UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SUZIE STEEN, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	No. 07-1395 SC ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter is before the Court on cross-motions for summary judgment filed by the plaintiff Suzie Steen ("Plaintiff" or "Claimant") and the defendant Michael J. Astrue ("Defendant"). Docket Nos. 14, 20. Plaintiff submitted a Reply. Docket No. 23. Plaintiff seeks review and reversal of the Social Security Commissioner's final decision denying her claim for Social Security Disability Insurance benefits. For the reasons set forth below, the Court GRANTS Plaintiff's Motion for Summary Judgment and DENIES Defendant's Cross-Motion for Summary Judgment.

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II. BACKGROUND

A. Procedural

Plaintiff, 56 years old, applied for Title II disability insurance benefits in August 2004, alleging onset of disability in February of 2004. Administrative Record ("AR") 65. The claim was denied initially and again on reconsideration. AR 25. Plaintiff then requested and was granted a hearing before an Administrative Law Judge ("ALJ"). Id. On January 23, 2006, Plaintiff, represented by counsel, appeared and testified at the hearing. Id. In addition, a vocational expert ("VE") testified. Id. In July 2006, the ALJ issued a decision finding that Plaintiff was not disabled. AR 31. The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied Plaintiff's request for review. AR 5-9. Plaintiff subsequently filed the present action seeking judicial review of the Commissioner's decision pursuant to 42 U.S.C. § 405(g).

B. Medical

Plaintiff, an avid recreational runner for many years, has a high school education and stopped working on February 2, 2004. AR 74, 313. Plaintiff admits that she stopped working because of the need to enter treatment for addiction to pain killers. AR 213, 220, 245. By all accounts, Plaintiff remained drug and alcohol free after entering treatment in February 2004. AR 26. The ALJ described Plaintiff's medical history as follows: "The medical record consists mainly of treatment notes from Kaiser, which reveal longstanding complaints of pain and fatigue, for which the claimant has undergone extensive testing and has been prescribed

numerous medications." AR 26. The ALJ also found that Plaintiff suffers from "severe" impairments, as defined under the Social Security Regulations. These impairments include fibromyalgia, rheumatoid arthritis, and Sjogren's syndrome.[1] AR 31. The Court notes that, according to the Administrative Record, Plaintiff has sought medical care more than thirty times since 1999. At the overwhelming majority of these visits, Plaintiff complained of excessive fatigue and chronic pain, especially in her shoulders, neck, and back. See, e.g., AR 131, 135, 139, 141, 149, 152, 171, 213, 237, 285, 292.

III. LEGAL STANDARD

To qualify for disability benefits, a claimant must show that he or she is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months . . . ." 42 U.S.C. § 423(d)(1)(A). In making this determination, "an ALJ conducts a five step inquiry. 20 C.F.R. §§ 404.1520 & 416.920." Lewis v. Apfel, 236 F.3d 503, 508 (9th Cir. 2001).

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[1] Fibromyalgia is marked by chronic musculoskeletal pain syndrome. AR 348 (report by Dr. Ken Fye, Professor of Clinical Medicine at University California San Francisco Medical Center). Sjogren's Syndrome "is an autoimmune disease in which the body's immune system mistakenly attacks its own moisture glands. . . . Sjogren's may . . . cause dryness of other organs [besides the eyes and mouth], affecting the kidneys, GI tract, blood vessels, lung, liver, pancreas, and the central nervous system. Many patients experience debilitating fatigue and joint pain." AR 125 (citing www.sjogrens.org).

> The ALJ first considers whether the claimant is engaged in substantial gainful activity; if not, the ALJ asks in the second step whether the claimant has a severe impairment (i.e., one that significantly affects his or her ability to function); if so, the ALJ asks in the third step whether the claimant's condition meets or equals one of those outlined in the Listing of Impairments in Appendix 1 of the Regulations [20 C.F.R. §§ 404.1520(d) & 416.920(d)]; if not, then in the fourth step the ALJ asks whether the claimant can perform in his or her past relevant work; if not, finally, the ALJ in the fifth step asks whether the claimant can perform other jobs that exist in substantial numbers in the national economy. 20 C.F.R. §§ 404.1520(b)-404.1520(f)(1) & 416.920(b)-416.920(f)(1).

Id.

Courts may set aside a decision of the ALJ if it is not supported by substantial evidence. 42 U.S.C. § 405(g); Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001). "Substantial evidence" is the relevant evidence which a reasonable person might accept as adequate to support the ALJ's conclusion. Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). In order to be "substantial," the evidence must amount to "more than a scintilla," but need not rise to the level of a preponderance. Holohan, 246 F.3d at 1202. Where the evidence could reasonably support either affirming or reversing the ALJ's decision, a court may not substitute its judgment for the ALJ's decision. Id.

IV. DISCUSSION

Plaintiff raises numerous arguments regarding the ALJ's findings at steps two, three, four, and five. The Court addresses

these in turn.

A. Depressive Disorder

Plaintiff argues that the ALJ erred by not finding her depressive disorder to also be a "severe" impairment at step two. The Social Security Regulations define "severe" as "any impairment or combination of impairments which significantly limits [a claimant's] physical or mental ability to do basic work activities." 20 C.F.R. § 404.1520(c). The primary evidence relied on by Plaintiff in support of her claim that her depression is severe is a psychological evaluation conducted by Dr. Richard Kjelson in October 2004. AR 218. Dr. Kjelson stated, in part:

> The subject is experiencing depression, frequent memory functioning difficulties and has stated that her abuse of illict substances and alcohol are only in eight months remission. It is probable that she is in need of a more lengthy period of sobriety and continued involvement in AA, as well as a [sic] psychotherapy for depression are needed at present [sic]. It is estimated that these difficulties, in combination with her memory functioning deficits, would currently create generally moderate impairment in her overall working abilities, as well as in the specific capacities for consistently attending work in a reliable manner and completing work tasks adequately.

AR 222.

The ALJ rejected this examining psychologist's finding that Plaintiff's depression resulted in a moderate impairment, and instead relied on the reports of two state agency medical consultants, neither of whom examined Plaintiff. The ALJ stated:

> Although the psychologist examiner assessed moderate limitations, which were based largely on the claimant's

> subjective complaints, . . . there is no significant supportive evidence from a treating source, and the record as a whole establishes lesser limitations. In this regard, I note that the state agency medical consultants who evaluated the claimant's mental functioning indicated that she has only mild limitations.

AR 29.

Generally, "an examining physician's opinion carries more weight that a reviewing physician's." Holohan, 246 F.3d at 1202. "As is the case with the opinion of a treating physician, the Commissioner must provide 'clear and convincing' reasons for rejecting the uncontradicted opinion of an examining physician." Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). "And like the opinion of a treating doctor, the opinion of an examining doctor, even if contradicted by another doctor, can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record." Id. at 830-31. "The opinion of a nonexamining physician cannot by itself constitute evidence that justifies the rejection of the opinion of . . . an examining physician." Id. at 831. "In addition, the regulations give more weight to opinions that are explained than those that are not . . . ." Holohan, 246 F.3d at 1202.

For the following reasons, the Court finds that the ALJ erred in concluding that Plaintiff's mental impairments were mild, rather than moderate limitations. To begin, the reports of the two reviewing medical consultants leave much to be desired. The first report is four pages long and contains approximately 12 multiple choice questions. AR 224-27. Each question contains various boxes for the medical consultant to check if that

particular answer applies. Id. None of the checked boxes contain any type of written explanation by the consultant. Id. Thus, although this report indicates that Plaintiff's mental impairments are not severe and her degree of limitation is "mild," the absence of any explanation for these diagnoses undermines significantly the weight of this report. This is especially true given that the report was made without actually examining the Plaintiff. See Holohan, 146 F.3d at 1202.

The second report, entitled Physical Residual Functional Capacity Assessment and completed in December of 2004, is equally problematic. AR 229-36. The report is comprised of six pages of multiple choice questions and one page of largely illegible handwritten notes. Id. The report states that Plaintiff can stand and/or walk for 6 hours per day, can sit for 6 hours per day, can frequently lift 25 pounds, can frequently climb stairs, ladders, rope or scaffolds, frequently crouch and crawl, and concludes that the severity of Plaintiff's symptoms are disproportionate to the expected severity based on Plaintiff's "medically determinable impairments." AR 234. The report also states that Plaintiff can occasionally lift 50 pounds, a conclusion the ALJ rejected in his decision. See AR 29 (finding that the ability to lift even 40 pounds was "in excess of the functional capacity assessed herein"). In addition, this report, like the previous report, contains no legible explanations regarding its findings. This, in combination with the ALJ's own rejection of a finding within the report, make its value questionable. This is especially true in light of the fact that

this report, similar to the first report, contradicts the opinions of the examining psychologist Dr. Kjelson.

Finally, numerous other medical reports contain documentation of Plaintiff's feelings of depression. See, e.g., AR 131 (stating Plaintiff felt "discouraged - [and that] simple things [were] insurmountable"); AR 149 (noting that doctor's diagnostic impression was "depression/anxiety"); AR 161 (doctor report stating Plaintiff was "feeling very depressed and anxious"); AR 237 (stating Plaintiff suffers from depression, anxiety, and panic attacks); AR 314 (stating "[p]ast medical history is significant for a history of depression").

In light of the above, the Court concludes that the ALJ's stated reasons for rejecting the opinions of Plaintiff's examining psychologist Dr. Kjelson are not "specific and legitimate reasons . . . supported by substantial evidence in the record." Lester, 81 F.3d at 830-31. Based on the evidence, the Court finds that Plaintiff's depression creates a moderate, rather than mild, limitation. The effect of this on Plaintiff's overall residual functional capacity is discussed below.

B. Treating Physician's Opinion

Plaintiff asserts that the ALJ improperly rejected the medical opinions of Plaintiff's treating physician, Dr. Dermody. Dr. Dermody had seen Plaintiff, on average, once every three months for more than three years, as of December 2004. Where "a treating doctor's opinion is contradicted by another doctor, the Commissioner may not reject this opinion without providing specific and legitimate reasons supported by substantial evidence

in the record for doing so." Lester, 81 F.3d at 830.

In a report prepared by Dr. Dermody titled "Fibromyaligia Residual Functional Capacity Questionnaire," he made the following findings: Plaintiff suffered from Sjogren's Syndrome, depression, and chronic pain syndrome; Plaintiff exhibited symptoms of chronic fatigue, muscle weakness, numbness and tingling, subjective swelling, and multiple tender points; Plaintiff had severe and constant pain in her cervical spine, thoracic spine, shoulders, hands/fingers, and knees/ankles/feet; this pain was exacerbated by fatigue, movement/overuse, and by being in a static position; the pain was reasonably consistent with the symptoms and functional limitations described in the report; and Plaintiff was not a malingerer. AR 237-38. Regarding limitations on possible work, the doctor concluded the following: Plaintiff's pain was severe enough to interfere with attention and concentration frequently throughout a typical workday; Plaintiff could not walk the length of a city block without rest or severe pain; Plaintiff can sit at one time for 30 minutes before needing to stand, and can stand for 15 minutes before needing to sit; Plaintiff should never lift more than 20 pounds and rarely lift more than 10 pounds; Plaintiff should never climb ladders and rarely twist, stoop, or climb stairs; and Plaintiff has significant limitations with reaching, handling or fingering. AR 238-41.

In rejecting these findings by Plaintiff's treating physician, the ALJ gave several reasons. First, the ALJ stated:

> I have considered the form completed by Dr. Dermody, which reflects that the claimant is essentially incapacitated due

> to her multiple reported symptoms and limitations. . . . I find the level of impairment indicated is inconsistent with Dr. Dermody's own treatment notes . . . .

AR 29.

Where a treating physician's recommendations are "so extreme as to be implausible and [are] not supported by any findings made by any doctor," an ALJ may properly reject these recommendations. Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001). Such is not the case here, however. Instead, Dr. Dermody's handwritten notes are, with the exception of perhaps five words, illegible. See AR 249-73; 334-47. The rest of notes that appear in the Administrative Record either relate to issues distinct from those relevant to the present action - i.e., notes from a instance where Plaintiff complained of a rapid heart beat; notes from a skin biopsy; and notes from a mammogram - or are medical charts which would require a medical professional to decipher. See AR 336, 337, 340-47. After careful review, the Court can find nothing in these notes that could be construed as being inconsistent with the level of impairment described by Dr. Dermody in his report.

Furthermore, "[t]o say that medical opinions are not supported by sufficient objective findings . . . does not achieve the level of specificity our prior cases have required." Embrey v. Bowen, 849 F.2d 418, 421 (9th Cir. 1998). "The ALJ must do more than offer his conclusions. He must set forth his own interpretations and explain why they, rather than the doctors', are correct." Id. at 421-22. The ALJ must "give proper weight to the subjective elements of the doctors' diagnoses. The subjective judgments of treating physicians are important, and properly play

a part in their medical evaluations." Id. at 422. "Accordingly, the ultimate conclusions of those physicians must be given substantial weight." Id.

In rejecting the level of impairment described by Dr. Dermody, the ALJ also noted the implausibility of a timeline provided by Dr. Dermody. In response to a question asking "[w]hat is the earliest date the description of symptoms and limitations on this questionnaire applies?" Dr. Dermody wrote "1994," which would have been ten years prior to the date of the alleged onset of disability.

An implication by Dr. Dermody that Plaintiff's impairments had existed with the same severity for the last ten years would clearly raise suspicion regarding the accuracy of the rest of the report, as there is no question that Plaintiff was capable of actively working for all of those years. Such an implication, however, is difficult to reconcile with the rest of the report.

There are, instead, other explanations for this discrepancy. For example, it is possible that the doctor wrote 1994 assuming that the question sought the date when the symptoms first began to manifest themselves, rather than the date at which the symptoms reached their present severity. Such an explanation is consistent with the conclusions of other doctors who found that Plaintiff's symptoms began in or near 1994. See, e.g., AR 292, Examination Report of June 29, 2005, by Dr. Kenneth Fye (concluding, after an examination of Plaintiff, that "[a]pproximately ten years ago, she developed a cryptic musculoskeletal pain syndrome associated with a positive rheumatoid factor"); AR 324, Medical Report by Dr. Neal

Birnbaum dated October 29, 1999 (stating "[a]pproximately 3 1/2 years ago the patient developed 'exhaustion,' diffuse aching, muscle soreness, and stiffness"). Although this inconsistency in Dr. Dermody's report is worth noting, it does not, in this Court's view, undermine the report's many other conclusions.

Finally, the ALJ rejected the report of Dr. Dermody because it was inconsistent with "claimant's own statements as to her level of activity, as well as [] the weight of the additional evidence." AR 29. Regarding the weight of the additional evidence, the Court finds that it supports, rather than undercuts, Dr. Dermody's assessment. In 1999, Plaintiff was examined by a rheumatologist who reported that Plaintiff had a positive rheumatoid factor, a prior diagnosis of rheumatoid arthritis, tingling in the hands and feet, and pain in the muscles and joints. AR 324. Although at that time the doctor thought Plaintiff's symptoms were more of a nuisance than a true disability, this doctor also concluded that her symptoms were consistent with fibromyalgia. AR 325. In 2000, another examining physician found that Plaintiff had "fulfilled criteria in the past, and probably presently, for fibromyalgia with the marked abnormal fatigue." AR 323. In 2001, Dr. Ken Sack, a Professor of Clinical Medicine at University of California San Francisco Medical Center, found that Plaintiff had "chronic muscoskeletal pain syndrome" and an "elevated rheumatoid factor." AR 314. In 2004, Plaintiff was seen at Kaiser hospital on approximately ten separate occasions, more often than not complaining of chronic pain in her shoulders, neck, and back and of excessive fatigue.

AR 131-71. In April 2005, Plaintiff was examined, for the second time, by Dr. Harrington. His conclusions, in relevant parts, are as follows:

> [Plaintiff] has an extremely complex past [medical] history. . . . [She] relates a many-year history of very widespread arthralgias involving essentially all joints and accompanied by marked and prolonged stiffness . . . . When seen by myself approximately three to four years ago, the diagnosis was unclear and she was referred to UCSF to see Dr. Ken Sack. . . . Since that time, she was continued to have all of the aforementioned symptoms, without relief. . . . It remains difficult to characterize definitively her illness.

AR 329.

In June of 2005, Plaintiff was examined by Dr. Fye at the University of California San Francisco Medical Center. AR 292. He opined that, given the symptoms, it would be possible to "explain all this patient's presentation with a diagnosis of Sjogren's syndrome and secondary fibromyalgia." AR 293. She was also seen three time in 2005 by Dr. Dugan. During her first visit, the doctor noted that she was feeling very poorly because of a drug, Decadron, she had been given to help with her symptoms. AR 333. At her second visit, the doctor noted that Plaintiff "comes in today still complaining of joint pain." AR 332. At her final visit, in September 2005, the doctor noted that she was on a number of new medications and that she "[o]verall feels much better that when I saw her before." AR 331. In addition, she was again diagnosed with Sjogren's syndrome. Id. Finally, in a letter dated August 28, 2006, Dr. Fye, who had examined Plaintiff in 2005, stated:

> [Plaintiff] is a 54 year old woman with Sjogren's syndrome complicated by a monoclonal gammopathy and fibromyalgia. The manifestations of Sjogren's syndrome include, but are not limited to, xerostomia with dysphagia, . . . and a host of extra-exocrine gland problems . . . . Fibromyalgia, a chronic musculoskeletal pain syndrome, is frequently seen in these patients. The monoclonal gammopathy puts patients at risk for everything from myeloma to hyperviscosity syndrome. The constitutional symptoms, such as malaise, lethargy, and fatigue, associated with the disorder are frequently as debilitating as the organ related manifestations. The specific problems Ms. Steen has to deal with include keratoconjunctivitis sicca, xerostomia, arthritis, fibromyalgia, dysphagia, and overwhelming constitutional symptoms. In addition, she has significant monoclonal gammopathy. I feel that the totality of her disease associated symptoms render her disabled. Since all of her conditions are chronic and not cureable, I also feel her disability is permanent.

AR 348.[2] The conclusions of Dr. Fye, a clinical professor in rheumatology, are particularly compelling given that the Social Security "regulations give more weight to . . . the opinions of

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[2] This letter was submitted after the hearing, and therefore was not considered by the ALJ. The Appeals Council, however, made the letter part of the record before it declined to review the ALJ's decision. See AR 9 (stating the "Appeals Council has received additional evidence which it is making part of the record"). It is appropriate, therefore, for this Court to consider the letter. See Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir. 1993) (stating that the court would "consider on appeal both the ALJ's decision and the additional material submitted to the Appeals Council"); see also Bates v. Sullivan, 894 F.2d 1059, 1063 (9th Cir. 1993) (reviewing de novo the Appeals Council refusal to review the ALJ's decision where the claimant presented new and material evidence to the Appeals Council after the hearing before the ALJ). As there can be no real dispute that this letter represents "material evidence," the Court may consider it. 20 C.F.R. § 404.976(b).

specialists concerning matters relating to their specialty over that of nonspecialists, see [20 C.F.R.] § 404.1527(d)(5)." Holohan, 246 F.3d at 1202.

As should be clear, the wealth of medical evidence supports Plaintiff's position that she suffers from substantial pain and fatigue. Moreover, all of the above-listed medical reports are from doctors who actually treated or examined Plaintiff. In contrast, the Commissioner points to three agency-requested consultations, only one of which involved an actual examination of the Plaintiff, in support of his conclusion that Plaintiff is not disabled.

The first of these was performed by Dr. Julian Espino. AR 213. Dr. Espino acknowledged that Plaintiff had previously been diagnosed with fibromyalgia and rheumatoid arthritis by other doctors. Id. The diagnosis for the arthritis, according to Dr. Espino, was "due to her chronic pain specifically in the neck, shoulders and hands." Id. He also noted that "[c]urrently, the claimant is in pain daily that increases with sustained activities such [as] writing or typing. Prolong walking and standing also increases the pain." Id. Although Dr. Espino did not believe that Plaintiff actually had rheumatoid arthritis, he nonetheless concluded that Plaintiff had "[c]hronic pain with diagnosis of fibromyalgia." AR 216. Even with these findings, however, Dr. Espino concluded that Plaintiff did "not have any restrictions while standing, walking or sitting. She can lift and carry objects more than 40 pounds." Id. He also stated that Plaintiff "can frequently climb, kneel, squat, stoop and bend." AR 217.

These findings on Plaintiff's limitations are difficult, if not impossible, to reconcile with Dr. Espino's own diagnosis of chronic pain and fibromyalgia. Even the ALJ rejected Dr. Espino's finding that Plaintiff could lift more than 40 pounds. See AR 29. The two other consultative reports, for reasons stated previously, are even less compelling, especially in light of the fact that they were made without conducting an examination of Plaintiff.

For all the reasons stated above, the Court finds that the ALJ did not provide specific and legitimate reasons supported by substantial evidence for rejecting the opinion of Plaintiff's treating physician. Lester, 81 F.3d at 830.

C. Plaintiff's Credibility

Plaintiff argues that the ALJ erred in discounting her subjective statements regarding the severity of her pain. Although "[t]he ALJ is responsible for determining credibility and resolving conflicts in medical testimony," Saelee v. Charter, 94 F.3d 520, 522 (9th Cir. 1995) (internal quotation marks omitted), "[d]enial of benefits cannot be based on the ALJ's observation of [the claimant], when [the claimant's] statements to the contrary . . . are supported by objective evidence." Perminter v. Heckler, 765 F.2d 870, 872 (9th Cir. 1985). If the ALJ does reject a claimant's testimony, he or she must provide "clear and convincing reasons" for doing so. Holohan, 246 F.3d at 1208. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." Lester, 81 F.3d at 834 (9th Cir. 1996). Moreover, this evidence must be "substantial." Holohan, 246 F.3d

at 1208. For the following reasons, the Court finds that the ALJ's justifications for rejecting Plaintiff's testimony are neither clear and convincing nor supported by substantial evidence. Id.

During the hearing, Plaintiff testified as to the following: her pain was too severe to permit her to return to her previous job as a sales manager for a hot air balloon company; although she suffers pain throughout her body, it is most focused in her shoulders, neck, and head; she also suffers from extreme exhaustion; the most activity she typically has in one day is approximately 30 minutes of walking; she is able to do only a little bit of housework at a time; she is unable to stand for a significant length of time, and even has a seat in her shower; she avoids buying gallons of milk because they are too difficult for her to lift; she has good days and bad days, with, on average, three bad days a week; on the bad days, she typically spends most of her time lying down in her house; on bad days she is unable to do housework or even take a shower; and on her good days she still needs to lie down for roughly two hours in the afternoon. AR 354-64.

In discounting much of this testimony, the ALJ stated: "I note that in addition to the lack of an objective medical basis for the claimant's reported symptoms, her use of Motrin [an over the counter pain reliever] for pain control indicates that her pain is not as severe as she alleges, notwithstanding her desire to avoid medication addiction." AR 28. For the following reasons, however, the Court finds these justifications for

discounting Plaintiff's testimony to be insufficient.

First, for the reasons stated in section IV.B, supra, the Court finds that there are in fact numerous objective medical explanations for Plaintiff's pain and exhaustion. Sjogren's syndrome, fibromyalgia, and rheumatoid arthritis are the three most obvious examples. Second, the Ninth Circuit has held that where a claimant treats impairments with over-the-counter pain medication, this evidence of "'conservative treatment' is sufficient to discount a claimant's testimony regarding [the] severity of an impairment." Parra v. Astrue, 481 F.3d 742, 751 (9th Cir. 2007). Such reasoning, however, is undermined by circumstances such as Plaintiff's. It is undisputed that Plaintiff had previously been addicted to Vicondin. As several doctors noted in their reports, Plaintiff refused to take Vicodin or any other opiate-derivative pain medication out of the fear that it would lead her back into addiction. See AR 94, Pl.'s Disability Report (stating that she has a fear of relapsing on prescription drugs, especially Vicodin, when dealing with her pain issues); AR 166, Report by Dr. Flaherty at Kaiser Hospital (stating "Plaintiff cannot take opiates - has been addicted in pass [sic] - relapsed, is back in recovery"); AR 328, Report by Dr. Harrington (stating Plaintiff "makes every effort to avoid any narcotic or semi-narcotic medications"). In light of Plaintiff's history with pain killers and her laudable desire to remain clean, the Court cannot agree that her failure to use more powerful pain medication is an indication that her pain is not as severe as she states.

The ALJ also pointed to various inconsistencies in Plaintiff's testimony in support of an adverse credibility finding. For example, the ALJ noted that the "Kaiser records reflect that the claimant reported sobriety November of 2003 and January of 2004, while she was still working." AR 28. The ALJ found that this evidence "undermine[d] her testimony that she was able to work only due to overuse of medications." Id. Plaintiff also testified, however, that even as she was overusing prescription drugs, her job "became increasingly more difficult." AR 354. After stating this, the following exchange occurred:

> A: [by Plaintiff] -- and my, I would use Vicodin, the pain killer, to make it possible to do the job.
> Q: [by the ALJ] Okay. So you, as far as you're concerned, you are taking Vicodin because of your physical problems --
> A: Yes.
> Q: -- and you need to because of the problems in order to physically do the job?
> A: No, I'm an addict by nature.

AR 344-45.

This testimony, while open to several interpretations, nonetheless indicates that, even with an addiction to painkillers, Plaintiff's job was becoming increasingly difficult due to the effects of her illnesses. Moreover, that Plaintiff was able to work for only for short periods in November 2003 and January 2004 while remaining sober would seem to support, rather than undermine, her claim that she indeed needed powerful painkillers to remain at work.

The remaining reasons provided by the ALJ for finding Plaintiff's claims about the severity of her pain and limitations

are also less than compelling. The Court therefore finds that the ALJ's adverse credibility finding was in error, as the ALJ did not provide "clear and convincing reasons," supported by substantial evidence, for his conclusion. Holohan, 246 F.3d at 1208.

D. Past Relevant Work Experience

At step four of the five-step disability analysis, "claimants have the burden of showing that they can no longer perform their past relevant work." Pinto v. Massanari, 249 F.3d 840, 844 (9th Cir. 2001) (citing 20 C.F.R. §§ 404.1520(e) & 416.920(e)). "Although the burden of proof lies with the claimant at step four, the ALJ still has a duty to make the requisite factual findings to support his conclusion." Id. (citing Soc. Sec. Ruling ("SSR") 82-62). "This is done by looking at the 'residual functional capacity and the physical and mental demands' of the claimant's past relevant work." Id. at 844-45 (quoting 20 C.F.R. §§ 404.1520(e) & 416.920(e)). "The claimant must be able to perform: 1. The actual functional demands and job duties of a particular past relevant job; or 2. the functional demands and job duties of the occupation as generally required by employers throughout the national economy." Id. at 845 (citing SSR 82-61). "This requires specific findings as to the claimant's residual functional capacity, the physical and mental demands of the past relevant work, and the relation of the residual functional capacity to the past work." Id. (citing SSR 82-62).

"Residual functional capacity" is defined by the Social Security Regulations as the most an individual can still do after considering the effects of physical and/or mental limitations,

including pain, on a claimant's ability to perform in a work setting. 20 C.F.R. § 404.1545. In assessing a claimant's residual functioning capacity, an ALJ must "consider all symptoms, including pain, and the extent to which [these] symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence." 20 C.F.R. § 404.1529. The ALJ must also consider any medical opinions that might reflect judgments about the nature and severity of the impairments and resulting limitations. 20 C.F.R. § 404.1527.

In the present case, the ALJ determined that Plaintiff could perform her past relevant work as a sales representative for a hot air balloon company. Based on Plaintiff's testimony, her psychologist's report, her treating physician's opinions, and the additional medical evidence, the Court finds that this determination is not supported by substantial evidence in the record and that Plaintiff is in fact unable to perform her past relevant work.

At her hearing, Plaintiff not only testified that she would be unable to return to her previous job, but she also testified that she is unable to get out of bed, on average, three days per week. AR 356-59. Plaintiff's examining psychologist stated that her mental difficulties would "would currently create generally moderate impairment in her overall working abilities, as well as in specific capacities for consistently attending work in a reliable manner and completing work tasks adequately." AR 222. Moreover, the VE who testified at the hearing stated that, based on his experience, "if a person is missing two days a month from

work, on a consistent basis," that person is essentially unemployable. AR 372. Based on this evidence alone, the Court is bound to conclude that Plaintiff's impairments would force her to miss too many days of work per month to be considered capable of returning to her previous employment.

In addition, a "vocational expert's testimony in a disability benefits proceeding is valuable only to the extent that it is supported by medical evidence." Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984) (internal quotation marks omitted). A "hypothetical question should set out all of the claimant's impairments." Id. (internal quotation marks omitted). In the present case, despite significant evidence in the record regarding the pain Plaintiff's medical conditions cause, the ALJ failed to include any mention of this pain in the hypothetical he presented to the VE. See AR 366-73. This omission is contrary to Ninth Circuit precedent. See Gallant, 753 F.2d at 1456 (stating "[b]ecause claimant's allegations of persistent disabling pain are supported by the medical evidence in this case and the ALJ had no clear or convincing reasons for rejecting such claims, claimant's pain should have formed a part of the ALJ's question to the expert"). Given that the ALJ's hypothetical did not "set forth all of [Plaintiff's] impairments, the vocational expert's testimony cannot constitute substantial evidence to support the ALJ's findings." Id.

For these reasons, the Court finds that, at step four, there is not substantial evidence to support the finding that Plaintiff has the residual functional capacity to return to her previous job

as a sales manager.

"If a claimant does not have the residual functional capacity to perform past relevant work, then it is the Commissioner's burden at step five to establish that the claimant can perform other work." Lewis, 236 F.3d at 517.

Although the ALJ performed the analysis at step five, the Commissioner concedes that the ALJ's finding at step five was flawed. See Def.'s Mot. at 3 n.1. The Commissioner, therefore, has not met its burden. Even had the ALJ's step-five analysis not been in error, there is more than sufficient evidence in the record to conclude that Plaintiff is unable to perform other work.

V. Whether Remand Is Necessary

"The decision to remand the case for additional evidence or simply to award the benefits is within the discretion of the court." Erickson v. Shalala, 9 F.3d 813, 819 (9th Cir. 1993). Where the record is fully developed, remand is unnecessary. Id. In the present case, the record is fully developed and there are no "outstanding issues that must be resolved before a determination of disability can be made." Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000). Nor would "additional proceedings . . . remedy defects in the original administrative proceeding . . . ." Marcia v. Sullivan, 900 F.2d 172, 176-77 (9th Cir. 1990) (internal quotation marks omitted). The Court therefore awards Plaintiff her benefits.

Although Plaintiff argues that the onset date of her disability was February 2, 2004, the Court notes this was the date

that she left work and entered treatment for addiction to painkillers. The Court therefore finds that the earliest date on which onset of disability is supported by all of the medical evidence is December 30, 2004. It was on this day that Plaintiff's treating physician submitted the "Fibromyalgia Residual Functional Capacity Questionnaire," described above.

VI. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff's Motion for Summary Judgment and DENIES Defendant's Motion for Summary Judgment. The matter is remanded to the Commissioner so that he may calculate and award benefits with an onset date of December 30, 2004.

IT IS SO ORDERED.

Dated: September 29, 2008

UNITED STATES DISTRICT JUDGE