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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

RICHARD GUERRA,	)	NO. EDCV 09-02274-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on December 22, 2009, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for social security income ("SSI"). On March 2, 2010, 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 August 16, 2010, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits or, alternatively, for further administrative proceedings; and defendant requests that the Commissioner's decision be affirmed. The Court has taken the parties' Joint Stipulation under submission without oral argument.

1                                   **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

2  
3           Plaintiff filed an application for a period of SSI on March 19,  
4 2008.<sup>1</sup> (Administrative Record ("A.R.") 98-100.) Plaintiff claims to  
5 have been disabled since February 27, 2008,<sup>2</sup> due to back injury and  
6 bipolar disorder. (A.R. 103, 108.) Plaintiff has past relevant work  
7 experience as a telephone solicitor, landscape laborer, fast food cook,  
8 golf cart attendant, greenskeeper, and egg processor. (A.R. 13, 109.)  
9

10           After the Commissioner denied plaintiff's claim initially and upon  
11 reconsideration (A.R. 46-51, 54-59), plaintiff requested a hearing  
12 (A.R. 60). On July 28, 2009, plaintiff, who was represented by counsel,  
13 appeared and testified at a hearing before Administrative Law Judge  
14 Michael D. Radensky ("ALJ"). (A.R. 15-43.) Vocational expert David  
15 Reinhart also testified. (A.R. 38-39, 41-42.) On September 23, 2009,  
16 the ALJ denied plaintiff's claim (A.R. 8-14), and the Appeals Council  
17 subsequently denied plaintiff's request for review of the ALJ's decision  
18 (A.R. 1-4). That decision is now at issue in this action  
19

20                                   **SUMMARY OF ADMINISTRATIVE DECISION**

21  
22           The ALJ found that plaintiff has not engaged in substantial gainful  
23 activity since February 27, 2008, the alleged onset date of plaintiff's  
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25  
26           <sup>1</sup>     It appears that plaintiff filed disability claims in the past;  
27 however, because those claims were denied and not appealed, those claims  
28 are not at issue here.

28           <sup>2</sup>     Plaintiff's onset date was changed to February 27, 2008, to  
comport with his work history. (A.R. 10, 103.)

1 claimed disability. (A.R. 10.) The ALJ determined that plaintiff has  
2 the following severe impairments: status post lumbar surgery, history  
3 of spinal meningitis, and anxiety. (*Id.*) The ALJ also determined that  
4 plaintiff does not have an impairment or combination of impairments that  
5 meets or equals in severity any impairment listed in 20 C.F.R. Part 404,  
6 Subpart P, Appendix 1 (20 C.F.R. §§ 416.920(d), 416.925 and 416.926).  
7 (A.R. 496.) Additionally, the ALJ found that plaintiff's pain  
8 allegations were not entirely credible. (A.R. 13.)

9  
10 After reviewing the record, the ALJ determined that plaintiff has  
11 the residual functional capacity ("RFC") to perform a limited range of  
12 light work as defined in 20 C.F.R. § 416.967(b). (A.R. 11.) In  
13 pertinent part, the ALJ determined that "[n]on-exertionally, [plaintiff]  
14 is able to perform work in a non-public setting and [plaintiff] should  
15 avoid intense interpersonal interactions with co-workers, supervisors,  
16 and members of the public." (*Id.*)

17  
18 Based on plaintiff's RFC, the ALJ determined that plaintiff was  
19 capable of performing his past relevant work as an egg processor. (A.R.  
20 13.) Accordingly, the ALJ concluded that plaintiff was not disabled  
21 within the meaning of the Social Security Act since February 27, 2008.  
22 (A.R. 14.)

#### 23 24 STANDARD OF REVIEW

25  
26 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
27 decision to determine whether it is free from legal error and supported  
28 by substantial evidence in the record as a whole. Orn v. Astrue, 495

1 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is “such relevant  
2 evidence as a reasonable mind might accept as adequate to support a  
3 conclusion.” *Id.* (citation omitted). The “evidence must be more than  
4 a mere scintilla but not necessarily a preponderance.” Connett v.  
5 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). “While inferences from the  
6 record can constitute substantial evidence, only those ‘reasonably drawn  
7 from the record’ will suffice.” Widmark v. Barnhart, 454 F.3d 1063,  
8 1066 (9th Cir. 2006)(citation omitted).

9  
10 Although this Court cannot substitute its discretion for that of  
11 the Commissioner, the Court nonetheless must review the record as a  
12 whole, “weighing both the evidence that supports and the evidence that  
13 detracts from the [Commissioner’s] conclusion.” Desrosiers v. Sec’y of  
14 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*  
15 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). “The ALJ is  
16 responsible for determining credibility, resolving conflicts in medical  
17 testimony, and for resolving ambiguities.” Andrews v. Shalala, 53 F.3d  
18 1035, 1039 (9th Cir. 1995).

19  
20 The Court will uphold the Commissioner’s decision when the evidence  
21 is susceptible to more than one rational interpretation. Burch v.  
22 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may  
23 review only the reasons stated by the ALJ in his decision “and may not  
24 affirm the ALJ on a ground upon which he did not rely.” Orn, 495 F.3d  
25 at 630; *see also* Connett, 340 F.3d at 874. The Court will not reverse  
26 the Commissioner’s decision if it is based on harmless error, which  
27 exists only when it is “clear from the record that an ALJ’s error was  
28 ‘inconsequential to the ultimate nondisability determination.’” Robbins

1 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.  
2 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d  
3 at 679.

## 4 5 DISCUSSION

6  
7 Plaintiff makes the following claims: (1) the ALJ did not consider  
8 plaintiff's pain testimony properly; (2) the ALJ failed to consider  
9 plaintiff's alleged side effects from medications; (3) the ALJ did not  
10 consider the opinions of plaintiff's treating physicians properly;<sup>3</sup> and  
11 (4) the ALJ improperly determined that plaintiff did not meet or equal  
12 Listing 1.04. (Joint Stipulation ("Joint Stip.") at 3-4.)

### 13 14 **I. The ALJ's Rejection Of Plaintiff's Pain Testimony Was Improper.**

15  
16 The law is well-settled that, once a disability claimant produces  
17 evidence of an underlying physical impairment that is reasonably likely  
18 to be the source of his subjective symptom(s), the subjective testimony  
19 as to the severity of the symptoms must be considered. Moisa v.  
20 Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947  
21 F.2d 341, 345 (9th Cir. 2001)(*en banc*); see also 20 C.F.R. § 416.929(a)  
22 (explaining how pain and other symptoms are evaluated). "Unless an ALJ  
23 makes a finding of malingering based on affirmative evidence thereof, he  
24 or she may only find an applicant not credible by making specific  
25 findings as to credibility and stating clear and convincing reasons for

26 \_\_\_\_\_  
27 <sup>3</sup> Although presented separately, for purposes of clarity, the  
28 Court will address plaintiff's claims regarding his treating physicians  
together.

1 each." Robbins v. Soc. Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006);  
2 see Smolen v. Chater, 80 F.3d 1273, 1283-84 (9th Cir. 1996)("Once a  
3 claimant meets the *Cotton* test [Cotton v. Bowen, 799 F.2d 1403, 1407  
4 (9th Cir. 1986)] and there is no affirmative evidence suggesting [he] is  
5 malingering, the ALJ may reject the claimant's testimony regarding the  
6 severity of [his] symptoms only if he makes specific findings stating  
7 clear and convincing reasons for doing so."); see also Lester v. Chater,  
8 81 F.3d 821 (9th Cir. 1996). Further, the ALJ's credibility findings  
9 must be "sufficiently specific" to allow a reviewing court to conclude  
10 that the ALJ rejected the claimant's testimony on permissible grounds  
11 and did not arbitrarily discredit the claimant's testimony. Moisa, 367  
12 F.3d at 885. If the ALJ's interpretation of the claimant's testimony is  
13 reasonable and is supported by substantial evidence, it is not the  
14 Court's role to "second-guess" it. Rollins v. Massanari, 261 F. 3d 853,  
15 857 (9th Cir. 2001).

16  
17 In this case, the ALJ concluded that plaintiff's "medically  
18 determinable impairments could reasonably be expected to cause the  
19 alleged symptoms." (A.R. 13.) Further, the ALJ cited no evidence of  
20 malingering by plaintiff. Accordingly, the ALJ's reason for rejecting  
21 plaintiff's credibility must be "clear and convincing."  
22

23 In his decision, the ALJ stated that plaintiff's "statements  
24 concerning the intensity, persistence and limiting effects of [his  
25 alleged] symptoms are not credible to the extent they are inconsistent  
26 with the [RFC] assessment." (A.R. 13.) At the hearing, plaintiff  
27 testified that his back problems keep him from working and make "it real  
28 hard to like sit down for long periods of time or stand up or anything

1 like that." (A.R. 29.) Plaintiff also testified that he is most  
2 comfortable lying down and spends five hours out of an eight-hour day  
3 lying down. (A.R. 29-30.) While the ALJ may find plaintiff's  
4 allegations of back pain to be not credible, the ALJ's boilerplate  
5 statement does not constitute a clear and convincing reason, as  
6 required, for rejecting plaintiff's pain testimony.<sup>4</sup> Additionally, the  
7 ALJ's boilerplate statement is not "sufficiently specific" to allow this  
8 Court to determine whether the ALJ rejected plaintiff's testimony on  
9 permissible grounds.

10  
11 To further discredit plaintiff's pain testimony, the ALJ stated  
12 that "the medical evidence is clearly suggestive of drug-seeking  
13 behaviors." (A.R. 11.) While evidence of drug seeking behavior could  
14 detract from plaintiff's credibility, the evidence cited by the ALJ --  
15 namely, that plaintiff requested that his pain medication be renewed at  
16 each medical visit (A.R. 11) -- does not constitute substantial evidence  
17 to support such a conclusion.<sup>5</sup> In fact, instead of detracting from  
18

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19 <sup>4</sup> Further, although the ALJ may find that plaintiff's "problems  
20 with working and maintaining employment are much more related to his  
21 mental problems than his back pain" (A.R. 12), the ALJ, nevertheless,  
must give clear and convincing reasons for rejecting plaintiff's pain  
testimony.

22 <sup>5</sup> "Several cases approve discounting the testimony of a claimant  
23 who has engaged in drug-seeking behavior, . . . but none has defined  
24 what constitutes drug-seeking behavior." Kellems v. Astrue, 2010 U.S.  
25 App. LEXIS 13263, \*8 (7th Cir. 2010). However, "[c]laimants in these  
26 cases do have a common thread, . . . each obtained, or attempted to  
27 obtain, pain medication by deceiving or manipulating a medical  
28 professional." *Id.*; see, e.g., Edlund v. Massanari, 253 F.3d 1152, 1157  
(9th Cir. 2001); Simila v. Astrue, 573 F.3d 503, 519 (7th Cir. 2009);  
Poppa v. Astrue, 569 F.3d 1167, 1171 (10th Cir. 2009); Berger v. Astrue,  
516 F.3d 538, 546 (7th Cir. 2008); Anderson v. Barnhart, 344 F.3d 809,  
815 (8th Cir. 2003). In this case, however, the ALJ cited no evidence  
that plaintiff attempted to obtain pain medication by deceiving or  
manipulating a medical professional.

1 plaintiff's credibility, plaintiff's behavior could support a finding of  
2 significant pain. See Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir.  
3 2001)(noting that plaintiff's "constant quest for medical treatment and  
4 pain relief" refuted the ALJ's finding that claimant lacked credibility  
5 about her pain and physical limitations).

6  
7 Moreover, while defendant offers several reasons to explain the  
8 ALJ's conclusion regarding plaintiff's alleged drug-seeking behaviors,  
9 the Court cannot entertain these post hoc rationalizations. See, e.g.,  
10 Connett, 340 F.3d at 874 (finding that "[i]t was error for the district  
11 court to affirm the ALJ's credibility decision based on evidence that  
12 the ALJ did not discuss").

13  
14 **II. The ALJ Failed To Consider The Side Effects Of Plaintiff's**  
15 **Medications.**

16  
17 In evaluating symptoms, SSR 96-7p specifically requires  
18 consideration of the "type, dosage, effectiveness, and side effects of  
19 any medication the individual takes or has taken to alleviate pain or  
20 other symptoms." See also 20 C.F.R. § 416.929(c)(3)(iv). The Ninth  
21 Circuit has held that "the side effects of medications can have a  
22 significant impact on an individual's ability to work and should figure  
23 in the disability determination process." Varney v. Sec'y of Health and  
24 Human Servs., 846 F.2d 581, 585 (9th Cir. 1988)(superseded by statute on  
25 other grounds as stated in Bunnell, 947 F.2d at 345). Thus, if the ALJ  
26 "chooses to disregard a claimant's testimony as to the subjective  
27 limitations of side effects, he must support that decision with specific  
28 findings similar to those required for excess pain testimony." *Id.*



1 In this case, the ALJ failed to provide specific reasons for  
2 rejecting plaintiff's testimony regarding the side effects of his  
3 medications. At the hearing, plaintiff testified that his pain  
4 medications, Norco and Methadone, make him drowsy. (A.R. 30.)  
5 Plaintiff also testified that Methadone makes him nauseous, and his  
6 nausea lasts for a "couple [of] hours," every day.<sup>6</sup> (A.R. 32.) The  
7 ALJ's decision, however, does not reference plaintiff's alleged side  
8 effects, and therefore, it is unclear whether the ALJ considered  
9 plaintiff's alleged side effects and/or the effect they may have on his  
10 ability to function in the workplace.<sup>7</sup> Further, although defendant cites  
11 various reasons to disregard plaintiff's alleged side effects, the Court  
12 cannot affirm the ALJ's decision based upon post hoc rationalizations.  
13 See Connett, 340 F.3d at 874.

14  
15 **III. The ALJ Did Not Commit Reversible Error In Connection With His**  
16 **Consideration Of The Opinions Of Plaintiff's Physicians.**

17  
18 An ALJ must provide "clear and convincing reasons" for rejecting  
19 the uncontradicted opinion of either a treating or examining physician.  
20 Lester, 81 F.3d at 830. To reject the contradicted opinion of a  
21 treating or examining physician, an ALJ must provide "specific and  
22 legitimate reasons that are supported by substantial evidence in the  
23 record." *Id.* at 830-31. However, an ALJ "need not discuss *all* evidence  
24

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25  
26 <sup>6</sup> The record also contains reports indicating that Norco causes  
27 plaintiff "stomach problems." (See, e.g., A.R. 147, 159.)

28 <sup>7</sup> To the extent the ALJ rejects plaintiff's alleged side effects  
based on his "drug-seeking behaviors," the ALJ's reasoning is  
unpersuasive for the reasons set forth *supra*.

1 presented" to him. Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir.  
2 1984)(citation omitted; emphasis in original); see also Howard v.  
3 Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003)(ALJ need not discuss every  
4 piece of evidence). An ALJ must explain only why "significant probative  
5 evidence has been rejected." Vincent, 739 F.2d at 1395 (internal  
6 quotations and citation omitted).

7  
8 A. Dr. Raval  
9

10 Plaintiff contends that the ALJ did not consider the opinion of  
11 plaintiff's treating physician, Niren Raval, D.O., regarding plaintiff's  
12 bowel and urinary incontinence, properly. No reversible error was  
13 committed with respect to the consideration of Dr. Raval's treatment  
14 notes.

15  
16 The medical record contains two treatment notes from Dr. Raval that  
17 document plaintiff's complaints and symptoms of urinary and fecal  
18 incontinence. (A.R. 206, 245.) In pertinent part, the later treatment  
19 note states that plaintiff's incontinence problems were "significant"  
20 following surgery, but have "gotten better." (A.R. 245.)  
21

22 Although the ALJ did not reference Dr. Raval's treatment notes  
23 specifically in his decision, the ALJ did reference the medical records  
24 from Arrowhead Regional Medical Center, where Dr. Raval practiced. The  
25 ALJ noted that these medical records made mention of plaintiff's  
26 "incontinence secondary to an old condition of spinal meningitis."  
27 (A.R. 11.) Contrary to plaintiff's contention, however, the record  
28

1 contains no opinion<sup>8</sup> by Dr. Raval or any other physician that plaintiff's  
2 incontinence causes him any limitations. Therefore, it is unclear what  
3 opinion, if any, the ALJ failed to consider. Moreover, at the hearing,  
4 plaintiff testified that he did not think his "urine problems" kept him  
5 from working. (A.R. 32.) Accordingly, any error committed by the ALJ  
6 in failing to consider Dr. Raval's treatment notes was harmless.<sup>9</sup>

7  
8 B. Dr. Hudson  
9

10 Plaintiff also contends that the ALJ did not consider the findings  
11 of plaintiff's treating psychiatrist,<sup>10</sup> Marcia Hudson, M.D., properly.  
12 Plaintiff's chief complaint appears to be that the ALJ did not consider  
13 plaintiff's Global Assessment of Functioning (GAF) score of 45 as  
14 assessed by Dr. Hudson. On December 7, 2007, approximately two and a  
15 half months prior to plaintiff's alleged disability onset date, Dr.  
16 Hudson performed an Adult Psychiatric Evaluation on plaintiff. At that  
17

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18 <sup>8</sup> Pursuant to 20 C.F.R. § 416.927(a)(2), "[m]edical opinions are  
19 statements . . . that reflect judgments about the nature and severity fo  
20 your impairment(s), including your symptoms, diagnosis and prognosis,  
21 what you can still do despite impairment(s), and your physical or mental  
22 restrictions."

23 <sup>9</sup> Further, as defendant properly notes, plaintiff's subjective  
24 symptoms alone are insufficient to establish a medically determinable  
25 physical impairment. Ukolov v. Barnhart, 420 F.3d 1002, 1005 (9th Cir.  
26 2005) ("under no circumstances may the existence of an impairment be  
27 established on the basis of symptoms alone") (quoting SSR 96-4p); SSR  
28 96-4p, 1996 SSR LEXIS 11 at \*3, 1996 WL 374187, at \*1 ("regardless of  
how many symptoms an individual alleges, or how genuine the individual's  
complaints may appear to be, the existence of a medically determinable  
physical or mental impairment cannot be established in the absence of  
objective medical abnormalities; i.e., medical signs and laboratory  
findings").

<sup>10</sup> Dr. Hudson is viewed more properly as an examining physician,  
because she appears to have examined plaintiff only once.

1 time, Dr. Hudson assessed plaintiff with a GAF score of 45. (A.R. 201.)

2  
3 The ALJ's failure to discuss plaintiff's GAF score does not  
4 constitute reversible error. Under the Social Security regulations, an  
5 ALJ is not required "to take the GAF score into account in determining  
6 the extent of an individual's disability; while the scores may help the  
7 ALJ assess the claimant's disability, it is not essential and the ALJ's  
8 failure to rely on the GAF does not constitute an improper application  
9 of the law." Quintanar v. Astrue, 2010 U.S. Dist. LEXIS 26637, \*26-\*27  
10 (C.D. Cal. Mar. 19, 2010)(citations omitted); 65 Fed. Reg. 50746, 50764-  
11 65 (August 21, 2000) ("The GAF scale . . . does not have a direct  
12 correlation to the severity requirements in our mental disorders  
13 listing."); McFarland v. Astrue, 288 Fed. Appx. 357, 359 (9th Cir. 2008)  
14 (finding the ALJ's failure to address plaintiff's GAF scores was not  
15 legal error); see also Howard v. Comm'r of Soc. Sec., 276 F.3d 235, 241  
16 (6th Cir. 2002)("The ALJ's failure to reference the GAF score in the  
17 RFC, standing alone, does not make the RFC inaccurate.").

18  
19 Moreover, contrary to plaintiff's contention, there is no  
20 indication that the ALJ "ignored" or "disregarded" Dr. Hudson's  
21 findings. The ALJ referred to the treatment records from San Bernardino  
22 County Mental Health, Phoenix Community Counseling, during the relevant  
23 time period when Dr. Hudson examined plaintiff. (A.R. 12.) In addition,  
24 Dr. Hudson's findings are not inconsistent with the ALJ's RFC  
25 determination, which recognized plaintiff's severe mental impairments  
26 and, thus, included work-related functional limitations. Further, the  
27 ALJ's findings are supported by substantial evidence. In fact, Dr.  
28 Hudson did not opine that plaintiff had any disabilities, impairments,

1 or work-related functional limitations.<sup>11</sup>

2  
3 Accordingly, there is no basis for finding error in connection with  
4 the ALJ's consideration of Dr. Hudson's opinion.

5  
6 **IV. The ALJ Did Not Err In Determining That Plaintiff's Impairments Did**  
7 **Not Meet Or Equal Listing 1.04.**

8  
9 Plaintiff contends that the ALJ failed to analyze and consider  
10 plaintiff's combined impairments properly before determining that they  
11 did not meet or equal the impairments set forth in Listing 1.04. (Joint  
12 Stip. at 26-29, 32.) No material error occurred.

13  
14 Plaintiff bears the burden of proving that his impairment or  
15 combination of impairments meets or equals the criteria of a Listing.  
16 Tackett v. Apfel, 180 F.3d 1094, 1100 (9th Cir. 1999); see Sullivan v.  
17 Zebley, 493 U.S. 521, 530-31 (1990)(burden is on the claimant to show  
18 that his or her impairment meets all of the specified medical criteria  
19 for a Listing or to present medical findings equal in severity to all  
20 the criteria for the one most similar listed impairment). The physical  
21 and mental conditions contained in the Listings are considered so severe  
22 that "they are irrebuttably presumed disabling, without specific finding  
23 as to the claimant's ability to perform his past relevant work or any  
24 other jobs." Lester, 81 F.3d at 828; see Zebley, 493 U.S. at 532

25  
26 \_\_\_\_\_  
27 <sup>11</sup> Moreover, as defendant properly noted, a week before  
28 plaintiff's GAF score was assessed, plaintiff admitted to receiving  
unemployment benefits (A.R. 200) -- benefits that are premised on an  
admission that the claimant is able and willing to work. (Joint Stip.  
at 20.)

1 (noting that the Listings were "designed to operate as a presumption of  
2 disability that makes further inquiry unnecessary").

3  
4 An ALJ must evaluate the relevant evidence to determine whether a  
5 claimant's impairment or impairments meet or equal one of the specified  
6 impairments set forth in the Listings. Lewis, 236 F.3d at 512; 20  
7 C.F.R. § 416.920(a)(4)(iii). A "boilerplate finding is insufficient to  
8 support a conclusion that a claimant's impairment" does not meet or  
9 equal a Listing. Lewis, 236 F.3d at 512; *see, e.g., Marcia v. Sullivan*,  
10 900 F.2d 172, 176 (9th Cir. 1990)(noting that the ALJ's unexplicated  
11 finding at Step Three was reversible error). An ALJ's lack of formal  
12 analysis and findings at Step Three, however, will not constitute  
13 reversible error when: the ALJ's subsequent discussion of the relevant  
14 medical evidence supports a conclusory finding; and with respect to  
15 equivalency, plaintiff fails to proffer a theory or evidence showing  
16 that his combined impairments equal a Listing. Lewis, 236 F.3d at 513-  
17 14.

18  
19 In this case, plaintiff failed to carry his burden with respect to  
20 establishing that his impairments meet or equal the impairments set  
21 forth in Listing 1.04. Plaintiff presented no evidence of nerve root  
22 compression or spinal arachnoiditis, which are necessary impairments to  
23 support a Listing 1.04A or a Listing 1.04B finding, respectively.  
24 Zebley, 493 U.S. at 530 (noting that "[f]or a claimant to show that his  
25 impairment matches a listing, it must meet all of the specified medical  
26 criteria"). With respect to Listing 1.04C, even if the Court were to  
27 accept all of plaintiff's alleged impairments, plaintiff, at best, meets  
28 some, but not all, of the requisite medical criteria. Critically,

1 plaintiff fails to present any evidence that he has an "inability to  
2 ambulate effectively"<sup>12</sup> -- a specified medical criteria for a Listing  
3 1.04C finding. *Id.* (noting that "[a]n impairment that manifests only  
4 some of [the specified medical] criteria, no matter how severely, does  
5 not qualify"). Additionally, plaintiff fails to proffer a theory or  
6 evidence showing that his combined impairments equal a Listing.  
7 Accordingly, plaintiff did not meet his burden.

8  
9 In addition, the ALJ's Listing-related evaluation sufficed under  
10 the circumstances of this case. The ALJ stated that plaintiff's  
11 "impairments do not singly or in combination cause the severity of  
12 symptoms to meet or equal a physical or mental Listing. This finding is  
13 supported by the opinions of the State Agency reviewing physicians,  
14 which are discussed in more detail in finding five." (A.R. 10.) In  
15 finding five, the ALJ discussed plaintiff's physical impairments,  
16 diagnoses, and symptoms (A.R. 11), and he concluded that "[t]he medical  
17 evidence does not document any musculoskeletal impairment that meets or  
18 equals the severity of listing 1.04" (A.R. 12). In so concluding, the  
19 ALJ gave "great weight to the evaluation and assessment made by the  
20 State Agency reviewing physicians (Exs. 4F, 5F)." (*Id.*) As defendant

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21  
22 <sup>12</sup> As defined by Section 1.00B2 of the Listings, an "inability to  
23 ambulate effectively" means an "extreme limitation of the ability to  
24 walk; *i.e.*, an impairment(s) that interferes very seriously with the  
25 individual's ability to independently initiate, sustain, or complete  
26 activities." Ineffective ambulation is "defined generally as having  
27 insufficient lower extremity functioning . . . to permit independent  
28 ambulation without the use of a hand-held assistive device(s) that  
limits the functions of both upper extremities." See Section  
1.00B2b(1). This provision cites as "examples," *inter alia*, an  
"inability to walk without the use of a walker, two crutches or two  
canes" or an "inability to use standard public transportation" or an  
"inability to carry out routine ambulatory activities, such as shopping"  
or an "inability to climb a few steps at a reasonable pace with the use  
of a single hand rail." See Section 1.00B2b(2)

1 properly notes, neither the State Agency reviewing physicians nor  
2 plaintiff's physicians opined that plaintiff's combined impairments met  
3 or equaled a listing. (Joint Stip. at 30.) Further, as discussed  
4 above, given that plaintiff did not present evidence or proffer a theory  
5 that he meets or equals a 1.04 Listing, any lack of formal analysis by  
6 the ALJ does not constitute reversible error.

7  
8 **V. Remand Is Required.**

9  
10 The decision whether to remand for further proceedings or order an  
11 immediate award of benefits is within the district court's discretion.  
12 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
13 useful purpose would be served by further administrative proceedings, or  
14 where the record has been fully developed, it is appropriate to exercise  
15 this discretion to direct an immediate award of benefits. *Id.* at 1179  
16 ("[T]he decision of whether to remand for further proceedings turns upon  
17 the likely utility of such proceedings."). However, where there are  
18 outstanding issues that must be resolved before a determination of  
19 disability can be made, and it is not clear from the record that the ALJ  
20 would be required to find the claimant disabled if all the evidence were  
21 properly evaluated, remand is appropriate. *Id.* at 1179-81.

22  
23 Here, remand is the appropriate remedy to allow the ALJ the  
24 opportunity to remedy the above-mentioned deficiencies and errors. *See*,  
25 *e.g.*, Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004) (remand for  
26 further proceedings is appropriate if enhancement of the record would be  
27 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989)  
28 (remand appropriate to remedy defects in the record).



1  
2 On remand, the ALJ must correct the above-mentioned deficiencies  
3 and errors. Specifically, the ALJ needs to revisit and reconsider  
4 plaintiff's pain testimony and reported side effects from his  
5 medications as well as the effect, if any, they have on plaintiff's  
6 ability to work. Further, should the ALJ reject plaintiff's allegations  
7 of pain or medication side effects, the ALJ must set forth clear and  
8 convincing reasons for so doing supported by the requisite substantial  
9 evidence.

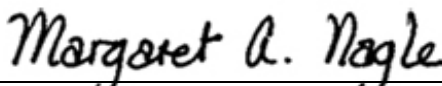
10  
11 **CONCLUSION**  
12

13 Accordingly, for the reasons stated above, IT IS ORDERED that the  
14 decision of the Commissioner is REVERSED, and this case is REMANDED for  
15 further proceedings consistent with this Memorandum Opinion and Order.  
16

17 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
18 copies of this Memorandum Opinion and Order and the Judgment on counsel  
19 for plaintiff and for defendant.  
20

21 **LET JUDGMENT BE ENTERED ACCORDINGLY.**  
22

23 DATED: December 7, 2010

24   
25 \_\_\_\_\_  
26 MARGARET A. NAGLE  
27 UNITED STATES MAGISTRATE JUDGE  
28