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

JANET S.,	)	NO. ED CV 19-1466-E
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM OPINION</b>
	)	
COMMISSIONER OF SOCIAL SECURITY	)	<b>AND ORDER OF REMAND</b>
ADMINISTRATION,	)	
	)	
Defendant.	)	
	)	

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Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS  
HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
judgment are denied, and this matter is remanded for further  
administrative action consistent with this Opinion.

**PROCEEDINGS**

Plaintiff filed a complaint on August 7, 2019, seeking review of  
the Commissioner's denial of benefits. The parties consented to  
proceed before a United States Magistrate Judge on August 22, 2019.  
Plaintiff filed a motion for summary judgment on December 6, 2019.

1 Defendant filed a motion for summary judgment on February 5, 2020.  
2 The Court has taken the motions under submission without oral  
3 argument. See L.R. 7-15; "Order," filed August 8, 2019.  
4

5 **BACKGROUND**  
6

7 Plaintiff, a former loan analyst/processor, asserts disability  
8 since May 22, 2015 (when she was 63 years old), based on alleged  
9 physical impairments (Administrative Record ("A.R.") 28-34, 41-42, 45,  
10 167, 179). An Administrative Law Judge ("ALJ") reviewed the record  
11 and heard testimony from Plaintiff and a vocational expert (A.R. 13-  
12 20, 26-44). Plaintiff testified, inter alia, that she cannot use her  
13 hands for more than 20 minutes before experiencing tingling, numbness  
14 and pain (A.R. 34-35, 39).<sup>1</sup>  
15

16 The ALJ found that Plaintiff has "severe" degenerative disc  
17 disease of the cervical and lumbar spine, osteoarthritis of the knees,  
18 peripheral neuropathy and obesity (A.R. 15). However, the ALJ found  
19 that Plaintiff retains a residual functional capacity for light work,  
20 limited to: (1) occasionally climbing ladders, ropes and scaffolding;  
21 (2) frequently climbing ramps and stairs and balancing;  
22 (3) occasionally stooping, kneeling, crouching and crawling;  
23 (4) frequently using her hands and bilateral upper extremities for  
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25 <sup>1</sup> The vocational expert testified that: (1) a person  
26 limited to using her hands for 20 minutes at a time before  
27 resting them for up to 30 minutes, per Plaintiff's testimony,  
28 would be limited to less than occasional use of the hands; and  
(2) a person limited to occasional use of the hands would not be  
able to perform Plaintiff's past relevant work (A.R. 41-43).

1 handling, fingering and feeling; and (5) less than occasionally being  
2 exposed to extreme cold and hazards (A.R. 16-20 (rejecting Plaintiff's  
3 allegations of greater limitations)) (emphasis added)). The ALJ  
4 deemed Plaintiff capable of performing her past relevant work and, on  
5 that basis, denied disability benefits through December 31, 2017 (the  
6 date last insured) (A.R. 13, 20 (adopting vocational expert testimony  
7 at A.R. 41-42)).

8  
9 The Appeals Council denied review (A.R. 1-3).

10  
11 **STANDARD OF REVIEW**

12  
13 Under 42 U.S.C. section 405(g), this Court reviews the  
14 Administration's decision to determine if: (1) the Administration's  
15 findings are supported by substantial evidence; and (2) the  
16 Administration used correct legal standards. See Carmickle v.  
17 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,  
18 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,  
19 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such  
20 relevant evidence as a reasonable mind might accept as adequate to  
21 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401  
22 (1971) (citation and quotations omitted); see also Widmark v.  
23 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

24  
25 If the evidence can support either outcome, the court may  
26 not substitute its judgment for that of the ALJ. But the  
27 Commissioner's decision cannot be affirmed simply by  
28 isolating a specific quantum of supporting evidence.

