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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TEENA S. FERRERRA,

 Plaintiff,

 v.

ANDREW SAUL, Commissioner of Social
Security,

 Defendant.

No. 2:18-cv-03081 JAM CKD

FINDINGS AND RECOMMENDATIONS

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying an application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act (“Act”). For the reasons discussed below, the undersigned Magistrate Judge will recommend that plaintiff’s motion for summary judgment’s be granted and the Commissioner’s cross-motion for summary judgment be denied.

BACKGROUND

Plaintiff, born in 1964, applied on July 19, 2014 for SSI and disability insurance benefits, alleging disability beginning June 30, 2014. Administrative Transcript (“AT”) 16, 27. Plaintiff alleged she was unable to work due to post-traumatic stress syndrome, depression, bipolar disorder, hepatitis C, diabetes, neuropathy in her hands and feet, and a diabetic ulcer on her right foot followed by infection and amputation. AT 22, 85. In a decision dated December 15, 2017,

1 the ALJ determined that plaintiff was not disabled.¹ AT 16-28. The ALJ made the following
2 findings (citations to 20 C.F.R. omitted):

- 3 1. The claimant meets the insured status requirements of the Social
4 Security Act through December 31, 2019.
- 5 2. The claimant has not engaged in substantial gainful activity since
6 June 30, 2014, the amended alleged onset date.
- 7 3. The claimant has the following severe impairments: obesity, type
8 1 diabetes mellitus with neuropathy and related complications,
9 including amputation of the left second toe; bipolar disorder; anxiety
10 disorder, with possible posttraumatic stress disorder, and
11 polysubstance dependence in partial remission.
- 12 4. The claimant does not have an impairment or combination of
13 impairments that meets or medically equals one of the listed

14 ¹ Disability Insurance Benefits are paid to disabled persons who have contributed to the
15 Social Security program, 42 U.S.C. § 401 et seq. Supplemental Security Income is paid to
16 disabled persons with low income. 42 U.S.C. § 1382 et seq. Both provisions define disability, in
17 part, as an “inability to engage in any substantial gainful activity” due to “a medically
18 determinable physical or mental impairment. . . .” 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A).
19 A parallel five-step sequential evaluation governs eligibility for benefits under both programs.
20 See 20 C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S.
21 137, 140-142, 107 S. Ct. 2287 (1987). The following summarizes the sequential evaluation:

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

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

28 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.

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. Bowen, 482 U.S. at 146 n.5, 107 S. Ct. at 2294 n.5. The Commissioner bears the
burden if the sequential evaluation process proceeds to step five. Id.

1 impairments in 20 CFR Part 404, Subpart P, Appendix 1.

2 5. After careful consideration of the entire record, the undersigned
3 finds that the claimant has the residual functional capacity to perform
4 light work except she is limited to simple routine tasks, to simple
5 workplace decisions, and to frequent interaction with the public. She
6 is limited to occasional use of foot controls and frequent handling
7 and fingering, bilaterally. The claimant requires a sit-stand option
8 alternating every 45 minutes with time off-task.

9 6. The claimant is unable to perform any past relevant work.

10 7. The claimant was born on XX/XX 1964 and was 49 years old,
11 which is defined as a younger individual age 18-49, on the alleged
12 disability onset date. The claimant subsequently changed age
13 category to closely approaching advanced age.

14 8. The claimant has at least a high-school education and is able to
15 communicate in English.

16 9. Transferability of job skills is not material to the determination of
17 disability because using the Medical-Vocational Rules as a
18 framework supports a finding that the claimant is ‘not disabled,’
19 whether or not the claimant has transferable job skills.

20 10. Considering the claimant’s age, education, work experience, and
21 residual functional capacity, there are jobs that exist in significant
22 numbers in the national economy that the claimant can perform.

23 11. The claimant has not been under a disability, as defined in the
24 Social Security Act, from June 30, 2014, through the date of this
25 decision.

26 AT 16-28.

27 ISSUES PRESENTED

28 Plaintiff argues that the ALJ committed the following errors in finding plaintiff not
disabled: (1) the ALJ improperly weighed the medical opinion evidence; (2) the ALJ improperly
rejected plaintiff’s testimony; and (3) the ALJ’s Step Five finding is not supported by substantial
evidence.

LEGAL STANDARDS

The court reviews the Commissioner’s decision to determine whether (1) it is based on
proper legal standards pursuant to 42 U.S.C. § 405(g), and (2) substantial evidence in the record
as a whole supports it. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial
evidence is more than a mere scintilla, but less than a preponderance. Connett v. Barnhart, 340

1 F.3d 871, 873 (9th Cir. 2003) (citation omitted). It means “such relevant evidence as a reasonable
2 mind might accept as adequate to support a conclusion.” Orn v. Astrue, 495 F.3d 625, 630 (9th
3 Cir. 2007), quoting Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). “The ALJ is
4 responsible for determining credibility, resolving conflicts in medical testimony, and resolving
5 ambiguities.” Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001) (citations omitted).
6 “The court will uphold the ALJ’s conclusion when the evidence is susceptible to more than one
7 rational interpretation.” Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

8 The record as a whole must be considered, Howard v. Heckler, 782 F.2d 1484, 1487 (9th
9 Cir. 1986), and both the evidence that supports and the evidence that detracts from the ALJ’s
10 conclusion weighed. See Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not
11 affirm the ALJ’s decision simply by isolating a specific quantum of supporting evidence. Id.; see
12 also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the
13 administrative findings, or if there is conflicting evidence supporting a finding of either disability
14 or nondisability, the finding of the ALJ is conclusive, see Sprague v. Bowen, 812 F.2d 1226,
15 1229-30 (9th Cir. 1987), and may be set aside only if an improper legal standard was applied in
16 weighing the evidence. See Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).

17 ANALYSIS

18 A. Credibility

19 The undersigned first reviews plaintiff’s claim that the ALJ failed to provide legally
20 sufficient reasons to discount plaintiff’s credibility as to her subjective symptoms.

21 Citing hearing testimony and the record, the ALJ summarized plaintiff’s subjective
22 statements as follows:

23 The claimant alleges experiencing constant thoughts of suicide,
24 constant bilateral foot pain, crying spells, tingling in the hands,
25 decreased grip strength, difficulty doing activities requiring fine
26 manipulation, and difficulty sitting for long periods. She claims that
27 she is unable to feel her toes and feet and has a limited ability to walk
28 and stand. She claims that she needs to use a wheelchair due to a
foot ulcer followed by amputation surgery. She claims that her
conditions affect her ability to sleep, lift, squat, bend, stand, reach,
walk, kneel, talk, climb stairs, see, remember, complete tasks,
concentrate, and use her hands.

1 AT 22. Following this summary, the ALJ found that plaintiff’s “statements concerning the
2 intensity, persistence and limiting effects of these symptoms are not entirely consistent with the
3 medical evidence and other evidence in the record for the reasons explained in this decision.” AT
4 22.

5 The ALJ next summarized the medical opinion evidence as to physical impairment, giving
6 no weight to the 2015 opinions of the state agency consultants “because evidence entered into the
7 record after the doctors issued their opinions supports a finding of severe impairments with
8 significant limitations.” AT 23. The ALJ gave partial weight to the opinion of examining
9 physician Dr. Shahid Ali, who performed a comprehensive internal medicine evaluation of
10 plaintiff in April 2017 and opined as to her functional limitations.² AT 23, citing AT 836-846.

11 The ALJ then summarized the medical record as to physical impairment. AT 23-24. The
12 record indicated that plaintiff had a diabetic right foot ulcer in 2015, that her diabetes was
13 “uncontrolled secondary to poor medication compliance and poor diet,” and that she was
14 hospitalized twice in 2015, the second time for amputation of her second left toe after her feet
15 became infected after sustaining burns. AT 23. The ALJ further noted that plaintiff started
16 treatment with an endocrinologist in April 2016 but, by November 2016, “had not seen her
17 endocrinologist for several months.” AT 23-24. The ALJ noted Dr. Ali’s April 2017 finding that
18 plaintiff “sat comfortably; was able to walk into the exam room, get on and off the exam table,
19 and take her shoes off and on without difficulty; and had negative straight leg raises, normal deep
20 tendon reflexes in the upper and lower extremities, and intact cranial nerves.” AT 24, citing AT
21 836-846.

22 “Based upon the claimant’s subjective complaints, her treatment history with gaps in
23 treatment, her noncompliance with diabetic treatment, the endocrinologist treatment notes with
24 overall negative findings, and her varied activities of daily living . . . , the undersigned finds the
25 claimant’s physical impairments to be well-accommodated for by the residual functional
26 capacity,” the ALJ concluded. AT 24. While the ALJ incorporated plaintiff’s subjective
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28 ² The ALJ’s weighing of medical opinions is the subject of a separate claim.

1 complaints into the RFC to some unknown degree, the decision did not explain what parts of
2 plaintiff's physical symptom testimony were not credible, or how the credited opinion evidence
3 and/or medical record cast doubt on plaintiff's testimony as to her symptoms.

4 The ALJ next turned to the opinion evidence as to mental impairment. AT 24-25. The
5 ALJ assigned various weights to these opinions and plaintiff's Global Assessment of Function
6 (GAF) scores, which indicated "serious impairment in social, occupational, or school
7 functioning" (AT 25), but did not relate them back to plaintiff's testimony or explain how the
8 credited opinions undercut plaintiff's statements about her symptoms. Similarly, the ALJ
9 summarized the mental health treatment record but did not explain what parts of the record
10 rendered plaintiff's subjective testimony less than credible. AT 25-26.

11 Earlier in the decision, the ALJ explained why she declined to credit two specific
12 statements by plaintiff. "[Plaintiff] claims that she does not spend time with others," the ALJ
13 wrote, "but she also has no problems getting along with family, friends, neighbors, or others. She
14 has never been fired or laid off from a job because of problems getting along with other people."
15 AT 20, citing AT 276-283. "[Plaintiff] claims that she does not finish what she starts," the ALJ
16 noted, citing in contrast plaintiff's normal thought processes, normal mental status examinations,
17 and ability to do simple math and spelling problems. AT 20-21. This reasoning factored into the
18 ALJ's conclusion that plaintiff had no more than moderate limitations in interacting with others,
19 concentrating, persisting, or maintaining pace. AT 20-21. Yet, the ALJ's decision did not assess
20 how plaintiff's other subjective complaints stacked up against the record evidence. The ALJ
21 concluded that plaintiff's mental limitations were "well-accommodated for by the [RFC] based on
22 [plaintiff's] subjective complaints" and several other factors. AT 26.

23 The ALJ determines whether a disability applicant is credible, and the court defers to the
24 ALJ's discretion if the ALJ used the proper process and provided proper reasons. See, e.g.,
25 Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1995). If credibility is critical, the ALJ must make an
26 explicit credibility finding. Albalos v. Sullivan, 907 F.2d 871, 873-74 (9th Cir. 1990); Rashad v.
27 Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990) (requiring explicit credibility finding to be
28 supported by "a specific, cogent reason for the disbelief").

1 In evaluating whether subjective complaints are credible, the ALJ should first consider
2 objective medical evidence and then consider other factors. Bunnell v. Sullivan, 947 F.2d 341,
3 344 (9th Cir. 1991) (en banc). If there is objective medical evidence of an impairment, the ALJ
4 then may consider the nature of the symptoms alleged, including aggravating factors, medication,
5 treatment and functional restrictions. See id. at 345-47. The ALJ also may consider: (1) the
6 applicant’s reputation for truthfulness, prior inconsistent statements or other inconsistent
7 testimony, (2) unexplained or inadequately explained failure to seek treatment or to follow a
8 prescribed course of treatment, and (3) the applicant’s daily activities. Smolen v. Chater, 80 F.3d
9 1273, 1284 (9th Cir. 1996); see generally SSR 96-7P, 61 FR 34483-01; SSR 95-5P, 60 FR 55406-
10 01; SSR 88-13. Work records, physician and third party testimony about nature, severity and
11 effect of symptoms, and inconsistencies between testimony and conduct also may be relevant.
12 Light v. Social Security Administration, 119 F.3d 789, 792 (9th Cir. 1997). A failure to seek
13 treatment for an allegedly debilitating medical problem may be a valid consideration by the ALJ
14 in determining whether the alleged associated pain is not a significant nonexertional impairment.
15 See Flaten v. Secretary of HHS, 44 F.3d 1453, 1464 (9th Cir. 1995). The ALJ may rely, in part,
16 on his or her own observations, see Quang Van Han v. Bowen, 882 F.2d 1453, 1458 (9th Cir.
17 1989), which cannot substitute for medical diagnosis. Marcia v. Sullivan, 900 F.2d 172, 177 n.6
18 (9th Cir. 1990). “Without affirmative evidence showing that the claimant is malingering, the
19 Commissioner’s reasons for rejecting the claimant’s testimony must be clear and convincing.”
20 Morgan v. Commissioner of Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

21 In Brown-Hunter v. Colvin, 806 F.3d 487, 494 (9th Cir. 2015), the Ninth Circuit held that
22 an ALJ’s failure “to identify the testimony she found not credible” and “link that testimony to
23 particular parts of the record supporting her non-credibility determination” was legal error. See
24 also Treichler v. Comm’r of Soc. Sec., 775 F.3d 1090, 1102-1103 (9th Cir. 2014) (ALJ’s failure
25 to “specifically identify the testimony” he found not credible was error; boilerplate statement that
26 symptoms were not credible to the extent they were inconsistent with the RFC was insufficient);
27 Morsea v. Berryhill, 725 Fed. Appx. 463, 465 (9th Cir. Feb. 12, 2018) (unpublished) (ALJ “failed
28 to identify the testimony from the claimant found not credible and explain what evidence

1 undermined his testimony. Although the ALJ summarized claimant’s testimony and also
2 summarized the medical evidence in the record, the findings were general in nature, which is
3 insufficient for an adverse credibility determination.”), citing Treichler, 775 F.3d at 1102.

4 Here, the ALJ concluded that plaintiff’s subjective statements about her symptoms were
5 “not entirely consistent with the medical evidence and other evidence in the record for the reasons
6 explained in this decision.” AT 22. But “[a]n ALJ’s vague allegation that a claimant’s testimony
7 is not consistent with the objective medical evidence, without any specific findings in support of
8 that conclusion is insufficient[.]” Treichler, 775 F.3d at 1103 (internal quotations and citation
9 omitted). “The ALJ must identify the testimony that was not credible, and specify what evidence
10 undermines the claimant’s complaints.” Id., citing Reddick v. Chater, 157 F.3d 715, 722 (9th Cir.
11 1998) (internal quotations omitted). Thus, the ALJ’s general references to the medical record and
12 opinion evidence, at least some of which could be read to support plaintiff’s testimony, are not
13 legally sufficient reasons to discount her credibility. The undersigned finds that plaintiff is
14 entitled to summary judgment on this claim.³

15 CONCLUSION

16 With error established, the court has the discretion to remand or reverse and award
17 benefits. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989). A case may be remanded
18 under the “credit-as-true” rule for an award of benefits where:

19 (1) the record has been fully developed and further administrative
20 proceedings would serve no useful purpose; (2) the ALJ has failed to
21 provide legally sufficient reasons for rejecting evidence, whether
22 claimant testimony or medical opinion; and (3) if the improperly
discredited evidence were credited as true, the ALJ would be
required to find the claimant disabled on remand.

23 Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir. 2014). Even where all the conditions for the
24 “credit-as-true” rule are met, the court retains “flexibility to remand for further proceedings when
25 the record as a whole creates serious doubt as to whether the claimant is, in fact, disabled within
26 the meaning of the Social Security Act.” Id. at 1021; see also Dominguez v. Colvin, 808 F.3d
27

28 ³ These findings and recommendations do not reach the remaining claims.

1 403, 407 (9th Cir. 2015) (“Unless the district court concludes that further administrative
2 proceedings would serve no useful purpose, it may not remand with a direction to provide
3 benefits.”); Treichler, 775 F.3d at 1105 (“Where . . . an ALJ makes a legal error, but the record is
4 uncertain and ambiguous, the proper approach is to remand the case to the agency.”).

5 Here, the record as a whole creates serious doubt as to whether plaintiff was disabled
6 during the relevant period. On remand, the ALJ is free to develop the record as needed, including
7 asking a vocational expert hypothetical questions about available jobs based on a revised RFC.
8 The court expresses no opinion regarding how the evidence should ultimately be weighed, and
9 any ambiguities or inconsistencies resolved, on remand. The court also does not instruct the ALJ
10 to credit any particular opinion or testimony. The ALJ may ultimately find plaintiff disabled
11 during the entirety of the relevant period; may find plaintiff eligible for some type of closed
12 period of disability benefits; or may find that plaintiff was never disabled during the relevant
13 period, provided that the ALJ’s determination complies with applicable legal standards and is
14 supported by the record as a whole.

15 Thus, the undersigned will order that this matter be remanded under sentence four of 42
16 U.S.C. § 405(g) for further administrative proceedings.

17 For the reasons stated herein, IT IS HEREBY RECOMMENDED that:

- 18 1. Plaintiff’s motion for summary judgment (ECF No. 17) be granted;
- 19 2. The Commissioner’s cross-motion for summary judgment (ECF No. 18) be denied;
- 20 3. This matter be remanded for further proceedings consistent with these findings and
21 recommendations.

22 These findings and recommendations are submitted to the United States District Judge
23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
24 after being served with these findings and recommendations, any party may file written
25 objections with the court and serve a copy on all parties. Such a document should be captioned
26 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections

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1 within the specified time may waive the right to appeal the District Court's order. Martinez v.
2 Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: April 27, 2020



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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