 367 F.3d at 885 (stating that
20 in the absence of evidence of malingering, an ALJ may not dismiss the subjective testimony of claimant
21 without providing "clear and convincing reasons"). The ALJ's credibility findings "must be sufficiently
22 specific to allow a reviewing court to conclude the ALJ rejected the claimant's testimony on permissible
23 grounds and did not arbitrarily discredit the claimant's testimony." Moisa, 367 F.3d at 885. If the ALJ's
24 assessment of the claimant's testimony is reasonable and is supported by substantial evidence, it is not the
25 court's role to "second-guess" it. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

26 In evaluating subjective symptom testimony, the ALJ must consider "all of the evidence presented,"
27 including the following factors: (1) the claimant's daily activities; (2) the location, duration, frequency, and
28 intensity of pain and other symptoms; (3) precipitating and aggravating factors, such as movement, activity,

1 and environmental conditions; (4) the type, dosage, effectiveness and adverse side effects of any pain
2 medication; (5) treatment, other than medication, for relief of pain or other symptoms; (6) any other
3 measures used by the claimant to relieve pain or other symptoms; and (7) other factors concerning the
4 claimant's functional restrictions due to such symptoms. See 20 C.F.R. §§ 404.1529(c) (3), 416.929(c)(3);
5 see also Social Security Ruling ("SSR") 96-7p, 1996 WL 374186, at *3 (clarifying the Commissioner's
6 policy regarding the evaluation of pain and other symptoms). The ALJ also may employ "ordinary
7 techniques of credibility evaluation," considering such factors as (8) the claimant's reputation for
8 truthfulness; (9) inconsistencies within the claimant's testimony, or between the claimant's testimony and
9 the claimant's conduct; (10) a lack of candor by the claimant regarding matters other than the claimant's
10 subjective symptoms; (11) the claimant's work record; and (12) information from physicians, relatives, or
11 friends concerning the nature, severity, and effect of the claimant's symptoms. See Light v. Social Sec.
12 Admin., 119 F.3d 789, 792 (9th Cir. 1997); Fair v. Bowen, 885 F.2d 597, 604 n. 5 (9th Cir. 1989).

13 Because there was no evidence of malingering, the ALJ was required to articulate specific, clear and
14 convincing reasons to support his negative credibility finding. The ALJ gave the following reasons for
15 rejecting the alleged severity of plaintiff's subjective symptoms: (1) her diagnosis of Parkinson's disease
16 was made by a physician's assistant, not by a physician; (2) there was "no objective evidence" to support
17 plaintiff's allegation that she has pain all over her body; (3) the internal medical examination by Dr. Siciarz
18 showed that plaintiff had "very few problems"; (4) plaintiff "is under a lot of financial pressure as her
19 husband is unemployed"; and (5) plaintiff alleges "very little activity of daily living other than watching
20 television all day." [AR 24].

21 The ALJ's first reason is not clear and convincing because he misapplied the "acceptable medical
22 source" standard in this context. The Commissioner "will consider all of the available evidence in the
23 individual's case record." SSR 06-03p, 2006 WL 2329939, at *1. Evidence from an "acceptable medical
24 source," such as a licensed physician or psychologist, is required in three circumstances: (a) to establish a
25 "medically determinable impairment"; (b) to provide medical opinion evidence; and (c) to be considered
26 a treating source whose medical opinions may be entitled to controlling weight. SSR 06-03p, 2006 WL
27 2329939, at *1-*2. The ALJ is, however, authorized to use information in the record from "other sources,"
28 such as a nurse practitioner or physician's assistant, to show "the severity of the individual's impairment(s)

1 and how it affects the individual's ability to function." SSR 06-03p, 2006 WL 2329939, at *1-*2; see 20
2 C.F.R. §§ 404.1508, 404.1513, 416.908, 416.913. The Commissioner has explained that

3 [w]ith the growth of managed health care in recent years and the emphasis on containing
4 medical costs, medical sources who are not "acceptable medical sources," such as nurse
5 practitioners, physician assistants, and licensed clinical social workers, have increasingly
6 assumed a greater percentage of the treatment and evaluation functions previously handled
7 primarily by physicians and psychologists. Opinions from these medical sources, who are
8 not technically deemed "acceptable medical sources" under our rules, are important and
9 should be evaluated on key issues such as impairment severity and functional effects, along
10 with the other relevant evidence in the file.

