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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JUDY TATE,)	Case No. CV 12-3557-MLG
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the)	
Social Security)	
Administration,)	
)	
Defendant.)	
)	

Plaintiff Judy Tate seeks judicial review of the Commissioner's final decision denying her application for disability insurance benefits ("DIB"). For the reasons stated below, the decision of the Commissioner is reversed, and the matter is remanded for further proceedings consistent with this opinion.

I. Background

Plaintiff was born on February 11, 1955, and was 53 years old at the time she filed her application for benefits. (Administrative Record ("AR") at 100, 132.) She completed two years of college and has relevant work experience in various positions in a senior citizen's community, as

1 well as positions as a limousine driver, hotel front desk clerk and
2 retail sales clerk. (AR at 138, 141.) Plaintiff filed her benefits
3 application on February 25, 2008, alleging disability beginning March
4 15, 2005, due to carpal tunnel syndrome and impairments of the neck, low
5 back, shoulder and bilateral knee. (AR at 33, 137.)

6 Plaintiff's application was denied initially on April 23, 2008, and
7 upon reconsideration on June 25, 2008. (AR at 102-105, 107-111.) An
8 administrative hearing was held on August 25, 2009, before
9 Administrative Law Judge ("ALJ") Mary Everstine. Plaintiff, represented
10 by counsel, testified, as did a Vocational Expert ("VE"). (AR at 81-99.)

11 On October 8, 2009, the ALJ issued an unfavorable decision. (AR at
12 28-37.) She found that Plaintiff had not engaged in substantial gainful
13 activity since the disability onset date. (AR at 33.) The ALJ further
14 found that the medical evidence established that Plaintiff suffered from
15 the following severe impairments: degenerative disc disease, disc
16 bulging and spondyloarthritic changes, cervical spine; degenerative
17 changes, bilateral knees; and mild carpal tunnel syndrome. (Id.)

18 However, the ALJ determined that Plaintiff's impairments did not
19 meet, or were not medically equal to, one of the listed impairments in
20 20 C.F.R., Part 404, Subpart P, Appendix 1. (AR at 35.) The ALJ
21 determined that Plaintiff retained the residual functional capacity
22 ("RFC") to "perform light work as defined in 20 C.F.R. 404.1567(b)
23 except further limited to only: occasional climbing, stooping, kneeling,
24 crouching, and crawling; occasional above the shoulder reaching; and no
25 power gripping or grasping." (Id.) The ALJ found that Plaintiff was
26 capable of performing her past relevant work as an activities director.
27 (AR at 36.) Therefore, the ALJ concluded that Plaintiff was not disabled
28 within the meaning of the Social Security Act. See 20 C.F.R. §

1 416.920(f). (Id.)

2 On June 17, 2011, the Appeals Council denied review. However, on
3 February 28, 2012, the Appeals Council set aside its earlier decision
4 but again denied review. (AR at 1-4.) Plaintiff then timely commenced
5 this action for judicial review. On September 10, 2012, the parties
6 filed a Joint Stipulation ("Joint Stip.") of disputed facts and issues.
7 Plaintiff contends that the ALJ erred by: (1) improperly evaluating
8 Plaintiff's RFC and her ability to perform her past relevant work at
9 step 4 of the sequential process; (2) improperly rejecting the opinion
10 of Plaintiff's treating physician; (3) failing to properly determine at
11 step 3 whether Plaintiff's impairments met or equaled a listed
12 impairment; and (4) failing to perform a proper credibility analysis.
13 (Joint Stip. at 4.) Plaintiff seeks reversal of the Commissioner's
14 denial of her applications and payment of benefits or, in the
15 alternative, remand for a new administrative hearing. (Joint Stip. at
16 52.) The Commissioner requests that the ALJ's decision be affirmed.
17 (Joint Stip. at 52-53.)

18 After reviewing the parties' respective contentions and the record
19 as a whole, the Court finds Plaintiff's contention regarding the ALJ's
20 failure to properly evaluate Plaintiff's credibility to be meritorious
21 and remands this matter for further proceedings consistent with this
22 opinion.¹

23
24 **II. Standard of Review**

25 Under 42 U.S.C. § 405(g), a district court may review the
26 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
27 decision must be upheld unless "the ALJ's findings are based on legal

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¹ The Court does not reach the remaining claims of error and will not decide whether these issues would independently warrant relief. Upon remand, the ALJ may wish to consider the other issues raised by Plaintiff.

1 error or are not supported by substantial evidence in the record as a
2 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Batson v.*
3 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Parra*
4 *v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means
5 such evidence as a reasonable person might accept as adequate to support
6 a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Widmark*
7 *v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more than a
8 scintilla, but less than a preponderance. *Robbins v. Soc. Sec. Admin.*,
9 466 F.3d 880, 882 (9th Cir. 2006). To determine whether substantial
10 evidence supports a finding, the reviewing court "must review the
11 administrative record as a whole, weighing both the evidence that
12 supports and the evidence that detracts from the Commissioner's
13 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If
14 the evidence can support either affirming or reversing the ALJ's
15 conclusion," the reviewing court "may not substitute its judgment for
16 that of the ALJ." *Robbins*, 466 F.3d at 882.

17 18 **III. Discussion**

19 Plaintiff contends that the ALJ erred by failing to provide clear
20 and convincing reasons for discounting Plaintiff's subjective symptom
21 testimony. (Joint Stip. at 45.) To determine whether a claimant's
22 testimony about subjective pain or symptoms is credible, an ALJ must
23 engage in a two-step analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th
24 Cir. 2009) (citing *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th
25 Cir. 2007)). First, the ALJ must determine whether the claimant has
26 presented objective medical evidence of an underlying impairment which
27 could reasonably be expected to produce the alleged pain or other
28 symptoms. *Lingenfelter*, 504 F.3d at 1036. "[O]nce the claimant produces

1 objective medical evidence of an underlying impairment, an adjudicator
2 may not reject a claimant's subjective complaints based solely on a lack
3 of objective medical evidence to fully corroborate the alleged severity
4 of pain." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en
5 banc). To the extent that an individual's claims of functional
6 limitations and restrictions due to alleged pain is reasonably
7 consistent with the objective medical evidence and other evidence in the
8 case, the claimant's allegations will be credited. SSR 96-7p, 1996 WL
9 374186 at *2 (explaining 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4)).²

10 Unless there is affirmative evidence showing that the claimant is
11 malingering, the ALJ must provide specific, clear and convincing reasons
12 for discrediting a claimant's complaints. *Robbins*, 466 F.3d at 883.
13 "General findings are insufficient; rather, the ALJ must identify what
14 testimony is not credible and what evidence undermines the claimant's
15 complaints." *Reddick*, 157 F.3d at 722 (quoting *Lester v. Chater*, 81 F.3d
16 821, 834 (9th Cir. 1996)). The ALJ must consider a claimant's work
17 record, observations of medical providers and third parties with
18 knowledge of claimant's limitations, aggravating factors, functional
19 restrictions caused by symptoms, effects of medication, and the
20 claimant's daily activities. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 &
21 n.8 (9th Cir. 1996). The ALJ may also consider an unexplained failure to
22 seek treatment or follow a prescribed course of treatment and employ
23 other ordinary techniques of credibility evaluation. *Id.* (citations
24 omitted).

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26 ² "The Secretary issues Social Security Rulings to clarify the
27 Secretary's regulations and policy Although SSRs are not published
28 in the federal register and do not have the force of law, [the Ninth
Circuit] nevertheless give[s] deference to the Secretary's
interpretation of its regulations." *Bunnell*, 947 F.2d at 346 n.3.

1 Plaintiff testified at the administrative hearing to the following
2 symptoms and functional limitations: she cannot sit and/or stand for
3 longer than 45 minutes to one hour due to pain in her lower back; she
4 cannot lift more than 15 pounds; she has constant pain in her back,
5 neck, knee, and hand; she has severe pain which requires her to stay in
6 bed usually between one and four days per week. (AR at 89-94.)

7 The ALJ found that Plaintiff's medical impairments could reasonably
8 be expected to produce the alleged symptoms. (AR at 36.) The ALJ was
9 therefore required to provide specific, clear and convincing reasons for
10 rejecting Plaintiff's subjective allegations of pain and functional
11 limitations. The ALJ provided the following reasons for finding
12 Plaintiff's testimony not fully credible:

13 While the claimant seemed very sincere at the hearing,
14 there is no objective evidence which would support the
15 severity of the limitations alleged.

16 In terms of the claimant's alleged disabling pain, it is
17 notable that the claimant is not taking any prescription
18 opiates or narcotics for her pain. (Citing AR at 185.) Office
19 visit records also show that the claimant was last prescribed
20 Vicodin for knee pain in July 2008. (Citing AR at 328.) After
21 that time, the treatment records on a whole show that the
22 claimant's symptoms appeared to be in control, as she
23 infrequently visited her physician and reported that she was
24 doing well. (Citing AR at 302.)

25 (AR at 36.)

26 The reasons put forth by the ALJ for discrediting Plaintiff's
27 testimony are not supported by substantial evidence in the record.
28 First, the ALJ's finding that there is no objective medical evidence

1 corroborating Plaintiff's subjective pain testimony is not, without
2 more, a sufficient reason for discrediting Plaintiff. See *Burch v.*
3 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (noting that "lack of
4 medical evidence cannot form the sole basis for discounting pain
5 testimony"). Although "the medical evidence is a relevant factor in
6 determining the severity of the claimant's pain and its disabling
7 effects," once a claimant produces objective medical evidence of an
8 underlying impairment, an ALJ "may not reject a claimant's subjective
9 complaints based solely on lack of objective medical evidence to fully
10 corroborate the alleged severity of pain." *Rollins v. Massanari*, 261
11 F.3d 853, 856-57 (9th Cir. 2001).

