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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION**

ROY GONZALEZ,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

Case No. ED CV 08-1253 JEM

MEMORANDUM OPINION AND ORDER

PROCEEDINGS

On September 19, 2008, Roy Gonzalez (“plaintiff”) filed a complaint seeking review of the decision by the Commissioner of Social Security (“Commissioner”) denying plaintiff’s application for Supplemental Security Income (“SSI”) benefits. Pursuant to 28 U.S.C. § 636(c), both parties filed consents to proceed before this Magistrate Judge. On June 8, 2009, the parties filed a Joint Stipulation (“JS”). The matter is now ready for decision.

After reviewing the pleadings, transcripts and administrative record (“AR”), the Court concludes that the decision of the Commissioner is reversed and remanded for further proceedings in accordance with law and with this Memorandum and Order.

BACKGROUND

1
2 Plaintiff is a 56 year old male who received SSI disability benefits from 1994 to
3 2000. (AR 437.) These benefits were terminated in 2000 when he was incarcerated.
4 (AR 403-04.) Claimant was released from prison on August 9, 2005. (AR 84.) He filed
5 an application for SSI disability benefits on August 12, 2005, alleging disability since
6 1997. (AR 312.) He has had no substantial gainful activity since 1997. (AR 12.)

7 Plaintiff appeared before U.S. Administrative Law Judge Joseph D. Schloss
8 ("ALJ") on August 3, 2006. (AR 10.) An unfavorable decision issued on October 24,
9 2006. (AR 10-15). A timely Request for Review was filed with the Appeals Council on
10 November 7, 2006. (AR 6). The Appeals Council declined to review the matter and
11 civil action EDCV 07-381 JTL commenced in the United States District for the Central
12 District of California, Eastern Division, on March 26, 2007.

13 On October 29, 2007, the parties filed a Stipulation to Voluntary Remand
14 pursuant to sentence four of 42 U.S.C. § 405(g). (AR 327-28.) The District Court
15 signed an order that same date remanding the action to the Commissioner for further
16 proceedings. (AR 326.) Thereafter, the Appeals Council on December 8, 2007,
17 directed the ALJ on remand to address plaintiff's mental condition and the opinions of
18 medical sources, consider the possibility of a substance abuse problem, reevaluate
19 plaintiff's credibility, and reevaluate plaintiff's residual functional capacity ("RFC"). (AR
20 332.)

21 The claimant appeared and testified at a de novo hearing on May 22, 2008, in
22 San Bernardino, California. (AR 312.) A second unfavorable decision issued on July 7,
23 2008. (AR 312-20.) The ALJ determined that plaintiff's mental impairment was non-
24 severe and that the plaintiff's history of polysubstance abuse was not an independent
25 basis for disability. (AR 317, 320.) The ALJ therefore concluded that the claimant has
26 not been under a disability since August 5, 2005, the date the application was filed. (AR
27 320.)

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1 The Appeals Council declined to review the ALJ's decision. Plaintiff commenced
2 this action on September 12, 2008.

3
4 **DISPUTED ISSUES**

5 As reflected in the Joint Stipulation, the disputed issues that plaintiff is raising as
6 grounds for reversal and remand are as follows:

7 1. Whether the ALJ complied with the Appeals Council remand order to properly
8 consider the plaintiff's medical condition and properly developed the record regarding
9 plaintiff's' mental condition.

10 2. Whether the ALJ complied with the Appeals Council remand order to make
11 proper credibility findings.

12
13 **STANDARD OF REVIEW**

14 Under 42 U.S.C. Section 405(g), this Court reviews the ALJ's decision to
15 determine whether the ALJ's findings are supported by substantial evidence and
16 whether the proper legal standards were applied. DeLorme v. Sullivan, 924 F.2d 841,
17 846 (9th Cir. 1991). Substantial evidence means "more than a mere scintilla" but less
18 than a preponderance. Richardson v. Perales, 402 U.S. 389, 401 (1971); Saelee v.
19 Chater, 94 F.3d 520, 521-22 (9th Cir. 1996).

20 Substantial evidence is "such relevant evidence as a reasonable mind might
21 accept as adequate to support a conclusion." Richardson, 402 U.S. at 401 (internal
22 quotations and citations omitted). This Court must review the record as a whole and
23 consider adverse as well as supporting evidence. Robbins v. Soc. Sec. Admin., 466
24 F.3d 880, 882 (9th Cir. 2006). Where evidence is susceptible to more than one rational
25 interpretation, the ALJ's decision must be upheld. Morgan v. Comm'r, 169 F.3d 595,
26 599 (9th Cir. 1999).

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DISCUSSION

1
2 The Court concludes that the ALJ, in determining that plaintiff is not disabled,
3 failed to develop the record fully and fairly, failed to address issues and evidence and
4 failed to apply governing legal standards in evaluating the evidence.

5 **A. The Sequential Evaluation**

6 The Social Security Act defines disability as the “inability to engage in any
7 substantial gainful activity by reason of any medically determinable physical or mental
8 impairment which can be expected to result in death or . . . can be expected to last for a
9 continuous period of not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A),
10 1382c(a)(3)(A). The Commissioner has established a five-step sequential process to
11 determine whether a claimant is disabled. 20 § C.F.R. §§ 404.1520, 416.920.

12 The first step is to determine whether the claimant is presently engaging in
13 substantially gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the
14 claimant is engaging in substantially gainful activity, disability benefits will be denied.
15 Bowen v. Yuckert, 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether
16 the claimant has a severe impairment or combination of impairments. Parra, 481 F.3d at
17 746. Third, the ALJ must determine whether the impairment is listed, or equivalent to an
18 impairment listed, in Appendix I of the regulations. Id. If the impediment meets or
19 equals one of the listed impairments, the claimant is presumptively disabled. Bowen,
20 482 U.S. at 141. Fourth, the ALJ must determine whether the impairment prevents the
21 claimant from doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th
22 Cir. 2001). If the claimant cannot perform his or her past relevant work, the ALJ
23 proceeds to the fifth step and must determine whether the impairment prevents the
24 claimant from performing any other substantial gainful activity. Moore v. Apfel, 216 F.3d
25 864, 869 (9th Cir. 2000).

26 The claimant bears the burden of proving steps one through four, consistent with
27 the general rule that at all times the burden is on the claimant to establish his or her
28 entitlement to benefits. Parra, 481 F.3d at 746. Once this prima facie case is

1 established by the claimant, the burden shifts to the Commissioner to show that the
2 claimant may perform other gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111,
3 1114 (9th Cir. 2006).

4 **B. The ALJ's Step Two Determination**

5 At step two of the five step sequential inquiry, the ALJ determines whether the
6 claimant has a medically severe impairment or combination of impairments. Bowen v.
7 Yuckert, 482 U.S. at 140-141. An impairment is not severe if it does not significantly
8 limit the claimant's ability to work. Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996).

9 The ALJ, however, must consider the combined effect of all the claimant's
10 impairments on his ability to function, regardless of whether each alone was sufficiently
11 severe. Id. Also, the ALJ must consider the claimant's subjective symptoms in
12 determining severity. Id.

13 The step two inquiry is a de minimis screening device to dispose of groundless
14 claims. Bowen, 482 U.S. at 153-154. An impairment or combination of impairments can
15 be found nonsevere only if the evidence establishes a slight abnormality that has no
16 more than a minimal effect on an individual's ability to work. Smolen, 80 F.3d at 1290;
17 SSR 85-28; Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988) (adopting SSR 85-28).

18 The ALJ determined that the plaintiff suffers from the medically determinable
19 impairment of anxiety disorder. (AR 314.) The ALJ, however, concluded that this
20 mental condition was not severe. Id.

21 **C. The ALJ's Duty to Develop the Record**

22 Plaintiff asserts that the ALJ failed to develop the record fully. In Social Security
23 cases, the ALJ has a special, independent duty to develop the record fully and fairly and
24 to assure that the claimant's interests are considered. Tonapetyan v. Halter, 242 F.3d
25 1144, 1150 (9th Cir. 2001); Smolen v. Chater, 80 F.3d at 1288; Brown v. Heckler, 713
26 F.2d 441, 443 (9th Cir. 1983). The ALJ has a basic duty to inform himself about facts
27 relevant to his decision. Heckler v. Campbell, 461 U.S. 458, 471 n.1 (1983) (Brennan,
28 J., concurring).

1 The ALJ's duty to develop the record exists even when the claimant is
2 represented by counsel. Tonapetyan, 242 F.3d at 1150. The ALJ's duty to develop the
3 record fully is heightened where the claimant may be mentally ill. Id.

4 Ambiguous evidence or the ALJ's own finding that the record is inadequate to
5 allow for proper evaluation of the evidence triggers the ALJ's duty to conduct an
6 appropriate inquiry. Smolen, 80 F.3d at 1288; Tonapetyan, 242 F.3d at 1150. The ALJ
7 may discharge this duty by subpoenaing the claimant's physicians, submitting questions
8 to them, continuing the hearing or keeping the record open after the hearing to allow
9 supplementation of the record. Smolen, 80 F.3d at 1288; Tonapetyan, 242 F.3d at 1150.

10 Claimant's treating psychiatrist, Dr. Dau Nguyen at the San Bernardino County
11 Department of Behavioral Health, diagnosed claimant on February 21, 2006, as suffering
12 from psychotic disorder NOS, bipolar disorder, polysubstance dependence in remission,
13 and adult antisocial behavior. (AR 275.) This diagnosis was accompanied by a mental
14 status examination, which indicated a short term memory problem with dates and
15 names, cognitive deficits due to fear and delusions, some paranoia, and mood swings
16 from depression to hypomania to mild mania. (AR 13, 271-274.) This examination was
17 a clinical assessment. (AR 273.)

18 Dr. Nguyen saw claimant several times in 2006. On April 8, 2006, Dr. Nguyen
19 administered a mental status examination reporting that claimant was depressed and
20 anxious. (AR 270.) He also reported an episode of mania. (AR 269.) Dr. Nguyen again
21 diagnosed claimant as suffering from bipolar disorder, polysubstance dependence in
22 remission and adult antisocial behavior. (AR 270.) Dr. Nguyen saw claimant again on
23 July 1, 2006, reporting claimant as depressed and observing constricted affect. (AR
24 278.) Dr. Nguyen saw claimant again on August 1, 2006, reporting panic attacks and
25 observing constricted affect. (AR 367.) Dr. Nguyen saw claimant next on September 2,
26 2006, reporting anxiety and depression. (AR 366.) Dr. Nguyen saw claimant again on
27 November 7, 2006, reporting mood swings, angry outbursts and panic attacks. (AR
28 365.)

1 Throughout 2006, Dr. Nguyen prescribed various psychotropic medications,
2 including Klonopin and Serraquil. Claimant says that he has been taking psychotropic
3 medications since he was 27 years old. (AR 372.) He was taking Zoloft and Klonopin in
4 2008. (AR 372.)

5 The Appeals Council noted that the claimant's social worker Thomas Dennison
6 sent a letter in April, 2004 stating that Dr. Nguyen had diagnosed a schizoaffective
7 disorder, undifferentiated type, chronic with a GAF of 40. (AR 331.) This report was not
8 in the record, although some of Dr. Nguyen's treatment notes are in the file. (AR 331.)
9 The Appeals Council directed the ALJ to address further on remand claimant's mental
10 condition and the opinions of medical sources. (AR 332.)

11 The ALJ issued a subpoena to Dr. Nguyen to appear at the May 22, 2008 hearing
12 in San Bernardino (AR 321-22) but Dr. Nguyen did not appear. The ALJ stated that "in
13 lieu of taking him to District Court, I'll just find that his records will not be given much
14 credence because of his failure to comply with a subpoena request." (AR 429.) In his
15 decision, the ALJ made the following statement:

16 "I have as I did in the prior decision of October 24, 2006, considered all
17 records from the treating psychiatrist, Dr. Nguyen. I felt they were not
18 supported with objective testing, therefore, I believed personal testimony
19 from Dr. Nguyen was necessary. On May 5, 2008 (see B section of the
20 Exhibit file), I issued and served a subpoena for the personal appearance of
21 Dr. Nguyen; however, he failed to appear. I have no power to hold
22 Dr. Nguyen in contempt and in order to have the issue addressed, it would
23 take months as it would be necessary to go through our Regional attorney,
24 to the Office of General Council, then to the United States Attorney's Office
25 and finally into Federal District Court. In my past experience this takes
26 anywhere from 6 to 12 months. Therefore, my decision is based on
27 evidence of record." (AR 316.) (Emphasis added.)
28

1 The ALJ then gave reasons for giving little weight to Dr. Nguyen’s opinion and
2 diagnoses. Id.

3 The ALJ committed legal error in not pursuing the basis of Dr. Nguyen’s testimony
4 further. Dr. Nguyen’s diagnoses, if substantiated, obviously indicate more severe mental
5 impairments than determined by the consulting psychologists who testified, diagnoses
6 that could satisfy the de minimis step two inquiry of more than a slight abnormality that
7 has no more than a minimal effect on claimant’s ability to work. Smolen, 80 F.3d at
8 1290. Treating physician opinions are entitled to “special weight,” Embrey v. Bowen,
9 849 F.2d 418, 421 (9th Cir. 1988), indeed the “greatest weight.” Orn v. Astrue, 495 F.2d
10 625, 632 (9th Cir. 2007). Greater weight is given treating physician opinions because
11 treating physicians are “employed to cure and thus have the greatest opportunity to
12 know and observe the patient” Smolen, 80 F.3d at 1285; see also Orn, 495 F.3d at
13 633 (treating relationship provides a “unique perspective”). Thus, Dr. Nguyen’s opinions
14 were critical to this case. Also, the Appeals Council had directed the ALJ to address
15 those opinions. (AR 332.)

16 The ALJ indicated that the record was not complete or adequate to evaluate Dr.
17 Nguyen’s opinion and diagnoses (AR 316), triggering a duty to conduct an appropriate
18 inquiry. Smolen, 80 F.3d at 1288. The ALJ issued a subpoena to secure Dr. Nguyen’s
19 testimony. When he did not appear, the ALJ should have continued the hearing and if
20 necessary pursued Dr. Nguyen through the District Court which the ALJ says would
21 have taken only 6 to 12 months. (AR 316.) This is particularly true given the importance
22 of Dr. Nguyen’s opinions as the treating physician. Having failed to develop the record
23 regarding Dr. Nguyen’s opinion, the ALJ could not then reject that opinion. Smolen, 80
24 F.3d at 1288.

25 The ALJ also erred in not subpoenaing the notes and records of social worker
26 Thomas Dennison which may contain a report and additional treatment notes by
27 Dr. Nguyen, indicating a schizoaffective disorder not otherwise mentioned in
28 Dr. Nguyen’s available treatment notes. Yet, at the May 22, 2008 hearing, the ALJ

1 indicated that, because the notes had not been provided, the case would be decided
2 without the notes. (AR 427-28.) In his decision, the ALJ put on the claimant the
3 obligation to produce the social worker's notes (AR 316-17), but the ALJ cannot avoid
4 his independent, special duty to develop the record fully and fairly regarding
5 Dr. Nguyen's diagnoses. The ALJ should have subpoenaed the social worker's notes.

6 There was another compelling reason for further inquiry of Dr. Nguyen. The ALJ
7 concluded that there was but one impairment, i.e., anxiety disorder. Yet several other
8 medical professionals in this case diagnosed multiple mental impairments or possible
9 multiple impairments. The step two inquiry requires the Commissioner to consider
10 whether a claimant's combination of impairments meets or equals a listed impairment in
11 20 C.F.R. 404, Support B, App. 1. 20 C.F.R. § 404, 1520(d); Lester v. Chater, 81 F.3d
12 821, 828-29 (9th Cir. 1995). The claimant's illnesses "must be considered in
13 combination and must not be fragmentized in evaluating their effects." Beecher v.
14 Heckler, 756 F.2d 693, 694-695 (9th Cir. 1985) (quoting Dressel v. Califano, 558 F.2d
15 504, 508 (8th Cir. 1977)). The ALJ must consider the combined effect of all of a
16 claimant's impairments on his or her ability to function "without regard to whether each
17 alone was sufficiently severe." Smolen, 80 F.3d at 1290.

18 The record in this case implicates five possible impairments: 12.03 (schizophrenic
19 or psychotic disorders), 12.04 (affective disorders), 12.06 (anxiety disorders), 12.08
20 (personality disorders) and 12.09 (substance addiction disorders). As already noted, Dr.
21 Nguyen diagnosed psychotic disorder, bipolar disorder and polysubstance dependence
22 in remission. State agency psychiatrists in September, 2005 diagnosed anxiety disorder
23 under 12.06 and substance addiction disorder under 12.09. (AR 237.) Prison
24 psychiatrists in 2002-05 diagnosed depression disorder, psychotic disorder and opiate
25 dependence. Dr. Goldman diagnosed mood disorder and personality disorder. (AR
26 374.) Dr. Malacharuvil had a mood disorder under 12.04 and possibly a 12.09
27 substance dependence condition. The ALJ determined that claimant has the impairment
28 of anxiety disorder.

1 The ALJ did not offer any analysis of whether the claimant suffered from a
2 combination of impairments.¹ The ALJ did not acknowledge or discuss the consulting
3 psychologist’s diagnosis of personality disorder, which was error. SSR 96-5p
4 (“adjudicators must always carefully consider medical source opinions about any issue”).
5 The ALJ stated “The examiner diagnosed: malingering, opiate dependence in full
6 sustained remission per claimant’s report and mood disorder, not otherwise specified.”
7 (AR 318.) Curiously, the ALJ omitted reference to Dr. Goldman’s diagnosis of
8 “personality disorder NOS with antisocial features.” (AR 374.) The ALJ addressed
9 substance abuse only as independent basis for disability. (AR 317.) Most importantly,
10 he did not make further inquiry of Dr. Nguyen’s diagnoses which could impact the
11 required step two combined effects analysis of severity.

12 **D. Harmless Error**

13 An ALJ may reject the opinion of a treating physician that conflicts with that of an
14 examining physician but must make findings setting forth specific, legitimate reasons for
15 doing so that are based on substantial evidence in the record. Bray v. Comm’r, 554 F.3d
16 1219, 1228 (9th Cir. 2009); Thomas v. Barnhart, 278 F.3d 947, 956-57 (9th Cir. 2002).
17 The ALJ provided four reasons for rejecting Dr. Nguyen’s opinion and diagnoses. The
18 Court must evaluate these reasons to determine whether the ALJ’s failure to develop a
19 complete record constituted harmless error. Burch v. Barnhart, 400 F.3d 676, 679 (9th
20 Cir. 2005) (ALJ will not be reversed for harmless error).

21 1. Lack of Objective Testing

22 First, the ALJ concluded that Dr. Nguyen’s records were “not supported by
23 objective testing.” (CAR 316.) He states that Dr. Nguyen “administered no
24 psychological testing and offered no clinical findings to support his opinions or
25 diagnoses.” Id. He concludes that, because Dr. Nguyen’s opinions/diagnoses are not

26
27 ¹ The ALJ does make a generalized statement without more that the claimant does not have
28 a severe combination of impairments (AR 314) but such generalized statements lack the level of
specificity required by the Ninth Circuit. Embrey, 849 F.2d at 421.

1 based on “clinical or objective evidence,” they “obviously were based largely on
2 claimant’s account of his symptoms and limitations.” Id. The ALJ noted that this
3 observation was supported by the opinion of consulting psychologist Dr. Malancharuvil.
4 Id.

5 The ALJ applied an improper legal standard in giving “little weight” (AR 316) to
6 Dr. Nguyen’s testimony because of a lack of objective psychological testing. Psychiatric
7 impairments are not as amenable to substantiation by objective laboratory testing as are
8 physical impairments. Hartman v. Bowen, 636 F. Supp. 129, 131-132 (N.D. Cal. 1986).
9 The diagnostic techniques necessarily will be less tangible. Lebus v. Harris, 526 F.
10 Supp. 56, 60 (N.D. Cal. 1981). Mental disorders cannot be “ascertained and verified”
11 like physical ailments. Hartman, 636 F. Supp. at 132. Thus, in the case of mental
12 illness, clinical and laboratory data may consist of “the diagnoses and observations of
13 professional psychiatrists and psychologists.” Id. Additionally, the Ninth Circuit requires
14 that the Commissioner must give proper weight to the subjective elements of a
15 physician’s opinion. Embrey, 849 F.2d at 422.

16 Thus, Dr. Nguyen’s opinions cannot be rejected for lack of objective psychological
17 testing. As the treating physician who saw the claimant frequently in 2006, Dr. Nguyen’s
18 clinical observations, subjective judgments and diagnoses cannot be disregarded, even
19 were it true that no objective psychological testing was done.

20 The record regarding Dr. Nguyen’s diagnoses, however, discloses clinical
21 assessments (AR 271-274), mental status examinations (AR 275) acknowledged by the
22 ALJ (AR 318), and GAF scores according to the social worker (AR 315). So it is not
23 accurate to say that no clinical evaluation occurred. Dr. Nguyen’s personal testimony,
24 moreover, could have clarified the basis of his opinions and the extent of clinical testing
25 performed and the extent to which he was relying on claimant’s accounts of his
26 symptoms and limitations.

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1 2. Contradictory Progress Notes

2 The ALJ's second reason for rejecting Dr. Nguyen's opinions is that his progress
3 notes are inconsistent with his diagnosis of a psychotic or schizoaffective disorder (AR
4 316), but this inconsistency is an ambiguity in the record that the ALJ has the
5 responsibility to resolve through further inquiry. The record does not contain Dr.
6 Nguyen's report, all of his notes or his testimony, which may clarify the bases for his
7 diagnoses.

8 3. Inconsistent With Other Evidence

9 The ALJ's third reason for giving little weight to Dr. Nguyen's opinion is that
10 Dr. Nguyen's diagnosis is inconsistent with other substantial evidence in the record. The
11 ALJ specifically cites the December 16, 2005, report of the consulting psychiatric
12 examiner Dr. Yang and the February 2008 report of the consulting psychological
13 examiner Dr. Kim Goldman. (AR 316.) Neither of these reports found evidence of a
14 psychotic disorder, although Dr. Goldman did diagnose a personality disorder. (AR
15 374.) The fact that other evidence conflicts with Dr. Nguyen's diagnoses is not a reason
16 for the ALJ to fail to develop the record fully as to Dr. Nguyen's diagnoses. Rather, the
17 conflict in evidence is a reason for developing a complete record. The ALJ is not in a
18 position to weigh the conflicting medical opinions until he knows the bases of
19 Dr. Nguyen's diagnoses.

20 The ALJ must weigh the opinions of a treating physician using all of the factors in
21 20 C.F.R. § 404.1527, such as the length of the treatment relationship, frequency of
22 examination and the nature and extent of the treatment relationships. The evaluations of
23 claimant by two consulting examiners cited by the ALJ are legitimate evidence, but both
24 were done at one point in time. Dr. Nguyen, on the other hand, saw the claimant for
25 nearly a year. "Generally, the longer a treating source has treated [the plaintiff] and the
26 more times [plaintiff] has been seen by a treating source, the more weight . . . will [be
27 given] to the source's medical opinion." 20 C.F.R. § 404.1527(d)(2)(I). Again, Dr.

1 | Nguyen's testimony, report and complete records were critical and required further
2 | inquiry.

3 | The Court expresses no view on the merits of the conflicting evidence nor may
4 | this Court second guess the ALJ's evaluation of the evidence once the record is
5 | complete. It is the ALJ's responsibility to resolve conflicts in the evidence but only after
6 | the record is fully and fairly developed.

7 | 4. Malingering

8 | The ALJ's last reason for giving little weight to Dr. Nguyen's diagnoses is that
9 | Dr. Nguyen was "apparently ignorant of the fact that the claimant is a proven
10 | malingerer." (AR 316.) In February 2008, Dr. Goldman reported that claimant did not
11 | make an adequate effort on psychological tests and diagnosed him as "malingering."
12 | (AR 374.) She nevertheless diagnosed claimant with mood disorder and personality
13 | disorder with antisocial features. Id.

14 | There is legitimate evidence that claimant failed to cooperate with testing, but the
15 | ALJ's characterization of the claimant as a "proven malingerer" based on Dr. Goldman's
16 | opinion is too strong. The 2008 incident also has little to do with Dr. Nguyen's course of
17 | treatment in 2006 and is not a sufficient justification to forego obtaining Dr. Nguyen's
18 | personal testimony, report and complete treatment notes. The ALJ also does not
19 | explain how or why this incident in 2008 would affect the weight to be given to Dr.
20 | Nguyen's diagnoses in 2006. Dr. Nguyen did not report that claimant was uncooperative
21 | in 2006. Dr. Nguyen, having observed claimant for 10 months, had substantial
22 | experience with claimant, and thus was in a position to judge whether he was a
23 | malingerer.

24 | 5. Harmless Error

25 | Based on the foregoing, this Court concludes that the ALJ's failure to develop the
26 | record fully was not inconsequential to the ultimate disability determination, and thus not
27 | harmless. Stout v. Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006). Until the record is
28 | complete, there is no need to address the residual functional analysis which will have to

1 be reconsidered in light of this Memorandum Opinion and any new evidence that is
2 adduced.

3 **E. Credibility**

4 The second issue raised by plaintiff is whether the ALJ made proper credibility
5 findings. Because the Court is remanding for further proceedings, there is no need to
6 address that issue here.

7 **F. Remand is Required to Remedy Defects in the ALJ's Decision**

8 The choice of whether to reverse and remand for further administrative
9 proceedings, or to reverse and simply award benefits, is within the discretion of the
10 Court. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989). Remand is appropriate
11 where additional proceedings would remedy defects in the ALJ's decision, and where
12 the record should be developed more fully. Marcia v. Sullivan, 900 F.2d 172, 176 (9th
13 Cir. 1990).

14 Here, the Court finds remand appropriate. The ALJ should take appropriate steps
15 to secure Dr. Nguyen's testimony, reports and records and to subpoena the files and
16 notes of the social worker. The ALJ should consider whether the claimant has multiple
17 impairments and whether any impairment(s) meet or equal the listings in Appendix 1.

18
19 **ORDER**

20 The Court, therefore, VACATES the decision of the Commissioner of Social
21 Security Administration and REMANDS this action for further administrative proceedings
22 consistent with this Memorandum Opinion and Order.

23 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

24
25
26 DATED: August 3, 2009.

27 /s/ John E. McDermott
28 JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE