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

Case No. 2:16-CV-02161 (VEB)

LATRINA MILLER,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

DECISION AND ORDER

I. INTRODUCTION

In July of 2012, Plaintiff Latrina Miller applied for Disability Insurance benefits (“DIB”) and Supplemental Security Income (“SSI”) benefits under the Social Security Act. The Commissioner of Social Security¹ denied the applications.

¹ On January 23, 2017, Nancy Berryhill took office as Acting Social Security Commissioner. The Clerk of the Court is directed to substitute Acting Commissioner Berryhill as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure.

1 Plaintiff, by and through her attorneys, Disability Advocates Group, Michelle
2 J. Shvarts, Esq., of counsel, commenced this action seeking judicial review of the
3 Commissioner’s denial of benefits pursuant to 42 U.S.C. §§ 405 (g) and 1383 (c)(3).

4 The parties consented to the jurisdiction of a United States Magistrate Judge.
5 (Docket No. 11, 12). On December 7, 2016, this case was referred to the
6 undersigned pursuant to General Order 05-07. (Docket No. 20).

7 8 **II. BACKGROUND**

9 Plaintiff applied for DIB and SSI benefits on July 24, 2012, alleging disability
10 beginning June 1, 2011. (T at 27).² The applications were denied initially and on
11 reconsideration. Plaintiff requested a hearing before an Administrative Law Judge
12 (“ALJ”).

13 On July 10, 2014, a hearing was held before ALJ Robert A. Evans. (T at 44).
14 Plaintiff appeared with her attorney and testified. (T at 47, 53-57). The ALJ also
15 received testimony from Dr. Jonas, a medical expert (T at 48-52), and Ms. Maron, a
16 vocational expert. (T at 57-60).

17 On July 25, 2014, the ALJ issued a written decision denying the applications
18 for benefits. (T at 24-43). The ALJ’s decision became the Commissioner’s final

19 ² Citations to (“T”) refer to the administrative record at Docket No. 17.

1 decision on January 21, 2016, when the Appeals Council denied Plaintiff’s request
2 for review. (T at 1-6).

3 On March 30, 2016, Plaintiff, acting by and through her counsel, filed this
4 action seeking judicial review of the Commissioner’s denial of benefits. (Docket No.
5 1). The Commissioner interposed an Answer on August 16, 2016. (Docket No. 17).
6 The parties filed a Joint Stipulation on December 15, 2016. (Docket No. 21).

7 After reviewing the pleadings, Joint Stipulation, and administrative record,
8 this Court finds that the Commissioner’s decision must be reversed and this case be
9 remanded for further proceedings.

10
11 **III. DISCUSSION**

12 **A. Sequential Evaluation Process**

13 The Social Security Act (“the Act”) defines disability as the “inability to
14 engage in any substantial gainful activity by reason of any medically determinable
15 physical or mental impairment which can be expected to result in death or which has
16 lasted or can be expected to last for a continuous period of not less than twelve
17 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
18 claimant shall be determined to be under a disability only if any impairments are of
19 such severity that he or she is not only unable to do previous work but cannot,

1 considering his or her age, education and work experiences, engage in any other
2 substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
3 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
4 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

5 The Commissioner has established a five-step sequential evaluation process
6 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
7 one determines if the person is engaged in substantial gainful activities. If so,
8 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
9 decision maker proceeds to step two, which determines whether the claimant has a
10 medically severe impairment or combination of impairments. 20 C.F.R. §§
11 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

12 If the claimant does not have a severe impairment or combination of
13 impairments, the disability claim is denied. If the impairment is severe, the
14 evaluation proceeds to the third step, which compares the claimant's impairment(s)
15 with a number of listed impairments acknowledged by the Commissioner to be so
16 severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii),
17 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or
18 equals one of the listed impairments, the claimant is conclusively presumed to be
19 disabled. If the impairment is not one conclusively presumed to be disabling, the

1 evaluation proceeds to the fourth step, which determines whether the impairment
2 prevents the claimant from performing work which was performed in the past. If the
3 claimant is able to perform previous work, he or she is deemed not disabled. 20
4 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant’s residual
5 functional capacity (RFC) is considered. If the claimant cannot perform past relevant
6 work, the fifth and final step in the process determines whether he or she is able to
7 perform other work in the national economy in view of his or her residual functional
8 capacity, age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
9 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

10 The initial burden of proof rests upon the claimant to establish a *prima facie*
11 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
12 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden
13 is met once the claimant establishes that a mental or physical impairment prevents
14 the performance of previous work. The burden then shifts, at step five, to the
15 Commissioner to show that (1) plaintiff can perform other substantial gainful
16 activity and (2) a “significant number of jobs exist in the national economy” that the
17 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

1 **B. Standard of Review**

2 Congress has provided a limited scope of judicial review of a Commissioner’s
3 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner’s decision,
4 made through an ALJ, when the determination is not based on legal error and is
5 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir.
6 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

7 “The [Commissioner’s] determination that a plaintiff is not disabled will be
8 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*
9 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial
10 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
11 n 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d
12 599, 601-02 (9th Cir. 1989). Substantial evidence “means such evidence as a
13 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*
14 *Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch inferences and
15 conclusions as the [Commissioner] may reasonably draw from the evidence” will
16 also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965). On review,
17 the Court considers the record as a whole, not just the evidence supporting the
18 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
19 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

1 It is the role of the Commissioner, not this Court, to resolve conflicts in
2 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
3 interpretation, the Court may not substitute its judgment for that of the
4 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
5 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
6 set aside if the proper legal standards were not applied in weighing the evidence and
7 making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d
8 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
9 administrative findings, or if there is conflicting evidence that will support a finding
10 of either disability or non-disability, the finding of the Commissioner is conclusive.
11 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

12 **C. Commissioner’s Decision**

13 The ALJ determined that Plaintiff had not engaged in substantial gainful
14 activity since June 1, 2011, the alleged onset date, and met the insured status
15 requirements of the Social Security Act through December 31, 2015 (the “date last
16 insured”). (T at 30). The ALJ found that Plaintiff’s asthma, seizure disorder, and
17 substance/alcohol abuse (in reported remission) were “severe” impairments under
18 the Act. (Tr. 30).

1 However, the ALJ concluded that Plaintiff did not have an impairment or
2 combination of impairments that met or medically equaled one of the impairments
3 set forth in the Listings. (T at 30).

4 The ALJ determined that Plaintiff retained the residual functional capacity
5 (“RFC”) to perform the full range of light work, as defined in 20 CFR § 404.1567
6 (b) and 416.967 (b), could lift/carry 10 pounds frequently and 20 pounds
7 occasionally, and could sit/stand/walk for 6 hours in an 8-hour workday. (T at 33-
8 34). The ALJ concluded that Plaintiff needed to avoid working around unprotected
9 heights, dangerous machinery, ladders, ropes, scaffolds, vats of acid, and swimming
10 pools. She could climb ramps and stairs occasionally, but needs to avoid
11 concentrated exposure to extreme heat/humidity and to respiratory irritants. Her
12 depth perception and peripheral vision are limited and she would need a 10-15
13 minute break every 2 hours due to pain. (T at 34).

14 The ALJ noted that Plaintiff had no past relevant work. (T at 38). Considering
15 Plaintiff’s age (34 years old on the alleged onset date), education (limited), work
16 experience (no past relevant work), and residual functional capacity, the ALJ found
17 that jobs exist in significant numbers in the national economy that Plaintiff can
18 perform. (T at 38).

1 claimant's credibility must be supported by specific cogent reasons. *Rashad v.*
2 *Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of
3 malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear
4 and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General
5 findings are insufficient: rather the ALJ must identify what testimony is not credible
6 and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834;
7 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

8 However, subjective symptomatology by itself cannot be the basis for a
9 finding of disability. A claimant must present medical evidence or findings that the
10 existence of an underlying condition could reasonably be expected to produce the
11 symptomatology alleged. See 42 U.S.C. §§423(d)(5)(A), 1382c (a)(3)(A); 20 C.F.R.
12 § 404.1529(b), 416.929; SSR 96-7p.

13 In this case, Plaintiff testified as follows: She experiences significant back
14 pain and tries to "stay in one spot" throughout the day. (T at 53). She has difficulty
15 staying awake. Knee and spine pain makes movement difficult. (T at 53). She
16 attempts a daily walk. (T at 54). She lives with her adult daughter. (T at 54). She
17 shops with her daughter, but avoids shopping alone for fear of a seizure. (T at 54).
18 Her pain is constant, although Advil PM provides some relief. (T at 55). She leaves
19 the home, accompanied, for visits with family and for medical appointments. (T at

1 55). She can sit comfortably for less than an hour, but then needs to get up, walk
2 around, and stretch. (T at 55-56). She cannot stand for more than 15 minutes or
3 walk for more than an hour. (T at 55). She spends most of her day sitting or laying
4 down. (T at 56). She can lift 10 pounds. (T at 56).

5 The ALJ concluded that Plaintiff's medically determinable impairments could
6 reasonably be expected to cause the alleged symptoms, but that her statements
7 regarding the intensity, persistence, and limiting effects of the symptoms were not
8 fully credible. (T at 34).

9 For the reasons that follow, this Court finds the ALJ's decision must be
10 reconsidered on remand.

11 The ALJ discounted Plaintiff's subjective testimony, finding that "the
12 diagnostic examinations, clinical signs, and medical opinions [did] not support her
13 alleged severe limitations." (T at 38). There is some support in the record for the
14 ALJ's conclusion. An October 2012 examination of Plaintiff's neck was essentially
15 normal. (T at 35, 437, 635-36). Imaging of Plaintiff's back revealed no evidence of
16 fracture or compression and only a possible small left foraminal disc protrusion and
17 small disc bulges without significant stenosis. (T at 35, 347, 637-38). Plaintiff was
18 noted on examination to have good strength, intact sensation, normal reflexes, and
19 negative straight leg raise testing bilaterally. (T at 37, 438-39). X-rays of Plaintiff's

1 knees were negative for fracture or dislocation, with mild medical compartment joint
2 space narrowing, but no sign of joint effusion. (T at 36, 345). Dr. Stephan Simonian
3 conducted a psychiatric consultative examination in November of 2012 and
4 concluded that Plaintiff's mental health issues imposed mild to no limitations with
5 regard to her ability to perform basic work activities. (T at 465). Dr. Homayoun
6 Saeid, a consultative examiner, concluded in October of 2012 that Plaintiff could
7 lift/carry 20 pounds occasionally and 10 pounds frequently; stand/walk for 6 hours
8 in an 8-hour day; and sit for 6 hours in an 8-hour day. (T at 439).

9 However, notwithstanding the foregoing evidence, the ALJ's credibility
10 assessment is still insufficient to withstand review. "The fact that a claimant's
11 testimony is not fully corroborated by the objective medical findings, in and of itself,
12 is not a clear and convincing reason for rejecting it." *Vertigan v. Halter*, 260 F.3d
13 1044, 1049 (9th Cir. 2001); *see also Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883
14 (9th Cir. 2006) ("While an ALJ may find testimony not credible in part or in whole,
15 he or she may not disregard it solely because it is not substantiated affirmatively by
16 objective medical evidence."); *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir.
17 1986) ("It is improper as a matter of law to discredit excess pain testimony solely on
18 the ground that it is not fully corroborated by objective medical findings.").

1 As such, the ALJ's citation of the lack of objective medical evidence cannot,
2 without more, justify the decision to discount Plaintiff's credibility. The ALJ
3 provided only one additional reason for this aspect of his decision – he concluded
4 that Plaintiff's allegations "are also inconsistent in that she claimed to be able to sit
5 for less than an hour before needing to get up, walk around, and stretch, and yet
6 spent the day either lying down or sitting up." (T at 38). It is difficult to discern
7 what, precisely, the ALJ found inconsistent about Plaintiff's testimony. The ALJ
8 provides only this single sentence in support of his reasoning.

9 It appears the ALJ believed that Plaintiff testified that she was not able to sit
10 for more than an hour at a time, but also testified that spent her entire day sitting or
11 laying down. Thus, apparently, the ALJ found these statements inconsistent,
12 because a person who could not sit for more than an hour would not be able to spend
13 her entire day sitting or laying down. This is not a reasonable reading of Plaintiff's
14 testimony. When asked to describe a "typical day," Plaintiff testified that she
15 "usually" tried "to stay in one spot," because it was "kind of hard for me to move
16 around a lot." (T at 53). She said that she tried to "take a walk once a day" around
17 her apartment complex. (T at 54). When asked how long she could sit
18 "comfortably," Plaintiff responded "Less than an hour," and explained that she
19 would need to walk around and stretch, which provided some relief. (T at 54-55).

1 She testified that “[u]sually” if she is not laying in bed, she sits on the sofa. (T at
2 56).

3 This Court fails to find any inconsistency in this testimony. First, it must be
4 noted that Plaintiff is asked to describe a “typical” day and discusses her “usual”
5 routine. Second, she is forthright about the fact that her days involve some
6 movement and change of position, albeit limited by pain in various parts of her
7 body. It appears the ALJ interpreted some aspect of Plaintiff’s testimony as
8 suggesting that she spends literally every minute of every day sitting or laying down,
9 and then found that claim inconsistent with her other testimony that she could not sit
10 for prolonged periods without changing positions. For the reasons outlined above,
11 this does not appear to be a fair reading of the evidence.

12 This Court acknowledges that it is fundamentally the ALJ’s role to resolve
13 conflicts in the evidence and to interpret ambiguities in the record. Indeed, if the
14 ALJ had provided a rationale, rooted in the evidence, for finding Plaintiff’s
15 testimony inconsistent on a point material to the disability determination, this Court
16 would be bound to defer to that rationale. But, in the absence of such a rationale,
17 this Court finds the reasons cited by the ALJ insufficient to justify a decision to
18 discount Plaintiff’s credibility under the applicable legal standard.

1 two categories: “acceptable” and “not acceptable.” 20 C.F.R. § 404.1502.
2 Acceptable medical sources include licensed physicians and psychologists. 20
3 C.F.R. § 404.1502.

4 Medical sources classified as “not acceptable” (also known as “other
5 sources”) include nurse practitioners, therapists, licensed clinical social workers, and
6 chiropractors. SSR 06-03p. The opinion of an acceptable medical source is given
7 more weight than an “other source” opinion. 20 C.F.R. §§ 404.1527, 416.927. For
8 example, evidence from “other sources” is not sufficient to establish a medically
9 determinable impairment. SSR 06-03p.

10 However, “other source” opinions must be evaluated on the basis of their
11 qualifications, whether their opinions are consistent with the record evidence, the
12 evidence provided in support of their opinions and whether the other source is “has a
13 specialty or area of expertise related to the individual's impairment.” See SSR 06-
14 03p, 20 CFR §§404.1513 (d), 416.913 (d). The ALJ must give “germane reasons”
15 before discounting an “other source” opinion. *Dodrill v. Shalala*, 12 F.3d 915, 919
16 (9th Cir. 1993).

17 Here, the ALJ provided no reasons for discounting Ms. Marsh’s opinion; he
18 did not discuss it all. This was error that should be remedied on remand. The
19 Commissioner contends that the ALJ’s error was harmless because (a) Ms. Marsh is

1 not an acceptable medical source, (b) it is not clear whether the pertinent section of
2 her progress note was setting forth her opinion, or merely reiterating Plaintiff's
3 subjective complaints, and (c) even if it was an opinion, it was conclusory and
4 unsupported by clinical findings or objective evidence. In the absence of any other
5 error, this Court might be persuaded by these arguments. However, given that a
6 remand is required for the reasons outlined above and in light of the treating
7 relationship between Ms. Marsh and Plaintiff, this Court finds that the ALJ should
8 address this progress note as part of his analysis on remand.

9 **C. Remand**

10 In a case where the ALJ's determination is not supported by substantial
11 evidence or is tainted by legal error, the court may remand the matter for additional
12 proceedings or an immediate award of benefits. Remand for additional proceedings
13 is proper where (1) outstanding issues must be resolved, and (2) it is not clear from
14 the record before the court that a claimant is disabled. *See Benecke v. Barnhart*, 379
15 F.3d 587, 593 (9th Cir. 2004).

16 Here, this Court finds that remand for further proceedings is warranted. There
17 are outstanding issues that might be resolved. The ALJ needs to revisit the question
18 of Plaintiff's credibility and consider whether, in fact, there are clear and convincing
19 reasons for discounting her subjective complaints apart from the fact that they are

1 not fully corroborated by the objective medical evidence. In addition, the ALJ
2 should explain what weight, if any, should be afforded to the progress note provided
3 by Plaintiff's primary treating mental health provider.

4 However, notwithstanding these issues, it is not clear from the record that
5 Plaintiff is disabled. The objective medical evidence does tend to support the ALJ's
6 overall decision, including the diagnostic testing and the opinions of the consultative
7 examiners and State Agency review consultants. As such, because there is doubt as
8 to whether Plaintiff is disabled, a remand for further proceedings is the appropriate
9 remedy. See *Strauss v. Comm'r of Soc. Sec.*, 635 F.3d 1135, 1138 (9th Cir.
10 2011)("Ultimately, a claimant is not entitled to benefits under the statute unless the
11 claimant is, in fact, disabled, no matter how egregious the ALJ's errors may be.").

1 **V. ORDERS**

2 IT IS THEREFORE ORDERED that:

3 Judgment be entered REVERSING the Commissioner’s decision and
4 REMANDING this action for further proceedings consistent with this Decision and
5 Order, and it is further ORDERED that

6 The Clerk of the Court file this Decision and Order and serve copies upon
7 counsel for the parties.

8 DATED this 6th day of March, 2017.

9
10 /s/Victor E. Bianchini
11 VICTOR E. BIANCHINI
12 UNITED STATES MAGISTRATE JUDGE
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