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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARLENE C. PERRY,)	Case No. 07-CV-0276-L (JMA)
)	
Plaintiff,	)	REPORT AND RECOMMENDATION OF
	)	UNITED STATES MAGISTRATE JUDGE
v.	)	RE (1) GRANTING IN PART AND
	)	DENYING IN PART PLAINTIFF'S
MICHAEL J. ASTRUE, Commissioner	)	MOTION FOR SUMMARY JUDGMENT
of Social Security,	)	[DOC. NO. 15] (2) GRANTING IN
	)	PART AND DENYING IN PART
Defendant.	)	DEFENDANT'S CROSS-MOTION FOR
	)	SUMMARY JUDGMENT [DOC. NO.
	)	16], AND (3) REMANDING CASE
	)	FOR FURTHER PROCEEDINGS

Plaintiff Marlene C. Perry ("Plaintiff") seeks judicial review of Defendant Social Security Commissioner Michael J. Astrue's ("Defendant") determination that she is not entitled to disability insurance benefits. Plaintiff has filed a Motion for Summary Judgment and Defendant has filed a Cross-Motion for Summary Judgment. For the reasons set forth below, the Court recommends that Plaintiff's motion be **GRANTED IN PART** and **DENIED IN PART**, that Defendant's motion be **GRANTED IN PART** and **DENIED IN PART**, and that the case be remanded for further proceedings.

//

1 **I. PROCEDURAL HISTORY**

2 Plaintiff filed an application for disability insurance
3 benefits on or around July 7, 2004 alleging a disability onset
4 date of January 1, 2001. (Admin. R. at 54-57.) Plaintiff's
5 claim was denied initially on August 3, 2004, and again upon
6 reconsideration on December 8, 2004. (Id. at 22-26, 30-34.)
7 Plaintiff requested a hearing before an Administrative Law Judge
8 ("ALJ"). (Id. at 35.) An administrative hearing was conducted
9 on October 18, 2005 by ALJ James S. Carletti, who determined that
10 Plaintiff was not disabled. (Id. at 14-19.) Plaintiff requested
11 a review of the ALJ's decision; the Appeals Council for the
12 Social Security Administration denied Plaintiff's request for
13 review on December 5, 2006. (Id. at 4-7.) Plaintiff then
14 commenced this action pursuant to 42 U.S.C. § 405(g).

15 **II. FACTUAL BACKGROUND**

16 Plaintiff was born on September 19, 1964, and completed high
17 school in 1983. (Id. at 54, 67.) She entered the United States
18 Army after high school and served on active duty through 1989.
19 (Id. at 279.) She remained in the Reserves, and was deployed to
20 the Persian Gulf in 1990. (Id.) She returned from the Gulf War
21 in 1991.

22 Since leaving the Army, Plaintiff has worked as a nurse's
23 assistant (1993-96), customer service representative (1998-99),
24 sales representative (1999), package handler (1999-2000), and job
25 coach (2000). (Id. at 72.) Plaintiff attended a computer
26 technician program between 2000 and 2004 and earned her
27 Associate's Degree. (Id. at 95, 213, 426, 431.)

28 Plaintiff alleges disability due to fibromyalgia, chronic

1 fatigue syndrome, and depression. (Id. at 63.) She attributes
2 her symptoms to her involvement in the Gulf War. (Id. at 213,
3 278.) Plaintiff has received a disability rating of 30% from the
4 Department of Veterans Affairs ("VA"), for which she receives a
5 pension. (Id. at 424.)

6 **III. MEDICAL EVIDENCE**

7 **A. Medical Records**

8 Virtually all of the medical records contained in the
9 administrative record before the Court relate to treatment
10 received by Plaintiff at the VA. On April 11, 2000, Plaintiff
11 underwent a mental health evaluation pursuant to a referral from
12 her primary physician. (Id. at 277-80.) Plaintiff complained of
13 depression, anxiety, and difficulty controlling her anger. (Id.
14 at 277.) She described sleep difficulties, lack of appetite,
15 poor concentration, and poor short-term memory. (Id.) She
16 stated that headaches, joint pain, sinus problems, and
17 gastrointestinal problems precluded her from working or attending
18 classes. (Id.) Plaintiff also reported difficulty communicating
19 with her two teenage sons, ages 12 and 14, who she was raising on
20 her own. (Id. at 277-79.)

21 Plaintiff, a native of Trinidad (id. at 343), reported that
22 she was not a U.S. citizen while serving in the Gulf War and thus
23 was not allowed to perform the duties for which she was trained.
24 She was also reportedly separated from her unit, felt castigated,
25 and believed that she was treated very poorly by her superiors.
26 (Id. at 278-79.) She revealed that she still carried a large
27 amount of anger regarding those conditions. (Id. at 279.) She
28 did not see any combat in the war. (Id. at 294.) Plaintiff was

1 diagnosed with Depressive Disorder by Dr. Shannon Chavez, a VA
2 psychiatrist. Plaintiff decided to pursue individual therapy,
3 was encouraged to take an antidepressant, and was prescribed
4 Trazodone to help with her sleep problems. (Id. at 280, 343-44.)

5 On June 15, 2000, Plaintiff saw Dr. Shreeti Patel for
6 migraine headaches, neck pain, and joint pain in her ankle and
7 knee. (Id. at 349.) While the pain had persisted for ten years,
8 it had worsened in the past months. (Id.) Dr. Patel noted
9 foraminal narrowing at C5-C6 which possibly accounted for
10 Plaintiff's right C6 radiculopathy and migraines. (Id. at 349-
11 50.) Plaintiff, however, was not interested in surgery. (Id. at
12 349.) Dr. Patel suggested a diagnosis of fibromyalgia and
13 recommended that Plaintiff read books by the Arthritis Foundation
14 to obtain more information. (Id. at 350.)

15 Dr. Chavez, the psychiatrist, saw Plaintiff on two
16 additional occasions in 2000. (Id. at 342-43.) Plaintiff had
17 much ambivalence about taking medications for her depression, and
18 reported that she had ceased attending group therapy sessions as
19 she found them ineffective. (Id. at 343.) Dr. Chavez prescribed
20 trial courses of Nefazodone and Wellbutrin, both antidepressants.
21 (Id. at 342-43.)

22 Plaintiff met regularly with Dr. Ariel J. Lang, a staff
23 psychologist at the VA, over the course of five years (2000-2005)
24 for individual psychotherapy sessions. Between July and December
25 2000, Plaintiff complained to Dr. Lang of physical pain that was
26 beginning to limit her daily activities. (Id. at 215.)
27 Plaintiff was frustrated with the medical system because she had
28 not been able to find anything to adequately diagnose her

1 condition or alleviate her pain. (Id. at 210, 213.) After
2 reading about the experiences of other veterans who had served in
3 the Persian Gulf, Plaintiff began to attribute her own symptoms
4 to her service in the war, which Dr. Lang agreed to be the case.
5 (Id. at 213, 215-16.)

6 Plaintiff advised Dr. Lang that she felt like her life was
7 passing her by, so she began the process of enrolling in a
8 vocational education program through the VA. (Id. at 213-15.)
9 She began taking computer technician classes in late 2000. (Id.
10 at 213.) Dr. Lang encouraged Plaintiff to increase her exercise
11 and reintroduce certain foods that Plaintiff had eliminated
12 because she believed they exacerbated her symptoms. (Id. at
13 211.) Overall, Dr. Lang felt that she had little to offer
14 Plaintiff, as few of her treatment suggestions were any help in
15 treating Plaintiff's symptoms. Dr. Lang noted, however, that
16 Plaintiff seemed to benefit from the therapy sessions as a source
17 of support. (Id.)

18 During the first half of 2001, Plaintiff generally reported
19 to Dr. Lang that her symptoms remained unchanged. (Id. at 208,
20 210.) Although she initially reported doing well in school (id.
21 at 210), she expressed doubt about the skills she was building
22 and eventually started missing school (id. at 207-09). She had a
23 confrontation with an instructor at school and even stopped
24 studying because of her dislike for the teacher. (Id. at 206-
25 07.) She scheduled an appointment with a Gulf War Illness
26 specialist in Los Angeles in March 2001, as she was dissatisfied
27 that her treatment providers at the VA had been unable to
28 adequately address her symptoms. (Id. at 209.) Dr. Lang again

1 reported that there was not much beyond providing support that
2 she could offer Plaintiff as she had tried many other approaches
3 with little success. (Id. at 210.)

4 Plaintiff received treatment over the course of 2001 for her
5 migraine headaches from Drs. Daniele Anderson and Alissa J.
6 Gilles, neurologists. (Id. at 191-93, 224-28.)

7 In her sessions with Dr. Lang during the latter half of
8 2001, Plaintiff became more dissatisfied with the medical
9 treatment she was receiving from the VA. (Id. at 205.) She
10 applied for MediCal as a means of obtaining second opinions.
11 (Id.) Plaintiff was still in school but did not feel that she
12 was learning anything. (Id. at 205-06.) She reported that
13 studying exacerbated her symptoms, as did her part-time work
14 study job. (Id. at 204.) Dr. Lang observed that Plaintiff
15 appeared to be "more and more defeated." (Id. at 205.)
16 Plaintiff was referred to physical therapy at the end of 2001 by
17 Dr. Rashida Abbas, a staff physician, due to "nearly constant"
18 ankle and knee pain. (Id. at 329-30.)

19 Plaintiff underwent a physical therapy evaluation in
20 February 2002. (Id. at 301-04.) Plaintiff's pain had worsened
21 such that even her skin was hypersensitive. (Id. at 301.) The
22 physical therapist, Mirna Zatarain-Beckwith, recommended pool
23 therapy and a home exercise program. (Id. at 303.) Plaintiff
24 stopped the pool therapy after her first time because she got
25 very cold when she left the pool and did not feel well for days
26 afterward. (Id. at 300.) The physical therapist issued

1 Plaintiff a TENS¹ unit instructed her to continue with her home
2 exercises, and discharged her from physical therapy. (Id.) That
3 same month, Plaintiff reported to Dr. Abbas that the TENS unit
4 helped her ankle and back pain, but that Propranolol had not
5 relieved her headaches. (Id. at 327.) Plaintiff declined a
6 referral to the Chronic Benign Pain program due to schedule
7 conflicts. (Id.) She did, however, request a referral for
8 acupuncture. (Id. at 328.)

9 During Plaintiff's sessions with Dr. Lang in early 2002,
10 Plaintiff stated that she continued to feel frustrated with her
11 physical symptoms, school, and the VA medical system. (Id. at
12 202-04.) Plaintiff had done well in some of her general
13 education classes, but had failed one of her exams at school.
14 (Id. at 203.) Plaintiff was upset that her disability claim had
15 been denied, but Dr. Lang praised her for using some of the
16 skills she had learned in therapy to deal with the situation
17 appropriately. (Id.) Dr. Lang noted that Plaintiff's
18 psychological symptoms were related to Plaintiff's "poorly
19 explained" physical symptoms and the related changes in her
20 lifestyle. (Id. at 202, 204.) Over the long run, Dr. Lang hoped
21 to increase Plaintiff's level of functioning. (Id. at 203.)

22 In July 2002, Plaintiff reported to Dr. Abbas that her ankle
23 pain was ongoing and that it was, if anything, worse. (Id. at
24 322.) She had been unable to exercise due to her pain, was

26 ¹Transcutaneous electrical nerve stimulation is a therapy
27 sometimes used to treat localized or regional pain. During TENS
28 therapy, electrodes deliver electrical impulses to nearby nerve
pathways which can help control or relieve some types of pain.
See <http://mayoclinic.com/health/tens/AN01946> (as visited Feb. 3,
2009).

1 having trouble sleeping, and was lacking in motivation. (Id.)
2 She stated that she was attending classes for her children only
3 and that she felt hopeless about her future. (Id.)

4 Plaintiff saw Dr. Dhyanne Warner, staff psychiatrist, on
5 three occasions during the latter half of 2002. (Id. at 234-36.)
6 Plaintiff reported that she had stopped seeing Dr. Lang as she
7 did not feel that therapy was helpful. (Id. at 235.) She stated
8 that she had no energy, was frightened to eat certain foods
9 because they could trigger a headache, and that she "hurt all the
10 time." (Id. at 235-36.) Dr. Warner prescribed Prozac, which
11 Plaintiff could not tolerate; Dr. Warner then recommended Celexa.
12 (Id.) Over the course of three visits, Dr. Warner found that
13 Plaintiff had Global Assessment of Functioning ("GAF") scores of
14 60, 60, and 62.² (Id. at 234, 235, 236.) Plaintiff began
15 keeping a pain diary as a way to monitor her pain. (Id. at
16 235.)³

17 Plaintiff attended the behavior medicine clinic at the VA in
18 late 2002 at Dr. Warner's suggestion. (Id. at 309-14.)
19 Psychologist Pollyanna V. Casmar noted that it was her impression

20
21 ²The Global Assessment of Functioning scale, or GAF scale, is a
22 numeric scale (0 through 100) used by mental health practitioners to
23 rate social, occupational, and psychological functioning, with lower
24 numbers representing more severe symptoms, difficulties, or
25 impairments. The scale is presented in the Diagnostic and Statistical
26 Manual of Mental Disorders. A GAF score between 51 and 60 suggests
27 "Moderate symptoms OR any moderate difficulty in social, occupational,
or school functioning." A GAF score between 61 and 70 suggests "Some
mild symptoms OR some difficulty in social, occupational, or school
functioning, but generally functioning pretty well, has some
meaningful interpersonal relationships." American Psychiatric
Association, Diagnostic and Statistical Manual of Mental Disorders,
Fourth Edition Text Revision (2000).

28 ³The administrative record includes journal entries from 2001
(id. at 116-21) and 2004 (id. at 122-26), as well as undated journal
entries (id. at 127-41).

1 that Plaintiff had recognized that she must accept her pain and
2 live with it as a part of her life. (Id. at 310.) Plaintiff
3 appeared to be eager to try new techniques to assist with the
4 pain and was hopeful that something would work. (Id.)

5 In December 2002, Plaintiff followed up with neurologist Dr.
6 Roy Yaari regarding her headaches. (Id. at 336-38.) She
7 presented with her sister, a nursing student, who requested that
8 Plaintiff have a spinal tap and be worked up for Gulf War
9 Syndrome. (Id. at 337.) Although Dr. Yaari explained that the
10 spinal tap was not indicated, both Plaintiff and her sister
11 insisted upon proceeding with one. (Id.) Shortly thereafter,
12 however, Plaintiff called Dr. Yaari to cancel the appointment.
13 (Id. at 338.) She agreed that it was likely not indicated, and
14 stated that she was going to see an outside neurologist. (Id.)

15 In early 2003, Plaintiff reported to Dr. Abbas that she had
16 applied for enrollment in a clinical trial at Johns Hopkins but
17 had been turned down due to her depression. (Id.) She was
18 disappointed as she felt she was a good candidate for the trial
19 because of her generalized pain and fatigue and poor
20 concentration. (Id.) She also revealed that she was failing
21 three of her courses at school. (Id. at 318.)

22 After a hiatus of eleven months, Plaintiff, at her own
23 request, resumed seeing Dr. Lang in March 2003. (Id. at 202.)
24 Plaintiff's primary complaint at that time was increased stress
25 after a wrongful eviction. She was having a hard time feeling
26 relaxed at home, and found that some of her war experiences were
27 coming back to her. Dr. Lang recommended that Plaintiff review
28 her coping skills in light of her new challenges. (Id.) Dr.

1 Lang noted the following month that she was "unclear" about how
2 to move Plaintiff forward. (Id. at 201.) In June 2003, Dr.
3 Abbas reviewed information that Plaintiff had provided regarding
4 the Gulf War Syndrome study at Hopkins. (Id. at 315.) Plaintiff
5 and Dr. Abbas discussed pain management possibilities including
6 yoga, pool therapy, and acupuncture, as well as tilt table
7 testing, which was part of ongoing research into Gulf War-related
8 illnesses. (Id. at 316.) Dr. Abbas also noted that Plaintiff
9 had minimized her medications as none had been helpful. (Id.)
10 X-rays taken of Plaintiff's ankles, legs, and knees in June 2003,
11 in relation to her chronic bilateral lower extremity pain, were
12 normal. (Id. at 176-78.)

13 During a physical therapy evaluation in July 2003, Plaintiff
14 provided a comprehensive description of her complaints, including
15 bilateral shoulder pain, bilateral knee/lower extremity pain,
16 pain in her sacrum, headaches, numbness of her right lower
17 extremity from her knee to her foot, difficulty with sitting for
18 a long period of time, and depression. (Id. at 283.)
19 Plaintiff's diagnosis was listed as chronic fatigue syndrome.
20 (Id. at 282.) Plaintiff tried pool therapy again (id. at 250-53,
21 281-82) as well as yoga (id. at 276-77, 356-57), without success
22 (id. at 266).

23 In November 2003, Dr. Lang observed that Plaintiff "was much
24 the same with multiple complaints without successful resolution."
25 (Id. at 200.) Plaintiff advised that she had failed one class
26 and withdrawn from another, leading Dr. Lang to initiate
27 discussions regarding a "more fruitful vocational path" for
28 Plaintiff. (Id.)

1 On December 17, 2003, Plaintiff had a neuropsychological
2 evaluation performed by Dr. Mindy S. Kane to assess her cognitive
3 strengths and weaknesses to aid in choosing a vocational path.
4 (Id. at 292-300.) Plaintiff reported cognitive difficulties
5 including problems with memory, concentration, and attention.
6 (Id. at 293.) She acknowledged occasional suicidal ideation but
7 stated that it was "not serious." (Id.)

8 Dr. Kane performed a series of tests on Plaintiff. (Id. at
9 294-95.) Plaintiff's overall intellectual function was in the
10 average range, with a Full Scale IQ of 92. (Id. at 295.) Dr.
11 Kane observed a significant discrepancy between Plaintiff's
12 intellectual functioning and her academic attainment, which
13 raised the possibility of a previously undiagnosed verbal
14 learning disability. (Id. at 299.) Dr. Kane found that an
15 optimal vocation for Plaintiff would be one which would utilize
16 her strengths in visual-spatial skills, abstract reasoning, and
17 arithmetic in a time-unlimited manner. (Id.) Dr. Kane concluded
18 that Plaintiff should continue to receive treatment for her
19 psychiatric symptoms as alleviation of those could produce
20 beneficial effects on her cognitive abilities. (Id.)

21 In early 2004, Plaintiff continued to express her concern
22 about her vocational plan to Dr. Lang. (Id. at 199.) Dr. Lang
23 noted that Plaintiff continued to exhibit depressive symptoms as
24 well as anxiety, which was mostly related to time pressure. (Id.
25 at 198.) Dr. Lang had some success using Eye Movement
26 Desensitization and Reprocessing ("EMDR") to deal with
27 Plaintiff's painful war memories, but after a few sessions,
28 Plaintiff decided to discontinue that line of treatment. (Id. at

1 196-98.) Plaintiff returned to physical therapy in March 2004
2 due to an exacerbation of neck pain that she had experienced
3 since December 2003. (Id. at 272.) Plaintiff explained that she
4 had stopped using her TENS unit because it irritated her neck.
5 (Id.) She attended physical therapy sessions from April to July
6 2004 and obtained partial relief of her symptoms. (Id. at 237-
7 46, 270-71.) Plaintiff also started receiving massage treatment
8 in May 2004 which appeared to help her. (Id. at 256-60, 167-70.)
9 Plaintiff reported that she was taking a holistic approach to her
10 health as she felt that other approaches had not worked for her.
11 (Id. at 195.) She explained that she was very careful about her
12 diet and that she had had mercury removed from her dental work as
13 she believed it was causing mercury toxicity. (Id. at 195, 257,
14 260.)

15 In June 2004, Plaintiff told Dr. Lang that she felt good
16 while visiting family in New York, including her sons, who by now
17 lived with their grandmother. (Id. at 167-68, 194.) She had
18 been feeling worse since her return home but still felt better
19 than in preceding months. (Id. at 194.) She stated that she had
20 read a book about fibromyalgia and chronic fatigue and believed
21 that those diagnoses were appropriate for her. (Id.) Dr. Lang
22 observed that Plaintiff appeared relieved to have found the
23 fibromyalgia diagnosis and acknowledged that she had been "in
24 denial" when this had been discussed with her in the past. (Id.)

25 In August 2004, Plaintiff told Dr. Lang that she would
26 continue to pursue alternative treatment when she was able to
27 afford it. (Id. at 169.) She also advised that she had not done
28 well in school during the last semester because of her symptoms.

1 (Id.) In October 2004, Plaintiff received a pain assessment with
2 Dr. Marilyn Castle of the Anesthesiology Department at the VA,
3 who noted Plaintiff's history of chronic pain/fibromyalgia. (Id.
4 at 162-63.) She reported that massage had increased the
5 circulation to her legs and that it helped her neck pain for the
6 first day or two after each massage. (Id. at 162.) Dr. Castle
7 recommended that Plaintiff proceed with trigger point injections,
8 acupuncture, and muscle relaxers. (Id. at 163.) In November
9 2004, Plaintiff expressed to Dr. Lang her frustrations that the
10 VA did not offer alternative medicine options and that she did
11 not have sufficient income to pay for all of the care that she
12 wanted to receive. (Id. at 161.)

13 Plaintiff continued with massage therapy into 2005, and
14 received a small amount of acupuncture, but her request for
15 hypnotherapy was denied. (Id. at 373-76, 380, 391, 398-99.) In
16 February 2005, Plaintiff reported to Dr. Lang that her depression
17 was "in check" and that it would not change until her pain got
18 better. (Id. at 397.) Dr. Lang reviewed depression treatment
19 options with Plaintiff, but noted that Plaintiff refused
20 medication, did not like group therapy, and that a number of
21 techniques had been tried to no avail. (Id.) Plaintiff told Dr.
22 Lang that she was doing "nothing" in terms of treatment except
23 waiting for massage to reduce her pain and hanging upside down as
24 she felt the right side of her body was shortening. (Id.) Dr.
25 Lang noted, "She is clear that she prefers to read books and
26 manage her treatment herself." (Id.)

27 In September 2005, Dr. Lang completed a "Mental Impairment
28 Review Form" on behalf of Plaintiff. (Id. at 361-64.) Dr. Lang

1 indicated that Plaintiff's diagnoses included recurrent
2 depressive disorder and fibromyalgia. (Id. at 361.) She
3 assessed Plaintiff's current and past year GAF score at 51. (Id.
4 at 361; see also fn. 1, *supra.*) Dr. Lang opined that Plaintiff's
5 prognosis was poor, that her depression and fibromyalgia each
6 exacerbated the other, and that she would have difficulty working
7 a regular job on a sustained basis. (Id. at 363.) She estimated
8 that Plaintiff would miss work more than three times per month
9 due to her impairments. (Id.) Dr. Lang further opined that
10 Plaintiff had "marked" limitations in activities of daily living,
11 maintaining social functioning, and maintaining concentration,
12 persistence or pace as a result of her mental impairments. (Id.)

13 On June 5, 2006, i.e., after the ALJ rendered his decision,
14 Dr. Lang wrote a letter clarifying her previous assessment of
15 Plaintiff's functioning. (Id. at 417-18.) She opined that
16 Plaintiff had more than a mild impairment but that it did not
17 quite fall into the serious range. (Id. at 417.) She also
18 reiterated her opinion that Plaintiff's symptoms would interfere
19 with her ability to hold a job. (Id.) Finally, although Dr.
20 Lang acknowledged that Plaintiff had completed her Associate's
21 Degree during the course of her treatment, she stated that
22 Plaintiff's performance had been variable and that she had
23 reported multiple difficulties with studying as well as many
24 absences from school. (Id.)

25 **B. Vocational Records**

26 In December 2005, Plaintiff received a vocational assessment
27 to identify her basic vocational skills. (Id. at 407-14.) The
28 assessment resulted in the following recommendations:

1 Given Ms. Perry's performance during this assessment,
2 return to competitive employment would appear
3 questionable at this time. Considering the client's
4 report of neck and back discomfort with minimal
5 physical exertion, she would appear to require a highly
6 selective work environment. The client's inconsistent
7 attention to detail would appear to limit her ability
8 to maintain accuracy. In addition, the client's
9 consistent below average work rate and aptitudes would
10 adversely affect her employability. It should be
11 noted, the client advised she prefers to work by
12 herself and would find it difficult working with
13 others, or having close supervision. This factor would
14 also appear to limit the client's vocational options.

15 (Id. at 413.)

16 In May 2006, Linda Raffignone, a Vocational Rehabilitation
17 Counselor with the VA, wrote a letter advising that Plaintiff had
18 been working with the Vocational Rehabilitation division since
19 2000. (Id. at 415.) She indicated that because Plaintiff's
20 physical and mental impairments had continued to plague her
21 without improvement, the division had determined that it was "no
22 longer feasible for Ms. Perry to return to work" and that it
23 would focus instead on increasing Plaintiff's quality of life
24 through Independent Living Services. (Id.)

25 **IV. THE ADMINISTRATIVE HEARING**

26 The ALJ conducted an administrative hearing on October 18,
27 2005. (Id. at 420.)

28 **A. Plaintiff's Testimony**

Plaintiff testified that she began to notice her symptoms
after returning from the Gulf War. (Id. at 424.) She stated
that she got out of the Army because of her disability and that
she receives a disability pension of \$850 per month. (Id.)
Plaintiff stated that she has a disability rating of 30%
connected to her service based on her joint, ankle, knee, and

1 sinus conditions and a 30% "non-connected" disability rating
2 based on her migraines. (Id.)⁴ Plaintiff testified that she
3 attended school between 2001 and 2004 to study computer
4 electronics. (Id. at 426-27.) She stated that her 18-year-old
5 son resided with her. (Id. at 427.) She testified that she
6 could still drive, but that her driving skills were
7 deteriorating. (Id.) She stated that she could still cook,
8 though not as often as before, and that she needed assistance to
9 go grocery shopping, but that she could still pay her bills.
10 (Id.)

11 Plaintiff testified that she was absent many times while
12 enrolled in school. (Id. at 430.) She stated that she was still
13 able to pass her classes as there were many group projects and
14 the other group members would do the work for her. (Id. at 431.)
15 She testified that although she learned a little bit about
16 computers, she did not retain a lot of the information she had
17 learned. (Id.) After finishing school, Plaintiff looked for
18 work but could not meet job demands, such as putting on a tool
19 belt, without an increase in her symptoms. (Id. at 428-29.) She
20 stated that she did nothing during the day other than attending
21 doctors' appointments. (Id. at 429.)

22 Plaintiff testified that she still experiences pain in her
23 neck, spine, lower back, knees, and ankle. (Id. at 434.) In
24 order to alleviate her pain, she takes hot showers, uses BenGay,
25 takes painkillers, and stretches. (Id.) Over the past year, she
26 experienced pain levels that were higher than normal about four

27
28 ⁴Plaintiff's counsel advised during the administrative hearing
that Plaintiff had applied to have her "non-service connected"
headaches changed to "service-connected." (Id. at 441.)

1 days per week. (Id. at 436.) She testified that she stays in
2 bed all day on days such as those. (Id.) She also testified
3 that she does not do anything for fun, does not watch television,
4 does not read for pleasure, and uses the computer only to do
5 research on her condition. (Id. at 438.) She stated that she
6 could sit for a maximum of twenty minutes at a time. (Id.) She
7 tries to refrain from lifting more than ten or fifteen pounds.
8 (Id. at 439.)

9 Upon questioning by Sidney Bolter, M.D., the medical expert
10 ("ME"), Plaintiff testified that she could not go out and walk
11 because it irritated her ankle and knee areas, and could not
12 force herself to exercise because it caused her pain. (Id. at
13 443.)

14 **B. Medical Expert Testimony**

15 The ME, a psychiatrist, testified that Plaintiff had
16 depression, not otherwise specified (Listing 12.04 of the Listing
17 of Impairments),⁵ secondary to pain, a somatoform disorder
18 (Listing 12.07),⁶ and chronic pain syndrome (Listings 12.07A3 and
19 12.07). (Id. at 445.) He testified that fibromyalgia is a "very
20 controversial diagnosis" but that it had been declared a disease
21 by the American Rheumatological Association and the Center for
22 Disease Control. (Id.) He opined that Plaintiff had a moderate
23

24 ⁵The Listing of Impairments in the Social Security Regulations
25 ("Listings") sets forth certain impairments which are considered to be
26 of sufficient severity to prevent the performance of any gainful
27 activity. See 20 C.F.R. § 404.1525(a); 20 C.F.R. pt. 404, subpt. P,
28 app. 1.

27 ⁶Somatoform disorders are defined in the Listings as "Physical
28 symptoms for which there are no demonstrable organic findings or known
physiological mechanism." 20 C.F.R. pt. 404, subpt. P, app. 1, §
12.07.

1 limitation on activities of daily living and a marked limitation
2 on social functioning. (Id.) He also opined that Plaintiff had
3 a mild limitation on concentration, persistence, and pace, but
4 that any work beyond one or two step tasks would result in a
5 moderate to marked limitation. (Id.) He stated that Plaintiff
6 should participate in a non-public job, and should have minimal
7 contact with peers and supervisors. (Id. at 445-46.)

8 **C. Vocational Expert Testimony**

9 Vocational expert ("VE") witness Gloria Lasoff also
10 testified at the hearing. In response to a hypothetical question
11 posed by the ALJ, she testified that a person with Plaintiff's
12 education and prior work experience who was "limited to simple,
13 repetitive tasks, non-public contact, [and] minimal co-worker and
14 supervisor interaction" would not be able to return to
15 Plaintiff's prior work. (Id. at 449.) Such a person could,
16 however, perform other work, including as an assembler,
17 Dictionary of Occupational Titles ("DOT") number 754.687-010,
18 inspector/hand packager, DOT number 559.687-074, and production
19 assembler, DOT number 706.687-010. (Id. at 449-50.) The VE
20 further testified that an individual who was absent more than
21 three times per month would not be able to sustain any of the
22 above cited jobs. (Id. at 451.) She also stated that each of
23 these jobs would require that a person perform a certain amount
24 of work within an eight hour day, and thus these positions were
25 not "time unlimited." (Id. at 451-52.)

26 **V. THE ALJ DECISION**

27 After considering the record, ALJ Carletti made the
28 following findings:

- 1
- 2 2. The claimant has not engaged in substantial gainful
3 activity since the alleged onset of disability.
- 4 3. The claimant's depressive disorder, not otherwise
5 specified; a cognitive disorder, and a somatoform
6 disorder are considered "severe" based on the
7 requirements in the Regulations [citation omitted].
- 8 4. These medically determinable impairments do not meet or
9 medically equal one of the listed impairments in [the
10 Social Security Regulations].
- 11 5. The undersigned finds the claimant's allegations
12 regarding her limitations are not totally credible for
13 the reasons set forth in the body of the decision.
- 14 6. The claimant has the following residual functional
15 capacity to perform simple, repetitive tasks in a
16 nonpublic work setting if she has limited contact with
17 coworkers and supervisors.
- 18
- 19 8. The claimant is unable to perform any of her past
20 relevant work [citation omitted].
- 21
- 22 12. Considering the types of work that the claimant is
23 still functionally capable of performing in combination
24 with the claimant's age, education and work experience,
25 she could be expected to make a vocational adjustment
26 to work that exists in significant numbers in the
27 national economy. Examples of such jobs include work
28 as an assembler, inspector and product assembler of
which there are 70,000; 140,000; and 400,000 jobs,
respectively, in the national economy. This finding is
based on expert vocational testimony provided at the
hearing.
13. The claimant was not under a "disability," as defined
in the Social Security Act, at any time through the
date of this decision [citation omitted].

(Id. at 18-19.)

VI. STANDARD OF REVIEW

To qualify for disability benefits under the Social Security Act, an applicant must show that: (1) He or she suffers from a medically determinable impairment that can be expected to result

1 in death or that has lasted or can be expected to last for a
2 continuous period of twelve months or more, and (2) the
3 impairment renders the applicant incapable of performing the work
4 that he or she previously performed or any other substantially
5 gainful employment that exists in the national economy. See 42
6 U.S.C.A. § 423(d)(1)(A), (2)(A) (West 2004). An applicant must
7 meet both requirements to be "disabled." Id. Further, the
8 applicant bears the burden of proving that he or she was either
9 permanently disabled or subject to a condition which became so
10 severe as to disable the applicant prior to the date upon which
11 his or her disability insured status expired. Johnson v.
12 Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995).

13 **A. Sequential Evaluation of Impairments**

14 The Social Security Regulations outline a five-step process
15 to determine whether an applicant is "disabled." The five steps
16 are as follows: (1) Whether the claimant is presently working in
17 any substantial gainful activity. If so, the claimant is not
18 disabled. If not, the evaluation proceeds to step two.

19 (2) Whether the claimant's impairment is severe. If not, the
20 claimant is not disabled. If so, the evaluation proceeds to step
21 three. (3) Whether the impairment meets or equals a specific
22 impairment listed in the Listing of Impairments. If so, the
23 claimant is disabled. If not, the evaluation proceeds to step
24 four. (4) Whether the claimant is able to do any work she has
25 done in the past. If so, the claimant is not disabled. If not,
26 the evaluation continues to step five. (5) Whether the claimant
27 is able to do any other work. If not, the claimant is disabled.

28 Conversely, if the Commissioner can establish there are a

1 significant number of jobs in the national economy that the
2 claimant can do, the claimant is not disabled. 20 C.F.R. §
3 404.1520; see also Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th
4 Cir. 1999).

5 **B. Judicial Review**

6 Sections 205(g) and 1631(c)(3) of the Social Security Act
7 allow unsuccessful applicants to seek judicial review of the
8 Commissioner's final agency decision. 42 U.S.C.A. §§ 405(g),
9 1383(c)(3). The scope of judicial review is limited. The
10 Commissioner's final decision should not be disturbed unless:
11 (1) The ALJ's findings are based on legal error or (2) are not
12 supported by substantial evidence in the record as a whole.
13 Schneider v. Comm'r of Soc. Sec. Admin., 223 F.3d 968, 973 (9th
14 Cir. 2000). Substantial evidence means "more than a mere
15 scintilla but less than a preponderance; it is such relevant
16 evidence as a reasonable mind might accept as adequate to support
17 a conclusion." Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir.
18 1995). The Court must consider the record as a whole, weighing
19 both the evidence that supports and detracts from the ALJ's
20 conclusion. See Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir.
21 2001); Desrosiers v. Sec'y of Health & Human Servs., 846 F.2d
22 573, 576 (9th Cir. 1988). "The ALJ is responsible for
23 determining credibility, resolving conflicts in medical
24 testimony, and for resolving ambiguities." Vasquez v. Astrue,
25 547 F.3d 1101, 1104 (9th Cir. 2008) (citing Andrews, 53 F.3d at
26 1039). Where the evidence is susceptible to more than one
27 rational interpretation, the ALJ's decision must be affirmed.
28 Id. (citation and quotations omitted).

1 Section 405(g) permits this Court to enter a judgment
2 affirming, modifying, or reversing the Commissioner's decision.
3 42 U.S.C.A. § 405(g). The matter may also be remanded to the
4 Social Security Administration for further proceedings. Id.

5 **VII. DISCUSSION**

6 **A. The ALJ Did Not Commit Reversible Error By Relying on**
7 **the VE's Testimony Without Inquiring Whether It**
8 **Conflicted With the DOT**

9 Plaintiff argues that the ALJ's finding that a person
10 limited to "simple repetitive tasks" can perform the jobs of
11 assembler, inspector, and product assembler is not supported by
12 substantial evidence. Pl.'s Mem. at 10. Plaintiff contends that
13 the Reasoning Level required for these jobs, as set forth in the
14 DOT, demonstrates that they are not appropriate for a person
15 limited to simple repetitive tasks, and that the ALJ erred by not
16 asking the VE about this purported conflict between her testimony
17 and the information provided in the DOT. Id. at 10-11.
18 Defendant counters that Reasoning Levels do not pertain to one's
19 residual functional capacity, and further contends that
20 Plaintiff's argument is not even supported by the cases in which
21 the courts considered DOT Reasoning Levels in the context
22 suggested by Plaintiff. Def.'s Opp'n at 7. Defendant further
23 asserts that even if the ALJ erred by not specifically asking the
24 VE whether her testimony deviated from the DOT, any such error
25 was harmless. Id. at 8.

