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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 TANYA GEANNA MACLEOD,
12 Plaintiff,
13 v.
14 NANCY A. BERRYHILL, Acting
15 Commissioner of Social Security,
16 Defendant.

Case No.: 3:18-cv-01873-LAB (RNB)

**REPORT AND
RECOMMENDATION REGARDING
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

(ECF Nos. 18, 24)

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18 This Report and Recommendation is submitted to the Honorable Larry Alan Burns,
19 United States District Judge, pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule
20 72.1(c) of the United States District Court for the Southern District of California.

21 On August 10, 2018, plaintiff Tanya Geanna Macleod filed a Complaint pursuant to
22 42 U.S.C. § 405(g) seeking judicial review of a decision by the Commissioner of Social
23 Security denying her application for a period of disability and disability insurance benefits.
24 (ECF No. 1.)

25 Now pending before the Court and ready for decision are the parties' cross-motions
26 for summary judgment. For the reasons set forth herein, the Court **RECOMMENDS** that
27 plaintiff's motion for summary judgment be **GRANTED**, that the Commissioner's cross-
28 motion for summary judgment be **DENIED**, and that Judgment be entered reversing the

1 decision of the Commissioner and remanding this matter for further administrative
2 proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

4 **PROCEDURAL BACKGROUND**

5 On July 15, 2014, plaintiff filed an application for a period of disability and disability
6 insurance benefits under Title II of the Social Security Act, alleging disability commencing
7 January 18, 2013. (Certified Administrative Record [“AR”] 181-84.) After her claim was
8 denied initially and upon reconsideration (AR 127-30, 132-37), plaintiff requested an
9 administrative hearing before an administrative law judge (“ALJ”). (AR 138-39.) An
10 administrative hearing was held on January 31, 2017. Plaintiff appeared at the hearing
11 with counsel, and testimony was taken from her and a vocational expert (“VE”). (AR 27-
12 46.)

13 As reflected in his June 1, 2017 hearing decision, the ALJ found that plaintiff had
14 not been under a disability, as defined in the Social Security Act, at any time from January
15 18, 2013, the alleged onset date, through September 30, 2013, the date last insured. (AR
16 15-23.) The ALJ’s decision became the final decision of the Commissioner on June 12,
17 2018, when the Appeals Council denied plaintiff’s request for review. (AR 1-6.) This
18 timely civil action followed.

20 **SUMMARY OF THE ALJ’S FINDINGS**

21 In rendering his decision, the ALJ initially determined that plaintiff last met the
22 insured status requirements of the Social Security Act on September 30, 2013. (AR 16,
23 18.) The ALJ proceeded to follow the Commissioner’s five-step sequential evaluation
24 process. *See* 20 C.F.R. § 404.1520.¹ At step one, the ALJ found that plaintiff had not
25 engaged in substantial gainful activity during the period from her alleged onset date of
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27 ¹ Unless otherwise indicated, all references herein to the Commissioner’s regulations
28 are to the regulations in effect at the time of the ALJ’s decision.

1 January 18, 2013 through her date last insured of September 30, 2013. (AR 18.)

2 At step two, the ALJ found that plaintiff had the following severe impairments:
3 degenerative joint disease of the cervical spine; asthma; fibromyalgia; obesity; and
4 depression. (AR 18.)

5 At step three, the ALJ found that plaintiff did not have an impairment or combination
6 of impairments that met or medically equaled the severity of one of the impairments listed
7 in the Commissioner's Listing of Impairments. (AR 18.)

8 Next, the ALJ determined that plaintiff had the residual functional capacity ("RFC")
9 to perform a range of light work as defined in 20 C.F.R. § 404.1567(b). Specifically, the
10 ALJ found that plaintiff was able to lift and carry 10 pounds frequently and 20 pounds
11 occasionally; could stand and walk six hours in an eight-hour workday, and could sit six
12 hours in an eight-hour workday. However, plaintiff could never reach overhead bilaterally;
13 had to avoid concentrated exposure to fumes, dust, and other allergens; and was limited to
14 one or two step oral and written instructions. (AR 19.)

15 For purposes of his step four determination, the ALJ adduced and accepted the VE's
16 testimony that a hypothetical person with plaintiff's vocational profile and RFC would be
17 unable to perform any past relevant work. (AR 21-22, 42-43.)

18 The ALJ then proceeded to step five of the sequential evaluation process. Based on
19 the VE's testimony that a hypothetical person with plaintiff's vocational profile and RFC
20 could perform the requirements of representative occupations that existed in significant
21 numbers in the national economy (*i.e.*, hotel housekeeper, cafeteria attendant, and small
22 part assembler), the ALJ found that plaintiff was not disabled. (AR 22-23.)

23 24 **DISPUTED ISSUES**

25 As reflected in plaintiff's summary judgment motion, the disputed issues that
26 plaintiff is raising as the grounds for reversal and remand are as follows:

- 27 1. Whether the ALJ properly rejected plaintiff's subjective symptom testimony.
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1 It is well established in this Circuit that, if the claimant has produced objective
2 medical evidence of an impairment or impairments that could reasonably be expected to
3 produce some degree of pain and/or other symptoms and the record is devoid of any
4 affirmative evidence of malingering, the ALJ may reject the claimant's testimony
5 regarding the severity of the claimant's pain and/or other symptoms only if the ALJ makes
6 specific findings stating clear and convincing reasons for doing so. *See Smolen v. Chater*,
7 80 F.3d 1273, 1281-82 (9th Cir. 1996); *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993);
8 *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991); *Cotton v. Bowen*, 799 F.2d 1403,
9 1407 (9th Cir. 1986). Further, it is incumbent on the ALJ to specify which statements by
10 plaintiff concerning his or her symptoms and functional limitations were not credible
11 and/or in what respect(s) plaintiff's statements were not credible. *See Reddick v. Chater*,
12 157 F.3d 715, 722 (9th Cir. 1998); *Smolen*, 80 F.3d at 1284.

13 Here, after citing the allegation from plaintiff's disability report and plaintiff's
14 testimony at the administrative hearing regarding the left eye blindness caused by her mini
15 stroke, the ALJ acknowledged:

16 "After careful consideration of the evidence, the undersigned finds that
17 the claimant's medically determinable impairments could reasonably be
18 expected to cause the alleged symptoms; however, the claimant's statements
19 concerning the intensity, persistence and limiting effects of these symptoms
20 are not entirely consistent with the medical evidence and other evidence in the
record for the reasons explained in this decision." (AR 20.)

21 The only statement made by the ALJ thereafter in support of his adverse credibility
22 determination was the following:

23 "In terms of the claimant's allegations, they are inconsistent with the
24 medical evidence. Despite the claimant's assertions of disability, as discussed
25 above, the clinical and objective findings were minimal. Moreover, contrary
26 to the claimant's allegation of functional limitations, she also iterated she
27 exercise[s] occasionally; takes care of her dogs, and does laundry (Exhibit
28 C1F/78; C2F/1312)." (AR 21.)

1 For the reasons discussed hereafter, the Court is unable to affirm the ALJ's adverse
2 credibility determination.

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4 1. The ALJ failed in his duty to fully and fairly develop the record with
5 respect to the symptoms and functional limitations resulting from
6 plaintiff's severe medically determinable impairments.

7 In Social Security cases, the ALJ has a special, independent duty to develop the
8 record fully and fairly and to assure that the claimant's interests are considered.
9 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir.2001); *Smolen*, 80 F.3d at 1288. *Brown*
10 *v. Heckler*, 713 F.2d 441, 443 (9th Cir.1983). The ALJ also has a basic duty to inform
11 himself about facts relevant to his decision. *Heckler v. Campbell*, 461 U.S. 458, 471 n.1
12 (1983) (Brennan, J., concurring). The ALJ's duty to develop the record is triggered "when
13 there is ambiguous evidence or when the record is inadequate to allow for proper evaluation
14 of the evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir.2001) (citation
15 omitted). The ALJ's duty to develop the record exists even when the claimant is
16 represented by counsel. *Tonapetyan*, 242 F.3d at 1150.

17 Here, as noted above, at step two of the sequential evaluation process, the ALJ found
18 that had the following severe impairments: degenerative joint disease of the cervical spine;
19 asthma; fibromyalgia; obesity; and depression. (AR 18.) Under the Commissioner's
20 regulations, an impairment is severe only if it **significantly** limits the claimant's physical
21 or mental ability to do basic work activities. *See* 20 C.F.R. § 416.920(c) (emphasis added).
22 Basic work activities are "abilities and aptitudes necessary to do most jobs," including
23 "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching,
24 carrying, or handling." Basic work activities also include mental activities such as
25 understanding, carrying out, and remembering simple instructions; use of judgment;
26 responding appropriately to supervision, co-workers, and usual work situations; and
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1 dealing with changes in a routine work setting. *See* Social Security Ruling (“SSR”) 85-
2 28.²

3 However, the ALJ did not specifically ask plaintiff at the administrative hearing
4 about the severity of her pain and/or other symptoms caused by the medical impairments
5 found by the ALJ to qualify as “severe.” Nor did the ALJ ask plaintiff about the intensity
6 and persistence of her symptoms resulting from those impairments. The ALJ also did not
7 specifically ask plaintiff about the degree of functional limitation she was alleging resulted
8 from her severe medical impairments. For example, the ALJ did not ask plaintiff how
9 many pounds she could lift or carry, or how long she could sit, stand, and/or walk in an
10 eight-hour work day. The ALJ’s examination of plaintiff focused on the mini stroke for
11 which plaintiff had been hospitalized in May 2013. (*See* AR 33-36.)³ While the ALJ did
12 ask plaintiff if the stroke affected her balance, ability to walk, and ability to lift and carry,
13 the ALJ did not follow up when plaintiff merely responded, “It did.” (*See* AR 35.)
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16 ² Social Security Rulings are binding on ALJs. *See Terry v. Sullivan*, 903 F.2d 1273,
17 1275 n.1 (9th Cir. 1990).

18 ³ Earlier in the decision when discussing the severity of plaintiff’s alleged
19 impairments for purposes of his step two finding, the ALJ noted that the hospital discharge
20 notes on May 20, 2013 “indicated diagnoses of abdominal pain, gastroparesis/constipation,
21 likely narcotic induced, chronic lower extremity pain, and fibromyalgia and no evidence
22 of stroke.” (AR 18, citing AR 3340.) However, the discharge notes did not expressly state
23 that there was “no evidence of stroke.” Indeed, the hospital admission notes reflected that
24 plaintiff was taken to the hospital by the paramedics after an incident in the shower when
25 plaintiff suddenly felt weakness to her left lower extremity and subsequently developed
26 some chest pain; and that, upon admission, plaintiff still was complaining of inability to
27 move her left lower extremity, about having no feeling to light touch or to palpitation of
28 the left extremity, and about having severe pain on the left side of her abdomen. (*See* AR
3337.) On the same page of discharge notes cited by the ALJ, the discharge doctor
indicated that he would be asking for “a neurology consult.” (*See* AR 3340.) The reason
for the ensuing neurology consult was “for possible ischemic attack.” (*See* AR 1798.) The
only reasonable inference to be drawn from this evidence is that plaintiff indeed had
exhibited stroke-like symptoms.

1 The evidence before the ALJ regarding the severity of plaintiff's pain and/or other
2 symptoms caused by her severe medically determinable impairments was sparse,
3 incomplete, and inadequate to allow for proper evaluation of plaintiff's functional
4 limitations. The ALJ was obligated to develop the record further than he did.
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6 2. The reasons provided by the ALJ in support of his adverse credibility
7 determination were not legally sufficient.

8 Since the Commissioner has not argued that there was evidence of malingering, the
9 Court will apply the "clear and convincing" standard to the reasons provided by the ALJ
10 in support of his adverse credibility determination. *See Burrell v. Colvin*, 775 F.3d 1133,
11 1136 (9th Cir. 2014) (applying "clear and convincing" standard where the government did
12 not argue that a lesser standard should apply based on evidence of malingering); *see also*
13 *Ghanim v. Colvin*, 763 F.3d 1154, 1163 n.9 (9th Cir. 2014) (same).

14 The Court first will address the ALJ's reliance on the specified daily activities. The
15 first exhibit cited by the ALJ was a page from notes of a doctor's office visit on October 9,
16 2013, which reflect that plaintiff reported exercising occasionally, 0-5 hours per week, and
17 cleaning up after the animals (dogs) in her home. (*See* AR 319.) The second exhibit cited
18 by the ALJ was to a page from notes of a doctor's visit on May 31, 2013, which reflect that
19 plaintiff reported she had injured her hand while transferring laundry from the washer to
20 the drier. (*See* AR 1634.) The ALJ apparently inferred from this incident that plaintiff did
21 laundry.

22 Under Ninth Circuit jurisprudence, there are "two grounds for using daily activities
23 to form the basis of an adverse credibility determination": Evidence of the daily activities
24 either (1) contradicts the claimant's other testimony, or (2) meets the threshold for
25 transferable work skills. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). Here,
26 neither of these grounds applies. First, the ALJ failed to posit any specific allegations by
27 plaintiff or any specific testimony from her that any of the specified daily activities
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1 contradicted.⁴ *See Burrell*, 775 F.3d at 1138 (ALJ erred by not elaborating on which daily
2 activities conflicted with which part of the claimant’s testimony). Second, the
3 Commissioner does not even purport to contend that plaintiff’s ability to exercise
4 occasionally (0-5 hours per week), clean up after her dogs, or do laundry constituted
5 substantial evidence that plaintiff was able to spend a substantial part of her day engaged
6 in pursuits involving the performance of physical and mental functions that are transferable
7 to a work setting. *See, e.g., Diedrich v. Berryhill*, 874 F.3d 634, 642-43 (9th Cir. 2017)
8 (claimant’s ability to perform daily activities including personal hygiene, cooking,
9 household chores, and shopping not a clear and convincing reason to find her less than
10 fully credible); *Vertigan v. Halter*, 260 F.3d 1044, 1049-50 (9th Cir. 2001) (evidence that
11 claimant did certain chores that did not consume a substantial part of the day did not detract
12 from her credibility); *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1996) (“The Social
13 Security Act does not require claimants to be utterly incapacitated to be eligible for
14 benefits, and many home activities may not be easily transferable to a work environment
15 where it might be impossible to rest periodically or take medication.”) (internal citations
16 omitted)).

17 The Court therefore finds that the ALJ’s reliance on the specified daily activities did
18 not constitute a clear and convincing reason upon which the ALJ could properly rely in
19 support of his adverse credibility determination.
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22 ⁴ Although the Commissioner asserts that the incident evidencing that plaintiff did
23 laundry was inconsistent with plaintiff’s administrative hearing testimony that, up until
24 September 2012, she did not perform any housework whatsoever (*see* ECF No. 24-1 at 6-
25 7), the ALJ did not reference plaintiff’s testimony about not doing housework or posit this
26 purported inconsistency as a basis for his adverse credibility determination. The Court
27 accordingly is unable to consider this purported inconsistency as a basis for upholding the
28 ALJ’s adverse credibility determination. *See Ceguerra v. Sec’y of Health & Human Servs.*,
933 F.2d 735, 738 (9th Cir. 1991) (“A reviewing court can evaluate an agency’s decision
only on the grounds articulated by the agency.”); *see also Connett v. Barnhart*, 340 F.3d
871, 874 (9th Cir. 2003).

1 The other stated reason on which the ALJ based his adverse credibility determination
2 was that plaintiff’s allegations were inconsistent with the medical evidence. Since the ALJ
3 did not specify which allegations by plaintiff concerning her symptoms and/or functional
4 limitations were inconsistent with what medical evidence, the Court has no basis for
5 finding that this reason constituted a clear and convincing reason upon which the ALJ could
6 properly rely in support of his adverse credibility determination. Moreover, since the
7 ALJ’s reliance on the specified daily activities was legally insufficient to support his
8 adverse credibility determination, this remaining reason cannot be legally sufficient by
9 itself. *See Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 884 (9th Cir. 2006) (where ALJ’s
10 initial reason for adverse credibility determination was legally insufficient, his sole
11 remaining reason premised on lack of medical support for claimant’s testimony was legally
12 insufficient); *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997) (“[A] finding
13 that the claimant lacks credibility cannot be premised wholly on a lack of medical support
14 for the severity of his pain.”).

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16 **B. As a result of the Court’s inability to affirm the ALJ’s adverse credibility**
17 **determination, it is unnecessary to reach the other disputed issue raised**
18 **by plaintiff.**

19 It follows from the Court’s inability to affirm the ALJ’s adverse credibility
20 determination, including for the reason that the ALJ failed to fully and fairly develop the
21 record with respect to the symptoms and functional limitations resulting from plaintiff’s
22 severe medically determinable impairments, that the Court also is unable to affirm the
23 ALJ’s RFC determination. Since the VE’s testimony on which the ALJ relied in support
24 of his vocational determination at step five of the sequential evaluation process was
25 predicated on a hypothetical person with plaintiff’s vocational profile and RFC, it in turn
26 follows from the Court’s inability to affirm the ALJ’s RFC determination that it is
27 unnecessary for the Court to address the other disputed issue raised by plaintiff (i.e.,
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1 whether the ALJ erred in his reliance on the VE’s testimony at step five of the sequential
2 evaluation process).

4 CONCLUSION AND RECOMMENDATION

5 The law is well established that the decision whether to remand for further
6 proceedings or simply to award benefits is within the discretion of the Court. *See, e.g.,*
7 *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir. 1990); *McAllister v. Sullivan*, 888 F.2d 599,
8 603 (9th Cir. 1989); *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981). Remand for
9 further proceedings is warranted where additional administrative proceedings could
10 remedy defects in the decision. *See, e.g., Kail v. Heckler*, 722 F.2d 1496, 1497 (9th Cir.
11 1984); *Lewin*, 654 F.2d at 635. Remand for the payment of benefits is appropriate where
12 no useful purpose would be served by further administrative proceedings, *Kornock v.*
13 *Harris*, 648 F.2d 525, 527 (9th Cir. 1980); where the record has been fully developed,
14 *Hoffman v. Heckler*, 785 F.2d 1423, 1425 (9th Cir. 1986); or where remand would
15 unnecessarily delay the receipt of benefits to which the disabled plaintiff is entitled, *Bilby*
16 *v. Schweiker*, 762 F.2d 716, 719 (9th Cir. 1985).

17 The Court is mindful of Ninth Circuit authority for the proposition that, where an
18 ALJ failed to properly consider either subjective symptom testimony or medical opinion
19 evidence, it is sometimes appropriate to credit the evidence as true and remand the case for
20 calculation and award of benefits. *See, e.g., Garrison v. Colvin*, 759 F.3d 995, 1019-21
21 (9th Cir. 2014). However, the Court has found here that the record has not been fully
22 developed with respect to the symptoms and functional limitations resulting from
23 plaintiff’s severe medically determinable impairments. Accordingly, the Court disagrees
24 with plaintiff that this is an appropriate case for application of the “credit as true” rule. *See*
25 *also Ghanim*, 763 F.3d at 1167 (In a case decided after *Garrison*, another Ninth Circuit
26 panel did not apply or even acknowledge the “credit as true” rule where substantial
27 evidence did not support an ALJ’s rejection of treating medical opinions and his adverse
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1 credibility determination; instead, the panel simply remanded the case for further
2 administrative proceedings.)

3 This Court therefore **RECOMMENDS** that plaintiff's motion for summary
4 judgment be **GRANTED**, that the Commissioner's cross-motion for summary judgment
5 be **DENIED**, and that Judgment be entered reversing the decision of the Commissioner
6 and remanding this matter for further administrative proceedings pursuant to sentence four
7 of 42 U.S.C. § 405(g).

8 Any party having objections to the Court's proposed findings and recommendations
9 shall serve and file specific written objections within 14 days after being served with a
10 copy of this Report and Recommendation. *See* Fed. R. Civ. P. 72(b)(2). The objections
11 should be captioned "Objections to Report and Recommendation." A party may respond
12 to the other party's objections within 14 days after being served with a copy of the
13 objections. *See id.*

14 IT IS SO ORDERED.

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16 Dated: May 29, 2019



ROBERT N. BLOCK
United States Magistrate Judge