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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEANNA GRIFFIN,)	NO. EDCV 11-1680-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
)	

Plaintiff filed a Complaint on October 24, 2011, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for a period of disability, disability insurance benefits ("DIB"), and supplemental security income ("SSI"). On December 19, 2011, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on July 16, 2012, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, alternatively, remanding for further administrative proceedings; and the Commissioner requests that his decision be affirmed or, alternatively, remanded for further administrative proceedings.

1 impairments meet or medically equal the criteria of an impairment listed
2 in 20 C.F.R. Part 404, Subpart P, Appendix 1, the Listing of
3 Impairments. (*Id.*)
4

5 After reviewing the record, the ALJ determined that plaintiff has
6 the residual functional capacity ("RFC") to perform "sedentary work as
7 defined in 20 C.F.R. §§ 404.1567(a) and 416.967(a)," except she would be
8 limited as follows:
9

10 [N]o work around unprotected heights or dangerous machinery.
11 She would be limited to occasional climbing, stooping or
12 lifting above shoulder level with the left upper extremity;
13 and no balancing, kneeling, crouching, crawling, and no
14 conveyor belt work or piecework.
15

16 (A.R. 14.)
17

18 The ALJ found that plaintiff's past work as a telemarketer
19 constitutes past relevant work under the regulations and that she is
20 capable of performing it, both as that work is generally performed and
21 as she actually performed it. (A.R. 18.) Additionally, after having
22 considered plaintiff's age, education, work experience, and RFC, the ALJ
23 found that other jobs exist in the national economy that plaintiff could
24 perform, including "telephone quotations clerk," "pari-mutuel ticket
25 checker," and "order clerk food and beverage." (*Id.*) The ALJ further
26 determined that plaintiff's substance abuse was not a contributing
27 factor material to the determination of disability, because "even in the
28 absence of her substance addiction, [the ALJ] would still not be able to

1 find [plaintiff] to be disabled." (A.R. 18-19.) Accordingly, the ALJ
2 concluded that plaintiff has not been under a disability, as defined in
3 the Social Security Act, since December 31, 1994, the alleged onset date
4 of her disability. (*Id.*)

5
6 **STANDARD OF REVIEW**

7
8 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
9 decision to determine whether it is free from legal error and supported
10 by substantial evidence. Orn v. Astrue, 495 F.3d 625, 630 (9th Cir.
11 2007). Substantial evidence is "'such relevant evidence as a reasonable
12 mind might accept as adequate to support a conclusion.'" *Id.* (citation
13 omitted). The "evidence must be more than a mere scintilla but not
14 necessarily a preponderance." Connett v. Barnhart, 340 F.3d 871, 873
15 (9th Cir. 2003). "While inferences from the record can constitute
16 substantial evidence, only those 'reasonably drawn from the record' will
17 suffice." Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir.
18 2006)(citation omitted).

19
20 Although this Court cannot substitute its discretion for that of
21 the Commissioner, the Court nonetheless must review the record as a
22 whole, "weighing both the evidence that supports and the evidence that
23 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
24 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*
25 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
26 responsible for determining credibility, resolving conflicts in medical
27 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
28 1035, 1039 (9th Cir. 1995).

1 The Court will uphold the Commissioner's decision when the evidence
2 is susceptible to more than one rational interpretation. Burch v.
3 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
4 review only the reasons stated by the ALJ in his decision "and may not
5 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
6 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
7 the Commissioner's decision if it is based on harmless error, which
8 exists only when it is "clear from the record that an ALJ's error was
9 'inconsequential to the ultimate nondisability determination.'" Robbins
10 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006) (quoting Stout v.
11 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d
12 at 679.

13 14 DISCUSSION

15
16 Plaintiff alleges the following three issues: (1) whether the ALJ
17 properly evaluated the medical evidence of record relevant to
18 plaintiff's mental impairment; (2) whether the ALJ properly considered
19 plaintiff's subjective complaints; and (3) whether the ALJ erred in
20 finding that plaintiff's prior employment as a telemarketer constituted
21 past relevant work ("PRW"). (Joint Stipulation ("Joint Stip.") at 3.)
22

23 I. The ALJ Failed To Properly Evaluate The Medical Evidence 24 Concerning Plaintiff's Mental Impairment.

25
26 An ALJ is obligated to take into account all medical opinions of
27 record. 20 C.F.R. §§ 404.1527(d), 416.927(d). It is the responsibility
28 of the ALJ to analyze evidence and resolve conflicts in medical

1 testimony. Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989). In
2 the hierarchy of physician opinions considered in assessing a social
3 security claim, "[g]enerally, a treating physician's opinion carries
4 more weight than an examining physician's, and an examining physician's
5 opinion carries more weight than a reviewing physician's." Holohan v.
6 Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001); 20 C.F.R. §§
7 404.1527(d), 416.927(d).

