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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-SOUTHERN DIVISION

JULIE A. BANKS,)	Case No. SA CV 14-01173-AS
)	
Plaintiff,)	MEMORANDUM OPINION AND
)	
v.)	ORDER OF REMAND
)	
CAROLYN W. COLVIN, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter is remanded for further administrative action consistent with this Opinion.

PROCEEDINGS

On July 24, 2014, Plaintiff filed a Complaint seeking review of the denial of her application for Disability Insurance Benefits. (Docket Entry No. 1). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Docket Entry Nos. 8-9). On December 15, 2014, Defendant filed an Answer along with the Administrative Record ("AR"). (Docket Entry Nos. 11-12). The parties

1 filed a Joint Position Statement ("Joint Stip.") on March 2, 2015,
2 setting forth their respective positions regarding Plaintiff's claims.
3 (Docket Entry No. 14).

4 The Court has taken this matter under submission without oral
5 argument. See C.D. Cal. L.R. 7-15; "Order Re: Procedures In Social
6 Security Case," filed July 29, 2014 (Docket Entry No. 4).

7
8 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
9

10 In March 2009, Plaintiff, formerly employed as a cashier/checker in
11 a grocery store (see AR 90, 276), filed an application for Disability
12 Insurance Benefits, alleging a disability since March 1, 2007. (See AR
13 23, 67, 86, 112).¹

14 On February 8, 2011, the Administrative Law Judge ("ALJ"), Helen E.
15 Hesse, heard testimony from Plaintiff, medical expert Sami Nafsoosi, and
16 vocational expert Alan Eye. (See AR 86-106). On February 22, 2011, the
17 ALJ issued a decision denying Plaintiff's application. (See AR 112-20).

18 Plaintiff requested that the Appeals Council review the ALJ's
19 Decision. (See AR 185, 328-30, 333-34). On May 8, 2012, the Appeals
20 Council vacated the Decsion and remanded the matter in order for the ALJ
21 to do the following: "[A]sk any health care professional who plans to
22 testify to confirm the accuracy of the statement or report of his or her
23 professional qualifications which will be entered into the record as an
24 exhibit. If there is no statement or report of professional
25 qualifications, or the individual indicates the statement or report

26
27 ¹ The administrative record does not contain a copy of
28 Plaintiff's application. (See Joint Stip. at 2 n.1). The exact date in
March on which she filed the application is unclear. (See AR 33
[stating March 27, 2009], 67 [stating March 12, 2009], 86 [stating March
12, 2009], 107-08 [stating March 12, 2009], 112, 120 [stating March 12,
2009]).

1 contains an error, the Administrative Law Judge will 'qualify' the
2 health care professional before he or she testifies by asking questions
3 on the record which will elicit the necessary information about his or
4 her qualifications. (See HALLEX I-2-6-70)." (See AR 126-27).

5 On February 13, 2013, the ALJ heard testimony from Plaintiff,
6 medical expert Arnold Ostrow, and vocational expert Alan Eye. (See AR
7 67-83). On April 2, 2013, the ALJ issued a decision denying Plaintiff's
8 application. (See AR 23-33). After finding that Plaintiff had severe
9 impairments -- cervical spondylosis, fibromyalgia syndrome, and
10 derangement of the left meniscus (AR 25-33),² the ALJ found that
11 Plaintiff had the residual functional capacity³ ("RFC") to perform light
12 work,⁴ with the following limitations: sitting 6 hours in an 8-hour
13 workday; standing and walking 6 hours in an 8-hour workday; occasionally
14 lifting 20 pounds and frequently lifting 10 pounds; no operating foot
15 pedals with the left lower extremity; occasionally climbing stairs,
16 bending, balancing, kneeling and crouching; no ladders, ropes,
17 scaffolding, stooping or crawling; no working at unprotected heights;
18 and no lifting above shoulder level with both upper extremities. (AR 27-
19 31). After finding that Plaintiff could not perform her past relevant
20 work as a cashier/checker (AR 31-32), the ALJ found that jobs existed in
21 significant numbers in the national economy that Plaintiff could
22 perform, and therefore found that Plaintiff was not disabled within the
23 meaning of the Social Security Act. (AR 32-33).

23 ² The ALJ found that Plaintiff's right shoulder supraspinatus
24 tendinopathy and colitis were non-severe impairments, and that
25 Plaintiff's plantar fasciitis was not a medically determinable
impairment. (See AR 25-26).

26 ³ A Residual Functional Capacity is what a claimant can still
27 do despite existing exertional and nonexertional limitations. See 20
C.F.R. § 404.1545(a)(1).

28 ⁴ "Light work involves lifting no more than 20 pounds at a time
with frequent lifting or carrying of objects weighing up to 10 pounds."
20 C.F.R. §§ 404.1567(b) and 416.967(b).

1 Plaintiff requested that the Appeals Council review the ALJ's 2013
2 Decision. (See AR 18-19). The request was denied on May 21, 2014.
3 (See AR 4-8). The ALJ's 2013 Decision then became the final decision of
4 the Commissioner, allowing this Court to review the decision. See 42
5 U.S.C. §§ 405(g), 1383(c).

6 **PLAINTIFF'S CONTENTIONS**

7
8 Plaintiff alleges that the ALJ erred in failing to properly: (1)
9 determine whether Plaintiff could perform other jobs; and (2) reject
10 Plaintiff's testimony. (See Joint Stip. at 4-13, 16-24).

11 **DISCUSSION**

12
13 After consideration of the record as a whole, the Court finds that
14 Plaintiff's second claim of error warrants a remand for further
15 consideration. Since the Court is remanding the matter based on
16 Plaintiff's second claim of error, the Court will not address
17 Plaintiff's first claim of error.

18 **A. The ALJ Failed to Properly Assess Plaintiff's Credibility**

19
20 Plaintiff asserts that the ALJ failed to provide clear and
21 convincing reasons for finding Plaintiff not credible. (See Joint Stip.
22 at 18-24). Defendant asserts that the ALJ properly found Plaintiff not
23 credible. (See Joint Stip. at 22-23).

24
25 Plaintiff made the following statements in an undated Disability
26 Report - Adult: Fibromyalgia, constant fatigue, muscle aches, headaches,
27 irritable bowel syndrom, and injuries to her feet, back and neck limit
28 her ability to work. She cannot do anything, including siting, standing

1 and walking, for a long period of time, and her arms, neck, back, and
2 shoulders constantly ache. (See AR 275, 280).

3
4 Plaintiff made the following statements in an undated Disability
5 Report - Appeal: Her conditions make it much harder for her to take care
6 of her personal needs, and she needs to rest a lot. It is very hard for
7 her to do household chores; she had to rest all day to function. She
8 tries to do a few pool activities, but she cannot do any hobbies. (See
9 AR 302).

10 Plaintiff made the following statements in an Exertion
11 Questionnaire dated June 5, 2009:

12 (1) she lives in a house with family; (2) her pain, fatigue,
13 weakness, diarrhea and dizziness effect her way of life; she
14 has to rest until 2 p.m. to be able to help her children with
15 homework and to cook dinner (and sometimes she cannot even do
16 that much); (3) her fibromyalgia does not allow her to do much
17 on a daily basis (when she tries to do something, her body
18 pays for it later [for example, cleaning house windows
19 resulted in her not being able to use her arm for days]; she
20 goes to the pool to do leg exercises 3 times a week and goes
21 into the Jacuzzi every night to relax her muscles; she is not
22 able to sleep at night due to leg cramps; (4) she avoids
23 walking long distances because of foot problems; she uses
24 orthopedics in her shoes and wears specific athletic shoes;
25 (5) she can climb stairs, but climbing one flight causes her
26 to feel weak and her legs to feel strained and aching (she
27 sometimes needs to lay down to regain her leg strength); (6)
28 She tries not to lift anything over a couple of pounds (i.e.,
pots, pans, small loads of laundry, grocery bags); when she
does lift something heavier her right shoulder hurts and
prevents her from moving her arm; (7) she does grocery

1 shopping with the help of her four children (ages 19, 18, and
2 10 [twins]); (8) she does not clean her home or living area;
3 (9) she drives a car, for a distance of probably 20 miles at
4 one time; (10) she does not work on cars or do yard work; (11)
5 before her disability she did a lot of chores, but now needs
6 to rely completely on her children to do them; (12) she has
7 difficulty finishing housework because of stairs and having to
8 stand for too long (washing dishes); (13) she sleeps 8 to 9
9 hours, but requires 3 naps (1 to 2 hours) during the day; (14)
10 she takes Neurontin 300 mg (3 times a day), Cymbalta 30 mg (1
11 time a day); Hydrocodone 500 mg (1 to 3 times a day), and
12 Aleve 200 mg (2 pills, two times a day); (15) she does not use
13 any assistive device; and (16) her previous disabilities
14 (neck, feet and lower back) and her fibromyalgia cause her to
feel depressed, and her doctor is still trying to find the
right combination of medications for her.

15 (See AR 284-86).

