

1 concluded that plaintiff's RFC did not preclude her from performing her past relevant work as a sales clerk.
2 Therefore, the ALJ found plaintiff not disabled at any time through the date of her decision. [AR 24, 25].

3 **Standard of Review**

4 The Commissioner's denial of benefits should be disturbed only if it is not supported by substantial
5 evidence or is based on legal error. Stout v. Comm'r, Social Sec. Admin., 454 F.3d 1050, 1054 (9th Cir.
6 2006); Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). "Substantial evidence" means "more than
7 a mere scintilla, but less than a preponderance." Bayliss v. Barnhart, 427 F.3d 1211, 1214 n.1 (9th Cir.
8 2005). "It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
9 Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (internal quotation marks omitted). The court is
10 required to review the record as a whole and to consider evidence detracting from the decision as well as
11 evidence supporting the decision. Robbins v. Social Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006);
12 Verduzco v. Apfel, 188 F.3d 1087, 1089 (9th Cir. 1999). "Where the evidence is susceptible to more than
13 one rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld."
14 Thomas, 278 F.3d at 954 (citing Morgan v. Comm'r of Social Sec. Admin., 169 F.3d 595, 599 (9th Cir.
15 1999)).

16 **Discussion**

17 **Credibility finding**

18 Plaintiff contends that the ALJ improperly assessed her subjective symptom testimony. [See JS 3-9].

19 Once a disability claimant produces evidence of an underlying physical or mental impairment that
20 is reasonably likely to be the source of the claimant's subjective symptoms, the adjudicator is required to
21 consider all subjective testimony as to the severity of the symptoms. Moisa v. Barnhart, 367 F.3d 882, 885
22 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.1991) (en banc); see also 20 C.F.R. §§
23 404.1529(a), 416.929(a) (explaining how pain and other symptoms are evaluated). Although the ALJ may
24 then disregard the subjective testimony she considers not credible, she must provide specific, convincing
25 reasons for doing so. Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th Cir. 2001); see also Moisa, 367 F.3d
26 at 885 (stating that in the absence of evidence of malingering, an ALJ may not dismiss the claimant's
27 subjective testimony without providing "clear and convincing reasons"). The ALJ's credibility findings
28 "must be sufficiently specific to allow a reviewing court to conclude the ALJ rejected the claimant's

1 testimony on permissible grounds and did not arbitrarily discredit the claimant’s testimony.” Moisa, 367
2 F.3d at 885. If the ALJ’s assessment of the claimant’s testimony is reasonable and is supported by
3 substantial evidence, it is not the court’s role to “second-guess” it. Rollins v. Massanari, 261 F.3d 853, 857
4 (9th Cir. 2001).

5 In evaluating subjective symptom testimony, the ALJ must consider “all of the evidence presented,”
6 including the following factors: (1) the claimant’s daily activities; (2) the location, duration, frequency, and
7 intensity of pain and other symptoms; (3) precipitating and aggravating factors, such as movement, activity,
8 and environmental conditions; (4) the type, dosage, effectiveness and adverse side effects of any pain
9 medication; (5) treatment, other than medication, for relief of pain or other symptoms; (6) any other
10 measures used by the claimant to relieve pain or other symptoms; and (7) other factors concerning the
11 claimant’s functional restrictions due to such symptoms. See 20 C.F.R. §§ 404.1529(c) (3), 416.929(c)(3);
12 see also Social Security Ruling (“SSR”) 96–7p, 1996 WL 374186, at *3 (clarifying the Commissioner’s
13 policy regarding the evaluation of pain and other symptoms). The ALJ also may employ “ordinary
14 techniques of credibility evaluation,” considering such factors as (8) the claimant’s reputation for
15 truthfulness; (9) inconsistencies within the claimant’s testimony, or between the claimant’s testimony and
16 the claimant’s conduct; (10) a lack of candor by the claimant regarding matters other than the claimant’s
17 subjective symptoms; (11) the claimant’s work record; and (12) information from physicians, relatives, or
18 friends concerning the nature, severity, and effect of the claimant’s symptoms. See Light v. Social Sec.
19 Admin., 119 F.3d 789, 792 (9th Cir. 1997); Fair v. Bowen, 885 F.2d 597, 604 n. 5 (9th Cir. 1989).

20 Because there was no evidence of malingering, the ALJ was required to articulate specific, clear,
21 and convincing reasons to support his negative credibility finding. The ALJ gave the following reasons for
22 rejecting the alleged severity of plaintiff’s subjective symptoms: (1) during a January 2009 examination,
23 Dr. Hsu, plaintiff’s treating physician at Kaiser Permanente, “noted pain out of proportion to exam” and
24 “also noted inconsistent signs and symptoms;” (2) plaintiff “declined epidural shots and indicated that she
25 wanted to be off work for one month because she could not afford the pain management classes;” and (3)
26 although plaintiff testified that she is being treated for depression and her concentration is not good due to
27 pain, an examination by a Kaiser Permanente psychologist who evaluated plaintiff for a pain management
28 program “reported unremarkable mental status examination findings.” [AR 24].

1 The ALJ's first reason for rejecting plaintiff's subjective testimony is not clear and convincing.
2 Although it is true that Dr. Hsu noted "pain out of proportion to exam" as well as "inconsistent signs and
3 symptoms," Dr. Hsu nevertheless doubled the strength of plaintiff's Fentanyl skin patch¹ from 25 to 50
4 micrograms, ordered her off work for an additional month, and referred her for a consultation with a
5 neurosurgeon. [AR 251]. These actions demonstrate that Dr. Hsu found plaintiff's subjective complaints
6 of pain credible. [AR 251]. In addition, as noted by plaintiff, this reference by Dr. Hsu to disproportionate
7 pain is the only such notation in plaintiff's 169 pages of medical records. [JS 4].

8 The ALJ's second reason for doubting plaintiff's veracity, that she refused epidural shots and stated
9 that she could not afford pain management classes, is also not clear and convincing. "[A]lthough a
10 conservative course of treatment can undermine allegations of debilitating pain, such fact is not a proper
11 basis for rejecting the claimant's credibility where the claimant has a good reason for not seeking more
12 aggressive treatment." Carmickle v. Comm'r, Soc. Sec. Admin. 533 F.3d 1155, 1162 (9th Cir. 2008); see
13 also SSR 96-7 (noting that an ALJ "must not draw any inferences about an individual's symptoms and their
14 functional effects from a failure to seek or pursue regular medical treatment without first considering any
15 explanations that the individual may provide"). The record indicates that plaintiff refused epidural
16 injections because she feared adverse side effects. [AR 262]. See Carmickle, 533 F.3d at 1162 (finding that
17 the claimant's failure to take stronger pain medication because of fear of adverse side effects did not
18 undermine the claimant's credibility). In addition, plaintiff's inability to afford pain management classes
19 does not adversely affect her credibility. The denial of disability benefits cannot be based upon a claimant's
20 failure to obtain treatment where the claimant cannot afford treatment.² Orn v. Astrue, 495 F.3d 625, 638
21 (9th Cir. 2007); Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996).

22 Moreover, when Dr. Hsu referred plaintiff to a neurosurgeon who prescribed pain management after
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24 ¹ Fentanyl skin patches are used to relieve moderate to severe pain that is expected to last for
25 some time, that does not go away, and that cannot be treated with other pain medications. U.S. Nat'l
26 Library of Med. and Nat'l Inst. of Health, Medline Plus website, available at
<http://www.nlm.nih.gov/medlineplus/druginfo/meds/a601202.html> (last visited July 2, 2013).

27 ² The ALJ wrote that plaintiff "claimed that she could not afford to pay for the chronic pain
28 management class," suggesting that he did not believe that aspect of her testimony either, but he did
not make a finding, or cite any evidence, regarding her ability to pay.

