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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANTHONY LUCERO,)	Case No. CV 11-07319-JEM
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	REVERSING DECISION OF
)	COMMISSIONER AND REMANDING
MICHAEL J. ASTRUE,)	FOR FURTHER PROCEEDINGS
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

PROCEEDINGS

On September 9, 2011, Anthony Lucero (“Plaintiff or Claimant”) filed a complaint seeking review of the decision by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for Social Security Disability Insurance benefits. The Commissioner filed an Answer on December 22, 2011. On March 7, 2012, the parties filed a Joint Stipulation (“JS”). The matter is now ready for decision.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision should be reversed and remanded for further proceedings in accordance with this Memorandum Opinion and Order and with law.

BACKGROUND

1
2 Plaintiff is a 42 year old male who applied for Social Security Disability Insurance
3 benefits on December 27, 2007, alleging disability beginning September 2, 2004. (AR 19.)
4 Plaintiff has not engaged in substantial gainful activity during the period from his alleged onset
5 date of September 2, 2004, through his date last insured of December 31, 2009. (AR 21.)

6 Plaintiff's claim was denied initially on March 13, 2008. (AR 19.) Plaintiff filed a timely
7 request for hearing on May 7, 2008. Plaintiff appeared and testified at hearings held before
8 Administrative Law Judge ("ALJ") David G. Marcus on September 1, 2009, and April 15, 2010,
9 in Downey, California. (AR 19.) Claimant was represented by counsel at both hearings. (AR
10 19.) Vocational expert ("VE") Stephen Berry testified at both hearings and medical expert
11 Dr. Miriam Sherman appeared and testified at the April 15, 2010, hearing. (AR 19.) The ALJ
12 issued an unfavorable decision on May 7, 2010. (AR 19-27.) The Appeals Council denied
13 review on July 7, 2011. (AR 1-6.)

DISPUTED ISSUES

14
15 As reflected in the Joint Stipulation, Plaintiff raises the following disputed issues as
16 grounds for reversal and remand:

- 17 1. Whether the ALJ erred in his analysis of the medical evidence.
- 18 2. Whether the Appeals Council erred in failing to consider new and material evidence.
- 19 3. Whether the ALJ erred in his evaluation of Plaintiff's credibility and subjective
20 symptoms.

STANDARD OF REVIEW

21
22 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether
23 the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v.
24 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846
25 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and
26 based on the proper legal standards).

27 Substantial evidence means "more than a mere scintilla,' but less than a
28 preponderance." Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v.

1 Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a
2 reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S. at
3 401 (internal quotation marks and citation omitted).

4 This Court must review the record as a whole and consider adverse as well as
5 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006). Where
6 evidence is susceptible to more than one rational interpretation, the ALJ’s decision must be
7 upheld. Morgan v. Comm’r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).
8 “However, a reviewing court must consider the entire record as a whole and may not affirm
9 simply by isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882
10 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495
11 F.3d 625, 630 (9th Cir. 2007).

12 THE SEQUENTIAL EVALUATION

13 The Social Security Act defines disability as the “inability to engage in any substantial
14 gainful activity by reason of any medically determinable physical or mental impairment which
15 can be expected to result in death or . . . can be expected to last for a continuous period of not
16 less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner has
17 established a five-step sequential process to determine whether a claimant is disabled. 20
18 C.F.R. §§ 404.1520, 416.920.

19 The first step is to determine whether the claimant is presently engaging in substantial
20 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is engaging
21 in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S.
22 137, 140 (1987). Second, the ALJ must determine whether the claimant has a severe
23 impairment or combination of impairments. Parra, 481 F.3d at 746. An impairment is not
24 severe if it does not significantly limit the claimant’s ability to work. Smolen v. Chater, 80 F.3d
25 1273, 1290 (9th Cir. 1996). Third, the ALJ must determine whether the impairment is listed, or
26 equivalent to an impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I of the
27 regulations. Parra, 481 F.3d at 746. If the impediment meets or equals one of the listed
28 impairments, the claimant is presumptively disabled. Bowen v. Yuckert, 482 U.S. at 141.

1 Fourth, the ALJ must determine whether the impairment prevents the claimant from doing past
2 relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001). Before making the
3 step four determination, the ALJ first must determine the claimant's residual functional capacity
4 ("RFC").¹ 20 C.F.R. § 416.920(e). The RFC must consider all of the claimant's impairments,
5 including those that are not severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security
6 Ruling ("SSR") 96-8p. If the claimant cannot perform his or her past relevant work or has no
7 past relevant work, the ALJ proceeds to the fifth step and must determine whether the
8 impairment prevents the claimant from performing any other substantial gainful activity. Moore
9 v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

10 The claimant bears the burden of proving steps one through four, consistent with the
11 general rule that at all times the burden is on the claimant to establish his or her entitlement to
12 benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the claimant,
13 the burden shifts to the Commissioner to show that the claimant may perform other gainful
14 activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a finding
15 that a claimant is not disabled at step five, the Commissioner must provide evidence
16 demonstrating that other work exists in significant numbers in the national economy that the
17 claimant can do, given his or her RFC, age, education, and work experience. 20 C.F.R.
18 § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled and
19 entitled to benefits. Id.

