

1 was not disabled under the Social Security Act, and issued an order denying benefits on October 27,
2 2016. (*Id.* at 19-29) Plaintiff filed a request for review of the decision with the Appeals Council,
3 which denied the request on August 14, 2017. (*Id.* at 2-5) Therefore, the ALJ’s determination became
4 the final decision of the Commissioner of Social Security.

5 **STANDARD OF REVIEW**

6 District courts have a limited scope of judicial review for disability claims after a decision by
7 the Commissioner to deny benefits under the Social Security Act. When reviewing findings of fact,
8 such as whether a claimant was disabled, the Court must determine whether the Commissioner’s
9 decision is supported by substantial evidence or is based on legal error. 42 U.S.C. § 405(g). The ALJ’s
10 determination that the claimant is not disabled must be upheld by the Court if the proper legal standards
11 were applied and the findings are supported by substantial evidence. *See Sanchez v. Sec’y of Health &*
12 *Human Serv.*, 812 F.2d 509, 510 (9th Cir. 1987).

13 Substantial evidence is “more than a mere scintilla. It means such relevant evidence as a
14 reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S.
15 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The record as a whole
16 must be considered, because “[t]he court must consider both evidence that supports and evidence that
17 detracts from the ALJ’s conclusion.” *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985).

18 **DISABILITY BENEFITS**

19 To qualify for benefits under the Social Security Act, Plaintiff must establish she is unable to
20 engage in substantial gainful activity due to a medically determinable physical or mental impairment
21 that has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C.
22 § 1382c(a)(3)(A). An individual shall be considered to have a disability only if:

23 his physical or mental impairment or impairments are of such severity that he is not only
24 unable to do his previous work, but cannot, considering his age, education, and work
25 experience, engage in any other kind of substantial gainful work which exists in the
26 national economy, regardless of whether such work exists in the immediate area in
which he lives, or whether a specific job vacancy exists for him, or whether he would be
hired if he applied for work.

27 42 U.S.C. § 1382c(a)(3)(B). The burden of proof is on a claimant to establish disability. *Terry v.*
28 *Sullivan*, 903 F.2d 1273, 1275 (9th Cir. 1990). If a claimant establishes a prima facie case of disability,

1 the burden shifts to the Commissioner to prove the claimant is able to engage in other substantial
2 gainful employment. *Maounis v. Heckler*, 738 F.2d 1032, 1034 (9th Cir. 1984).

3 **ADMINISTRATIVE DETERMINATION**

4 To achieve uniform decisions, the Commissioner established a sequential five-step process for
5 evaluating a claimant's alleged disability. 20 C.F.R. §§ 404.1520, 416.920(a)-(f). The process requires
6 the ALJ to determine whether Plaintiff (1) engaged in substantial gainful activity during the period of
7 alleged disability, (2) had medically determinable severe impairments (3) that met or equaled one of the
8 listed impairments set forth in 20 C.F.R. § 404, Subpart P, Appendix 1; and whether Plaintiff (4) had
9 the residual functional capacity to perform to past relevant work or (5) the ability to perform other work
10 existing in significant numbers at the state and national level. *Id.* The ALJ must consider testimonial
11 and objective medical evidence. 20 C.F.R. §§ 404.1527, 416.927.

12 **A. Medical Evidence**

13 In August 2007, Plaintiff had a spinous process distraction device inserted at a single level in
14 her lumbar spine. (Doc. 11-11 at 57) This was followed by a lumbar spine fusion in February 2008.
15 (*Id.*) On November 14, 2013, Plaintiff had a third spinal surgery that included lumbar decompression at
16 the L5-S1 level, fusion of the L5-S1 level, re-instrumentation at the L5 level, and posterolateral spinal
17 fusion at the L3-4 and L5-S1 levels. (Doc. 11-9 at 9, 10)

18 In considering the medical evidence at issue, the ALJ observed²:

19 Noman O. Khan, M.D. performed a post-operative examination of the claimant on
20 February 25, 2014. The claimant informed that her pain had been well-controlled with
21 medication. Dr. Khan found that the claimant was neurologically and vascularly
22 intact in the lower extremities. The doctor noted that x-rays showed good and
23 consistent alignment of instrumentation in comparison to previous imaging studies
24 [Exhibit 4F9-10]. Dr. Khan noted on May 27, 2014, that from a radiographic and
25 surgical perspective, the claimant's lumbar surgical fusion appeared well-healed and
26 solid [Exhibit F428].

24 Andal V. Kadambi, M.D., the claimant's primary care provider, provided the claimant
25 with regular follow-up care and medication treatment for her obesity; Meniere's
26 disease; asthma, mild, persistent; and low back pain syndrome from March 24, 2014 to
27 July 13, 2016. Dr. Kadambi consistently found the claimant to be in no acute distress
28 and found her lungs to be clear to auscultation, bilaterally, with no wheezes, rhonchi,
or cackles [Exhibits 3F48-51, 59-62, and 69-72; 6F2-5; 9F3-5; 14F5-6, 33-36, 41-44,

² Plaintiff's sole challenge to the ALJ's decision relates to the adverse credibility analysis. (*See* Doc. 18 at 7)
Because Plaintiff does not challenge the ALJ's summary of the medical evidence, the Court here adopts the ALJ's summary
of the evidence. Nevertheless, the Court has reviewed and considered the entirety of the medical record.

1 and 84-91; and 16F89-93]. Dr. Kadambi noted on January 20, 2015, that the claimant
2 was walking with a cane [Exhibit 9F3-5].

3 Shirley Xiaoying Wu, M.D., evaluated the claimant on June 6, 2014, for pain
4 management follow-up. The claimant stated that the back surgery helped reduce her
5 left leg pain, but she still had significant back pain, weakness at the right leg, and
6 numbness at the left leg. She currently participated in physical therapy and used the
7 bike and treadmill at the gym on a daily basis. Dr. Wu found the claimant to have
8 normal chest expansion with lungs clear to auscultation without wheezes or rales.
9 The doctor found the claimant to have a reduced range of motion of the lumbar spine
10 with positive Patrick's sign and facet loading. The doctor noted that the claimant had
11 diffuse palpation tenderness in the lower back and decreased sensation to light touch
12 and pinprick at the left lateral calf and foot. The doctor found the claimant to have
13 normal deep tendon reflexes and normal motor strength at the lower extremities with
14 normal muscle bulk and tone. The claimant had negative straight leg raises in the
15 seated position, bilaterally [Exhibit 3F37-40]. Dr. Wu noted on June 27, 2014, that
16 the claimant had intact sensation to light touch and pinprick at the bilateral lower
17 extremities [Exhibit 3F49-52]. Dr. Wu noted on January 8, 2016, that the claimant
18 had decreased sensation to light touch and pinprick at the L5 dermatome and diffuse
19 palpation tenderness especially in the lower back and buttocks [Exhibit 14F37-40].
20 The claimant regularly attended follow-up appointments and received medication
21 treatment from Dr. Wu through July 15, 2016. The doctor's findings upon physical
22 examinations remained generally stable [Exhibits 6F13-16 and 25-28, 14F23-26, 37-
23 40, 45-48, 55-58, and 74-77; and 16F106-109].

24 Treatment notes, dated December 19, 2014, indicate that the claimant had an asthma
25 exacerbation. The claimant was found to have scattered expiratory wheeze, but no
26 rales, rhonchi, or dullness [Exhibit 6F38-41].

27 Treatment notes, dated April 16, 2015, indicate that the claimant underwent a bilateral
28 sacroiliac joint injection [Exhibit 14F67-68].

