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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEVE FRED JACQUES, Plaintiff, v. CAROLYN W. COLVIN, Acting Commissioner of Social Security Administration, Defendant.	Case No. CV 12-2550-SP MEMORANDUM OPINION AND ORDER

I.

INTRODUCTION

On March 23, 2012, plaintiff Steve Fred Jacques filed a complaint against defendant Michael J. Astrue,[1] seeking a review of a denial of a period of disability and disability insurance benefits ("DIB"). Both plaintiff and defendant have consented to proceed for all purposes before the assigned Magistrate Judge

[1] Pursuant to Fed. R. Civ. P. 25(d), Carolyn W. Colvin, who is now Acting Commissioner of Social Security Administration, has been substituted as the defendant.

pursuant to 28 U.S.C. § 636(c). The court deems the matter suitable for adjudication without oral argument.

Plaintiff presents two disputed issues for decision: (1) whether the Administrative Law Judge ("ALJ") properly rejected the opinions of Drs. Stuart A. Green and Russell W. Nelson; and (2) whether the ALJ properly discounted plaintiff's credibility. Memorandum in Support of Plaintiff's Complaint ("Pl. Mem.") at 8-18; Memorandum in Support of Defendant's Answer ("Def. Mem.") at 2-9.

Having carefully studied, inter alia, the parties's moving papers, the Administrative Record ("AR"), and the decision of the ALJ, the court concludes that, as detailed herein, the ALJ improperly rejected the opinions of plaintiff's treating and examining physicians without providing specific and legitimate reasons supported by substantial evidence for doing so, and improperly discounted plaintiff's credibility. Therefore, the court remands this matter to the Commissioner of the Social Security Administration ("Commissioner") in accordance with the principles and instructions enunciated in this Memorandum Opinion and Order.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, who was fifty-eight years old on the date of his August 27, 2010 administrative hearing, has a twelfth grade education. *See* AR at 17, 23, 32. His past relevant work includes employment as a semi truck driver and loader and unloader. *Id.* at 54.

On March 6, 2009, plaintiff applied for DIB, alleging that he had been disabled since July 1, 2000, due to lower back, left shoulder, and right and left hand problems. *Id.* at 17, 58-60, 70, 128, 133. Plaintiff's application was denied initially and upon reconsideration, after which he filed a request for a hearing. *Id.* at 17, 58-60, 70, 76.

On August 27, 2010, plaintiff, represented by counsel, appeared and testified at a hearing before the ALJ. *Id.* at 31-53. The ALJ also heard testimony from Elizabeth Ramos, a vocational expert. *Id.* at 53-56. On September 23, 2010, the ALJ denied plaintiff's request for benefits. *Id.* at 17-24.

Applying the well-known five-step sequential evaluation process, the ALJ found, at step one, that plaintiff was not engaged in substantial gainful activity from July 1, 2000, his alleged disability onset date, to December 31, 2005, his date last insured ("DLI"). *Id.* at 19.

At step two, the ALJ found that, through the DLI, plaintiff suffered from severe medically determinable impairments consisting of: status post left shoulder surgery, left shoulder arthritis, lumbar spine arthritis, and cervical spine arthritis. *Id.*

At step three, the ALJ determined that, through the DLI, the evidence does not demonstrate that plaintiff's impairments, either individually or in combination, met or medically equaled the severity of any listing set forth in 20 C.F.R. Part 404, Subpart P, Appendix 1. *Id.*

The ALJ then assessed plaintiff's residual functional capacity ("RFC")[2] and determined that, through the DLI, he can perform light work with the following limitations:

> [plaintiff] could lift and/or carry 20 pounds occasionally and 10 pounds frequently, stand and/or walk (with normal breaks) for a total of six hours in an eight-hour workday, sit (with normal breaks) for a

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[2] Residual functional capacity is what a claimant can still do despite existing exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). "Between steps three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which the ALJ assesses the claimant's residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151 n.2 (9th Cir. 2007) (citation omitted).

total of six hours in an eight-hour workday, could perform postural activities occasionally, could perform pushing and pulling with the right upper extremity occasionally, could not perform overhead reaching with the left upper extremity, and could perform occasional manipulation with the left upper extremity.

Id. at 19-20 (bold omitted).

The ALJ found, at step four, that plaintiff was unable to perform any past relevant work. *Id.* at 23.

At step five, based upon plaintiff's RFC, vocational factors and the vocational expert's testimony, the ALJ concluded that "there were jobs that existed in significant numbers in the national economy that [plaintiff] could have performed," including counter clerk, conveyor belt bakery worker and blending tank tender. *Id.* 23-24 (bold omitted). Consequently, the ALJ concluded that plaintiff did not suffer from a disability as defined by the Social Security Act. *Id.* at 17, 24.

Plaintiff filed a timely request for review of the ALJ's decision, which was denied by the Appeals Council. *Id.* at 1-6, 112. The ALJ's decision stands as the final decision of the Commissioner.

III.

STANDARD OF REVIEW

This court is empowered to review decisions by the Commissioner to deny benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security Administration must be upheld if they are free of legal error and supported by substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001) (as amended). But if the court determines that the ALJ's findings are based on legal error or are not supported by substantial evidence in the record, the court may reject the findings and set aside the decision to deny benefits. *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d

1144, 1147 (9th Cir. 2001).

"Substantial evidence is more than a mere scintilla, but less than a preponderance." *Aukland*, 257 F.3d at 1035. Substantial evidence is such "relevant evidence which a reasonable person might accept as adequate to support a conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276 F.3d at 459. To determine whether substantial evidence supports the ALJ's finding, the reviewing court must review the administrative record as a whole, "weighing both the evidence that supports and the evidence that detracts from the ALJ's conclusion." *Mayes*, 276 F.3d at 459. The ALJ's decision "'cannot be affirmed simply by isolating a specific quantum of supporting evidence.'" *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir. 1998)). If the evidence can reasonably support either affirming or reversing the ALJ's decision, the reviewing court "'may not substitute its judgment for that of the ALJ.'" *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)).

IV.

DISCUSSION

A. The ALJ Failed to Provide Specific and Legitimate Reasons for Rejecting the Opinions of Plaintiff's Treating and Examining Physicians

Plaintiff argues that the ALJ improperly rejected the opinions of his treating physician, Dr. Nelson, and his examining physician, Dr. Green. Pl. Mem. at 8-12. Specifically, plaintiff contends that the ALJ erred when he "failed to accept or reject the opinions of Dr. Nelson" (*id.* at 9), and "failed to discuss . . . pertinent findings of Dr. Green." *Id.* at 12. The court agrees.

In determining whether a claimant has a medically determinable impairment, among the evidence the ALJ considers is medical evidence. 20 C.F.R. § 416.927(b). In evaluating medical opinions, the regulations distinguish

among three types of physicians: (1) treating physicians; (2) examining physicians; and (3) non-examining physicians. 20 C.F.R. § 416.927(c), (e); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (as amended). "Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing physician's." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001); 20 C.F.R. § 416.927(c)(1)-(2). The opinion of the treating physician is generally given the greatest weight because the treating physician is employed to cure and has a greater opportunity to understand and observe a claimant. *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996); *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

Nevertheless, the ALJ is not bound by the opinion of the treating physician. *Smolen*, 80 F.3d at 1285. If a treating physician's opinion is uncontradicted, the ALJ must provide clear and convincing reasons for giving it less weight. *Lester*, 81 F.3d at 830. If the treating physician's opinion is contradicted by other opinions, the ALJ must provide specific and legitimate reasons supported by substantial evidence for rejecting it. *Id.* at 830. Likewise, the ALJ must provide specific and legitimate reasons supported by substantial evidence in rejecting the contradicted opinions of examining physicians. *Id.* at 830-31. The opinion of a non-examining physician, standing alone, cannot constitute substantial evidence. *Widmark v. Barnhart*, 454 F.3d 1063, 1067 n.2 (9th Cir. 2006); *Morgan v. Comm'r*, 169 F.3d 595, 602 (9th Cir. 1999); *see also Erickson v. Shalala*, 9 F.3d 813, 818 n.7 (9th Cir. 1993).