20 THE ALJ DECISION

21 In this case, the ALJ determined at step one of the sequential process that Plaintiff did
22 not engage in substantial gainful activity during the period from his alleged onset date of
23 September 2, 2004, through his date last insured of December 31, 2009. (AR 21.)

24 At step two, the ALJ determined that through the date last insured Plaintiff had the
25 following combination of medically determinable severe impairments: degenerative changes of
26

27 ¹ Residual functional capacity ("RFC") is what one "can still do despite [his or her] limitations"
28 and represents an assessment "based on all the relevant evidence." 20 C.F.R. §§ 404.1545(a)(1),
416.945(a)(1).

1 the left knee, including a torn medial meniscus and chondromalacia, status post arthroscopic
2 surgeries; a chronic pain disorder; and an adjustment disorder with mixed anxiety and
3 depressed mood. (AR 21.)

4 At step three, the ALJ determined that Plaintiff did not have an impairment or
5 combination of impairments that meets or medically equals one of the listed impairments. (AR
6 22.)

7 The ALJ then found that the Plaintiff, through the date last insured, had an RFC as
8 follows:

9 . . . able to lift 10 pounds frequently and 20 pounds occasionally; able to
10 stand and/or walk two hours in an eight-hour workday; able to sit six hours
11 in an eight-hour workday; able to perform frequent balancing and stooping;
12 able to perform occasional climbing, kneeling, crouching, and crawling; and
13 able to perform only simple, routine tasks.

14 (AR 22.) In determining this RFC, the ALJ also appears to have made an adverse credibility
15 determination to the extent Plaintiff's subjective symptoms are inconsistent with the above
16 RFC. (AR 23-24.)

17 At step four, the ALJ found that, through the date last insured, Plaintiff was unable to
18 perform his past relevant work as a sales route driver and bagger. (AR 25.) The ALJ,
19 however, also found at step five that there were sedentary, unskilled jobs that exist in
20 significant numbers in the national economy that Plaintiff could perform, including order clerk,
21 charge clerk and call-out operator. (AR 26.)

22 Consequently, the ALJ concluded that Plaintiff was not disabled, within the meaning of
23 the Social Security Act, at any time from September 2, 2004, the alleged onset date, through
24 December 31, 2009, the date last insured. (AR 27.)

25 **DISCUSSION**

26 The ALJ decision must be reversed. The ALJ did not err in his evaluation of the medical
27 evidence, but did err in his assessment of Plaintiff's credibility. Additionally, the Appeals
28

1 Council did not provide any reasons why new evidence it permitted to be added to the record
2 did not present a reasonable possibility of changing the ALJ decision.

3 **I. THE ALJ'S RFC IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

4 An RFC is not a medical determination but an administrative finding or legal decision
5 reserved to the Commissioner based on consideration of all the relevant evidence, including
6 medical evidence, lay witnesses and subjective symptoms. See SSR 96-5p; 20 C.F.R.
7 § 1527(e). In determining a claimant's RFC, an ALJ must consider all the relevant evidence in
8 the record, including medical records, lay evidence, and the effects of symptoms, including
9 pain reasonably attributable to the medical condition. Robbins, 466 F.3d at 883.

10 Plaintiff had a work-related knee injury and three surgeries in 2004, 2005 and 2009.
11 (AR 21, 795, 391-92, 541, 774.) Plaintiff continues to complain of constant pain and says he
12 has trouble walking and standing. (AR 23.) Claimant also testified at the September 2009
13 hearing that he has to sit with his legs elevated and that even with a cane, he is unable to
14 stand more than 30 minutes at a time. (AR 23.) He requires the option to alternate sitting and
15 standing at will. (AR 23.) Nonetheless, the ALJ, based on the findings of treating physician
16 Dr. Albert and State agency reviewing physicians, assessed an RFC for sedentary work. (AR
17 22-24.)

