

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SHAWN MURPHY,	)	Case No. CV 11-8021 JC
Plaintiff,	)	
v.	)	MEMORANDUM OPINION AND ORDER OF REMAND
MICHAEL J. ASTRUE, Commissioner of Social Security,	)	
Defendant.	)	

---

**I. SUMMARY**

On September 30, 2011, plaintiff Shawn Murphy (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have consented to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties’ cross motions for summary judgment, respectively (“Plaintiff’s Motion”) and (“Defendant’s Motion”). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; October 5, 2011 Case Management Order ¶ 5.

///

1 Based on the record as a whole and the applicable law, the decision of the  
2 Commissioner is REVERSED AND REMANDED for further proceedings  
3 consistent with this Memorandum Opinion and Order of Remand.

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

6 On July 22, 2008, plaintiff filed an application for Disability Insurance  
7 Benefits. (Administrative Record (“AR”) 176). Plaintiff asserted that he became  
8 disabled on December 12, 2007, due to congestive heart failure. (AR 201). The  
9 Administrative Law Judge (“ALJ”) examined the medical record and heard  
10 testimony from plaintiff (who was represented by counsel), plaintiff’s girlfriend,  
11 and a vocational expert on December 16, 2009. (AR 27-47). On December 30,  
12 2009, the ALJ determined that plaintiff was not disabled through the date of the  
13 decision. (AR 18-22). Specifically, the ALJ found: (1) plaintiff suffered from the  
14 following severe impairments: hypertension, congestive heart failure, and Type II  
15 diabetes mellitus (AR 20); (2) plaintiff’s impairments, considered singly or in  
16 combination, did not meet or medically equal one of the listed impairments (AR  
17 20-21); (3) plaintiff retained the residual functional capacity to perform light work  
18 (20 C.F.R. § 404.1567(b)) with certain limitations<sup>1</sup> (AR 21); (4) plaintiff could not  
19 perform his past relevant work (AR 21-22); (5) there are jobs that exist in  
20 significant numbers in the national economy that plaintiff could perform (AR 22);  
21 and (6) plaintiff’s allegations regarding his limitations were not entirely credible.  
22 (AR 21).

23 The Appeals Council denied plaintiff’s application for review. (AR 1).

---

24  
25 <sup>1</sup>The ALJ determined that plaintiff could perform light work, except plaintiff: (i) could  
26 stand and/or walk for no more than four hours in an eight-hour workday; and (ii) could  
27 occasionally climb, balance, stoop, kneel, crouch and crawl. (AR 21). In the hypothetical  
28 question the ALJ posed to the vocational expert at the administrative hearing, the ALJ also  
limited plaintiff to “sit[ting] six hours out of eight hours.” (AR 42). In the administrative  
decision, however, the ALJ did not include any limitation on sitting in the residual functional  
capacity assessment. (AR 21).

1 **III. APPLICABLE LEGAL STANDARDS**

2 **A. Sequential Evaluation Process**

3 To qualify for disability benefits, a claimant must show that the claimant is  
4 unable to engage in any substantial gainful activity by reason of a medically  
5 determinable physical or mental impairment which can be expected to result in  
6 death or which has lasted or can be expected to last for a continuous period of at  
7 least twelve months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing  
8 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of  
9 performing the work claimant previously performed and incapable of performing  
10 any other substantial gainful employment that exists in the national economy.  
11 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C.  
12 § 423(d)(2)(A)).

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

- 15 (1) Is the claimant presently engaged in substantial gainful activity? If  
16 so, the claimant is not disabled. If not, proceed to step two.
- 17 (2) Is the claimant's alleged impairment sufficiently severe to limit  
18 claimant's ability to work? If not, the claimant is not disabled.  
19 If so, proceed to step three.
- 20 (3) Does the claimant's impairment, or combination of  
21 impairments, meet or equal an impairment listed in 20 C.F.R.  
22 Part 404, Subpart P, Appendix 1? If so, the claimant is  
23 disabled. If not, proceed to step four.
- 24 (4) Does the claimant possess the residual functional capacity to  
25 perform claimant's past relevant work? If so, the claimant is  
26 not disabled. If not, proceed to step five.
- 27 (5) Does the claimant's residual functional capacity, when  
28 considered with the claimant's age, education, and work

1 experience, allow claimant to adjust to other work that exists in  
2 significant numbers in the national economy? If so, the  
3 claimant is not disabled. If not, the claimant is disabled.

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

6 The claimant has the burden of proof at steps one through four, and the  
7 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262  
8 F.3d 949, 954 (9th Cir. 2001) (citing Tackett); see also Burch, 400 F.3d at 679  
9 (claimant carries initial burden of proving disability).

#### 10 **B. Standard of Review**

11 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of  
12 benefits only if it is not supported by substantial evidence or if it is based on legal  
13 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.  
14 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457  
15 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable  
16 mind might accept as adequate to support a conclusion.” Richardson v. Perales,  
17 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a  
18 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing  
19 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

20 To determine whether substantial evidence supports a finding, a court must  
21 “consider the record as a whole, weighing both evidence that supports and  
22 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.  
23 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d  
24 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming  
25 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that  
26 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

27 ///

28 ///

1 **IV. DISCUSSION**

2 **A. The ALJ Failed Properly to Evaluate Plaintiff’s Credibility and**  
3 **the Court Cannot Find Such Error Harmless**

4 Plaintiff contends that the ALJ failed properly to evaluate the credibility of  
5 his subjective complaints. (Plaintiff’s Motion at 4-9). The Court agrees. As the  
6 Court cannot find that the ALJ’s error was harmless, a remand is warranted.

7 **1. Pertinent Law**

8 Questions of credibility and resolutions of conflicts in the testimony are  
9 functions solely of the Commissioner. Greger v. Barnhart, 464 F.3d 968, 972 (9th  
10 Cir. 2006). If the ALJ’s interpretation of the claimant’s testimony is reasonable  
11 and is supported by substantial evidence, it is not the court’s role to “second-  
12 guess” it. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

13 An ALJ is not required to believe every allegation of disabling pain or other  
14 non-exertional impairment. Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007)  
15 (citing Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). If the record establishes  
16 the existence of a medically determinable impairment that could reasonably give  
17 rise to symptoms assertedly suffered by a claimant, an ALJ must make a finding as  
18 to the credibility of the claimant’s statements about the symptoms and their  
19 functional effect. Robbins, 466 F.3d 880 at 883 (citations omitted). Where the  
20 record includes objective medical evidence that the claimant suffers from an  
21 impairment that could reasonably produce the symptoms of which the claimant  
22 complains, an adverse credibility finding must be based on clear and convincing  
23 reasons. Carmickle v. Commissioner, Social Security Administration, 533 F.3d  
24 1155, 1160 (9th Cir. 2008) (citations omitted). The only time this standard does  
25 not apply is when there is affirmative evidence of malingering. Id. The ALJ’s  
26 credibility findings “must be sufficiently specific to allow a reviewing court to  
27 conclude the ALJ rejected the claimant’s testimony on permissible grounds and

28 ///

1 did not arbitrarily discredit the claimant’s testimony.” Moisa v. Barnhart, 367  
2 F.3d 882, 885 (9th Cir. 2004).

3 To find the claimant not credible, an ALJ must rely either on reasons  
4 unrelated to the subjective testimony (*e.g.*, reputation for dishonesty), internal  
5 contradictions in the testimony, or conflicts between the claimant’s testimony and  
6 the claimant’s conduct (*e.g.*, daily activities, work record, unexplained or  
7 inadequately explained failure to seek treatment or to follow prescribed course of  
8 treatment). Orn, 495 F.3d at 636; Robbins, 466 F.3d at 883; Burch, 400 F.3d at  
9 680-81; SSR 96-7p. Although an ALJ may not disregard such claimant’s  
10 testimony solely because it is not substantiated affirmatively by objective medical  
11 evidence, the lack of medical evidence is a factor that the ALJ can consider in his  
12 credibility assessment. Burch, 400 F.3d at 681.

## 13 2. Analysis

14 Here, the ALJ found plaintiff’s subjective symptom testimony “not entirely  
15 credible.” (AR 21). The ALJ provided several conclusory reasons for discounting  
16 plaintiff’s credibility. The Court finds none of them to be clear and convincing.

17 First, the ALJ noted that plaintiff “appeared healthy looking” at the hearing.  
18 (AR 21). However, the ALJ was not permitted to discount plaintiff’s credibility  
19 based on the absence of the manifestation of external symptoms. See, e.g.,  
20 Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999) (ALJ’s reliance on  
21 observations of claimant proper where ALJ pointed to plaintiff’s affirmative  
22 exhibition of symptoms which were inconsistent with both medical evidence and  
23 plaintiff’s other behavior but did not point to the absence of the manifestation of  
24 external symptoms to discredit plaintiff, referring to the latter as disapproved “sit  
25 and squirm” jurisprudence).

26 Second, the ALJ discounted plaintiff’s credibility because plaintiff  
27 “exaggerated his pain and symptoms.” (AR 21). The ALJ was permitted to use  
28 “ordinary techniques of credibility evaluation” to evaluate plaintiff’s testimony.

1 See Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th Cir. 2001) (internal quotation  
2 marks and citation omitted). Here, however, the ALJ did not specify particular  
3 subjective symptom testimony plaintiff allegedly inflated, nor did the ALJ identify  
4 the evidentiary basis for his finding that plaintiff had not been entirely honest  
5 while testifying. The ALJ’s conclusory finding that plaintiff’s testimony was  
6 “exaggerated” is not a clear and convincing reason for discounting plaintiff’s  
7 credibility. Moisa, 367 F.3d at 885.

8 Third, the ALJ discounted the alleged severity of plaintiff’s subjective  
9 symptom testimony as inconsistent with plaintiff’s “daily activities.” (AR 21).  
10 The ALJ’s finding, however, is not supported by substantial evidence. The only  
11 daily activities the ALJ identified for plaintiff were “watching television and  
12 sleeping.” (AR 21). At the administrative hearing, plaintiff testified that, apart  
13 from visits to the doctor and his lawyer, he essentially stayed in his house all day  
14 and attempted to watch television when he was not falling asleep (apparently due,  
15 in part, to side effects from his medication). (AR 34-39). Even assuming that  
16 plaintiff retained the ability to carry on certain minimal activities of daily living  
17 (*i.e.*, watch television, travel to medical appointments), the ALJ did not find, nor  
18 does the record reflect, that such activities “consume[d] a substantial part of  
19 [plaintiff’s] day,” and thus such evidence does not constitute a clear and  
20 convincing reason for discounting plaintiff’s credibility. See Vertigan v. Halter,  
21 260 F.3d 1044, 1050 (9th Cir. 2001) (citing Fair, 885 F.2d at 603).

22 Fourth, the ALJ’s conclusory statement that “[plaintiff] does not appear to  
23 be too motivated to work” (AR 21) is not a clear and convincing reason for  
24 discounting plaintiff’s credibility. Moisa, 367 F.3d at 885. In short, the record  
25 lacks substantial evidence which suggests that plaintiff’s only daily activities (*i.e.*,  
26 sleeping and attempting to watch television) somehow reflect plaintiff’s lack of  
27 motivation to work as opposed to a reasonable effort to manage his impairments  
28 and the alleged side effects from medication.

1 Fifth, in evaluating the medical evidence, the ALJ noted that “[plaintiff’s]  
2 morbid obesity [] contributes a great deal to [plaintiff’s] problem,” and that  
3 plaintiff “was not always compliant with treatment” (*i.e.*, “[plaintiff] was not  
4 motivated to change [his] diet”). (AR 21). In general, an ALJ may discount a  
5 plaintiff’s credibility due to an unexplained failure to seek treatment consistent  
6 with the alleged severity of subjective symptoms. See Bunnell v. Sullivan, 947  
7 F.2d 341, 346 (9th Cir. 1991) (en banc). Nonetheless, where, like here, the  
8 plaintiff is obese, an alleged failure to seek or follow treatment is generally not  
9 probative of credibility, and therefore such failure cannot serve as a clear and  
10 convincing reason for discrediting a plaintiff’s subjective complaints. Orn, 495  
11 F.3d at 638 (“failure to follow treatment for obesity tells [] little or nothing about a  
12 claimant’s credibility”) (citation omitted).

13 Finally, the ALJ suggests that plaintiff is not fully credible because the  
14 objective medical evidence does not support his subjective complaints (*i.e.*, “[t]he  
15 record shows that [plaintiff’s] condition is stable”). (AR 21). As detailed above,  
16 however, the ALJ did not provide any other valid reason for discounting plaintiff’s  
17 credibility. Lack of objective medical evidence to support subjective symptom  
18 allegations alone is not sufficient to discount a claimant’s credibility. See Burch,  
19 400 F.3d at 681.

20 The Court cannot conclude that the above errors were harmless because it  
21 cannot “confidently conclude that no reasonable ALJ, when fully crediting the  
22 testimony, could have reached a different disability determination.” Stout, 454  
23 F.3d at 1055-56. At the administrative hearing, plaintiff testified, in essence, that  
24 he was unable to walk more than 40-50 feet before he needed to stop, and he could  
25 not sit for more than 20-25 minutes at a time without needing to lay down and  
26 elevate his legs. (AR 37-38). At the administrative hearing, the vocational expert  
27 testified that if plaintiff (or a hypothetical person with similar characteristics) had  
28 such limitations, there would be no work plaintiff could do. (AR 44-45).



