

1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is REVERSED AND REMANDED for further proceedings
3 consistent with this Memorandum and Opinion and Order of Remand because the
4 Administrative Law Judge (“ALJ”) erred in finding that plaintiff does not have
5 any severe impairment at step two.

6 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
7 **DECISION**

8 On July 25, 2008, plaintiff filed applications for Disability Insurance
9 Benefits and Supplemental Security Income benefits. (Administrative Record
10 (“AR”) 95-98, 102-04). Plaintiff asserted that he became disabled on June 1,
11 2001, due to heart and back problems. (AR 135). The ALJ examined the medical
12 record and heard testimony from plaintiff, who was represented by counsel, on
13 July 13, 2009. (AR 36-54).

14 On September 23, 2009, the ALJ determined that plaintiff was not disabled
15 from his alleged onset date of June 1, 2001, through September 30, 2006,
16 plaintiff’s last date insured.¹ (AR 21-35). Specifically, the ALJ found that
17 plaintiff does not have a severe impairment or a severe combination of
18 impairments. (AR 32-34).

19 The Appeals Council denied plaintiff’s application for review. (AR 1-3).

20 **III. APPLICABLE LEGAL STANDARDS**

21 **A. Sequential Evaluation Process**

22 To qualify for disability benefits, a claimant must show that he is unable to
23 engage in any substantial gainful activity by reason of a medically determinable
24 physical or mental impairment which can be expected to result in death or which
25 has lasted or can be expected to last for a continuous period of at least twelve
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28 ¹Plaintiff’s pension from the Department of Veterans’ Affairs presumably disqualifies
him for Supplemental Security Income benefits. See AR 39, 103; 20 C.F.R. § 416.1100 *et seq.*

1 months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C. §
2 423(d)(1)(A)). The impairment must render the claimant incapable of performing
3 the work he previously performed and incapable of performing any other
4 substantial gainful employment that exists in the national economy. Tackett v.
5 Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

6 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
7 sequential evaluation process:

- 8 (1) Is the claimant presently engaged in substantial gainful activity? If
9 so, the claimant is not disabled. If not, proceed to step two.
- 10 (2) Is the claimant's alleged impairment sufficiently severe to limit
11 his ability to work? If not, the claimant is not disabled. If so,
12 proceed to step three.
- 13 (3) Does the claimant's impairment, or combination of
14 impairments, meet or equal an impairment listed in 20 C.F.R.
15 Part 404, Subpart P, Appendix 1? If so, the claimant is
16 disabled. If not, proceed to step four.
- 17 (4) Does the claimant possess the residual functional capacity to
18 perform his past relevant work? If so, the claimant is not
19 disabled. If not, proceed to step five.
- 20 (5) Does the claimant's residual functional capacity, when
21 considered with the claimant's age, education, and work
22 experience, allow him to adjust to other work that exists in
23 significant numbers in the national economy? If so, the
24 claimant is not disabled. If not, the claimant is disabled.

25 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
26 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920). The claimant has the burden
27 of proof at steps one through four, and the Commissioner has the burden of proof
28 at step five. Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001)

1 (citing Tackett); see also Burch, 400 F.3d at 679 (claimant carries initial burden of
2 proving disability).

3 **B. Standard of Review**

4 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
5 benefits only if it is not supported by substantial evidence or if it is based on legal
6 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
7 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457
8 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
9 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
10 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
11 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
12 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

13 To determine whether substantial evidence supports a finding, a court must
14 “consider the record as a whole, weighing both evidence that supports and
15 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.
16 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d
17 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
18 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that
19 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

20 **IV. DISCUSSION**

21 **A. Step Two Determination**

22 Plaintiff argues that the ALJ committed reversible error at step two by
23 determining that plaintiff does not suffer from a severe impairment. (Plaintiff’s
24 Motion at 4-6). The Court agrees.

25 **1. Pertinent Law**

26 At step two of the sequential evaluation process, plaintiff has the burden to
27 present evidence of medical signs, symptoms and laboratory findings that establish
28 a medically determinable physical or mental impairment that is severe, and that

1 can be expected to result in death or which has lasted or can be expected to last for
2 a continuous period of at least twelve months. Ukolov v. Barnhart, 420 F.3d 1002,
3 1004-1005 (9th Cir. 2005) (citing 42 U.S.C. §§ 423(d)(3), 1382c(a)(3)(D)); see 20
4 C.F.R. § 404.1520. Substantial evidence supports an ALJ’s determination that a
5 claimant is not disabled at step two where “there are no medical signs or
6 laboratory findings to substantiate the existence of a medically determinable
7 physical or mental impairment.” Id. (quoting Social Security Ruling (“SSR”)
8 96-4p²). “If an adjudicator is unable to determine clearly the effect of an
9 impairment or combination of impairments on [an] individual’s ability to do basic
10 work activities, the sequential evaluation should not end” at step two. SSR 85-28.

11 “Step two, then, is ‘a de minimis screening device [used] to dispose of
12 groundless claims.’” Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005)
13 (quoting Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996)). Applying the
14 normal standard of review to the requirements of step two, a court must determine
15 whether an ALJ had substantial evidence to find that the medical evidence clearly
16 established that the claimant did not have a medically severe impairment or
17 combination of impairments. Id.; see also Yuckert v. Bowen, 841 F.2d 303, 306
18 (9th Cir. 1988) (“Despite the deference usually accorded to the Secretary’s
19 application of regulations, numerous appellate courts have imposed a narrow
20 construction upon the severity regulation applied here.”). An impairment or
21 combination of impairments can be found “not severe” only if the evidence
22 establishes a slight abnormality that has “no more than a minimal effect on an
23 individual’s ability to work.” Webb, 433 F.3d at 686 (citation omitted).

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26 ²Social Security rulings are binding on the Administration. See Terry v. Sullivan, 903
27 F.2d 1273, 1275 n.1 (9th Cir. 1990). Such rulings reflect the official interpretation of the Social
28 Security Administration and are entitled to some deference as long as they are consistent with the
Social Security Act and regulations. Massachi v. Astrue, 486 F.3d 1149, 1152 n.6 (9th Cir.
2007) (citing SSR 00-4p).

1 **2. Analysis**

2 Under this narrow standard for step two evaluations, the finding that
3 plaintiff does not have a severe impairment is not clearly established by the
4 medical evidence. Plaintiff alleges that he has experienced back pain since he was
5 injured in a 1970 military incident involving two forklifts. (AR 40, 135). During
6 the period for which he was eligible for Disability Insurance Benefits, plaintiff
7 was diagnosed with intervertebral disk disease, cervical and lumbar radiculopathy,
8 lumbago, degenerative joint disease, chronic back pain, osteoarthritis, and chronic
9 rhabdomyolysis.³ (AR 170, 184, 186, 189-90). These diagnoses were based on
10 objective medical evidence such as physical examinations and radiological
11 studies. (E.g., AR 170, 189-90). In March 2006 plaintiff underwent surgery to
12 treat “chronic neck pain with mainly [right upper extremity] radiculopathy
13 secondary to C3456 degenerative cervical spine canal stenosis with
14 neuroforaminal stenosis.” (AR 185). Moreover, plaintiff continued to receive
15 treatment for his back pain after his period of eligibility (e.g., AR 173-74, 349,
16 377-78, 491-95), further suggesting that his impairments meet the durational
17 requirement of step two. The Court appreciates that the medical record may not
18 paint a complete picture of plaintiff’s overall health during the relevant period, but
19 “it includes evidence of problems sufficient to pass the de minimis threshold of
20 step two.” Webb, 433 F.3d at 687. Although the Court “do[es] not intimate that
21 [plaintiff] will succeed in proving that he is disabled,” the ALJ must continue the
22 sequential evaluation beyond step two “because there was not substantial evidence
23 to show that [plaintiff’s] claim was groundless.” Id. at 688.⁴

24 _____
25 ³He also received diagnoses of chest pain, hypertension, dyslipidemia, colonic polyps,
26 foramen ovale, diverticulosis, and glaucoma during his period of eligibility. (AR 170, 186, 187,
27 189-90).

28 ⁴The Court need not, and has not adjudicated plaintiff’s other challenges to the ALJ’s
decision except insofar as to determine that a reversal and remand for immediate payment of
(continued...)

1 **V. CONCLUSION**

2 For the foregoing reasons, the decision of the Commissioner of Social
3 Security is reversed in part, and this matter is remanded for further administrative
4 action consistent with this Opinion.⁵

5 LET JUDGMENT BE ENTERED ACCORDINGLY.

6 DATED: October 21, 2010

7 /s/

8 Honorable Jacqueline Chooljian
9 UNITED STATES MAGISTRATE JUDGE

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⁴(...continued)

23 benefits would not be appropriate. On remand, the ALJ must determine in the first instance
24 whether plaintiff suffers from an impairment that meets or medically equals one of the listed
25 impairments, and the ALJ is free to reassess the medical evidence in making a determination of
26 plaintiff's residual functional capacity, if necessary. (See Plaintiff's Motion at 2-4, 6-9).

27 ⁵When a court reverses an administrative determination, "the proper course, except in rare
28 circumstances, is to remand to the agency for additional investigation or explanation."
Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and
quotations omitted). Remand is proper where, as here, additional administrative proceedings
could remedy the defects in the decision. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.
1989).