8
9 The opinions of treating physicians are entitled to the greatest
10 weight, because a treating physician is hired to cure and has a better
11 opportunity to observe the claimant. Magallanes, 881 F.2d at 751. When
12 a treating physician's opinion is not contradicted by another
13 physician's opinion, it may be rejected only for "clear and convincing"
14 reasons. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). When
15 contradicted by another doctor's opinion, a treating physician's opinion
16 may be rejected only if the ALJ provides "specific and legitimate"
17 reasons supported by substantial evidence in the record. *Id.* An ALJ
18 must provide "clear and convincing reasons" for rejecting the
19 uncontradicted opinion of either a treating or examining physician. *Id.*

20
21 The medical treatment records before the ALJ concerning plaintiff's
22 mental impairment were from the Riverside County Department of Mental
23 Health ("Riverside County"), where plaintiff was treated from December
24 2008, through at least June 2009. (A.R. 499-519, 547-65, 567-83.) It
25 appears that plaintiff was seen monthly by her treating psychiatrist,
26 David Aryanpur, M.D., and by several different clinicians on a weekly
27 basis. (*Id.*)

1 On December 31, 2008, Dr. Aryanpur noted that plaintiff was doing
2 a "little better" but was "frustrated." (A.R. 516.) He also noted that
3 plaintiff exhibited "mood swings" and "slightly rambling speech," and
4 was on "verge of tears." (*Id.*) He further noted marijuana use on
5 December 28, 2008, and he recommended that plaintiff abstain from drugs,
6 especially marijuana. (*Id.*)

7
8 On February 6, 2009, Dr. Aryanpur noted that plaintiff's mood was
9 improved and she had less rambling speech. (A.R. 505.) He noted her
10 last marijuana use was on January 24, 2009. (*Id.*) He recommended that
11 she continue with Tegretol, the medication for her bipolar disorder.
12 (*Id.*)

13
14 On March 6, 2009, Dr. Aryanpur reported that plaintiff was doing
15 well but had a "lapse . . . during her wedding which negatively affected
16 her mood but only temporarily." (A.R. 564.) Her last marijuana use was
17 on February 15, 2009. (*Id.*) He indicated that she should continue to
18 take Tegretol. (*Id.*)

19
20 On April 3, 2009, Dr. Aryanpur noted that plaintiff had "family
21 stressors" and is "a little on edge as a result," but that she was
22 "holding up fairly well." (A.R. 560.) He noted she last used marijuana
23 three weeks ago and should continue taking Tegretol. (*Id.*)

24
25 On May 15, 2009, Dr. Aryanpur noted that plaintiff was "doing
26 better," and that the "family stressors have resolved themselves."
27 (A.R. 549.) Plaintiff ranked her mood "7/10." (*Id.*) He noted her last
28 marijuana use was the day before and she should continue taking

1 Tegretol. (*Id.*)

2
3 An "Adult Annual Re-Assessment" was completed on May 29, 2009, by
4 T. Drumgole, IMF. (A.R. 572-77.) In the Re-Assessment, plaintiff was
5 diagnosed with bipolar disorder, NOS, and cannabis dependence. (A.R.
6 572.) Plaintiff's motor activity was restless, her concentration was
7 poor, and her memory was slightly impaired. (A.R. 574.) Plaintiff had
8 a depressed mood, flight of ideas/racing thoughts, excessive anxiety,
9 muscle tension, recurrent distressing dreams, and fear of losing
10 control. (*Id.*) Plaintiff's thought process was characterized as
11 "blocking" and reflecting "flight of ideas/loose associations." (*Id.*)
12 Her thought content was "mood congruent," she had no delusions, but she
13 did have visual perceptions/hallucinations. (*Id.*) She had a "low
14 average" general fund of knowledge, fair insight, and poor judgment and
15 impulse control. (*Id.*) Plaintiff was assessed a GAF score of 50.¹
16 (A.R. 573.)

