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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GILBERT CISNEROS,)	Case No. CV 10-4940-PJW
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
COMMISSIONER OF THE)	
SOCIAL SECURITY ADMINISTRATION,)	
)	
Defendant.)	

I. INTRODUCTION

Before the Court is Plaintiff's appeal from a decision by Defendant Social Security Administration ("the Agency"), denying his application for Disability Insurance benefits ("DIB") and Supplemental Security Income ("SSI"). Plaintiff claims that the Administrative Law Judge ("ALJ") erred in finding that he was not credible. For the reasons explained below, the Court concludes that the ALJ erred and remands the case to the Agency for further consideration.

II. SUMMARY OF PROCEEDINGS

On October 6, 2006, Plaintiff applied for DIB and SSI, alleging that he had been unable to work since January 1, 1990, due to arthritis, hepatitis C, and osteoporosis. (Administrative Record

1 ("AR") 115-20, 129, 133.) His claim was denied initially and on
2 reconsideration. He then requested and was granted a hearing before
3 an ALJ, at which he appeared and testified. (AR 25-58.) On September
4 2, 2008, the ALJ issued a decision denying benefits. (AR 12-22.)
5 Plaintiff appealed to the Appeals Council, which denied review. This
6 appeal followed.

7 III. DISCUSSION

8 Plaintiff's only claim is that the ALJ erred in finding him not
9 credible. For the following reasons, the Court agrees.¹

10 ALJs are tasked with judging the credibility of witnesses. In
11 making credibility determinations, they employ ordinary credibility
12 evaluation techniques. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.
13 1996). Where a claimant has produced objective medical evidence of an
14 impairment which could reasonably be expected to produce the symptoms
15 alleged and there is no evidence of malingering, the ALJ can only
16 reject the claimant's testimony for specific, clear, and convincing
17 reasons that are supported by substantial evidence in the record. *Id.*
18 at 1283-84; *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

19 Plaintiff testified that his right shoulder and left elbow "pop
20 out" and are painful; that his left shoulder and neck are always sore;
21 that his right hand gets numb; that his back "once in a while" goes
22 out, forcing him to sit or lay down; that his left foot swells up when
23

24 ¹ The Joint Stipulation is 17 pages long. Plaintiff sets out at
25 page three that he is only challenging the ALJ's credibility finding
26 and argues throughout the brief why he thinks the ALJ erred. In
27 footnote two on page five, however, he argues that the ALJ erred when
28 he found that Plaintiff's foot, shoulder, and migraine headaches were
not severe impairments. This claim is rejected on procedural grounds.
Plaintiff cannot bury an argument in a footnote on page five of a 17-
page brief and expect the Court to address it on the merits.

1 he walks because his big toe does not bend properly; and that he
2 suffers on-and-off from migraines lasting for at least an hour at a
3 time, during which he must lie down and apply cold packs to his head.
4 (AR 36-40.) He also testified that his hepatitis makes him tire
5 easily. (AR 42.)

6 The ALJ determined that Plaintiff was not credible because:

7 (1) he was not using narcotic medication to treat his alleged severe
8 pain and had not sought a stronger prescription; (2) he did not report
9 any adverse side effects from the medication that he was using; (3) he
10 failed to report for a consultative examination and failed to offer a
11 satisfactory reason for doing so; (4) he has a history of
12 incarceration; (5) his daily activities, other than overhead lifting,
13 are not compromised by his impairments; (6) his demeanor at the
14 hearing was inconsistent with his alleged limitations; (7) he is not
15 being seen by a mental health professional; (8) he worked as a
16 furniture mover for ten years during the period of alleged disability;
17 (9) he failed to disclose to the Agency in the application process
18 that he had worked as a furniture mover; and (10) he failed to report
19 his earnings from his job as a furniture mover to the IRS. (AR 20.)

20 The Court addresses each in order.

21 1. Failure to Use Stronger Pain Medication

22 The ALJ found that Plaintiff was not using narcotic pain
23 medication for his "allegedly severe pain" and had not sought a
24 stronger prescription from his doctors. (AR 20.) In his view, this
25 showed that Plaintiff's allegations of debilitating pain were not
26 entirely credible. (AR 20.)

27 Though a claimant's failure to use strong pain medication to
28 treat allegedly disabling pain is a legitimate reason for discounting

1 a claimant's credibility, see, e.g., *Parra v. Astrue*, 481 F.3d 742,
2 750-51 (9th Cir. 2007) (approving ALJ's discounting of claimant's
3 testimony that impairment was severe where claimant treated impairment
4 with over-the-counter medication), the ALJ's finding here that
5 Plaintiff was not using strong medication is not supported by the
6 record. As the ALJ noted elsewhere in his decision, Plaintiff had
7 been taking Vicodin to control his pain and had at times been
8 prescribed other medications, including Butalbital, a barbiturate
9 prescribed for pain and headaches, and Hydrocodone and Tramadol,
10 narcotic analgesics used to treat moderate to severe pain. (AR 19.)
11 Plaintiff testified that he continued to take Tramadol three times a
12 day. (AR 44.) Thus, Plaintiff was taking what appears to be fairly
13 strong medication for his symptoms and there is no evidence that
14 stronger medication had been recommended but Plaintiff chose not to
15 take it. Moreover, the ALJ did not address Plaintiff's testimony that
16 he could not take stronger medication for his migraines because of
17 liver and his stomach problems. (AR 40.) As such, the Court does not
18 find this reason for questioning Plaintiff's credibility to be
19 convincing.

20 2. Lack of Side Effects

21 The ALJ questioned Plaintiff's credibility based on the fact that
22 his condition was controllable with medications and he had not
23 reported adverse side effects from the medication. (AR 20.) Though
24 these are valid reasons for questioning a claimant's testimony, see 20
25 C.F.R. § 416.929(c)(3)(iv); Social Security Ruling 96-7p (fact that a
26 claimant's medical condition can be controlled with medication that
27 does not cause side effects can be considered by the ALJ in
28 determining whether a claimant is credible); *Orteza v. Shalala*, 50

1 F.3d 748, 750 (9th Cir. 1995) (holding ALJ was permitted to consider
2 the lack of evidence of side effects from prescription medication in
3 discrediting claimant's testimony), they are not fully supported by
4 the record. Plaintiff reported that his use of Naproxen caused
5 drowsiness. (AR 153-54.) It is also not clear that Plaintiff's
6 condition was completely controlled by his medication or that he could
7 take stronger medication to control it due to liver and stomach
8 conditions. (AR 40.) Thus, the Court finds this justification
9 questionable.

10 3. Failure to attend consultative examination

11 The ALJ found that Plaintiff's failure to attend a consultative
12 internal medicine examination on March 5, 2008--despite two reminder
13 notices and without any reason for not attending--undermined
14 Plaintiff's credibility. (AR 18, 20.) This justification is not
15 convincing, either. Though a claimant's failure to attend a
16 consultative examination can support a finding that the claimant is
17 not disabled, that inference is only proper where the claimant does
18 not have a "good reason" for not attending. 20 C.F.R. § 416.918(a).

19 Here, Plaintiff testified that he failed to attend the
20 examination because he had not received notice of the scheduled exam.
21 (AR 642.) Though the ALJ heard this testimony, he overlooked it in
22 his decision, finding that Plaintiff had failed to offer any
23 explanation. (AR 18, 20.) This was error. Further, under the
24 regulations, not receiving notice of an examination constitutes a
25 "good reason" not to attend. 20 C.F.R. § 416.918(b)(2). Because the
26 ALJ ignored Plaintiff's explanation for not attending the examination
27 and because the explanation amounted to a good reason for missing the
28

1 appointment, the Court rejects this justification for questioning
2 Plaintiff's credibility.

3 4. History of Incarceration

4 The ALJ found that Plaintiff "has a history of incarceration
5 which erodes his credibility." (AR 20.) Generally speaking, a
6 finding that a claimant has suffered past convictions involving
7 dishonesty may properly be used to find a claimant not credible. See,
8 e.g., *Albridez v. Astrue*, 504 F. Supp.2d 814, 822 (C.D. Cal. 2007)
9 (holding adverse credibility finding may be based on prior convictions
10 involving moral turpitude); *Buck v. Astrue*, 2011 WL 2600505, at *11
11 (W.D. Wash. June 28, 2011) (noting prior history of crimes involving
12 dishonesty has "strong bearing on credibility"). Here, however, the
13 ALJ did not make any findings regarding the nature of Plaintiff's past
14 conviction. Further, there is nothing in the record to explain what
15 Plaintiff was convicted of and whether it was a felony or a
16 misdemeanor. Absent some evidence as to the nature of his conviction,
17 the Court cannot say that it is a convincing reason to discredit
18 Plaintiff's testimony.²

19 5. Daily Activities

20 The ALJ found that Plaintiff's daily activities were inconsistent
21 with his alleged limitations, noting that the activities were "not
22 compromised by any of his medical impairments, except for overhead
23 lifting," that there was no evidence that Plaintiff could not maintain
24 his hygiene, and that he remained capable of taking care of his

25
26 ² Plaintiff noted on his disability application that he had not
27 been convicted of a felony. (AR 118.) The only reference to his
28 incarceration is on a physical therapy progress note, which notes that
Plaintiff received physical therapy in prison for four months,
apparently some time in 2005 or 2006. (AR 571.)

1 personal and business affairs. (AR 20.) These are not convincing
2 reasons for discounting Plaintiff's testimony.

3 Plaintiff reported that he did some yard work and walked two
4 blocks to buy the L.A. Times each day, but that he needed help with
5 cooking and cleaning and that he could not sit for long periods of
6 time or lift more than 15 pounds. (AR 154-58.) These activities are
7 not inconsistent with Plaintiff's claims that he was unable to get
8 around well enough to be able to work. *See, e.g., Vertigan v. Halter,*
9 260 F.3d 1044, 1049-50 (9th Cir. 2001) (overruling ALJ's finding that
10 claimant was not credible when she claimed that she could not work
11 because she could perform daily activities where extent of daily
12 activities did not suggest that she performed them a substantial part
13 of the day or that they would transfer to work setting). As such,
14 this reason is rejected.

15 6. Hearing Demeanor

16 The ALJ found that Plaintiff's demeanor at the administrative
17 hearing was inconsistent with his claimed restrictions and
18 limitations. (AR 20.) Though an ALJ may base an adverse credibility
19 finding on his observations of a claimant during the administrative
20 hearing where, for example, the claimant displays symptoms that are
21 inconsistent with the medical evidence, *see Verduzco v. Apfel,* 188
22 F.3d 1087, 1089 (9th Cir. 1999), the ALJ may not use the fact that a
23 claimant *fails* to manifest symptoms of his alleged pain as a basis for
24 discrediting his testimony. *See Perminter v. Heckler,* 765 F.2d 870,
25 872 (9th Cir. 1985). That is what the ALJ appears to have done here.
26 Furthermore, the ALJ failed to describe Plaintiff's demeanor or to
27 explain how it was at odds with his alleged symptoms. Nor does the
28 transcript reveal any clue as to what Plaintiff was doing that

1 undermined his claimed impairments. As such, this reason is not
2 convincing, either.

3 7. No Mental Health Treatment

4 The ALJ noted that Plaintiff's failure to undergo mental health
5 treatment called into question his credibility. The Court is at a
6 loss to understand how this finding diminishes Plaintiff's credibility
7 where Plaintiff was not alleging that he suffers from a mental
8 impairment. Thus, this ground is rejected.

9 8. Work as a Furniture Mover After Alleged Onset Date

10 Plaintiff alleged an onset date of January 1, 1990. The ALJ
11 found that Plaintiff had worked as a furniture mover from 1994 to
12 2004, and concluded that that fact cut into his credibility. (AR 20.)
13 The Court agrees. Plaintiff's ability to work as a furniture mover
14 for ten years during the time he was allegedly so incapacitated he was
15 not capable of doing much of anything really undermines Plaintiff's
16 testimony. As Plaintiff explained, he was lifting and carrying things
17 like desks and filing cabinets on this job. (AR 49.) This is defined
18 as very heavy work. (AR 49.) And he did it for more than 100 days a
19 year (assuming his numbers are right and he was making about \$8,000 a
20 year, working eight hours a day for nine dollars an hour). The fact
21 that he was able to perform this work certainly calls into question
22 his claims in, for example, his pain questionnaire that he was hurt in
23 1984 and that, beginning in 1990, the pain from his injuries seriously
24 affected his activities. (AR 153-54.) Thus, this was a good reason
25 for the ALJ to question Plaintiff's credibility and is supported by
26 substantial evidence in the record.

1 9. Failure to Disclose Furniture Moving Job on Social
2 Security Application

3 The ALJ also questioned Plaintiff's credibility based on the fact
4 that he had failed to disclose that he worked as a furniture mover on
5 the forms he submitted to the Agency in connection with his
6 application for benefits. (AR 20.) Generally speaking, this is a
7 valid reason for discounting a claimant's testimony. *See, e.g., Smith*
8 *v. Barnhart*, 2003 WL 22862663, at *5-6 (N.D. Cal. Dec. 2, 2003); *but*
9 *see Hostrawser v. Astrue*, 364 Fed. App'x 373, 377 (9th Cir. 2010)
10 (holding claimant's non-disclosure of income earned both before and
11 after disability application was "just one discrepancy [that was]
12 unrelated to the medical symptoms and physical limitations at issue in
13 this case.") The problem here is that, although Plaintiff failed to
14 include this information on the forms, he did volunteer it at the
15 administrative hearing without prompting. (AR 35, 45-47.) The
16 Agency, apparently, was not aware that Plaintiff had performed this
17 work and, it seems, had no way of discovering it absent Plaintiff's
18 admission because Plaintiff was being paid "off the books." (AR 45-
19 47, 124.) Under these circumstances, it is hard to endorse the ALJ's
20 finding that Plaintiff's unsolicited admission that he had worked
21 while he was allegedly disabled establishes that he was lying when he
22 failed to identify the job on the forms that he submitted. If
23 anything, his admission seems to demonstrate the opposite. As such,
24 the Court does not find this reason very convincing.

25 10. Failure to File Tax Returns

26 The ALJ also based his adverse credibility finding on the fact
27 that Plaintiff failed to report his earnings from the furniture moving
28 job to the IRS. (AR 20.) Here, the Court agrees with the ALJ.

1 Plaintiff testified that he earned approximately \$8,000 a year as
2 a furniture mover, but that he never filed tax returns reporting this
3 income. (AR 46-47.) Plaintiff's failure to report this income is a
4 valid reason for questioning his credibility, *see, e.g., Berger v.*
5 *Astrue*, 516 F.3d 539, 546 (7th Cir. 2008) (holding claimant's failure
6 to report income on tax returns supported ALJ's adverse credibility
7 determination), and is supported by the record.

8 11. This Case Warrants Further Analysis

9 In the end, of the ten reasons cited by the ALJ for rejecting
10 Plaintiff's testimony, the Court finds that two are valid and
11 convincing--the fact that Plaintiff was working as a furniture mover
12 for ten years despite his claimed disability and the fact that he
13 failed to report his income to the IRS--and eight are not.³ The issue
14 that remains is whether these two reasons are enough to uphold the
15 ALJ's decision. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d
16 1155, 1162 (9th Cir. 2008) (stating that the "relevant inquiry . . .
17 is whether the ALJ's decision remains legally valid," despite errors
18 in the credibility analysis). Obviously, it is not simply a numbers
19 game in which, because the Court rejected the majority of the ALJ's
20 reasons, remand is required. This is particularly so in this case
21 because the fact that Plaintiff was able to perform very heavy work
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23 ³ The Agency asserts that several other grounds support the
24 ALJ's credibility finding. It argues, for example, that Plaintiff
25 presented no evidence of disability prior to September 2005, that his
26 treatment was conservative and routine, and that the consultative
27 examining physician's findings were unremarkable. (Joint Stip. at 9-
28 11.) The ALJ never cited these reasons for rejecting Plaintiff's
credibility, however, and, for that reason, the Court may not consider
them. *Pinto v. Massanari*, 249 F.3d 840, 848-849 (9th Cir. 2001)
(explaining court cannot affirm ALJ's decision for reason not
specified by ALJ in his decision).

1 for ten years while supposedly disabled seems almost overwhelming
2 proof that his claims are contrived. Ultimately, however, the Court
3 is convinced that remand for further proceedings is warranted. This
4 will allow the ALJ to make a determination in the first instance
5 whether he would have found Plaintiff incredible based on these two
6 reasons alone. It will also give Plaintiff and his counsel an
7 opportunity to re-evaluate their position and seek, perhaps, to amend
8 the application to allege an onset date after Plaintiff stopped
9 working as a furniture mover. (In fact, he may not be eligible for
10 benefits during at least part of this period because the work likely
11 qualified as substantial gainful activity.) Thus, though the Court
12 finds this a close case, it concludes that the more prudent course
13 here is for remand to allow the Agency and the Plaintiff to address
14 these issues.⁴

23 ⁴ Plaintiff asks the Court to remand the case for an award of
24 benefits. The Court recognizes it has the authority to do so, see
25 *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989), but
26 concludes that that relief is not warranted here. As explained above,
27 it is not clear to the Court from the record before it that Plaintiff
28 is, in fact, credible or that he is disabled. Further proceedings are
necessary to flesh this out. See *Harman v. Apfel*, 211 F.3d 1172,
1180-81 (9th Cir. 2000) (holding remand for further proceedings was
appropriate where the record contained additional unanswered questions
regarding the applicant's eligibility for benefits).

1 IV. CONCLUSION

2 For the foregoing reasons, the Agency's decision is reversed and
3 the case is remanded for further proceedings consistent with this
4 Memorandum Opinion and Order.

5 IT IS SO ORDERED.

6 DATED: September 26, 2011

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PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE