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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARIA M. BARRIOS,)	Case No. EDCV 15-0401-JPR
)	
Plaintiff,)	
)	MEMORANDUM DECISION AND ORDER
v.)	REVERSING COMMISSIONER
)	
CAROLYN W. COLVIN, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner’s final decision denying her applications for Social Security disability insurance benefits (“DIB”) and supplemental security income benefits (“SSI”). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). The matter is before the Court on the parties’ Joint Stipulation, filed December 28, 2015, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner’s decision is reversed and this action is remanded for further proceedings.

1 **II. BACKGROUND**

2 Plaintiff was born in 1956. (Administrative Record ("AR")
3 155.) She completed 12th grade and worked as a secretary for a
4 moving company. (AR 191, 218.)

5 On February 6, 2013, Plaintiff filed applications for DIB
6 and SSI (AR 12), alleging that she had been unable to work since
7 January 15, 2013, because of an enlarged heart, diabetes, carpal-
8 tunnel syndrome, poor kidney function, high blood pressure, and
9 shortness of breath. (AR 190.) After her applications were
10 denied initially and on reconsideration, she requested a hearing
11 before an Administrative Law Judge. (AR 100-01.) A hearing was
12 held on July 9, 2014, at which Plaintiff, who was represented by
13 counsel, testified, as did a vocational expert. (AR 23-43.) In
14 a written decision issued September 5, 2014, the ALJ found
15 Plaintiff not disabled. (AR 10-21.) This action followed.

16 **III. STANDARD OF REVIEW**

17 Under 42 U.S.C. § 405(g), a district court may review the
18 Commissioner's decision to deny benefits. The ALJ's findings and
19 decision should be upheld if they are free of legal error and
20 supported by substantial evidence based on the record as a whole.
21 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra
22 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
23 evidence means such evidence as a reasonable person might accept
24 as adequate to support a conclusion. Richardson, 402 U.S. at
25 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
26 It is more than a scintilla but less than a preponderance.
27 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
28 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether

1 substantial evidence supports a finding, the reviewing court
2 "must review the administrative record as a whole, weighing both
3 the evidence that supports and the evidence that detracts from
4 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
5 720 (9th Cir. 1996). "If the evidence can reasonably support
6 either affirming or reversing," the reviewing court "may not
7 substitute its judgment" for the Commissioner's. Id. at 720-21.

8 **IV. THE EVALUATION OF DISABILITY**

9 People are "disabled" for purposes of receiving Social
10 Security benefits if they are unable to engage in any substantial
11 gainful activity owing to a physical or mental impairment that is
12 expected to result in death or has lasted, or is expected to
13 last, for a continuous period of at least 12 months. 42 U.S.C.
14 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
15 1992).

16 A. The Five-Step Evaluation Process

17 The ALJ follows a five-step sequential evaluation process to
18 assess whether a claimant is disabled. 20 C.F.R.
19 §§ 404.1520(a)(4), 416.920(a)(4); Lester v. Chater, 81 F.3d 821,
20 828 n.5 (9th Cir. 1995) (as amended Apr. 9, 1996). In the first
21 step, the Commissioner must determine whether the claimant is
22 currently engaged in substantial gainful activity; if so, the
23 claimant is not disabled and the claim must be denied.
24 §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

25 If the claimant is not engaged in substantial gainful
26 activity, the second step requires the Commissioner to determine
27 whether the claimant has a "severe" impairment or combination of
28 impairments significantly limiting her ability to do basic work

1 activities; if not, the claimant is not disabled and her claim
2 must be denied. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

3 If the claimant has a "severe" impairment or combination of
4 impairments, the third step requires the Commissioner to
5 determine whether the impairment or combination of impairments
6 meets or equals an impairment in the Listing of Impairments
7 ("Listing") set forth at 20 C.F.R. part 404, subpart P, appendix
8 1; if so, disability is conclusively presumed.
9 §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

10 If the claimant's impairment or combination of impairments
11 does not meet or equal an impairment in the Listing, the fourth
12 step requires the Commissioner to determine whether the claimant
13 has sufficient residual functional capacity ("RFC")¹ to perform
14 her past work; if so, she is not disabled and the claim must be
15 denied. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The claimant
16 has the burden of proving she is unable to perform past relevant
17 work. Drouin, 966 F.2d at 1257. If the claimant meets that
18 burden, a prima facie case of disability is established. Id.

19 If that happens or if the claimant has no past relevant
20 work, the Commissioner then bears the burden of establishing that
21 the claimant is not disabled because she can perform other
22 substantial gainful work available in the national economy.
23 §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); Drouin, 966 F.2d at 1257.
24 That determination comprises the fifth and final step in the
25 sequential analysis. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);

26
27 ¹ RFC is what a claimant can do despite existing exertional
28 and nonexertional limitations. §§ 404.1545, 416.945; see Cooper
v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

2 B. The ALJ's Application of the Five-Step Process

3 At step one, the ALJ found that Plaintiff had not engaged in
4 substantial gainful activity since January 15, 2013, the alleged
5 onset date. (AR 14.) At step two, he concluded that Plaintiff
6 had severe impairments of supermorbid obesity with insulin-
7 dependent diabetes mellitus type II, diabetic peripheral
8 neuropathy, asthma, and essential hypertension. (Id.) At step
9 three, he determined that Plaintiff's impairments did not meet or
10 equal a listing. (Id.)

11 At step four, the ALJ found that Plaintiff had the RFC to
12 perform sedentary work but must stand and stretch every 15
13 minutes for one minute and use an oxygen tank on wheels. (AR
14 15.) Plaintiff could be exposed to no more air pollutants than
15 found in an air-conditioned environment, and she could frequently
16 handle and constantly finger. (Id.)

17 Based on the VE's testimony, the ALJ concluded that
18 Plaintiff could perform her past relevant work as a secretary.
19 (AR 17.) Accordingly, he found her not disabled. (AR 18.)

20 **V. DISCUSSION**

21 Plaintiff claims that the ALJ failed to pose a complete
22 hypothetical question to the VE, properly consider her obesity,
23 and properly assess her credibility. (J. Stip. at 2-3.) Because
24 the ALJ's findings concerning Plaintiff's credibility were
25 insufficient, the matter must be remanded for further analysis
26 and findings. The Court therefore does not reach the other two
27 issues.

1 A. The ALJ Failed to Adequately Explain Why He Found
2 Plaintiff Only Partially Credible

3 Plaintiff contends that the ALJ improperly rejected her
4 testimony based solely on a lack of corroborating medical
5 findings. (J. Stip. at 16 (citing Vertigan v. Halter, 260 F.3d
6 1044, 1049 (9th Cir. 2001)).)

7 1. Applicable law

8 An ALJ's assessment of symptom severity and claimant
9 credibility is entitled to "great weight." See Weetman v.
10 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v. Heckler, 779
11 F.2d 528, 531 (9th Cir. 1986). "[T]he ALJ is not required to
12 believe every allegation of disabling pain, or else disability
13 benefits would be available for the asking, a result plainly
14 contrary to 42 U.S.C. § 423(d)(5)(A)." Molina v. Astrue, 674
15 F.3d 1104, 1112 (9th Cir. 2012) (citing Fair v. Bowen, 885 F.2d
16 597, 603 (9th Cir. 1989)).

17 In evaluating a claimant's subjective symptom testimony, the
18 ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d
19 at 1035-36. "First, the ALJ must determine whether the claimant
20 has presented objective medical evidence of an underlying
21 impairment [that] could reasonably be expected to produce the
22 pain or other symptoms alleged." Id. at 1036. If such objective
23 medical evidence exists, the ALJ may not reject a claimant's
24 testimony "simply because there is no showing that the impairment
25 can reasonably produce the degree of symptom alleged." Smolen v.
26 Chater, 80 F.3d 1273, 1282 (9th Cir. 1996) (emphasis in
27 original).

28 If the claimant meets the first test, the ALJ may discredit

1 the claimant's subjective symptom testimony only if he makes
2 specific findings that support the conclusion. See Berry v.
3 Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding or
4 affirmative evidence of malingering, the ALJ must provide "clear
5 and convincing" reasons for rejecting the claimant's testimony.
6 Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir. 2015) (as
7 amended); Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090,
8 1102 (9th Cir. 2014). The ALJ may consider, among other factors,
9 (1) ordinary techniques of credibility evaluation, such as the
10 claimant's reputation for lying, prior inconsistent statements,
11 and other testimony by the claimant that appears less than
12 candid; (2) unexplained or inadequately explained failure to seek
13 treatment or to follow a prescribed course of treatment; (3) the
14 claimant's daily activities; (4) the claimant's work record; and
15 (5) testimony from physicians and third parties. Rounds v.
16 Comm'r Soc. Sec. Admin., 807 F.3d 996, 1006 (9th Cir. 2015) (as
17 amended); Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.
18 2002). If the ALJ's credibility finding is supported by
19 substantial evidence in the record, the reviewing court "may not
20 engage in second-guessing." Thomas, 278 F.3d at 959.

21 2. Relevant background

22 In reports dated March 25, 2013, Plaintiff wrote that she
23 was unable to stand for more than 20 minutes, bend down, or squat
24 because of painful, swollen legs. (AR 201, 207.) She could not
25 sit "for a long time" and could walk only 30 yards before needing
26 a 10-minute rest. (Id.) Her diabetes affected her eyesight, and
27 she needed to urinate "often on some days." (AR 207, 209.) Her
28 daily activities included straightening up around the house,

1 watching television, watering the front and back yards with her
2 left hand, and feeding the dog. (AR 202.) She cooked once a
3 week, did laundry twice a week, shopped for groceries in stores
4 once a week for 30 minutes, cared for her seven-year-old
5 granddaughter once a week, and attended her granddaughter's
6 sports games twice a week. (AR 203-06.) She reported that
7 someone needed to accompany her to the store and her
8 granddaughter's games. (AR 206.) She had no problems with
9 memory, attention, concentration, ability to complete tasks,
10 personal care, or getting along with others. (AR 207.)

11 In a disability report dated May 21, 2013, Plaintiff
12 reported an increase in the severity of her symptoms, including
13 difficulty balancing and gripping with her right hand. (AR 210.)
14 Her listed diagnoses included anxiety, depression, "difficulties
15 with social functioning," emotional withdrawal, and isolation.
16 (AR 214.) She could not eat without spilling food and needed
17 help with personal care and administering insulin. (AR 210,
18 213.)

19 In an August 18, 2013 function report, Plaintiff reiterated
20 the symptoms from March 2013 and added decreased kidney function,
21 an inability to stand, rashes on both hands and arms, and a
22 tingling sensation in her fingers. (AR 237.) She reported that
23 her illnesses affected her memory, concentration, and ability to
24 complete tasks. (AR 242.) Her daily activities had not
25 significantly changed from the March 2013 function report. (AR
26 238-41.) Plaintiff listed side effects from her prescribed
27 medications, such as numbness, swelling, blurred vision, rash,
28 dizziness, and joint pain. (AR 244.) She had no problem with

1 personal care but could pay attention for only 20 minutes. (AR
2 238, 242.)

3 At the July 2014 ALJ hearing, Plaintiff testified that she
4 had trouble picking things up, as her hands would get numb and
5 heavy. (AR 32-33.) She could not sit for more than
6 approximately 10 minutes, including at the ALJ hearing, without
7 her legs feeling numb and requiring her to stand up, which had
8 led to her losing her balance and falling. (AR 33.) She was
9 able to walk a distance of approximately six house lengths before
10 becoming tired. (AR 34.) Walking that distance and returning
11 home would take between 20 and 45 minutes. (AR 34-35.) Finally,
12 Plaintiff testified that she had used a prescribed oxygen tank
13 since October 2013, after suffering a "mini stroke." (AR 28-37.)

14 3. Analysis

15 The ALJ credited some of Plaintiff's subjective complaints,
16 such as her asserted inability to stand or walk for prolonged
17 periods, and he therefore limited her to a range of sedentary
18 work. (AR 17.) But the ALJ discredited Plaintiff's complaints
19 to the extent they were inconsistent with her RFC, finding that
20 although her "medically determinable impairments could reasonably
21 be expected to cause the alleged symptoms[,] . . . [her]
22 statements concerning the intensity, persistence and limiting
23 effects of these symptoms [were] not entirely credible." (AR
24 16.) As discussed below, the ALJ's findings were insufficient.

25 The ALJ discounted Plaintiff's subjective complaints because
26 they were unsupported by the medical record. (AR 17.) As to
27 Plaintiff's complaints of shortness of breath, foot pain, and
28 hand numbness, the ALJ found "scant evidence of any neurological

1 or pulmonary problems when [Plaintiff] was hospitalized for six
2 days at the end of September 2012." (AR 16; see AR 255-56, 318-
3 19.) Furthermore, "she did not complain of hand numbness until
4 January 2013 with minimal decrease in grip strength bilaterally."
5 (AR 16; AR 322-23.) Plaintiff first saw a pulmonologist on
6 February 3, 2014; she reported a history of shortness of breath
7 with wheezing, cough and phlegm, and asthma. (AR 16, 367-68.)
8 The ALJ noted that the treatment record was incomplete but showed
9 that Plaintiff was not using a rescue inhaler at the time of the
10 pulmonary consultation, her lungs were clear to auscultation
11 bilaterally, and her breathing was normal. (Id.) The ALJ also
12 noted that on July 5, 2014, Plaintiff was treated in an emergency
13 room for an asthma attack. (AR 16, 352.) The ALJ found that a
14 brain MRI and chest x-ray did not show "anything of medical
15 [significance]," and emergency-room records did not include any
16 physical-examination or laboratory findings. (AR 16, 351-66.)
17 Finally, the ALJ also found that Plaintiff's poor eyesight had
18 been corrected to "20/20-1" by her optometrist as of April 19,
19 2011. (AR 16; see AR 343.)

20 Although the ALJ's findings appear to be supported by
21 substantial evidence, the lack of objective medical evidence
22 corroborating Plaintiff's subjective symptom testimony cannot
23 alone support the ALJ's adverse credibility finding. See
24 Robbins, 466 F.3d at 883 (explaining that ALJ may not make
25 negative credibility finding "solely because" claimant's symptom
26 testimony "is not substantiated affirmatively by objective
27 medical evidence"); Burch v. Barnhart, 400 F.3d 676, 681 (9th
28 Cir. 2005) (stating that ALJ may consider "lack of medical

1 evidence" as factor in credibility analysis, but it "cannot form
2 the sole basis for discounting pain testimony"). The ALJ did not
3 provide any other reasons for discounting Plaintiff's
4 credibility.²

5 Thus, even if the Court were to agree that the objective
6 medical evidence did not support Plaintiff's allegations of
7 disabling pain, remand is still warranted because the ALJ failed
8 to give any other clear and convincing reason for discounting her
9 credibility. See Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir.
10 2004) (reversing Commissioner when ALJ rejected plaintiff's pain
11 testimony solely for lack of objective medical evidence);
12 Figueroa v. Colvin, No. CV 14-06522-GJS, 2015 WL 4331300, at *2
13 (C.D. Cal. July 15, 2015) (remanding for further proceedings
14 because ALJ failed to provide clear and convincing reason for
15 discounting plaintiff's credibility "apart from the lack of
16 objective medical evidence").

17 The Commissioner argues that "[Plaintiff] testified that she
18 believed that she could return to her former work . . . [which]
19 directly contradicts any claim that she is incapable of working."
20

21 ² The ALJ did note that Plaintiff "has not been prescribed
22 any narcotic medication for pain." (AR 17.) The Commissioner
23 does not argue that on the basis of this one sentence the ALJ
24 rejected Plaintiff's credibility because she had received only
25 conservative treatment, which is a legitimate reason. See Parra,
26 481 F.3d at 751 (evidence of conservative treatment sufficient to
27 discount claimant's testimony regarding limitations); (see also
28 J. Stip. at 17-19). Moreover, the ALJ made the statement in the
context of discussing the lack of objective medical evidence
supporting Plaintiff's subjective pain complaints. Accordingly,
the Court does not consider this one sentence to amount to a
separate reason upon which the ALJ found Plaintiff only partially
credible.

1 (J. Stip. at 18-19.) Although this may be a valid reason for
2 discounting Plaintiff's credibility, see Rounds, 807 F.3d at 1006
3 (ALJ may consider claimant's inconsistent statements); Verduzco
4 v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999) (in assessing
5 credibility, ALJ can consider whether plaintiff's statements were
6 inconsistent with other statements and evidence), the ALJ did not
7 cite Plaintiff's testimony that she believed she could do her
8 previous job as a reason for discounting her credibility. (See
9 AR 16-17.) As such, the Court cannot rely on it to affirm the
10 ALJ's credibility determination. See Burrell v. Colvin, 775 F.3d
11 1133, 1139 (9th Cir. 2014) (rejecting government's argument that
12 ALJ's findings concerning claimant's treatment for headaches
13 supported adverse credibility decision because ALJ "never stated
14 that he rested his . . . credibility determination on those
15 findings").

16 In sum, the ALJ's explanation for his adverse credibility
17 determination was insufficient and remand is appropriate to allow
18 him to reevaluate or more fully explain that finding. Plaintiff
19 is entitled to remand on this ground.

20 B. Remand for Further Proceedings Is Appropriate

21 When, as here, an ALJ errs in denying benefits, the Court
22 generally has discretion to remand for further proceedings. See
23 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000) (as
24 amended). When no useful purpose would be served by further
25 administrative proceedings, however, or when the record has been
26 fully developed, it is appropriate under the "credit-as-true"
27 rule to direct an immediate award of benefits. See id. at 1179
28 (noting that "the decision of whether to remand for further

1 proceedings turns upon the likely utility of such proceedings");
2 Garrison v. Colvin, 759 F.3d 995, 1019-20 (9th Cir. 2014).

3 Under the credit-as-true framework, three circumstances must
4 be present before a court may remand to the ALJ with instructions
5 to award benefits:

6 (1) the record has been fully developed and further
7 administrative proceedings would serve no useful purpose;

8 (2) the ALJ has failed to provide legally sufficient
9 reasons for rejecting evidence, whether claimant
10 testimony or medical opinion; and (3) if the improperly
11 discredited evidence were credited as true, the ALJ would
12 be required to find the claimant disabled on remand.

13 Garrison, 759 F.3d at 1020; Treichler, 775 F.3d at 1100-01.

14 When, however, the ALJ's findings are so "insufficient" that a
15 court cannot determine whether the rejected testimony should be
16 credited as true, the court has "some flexibility" in applying
17 the credit-as-true rule. Connett v. Barnhart, 340 F.3d 871, 876
18 (9th Cir. 2003); see also Garrison, 759 F.3d at 1020 (noting that
19 Connett established that credit-as-true rule may not be
20 dispositive in all cases); Treichler, 775 F.3d at 1101 (noting
21 that remand for benefits is inappropriate when "there is
22 conflicting evidence, and not all essential factual issues have
23 been resolved").

24 Here, remand for further proceedings is appropriate because
25 the ALJ erred in assessing Plaintiff's credibility. It may well
26 be that the ALJ had adequate reasons to find Plaintiff's
27 statements not credible but simply failed to express them.
28 Indeed, as the Commissioner notes (J. Stip. at 18-19), Plaintiff

1 herself believed she could work; moreover, several of her
2 statements regarding her symptoms and abilities were
3 inconsistent. (Compare AR 213 (May 2013, alleging need for help
4 with dressing and caring for hair) with AR 238 (Aug. 2013,
5 alleging "no problem" with personal care including dressing and
6 caring for hair); compare AR 190 (Mar. 2013, alleging that
7 conditions became severe enough to preclude work in Jan. 2013)
8 and AR 100 (Oct. 2013, alleging total disability and inability to
9 work) with AR 31 (July 2014, alleging ability to work at previous
10 job); compare AR 214 (May 2013, alleging "diagnoses" of anxiety,
11 depression, "[d]ifficulties with social functioning," and
12 "[e]motional withdrawal and isolation") with AR 237-46 (Aug.
13 2013, failing to mention any problems with anxiety, depression,
14 social functioning, and emotional withdrawal) and AR 242-43 (Aug.
15 2013, alleging that she had no "unusual behavior or fears" and
16 could handle stress well, get along with others, handle changes
17 in routine well, and follow written and spoken instructions
18 well).) Thus, remand for further credibility analysis and
19 findings is appropriate.

20 Upon remand, the ALJ may, if warranted, make further
21 findings regarding Plaintiff's obesity and solicit additional VE
22 testimony regarding Plaintiff's use of an oxygen tank in the
23 workplace.

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1 **VI. CONCLUSION**

2 Consistent with the foregoing and under sentence four of 42
3 U.S.C. § 405(g),³ IT IS ORDERED that judgment be entered REVERSING
4 the decision of the Commissioner, GRANTING Plaintiff's request
5 for remand, and REMANDING this action for further proceedings
6 consistent with this Memorandum Decision. IT IS FURTHER ORDERED
7 that the Clerk serve copies of this Order and the Judgment on
8 counsel for both parties.

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11 DATED: July 6, 2016

JEAN ROSENBLUTH _____

JEAN ROSENBLUTH
U.S. Magistrate Judge

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25 _____
26 ³ That sentence provides: "The [district] court shall have
27 power to enter, upon the pleadings and transcript of the record,
28 a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."