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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

COZETTE A. WOLFINBARGER,

No. 2:12-CV-0174-CMK

Plaintiff,

vs.

MEMORANDUM OPINION AND ORDER

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

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Plaintiff, who is proceeding with retained counsel, brings this action for judicial review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). Pursuant to the written consent of all parties, this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). Pending before the court are plaintiff’s motion for summary judgment (Doc. 17) and defendant’s cross-motion for summary judgment (Doc. 19). For the reasons discussed below, the court will grant plaintiff’s motion for summary judgment for remand and deny the Commissioner’s cross-motion for summary judgment.

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2 **I. PROCEDURAL HISTORY**<sup>1</sup>

3 Plaintiff applied for social security benefits on October 26, 2007, alleging an onset  
4 of disability on June 1, 2002, due to disabilities including fibromyalgia, arthritis in back,  
5 reconstruction of left ureter, irritated bowel syndrome, cluster headaches, chronic pain, chronic  
6 fatigue, ulcer, disorders of the back (discogenic & degenerative) and other rheumatic heart  
7 disease (Certified administrative record (“CAR”) 81-84, 142-45, 152-54, 161-72). Plaintiff’s  
8 claim was denied initially and upon reconsideration. Plaintiff requested an administrative  
9 hearing, which was held on February 24, 2010, before Administrative Law Judge (“ALJ”)  
10 Sharilyn Hopson. In an April 9, 2010, decision, the ALJ concluded that plaintiff is not disabled<sup>2</sup>

11  
12 <sup>1</sup> Because the parties are familiar with the factual background of this case, including  
13 plaintiff’s medical history, the undersigned does not exhaustively relate those facts here. The  
14 facts related to plaintiff’s impairments and medical history will be addressed insofar as they are  
15 relevant to the issues presented by the parties’ respective motions.

16 <sup>2</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to  
17 the Social Security program, 42 U.S.C. § 401 et seq. Supplemental Security Income (“SSI”) is  
18 paid to disabled persons with low income. 42 U.S.C. § 1382 et seq. Under both provisions,  
19 disability is defined, in part, as an “inability to engage in any substantial gainful activity” due to  
20 “a medically determinable physical or mental impairment.” 42 U.S.C. §§ 423(d)(1)(a) &  
21 1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. See 20 C.F.R.  
22 §§ 423(d)(1)(a), 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987). The  
23 following summarizes the sequential evaluation:

24 Step one: Is the claimant engaging in substantial gainful  
25 activity? If so, the claimant is found not disabled. If not, proceed  
26 to step two.

Step two: Does the claimant have a “severe” impairment?  
If so, proceed to step three. If not, then a finding of not disabled is  
appropriate.

Step three: Does the claimant’s impairment or combination  
of impairments meet or equal an impairment listed in 20 C.F.R., Pt.  
404, Subpt. P, App.1? If so, the claimant is automatically  
determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past  
work? If so, the claimant is not disabled. If not, proceed to step  
five.

Step five: Does the claimant have the residual functional  
capacity to perform any other work? If so, the claimant is not  
disabled. If not, the claimant is disabled.

1 based on the following findings:

- 2 1. The claimant meets the insured status requirements of the Social  
3 Security Act through December 31, 2007.
- 4 2. The claimant has not engaged in substantial gainful activity since  
5 June 1, 2002, the alleged onset date (20 CFR 404.1571 *et seq.* and  
6 416.971 *et seq.*).
- 7 3. The claimant has the following severe impairments: congenital  
8 adynamic left ureter with chronic left pyelonephritis/left kidney  
9 atrophy and stage 1 chronic kidney disease; fibromyalgia  
10 syndrome; and obesity (20 CFR 404.1520(c) and 416.920(c)).
- 11 4. The claimant does not have an impairment or combination of  
12 impairments that meets or medically equals one of the listed  
13 impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR  
14 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and  
15 416.926).
- 16 5. After careful consideration of the entire record, the undersigned  
17 finds that the claimant has the residual functional capacity to  
18 perform light work as defined in 20 CFR 404.1567(b) and  
19 416.967(b) except she can stand and/or walk six hours in an eight-  
20 hour day with normal breaks such as every two hours; she can sit  
21 six hours in an eight-hour day with normal breaks such as every  
22 two hours, with standing and stretching breaks every 30 minutes,  
23 estimated to last one to three minutes at a time; she can lift and/or  
24 carry 10 pounds frequently and 20 pounds occasionally; she can  
25 occasionally stoop and bend; she can climb stairs, but not climb  
26 ladders; she cannot work at heights or balance; she can perform  
occasional neck motion, but should avoid extremes of motion; her  
head should be held in a comfortable position most of the time; she  
can maintain a fixed head position for 15 to 30 minutes at a time  
occasionally; she should not operate motorized vehicles or work  
around unprotected machinery; and she should work in an air-  
conditioned environment.
6. The claimant is capable of performing past relevant work as a  
teacher's aide. This work does not require the performance of  
work-related activities precluded by the claimant's residual  
functional capacity (20 CFR 404.1565 and 416.965).
7. The claimant has not been under a disability, as defined in the

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24 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

25 The claimant bears the burden of proof in the first four steps of the sequential evaluation  
26 process. Bowen, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential  
evaluation process proceeds to step five. Id.

