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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CARLOS A. FLORES,	)	NO. CV 12-01424-MAN
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION
v.	)	
	)	AND ORDER
CAROLYN W. COLVIN, <sup>1</sup>	)	
Acting Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on February 23, 2012, seeking review of the denial of plaintiff's application for a period of disability and disability insurance benefits ("DIB"). On March 13, 2012, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on December 13, 2012, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the

<sup>1</sup> Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013, and is substituted in place of former Commissioner Michael J. Astrue as the defendant in this action. (See Fed. R. Civ. P. 25(d).)

1 payment of benefits; and the Commissioner requests that her decision be  
2 affirmed or, alternatively, remanded for further administrative  
3 proceedings.

4  
5 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**  
6

7 Plaintiff filed an application for a period of disability and DIB  
8 on December 5, 2007. (Administrative Record ("A.R.") 191, 261.)  
9 Plaintiff, who was born on June 8, 1970,<sup>2</sup> claims to have been disabled  
10 since September 13, 2006 (A.R. 16, 191). Plaintiff has past relevant  
11 work experience as construction worker. (A.R. 22.)  
12

13 After the Commissioner denied plaintiff's claims initially (A.R.  
14 123-27), plaintiff requested a hearing (A.R. 128). On May 12, 2009,  
15 plaintiff, who was represented by counsel, appeared and testified at a  
16 hearing before Administrative Law Judge Robert S. Eisman (the "ALJ").  
17 (A.R. 70-104.) Vocational expert Freeman Leeth also testified. (*Id.*)  
18 On June 5, 2009, the ALJ denied plaintiff's claim. (A.R. 109-15.)  
19

20 Plaintiff requested review of the ALJ's decision (A.R. 264-69), and  
21 the Appeals Council subsequently vacated the ALJ's decision and remanded  
22 the case to the ALJ for further proceedings (A.R. 119-122). In its  
23 Order, the Appeals Council ordered the ALJ to: (1) "[r]ule on the issue  
24 of disability in [plaintiff]'s case through December 31, 2007, the date  
25 that he last met the insured status requirements of the Social Security  
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27 <sup>2</sup> On the alleged onset date, plaintiff was 36 years old, which  
28 is defined as a younger individual. (A.R. 22; citing 20 C.F.R.  
§ 404.1563.)

1 Act"; (2) "[g]ive further consideration to [plaintiff]'s maximum [RFC]  
2 and provide appropriate rationale with specific references to evidence  
3 of record in support of the assessed limitations"; and (3) "[i]f  
4 warranted by the expanded record, obtain supplemental evidence from a  
5 vocational expert to clarify the effect of the assessed limitations on  
6 [plaintiff]'s occupational base." (A.R. 121.)

7  
8 On September 14, 2010, plaintiff again appeared and testified  
9 before the ALJ. (A.R. 29-57.) Vocational expert Joseph Torres and  
10 medical expert William Temple, M.D. also testified. (*Id.*) On October  
11 1, 2010, the ALJ denied plaintiff's claim (A.R. 16-24), and the Appeals  
12 Council subsequently denied plaintiff's request for review of the ALJ's  
13 decision (A.R. 1-4). That decision is now at issue in this action.

14  
15 **SUMMARY OF ADMINISTRATIVE DECISION**

16  
17 In his October 1, 2010 decision, the ALJ found that plaintiff met  
18 the insured status requirements of the Social Security Act through  
19 December 31, 2007,<sup>3</sup> and he has not engaged in substantial gainful  
20 activity since September 13, 2006, the alleged onset date of his  
21 disability. (A.R. 19.) The ALJ determined that plaintiff has the  
22 severe impairments of "status post anterior and posterior L4-S1 lumbar  
23 spine fusion with internal fixation for degenerative disk disease, with  
24 spondylolisthesis and spondylosis," but he does not have an impairment  
25 or combination of impairments that meets or medically equals one of the

26  
27 <sup>3</sup> The ALJ also found that plaintiff "meets the insured status  
28 requirements through September 30, 2012 for Medicare only based upon  
Medicare Qualified Government Employment." (A.R. 19 n.1.)

1 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20  
2 C.F.R. §§ 404.1520(d), 404.1525, 404.1526). (*Id.*)

3  
4 After reviewing the record, the ALJ determined that plaintiff has  
5 the residual functional capacity ("RFC") to perform sedentary work as  
6 defined in 20 C.F.R. § 404.1567(a) from September 13, 2006, the alleged  
7 onset date, to June 21, 2007, the date of his surgery. (A.R. 19.)  
8 Specifically, the ALJ found that, during this time period, plaintiff  
9 could: "exert up to 10 pounds of force occasionally and/or exert a  
10 negligible amount of force frequently to move objects, including the  
11 human body"; "stand and walk up to 2 hours and sit up to 6 hours in an  
12 8-hour workday with normal breaks"; "perform work that does not require  
13 climbing ladders, ropes or scaffolds"; perform "no more than frequent  
14 balancing and kneeling"; "perform work that allows for use of a hand-  
15 held assistive device for prolonged ambulation, i.e., more than 30  
16 minutes, and when walking on uneven terrain or ascending and descending  
17 slopes"; and "perform work that does not require any exposure to extreme  
18 vibration, and any concentrated exposure to hazardous machinery,  
19 unprotected heights, or other high risk, hazardous or unsafe  
20 conditions." (A.R. 19-20.) However, as of June 21, 2007, the ALJ found  
21 that plaintiff "was not able to work due to surgery and needed  
22 recovery/rehabilitation, which was expected to continue for no more than  
23 9-10 months, after which time [plaintiff] could resume sedentary work,  
24 including occasional stooping and crouching, with subsequent ability to  
25 do light exertion level work with frequent stooping and crouching."  
26 (A.R. 20.)

27  
28 The ALJ found that plaintiff was unable to perform his past

1 relevant work as a construction worker. (A.R. 22.) However, based upon  
2 his RFC assessment for plaintiff and after having considered plaintiff's  
3 age, education,<sup>4</sup> work experience, and the testimony of the vocational  
4 expert, the ALJ found that "there are jobs that exist in significant  
5 numbers in the national economy that [plaintiff] can perform," including  
6 the jobs of "order clerk," "cable worker," and "product sorter." (A.R.  
7 23.) Accordingly, the ALJ concluded that plaintiff has not been under  
8 a disability, as defined in the Social Security Act, from September 13,  
9 2006, the alleged onset date, through December 31, 2007, the date last  
10 insured. (A.R. 24.)

11  
12 **STANDARD OF REVIEW**  
13

14 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
15 decision to determine whether it is free from legal error and supported  
16 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
17 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant  
18 evidence as a reasonable mind might accept as adequate to support a  
19 conclusion.'" *Id.* (citation omitted). The "evidence must be more than  
20 a mere scintilla but not necessarily a preponderance." Connett v.  
21 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the  
22 record can constitute substantial evidence, only those 'reasonably drawn  
23 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,  
24 1066 (9th Cir. 2006)(citation omitted).

25  
26 Although this Court cannot substitute its discretion for that of

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<sup>4</sup> The ALJ found that plaintiff has at least a high school  
education and is able to communicate in English. (A.R. 22.)

1 the Commissioner, the Court nonetheless must review the record as a  
2 whole, "weighing both the evidence that supports and the evidence that  
3 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
4 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also  
5 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
6 responsible for determining credibility, resolving conflicts in medical  
7 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
8 1035, 1039 (9th Cir. 1995).

9  
10 The Court will uphold the Commissioner's decision when the evidence  
11 is susceptible to more than one rational interpretation. Burch v.  
12 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may  
13 review only the reasons stated by the ALJ in his decision "and may not  
14 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d  
15 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse  
16 the Commissioner's decision if it is based on harmless error, which  
17 exists only when it is "clear from the record that an ALJ's error was  
18 'inconsequential to the ultimate nondisability determination.'" Robbins  
19 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.  
20 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d  
21 at 679.

## 22 23 DISCUSSION

24  
25 Plaintiff claims the ALJ erred by not considering  
26 properly: (1) the opinions of plaintiff's treating physicians; and  
27 (2) plaintiff's subjective symptoms and credibility. (Joint Stipulation  
28 ("Joint Stip.") at 4-8, 11-14, 16-17.)

1           I.    The ALJ Failed To Set Forth Appropriate Reasons For  
2                    Rejecting The Opinions Of Plaintiff's Treating  
3                    Physicians.

4  
5           It is the responsibility of the ALJ to analyze evidence and resolve  
6 conflicts in medical testimony. Magallanes v. Bowen, 881 F.2d 747, 750  
7 (9th Cir. 1989). In the hierarchy of physician opinions considered in  
8 assessing a social security claim, "[g]enerally, a treating physician's  
9 opinion carries more weight than an examining physician's, and an  
10 examining physician's opinion carries more weight than a reviewing  
11 physician's." Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir.  
12 2001); 20 C.F.R. § 404.1527(d).

13  
14           The opinions of treating physicians are entitled to the greatest  
15 weight, because the treating physician is hired to cure and has a better  
16 opportunity to observe the claimant. Magallanes, 881 F.2d at 751. When  
17 a treating physician's opinion is not contradicted by another physician,  
18 it may be rejected only for "clear and convincing" reasons. Lester v.  
19 Chater, 81 F.3d 821, 830 (9th Cir. 1995). When contradicted by another  
20 doctor, a treating physician's opinion may only be rejected if the ALJ  
21 provides "specific and legitimate" reasons supported by substantial  
22 evidence in the record. *Id.*

23  
24           A.    Dr. Williams

25  
26           In his decision, the ALJ rejected the opinion of Lytton A.  
27 Williams, M.D., an orthopedic surgeon, in favor of that of non-  
28 examining, medical expert William E. Temple, M.D., an orthopedic

1 surgeon, because: (1) "Dr. Williams is a physician who treated  
2 [plaintiff] for workers' compensation purposes, i.e., for the specific  
3 purpose of examining and treating [plaintiff] because he applied for  
4 workers' compensation benefit, which raises a specter of bias"; and  
5 (2) Dr. Williams rendered an opinion that plaintiff was disabled and/or  
6 unable to work -- a determination which is reserved to the Commissioner.  
7 (A.R. 21-22.)

8  
9 The ALJ's first reason for rejecting Dr. McLennan's opinion -- to  
10 wit, that a specter of bias is raised, because Dr. Williams is a  
11 workers' compensation physician -- is unavailing. The ALJ has failed to  
12 point to, and the record does not contain, *any* evidence of impropriety  
13 or bias on the part of Dr. Williams. See Lester, 81 F.3d at 832 ("The  
14 Secretary may not assume that doctors routinely lie in order to help  
15 their patients collect disability benefits")(citation omitted); see  
16 also Nguyen v. Chater, 100 F.3d 1462, 1465 (9th Cir. 1996)(noting that  
17 the source of a report is a factor that justifies rejection only if  
18 there is evidence of actual impropriety or no medical basis for the  
19 opinion). Further, an ALJ "may not disregard a physician's medical  
20 opinion simply because it was initially elicited in a state workers'  
21 compensation proceeding, or because it is couched in the terminology  
22 used in such proceedings." Booth v. Barnhart, 181 F. Supp. 2d 1099,  
23 1105 (C.D. Cal. 2002)(citing Coria v. Heckler, 750 F.2d 245, 247 (3d  
24 Cir. 1984)(holding that by failing to consider medical reports submitted  
25 in state workers' compensation proceedings the ALJ failed to weigh all  
26 the evidence of record)). Accordingly, the ALJ's first rationale does  
27 not constitute a specific and legitimate reason for rejecting the  
28 opinion of Dr. Williams.



1           The ALJ's second reason for rejecting the opinion of Dr. Williams  
2 is misguided. While it is true that a treating physician's opinion on  
3 the matter of ultimate disability is not determinative or entitled to  
4 special weight, "a treating physician's *medical* opinions are generally  
5 [entitled] to more weight." Boardman v. Astrue, 286 Fed. Appx. 397, 399  
6 (9th Cir. 2008)(citing 20 C.F.R. § 404.1527(d)(2)). A medical opinion  
7 "'reflect[s] judgments about the nature and severity of [a claimant's]  
8 impairment(s), including [a claimant's] symptoms, diagnosis and  
9 prognosis, what [a claimant] can still do despite impairment(s), and [a  
10 claimant's] physical or mental restrictions.'" *Id.* (citing 20 C.F.R.  
11 § 404.1527(a)(2)). Here, beyond finding that plaintiff was temporarily  
12 disabled and/or unable to work, Dr. Williams diagnosed plaintiff with,  
13 *inter alia*, a loose screw at the L4 location and painful  
14 hardware/instrumentation as a result of his lumbar spine fusion (A.R.  
15 531), chronic lumbosacral sprain/strain (A.R. 536, 553, 556),  
16 degenerative disc disease at L3-S1 (A.R. 541, 545), and radiculopathy at  
17 L4 and L5 (A.R. 549). In addition, Dr. Williams opined that plaintiff  
18 would have "difficulty with prolonged sitting, standing and walking."  
19 (A.R. 397.) Dr. Williams' treatment records document plaintiff's  
20 continued complaints of, *inter alia*, moderate to severe pain in his  
21 lower back and bilateral lower extremities as well as Dr. Williams'  
22 findings of diminished reflexes at plaintiff's bilateral knees and  
23 ankles, positive orthopedic testing, and restricted range of motion,  
24 tenderness, and spasms in plaintiff's back.<sup>5</sup>

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25  
26           <sup>5</sup> See, e.g., A.R. 397 (11/25/08 Report - noting plaintiff "has  
27 moderate constant low back pain and right leg pain" and "restricted and  
28 painful range of motion on flexion, extension, lateral bending and  
rotation, tenderness and spasms to midline and paraspinal muscles,  
diminished reflexes to the knees and ankles, decreased motor strength,

1 While the Commissioner correctly asserts that most of the treatment  
2 records post-date plaintiff's date last insured of December 31, 2007,  
3 Dr. Williams' records show that plaintiff's spinal surgery resulted in  
4 a complication, *to wit*, a loose screw and painful instrumentation, which  
5 resulted in a subsequent hardware removal surgery -- a complication  
6 which was not accounted for in the ALJ's RFC assessment. As relevant  
7 here, the ALJ's RFC assessment for plaintiff provided that "as of June  
8 21, 2007, [plaintiff] was not able to work due to surgery and needed  
9 recovery/rehabilitation, *which was expected to continue for not more*  
10 *than 9-10 months*, after which time [plaintiff] could resume sedentary  
11 work." (A.R. 20; emphasis added.) In so finding, the ALJ relied upon  
12 the testimony of non-examining physician Dr. Temple, who had the  
13 opportunity to review Dr. Williams' diagnosis of the loose screw, but  
14 not his latter diagnosis of painful instrumentation/hardware for which

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15 as well as positive orthopedic testing including positive straight leg  
16 raise on the right with reproduction of back pain and positive Lasegue  
17 test on the right"); A.R. 526-27 (10/19/09 Report - noting plaintiff's  
18 "continued subjective complaints of moderate to severe constant pain in  
19 the low back with radiation of pain, numbness and tingling sensation to  
20 the bilateral legs, left greater than right, weakness in his bilateral  
21 legs, ambulating with a cane, combined with the objective findings of  
22 decreased and restricted range of motion of the lumbar spine with  
23 flexion, extension and lateral bending, pain with extension, tenderness  
24 and spasms to midline and paraspinal muscles[,] abnormal gait,  
25 diminished reflexes at the bilateral knees and ankles, decreased motor  
26 strength at the bilateral anterior tibialis, EHL and gastroc soleus,  
27 decreased sensation to light touch at the left lower extremity, as well  
28 as positive orthopedic testing including positive straight leg raising  
bilaterally with reproduction of back pain and positive Lasegue test  
bilaterally"); A.R. 522 (12/2/09 Report - noting plaintiff's "continued  
subjective complaints of worsened and increasing severe constant pain in  
the low back and bilateral legs with associated spasm, abnormal motion  
in his back, increased weight due to inactivity and limitations, [as  
well as] objective findings of decreased and restricted range of motion  
with flexion, extension, lateral bending and rotation, pain with  
extension, tenderness and spasm to midline and paraspinal muscles,  
diminished reflexes at the bilateral knees and ankles, as well as  
positive orthopedic testing including positive straight leg raising  
bilaterally and reproduction of back pain and positive Lasegue test  
bilaterally").

1 plaintiff had removal surgery.<sup>6</sup> Critically, this evidence could have  
2 affected Dr. Temple's opinion regarding plaintiff's recovery time.  
3 Given these circumstances, the ALJ's apparent rejection of Dr. Williams'  
4 opinion on the ground that it also contained an opinion regarding the  
5 ultimate issue of disability is not legitimate. See Boardman, 286 Fed.  
6 Appx. at 399 (finding that "while [the fact that the treating physician  
7 expressed an opinion regarding Boardman's ultimate disability and  
8 residual functional] may be a specific reason to reject a treating  
9 physician's medical opinion, it is not a legitimate one").<sup>7</sup>

10  
11 Accordingly, for the aforementioned reasons, the ALJ failed to  
12 properly reject the opinion of Dr. Williams.

13  
14 B. Dr. North

15  
16 In a March 11, 2009 Mental Impairment Questionnaire ("March 11  
17 Questionnaire"), Dr. Richard North, who began treating plaintiff in May  
18 2008, diagnosed plaintiff with depressive disorder and assessed

19  
20 <sup>6</sup> Indeed, when asked about plaintiff's later hardware removal  
21 surgery, Dr. Temple testified that "[o]ne reason [for the surgery] might  
22 have been that [plaintiff] had that screw that was loose in there and  
23 they may have wanted to inspect the fusion to make sure that it was  
24 indeed solid as it was shown on the X-rays." (A.R. 48.) Notably, Dr.  
25 Temple's testimony indicates that he was entirely unaware of Dr.  
26 Williams' painful hardware/instrumentation diagnosis and the resulting  
27 pain and symptoms that plaintiff suffered.

28 <sup>7</sup> Moreover, while it is true that medical source opinions on  
issues reserved to the Commissioner, such as the determination of  
claimant's ultimate disability, are not determinative or entitled to  
special weight based on the source of the medical opinion, it is not  
true that the Commissioner is free to disregard this  
information. Social Security Ruling ("SSR") 96-8p, 1996 SSR LEXIS 5, at  
\*21 n.8. Rather, the ALJ is instructed to consider such opinions in  
adjudicating a disability claim. *Id.*

1 plaintiff with a GAF score of 63. (A.R. 512.) Dr. North opined that,  
2 with respect to the abilities and aptitudes necessary to do unskilled  
3 work, plaintiff was "[l]imited but satisfactory" in his ability to:  
4 remember work-like procedures; understand, remember, and carry out very  
5 short and simple instructions; maintain attention for a two hour  
6 segment; work in coordination with or proximity to others without being  
7 unduly distracted; perform at a consistent pace without an unreasonable  
8 number and length of rest periods; ask simple questions or request  
9 assistance; accept instructions and respond appropriately to criticism  
10 from supervisors; and get along with co-workers or peers without unduly  
11 distracting them or exhibiting behavioral extremes. (A.R. 513-14.) Dr.  
12 North further opined that plaintiff would be severely limited in, but  
13 not precluded from, the following mental abilities and aptitudes  
14 necessary to do unskilled work: maintain regular attendance and be  
15 punctual within customary, usually strict tolerances; sustain an  
16 ordinary routine without special supervision; complete a normal weekday  
17 and work week without interruptions from psychologically based symptoms;  
18 respond appropriately to changes in a routine work setting; deal with  
19 normal work stress; and be aware of normal hazards and take appropriate  
20 precautions. (*Id.*)

21  
22 With respect to semiskilled and skilled work, Dr. North opined that  
23 plaintiff would be "[l]imited but satisfactory" in his mental abilities  
24 and aptitudes to: understand and remember detailed instructions; carry  
25 out detailed instructions; set realistic goals or make plans  
26 independently of others; and deal with the stress of semiskilled and  
27 skilled work. (A.R. 515.) With respect to the mental abilities and  
28 aptitudes necessary to do "particular types of jobs," Dr. North opined

1 that plaintiff would be "[l]imited but satisfactory" in his ability to:  
2 interact appropriately with the general public; maintain socially  
3 appropriate behaviors; adhere to basic standards of neatness and  
4 cleanliness; and travel in unfamiliar places. (*Id.*) Dr. North opined  
5 that in terms of functional limitations, plaintiff would have "None-  
6 Mild": restrictions of activities of daily living; difficulties in  
7 maintaining social functioning; and deficiencies of concentration,  
8 persistence, or pace. (A.R. 516.) As a result of plaintiff's  
9 impairments or treatment, Dr. North opined that plaintiff would be  
10 absent from work more than four days per month. (*Id.*)

11  
12 In his decision, the ALJ failed to mention, let alone give an  
13 appropriate reason for rejecting, the opinion of Dr. North. This  
14 constitutes error. While it is true, as the Commissioner contends, that  
15 Dr. North's March 11 Questionnaire post-dates plaintiff's date last  
16 insured (Joint Stip. at 11), the Ninth Circuit has held that "[m]edical  
17 evaluations made after the expiration of a claimant's insured status are  
18 relevant to the pre-expiration conditions." Smith v. Bowen, 849 F.2d  
19 1222, 1225 (9th Cir. 1988), reaffirmed in Lester, 81 F.3d at 832. In  
20 this case, there is evidence that plaintiff suffered from depression  
21 both prior to, and after, his date last insured. For example, plaintiff  
22 alleged in his Exertional Daily Activities Questionnaire dated December  
23 28, 2007, that he was depressed. (See, e.g., A.R. 219, 221.) In  
24 addition, at the May 12, 2009 Administrative Hearing, plaintiff  
25 testified that his depression stemmed from his 2006 injury and that he  
26 had been seen by a psychiatrist for approximately 12 sessions and was  
27 currently taking medication for his depression. (A.R. 84-86.) Further,  
28 at the September 14, 2010 administrative hearing, Dr. Temple, the

