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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

RICHARD CARDEN,	)	NO. CV 13-3856-E
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM OPINION</b>
	)	
CAROLYN W. COLVIN, ACTING	)	<b>AND ORDER OF REMAND</b>
COMMISSIONER OF SOCIAL SECURITY,	)	
	)	
Defendant.	)	
	)	
	)	

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS  
HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
judgment are denied and this matter is remanded for further  
administrative action consistent with this Opinion.

**PROCEEDINGS**

Plaintiff filed a complaint on June 5, 2013, seeking review of  
the Commissioner's denial of disability benefits. The parties filed a  
consent to proceed before a United States Magistrate Judge on July 11,  
2013. Plaintiff filed a motion for summary judgment on January 14,

1 2014. Defendant filed a motion for summary judgment on February 13,  
2 2014. Plaintiff filed a Reply on February 28, 2014. The Court has  
3 taken the motions under submission without oral argument. See L.R. 7-  
4 15; Minute Order, filed June 17, 2013.

5  
6 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

7  
8 Plaintiff asserts disability since June 8, 1996, based primarily  
9 on alleged mental problems (Administrative Record ("A.R.") 65-777).  
10 In the most recent administrative decision, the Administrative Law  
11 Judge ("ALJ") found Plaintiff has severe mental impairments, but also  
12 found that these impairments limit Plaintiff's work capacity only  
13 moderately (A.R. 26-27). In denying disability benefits, the ALJ  
14 deemed Plaintiff's testimony less than fully credible and rejected the  
15 opinions of Dr. John L. Perry, a treating psychiatrist (A.R. 28, 31-  
16 32). The Appeals Council considered additional evidence, but denied  
17 review (A.R. 1-5).

18  
19 **STANDARD OF REVIEW**

20  
21 Under 42 U.S.C. section 405(g), this Court reviews the  
22 Administration's decision to determine if: (1) the Administration's  
23 findings are supported by substantial evidence; and (2) the  
24 Administration used correct legal standards. See Carmickle v.  
25 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,  
26 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such  
27 relevant evidence as a reasonable mind might accept as adequate to  
28 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401

1 (1971) (citation and quotations omitted); see Widmark v. Barnhart,  
2 454 F.3d 1063, 1066 (9th Cir. 2006).

3  
4 **DISCUSSION**

5  
6 **I. The ALJ Materially Erred in the Analysis of Plaintiff's**  
7 **Credibility.**

8  
9 When an ALJ finds that a claimant's medically determinable  
10 impairments reasonably could be expected to cause the symptoms  
11 alleged, the ALJ may not discount the claimant's testimony regarding  
12 the severity of the symptoms without making "specific, cogent"  
13 findings, supported in the record, to justify discounting such  
14 testimony. Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995); see  
15 Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990); Varney v.  
16 Secretary, 846 F.2d 581, 584 (9th Cir. 1988).<sup>1</sup> Generalized,  
17 conclusory findings do not suffice. See Moisa v. Barnhart, 367 F.3d  
18 882, 885 (9th Cir. 2004) (the ALJ's credibility findings "must be  
19 sufficiently specific to allow a reviewing court to conclude the ALJ  
20 rejected the claimant's testimony on permissible grounds and did not  
21 arbitrarily discredit the claimant's testimony") (internal citations

22  
23 <sup>1</sup> In the absence of evidence of "malingering," most  
24 recent Ninth Circuit cases have applied the "clear and  
25 convincing" standard. See, e.g., Molina v. Astrue, 674 F.3d 1104  
26 (9th Cir. 2012); Taylor v. Commissioner of Social Security  
27 Admin., 659 F.3d 1228, 1234 (9th Cir. 2011); Valentine v.  
28 Commissioner, 574 F.3d 685, 693 (9th Cir. 2009); Ballard v.  
Apfel, 2000 WL 1899797, at \*2 n.1 (C.D. Cal. Dec. 19, 2000)  
(collecting cases). In the present case, the ALJ's findings are  
insufficient under either standard, so the distinction between  
the two standards (if any) is academic.

1 and quotations omitted); Holohan v. Massanari, 246 F.3d 1195, 1208  
2 (9th Cir. 2001) (the ALJ must "specifically identify the testimony  
3 [the ALJ] finds not to be credible and must explain what evidence  
4 undermines the testimony"); Smolen v. Chater, 80 F.3d 1273, 1284 (9th  
5 Cir. 1996) ("The ALJ must state specifically which symptom testimony  
6 is not credible and what facts in the record lead to that  
7 conclusion."); see also Social Security Ruling 96-7p.

