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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEVEN SIMS,)	NO. CV 11-5312 SS
)	
Plaintiff,)	
)	
v.)	MEMORANDUM DECISION AND ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

I.
INTRODUCTION

Steven Sims ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying his application for Disability Insurance Benefits ("DIB"). 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.
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II.

PROCEDURAL HISTORY

Plaintiff filed an application for DIB on October 29, 2007. (Administrative Record ("AR") 91-93). The Agency denied benefits on July 2, 2008. (AR 50-55). Plaintiff requested a hearing by an administrative law judge ("ALJ") on July 22, 2008. (AR 59). The ALJ held a hearing on February 23, 2010, (AR 24-48), and on May 7, 2010, he issued an unfavorable decision. (AR 9-20). Plaintiff sought review of the ALJ's decision on July 12, 2010, (AR 7). The Appeals Counsel denied further review on May 6, 2011. (AR 1). Plaintiff commenced the instant action on June 24, 2011.

III.

FACTUAL BACKGROUND

A. Plaintiff's Medical History

Plaintiff has sought treatment for several medical problems, including episodes of unconsciousness, (AR 226), dizziness, (AR 146, 181, 207, 209, 221, 226, 233, 345, 391), chest pains, (AR 145, 221), left arm and neck pain, (AR 187, 193, 212, 216, 345), vomiting and nausea, (AR 233, 268, 270, 391, 393, 407), abdominal pain and pancreas problems, (AR 283, 378, 391-94, 394, 408, 410), weight loss (AR 269-70, 378) and anxiety. (AR 166, 185, 345). He has received treatment from Kaiser Permanente's Bellflower Medical Center and West L.A. Medical Center, as well as St. Francis Medical Center and Cedars-Sinai Medical Center. (AR 145, 187, 232, 377).

1 On August 18, 2006, Plaintiff visited Dr. Ontiveros at West L.A.
2 Medical Center for dizziness and stress following an episode that
3 morning where he "passed out." (AR 226). He said he felt lightheaded,
4 experienced a room-spinning sensation, fell to the ground, hit his back
5 and might have lost consciousness. (Id.). On August 21, 2006,
6 Plaintiff went to the emergency room at Kaiser Permanente's Bellflower
7 Medical Center following a dizzy and fainting episode. (AR 145-46, 148,
8 181-82).¹ The hospital performed a CT scan of Plaintiff's head and the
9 results were negative, indicating no abnormalities. (AR 181).

10
11 On August 23, 2006, Plaintiff was admitted to the same hospital for
12 chest pains. (AR 145). Tests performed at the hospital showed
13 Plaintiff had "frequent PVCs", and an echocardiogram and Holter monitor
14 were recommended by the cardiology department. (AR 160, 183).
15 Plaintiff also complained of "vertigo 'spinning' dizziness with movement
16 of his head." (AR 146). On August 24, 2006, Plaintiff was diagnosed
17 with vertigo and discharged. (AR 150).

18
19 On August 31, 2006, Plaintiff returned to Dr. Ontiveros at West
20 L.A. Medical Center for a follow-up appointment, during which he
21 complained of dizziness. (AR 221). In September 2006, Plaintiff saw
22 Dr. Saccone for vertigo dizziness, (AR 207, 209), and was diagnosed with
23 benign paroxysmal positional vertigo ("BPPV"). (AR 207). On October
24 16, 2006, Plaintiff saw Dr. Tafreshi for pain and tingling in his left
25 hand, wrist, and forearm. (AR 212). Plaintiff had a follow-up
26

27 ¹ The record fails to contain an emergency room ("ER") report from
28 Plaintiff's August 21, 2006 visit. Thus, the Court cites to Plaintiff's
subsequent medical records that note the August 21, 2006 visit.

1 appointment with Dr. Saccone on November 2, 2006, during which he again
2 complained of left arm tingling. (AR 216). After this appointment,
3 Plaintiff returned to West L.A. Medical Center several times seeking
4 treatment for his left arm pain and tingling. (AR 187, 193, 199, 202).
5 In January 2007, Plaintiff was prescribed Prednisone. (AR 188, 196).
6

7 On October 4, 2007, Plaintiff was admitted to St. Francis Medical
8 Center for "persistent bouts of vomiting, weight loss." (AR 268, 270).
9 A CT scan of the abdomen and pelvis rendered a small stone in
10 Plaintiff's gallbladder, a small irregular density in the right middle
11 lobe, and portions of the bowel showed diverticulosis of the colon. (AR
12 279-280). A colonoscopy performed on October 8, 2007 revealed an
13 internal hemorrhoid. (AR 282). Plaintiff was subsequently discharged.
14 (AR 274).
15

16 On October 16, 2007, Plaintiff returned to St. Francis Medical
17 Center for "persistent and intractable vomiting." (AR 233). On October
18 17, 2007, the Department of Imaging Services performed an MRI on
19 Plaintiff's cervical spine. (AR 258-60, 263-65). The MRI showed disc
20 herniation, osteoarthritis, and disc desiccation. (AR 263-64). A
21 radiograph of Plaintiff's upper gastrointestinal tract and small bowel
22 series revealed a small hiatal hernia. (AR 259-60).
23

24 In a consultation report also completed on October 17, 2007, Dr.
25 Zevallos, the consulting physician, found mild lymphocytosis. (AR 247).
26 Dr. Zevallos described Plaintiff's symptoms as a "complex clinical
27 picture" and named a number of conditions that could cause Plaintiff's
28 symptoms, including gastroparesis, a tumor or lesion in the inner ear,

1 hyperthyroidism, prolapse, of the mitral valve or a psychosomatic
2 disorder. (Id.). On October 18, 2007, the consulting physician, Dr.
3 Ayoub, diagnosed Plaintiff with labyrinthitis and sent him for
4 audiologic testing. (AR 237). Plaintiff was subsequently discharged.
5 (AR 250).

6
7 On October 30, 2007, Plaintiff was admitted to Cedars-Sinai Medical
8 Center, where his operation report reflected his significant problems
9 with vertigo and "probable mild diffuse chronic pancreatitis."² (AR
10 407-08). On November 20, 2007, Dr. Ulick diagnosed Plaintiff with
11 "chronic pancreatitis, autoimmune." (AR 392). Plaintiff had a CT scan
12 of his abdomen on February 15, 2008, and although radiology report
13 stated there was no abnormality of the pancreas identified, (AR 390),
14 a prescription form dated February 13, 2008 from St. Francis Medical
15 Center, the same medical center that treated Plaintiff in 2007, reads,
16 "Pt is permanty [sic] disable [sic] due to autoimmune pancreati [sic]."
17 (AR 283). On February 29, 2008, Dr. Lo performed an endoscopic
18 ultrasound of Plaintiff's pancreas and biliary tracts. (AR 378). He
19 found a "persistent mild-to-moderate chronic pancreatitis change."
20 (Id.).

21
22 On April 4, 2008, Plaintiff underwent a neurological evaluation to
23 "elicit and analyze all clinically significant job or work related
24 injury induced neurological symptoms (primarily radicular neck and back
25 pain, shoulder pain, headaches, dizziness, etc.)." (AR 350). The
26

27 ² According to the operation report, chronic pancreatitis could be
28 the cause of Plaintiff's chronic nausea, vomiting, and weight loss. (AR
408).

1 report listed seven primary diagnoses for Plaintiff: (1) posttraumatic
2 cephalgia, (2) posttraumatic stress disorder, (3) cervical
3 radiculopathy/radiculitis, (4) vertigo, (5) cervical headaches/posterior
4 headaches, (6) probable cervical discopathy and (7) cervical myofascial
5 syndrome. (Id.). The report also listed five additional diagnoses: (1)
6 left shoulder sprain/myofascial syndrome, (2) thoracic myofascial
7 syndrome, (3) lumbo-sacral myofascial syndrome, (4) lumbo-sacral
8 radiculopathy/radiculitis and (5) lumbar discopathy. (AR 353).

9
10 Plaintiff had several progress appointments from April 10, 2008 to
11 February 12, 2009. (AR 317-24). The reports from those appointments
12 indicated that he continued to complain of headaches, neck pain,
13 dizziness, and pancreatic problems. (Id.). At his progress appointment
14 on May 8, 2008, Plaintiff still had nausea and vomiting. (AR 323).

15
16 **B. Plaintiff's Application**

17
18 Plaintiff received DIB payments since approximately August 23,
19 2006. (AR 94-99). On November 21, 2007, Plaintiff received a statement
20 notifying him that he had exhausted his DIB. (AR 95). He filed an
21 initial application for DIB to continue payments on October 29, 2007.
22 (AR 91-93). That same day the interviewer who completed the "Disability
23 Report - Field Office - Form SSA - 3367" recorded, "Clmt looked very
24 thin." (AR 103).

25
26 On November 7, 2007, Plaintiff completed the "Disability Report -
27 Adult - Form SSA - 3368." (AR 105-115). He wrote that he cannot lift
28 more than fifty pounds at his job, where he was required to lift

1 seventy-five pounds at times. (AR 106). He also cannot stand for more
2 than four hours and his job required eight hours of standing. (Id.).
3 Plaintiff wrote that his vertigo has him "dizzy all the time - there are
4 times [he] just faint[s]." (Id.). Plaintiff listed twelfth grade as
5 the highest grade of school he had completed. (AR 112). Plaintiff
6 indicated that "[he] can not [sic] hold down food or liquids and [has]
7 lost weight." (AR 113).

8
9 On November 19, 2007, Plaintiff completed the pain questionnaire,
10 (AR 116-18), on which he listed basketball, football, dancing, and sex
11 as activities he can no longer do because of his pain. (AR 117). He
12 wrote that he is able to walk "no to [sic] far" from his home, to stand
13 for ten to fifteen minutes at a time, and to sit for thirty to forty-
14 five minutes at a time. (AR 118). Plaintiff finds himself "constantly"
15 having to stop engaging in activities due to pain. (Id.).

16
17 On November 19, 2007, Plaintiff also completed his "Function Report
18 - Adult," (AR 119-26), on which he wrote that he was no longer able to
19 "work, [play] sports, run, lift heavy objects, hold [his] food down or
20 liquids" because of his injuries. (AR 120). He does not do yard work
21 because he cannot stand for long or bend over because those actions
22 cause dizziness. (AR 122). Plaintiff included watching television and
23 playing sports with his children as his hobbies and interests. (AR
24 123). When answering how often and how well he performed these hobbies
25 and interests, Plaintiff wrote "not as often, and not as well." (Id.).
26 Plaintiff's illness causes him to tire easily, in addition to causing
27 dizziness, vomiting, and nausea. (Id.). He plays dominoes and cards
28 two to three times a week and visits his mother, who lives on the same

1 street, everyday. (AR 119, 123). In the section asking what abilities
2 were affected by the claimant's injury or condition, Plaintiff checked
3 the boxes for lifting, bending, standing, kneeling, memory, and
4 understanding. (AR 124).

5
6 **C. Plaintiff's Testimony**

7
8 After Plaintiff's initial application for DIB was denied, there was
9 a hearing on February 23, 2010 where a medical expert, vocational
10 expert, and Plaintiff testified. (AR 24). Plaintiff testified that he
11 completed school through the eleventh grade, in addition to some course
12 work at L.A. Trade Tech and Fremont Adult High School. (AR 28).
13 Plaintiff completed classes at both schools, but never finished a course
14 to receive a certificate. (AR 28-29). Prior to his alleged onset date,
15 Plaintiff worked for the United Parcel Service ("UPS") for sixteen
16 years, primarily loading, unloading and sorting boxes. (AR 29).

17
18 Plaintiff testified that his disability onset date was August 15,
19 2006, after which he stopped working because "[he] got home and [he]
20 woke up and passed out, hit [his] head, and hit a pinched . . . nerve
21 in [his] neck. And [he] had a lot of bad headaches . . . And, [he] has
22 a pancreas problem now." (AR 29-30). He said that his pancreas is
23 swollen and that he "can't eat nothing, can't hardly stand, can't hardly
24 walk too long, because [he] [throws] up a lot and [he] [has] a lot of
25 diarrhea." (AR 30). He is only able to walk a half block, if that, due
26 to his condition. (AR 31). He also needs to stop because he gets short
27 of breath and dizzy. (AR 31-32). He cannot stand for long because his
28 legs get tired, and he gets dizzy and weak. (AR 32). He throws up

1 everyday, with an average of "at least three times a day," and has
2 diarrhea "maybe one time a day." (AR 31). Additionally, he said that
3 he cannot sit for long, "like, maybe five or ten minutes" because his
4 lower back and a nerve in his neck cause him pain. (AR 33). Prior to
5 his injury he could lift things up to seventy-five pounds, but now he
6 "can't lift no [sic] more than about twenty pounds. Not even twenty
7 pounds, maybe." (AR 34).

8
9 Plaintiff testified to being hospitalized at St. Francis for his
10 pancreas and stomach. (AR 38). St. Francis sent Plaintiff to Cedars-
11 Sinai Medical Center, where the doctor told him that he had "swelling
12 of the pancreas" and performed a biopsy, but never told him the results.
13 (AR 38-39). He was also hospitalized at Kaiser after he "had a pinched
14 nerve in [his] neck when [he] passed out." (AR 39). He also had
15 problems with anxiety, which were mentioned during his hospitalizations
16 at St. Francis and Kaiser. (Id.).

17
18 **D. Consultative Evaluations**

19
20 Dr. N. Lin performed Plaintiff's internal medicine evaluation on
21 April 11, 2008. (AR 284-288). He found that Plaintiff "is able to lift
22 or carry 50 pounds occasionally and 25 pounds frequently. He can stand
23 or walk up to 6 hours in an 8-hour workday and he can sit for 6 hours
24 in an 8-hour workday. There are no postural, manipulative, visual or
25 communicative limitations." (AR 288).

26
27 On May 17, 2008, Dr. Sohini P. Parikh performed a complete
28 psychiatric evaluation and found that Plaintiff did not have "any

1 impairment in the ability to reason and make social, occupational, and
2 personal adjustments." (AR 295). However, Dr. Parikh diagnosed
3 Plaintiff with mood disorder and anxiety disorder. (AR 294-95).

4
5 **E. Medical Expert's Testimony**

6
7 At the February 23, 2010 hearing, the medical expert, Dr. Nafuosi,³
8 testified that the medical records supported findings that Plaintiff had
9 a cervical spine disorder, degenerative joint disease and a mood
10 disorder. (AR 41). However, he found that based on the record,
11 Plaintiff's pancreatitis and radiculopathy of the lower back were not
12 medically determinable. (AR 43). Dr. Nafuosi did not review the Cedar
13 Sinai records to arrive at his conclusions, because they were not in the
14 file he was provided with. (Id.). He also found Plaintiff's lower back
15 pain complaints were possible, even though the pain was not medically
16 determinable. (AR 41). Ultimately, Dr. Nafuosi testified that
17 Plaintiff had a severe cervical spine condition. (AR 41-42).

18
19 **F. Vocational Expert's Testimony**

20
21 At the February 23, 2010 hearing, the vocational expert ("VE"),
22 Kelly Huynh, testified that Plaintiff's past work was the medium,
23 unskilled work of a laborer. (AR 46). The VE testified that Plaintiff
24 could not perform his past work, but that he could perform other work,
25 such as a deliverer. (AR 47). The VE stated that for deliverers, which

26 _____
27 ³ The February 23, 2010 transcript refers to the medical expert as
28 Dr. Stanley Nafuzi, but the court reporter notes this spelling is
phonetic, (AR 24), so the Court defers to the spelling provided in the
ALJ's opinion. (AR 14).

1 assume a medium, unskilled position, there are 2,700 positions available
2 locally and 310,000 nationally. (Id.). Additionally, the VE testified
3 that Plaintiff could perform the work of a packager, an employment
4 option with 18,000 positions locally and 480,000 positions nationally.
5 (Id.). However, the VE also stated that if Plaintiff needed to take two
6 to three breaks in addition to his normal breaks to use the bathroom,
7 he could not do either job. (AR 47-48).

8
9 **IV.**

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

11
12 To qualify for disability benefits, a claimant must demonstrate a
13 medically determinable physical or mental impairment that prevents her
14 from engaging in substantial gainful activity⁴ and that is expected to
15 result in death or to last for a continuous period of at least twelve
16 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing
17 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant
18 incapable of performing the work she previously performed and incapable
19 of performing any other substantial gainful employment that exists in
20 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
21 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

22
23 To decide if a claimant is entitled to benefits, an ALJ conducts
24 a five-step inquiry. 20 C.F.R. § 404.1520(a). The steps are:

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⁴ Substantial gainful activity means work that involves doing
significant and productive physical or mental duties and is done for pay
or profit. 20 C.F.R. § 404.1510.

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

17
18 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d
19 949, 953-54 (9th Cir. 2001); 20 C.F.R. § 404.1520(a)(4).

20
21 The claimant has the burden of proof at steps one through four, and
22 the Commissioner has the burden of proof at step five. Bustamante, 262
23 F.3d at 953-54; see also Parra v. Astrue, 481 F.3d 742, 746 (9th Cir.
24 2007). If, at step four, the claimant meets his burden of establishing
25 an inability to perform the past work, the Commissioner must show that
26 the claimant can perform some other work that exists in "significant
27 numbers" in the national economy, taking into account the claimant's
28

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

11
12 **V.**

13 **THE ALJ'S DECISION**

14
15 The ALJ employed the five-step sequential evaluation process and
16 concluded that Plaintiff was not disabled within the meaning of the
17 Social Security Act. (AR 20). At the first step of the five-step
18 evaluation, the ALJ found that Plaintiff had not engaged in substantial
19 gainful activity since the alleged onset date of August 15, 2006. (AR
20 14). Next, at step two, he found that Plaintiff had a "severe
21 impairment: disorder of the cervical spine." (Id.). At the third step,
22 he found that Plaintiff did not have an impairment or combination of
23 impairments that met or medically equaled a listed impairment. (AR 16).

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28 ⁵ 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 At step four, the ALJ found that Plaintiff has the RFC "to perform
2 medium work as defined in 20 CFR 404.1567(c) except occasionally work
3 at shoulder level with both upper extremities; and no work at
4 unprotected heights, around heavy machinery or open pool of water." (AR
5 16). The ALJ thus found that Plaintiff was unable to perform his past
6 relevant work, (AR 18), but that transferability of job skills was not
7 an issue because Plaintiff's past relevant work was unskilled. (AR 19).
8 Plaintiff was defined as a younger individual because he was 41 years
9 old on the alleged disability onset date. (Id.). Plaintiff has at
10 least a high school education and is able to communicate in English.
11 (Id.).
12

13 At the fifth step, the ALJ could not use the grids because
14 Plaintiff was not able to perform substantially all of the requirements
15 of "medium work." (AR 19). To determine the extent to which
16 Plaintiff's additional limitations impeded on his ability to perform
17 work, the ALJ consulted a vocational expert who testified that jobs
18 existed in the national economy for someone with Plaintiff's age,
19 education, work experience, and RFC. (AR 19-20). Relying on the
20 vocational expert's testimony, the ALJ held that Plaintiff could perform
21 other work, such as a deliverer or hand packager. (Id.). Thus, the ALJ
22 found there were jobs in the economy that Plaintiff could perform and
23 Plaintiff was found not disabled. (AR 20).

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1 VI.

2 STANDARD OF REVIEW

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

10
11 "Substantial evidence" means more than a mere scintilla, but less
12 than a preponderance. It means such relevant evidence as a reasonable
13 mind might accept as adequate to support a conclusion." Valentine v.
14 Comm'r of Soc. Sec. Admin., 574 F.3d 685, 690 (9th Cir. 2009) (quoting
15 Desrosiers v. Sec'y of Health & Human Servs, 846 F.2d 573, 576 (9th Cir.
16 1988)); see also Reddick, 157 F.3d at 720. To determine whether
17 substantial evidence supports a finding, the court must "consider the
18 record as a whole, weighing both evidence that supports and evidence
19 that detracts from the [Commissioner's] conclusion." Aukland, 257 F.3d
20 at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)).
21 If the evidence can reasonably support either affirming or reversing
22 that conclusion, the court may not substitute its judgment for that of
23 the Commissioner. Reddick, 157 F.3d at 720-21.

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1 VII.

2 DISCUSSION

3
4 The ALJ Failed To Provided Clear And Convincing Reasons For
5 Rejecting Plaintiff's Credibility

6
7 Plaintiff contends the ALJ erroneously rejected his testimony by
8 relying on immaterial inconsistencies. (Opening Brief in Support of
9 Plaintiff's Complaint ("Complaint Memo") at 10). For the reasons stated
10 below, the Court finds the ALJ's decision should be reversed and this
11 action remanded for further proceedings.

12
13 The ALJ may reject a claimant's testimony if he or she makes an
14 explicit credibility finding that is supported by "specific, cogent
15 reasons for the disbelief." Lester v. Chater, 81 F.3d 821, 834 (9th
16 Cir. 1995) (citing Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir.
17 1990) (internal citations omitted)). When determining whether to reject
18 a claimant's subjective pain and symptom testimony, the ALJ applies a
19 two-step analysis. Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir.
20 2009). First, the ALJ must determine whether there is "'objective
21 medical evidence of an underlying impairment which could reasonably be
22 expected to produce the pain or other symptoms alleged.'" Id. (quoting
23 Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007)). Second,
24 if the ALJ finds evidence to support the alleged pain or other symptoms
25 and there is no evidence of malingering, then he or she must provide
26 "specific, clear and convincing reasons" for rejecting the claimant's
27 credibility. Id.; see also Smolen, 80 F.3d at 1281. The ALJ may use
28 "'ordinary techniques of credibility evaluation'" to assess the

1 claimant's testimony, such as considering inconsistencies within the
2 claimant's testimony or between the testimony and claimant's conduct.
3 Turner v. Comm'r of Soc. Sec., 613 F.3d 1217, 1224 n.3 (9th Cir. 2010).
4 The ALJ may also consider whether the claimant's daily activities are
5 inconsistent with his or her alleged symptoms. Lingenfelter, 504 F.3d
6 at 1040. However, the ALJ may not discredit a claimant's testimony of
7 pain and deny disability benefits solely because the degree of pain
8 alleged by the claimant is not supported by objective medical evidence.
9 Bunnell v. Sullivan, 947 F.2d 341, 346-47 (9th Cir. 1991).

10
11 Here, the ALJ concluded that although Plaintiff's "medically
12 determinable impairments could reasonably be expected to cause [his]
13 alleged symptoms," his "statements concerning the intensity, persistence
14 and limiting effects of [the] symptoms [we]re not credible to the extent
15 they [we]re inconsistent with the . . . [RFC] assessment." (AR 17).
16 The ALJ rejected Plaintiff's testimony based on five areas where he was
17 inconsistent: (1) highest level of education obtained, (2) inability to
18 stand, (3) frequency of vomiting, (4) disability due to hypertension;
19 and (5) inability to function due to vertigo and dizziness. (AR 18).

20
21 First, the ALJ found that Plaintiff was inconsistent regarding the
22 level of education he obtained. (AR 18). The ALJ found that
23 Plaintiff's testimony was inconsistent because "[Plaintiff] stated that
24 he completed 12th grade in his application. However, at the hearing the
25 [Plaintiff] testified he only completed 11th grade." (Id.) (citations
26 omitted). At the hearing, Plaintiff testified that he only completed
27 the eleventh grade. (AR 28). However, he also testified that although
28 he never received his GED, "[he] went to college" and "tr[ie]d to get

1 [his] grades from LA Trade Tech and [went] back to Fremont Adult High
2 School." (Id.). Consequently, Plaintiff's testimony appears to be a
3 clarification of his previous report rather than a true inconsistency.
4 Regardless, this inconsistency, if valid at all, is minor in light of
5 all of Plaintiff's testimony and inconsequential to Plaintiff's
6 testimony related to his medical condition. Thus, this reason provided
7 by the ALJ is not a legitimate reason to discredit Plaintiff's
8 credibility.

9
10 Second, the ALJ found that Plaintiff made inconsistent statements
11 about his ability to stand. (AR 18). The ALJ noted that "Plaintiff
12 also stated he cannot stand for 'too long' due to his dizziness. And
13 yet, he visited his mother everyday by walking down the street and
14 played sports with his kids." (Id.) (citations omitted). Plaintiff did
15 list playing sports with his children as one of his hobbies and
16 interests in his function report. (AR 123). However, Plaintiff also
17 wrote in his report that sports was something he was able to do before
18 his disability that he can no longer do. (AR 120). In his pain
19 questionnaire, Plaintiff also said he can no longer play basketball and
20 football due to pain from his injuries. (AR 117). Plaintiff's
21 statements in his functional report and his pain questionnaire support
22 the conclusion that Plaintiff was formerly able to play sports with his
23 children, but no longer is, not the conclusion that Plaintiff continues
24 to play sports with his children. Thus, the ALJ's determination that
25 Plaintiff can still play sports is not supported by the record and not
26 a sufficient reason to discredit Plaintiff's credibility.

1 The ALJ's determination that Plaintiff's alleged inability to stand
2 for long periods conflicts with his ability to walk to his mother's
3 house is also not supported by the record. (AR 18). Plaintiff stated
4 that he can only stand for ten to fifteen minutes, (AR 118), and walk
5 not too far from home, (id.), about half a block. (AR 31). Plaintiff
6 lives at 1150 E. 107th Street, Los Angeles, CA 90002, (AR 64), while his
7 mother lives only a few houses away at 1130 E. 107th Street, Los
8 Angeles, CA 90002. (AR 118). His testimony about not being able to
9 stand and bend to do yard work because it causes dizziness, (AR 122),
10 does not conflict with his ability to walk to his mother's home a few
11 houses down the street. Thus, this reason cited by the ALJ is not a
12 legitimate reason to reject Plaintiff's credibility.

13
14 Third, the ALJ noted that "[a]t the hearing [Plaintiff] testified
15 he vomits everyday. However, to Dr. Lin, the consultative examiner,
16 [Plaintiff] reported only vomiting once a week." (AR 18) (citations
17 omitted). Almost two years elapsed between Plaintiff's April 2008
18 statement to Dr. Lin (AR 284) and his statement at the hearing before
19 the ALJ in February 2010. (AR 31). Because Plaintiff's statements as
20 to how often he experienced vomiting symptoms were made at different
21 times during his illness, the ALJ wrongly held against Plaintiff this
22 inconsistency, if it is an inconsistency at all.

23
24 Moreover, the record confirms that Plaintiff suffered from episodic
25 vomiting on numerous occasions. (AR 233, 247, 268-69, 271, 284).
26 Plaintiff has also been diagnosed with chronic pancreatitis, which can
27 produce symptoms such as nausea and vomiting. (AR 378, 392, 394, 407-
28 08). As long as Plaintiff offers evidence of a medical impairment that

1 could be reasonably be expected to produce some degree of symptom, the
2 ALJ may not require the degree of symptom to be corroborated by
3 objective medical evidence. Smolen v. Chater, 80 F.3d 1273 (9th Cir.
4 1995). The record is replete with objective medical evidence to support
5 Plaintiff's diagnosis of chronic pancreatitis. (AR 378, 392, 394, 407-
6 08). This evidence is sufficient to support Plaintiff's credibility as
7 to his vomiting complaints.

8
9 Additionally, the ALJ found that "[Plaintiff's] weight has been
10 essentially constant without any significant fluctuation as one might
11 expect with frequent vomiting." (AR 18). However, the record
12 contradicts the ALJ's determination that Plaintiff's weight did not
13 fluctuate. For example, on October 4, 2007, Plaintiff weighed 211 lbs.,
14 (AR 271), nine pounds less than his December 2006 weight of 220 lbs.
15 (AR 199). In addition, Plaintiff lost another thirteen pounds between
16 October 4, 2007 and October 30, 2007, a short span of about three weeks.
17 (AR 410). By October 30, 2007, Plaintiff had lost a total of twenty two
18 pounds. (AR 199, 410). Moreover, Dr. Bhatt at St. Francis Medical
19 Center ordered a CT scan of Plaintiff's abdomen and a gastric emptying
20 study to determine the cause of Plaintiff's weight loss, which indicates
21 that Dr. Bhatt was concerned about Plaintiff's drop in weight. (AR 279,
22 281). Additionally, in a disability report dated October 29, 2007, it
23 was noted "Clmt looked very thin" which further contradicts the ALJ's
24 assertion that plaintiff's weight did not fluctuate. (AR 103). Thus,
25 the ALJ's determination that Plaintiff's weight remained "essentially
26 constant" is incorrect in light of the evidence contained in the record,
27 and is not a legitimate reason to discredit Plaintiff's testimony.

1 Fourth, the ALJ found that "[Plaintiff] also alleged disability due
2 to hypertension. However the treating notes indicated his blood
3 pressure was normal with 107/72 and 110/56 in September 2006." (AR 18)
4 (citations omitted). The ALJ only cited Plaintiff's blood pressure on
5 two occasions in September 2006 when his blood pressure was normal,
6 (id.), while the record contains several treating notes that indicate
7 Plaintiff's blood pressure was elevated including: 135/88 on August 18,
8 2006 (AR 226), 121/82 on August 23, 2006, (AR 148), 130/90 on August 24,
9 2006, (AR 160), 135/50 on September 5, 2006, (AR 210), 126/74 on October
10 4, 2007, (AR 271), 130/80 on October 16, 2007, (AR 234), 125/88 on
11 October 18, 2007, (AR 244), 126/85 on October 30, 2007 (AR 410) and
12 121/81 on February 29, 2008. (AR 381). Thus, it is unclear, based upon
13 this record, whether or not Plaintiff suffered from hypertension and the
14 role hypertension may play in Plaintiff's symptoms.

15
16 Fifth, the ALJ determined that "[Plaintiff] alleges inability to
17 function due to vertigo and dizziness. However the treating notes
18 stated diagnosis was benign paroxysmal positional vertigo. A CT scan
19 of the head showed no signs of intra-cranial masses. And the MRI of the
20 brain revealed no significant abnormalities." (AR 18) (citations
21 omitted). Plaintiff was diagnosed with "vertigo, benign paroxysmal
22 positional" on September 21, 2006 after suffering from vertigo for
23 several weeks. (AR 207, 209). Although the record does not explain
24 what benign paroxysmal positional vertigo is, the record does support
25 a general diagnosis of vertigo. For example, Plaintiff's discharge
26 summary from the Bellflower Medical Center states "[t]he patient also
27 had vertigo 'spinning' dizziness with movement of his head." (AR 146).
28 Plaintiff was also diagnosed with "posttraumatic vestibular disorder

1 (Vertigo)" by Dr. Onubah during his neurological evaluation on April 4,
2 2008. (AR 353). Additionally, Dr. Lo at Cedar Sinai Medical Center
3 noted that Plaintiff "has had significant problems with vertigo" in his
4 treatment notes on October 30, 2007. (AR 408). Finally, Plaintiff
5 complained about dizziness during several of his medical visits,
6 including visits in August 2006, (AR 146, 167, 221, 226), October 2007,
7 (AR 233, 237, 246), April 2008 (AR 353), and July 2008. (AR 325).
8 Thus, the basis for the ALJ's rejection of Plaintiff's claims about
9 vertigo and dizziness is undermined by the record.

10
11 In sum, the ALJ failed to provide specific clear and convincing
12 reasons for rejecting Plaintiff's credibility. Thus, the decision must
13 be reversed.⁶ Upon remand, the ALJ must reconsider Plaintiff's
14 subjective pain testimony in light of the entire record and if his
15 testimony is rejected, he must provide clear and convincing reasons that
16 are consistent with the record.

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25 ⁶ The ALJ ultimately found that "[Plaintiff] ha[d] not been under
26 a disability, as defined in the Social Security Act, from August 15,
27 2006, through the date of this decision [May 7, 2010]." (AR 20)
28 (citation omitted). However, the Court notes that Plaintiff was
receiving DIB for his condition until November 21, 2007, when his
benefits were terminated for exhaustion of funds. (AR 94-99). Thus,
the Agency apparently found Plaintiff's claims credible at least until
November 21, 2007. (AR 95).

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VIII.
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: May 23, 2012.

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