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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

M. ANGELICA CONEJO,)	NO. ED CV 10-706-AS
)	
)	
Plaintiff,)	MEMORANDUM OPINION AND
)	
v.)	ORDER OF REMAND
)	
CAROLYN W. COLVIN, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	

PROCEEDINGS

On May 27, 2010, Plaintiff filed a Complaint seeking review of the Commissioner's denial of Plaintiff's application for disability benefits and supplemental security income ("SSI"). (Docket Entry No. 4). On April 14, 2011, pursuant to the parties' stipulated remand, the Court remanded this case for further administrative proceedings, and retained jurisdiction pursuant to sentence six of 42 U.S.C. § 405(g). (Docket No. 15). After the proceedings on

1 remand resulted in a decision unfavorable to Plaintiff, on May 2,
2 2013, the parties stipulated to reopen the matter (Docket Entry No.
3 16), and the Court ordered the case reopened (Docket Entry No. 17).
4

5 On August 9, 2013, Defendant filed an Answer and the
6 Administrative Record ("A.R."). (Docket Entry Nos. 19, 20). On
7 August 21, 2013, the matter was transferred and referred to the
8 current Magistrate Judge. (Docket Entry No. 21). The parties have
9 consented to proceed before a United States Magistrate Judge.
10 (Docket Entry Nos. 23-24). On January 14, 2014, the parties filed
11 a Joint Stipulation ("Joint Stip.") setting forth their respective
12 positions regarding Plaintiff's claims. (Docket Entry No. 25). On
13 August 25, 2014, pursuant to the Court's request, Defendant
14 supplemented the Administrative Record. (Docket Entry Nos. 34,
15 35). The Court has taken this matter under submission without oral
16 argument. See C.D. Local R. 7-15; "Case Management Order," filed
17 June 2, 2010. (Docket Entry No. 2).
18

19 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

20
21 Plaintiff, a former sales clerk-cashier (A.R. 250), asserts
22 disability beginning January 1, 2004, based on alleged physical and
23 mental impairments. (Id. 10, 132). The Administrative Law Judge,
24 Michael D. Radensky ("ALJ"), examined the record and heard
25 testimony from Plaintiff and vocational expert ("VE"), David A.
26 Rinehart, on January 3, 2012. (Id. 245, 258-95).
27

28 On January 18, 2012, the ALJ issued a decision denying

1 Plaintiff's application for benefits. (Id. 245-51). The ALJ found
2 that Plaintiff has the "severe combination of impairments" of
3 obesity, fibromyalgia, and depression. (Id. 248). The ALJ also
4 determined that Plaintiff's medically determinable impairments of
5 depression and obesity were nonsevere as they did not cause more
6 than minimal limitation in her ability to perform basic mental work
7 activities. (Id. 246, 248). The ALJ determined that,
8 notwithstanding these impairments, Plaintiff assertedly retains
9 the residual functional capacity ("RFC") to perform the full range
10 of light work and that she is able to perform her past relevant
11 work as a sales clerk-cashier. (Id. 249-50).

12
13 Accordingly, the ALJ found that Plaintiff was not disabled at
14 any time from the alleged disability onset date through the date of
15 the ALJ's decision. (Id. 250).

16 17 **PLAINTIFF'S CONTENTIONS**

18
19 Plaintiff contends that the ALJ erred: (1) in his assessment
20 of Plaintiff's credibility; (2) in failing to properly evaluate
21 Plaintiff's mental impairment; and (3) by incorporating by
22 reference a prior decision vacated by the Appeals Council, thereby
23 violating the Appeals Council's remand order. (Joint Stip. 3-4).

24 25 **STANDARD OF REVIEW**

26
27 This Court reviews the Commissioner's decision to determine
28 if: (1) the Commissioner's findings are supported by substantial

1 evidence; and (2) the Commissioner used proper legal standards. 42
2 U.S.C. § 405(g); see Carmickle v. Comm'r, 533 F.3d 1155, 1159 (9th
3 Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007).
4 "Substantial evidence is more than a scintilla, but less than a
5 preponderance." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
6 1998) (citing Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir.
7 1997)). It is relevant evidence "which a reasonable person might
8 accept as adequate to support a conclusion." Hoopai, 499 F.3d at
9 1074; Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996)). To
10 determine whether substantial evidence supports a finding, "a court
11 must 'consider the record as a whole, weighing both evidence that
12 supports and evidence that detracts from the [Commissioner's]
13 conclusion.'" Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir.
14 1997) (citation omitted); see Widmark v. Barnhart, 454 F.3d 1063,
15 1066 (9th Cir. 2006) (inferences "reasonably drawn from the record"
16 can constitute substantial evidence).

17
18 This Court "may not affirm [the Commissioner's] decision
19 simply by isolating a specific quantum of supporting evidence, but
20 must also consider evidence that detracts from [the Commissioner's]
21 conclusion." Ray v. Bowen, 813 F.2d 914, 915 (9th Cir. 1987)
22 (citation and internal quotation marks omitted); Lingenfelter v.
23 Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007) (same). However, the
24 Court cannot disturb findings supported by substantial evidence,
25 even though there may exist other evidence supporting Plaintiff's
26 claim. See Torske v. Richardson, 484 F.2d 59, 60 (9th Cir. 1973).
27 "If the evidence can reasonably support either affirming or
28 reversing the [Commissioner's] conclusion, [a] court may not

1 substitute its judgment for that of the [Commissioner].” Reddick,
2 157 F.3d 715, 720-21 (9th Cir. 1998) (citation omitted).

3
4 **APPLICABLE LAW**

5
6 “The Social Security Act defines disability as the ‘inability
7 to engage in any substantial gainful activity by reason of any
8 medically determinable physical or mental impairment which can be
9 expected to result in death or which has lasted or can be expected
10 to last for a continuous period of not less than 12 months.’” Webb
11 v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005) (quoting 42 U.S.C.
12 § 423 (d) (1) (A)). The ALJ follows a five-step, sequential analysis
13 to determine whether a claimant has established disability. 20
14 C.F.R. § 404.1520.

15
16 At step one, the ALJ determines whether the claimant is
17 engaged in substantial gainful employment activity. Id. §
18 404.1520(a) (4) (i). “Substantial gainful activity” is defined as
19 “work that . . . [i]nvolves doing significant and productive
20 physical or mental duties[] and . . . [i]s done (or intended) for
21 pay or profit.” Id. §§ 404.1510, 404.1572. If the ALJ determines
22 that the claimant is not engaged in substantial gainful activity,
23 the ALJ proceeds to step two which requires the ALJ to determine
24 whether the claimant has a medically severe impairment or
25 combination of impairments that significantly limits his ability to
26 do basic work activities. See id. § 404.1520(a) (4) (ii); see also
27 Webb, 433 F.3d at 686. The “ability to do basic work activities”
28 is defined as “the abilities and aptitudes necessary to do most

1 jobs." 20 C.F.R. § 404.1521(b); Webb, 433 F.3d at 686. An
2 impairment is not severe if it is merely "a slight abnormality (or
3 combination of slight abnormalities) that has no more than a
4 minimal effect on the ability to do basic work activities." Webb,
5 433 F.3d at 686.

6
7 If the ALJ concludes that a claimant lacks a medically severe
8 impairment, the ALJ must find the claimant not disabled. Id.; 20
9 C.F.R. § 1520(a)(ii); Ukolov v. Barnhart, 420 F.3d 1002, 1003 (9th
10 Cir. 2005) (ALJ need not consider subsequent steps if there is a
11 finding of "disabled" or "not disabled" at any step).

12
13 However, if the ALJ finds that a claimant's impairment is
14 severe, then step three requires the ALJ to evaluate whether the
15 claimant's impairment satisfies certain statutory requirements
16 entitling him to a disability finding. Webb, 433 F.3d at 686. If
17 the impairment does not satisfy the statutory requirements
18 entitling the claimant to a disability finding, the ALJ must
19 determine the claimant's RFC, that is, the ability to do physical
20 and mental work activities on a sustained basis despite limitations
21 from all his impairments. 20 C.F.R. § 416.920(e).

22
23 Once the RFC is determined, the ALJ proceeds to step four to
24 assess whether the claimant is able to do any work that he or she
25 has done in the past, defined as work performed in the last fifteen
26 years prior to the disability onset date. If the ALJ finds that
27 the claimant is not able to do the type of work that he or she has
28 done in the past or does not have any past relevant work, the ALJ

1 proceeds to step five to determine whether - taking into account
2 the claimant's age, education, work experience and RFC - there is
3 any other work that the claimant can do and if so, whether there
4 are a significant number of such jobs in the national economy.
5 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999); 20 C.F.R. §
6 404.1520(a)(4)(iii)-(v). The claimant has the burden of proof at
7 steps one through four, and the Commissioner has the burden of
8 proof at step five. Tackett, 180 F.3d at 1098.

10 DISCUSSION

11
12 After consideration of the record as a whole, the Court finds
13 that the Commissioner's findings are *not* supported by substantial
14 evidence or free from material¹ legal error. For the reasons
15 discussed below, the case is remanded under sentence four of 42
16 U.S.C. Section 405(g).

18 **A. The ALJ Materially Erred in Evaluating Plaintiff's Credibility**

19
20 Plaintiff asserts that the ALJ erred in assessing Plaintiff's
21 credibility because he failed to "utilize the techniques outlined
22 by the Ninth Circuit for determining credibility," made statements
23 that are inconsistent with the medical record, and failed to
24 provide specific, clear, and convincing reasons for challenging

25
26 ¹ The harmless error rule applies to the review of
27 administrative decisions regarding disability. See McLeod v.
28 Astrue, 640 F.3d 881, 886-88 (9th Cir. 2011); Burch v. Barnhart,
400 F.3d 676, 679 (9th Cir. 2005) (stating that an ALJ's decision
will not be reversed for errors that are harmless).

1 Plaintiff's credibility. (Joint Stip. 5-7). Plaintiff also
2 contends that "the ALJ limited his analysis" to Plaintiff's
3 "purported ability to walk, her poor effort on one consultative
4 grip test," her failure to fully describe the intensity of her
5 fatigue to her physicians, and inferred that she was malingering.
6 (Id. 11).

7
8 The ALJ noted Plaintiff's testimony as follows:

9
10 [S]he testified . . . that she had to lay down and
11 nap four to six times a day on a regular basis for a half
12 to two hours at a time because of her pain although she
13 also complained of being unable to sleep at night because
14 the medication for sleep no longer helped her. However,
15 she stressed that her medication made her sleepy and how
16 she was seeing a pain management specialist on a monthly
17 basis for epidural injections as well as other shots in
18 the areas where she has pain. [¶] . . . The claimant
19 reportedly admitted substantial improvement of her pain
20 with each injection as well as reporting relief of pain
21 with her medication, which included Vicoprofen and
22 Robaxin, and there was no indication of any complaints of
23 medication side effects. [¶] . . . The medical evidence
24 of record like her prehearing statements and hearing
25 testimony does reflect complaints of pain all over her
26 body, but the record does not support the degree of
27 limitations alleged. She has said that her family does
28 everything for her, but it is clear that she was overly

1 dramatic at the hearing, and in fact livened up a bit
2 when talking about things she liked. She admitted that
3 she drove her daughter to school sometimes and helped
4 with homework, but otherwise maintained that her husband
5 and son took care of everything for her.

6
7 (A.R. 250).

8
9 Where, as here, the ALJ finds that a claimant suffers from a
10 medically determinable impairment that could reasonably be expected
11 to produce his or her alleged symptoms, the ALJ must evaluate "the
12 intensity, persistence, and functionally limiting effects of the
13 individual's symptoms . . . to determine the extent to which the
14 symptoms affect the individual's ability to do basic work
15 activities. This requires the [ALJ] to make a finding about the
16 credibility of the individual's statements about the symptom(s) and
17 its functional effect." Soc. Sec. Ruling ("SSR") 96-7p.

18
19 An ALJ's assessment of a claimant's credibility is entitled to
20 "great weight." Anderson v. Sullivan, 914 F.2d 1121, 1124 (9th
21 Cir. 1990); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985).
22 The ALJ may not discount the claimant's testimony regarding the
23 severity of the symptoms without making "specific, cogent"
24 findings. Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995); see
25 also Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010)
26 (reaffirming same); but see Smolen, 80 F.3d at 1283-84 (indicating
27 that ALJ must provide "specific, clear and convincing reasons to
28 reject a claimant's testimony where there is no evidence of

1 malingering); see Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir.
2 1990).² Generalized, conclusory findings do not suffice. See
3 Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004) (the ALJ's
4 credibility findings "must be sufficiently specific to allow a
5 reviewing court to conclude the [ALJ] rejected [the] claimant's
6 testimony on permissible grounds and did not arbitrarily discredit
7 the claimant's testimony") (citation and internal quotation marks
8 omitted); Holohan v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001)
9 (the ALJ must "specifically identify the testimony [the ALJ] finds
10 not to be credible and must explain what evidence undermines the
11 testimony"); Smolen, 80 F.3d at 1284 ("The ALJ must state
12 specifically which symptom testimony is not credible and what facts
13 in the record lead to that conclusion."); see also SSR 96-7p.