(Doc. 11-3 at 25-27)

18 **B. Plaintiff's Exertion Report**

19 Plaintiff completed a form entitled "Exertion Questionnaire Since Your Disability Began" on
20 August 16, 2014. (Doc. 11-7 at 11-27) She reported that with her back pain, it was "difficult to sit up
21 straight in an office chair for more than fifteen minutes," and it was "painful to stand in one place for
22 more than ten minutes." (*Id.* at 25) Plaintiff noted she could "walk with [her] cane for about twenty
23 minutes on level ground." (*Id.*)

24 She noted that if she could, she would "go to the gym per [her] doctors' orders and do the
25 treadmill and lay back bike or go to the mall and walk around." (Doc. 11-7 at 25) Plaintiff indicated
26 that when using a treadmill, she would "go about .33 miles in fifteen minutes." (*Id.*) According to
27 Plaintiff, "[a]fter walking any kind of distance [she was] in more pain," and she would "need to rest or
28 lie down," use an ice pack, or take additional pain medication. (*Id.*)

1 She stated she could “lift up to five pounds,” including “[s]mall items from the store” such as
2 laundry soap, medications, empty water bottles, and newspapers. (Doc. 11-7 at 26) Plaintiff indicated
3 she was not supposed to do “heavy lifting over 10 lbs., no twisting, crawling, kneeling, climbing or
4 working on uneven surface[s].” Plaintiff noted that her husband did “the major grocery shopping,” and
5 her housework was “limited.” (*Id.*) She noted she washed dishes, wiped down counters in their kitchen
6 and bathrooms, and “[l]ight dusting at waist level.” (*Id.*) She also could do laundry, explaining the
7 machines were front-loading and on pedestals so they were at her waist level. (*Id.* at 25-26) Plaintiff
8 reported that when doing these chores, she could “go about ten minutes” at a time before she would
9 “need to stop due to back pain, muscle spasms or dizziness.” (*Id.* at 26)

10 **C. Administrative Hearing Testimony**

11 Plaintiff testified before the ALJ at a hearing on July 8, 2016. (Doc. 11-3 at 36) She stated that
12 she stopped working on October 25, 2013, after she suffered back pain at work. (*Id.* at 44) Plaintiff said
13 she “was sitting on the floor doing some filing” when she felt “a pop in [her] back and it became
14 excruciating.” (*Id.*) She went to the doctor, who determined a screw in Plaintiff’s back collapsed from
15 the L5 level to the S1 level. (*Id.*) Plaintiff stated she then “had to have a third back surgery.” (*Id.*)
16 Plaintiff said she had not “been a day without pain since then.” (*Id.*)

17 She stated she had arthritis in her hands and trigger finger, which caused “shooting pain down
18 both [her] hands.” (Doc. 11-3 at 54) Plaintiff said this “limited [her] ability to do more things,” and
19 estimated she could lift and carry five pounds. (*Id.* at 54, 57) She stated she had problems with taking
20 care of her personal hygiene, such as cutting her toenails or shaving her legs. (*Id.* at 54) She also
21 stated that she could not vacuum, sweep, or dust. (*Id.* at 55) Plaintiff testified her husband did “90% of
22 the cooking,” and there were days where she could not do the dishes easily, so she would “do them in
23 five to minute increments.” (*Id.*)

24 Plaintiff reported that she was unable to bend, crouch, or get up from the floor without
25 assistance. (Doc. 11-3 at 54) She testified she had “balance issues” and had to use a cane at home.
26 (*Id.*) She estimated she could walk one block, or “10 to 15 minutes” using her cane before she needed
27 to sit and rest. (*Id.* at 55) Plaintiff said she used a walker for any “long walking,” such as going to
28 physical therapy, attending doctor’s appointments, or going to the farmer’s market or mall. (*Id.* at 56)

1 She testified she also suffered from “[d]epression, anxiety and panic attacks,” for which she saw
2 a counselor. (Doc. 11-3 at 59) Plaintiff explained her pain management specialist sent her to
3 counseling because she “wasn’t dealing with [her] depression” and it was “very depressing” that she
4 could not do what she used to. (*Id.*)

5 **D. The ALJ’s Findings**

6 Pursuant to the five-step process, the ALJ determined Plaintiff did not engage in substantial
7 activity after the alleged onset date of October 25, 2013. (Doc. 11-3 at 21) Second, the ALJ found
8 Plaintiff had “the following severe impairments: obesity; degenerative disc disease of the lumbar spine
9 status post surgical decompressions, fusions, and instrumentations; Meniere’s disease; and asthma.”
10 (*Id.*) At step three, the ALJ determined these impairments did not meet or medically equal a listed
11 impairment. (*Id.* at 22-23) Next, the ALJ opined:

12 [T]he claimant has the residual functional capacity to perform sedentary work as defined
13 in 20 CFR 404.1567(a) except she is able to lift and carry 20 pounds occasionally and 10
14 pounds frequently. She is also able to stand and walk for four hours in an eight-hour
15 workday. She must be able to alternate her position for 10 minutes after every one hour,
16 but she will continue to remain on task throughout. The claimant is never able to climb
ladders, ropes, or scaffolds. She is able to continually balance, stoop, kneel, crouch,
crawl, and climb raps and stairs. She must avoid all exposure to unprotected heights and
other hazards. She is able to withstand occasional exposure to smoke and other
pulmonary irritants.

17 (*Id.* at 24) With this residual functional capacity, the ALJ found Plaintiff was “unable to perform any
18 past relevant work.” (*Id.* at 27) However, the ALJ found Plaintiff was able to work in “other
19 occupations with jobs existing in significant numbers in the national economy.” (*Id.*) Thus, the ALJ
20 concluded Plaintiff was not disabled as defined by the Social Security Act. (*Id.* at 28-29)

21 **DISCUSSION AND ANALYSIS**

22 Appealing the decision to deny her applications for benefits, Plaintiff asserts the ALJ did not
23 identify legally sufficient reasons to reject her credibility. (Doc. 18 at 7-11) Defendant argues the
24 ALJ’s decision should be affirmed because “the ALJ sufficiently articulated the reasons she discounted
25 Plaintiff’s subjective complaints.” (Doc. 19 at 9)

26 **A. The ALJ’s Credibility Analysis**

27 In assessing credibility, an ALJ must determine first whether objective medical evidence shows
28 an underlying impairment “which could reasonably be expected to produce the pain or other symptoms

1 alleged.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*,
2 947 F.2d 341, 344 (9th Cir. 1991)). Where the objective medical evidence shows an underlying
3 impairment, and there is no affirmative evidence of a claimant's malingering, an “adverse credibility
4 finding must be based on clear and convincing reasons.” *Id.* at 1036; *Carmickle v. Comm’r of Soc. Sec.*
5 *Admin.*, 533 F.3d 1155, 1160 (9th Cir. 2008).

6 Factors that may be considered by an ALJ in assessing a claimant’s credibility include, but are
7 not limited to: (1) the claimant’s reputation for truthfulness, (2) inconsistencies in testimony or between
8 testimony and conduct, (3) the claimant’s daily activities, (4) an unexplained, or inadequately
9 explained, failure to seek treatment or follow a prescribed course of treatment, and (5) testimony from
10 physicians concerning the nature, severity, and effect of the symptoms of which the claimant
11 complains. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *see also Thomas v. Barnhart*, 278 F.3d
12 947, 958-59 (9th Cir. 2002) (evaluating credibility, the ALJ may consider a claimant’s reputation for
13 truthfulness, inconsistencies between a claimant’s testimony and conduct, and daily activities).

14 The ALJ observed Plaintiff’s “alleged impairments include back pain; asthma; Meniere’s
15 disease; migraines; breast cancer, in remission; and gastroesophageal reflux disease.” (Doc. 11-3 at 25)
16 After reviewing Plaintiff’s impairments, the ALJ summarized Plaintiff’s statements regarding her
17 limitations made both at the hearing and in forms completed for the Social Security Administration, and
18 reviewed the medical record. (*Id.* at 25-26) The ALJ then stated:

19 After careful consideration of the evidence, I find that the claimant’s medically
20 determinable impairments could reasonably be expected to cause the alleged symptoms;
21 however, the claimant’s statements concerning the intensity, persistence and limiting
effects of these symptoms are not entirely consistent with the medical evidence and
other evidence in the record for the reasons explained in this decision.

22 (*Id.* at 26) Plaintiff argues these findings related to her subjective complaints are not sufficient, and
23 that “the ALJ made no specific findings regarding Plaintiff’s credibility.” (Doc. 18 at 9) She argues
24 the ALJ erred through “failing to provide any reasons beyond a general finding and then summarizing
25 the medical evidence.” (*Id.* at 10)

26 1. Summary of the medical record

27 In general, “conflicts between a [claimant’s] testimony of subjective complaints and the
28 objective medical evidence in the record” may constitute “specific and substantial reasons that

1 undermine . . . credibility.” *Morgan v. Commissioner of the SSA*, 169 F.3d 595, 600 (9th Cir. 1999).
2 However, “summariz[ing] the medical evidence supporting [the] RFC determination... is not the sort of
3 explanation or the kind of ‘specific reasons’ [the Court] must have in order to ... ensure that the
4 claimant’s testimony was not arbitrarily discredited.” *See, e.g., Brown-Hunter v. Colvin*, 806 F.3d 487,
5 494 (9th Cir. 2015). Consequently, “the observations an ALJ makes as part of the summary of the
6 medical record are not sufficient to establish clear and convincing reasons for rejecting a Plaintiff’s
7 credibility.” *Argueta v. Colvin*, 2016 WL 4138577 at *13 (E.D. Cal. Aug. 3, 2016).

8 Although Defendant identifies reasons for rejecting Plaintiff’s credibility based upon the ALJ’s
9 summary of the medical records (*see* Doc. 19 at 7-9), these reasons were not clearly identified by the
10 ALJ to support the adverse credibility determination. Instead, the ALJ merely summarized the
11 evidence of record related to Plaintiff’s impairments. (*See* Doc. 11-3 at 25-26)

12 Importantly, the Court is “constrained to *review* the reasons the *ALJ* asserts.” *Brown-Hunter*,
13 806 F.3d at 494 (emphasis in original) (quoting *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir.
14 2003)); *Bray v. Comm’r*, 554 F.3d 1219, 1229 (9th Cir. 2009) (the court cannot engage in “*post hoc*
15 rationalizations that attempt to intuit what the [ALJ] might have been thinking”). In *Brown-Hunter*, the
16 claimant argued the ALJ failed to provide clear and convincing reasons for rejecting her testimony. *Id.*,
17 806 F. 3d at 491. The district court identified inconsistencies in the ALJ’s summary of the medical
18 record that it gave rise to reasonable inferences about Plaintiff’s credibility. *Id.* On appeal, the Ninth
19 Circuit determined the ALJ failed to identify the testimony she found not credible, and did not link that
20 testimony to support the adverse credibility determination. *Id.* at 493. The Court explained that even if
21 the district court’s analysis was sound, the court’s analysis could not cure the ALJ’s failure. *Id.* at 494.

22 Similarly, here, the ALJ offered little more than a summary of the medical evidence and
23 boilerplate language to support her rejection Plaintiff’s credibility, which is not sufficient to support the
24 adverse credibility analysis.³ *See Brown-Hunter*, 806 F.3d at 494; *see also Kimbrough v. Colvin*, 2016
25 WL 403260 at *7 (E.D. Cal. Feb. 3, 2016) (“Under *Brown-Hunter*, the observations an ALJ makes as
26 part of the summary of the medical record is not sufficient to establish clear and convincing reasons for
27

28 ³ Moreover, a claimant’s “subjective pain testimony cannot be rejected on the sole ground that it is not fully corroborated by objective medical evidence.” *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

1 rejecting a Plaintiff's credibility.”)

2 2. Failure to identify the testimony being discounted

3 Further, as Plaintiff observes, “the ALJ must identify what testimony is not credible.” (Doc. 18
4 at 8) (citing *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005); *Dodrill v. Shalala*, 12 F.3d 915, 918
5 (9th Cir. 1993)). “General findings,” such as the ALJ provided here, “are insufficient.” *See Berry v.*
6 *Astrue*, 622 F.3d 1228, 1234 (9th Cir. 2010) (citations omitted).

7 The Ninth Circuit requires an ALJ to “**specifically identify what testimony is credible** and
8 what evidence undermines the claimant’s complaints.” *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir.
9 2006) (emphasis added); *see also Dodrill* at 918 (9th Cir. 1993) (an ALJ “must state which pain
10 testimony is not credible and what evidence suggests the complaints are not credible”); *Parra v. Astrue*,
11 481 F.3d 742, 750 (9th Cir. 2007) (“The ALJ must provide ‘clear and convincing’ reasons to reject a
12 claimant’s subjective testimony, by specifically identifying what testimony is not credible and what
13 evidence undermines the claimant’s complaints”). Because the ALJ did not meet this burden, the Court
14 finds the ALJ failed to properly set forth findings “sufficiently specific to allow a reviewing court to
15 conclude the ALJ rejected the claimant’s testimony on permissible grounds.” *Moisa v. Barnhart*, 367
16 F.3d 882, 885 (9th Cir. 2004); *see also Thomas*, 278 F.3d at 958.

17 **B. Remand is Appropriate**

18 The decision whether to remand a matter pursuant to sentence four of 42 U.S.C. § 405(g) or to
19 order immediate payment of benefits is within the discretion of the district court. *Harman v. Apfel*,
20 211 F.3d 1172, 1178 (9th Cir. 2000). Except in rare instances, when a court reverses an administrative
21 agency determination, the proper course is to remand to the agency for additional investigation or
22 explanation. *Moisa*, 367 F.3d at 886 (citing *INS v. Ventura*, 537 U.S. 12, 16 (2002)). Generally, an
23 award of benefits is directed when:

- 24 (1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence,
25 (2) there are no outstanding issues that must be resolved before a determination of
26 disability can be made, and (3) it is clear from the record that the ALJ would be required
to find the claimant disabled were such evidence credited.

27 *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). In addition, an award of benefits is directed
28 where no useful purpose would be served by further administrative proceedings, or where the record is

1 fully developed. *Varney v. Sec’y of Health & Human Serv.*, 859 F.2d 1396, 1399 (9th Cir. 1988).

2 The Ninth Circuit explained that “where the ALJ improperly rejects the claimant’s testimony
3 regarding his limitations, and the claimant would be disabled if his testimony were credited,” the
4 testimony can be credited as true, and remand is not appropriate. *Lester*, 81 F.3d at 834. However,
5 courts retain flexibility in crediting testimony as true, and a remand for further proceedings regarding
6 the credibility of a claimant is an appropriate remedy. *See, e.g., Bunnell*, 947 F.2d at 348 (affirming the
7 district court’s order remanding for further proceedings where the ALJ failed to explain with sufficient
8 specificity the basis for rejecting the claimant’s testimony); *Byrnes v. Shalala*, 60 F.3d 639, 642 (9th
9 Cir. 1995) (remanding the case “for further proceedings evaluating the credibility of [the claimant’s]
10 subjective complaints ...”). Consequently, the Court finds a remand for further proceedings and re-
11 evaluation of Plaintiff’s testimony is appropriate.

12 **CONCLUSION AND ORDER**

13 For the reasons set forth above, the Court finds the ALJ failed to apply the proper legal
14 standards in evaluating Plaintiff’s credibility, and administrative decision should not be upheld. *See*
15 *Sanchez*, 812 F.2d at 510. Accordingly, the Court **ORDERS**:

- 16 1. The matter is **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) for further
17 proceedings consistent with this decision; and
18 2. The Clerk of Court IS **DIRECTED** to enter judgment in favor of Plaintiff Valerie Ann
19 Francesconi and against Defendant, Nancy A. Berryhill, Acting Commissioner of Social
20 Security.

21
22 IT IS SO ORDERED.

23 Dated: March 5, 2019

/s/ Jennifer L. Thurston
24 UNITED STATES MAGISTRATE JUDGE