



1 Disputed Issue Two is directed to the ALJ's adverse credibility determination.  
2 (See Jt Stip at 14-23.)

3 An ALJ's assessment of pain severity and claimant credibility is entitled to  
4 "great weight." See Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman  
5 v. Heckler, 779 F.2d 528, 531 (9th Cir. 1986). Under the "Cotton standard," where  
6 the claimant has produced objective medical evidence of an impairment which could  
7 reasonably be expected to produce some degree of pain and/or other symptoms, and  
8 the record is devoid of any affirmative evidence of malingering, the ALJ may reject  
9 the claimant's testimony regarding the severity of the claimant's pain and/or other  
10 symptoms only if the ALJ makes specific findings stating clear and convincing  
11 reasons for doing so. See Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986); see  
12 also Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996); Dodrill v. Shalala, 12  
13 F.3d 915, 918 (9th Cir. 1993); Bunnell v. Sullivan, 947 F.2d 341, 343 (9th Cir. 1991).

14 Plaintiff testified that she cannot work because of knee problems, depression,  
15 vision problems, migraine headaches, and sleep problems. (See AR 87-88.) Plaintiff  
16 also testified that on account of her conditions, she cannot be responsible for other  
17 people and was limited to walking for 2-3 blocks at a time, standing for less than one  
18 hour at a time, sitting for one hour at a time, and lifting 10 pounds. (See AR 87, 89-  
19 90.)

20 In addition to providing testimony at the hearing, plaintiff completed a  
21 Function Report describing her activities and abilities. (See AR 263-70.) In the  
22 report, plaintiff stated that she performs personal care without assistance, prepares  
23 simple meals, does laundry, shops for groceries, and walks her dog. (See AR 263,  
24 265, 266.)

25 The ALJ determined that, although plaintiff's medically determinable  
26 impairments could reasonably be expected to cause the alleged symptoms, plaintiff's  
27 statements concerning the intensity, persistence, and limiting effects of these  
28 symptoms were not credible to the extent they were inconsistent with the ALJ's

1 residual functional capacity (“RFC”) assessment. (See AR 57.) As support for this  
2 adverse credibility determination, the ALJ stated four reasons. (See AR 57-58.) The  
3 Court finds that, although one of the ALJ’s proffered reasons was legally insufficient  
4 to support his adverse credibility determination, the error was harmless because the  
5 other three reasons were legally sufficient.

6 One of the reasons stated by the ALJ was that plaintiff’s treatment history  
7 undermined her allegations, specifically because the record contained no evidence  
8 that plaintiff underwent surgical procedures, physical therapy, or pain relief injections  
9 for her knee since the alleged onset date. (See AR 57-58.) The ALJ also found that  
10 plaintiff had no history of admission to a psychiatric unit and had not received  
11 psychotherapy, treatment, or other medical interventions in a mental health facility.  
12 (See AR 58.) However, the record reflects that plaintiff received multiple  
13 recommendations for knee surgery (see AR 386, 743); that she underwent physical  
14 therapy (see AR 374, 386); and that she received psychotherapy and psychiatric  
15 treatment (see AR 418, 430, 436, 440, 441, 444, 473, 480, 513, 518). Although the  
16 ALJ technically was correct in finding that plaintiff had not yet had surgery and that  
17 the record contained no evidence that plaintiff was admitted to a psychiatric unit or  
18 that plaintiff was treated in a mental health facility, the Court does not find this reason  
19 “clear and convincing” in light of the evidence that authorization for the knee surgery  
20 was pending (see AR 743) and the ample evidence of plaintiff’s outpatient psychiatric  
21 treatment, including evidence that plaintiff had visited an emergency room for acute  
22 anxiety and had been prescribed the maximum dosage of an anti-depressant (see AR  
23 421, 447). The Court therefore finds that, on the whole, this reason did not constitute  
24 a legally sufficient reason on which the ALJ could properly rely in support of his  
25 adverse credibility determination.

