

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION**

FERNANDO GUTIERREZ,  
Plaintiff,  
  
v.  
MICHAEL J. ASTRUE,  
Commissioner of Social Security,  
Defendant.

Case No.: CV 10-08960 (CW)  
**MEMORANDUM DECISION  
AND ORDER**

**I. SUMMARY**

This matter is before the Court for review of the Social Security Commissioner's decision denying Plaintiff's application for Disability Insurance Benefits and Supplemental Security Income under Titles II and XVI of the Social Security Act. Pursuant to 28 U.S.C. § 636(c), the parties have consented that the undersigned may handle the case. The action arises under 42 U.S.C. § 405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the record before the Commissioner. Plaintiff and Defendant have filed their pleadings (Joint Stipulation For Social Security Case), and Defendant has filed

1 the certified transcript of record. After reviewing the matter, the Court concludes  
2 that the Commissioner's decision should be remanded.

## 3 4 **II. BACKGROUND**

5 Plaintiff Fernando Gutierrez ("Plaintiff") applied for Disability Insurance  
6 Benefits and Supplemental Security Income ("SSI") on April 16, 2008, and again  
7 for SSI on July 16, 2008, alleging inability to work since June 29, 2007.  
8 Administrative Record ("AR") 105-120. An administrative hearing was held on  
9 February 17, 2010. AR 23-47. On March 22, 2010, an Administrative Law  
10 Judge ("ALJ") determined that Plaintiff was not disabled within the meaning of  
11 the term under the Social Security Act. AR 9-18. Following the Appeals  
12 Council's denial of Plaintiff's request for a review of the hearing decision,  
13 Plaintiff filed an action in this Court. AR 1-8. After reviewing the matter, the  
14 Court finds that the Commissioner's decision should be reversed and remanded.

## 15 16 **III. DISCUSSION**

17 Plaintiff challenges the decision on the grounds that, first, the ALJ  
18 improperly disregarded Plaintiff's treating psychologist's opinion in the ALJ's  
19 determination of Plaintiff's residual functional capacity ("RFC"), and, second,  
20 that the ALJ failed to properly account for Plaintiff's severe obesity in the five-  
21 step sequential evaluation process for determining whether a claimant has a  
22 disability. Plaintiff alleges legal error by the ALJ on both issues. For the  
23 reasons discussed below, the Court concludes that while Plaintiff's first claim  
24 has merit it amounts to harmless error, and that the second claim of error also has  
25 merit, but requires reversal and remand for further proceedings.

1           **A. ISSUE NO. ONE:**

2           Plaintiff first claims that the ALJ improperly gave little weight to the  
3 opinion of the treating psychologist in the determination that Plaintiff's mental  
4 limitations notwithstanding, he retained sufficient RFC to engage in work that  
5 exists in significant numbers in the national economy. Defendant argues that the  
6 ALJ's disregard of the treating psychologist's opinion was legitimate.

7           The Social Security Regulations set forth a five-step sequential evaluation  
8 process for determining whether a claimant is disabled. 20 C.F.R. § 404.1520;  
9 see Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007); see Social Security  
10 Ruling ("SSR") 82-62. If the ALJ determines that a claimant's impairment is  
11 severe in step two, then the ALJ must determine in step three whether a claimant  
12 meets or exceeds a listed impairment. 20 C.F.R. §§ 404.1525, 404.1526,  
13 416.925, 416.926.

14           A claimant's treating doctors' opinions usually carry substantial weight in  
15 the step three determination because the treating professional is hired to cure and  
16 has the opportunity to come to know the claimant's impairments in detail.  
17 Valentine v. Comm'r of Soc. Sec., 574 F.3d 685, 692 (9th Cir. 2009); Connett v.  
18 Barnhart, 340 F.3d 871, 874 (9th Cir. 2003); Thomas v. Barnhart, 278 F.3d 947,  
19 956-57 (9th Cir. 2002). However, the ALJ may disfavor or completely disregard  
20 the opinion of a treating physician for clear and convincing reasons. Lester v.  
21 Chater, 81 F.3d 821, 830 (9th Cir. 1995). In so doing, the ALJ must specifically  
22 enumerate the reasons with the support of substantial evidence in the record. Id.  
23 at 830-31; see also Orn v. Astrue, 495 F.3d 625, 631-2 (9th Cir. 2007); Ryan v.  
24 Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008). The ALJ may  
25 disregard a treating physician's conclusory opinions as well as those not  
26 supported by the administrative record as a whole. Batson v. Comm'r of Soc.  
27 Sec., 359 F.3d 1190, 1195 (9th Cir. 2004); Matney v. Sullivan, 981 F.2d 1016,  
28 1019 (9th Cir. 1992). If another doctor contradicts the treating physician's  
opinion, the ALJ may reject that opinion, but, again, only with legitimate reasons

