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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SHERRI MARIE HYDEN,

No. C-12-4320 EMC

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; DENYING DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT; AND GRANTING
MOTIONS FOR REMAND**

(Docket Nos. 15, 16)

I. INTRODUCTION

On June 27, 2007, Sherri Marie Hyden protectively filed for disability insurance benefits pursuant to Title II of the Social Security Act ("Act"). AR 81-86. She alleged disability since April 1, 2004 because of back, neck, and knee injuries, pain, fibromyalgia, and depression. AR 97. During administrative proceedings, her application was denied. AR 35-37. She requested a hearing before an Administrative Law Judge ("ALJ"), and appeared and testified at a hearing on April 30, 2010. AR 599-628. In a decision dated May 20, 2010, the ALJ found the Plaintiff was not disabled as defined by the Act because she could perform past work as a dispatcher or retail collections clerk. AR 13-29. When the Appeals Council denied Ms. Hyden's request to review the ALJ's decision, the ALJ's decision became the Commissioner's final decision. AR 2-4.

Ms. Hyden has exhausted her administrative remedies with respect to her claim of disability and has sought judicial review of the Commissioner's denial of benefits through this action. The Court has jurisdiction for judicial review pursuant to 42 U.S.C. § 405(g). Ms. Hyden has moved for

1 summary judgment for an award of benefits or, in the alternative, remand for additional proceedings.
2 Plaintiff's Motion for Summary Judgment ("Plaintiff's MSJ") (Docket No. 15.) The Commissioner
3 has cross-moved for summary judgment or, in the alternative remand for further proceedings en lieu
4 of payment of benefits. Defendant's Cross-Motion for Summary Judgment ("Def.'s Cross-MSJ")
5 (Docket No. 16).

6 **II. FACTUAL & PROCEDURAL BACKGROUND**

7 Ms. Hyden claimed an inability to work based on injuries to her back, neck, knee and related
8 pain. She further claimed obesity, fibromyalgia, depression, anxiety and pain related to her shoulder
9 surgery, and alleged disability beginning April 1, 2004. AR 97.

10 The claim was initially denied on res judicata grounds on November 17, 2007, and again
11 upon reconsideration on January 29, 2008. AR 16. Ms. Hyden requested a hearing on March 12,
12 2008 in front of an ALJ who found the claim should not have been denied on res judicata grounds
13 because the claimant had submitted new and material evidence with her application. *Id.* The ALJ
14 dismissed the request for hearing and returned the claim to the District Office so that a medical
15 determination could be made. *Id.* As no medical determination was made, Ms. Hyden filed a
16 written request for a hearing on March 1, 2010. *Id.* The hearing was conducted on April 30, 2010 in
17 San Bernardino, California. *Id.* At the hearing the ALJ heard testimony from Ms Hyden, as well as
18 a vocational expert and a medical expert. *Id.*

19 On May 20, 2010, the ALJ issued a written decision, in which he concluded that Ms. Hyden
20 suffered from severe impairments but that she was not entitled to disability benefits because she was
21 capable of performing past relevant work as a dispatcher or retail collections clerk. AR 29. The
22 ALJ evaluated Ms. Hyden's claim for disability using the five-step sequential evaluation process for
23 disability required under 20 C.F.R. §§ 404.1520 and 416.920.

24 Step one disqualifies claimants who are engaged in substantial gainful
25 activity from being considered disabled under the regulations. Step
26 two disqualifies those claimants who do not have one or more severe
27 impairments that significantly limit their physical or mental ability to
28 conduct basic work activities. Step three automatically labels as
disabled those claimants whose impairment or impairments meet the
duration requirement and are listed or equal to those listed in a given
appendix. Benefits are awarded at step three if claimants are disabled.
Step four disqualifies those remaining claimants whose impairments

1 do not prevent them from doing past relevant work. Step five
2 disqualifies those claimants whose impairments do not prevent them
3 from doing other work, but at this last step the burden of proof shifts
from the claimant to the government. Claimants not disqualified by
step five are eligible for benefits.

4 *Celaya v. Halter*, 332 F.3d 1177, 1180 (9th Cir. 2003).

5 At step one, the ALJ found that Ms. Hyden did not engage in substantial gainful activity
6 from the alleged onset date through her date last insured. AR 18. At the second step, the ALJ found
7 that she suffered from severe impairments in her right knee, cervical spine, lumbar spine, left
8 shoulder, left wrist, and from obesity and fibromyalgia. AR 18. At the third step, the ALJ
9 determined that none of these impairments or combination of impairments were listed in or were the
10 medical equivalent of an impairment listed in the relevant appendix. AR 19.

11 At step four, the ALJ found that Ms. Hyden had a residual functional capacity (“RFC”) to
12 perform a range of light work which requires the ability to lift no more than 20 pounds, with
13 frequent lifting of 10 pounds. *See* 20 C.F.R. 404.1567(b) (defining “light work”). AR 20. The ALJ
14 found that she could stand and walk for only one hour at a time, and up to four hours total in an
15 eight-hour day; sit for only one hour at a time; could not walk on uneven or rough terrain, could not
16 climb ladders, ropes or scaffolds, could not work at unprotected heights, could not work overhead,
17 could not kneel or crawl, and could only occasionally bend, stoop, or crouch. AR 20. The ALJ
18 concluded that her ability to participate in certain daily activities undermined the credibility of her
19 allegations of disabling functional limitations. AR 22. The ALJ highlighted Ms. Hyden’s ability “to
20 drive a minivan, prepare simple foods, and go grocery shopping for light items.” AR 21.
21 Additionally, the ALJ inferred that when her children were four years old and three years old, she
22 must have been responsible for the care of her children at some point while her husband was at
23 work. AR 21.

24 The ALJ determined that “[t]he credibility of the claimant’s allegations regarding the
25 severity of her symptoms and limitations is diminished because those allegations are greater than
26 expected in light of the objective evidence of record.” AR 22. The ALJ then proceeded with a
27 detailed discussion of the clinical and diagnostic findings between the alleged onset date and the
28 date last insured, and found that the evidence as a whole supports his assessment. AR 28. He

1 discussed each medical experts findings and made credibility determinations as to why some
2 findings were given more weight than others. AR 25-28.

3 Based on his RFC assessment in step four of the analysis, the ALJ found the claimant was
4 capable of performing past relevant work as a retail collections clerk or a dispatcher. AR 28. The
5 ALJ concluded that Ms. Hyden was not under a disability at any time from the alleged onset date,
6 April 1, 2004, through March 31, 2006, the date last insured. AR 29. The Appeals Council denied
7 Ms. Hyden’s request for review, which made the ALJ’s decision the final decision of the
8 Commissioner of Social Security in this case. AR 2. Ms. Hyden seeks judicial review of the
9 Commissioner’s denial of benefits through this action.

10 **III. DISCUSSION**

11 A. Legal Standard

12 A reviewing court will only address the issues raised by the claimant in her appeal from the
13 ALJ’s decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n. 13 (9th Cir. 2001). A federal court “may
14 set aside a denial of disability benefits only if it is not supported by substantial evidence or if it is
15 based in legal error.” *Jamerson v. Chater*, 112 F.3d 1064, 1066 (9th Cir. 1997); 42 U.S.C. §§
16 405(g); 1383(c)(3). “Substantial evidence means more than a mere scintilla but less than a
17 preponderance.” *Id.* It is “relevant evidence which, considering the record as a whole, a reasonable
18 person might accept as adequate to support a conclusion.” *Flaten v. Sec’y of Health and Human*
19 *Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995).

20 The reviewing court only considers the reasons provided by the ALJ in the disability
21 determination and may not affirm the ALJ on a ground upon which he or she did not rely. *See Orn*
22 *v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (citing *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir.
23 2003)). “Where evidence is susceptible to more than one rational interpretation, one of which
24 supports the ALJ’s decision, the ALJ’s decision must be upheld.” *Thomas v. Barnhart*, 278 F.3d
25 942, 954 (9th Cir. 2002). “However, a reviewing court must consider the entire record as a whole
26 and may not affirm simply by isolating a ‘specific quantum of supporting evidence.’” *Robbins v.*
27 *Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock v. Bowen*, 879 F.2d 498, 501
28 (9th Cir. 1989).

1 B. Credibility of Ms. Hyden

2 The only issue raised by the claimant in this review is the ALJ’s credibility determination
3 with respect to Ms. Hyden’s testimony. As such, this Court limits its review to this issue. Generally,
4 “questions of credibility and resolution of conflicts in the testimony are functions solely” for the
5 agency to resolve. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (internal quotation marks
6 omitted). The ALJ must provide “clear and convincing” reasons to reject a claimant’s subjective
7 testimony, by specifically identifying “what testimony is not credible and what evidence undermines
8 the claimant’s complaints.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

9 The ALJ must engage in a two-step analysis to determine whether testimony concerning
10 severity of symptoms is credible. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007).
11 First, the ALJ must determine whether a claimant produced objective medical evidence of an
12 underlying impairment “which could reasonably be expected to produce the pain or other symptoms
13 alleged.” *Id.* at 1036. Second, if there is no evidence of malingering, an “ALJ can reject the
14 claimant’s testimony about the severity of her symptoms only by offering specific, clear and
15 convincing reasons for doing so.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Benton v.*
16 *Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). An ALJ’s credibility finding must be properly
17 supported by the record and be sufficiently specific to ensure a reviewing court that the ALJ did not
18 arbitrarily reject a claimant’s subjective testimony. *Bunnell v. Sullivan*, 947 F.2d 341, 345–47 (9th
19 Cir.1991).

20 Ms. Hyden argues in her motion for summary judgment that the “ALJ improperly considered
21 her testimony.” Plaintiff’s MSJ at 3. Specifically, Ms. Hyden contends that the Commissioner
22 failed to articulate clear and convincing reasons for rejecting her testimony regarding her subjective
23 symptoms. In the first step of the credibility analysis regarding the severity of Ms. Hyden’s
24 symptoms, the ALJ found that, “the claimant’s medically determinable impairments could
25 reasonably be expected to cause some of the alleged symptoms.” AR 22. Since the ALJ found that
26 there was objective medical evidence of an underlying impairment and did not make any specific
27 findings of malingering, Ms. Hyden’s appeal focuses on the contention that the ALJ did not properly
28 conduct the second step of the credibility analysis.

1 1. Conflict between Subjective Testimony and Objective Evidence

2 In the second step of the credibility analysis, the ALJ found that Ms. Hyden’s testimony
3 regarding the severity of her symptoms “are not credible to the extent those statements are
4 inconsistent with the residual functional capacity assessment herein.” AR 22. Although Ms.
5 Hyden’s impairment could reasonably be expected to cause some of the alleged symptoms, there is
6 evidence in the record that the subjective pain testimony was inconsistent with the objective medical
7 evidence: MRI’s of Ms. Hyden’s neck and back were essentially normal (AR 280-82), her left
8 shoulder improved after surgery (AR 193), and an MRI of Plaintiff’s right knee in 2006 showed
9 improvement from surgeries (AR 512).

10 The ALJ specifically found that her credibility was diminished “because those allegations [of
11 pain] are greater than expected in light of the objective evidence of record.” AR 22. A conflict
12 between a claimant’s subjective complaints and the objective medical evidence can be a factor in
13 weighing a claimant’s credibility when coupled with additional findings. *See Morgan v. Comm’r of*
14 *Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999) (ALJ may properly rely on plaintiff’s daily
15 activities, and on conflict between claimant’s testimony of subjective complaints and objective
16 medical evidence in the record). “But the [ALJ] may not discredit a claimant’s testimony of pain
17 and deny disability benefits solely because the degree of pain alleged by the claimant is not
18 supported by objective medical evidence.” *Bunnell*, 947 F.2d at 346-47. “While an ALJ may find
19 testimony not credible in part or in whole, he or she may not disregard it solely because it is not
20 substantiated affirmatively by objective medical evidence.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d
21 880, 883 (9th Cir. 2006) (citations omitted). The regulations specifically prohibit rejecting
22 subjective pain testimony solely on the basis of objective medical evidence. 20 C.F.R. §
23 404.1529(c)(2) (we will not rejected your statements about the intensity and persistence of your pain
24 or other symptoms or about the effect your symptoms have on your ability to work solely because
25 the available objective medical evidence does not substantiate your statements). Such reliance on
26 non-corroborative medical evidence is particularly problematic where, as here, there was significant
27 medical evidence supporting Ms. Hyden’s testimony. *See* AR 23-27.

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1 To the extent the ALJ rejected Ms. Hyden’s testimony about the severity of her symptoms
2 based solely on the lack of support by objective medical evidence, that decision was in error for the
3 reasons stated above. To the extent, it was not the sole basis, the ALJ was required to articulate
4 clear and convincing reasons to reject her testimony regarding the severity of her symptoms. In this
5 regard, “while subjective pain testimony cannot be rejected on the sole ground that it is not fully
6 corroborated by objective medical evidence, the medical evidence is still a relevant factor in
7 determining the severity of the claimant’s pain and its disabling effects.” *Rollins v. Massanari*, 261
8 F.3d 853, 857 (9th Cir. 2007). The Court thus turns to the other factors cited by the Commissioner
9 as supporting the ALJ’s determination.

10 2. Daily Activities

11 The ALJ referred to Ms. Hyden’s daily activities as another reason to find her excess pain
12 testimony not credible. AR 21. The first question is whether this finding is supporting substantial
13 evidence.

14 The Social Security Act does not require that claimants be utterly incapacitated to be eligible
15 for benefits. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). “The [Ninth Circuit] has repeatedly
16 asserted that the mere fact that a plaintiff has carried on certain daily activities, such as grocery
17 shopping, driving a car, or limited walking for exercise, does not in any way detract from her
18 credibility as to her overall disability.” *Vertigan v. Halter*, 260 F.3d 1044, 1049-50 (9th Cir. 2001).
19 *See also, Gallant v. Heckler*, 753 F.2d 1450, 1453-55 (9th Cir. 1984) (“[T]he fact that claimant
20 could cook for himself and family members as well as wash dishes did not preclude a finding that
21 claimant was disabled due to constant pain.”) “Yet if a claimant is able to spend a substantial part of
22 his day engaged in pursuits involving the performance of physical functions that are transferable to a
23 work setting, a specific finding as to this fact may be sufficient to discredit an allegation of disabling
24 excess pain.” *Fair v. Bowen*, 885 F.2d at 603. Thus, an ALJ may consider daily living activities in
25 the credibility analysis only where “a claimant engages in numerous daily activities involving skills
26 that could be transferred to the workplace.” *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2008).
27 *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175 (9th Cir. 2008) (ALJ properly discredited
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1 claimant’s testimony on the basis of daily activities that included claimant helping her husband in
2 managing finances).

3 Here, the ALJ did not make any finding that Ms. Hyden managed her own finances or the
4 finances of others, skills relevant to her former job as a retail collections clerk. *See* AR 16-29. The
5 ALJ did make a specific finding that Ms. Hyden’s daily activities were transferable to the workplace
6 on the assumption that while her husband was at work she must have been responsible for the care of
7 her children when they were four years old and three years old. AR 21. During the relevant period
8 of alleged disability and the date last insured (2004 through 2006), Ms. Hyden’s two older children
9 were between one and three and two and four years old. AR 21. Defendant points to Ms. Hyden’s
10 testimony that her husband worked to support her family (AR 603) as a reasonable basis to infer that
11 Ms. Hyden took care of the children during the workday. AR 21. Defendant contends that “the ALJ
12 quite reasonably concluded that Plaintiff was responsible for their care when they were between
13 ages one and four.” Def.’s Cross-MSJ at 4. In reaching his findings, an ALJ “is entitled to draw
14 inferences logically flowing from the evidence.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th
15 Cir. 2008).

16 However, the only evidence the Commissioner cites to support this finding is the fact that
17 Ms. Hyden’s husband worked. Def.’s Cross-MSJ at 4, *see also* AR 21. There is no other evidence
18 from the record cited by the Commissioner that indicates Ms. Hyden was a primary care-giver for
19 her children while her husband was at work during the relevant period of coverage. *See* AR 16-29.
20 In fact, a closer examination of the administrative record indicates that there is evidence to support
21 the opposite conclusion.

22 In particular, the ALJ failed to discuss evidence in the record that indicates that Ms. Hyden
23 relied on other family members for providing support with household activities and child-care
24 responsibilities when the children were younger. AR 127 (“My husband and family help with the
25 children and animals from food to bathing to daily care.”). The ALJ also did not discuss evidence in
26 the record that indicates Ms. Hyden relied on her father to help her around the house with tasks like
27 housecleaning. AR 615-16 (“My father will come down and help me [with housecleaning] . . .”).
28 Ms. Hyden further explained that her father comes by to help with laundry because “bending over to

1 get the laundry in and out of the machines is too much for my back and the bending of the knee.”
2 AR 616. This evidence suggests that Ms. Hyden’s knee-pain and back pain when bending over may
3 have prevented her from lifting small children, or otherwise acting as the primary care-giver. It
4 supports the inference that other family members, like her father, looked after the children while her
5 husband worked. On this record, the ALJ’s assumption that Ms. Hyden took care of the children
6 while her husband was at work is not supported by substantial evidence.

7 Moreover, even if she did assume responsibility to care for the children, the ALJ failed to
8 analyze with any specificity the transferability of those tasks to her ability to work full time.
9 *Vertigan*, 260 F.3d at 1050. *Cf. Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir. 1987) (disability does
10 not mean that a claimant must vegetate in a dark room excluded from all forms of human and social
11 activity). *Leftwich v. Gardner*, 377 F.2d 287, 289 (4th Cir. 1967) (“Congress did not intend to
12 exclude from the benefits of the Act those disabled persons who because of character and a sense of
13 responsibility for their dependents are most deserving.”).

14 Hence, the record evidence about Ms. Hyden’s daily activities, even when combined with the
15 medical evidence discussed above, does not constitute clear and convincing reasons for discrediting
16 her testimony. *Smolen*, 80 F.3d at 1281; *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).

17 3. Evidence of Conservative Treatment

18 Defendant argues in its cross-motion for summary judgment that because Plaintiff admitted
19 relief from sleep apnea through the use of a CPAP machine and that her pain medication, Darvocet,
20 diminished her pain to a “very mild level,” the ALJ properly discredited Plaintiff’s pain testimony.
21 Def.’s Cross-MSJ at 4-5 (*citing Tommassetti*, 533 F.3d 1039-40, for the proposition that the ALJ
22 properly discredited claims of disabling pain when conservative treatment, including pain
23 medications and physical therapy, effectively relieved the pain).

24 An ALJ may properly infer that a claimant’s pain was not all disabling in light of the fact
25 that she did not seek a more aggressive treatment plan. *Tommasetti*, 533 F.3d at 1039 (finding
26 claimant’s favorable response to conservative treatment like physical therapy and the use of anti-
27 inflammatory medication, a transcutaneous electrical nerve stimulation unit, and a lumbosacral
28 corset undermined claimant’s reports of the disabling nature of his pain). In fact, “evidence of

1 ‘conservative treatment’ is sufficient to discount a claimant’s testimony regarding severity of an
2 impairment.” *Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007) (finding the use of over-the-
3 counter pain medication to be evidence of conservative treatment sufficient to discount claimant’s
4 testimony of disabling pain). For example, a claimant’s testimony that “she experienced pain
5 approaching the highest level imaginable was inconsistent with the ‘minimal, conservative
6 treatment’ that she received” and properly discounted. *Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th
7 Cir. 1999) (where the failure to prescribe and failure to request any serious medical treatment was
8 the basis for discounting plaintiff’s credibility).

9 As a threshold matter, this Court only considers the reasons provided by the ALJ in the
10 disability determination and may not affirm the ALJ on a ground upon which he did not rely.
11 *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). The ALJ notes that Ms. Hyden admitted
12 pain medication diminished her pain “[t]o a very mild level, but it never goes away completely.”
13 AR 21, *citing* AR 613. The ALJ also noted that Ms. Hyden admitted that her CPAP machine
14 improved her sleep apnea, although her testimony was that it was not entirely effective. AR 21,
15 *citing* AR 612-13 (“With the sleep apnea, it does seem to help. I still don’t sleep that well, but it
16 stops where I stop breathing at night.”). Defendant argues that because Ms. Hyden indicated that her
17 problems sleeping are a reason for her alleged disability, and also stated that she had positive results
18 from use of the CPAP machine, this discounts her credibility. Def.’s Cross-MSJ at 4, *citing* AR 97
19 (“I sleep only three hours a night”). However, the ALJ did not identify either the use of a CPAP
20 machine or Darvocet as a specific reason for discounting Ms. Hyden’s credibility. While the ALJ
21 briefly mentions the use of a CPAP machine and Darvocet, the ALJ did not rely on this in his
22 determination of Ms. Hyden’s credibility. *See* AR 16-29 (ALJ Decision). Thus, this is not a basis
23 for this Court to affirm the ALJ’s determination.

24 The Commissioner’s reliance on *Tommasetti* is misplaced. Unlike *Tommasetti*, the ALJ did
25 not find that Ms. Hyden failed to seek an aggressive treatment program with respect to either her
26 sleep apnea or pain. The ALJ did not rely on any finding of “conservative treatment” to undermine
27 Ms. Hyden’s pain testimony. *See* AR 21-22. Again, this Court cannot affirm the ALJ’s denial of
28 benefits on a basis upon which the ALJ did not rely.

1 4. Summary

2 Other than the inconsistency of Ms. Hyden’s testimony with some of the objective medical
3 evidence and the assumption that she worked in caring for her children, the ALJ did not rely on any
4 other basis to discredit Ms. Hyden’s testimony. The ALJ did not, *e.g.*, “rely either on reasons
5 unrelated to the subjective testimony (*e.g.*, reputation for dishonesty), on conflicts between his
6 testimony and his own conduct, or on internal contradictions in that testimony.” *Light v. Social Sec.*
7 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). *See* AR 16-29.

8 The burden was on the Commissioner in discrediting Ms. Hyden’s pain testimony to
9 articulate clear and convincing reasons for doing so. No such reasons are found in the ALJ’s
10 opinion.

11 C. Remand

12 The decision whether to remand for further proceedings or to reverse and award benefits falls
13 within the discretion of the district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989).
14 Where no useful purpose would be served by further proceedings, or where the record has been fully
15 developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. *See*
16 *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000) (decision whether to remand for further
17 proceedings turns upon its likely utility). But where there are outstanding factual issues that must be
18 resolved before a determination can be made, and it is not clear from the record that the ALJ would
19 be required to find a plaintiff disabled if all the evidence were properly evaluated, remand is
20 appropriate. *See Benecke*, 379 F.3d at 595-96; *Harman*, 211 F.3d at 1179-80.

21 Although the Court finds error here, it shall not automatically credit as true Ms. Hyden’s
22 claims regarding her disabling symptoms. There is a split in the Ninth Circuit as to whether the
23 credit-as-true rule is mandatory or discretionary. *See Vasquez v. Astrue*, 572 F.3d 586, 593 (9th Cir.
24 2009); *see also Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (stating that “we are not
25 convinced that the ‘crediting as true’ doctrine is mandatory in the Ninth Circuit” because, “[d]espite
26 the seemingly compulsory language in [several cases], there are other Ninth Circuit cases in which
27 we have remanded solely to allow an ALJ to make specific credibility findings.”).

1 Moreover, even if the Court were to credit Ms. Hyden’s excess pain testimony as true, it is
2 not clear that the ALJ would be required to award her benefits. *See Varney v. Sec’y of Health and*
3 *Hum. Servs.*, 859 F.2d 1396, 1401 (9th Cir. 1988) (where record is fully developed there is no need
4 to remand for further proceedings). For example, in *Orn*, the daily activities of the claimant
5 included “sometimes” reading, watching television, and coloring in coloring books, which failed to
6 establish that the claimant “has ‘transferable’ skills to be a surveillance system monitor” a “position
7 that requires sustained concentration and attention, as well as the ability to act immediately in
8 emergencies.” 496 F.3d at 369. In this case, the ALJ found Ms. Hyden was able to work as either a
9 dispatcher or retail collections clerk. AR 28. Although the daily activities of Ms. Hyden are not
10 obviously transferrable to the work of a dispatcher, they may be, especially for the sedentary
11 position of a retail collections clerk. AR 28.

12 This Court finds that the record regarding Ms. Hyden’s daily activities, particularly the
13 extent of her child-care activities, is not sufficiently developed, and as a result, it is unclear if the
14 ALJ is required to award benefits. Furthermore, the record is not fully developed regarding the issue
15 of potentially conservative treatment which, if properly established in the record, could also
16 undermine her reports regarding disabling nature of pain. *See Tommasetti*, 533 F.3d at 1039 (*citing*
17 *Parra v. Astrue*, 481 F.3d 742, 750–51 (9th Cir. 2007) (stating that “evidence of ‘conservative
18 treatment’ is sufficient to discount a claimant’s testimony regarding severity of an impairment.”).

19 The Court concludes the ALJ erred in making his credibility determination and that remand
20 for further proceedings rather than an award of benefits is appropriate. In his credibility
21 determination, if there is no evidence of malingering, the Commissioner should provide specific,
22 clear and convincing reasons supported by substantial evidence for rejecting plaintiff’s testimony.

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IV. CONCLUSION

For the reasons stated above, the Court **DENIES** Plaintiff's Motion for Summary Judgment, **DENIES** Defendant's Cross-Motion for Summary Judgment, and **GRANTS** both parties' motions to remand for further proceedings consistent with this opinion.

This order disposes of Docket Nos. 15 and 16.

IT IS SO ORDERED.

Dated: April 22, 2013



EDWARD M. CHEN
United States District Judge