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

DORIS MORRIS,

Plaintiff,

v.

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,

Defendant.

No. ED CV 09-1255-PLA

MEMORANDUM OPINION AND ORDER

I.

PROCEEDINGS

Plaintiff filed this action on July 9, 2009, seeking review of the Commissioner’s denial of her application for Supplemental Security Income payments. The parties filed Consents to proceed before the undersigned Magistrate Judge on August 20, 2009, and August 21, 2009. The parties filed a Joint Stipulation on January 4, 2010, that addresses their positions concerning the disputed issues in the case. The Court has taken the Joint Stipulation under submission without oral argument.

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II.

BACKGROUND

Plaintiff was born on May 23, 1955. [Administrative Record (“AR”) at 84.] She completed the eleventh grade [AR at 65], and has past relevant work experience as a brick stacker. [AR at 66-68.]

On April 28, 2006, plaintiff applied for Supplemental Security Income payments, claiming an inability to work since March 1, 1998,¹ due to, among other things, chronic back pain. [AR at 10, 12-14, 101-06, 122.] After her application was denied initially and upon reconsideration, plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). [AR at 10, 86-96.] Hearings were held on September 10, 2008, and November 18, 2008, at which plaintiff appeared with counsel and testified on her own behalf. [AR at 50-81.] A vocational expert also testified. [AR at 68, 79-80.] On December 23, 2008, the ALJ determined that plaintiff was not disabled. [AR at 10-16.] When the Appeals Counsel denied plaintiff’s request for review of the hearing decision on May 14, 2009, the ALJ’s decision became the final decision of the Commissioner. [AR at 1-3.] This action followed.

III.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence or if it is based upon the application of improper legal standards. Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

In this context, the term “substantial evidence” means “more than a mere scintilla but less than a preponderance -- it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion.” Moncada, 60 F.3d at 523; see also Drouin, 966 F.2d at 1257.

¹ Plaintiff later amended the onset date to April 28, 2006, the date she filed her application for Supplemental Security Income payments. [AR at 10.]

1 When determining whether substantial evidence exists to support the Commissioner’s decision, the
2 Court examines the administrative record as a whole, considering adverse as well as supporting
3 evidence. Drouin, 966 F.2d at 1257; Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989).
4 Where the evidence is susceptible to more than one rational interpretation, the Court must defer
5 to the decision of the Commissioner. Moncada, 60 F.3d at 523; Andrews v. Shalala, 53 F.3d 1035,
6 1039-40 (9th Cir. 1995); Drouin, 966 F.2d at 1258.

8 IV.

9 THE EVALUATION OF DISABILITY

10 Persons are “disabled” for purposes of receiving Social Security benefits if they are unable
11 to engage in any substantial gainful activity owing to a physical or mental impairment that is
12 expected to result in death or which has lasted or is expected to last for a continuous period of at
13 least twelve months. 42 U.S.C. § 1382c(a)(3)(A); Drouin, 966 F.2d at 1257.

15 A. THE FIVE-STEP EVALUATION PROCESS

16 The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing
17 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lester v. Chater, 81 F.3d 821,
18 828 n.5 (9th Cir. 1995, as amended April 9, 1996). In the first step, the Commissioner must
19 determine whether the claimant is currently engaged in substantial gainful activity; if so, the
20 claimant is not disabled and the claim is denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If the
21 claimant is not currently engaged in substantial gainful activity, the second step requires the
22 Commissioner to determine whether the claimant has a “severe” impairment or combination of
23 impairments significantly limiting her ability to do basic work activities; if not, a finding of
24 nondisability is made and the claim is denied. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
25 claimant has a “severe” impairment or combination of impairments, the third step requires the
26 Commissioner to determine whether the impairment or combination of impairments meets or equals
27 an impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R., Part 404, Subpart P,
28 Appendix 1; if so, disability is conclusively presumed and benefits are awarded. 20 C.F.R. §§

1 404.1520(d), 416.920(d). If the claimant’s impairment or combination of impairments does not
2 meet or equal an impairment in the Listing, the fourth step requires the Commissioner to determine
3 whether the claimant has sufficient “residual functional capacity” (“RFC”)² to perform her past work;
4 if so, the claimant is not disabled and the claim is denied. 20 C.F.R. §§ 404.1520(e)-(f),
5 416.920(e)-(f). The claimant has the burden of proving that she is unable to perform past relevant
6 work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a prima facie case of disability
7 is established. The Commissioner then bears the burden of establishing that the claimant is not
8 disabled, because she can perform other substantial gainful work available in the national
9 economy. The determination of this issue comprises the fifth and final step in the sequential
10 analysis. 20 C.F.R. §§ 404.1520(g), 416.920(g); Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at
11 1257.

13 **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

14 In this case, at step one, the ALJ found that plaintiff has not engaged in any substantial
15 gainful activity since April 28, 2006, the alleged onset date of the disability. [AR at 12.] At step two,
16 the ALJ concluded that plaintiff has the “severe” impairments of lumbosacral strain and
17 degenerative disc disease. [AR at 12.] At step three, the ALJ determined that plaintiff’s
18 impairments do not meet or equal any of the impairments in the Listing. [AR at 12-13.] The ALJ
19 further found that plaintiff retained the residual functional capacity (“RFC”) to perform the full range
20 of medium work.³ [AR at 13-14.] At step four, the ALJ concluded that plaintiff is unable to perform
21 her past relevant work. [AR at 15.] At step five, using the Medical-Vocational Rules as a
22 framework and the vocational expert’s testimony, the ALJ concluded that plaintiff is “capable of
23 making a successful adjustment to other work that exist[s] in significant numbers in the national

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25 ² RFC is what a claimant can still do despite existing exertional and nonexertional limitations.
Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

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27 ³ Medium work is defined as work involving “lifting no more than 50 pounds at a time with
28 frequent lifting or carrying of objects weighing up to 25 pounds.” 20 C.F.R. §§ 404.1567(c),
416.967(c). If a plaintiff is able to perform medium work, he or she is also deemed able to perform
sedentary and light work. See id.

1 economy.” [AR at 15-16.] Accordingly, the ALJ determined that plaintiff is not disabled. [AR at 16.]

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3 **V.**

4 **THE ALJ’S DECISION**

5 Plaintiff contends that the ALJ failed to properly (1) consider all of the relevant medical
6 evidence of record; and (2) assess plaintiff’s credibility. [Joint Stipulation (“JS”) at 3-4, 7-10.] As
7 set forth below, the Court agrees with plaintiff that the ALJ did not make a proper credibility
8 determination, and remands the matter for further proceedings.

9
10 **PLAINTIFF’S CREDIBILITY**

11 Plaintiff contends that the ALJ failed to properly consider plaintiff’s subjective complaints and
12 failed to make proper credibility findings. [JS at 7-10.] Whenever an ALJ discredits a claimant’s
13 testimony regarding subjective symptoms, including degree of pain and functional limitations, the
14 ALJ must make explicit credibility findings. See Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir.
15 1990); see also Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993) (if the ALJ does not accept a
16 claimant’s testimony, he must make specific findings rejecting it). The ALJ can reject a claimant’s
17 allegations “only upon (1) finding evidence of malingering, or (2) expressing clear and convincing
18 reasons for doing so.” Benton v. Barnhart, 331 F.3d 1030, 1040 (9th Cir. 2003); see Lester, 81
19 F.3d at 834 (the ALJ must provide clear and convincing reasons for discrediting a claimant’s
20 testimony as to severity of symptoms when there is medical evidence of an underlying impairment).
21 The factors to be considered in weighing a claimant’s credibility include: (1) the claimant’s
22 reputation for truthfulness; (2) inconsistencies either in the claimant’s testimony or between the
23 claimant’s testimony and her conduct; (3) the claimant’s daily activities; (4) the claimant’s work
24 record; and (5) testimony from physicians and third parties concerning the nature, severity, and
25 effect of the symptoms of which the claimant complains. See Thomas v. Barnhart, 278 F.3d 947,
26 958-59 (9th Cir. 2002); see also 20 C.F.R. §§ 404.1529(c), 416.929(c). “It is not sufficient for the
27 ALJ to make only general findings.” Dodrill, 12 F.3d at 918. Absent evidence showing that a
28 plaintiff is malingering, the ALJ “must state specifically which symptom testimony is not credible and

1 what facts in the record lead to that conclusion.” Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir.
2 1996) (citing Dodrill, 12 F.3d at 918). If properly supported, the ALJ’s credibility determination is
3 entitled to “great deference.” See Green v. Heckler, 803 F.2d 528, 532 (9th Cir. 1986).

4 Here, because the ALJ made no finding that the plaintiff was malingering, the ALJ was
5 required to justify his credibility determination with clear and convincing reasons. See Benton, 331
6 F.3d at 1040. Despite finding that plaintiff’s medical impairments “could reasonably be expected
7 to cause the alleged symptoms,” the ALJ found plaintiff’s “statements concerning the intensity,
8 persistence and limiting effects” of her symptoms to be not entirely credible. [AR at 14.] The ALJ
9 discredited plaintiff’s subjective symptoms because he found that (1) her testimony was “not
10 supported [by] and [was] inconsistent with objective findings”; (2) “her complaints were inconsistent
11 with signs and findings”; and 3) she received “conservative and non-aggressive” treatment. [AR
12 at 15.] As discussed below, the Court has considered the ALJ’s reasons for discrediting plaintiff’s
13 subjective symptoms, and finds that they are neither clear nor convincing.

14 An ALJ cannot rely solely on an absence of supporting objective medical findings to reject
15 a plaintiff’s credibility. See Bunnell v. Sullivan, 947 F.2d 341, 345-47 (9th Cir. 1991) (an
16 “adjudicator may not discredit a claimant’s testimony of pain and deny disability benefits *solely*
17 because the degree of pain alleged by the claimant is not supported by objective medical
18 evidence.”) (emphasis added). A claimant need not produce evidence of pain other than her own
19 subjective testimony. Smolen, 80 F.3d at 1282 (“The claimant need not produce objective medical
20 evidence of the pain or fatigue itself, or the severity thereof.”). Nor must a claimant present
21 objective medical evidence of a causal relationship between the impairment and the type of
22 symptom. See id. at 1282; see also Johnson v. Shalala, 60 F.3d 1428, 1433 (9th Cir. 1995)
23 (“[O]nce an impairment is medically established, the ALJ cannot require medical support to prove
24 the severity of the pain.”). Rather, the claimant need only “produce objective medical evidence of
25 an underlying impairment which could reasonably be expected to produce the pain or other
26 symptoms alleged.” Bunnell, 947 F.2d at 344 (internal quotations omitted). This approach reflects
27 the Ninth Circuit’s recognition of the “highly subjective and idiosyncratic nature of pain and other
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1 such symptoms,” such that “[t]he amount of pain caused by a given physical impairment can vary
2 greatly from individual to individual.” Smolen, 80 F.3d at 1282 (internal quotations omitted).

3 The record documents plaintiff’s consistent complaints of back pain radiating down both
4 legs, limiting her ability to sit or stand for long periods of time. [See, e.g., AR at 71-76, 129-31,
5 152-54, 325-26.] The objective medical evidence demonstrates impairments in plaintiff’s spine and
6 left knee as well as decreased bone density. [See, e.g., AR at 165, 166, 190, 226, 230, 268, 275.]
7 Because plaintiff produced medical evidence of underlying impairments that the ALJ determined
8 could reasonably be expected to cause her alleged symptoms, objective medical findings are not
9 required to support their alleged severity. Bunnell, 947 F.2d at 344-45. Thus, a lack of
10 corroborating objective evidence was an insufficient reason, on its own, for the ALJ to find plaintiff
11 incredible. As discussed below, no other valid reasons were properly supported by the ALJ.

12 The ALJ’s assertion that plaintiff’s testimony and complaints were “inconsistent” with signs
13 and findings is inadequate to undermine plaintiff’s credibility. Although “[c]ontradiction with the
14 medical record is a sufficient basis for rejecting the claimant’s subjective testimony,” Carmickle v.
15 Commissioner of Social Security Administration, 533 F.3d 1155, 1161 (9th Cir. 2008) (citing
16 Johnson, 60 F.3d at 1434), here the ALJ did not explain how any of plaintiff’s specific testimony or
17 complaints was supposedly “inconsistent” with any objective evidence. [See AR at 13-15.] The
18 ALJ merely summarized the medical evidence and drew a conclusion as to plaintiff’s credibility
19 without providing any analysis. Moreover, the evidence that the ALJ summarized is not necessarily
20 inconsistent with plaintiff’s subjective testimony. For example, clinicians’ observations of plaintiff’s
21 ability to walk with a normal gait, sit comfortably for an examination of unspecified duration, get on
22 and off an examination table without difficulty, and tolerate palpation of her lumbar spine, do not
23 necessarily conflict with her testimony that she is able to sit or walk only for 45 minutes to one hour
24 at a time and needs to change her position frequently due to pain.⁴ [See id.] Because the ALJ did

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26 ⁴ Other clinical reports conflicted with some of these observations cited by the ALJ. For
27 example, at a physical therapy evaluation in March 2007, plaintiff’s spine was tender to palpation
28 and she exhibited an antalgic gait. [AR at 325-26.] The ALJ may not selectively review the
treating records to justify his decision. See Gallant v. Heckler, 753 F.2d 1450, 1455-56 (9th Cir.
1984) (An ALJ “cannot reach a conclusion first, and then attempt to justify it by ignoring competent

1 not provide clear and convincing reasons for characterizing plaintiff's testimony as inconsistent with
2 the medical evidence, the ALJ's adverse credibility finding cannot be sustained on this basis.

3 The only other reason provided by the ALJ for finding plaintiff incredible is his finding that
4 "her treatment has been conservative and non-aggressive." [AR at 15.] An ALJ may rely on a
5 claimant's conservative treatment regimen to reject a claimant's testimony of disabling limitations
6 or disabling pain. See Fair v. Bowen, 885 F.2d 597, 604 (9th Cir. 1989) (an ALJ may rely on a
7 claimant's conservative treatment regimen to reject a claimant's testimony of disabling limitations
8 or disabling pain); see also Johnson, 60 F.3d at 1434 (that the claimant received only conservative
9 treatment for back injury is a clear and convincing reason for disregarding testimony that the
10 claimant is disabled). Here, however, the ALJ did not provide any reasons for his characterization
11 of plaintiff's treatment regimen as "conservative and non-aggressive." Because of her back pain,
12 plaintiff has attended numerous doctors' appointments, been prescribed multiple medications,
13 undergone several diagnostic procedures, received epidural injections, and visited the emergency
14 room. [See, e.g., AR at 13, 71-72, 165, 166, 176, 180, 182, 183, 213, 224, 226, 229, 230, 244,
15 268, 275, 323-26, 366, 386-88.] In addition, plaintiff twice attempted, but could not fully tolerate,
16 a diagnostic diskography procedure. [AR 226, 244, 250, 280, 323.] Plaintiff also attempted
17 physical therapy, but she was hypersensitive to palpation and could not sufficiently tolerate the
18 testing to enable the therapist to make an accurate assessment. [AR at 325-26.] The ALJ did not
19 mention any more aggressive treatment options that were suggested or prescribed to plaintiff that
20 she refused. Accordingly, the ALJ's bald assertion that plaintiff's treatment was "conservative and
21 non-aggressive" does not constitute a clear and convincing reason sufficient to support an adverse
22 credibility finding.

23 "While an ALJ may certainly find testimony not credible and disregard it . . . , [courts] cannot
24 affirm such a determination unless it is supported by specific findings and reasoning." Robbins v.
25 Social Security Administration, 466 F.3d 880, 884-85 (9th Cir. 2006). The ALJ erred by failing to

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28 evidence in the record that suggests an opposite result.").

1 provide clear and convincing reasons for discounting plaintiff's subjective testimony. Remand is
2 warranted on this issue.⁵

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4 **VI.**

5 **REMAND FOR FURTHER PROCEEDINGS**

6 As a general rule, remand is warranted where additional administrative proceedings could
7 remedy defects in the Commissioner's decision. See Harman v. Apfel, 211 F.3d 1172, 1179 (9th
8 Cir. 2000), cert. denied, 531 U.S. 1038 (2000); Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984).
9 In this case, remand is appropriate in order to properly consider plaintiff's credibility. The ALJ is
10 instructed to take whatever further action is deemed appropriate and consistent with this decision.
11 Accordingly, **IT IS HEREBY ORDERED** that: (1) plaintiff's request for remand is **granted**; (2) the
12 decision of the Commissioner is **reversed**; and (3) this action is **remanded** to defendant for further
13 proceedings consistent with this Memorandum Opinion.

14 **This Memorandum Opinion and Order is not intended for publication, nor is it**
15 **intended to be included in or submitted to any online service such as Westlaw or Lexis.**

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18 DATED: April 26, 2010

19 _____
20 PAUL L. ABRAMS
21 UNITED STATES MAGISTRATE JUDGE

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28 ⁵ In light of the Court's remand order, the Court does not address plaintiff's remaining
contention of error.