1           Rather, a court must consider the record as a whole,  
2           weighing both evidence that supports and evidence that  
3           detracts from the [administrative] conclusion.  
4

5 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and  
6 quotations omitted).  
7

## 8   DISCUSSION

9

10           After consideration of the record as a whole, the Court reverses  
11 the Administration's decision in part and remands the matter for  
12 further administrative proceedings. As discussed below, the  
13 Administration materially erred in evaluating the evidence of record.  
14

### 15           **I. Summary of Plaintiff's Subjective Complaints and the Medical** 16           **Record.** 17

18           Plaintiff testified that she stopped working because she was in  
19 too much pain (A.R. 32). Plaintiff said she could not work because  
20 her job duties required her to "be on the computer and type" and she  
21 cannot use her hands for more than 20 minutes before experiencing  
22 tingling, numbness and pain in her fingers due to carpal tunnel  
23 syndrome/neuropathy for which surgery had been recommended (A.R. 34-  
24 35, 39). Plaintiff also said she could not work because of pain in  
25 her neck and associated headaches (A.R. 35, 38). Plaintiff said she  
26 experiences neuropathy in her hands and her feet, which requires her  
27 to shift positions to help with numbness, tingling and pain (A.R. 38).  
28

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28

1 Plaintiff testified that she can drive, make breakfast, do light  
2 cleaning (but she employs a housekeeper), do laundry, cook "nothing  
3 extensive," and attend church once a month (A.R. 30, 36-37).  
4 Plaintiff said she can lift 10 pounds, sit for 30 minutes at a time,  
5 stand for 30 minutes at a time, and walk for not more than 30 minutes  
6 at a time (A.R. 37).<sup>2</sup>

7  
8 Treatment records reflect consistent complaints of pain, numbness  
9 and tingling in Plaintiff's hands. In early May, 2015, just before  
10 Plaintiff stopped working, Plaintiff complained of numbness in her  
11 hands and feet, as well as low back pain (A.R. 271-73). She was  
12 assessed with, inter alia, cervical radiculopathy, lumbar spondylosis,  
13 lumbar radiculopathy and cervical spine stenosis (A.R. 272). She  
14 received a prescription of Tramadol (A.R. 272). Plaintiff reportedly  
15 called her doctor on May 26, 2015, requesting an "off work order" for  
16 one or two weeks due to numbness and tingling in her legs (A.R. 269-  
17 70).

18  
19 Plaintiff presented for evaluation of her back and neck pain on  
20 May 29, 2015, complaining of chronic neck and back pain with worsening  
21 symptoms after prolonged sitting at work, including pain in both legs

22 \_\_\_\_\_  
23 <sup>2</sup> In an Exertion Questionnaire dated November 25, 2015,  
24 Plaintiff reported that: (1) she is unable to sit for more than  
25 20 minutes at a time due to tingling, numbness, and pain in her  
26 feet; (2) she cannot write for more than a few minutes at a time  
27 due to tingling, numbness and pain; and (3) she can walk to the  
28 mailbox and sometimes uses a cane when her legs hurt (A.R. 187-  
193).

1 and in the upper arms, tingling and numbness in the right hand, and  
2 numbness in the left leg (A.R. 266). An EMG study from 2011  
3 reportedly had shown active right C7 cervical radiculopathy "with  
4 signs of ongoing axon loss" (A.R. 266). On examination, she  
5 reportedly was obese with a normal gait, tenderness in the lumbar and  
6 cervical spine, lower extremity strength of 4/5 and 5/5, upper  
7 extremity strength of 4/5, decreased sensation in the right arm and  
8 forearm and in both hands, and slightly decreased sensation in the  
9 left lateral leg and foot (A.R. 267-68). She was assessed with right  
10 C7 radiculopathy and mild degenerative joint disease in the lumbar  
11 spine (A.R. 268). She was prescribed physical therapy and Tramadol  
12 (A.R. 268).

13  
14 In June of 2015, Plaintiff presented for an extension of her "off  
15 work order" due to ongoing low back pain not responding to physical  
16 therapy (A.R. 261). Later in June, Plaintiff reported the same  
17 complaints as at the May 29, 2015 evaluation, with the same reported  
18 findings on examination (A.R. 258-60).

19  
20 In July of 2015, Plaintiff presented to the emergency room for  
21 right side flank pain, which reportedly differed from her chronic back  
22 pain (A.R. 242). On examination, she had musculoskeletal and lumbar  
23 back pain and tenderness (A.R. 245). She was diagnosed with flank  
24 pain and prescribed Norco (A.R. 247).

25  
26 Later in July of 2015, Plaintiff followed up with her regular  
27 provider, requesting a continued "off work order" because her work  
28 required her to sit for a long time, which causes her low back pain

1 and leg numbness (A.R. 241). Plaintiff reportedly was taking Norco  
2 and Tramadol (A.R. 241). On examination, she had paraspinal  
3 tenderness (A.R. 242). She was diagnosed with lumbosacral radiculitis  
4 and was prescribed more Norco (A.R. 242).

5  
6 In September of 2015, Plaintiff complained of low back pain with  
7 sciatica, neck pain, tingling in her fingers and toes with swelling,  
8 and right knee pain (A.R. 237-39). Plaintiff requested a continued  
9 "off work order" (A.R. 238). Plaintiff reportedly was attending  
10 physical therapy (A.R. 237-38; see also A.R. 252-54, 256-58, 262-65).  
11 Plaintiff reportedly was taking Norco and Tramadol (A.R. 238, 240).  
12 Plaintiff reportedly did not want to try trigger point injections  
13 because she was afraid of possible pain therefrom (A.R. 240). On  
14 examination, Plaintiff had musculoskeletal and paraspinal tenderness  
15 (A.R. 238). She was assessed with, inter alia, cervical  
16 radiculopathy, lumbar radiculopathy, osteoarthritis of the right knee,  
17 lumbar myofascial pain syndrome, and peripheral neuropathy/paresthesia  
18 (A.R. 238, 240).

19  
20 In November of 2015, Plaintiff reported neck pain radiating to  
21 her upper extremities, low back pain, bilateral knee pain and  
22 tenderness (A.R. 343). On examination, she had musculoskeletal  
23 tenderness and tenderness in the paracervical muscles, mid and low  
24 back, and knees (A.R. 343). She was not then using an assistive  
25 device but was advised to do so because of her observed difficulty in  
26 changing from a sitting position to a standing position (A.R. 343).  
27 Plaintiff's Tramadol was continued (A.R. 344).

28 ///

1 On January 21, 2016, Plaintiff's workers' compensation claim was  
2 denied for lack of medical evidence to support an industrially-related  
3 injury (A.R. 364-65). Agreed Medical Examiner and orthopedic surgeon  
4 Dr. Peter M. Newton subsequently reviewed the medical record,  
5 evaluated Plaintiff and prepared a report dated June 6, 2016 (A.R.  
6 464-91). Plaintiff reportedly had been given temporary total  
7 disability for six months and then was laid off from work (A.R. 465).  
8 Plaintiff reportedly complained of headaches and pain in her neck  
9 radiating to the left arm, as well as pain in the low back, knees,  
10 hands and feet with numbness and tingling, which she attributed to  
11 sitting for prolonged periods (A.R. 465-67). Plaintiff reported  
12 numbness from repeated and prolonged typing and also reported that her  
13 feet would go numb after 20 minutes of sitting (A.R. 466). Plaintiff  
14 then was scheduled to have surgery on her left knee for a torn  
15 meniscus (A.R. 466). Plaintiff reportedly then was then taking Norco  
16 and Tramadol for her pain (A.R. 470).

17  
18 On examination, Plaintiff had reduced range of motion in the  
19 cervical, thoracic and lumbar spine with pain, tenderness in her  
20 paraspinal and trapezius muscles, neck pain with movement of the  
21 shoulders, pain in the left knee when walking on toes and heels and in  
22 range of motion testing, and positive Apley's test on the left side  
23 (A.R. 472-82). X-rays showed mild degenerative joint disease of the  
24 left knee, and mild diffuse degenerative disc disease of the cervical  
25 spine and lumbosacral spine (A.R. 487). Dr. Newton diagnosed:  
26 (1) chronic pain (rule out herniated disc) causing intermittent upper  
27 extremity radiculopathy; (2) left wrist pain (rule out soft tissue  
28 strain versus peripheral neuropathy); (3) chronic low back pain (rule



1 out herniated disc) causing lower extremity radiculopathy; and  
2 (4) left knee pain with moderate degenerative joint disease (A.R.  
3 487). Dr. Newton referred Plaintiff for MRI studies and  
4 electrodiagnostic testing (A.R. 488). For "work status," Dr. Newton  
5 opined that Plaintiff should be limited to lifting 5 pounds, no  
6 repetitive or prolonged overhead work, no repetitive bending,  
7 stooping, twisting, squatting or standing, and no repetitive forceful  
8 gripping or grasping (A.R. 489-90). Dr. Newton stated that Plaintiff  
9 would require 10 minutes of rest for every 50 minutes of typing or  
10 writing (A.R. 490).

