

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9

10 JANETTE E. HAHKA,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN,
Commissioner of Social Security,

14 Defendant.
15

No. CV 13-5676 FFM

MEMORANDUM DECISION AND
ORDER

16 Plaintiff brings this action seeking to overturn the decision of the Commissioner
17 of the Social Security Administration denying her application for a period of disability
18 and disability insurance benefits. The parties consented, pursuant to 28 U.S.C. § 636(c),
19 to the jurisdiction of the undersigned United States Magistrate Judge. Pursuant to the
20 August 15, 2013 Case Management Order, on April 24, 2014, the parties filed a Joint
21 Stipulation (“JS”) detailing each party’s arguments and authorities. The Court has
22 reviewed the JS and the administrative record (“AR”), filed by defendant on April 7,
23 2014. For the reasons stated below, the decision of the Commissioner is reversed and
24 the matter remanded for further proceedings.

25 ///

26 ///

27 ///

28 ///

1 **PROCEDURAL HISTORY**

2 On September 29, 2009, plaintiff filed an application for a period of disability and
3 disability insurance benefits. (AR 131-32.) The application was denied initially and
4 upon reconsideration. (AR 64-67, 71-76.) Plaintiff requested a hearing before an
5 administrative law judge (“ALJ”). (AR 77.) ALJ Mary L. Everstine held hearings on
6 June 6, 2011 and September 19, 2011. (AR 32-53, 54-61.) Plaintiff appeared with
7 counsel at both hearings and testified at the second hearing. (*Id.*) On October 18, 2011,
8 the ALJ issued a decision denying benefits. (AR 8-25.) Plaintiff sought review of the
9 decision before the Social Security Administration Appeals Council. (AR 7.) The
10 Council denied the request for review on June 12, 2013. (AR 1-6.)

11 Plaintiff filed the complaint herein on August 6, 2013.

12
13 **ISSUES**

14 Plaintiff raises a single issue:

- 15 1. Whether the ALJ properly assessed plaintiff’s credibility with respect to the
16 symptoms related to her left upper extremity lymphedema.

17
18 **STANDARD OF REVIEW**

19 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to
20 determine whether the Commissioner’s findings are supported by substantial evidence
21 and whether the proper legal standards were applied. *DeLorme v. Sullivan*, 924 F.2d
22 841, 846 (9th Cir. 1991). Substantial evidence means “more than a mere scintilla” but
23 less than a preponderance. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28
24 L. Ed. 2d 842 (1971); *Desrosiers v. Secretary of Health & Human Servs.*, 846 F.2d 573,
25 575-76 (9th Cir. 1988). Substantial evidence is “such relevant evidence as a reasonable
26 mind might accept as adequate to support a conclusion.” *Richardson*, 402 U.S. at 401.
27 This Court must review the record as a whole and consider adverse as well as supporting
28 evidence. *Green v. Heckler*, 803 F.2d 528, 929-30 (9th Cir. 1986). Where

1 evidence is susceptible to more than one rational interpretation, the Commissioner's
2 decision must be upheld. *Gallant v. Heckler*, 753 F.2d 1450, 1452 (9th Cir. 1984).

4 DISCUSSION

5 Plaintiff suffers from lymphedema in her left arm.¹ (AR 15.) At the hearing in
6 her case, plaintiff testified that her left arm was almost always swollen. (AR 46.) She
7 wore a compression sleeve on her left arm to treat her lymphedema. (AR 37, 46-47.)
8 She had to manually drain the arm every night. (AR 47.) Plaintiff could not lift a gallon
9 of milk with her left arm, because doing so exacerbated the swelling. (*Id.*) At most, she
10 could use her left arm to steady a heavy object, such as a gallon of milk, carried with her
11 right arm. (AR 44.) She usually had other people, such as her children, lift and carry
12 heavy objects for her. (*Id.*) Plaintiff could not reach behind herself with her left arm.
13 (AR 38.) She compensated for her left arm's limited utility by overusing her right arm.
14 As a result, she had pain in her right arm and elbow. (AR 37, 46.)

15 Plaintiff testified that she did bookwork and other clerical work for her husband's
16 business. She did such work at home on her laptop, for an hour or so, on an irregular
17 basis. (AR 35, 42-43.) She could drive and shop for groceries. (AR 35, 43.) However,
18 she did very little work around the house. Her husband and children made their own
19 beds and did their own laundry, and a live-in friend often helped with cooking and with
20 the children. In addition, she had a twice-monthly gardener. (AR 43-44.) Similarly, in
21 an October 2009 function report, plaintiff reported that she could shop, prepare simple
22 meals, and wash dishes. However, she did such work on a very limited basis and had
23 assistance from a housekeeper. (*See* AR 180-83.)

24
25
26 ¹ Plaintiff asserts, and defendant does not dispute, that lymphedema is the
27 abnormal build-up of fluid in soft tissue caused by a blockage in the lymphatic system
28 after lymph nodes are removed or damaged. (JS 4; *see* JS 28-35.) It is a not-
uncommon long-term complication of breast cancer treatment. (JS 5; *see* JS 28-35.)

1 In her decision, the ALJ found that plaintiff had the severe impairments of history
2 of left breast cancer, status post mastectomy with residual lymphedema; and status post
3 prophylactic mastectomy right breast. (AR 13.) The ALJ found, in pertinent part, that
4 plaintiff had the residual functional capacity (“RFC”) to perform light work, but was
5 restricted to lifting and carrying 20 pounds occasionally and 10 pounds frequently with
6 the dominant right arm; “left arm assist only”; and no overhead reaching with the left
7 arm. (AR 16.) The ALJ concluded that with that RFC, and considering her vocational
8 factors, plaintiff was able to work as an information clerk and parking attendant. (AR
9 20.) The ALJ found plaintiff not credible in her statements regarding her subjective
10 symptoms. (AR 17.)

11 Plaintiff contends that the ALJ failed to provide legally sufficient reasons for
12 finding her incredible as to the limiting effects of her lymphedema. The Court agrees.
13 Once a claimant produces medical evidence of an underlying impairment that is
14 reasonably likely to cause the alleged symptoms, medical findings are not required to
15 support their alleged severity. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).
16 However, an ALJ may reject a claimant’s allegations upon: (1) finding evidence of
17 malingering; or (2) providing clear and convincing reasons for so doing. *Benton v.*
18 *Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003).

19 In the absence of evidence of malingering, an ALJ may consider, *inter alia*,
20 inconsistencies in either the claimant’s testimony or between the claimant’s testimony
21 and his conduct. The ALJ may also consider testimony from physicians and third parties
22 concerning the nature, severity, and effect of the symptoms of which the claimant
23 complains. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002); *see also* 20
24 C.F.R. § 404.1529(c); Social Security Ruling 96-7p, 1996 WL 374186 (S.S.A.). The
25 ALJ may also use “ordinary techniques of credibility evaluation.” *Thomas*, 278 F.3d at
26 960. The ALJ’s credibility determination is entitled to deference if his reasoning is
27 supported by substantial evidence in the record and is “sufficiently specific to allow a
28 reviewing court to conclude the adjudicator rejected the claimant’s testimony on

1 permissible grounds and did not arbitrarily discredit a claimant’s testimony”

2 *Bunnell*, 947 F.2d at 345 (internal quotation marks omitted).

3 Here, the ALJ provided three grounds for finding plaintiff incredible: (1) the
4 medical evidence did not support plaintiff’s allegations; (2) plaintiff’s activities of daily
5 living (“ADL”) “appear[ed] to be inconsistent” with plaintiff’s testimony; and (3)
6 plaintiff performed unpaid work for her husband and temporary work as a music teacher.
7 (AR 18.) The ALJ also asserted that plaintiff’s medical records did not clearly document
8 a disability lasting the requisite 12-month durational period.² (AR 18.) The Court finds
9 these grounds are insufficient to discredit plaintiff’s testimony regarding her
10 lymphedema.

11 First, the ALJ did not specify which ADL were inconsistent with plaintiff’s
12 testimony regarding her lymphedema. (*See* AR 18.) Arguably, this omission alone
13 renders plaintiff’s ADL infirm as grounds for finding her incredible, as the Court is left
14 guessing as to the ALJ’s reasoning. *See Bunnell*, 947 F.2d at 346 (“A reviewing court
15 should not be forced to speculate as to the grounds for an adjudicator’s rejection of a
16 claimant’s allegations of disabling pain”); *see also Burch v. Barnhart*, 400 F.3d 676,
17 680-81 (9th Cir. 2005) (ALJ may discredit claimant’s allegations by citing ADL
18 involving skills transferrable to workplace, “*upon making specific findings relating to*
19 *those activities*” (emphasis added)).

20 Nor is it evident to the Court that the record reveals the inconsistency the ALJ
21 cited. Plaintiff claimed, in essence, that her lymphedema limited her ability to reach and
22 carry with her left arm and indirectly resulted in pain in her right shoulder and elbow.
23 Her testimony regarding her ADL was consistent with those claims. She testified that
24 she received ample assistance around the house, did not carry heavy objects with her left

26
27 ² The ALJ further stated that plaintiff’s “additional reported activities” were
28 inconsistent with plaintiff’s testimony. (AR 18.) This statement appears to be an
editing error, as no additional activities are discussed or cited. (*See id.*)

1 arm, and performed only occasional work for her husband. She made similar statements
2 in the October 2009 function report.

3 Moreover, there is no evidence that she engaged in the ADL at issue to a degree
4 that would translate to a workplace setting. Therefore, contrary to defendant's assertion
5 (JS 33-34), the fact that plaintiff could perform *some* ADL, such as washing dishes, does
6 not undermine her claims. *See Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001)
7 (daily activities such as grocery shopping, driving, or walking for exercise do not
8 undermine subjective claims unless activities consume "*substantial part*" of day
9 (emphasis in original)). Thus, plaintiff's ADL are not a clear and convincing reason to
10 reject her lymphedema testimony.

11 Second, there is no indication that plaintiff's work for her husband involved
12 reaching or carrying with her left arm, or that it required significant use of her right
13 shoulder and elbow. Neither the ALJ nor defendant points to evidence to counter
14 plaintiff's testimony that the work was irregular, performed from home, and involved
15 mainly (or entirely) working on her laptop. Defendant nonetheless insists that plaintiff's
16 work for her husband is "relevant" to her credibility (JS 34), but relevance is not the
17 standard. It must be a *convincing* reason to doubt her claimed limitations, *Benton*, 331
18 F.3d at 1040, and it is not. As to plaintiff's temporary music teacher work, defendant
19 concedes that it is irrelevant, as there is no evidence that it occurred after plaintiff's
20 mastectomy. (JS 34.) Accordingly, plaintiff's work is an improper ground for finding
21 her incredible.

22 Third, an ALJ may not reject subjective symptom testimony solely because there
23 is no objective medical evidence showing that the impairment can reasonably produce
24 the degree of symptom alleged. *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996).
25 Thus, the alleged lack of objective medical evidence fails as a ground for finding
26 plaintiff incredible, as the ALJ's other, non-medical reasons are invalid. In addition, it is
27 not clear from the ALJ's decision *how* the medical evidence weakens plaintiff's
28 subjective claims. (*See* AR 19.) In her general discussion of the medical evidence (AR

1 17), the ALJ noted only that plaintiff’s lymphedema first appeared in July 2009, had
2 lessened by August 2009, and was “controlled” by radiation and a compression sleeve
3 by October 2009. (AR 17; *see* AR 423, 440, 442-43.) By November 2009, the ALJ
4 asserted, the lymphedema “was present in the left arm only.” (AR 17.)

5 The ALJ may have meant that because plaintiff’s lymphedema was under control
6 after a few months, it did not meet the Social Security Act’s 12-month duration
7 requirement. (*See* AR 18; *see also* 20 C.F.R. § 404.1509 (impairment “must have lasted
8 or must be expected to last for a continuous period of at least 12 months”).) In fact, the
9 medical record suggests that plaintiff’s lymphedema was present before July 2009 and
10 persisted after November 2009. (*See* AR 300 (in April 2009 lymphedema evaluation,
11 noting swelling in left upper arm); *see also* AR 334 (noting that plaintiff’s lymphedema
12 pre-dated radiation therapy, which began in August 2009); AR 551 (in December 2009,
13 noting that plaintiff complained of lymphedema; observing edema in plaintiff’s left
14 upper arm).) Moreover, the ALJ cited “residual lymphedema” as an aspect of plaintiff’s
15 severe impairments and assigned some limitations bearing on her left arm. These actions
16 suggest that the ALJ accepted plaintiff’s claim that her lymphedema lasted well beyond
17 November 2009.

18 Furthermore, the records the ALJ cited reflect, at most, that the compression
19 sleeve helped with the swelling. The sleeve did not eliminate the swelling entirely;
20 plaintiff still had to manually drain her arm. (*See* AR 423 (in November 2009, noting
21 after her reconstruction surgery that plaintiff required manual lymphatic drainage
22 (“MLD”)), 422 (same).) Accordingly, the objective medical evidence does not
23 undermine plaintiff’s subjective lymphedema claims.

24 Defendant contends that the RFC the ALJ assigned is consistent with plaintiff’s
25 testimony. (JS 35.) That is, although the ALJ found that plaintiff could lift/carry 20
26 pounds occasionally and 10 pounds frequently, she restricted plaintiff to using her left
27 arm only to assist her right arm. (*Id.*) Defendant’s argument is unavailing. Although
28 plaintiff testified that she could use her left arm to steady a gallon of milk in her right

1 arm, a gallon of milk weighs less than 10 pounds and significantly less than 20 pounds.³
2 Thus, plaintiff's testimony is not consistent with the limitations the ALJ assigned.

3 In sum, the ALJ failed to provide legally sufficient reasons for finding plaintiff
4 incredible with respect to her testimony regarding the limiting effects of her left arm
5 lymphedema. Remand on this claim is therefore warranted.

6
7 **ORDER**

8 "Remand for further administrative proceedings is appropriate if enhancement of
9 the record would be useful. Conversely, where the record has been developed fully and
10 further administrative proceedings would serve no useful purpose, the district court
11 should remand for an immediate award of benefits." *Benecke v. Barnhart*, 379 F.3d 587,
12 593 (9th Cir. 2004). A remand for an award of benefits is appropriate if (1) the ALJ
13 failed to provide legally sufficient reasons for rejecting the evidence; (2) there are no
14 outstanding issues that must be resolved before a determination of disability can be
15 made; and (3) it is clear from the record that the ALJ would be required to find the
16 claimant disabled if such evidence were credited. *Id.*

17
18
19
20
21
22
23
24
25
26
27
28

³ The parties agree that a gallon of milk weighs approximately eight pounds.
(See JS 35, 38.)

1 Here, there is no testimony from the vocational expert regarding the effect of
2 plaintiff's claimed limitations on her ability to work. (See AR 49-52.) Accordingly, this
3 action is remanded to the Commissioner of Social Security for further proceedings
4 consistent with this decision. See *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000).

5 IT IS SO ORDERED.

6
7 DATED: December 15, 2014

8 /S/ FREDERICK F. MUMM
9 FREDERICK F. MUMM
10 United States Magistrate Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28