

1 On June 8, 2005, plaintiff Donald Gardner filed an application for a period of
2 disability or Disability Insurance Benefits, alleging an inability to work since March 30,
3 2002, due to asthma and pain in his feet caused by Ainhum disease.¹ (See Administrative
4 Record [“AR”] 60-62, 83-90). On June 15, 2007, subsequent to a hearing, an
5 Administrative Law Judge (“ALJ”), who found that plaintiff had severe impairments
6 (asthma, Ainhum disease), determined that plaintiff was not disabled within the meaning
7 of the Social Security Act. (AR 16-25).

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9 Following the Appeals Council’s denial of plaintiff’s request for a review of the
10 hearing decision (AR 5-7), plaintiff filed an action in this Court.

11 Plaintiff makes four challenges to the ALJ’s 2007 Decision denying benefits.
12 Plaintiff alleges that the ALJ erred in (1) failing to properly consider the medical
13 evidence; (2) failing to properly evaluate plaintiff’s credibility; (3) failing to properly
14 consider lay witness testimony; and (4) failing to pose a complete hypothetical question
15 to the vocational expert.

16 For the reasons discussed below, the Court finds that plaintiff’s second claim of
17 error does have merit. Since the matter is remanded based on plaintiff’s second claim of
18 error, the Court will not address plaintiff’s first, third and fourth claims of error.
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21 **ISSUE NO. 2:**

22 Plaintiff asserts that the ALJ improperly found that plaintiff’s “statements
23 concerning the intensity, persistence and limiting effects of these symptoms are not
24 entirely credible” (AR 23). Plaintiff alleges that the ALJ failed to state which of
25 plaintiff’s statements were not credible and why such statements were not credible.
26 Plaintiff further alleges that it appeared the ALJ failed to consider all of the evidence in
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¹ Ainhum is “a condition of unknown origin, occurring chiefly in dark-
skinned races in the tropics, in which linear constriction of a toe, especially the fifth one,
leads to gradual spontaneous amputation.” Dorland’s Pocket Medical Dictionary, p. 22
(23rd ed. 1982); see also Administrative Record 116-44.

1 his determination about plaintiff's credibility. In response, defendant argues that the ALJ
2 provided specific, clear and convincing reasons for his credibility finding.

3 The Commissioner's assessment of plaintiff's credibility should be given great
4 weight. Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985). "If the ALJ's decision is
5 based on a credibility assessment, there must be an explicit finding as to whether the
6 plaintiff's testimony was believed or disbelieved and the testimony must not be entirely
7 discounted simply because there was a lack of objective findings." Cotton v. Bowen, 799
8 F.2d 1403, 1407 (9th Cir. 1986). Furthermore, if the Commissioner chooses to disregard
9 plaintiff's testimony, the Commissioner must set forth specific cogent reasons for
10 disbelieving it. Lewin v. Schweiker, 654 F.2d 631, 635 (9th Cir. 1981); Holohan v.
11 Massanari, 246 F.3d 1195 (9th Cir. 2001). Once the plaintiff produces objective medical
12 evidence of an underlying impairment, the ALJ may still reject the plaintiff's excess pain
13 testimony, but only by setting forth clear and convincing reasons for doing so. Light v.
14 Social Sec. Admin., 119 F.3d 780, 792 (9th Cir. 1997); Smolen v. Chater, 80 F.3d 1273,
15 1281 (9th Cir. 1996); see also Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). In
16 evaluating a claimant's credibility, the ALJ may consider the claimant's reputation for
17 truthfulness, inconsistencies within the claimant's testimony or as between his testimony
18 and conduct, the claimant's daily activities, work history, as well as testimony from
19 physicians or third parties concerning the nature, severity, and effect on the symptoms of
20 which the claimant complains. Light, supra; see also Reddick, supra (although disability
21 claimants should not be penalized for trying to lead normal lives despite their limitations,
22 when the level of their activities are inconsistent with their claimed limitations, those
23 activities have a bearing on the claimants' credibility).

24 At the administrative hearing, plaintiff testified that he has problems with his
25 asthma when he is exposed to dust or fumes. (See AR 416). Plaintiff further testified
26 that in 2003 or 2004 he had to have his left baby toe amputated after a couple of years of
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1 severe pain,² that he was developing bunions under that toe, that he was experiencing
2 pain with the next two left toes and the right three smallest toes, that he could stand or
3 walk for only about 30 minutes (and then he needed to get off his feet for a couple of
4 hours), and that pain medication (Naprosyn and Vicodin) only provided temporary relief.
5 (See AR 416-20).

6 In his Decision, the ALJ found that plaintiff's asthma and Ainhum disease "could
7 reasonably be expected to produce the alleged symptoms[.]" (AR 23). Nonetheless, the
8 ALJ found that the "statements concerning the intensity, persistence and limiting effects
9 of these symptoms are not entirely credible." (Id.).

10 As plaintiff points out, it is not entirely clear on what bases the ALJ made the
11 determination about plaintiff's credibility as to his foot condition.³

12 The ALJ's credibility finding as to plaintiff's foot condition appeared to rely on the
13 following: (1) plaintiff's testimony at the hearing that "[h]is pain sometimes improves
14 enough to the point that he only needs non-prescription pain relief" (AR 23); (2) the
15 notation during the application interview that plaintiff had no difficulties moving about
16 (Id.); (3) the State Agency consultant's opinion that plaintiff did not have a need for a
17 cane (Id.); (4) the fact that plaintiff "has shoe inserts to address his amputated toe, foot
18 pain and abnormal gait" (Id.); (5) plaintiff's treating podiatrist's statements that plaintiff
19 has successfully healed from toe amputation and that his pain is controlled (Id.); and (6)
20 plaintiff's statements that he can lift 50 pounds, do his own grocery shopping, clean the
21 house, change the battery, wash his car and do yard work (Id.).

22 Contrary to the ALJ's statement, plaintiff did not testify that he sometimes takes
23 non-prescription pain medication. Rather, plaintiff testified that he takes Naprosyn for
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25 ² The surgery was actually performed on May 6, 2004. (See AR 278, 294).

26 ³ Since the Court is remanding the matter based on ALJ's failure to provide
27 clear and convincing reasons for finding plaintiff not credible with respect to his foot
28 condition, the Court will not address the ALJ's credibility determination with respect to
plaintiff's asthma condition.

1 mild pain and Vicodin for more severe pain. (AR 420). It was not clear that plaintiff was
2 taking Naprosyn as a non-prescription pain medication. There was no indication as to the
3 extent to which plaintiff suffered mild pain as opposed to severe pain. The fact that
4 plaintiff may have suffered only mild pain for an unknown time period simply does not
5 support the ALJ's credibility determination.

6 Although the ALJ correctly noted that the application interviewer did not observe
7 plaintiff having any difficulties with activities such as sitting, standing and walking (see
8 AR 23, citing AR 78), the ALJ failed to note that the interviewer observed that plaintiff
9 had a "very slight limp." (See AR 78-79). That interview took place on June 8, 2005
10 (see AR 79), more than three years after plaintiff's alleged onset date. Moreover, there is
11 no indication that the interviewer observed plaintiff after plaintiff had been on his feet for
12 about 30 minutes (according to plaintiff, he can stand or walk for about 30 minutes before
13 he is limited by his foot problems, see AR 419). Thus, the interviewer's observations of
14 plaintiff did not provide a clear and convincing reason for the ALJ's rejection of
15 plaintiff's testimony.

16 The ALJ relied on a statement by a consultative examiner (who happened to be an
17 allergist and immunologist) in a July 13, 2005 evaluative report that plaintiff "can walk
18 without any assistive devices." (AR 23, citing AR 145-47). However, the ALJ failed to
19 state why the absence of a cane (or any other assistive device) made plaintiff less
20 credible. Again, there is no indication that the consultative examiner observed plaintiff
21 after plaintiff had been on his feet for about 30 minutes.

22 With regard to the ALJ's reliance on the fact that plaintiff "has shoe inserts to
23 address his amputated toe, foot pain and abnormal gait" (AR 23, citing AR 234, 315, 317-
24 18), none of the medical records cited by the ALJ state that the shoe inserts successfully
25 reduced or eliminated plaintiff's pain. Indeed, plaintiff testified that he was not able to
26 wear a pair of shoes which were fitted to conform to his feet because of pain at the
27 bottom of his feet. (AR 417). In addition, according to a January 24, 2007 progress note,
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1 plaintiff was not able to wear shoes even after he had been given “superfeet orthotics,”
2 and plaintiff apparently required additional orthotics. (See AR 325-26). Thus, plaintiff’s
3 testimony and the medical evidence contradict the ALJ’s credibility finding.

4 The ALJ improperly relied on plaintiff’s treating podiatrist’s December 7, 2005
5 report that states that plaintiff “has healed successfully” from the amputation of the fifth
6 digit of the left foot and that plaintiff’s pain “is controlled with Lidoderm patches which
7 numb the area and increases [sic] the circulation.” (See AR 23, citing AR 295). The ALJ
8 failed to note that the same report contains statements -- namely, “the 5th digits on both
9 feet were severely painful due to lack of circulation to the toes,” and “The toes will
10 eventually auto-amputate with time but due to the severity of the pain the patient opted
11 for amputation of the 5th digit of the left foot” (AR 295) -- which support plaintiff’s pain
12 testimony. Moreover, it is not clear what the podiatrist meant when he stated that
13 plaintiff’s pain is “controlled.” The podiatrist’s statements are somewhat suspect because
14 there is no indication that podiatrist treated plaintiff after late 2004 (at the time of the last
15 visit, it was noted that plaintiff had nerve pain in his left foot and continued to have pain
16 in his right fifth toe, and plaintiff apparently was given Liboderm patches, see AR 277).
17 Indeed, it appears that plaintiff sought treatment with another podiatrist beginning in July
18 2005. (See AR 227). Later treatment records, not addressed by the ALJ, indicate that
19 plaintiff experienced problems with pain in the toes of his left and right feet. (See AR
20 318, 343).

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22 Finally, the ALJ improperly found that plaintiff’s statements that he can lift 50
23 pounds, do his own grocery shopping, clean the house, change the battery, wash his car
24 and do yard work “are inconsistent with complaints of disabling pain” (AR 23, citing AR
25 92). In a questionnaire dated June 17, 2005, plaintiff stated that he was able to lift 50
26 pounds, clean the house, change the battery, wash his car, and do yard work. (AR 92).
27 However, plaintiff did not indicate (and there is no indication in the record about) how
28 often he can lift 50 pounds. Moreover, the ALJ failed to consider several of plaintiff’s

1 responses. When asked what kind of things he can carry, plaintiff stated “Not much.”
2 (Id.). Plaintiff stated that his ability to drive a car “depends on pain from feet.” (Id.)
3 Plaintiff stated that he could work on the car “Not long” and that he could do yard work
4 for one hour. (Id.). Plaintiff stated that he had difficulty finishing his housework and
5 other chores because of “pain in feet.” (AR 93). Plaintiff stated that he was required to
6 take rest periods or naps during the day. (Id.; see also AR 420-21). The ALJ’s reliance
7 on selective statements about plaintiff’s daily activities was an insufficient basis for
8 discrediting plaintiff. See Fair v. Bowen, 885 F.2d 597, 561 (9th Cir. 1989)(“The Social
9 Security Act does not require that claimants be utter incapacitated to be eligible for
10 benefits . . . and many home activities are not easily transferable to what may be the more
11 grueling environment of the workplace, where it might be impossible to periodically rest
12 or take medication.”).

14 Accordingly, the ALJ did not provide clear and convincing reasons for the
15 determination about plaintiff’s credibility determination with respect to his foot
16 condition.

17 **ORDER**

18 For the foregoing reasons, the decision of the Commissioner is reversed, and the
19 matter is remanded for further proceedings in accordance with the decision, pursuant to
20 Sentence 4 of 42 U.S.C. § 405(g).

21 DATED: July 31, 2009

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24 /s/
25 STEPHEN J. HILLMAN
26 UNITED STATES MAGISTRATE JUDGE
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