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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CONSTANCE KRISTEN CHONG,  
Plaintiff,  
v.  
CAROLYN W. COLVIN, Acting  
Commissioner of Social Security  
Administration,  
Defendant.

Case No. CV 13-1044-SP  
  
MEMORANDUM OPINION AND  
ORDER

**I.**

**INTRODUCTION**

On February 19, 2013, plaintiff Constance Kristen Chong filed a complaint against the Commissioner of the Social Security Administration (“Commissioner”), seeking a review of a denial of a period of disability and disability insurance benefits (“DIB”) and supplemental security income (“SSI”). Both plaintiff and defendant have consented to proceed for all purposes before the assigned Magistrate Judge pursuant to 28 U.S.C. § 636(c). The court deems the matter suitable for adjudication without oral argument.

1 Plaintiff presents three disputed issues for decision: (1) whether the  
2 Administrative Law Judge (“ALJ”) properly considered the opinion of Dr. Herbert  
3 Chin; (2) whether the ALJ properly considered plaintiff’s credibility; and  
4 (3) whether the ALJ erred in his residual functional capacity (“RFC”)  
5 determination. Memorandum in Support of Plaintiff’s Complaint (“P. Mem.”) at  
6 4-12. Memorandum in Support of Defendant’s Answer (“D. Mem.”) at 9-15.

7 Having carefully studied, inter alia, the parties’s moving papers, the  
8 Administrative Record (“AR”), and the decision of the ALJ, the court concludes  
9 that, as detailed herein, the ALJ improperly rejected the opinion of plaintiff’s  
10 treating physician without providing specific and legitimate reasons supported by  
11 substantial evidence for doing so, and also failed to properly consider plaintiff’s  
12 credibility. Therefore, the court remands this matter to the Commissioner in  
13 accordance with the principles and instructions enunciated in this Memorandum  
14 Opinion and Order.

## 15 II.

### 16 **FACTUAL AND PROCEDURAL BACKGROUND**

17 Plaintiff, who was fifty-three years old on December 1, 2009, her alleged  
18 onset date of disability, is a college graduate. AR at 83, 230, 270. Plaintiff has  
19 past relevant work as a medical transcriber. *Id.* at 83.

20 On December 23, 2009, plaintiff filed applications for a period of disability,  
21 DIB, and SSI due to bipolar disease, depression, anxiety, panic disorder, and  
22 fibromyalgia. *Id.* at 229, 270. The Commissioner denied plaintiff’s applications  
23 initially and upon reconsideration, after which she filed a request for a hearing. *Id.*  
24 at 105-13, 117-21.

25 On April 5, 2011, plaintiff appeared at a hearing before ALJ James  
26 Goodman. *Id.* at 92-99. Plaintiff’s counsel withdrew from representation at the  
27 onset of the hearing. *Id.* at 93. Although plaintiff twice expressed that she wished  
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1 to proceed on her own, ALJ Goodman continued the hearing in order for plaintiff  
2 to retain other counsel. *Id.* at 95, 98.

3 On July 7, 2011, plaintiff, appearing without counsel, testified at a hearing  
4 before ALJ Milan Dostal. *Id.* at 65-91. The ALJ also heard testimony from Susan  
5 Allison, a vocational expert. *Id.* at 83-88. On August 12, 2011, the ALJ denied  
6 plaintiff's claim for benefits. *Id.* at 30-38.

7 Applying the well-known five-step sequential evaluation process, the ALJ  
8 found, at step one, that plaintiff had not engaged in substantial gainful activity  
9 since her alleged onset date of disability, December 1, 2009. *Id.* at 32.

10 At step two, the ALJ found that plaintiff suffered from the following severe  
11 impairments: fibromyalgia; bipolar II disorder; anxiety; mood disorder; and  
12 hypothyroidism under treatment. *Id.*

13 At step three, the ALJ found that plaintiff's impairments, whether  
14 individually or in combination, did not meet or medically equal one of the listed  
15 impairments set forth in 20 C.F.R. part 404, Subpart P, Appendix 1 (the  
16 "Listings"). *Id.* at 33.

17 The ALJ then assessed plaintiff's RFC,<sup>1</sup> and determined that she had the  
18 RFC to perform medium work with the following limitations: lift/carry fifty  
19 pounds occasionally and twenty-five pounds frequently; and sit/stand/walk six  
20 hours in an eight-hour workday. *Id.* The ALJ also determined that plaintiff had  
21 pain in the neck, back, shoulder, hand, wrist, knee, and hips that was moderate in  
22 nature, but could be controlled with medication without significant adverse side  
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24 <sup>1</sup> Residual functional capacity is what a claimant can do despite existing  
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152,  
26 1155-56 n.5-7 (9th Cir. 1989). "Between steps three and four of the five-step  
27 evaluation, the ALJ must proceed to an intermediate step in which the ALJ  
28 assesses the claimant's residual functional capacity." *Massachi v. Astrue*, 486  
F.3d 1149, 1151 n.2 (9th Cir. 2007).

1 effects. *Id.* Finally, the ALJ determined that plaintiff’s bipolar disorder,  
2 depression, anxiety, anger, and aggression would only have a slight effect on her  
3 ability to maintain attention, concentration, and memory. *Id.*

4 The ALJ found, at step four, that plaintiff was capable of performing her  
5 past relevant work as a medical transcriber. *Id.* at 37. Consequently, the ALJ  
6 concluded that plaintiff did not suffer from a disability as defined by the Social  
7 Security Act. *Id.* at 38.

8 Plaintiff filed a timely request for review of the ALJ’s decision, which was  
9 denied by the Appeals Council. *Id.* at 1-3. The ALJ’s decision stands as the final  
10 decision of the Commissioner.

### 11 III.

#### 12 STANDARD OF REVIEW

13 This court is empowered to review decisions by the Commissioner to deny  
14 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security  
15 Administration must be upheld if they are free of legal error and supported by  
16 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001)  
17 (as amended). But if the court determines that the ALJ’s findings are based on  
18 legal error or are not supported by substantial evidence in the record, the court  
19 may reject the findings and set aside the decision to deny benefits. *Auckland v.*  
20 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d  
21 1144, 1147 (9th Cir. 2001).

22 “Substantial evidence is more than a mere scintilla, but less than a  
23 preponderance.” *Auckland*, 257 F.3d at 1035. Substantial evidence is such  
24 “relevant evidence which a reasonable person might accept as adequate to support  
25 a conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276  
26 F.3d at 459. To determine whether substantial evidence supports the ALJ’s  
27 finding, the reviewing court must review the administrative record as a whole,  
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1 “weighing both the evidence that supports and the evidence that detracts from the  
2 ALJ’s conclusion.” *Mayes*, 276 F.3d at 459. The ALJ’s decision “cannot be  
3 affirmed simply by isolating a specific quantum of supporting evidence.”  
4 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th  
5 Cir. 1998)). If the evidence can reasonably support either affirming or reversing  
6 the ALJ’s decision, the reviewing court “may not substitute its judgment for that  
7 of the ALJ.” *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.  
8 1992)).

#### 9 IV.

#### 10 DISCUSSION

##### 11 A. The ALJ Failed to Provide Specific and Legitimate Reasons for 12 Rejecting the Opinion of a Treating Physician

13 Plaintiff argues that the ALJ improperly rejected the opinion of his treating  
14 psychiatrist, Dr. Herbert Chin. P. Mem. at 4-7. Specifically, plaintiff contends  
15 the ALJ’s reason for rejecting Dr. Chin’s opinion – inconsistencies with the record  
16 as a whole, including medical evidence and plaintiff’s daily activities – was not  
17 specific and legitimate and supported by substantial evidence. *Id.* The court  
18 agrees.

19 In determining whether a claimant has a medically determinable  
20 impairment, among the evidence the ALJ considers is medical evidence. 20  
21 C.F.R. §§ 404.1527(b), 416.927(b). In evaluating medical opinions, the  
22 regulations distinguish among three types of physicians: (1) treating physicians;  
23 (2) examining physicians; and (3) non-examining physicians. 20 C.F.R.  
24 §§ 404.1527(c), (e), 416.927(c), (e); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.  
25 1995) (as amended). “Generally, a treating physician’s opinion carries more  
26 weight than an examining physician’s, and an examining physician’s opinion  
27 carries more weight than a reviewing physician’s.” *Holohan v. Massanari*, 246  
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1 F.3d 1195, 1202 (9th Cir. 2001); 20 C.F.R. §§ 404.1527(c)(1)-(2), 416.927(c)(1)-  
2 (2). The opinion of the treating physician is generally given the greatest weight  
3 because the treating physician is employed to cure and has a greater opportunity to  
4 understand and observe a claimant. *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th  
5 Cir. 1996); *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

6 Nevertheless, the ALJ is not bound by the opinion of the treating physician.  
7 *Smolen*, 80 F.3d at 1285. If a treating physician's opinion is uncontradicted, the  
8 ALJ must provide clear and convincing reasons for giving it less weight. *Lester*,  
9 81 F.3d at 830. If the treating physician's opinion is contradicted by other  
10 opinions, the ALJ must provide specific and legitimate reasons supported by  
11 substantial evidence for rejecting it. *Id.* Likewise, the ALJ must provide specific  
12 and legitimate reasons supported by substantial evidence in rejecting the  
13 contradicted opinions of examining physicians. *Id.* at 830-31. The opinion of a  
14 non-examining physician, standing alone, cannot constitute substantial evidence.  
15 *Widmark v. Barnhart*, 454 F.3d 1063, 1067 n.2 (9th Cir. 2006); *Morgan v.*  
16 *Comm'r*, 169 F.3d 595, 602 (9th Cir. 1999); *see also Erickson v. Shalala*, 9 F.3d  
17 813, 818 n.7 (9th Cir. 1993).

18 **1. Dr. Chin**

19 Dr. Chin, a psychiatrist, treated plaintiff from April 7, 2010 through at least  
20 June 30, 2011.<sup>2</sup> *See* AR at 400-02, 604. Dr. Chin diagnosed plaintiff with bipolar  
21 II disorder. *Id.* at 610. During the sessions, Dr. Chin observed that plaintiff had  
22 pressured and soft speech, anxiety, depression, and mood swings. *See id.* at 397-

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24 <sup>2</sup> The record appears to be missing treatment notes. In the April 7, 2010  
25 certification, Dr. Chin indicated that his next appointment with plaintiff was May  
26 26, 2010. AR at 446. In a letter opinion dated June 30, 2011, Dr. Chin stated that  
27 he last examined plaintiff on June 21, 2011. *Id.* at 604. The record does not  
28 contain the treatment notes for the May 26, 2010 appointment or any appointments  
after January 19, 2011.

1 99, 401, 421. Dr. Chin also noted that, on multiple occasions, plaintiff reported  
2 that the medication was not helping. *See id.* at 397, 399, 425. On January 5, 2011,  
3 Dr. Chin noted that plaintiff was stable, but then two weeks later Dr. Chin noted  
4 plaintiff had a meltdown because she lost her prescription. *Id.* at 423, 425.

5 The record includes three opinions from Dr. Chin. In a California disability  
6 certification form dated April 7, 2010, Dr. Chin opined that plaintiff would not be  
7 able to perform her regular and customary work until December 31, 2010 due to  
8 mood swings, inability to concentrate and complete tasks, and episodes of  
9 decompensation. *Id.* at 446. In a Release to Return to Work form dated July 28,  
10 2010, Dr. Chin restricted plaintiff to two hours of work per day for three days per  
11 week. *Id.* at 445. In a June 30, 2011 opinion, Dr. Chin stated that plaintiff 's  
12 mood was labile, and she was "aggressive, angry, anxious[,] eupohric and  
13 irritable." *Id.* at 604. Dr. Chin noted that plaintiff had "extreme mood swings  
14 with inability to concentrate and finish tasks" and she decompensated easily. *Id.*  
15 at 606. Dr. Chin further opined that although plaintiff was competent to perform  
16 activities of daily living, she had difficulty coping with them. *Id.* at 608. Citing  
17 an example to support this opinion, Dr. Chin relayed an incident at Walmart, in  
18 which plaintiff kicked an employee. *Id.* at 608, 610. Dr. Chin concluded that  
19 plaintiff was unable to perform full-time employment "due to her continued  
20 impulsivity and varying mood swings combined with her agitated labile behavior,"  
21 and that she had marked restrictions in her ability to perform activities of daily  
22 living due to the physical pain from fibromyalgia, which in turn contributed to her  
23 depression. *Id.* at 612.

## 24 **2. Examining Physicians**

25 From July 1990 through 2007, plaintiff received psychiatric care for her  
26 bipolar disorder at the Asian Pacific Counseling and Treatment Center ("Center").  
27 *See id.* at 450, 459. Plaintiff stopped her treatment after the Center discontinued  
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1 seeing patients on a cash basis. *Id.* at 450. The treatment notes from the Center  
2 are difficult to read, but it appears that her medications were helping her. On  
3 October 17, 2006, plaintiff reported that it was harder and harder to concentrate at  
4 work. *Id.* at 509.

5 Dr. Eliseo Mills treated plaintiff on three occasions from October 2009  
6 through February 2010.<sup>3</sup> *See id.* at 361-62, 365-67. Dr. Mills diagnosed plaintiff  
7 with bipolar II disorder. *Id.* at 367. Dr. Mills noted that plaintiff was anxious and  
8 depressed, but the medications helped her. *Id.* at 361-62. Dr. Mills also noted that  
9 plaintiff was written up at work and did not wash. *Id.* at 361.

### 10 **3. State Agency Physicians**

11 Two State Agency physicians also provided opinions as to plaintiff's  
12 alleged mental impairment. *Id.* at 375-85, 393-94. On April 9, 2010, Dr. R.  
13 Paxton reviewed plaintiff's file and opined that she had an affective disorder, but  
14 it was not severe. *Id.* at 375, 377. Dr. Paxton further opined that plaintiff would  
15 have only one or two episodes of decompensation, and had mild limitations with  
16 respect to activities of daily living, maintaining social functioning, and  
17 maintaining concentration, persistence, or pace. *Id.* at 383. On August 2, 2010,  
18 Dr. F.L. Williams opined that plaintiff did not have a severe mental impairment.  
19 *Id.* at 393-94.

### 20 **4. The ALJ's Findings**

21 The ALJ concluded that plaintiff had the following severe mental  
22 impairments: bipolar II disorder; anxiety; and mood disorder. *Id.* at 32. The ALJ  
23 also concluded that these mental impairments, as well as plaintiff's anger and  
24 aggression, would only have a slight effect on her ability to maintain attention,  
25 concentration, and memory. *Id.* at 33. In reaching that determination, the ALJ  
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27 <sup>3</sup> From 2007 through late 2009, plaintiff's primary care physicians refilled her  
28 psychiatric medications. *See AR* at 450-454, 457.

1 gave Dr. Chin’s opinion with respect to the severity of plaintiff’s impairments  
2 “little probative weight” on the basis that his opinion was inconsistent with the  
3 record as a whole. *Id.* at 36. Specifically, the ALJ found that Dr. Chin’s opinion  
4 was inconsistent with the opinions of the examining and non-examining medical  
5 sources, and with plaintiff’s daily activities. *Id.* The ALJ erred because he failed  
6 to provide specific and legitimate reasons supported by substantial evidence for  
7 rejecting Dr. Chin’s opinion. *See Lester*, 81 F.3d at 830.

8         The first reason cited by the ALJ – that Dr. Chin’s opinion was inconsistent  
9 with his own treatment notes – was not supported by substantial evidence.<sup>4</sup> The  
10 ALJ noted that in January 2011, Dr. Chin’s notes reflect that plaintiff reported she  
11 was feeling better and the medication was helpful, but then on June 30, 2011, Dr.  
12 Chin reported that plaintiff had continued difficulty with concentration and  
13 opined that she was unable to work full-time. *Id.* at 36. Although the ALJ  
14 correctly noted that plaintiff stated on January 5, 2011 that she was feeling better  
15 and the medication was helpful, it is the only treatment note that indicated  
16 improvement and stability. *Id.* at 423. At almost every other session, plaintiff  
17 complained that she was not feeling better and the medication did not help. *See id.*  
18 at 397, 399, 425; *see also id.* at 398 (medication helped with the physical pain).  
19 Moreover, only two weeks after plaintiff reported feeling better on January 5,  
20 2011, she had a meltdown because she lost her prescription, and Dr. Chin noted  
21 that she was angry and demanding. *Id.* at 425. Although Dr. Chin’s treatment  
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24         <sup>4</sup> Although the ALJ did not specifically cite inconsistency with his own  
25 treatment notes as a reason for rejecting Dr. Chin’s opinion, the ALJ stated that he  
26 considered examining medical sources. AR at 36. Because the ALJ did not order  
27 a consultative psychiatric examination, Dr. Chin was the only treating or  
28 examining physician to provide an opinion regarding plaintiff’s mental  
impairment. As such, the court assumes that the ALJ found Dr. Chin’s opinion  
inconsistent with his own treatment notes.

1 notes lacked the detail of his June 2011 opinion, the opinion was not inconsistent  
2 with his own treatment notes.

3 In addition to disregarding most of the treatment notes, the ALJ also did not  
4 discuss Dr. Chin's July 2010 opinion (Release to Work) limiting plaintiff to two  
5 hours of work per day for three days a week. *See* AR at 445-46. Although  
6 defendant contends that the Release to Work opinion was for a two-month  
7 duration, October 2010 through December 2010 (D. Mem. at 12), nothing on the  
8 form supports defendant's claim. *See* AR at 445.

9 The second reason the ALJ cited for rejecting Dr. Chin's opinion –  
10 inconsistency with other physicians – was similarly unsupported by substantial  
11 evidence. *See Magallanes*, 881 F.2d at 751-54 (inconsistency with the medical  
12 record is a specific and legitimate reason for rejecting an opinion). The only other  
13 examining physician was Dr. Mills, who did not submit an opinion as to plaintiff's  
14 non-exertional limitations.<sup>5</sup> Dr. Mills only treated plaintiff on three occasions, and  
15 although her treatment notes indicated that plaintiff's medications helped her and  
16 had no remarkable findings, the notes also reflected that plaintiff was depressed,  
17 anxious, not washing, and was having trouble at work. *See id.* at 361-62, 365-67.  
18 Dr. Mills's notes were not necessarily inconsistent with Dr. Chin's opinion.

19 The only other physicians who contributed opinions about plaintiff's mental  
20 limitations were the State Agency physicians. Because there is no other evidence  
21 supporting their conclusions, those opinions, by themselves, cannot constitute  
22 substantial evidence. *See Widmark*, 454 F.3d at 1067 n.2; *Morgan*, 169 F.3d at  
23 602. Furthermore, it is unclear that the ALJ even credited their opinions as, in  
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25 <sup>5</sup> Dr. Concepcion A. Enriquez was a consulting internist and performed a  
26 physical examination. *See* AR at 369-72. To the extent that defendant contends  
27 that the ALJ rejected Dr. Chin's opinion regarding plaintiff's fibromyalgia, Dr.  
28 Chin did not offer an opinion as to her fibromyalgia except that the pain affected  
her sleep, which in turn contributed to her depression. *See id.* at 612.

1 contrast to the ALJ, the State Agency physicians both concluded that plaintiff did  
2 not suffer from a severe mental impairment. *See* AR at 375, 393-94.

3 Finally, the ALJ cited plaintiff's self-reported daily activities as a basis for  
4 rejecting Dr. Chin's opinion. Inconsistency between a treating physician's opinion  
5 and a claimant's daily activities may be a specific and legitimate reason for  
6 rejecting the opinion. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.  
7 2005); *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001). Plaintiff reported  
8 that she did light housework, cooked simple meals, and ran errands. AR at 274.  
9 Plaintiff also reported that she could read magazines but not books, watched  
10 movies once a week, and ate dinner with her family once or twice a month. *Id.* at  
11 278. None of these daily or regular activities exceeded Dr. Chin's opined  
12 limitations. As for plaintiff's part-time work, as discussed *infra*, it does not appear  
13 that the amount plaintiff worked exceeded Dr. Chin's limitations either.

14 Accordingly, the ALJ failed to cite specific and legitimate reasons  
15 supported by substantial evidence for rejecting the opinion of Dr. Chin.

16 **B. The ALJ Failed to Provide Clear and Convincing Reasons for**  
17 **Discounting Plaintiff's Subjective Complaints**

18 Plaintiff contends that the ALJ failed to make a proper credibility  
19 determination. P. Mem. at 7-11. Specifically, plaintiff contends that the ALJ did  
20 not provide clear and convincing reasons that were supported by substantial  
21 evidence for discounting plaintiff's credibility. *Id.* This court agrees.

22 An ALJ must make specific credibility findings, supported by the record.  
23 Social Security Ruling 96-7p.<sup>6</sup> To determine whether testimony concerning  
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25 <sup>6</sup> "The Commissioner issues Social Security Rulings to clarify the Act's  
26 implementing regulations and the agency's policies. SSRs are binding on all  
27 components of the SSA. SSRs do not have the force of law. However, because  
28 they represent the Commissioner's interpretation of the agency's regulations, we  
give them some deference. We will not defer to SSRs if they are inconsistent with

1 symptoms is credible, an ALJ engages in a two-step analysis. *Lingenfelter v.*  
2 *Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, an ALJ must determine  
3 whether a claimant produced objective medical evidence of an underlying  
4 impairment ““which could reasonably be expected to produce the pain or other  
5 symptoms alleged.”” *Id.* at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344  
6 (9th Cir. 1991) (en banc)). Second, if there is no evidence of malingering, an  
7 “ALJ can reject the claimant’s testimony about the severity of her symptoms only  
8 by offering specific, clear and convincing reasons for doing so.” *Smolen*, 80 F.3d  
9 at 1281; *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). An ALJ may  
10 consider several factors in weighing a claimant’s credibility, including: (1)  
11 ordinary techniques of credibility evaluation such as a claimant’s reputation for  
12 lying; (2) the failure to seek treatment or follow a prescribed course of treatment;  
13 and (3) a claimant’s daily activities. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039  
14 (9th Cir. 2008); *Bunnell*, 947 F.2d at 346-47.

15 At the first step, the ALJ found that plaintiff’s medically determinable  
16 impairments could reasonably be expected to cause the symptoms alleged. AR at  
17 37. At the second step, because the ALJ did not find any evidence of malingering,  
18 the ALJ must provide clear and convincing reasons for finding plaintiff less  
19 credible. Here, the ALJ discounted plaintiff’s credibility because: (1) of “her  
20 treatment history”; (2) her symptoms were inconsistent with the objective medical  
21 evidence; and (3) she could perform a “wide range of activities of daily living,”  
22 including working part-time. *Id.* at 36. The ALJ’s reasons were not supported by  
23 substantial evidence.

24 First, the ALJ noted: “One factor affecting [plaintiff’s] credibility is her  
25 treatment history.” *Id.* But this reason is too vague to be clear and convincing.

26 \_\_\_\_\_  
27 the statute or regulations.” *Holohan v. Massanari*, 246 F.3d 1195, 1203 n.1 (9th  
28 Cir. 2001) (internal citations omitted).

1 “Treatment history” could mean a lack of treatment history, conservative  
2 treatment, or perhaps even inconsistency between plaintiff’s symptoms and the  
3 medical evidence. Assuming that the ALJ meant that plaintiff had a lack of  
4 treatment history, the evidence would not support such a reason. The record  
5 shows that plaintiff consistently sought treatment from 1990 through the present.  
6 *See id.* at 361-62, 365-67, 450-59, 604. Assuming that the ALJ meant  
7 conservative treatment, the fact that plaintiff was not hospitalized, alone, would be  
8 insufficient to find her not disabled. *See Tommasetti*, 533 F.3d at 1040  
9 (conservative treatment may be a clear and convincing reason for discounting a  
10 claimant’s credibility); *but see, e.g., Kuharski v. Colvin*, No. 12-1055, 2013 WL  
11 3766576, at \*5 (E.D. Cal. Jul. 16, 2013) (“The fact that plaintiff had not been  
12 hospitalized for a psychiatric crisis does not mean that his treatment was  
13 ‘conservative’ or that he could function in a normal working environment.”); *Finn*  
14 *v. Astrue*, No. 11-1388, 2013 WL 501661, at \*5 (C.D. Cal. Feb. 7, 2013) (lack of  
15 hospitalization was not a specific and legitimate reason to reject the ALJ’s opined  
16 mental limitations). Regardless, at a minimum the ALJ must clarify what he meant  
17 by “treatment history” for it to constitute a clear and convincing reason.

