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

IRMA O. L.,)	NO. CV 19-3115-E
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
ANDREW SAUL, Commissioner of Social Security,)	AND ORDER OF REMAND
)	
Defendant.)	
)	

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
HEREBY ORDERED that this matter is remanded for further administrative
action consistent with this Opinion.

PROCEEDINGS

Plaintiff filed a complaint on April 22, 2019, seeking review of
the Commissioner's denial of benefits. The parties consented to
proceed before a United States Magistrate Judge on May 28, 2019.
The parties filed a Joint Stipulation on February 20, 2020. Following
the retirement of Magistrate Judge Mumm, the case was transferred to

1 Magistrate Judge Eick on April 29, 2020. The Court has taken the
2 matter under submission without oral argument. See L.R. 7-15; "Case
3 Management Order," filed April 29, 2019.

4
5 **BACKGROUND**
6

7 Plaintiff, a former cafeteria helper, alleges disability based
8 primarily on orthopedic impairments (Administrative Record ("A.R.")
9 74, 86-87, 90-96, 237, 244, 285, 298-300). Plaintiff claims to suffer
10 from knee and back pain of disabling severity despite pain management
11 treatment that has included narcotic pain medication (Tramadol) and
12 pain injections (A.R. 26, 74, 86-87, 90-96, 266, 298-300, 634, 643,
13 724, 725, 753, 770, 788, 1042-50, 1062, 1088-94).

14
15 The Administrative Law Judge ("ALJ") found Plaintiff has several
16 "severe" orthopedic impairments, including left knee osteoarthritis
17 and degenerative disc disease of the spine (A.R. 22). However, the
18 ALJ discounted the claimed severity of Plaintiff's pain and functional
19 limitations in deeming Plaintiff not disabled (A.R. 22-27). The
20 Appeals Council denied review (A.R. 1-3).

21
22 **STANDARD OF REVIEW**
23

24 Under 42 U.S.C. section 405(g), this Court reviews the
25 Administration's decision to determine if: (1) the Administration's
26 findings are supported by substantial evidence; and (2) the
27 Administration used correct legal standards. See Carmickle v.
28 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,

1 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,
2 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such
3 relevant evidence as a reasonable mind might accept as adequate to
4 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401
5 (1971) (citation and quotations omitted); see also Widmark v.
6 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

7
8 If the evidence can support either outcome, the court may
9 not substitute its judgment for that of the ALJ. But the
10 Commissioner's decision cannot be affirmed simply by
11 isolating a specific quantum of supporting evidence.
12 Rather, a court must consider the record as a whole,
13 weighing both evidence that supports and evidence that
14 detracts from the [administrative] conclusion.

15
16 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and
17 quotations omitted).

18 19 **DISCUSSION**

20
21 After consideration of the record as a whole, the Court reverses
22 the Administration's decision in part and remands the matter for
23 further administrative proceedings.

24
25 Where, as here, an ALJ finds that a claimant's medically
26 determinable impairments reasonably could be expected to cause some
27 degree of the alleged symptoms of which the claimant subjectively
28 complains, any discounting of the claimant's complaints must be

1 supported by "specific, cogent" findings. See Berry v. Astrue, 622
2 F.3d 1228, 1234 (9th Cir. 2010); Lester v. Chater, 81 F.3d 821, 834
3 (9th Cir. 1995); but see Smolen v. Chater, 80 F.3d 1273, 1282-84 (9th
4 Cir. 1996) (indicating that ALJ must state "specific, clear and
5 convincing" reasons to reject a claimant's testimony where there is no
6 evidence of malingering).¹ Generalized, conclusory findings do not
7 suffice. See Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004)
8 (the ALJ's credibility findings "must be sufficiently specific to
9 allow a reviewing court to conclude the ALJ rejected the claimant's
10 testimony on permissible grounds and did not arbitrarily discredit the
11 claimant's testimony") (internal citations and quotations omitted);
12 Holohan v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001) (the ALJ
13 must "specifically identify the testimony [the ALJ] finds not to be
14 credible and must explain what evidence undermines the testimony");
15 Smolen v. Chater, 80 F.3d at 1284 ("The ALJ must state specifically
16 which symptom testimony is not credible and what facts in the record
17 lead to that conclusion."); see also Social Security Ruling ("SSR")
18 96-7p (explaining how to assess a claimant's credibility), superseded,
19 ///

21 ¹ In the absence of an ALJ's reliance on evidence of
22 "malingering," most recent Ninth Circuit cases have applied the
23 "clear and convincing" standard. See, e.g., Leon v. Berryhill,
24 880 F.3d 1041, 1046 (9th Cir. 2017); Brown-Hunter v. Colvin, 806
25 F.3d 487, 488-89 (9th Cir. 2015); Burrell v. Colvin, 775 F.3d
26 1133, 1136-37 (9th Cir. 2014); Treichler v. Commissioner, 775
27 F.3d 1090, 1102 (9th Cir. 2014); Ghanim v. Colvin, 763 F.3d 1154,
28 1163 n.9 (9th Cir. 2014); Garrison v. Colvin, 759 F.3d 995,
1014-15 & n.18 (9th Cir. 2014); 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.

1 SSR 16-3p (eff. March 28, 2016).²

2
3 In the present case, the ALJ stated only two specific reasons for
4 discounting Plaintiff's subjective complaints of pain and functional
5 limitations: (1) the objective medical evidence ("there does not
6 appear to be sufficient clinical signs and laboratory findings to
7 objectively support those subjective limitations"; and (2) the
8 assertedly "conservative" nature of the treatment Plaintiff has
9 received for her pain ("the claimant's seeming acceptance of only
10 conservative treatment after June 2014 [when Plaintiff underwent knee
11 surgery], serves to undermine the extent and persistence of her
12 subjective pain symptoms and limitations as alleged") (A.R. 27). As
13 demonstrated below, these stated reasons are legally insufficient
14 under the circumstances of this case.

15
16 With regard to the first stated reason, inconsistencies between a
17 claimant's subjective complaints and the objective medical evidence
18 can be a factor in discounting a claimant's subjective complaints, but
19 cannot "form the sole basis." See Burch v. Barnhart, 400 F.3d 676,
20 681 (9th Cir. 2005); Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir.
21 2001). Therefore, the validity of the ALJ's discounting of
22 Plaintiff's complaints stands or falls with the second stated reason,

23
24 ² SSRs are binding on the Administration. See Terry v.
25 Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir. 1990). The
26 appropriate analysis under the superseding SSR is substantially
27 the same as the analysis under the superseded SSR. See R.P. v.
28 Colvin, 2016 WL 7042259, at *9 n.7 (E.D. Cal. Dec. 5, 2016)
(stating that SSR 16-3p "implemented a change in diction rather
than substance") (citations omitted); see also Trevizo v.
Berryhill, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (suggesting that
SSR 16-3p "makes clear what our precedent already required").

1 the assertedly "conservative" nature of the treatment Plaintiff has
2 received.

3
4 A limited course of treatment sometimes can justify the
5 discounting of a claimant's subjective complaints, at least where the
6 complaints concern physical problems. See, e.g., Burch v. Barnhart,
7 400 F.3d at 681 (lack of consistent treatment, such as where there was
8 a three to four month gap in treatment, properly considered in
9 discrediting claimant's back pain testimony); Meanel v. Apfel, 172
10 F.3d 1111, 1114 (9th Cir. 1999) (in assessing the credibility of a
11 claimant's pain testimony, the Administration properly may consider
12 the claimant's failure to request treatment and failure to follow
13 treatment advice) (citing Bunnell v. Sullivan, 947 F.2d 341, 346 (9th
14 Cir. 1991) (en banc)); Matthews v. Shalala, 10 F.3d 678, 679-80 (9th
15 Cir. 1993) (permissible credibility factors in assessing pain
16 testimony include limited treatment and minimal use of medications);
17 see also Johnson v. Shalala, 60 F.3d 1428, 1434 (9th Cir. 1995)
18 (absence of treatment for back pain during half of the alleged
19 disability period, and evidence of only "conservative treatment" when
20 the claimant finally sought treatment, sufficient to discount
21 claimant's testimony).

22
23 In the present case, however, it is doubtful Plaintiff's
24 treatment with narcotic pain medication and pain injections over an
25 extended period of time properly may be characterized as
26 "conservative" within the meaning of Ninth Circuit jurisprudence.
27 See, e.g., Garrison v. Colvin, 759 F.3d 995, 1015 n.20 (9th Cir. 2014)
28 ("we doubt that epidural steroid shots to the neck and lower back

1 qualify as "conservative" medical treatment"); Shepard v. Colvin, 2015
2 WL 9490094, at *7 (E.D. Cal. Dec. 30, 2015) ("[p]rior cases in the
3 Ninth Circuit have found that treatment was conservative when the
4 claimant's pain was adequately treated with over-the-counter
5 medication and other minimal treatment," however where record
6 reflected heavy reliance on Tramadol and Oxycodone and other
7 prescriptions for pain, record did not support finding that treatment
8 was "conservative") (internal citations omitted; citing for comparison
9 Lapeirre-Gutt v. Astrue, 382 Fed. App'x. 662, 664 (9th Cir. 2010)
10 (doubting whether "copious amounts of narcotic pain medication" as
11 well as nerve blocks and trigger point injections constituted
12 "conservative" treatment)); Aguilar v. Colvin, 2014 WL 3557308, at *8
13 (C.D. Cal. July 18, 2014) ("It would be difficult to fault Plaintiff
14 for overly conservative treatment when he has been prescribed strong
15 narcotic pain medications"); Christie v. Astrue, 2011 WL 4368189, at
16 *4 (C.D. Cal. Sept. 16, 2011) (refusing to characterize as
17 "conservative" treatment that included narcotic pain medication and
18 epidural injections); Eicholtz v. Astrue, 2008 WL 4642976, at *3 (C.D.
19 Cal. Oct. 20, 2008) (court acknowledged the precept that "[a]n ALJ may
20 discount a claimant's testimony based on conservative treatment," but
21 appeared to deem this precept inapplicable because the claimant took
22 Tramadol).

23
24 Furthermore, the ALJ appears to have inferred that, if
25 Plaintiff's pain truly were as intense as she claims, she would have
26 received more aggressive treatment (such as surgery) and that such
27 treatment would have been effective in reducing pain and restoring
28 function. The ALJ was not competent to make the medical judgments

1 underlying these apparent inferences. See Balsamo v. Chater, 142 F.3d
2 75, 81 (2d Cir. 1998); see also Rohan v. Chater, 98 F.3d 966, 970 (7th
3 Cir. 1996) ("ALJs must not succumb to the temptation to play doctor
4 and make their own independent medical findings"); Day v. Weinberger,
5 522 F.2d 1154, 1156 (9th Cir. 1975) (an ALJ is forbidden from making
6 his or her own medical assessment beyond that demonstrated by the
7 record). No substantial evidence supports the ALJ's lay inferences on
8 these medical matters. To the contrary, Plaintiff's pain management
9 specialist reportedly believes that surgery would not help Plaintiff
10 (A.R. 87-88).

11
12 The Court is unable to conclude that the ALJ's failure to state
13 legally sufficient reasons for discounting Plaintiff's subjective
14 complaints was harmless. See Molina v. Astrue, 674 F.3d 1104, 1115
15 (9th Cir. 2012) (an error "is harmless where it is inconsequential to
16 the ultimate non-disability determination") (citations and quotations
17 omitted); McLeod v. Astrue, 640 F.3d 881, 887 (9th Cir. 2011) (error
18 not harmless where "the reviewing court can determine from the
19 'circumstances of the case' that further administrative review is
20 needed to determine whether there was prejudice from the error").

21
22 Contrary to Plaintiff's argument, a remand for further
23 administrative proceedings, rather than an order for the immediate
24 calculation of benefits, is the appropriate remedy in this case. See
25 McLeod v. Astrue, 640 F.3d at 888; see also INS v. Ventura, 537 U.S.
26 12, 16 (2002) (upon reversal of an administrative determination, the
27 proper course is remand for additional agency investigation or
28 explanation, except in rare circumstances); Leon v. Berryhill, 880

1 F.3d 1041, 1044 (9th Cir. 2017) (reversal with a directive for the
2 immediate calculation of benefits is a "rare and prophylactic
3 exception to the well-established ordinary remand rule"); Dominguez v.
4 Colvin, 808 F.3d 403, 407 (9th Cir. 2015) ("Unless the district court
5 concludes that further administrative proceedings would serve no
6 useful purpose, it may not remand with a direction to provide
7 benefits"); Treichler v. Commissioner, 775 F.3d 1090, 1101 n.5 (9th
8 Cir. 2014) (remand for further administrative proceedings is the
9 proper remedy "in all but the rarest cases"); Harman v. Apfel, 211
10 F.3d 1172, 1180-81 (9th Cir.), cert. denied, 531 U.S. 1038 (2000)
11 (remand for further proceedings rather than for the immediate payment
12 of benefits is appropriate where there are "sufficient unanswered
13 questions in the record"); Connett v. Barnhart, 340 F.3d 871, 876 (9th
14 Cir. 2003) ("Connett") (remand is an option where the ALJ fails to
15 state sufficient reasons for rejecting a claimant's excess symptom
16 testimony); but see Orn v. Astrue, 495 F.3d 625, 640 (9th Cir. 2007)
17 (citing 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 Brown-Hunter v. Colvin, 806 F.3d 487, 495-96 (9th Cir. 2015)
23 (discussing the narrow circumstances in which a court will order a
24 benefits calculation rather than further proceedings); Ghanim v.
25 Colvin, 763 F.3d 1154, 1166 (9th Cir. 2014) (remanding for further
26 proceedings where the ALJ failed to state sufficient reasons for
27 deeming a claimant's testimony not credible); Vasquez v. Astrue, 572
28 F.3d 586, 600-01 (9th Cir. 2009) (a court need not "credit as true"