1. Dr. Nelson

Dr. Nelson, an orthopedic surgeon with Downey Orthopedic Medical Group ("Downey"), treated plaintiff from at least July 8, 2000 through December 7,

2001.[3] AR at 238-91. On January 18, 2001, Dr. Nelson examined plaintiff and completed a Primary Treating Physician's Permanent and Stationary Report. *Id.* at 271-77. Dr. Nelson noted the following objective findings: status post subacromial debridement and arthroscopic of the glenohumeral joint; significant changes on x-rays of the left shoulder; and severe loss of motion. *Id.* at 275. Dr. Nelson diagnosed significant arthritis of the left shoulder and opined that plaintiff's "present left shoulder disability will preclude any type of heavy work with the left arm." *Id.* at 274-75. According to Dr. Nelson, plaintiff: "cannot do any lifting over 20 pounds" and "cannot do any pushing or pulling, and is precluded from all over shoulder work activity with the left arm." *Id.* at 275. Dr. Nelson based his opinion on his objective findings, plaintiff's subjective complaints, and a review of plaintiff's medical records. *Id.* at 271-75.

On August 22, 2001, Dr. Nelson further examined plaintiff and found, based on electrodiagnostic testing of plaintiff's upper extremities, that plaintiff exhibited: median neuropathy at both wrists; possible ulnar neuropathy of the left wrist; and evidence of polyneuropathy of the upper extremities. *Id.* at 244. Dr. Nelson opined based on these findings that plaintiff is further restricted from "repetitive gripping and grasping with the left hand," and that "[a]n additional restriction/disability could apply precluding fine manipulation with the left hand." *Id.* at 245.

In his decision, although the ALJ cited to some of Dr. Nelson's findings, he effectively ignored Dr. Nelson's opinion concerning plaintiff's work capacity and failed to explain why he omitted some of Dr. Nelson's limitations from plaintiff's RFC. *Compare id.* at 19-23 *with id.* at 245, 275. In particular, plaintiff's RFC

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[3] Plaintiff's medical records from Downey list Dr. Nelson as plaintiff's primary treating physician through at least December 24, 2003. AR at 200-37. But there is no indication in the record that Dr. Nelson treated plaintiff after December 7, 2001. *See id.*

does not reflect Dr. Nelson's determination that plaintiff is restricted from pushing and/or pulling with the left arm. *Compare id.* at 19-20 *with id.* at 275. The ALJ's failure to include the left arm push/pull restriction opined by Dr. Nelson in plaintiff's RFC constitutes an implicit rejection of Dr. Nelson's opinion. *See Smolen*, 80 F.3d at 1286 ("By disregarding [plaintiff's treating physicians'] opinions and making contrary findings, [the ALJ] effectively rejected them."). But the ALJ failed to provide any reason, let alone a specific and legitimate one, for rejecting Dr. Nelson's finding. *See*, *generally*, AR at 17-24. Indeed, he did not even acknowledge he was rejecting any portion of Dr. Nelson's findings. Accordingly, the ALJ erred in rejecting Dr. Nelson's opinion. *See Lester*, 81 F.3d at 830 ("Even if the treating doctor's opinion is contradicted by another doctor, the Commissioner may not reject this opinion without providing 'specific and legitimate reasons' supported by substantial evidence in the record for so doing.") (internal quotation marks and citation omitted).

Moreover, the court finds unpersuasive defendant's claim that any error by the ALJ in failing to adopt Dr. Nelson's left arm push/pull limitation would be harmless because only one job relied upon by the ALJ at step five requires pushing/pulling and there is no indication that it requires pushing/pulling bilaterally. *See* Def. Mem. at 4. Defendant apparently relies on the *Dictionary of Occupational Titles's* ("DICOT") short opening paragraph describing the duties for each the three occupations at issue. *See* DICOT 249.366-010; DICOT 524.687-022; DICOT 520.687-066. Yet, while the duties of bakery worker and counter clerk do not explicitly include pushing and/or pulling, these activities may be implicit in the other tasks listed. *See id.* Indeed, all three jobs are classified as "light work," which may include "pushing and pulling of arm or leg controls." 20 C.F.R. §§ 404.1567(b) & 416.967(b). Neither the DICOT nor the relevant regulations indicate whether the push/pull requirement may be satisfied with one hand (*see, generally, id.*; DICOT 249.366-010; DICOT 524.687-022; DICOT

520.687-066), and the vocational expert did not testify concerning the push/pull requirements of the jobs in question. *See, generally,* AR at 53-56. In sum, the court does not find the ALJ's error was harmless.

The ALJ arguably also failed to adopt Dr. Nelson's limitation against repetitive gripping or grasping with the left hand. *Compare id.* at 19-20 *with id.* at 245. The ALJ's failure to adopt Dr. Nelson's left hand repetitive gripping/grasping restriction is arguable because the ALJ limited plaintiff to occasional manipulation with the left upper extremity. *See id.* at 20. If "frequent" is the same as "repetitive", and therefore less than frequent, i.e., occasional, is the same as less than repetitive, then there is no conflict between the RFC (occasional manipulation) and Dr. Nelson's opinion (no repetitive gripping/grasping). But the Ninth Circuit has suggested (in dictum) that "frequent" and "repetitive" are not the same, and that a job could require repetitive activity occasionally. *See Gardner v. Astrue*, 257 Fed. Appx. 28, 30 & n. 5 (9th Cir. 2007) (discussing differences between frequent and repetitive activity). Under *Gardner*, a limitation to occasional manipulation on the left, as included in the ALJ's RFC, may not account for Dr. Nelson's limitation to no repetitive gripping and grasping on the left. *See id.* The court need not resolve this issue in light of its conclusion that the ALJ's error in failing to adopt Dr. Nelson's left arm push/pull limitation was not harmless. *See supra*. On remand, however, the ALJ shall clarify that his RFC is consistent with Dr. Nelson's preclusion from left hand repetitive gripping or grasping.

In addition, Dr. Nelson opined that "[a]n additional restriction/disability could apply *precluding* fine manipulation with the left hand[,]" AR at 245 (emphasis added), whereas the ALJ limited plaintiff to "*occasional* manipulation with the left upper extremity." (*Id.* at 20) (emphasis added). While Dr. Nelson's fine manipulation restriction was ambiguous (*see id.* at 245) (stating only that such a restriction "could" apply), the ALJ had a duty to develop the record to allow for

proper evaluation of Dr. Nelson's opinion. *See Tonapetyan*, 242 F.3d at 1150 ("Ambiguous evidence, or the ALJ's own finding that the record is inadequate to allow for proper evaluation of the evidence, triggers the ALJ's duty to conduct an appropriate inquiry.") (internal quotation marks and citations omitted). In this case, however, any error by the ALJ in failing to develop the record concerning Dr. Nelson's left hand fine manipulation restriction was likely harmless given the vocational expert's testimony that two out of the three jobs relied upon by the ALJ at step five require no fingering. *See* AR at 55. Nonetheless, on remand the ALJ shall ensure that the record is fully developed to allow for proper evaluation of Dr. Nelson's opinion concerning plaintiff's fine manipulation limitations.

Finally, plaintiff also claims that the ALJ also erred in precluding overhead reaching with the left upper extremity, but in not precluding work *above shoulder*, consistent with the opinion of Dr. Nelson. *See* Pl. Mem. at 9-11; Reply at 5; *compare* AR at 19-20 *with* AR at 275. But plaintiff did not cite to any authority supporting plaintiff's distinction between work above shoulder and work overhead, and this court is not aware of any such authority. *See, generally,* Pl. Mem. at 9-11; Reply at 3-5. Thus, the court finds no error by the ALJ in this respect.

2. Dr. Green

On September 13, 2002, Dr. Green examined plaintiff on behalf of the California workers' compensation system. AR at 379-416. Based on objective testing, plaintiff's subjective complaints, and a review of plaintiff's medical records, Dr. Green found: constant and minimal left shoulder pain; slight left shoulder pain with activities of daily living; slight-to-moderate left shoulder pain with light lifting, pushing/pulling/torquing against light resistance, and/or attempted work above chest level; moderate left shoulder pain with further effort; pain radiating up into the neck and down into the low back from the left shoulder; absence of substantial part of the acromion process to palpation and on x-ray;

downward drooping of entire left shoulder complex; surgical scar over left shoulder; and radiographic evidence of gleno-humeral joint narrowing and osteophyte formation. *Id.* at 413. Dr. Green limited plaintiff to: light lifting, and pushing/pulling/torquing against light resistance; no repetitive strong gripping and grasping; and no work above shoulder level. *Id.* at 413-14.

While the ALJ stated that he "generally adopt[ed] Dr. Green's opinion" (*id.* at 22), the ALJ failed to explain why he omitted some of Dr. Green's limitations from plaintiff's RFC. *Compare id.* at 19-23 *with id.* at 413-14. For example, plaintiff's RFC does not reflect Dr. Green's determination that plaintiff "is precluded from repetitive strong gripping and grasping." *Id.* at 414. As previously discussed with respect to Dr. Nelson, the ALJ's failure to adopt Dr. Green's limitation was an implicit rejection of this opinion, and his failure to provide any reason for doing so was legal error. *See Smolen*, 80 F.3d at 1286. But again, it is arguable whether the ALJ's error in failing to adopt Dr. Green's preclusion from "repetitive" strong gripping and grasping (AR at 414) is harmless given that none of the jobs relied upon by the ALJ at step five require "frequent" handling. *See id.* at 55. Once again, although the court will not resolve this issue given the alternative grounds for reversal of the ALJ's decision, the parties may wish to clarify this matter on remand.

In addition, although Dr. Green precluded all "work[] above shoulder level" (*id*. at 414), the ALJ found only that plaintiff "could not perform overhead reaching with the *left* upper extremity." *Id.* at 20 (emphasis added). But any error by the ALJ in failing to adopt Dr. Green's preclusion against all above shoulder level work appears to have been harmless given the vocational expert's testimony that two out of the three jobs relied upon by the ALJ at step five require no overhead reaching. *See* AR at 56. The court again notes this is a matter the parties may wish to address on remand.

Plaintiff also argues that the ALJ erred in failing to include Dr. Green's

opinion that plaintiff cannot sit longer than 20 minutes, and stand/walk longer than ten minutes. *See* Pl. Mem. at 12. But the court agrees with defendant that Dr. Green did not find these limitations; rather, they simply constituted plaintiff's subjective complaints. *See* AR at 367.

In sum, the ALJ failed to properly evaluate the opinions of Drs. Nelson and Green.

B. The ALJ Failed to Provide Clear and Convincing Reasons for Discounting Plaintiff's Subjective Complaints

Plaintiff argues that the ALJ failed to make a proper credibility determination. Pl. Mem. at 13-17. Specifically, plaintiff contends that the ALJ did not provide clear and convincing reasons that are supported by substantial evidence for discounting plaintiff's subjective pain testimony. *Id.* This court agrees.

An ALJ must make specific credibility findings, supported by the record. Social Security Ruling ("SSR") 96-7p.[4] To determine whether testimony concerning symptoms is credible, an ALJ engages in a two-step analysis. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, an ALJ must determine whether a claimant produced objective medical evidence of an underlying impairment "'which could reasonably be expected to produce the pain or other symptoms alleged.'" *Id.* at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). Second, if there is no evidence of malingering, an "ALJ can reject the claimant's testimony about the severity of her

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[4] "The Commissioner issues Social Security Rulings to clarify the Act's implementing regulations and the agency's policies. SSRs are binding on all components of the [Social Security Administration]. SSRs do not have the force of law. However, because they represent the Commissioner's interpretation of the agency's regulations, we give them some deference. We will not defer to SSRs if they are inconsistent with the statute or regulations." *Holohan*, 246 F.3d at 1203 n.1 (internal citations omitted).

symptoms only by offering specific, clear and convincing reasons for doing so." *Smolen*, 80 F.3d at 1281; *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). An ALJ may consider several factors in weighing a claimant's credibility, including: (1) ordinary techniques of credibility evaluation such as a claimant's reputation for lying; (2) the failure to seek treatment or follow a prescribed course of treatment; and (3) a claimant's daily activities. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Bunnell*, 947 F.2d at 346-47.

In his decision, the ALJ found plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms" (AR at 20), which "satisfie[s] the first [step] of the ALJ's inquiry regarding the credibility of [plaintiff]'s complaints." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). At the second step, because the ALJ did not find any evidence of malingering (*see, generally,* AR at 19-23), the ALJ was required to provide clear and convincing reasons for discounting plaintiff's credibility. *See Benton*, 331 F.3d at 1040.

Here, the ALJ found that plaintiff's statements regarding his symptoms and limitations were "not credible to the extent they are inconsistent with the . . . assess[ed] [RFC.]" AR at 20. The ALJ provided four reasons for discounting plaintiff's credibility: (1) plaintiff's daily activities are "fairly normal"; (2) plaintiff's prescribed medications were effective in alleviating his pain "to some extent"; (3) plaintiff attended school to train for a new career in jewelry; and (4) there is a lack of objective medical evidence concerning plaintiff's back and neck impairments, especially plaintiff's back dysfunction prior to December 2005. *Id.* at 22-23. The ALJ's reasons were not clear and convincing reasons supported by substantial evidence.

First, the ALJ noted that plaintiff's daily activities are "fairly normal." *Id.* at 22. The ALJ may properly consider inconsistencies between plaintiff's pain allegations and his daily activities. *See Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002). But the ALJ's finding that plaintiff's daily activities are "fairly

normal" misstates the record and is not supported by substantial evidence. *See Lingenfelter*, 504 F.3d at 1036 (reasons for discrediting plaintiff that mischaracterize the record "provide[] no support for the [ALJ's] credibility finding[]"). The ALJ noted that plaintiff could water the lawn, clean up after his dog, vacuum one room each day, shop (with a cane), wash dishes, and help with cooking. *See* AR at 20. Yet, the ALJ failed entirely to discuss Dr. Green's report noting plaintiff's complaints of difficulty with standing, sitting, walking, reclining, ascending and descending stairs, bowel movements, brushing his teeth, combing his hair, bathing, dressing, eating, lifting, grasping, tactile discrimination, writing, hearing and driving. *See id.* at 367. Moreover, the ALJ ignored Dr. Green's note that plaintiff reported sleeping only three to four hours per night due to pain. *See id.*; *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004) (ALJ erred in discrediting plaintiff's pain testimony based on daily activities that were "quite limited and carried out with difficulty[]").

In any event, plaintiff's reported daily activities are not inconsistent with plaintiff's claim of disabling impairments. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (the mere fact that plaintiff has carried on certain daily activities is not a clear and convincing reason for discrediting his testimony); *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) ("[M]any home activities are not easily transferable to what may be the more grueling environment of the workplace, where it might be impossible to periodically rest or take medication."); *see also Vertigan v. Halter*, 260 F.3d 1044, 1049-50 (9th Cir. 2001) (plaintiff's ability to go grocery shopping with assistance, walk approximately an hour in the mall, get together with friends, play cards, swim, watch television, read, take physical therapy, and exercise at home did not constitute a clear and convincing reason for rejecting her pain testimony). Here, "there is neither evidence to support that [plaintiff]'s activities were 'transferable' to a work setting nor proof that [plaintiff] spent a 'substantial' part of his day engaged in transferable skills." *Orn*, 495 F.3d

at 639; *see, generally,* AR at 22-23. Accordingly, the ALJ erred to the extent he rejected plaintiff's testimony based on his daily activities. *See Orn*, 495 F.3d at 639 ("The ALJ must make 'specific findings relating to [the daily] activities' and their transferability to conclude that a claimant's daily activities warrant an adverse credibility determination.").

Second, the ALJ noted that plaintiff's prescribed medications were effective in alleviating his pain "to some extent." AR at 22. The ALJ may properly discredit plaintiff's pain allegations when the evidence shows that his pain is controllable by medication. *See Morgan*, 169 F.3d at 599 (ALJ's adverse credibility determination properly accounted for physician's report of improvement with medication). Moreover, the ALJ correctly noted that plaintiff testified that the pain medication was effective in alleviating his pain "to some extent." AR at 22, 39. But plaintiff's testimony that the pain medication "helps for a while," i.e., "maybe . . . a few hours," and does not eliminate the pain but only reduces it (*id.* at 39), was not a clear and convincing reason to reject his testimony in this case. Despite pain medication treatment that provided some relief for "maybe . . . a few hours" at a time, plaintiff continued to experience significant pain such that his treating physician, Dr. Simon Lavi, concluded that plaintiff "failed all conservative measures, . . . includ[ing] activity modification, physical therapy and pain management" (*id.* at 424), and recommended back surgery to treat plaintiff's symptoms. *Id.* at 424, 429; *see also id.* at 376 (Dr. Green concluded for the purposes of plaintiff's worker's compensation claims that plaintiff "is reasonably entitled to the surgery being proposed by Dr. Lavi.").[5] Moreover, even if pain management treatment was effective in addressing plaintiff's pain, Dr. Lavi

[5] Plaintiff testified at the hearing that he had not undergone the recommended surgery because it was denied by plaintiff's health insurance. *See* AR at 40; *see also id.* at 366.

instructed plaintiff that his pain medications "are not to be taken during the course of employment or while operating any sort of machinery." *Id.* at 441; *see Erickson*, 9 F.3d at 817-18 (in determining a claimant's limitations, the ALJ must consider all factors that might have a significant impact on an individual's ability to work, including the side effects of medication). Accordingly, the ALJ erred to the extent he rejected plaintiff's testimony because his medications were effective in alleviating his pain.

Third, the ALJ noted that plaintiff attended school to train for a new career in jewelry. AR at 22. As previously noted, while the ALJ may properly consider inconsistencies between plaintiff's pain allegations and his daily activities (*see Thomas*, 278 F.3d at 958-59), the mere fact that plaintiff has carried on certain activities is not a clear and convincing reason for discrediting his testimony. *Orn*, 495 F.3d at 639. Again, here "there is neither evidence to support that [plaintiff]'s activities [while attending school] were 'transferable' to a work setting nor proof that [plaintiff] spent a 'substantial' part of his day engaged in transferable skills." *Id.* To the contrary, plaintiff testified that he was able to attend jewelry classes because "if [he] w[as] hurt they allow[ed] [him] to get up, walk around, sit in different areas, walk – [he] w[as]n't always in one position." AR at 50. Plaintiff further testified that "[he] do[es]n't think [he could work in the jewelry industry] . . . because of [his] pain and at a jewelry store . . . they have you on assembly like and . . . you're not as free, as free to go as you were at school." *Id.* at 51. In sum, the ALJ erred to the extent he rejected plaintiff's pain allegations because plaintiff attended school to train for a new career in jewelry.

Finally, the ALJ noted that there is a lack of objective medical evidence concerning plaintiff's back and neck impairments, especially plaintiff's back dysfunction prior to December 2005. *Id.* at 22. But the medical evidence of record documents the following evidence of plaintiff's back and neck

impairments: (1) physical examinations of plaintiff's lumbar and cervical spines consistently yielded abnormal results, including pain on palpation, restricted range of motion, spasm and/or dysesthesia (*see, e.g., id.* at 201, 205, 209, 221, 225, 257, 374-75, 420, 424, 427, 435-36, 460, 524, 530, 534, 538, 541, 588 (lumbar spine); 182, 201, 221, 225, 233, 257, 261, 288, 440, 460, 524, 529 (cervical spine)); (2) abnormal lumbar and cervical Magnetic Resonance Imaging ("MRI") results in 2006 (*id.* at 300, 302); (3) positive discogram at L2-3 and L5 levels in 2008 (*id.* at 355-57); (4) treatment with three epidural injections in plaintiff's lumbar spine in 2008 (*id.* at 355, 358, 360); and (5) finding by both plaintiff's treating and examining physicians that plaintiff is a candidate for back surgery in 2008, (*id.* at 376, 424, 429). Moreover, the record documents plaintiff's back impairments before December 2005, including: July 1999 diagnosis of chronic hyperflexion/hyperextension/deceleration injury of cervical spine based on, inter alia, physical examination of plaintiff's cervical spine revealing trapezial spasm and tenderness, and cervical x-ray showing narrowing of C5-6 disc space and reversal of cervical angulation secondary to muscle spasm (*id.* at 182, 186-87); July 1999 diagnosis of chronic lumbosacral sprain and strain based on, inter alia, physical examination of plaintiff's lumbar spine revealing paravertebral spasm and tenderness, and lumbar x-ray showing osteophytes of the L3 lumbar vertebra (*id.* at 184, 186-87); and consistent diagnoses in 2001-03 of disc injuries/Spondylosis, C5-6 and C6-7, and lumbosacral strain/spondylosis based on, inter alia, abnormal physical examination findings of plaintiff's cervical and lumbar spines, including pain on palpation, restricted range of motion, and spasm (*id.* at 201-02, 205, 209-10, 221, 225-26, 233, 236, 252, 257, 261, 266). It is unclear how the above objective findings do not support plaintiff's claims. In sum, the ALJ's reason is not supported by substantial evidence.

In any event, since the ALJ failed to provide any other legally sufficient

reason to discredit plaintiff, the ALJ erred to the extent he rejected the severity of plaintiff's alleged limitations based on a lack of objective medical evidence. *See* AR. at 22-23. The ALJ concluded that plaintiff presented sufficient medical evidence of an underlying impairment that "could reasonably be expected to cause the alleged symptoms." *See id.* at 20. As such, the ALJ may not discredit plaintiff's testimony "solely because the degree of pain [he] alleged . . . is not supported by objective medical evidence." *Bunnell*, 947 F.2d at 347; *Moisa v. Barnhart*, 367 F.3d 882, 885 (9th Cir. 2004).

In short, the ALJ did not provide clear and convincing reasons supported by substantial evidence for discounting plaintiff's credibility.

V.

REMAND IS APPROPRIATE

The decision whether to remand for further proceedings or reverse and award benefits is within the discretion of the district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). Where no useful purpose would be served by further proceedings, or where the record has been fully developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. *See Benecke*, 379 F.3d at 595-96; *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000) (decision whether to remand for further proceedings turns upon their likely utility). But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a plaintiff disabled if all the evidence were properly evaluated, remand is appropriate. *See Benecke*, 379 F.3d at 595-96; *Harman*, 211 F.3d at 1179-80.

Here, as set out above, remand is required because the ALJ erred in failing to properly evaluate the opinions of Drs. Nelson and Green, and at least to some extent the ALJ's error in these evaluations was not harmless, and because the ALJ also erred in discounting plaintiff's credibility. On remand, the ALJ shall: (1)

reconsider the opinions provided by Drs. Nelson and Green, and either credit their opinions or provide adequate reasons under the appropriate legal standard for rejecting any portion of their opinions; and (2) reconsider plaintiff's subjective complaints, and either credit plaintiff's testimony or provide clear and convincing reasons supported by substantial evidence for rejecting it. The ALJ shall then assess plaintiff's RFC and proceed through steps four and five to determine what work, if any, plaintiff is capable of performing.

VI.

CONCLUSION

IT IS THEREFORE ORDERED that Judgment shall be entered REVERSING the decision of the Commissioner denying benefits, and REMANDING the matter to the Commissioner for further administrative action consistent with this decision.

DATED: February 25, 2013

SHERI PYM
United States Magistrate Judge