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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

STEPHEN PRINCE,)	Case No. CV 11-9576-MLG
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

Plaintiff Stephen David Prince seeks judicial review of the Commissioner's denial of his application for disability insurance benefits ("DIB") and Supplemental Security Income ("SSI") benefits under the Social Security Act. For the reasons discussed below, the Commissioner's decision is reversed, and this action is remanded for further proceedings.

I. BACKGROUND

Plaintiff was born on January 13, 1956. (Administrative Record ("AR") at 14.) He has work experience as a detailer, firefighter, maintenance worker, roustabout, construction laborer, carpet cleaner, mechanical technician, and auto body repairer. (AR at 47.)

1 Plaintiff filed his applications for benefits on January 13, 2009,
2 alleging disability beginning November 10, 2007, due to an injured
3 left shoulder and arthritis in the neck and spine. (AR at 10, 56.)
4 The Social Security Administration denied Plaintiff's applications
5 initially on June 15, 2009, and upon reconsideration on October 1,
6 2009. (AR at 10.)

7 A video-conferenced administrative hearing was held before
8 Administrative Law Judge ("ALJ") Dale A. Garwal on December 10,
9 2010. (AR at 10.) Plaintiff, who was represented by counsel,
10 testified at the hearing, as did a vocational expert ("VE"). (AR at
11 10.) On January 7, 2011, the ALJ issued a decision denying
12 Plaintiff's application. (AR at 10-15.) The ALJ determined that
13 although Plaintiff suffers from "chronic degenerative disc disease"
14 and "cervical spine with radiculopathy," he has the residual
15 functional capacity ("RFC") to perform a limited range of light
16 work activity. (AR at 13.) Specially, the ALJ found that Plaintiff
17 can: "sit 6 hours of an 8 hour day; stand 6 hours of an 8 hour day;
18 lift 10 pounds frequently, 20 pounds occasionally; occasionally
19 bend or stoop; and occasionally use dominant left upper extremity
20 to perform overhead work." (AR at 13.) The ALJ found that while
21 Plaintiff is unable to perform any past relevant work, there are
22 jobs that exist in significant numbers in the national economy that
23 he can perform. (AR at 14.) The Appeals Council denied review on
24 September 17, 2011. (AR at 1.)

25 Plaintiff commenced this action for judicial review, and the
26 parties filed a Joint Stipulation ("Joint Stip.") of disputed facts
27 and issues on July 11, 2012. Plaintiff contends that the ALJ erred
28 in five respects: (1) he improperly rejected the opinion of

1 Plaintiff's treating physician; (2) his RFC finding is not
2 supported by substantial evidence; (3) he improperly assessed
3 Plaintiff's credibility; (4) he failed to properly develop the
4 record by pursuing all relevant evidence; and (5) he failed to
5 properly inquire into conflicts between the VE's testimony and the
6 Dictionary of Occupational Titles (the "DOT"). (AR at 3-4.)
7 Plaintiff seeks remand for the payment of benefits or, in the
8 alternative, remand for further administrative proceedings. (Joint
9 Stip. at 40-41.) Defendant requests that the ALJ's decision be
10 affirmed or, if the Court finds that the ALJ committed reversible
11 error, that the Court remand for further administrative
12 proceedings. (Joint Stip. at 41.)

13 14 **II. STANDARD OF REVIEW**

15 Under 42 U.S.C. § 405(g), a district court may review the
16 Commissioner's decision to deny benefits. The Commissioner's or
17 ALJ's decision must be upheld unless "the ALJ's findings are based
18 on legal error or are not supported by substantial evidence in the
19 record as a whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
20 1990); *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).
21 Substantial evidence means such evidence as a reasonable person
22 might accept as adequate to support a conclusion. *Richardson v.*
23 *Perales*, 402 U.S. 389, 401 (1971); *Widmark v. Barnhart*, 454 F.3d
24 1063, 1066 (9th Cir. 2006). It is more than a scintilla, but less
25 than a preponderance. *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880,
26 882 (9th Cir. 2006). To determine whether substantial evidence
27 supports a finding, the reviewing court "must review the
28 administrative record as a whole, weighing both the evidence that

1 supports and the evidence that detracts from the Commissioner's
2 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996).
3 "If the evidence can support either affirming or reversing the
4 ALJ's conclusion," the reviewing court "may not substitute its
5 judgment for that of the ALJ." *Robbins*, 466 F.3d at 882.

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7 **III. DISCUSSION**

8 **A. The ALJ Failed to Give Appropriate Weight to the Opinion of**
9 **Plaintiff's Treating Physician**

10 Plaintiff contends that the ALJ improperly rejected the work-
11 related limitations assessed by Bala Bhat, M.D., Plaintiff's
12 treating physician, in finding that Plaintiff was not disabled.
13 (Joint Stip. at 4-8). Dr. Bhat saw Plaintiff nine times between
14 January 3, 2008 and July 23, 2010, mostly for his neck and left
15 shoulder pain (AR at 187-217). Dr. Bhat found that Plaintiff would
16 be unable to do even light or sedentary work, including watching
17 video screen monitors, as turning his neck and prolonged flexion
18 and extension positions cause him severe pain. (AR at 271.) He also
19 found that Plaintiff would only be able to stand/walk for up to two
20 hours, and to sit between two and four hours, in an eight hour
21 workday. (AR at 248.) He noted that Plaintiff is on chronic pain
22 medications that are only of very little help to him. (AR at 271.)

23 The Commissioner is directed to weigh medical opinions based
24 in part on their source, specifically, whether proffered by
25 treating, examining, or non-examining professionals. *Lester v.*
26 *Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). Generally, more weight
27 is given to the opinion of a treating professional, who has a
28 greater opportunity to know and observe the patient as an

1 individual, than the opinion of a non-treating professional. See
2 *id.*; *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996).
3 Similarly, more weight is generally given to the opinion of a
4 source who has examined the patient than someone who has not done
5 so. 20 CFR § 404.1527(d)(1).

6 The Commissioner must also consider whether a medical opinion
7 is supported by clinical findings and is contradicted by other
8 medical evidence in the record. The Commissioner may reject the
9 uncontradicted opinion of a treating or examining medical
10 professional only for "clear and convincing" reasons supported by
11 substantial evidence in the record. See *Lester*, 81 F.3d at 831. A
12 contradicted opinion of a treating or examining professional may be
13 rejected only for "specific and legitimate" reasons supported by
14 substantial evidence. *Lester*, 81 F.3d at 830. If a treating
15 professional's opinion is contradicted by an examining
16 professional's opinion, which is supported by different independent
17 clinical findings, the Commissioner may resolve the conflict by
18 relying on the latter. See *Andrews v. Shalala*, 53 F.3d 1035, 1041
19 (9th Cir. 1995); see also *Orn v. Astrue*, 495 F.3d 625, 632 (9th
20 Cir. 2007) (ALJ may reject opinion of treating physician in favor
21 of examining physician whose opinion rests on independent clinical
22 findings).

23 The ALJ rejected Dr. Bhat's opinion as to Plaintiff's
24 limitations, but failed to state adequate reasons for doing so. (AR
25 at 14.) First, the ALJ stated that the "extreme limitations" found
26 by Dr. Bhat are not supported by the treatment records. In doing
27 so, the ALJ noted that "there is no evidence of herniation, nerve
28 compression or severe stenosis," and that Plaintiff "has not had

1 surgery or injections." (AR at 13.) On the contrary, the medical
2 record does contain such evidence. An MRI taken on February 4,
3 2009, showed that Plaintiff suffers from severe and moderate
4 stenosis in several places on his spine. (AR at 179-80.)
5 Additionally, Dr. Bhat states in a December 6, 2010 letter that
6 Plaintiff was receiving pain injections from a pain specialist. (AR
7 at 271.) Moreover, the treatment records reflect that Plaintiff
8 consistently had complaints of neck pain and was repeatedly
9 prescribed strong pain medications. (AR at 187-217.) In light of
10 this evidence, the ALJ's rejection of Dr. Bhat's findings is not
11 supported by substantial evidence.

12 The ALJ's second reason for rejecting Dr. Bhat's opinion, that
13 Plaintiff "only had minimal treatment over the years," is not
14 substantially supported either because there was significant
15 evidence that Plaintiff could not afford to see a medical provider
16 more frequently. See *Orn v. Astrue*, 495 F.3d 625 (9th Cir. 2007)
17 ("`[d]isability benefits may not be denied because of the
18 claimant's failure to obtain treatment he cannot obtain for lack of
19 funds'") (quoting *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir.
20 1995)); *Smolen*, 80 F.3d 1273 at 184. Plaintiff testified that he
21 did not have insurance coverage for therapy, (AR at 36-38), and
22 there was additional evidence that he could not afford surgery or
23 other procedures apparently discussed with Dr. Bhat. (AR at 189,
24 198.) Given that Plaintiff saw Dr. Bhat multiple times over a two-
25 and-a-half year period and could not afford more extensive
26 treatment, it was error for the ALJ to rely on the lack of
27 additional treatment as a reason for rejecting Dr. Bhat's opinion.

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1 Third, the ALJ found that Dr. Bhat's opinion that Plaintiff
2 "would be unable to perform a job that required watching a video
3 screen" was not credible "in light of [Plaintiff's] testimony that
4 this daily activities include watching television." (AR at 14.) The
5 ALJ's RFC rejected not only Dr. Bhat's opinion regarding
6 Plaintiff's capacity to watch video screens, but also his opinion
7 as to plaintiff's ability to lift weight and sit and stand
8 throughout a workday. (AR at 13, 258.)

9 Plaintiff's ability to watch TV does not appear to have a
10 bearing on these other aspects of Dr. Bhat's opinion, and thus does
11 not constitute a legitimate reason for rejecting them. Furthermore,
12 Plaintiff clarified in his testimony that he reclines while he is
13 seated at home, rather than maintaining an upright seated position.
14 (AR at 40-43.) Dr. Bhat's opinion that Plaintiff would be unable to
15 do work involving watching video screen monitors, a task presumably
16 performed while sitting upright, because of his inability to turn
17 his neck or maintain certain positions is not inconsistent with
18 Plaintiff's testimony that he watches TV from a reclining position.

19 Finally, the ALJ rejected Dr. Bhat's opinion because Dr. Bhat
20 is not an orthopedic or pain management specialist, but rather an
21 internist, who is trained in the prevention and treatment of adult
22 diseases. (AR at 14.) Examining physician Dale H. Van Kirk, MD,
23 whose findings were specifically adopted by the ALJ, is a board
24 certified orthopedist.¹ (AR at 184-85.)

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27 ¹ Dr. Van Kirk found that Plaintiff could stand or walk 6
28 hours out of an 8-hour day, if allowed to sit 5-10 minutes every
hour, had no limitations in sitting, and could frequently lift 25
pounds and occasionally 50 pounds. (AR 184.)

1 The regulations provide that generally more weight is given to
2 the opinion of a specialist on medical issues related to his or her
3 area of specialty. 20 CFR § 404.1527(c)(2)(ii)(5). *Holohan v.*
4 *Massanari*, 246 F.3d 1195, 1202-03, n. 2 (9th Cir. 2001) (a treating
5 physician's opinion may be entitled to little weight "on a matter
6 not related to his or her area of specialization."). The
7 regulations do not specify, however, how to resolve the tension
8 between the rule giving deference to specialists and the rule
9 regarding giving greater weight to the opinion of a treating
10 physician over examining or consulting physicians. *See generally* 20
11 CFR § 404.1527(c); *see also* *Yang v. Barnhart*, No. 04-958, 2006 WL
12 3694857 at *3 (C.D. Cal. Dec. 12, 2006) (noting that "we have two
13 competing rules in play"). In at least one decision, the Ninth
14 Circuit has found that it was improper for the ALJ to have based
15 his rejection of the treating physician's opinion on the ground
16 that he was not a specialist in the area for which he treated
17 plaintiff. *See Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1996).
18 Here, Dr. Bhat's training as an internist encompasses the ability
19 to generally diagnose and treat adult disease, and therefore his
20 practice is not wholly unrelated to Plaintiff's type of injury.
21 Given this fact and the ambiguity regarding the weight properly
22 accorded to treating physicians as compared to specialists, the
23 Court finds that Dr. Bhat's lack of certification in orthopedics
24 does not on its own constitute a specific and legitimate reason for
25 rejecting his opinion. As the other three reasons provided by the
26 ALJ for rejecting Dr. Bhat's opinion are not supported by
27 substantial evidence, the ALJ has failed to state adequate reasons
28 for rejecting Dr. Bhat's opinion.

1 **B. The ALJ Improperly Evaluated Plaintiff's Credibility**

2 Plaintiff contends that the ALJ failed to properly evaluate
3 his credibility. At the hearing, Plaintiff testified that he sits
4 and reclines most of the day, that his neck and shoulder ache
5 constantly and his neck pain has been getting worse, that he has
6 severe headaches on a daily basis that last from 8 to 12 hours, and
7 that medicine does not significantly relieve his pain. (AR at 36-
8 48.)

9 To determine whether a claimant's testimony about subjective
10 pain or symptoms is credible, an ALJ must engage in a two-step
11 analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009)
12 (citing *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir.
13 2007)). First, the ALJ must determine whether the claimant has
14 presented objective medical evidence of an underlying impairment
15 which could reasonably be expected to produce the alleged pain or
16 other symptoms. *Lingenfelter*, 504 F.3d at 1036. "[O]nce the
17 claimant produces objective medical evidence of an underlying
18 impairment, an adjudicator may not reject a claimant's subjective
19 complaints based solely on a lack of objective medical evidence to
20 fully corroborate the alleged severity of pain." *Bunnell v.*
21 *Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc). To the
22 extent that an individual's claims of functional limitations and
23 restrictions due to symptoms are reasonably consistent with the
24 objective medical evidence and other evidence in the case, the
25 claimant's allegations will be credited. SSR 96-7p, 1996 WL 374186

1 at *2 (explaining 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4)).²

2 When there is no affirmative evidence showing that the
3 claimant is malingering, the ALJ must provide specific, clear and
4 convincing reasons for discrediting a claimant's complaints.
5 *Robbins*, 466 F.3d at 883. "General findings are insufficient;
6 rather, the ALJ must identify what testimony is not credible and
7 what evidence undermines the claimant's complaints." *Reddick*, 157
8 F.3d at 722 (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.
9 1996)). The ALJ must consider a claimant's work record,
10 observations of medical providers and third parties with knowledge
11 of claimant's limitations, aggravating factors, functional
12 restrictions caused by symptoms, effects of medication, and the
13 claimant's daily activities. *Smolen v. Chater*, 80 F.3d 1273,
14 1283-84 & n.8 (9th Cir. 1996). The ALJ may also consider an
15 unexplained failure to seek treatment or follow a prescribed course
16 of treatment and employ other ordinary techniques of credibility
17 evaluation. *Id.* (citations omitted).

18 Here, the ALJ concluded that Plaintiff's "medically
19 determinable impairments could reasonably be expected to cause some
20 of the alleged symptoms." (AR at 20.) However, the ALJ rejected
21 Plaintiff's statements "concerning the intensity, persistence and
22 limiting effects of these symptoms" to the extent they are
23 inconsistent with the RFC allowing for the performance of a limited
24

25 ² "The Secretary issues Social Security Rulings to clarify the
26 Secretary's regulations and policy Although SSRs are not
27 published in the federal register and do not have the force of law,
28 [the Ninth Circuit] nevertheless give[s] deference to the
Secretary's interpretation of its regulations." *Bunnell*, 947 F.2d
at 346 n.3.

1 range of light work activity. (AR at 13.) As there was no evidence
2 of malingering, the ALJ was required to provide clear and
3 convincing reasons for rejecting Plaintiff's testimony.

4 The ALJ provided two reasons for rejecting this testimony.
5 First, he found that Plaintiff had received only conservative
6 treatment. Specifically, he noted that: (1) Plaintiff had not had
7 surgery or injections or seen specialists; (2) there was no
8 evidence of herniation, nerve compression or severe stenosis; and
9 (3) had doctor visits only every couple of months for medication
10 refills, without any emergency room or urgent care visits. "[A]n
11 unexplained, or inadequately explained, failure to seek treatment
12 may be the basis for an adverse credibility finding unless one of
13 a number of good reasons for not doing so applies." *Orn v. Astrue*,
14 495 F.3d 625, 638 (9th Cir. 2007) (internal citations and quotation
15 marks omitted). One such "good reason" for failing to seek
16 treatment is the inability to afford it. *Id.* As discussed above,
17 there was evidence here that although surgery and other options
18 were discussed with his treating physician Dr. Bhat, Plaintiff
19 could not afford this additional treatment. (AR at 36-38, 189,
20 198.) Furthermore, as also addressed above, there is objective
21 evidence in the record showing that Plaintiff does suffer from
22 severe stenosis and has had injections. (AR at 179-80, 271.)
23 Accordingly, the ALJ's reliance on this reason for his adverse
24 credibility finding was improper.

25 Next, the ALJ discredited Plaintiff's symptom testimony based
26 on his daily activities. A disability claimant's daily activities
27 "may be grounds for an adverse credibility finding if a claimant is
28 able to spend a substantial part of his day engaged in pursuits

1 involving the performance of physical functions that are
2 transferable to a work setting." *Orn*, 495 F.3d at 639 (internal
3 quotation marks omitted). Here, the ALJ noted that Plaintiff had
4 testified that he "sits most of the day, vacuums, goes grocery
5 shopping, watches television, and cooks a little." (AR at 13.)
6 These limited activities, however, are not inconsistent with
7 Plaintiff's testimony regarding his abilities. Furthermore, the
8 record clarifies that these activities are done on a limited basis
9 and while in pain. Plaintiff testified that most of the time he is
10 sitting, it is in a reclining position, and that he experiences
11 constant discomfort in his neck. (AR at 41, 43.) Additionally,
12 Plaintiff testified that he vacuums only occasionally. (AR at 39.)
13 When he does perform an activity such as vacuuming or cooking, he
14 "pay[s] for it" and needs to rest immediately following it. (AR at
15 39, 44.) In short, the fact that Plaintiff is not "utterly
16 incapacitated" does not prevent a finding of disability nor render
17 his testimony not credible. *See Vertigan v. Halter*, 260 F.3d 1044,
18 1050 (9th Cir. 2001) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th
19 Cir. 1989) (One does not need to be "utterly incapacitated" in
20 order to be disabled).

21 22 **IV. CONCLUSION**

23 As a general rule, remand is warranted where additional
24 administrative proceedings could remedy defects in the
25 Commissioner's decision. *See Harman v. Apfel*, 211 F.3d 1172, 1179
26 (9th Cir. 2000). In this case, remand for a new hearing is
27 appropriate to properly consider the opinions of Dr. Bhat and
28

1 Plaintiff's testimony, and to fully develop the record.³

2 Accordingly, the decision of the Commissioner is reversed; and
3 this action is remanded for further proceedings consistent with
4 this opinion and order.

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6 Dated: August 1, 2012

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Marc L. Goldman
United States Magistrate Judge

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27 ³ As the Court has elected to remand this case based on the
28 two legal errors discussed above, the other three claims of error
will not be addressed.