1 finding that her condition was not surgically correctable, plaintiff was admitted to the Kaiser Permanente
2 Integrated Pain Management Program and actively participated in it for several months. Plaintiff told her
3 Kaiser Permanente providers that she continued to have chronic pain despite compliance with the program.
4 [See AR 250-338].

5 Finally, the ALJ determined that plaintiff was not credible because of alleged inconsistencies
6 between her testimony at the administrative hearing and a psychological evaluation administered by Clifford
7 Taylor, Ph.D. for purposes of evaluating plaintiff's suitability for admission to the pain management
8 program. The ALJ noted as follows:

9 The claimant testified that she is being treated for depression, and her concentration is not
10 good due to her pain (Testimony). However, the evidence documented that, Dr. Taylor, the
11 psychologist who evaluated the claimant for the pain management program, reported
12 unremarkable mental status examination findings, noting that: the claimant was alert and
13 fully oriented; her mood and affect were essentially appropriate to the situation; there was
14 no evidence of abnormal thought processes; and speech was unremarkable [citing AR 262].

15 Thus, the undersigned finds the claimant's credibility is further diminished as a result of
16 these inconsistencies.

17 [AR 24]. Viewing the record as a whole, plaintiff's testimony is not inconsistent with Dr. Taylor's mental
18 status examination of March 18, 2009. Plaintiff testified at the administrative hearing that she is taking
19 medication for depression and that she has difficulty concentrating due to the combination of pain and
20 medication. [AR 84-85]. However, Dr. Taylor's mental status examination did not address whether plaintiff
21 had any difficulty concentrating. Rather, Dr. Taylor merely observed that, at the time of the mental status
22 examination on March 18, 2009, plaintiff was generally alert and oriented and her mood and affect were
23 appropriate to the situation. [AR 262]. Furthermore, Dr. Taylor concluded that plaintiff's presentation was
24 consistent with the pain management program's criteria for "Level 2 chronic pain," and plaintiff was
25 admitted to the program. [AR 263-339]. Thus, it is clear from a review of the record that Dr. Taylor's
26 mental status examination is not a clear and convincing reason for rejecting plaintiff's subjective symptoms
27 testimony.

28 **Medical opinion evidence**

1 Plaintiff contends that in assessing her RFC, the ALJ improperly weighed the medical opinion
2 evidence. [See JS 10-17].

3 The ALJ must provide clear and convincing reasons, supported by substantial evidence in the record,
4 for rejecting an uncontroverted treating source opinion. If contradicted by that of another doctor, a treating
5 or examining source opinion may be rejected for specific and legitimate reasons that are based on substantial
6 evidence in the record. Batson v. Comm’r of Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004);
7 Tonapetyan, 242 F.3d at 1148-1149; Lester v. Chater, 81 F.3d 821, 830-831 (9th Cir. 1995).

8 The ALJ stated that he gave the most weight to the opinion of treating physician Dr. Hsu, and that
9 Dr. Hsu’s “[RFC] assessment was consistent with the objective medical evidence of record.” [AR 22].
10 Specifically, the ALJ noted that Dr. Hsu placed claimant on “light duty” for 35 days in December 2008. The
11 ALJ credited that “light duty” assessment. [AR 23].

12 The record indicates that Dr. Hsu treated plaintiff from April 2008 through January 2009 and ordered
13 plaintiff “off work” from April 29, 2008 until approximately December 11, 2008, when she placed plaintiff
14 on “light duty” work for 35 days. [AR 190, 207, 241, 244, 248]. In January 2009, however, Dr. Hsu
15 ordered plaintiff off work for an additional month, notwithstanding a finding that plaintiff’s subjective pain
16 was out of proportion to examination findings. At that time Dr. Hsu also doubled plaintiff’s Fentanyl patch
17 dosage and referred her to a neurosurgeon, Dr. Everett. In February 2009, based on his examination and
18 “significant” lumbosacral spine x-ray findings, Dr. Everett diagnosed lumbar spondylosis without
19 myelopathy. He opined that plaintiff’s symptoms were not correctable with surgery and prescribed the pain
20 management program. [AR 252-259].

21 Dr. Everett’s opinion is consistent with the opinion of Dr. Sircable, who treated plaintiff at the pain
22 management program. Dr. Sircable signed a letter dated January 21, 2010 stating that plaintiff had chronic,
23 degenerative pain that was not expected to go away. She opined that plaintiff could not sit or stand for more
24 than 20-30 minutes at a time and could not lift or bend. She said that plaintiff had completed a pain
25 management program utilizing interventions other than medication and also was on “chronic daily opiate
26 therapy.” [AR 364].

27 Given that Dr. Hsu only placed plaintiff on “light duty” for about a month and ordered her “off
28 work” for the other nine months or so she treated plaintiff, the ALJ’s reliance on Dr. Hsu’s “well supported”

1 opinion to find plaintiff capable of “light work” was not legitimate, nor was it consistent with the other
2 treating source opinion evidence in the record. Furthermore, Dr. Hsu did not define what she meant by
3 “light duty,” and the record does not permit a reasonable inference that “light duty” is equivalent to the
4 Commissioner’s definition of light work. Therefore, substantial evidence does not support the ALJ’s RFC
5 finding.

6 **Remedy**

7 The choice whether to reverse and remand for further administrative proceedings, or to reverse and
8 simply award benefits, is within the discretion of the court. See Harman v. Apfel, 211 F.3d 1172, 1178 (9th
9 Cir.) (holding that the district court’s decision whether to remand for further proceedings or payment of
10 benefits is discretionary and is subject to review for abuse of discretion), cert. denied, 531 U.S. 1038
11 (2000). The Ninth Circuit has observed that “the proper course, except in rare circumstances, is to remand
12 to the agency for additional investigation or explanation.” Moisa, 367 F.3d at 886 (quoting INS v. Ventura,
13 537 U.S. 12, 16 (2002) (per curiam)). A district court, however,

14 should credit evidence that was rejected during the administrative process and remand for
15 an immediate award of benefits if (1) the ALJ failed to provide legally sufficient reasons for
16 rejecting the evidence; (2) there are no outstanding issues that must be resolved before a
17 determination of disability can be made; and (3) it is clear from the record that the ALJ
18 would be required to find the claimant disabled were such evidence credited.

19 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004) (citing Harman, 211 F.3d at 1178). The Harman test
20 “does not obscure the more general rule that the decision whether to remand for further proceedings turns
21 upon the likely utility of such proceedings.” Harman, 211 F.3d at 1179; see Benecke, 379 F.3d at 593
22 (noting that a remand for further administrative proceedings is appropriate “if enhancement of the record
23 would be useful”).

24 Since it remains to be resolved whether plaintiff could perform alternative work if the ALJ properly
25 evaluated her subjective testimony and the medical opinion evidence of record, the proper remedy in this
26 case is reversal and remand for further administrative proceedings to permit the ALJ to provide plaintiff
27 with a supplemental hearing and to issue a new decision with appropriate findings at each step of the
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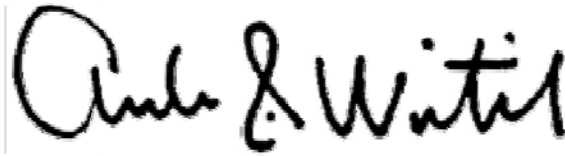
1 sequential evaluation procedure.³

2 **Conclusion**

3 For the reasons stated above, the Commissioner’s decision is **reversed**, and the case is **remanded**
4 for further administrative proceedings consistent with this memorandum of decision.

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6 **IT IS SO ORDERED.**

7
8 July 29, 2013



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11 ANDREW J. WISTRICH
United States Magistrate Judge

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³ This disposition makes it unnecessary to consider plaintiff’s remaining contention that the ALJ
28 erred at step five, and that “remand is necessary to re-evaluate plaintiff’s ability to perform any work.” [JS 19].