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

ANNETTE M.,<sup>1</sup>  
  
Plaintiff,  
  
v.  
  
NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,  
  
Defendant.

Case No. 5:18-cv-00248-AFM

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

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

**BACKGROUND**

Plaintiff applied for disability insurance benefits and supplemental security income, alleging that she became disabled on December 20, 2012. Plaintiff’s claims

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<sup>1</sup> 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 were denied initially and on reconsideration. (Administrative Record (“AR”) 73-95,  
2 182-190.)<sup>2</sup> An Administrative Law Judge (“ALJ”) held hearings on January 20, 2016  
3 and June 1, 2016, at which Plaintiff, her attorney, and a Vocational Expert (“VE”)  
4 were present. (AR 55-72.)

5 The ALJ issued a decision on September 21, 2016, finding that Plaintiff  
6 suffered from the following severe impairments: fibromyalgia; obesity, lumbar  
7 degenerative disc disease, and systemic lupus erythematosus. (AR 25.) The ALJ  
8 determined that Plaintiff retained the RFC to perform a range of light work as  
9 follows: lift and/or carry 20 pounds occasionally and 10 pounds frequently; stand  
10 and/or walk for four hours of an eight-hour workday with normal breaks; sit for six  
11 hours out of an eight-hour workday; occasionally push and/or pull with the lower  
12 extremities; occasionally bend, stoop, kneel, crouch, or crawl; no limitations on fine  
13 and gross manipulation; can walk on uneven terrain; can climb ladders and work at  
14 heights; can use a cane for long-distance ambulation. (AR 28.) Relying on the  
15 testimony of the VE, the ALJ concluded that Plaintiff was able to perform her past  
16 relevant work as a work as a personnel clerk. (AR 31.) Accordingly, the ALJ  
17 determined that Plaintiff was not disabled through the date of his decision. (AR 32.)  
18 The Appeals Council denied review, thereby rendering the ALJ’s decision the final  
19 decision of the Commissioner. (AR 1-7.)

## 20 **DISPUTED ISSUES**

- 21 1. Whether the ALJ properly considered the medical evidence in assessing  
22 Plaintiff’s RFC.
- 23 2. Whether the ALJ properly evaluated Plaintiff’s subjective complaints.  
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<sup>2</sup> Plaintiff points out that although the ALJ refers to an application for disability insurance benefits,  
27 that application is not part of the Administrative Record. (ECF No. 24 at 1.) Nevertheless, the record  
28 contains references to that application, including the notices of denial on initial review and on  
reconsideration. (See AR 23, 73-95.)

## STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), the Court reviews the Commissioner’s 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. Where evidence is susceptible of more than one rational interpretation, the Commissioner’s decision must be upheld. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007); *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004) (“When evidence reasonably supports either confirming or reversing the ALJ’s decision, [the court] may not substitute [its] judgment for that of the ALJ.”).

## DISCUSSION

### **The ALJ did not provide legally sufficient reasons for discounting Plaintiff’s subjective complaints**

Plaintiff argues that the ALJ failed to properly consider her subjective complaints regarding pain and other symptoms. (ECF No. 24 at 6-8.)

#### **a. Relevant Law**

Where, as here, a claimant has presented evidence of an underlying impairment that could reasonably be expected to produce pain or other symptoms, the ALJ must “evaluate the intensity and persistence of [the] individual’s symptoms ... and determine the extent to which [those] symptoms limit his ... ability to perform work-related activities ....” SSR 16–3p, 2016 WL 1119029, at \*4. Absent a finding that the claimant is malingering, an ALJ must provide specific, clear and convincing reasons before rejecting a claimant’s testimony about the severity of his symptoms. *Trevizo*

1 v. *Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017) (citing *Garrison v. Colvin*, 759 F.3d  
2 995, 1014-1015 (9th Cir. 2014)). “General findings [regarding a claimant’s  
3 credibility] are insufficient; rather, the ALJ must identify what testimony is not  
4 credible and what evidence undermines the claimant’s complaints.” *Burrell v. Colvin*,  
5 775 F.3d 1133, 1138 (9th Cir. 2014) (quoting *Lester v. Chater*, 81 F.3d 821, 834)  
6 (9th Cir. 1995)). The ALJ’s findings “must be sufficiently specific to allow a  
7 reviewing court to conclude the adjudicator rejected the claimant’s testimony on  
8 permissible grounds and did not arbitrarily discredit a claimant’s testimony regarding  
9 pain.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015) (quoting *Bunnell*  
10 *v. Sullivan*, 947 F.2d 341, 345-346 (9th Cir. 1991) (en banc)).

11 Factors an ALJ may consider when making such a determination include the  
12 objective medical evidence, the claimant’s treatment history, the claimant’s daily  
13 activities, unexplained failure to pursue or follow treatment, and inconsistencies in  
14 testimony. See *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014); *Molina v.*  
15 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012).

#### 16 **b. Analysis**

17 The ALJ noted Plaintiff’s subjective complaints: her allegations of back pain,  
18 joint pain, and fibromyalgia pain, and her intolerance to cold and heat. He further  
19 noted Plaintiff’s statements that she could not sit, stand, or walk for more than a few  
20 minutes at a time and the testimony that her lupus flare-ups last for months at a time.  
21 (AR 29.) In discounting Plaintiff’s allegations, the ALJ found that Plaintiff’s  
22 “statements concerning the intensity, persistence and limiting effects of these  
23 symptoms are not entirely consistent with the medical evidence and other evidence  
24 in the record for the reasons explained in this decision.” (AR 29.)

25 The Ninth Circuit has observed that a version of this boilerplate statement is  
26 routinely included in an ALJ’s decision “as an introduction to the ALJ’s credibility  
27 determination” after which the ALJ “typically identify what parts of the claimant’s  
28 testimony were not credible and why.” *Treichler*, 775 F.3d at 1103. Here, after stating

1 that Plaintiff's subjective complaints were inconsistent with the evidence, the ALJ  
2 simply summarized the medical evidence without further mention of any particular  
3 aspect of Plaintiff's testimony. (See AR 29-31.) The ALJ failed to identify the  
4 testimony that was being discounted and failed to "link that testimony to the  
5 particular parts of the record" supporting his determination. See *Brown-Hunter*, 806  
6 F.3d at 494. While the ALJ's summary of the medical records was accurate, his  
7 written decision does not provide "the sort of explanation or the kind of 'specific  
8 reasons' we must have in order to review the ALJ's decision meaningfully, so that  
9 we may ensure that the claimant's testimony was not arbitrarily discredited." *Brown-*  
10 *Hunter*, 806 F.3d at 493; see *Laborin v. Berryhill*, 867 F.3d 1151, 1153 (9th Cir.  
11 2017) (ALJ's statement that claimant's testimony regarding the intensity, persistence,  
12 and limiting effects of his symptoms was not credible to the extent his testimony is  
13 "inconsistent with the above residual functional capacity assessment" is an  
14 insufficient basis for discrediting testimony).

15 Furthermore, even assuming the ALJ properly relied upon the lack of objective  
16 medical evidence in evaluating the credibility of subjective complaints, this cannot  
17 provide the only basis for rejecting a claimant's subjective complaints. See *Burch v.*  
18 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005); *Rollins v. Massanari*, 261 F.3d 853,  
19 857 (9th Cir. 2001). Although the Commissioner proffers several other reasons, the  
20 Court's review of the ALJ's decision reveals no legally sufficient reason for the  
21 adverse credibility determination.

22 First, the Commissioner points to the ALJ's discussion of the absence of  
23 mental health treatment and a finding that Plaintiff's depression and anxiety were  
24 managed with routine medication therapy. (ECF No. 25 at 9 [citing AR 27].) While  
25 this might be a ground for rejection of claims concerning depression and anxiety, the  
26 ALJ did not purport to rely on it to reject Plaintiff's complaints of pain and other  
27 symptoms from her physical impairments, nor could he reasonably do so. The  
28 Commissioner also mentions an alleged inconsistency between the testimony that

1 Plaintiff sometimes forgot where she was going while driving and the mental  
2 examinations revealing Plaintiff could remember objects and perform serial threes.  
3 (ECF No. 25 at 10.) Again, while this inconsistency might undermine Plaintiff’s  
4 mental impairment, it is not relevant to complaints of pain stemming from her severe  
5 physical impairments.

6 Next, the Commissioner contends that the ALJ rejected Plaintiff’s subjective  
7 complaints because her fibromyalgia, lupus, back and shoulder problems were  
8 “treated conservatively with medication and injections.” (ECF No. 25 at 9.) Evidence  
9 of conservative treatment<sup>3</sup> may form the basis for discounting a claimant’s credibility  
10 regarding the severity of the ailment. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th  
11 Cir. 2008); *Parra v. Astrue*, 481 F.3d 742, 750-751 (9th Cir. 2007). However, the  
12 ALJ’s decision here does not reflect that this was a reason for his adverse credibility  
13 determination. The closest the decision comes to offering such a reason is a summary  
14 of certain evidence: Plaintiff reported that trigger injections helped with her pain  
15 symptoms for several months at a time and continued to request them; Plaintiff was  
16 prescribed Norco and Celebrex to help with chronic pain; and in September 2015  
17 Plaintiff reported that she had not had a lupus flare-up “in a while.” (AR 29.) In the  
18 absence of a clearer indication that the ALJ intended to rely on this evidence to show  
19 conservative treatment that justified rejection of Plaintiff’s subjective complaints, the  
20 Court may not consider it, and it is not a legally sufficient reason. *See Treichler*, 775  
21 F.3d at 1103 (“we cannot substitute our conclusions for the ALJ’s, or speculate as to  
22 the grounds for the ALJ’s conclusions”).

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23  
24 <sup>3</sup> The Court notes that there is some question whether treatment consisting of multiple steroid  
25 injections every two to four months and prescription pain medication such as Norco constitutes  
26 conservative treatment. *Compare Jones v. Comm’r of Soc. Sec.*, 2014 WL 228590, at \*7 (E.D. Cal.  
27 Jan. 21, 2014) (occasional use of epidural injections in conjunction with massages and anti-  
28 inflammatory medications could be considered conservative) *with Christie v. Astrue*, 2011 WL  
4368189, at \*4 (C.D. Cal. Sept. 16, 2011) (treatment with narcotics, steroid injections, trigger point  
injections, and epidural injections is not conservative). The Court need not resolve that question  
here.

1 Finally, the Commissioner points to inconsistencies between Plaintiff's  
2 testimony and her function report. (ECF No. 25 at 10.) But the ALJ did not mention  
3 these inconsistencies, and he did not purport to base his adverse credibility  
4 determination on them. *See Treichler*, 775 F.3d at 1103. Thus, they cannot provide a  
5 basis for affirmance of that determination.<sup>4</sup>

6 In sum, the ALJ failed to provide specific clear and convincing reasons to  
7 support his discrediting of Plaintiff's subjective complaints concerning pain and  
8 other symptoms. The Court cannot conclude that this error was harmless. *See, e.g.,*  
9 *Brown-Hunter*, 806 F.3d at 492 (ALJ's failure adequately to specify reasons for  
10 discrediting claimant's testimony "will usually not be harmless"). In light of the  
11 significant functional limitations reflected in Plaintiff's subjective statements, the  
12 Court cannot "confidently conclude that no reasonable ALJ, when fully crediting  
13 [Plaintiff's] testimony, could have reached a different disability determination." *Stout*  
14 *v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055-1056 (9th Cir. 2006).<sup>5</sup>

### 15 REMEDY

16 "When the ALJ denies benefits and the court finds error, the court ordinarily  
17 must remand to the agency for further proceedings before directing an award of  
18 benefits." *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017). Indeed, Ninth  
19 Circuit case law "precludes a district court from remanding a case for an award of  
20 benefits unless certain prerequisites are met." *Dominguez v. Colvin*, 808 F.3d 403,  
21 407 (9th Cir. 2016) (citations omitted). "The district court must first determine that  
22 the ALJ made a legal error, such as failing to provide legally sufficient reasons for  
23 rejecting evidence. . . . If the court finds such an error, it must next review the record

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24 <sup>4</sup> The Commissioner also points out that Plaintiff was prescribed a seated walker "but the ALJ  
25 could find no objective evidence of gait abnormality or muscle weakness." (ECF No. 25 at 9.) As  
26 mentioned above, the absence of objective medical evidence may not be the sole reason for the  
ALJ's credibility determination.

27 <sup>5</sup> Because the Court finds reversible error in the ALJ's adverse credibility determination and is  
28 remanding the case for further administrative proceedings, the other issue raised by Plaintiff need  
not be addressed.

1 as a whole and determine whether it is fully developed, is free from conflicts and  
2 ambiguities, and all essential factual issues have been resolved.” *Dominguez*, 808  
3 F.3d at 407 (citation and internal quotation marks omitted).

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

14 Accordingly, the appropriate remedy is a remand for further administrative  
15 proceedings.<sup>6</sup>

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

20  
21 DATED: 3/14/2019

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23 \_\_\_\_\_  
24 ALEXANDER F. MacKINNON  
25 UNITED STATES MAGISTRATE JUDGE  
26  
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28 \_\_\_\_\_  
<sup>6</sup> It is not the Court’s intent to limit the scope of the remand.