



1 I. Background

2 On October 22, 2012, plaintiff filed applications for DIB and SSI, alleging that she had  
3 been disabled since June 1, 2012. Administrative Record (“AR”) at 101-04; 597-507. Plaintiff’s  
4 application was denied initially (*id.* at 65-65D) and upon reconsideration by the Commissioner  
5 (*id.* at 66-71). Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”) (*id.* at  
6 72-73), and a hearing was held on September 11, 2014 before ALJ Carol Eckersen. *Id.* at 531.  
7 Plaintiff was represented by an attorney at this hearing. *Id.* at 531-75. Plaintiff testified at the  
8 hearing, as did a vocational expert. *Id.*

9 The ALJ issued a decision on February 27, 2015 and found that, based on the DIB  
10 application, plaintiff was not disabled under sections 216(i) and 223(d) of the Act.<sup>1</sup> *Id.* at 30.

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

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

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

26 Step three: Does the claimant’s impairment or combination  
27 of impairments meet or equal an impairment listed in 20 C.F.R., Pt.  
28 404, 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.

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

27 The claimant bears the burden of proof in the first four steps of the sequential evaluation  
28 process. *Yuckert*, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential

1 The ALJ also found that, based on the SSI application, plaintiff was not disabled under section  
2 1614(a)(3)(A) of the Act. *Id.* She made the following specific findings:

3 1. The claimant meets the insured status requirements of the Social Security Act through  
4 March 31, 2015.

5 \* \* \*

6 2. The claimant has not engaged in substantial gainful activity since June 1, 2012, the  
7 alleged onset date (20 CFR 404.1571 *et seq.*, and 416.971 *et seq.*).

8 \* \* \*

9 3. The claimant has the following severe impairments: degenerative disc disease of the  
10 lumbar spine and bilateral carpal tunnel syndrome, status post bilateral carpal tunnel  
11 release surgery (20 CFR 404.1520(c) and 416.920(c)).

12 \* \* \*

13 4. The claimant does not have an impairment or combination of impairments that meets or  
14 medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart  
15 P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and  
16 416.926).

17 \* \* \*

18 5. After careful consideration of the entire record, I find that the claimant has the residual  
19 functional capacity to perform light work as defined in 20 CFR 404.1567(b) and  
20 416.967(b) except with additional postural limitations restricting her to no more than  
21 occasional climbing of ramps and chairs with no climbing of ladders, ropes or scaffolds,  
22 and occasional crawling, crouching, kneeling and stooping, and manipulative limitations  
23 restricting her to no more than frequent handling and fingering with her right upper  
24 extremity.

25 \* \* \*

26 6. The claimant is capable of performing past relevant work as a EKG technician. This work  
27 does not require the performance of work-related activities precluded by the claimant's  
28 residual functional capacity (20 CFR 404.1565 and 416.965).

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7. The claimant has not been under a disability, as defined in the Social Security Act, from  
June 1, 2012, through the date of this decision (20 CFR 404.1520(f) and 416.920(f)).

*Id.* at 15-30.

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evaluation process proceeds to step five. *Id.*

1 Plaintiff's request for Appeals Council review was denied on August 2, 2016, leaving the  
2 ALJ's decision as the final decision of the Commissioner. *Id.* at 6-9.

3 II. Legal Standards of Review

4 The Commissioner's decision that a claimant is not disabled will be upheld if the findings  
5 of fact are supported by substantial evidence in the record and the proper legal standards were  
6 applied. *Schneider v. Comm'r of the Soc. Sec. Admin.*, 223 F.3d 968, 973 (9th Cir. 2000);  
7 *Morgan v. Comm'r of the Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999); *Tackett v. Apfel*,  
8 180 F.3d 1094, 1097 (9th Cir. 1999).

9 The findings of the Commissioner as to any fact, if supported by substantial evidence, are  
10 conclusive. *See Miller v. Heckler*, 770 F.2d 845, 847 (9th Cir. 1985). Substantial evidence is  
11 more than a mere scintilla, but less than a preponderance. *Saelee v. Chater*, 94 F.3d 520, 521 (9th  
12 Cir. 1996). "It means such evidence as a reasonable mind might accept as adequate to support a  
13 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v.*  
14 *N.L.R.B.*, 305 U.S. 197, 229 (1938)).

15 "The ALJ is responsible for determining credibility, resolving conflicts in medical  
16 testimony, and resolving ambiguities." *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.  
17 2001) (citations omitted). "Where the evidence is susceptible to more than one rational  
18 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld."  
19 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

20 III. Analysis

21 Plaintiff argues that: (1) this case should be remanded for additional administrative  
22 proceedings so that the Commissioner can consider an MRI that was taken after the ALJ issued  
23 her decision; (2) that the ALJ erred in failing to account for claimant's mental impairments in the  
24 residual functional capacity; (3) that the ALJ improperly discounted the opinions of Dr. Palatnik  
25 and family nurse practitioner Makovey; and (4) that the ALJ improperly discounted plaintiff's

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1 testimony regarding her pain symptoms. As discussed below, the court finds merit in plaintiff's  
2 fourth argument and remands this matter for further administrative proceedings.<sup>2</sup>

3 A. Relevant Legal Standards

4 In evaluating whether subjective complaints are credible, the ALJ should first consider  
5 objective medical evidence and then consider other factors. *Bunnell v. Sullivan*, 947 F.2d 341,  
6 344 (9th Cir. 1991) (en banc). If there is objective medical evidence of impairment, the ALJ may  
7 then consider the nature of the symptoms alleged, including aggravating factors, medication,  
8 treatment, and functional restrictions. *See id.* at 345-347. The ALJ also may consider: (1) the  
9 applicant's reputation for truthfulness, prior inconsistent statements or other inconsistent  
10 testimony, (2) unexplained or inadequately explained failure to seek treatment or to follow a  
11 prescribed course of treatment, and (3) the applicant's daily activities. *Smolen v. Chater*, 80 F.3d  
12 1273, 1284 (9th Cir. 1996). Work records, physician and third party testimony about nature,  
13 severity and effect of symptoms, and inconsistencies between testimony and conduct also may be  
14 relevant. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). A failure to seek  
15 treatment for an allegedly debilitating medical problem may be a valid consideration by the ALJ  
16 in determining whether the alleged associated pain is not a significant nonexertional impairment.  
17 *See Flaten v. Secretary of HHS*, 44 F.3d 1453, 1464 (9th Cir. 1995). The ALJ may rely, in part,  
18 on his or her own observations, *see Quang Van Han v. Bowen*, 882 F.2d 1453, 1458 (9th Cir.  
19 1989), which cannot substitute for medical diagnosis. *Marcia v. Sullivan*, 900 F.2d 172, 177 n. 6  
20 (9th Cir. 1990). "Without affirmative evidence showing that the claimant is malingering, the  
21 Commissioner's reasons for rejecting the claimant's testimony must be clear and convincing."  
22 *Morgan*, 169 F.3d at 599. Finally, it must be noted that, while the ALJ should begin by  
23 considering the objective medical evidence, she "may not reject a claimant's subjective  
24 complaints based solely on a lack of objective medical evidence to fully corroborate the alleged  
25 severity of pain." *Bunnell*, 947 F.2d at 345.

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<sup>2</sup> Given this finding, the court declines to address plaintiff's remaining arguments.

1                   B. Background

2                   Plaintiff testified that she had pain in her thoracic spine, headaches connected to blood  
3 pressure, chest pain, and a carpal tunnel condition that had not improved with treatment. AR at  
4 556-57. She also testified that she had “constant stiffness” in her lumbar spine, so much so that it  
5 was difficult to turn onto her side at night. *Id.* at 559. Finally, she testified that she had recently  
6 (and in the past) experienced “very intense” pain in her left leg and back. *Id.* at 561. Based on  
7 her history of carpal tunnel, plaintiff testified that she had difficulty performing home tasks that  
8 involved using her hands. *Id.*

9                   The ALJ discounted plaintiff’s testimony regarding pain, stating:

10                   The claimant’s medically determinable impairments could  
11 reasonably be expected to cause some of the claimant’s alleged  
12 symptoms. However, the claimant’s statements concerning the  
13 intensity, persistence and limiting effects of these symptoms are not  
14 entirely credible. The claimant’s history of physical examinations  
15 are mostly benign and disproportionate to the chronicity, intensity  
16 and frequency of pain that she contends. The claimant’s reports  
17 that she does virtually no household chores or very little physical  
18 activity is not consistent with lack of positive objective findings  
19 upon her examination history. Despite the claimant’s complaints of  
20 debilitating pain, there have been few corresponding signs of  
21 tenderness on examination.

22 *Id.* at 28.

23                   C. Argument

24                   The ALJ has failed to offer sufficient reasons for discounting plaintiff’s subjective  
25 testimony regarding her pain. She cited the discrepancy between plaintiff’s treatment records and  
26 her complaints but did not, as was required, explicitly address any other factors in her decision.  
27 *See Bunnell*, 947 F.2d at 345; *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (holding  
28 that “subjective pain testimony cannot be rejected on the sole ground that it is not fully  
corroborated by objective medical evidence . . .”); 20 C.F.R. § 404.1529(c)(2) (“However, we  
will not reject your statements about the intensity and persistence of your pain or other symptoms  
or about the effect your symptoms have on your ability to work solely because the available  
objective medical evidence does not substantiate your statements.”). In her cross-motion, the  
Commissioner argues that the ALJ *did* provide additional reasons for discounting plaintiff’s

1 testimony, namely that plaintiff's testimony regarding her daily activities was inconsistent with  
2 her assertions of disabling pain. ECF No. 17 at 15. The Commissioner points to treatment  
3 records which state that medication "enables [plaintiff] to perform activities of daily life easier."  
4 AR at 408, 428. This argument is simply a restatement of the ALJ's finding that plaintiff's  
5 treatment records were inconsistent with her subjective pain testimony. It is far from obvious that  
6 this finding is actually inconsistent with plaintiff's testimony. Axiomatically, "easier" is not the  
7 same as "easy." It might well be that the beneficial effects of medication simply transform  
8 impossible tasks into difficult ones. The records cited by the Commissioner are silent on this  
9 point and the court declines to make inferences, favorable or unfavorable. In any event, the ALJ  
10 did not cite these records in her determination and, thus, they cannot save the inadequately  
11 supported decision to discount plaintiff's subjective testimony. *See Hernandez v. Colvin*, 2014  
12 U.S. Dist. LEXIS 5411, 2014 WL 185742, at \*3 (C.D. Cal. Jan. 15, 2014) ("Whether accurate or  
13 inaccurate, the 'reasons' gleaned by [the Commissioner] but not specifically and expressly stated  
14 by the ALJ as the reason(s) for the credibility determination cannot properly form the basis for a  
15 judicial affirmance of the credibility determination.").

16 The error in this case cannot be considered harmless. Where some of an ALJ's reasons  
17 for an adverse credibility determination are legally insufficient, the Court must consider whether  
18 the reliance on invalid reasons was a harmless error. *See Batson v. Comm'r of the Soc. Sec.*  
19 *Admin.*, 359 F.3d 1190, 1195-97 (9th Cir. 2003) (applying a harmless error standard where the  
20 credibility finding was invalid). The Ninth Circuit stated that, "[s]o long as there remains  
21 'substantial evidence supporting the ALJ's conclusion's on credibility' and the error 'does not  
22 negate the validity of the ALJ's ultimate credibility conclusion,' such [error] is deemed harmless."  
23 *Carmickle v. Comm'r of the Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (quoting  
24 *Batson*, 359 F.3d at 1197). Here, there were no other explicit reasons supporting the adverse  
25 determination.

26 The only remaining question is whether to remand for additional administrative  
27 proceedings or the award of benefits. "The decision whether to remand a case for additional  
28 evidence, or simply to award benefits is within the discretion of the court." *Sprague v. Bowen*,

1 812 F.2d 1226, 1232 (9th Cir. 1987). A court should remand for further administrative  
2 proceedings, however, unless it concludes that such proceedings would not serve a useful  
3 purpose. *Dominguez v. Colvin*, 808 F.3d 403, 407 (9th Cir. 2016). The court cannot say that  
4 additional proceedings would have no utility in the present case. That the ALJ failed to provide  
5 sufficient reasons for discounting plaintiff's subjective testimony in this instance does not compel  
6 a finding that she is *unable* do so. Additionally, the potential generation of additional medical  
7 evidence in the intervening years may prove enlightening. *See Treichler v. Comm'r of Soc. Sec.*,  
8 775 F.3d 1090, 1101 (9th Cir. 2014) (additional proceedings have utility where "there is a need to  
9 resolve conflicts and ambiguities, . . . or the presentation of further evidence . . . may well prove  
10 enlightening in light of the passage of time.") (internal quotations and quotation marks omitted).

11 IV. Conclusion

12 Accordingly, it is hereby ORDERED that:

- 13 1. Plaintiff's motion for summary judgment (ECF No. 16) is granted;
- 14 2. The Commissioner's cross-motion for summary judgment (ECF No. 17) is denied;
- 15 3. This matter is remanded for additional administrative proceedings; and
- 16 4. The Clerk is directed to enter judgment in plaintiff's favor and close the case.

17 DATED: March 21, 2018.

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19 EDMUND F. BRENNAN  
20 UNITED STATES MAGISTRATE JUDGE