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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

UBALDO R. ORELLANA BATRES,	)	Case No. CV 10-0056-JEM
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
v.	)	REVERSING DECISION OF
	)	COMMISSIONER AND REMANDING
MICHAEL J. ASTRUE,	)	FOR FURTHER PROCEEDINGS
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

**PROCEEDINGS**

On January 7, 2010, Ubaldo R. Orellana Batres (“Plaintiff” or “Claimant”) filed a Complaint seeking review of the decision by the Commissioner of the Social Security Administration (“Commissioner”) denying Plaintiff’s application for disability benefits under Title II of the Social Security Act. On July 23, 2010, the Commissioner filed an Answer to the Complaint. On October 4, 2010, the parties filed a Joint Stipulation (“JS”) setting forth their positions and the issues in dispute.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before the undersigned Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision should be reversed and

1 remanded for further proceedings in accordance with law and with this Memorandum  
2 Opinion and Order.

### 3 **BACKGROUND**

4 Plaintiff was born on August 5, 1965, and was 42 years old on his alleged disability  
5 onset date of October 5, 2007. (AR 84.) Plaintiff filed an application for Disability Insurance  
6 Benefits on or about February 14, 2008. (AR 12, 84-86.) Plaintiff claims he is disabled due  
7 to diabetic neuropathy and fibromyalgia. (AR 118.) Plaintiff has not engaged in substantial  
8 gainful activity since October 4, 2007. (AR 16, 103.)

9 Plaintiff's claim was denied initially on May 16, 2008 (AR 43-47), and on  
10 reconsideration on September 23, 2008. (AR 49-53.) Plaintiff filed a timely request for  
11 hearing on October 2, 2008. (AR 54-55.) Plaintiff appeared with counsel and testified at a  
12 hearing held on April 29, 2009, before Administrative Law Judge ("ALJ") Robert Evans. (AR  
13 21-40.) The ALJ issued a decision denying benefits on July 7, 2009. (AR 12-17.) On  
14 August 24, 2009, Plaintiff filed a timely request for review of the ALJ's decision. (AR 8.) The  
15 Appeals Council denied review on November 6, 2009. (AR 2-4.) Plaintiff then commenced  
16 the present action.

### 17 **DISPUTED ISSUE**

18 As reflected in the Joint Stipulation, there is one disputed issue: whether the ALJ  
19 properly considered Plaintiff's subjective symptom testimony. (JS at 3.)

### 20 **STANDARD OF REVIEW**

21 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether  
22 the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v.  
23 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846  
24 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and  
25 based on the proper legal standards).

26 Substantial evidence means "'more than a mere scintilla,' but less than a  
27 preponderance." Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson

1 v. Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a  
2 reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S.  
3 at 401 (internal quotation marks and citation omitted).

4 This Court must review the record as a whole and consider adverse as well as  
5 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).  
6 Where evidence is susceptible to more than one rational interpretation, the ALJ’s decision  
7 must be upheld. Morgan v. Comm’r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir.  
8 1999). “However, a reviewing court must consider the entire record as a whole and may not  
9 affirm simply by isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at  
10 882 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue,  
11 495 F.3d 625, 630 (9th Cir. 2007).

## 12 THE SEQUENTIAL EVALUATION

13 The Social Security Act defines disability as the “inability to engage in any substantial  
14 gainful activity by reason of any medically determinable physical or mental impairment which  
15 can be expected to result in death or . . . can be expected to last for a continuous period of  
16 not less than 12 months.” 42 U.S.C. §§ 423(d) (1)(A), 1382c(a)(3)(A). The Commissioner  
17 has established a five-step sequential process to determine whether a claimant is disabled.  
18 20 C.F.R. §§ 404.1520, 416.920.

19 The first step is to determine whether the claimant is presently engaging in substantial  
20 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is  
21 engaging in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert,  
22 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether the claimant has a  
23 severe impairment or combination of impairments. Parra, 481 F.3d at 746. An impairment is  
24 not severe if it does not significantly limit the claimant’s ability to work. Smolen, 80 F.3d at  
25 1290. Third, the ALJ must determine whether the impairment is listed, or equivalent to an  
26 impairment listed, in Appendix I of the regulations. Id. If the impediment meets or equals  
27 one of the listed impairments, the claimant is presumptively disabled. Bowen v. Yuckert, 482  
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1 U.S. at 141. Fourth, the ALJ must determine whether the impairment prevents the claimant  
2 from doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001).  
3 Before making the step four determination, the ALJ first must determine the claimant's  
4 residual functional capacity ("RFC").<sup>1</sup> 20 C.F.R. § 416.920(e). The RFC must account for all  
5 of the claimant's impairments, including those that are not severe. 20 C.F.R. §§ 416.920(e),  
6 416.945(a)(2); Social Security Ruling ("SSR") 96-8p. If the claimant cannot perform his or  
7 her past relevant work or has no past relevant work, the ALJ proceeds to the fifth step and  
8 must determine whether the impairment prevents the claimant from performing any other  
9 substantial gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

10 The claimant bears the burden of proving steps one through four, consistent with the  
11 general rule that at all times the burden is on the claimant to establish his or her entitlement  
12 to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the  
13 claimant, the burden shifts to the Commissioner to show that the claimant may perform other  
14 gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a  
15 finding that a claimant is not disabled at step five, the Commissioner must provide evidence  
16 demonstrating that other work exists in significant numbers in the national economy that the  
17 claimant can do, given his or her RFC, age, education, and work experience. 20 C.F.R. §  
18 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled and  
19 entitled to benefits. Id.

## 20 DISCUSSION

### 21 A. The ALJ's Decision

22 In this case, the ALJ determined at step one of the sequential evaluation that Plaintiff  
23 has not engaged in substantial gainful activity since October 5, 2007, his alleged disability  
24 onset date. (AR 16.)

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26 <sup>1</sup>Residual functional capacity ("RFC") is what one "can still do despite [his or her]  
27 limitations" and represents an assessment "based on all the relevant evidence." 20 C.F.R.  
28 §§ 404.1545(a)(1), 416.945(a)(1).

1 At step two, the ALJ determined that Plaintiff has the severe impairment of type II  
2 diabetes mellitus with peripheral neuropathy. (AR 16.) Plaintiff alleged that he had  
3 fibromyalgia and one of his treating physicians wrote that he had fibromyalgia (AR 193), but  
4 the ALJ did not list fibromyalgia as a severe impairment, presumably because Plaintiff's  
5 treating physician "did not specify any trigger points." (AR 15; see AR 27.)

6 At step three, the ALJ found that Plaintiff does not have an impairment or combination  
7 of impairments that meets or medically equals one of the listed impairments. (AR 16.)

8 The ALJ found that Plaintiff has the RFC to perform "the full range of light work . . .  
9 with no working at unprotected heights or around dangerous moving machinery." (AR 16.)

10 At step four, the ALJ relied on the testimony of a vocational expert in finding that  
11 Plaintiff could perform his past relevant work as a utility bag assembler, and is therefore not  
12 disabled. (AR 16.)

13 **B. The ALJ Did Not Properly Evaluate Plaintiff's Credibility.**

14 Plaintiff argues that the ALJ did not provide legally sound reasons for discounting his  
15 credibility. (JS at 4-13, 21-22.) The Court agrees.

16 **1. Pertinent Law**

17 The test for deciding whether to accept a claimant's subjective symptom testimony  
18 turns on whether the claimant produces medical evidence of an impairment that reasonably  
19 could be expected to produce the pain or other symptoms alleged. Bunnell v. Sullivan, 947  
20 F.2d 341, 346 (9th Cir. 1991); see also Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998);  
21 Smolen, 80 F.3d at 1281-82 & n.2. The Commissioner may not discredit a claimant's  
22 testimony on the severity of symptoms merely because they are unsupported by objective  
23 medical evidence. Reddick, 157 F.3d at 722; Bunnell, 947 F.2d at 343, 345. If the ALJ finds  
24 the claimant's symptom testimony not credible, the ALJ "must specifically make findings  
25 which support this conclusion." Bunnell, 947 F.2d at 345. These findings must be  
26 "sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit  
27 [the] claimant's testimony." Thomas, 278 F.3d at 958; see also Rollins v. Massanari, 261

1 F.3d 853, 856-57 (9th Cir. 2001); Bunnell, 947 F.2d at 345-46. Unless there is evidence of  
2 malingering, the ALJ can reject the claimant’s testimony about the severity of her symptoms  
3 only by offering “specific, clear and convincing reasons for doing so.” Smolen, 80 F.3d at  
4 1283-84; see also Reddick, 157 F.3d at 722. The ALJ must identify what testimony is not  
5 credible and what evidence discredits the testimony. Reddick, 157 F.3d at 722; Smolen, 80  
6 F.3d at 1284.

## 7 **2. Analysis**

8 In this case, the ALJ determined the he “cannot rely on [Plaintiff’s] testimony as  
9 establishing greater limitations than those set forth [in the RFC assessment] because his  
10 statements are not entirely credible.”<sup>2</sup> (AR 15.) Plaintiff testified, among other things, that he  
11 cannot sit, stand, or walk for more than ten to fifteen minutes at one time; numbness  
12 prevents him from moving his hands, arms or back on a daily basis; and he has difficulty  
13 concentrating and memory problems. (AR 27-32.) The ALJ offered several reasons for  
14 discounting Plaintiff’s credibility. The Court finds none of them to be clear and convincing.

15 First, the ALJ found that Plaintiff “embellish[ed] on lifting at his past work as a utility  
16 bag assembler.” (AR 15.) The ALJ wrote “that [Plaintiff] testified that he had to carry 80  
17 pounds often for [half] a block; however, this is not credible since carts, dollies, etc. are  
18 generally available, per [the] vocational expert.” (AR 16.) The ALJ accurately characterized  
19 Plaintiff’s testimony about his past work (see AR 25-26), but he did not fairly rely on the  
20 vocational expert’s testimony to discount Plaintiff’s credibility. The vocational expert did  
21 testify that “normally” the job of utility bag assembler is “performed with dollies or carts or  
22 carriers of some kind” and that “[m]oderate size companies certainly do have . . . dollies or  
23 other devices.” (AR 33-34.) But the expert also stated “[t]hat’s not to say that [Plaintiff]  
24 didn’t perform [his past work] the way he said he did” because his employer “apparently was  
25 a company that didn’t have that equipment.” (AR 34.) The ALJ did not cite any other

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27 <sup>2</sup>For the sake of analysis, the Court assumes that the ALJ found that Plaintiff’s  
28 medically determinable impairments could reasonably be expected to cause the alleged  
symptoms. On remand, the ALJ should make this finding express.

1 evidence that Plaintiff's prior work differed from his description. Thus, the ALJ's conclusion  
2 that Plaintiff exaggerated the demands of his prior work amounts only to speculation and  
3 does not clearly and convincingly detract from Plaintiff's credibility.

4 Next, the ALJ wrote that Plaintiff's "daily activities are . . . inconsistent with his  
5 allegations." (AR 15.) The ALJ cited Plaintiff's "report[] that he lived in a house with his wife  
6 and 11 years old daughter, he took care of his personal needs, watched television, took  
7 walks, read [the] newspaper, talked on the telephone and he socialized with friends and  
8 family members." (Id. (citing Exhibit 6E [AR 136-43]).) The ALJ did not mention any of  
9 Plaintiff's other statements about his activities of daily living, including that he wears pants  
10 with elastic waistbands because he has difficulty with buttons; he uses the shower because  
11 he cannot get in and out of the bathtub; he cannot "help around the house," do yard work, or  
12 drive; he needs assistance whenever he goes beyond the front of his house; it is extremely  
13 difficult for him to climb stairs; he typically does not go anywhere because he cannot focus;  
14 and he cannot cook for himself. (AR 30-32, 137, 139, 143.) On the record as a whole, the  
15 ALJ's conclusion that Plaintiff's activities of daily living undermine his allegations of disability  
16 is not supported by substantial evidence. See Benecke v. Barnhart, 379 F.3d 587, 594 (9th  
17 Cir. 2004) ("[T]he mere fact that a plaintiff has carried on certain daily activities . . . does not  
18 in any way detract from her credibility as to her overall disability. One does not need to be  
19 'utterly incapacitated' in order to be disabled." (quoting Vertigan v. Halter, 260 F.3d 1044,  
20 1050 (9th Cir. 2001))). This reason, too, fails to detract from Plaintiff's credibility.

21 As the final reason for supporting his adverse credibility determination, the ALJ wrote  
22 that Plaintiff "does not appear to be too motivated to work." (AR 15.) The ALJ did not cite  
23 any evidence in support of this conclusion. Plaintiff's earnings record indicates that he  
24 worked four quarters per year from 1995 through 2007, when he alleges he became  
25 disabled. (AR 92.) He earned over \$30,000 each year from 1997 through 2007. (Id.)  
26 Plaintiff wrote that he has "always been a hard working man," he "loved [his] job," and he  
27 "was always read[y] to take on any overtime that the company would allow," but his condition  
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1 eventually prevented him from working. (AR 119, 126.) The ALJ's statement that Plaintiff  
2 lacks motivation to work appears to be pure conjecture. This reason does not clearly and  
3 convincingly detract from Plaintiff's credibility.

4 Remand is warranted for the ALJ to reassess Plaintiff's credibility.

5 **ORDER**

6 In accordance with the Memorandum Opinion and Order Reversing Decision of  
7 Commissioner and Remanding for Further Proceedings filed concurrently herewith,

8 IT IS HEREBY ADJUDGED that the decision of the Commissioner of Social Security  
9 is REVERSED and this matter is REMANDED for further proceedings.

10  
11 DATED: January 19, 2011

/s/ John E. McDermott  
JOHN E. MCDERMOTT  
UNITED STATES MAGISTRATE JUDGE