1 Social Security Act, from June 1, 2002, through the date of this  
2 decision (20 CFR 404.1520(f) and 416.920(f)).

3 (CAR 30-36). After the Appeals Council declined review on October 17, 2011, this appeal  
4 followed.

## 5 II. STANDARD OF REVIEW

6 The court reviews the Commissioner's final decision to determine whether it is:  
7 (1) based on proper legal standards; and (2) supported by substantial evidence in the record as a  
8 whole. See Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). "Substantial evidence" is  
9 more than a mere scintilla, but less than a preponderance. See Saelee v. Chater, 94 F.3d 520, 521  
10 (9th Cir. 1996). It is "such evidence as a reasonable mind might accept as adequate to support a  
11 conclusion." Richardson v. Perales, 402 U.S. 389, 402 (1971). The record as a whole, including  
12 both the evidence that supports and detracts from the Commissioner's conclusion, must be  
13 considered and weighed. See Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986); Jones v.  
14 Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not affirm the Commissioner's  
15 decision simply by isolating a specific quantum of supporting evidence. See Hammock v.  
16 Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the administrative  
17 findings, or if there is conflicting evidence supporting a particular finding, the finding of the  
18 Commissioner is conclusive. See Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987).  
19 Therefore, where the evidence is susceptible to more than one rational interpretation, one of  
20 which supports the Commissioner's decision, the decision must be affirmed, see Thomas v.  
21 Barnhart, 278 F.3d 947, 954 (9th Cir. 2002), and may be set aside only if an improper legal  
22 standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th  
23 Cir. 1988).

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1 **III. DISCUSSION**

2 Plaintiff argues the ALJ erred in three ways: (1) the ALJ’s credibility  
3 determination was in error; (2) the ALJ’s residual functional capacity (RFC) analysis was  
4 improper; and (3) the ALJ’s Step 4 determination was erroneous.

5 **A. CREDIBILITY**

6 Plaintiff first argues that the ALJ’s credibility determination was in error. She  
7 argues the ALJ failed to provide specific, clear and convincing reasons for discrediting her  
8 subjective limitations, and improperly relied solely on the objective medical evidence.

9 The Commissioner determines whether a disability applicant is credible, and the  
10 court defers to the Commissioner’s discretion if the Commissioner used the proper process and  
11 provided proper reasons. See Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1996). An explicit  
12 credibility finding must be supported by specific, cogent reasons. See Rashad v. Sullivan, 903  
13 F.2d 1229, 1231 (9th Cir. 1990). General findings are insufficient. See Lester v. Chater, 81 F.3d  
14 821, 834 (9th Cir. 1995). Rather, the Commissioner must identify what testimony is not credible  
15 and what evidence undermines the testimony. See id. Moreover, unless there is affirmative  
16 evidence in the record of malingering, the Commissioner’s reasons for rejecting testimony as not  
17 credible must be “clear and convincing.” See id.; see also Carmickle v. Commissioner, 533 F.3d  
18 1155, 1160 (9th Cir. 2008) (citing Lingenfelter v Astrue, 504 F.3d 1028, 1936 (9th Cir. 2007),  
19 and Gregor v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006)).

20 If there is objective medical evidence of an underlying impairment, the  
21 Commissioner may not discredit a claimant’s testimony as to the severity of symptoms merely  
22 because they are unsupported by objective medical evidence. See Bunnell v. Sullivan, 947 F.2d  
23 341, 347-48 (9th Cir. 1991) (en banc). As the Ninth Circuit explained in Smolen v. Chater:

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1           The claimant need not produce objective medical evidence of the  
2 [symptom] itself, or the severity thereof. Nor must the claimant produce  
3 objective medical evidence of the causal relationship between the  
4 medically determinable impairment and the symptom. By requiring that  
the medical impairment “could reasonably be expected to produce” pain or  
another symptom, the Cotton test requires only that the causal relationship  
be a reasonable inference, not a medically proven phenomenon.

5 80 F.3d 1273, 1282 (9th Cir. 1996) (referring to the test established in Cotton v. Bowen, 799  
6 F.2d 1403 (9th Cir. 1986)).

7           The Commissioner may, however, consider the nature of the symptoms alleged,  
8 including aggravating factors, medication, treatment, and functional restrictions. See Bunnell,  
9 947 F.2d at 345-47. In weighing credibility, the Commissioner may also consider: (1) the  
10 claimant’s reputation for truthfulness, prior inconsistent statements, or other inconsistent  
11 testimony; (2) unexplained or inadequately explained failure to seek treatment or to follow a  
12 prescribed course of treatment; (3) the claimant’s daily activities; (4) work records; and (5)  
13 physician and third-party testimony about the nature, severity, and effect of symptoms. See  
14 Smolen, 80 F.3d at 1284 (citations omitted). It is also appropriate to consider whether the  
15 claimant cooperated during physical examinations or provided conflicting statements concerning  
16 drug and/or alcohol use. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If the  
17 claimant testifies as to symptoms greater than would normally be produced by a given  
18 impairment, the ALJ may disbelieve that testimony provided specific findings are made. See  
19 Carmickle, 533 F.3d at 1161 (citing Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)).

20           As to plaintiff’s credibility, the ALJ stated:

21           After careful consideration of the evidence, the [ALJ] finds that the  
22 claimant’s medically determinable impairments could reasonably  
23 be expected to cause the alleged symptoms; however, the  
24 claimant’s statements concerning the intensity, persistence and  
limiting effects of these symptoms are not credible to the extent  
they are inconsistent with the above residual functional capacity  
assessment.

25 [CAR 34].

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1           The ALJ then reviewed plaintiff's medical evidence related to her kidney  
2 problems, fibromyalgia and back issues. She then summarized the medical opinions in the  
3 record. Thereafter, she determined the residual functional capacity to be supported by the  
4 evidence as a whole, but found:

5           [a]lthough the claimant's subjective complaints are not entirely  
6 supported by the objective medical evidence, the [ALJ] considered  
7 those complaints in the above residual functional capacity  
8 assessment. Despite reporting mental limitations, there is no  
evidence of any mental impairments to support those limitations;  
they are secondary to her pain complaints. No further limitations  
or restrictions are warranted.

9 [CAR 35].

10           Plaintiff argues the ALJ failed to provide sufficient reasons for determining she  
11 was not entirely credible. She argues that the ALJ relied solely on the objective medical  
12 evidence, which is insufficient, failed to provide any other reason in support of the credibility  
13 determination, and failed to discuss any of the credibility factors.

14           Defendant contends that the ALJ did not fully discredit plaintiff, but rather  
15 partially credited plaintiff's allegations and took them into account in the RFC accordingly. In  
16 addition, the ALJ supported her determination based on plaintiff's routine course of treatment  
17 and that her medical records and treatment were largely consistent with Dr. Landua's assessment.  
18 Plaintiff counters that the reasons given by the defendant are not articulated by the ALJ, and are  
19 not supported by the ALJ's decision but by citations to the record.

20           The undersigned finds plaintiff's arguments compelling. While her arguments are  
21 not fully developed or articulated for the court, the undersigned does find the ALJ failed to  
22 support her credibility determination. Originally stating that plaintiff's subjective complaints are  
23 not entirely credible, the ALJ then states she has considered those complaints in determining the  
24 RFC. However, the ALJ fails to articulate what testimony was not credible and what evidence  
25 undermined that testimony. Reviewing the record, it would appear that the ALJ credited  
26 plaintiff's testimony as to her need to change positions often, and not being able to sit or stand

1 for long periods of time. However, plaintiff also testified to a need to lie down or nap often,  
2 having on average three bad days a week wherein she is unable to do much, and has side effects  
3 from medication which makes her tired. None of these limitations were specifically addressed by  
4 the ALJ, and therefore no reasons given as to why plaintiff's assertion of these limitations were  
5 not credible.

6 As stated above, general findings are insufficient. The ALJ is required to specify  
7 what testimony is not credible, and what evidence undermines that testimony. Here, the ALJ  
8 erroneously failed to do so.

#### 9 **B. RESIDUAL FUNCTIONAL CAPACITY**

10 Next plaintiff argues the ALJ's RFC analysis was improper as she failed to  
11 explain why she was crediting the medical opinions.

12 The undersigned finds this conclusory argument inadequate. Plaintiff fails to  
13 articulate how the ALJ erred in accepting the uncontroverted medical opinions. The ALJ did not  
14 indicate there were conflicting medical opinions nor that she was rejecting a medical opinion.  
15 Similarly, plaintiff does not point to any conflicting medical opinion or evidence which would  
16 give rise to the ALJ's need to resolve the conflict.

17 Accordingly, the undersigned finds no error in the ALJ's acceptance of the  
18 medical opinions on which the RFC was based.

#### 19 **C. VOCATIONAL EXPERT**

20 Finally, plaintiff contends the ALJ erred in her determination that she was able to  
21 perform her past relevant work. As the court understands this argument, it relates to the  
22 vocational expert's (VE) testimony that plaintiff could perform the job of teacher's aide based on  
23 the limitations the ALJ found. Defendant interprets this argument as a conflict between the VE's  
24 testimony and the Dictionary of Occupational Titles (DOT).

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Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment (Doc. 17) is granted;
2. Defendant's cross-motion for summary judgment (Doc. 18) is denied;
3. This matter is remanded for further proceedings consistent with this order;
4. The Clerk of the Court is directed to enter judgment and close this case.

and

DATED: February 24, 2014

  
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**CRAIG M. KELLISON**  
UNITED STATES MAGISTRATE JUDGE