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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESUS G.,¹

Plaintiff

v.

ANDREW SAUL, Commissioner of
Social Security,

Defendant.

Case No. 5:20-cv-0494-GJS

**MEMORANDUM OPINION AND
ORDER**

I. PROCEDURAL HISTORY

Plaintiff Jesus G. (“Plaintiff”) filed a complaint seeking review of Defendant Commissioner of Social Security’s (“Commissioner”) denial of his applications for Disability Insurance Benefits and Supplemental Security Income (“SSI”). The parties filed consents to proceed before the undersigned United States Magistrate Judge [Dkts. 11, 12] and briefs addressing disputed issues in the case [Dkt. 18 (“Pltf.’s Br.”), Dkt. 21 (“Def.’s Br.”), and Dkt. 22 (Pltf.’s Reply)]. The Court has taken the parties’ briefing under submission without oral argument. For the reasons discussed below, the Court finds that this matter should be remanded for further

¹ In the interest of privacy, this Order uses only the first name and the initial of the last name of the non-governmental party.

1 proceedings.

2 II. ADMINISTRATIVE DECISION UNDER REVIEW

3 Plaintiff filed applications for DIB and SSI alleging that he became disabled
4 as of November 24, 2010. [Dkt. 16, Administrative Record (“AR”) 21, 272-280.]
5 Plaintiff’s applications were denied initially, on reconsideration, and after a hearing
6 before Administrative Law Judge (“ALJ”) Clary Simmonds [AR 1-6, 19-33.]

7 Applying the five-step sequential evaluation process, the ALJ found that
8 Plaintiff was not disabled. *See* 20 C.F.R. §§ 416.920(b)-(g)(1). At step one, the
9 ALJ concluded that Plaintiff has not engaged in substantial gainful activity since
10 November 24, 2010, the onset date. [AR 21 (citing 20 C.F.R. § 416.971).] At step
11 two, the ALJ found that Plaintiff suffered from the following severe impairments:
12 degenerative disc disease of the lumbar spine; degenerative disc disease of the
13 cervical spine with stenosis; cervical radiculopathy; right shoulder tendonitis and
14 small partial rotator cuff tear; bilateral shoulder impingement; neuropathy; and
15 arthritis of the bilateral hips. Next, the ALJ determined that Plaintiff did not have an
16 impairment or combination of impairments that meets or medically equals the
17 severity of one of the listed impairments. [AR 25 (citing 20 C.F.R. Part 404,
18 Subpart P, Appendix 1; 20 C.F.R. §§ 416.920(d), 416.925, and 416.926.)]

19 The ALJ found that Plaintiff had the residual functional capacity (RFC) to
20 perform a limited range of sedentary work except:

21
22 he can lift, carry, push or pull up to 10 pounds
23 occasionally and less than 10 pounds frequently; can stand
24 or walk for four hours in an eight-hour workday and sit for
25 six hours in an eight-hour workday; can occasionally
26 climb ramps and stairs, balance, stoop, kneel, crouch, and
27 crawl; can never climb ladders, ropes or scaffolds; would
28 require an assistive device for all ambulation; can
frequently reach in any direction including overhead; can
frequently handle and finger with the bilateral upper
extremities; and can perform work that does not require
exposure to uneven terrain; or to hazards such as moving
machinery or unprotected heights.

1 [AR 25.] Applying this RFC, the ALJ found that Plaintiff could not return to his
2 past relevant work, but as a younger individual with limited education and English
3 speaking abilities, he could perform other work in the national economy and, thus, is
4 not disabled. [AR 32.]
5

6 **III. GOVERNING STANDARD**

7 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner’s decision to
8 determine if: (1) the Commissioner’s findings are supported by substantial evidence;
9 and (2) the Commissioner used correct legal standards. *See Carmickle v. Comm’r*
10 *Soc. Sec. Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*, 499 F.3d
11 1071, 1074 (9th Cir. 2007). Substantial evidence is “such relevant evidence as a
12 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*
13 *Perales*, 402 U.S. 389, 401 (1971) (internal citation and quotations omitted); *see*
14 *also Hoopai*, 499 F.3d at 1074. The Court will uphold the Commissioner’s decision
15 when the evidence is susceptible to more than one rational interpretation. *Burch v.*
16 *Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may review only
17 the reasons stated by the ALJ in his decision “and may not affirm the ALJ on a
18 ground upon which he did not rely.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir.
19 2007).

20 **IV. DISCUSSION**

21 The single issue raised by Plaintiff is whether the ALJ failed to state sufficient
22 reasons for discounting his subjective symptom testimony. [Pltf.’s Br. at 5-15.]

23 In November 2015, Plaintiff authored a function report where he reported an
24 inability to squat, kneel, or climb stairs. [AR 355.] Plaintiff reported being able to
25 lift up to 15 pounds from the waist to face level, but that he cannot comfortably
26 carry more than ten pounds. [AR 355.] During the day, he performs light
27 housework and he supervises his young daughter while she does her homework.
28 [AR 356.] His girlfriend, who works a night shift, “does all basic care for [their]

1 daughter that she needs.” [AR 356.] Plaintiff, however, prepares small meals such
2 as hot dogs, sandwiches, and noodles, for himself and his daughter, but he can no
3 longer prepare big meals. [AR 357.] Plaintiff goes out alone and he waters his yard
4 daily. He can drive a car and goes shopping twice per month. [AR 358.]

5 At the June 2017 hearing, Plaintiff testified that he suffers from neck pain,
6 back pain, and weakness in his legs and arms. [AR 57.] Plaintiff also experiences
7 hip pain and stiffness. [AR 56, 57.] His pain stems from work related injuries where
8 he fell backwards injuring his back. [AR 58.] Upon questioning from his attorney,
9 Plaintiff testified that he has used a cane to ambulate for approximately three years.
10 [AR 56.] Although the cane was not initially prescribed by a doctor, his doctors
11 were aware that he is using the cane and they did not object to its use. [AR 56.]
12 Plaintiff also regularly wears a back brace. [AR 57.] For his pain, Plaintiff takes
13 narcotic pain medication and he receives injections in his spine and neck
14 approximately every five months. [AR 61.] When asked about his daily activities,
15 Plaintiff explained that he has a hard time carrying objects. [AR 66.] Plaintiff
16 testified that he cannot lift anything and he cannot carry anything. [AR 65.] His
17 daughter and her mom help carry groceries to the car. [AR 66.] He has a difficult
18 time with stairs and uses a cane to walk up the four steps at the entryway of his
19 mobile home. [AR 66.] Plaintiff testified that he cannot stand for longer than two
20 minutes at a time before he starts experiencing pain in his feet and back. [AR 68.]
21 During the day, he does not lay down much, rather he alternates between sitting on
22 the couch and standing. [AR 69.]

23 Because there is no allegation of malingering and the ALJ found that
24 “claimant’s medically determinable impairments could reasonably be expected to
25 cause the alleged symptoms” [AR 26], the ALJ’s reasons must be clear and
26 convincing. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). Even if
27 “the ALJ provided one or more invalid reasons for disbelieving a claimant’s
28 testimony,” if he “also provided valid reasons that were supported by the record,”

1 the ALJ’s error “is harmless so long as there remains substantial evidence
2 supporting the ALJ’s decision and the error does not negate the validity of the ALJ’s
3 ultimate conclusion.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
4 (internal quotation omitted).

5 Here, the ALJ gave two clear reasons to reject Plaintiff’s credibility: (1)
6 inconsistencies between Plaintiff’s testimony and his daily activities; and (2)
7 inconsistencies between the objective medical evidence and Plaintiff’s allegations of
8 pain limitations. The ALJ also implied a third reason: that Plaintiff’s use of a cane
9 that was “not medically necessary” and without a prescription further demonstrated
10 that Plaintiff’s subjective complaints were inconsistent with the medical evidence.
11 The Court takes each in turn.

12 First, the ALJ found that Plaintiff’s reported daily activities are not entirely
13 consistent with his allegations of subjective symptoms/pain. [AR 26.]. An ALJ
14 may rely on “testimony about the claimant’s daily activities” to “discredit an
15 allegation of pain.” *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). There are
16 “two grounds for using daily activities to form the basis of an adverse credibility
17 determination:” (1) where the plaintiff’s testimony contradicts his activities of daily
18 living; and (2) where the activities of daily living meet “the threshold for
19 transferable work skills.” *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). But
20 “[t]he ALJ must make ‘specific findings relating to [the daily] activities’ and their
21 transferability to conclude that a claimant’s daily activities warrant an adverse
22 credibility determination.” *Orn*, 495 F.3d at 639 (internal quotation marks and
23 citation omitted). *Id.* (quoting *Burch*, 400 F.3d at 681). The Ninth Circuit has
24 cautioned that a plaintiff need not be “utterly incapacitated” to be disabled. *Fair*,
25 885 F.2d at 603. “[T]he mere fact that a plaintiff has carried on certain daily
26 activities, such as grocery shopping, driving a car, or limited walking for exercise,
27 does not in any way detract from her credibility as to his overall disability.”
28 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001). Some activities, such as

1 walking, are “not necessarily transferable to the work setting with regard to the
2 impact of pain” because a plaintiff “may do these activities despite pain for
3 therapeutic reasons.” *Id.* “[T]hat does not mean she could concentrate on work
4 despite the pain or could engage in similar activity for a longer period given the pain
5 involved.” *Id.*

6 Here the ALJ noted that Plaintiff’s daily activities include “making meals for
7 his daughter, watering the plants, washing dishes, driving, shopping in stores, going
8 out alone, taking his daughter to and from school, going to doctors’ appointments,
9 and spending time with others and his family.” [AR 26.] The ALJ stated that these
10 activities were “specifically inconsistent with claimant’s allegation that he had
11 difficulty lifting, standing, walking, sitting, squatting, bending, standing, reaching,
12 kneeling, climbing, following instructions, using hands, concentrating,
13 understanding, and memorizing. [AR 26.] Although the ALJ lists potential
14 inconsistencies, the ALJ fails to explain how these daily activities contradict
15 Plaintiff’s testimony or established that he can work.

16 In fact, the ALJ does not make *any* specific findings regarding Plaintiff’s
17 daily activities. Rather, the ALJ merely summarized the activities that Plaintiff
18 testified about performing and summarized Plaintiff’s alleged impairments. It is not
19 apparent from the record how Plaintiff’s statements regarding the minimal activities
20 that he can perform inside and outside the home to take care of himself conflict with
21 Plaintiff’s allegedly disabling symptomology. “[T]he mere fact that a plaintiff has
22 carried on certain daily activities, such as grocery shopping, driving a car, or limited
23 walking for exercise, does not in any way detract from h[is] credibility as to h[is]
24 overall disability.” *Vertigan v. Halter*, 260 F.3d 1044, 1049-50 (9th Cir. 2001).
25 Further, “many home activities are not easily transferable to what may be the more
26 grueling environment of the workplace, where it might be impossible to periodically
27 rest or take medication.” *Fair*, 885 F.2d at 603; *Garrison v. Colvin*, 759 F.3d 995,
28 1016 (9th Cir. 2014) (“We have repeatedly warned that ALJs must be especially

1 cautious in concluding that daily activities are inconsistent with testimony about
2 pain, because impairments that would unquestionably preclude work and all the
3 pressures of a workplace environment will often be consistent with doing more than
4 merely resting in bed all day.”). Thus, the record fails to show that Plaintiff’s
5 asserted home activities are inconsistent with his allegedly disabling symptomology.

6 Second, the parties raise the ALJ’s discussion of Plaintiff’s use of a cane
7 without a prescription as a credibility factor. According to the parties, the ALJ
8 rejected Plaintiff’s credibility, in part, because he used a cane to walk that was
9 neither prescribed nor medically necessary. (Pltf.’s Br. at 11-12; Def’s Br. at 3.) It
10 is unclear from the decision whether the ALJ intended this to be an independent
11 reason for doubting Plaintiff’s subjective complaints, as the ALJ concludes the cane
12 discussion by stating that Plaintiff’s “ability to ambulate [is] inconsistent with the
13 objective medical evidence.” [AR 27.] Thus, it appears that the ALJ intended her
14 statement regarding Plaintiff’s use of a cane as an explanatory reason why Plaintiff’s
15 allegations were inconsistent with the objective medical evidence. Nonetheless,
16 Plaintiff contends that the ALJ’s reliance on his use of a cane without a prescription
17 to undermine his credibility was error. Specifically, Plaintiff argues that “just
18 because he was not initially prescribed a cane does not mean that he does not need
19 one.” (Pltf.’s Br. at 11.) Moreover, Plaintiff contends that he obtained a
20 prescription for a cane in March 2019, a few weeks after the ALJ issued the
21 February 2019 unfavorable decision. (Pltf.’s Br. at 11.). The Commissioner
22 responds that “an ALJ appropriately considers whether the claimant uses an
23 assistive device despite a lack of medical necessity.” *See Chaudry v. Astrue*, 688
24 F.3d 661, 671 (9th Cir. 2012) (claimant’s non-prescribed use of a wheelchair and
25 unwarranted use of a cane also factored into the ALJ’s determination that
26 [claimant’s] subjective expression of his limitations lacked credibility.”).

27 The Commissioner’s reliance on *Chaudry* is misplaced. There, the Ninth
28 Circuit determined that the unprescribed and unwarranted use of an assistive device

1 could be a valid consideration in an ALJ’s credibility analysis. However, in
2 *Chaudry*, the ALJ found that the Plaintiff’s continued use of a cane undermined his
3 credibility because the Plaintiff-claimant’s physicians specifically advised him to
4 stop using his non-prescribed cane as “long term use of the cane [would] further
5 encourage pain and disabled behaviors.” *Chaudhry*, 688 F.3d at 664. In affirming
6 the ALJ’s adverse credibility determination, the Ninth Circuit held that Plaintiff’s
7 continued use of a cane against his physicians’ recommendations demonstrated his
8 failure to follow the advice of providers which itself undermined Plaintiff’s
9 credibility. *Id.* at 672. The present case is therefore unlike *Chaudry*.

10 Here, although Plaintiff’s cane was not initially prescribed, Plaintiff’s medical
11 records confirm that his physicians repeatedly noted the use of a cane without
12 objection. [See AR 758 (“cane”), 863 (“cane dependent”), 906 (“antalgic gait with
13 the use of a cane”).] Further, despite the ALJ’s uncertainty about whether Plaintiff’s
14 cane was medically necessary, the ALJ ultimately “incorporated the use of a cane in
15 [Plaintiff’s] RFC” which suggests that the ALJ considered that the need for a cane
16 was more than theoretical. [AR 27.] Moreover, in establishing that his cane is
17 medically necessary, Plaintiff points to evidence throughout the record of
18 measurable muscle atrophy in his legs, as noted by the consultative examiner who
19 measured a five-centimeter difference in size between Plaintiff’s right thigh and left
20 thigh (41 cm/46 cm, respectively), and his later acquired prescription for the use of a
21 cane. [AR 711.]

22 Thus, because it is not entirely clear that the ALJ intended her discussion of
23 Plaintiff’s use of a cane to be an additional reason (beyond inconsistency with the
24 objective medical evidence) to discount Plaintiff’s credibility, and there is at least
25 some medical evidence supporting his need for a cane, the Court does not find this a
26 sufficiently clear or convincing reason supporting the credibility determination. *See,*
27 *e.g., Saunders v. Astrue*, 433 F. App’x 531, 534 (9th Cir. 2011) (ALJ’s observation
28 that claimant wore a brace and used a cane when “no treating physician had

1 prescribed these assistive devices” provided little, if any, support to discredit his
2 testimony).

3 Lastly, the ALJ concluded that the objective medical evidence was
4 inconsistent with Plaintiff’s testimony regarding his limitations. [AR 26-27.] It is
5 well established that an “ALJ may not discredit a claimant’s subjective testimony
6 on” the sole basis that “no objective medical evidence” supports the claimant’s
7 testimony as to “the severity of the subjective symptoms from which he suffers.”
8 *Light v. Comm’r of Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). Indeed, “it
9 is the very nature of excess pain to be out of proportion to the medical evidence,”
10 and thus, a finding that a claimant is not credible because his pain testimony is out
11 of proportion to the medical evidence is an “inadequate reason.” *Gonzalez v.*
12 *Sullivan*, 914 F.2d 1197, 1201 (9th Cir. 1990). While the lack of medical evidence
13 to support a claimant’s allegations of disabling pain and symptoms “is a factor that
14 the ALJ can consider in his credibility analysis,” it “cannot form the sole basis for
15 discounting pain testimony.” *Burch*, 400 F.3d at 681.

16 Thus, this reason, on its own, is inadequate to support the ALJ’s adverse
17 credibility determination, because the asserted failure of the medical record to
18 corroborate Plaintiff’s subjective symptom and pain testimony fully is not, by itself,
19 a legally sufficient basis for rejecting such testimony. *Rollins v. Massanari*, 261
20 F.3d 853, 856 (9th Cir. 2001). The ALJ may not make a negative credibility finding
21 “solely because” the claimant’s symptom/pain testimony “is not substantiated
22 affirmatively by objective medical evidence.” *Robbins v. Comm’r of Soc. Sec.*
23 *Admin.*, 466 F.3d 880, 883 (9th Cir. 2006); *Light*, 119 F.3d at 792 (“a finding that
24 the claimant lacks credibility cannot be premised wholly on a lack of medical
25 support for the severity of his pain”); *Bunnell v. Sullivan*, 947 F.2d at 345 (“an
26 adjudicator may not reject a claimant’s subjective complaints based solely on a lack
27 of objective medical evidence to fully corroborate the alleged severity of the
28 [symptoms].”). The ALJ’s last reason, therefore, is not clear and convincing and

1 cannot save the ALJ's adverse credibility determination.

2 Accordingly, as there is no basis for finding the ALJ's error to be harmless,
3 reversal is required.

4 V. CONCLUSION

5 The decision of whether to remand for further proceedings or order an
6 immediate award of benefits is within the district court's discretion. *Harman v.*
7 *Apfel*, 211 F.3d 1172, 1175-78 (9th Cir. 2000). When no useful purpose would be
8 served by further administrative proceedings, or where the record has been fully
9 developed, it is appropriate to exercise this discretion to direct an immediate award
10 of benefits. *Id.* at 1179 ("the decision of whether to remand for further proceedings
11 turns upon the likely utility of such proceedings"). But when there are outstanding
12 issues that must be resolved before a determination of disability can be made, and it
13 is not clear from the record the ALJ would be required to find the claimant disabled
14 if all the evidence were properly evaluated, remand is appropriate. *Id.* A remand
15 for an immediate award of benefits is appropriate "only in rare circumstances."
16 *Brown-Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015) (internal citation
17 omitted).

18 The Court finds that remand is appropriate because the circumstances of this
19 case do not preclude the possibility that further administrative review could remedy
20 the ALJ's errors. On remand, the Commissioner must re-evaluate Plaintiff's
21 pain/subjective symptom assertions and testimony properly, which in turn may lead
22 to the formulation of a new RFC and the need for additional vocational expert
23 testimony. The Court therefore declines to exercise its discretion to remand for an
24 immediate award of benefits. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (upon
25 reversal of an administrative determination, the proper course is remand for
26 additional agency investigation or explanation, "except in rare circumstances");
27 *Dominguez v. Colvin*, 808 F.3d 403, 407 (9th Cir. 2015) ("Unless the district court
28 concludes that further administrative proceedings would serve no useful purpose, it

1 may not remand with a direction to provide benefits.”).

2 For all of the foregoing reasons, **IT IS ORDERED** that:

- 3 (1) the Decision of the Commissioner is REVERSED and this matter
4 REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further
5 administrative proceedings consistent with this Memorandum Opinion and
6 Order; and
7 (2) Judgment be entered in favor of Plaintiff.

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9 **IT IS SO ORDERED.**

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11 DATED: March 16, 2021

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14 GAIL J. STANDISH
15 UNITED STATES MAGISTRATE JUDGE
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