14
15 An ALJ may consider a range of factors in assessing
16 credibility, including "(1) ordinary techniques of credibility
17 evaluation, such as the claimant's reputation for lying, prior
18 inconsistent statements concerning the symptoms, and other
19 testimony by the claimant that appears less than candid; (2)
20 unexplained or inadequately explained failure to seek treatment or
21 to follow a prescribed course of treatment; and (3) the claimant's

22
23 ² In the absence of evidence of "malingering," most recent
24 Ninth Circuit cases have applied the "clear and convincing"
25 standard. See, e.g., Chaudhry v. Astrue, 688 F.3d 661, 670, 672
26 n.10 (9th Cir. 2012); Molina v. Astrue, 674 F.3d 1104, 1112 (9th
27 Cir. 2012); Taylor v. Comm'r, 659 F.3d 1228, 1234 (9th Cir. 2011);
28 Valentine v. Comm'r, 574 F.3d 685, 693 (9th Cir. 2009); Ballard v.
Apfel, 2000 WL 1899797, at *2 n.1 (C.D. Cal. Dec. 19, 2000)
(collecting cases). As set forth infra, the ALJ's findings in this
case are insufficient under either standard, so the distinction
between the two standards (if any) is academic.

1 daily activities.” Ghanim v. Colvin, --- F.3d ----, 2014 WL
2 4056530, at *7 (9th Cir. Aug. 18, 2014) (quoting Smolen, 80 F.3d at
3 1284; accord Orn v. Astrue, 495 F.3d 625, 636 (9th Cir. 2007)).
4

5 Here, the ALJ, after considering the record and the testimony
6 presented at the hearing, found Plaintiff’s statements concerning
7 the intensity, persistence and limiting effects of her symptoms
8 “not credible to the extent they are inconsistent with” the ALJ’s
9 RFC. (A.R. 249).
10

11 Contrary to her testimony, the medical records
12 reflect good response to medication, and there is no
13 clinical evidence of any problems with standing, walking
14 or sitting, but rather repeated reports of no apparent
15 distress and no problems with walking or anything more
16 than some tenderness over her spine without any muscle
17 spasm, sensory or motor changes, or limitation of spinal
18 motion. Her medications are consistent with only mild to
19 moderate pain, there are repeated references to good
20 response to medication without medication side effects,
21 and there is certainly no mention of the alleged frequent
22 need for naps of up to two hours at a time.
23

24 (Id. 250).
25

26 Thus, the ALJ discounted Plaintiff’s credibility for the
27 following reasons: (1) the objective medical evidence does not
28 fully support either the degree of limitation, or the degree of

1 pain and fatigue alleged by Plaintiff; (2) there were internal
2 inconsistencies in Plaintiff's complaints; and (3) treatment and
3 conservative medications provide relief. (Id.).
4

5 The Court finds that the ALJ failed to state legally
6 sufficient reasons for his adverse credibility finding.
7

8 **1. Objective Medical Evidence**

9

10 Although a claimant's credibility "cannot be rejected on the
11 sole ground that it is not fully corroborated by objective medical
12 evidence, the medical evidence is still a relevant factor . . ."
13 Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001). Lack of
14 supporting objective medical evidence is a key consideration for
15 the ALJ in evaluating credibility. See 20 C.F.R. §§
16 404.1529(c)(4), 416.929(c)(4) (in determining disability, an ALJ
17 must evaluate a claimant's statements about the intensity,
18 persistence and limiting effects of her symptoms "in relation to
19 the objective medical evidence and other evidence").
20

21 Here, the ALJ discounted Plaintiff's credibility based in part
22 on a finding that the objective medical evidence does not fully
23 support the degree of limitation alleged by Plaintiff. (Id. 250).
24 The ALJ noted that there is "no clinical evidence" of any problems
25 standing, walking, or sitting, and repeated reports of "no apparent
26 distress and no problems with walking or anything more than some
27 tenderness over her spine without any spasm, sensory or motor
28 changes, or limitation of spinal motion." (Id.). He also found

1 that the medical records do not reflect the degree of pain and
2 fatigue alleged by Plaintiff. (Id.).

3
4 The ALJ and Defendant also point out that (1) the reports of
5 Plaintiff's treating physician, Dr. Loomba, reflect normal range of
6 motion, normal muscle strength, normal sensation, and negative
7 straight leg raising tests (A.R. 250; Joint Stip. 8 (citing A.R.
8 405, 407, 410, 413, 417)); (2) the internal medicine consultative
9 examiner and the orthopedic examiner both opined that Plaintiff
10 could work with some limitations, finding only mild objective
11 findings (Joint Stip. 8 (citing A.R. 146-50, 390-94)); (3) the
12 consultative examiners also noted no problem with walking and/or
13 sitting (id. (citing A.R. 148, 263-64, 391)); and (4) Plaintiff's
14 physicians generally reported no difficulties in walking (id.
15 (citing A.R. 168, 173, 178, 181, 185)).³

16
17 A review of the record, however, reveals that the ALJ's
18 findings only reflect part of the record. For instance, a November
19 17, 2011, note from an urgent care visit for a headache, seems to
20 possibly indicate that Plaintiff's heel walking and toe walking
21 were abnormal. (A.R. 449). Dr. Loomba also consistently mentioned
22 that on examination of Plaintiff's back and neck, Plaintiff had
23 "tenderness in cervical paraspinal muscles," and "tenderness in
24 lumbar paraspinal muscles, increased pain with flexion of the

25
26 ³ The Court's review of the record reveals that only one of
27 the cited documents actually mentions an assessment of Plaintiff's
28 gait and stance. (See, e.g., A.R. 168 ("Gait And Stance:
Normal.")). The other pages that are cited do not mention walking
at all. (See, e.g., A.R. 173, 178, 181, 185).

1 spine, [and] increased pain with extension of the spine.” (Id.
2 405, 407, 410, 413, 417; see also id. 420, 422, 424, 428, 432, 436,
3 438, 440). The Court finds itself ill equipped to determine which,
4 if any, of Dr. Loomba’s clinical findings are or are not
5 significant in light of Plaintiff’s impairments. Indeed, in the
6 context of fibromyalgia the Ninth Circuit has recognized that
7 objective findings often “do not establish the presence or absence
8 of [the disease].” Jordan v. Northrop Grumman Corp., 370 F.3d 869,
9 872 (9th Cir. 2003), overruled on other grounds by Abatie v. Alta
10 Health & Life Ins., 458 F.3d 955, 970 (9th Cir. 2006) (en banc).
11 In Jordan, the court recognized that objective tests are
12 administered to rule out other diseases and alternative
13 explanations for the pain, but do not themselves establish the
14 presence or absence of fibromyalgia, as that condition cannot be
15 objectively proven. Id. at 877.

16
17 The ALJ also found that the record does not support the degree
18 of fatigue alleged by Plaintiff as there was no mention in the
19 medical record of Plaintiff’s frequent need for naps. (A.R. 250).
20 A review of Dr. Loomba’s records, however, shows that Plaintiff
21 complained of fatigue at every visit. (See, e.g., id. 404, 406,
22 409, 412, 416, 417, 419, 421, 427, 429, 437). More importantly,
23 the records reflect that after treating Plaintiff for almost six
24 months, Dr. Loomba prescribed Provigil in October 2009. (Id. 433).
25 According to its official website, Provigil is “used to improve
26 wakefulness in adults who experience excessive sleepiness”
27 Provigil Website, <http://www.provigil.com> (last visited August 22,
28 2014). It appears, therefore, that Dr. Loomba was aware of

1 Plaintiff's complaints of daytime fatigue and concerned enough
2 about these complaints to prescribe a medication to help Plaintiff
3 stay awake.
4

5 Thus, the ALJ's reliance on the objective medical evidence in
6 this case was not a clear and convincing reason for discounting
7 Plaintiff's credibility. Even if the ALJ's reliance on the
8 objective evidence was deemed to be a clear and convincing reason
9 for discounting Plaintiff's credibility, it cannot be the sole
10 legally sufficient reason. As discussed below, because the Court
11 finds that the other reasons given by the ALJ for discounting
12 Plaintiff's credibility are also not legally sufficient, the matter
13 must be remanded.
14

15 **2. Inconsistent Statements**

16
17 The ALJ pointed to inconsistencies in Plaintiff's complaints
18 as a basis for discounting Plaintiff's credibility. For example,
19 although Plaintiff testified that because of her pain she had to
20 nap and/or rest four to six times a day for up to two hours at a
21 time, she also complained that she was unable to sleep at night
22 because her sleep medication no longer helped her. (A.R. 249; but
23 see id. 447 ("no sleep complaints"). Although she complained she
24 was unable to sleep at night because her sleep medication no longer
25 helped her, she also complained that her medication made her
26 sleepy. (Id. 249-50).
27

28 Inconsistencies in a claimant's testimony are a valid factor

1 to be considered in weighing a claimant's credibility. Thomas v.
2 Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); Burch, 400 F.3d at
3 680 ("In determining credibility, an ALJ may engage in other
4 techniques of credibility evaluation, such as . . . inconsistencies
5 in claimant's testimony"); Tonapetyan v. Halter, 242 F.3d 1144,
6 1148 (9th Cir. 2001) (claimant's inconsistent statements were
7 specific and convincing reason for discounting the testimony); see
8 also 20 C.F.R. §§ 404.1529(c), 416.929(c).

9
10 In this case, however, Plaintiff's statements regarding
11 fatigue, frequent napping/resting during the day, and inability to
12 sleep well at night are not necessarily inconsistent: pain may
13 necessitate rest during the day, result in napping and, in turn,
14 result in difficulty sleeping at night either because of prior
15 daytime sleep, or because of pain interrupting sleep at night.
16 Additionally, as previously discussed (see Discussion supra Part
17 A.1), although Dr. Loomba's records do not specifically mention
18 Plaintiff's frequent naps/rests during the day, it is clear that
19 Dr. Loomba was aware of Plaintiff's daytime fatigue, and was
20 treating this symptom with medication.

21
22 Accordingly, the ALJ's reliance on Plaintiff's inconsistent
23 statements is not supported by the record and is not a clear and
24 convincing reason to discount Plaintiff's allegations.

25 ///
26 ///
27 ///

1 **3. Conservative Medication and Positive Response**
2 **to Treatment**

3
4 The ALJ noted that Plaintiff's medications were "consistent
5 with only mild to moderate pain," her medications and other
6 treatment provided her pain relief, and there was no indication of
7 any complaints of medication side effects. (A.R. 250 (citing id.
8 404-41)).

9
10 However, a review of Dr. Loomba's records reveals that as of
11 July 2011 Plaintiff was taking three different prescribed pain
12 medications: Gabapentin, Robaxin, and Vicoprofen. (See, e.g., id.
13 404; see also id. 308). There is nothing in the record to support
14 the ALJ's perfunctory statement that these medications are
15 prescribed for "only mild to moderate pain," especially in light of
16 the fact that all three were being prescribed at the same time.
17 Furthermore, over the course of the time that she treated
18 Plaintiff, Dr. Loomba not only adjusted Plaintiff's pain and
19 sleep/wakefulness medications, but also suggested additional
20 treatment options of lumbar and cervical injections in order to
21 help Plaintiff better manage her pain.⁴ (Id. 404-41).

22
23 Although the ALJ reported that Plaintiff experienced relief
24 from her medications and other treatments, there is no indication
25 in the record that such relief was inconsistent with her testimony.

26
27 ⁴ The ALJ only found the medication regimen to be
28 "conservative"; he does not appear to deem the spinal injections to
be a conservative form of treatment.

1 On numerous visits to Dr. Loomba between June 15, 2009 and July 12,
2 2011, Plaintiff reported that her pain is relieved by "medications,
3 rest," massage, heat and/or epidural injections, that the pain
4 medications are helping, and/or that after receiving injections in
5 September 2009, November 2009, September 2010, February 2011, and
6 March 2011, there was a decrease in pain, ranging between 30 and
7 80%. (See, e.g., id. at 404, 406, 409, 412, 416, 419, 421, 427,
8 431, 433, 435, 437). However, at each of her visits, Plaintiff
9 also fairly consistently rated her average pain between 7/10 and
10 10/10, and there is nothing to suggest that she was ever without
11 pain, even after receiving the injections. (Id.). Additionally,
12 Plaintiff continued to periodically receive these injections, which
13 suggests that any benefit from them was not long lasting.

14
15 Plaintiff also repeatedly informed Dr. Loomba that her pain
16 symptoms were aggravated by physical activity, including movement,
17 sitting, standing, and walking. (Id. 404, 406, 409, 412, 416, 417,
18 419, 421, 427, 429, 437). She consistently described her pain to
19 Dr. Loomba as burning, dull aching, constant, sharp, shooting, and
20 radiating, and sometimes with cramping or numbness. (Id.) These
21 statements are consistent with her testimony at the hearing. (See,
22 e.g., id. at 261-63).

23
24 The ALJ discounted Plaintiff's credibility because she did not
25 report any side effects from her medications. In assessing a
26 claimant's credibility about her symptoms, an ALJ may consider "the
27 type, dosage, effectiveness, and side effects of any medication."
28 20 C.F.R. § 404.1529(c). However, in this case, there does not

1 appear to be any connection between the ALJ's finding that
2 Plaintiff takes her medication without any reported side effects,
3 and Plaintiff's credibility.

4
5 Thus, the Court finds that, when read as a whole, the record
6 in this case does not undermine Plaintiff's testimony of pain and
7 fatigue. Ghanim, 2014 WL 4056530, at *8. Rather, the record
8 consistently reveals that despite some occasional signs of
9 improvement, Plaintiff continues to suffer from, and be treated
10 for, pain, fatigue, and sleep disturbances. The Court also finds
11 that the ALJ's stated reasons for discounting Plaintiff's
12 credibility do not sufficiently allow the Court to conclude that
13 the ALJ discounted Plaintiff's credibility on legally permissible
14 grounds.

15
16 **B. Plaintiff's Mental Impairments Should Be Reconsidered on**
17 **Remand**

18
19 The ALJ noted that, with respect to Plaintiff's mental
20 impairment, Plaintiff has had "little treatment for her varying
21 complaints of anxiety and depression and that they responded
22 quickly to medication." (A.R. 248 (citing id. 164, 167-68, 172,
23 177, 180, 184, 188, 190)).⁵ He found that although Plaintiff

24
25 ⁵ The Court's review of these documents reveals that some of
26 the cited pages do *not* fully support the ALJ's finding. For
27 instance, one treatment note never mentions Plaintiff's medications
28 and reflects only a routine visit for sinusitis (A.R. 177), and
another reflects that Plaintiff reported insomnia, decreased
interest, increased feelings of worthlessness, decreased energy,
(continued...)

1 stated at the hearing that she is very depressed, she has not
2 received any formal mental health treatment and there is "even less
3 evidence of depression and anxiety than at the time of the prior
4 decision in 2003." (Id.). Therefore, the ALJ concluded that
5 Plaintiff's mental impairment causes no more than mild limitation
6 in concentration, persistence, or pace, and that "even in
7 conjunction with her medically determinable physical impairments,"
8 is nonsevere and non limiting in terms of mental functioning.
9 (Id.).

10
11 Plaintiff contends that the ALJ erred in failing to properly
12 evaluate Plaintiff's mental impairment and that the ALJ's finding
13 that her depression was nonsevere is not supported by substantial
14 evidence. (Joint Stip. 12). In support of this contention,
15 Plaintiff cites to many of the same medical records that the ALJ
16 identified as indicating diagnoses or assessments of depression and
17 anxiety due to chronic muscle/joint pain, and accompanied by sleep
18 disturbance. (Id. (citing A.R. 167, 168, 172, 180, 183, 184, 188,
19 189, 403, 410, 413, 417, 440)). Plaintiff also points out that she
20 has been, and is being, treated for depression with medications.⁶

21
22 ⁵(...continued)
23 increased difficulty in concentrating, and anxiety attacks (id.
24 190).

25 ⁶ The record reflects that in 2007 a physician's assistant
26 noted Plaintiff's complaints of depression, resulting in fatigue.
27 (Id. 166-68, 172-88). Plaintiff was treated with Cymbalta, and
28 reported that it "helped her significantly." (Id. 172, 180, 184).
Some of these same notes, however, also indicate that Plaintiff
still feels "very anxious," paranoid, and depressed (see, e.g., id.
(continued...))

1 (Id.).

2
3 As this case is being remanded for the ALJ to reconsider
4 Plaintiff's credibility, which in turn may support Plaintiff's
5 complaints regarding her mental impairments, the Court does not
6 reach the merits of Plaintiff's claim that the ALJ erred in finding
7 Plaintiff's mental impairments to be nonsevere. The Court will
8 instead direct this issue to be reassessed on remand.

9
10 **C. The ALJ's Incorporation of the Prior Decision Was Not Error**

11
12 After this Court remanded the matter pursuant to the parties'
13 stipulation, the Appeals Council vacated the 2008 decision and
14 remanded the matter "for a new hearing, any further action to
15 complete the record and a new decision." (A.R. 316). In his 2012
16 decision, the ALJ noted that "the prior decision issued April 8,
17 2008 is incorporated by reference herein and remains the decision
18 of record as supplemented herein below." (Id. 246).

19
20 Plaintiff contends that the 2012 decision was inconsistent
21 with the remand order because the ALJ did not make a new decision,

22 _____
23 (...continued)
24 172, 180), and it appears that her Cymbalta dosage was increased as
25 a result (id. 173). Dr. Loomba's records show that from July 2009
26 through August 2010 Plaintiff was taking Elavil and Fluoxetine
27 (Prozac) (id. 437), and Plaintiff's December 2011 list of
28 medications includes Prozac, but not Elavil, as a current
medication as of that date (id. 388). On November 22, 2011,
Plaintiff reported to treating physician, Dr. Lopa, that her mood
was stable on Prozac. (Id. 445).

1 he merely reiterated the old decision. (Joint Stip. 17). The
2 Court does not agree.

3
4 After reviewing the record, the Court finds that, although the
5 ALJ referenced the previous decision and incorporated it by
6 reference, his decision was otherwise complete in and of itself at
7 every step of the evaluation process. (A.R. 245-51). The ALJ
8 included a complete discussion of the fact that there was little or
9 no change in the nature and severity of Plaintiff's medically
10 determinable impairments since 2003, including her obesity, which
11 had not been mentioned in the 2003 decision. (Id. 246). He also
12 considered and discussed the new medical evidence submitted for the
13 hearing as well as some of the earlier medical evidence. (Id. 245-
14 51). Finally, the ALJ provided a thorough (albeit flawed)
15 discussion of Plaintiff's credibility.

16
17 Generally, it is not improper for an ALJ to incorporate a
18 previous decision and supplement it with a subsequent decision.
19 See, e.g., Walker v. Astrue, No. EDCV 08-971 DSF (FFM), 2010 WL
20 2305849, at *11 (C.D. Cal. June 4, 2010) (citing Mason v. Astrue,
21 No. ED CV 08-240-E, 2008 WL 4382662, at *2 (C.D. Cal. Sept. 11,
22 2008)). Moreover, it would elevate form over substance to require
23 an ALJ to actually copy the past findings, rather than incorporate
24 them by reference, especially where, as here, the remand was due to
25 an administrative issue involving a missing document and did not
26 relate to any concerns regarding the substantive issues in the
27 ALJ's 2008 decision. See, e.g., Alsyouf v. Astrue, No. EDCV 11-

1 1867-SS, 2013 WL 327794, at *12 (C.D. Cal. Jan. 29, 2013).

2
3 The Court finds that the ALJ did not err or violate the
4 Appeals Council's order by issuing a new decision, which happened
5 to incorporate the 2008 decision, after conducting a new hearing.

6
7 **D. Remand Is Appropriate**

8
9 The decision whether to remand for further proceedings or
10 order an immediate award of benefits is within the district court's
11 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir.
12 2000). Where no useful purpose would be served by further
13 administrative proceedings, or where the record has been fully
14 developed, it is appropriate to exercise this discretion to direct
15 an immediate award of benefits. Id. at 1179 ("[T]he decision of
16 whether to remand for further proceedings turns upon the likely
17 utility of such proceedings."). However, where, as here, the
18 circumstances of the case suggest that further administrative
19 review could remedy the ALJ's errors, remand is appropriate.
20 McLeod, 640 F.3d at 888 (9th Cir. 2011); Harman, 211 F.3d at 1179-
21 81.

22
23 The Court has determined that the ALJ's credibility findings
24 were not sufficiently specific to allow this Court to conclude that
25 the ALJ rejected Plaintiff's testimony on permissible grounds and
26 did not arbitrarily discredit her testimony. After reassessing
27 Plaintiff's credibility on remand, the ALJ should revisit the issue

1 of Plaintiff's mental impairment in light of his credibility
2 determination.

3
4 **CONCLUSION**

5
6 For all of the foregoing reasons,⁷ this matter is remanded for
7 further administrative action consistent with this Opinion.

8
9 LET JUDGMENT BE ENTERED ACCORDINGLY.

10
11 DATED: August 27, 2014.

12 /s/

13 _____
14 ALKA SAGAR
15 UNITED STATES MAGISTRATE JUDGE

16
17
18
19
20
21
22
23
24
25 _____
26 ⁷ The Court has not reached any other issue raised by
27 Plaintiff except insofar as to determine that reversal with a
28 directive for the payment of benefits would not be appropriate at
this time.