12 The other reasons given by the ALJ for discrediting Plaintiff's
13 subjective symptom testimony - she was not taking any prescription
14 opiates or narcotics for her pain, she was last prescribed Vicodin in
15 July of 2008, and she reported doing well - are undermined by the
16 medical evidence which Plaintiff later submitted to the Appeals Council.
17 After the administrative hearing, Plaintiff submitted medical records
18 from Santa Barbara County Public Health and other medical providers (AR
19 at 388-468) to the Appeals Council, which considered the records and
20 "found that this information [did] not provide a basis for changing the
21 Administrative Law Judge's decision." (AR at 1-6.)

22 The Ninth Circuit Court of Appeals recently held that a district
23 court must consider evidence reviewed by the Appeals Council in
24 determining whether the ALJ's decision was supported by substantial
25 evidence and free from legal error. See *Brewes v. Comm'r of Soc. Sec.*
26 *Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012) ("[W]hen the Appeals Council
27 considers new evidence in deciding whether to review a decision of the
28 ALJ, that evidence becomes part of the administrative record, which the

1 district court must consider when reviewing the Commissioner's final
2 decision for substantial evidence."). The *Brewes* Court also determined
3 that a plaintiff is not required to demonstrate that these new medical
4 records meet the materiality standard of 42 U.S.C. § 405(g)³ because that
5 standard applies only to new evidence that is not part of the
6 administrative record and that is presented in the first instance to the
7 district court. *Id.* at 1164. Rather, "evidence submitted to and
8 considered by the Appeals Council is not new but rather part of the
9 administrative record properly before the district court." *Id.*

10 Here, the evidence provided to the Appeals Council after the
11 administrative hearing contradicts the ALJ's reasons for finding
12 Plaintiff not fully credible. As noted by Plaintiff, the records show
13 that, contrary to the ALJ's finding, Plaintiff was prescribed Vicodin
14 for pain after July 2008. (See AR at 390, 403, 407, 410.) Plaintiff was
15 also prescribed Flexeril (AR at 401, 409, 410) and Salsalate.⁴ (AR at
16 409, 422.) As Plaintiff also notes, the ALJ's conclusion that Plaintiff
17 was "doing well" since July 2008 is belied by the medical records
18 submitted to the Appeals Council, which show Plaintiff consistently
19 complaining of neck and back pain for which she had multi-level fusion
20 surgery in November 2010.

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22 ³ Section 405(g) provides in relevant part as follows: "The
23 [district] court may ... at any time order additional evidence to be
24 taken before the Commissioner, ... but only upon a showing that there is
25 new evidence which is material and that there is good cause for the
failure to incorporate such evidence into the record in a prior
proceeding."

26 ⁴ Flexeril is used to relax muscles and relieve pain and discomfort
27 caused by strains and other muscle injuries. Salsalate is used to
28 relieve pain, tenderness, swelling and stiffness caused by rheumatoid
arthritis, osteoarthritis, and other conditions that cause swelling.
<http://www.nlm.nih.gov>.

1 In support of the argument that the ALJ properly addressed
2 Plaintiff's subjective complaints, the Commissioner points to other
3 evidence in the record which allegedly discredits Plaintiff's
4 statements. For example, the Commissioner argues that the ALJ noted at
5 various points in the hearing decision that Plaintiff was injured at
6 work in 2003 but continued to work until 2005; that she had relatively
7 conservative treatment, primarily consisting of medication refills; that
8 she did not go to physical therapy because she did not have a car; and
9 that she missed various medical appointments. (Joint Stip. at 48-49,
10 citing AR at 33-35.) However, even assuming that these would be
11 sufficient reasons for the ALJ to reject Plaintiff's subjective
12 complaints, the ALJ did not clearly and explicitly rely on these facts
13 in support of her credibility determination. It would be error for this
14 Court to affirm the ALJ's decision based upon reasons that the ALJ did
15 not discuss. *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003).

16 Therefore, in light of the evidence before the ALJ and the
17 additional evidence submitted to the Appeals Council, the Court cannot
18 conclude that the ALJ's credibility determination is supported by
19 substantial evidence, or that any error was harmless.

20 21 **IV. Conclusion**

22 The decision whether to remand for further proceedings is within
23 this Court's discretion. *Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th
24 Cir. 2000). Where no useful purpose would be served by further
25 administrative proceedings, or where the record has been fully
26 developed, it is appropriate to exercise this discretion to direct an
27 immediate award of benefits. *Id.* at 1179 ("[T]he decision of whether to
28 remand for further proceedings turns upon the likely utility of such

1 proceedings."); *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004).
2 However, where there are outstanding issues that must be resolved before
3 a determination of disability can be made, and it is not clear from the
4 record that the ALJ would be required to find the claimant disabled if
5 all the evidence were properly evaluated, remand is appropriate.
6 *Bunnell v. Barnhart*, 336 F.3d 1112, 1115-16 (9th Cir. 2003); see also
7 *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding case
8 for reconsideration of credibility determination).

9 Here, the ALJ did not review and evaluate the medical evidence
10 submitted by Plaintiff to the Appeals Council after the administrative
11 hearing when assessing Plaintiff's credibility. Accordingly, the case is
12 remanded for further proceedings consistent with this opinion and order.

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14 DATED: September 18, 2012

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16 MARC L. GOLDMAN
17 Marc L. Goldman
18 United States Magistrate Judge
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