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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA-EASTERN DIVISION

DARLENE ANDREA REFFEL,	)	Case No. ED CV 16-01985-AS
	)	
Plaintiff,	)	<b>MEMORANDUM OPINION AND</b>
	)	<b>ORDER OF REMAND</b>
	)	
v.	)	
	)	
NANCY A. BERRYHILL, <sup>1</sup> Acting	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
_____	)	

PROCEEDINGS

On September 16, 2016, Plaintiff filed a Complaint seeking review of the denial of her application for Disability Insurance Benefits. (Docket Entry No. 1). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Docket Entry Nos. 9-10). On January 31, 2017, Defendant filed an Answer along with the

<sup>1</sup> Nancy A. Berryhill is now the Acting Commissioner of the Social Security Administration and is substituted in for Acting Commissioner Carolyn W. Colvin in this case. See 42 U.S.C. § 205(g).

1 Administrative Record ("AR"). (Docket Entry Nos. 13-14). On July 11,  
2 2017, the parties filed a Joint Stipulation ("Joint Stip."), setting  
3 forth their respective positions regarding Plaintiff's claims. (Docket  
4 Entry No. 21).

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7 The Court has taken this matter under submission without oral  
8 argument. See C.D. Cal. L.R. 7-15; "Order Re: Procedures in Social  
9 Security Case," filed September 20, 2016 (Docket Entry No. 7).

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11 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

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14 On March 7, 2013, Plaintiff, formerly employed as a  
15 receptionist/physical therapy assistant, an administrative assistant for  
16 a construction equipment company, and an accounting specialist for a  
17 temporary agency and an insurance company (see AR 41-43, 186, 195-99),  
18 filed an application for Disability Insurance Benefits, alleging an  
19 inability to work because of her disabling condition since September 8,  
20 2010. (AR 159-65). On December 30, 2014, the Administrative Law Judge  
21 ("ALJ"), Jesse J. Pease, heard testimony from Plaintiff (who was  
22 represented by counsel) and vocational expert Mary Jesko. (See AR 35-  
23 67). On February 13, 2015, the ALJ issued a decision denying  
24 Plaintiff's application. (See AR 16-27). After determining that  
25 Plaintiff had severe impairments -- "fibromyalgia, non-insulin dependent  
26 diabetes, history of cervical cancer in remission, anxiety, prescription  
27 medication dependence, right ankle sprain, patellofemoral osteoarthritis  
28

1 of the left knee, lumbar strain, obesity, migraines, and depression" (AR  
2 18) -- but did not have an impairment or combination of impairments that  
3 met or medically equaled the severity of one of the Listed Impairments  
4 (AR 19-20), the ALJ found that Plaintiff had the residual functional  
5 capacity ("RFC")<sup>2</sup> to perform light work<sup>3</sup> with the following limitations:  
6 can lift, carry, push or pull 20 pounds occasionally and 10 pounds  
7 frequently; can stand and walk for about 6 hours out of an 8-hour  
8 workday; can sit for about 6 hours out of an 8-hour workday; can do  
9 postural activities occasionally, but no ladders, ropes, or scaffolds;  
10 no hazardous machinery; no unprotected heights; and can do simple and  
11 routine tasks in a nonpublic environment. (AR 20-25). The ALJ then  
12 determined that Plaintiff was not able to perform any past relevant work  
13 (AR 25), but that jobs existed in significant numbers in the national  
14 economy that Plaintiff can perform, and therefore found that Plaintiff  
15 was not disabled within the meaning of the Social Security Act. (AR 25-  
16 27).

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20 Plaintiff requested that the Appeals Council review the ALJ's  
21 Decision. (See AR 8). The request was denied on July 19, 2016. (See AR  
22 1-5). The ALJ's Decision then became the final decision of the  
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26 <sup>2</sup> A Residual Functional Capacity is what a claimant can still do  
27 despite existing exertional and nonexertional limitations. See 20  
28 C.F.R. § 404.1545(a)(1).

<sup>3</sup> "Light work involves lifting no more than 20 pounds at a time  
with frequent lifting or carrying of objects weighing up to 10 pounds."  
20 C.F.R. § 404.1567(b).

1 Commissioner, allowing this Court to review the decision. See 42 U.S.C.  
2 §§ 405(g), 1383(c).

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5 **PLAINTIFF'S CONTENTIONS**

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7 Plaintiff alleges that the ALJ failed to properly (1) determine  
8 Plaintiff's RFC; and (2) assess Plaintiff's credibility. (See Joint  
9 Stip. at 3-8, 11-14).

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11 **DISCUSSION**

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14 After consideration of the record as a whole, the Court finds that  
15 Plaintiff's second claim of error warrants a remand for further  
16 consideration. Since the Court is remanding the matter based on  
17 Plaintiff's second claim of error, the Court will not address  
18 Plaintiff's first claim of error.

19  
20 **A. The ALJ Did Not Properly Assess Plaintiff's Credibility**

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22  
23 Plaintiff asserts that the ALJ failed to properly find that  
24 Plaintiff's testimony about her pain and functional limitations was not  
25 fully credible. (See Joint Stip. at 10-14). Defendant asserts that the  
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1 ALJ properly considered Plaintiff's testimony and found Plaintiff not  
2 entirely credible. (See Joint Stip. at 14-17).<sup>4</sup>

3  
4 Plaintiff made the following statements in a "Function Report -  
5 Adult" dated May 3, 2013 (see AR 206-14):  
6

7  
8 She lives with her family in a house. Her impairments  
9 limit her ability to work because she has extreme swelling and  
10 pain when she walks, sits or stands, she has weak muscles that  
11 limit her walking and standing to 5 minutes (her high insulin  
12 level prevents her from building muscle strength), she has  
13 shoulders, hips and legs that when used get stiffer and more  
14 painful, and she has extreme anxiety and panic attacks when  
15 dealing with simple things (like completing paperwork). For  
16 her impairments she takes Prozac (which keeps her awake),  
17 Xanax (which makes her sleepy), Buspar (which makes her  
18 sleepy), Cymbalta (which makes her nauseated, gives her  
19 diarrhea and keeps her awake), Lisinopril (which makes her  
20 sleepy), Norco (which keeps her awake and causes migraine  
21 headaches), and Tylenol with Codeine #3. (See AR 206, 213-14).  
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27 <sup>4</sup> The Court rejects Defendant's alternative assertion that  
28 Plaintiff has waived this claim (see Joint Stip. at 17, citing  
Independent Towers of Washington, 350 F.3d 925, 928 (9th Cir. 2003)).  
See Tadman v. Berryhill, 2017 WL 1073341, \*4 (C.D. Cal. March 21,  
2017)(rejecting the defendant's same waiver argument).

1           With respect to daily activities, she stays at home, lies  
2 on the bed, and moves to lie on the couch (she cannot sit for  
3 long). She does not take care of anyone else. She takes care  
4 of pets, letting them in and out of the house. Her husband  
5 helps her take care of the pets, feeding them, playing with  
6 them, bathing them, and picking up after them. As a result of  
7 her impairments, she can no longer work, walk (she bought an  
8 electric scooter to get around), shop, water ski, or snow ski.  
9 Her impairments affect her abilities to bathe (her husband  
10 helps her so she does not fall; she feels exhausted after  
11 taking a shower or bath), to care for her hair (she cannot dry  
12 her hair for more than 5 minutes), to feed herself (she cannot  
13 stand long enough to cook), and to use the toilet (she gets  
14 stiff from sitting). She does not need special reminders to  
15 take care of personal needs and grooming or to take medicine.  
16 Her impairments inflame her joints and cause her to move to  
17 different beds, thereby affecting her sleep. (See AR 207-08,  
18 213).

