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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CLIFFORD A. ASHING,)	CASE NO. CV 08-00429 (RZ)
)	
Plaintiff,)	
)	MEMORANDUM OPINION
vs.)	AND ORDER
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	
_____)	

This matter is before the Court for the second time. When the case was here the first time, the Court had before it the decision of the Commissioner concluding that Plaintiff was not entitled to receive disability benefits because he suffered from no impairment. [AR 19-23] The Administrative Law Judge noted, among other things, that Plaintiff “has periodic episodes of diverticulitis of undetermined frequency.” [AR 21] With that record, the parties stipulated that the matter should be remanded, and on remand the Commissioner’s delegate, the Administrative Law Judge, should perform certain tasks. Among other things, the parties stipulated that the Administrative Law Judge would be instructed to “[o]btain medical documentation and/or medical expert testimony, if warranted, regarding the probable frequency of flare-ups of Plaintiff’s diverticulitis.” [AR 274] The Administrative Law Judge also was to be directed to explain the weight given all witness’s testimony and written evidence, including the Plaintiff’s. [*Id.*] The

1 stipulation of the parties was referenced in the Court’s Judgment, which directed the
2 Commissioner to conduct further proceedings consistent with the stipulation. [AR 276]
3 This history is important because, as the Supreme Court has said, “[d]eviation from the
4 court’s remand order in the subsequent administrative proceedings is itself legal error,
5 subject to reversal on further judicial review.” *Sullivan v. Hudson*, 490 U.S. 877, 885-86
6 (1989) (citations omitted).

7 Upon remand, a different Administrative Law Judge sent Plaintiff for an
8 internal medicine review, held a further hearing with a different medical expert, and issued
9 a new decision denying Plaintiff disability benefits. This time the Administrative Law
10 Judge found that the Plaintiff had “the following, very questionable, severe impairments:
11 diverticulosis, degenerative changes of the right knee, and exogenous obesity.” [AR 267
12 (citation omitted)] The only impairment at issue in this case concerns Plaintiff’s
13 diverticulosis.

14 As explained by the medical experts at both hearings, diverticulosis is the
15 condition which Plaintiff has, of having “pockets” on the bowel; it is when the pockets
16 become infected or inflamed that diverticulitis exists. [AR 74 (first hearing); AR 327
17 (second hearing)] The key issue on remand had to do with the frequency of bouts of
18 diverticulitis. Plaintiff’s primary argument in this Court is that the Administrative Law
19 Judge ignored the testimony of the medical expert from the first hearing, who had opined
20 that Plaintiff might in fact have had to miss 50 days a year of work due to episodes of
21 diverticulitis. [AR 73]

22 In this Court, Defendant responds that the Administrative Law Judge was free
23 to pursue the inquiry in his own way, and that what he decided to do was to order an
24 internal medicine evaluation. That evaluation, however, shed no light on the question that
25 was remanded, which had to do with assessing the medical record if one existed, or the
26 likelihood if one did not, of how frequently Plaintiff would have to miss work due to bouts
27 of diverticulitis. The information on this point in the internal medicine evaluation came
28 largely from Plaintiff [AR 301], and the only reference to frequency of bouts of

1 diverticulitis is found in the portion of the report labeled “Diagnostic Impression,” which
2 states “[c]hronic abdominal pain and diarrhea secondary to history of chronic diverticulosis
3 and intermittent diverticulitis.” [AR 306]

4 But, just how intermittent was the question because, as the first Administrative
5 Law Judge tellingly noted, “this case pretty much turns on how often the Claimant would
6 miss work.” [AR 75] Neither the medical expert who testified at the first hearing, nor the
7 medical expert who testified at the second hearing, found any medical documentation of
8 the frequency of the episodes. [AR 73 (first hearing); AR 323 (second hearing)] The only
9 expert evidence of any prediction concerning the frequency of such bouts was the
10 aforementioned aside by the medical expert from the first hearing that “[h]e would be
11 expected to miss work – maybe his estimate of 50 days per calendar year is fairly close.”
12 [AR 73] In a not dissimilar vein, the medical expert at the second hearing acknowledged
13 that the type of condition which Plaintiff might have is a condition that tends to flare or
14 recur intermittently. [AR 325]

15 The Administrative Law Judge answered the question of frequency using a
16 different methodology. He found as follows:

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18 The claimant has not been hospitalized in ten years. Since the
19 alleged onset date of disability, he has made no emergency room
20 visits and sees his current general practitioner only once or twice
21 a year. There is not the slightest evidence of deficiency of
22 nutrition. In fact, the claimant has at all times since the alleged
23 onset date been obese. His weight indeed went up to 280
24 pounds and he said he deliberately reduced it to his current
25 (though still obese) weight of 260 pounds by avoiding sugar.
26 There is no evidence of anemia or lack of nutrient elements or
27 electrolytes in the blood. These undeniable facts strongly
28 militate against the claimant’s assertions of incapacitating

1 gastrointestinal symptoms, which allegedly would prevent work
2 10 to 12 days a month.

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4 [AR 268] The notion that a person who maintains and even increases his weight cannot
5 have intermittent, debilitating bouts of diverticulitis is not intuitively obvious; more to the
6 point, it is a judgment which demands *medical* expertise, and is not one which an
7 administrative law judge may make without medical evidence. Likewise, the facts that
8 Plaintiff had not been hospitalized for ten years, and only sees his physician once or twice
9 a year, do not by themselves speak to the frequency of the bouts of diverticulitis. Plaintiff
10 testified that he did not more aggressively seek treatment because he had been told that
11 there was no cure and that he was doing what he could [AR 335]; the Administrative Law
12 Judge did not refer to any contrary medical opinion to justify his implied rejection of
13 Plaintiff's statement. The Administrative Law Judge is not himself a doctor, and he may
14 not act as one. *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975); *Manso-Pizarro*
15 *v. Secy of Health and Human Services*, 76 F.3d 15, 17 (1st Cir. 1996). Yet that is what he
16 did in framing his response, albeit indirect, to the issue remanded.

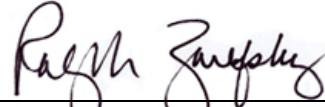
17 So the administrative record lacks the evidence that is central to this case; as
18 the medical expert at the second hearing testified, a person could not work during a flare-up
19 of diverticulitis. [AR 328] Thus, the frequency of flare-ups, either actual or expected, may
20 affect the residual functional capacity and, in turn, whether there are sufficient jobs in the
21 economy which Plaintiff could perform. Under the present state of the record, the
22 Commissioner's decision is not backed by substantial evidence.

23 The decision therefore is reversed, and the matter is remanded to the
24 Commissioner for further proceedings consistent with this memorandum opinion. On
25 remand, the Administrative Law Judge should consult a medical expert as to the effect of
26 Plaintiff's diverticulosis upon his ability to work, specifically addressing the actual or
27 expected frequency of flare-ups. The Administrative Law Judge should also discuss all
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1 relevant evidence on the subject, including statements or reports, such as Plaintiff's wife's
2 contemporary calendar. *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 1993).

3 IT IS SO ORDERED.

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5 DATED: October 8, 2008

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9 RALPH ZAREFSKY
10 UNITED STATES MAGISTRATE JUDGE
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