



1 Based on the record as a whole and the applicable law, the decision of the  
2 Commissioner is REVERSED AND REMANDED for further proceedings  
3 consistent with this Memorandum Opinion and Order of Remand.

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**  
5 **DECISION**

6 On December 12, 2008, plaintiff filed an application for Supplemental  
7 Security Income benefits. (Administrative Record (“AR”) 126). Plaintiff asserted  
8 that she became disabled on February 1, 1994, due to lumbar disc disease, a panic  
9 disorder, hearing loss, fatigue syndrome, depression, headaches and diabetes. (AR  
10 143). The Administrative Law Judge (“ALJ”) examined the medical record and  
11 heard testimony from plaintiff (who was represented by counsel) and a vocational  
12 expert on July 14, 2010. (AR 22-45).

13 On December 21, 2010, the ALJ determined that plaintiff was not disabled  
14 through the date of the decision. (AR 10-17). Specifically, the ALJ found:  
15 (1) plaintiff suffered from the following severe impairments: chronic fatigue  
16 syndrome by history, diabetes, and lumbar sprain/strain (AR 12); (2) plaintiff’s  
17 impairments, considered singly or in combination, did not meet or medically equal  
18 a listed impairment (AR 12); (3) plaintiff retained the residual functional capacity  
19 to perform the full range of light work (20 C.F.R. § 416.967(b)) (AR 12);  
20 (4) plaintiff could perform her past relevant work as a caterer/helper (AR 16);  
21 (5) alternatively, there are jobs that exist in significant numbers in the national  
22 economy that plaintiff could perform (AR 16-17); and (6) plaintiff’s allegations  
23 regarding her limitations were not credible to the extent they were inconsistent  
24 with the ALJ’s residual functional capacity assessment (AR 14).

25 The Appeals Council denied plaintiff’s application for review. (AR 1).

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1 **III. APPLICABLE LEGAL STANDARDS**

2 **A. Sequential Evaluation Process**

3 To qualify for disability benefits, a claimant must show that the claimant is  
4 unable “to engage in any substantial gainful activity by reason of any medically  
5 determinable physical or mental impairment which can be expected to result in  
6 death or which has lasted or can be expected to last for a continuous period of not  
7 less than 12 months.” Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012)  
8 (quoting 42 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted). The  
9 impairment must render the claimant incapable of performing the work claimant  
10 previously performed and incapable of performing any other substantial gainful  
11 employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094,  
12 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

13 In assessing whether a claimant is disabled, an ALJ is to follow a five-step  
14 sequential evaluation process:

- 15 (1) Is the claimant presently engaged in substantial gainful activity? If  
16 so, the claimant is not disabled. If not, proceed to step two.
- 17 (2) Is the claimant’s alleged impairment sufficiently severe to limit  
18 the claimant’s ability to work? If not, the claimant is not  
19 disabled. If so, proceed to step three.
- 20 (3) Does the claimant’s impairment, or combination of  
21 impairments, meet or equal an impairment listed in 20 C.F.R.  
22 Part 404, Subpart P, Appendix 1? If so, the claimant is  
23 disabled. If not, proceed to step four.
- 24 (4) Does the claimant possess the residual functional capacity to  
25 perform claimant’s past relevant work? If so, the claimant is  
26 not disabled. If not, proceed to step five.
- 27 (5) Does the claimant’s residual functional capacity, when  
28 considered with the claimant’s age, education, and work

1 experience, allow the claimant to adjust to other work that exists in  
2 significant numbers in the national economy? If so, the claimant is not  
3 disabled. If not, the claimant is disabled.

4 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th  
5 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920); see also Molina, 674 F.3d at  
6 1110 (same).

7 The claimant has the burden of proof at steps one through four, and the  
8 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262  
9 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also Burch  
10 v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (claimant carries initial burden of  
11 proving disability).

#### 12 **B. Standard of Review**

13 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of  
14 benefits only if it is not supported by substantial evidence or if it is based on legal  
15 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.  
16 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457  
17 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable  
18 mind might accept as adequate to support a conclusion.” Richardson v. Perales,  
19 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a  
20 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing  
21 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

22 To determine whether substantial evidence supports a finding, a court must  
23 “consider the record as a whole, weighing both evidence that supports and  
24 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.  
25 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d  
26 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming  
27 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that  
28 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

1 **IV. DISCUSSION**

2 Plaintiff contends that the ALJ failed properly to evaluate the credibility of  
3 her subjective complaints. (Plaintiff’s Motion at 4-9). The Court agrees. As the  
4 Court cannot find that the ALJ’s error was harmless, a remand is warranted.

5 **A. Pertinent Law**

6 Questions of credibility and resolutions of conflicts in the testimony are  
7 functions solely of the Commissioner. Greger v. Barnhart, 464 F.3d 968, 972 (9th  
8 Cir. 2006). If the ALJ’s interpretation of the claimant’s testimony is reasonable  
9 and is supported by substantial evidence, it is not the court’s role to “second-  
10 guess” it. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

11 An ALJ is not required to believe every allegation of disabling pain or other  
12 non-exertional impairment. Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007)  
13 (citing Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). If the record establishes  
14 the existence of a medically determinable impairment that could reasonably give  
15 rise to symptoms assertedly suffered by a claimant, an ALJ must make a finding as  
16 to the credibility of the claimant’s statements about the symptoms and their  
17 functional effect. Robbins, 466 F.3d 880 at 883 (citations omitted). Where the  
18 record includes objective medical evidence that the claimant suffers from an  
19 impairment that could reasonably produce the symptoms of which the claimant  
20 complains, an adverse credibility finding must be based on clear and convincing  
21 reasons. Carmickle v. Commissioner, Social Security Administration, 533 F.3d  
22 1155, 1160 (9th Cir. 2008) (citations omitted). The only time this standard does  
23 not apply is when there is affirmative evidence of malingering. Id. The ALJ’s  
24 credibility findings “must be sufficiently specific to allow a reviewing court to  
25 conclude the ALJ rejected the claimant’s testimony on permissible grounds and  
26 did not arbitrarily discredit the claimant’s testimony.” Moisa v. Barnhart, 367  
27 F.3d 882, 885 (9th Cir. 2004).

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1 To find the claimant not credible, an ALJ must rely either on reasons  
2 unrelated to the subjective testimony (*e.g.*, reputation for dishonesty), internal  
3 contradictions in the testimony, or conflicts between the claimant’s testimony and  
4 the claimant’s conduct (*e.g.*, daily activities, work record, unexplained or  
5 inadequately explained failure to seek treatment or to follow prescribed course of  
6 treatment). Orn, 495 F.3d at 636; Robbins, 466 F.3d at 883; Burch, 400 F.3d at  
7 680-81; SSR 96-7p. Although an ALJ may not disregard such claimant’s  
8 testimony solely because it is not substantiated affirmatively by objective medical  
9 evidence, the lack of medical evidence is a factor that the ALJ can consider in his  
10 credibility assessment. Burch, 400 F.3d at 681.

11 **B. Analysis**

12 Here, the ALJ found plaintiff’s subjective symptom testimony “not credible  
13 to the extent [it was] inconsistent with the [ALJ’s] residual functional capacity  
14 assessment.” (AR 14). The ALJ provided several conclusory reasons for  
15 discounting plaintiff’s credibility. The Court finds none of them to be clear and  
16 convincing.

17 First, it appears that the ALJ discounted plaintiff’s credibility because  
18 plaintiff “received conservative sporadic treatment.” (AR 14). The ALJ was  
19 permitted to discounted plaintiff’s credibility based on any unexplained failure to  
20 seek treatment consistent with the alleged severity of her subjective complaints.  
21 See Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991) (en banc) (In assessing  
22 credibility, the ALJ may properly rely on plaintiff’s unexplained failure to request  
23 treatment consistent with the alleged severity of her symptoms.). Here, however,  
24 the ALJ did not specify particular subjective complaints for which plaintiff  
25 allegedly did not seek adequate treatment, nor did the ALJ identify the evidentiary  
26 basis for his finding that plaintiff had failed to seek treatment consistent with her  
27 subjective complaints. The ALJ’s conclusory finding that plaintiff’s treatment for

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1 unspecified impairments had been “conservative” or “sporadic” is not a clear and  
2 convincing reason for discounting plaintiff’s credibility. Moisa, 367 F.3d at 885.

3 Second, the ALJ’s citation to basically all of plaintiff’s medical records, and  
4 conclusory assertion that such records “do not establish an inability to perform  
5 work activity for any twelve month period of time” (AR 14) (citing Exhibits B1F  
6 at 2-29 [AR 209-36]; B2F at 2-7 [AR 238-43]; B3F at 2-57 [AR 245-300]; B10F  
7 at 2-22 [AR 335-55]) does not provide a clear and convincing reason for  
8 discounting plaintiff’s credibility. Moisa, 367 F.3d at 885.

9 Finally, the ALJ also suggests that plaintiff is not fully credible because the  
10 objective medical evidence does not support her subjective complaints (*i.e.*,  
11 “[Plaintiff’s] records do not support the degree of limitations she is alleging or  
12 greater work restrictions beyond those in the residual functional capacity herein.”).  
13 (AR 13, 14). As detailed above, however, the ALJ did not provide any other valid  
14 reason for discounting plaintiff’s credibility. Lack of objective medical evidence  
15 to support subjective symptom allegations alone is not sufficient to discount a  
16 claimant’s credibility.<sup>1</sup> See Burch, 400 F.3d at 681.

17 The Court cannot conclude that the above errors were harmless because it  
18 cannot “confidently conclude that no reasonable ALJ, when fully crediting the  
19 testimony, could have reached a different disability determination.” Stout, 454  
20 F.3d at 1055-56. At the administrative hearing, plaintiff testified, in essence, that  
21 she is sick and weak most of the time, she requires a cane to ambulate, sometimes  
22 she is unable to get out of her bed, she has lost a significant amount of weight, and  
23 her daughter “does most of everything for [her] now.” (AR 33-39). In written

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25 <sup>1</sup>The ALJ noted that the report of a consultative examination of plaintiff reflects that  
26 plaintiff “gave poor effort on her grip strength testing.” (AR 15) (citing Exhibit B11F at 4 [AR  
27 359]). The Court cannot conclude, as defendant suggests (Defendant’s Motion at 6-7), that  
28 plaintiff’s “poor effort” on a single grip test constituted “affirmative” evidence of malingering  
sufficient to justify wholesale rejection of plaintiff’s allegations of multiple and severe subjective  
symptoms.

1 statements she submitted, plaintiff stated, *inter alia*, that (i) she suffers from daily  
2 headaches; (ii) she “can’t do anything anymore” and when she tries to do things  
3 she “get[s] really sick”; (iii) her condition affects her abilities to lift, squat, bend,  
4 stand, reach, walk, sit, kneel, climb stairs, see, hear, remember, complete tasks,  
5 concentrate, understand, and follow directions; (iv) she cannot walk more than a  
6 block before needing to rest; (v) she cannot pay attention for more than 15-30  
7 minutes at a time; (vi) she has panic attacks and cries every day; (vii) she has  
8 unbearable back pain and pain in both knees, and “is in pain all the time”;  
9 (viii) her pain medication helps a little but makes her very sleepy; (ix) she cannot  
10 sit due to her back pain; (x) she can relieve the pain only by taking pain  
11 medication and then laying on her couch; and (xi) she has about 20-25 “bad days”  
12 a month. (AR 159-60, 169-76, 182-83, 195).

13           Therefore, remand is warranted at least so the ALJ can reassess plaintiff’s  
14 credibility.

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1 **V. CONCLUSION<sup>2</sup>**

2 For the foregoing reasons, the decision of the Commissioner of Social  
3 Security is reversed in part, and this matter is remanded for further administrative  
4 action consistent with this Opinion.<sup>3</sup>

5 LET JUDGMENT BE ENTERED ACCORDINGLY.

6 DATED: December 21, 2012

7 /s/

8 Honorable Jacqueline Chooljian  
9 UNITED STATES MAGISTRATE JUDGE

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19 <sup>2</sup>The Court need not, and has not adjudicated plaintiff's other challenges to the ALJ's  
20 decision, except insofar as to determine that a reversal and remand for immediate payment of  
21 benefits would not be appropriate. On remand, however, the ALJ may wish to reevaluate the  
22 report of the Complete Internal Medicine Evaluation of plaintiff, specifically the consultative  
23 examiner's opinion that plaintiff had multiple postural limitations (*i.e.*, plaintiff needed to avoid  
24 frequent bending, stooping, crouching, kneeling, jumping, and walking on uneven terrain) (AR  
362) – limitations which the ALJ neither expressly rejected nor included in his residual  
functional capacity assessment for plaintiff.

25 <sup>3</sup>When a court reverses an administrative determination, "the proper course, except in rare  
26 circumstances, is to remand to the agency for additional investigation or explanation."  
27 Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and  
28 quotations omitted). Remand is proper where, as here, additional administrative proceedings  
could remedy the defects in the decision. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.  
1989); see also Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) (remand is an option  
where the ALJ stated invalid reasons for rejecting a claimant's excess pain testimony).