



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 Opinion and Order of Remand.

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**  
5 **DECISION**

6 On or about February 6, 2008, plaintiff filed an application for Disability  
7 Insurance Benefits. (Administrative Record (“AR”) 11, 82). Plaintiff asserted that  
8 he became disabled on February 5, 2005, due to left shoulder and neck pain,  
9 irritable bowel syndrome (“IBS”), acid reflux and gastric peresis. (AR 100-01).  
10 The Administrative Law Judge (“ALJ”) examined the medical record and heard  
11 testimony from plaintiff (who was represented by counsel) and a vocational expert  
12 on April 8, 2009. (AR 21).

13 On September 1, 2009, the ALJ determined that plaintiff was disabled for  
14 the closed period of May 1, 2005 through September 30, 2008, and that, due to  
15 medical improvement, plaintiff was not disabled from September 30, 2008 through  
16 the date of the decision. (AR 17). The ALJ also found that beginning on  
17 September 30, 2008 (1) plaintiff suffered from the following severe impairments:  
18 cervical spine degenerative joint disease, left shoulder pain, and bacterial  
19 overgrowth in the small intestine (AR 15); (2) plaintiff’s impairments, considered  
20 singly or in combination, did not meet or medically equal one of the listed  
21 impairments (AR 17-18); (3) plaintiff retained the residual functional capacity to  
22 perform sedentary work<sup>1</sup> with certain additional limitations<sup>2</sup> (AR 18); (4) plaintiff  
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25 <sup>1</sup>“Sedentary work involves lifting no more than 10 pounds at a time and occasionally  
26 lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is  
27 defined as one which involves sitting, a certain amount of walking and standing is often  
28 necessary in carrying out job duties. Jobs are sedentary if walking and standing are required  
occasionally and other sedentary criteria are met.” 20 C.F.R. § 404.1567(a).

<sup>2</sup>The ALJ determined that plaintiff could perform sedentary work, but was limited to  
occasional kneeling, crouching, crawling and bilateral overhead reaching, frequent handling and  
fingering, and needed to have ready access to a lavatory. (AR 18).

1 could not perform his past relevant work (AR 19); (5) there are jobs that exist in  
2 significant numbers in the national economy that plaintiff could perform,  
3 specifically inspector (AR 19); and (6) plaintiff's allegations regarding his  
4 limitations were not credible to the extent they were inconsistent with the assessed  
5 residual functional capacity (AR 18).

6 The Appeals Council denied plaintiff's application for review. (AR 1).

### 7 **III. APPLICABLE LEGAL STANDARDS**

#### 8 **A. Sequential Evaluation Process**

9 To qualify for disability benefits, a claimant must show that he is unable to  
10 engage in any substantial gainful activity by reason of a medically determinable  
11 physical or mental impairment which can be expected to result in death or which  
12 has lasted or can be expected to last for a continuous period of at least twelve  
13 months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C.  
14 § 423(d)(1)(A)). The impairment must render the claimant incapable of  
15 performing the work he previously performed and incapable of performing any  
16 other substantial gainful employment that exists in the national economy. Tackett  
17 v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

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

- 20 (1) Is the claimant presently engaged in substantial gainful activity? If  
21 so, the claimant is not disabled. If not, proceed to step two.
- 22 (2) Is the claimant's alleged impairment sufficiently severe to limit  
23 his ability to work? If not, the claimant is not disabled. If so,  
24 proceed to step three.
- 25 (3) Does the claimant's impairment, or combination of  
26 impairments, meet or equal an impairment listed in 20 C.F.R.  
27 Part 404, Subpart P, Appendix 1? If so, the claimant is  
28 disabled. If not, proceed to step four.

1 (4) Does the claimant possess the residual functional capacity to  
2 perform his past relevant work? If so, the claimant is not  
3 disabled. If not, proceed to step five.

4 (5) Does the claimant’s residual functional capacity, when  
5 considered with the claimant’s age, education, and work  
6 experience, allow him to adjust to other work that exists in  
7 significant numbers in the national economy? If so, the  
8 claimant is not disabled. If not, the claimant is disabled.

9 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th  
10 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

11 The claimant has the burden of proof at steps one through four, and the  
12 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262  
13 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett); see also Burch, 400 F.3d at 679  
14 (claimant carries initial burden of proving disability).

15 **B. Standard of Review**

16 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of  
17 benefits only if it is not supported by substantial evidence or if it is based on legal  
18 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.  
19 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457  
20 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable  
21 mind might accept as adequate to support a conclusion.” Richardson v. Perales,  
22 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a  
23 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing  
24 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

25 To determine whether substantial evidence supports a finding, a court must  
26 “consider the record as a whole, weighing both evidence that supports and  
27 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.  
28 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d

1 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming  
2 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that  
3 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

#### 4 **IV. DISCUSSION**

5 Plaintiff contends that the ALJ improperly evaluated the credibility of  
6 plaintiff’s subjective complaints for the period beginning on September 30, 2008  
7 (*i.e.*, after the closed period of disability). (Plaintiff’s Motion at 2-5). The Court  
8 agrees. As the Court cannot find that the ALJ’s error was harmless, a remand is  
9 warranted.

##### 10 **A. Pertinent Law**

11 “To determine whether a claimant’s testimony regarding subjective pain or  
12 symptoms is credible, an ALJ must engage in a two-step analysis.” Lingenfelter v.  
13 Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, “the ALJ must determine  
14 whether the claimant has presented objective medical evidence of an underlying  
15 impairment ‘which could reasonably be expected to produce the pain or other  
16 symptoms alleged.’” Id. (quoting Bunnell v. Sullivan, 947 F.2d 341, 344 (9th Cir.  
17 1991) (*en banc*)).

18 “Second, if the claimant meets this first test, and there is no evidence of  
19 malingering, ‘the ALJ can reject the claimant’s testimony about the severity of  
20 [his] symptoms only by offering specific, clear and convincing reasons for doing  
21 so.’” Lingenfelter, 504 F.3d at 1036 (citations omitted). “In making a credibility  
22 determination, the ALJ ‘must specifically identify what testimony is credible and  
23 what testimony undermines the claimant’s complaints.’” Greger v. Barnhart, 464  
24 F.3d 968, 972 (9th Cir. 2006) (citation omitted). “The ALJ must cite the reasons  
25 why the claimant’s testimony is unpersuasive.” Orn v. Astrue, 495 F.3d 625, 635  
26 (9th Cir. 2007) (citation and quotation marks omitted). In weighing credibility,  
27 the ALJ may consider factors including: the nature, location, onset, duration,  
28 frequency, radiation, and intensity of any pain; precipitating and aggravating

1 factors (e.g., movement, activity, environmental conditions); type, dosage,  
2 effectiveness, and adverse side effects of any pain medication; treatment, other  
3 than medication, for relief of pain; functional restrictions; the claimant’s daily  
4 activities; and “ordinary techniques of credibility evaluation.” Bunnell, 947 F.2d  
5 at 346 (citing Social Security Ruling (“SSR”) 88-13; quotation marks omitted).  
6 The ALJ may consider (a) inconsistencies or discrepancies in a claimant’s  
7 statements; (b) inconsistencies between a claimant’s statements and activities;  
8 (c) exaggerated complaints; and (d) an unexplained failure to seek treatment.  
9 Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If properly supported,  
10 the ALJ’s credibility determination is entitled to “great deference.” See Green v.  
11 Heckler, 803 F.2d 528, 532 (9th Cir. 1986).

12 **B. Analysis**

13 Here, the ALJ found that plaintiff’s statements concerning his limitations  
14 were “not credible beginning on September 30, 2008, to the extent they [were]  
15 inconsistent with the [ALJ’s] residual functional capacity assessment for the  
16 reasons explained below.” (AR 18). The ALJ failed, however, to provide any  
17 explanation “below,” much less any clear and convincing reasons for discrediting  
18 any of plaintiff’s statements. (See AR 18-20). Even assuming that earlier in the  
19 decision the ALJ properly discounted plaintiff’s December 2008 statements to an  
20 examining physician,<sup>3</sup> that finding does not constitute a clear and convincing  
21 reason for discrediting plaintiff’s extensive testimony at the administrative hearing  
22 that plaintiff suffered from disabling impairments. (AR 16, 27-39). See Greger,  
23 464 F.3d at 972.

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26 <sup>3</sup>In assessing plaintiff’s residual functional capacity for the closed period of disability  
27 (*i.e.*, May 1, 2005 through September 30, 2008), the ALJ did consider plaintiff’s December 2008  
28 statements to a qualified medical examiner that plaintiff had “reflux with intractable  
symptomatology” and “continued to take Xanax for abdominal bloating,” and found such  
statements not credible. (AR 16).

1 The Court cannot find that the ALJ's error was harmless. The ALJ  
2 accounted for plaintiff's subjective symptom complaints only "to the extent such  
3 complaints [were not] inconsistent with the residual functional capacity  
4 assessment." (AR 18). Had the ALJ considered, and been unable to discredit,  
5 plaintiff's testimony at the administrative hearing that his impairments essentially  
6 rendered him "non-functional . . . [e]very single day," the ALJ could reasonably  
7 have reached a more restrictive residual functional capacity assessment. Further  
8 restriction in the ALJ's assessment that plaintiff retained the residual functional  
9 capacity to do a narrowed range of "sedentary work" would have been material,  
10 particularly in light of the vocational expert's testimony that no jobs would be  
11 available for a person with plaintiff's characteristics, if that person had limitations  
12 beyond the ALJ's assessed residual functional capacity. (AR 42-43).

13 **V. CONCLUSION<sup>4</sup>**

14 For the foregoing reasons, the decision of the Commissioner of Social  
15 Security is reversed in part, and this matter is remanded for further administrative  
16 action consistent with this Opinion.<sup>5</sup>

17 LET JUDGMENT BE ENTERED ACCORDINGLY.

18 DATED: May 19, 2011

19 \_\_\_\_\_  
/s/

20 Honorable Jacqueline Chooljian  
UNITED STATES MAGISTRATE JUDGE

21 \_\_\_\_\_  
22 <sup>4</sup>The Court need not, and has not adjudicated plaintiff's other challenge to the ALJ's  
23 decision, except insofar as to determine that a reversal and remand for immediate payment of  
24 benefits would not be appropriate. On remand, however, the ALJ may wish to explain more  
25 thoroughly the weight, if any, placed on the opinions expressed by Dr. Jeffrey A. Hirsch in the  
26 doctor's Qualified Medical Evaluator Re-Evaluation report dated December 15, 2008.  
(Plaintiff's Motion at 5-8) (citing AR 350-59).

27 <sup>5</sup>When 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); see also Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) (remand is an option  
where the ALJ stated invalid reasons for rejecting a claimant's excess pain testimony).