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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRENDA RENEE MORGAN,
Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,
Defendant.

Case No. ED CV 13-1067-SP

MEMORANDUM OPINION AND
ORDER

I.

INTRODUCTION

On June 18, 2013, plaintiff Brenda Morgan filed a complaint against the Commissioner of Social Security Administration (“Commissioner”), seeking a review of a denial of a Supplemental Security Income (“SSI”). Both plaintiff and defendant have consented to proceed for all purposes before the assigned Magistrate Judge pursuant to 28 U.S.C. § 636(c). The court deems the matter suitable for adjudication without oral argument.

Plaintiff presents one disputed issue: whether the Administrative Law Judge (“ALJ”) improperly discounted plaintiff’s credibility.

1 Having carefully studied, inter alia, the parties’s written submissions, the
2 Administrative Record (“AR”), and the decision of the ALJ, the court concludes
3 that, as detailed herein, the ALJ erred in discounting plaintiff’s credibility, and
4 such an error is not harmless as the ALJ consequently did not proceed beyond step
5 two. Therefore, the court remands this matter to the Commissioner in accordance
6 with the principles and instructions enunciated in this Memorandum Opinion and
7 Order.

8 II.

9 FACTUAL AND PROCEDURAL BACKGROUND

10 Plaintiff, who was forty-six years old on her October 31, 2007 alleged
11 disability onset date, is a high school graduate. AR at 27, 129. Plaintiff has past
12 relevant work experience as a sample board maker and a dental assistant. AR at
13 134.

14 On October 20, 2010 plaintiff applied for SSI due to depression, anxiety,
15 high blood pressure, and high cholesterol. AR at 115, 129, 133. Plaintiff,
16 subsequent to the application, allegedly developed herpetic whitlow.¹ See AR at
17 258.

18 On June 8, 2012, plaintiff, represented by council, appeared and testified at
19 a hearing before the ALJ. AR at 23-40. Aida Worthington, a vocational expert,
20 also testified. AR at 40-43.

21 Applying the well known five-step sequential evaluation process, the ALJ
22 found, at step one, that the plaintiff has not engaged in substantial gainful activity
23 since her October 20, 2010 application date. AR at 12.

24 At step two, the ALJ found plaintiff does not have a severe impairment or
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26 ¹ Herpetic whitlow is a type of herpes effecting the finger digits. The disease
27 is highly contagious and can manifest itself as lesions appearing as small blisters,
28 which eventually open up and become scabbed over. See generally Elsevier
Saunders, *Dorland’s Illustrated Medical Dictionary* 2080 (3rd ed. 2012)

1 combination of impairments that limits (or can be expected to limit) plaintiff's
2 ability to work for twelve consecutive months. AR at 12-16. Accordingly, the
3 ALJ did not proceed beyond step two and determined plaintiff was not disabled.
4 AR at 16.

5 Plaintiff filed a timely application for review, which was denied by the
6 Appeals Council. AR at 1-3, 6. The ALJ's decision stands as the final decision of
7 the Commissioner.

8 III.

9 STANDARD OF REVIEW

10 This court is empowered to review decisions by the Commissioner to deny
11 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security
12 Administration must be upheld if they are free of legal error and supported by
13 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001)
14 (as amended). But if the court determines that the ALJ's findings are based on
15 legal error or are not supported by substantial evidence in the record, the court
16 may reject the findings and set aside the decision to deny benefits. *Aukland v.*
17 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d
18 1144, 1147 (9th Cir. 2001).

19 "Substantial evidence is more than a mere scintilla, but less than a
20 preponderance." *Aukland*, 257 F.3d at 1035. Substantial evidence is such
21 "relevant evidence which a reasonable person might accept as adequate to support
22 a conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276
23 F.3d at 459. To determine whether substantial evidence supports the ALJ's
24 finding, the reviewing court must review the administrative record as a whole,
25 "weighing both the evidence that supports and the evidence that detracts from the
26 ALJ's conclusion." *Mayes*, 276 F.3d at 459. The ALJ's decision "cannot be
27 affirmed simply by isolating a specific quantum of supporting evidence."
28 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th

1 Cir. 1998)). If the evidence can reasonably support either affirming or reversing
2 the ALJ's decision, the reviewing court "may not substitute its judgment for that
3 of the ALJ." *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.
4 1992)).

5 IV.

6 DISCUSSION

7 A. The ALJ Improperly Discounted Plaintiff's Credibility

8 Plaintiff contends that the reasons provided by the ALJ for discounting
9 plaintiff's credibility are not clear and convincing. Pl. Mem. at 11-20. The court
10 agrees.

11 The ALJ must make specific credibility findings, supported by the record.
12 Social Security Ruling ("SSR") 96-7p.² To determine whether testimony
13 concerning symptoms is credible, the ALJ engages in a two-step analysis.
14 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, the ALJ
15 must determine whether a claimant produced objective medical evidence of an
16 underlying impairment "which could reasonably be expected to produce the pain
17 or other symptoms alleged." *Id.* at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d
18 341, 344 (9th Cir. 1991) (en banc)). Second, if there is no evidence of
19 malingering, an "ALJ can reject the claimant's testimony about the severity of her
20 symptoms only by offering specific, clear and convincing reasons for doing so."
21 *Smolen v. Chater*, 80 F.3d 1273, 1281(9th Cir. 1996); *Benton v. Barnhart*, 331
22 F.3d 1030, 1040 (9th Cir. 2003). The ALJ may consider several factors in

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24 ² "The Commissioner issues Social Security Rulings to clarify the Act's
25 implementing regulations and the agency's policies. SSRs are binding on all
26 components of the SSA. SSRs do not have the force of law. However, because
27 they represent the Commissioner's interpretation of the agency's regulations, we
28 give them some deference. We will not defer to SSRs if they are inconsistent with
the statute or regulations." *Holohan v. Massanari*, 246 F.3d 1195, 1203 n.1 (9th
Cir. 2001) (internal citations omitted).

1 weighing a claimant’s credibility, including: (1) ordinary techniques of credibility
2 evaluation such as a claimant’s reputation for lying; (2) the failure to seek
3 treatment or follow a prescribed course of treatment; and (3) a claimant’s daily
4 activities. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Bunnell*,
5 947 F.2d at 346-47.

6 At the first step, the ALJ found that plaintiff’s medically determinable
7 impairments could reasonably be expected to cause the symptoms alleged. AR at
8 13. At the second step, because the ALJ did not find any evidence of
9 malingering, the ALJ was required to provide clear and convincing reasons for
10 discounting plaintiff’s credibility. Here, the ALJ discounted plaintiff’s credibility
11 because: (1) plaintiff made contradictory statements regarding her ability to wet
12 her hands; (2) plaintiff made contradictory statements regarding her daily activity;
13 (3) plaintiff applied for work subsequent to her alleged onset of disability; and (4)
14 the medical evidence does not support the severity of the symptoms claimed by
15 plaintiff with regard to her herpetic whitlow. AR 13-14.

16 **1. Plaintiff’s Inability to Wet Her Hands**

17 The ALJ’s first proffered reason for finding plaintiff less than credible was
18 her ostensibly inconsistent statements regarding the ability to wet her hands. AR
19 at 13-14. Specifically, plaintiff noted she could not wet her hands, but later
20 admitted to being able to shower to help alleviate her pain. *Id.*

21 Plaintiff testified she could not do the dishes because she could not wet her
22 hands, as wetting her hands causes her herpetic whitlow to flare. AR at 34.
23 Plaintiff testified she could shower and this would help alleviate the pain
24 temporarily, but in the long term water made the condition worse. *Id.* These two
25 statements are not contradictory. Plaintiff noted the short term “softening” of her
26 hands when they get wet gives relief temporarily, but eventually results in her
27 overall condition worsening. *Id.* Accordingly, these two statements do not
28 constitute a contradiction. As such the ALJ’s citation to these statements as

1 contradictory does not constitute a clear and convincing reason for discounting
2 plaintiff's credibility.

3 **2. Daily Activities**

4 The ALJ's second proffered reason for discounting plaintiff's credibility is
5 her inconsistent statements regarding her daily activity. AR at 14. Specifically,
6 the ALJ notes plaintiff testified her daily activities were limited to taking
7 medication and sitting outside, but a state medical consultant indicated she could
8 participate in chores such as vacuuming, dusting, and washing dishes.³ AR at 14.

9 There are three problems with the ALJ's finding in this regard. First, the
10 question posed at the hearing to which plaintiff responded was, "How do you
11 spend a typical day?" AR at 39. Plaintiff responded her typical day included
12 taking medication, going outside, and taking care of her dog. *Id.* Plaintiff was not
13 asked to list all of her daily activities. As such, plaintiff's response does not
14 constitute a contradiction of other statements about her daily activities that she
15 may have given to the state examiner.

16 Second and relatedly, elsewhere in her testimony plaintiff also did not
17 address her ability to perform chores like vacuuming or dusting. She indicated her
18 primary concerns were with bathroom and food related activities, as her disease is
19 highly contagious. AR 33-34. Plaintiff never indicated her ability to perform
20 chores beyond her aversion to wetting her hands. Plaintiff never offered a
21 statement to the contrary that she could not vacuum or dust. Thus, plaintiff's
22 testimony was not contradictory in this regard.

23 Finally, both of the state consultants' opinions used by the ALJ to discredit
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25 ³ The court also notes plaintiff's objection that, while the consultant's
26 findings appear to be based in part on a conversation with plaintiff, it is unclear
27 whether this conversation actually took place. Pl. Mem. at 15; *see* AR at 242. The
28 agency activity log only indicates a message left on plaintiff's answering machine
on this date, not a conversation. AR at 140.

1 plaintiff on the basis of her daily activities were taken before the medical evidence
2 of her herpetic whitlow in 2012. *See* AR at 242-43, 252-53. Both consultants
3 reviewed the records from 2008 until 2011. *Id.* As plaintiff’s evidence of herpetic
4 whitlow came in 2012, the consultants’ opinions would naturally not include the
5 limitations imposed by this condition. Accordingly, the ALJ erred on relying on
6 them to show plaintiff’s current daily activities are beyond what she indicated.

7 **3. Application for Work**

8 The ALJ noted that plaintiff applied for work, suggesting she believed her
9 abilities allowed her some capacity for work. AR at 14. In particular, at the
10 hearing plaintiff testified she had applied for work, but gave no details and the
11 ALJ did not further question her about this. AR at 26-27.

12 Seeking employment after the alleged onset of disability date may be a
13 factor in an ALJ’s credibility determination. *See Bray v. Comm’r of Soc. Sec.*
14 *Admin.*, 554 F.3d 1219 (9th Cir. 2009); *Macri v. Chater*, 93 F.3d 540, 544 (9th
15 Cir. 1996). But in both *Bray* and *Macri*, there was some indication of the
16 exertional levels required by the positions or how work would affect the plaintiffs’
17 alleged disabilities. Here, there is no indication the type of work plaintiff applied
18 for, how it would affect her alleged impairments, or whether it would constitute
19 substantial gainful activity. Without more, this is of little value to the ALJ’s
20 credibility determination. *See Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1978)
21 (“A willingness to try to engage in rehabilitative activity. . . is clearly not
22 probative of a present ability to engage in such activity.”) As such, it is not a clear
23 and convincing reason to discount plaintiff’s credibility.

24 **4. Insufficiency of the Medical Evidence**

25 The ALJ contends plaintiff’s alleged symptoms are more severe than would
26 be expected in light of the objective medical evidence. Specifically, the ALJ
27 asserts the record of plaintiff’s herpetic whitlow is extremely sparse, and contained
28 only one report of a rash in 2011. AR at 14. This is not accurate. On April 20,

1 2012, plaintiff was assessed by a High Desert Community Care physician as
2 having herpetic whitlow. AR at 258. The records also indicate that plaintiff
3 began some treatment for this condition. AR at 259-61. Nothing in the record
4 contradicts this assessment and treatment.

5 In any event, lack of objective medical evidence cannot be the sole basis for
6 discounting plaintiff's credibility. Although lack of objective medical evidence
7 may be one factor used to evaluate credibility, an ALJ "may not reject a claimant's
8 subjective complaints based solely on a lack of objective medical evidence to fully
9 corroborate the alleged severity of pain." *Bunnell*, 947 F.2d at 345; *see also*
10 *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001). Here, the ALJ provided
11 no other clear and convincing reasons for discounting plaintiff's credibility. As
12 such, even if the medical record may fairly be read as not supporting the severity
13 of the symptoms plaintiff claimed to have suffered, that was not by itself a clear
14 and convincing reason to discount plaintiff's credibility.

15 **B. The Errors Are Not Harmless As the ALJ Did Not Proceed Beyond Step**

16 **Two**

17 At step two, the ALJ found plaintiff's herpetic whitlow to be a medically
18 determinable impairment, but found it was not a severe impairment that
19 significantly limited plaintiff's ability to work. AR at 12. The ALJ found
20 plaintiff's herpetic whitlow was not a severe impairment because he found the
21 symptoms were not as severe as plaintiff claimed. AR at 13-14. Thus, the ALJ's
22 credibility determination was critical to his step two determination. As the ALJ
23 consequently did not proceed beyond the *de minimis* threshold of step two, his
24 errors in discounting plaintiff's credibility cannot be considered harmless.

25 At step two, the Commissioner considers the severity of the claimant's
26 impairment. 20 C.F.R. § 416.920 (a)(4)(ii). "[T]he step-two inquiry is a *de*
27 *minimis* screening device to dispose of groundless claims." *Smolen*, 80 F.3d at
28 1290. The purpose is to identify "at an early stage those claimants whose medical

1 impairments are so slight that it is unlikely they would be disabled even if their
2 age, education, and experience were taken into account.” *Bowen v. Yuckert*, 482
3 U.S. 137, 153 (1987).

4 An impairment is “not severe” when the impairment would have no more
5 than a minimal effect on a claimant’s ability to work.⁴ *Webb v. Barnhart*, 433 F.3d
6 683, 686-87 (9th Cir. 2005) (“[A]n ALJ may find that a claimant lacks a medically
7 severe impairment or combination of impairments only when his conclusion is
8 ‘clearly established by medical evidence.’”); SSR 85-28. “[A]pplying our normal
9 standard of review to the requirements of step two, we must determine whether the
10 ALJ had substantial evidence to find that the medical evidence clearly established
11 that [the claimant] did not have a medically severe impairment or combination of
12 impairments.” *Webb*, 433 F.3d at 687. In addition, “if an adjudicator is unable to
13 determine clearly the effect of an impairment or combination of impairments on
14 the individual’s ability to do basic work activities, the sequential evaluation
15 should not end with the not severe evaluation step.” *Id.* (quoting SSR 85-28)
16 (brackets omitted).

17 Here, plaintiff produced sufficient evidence – including objective medical
18 records regarding her herpetic whitlow, and subjective testimony discredited in
19 error – to suggest her claims are not “groundless” under the *de minimis* standard of
20 step two. While the ALJ correctly notes the medical records are “incomplete,”
21 they are sufficient to pass the *de minimis* standard. *See Webb*, 433 F.3d at 687
22 (“Although the medical record paints an incomplete picture [two clinical visits
23 years apart]. . . it includes evidence of problems sufficient to pass the *de minimis*
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25 ⁴ “Basic work activities’ are defined as including such capabilities as use of
26 judgment; responding appropriately to supervision, co-workers and usual work
27 situations; and dealing with changes in a routine work setting.” *Edlund v.*
28 *Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001) (as amended) (internal citations
omitted).

1 threshold of step two.”). Plaintiff’s objective evidence is therefore sufficient to
2 pass this low threshold.

3 Furthermore, if the ALJ considered the medical evidence incomplete, he had
4 a duty to supplement the record before rejecting plaintiff’s credibility at step two.
5 Although a claimant bears the burden at step two, “the ALJ [has] an affirmative
6 duty to supplement [a claimant’s] medical record, to the extent that it was
7 incomplete, before rejecting [a claimant’s] petition at so early a stage in the
8 analysis.” *Id.* Here, plaintiff’s record was sufficiently incomplete or ambiguous to
9 warrant supplementation or clarification. *See Tonapetyan*, 242 F.3d at 1150
10 (“Ambiguous evidence . . . triggers the ALJ’s duty to conduct an appropriate
11 inquiry.”) (internal quotation and citation omitted).

12 Because there was not substantial evidence to show that plaintiff’s claim
13 was groundless, the ALJ should have supplemented or clarified the record, and
14 continued the five-step sequential analysis beyond step two to determine whether
15 plaintiff was disabled. *See Webb*, 433 F.3d at 688. Accordingly, the ALJ erred in
16 ignoring objective medical evidence of record, and finding plaintiff less than
17 credible at step two.

18 V.

19 REMAND IS APPROPRIATE

20 The decision whether to remand for further proceedings or reverse and
21 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
22 888 F.2d 599, 603 (9th Cir. 1989). Where no useful purpose would be served by
23 further proceedings, or where the record has been fully developed, it is appropriate
24 to exercise this discretion to direct an immediate award of benefits. *See Benecke*
25 *v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d
26 1172, 1179-80 (9th Cir. 2000) (decision whether to remand for further proceedings
27 turns upon their likely utility). But where there are outstanding issues that must be
28 resolved before a determination can be made, and it is not clear from the record

1 that the ALJ would be required to find a plaintiff disabled if all the evidence were
2 properly evaluated, remand is appropriate. *See Benecke*, 379 F.3d at 595-96;
3 *Harman*, 211 F.3d at 1179-80.

4 Here, as set out above, remand is required because the ALJ erred at step two
5 in plaintiff's credibility determination. On remand, the ALJ shall again consider
6 plaintiff's testimony and either credit it or provide clear and convincing reasons
7 supported by substantial evidence for rejecting it. In addition, the ALJ shall
8 supplement the medical record to the extent necessary. The ALJ shall then proceed
9 through steps two, three, four, and five as necessary to determine whether plaintiff
10 is under a disability as defined in the Social Security Act.

11 **VI.**

12 **CONCLUSION**

13 IT IS THEREFORE ORDERED that Judgment shall be entered
14 REVERSING the decision of the Commissioner denying benefits, and
15 REMANDING the matter to the Commissioner for further administrative action
16 consistent with this decision.

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18
19 DATED: June 23, 2014



20 SHERI PYM
United States Magistrate Judge