21  
22           She does not prepare meals because her joints and muscles  
23 gets stiff and swollen when she stands, sits or walks; her  
24 husband has to cook. She is not able to do any house or yard  
25 work (unless she is heavily medicated) because of her pain and  
26 lack of strength. She goes outside occasionally, driving a  
27 car (but "not very far"). She shops for clothes and presents  
28

1 by mail. She rarely shops in stores; when she does shop in  
2 stores she has to know exactly where the items are (because of  
3 limited walking time). (See AR 208-09).  
4

5 She is not able to pay bills, count change, handle a  
6 saving account, or use a checkbook or money orders, because  
7 her shoulders are swollen and in pain. Her impairments have  
8 affected her ability to handle money; she cannot spend money  
9 because she cannot go anywhere for long, and her medications  
10 are expensive. (See AR 209-10).  
11

12 She no longer does her hobbies and interests, namely,  
13 walking dogs, reading, and using the computer. Because of her  
14 impairments, she can write and use the computer only a little  
15 at a time. She spends time with others, talking on the phone  
16 maybe once a day. She does not go to any places on a regular  
17 basis. She needs to be reminded to go to doctors'  
18 appointments, and sometimes needs to be accompanied. She has  
19 problems getting along with others because strong-willed,  
20 overbearing and negative people make her anxious and cause her  
21 to have panic attacks. Since her impairments began, people in  
22 positions of authority such as police and bosses cause her to  
23 experience extreme anxiety and to cry. (See AR 210-12).  
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1 Her impairments affect her lifting, squatting, bending,  
2 standing, reaching, walking, kneeling, stair-climbing, seeing,  
3 memory, completing tasks, concentration, understanding,  
4 following instructions, using hands, and getting along with  
5 others. When she moves for more than 5 minutes, her joints  
6 tighten, get swollen, and feel pain. She can walk for 25 feet  
7 before she has to rest, and then must rest for at least 30  
8 minutes before she can resume walking. Her ability to pay  
9 attention depends on her level of anxiety. She can follow  
10 written and spoken instructions okay. Although she does not  
11 get along well with authority figures, she has never been  
12 fired or laid off from a job because of problems getting along  
13 with other people (she left a job at Empire Orthopedic before  
14 she could be fired). She does not handle stress well. She  
15 handles changes in routine fine. Since her impairments began,  
16 she is afraid of new people and going places. She uses a  
17 wheelchair (but her husband could no longer push it) and an  
18 electric scooter, both of which were prescribed by her doctors  
19 (Dr. Fagan, Dr. Hussein). (See AR 211-12).  
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23  
24 Plaintiff made the following statements in a "Function Report -  
25 Adult" dated November 14, 2013 (see AR 232-40)<sup>5</sup>:  
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27  
28 <sup>5</sup> Many of Plaintiff's statements of repetitive. The Court will  
try not to repeat statements made by Plaintiff in her early "Function  
Report-Adult."



1 Her ability to work is limited by her shoulders (limited  
2 motion due to inflamed bursitis), lower back, hips, quad  
3 muscles, knees (particularly her left knee), joints, weak  
4 muscles (caused by high insulin and a high dose of Crestor),  
5 migraine headaches, and short-term memory loss (caused by 5-  
6 hour and 10 hour surgeries). She takes Prozac (which keeps  
7 her awake), Tylenol with Codeine #3 (which keeps her awake)  
8 Norco (which keeps her awake), Restorile (which makes her  
9 weak) and Crestor (which makes her muscles weak). (See AR  
10 232, 239).  
11  
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13 As far as her daily activities are concerned, she does  
14 not take care of anyone else or pets. As a result of her  
15 impairments, she can no longer walk, ride a bike, cook, clean,  
16 do her own hair, enter or exit the bath, shop, water ski, snow  
17 ski, hike, garden, or fill out paperwork quickly. Her  
18 impairments affect her sleep because she can only sleep on her  
19 back (she feels like she is laying on rocks when she sleeps on  
20 her sides). Her impairments affect her ability to dress (she  
21 wears "easy on clothing"), to bathe (she needs help getting in  
22 and out), to care for her hair (a friend helps her do her hair  
23 once a week), to feed herself (she cannot cook), to use the  
24 toilet (she has a hard time getting up and down), to shop, to  
25 clean, and to do laundry. She needs special reminders taking  
26 care of personal needs and grooming (she cannot remember when  
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1 she last bathed), and she needs special reminders and help  
2 taking medicine (she cannot remember what pills she took; her  
3 husband puts her pills in a daily pill box). (See AR 233-34).  
4

5  
6 She rarely goes outside; when she does go out she travels  
7 in her scooter. She does not go out alone because she is  
8 unable to put together her scooter and because she can walk,  
9 stand or sit for only 15 minutes (on a good day). She can  
10 drive, but only if she takes heavy doses of pain medications  
11 and does not drive a long distance. She shops by mail for  
12 birthdays and Christmas. She shops twice a year, but only for  
13 minutes. Although she cannot pay bills, handle a savings  
14 account (she can use a computer for only 5 minutes), or use a  
15 checkbook or money orders, she can count change for about 5  
16 minutes. (See AR 235-36).  
17

18  
19 She no longer does any of her hobbies or interests  
20 because of her severe pain. With reminders, she goes to the  
21 doctors every 3 months, and sometimes she needs somebody to  
22 accompany her (depending on her mobility, depression, anxiety  
23 and migraines). She does not have any problems getting along  
24 with family, friends, neighbors, or others. Since her  
25 impairments began, changes in social activities cause her  
26 severe anxiety and panic attacks which lead to depression.  
27  
28 (See AR 236-37).

1 Her impairments affect the same areas as she stated  
2 before, with the addition of talking and the elimination of  
3 getting along with others. She can walk for 50 feet before  
4 needing to rest, and then she needs a minimum of half-a-day  
5 before she can resume walking. The length of time she can pay  
6 attention depends on her depression, anxiety or panic attacks.  
7 She cannot finish what she starts, and she has difficulty with  
8 written instructions (she has to re-read them) and spoken  
9 instructions (she has to have them repeated). Authority  
10 figures frighten her and cause her severe anxiety and panic  
11 attacks. She does not handle stress well, which is why she  
12 has been prescribed four different medications. She handles  
13 changes in routine only if she can remember the change (her  
14 short-term memory loss interferes). Her unusual behaviors  
15 include talking to herself and obsessing over things. She  
16 uses a wheelchair, which was prescribed by a doctor about 10  
17 years ago, and a scooter, which was prescribed by a doctor 3  
18 years ago. (See AR 237-38).  
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22 Plaintiff testified at the December 30, 2014 administrative hearing  
23 as follows (see AR 40-52):  
24  
25

26 She attended college for one year. In 2007/2008, she did  
27 skilled accounting work -- going through records doing  
28 accounting, copying checks, opening mail -- for a temporary

1 service. She worked as an administrative assistant, doing  
2 basic accounting, for a construction equipment company. She  
3 also worked as a receptionist/physical therapy assistant for  
4 a physical therapy place. The last place she worked was not  
5 friendly and "kicked up" her anxiety. When asked why she was  
6 not able to work, she said she had brought a "cheat sheet"  
7 because her anxiety and panic attacks causes her brain to go  
8 blank and because she had a hard time remembering things. She  
9 has fibromyalgia, pain in her shoulders (which makes her hands  
10 numb), pain in her joints, migraine headaches, diabetes  
11 (uncontrolled), anxiety (every day), and panic attacks (caused  
12 by anything new, but at least once a week in the past month;  
13 it takes her at least an hour to return to normal after an  
14 attack). Since 2010 (when she had her last surgery for  
15 cancer), she cannot take care of her daily personal care  
16 (shower, hair, shaving), she cannot sit because her hips get  
17 stiff and her lower back starts to hurt (with pain down to her  
18 ankles), her left knee does not bend or straighten (it swells  
19 up), she can walk for about 15 minutes before her back  
20 tightens up, she cannot sleep because of the shoulder pain,  
21 and she is sensitive to heat. Toradol shots for her  
22 fibromyalgia relieves the pain for a couple of days. For her  
23 fibromyalgia she has been prescribed various medications  
24 (Norco, Tylenol with Codeine), but she could not afford them  
25 or they increased her anxiety; she also has been prescribed a  
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1 patch (Lyrica) ("a step above Norco"), but she could not  
2 afford it. She does not take Norco "like [she] should"  
3 because she "suffer[s] through pain" and does not "want to  
4 move up in pain pills." A psychologist prescribed Prozac for  
5 her anxiety, which "seems to have helped," but her anxiety  
6 kicked in when she went out (particularly during interviews,  
7 when she was not able to say what she wanted). She has been  
8 prescribed a muscle relaxant. She also has been prescribed  
9 Xanax for her anxiety, but she tries not to take it so much  
10 because of an addiction concern. (See AR 40-48, 50-54).  
11  
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13  
14 When asked about prescription medication dependence and  
15 her "overly getting medications from different sources and  
16 overly using medication," she responded she only got  
17 medication (something stronger than codeine) from her  
18 rheumatologist, who released her back to the care of another  
19 doctor "because [the rheumatologist] really couldn't do  
20 anything more for [her]" since the prescribed medications  
21 "kicked up the panic and anxiety." (See AR 46-47).  
22  
23

24 She cannot do anything around the house; her husband does  
25 all of the cooking and cleaning. She tries to walk but her  
26 back tightens up. Before she experiences serious pain, she  
27 can sit in a chair for maybe 10 minutes, and she can walk  
28 about 5 to 10 minutes (which takes her to the end of the block

1 and back). She can lift only less than 5 pounds (she needed  
2 to lift a coffee pot with two hands that morning). She has to  
3 lie down during the day. She cannot finish tasks, such as  
4 washing dishes, because she cannot stand for that long, her  
5 arms lock up, and then she "squirrels" and forgets what she is  
6 doing. (See AR 48-49, 53).  
7

8 She would have to lay down 7 to 7 1/2 hours out of an 8-  
9 hour workday. She cannot do her former receptionist work  
10 because she cannot reach and move her arms, hold things, type,  
11 or write things down, and because her anxiety caused by people  
12 coming in, talking on the phone, and depending on the  
13 friendliness of the people. (See AR 49-50, 52).  
14

15 Prior to discussing Plaintiff's testimony, the ALJ addressed  
16 Plaintiff's credibility as follows: "After careful consideration of the  
17 evidence, the undersigned finds that the claimant's medically  
18 determinable impairments could reasonably be expected to cause the  
19 alleged symptoms; however, the claimant's statements concerning the  
20 intensity, persistence and limiting effects of these symptoms are not  
21 entirely credible for the reasons explained in this decision." (AR 21).  
22  
23

24 After discussing the medical evidence relating to Plaintiff's  
25 physical impairments (see AR 21-22), and after briefly summarizing  
26 Plaintiff's testimony in her function reports and at the administrative  
27 hearing with respect to her physical impairments (see AR 22), the ALJ  
28

1 addressed Plaintiff's credibility regarding her physical impairments as  
2 follows:

3  
4           The undersigned finds the claimant not entirely credible  
5 regarding the alleged severity of her physical impairments.  
6 The claimant reports she has been using a prescribed  
7 wheelchair for 10 years and a prescribed scooter for 3 years,  
8 but the medical evidence does not establish the medical  
9 necessity for an assistive ambulatory device. Neither her  
10 treatment records nor Dr. Bernabe's orthopedic report indicate  
11 an ongoing need for an assistive device. The claimant  
12 testified she has been taking less pain medication than she  
13 should because of concerns about addiction. Despite her  
14 concerns, she is not in pain management. A psychiatric  
15 consultative examiner noted the claimant appears to be  
16 overusing benzodiazepines and sedatives, and diagnosed the  
17 claimant with sedative hypnotic and anxiolytic abuse (Exhibit  
18 8F, p. 5-6). The claimant's allegation of a disabling  
19 physical condition is not well-supported. A sedentary  
20 residual functional capacity is not appropriate, but the  
21 claimant is capable of a light range of work.

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24 (AR 22-23).

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26  
27 The ALJ then proceeded to discuss the medical evidence relating to  
28 Plaintiff's mental impairments. In that discussion, the ALJ briefly

1 summarized Plaintiff's testimony in her Function Reports and at the  
2 administrative hearing concerning her mental impairments. (See AR 23-  
3 25). The ALJ addressed Plaintiff's credibility regarding her mental  
4 impairments as follows:

5  
6 The undersigned finds the claimant not entirely credible  
7 regarding the alleged severity of her mental impairments. The  
8 claimant stopped working because she was not treated well at  
9 her workplace, but she responded well to mental health  
10 treatment and even reported returning to school. Since she  
11 has not been following up with a psychiatrist, medication  
12 management became more difficult, but she acknowledges  
13 benefitting from Prozac. The claimant has been able to  
14 interact appropriately with treatment providers and  
15 consultative examiners. She appears capable of working in a  
16 nonpublic environment. Dr. Unwalla's psychiatric report also  
17 indicates the claimant would be capable of simple and routine  
18 tasks.  
19  
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21 (AR 25).  
22

23 A claimant initially must produce objective medical evidence  
24 establishing a medical impairment reasonably likely to be the cause of  
25 the subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir.  
26 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991). Once a  
27 claimant produces objective medical evidence of an underlying impairment  
28



1 that could reasonably be expected to produce the pain or other symptoms  
2 alleged, and there is no evidence of malingering, the ALJ may reject the  
3 claimant's testimony regarding the severity of his or her pain and  
4 symptoms only by articulating specific, clear and convincing reasons for  
5 doing so. Brown-Hunter v. Colvin, 798 F.3d 749, 755 (9th Cir.  
6 2015)(citing Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir.  
7 2007)); see also Smolen, supra; Reddick v. Chater, 157 F.3d 715, 722  
8 (9th Cir. 1998); Light v. Social Sec. Admin., 119 F.3d 789, 792 (9th  
9 Cir. 1997). Because the ALJ does not cite to any evidence in the record  
10 of malingering, the "clear and convincing" standard stated above  
11 applies.  
12

13  
14 Here, the ALJ failed to provide clear and convincing reasons for  
15 finding that Plaintiff's testimony about the intensity, persistence and  
16 limiting effects of her symptoms was not entirely credible.<sup>6</sup>  
17  
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19 First, the ALJ failed to "specifically identify 'what testimony is  
20 not credible and what evidence undermines [Plaintiff's] complaints.'" Parra v. Astrue, 481 F.3d 742, 750 (9th Cir. 2007) (quoting Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995)); see also Smolen, supra, 80  
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25 <sup>6</sup> The Court will not consider reasons for finding Plaintiff not  
26 entirely credible (see Joint Stip. at 15-17) that were not given by the  
27 ALJ in the Decision. See Connett v. Barnhart, 340 F.3d 871, 874 (9th  
28 Cir. 2003)("We are constrained to review the reasons the ALJ asserts."; citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947), Pinto v. Massanari, 249 F.3d 840, 847-48 (9th Cir. 2001)); and Garrison v. Colvin, 759 F.3d 995, 1010 (9th Cir. 2014)("We review only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not rely.").

1 F.3d at 1284 ("The ALJ must state specifically what symptom testimony is  
2 not credible and what facts in the record lead to that conclusion").  
3

4  
5 Second, the ALJ's determination that Plaintiff's testimony about  
6 using a wheelchair prescribed 10 years earlier and using a scooter  
7 prescribed 3 years earlier was not supported by the medical evidence  
8 (i.e. treatment records, orthopedic report) was an insufficient reason  
9 for finding Plaintiff less than fully credible with respect to her  
10 testimony about the severity of her physical impairments. Once a  
11 claimant demonstrates medical evidence of an underlying impairment, "an  
12 ALJ 'may not disregard [a claimant's testimony] solely because it is not  
13 substantiated affirmatively by objective medical evidence.'" Trevizo v.  
14 Berryhill, 862 F.3d 987, 1001 (9th Cir. 2017)(quoting Robbins v. Soc.  
15 Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006)). The ALJ did not cite  
16 to any evidence, including Plaintiff's treatment records and Dr.  
17 Bernabe's August 7, 2013 Report, contradicting Plaintiff's testimony  
18 that she had not been prescribed a wheelchair 10 years earlier and a  
19 scooter 3 years earlier. Compare Chaudry v. Astrue, 688 F.3d 661, 671,  
20 n. 9 (9th Cir. 2012)(finding that the claimant's "non-prescribed use of  
21 a wheelchair and unwarranted use of a cane," which was supported by  
22 specific evidence in the record -- "The cane was prescribed only at  
23 [the claimant's] request and the wheelchair was never prescribed. The  
24 record reflects that use of a cane was not appropriate for [the  
25 claimant's] asserted back pain." -- also factored into the ALJ's  
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1 determination that (the claimant's] subejctive expression of his  
2 limitations lacked credibility.").

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4  
5 Third, to the extent that the ALJ determined that Plaintiff was not  
6 credible because her testimony about taking less pain medication (Norco)  
7 than she should out of concerns about addiction (see AR 54) was  
8 inconsistent with her lack of pain management and her overuse of  
9 anxiolytics and pain medication (see AR 23), the ALJ's reason for  
10 discounting Plaintiff's testimony was not clear and convincing. See  
11 Trevizo, supra, 862 F.3d at 1001-02 ("The ALJ did not address the  
12 believability of Trevizo's proffered reasons: her fear of becoming  
13 addicted to narcotics and the ability of alternate drugs to control her  
14 pain. The ALJ's weighing of Trevizo's failure to take narcotics against  
15 her credibility was thus erroneous."). While the ALJ was critical of  
16 Plaintiff not being in pain management, the ALJ failed to cite evidence  
17 that Plaintiff had been referred to pain management. See Tommasetti v.  
18 Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008)(an ALJ may consider  
19 "unexplained or inadequately explained failure to seek treatment or to  
20 follow a prescribed course of treatment" when weighing a claimant's  
21 credibility)(citation omitted). The ALJ also failed to state how  
22 Plaintiff's testimony concerning her concerns about addiction was  
23 inconsistent with Plaintiff not being in pain management and did not ask  
24 Plaintiff why she was not in pain management.  
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1 At the hearing, Plaintiff testified she did not take certain  
2 medication, specifically a prescribed patch (Lyrica), because she could  
3 not afford it and did not have great insurance. (See AR 50-51, 53-54;  
4 see also AR 653 (In a Report dated August 4, 2013, consultative  
5 psychiatric examiner Khushro Unwalla, M.D., stated that Plaintiff "is  
6 underutilizing her psychiatric medications including Prozac and BuSpar  
7 because of insurance issues"). Plaintiff's lack of involvement in pain  
8 management may have been related to her financial issues. See Smolen,  
9 supra ("Where a claimant provides evidence of a good reason for not  
10 taking medication for her symptoms [such as the plaintiff's testimony  
11 that "she had not sought treatment (and therefore was not taking  
12 medication) for her chronic fatigue and pain because, as a result of not  
13 being able to maintain a job, she had no insurance and could not afford  
14 treatment"], her symptom testimony cannot be rejected for not doing  
15 so."); see also Regennitter v. Commissioner of Soc. Sec. Admin., 166  
16 F.3d 1294, 1297 (9th Cir. 1998)(" . . . [W]e have proscribed the  
17 rejection of a claimant's complaints for lack of treatment when the  
18 record establishes that the claimant could not afford it[.]"); Gamble v.  
19 Chater, 68 F.3d 319, 322 (9th Cir. 1995)("It flies in the face of the  
20 patent purposes of the Social Security Act to deny benefits to someone  
21 because he is too poor to obtain medical treatment that may help  
22 him.")(quoting Gordon v. Schweiker, 725 F.2d 231, 237 (4th Cir. 1984)).  
23 In addition, the ALJ failed to state how Plaintiff's testimony  
24 concerning her concerns about Narco addiction was inconsistent with Dr.  
25 Unwalla's statements that Plaintiff appeared to overuse anxiolytics and  
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1 pain medications (see AR 652-53). At the hearing the ALJ asked  
2 Plaintiff, in a compound question, about her overuse of medication, but  
3 did not have Plaintiff focus on her overuse of medication in her  
4 responses. (See AR 46-47).  
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7 Fourth, none of the reasons given by the ALJ for finding  
8 Plaintiff's testimony concerning the severity of her mental impairments  
9 not entirely credible -- namely, Plaintiff stopped working because she  
10 was not treated well at the workplace; Plaintiff responded well to  
11 mental health treatment; Plaintiff's medication management became more  
12 difficult because she did not continue to go to a psychiatrist, but she  
13 acknowledged benefitting from Prozac; and Plaintiff interacted  
14 appropriately with treatment providers and consultative examiners -- was  
15 clear and convincing. Unlike Bruton v. Massanari, 268 F.3d 824, 828  
16 (9th Cir. 2001)(finding that the ALJ's reliance, in part, on the  
17 claimant's false statements at the administrative hearing and to a  
18 doctor that "he left his job because he was laid off, rather than  
19 because he was injured"), a case relied on by Defendant (see Joint Stip.  
20 at 17), there is no indication that Plaintiff gave false information  
21 about why she left her employment (see AR 212 ["I left before they could  
22 fire me cuz I couldn't take it any longer."], which was consistent with  
23 her hearing testimony, AR 52 ["The last place I worked was not a very  
24 friendly place which kicked up the anxiety even worse."]). Moreover,  
25 while the ALJ stated that Plaintiff responded well to mental health  
26 treatment, the ALJ failed to cite to particular medical records that  
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1 specifically contradicted Plaintiff's testimony about her symptoms and  
2 limitations. Although, as the ALJ noted, Plaintiff testified the Prozac  
3 prescribed by the psychologist "seems to have helped" (AR 47), she also  
4 testified that her anxiety still "kicks in" when she goes any anywhere,  
5 particularly to an interview (AR 47). Thus, it is unclear, based on  
6 Plaintiff's own testimony, that the Prozac was effective in controlling  
7 her symptoms. See Warre v. Comm'r of Soc. Sec. Admin. 439 F.3d 1001,  
8 1006 (9th Cir. 2006)("Impairments that can be controlled effectively  
9 with medication are not disabling for the purpose of determining  
10 eligibility for SSI benefits."). Finally, the ALJ failed to specify how  
11 Plaintiff's ability to interact appropriately with treatment providers  
12 and consultative examiners served as a basis for discounting Plaintiff's  
13 testimony.<sup>7</sup>  
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#### 16 17 **B. Remand Is Warranted**

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19 The decision whether to remand for further proceedings or order an  
20 immediate award of benefits is within the district court's discretion.  
21 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
22 useful purpose would be served by further administrative proceedings, or  
23 where the record has been fully developed, it is appropriate to exercise  
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26 <sup>7</sup> The Court notes that Defendant did not discuss three of the  
27 ALJ's reasons for finding Plaintiff's testimony concerning the severity  
28 of her mental impairments not entirely credible (namely, positive  
response to mental health treatment; benefit from Prozac; and  
appropriate interaction with treatment providers and consultative  
examiners), see Joint Stip. at 15-17.

1 this discretion to direct an immediate award of benefits. Id. at 1179  
2 (“[T]he decision of whether to remand for further proceedings turns upon  
3 the likely utility of such proceedings.”). However, where, as here, the  
4 circumstances of the case suggest that further administrative review  
5 could remedy the Commissioner’s errors, remand is appropriate. McLeod  
6 v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); Harman v. Apfel, supra,  
7 211 F.3d at 1179-81.  
8

9       Since the ALJ failed to properly assess Plaintiff’s credibility,  
10 remand is appropriate. Because outstanding issues must be resolved  
11 before a determination of disability can be made, and “when the record  
12 as a whole creates serious doubt as to whether the [Plaintiff] is, in  
13 fact, disabled within the meaning of the Social Security Act,” further  
14 administrative proceedings would serve a useful purpose and remedy  
15 defects. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir.  
16 2014)(citations omitted).<sup>8</sup>  
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25       <sup>8</sup> The Court has not reached any other issue raised by Plaintiff  
26 except to determine that reversal with a directive for the immediate  
27 payment of benefits would not be appropriate at this time. “[E]valuation of the record as a whole creates serious doubt that  
28 Plaintiff is in fact disabled.” See Garrison v. Colvin, 759 F.3d 995,  
1021 (2014). Accordingly, the Court declines to rule on Plaintiff’s  
claims regarding the ALJ’s failure to properly determine Plaintiff’s RFC  
(see Joint Stip. at 3-8). Because this matter is being remanded for  
further consideration, this issue should also be considered on remand.

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**ORDER**

For the foregoing reasons, the decision of the Commissioner is reversed, and the matter is remanded for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: August 16, 2017

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/s/  
ALKA SAGAR  
UNITED STATES MAGISTRATE JUDGE