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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MIGUEL MAGALLON DIAZ,)	NO. EDCV 08-1919 SS
)	
Plaintiff,)	MEMORANDUM DECISION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

I.
INTRODUCTION

Miguel Magallon Diaz ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying his application for Disability Insurance Benefits ("DIB"). The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Commissioner is REVERSED and REMANDED for further proceedings.

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II.

PROCEDURAL HISTORY

Plaintiff filed an application for DIB on August 5, 2004. (Administrative Record ("AR") 57-60). He alleged a disability onset date of June 4, 2004 (AR 57) due to osteomyelitis in the spine and diabetes. (AR 80, 140). The Agency denied Plaintiff's claim for DIB initially on September 14, 2004. (AR 26-30). This denial was upheld upon reconsideration on December 9, 2004. (AR 32-36).

On December 4, 2006, a hearing was held before Administrative Law Judge ("ALJ") Peter J. Valentino. (AR 1201-28). The ALJ denied benefits in a written decision dated December 15, 2006. (AR 16-24). On January 25, 2007, Plaintiff sought review of the unfavorable decision. (AR 15). The Appeals Council declined review on October 28, 2008. (AR 5-7). Plaintiff commenced the instant action on December 24, 2008.

III.

THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

To qualify for disability benefits, a claimant must demonstrate a medically determinable physical or mental impairment that prevents him from engaging in substantial gainful activity¹ and that is expected to result in death or to last for a continuous period of at least twelve

¹ Substantial gainful activity means work that involves doing significant and productive physical or mental duties and is done for pay or profit. 20 C.F.R. §§ 404.1510, 416.910.

1 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing
2 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant
3 incapable of performing the work he previously performed and incapable
4 of performing any other substantial gainful employment that exists in
5 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
6 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

7
8 To decide if a claimant is entitled to benefits, an ALJ conducts
9 a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are as
10 follows:

- 11
12 (1) Is the claimant presently engaged in substantial gainful
13 activity? If so, the claimant is found not disabled.
14 If not, proceed to step two.
- 15
16 (2) Is the claimant's impairment severe? If not, the
17 claimant is found not disabled. If so, proceed to step
18 three.
- 19
20 (3) Does the claimant's impairment meet or equal one of a
21 list of specific impairments described in 20 C.F.R. Part
22 404, Subpart P, Appendix 1? If so, the claimant is
23 found disabled. If not, proceed to step four.
- 24
25 (4) Is the claimant capable of performing her past work? If
26 so, the claimant is found not disabled. If not, proceed
27 to step five.
- 28

1 (5) Is the claimant able to do any other work? If not, the
2 claimant is found disabled. If so, the claimant is
3 found not disabled.
4

5 Tackett, 180 F.3d at 1098-99; see also 20 C.F.R. §§ 404.1520(b)-(g)(1),
6 416.920(b)-(g)(1); Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th
7 Cir. 2001) (citations omitted).
8

9 The claimant has the burden of proof at steps one through four, and
10 the Commissioner has the burden of proof at step five. Bustamante, 262
11 F.3d at 953-54. If, at step four, the claimant meets his burden of
12 establishing an inability to perform past work, the Commissioner must
13 show that the claimant can perform some other work that exists in
14 "significant numbers" in the national economy, taking into account the
15 claimant's residual functional capacity ("RFC"),² age, education, and
16 work experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at
17 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner may
18 do so by the testimony of a vocational expert or by reference to the
19 Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart
20 P, Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel, 240
21 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both exertional
22 (strength-related) and nonexertional limitations, the Grids are
23 inapplicable and the ALJ must take the testimony of a VE. Moore v.
24 Apfel, 216 F.3d 864, 869 (9th Cir. 2000).
25

26 ² Residual functional capacity is "the most [one] can still do
27 despite [one's] limitations" and represents an assessment "based on all
28 the relevant evidence in [one's] case record." 20 C.F.R. §§
404.1545(a), 416.945(a).

1 IV.

2 THE ALJ'S DECISION

3
4 At step one, the ALJ found that Plaintiff had not engaged in
5 substantial gainful activity at any time relevant to the ALJ's decision.
6 (AR 21).

