

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

K.E.B.,

Plaintiff,

v.

ANDREW M. SAUL, Commissioner of
Social Security,

Defendant.

Case No. 2:19-cv-09501-SHK

OPINION AND ORDER

Plaintiff K.E.B.¹ (“Plaintiff”) seeks judicial review of the final decision of the Commissioner of the Social Security Administration (“Commissioner,” “Agency,” or “Defendant”) denying her application for disability insurance benefits (“DIB”), under Title II of the Social Security Act (the “Act”). This Court has jurisdiction under 42 U.S.C. § 405(g), and, pursuant to 28 U.S.C. § 636(c), the parties have consented to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the Commissioner’s decision is REVERSED and this action is REMANDED for further proceedings consistent with this Order.

¹ The Court substitutes Plaintiff’s initials for Plaintiff’s name to protect Plaintiff’s privacy with respect to Plaintiff’s medical records discussed in this Opinion and Order.

1 **I. BACKGROUND**

2 Plaintiff filed an application for DIB on June 29, 2016, alleging disability
3 beginning on June 7, 2016. Transcript (“Tr.”) 162-63.² Plaintiff amended the
4 alleged disability onset date to October 28, 2014. Tr. 15. Following a denial of
5 benefits, Plaintiff requested a hearing before an administrative law judge (“ALJ”)
6 and, on November 8, 2018, ALJ Mary Everstine determined that Plaintiff was not
7 disabled. Tr. 12-29. Plaintiff sought review of the ALJ’s decision with the Appeals
8 Council, however, review was denied on September 18, 2019. Tr. 1-6. This appeal
9 followed.

10 **II. STANDARD OF REVIEW**

11 The reviewing court shall affirm the Commissioner’s decision if the decision
12 is based on correct legal standards and the legal findings are supported by
13 substantial evidence in the record. 42 U.S.C. § 405(g); Batson v. Comm’r Soc.
14 Sec. Admin., 359 F.3d 1190, 1193 (9th Cir. 2004). Substantial evidence is “more
15 than a mere scintilla. It means such relevant evidence as a reasonable mind might
16 accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389,
17 401 (1971) (citation and internal quotation marks omitted). In reviewing the
18 Commissioner’s alleged errors, this Court must weigh “both the evidence that
19 supports and detracts from the [Commissioner’s] conclusions.” Martinez v.
20 Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

21 “‘When evidence reasonably supports either confirming or reversing the
22 ALJ’s decision, [the Court] may not substitute [its] judgment for that of the ALJ.’”
23 Ghanim v. Colvin, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting Batson, 359 F.3d at
24 1196); see also Thomas v. Barnhart, 278 F.3d 947, 959 (9th Cir. 2002) (“If the
25 ALJ’s credibility finding is supported by substantial evidence in the record, [the
26

27 ² A certified copy of the Administrative Record was filed on March 31, 2020. Electronic Case
28 Filing Number (“ECF No.”) 16. Citations will be made to the Administrative Record or
Transcript page number rather than the ECF page number.

1 Court] may not engage in second-guessing.”) (citation omitted). A reviewing
2 court, however, “cannot affirm the decision of an agency on a ground that the
3 agency did not invoke in making its decision.” Stout v. Comm’r Soc. Sec. Admin.,
4 454 F.3d 1050, 1054 (9th Cir. 2006) (citation omitted). Finally, a court may not
5 reverse an ALJ’s decision if the error is harmless. Burch v. Barnhart, 400 F.3d 676,
6 679 (9th Cir. 2005) (citation omitted). “[T]he burden of showing that an error is
7 harmful normally falls upon the party attacking the agency’s determination.”
8 Shinseki v. Sanders, 556 U.S. 396, 409 (2009).

9 III. DISCUSSION

10 A. Establishing Disability Under The Act

11 To establish whether a claimant is disabled under the Act, it must be shown
12 that:

13 (a) the claimant suffers from a medically determinable physical or
14 mental impairment that can be expected to result in death or that has
15 lasted or can be expected to last for a continuous period of not less than
16 twelve months; and

17 (b) the impairment renders the claimant incapable of performing the
18 work that the claimant previously performed and incapable of
19 performing any other substantial gainful employment that exists in the
20 national economy.

21 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C.
22 § 423(d)(2)(A)). “If a claimant meets both requirements, he or she is ‘disabled.’”
23 Id.

24 The ALJ employs a five-step sequential evaluation process to determine
25 whether a claimant is disabled within the meaning of the Act. Bowen v. Yuckert,
26 482 U.S. 137, 140 (1987); 20 C.F.R. § 404.1520(a). Each step is potentially
27 dispositive and “if a claimant is found to be ‘disabled’ or ‘not-disabled’ at any step
28 in the sequence, there is no need to consider subsequent steps.” Tackett, 180 F.3d

1 at 1098; 20 C.F.R. § 404.1520. The claimant carries the burden of proof at steps
2 one through four, and the Commissioner carries the burden of proof at step five.
3 Tackett, 180 F.3d at 1098.

4 The five steps are:

5 Step 1. Is the claimant presently working in a substantially gainful
6 activity [(“SGA”)]? If so, then the claimant is “not disabled” within
7 the meaning of the [] Act and is not entitled to [DIB]. If the claimant is
8 not working in a [SGA], then the claimant’s case cannot be resolved at
9 step one and the evaluation proceeds to step two. See 20 C.F.R.
10 § 404.1520(b).

11 Step 2. Is the claimant’s impairment severe? If not, then the
12 claimant is “not disabled” and is not entitled to [DIB]. If the claimant’s
13 impairment is severe, then the claimant’s case cannot be resolved at
14 step two and the evaluation proceeds to step three. See 20 C.F.R.
15 § 404.1520(c).

16 Step 3. Does the impairment “meet or equal” one of a list of
17 specific impairments described in the regulations? If so, the claimant is
18 “disabled” and therefore entitled to [DIB]. If the claimant’s
19 impairment neither meets nor equals one of the impairments listed in
20 the regulations, then the claimant’s case cannot be resolved at step
21 three and the evaluation proceeds to step four. See 20 C.F.R.
22 § 404.1520(d).

23 Step 4. Is the claimant able to do any work that he or she has
24 done in the past? If so, then the claimant is “not disabled” and is not
25 entitled to [DIB]. If the claimant cannot do any work he or she did in
26 the past, then the claimant’s case cannot be resolved at step four and
27 the evaluation proceeds to the fifth and final step. See 20 C.F.R.
28 § 404.1520(e).

1 Step 5. Is the claimant able to do any other work? If not, then
2 the claimant is “disabled” and therefore entitled to [DIB]. See 20
3 C.F.R. § 404.1520(f)(1). If the claimant is able to do other work, then
4 the Commissioner must establish that there are a significant number of
5 jobs in the national economy that claimant can do. There are two ways
6 for the Commissioner to meet the burden of showing that there is other
7 work in “significant numbers” in the national economy that claimant
8 can do: (1) by the testimony of a vocational expert [(“VE”)], or (2) by
9 reference to the Medical-Vocational Guidelines at 20 C.F.R. pt. 404,
10 subpt. P, app. 2. If the Commissioner meets this burden, the claimant
11 is “not disabled” and therefore not entitled to [DIB]. See 20 C.F.R. §§
12 404.1520(f), 404.1562. If the Commissioner cannot meet this burden,
13 then the claimant is “disabled” and therefore entitled to [DIB]. See *id.*
14 *Id.* at 1098-99.

15 **B. Summary Of ALJ’s Findings**

16 The ALJ determined that “[Plaintiff] meets the insured status requirements
17 of the . . . Act through December 31, 2020.” Tr. 17. The ALJ then found at step
18 one, that “[Plaintiff] has not engaged in [SGA] since October 28, 2014, the alleged
19 onset date (20 CFR 404.1571 *et seq.*.” *Id.* At step two, the ALJ found that
20 “[Plaintiff] has the following severe impairments: multi-level degenerative disc
21 disease of the lumbar spine with mild to moderate stenosis, poly-radiculopathy and
22 L5-S 1 grade I anterolisthesis due to pars defect and disc bulge with moderate to
23 severe foraminal stenosis; history of tachycardia (asymptomatic with medication);
24 left elbow epicondylitis with small bone fragment suggestive of old nonunion
25 fracture; C4-5 and CS- 6 foraminal stenosis; mild osteoarthritis of left knee with
26 chondromalacia; status post left foot bunionectomy and hammertoe repair times 3
27 (March 2016); status post left foot hammertoe repair (September 2016); and
28 carotid artery stenosis (20 CFR 404.1520(c)).” Tr. 18. At step three, the ALJ

1 found that “[Plaintiff] does not have an impairment or combination of impairments
2 that meets or medically equals the severity of one of the listed impairments in 20
3 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525 and
4 404.1526).” Id.

5 In preparation for step four, the ALJ found that Plaintiff has the residual
6 functional capacity (“RFC”) to:

7 perform sedentary work as defined in 20 CFR 404.1567(a) except no
8 more than occasional overhead reaching bilaterally; no more than
9 frequent gross handling with the left upper extremity but no left upper
10 extremity limitations in fine fingering or feeling, and no limitations with
11 the right upper extremity.

12 Tr. 18-19. The ALJ then found, at step four, that “[Plaintiff] is capable of
13 performing past relevant work as a bookkeeper. This work does not require the
14 performance of work-related activities precluded by [Plaintiff]’s [RFC] (20 CFR
15 404.1565).” Tr. 24.

16 The ALJ, therefore, found that “[Plaintiff] has not been under a disability, as
17 defined in the . . . Act, from October 28, 2014, through [November 8, 2018,] the
18 date of th[e] decision (20 CFR 404.1520(f)).” Id.

19 **C. Issues Presented**

20 In this appeal, Plaintiff raises three issues, whether the ALJ erred by: (1)
21 failing to “make any finding concerning additional sitting limitations despite
22 overwhelming evidence of issues in this regard which would prevent full time
23 employment”; (2) failing to “make any finding concerning additional findings
24 concerning Plaintiff’s necessity to elevate her feet and the amount of time she
25 would be off task”; and (3) “finding that Plaintiff could perform past-relevant work
26 as a bookkeeper despite the factual support that the only way she performed this
27 work was due to the fact that she was self-employed.” ECF No. 18, Joint Stip. at 3-
28 4.

1 **D. Court's Consideration Of The Issues Raised**

2 **1. Parties' Arguments**

3 As an initial matter, the Court notes that although Plaintiff raised three
4 distinct issues, Plaintiff did not address each issue individually. See id. at 4-5.
5 Instead, Plaintiff supports the aforementioned arguments by asserting briefly that
6 the ALJ erred by failing to include all her functional limitations in her RFC by: (1)
7 improperly rejecting the opinions of three of Plaintiff's treating doctors "despite
8 their consistency with the overall record as well as Plaintiff's testimony"; (2)
9 finding Plaintiff's "testimony not consistent with the records that [the ALJ] wants
10 to follow"; and (3) failing to consider that "[s]ince [Plaintiff] was self-employed,
11 she could work at her own schedule and pace" and that jobs that accommodate
12 Plaintiff's limitations in the way her self-employment did "simply do not exist in
13 this fashion in the open labor market." Id. at 4-5, 10.

14 Defendant responds that "[t]he ALJ's RFC finding was duly supported by
15 substantial evidence as she duly assessed the medical and other record evidence
16 including Plaintiff's own allegations." Id. at 6. Defendant asserts that the ALJ
17 "properly resolved the medical opinions" in the record, correctly found that
18 Plaintiff's symptom statements were "undermined by inconsistencies in the
19 record[,] " and "properly rejected" Plaintiff's "alleged accommodation[s] of her
20 'disabilities'" in her PRW because Plaintiff's need for the alleged accommodations
21 was "unsupported by the record." Id. at 6-9. Defendant adds that to the extent
22 Plaintiff failed to specifically dispute the reasons provided by the ALJ for rejecting
23 Plaintiff's symptom statements, "Plaintiff ignored those findings and may no
24 longer dispute them." Id. at 6-7.

25 Although Plaintiff did not specifically address some of the evidence
26 discussed below, the Court has weighed "both the evidence that supports and
27 detracts from the [ALJ's] conclusions[,] " Martinez, 807 F.2d at 772, and finds that
28 the ALJ's rejection of Plaintiff's symptom statements was not supported by

1 substantial evidence in the record. Consequently, the ALJ's RFC determination
2 and step-four findings was not supported by substantial evidence in the record.
3 The Court addresses this conclusion below.

4 2. **ALJ's Consideration Of Plaintiff's Symptom Statements**

5 The ALJ began her assessment of Plaintiff's symptom statements by
6 discussing Plaintiff's testimony from the administrative hearing. Tr. 19.

7 Specifically, the ALJ observed that:

8 At the hearing, [Plaintiff] testified that she is disabled due to constant
9 pain from 'head to toe.' She has had a brain lesion since 3rd grade that
10 causes seizure-like activity . . . about once a month that causes her to
11 drop to the floor. [Plaintiff] testified she has pinched nerves in her back
12 and neck. She has nerve damage in her wrists[,] and she underwent 4
13 surgeries on each foot[,] most recently left foot surgery in March 2018
14 for which she still wears a brace. [Plaintiff] testified she has arthritis in
15 her knees and that her pain is at level 8 on a 0-10 pain scale. She only
16 takes Advil during the day and uses a lidocaine patch at night so she is
17 able to sleep. She uses ice and heat and sits and rests as needed
18 throughout the day. [Plaintiff] produced a suitcase full of various braces
19 and testified she has worn wrist braces since age 32. She demonstrated
20 her use of the wrist braces by slipping them onto her hands. To a
21 layperson, the braces appeared loose contrary to the typical method of
22 wrapping the Velcro straps after the brace is put on rather than merely
23 slipping them on.

24 Tr. 19.

25 The ALJ added that:

26 [Plaintiff] lives with her retired husband who has health problems. She
27 is able to drive a car and she can walk for 30 minutes with a boot and
28 then she must elevate her foot. [Plaintiff] testified she can stand only

1 15 minutes due to her vasovagal syndrome, sit 1 hour at a time, and she
2 avoids heavy lifting. She testified she sits or lies down as needed
3 throughout the day although she can perform cooking household
4 chores, and shopping. [Plaintiff] testified she continues to work,
5 performing work for an hour and then taking a 2 hour break.

6 Id.

7 After discussing Plaintiff's symptom statements, the ALJ found that
8 Plaintiff's "medically determinable impairments could reasonably be expected to
9 cause the alleged symptoms; however, [Plaintiff's] statements concerning the
10 intensity, persistence, and limiting effects of these symptoms are not entirely
11 consistent with the medical evidence and other evidence in the record for the
12 reasons explained in th[e] decision." Tr. 20.

13 The ALJ explained that "[t]he record reflects at [Tr. 489, 494] that
14 [Plaintiff] denied difficulty walking or climbing stairs, any difficulty dressing and
15 bathing, and any difficulty independently performing/running errands." Id. The
16 ALJ added that "[a]t [Tr. 667-72] [Plaintiff] reported she was able to perform
17 [activities of daily living ("ADLs")] of driving a car, walking on a daily basis, and
18 consistently performing part-time work as a self-employed bookkeeper" and that
19 "[a]t the hearing, [Plaintiff] testified she can drive a car, walk 30 minutes, sit for 1
20 hour at a time, and she can cook, perform household chores, and go shopping." Id.
21 The ALJ found that "[w]hile not controlling, such activities are generally
22 inconsistent with disability because they indicate sufficient capacity to perform
23 focused and substantial activities similar to the capacity required to perform many
24 job functions." Id.

25 The ALJ next found that Plaintiff's "statements regarding the intensity,
26 persistence, and limiting effects of [her] symptoms are undermined by
27 inconsistencies in the record." Id. The ALJ noted, "[f]or example, while
28 [Plaintiff] testified that she underwent 4 surgeries to each foot and recently

1 underwent left foot surgery in March 2018, she reported to the orthopedic
2 [consultative examiner (“CE”)] that she had undergone 5 surgeries to the right
3 foot and 2 surgeries to the left foot.” Id. The ALJ added that “if her testimony
4 were accurate, she would have undergone 2 more surgeries to the left foot between
5 April 2017 and the hearings on September 2, 2018, and 1 less surgery to the right
6 foot.” Id. The ALJ also noted that “[w]hile [Plaintiff] complained of significant
7 knee pain to the orthopedic CE at [Tr. 667-72] [that] apparently caus[es] a
8 limitation of no more than occasional climbing of stairs or steps, [Plaintiff]
9 consistently denied difficulty walking or climbing stairs to the orthopedic surgeon,
10 Dr. Ramberg at [Tr. 489, 494].” Id. The ALJ also noted that “[w]hile [Plaintiff] is
11 not currently engaged in substantial gainful activity, her regular and consistent
12 part-time work activities over a protracted period of time are some evidence
13 tending to show her ability to engage in [SGA]” and that “[s]uch inconsistencies in
14 the record tend to diminish the veracity of [Plaintiff’s] allegations.” Id.

15 Next, the ALJ observed that “[i]n the present case, [Plaintiff] reported
16 taking over-the-counter Advil during the day and then using a lidocaine patch at
17 night, despite complaints of ‘constant’ widespread body pain from ‘head to toe.’”
18 Tr. 20-21. The ALJ found that “[if] her pain were as severe as alleged, one would
19 expect [Plaintiff] to take stronger prescribed pain medication instead of over-the-
20 counter medication and a patch.” Tr. 21.

21 The ALJ next found that “[t]he consistency of [Plaintiff’s] allegations is
22 further reduced by indications of noncompliance with medical evidence.” Id. The
23 ALJ noted, “[f]or example, at [Tr. 257] [Plaintiff] refused to undergo lumbar
24 surgery despite a diagnosis of severe lumbar stenosis, although she agreed
25 reluctantly to consult with Dr. Ramberg.” Id. The ALJ added that Plaintiff “also
26 refused surgery as to cervical stenosis and she was reluctant to accept her
27 diagnosis.” Id. Next, the ALJ added that “[a]lthough [Plaintiff] was advised to
28 undergo physical therapy . . . based on a history of improvement with physical

1 therapy, physical therapy progress notes at [Tr. 762-74] indicate no documented
2 attendance in physical therapy after 2013.” Id. The ALJ added that Plaintiff “was
3 advised to undergo further injections based on her history of improvement with
4 injections [but] the record fails to reflect compliance or follow-up with this
5 advice.” Id.

6 Finally, the ALJ noted that “[t]reating sources have generally responded
7 with limited and conservative treatment which [Plaintiff] apparently agreed with by
8 failing to undergo surgery.” Id. The ALJ found that “such treatment is
9 inconsistent with, and would not be expected from treating sources if they found
10 the level of severity of symptoms as alleged by [Plaintiff].” Id. The ALJ, therefore,
11 found that “based on the totality of the record, . . . while partially consistent,
12 [Plaintiff’s] statements as to the intensity, persistence, and limiting effects of the
13 symptoms are not consistent with the evidence to the extent of establishing
14 disability.” Id.

15 **3. Standard To Review ALJ’s Analysis Of Plaintiff’s Symptom**
16 **Statements**

17 When a claimant has medically documented impairments that “might
18 reasonably produce the symptoms or pain alleged and there is no evidence of
19 malingering, the ALJ must give ‘specific, clear, and convincing reasons for
20 rejecting’ the testimony by identifying ‘which testimony [the ALJ] found not
21 credible’ and explaining ‘which evidence contradicted that testimony.’” Laborin
22 v. Berryhill, 867 F.3d 1151, 1155 (9th Cir. 2017) (emphasis in original) (quoting
23 Brown-Hunter v. Colvin, 806 F.3d 487, 489, 494 (9th Cir. 2015). “This is not an
24 easy requirement to meet: ‘the clear and convincing standard is the most
25 demanding required in Social Security cases.’” Garrison v. Colvin, 759 F.3d 995,
26 1015 (9th Cir. 2014) (quoting Moore v. Comm’r Soc. Sec. Admin., 278 F.3d 920,
27 924 (9th Cir. 2002)).

28 ///

1 “The ALJ may consider inconsistencies either in the claimant’s testimony or
2 between the testimony and the claimant’s conduct.” Molina v. Astrue, 674 F.3d
3 1104, 1112 (9th Cir. 2012), superseded by regulation on other grounds. Also, while
4 an ALJ cannot reject the severity of subjective complaints solely on the lack of
5 objective evidence, the ALJ may nonetheless look to the medical record for
6 inconsistencies. See Morgan v. Comm’r Soc. Sec. Admin., 169 F.3d 595, 599-600
7 (9th Cir. 1999) (finding that “[t]he ALJ provided clear and convincing reasons for
8 rejecting [Plaintiff’s] testimony” by “point[ing] to specific evidence in the
9 record—including reports by [Plaintiff’s doctors]—in identifying what testimony
10 was not credible and what evidence undermined [Plaintiff’s] complaints.”).

11 4. ALJ’s Decision Is Not Supported By Substantial Evidence

12 Here, the ALJ rejected Plaintiff’s symptom statements for the following five
13 reasons: (1) Plaintiff’s ADLs were “generally inconsistent with disability”; (2)
14 “inconsistencies in the record” between Plaintiff’s statements and the medical
15 evidence; (3) Plaintiff’s failure “take stronger prescribed pain medication instead
16 of over-the-counter medication and a patch”; (4) Plaintiff’s “noncompliance with
17 medical evidence”; and (5) “limited and conservative treatment.” Tr. 19-21. The
18 Court addresses each in turn.

19 a. *Plaintiff’s ADLs*

20 As discussed above, the ALJ noted that Plaintiff’s ADL’s included driving a
21 car, “cooking[,] household chores, and shopping[,]” and “perform[ing] part-time
22 work as a self-employed bookkeeper[.]” Tr. 19-20 (citing Tr. 489, 494). The ALJ
23 further noted that Plaintiff “denied difficulty walking or climbing stairs, any
24 difficulty dressing and bathing, and any difficulty independently
25 performing/running errands.” Id. The ALJ found that “[w]hile not controlling,
26 such activities are generally inconsistent with disability because they indicate
27 sufficient capacity to perform focused and substantial activities similar to the
28 capacity required to perform many job functions.” Id.

1 The ALJ’s rejection of Plaintiff’s symptom statements due to Plaintiff’s
2 ADLs fails for three reasons.

3 First, the ALJ considered only some evidence in the record that supports her
4 rejection of Plaintiff’s symptoms, while ignoring evidence in the record that
5 Plaintiff performed the ADLs cited by the ALJ with limitations. See Holohan v.
6 Massanari, 246 F.3d 1195, 1207-08 (9th Cir. 2001) (holding that an ALJ cannot
7 selectively rely on some entries in plaintiff’s records while ignoring others).

8 For example, the ALJ did not consider evidence that Plaintiff’s ability to
9 cook and do household chores is limited. Plaintiff testified that her husband is
10 “very sick” and disabled and that she “do[es] some of the household chores[]
11 [m]ainly because [her] husband isn’t able to do a lot of them, like the cooking and
12 some of the cleaning.” Tr. 46, 51. Plaintiff indicated that her husband “can only
13 eat [the] same thing every night. He eats green peas and organic chicken and
14 potatoes. That’s it.” Tr. 51. Plaintiff indicated that she “just put[s] [food] in the
15 oven, like 30 minutes it’s in the oven” and once the food begins cooking, she
16 “go[es to] sit down” because she “can’t stand there and do all that.” Tr. 51-52.
17 Plaintiff explained that she “just put[s] [food] in the oven[and i]f [she] need[s]
18 help, he[r husband] gets it out for me” and that her husband “can pick up things
19 and do things like that for [her].” Tr. 52. Plaintiff indicated that after dinner, she
20 and her husband put their dishes in the dishwasher together, which takes “[j]ust a
21 few minutes because it’s just the two of [them].” Id. Plaintiff added that with
22 respect to cleaning chores, she lives in “a little house” and she “just do[es] a little
23 bit, you know, here and there when [she] can[,]” like, “a little bit of dusting. He
24 vacuums. You know, just wipe down the—whatever, you know, [she] just do[es]
25 what [she] ha[s] to do and when [she] can.” Id.

26 This evidence, which the ALJ did not consider or discuss, demonstrates that
27 Plaintiff’s ability to cook and clean is limited and that she receives help performing
28 both tasks from her disabled husband. Accordingly, because the ALJ did not

1 consider or discuss the above discussed evidence—that Plaintiff can cook and clean
2 in a limited way and with help from her disabled husband—the Court finds that
3 Plaintiff’s ability to cook and perform household chores was not a clear and
4 convincing reason for rejecting Plaintiff’s symptom statements.

5 Moreover, with respect to Plaintiff’s ability to shop and run errands, the ALJ
6 did not consider evidence in the record that Plaintiff shops because she “ha[s] to”
7 as a result of her husband’s disability. Tr. 46. At the administrative hearing,
8 Plaintiff also alluded to her husband helping her with the shopping when he can,
9 but this point is not clear as it appears that the ALJ interrupted Plaintiff when
10 Plaintiff was answering the ALJ’s question regarding Plaintiff’s ability to shop.
11 Specifically, at the hearing, the ALJ asked: “[sh]hopping?”, to which Plaintiff
12 responded “Yeah, I kind of have to. But he’ll—you know, when he can do things
13 with me, he’ll—”, before the ALJ apparently cut in and asked “[a]nd you take care
14 of your own personal needs?” Tr. 46 (sentenced stopped in original). Thus, it
15 appears from Plaintiff’s testimony that as a result of her husband’s disability,
16 Plaintiff shops for herself and for her husband, but that when her husband is able
17 to, he perhaps provides some type of assistance. Plaintiff’s testimony from later in
18 the hearing supports this conclusion.

19 Specifically, Plaintiff later testified that she has modified her shopping
20 process as a result of her impairments, such as by buying half a gallon of milk now,
21 rather than a full gallon of milk “because [she] doe[s]n’t get heavy things”
22 anymore. Tr. 51. Moreover, Plaintiff added that she “do[es]n’t try to lift heavy
23 things because [she] know[s] if [she] do[es], it’s just going to set off something. So
24 [she] avoid[s]—you know, [her] husband can pick up things for [her].” Tr. 51.
25 Thus, the evidence establishes that Plaintiff shops in a modified way, for lighter
26 items, because she has trouble lifting heavier items and that Plaintiff’s husband
27 helps Plaintiff shop by picking things up for her when he can. Moreover, Plaintiff’s
28 medical records, which the Court discusses below, indicate the Plaintiff “has

1 chronic neck pain and also pain into both hands and wrists which inhibits lifting
2 activities[,]” which supports Plaintiff’s claims that she cannot lift heavy items and
3 has consequently modified her shopping processes to accommodate her limitations.
4 Tr. 492, 495.

5 Accordingly, because the ALJ did not consider the above discussed
6 evidence—that Plaintiff can shop in a modified fashion, avoiding heavy items and
7 likely with help from her husband when he is able to help—the ALJ’s rejection of
8 Plaintiff’s statements for shopping and running errands was not a clear and
9 convincing reason for rejecting Plaintiff’s symptom statements.

10 With respect to Plaintiff’s ability to walk and climb stairs, the ALJ failed to
11 consider or discuss evidence that Plaintiff had difficulty and limitations with both
12 activities. Specifically, the ALJ did not consider or discuss Plaintiff’s testimony
13 that Plaintiff sold her house and got a “single story house . . . [with] no stairs[] [to]
14 make it easy[,]” and that Plaintiff can walk “[m]aybe 30 minutes” if she wears her
15 prescribed controlled ankle motion (“CAM”) walker boot, but that after thirty
16 minutes of walking, Plaintiff has to “go home and put [her] foot up[,]” and that
17 Plaintiff “do[es]n’t wear shoes in [her] house at all.” Tr. 39, 50. Plaintiff added
18 that she “can only wear like tennis shoes, and everything else hurts [her] feet.” Tr.
19 50.

20 Plaintiff’s medical records appear to corroborate Plaintiff’s testimony.
21 Specifically, Dr. Julie M. Chatigny, Doctor of Podiatric Medicine (“DPM”)—who
22 reportedly treated Plaintiff since 2015 and whose opinion the ALJ rejected, in part,
23 because Plaintiff “did not require the use of an assistive device for ambulation” —
24 noted that Plaintiff required “assistive devices for ambulation” that included a
25 “CAM walker or surgical shoe orthotics . . . to increase stability and decrease pain”
26 and to “aid in both walking and standing.” Tr. 23-24, 757-58 (capitalization
27 normalized). Additionally, Dr. Arthur D. Schwartz, M.D., noted that Plaintiff has
28 “[p]robable moderate [degenerative joint disease (“DJD”)] of both knees”; zero

1 degrees of extension, pain on flexion, and mild crepitation bilaterally in Plaintiff's
2 knees; and "severely painful knees when she uses stairs, crouches[,] or squats."
3 Tr. 668-70. Dr. Schwartz added that Plaintiff has "[b]ilateral foot problems with
4 cavus feet and multiple toe problems, largely corrected by she still has some
5 hammering of the toes." Tr. 669. Additionally, Dr. Donald. A. Ramberg, M.D.,
6 observed Plaintiff to have an antalgic gait when she walked, which indicates a
7 potential problem walking. Tr. 492. Finally, Plaintiff's records indicate that
8 Plaintiff had custom orthotics made to assist with her foot impairments, that her
9 foot impairments resulted in injections and surgery, and that Plaintiff's foot pain
10 was, at times, "too painful to wear regular athletic shoes" and that Plaintiff
11 reportedly "ha[d] been wearing slippers a majority of the time." See Tr. 584-97.

12 The Court finds that this evidence supports greater limitations in Plaintiff's
13 ability to walk and climb stairs than the ALJ acknowledged. Because the ALJ failed
14 to consider this evidence, the Court finds that the ALJ's rejection of Plaintiff's
15 statements due to Plaintiff's ability to walk and climb stairs was not a clear and
16 convincing reason for rejecting Plaintiff's symptom statements.

17 Second, the ALJ erred by rejecting objective medical evidence that supports
18 Plaintiff's symptom statements without providing valid reasons for doing so.

19 The Social Security Administration evaluates medical evidence "according
20 to the rules pertaining to the relevant category of evidence." 20 C.F.R. §
21 404.153(a). The categories of evidence are: (1) objective medical evidence; (2)
22 medical opinions; (3) other medical evidence; (4) evidence from non-medical
23 sources; and (5) evidence from a prior medical finding. Id.

24 "Objective medical evidence" includes "medical signs, laboratory findings,
25 or both, as defined in § 404.1502(f)." Id. at § 404.1513(a)(1). By contrast, a
26 "medical opinion" is:

27

28

1 a statement from a medical source about what [a claimant] can still do
2 despite [their] impairment(s) and whether [they] have one or more
3 impairment-related limitations or restrictions in the following abilities:

4 (i) [An] ability to perform physical demands of work activities,
5 such as sitting, standing, walking, lifting, carrying, pushing, pulling, or
6 other physical functions (including manipulative or postural functions,
7 such as reaching, handling, stooping, or crouching);

8 (ii) [An] ability to perform mental demands of work activities,
9 such as understanding; remembering; maintaining concentration,
10 persistence, or pace; carrying out instructions; or responding
11 appropriately to supervision, co-workers, or work pressures in a work
12 setting;

13 (iii) [An] ability to perform other demands of work, such as
14 seeing, hearing, or using other senses; and

15 (iv) [An] ability to adapt to environmental conditions, such as
16 temperature extremes or fumes.

17 For example, with respect to Plaintiff's ability to drive, Dr. Ramberg,
18 indicated that Plaintiff "has had for a number of years[,] pain in the low lumbar
19 are[a] that goes to the buttocks at times[,] . . . is worse with sitting . . . and [that]
20 driving aggravates the problem." Tr. 492, 495 (emphasis added). Dr. Ramberg
21 included this notation in an examination report where he noted that he "reviewed
22 the MRIs from 2012 and 2016" and observed that Plaintiff's "L3-4 disc is now
23 collapsed[,] but opined that "surgical fusion is not highly recommended and
24 would now have to be from L3 to the sacrum." Tr. 492. Dr. Ramberg also
25 assessed, in pertinent part, congenital spondylolisthesis of the lumbosacral region,
26 antalgic gait, "pain with motion" and zero-degree extension of the lumbar spine,
27 hyperactive knee reflex, and diminished ankle reflex. Id. Finally, Dr. Ramberg
28

1 noted that Plaintiff used lidocaine patches and was prescribed tramadol, a narcotic-
2 like pain medication, to treat her pain symptoms. Tr. 491, 494.

3 Although the ALJ observed these treatment records later in the decision
4 when analyzing Plaintiff's medical records, and not when rejecting Plaintiff's
5 symptoms, the ALJ gave these records, and all medical records contained at Tr.
6 236-65, 484-547, 737-41, only "some weight, to the extent these records document
7 treatment and monitoring of [Plaintiff's] chronic conditions, but not to the extent
8 of establishing a disabling degree of severity." Tr. 22. The ALJ, however,
9 provided no explanation for rejecting the nearly 100 pages of Plaintiff's treatment
10 records discussed above, which included Dr. Ramberg's notations at Tr. 492, 495
11 that driving aggravates Plaintiff's symptoms. Instead, after briefly summarizing
12 Plaintiff's medical records contained at Tr. 236-65, 484-547, 737-41, the ALJ
13 concluded her discussion of the evidence by stating: "[t]herefore, treatment
14 records at Exhibits 1 F, 7 F, and 21 F are given some weight." Tr. 23.

15 Although "it is the ALJ's role to determine credibility and to resolve the
16 conflict[,] in conflicting medical evidence, Allen v. Heckler, 749 F.2d 577, 579
17 (9th Cir. 1984) (citation omitted), here, the ALJ did not discuss conflicting
18 evidence that driving does not, or would not, aggravate Plaintiff's symptoms. As
19 such, the ALJ's rejection of the medical evidence that Plaintiff's driving aggravates
20 Plaintiff's symptoms, without explanation, was not a clear and convincing reason to
21 reject Plaintiff's symptom statements. See Garrison, 759 F.3d at 1012 ("The ALJ
22 must do more than state conclusions. [Sh]e must set forth his own interpretations
23 and explain why they, rather than the doctor's, are correct."); see also id. at 1012-
24 13 ("[A]n ALJ errs when [s]he rejects a medical opinion or assigns it little weight
25 while doing nothing more than ignoring it, asserting without explanation that
26 another medical opinion is more persuasive, or criticizing it with boilerplate
27 language that fails to offer a substantive basis for his conclusion." (citing Nguyen v.
28 Chater, 100 F.3d 1462, 1464 (9th Cir. 1996))).

1 Moreover, the ALJ selectively relied on only some evidence cited by Dr.
2 Ramberg, while ignoring other evidence cited by Dr. Ramberg, including Plaintiff's
3 antalgic gait, "pain with motion" and zero-degree extension of Plaintiff's lumbar
4 spine, hyperactive knee reflex, diminished ankle reflex, and Plaintiff's use of
5 lidocaine patches and tramadol to treat her pain symptoms. Tr. 491-92, 494. Thus,
6 in addition to erroneously failing to explain why Dr. Ramberg's records and the rest
7 of the medical records contained at Tr. 236-65, 484-547, 737-41 were due only
8 some weight, the ALJ also erred in rejecting Dr. Ramberg's records by citing only
9 some of Dr. Ramberg's findings, while ignoring others. Holohan, 246 F.3d at 1207-
10 08.

11 Similarly, with respect to Plaintiff's ability to work part-time as a
12 bookkeeper, Dr. Ramberg indicated that Plaintiff "continues to have pain in the
13 cervical, both arms, and the back and legs. This is aggravated by sitting and
14 working at the computer." Tr. 486, 489 (emphasis added). Dr. Ramberg added
15 that "Plaintiff continues with cervical and lumbar radiculopathy. Her job activities
16 are compromised by the symptomology and the disease. She needs to restrict her
17 activities. Surgical treatment may be needed in the future, but will probably not
18 affect her work status." Tr. 487, 490 (emphasis added). In support of these
19 findings, Dr. Ramberg assessed Plaintiff as having acquired spondylolistheses,
20 cervical spondylosis with myelopathy, and observed that Plaintiff was using
21 lidocaine patches and tramadol to treat her pain symptoms. Tr. 487-91.

22 As discussed above, however, the ALJ erred by rejecting these records by
23 failing to adequately explain why they were due less weight and by selectively
24 relying on only some of Dr. Ramberg's findings while ignoring others. As such,
25 Plaintiff's ability to work part-time as a bookkeeper was not a clear and convincing
26 reason for rejecting Plaintiff's symptom statements.

27 Finally, Plaintiff's ability to perform the above discussed ADLs in the limited
28 way Plaintiff performs them does not appear to indicate a "sufficient capacity to

1 perform focused and substantial activities similar to the capacity required to
2 perform many job functions” as the ALJ found. Tr. 20; see Reddick v. Chater, 157
3 F.3d 715, 722 (9th Cir. 1998) (“Only if the level of activity were inconsistent with
4 [c]laimant’s claimed limitations would these activities have any bearing on
5 [c]laimant’s credibility” and “disability claimants should not be penalized for
6 attempting to lead normal lives in the face of their limitations.”); see also Molina,
7 674 F.3d at 1112-13 (“a claimant need not vegetate in a dark room in order to be
8 eligible for benefits”) (citation and internal quotation marks omitted). Further, the
9 Ninth Circuit “‘has repeatedly asserted that the mere fact that a plaintiff has
10 carried on certain daily activities . . . does not in any way detract from h[is]
11 credibility as to h[is] overall disability.’” Orn v. Astrue, 495 F.3d 625, 639 (9th Cir.
12 2007) (quoting Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001)). It is only
13 when a “claimant is able to spend a substantial part of h[er] day engaged in pursuits
14 involving the performance of physical functions that are transferable to a work
15 setting, [that] a specific finding as to this fact may be sufficient to discredit an
16 allegation of disabling excess pain.” Fair v. Bowen, 885 F.2d 597, 603 (9th Cir.
17 1989).

18 For example, the ALJ found that Plaintiff’s part-time work as a bookkeeper,
19 “indicate[d] sufficient capacity to perform focused and substantial activities similar
20 to the capacity required to perform many job functions” and, consequently, was
21 “generally inconsistent with disability.” Tr. 20. Plaintiff, however, testified that
22 she works “[m]aybe five, six” hours total “throughout the week” and that the
23 “longest stint [she has] do[ne] at one time” is “maybe three hours if [she] had to”
24 and that after doing so, she lays down or does “[w]hatever it takes” to alleviate her
25 symptoms including putting “those sticky pad things on [her body] and ice, heat,
26 whatever [she] need[s].” Tr. 52-53. Plaintiff added that as a result of “permanent
27 nerve damage in both hands” she can only use a keyboard or a mouse for “[m]aybe
28 an hour.” Tr. 47-78.

1 It is unclear how Plaintiff's stated ability to work in such a limited basis
2 indicates "the capacity required to perform many job functions" as the ALJ found
3 for a "substantial part of [Plaintiff's] day." Fair, 885 F.2d at 603. Indeed, the ALJ
4 found in the decision that Plaintiff's part-time "work as a self-employed
5 bookkeeper working about 5-6 hours a week, . . . is not considered [SGA]" and
6 "did not rise to the level of [SGA]." Tr. 17-18.

7 Moreover, it is unclear how Plaintiff's ability to perform the ADLs in the
8 limited ways described above, or Plaintiff's ability to bathe and dress herself,
9 translate to an ability to spend a substantial part of her day engaged in pursuits
10 involving the performance of physical functions that are transferable to a work
11 setting. Fair, 885 F.2d at 603.

12 Accordingly, Plaintiff's ADLs were not a clear and convincing reason to
13 reject Plaintiff's symptom statements. On remand, the ALJ shall explain how
14 Plaintiff's ability to perform ADLs with the above discussed limitations
15 "indicate[s] sufficient capacity to perform focused and substantial activities similar
16 to the capacity required to perform many job functions" as the ALJ found, Tr. 20,
17 or translate to an ability to "spend a substantial part of h[er] day engaged in
18 pursuits involving the performance of physical functions that are transferable to a
19 work setting," see Fair, 885 F.2d at 603.

20 *b. Inconsistencies Between Plaintiff's Statements And The*
21 *Record*

22 The ALJ listed four inconsistencies between Plaintiff's statements and the
23 record as cause for rejecting Plaintiff's symptom statements. The Court finds,
24 however, that none of the four purported inconsistencies were clear and convincing
25 reasons to reject Plaintiff's symptom statements.

26 With respect to the first purported inconsistency noted by the ALJ—that
27 while Plaintiff "testified that she underwent 4 surgeries to each foot and recently
28 underwent left foot surgery in March 2018, she [also] reported to the orthopedic

1 [CE] that she had undergone 5 surgeries to the right foot and 2 surgeries to the left
2 foot” and “if her testimony were accurate, she would have undergone 2 more
3 surgeries to the left foot between April 2017 and the hearings on September 2,
4 2018, and 1 less surgery to the right foot” —the Court finds that this was not a clear
5 and convincing reason to reject Plaintiff’s symptom statements for three reasons.
6 Tr. 20.

7 First, there is no indication that Plaintiff was the source of the information
8 cited by the CE that Plaintiff had undergone 5 surgeries to the right foot and 2
9 surgeries to the left foot. Rather, a close inspection of the CE’s report from April
10 23, 2017, reveals that the CE stated in the “past medical history” section of the
11 report that Plaintiff “has had a tonsillectomy. She has had seven foot surgeries,
12 two on the right and five on the left for multiple hammertoes and bunions. She is
13 gravida 0 and has a tubal ligation.” Tr. 668 (capitalization normalized). Thus,
14 because it is not clear that Plaintiff was the source of the number of foot surgeries
15 cited by the CE, the inconsistency between the number of foot surgeries cited by
16 the CE and the number of foot surgeries Plaintiff reported she had is not a clear and
17 convincing reason to reject Plaintiff’s statements.

18 Second, the record indicates that Plaintiff had more foot surgeries before
19 1997, the starting date range Plaintiff testified to at the hearing. Specifically,
20 Plaintiff testified at the September 2018 administrative hearing that since 1997, she
21 has had four surgeries on each foot. See Tr. 48. The record indicates, however,
22 that Plaintiff had a foot surgery before 1997. Plaintiff’s records indicate that
23 Plaintiff had foot surgery as early as 1989. See Tr. 485, 489, 491, 494. Moreover,
24 the record indicates that Plaintiff had foot surgery in March 2018, eleven months
25 after the CE’s April 2017 report was issued. Thus, the record provides two
26 potential explanations for discrepancies between the number of foot surgeries
27 Plaintiff reported she had at the hearing and the number of surgeries cited by the
28 CE: (1) Plaintiff reported foot surgeries dating back to only 1997 at the hearing,

1 whereas Plaintiff began having foot surgery as early as 1989. Thus, if the CE had
2 reviewed Plaintiff's records that spanned back to 1989, he could have been
3 reporting additional surgeries that Plaintiff had not referenced at the hearing that
4 dated back to only 1997; and (2) Plaintiff had an additional foot surgery eleven
5 months after the CE's report, which would explain why the CE had underreported
6 at least one surgery.

7 Third, to the extent Plaintiff's medical records, rather than Plaintiff, were
8 the source of the information cited by the CE, it is possible that the CE did not
9 have all of Plaintiff's records available for review at the time of the examination
10 because Plaintiff indicated her doctors told her "they no longer have [her] records
11 as it has been too many years" since she has seen them. Tr. 195. Thus, some of
12 Plaintiff's records may not have been available for the CE to review and report on.
13 As such, the inconsistency between the number of foot surgeries Plaintiff reported
14 at the hearing and the number of foot surgeries the CE reported Plaintiff had was
15 not a clear and convincing reason to reject Plaintiff's symptoms for this additional
16 reason.

17 On remand, the ALJ shall specifically consider discuss the above discussed
18 evidence. Moreover, the ALJ shall explain how this discrepancy is material to
19 Plaintiff's claim, when Plaintiff's amended disability onset date is October 28,
20 2014, and: (1) some of Plaintiff's surgeries occurred as early as 1989 and, thus
21 appear to be of little relevance to Plaintiff's instant claim; and (2) Plaintiff had
22 multiple surgeries during the relevant time period, and, notably, was even still
23 wearing a foot brace at the September 2018 hearing following her most recent
24 March 2018 foot surgery. See Tr. 485, 489, 491, 494 (surgeries reported in 1989
25 and 2005); Tr. 572 (foot surgeries noted in March 2016 and "June-September
26 2016"); Tr. 584, 586 (medical records noting "4 foot surgeries 1998-2004"); Tr.
27 485, 587, 590 (medical records from 2015 observing Plaintiff's "history of multiple
28 surgeries and resultant hammertoe contractures with bowstringing of extensor

1 tendons”); 594-98 (surgical chart notes from March 2016 left foot surgery) Tr.
2 599-603 (operative reports from March 2016 left foot surgery); Tr. 48-49 (Plaintiff
3 was reportedly wearing a brace on her left foot at the hearing following a March
4 2018 foot surgery to repair a 2016 “reconstructive surgery” she had because her
5 “toes wo[uld]n’t bend at all”).

6 Accordingly, the ALJ’s reliance on the inconsistency between the number of
7 surgeries noted in the CE’s report and the number of surgeries Plaintiff stated she
8 had at the hearing was not a clear and convincing reason to reject Plaintiff’s
9 symptom statements.

10 With respect to the second inconsistency noted by the ALJ—that “[w]hile
11 [Plaintiff] complained of significant knee pain to the orthopedic CE at [Tr. 667-
12 72] . . . , [Plaintiff] consistently denied difficulty walking or climbing stairs to the
13 orthopedic surgeon, Dr. Ramberg at [Tr. 489, 494]” —this too was not a clear and
14 convincing reason to reject Plaintiff’s symptom statements because the ALJ’s
15 finding selectively relies on only some evidence, while ignoring the evidence
16 discussed above indicating that Plaintiff had greater difficulty walking and climbing
17 stairs than the ALJ observed. Tr. 20; see infra at 15-16 (citing Tr. 23-24, 39, 50,
18 492, 668-70, 757-58); Holohan, 246 F.3d at 1207-08.

19 With respect to the third inconsistency noted by the ALJ—that “[w]hile
20 [Plaintiff] is not currently engaged in [SGA], her regular and consistent part-time
21 work activities over a protracted period of time are some evidence tending to show
22 her ability to engage in [SGA]” —this was not a clear and convincing reason to
23 reject Plaintiff’s symptom statements because, as discussed above, the ALJ erred
24 by failing to recognize the limited manner in which Plaintiff worked part-time as a
25 bookkeeper. Tr. 20; see infra at 19-20; Holohan, 246 F.3d at 1207-08; Fair, 885
26 F.2d at 603. On remand, the ALJ shall explain how Plaintiff’s ability to work part-
27 time as a bookkeeper in the limited manner described above “tend[s] to show
28 [Plaintiff’s] ability to engage in [SGA,]” especially when the ALJ also found that

1 Plaintiff's part-time work as a bookkeeper "working about 5-6 hours a week," in
2 the full capacity described by the ALJ was "not considered [SGA]" and "did not
3 rise to the level of [SGA.]" Tr. 17-18, 20.

4 With respect to the ALJ's fourth inconsistency noted by the ALJ—that
5 Plaintiff's "tax returns at [Tr. 222-27] reflect substantial business deductions and
6 appreciation, which appear inconsistent with [Plaintiff's] allegation she is unable to
7 work—this was not a clear and convincing reason to reject Plaintiff's statements
8 regarding her ability to work for two reasons.

9 First, Plaintiff's tax records show only deductions and appreciation from
10 2003-2005. See Tr. 222-27 (Plaintiff's tax records include only: (1) an earning
11 summary from 1967 through 2008, which shows only Plaintiff's "[t]axed Social
12 Security [e]arnings" and Plaintiff's "taxed Medicare [e]arnings"; and (2) three
13 Schedule C profit or loss tax forms from 2003-2005, with only the latter discussing
14 Plaintiff's business deductions and appreciation). It is unclear how a subset of
15 Plaintiff's tax records from nine to twelve years before her alleged onset date in
16 2003-2005 refute Plaintiff's claims of disability in 2014-2018. On remand, the ALJ
17 shall specifically explain this theory further.

18 Second, even assuming Plaintiff's tax documents were from the relevant
19 time period, and not stale proof of Plaintiff's business dealings from a bygone
20 decade, it is unclear how a claimant's ability to deduct and appreciate things—
21 rather than Plaintiff's ability to earn and generate profits—refute Plaintiff's
22 allegations of disability. See Fair, 885 F.2d at 603. On remand, the ALJ shall
23 explain this theory as well.

24 Accordingly, Plaintiff's tax documents were not a clear and convincing
25 reason to reject Plaintiff's statements.

26 *c. Lack Of Stronger Medication*

27 With respect to Plaintiff's medications, the ALJ observed that Plaintiff "only
28 takes Advil during the day and uses a lidocaine patch at night so she is able to sleep.

1 She uses ice and heat and sits and rests as needed throughout the day.” Tr. 19.
2 The ALJ also observed that observed that Plaintiff “reported taking over-the-
3 counter Advil during the day and then using a lidocaine patch at night, despite
4 complaints of ‘constant’ widespread body pain from ‘head to toe.’” Tr. 20-21.
5 The ALJ rejected Plaintiff’s symptom statements after explaining that “[if]
6 [Plaintiff’s] pain w[as] as severe as alleged, one would expect [Plaintiff] to take
7 stronger prescribed pain medication instead of over-the-counter medication and a
8 patch.” Tr. 21.

9 The ALJ’s rejection of Plaintiff’s symptom statements due to Plaintiff’s lack
10 of taking stronger medication fails for two reasons.

11 First, the record indicates that Plaintiff took stronger and more medications
12 than the ALJ observed. See Holohan, 246 F.3d at 1207-08. For example, the ALJ
13 failed to consider evidence that Plaintiff took, among other medications, Tramadol
14 for her pain and Gabapentin for her seizures. See Tr. 43, 177, 218, 484-85, 488-91,
15 667. Moreover, the record reveals that Plaintiff did not use “a lidocaine patch at
16 night” to sleep; instead, Plaintiff used two to three lidocaine patches at night, and
17 Plaintiff testified that three lidocaine patches was the maximum number of patches
18 she could use at one time. Tr. 19, 21, 43 (emphasis added). Moreover, Plaintiff
19 received multiple injections throughout the record to treat pain, which the ALJ
20 failed to acknowledge. See Tr. 181-82, 183, 500, 562, 586-87.

21 Thus, the ALJ’s rejection of Plaintiff’s symptom statements for not taking a
22 “stronger prescribed pain medication instead of over-the-counter medication and a
23 patch” was not supported by substantial evidence because the record reveals that
24 Plaintiff used prescribed narcotic-like pain medication, as well as multiple—and
25 sometimes even the maximum number of allowed—lidocaine patches.

26 Second, to the extent Plaintiff used over-the-counter medication rather than
27 prescription medication to treat her symptoms, Plaintiff provided a valid reason for
28 doing so—her prescription medication caused adverse side effects. See Carmickle

1 v. Comm’r, Soc. Sec. Admin., 533 F.3d 1155, 1162 (9th Cir. 2008) (“[A]lthough a
2 conservative course of treatment can undermine allegations of debilitating pain,
3 such fact is not a proper basis for rejecting the claimant’s credibility where the
4 claimant has a good reason for not seeking more aggressive treatment[,]” such as
5 “not tak[ing] . . . medication because of adverse side effects.” Id. (internal citation
6 omitted)). Specifically, Plaintiff testified that she cannot take her prescription
7 medication and perform work tasks due to the side effects the medication causes.
8 Tr. 43-44. Moreover, Plaintiff’s medical records support Plaintiff’s allegations of
9 adverse side effects. For example, Plaintiff’s doctors indicated that Plaintiff’s
10 prescription medications cause dizziness and drowsiness and affects Plaintiff’s
11 ability to work. Tr. 487, 754.

12 Accordingly, Plaintiff’s lack of taking stronger medication to treat her pain
13 was not supported by substantial evidence in the record and was, therefore, not a
14 clear and convincing reason for rejecting Plaintiff’s symptom statements. Holohan,
15 246 F.3d at 1207-08; Carmickle, 533 F.3d at 1162.

16 *d. Noncompliance With Medical Recommendations*

17 The ALJ listed three instances of noncompliance with medical advice as
18 cause for rejecting Plaintiff’s symptom statements. See Tr. 21. The Court finds,
19 however, that none of the three purported instances of noncompliance were clear
20 and convincing reasons to reject Plaintiff’s symptom statements.

21 With respect to the first instance of noncompliance, the ALJ noted that “at
22 [Tr. 257] [Plaintiff] refused to undergo lumbar surgery despite a diagnosis of severe
23 lumbar stenosis, although she agreed reluctantly to consult with Dr. Ramberg.” Id.
24 The ALJ added that Plaintiff “also refused surgery as to cervical stenosis and she
25 was reluctant to accept her diagnosis.” Id.

26 Here, the ALJ’s first instance of noncompliance was not a clear and
27 convincing reason to reject Plaintiff’s symptom statements because the record
28 indicates that Plaintiff had good reasons for her reluctance to accept the severe

1 diagnosis and surgery that was recommended to her—within two weeks of the
2 severe diagnosis and surgery recommendation, other doctors diagnosed less severe
3 problems and did not recommend surgery. Carmickle, 533 F.3d at 1162.

4 Specifically, the ALJ correctly observed that Plaintiff was “reluctant” to
5 accept her February 2, 2016, diagnosis of severe lumbar stenosis and the resulting
6 recommendation that she undergo lumbar surgery. See Tr. 257. However, the ALJ
7 did not consider or discuss when making this finding that one week earlier, on
8 January 25, 2016, Plaintiff was diagnosed by another doctor with only “moderate to
9 severe left and moderate foraminal stenosis . . . at L5-S1” and “at L3-
10 L4[,] . . . moderate left foraminal stenosis.” Tr. 541. Moreover, although Plaintiff
11 was “reluctant” to consult with Dr. Ramberg as the ALJ correctly observes,
12 Plaintiff nevertheless did so and received a second opinion from Dr. Ramberg on
13 February 16, 2016, that surgery would not be helpful. Tr. 257, 484-95. Specifically,
14 Dr. Ramberg noted on February 16, 2016, that Plaintiff’s “L3-4 disc is now
15 collapsed. As [Plaintiff] does not have much in the way [o]f radicular symptoms
16 and the slippage is not increased, surgical fusion is not highly recommended and
17 would have to be from L3 to the sacrum.” Tr. 492, 495.

18 Moreover, in July 2016, Dr. Ramberg again indicated the surgery was not
19 needed at that time. Specifically, Dr. Ramberg indicated that Plaintiff “continues
20 [to suffer] with cervical and lumbar radiculopathy” and that Plaintiff’s “job
21 activities are compromised by the symptomology of the disease.” Tr. 487. Dr.
22 Ramberg added that Plaintiff “needs to restrict her activities” and that “[s]urgical
23 treatment may be needed in the future but will probably not affect [Plaintiff’s] work
24 status.” Tr. 487, 490.

25 Accordingly, because there was a good reason for not accepting the severe
26 diagnosis and resulting surgery recommendation—other doctors provided different
27 diagnoses and recommendations—Plaintiff’s reluctance to accept a diagnosis and
28

1 refusal to accept a surgical recommendation was not a clear and convincing reason
2 to reject Plaintiff's symptom statements.

3 With respect to the ALJ's second instance of noncompliance, the ALJ noted
4 that "[a]lthough [Plaintiff] was advised to undergo physical therapy . . . based on a
5 history of improvement with physical therapy, physical therapy progress notes at
6 [Tr. 762-74] indicate no documented attendance in physical therapy after 2013."
7 Tr. 21. This finding is not supported by substantial evidence in the record.
8 Plaintiff's records reveal that following 2013 when the ALJ found Plaintiff no
9 longer received physical therapy, Plaintiff indeed saw a physical therapist at least
10 ten times beginning on February 24, 2014, for treatment sessions that lasted fifty
11 minutes and included ultrasounds and manual therapy. See Tr. 766-69, 771-74.
12 Accordingly, Plaintiff's lack of physical therapy after 2013 was not a valid reason to
13 reject Plaintiff's symptom statements. See Holohan, 246 F.3d at 1207-08.

14 Finally, the ALJ added that Plaintiff "was advised to undergo further
15 injections based on her history of improvement with injections [but] the record fails
16 to reflect compliance or follow-up with this advice." Tr. 21. As discussed above,
17 Plaintiff received multiple injections throughout the record to treat pain, which the
18 ALJ failed to acknowledge. See Tr. 181-82, 183, 500, 562, 586-87. Thus, Plaintiff's
19 lack of injections was not a valid reason to reject Plaintiff's statements. See
20 Holohan, 246 F.3d at 1207-08.

21 On remand, the ALJ shall consider and discuss the aforementioned evidence
22 when reassessing Plaintiff's symptom statements.

23 *e. Limited And Conservative Treatment*

24 With respect to the ALJ's rejection of Plaintiff's statements because
25 "[t]reating sources have generally responded with limited and conservative
26 treatment which [Plaintiff] apparently agreed with by failing to undergo surgery[,]"
27 this was not a clear and convincing reason to reject Plaintiff's statements. Tr. 21.

28 / / /

1 The ALJ’s finding is not supported by substantial evidence because, as
2 discussed above, Plaintiff’s treatment was more extensive than the ALJ
3 acknowledged. See Holohan, 246 F.3d at 1207-08. Specifically, Plaintiff took
4 prescription medications, saw physical therapists, and received injections beyond
5 what the ALJ acknowledged. Moreover, Plaintiff did not appear to “apparently
6 agree[]” with “conservative treatment” recommendations “by failing to undergo
7 surgery[,]” as the ALJ states. Tr. 21. Rather, as discussed above, Plaintiff had a
8 good reason for rejecting surgery; she received a contradicting diagnosis and a
9 recommendation against surgery within two weeks of the diagnosis and surgical
10 recommendation she rejected. Moreover, Dr. Ramberg, the doctor who
11 recommended against surgery, supported his recommendation with objective
12 findings that Plaintiff’s “L3-4 disc is now collapsed[,]” and therefore “surgical
13 fusion is not highly recommended [because it] would now have to be from L3 to the
14 sacrum.” Tr. 492. Thus, Plaintiff’s recommendation against surgery does not
15 appear to be from a lack of symptomology of a finding that her symptoms were not
16 disabling. Rather, the recommendation appears to be a result of Plaintiff’s
17 condition deteriorating—her L3-4 disc collapsing—and her surgery needing to be
18 extensive—from her L3 to her sacrum. Id.

19 Additionally, the ALJ failed to consider evidence that Plaintiff cannot take
20 some medications that would help ameliorate her symptoms because of adverse
21 side effects those medications would cause when taken in conjunction with
22 Plaintiff’s other prescription medications, which the ALJ also did not consider or
23 discuss. For example, Plaintiff indicated that she cannot take medication to treat
24 her vasovagal because that medication interferes with her other prescription
25 medications. Tr. 50. The ALJ’s failure to consider this evidence is material here
26 because Plaintiff testified that her ability to stand is limited to fifteen minutes as a
27 result of her vasovagal, and that this limitation kicks in even before Plaintiff’s foot
28 and knee impairments require her to sit down. Id. Thus, there is evidence on the


1 the medical records. As such, the Court finds that the ALJ’s decision is not
2 supported by substantial evidence in the record.

3 **IV. CONCLUSION**

4 Because the Commissioner’s decision is not supported by substantial
5 evidence, IT IS HEREBY ORDERED that the Commissioner’s decision is
6 **REVERSED** and this case is **REMANDED** for further administrative proceedings
7 under sentence four of 42 U.S.C. § 405(g). See Garrison, 759 F.3d at 1009
8 (holding that under sentence four of 42 U.S.C. § 405(g), “[t]he court shall have
9 power to enter . . . a judgment affirming, modifying, or reversing the decision of the
10 Commissioner . . . , with or without remanding the cause for a rehearing.”)
11 (citation and internal quotation marks omitted).

12
13 IT IS SO ORDERED.

14
15 DATED: 8/28/2020

16 
17 _____
18 HONORABLE SHASHI H. KEWALRAMANI
19 United States Magistrate Judge
20
21
22
23
24
25
26
27
28