11  
12 Subsequent MRI studies showed straightening of the cervical  
13 lordosis, multilevel disc bulges from C4-C5 through C6-C7 with  
14 bilateral neuroforaminal narrowing, multiple ovoid lesions at L2, L3  
15 and S1 which were recommended for further evaluation, and disc bulges  
16 at L1-L2, L2-L3 and L4-L5 with neuroforaminal narrowing (A.R. 493-96).  
17 EMG/nerve conduction studies showed bilateral polongation of the  
18 median motor nerve distal latencies and moderate slowing of the left  
19 median sensory velocity across the wrist, absent right median sensory  
20 nerve action potential, no abnormalities on EMG testing, and normal  
21 electrodiagnostic studies of the lower limbs (A.R. 498-500). Wrist  
22 ultrasounds showed "bilateral median nerve moderate fusiform  
23 enlargement and thickening (right greater than left)" (A.R. 502).

24  
25 Dr. Newton reevaluated Plaintiff and prepared a second report  
26 dated September 26, 2016 (A.R. 369-95). Plaintiff had undergone left  
27 knee arthroscopy as scheduled in June (A.R. 370; see also A.R. 412-  
28 18). Plaintiff reportedly was taking Tramadol (A.R. 370).

1 Examination results were similar to those from Dr. Newton's first  
2 examination. Compare A.R. 472-82 with A.R. 371-80. Dr. Newton  
3 diagnosed: (1) chronic neck pain with 1-3 mm disc protrusion;  
4 (2) right and left median nerve neuropathy; (3) chronic low back  
5 strain with 2-3 mm disc protrusion; and (4) status post left knee  
6 arthroscopy with underlying moderate degenerative joint disease (A.R.  
7 381). Dr. Newton opined that Plaintiff's condition was permanent and  
8 stationary (A.R. 382). Dr. Newton also opined that Plaintiff would be  
9 a candidate for cortisone injections for her wrists and that, if she  
10 continued to have significant symptoms, she would be a candidate for  
11 bilateral carpal tunnel release surgery (A.R. 386). Dr. Newton  
12 assessed the same "work status" as before, and opined that Plaintiff  
13 could work with restrictions to performing the following activities  
14 for only two to four hours each in an eight hour work day: forward  
15 bending, twisting, keyboarding and bilateral hand grasping (A.R. 386).  
16 Dr. Newton also opined that Plaintiff could not lift or carry more  
17 than five pounds for more than four hours per day (A.R. 386). On  
18 March 1, 2017, Plaintiff was awarded permanent disability workers'  
19 compensation benefits (A.R. 397-406).

20  
21 Plaintiff received treatment from Dr. Rubina Shaheen during  
22 January, 2017 - March, 2018 (A.R. 515-41). In April of 2017,  
23 Plaintiff complained of left arm and shoulder pain radiating down to  
24 her fingers and was assessed with left shoulder impingement and  
25 neuralgia (A.R. 534-35). Dr. Shaheen prescribed Soma (A.R. 535). In  
26 June of 2017, Plaintiff complained of chronic lower right sided pain  
27 radiating to the right leg for which she was taking Tramadol (A.R.  
28 528). Plaintiff was diagnosed with sciatica and given a Lidoderm

1 patch (A.R. 529).

2  
3 Dr. Shaheen completed a "Medical Assessment of Ability to do  
4 Work-Related Activities," dated April 5, 2018 (A.R. 460). Dr. Shaheen  
5 opined that Plaintiff could: (1) lift and carry 10 pounds;  
6 (2) occasionally use her upper extremities; (3) sit, stand and walk  
7 for 30 minutes at one time; and (4) sit for 30 minutes total and stand  
8 or walk for 30 minutes total in an eight hour workday (A.R. 460). Dr.  
9 Shaheen reported that Plaintiff has "cervical neck stenosis with  
10 compression and neuropathy with pain," as supported by a cervical MRI  
11 and "neurological assessment in documentation" (A.R. 460).

12  
13 Non-examining state agency physicians reviewed the record in  
14 December of 2015 and May of 2016 (before Dr. Newton's comprehensive  
15 evaluations) and found Plaintiff capable of light work with no  
16 manipulative limitations (A.R. 45-63). The state agency physicians  
17 did not review any other doctors' opinions. See id.

18  
19 **II. The ALJ Erred in Discounting Plaintiff's Testimony and Statements**  
20 **Regarding the Severity of Plaintiff's Symptoms Without Stating**  
21 **Legally Sufficient Reasons for Doing So.**

22  
23 Where, as here, an ALJ finds that a claimant's medically  
24 determinable impairments reasonably could be expected to cause some  
25 degree of the alleged symptoms of which the claimant subjectively  
26 complains, any discounting of the claimant's complaints must be  
27 supported by "specific, cogent" findings. See Berry v. Astrue, 622  
28 F.3d 1228, 1234 (9th Cir. 2010); Lester v. Chater, 81 F.3d 821, 834

1 (9th Cir. 1995); but see Smolen v. Chater, 80 F.3d 1273, 1282-84 (9th  
2 Cir. 1996) (indicating that ALJ must state "specific, clear and  
3 convincing" reasons to reject a claimant's testimony where there is no  
4 evidence of malingering).<sup>3</sup> Generalized, conclusory findings do not  
5 suffice. See Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004)  
6 (the ALJ's credibility findings "must be sufficiently specific to  
7 allow a reviewing court to conclude the ALJ rejected the claimant's  
8 testimony on permissible grounds and did not arbitrarily discredit the  
9 claimant's testimony") (internal citations and quotations omitted);  
10 Holohan v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001) (the ALJ  
11 must "specifically identify the testimony [the ALJ] finds not to be  
12 credible and must explain what evidence undermines the testimony");  
13 Smolen v. Chater, 80 F.3d at 1284 ("The ALJ must state specifically  
14 which symptom testimony is not credible and what facts in the record  
15 lead to that conclusion."); see also Social Security Ruling ("SSR")  
16 96-7p (explaining how to assess a claimant's credibility), superseded,

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21 <sup>3</sup> In the absence of an ALJ's reliance on evidence of  
22 "malingering," most recent Ninth Circuit cases have applied the  
23 "clear and convincing" standard. See, e.g., Leon v. Berryhill, 806  
24 F.3d 487, 488-89 (9th Cir. 2015); Burrell v. Colvin, 775 F.3d  
25 1133, 1136-37 (9th Cir. 2014); Treichler v. Commissioner, 775  
26 F.3d 1090, 1102 (9th Cir. 2014); Ghanim v. Colvin, 763 F.3d 1154,  
27 1163 n.9 (9th Cir. 2014); Garrison v. Colvin, 759 F.3d 995,  
28 1014-15 & n.18 (9th Cir. 2014); see also Ballard v. Apfel, 2000  
WL 1899797, at \*2 n.1 (C.D. Cal. Dec. 19, 2000) (collecting  
earlier cases). In the present case, the ALJ's findings are  
insufficient under either standard, so the distinction between  
the two standards (if any) is academic.

1 SSR 16-3p (eff. March 28, 2016).<sup>4</sup>

2  
3 In the present case, the ALJ acknowledged that "there is evidence  
4 of some significant degenerative pathology in the cervical and lumbar  
5 spines which might be expected to result in some chronic pain and  
6 stiffness (though not necessarily in radiculopathy, based on the MRIs  
7 and EMG studies)" (A.R. 18). The ALJ also acknowledged that nerve  
8 conduction studies "suggested some medial nerve issues" and wrist  
9 ultrasounds "suggested 'thickening' of the median nerves bilaterally,  
10 which might account for . . . reports of recurrent hand sensation  
11 problems" (A.R. 18). However, the ALJ discounted Plaintiff's  
12 testimony and statements regarding the severity of her limitations  
13 (A.R. 18-19). The ALJ stated three reasons for doing so:

14 (1) Plaintiff's allegations were "not entirely support[ed]" by the  
15 evidence of record because she did not "consistently exhibit"  
16 sensation loss in her extremities on examination or "clear evidence of  
17 serious dexterity or grip loss on exam" (A.R. 18); (2) with the  
18 exception of knee surgery, Plaintiff "required relatively minimal  
19 treatment for her symptoms" (A.R. 18); and (3) Plaintiff was able to  
20 perform "a fairly good range of normal daily tasks (many household  
21 chores were taken care of by a housekeeper), including caring for her  
22

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23 <sup>4</sup> Social Security Rulings ("SSRs") are binding on the  
24 Administration. See Terry v. Sullivan, 903 F.2d 1273, 1275 n.1  
25 (9th Cir. 1990). The appropriate analysis under the superseding  
26 SSR is substantially the same as the analysis under the  
27 superseded SSR. See R.P. v. Colvin, 2016 WL 7042259, at \*9 n.7  
28 (E.D. Cal. Dec. 5, 2016) (stating that SSR 16-3p "implemented a  
change in diction rather than substance") (citations omitted);  
see also Trevizo v. Berryhill, 871 F.3d 664, 678 n.5 (9th Cir.  
2017) (suggesting that SSR 16-3p "makes clear what our precedent  
already required").

1 pet, engaging in self-care, leaving her home when necessary, engaging  
2 in non-strenuous leisure activity, etc." (A.R. 18-19).

3  
4 With regard to reason (2), a limited course of treatment  
5 sometimes can justify the rejection of a claimant's testimony, at  
6 least where the testimony concerns physical problems. See, e.g.,  
7 Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) (lack of  
8 consistent treatment, such as where there was a three to four month  
9 gap in treatment, properly considered in discrediting claimant's back  
10 pain testimony); Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999)  
11 (in assessing the credibility of a claimant's pain testimony, the  
12 Administration properly may consider the claimant's failure to request  
13 treatment and failure to follow treatment advice) (citing Bunnell v.  
14 Sullivan, 947 F.2d 341, 346 (9th Cir. 1991) (en banc)); Matthews v.  
15 Shalala, 10 F.3d 678, 679-80 (9th Cir. 1993) (permissible credibility  
16 factors in assessing pain testimony include limited treatment and  
17 minimal use of medications); see also Johnson v. Shalala, 60 F.3d  
18 1428, 1434 (9th Cir. 1995) (absence of treatment for back pain during  
19 half of the alleged disability period, and evidence of only  
20 "conservative treatment" when the claimant finally sought treatment,  
21 sufficient to discount claimant's testimony).

22  
23 In the present case, however, it is doubtful Plaintiff's  
24 treatment with narcotic pain medications (Norco and Tramadol) may  
25 properly be characterized as "minimal" or "conservative" within the  
26 meaning of Ninth Circuit jurisprudence. See, e.g., Shepard v. Colvin,  
27 2015 WL 9490094, at \*7 (E.D. Cal. Dec. 30, 2015) ("[p]rior cases in  
28 the Ninth Circuit have found that treatment was conservative when the

1 claimant's pain was adequately treated with over-the-counter  
2 medication and other minimal treatment," however where record  
3 reflected heavy reliance on Tramadol and Oxycodone and other  
4 prescriptions for pain, record did not support finding that treatment  
5 was "conservative") (internal citations omitted; citing for comparison  
6 Lapeirre-Gutt v. Astrue, 382 Fed. App'x. 662, 664 (9th Cir. 2010)  
7 (doubting whether "copious amounts of narcotic pain medication" as  
8 well as nerve blocks and trigger point injections was "conservative"  
9 treatment)); Childress v. Colvin, 2014 WL 4629593, at \*12 (N.D. Cal.  
10 Sept. 16, 2014) ("[i]t is not obvious whether the consistent use of  
11 [Norco] (for several years) is 'conservative' or in conflict with  
12 Plaintiff's pain testimony"); Aguilar v. Colvin, 2014 WL 3557308, at  
13 \*8 (C.D. Cal. July 18, 2014) ("It would be difficult to fault  
14 Plaintiff for overly conservative treatment when he has been  
15 prescribed strong narcotic pain medications"); Christie v. Astrue,  
16 2011 WL 4368189, at \*4 (C.D. Cal. Sept. 16, 2011) (refusing to  
17 characterize as "conservative" treatment that included narcotic pain  
18 medication and epidural injections); Eicholtz v. Astrue, 2008 WL  
19 4642976, at \*3 (C.D. Cal. Oct. 20, 2008) (court acknowledged the  
20 precept that "[a]n ALJ may discount a claimant's testimony based on  
21 conservative treatment," but appeared to deem this precept  
22 inapplicable because the claimant took Tramadol). As detailed above,  
23 Plaintiff regularly sought treatment throughout the alleged disability  
24 period, underwent physical therapy and knee surgery and consistently  
25 ///  
26 ///  
27 ///  
28 ///

1 was prescribed narcotic pain medication.<sup>5</sup> Contrary to the ALJ's  
2 assertion, Plaintiff's treatment has not been "minimal" within the  
3 meaning of Ninth Circuit jurisprudence.

4  
5 With regard to reason (3), inconsistencies between admitted daily  
6 activities and claimed incapacity properly may impugn the accuracy of  
7 a claimant's testimony and statements under certain circumstances.  
8 See, e.g., Thune v. Astrue, 499 Fed. App'x 701, 703 (9th Cir. 2012)  
9 (ALJ properly discredited pain allegations as contradicting claimant's  
10 testimony that she gardened, cleaned, cooked, and ran errands);  
11 Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1175 (9th Cir. 2008)  
12 (claimant's "normal activities of daily living, including cooking,  
13 house cleaning, doing laundry, and helping her husband in managing  
14 finances" provided sufficient explanation for discounting claimant's  
15 testimony). Yet, it is difficult to reconcile Ninth Circuit opinions  
16 discussing when a claimant's admitted activities may and may not  
17 justify a discounting of the claimant's testimony and statements.  
18 Compare Stubbs-Danielson v. Astrue with Vertigan v. Halter, 260 F.3d  
19 1044, 1049-50 (9th Cir. 2001) ("the mere fact that a plaintiff has  
20 carried on certain daily activities, such as grocery shopping, driving  
21 a car, or limited walking for exercise, does not in any way detract

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22  
23 <sup>5</sup> Defendant appears to suggest as a reason to discount  
24 Plaintiff's subjective complaints the alleged fact that Plaintiff  
25 testified surgery had been recommended for her wrist/hand pain  
26 even though the record assertedly fails to reflect such a  
27 recommendation. The Court may not rely on this reasoning because  
28 the ALJ did not specify this reasoning in discounting Plaintiff's  
subjective complaints. See Pinto v. Massanari, 249 F.3d 840, 847  
(9th Cir. 2001) (the court "cannot affirm the decision of an  
agency on a ground that the agency did not invoke in making its  
decision").



1 from her credibility as to her overall disability"); see also Diedrich  
2 v. Berryhill, 874 F.3d 634, 642-43 (9th Cir. 2017) (daily activities  
3 of cooking, cleaning, vacuuming, washing dishes, shopping and cleaning  
4 a cat's litter box insufficient to discount the claimant's subjective  
5 complaints).

6  
7 In the present case, Defendant concedes that Plaintiff's limited  
8 daily activities "do not necessarily contradict her subjective  
9 complaints" (Defendant's Motion, p. 9). The Court agrees.  
10 Plaintiff's daily activities cannot properly undermine her subjective  
11 complaints. See Revels v. Berryhill, 874 F.3d 648, 667-68 (9th Cir.  
12 2017).

13  
14 With regard to reason (1), inconsistencies between a claimant's  
15 subjective complaints and the objective medical evidence can be a  
16 factor in discounting a claimant's subjective complaints, but cannot  
17 "form the sole basis." See Burch v. Barnhart, 400 F.3d at 681;  
18 Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001). As discussed  
19 above, the ALJ's other two stated reasons for discounting Plaintiff's  
20 subjective complaints are legally infirm. Therefore, the ALJ's  
21 reliance on any alleged inconsistency between Plaintiff's subjective  
22 complaints and the objective medical evidence cannot properly support  
23 the ALJ's decision.

24  
25 Even if the ALJ could rely solely on an alleged inconsistency  
26 between Plaintiff's subjective complaints and the objective medical  
27 evidence, the ALJ's reasoning would still be insufficient. The ALJ  
28 observed that, although Plaintiff complained of extremity numbness,

1 tingling and pain, she had largely normal findings of strength and  
2 sensation on examination (A.R. 17-19). The ALJ acknowledged, however,  
3 that the results of Plaintiff's nerve conduction study and wrist  
4 ultrasound "might account for" Plaintiff's reported hand problems  
5 (A.R. 18). Further, the medical record includes findings of lumbar  
6 and cervical radiculopathy, as well as peripheral neuropathy (which  
7 the ALJ found to be a severe impairment) (A.R. 15, 238, 240, 242, 268,  
8 382, 487). The cited normal strength and sensory findings on  
9 examination are not necessarily inconsistent with Plaintiff's  
10 testimony regarding the problems with her hands she experiences after  
11 20 minutes of repetitive use. Thus, Plaintiff's relevant subjective  
12 complaints are not necessarily inconsistent with the objective medical  
13 evidence.

14  
15 The Court is unable to conclude that the ALJ's failure to state  
16 legally sufficient reasons for discounting Plaintiff's subjective  
17 complaints was harmless. "[A]n ALJ's error is harmless where it is  
18 inconsequential to the ultimate non-disability determination." Molina  
19 v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012) (citations and  
20 quotations omitted). Here, the vocational expert testified that, if  
21 someone were limited to occasional use of her hands, she could not  
22 perform Plaintiff's past relevant work (A.R. 43). The vocational  
23 expert did not testify whether there are jobs performable by a person  
24 as limited as Plaintiff claims to be (A.R. 41-43).

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1 **III. Remand for Further Administrative Proceedings is Appropriate.**

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3 Remand is appropriate because the circumstances of this case

4 suggest that further development of the record and further

5 administrative review could remedy the ALJ's errors. See McLeod v.

6 Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see also INS v. Ventura,

7 537 U.S. 12, 16 (2002) (upon reversal of an administrative

8 determination, the proper course is remand for additional agency

9 investigation or explanation, except in rare circumstances); Leon v.

10 Berryhill, 880 F.3d 1041, 1044 (9th Cir. 2017) (reversal with a

11 directive for the immediate calculation of benefits is a "rare and

12 prophylactic exception to the well-established ordinary remand rule");

13 Dominquez v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) ("Unless the

14 district court concludes that further administrative proceedings would

15 serve no useful purpose, it may not remand with a direction to provide

16 benefits"); Treichler v. Commissioner, 775 F.3d 1090, 1101 n.5 (9th

17 Cir. 2014) (remand for further administrative proceedings is the

18 proper remedy "in all but the rarest cases"); Harman v. Apfel, 211

19 F.3d 1172, 1180-81 (9th Cir.), cert. denied, 531 U.S. 1038 (2000)

20 (remand for further proceedings rather than for the immediate payment

21 of benefits is appropriate where there are "sufficient unanswered

22 questions in the record"); Connett v. Barnhart, 340 F.3d 871, 876 (9th

23 Cir. 2003) ("Connett") (remand is an option where the ALJ fails to

24 state sufficient reasons for rejecting a claimant's excess symptom

25 testimony); but see Orn v. Astrue, 495 F.3d 625, 640 (9th Cir. 2007)

26 (citing Connett for the proposition that "[w]hen an ALJ's reasons for

27 rejecting the claimant's testimony are legally insufficient and it is

28 clear from the record that the ALJ would be required to determine the

1 claimant disabled if he had credited the claimant's testimony, we  
2 remand for a calculation of benefits") (quotations omitted); see also  
3 Brown-Hunter v. Colvin, 806 F.3d 487, 495-96 (9th Cir. 2015)  
4 (discussing the narrow circumstances in which a court will order a  
5 benefits calculation rather than further proceedings); Ghanim v.  
6 Colvin, 763 F.3d 1154, 1166 (9th Cir. 2014) (remanding for further  
7 proceedings where the ALJ failed to state sufficient reasons for  
8 deeming a claimant's testimony not credible); Vasquez v. Astrue, 572  
9 F.3d 586, 600-01 (9th Cir. 2009) (a court need not "credit as true"  
10 improperly rejected claimant testimony where there are outstanding  
11 issues that must be resolved before a proper disability determination  
12 can be made). There remain significant unanswered questions in the  
13 present record.

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**CONCLUSION**

For all of the foregoing reasons,<sup>6</sup> Plaintiff's and Defendant's motions for summary judgment are denied and this matter is remanded for further administrative action consistent with this Opinion.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: March 9, 2020.

\_\_\_\_\_  
/s/  
CHARLES F. EICK  
UNITED STATES MAGISTRATE JUDGE

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<sup>6</sup> The Court has not reached any other issue raised by Plaintiff except insofar as to determine that reversal with a directive for the immediate payment of benefits would not be appropriate at this time.