26 Another reason for the ALJ’s adverse credibility determination was that the  
27 record contained evidence that plaintiff “has failed to comply with prescribed  
28 treatment” by missing appointments and failing to take medication. (See AR 58; see

1 also AR 400, 629, 631, 665, 711, 788, 791, 800, 802, 803.) In general, an ALJ may  
2 not draw an adverse inference when a claimant fails to comply with treatment because  
3 of a mental illness. See Nguyen v. Chater, 100 F.3d 1462, 1465 (9th Cir. 1996).  
4 Here, the record does reflect that one of plaintiff's treating physicians observed that  
5 plaintiff would become more receptive to medical advice when her depression  
6 became better controlled and responded to plaintiff's non-compliance on one  
7 occasion with an "urgent" referral to a psychiatrist. (See AR 400, 802.) Nonetheless,  
8 the Court finds that the ALJ's interpretation of the evidence was rational because the  
9 evidence of plaintiff's non-compliance was ample and because the record does not  
10 clearly show that plaintiff's non-compliance always was beyond her control. See  
11 Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) ("Where evidence is susceptible  
12 to more than one rational interpretation, it is the ALJ's conclusion that must be  
13 upheld."). The Court therefore finds that this reason constituted a legally sufficient  
14 reason on which the ALJ could properly rely in support of his adverse credibility  
15 determination. See Molina v. Astrue, 674 F.3d 1104, 1114 (9th Cir. 2012) (upholding  
16 adverse credibility determination where the record was filled with evidence that  
17 claimant had improperly failed to obtain treatment); Tommasetti v. Astrue, 533 F.3d  
18 1035, 1039 (9th Cir. 2008) (ALJ's adverse credibility determination may properly  
19 account for a claimant's unexplained or inadequately explained failure to seek  
20 treatment or to follow a prescribed course of treatment).<sup>2</sup>

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22 <sup>2</sup> Plaintiff contends that it was improper for the ALJ to rely on her non-  
23 compliance without first finding that the treatment was clearly expected to restore  
24 capacity, as required by Social Security Ruling ("SSR") 82-59, 1982 WL 31384. (See  
25 Jt Stip at 17.) SSR 82-59 "delineates the circumstance in which the Commissioner  
26 can deny benefits on the basis that a claimant has failed to follow prescribed  
27 treatment." See Roberts v. Shalala, 66 F.3d 179, 183 (9th Cir. 1995). "The  
28 procedures that SSR 82-59 mandates, however, only apply to claimants who would  
otherwise be disabled within the meaning of the Act." Id. Since the ALJ did not find  
(continued...)

1 Another reason provided by the ALJ for his adverse credibility determination  
2 was that plaintiff's daily activities were "not consistent with the alleged degree of  
3 impairment" and tended "to show that she has the ability to perform work." (See AR  
4 58.) In general, an ALJ may base an adverse credibility determination on evidence  
5 of a claimant's daily activities on two grounds: the stated activities contradict the  
6 claimant's other testimony, or they meet the threshold for transferable work skills.  
7 See Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007). Here, although it appears that  
8 the ALJ invoked both grounds, he specifically supported only the first ground by  
9 finding that plaintiff's testimony (particularly her testimony that she could walk only  
10 2-3 blocks at a time) was contradicted by her stated activities, which included  
11 performing personal care without assistance, preparing simple meals, doing laundry,  
12 shopping for groceries, and walking her dog for 10 minutes. (See AR 58; see also AR  
13 263, 265, 266, 629.) The Court finds that this reason also constitutes a legally  
14 sufficient reason on which the ALJ could properly rely in support of his adverse  
15 credibility determination. See Molina, 674 F.3d at 1113 ("Even where those activities  
16 suggest some difficulty functioning, they may be grounds for discrediting the  
17 claimant's testimony to the extent that they contradict claims of a totally debilitating  
18 impairment."); Berry v. Astrue, 622 F.3d 1228, 1234-35 (9th Cir. 2010) (evidence  
19 that claimant's self-reported activities suggested a higher degree of functionality than  
20 reflected in subjective symptom testimony adequately supported adverse credibility  
21 determination); Valentine v. Commissioner Social Sec. Admin., 574 F.3d 685, 693  
22 (9th Cir. 2009) (evidence that claimant exercised and undertook projects suggested

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25 <sup>2</sup>(...continued)  
26 that plaintiff would otherwise be disabled by premising the denial of benefits solely  
27 on plaintiff's failure to follow prescribed treatment, plaintiff was not entitled to the  
28 protections of SSR 82-59. See id. (claimant had no right to enjoy protections of SSR  
82-59 where she would not have otherwise been disabled because ALJ did not  
premise denial of her benefits solely on her failure to follow prescribed treatment).

1 that claimant's later claims about the severity of his limitations were exaggerated);  
2 Bray v. Commissioner of Social Security Admin., 554 F.3d 1219, 1227 (9th Cir.  
3 2009) ("In reaching a credibility determination, an ALJ may weigh consistencies  
4 between the claimant's testimony and his or her conduct, daily activities, and work  
5 record, among other factors.").

6 Another reason for the ALJ's adverse credibility determination was that the  
7 "objective evidence does not support [plaintiff's] allegations." The ALJ specifically  
8 noted in this regard that the findings of the consultative examiners supported the  
9 ALJ's RFC assessment for medium work with limitations to simple to moderately  
10 complex work, no public contact, and occasional contact with peers. (See id.; see  
11 also AR 406, 413.) The Court finds that this reason also constituted a legally  
12 sufficient reason on which the ALJ could properly rely in support of his adverse  
13 credibility determination. See Parra v. Astrue, 481 F.3d 742, 750 (9th Cir. 2007)  
14 (ALJ properly considered conflict between claimant's testimony about knee pain and  
15 specific evidence in the record); Morgan v. Comm'r of Soc. Sec., 169 F.3d 595, 600  
16 (9th Cir. 1999) (ALJ may properly consider conflict between claimant's testimony of  
17 subjective complaints and objective medical evidence in the record).<sup>3</sup>

18 In sum, the Court finds that, even though the ALJ erred in relying on one of his  
19 four stated reasons in support of his adverse credibility determination, the error was  
20 harmless because the ALJ's other three reasons and ultimate adverse credibility  
21 determination were adequately supported by substantial evidence. See Carmickle v.  
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24 <sup>3</sup> Plaintiff contends that this reason was legally insufficient because an  
25 adverse credibility determination may not be based "solely" on the alleged lack of  
26 objective medical support. (See It Stip at 16.) Here, however, lack of objective  
27 medical support was not the sole basis for the ALJ's adverse credibility  
28 determination, but just one of multiple factors. See Burch, 400 F.3d at 681  
("Although lack of medical evidence cannot form the sole basis for discounting pain  
testimony, it is a factor that the ALJ can consider in his credibility analysis.").

1 Comm'r Social Sec. Admin., 533 F.3d 1155, 1162-63 (9th Cir. 2008) (holding that  
2 ALJ's reliance on two invalid reasons in support of adverse credibility determination  
3 was harmless where remaining reasons were adequately supported by substantial  
4 evidence).

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6 **B. The ALJ failed to properly consider the treating physician's opinion**  
7 **(Disputed Issue One).**

8 Disputed Issue One is directed to the ALJ's consideration of the opinion of Dr.  
9 Sobol, an orthopedic surgeon. (See Jt Stip at 4-14.) In May 2011, Dr. Sobol issued  
10 an opinion addressing plaintiff's left knee impairment. (See AR 384-98.) Dr. Sobol  
11 opined that plaintiff should avoid work requiring heavy lifting, avoid prolonged  
12 weight-bearing over five hours in an eight-hour workday, and avoid running,  
13 jumping, climbing, walking over uneven ground, squatting, kneeling, crouching,  
14 crawling, pivoting, or other activities of comparable physical effort. (See AR 396.)

15 As a preliminary matter, the Court rejects the Commissioner's contention that  
16 Dr. Sobol was not a treating physician because his purpose was to provide reports for  
17 plaintiff's worker's compensation case and because he only saw plaintiff for 30  
18 minutes before issuing his May 2011 opinion. (See Jt Stip at 8-9.) An ALJ may not  
19 discount a medical report because of the purpose for which it was obtained, even if  
20 the purpose is worker's compensation litigation. See Lester, 81 F.3d at 832; Booth  
21 v. Barnhart, 181 F. Supp. 2d 1099, 1105 (C.D. Cal. 2002). Moreover, the record  
22 reflects that Dr. Sobol's contact with plaintiff well exceeded a 30 minute visit before  
23 he issued his May 2011 opinion: he first saw plaintiff in August 2010; prescribed  
24 multiple types of treatment, including various types of therapy, medication, and  
25 bracing; and referred her to other specialists. (See AR 374-75, 377, 386, 390.)  
26 Moreover, after he issued his May 2011 opinion, Dr. Sobol continued to treat plaintiff  
27 on numerous occasions in 2011 and 2012. (See AR 711-41.) The record also reflects  
28 that Dr. Sobol was designated as plaintiff's "primary treating physician" for purposes

1 of her worker's compensation case. (See AR 713, 721, 725.) This history amply  
2 evinced a treating medical relationship between plaintiff and Dr. Sobol. See 20  
3 C.F.R. § 404.1502 (defining a treating source as a physician who has provided  
4 medical treatment or evaluation and has had an ongoing treatment relationship with  
5 the claimant).

6       The law is well established in this Circuit that a treating physician's opinions  
7 are entitled to special weight because a treating physician is employed to cure and has  
8 a greater opportunity to know and observe the patient as an individual. See  
9 McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989). "The treating physician's  
10 opinion is not, however, necessarily conclusive as to either a physical condition or the  
11 ultimate issue of disability." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir.  
12 1989). The weight given a treating physician's opinion depends on whether it is  
13 supported by sufficient medical data and is consistent with other evidence in the  
14 record. See 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). If the treating physician's  
15 opinion is uncontroverted by another doctor, it may be rejected only for "clear and  
16 convincing" reasons. See Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996); Baxter  
17 v. Sullivan, 923 F.3d 1391, 1396 (9th Cir. 1991). Where, as here, the treating  
18 physician's opinion is controverted, it may be rejected only if the ALJ makes findings  
19 setting forth specific and legitimate reasons that are based on the substantial evidence  
20 of record. See, e.g., Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998) ("A  
21 treating physician's opinion on disability, even if controverted, can be rejected only  
22 with specific and legitimate reasons supported by substantial evidence in the  
23 record."); Magallanes, 881 F.2d at 751; Winans v. Bowen, 853 F.2d 643, 647 (9th  
24 Cir. 1987).

25       The ALJ declined to credit Dr. Sobol's May 2011 opinion for two reasons.  
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1 (See AR 54.)<sup>4</sup> First, the ALJ found that “Dr. Sobol did not review [plaintiff’s]  
2 medical records from 2011 or 2012.” (See AR 54.) To the contrary, the record  
3 reflects that Dr. Sobol did in fact review plaintiff’s medical records from 2011 and  
4 2012. (See AR 713-14, 732-34.) Moreover, plaintiff’s later medical records  
5 evidenced that plaintiff’s knee condition did not improve and arguably worsened. For  
6 example, another orthopedic surgeon recommended knee surgery in 2012. (See AR  
7 743.) Accordingly, the Court finds that this first stated reason did not constitute a  
8 legally sufficient reason on which the ALJ could properly rely in support of his  
9 rejection of Dr. Sobol’s opinion.

10 Second, the ALJ found that Dr. Sobol’s findings “support the above  
11 limitations” for medium work. (See AR 54.) The ALJ specifically found that Dr.  
12 Sobol had noted that (1) a radiograph of plaintiff’s left knee simply showed  
13 chondrocalcinosis and a slight decrease in medial joint compartment cartilage; and  
14 (2) plaintiff had intact sensation, a 4/5 on motor strength for her left knee, and intact  
15 reflexes with a slight limp to her gait. (See id.; see also AR 388.) However, the  
16 ALJ’s limited findings did not accurately capture the overall diagnostic picture, which  
17 reflected that Dr. Sobol’s May 2011 opinion was supported by his findings of  
18 parapatellar effusion; patellofemoral crepitus and pain with patellar compression and  
19 passive ranging; and diffuse left knee pain, absent a click. (See AR 387-88.)  
20 Moreover, after issuing the May 2011 opinion, Dr. Sobol found, for example, that  
21 plaintiff had “increased pain and disability consistent with a chronic sprain/strain and  
22 patellofemoral arthralgia,” a “significant limp,” and “increased left knee pain with  
23 associated mechanical complaints of locking, mistrust, and giving-way.” (See AR  
24 715, 723, 724-25.) And, as noted above, another orthopedic surgeon essentially  
25 corroborated Dr. Sobol’s opinion by recommending knee surgery. (See AR 743.)

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27 <sup>4</sup> The ALJ incorrectly dated Dr. Sobol’s opinion to August 2010. (See AR  
28 54; see also AR 384-98.)

1 Accordingly, the Court finds that this second reason also did not constitute a legally  
2 sufficient reason on which the ALJ could properly rely in support of his rejection of  
3 Dr. Sobol's opinion. See Ghanim v. Colvin, 763 F.3d 1154, 1161-62 (9th Cir. 2014)  
4 (ALJ improperly rejected treating physician's opinion based on limited findings  
5 where the opinion was supported by the "context of the overall diagnostic picture"  
6 or the medical record on the whole) (citations omitted); Holohan v. Massanari, 246  
7 F.3d 1195, 1205, 1207 (9th Cir. 2001) (ALJ failed to properly consider treating  
8 physician's opinion by relying on treatment notes selectively and by disregarding  
9 more recent evidence that claimant's impairments were quite severe).

### 11 CONCLUSION AND ORDER

12 The law is well established that the decision whether to remand for further  
13 proceedings or simply to award benefits is within the discretion of the Court. See,  
14 e.g., Salvador v. Sullivan, 917 F.2d 13, 15 (9th Cir. 1990); McAllister, 888 F.2d at  
15 603; Lewin v. Schweiker, 654 F.2d 631, 635 (9th Cir. 1981). Remand is warranted  
16 where additional administrative proceedings could remedy defects in the decision.  
17 See, e.g., Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984); Lewin, 654 F.2d at  
18 635. Remand for the payment of benefits is appropriate where no useful purpose  
19 would be served by further administrative proceedings, Kornock v. Harris, 648 F.2d  
20 525, 527 (9th Cir. 1980); where the record has been fully developed, Hoffman v.  
21 Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); or where remand would unnecessarily  
22 delay the receipt of benefits, Bilby v. Schweiker, 762 F.2d 716, 719 (9th Cir. 1985).

23 The Court is mindful that, in Garrison v. Colvin, 759 F.3d 995, 1019-21 (9th  
24 Cir. 2014), a Ninth Circuit panel held that where an ALJ failed to properly consider  
25 various types of evidence, it was appropriate to credit the evidence as true and remand  
26 the case for calculation and award of benefits. However, the Court also notes that  
27 after Garrison was decided, another Ninth Circuit panel did not apply or even  
28 acknowledge this "credit as true" rule where substantial evidence did not support an

1 ALJ's rejection of treating medical opinions and his adverse credibility  
2 determination; instead, the panel simply remanded the case for further administrative  
3 proceedings. See Ghanim, 763 F.3d at 1167. In any event, to the extent that Garrison  
4 governs the Court's analysis, the Court finds it distinguishable, as discussed below.

5 In Garrison, the Ninth Circuit held that the district court should remand to the  
6 Commissioner for an award of benefits if three conditions are met: (1) the record has  
7 been fully developed and further administrative proceedings would serve no useful  
8 purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting  
9 evidence, whether claimant testimony, physician's opinion, or opinion from an "other  
10 source"; and (3) if the improperly discredited evidence were credited as true, the ALJ  
11 would be required to find the claimant disabled on remand. See Garrison, 759 F.3d  
12 at 1020.

13 Here, plaintiff contends that Dr. Sobol's May 2011 opinion, if credited,  
14 reflected an RFC for light work and therefore would direct a finding of disability  
15 under the Medical-Vocational Guidelines ("Grids"). (See Jt Stip at 7-8.) The Court  
16 disagrees. Nowhere in Dr. Sobol's May 2011 opinion is there a specific weight-  
17 bearing limitation consistent with an RFC for light work. Rather, the only evidence  
18 suggesting such a limitation was the testimony of the vocational expert, who  
19 effectively "translated" Dr. Sobol's opinion into an RFC for light work. (See Jt Stip  
20 at 7; see also AR 106-07, 109.) However, it was not the vocational expert's role to  
21 make such a determination, nor was she qualified to do so. See Sample v. Schweiker,  
22 694 F.2d 639, 643-44 and n.6 (9th Cir. 1982) (noting that a vocational expert has  
23 neither the role nor qualifications "to determine the validity of the medical opinion  
24 offered"); see also Petrauskas v. Commissioner Social Sec. Admin., 414 Fed. Appx.  
25 7, 9 (9th Cir. 2010) (now citable for its persuasive value per Ninth Circuit Rule 36-3)  
26 (noting that vocational experts "did not have the expertise to provide a medical  
27 opinion as to the severity of [claimant's] impairments").

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1 The Court therefore finds that remand for further proceedings is warranted here  
2 because the vocational expert did not testify that a person could not work with the  
3 limitations described by Dr. Sobol and consequently the third Garrison condition has  
4 not been met. See Harman v. Apfel, 211 F.3d at 1172, 1180 (9th Cir. 2000)  
5 (remanding for further proceedings in part because the record contained no testimony  
6 from the vocational expert that the limitations established by the improperly  
7 discredited evidence would render claimant unable to engage in any work); see also  
8 Strauss v. Commissioner of the Social Sec. Admin., 635 F.3d 1135, 1138 (9th Cir.  
9 2011) (reversal for award of benefits is appropriate only where the record  
10 demonstrates claimant is disabled within meaning of Social Security Act).

11 Accordingly, IT IS HEREBY ORDERED that Judgment be entered reversing  
12 the decision of the Commissioner of Social Security and remanding this matter for  
13 further administrative proceedings pursuant to Sentence Four of 42 U.S.C. § 405(g).<sup>5</sup>

14  
15 DATED: December 8, 2014



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18 ROBERT N. BLOCK  
UNITED STATES MAGISTRATE JUDGE

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28 <sup>5</sup> It is not the Court's intent to limit the scope of the remand.