7
8 At step two, the ALJ determined that Plaintiff had the severe
9 impairments of spinal disc disease, history of osteomyelitis, thoracic
10 radiculopathy, chronic back pain, diabetes mellitus, and hypertension.
11 (Id.).

12
13 At step three, the ALJ concluded that Plaintiff did not have an
14 impairment or combination of impairments that met or medically equaled
15 a listed impairment. (Id.).

16
17 At step four, the ALJ found that Plaintiff retained the RFC to
18 perform light work, with occasional postural activities and no climbing
19 of ladders, ropes, or scaffolds.³ (Id.). The ALJ determined that
20 Plaintiff was capable of performing his past relevant work as a
21 supervisor of a wheels and rims assembly line. (AR 23). Therefore, the
22 ALJ concluded that Plaintiff was not disabled. (Id.).

23 ///

24
25 _____
26 ³ Light work is defined as work involving "lifting no more than 20
27 pounds at a time with frequent lifting or carrying of objects weighing
28 up to 10 pounds" and requiring "a good deal of walking or standing" or
"sitting most of the time with some pushing and pulling of arm or leg
controls." 20 C.F.R. §§ 404.1567(b), 416.967(b).

V.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The court may set aside the Commissioner's decision when the ALJ's findings are based on legal error or are not supported by substantial evidence in the record as a whole. Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion." Id. To determine whether substantial evidence supports a finding, the court must "'consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming or reversing that conclusion, the court may not substitute its judgment for that of the Commissioner. Reddick, 157 F.3d at 720-21.

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1 VI.

2 DISCUSSION

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4 A. Remand Is Required For Further Consideration Of Dr. Ralph
5 Steiger's Opinion

6
7 Plaintiff contends that the ALJ failed to properly consider Dr.
8 Ralph Steiger's opinion. (Jt. Stip. at 5-6). Specifically, Plaintiff
9 claims that the ALJ failed to provide clear and convincing reasons for
10 rejecting Dr. Steiger's opinion. (Jt. Stip. at 6). Defendant argues
11 that the ALJ provided specific and legitimate reasons for the rejection.
12 (Jt. Stip. at 8-9). As set forth below, the Court agrees with
13 Plaintiff.

14
15 In general, "[t]he opinions of treating doctors should be given
16 more weight than the opinions of doctors who do not treat the claimant."
17 Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007) (citing Reddick v.
18 Chater, 157 F.3d 715, 725 (9th Cir. 1998)). An examining physician's
19 opinion, in turn, generally is afforded more weight than a nonexamining
20 physician's opinion. Orn, 495 F.3d at 631.

21
22 If the treating doctor's opinion is not contradicted by another
23 doctor, it may be rejected only for "clear and convincing" reasons
24 supported by substantial evidence in the record. Lester v. Chater, 81
25 F.3d 821, 830 (9th Cir. 1995) (citing Baxter v. Sullivan, 923 F.2d 1391,
26 1396 (9th Cir. 1991)). Even when the treating doctor's opinion is
27 contradicted by the opinion of another doctor, the ALJ may properly
28 reject the treating doctor's opinion by providing "specific and

1 legitimate reasons' supported by substantial evidence in the record."
2 Orn v. Astrue, 495 F.3d 625, 633 (9th Cir. 2007) (quoting Reddick, 157
3 F.3d at 725).

4
5 As with a treating physician, the ALJ must present "clear and
6 convincing" reasons for rejecting the uncontroverted opinion of an
7 examining physician and may reject the controverted opinion of an
8 examining physician only for "specific and legitimate reasons that are
9 supported by substantial evidence." Carmickle v. Comm'r, Soc. Sec.
10 Admin., 533 F.3d 1155, 1164 (9th Cir. 2008) (quoting Lester, 81 F.3d at
11 830-31).

12
13 On December 7, 2004, Dr. Steiger, a worker's compensation examining
14 physician, conducted an orthopedic evaluation of Plaintiff. (AR 981-
15 93). Plaintiff reported that he had frequent slight to moderate right
16 knee and leg pain; constant slight lower back pain, which was
17 intermittently slight to moderate; and intermittent, slight neck pain.
18 (AR 988). An examination of the cervical spine revealed: moderate
19 tenderness on palpation at the base of the occiput, upper trapezius,
20 levator scapulae, and rhomboid muscles, bilaterally, with no evidence
21 of muscle spasm, rigidity, or trigger points upon palpation of these
22 muscles; pain at the base of the neck with axial compression testing;
23 decreased range of motion in flexion, extension, right and left lateral
24 bending, and right and left rotation. (AR 983-84). Dr. Steiger also
25 noted that Plaintiff had decreased range of motion of the right shoulder
26 with tenderness on palpation of the coracoid process, biceps,
27 acromioclavicular joint, and supraspinatus musculature. (AR 984).

1 Dr. Steiger also examined Plaintiff's thoracolumbar spine, which
2 revealed: ambulation with a right antalgic gait and with the right knee
3 bent; difficulty heel walking; toe walking performed satisfactorily;
4 moderate tenderness of the upper and lower lumbar spine and of the
5 posterior-superior iliac spines, bilaterally; no evidence of muscle
6 spasm or trigger points in the paravertebral muscles; decreased range
7 of motion in flexion, extension, right and left lateral bending, and
8 right and left rotation; positive straight leg raising in the sitting
9 and supine position; and positive signs of right sciatic nerve root
10 irritability. (AR 985-86). His examination of Plaintiff's right knee
11 demonstrated crepitus of the medial compartment; tenderness of the
12 medial and lateral joint lines; and decreased range of motion in flexion
13 and extension. (AR 986). Dr. Steiger noted that Plaintiff was only
14 able to partially squat due to knee pain. (Id.). He also conducted a
15 neurological examination which revealed: sensation in both upper
16 extremities were intact; deep tendon reflexes in the upper extremities
17 were "unobtainable" at the biceps, triceps, and brachioradialis,
18 bilaterally; presence of hypesthesia in the right leg and foot; and deep
19 tendon reflexes at the ankles were "unobtainable," bilaterally. (AR
20 984, 986).

21
22 Dr. Steiger also commented that x-rays taken on that same date
23 revealed "anterior lipping and bridging at multiple levels of the
24 thoracic spine and . . . narrowing of the disc space and some scalloping
25 in the superior end plate of what is probably T6-7 of this film." (AR
26 987). He diagnosed Plaintiff with, inter alia, chondromalacia patella
27 and internal derangement of the right knee; musculoligamentous sprain
28 of the lumbar spine with lower extremity radiculitis; musculoligamentous

1 sprain of the cervical spine; and status post thoracotomy in the right
2 chest for infection in the thoracic spine. (Id.). Dr. Steiger assess
3 Plaintiff's work restrictions as follows: no heavy lifting or repetitive
4 bending and stooping; no repetitive twisting; no prolonged neck
5 movement; no heavy pushing or pulling; no prolonged weight bearing; no
6 repetitive squatting or climbing; and no crawling or kneeling on the
7 right knee. (AR 989). He commented that Plaintiff was a "qualified
8 injured worker" who was "unable to return to his previous occupation"
9 as a forklift driver.⁴ (AR 982, 989).

10
11 Dr. Steiger's opinion contradicted that of Dr. George Weilepp, the
12 medical expert who testified at the December 4, 2006 hearing. (AR 1216-
13 22). Dr. Weilepp testified that, based on the medical records,
14 Plaintiff could perform "sedentary, light" work activities. (AR 1218-
15 19). Specifically, Dr. Weilepp assessed the following limitations: sit
16 for six hours, two hours at a time with normal breaks; stand for six
17 hours, an hour and a half to two hours at a time with normal breaks;
18 occasional kneeling, crawling, and squatting; frequent lifting and
19 bending; no heights or ladders; and no heavy industrial vibration or
20 dangerous equipment. (AR 1219-21).

21
22 The ALJ relied on Dr. Weilepp's opinion in finding that Plaintiff
23 retained the RFC to perform light work, with occasional postural
24 activities and no climbing of ladders, ropes, or scaffolds. (AR 21-22).

25
26 ⁴ On August 10, 2005, Dr. Steiger completed a supplemental medical
27 report, in which he summarized various medical records from Plaintiff's
28 treating physicians. (AR 1190-98). Based on his review of the records,
he concluded that his December 7, 2004 assessments remained unchanged.
(AR 1196).

1 In so doing, the ALJ discounted a portion of Dr. Steiger's opinion,
2 stating:

3 Dr. Steiger also merely precluded [Plaintiff] from heavy
4 lifting or repeated bending or stooping, repetitive twisting,
5 prolonged neck movement, heavy pushing or pulling, and
6 repetitive squatting or climbing. Although Dr. Steiger also
7 precluded [Plaintiff] from prolonged weight bearing,
8 crawling, or kneeling, upon examination he found only pain,
9 tenderness, and crepitus of the right knee, with loss of
10 motion, hypesthesia, and absent ankle reflexes. Remaining
11 knee signs were normal and knee pain was only slight to
12 moderate. I do not agree with Dr. Steiger, but rather, agree
13 with Dr. Weilepp, as to [Plaintiff's] capacity for performing
14 the standing and walking requirements of light work, and
15 performing occasional crawling or kneeling. In fact, Dr.
16 Steiger found [Plaintiff] able to perform toe walking, there
17 were no spasms or trigger points, sensation was intact in the
18 upper extremities, low back pain was slight and only
19 intermittently slight to moderate, and neck pain was only
20 intermittent and slight (Exhibit 13F).

21 (AR 22).

22
23 As Dr. Steiger's opinion was contradicted by Dr. Weilepp's
24 testimony, the ALJ was required to provide specific and legitimate
25 reasons for rejecting the portion of Steiger's opinion concerning
26 Plaintiff's ability to bear weight, crawl, and kneel. Carmickle, 533
27 F.3d at 1164. Here, the ALJ failed to satisfy this obligation.
28 Specifically, the ALJ's finding that Dr. Steiger's opinion was not

1 supported by his own clinical findings was not legally sufficient to
2 reject his opinion. Although the ALJ noted several findings indicating
3 that Plaintiff's condition was not as severe as Dr. Steiger assessed
4 (e.g., able to perform toe walking, no spasms or trigger points,
5 sensation was intact in the upper extremities, constant lower back pain
6 which was intermittently slight to moderate, and neck pain was
7 intermittent and slight), he failed to discuss the other findings that
8 did support the physician's opinion. For example, Dr. Steiger also
9 observed: moderate tenderness in the base of the occiput, upper
10 trapezius, levator scapulae, and rhomboid muscles; decreased range of
11 motion of the cervical spine in all directions; decreased range of
12 motion of the right shoulder; tenderness of the coracoid process,
13 biceps, acromioclavicular joint, and supraspinatus musculature; right
14 antalgic gait with difficulty heel walking; moderate tenderness of the
15 upper and lower lumbar spine and of the posterior-superior iliac spine;
16 decreased range of motion of the thoracolumbar spine in all directions;
17 reduced straight leg raising in the sitting and supine position with
18 positive signs of right sciatic nerve root irritability; and limitation
19 to partial squat due to knee pain. (AR 983-86). The ALJ's selective
20 reliance on only portions of the report from Dr. Steiger was misleading
21 and failed to constitute substantial evidence.⁵ See Reddick, 157 F.3d
22 at 723 (it is impermissible for the ALJ to develop an evidentiary basis
23

24
25 ⁵ Although Dr. Steiger found that Plaintiff could not bear weight
26 for a prolonged period, crawl, or kneel due to his right knee
27 impairment, it is reasonable to assume that Plaintiff's back and right
28 shoulder impairments would also contribute to these functional
limitations. (AR 989). As such, the ALJ should have properly
considered the clinical findings concerning Plaintiff's back and right
shoulder.

1 by "not fully accounting for the context of materials or all parts of
2 the testimony and reports"); Gallant v. Heckler, 753 F.2d 1450, 1456
3 (9th Cir. 1984) (an ALJ may not reach a conclusion and justify it by
4 ignoring competent evidence in the record that would suggest an opposite
5 result).

6
7 Furthermore, the ALJ failed to translate Dr. Steiger's workers'
8 compensation findings into Social Security terms. Although workers'
9 compensation disability ratings are not controlling in Social Security
10 cases, an ALJ must nevertheless evaluate medical opinions stated in
11 workers' compensation terminology just as he would evaluate any other
12 medical opinion. Macri v. Chater, 93 F.3d 540, 544 (9th Cir. 1996);
13 Desrosiers v. Secretary of Health & Human Services, 846 F.2d 573, 576
14 (9th Cir. 1988); Booth v. Barnhart, 181 F. Supp. 2d 1099, 1104 (C.D.
15 Cal. 2002). The ALJ must "translate" terms of art contained in such
16 medical terminology in order to accurately assess the implications of
17 those opinions for the Social Security disability determination. See
18 Desrosiers, 846 F.2d at 576). "While the ALJ's decision need not
19 contain an explicit 'translation,' it should at least indicate that the
20 ALJ recognized the differences between the relevant state workers'
21 compensation terminology, on the one hand, and the relevant Social
22 Security disability terminology, on the other hand, and took those
23 differences into account in evaluating the medical evidence.'" Booth,
24 181 F. Supp. 2d at 1105. Here, Dr. Steiger made findings relevant to
25 his workers compensation evaluation that were not translated for
26 determining Plaintiff's eligibility for social security benefits. (See
27 AR 988-989).

1 Accordingly, the ALJ's failure to provide specific and legitimate
2 reasons for rejecting Dr. Steiger's opinion constitutes error. This
3 case must be remanded for further consideration of Dr. Steiger's report.
4

5 **B. Remand Is Required For Further Consideration Of The Lay Witness**
6 **Testimony Of Pauline Mendoza**
7

8 Plaintiff claims that the ALJ failed to consider the lay witness
9 testimony of his friend, Pauline Mendoza. (Jt. Stip. at 12). Defendant
10 argues that Ms. Mendoza's statements are immaterial as they would not
11 render Plaintiff disabled even when fully credited. (Jt. Stip. at 14).
12 For the following reasons, the Court agrees with Plaintiff's contention
13 and remands the case for further proceedings on this issue.
14

15 In determining whether a claimant is disabled, an ALJ must consider
16 lay witness testimony concerning a claimant's ability to work. Stout
17 v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1053 (9th Cir. 2006);
18 Smolen, 80 F.3d at 1288; 20 C. F. R. §§ 404.1513(d)(4) & (e),
19 416.913(d)(4) & (e). The ALJ may discount the testimony of lay
20 witnesses only if he gives "reasons that are germane to each witness."
21 Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993); see also Lewis v.
22 Apfel, 236 F.3d 503, 511 (9th Cir. 2001) ("Lay testimony as to a
23 claimant's symptoms is competent evidence that an ALJ must take into
24 account, unless he or she expressly determines to disregard such
25 testimony and gives reasons germane to each witness for doing so.")
26 (citations omitted). An ALJ's failure to consider competent lay witness
27 testimony favorable to the claimant is harmless error only if the
28 reviewing court "can confidently conclude that no reasonable ALJ, when

1 fully crediting the testimony, could have reached a different disability
2 determination." Stout, 454 F.3d at 1056.

3
4 On November 22, 2004, Ms. Mendoza completed a third party function
5 report describing Plaintiff's daily activities and abilities. (AR 115-
6 23). She reported that she has known Plaintiff for 16 years and sees
7 him every other day. (AR 115). Ms. Mendoza commented that Plaintiff
8 did not prepare his own meals because he had difficulty using his right
9 arm and experienced shortness of breath. (AR 117). She also noted that
10 Plaintiff did not do any household chores due to pain and shortness of
11 breath. (AR 117-18). Ms. Mendoza stated that Plaintiff could sit down
12 for only short periods of time. (AR 119). She noted that Plaintiff did
13 not go out very much and when he did, he sometimes had his wife
14 accompany him because he got drowsy from his medication. (AR 119-20).
15 Ms. Mendoza reported that Plaintiff's condition affected his ability to
16 lift, squat, bend, stand, reach, walk, sit, see, climb stairs, remember,
17 understand, and follow instructions. (AR 120). In particular, she
18 commented that Plaintiff could lift 5 to 15 pounds; could walk for 30
19 minutes before needing to rest for 20 to 25 minutes; and could pay
20 attention for 30 minutes. (Id.). Ms. Mendoza noted that Plaintiff was
21 "very depressed and scared for his health." (AR 121). She stated that
22 Plaintiff purchased a cane and used it for support "all the time"
23 because he had pain in his back and legs. (Id.).

24
25 Here, the ALJ failed to consider the lay witness statement of Ms.
26 Mendoza. In his decision, the ALJ did not even mention the third party
27 function report completed by Ms. Mendoza. The ALJ's failure to consider
28 Ms. Mendoza's statement was error. See Dodrill, 12 F.3d at 919

1 ("Disregard of [lay witness statements] violates the Secretary's
2 regulation that he will consider observations by non-medical sources as
3 to how an impairment affects a claimant's ability to work. 20 C.F.R.
4 § 404.1513(e) (2).") (quoting Sprague v. Bowen, 812 F.2d 1226, 1232 (9th
5 Cir. 1987)).
6

7 The Court does not find that the ALJ's failure to consider Ms.
8 Mendoza's statement was harmless. Contrary to Plaintiff's contention,
9 Ms. Mendoza provided clear assessments of the extent of Plaintiff's
10 functional limitations, which suggested that Plaintiff was disabled.
11 Specifically, Ms. Mendoza noted that Plaintiff could lift only 5 to 15
12 pounds and walk for only 30 minutes before needing to rest for 20 to 25
13 minutes. (AR 120). The Court cannot conclude that no reasonable ALJ
14 would have found Plaintiff disabled if Ms. Mendoza's statements were
15 fully credited. See Stout, 454 F.3d at 1056. Accordingly, remand is
16 warranted on this issue.
17

18 **C. Remand Is Required For Further Consideration Of The Physical**
19 **Demands Of Plaintiff's Past Relevant Work**
20

21 Plaintiff argues that the ALJ's decision that Plaintiff was capable
22 of returning to his past relevant work as a supervisor for a wheel and
23 rims shop was not supported by substantial evidence of record. (Jt.
24 Stip. at 15-16). Specifically, Plaintiff contends that the ALJ
25 mischaracterized Plaintiff's past relevant job as "light" work. (Jt.
26 Stip. at 16). Defendant asserts that the ALJ properly relied on the
27 testimony of Plaintiff and the vocational expert in determining the
28

1 physical exertional requirements of Plaintiff's past relevant work.
2 (Jt. Stip. At 18-19).

3
4 At step four of the five-step sequential evaluation, the claimant
5 carries the burden of proving that he can no longer perform his past
6 relevant work. Pinto v. Massanari, 249 F.3d 840, 844 (9th Cir. 2001)
7 (citing 20 C.F.R. §§ 404.1520(e) and 416.920(e)). Specifically, the
8 claimant is required to prove that he cannot return to his "former type
9 of work" as that work is generally performed, not just that he cannot
10 return to his particular job. See Villa v. Heckler, 797 F.2d 794, 798
11 (9th Cir. 1986). Although the burden of proof lies with the plaintiff
12 at step four, the ALJ has the duty to make factual findings to support
13 his ultimate conclusion. Pinto, 249 F.3d at 844. The ALJ can meet this
14 burden by comparing the physical and mental demands of the past relevant
15 work with the plaintiff's actual RFC. Id. at 845.

16
17 Plaintiff has past relevant work experience as a forklift operator
18 and a supervisor for a wheels and rims shop. (AR 23, 81, 92-95, 140-41,
19 147-49). In his disability report, Plaintiff reported that he had
20 worked as a supervisor for two different wheels and rims shops from 1973
21 through 1996 or 1997 and as a forklift operator from 1998 through 2004.
22 (AR 81, 140-41, 1208). He noted that his supervisor job at the first
23 wheels and rims shop entailed supervising employees, managing inventory,
24 and operating machines. (AR 81, 141). Plaintiff stated that this
25 position required walking and standing for 8 hours a day, lifting up to
26 75 to 80 pounds, and frequently lifting 50 pounds. (Id.). He reported
27 that he lifted car rims and placed them on pallets that were 2 to 3 feet
28 away from him. (Id.). In his work history report, Plaintiff provided

1 similar descriptions of his supervisor position at the first wheels and
2 rims shop. (AR 93, 148-49). He also noted that the duties and physical
3 requirements of his first supervisor job were similar to those of his
4 second supervisor job. (AR 93-94).

5
6 Plaintiff reported in his work history report that his job as a
7 forklift operator required him to fill orders, load and unload trucks,
8 and drive forklifts. (AR 95). He stated that the physical requirements
9 of this job included walking and standing for 8 to 9 hours a day,
10 sitting for 4 to 5 hours a day, lifting up to 70 to 80 pounds, and
11 frequently lifting 50 pounds. (Id.). Plaintiff noted that he loaded
12 plastic and steel pipes into trucks and carried hoses, plastic pipes,
13 and tools a distance of 8 to 10 feet. (Id.).

14
15 Plaintiff appeared at the hearing with his counsel and testified
16 through an interpreter.⁶ (AR 1203-14, 1222-25). Plaintiff stated that
17 his work as a supervisor entailed "looking at the production" and
18 "watching the persons." (AR 1224). When questioned by the ALJ about
19 whether he did "actual work" or just simply "made sure that the
20 employees were doing their work," Plaintiff responded that he would
21 "render some documents of what had taken place during the shift" and
22 give them to his manager. (Id.). The following colloquy then ensued:⁷

23 VE: [Plaintiff], when I reviewed your file, the job that you
24 had supervising the wheels and rims business, it said

25
26 ⁶ At the hearing, Plaintiff's counsel informed the ALJ that she
27 communicated with Plaintiff in Spanish with the aid of his niece, who
acted as his interpreter. (AR 1204).

28 ⁷ "VE" refers to the vocational expert. "PLF" refers to Plaintiff.

1 that you work as a machine operator and that you loaded
2 and unloaded pallets.

3 ALJ: Well that's when he worked as a forklift operator.

4 VE: Right, but it was under that.

5 ALJ: Well, I don't think so.

6 PLF: No, that is mixed up with what I did for [the forklift
7 operator job].

8 ALJ: For [the forklift operator job], that's right.

9 VE: Okay. Could you briefly describe your job at . . . the
10 wheel and rim shop?

11 ALJ: He supervised people who did that work.

12 PLF: Describe it right now?

13 VE: Okay. You only supervised.

14 PLF: I was supervisor, and I had to report, watch the people
15 that was working in the machinery, and I had to render
16 information to see if that particular machine was going
17 to produce 200 rims, and if it only produce 150, I have
18 to give them a reason why was it that that machine
19 didn't produce 200 wheels.

20 [AR 1224-25].

21
22 The vocational expert subsequently characterized Plaintiff's
23 supervisor job as skilled, light work. (Id.). He characterized
24 Plaintiff's forklift operator job as semi-skilled, medium work. (AR
25 1225-26).

26
27 The ALJ posed a hypothetical question involving a person with the
28 following limitations: able to perform light work; no continuous lifting

1 or bending; no climbing of ladders or scaffolds; and requirement of a
2 typical break after 2 hours of continuous standing or walking. (AR
3 1226). The vocational expert responded that Plaintiff could perform his
4 past work as a supervisor of a wheels and rims shop. (Id.). The ALJ
5 relied on the vocational expert's testimony and concluded that Plaintiff
6 was capable of performing his past relevant work as a supervisor of a
7 wheels and rims assembly line. (AR 23).

8
9 In this case, the ALJ implicitly determined that Plaintiff's past
10 relevant work as a supervisor was classified as light work. (Id.).
11 However, there appears to have been some confusion as to the physical
12 exertion requirements of Plaintiff's past job. Plaintiff reported in
13 his disability report and work history report that his duties as a
14 supervisor included substantial manual labor, which was performed at the
15 heavy exertional level.⁸ (AR 81, 93-94, 141, 148-49). He indicated at
16 the hearing, however, that he did not perform manual labor but rather
17 oversaw employees and drafted reports. (AR 1224-25). Plaintiff
18 explained that the description of his supervisor job contained in the
19 reports - specifically, operating machines and loading and unloading
20 pallets - should actually have been stated under the forklift operator
21 job heading. (AR 1225).

22
23 It is unclear whether Plaintiff properly understood the ALJ's and
24 vocational expert's questions concerning the job duties and physical
25 demands of his prior work. First, the vocational expert's question

26 _____
27 ⁸ Heavy work is defined as work involving "lifting no more than 100
28 pounds at a time with frequent lifting or carrying of objects weighing
up to 50 pounds." 20 C.F.R. §§ 404.1567(d), 416.967(d).

1 regarding whether Plaintiff operated machines and loaded and unloaded
2 pallets as a supervisor of a wheels and rims company was not entirely
3 clear. Given that Plaintiff's job as a forklift operator required him
4 to drive forklifts and load and unloaded trucks, it is possible that
5 Plaintiff understood the vocational expert's question as one concerning
6 Plaintiff's forklift operator job. In fact, even the ALJ thought that
7 the vocational expert was questioning Plaintiff about what Plaintiff had
8 written in his reports concerning his duties as a forklift operator
9 job.⁹ (AR 1224-25). Moreover, when the vocational expert asked
10 Plaintiff to describe his supervisor job, the ALJ interjected that
11 Plaintiff "supervised people who did that work." (AR 1225). Plaintiff
12 never expressly stated that he did not do any manual labor.
13 Furthermore, in light of Plaintiff's reports in which he explicitly
14 stated under the supervisor job heading that he "lift[ed] car rims to
15 put on pallet's [sic]," it is doubtful that Plaintiff meant to write
16 this description under the forklift operator job heading. (AR 81, 93-
17 94, 141, 148-49). Indeed, under the forklift operator job heading,
18 Plaintiff noted that he loaded plastic and steel pipes into trucks, not
19 rims. (AR 95). On this record, the Court cannot find that the ALJ's
20 determination of the physical demands of Plaintiff's past relevant work
21 was supported by substantial evidence. Upon remand, the ALJ should
22

23 ⁹ Further, there may have been confusion due to a language barrier.
24 Plaintiff could not speak English, and the record does not indicate
25 whether Plaintiff's niece or a professional interpreter was used at the
26 hearing. (AR 1202-03). If Plaintiff's niece was translating, it is
27 quite possible that the ALJ's questions were not properly translated.
28 For example, it is possible that Plaintiff thought the ALJ and
vocational expert were asking questions only about his role in
"supervising" employees and not about the aspect of his job requiring
manual labor.

1 further inquire about the job duties and physical demands of his past
2 relevant work before determining whether Plaintiff can return to that
3 specific job.

4
5 **VII.**
6 **CONCLUSION**

7
8 Consistent with the foregoing, and pursuant to sentence four of 42
9 U.S.C. § 405(g),¹⁰ IT IS ORDERED that judgment be entered REVERSING the
10 decision of the Commissioner and REMANDING this matter for further
11 proceedings consistent with this decision. IT IS FURTHER ORDERED that
12 the Clerk of the Court serve copies of this Order and the Judgment on
13 counsel for both parties.

14
15 DATED: September 21, 2009.

16 /S/

17 _____
18 SUZANNE H. SEGAL
19 UNITED STATES MAGISTRATE JUDGE
20
21
22
23
24
25

26 _____
27 ¹⁰ This sentence provides: "The [district] court shall have power
28 to enter, upon the pleadings and transcript of the record, a judgment
affirming, modifying, or reversing the decision of the Commissioner of
Social Security, with or without remanding the cause for a rehearing."