UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VERNA GAIL GRIFFIN, Plaintiff, v. CAROLYN W. COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY, Defendant.	NO. CV 15-535-E **MEMORANDUM OPINION** **AND ORDER OF REMAND**

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 January 23, 2015, seeking review of the Commissioner's denial of benefits. The parties consented to proceed before a United States Magistrate Judge on March 19, 2015. Plaintiff filed a motion for summary judgment on July 15, 2015.

Defendant filed a motion for summary judgment on September 14, 2015. The Court has taken the motions under submission without oral argument. See L.R. 7-15; "Order," filed January 28, 2015.

BACKGROUND

Plaintiff alleges disability since August 11, 2010, based on lumbar degenerative disc disease and a back injury (Administrative Record ("A.R.") 233, 305). Plaintiff worked as a hotel reservation clerk until she suffered a work-related injury to her back on June 25, 2007 (A.R. 40, 42-43, 48, 233-34, 245, 282, 334, 336-37, 350-58, 464-72).

The Administrative Law Judge ("ALJ") found Plaintiff suffers from a severe right knee disorder with pain, and severe degenerative disc disease with low back pain, but retains the residual functional capacity to perform a limited range of sedentary work (A.R. 16-19).[1] Specifically, the ALJ found that Plaintiff can perform sedentary work except:

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[1] Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

See 20 C.F.R. § 404.1567(a).

> she can stand and walk for up to two of eight hours, cumulatively, but requires use of a cane for extended periods of ambulation; can sit for no more than six of eight hours, cumulatively, but must have an opportunity to alternate between seated and standing positions at least every 30 minutes; has unlimited capacity for pushing and pulling, except weight restrictions for lifting and carrying; can no more than occasionally climb ramps or stairs, balance, or stoop; can never crawl, kneel, crouch or climb ladders or ropes; and cannot be exposed to dangerous machines or unprotected heights.

(A.R. 17).

In finding Plaintiff retains this capacity, the ALJ purportedly gave "substantial evidentiary weight" to opinions from Agreed Medical Examiner ("AME") Dr. Steven Silbart, the consultative examiners, and the State agency review physicians. See A.R. 18-19. The ALJ rejected the contrary opinion of Plaintiff's treating physician, Dr. Philip Conwisar (A.R. 1388-95). The ALJ also rejected as not credible Plaintiff's contrary testimony. See A.R. 17, 19.

The ALJ found that Plaintiff's residual functional capacity permitted her to perform her past relevant work as a reservation clerk as actually and generally performed (A.R. 19-20 (relying on vocational

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expert testimony at A.R. 56-61)).[2] Accordingly, the ALJ found Plaintiff not disabled (A.R. 20). The Appeals Council denied review (A.R. 1-3).

STANDARD OF REVIEW

Under 42 U.S.C. section 405(g), this Court reviews the Administration's decision to determine if: (1) the Administration's findings are supported by substantial evidence; and (2) the Administration used correct legal standards. See Carmickle v. Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner, 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted); see also Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

> If the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ. But the Commissioner's decision cannot be affirmed simply by isolating a specific quantum of supporting evidence. Rather, a court must consider the record as a whole,

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[2] Plaintiff reported that her job as a reservationist required her to walk 1.5 hours, stand 0.5 hours, and sit six hours in an eight hour day (A.R. 245). She lifted less than 10 pounds and was not required to climb, stoop, kneel, crouch, or crawl (A.R. 245). Nor did she use any machines, tools, or equipment (A.R. 245).

weighing both evidence that supports and evidence that detracts from the [administrative] conclusion.

Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and quotations omitted).

DISCUSSION

Plaintiff contends, inter alia, that the ALJ materially erred in: (1) the evaluation of Dr. Conwisar's opinion; and (2) the evaluation of Plaintiff's credibility. For the reasons discussed herein, the Court agrees. Remand for further administrative proceedings is appropriate.

I. Summary of the Medical Record

MRI studies from the time of Plaintiff's work injury showed a five millimeter disc bulge at L5-S1, and early disc desiccation at L4-L5 with a three millimeter disc bulge, which was causing pain radiating down Plaintiff's legs (A.R. 48, 351, 360-61; see also A.R. 605-06 (follow up MRI from May 13, 2009, also showing mild spondylosis throughout the lumbar spine and disc dessication at L5-S1); A.R. 700-01 (post-operative MRI from March 29, 2011, showing mild arthritis at L4-L5, small posterior annular fissure at L5-S1, and mild loss of disc height at L5-S1); A.R. 868-70 (MRI from March 13, 2012 showing a 1-2 millimeter disc bulge at L4-L5 with moderate-to-severe facet arthropathy, mild-to-moderate loss of disc height and a 1-2 millimeter bulge at L5-S1)).

Plaintiff's worker's compensation orthopedic surgeon, Dr. Conwisar, treated Plaintiff for her back injury from April 2008 through at least December 2012 (A.R. 43, 421-74, 477-79, 483-85, 572-73, 586, 654-79, 687-88, 692-93, 702-03, 719, 723-25, 744-45, 776-79, 787-95, 814-15, 871-1088, 1355-86). Dr. Conwisar prescribed narcotic pain relievers, in coordination with pain management specialists, and requested authorization for three lumbar epidural cortisone injections and a short course of physical therapy (A.R. 460-72, 661-63, 1090-1119, 1121-23, 1132-74, 1201-06, 1210-25). Plaintiff was given a total of three epidural injections for her pain in November and December of 2009, "without significant improvement" (A.R. 48, 559-71, 574-85, 589-99, 660, 780-82, 785-86).

Orthopedic surgeon, Dr. Edwin Haronian, evaluated Plaintiff on May 20, 2010, and stated that additional lumbar injections would be "out of the question" because Plaintiff's "pain recurred" after the previous injections (A.R. 618). Dr. Haronian, like Agreed Medical Examiner Dr. Silbart (A.R. 763-75), recommended decompression surgery at the L5-S1 level (for Plaintiff's leg pain), and possibly a lumbar arthrodesis (for her back pain) (A.R. 618-23). On August 6, 2010, Dr. Haronian performed the lumbar decompression surgery ("hemilaminectomies" at L5 and S1), which reportedly helped resolve Plaintiff's leg pain, but not her back pain (A.R. 48, 624-28, 637-39). Dr. Haronian requested authorization for physical therapy (A.R. 625). By February 1, 2011, Plaintiff had completed nine post-operative physical therapy sessions (A.R. 654). Dr. Conwisar ordered additional

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physical therapy to occur after February 1, 2011 (A.R. 654).[3]

Plaintiff's back did not improve after surgery. See A.R. 48-49 (medical expert calling it a "failed surgery"). As the medical expert stated, "it's a frequent scenario, the more [the doctors] did the worse she got" (A.R. 48). As of January 24, 2012, Dr. Conwisar stated that Plaintiff's pain was more severe and that she would need an updated MRI and spine surgical re-evaluation (A.R. 1004-05; see also A.R. 1384 (recommending same in May of 2012)). On evaluation in 2012, Dr. Haronian reportedly recommended pool physical therapy (A.R. 1356). In May and July of 2012, Plaintiff underwent additional epidural steroid injections for her pain (A.R. 1192-99, 1207-09). She initially reported "significant relief in her pain which has been persistent so far" (A.R. 1211). However, Dr. Conwisar indicated as of September 25, 2012, that the injections did not provide lasting

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[3] On February 2, 2011, AME Dr. Silbart found that Plaintiff continued to be "validly temporarily totally disabled" (A.R. 713). On May 19, 2011, Dr. Silbart found that Plaintiff then was "Permanent and Stationary," and opined that Plaintiff was not capable of performing her "usual and customary work duties" (A.R. 682-83). On August 12, 2011, Dr. Silbart opined that Plaintiff's current lifting capacity was between 25 and 28 pounds, and that she would be precluded from "prolonged sitting," but he did not assign a specific sitting time limit (A.R. 689-90). In his most recent examination on February 11, 2013, Dr. Silbart did not express an opinion as to Plaintiff's limitations, but he noted that she presented with "increased lumbar symptomatology" (A.R. 1412). Consistent with her increased symptomatology, Dr. Silbart assigned Plaintiff a "35% Whole Person Impairment" score. See A.R. 1413; compare A.R. 682 (Dr. Silbart assigning a 27 percent impairment on May 19, 2011, when he opined that Plaintiff was incapable of performing her ordinary work duties); A.R. 690 (Dr. Silbart also assigning a 27 percent impairment on August 12, 2011, when he opined that Plaintiff could lift between 25 and 28 pounds and would be precluded from prolonged sitting).

significant improvement (A.R. 1368). "She continues to have severe low back pain radiating predominantly to the right lower extremity" (A.R. 1368).

Dr. Conwisar completed a Residual Functional Capacity Assessment form dated February 28, 2013 (A.R. 1388-95). Dr. Conwisar indicated that Plaintiff could lift and carry less than 10 pounds, would require a hand-held assistive device for ambulation, and must periodically alternate between sitting and standing (A.R. 1389). Dr. Conwisar did not indicate how long he thought Plaintiff could stand and/or walk or sit in a workday (A.R. 1389). He stated Plaintiff then was in a wheelchair due to alleged problems with her right knee, unrelated to her back injury (A.R. 1389).[4] Dr. Conwisar indicated that Plaintiff should never climb, balance, stoop, kneel, crouch, or crawl (A.R. 1390).

As the medical expert stated, there was some evidence of right knee arthritis (A.R. 48; see also A.R. 844-57, 1227-31, 1255-1353 (medical records reporting right knee pain and arthritis and related treatment)). Plaintiff underwent arthroscopic surgery in November of 2012, testified that her knee is "bone on bone" and also testified that Dr. Minkowitz at Kaiser said she is a candidate for knee replacement (A.R. 51-52; see also A.R. 1346-48 (medical record from arthroscopic surgery)).

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[4] At her February 11, 2013 Agreed Medical Examination, Plaintiff presented with both a cane and a wheelchair but reportedly "can walk without the use of either." See A.R. 1410.

The medical expert opined that Plaintiff could perform light work limited to standing two hours in an eight hour workday, and sitting approximately six hours in an eight hour workday, with periodic alternation between sitting and standing (A.R. 49). The expert opined that Plaintiff could never climb ladders, ropes, or scaffolding, and could occasionally climb ramps and stairs, balance, stoop, kneel, crouch, and crawl (A.R. 49). The expert found no manipulative or environmental limitations (A.R. 49).[5]

II. The ALJ's Stated Reasons For Rejecting Dr. Conwisar's Opinion are Insufficient.

A treating physician's conclusions "must be given substantial weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988); see Rodriguez v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989) ("the ALJ must give sufficient weight to the subjective aspects of a doctor's opinion. . . . This is especially true when the opinion is that of a treating physician") (citation omitted); see also Orn v. Astrue, 495 F.3d 625, 631-33 (9th Cir. 2007) (discussing deference owed to treating physician opinions). Even where the treating physician's

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[5] On October 23, 2011, a consultative orthopedic examiner found lesser limitations than those found by the medical expert. The examiner opined that Plaintiff would be limited to light work, with standing and walking six hours in an eight hour day, sitting six hours, and only occasional climbing, stooping, kneeling, and crouching (A.R. 835-40; see also A.R. 541-46 (May 8, 2009 consultative orthopedic examination also finding lesser limits than the medical expert found)).

opinions are contradicted,[6] "if the ALJ wishes to disregard the opinion[s] of the treating physician he . . . must make findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record." Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987) (citation, quotations and brackets omitted); see Rodriguez v. Bowen, 876 F.2d at 762 ("The ALJ may disregard the treating physician's opinion, but only by setting forth specific, legitimate reasons for doing so, and this decision must itself be based on substantial evidence") (citation and quotations omitted).

In the present case, the ALJ rejected Dr. Conwisar's opinion, stating the following:

> Throughout 2012 and in early 2013, when not noting a short-term disability, Dr. Conwisar repeatedly notes that the claimant's long-term (permanent and stationary) Work/Disability Status is as previously determined by the Agreed Medical Examiner [A.R. 1354-86 (Dr. Conwisar's reports for Plaintiff's worker's compensation claim)]. That is, Dr. Conwisar agrees with the opinion of Dr. Silbart that the claimant's long-term functioning is limited to lifting 25 to 28 pounds with no prolonged sitting.

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[6] Rejection of an uncontradicted opinion of a treating physician requires a statement of "clear and convincing" reasons. Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996); Gallant v. Heckler, 753 F.2d 1450, 1454 (9th Cir. 1984).

> In spite of this, on February 28, 2013 Dr. Conwisar issued a residual functional capacity form indicating that the claimant is, essentially, completely disabled [A.R. 1388-95]. However, it explicitly attributes the claimant's necessary wheelchair use to the claimant's knee pain, which he does not treat, and he explicitly anticipates an arthroscopic surgery on the knee, which, is apparently based on the claimant's statements. There is no evidence Dr. Conwisar actually examined the claimant's knee or viewed any medical images of the knee. As such, Dr. Conwisar is not in a qualified position to address the knee impairments. . . . [I]n the absence of any significant knee treatment record or medical image I am unable to accept Dr. Conwisar's recommendation that the claimant is completely disabled by knee pain.

(A.R. 18-19).

An ALJ's material mischaracterization of the record can warrant remand. See, e.g., Regennitter v. Commissioner of Social Sec. Admin., 166 F.3d 1294, 1297 (9th Cir. 1999). Here, the ALJ materially mischaracterized the record in evaluating Dr. Conwisar's opinion. First, while Dr. Conwisar's notes reference Plaintiff's "Permanent and Stationary" status and refer to Plaintiff's work status with "per AME" in December of 2012 (see, e.g., 1356, 1358, 1360), Dr. Conwisar's notes also indicate that Plaintiff was scheduled to have a re-evaluation by the Agreed Medical Examiner that had not happened as of December 4, 2012 (A.R. 1355). Prior to that time, Dr. Conwisar either

indicated a need for an "AME" re-evaluation regarding Plaintiff's work status and treatment (see, e.g., A.R. 1363-64, 1367, 1369, 1371, 1373), or referred to the prior "Permanent and Stationary" finding (see, e.g., 1376-77, 1382, 1384). There is no indication anywhere in the notes that Dr. Conwisar considered and agreed with Dr. Silbart's snapshot from August of 2011 suggesting that Plaintiff could lift between 25 and 28 pounds.[7] To the extent the ALJ attempted to rely on any alleged inconsistency between Dr. Conwisar's treatment notes (which utilize worker's compensation terminology), and Dr. Conwisar's opinion regarding Plaintiff's residual functional capacity, this is not a specific and legitimate reason for rejecting Dr. Conwisar's opinion in total. Significantly, in finding Plaintiff capable of only sedentary work, the ALJ arguably agreed with Dr. Conwisar's opinion that Plaintiff could only lift and carry less than 10 pounds. Compare A.R. 17 with A.R. 1389.

Second, contrary to the ALJ's assertion, Dr. Conwisar's residual functional capacity opinion does not suggest "complete" disability due to knee pain. As summarized above, Dr. Conwisar did state that Plaintiff then was in a wheelchair because of her right knee problem (A.R. 1389). However, Dr. Conwisar indicated that Plaintiff would have to alternate between sitting and standing to relieve her pain, and would have to use a hand-held assistive device for ambulation – suggesting that he was not basing all the limitations on Plaintiff's current knee issue (A.R. 1389). To the contrary, Dr. Conwisar

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[7] AME Silbart himself later gave a more restrictive assessment, apparently based in part on Plaintiff's "increased lumbar symptomatology." See footnote 3, supra.

expressly indicated that his findings were based on facts unrelated to Plaintiff's knee issues, including the following: (1) Plaintiff had undergone a lumbar microdiscectomy at L5-S1 and had two lumbar epidural injections (A.R. 1389); (2) a MRI from March of 2012 showed moderate to severe facet arthropathy at L4-L5, and left hemilaminectomy deficit at L5-S1 (A.R. 1390); and (3) Plaintiff was having more severe pain in the lumbar spine, radiating predominantly to the right lower extremity, and that she had not obtained "significant improvement" from treatment (A.R. 1393). Thus, the ALJ could not properly reject Dr. Conwisar's opinion based on assertion that Dr. Conwisar predicated his opinion only on Plaintiff's current knee problem. Manifestly, he did not.

As discussed above, Dr. Conwisar did not indicate how long Plaintiff could stand and/or walk or sit in a regular workday (A.R. 1389). The ALJ should have further developed the record on this point. See generally Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983) ("[T]he ALJ has a special duty to fully and fairly develop the record to assure the claimant's interests are considered. This duty exists even when the claimant is represented by counsel.") (internal citation omitted); see also Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001) ("An ALJ's duty to develop the record further is triggered only when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence.") (citation omitted). As the ALJ acknowledged, Dr. Silbart opined that Plaintiff is precluded from prolonged sitting (A.R. 18, 690). Both Dr. Conwisar and the medical expert opined (and the ALJ agreed) that Plaintiff would have to alternate between sitting and standing periodically to

relieve her pain (A.R. 17, 49, 1389). Without the benefit of any examination, the non-examining medical expert opined that Plaintiff would be capable of sitting six hours and standing and/or walking two hours in a workday (A.R. 49).[8] The only examining doctors who opined concerning these abilities were the consultative examiners, whose opinions the ALJ did not adopt for these abilities and whose opinions predated Dr. Conwisar's opinion by more than a year. See A.R. 18, 541-46, 835-40.

III. The ALJ's Credibility Findings Are Insufficient.

Where, as here, an ALJ finds that a claimant's medically determinable impairments reasonably could be expected to cause the symptoms alleged (A.R. 17), the ALJ may not discount the claimant's testimony regarding the severity of the symptoms without making "specific, cogent" findings, supported in the record, to justify discounting such testimony. See Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010); Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995); but see Smolen v. Chater, 80 F.3d at 1282-84 (indicating that ALJ must

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[8] "The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician." Lester v. Chater, 81 F.3d at 831 (emphasis original); see also Orn v. Astrue, 495 F.3d at 632 ("When [a nontreating] physician relies on the same clinical findings as a treating physician, but differs only in his or her conclusions, the conclusions of the [nontreating] physician are not 'substantial evidence.'"); Pitzer v. Sullivan, 908 F.2d 502, 506 n.4 (9th Cir. 1990) ("The nonexamining physicians' conclusion, with nothing more, does not constitute substantial evidence, particularly in view of the conflicting observations, opinions, and conclusions of an examining physician").

state "specific, clear and convincing" reasons to reject a claimant's testimony where there is no evidence of malingering).[9] Generalized, conclusory findings do not suffice. See Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004) (the ALJ's credibility findings "must be sufficiently specific to allow a reviewing court to conclude the ALJ rejected the claimant's testimony on permissible grounds and did not arbitrarily discredit the claimant's testimony") (internal citations and quotations omitted); Holohan v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001) (the ALJ must "specifically identify the testimony [the ALJ] finds not to be credible and must explain what evidence undermines the testimony"); Smolen v. Chater, 80 F.3d at 1284 ("The ALJ must state specifically which symptom testimony is not credible and what facts in the record lead to that conclusion."); see also Social Security Ruling 96-7p.[10] A lack of objective medical evidence to support the alleged severity of a claimant's symptomatology "can be a factor" in rejecting a claimant's credibility, but cannot "form the sole basis." See Burch v. Barnhart, 400 F.3d 676, 681 (2005).

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[9] In the absence of an ALJ's reliance on evidence of "malingering," most recent Ninth Circuit cases have applied the "clear and convincing" standard. See, e.g., Burrell v. Colvin, 775 F.3d 1133, 1136-37 (9th Cir. 2014); Treichler v. Commissioner, 775 F.3d 1090, 1102 (9th Cir. 2014); Ghanim v. Colvin, 763 F.3d 1154, 1163 n.9 (9th Cir. 2014); Garrison v. Colvin, 759 F.3d 995, 1014-15 & n.18 (9th Cir. 2014); Chaudhry v. Astrue, 688 F.3d 661, 670, 672 n.10 (9th Cir. 2012); Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012); see also Ballard v. Apfel, 2000 WL 1899797, at *2 n.1 (C.D. Cal. Dec. 19, 2000) (collecting earlier 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.

[10] Social security rulings are binding on the Administration. See Terry v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir. 1990).

Plaintiff testified that she was taking Norco for her pain and Zanaflex for muscle spasms (A.R. 44-45). She said that, with medication, her pain is approximately a seven on a scale of one to 10 (A.R. 55). Further, Plaintiff said that her medication makes her "woozy" and sleepy and prevents her from focusing or concentrating (A.R. 50-51). Plaintiff said she could not perform her job as a reservation clerk due to the side effects of her medication (A.R. 51).

Plaintiff also testified that she does not drive due to her pain medications and would have difficulty using steps to ride public transportation (A.R. 39). Plaintiff claimed that she needs bathing assistance and some dressing assistance (A.R. 45). She said she could prepare simple meals that do not require standing too long (A.R. 45). Reportedly, Plaintiff then was taking two or three naps or rest breaks per day for an hour or two each (A.R. 54). Plaintiff said she could shop only with the assistance of electric chairs because she has problems walking more than 100 yards due to lower back and tailbone pain (A.R. 46, 54). Plaintiff said she could barely sit for 15 minutes (A.R. 54).[11]

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[11] Plaintiff's written reports reflect worsening pain over time, consistent with the medical source observations. In an Exertion Questionnaire dated September 29, 2011, Plaintiff reported that she lives with her parents and does no housekeeping (A.R. 249-51). She stated that she can cook but must take many breaks to sit, can sit no longer than 20 minutes and can stand no longer than 15 minutes due to her pain (A.R. 249, 251). She reported that she could walk 15 to 20 yards before she is in "a lot" of pain, and that she uses a wheelchair when she goes somewhere that requires her to walk a long distance (A.R. 249, 251). She reported that she uses a cane daily (A.R. 251). Plaintiff stated that she could drive a car five to 10 miles to her doctor appointments every four to six weeks (A.R. 250). She

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The ALJ rejected Plaintiff's pain testimony: (1) as supposedly contradicted by "[e]xamination results"; and (2) for "failure to pursue all available pain treatment modalities" (i.e., more epidural injections, using a TENS unit, or "chiropractic adjustment") (A.R. 19).

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[11](...continued)
stated that she tries to get at least a 30 minute nap during the day (A.R. 251). Plaintiff then was taking Flexeril (a muscle relaxant) and Lortab (Vicodin) for her pain (A.R. 251).

In a Disability Report - Appeal form dated January 18, 2012, Plaintiff reported that her pain had increased and continues to radiate down both legs, and that she has right hip pain which makes it difficult for her to sit or stand too long (A.R. 252-56). She reported spending more time at home due to limitations from her pain (A.R. 252, 256). By then, Plaintiff indicated that she was not driving anymore (A.R. 255).

In a Disability Report - Appeal form dated June 27, 2012, Plaintiff reported that because of back spasm and tailbone pain, she cannot walk farther than 50 yards, and that her pain is worse on her right side, which requires her to sit and lean on her left side (A.R. 262-68). She reportedly was unable to go anywhere alone without assistance (A.R. 262). She reported that she could not sit for "any length of time" (A.R. 266).

In a "Written Questions to Claimant (Adult)" form dated January 16, 2013, Plaintiff reported that her medications had rendered her unable to drive or concentrate (A.R. 281-88; see also A.R. 294-301 (follow up form dated April 26, 2013, reporting similar answers)). She indicated that she could drive to her attorney's office but "in general" does not drive (A.R. 282). Plaintiff thought she could lift less than 10 pounds, stand and walk less than two hours in an eight hour day, and sit less than six hours in an eight hour day (A.R. 284-85). She indicated that she uses a cane and cannot sit or stand longer than 15-20 minutes, and cannot bend (A.R. 285). She reported that her pain is always present and is getting worse (A.R. 286). She also reported that her medication does not allow her to concentrate, and, if she fails to take her medication, her pain prevents her from concentrating (A.R. 287). Plaintiff indicated that when she is hurting, she can only lie down or recline (A.R. 287). She reportedly was taking Norco, Neurontin, and Zanaflex (A.R. 292).

With regard to the first stated reason, a failure of the medical record to corroborate fully a claimant's subjective symptom testimony is not, by itself, a legally sufficient basis for rejecting such testimony. See Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001); Varney v. Secretary, 846 F.2d 581, 584 (9th Cir. 1988); Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986); see also Burch v. Barnhart, 400 F.3d at 681. The ALJ's general reference to "[e]xamination results" supposedly contradicting Plaintiff's statements lacks the requisite specificity. To the extent the ALJ did cite specifics, the specifics fail adequately to support the ALJ's conclusion. The early examination record from May of 2009 cited by the ALJ may have shown normal posture, gait, and ambulation at that time (A.R. 543), but other, more recent examinations reflect: (1) mild antalgic gait, referable to the right, with the use of a cane (A.R. 767 (March 24, 2010 exam); (2) a gait with "diminished cadence and velocity" (A.R. 836 (October 23, 2011 exam)); and (3) moderately antalgic gait favoring the left with the use of a cane (A.R. 710 (February 2, 2011 exam)).

With regard to the second stated reason, a limited course of treatment sometimes can justify the rejection of a claimant's testimony, at least where the testimony concerns physical problems. See, e.g., Burch v. Barnhart, 400 F.3d at 681 (lack of consistent treatment such as where there was a three to four month gap in treatment properly considered in discrediting claimant's back pain testimony); Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (in assessing the credibility of a claimant's pain testimony, the Administration properly may consider the claimant's failure to request

treatment and failure to follow treatment advice) (citing Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991) (en banc)); Matthews v. Shalala, 10 F.3d 678, 679-80 (9th Cir. 1993) (permissible credibility factors in assessing pain testimony include limited treatment and minimal use of medications); see also Johnson v. Shalala, 60 F.3d 1428, 1434 (9th Cir. 1995) (absence of treatment for back pain during half of the alleged disability period, and evidence of only "conservative treatment" when the claimant finally sought treatment, sufficient to discount claimant's testimony).

Here, however, no doctor opined that Plaintiff should receive additional epidural injections for her pain; her previous injections had failed to provide enduring relief. Nor did any doctor opine that Plaintiff should use a TENS unit or seek chiropractic adjustment for her condition. To the contrary, it appears Plaintiff followed all treatment suggestions, including physical therapy, narcotic pain medication, multiple epidural injections, and surgery. The ALJ was not qualified to determine on his own that Plaintiff had any available additional or different treatment options. An ALJ may not rely on his or her own lay opinion regarding medical matters. See Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir. 1975) (an ALJ who is not qualified as a medical expert cannot make "his own exploration and assessment as to [the] claimant's physical condition"); see also Rohan v. Chater, 98 F.3d 966, 970-71 (7th Cir. 1996) (ALJ may not rely on his or her own lay opinion regarding medical matters); Ferguson v. Schweiker, 765 F.2d 31, 37 (3d Cir. 1995) (same); cf. Rudder v. Colvin, 2014 WL 3773565, at *12 (N.D. Ill. July 30, 2014) ("The ALJ may be correct that disabling limitations from multiple sclerosis

would result in more frequent treatment or need for medication. However, the ALJ must include evidence to support such a conclusion in his opinion because he is not qualified, on his own, to make such determinations.") (citations and quotations omitted).

Finally, the ALJ erred by failing specifically to address the alleged side effects of Plaintiff's pain medication. When a claimant testifies to side effects that "are in fact associated with the claimant's medication(s)," the ALJ may not disregard such testimony unless the ALJ makes "specific findings similar to those required for excess pain testimony." Varney v. Secretary, 846 F.2d at 585; see also 20 C.F.R. § 404.1529(c)(3)(iv) ("We will consider . . . side effects of any medication you take or have taken to alleviate your pain or other symptoms"); Social Security Ruling 96-7p (mandating consideration of "side effects of any medications the individual takes or has taken to alleviate pain or other symptoms"); Cooley v. Astrue, 2011 WL 2554222, at *5 & n.4 (C.D. Cal. June 27, 2011) (ALJ erred in failing to consider side effect of Norco, which claimant alleged caused her to feel drowsy/tired and to lose focus). In the present case, the ALJ failed to mention Plaintiff's testimony concerning the allegedly debilitating side effects of her medication. Thus, the ALJ necessarily failed to state legally sufficient reasons for implicitly finding such testimony not credible.

In attempting to defend the ALJ's adverse credibility finding, Defendant characterizes the ALJ's decision as having found that Plaintiff's medical treatment was "routine and conservative." See Defendant's Motion, pp. 8-9. To the extent Defendant's

characterization seeks to provide a reason additional to or different from those reasons expressly stated by the ALJ, the characterization must fail. Defendant cannot properly suggest specifics the ALJ failed to state expressly as reasons for rejecting Plaintiff's credibility. See Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001) (court "cannot affirm the decision of an agency on a ground that the agency did not invoke in making its decision"); see also Treichler v. Commissioner, 775 F.3d 1090, 1102 (9th Cir. 2014) (for meaningful appellate review, "we require the ALJ to specifically identify the testimony . . . she or he finds not credible . . . and explain what evidence undermines the testimony") (citations and quotations omitted). In any event, Plaintiff's treatment (which has included narcotic pain medication, epidural injections, and surgery) does not appear to have been "routine or conservative." See, e.g., Sanchez v. Colvin, 2013 WL 1319667, at *4 (C.D. Cal. March 29, 2013) ("Surgery is not conservative treatment"); Aguilar v. Colvin, 2014 WL 3557308, at *8 (C.D. Cal. July 18, 2014) ("there is evidence in the record that Plaintiff has been prescribed narcotic medications, such as Vicodin. . . . It would be difficult to fault Plaintiff for overly conservative treatment when he has been prescribed strong narcotic pain medications"); Christie v. Astrue, 2011 WL 4368189, at *4 (C.D. Cal. Sept. 16, 2011) (refusing to categorize as "conservative" treatment including use of narcotic pain medication and epidural injections).

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IV. Remand is Appropriate.

Remand is appropriate because the circumstances of this case suggest that further administrative review could remedy the ALJ's errors. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) ("Connett") (remand is an option where the ALJ fails to state sufficient reasons for rejecting a claimant's excess symptom testimony); but see Orn v. Astrue, 495 F.3d 625, 640 (9th Cir. 2007) (citing Connett for the proposition that "[w]hen an ALJ's reasons for rejecting the claimant's testimony are legally insufficient and it is clear from the record that the ALJ would be required to determine the claimant disabled if he had credited the claimant's testimony, we remand for a calculation of benefits") (quotations omitted); see also Brown-Hunter v. Colvin, 2015 WL 4620123, at *7-8 (9th Cir. Aug, 4, 2015) (discussing the requirements for the "extreme remedy" of crediting testimony as true and remanding for an immediate award of benefits); Ghanim v. Colvin, 763 F.3d 1154, 1166 (9th Cir. 2014) (remanding for further proceedings where the ALJ failed to state sufficient reasons for deeming a claimant's testimony not credible); Garrison v. Colvin, 759 F.3d 995, 1021 (9th Cir. 2014) (court may "remand for further proceedings, even though all conditions of the credit-as-true rule are satisfied, [when] an evaluation of the record as a whole creates serious doubt that a claimant is, in fact, disabled"); Vasquez v. Astrue, 572 F.3d 586, 600-01 (9th Cir. 2009) (a court need not "credit as true" improperly rejected claimant testimony where there are outstanding issues that must be resolved before a proper disability determination can be made); see generally INS v. Ventura, 537 U.S. 12, 16 (2002) (upon

reversal of an administrative determination, the proper course is to remand for additional agency investigation or explanation, except in rare circumstances); Treichler v. Commissioner, 775 F.3d at 1101 n.5 (remand for further administrative proceedings is the proper remedy "in all but the rarest cases").[12]

CONCLUSION

For all of the foregoing reasons,[13] Plaintiff's and Defendant's motions for summary judgment are denied and this matter is remanded for further administrative action consistent with this Opinion.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: September 30, 2015.

/S/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

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[12] There are outstanding issues that must be resolved before a proper disability determination can be made in the present case. For example, it is not clear whether the ALJ would be required to find Plaintiff disabled for the entire claimed period of disability even if Plaintiff's testimony were fully credited. See Luna v. Astrue, 623 F.3d 1032, 1035 (9th Cir. 2010).

[13] The Court has not reached any other issue raised by Plaintiff except insofar as to determine that reversal with the directive for the immediate payment of benefits would not be appropriate at this time. "[E]valuation of the record as a whole creates serious doubt that [Plaintiff] is in fact disabled." See Garrison v. Colvin, 759 F.3d at 1021.