

1 alleging a disabling condition which had rendered him unable to work
2 since March 31, 2011. (A.R. at 156-57). The Administrative Law
3 Judge ("ALJ"), Eileen Burlison, examined the records and heard
4 testimony from Plaintiff and a vocational expert ("VE"), Valerie
5 Williams, on April 3, 2013. (A.R. at 33-55). On May 2, 2013, the
6 ALJ denied Plaintiff benefits in a written decision. (A.R. at 14-
7 21). The Appeals Council denied review of the ALJ's decision. (A.R.
8 at 1-4).

9
10 On December 16, 2014, Plaintiff filed a Complaint pursuant to
11 42 U.S.C. §§ 405(g) and 1383(c) alleging that the Social Security
12 Administration erred in denying him disability benefits. (Docket
13 Entry No. 1). On May 6, 2015, Defendant filed an Answer to the
14 Complaint, (Docket Entry No. 12), and the Certified Administrative
15 Record ("A.R."), (Docket Entry No. 13). The parties have consented
16 to proceed before a United States Magistrate Judge. (Docket Entry
17 Nos. 9, 10). On July 15, 2015, the parties filed a Joint Stipulation
18 ("Joint Stip.") setting forth their respective positions on
19 Plaintiff's claim. (Docket Entry No. 15).

20 21 **II. SUMMARY OF PLAINTIFF'S TESTIMONY AND ALJ'S DECISION**

22
23 At the April 3, 2013, hearing, Plaintiff testified that he was
24 unable to continue working due to several impairments. (A.R. at 38).
25 Specifically, Plaintiff stated that "a pinched nerve in the disks in
26 [his] neck" caused chronic headaches that made him unable to
27 concentrate. (A.R. at 38). Plaintiff also stated that he could walk
28 only with difficulty due to a torn meniscus, torn L4 spinal segment,

1 and arthritic knee. (A.R. at 45). Plaintiff also testified that he
2 could sit for 15 minutes before needing to "alternate between
3 standing, sitting and laying"; stand only with difficulty balancing
4 due to his knee problems; and lift/carry only 10 or 15 pounds. (A.R.
5 at 45). Plaintiff testified that his L4-L5 spinal discs needed to be
6 replaced and that bone spurs and arthritis in his neck were causing
7 chronic headaches and neuropathy on his right side. (A.R. at 46).
8 Plaintiff also noted that he suffered from hepatitis and diabetes.
9 (A.R. at 41, 46).

10
11 Plaintiff testified that he did not cook, clean, or shop very
12 often, and that he could not drive for more than twenty minutes due
13 to pain. (A.R. at 42). Plaintiff further testified that his "social
14 activity" was "[s]omewhat limited to the physical capacity," and that
15 he was no longer able to fish. (A.R. at 43). Plaintiff also claimed
16 that headaches interfered with his sleep and caused him to be
17 chronically fatigued during the day. (A.R. at 48-49).

18
19 The ALJ applied the five-step process to the evaluation of the
20 record in Plaintiff's case. (A.R. at 14-16). At step one, the ALJ
21 determined that Plaintiff had not engaged in substantial gainful
22 activity after the alleged onset date. (A.R. at 16). At step two,
23 the ALJ found that Plaintiff had severe impairments including
24 degenerative disc disease of the cervical and lumbar spine and a
25 small tear of the medial meniscus and lateral meniscus of the right
26 knee. (A.R. at 16). At step three, the ALJ found that Plaintiff's
27 impairments did not meet or equal a listing found in 20 C.F.R. Part
28 404, Subpart P, Appendix 1. (A.R. at 16). The ALJ noted

1 particularly that the criteria for major dysfunction of a joint,
2 disorder of the spine, and chronic liver disease were unmet. (A.R.
3 at 16).

4
5 Before proceeding to step four, the ALJ found that Plaintiff had
6 the RFC to perform light work as defined in 20 CFR section
7 404.1567(b) "except he would be limited to occasional postural
8 limitations, and he should avoid walking on uneven terrain." (A.R.
9 at 16-17). The ALJ stated that Plaintiff's impairments could be
10 expected to cause his symptoms, but Plaintiff's statements about the
11 "intensity, persistence and limiting effects of these symptoms [were]
12 exaggerated and inconsistent with the medical evidence, and [were]
13 not entirely credible for the reasons explained in this decision."
14 (A.R. at 17). The ALJ also gave no weight to the opinions of two
15 treating physicians because they were "grossly exaggerated" and
16 "inconsistent with the clinical, objective, and other medical
17 evidence in the record." (A.R. at 18). Instead, the ALJ gave
18 partial weight to the opinions of examining medical consultant Ruben
19 Ustaris and of non-examining state agency medical consultants. (A.R.
20 at 18-19).

21
22 At step four, the ALJ determined that Plaintiff
23 possessed the RFC to return to his past relevant work as a counselor
24 therapist. (A.R. at 19-20). Notwithstanding this finding, the ALJ
25 proceeded to step five and determined that Plaintiff's RFC permitted
26 him to perform other jobs existing in significant numbers in the
27 national economy. (A.R. at 20). The ALJ accordingly determined that
28 Plaintiff was not disabled within the meaning of 42 U.S.C. sections

1 416(i) and 423(d).

2
3 **III. STANDARD OF REVIEW**
4

5 This court reviews the Administration's decision to determine if
6 the decision is free of legal error and supported by substantial
7 evidence. See Brewes v. Commissioner of Social Sec. Admin., 682 F.3d
8 1157, 1161 (9th Cir. 2012). "Substantial evidence" is more than a
9 mere scintilla, but less than a preponderance. Garrison v. Colvin,
10 759 F.3d 995, 1009 (9th Cir. 2014). To determine whether substantial
11 evidence supports a finding, "a court must consider the record as a
12 whole, weighing both evidence that supports and evidence that
13 detracts from the [Commissioner's] conclusion." Aukland v.
14 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (internal quotation
15 omitted). As a result, "[i]f the evidence can reasonably support
16 either affirming or reversing the ALJ's conclusion, [a court] may not
17 substitute [its] judgment for that of the ALJ." Robbins v. Soc. Sec.
18 Admin., 466 F.3d 880, 882 (9th Cir. 2006).

19
20 **IV. PLAINTIFF'S CONTENTIONS**
21

22 Plaintiff contends that the ALJ improperly (1) rejected the
23 opinions of his treating physicians; and (2) rejected his testimony
24 as not credible. (Joint Stip. at 4).

25
26 **V. DISCUSSION**
27

28 After reviewing the record, the Court finds that Plaintiff's

1 second claim warrants remand for further consideration. Because
2 remand is appropriate on the issue of whether the ALJ improperly
3 rejected Plaintiff's testimony as not credible, the Court declines to
4 consider the remaining issues.

5
6 **A. The ALJ Erred in Rejecting Plaintiff's Testimony as Not Credible**
7

8 A claimant initially must produce objective medical evidence
9 establishing a medical impairment reasonably likely to be the cause
10 of the subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281
11 (9th Cir. 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.
12 1991). Once a claimant produces objective medical evidence of an
13 underlying impairment that could reasonably be expected to produce
14 the pain or other symptoms alleged, and there is no evidence of
15 malingering, the ALJ may reject the claimant's testimony regarding
16 the severity of his pain and symptoms only by articulating specific,
17 clear and convincing reasons for doing so. Brown-Hunter v. Colvin,
18 __ F.3d __, 2015 WL 6684997 at *5 (9th Cir. 2015) (citing
19 Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007)); see
20 also Smolen v. Chater, supra; Reddick v. Chater, 157 F.3d 715, 722
21 (9th Cir. 1998); Light v. Social Sec. Admin., 119 F.3d 789, 792 (9th
22 Cir. 1997).

23
24 Plaintiff asserts that the ALJ improperly rejected his testimony
25 as not credible and failed to identify evidence supporting this
26 finding, relying instead upon a "benign recitation of the medical
27 record." (Joint Stip. at 14-17, 20). Defendant asserts that the ALJ
28 properly rejected Plaintiff's testimony in light of objective medical

1 evidence and inconsistencies between Plaintiff's alleged limitations
2 and his admitted activities of daily living. (Joint Stip. at 17-19).

3
4 The ALJ found Plaintiff's testimony not entirely credible in the
5 following excerpt:

6
7 The claimant testified at the hearing as a witness on his
8 own behalf. He graduated high school and college. He lives
9 with his wife and daughter. He will pick his daughter up
10 from school. He can read and use a computer. He last
11 worked in April 2011 as a self-employed counselor. He has
12 diabetes and liver disease. He said he had a pinched nerve
13 in his neck which caused headaches. He said he needed 2
14 discs in his neck replaced. His hands will go numb. He can
15 walk and stand, but said he needed a knee replacement. He
16 can sit for 15 minutes. He can lift 10 to 15 pounds.

17
18 After careful consideration of the evidence, I find that the
19 claimant's medically determinable impairments could
20 reasonably be expected to cause the alleged symptoms;
21 however, the claimant's statements concerning the intensity,
22 persistence and limiting effects of these symptoms are
23 exaggerated and inconsistent with the medical evidence, and
24 are not entirely credible for the reasons explained in this
25 decision.

26 (A.R. at 17).

27
28 The ALJ's opinion does not explicitly identify the ALJ's reasons
for discrediting Plaintiff's testimony, and the foregoing excerpt is
followed by a summary of all of the medical evidence considered by the
ALJ. (A.R. at 17-19). The ALJ's opinion therefore fails to provide
"specific, clear and convincing reasons" for rejecting Plaintiff's
testimony about the intensity, persistence, and limiting effects of
his symptoms. See Brown-Hunter, __ F.3d __, 2015 WL 6684997 at *5-*6
(rejecting ALJ's credibility determination where ALJ "did not

1 specifically identify . . . inconsistencies; she simply stated her non-
2 credibility conclusion and then summarized the medical evidence
3 supporting her RFC determination"). See also Burch v. Barnhart, 400
4 F.3d 676, 681 (9th Cir. 2005) ("lack of medical evidence" can be "a
5 factor" in rejecting credibility, but cannot "form the sole basis").
6

7 Defendant argues that the Court may affirm the ALJ's partial
8 rejection of Plaintiff's testimony based on: (1) inconsistencies
9 between Plaintiff's testimony and objective medical evidence,
10 including the opinions of Dr. Ustaris and the non-examining state
11 agency medical consultants; and (2) inconsistencies between
12 Plaintiff's statements that he could sit or drive for only 15 minutes
13 and lift only 10 or 15 pounds and his statements that he shops for
14 groceries, drives for 40 minutes at a time, attends church, and
15 socializes with friends. (Joint Stip. at 18). Preliminarily,
16 Defendant overstates the contradictions between Plaintiff's alleged
17 limitations and activities, (see A.R. at 43 (testimony that Plaintiff
18 engaged in "social activity" that was "[s]omewhat limited to the
19 physical capacity"), 47 (testimony that Plaintiff walks in the back of
20 his church when he needs to stand or stretch)), and cites to a
21 discrepancy between the duration that Plaintiff could drive at the
22 time of the April 2013 hearing (15 or 20 minutes, see A.R. at 42) and
23 the duration that he could drive when he filled out an Exertion
24 Questionnaire in May 2011 (40 minutes, see A.R. at 180).
25

26 More significantly, the Court cannot affirm an ALJ's decision
27 based upon inconsistencies in testimony or medical evidence that the
28 ALJ did not specifically identify in support of her decision. As the

1 Ninth Circuit observed in Burrell v. Colvin, 775 F.3d 1133 (9th Cir.
2 2014):

3 "We are constrained to review the reasons the ALJ
4 asserts." Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir.
5 2003). Our decisions make clear that we may not take a
6 general finding – an unspecified conflict between Claimant's
7 testimony about daily activities and her reports to doctors
8 – and comb the administrative record to find specific
9 conflicts. "General findings are insufficient; rather, the
10 ALJ must identify what testimony is not credible and what
11 evidence undermines the claimant's complaints." Lester v.
12 Chater, 81 F.3d 821, 834 (9th Cir. 1995). "To support a lack
13 of credibility finding, the ALJ was required to point to
14 specific facts in the record...." Vasquez v. Astrue, 572
15 F.3d 586, 592 (9th Cir. 2009) (emphasis added) (internal
16 quotation marks omitted). Here, the ALJ stated only – in
17 passing and in a different section than the credibility
18 determination – that Claimant's self-reports were
19 inconsistent in some unspecified way with her testimony at
20 the hearing. That finding is insufficient to meet "our
21 requirements of specificity." Connett, 340 F.3d at 873.
22 [. . . .]

23 The government argues that Claimant's testimony that she
24 has, on average, one or two headaches a week conflicts with
25 the medical record. As an initial matter, the ALJ never
26 connected the medical record to Claimant's testimony about
27 her headaches. Although the ALJ made findings [. . . .]
28 concerning Claimant's treatment for headaches, he never
stated that he rested his adverse credibility determination
on those findings. For that reason alone, we reject the
government's argument that the history of treatment for
headaches is a specific, clear, and convincing reason to
support the credibility finding.

23 Burrell, 775 F.3d at 1138-39. See also Connett, 340 F.3d at 874
24 ("Because the ALJ did not assert specific facts or reasons to reject
25 Connett's testimony . . . we must reverse the district court on this
26 issue."); Brown-Hunter, ___ F.3d ___, 2015 WL 6684997 at *6 ("Because
27 the ALJ failed to identify the testimony she found not credible, she
28

1 did not link that testimony to the particular parts of the record
2 supporting her non-credibility determination. This was legal
3 error."); and Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001)
4 (court "cannot affirm the decision of an agency on a ground that the
5 agency did not invoke in making its decision").

6
7 Here, although the ALJ summarized Plaintiff's testimony and the
8 available medical evidence, she did not clearly identify the evidence
9 that supported her adverse credibility finding. As a result, the
10 ALJ's statement that Plaintiff's complaints were "exaggerated and
11 inconsistent with the medical evidence, and [were] not entirely
12 credible" is not adequately supported and does not provide the
13 specificity required by case law.

14 15 **B. The ALJ's Error Was Not Harmless**

16
17 "[H]armless error principles apply in the Social Security . . .
18 context." Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012)
19 (citing Stout v. Comm'r Soc. Sec. Admin., 454 F.3d 1050, 1054 (9th
20 Cir. 2006)). Generally, "an ALJ's error is harmless where it is
21 'inconsequential to the ultimate nondisability determination.'" Id.
22 (citing Carmickle v. Comm'r Soc. Sec. Admin., 466 F.3d 880, 885 (9th
23 Cir. 2006)).

24
25 The Court cannot conclude that the ALJ's errors were harmless.
26 Plaintiff's credibility was directly relevant to assessing his
27 limitations and, in turn, his RFC. A claimant's RFC "may be the most
28 critical finding contributing to the final . . . decision about

1 disability." See McCawley v. Astrue, 423 F. App'x 687, 689 (9th Cir.
2 2011) (quoting SSR 96-5p). Here, Plaintiff's RFC was central to the
3 ALJ's determination that he could return to his prior work and the
4 availability and nature of other work that he could perform. (A.R.
5 at 19-20). Because the Court cannot determine that the ALJ's errors
6 are "inconsequential to the ultimate disability determination," the
7 errors cannot be deemed harmless. See Carmickle, 466 F.3d at 885.

8 9 **C. Remand Is Warranted**

10
11 The decision whether to remand for further proceedings or
12 order an immediate award of benefits is within the district court's
13 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000).
14 Where no useful purpose would be served by further administrative
15 proceedings, or where the record has been fully developed, it is
16 appropriate to exercise this discretion to direct an immediate award
17 of benefits. Id. at 1179 ("[T]he decision of whether to remand for
18 further proceedings turns upon the likely utility of such
19 proceedings."). However, where the circumstances of the case suggest
20 that further administrative review could remedy the Commissioner's
21 errors, remand is appropriate. McLeod v. Astrue, 640 F.3d 881, 888
22 (9th Cir. 2011); Harman, 211 F.3d at 1179-81.

23
24 Here, the Court remands primarily because it cannot effectively
25 review the ALJ's opinion, and further review might remedy this
26 problem. The record also does not establish that Plaintiff's
27 testimony should necessarily have been credited or that the ALJ would
28 necessarily be required to find Plaintiff disabled if Plaintiff's