26 Social Security Ruling ("SSR") 00-4p states that before
27 relying on VE evidence to support a disability determination or
28 decision, the ALJ must inquire whether the VE testimony is
consistent with the DOT. See SSR 00-4p, 2000 WL 1898704, at *2;

1 see also Massachi v. Astrue, 486 F.3d 1149, 1152 (9th Cir. 2007).
2 When there is an apparent unresolved conflict, the ALJ must
3 inquire, on the record, about the inconsistency, and must obtain
4 a reasonable explanation for the conflict. SSR 00-4p, 2000 WL
5 1898704, at *2. The failure to do so constitutes procedural
6 error. Massachi, 486 F.3d 1149, 1153-54 & n.19. Such error is
7 harmless, however, if there was no conflict or if the VE provided
8 sufficient support for his or her conclusion so as to justify any
9 potential conflicts. Id. at 1154 n.19.

10 Here, the VE's testimony provided that the jobs of
11 assembler, hand packager, and production assembler were
12 appropriate for a person with a limitation to simple repetitive
13 tasks. (Admin. R. at 449-50.) Plaintiff, noting that the DOT
14 indicates that each of these jobs has a Reasoning Level of 2,
15 argues that these jobs are beyond the ability to perform simple
16 repetitive tasks. (Pl.'s Mem. at 10-11.)

17 The DOT defines a position with a Reasoning Level of 2 as
18 requiring the worker to "[a]pply commonsense understanding to
19 carry out detailed but uninvolved written or oral instructions []
20 and [d]eal with problems involving a few concrete variables in or
21 from standardized situations." DOT, app. C. Other courts have
22 found a Reasoning Level of 2 to be consistent with a limitation
23 to simple repetitive tasks. See, e.g., Hackett v. Barnhart, 395
24 F.3d 1168, 1176 (10th Cir. 2005) ("[L]evel-two reasoning appears
25 more consistent with Plaintiff's [residual functional capacity]"
26 to perform "simple and routine work tasks"); Meissl v. Barnhart,
27 403 F.Supp.2d 981, 984-85 (C.D. Cal. 2005) (finding that a
28 plaintiff's ability to perform "simple tasks . . . that had some

1 element of repetitiveness to them" indicated a reasoning level of
2 two); Flaherty v. Halter, 182 F.Supp.2d 824, 850 (D. Minn. 2001)
3 ("the DOT's level two reasoning requirement did not conflict with
4 the ALJ's prescribed limitation" to "simple, routine, repetitive,
5 concrete, tangible tasks"). Furthermore, this Court, in a recent
6 decision, made the same finding. See Harrington v. Comm'r of
7 Soc. Sec. Admin., 2008 WL 4492614, at *10-11 (S.D. Cal. 2008),
8 *modified in part*, 2009 WL 102689 (S.D. Cal. Jan. 14, 2009).
9 Thus, the Court finds that Plaintiff's contention that jobs
10 requiring level two reasoning are inconsistent with her
11 limitation to simple repetitive tasks is without merit.⁷

12 Because the VE's testimony did not conflict with the DOT,
13 the ALJ's failure to ask the VE whether there was any such
14 conflict constituted harmless error. Massachi, 486 F.3d at 1154
15 n.19; Harrington, 2009 WL 102689, at *2. Thus, the ALJ did not
16 commit reversible error by relying on the testimony of the VE.

17 **B. The ALJ Did Not Meet His Burden of Articulating**
18 **Specific and Legitimate Reasons for Rejecting Dr.**
19 **Lang's Opinion**

20 Plaintiff next contends that the ALJ improperly rejected the
21 opinion of Dr. Lang, Plaintiff's treating psychologist.
22 Plaintiff argues that Dr. Lang's opinions were not controverted,
23 and contends that none of the four reasons set forth by the ALJ
24 to reject Dr. Lang's opinion was either "clear and convincing" or
25 "specific and legitimate." Pl.'s Mem. at 13. Defendant argues

26 ⁷Defendant's argument that Reasoning Levels of jobs have no
27 relation to a claimant's residual functional capacity (see Def.'s
28 Opp'n at 7) is also without merit. As the court in Meissl stated,
"[T]he one vocational consideration directly on point with [a
limitation to simple repetitive tasks] is a job's reasoning level
score." Meissl, 403 F.Supp.2d at 983.

1 in opposition that Dr. Lang's opinion was controverted by Dr.
2 Bolter, the ME, and that the ALJ properly articulated specific
3 and legitimate reasons to reject her opinion. Def.'s Opp'n at 8-
4 9.

5 More weight is given to a treating physician's opinion than
6 to the opinion of a nontreating physician. Magallanes v. Bowen,
7 881 F.2d 747, 751 (9th Cir. 1989). Likewise, greater weight is
8 accorded to the opinion of an examining physician than a
9 nonexamining physician. Andrews, 53 F.3d at 1041. The ALJ may
10 disregard the opinion of a treating physician, whether or not it
11 is controverted. Id. If the treating physician's opinion is
12 uncontroverted, the ALJ may reject the opinion only by
13 articulating clear and convincing reasons. Id. "Where . . . a
14 nontreating source's opinion contradicts that of the treating
15 physician but is not based on independent clinical findings, or
16 rests on clinical findings also considered by the treating
17 physician, the opinion of the treating physician may be rejected
18 only if the ALJ gives specific, legitimate reasons for doing so
19 that are based on substantial evidence in the record." Id.
20 (citing Magallanes, 881 F.2d at 751, 755). If, on the other
21 hand, the opinion of the claimant's treating physician is
22 contradicted, and the opinion of a nontreating source is based on
23 independent clinical findings that differ from those of the
24 treating physician, the opinion of the nontreating source may
25 itself constitute substantial evidence, and it is then solely the
26 province of the ALJ to resolve the conflict. Id. (citing
27 Magallanes, 881 F.2d at 751).

28 Here, Dr. Lang's opinion that Plaintiff would have

1 difficulty working at a regular job on a sustained basis and that
2 she had marked limitations in three areas of functionality (see
3 Admin. R. at 363) was contradicted by the ME's opinion that
4 Plaintiff had less than marked limitations in all but one area of
5 functionality (see id. at 445). Dr. Lang and the ME also had
6 differing diagnoses of Plaintiff's conditions: Dr. Lang noted
7 that Plaintiff's diagnoses consisted of "recurrent depressive
8 disorder" and "fibromyalgia," each of which exacerbated the
9 other, while the ME testified that Plaintiff had "depression, not
10 otherwise specified, secondary to pain", which is a "somatoform
11 disorder", and "chronic pain syndrome." (Id. at 362-63, 445.)⁸
12 Thus, in order to reject Dr. Lang's opinion, the ALJ was required
13 to articulate specific, legitimate reasons for doing so based on
14 substantial evidence in the record. Andrews, 53 F.3d at 1041.⁹

15 The ALJ articulated the following four reasons for rejecting
16

17 ⁸The Court observes that Dr. Lang was not making the diagnosis of
18 fibromyalgia; rather, she was confirming a diagnosis that had
19 previously been made by Plaintiff's other treatment providers.
20 Additionally, her opinion that Plaintiff cannot maintain employment
21 was based primarily upon Plaintiff's mental, not physical impairments;
22 Dr. Lang was merely noting that Plaintiff's depression and
23 fibromyalgia each exacerbate the other. See id. at 363. Thus, Buxton
24 v. Halter, 246 F.3d 762, 775 (6th Cir. 2001), cited by Defendant (see
25 Def.'s Opp'n at 9) is inapplicable.

