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

DIANE MARIE NAVARRO,  
  
Plaintiff,  
  
v.  
  
NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,  
  
Defendant.

Case No. ED CV 18-00197 MAA

**ORDER REVERSING DECISION OF  
THE COMMISSIONER AND  
REMANDING FOR FURTHER  
ADMINISTRATIVE PROCEEDINGS**

Plaintiff has filed a Complaint seeking review of the Commissioner’s final decision denying her application under Title II of the Social Security Act. This matter is fully briefed and ready for decision. For the reasons discussed below, the Commissioner’s decision is reversed, and this matter is remanded for further administrative proceedings.

**ADMINISTRATIVE BACKGROUND**

On September 18, 2015, Plaintiff filed an application under Title II for a period of disability and Disability Insurance Benefits, alleging disability beginning on August 3, 2013. (Administrative Record [AR] 16, 209-12.) Plaintiff alleged

1 disability due to chronic fatigue, hepatitis A and B, a fatty liver, and chronic  
2 obstructive pulmonary disease. (AR 74.) After her application was denied initially  
3 and on reconsideration, Plaintiff requested a hearing before an Administrative Law  
4 Judge (“ALJ”). (AR 125-26.) At a hearing held November 10, 2016, Plaintiff  
5 appeared with counsel, and the ALJ heard testimony from Plaintiff and a vocational  
6 expert. (AR 35-73.)

7 In a decision issued on September 13, 2017, the ALJ denied Plaintiff’s claim  
8 after making the following findings pursuant to the Commissioner’s five-step  
9 evaluation. Plaintiff had not engaged in substantial gainful activity since her  
10 alleged disability onset date. (AR 18.) She had the following “severe”  
11 impairments: chronic obstructive pulmonary disease, history of hepatitis B,  
12 cirrhosis of the liver with a history of alcohol abuse, musculoligamentous strain of  
13 the cervical spine, degenerative disc disease of the thoracic spine, degenerative disc  
14 disease of the lumbar spine, and obesity. (*Id.*) She did not have an impairment or  
15 combination of impairments that met or medically equaled the requirements of one  
16 of the impairments from the Commissioner’s Listing of Impairments. (AR 20.)  
17 She had a residual functional capacity to perform light work (*id.*), thus enabling her  
18 to perform her past relevant work as an office manager and accounting clerk (AR  
19 25). Accordingly, the ALJ concluded that Plaintiff was not disabled as defined by  
20 the Social Security Act. (AR 26.)

21 On December 28, 2017, the Appeals Council denied Plaintiff’s request for  
22 review. (AR 1-6.) Thus, the ALJ’s decision became the final decision of the  
23 Commissioner.

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## DISPUTED ISSUES

The parties dispute the following two issues:

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1. Whether the ALJ properly considered evidence that Plaintiff needed oxygen supplementation; and
  2. Whether the ALJ properly considered Plaintiff’s complaints of fatigue in rejecting her subjective allegations about her symptoms.

## STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), the Court reviews the Commissioner’s final decision to determine whether the Commissioner’s findings are supported by substantial evidence and whether the proper legal standards were applied. See *Treichler v. Commissioner of Social Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014). Substantial evidence means “more than a mere scintilla” but less than a preponderance. See *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402 U.S. at 401. This Court must review the record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner’s conclusion. *Lingenfelter*, 504 F.3d at 1035. Where evidence is susceptible of more than one rational interpretation, the Commissioner’s interpretation must be upheld. See *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).

## DISCUSSION

25 For the reasons discussed below, reversal and remand for further  
26 administrative proceedings are warranted for Issue Two, based on the ALJ’s  
27 evaluation of Plaintiff’s subjective symptom allegations. It is therefore unnecessary  
28 to address Issue One, regarding Plaintiff’s alleged need for oxygen

1 supplementation. *See Marcia v. Sullivan*, 900 F.2d 172, 177 n.6 (9th Cir. 1990)  
2 (declining to decide alternate issues where reversal otherwise is warranted); *Light v.*  
3 *Soc. Sec. Admin.*, 119 F.3d 789, 793 n.1 (9th Cir. 1997) (same).

4  
5 **A. Plaintiff’s Fatigue as a Subjective Symptom Allegation (Issue Two).**

6 **1. Legal Standard.**

7 An ALJ must make two findings in assessing a claimant’s pain or symptom  
8 allegations. Social Security Ruling (“SSR”) 16-3P, 2017 WL 5180304, at \*3;  
9 *Treichler v. Comm’r of Soc. Sec.*, 775 F.3d 1090, 1102 (9th Cir. 2014). “First, the  
10 ALJ must determine whether the claimant has presented objective medical evidence  
11 of an underlying impairment which could reasonably be expected to produce the  
12 pain or other symptoms alleged.” *Treichler*, 775 F.3d at 1102 (citation omitted).  
13 “Second, if the claimant has produced that evidence, and the ALJ has not  
14 determined that the claimant is malingering, the ALJ must provide specific, clear  
15 and convincing reasons for rejecting the claimant’s testimony regarding the severity  
16 of the claimant’s symptoms” and those reasons must be supported by substantial  
17 evidence in the record. *Id.*; *see also Marsh v. Colvin*, 792 F.3d 1170, 1174 n.2 (9th  
18 Cir. 2015).

19 “A finding that a claimant’s testimony is not credible ‘must be sufficiently  
20 specific to allow a reviewing court to conclude the adjudicator rejected the  
21 claimant’s testimony on permissible grounds and did not arbitrarily discredit a  
22 claimant’s testimony regarding pain.’” *Brown-Hunter v. Colvin*, 806 F.3d 487, 493  
23 (9th Cir. 2015) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991)  
24 (*en banc*)).

25 Effective March 28, 2016, SSR 16-3P rescinded and superseded the  
26 Commissioner’s prior rulings as to how the Commissioner will evaluate a  
27 claimant’s statements regarding the intensity, persistence, and limiting effects of  
28 symptoms in disability claims. *See SSR 16-3P*, 2017 WL 5180304, at \*1. Because

1 the ALJ's decision in this case was issued on September 13, 2017, it is governed by  
2 SSR 16-3P. *See id.* at \*13 and n.27. In pertinent part, SSR 16-3P eliminated the  
3 use of the term "credibility" and clarified that the Commissioner's subjective  
4 symptom evaluation "is not an examination of an individual's character." SSR 16-  
5 3P, 2017 WL 5180304, at \*2; *see also Trevizo v. Berryhill*, 871 F.3d 664, 678 n.5  
6 (9th Cir. 2017). These changes are largely stylistic and are consistent in substance  
7 with Ninth Circuit precedent that existed before the effective date of SSR16-3P.  
8 *See Trevizo*, 871 F.3d at 678 n.5

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## 10 **2. Background**

11 During the hearing, Plaintiff testified about her work history and her alleged  
12 symptoms. She last worked in 2013, as a general manager for an office. (AR 43-  
13 44.) She can no longer work because of "end-stage" chronic obstructive pulmonary  
14 disease, "chronic pain," numbness, "extreme anxiety," and "overwhelming"  
15 depression. (AR 50-51.) She "can't even walk down the driveway without losing  
16 my breath." (AR 50.) She takes multiple medications for breathing and was  
17 recently approved for an oxygen tank. (AR 51.) She "can hardly lift" the bag she  
18 brought to the hearing. (AR 54.) She can stand for no more than 15 minutes. (AR  
19 55.) She can sit for 20 to 26 minutes at a time. (AR 56.) She has difficulty with  
20 walking, lifting, bending, and writing. (*Id.*) She takes medication for depression  
21 and anxiety. (AR 59-60.)

22 Plaintiff also testified at the hearing about her history of smoking and  
23 drinking. She stopped smoking shortly before the hearing and was taking Chantix.  
24 (AR 61-62.) She had quit smoking two years earlier but backslid. (AR 62.) She  
25 also had quit drinking but backslid. (AR 62-63.) She previously attended  
26 Alcoholics Anonymous meetings. (AR 63, 64.)

27 In addition to testifying at the hearing, Plaintiff completed an "Exertion  
28 Questionnaire" describing her symptoms. (AR 254-56.) In pertinent part, Plaintiff

1 wrote that she is “tired all the time,” lacks energy, and can walk for one block at a  
2 time. (AR 254.)

3 In his decision, the ALJ rejected Plaintiff’s subjective symptom allegations.  
4 The ALJ first found that Plaintiff’s medically determinable impairments could  
5 reasonably be expected to cause the alleged symptoms. (AR 22.) The ALJ next  
6 found, however, that her statements concerning the intensity, persistence, and  
7 limiting effects of these symptoms were not entirely consistent with the medical  
8 evidence and other evidence in the record. (*Id.*) In support of this determination,  
9 the ALJ articulated three reasons: Plaintiff’s failure to comply with treatment  
10 recommendations to stop smoking and drinking, the absence of objective medical  
11 findings, and the conservative nature of her pain treatment. (AR 21-22.)  
12

### 13 3. Analysis

14 As a threshold matter, Plaintiff argues that the ALJ erred because none of the  
15 three reasons specifically addressed one of her primary symptom allegations:  
16 fatigue. The Court concurs. An ALJ must consider all critical aspects of a  
17 claimant’s subjective symptom allegations. *See Lester v. Chater*, 81 F.3d 821, 834  
18 (9th Cir. 1995) (holding that an ALJ erred by focusing on claimant’s back pain  
19 without addressing his alleged mental limitation); *see also Werlein v. Berryhill*, 725  
20 F. App’x 534, 535 (9th Cir. 2018) (holding that an ALJ erred because he addressed  
21 only parts of the testimony and “never explained why he rejected some parts of  
22 Werlein’s testimony and not others”). More generally, an ALJ has a duty to  
23 address all evidence that is significant and probative. *See Vincent v. Heckler*, 739  
24 F.2d 1393, 1395 (9th Cir. 1984).

25 Here, none of the ALJ’s three reasons directly addressed Plaintiff’s  
26 subjective symptom allegation of fatigue, and the ALJ did not explore the issue of  
27 fatigue in detail during Plaintiff’s live testimony at the hearing. However, the  
28 record is clear that Plaintiff did raise fatigue as one of her primary subjective

1 symptom allegations, thereby requiring the ALJ to address it before rejecting her  
2 allegations in whole. Significantly, Plaintiff raised the allegation in her Exertion  
3 Questionnaire, where she claimed that she is tired all the time (AR 254), and she  
4 raised it as one of the primary grounds for her disability application (AR 74).  
5 Moreover, the medical record corroborated her allegation of fatigue. (AR 333, 338,  
6 349, 453, 454, 604.) Thus, since Plaintiff's allegation of fatigue was a critical  
7 aspect of her claim of disability (because it was raised as a primary ground for  
8 disability and because she asserted it with specificity and detail in her written  
9 questionnaire), the failure to address the allegation was reversible legal error. *See*  
10 *Swenson v. Sullivan*, 876 F.2d 683, 687-88 (9th Cir. 1989) (holding that an ALJ's  
11 failure to specify adequate reasons for rejecting a claimant's complaints of fatigue  
12 was reversible legal error).

13 But in any event, even assuming the ALJ's actual reasons for rejecting  
14 Plaintiff's subjective symptom complaints could be construed as addressing her  
15 complaints of fatigue, the reasons used to support that evaluation were legally  
16 insufficient, as discussed below.

17  
18 **a. failure to stop smoking and drinking**

19 The ALJ rejected Plaintiff's subjective symptom allegations in part because  
20 she had "failed to follow treatment recommendations" that she stop smoking and  
21 drinking due to her chronic obstructive pulmonary disease and cirrhosis. (AR 21.)  
22 As support, the ALJ cited evidence that despite receiving treatment  
23 recommendations in 2014 to stop smoking and drinking (AR 333, 340), Plaintiff  
24 continued to smoke and drink (AR 322, 333, 340, 448, 454, 526, 531, 535).

25 Social Security regulations require that a claimant follow prescribed  
26 treatment in order to receive disability benefits. *See* 20 C.F.R. § 404.1530(a).  
27 Thus, in weighing a claimant's testimony, an ALJ may consider "unexplained or  
28 inadequately explained failure to seek treatment or to follow a prescribed course of

1 treatment.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008).

2 Here, as a threshold matter, it is not clear that Plaintiff ever received  
3 “prescribed treatment” or “a prescribed course of treatment” to stop smoking or  
4 drinking, so as to warrant the rejection of her subjective symptom testimony for  
5 non-compliance. Rather, it appears that Plaintiff received only what the ALJ  
6 characterized as “treatment recommendations” (AR 333, 340), which are not legally  
7 equivalent to treatment that is “prescribed.” *See Schena v. Secretary of Health and*  
8 *Human Services*, 635 F.2d 15, 19 (1st Cir. 1980) (“[T]he denial of benefits because  
9 of Schena’s alleged ‘willful refusal to follow a recommended course of treatment’  
10 . . . disregards the language of the regulation which specifically speaks in terms of  
11 the willful failure to follow ‘prescribed’ treatment.”); *Teter v. Heckler*, 775 F.2d  
12 1104, 1107 (10th Cir. 1985) (“Recommendations, suggestions, and abstract  
13 opinions are not enough.”); *see also Orn v. Astrue*, 495 F.3d 625, 637 (9th Cir.  
14 2007) (commenting in the context of obesity, “‘Prescribed treatment’ is a term of  
15 art. . . . A treating source’s statement that an individual ‘should’ lose weight or has  
16 ‘been advised’ to get more exercise is not prescribed treatment.”). Thus, in the  
17 absence of evidence of prescribed treatment to stop smoking and drinking,  
18 Plaintiff’s failure to comply would not appear be a clear and convincing reason to  
19 reject her subjective symptom allegations, according to the relevant regulation.

20 In any event, even if it is assumed that Plaintiff did receive a prescribed  
21 course of treatment to stop smoking and drinking, evidence of her failure to comply  
22 still would not be clear and convincing. The probative value of a claimant’s failure  
23 to follow a prescribed course of treatment is questionable when the treatment is  
24 aimed at behavior that may be addictive, such as smoking and drinking. *See Bray*  
25 *v. Commissioner of Social Security Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009)  
26 (“It is certainly possible that Bray was so addicted to cigarettes that she continued  
27 smoking even in the face of debilitating shortness of breath and acute chemical  
28 sensitivity.”); *Griffis v. Weinberger*, 509 F.2d 837, 838 n.1 (9th Cir. 1975) (“Some



1 alcoholics can stop; more cannot.”). Thus, before rejecting a claimant’s subjective  
2 symptom allegations for failure to follow a prescribed course of treatment to stop  
3 smoking or drinking, an ALJ must at least make a finding that compliance is  
4 possible. *See Byrnes v. Shalala*, 60 F.3d 639, 641 (9th Cir. 1995) (noting that  
5 before a claimant’s complaints could be found not credible for failure to stop  
6 smoking, “the ALJ ‘must examine the medical conditions and personal factors that  
7 bear on whether [a claimant] can reasonably remedy’ his impairment and must  
8 make specific findings”) (quoting *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.  
9 1993)) (alteration in original); *Gordon v. Schweiker*, 725 F.2d 231, 236 (4th Cir.  
10 1984) (“Where there is evidence of alcohol abuse, the [Commissioner] must inquire  
11 whether the claimant is addicted to alcohol and has lost the ability to control its  
12 use.”).

13 The ALJ did not specifically find that Plaintiff’s failure to stop smoking and  
14 drinking was deliberate or willful based on her medical conditions and personal  
15 factors. Moreover, the record suggests that Plaintiff’s smoking and drinking were  
16 addictive behaviors. She was described as an “alcoholic” (AR 322), and she  
17 testified at the hearing that she attended Alcoholics Anonymous meetings (AR 63)  
18 and backslid after initial efforts to stop smoking and drinking (AR 62, 64).  
19 Plaintiff’s failure to comply with a prescribed course of treatment under these  
20 circumstances was not a legally sufficient reason to reject her subjective symptom  
21 allegations.

#### 22 23 **b. conservative treatment**

24 The ALJ rejected Plaintiff’s subjective symptom allegations in part by  
25 finding that Plaintiff’s pain treatment was conservative: She “was not described as  
26 a surgical candidate, nor is there any evidence that she has required any extended  
27 periods of hospital confinement, use of a TENS unit, participation in a pain control  
28 clinic, or other extensive or significant forms of treatment commonly prescribed for

1 intense pain.” (AR 22.)

2 An ALJ may draw an adverse inference from evidence of a claimant’s  
3 conservative treatment. *See Tommassetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.  
4 2008); *Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007). One type of treatment  
5 that is commonly identified as conservative is over-the-counter pain medication.  
6 *See Parra*, 481 F.3d at 751. Here, however, Plaintiff was not limited to over-the-  
7 counter pain medication, but repeatedly was prescribed an opioid analgesic,  
8 Hydrocodone bitartrate with acetaminophen. (AR 495, 505, 527, 532, 536, 540,  
9 570, 580, 604.) Pain treatment with opioid analgesics generally is not considered  
10 conservative. *See Abbott v. Astrue*, 391 F. App’x 554, 560 (7th Cir. 2010)  
11 (describing hydrocodone as a “strong pain reliever”); *see also Kager v. Astrue*, 256  
12 F. App’x 919, 923 (9th Cir. 2007) (rejecting adverse credibility determination  
13 premised on the absence of significant pain therapy where the claimant took  
14 prescription pain medications including Methocarbomal and the narcotic analgesics  
15 Roxicet and Valium); *cf. Osenbrock v. Apfel*, 240 F.3d 1157, 1166 (9th Cir. 2001)  
16 (noting that an allegation of severe and unremitting pain may be corroborated by  
17 treatment with “strong Codeine or Morphine based analgesics”).

18 Thus, despite the absence of evidence of other types of pain treatment such as  
19 hospitalizations, a TENS unit, or a pain control clinic, the pain treatment that  
20 Plaintiff actually received cannot be properly characterized as conservative. The  
21 nature of her treatment was not a legally sufficient reason to reject her subjective  
22 symptom allegations.

23  
24 **c. inconsistency with positive objective medical findings**

25 Finally, the ALJ rejected Plaintiff’s subjective symptom allegations in part  
26 because Plaintiff’s allegations of disabling pain were “too extreme in light of the  
27 positive objective medical findings in the record.” (AR 21-22.) As support, the  
28 ALJ cited two evidentiary deficiencies: the absence of positive findings from

1 diagnostic imaging of Plaintiff’s back (AR 439, 493, 545) and the absence of  
2 evidence of significant problems in her gait or of the need for an assistive device for  
3 ambulation (AR 333).

4 “Although lack of medical evidence cannot form the sole basis for  
5 discounting pain testimony, it is a factor that the ALJ can consider in his credibility  
6 analysis.” *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). Here, however,  
7 even assuming this reason was supported by the record, the other two reasons, as  
8 discussed above, were legally insufficient. Because this final reason by itself  
9 cannot support the ALJ’s rejection of Plaintiff’s subjective symptom testimony, it is  
10 unnecessary to determine whether this reason constitutes substantial evidence for  
11 the ALJ’s rejection of Plaintiff’s subjective symptom testimony. *See Robbins v.*  
12 *Social Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006) (holding that where ALJ’s  
13 other reason to reject the claimant’s testimony was legally insufficient, the sole  
14 remaining reason premised on the absence of objective medical support could not  
15 justify the credibility determination); *see generally Bunnell*, 947 F.2d at 345 (“[A]n  
16 adjudicator may not reject a claimant’s subjective complaints based solely on a lack  
17 of objective medical evidence to fully corroborate the alleged severity of pain”).

#### 18 19 **4. Conclusion**

20 For the foregoing reasons, reversal is warranted for Issue Two, based on the  
21 ALJ’s evaluation of Plaintiff’s subjective symptom allegations.

#### 22 23 **B. Remand for further administrative proceedings.**

24 Ninth Circuit case law “precludes a district court from remanding a case for  
25 an award of benefits unless certain prerequisites are met.” *Dominguez v. Colvin*,  
26 808 F.3d 403, 407 (9th Cir. 2015) (citations omitted). “The district court must first  
27 determine that the ALJ made a legal error, such as failing to provide legally  
28 sufficient reasons for rejecting evidence.” *Id.* “If the court finds such an error, it

1 must next review the record as a whole and determine whether it is fully developed,  
2 is free from conflicts and ambiguities, and all essential factual issues have been  
3 resolved.” *Id.* (citation and internal quotation marks omitted).

4 Although the Court has found legal error as discussed above, the record on  
5 the whole is not fully developed, and essential factual issues remain outstanding.  
6 The discredited evidence raises factual conflicts about Plaintiff’s level of  
7 functioning that “should be resolved through further proceedings on an open record  
8 before a proper disability determination can be made by the ALJ in the first  
9 instance.” *See Brown-Hunter*, 806 F.3d at 496; *see also Treichler v. Commissioner*  
10 *of Social Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014) (remand for award of  
11 benefits is inappropriate where “there is conflicting evidence, and not all essential  
12 factual issues have been resolved”) (citation omitted); *Strauss v. Commissioner of*  
13 *the Social Sec. Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011) (same where the record  
14 does not clearly demonstrate the claimant is disabled within the meaning of the  
15 Social Security Act).

16 Therefore, based on its review and consideration of the entire record, the  
17 Court has concluded on balance that a remand for further administrative  
18 proceedings pursuant to sentence four of 42 U.S.C. § 405(g) is warranted here. It is  
19 not the Court’s intent to limit the scope of the remand.

20  
21 **ORDER**

22 It is ordered that Judgment be entered reversing the decision of the  
23 Commissioner of Social Security and remanding this matter for further  
24 administrative proceedings.

25 DATED: Sept. 4, 2018

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27   
28 **MARIA A. AUDERO**  
**UNITED STATES MAGISTRATE JUDGE**