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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

ROBERT G. BROWN,	)	NO. ED CV 14-101-E
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM OPINION</b>
	)	
CAROLYN W. COLVIN, ACTING	)	<b>AND ORDER OF REMAND</b>
COMMISSIONER OF SOCIAL SECURITY,	)	
	)	
Defendant.	)	
	)	
	)	

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS  
HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
judgment are denied and this matter is remanded for further  
administrative action consistent with this Opinion.

**PROCEEDINGS**

Plaintiff filed a complaint on January 15, 2014, seeking review  
of the Commissioner's denial of disability benefits. The parties  
filed a consent to proceed before a United States Magistrate Judge on  
March 1, 2014. Plaintiff filed a motion for summary judgment on

1 August 1, 2014. Defendant filed a motion for summary judgment on  
2 October 2, 2014. The Court has taken the motions under submission  
3 without oral argument. See L.R. 7-15; Order, filed January 27, 2014.  
4

5 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**  
6

7 Plaintiff, a former fire alarm installer, asserts disability  
8 since July 17, 2009, based primarily on alleged ankylosing  
9 spondylitis<sup>1</sup> (Administrative Record ("A.R.") 38, 54, 124-25, 145-46).  
10 Plaintiff testified, "I have chronic pain throughout my back; lower  
11 back and upper back pain; my neck" (A.R. 40). Plaintiff claimed he  
12 could move his neck only a few degrees and also claimed his back is  
13 severely restricted in its range of motion (A.R. 40-41). Plaintiff  
14 reportedly is unable to use his hands to perform tasks for any length  
15 of time (A.R. 43). Plaintiff reportedly is often fatigued, must lie  
16 down during the day, and is "constantly out of breath" (A.R. 45-47).  
17 Plaintiff allegedly suffers these disabling symptoms despite having  
18 received medical treatments including injections with Humira,  
19 injections with steroids, injections with Toradol, and the use of  
20 prescription muscle relaxants and narcotic pain medication such as  
21 Vicodin (A.R. 161, 257-58, 297, 300, 304, 347).  
22

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23 <sup>1</sup> Ankylosing spondylitis is "a progressive, degenerative  
24 disease of the spine and joints which destroys cartilage and  
25 causes bones to fuse together." Liebig-Grigsby v. United States,  
26 2003 WL 1090272, at \*11 (N.D. Ill. 2003); see also Campbell v.  
27 Astrue, 2011 WL 90312, at \*3 n.10 (E.D. Cal. Jan. 7, 2011)  
28 ("Ankylosing spondylitis is a long-term disease that causes  
inflammation of the joints between the spinal bones, and the  
joints between the spine and pelvis. It eventually causes the  
affected spinal bones to join together") (citations and  
quotations omitted).

1 An Administrative Law Judge ("ALJ") found Plaintiff has severe  
2 "ankylosing spondylosis" which renders Plaintiff "unable to perform  
3 any past relevant work" (A.R. 13, 17). The ALJ also found, however,  
4 that Plaintiff retains the residual functional capacity to perform  
5 certain medium work, including the jobs of "kitchen helper" and  
6 "assembler" (A.R. 15-19).

7  
8 In deeming Plaintiff not disabled, the ALJ determined that  
9 Plaintiff's testimony regarding his pain and functional limitations  
10 was less than fully credible (A.R. 16-17). The ALJ stated only two  
11 reasons for this credibility determination. According to the ALJ,  
12 (1) Plaintiff's allegations of pain severity and functional  
13 limitations "are greater than expected in light of the objective  
14 [medical] evidence of record" (A.R. 17); and (2) "Although the  
15 claimant has received treatment for the allegedly disabling  
16 impairment, that treatment has been essentially routine and/or  
17 conservative in nature. There is no record of hospital admission or  
18 undergone [sic] aggressive treatment such as surgery for his back and  
19 neck pain. The lack of more aggressive treatment or surgical  
20 intervention suggests the claimant's symptoms and limitations were not  
21 as severe as he alleged" (A.R. 16-17). The Appeals Council denied  
22 review (A.R. 1-3).

23  
24 **STANDARD OF REVIEW**

25  
26 Under 42 U.S.C. section 405(g), this Court reviews the  
27 Administration's decision to determine if: (1) the Administration's  
28 findings are supported by substantial evidence; and (2) the

1 Administration used correct legal standards. See Carmickle v.  
2 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,  
3 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner  
4 of Social Sec. Admin., 682 F.3d 1157, 1161 (9th Cir. 2012).  
5 Substantial evidence is "such relevant evidence as a reasonable mind  
6 might accept as adequate to support a conclusion." Richardson v.  
7 Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted);  
8 see Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

## 10 DISCUSSION

11  
12 When an ALJ finds that a claimant's medically determinable  
13 impairments reasonably could be expected to cause the symptoms  
14 alleged, the ALJ may not discount the claimant's testimony regarding  
15 the severity of the symptoms without making "specific, cogent"  
16 findings, supported in the record, to justify discounting such  
17 testimony. Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995); see  
18 also Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990); Varney  
19 v. Secretary, 846 F.2d 581, 584 (9th Cir. 1988).<sup>2</sup> Generalized,  
20 conclusory findings do not suffice. See Moisa v. Barnhart, 367 F.3d  
21 882, 885 (9th Cir. 2004) (the ALJ's credibility findings "must be

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23 <sup>2</sup> In the absence of a finding of "malingering," or at  
24 least evidence of "malingering," most recent Ninth Circuit cases  
25 have applied the "clear and convincing" standard. See, e.g.,  
26 Ghanim v. Colvin, 763 F.3d 1154, 1163 n.9 (9th Cir. 2014); Molina  
27 v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012); Taylor v.  
28 Commissioner of Social Security Admin., 659 F.3d 1228, 1234 (9th  
Cir. 2011); Ballard v. Apfel, 2000 WL 1899797, at \*2 n.1 (C.D.  
Cal. Dec. 19, 2000) (collecting cases). In the present case, the  
ALJ's findings are insufficient under either standard, so the  
distinction between the two standards (if any) is academic.

1 sufficiently specific to allow a reviewing court to conclude the ALJ  
2 rejected the claimant's testimony on permissible grounds and did not  
3 arbitrarily discredit the claimant's testimony") (internal citations  
4 and quotations omitted); Holohan v. Massanari, 246 F.3d 1195, 1208  
5 (9th Cir. 2001) (the ALJ must "specifically identify the testimony  
6 [the ALJ] finds not to be credible and must explain what evidence  
7 undermines the testimony"); Smolen v. Chater, 80 F.3d 1273, 1284 (9th  
8 Cir. 1996) ("The ALJ must state specifically which symptom testimony  
9 is not credible and what facts in the record lead to that  
10 conclusion."); see also Social Security Ruling 96-7p.

11  
12 In the present case, the ALJ found that Plaintiff's "medically  
13 determinable impairment could reasonably be expected to cause the  
14 alleged symptoms. . . ." (A.R. 17). The ALJ discounted the  
15 credibility of Plaintiff's testimony regarding the severity of the  
16 symptoms for two stated reasons: (1) the "objective [medical] evidence  
17 of record"; and (2) the "essentially routine and/or conservative"  
18 nature of Plaintiff's medical treatment (A.R. 16-17). These stated  
19 reasons do not suffice on the present record.

20  
21 A lack of objective medical evidence to support the alleged  
22 severity of a claimant's symptomatology "can be a factor" in rejecting  
23 a claimant's credibility, but cannot "form the sole basis." See Burch  
24 v. Barnhart, 400 F.3d 676, 681 (2005). Therefore, the alleged lack of  
25 supporting objective medical evidence cannot by itself justify the  
26 ALJ's credibility determination in the present case. See id.

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1 A "conservative" course of treatment may sometimes properly  
2 discredit a claimant's allegations of disabling symptoms. See, e.g.,  
3 Parra v. Astrue, 481 F.3d 742, 750-51 (9th Cir. 2007), cert. denied,  
4 552 U.S. 1141 (2008) (treatment with over-the-counter pain medication  
5 is "conservative treatment" sufficient to discredit a claimant's  
6 testimony regarding allegedly disabling pain). In the present case,  
7 however, it is uncertain whether the ALJ accurately characterized  
8 Plaintiff's treatment as "essentially routine and/or conservative in  
9 nature." See, e.g., Aguilar v. Colvin, 2014 WL 3557308, at \*8 (C.D.  
10 Cal. July 18, 2014) ("there is evidence in the record that Plaintiff  
11 has been prescribed narcotic pain medications, such as Vicodin . . .  
12 It would be difficult to fault Plaintiff for overly conservative  
13 treatment when he has been prescribed strong narcotic pain  
14 medications"); Brunkalla-Saspa v. Colvin, 2014 WL 1095958, at \*1 (C.D.  
15 Cal. March 18, 2014) ("[T]he ALJ found that Plaintiff had been  
16 conservatively treated with Vicodin. . . . But Vicodin qualifies as  
17 strong medication to alleviate pain") (citations and quotations  
18 omitted); Harrison v. Astrue, 2012 WL 527419, at \*7 (D. Or. Feb. 16,  
19 2012) (nerve blocks and multiple steroid injections "certainly not  
20 conservative"); but see Nash v. Astrue, 2012 WL 6700582, at \*9 (C.D.  
21 Cal. Dec. 21, 2012) (declining to "second guess" the ALJ's  
22 characterization as "routine conservative treatment" the prescribing  
23 of pain medicine, muscle relaxers and Humira injections for ankylosing  
24 spondylitis).

25  
26 Regardless of the proper characterization of the treatment  
27 Plaintiff has received, the critical question here is whether  
28 substantial evidence supports the ALJ's inference that "[t]he lack of

1 more aggressive treatment or surgical intervention suggests  
2 [Plaintiff's] symptoms and limitations were not as severe as he  
3 alleged" (A.R. 17). On the present record, this question must be  
4 answered in the negative.

5  
6 The record does not contain any medical evidence that surgical  
7 intervention or other "aggressive" treatment would be an appropriate  
8 or effective response to Plaintiff's claimed symptomatology.  
9 Plaintiff's treating rheumatologist, who opined that Plaintiff is  
10 disabled, has not prescribed surgery or any other treatment Plaintiff  
11 has failed to undergo (A.R. 255-56, 348-52). Neither has any other  
12 physician. "A claimant cannot be discredited for failing to pursue  
13 non-conservative treatment options where none exist." Devee v.  
14 Colvin, 2014 WL 4220909, at \*11 (D. Or. Aug. 25, 2014); see Condon v.  
15 Astrue, 780 F. Supp. 2d 831, 837 (N.D. Iowa 2011) (reasoning that the  
16 absence from a lengthy medical record of any recommendation for "more  
17 aggressive treatment would seem to suggest no more aggressive  
18 treatment options exist").

19  
20 Defendant's motion cites an internet article while arguing that  
21 "total joint replacement" can sometimes be a "treatment option" for  
22 ankylosing spondylitis (Defendant's motion at 9 n.4). The cited  
23 article, which is not part of the administrative record, indicates  
24 that "[t]he most commonly replaced joints are the knee and hip." See  
25 www.niams.nih.gov/Health\_Info/Ankylosing\_spondylitis/. Plaintiff  
26 complains of shortness of breath and restrictions in the movement of  
27 his neck, back and hands. "Total joint replacement" presumably would  
28 not be a treatment option for any of these claimed symptoms. Even if

1 this Court could consider evidence outside the administrative record  
2 (which it cannot),<sup>3</sup> the cited article provides no substantial evidence  
3 that "surgery for [Plaintiff's] back and neck pain" or other "more  
4 aggressive treatment" would be an appropriate or effective medical  
5 response to Plaintiff's claimed symptoms (A.R. 16-17). The above-  
6 quoted speculation of the ALJ cannot substitute for medical evidence,  
7 and the speculation cannot support the inference on which the validity  
8 of the ALJ's credibility determination depends. See Day v.  
9 Weinberger, 522 F.2d at 1156 (an ALJ who is not qualified as a medical  
10 expert cannot make "his own exploration and assessment as to [the]  
11 claimant's physical condition"); see also Rohan v. Chater, 98 F.3d  
12 966, 970-71 (7th Cir. 1996) (ALJ may not rely on his or her own lay  
13 opinion regarding medical matters); Ferguson v. Schweiker, 765 F.2d  
14 31, 37 (3d Cir. 1995) (same); cf. Rudder v. Colvin, 2014 WL 3773565,  
15 at \*12 (N.D. Ill. July 30, 2014) ("The ALJ may be correct that  
16 disabling limitations from multiple sclerosis would result in more  
17 frequent treatment or need for medication. However, the ALJ must  
18 include evidence to support such a conclusion in his opinion because  
19 he is not qualified, on his own, to make such determinations")  
20 (citations and quotations omitted).

21  
22 In sum, Plaintiff's failure to receive "more aggressive treatment  
23 or surgical intervention" is an insufficient reason for discounting

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24  
25 <sup>3</sup> Absent circumstances justifying a "sentence six"  
26 remand, the District Court is confined to a review of the  
27 evidence contained within the administrative record. See 42  
28 U.S.C. § 405(g); Mayes v. Massanari, 276 F.3d 453, 461-63 (9th  
Cir. 2001); cf. Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir.  
1975) (ALJ should not go outside the record to consult medical  
textbooks).



1 Plaintiff's credibility. See Matamoros v. Colvin, 2014 WL 1682062, at  
2 \*4 (C.D. Cal. April 28, 2014) ("The ALJ cannot fault [the claimant]  
3 for failing to pursue non-conservative treatment options if none  
4 exist") (citation omitted); Clark v. Astrue, 2013 WL 254065, at \*12  
5 (D. Ariz. Jan. 23, 2013) ("There is no evidence in the record that  
6 Plaintiff was prescribed a TENS unit, cane, walker, wheelchair, or  
7 directed to use a heating pad and thus the ALJ's speculation that  
8 Plaintiff should have used those or other 'treatment modalities' is  
9 not a clear and convincing reason for discounting her credibility");  
10 Townson v. Astrue, 2010 WL 2077187, at \*15 (D. Kan. 2010) ("[O]n this  
11 record, it is speculative for the ALJ to assume that if claimant were  
12 as disabled as he claims, his doctors would have ordered more  
13 aggressive treatment. . . . This comment assumes that plaintiff's  
14 doctors disbelieved plaintiff's pain complaints, when the record does  
15 not show that they did") (citations and quotations omitted).

16  
17 Because the circumstances of this case suggest that further  
18 administrative review could remedy the ALJ's errors, remand is  
19 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see  
20 Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) ("Connett")  
21 (remand is an option where the ALJ fails to state sufficient reasons  
22 for rejecting a claimant's excess symptom testimony); but see Orn v.  
23 Astrue, 495 F.3d 625, 640 (9th Cir. 2007) (citing Connett for the  
24 proposition that "[w]hen an ALJ's reasons for rejecting the claimant's  
25 testimony are legally insufficient and it is clear from the record  
26 that the ALJ would be required to determine the claimant disabled if  
27 he had credited the claimant's testimony, we remand for a calculation  
28 of benefits") (quotations omitted); see also Ghanim v. Colvin, 763

1 F.3d at 1166 (remanding for further proceedings where the ALJ failed  
2 to state sufficient reasons for deeming a claimant's testimony not  
3 credible); Garrison v. Colvin, 759 F.3d 995, 1021 (9th Cir. 2014)  
4 (court may "remand for further proceedings, even though all conditions  
5 of the credit-as-true rule are satisfied, [when] an evaluation of the  
6 record as a whole creates serious doubt that a claimant is, in fact,  
7 disabled"); Vasquez v. Astrue, 572 F.3d 586, 600-01 (9th Cir. 2009) (a  
8 court need not "credit as true" improperly rejected claimant testimony  
9 where there are outstanding issues that must be resolved before a  
10 proper disability determination can be made); see generally INS v.  
11 Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an administrative  
12 determination, the proper course is remand for additional agency  
13 investigation or explanation, except in rare circumstances).<sup>4</sup>

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25 <sup>4</sup> There are outstanding issues that must be resolved  
26 before a proper disability determination can be made in the  
27 present case. For example, it is not clear whether the ALJ would  
28 be required to find Plaintiff disabled for the entire claimed  
period of disability even if Plaintiff's testimony were fully  
credited. See Luna v. Astrue, 623 F.3d 1032, 1035 (9th Cir.  
2010).

1 **CONCLUSION**

2  
3 For all of the foregoing reasons,<sup>5</sup> Plaintiff's and Defendant's  
4 motions for summary judgment are denied and this matter is remanded  
5 for further administrative action consistent with this Opinion.  
6

7 LET JUDGMENT BE ENTERED ACCORDINGLY.  
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9 DATED: October 20, 2014.  
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11 \_\_\_\_\_/s/\_\_\_\_\_  
12 CHARLES F. EICK  
13 UNITED STATES MAGISTRATE JUDGE  
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25 <sup>5</sup> The Court has not reached any other issue raised by  
26 Plaintiff except insofar as to determine that reversal with a  
27 directive for the immediate payment of benefits would not be  
28 appropriate at this time. "[E]valuation of the record as a whole  
creates serious doubt that [Plaintiff] is in fact disabled."  
See Garrison v. Colvin, 759 F.3d at 1021.