17
18 At the hearing before the ALJ, plaintiff testified that her bipolar
19 disorder was her most serious problem. (A.R. 32.) She stated that it
20 causes her uncontrollable emotions and anxiety, and it affects her
21 ability to work, because if she "can't keep the moods under control,
22 it's not good to be around people." (A.R. 33-34.) Plaintiff testified
23 that she takes Tegretol for the bipolar disorder. (A.R. 33) She also

24
25 ¹ The GAF scale "[c]onsider[s] psychological, social, and
26 occupational functioning on a hypothetical continuum of mental
27 health-illness." Diagnostic and Statistical Manual of Mental Disorders,
28 DSM-IV-TR, 34 (rev. 4th ed. 2000). A rating of 41-50 reflects
"[s]erious symptoms (e.g., suicidal ideation, severe obsessional
rituals, frequent shoplifting) OR any serious impairment in social,
occupational, or school functioning (e.g., no friends, unable to keep a
job)." *Id.*

1 goes to a "co-occurring disorder group" at the mental health clinic
2 twice a week for her mental illness and marijuana addiction. (A.R. 41.)

3
4 After the ALJ's adverse November 12, 2009 decision, plaintiff's
5 counsel provided to the Appeals Council a "Mental Impairment
6 Questionnaire" from Dr. Aryanpur dated January 20, 2010. (A.R. 651-54.)

7
8 In the Impairment Questionnaire, Dr. Aryanpur opined that plaintiff
9 suffered from bipolar disorder, NOS. (A.R. 651.) He assessed a GAF
10 score of 50 and noted that plaintiff's highest GAF score in the past
11 year was 56. (*Id.*) Dr. Aryanpur opined that plaintiff's prognosis is
12 "guarded." (A.R. 653.) Dr. Aryanpur described plaintiff's mental
13 impairment and symptoms as "mood swings and depression which cause
14 apathy, lethargy, feelings of worthlessness, impairment in focus and
15 concentration," and he noted that plaintiff has had two suicide
16 attempts. (A.R. 652.) He indicated plaintiff's limitations to be:
17 slight restriction of activities of daily living; marked difficulties in
18 maintaining social functioning; frequent deficiencies in concentration,
19 persistence, or pace; and repeated episodes of deterioration or
20 decompensation. (A.R. 654.) Dr. Aryanpur also noted that plaintiff's
21 impairments or treatment would cause her to be absent from work more
22 than three times a month. (A.R. 653.) He stated that plaintiff's
23 prescribed medications (Tegretol and Trazodone) cause drowsiness. (*Id.*)
24 Dr. Aryanpur concluded that plaintiff's "emotional instability, low
25 energy and decrease[d] ability to concentrate preclude [her] from
26 substantial full-time employment." (A.R. 654.)

27
28 The Appeals Council denied review, stating:

1 We considered the medical source statement that your
2 representative submitted with the request for review . . . but
3 the assessment was not accompanied by an explanation with
4 specific references to treatment records. Absent an
5 explanation with specific references to the treatment record,
6 we have concluded that the record does not support the
7 assessment and that the assessment . . . would not have
8 changed the [ALJ's] decision in the case. We have reviewed
9 the entire record and we have found no basis for changing the
10 [ALJ's] decision.

11
12 (A.R. 2.) Plaintiff argues that a remand is appropriate based on the
13 ALJ's failure to properly consider the medical evidence "as it pertains
14 to the extent and severity of her mental impairment," and in light of
15 the additional evidence she presented to the Appeals Council. (Joint
16 Stip. 4-5.) The Court agrees.

17
18 Although the ALJ found plaintiff's bipolar disorder and marijuana
19 addiction to be severe, he does not address these impairments in any
20 other portion of his opinion. (A.R. 13.) When an ALJ has determined
21 that a claimant has a severe impairment at step two, "all medically
22 determinable impairments must be considered in the remaining steps of
23 the sequential analysis." See Orn, 495 F.3d at 630. However, an ALJ
24 may properly conclude that a severe mental impairment does not
25 necessarily limit the ability to perform basic work activities if the
26 medical record supports such a finding. See Bray v. Comm'r, 554 F.3d
27 1219, 1228-29 (9th Cir. 2009)(finding that the ALJ adequately accounted
28 for a mental disorder despite finding it did not limit all work). Here,

1 the ALJ neither determined whether plaintiff's severe mental impairment
2 limited her ability to perform basic work activities nor considered the
3 uncontradicted evidence regarding plaintiff's mental impairment in the
4 remaining steps of the sequential analysis. Further, the ALJ did not
5 make any credibility findings as to whether the mental impairment could
6 reasonably be expected to produce plaintiff's complaints.² Thus, the ALJ
7 committed error.

