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

MARINA M.,¹

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. ED CV-17-02374 AFM

**MEMORANDUM OPINION AND
ORDER REVERSING AND
REMANDING DECISION OF
THE COMMISSIONER**

Plaintiff seeks review of the Commissioner's final decision denying her application for disability insurance benefits. In accordance with the Court's case management order, the parties have filed memorandum briefs addressing the disputed issues. This matter is now ready for decision.

BACKGROUND

Plaintiff filed an application for disability benefits on January 22, 2014, alleging disability as of January 20, 2012. Her application was denied initially and

¹ Plaintiff's name has been partially redacted in accordance with Federal Rule of Civil Procedure 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

1 on reconsideration. (Administrative Record [“AR”] 94-97, 102-106.) A hearing took
2 place before an Administrative Law Judge (ALJ) on August 25, 2016, at which
3 Plaintiff, her attorney, and a vocational expert (“VE”) were present. (AR 33-65.) In
4 a written decision dated October 13, 2016, the ALJ found that Plaintiff suffered from
5 the following severe impairments: osteoarthritis; rheumatoid arthritis;
6 gastroesophageal reflux disease (“GERD”); bilateral rotator cuff tendinopathy; and
7 history of hiatal hernias, status post repair. (AR 20.) The ALJ determined that
8 Plaintiff retained the residual functional capacity (“RFC”) to perform a limited range
9 of light work. (AR 22.) Relying on the testimony of the VE, the ALJ concluded that
10 Plaintiff was able to perform work existing in significant numbers in the national
11 economy. (AR 26.) Accordingly, the ALJ determined that Plaintiff was not disabled
12 from January 20, 2012 through the date of the las insured (December 31, 2014). (AR
13 27.) The Appeals Council denied review, thereby rendering the ALJ’s decision the
14 final decision of the Commissioner. (AR 1-3.)

15 **DISPUTED ISSUES**

- 16 1. Whether the ALJ properly considered all of the relevant medical
17 evidence.
- 18 2. Whether the ALJ properly considered Plaintiff’s subjective
19 complaints.
- 20 3. Whether the ALJ properly relied upon the VE’s testimony.

21 **STANDARD OF REVIEW**

22 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to
23 determine whether the Commissioner’s findings are supported by substantial
24 evidence and whether the proper legal standards were applied. *See Treichler v.*
25 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014). Substantial
26 evidence means “more than a mere scintilla” but less than a preponderance. *See*
27 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter v. Astrue*, 504 F.3d
28 1028, 1035 (9th Cir. 2007). The Court reviews the record as a whole, weighing both

1 the evidence that supports and the evidence that detracts from the Commissioner’s
2 conclusion. *Lingenfelter*, 504 F.3d at 1035. Where evidence is susceptible of more
3 than one rational interpretation, the Commissioner’s decision must be upheld. *See*
4 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007); *Batson v. Comm’r of Soc. Sec.*
5 *Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004) (“When evidence reasonably supports
6 either confirming or reversing the ALJ’s decision, [the court] may not substitute [its]
7 judgment for that of the ALJ.”).

8 **DISCUSSION**

9 Plaintiff contends that the ALJ failed to provide clear and convincing reasons
10 for rejecting Plaintiff’s subjective complaints. For the following reasons, the Court
11 finds that Plaintiff’s contention is meritorious.

12 Plaintiff testified that she was unable to work due to depression, anxiety,
13 arthritis, and gastrointestinal problems. She stated that she was unable to stand for
14 long periods due to pain, unable to bend down due to acid reflux, and unable to grasp
15 objects due to arthritis. Plaintiff further testified that there were days that she was
16 unable to get out of bed. She attributed this to depression as well as drowsiness caused
17 by her medications. She also had “a very hard time concentrating on things and
18 memorizing things.” On some days, she was unable to watch a television show and
19 “follow what’s going on.” (AR 39-41, 43-45, 48-49.)

20 Plaintiff lives with her husband and daughter. According to Plaintiff, she is
21 able to vacuum and sweep for five minutes at a time, do laundry twice a week, prepare
22 meals with her husband, go out alone, drive to appointments and to the store, care for
23 three dogs and two cats, and cook “quick things.” She has no problem driving herself
24 to her appointments, one of which requires an hour and a half to two hours in the car
25 each way. She spends her days reading and watching television. Plaintiff speaks on
26 the phone to her mother, sister, and best friend several times a week. She goes to
27 church weekly and assisted in a church class for an hour and a half once a week. (AR
28 41, 50-55.) According to Plaintiff’s Function Report, arthritis rendered her unable to

1 stand or walk for long; she was able to walk for only a quarter of a mile; she was
2 unable to sit for long due to hip pain; she could lift about ten pounds; she had trouble
3 paying attention; and she had “no energy.” (AR 188-196.)

4 Where, as here, a claimant has presented evidence of an underlying impairment
5 that could reasonably be expected to produce pain or other symptoms, the ALJ must
6 evaluate the intensity and persistence of the claimant’s symptoms and determine the
7 extent to which those symptoms limit her ability to perform work-related activities.
8 SSR 16-3P, 2016 WL 1119029, at *4.² Absent a finding that the claimant is
9 malingering, an ALJ must provide specific, clear and convincing reasons before
10 rejecting a claimant’s testimony about the severity of his symptoms. *Trevizo v.*
11 *Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017) (citing *Garrison v. Colvin*, 759 F.3d 995,
12 1014-1015 (9th Cir. 2014)). “General findings [regarding a claimant’s credibility] are
13 insufficient; rather, the ALJ must identify what testimony is not credible and what
14 evidence undermines the claimant’s complaints.” *Burrell v. Colvin*, 775 F.3d 1133,
15 1138 (9th Cir. 2014) (quoting *Lester v. Chater*, 81 F.3d 821, 834) (9th Cir. 1995)).
16 The ALJ’s findings “must be sufficiently specific to allow a reviewing court to
17 conclude the adjudicator rejected the claimant’s testimony on permissible grounds
18 and did not arbitrarily discredit a claimant’s testimony regarding pain.” *Brown-*
19 *Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015) (quoting *Bunnell v. Sullivan*, 947
20 F.2d 345-346 (9th Cir. 1991) (en banc)).

21 Factors an ALJ may consider when making such a determination include the
22 objective medical evidence, the claimant’s treatment history, the claimant’s daily

23 ² Social Security Ruling 16-3P, which became effective March 28, 2016 applies to this case. SSR
24 16-3P rescinded and superseded the Commissioner’s prior rulings as to how the Commissioner will
25 evaluate a claimant’s statements regarding the intensity, persistence, and limiting effects of
26 symptoms in disability claims. *See* SSR 16-3P, 2017 WL 5180304, at *1. The Ninth Circuit has
27 found the changes in SSR 16-3P to be largely stylistic and held that SSR 16-3P is consistent in
28 substance with Ninth Circuit precedent that existed before the effective date. *Trevizo v. Berryhill*,
871 F.3d 664, 678 n.5 (9th Cir. 2017). Accordingly, the Court relies upon Ninth Circuit authority
governing the proper method for assessing a claimant’s credibility.

1 activities, an unexplained failure to pursue or follow treatment, and inconsistencies
2 in testimony. *See Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014); *Molina v.*
3 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012). If the ALJ’s credibility finding is
4 supported by substantial evidence in the record, the court may not engage in second-
5 guessing. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002).

6 As the Commissioner points out, the ALJ provided two reasons for discounting
7 Plaintiff’s subjective complaints. (*See* ECF No. 22 at 10-14.)

8 For the first reason, the ALJ concluded that Plaintiff’s allegations were
9 inconsistent with the medical evidence. Upon review of the record and the decision,
10 the Court finds that the ALJ’s summary of the evidence was accurate and complete,
11 and her characterization of the record is supported by substantial evidence. Thus, the
12 ALJ was entitled to rely upon the lack of objective medical evidence to discredit
13 Plaintiff’s subjective complaints, but this may not be the sole basis for the adverse
14 credibility determination. *See Bunnell v. Sullivan*, 947 F.2d 341, 346-347 (9th Cir.
15 1991); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005); *Rollins v. Massanari*,
16 261 F.3d 853, 857 (9th Cir. 2001).

17 As a second reason, the ALJ relied upon Plaintiff’s daily activities to reject her
18 subjective complaints. Specifically, the ALJ stated that Plaintiff’s ability to vacuum
19 or sweep for five minutes at a time, drive alone to appointments or the store, care for
20 pets, talk on the telephone, read, watch television, and volunteer as an assistant for a
21 weekly church class, was consistent with the RFC in the decision. (AR 23.)

22 “Engaging in daily activities that are incompatible with the severity of
23 symptoms alleged can support an adverse credibility determination.” *Trevizo*, 871
24 F.3d at 682 (citing *Ghanim*, 763 F.3d at 1165). An ALJ, however, is required to
25 explain which particular activities are considered incompatible with which of the
26 claimant’s allegations. *See Burrell*, 775 F.3d at 1138 (error where “the ALJ did not
27 elaborate on *which* daily activities conflicted with *which* part of Claimant’s
28 testimony”).

1 Here, the ALJ failed to identify which of Plaintiff’s activities she believed were
2 inconsistent with which of Plaintiff’s subjective complaints. The ALJ’s conclusory
3 reliance upon Plaintiff’s daily activities – by simply listing basic activities that
4 Plaintiff can do – is legally insufficient. *See Garrison*, 759 F.3d at 1015-1016 (noting
5 that “[w]e have repeatedly warned that ALJs must be especially cautious in
6 concluding that daily activities are inconsistent with testimony about pain, because
7 impairments that would unquestionably preclude work and all the pressures of a
8 workplace environment will often be consistent with doing more than merely resting
9 in bed all day,” and holding that the ALJ erred in concluding that the claimant’s
10 reported daily activities, which “included talking on the phone, preparing meals,
11 cleaning her room, and helping to care for her daughter,” were inconsistent with her
12 pain complaints); *Gooden v. Colvin*, 2016 WL 6407367, at *6 (C.D. Cal. Oct. 28,
13 2016) (the ALJ improperly relied upon claimant’s ability to perform a caregiver job
14 “22 hours a week and engage in various exertional activities such as cooking,
15 cleaning, shopping, doing the laundry, carrying groceries, and driving a car,” because
16 the ALJ did not explain how those chores or other activities contradicted claimant’s
17 subjective symptom testimony or were transferable to a work setting); *see generally*
18 *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005) (“The mere fact that a plaintiff
19 has carried on certain daily activities, such as grocery shopping, driving a car, or
20 limited walking for exercise, does not in any way detract from her credibility as to
21 her overall disability. One does not need to be ‘utterly incapacitated’ in order to be
22 disabled.”) (quoting *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001)).

23 Consequently, the ALJ failed to provide a sufficient clear and convincing
24 reason to support the decision to discredit Plaintiff’s subjective complaints. Further,
25 the Court cannot conclude that the ALJ’s error was harmless. *See, e.g., Brown-*
26 *Hunter*, 806 F.3d at 492 (ALJ’s failure adequately to specify reasons for discrediting
27 claimant’s testimony “will usually not be harmless”). In light of the significant
28 functional limitations reflected in Plaintiff’s subjective statements, the Court cannot

1 “confidently conclude that no reasonable ALJ, when fully crediting the [plaintiff’s]
2 testimony, could have reached a different disability determination.” *Stout v. Comm’r*
3 *of Soc. Sec. Admin.*, 454 F.3d 1050, 1055-1056 (9th Cir. 2006).³

4 **REMEDY**

5 “When the ALJ denies benefits and the court finds error, the court ordinarily
6 must remand to the agency for further proceedings before directing an award of
7 benefits.” *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017). Indeed, Ninth
8 Circuit case law “precludes a district court from remanding a case for an award of
9 benefits unless certain prerequisites are met.” *Dominguez v. Colvin*, 808 F.3d 403,
10 407 (9th Cir. 2016) (citations omitted). “The district court must first determine that
11 the ALJ made a legal error, such as failing to provide legally sufficient reasons for
12 rejecting evidence. . . . If the court finds such an error, it must next review the record
13 as a whole and determine whether it is fully developed, is free from conflicts and
14 ambiguities, and all essential factual issues have been resolved.” *Dominguez*, 808
15 F.3d at 407 (citation and internal quotation marks omitted).

16 Although the Court has found error as discussed above, the record on the whole
17 is not fully developed and factual issues remain outstanding. The issues concerning
18 Plaintiff’s alleged disability “should be resolved through further proceedings on an
19 open record before a proper disability determination can be made by the ALJ in the
20 first instance.” *See Brown-Hunter*, 806 F.3d at 496; *see also Treichler*, 775 F.3d at
21 1101 (remand for award of benefits is inappropriate where “there is conflicting
22 evidence, and not all essential factual issues have been resolved”) (citation omitted);
23 *Strauss v. Comm’r of Soc. Sec. Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011) (same
24 where the record does not clearly demonstrate the claimant is disabled within the

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26 ³ In light of the Court’s finding with regard to the credibility issue, it declines to address the two
27 remaining issues raised by Plaintiff. *See Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir. 2012)
28 (“Because we remand the case to the ALJ for the reasons stated, we decline to reach [Plaintiff’s]
alternative ground for remand.”).

1 meaning of the Social Security Act).

2 Accordingly, the appropriate remedy is a remand for further administrative
3 proceedings pursuant to sentence four of 42 U.S.C. § 405(g). It is not the Court's
4 intent to limit the scope of the remand.

5 *****

6 IT IS THEREFORE ORDERED that Judgment be entered reversing the
7 decision of the Commissioner of Social Security and remanding this matter for
8 further administrative proceedings consistent with this opinion.

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10 DATED: 11/6/2018

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12 _____
13 ALEXANDER F. MacKINNON
14 UNITED STATES MAGISTRATE JUDGE

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