8  
9 In the present case, the ALJ found that Plaintiff's "medically  
10 determinable impairments could reasonably be expected to cause the  
11 alleged symptoms" (A.R. 28). Under the above authorities, this  
12 finding mandated that the ALJ either accept Plaintiff's testimony  
13 regarding the assertedly disabling severity of the symptoms or state  
14 "specific, cogent" findings, supported in the record, to justify  
15 discounting such testimony. The ALJ appears to have rejected  
16 Plaintiff's testimony on the stated bases of: (1) the "medical  
17 evidence" (A.R. 31-32); and (2) the ALJ's perception that Plaintiff's  
18 mental health treatment has been "conservative at best" (A.R. 32).

19  
20 The "medical evidence" in itself cannot provide a legally  
21 sufficient basis for rejecting Plaintiff's credibility. A "lack of  
22 medical evidence can be a factor" in rejecting a claimant's  
23 credibility, but cannot "form the sole basis." Burch v. Barnhart, 400  
24 F.3d 676, 681 (9th Cir. 2005).

25  
26 A conservative course of treatment sometimes can justify the  
27 rejection of a claimant's testimony, at least where the testimony  
28 concerns physical problems. See, e.g., Tommasetti v. Astrue, 533 F.3d

1 1035, 1040 (9th Cir. 2008); Meanel v. Apfel, 172 F.3d 1111, 1114 (9th  
2 Cir. 1999). In the present case, however, the ALJ's description of  
3 Plaintiff's mental health treatment as "conservative at best"  
4 mischaracterizes the treatment. From at least November of 2006  
5 forward, Plaintiff has been under the continuous care of mental health  
6 professionals, including psychiatrists, clinical pharmacists, and  
7 psychiatric social workers (A.R. 356-794). This care has taken the  
8 form of frequent therapy sessions and the prescribing of psychotropic  
9 medications (id.). As another Magistrate Judge of this Court recently  
10 determined on similar facts:

11  
12 Evidence of conservative treatment, such as over-the-counter  
13 medication, can be sufficient to discount a claimant's  
14 allegations of disability. . . . Here, however, Plaintiff  
15 has been taking psychotropic medication and receiving  
16 outpatient care since 2005. Claimant does not have to  
17 undergo inpatient hospitalization to be disabled. Indeed,  
18 the Ninth Circuit has criticized the use of lack of  
19 treatment to reject mental complaints, both because mental  
20 illness is notoriously under-reported and because it is a  
21 questionable practice to chastise one with a mental  
22 impairment for the exercise of poor judgment in seeking  
23 rehabilitation. Regennitter v. Commissioner of Soc. Sec.  
24 Adm., 166 F.3d 1294, 1299-1300 (9th Cir. 1999). The ALJ's  
25 conservative treatment reason is not clear and convincing.

26  
27 Matthews v. Astrue, 2012 WL 1144423, at \*9 (C.D. Cal. April 4, 2012);  
28 see Mason v. Colvin, 2013 WL 5278932, at \*6 (E.D. Cal. Sept. 18, 2013)

1 (treatment not "conservative" where claimant took prescription  
2 antidepressants and anti-psychotic medication for almost two years  
3 and, though not hospitalized during this time, received mental health  
4 treatment by a psychiatrist and a psychiatric social worker for a 14  
5 month period); Gutierrez v. Astrue, 2010 WL 729007, at \*10 (E.D. Cal.  
6 March 1, 2010) (where plaintiff took psychotropic medication  
7 prescribed by a family practitioner, the fact that the claimant was  
8 "not being followed by a psychologist or a psychiatrist" failed to  
9 support the ALJ's rejection of the claimant's credibility); see also  
10 Nguyen v. Chater, 100 F.3d 1462, 1465 (9th Cir. 1996) ("it is a  
11 questionable practice to chastise one with a mental impairment for the  
12 exercise of poor judgment in seeking rehabilitation") (citations and  
13 quotations omitted).

14  
15 Plaintiff's prescription medications have included Zyprexa,  
16 Depakote, Geodon, Remeron, Lithium, Zoloft, Risperdal, Wellbutrin,  
17 Seroquel, Trazodone and Buspirone (A.R. 276, 295, 356, 650, 678, 694,  
18 791). Courts specifically have recognized that the prescription of  
19 several of these medications connotes mental health treatment which is  
20 not "conservative," within the meaning of social security  
21 jurisprudence. See, e.g., Gentry v. Colvin, 2013 WL 6185170, at \*12  
22 (E.D. Cal. Nov. 26, 2013) (Zyprexa); Mason v. Colvin, 2013 WL 5278932,  
23 at \*3-6 (Geodon and Seroquel); Armstrong v. Colvin, 2013 WL 3381352,  
24 at \*4-5 (C.D. Cal. July 8, 2013) (Zoloft and Seroquel); Simington v.  
25 Astrue, 2011 WL 1261298, at \*7 (D. Or. Feb. 23, 2011), adopted, 2011  
26 WL 1225581 (D. Or. March 29, 2011) (Depakote and Lithium).

27 ///

28 ///

1 Defendant appears to argue that the ALJ also stated a third  
2 reason for rejecting Plaintiff's credibility (Defendant's Motion at 8  
3 ("Further the ALJ observed that Plaintiff's subjective pain complaints  
4 and his statements concerning his daily activities were not  
5 consistent") (emphasis added)). Defendant's argument is misplaced.  
6 "Subjective pain complaints" are not at issue in the present case. In  
7 any event, it is unclear from the ALJ's decision whether the ALJ  
8 actually predicated any part of the credibility determination on any  
9 perceived inconsistency between Plaintiff's alleged mental illness  
10 symptomology and Plaintiff's admitted daily activities. The ALJ's  
11 decision mentions certain of Plaintiff's daily activities, but does so  
12 in the context of summarizing "the most recent medical evidence,"  
13 specifically the report of Dr. Levin (A.R. 32). The Court cannot  
14 uphold a credibility determination based on a reason not specifically  
15 and expressly stated by the ALJ as the reason for the credibility  
16 determination. See Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir.  
17 2003) ("Connett") (district court erred by relying on reasons for  
18 discounting claimant's testimony other than the reasons stated by the  
19 ALJ, even though the record supported the reasons on which the  
20 district court had relied); Pinto v. Massanari, 249 F.3d 840, 847 (9th  
21 Cir. 2001) (court "cannot affirm the decision of an agency on a ground  
22 that the agency did not invoke in making its decision"); Watts v.  
23 Astrue, 2012 WL 2577525, at \*8-9 (E.D. Cal. July 3, 2012) (remand  
24 required where ALJ's decision discussed the evidence potentially  
25 bearing on the claimant's credibility, but "provide[d] no discussion  
26 how this evidence impacted the ALJ's view of Plaintiff's  
27 credibility"); see also Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th  
28 Cir. 1990) ("We are wary of speculating about the basis of the ALJ's

1 conclusion. . . ."); Lewin v. Schweiker, 654 F.2d 631, 634-35 (9th  
2 Cir. 1981) (ALJ's decision should include a statement of the  
3 subordinate factual foundations on which the ALJ's ultimate factual  
4 conclusions are based, so that a reviewing court may know the basis  
5 for the decision); Coronado v. Astrue, 2011 WL 3348066, at \*8 (E.D.  
6 Cal. Aug. 2, 2011) (where the reasons for the ALJ's credibility  
7 determination were uncertain, and the determination overlapped and  
8 blended with the ALJ's discussion of the medical record, remand was  
9 appropriate).

10  
11 Assuming arguendo that the ALJ partially based the credibility  
12 determination on a perceived inconsistency between the daily  
13 activities mentioned in the ALJ's decision and Plaintiff's subjective  
14 complaints, the ALJ's credibility determination still would fail. In  
15 the context of discussing Dr. Levin's report, the ALJ mentions the  
16 following daily activities of Plaintiff: "he is able to live alone,  
17 take care of self-dressing, self-bathing and personal hygiene," and  
18 "while it is reported that [Plaintiff] had no family members or close  
19 friends, he remained capable of interacting and actually had no  
20 problems with any of the other individuals at his place of residence."  
21 Self-sufficiency in personal care and the ability to live alone in a  
22 room without having problems with other people who live in the same  
23 building<sup>2</sup> are not activities inconsistent with a claimed psychiatric  
24 inability to work at a job. A claimant does not have to be completely  
25 incapacitated to be disabled. See Fair v. Bowen, 885 F.2d 597, 603

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26  
27 <sup>2</sup> Actually, Plaintiff reported considerable problems  
28 interacting with people who lived in the same building (A.R. 510,  
624, 767, 793).



1 (9th Cir. 1989); see also Vertigan v. Halter, 260 F.3d 1044, 1049-50  
2 (9th Cir. 2001) ("the mere fact that a plaintiff has carried on  
3 certain daily activities, such as grocery shopping, driving a car, or  
4 limited walking for exercise, does not in any way detract from her  
5 credibility as to her overall disability."); Gallant v. Heckler, 753  
6 F.2d 1450, 1453-55 (9th Cir. 1984) (fact that claimant could cook for  
7 himself and family members as well as wash dishes did not preclude a  
8 finding that claimant was disabled).

9  
10 **II. The ALJ Materially Erred in the Analysis of Dr. Perry's Opinions.**

11  
12 In addition to erring in the analysis of Plaintiff's credibility,  
13 the ALJ erred in the analysis of Dr. Perry's opinions. A treating  
14 physician's opinions "must be given substantial weight." Embrey v.  
15 Bowen, 849 F.2d 418, 422 (9th Cir. 1988); see Rodriguez v. Bowen, 876  
16 F.2d 759, 762 (9th Cir. 1989) ("the ALJ must give sufficient weight to  
17 the subjective aspects of a doctor's opinion. . . . This is  
18 especially true when the opinion is that of a treating physician")  
19 (citation omitted); see also Orn v. Astrue, 495 F.3d 625, 631-33 (9th  
20 Cir. 2007) (discussing deference owed to treating physician opinions).  
21 Even where the treating physician's opinions are contradicted,<sup>3</sup> "if  
22 the ALJ wishes to disregard the opinion[s] of the treating physician  
23 he . . . must make findings setting forth specific, legitimate reasons  
24 for doing so that are based on substantial evidence in the record."

25  
26  
27 <sup>3</sup> Rejection of an uncontradicted opinion of a treating  
28 Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996); Gallant v.  
Heckler, 753 F.2d at 1454.

1 Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987) (citation,  
2 quotations and brackets omitted); see Rodriguez v. Bowen, 876 F.2d at  
3 762 ("The ALJ may disregard the treating physician's opinion, but only  
4 by setting forth specific, legitimate reasons for doing so, and this  
5 decision must itself be based on substantial evidence") (citation and  
6 quotations omitted).

7  
8 Furthermore, "[t]he ALJ has a special duty to fully and fairly  
9 develop the record and to assure that the claimant's interests are  
10 considered. This duty exists even when the claimant is represented by  
11 counsel." Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983); see  
12 also Sims v. Apfel, 530 U.S. 103, 110-11 (2000) ("Social Security  
13 proceedings are inquisitorial rather than adversarial. It is the  
14 ALJ's duty to investigate the facts and develop the arguments both for  
15 and against granting benefits . . ."); DeLorme v. Sullivan, 924 F.2d  
16 841, 849 (9th Cir. 1991) (ALJ's duty to develop the record is  
17 "especially important" "in cases of mental impairments"). As  
18 effective at the time the ALJ rendered his most recent decision,  
19 section 404.1512(e) of 20 C.F.R. provided that the Administration  
20 "will seek additional evidence or clarification from your medical  
21 source when the report from your medical source contains a conflict or  
22 ambiguity that must be resolved, the report does not contain all of  
23 the necessary information, or does not appear to be based on medically  
24 acceptable clinical and laboratory diagnostic techniques." See 20  
25 C.F.R. § 404.1512(e) (eff. through Mar. 25, 2012);<sup>4</sup> see also Smolen v.  
26 Chater, 80 F.3d at 1288 ("If the ALJ thought he needed to know the

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27  
28 <sup>4</sup> Paragraph (e) has since been deleted from this section.  
See 20 C.F.R. § 404.1512.

1 basis of Dr. Hoeflich's opinions in order to evaluate them, he had a  
2 duty to conduct an appropriate inquiry, for example, by subpoenaing  
3 the physicians or submitting further questions to them. He could also  
4 have continued the hearing to augment the record") (citations  
5 omitted). The ALJ's duty under former section 404.1512(e) is  
6 triggered "when there is ambiguous evidence or when the record is  
7 inadequate to allow for proper evaluation of the evidence." Mayes v.  
8 Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001) (citation omitted).  
9

10 In 2006, 2007 and 2008, Dr. Perry saw Plaintiff regularly and  
11 prescribed "powerful medicine," including Lithium and Geodon (A.R.  
12 433, 438). Dr. Perry opined that Plaintiff's mental problems  
13 nevertheless remained so severe as to be disabling from all employment  
14 (A.R. 433-38).  
15

16 The ALJ appears to have stated two reasons for rejecting Dr.  
17 Perry's opinions: (1) a perceived lack of "explanation" for Dr.  
18 Perry's prognosis of "chronic occupational disability" (A.R. 32); and  
19 (2) the ALJ's belief that Dr. Perry's opinions were "based on  
20 [Plaintiff's] report of a number of symptoms and signs and  
21 [Plaintiff's] report of memory limitations and concentration deficits.  
22 . . ." (A.R. 32).  
23

24 With regard to reason (1), the ALJ should have attempted to  
25 recontact Dr. Perry for further explanation. See Sims v. Apfel, 530  
26 U.S. at 110-11; Smolen v. Chater, 80 F.3d at 1288; Brown v. Heckler,  
27 713 F.2d at 443; 20 C.F.R. 404.1512(e) (eff. through March 25, 2012).  
28 With regard to reason (2), an ALJ sometimes may disregard a treating

1 physician's opinion which is based on a claimant's subjective  
2 complaints, if the ALJ properly has discounted those subjective  
3 complaints. See, e.g., Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th  
4 Cir. 2001); Fair v. Bowen, 885 F.2d at 605. As discussed above,  
5 however, the ALJ did not state sufficient reasons for discounting  
6 Plaintiff's subjective complaints. Moreover, it is unclear whether  
7 Dr. Perry based his opinions solely on Plaintiff's report of  
8 subjective symptoms or, as Plaintiff argues, on Dr. Perry's  
9 observations of Plaintiff over more than a year's time and Plaintiff's  
10 asserted failure to respond adequately to the "powerful medicine"  
11 prescribed for him (A.R. 438). Cf. Mason v. Colvin, 2013 WL 5278932,  
12 at \*7 (E.D. Cal. Sept. 18, 2013) (ALJ's decision to reject the opinion  
13 of a psychiatric social worker as having been "based primarily on  
14 Plaintiff's self-reports" reversed where "a review of the report  
15 reveals that the social worker clearly delineated symptoms he observed  
16 himself versus those symptoms that were based on Plaintiff's self-  
17 reports"). The ALJ should have attempted to determine the actual  
18 bases for Dr. Perry's opinions, rather than presuming Dr. Perry based  
19 his opinions solely on Plaintiff's self-reports.

20  
21 **III. Remand is Appropriate.**

22  
23 Because the circumstances of the case suggest that further  
24 administrative review could remedy the ALJ's errors, remand is  
25 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see  
26 Connett, 340 F.3d at 876 (remand is an option where the ALJ fails to  
27 state sufficient reasons for rejecting a claimant's excess symptom  
28 testimony); but see Orn v. Astrue, 495 F.3d at 640 (appearing,

1 confusingly, to cite Connett for the proposition that "[w]hen an ALJ's  
2 reasons for rejecting the claimant's testimony are legally  
3 insufficient and it is clear from the record that the ALJ would be  
4 required to determine the claimant disabled if he had credited the  
5 claimant's testimony, we remand for a calculation of benefits")  
6 (quotations omitted); see also Vasquez v. Astrue, 572 F.3d 586, 600-01  
7 (9th Cir. 2009) (agreeing that a court need not "credit as true"  
8 improperly rejected claimant testimony where there are outstanding  
9 issues that must be resolved before a proper disability determination  
10 can be made); see generally INS v. Ventura, 537 U.S. 12, 16 (2002)  
11 (upon reversal of an administrative determination, the proper course  
12 is remand for additional agency investigation or explanation, except  
13 in rare circumstances).<sup>5</sup>

#### 14 15 **CONCLUSION**

16  
17 For all of the foregoing reasons,<sup>6</sup> Plaintiff's and Defendant's  
18 motions for summary judgment are denied and this matter is remanded  
19

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20 <sup>5</sup> There are outstanding issues that must be resolved  
21 before a proper disability determination can be made in the  
22 present case. For example, it is not clear whether the ALJ would  
23 be required to find Plaintiff disabled for the entire claimed  
24 period of disability, even if the opinions of Dr. Perry were  
25 fully credited. See Luna v. Astrue, 623 F.3d 1032, 1035 (9th  
26 Cir. 2010). For at least this reason, the Ninth Circuit's  
27 decision in Harman v. Apfel, 211 F.3d 1172 (9th Cir.), cert.  
28 denied, 531 U.S. 1038 (2000) does not compel a reversal for the  
immediate payment of benefits.

<sup>6</sup> The Court has not reached any other issue raised by  
Plaintiff except insofar as to determine that reversal with a  
directive for the immediate payment of benefits would not be  
appropriate at this time.