8
9 Further, because the Appeals Council considered, *inter alia*, the
10 Impairment Questionnaire in deciding whether to review the ALJ's
11 decision, this Court also must consider such evidence in determining
12 whether the ALJ's decision was supported by substantial evidence and
13 free from legal error. See Brewes v. Comm'r, 682 F.3d 1157, 1163 (9th
14 Cir. 2012) ("when the Appeals Council considers new evidence in deciding
15 whether to review a decision of the ALJ, that evidence becomes part of
16 the administrative record, which the district court must consider when
17 reviewing the Commissioner's final decision for substantial evidence");
18 Warner v. Astrue, 859 F. Supp. 2d 1107, 1114-15 (C.D. Cal. 2012) (though
19 the Appeals Councils is not required to provide reasons for discounting
20 additional evidence, the Court reviews "the ALJ's decision in light of
21 the record as a whole, including the evidence submitted for the first
22 time to the Appeals Council") (citing Taylor v. Comm'r, 659 F.3d 1228,

23
24 ² The ALJ must make a finding on the credibility of the statements
25 based on a consideration of the entire record whenever statements about
26 intensity, persistence, or functionally limiting effects of pain or
27 other symptoms are not substantiated by objective medical evidence. The
28 ALJ's findings "must be sufficiently specific to allow a reviewing
court to conclude the [ALJ] rejected [the] claimant's testimony on
permissible grounds and did not arbitrarily discredit the claimant's
testimony." Moisa v. Barnhart, 367 F.3d 882, 884 (9th Cir.
2004) (quoting Rollins v. Massanari, 261 F.3d 853, 856-57 (9th Cir.
2001)).

1 1231-32 (9th Cir. 2011)). The Court may remand upon finding that "there
2 is a substantial likelihood the ALJ's consideration of the additional
3 evidence submitted to the Appeals Council will materially alter the
4 ALJ's disability analysis." Warner, 859 F. Supp. 2d at 1117.

5
6 As noted above, although the ALJ determined that plaintiff's
7 bipolar disorder and marijuana addiction were severe at step two of the
8 sequential analysis, the ALJ failed consider their effects in the
9 remaining steps of the analysis. Dr. Aryanpur's Impairment
10 Questionnaire provides a link between the treating notes from Riverside
11 County and plaintiff's specific mental limitations and restrictions that
12 had not been considered by the ALJ. With the addition of Dr. Aryanpur's
13 RFC assessment, there is substantial evidence in the record to show that
14 plaintiff's mental impairment limits her ability to perform basic work
15 activities. Therefore, in view of the evidence before the ALJ and the
16 additional evidence submitted to the Appeals Council, this Court cannot
17 conclude that the ALJ's decision is supported by substantial evidence,
18 or that any error is harmless. Indeed, the ALJ's consideration of the
19 additional evidence submitted to the Appeals Council may materially
20 alter the ALJ's disability analysis. Therefore, remand is appropriate
21 to permit the ALJ to properly evaluate all of plaintiff's medical
22 records concerning her mental impairment. See McLeod v. Astrue, 640
23 F.3d 881, 888 (9th Cir. 2011)(remand appropriate when there was a
24 substantial likelihood that the ALJ's consideration of additional
25 evidence submitted to the Appeals Council could alter the ALJ's
26 analysis).

1 **II. The ALJ Failed To Set Forth Clear And Convincing Reasons For**
2 **Finding Plaintiff's Testimony Regarding Her Subjective**
3 **Symptoms And Pain To Be Not Credible.**
4

5 Once a disability claimant produces objective medical evidence of
6 an underlying impairment that is reasonably likely to be the source of
7 claimant's subjective symptom(s), all subjective testimony as to the
8 severity of the symptoms must be considered. Moisa, 367 F.3d at 885;
9 Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991); see also 20
10 C.F.R. §§ 404.1529(a), 416.929(a) (explaining how pain and other
11 symptoms are evaluated). "[U]nless an ALJ makes a finding of
12 malingering based on affirmative evidence thereof, he or she may only
13 find an applicant not credible by making specific findings as to
14 credibility and stating clear and convincing reasons for each."
15 Robbins, 466 F.3d at 883. The factors to be considered in weighing a
16 claimant's credibility include: (1) the claimant's reputation for
17 truthfulness; (2) inconsistencies either in the claimant's testimony or
18 between the claimant's testimony and her conduct; (3) the claimant's
19 daily activities; (4) the claimant's work record; and (5) testimony from
20 physicians and third parties concerning the nature, severity, and effect
21 of the symptoms of which the claimant complains. See Thomas v.
22 Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); see also 20 C.F.R. §§
23 404.1529(c), 416.929(c).

24
25 Here, the ALJ found that "[a]fter careful consideration of the
26 evidence . . . [plaintiff]'s medically determinable impairments could
27 reasonably be expected to cause the alleged symptoms." (A.R. 17.)
28 Further, the ALJ cited no evidence of malingering by plaintiff.

1 Nonetheless, the ALJ concluded that plaintiff's "statements concerning
2 the intensity, persistence and limiting effects of these symptoms are
3 not credible" to the extent they varied from the ALJ's own RFC
4 assessment. (*Id.*) Accordingly, the ALJ's reasons for finding that
5 plaintiff was not credible with respect to her subjective symptom and
6 pain testimony must be "clear and convincing."

7
8 During the June 9, 2009 hearing, plaintiff testified that she had
9 back problems and arthritis that caused "problems [] sitting or standing
10 for very long periods of time"; in particular, once a week, her back
11 pain requires her to lay on the floor until the pain stops. (A.R. 35,
12 46-47; *see also* A.R. 38-39, 48-49.) She testified that her back pain on
13 a regular basis is at an eight out of a ten level of severity. (A.R.
14 47-48.) She testified that her right shoulder hurts frequently and her
15 left knee is hyperextended and bothers her. (A.R. 39, 49-50.)
16 Plaintiff also experiences dizziness, ringing in her ears, and balance
17 problems. (A.R. 50-51.) She stated that her symptoms interfere with
18 her ability to concentrate and focus on a job. (A.R. 52.) Plaintiff
19 testified that she could sit a half an hour before she would have to
20 change positions and could stand for only an hour at a time. (*Id.*) She
21 further testified that she could not work a full-time job due to her
22 "own head, because I overdo myself, and then I get overwhelmed." (A.R.
23 53.)

24
25 The ALJ found 12 reasons for finding plaintiff to lack credibility
26 with respect to her subjective symptoms and pain. (A.R. 16-17.) These
27 stated reasons were: (1) the objective evidence did not support
28 plaintiff's allegations of pain or other limitations (reasons three

1 through seven, nine, ten, and twelve); (2) plaintiff's testimony
2 regarding her daily activities was inconsistent with her subjective
3 symptom/pain complaints (reasons one and two); (3) plaintiff's symptoms
4 were well-controlled by her medication (reason eight); and (4) no
5 physician ever opined that plaintiff's severe impairments met or equaled
6 listing level limitations (reason eleven). (*Id.*)

7
8 Eight of the twelve bases for the ALJ's rejection of plaintiff's
9 subjective complaints essentially were that the objective medical
10 evidence did not corroborate the alleged symptom/pain severity.³ (A.R.

11
12 ³ Specifically the ALJ cited to the following objective evidence
13 (A.R. 16-17):

14 **Third**, lumbosacral spin x-rays taken on August 2, 2007,
15 revealed no significant abnormalities demonstrated. **Fourth**,
16 during the August 20, 2007, consultative orthopedic
17 examination by Dr. Boeck, [plaintiff] was noted to stand with
18 shoulders level and pelvic crests level; her head was held
19 straight and spinal alignment was normal with legs straight
20 and feet pointing straight ahead; and her walking was even,
21 steady and heel-to-toe, and no limp was present.

22 **Fifth**, the August 24, 2007 arthrogram of her right
23 shoulder was unremarkable. **Sixth**, on March 27, 2008,
24 [plaintiff] had an MRI scan of her lumbar spine. Impressions
25 of the scan were of only some mild discogenic inferior end-
26 plate marrow edema noted at L5. **Seventh**, additional x-rays
27 were taken of [plaintiff's] right shoulder on September 23,
28 2008 and October 24, 2008, with the resulting impressions of
unremarkable right shoulder x-rays.

. . . .

24 **Ninth**, December 10, 2008, lumbar spine x-rays revealed no
25 fracture or significant degenerative changes. **Tenth**, again on
26 February 18, 2009, lumbar spine x-rays showed no acute changes
27 to the lumbar spine.

. . . .

27 **Twelfth**, the objective evidence of [plaintiff's] medical
28 record does not establish impairments likely to produce
disabling pain or other limitations as alleged for any period

1 16-17.) Although "the medical evidence is a relevant factor in
2 determining the severity of the claimant's pain and its disabling
3 effects," once a claimant produces objective medical evidence of an
4 underlying impairment, an ALJ "may not reject a claimant's subjective
5 complaints based solely on lack of objective medical evidence to fully
6 corroborate the alleged severity of pain." Rollins, 261 F.3d at 856-57;
7 see also Bunnell, 947 F.2d at 347 (noting that "[i]f an adjudicator
8 could reject a claim of disability simply because a claimant fails to
9 produce evidence supporting the severity of the pain there would be no
10 reason for an adjudicator to consider anything other than medical
11 findings"). Thus, with respect to the ALJ's third through seventh,
12 ninth, tenth, and twelfth reasons, the failure of the objective medical
13 evidence to fully corroborate plaintiff's testimony regarding her
14 subjective symptoms/pain constitutes a valid reason for finding her
15 testimony to lack credibility *only* if the other reasons upon which the
16 ALJ based his credibility finding are supported by substantial evidence
17 in the record. However, as discussed below, the other reasons posited
18 by the ALJ for rejecting plaintiff's testimony are not convincing.

19
20 First, the Court finds that the ALJ's summary of plaintiff's daily
21 activities mischaracterizes plaintiff's statements regarding those
22 activities. See Regennitter v. Comm'r, 166 F.3d 1294, 1297 (9th Cir.
23 1999)("inaccurate characterization of the evidence" constitutes error).
24 The ALJ opined -- referencing plaintiff's "Exertional Daily Activities
25 Questionnaire Since Your Disability Began" and her testimony at the June
26 9, 2009 hearing -- that plaintiff's daily activities include:

27
28 of 12 or more continuous months.

1 "independently caring for her own personal hygiene; shopping; and
2 performing household chores, such as cleaning and laundry; performing
3 yard work; driving a vehicle; attending COD meeting and attending
4 church. (See A.R. 16.) Based on his description, the ALJ concluded
5 that plaintiff's activities are inconsistent with a disabling level of
6 impairment. (*Id.*) However, in the same Questionnaire, plaintiff
7 explained that she does a "small load of laundry," drives "as far as I
8 have to," her "yard work" consists of cleaning "dog poop" and
9 "trim[ming] rose bushes" but it hurts her back and shoulders, and while
10 she performs household chores, "it hurts me a lot and I get very winded
11 and tire easily." (A.R. 201-02.) Plaintiff also testified at the
12 hearing that she has somebody help her "with the groceries out to the
13 car." (A.R. 41.) The ALJ erred in drawing conclusions regarding the
14 extent of plaintiff's activities that failed to take these significant
15 qualifications and limitations into account. See Reddick v. Chater, 157
16 F.3d 715, 722-23 (9th Cir. 1998)(the ALJ erred in developing the
17 evidentiary basis for his finding by not fully accounting for all
18 evidence of record and by inaccurately paraphrasing portions of the
19 record).

20
21 The ALJ also rejected plaintiff's subjective complaints, because
22 "[p]erforming activities such as mowing the lawn, is not consistent with
23 an individual too disabled to perform any work activity." (A.R. 16.)
24 However, plaintiff testified that she dislocated her shoulder while
25 pulling on the lawn mower starter, and thus, "I don't do lawnmowers
26 anymore." (A.R. 40.) The ALJ's finding, therefore, is contrary to the
27 evidence.

1 Moreover, the ALJ does not articulate how plaintiff's daily
2 activities are at odds with her alleged pain, as well as her mental and
3 physical limitations. The ALJ fails to explain how plaintiff's ability
4 to care for herself, grocery shop with the assistance of others, perform
5 light household chores (albeit, becoming exhausted when she does so),
6 and drive to attend meetings and church translates into the ability to
7 perform full-time work. See Vertigan v. Halter, 260 F.3d 1044, 1050
8 (9th Cir. 2001)(noting that the "mere fact that a plaintiff has carried
9 on certain daily activities, such as grocery shopping, driving a car, or
10 limited walking for exercise, does not in any way detract from her
11 credibility as to her overall disability"); Smolen v. Chater, 80 F.3d
12 1273, 1283 n.7 (9th Cir. 1996)("The Social Security Act does not require
13 that claimants be utterly incapacitated to be eligible for benefits, and
14 many home activities may not be easily transferable to a work
15 environment where it might be impossible to rest periodically or take
16 medication."). Therefore, the ALJ's first and second reasons do not
17 constitute clear and convincing reasons for finding plaintiff to be not
18 credible.

19
20 Second, the ALJ's rejection of plaintiff's subjective complaints on
21 the ground that plaintiff "takes hydrochlorothiazide for Meniere's
22 disease and Tegretol for bipolar disorder; [and] there are no reports of
23 complications from either the Meniere's disease or the bipolar disorder
24 and they appear to be well-controlled on medication" (A.R. 17) also is
25 not convincing, because it is not supported by the evidence. Contrary
26 to the ALJ's contention that plaintiff's Meniere's disease and bipolar
27 disease "appear" to be "well-controlled," plaintiff testified that,
28 although she takes hydrochlorothiazide for her left ear, she has

1 "problems with it." (A.R. 33.) In addition, as noted above, plaintiff
2 testified that her ear problem "offsets" her and makes her dizzy,
3 causing her to periodically lose her balance and fall. (A.R. 51.)
4 Further, in response to the ALJ's question, "would you say that your
5 bipolar is fairly well controlled," plaintiff responded, "[it] still
6 gives me problems," including "[u]ncontrollable emotions" and anxiety.
7 (A.R. 34.) Plaintiff also testified that, while she takes Tegretol for
8 her bipolar disorder and "[i]t seems to be doing all right":

9
10 I discussed with my doctor when I just saw him that we might
11 need to do something else. I don't know if it's just added
12 stress of what I've been going through with this right now,
13 but I've been getting manic -- more on the manic side, I've
14 noticed. I haven't been able to sleep.

15
16 (A.R. 33-34.) Moreover, the ALJ does not explain how the purportedly
17 "well-controlled" nature of plaintiff's Meniere's disease and bipolar
18 disease would, in the light of her other impairments, undermine her
19 complaints of pain or would make plaintiff able to perform work-related
20 functions. Accordingly, the ALJ's eighth reason for discrediting
21 plaintiff is unpersuasive.

22
23 Third, the ALJ stated that plaintiff is not fully credible, because
24 "when discussing [plaintiff's] impairments, no physician, neither any of
25 the [plaintiff's] treating physicians or a State Agency physician, ever
26 opined that listing level limitations were ever met or equaled." (A.R.
27 17.) This is not a legally valid reason for rejecting plaintiff's
28 subjective symptom/pain testimony. Whether or not an impairment meets

1 or medically equals a listed impairment has no reasonable bearing upon
2 a claimant's credibility. The fact that a severe impairment does not
3 satisfy a Listing for purposes of the step three analysis does not
4 prevent it from constituting a disabling impairment under the Social
5 Security Act. The ALJ's eleventh reason for discrediting plaintiff is
6 not tenable.

7
8 In sum, the 12 reasons given by the ALJ were not clear and
9 convincing reasons for discrediting plaintiff's testimony. Accordingly,
10 the ALJ's adverse credibility determination constitutes reversible
11 error.

12
13 **III. On Remand, The ALJ Must Reconsider Plaintiff's Ability to**
14 **Perform Her Past Relevant Work And Her Ability To Perform**
15 **"Other Work".**

16
17 Relying on the vocational expert's testimony, the ALJ determined
18 that plaintiff could "perform her past relevant work as a telemarketer,
19 both as she actually performed the duties and as they are generally
20 performed in the national economy, because such work would not be
21 precluded by [plaintiff's] exertional or non-exertional limitations."
22 (A.R. 18.)

23
24 To qualify as "past relevant work," work activity must have, among
25 other things, amounted to "substantial gainful activity." 20 C.F.R. §§
26 404.1565(a), 416.965(a). Plaintiff argues that her limited experience
27 as a telemarketer does not qualify as "past relevant work," because:
28 based on her sparse earnings as a telemarketer, her work as a

1 telemarketer does not meet the "substantial gainful activity" criterion
2 of the "past relevant work" test; and "she did not perform [work as a
3 telemarketer] long enough to adequately learn this job." (Joint Stip.
4 at 16-17.)

