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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JORGE SENDA AGUILERA,)	NO. CV 12-9644-E
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
CAROLYN W. COLVIN, COMMISSIONER)	AND ORDER OF REMAND
OF SOCIAL SECURITY ADMINISTRATION,)	
)	
Defendant.)	
)	
_____)	

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
HEREBY ORDERED that Plaintiff's and Defendant's motions for summary
judgment are denied and this matter is remanded for further
administrative action consistent with this Opinion.

PROCEEDINGS

Plaintiff filed a complaint on November 14, 2012, seeking review
of the Commissioner's denial of social security benefits. The parties
filed a consent to proceed before a United States Magistrate Judge on

1 December 18, 2012. Plaintiff filed a motion for summary judgment on
2 June 3, 2013. Defendant filed a motion for summary judgment on
3 June 6, 2013. The Court has taken both motions under submission
4 without oral argument. See L.R. 7-15; "Order," filed November 14,
5 2012.

6
7 **BACKGROUND**
8

9 Plaintiff filed an application for benefits on November 13, 2009,
10 asserting disability since April 30, 2008 (Administrative Record
11 ("A.R.") 140-41). Plaintiff alleged that injuries to his "lower
12 waist, shoulder [and] left hand" limited his ability to work (A.R.
13 160).

14
15 An Administrative Law Judge ("ALJ") found that, although
16 Plaintiff suffered from severe degenerative disc disease of the lumbar
17 spine and status left rotator cuff repair, Plaintiff retained the
18 residual functional capacity to perform a limited range of light work
19 (A.R. 31, 34 (citing 20 C.F.R. 404.1567(b)).¹ The ALJ found that
20 Plaintiff's limitations precluded the performance of Plaintiff's past
21

22 ¹ Specifically, the ALJ found that Plaintiff could:

23 . . . stand, walk, or sit for 6 hours in an 8 hour
24 workday; can occasionally climb ramps and stairs,
25 balance, stoop, kneel, or crouch; can never climb
26 ladders, ropes or scaffolds or crawl; can occasionally
reach overhead with the left upper extremity; and must
avoid concentrated exposure to vibrations and cold
temperatures.

27 (A.R. 34 (adopting non-examining medical expert's testimony at
28 A.R. 78 and adding limitations for vibrations and cold
temperatures)).

1 relevant work, but not the performance of certain other jobs (A.R. 37
2 (adopting vocational expert testimony at A.R. 86-87)).

3
4 Plaintiff sought review from the Appeals Council, submitting
5 letters from Plaintiff's representative and some additional medical
6 records (A.R. 199-200, 203-05 (letters); A.R. 357-66 (additional
7 medical records)). The Appeals Council considered these additional
8 materials, but denied review (A.R. 1-6).

9
10 **STANDARD OF REVIEW**

11
12 Under 42 U.S.C. section 405(g), this Court reviews the
13 Administration's decision to determine if: (1) the Administration's
14 findings are supported by substantial evidence; and (2) the
15 Administration used correct legal standards. See Carmickle v.
16 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,
17 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such
18 relevant evidence as a reasonable mind might accept as adequate to
19 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401
20 (1971) (citation and quotations omitted); see also Widmark v.
21 Barnhart, 454 F.3d 1063, 1067 (9th Cir. 2006).

22
23 Where, as here, the Appeals Council considered additional
24 material but denied review, the additional material becomes part of
25 the Administrative Record for purposes of the Court's analysis. See
26 Brewes v. Commissioner, 682 F.3d 1157, 1163 (9th Cir. 2012) ("[W]hen
27 the Appeals Council considers new evidence in deciding whether to
28 review a decision of the ALJ, that evidence becomes part of the

1 administrative record, which the district court must consider when
2 reviewing the Commissioner's final decision for substantial
3 evidence."; expressly adopting Ramirez v. Shalala, 8 F.3d 1449, 1452
4 (9th Cir. 1993)); Taylor v. Commissioner, 659 F.3d 1228, 1232 (2011)
5 (courts may consider evidence presented for the first time to the
6 Appeals Council "to determine whether, in light of the record as a
7 whole, the ALJ's decision was supported by substantial evidence and
8 was free of legal error"); Penny v. Sullivan, 2 F.3d 953, 957 n.7 (9th
9 Cir. 1993) ("the Appeals Council considered this information and it
10 became part of the record we are required to review as a whole"); see
11 generally 20 C.F.R. §§ 404.970(b), 416.1470(b).

12 13 DISCUSSION

14 15 I. The ALJ Erred in the Evaluation of Evidence from Plaintiff's 16 Examining Physicians.

17
18 As discussed below, the ALJ failed properly to evaluate the
19 examining physicians' opinions regarding Plaintiff's limitations.

20 21 A. Summary of the Available Medical Evidence

22
23 Following Plaintiff's work-related injury,² Plaintiff received
24 chiropractic treatment from Arbi Mirzaians DC (A.R. 162; see also A.R.
25 222. Mirzaians reportedly referred Plaintiff for MRI and CT scans of

26
27 ² A 60-pound hanging flowerpot reportedly fell from a
28 height of 10 feet, striking Plaintiff on the right side of his
back and ribs as Plaintiff was bent over. See A.R. 248.

1 his lower back (A.R. 163). The record before the ALJ contained no
2 regular treatment notes or reports from Mirzaians.³

3
4 As part of Plaintiff's workers compensation claim, Plaintiff was
5 evaluated by two orthopedic surgeons. Dr. Stepan Kasimian evaluated
6 Plaintiff on three occasions and prepared reports. See A.R. 233-37,
7 242-44, 247-54 ("Spinal Consultation Re-Evaluation Report" and
8 "Supplementary Report" dated October 13, 2009, "Spinal Consultation
9 Re-Evaluation Report" dated September 1, 2009, and "Orthopedic
10 Surgical Consultation Report" dated June 9, 2009). Plaintiff
11 initially complained of left shoulder and low back pain, but later
12 complained of leg pain as well (A.R. 234, 243, 249). On examination,
13 Dr. Kasimian found pain aggravated by flexion and extension of
14 Plaintiff's lumbar spine (A.R. 252). Plaintiff also had decreased
15 motor power strength in his left lower extremities (A.R. 252).
16 Available x-rays and MRI studies showed spondylosis at L5-S1, a 7mm
17 disc herniation (paracentral and left) at L5-S1, and a 3mm disc
18 herniation at L4-5 with mild stenosis (A.R. 253).⁴ Dr. Kasimian
19 diagnosed Plaintiff with L5-S1 herniated nucleus pulposus and left L5
20 radiculopathy, indicated that Plaintiff was a surgical candidate, and
21 requested that Plaintiff return in six weeks for re-evaluation

22
23 ³ As discussed below, Plaintiff did submit to the Appeals
24 Council a "Primary Treating Physician's Re-Evaluation Narrative
25 Report and Request for Authorization" by Mirzaians dated
December 8, 2011 (A.R. 363-66).

26 ⁴ It appears that the imaging studies included in the
27 record are incomplete. Dr. Kasimian referenced x-rays taken the
28 day after Plaintiff's injury (i.e., on May 1, 2008), and a
June 9, 2009 x-ray that are not in the record. Compare A.R. 249
and 253 (Dr. Kasimian's notes) with A.R. 255-57 (the only imaging
reports included in the record).

1 (A.R. 253).

2
3 On Plaintiff's second visit, Dr. Kasimian stated that Plaintiff
4 had failed conservative treatment and was a candidate for L4-5 and L5-
5 S1 decompression and fusion (A.R. 243-44). Plaintiff reported
6 difficulty walking for prolonged periods of time (A.R. 243).
7 Available radiographs and MRIs assertedly showed Grade 1
8 spondylolisthesis with 4-mm of motion on flexion-extension films, and
9 foraminal stenosis at L5 with lateral recess stenosis at L4-5 (A.R.
10 243). Dr. Kasimian requested authorization for surgery (A.R. 244).

11
12 On Plaintiff's third visit, Dr. Kasimian stated that Plaintiff
13 wanted to move forward with surgery (A.R. 234). On examination,
14 Plaintiff had reduced motor power strength in both his left and right
15 lower extremities (A.R. 234). Dr. Kasimian diagnosed Plaintiff with
16 herniated nucleus pulposus at L4-5 and L5-S1, degenerative disc
17 disease at L4-5 and L5-S1, chronic low back pain, and chronic
18 radiculopathy (A.R. 234-35). Dr. Kasimian again requested
19 authorization for surgery (A.R. 235).

20
21 Authorization for the surgery did not follow. Plaintiff
22 reportedly did not meet the guidelines for surgery because there
23 supposedly was no documentation of at least one imaging report finding
24 nerve root compression, lateral disc rupture, or lateral recess
25 stenosis, with a diagnosis for which fusion is indicated at the
26 corresponding levels (A.R. 213-16).

27 ///

28 ///

1 Meanwhile, orthopedic surgeon Dr. Arthur Garfinkel examined
2 Plaintiff and prepared an Orthopaedic Qualified Medical Evaluation
3 dated September 21, 2009 (A.R. 221-32). Dr. Garfinkel reviewed, inter
4 alia, Plaintiff's relevant medical records from Mirzaians and Dr.
5 Kasimian's initial report (A.R. 221, 227-28). At the time, Plaintiff
6 had undergone physical therapy and epidural steroid injections (A.R.
7 228).

8
9 To Dr. Garfinkel, Plaintiff reported left shoulder and low back
10 pain, radiating down both legs, with more pain on the left side (A.R.
11 223). Plaintiff was taking naproxen for pain (A.R. 224). Examination
12 revealed: (1) a somewhat stiff gait; (2) full range of motion for the
13 cervical and thoracic spine without tenderness; (3) full range of
14 motion in the lumbosacral spine with pain at the end range of motion,
15 and muscle tenderness to palpation; (4) positive straight leg raising
16 in both seated and supine position; (5) full range of motion for the
17 left shoulder with pain at the end range of motion in all planes and
18 positive impingement sign; and (6) no evidence of atrophy in the upper
19 or lower extremities (A.R. 224-26).

20
21 Dr. Garfinkel opined that Plaintiff had a strain of the
22 lumbosacral spine, lumbar radiculopathy, herniated nucleus pulposus of
23 the lumbosacral spine, sprain and strain of the left shoulder, a torn
24 left rotator cuff, and impingement syndrome of the left shoulder (A.R.
25 229). Plaintiff then was a candidate for lumbosacral and left
26 shoulder surgery (A.R. 229). Dr. Garfinkel opined that Plaintiff
27 could work with the following restrictions: (1) lifting no more than
28 15 pounds on a frequent and occasional basis; (2) standing or walking

1 no more than four hours in an eight hour period, and standing no more
2 than 30 minutes at one time; (3) no overhead reaching with his left
3 upper extremity; and (4) no climbing, crawling, kneeling, squatting,
4 bending, stooping, or balancing (A.R. 229-31).

5
6 On December 11, 2009, Dr. Daniel Silver performed surgery on
7 Plaintiff's left shoulder to repair the rotator cuff. Dr. Silver saw
8 Plaintiff for follow-up visits through at least January 25, 2010 (A.R.
9 307-56). Six weeks after the surgery, Plaintiff's wounds were healed
10 and he was able to move his shoulder, although with limited range of
11 motion (A.R. 308). Plaintiff reportedly still had shoulder and back
12 pain that radiated to his right leg (A.R. 308). Dr. Silver diagnosed
13 Plaintiff with left shoulder rotator cuff tear, acromioclavicular
14 joint severe arthrosis, lumbar sprain/strain (rule out herniated
15 nucleus pulposus), insomnia, depression, postoperative bladder
16 dysfunction, and status post arthroscopic subacromial decompression,
17 partial claviclectomy and left shoulder rotator cuff repair (A.R.
18 308). Plaintiff was referred for physical therapy (A.R. 308).

19
20 Plaintiff underwent an orthopedic examination by Dr. Payam
21 Moazzaz on April 6, 2010 (A.R. 274-79). Dr. Moazzaz reviewed no
22 medical records (A.R. 274). Plaintiff complained of left shoulder and
23 low back pain (A.R. 274). Plaintiff was observed to have difficulty
24 squatting, tenderness to palpation in the paraspinal musculature and
25 diminished range of motion, but negative straight leg raising (A.R.
26 276). Plaintiff also had decreased range of motion in his left
27 shoulder (A.R. 276). Dr. Moazzaz opined that Plaintiff had
28 degenerative disc disease of the lumbar spine and was status post left

1 shoulder rotator cuff repair based on the incision to Plaintiff's
2 shoulder (A.R. 278). Dr. Moazzaz opined that Plaintiff was capable of
3 performing medium work (lifting and carrying 50 pounds occasionally
4 and 25 pounds frequently), standing and walking six hours and sitting
5 six hours out of an eight hour day, with frequent climbing, stooping,
6 kneeling and crouching, and frequent overhead activities on the left
7 side (A.R. 278).

8
9 Non-examining state agency review physician K. Mauro completed a
10 Physical Residual Functional Capacity Assessment for Plaintiff dated
11 April 21, 2010 (A.R. 280-84). Dr. Mauro opined that Plaintiff was
12 capable of performing light work, with preclusion from climbing
13 ladders, ropes, or scaffolds, with only occasional kneeling and
14 crawling, with limited left upper extremity reaching, and with
15 avoidance of extreme cold and vibration. Id. Dr. Mauro stated that a
16 light residual functional capacity, rather than a medium capacity,
17 better accommodated Plaintiff's combination of impairments in view of
18 the lumbar spine imaging (which Dr. Moazzaz did not review) (A.R.
19 298). A later non-examining reviewing physician, Dr. Vaghaiwalla,
20 agreed with Dr. Mauro's assessment. See A.R. 300-02.

21
22 Dr. Arthur Brovender, the non-examining medical expert, reviewed
23 the available medical records and testified from Dr. Moazzaz's report
24 that Plaintiff had decreased range of motion in his lumbosacral spine
25 and left shoulder, and negative straight leg raising, with normal
26 motor, neurological and sensory examinations (A.R. 72, 76-77). Dr.
27 Brovender did not summarize or discuss any of the other physicians'
28 opinions or findings. Dr. Brovender opined that Plaintiff would be

1 able to perform a limited range of light work, with all of the
2 limitations the ALJ found to exist except the environmental
3 limitations. Compare A.R. 78 with 34 (ALJ's residual functional
4 capacity assessment).

5
6 **B. Evidence Reviewed by the Appeals Council**

7
8 After the ALJ's adverse decision, Plaintiff submitted a "Physical
9 Capacities Evaluation" form from Dr. Thomas Grogan dated September 28,
10 2011 (A.R. 357; see also A.R. 4 (Appeals Council's exhibit list)).
11 Dr. Grogan opined that Plaintiff was capable of sitting four hours,
12 standing three hours, and walking two hours in an eight hour day, and
13 lifting and carrying up to five pounds occasionally (A.R. 357).
14 Plaintiff also submitted a report from Mirzaians dated December 8,
15 2011, wherein Mirzaians stated that Plaintiff had undergone low back
16 surgery (A.R. 363). Plaintiff did not submit any records from that
17 surgery, but did indicate in a letter to the Appeals Council that the
18 surgery occurred on November 8, 2011 (A.R. 203-05).

19
20 **C. Analysis**

21
22 As summarized above, the ALJ found Plaintiff capable of
23 performing a limited range of light work. In reaching this
24 conclusion, the ALJ purportedly gave "moderate" weight to the opinions
25 of consultative examiner Dr. Moazzaz, state agency review physician
26 Dr. Mauro, and non-examining medical expert Dr. Brovender (A.R. 34-
27 36). The ALJ reportedly gave "little" weight to the opinions of
28 consultative examiner Dr. Garfinkel because Dr. Garfinkel's opinions

1 "[were] developed as part of [Plaintiff's] worker's compensation case"
2 and "[were] based a single examination" (A.R. 36).⁵

3
4 The Administration must "consider" and "evaluate" every medical
5 opinion of record. 20 C.F.R. § 404.1527(b) and (c); see SSR 96-8p.
6 In this consideration and evaluation, an ALJ "cannot reject [medical]
7 evidence for no reason or the wrong reason." Cotter v. Harris, 642
8 F.2d 700, 706-07 (3d Cir. 1981); see Day v. Weinberger, 522 F.2d 1154,
9 1156 (9th Cir. 1975) (ALJ may not make his or her own lay medical
10 assessment); see also Balsamo v. Chater, 142 F.3d 75, 81 (2d Cir.
11 1887) ("ALJ cannot arbitrarily substitute his [or her] own judgment
12 for competent medical opinion").

13
14 In the present case, the ALJ erred in the evaluation of Dr.
15 Garfinkel's opinions. The only two stated reasons for discounting Dr.
16 Garfinkel's opinions (the "worker's compensation" rationale and the
17 "single examination" rationale) are demonstrably arbitrary and/or
18 legally infirm.

19
20 With regard to the "worker's compensation" rationale, the Ninth
21 Circuit has made clear that "in the absence of other evidence to
22 undermine the credibility of a medical report, the purpose for which
23 [a medical] report was obtained does not provide a legitimate basis
24 for rejecting it." Reddick v. Chater, 157 F.3d 715, 726 (9th Cir.

25
26 ⁵ From the residual functional capacity assessment the
27 ALJ adopted, it appears that the ALJ gave the greatest weight to
28 Compare A.R. 34 (ALJ's assessment) with A.R. 78 and 280-84
(opinions).

1 1988) (mere fact that opinions were provided for disability carrier at
2 the request of counsel is not a legitimate basis for evaluating the
3 reliability of the report); see Booth v. Barnhart, 181 F. Supp. 2d
4 1099, 1105 (C.D. Cal. 2002) ("the ALJ may not disregard a physician's
5 medical opinion simply because it was initially elicited in a state
6 worker's compensation proceeding . . ."). Here, the ALJ identified no
7 other evidence to undermine the credibility of Dr. Garfinkel's report,
8 and no such evidence is apparent in the available record.

9
10 The "sole examination" rationale is equally unsustainable. The
11 fact that Dr. Garfinkel examined Plaintiff only once plainly does not
12 provide a non-arbitrary basis for discounting Dr. Garfinkel's opinion
13 in favor of the opinions of Dr. Moazzaz (who also examined Plaintiff
14 only once and who did not review any medical records),⁶ or the
15 opinions of Drs. Mauro and Brovender (who did not examine Plaintiff at
16 all). Without further consideration and explanation, substantial
17 evidence does not support the ALJ's rejection of Dr. Garfinkel's
18 opinion in favor of the opinions of Drs. Moazzaz, Mauro, and

19 ///

20 ///

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24 _____

25 ⁶ The only reason the ALJ stated for purporting to accord
26 "moderate weight" to Dr. Moazzaz's opinions is equally arbitrary
27 and similarly fails to distinguish Dr. Moazzaz's opinions from
28 those of Dr. Garfinkel. The ALJ "assigned moderate weight to Dr.
Moazzaz's opinion, as it is based on professional observation and
testing" (A.R. 35). Of course, Dr. Garfinkel's opinions also
were based on, inter alia, "professional observation and testing"
(A.R. 221-32).

1 Brovender.⁷

2
3 **II. Remand is Appropriate.**

4
5 Remand is appropriate because the circumstances of this case
6 suggest that further administrative review could remedy the ALJ's
7 errors.⁸ McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see
8 generally INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an
9 administrative determination, the proper course is remand for
10 additional agency investigation or explanation, except in rare
11 circumstances).

12
13 ⁷ The Court observes that, despite the ALJ purportedly
14 having given "moderate weight" to Dr. Moazzaz's opinions, the ALJ
15 adopted a residual functional capacity more akin to the capacity
16 assessed by the non-examining medical sources. In the absence of
17 record evidence to support the non-examining opinions, however,
such assessments could not by themselves constitute substantial
evidence to support the ALJ's decision. See Andrews v. Shalala,
53 F.3d 1035, 1042 (9th Cir. 1995).

18 ⁸ There are outstanding issues that must be resolved
19 before a proper disability determination can be made in the
20 present case. For this reason, the Ninth Circuit's decision in
21 Harman v. Apfel, 211 F.3d 1172 (9th Cir.), cert. denied, 531 U.S.
22 1038 (2000) ("Harman") also does not compel a reversal for the
23 immediate payment of benefits. In Harman, the Ninth Circuit
24 stated that improperly rejected medical opinion evidence should
25 be credited and an immediate award of benefits directed where
26 "(1) the ALJ has failed to provide legally sufficient reasons for
27 rejecting such evidence, (2) there are no outstanding issues that
28 must be resolved before a determination of disability can be
made, and (3) it is clear from the record that the ALJ would be
required to find the claimant disabled were such evidence
credited." Harman at 1178 (citations and quotations omitted).
Assuming, arguendo, the Harman holding survives the Supreme
Court's decision in INS v. Ventura, 537 U.S. 12 (2002), the
Harman holding does not direct reversal of the present case. In
addition to the outstanding issues that must be resolved, it is
not clear that the ALJ would be required to find Plaintiff
disabled for the entire period of claimed disability even if Dr.
Garfinkel's opinions were fully credited.

1 **CONCLUSION**

2
3 For all of the foregoing reasons, Plaintiff's and Defendant's
4 motions for summary judgment are denied and this matter is remanded
5 for further administrative action consistent with this Opinion.⁹
6

7 LET JUDGMENT BE ENTERED ACCORDINGLY.
8

9 DATED: July 24, 2013.
10

11 _____/S/_____
12 CHARLES F. EICK
13 UNITED STATES MAGISTRATE JUDGE
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27 _____
28 ⁹ The Court has not reached any of the other issues
raised by Plaintiff.