

1 examined records and heard testimony from Plaintiff and vocational
2 expert ("V.E.") Carlen Stock. (AR 35-71). On August 7, 2014, the
3 ALJ denied Plaintiff benefits in a written decision. (AR 15-28).
4 The Appeals Council denied review of the ALJ's decision. (AR 1-3).
5

6 On December 9, 2015, Plaintiff filed a Complaint pursuant to
7 42 U.S.C. § 405(g) alleging that the Social Security Administration
8 erred in denying benefits. (Docket Entry No. 1). On April 12, 2016,
9 Defendant filed an Answer to the Complaint, (Docket Entry No. 13),
10 and the Certified Administrative Record ("AR"), (Docket Entry No.
11 14). The parties have consented to proceed before a United States
12 Magistrate Judge. (Docket Entry Nos. 8, 9). On July 28, 2016, the
13 parties filed a Joint Stipulation ("Joint Stip.") setting forth their
14 respective positions on Plaintiff's claims. (Docket Entry No. 17).
15

16 **SUMMARY OF ALJ'S DECISION**

17

18 The ALJ applied the five-step process in evaluating Plaintiff's
19 case. (AR 16-17). At step one, the ALJ determined that Plaintiff
20 had not engaged in substantial gainful activity after the alleged
21 onset date. (AR 17). At step two, the ALJ found that Plaintiff's
22 severe impairments included obesity, degenerative disc disease,
23 degenerative joint disease, repetitive use injuries of the right
24 upper extremity, chronic pain, impingement syndrome, cubital tunnel
25 syndrome, carpal tunnel syndrome, and depression. (AR 17). At step
26 three, the ALJ found that Plaintiff's impairments did not meet or
27 equal a listing found in 20 C.F.R. Part 404, Subpart P, Appendix 1.
28 (AR 17-18).

1 Before proceeding to step four, the ALJ found that Plaintiff had
2 the residual functional capacity ("RFC") to perform light work with
3 the following further limitations: "with respect to [Plaintiff's]
4 sitting for six hours out of an eight-hour workday she would require
5 hourly breaks of five minutes to change position, and during that
6 five minutes she could either stand at the workstation or walk around
7 the workstation close enough to remain on task. She can frequently
8 push and pull with the dominant right upper extremity. She can
9 occasionally climb ramps and stairs, stoop, crouch and crawl. She
10 can frequently balance and kneel. She is precluded from climbing
11 ladders, ropes, and scaffolds. She is precluded from exposure to
12 hazards. She is precluded from overhead reaching with the right
13 upper extremity but can otherwise perform frequent reaching,
14 handling, fingering and feeling with the right upper extremity. She
15 is limited to nonpublic work that is unskilled and involves simple
16 and repetitive tasks." (AR 19). In making his RFC finding, the ALJ
17 stated that Plaintiff's subjective complaints were "less than fully
18 credible" and inconsistent with objective medical evidence. (AR 21,
19 24, 26).

20
21 At steps four and five, the ALJ determined that Plaintiff was
22 unable to perform past relevant work but that she could seek work as
23 a packager, inspector, or assembler, which were all jobs existing in
24 significant numbers in the national economy. (See AR 27-28).
25 Accordingly, the ALJ determined that Plaintiff was not disabled
26 within the meaning of the Social Security Act. (AR 28).

1 that previous surgeries had helped her. (AR 45). Plaintiff also
2 noted that she had epidural injections in her back and neck, but
3 those had not helped either. (AR 45). Plaintiff testified that she
4 was unable to use her right hand to grip, pick up small things or
5 button a shirt "quickly" or "for a long time," or lift a gallon of
6 milk. (AR 45-46). Plaintiff further testified that she had also
7 tried physical therapy, unspecified "pain management," and
8 acupuncture. (AR 46-47).

9
10 Plaintiff stated that she could walk for about an hour at a
11 time, although she sometimes fell down, and she had memory and
12 concentration problems. (AR 47). Plaintiff testified that she would
13 be unable to work a job where she would have to sit or stand for a
14 long time, and she sometimes needed to lie down for thirty to sixty
15 minutes due to her pain. (AR 48). Plaintiff also stated that she
16 would be unable to perform full time work that involved moving her
17 right hand repetitively. (See AR 48). Plaintiff further testified
18 that, with assistance, she could shop at a nearby store and perform
19 household chores. (AR 49).

