UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAMON MORENO, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	No. EDCV 08-0657-RC OPINION AND ORDER

Plaintiff Ramon Moreno filed a complaint on May 22, 2008, seeking review of the Commissioner's decision denying his application for disability benefits, and on October 20, 2008, the Commissioner answered the complaint. The parties filed a joint stipulation on December 9, 2008.

BACKGROUND

I

On October 4, 2005 (protective filing date), plaintiff applied for disability benefits under the Supplemental Security Income program of Title XVI of the Act, 42 U.S.C. § 1382(a), claiming an inability to

work since December 7, 2004. Certified Administrative Record ("A.R.") 13, 66-77. The plaintiff's application was initially denied on January 6, 2006, and was denied again on February 7, 2006, following reconsideration. A.R. 37-41, 44-50. The plaintiff then requested an administrative hearing, which was held before Administrative Law Judge Mason D. Harrell, Jr. ("the ALJ") on April 24, 2007. A.R. 52, 288-311. On May 9, 2007, the ALJ issued a decision finding plaintiff is not disabled. A.R. 201-12. The plaintiff appealed the decision to the Appeals Council, which remanded the matter to the ALJ for further proceedings. A.R. 213-19.

On December 5, 2007, following remand, the ALJ held a new administrative hearing, A.R. 269-87, and on January 11, 2008, the ALJ issued a decision again finding plaintiff is not disabled. A.R. 10-24. The plaintiff appealed this decision to the Appeals Council, which denied review on April 25, 2008. A.R. 6-9.

II

The plaintiff, who was born on July 31, 1959, is currently 50 years old. A.R. 67, 69, 73. He has an eleventh-grade education, and has previously worked as a truck driver, delivery driver, security supervisor and security guard. A.R. 82-89, 294.

Since October 31, 2004, plaintiff has received medical treatment at Loma Linda University Medical Center ("Loma Linda"), where he has been diagnosed with cervical and lumbar degenerative disc disease, asthma, bronchitis, diabetes mellitus and hypertension, among other conditions. A.R. 111-49, 176-200, 235-64. On December 15, 2004,

plaintiff had cervical and lumbar spine x-rays, which revealed mild degenerative disc disease at C5-C6, with a suggestion of mild neural foraminal narrowing on the right and mild-to-moderate disc space narrowing, with endplate sclerosis; mild anterior hypertrophic spurring at L4-L5 and L5-S1, worse at the lumbosacral junction; and mild associated sclerosis of the facet joints at L4-L5 and L5-S1. A.R. 108-09, 147-48. On February 3, 2005, plaintiff had a lumbar spine MRI, which revealed: mild right lateral recess stenosis[1] secondary to a 4-mm. right (greater than left) posterior disc bulge at L5-S1, with potential for impingement on the traversing right S1 nerve; mild-to-moderate right L5-S1 foraminal encroachment, with potential for impingement on the exiting right L5 nerve; 2-mm. posterior disc bulges at L2-L3 and L3-L4, without evidence of neural impingement; and mild-to-moderate degenerative disc disease at L4-L5, with a 2.5-mm. posterior disc bulge without evidence of neural impingement. A.R. 105-06. On April 19, 2006, plaintiff underwent electromyographic studies of both arms, which demonstrated bilateral moderate median neuropathy[2] at the wrist (carpal tunnel syndrome), slightly worse on the more symptomatic right side. A.R. 262-63.

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[1] Spinal stenosis is "narrowing of the vertebral canal, nerve root canals, or intervertebral foramina of the lumbar spine caused by encroachment of the bone upon the space; symptoms are caused by compression of the cauda equina and include pain, paresthesias, and neurogenic claudication." Dorland's Illustrated Medical Dictionary, 1698 (29th ed. 2000).

[2] Neuropathy is "a functional disturbance or pathological change in the peripheral nervous system, sometimes limited to noninflammatory lesions as opposed to those of neuritis; the etiology may be known or unknown." Dorland's Illustrated Medical Dictionary at 1212.

On May 2, 2006, a Loma Linda physician, Dr. Danielle Sawyer-Macknet, noting plaintiff has stenosis at L5-S1, as documented by an MRI, and a history of a work-related head injury, which could account for his memory issues, A.R. 171, opined plaintiff: is able to occasionally lift and carry less than 10 pounds; can sit, stand and walk for less than 2 hours in an 8-hour day; can sit or stand for 5 minutes before changing position; needs to be able to shift positions at will from sitting to standing/walking, and will need to lie down 3-4 times during a work shift; can occasionally twist, stoop, crouch and climb stairs, and never climb ladders; and he might have problems fingering and feeling due to carpal tunnel syndrome and diabetic neuropathy. A.R. 170-72. Dr. Sawyer-Macknet also opined plaintiff is "moderately" limited in his ability to understand and remember very short and simple instructions; is "slightly" limited in his ability to remember locations and work-like procedures, maintain attention and concentration for extended periods, perform activities within a schedule, maintain regular attendance, be punctual within customary tolerances, sustain an ordinary routine without special supervision, and work in coordination with or proximity to others without being distracted by them; and is otherwise not significantly limited. A.R. 265-66. Finally, Dr. Sawyer-Macknet opined plaintiff would miss three or more work days per month due to his condition. A.R. 172, 266.

On August 29, 2006, another Loma Linda physician, Dr. David Ham, opined plaintiff: is able to occasionally lift and carry less than 10 pounds; can stand and walk for about 2 hours and sit for about 5 hours in an 8-hour day; can sit for 30 minutes and stand for 10 minutes before changing position; must walk every 30 minutes for 0-5 minutes;

needs to be able to shift positions at will from sitting to standing/walking; can occasionally crouch, and never twist, stoop, or climb stairs or ladders; should avoid all exposure to extreme cold, heat, fumes, odors, dusts, gases, poor ventilation, etc., and hazards; and might have problems reaching, handling, fingering, feeling, and pushing/pulling. A.R. 173-75. Dr. Ham also opined plaintiff is "moderately" limited in his ability to sustain an ordinary work routine without supervision; "slightly" limited in his ability to remember locations and work-like procedures and work in coordination with or in proximity to others without being distracted by them; and is otherwise not significantly limited. A.R. 267-68. Finally, Dr. Ham opined plaintiff would miss three or more work days per month due to his condition. A.R. 175, 268.

On December 5, 2005, Thomas R. Dorsey, M.D., an orthopedic surgeon, examined plaintiff, found there was no evidence plaintiff had radiculopathy,[3] and opined plaintiff can lift and/or carry up to 20 pounds occasionally and 10 pounds frequently, occasionally bend or stoop, and stand and walk for 6 hours in an 8-hour day. A.R. 150-55.

Medical expert Samuel Landau, M.D., testified at the 2007 administrative hearing, opining that plaintiff has obesity, low back pain, neck and low back degenerative disc disease, asthmatic bronchitis, type II diabetes mellitus, and carpal tunnel syndrome in both wrists, none of which meet or in combination equal a listed impairment. A.R. 272-78. Dr. Landau further opined plaintiff: should

[3] Radiculopathy is "disease of the nerve roots." Dorland's Illustrated Medical Dictionary at 1511.

be limited to lifting and/or carrying up to 10 pounds frequently and 20 pounds occasionally; can occasionally bend and stoop; can perform occasional neck motions, but should avoid extremes of motions; should hold his head in a comfortable position most of the time; can sit for six hours with normal breaks every two hours, and stand and/or walk for two hours out of 8 hours; should be able to use a cane as needed for walking; can climb stairs, but not climb ladders, work at heights, or balance; can maintain a fixed step position for 15-30 minutes and then climb occasionally; needs an air conditioned work environment free from excessive inhaled pollutants; and cannot do forceful gripping, grasping and twisting or continuous fine or gross manipulation, but can do frequent fine or gross manipulation. A.R. 275-76, 285.

DISCUSSION

III

The Court, pursuant to 42 U.S.C. § 405(g), has the authority to review the decision denying plaintiff disability benefits to determine if his findings are supported by substantial evidence and whether the Commissioner used the proper legal standards in reaching his decision. Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009); Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir. 2009).

The claimant is "disabled" for the purpose of receiving benefits under the Act if he is unable to engage in any substantial gainful activity due to an impairment which has lasted, or is expected to last, for a continuous period of at least twelve months. 42 U.S.C. § 1382c(a)(3)(A); 20 C.F.R. § 416.905(a). "The claimant bears the

burden of establishing a prima facie case of disability." Roberts v. Shalala, 66 F.3d 179, 182 (9th Cir. 1995), cert. denied, 517 U.S. 1122 (1996); Smolen v. Chater, 80 F.3d 1273, 1289 (9th Cir. 1996).

The Commissioner has promulgated regulations establishing a five-step sequential evaluation process for the ALJ to follow in a disability case. 20 C.F.R. § 416.920. In the **First Step**, the ALJ must determine whether the claimant is currently engaged in substantial gainful activity. 20 C.F.R. § 416.920(b). If not, in the **Second Step**, the ALJ must determine whether the claimant has a severe impairment or combination of impairments significantly limiting him from performing basic work activities. 20 C.F.R. § 416.920(c). If so, in the **Third Step**, the ALJ must determine whether the claimant has an impairment or combination of impairments that meets or equals the requirements of the Listing of Impairments ("Listing"), 20 C.F.R. § 404, Subpart P, App. 1. 20 C.F.R. § 416.920(d). If not, in the **Fourth Step**, the ALJ must determine whether the claimant has sufficient residual functional capacity despite the impairment or various limitations to perform his past work. 20 C.F.R. § 416.920(f). If not, in **Step Five**, the burden shifts to the Commissioner to show the claimant can perform other work that exists in significant numbers in the national economy.[4] 20 C.F.R. § 416.920(g).

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[4] Moreover, where there is evidence of a mental impairment that may prevent a claimant from working, the Commissioner has supplemented the five-step sequential evaluation process with additional regulations addressing mental impairments. Maier v. Comm'r of the Soc. Sec. Admin., 154 F.3d 913, 914 (9th Cir. 1998) (per curiam); see also 20 C.F.R. § 416.920a.

Applying the five-step sequential evaluation process, the ALJ found plaintiff has not engaged in substantial gainful activity since his application date of October 4, 2005. (Step One). The ALJ then found plaintiff has the severe impairments of: obesity with low back pain; degenerative disc disease of the neck and low back; asthmatic bronchitis; diabetes mellitus, type-2; and carpal tunnel syndrome; however, plaintiff does not have a severe mental impairment. (Step Two). The ALJ also found plaintiff does not have a combination of impairments that meets or equals a Listing. (Step Three). The ALJ next determined plaintiff cannot perform his past relevant work. (Step Four). Finally, the ALJ concluded plaintiff can perform a significant number of jobs in the national economy; therefore, he is not disabled. (Step Five).

IV

The Step Two inquiry is "a de minimis screening device to dispose of groundless claims." Smolen, 80 F.3d at 1290; Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005). Including a severity requirement at Step Two of the sequential evaluation process "increases the efficiency and reliability of the evaluation process by identifying at an early stage those claimants whose medical impairments are so slight that it is unlikely they would be found to be disabled even if their age, education, and experience were taken into account." Bowen v. Yuckert, 482 U.S. 137, 153, 107 S. Ct. 2287, 2297, 96 L. Ed. 2d 119 (1987). However, an overly stringent application of the severity requirement violates the Act by denying benefits to claimants who meet the statutory definition of disabled. Corrao v. Shalala, 20 F.3d 943, 949 (9th Cir. 1994).

A severe impairment exists when there is more than a minimal effect on an individual's ability to do basic work activities. Webb, 433 F.3d at 686; Mayes v. Massanari, 276 F.3d 453, 460 (9th Cir. 2001); see also 20 C.F.R. § 416.921(a) ("An impairment or combination of impairments is not severe if it does not significantly limit [a person's] physical or mental ability to do basic work activities."). Basic work activities are "the abilities and aptitudes necessary to do most jobs," including physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling, as well as the capacity for seeing, hearing and speaking, understanding, carrying out, and remembering simple instructions, use of judgment, responding appropriately to supervision, co-workers and usual work situations, and dealing with changes in a routine work setting. 20 C.F.R. § 416.921(b); Webb, 433 F.3d at 686.

In Step Two, the ALJ found plaintiff does not have a severe mental impairment. A.R. 16. However, plaintiff contends this finding is not supported by substantial evidence because the ALJ failed to properly consider the opinions of his treating physician, Dr. Sawyer-Macknet. There is no merit to this claim.

Since the medical opinions of a treating physician is entitled to special weight because a treating physician is "employed to cure and has a greater opportunity to know and observe the patient as an individual[,]" Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987); Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999), the ALJ must provide "clear and convincing" reasons for rejecting the uncontroverted opinion of a treating physician, Ryan v.

Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008); Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998), and "[e]ven if [a] treating doctor's opinion is contradicted by another doctor, the ALJ may not reject this opinion without providing 'specific and legitimate reasons' supported by substantial evidence in the record." Reddick, 157 F.3d at 725; Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008).

With respect to plaintiff's mental health, Dr. Sawyer-Macknet opined plaintiff: is "moderately" limited in his ability to understand and remember very short and simple instructions; is "slightly" limited in his ability to remember locations and work-like procedures, maintain attention and concentration for extended periods, perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances, sustain an ordinary routine without special supervision, and work in coordination with or proximity to others without being distracted by them; is otherwise not significantly limited; and would miss three or more work days per month due to his condition. A.R. 265-66. The ALJ rejected Dr. Sawyer-Macknet's opinions because they were "inconsistent with the medical evidence as a whole and . . . unsupported by medically acceptable clinical or diagnostic findings." A.R. 22. The ALJ's reasoning is well-founded and supported by substantial evidence in the record. Although plaintiff has been prescribed Elavil, see, e.g., A.R. 257, 304, he testified at the administrative hearing that Elavil was prescribed to him for pain.[5] A.R. 279. Nothing else in the

[5] Among other uses, Elavil is used "to control chronic pain [and] to prevent migraine headaches. . . ." The PDR Family Guide

record indicates plaintiff has been diagnosed with a mental impairment. Thus, the ALJ properly discredited Dr. Sawyer-Macknet's opinions as "conclusory, brief, and unsupported by the record as a whole, or by objective medical findings." Batson v. Comm'r of the Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004) (citation omitted); Bray v. Astrue, 554 F.3d 1219, 1228 (9th Cir. 2009).

The ALJ also rejected Dr. Sawyer-Macknet's opinions about plaintiff's mental health because they were on a check-the-box form that "does not provide detailed analysis of [plaintiff's] condition and his diagnosis. . . ." A.R. 22. This too is a proper rationale for the ALJ to reject Dr. Sawyer-Macknet's opinions.[6] See, e.g., Batson, 359 F.3d at 1195 (ALJ properly rejected treating physicians' opinions in part because they were in checklist form with no

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to Prescription Drugs, 240 (8th ed. 2000).

[6] The ALJ, however, improperly rejected Dr. Sawyer-Macknet's opinions about plaintiff's mental health because "there is no evidence to show Dr. Sawyer-Macknet has any particular qualifications, training, or expertise relative to psychological or psychiatric impairments enabling her to make such an assessment." A.R. 22. Under the Act, any physician "is qualified to give a medical opinion as to [a claimant's] mental state . . . even though . . . not a psychiatrist." Sprague, 812 F.2d at 1232; see also Lester v. Chater, 81 F.3d 821, 833 (9th Cir. 1995) ("Dr. Kho provided treatment for the claimant's psychiatric impairment, including the prescription of psychotropic medication. His opinion constitutes 'competent psychiatric evidence' and may not be discredited on the ground that he is not a board certified psychiatrist."). Nevertheless, given the other well-supported reasons for the ALJ rejecting Dr. Sawyer-Macknet's opinions about plaintiff's mental health, as discussed herein, any error in this regard was harmless, Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005), and the ALJ was not required to further develop the record regarding Dr. Sawyer-Macknet's credentials, as plaintiff contends.

supporting objective evidence); Crane v. Shalala, 76 F.3d 251, 253 (9th Cir. 1996) (ALJ properly rejected psychological evaluations "because they were check-off reports that did not contain any explanation of the bases of their conclusions."). Thus, "the ALJ provided 'specific and legitimate' reasons based on substantial evidence" for rejecting Dr. Sawyer-Macknet's opinions about plaintiff's mental health. Tommasetti, 533 F.3d at 1037.

V

A claimant's residual functional capacity ("RFC") is what he can still do despite his physical, mental, nonexertional, and other limitations. Mayes, 276 F.3d at 460; Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). Here, the ALJ found plaintiff has the RFC to perform limited light work,[7] as follows:

> [W]ithin an eight hour workday he can stand and/or walk for two hours, sit for six hours with normal breaks such as every 2 hours, and use a cane as needed. He can lift and/or carry 10 lbs. frequently and 20 lbs. occasionally, and occasionally stoop and bend. He can climb stairs, but he cannot climb ladders, work at heights, or balance. His work environment should be air-conditioned and free of excessive

[7] Under Social Security regulations, "[l]ight work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities." 20 C.F.R. § 416.967(b).

> inhaled pollutants, such as an office or th[e] [ALJ's] hearing room. He can do occasional neck motion but should avoid extremes of motion. His head should be held in a comfortable position most of the time. He can maintain a fixed head position for 15-30 minutes at a time[] occasionally and work without forceful gripping, grasping, or twisting and no continuous fine and gross manipulations, but can do so frequently. He can perform simple repetitive tasks due to medications.

A.R. 17. However, plaintiff contends the RFC determination, and resultant Step 5 denial of benefits, are not supported by substantial evidence because, among other reasons, the ALJ improperly found he was not a credible witness. The plaintiff is correct.

The plaintiff testified at the administrative hearing that he has headaches, neck, lower back and leg pain, his legs give out, and he has carpal tunnel syndrome. A.R. 280-82, 292, 295-96, 298. He stated he can only lie around the house because of his pain, his pain makes it difficult for him to concentrate, and he gets disoriented, tired and forgetful when he takes his medication. A.R. 279-81, 283, 292, 295, 298, 303-04. After he takes his medication in the morning, plaintiff stated he naps, sometimes sleeping four hours. A.R. 283, 295-96. Further, plaintiff testified that, as a result of his carpal tunnel syndrome, he cannot hold heavy items or grab things too hard because his hands start hurting and go numb, and he sometimes drops cereal bowls because of the numbness. A.R. 282, 296. The plaintiff was prescribed a cane to help him walk because his legs give out, but

he does not do much walking because of his pain. A.R. 280, 296, 306.

Once a claimant has presented objective evidence he suffers from an impairment that could cause pain or other nonexertional limitations,[8] the ALJ "'must provide specific, cogent reasons'" if he finds the claimant's subjective complaints are not credible. Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006) (citations omitted); Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007). Furthermore, when the medical evidence establishes an objective basis for some degree of pain and related symptoms, and no evidence affirmatively suggests the claimant is malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." Morgan, 169 F.3d at 599; Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1160 (9th Cir. 2008).

Here, the ALJ found plaintiff's testimony was not credible for several reasons: (1) the claimant makes "excessive exaggeration and inconsistent statements"; (2) the claimant's "inconsistent [testimony] with his prior testimony" about medications"; (3) the claimant "is able to work" since he has "look[ed] for work"; (4) the claimant's "failure to follow his treatment plan relative to the treatment of his diabetes mellitus and obesity"; and (5) the "[o]bjective medical evidence does not fully support the claimant's complaints." A.R. 19-21.

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[8] "While most cases discuss excess pain testimony rather than excess symptom testimony, rules developed to assure proper consideration of excess pain apply equally to other medically related symptoms." Swenson v. Sullivan, 876 F.2d 683, 687-88 (9th Cir. 1989).

The ALJ found plaintiff was not entirely credible "due to excessive exaggeration and inconsistent statements" when he "was asked about his response to a questionnaire where he stated he changes sitting position after sitting a while. However, during the course of the hearing he was observed changing position for the first time after 45 minutes had passed, evidencing an inconsistency between his testimony and his behavior." A.R. 20. Yet, "[t]he fact that a claimant does not exhibit physical manifestations of prolonged pain at the hearing provides little, if any, support for the ALJ's ultimate conclusion that the claimant is not disabled or that his allegations of constant pain are not credible." Gallant v. Heckler, 753 F.2d 1450, 1455 (9th Cir. 1984); see also Perminter v. Heckler, 765 F.2d 870, 872 (9th Cir. 1985) (per curiam) (condemning ALJ's personal observations as "sit and squirm" jurisprudence and noting inapplicability where contrary evidence).

Additionally, the ALJ found plaintiff was not credible based on:

> . . . the fact that during the April 24, 2007 hearing, the [plaintiff] said he was testifying slowly because his medications make him confused. This statement is inconsistent with his prior testimony that he had taken less medication that morning so that he would be alert. Based on his testimony on April 24, 2007, it also appears that the [plaintiff] may be adjusting to his medications now and may not be so sleepy in the future after he has adequately adjusted.

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A.R. 20. At the administrative hearing, plaintiff testified he "only took a little bit" of his medication that morning, and he would take the rest of the medication after the hearing, because the medication makes him disoriented and exhausted and he cannot concentrate. A.R. 292, 295-96, 298, 303-04. Later, plaintiff apologized to the ALJ, stating "you have to forgive me, Your Honor, because the medication, it makes me a little disoriented, so I've got to try to get my thoughts together when you ask me questions, so I apologize if I go slow or kind of look disoriented to you." A.R. 306-07. There is simply no inconsistency between the plaintiff's two statements; therefore, this supposed "inconsistency" is not a proper reason for finding plaintiff was not credible. Moreover, the ALJ's conclusion that plaintiff "may be adjusting to his medications" is rank speculation and is improper. An "'ALJ cannot arbitrarily substitute his own judgment for competent medical opinion . . . [,]'" Balsamo v. Chater, 142 F.3d 75, 81 (2d Cir. 1998) (citations omitted), and he "must not succumb to the temptation to play doctor and make [his] own independent medical findings." Rohan v. Chater, 98 F.3d 966, 970 (7th Cir. 1996).

Further, the ALJ found plaintiff's credibility was "undermined" by his:

> failure to follow his treatment plan relative to the treatment of his diabetes mellitus and obesity. Medical records show his treating physician instructed him to avoid sugars and starches due to his diabetes mellitus (Exhibit 10F, p. 22). Furthermore, he testified his doctor told him

> to lose weight relative to his back condition and diabetes. However, the claimant's medical records . . . do not reflect an adherence to a diet free of sugar and starches, but rather, his escalating weight gain since his alleged onset date. Specifically, in January 2005, he weighed 218 lbs. By December 2005, he weighed 226 lbs. with a body mass index score of 38. By November 2006 he weighed 237 lbs. The claimant testified that he recently went on a diet, and touted that he has lost two pounds, a minuscule amount when compared to the amount of weight he has gained.

A.R. 21 (some citations omitted). However, this determination also is not supported by substantial evidence, or even the exhibit the ALJ cites. That exhibit is dated November 8, 2006, A.R. 197, and it appears to be the **first** date plaintiff was advised to avoid sugars and starches due to his diabetes. See also A.R. 178 (3/7/07), 240 (3/7/07). Thus, the ALJ's reliance on plaintiff's weight gain to support the determination that plaintiff ignored his doctor's advice of November 8, 2006, is not supported by substantial evidence. Rather, plaintiff's weight on November 8, 2006, was the reason plaintiff's doctor advised him to avoid sugars and starches, and the record demonstrates that by the administrative hearing five months later, plaintiff had lost approximately nine pounds. A.R. 261. Since the ALJ's reason for disbelieving plaintiff is not supported by the record, once again, it is not a "clear and convincing" reason for finding plaintiff was not credible.

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The ALJ also found plaintiff was not credible because he:

> . . . initially testified that he did not look for work. However, upon being advised that the unemployment benefits compensation system requires that he look for work, he then changed his testimony and admitted that his wife took him around looking for work. Such an admission is evidence that he averred that he is able to work.

A.R. 20-21. The record, however, does not clearly show whether plaintiff sought unemployment benefits **after** the time of his alleged disability, see A.R. 296-98, and the ALJ did not cite anything in the record to show plaintiff represented he was capable of performing full-time work **after** his disability onset date. Therefore, this too is not a clear and convincing reason for finding plaintiff was not credible. See Carmickle, 533 F.3d at 1161-62 ("[W]hile receipt of unemployment benefits can undermine a claimant's alleged inability to work fulltime, the record here does not establish whether [the claimant] held himself out as available for full-time or part-time work. Only the former is inconsistent with his disability allegations. Thus, such basis for the ALJ's credibility finding is not supported by substantial evidence." (citations omitted)).

Finally, it is well-established law that the ALJ may not discredit a claimant's testimony "solely because the degree of pain alleged by the claimant is not supported by objective medical evidence." Bunnell v. Sullivan, 947 F.2d 341, 347 (9th Cir. 1991) (en banc); Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004). Thus,

this "is not a clear and convincing reason" for rejecting plaintiff's credibility. Vertigan v. Halter, 260 F.3d 1044, 1049 (9th Cir. 2001); see also Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986) ("It is improper as a matter of law to discredit . . . testimony solely on the ground that it is not fully corroborated by objective medical findings.").

For all these reasons, the ALJ provided "nothing but unsatisfactory reasons for discounting [plaintiff's] credibility," Reddick, 157 F.3d at 724; thus, "substantial evidence does not support the [ALJ's RFC] assessment." Lingenfelter v. Astrue, 504 F.3d 1028, 1040 (9th Cir. 2007). "Nor does substantial evidence support the ALJ's step-five determination, since it was based on this erroneous RFC assessment." Id. at 1041.

VI

When the Commissioner's decision is not supported by substantial evidence, the Court has authority to affirm, modify, or reverse the Commissioner's decision "with or without remanding the cause for rehearing." 42 U.S.C. § 405(g); McCartey v. Massanari, 298 F.3d 1072, 1076 (9th Cir. 2002). "Remand for further administrative proceedings is appropriate if enhancement of the record would be useful." Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004); Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir.), cert. denied, 531 U.S. 1038 (2000). Here, since there are "insufficient findings as to whether [plaintiff's] testimony should be credited as true," remand is the

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appropriate remedy. Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003).[9]

ORDER

IT IS ORDERED that: (1) plaintiff's request for relief is granted; and (2) the Commissioner's decision is reversed, and the action is remanded to the Social Security Administration for further proceedings consistent with this Opinion and Order, pursuant to sentence four of 42 U.S.C. § 405(g), and Judgment shall be entered accordingly.

DATE: August 26, 2009

/S/ ROSALYN M. CHAPMAN
ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE

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[9] Having reached this conclusion, it is unnecessary for the Court to address the other claims plaintiff raises, none of which warrant any further relief than granted herein.