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

AMELIA RICHARDSON,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. SA CV 16-1861 AFM

**MEMORANDUM AND ORDER
REVERSING DECISION OF
COMMISSIONER AND
REMANDING FOR FURTHER
ADMINISTRATIVE
PROCEEDINGS**

I.

BACKGROUND

On September 17, 2012, Plaintiff Amelia Richardson protectively filed her application for a period of disability and disability insurance benefits under Title II of the Social Security Act and supplemental security income under Title XVI of the Social Security Act, alleging disability onset as of August 19, 2011. After denial on initial review and on reconsideration, a hearing took place before an Administrative Law Judge (ALJ) on January 13, 2015. In a written decision dated April 16, 2015, the ALJ found that Plaintiff was not disabled. The Appeals Council declined to set aside the ALJ's unfavorable decision in a notice dated August 11,

1 2016. Plaintiff filed a Complaint herein on October 10, 2016, seeking review of the
2 Commissioner’s denial of his application for benefits.

3 In accordance with the Court’s Order re Procedures in Social Security
4 Appeal, Plaintiff filed a memorandum in support of his complaint on March 30,
5 2017. The Commissioner filed a memorandum in support of her answer on May 9,
6 2017. This was untimely by approximately 5 days, but the Court in exercise of its
7 discretion will consider the memorandum. Plaintiff filed a reply on May 18, 2017.
8 This matter now is ready for decision.¹

9 **II.**

10 **DISPUTED ISSUES**

11 As reflected in the parties’ memoranda, the disputed issues that Plaintiff
12 raises are:

- 13 1. Whether the ALJ erred in determining Plaintiff’s severe
14 impairment at step 2 of the sequential evaluation.
- 15 2. Whether the ALJ erred in determining Plaintiff’s credibility.
- 16 3. Whether the ALJ erred in determining Plaintiff’s residual
17 functional capacity (RFC) and in finding Plaintiff can perform
18 her past relevant work.

19 **III.**

20 **STANDARD OF REVIEW**

21 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to
22 determine whether the Commissioner’s findings are supported by substantial
23 evidence and whether the proper legal standards were applied. *See Treichler v.*
24 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014). Substantial
25 evidence means “more than a mere scintilla” but less than a preponderance. *See*
26

27 ¹ The decision in this case is being made based on the pleadings, the
28 administrative record (“AR”) and the parties’ briefs in support of their pleadings.

1 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter v. Astrue*, 504 F.3d
2 1028, 1035 (9th Cir. 2007). Substantial evidence is “such relevant evidence as a
3 reasonable mind might accept as adequate to support a conclusion.” *Richardson*,
4 402 U.S. at 401. This Court must review the record as a whole, weighing both the
5 evidence that supports and the evidence that detracts from the Commissioner’s
6 conclusion. *Lingenfelter*, 504 F.3d at 1035. Where evidence is susceptible of more
7 than one rational interpretation, the Commissioner’s decision must be upheld. *See*
8 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).

9 IV.

10 FIVE-STEP EVALUATION PROCESS

11 The Commissioner (or ALJ) follows a five-step sequential evaluation process
12 in assessing whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920;
13 *Lester v. Chater*, 81 F.3d 821, 828 n.5 (9th Cir. 1995), *as amended* April 9, 1996.
14 In the first step, the Commissioner must determine whether the claimant is
15 currently engaged in substantial gainful activity; if so, the claimant is not disabled
16 and the claim is denied. *Id.* If the claimant is not currently engaged in substantial
17 gainful activity, the second step requires the Commissioner to determine whether
18 the claimant has a “severe” impairment or combination of impairments significantly
19 limiting his ability to do basic work activities; if not, a finding of nondisability is
20 made and the claim is denied. *Id.* If the claimant has a “severe” impairment or
21 combination of impairments, the third step requires the Commissioner to determine
22 whether the impairment or combination of impairments meets or equals an
23 impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R. part
24 404, subpart P, appendix 1; if so, disability is conclusively presumed and benefits
25 are awarded. *Id.* If the claimant’s impairment or combination of impairments does
26 not meet or equal an impairment in the Listing, the fourth step requires the
27 Commissioner to determine whether the claimant has sufficient “residual functional
28 capacity” to perform his past work; if so, the claimant is not disabled and the claim

1 is denied. *Id.* The claimant has the burden of proving that he is unable to perform
2 past relevant work. *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992). If the
3 claimant meets this burden, a *prima facie* case of disability is established. *Id.* The
4 Commissioner then bears the burden of establishing that the claimant is not
5 disabled, because he can perform other substantial gainful work available in the
6 national economy. *Id.* The determination of this issue comprises the fifth and final
7 step in the sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; *Lester*, 81 F.3d at
8 828 n.5; *Drouin*, 966 F.2d at 1257.

9 **V.**

10 **THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

11 At step one, the ALJ found that Plaintiff met the insured status requirements
12 of the Social Security Act and had not engaged in substantial gainful activity from
13 the alleged onset date through December 31, 2016. (AR 34.) At step two, the ALJ
14 found that Plaintiff had the following severe impairment: degenerative disc disease
15 of the cervical spine. (AR 34-36.) At step three, the ALJ found that Plaintiff did
16 not have an impairment or combination of impairments that meets or medically
17 equals the severity of one of the listed impairments. (AR 36-37.) At step four, the
18 ALJ found that Plaintiff had the RFC to perform the following: “occasionally lift
19 and/or carry 20 pounds; frequently lift and/or carry 10 pounds; stand and/or walk
20 for 6 hours in an 8-hour workday; sit for 6 hours in an 8-hour workday; and
21 occasionally perform all posturals.” (AR 37-42.) Finally, the ALJ concluded that
22 Plaintiff is capable of performing past relevant work as a sales associate/processor
23 and cashier/food clerk. (AR 42.) Accordingly, the ALJ concluded that Plaintiff
24 was not under a disability at any time from August 19, 2011, the alleged onset date,
25 through the date of the ALJ’s decision. (AR 42.)

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VI.

DISCUSSION

A. The ALJ’s Step Two Determination (Disputed Issue One)

The ALJ found that Plaintiff had a severe impairment of degenerative disc disease of the cervical spine. Plaintiff argues that the ALJ should have found a number of other conditions to be severe impairments. On this issue, the Court agrees with the Commissioner’s position. Because the ALJ found at step two that Plaintiff had a severe impairment, it would be harmless error if the ALJ’s failure to include other conditions as severe impairments were wrong. As long as the other impairments are considered at the subsequent steps, the lack of inclusion at step two (or a non-severe finding at step two for a particular impairment) does not constitute a basis for reversal. *See Carpenter v. Astrue*, 537 F.3d 1264, 1266 (10th Cir. 2008). In the present case, the ALJ did not dispose of Plaintiff’s claim as groundless at step two; rather, she found that Plaintiff had satisfied the severity requirement and proceeded to consider the combination of Plaintiff’s impairments in making the disability determination in the subsequent steps. *See Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1010 (9th Cir. 2003). Thus, the ALJ’s step two determination did not constitute reversible error.

B. The ALJ’s Adverse Credibility Finding (Disputed Issue Two)

An ALJ’s assessment of pain severity and claimant credibility is entitled to “great weight.” *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989). Where the claimant has produced objective medical evidence of an impairment which could reasonably be expected to produce some degree of pain and/or other symptoms, and the record is devoid of any affirmative evidence of malingering, the ALJ may reject the claimant’s testimony regarding the severity of the claimant’s pain and/or other symptoms only if the ALJ makes specific findings stating clear and convincing reasons for doing so. *See Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986); *see also Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Here, since the

1 Commissioner has not argued that there was evidence of malingering and that a
2 lesser standard consequently should apply, the Court will apply the “clear and
3 convincing” standard to the ALJ’s adverse credibility determination. *See Burrell v.*
4 *Colvin*, 775 F.3d 1133, 1136 (9th Cir. 2014) (applying “clear and convincing”
5 standard where the government did not argue that a lesser standard should apply
6 based on evidence of malingering). “The clear and convincing evidence standard is
7 the most demanding required in Social Security cases.” *Garrison v. Colvin*, 759
8 F. 3d 995, 1015 (9th Cir. 2014).

9 The ALJ’s credibility discussion is found in the final paragraph on AR 40
10 and the two paragraphs on AR 41. In those paragraphs, the ALJ sets forth two
11 reasons: (1) “The claimant has not generally received the type of medical treatment
12 one would expect for a totally disabled individual.” (2) “[T]he claimant’s ability to
13 participate in [daily] activities diminishes the credibility of the claimant’s
14 allegations of functional limitations.” (AR 41.)²

15 With regard to the first reason — conservative medical treatment — the ALJ
16 states that Plaintiff’s treatment has been “routine and/or conservative in nature” and
17 that use of medication did not suggest impairments beyond those found in the
18 decision. At the time of the administrative hearing, however, Plaintiff testified that
19 she was scheduled to have a surgical assessment by an orthopedic surgeon. (AR
20 58.) On March 31, 2015, Plaintiff underwent a cervical discectomy at C5-6 and
21 cervical fusion at the same level. This predated the ALJ’s decision, but the relevant
22 records were not submitted until the Appeals Council review. Although submitted
23 for the first time to the Appeals Council, these records must be considered by the
24 Court as part of the administrative record in determining whether the
25 Commissioner’s decision is supported by substantial evidence. *See Brewes v.*

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27 ² As discussed below, although the Commissioner asserts that the ALJ provided
28 four additional reasons, the Court is limited to considering grounds actually set out
in the decision as bases for the credibility determination.

1 *Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157, 1159-60 (9th Cir. 2012).³ In this case,
2 consideration of the evidence of Plaintiff’s March 2015 cervical spine surgery
3 necessarily leads to the conclusion that her treatment has not been limited to
4 medication and has not been conservative. The ALJ’s finding to the contrary is not
5 supported by substantial evidence when the surgical records at AR 693-95 are taken
6 into account. The ALJ also referred to “gaps” in Plaintiff’s treatment history, but
7 did not offer any specifics. Plaintiff testified that she had relocated from
8 Mississippi and had to get a new doctor after the move. (AR 72-76.) Although that
9 may have caused a gap in treatment, the ALJ did not discuss Plaintiff’s move, and
10 that move provides a reasonable explanation of a gap in treatment. In these
11 circumstances, the ALJ’s vague reference to a gap in treatment does not constitute
12 the clear and convincing evidence required to discount the credibility of Plaintiff’s
13 symptom testimony. Accordingly, the Court concludes that the ALJ’s assessment
14 of the type and timing of Plaintiff’s medical treatment does not constitute a valid
15 basis for her adverse credibility determination.⁴

16 As to the second reason — Plaintiff’s daily activities — the ALJ’s decision
17 sets out a list of activities that Plaintiff can perform: “personal care, food
18 preparation, shopping, cleaning, sweeping, mopping, dusting, making beds,
19 dishwashing, laundry, reading, keeping up with the news, driving, watching
20 television, reading the Bible, going to the laundromat, grocery shopping, walking,
21 taking the bus, going out to eat, going to the beach, feeding the birds, attending
22 church, socializing with acquaintances and family, and using the telephone.” (AR

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24 ³ “[W]hen the Appeals Council considers new evidence in deciding whether to
25 review a decision of the ALJ, that evidence becomes part of the administrative
26 record, which the district court must consider when reviewing the Commissioner’s
final decision for substantial evidence.” 682 F.3d at 1163.

27 ⁴ Although the Commissioner’s memorandum includes a discussion of Plaintiff’s
28 treatment (Def. Mem. at 6), it does not address the March 2015 surgical records and
does not offer further specifics regarding the alleged gaps in treatment.

1 41.) The decision then states that “[s]ome of the physical and mental abilities and
2 social interactions required in order to perform these activities are the same as those
3 necessary for obtaining and maintaining employment.” There are two problems
4 with this assessment of daily activities. First, given the broad manner in which the
5 alleged activities are identified, the decision does not fairly state the extent to which
6 Plaintiff can engage in these activities. For example, the decision states that
7 Plaintiff does “walking,” but the record cited in the decision states that Plaintiff can
8 walk only 45-50 feet and can stand only for 2 minutes. (AR 392.) Similarly, the
9 decision states that Plaintiff can take a bus and can drive. Yet the record reflects
10 that Plaintiff can sit for only 5 to 10 minutes, and she does not drive. (*Id.*)

11 The ambiguities and omissions in the decision’s list of Plaintiff’s daily
12 activities are compounded when the ALJ then states that “some” of the abilities
13 necessary to perform these activities are same as those used in getting and
14 maintaining employment. But that statement begs the key questions: what abilities
15 and what types of employment. Accordingly, the ALJ’s finding about daily
16 activities is not specific and is insufficient as a basis for the adverse credibility
17 finding: A “reviewing court should not be forced to speculate as to the grounds for
18 an adjudicator’s rejection of a claimant’s allegations of disabling pain.” *Bunnell v.*
19 *Sullivan*, 947 F.2d 341, 346 (9th Cir. 1991) (en banc); *see also Brown-Hunter v.*
20 *Colvin*, 806 F.3d 487, 493-94 (9th Cir. 2015) (ALJ’s failure to link claimant’s
21 testimony to particular parts of the record is insufficient support for adverse
22 credibility finding); *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993) (“It’s not
23 sufficient for the ALJ to make only general findings; he must state which pain
24 testimony is not credible and what evidence suggests the complaints are not
25 credible.”).

26 Finally, the Commissioner’s attempt to add other grounds to support the ALJ
27 credibility determination fails. For each of these purported reasons — a function
28 report by Plaintiff’s husband, the ALJ’s observation of Plaintiff at the hearing, and

1 Plaintiff's voluntarily stopping work — the Commissioner cites to statements in the
2 decision from pages AR 36 and 37. As reflected by their placement and context in
3 the decision, these statements were not made in connection with the adverse
4 credibility finding — which took place at AR 40-41. Under the law in this Circuit,
5 the Court is not permitted to comb through the decision looking for other facts and
6 reasoning that could be (but were not) applied to support the credibility
7 determination: “Long-standing principles of administrative law require us to
8 review the ALJ’s decision based on the reasoning and factual findings offered by
9 the ALJ — not post hoc rationalizations” *Bray v. Comm’r of Soc. Sec. Admin.*,
10 554 F.3d 1219, 1225 (9th Cir. 2009). Moreover, the Commissioner urges that
11 Plaintiff’s symptom testimony was inconsistent with unsupported by the objective
12 medical evidence. Again, this was not part of the ALJ’s stated reasons, but even if
13 it were, it could not be the sole basis for discounting credibility when the other
14 reasons were legally sufficient. *See Robbins v. Social Sec. Admin.*, 466 F.3d 880,
15 884 (9th Cir. 2006) (where ALJ’s initial reason for adverse credibility
16 determination was legally insufficient, his sole remaining reason premised on lack
17 of medical support for claimant’s testimony was legally insufficient); *Light v.*
18 *Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997) (“[A] finding that the
19 claimant lacks credibility cannot be premised wholly on a lack of medical support
20 for the severity of his pain.”).⁵

21 VII.

22 DECISION TO REMAND

23 The law is well established that the decision whether to remand for further
24 proceedings or simply to award benefits is within the discretion of the Court. *See,*
25 *e.g., Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir. 1990); *McAllister v. Sullivan*,

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27 ⁵ Given the determination that the ALJ erred in the adverse credibility finding and
28 that the case should be remanded on that basis, the third disputed issue need not be
addressed here.

1 888 F.2d 599, 603 (9th Cir. 1989); *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir.
2 1981). Before a case may be remanded for an immediate award of benefits, three
3 requirements must be met: “(1) the record has been fully developed and further
4 administrative proceedings would serve no useful purpose; (2) the ALJ has failed to
5 provide legally sufficient reasons for rejecting evidence, whether claimant
6 testimony or medical opinion; and (3) if the improperly discredited evidence were
7 credited as true, the ALJ would be required to find the claimant disabled on
8 remand.” *Garrison*, 759 F.3d at 1020; *see also Brown-Hunter*, 806 F.3d at 495. If
9 the record is “uncertain and ambiguous, the proper approach is to remand the case
10 to the agency” for further proceedings. *See Treichler*, 775 F.3d at 1105. Here,
11 further proceedings would be useful to resolve conflicts and ambiguities in the
12 record. *Id.* at 1103-04 (in evaluating whether further administrative proceedings
13 would be useful, the reviewing court should consider “whether the record as a
14 whole is free from conflicts, ambiguities, or gaps, whether all factual issues have
15 been resolved, and whether the claimant’s entitlement to benefits is clear under the
16 applicable legal rules”); *Burrell*, 775 F.3d at 1141-42. Plaintiff has not shown that
17 this case presents the rare circumstances that would warrant an immediate award of
18 benefits.

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20 * * * *

21 IT THEREFORE IS ORDERED that Judgment be entered reversing the
22 decision of the Commissioner of Social Security and remanding this matter for
23 further administrative proceedings consistent with this Order.

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25 DATED: July 28, 2017

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ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE