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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

|                               |   |                    |
|-------------------------------|---|--------------------|
| DOMINIC DEBELLO,              | ) | No. EDCV 09-444 CW |
|                               | ) |                    |
| Plaintiff,                    | ) | DECISION AND ORDER |
| v.                            | ) |                    |
|                               | ) |                    |
| MICHAEL J. ASTRUE,            | ) |                    |
| Commissioner, Social Security | ) |                    |
| Administration,               | ) |                    |
|                               | ) |                    |
| Defendant.                    | ) |                    |
| _____                         | ) |                    |

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner’s denial of disability benefits. As discussed below, the court finds that the Commissioner’s decision should be reversed and this matter remanded for further proceedings.

**I. BACKGROUND**

Plaintiff Dominic DeBello was born on October 9, 1959, and was forty-seven years old on the date he last met the insured status requirements of the Social Security Act. [Administrative Record (“AR”) 7, 117.] Plaintiff has a high school education and past relevant work

1 experience as a plumber, heating and air conditioning. [AR 14.]  
2 Plaintiff alleges disability on the basis of herniated and bulging  
3 discs in his lower back. [AR 52.]

4 **II. PROCEEDINGS IN THIS COURT**

5 Plaintiff's complaint was lodged on February 27, 2009, and filed  
6 on March 6, 2009. On August 7, 2009, Defendant filed an Answer and  
7 Plaintiff's Administrative Record ("AR"). On October 20, 2009, the  
8 parties filed their Joint Stipulation ("JS") identifying matters not  
9 in dispute, issues in dispute, the positions of the parties, and the  
10 relief sought by each party. This matter has been taken under  
11 submission without oral argument.

12 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

13 Plaintiff applied for a period of disability and disability  
14 insurance benefits ("DIB") on October 31, 2006, alleging disability  
15 since May 31, 2004. [AR 7.] Plaintiff's date last insured for DIB  
16 eligibility is September 30, 2007. [Id.] After the application was  
17 denied initially and on reconsideration, Plaintiff requested an  
18 administrative hearing, which was held on August 15, 2008, before  
19 Administrative Law Judge ("ALJ") Lowell Fortune. [AR 21.] Plaintiff  
20 appeared with counsel, and testimony was taken from Plaintiff, medical  
21 expert Samuel Landau, and vocational expert Sandra Fioretti. [AR 22.]  
22 The ALJ denied benefits in a decision issued on September 16, 2008.  
23 [AR 7-16.] When the Appeals Council denied review on February 4,  
24 2009, the ALJ's decision became the Commissioner's final decision.  
25 [AR 1-3.]

26 **IV. STANDARD OF REVIEW**

27 Under 42 U.S.C. § 405(g), a district court may review the  
28 Commissioner's decision to deny benefits. The Commissioner's (or

1 ALJ's) findings and decision should be upheld if they are free of  
2 legal error and supported by substantial evidence. However, if the  
3 court determines that a finding is based on legal error or is not  
4 supported by substantial evidence in the record, the court may reject  
5 the finding and set aside the decision to deny benefits. See Aukland  
6 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.  
7 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240  
8 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,  
9 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.  
10 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada  
11 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

12 "Substantial evidence is more than a scintilla, but less than a  
13 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence  
14 which a reasonable person might accept as adequate to support a  
15 conclusion." Id. To determine whether substantial evidence supports  
16 a finding, a court must review the administrative record as a whole,  
17 "weighing both the evidence that supports and the evidence that  
18 detracts from the Commissioner's conclusion." Id. "If the evidence  
19 can reasonably support either affirming or reversing," the reviewing  
20 court "may not substitute its judgment" for that of the Commissioner.  
21 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

## 22 V. DISCUSSION

### 23 A. THE FIVE-STEP EVALUATION

24 To be eligible for disability benefits a claimant must  
25 demonstrate a medically determinable impairment which prevents the  
26 claimant from engaging in substantial gainful activity and which is  
27 expected to result in death or to last for a continuous period of at  
28 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at

1 721; 42 U.S.C. § 423(d)(1)(A).

2 Disability claims are evaluated using a five-step test:

3 Step one: Is the claimant engaging in substantial  
4 gainful activity? If so, the claimant is found not  
5 disabled. If not, proceed to step two.

6 Step two: Does the claimant have a "severe" impairment?  
7 If so, proceed to step three. If not, then a finding of not  
8 disabled is appropriate.

9 Step three: Does the claimant's impairment or  
10 combination of impairments meet or equal an impairment  
11 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If  
12 so, the claimant is automatically determined disabled. If  
13 not, proceed to step four.

14 Step four: Is the claimant capable of performing his  
15 past work? If so, the claimant is not disabled. If not,  
16 proceed to step five.

17 Step five: Does the claimant have the residual  
18 functional capacity to perform any other work? If so, the  
19 claimant is not disabled. If not, the claimant is disabled.

20 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended  
21 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107  
22 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20  
23 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or  
24 "not disabled" at any step, there is no need to complete further  
25 steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

26 Claimants have the burden of proof at steps one through four,  
27 subject to the presumption that Social Security hearings are non-  
28 adversarial, and to the Commissioner's affirmative duty to assist  
claimants in fully developing the record even if they are represented  
by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at  
1288. If this burden is met, a prima facie case of disability is  
made, and the burden shifts to the Commissioner (at step five) to

1 prove that, considering residual functional capacity ("RFC")<sup>1</sup>, age,  
2 education, and work experience, a claimant can perform other work  
3 which is available in significant numbers. Tackett, 180 F.3d at 1098,  
4 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

5 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

6 Here, the ALJ found that plaintiff had not engaged in substantial  
7 gainful activity during the period from his alleged disability onset  
8 date (May 31, 2004) to the date last insured (September 30, 2007)  
9 (step one); that plaintiff had "severe" impairments, namely morbid  
10 obesity and a lumbar spine disorder (step two); and that plaintiff did  
11 not have an impairment or combination of impairments that met or  
12 equaled a "listing" (step three). [AR 9.] The ALJ determined that  
13 Plaintiff had an RFC for a limited range of light work, including the  
14 ability to lift twenty pounds occasionally and ten pounds frequently;  
15 stand and walk for one to three blocks at a time for two hours out of  
16 an eight-hour workday; sit for six hours in an eight-hour workday;  
17 have the option to sit/stand every two hours for up to three minutes  
18 so he can stand and stretch; occasionally climb ramps and stairs;  
19 restricted from climbing ladders, ropes and scaffolds; occasionally  
20 bend and stoop; restricted from crouching or kneeling; walk with an  
21 assistive device as needed to walk on uneven terrain if he is walking  
22 more than two blocks; restricted from work at unprotected heights;

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24 <sup>1</sup> Residual functional capacity measures what a claimant can  
25 still do despite existing "exertional" (strength-related) and  
26 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155  
27 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to  
28 work without directly limiting strength, and include mental, sensory,  
postural, manipulative, and environmental limitations. Penny v.  
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155  
n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a  
nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,  
765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 work in an air-conditioned workplace. [AR 10.] This RFC precluded  
2 Plaintiff from returning to his past relevant work (step four). [AR  
3 14.] The vocational expert testified that a person with Plaintiff's  
4 RFC could perform other jobs in the national economy, such as bench  
5 assembler, assembler of buttons and notions, and optical assembler  
6 (step five). [AR 15.] Accordingly, Plaintiff was found not "disabled"  
7 as defined by the Social Security Act. [Id.]

### 8 **C. ISSUES IN DISPUTE**

9 The parties' Joint Stipulation raises four disputed issues:

- 10 1. Whether the ALJ properly considered Plaintiff's morbid  
11 obesity;
- 12 2. Whether the ALJ properly considered the opinions of  
13 Plaintiff's treating physician;
- 14 3. Whether the ALJ properly developed the record; and
- 15 4. Whether the ALJ properly considered Plaintiff's medication  
16 side effects.

17 [JS 2-3.]

18 As discussed below, Issue Three is dispositive.

### 19 **D. DR. TYLEE**

20 In Issue Three, Plaintiff contends that the ALJ did not properly  
21 develop the record as to the opinion of his treating physician, Dr.  
22 Lafayette Tylee. [JS 16-18.]

#### 23 **Background**

24 The record indicates that Plaintiff stated that his symptoms  
25 began in approximately 1999, and that his symptoms worsened so that he  
26 stopped working as a plumber in 2001. [AR: Exh. 4F at 1.] The pain  
27 was predominately in the thoracolumbar area and "has been quite  
28 debilitating." [Id.] Plaintiff alleges a disability onset date of

1 May 31, 2004.

2 On July 12, 2007, Dr. Tylee completed a Physical Capacities  
3 Evaluation for Plaintiff that stated a diagnosis of low back pain and  
4 degenerative disc disease. [AR: Exh. 7F.] Dr. Tylee's responses to  
5 the questionnaire stated, among other things, that Plaintiff should be  
6 limited to two hours of sitting, two hours of standing, and one hour  
7 of walking at one time during an eight-hour workday; three total hours  
8 of sitting, four total hours of standing, and two total hours of  
9 walking in an eight-hour workday; that Plaintiff can occasionally lift  
10 and carry ten pounds; that Plaintiff's signs and symptoms included  
11 substance dependence, impaired sleep, depression, anxiety, difficulty  
12 thinking or concentrating, and emotional withdrawal or isolation; and  
13 that the impairment lasted or could be expected to last for at least  
14 twelve months. [Id.]

15 On July 31, 2007, Dr. Tylee completed a Physical Residual  
16 Functional Capacity ["PRFC"] Questionnaire. [AR: Exh. 10F.] Dr. Tylee  
17 stated that Plaintiff's first date of treatment was on January 10,  
18 2007, that the most recent treatment occurred on July 12, 2007, and  
19 that treatment occurred monthly. [Id. at 1.] Dr. Tylee estimated that  
20 Plaintiff's level of pain was "7-9" on a scale of zero to ten. [Id.]  
21 Dr. Tyree stated that Plaintiff should be limited to three hours of  
22 sitting and three hours of standing/walking in an eight-hour workday,  
23 and that Plaintiff should be limited to lifting, at most, five to ten  
24 pounds occasionally. [Id. at 2.] In the comments section of the  
25 questionnaire, Dr. Tylee wrote, in part, that Plaintiff "has chronic  
26 moderate to severe pain (low back) over a very long time (>10 years)  
27 and is currently dependent and a chronic user of anxiety and narcotic  
28 medications which contribute to his suboptimal functioning." [Id. at

1 5.]

2 On October 10, 2007, Dr. Tylee completed another PRFC  
3 Questionnaire. [AR 68-72.] Dr. Tylee stated that Plaintiff's first  
4 date of treatment was on January 10, 2007, that the most recent  
5 treatment occurred on October 9, 2007, and that treatment occurred  
6 monthly. [AR 68.] Dr. Tylee estimated that Plaintiff's level of pain  
7 was "7-9" on a scale of zero to ten, and that his level of fatigue was  
8 seven. [Id.] Dr. Tyree gave the same postural and lifting limitations  
9 as the prior questionnaire. [AR 69.] In the comments section of the  
10 questionnaire, Dr. Tylee reiterated Plaintiff's lower back problems  
11 and stated, in part, that Plaintiff "is coming to our clinic for pain  
12 management, but his inability to function physically, emotionally and  
13 cognitively has made him disabled at this time." [AR 72.]

14 **The Commissioner's Evaluation**

15 In the administrative decision, the ALJ decided not to attach  
16 "great weight" to the two evaluations completed by Dr. Tyree in July  
17 2007. The ALJ did not address the October 10, 2007 questionnaire.  
18 The ALJ cited several reasons to reject the July 2007 opinions,  
19 including, in pertinent part, that no treatment notes were attached to  
20 the opinions, and that the opinions were not supported by any other  
21 treatment notes in the file. [AR 13.] Plaintiff contends that, in  
22 light of the fact that the record indicates that Dr. Tyree had a prior  
23 treatment relationship with Plaintiff, the ALJ should have made  
24 "reasonable attempts to obtain missing medical records from Dr. Tylee"  
25 before rejecting his opinions. [JS 17.]

26 **Discussion**

27 The ALJ has a "special duty to fully and fairly develop the  
28 record and to assure that the claimant's interests are considered



1 . . . even when the claimant is represented by counsel." Celaya v.  
2 Halter, 332 F.3d 1177, 1183 (9th Cir. 2003)(ellipsis in original)  
3 (quoting Brown v. Heckler, 713 F.2d 441, 443 (9th Cir.1983); Smolen v.  
4 Chater, 80 F.3d 1273, 1288 (9th Cir. 1996); see also Widmark v.  
5 Barnhart, 454 F.3d 1063, 1069 (9th Cir. 2006)(ALJ has a duty to  
6 develop the record where there is a "gap" in the medical evidence).  
7 This duty requires, among other things, that the ALJ "make every  
8 reasonable effort to obtain from the individual's treating physician  
9 . . . all medical evidence, including diagnostic tests, necessary in  
10 order to properly make [a disability] determination, prior to  
11 evaluating medical evidence obtained from any other source on a  
12 consultative basis." 42 U.S.C. § 423(d)(5)(B); see also 20 C.F.R. §  
13 404.1512(d)(1).

14 In this case, because it was evident that Plaintiff's existing  
15 record did not contain treating medical evidence referenced elsewhere  
16 in the record, the ALJ should have made additional reasonable efforts  
17 to develop the evidence. The two PRFC questionnaires completed by Dr.  
18 Tylee indicate that there was an earlier treatment relationship dating  
19 back to January 10, 2007, yet the record does not contain any  
20 treatment records from Dr. Tylee. Defendant cites a record indicating  
21 that the Commissioner made an initial request for treatment records  
22 from Dr. Tylee's clinic in Victorville, but it appears that the  
23 request was returned undelivered, and it did not cover the later  
24 stages of treatment; this does not appear to be, based on the existing  
25 record, a "reasonable effort" to develop the evidence pursuant to the  
26 Commissioner's regulations. [JS 19; AR 19-20.] See 20 C.F.R. §  
27 404.1512(d)(1) ("'Every reasonable effort' means that we will make an  
28 initial request for evidence from your medical source and, at any time

1 between 10 and 20 calendar days after the initial request, if the  
2 evidence has not been received, we will make one followup request to  
3 obtain the medical evidence necessary to make a determination”).

4 Defendant further argues that Plaintiff and his counsel had  
5 several opportunities to submit evidence from Dr. Tylee, and the  
6 record indicates that they did not make a reasonable effort to do so.  
7 [JS 19-20.] Although Defendant’s apparent argument that the claimant  
8 shares in the burden of developing the record is well-taken, see 20  
9 C.F.R. § 404.1512(c), it is also well-settled that the Commissioner is  
10 not a “mere umpire” in the proceeding and has a special duty to  
11 develop the record fully and fairly to assure that the claimant’s  
12 interests are considered. See Widmark v. Barnhart, 454 F.3d at 1068.  
13 Based on the circumstances of this case, particularly the clear  
14 indications that the record is incomplete, remand for further  
15 development of the record is appropriate.

16 **E. REMAND FOR FURTHER PROCEEDINGS**

17 The decision whether to remand for further proceedings is within  
18 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,  
19 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by  
20 further proceedings, or where the record has been fully developed, it  
21 is appropriate to exercise this discretion to direct an immediate  
22 award of benefits. Harman, 211 F.3d at 1179 (decision whether to  
23 remand for further proceedings turns upon their likely utility).  
24 However, where there are outstanding issues that must be resolved  
25 before a determination can be made, and it is not clear from the  
26 record that the ALJ would be required to find the claimant disabled if  
27 all the evidence were properly evaluated, remand is appropriate. Id.  
28 Here, as set out above, outstanding issues remain before a finding of

1 disability can be made.<sup>2</sup> Accordingly, remand is appropriate.

2 **VI. ORDERS**

3 Accordingly, **IT IS ORDERED** that:

4 1. The decision of the Commissioner is **REVERSED**.

5 2. This action is **REMANDED** to defendant, pursuant to Sentence  
6 Four of 42 U.S.C. § 405(g), for further proceedings as discussed  
7 above.

8 3. The Clerk of the Court shall serve this Decision and Order  
9 and the Judgment herein on all parties or counsel.

10  
11 DATED: November 30, 2009

12 \_\_\_\_\_/S/  
13 CARLA M. WOEHRLE  
14 United States Magistrate Judge  
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27 <sup>2</sup> None of the remaining claims raised by Plaintiff in the Joint  
28 Stipulation clearly directs a finding of disability on the basis of  
the current record.