11 SSR 06-03p, 2006 WL 2329939, at *3. The same factors that govern how opinions from acceptable medical
12 sources are weighed apply to evaluating opinion evidence from other sources. SSR 06-03p, 2006 WL
13 2329939, at *4-*5; see 20 C.F.R. §§ 404.1527(d), 416.927(d). Depending on the particular facts and
14 circumstances, the opinion of an other source may be entitled to more or less weight than the opinion of an
15 acceptable medical source. SSR 06-03p, 2006 WL 2329939, at *5; see Gomez v. Chater, 74 F.3d. 967, 970-
16 971 (9th Cir.), cert. denied, 519 U.S. 881 (1996). "For example, it may be appropriate to give more weight
17 to the opinion of a medical source who is not an 'acceptable medical source' if he or she has seen the
18 individual more often than the treating source and has provided better supporting evidence and a better
19 explanation for his or her opinion." SSR 06-03p, 2006 WL 2329939, at *5.

20 Plaintiff testified that for the past three years, she had received all of her medical treatment from
21 nurse practitioner John Batten ("NP Batten"), who worked at a county clinic. [AR 51-52]. He diagnosed
22 her with Parkinson's disease. She was waiting for an appointment with a neurologist. [AR 52]. The clinic
23 she attended was staffed by two nurse practitioners and a pediatrician, but no other physicians. [AR 56-57].
24 Plaintiff also testified that she had no medical insurance, had been paying out-of-pocket for her medical
25 care, and was in the process of applying for MISP (Medically Indigent Services Program) benefits. [AR 52-
26 53, AR 55].

27 The ALJ permissibly found that NP Batten's evidence was insufficient to establish Parkinson's
28

1 disease as a medically determinable impairment and was not a controlling treating source opinion. Since,
2 however, the ALJ found that plaintiff had severe medically determinable impairments, the ALJ was required
3 to consider the evidence from NP Batten to evaluate the severity and functional effects of those
4 impairments. In the context of evaluating the credibility of plaintiff's subjective complaints, it was error
5 for the ALJ to reject or give "little weight" to NP Batten findings and conclusions merely because he was
6 an "other source," without applying the factors used to weigh medical opinions set forth in the
7 Commissioner's regulations. See SSR 06-03p, 2006 WL 2329939, at *4-*5; 20 C.F.R. §§ 404.1527(d),
8 416.927(d).

9 The ALJ's second reason for doubting the veracity of plaintiff's subjective complaints was that there
10 was "no objective evidence" to support plaintiff's subjective complaints of pain in her hands, feet, back,
11 legs, and neck, and the third reason was that Dr. Siciarz's examination report showed "very few problems."
12 [AR 24]. The ALJ already found that plaintiff's severe medically determinable impairments could
13 reasonably be expected to cause her alleged symptoms. [AR 24]. Therefore, the ALJ's finding that the
14 objective medical evidence in the record, including Dr. Siciarz's examination findings, failed to support
15 plaintiff's pain complaints is properly understood as a finding that the objective evidence does not fully
16 corroborate the alleged severity of her pain. See Fair, 885 F.2d at 602 ("Excess pain is by definition pain
17 at a level above that supported by the medical findings . . .").

18 A lack of medical evidence corroborating the alleged severity of a claimant's subjective symptoms
19 is one reason the ALJ may consider, but it cannot form the sole basis for discounting subjective symptom
20 testimony. Burch, 400 F.3d at 681; Bunnell, 947 F.2d at 343, 345. Furthermore, the ALJ apparently gave
21 little weight to objective evidence that tended to bolster the credibility of plaintiff's subjective complaints,
22 such as evidence that she had been prescribed benzotropine, which is used to treat the symptoms of
23 Parkinson's disease as well as tremors due to other causes⁶, and Vicodin, a narcotic pain medication. Cf.
24 Osenbrock v. Apfel, 240 F.3d 1157, 1166 (9th Cir. 2001) (holding that the ALJ properly rejected the
25

26 ⁶ See United States National Library of Medicine and National Institutes of Health,
27 MedlinePlus website, "Benzotropine Mesylate Oral," available at
28 <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682155.html#why> (last accessed March 20,
2013).