20
21 Several portions of the administrative record are also relevant
22 to Plaintiff's claim that the ALJ erroneously rejected her pain
23 testimony. During a February 2011 orthopedic re-evaluation,
24 Plaintiff reported that "her last injection" in January 2011 had been
25 "of some help," although she was still experiencing "severe"
26 shoulder, neck, and back pain that caused difficulty sleeping. (AR
27 321). During a March 2011 postoperative evaluation, Plaintiff
28 reported that pain in her right shoulder had decreased in the week

1 following her surgery on that shoulder. (AR 327). During an April
2 2011 postoperative evaluation, Plaintiff again reported "improving
3 right shoulder pain, status-post arthroscopic repair of her right
4 shoulder as of 3/1/11." (AR 330). Plaintiff still reported chronic
5 cervical and lumbar spine pain. (AR 330).

6
7 In November 2011 and April 2012, Plaintiff underwent physical
8 examinations, and her grip strength in her right hand improved during
9 this period. (Compare AR 339 (testing at "5, 5, 5 pounds" in
10 November 2011) with AR 695 (testing at "20, 20, 15 pounds" in April
11 2012)).

12
13 In an April 2012 Adult Function Report, Plaintiff reported that
14 she was unable to sleep because of her pain and that she had
15 difficulty bathing and grooming herself due to pain. (AR 221).
16 Plaintiff stated that family members helped her with grooming,
17 housework, and preparing meals. (AR 222). Plaintiff claimed that
18 she left the house once or twice a day to pick up her son from school
19 and visited with friends once or twice a week. (AR 223-24).
20 Plaintiff reported that she could walk for up to thirty minutes
21 before needing to rest for fifteen minutes and that her ailments also
22 affected her ability to lift, stand, squat, bend, stand, reach,
23 kneel, climb stairs, concentrate, understand, follow instructions,
24 and use her hands. (AR 225). A December 2012 Adult Function Report
25 made substantially similar allegations. (AR 258-66).

26
27 In an October 2012 Progress Note, Dr. Joseph Fujun Liu observed
28 that Plaintiff reported "improved mood and sleeping" but also "a lot

1 of anxiety" and that her mood during the examination was "stable and
2 cooperative." (AR 610). Dr. Liu recommended increasing Plaintiff's
3 Buspar dosage and otherwise did not modify Plaintiff's course of
4 treatment. (AR 611).

5
6 In a November 2012 Progress Report, Dr. Nelson J. Flores
7 observed that Plaintiff's mood had improved with the use of
8 psychotropic medication, although she was anxious, irritable, and
9 suffered from heart palpitations. (AR 423). Dr. Flores recommended
10 no changes to Plaintiff's treatment regimen. (AR 424).

11
12 In a second November 2012 Progress Note, Dr. Liu observed that
13 Plaintiff reported improved sleep and mood due to her medication
14 regimen but still reported anxiety. (AR 420). Dr. Liu reported that
15 Plaintiff's mood was "stable [and] cooperative" and recommended
16 increasing her Buspar dosage. (AR 420-21).

17
18 In a December 2012 Progress Note, Dr. Liu observed that
19 Plaintiff reported "a lot of crying" and "depressed mood," although
20 her mood during the examination was stable and cooperative. (AR
21 613). Dr. Liu recommended increasing Plaintiff's Wellbutrin and
22 Remeron dosages but otherwise did not modify Plaintiff's course of
23 treatment. (AR 613-14).

24
25 In a January 2013 Progress Note, Dr. Liu reported that Plaintiff
26 felt "better" following the increase of her Wellbutrin dosage and was
27 "cooperative and engaged" during the examination. (AR 619). Dr. Liu
28 did not modify Plaintiff's treatment regimen. (AR 620).

1 The ALJ summarized Plaintiff's testimony and the aforementioned
2 evidence, determining that: (1) Plaintiff had "some improvement" in
3 her grip and motor strength following surgery on her right upper
4 extremity; (2) no doctor had recommended surgery for Plaintiff's
5 degenerative disc disease of the lumbar and cervical spine;
6 (3) Plaintiff had not been treated for physical impairments after
7 2013; (4) Plaintiff's treatment for her depression had generally been
8 successful, requiring "very little treatment" after February 2013,
9 and her mood disorder was "stable" since October 2012; (5) Plaintiff
10 had never been psychiatrically hospitalized; and (6) Plaintiff had
11 received "routine, conservative, and non-emergency treatment" since
12 the alleged onset date. (AR 19-21). The ALJ then summarized
13 additional medical evidence and assessments, opining that "[t]he
14 medical evidence of record suggests that [Plaintiff's] impairments
15 are not as limiting as alleged by [Plaintiff]." (AR 21-26; see also
16 id. at 24 ("The [ALJ] finds that objective clinical findings and the
17 treatment record do not support [Plaintiff's] allegations of
18 disabling symptoms and limitations; thus, [Plaintiff's] allegations
19 are not fully credible.")). Following these summaries, the ALJ
20 concluded that his RFC assessment was "supported by the evidence as a
21 whole" and that Plaintiff's complaints were "less than fully credible
22 and the objective medical evidence [did] not support the alleged
23 severity of symptoms." (AR 26).

24
25 Remand is warranted. Preliminarily, the ALJ's summary of
26 Plaintiff's testimony, summary of the medical evidence, assignment of
27 weight to medical assessments, and ruling on Plaintiff's credibility
28 are intermingled over several pages. (AR 19-26). Although the ALJ

1 intersperses references to facts or conclusions that might be
2 relevant to assessing Plaintiff's credibility, e.g., her treatment
3 regimen and improvement with treatment, the ALJ's clearest findings
4 regarding Plaintiff's credibility were that her complaints were
5 inconsistent with the medical evidence of record, the "clinical
6 findings," and the "treatment record." (AR 21, 24). Lack of
7 objective medical support cannot be the sole basis for finding a
8 claimant not credible, and the ALJ's other reasons are not presented
9 with the degree of specificity required by case law. See Burrell v.
10 Colvin, 775 F.3d 1133, 1138-39 (9th Cir. 2014); Brown-Hunter, 806
11 F.3d at 494 ("Because the ALJ failed to identify the testimony she
12 found not credible, she did not link that testimony to the particular
13 parts of the record supporting her non-credibility determination.
14 This was legal error."); see also Burch v. Barnhart, 400 F.3d 676,
15 681 (9th Cir. 2005) ("lack of medical evidence" can be "a factor" in
16 rejecting credibility, but cannot "form the sole basis").

17
18 Moreover, to the extent that the Court can identify the ALJ's
19 other reasons for discrediting Plaintiff's testimony, these reasons
20 are suspect. For example, the ALJ referenced Plaintiff's testimony
21 and Adult Function Report and concluded that her "daily activities
22 . . . do not comport with additional limitations beyond those found
23 herein." (AR 20). Having reviewed Plaintiff's testimony and the
24 administrative record, the Court is unconvinced that Plaintiff's
25 daily activities are consistent with the ability to perform full time
26 work or inconsistent with her excess pain testimony. See Vertigan v.
27 Halter, 260 F.3d 1044, 1050 (9th Cir. 2001) (finding "only a
28 scintilla" of evidence supporting ALJ's adverse credibility finding

1 where claimant was able to go grocery shopping with assistance, walk
2 approximately an hour in the mall, get together with friends, play
3 cards, swim, watch television, read, undergo physical therapy, and
4 exercise at home); see also Reddick v. Chater, 157 F.3d 715, 722-23
5 (9th Cir. 1998) (activities of daily living affect a claimant's
6 credibility "[o]nly if the level of activity [is] inconsistent with
7 [the claimant's] claimed limitations"; ALJ erred by "not fully
8 accounting for the context of materials or all parts of the testimony
9 and reports," resulting in paraphrasing of record material that was
10 "not entirely accurate regarding the content or tone of the record").
11

12 Moreover, according to the ALJ, "[t]he treatment records reveal
13 [that Plaintiff] received routine, conservative, and non-emergency
14 treatment since the alleged onset date," (AR 21), and the ALJ also
15 noted that no physician had recommended surgery for Plaintiff's
16 degenerative disc disease and that Plaintiff had never been
17 psychiatrically hospitalized. (AR 20). However, Plaintiff underwent
18 hospitalization and surgery for several conditions *after* the alleged
19 onset date, and the Ninth Circuit has expressed doubt as to whether a
20 treatment regimen including epidural steroid injections qualifies as
21 "conservative." See Garrison, 759 F.3d at 1015 n.20; (see also AR
22 45, 318, 321 (Plaintiff received epidural steroid injections)).
23

24 Relatedly, to the extent that the ALJ discredited Plaintiff's
25 testimony because she did not seek surgery or other specific
26 treatments, the ALJ was required, and failed, to consider Plaintiff's
27 explanation for not doing so. See Smolen, 80 F.3d at 1284 ("Where a
28 claimant provides evidence of a good reason for not taking medication

1 for her symptoms, her symptom testimony cannot be rejected for not
2 doing so."); Molina v. Astrue, 674 F.3d 1104, 1113 (9th Cir. 2012)
3 (unexplained or inadequately explained failure to seek treatment or
4 follow prescribed course of treatment can support adverse credibility
5 finding). Here, Plaintiff reported in 2013 that she was reluctant to
6 undergo further surgery because she did not believe her prior
7 surgeries had provided meaningful pain relief, (AR 45), which is
8 consistent with Plaintiff's reports of "decreased" or "improving"
9 pain one month or less after surgery in March 2011. (AR 327, 330).
10 In any event, even a brief pain-free period or temporary improvement
11 is consistent with a claim of disability. See Lester v. Chater, 81
12 F.3d 821, 833 (9th Cir. 1995) ("Occasional symptom-free periods - and
13 even the sporadic ability to work - are not inconsistent with
14 disability.").

15
16 In light of the foregoing, the Court concludes that the ALJ
17 provided insufficient support for his decision to discount
18 Plaintiff's pain testimony.

19
20 **B. The Court Cannot Conclude That The ALJ's Error Was Harmless**

21
22 "[H]armless error principles apply in the Social Security . . .
23 context." Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012)
24 (citing Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1054 (9th
25 Cir. 2006)). Generally, "an ALJ's error is harmless where it is
26 'inconsequential to the ultimate nondisability determination.'" Id.
27 (citing Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1162
28 (9th Cir. 2008)).

1 The Court cannot conclude that the ALJ's errors were harmless.
2 The limiting effects of Plaintiff's pain are directly relevant to
3 assessing her RFC. A claimant's RFC "may be the most critical
4 finding contributing to the final . . . decision about disability."
5 See McCawley v. Astrue, 423 F. App'x 687, 689 (9th Cir. 2011)
6 (quoting SSR 96-5p). Here, Plaintiff's RFC was central to the ALJ's
7 determination that there was work that she could perform despite her
8 limitations. (AR 27-28). Because the Court cannot determine that
9 the ALJ's errors were "inconsequential to the ultimate nondisability
10 determination," the errors cannot be deemed harmless. See Carmickle,
11 533 F.3d at 1162.

12 13 **C. Remand Is Warranted**

14
15 The decision whether to remand or order an immediate award of
16 benefits is within the district court's discretion. Harman v. Apfel,
17 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no useful purpose
18 would be served by further administrative proceedings, or where the
19 record is fully developed, it is appropriate to direct an immediate
20 award of benefits. Id. at 1179 ("[T]he decision of whether to remand
21 for further proceedings turns upon the likely utility of such
22 proceedings."). However, where the circumstances of the case suggest
23 that further administrative review could remedy the Commissioner's
24 errors, remand is appropriate. McLeod v. Astrue, 640 F.3d 881, 888
25 (9th Cir. 2011); Harman, 211 F.3d at 1179-81.

26 Here, the Court remands because the ALJ provided insufficient
27 support for his decision to discount Plaintiff's pain testimony. The
28 record does not affirmatively establish that the ALJ could not have

1 found Plaintiff not fully credible for other reasons, nor does it
2 establish that the ALJ would necessarily be required to find
3 Plaintiff disabled if these deficiencies were remedied. Remand is
4 therefore appropriate.

5
6 The Court has not reached issues not discussed supra except to
7 determine that reversal with a directive for the immediate payment of
8 benefits would be inappropriate at this time. In addition to the
9 issues addressed in this order, the ALJ should consider on remand any
10 other issues raised by Plaintiff, if necessary.

11
12 **CONCLUSION**

13
14 For the foregoing reasons, the decision of the Administrative
15 Law Judge is VACATED, and the matter is REMANDED, without benefits,
16 for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).

17
18 LET JUDGMENT BE ENTERED ACCORDINGLY.

19
20 Dated: February 28, 2017.

21 _____/s/_____
22 ALKA SAGAR
23 UNITED STATES MAGISTRATE JUDGE
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