18         Second, the ALJ noted that the objective medical evidence did not support  
19 plaintiff’s claims. Here, the ALJ cited the fact that Dr. Enriquez found no pain  
20 tender points, plaintiff was able to reach six inches from the floor, and her range of  
21 motion was within normal limits in all joints other than the lumbrosacral spine and  
22 left hip, which exhibited tenderness. AR at 35-36; *see id.* at 371-72. But it is  
23 unclear how this evidence is inconsistent with plaintiff’s complaints of pain.  
24 There is no dispute that plaintiff suffers from fibromyalgia. Indeed, plaintiff twice  
25 received trigger point injections for her fibromyalgia. *See id.* at 476-78. At the  
26 hearing, plaintiff testified that she had persistent stabbing nerve pain all over, in  
27 particular in her back and knees. *Id.* at 75. She testified that her knees and hips  
28 were “very bad” and her wrist and fingers were getting tight. *Id.* at 73. Plaintiff

1 further testified that Cymbalta has helped her, but she still had good and bad days.  
2 *Id.* at 73-74. She did not testify that her range of motion was impaired. As for the  
3 lack of tender points upon examination, fibromyalgia symptoms may come and go  
4 so the absence of trigger points on one occasion does not signify lack of pain at all  
5 times.<sup>7</sup> Thus, the ALJ’s assertion that plaintiff’s symptoms were inconsistent with  
6 the objective medical evidence was not supported by substantial evidence.

7 Third, the ALJ found that plaintiff’s daily activities were inconsistent with  
8 her alleged symptoms. *Id.* at 36; *see Morgan*, 169 F.3d at 599 (a plaintiff’s ability  
9 “to spend a substantial part of [her] day engaged in pursuits involving the  
10 performance of physical functions that are transferable to a work setting” may be  
11 sufficient to discredit her). The ALJ noted plaintiff’s ability to perform light  
12 housekeeping, prepare meals, and run errands, as well as her ability to work  
13 eighteen to twenty-four hours a week, go to movies, and spend time with family.  
14 AR at 36. At the hearing, plaintiff had testified that on bad days, she stayed in bed  
15 all day, her anxiety caused her to want to get away from crowds, she could only sit  
16 for about 30 minutes to an hour at a time, and she could walk about thirty minutes  
17 at a time. *Id.* at 75-76. In a Function Report dated March 7, 2010, plaintiff  
18 reported that she did light housework, ran errands, and did two hours of  
19 transcribing work. *Id.* at 274. Plaintiff also reported difficulty concentrating and  
20 handling stress. *Id.* at 278, 280.

21 “[T]he mere fact that a plaintiff has carried on certain daily activities, such  
22 as grocery shopping, driving a car, or limited walking for exercise, does not in any  
23 way detract from her credibility as to her overall disability.” *Vertigan v. Halter*,  
24 260 F.3d 1044, 1050 (9th Cir. 2001). A claimant does not need to be “utterly  
25 incapacitated.” *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). But if a

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27 <sup>7</sup> See <http://www.mayoclinic.com/health/fibromyalgia-symptoms/AR00054>  
28 (noting that the old guidelines required tender points but the newer diagnostic  
criteria did not).

1 claimant is “able to spend a substantial part of his day engaged in pursuits  
2 involving the performance of physical functions that are transferable to a work  
3 setting, a specific finding as to this fact may be sufficient to discredit” him. *Id.*  
4 Here, plaintiff’s ability to do light housework, run errands, watch a movie, and  
5 have dinner with her family once or twice a month did not mean that she had the  
6 physical ability to work the entire work day, had the mental ability to maintain  
7 attention and concentrate the entire work day, or could deal with work stress.  
8 Likewise, her ability to conduct these daily activities was not inconsistent with her  
9 claimed symptoms.

10 Plaintiff’s ability to work part-time, however, was an activity directly  
11 transferrable to a work setting. *See Vertigan*, 260 F.3d at 1050. In an undated  
12 Work Activity Report, plaintiff indicated that she worked twenty-four hours a  
13 week, earning ten dollars an hour. AR at 260-61. In a Work Background form  
14 dated September 13, 2010, plaintiff reported that she worked eighteen hours a  
15 week. *Id.* at 443. Regardless of whether plaintiff worked eighteen or twenty-four  
16 hours a week, this evidence supported the ALJ’s finding that plaintiff was less  
17 credible.

18 The problem, however, is that plaintiff’s reported earnings contradict  
19 plaintiff’s stated hours. Plaintiff earned only \$3621.99 in 2010. *Id.* at 218. Had  
20 plaintiff been paid ten dollars an hour, then she should have only worked an  
21 average of seven hours a week. If plaintiff only worked seven hours a week, then  
22 she did not spend a substantial part of her day working as the ALJ found. There  
23 was additional evidence that plaintiff did not work 18-24 hours a week. In a letter  
24 dated January 4, 2011, plaintiff explained that in late 2009, she worked twenty-  
25 five hours a week in order to procure insurance. *Id.* at 450. This coincided with  
26 plaintiff seeking treatment from Dr. Mills and her initial application for disability.  
27 But as plaintiff’s “health deteriorated,” plaintiff became a cash patient of Dr.  
28 Chin’s instead. *Id.* This implies that by the time plaintiff sought treatment from

1 Dr. Chin, she was not working the twenty-four hours necessary to qualify for  
2 insurance benefits. Because a finding that plaintiff only worked seven hours a  
3 week as opposed to 18-24 hours a week would be consistent with Dr. Chin's work  
4 restrictions, the earnings report, and her loss of insurance, plaintiff's ability to  
5 work part-time did not constitute substantial evidence that her alleged symptoms  
6 were inconsistent with her activities.

7 Because the court is remanding the case, the ALJ should seek clarification  
8 as to how many hours plaintiff actually worked. Moreover, in discussing  
9 plaintiff's limited ability to work, Dr. Chin referred the Commissioner to copies of  
10 plaintiff's employment record, but such records were not included in the record.  
11 AR at 608. The ALJ should also obtain the referenced employment records.

12 In sum, however, the ALJ's reasons for discounting plaintiff's credibility  
13 were not clear and convincing and supported by substantial evidence.

### 14 **3. The ALJ Must Reconsider Plaintiff's RFC**

15 Plaintiff argues that the ALJ erred in his RFC determination because it was  
16 inconsistent with Dr. Chin's opinion. P. Mem. at 11-12. Because the court found  
17 that the ALJ failed to properly consider Dr. Chin's opinion, the ALJ must  
18 reconsider plaintiff's RFC after reconsidering Dr. Chin's opinion

19 **V.**

### 20 **REMAND IS APPROPRIATE**

21 The decision whether to remand for further proceedings or reverse and  
22 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
23 888 F.2d 599, 603 (9th Cir. 1989). Where no useful purpose would be served by  
24 further proceedings, or where the record has been fully developed, it is appropriate  
25 to exercise this discretion to direct an immediate award of benefits. *See Benecke*  
26 *v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d  
27 1172, 1179-80 (9th Cir. 2000) (decision whether to remand for further proceedings  
28 turns upon their likely utility). But where there are outstanding issues that must be

1 resolved before a determination can be made, and it is not clear from the record  
2 that the ALJ would be required to find a plaintiff disabled if all the evidence were  
3 properly evaluated, remand is appropriate. *See Benecke*, 379 F.3d at 595-96;  
4 *Harman*, 211 F.3d at 1179-80.

5 Here, as set out above, remand is required because the ALJ erred in failing  
6 to properly evaluate Dr. Chin's opinion and plaintiff's credibility. On remand, the  
7 ALJ shall: (1) reconsider the opinion provided by Dr. Chin regarding plaintiff's  
8 mental impairments and limitations, and either credit his opinion or provide  
9 specific and legitimate reasons supported by substantial evidence for rejecting it;  
10 (2) reconsider plaintiff's subjective complaints with respect to her impairments  
11 and the resulting limitations, and either credit plaintiff's testimony or provide clear  
12 and convincing reasons supported by substantial evidence for rejecting them; and  
13 (3) reconsider plaintiff's RFC. The ALJ shall also further develop the record as  
14 needed, which may include ordering a consultative psychiatric examination and  
15 obtaining any additional medical and employment records. The ALJ shall then  
16 proceed through steps four and five to determine what work, if any, plaintiff is  
17 capable of performing.

18 **VI.**

19 **CONCLUSION**

20 IT IS THEREFORE ORDERED that Judgment shall be entered  
21 REVERSING the decision of the Commissioner denying benefits, and  
22 REMANDING the matter to the Commissioner for further administrative action  
23 consistent with this decision.

24  
25 DATED: December 16, 2013



26  
27 SHERI PYM  
United States Magistrate Judge