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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMY LYN SMITH,)	NO. ED CV 14-2473-E
)	
Plaintiff,)	
)	
v.)	JUDGMENT
)	
CAROLYN W. COLVIN, ACTING)	
COMMISSIONER OF SOCIAL SECURITY,)	
)	
Defendant.)	
)	
)	

IT IS HEREBY ADJUDGED that the decision of the Commissioner of the Social Security Administration is reversed in part and the matter is remanded for further administrative action consistent with the Memorandum Opinion and Order of Remand filed concurrently herewith.

DATED: October 7, 2015.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMY LYN SMITH,)	NO. ED CV 14-2473-E
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
CAROLYN W. COLVIN, ACTING)	AND ORDER OF REMAND
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 December 2, 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
February 15, 2015. Plaintiff filed a motion for summary judgment on

1 July 13, 2015. Defendant filed a motion for summary judgment on
2 September 11, 2015. The Court has taken the motions under submission
3 without oral argument. See L.R. 7-15; "Order," filed December 8,
4 2014.

5
6 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
7

8 Plaintiff alleges disability since September 12, 2010, based on
9 degenerative disk disease, a herniated disk, and sciatica
10 (Administrative Record ("A.R.") 161-73, 193, 198). An Administrative
11 Law Judge ("ALJ") found Plaintiff has severe degenerative disk disease
12 of the lumbar spine with multi-level neural foramina stenosis, facet
13 joint dysfunction with spondylosis, post-laminectomy syndrome, and
14 parasthesia in the right upper and lower extremities, which prevent
15 Plaintiff from performing her past relevant work (A.R. 28, 30
16 (adopting diagnoses at A.R. 237, 245, and vocational expert testimony
17 at A.R. 69)). The ALJ also found, however, that Plaintiff retains the
18 residual functional capacity to perform a limited range of light work,
19 including the light jobs of electronics worker and production
20 solderer, and the sedentary jobs of addresser and tube operator (A.R.
21 28-31 (relying on non-examining State agency physician residual
22 functional capacity assessments at A.R. 76-81, 86-91, 95-100, and
23 vocational expert testimony at 69-70)).¹
24

25 In finding Plaintiff not disabled, the ALJ determined that
26 Plaintiff's testimony regarding her pain and functional limitations

27 _____
28 ¹ There are no opinions from examining physicians concerning Plaintiff's residual functional capacity.

1 was less than fully credible, based on the objective medical evidence
2 and the allegedly "conservative" nature of Plaintiff's medical
3 treatment (A.R. 29-30). The Appeals Council considered additional
4 medical records but denied review (A.R. 14-19).

5
6 **STANDARD OF REVIEW**
7

8 Under 42 U.S.C. section 405(g), this Court reviews the
9 Administration's decision to determine if: (1) the Administration's
10 findings are supported by substantial evidence; and (2) the
11 Administration used correct legal standards. See Carmickle v.
12 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,
13 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner
14 of Social Sec. Admin., 682 F.3d 1157, 1161 (9th Cir. 2012).
15 Substantial evidence is "such relevant evidence as a reasonable mind
16 might accept as adequate to support a conclusion." Richardson v.
17 Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted);
18 see Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).² "The
19 claimant carries the burden of proving a disability. Failure to prove
20 disability justifies a denial of benefits." Ukolov v. Barnhart, 420

21
22 ² If the evidence can support either outcome,
23 the court may not substitute its judgment for
24 that of the ALJ. But the Commissioner's
25 decision cannot be affirmed simply by
26 isolating a specific quantum of supporting
27 evidence. Rather, a court must consider the
28 record as a whole, weighing both evidence
that supports and evidence that detracts from
the [administrative] conclusion.

Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations
and quotations omitted).

1 F.3d 1002, 1004 (9th Cir. 2005) (citations omitted).
2

3 Where, as here, the Appeals Council considered additional
4 evidence but denied review, the additional evidence becomes part of
5 the record for purposes of the Court's analysis. See Brewes v.
6 Commissioner, 682 F.3d at 1163 ("[W]hen the Appeals Council considers
7 new evidence in deciding whether to review a decision of the ALJ, that
8 evidence becomes part of the administrative record, which the district
9 court must consider when reviewing the Commissioner's final decision
10 for substantial evidence"; expressly adopting Ramirez v. Shalala, 8
11 F.3d 1449, 1452 (9th Cir. 1993)); Taylor v. Commissioner, 659 F.3d
12 1228, 1232 (2011) (courts may consider evidence presented for the
13 first time to the Appeals Council "to determine whether, in light of
14 the record as a whole, the ALJ's decision was supported by substantial
15 evidence and was free of legal error"); Penny v. Sullivan, 2 F.3d 953,
16 957 n.7 (9th Cir. 1993) ("the Appeals Council considered this
17 information and it became part of the record we are required to review
18 as a whole"); see generally 20 C.F.R. §§ 404.970(b), 416.1470(b).
19

20 DISCUSSION

21

22 When, as in the present case, an ALJ finds that a claimant's
23 medically determinable impairments reasonably could be expected to
24 cause the symptoms alleged, the ALJ may not discount the claimant's
25 testimony regarding the severity of the symptoms without making
26 "specific, cogent" findings, supported in the record, to justify
27 discounting such testimony. See Berry v. Astrue, 622 F.3d 1228, 1234
28 (9th Cir. 2010); Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995);

1 but see Smolen v. Chater, 80 F.3d 1273, 1282-84 (9th Cir. 1996)
2 (indicating that ALJ must state "specific, clear and convincing"
3 reasons to reject a claimant's testimony where there is no evidence of
4 malingering).³ Generalized, conclusory findings do not suffice. See
5 Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004) (the ALJ's
6 credibility findings "must be sufficiently specific to allow a
7 reviewing court to conclude the ALJ rejected the claimant's testimony
8 on permissible grounds and did not arbitrarily discredit the
9 claimant's testimony") (internal citations and quotations omitted);
10 Holohan v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001) (the ALJ
11 must "specifically identify the testimony [the ALJ] finds not to be
12 credible and must explain what evidence undermines the testimony");
13 Smolen v. Chater, 80 F.3d at 1284 ("The ALJ must state specifically
14 which symptom testimony is not credible and what facts in the record
15 lead to that conclusion."); see also Social Security Ruling ("SSR")
16 96-7p.

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21 ³ In the absence of an ALJ's reliance on evidence of
22 "malingering," most recent Ninth Circuit cases have applied the
23 "clear and convincing" standard. See, e.g., Burrell v. Colvin,
24 775 F.3d 1133, 1136-37 (9th Cir. 2014); Treichler v.
25 Commissioner, 775 F.3d 1090, 1102 (9th Cir. 2014); Ghanim v.
26 Colvin, 763 F.3d 1154, 1163 n.9 (9th Cir. 2014); Garrison v.
27 Colvin, 759 F.3d 995, 1014-15 & n.18 (9th Cir. 2014); Chaudhry v.
28 Astrue, 688 F.3d 661, 670, 672 n.10 (9th Cir. 2012); Molina v.
Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012); see also Ballard v.
Apfel, 2000 WL 1899797, at *2 n.1 (C.D. Cal. Dec. 19, 2000)
(collecting earlier 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 **I. Plaintiff's Testimony**

2
3 Plaintiff testified that chronic lower back pain prevents her
4 from working (A.R. 47, 58). Plaintiff previously worked at Wendy's
5 but reportedly had to quit because she could not do the standing and
6 the cleanup required for that job (A.R. 57-58).⁴ Plaintiff also said
7 she could not sit for hours at a time because prolonged sitting causes
8 her back to cramp up (A.R. 58, 62).⁵ She assertedly needs the option
9 to sit and stand at will (A.R. 58). Plaintiff said that she has daily
10 right side pain that sometimes causes swelling in her right hand and
11 loss of strength, or numbness in her right foot, as well as neck pain
12 (A.R. 59, 61-62, 66; but see A.R. 199, 226 (reporting left side pain
13 and numbness)). Plaintiff said she thought she could: (1) lift less
14 than five pounds; (2) sit for no longer than 30 minutes at a time
15 before having to stand for 15 minutes to relieve her pain; and
16 (3) stand for 40 minutes in one place before having to sit for 20 to
17 30 minutes to relieve her pain (A.R. 64-65). Plaintiff said she has
18 four to five bad days a month when she stays in bed (A.R. 66). She
19 also stated that her pain medications make her drowsy and "feel

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23
24 ⁴ Although Plaintiff said she stopped working in 2010,
25 records reflected self-employment earnings of approximately
26 \$6,900 in 2011 (A.R. 56-57; see also A.R. 178, 181, 183, 185,
187). Plaintiff said these records must be mistaken; she
testified that she had not filed for self-employment (A.R. 57).

27 ⁵ In a report dated June 26, 2012, a field office
28 examiner observed that Plaintiff appeared to have difficulty
standing, walking, and sitting (A.R. 202-04).

1 dumbfounded" (A.R. 64; see also A.R. 226).⁶
2

3 Plaintiff described her treatment to date as taking pain
4 medications and sometimes receiving shots. She reportedly was
5 "supposed to have been" receiving cortisone injections and physical
6 therapy but such treatments had not been started as of the date of the
7 hearing. See A.R. 58-60. She had surgery for a herniated disk in
8 1990 (A.R. 59-60 (describing the surgery as a "defusion" where the
9 disk was herniated)). Plaintiff claimed that she did not have further
10 treatment because her doctors did not provide sufficient paperwork for
11 further treatment (A.R. 60). At the outset of the hearing, prior to
12 being sworn, Plaintiff also said that her insurance was "stopped" and,
13 for a period of time, she lost her primary care physician, such that
14 all she could do for her condition was get pain pills (A.R. 42, 45).
15

16 Plaintiff said that her pain medication sometimes does not work
17 to treat her pain, and that she takes hot baths or goes to the
18 emergency room for shots (A.R. 60-62). Plaintiff reportedly was
19 taking Norco, Robaxin and Motrin, and also was using Bengay (A.R. 63,
20 67).
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26 ⁶ In a Disability Report - Appeal form, Plaintiff
27 reported that she had depression beginning in March of 2012 (A.R.
28 205). In an "Exertion Questionnaire" dated May 26, 2012,
Plaintiff reported that she rests or naps every three to four
hours during the day (A.R. 201).

1 **II. Summary of the Medical Record**

2
3 There are relatively few medical records, and the records appear
4 incomplete. See A.R. 235-68. All the treatment records provided are
5 from Arrowhead Regional Medical Center (id.).
6

7 On January 28, 2011, Plaintiff presented for a medication refill,
8 complaining of lower back pain (A.R. 239-40). She was given Norco and
9 Robaxin and was told to return to the clinic in one to two months or
10 as needed (A.R. 239).⁷ Plaintiff returned on September 19, 2011, with
11 complaints of lower back pain and right upper and lower extremity
12 numbness (A.R. 237). Her examining nurse practitioner noted that
13 although Plaintiff states that she has chronic back pain, Plaintiff
14 had "not been seen in this clinic for many, many months" (A.R. 237).
15 Plaintiff reported that her pain medications were not working and
16 asked for a referral for pain management (A.R. 237).⁸ Plaintiff
17 appeared to be in "moderate distress" related to her back pain, unable
18 to sit still in her chair and alternated from seated to standing
19 position throughout her visit (A.R. 237). However, Plaintiff
20

21 ⁷ The treatment provider's prescription notes indicate
22 that Plaintiff was given one month's supply of Norco and Robaxin
23 with two refills. See A.R. 239 (noting Norco "TID 90(2)" and
24 Robaxin "TID 90(2)"; TID means three times a day); see also
25 Michael Bihari, M.D., Prescription Abbreviations: Understanding
26 What Your Doctor Writes on a Prescription (Dec. 16, 2014)
(available online at http://healthinsurance.about.com/od/prescriptiondrugs/a/understanding_MD_Rx.htm (last visited
Sept. 29, 2015)).

27 ⁸ It is not clear whether Plaintiff obtained any pain
28 medication refills between her January and September 2011 office
visits.

1 reportedly was able to get on and off the examination table with no
2 obvious difficulty (A.R. 237). Plaintiff was diagnosed with chronic
3 low back pain secondary to degenerative disk disease and right upper
4 and lower extremity parasthesia (A.R. 237). She was prescribed Norco,
5 Ultram, and Neurontin, and also was given an intramuscular Toradol
6 injection (A.R. 238).⁹ Further, Plaintiff was encouraged to do
7 stretching and back exercises daily (A.R. 238). The nurse
8 practitioner indicated that Plaintiff would be referred for pain
9 management and that an electromyogram ("EMG") of her right extremities
10 would be ordered (A.R. 238).¹⁰

11
12 On January 3, 2012, Plaintiff presented for a pap smear and it
13 was noted that Plaintiff had not been given an appointment for pain
14 management as discussed in her September visit (A.R. 235-36).
15 Plaintiff complained of worsening pain and right upper and lower
16 extremity numbness (A.R. 236). She was taking Norco, Ultram, and
17 Neurontin, and also was using a heating pad and Bengay for her pain
18 (A.R. 236). She reported that she does not take her medications every
19 day because the medications only help "at times" (A.R. 236). She
20 reportedly had gone to the emergency room and had been given Baclofen
21 ///

22
23 ⁹ The treatment provider's notes indicate that Plaintiff
24 was given one month's supply of Norco, Ultram, and Neurontin,
25 with one refill. See A.R. 238 (noting Norco "one p.o. b.i.d.
26 p.r.n., #60, with one refill"; Ultram "one p.o. t.i.d., #90, with
27 one refill"; Neurontin "one p.o. q.h.s. for 1 day and then b.i.d.
for 1 day and then t.i.d. is prescribed, #90, with one refill";
b.i.d. means twice a day).

28 ¹⁰ There is no EMG study in the record, although the
record mentions that one was done (A.R. 236).

1 and Norco for pain (A.R. 236).¹¹ She was trying some exercises at
2 home but reported that she experiences pain afterwards (A.R. 236).

3
4 On February 6, 2012, Plaintiff returned, complaining of daily low
5 back pain (A.R. 244). On examination, Plaintiff had positive straight
6 leg raising and pain with flexion and extension (A.R. 245). Plaintiff
7 was diagnosed with diffuse degenerative disk disease, multilevel
8 foraminal stenosis, mild to moderate facet joint dysfunction with
9 spondylosis without myelopathy, and post-laminectomy syndrome (A.R.
10 245). She was ordered to continue her medications per her primary
11 care provider, and the provider supposedly would follow up with
12 Plaintiff regarding a possible lumbar epidural steroid injection (A.R.
13 245).

14
15 On April 26, 2012, Plaintiff presented to the Spine Clinic for a
16 follow-up examination after having had a "draining lumbar spine wound
17 [and] dural tear [status post] [incision and drainage] [and] dural
18 repair" (A.R. 242-43).¹² Her treating provider indicated that
19 Plaintiff could be "d/c'd" [discontinued] for this illness and
20 encouraged ambulation (A.R. 242). Plaintiff reportedly had positive
21 straight leg raising bilaterally (A.R. 242).

22
23 Plaintiff presented to the Arrowhead emergency room on June 29,
24 2012, complaining of, inter alia, low back pain radiating to the left

25
26 ¹¹ There are no treatment notes from this reported
27 emergency room visit.

28 ¹² There are no treatment notes in the record regarding
the incision, drainage, and repair.

1 lower extremity (A.R. 251). She reportedly had negative straight leg
2 raising (A.R. 252). Her medications were refilled (A.R. 252).
3 Plaintiff returned to the emergency room on November 4, 2012,
4 complaining of left arm numbness (A.R. 248). She requested a
5 medication refill (A.R. 248). Her treating physician noted chronic
6 lower back pain with suspected cervical radiculopathy and ordered her
7 medication refilled (A.R. 249). On May 29, 2013, Plaintiff returned
8 to the emergency room, complaining of jaw pain and lumbar back pain
9 (A.R. 256). She was given Norco and Robaxin for her pain (A.R. 257).
10 A lumbar spine x-ray from this visit showed reversed lordotic lumbar
11 curvature, diskitis at L2-L3 (occurring since February 2009), and
12 advanced degenerative change at L5-S1 (stable and unchanged from
13 February 2009) (A.R. 258).

14
15 In addition to the above-described records, the Appeals Council
16 reviewed an MRI of Plaintiff's lumbar spine dated October 22, 2013,
17 which showed multilevel degenerative disk disease and facet
18 hypertrophy causing multilevel neural foraminal narrowing (A.R. 261-
19 62).

20
21 **III. Analysis**

22
23 As indicated above, the ALJ discounted the credibility of
24 Plaintiff's testimony regarding the severity of the symptoms based on
25 the objective medical record and the allegedly conservative nature of
26 Plaintiff's medical treatment (A.R. 29-30). According to the ALJ,
27 (1) Plaintiff "has not had much treatment" and the treatment she has
28 received has been "conservative"; and (2) the objective medical

1 record, inter alia: (a) did not show sensory deficits in Plaintiff's
2 extremities "other than in a non-dermatomal pattern," which the ALJ
3 asserted was "suggestive of exaggeration"; and (b) showed pain
4 medication refills (instead of forgoing refills), even though
5 Plaintiff claimed that the pain medication did not always help. See
6 A.R. 29-30. As discussed below, these stated reasons are legally
7 insufficient on the present record.

8
9 First, the fact (if it is a fact) that a claimant has not
10 received much treatment sometimes can be a sufficient reason for
11 finding the claimant not credible. See Fair v. Bowen, 885 F.2d 597,
12 603 (9th Cir. 1989) (unexplained or inadequately explained failure to
13 seek or follow prescribed course of treatment can cast doubt on
14 claimant's credibility); see also, e.g., Burch v. Barnhart, 400 F.3d
15 676, 681 (9th Cir. 2005) (lack of consistent treatment such as where
16 there was a three to four month gap in treatment properly considered
17 in discrediting claimant's back pain testimony); Meanel v. Apfel, 172
18 F.3d 1111, 1114 (9th Cir. 1999) (in assessing the credibility of a
19 claimant's pain testimony, the Administration properly may consider
20 the claimant's failure to request treatment and failure to follow
21 treatment advice) (citing Bunnell v. Sullivan, 947 F.2d 341, 346 (9th
22 Cir. 1991) (en banc)); Johnson v. Shalala, 60 F.3d 1428, 1434 (9th
23 Cir. 1995) (absence of treatment for back pain during half of the
24 alleged disability period, and evidence of only "conservative
25 treatment" when the claimant finally sought treatment, sufficient to
26 discount claimant's testimony); Matthews v. Shalala, 10 F.3d 678,
27 679-80 (9th Cir. 1993) (permissible factors in assessing the
28 credibility of pain testimony include limited treatment and minimal

1 use of medications).

2
3 [An] individual's statements may be less credible if the
4 level or frequency of treatment is inconsistent with the
5 level of complaints, or if the medical reports or records
6 show that the individual is not following the treatment as
7 prescribed and there are no good reasons for this failure.
8 However, the adjudicator must not draw any inferences about
9 an individual's symptoms and their functional effects from a
10 failure to seek or pursue regular medical treatment without
11 first considering any explanations that the individual may
12 provide, or other information in the case record, that may
13 explain infrequent or irregular medical visits or failure to
14 seek medical treatment.

15
16 SSR 96-7p at *7. Social Security rulings such as SSR 96-7p are
17 "binding on ALJs." Terry v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th
18 Cir. 1990).

19
20 In the present case, Plaintiff said that she did not seek more
21 treatment due to a lack of insurance for a period of time and a lack
22 of approval for further treatment (A.R. 42, 45, 58-61). She stated
23 that she did not have a primary doctor for part of the time period,
24 and did want to come in just for pain medication since the

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1 medication did not always work for her (A.R. 45, 60).¹³ The ALJ did
2 not mention any of these explanatory statements in his decision,
3 perhaps implicitly disbelieving the statements while citing
4 Plaintiff's lack of treatment as a reason to discount her credibility.
5 See A.R. 29-30.

6
7 The ALJ erred by relying, at least in part, on Plaintiff's
8 alleged lack of treatment without expressly considering Plaintiff's
9 proffered explanation regarding why she did not receive more
10 treatment. See SSR 96-7p; Orn v. Astrue, 495 F.3d 625, 638 (9th Cir.
11 2007) ("Orn's failure to receive medical treatment during the period
12 that he had no medical insurance cannot support an adverse credibility
13 finding"); Jesus v. Colvin, 2015 WL 4999501, at *8 (N.D. Cal. Aug. 20,
14 2015) ("the Ninth Circuit has consistently held that when a claimant
15 suffers from financial hardships, a failure to obtain treatment is not
16 a sufficient reason to deny benefits"; citing Orn); Oliverio v.
17 Colvin, 2015 WL 1894299, at *5 & n.6 (C.D. Cal. Apr. 27, 2015)
18 (claimant could not be faulted for failing to attend more counseling
19 sessions where her insurance did not cover them; citing Orn); Fisher
20 v. Colvin, 2015 WL 1442064, at *17 (E.D. Cal. Feb. 20, 2015) (ALJ

21
22 ¹³ The record reflects that Plaintiff's providers referred
23 Plaintiff for additional treatment or discussed with Plaintiff
24 "possible" additional treatment (i.e., pain management, epidural
25 injections) (A.R. 235-36, 238, 245), and that Plaintiff
26 complained in one visit that her pain management referral had not
27 resulted in an appointment (A.R. 235). The record also reflects
28 that Plaintiff was "strongly encouraged" to schedule her
Arrowhead appointments with the same provider since she was
getting narcotic pain medications (A.R. 238). From the limited
record, it appears that, with the exception of her visit to the
spine clinic (A.R. 242), treatment was being provided by
different nurse practitioners. See A.R. 235, 238, 245.

1 could not reject credibility for lack of treatment where claimant
2 testified that she could not afford to pay for treatment; citing Orn);
3 Marquez v. Astrue, 2010 WL 1709204, at *2 (C.D. Cal. Apr. 27, 2010)
4 (ALJ erred by relying on lack of treatment without expressly
5 considering claimant's explanation that she did not have health
6 insurance and could not afford to see a doctor; citing Orn).

7
8 Second, it is true that a "conservative" course of treatment
9 sometimes properly may discredit a claimant's allegations of disabling
10 symptoms. See, e.g., Parra v. Astrue, 481 F.3d 742, 750-51 (9th Cir.
11 2007), cert. denied, 552 U.S. 1141 (2008) (treatment with over-the-
12 counter pain medication is "conservative treatment" sufficient to
13 discredit a claimant's testimony regarding allegedly disabling pain).
14 In the present case, however, it is uncertain whether the ALJ
15 accurately characterized Plaintiff's treatment as "conservative."
16 See, e.g., Childress v. Colvin, 2014 WL 4629593, at *12 (N.D. Cal.
17 Sept. 16, 2014) ("[i]t is not obvious whether the consistent use of
18 [Norco] (for several years) is 'conservative' or in conflict with
19 Plaintiff's pain testimony"); Aguilar v. Colvin, 2014 WL 3557308, at
20 *8 (C.D. Cal. July 18, 2014) ("there is evidence in the record that
21 Plaintiff has been prescribed narcotic pain medications, . . . It
22 would be difficult to fault Plaintiff for overly conservative
23 treatment when he has been prescribed strong narcotic pain
24 medications").

25
26 Third, while the ALJ may properly have relied on "a report of
27 negative findings from the application of medically acceptable
28 clinical and laboratory diagnostic techniques" in considering

1 Plaintiff's credibility, "allegations concerning the intensity and
2 persistence of pain or other symptoms may not be disregarded solely
3 because they are not substantiated by objective medical evidence."
4 see SSR 96-7p at *6; see also Burch v. Barnhart, 400 F.3d at 681 (lack
5 of objective medical evidence to support the alleged severity of a
6 claimant's symptomatology "can be a factor" in rejecting a claimant's
7 credibility, but cannot "form the sole basis"). Therefore, the ALJ's
8 citation to specific instances in the objective medical evidence which
9 assertedly do not support Plaintiff's allegations cannot by itself
10 justify the ALJ's credibility determination. See id.

11
12 Additionally, the ALJ relied on the fact that examination did not
13 show sensory deficits in Plaintiff's extremities "other than in a non-
14 dermatomal pattern" (A.R. 249), which the ALJ asserted was "suggestive
15 of exaggeration" (A.R. 30). There is no expert medical opinion in the
16 record that such a test result is "suggestive of exaggeration."
17 Compare A.R. 86 (State agency physician referring to examination but
18 not mentioning "non-dermatomal pattern"). While the ALJ may be
19 correct in his conclusion, see, e.g., Azizi v. Astrue, 2009 WL
20 1015066, at *6 (C.D. Cal. Apr. 15, 2009) (consultative examiners
21 opining that sensation in a "nondermatomal" distribution suggests
22 "symptom magnification"), the ALJ is not qualified to offer such a
23 conclusion without evidentiary support from a medical expert. An ALJ
24 may not rely on his or her own lay opinion regarding medical matters.
25 See Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir. 1975) (an ALJ who
26 is not qualified as a medical expert cannot make "his own exploration
27 and assessment as to [the] claimant's physical condition"); see also
28 Rohan v. Chater, 98 F.3d 966, 970-71 (7th Cir. 1996) (ALJ may not rely

1 on his or her own lay opinion regarding medical matters); Ferguson v.
2 Schweiker, 765 F.2d 31, 37 (3d Cir. 1995) (same); cf. Rudder v.
3 Colvin, 2014 WL 3773565, at *12 (N.D. Ill. July 30, 2014) ("The ALJ
4 may be correct that disabling limitations from multiple sclerosis
5 would result in more frequent treatment or need for medication.
6 However, the ALJ must include evidence to support such a conclusion in
7 his opinion because he is not qualified, on his own, to make such
8 determinations.") (citations and quotations omitted).

9
10 The ALJ also relied on the purported fact that the medical record
11 showed pain medication refills where one might expect forgoing refills
12 based on Plaintiff's reports that the pain medication did not always
13 help her condition (A.R. 30). Assuming, arguendo, that failure to
14 forgo refills could bear on a claimant's credibility, the record of
15 Plaintiff's refills and their frequency is insufficiently developed to
16 support the ALJ's conclusion that Plaintiff materially failed to forgo
17 refills. See Footnotes 7-9 above and accompanying text.¹⁴

18
19 ¹⁴ Defendant also argues, inter alia, that the ALJ
20 properly relied on the fact that Plaintiff allegedly engaged in
21 work activities in 2011 to discount Plaintiff's credibility
22 (Defendant's Motion, p. 7). The Court cannot affirm the
23 administrative decision on the basis of this argument. See Pinto
24 v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001) (court "cannot
25 affirm the decision of an agency on a ground that the agency did
26 not invoke in making its decision"); see also Treichler v.
27 Commissioner, 775 F.3d 1090, 1102 (9th Cir. 2014) (for meaningful
28 appellate review, "we require the ALJ to specifically identify
the testimony . . . she or he finds not credible . . . and
explain what evidence undermines the testimony") (citations and
quotations omitted). While the ALJ generally referred to the
alleged earnings in 2011 as "indicative of the claimant's ability
to engage in substantial gainful activity" at Step One of the
sequential evaluation process (A.R. 27), the ALJ did not

(continued...)

1 Because the circumstances of this case suggest that further
2 administrative review could remedy the ALJ's errors, remand is
3 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see
4 Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) ("Connett")
5 (remand is an option where the ALJ fails to state sufficient reasons
6 for rejecting a claimant's excess symptom testimony); but see Orn v.
7 Astrue, 495 F.3d at 640 (citing Connett for the proposition that
8 "[w]hen an ALJ's reasons for rejecting the claimant's testimony are
9 legally insufficient and it is clear from the record that the ALJ
10 would be required to determine the claimant disabled if he had
11 credited the claimant's testimony, we remand for a calculation of
12 benefits") (quotations omitted); see also Brown-Hunter v. Colvin, 798
13 F.3d 749, 757-59 (9th Cir. 2015) (discussing the requirements for the
14 "extreme remedy" of crediting testimony as true and remanding for an
15 immediate award of benefits); Ghanim v. Colvin, 763 F.3d 1154, 1166
16 (9th Cir. 2014) (remanding for further proceedings where the ALJ
17 failed to state sufficient reasons for deeming a claimant's testimony
18 not credible); Garrison v. Colvin, 759 F.3d 995, 1021 (9th Cir. 2014)
19 (court may "remand for further proceedings, even though all conditions
20 of the credit-as-true rule are satisfied, [when] an evaluation of the
21 record as a whole creates serious doubt that a claimant is, in fact,
22 disabled"); Vasquez v. Astrue, 572 F.3d 586, 600-01 (9th Cir. 2009) (a

23
24 ¹⁴ (...continued)
25 specifically cite to this evidence as a reason to discount
26 Plaintiff's credibility. Nor did the ALJ address Plaintiff's
27 claim that the reported earnings must have been a mistake. See
28 Footnote 4. The ALJ's discussion at Step One is insufficiently
specific for the Court to conclude that the ALJ discounted
Plaintiff's testimony on permissible grounds. See Moisa v.
Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); SSR 96-7p.

1 court need not "credit as true" improperly rejected claimant testimony
2 where there are outstanding issues that must be resolved before a
3 proper disability determination can be made); see generally INS v.
4 Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an administrative
5 determination, the proper course is to remand for additional agency
6 investigation or explanation, except in rare circumstances); Treichler
7 v. Commissioner, 775 F.3d at 1101 n.5 (remand for further
8 administrative proceedings is the proper remedy "in all but the rarest
9 cases").¹⁵

10
11 **CONCLUSION**

12
13 For all of the foregoing reasons, Plaintiff's and Defendant's
14 motions for summary judgment are denied and this matter is remanded
15 for further administrative action consistent with this Opinion.

16
17 LET JUDGMENT BE ENTERED ACCORDINGLY.

18
19 DATED: October 7, 2015.

20
21 _____
22 CHARLES F. EICK
23 UNITED STATES MAGISTRATE JUDGE

24 _____
25 ¹⁵ 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).