26 ⁹The ME's opinion itself does not constitute substantial evidence
27 as it was not based upon independent clinical findings. Independent
28 clinical findings can be either (1) diagnoses that differ from those
offered by another physician and that are supported by substantial
evidence or (2) findings based on objective medical tests that the
treating physician has not herself considered. Orn v. Astrue, 495
F.3d 625, 632 (9th Cir. 2007) (citations omitted). The first factor
is not met here because although the ME's diagnosis of a "somatoform
disorder" differed from Dr. Lang's diagnoses, there is no mention of
such a diagnosis anywhere in Plaintiff's medical records and thus,
without further explanation, the diagnosis is not supported by
substantial evidence in the record. The second factor is not met
because the ME does not describe any objective medical tests that he
relied on in formulating his opinions.

1 Dr. Lang's opinion:

2 First, while Dr. Lang has given the claimant a current
3 and past year Global Assessment of only 51, the
4 claimant's treating psychiatrist has reported a Global
5 Assessment of Functioning of 62 [citation omitted].

6 Second, nor is there any evidence that the claimant has
7 had any psychiatric hospitalizations or emergency room
8 treatment or mental illness.

9 Third, the claimant was able to obtain an Associate of
10 Arts degree in computer electronics after attending
11 school from 2001 to November 2004. Surely, the
12 claimant's ability to obtain a degree in computer
13 electronics subsequent to [the] alleged onset date is
14 markedly at odds with Dr. Lang's assessment of her
15 mental residual functional capacity.

16 Fourth, nothing in the claimant's treatment records
17 from the Veterans Administration Medical Center
18 supports Dr. Lang's assessment of the claimant's mental
19 residual functional capacity.

20 (Admin. R. at 16.)

21 The ALJ's first stated reason is not sufficient to discount
22 Dr. Lang's opinion. Although it is true that Dr. Warner, a staff
23 psychiatrist at the VA, found that Plaintiff had a GAF score of
24 62 (see id. at 234), this finding was made in 2002, three years
25 before Dr. Lang found that Plaintiff's GAF score for 2005 and the
26 preceding year was 51.¹⁰ Indeed, a GAF score of 62 in 2002
27 followed by a GAF score of 51 in 2005 is consistent with the
28 continued deterioration of Plaintiff's condition as reflected in
the record. Plaintiff is correct that the ALJ failed to explain
how GAF score assessments made three years apart invalidates Dr.
Lang's opinion. Pl.'s Mem. at 13.

Although the ALJ's second proffered reason is a true
statement, it, too, is not sufficient to discount Dr. Lang's

¹⁰The Court also observes that the ALJ failed to mention that Dr. Warner also assigned a lower GAF score of 60 on two prior occasions in 2002. (See Admin. R. at 235, 236.)

1 assessment. The ALJ has provided no explanation of how this
2 invalidates Dr. Lang's opinion. The Court can infer, as
3 Defendant does, that the ALJ meant that because Plaintiff's
4 mental condition was not sufficiently serious to warrant
5 hospitalization, it was not disabling. See Def.'s Opp'n at 9.
6 The Court disagrees, however, that hospitalization or emergency
7 room treatment is necessary to render a mental impairment
8 disabling, and Defendant cites no authority to the contrary.

9 The Court finds that the ALJ's third stated reason for
10 rejecting Dr. Lang's opinion, though arguable, is sufficiently
11 specific and legitimate. The fourth reason, however, is not.
12 The record is replete with evidence indicating that Plaintiff's
13 depression, alone or in conjunction with her physical symptoms,
14 presented functional limitations and affected her ability to work
15 and attend school. See, e.g., Admin. R. at 235, 236 (reflecting
16 GAF scores of 60, indicative of "moderate" difficulties in
17 functioning); 200, 203, 209, 318 (reflecting difficulties at and
18 absences from school); 204 (Plaintiff's report that school and
19 part time work study exacerbated symptoms); 299
20 (neuropsychological consultant observing that psychiatric
21 symptoms could affect Plaintiff's cognitive weaknesses); 413
22 (vocational assessment indicating that Plaintiff's return to
23 competitive employment was "questionable"), and 415
24 (determination by vocational rehabilitation division at VA that
25 it was no longer feasible for Plaintiff to return to work).

26 The Court thus finds that the ALJ properly articulated only
27 one specific and legitimate reason for rejecting Dr. Lang's
28 opinion regarding Plaintiff's disability and limitations. This

1 sole reason is insufficient to convince the Court that Dr. Lang's
2 opinion was properly rejected. As discussed above, the record
3 contains ample evidence that Plaintiff encountered many
4 difficulties while attending school, and it did, after all, take
5 Plaintiff four years to complete a two year degree. Thus, the
6 Court finds that the ALJ committed reversible error. The Court
7 accordingly recommends that the case be remanded for further
8 consideration of Dr. Lang's opinions.¹¹

9 **C. The ALJ Failed to Articulate Clear and Convincing**
10 **Reasons for Finding That Plaintiff's Subjective Symptom**
11 **Testimony Was Not Credible**

12 Finally, Plaintiff argues that the ALJ's rejection of her
13 subjective complaints is based on legal error and is not
14 supported by substantial evidence. Pl.'s Mem. at 14-16. In
15 determining a claimant's residual functional capacity, the ALJ
16 must consider all relevant evidence in the record, including
17 medical records, lay evidence, and "the effects of symptoms,
18 including pain, that are reasonably attributed to a medically
19 determinable impairment." See Robbins v. Soc. Sec. Admin., 466
20 F.3d 880, 883 (9th Cir. 2006) (citing SSR 96-8p, 1996 WL 374184,

21 ¹¹Plaintiff argues that Dr. Lang's opinion should be credited "as
22 a matter of law." Pl.'s Mem. at 14. There is a split in authority,
23 however, over whether the "credit-as-true" rule is mandatory or
24 discretionary in the Ninth Circuit. See Vasquez v. Astrue, 547 F.3d
25 1101, 1106 (9th Cir. 2008). In any event, the decision whether to
26 remand for further proceedings or to simply award benefits is within
27 the discretion of the court. McAllister v. Sullivan, 888 F.2d 599,
28 603 (9th Cir. 1989). "If additional proceedings can remedy defects in
the original administrative proceedings, a social security case should
be remanded." Lewin v. Schweiker, 654 F.2d 631, 635 (9th Cir. 1981);
see also McAllister, 888 F.2d at 603 ("[A] remand for further
proceedings is appropriate. There may be evidence in the record to
which the Secretary can point to provide the requisite specific and
legitimate reasons for disregarding the testimony of [the] treating
physician. Then again, there may not be. In any event, the Secretary
is in a better position than this court to perform this task.").

1 at *5). "Careful consideration must be given to any available
2 information about symptoms because subjective descriptions may
3 indicate more severe limitations or restrictions than can be
4 shown by objective medical evidence alone." SSR 96-8p, 1996 WL
5 374184, at *5. When considering a claimant's subjective symptom
6 testimony, "if the record establishes the existence of a
7 medically determinable impairment that could reasonably give rise
8 to the reported symptoms, an ALJ must make a finding as to the
9 credibility of the claimant's statements about the symptoms and
10 their functional effect." Robbins, 466 F.3d at 883 (9th Cir.
11 2006) (citations omitted). "While an ALJ may find testimony not
12 credible in part or in whole, he or she may not disregard it
13 solely because it is not substantiated affirmatively by objective
14 evidence." Id. Rather, an ALJ may only find a claimant not
15 credible by making specific findings as to credibility and
16 stating clear and convincing reasons to discount the claimant's
17 subjective symptom testimony. Id.

