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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ARMANDO OLIVARES,)	NO. CV 10-07976 SS
)	
Plaintiff,)	
)	
v.)	MEMORANDUM DECISION AND ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
)	

**I.
INTRODUCTION**

Plaintiff Armando Olivares ("Plaintiff") brings this action seeking to reverse the decision of the Commissioner of the Social Security Administration (the "Agency") denying his application for Supplemental Security Income ("SSI"). Alternatively, Plaintiff asks that this Court remand the case for further review. The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Agency is REVERSED and REMANDED for further proceedings.

1 II.

2 PROCEDURAL HISTORY

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4 On January 30, 2008, Plaintiff filed an application for
5 Supplemental Security Income ("SSI") claiming that he became disabled
6 on January 8, 2008. (Administrative Record ("AR") at 120-22). The
7 Agency initially denied Plaintiff benefits on April 23, 2008 and upon
8 reconsideration on August 21, 2008. (AR 79-83, 88-92). On October 3,
9 2008 Plaintiff requested a hearing before an Administrative Law Judge
10 ("ALJ"). (AR 94). The hearing took place on November 30, 2009 and
11 Plaintiff testified that he was unable to work due to back pain and
12 fatigue. (AR 24, 42-43). Plaintiff appeared with counsel and
13 testified. (AR 24-76). On January 29, 2010, the ALJ denied benefits.
14 (AR 10-23). On March 29, 2010 Plaintiff requested review by the Appeals
15 Council (AR 7-8). On April 3, 2010 the Appeals Council notified
16 Plaintiff that he "may send . . . more evidence or a statement about the
17 facts and law in this case. Any more evidence must be new and material
18 to the issues considered in the hearing decision dated January 29,
19 2010." (AR 5). The Appeals Council stated that Plaintiff must send any
20 additional information to the Appeals Council "within 25 days of the
21 date of this letter [April 3, 2010]." (Id.). On June 23, 2010
22 Plaintiff submitted additional medical records from April 2010 to the
23 Appeals Council. (AR 4, 457-71). The Appeals Council denied
24 Plaintiff's request for review on August 23, 2010. (AR 1-4). On October
25 22, 2010, Plaintiff filed the instant action.

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1 In the interim, on March 25, 2010, Plaintiff filed a second
2 application for disability payments. (Exhibit 1 to Plaintiff's
3 Memorandum in Support of Complaint ("Exhibit 1") at 1). On September
4 17, 2010 the Agency notified Plaintiff that he "[met] all the rules to
5 be eligible for SSI beginning March 25, 2010." (Id. at 2).¹ In the
6 instant action Plaintiff seeks disability benefits for a closed period
7 of time, from January 8, 2008 until April 1, 2010. (Memorandum in
8 Support of Complaint ("Complaint Memo.") at 2).

9
10 **III.**

11 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

12
13 To qualify for disability benefits, a claimant must demonstrate a
14 medically determinable physical or mental impairment that prevents him
15 from engaging in substantial gainful activity² and that is expected to
16 result in death or to last for a continuous period of at least twelve
17 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing
18 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant
19 incapable of performing the work he previously performed and incapable
20 of performing any other substantial gainful employment that exists in
21 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
22 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

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¹ Payment began in April 2010. (Exhibit at 1, 13).

27 ² Substantial gainful activity means work that involves doing
28 significant and productive physical or mental duties and is done for pay
or profit. 20 C.F.R. § 416.910.

1 To decide if a claimant is entitled to benefits, an ALJ conducts
2 a five-step inquiry. 20 C.F.R. § 416.920. The steps are:

- 3
- 4 (1) Is the claimant presently engaged in substantial gainful
5 activity? If so, the claimant is found not disabled.
6 If not, proceed to step two.
- 7 (2) Is the claimant's impairment severe? If not, the
8 claimant is found not disabled. If so, proceed to step
9 three.
- 10 (3) Does the claimant's impairment meet or equal the
11 requirements of any impairment listed at 20 C.F.R. Part
12 404, Subpart P, Appendix 1? If so, the claimant is
13 found disabled. If not, proceed to step four.
- 14 (4) Is the claimant capable of performing his past work? If
15 so, the claimant is found not disabled. If not, proceed
16 to step five.
- 17 (5) Is the claimant able to do any other work? If not, the
18 claimant is found disabled. If so, the claimant is
19 found not disabled.