1 based on substantial evidence in the record. Lester, 81 F.3d at 830-31. The ALJ  
2 meets the standard to disregard the treating physician's opinion by "setting out a  
3 detailed summary of the facts and conflicting clinical evidence, stating his  
4 interpretation thereof, and making findings." Embry v. Bowen, 849 F.2d 418,  
5 421 (9<sup>th</sup> Cir. 1988).

6 Here, the ALJ "gave little weight" to the opinion of the treating  
7 psychologist, Arturo Fierro, Ph.D. AR 16. Dr. Fierro opined in his concluding  
8 report that Plaintiff fit the "clinical profile of a chronically disabled [person]  
9 w[ith] a permanent impairment." AR 271. The ALJ asserted in his decision that  
10 Dr. Fierro's opinion was " unsupported by the longitudinal record or by Dr.  
11 Fierro's own treatment notes." AR 16. The ALJ offered no other support for his  
12 conclusion regarding Dr. Fierro's opinion and therefore did not meet the standard  
13 of "a detailed summary of the facts and conflicting clinical evidence." Embry,  
14 849 F.2d at 421. The ALJ's failure to set forth specific facts that led to clear and  
15 convincing reasons for disregarding Dr. Fierro's opinion constitutes legal error.  
16 However, in light of Dr. Fierro's treatment notes and the treatment notes and  
17 conclusions of Plaintiff's two other treating mental health professionals, Dr. Sim-  
18 on Chin, M.D., who is a psychiatrist, and Dr. Rhoda Bernardez, M.D., also a  
19 psychiatrist, the ALJ's conclusion would have been the same. AR 213-20, 351-  
20 65.

21 Dr. Fierro's treatment notes, or his longitudinal record, characterize  
22 Plaintiff as a patient on the mend. AR 338-49. When Plaintiff's treatment began  
23 in October of 2007, Dr. Fierro observed that his relations with his family were  
24 "dysfunctional," he was "depressed," subject to "panic attacks," in physical pain,  
25 and generally not doing well. AR 346-48. By January 15, 2008, after four  
26 sessions, Dr. Fierro reported that "P[atien]t is recovering from physical  
27 disability, [and] needs time off to recover." AR 341. The same progress report  
28 noted that Plaintiff had never been hospitalized for a psychiatric condition, that  
while his family relationships were "impaired," he was not having suicidal or

1 homicidal ideation, not subject to bingeing or purging, not having psychotic  
2 symptoms, and not engaging destructive behavior toward himself, others, or  
3 towards property. The report noted that Plaintiff's Global Assessment of  
4 Functioning score ("GAF"), a widely used general metric of mental health, was  
5 41, indicating fairly serious difficulties, but the report also noted that within the  
6 past year, Plaintiff's GAF had been at 69, indicating mild symptoms. Id.  
7 Furthermore, the treatment notes from the same day indicated a "high" capacity  
8 "to engage in and benefit from" treatment. AR 342.

9 Over the next four months, Plaintiff appeared to show improvement. His  
10 capacity to benefit from treatment remained "high." AR 338-40. He was  
11 helping out a friend stricken with AIDS, for whom he said he felt "compassion."  
12 AR 338-39. He said he wanted to return to work, though not necessarily to the  
13 same job. AR 339.

14 Nevertheless, despite what appears to have been some improvement by  
15 Plaintiff, Dr. Fierro's final Mental Assessment two months after their last session  
16 painted a dark picture. The final assessment consisted of twenty check-box  
17 observations, on which Dr. Fierro checked "moderately limited" for only four  
18 items, while for the rest he checked "markedly limited." AR 268-71. In the  
19 space for narrative observations, Dr. Fierro concluded that Plaintiff had "severe  
20 functional [physical and psychological] impairment," and that the "problems  
21 appear[ed] chronic and permanent." AR 270. The inconsistency between the  
22 longitudinal notes and the final assessment constitutes a basis to disregard the  
23 opinion. Batson, 359 F.3d at 1195.

24 Dr. Chin saw Plaintiff from October 2007 to April 2008. AR 213-20. Dr.  
25 Chin's notes also show an improving trend. On his last set of notes, Dr. Chin  
26 indicated that Plaintiff's condition was "stable," and that his treatment progress  
27 had been "Satisfactory." While not a wholly positive report, the notes indicate  
28 overall progress. Dr. Bernardez saw Plaintiff from August 2008 to July 2009,  
after both Dr. Fierro and Dr. Chin. Dr. Bernardez's early notes in September

1 2008, describe Plaintiff as “cooperative, verbal, and spont[aneous],” and  
2 possessing an affect “approp[riate] to [his] mood.” AR 364. She also observed  
3 that his “compliance” with his medication regimen was “poor.” AR 364.

4 By November, 2008, Plaintiff’s medication adherence was “good,” he was  
5 “fairly groomed, very polite, verbal [and] engaging,” and he was self-reporting  
6 that his mood was “stable.” AR 357. In March, 2009, despite continuing anxiety  
7 for which he continued to take medication, Plaintiff self-reported ongoing mood  
8 stability, the doctor noted that his medication adherence remained “good,” and  
9 that his affect remained “approp[riate].” AR 355. Finally, in July 2009, the  
10 doctor noted that Plaintiff stated a desire to do “vol[unteer] work”, he continued  
11 on a good footing with his medication, and he continued to be articulate” and  
12 “engaged”. AR 353. Though neither Dr. Chin nor Dr. Bernardez indicated that  
13 Plaintiff had achieved full recovery, or that he was not still having problems,  
14 neither of them asserted or implied that he was fully incapable of doing any work  
15 at all.

16 Therefore, taking into account the treatment records of all three treating  
17 mental health professionals, the ALJ’s conclusion that Plaintiff retained  
18 sufficient RFC would not have been different even if had he properly parsed Dr.  
19 Fierro’s opinion. Although the ALJ erroneously set aside Dr. Fierro’s opinion,  
20 his error was harmless because the ALJ’s conclusion was correct nonetheless.  
21 Stout v. Comm’r Soc. Sec., 454 F.3d 1050, 1055 (9<sup>th</sup> Cir. 2005) (“We have also  
22 affirmed under the rubric of harmless error where the mistake was . . . irrelevant  
23 to the ALJ’s ultimate disability conclusion.”).

## 24 **B. ISSUE NO. TWO:**

25 Plaintiff next alleges that given the finding of severe obesity the ALJ  
26 failed to properly incorporate obesity into the five-step evaluation to determine  
27 whether Plaintiff had a disability. Defendant counters that the ALJ did properly  
28 consider Plaintiff’s obesity at each step of his evaluation.

1 In the five-step evaluation, discussed above, where there is evidence of  
2 obesity, the ALJ must determine the effect of the claimant's obesity upon his  
3 other impairments, his ability to work, and his general health. Celaya v. Halter,  
4 332 F.3d 1177, 1181 (9<sup>th</sup> Cir. 2003); SSR 02-01p. The Social Security  
5 Administration removed obesity from the listing of impairments in 1999, but  
6 where a claimant's condition falls short of the criterion for a listed condition and  
7 the claimant is severely obese, the five-step analysis should include the  
8 claimant's obesity. Burch v. Barnhart, 400 F.3d 676, 682 (9<sup>th</sup> Cir. 2005); Celaya,  
9 332 F.3d at 1181; SSR 02-01p. A claimant's obesity should be considered when  
10 the record indicates that the obesity exacerbates other impairments. Burch, 400  
11 F.3d at 682.

12 The ALJ did find that Plaintiff's obesity was severe. AR 11. Yet, after  
13 setting forth that severity in step two, the ALJ mentioned obesity only one more  
14 time in his analysis, in connection with a determination that Plaintiff's ability to  
15 concentrate was limited. AR 13. Otherwise, in step three, in the RFC  
16 assessment, in step four, and in step five, the ALJ failed to discuss Plaintiff's  
17 obesity. AR 12-18.

18 In his step three analysis regarding whether Plaintiff had an impairment or  
19 combination of impairments that met or exceeded one of the listed impairments,  
20 the ALJ should have discussed Plaintiff's severe obesity in a multiple  
21 impairment analysis. 20 C.F.R. § 404.1526(b)(3); Lewis v. Apfel, 236 F.3d 503,  
22 514 (9<sup>th</sup> Cir. 2001); SSR 02-01p. When a claimant's obesity is undisputed the  
23 ALJ must evaluate the obesity throughout the five-step evaluation. Celaya, 332  
24 F.3d at 1182. According to the ALJ, Plaintiff did have multiple impairments  
25 aside from severe obesity: severe lumbar degenerative disease, status post fusion  
26 surgery, and depressive disorder. AR 11-12. The ALJ did expressly assert that  
27 neither the lumbar degenerative disease nor the status post fusion surgery met or  
28 equaled a listed impairment. AR 12. However, the ALJ did not expressly  
discuss obesity in combination with either or both of the above impairments, nor

1 was it discussed in combination with Plaintiff's depressive disorder, nor were all  
2 four impairments considered as possibly equaling a listed impairment. A  
3 complete evaluation required express consideration of the above alternatives to a  
4 listed impairment.

5 Additionally, the RFC assessment should have contained a discussion of  
6 obesity in the context of an assessment of limitation of function. SSR 02-01p.  
7 However, the ALJ's failure to account for Plaintiff's obesity in step four did not  
8 prejudice Plaintiff because the ALJ determined Plaintiff was not capable of  
9 performing his PRW. AR 16.

10 Finally, the ALJ failed to consider Plaintiff's obesity in the step five  
11 determination that Plaintiff had the ability to perform work that exists in  
12 substantial numbers in the national economy. AR 17-18. In conducting the  
13 analysis for step five, the ALJ may call a vocational expert ("VE"). Thomas v.  
14 Barnhart, 278 F.3d 947, 956 (9th Cir. Or. 2002); Andrews v. Shalala, 53 F.3d  
15 1035, 1043 (9<sup>th</sup> Cir. 1995). The ALJ must present the VE with various  
16 hypothetical descriptions of different abilities and limitations that match those of  
17 the Plaintiff. Id. at 1044. The ALJ must include all substantiated limitations in  
18 the hypothetical descriptions, particularly obesity when it is severe. Robbins v.  
19 Soc. Sec. Admin., 466 F.3d 880, 886 (9<sup>th</sup> Cir. 2006); Burch, 400 F.3d at 682.

20 The ALJ properly called a VE to assist with the step five determination,  
21 The ALJ's hypothetical descriptions to the VE encompassed limitations such as  
22 how long a person could stand or sit, how much weight a person could lift,  
23 whether a job required occasional crouching, whether a job required interacting  
24 with the public, and whether a person had limitations on his ability to  
25 concentrate. AR 42-46. However, none of the hypothetical descriptions posed  
26 to the VE set forth obesity. Given that Plaintiff's obesity was deemed severe, the  
27 ALJ had an obligation to expressly include it. The failure to include obesity as a  
28 limitation for the VE to consider was improper. Thus the ALJ erred in his



1 determination of the Plaintiff's capability to perform other work in the national  
2 economy.

3  
4 **IV. CONCLUSION**

5 For the foregoing reasons, the decision of the Commissioner is reversed,  
6 and the matter is remanded for further proceedings in accordance with the  
7 decision, pursuant to Sentence 4 of 42 U.S.C. § 405(g).

8  
9 DATED: August 31, 2011

10 \_\_\_\_\_/s/\_\_\_\_\_  
11 CARLA WOEHRLE  
12 UNITED STATES MAGISTRATE JUDGE  
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