18 Here, the ALJ set forth the following reasons for finding
19 that Plaintiff was not credible:

20 First, numerous treating physicians have cited the
21 absence of any medical explanation for the claimant's
22 myriad of symptoms [citation omitted]. Despite her
23 complaints of severe neck pain radiating into her arms,
24 a December 1999 MRI scan revealed only mild narrowing
25 at the C5-6 level of her cervical spine, with no
26 evidence of cervical radiculopathy consistent with her
27 complaints of bilateral arm pain and weakness, such as
28 frank disc herniation, nerve root impingement of spinal
stenosis [citation omitted]. January 2004 x-rays of
the claimant's cervical spine were also within normal
limits [citation omitted]. An EMG/nerve conduction
study of her upper extremities was also negative for
any significant pathology [citation omitted].

Second, despite the claimant's complaints of recurrent
migraine headaches, an MRI of the claimant's brain was
within normal limits [citation omitted]. The claimant

1 denied any improvement, despite the usage of numerous
2 medications prescribed by treating sources, and has
3 indicated that her migraine headaches have responded to
4 adjustments to her "attitude" [citation omitted].

5 Third, x-rays of the claimant's knees and ankles have
6 been within normal limits, despite her complaints of
7 severe knee pain [citation omitted].

8 Fourth, the claimant has been described as having full
9 motor strength in her arms, despite her complaints of
10 pain radiating from her neck into both arms [citation
11 omitted].

12 Fifth, despite the claimant's complaint of severe right
13 shoulder pain, no treating or examining physician has
14 ever recommended surgery for her shoulder. Indeed, the
15 claimant has been described by treating sources as "not
16 a surgical candidate" [citation omitted]. At most, the
17 claimant has received only a very limited number of
18 steroid injections in her right shoulder.

19 Sixth, Dr. Lang acknowledged that the claimant's
20 psychiatric condition exacerbates her pain and
21 acknowledged that there is an interaction between the
22 claimant's depression and her fibromyalgia,
23 characterized by each condition exacerbating the other
24 [citation omitted].

25 Seventh, the claimant's treatment records from the
26 Veterans Administration Medical Center also reveal that
27 she has a history of self-diagnosing, with almost
28 hypochondriac behavior, which leads the undersigned to
conclude that she does not have any physical impairment
or combination of physical impairments which impose any
significant work-related limitations.

(Admin. R. at 17.)¹²

Reasons 1 through 5 each concern the lack of objective
medical evidence supporting Plaintiff's *physical* complaints.
However, an ALJ clearly may not disregard a claimant's testimony
regarding her symptoms solely because it is not substantiated
affirmatively by objective evidence. Robbins, 466 F.3d at 883.

¹²Defendant argues that Plaintiff's "uncooperativeness with her
treatment" and her failure to follow her doctors' advice factored into
the ALJ's determination of Plaintiff's credibility. Def.'s Opp'n at
10. As seen above, however, it did not.

1 Furthermore, Plaintiff alleges both physical and mental
2 impairments. None of these reasons sufficiently addresses why
3 Plaintiff's testimony regarding her *mental* impairments is not
4 credible. Although these reasons may explain why the ALJ did not
5 find that Plaintiff's fibromyalgia was "severe" at step 2 of the
6 disability evaluation -- a finding that Plaintiff does not
7 contest -- they provide no basis to discount the symptoms based
8 upon Plaintiff's mental impairments. See Robbins, 466 F.3d at
9 883 (the ALJ must make a *specific* finding as to the credibility
10 of a claimant's statements about her reported symptoms and their
11 functional effects); see also Orn, 495 F.3d at 635 ("[T]o
12 discredit a claimant's testimony when a medical impairment has
13 been established, the ALJ must provide 'specific, cogent reasons
14 for the disbelief'").

15 The Court does not understand how the ALJ's sixth proffered
16 reason for finding Plaintiff not credible weighs against
17 Plaintiff, and Defendant has provided no explanation as to why
18 this constitutes a clear and convincing reason to reject
19 Plaintiff's subjective symptom testimony. Indeed, in the Court's
20 view, this statement appears to support Plaintiff's claim for
21 disability.

22 The ALJ's seventh proffered reason for finding Plaintiff's
23 testimony not credible is unsupported by the record. The Court,
24 after considering the record as a whole, fully disagrees with the
25 ALJ that Plaintiff's medical records "reveal that she has a
26 history of self-diagnosing, with almost hypochondriac behavior."
27 (Admin. R. at 17.) Nowhere in Plaintiff's extensive records is
28 it even suggested that Plaintiff is a hypochondriac. The ALJ's

1 statement that Plaintiff has a history of self-diagnosing appears
2 to rest on his earlier observation that, "[T]he claimant's
3 treatment records confirm that, after reading a book, the
4 claimant diagnosed herself with fibromyalgia and chronic fatigue
5 syndrome." (Id. at 15 (citing id. at 194).) This is an untrue
6 statement, however. As the record itself makes clear, Plaintiff
7 told Dr. Lang on June 21, 2004 that she agreed that these
8 diagnoses, *which had previously been offered by her VA medical*
9 *providers*, were appropriate for her after reading a book on these
10 topics. See id. at 350 (Dr. Patel's suggestion on June 15, 2000
11 that Plaintiff had fibromyalgia), 282 (VA record dated July 29,
12 2003 reflecting diagnosis of chronic fatigue syndrome).

13 Plaintiff did not diagnose herself with these conditions.

14 Indeed, the suggestion that Plaintiff read about these conditions
15 came from Dr. Patel. Id. at 350 (treatment note reflecting that
16 Plaintiff had been advised of books to read).

17 The Court believes that this erroneous assumption may have
18 disfavorably colored the ALJ's entire assessment of Plaintiff's
19 conditions and credibility. Therefore, upon remand, the ALJ
20 shall reconsider Plaintiff's credibility. If he wishes to reject
21 Plaintiff's testimony regarding the limitations imposed by her
22 mental impairments, he must point to "specific facts in the
23 record" for doing so, or else accept Plaintiff's testimony. See,
24 e.g., *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

25 **VIII. CONCLUSION**

26 For the reasons set forth above, Plaintiff's Motion for
27 Summary Judgment should be **GRANTED IN PART** and **DENIED IN PART**,
28 Defendant's Cross-Motion for Summary Judgment should be **GRANTED**

1 **IN PART** and **DENIED IN PART**, and the case should be remanded for
2 further proceedings.

3 This report and recommendation will be submitted to the
4 Honorable M. James Lorenz, United States District Judge assigned
5 to this case, pursuant to the provisions of 28 U.S.C.
6 § 636(b)(1). Any party may file written objections with the
7 Court and serve a copy on all parties on or before **February 18,**
8 **2009**. The document should be captioned "Objections to Report and
9 Recommendation." Any reply to the Objections shall be served and
10 filed on or before **March 2, 2009**. The parties are advised that
11 failure to file objections within the specified time may waive
12 the right to appeal the district court's order. Martinez v.
13 Ylst, 951 F.2d 1153 (9th Cir. 1991).

14 **IT IS SO ORDERED.**

15 DATED: February 3, 2009

16 
17 Jan M. Adler
18 U.S. Magistrate Judge
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