

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

KEIKI CONWAY,	)	Case No. EDCV 10-00411-MLG
	)	
Plaintiff,	)	MEMORANDUM OPINION AND ORDER
	)	
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the	)	
Social Security	)	
Administration,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Keiki Conway seeks judicial review of the Commissioner's final decision denying her application for Social Security Disability Insurance benefits ("DIB"). For the reasons set forth below, the decision of the Social Security Commissioner is reversed, and the matter is remanded for further proceedings consistent with this opinion.

**I. Background**

Plaintiff was born on September 1, 1958. (Administrative Record ("AR") 104.) She graduated from high school and completed one year of college. (AR 131.) Plaintiff has worked as a bus driver, postal clerk and sales representative (AR 127.)

1 Plaintiff filed an application for disability benefits on February  
2 12, 2008, alleging that she had been disabled since November 15, 2007  
3 due to discogenic and degenerative back impairments. (AR 43, 104-108.)  
4 Plaintiff's application was denied initially on June 18, 2008, and upon  
5 reconsideration on July 14, 2008. (AR 44-48, 50-54.) An administrative  
6 hearing was held on October 19, 2009, before Administrative Law Judge  
7 ("ALJ") F. Keith Varni. Plaintiff, represented by counsel, testified at  
8 the hearing, as did vocational expert David Rhinehart. (AR 23-39.)

9 On November 24, 2009, ALJ Varni denied Plaintiff's application for  
10 benefits. (AR 9-16.) The ALJ found that Plaintiff had not engaged in  
11 substantial gainful activity during the period at issue, except for a  
12 period from January 1, 2008 through February 29, 2008. (AR 11.) The ALJ  
13 further found that the medical evidence established that Plaintiff  
14 suffered from the following severe impairments: thoracic spinal  
15 stenosis, status post thoracic laminectomy, right ankle sprain/strain,  
16 status post operative ligamentous repair, and obesity. (Id.) However,  
17 the ALJ concluded that Plaintiff's impairments did not meet, or were not  
18 medically equal to, one of the listed impairments in 20 C.F.R., Part  
19 404, Subpart P, Appendix 1. (Id.) The ALJ next found that Plaintiff  
20 retained the residual functional capacity ("RFC") to:

21 perform light work as defined in 20 C.F.R. 404.1567(b) and  
22 SSR 83-10 except the claimant [can] lift and/or carry 20  
23 pounds occasionally and 10 pounds frequently; she can stand  
24 and/or walk two hours in an 8-hour workday; she can sit 6  
25 hours in an 8-hour workday; she no [sic] push and/or pull  
26 limitations, other than as shown for lifting and/or carrying;  
27 and she is limited to occasional climbing and walking on  
28 uneven ground.

1 (AR 12.) The ALJ determined that Plaintiff was able to perform her past  
2 relevant work as a mobile lounge driver. (AR 15.) The ALJ concluded that  
3 Plaintiff was not disabled within the meaning of the Social Security  
4 Act. See 20 C.F.R. § 416.920(f).

5 On January 22, 2010, the Appeals Council denied review (AR 1-3)  
6 and Plaintiff timely commenced this action for judicial review. On  
7 September 28, 2010, the parties filed a Joint Stipulation ("Joint  
8 Stp.") of disputed facts and issues. Plaintiff contends that the ALJ  
9 erred by: (1) failing to properly develop the record and (2) failing  
10 to give clear and convincing reasons for discounting Plaintiff's  
11 credibility. (Joint Stp. 2.) Plaintiff seeks a reversal of the  
12 Commissioner's denial of her application and payment of benefits or,  
13 in the alternative, remand for a new administrative hearing. (Joint  
14 Stp. 18.) The Commissioner contends that the ALJ's decision should be  
15 affirmed. (Joint Stp. 19.)

16 After reviewing the parties' respective contentions and the record  
17 as a whole, the Court finds that the ALJ failed to make a legally sound  
18 credibility determination. Accordingly, this matter shall be remanded  
19 for further proceedings consistent with this opinion.<sup>1</sup>

## 21 **II. Standard of Review**

22 Under 42 U.S.C. § 405(g), a district court may review the  
23 Commissioner's decision to deny benefits. The Commissioner's or ALJ's  
24 decision must be upheld unless "the ALJ's findings are based on legal  
25

---

26 <sup>1</sup> Plaintiff also contends that the ALJ erred by failing to develop  
27 the record regarding a leg fracture Plaintiff suffered the week before  
28 the administrative hearing. (Joint Stp. 3.) If Plaintiff believes that  
this injury has an impact on her disability status, she may seek to  
amend her DIB application or file a new one.

1 error or are not supported by substantial evidence in the record as a  
2 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Parra*  
3 *v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence  
4 means such evidence as a reasonable person might accept as adequate to  
5 support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971);  
6 *Widmark v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more  
7 than a scintilla, but less than a preponderance. *Robbins v. Soc. Sec.*  
8 *Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). To determine whether  
9 substantial evidence supports a finding, the reviewing court "must  
10 review the administrative record as a whole, weighing both the evidence  
11 that supports and the evidence that detracts from the Commissioner's  
12 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If  
13 the evidence can support either affirming or reversing the ALJ's  
14 conclusion," the reviewing court "may not substitute its judgment for  
15 that of the ALJ." *Robbins*, 466 F.3d at 882.

### 17 **III. Discussion**

18 Plaintiff contends the ALJ erred by failing to provide clear and  
19 convincing reasons for discounting Plaintiff's subjective symptom  
20 testimony. (Joint Stp. at 35.) To determine whether a claimant's  
21 testimony about subjective pain or symptoms is credible, an ALJ must  
22 engage in a two-step analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591  
23 (9th Cir. 2009) (citing *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36  
24 (9th Cir. 2007)). First, the ALJ must determine whether the claimant  
25 has presented objective medical evidence of an underlying impairment  
26 which could reasonably be expected to produce the alleged pain or other  
27 symptoms. *Lingenfelter*, 504 F.3d at 1036. "[O]nce the claimant produces  
28 objective medical evidence of an underlying impairment, an adjudicator

1 may not reject a claimant's subjective complaints based solely on a  
2 lack of objective medical evidence to fully corroborate the alleged  
3 severity of pain." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir.  
4 1991) (en banc). To the extent that an individual's claims of  
5 functional limitations and restrictions due to alleged pain is  
6 reasonably consistent with the objective medical evidence and other  
7 evidence in the case, the claimant's allegations will be credited. SSR  
8 96-7p, 1996 WL 374186 at \*2 (explaining 20 C.F.R. §§ 404.1529(c)(4),  
9 416.929(c)(4)).<sup>2</sup>

10 Unless there is affirmative evidence showing that the claimant is  
11 malingering, the ALJ must provide specific, clear and convincing  
12 reasons for discrediting a claimant's complaints. *Robbins*, 466 F.3d at  
13 883. "General findings are insufficient; rather, the ALJ must identify  
14 what testimony is not credible and what evidence undermines the  
15 claimant's complaints." *Reddick*, 157 F.3d at 722 (quoting *Lester v.*  
16 *Chater*, 81 F.3d 821, 834 (9th Cir. 1996)). The ALJ must consider a  
17 claimant's work record, observations of medical providers and third  
18 parties with knowledge of claimant's limitations, aggravating factors,  
19 functional restrictions caused by symptoms, effects of medication, and  
20 the claimant's daily activities. *Smolen v. Chater*, 80 F.3d 1273, 1283-  
21 84 & n.8 (9th Cir. 1996). The ALJ may also consider an unexplained  
22 failure to seek treatment or follow a prescribed course of treatment  
23 and employ other ordinary techniques of credibility evaluation. *Id.*  
24 (citations omitted).

---

25  
26 <sup>2</sup> "The Secretary issues Social Security Rulings to clarify the  
27 Secretary's regulations and policy .... Although SSRs are not published  
28 in the federal register and do not have the force of law, [the Ninth  
Circuit] nevertheless give[s] deference to the Secretary's  
interpretation of its regulations." *Bunnell*, 947 F.2d at 346 n.3.

1 Plaintiff testified at the administrative hearing that she cannot  
2 sit for more than 15 minutes, cannot stand for more than 30 minutes,  
3 cannot walk farther than her mailbox and cannot lift a gallon of milk  
4 unless leaning on something. (AR 28, 31, 34.) She further testified that  
5 she has been falling frequently and had actually fallen the week before  
6 the October 29, 2009 administrative hearing, sustaining a "spiral  
7 fracture" of her leg. (AR 29.) She also testified that she usually uses  
8 a cane to walk, which was prescribed for her after foot surgery in March  
9 2008. (AR 28.)

10 The ALJ found that Plaintiff's medical impairments could reasonably  
11 be expected to produce the alleged symptoms. (AR 13.) The ALJ was  
12 therefore required to provide specific, clear and convincing reasons for  
13 rejecting Plaintiff's subjective allegations of pain and functional  
14 limitations. Here however, the ALJ did not provide any specific reasons  
15 for rejecting Plaintiff's testimony, but rather merely stated that "the  
16 objective medical evidence does not support the alleged severity of  
17 symptoms or more restrictive functional limitations," without specifying  
18 what medical evidence in the record contradicts Plaintiff's subjective  
19 complaints. (AR 15.) *See Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.  
20 2005) (noting that "lack of medical evidence cannot form the sole basis  
21 for discounting pain testimony").

22 In support of the argument that the ALJ properly addressed  
23 Plaintiff's subjective complaints, the Commissioner points to other  
24 evidence in the record which allegedly discredits Plaintiff's subjective  
25 statements. (Joint Stp. 16-17.) For example, the Commissioner notes that  
26 Plaintiff alleged a disability onset date of November 15, 2007, but  
27 continued to work as a sales representative through February 2008 and  
28 sought employment as late as June 2008. (Joint Stp. 16.) The

1 Commissioner also contends that Plaintiff was not credible because she  
2 accepted unemployment benefits, which implies an ability to work. (Id.)  
3 However, even assuming that these are sufficient reasons for the ALJ to  
4 reject Plaintiff's subjective complaints, the ALJ did not cite this  
5 evidence in support of his credibility determination, as the  
6 Commissioner himself concedes. (Joint Stp. 16-17.) It would be error for  
7 this Court to affirm the ALJ's decision based upon reasons that the ALJ  
8 did not discuss. *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003).

#### 9 10 **IV. Conclusion**

11 The decision whether to remand for further proceedings is within  
12 this Court's discretion. *Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th  
13 Cir. 2000). Where no useful purpose would be served by further  
14 administrative proceedings, or where the record has been fully  
15 developed, it is appropriate to exercise this discretion to direct an  
16 immediate award of benefits. *Id.* at 1179 ("[T]he decision of whether to  
17 remand for further proceedings turns upon the likely utility of such  
18 proceedings."); *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004).  
19 However, where there are outstanding issues that must be resolved before  
20 a determination of disability can be made, and it is not clear from the  
21 record that the ALJ would be required to find the claimant disabled if  
22 all the evidence were properly evaluated, remand is appropriate.  
23 *Bunnell v. Barnhart*, 336 F.3d 1112, 1115-16 (9th Cir. 2003); see also  
24 *Connett*, 340 F.3d at 876 (remanding case for reconsideration of  
25 credibility determination).

26 Here, the ALJ failed to explain with sufficient specificity the  
27 basis for his determination that Plaintiff was not fully credible  
28 regarding the intensity, persistence, and limiting effects of her

1 symptoms. Accordingly, the case is remanded for further proceedings  
2 consistent with this opinion and order.

3

4 DATED: October 1, 2010

5

6



7

---

Marc L. Goldman  
United States Magistrate Judge

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28