16
17 At the February 8, 2011 hearing, Plaintiff testified to the
18 following:

19
20 She is 43 years old, graduated high school in 1986, and
21 attended one semester of community college. She lives with
22 her husband, two sons, and one of her daughters. She has a
23 California Driver's License and drives a van. Her family has
24 one dog, a labradoodle. She last worked in June 2004 (as a
25 retail checker at Vons) but had to leave that job because of
26 plantar fasciitis, heel spurs and neuromas (surgery on her
27 feet did not help). She worked at Vons a total of 17 years.
28 (See AR 87-90, 93-94).

1 She is not able to work because of chronic fatigue and
2 radiating pain in her arms, shoulders and neck and down her
3 back (which affects her legs). She is taking Cymbalta 60 mg
4 (one time a day), Lyrica 50 mg (two times a day), Vicodin 500
5 mg (two times a day), and sometimes Flexiril (a muscle
6 relaxer, to sleep). The medications help her with her pain,
7 and help somewhat with depression from her pain and chronic
8 fatigue. For pain relief she also goes into a Jacuzzi about
4 times a week. (See AR 91-92).

9
10 She has done water aerobics (to strengthen her muscles)
11 for approximately 5 years, on and off. (She has not done them
12 in a while because she has not felt good). She walks 15
13 minutes a day, two times a day. She does stretches at home.
14 She takes a lot of naps. She listens to music. She helps her
15 sons with their homework. She does not read, watch
16 television, or use a computer (once a day she uses her
husband's computer to find out about her son's homework).

17 (See AR 92-93).

18
19 At the February 13, 2013 hearing, Plaintiff testified to the
20 following:

21 She still lives with her husband and children, she still
22 has her driver's license and drives the van, and she still
23 does her water aerobics and stretches. She walks the dog for
24 10 to 12 minutes, two times a day. The dog has a little
25 backpack to help carry in groceries. (See AR 68-70).

26 She can pick up 8 pounds, at most. She can continually
27 stand for no more than 30 minutes. She can walk for about a
28 mile (which takes her about 12 minutes). Walking causes her

1 legs to be strained and heavy; she usually has to sit down and
2 take off her shoes and put on orthotic Crocs. She is not able
3 to sit on a continuous basis for 8 hours a day; she needs to
4 walk around and stretch after 30 minutes of sitting. (See AR
5 71-80).

6 She has pain every day -- in her neck, shoulders, and
7 lower back. She does not have pain in her hands; they just
8 feel weak. She has good days and bad days; treatment from her
9 doctor (like getting a steroid pack) for a "flare up"
10 (something caused by a change in her daily conditions) would
11 probably make her feel better for 3 days. She once was
12 bedridden; she suffered an episode in her neck which caused
13 her to use a neck brace and heavy muscle relaxers and pain
14 medication. (See AR 80-81).

15 The pool is a form of treatment for her fibromyalgia; it
16 allows her to meditate and do arm stretches (and then go into
17 the Jacuzzi to massage her muscles). As far as medication for
18 her impairments, she takes Naproxen (Aleve) 400 mg (two times
19 a day), occasional pain medications (such as Norco for 30 days
20 when she has a "flare up"), Lyrica (for her fibromyalgia), and
21 Cymbalta (an antidepressant, for her fibromyalgia). (See AR
22 77-78, 80-82).

23 With respect to daily activities, her identity has
24 changed due to lessened activities (she is a little slower).
25 She gets her sons ready for school, drives them to school
26 down the street, drives home, walks the dog, takes a nap, has
27 lunch, walks the dog, goes to the pool (if it is warm enough)
28 to do stretches and work on her posture, go to the Jacuzzi,
watches some television, helps her sons with their homework,
and gets dinner started with her sons' help, and stays up

1 until 9:00 p.m. (She stated that during the day she probably
2 rested three times "with probably 30 to 45 minute[s] laying
3 down and getting ready for the next activity."). (See AR 77).

4 Her daughters and sons help her with household chores.
5 Everybody helps with the cooking of dinner. Her sons (with
6 her supervision and directions) do some cooking, set the
7 table, clean up after dinner (i.e., putting plates in the
8 dishwasher), bring down clothes that need to be washed, and
9 help her with the grocery shopping (she does not have to lift
10 or carry anything). (See AR 78-79).

11 With respect to her personal care, she cannot style her
12 hair like she used to (the clips hurt her head and her hair is
13 too heavy and hard to brush). She is only able to shower
14 every other day. (See AR 79).

15 After briefly summarizing Plaintiff's statements in the Disability
16 Report - Adult, and the Disability Report - Appeal, and Plaintiff's
17 testimony at the February 13, 2013 hearing (see AR 28), the ALJ stated:
18 "After careful consideration of the evidence, the undersigned finds that
19 the claimant's medically determinable impairments could reasonably be
20 expected to cause the alleged symptoms; however, the claimant's
21 statements concerning the intensity, persistence and limiting effects of
22 these symptoms are not entirely credible for the reasons explained in
23 this decision." (Id.).

24 After making a determination of Plaintiff's RFC based, in part, on
25 a review and consideration of the treating, examining, and reviewing
26 medical sources (see AR 28-30), the ALJ addressed Plaintiff's
27 credibility as follows:
28

1 One factor affecting the claimant's credibility is her
2 treatment history. The claimant's medical records show almost
3 continuous access to treatment based on the medical records in
4 Exhibit 2F, 4F, 6F, 7F and 8F. In addition, these treatment
5 notes also show very few actual examinations for her treatment
6 physicians as the bulk of her treatment notes are records of
7 continued prescriptions for her medications. For example,
8 there is a treatment note dated May 24, 2011 (see Exhibit
9 7F/14) and the next treatment note is not dated until December
10 14, 2012 (see Exhibit 8F/3). The records between those dates
11 as shown in Exhibits 7F and 8F are all notations of continued
12 prescriptions for her medications (see Exhibits 7F and 8F).
13 This shows the claimant only needed continued prescriptions
14 for her medications and did not need additional observations
15 from her treating physicians for much of her recent treatment
16 history. This also shows the claimant's impairments are not
17 as significant as alleged as she did not require additional
18 observations or visits with her treating physicians. Thus,
19 the undersigned finds the claimant's credibility is affected
20 by her treatment history.

21 Another factor affecting her treatment history is the
22 notations of other measures that affect her symptoms. The
23 treatment note dated December 14, 2012 notes the claimant is
24 using a Jacuzzi to help her symptoms (Exhibit 8F/3). This
25 shows the claimant has access to other methods of symptom
26 control and that she is using them to help control her
27 symptoms. This also negates her allegations about the
28 significant nature of her symptoms as they are helped by less
invasive and other non-medically related methods. Thus, her
credibility is affected by this.

1 Further, the claimant's work history affects her
2 credibility. The claimant's earnings record shows she ceased
3 all work activity in 2004 or 2005 (see Exhibit 12D). Since
4 then the claimant has posted no additional, countable
5 earnings. This corroborates the claimant's allegations that
6 she has not been able to work for a number of years. Thus,
7 the undersigned finds that the claimant's work history
bolsters her credibility.

8 * * * * *

9
10 . . . Additionally, the claimant's statements and
11 allegations about the severity and effect of her impairments
12 cannot be given full weight because, as discussed above, the
13 factors that affect her credibility outweigh the factors that
14 bolster her credibility.

15 (AR 31).

16
17 A claimant initially must produce objective medical evidence
18 establishing a medical impairment reasonably likely to be the cause of
19 the subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir.
20 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991). Once a
21 claimant produces objective medical evidence of an underlying impairment
22 that could reasonably be expected to produce the pain or other symptoms
23 alleged, and there is no evidence of malingering, the ALJ may reject the
24 claimant's testimony regarding the severity of his pain and symptoms
25 only by articulating specific, clear and convincing reasons for doing
26 so. Brown-Hunter v. Colvin, 798 F.3d 749, 755 (9th Cir. 2015)(citing
27 Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007)); see also
28 Smolen v. Chater, supra; Reddick v. Chater, 157 F.3d 715, 722 (9th Cir.
1998); Light v. Social Sec. Admin., 119 F.3d 789, 792 (9th Cir. 1997).

1 Because the ALJ does not cite to any evidence in the record of
2 malingering, the "clear and convincing" standard stated above applies.

3
4 Here, the ALJ failed to provide clear and convincing reasons for
5 his finding that Plaintiff's testimony about the intensity, persistence
6 and limiting effects of the symptoms was not fully credible.⁵

7 First, the ALJ failed to "specifically identify 'what testimony is
8 not credible and what evidence undermines [Plaintiff's] complaints.'" Parra v. Astrue, 481 F.3d 742, 750 (9th Cir. 2007) (quoting Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995)); see also Smolen v. Chater, supra, 80 F.3d at 1284 ("The ALJ must state specifically what symptom testimony is not credible and what facts in the record lead to that conclusion").

13
14 Second, the ALJ's discrediting of Plaintiff's testimony because she
15 "only needed continued prescriptions for her medications and did not
16 need additional observations for much of her recent treatment history"
17 was improper. Although, as the ALJ noted, Plaintiff's treatment records
18 reflect mostly continued prescriptions for medications, rather than
19 additional visits with physicians for her fibromyalgia (see AR 31,
20 citing AR 729-51, 754-60), there is no evidence that Plaintiff failed to
21 follow a course of treatment for her fibromyalgia, or that additional
22 or more intensive treatments were recommended or available to treat her
23 fibromyalgia. See Benecke v. Barnhart, 379 F.3d 587, 590
24 ("Fibromyalgia's cause is unknown, there is no cure, and it is poorly
25 understood within much of the medical community."); see also Lapeirre-
26 Gutt v. Astrue, 382 Fed.Appx. 662, 664 (9th Cir. 2010) ("A claimant
cannot be discredited for failing to pursue non-conservative treatment

27 ⁵ The Court will not consider reasons for finding Plaintiff not
28 fully credible (see Joint Stip. at 20) that were not given by the ALJ in
the Decision. See Pinto v. Massanari, 249 F.3d 840, 847-48 (9th Cir.
2001); SEC v. Chenery Corp., 332 US 194, 196 (1947).

1 options where none exist."). Moreover, at the hearings, the ALJ did not
2 ask Plaintiff why she did not pursue additional or more intensive
3 treatments for her fibromyalgia.

4
5 Third, the ALJ's discrediting of Plaintiff's testimony because her
6 symptoms apparently improved based on her use of a Jacuzzi (see AR 31,
7 citing AR 754 [Treatment record dated December 14, 2012, noting that
8 "Relieving factors tried including jacuzzi helps"]) was also improper.
9 That treatment record (which was discussing Plaintiff's neck pain) did
10 not state that the use of a Jacuzzi completely alleviated Plaintiff's
11 symptoms. Indeed, that same treatment record (immediately prior to the
12 notation about Plaintiff's use of a Jacuzzi) notes: "The problem is
13 severe. The problem has worsened. The frequency of pain is constant.
14 Location of pain is bilateral shoulder. The patient describes the pain
15 as sharp and shooting." (AR 754). Moreover, other treatment records do
16 not reflect improvement in Plaintiff's condition. (See e.g., AR 740
17 [Treatment note dated May 24, 2011, noting that Plaintiff had suffered
18 a flare up of fibromyalgia], AR 426-27 [Treatment records dated
19 September 11, 2008, noting that Plaintiff had not gotten any improvement
20 from prior epidurals], and AR 388 [Treatment record dated September 22,
21 2008, noting that Plaintiff's neck and arm pain persisted after a
22 steroid injection]).

23 **B. Remand Is Warranted**

24 The decision whether to remand for further proceedings or order an
25 immediate award of benefits is within the district court's discretion.
26 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
27 useful purpose would be served by further administrative proceedings, or
28 where the record has been fully developed, it is appropriate to exercise
this discretion to direct an immediate award of benefits. Id. at 1179
("[T]he decision of whether to remand for further proceedings turns upon
the likely utility of such proceedings."). However, where, as here, the

1 circumstances of the case suggest that further administrative review
2 could remedy the Commissioner's errors, remand is appropriate. McLeod
3 v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); Harman v. Apfel, supra,
4 211 F.3d at 1179-81.

5 Since the ALJ failed to properly assess Plaintiff's credibility,
6 remand is appropriate. Because outstanding issues must be resolved
7 before a determination of disability can be made, and "when the record
8 as a whole creates serious doubt as to whether the [Plaintiff] is, in
9 fact, disabled within the meaning of the Social Security Act," further
10 administrative proceedings would serve a useful purpose and remedy
11 defects. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir.
12 2014)(citations omitted).⁶

13 **ORDER**

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

17 LET JUDGMENT BE ENTERED ACCORDINGLY.

18 DATED: October 16, 2015.

19
20
21 _____ /s/
22 ALKA SAGAR
23 UNITED STATES MAGISTRATE JUDGE

24 ⁶ The Court has not reached any other issue raised by Plaintiff
25 except insofar as to determine that reversal with a directive for the
26 immediate payment of benefits would not be appropriate at this time.
27 "[E]valuation of the record as a whole creates serious doubt that
28 Plaintiff is in fact disabled." See Garrison v. Colvin, 759 F.3d 995,
1021 (2014). Accordingly, the Court declines to rule on Plaintiff's
claim regarding the ALJ's alleged failure to properly determine whether
Plaintiff could perform other jobs (see Joint Stip. at 4-13, 16-18).
Because this matter is being remanded for further consideration, this
issue should also be considered on remand.