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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANA LOPEZ,
Plaintiff

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

Case No. 2:17-cv-02310-GJS

**MEMORANDUM OPINION AND
ORDER**

I. PROCEDURAL HISTORY

Plaintiff Ana Lopez (“Plaintiff”) filed a complaint seeking review of the decision of the Commissioner of Social Security denying her applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”). The parties filed consents to proceed before the undersigned United States Magistrate Judge [Dkts. 10 and 11] and briefs addressing disputed issues in the case [Dkt. 17 (“Pltf.’s Br.”), Dkt. 18 (“Def.’s Br.”), and Dkt. 19 (“Pltf.’s Reply)"]. The Court has taken the parties’ briefing under submission without oral argument. For the reasons discussed below, the Court finds that this matter should be remanded for further proceedings.

1 **II. ADMINISTRATIVE DECISION UNDER REVIEW**

2 In September 2013, Plaintiff filed applications for DIB and SSI, alleging
3 disability as of August 15, 2013. [Dkt. 16, Administrative Record (“AR”) 186,
4 188.] Plaintiff’s applications were denied at the initial level of review and on
5 reconsideration. [AR 124, Def’s Br. at 2] On May 12, 2015, a hearing was held
6 before Administrative Law Judge James P. Nguyen (“the ALJ”). [AR 24.] On
7 March 4, 2015, the ALJ issued an unfavorable decision. [AR 24-31.]

8 Applying the five-step sequential evaluation process, the ALJ found that
9 Plaintiff was not disabled. *See* 20 C.F.R. §§ 404.1520(b)-(g)(1), 416.920(b)-(g)(1).
10 At step one, the ALJ found that Plaintiff had not engaged in substantial gainful
11 activity since the alleged onset date. [AR 27.] At step two, the ALJ found that
12 Plaintiff suffered from the severe impairments of degenerative disc disease of the
13 cervical and thoracic spine; strain of the cervical and thoracic spine, left knee strain;
14 dyslipidemia; left shoulder tendinitis; a history of carpal tunnel syndrome; and a
15 history of carcinoma of the thyroid gland, status post thyroidectomy. [*Id.*] At step
16 three, the ALJ determined that Plaintiff did not have an impairment or combination
17 of impairments that meets or medically equals the severity of one of the
18 impairments listed in Appendix I of the Regulations, (“the Listings”). [AR 28]; *see*
19 20 C.F.R. Pt. 404, Subpt. P, App. 1. Next, the ALJ found that Plaintiff had the
20 residual functional capacity (“RFC”) to perform light work (20 C.F.R. §§
21 404.1567(b), 416.967(b)) with the following additional nonexertional limitations:

22 [Plaintiff is] able to climb ladders, ropes, and scaffolds
23 occasionally; otherwise, able to perform frequent climbing
24 for ramps and stairs, as well as frequent balancing,
25 stooping, kneeling, crouching, and crawling; able to
26 perform occasional overhead reaching; and able to
27 perform frequent handling and fingering with the upper
28 extremities.

[AR 28.] Applying this RFC, the ALJ found that Plaintiff was capable of

1 performing her past relevant work as an electronic assembler, and was, thus, not
2 disabled. [AR 30-31.]

3 The Appeals Council denied review of the ALJ's decision on January 25,
4 2017. [AR 1-4.] This action followed.

5 III. GOVERNING STANDARD

6 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner's decision to
7 determine if: (1) the Commissioner's findings are supported by substantial evidence;
8 and (2) the Commissioner used correct legal standards. *Carmickle v. Comm'r, Soc.*
9 *Sec. Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*, 499 F.3d 1071,
10 1074 (9th Cir. 2007). Substantial evidence is "such relevant evidence as a
11 reasonable mind might accept as adequate to support a conclusion." *Richardson v.*
12 *Perales*, 402 U.S. 389, 401 (1971) (internal citation and quotations omitted); *see*
13 *also Hoopai*, 499 F.3d at 1074.

14 IV. DISCUSSION

15 Plaintiff contends that the ALJ erred by: (1) finding that Plaintiff did not
16 meet a listing at step three, and (2) improperly discrediting Plaintiff's testimony.
17 [Pltf.'s Br. at 1.] As set forth below, the Court agrees with Plaintiff, in part, and
18 remands the matter for further proceedings. Because the Court finds Plaintiff's
19 second argument regarding her credibility compelling, this memorandum does not
20 deal with Plaintiff's contention that the ALJ improperly found that none of her
21 impairments met a listing. However, the ALJ should consider this issue on remand.

22 A. ALJ Failed to Properly Consider Plaintiff's Subjective Complaints

23 Plaintiff contends that the ALJ failed to state sufficient reasons for
24 discounting her credibility. [Pltf.'s Br. at 5-7.]

25 Once a disability claimant produces evidence of an underlying physical or
26 mental impairment that could reasonably be expected to produce the symptoms
27 alleged and there is no affirmative evidence of malingering, the ALJ must offer
28 "specific, clear and convincing reasons" to reject the claimant's testimony. *Brown-*

1 *Hunter v. Colvin*, 806 F.3d 487, 492-93 (9th Cir. 2015); *Smolen v. Chater*, 80 F.3d
2 1273, 1283-84 (9th Cir. 1996). The ALJ must identify what testimony is not
3 credible and what evidence discredits the testimony. *See Treichler v. Comm’r, Soc.*
4 *Sec. Admin.*, 775 F.3d 1090, 1102-03 (9th Cir. 2014); *Reddick v. Chater*, 157 F.3d
5 715, 722 (9th Cir. 1998). But if the ALJ’s assessment of the claimant’s testimony is
6 reasonable and is supported by substantial evidence, it is not the Court’s role to
7 “second-guess” it. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

8 As an initial matter, the Court notes that Plaintiff testified through an
9 interpreter. It appears from the English transcript that both the ALJ and Plaintiff
10 may have been having trouble clearly understanding each other (the interpreter even
11 interrupted at one point to attempt to offer an explanation of what Plaintiff may have
12 meant). [AR 56-57.] Even if that was not the case, the transcript itself is not a
13 model of clarity. [*E.g.*, AR 54 (indicates Plaintiff is speaking, but transcribed as:
14 “The interpreter requires some repetition. To me, it sounds a little convoluted and I
15 couldn’t make sense of what she was saying. Is that okay?”)]. But essentially,
16 Plaintiff testified that she had a license but did not drive (when asked if she had
17 difficulty driving, she answered, “Yes, with my hands.”). [AR 46.] She further
18 testified that the medication she was taking for her thyroid condition post-cancer,
19 the dosage of which had been changed recently, made her “have a lot of anxieties,”
20 [AR 49-50.] She complained about knee and shoulder pain as well. [AR 52-53.]
21 With respect to her neck pain, she was “taking a lot of meds,” and had been going to
22 physical therapy but told her doctor that she “can’t handle that.” [AR 50.] Finally,
23 although the ALJ made a valiant attempt to get a clear record with respect to
24 whether or not Plaintiff had been referred for surgery or just for a further evaluation
25 about whether surgical intervention would be a good option for Plaintiff’s cervical
26 spine issues – and ultimately determined that no medical source had, at that point,
27 recommended surgical intervention – it is unclear to the Court what actually
28 transpired, if anything, between Plaintiff and her doctors. [AR 56-57, 59-62.] The

1 ALJ offered to leave the record open for 30 days, but Plaintiff’s non-lawyer
2 representative did not believe he could obtain additional records in that time.

3 As to her limitations, Plaintiff testified that she could only lift a half gallon of
4 milk, as opposed to a gallon, and she had trouble grasping things. [AR 58.] She
5 also testified that she depends on others to do household chores. [AR 46.]

6 The ALJ found that her medically determinable impairments could reasonably
7 be expected to cause the symptoms about which she testified, but did not find her
8 statements about “the intensity, persistence and limiting effects” of her symptoms to
9 be entirely credible. [AR 29.]

10 The ALJ first noted that the record showed that Plaintiff collected
11 unemployment benefits in the amount of \$898 in the third quarter of 2013, allegedly
12 subsequent to her alleged onset date, but did not elaborate further. The only
13 additional reason the ALJ gave for discounting Plaintiff’s testimony was that “the
14 medical evidence of record documents only conservative treatment.” [*Id.*]

15 Although the ALJ went on to discuss many of the indications in the medical records
16 that Plaintiff retained relatively normal function in many areas (and discusses and
17 discounts a treating physician’s evaluation to the contrary, as well), the only
18 discussion of conservative *treatment* is the ALJ’s note that “the record apparently
19 does not document a referral for surgery nor does it show any epidural steroid
20 injections.” [*Id.*]

21 As an initial matter, it is notable that the ALJ found that Plaintiff’s statements
22 were consistent both throughout the medical record and in her testimony. [AR 29.]
23 And as Plaintiff correctly points out in her briefs, the record shows that
24 Plaintiff was seeking medical treatment for her cervical spine pain when her course
25 of treatment was interrupted by a bout of thyroid cancer. When cleared of the
26 cancer, Plaintiff again sought treatment for her neck (and other area) pain. She was
27 treated with fairly heavy-duty narcotics, and had at least one toradol shot. [AR 391-
28 93]. Although she did not *have* an epidural injection, one doctor did *recommend*

1 that she get a shot. [AR 394]. And while the ALJ notes that Plaintiff stated at one
2 point that she was afraid of surgical procedures, at a subsequent point in her
3 testimony she spoke about the possibility of having surgery done. [E.g., AR 61.]
4 Based on the dearth of explanation as to what the ALJ considered “conservative”
5 treatment and his failure to address the treatment that Plaintiff actually was
6 receiving, and in light of the nearly complete lack of clarity in Plaintiff’s translated
7 testimony, it was incumbent on the ALJ to explain more specifically what
8 statements he discredited, and why he discredited them. The Court thus finds that
9 the ALJ did not provide at least one specific and legitimate reason supported by
10 substantial evidence to discount Plaintiff’s testimony.

11 V. CONCLUSION

12 When the Court reverses an ALJ’s decision for error, the Court “ordinarily
13 must remand to the agency for further proceedings.” *Leon v. Berryhill*, 874 F.3d
14 1130, 1132 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004)
15 (“the proper course, except in rare circumstances, is to remand to the agency for
16 additional investigation or explanation”); *Treichler*, 775 F.3d at 1099. But the Court
17 does have discretion to make a direct award of benefits under the “credit-as-true”
18 rule, which asks whether: “(1) the record has been fully developed and further
19 administrative proceedings would serve no useful purpose; (2) the ALJ has failed to
20 provide legally sufficient reasons for rejecting evidence, whether claimant testimony
21 or medical opinion; and (3) if the improperly discredited evidence were credited as
22 true, the ALJ would be required to find the claimant disabled on remand.”
23 *Garrison*, 759 F.3d at 1020. Each part of this three-part standard must be satisfied
24 for the Court to remand for an award of benefits, *id.*, and it is only the “unusual
25 case” that meets this standard, *Benecke*, 379 F.3d at 595. *See, e.g., Treichler*, 775
26 F.3d at 1105 (“[A] reviewing court is not required to credit claimants’ allegations
27 regarding the extent of their impairments as true merely because the ALJ made a
28 legal error in discrediting their testimony.”). Moreover, if “an evaluation of the

1 record as a whole creates serious doubt that a claimant is, in fact, disabled,” a court
2 must remand for further proceedings “even though all conditions of the credit-as-
3 true rule are satisfied.” *Garrison*, 759 F.3d at 1021; *see also Leon*, 874 F.3d at 1133
4 (“an award under [the credit-as-true] rule is a rare exception, and the rule was
5 intended to deter ALJs from providing boilerplate rejections without analysis”);
6 *Brown-Hunter*, 806 F.3d at 495 (“The touchstone for an award of benefits is the
7 existence of a disability, not the agency’s legal error.”).

8 Here, given the ALJ’s insufficient consideration of Plaintiff’s subjective
9 symptom testimony, questions regarding the extent to which Plaintiff’s pain and
10 symptoms limit her ability to work remain unresolved. *See, e.g., Brown-Hunter*,
11 806 F.3d at 495-96. Therefore, in accordance with Plaintiff’s request, the Court
12 concludes that remand for further proceedings is warranted. [Pltf.’s Br. at 24; Pltf’s
13 Reply at 10]; *see Treichler*, 775 F.3d at 1107; *see also Connett v. Barnhart*, 340
14 F.3d 871, 876 (9th Cir. 2003) (remand for further proceedings appropriate when the
15 ALJ’s findings are so insufficient that the reviewing court cannot determine whether
16 the claimant’s rejected testimony should be credited as true).

17 For all of the foregoing reasons, **IT IS ORDERED** that:

- 18 (1) the decision of the Commissioner is **REVERSED** and this matter is
19 **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) for further
20 administrative proceedings consistent with this Memorandum Opinion and
21 Order; and
22 (2) Judgment be entered in favor of Plaintiff.

23
24 **IT IS SO ORDERED.**

25
26 DATED: February 22, 2018

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28 _____
GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE