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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MARK FACE,	)	NO. EDCV 09-01508-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on August 13, 2009, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for disability insurance benefits ("DIB"). On November 18, 2009, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on March 11, 2010, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, in the alternative, remanding the matter for further administrative proceedings; and defendant seeks an order affirming the Commissioner's decision. The Court has taken the parties' Joint Stipulation under submission without oral argument.



1 Commissioner. (A.R. 240.) On July 20, 2005, this Court reversed the  
2 Commissioner's decision on the basis that ALJ Varni failed to provide  
3 specific and legitimate reasons for rejecting the opinion of Dr. Theron  
4 Wells and needed to further develop the record by re-contacting Dr.  
5 Wells. (A.R. 240-54.) This Court remanded the matter for further  
6 proceedings consistent with its decision. (A.R. 255.) On February 28,  
7 2006, the Appeals Council remanded the case for further proceedings  
8 consistent with the Court Order and, noting the grant of plaintiff's  
9 subsequent claim for disability, limited the proceedings to prior to  
10 September 25, 2003. (A.R. 258-59.) The Appeals Council directed the  
11 Administrative Law Judge to give further consideration to Dr. Wells'  
12 opinion and stated that he *may* contact Dr. Wells. (*Id.*)

13  
14 On September 5, 2006, plaintiff testified at a hearing before ALJ  
15 Varni. (A.R. 360-65.) Sandra Fioretti, a vocational expert, also  
16 testified. (A.R. 361-64.) On October 27, 2006, without having re-  
17 contacted Dr. Wells, ALJ Varni again denied plaintiff's application.  
18 (A.R. 209-18.) On January 11, 2007, plaintiff initiated a civil action  
19 in this district to appeal the October 27, 2006, decision. (A.R. 489-  
20 90.) On July 26, 2007, the parties executed a Stipulation to Voluntary  
21 Remand Pursuant to Sentence Four of 42 U.S.C. § 405(g) and to Entry of  
22 Judgment. Pursuant to the parties' Stipulation, the Court entered  
23 judgment on July 26, 2007, ordering that, on remand, the Administrative  
24 Law Judge was to re-contact and/or contact plaintiff's treating  
25 physicians, namely, Dr. Wells, Dr. William H. Cherry, and Dr. Peterson  
26 (the "Stipulated Remand Order"). (A.R. 487-88.)

27  
28 On February 13, 2009, plaintiff testified at a hearing before

1 Administrative Law Judge Lowell Fortune ("ALJ" or "ALJ Fortune"). (A.R.  
2 387-404.) Troy Scott, a vocational expert, also testified. (A.R. 401-  
3 03.) On April 8, 2009, the ALJ denied plaintiff's application. (A.R.  
4 369-81.)

5  
6 **SUMMARY OF ADMINISTRATIVE DECISION**  
7

8 The ALJ found that plaintiff did not engage in substantial gainful  
9 activity from May 10, 2001, the alleged onset date, through September  
10 24, 2003. (A.R. 372, 381.) The ALJ determined that plaintiff had the  
11 following severe impairments: insulin-dependent diabetes mellitus;  
12 adjustment disorder; and methamphetamine abuse. (A.R. 372.) The  
13 impairments, including the substance abuse disorder, met sections 12.04  
14 and 12.09 of 20 C.F.R. Part 404, Subpart P, Appendix 1. (*Id.*) The ALJ  
15 determined, however, that if plaintiff stopped the substance abuse, his  
16 impairments would not have met or equaled any of the impairments listed  
17 in 20 C.F.R. Part 404, Subpart P, Appendix 1. (A.R. 373.)  
18

19 The ALJ determined that had plaintiff stopped the substance abuse  
20 during the relevant period, he would have had the residual functional  
21 capacity ("RFC") to:

22  
23 perform medium work as defined in 20 [C.F.R.] 404.1567(c)  
24 except [plaintiff] was precluded from climbing ladders, ropes,  
25 and scaffolds, and he should avoid working around unprotected  
26 heights or pools of water. [Plaintiff] was able to perform  
27 simple, repetitive, nonpublic tasks with no safety operations  
28 or responsibility for [t]he safety of others.

1 (A.R. 374.) The ALJ found that plaintiff was unable to perform his past  
2 relevant work. (A.R. 380.) Having considered plaintiff's age,  
3 education, work experience, and RFC, as well as relied on testimony from  
4 the vocational expert, the ALJ found that jobs existed in the national  
5 economy that plaintiff could have performed if he stopped his substance  
6 abuse, including cleaner, dishwasher, and handpacker. (A.R. 380-81.)

7  
8 Accordingly, the ALJ concluded that plaintiff, had he stopped the  
9 substance abuse, was not disabled, as defined in the Social Security  
10 Act, from May 10, 2001, through September 24, 2003. (A.R. 381.)

11  
12 **STANDARD OF REVIEW**

13  
14 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
15 decision to determine whether it is free from legal error and supported  
16 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
17 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant  
18 evidence as a reasonable mind might accept as adequate to support a  
19 conclusion.'" *Id.* (citation omitted). The "evidence must be more than  
20 a mere scintilla but not necessarily a preponderance." Connett v.  
21 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the  
22 record can constitute substantial evidence, only those "'reasonably  
23 drawn from the record'" will suffice. Widmark v. Barnhart, 454 F.3d  
24 1063, 1066 (9th Cir. 2006)(citation omitted).

25  
26 Although this Court cannot substitute its discretion for that of  
27 the Commissioner, the Court nonetheless must review the record as a  
28 whole, "weighing both the evidence that supports and the evidence that

1 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
2 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also  
3 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
4 responsible for determining credibility, resolving conflicts in medical  
5 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
6 1035, 1039 (9th Cir. 1995).

7  
8 The Court will uphold the Commissioner's decision when the evidence  
9 is susceptible to more than one rational interpretation. Burch v.  
10 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may  
11 review only the reasons stated by the ALJ in his decision "and may not  
12 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d  
13 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse  
14 the Commissioner's decision if it is based on harmless error, which  
15 exists only when it is "clear from the record that an ALJ's error was  
16 'inconsequential to the ultimate nondisability determination.'" Robbins  
17 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.  
18 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d  
19 at 679.

## 20 21 DISCUSSION

22  
23 Plaintiff alleges the following three issues: (1) whether the ALJ  
24 complied with this Court's order requiring him to re-contact Dr. Theron  
25 Wells; (2) whether the ALJ complied with this Court's order requiring  
26 him to re-contact Dr. William H. Cherry; and (3) whether the ALJ  
27 complied with this Court's order requiring him to contact Dr. Peterson.  
28 (Joint Stipulation ("Joint Stip.") at 3.) Because the three issues are

1 similar, the Court will address these issues as one.

2  
3 **I. The ALJ Erred By Failing To Comply With the Court's Remand Order**  
4 **Regarding Dr. Wells and Dr. Cherry, But Did Not Err Regarding Dr.**  
5 **Peterson.**  
6

7 The Code of Federal Regulations sets forth the procedure for  
8 adjudication of social security disability claims. "When a Federal  
9 Court remands a case to the Commissioner for further consideration, the  
10 Appeals Council" may make a decision or remand to an administrative law  
11 judge with instructions. 20 C.F.R. § 404.983. The Appeals Council may  
12 remand a case "in which additional evidence is needed or additional  
13 action by the administrative law judge is required." 20 C.F.R. §  
14 404.977(a). Once the Appeals Council remands the case, the  
15 administrative law judge shall take any action ordered by the Appeals  
16 Council and any additional action not inconsistent with the remand  
17 order. 20 C.F.R. § 404.977(b).  
18

19 On July 26, 2007, the Court remanded the case pursuant to the  
20 Stipulated Remand Order, which required the ALJ to: (1) pursuant to the  
21 Court Order dated July 20, 2005, re-contact Dr. Wells for all treatment  
22 records, to seek clarification regarding his opinion that plaintiff had  
23 a poor ability to adapt to work-like situations and to determine whether  
24 plaintiff's visual hallucinations resulted from his prior drug use; (2)  
25 contact Dr. Peterson for any mental health treatment records; (3) obtain  
26 any updated treatment records from Dr. Cherry and provide further  
27 evaluation of his opinion; and (4) reconcile the two previous decisions  
28 with regard to the period, if any, when plaintiff may have abused drugs.

1 (A.R. 487-88.) On December 13, 2007, the Appeals Council remanded the  
2 case to an administrative law judge directing him, in relevant part, to:  
3 (1) contact Dr. Wells; (2) obtain the treatment records of Dr. Peterson;  
4 and (3) give consideration to the opinions of Dr. Wells and Dr. Cherry  
5 (the "Appeals Council Remand Order"). (A.R. 493-95.)  
6

7 On October 26, 2008, the ALJ sent a letter to plaintiff's counsel,  
8 requesting that he submit the current mailing addresses for Dr. Wells,  
9 Dr. Peterson, and Dr. Cherry. (A.R. 496.) On November 28, 2008, the  
10 ALJ sent plaintiff's counsel a subsequent letter stating that he had not  
11 received the mailing addresses of the physicians as requested in his  
12 letter dated October 26, 2008, and that if he did not receive them in 20  
13 days, he would "consider each doctor to be unlocatable, and their  
14 medical records not retrievable." (A.R. 497.) Plaintiff's counsel  
15 again failed to respond. Consequently, the ALJ held a hearing and  
16 issued a decision denying the application. (A.R. 387-404, 369-81.) In  
17 his decision, the ALJ stated that the Court had directed him to re-  
18 contact Dr. Wells, Dr. Peterson, and Dr. Cherry, but that the "doctors  
19 were not locatable and the medical records were not retrievable." (A.R.  
20 377.)  
21

22 Plaintiff argues that the ALJ did not make a diligent effort to  
23 comply with the Appeals Council Remand Order. (Joint Stip. at 5, 14-  
24 15.)  
25

26 **A. The ALJ Erred By Failing To Contact Dr. Wells and Dr. Cherry.**  
27

28 The ALJ's failure to comply with the Stipulated Remand Order and

1 related Appeals Council Remand Order with respect to Dr. Wells and Dr.  
2 Cherry constitutes error. As the ALJ acknowledged, these remand orders  
3 clearly directed the ALJ to contact Dr. Wells and Dr. Cherry. (A.R.  
4 377.) Contrary to the Commissioner's contentions, solely writing two  
5 letters to plaintiff's counsel to obtain current addresses is  
6 insufficient and unreasonable. (Joint Stip. at 7, A.R. 496-97.) The  
7 ALJ could have obtained the addresses from the medical records. (See,  
8 e.g., A.R. 153, 178.) Even if the physicians no longer worked at those  
9 locations, their former employers may have possessed the treatment  
10 records needed and/or provided the ALJ with the physicians' current  
11 addresses. The ALJ also could have attempted to find the contact  
12 information in a phone book or on the internet and/or through the  
13 Medical Board of California.

14  
15 Plaintiff's counsel is not without blame and offers no explanation  
16 for his failure to respond to the two letters from the ALJ. The fact  
17 that plaintiff's counsel was delinquent in his duties, however, does not  
18 absolve the ALJ of his duty to comply with the Stipulated Remand Order.  
19 In social security cases, the law is well-settled that the ALJ has an  
20 affirmative "duty to fully and fairly develop the record and to assure  
21 that the claimant's interests are considered." Tonapetyan v. Halter,  
22 242 F.3d 1144, 1150 (9th Cir. 2001)(citations omitted). "This duty  
23 extends to the represented as well as to the unrepresented claimant."  
24 *Id.*; see also Celaya v. Halter, 332 F.3d 117, 1183 (9th Cir. 2003)  
25 (noting that the ALJ has an affirmative "duty to fully and fairly  
26 develop the record and to assure that the claimant's interests are  
27 considered . . . even when the claimant is represented by  
28 counsel")(ellipsis in original; quoting Brown v. Heckler, 713 F.2d 441,

1 443 (9th Cir. 1983)). Further, the ALJ has a duty "to scrupulously and  
2 conscientiously probe into, inquire of, and explore all the relevant  
3 facts" by procuring the necessary, relevant treatment records. Higbee  
4 v. Sullivan, 975 F.2d 558, 561-62 (9th Cir. 1991)(citation omitted).  
5 Here, the ALJ was directed to contact Dr. Wells and Dr. Cherry to  
6 supplement the record, yet made no reasonable effort. See, e.g., Rachal  
7 v. Astrue, 2008 WL 2620354, \*3 (C.D. Cal. June 30, 2008)(finding that  
8 the ALJ erred by failing to comply with the remand order directing him  
9 to re-contact the treating physician).

10  
11 The Commissioner contends that even if the ALJ's actions failed to  
12 meet his duty to develop the record diligently, they were harmless.  
13 (Joint Stip. at 10.) The Court disagrees.

14  
15 In the hierarchy of physician opinions considered in assessing a  
16 social security claim, "[g]enerally, a treating physician's opinion  
17 carries more weight than an examining physician's, and an examining  
18 physician's opinion carries more weight than a reviewing physician's."  
19 Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001); 20 C.F.R. §  
20 404.1527(d)(1)-(2). The opinions of treating physicians are entitled to  
21 the greatest weight, because the treating physician is hired to cure and  
22 has a better opportunity to observe the claimant. Magallanes v. Bowen,  
23 881 F.2d 747, 751 (9th Cir. 1989).

24  
25 The ALJ relied primarily on the opinions of examining and State  
26 Agency Review physicians to reach his decision. (A.R. 378-80.) As  
27 such, any additional evidence obtained from plaintiff's treating  
28 physicians could impact the decision, because the opinions of treating

1 physicians are given the greatest weight. Holohan, 246 F.3d at 1202.  
2 Further, this Court already has found that the evidence provided by the  
3 treating physicians was ambiguous and inadequate. Webb v. Barnhart, 433  
4 F.3d 683, 687 (9th Cir. 2005) ("The ALJ's duty to supplement a claimant's  
5 record is triggered by ambiguous evidence, the ALJ's own finding that  
6 the record is inadequate or the ALJ's reliance on an expert's conclusion  
7 that the evidence is ambiguous."). As the Court clearly stated in its  
8 first remand order of July 21, 2005, the evidence "is unclear as to what  
9 Dr. Wells' opinion (viz., that [p]laintiff has a 'poor' ability to adapt  
10 to work-like situations) means in terms of specific limitations that  
11 would affect [p]laintiff in the workplace." (A.R. 251.) Thus,  
12 clarification is vital. Dr. Wells, as a treating psychiatrist, can also  
13 provide insight as to whether plaintiff abstained from further substance  
14 abuse, and his "records could shed further light on his opinions,  
15 observations, and diagnoses." (A.R. 251-52.) The Court further noted  
16 that the diagnoses and observations of Dr. Cherry, also a treating  
17 physician, supported Dr. Wells' opinion. Dr. Cherry treated plaintiff's  
18 physical problems and diagnosed him with depression. (A.R. 242, 250.)

19  
20 Given that the ALJ found that plaintiff had the severe impairments  
21 of an adjustment disorder and methamphetamine abuse (A.R. 372), any  
22 additional evidence obtained from Dr. Wells and Dr. Cherry would help  
23 clarify whether plaintiff's mental impairments resulted solely from his  
24 substance abuse. Upon contact with the physicians, the ALJ's analysis  
25 may ultimately prove to be correct, but he has not yet fulfilled his  
26 duty to develop the record and obtain all available information.  
27 Accordingly, the ALJ erred by failing to comply with the Stipulated  
28 Remand Order and related Appeals Council Remand Order.

1           **B. The ALJ's Attempt To Contact Dr. Peterson Was In Compliance**  
2           **With The Remand Order.**  
3

4           The ALJ's attempt to contact Dr. Peterson, plaintiff's treating  
5 psychiatrist, was reasonable. Unlike the information readily available  
6 with respect to Dr. Wells and Dr. Cherry, the ALJ did not have  
7 sufficient information to make further attempts to contact Dr. Peterson.  
8 The sole reference to Dr. Peterson in the record occurred in a Complete  
9 Psychiatric Evaluation, dated July 24, 2006. (A.R. 331-37.) During  
10 this evaluation, plaintiff informed the examining psychiatrist that he  
11 was being treated by Dr. Peterson. (A.R. 332.) Plaintiff did not state  
12 Dr. Peterson's first name, at which hospital or with which group he  
13 practiced, or in which city he is located.  
14

15           The ALJ cannot contact a physician when he does not have any  
16 information other than a last name and specialty. The ALJ sent two  
17 requests to plaintiff for Dr. Peterson's current address. (A.R. 496-  
18 97.) Plaintiff's counsel failed to respond and has provided no  
19 explanation for his failure. Given the ALJ's lack of information, the  
20 ALJ's attempt was reasonable.  
21

22           Accordingly, the ALJ complied with the Stipulated Remand Order  
23 directing him to contact Dr. Peterson.  
24

25           **II. Remand Is Required.**  
26

27           The decision whether to remand for further proceedings or order an  
28 immediate award of benefits is within the district court's discretion.

1 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
2 useful purpose would be served by further administrative proceedings, or  
3 where the record has been fully developed, it is appropriate to exercise  
4 this discretion to direct an immediate award of benefits. *Id.* at 1179  
5 (“[T]he decision of whether to remand for further proceedings turns upon  
6 the likely utility of such proceedings.”). However, where there are  
7 outstanding issues that must be resolved before a determination of  
8 disability can be made, and it is not clear from the record that the ALJ  
9 would be required to find the claimant disabled if all the evidence were  
10 properly evaluated, remand is appropriate. *Id.* at 1179-81.

11  
12 Here, outstanding issues remain with respect to the effect of  
13 plaintiff’s substance abuse. Accordingly, remand is the appropriate  
14 remedy to allow the ALJ the opportunity to remedy the above-mentioned  
15 deficiencies and errors. *See, e.g., Benecke v. Barnhart*, 379 F.3d 587,  
16 593 (9th Cir. 2004)(remand for further proceedings is appropriate if  
17 enhancement of the record would be useful); McAllister v. Sullivan, 888  
18 F.2d 599, 603 (9th Cir. 1989)(remand appropriate to remedy defects in  
19 the record).

20  
21 **CONCLUSION**

22  
23 Accordingly, for the reasons stated above, IT IS ORDERED that the  
24 decision of the Commissioner is REVERSED, and this case is REMANDED for  
25 further proceedings consistent with this Memorandum Opinion and Order.

26  
27 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
28 copies of this Memorandum Opinion and Order and the Judgment on counsel

1 for plaintiff and for defendant.

2

3 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

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5 DATED: August 26, 2010

6

*Margaret A. Nagle*  
\_\_\_\_\_  
MARGARET A. NAGLE  
UNITED STATES MAGISTRATE JUDGE

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