18 Plaintiff complains that the ALJ did not credit the opinion of Dr. Beck, another treating
19 physician, who found Plaintiff unable to climb, stoop or bend. (AR 24.) The ALJ, relying on the
20 opinions of other physicians, assessed an RFC of only "occasional climbing, kneeling,
21 crouching or crawling." (AR 22.) Dr. Albert assessed no limitations on climbing, stooping and
22 bending, and two State agency reviewers assessed only occasional limitations of those
23 activities consistent with the RFC. (AR 23-24.) Although Plaintiff clearly disagrees with the
24 ALJ's interpretation of the medical evidence, it is the ALJ who is responsible for resolving
25 conflicts in the medical evidence. Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995);
26 Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989). Here, the ALJ's interpretation was
27 reasonable and should not be second-guessed. Rollins v. Massanari, 261 F.3d 853, 857 (9th
28 Cir. 2001).

1 Additionally, Dr. Beck never opined that Plaintiff was precluded from all work (AR 559,
2 589), and Plaintiff never explains how the omission of Dr. Beck’s limitation on climbing,
3 stooping and bending would result in a finding of disability. Any error was harmless. Stout v.
4 Comm’r Soc. Sec. Admin., 454 F.3d 1050, 1055-56 (9th Cir. 2006) (harmless error is one
5 inconsequential to non-disability determination).

6 Plaintiff also argues that the ALJ’s RFC is unsupported by substantial evidence because
7 the ALJ improperly discounted Plaintiff’s credibility regarding his subjective pain symptoms.
8 On this point, the Court agrees.

9 **A. Relevant Federal Law**

10 The test for deciding whether to accept a claimant’s subjective symptom testimony turns
11 on whether the claimant produces medical evidence of an impairment that reasonably could be
12 expected to produce the pain or other symptoms alleged. Bunnell v. Sullivan, 947 F.2d 341,
13 346 (9th Cir. 1991); see also Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998); Smolen, 80
14 F.3d at 1281-82 & n.2. The Commissioner may not discredit a claimant’s testimony on the
15 severity of symptoms merely because it is unsupported by objective medical evidence.
16 Reddick, 157 F.3d at 722; Bunnell, 947 F.2d at 343, 345. If the ALJ finds the claimant’s
17 symptom testimony not credible, the ALJ “must specifically make findings which support this
18 conclusion.” Bunnell, 947 F.2d at 345. These findings must be “sufficiently specific to permit
19 the court to conclude that the ALJ did not arbitrarily discredit [the] claimant’s testimony.”
20 Thomas v. Barnhart, 278 F.3d 947, 958 (9th Cir. 2002); see also Rollins v. Massanari, 261
21 F.3d at 856-57; Bunnell, 947 F.2d at 345-46. Unless there is evidence of malingering, the ALJ
22 can reject the claimant’s testimony about the severity of her symptoms only by offering
23 “specific, clear and convincing reasons for doing so.” Smolen, 80 F.3d at 1283-84; see also
24 Reddick, 157 F.3d at 722. The ALJ must identify what testimony is not credible and what
25 evidence discredits the testimony. Reddick, 157 F.3d at 722; Smolen, 80 F.3d at 1284.

1 **B. Analysis**

2 The ALJ made no finding that Plaintiff’s’ medically determinable impairments reasonably
3 could be expected to produce Plaintiff’s symptoms. The ALJ, however, stated that “the medical
4 evidence of record does not seem consistent with the degree of limitation that the Claimant
5 alleges” and that the medical opinion of record supported an RFC for sedentary work. (AR 23.)
6 Because the ALJ made no finding of malingering, he was required to provide clear and
7 convincing reasons supported by substantial evidence to discount Plaintiff’s credibility. Smolen,
8 80 F.3d at 1283-84. The ALJ failed to meet this exacting standard.

9 The ALJ reasonably relied on the medical evidence, which was consistent with sedentary
10 work. (AR 23-24.) An ALJ is entitled to consider whether there is a lack of medical evidence to
11 corroborate a claimant’s alleged pain symptoms so long as it is not the only reason for
12 discounting a claimant’s credibility. Burch v. Barnhart, 400 F.3d 676, 680-81 (9th Cir. 2005);
13 Thomas, 278 F.3d at 959. The problem in this case is that the ALJ failed to offer additional
14 clear and convincing reasons supported by substantial evidence for discounting Plaintiff’s
15 credibility.

16 One additional reason advanced by the ALJ is that Claimant “has not attended physical
17 therapy because he wants the physician to go over his MRI films and give his
18 recommendation.” (AR 24.) Failing to follow prescribed treatment can be a basis for finding a
19 complaint unjustified or exaggerated. Orn, 495 F.3d at 638. Here, though, there is no evidence
20 that the physician, Dr. Woods, recommended physical therapy after viewing Plaintiff’s MRI or
21 viewed Claimant’s request as unreasonable. Additionally, he was told to stop physical therapy
22 because there was not any improvement and he was still in pain. (AR 95.) Claimant, then, had
23 good reason for not pursuing physical therapy, which the ALJ was bound to consider but failed
24 to do so. See SSR 96-7p.

25 Another reason proffered by the Commissioner is that Claimant had not taken his pain
26 medications:

27 Notwithstanding his complaints of significant pain, the record reflects
28 his allegation that he had not taken pain medication in that he had been

1 unable to tolerate it because he developed pancreatitis as a result of taking
2 Celebrex (e.g. Exhibit 4E). However, at the April 2010 hearing, he testified
3 that he had recently started taking Tramadol, although he affirmed that it has
4 not been effective in relieving his pain.

5 (AR 23.) Plaintiff twice developed pancreatitis from the Celebrex, and is also diabetic. (AR 23,
6 56, 61, 83, 84.) He hardly can be faulted for discontinuing its use. Nor is it clear that the ALJ
7 was even suggesting that Plaintiff was non-compliant with his medication. Rather, the ALJ did
8 not accept Plaintiff's allegation that, even with Tramadol, he was in constant pain because the
9 medical evidence of record was not consistent with the degree of limitation alleged. (AR 23.)
10 Any assertion that Plaintiff was non-compliant with his medication without good reason is not
11 supported by substantial evidence.

12 The Commissioner's last argument is that Plaintiff was capable of doing chores and
13 looking after his daughter. (JS 17.) Daily activities inconsistent with alleged limitations can be
14 a valid basis for rejecting a claimant's credibility. Burch, 400 F.3d at 681. The Commissioner,
15 however, provides no citation to the ALJ decision and the Court did not find anywhere in the
16 decision that the ALJ gave inconsistent daily activities as a reason for discounting Plaintiff's
17 credibility. The Court may not consider arguments and evidence not articulated by the ALJ.
18 Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003) ("We are constrained to review the
19 reasons the ALJ asserts"). Additionally, Dr. Beck reported Plaintiff had difficulty with bathing,
20 showering and preparing meals. (AR 608.) Dr. Simpkins gave a similar evaluation. (AR 790.)

21 The ALJ decision, then, fails to present clear and convincing reasons supported by
22 substantial evidence for rejecting Plaintiff's subjective pain symptoms, other than the medical
23 evidence. The ALJ's RFC is not supported by substantial evidence. The ALJ's non-disability
24 determination is reversed and remanded for further proceedings.

25 **II. THE APPEALS COUNCIL DID NOT PROPERLY CONSIDER PLAINTIFF'S**
26 **NEW EVIDENCE SUBMITTED AFTER THE ALJ OPINION WAS ISSUED**

27 After the May 7, 2010, ALJ decision, Plaintiff presented new evidence to the Appeals
28 Council. Specifically, a June 2010 orthopedic examination by Dr. Simpkins, an agreed medical

1 evaluator for workers' compensation, revealed a recurrent tear of the posterior horn of the
2 medial meniscus. (AR 792.) Dr. Simpkins believed that Claimant was in need of a fourth knee
3 surgery. (AR 792.) The Appeals Council made this new evidence part of the record. (AR 5.)
4 The Appeals Council, however, "found that this information does not provide a basis for
5 changing the Administrative Law Judge's decision." (AR 2.) No explanation of this finding was
6 provided.

7 Sentence six of 42 U.S.C. § 405(g) allows a court to remand for consideration of
8 additional evidence only if Plaintiff shows that (1) new evidence is material to his disability, and
9 (2) he has good cause for failing to submit the evidence earlier. Mayes v. Massanari, 276 F.3d
10 453, 462 (9th Cir. 2001). To be "material," the evidence must present a "reasonable possibility"
11 of changing the administrative decision. Id.

12 Dr. Simpkins' evaluation did not occur until after the ALJ decision. It is plainly material in
13 that it supports Claimant's continuing pain allegations. Dr. Simpkins found that Plaintiff has
14 difficulty with showering, bathing and getting dressed. (AR 790.) Dr. Simpkins' evaluation
15 presents facts which may be inconsistent with sedentary work and thus a "reasonable
16 possibility" of changing the ALJ decision. Because the Appeals Council did not provide any
17 reasons for its contrary view, the Court has no record or basis for assessing whether the
18 Appeals Council gave proper weight to Dr. Simpkins' evaluation. On remand, the Appeals
19 Council and/or ALJ will have to do so.

20 ORDER

21 IT IS HEREBY ORDERED that the decision of the Commissioner of Social Security is
22 REVERSED and REMANDED for further proceedings in accordance with this Memorandum
23 Opinion and Order and with law.

24 LET JUDGMENT BE ENTERED ACCORDINGLY.

25
26 DATED: May 4, 2012

27 /s/ John E. McDermott
28 JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE