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UNITED STATES DISTRICT COURT

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CENTRAL DISTRICT OF CALIFORNIA

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11

KATHIE MARIE BUCKNELL,

CASE NO. ED CV 18-0261 AS

12

Plaintiff,

13

v.

MEMORANDUM OPINION

14

NANCY A. BERRYHILL, Acting
Commissioner of Social
Security,**AND ORDER OF REMAND**

15

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Defendant.

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For the reasons discussed below, IT IS HEREBY ORDERED that, pursuant to Sentence Four of 42 U.S.C. § 405(g), this matter is remanded for further administrative action consistent with this Opinion.

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23

PROCEEDINGS

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On February 2, 2018, Plaintiff filed a Complaint seeking review of the denial of her application for Disability Insurance Benefits. (Dkt. No. 1). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Dkt. Nos.

1 12-14). On July 24, 2018, Defendant filed an Answer along with
2 the Administrative Record ("AR"). (Dkt. Nos. 16-17). The parties
3 filed a Joint Stipulation ("Joint Stip.") on October 16, 2018,
4 setting forth their respective positions regarding Plaintiff's
5 claim. (Dkt. No. 18).

6
7 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE RECORD**
8

9 On October 21, 2013, Plaintiff filed an application for
10 Disability Insurance Benefits ("DIB") pursuant to Title II of the
11 Social Security Act alleging a disability onset date of August 1,
12 2013. (AR 71, 148). The Commissioner denied Plaintiff's
13 application initially and on reconsideration. (AR 62-81). On
14 February 18, 2016, Plaintiff, represented by counsel, testified at
15 a hearing before Administrative Law Judge Alan J. Markiewicz (the
16 "ALJ"). (AR 28-61). The ALJ also heard testimony from Alan
17 Boroskin, an impartial vocational expert ("VE"). (AR 64-78; see
18 id. 214-18).

19
20 On July 13, 2016, the ALJ denied Plaintiff's request for
21 benefits. (AR 18-24). Applying the five-step sequential process,
22 the ALJ found at step one that Plaintiff has not engaged in
23 substantial gainful activity since August 1, 2013, the alleged
24 onset date. (AR 20). At step two, the ALJ found that Plaintiff's
25 lumbar spine strain and chondromalacia of the bilateral knees are
26 severe impairments.¹ (AR 20). At step three, the ALJ determined

27 _____
28 ¹ The ALJ found that Plaintiff's diabetes, hypertension,
chronic obstructive pulmonary disease, and sleep apnea have not

1 that Plaintiff does not have an impairment or combination of
2 impairments that meet or medically equal the severity of any of
3 the listings enumerated in the regulations. (AR 21).

4
5 The ALJ then assessed Plaintiff's residual functional capacity
6 ("RFC")² and concluded that she can perform a range of sedentary
7 work, as defined in 20 C.F.R. § 404.1567(a),³ except:

8
9 [Plaintiff] can lift and/or carry up to 10 pounds
10 occasionally and less than 10 pounds frequently; can
11 stand and/or walk for a total of four hours, and sit for
12 a total of six hours, in an eight-hour workday with
13 normal breaks; cannot use ladders, ropes or scaffolds;
14 can occasionally climb ramps or stairs; and can
15 occasionally balance, stoop, kneel, crouch and crawl.

16
17 (AR 21). At step four, the ALJ found that Plaintiff is capable of
18 performing past relevant work as a reservation specialist, as
19 generally performed in the national economy and as actually
20 _____
21 resulted in any consistent and significant functional impact during
the period at issue and are therefore nonsevere. (AR 20).

22 ² A Residual Functional Capacity ("RFC") is what a claimant
23 can still do despite existing exertional and nonexertional
limitations. See 20 C.F.R. § 404.1545(a)(1).

24 ³ "Sedentary work involves lifting no more than 10 pounds
25 at a time and occasionally lifting or carrying articles like docket
26 files, ledgers, and small tools. Although a sedentary job is
27 defined as one which involves sitting, a certain amount of walking
and standing is often necessary in carrying out job duties. Jobs
28 are sedentary if walking and standing are required occasionally
and other sedentary criteria are met." 20 C.F.R. § 404.1567(a).

1 performed by Plaintiff. (AR 23). Accordingly, the ALJ found that
2 Plaintiff was not under a disability as defined in the Social
3 Security Act from August 1, 2013, through the date of the decision.
4 (AR 23-24).

5
6 The Appeals Council denied Plaintiff's request for review on
7 December 22, 2017. (AR 4-9). Plaintiff now seeks judicial review
8 of the ALJ's decision, which stands as the final decision of the
9 Commissioner. 42 U.S.C. §§ 405(g), 1383(c).

10 11 **STANDARD OF REVIEW**

12
13 This Court reviews the Commissioner's decision to determine
14 if: (1) the Commissioner's findings are supported by substantial
15 evidence; and (2) the Commissioner used proper legal standards. 42
16 U.S.C § 405(g); see Carmickle v. Comm'r, 533 F.3d 1155, 1159 (9th
17 Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007).
18 "Substantial evidence is more than a scintilla, but less than a
19 preponderance." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
20 1998) (citing Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir.
21 1997)). It is relevant evidence "which a reasonable person might
22 accept as adequate to support a conclusion." Hoopai, 499 F. 3d at
23 1074; Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996). To
24 determine whether substantial evidence supports a finding, "a court
25 must 'consider the record as a whole, weighing both evidence that
26 supports and evidence that detracts from the [Commissioner's]
27 conclusion.'" Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir.
28 2001) (citation omitted); see Widmark v. Barnhart, 454 F.3d 1063,

1 1066 (9th Cir. 2006) (inferences "reasonably drawn from the record"
2 can constitute substantial evidence).

3
4 This Court "may not affirm [the Commissioner's] decision
5 simply by isolating a specific quantum of support evidence, but
6 must also consider evidence that detracts from [the Commissioner's]
7 conclusion." Ray v. Bowen, 813 F.2d 914, 915 (9th Cir. 1987)
8 (citation and internal quotation marks omitted). However, the
9 Court cannot disturb findings supported by substantial evidence,
10 even though there may exist other evidence supporting Plaintiff's
11 claim. See Torske v. Richardson, 484 F.2d 59, 60 (9th Cir. 1973).
12 "If the evidence can reasonably support either affirming or
13 reversing the [Commissioner's] conclusion, [a] court may not
14 substitute its judgment for that of the [Commissioner]." Reddick,
15 157 F.3d 715, 720-21 (9th Cir. 1998) (citation omitted).

17 DISCUSSION

18
19 Plaintiff's sole claim is that the ALJ erred in rejecting her
20 subjective symptom statements. (Joint Stip. at 4-7, 13-14). After
21 consideration of the parties' arguments and the record as a whole,
22 the Court finds that Plaintiff's claim of error warrants remand
23 for further consideration.

1 **A. The ALJ Failed To Provide Specific, Clear, and Convincing**
2 **Reasons for Rejecting Plaintiff's Subjective Symptom**
3 **Testimony**

4
5 Plaintiff asserts that in evaluating her subjective
6 statements, the ALJ failed to specifically identify the testimony
7 he found not to be credible and to clearly explain the evidence
8 that undermined Plaintiff's testimony. (Joint Stip. at 5, 7, 13).
9

10 Plaintiff alleges disability from diabetes, COPD, sleep apnea,
11 upper extremity pain, and neuropathic lower extremity pain. (AR
12 34). She testified that she is insulin dependent and her diabetes
13 is uncontrolled. (AR 40-41, 189). She easily tires and feels weak
14 most of the time. (AR 187). Plaintiff has severe, throbbing,
15 shooting pain in her feet due to diabetic neuropathy. (AR 42-43).
16 She testified that she has a hard time breathing and gets short of
17 breath. (AR 43). Plaintiff has a nebulizer that plugs into the
18 wall, which she uses at home, and a CPAP machine that she uses at
19 night. (AR 43, 46). Plaintiff's back pain has been getting
20 progressively worse. (AR 43-44). She has been prescribed Norco
21 for her pain, but it makes her sleepy. (AR 44). Due to the side
22 effects from Norco, Plaintiff's chronic pain, and her lack of sleep
23 due to her sleep apnea, Plaintiff testified that she takes two to
24 three naps a day totaling three to four hours. (AR 44, 51, 52).
25 The VE testified that an individual who would be off task for 20%
26 of a workday due to medicine side effects, fatigue, or an inability
27 to stay alert could not sustain fulltime work in the national
28 economy. (AR 57-58).

1 When assessing a claimant's credibility regarding subjective
2 pain or intensity of symptoms, the ALJ must engage in a two-step
3 analysis. Trevizo v. Berryhill, 874 F.3d 664, 678 (9th Cir. 2017).
4 First, the ALJ must determine if there is medical evidence of an
5 impairment that could reasonably produce the symptoms alleged.
6 Garrison v. Colvin, 759 F.3d 995, 1014 (9th Cir. 2014). "In this
7 analysis, the claimant is not required to show that her impairment
8 could reasonably be expected to cause the severity of the symptom
9 she has alleged; she need only show that it could reasonably have
10 caused some degree of the symptom." Id. (emphasis in original)
11 (citation omitted). "Nor must a claimant produce objective medical
12 evidence of the pain or fatigue itself, or the severity thereof."
13 Id. (citation omitted).

14
15 If the claimant satisfies this first step, and there is no
16 evidence of malingering, the ALJ must provide specific, clear and
17 convincing reasons for rejecting the claimant's testimony about
18 the symptom severity. Trevizo, 874 F.3d at 678 (citation omitted);
19 see also Smolen, 80 F.3d at 1284 ("[T]he ALJ may reject the
20 claimant's testimony regarding the severity of her symptoms only
21 if he makes specific findings stating clear and convincing reasons
22 for doing so."); Robbins v. Soc. Sec. Admin., 466 F.3d 880, 883
23 (9th Cir. 2006) ("[U]nless an ALJ makes a finding of malingering
24 based on affirmative evidence thereof, he or she may only find an
25 applicant not credible by making specific findings as to
26 credibility and stating clear and convincing reasons for each.").
27 "This is not an easy requirement to meet: The clear and convincing
28

1 standard is the most demanding required in Social Security cases.”
2 Garrison, 759 F.3d at 1015 (citation omitted).

3
4 In discrediting the claimant’s subjective symptom testimony,
5 the ALJ may consider the following:

6
7 (1) ordinary techniques of credibility evaluation, such
8 as the claimant’s reputation for lying, prior
9 inconsistent statements concerning the symptoms, and
10 other testimony by the claimant that appears less than
11 candid; (2) unexplained or inadequately explained
12 failure to seek treatment or to follow a prescribed
13 course of treatment; and (3) the claimant’s daily
14 activities.

15
16 Ghanim v. Colvin, 763 F.3d 1154, 1163 (9th Cir. 2014) (citation
17 omitted). Inconsistencies between a claimant’s testimony and
18 conduct, or internal contradictions in the claimant’s testimony,
19 also may be relevant. Burrell v. Colvin, 775 F.3d 1133, 1137 (9th
20 Cir. 2014); Light v. Soc. Sec. Admin., 119 F.3d 789, 792 (9th Cir.
21 1997). In addition, the ALJ may consider the observations of
22 treating and examining physicians regarding, among other matters,
23 the functional restrictions caused by the claimant’s symptoms.
24 Smolen, 80 F.3d at 1284; accord Burrell, 775 F.3d at 1137. However,
25 it is improper for an ALJ to reject subjective testimony based
26 “solely” on its inconsistencies with the objective medical evidence
27 presented. Bray v. Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1227
28 (9th Cir. 2009) (citation omitted).

1 Further, the ALJ must make a credibility determination with
2 findings that are "sufficiently specific to permit the court to
3 conclude that the ALJ did not arbitrarily discredit claimant's
4 testimony." Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir.
5 2008) (citation omitted); see Brown-Hunter v. Colvin, 806 F.3d 487,
6 493 (9th Cir. 2015) ("A finding that a claimant's testimony is not
7 credible must be sufficiently specific to allow a reviewing court
8 to conclude the adjudicator rejected the claimant's testimony on
9 permissible grounds and did not arbitrarily discredit a claimant's
10 testimony regarding pain.") (citation omitted). Although an ALJ's
11 interpretation of a claimant's testimony may not be the only
12 reasonable one, if it is supported by substantial evidence, "it is
13 not [the court's] role to second-guess it." Rollins v. Massanari,
14 261 F.3d 853, 857 (9th Cir. 2001).

15
16 The ALJ found that Plaintiff's "medically determinable
17 impairments could reasonably be expected to cause the alleged
18 symptoms," and the ALJ did not make a finding of malingering. (AR
19 22). Nevertheless, the ALJ concluded that Plaintiff's subjective
20 symptom statements "are not entirely consistent with the medical
21 evidence and other evidence in the record." (AR 22). After careful
22 consideration, the Court finds that the ALJ's conclusions are
23 contrary to law and not supported by clear and convincing evidence.
24 See Garrison, 759 F.3d at 1015 (The clear and convincing standard
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1 is "the most demanding required in Social Security cases" and "is
2 not an easy requirement to meet." (citation omitted).⁴

3
4 First, the ALJ's decision is not "sufficiently specific to
5 permit the court to conclude that the ALJ did not arbitrarily
6 discredit claimant's testimony." Tommasetti, 533 F.3d at 1039
7 (citation omitted). It is not at all clear which testimony the
8 ALJ found credible and which he found not credible and why. See
9 Brown-Hunter, 806 F.3d at 493 ("The ALJ . . . failed to identify
10 specifically which of Brown-Hunter's statements she found not
11 credible and why."); Knape v. Berryhill, 734 F. App'x 500, 501 (9th
12 Cir. 2018)("The ALJ failed to identify the parts of Knape's mental
13 health symptom testimony he found not credible and failed to
14 provide any links to the record."); Fritz v. Berryhill, 685 F.
15 App'x 585, 586 (9th Cir. 2017) ("[T]he ALJ did not identify what
16 testimony was not credible and what evidence undermined Fritz's
17 complaints."). Instead, the ALJ summarized Plaintiff's testimony
18 in a single sentence: "[Plaintiff] alleges disabling limitations
19 due to her symptoms including difficulties with maneuvering and
20 exertion." (AR 22). The ALJ then went on to summarize the medical

21
22 ⁴ The Commissioner accurately rejects Plaintiff's contention
23 that "[o]nce [Plaintiff] demonstrated the existence of a condition that
24 would cause some degree of limitation of work function, the burden shifted
25 to the Commissioner . . . to articulate specific reasons for rejecting
26 the subjective limitations." (Joint Stip. at 4; see id. 6, 8-9). Indeed,
27 the claimant retains the burden of proof at steps one through four, and
28 the Commissioner has the burden only at step five. Bustamante v.
Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001). Instead, if the claimant
first provides medical evidence of an impairment that could reasonably
produce the symptoms she alleges, the ALJ must then provide specific,
clear, and convincing reasons for rejecting the claimant's testimony
regarding the symptom's severity. Garrison, 759 F.3d at 1014-15;
Trevizo, 874 F.3d at 678.

1 evidence supporting his RFC determination. (AR 22-23). "This is
2 not the sort of explanation or the kind of 'specific reasons' [this
3 Court] must have in order to review the ALJ's decision
4 meaningfully, so that [the Court] may ensure that the claimant's
5 testimony was not arbitrarily discredited." Brown-Hunter, 806 F.3d
6 at 494. Critically, the ALJ never addressed Plaintiff's testimony
7 that her pain medicine causes sleepiness, which interferes with
8 her ability to complete a normal workday, even though the ALJ found
9 Plaintiff's lumbar spine strain severe and commented that her
10 "history of pain . . . [has] been treated with pain medication."
11 (AR 21, 22); see Werlein v. Berryhill, 725 F. App'x 534, 535-36
12 (9th Cir. 2018) ("Critically here, the ALJ . . . never addressed
13 [the claimant's] testimony that her thyroid medication causes
14 sleeplessness, which interferes with her ability to go to work,
15 even though [the ALJ] concluded that [the claimant's] thyroid
16 problem is controlled by medication.").

17
18 Second, the ALJ erroneously concluded that Plaintiff's care
19 was conservative. The ALJ found that Plaintiff's [p]rimary care
20 treatment records . . . document conservative care for [her]
21 chronic conditions and temporary minor maladies." (AR 22). A
22 conservative course of treatment may discredit a claimant's
23 allegations of disabling symptoms. See, e.g., Parra v. Astrue,
24 481 F.3d 742, 750-51 (9th Cir. 2007) (treatment with over-the-
25 counter pain medication is "conservative treatment" sufficient to
26 discredit a claimant's testimony regarding allegedly disabling
27 pain). Here, however, the medical evidence reflects that in
28 addition to the need for multiple daily insulin injections and the

1 use of a plug-in nebulizer, Plaintiff was prescribed Norco
2 (hydrocodone) and Ativan (lorazepam). (AR 47, 289, 297, 3065, 308,
3 324, 366). The consistent use of Norco, a strong opioid medication,
4 cannot accurately be described as "conservative" treatment. See
5 Lapeirre-Gutt v. Astrue, 382 F. App'x 662, 664 (9th Cir. 2010)
6 (treatment consisting of "copious" amounts of narcotics, occipital
7 nerve blocks, and trigger point injections not conservative); Kager
8 v. Astrue, 256 F. App'x 919, 923 (9th Cir. 2007) (rejecting adverse
9 credibility determination premised on absence of significant pain
10 therapy where claimant took prescription pain medications including
11 Methocarbomal and the narcotic analgesics Roxicet and Valium);
12 Madrigal v. Berryhill, No. CV 17 0824, 2017 WL 5633028, at *6 (C.D.
13 Cal. Nov. 21, 2017) ("[P]laintiff has been prescribed strong
14 prescription pain medications, including the narcotic medication
15 Norco, has received spinal injections, and has been referred for a
16 lap band surgery consultation, treatment that is not necessarily
17 conservative."); Mangat v. Colvin, No. 15 CV 2312, 2017 WL 1223881,
18 at *5 (S.D. Cal. Feb. 3, 2017) (finding that treatment of diabetes,
19 which progressed to insulin therapy, cannot be characterized as
20 conservative); Childress v. Colvin, No. 13 CV 3252, 2014 WL
21 4629593, at *12 (N.D. Cal. Sept. 16, 2014) ("not obvious whether
22 the consistent use of [Norco] (for several years) is
23 'conservative' " treatment); Aguilar v. Colvin, No. CV 130 8307,
24 2014 WL 3557308, at *8 (C.D. Cal. July 18, 2014) ("It would be
25 difficult to fault Plaintiff for overly conservative treatment when
26 he has been prescribed strong narcotic pain medications."); cf.
27 Osenbrock v. Apfel, 240 F.3d 1157, 1166 (9th Cir. 2001) (treatment
28 corroborating allegations of severe and unremitting pain may

1 include a strong Codeine or Morphine basic analgesic); Ascencio v.
2 Colvin, No. CV 14-0971, 2014 WL 5661882, at *5 (C.D. Cal. Nov. 4,
3 2014) (finding ALJ provided clear and convincing evidence for
4 discounting plaintiff's subjective pain testimony, in part because
5 ALJ "found that healthcare providers treated [p]laintiff's diabetes
6 with oral medication, not insulin") (emphasis added). Further,
7 the ALJ failed to acknowledge that Plaintiff experienced
8 significant side effects from her pain medications, including
9 drowsiness, as discussed above. (AR 44, 51, 52).

10
11 Finally, the ALJ's reliance on objective medical evidence is
12 insufficient to undermine Plaintiff's subjective symptom
13 testimony. The ALJ concluded that "[r]ecords dating after the
14 alleged onset date are limited and do not reflect a disabling
15 degree of functional limitations." (AR 22). While inconsistencies
16 with the objective medical evidence can be a factor that the ALJ
17 may consider when evaluating a claimant's credibility, it cannot
18 be the sole ground for rejecting a claimant's subjective testimony.
19 Bray, 554 F.3d at 1227; Burch v. Barnhart, 400 F.3d 676, 681 (9th
20 Cir. 2005); Rollins, 261 F.3d at 857. Here, the only other factor
21 noted by the ALJ was the supposed conservative treatment, which
22 was not supported by substantial evidence, as discussed above. In
23 any event, the objective evidence cited by the ALJ does not dispute
24 all of Plaintiff's subjective statements. For example, as already
25 noted, the ALJ does not cite any evidence to dispute Plaintiff's
26 testimony that due to the side effects from Norco, Plaintiff's
27 chronic pain, and her lack of sleep due to her sleep apnea, she
28 takes two to three naps a day totaling three to four hours. (AR

1 44, 51, 52). As noted above, unless the ALJ properly rejects these
2 subjective symptoms, an individual off task for 20% of a workday
3 cannot sustain fulltime employment. (AR 57-58).
4

5 In sum, the ALJ failed to provide clear and convincing
6 reasons, supported by substantial evidence, for rejecting
7 Plaintiff's subjective symptoms. The matter is remanded for
8 further proceedings. On remand, the ALJ shall reevaluate
9 Plaintiff's symptoms in accordance with SSR 16-3p, taking into
10 account the full range of medical evidence.
11

12 **B. Remand Is Warranted**
13

14 The decision whether to remand for further proceedings or
15 order an immediate award of benefits is within the district court's
16 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir.
17 2000). Where no useful purpose would be served by further
18 administrative proceedings, or where the record has been fully
19 developed, it is appropriate to exercise this discretion to direct
20 an immediate award of benefits. Id. at 1179 ("[T]he decision of
21 whether to remand for further proceedings turns upon the likely
22 utility of such proceedings."). However, where, as here, the
23 circumstances of the case suggest that further administrative
24 review could remedy the Commissioner's errors, remand is
25 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011);
26 Harman, 211 F.3d at 1179-81; see also Garrison, 759 F.3d at 1020
27 (cautioning that "the credit-as-true rule may not be dispositive
28 of the remand question in all cases"); cf. Treichler v. Comm'r of

1 Soc. Sec. Admin., 775 F.3d 1090, 1105 (9th Cir. 2014) (“[T]he
2 record raises crucial questions as to the extent of Treichler’s
3 impairment given inconsistencies between his testimony and the
4 medical evidence in the record. These are exactly the sort of
5 issues that should be remanded to the agency for further
6 proceedings.”).

7
8 Since the ALJ failed to properly evaluate Plaintiff’s
9 subjective symptom testimony, remand is warranted. However, if
10 the ALJ properly determines which of Plaintiff’s statements he
11 found not credible and why, the record does not affirmatively
12 establish that Plaintiff is disabled. Remand is therefore
13 appropriate.

14
15 **ORDER**

16
17 For the foregoing reasons, the decision of the Commissioner
18 is reversed, and the matter is remanded for further proceedings
19 pursuant to Sentence 4 of 42 U.S.C. § 405(g).

20
21 LET JUDGMENT BE ENTERED ACCORDINGLY.

22
23 DATED: November 27, 2018

24
25 _____/S/_____
26 ALKA SAGAR
27 UNITED STATES MAGISTRATE JUDGE
28