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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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|---------------------------------|---|---------------------|
| MARY L. GILLETT, |) | NO. CV 07-03860-MAN |
| |) | |
| Plaintiff, |) | MEMORANDUM OPINION |
| |) | |
| v. |) | AND ORDER |
| |) | |
| MICHAEL J. ASTRUE, |) | |
| Commissioner of the |) | |
| Social Security Administration, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

Plaintiff filed a Complaint on June 14, 2007, seeking review of the denial by the Social Security Commissioner ("Commissioner") of her application for disability insurance benefits ("DIB"). Subsequently, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on January 10, 2008, in which Plaintiff seeks an order reversing the Commissioner's decision and remanding solely for calculation and award of benefits or, in the alternative, remanding the matter for a new administrative hearing; and Defendant seeks an order affirming the Commissioner's decision. The Court has taken the parties' Joint Stipulation under submission without oral argument.

1 have more than a minimal effect on her basic work abilities and, thus,
2 qualify as severe impairments. (*Id.*) The ALJ concluded, however, that
3 Plaintiff's impairments do not meet or medically equal the criteria of
4 an impairment listed in Appendix 1, Subpart P, Regulation No. 4. (*Id.*)
5 Additionally, the ALJ found that Plaintiff has the following mental
6 impairments, which he concluded were not severe: (1) mental depression
7 related to general physical condition; and (2) somatoform disorder.
8 (*Id.*) The ALJ further found that Plaintiff's allegations regarding her
9 limitations were "not credible." (A.R. 35.) Based on Plaintiff's
10 medical records and the testimony of a vocational expert ("VE"), the ALJ
11 concluded that Plaintiff has the residual functional capacity to perform
12 light work with limitations, and therefore, she can perform her past
13 relevant work as an apartment manager. (*Id.*) Consequently, the ALJ
14 found that Plaintiff was not disabled within the meaning of the Social
15 Security Act during the relevant time period. (*Id.*)

16
17 **STANDARD OF REVIEW**
18

19 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
20 decision to determine whether it is free from legal error and supported
21 by substantial evidence in the record as a whole. Orn v. Astrue, 495
22 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
23 evidence as a reasonable mind might accept as adequate to support a
24 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
25 a mere scintilla but not necessarily a preponderance." Connett v.
26 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the
27 record can constitute substantial evidence, only those "'reasonably
28 drawn from the record'" will suffice. Widmark v. Barnhart, 454 F.3d

1 1063, 1066 (9th Cir. 2006)(citation omitted).

2
3 Although this Court cannot substitute its discretion for that of
4 the Commissioner, the Court nonetheless must review the record as a
5 whole, "weighing both the evidence that supports and the evidence that
6 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
7 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also
8 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
9 responsible for determining credibility, resolving conflicts in medical
10 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
11 1035, 1039-40 (9th Cir. 1995).

12
13 The Court will uphold the Commissioner's decision when the evidence
14 is susceptible to more than one rational interpretation. Burch v.
15 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
16 review only the reasons stated by the ALJ in his decision "and may not
17 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
18 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
19 the Commissioner's decision if it is based on harmless error, which
20 exists only when it is "clear from the record that an ALJ's error was
21 'inconsequential to the ultimate nondisability determination.'" Robbins
22 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
23 Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400
24 F.3d at 679.

25
26 **DISCUSSION**

27
28 Plaintiff alleges the following three issues: (1) whether the ALJ

1 erred in failing to make proper credibility findings; (2) whether the
2 ALJ properly rejected treating source opinions regarding Plaintiff's
3 physical residual functional capacity; and (3) whether the ALJ erred in
4 finding at step two that Plaintiff's mental impairments were not legally
5 severe. The Court addresses these issues, and one other, below.

6
7 **I. The ALJ Arbitrarily Discredited Plaintiff's Testimony Regarding Her**
8 **Subjective Pain And The Side Effects Of Her Medications.**

9
10 Once a disability claimant produces evidence of an underlying
11 physical impairment that is reasonably likely to be the source of her
12 subjective symptom(s), all subjective testimony as to the severity of
13 the symptoms must be considered. Moisa v. Barnhart, 367 F.3d 882, 885
14 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.
15 2001)(*en banc*); see also 20 C.F.R. § 404.1529(a) (explaining how pain
16 and other symptoms are evaluated). "Unless an ALJ makes a finding of
17 malingering based on affirmative evidence thereof, he or she may only
18 find an applicant not credible by making specific findings as to
19 credibility and stating clear and convincing reasons for each."
20 Robbins, 466 F.3d at 883. Further, the ALJ's credibility findings must
21 be "sufficiently specific" to allow a reviewing court to conclude that
22 the ALJ rejected the claimant's testimony on permissible grounds and did
23 not arbitrarily discredit the claimant's testimony. Moisa, 367 F.3d at
24 885. It is the ALJ's duty to "identify what testimony is credible and
25 what evidence undermines the claimant's complaints." Reddick v. Chater,
26 157 F.3d 715, 722 (9th Cir. 1998).

27
28 The ALJ does not dispute that Plaintiff has sufficiently

1 demonstrated objective evidence of physical impairments. However, the
2 ALJ found that Plaintiff's subjective testimony regarding her condition
3 was "not fully credible" for three reasons. (A.R. 31.)
4

5 **First**, the ALJ notes that Plaintiff's treatment has generally been
6 conservative, because she has not undergone any surgeries since 2001,
7 and she has not been hospitalized for her pain. (A.R. 31.) Although
8 Plaintiff does not spend her days in the emergency room, she does have
9 scheduled monthly visits with her doctors. (A.R. 159.) Plaintiff also
10 participates in physical therapy twice a week. (A.R. 120.) In
11 addition, Plaintiff undergoes weekly individual psychotherapy. (A.R.
12 1074.) Given the nature and extent of Plaintiff's treatment, it does
13 not appear that it is so conservative as to call into question
14 Plaintiff's subjective testimony. Further, there is no surgical or
15 other cure for fibromyalgia, which can be a debilitating disease. See
16 Jordan v. Northrop Grumman Corp. Welfare Plan, 370 F.3d 869, 872 (9th
17 Cir. 2004)(recognizing that there is no cure for fibromyalgia). Indeed,
18 it is wholly unclear what additional treatment the ALJ believes
19 Plaintiff should have received.
20

21 **Second**, the ALJ inaccurately states that Plaintiff has never
22 alleged that she experiences adverse side effects from her medication.
23 (A.R. 32.) In fact, in a daily activities questionnaire dated July 15,
24 2002, Plaintiff stated that "between the daily pain through the body and
25 *all the medication for pain*, [she suffers from] depression, anxiety,
26 fatigue, constipation, upset stomach, ear pain, [and is] always
27 irritable." (A.R. 119; emphasis added.)
28

1 When an ALJ evaluates a claimant's limitations, he must consider
2 evidence regarding the side effects of medications. Social Security
3 Ruling 96-7p requires consideration of the "type, dosage, effectiveness,
4 and side effects of any medication the individual takes or has taken to
5 alleviate pain or other symptoms." See also 20 C.F.R. §
6 416.929(c)(3)(iv). The Ninth Circuit has observed that "the side
7 effects of medications can have a significant impact on an individual's
8 ability to work and should figure in the disability determination
9 process." Varney v. Sec'y of Health & Human Servs., 846 F.2d 581, 585
10 (9th Cir. 1988). Like pain, side effects can be a "highly idiosyncratic
11 phenomenon," and a claimant's testimony as to their limiting effects
12 should not be trivialized. *Id.*

13
14 The ALJ fails to mention 18 of the 19 medications that Plaintiff
15 has been prescribed and to consider the toll such medications have on
16 Plaintiff's mind and body. Such an oversight has been deemed an error.
17 See Rabadi v. Astrue, 2008 WL 2490188, *2 (9th Cir. 2008)(rejecting the
18 ALJ's determination that the claimant was not entitled to benefits,
19 because the ALJ failed to take into consideration "side effects of his
20 medication and all of his impairments, whether severe or not, in
21 combination").

22
23 **Third**, the ALJ asserts that Plaintiff's daily activities undermine
24 her claim, because "[i]t is doubtful that an individual with the severe
25 pain and limitations asserted by the claimant would do chores such as
26 cleaning up around the apartment and washing dishes, as well as do her
27 own shopping." (A.R. 32.) However, "disability claimants should not be
28 penalized for attempting to lead normal lives in the face of their

1 limitations." Reddick, 157 F.3d at 722. It would be unreasonable to
2 require a claimant "to vegetate in a dark room in order to be deemed
3 eligible for benefits." *Id.* "Many home activities are not easily
4 transferrable to . . . the more grueling environment of the workplace,
5 where it might be impossible to periodically rest or take medication."
6 Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989).

7
8 Plaintiff states that she can lift her own shampoo bottle in the
9 shower and go shopping, but when she does go shopping, she takes her
10 husband or children with her to carry the heavier items. (A.R. 120.)
11 Further, although Plaintiff can dress herself, she needs help fixing her
12 bra straps and putting on her belt. (A.R. 119.) Plaintiff's daily
13 activities are not so physically demanding as to undermine her
14 credibility and establish her ability to engage in a full-time job.

15
16 As Plaintiff's complaints regarding her subjective limitations and
17 medication side effects may have a significant impact on her ability to
18 engage in light work, the ALJ erred in failing to set forth clear and
19 convincing reasons for discounting them.

20
21 **II. The ALJ Failed To Provide Specific, Legitimate Reasons Supported By**
22 **Substantial Evidence For Rejecting Plaintiff's Treating Physicians'**
23 **Opinions.**

24
25 A treating physician's conclusions "must be given substantial
26 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Even
27 where treating physician's opinions are contradicted, "if the ALJ wishes
28 to disregard the opinion[s] of the treating physician he . . . must make

1 findings setting forth specific, legitimate reasons for doing so that
2 are based on substantial evidence in the record." Winans v. Bowen, 853
3 F.2d 643, 647 (9th Cir. 1987); see also Magallanes v. Bowen, 881 F.2d
4 747, 751 (9th Cir. 1989)(opinions of treating physicians are entitled to
5 great deference).

6
7 In this case, the ALJ found that Plaintiff has the residual
8 functional capacity for light work² with limitations.³ (A.R. 33.) In
9 making this determination, the ALJ rejected the findings of two of
10 Plaintiff's treating physicians, Drs. Gil Tepper and Allen Salick. The
11 ALJ rejected Dr. Tepper's finding that, unless Plaintiff's fibromyalgia
12 went into complete remission, she was unemployable and unable to
13 participate in the open labor market. (A.R. 26.) As his basis for
14 rejecting Dr. Tepper's opinion, the ALJ asserts that, since 2002, no
15 other doctor of record has found Plaintiff on examination to have more
16 than slight reduction of neck motion.⁴ (A.R. 27.) But the ALJ fails to
17 note that Plaintiff has been receiving care from Dr. Tepper since her
18 slip and fall accident in 2001, and there are countless pages of medical

19
20 ² Light work involves lifting no more than twenty pounds at a time
21 with frequent lifting or carrying of objects weighing up to ten pounds,
22 and may involve a good deal of walking, standing, or sitting while
23 pushing and pulling arm and leg controls. To be considered capable of
performing the full range of light work, the claimant must have the
ability to do substantially all of these activities. 20 C.F.R. §
404.1567(b).

24 ³ Such limitations include the ability to: sit or stand as needed;
25 avoid overhead work and extreme torqueing; avoid working at heights and
26 around moving machinery and other hazards. However, she is capable of
gripping and grasping both occasionally and frequently, but not more
than frequently (*i.e.*, constantly or repetitively). (A.R. 33.)

27 ⁴ Because one of the principal symptoms of fibromyalgia is stiffness,
28 McFadden v. Barnhart, 2002 WL 31031305, *1 n.1 (N.D. Cal. 2002)
(citations omitted), the ALJ believed it was necessary to dispel Dr.
Tepper's opinion regarding Plaintiff's reduction in neck motion.

1 reports regarding her care by Dr. Tepper. Because Plaintiff has been
2 treated by Dr. Tepper on countless occasions, it seems unreasonable for
3 the ALJ to point to one conclusion in Dr. Tepper's medical records,
4 which differs from those of other medical experts, to claim that his
5 entire medical history of Plaintiff is not credible.

6
7 The ALJ also disregarded the opinion of Dr. Salick, Plaintiff's
8 treating rheumatologist. Dr. Salick noted that Plaintiff's fibromyalgia
9 has left her unable to compete in an open labor market, and thus, she is
10 in a permanent, stationary, and totally disabled condition. (A.R. 25)
11 In disregarding Dr. Salick's opinion, the ALJ concluded that, although
12 Dr. Salick's "report conveys that [Plaintiff] had some pain due to
13 fibromyalgia, the evidence does not establish that the pain was so
14 severe as to be disabling. For example, Dr. Salick did not refer the
15 claimant to an emergency room." (A.R. 26.) The mere fact that
16 Plaintiff did not seek emergency room treatment does not qualify as a
17 specific, legitimate reason for rejecting Dr. Salick's opinion. Also,
18 the ALJ states that the only objective factor cited in Dr. Salick's
19 records to support his fibromyalgia diagnoses of Plaintiff "was [the
20 presence of] tender points of fibromyalgia." (A.R. 26.) The ALJ failed
21 to mention, however, that the tender points test is *the* principal
22 diagnostic test for fibromyalgia.⁵

23
24 ⁵ "The principal symptoms [of fibromyalgia] are pain all over,
25 fatigue, disturbed sleep, stiffness, and the only symptom that
26 discriminates between it and other diseases of a rheumatic character -
27 multiple tender spots, more precisely 18 fixed locations on the body
28 (and the rule of thumb is that a patient must have at least 11 of them
to be diagnosed as having fibromyalgia) that when pressed firmly cause
the patient to flinch. All of these symptoms are easy to fake, although
few applicants for disability benefits may yet be aware of the specific
locations that if palpated will cause a patient who really has
fibromyalgia to flinch." McFadden, 2002 WL 31031305 at *1 n.1.

1 Accordingly, the reasons provided by the ALJ for rejecting the
2 opinions of Plaintiff's treating physicians, Drs. Tepper and Salick, are
3 not legitimate.

4
5 **III. The Record Must Be Further Developed Regarding The Severity Of**
6 **Plaintiff's Mental Condition.**

7
8 A "severe" impairment (or combination of impairments) is defined as
9 one that significantly limits physical or mental ability to do basic
10 work activities. 20 C.F.R. § 404.1520(c). Basic work activities have
11 been defined as the abilities and aptitudes necessary to do most jobs.
12 20 C.F.R. § 404.152(b)(3)-(6). With regard to mental function, these
13 basic work activities include "use of judgment; responding appropriately
14 to supervision, co-workers and usual work situations; and dealing with
15 changes in a routine work setting." *Id.*

16
17 The Supreme Court has recognized that including a "severity"
18 inquiry at stage two of the evaluation process "increases the efficiency
19 and reliability of the evaluation process by identifying at an early
20 stage those claimants whose medical impairments are so slight that it is
21 unlikely that they would be found disabled even if their age, education,
22 and experience were taken into account." Bowen v. Yuckert, 482 U.S.
23 137, 153 (1987); see also Corrao v. Shalala, 20 F.3d 943, 949 (9th Cir.
24 1994). Accordingly, an impairment should be found to be non-severe
25 "when the medical evidence establishes only a slight abnormality . . .
26 which would have no more than a minimal effect on a claimant's ability
27 to work." Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988)(citing
28 Social Security Ruling 85-28).

1 Despite use of the term "severe," most circuits, including the
2 Ninth Circuit, have held that the step two inquiry is a *de minimis*
3 screening devise to dispose of groundless claims. Smolen v. Chater, 80
4 F.3d 1273, 1290 (9th Cir. 1996). See, e.g., Hawkins v. Chater, 113 F.3d
5 1273, 1290 (9th Cir. 1996); Hudson v. Bowen, 870 F.2d 1392, 1396 (8th
6 Cir. 1989)(evaluation can stop at step two only when there is no more
7 than a minimal effect on a claimant's ability to work).

8
9 The ALJ determined that Plaintiff does not have a severe mental
10 impairment. The ALJ specifically bases that finding on the testimony of
11 the Social Security Administration's psychiatrist, Dr. Nathan Lavid, who
12 diagnosed Plaintiff with a "mild level of severity from her mental
13 condition and gave her a GAF score of 65."⁶ (A.R. 32.) In relying on
14 Dr. Lavid and the GAF score with which he assessed Plaintiff, the ALJ
15 brushed aside four other GAF scores submitted by Plaintiff's treating
16 psychiatrists, Drs. David Friedman and Inge Polyak. Plaintiff's
17 treating psychiatrists put her in a GAF range of 41-55.⁷ (A.R. 28-30.)

18
19 The ALJ expressly gave less weight to the treating psychiatrists'
20 opinions, because he found them to be exaggerated and unsupported by the
21

22 ⁶ GAF is a scale reflecting the "psychological, social, and
23 occupational function on a hypothetical continuum of mental health-
24 illness." American Psychiatric Association, DIAGNOSTIC AND STATISTICAL
25 MANUAL OF MENTAL DISORDERS, 34 (4th ed. Text Revision, 2000) ("DSM IV-TR").
26 A GAF score between 61-70 indicates some mild symptoms. *Id.*

27 ⁷ A GAF score between 41-50 indicates serious symptoms (e.g.,
28 suicidal ideation) or any serious impairment in social, occupational, or
school functioning (e.g., no friends, unable to keep a job. A GAF score
between 51-60 indicates moderate symptoms (e.g., flat affect and
circumstantial speech, occasional panic attacks) or moderate difficulty
in social, occupation, or school functioning (e.g., a few friends,
conflicts with peers or co-workers). DSM IV-TR at. 34.

1 medical record as a whole. (A.R. 28-31.) Specifically, the ALJ gave
2 very little weight to Dr. Polyak's determination that Plaintiff suffered
3 from major depression, because he found that there were no narrative
4 progress records from the doctor that established Plaintiff experienced
5 symptoms and signs consistent with the problems her doctor listed in the
6 questionnaire. (A.R. 30.) However, if the ALJ believed there was a
7 need for further evidence regarding Dr. Polyak's determination that
8 Plaintiff suffered from "major depression and had symptoms that included
9 depression, anxiety pain, insomnia, social isolation, cry spells, fear,
10 loss of function, irritability, poor memory and concentration,
11 diminished energy an anger" (A.R. 563), then the ALJ had the duty to
12 further develop the record to resolve any ambiguities. See Smolen, 80
13 F.3d at 1288 (noting that the ALJ has a duty to conduct an appropriate
14 inquiry if he needed to know the basis for the treating physicians
15 findings).

16
17 Further, the ALJ rejected Dr. Friedman's diagnosis of Plaintiff,
18 because the ALJ believed that the psychiatrist's diagnosis that
19 Plaintiff suffered from major depression was overstated. (A.R. 30.)
20 Additionally, the ALJ discredits Dr. Friedman's diagnosis, because he
21 failed to explain why on June 8, 2005, he assessed Plaintiff with a GAF
22 score of 41, which was lower than Plaintiff's GAF score of 55 assessed
23 in August 2001, but opined that she had less severe functional
24 limitations at the time her GAF score was lower. (*Id.*) Again, if the
25 ALJ found that Dr. Friedman's conclusions were ambiguous, it was his
26 duty to develop the record further, rather than disregarding Dr.
27 Friedman entire testimony.

1 Finally, it is inappropriate for an ALJ to substitute his own
2 medical judgment for that of the treating physician. See Tackett v.
3 Apfel, 180 F.3d 1094, 1102 (9th Cir. 1999); Day v. Weinberger, 522 F.2d
4 1154, 1156 (9th Cir. 1975)(recognizing that an ALJ is forbidden from
5 making his own medical assessments beyond those demonstrated by the
6 record). In this case, the ALJ substituted his own diagnosis for that
7 of Dr. Polyak. For example, the ALJ stated that "if the claimant
8 actually had the major problems noted in [Dr. Polyak's] questionnaire,
9 it is likely that she would be seen by a psychiatrist or psychologist
10 more often than once every 1-2 months." (A.R. 30.)

11
12 Although such a determination is better left to medical experts,
13 the mere fact that Plaintiff is prescribed several psychological
14 medications (*i.e.*, Zoloft, Ativan, Buspar, Elavil, Tradazone, and
15 Zonegran) (A.R. 29; J.S. 14, 20) suggests that she would likely meet the
16 *de minimis* severity standard. Thus, on remand, it is imperative that
17 the ALJ focus on developing the medical testimony to determine properly
18 the severity of Plaintiff's mental impairments.

19
20 **IV. The ALJ Mischaracterized The Record To Support His Decision.**

21
22 Although not raised by Plaintiff as a legally significant error,
23 the ALJ's decision rests on several mischaracterizations of the record.

24
25 First, the ALJ recognizes that Plaintiff had been prescribed
26 moderately strong pain medication, Vicodin, and "other medications" to
27 reduce her pain. (A.R. 32.) The ALJ's decision fails to note that
28 Plaintiff is, in fact, taking **18** other medications to alleviate her

1 symptoms, including at least four at a maximum dosage. (A.R. 598.)
2 Plaintiff was prescribed the following drugs: (1) Vicodin; (2) Soma;
3 (3) Pamelor; (4) Neurontin; (5) Ativan; (6) Zonegran; (7) Elavil; (8)
4 Zoloft; (9) Trazadone; and (10) Buspar. Additionally, Plaintiff has
5 been prescribed the following medications: (1) Frorinal; (2) Motrin;
6 (3) Protonix; (4) Zonegram; (5) Provigil; (6) Chlorhexidine Gluconale;
7 (7) Lozi; (8) Cephalexin; and (9) Ambien. (A.R. 116-17.) None of these
8 drugs, with the exception of Vicodin, was explicitly mentioned in the
9 ALJ's decision. Also, the ALJ did not include a list of the medications
10 Plaintiff was prescribed or reference any of the medications' side
11 effects when presenting his hypothetical to the VE. When making a
12 disability determination, the ALJ's description of the claimant's
13 disability must be accurate and detailed. Tackett, 180 F.3d at 1101.
14 On remand, for the VE to make an accurate finding regarding Plaintiff's
15 ability to perform her past relevant work, it is necessary for the ALJ
16 to include in his hypothetical all medications Plaintiff has been
17 prescribed and any side effects of such medications which Plaintiff
18 experiences.

19

20 Second, the ALJ mischaracterizes Plaintiff's size. In his
21 decision, the ALJ finds that Plaintiff suffers from mild obesity. (A.R.
22 32.) In reaching this conclusion, the ALJ noted that Plaintiff
23 "generally weigh[s] around 200 pounds . . . and is 65 inches tall".
24 (*Id.*) However, the ALJ fails to note that Plaintiff's weight has
25 fluctuated up to 222 pounds, and inexplicably, medical records describe
26 her height as anywhere between five feet two inches and five feet five
27 inches. (A.R. 456.) Beyond this, the ALJ stated that "none of the
28 medical records in the voluminous file shows a diagnosis of obesity."

1 (A.R. 32.) As a result, the ALJ found that Plaintiff was only "mildly
2 obese" when determining the severity of Plaintiff's impairments. (A.R.
3 32, 34.) However, in Dr. Friedman's report dated August 23, 2001, he
4 stated that Plaintiff was "noticeably obese." (A.R. 185.)

5
6 The ALJ's materially "inaccurate characterization of the evidence"
7 compounds the error in his decision in this case. See Regennitter v.
8 Comm'r, 166 F.3d 1294, 1297 (9th Cir. 1999).

9
10 **V. Remand Is Required.**

11
12 The decision whether to remand for further proceedings or order an
13 immediate award of benefits is within the district court's discretion.
14 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
15 useful purpose would be served by further administrative proceedings, or
16 where the record has been fully developed, it is appropriate to exercise
17 this discretion to direct an immediate award of benefits. *Id.* at 1179
18 ("the decision of whether to remand for further proceedings turns upon
19 the likely utility of such proceedings"). However, where there are
20 outstanding issues that must be resolved before a determination of
21 disability can be made, and it is not clear from the record that the ALJ
22 would be required to find the claimant disabled if all the evidence were
23 properly evaluated, remand is appropriate. *Id.*

24
25 Here, remand is the appropriate remedy to allow the ALJ the
26 opportunity to remedy the above-mentioned deficiencies and errors. See,
27 e.g., Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for
28 further proceedings is appropriate if enhancement of the record would be

1 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.
2 1989)(remand appropriate to remedy defects in the record).

3
4 **CONCLUSION**

5
6 Accordingly, for the reasons stated above, IT IS ORDERED that the
7 decision of the Commissioner is REVERSED, and this case is REMANDED for
8 further proceedings consistent with this Memorandum Opinion and Order.

9
10 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
11 copies of this Memorandum Opinion and Order and the Judgment on counsel
12 for Plaintiff and for Defendant.

13
14 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

15
16 DATED: November 25, 2008

17 _____ /s/
18 MARGARET A. NAGLE
19 UNITED STATES MAGISTRATE JUDGE
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