20

21 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d
22 949, 953-54 (9th Cir. 2001); 20 C.F.R. § 416.920(b)-(g)(1).

23

24 The claimant has the burden of proof at steps one through four, and
25 the Commissioner has the burden of proof at step five. Bustamante, 262
26 F.3d at 953-54. If, at step four, the claimant meets his burden of
27 establishing an inability to perform the past work, the Commissioner
28 must show that the claimant can perform some other work that exists in

1 "significant numbers" in the national economy, taking into account the
2 claimant's residual functional capacity ("RFC"),³ age, education and
3 work experience. Tackett, 180 F.3d at 1100; 20 C.F.R. § 416.920(g)(1).
4 The Commissioner may do so by the testimony of a vocational expert or
5 by reference to the Medical-Vocational Guidelines appearing in 20 C.F.R.
6 Part 404, Subpart P, Appendix 2 (commonly known as "the Grids").
7 Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001). When a
8 claimant has both exertional (strength-related) and nonexertional
9 limitations, the Grids are inapplicable and the ALJ must take the
10 testimony of a vocational expert. Moore v. Apfel, 216 F.3d 864, 869
11 (9th Cir. 2000).

12 IV.

13 STANDARD OF REVIEW

14
15 Under 42 U.S.C. § 405(g), a district court may review the
16 Commissioner's decision to deny benefits. The court may set aside the
17 Commissioner's decision when the ALJ's findings are based on legal error
18 or are not supported by substantial evidence in the record as a whole.
19 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v.
20 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

21
22 "Substantial evidence is more than a scintilla, but less than a
23 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
24 which a reasonable person might accept as adequate to support a
25 conclusion." Id. To determine whether substantial evidence supports
26 a finding, the court must "'consider the record as a whole, weighing

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28 ³ Residual functional capacity is "the most [one] can still do
despite [his] limitations" and represents an assessment "based on all
the relevant evidence." 20 C.F.R. § 416.945(a).

1 both evidence that supports and evidence that detracts from the
2 [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny
3 v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can
4 reasonably support either affirming or reversing that conclusion, the
5 court may not substitute its judgment for that of the Commissioner.
6 Reddick, 157 F.3d at 720-21.

7
8 **V.**

9 **DISCUSSION**

10
11 **A. The ALJ Failed to Consider New, Material Evidence**

12
13 Plaintiff contends that the ALJ's decision should be remanded for
14 consideration of evidence supplied to the Appeals Council after the
15 ALJ's decision. (Complaint Memo. at 2-3). As noted, on June 23, 2010,
16 Plaintiff submitted additional medical records from April 2010 to the
17 Appeals Council. (AR 4, 457-71). The Appeals Council subsequently
18 denied Plaintiff's request for review on August 23, 2010. (AR 1-3).
19 Specifically, Plaintiff argues that the "Appeals Council failed to
20 consider records" which "contain a new MRI [magnetic resonance image]
21 of the lumbar spine which shows progression of the back impairment and
22 provides support for [P]laintiff's testimony concerning his pain."
23 (Complaint Memo. at 3). Plaintiff's representative stated that "the
24 [new] MRI provides . . . documentation of multi-level degenerative disk
25 disease, bulges, moderate to severe facet hypertrophy, mild central
26 stenosis and moderate bi-lateral neural foraminal stenosis of L3-4 and
27 stenosis at L4-L5." (AR 457). Plaintiff contends that the "evidence
28 supplied to the Appeals Council supports a greater degree [of]

1 limitation than found by the ALJ” and argues that because “the Appeals
2 Council failed to consider this evidence, the case should be remanded
3 for a fair evaluation of all the evidence.” (Complaint Memo. at 3).
4

5 The ALJ concluded that the Plaintiff “has the residual functional
6 capacity to perform light work . . . except that he is limited to
7 performing postural activities occasionally, he can perform tasks
8 requiring depth perception occasionally, he cannot be exposed to
9 heights, hazards, or extreme temperatures, and he can perform hand
10 manipulations frequently.” (AR 16). The ALJ based this determination
11 on the medical evidence in the record, including an MRI scan from March
12 2009 which “showed grade I spondylolistheis and a moderate disc bulge
13 at the L4-5 level, as well as a mild bulge at L3-4.” (AR 17). The ALJ
14 noted that the March 2009 MRI “appear[ed] to indicate less severe damage
15 than an MRI taken in May 2008 which showed moderate-to-severe central
16 canal stenosis and mild-to-moderate bilateral neuroforaminal stenosis
17 at L4-5.” (Id.). The ALJ found that “[t]aken as whole . . . the
18 evidence indicates that while the [Plaintiff] has severe impairments,
19 he is able to work.” (AR 17).
20

21 The Court may remand a matter to the Commissioner if there is new
22 evidence which is “material” to a determination of disability and
23 Plaintiff shows “good cause” for having failed to produce that evidence
24 earlier. 42 U.S.C. § 405(g). To be material, the new evidence must
25 bear directly and substantially on the matter at issue and there must
26 be a “reasonable possibility” that the new evidence would have changed
27 the outcome of the administrative hearing. Mayes v. Massanari, 276 F.3d
28 453, 462 (9th Cir. 2001) (as amended); Booz v. Secretary of Health &

1 Human Servs., 734 F.2d 1378, 1380-81 (9th Cir. 1984). The good cause
2 requirement is satisfied if new information surfaces after the
3 Commissioner's final decision and the claimant could not have obtained
4 that evidence at the time of the administrative proceeding. Key v.
5 Heckler, 754 F.2d 1545, 1551 (9th Cir. 1985). A claimant does not meet
6 the good cause requirement by merely obtaining a more favorable report
7 once his claim has been denied. To demonstrate good cause, the claimant
8 must demonstrate that the new evidence was unavailable earlier. Mayes,
9 276 F.3d at 463.

10
11 Here, the additional evidence submitted to the Appeals Council by
12 Plaintiff on June 23, 2010 contained an MRI from April 2010. (AR 4,
13 457-71). Dr. Meng Law conducted the April 2010 MRI and noted in his
14 report that at the L3-L4 level there was "[m]ild diffuse disk bulge[,]
15 [m]ild superimposed central disk protrusion[,] [m]ild bilateral facet
16 hypertrophy[,] [m]ild central stenosis, and moderate bilateral neural
17 foraminal stenosis." (AR 460). Dr. Law also stated that at the L4-L5
18 level there was "[u]ncovering of the disk[,] [m]ild diffuse disk
19 bulge[,] [m]oderate bilateral facet hypertrophy[,] [m]oderate central
20 stenosis and moderate bilateral neural foraminal stenosis." (Id.).

21
22 **1. The Additional MRI Results Are Material to the Determination**
23 **of Disability**

24
25 Here, the new medical evidence is material to the determination
26 of disability because it bears directly and substantially on the matter
27 at issue. Plaintiff testified that he was unable to work due to severe
28 back pain and fatigue. (AR 42-43). In finding that Plaintiff was able

1 to work despite severe impairments, the ALJ relied on the medical record
2 which included two MRIs from May 2008 and March 2009. (AR 16-17).
3 Also, because Plaintiff's back pain is a continuing condition, the new
4 evidence bears directly and substantially on the issue of whether
5 Plaintiff is able to maintain work on a sustained basis. See Lester v.
6 Chater, 81 F.3d 821, 833 (9th Cir. 1995) (as amended) (internal citation
7 omitted) ("In evaluating whether the claimant satisfies the disability
8 criteria, the Commissioner must evaluate the claimant's ability to work
9 on a sustained basis. Occasional symptom-free periods-and even the
10 sporadic ability to work-are not inconsistent with disability."); see
11 also 20 C.F.R. § 404.1512(a).

12
13 Furthermore, although the April 2010 MRI was taken after the period
14 under consideration by the ALJ, the fact that the Agency subsequently
15 determined that Plaintiff became eligible for disability payments in
16 March 2010 is relevant to the ALJ's initial determination. See Luna v.
17 Astrue, 623 F.3d 1032, 1034 (9th Cir. 2010) (noting that "in certain
18 circumstances, an award based on an onset date coming in immediate
19 proximity to an earlier denial of benefits is worthy of further
20 administrative scrutiny to determine whether the favorable event should
21 alter the initial, negative outcome on the claim") (internal quotations
22 and citations omitted). In Luna, the Ninth Circuit noted that "the
23 subsequent grant of benefits was based on new evidence not considered
24 by the ALJ as part of the first application [and that this] indicate[d]
25 that further consideration of the factual issues [was] appropriate to
26 determine whether the outcome of the first application should be
27 different." (Id. at 1035). Here, the Appeals Council denied review of
28 the ALJ's unfavorable decision on August 23, 2010, yet the Agency

1 separately determined that Plaintiff was eligible to receive disability
2 payments as of March 25, 2010. (See AR 1-4, Exhibit 1 at 1-2). Given
3 the Agency's differing disability decisions within a short overlapping
4 period of time, the Court is unable to establish whether the two
5 determinations are reconcilable or inconsistent. Therefore, remand for
6 further proceedings is an appropriate remedy. See Am. Bird Conservancy
7 v. FCC, 545 F.3d 1190, 1195 n. 3 (9th Cir. 2008) ("The proper remedy for
8 an inadequate record . . . is to remand to the agency for further
9 factfinding."). The Court finds that the new evidence is material to
10 a determination of disability.

11
12 **2. Good Cause is Established**

13
14 To demonstrate good cause, the claimant must demonstrate that the
15 new evidence was unavailable earlier. Mayes, 276 F.3d at 463; see also
16 Burton v. Heckler, 724 F.2d 1415, 1417-18 (9th Cir. 1984) (noting that
17 "[t]he good cause requirement often is liberally applied, where . . .
18 there is no indication that a remand for consideration of new evidence
19 will result in prejudice to the Secretary").

20
21 Here, the additional MRI was performed on April 5, 2010 and
22 therefore could not have been presented to the ALJ prior to his January
23 29, 2010 decision. Moreover, a remand for consideration of the MRI will
24 not cause any prejudice to the Agency. Thus, remand to the agency for
25 further factfinding is appropriate.

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1 **B. The ALJ Failed to Expressly Reject the Third Party Statement for**
2 **Reasons Germane to the Witness**
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4 Plaintiff contends that the "ALJ failed to adequately consider the
5 testimony" of Plaintiff's sister, Irene Garcia ("Garcia"). (Complaint
6 Memo. at 8). Specifically, Plaintiff argues that the "ALJ failed to
7 evaluate the credibility of corroborating testimony by [Garcia]" and
8 that "the ALJ never intended to consider Ms. Garcia's testimony[] since
9 he propounded hypotheticals to the VE before even hearing from third
10 party witnesses." (Complaint Memo. at 8, Plaintiff's Reply Brief
11 ("Reply Brief") at 4). The Court agrees.
12

13 The ALJ found that "[Plaintiff's] statements concerning the
14 intensity, persistence and limiting effects of [his] symptoms are not
15 credible to the extent they are inconsistent with the . . . residual
16 function capacity." (AR 16). The ALJ stated that he made a
17 determination regarding Plaintiff's disability "[a]fter careful
18 consideration of the evidence," but the ALJ did not expressly address
19 Garcia's credibility. (Id.). The ALJ did mention Garcia's testimony
20 briefly in his decision when he noted that "[Garcia], with whom
21 [Plaintiff] does not live, testified that she sees [Plaintiff]
22 approximately once per week." (Id.). The ALJ also stated that
23 "[Garcia] testified that certain foods make the [Plaintiff] vomit and
24 afterwards he is pale and sweaty." (Id.).
25