1 medical expert to whom the ALJ gave great weight, noted that plaintiff  
2 has a "psychiatric diagnosis of depression which is not unusual in these  
3 cases." (A.R. 42.) Indeed, in his decision, the ALJ noted that  
4 "[plaintiff] has made several allegations concerning the nature,  
5 intensity, frequency, persistence and limiting effects of [his] *mental*  
6 and physical symptoms." (A.R. 20; emphasis added.) Accordingly, in  
7 view of this evidence, the Court cannot find the ALJ's failure to  
8 address Dr. North's opinion -- an opinion which may have shed light on  
9 plaintiff's pre-expiration condition -- to be harmless. Thus, remand is  
10 appropriate.<sup>8</sup>

11  
12 **II. The ALJ Failed To Give Clear And Convincing Reasons For**  
13 **Finding Plaintiff's Subjective Symptoms To Be Not**  
14 **Credible.**

15  
16 Once a disability claimant produces objective medical evidence of  
17 an underlying impairment that is reasonably likely to be the source of  
18 claimant's subjective symptom(s), all subjective testimony as to the  
19 severity of the symptoms must be considered. Moisa v. Barnhart, 367  
20 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 346  
21 (9th Cir. 1991); see also 20 C.F.R. § 404.1529(a) (explaining how pain  
22 and other symptoms are evaluated). "[U]nless an ALJ makes a finding of  
23 malingering based on affirmative evidence thereof, he or she may only  
24 find an applicant not credible by making specific findings as to

25  
26 <sup>8</sup> Although the Commissioner now offers other reasons to explain  
27 the ALJ's rejection of the opinion of Dr. North, the Court cannot  
28 entertain these post hoc rationalizations. See, e.g., Orn, 495 F.3d at  
630 ("We review only the reasons provided by the ALJ in the disability  
determination and may not affirm on a ground upon which he did not  
rely").

1 credibility and stating clear and convincing reasons for  
2 each." Robbins, 466 F.3d at 883. The factors to be considered in  
3 weighing a claimant's credibility include: (1) the claimant's  
4 reputation for truthfulness; (2) inconsistencies either in the  
5 claimant's testimony or between the claimant's testimony and her  
6 conduct; (3) the claimant's daily activities; (4) the claimant's work  
7 record; and (5) testimony from physicians and third parties concerning  
8 the nature, severity, and effect of the symptoms of which the claimant  
9 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.  
10 2002); see also 20 C.F.R. § 404.1529(c).

11  
12 An ALJ may not rely on a plaintiff's daily activities to support an  
13 adverse credibility determination when those activities do not affect  
14 the claimant's ability to perform appropriate work activities on an  
15 ongoing and daily basis. Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th  
16 Cir. 1990). As the Ninth Circuit noted in Lester, the ALJ must evaluate  
17 claimant's "'ability to work on a *sustained* basis.'" 81 F.3d at 833  
18 (emphasis in original; citation omitted). A claimant need not be  
19 "utterly incapacitated to be eligible for benefits . . . and many home  
20 activities are not easily transferable to what may be the more grueling  
21 environment of the workplace, where it might be impossible to  
22 periodically rest or take medication." Fair v. Bowen, 885 F.2d 597, 603  
23 (9th Cir. 1989)(internal citations omitted).

24  
25 In his Exertional Daily Activities Questionnaire, plaintiff  
26 indicated, *inter alia*, that his "pain keeps [him] from walking, sitting,  
27 standing, and twisting." (A.R. 219.) Plaintiff noted that he is unable  
28 to carry out a normal workday, because: (1) he experiences weakness in

1 his legs when he stands and walks; and (2) his medications make him feel  
2 drowsy and tired, and he experiences dry mouth. (*Id.*) Plaintiff stated  
3 he can walk for 8 minutes at a speed of 1.2 miles per hour, but “[i]t  
4 makes [him] feel tired, weak, and makes [his] legs weak.” (*Id.*) He  
5 also stated that he can climb “6 to 8 flights [of stairs] a day[, but]  
6 it’s very difficult for [him] because of the pain in [his] back.” (A.R.  
7 220.) Additionally, plaintiff indicated that he is depressed. (A.R.  
8 219, 221.)

9  
10 At the May 12, 2009 Administrative Hearing, plaintiff testified  
11 that he is taking Cyclobenzaprine, Norco, Lyrica, and Lidoderm patches  
12 for his pain as well as Lexapro and Cymbalta for his depression. (A.R.  
13 80.) Plaintiff testified that these medications make him experience dry  
14 mouth and drowsiness as well as not feel “100 percent - clear [in his]  
15 mind.” (A.R. 92-93.) In addition to his medications, plaintiff  
16 testified that he uses electrical stimulation “[a]bout three or four  
17 hours a [day], . . . for thirty minutes [at a time]” to treat his pain  
18 (A.R. 83); he also testified that he uses a cane, which was given to him  
19 by his doctor, when he ambulates and when he is sitting to help  
20 alleviate the pressure on his back (A.R. 86, 92).

21  
22 As noted *supra*, the ALJ found that plaintiff has the severe  
23 impairments of: “status post anterior and posterior L4-S1 lumbar spine  
24 fusion with internal fixation for degenerative disk disease, with  
25 spondylolisthesis and spondylosis.” (A.R. 19.) The ALJ also found that  
26 “[plaintiff]’s medically determinable impairments could reasonably be  
27 expected to cause the alleged symptoms.” (A.R. 20.) Further, the ALJ  
28 cited no evidence of malingering by plaintiff. Accordingly, the ALJ’s



1 reason for discrediting plaintiff's subjective complaints must be clear  
2 and convincing.

3  
4 The ALJ found that "[plaintiff]'s statements concerning the  
5 intensity, persistence and limiting effects of [his] symptoms are not  
6 credible to the extent they are inconsistent with [the ALJ's RFC]  
7 assessment." (A.R. 20.) In so finding, the ALJ incorporated by  
8 reference the findings and conclusions of his June 5, 2009 decision,  
9 which, according to the ALJ, "included a detailed analysis of the  
10 objective medical evidence and other credibility factors which do not  
11 fully support [plaintiff]'s complaints and render his assertions only  
12 partially credible." (*Id.*)

13  
14 In his June 5, 2009 decision, while the ALJ discussed the objective  
15 evidence, the ALJ did not give any clear and convincing reasons for  
16 finding plaintiff's subjective symptoms to be only "partially credible."  
17 Specifically, the ALJ stated:

18  
19 In determining [plaintiff]'s [RFC], great weight has been  
20 accorded to the opinion of the State Agency medical consultant  
21 who found [plaintiff] capable of performing sedentary work  
22 with occasional postural restrictions. Such restrictions are  
23 consistent with the objective clinical and diagnostic findings  
24 of ongoing lower back pain resulting in surgery and possible  
25 future surgery due to loose hardware. Nevertheless, in giving  
26 [plaintiff]'s subjective allegations full consideration and  
27 benefit of the doubt, the [ALJ] has additionally factored in  
28 to the [RFC] the need to use a hand-held assistive device for

1 prolonged ambulation and walking on uneven terrain, and the  
2 need to avoid hazardous and unsafe working conditions.

3  
4 [Plaintiff]'s own self-reported activities of daily living  
5 also support the [RFC]. [Plaintiff] has indicated that he can  
6 walk 1.2 miles per hour and apparently walk for 8 minutes at  
7 a time. [Plaintiff] has also stated that although it leaves  
8 him tired, he can walk 6-8 flights of stairs a day. Such  
9 allegations, while demonstrating significant restrictions in  
10 the ability to sustain prolonged ambulation, nevertheless,  
11 support a [RFC] of standing/walking for 2 hours per 8-hour  
12 workday with normal breaks. His allegations of being able to  
13 lift 5 pounds is also consistent with a restriction of lifting  
14 no more than 10 pounds occasionally lifting small office items  
15 or tools.

16  
17 (A.R. 113; internal citations omitted.)

18  
19 Although not entirely clear, to the extent the ALJ rejects  
20 plaintiff's subjective symptoms because they are not supported by the  
21 objective evidence, the failure of the medical record to corroborate a  
22 claimant's subjective symptoms fully is not, by itself, a legally  
23 sufficient basis for rejecting such testimony. *Rollins v. Massanari*,  
24 261 F.3d 853, 856 (9th Cir. 2001); *Bunnell*, 947 F.2d at 347 (noting that  
25 "[i]f an adjudicator could reject a claim of disability simple because  
26 [plaintiff] fails to produce evidence supporting the severity of the  
27 pain, there would be no reason for an adjudicator to consider anything  
28 other than medical findings"). Accordingly, the ALJ's reasoning cannot,

1 by itself, constitute a clear and convincing reason for rejecting  
2 plaintiff's subjective symptoms. See *Varney v. Secretary*, 846 F.2d 581,  
3 584 (9th Cir. 1988); *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir.  
4 1986).

5  
6 To the extent the ALJ finds plaintiff to be not credible because of  
7 his daily activities, the ALJ's reasoning is flawed. While it is true  
8 that an ALJ may find a claimant not credible if there is an  
9 inconsistency between the claimant's daily activities and his alleged  
10 symptoms, the ALJ has failed to identify any such inconsistency. See  
11 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) ("Only if the level  
12 of activity were inconsistent with Claimant's claimed limitations would  
13 these activities have any bearing on Claimant's credibility."). As  
14 such, the ALJ's reasoning is neither clear nor convincing.

15  
16 Moreover, although the ALJ states that plaintiff's RFC is supported  
17 by the objective evidence and "to a certain degree [by plaintiff]'s own  
18 allegations regarding his functional abilities," the ALJ failed to give  
19 any reason for failing to credit the full extent of plaintiff's alleged  
20 functional limitations. For example, as noted *supra*, plaintiff alleged  
21 that he cannot lift or carry more than five pounds or walk for more than  
22 8 minutes at a speed of 1.2 miles an hour without feeling "tired" and  
23 "weak" in his legs. Notwithstanding these allegations, the ALJ opined  
24 that plaintiff, except for the time that he was recovering from surgery,  
25 could perform "sedentary work" -- work that exceeds plaintiff's  
26 limitations and includes lifting up to 10 pounds, walking up to two  
27 hours, and sitting up to six hours in an eight-hour workday with normal  
28 breaks. Critically, however, the ALJ failed to explain why he did not

1 find plaintiff's allegations to be fully credible and/or how he  
2 reconciled the differences between plaintiff's alleged symptoms and the  
3 RFC assessment. Further, the ALJ failed to discuss plaintiff's  
4 depression and/or the side effects of plaintiff's medications, which  
5 cause him to feel tired and drowsy and have dry mouth. See Erickson v.  
6 Shalala, 9 F.3d 813, 817-18 (th Cir. 1993)(noting that an ALJ must  
7 consider all factors, including the side effects of medications, that  
8 might have a "significant impact on an individual's ability to work").  
9 This constitutes error.

10  
11 Accordingly, for the aforementioned reasons, the ALJ committed  
12 error, because he failed to give clear and convincing reasons, as  
13 required, for finding plaintiff to be not credible.<sup>9</sup>

14  
15 **III. Remand Is Required.**

16  
17 The decision whether to remand for further proceedings or order an  
18 immediate award of benefits is within the district court's discretion.  
19 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
20 useful purpose would be served by further administrative proceedings, or  
21 where the record has been fully developed, it is appropriate to exercise  
22 this discretion to direct an immediate award of benefits. *Id.* at 1179  
23 ("[T]he decision of whether to remand for further proceedings turns upon  
24 the likely utility of such proceedings."). However, where there are  
25

26  
27 <sup>9</sup> While the Commissioner now offers other reasons to explain the  
28 ALJ's credibility determination, the Court cannot entertain these post  
hoc rationalizations. See, e.g., Connett, 340 F.3d at 874 (finding that  
"[i]t was error for the district court to affirm the ALJ's credibility  
decision based on evidence that the ALJ did not discuss").

1 outstanding issues that must be resolved before a determination of  
2 disability can be made, and it is not clear from the record that the ALJ  
3 would be required to find the claimant disabled if all the evidence were  
4 properly evaluated, remand is appropriate. *Id.* at 1179-81.

5  
6 Remand is the appropriate remedy to allow the ALJ the opportunity  
7 to remedy the above-mentioned deficiencies and errors. *See, e.g.,*  
8 *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004)(remand for  
9 further proceedings is appropriate if enhancement of the record would be  
10 useful); *see Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.  
11 1993)(ordering remand so that the ALJ could articulate specific and  
12 appropriate findings, if any existed, for rejecting the claimant's  
13 subjective pain testimony). On remand, the ALJ must correct the above-  
14 mentioned deficiencies and errors. After doing so, the ALJ may need to  
15 reassess plaintiff's RFC, in which case additional testimony from a  
16 vocational expert likely will be needed to determine what work, if any,  
17 plaintiff can perform.

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1 **CONCLUSION**

2  
3 Accordingly, for the reasons stated above, IT IS ORDERED that the  
4 decision of the Commissioner is REVERSED, and this case is REMANDED for  
5 further proceedings consistent with this Memorandum Opinion and Order.  
6

7 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
8 copies of this Memorandum Opinion and Order and the Judgment on counsel  
9 for plaintiff and for defendant.  
10

11 **LET JUDGMENT BE ENTERED ACCORDINGLY.**  
12

13 DATED: July 1, 2013

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16 MARGARET A. NAGLE  
17 UNITED STATES MAGISTRATE JUDGE  
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