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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

SHERRY A. FACCIUTO,)	NO. CV 15-3894-E
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
CAROLYN W. COLVIN, Acting)	AND ORDER OF REMAND
Commissioner of Social Security,)	
)	
Defendant.)	
)	

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 May 22, 2015, seeking review of
the Commissioner's denial of benefits. The parties consented to
proceed before a United States Magistrate Judge on July 29, 2016.
Plaintiff filed a motion for summary judgment on March 10, 2016.

1 Defendant filed a motion for summary judgment on June 15, 2016. The
2 Court has taken the motions under submission without oral argument.
3 See L.R. 7-15; "Order," filed August 19, 2015.

4
5 **BACKGROUND**
6

7 Plaintiff asserts disability since April 1, 2006, based on
8 alleged low back pain, anxiety, hyperlipidemia, hypothyroidism,
9 hypertension, migraine headaches, and frequent urinary tract
10 infections (Administrative Record ("A.R.") 53-55, 284). Plaintiff
11 testified that she suffers from back pain and other symptoms of
12 allegedly disabling severity (A.R. 55-74).

13
14 The Administrative Law Judge ("ALJ") found Plaintiff has severe
15 degenerative disc disease of the lumbar spine and migraines (A.R.
16 23).¹ However, the ALJ also found Plaintiff retains the residual
17 functional capacity to perform a limited range of light work,
18 including Plaintiff's past relevant work as a reception clerk,
19 phlebotomist, file clerk, and medical assistant (A.R. 26-29 (adopting
20 vocational expert testimony at A.R. 80-82)). The ALJ deemed
21 Plaintiff's contrary testimony "not entirely credible" (A.R. 27). The
22 ALJ therefore found Plaintiff not disabled (A.R. 29). The Appeals
23 Council denied review (A.R. 1-6).

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¹ The ALJ found "non-severe" Plaintiff's alleged
28 hyperlipidemia, hypothyroidism, anxiety, and depression (A.R. 24-
25).

1 DISCUSSION

2
3 I. The ALJ's Stated Reasons for Rejecting Plaintiff's Credibility
4 are Legally Insufficient.
5

6 Plaintiff testified, inter alia, she has back pain every day, all
7 day, in her lower back and on the right side above her waist which
8 radiates down to her calf when she sleeps (A.R. 56-57). Plaintiff
9 also testified she has intermittent back spasms (A.R. 71-72).
10 Plaintiff claimed that on an average day she must lie down to relieve
11 her pain and spasms four or five times for 30 to 60 minutes each time
12 (A.R. 73-74).
13

14 Where, as here, an ALJ finds that a claimant's medically
15 determinable impairments reasonably could be expected to cause the
16 symptoms alleged (A.R. 27), the ALJ may not discount the claimant's
17 testimony regarding the severity of the symptoms without making
18 "specific, cogent" findings, supported in the record, to justify
19 discounting such testimony. See Berry v. Astrue, 622 F.3d 1228, 1234
20 (9th Cir. 2010); Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995);
21 but see Smolen v. Chater, 80 F.3d 1273, 1282-84 (9th Cir. 1996)
22 (indicating that ALJ must state "specific, clear and convincing"
23 reasons to reject a claimant's testimony where there is no evidence of

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1 malingering).² Generalized, conclusory findings do not suffice. See
2 Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004) (the ALJ's
3 credibility findings "must be sufficiently specific to allow a
4 reviewing court to conclude the ALJ rejected the claimant's testimony
5 on permissible grounds and did not arbitrarily discredit the
6 claimant's testimony") (internal citations and quotations omitted);
7 Holohan v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001) (the ALJ
8 must "specifically identify the testimony [the ALJ] finds not to be
9 credible and must explain what evidence undermines the testimony");
10 Smolen v. Chater, 80 F.3d at 1284 ("The ALJ must state specifically
11 which symptom testimony is not credible and what facts in the record
12 lead to that conclusion."); see also Social Security Ruling 96-7p.³

13
14 Here, the ALJ rejected Plaintiff's credibility "for the reasons
15 explained in this decision," stating:

16
17 In terms of the claimant's alleged impairments, her
18 testimony concerning her symptoms was grossly exaggerated.

19
20 ² In the absence of an ALJ's reliance on evidence of
21 "malingering," most recent Ninth Circuit cases have applied the
22 "clear and convincing" standard. See, e.g., Burrell v. Colvin,
23 775 F.3d 1133, 1136-37 (9th Cir. 2014); Treichler v.
24 Commissioner, 775 F.3d 1090, 1102 (9th Cir. 2014); Ghanim v.
25 Colvin, 763 F.3d 1154, 1163 n.9 (9th Cir. 2014); Garrison v.
26 Colvin, 759 F.3d 995, 1014-15 & n.18 (9th Cir. 2014); see also
27 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
28 findings are insufficient under either standard, so the
distinction between the two standards (if any) is academic.

³ Social security rulings are binding on the
Administration. See Terry v. Sullivan, 903 F.2d 1273, 1275 n.1
(9th Cir. 1990).

1 She was able to drive herself to the hearing, although she
2 said her son or a friend usually drives her [A.R. 43]. She
3 testified she can take care of her own personal hygiene but
4 it takes longer [A.R. 63]. She uses no assistive device
5 [A.R. 63]. She can prepare food in a microwave but does not
6 clean [A.R. 65-66]. She does not do laundry other than to
7 fold clothes [A.R. 65]. She can wash dishes for fifteen
8 minutes then has to lie down or sit for 30 minutes [A.R.
9 66]. She does not grocery shop [A.R. 67].

10
11 The claimant is able to take the train to Ventura to
12 visit her daughter riding 12 hours but said she was able to
13 do it because the seats recline and she can walk around
14 [A.R. 67-68]. She makes this trip every 1-2 months [A.R.
15 68].⁴ She visits her daughter[,] son in law and
16 grandchildren for a week at a time [A.R. 68]. She also
17 stays with and socializes with her daughter's mother in law
18 while there [A.R. 68, 75-76]. She alleges she has 2-3
19 anxiety attack[s] a week even when she does not go anywhere
20 [A.R. 69-70]. She has been able to pass the courses of
21 study for phlebotomy and her CNA courses but contends she
22 does not comprehend when reading a magazine [A.R. 76-77].
23 She alleges that she has back spasms, applies ice and has to
24 lie down for an hour [A.R. 71-72]. She can walk 15-20
25 minutes, stand for 15-20 minutes and sit for 30-60 minutes
26

27 ⁴ Plaintiff actually testified that she tries to go to
28 her daughter's home once every two months, not every 1-2 months
(A.R. 68).

1 [A.R. 72].⁵ She uses a TENS unit for pain [A.R. 72].⁶ She
2 alleges that she has disturbed sleep 3-4 times a month and
3 wakes up with panic attacks and her heart racing [A.R. 74].⁷
4 She alleges that she has migraines for which she takes over
5 the counter generic medication which make the headaches go
6 away after 30-45 minutes [A.R. 60] (Testimony). On
7 December 11, 2008, her treatment record indicated she needed
8 a supply of medication because she was traveling to Hawaii
9 for three months [citing A.R. 421].

10
11 (A.R. 27). The ALJ did not mention specifically Plaintiff's testimony
12 that she has to lie down four or five times a day for 30 to 60 minutes
13 each time (A.R. 73-74).

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15 It thus appears that the ALJ discounted Plaintiff's credibility
16 based on her reported daily activities and on asserted inconsistencies

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22 ⁵ Plaintiff testified that she can stand 15 minutes
23 before needing to sit with her feet elevated to relieve pain
24 (A.R. 72-73). However, sitting for extended times also
reportedly causes her pain (A.R. 73).

25 ⁶ The record also reflects that Plaintiff was taking
26 Vicodin regularly for her pain and Soma for her muscle spasms
(see A.R. 390-92, 510).

27 ⁷ Plaintiff actually testified that she wakes up three or
28 four times a night and could not remember getting a good night's
sleep "in a long time" (A.R. 74).

1 in the record.⁸ The ALJ's stated reasoning is legally insufficient.

2
3 First, Plaintiff's limited daily activities do not support the
4 ALJ's adverse credibility determination. See, e.g., Vertigan v.
5 Halter, 260 F.3d 1044, 1049-50 (9th Cir. 2001) ("Vertigan") ("the mere
6 fact that a plaintiff has carried on certain daily activities, such as
7 grocery shopping, driving a car, or limited walking for exercise, does
8 not in any way detract from her credibility as to her overall
9 disability"); Gallant v. Heckler, 753 F.2d 1450, 1453-55 (9th Cir.
10 1984) ("Gallant") (fact that claimant could cook for himself and
11 family members as well as wash dishes did not preclude a finding that
12 claimant was disabled due to constant back and leg pain); see also
13 Burrell v. Colvin, 775 F.3d at 1138 (reversing adverse credibility
14 determination where "the ALJ did not elaborate on *which* daily
15 activities conflicted with *which* part of Claimant's testimony"). "The
16 Social Security Act does not require that claimants be utterly
17 incapacitated to be eligible for benefits, and many home activities
18 may not be easily transferable to a work environment where it might be
19 impossible to rest periodically or take medication." Smolen v.
20 Chater, 80 F.3d at 1283 n.7. The record does not reflect that
21 Plaintiff performed activities which would translate to sustained
22 activity in a work setting on a regular and continuing basis for eight
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25 ⁸ In evaluating a claimant's credibility, an ALJ may
26 consider evidence of inconsistencies. See Tommasetti v. Astrue,
27 533 F.3d 1035, 1039 (9th Cir. 2008) (citations omitted); see also
28 Bray v. Commissioner of Social Sec. Admin., 554 F.3d 1219, 1226-
27 (9th Cir. 2009); Smolen v. Chater, 80 F.3d at 1284; 20 C.F.R.
§§ 404.1529, 416.929.

1 hours a day, five days a week.⁹

2
3 Second, to the extent the ALJ considered as a significant part of
4 Plaintiff's daily activities the fact that Plaintiff travels by train
5 once every two months to visit family, or the fact that she once spent
6 three months in Hawaii, substantial evidence does not suggest that
7 these activities would translate to regular sustained work activity.
8 Plaintiff testified that when she takes the train she can lie down
9 fully and get up and move around at will (A.R. 67-68). While with her
10 family, she reportedly socializes for only approximately an hour a day
11 before going to a spare bedroom in her in-law's house to lie down
12 (A.R. 76). There is no information in the record concerning
13 Plaintiff's activities during her trip to Hawaii.

14
15 Third, the only arguable inconsistencies the Court can glean from
16 the ALJ's discussion of the record are: (1) Plaintiff's purported
17 testimony that she "does not comprehend when reading a magazine," yet

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19 ⁹ In Burch v. Barnhart, 400 F.3d 676, 680 (9th Cir. 2005)
20 ("Burch"), the Ninth Circuit upheld an ALJ's rejection of a
21 claimant's credibility in partial reliance on the claimant's
22 daily activities of cooking, cleaning, shopping, interacting with
23 others and managing her own finances and those of her nephew. In
24 doing so, the Ninth Circuit did not purport to depart from the
25 general rule that an ALJ may consider daily living activities in
26 the credibility analysis only where "a claimant engages in
27 numerous daily activities involving skills that could be
28 transferred to the workplace." Id. at 681. Undeniably, however,
it is difficult to reconcile the result in Burch with the results
in cases like Vertigan and Gallant. Certainly, "the relevance of
a claimant carrying on daily activities should be evaluated on a
case-by-case basis." Bloch on Social Security § 3.37 (Jan.
2005). In the present case, in light of the seemingly
conflicting Ninth Circuit case law as well as the evidence in the
record suggesting Plaintiff engages in only limited daily
activities, this Court does not believe Burch compels affirmance.

1 was able to pass phlebotomy and CNA courses; and (2) Plaintiff's
2 testimony that she has anxiety attacks two to three times a week, yet
3 can travel to Hawaii and can visit with her family once every two
4 months (A.R. 27). The record does not support the significance of
5 these alleged inconsistencies. Plaintiff did not testify that she is
6 incapable of comprehending when reading; Plaintiff testified that she
7 "always had a hard time comprehending reading and having it stay in
8 [her] mind," and that she had read "probably" three books for pleasure
9 in her whole life (A.R. 76-77). Plaintiff admitted that she had to
10 read and understand to get through her training, and explained that
11 she had a "very hard" time passing the courses (A.R. 76-78).
12 Plaintiff's admitted difficulty with reading comprehension is not
13 necessarily inconsistent with her ability to pass the referenced
14 courses. Similarly, Plaintiff did not claim any functional
15 limitations from her anxiety attacks which would prevent her from
16 traveling as she sometimes did. Plaintiff testified that when she
17 gets anxiety attacks her chest hurts, her heart starts beating fast,
18 and she gets light headed (A.R. 62). She takes Valium and Ziprasidone
19 regularly to manage her anxiety (A.R. 62-63). As described,
20 Plaintiff's twice weekly anxiety attacks are not inconsistent with an
21 ability to travel once every two months to visit family or an ability
22 to spend time in Hawaii.

23

24 The ALJ did not specify the objective medical record as a stated
25 reason for discounting Plaintiff's credibility (A.R. 27). To the
26 extent the ALJ may have relied on the medical record to discount
27 Plaintiff's credibility, a lack of objective medical evidence "can be
28 a factor" in discounting a claimant's credibility, but cannot "form

1 the sole basis." See Burch v. Barnhart, 400 F.3d at 681.
2 Additionally, the ALJ would have had to make a specific finding
3 identifying the testimony the ALJ found not credible and linking the
4 rejected testimony to parts of the medical record supporting the ALJ's
5 non-credibility determination. See Brown-Hunter v. Colvin, 806 F.3d
6 487, 494 (9th Cir. 2015) (holding it was legal error for ALJ to fail
7 to make such a link) (citations omitted). The ALJ made no such link
8 in the present case.

9
10 Defendant cites to other potential reasons for discounting
11 Plaintiff's credibility (e.g., Plaintiff's allegation that she was
12 unable to work as of April 1, 2006, despite an indication that
13 Plaintiff engaged in substantial gainful activity for three months in
14 2010, Plaintiff's alleged failure to see a specialist for her back
15 pain (she did see a pain management specialist (A.R. 356-60)), and
16 Plaintiff's alleged failure to seek mental health treatment) (see
17 Defendant's Motion, pp. 7-8). Because the ALJ did not state such
18 reasons for discounting Plaintiff's credibility, the Court cannot
19 uphold the credibility determination on the basis of such reasons.
20 Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001) (the court
21 "cannot affirm the decision of an agency on a ground that the agency
22 did not invoke in making its decision").

23
24 The Court is unable to conclude that the ALJ's failure to state
25 legally insufficient reasons for discounting Plaintiff's credibility
26 was harmless. "[A]n ALJ's error is harmless where it is
27 inconsequential to the ultimate non-disability determination." Molina
28 v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012) (citations and

1 quotations omitted). Here, the vocational expert testified that if
2 someone needed to sit or lie down two times a work day for 15-minute
3 breaks - which is a need less extreme than Plaintiff claimed - that
4 person would not be able to do any of Plaintiff's past relevant work
5 (A.R. 82). The vocational expert did not identify any other work such
6 a person could perform (A.R. 79-83).

7
8 **II. Remand for Further Administrative Proceedings is Appropriate.**

9
10 Because the circumstances of the case suggest that further
11 administrative review could remedy the ALJ's error, remand is
12 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2010); see
13 Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) ("Connett")
14 (remand is an option where the ALJ fails to state sufficient reasons
15 for rejecting a claimant's excess symptom testimony); but see Orn v.
16 Astrue, 495 F.3d 625, 640 (9th Cir. 2007) (appearing, confusingly, to
17 cite Connett for the proposition that "[w]hen an ALJ's reasons for
18 rejecting the claimant's testimony are legally insufficient and it is
19 clear from the record that the ALJ would be required to determine the
20 claimant disabled if he had credited the claimant's testimony, we
21 remand for a calculation of benefits") (quotations omitted); see also
22 Dominquez v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) ("Unless the
23 district court concludes that further administrative proceedings would
24 serve no useful purpose, it may not remand with a direction to provide
25 benefits"); Brown-Hunter v. Colvin, 806 F.3d at 495-96 (discussing the
26 evidently narrow circumstances in which a court will order a benefits
27 calculation rather than further proceedings); Ghanim v. Colvin, 763
28 F.3d 1154, 1166 (9th Cir. 2014) (remanding for further proceedings

1 where the ALJ failed to state sufficient reasons for deeming a
2 claimant's testimony not credible); Garrison v. Colvin, 759 F.3d 995,
3 1021 (9th Cir. 2014) (court may "remand for further proceedings, even
4 though all conditions of the credit-as-true rule are satisfied, [when]
5 an evaluation of the record as a whole creates serious doubt that a
6 claimant is, in fact, disabled"); Vasquez v. Astrue, 572 F.3d 586,
7 600-01 (9th Cir. 2009) (agreeing that a court need not "credit as
8 true" improperly rejected claimant testimony where there are
9 outstanding issues that must be resolved before a proper disability
10 determination can be made); see generally INS v. Ventura, 537 U.S. 12,
11 16 (2002) (upon reversal of an administrative determination, the
12 proper course is remand for additional agency investigation or
13 explanation, except in rare circumstances); Treichler v. Commissioner,
14 775 F.3d 1090, 1101 n.5 (9th Cir. 2014) (remand for further
15 administrative proceedings is the proper remedy "in all but the rarest
16 cases").

17
18 **CONCLUSION**

19
20 For the foregoing reasons,¹⁰ Plaintiff's and Defendant's
21 motions for summary judgment are denied and this matter is remanded

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26 _____
27 ¹⁰ The Court has not reached any other issues raised by
28 Plaintiff except insofar as to determine that reversal with a
directive for the immediate payment of benefits would not be
appropriate at this time.