26 The ALJ is required to consider the credibility of lay testimony
27 concerning a plaintiff's ability to work. Bruce v. Astrue, 557 F.3d
28 1113, 1115 (9th Cir. 2009). If an ALJ rejects lay witness testimony,

1 the ALJ must provide specific reasons that are germane to each witness
2 whose testimony he rejects. Id. (citing Stout v. Comm'r, Soc. Sec.
3 Admin., 454 F.3d 1050, 1054 (9th Cir. 2006)); see also Carmickle v.
4 Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1164 (9th Cir. 2008) (noting
5 that an ALJ need only provide reasons "germane to [the] witness" for
6 rejecting lay witness testimony). An ALJ need not discuss "medical
7 diagnoses" made by lay witnesses because they "are beyond the competence
8 of lay witnesses and therefore do not constitute competent evidence."
9 Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996) (citing 20 C.F.R.
10 § 404.1513(a)). "However, lay witness testimony as to a claimant's
11 symptoms or how an impairment affects ability to work is competent
12 evidence, and therefore cannot be disregarded without comment." Id.
13 (internal citations omitted).

14
15 Garcia testified that "there's (sic) times when [Plaintiff is] in
16 a high level of pain" and that Plaintiff occasionally has problems
17 walking. (AR 70). Garcia also stated that Plaintiff used to be "very
18 active[,]" but that "now his level activity . . . has been . . . really
19 down." (AR 72). In addition, Garcia noted that she has observed
20 Plaintiff having difficulty with his hands and that "there's been
21 time[s] when [Plaintiff has] broke[n] a couple of [Garcia's] dishes .
22 . . when [Plaintiff's] hands go numb." (AR 75).

23
24 Here, the ALJ did not expressly reject Garcia's testimony or
25 address her credibility. (See AR 16). Because Garcia's testimony
26 relates to the Plaintiff's symptoms it cannot be disregarded without
27
28

1 comment.⁴ See Nguyen, 100 F.3d at 1467 (noting that "[b]y failing to
2 include in the hypothetical the physical manifestations that were
3 described by the witnesses or expressly rejecting the testimony for
4 legitimate reasons, the ALJ erred. Lay testimony as to a claimant's
5 symptoms is competent evidence which the Secretary must take into
6 account . . . unless he expressly determines to disregard such
7 testimony, in which case he must give reasons that are germane to each
8 witness.") (internal citation and quotations omitted). Furthermore, as
9 noted by Plaintiff, the ALJ would have been unable to incorporate the
10 testimony of Garcia into his RFC because the ALJ examined Garcia after
11 presenting the vocational expert with his hypothetical. (See AR 56-75).
12 To the extent that the ALJ rejected Garcia's testimony in forming
13 Plaintiff's RFC, he must give reasons germane to the witness.

14
15 The Court does not reach the remaining issues because they are not
16 necessary to the resolution of the action. Remand for further
17 proceedings is appropriate where additional proceedings could remedy
18 defects in the Commissioner's decision. See Harman v. Apfel, 211 F.3d
19 1172, 1179 (9th Cir. 2000). Because the ALJ was unable to evaluate or
20 incorporate Plaintiff's additional medical evidence into his
21 determination of disability, remand to the agency for further
22 factfinding is appropriate.

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25 _____
26 ⁴ Defendant contends that the ALJ rejected Garcia's testimony
27 because it "merely parroted [Plaintiff's] own discredited statements."
28 (Memorandum in Support of Defendant's Answer ("Answer Memo.") at 6).
Yet, in his decision, the ALJ did not expressly reject Garcia's
testimony or mention this rationale or any other reason germane to the
witness for rejecting her testimony.

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VII.

CONCLUSION

Consistent with the foregoing, IT IS ORDERED that judgment be entered REVERSING the decision of the Commissioner and REMANDING this matter for further proceedings consistent with this decision. IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment on counsel for both parties.

DATED: July 19, 2011

_____/s/_____
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE