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

RACHEL V. B.,	)	NO. CV 20-2053-E
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM OPINION</b>
	)	
ANDREW SAUL, Commissioner of	)	<b>AND ORDER OF REMAND</b>
Social Security,	)	
	)	
Defendant.	)	
	)	

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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 March 2, 2020, seeking review of  
the Commissioner's denial of benefits. The parties consented to  
proceed before a United States Magistrate Judge on April 15, 2020.  
Following the retirement of Magistrate Judge Walsh, the case was  
transferred to Magistrate Judge Eick on August 21, 2020. The parties

1 filed a Joint Stipulation on November 10, 2020. The Court has taken  
2 the matter under submission without oral argument. See L.R. 7-15.

3  
4 **BACKGROUND**

5  
6 Plaintiff asserts disability since January 7, 2015, based on  
7 alleged physical impairments (Administrative Record ("A.R.") 247-48,  
8 261, 300). An Administrative Law Judge ("ALJ") reviewed the record  
9 and heard testimony from Plaintiff and a vocational expert (A.R. 15-  
10 25, 81-115). Plaintiff testified that, because of pain, she could  
11 lift only five pounds or less and could sit for only five or ten  
12 minutes before having to change positions (A.R. 95, 97).

13  
14 The ALJ found that Plaintiff has severe: (1) right shoulder  
15 impingement, rotator cuff tear and degenerative joint disease, status-  
16 post arthroscopy; (2) history of adhesive capsulitis; (3) diabetes  
17 mellitus type 2 with hyperglycemia in stable condition; (4) occipital  
18 neuralgia; (5) cervical spine degenerative disc disease, status-post  
19 discectomy in December 2015; (6) carpal tunnel syndrome; and  
20 (7) obesity (A.R. 18). However, the ALJ also found that Plaintiff  
21 retains the residual functional capacity for light work (which  
22 involves lifting/carrying 20 pounds occasionally and 10 pounds  
23 frequently), limited to no more than frequent stooping, kneeling,  
24 crouching and balancing, occasional crawling, no climbing of ladders,  
25 ropes or scaffolds, occasional reaching overhead with her right upper  
26 extremity, and occasional handling, feeling and fingering (A.R. 19-23  
27 (rejecting Plaintiff's allegations of greater limitations)). The ALJ  
28 deemed Plaintiff capable of performing work as an usher and counter

1 clerk and, on that basis, denied disability benefits (A.R. 24-25  
2 (adopting vocational expert testimony at A.R. 110-11)).<sup>1</sup> The Appeals  
3 Council denied review (A.R. 1-3).

4  
5 **STANDARD OF REVIEW**  
6

7 Under 42 U.S.C. section 405(g), this Court reviews the  
8 Administration's decision to determine if: (1) the Administration's  
9 findings are supported by substantial evidence; and (2) the  
10 Administration used correct legal standards. See Carmickle v.  
11 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,  
12 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,  
13 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such  
14 relevant evidence as a reasonable mind might accept as adequate to  
15 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401  
16 (1971) (citation and quotations omitted); see also Widmark v.  
17 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

18  
19 If the evidence can support either outcome, the court may  
20 not substitute its judgment for that of the ALJ. But the  
21 Commissioner's decision cannot be affirmed simply by  
22 isolating a specific quantum of supporting evidence.  
23 Rather, a court must consider the record as a whole,  
24 weighing both evidence that supports and evidence that

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26  
27 <sup>1</sup> The vocational expert testified that, if a person were  
28 further limited to lifting and carrying 10 pounds occasionally  
and five pounds frequently, there would be no work that person  
could perform (A.R. 112).

1 detracts from the [administrative] conclusion.

2  
3 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and  
4 quotations omitted).

5  
6 **DISCUSSION**

7  
8 After consideration of the record as a whole, the Court reverses  
9 the Administration's decision in part and remands the matter for  
10 further administrative proceedings. As discussed below, the  
11 Administration materially erred in evaluating the evidence of record.

12  
13 I. **Summary of the Medical Record and Plaintiff's Subjective**  
14 **Complaints.**

15  
16 Treatment records reflect consistent complaints of pain despite  
17 escalating treatment. Plaintiff's treatment began with chiropractic  
18 care, physical therapy and acupuncture coupled with anti-inflammatory  
19 medications. Eventually, her treatment progressed to narcotic pain  
20 medications, steroid injections, and surgeries.

21  
22 Plaintiff had a right shoulder injection in September of 2014,  
23 after chiropractic treatment had failed to improve her pain (A.R. 466-  
24 67, 479-80, 487-88, 491-97). A MRI showed two right shoulder tears  
25 with mild acromioclavicular joint degenerative changes (A.R. 468-69).  
26 By mid-October, Plaintiff reported having a painful frozen shoulder  
27 that had improved by only a few degrees over the previous month and a  
28 half with chiropractic treatment (A.R. 503). The next week she

1 reported that her pain had decreased but she was not "a hundred  
2 percent" (A.R. 505). On October 27, 2014, Plaintiff reported that  
3 physical therapy and chiropractic treatment had improved her neck pain  
4 but she still had shoulder pain (A.R. 506). Over the next two months  
5 of chiropractic treatment, Plaintiff reported continued pain and  
6 reduced range of motion in her shoulder and neck, moving into her mid  
7 back (A.R. 507-22).

8  
9 On January 7, 2015 (the alleged onset date), Plaintiff presented  
10 to Memorial Care Medical Group, reporting that she had been rear ended  
11 that morning on the freeway, which had caused her neck to snap with  
12 ensuing tightness, right side tingling and bilateral side pain (A.R.  
13 399, 537-42). After the accident, Plaintiff had gone to her  
14 chiropractor for electric stimulation (A.R. 400; see also A.R. 524,  
15 544-51 (chiropractic treatment note and "Doctors [sic] Excuse" form  
16 stating that Plaintiff was restricted from work until January 9,  
17 2015)). On examination at the Memorial Care Medical Group, Plaintiff  
18 reportedly had right shoulder impingement syndrome, cervical  
19 radiculopathy and diabetes mellitus since at least October of 2014  
20 (A.R. 400). Plaintiff was diagnosed with back pain/strain, prescribed  
21 800 mg ibuprofen and referred for physical therapy (A.R. 401-04).<sup>2</sup>

22  
23 In April of 2015, Plaintiff was diagnosed with cervical and  
24 lumbar radiculopathy, right shoulder impingement and adhesive  
25

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26  
27 <sup>2</sup> Plaintiff also followed up for regular chiropractic  
28 treatment through at least July of 2015, reporting fluctuating  
pain and decline in certain activities (e.g., driving, computer  
work, cooking and gardening) (A.R. 552-648).

1 capsulitis based on cervical and lumbar spine MRI studies (A.R. 658;  
2 see A.R. 649-51 (April, 2015 cervical spine MRI showing C6-C7 central  
3 to right foraminal disc extrusion without canal stenosis, with  
4 uncovertebral spurring contributing to mild to moderate right and mild  
5 left neural foraminal stenosis, and mild disc disease at C5-C6 without  
6 stenosis), A.R. 652-53 (April, 2015 lumbar spine MRI showing mild disc  
7 disease at L5-S1 with slight effacement of the L5 nerve root).

8  
9 In June of 2015, Plaintiff reportedly presented with, inter alia,  
10 acute cervical and thoracic sprain, rotator cuff tear with arthropathy  
11 of the right shoulder, labral tear of the right shoulder and  
12 uncontrolled type 2 diabetes (A.R. 426). She was prescribed Soma, 800  
13 mg ibuprofen, and referred for a diabetes management appointment (A.R.  
14 429-30).

15  
16 In October of 2015, orthopedic surgeon Dr. Sam Bakshian evaluated  
17 Plaintiff's severe cervical spine pain radiating into her right  
18 shoulder and arm, as confirmed by a cervical EMG/nerve conduction  
19 study (A.R. 857-58). Dr. Bakshian recommended surgery (id.).  
20 Plaintiff underwent a cervical spine discectomy and fusion at C6-C7  
21 with hardware placement on December 1, 2015 (A.R. 678-704). As  
22 Plaintiff recovered from her surgery, she noted an increase in her  
23 right shoulder pain (A.R. 708).

