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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION**

GABRIELA REYES,  
Plaintiff,  
v.  
CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,  
Defendant.

Case No. CV 14-04740 (SH)  
MEMORANDUM DECISION AND  
ORDER

This matter is before the Court for review of the decision by the Commissioner of Social Security denying plaintiff’s applications for Disability Insurance Benefits and Supplemental Social Security Income. Pursuant to 28 U.S.C. § 636, the parties have consented that the case may be handled by the undersigned. The action arises under 42 U.S.C. § 405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the record before the Commissioner. The plaintiff and the defendant have filed their pleadings (Plaintiff’s Brief In Support of Complaint for Review of Social

1 Security Decision; Defendant’s Brief in Support of Defendant’s Answer; Plaintiff’s  
2 Reply Brief); and the defendant has filed the certified transcript of record. After  
3 reviewing the matter, the Court concludes that the decision of the Commissioner should  
4 be reversed and remanded.  
5

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7 **I. BACKGROUND**

8 On October 25, 2011, plaintiff Gabriela Reyes filed an application for a period of  
9 disability and Disability Insurance Benefits. On the same date, plaintiff filed an  
10 application for Supplemental Social Security Income. Both applications alleged an  
11 inability to work since June 3, 2011. (See Administrative Record [“AR”] 180-94). On  
12 February 12, 2013 (following a hearing on January 17, 2013, see AR 60-76), an  
13 Administrative Law Judge (“ALJ”) issued a decision. The ALJ determined that the  
14 plaintiff had severe impairments -- “hallux valgus deformity; plantar fasciitis, calcaneal  
15 spur and hammertoe; status post bunionectomy and hammertoe surgery on June 6, 2011;  
16 stable chronic kidney disease; hypertensive nephropathy; and obesity” -- but found that  
17 plaintiff was not disabled within the meaning of the Social Security Act. (See AR 37-46).  
18

19 Following the Appeals Council’s denial of plaintiff’s request for a review of the  
20 hearing decision (see AR 4-6), plaintiff filed this action in this Court.  
21

22 Plaintiff makes three challenges to the ALJ’s Decision. Plaintiff alleges the ALJ  
23 erred in (1) failing to properly assess plaintiff’s residual functional capacity; (2) failing to  
24 properly assess plaintiff’s credibility and plaintiff’s daughter’s credibility; and (3) failing  
25 to account fo plaintiff’s diagnosis of fibromyalgia.

26 For the reasons discussed below, the Court concludes that plaintiff’s first claim of  
27 error has merit. Since the Court is remanding the matter based on plaintiff’s first claim of  
28 error, the Court will not address plaintiff’s second and third claims of error.

**II. DISCUSSION**

1 **ISSUE NO. 1:**

2 Plaintiff contends that the ALJ erred in assessing plaintiff’s residual functional  
3 capacity (“RFC”),<sup>1</sup> by discrediting plaintiff’s need for a cane. Defendant asserts that the  
4 ALJ properly determined plaintiff’s RFC.

5 In a Form entitled “Function Report – Adult” dated December 27, 2011, plaintiff  
6 stated that she constantly used a cane for support, and that the cane was prescribed by a  
7 doctor. (See AR 254-61).

8 In a Form entitled “Function Report – Adult – Third Party” dated December 27,  
9 2011, plaintiff’s daughter stated that plaintiff needed the use of a cane, and that the cane  
10 was prescribed by a doctor in January 2011.

11 At the administrative hearing, the ALJ asked plaintiff where she got the cane she  
12 brought to the hearing. Plaintiff replied, “My doctor prescribed this because of problems  
13 that I have in one foot, my knees, and my back.” The ALJ asked whether there was a  
14 prescription for the cane in plaintiff’s file. Without letting plaintiff’s counsel respond,  
15 the ALJ stated, “There’s a mention, there’s an observation that she’s using a cane, but  
16 that’s not a prescription for a cane.” (See AR 66).

17 Soon thereafter, when responding to a question by the ALJ about plaintiff’s  
18 weight, plaintiff’s counsel noted that one medical record (Exhibit 1F) stated plaintiff’s  
19 continual use of a cane with her left arm. (See AR 69).

20 Soon thereafter, at the conclusion of plaintiff’s testimony, plaintiff’s counsel stated  
21 that another medical record (Exhibit 14 F) mentioned plaintiff’s “cane for ambulation.”  
22 The ALJ stated he was “looking for a prescription, not a description.” (See AR 70).

23 Olga Alarid, M.D., of Health Care Partners Medical Group, examined plaintiff on  
24 October 20, 2011. In the report, Dr. Alarid stated that “[p]laintiff walks using a cane.”  
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28 <sup>1</sup> A Residual Functional Capacity (“RFC”) is what a claimant can still do despite existing exertional and nonexertional limitations. See 20 C.F.R. § 404.1545(a)(1).

1 Under the “Plan” section of the report, Dr. Alarid stated, “Use knee braces, continuously  
2 use cane left arm.” (See AR 287-88).

3 In a “Medical Source Statement (Physical)” dated September 26, 2012, Dr. Alarid  
4 opined that plaintiff needs a medically required hand held assistive device, specifically, a  
5 cane. (See AR 638).

6 When discussing the hearing testimony, the ALJ wrote, “At the hearing, the  
7 claimant testified that a doctor prescribed her cane because of the problems she has in one  
8 foot, her knees, and back (note: the claimant’s representative was unable to produce a  
9 prescription for the cane).” (AR 41).

10 The ALJ afforded little evidentiary weight to Dr. Alarid’s testimony, stating that  
11 her “report primarily summarizes the claimant’s subjective complaints and diagnoses but  
12 does not present objective clinical or laboratory diagnostic findings that support its  
13 conclusions.” (See AR 45).

14 The ALJ discredited plaintiff’s daughter’s testimony, stating, in part: “Her  
15 representations as to the claimant’s activities and functional limitations are similar to  
16 those described the claimant and are found credible insofar as the claimant’s allegations  
17 have been found credible as explained above.” (See AR 45).

18 Based on his review of plaintiff’s testimony, the entire medical record, including  
19 the records of Dr. Alarid (plaintiff’s treating physician) and of Dr. Seung Ha Lim (a  
20 consultative examiner), and plaintiff’s daughter’s testimony, the ALJ found that plaintiff  
21 had the RFC to perform light work,<sup>2</sup> except with the capacity to lift and carry 20 pounds  
22 occasionally and 10 pounds frequently, and to sit, stand and/or walk 6 hours in an 8-hour  
23 workday. (See AR 40-45).

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28 <sup>2</sup> “Light work involves lifting no more than 20 pounds at a time with frequent  
lifting or carrying of objects weighing up to 10 pounds.” 20 C.F.R. §§ 404.1567(b),  
416.967(b).

1 To the extent the ALJ did not include the use of a cane in his determination of  
2 plaintiff's RFC based on his rejection of plaintiff's, Dr. Alarid's, and/or plaintiff's sister's  
3 testimony about plaintiff's need for a cane due to plaintiff's lack of a prescription for a  
4 cane, the Court finds that the ALJ erred. See Saunders v. Astrue, 433 Fed.Appx. 531,  
5 534 (9th Cir. 2011)("Whether prescribed by a doctor or not, [claimant] did suffer from a  
6 'serious' impairment, and his use of these devices [brace and cane] is not clear and  
7 convincing evidence to find him not credible.").

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9 Contrary to respondent's contention, Dr. Alarid's "plan" in her October 20, 2011  
10 report that plaintiff "continuously use cane left arm," was a prescription for plaintiff to  
11 use a cane, as opposed to merely a description of plaintiff's use of a cane, and was based  
12 on Dr. Alarid's findings during her examination of plaintiff.

13 Moreover, there was additional evidence in the record showing that plaintiff used a  
14 cane for ambulation, including the October 26, 2011 field officer's statement that plaintiff  
15 "walks with the assistance of a cane" (see AR 225-27), Dr. Alarid's December 17, 2012  
16 statement in a report that plaintiff "ambulates with a cane" (see AR 630-34), and Dr.  
17 Alarid's December 21, 2012 statement in support of plaintiff's Disabled TAP  
18 Identification Card Application that plaintiff has "severe and chronic low back pain [and]  
19 ambulates with a cane" (see AR 450-53).

20  
21 The ALJ erred in failing to include plaintiff's use of a cane in plaintiff's RFC  
22 based on the lack of a "prescription." The Court is unable to find that the ALJ's error  
23 was harmless. See Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008)(stating  
24 that an ALJ's error is harmless "when it is clear from the record . . . that it was  
25 'inconsequential to the ultimate nondisability determination.'"); Burch v. Barnhart, 400  
26 F.3d 676, 679 (9th Cir. 2005)("A decision of the ALJ will not be reversed for errors that  
27 are harmless.").

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**III. ORDER**

1 For the foregoing reasons, the decision of the Commissioner is reversed, and the  
2 matter is remanded for further proceedings in accordance with the decision, pursuant to  
3 Sentence 4 of 42 U.S.C. § 405(g). At the hearing, the ALJ is not precluded from asking  
4 questions to plaintiff, plaintiff's daughter, or Dr. Alarid about the extent of plaintiff's use  
5 of a cane. Further, the hypothetical questions to the vocational expert should reflect  
6 plaintiff's limitation about her need for a cane to ambulate. See Hill v. Astrue, 698 F.3d  
7 1153, 1162 (9th Cir. 2012)("Because the overall record shows these additional  
8 assumptions should be incorporated into the ALJ's hypothetical, remand is  
9 appropriate."); Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988)("Hypothetical  
10 questions posed to the vocational expert must set out *all* the limitations and restrictions of  
11 the particular claimant . . . .").

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13 DATED: January 14, 2015

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STEPHEN J. HILLMAN  
UNITED STATES MAGISTRATE JUDGE