5
6 The record reflects that in 2007, plaintiff earned \$212.00 as a
7 telemarketer. (A.R. 123, 220.) According to the Social Security
8 Administration ("SSA") website, the baseline amount for "substantial
9 gainful activity" was \$900 per month in 2007. See
10 <http://www.ssa.gov/OACT/COLA/sga.html>. Thus, as plaintiff's average
11 monthly income in 2007 fell below the requisite baseline amounts for
12 "substantial gainful activity," her past work -- for approximately one
13 month -- as a telemarketer could not have constituted "past relevant
14 work."

15
16 Further, it appears that plaintiff's work as a telemarketer did not
17 last long enough for plaintiff to learn to perform this job, according
18 to the Dictionary of Occupational Titles ("DOT"). (Joint Stip. at 16.)
19 The DOT lists Specific Vocational Preparation ("SVP") ratings for each
20 described occupation. SVP is defined "as the amount of lapsed time
21 required by a typical worker to learn the techniques, acquire the
22 information, and develop the facility needed for average performance in
23 a specific job-worker situation." DOT, app. C, 1991 WL 688702.
24 According to the DOT, a telemarketer has a SVP level of three. DOT
25 299.357-014. A job with a three SVP rating means that a typical worker
26 will require "[o]ver 1 month up to and including 3 months" to learn the
27 skills necessary to perform the job. DOT, app. C, 1991 WL 688702.
28 According to the record, plaintiff performed this job for approximately

1 one month. (A.R. 126.) Thus, on its face, the DOT's SVP rating for a
2 telemarketer appears to be inconsistent with the length of time
3 plaintiff spent at the job.
4

5 The vocational expert did not explain or justify this discrepancy
6 between his testimony and the DOT, and the ALJ failed to inquire about
7 this discrepancy. This failure constitutes error. See Massachi v.
8 Astrue, 486 F.3d 1149, 1153-54 (9th Cir. 2007)(only after determining
9 whether the vocational expert has deviated from the DOT and whether any
10 deviation is reasonable may an ALJ properly rely on the vocational
11 expert's testimony as substantial evidence to support a disability
12 determination). Accordingly, the ALJ's conclusion that plaintiff's
13 telemarketer job was "past relevant work" is not supported by
14 substantial evidence and was error.
15

16 Defendant argues that this error is harmless, because the ALJ also
17 determined that plaintiff could perform "other work" that existed in
18 significant numbers in the national economy, such as "telephone
19 quotations clerk," "pari-mutuel ticket checker," and "order clerk food
20 and beverage." (Joint Stip. at 19.) Plaintiff argues that the ALJ's
21 alternative finding was not supported by substantial evidence, because
22 the ALJ failed to pose a complete and accurate hypothetical to the
23 vocational expert. (Joint Stip. at 17.) As there are several matters
24 that the ALJ needs to review and reconsider on remand, the Court does
25 not address this issue, because the ALJ's conclusion regarding
26 plaintiff's RFC, and thus her capacity to perform "other work," may
27 change. To properly review and reconsider this issue, the ALJ needs to
28 evaluate *all* of plaintiff's mental health records and assess properly

1 what weight, if any, this evidence has on the ALJ's assessment of
2 plaintiff's RFC and credibility. Further, to the extent plaintiff's RFC
3 may need to be reassessed, additional testimony from a vocational expert
4 likely will be required.

5
6 **IV. Remand Is Required.**

7
8 The decision whether to remand for further proceedings or order an
9 immediate award of benefits is within the district court's discretion.
10 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
11 useful purpose would be served by further administrative proceedings, or
12 where the record has been fully developed, it is appropriate to exercise
13 this discretion to direct an immediate award of benefits. *Id.* at 1179
14 ("[T]he decision of whether to remand for further proceedings turns upon
15 the likely utility of such proceedings."). However, where there are
16 outstanding issues that must be resolved before a determination of
17 disability can be made, and it is not clear from the record that the ALJ
18 would be required to find the claimant disabled if all the evidence were
19 properly evaluated, remand is appropriate. *Id.* at 1179-81.

20
21 Remand is the appropriate remedy to allow the ALJ the opportunity
22 to remedy the above-mentioned deficiencies and errors. *See, e.g.,*
23 Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993)(ordering remand so
24 that the ALJ could articulate specific and appropriate findings, if any
25 existed, for rejecting the claimant's subjective pain testimony).

26 ///

27 ///

28 ///