24  
25 Orthopedic surgeon Dr. Howard J. Marans evaluated Plaintiff's  
26 right shoulder on March 2, 2016, and prepared a Comprehensive  
27 Orthopedic Consultation report (A.R. 707-10). Plaintiff complained of  
28 constant, moderate to severe pain in her right shoulder radiating down

1 to the elbow and right thumb with numbness and tingling, increased by  
2 reaching, pushing, pulling, driving and most movements, with popping,  
3 grinding and cracking in her right shoulder, not relieved by heat, ice  
4 or medication (A.R. 707). On examination, she had a range of motion  
5 at 60 percent of the normal range with pain, positive impingement  
6 signs and marked tenderness (A.R. 709). An MRI revealed bursal-sided  
7 rotator cuff tearing, which was worse than before Plaintiff's car  
8 accident (A.R. 709). Dr. Marans recommended right shoulder  
9 arthroscopy and subacromial decompression with rotator cuff repair and  
10 debridement, given that Plaintiff had not had long-term benefit from  
11 anti-inflammatory medications, physical therapy or multiple  
12 corticosteroid injections (A.R. 709). Plaintiff underwent the  
13 recommended surgery (see A.R. 719-21 (surgery notes)) and followed up  
14 on April 6, 2016, one week after her surgery, when she was approved to  
15 start physical therapy (A.R. 711-12). On April 20, 2016, Plaintiff  
16 reported that she was doing well and her preoperative pain was gone  
17 (A.R. 713-14). On May 13, 2016, however, Plaintiff reported that her  
18 preoperative pain was improved, but she was having very significant  
19 postoperative discomfort (A.R. 717).

20  
21 A state agency physician reviewed the record in July of 2016, and  
22 deemed Plaintiff capable of light work limited to no more than  
23 frequent postural activities, except for occasional crawling, no  
24 climbing ladders/ropes/scaffolds, and occasional right side overhead  
25 reaching (A.R. 116-26). On reconsideration in October of 2016,  
26 another state agency physician opined that Plaintiff would also be  
27 limited to no more than frequent fingering/handling with the right  
28 upper extremity (A.R. 140-50).

1           Meanwhile, Dr. Bakshian evaluated Plaintiff on October 5, 2016,  
2 for bilateral hand numbness and tingling, as well as neck, arm and  
3 right hip pain (A.R. 852-53). A July, 2016 electrodiagnostic study of  
4 Plaintiff's upper extremities was abnormal, showing evidence of  
5 moderate bilateral carpal tunnel syndrome (A.R. 845-47). Dr. Bakshian  
6 diagnosed status post anterior cervical discectomy and fusion at C5-C6  
7 with right upper extremity radiation (improved), status post right  
8 shoulder arthroscopy, lumbosacral sprain/strain with presumed  
9 discopathy at L5-S1, acute onset of neck and upper back pain with  
10 radiation, numbness, tingling and weakness in both upper extremities,  
11 right-sided sacroiliitis versus lumbosacral sprain/strain, and  
12 bilateral carpal tunnel syndrome for which Dr. Bakshian recommended  
13 bilateral carpal tunnel releases (A.R. 853).<sup>3</sup>

14  
15           Plaintiff also received monthly pain management from July of 2015  
16 through at least June of 2017 for reported neck pain with numbness  
17 radiating to the right upper extremity, low back pain radiating to the  
18 right lower extremity, right shoulder and hand pain, bilateral arm  
19 pain, and related insomnia (A.R. 760-838, 866-909). Plaintiff was  
20 prescribed Flexeril, Norco, Gabapentin, at least one Toradol injection  
21 and a cervical spine epidural steroid injection (*id.*). Plaintiff also  
22 underwent a cervical steroid injection on August 11, 2015, with  
23 minimal improvement, she had some benefit from acupuncture and  
24 physical therapy, but she had continuing postoperative pain with

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25  
26           <sup>3</sup> The state agency physicians who reviewed the record did  
27 not have the benefit of Dr. Bakshian's October, 2016 evaluation  
28 or the July, 2016 abnormal electrodiagnostic studies showing  
carpal tunnel syndrome. See A.R. 142-45.



1 numbness in the arms (A.R. 761). Plaintiff reported limited  
2 activities of daily living throughout this period of time. See, e.g.,  
3 A.R. 761, 833, 867, 895.

4  
5 At the administrative hearing on November 8, 2018, Plaintiff  
6 similarly testified to only limited daily activities. She testified  
7 that she lived in an apartment with her boyfriend, three dogs, one  
8 turtle and two fish, and that she helped care for the pets (A.R. 85).  
9 She did not have a car or a current driver's license, but she could  
10 take public transportation (A.R. 87-89). She said she could go  
11 shopping, but her boyfriend handled most of the shopping (A.R. 89).

12  
13 Plaintiff said she spent her days fielding phone calls and  
14 updating calendars for her mother's vacation rental business, which  
15 she said took only five minutes per booking and involved no more than  
16 four bookings a day (A.R. 98-99, 101). Plaintiff said that, if she is  
17 able to sleep, she sleeps, and it takes her a while to get moving in  
18 the morning (A.R. 104). Plaintiff said she eats breakfast, checks on  
19 her mother, goes to doctor appointments, checks email on her phone,  
20 has dinner (if she makes a meal she just opens prepared foods), and  
21 she watches her dogs have their dinner before going to bed (A.R. 105-  
22 07). Plaintiff said she often falls asleep during the day because she  
23 is tired due to lack of sleep at night from the pain (A.R. 103).

24 Plaintiff said she does not lie down during the day and sleeps sitting

25 ///

26 ///

27 ///

28 ///

1 up to manage her neck pain (A.R. 98).<sup>4</sup>

2  
3 Plaintiff testified that she previously had worked as an interior  
4 designer, traveling notary, loan foreclosure processor and accounts  
5 receivable clerk (A.R. 90-93). Plaintiff said she stopped working  
6 because her work required her to carry things and her hands and back  
7 prevent her from picking up things like a hammer, and because her neck  
8 hurts if she looks up for too long (A.R. 93-95). As noted above,  
9 Plaintiff explained that she could lift no more than five pounds and  
10 could sit for five or ten minutes before having to change positions  
11 due to pain (A.R. 95, 97). Plaintiff said she was supposed to have  
12 bilateral carpal tunnel surgery, but that particular surgery had not  
13 yet happened (A.R. 94). She said she still had pain in her neck post  
14 spinal surgery, which makes holding her neck up (or down)  
15 uncomfortable (A.R. 97-98).

16  
17 Plaintiff said she no longer uses a computer because typing hurts  
18 her hands, so she uses her phone with a stylus (A.R. 100). Plaintiff  
19 said she could no longer work as a notary due to her hand and neck  
20 problems (A.R. 100). Plaintiff said she "would try" to do a job where  
21 she would not have to use her hands frequently and could sit and stand  
22 whenever she wanted (A.R. 100). Plaintiff also said she "would try" a

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23  
24 <sup>4</sup> In an undated Disability Report - Appeal form,  
25 Plaintiff reported that severe hand pain impairs her daily  
26 activities (e.g., she could not hold and use a hairbrush, she  
27 cannot open envelopes, it takes her a long time to complete  
28 simple tasks), severe hip pain limits her ability to stand, sit,  
walk or lie down for extended periods of time, sleeplessness  
interferes with her ability to think or focus, and she is unable  
to keep on top of household chores like laundry, cooking or  
managing household finances (A.R. 345).

1 job doing work like the work she does for her mother, notwithstanding  
2 difficulty concentrating and staying awake and notwithstanding pain  
3 from sitting and from lifting a phone to her ear (A.R. 102-03).

4  
5 At the time of the hearing, Plaintiff said she was not taking any  
6 diabetes medications because she could not afford them (her out of  
7 pocket medication costs were \$600 per month), and she was not seeking  
8 out other treatment because her deductible was too high for the health  
9 insurance she had through her father, and she only very recently had  
10 found out she still had Medi-Cal (A.R. 96). Plaintiff had received an  
11 accident settlement in June of 2018, but she said all that money had  
12 gone for medical bills and back rent (A.R. 86).

13  
14 **II. The ALJ Erred in Discounting Plaintiff's Testimony and Statements**  
15 **Regarding the Severity of Plaintiff's Symptoms Without Stating**  
16 **Legally Sufficient Reasons for Doing So.**

17  
18 Where, as here, an ALJ finds that a claimant's medically  
19 determinable impairments reasonably could be expected to cause some  
20 degree of the alleged symptoms of which the claimant subjectively  
21 complains, any discounting of the claimant's complaints must be  
22 supported by "specific, cogent" findings. See Berry v. Astrue, 622  
23 F.3d 1228, 1234 (9th Cir. 2010); Lester v. Chater, 81 F.3d 821, 834  
24 (9th Cir. 1995); but see Smolen v. Chater, 80 F.3d 1273, 1282-84 (9th  
25 Cir. 1996) (indicating that ALJ must state "specific, clear and  
26 convincing" reasons to reject a claimant's testimony where there is no

27 ///

28 ///



1 SSR 16-3p (eff. March 28, 2016).<sup>6</sup>

2  
3 In the present case, the ALJ discounted Plaintiff's testimony  
4 regarding the severity of her symptoms (A.R. 19-22). As reasons, the  
5 ALJ stated: (1) Plaintiff's activities of daily living assertedly  
6 included maintaining her personal care, eating independently, going to  
7 her appointments, "cooking" simple meals such as pre-cut salads,  
8 checking her email on her cell phone, "putting dishes into the  
9 washer,"<sup>7</sup> and caring for her pets; (2) the medical records supposedly  
10 show that Plaintiff received "conservative treat[ment] with  
11 medications" and epidural steroid injections, and that she "only  
12 needed conservative treatment even after her surgery"; and  
13 (3) Plaintiff had not been compliant with her diabetic medications and  
14 had "self-stopped her treatment," assertedly suggesting her symptoms  
15 were not as severe as reported (although the ALJ did not "base the  
16 ultimate decision . . . on this factor alone") (A.R. 19-22).

17  
18 With regard to reason (1), inconsistencies between admitted daily  
19 activities and claimed incapacity properly may impugn the accuracy of  
20

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21 <sup>6</sup> Social Security Rulings ("SSRs") are binding on the  
22 Administration. See Terry v. Sullivan, 903 F.2d 1273, 1275 n.1  
23 (9th Cir. 1990). The appropriate analysis under the superseding  
24 SSR is substantially the same as the analysis under the  
25 superseded SSR. See R.P. v. Colvin, 2016 WL 7042259, at \*9 n.7  
26 (E.D. Cal. Dec. 5, 2016) (stating that SSR 16-3p "implemented a  
27 change in diction rather than substance") (citations omitted);  
28 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").

<sup>7</sup> Actually, Plaintiff testified she did not put dishes  
into the dishwasher (A.R. 107).

1 a claimant's testimony and statements under certain circumstances.  
2 See, e.g., Thune v. Astrue, 499 Fed. App'x 701, 703 (9th Cir. 2012)  
3 (ALJ properly discredited pain allegations as contradicting claimant's  
4 testimony that she gardened, cleaned, cooked, and ran errands);  
5 Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1175 (9th Cir. 2008)  
6 (claimant's "normal activities of daily living, including cooking,  
7 house cleaning, doing laundry, and helping her husband in managing  
8 finances" provided sufficient explanation for discounting claimant's  
9 testimony). Yet, it is difficult to reconcile Ninth Circuit opinions  
10 discussing when a claimant's admitted activities may and may not  
11 justify a discounting of the claimant's testimony and statements.  
12 Compare Stubbs-Danielson v. Astrue with Vertigan v. Halter, 260 F.3d  
13 1044, 1049-50 (9th Cir. 2001) ("the mere fact that a plaintiff has  
14 carried on certain daily activities, such as grocery shopping, driving  
15 a car, or limited walking for exercise, does not in any way detract  
16 from her credibility as to her overall disability"); see also Diedrich  
17 v. Berryhill, 874 F.3d 634, 642-43 (9th Cir. 2017) (daily activities  
18 of cooking, cleaning, vacuuming, washing dishes, shopping and cleaning  
19 a cat's litter box insufficient to discount the claimant's subjective  
20 complaints).

21  
22 In the present case, Plaintiff's limited daily activities do not  
23 necessarily contradict her subjective complaints. Although Plaintiff  
24 reported helping her mother with her mother's rental business, the  
25 help Plaintiff provided was very minimal. None of Plaintiff's  
26 reported activities on which the ALJ expressly relied contradict her  
27 claim that she could lift no more than five pounds. Plaintiff's daily  
28 activities do not undermine her subjective complaints. See Revels v.

1 Berryhill, 874 F.3d 648, 667-68 (9th Cir. 2017).

2  
3 With regard to reason (2), a limited course of treatment  
4 sometimes can justify the rejection of a claimant's testimony, at  
5 least where the testimony concerns physical problems. See, e.g.,  
6 Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) (lack of  
7 consistent treatment, such as where there was a three to four month  
8 gap in treatment, properly considered in discrediting claimant's back  
9 pain testimony); Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999)  
10 (in assessing the credibility of a claimant's pain testimony, the  
11 Administration properly may consider the claimant's failure to request  
12 treatment and failure to follow treatment advice) (citing Bunnell v.  
13 Sullivan, 947 F.2d 341, 346 (9th Cir. 1991) (en banc)); Matthews v.  
14 Shalala, 10 F.3d 678, 679-80 (9th Cir. 1993) (permissible credibility  
15 factors in assessing pain testimony include limited treatment and  
16 minimal use of medications); see also Johnson v. Shalala, 60 F.3d  
17 1428, 1434 (9th Cir. 1995) (absence of treatment for back pain during  
18 half of the alleged disability period, and evidence of only  
19 "conservative treatment" when the claimant finally sought treatment,  
20 sufficient to discount claimant's testimony).

21  
22 In the present case, however, it is doubtful Plaintiff's  
23 treatment with narcotic pain medications, epidural steroid injections,  
24 and two surgeries with a third surgery recommended may properly be  
25 characterized as "conservative" within the meaning of Ninth Circuit  
26 jurisprudence. See, e.g., Shepard v. Colvin, 2015 WL 9490094, at \*7  
27 (E.D. Cal. Dec. 30, 2015) ("[p]rior cases in the Ninth Circuit have  
28 found that treatment was conservative when the claimant's pain was

1 adequately treated with over-the-counter medication and other minimal  
2 treatment," however where record reflected heavy reliance on Tramadol  
3 and Oxycodone and other prescriptions for pain, record did not support  
4 finding that treatment was "conservative") (internal citations  
5 omitted; citing for comparison Lapeirre-Gutt v. Astrue, 382 Fed.  
6 App'x. 662, 664 (9th Cir. 2010) (doubting whether "copious amounts of  
7 narcotic pain medication" as well as nerve blocks and trigger point  
8 injections was "conservative" treatment)); Childress v. Colvin, 2014  
9 WL 4629593, at \*12 (N.D. Cal. Sept. 16, 2014) ("[i]t is not obvious  
10 whether the consistent use of [Norco] (for several years) is  
11 'conservative' or in conflict with Plaintiff's pain testimony");  
12 Aguilar v. Colvin, 2014 WL 3557308, at \*8 (C.D. Cal. July 18, 2014)  
13 ("It would be difficult to fault Plaintiff for overly conservative  
14 treatment when he has been prescribed strong narcotic pain  
15 medications"); Christie v. Astrue, 2011 WL 4368189, at \*4 (C.D. Cal.  
16 Sept. 16, 2011) (refusing to characterize as "conservative" treatment  
17 that included narcotic pain medication and epidural injections).  
18 Indeed, Defendant admits that Plaintiff's "conservative treatment" for  
19 her neck ultimately failed and she had to have surgery. See Joint  
20 Statement, p. 17. As detailed above, Plaintiff regularly sought  
21 treatment throughout much of the alleged disability period, taking  
22 prescription narcotic pain medications and undergoing physical  
23 therapy, chiropractic treatment, acupuncture, pain injections and neck  
24 and shoulder surgeries.