1 claimant’s testimony because he did not use “Codeine or Morphine based analgesics that are commonly
2 prescribed for severe and unremitting pain”). [AR 255-259]. Standing alone, the ALJ’s finding that “no
3 objective evidence” corroborated plaintiff’s pain complaints is not sufficient to support the ALJ’s adverse
4 credibility finding.

5 The remaining two reasons cited by the ALJ for his credibility finding are not clear and convincing.
6 The ALJ said that he discredited plaintiff’s subjective complaints because she was under “a lot of financial
7 pressure” since her husband is unemployed. [See AR 24]. A person must have “limited income and
8 resources” in order to be eligible for SSI benefits in the first instance. 20 C.F.R. § 416.1100; see 42 U.S.C.
9 § 1382(a); 20 C.F.R. § 416.1205. Therefore, being under “financial pressure” is not a legitimate reason for
10 disbelieving plaintiff’s subjective allegations. Townsend v. Astrue, 2013 WL 687042, at *8 (D. Or. Feb.
11 25, 2013) (holding that the ALJ erred in using the claimant’s “financial distress as a reason to doubt his
12 credibility”); Edgar v. Astrue, 2010 WL 2730927, at *5 (D. Or. June 2, 2010) (“The ALJ may not chastise
13 a claimant for seeking disability benefits payments; such reasoning circumvents the very purpose of
14 disability benefit applications.”)(citing Ratto v. Sec’y, Dep’t of Health & Human Servs., 839 F.Supp. 1415,
15 1428 (D. Or. 1993) (holding that the ALJ erred in discounting the claimant’s “subjective complaints and
16 the corroborating testimony of her husband because of her ‘clear secondary gain motivation,’ i.e., she was
17 applying for disability benefits. By definition, every claimant who applies for Title II benefits does so with
18 the knowledge—and intent—of pecuniary gain. That is the very purpose of applying for Title II benefits.”));
19 see also Fair, 885 F.2d at 602 (noting that the ALJ’s credibility assessment is “exceptionally important in
20 excess pain cases” because “incorrect denials can leave deserving claimants, who are often in precarious
21 financial conditions, without a crucial source of income”). The ALJ failed to make any specific findings or
22 cite any evidence in the record to support an inference that plaintiff’s financial pressures caused her to be
23 untruthful in her allegations of excess pain. Cf. Gaddis v. Chater, 76 F.3d 893, 896 (8th Cir. 1996)
24 (agreeing with the ALJ that a “strong element of secondary gain” undermined the claimant’s subjective
25 testimony where, “[d]espite testifying to an inability to work because of his condition, [the claimant] at one
26 point conceded that ‘he can go out and find a minimum wage job at any time, but he is more worried about
27 the future’”). As a result, the ALJ failed “to convincingly justify his rejection of” the alleged severity of
28

1 plaintiff's subjective symptoms. Fair, 885 F.2d at 602.

2 The ALJ also indicated that he disbelieved plaintiff's subjective complaints because plaintiff
3 "alleges very little activity of daily living other than watching television all day." [AR 24]. That testimony
4 did not detract from plaintiff's credibility because it was consistent with her subjective complaints, and the
5 ALJ made no finding that "the ability to perform those daily activities translated into the ability to perform
6 appropriate work." Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th Cir. 1990).

7 The Commissioner contends that the ALJ permissibly discounted plaintiff's subjective complaints
8 because she "did not see a neurologist, nor was she diagnosed by a medically recognized source," and that
9 her "unexplained failure to have neurological tests, or any tests for Parkinson's disease" was evidence of
10 "minimal or conservative treatment" that supported his credibility finding. [JS 19; AR 23-24]. The
11 "unexplained, or inadequately explained failure to seek treatment or follow a prescribed course of treatment"
12 is relevant to assessing the credibility of a claimant's subjective complaints. Bunnell, 947 F.2d at 346. In
13 light of plaintiff's uncontroverted testimony that she lacked medical insurance, paid out-of-pocket for
14 treatment (while, as the ALJ noted, being under "a lot of financial pressure"), could not afford oxygen
15 treatment that had been prescribed, and was applying for MISP benefits, plaintiff's failure to obtain
16 additional neurological evaluation and treatment was neither unexplained nor inadequately explained.
17 Therefore, the Commissioner's argument lacks merit.

18 For all of these reasons, the ALJ did not articulate legally sufficient reasons for rejecting the alleged
19 severity of plaintiff's subjective complaints of pain and functional limitations.
20

21 **Lay witness statements**

22 Plaintiff contends that the ALJ erred in failing to discuss the written third party "Function Report"
23 from plaintiff's friend, Kathy Barger. [JS 11-14].

24 Under Ninth Circuit law, "[t]he ALJ is required to account for all lay witness testimony in the
25 discussion of his or her findings." Robbins, 466 F.3d at 885. "[W]here the ALJ's error lies in a failure to
26 properly discuss competent lay testimony favorable to the claimant, a reviewing court cannot consider the
27 error harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the
28

1 testimony, could have reached a different disability determination.” Stout, 454 F.3d at 1056.

2 The ALJ erred in completely ignoring Ms. Barger’s statement regarding plaintiff’s functional
3 limitations, which was consistent with plaintiff’s improperly discredited testimony. [AR 121-128].
4 Moreover, the ALJ’s error was not harmless because several of the limitations contained in Ms. Barger’s
5 report were not included in plaintiff’s RFC. [AR 23]. As a result, the court cannot conclude that no
6 reasonable ALJ, when fully crediting Mr. Barger’s statements, could have reached a different disability
7 determination.

8 **Remedy**

9
10 The choice whether to reverse and remand for further administrative proceedings, or to reverse and
11 simply award benefits, is within the discretion of the court. See Harman v. Apfel, 211 F.3d 1172, 1178 (9th
12 Cir.) (holding that the district court’s decision whether to remand for further proceedings or payment of
13 benefits is discretionary and is subject to review for abuse of discretion), cert. denied, 531 U.S. 1038
14 (2000). The Ninth Circuit has adopted the “Smolen test” to determine whether evidence should be credited
15 and the case remanded for an award of benefits:

- 16 (1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2)
17 there are no outstanding issues that must be resolved before a determination of disability can
18 be made, and (3) it is clear from the record that the ALJ would be required to find the
19 claimant disabled were such evidence credited.

20 Harman, 211 F.3d at 1178 (quoting Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996)). Where the
21 Smolen test is satisfied with respect to the evidence in question, “then remand for determination and
22 payment of benefits is warranted regardless of whether the ALJ might have articulated a justification for
23 rejecting” the improperly discredited evidence. Harman, 211 F.3d at 1179; Varney v. Sec’y of Health &
24 Human Servs., 859 F.2d 1396, 1400-1401 (9th Cir. 1988).

25 The appropriate remedy in this case is a remand for further administrative proceedings because it
26 is not clear from the record that the ALJ would be required to award benefits if plaintiff’s and Ms. Barger’s
27 testimony were credited. On remand, the ALJ shall take appropriate steps to develop the record, conduct
28

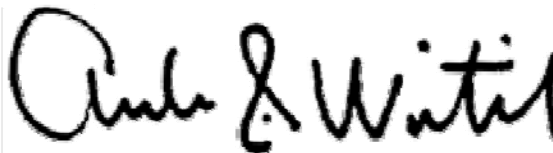
1 a supplemental hearing, and issue a new decision that applies the correct legal principles and includes a
2 complete evaluation of the medical evidence and testimony of record. See Bunnell v. Barnhart, 336 F.3d
3 1112, 1115-1116 (9th Cir. 2003) (applying the Smolen test to hold that while the ALJ did not properly reject
4 the opinions of the treating physicians or the claimant's subjective complaints and lay witness testimony,
5 several "outstanding issues" remain to be resolved, including whether, according to a vocational expert,
6 there was alternative work the claimant could perform).⁷

7
8 **Conclusion**

9 For the reasons stated above, the Commissioner's decision is **reversed**, and the case is **remanded**
10 for further administrative proceedings consistent with this memorandum of decision

11 **IT IS SO ORDERED.**

12 March 28 , 2013



13
14 ANDREW J. WISTRICH
15 United States Magistrate Judge
16
17
18
19
20
21
22
23
24
25

26
27 ⁷ This disposition makes it unnecessary to consider separately plaintiff's remaining contention
28 that the ALJ erred in rejecting the diagnosis of Parkinson's disease. [JS 4-6, 10]. On remand, the
ALJ shall reevaluate the medical evidence and make appropriate findings with respect to all of
plaintiff's impairments that are supported by the record.