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

HEIDY C.¹,)	NO. EDCV 17-2302-KS
Plaintiff,)	
v.)	MEMORANDUM OPINION AND ORDER
)	
NANCY A. BERRYHILL, Acting)	
Commissioner of Social Security,)	
Defendant.)	
_____)	

INTRODUCTION

Heidy C. (“Plaintiff”) filed a Complaint on November 13, 2017, seeking review of the denial of her applications for a period of disability, disability insurance (“DI”), and supplemental security income (“SSI”). On January 17, 2018, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. (Dkt. Nos. 11-13.) On November 27, 2018, the parties filed a Joint Stipulation (“Joint Stip.”). (Dkt. No. 26.) Plaintiff seeks an order reversing the Commissioner’s decision and ordering the payment of benefits or, in the alternative, remanding for further proceedings. (Joint Stip. at

¹ Partially redacted in compliance with Federal Rule of Civil Procedure 5.2(c)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

1 25.) The Commissioner requests that the ALJ’s decision be affirmed or, in the alternative,
2 remanded for further proceedings. (*See* AR 26.) The Court has taken the matter under
3 submission without oral argument.
4

5 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

6

7 In June 2013, Plaintiff, who was born on May 19, 1965, protectively filed applications
8 for a period of disability, DI, and SSI.² (*See* Administrative Record (“AR”) 183-214.) Plaintiff
9 alleged disability commencing April 15, 2008 due to: fibromyalgia; hypothyroidism; IBS;
10 diabetes; and depression. (AR 207, 226.) Plaintiff subsequently amended the alleged onset
11 date to her application date – June 30, 2013 – and dismissed her claim for a period of disability
12 and DI. (AR 43.) Plaintiff previously worked as a dental assistant (DOT 079.361-018). (AR
13 30, 238.) After the Commissioner denied Plaintiff’s applications initially (AR 84, 85) and on
14 reconsideration (AR 112, 113), Plaintiff requested a hearing (AR 132-33). Administrative
15 Law Judge Joan Ho (“ALJ”) held a hearing on March 17, 2016. (AR 38.) Plaintiff, who was
16 represented by counsel, testified before the ALJ as did vocational expert (“VE”) Luis Mas.
17 (AR 38-58.) On June 15, 2016, the ALJ issued an unfavorable decision, denying Plaintiff’s
18 applications. (AR 21-32.) On September 18, 2017, the Appeals Council denied Plaintiff’s
19 request for review. (AR 1-7.)
20

21 **SUMMARY OF ADMINISTRATIVE DECISION**

22

23 The ALJ found that Plaintiff had not engaged in substantial gainful activity since her
24 June 30, 2013 application date. (AR 23.) The ALJ determined that Plaintiff had the following
25 severe impairments: “fibromyalgia; degenerative disc disease of the cervical spine; mild
26

27 ² Plaintiff was 42 years old on the alleged onset date and thus met the agency’s definition of a younger individual.
28 *See* 20 C.F.R. §§ 404.1563(c), 416.963(c). Plaintiff has since changed age categories and is now a person closely
approaching advanced age. *See id.* §§ 404.1563(d), 416.963(d).

1 osteoarthritis of the bilateral knees; mild degenerative disc disease at the mid thoracic spine;
2 and bilateral myopia, astigmatism, presbyopia, and moderate non-proliferative diabetic
3 retinopathy with macular edema.” (AR 24.) In reaching this conclusion, the ALJ found that
4 Plaintiff had other medically determinable impairments but they were not “severe.” (AR 24.)
5 The ALJ concluded that Plaintiff did not have an impairment or combination of impairments
6 that met or medically equaled the severity of an impairment listed in 20 C.F.R. part 404,
7 subpart P, appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925,
8 416.926). (AR 25.) The ALJ determined that Plaintiff had the residual functional capacity
9 (“RFC”) to perform the following:

10
11 [O]ccasionally lift and/or carry 20 pounds; frequently lift and/or carry 10 pounds;
12 stand and/or walk for 6 hours in an 8-hour workday; sit for 6 hours in an 8-hour
13 workday; occasionally climb ramps/stairs, ladders, ropes, or scaffolds, balance,
14 stoop, kneel, crouch, and crawl; and limited to work that does not require highly
15 acute vision.

16
17 (AR 26.)

18
19 The ALJ found that Plaintiff was unable to perform her past relevant work as a dental
20 assistant (DOT 079.361-018). (AR 30.) However, the ALJ also found that, considering
21 Plaintiff’s age, education, work experience, and residual functional capacity, there are jobs
22 that exist in significant numbers in the national economy that Plaintiff can perform, including
23 the representative occupations of ticket taker (DOT 344.667-010), cashier II (DOT 211.462-
24 010), and checker I (DOT 222.687-010). (AR 31.) Accordingly, the ALJ determined that
25 Plaintiff had not been under a disability, as defined in the Social Security Act, from the
26 application date through the date of the ALJ’s decision. (AR 32.)

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STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to determine whether it is free from legal error and supported by substantial evidence in the record as a whole. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). “Substantial evidence is ‘more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d 519, 522-23 (9th Cir. 2014) (internal citations omitted). “Even when the evidence is susceptible to more than one rational interpretation, we must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012).

Although this Court cannot substitute its discretion for the Commissioner’s, the Court nonetheless must review the record as a whole, “weighing both the evidence that supports and the evidence that detracts from the [Commissioner’s] conclusion.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (internal quotation marks and citation omitted); *Desrosiers v. Sec’y of Health and Hum. Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). “The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

The Court will uphold the Commissioner’s decision when the evidence is susceptible to more than one rational interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may review only the reasons stated by the ALJ in his decision “and may not affirm the ALJ on a ground upon which he did not rely.” *Orn*, 495 F.3d at 630; *see also Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). The Court will not reverse the Commissioner’s decision if it is based on harmless error, which exists if the error is “‘inconsequential to the ultimate nondisability determination,’ or if despite the legal error, ‘the

1 agency's path may reasonably be discerned.'" *Brown-Hunter v. Colvin*, 806 F.3d 487, 492
2 (9th Cir. 2015) (internal citations omitted).

4 DISCUSSION

5 There are two issues in dispute: (1) whether the ALJ properly evaluated the credibility
6 of Plaintiff's statements about the severity of her symptoms and limitations; and (2) whether
7 the ALJ's assessment of Plaintiff's residual functional capacity is supported by substantial
8 evidence. (Joint Stip. at 4.)

10 I. The ALJ's Evaluation of the Credibility of Plaintiff's Statements

12 A. Plaintiff's Statements

14 1. *October 10, 2013 Adult Function Report*

16 On October 10, 2013, Plaintiff completed an Adult Function Report on which she made
17 the following statements. (AR 257-64.) Plaintiff stated that she cannot sit or stand for long
18 periods of time due to pain in her ankles, knees, and hips. (AR 257.) Her medications bring
19 her pain down from a level 10 to a 6-7. (AR 257.) However, her medications give her dizzy
20 spells and interfere with her concentration. (AR 257.) Plaintiff's pain also interferes with her
21 sleep. (AR 258.)

23 During the course of a day, Plaintiff gets her 10 year old son off to school, makes
24 breakfast, does some light housework, and gets groceries if needed for dinner. (AR 257.) She
25 stated that her 20 year old daughter sometimes helps by driving the 10 year old to and from
26 school and by making dinner when Plaintiff is not feeling well. (AR 258.) Plaintiff is able to
27 do all personal care activities, although some might take her longer than they did before. (AR
28 258.) Plaintiff prepares meals daily: soups; sandwiches; some frozen dinners; and, every once

1 in a while, a complete dinner with help from her adult daughter. (AR 259.) It takes Plaintiff
2 two to three hours to prepare these meals. (AR 259.) Plaintiff's housework consists of doing
3 the laundry and doing some cleaning and cooking when she is feeling well. (AR 259.) She
4 stated that her daughter helps her do some daily chores, including carrying the laundry up and
5 down the stairs and cooking. (AR 259.) Plaintiff stated that she does not do any yard work
6 and only goes outside if it is "absolutely necessary," *i.e.*, to pick up her son from school or to
7 go shopping. (AR 260.) However, she also stated that she does not go shopping alone because
8 her medications cause her to feel drowsy and experience dizzy spells. (AR 260.) Plaintiff
9 stated that she tries not to go anywhere because of her IBS and the medication side effects.
10 (AR 261.) When she does go shopping, Plaintiff shops for food, clothes for her son,
11 medications, and "household necessities." (AR 260.) She stated that she goes shopping once
12 or twice a week for 1.5 hours at a time. (AR 260.) Plaintiff watches TV daily. (AR 261.)
13 Plaintiff indicated that her conditions affect her ability to lift, climb stairs, stand, kneel, walk,
14 squat, sit, concentrate, remember, and complete tasks. (AR 262.) She stated that she can walk
15 for one block before needing to stop and rest for a few minutes. (AR 262.) She stated that
16 she can pay attention for 20-30 minutes at a time but does not always finish what she starts
17 (e.g., conversations, chores, reading, watching a movie). (AR 262.) She stated that when she
18 is under stress she experiences anxiety attacks. (AR 263.) Plaintiff listed her medications as
19 gabapentin (a nerve pain medication), sertraline (an antidepressant), and piroxicam (an anti-
20 inflammatory drug). (AR 264.)

22 2. *March 17, 2016 Hearing Testimony*

23
24 Plaintiff also testified at the March 17, 2016 hearing, approximately two and a half years
25 after she completed the Adult Function Report. (AR 39.) Plaintiff testified that she was unable
26 to work because she has constant muscle and joint aches, dizzy spells, and irritable bowel
27 syndrome ("IBS") that could "come on at any moment." (AR 48.) She testified that she did
28 not think she could return to working as a dental assistant because she would be unable to be

1 on her feet for long periods and to sit for long periods during procedures and because of her
2 dizziness and drowsiness she did not think that she would be able to work properly with
3 patients and sharp instruments. (AR 49.) She also testified that she has a lot of issues with
4 her vision and cannot see things close up, which she would need to be able to do to work as a
5 dental assistant. (AR 49.) She testified that she believed she could be on her feet for maybe
6 10 minutes at a time. (AR 50.) She testified that she sees a pain management specialist who
7 was trying different medications and had given her a shot in her neck that had eased her pain
8 for maybe three months. (AR 50.)

9
10 Plaintiff testified that her adult daughter helps her wash dishes, make dinner, and run
11 errands when Plaintiff is not feeling well. (AR 51.) She testified that during the day she
12 spends “quite a few hours” lying down and sleeps “a lot.” (AR 51.) Plaintiff testified that her
13 anxiety sometimes causes her to leave “the market” because she suddenly “couldn’t be there.”
14 (AR 54.)

15 16 **B. Applicable Law**

17
18 An ALJ must make two findings before determining that a claimant’s pain or symptom
19 testimony is not credible. *Treichler v. Comm’r of Soc. Sec.*, 775 F.3d 1090, 1102 (9th Cir.
20 2014). “First, the ALJ must determine whether the claimant has presented objective medical
21 evidence of an underlying impairment which could reasonably be expected to produce the pain
22 or other symptoms alleged.” *Id.* (quoting *Lingenfelter*, 504 F.3d at 1036). “Second, if the
23 claimant has produced that evidence, and the ALJ has not determined that the claimant is
24 malingering, the ALJ must provide specific, clear and convincing reasons for rejecting the
25 claimant’s testimony regarding the severity of the claimant’s symptoms” and those reasons
26 must be supported by substantial evidence in the record. *Id.*; see also *Marsh v. Colvin*, 792
27 F.3d 1170, 1174 n.2 (9th Cir. 2015); *Carmickle v. Comm’r of Soc. Sec.*, 533 F.3d 1155, 1161
28

1 (9th Cir. 2008) (court must determine “whether the ALJ’s adverse credibility finding . . . is
2 supported by substantial evidence under the clear and convincing standard”).
3

4 In weighing a plaintiff’s credibility, the ALJ may consider many factors, including: “(1)
5 ordinary techniques of credibility evaluation, such as the claimant’s reputation for lying, prior
6 inconsistent statements concerning the symptoms, and other testimony . . . that appears less
7 than candid; (2) unexplained or inadequately explained failure to seek treatment or to follow
8 a prescribed course of treatment; and (3) the claimant’s daily activities.” *Tommasetti v. Astrue*,
9 533 F.3d 1035, 1039 (9th Cir. 2008). However, “subjective pain testimony cannot be rejected
10 on the *sole* ground that it is not fully corroborated by objective medical evidence.” *Rollins v.*
11 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (emphasis added) (citation omitted).
12

13 **C. ALJ’s Assessment And Analysis**

14

15 The ALJ found that Plaintiff’s medically determinable impairments could reasonably be
16 expected to cause the alleged symptoms, but Plaintiff’s statements about the intensity,
17 persistence, and limiting effects of those symptoms were not consistent with the medical
18 evidence and other evidence of record. (AR 29.) First, the ALJ stated that Plaintiff has not
19 generally received the type of medical treatment one would expect for a totally disabled
20 individual because: there were significant gaps in Plaintiff’s history of treatment; Plaintiff
21 made relatively infrequent trips to the doctor for allegedly disabling symptoms; and Plaintiff’s
22 “use of medications does not suggest the presence of impairments which is more limiting than
23 found in [the ALJ’s] decision.” (AR 29.) Second, the ALJ stated that Plaintiff’s activities of
24 daily living were “somewhat normal” and required some of the same physical and mental
25 abilities and social interactions as those necessary for obtaining and maintaining employment.
26 (AR 29.) Specifically, the ALJ cited Plaintiff’s ability to perform personal care activities,
27 childcare, housework, preparing meals, laundry, cleaning, cooking, paying bills, watching
28 movies and television, driving, shopping, and spending time with others. (AR 29.)

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3 *1. Plaintiff's Medical Treatment*

4 The ALJ's first reason for finding Plaintiff less than fully credible – the type of medical
5 treatment she has received – is not clear, convincing, and supported by substantial evidence in
6 the record. The ALJ states that there are “significant gaps” in Plaintiff's history of treatment.
7 (AR 29.) The ALJ does not identify any significant gaps, and the Court's review of the
8 administrative record does not reveal “significant gaps.” The medical record shows that, in
9 the years between Plaintiff's June 30, 2013 application date and March 17, 2016 hearing,
10 Plaintiff suffered from multiple conditions necessitating visits to a myriad of different care
11 providers, including rheumatologists, endocrinologists, psychiatrists, therapists, internists, and
12 gastroenterologists, resulting in more than 30 medical appointments in less than three years.
13 The longest gap between medical appointments was approximately 6 months between
14 Plaintiff's October 23, 2013 follow up appointment with Dr. Babak Zamiri, a rheumatologist,
15 and her April 29, 2014 follow up appointment with the West Gastroenterology Group. To the
16 extent that this six month gap can be characterized as “significant,” it is not a convincing
17 reason for finding Plaintiff less than fully credible. Before Plaintiff's October 23, 2013
18 appointment with Dr. Zamiri, she had already received diagnoses for fibromyalgia and arthritis
19 (*see* AR 407) and for multiple gastroenterological conditions (*see* AR 543 (results of August
20 15, 2013 video capsule enteroscopy report showing delayed gastric emptying suggestive of
21 gastroparesis and “extremely congested” gastric mucosa associated with hemorrhagic
22 gastritis)). There is no indication that Plaintiff's physicians advised her to undergo additional
23 tests or treatment during the six month period in question, and, perhaps more significantly,
24 there is no indication that her condition would have improved had she made additional medical
25 appointments during that time. Additionally, Plaintiff did attend a psychiatric evaluation at
26 the request of the Commissioner during the six month period (*see* AR 435 (1/9/2014)) and she
27 continued to follow her treatment regimen by taking her prescribed medications, which, at that
28 time, included: gabapentin (Neurontin), a nerve pain medication; sertraline (Zoloft), for
depression and anxiety; canagliflozin (Invokana), for diabetes; and levothyroxine (Levoxyl),

1 for hypothyroidism. (AR 448.) In sum, given the nature of Plaintiff's conditions and her
2 prescribed treatment plans, the six month gap between Plaintiff's rheumatology appointment
3 with Dr. Zamiri in October 2013 and her gastroenterology appointment in April 2014 was not
4 a convincing reason for finding Plaintiff's statements less than fully credible.
5

6 Similarly, the Court is not persuaded that Plaintiff's complaints were not credible
7 because she made "relatively infrequent trips to the doctor for allegedly disabling symptoms."
8 (*See* AR 29.) As stated above, Plaintiff attended more than 30 medical appointments in less
9 than 3 years, saw a wide range of specialists, and sometimes saw multiple care providers in a
10 single month. (*See, e.g.*, AR 482-83 (12/10/2015 endocrinology appointment), 481 (12/4/2015
11 psychiatric appointment); AR 478 (7/31/2015 psychiatric appointment), 955 (appointment
12 with family therapist), 620 (7/3/2015 emergency room admission for lesion on foot related to
13 diabetes)); AR 957 (6/13/2015 appointment with family therapist), 526 (gastroenterology
14 appointment), 454-57 (6/8/2015 pre-operative appointment with internist in advance of carpal
15 tunnel release surgery).) Accordingly, substantial evidence in the record does not support the
16 ALJ's finding that Plaintiff's trips to the doctor were "relatively infrequent." Moreover, there
17 is no indication that Plaintiff's doctors were urging her to schedule more frequent
18 appointments or had ever suggested that she would benefit from more frequent appointments.
19 To the contrary, Plaintiff's rheumatologist, Dr. Zamiri, generally asked Plaintiff to schedule
20 follow up visits every five to six months. (*See, e.g.*, AR 399, 402, 406.) Thus, the frequency
21 of Plaintiff's medical appointments are not a convincing reason for finding Plaintiff's
22 statements less than fully credible.
23

24 The ALJ also cited Plaintiff's "use of medications" as being inconsistent with limitations
25 greater than those found by the ALJ. (AR 29.) It is unclear what aspect of Plaintiff's extensive
26 medication use was inconsistent with Plaintiff's statements about her symptoms and
27 limitations. At times, Plaintiff was taking ten or more different prescription medications daily,
28 including gabapentin, Norco (a highly addictive narcotic), alprazolam (Xanax), sertraline

1 (Zoloft), baclofen (a muscle relaxant), diclofenac (anti-inflammatory drug), piroxicam (a
2 second anti-inflammatory), Invokana, levothyroxine, metformin (a second anti-diabetic
3 medication), and pantoprazole (a proton pump inhibitor for gastroesophageal reflux disease).
4 (*See, e.g.*, AR 482 (list of current medications as of 12/10/2015), 486 (list of current
5 medications as of 8/26/2015).) Plaintiff’s need for this many daily medications, including
6 three different pain relievers, a nerve pain medication, a muscle relaxant, and both Xanax and
7 Zoloft, would seem to support, rather than undermine, her allegations of disabling limitations.
8 Accordingly, the ALJ’s determination that Plaintiff had not “received the type of medical
9 treatment one would expect for a totally disabled individual” is not a convincing reason
10 supported by substantial evidence for finding Plaintiff’s statements about her symptoms and
11 limitation less than fully credible.

12 13 *2. Plaintiff’s Activities of Daily Living*

14
15 The ALJ’s second reason for finding Plaintiff’s statements less than fully credible is that
16 Plaintiff performed activities of daily living that were “somewhat normal” and required some
17 of the same physical and mental abilities and social interactions as those necessary for
18 obtaining and maintaining employment. (AR 29.) Specifically, the ALJ cited Plaintiff’s
19 ability to perform personal care activities, childcare, housework, preparing meals, laundry,
20 cleaning, cooking, paying bills, watching movies and television, driving, shopping, and
21 spending time with others. (AR 29.)

22
23 An ALJ may rely on a plaintiff’s daily activities to support an adverse credibility
24 determination only when those activities either: “contradict [the plaintiff’s] other testimony”;
25 or “meet the threshold for transferable work skills” – that is, where the plaintiff “is able to
26 spend a substantial part of his or her day performing household chores or other activities that
27 are transferable to a work setting.” *Orn*, 495 F.3d at 639; *Smolen v. Chater*, 80 F.3d 1273,
28 1284 n. 7 (9th Cir. 1996). The ALJ does not indicate that Plaintiff’s activities of daily living

1 contradict her testimony, only that “some of the physical and mental abilities and social
2 interactions required in order to perform these activities are the same as those necessary for
3 obtaining and maintaining employment.” (AR 29.) This is not the standard. The ALJ did not
4 find that Plaintiff “is able to spend a substantial portion of [her] day performing . . . activities
5 that are transferable to a work setting.” *See Orn*, 495 F.3d at 639. Nor could she. Plaintiff
6 indicates that, during an average day, she drives her son to and from school, prepares breakfast,
7 lunch, and dinner – usually soups, sandwiches, or frozen meals – and does the laundry and
8 some cleaning. (AR 257-59.) However, she also indicates that she receives help from her
9 adult daughter in accomplishing these tasks. (*See id.*) In particular, Plaintiff reports that, when
10 she is not feeling well, her daughter does virtually all of these tasks: driving Plaintiff’s son to
11 and from school; running errands; making dinner; washing dishes; carrying laundry and up
12 and down the stairs; and doing some cleaning. (AR 51, 257-59.) Similarly, Plaintiff indicates
13 that she shops for groceries, clothes for her son, and medications once or twice a week for 1.5
14 hours at a time, but she does not go shopping alone because of the side effects of her
15 medications. (AR 260.) Plaintiff also testified that during the day she spends “quite a few
16 hours” lying down and sleeps “a lot.” (AR 51.) Given Plaintiff’s reported need for both help
17 and rest, the record before the Court does not support a finding that Plaintiff spends a
18 substantial portion of her day performing activities that are transferable to a work setting.

19
20 Furthermore, the Ninth Circuit has repeatedly emphasized that “ALJs must be especially
21 cautious in concluding that daily activities are inconsistent with testimony about pain, because
22 impairments that would unquestionably preclude work and all the pressures of a workplace
23 environment will often be consistent with doing more than merely resting in bed all day.”
24 *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014). In *Smolen*, for example, the Ninth
25 Circuit pointed out that “many home activities may not be easily transferable to a work
26 environment where it might be impossible to rest periodically or take medication.” *Smolen*,
27 80 F.3d at 1287 n. 7; *see also Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (same).
28 Similarly, in *Reddick*, the Ninth Circuit stated that “disability claimants should not be

1 penalized for attempting to lead normal lives in the face of their limitations.” 157 F.3d at 722.
2 Further, in *Garrison*, the Ninth Circuit quoted with approval the Seventh Circuit’s admonition
3 that:

4
5 [t]he critical differences between activities of daily living and activities in a
6 full-time job are that a person has more flexibility in scheduling the former than
7 the latter, can get help from other persons . . . , and is not held to a minimum
8 standard of performance, as she would be by an employer. The failure to
9 recognize these differences is a recurrent, and deplorable feature of opinions by
10 administrative law judges in social security disability cases.

11
12 *Garrison*, 759 F.3d at 1016 (quoting *Bjornson v. Astrue*, 671 F.3d 640, 647 (7th Cir. 2012)).

13
14 In light of the foregoing, the Court rejects the Commissioner’s attempt to discredit
15 Plaintiff’s statements solely because Plaintiff, a single mom of a then pre-teen boy, had not
16 lost all motivation and physical capacity for being a mother to her son and, instead, persisted,
17 to the best of her ability, in providing food, clothing, transportation to school, and a clean
18 home for her child. Thus, the ALJ failed to provide a clear and convincing reason supported
19 by substantial evidence for finding Plaintiff’s statements about her symptoms and limitations
20 less than fully credible. Remand on this issue is warranted.

21
22 **II. The ALJ’s Assessment of Plaintiff’s Residual Functional Capacity**

23
24 The second issue in dispute is whether the ALJ’s assessment of Plaintiff’s residual
25 functional capacity is supported by substantial evidence. (AR 4.) Specifically, Plaintiff
26 contends that the ALJ erred by failing to order a consultative examination. (*See* Joint Stip. at
27 19-20.) Plaintiff points out that, in the absence of a physical RFC assessment from an
28 examining physician, the ALJ relied on the 2013 and 2014 opinions of the reviewing State

1 agency medical consultants, Dr. Chan, an internist, and Dr. Ballard, a family or general
2 practitioner, which were more than two years old at the time of the ALJ's decision. (Joint
3 Stip. at 30; *see also* AR 30, 84, 113.) Specifically, the ALJ stated that Drs. Ballard and Chan
4 "found that [Plaintiff] can occasionally lift and/or carry 20 pounds; frequently lift and/or carry
5 10 pounds; stand and/or walk for 6 hours in an 8-hour workday; and sit for 6 hours in an 8-
6 hour workday." (AR 30.) The ALJ adopted the assessment of Drs. Ballard and Chan.
7 (*Compare* AR 26 with AR 68, 95.)

8
9 "[T]he Commissioner has broad latitude in ordering a consultative examination." *Reed*
10 *v. Massanari*, 270 F.3d 838, 842 (9th Cir. 2001) (internal quotation marks and citation
11 omitted). However, some cases "normally require a consultative examination, including those
12 in which additional evidence needed is not contained in the records of the claimant's medical
13 sources and those involving an ambiguity or insufficiency in the evidence that must be
14 resolved." *Id.* (internal quotation marks and citations omitted). The Agency's regulations
15 state that it "may" purchase a consultative examination "to try to resolve an inconsistency in
16 the evidence" or when the evidence is insufficient to support a determination. 20 C.F.R. §
17 416.919a(b). The Ninth Circuit has found that a case may be remanded where the ALJ's
18 refusal to purchase a consultative examination for a claimant was "not in accordance with the
19 law." *Reed*, 270 F.3d at 845.

20
21 Because this matter must be remanded for reconsideration of the credibility of Plaintiff's
22 statements about her symptoms and limitations, the Court exercises its discretion not to decide
23 whether the ALJ's failure to order a consultative examination rendered her assessment of
24 Plaintiff's RFC unsupported by substantial evidence in the record. Nevertheless, on remand,
25 the ALJ, after reconsidering the credibility of Plaintiff's statements, may need to reassess
26 Plaintiff's RFC. In doing so, the ALJ should consider whether, given the absence of an RFC
27 assessment from a treating physician, the record would benefit from the opinion of an
28 examining physician who could shed light on both the apparent inconsistencies between

1 Plaintiff's statements and the opinions of Drs. Ballard and Chan and on Plaintiff's current
2 physical condition, which the now five and six year old opinions of Drs. Ballard and Chan do
3 not address.

4
5 **III. The ALJ's Assessment of Plaintiff's Residual Functional Capacity**

6
7 The decision whether to remand for further proceedings or order an immediate award of
8 benefits is within the district court's discretion. *Harman v. Apfel*, 211 F.3d 1172, 1175-78
9 (9th Cir. 2000). Under the credit-as-true rule, a district court may remand for an award of
10 benefits when the following three conditions are satisfied: "(1) the record has been fully
11 developed and further administrative proceedings would serve no useful purpose; (2) the ALJ
12 has failed to provide legally sufficient reasons for rejecting evidence, whether claimant
13 testimony or medical opinion; and (3) if the improperly discredited evidence were credited as
14 true, the ALJ would be required to find the claimant disabled on remand." *Garrison*, 759 F.3d
15 at 1020. The third of these conditions "incorporates . . . a distinct requirement of the credit-
16 as-true rule, namely that there are no outstanding issues that must be resolved before a
17 determination of disability can be made." *Id.* n.26. However, even if those three requirements
18 are met, the Court retains "flexibility" in determining the appropriate remedy and may remand
19 for further proceedings "when the record as a whole creates serious doubt as to whether the
20 claimant is, in fact, disabled within the meaning of the Social Security Act." *Burrell v. Colvin*,
21 775 F.3d 1133, 1141 (9th Cir. 2014) (quoting *Garrison*, 759 F.3d at 1021).

22
23 Here, it is not clear from the record that, if the ALJ credited the statements of Plaintiff,
24 he would be required to find Plaintiff disabled on remand. Accordingly, the Court remands
25 for further development of the record, including the proper consideration of the statements and
26 testimony of Plaintiff and, if appropriate, the purchase of a consultative physical examination.

27 \\\

28 \\\

1 **CONCLUSION**

2

3 For the reasons stated above, IT IS ORDERED that the decision of the Commissioner
4 is REVERSED, and this case is REMANDED for further proceedings consistent with this
5 Memorandum Opinion and Order.

6


7 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this
8 Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for defendant.

9

10 LET JUDGMENT BE ENTERED ACCORDINGLY

11

12 DATE: February 5, 2019

13 
14 KAREN L. STEVENSON
15 UNITED STATES MAGISTRATE JUDGE