25  
26 With regard to reason (3), noncompliance with prescribed or  
27 recommended treatment sometimes can properly suggest that a claimant's  
28 symptoms have not been as severe as the claimant has asserted. See



1 Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989) (unexplained or  
2 inadequately explained failure to follow prescribed course of  
3 treatment can cast doubt on claimant's credibility ); see also Molina  
4 v. Astrue, 674 F.3d 1104, 1113 (9th Cir. 2012) ("We have long held  
5 that, in assessing a claimant's credibility the ALJ may properly rely  
6 on unexplained or inadequately explained failure. . . to follow a  
7 prescribed course of treatment") (citations and quotations omitted);  
8 SSR 16-3p ("if the individual fails to follow prescribed treatment  
9 that might improve symptoms, we may find that the alleged intensity  
10 and persistence of an individual's symptoms are inconsistent with the  
11 overall evidence of record"); Rouse v. Berryhill, 2017 WL 4404402, at  
12 \*16 (D.S.C. July 6, 2017), rejected on other grounds, 2017 WL 4348560  
13 (D.S.C. Sept. 29, 2017) (court upheld ALJ's discounting of the  
14 plaintiff's testimony concerning back pain, stating, inter alia,  
15 "while pain medication was prescribed, the plaintiff declined refills,  
16 indicating her pain may not have been as severe as alleged").

17  
18 In the present case, however, Plaintiff explained that she had  
19 not been compliant with her diabetic medications and had stopped  
20 treatment because she could not afford to pay for either (A.R. 96).  
21 Plaintiff also said she had been under the mistaken impression that  
22 her accident settlement had rendered her ineligible for Medi-Cal (A.R.  
23 96). In the ALJ's decision, the ALJ did not acknowledge Plaintiff's  
24 stated reasons for recently having stopped her treatment (A.R. 19-22).

25  
26 It is sometimes improper for an ALJ to fault a claimant for  
27 noncompliance with recommended treatment if the claimant cannot pay  
28 for treatment. See Regennitter v. Commissioner, 166 F.3d 1294, 1297

1 (9th Cir. 1999) (“we have proscribed the rejection of a claimant’s  
2 complaints for lack of treatment when the record establishes that the  
3 claimant could not afford it”) (citations and footnote omitted). On  
4 the present record, in light of Plaintiff’s explanations for her  
5 noncompliance with treatment, such noncompliance may not properly  
6 undermine Plaintiff’s credibility. If the ALJ had wished to discount  
7 Plaintiff’s credibility on this basis, the ALJ should have addressed  
8 Plaintiff’s explanations. See Marquez v. Astrue, 2010 WL 1709204, at  
9 \*2 (C.D. Cal. Apr. 27, 2010) (ALJ erred by relying on lack of  
10 treatment without expressly addressing claimant’s explanations);  
11 Ostalaza v. Astrue, 2009 WL 3170089, at \*7 (C.D. Cal. Sept. 30, 2009)  
12 (same).

13  
14 Defendant cites to a patient instruction page from a diabetes  
15 management visit in July of 2016 – when Plaintiff was prescribed  
16 glucose, Metformin, Glipizide and referred to endocrinology with a  
17 note that she also needed insulin – stating, “Walmart medications for  
18 diabetes cash price: \$4, 30-day Supply.” See Joint Stipulation, p. 18  
19 (citing A.R. 441, 445). Defendant suggests that such evidence  
20 demonstrates that doctors had provided Plaintiff with inexpensive ways  
21 of treating her diabetes, but Plaintiff chose not to pursue them  
22 (id.). Contrary to Defendant’s suggestion, the patient instruction  
23 does not conclusively establish that Plaintiff rejected a less  
24 expensive way to treat her diabetes. The instruction does not specify  
25 what the “medications” are that may be filled for \$4 per month, or  
26 indicate whether that price encompassed all of Plaintiff’s necessary  
27 diabetic medications (A.R. 441, 445). In any event, the ALJ did not  
28 cite this evidence as part of the ALJ’s stated reasoning. The Court

1 cannot affirm the ALJ's decision on a ground that the ALJ did not  
2 state in the decision. See Pinto v. Massanari, 249 F.3d 840, 847 (9th  
3 Cir. 2001) (court "cannot affirm the decision of an agency on a ground  
4 that the agency did not invoke in making its decision"); Gonzalez v.  
5 Sullivan, 914 F.2d 1197, 1201 (9th Cir. 1990) ("We are wary of  
6 speculating about the basis of the ALJ's conclusion. . . ."); see also  
7 Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003) (Ninth Circuit  
8 reversed the district court's decision where the district court had  
9 affirmed on the basis of reasons supported by the record but unstated  
10 by the ALJ).

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. "[A]n ALJ's error is harmless where it is  
15 inconsequential to the ultimate non-disability determination." Molina  
16 v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012) (citations and  
17 quotations omitted). Here, the vocational expert testified that,  
18 if a person were further limited to lifting and carrying 10 pounds  
19 occasionally and five pounds frequently, there would be no work that  
20 person could perform (A.R. 112).

21  
22 **III. Remand for Further Administrative Proceedings is Appropriate.**

23  
24 Remand is appropriate because the circumstances of this case  
25 suggest that further development of the record and further  
26 administrative review could remedy the ALJ's errors. See McLeod v.  
27 Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see also INS v. Ventura,  
28 537 U.S. 12, 16 (2002) (upon reversal of an administrative

1 determination, the proper course is remand for additional agency  
2 investigation or explanation, except in rare circumstances); Leon v.  
3 Berryhill, 880 F.3d 1041, 1044 (9th Cir. 2017) (reversal with a  
4 directive for the immediate calculation of benefits is a "rare and  
5 prophylactic exception to the well-established ordinary remand rule");  
6 Dominquez v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) ("Unless the  
7 district court concludes that further administrative proceedings would  
8 serve no useful purpose, it may not remand with a direction to provide  
9 benefits"); Treichler v. Commissioner, 775 F.3d 1090, 1101 n.5 (9th  
10 Cir. 2014) (remand for further administrative proceedings is the  
11 proper remedy "in all but the rarest cases"); Harman v. Apfel, 211  
12 F.3d 1172, 1180-81 (9th Cir.), cert. denied, 531 U.S. 1038 (2000)  
13 (remand for further proceedings rather than for the immediate payment  
14 of benefits is appropriate where there are "sufficient unanswered  
15 questions in the record"); Connett v. Barnhart, 340 F.3d 871, 876 (9th  
16 Cir. 2003) ("Connett") (remand is an option where the ALJ fails to  
17 state sufficient reasons for rejecting a claimant's excess symptom  
18 testimony); but see Orn v. Astrue, 495 F.3d 625, 640 (9th Cir. 2007)  
19 (citing Connett for the proposition that "[w]hen an ALJ's reasons for  
20 rejecting the claimant's testimony are legally insufficient and it is  
21 clear from the record that the ALJ would be required to determine the  
22 claimant disabled if he had credited the claimant's testimony, we  
23 remand for a calculation of benefits") (quotations omitted); see also  
24 Brown-Hunter v. Colvin, 806 F.3d 487, 495-96 (9th Cir. 2015)  
25 (discussing the narrow circumstances in which a court will order a  
26 benefits calculation rather than further proceedings); Ghanim v.  
27 Colvin, 763 F.3d 1154, 1166 (9th Cir. 2014) (remanding for further  
28 proceedings where the ALJ failed to state sufficient reasons for

