

1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is REVERSED AND REMANDED for further proceedings
3 consistent with this Memorandum and Opinion and Order of Remand because the
4 Administrative Law Judge (“ALJ”) did not properly assess the credibility of
5 plaintiff’s subjective complaints.

6 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
7 **DECISION**

8 On November 21, 2006, plaintiff filed an application for supplemental
9 security income benefits. (Administrative Record (“AR”) 138-40). Plaintiff
10 asserted that he became disabled on September 10, 2006, due to a lower back
11 injury, numbness in the right leg, and shortness of breath. (AR 138, 148). The
12 ALJ examined the medical record and heard testimony from plaintiff, who was
13 represented by counsel, on September 23, 2008. (AR 80-107).

14 On October 28, 2008, the ALJ determined that plaintiff was not disabled
15 through the date of the decision. (AR 55-62). Specifically, the ALJ found:
16 (1) plaintiff suffered from the severe impairments of morbid obesity, sleep apnea,
17 and degenerative disc disease (AR 57); (2) plaintiff’s impairments, considered
18 singly or in combination, did not meet or medically equal one of the listed
19 impairments (AR 57); (3) plaintiff retained the residual functional capacity to
20 perform a limited range of light work¹ (AR 58); (4) plaintiff could not perform his
21 past relevant work (AR 60); (5) there are jobs that exist in significant numbers in
22 the national economy that plaintiff could perform (AR 61); and (6) plaintiff’s
23 allegations regarding his limitations were not entirely credible (AR 59).

24 The Appeals Council denied plaintiff’s application for review. (AR 1-3).
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26 ¹Specifically, the ALJ determined that plaintiff “can lift and carry 20 pounds occasionally
27 and 10 pounds frequently. He can stand and walk for 2 hours out of an 8-hour work day, and he
28 can sit for 6 hours out of an 8-hour work day. He cannot work at unprotected heights or with
dangerous machinery. He cannot balance, but he can occasionally climb, stoop, kneel, crouch,
and crawl.” (AR 58).

1 **III. APPLICABLE LEGAL STANDARDS**

2 **A. Sequential Evaluation Process**

3 To qualify for disability benefits, a claimant must show that he is unable to
4 engage in any substantial gainful activity by reason of a medically determinable
5 physical or mental impairment which can be expected to result in death or which
6 has lasted or can be expected to last for a continuous period of at least twelve
7 months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C.
8 § 423(d)(1)(A)). The impairment must render the claimant incapable of
9 performing the work he previously performed and incapable of performing any
10 other substantial gainful employment that exists in the national economy. Tackett
11 v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

12 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
13 sequential evaluation process:

- 14 (1) Is the claimant presently engaged in substantial gainful activity? If
15 so, the claimant is not disabled. If not, proceed to step two.
- 16 (2) Is the claimant's alleged impairment sufficiently severe to limit
17 his ability to work? If not, the claimant is not disabled. If so,
18 proceed to step three.
- 19 (3) Does the claimant's impairment, or combination of
20 impairments, meet or equal an impairment listed in 20 C.F.R.
21 Part 404, Subpart P, Appendix 1? If so, the claimant is
22 disabled. If not, proceed to step four.
- 23 (4) Does the claimant possess the residual functional capacity to
24 perform his past relevant work? If so, the claimant is not
25 disabled. If not, proceed to step five.
- 26 (5) Does the claimant's residual functional capacity, when
27 considered with the claimant's age, education, and work
28 experience, allow him to adjust to other work that exists in

1 significant numbers in the national economy? If so, the
2 claimant is not disabled. If not, the claimant is disabled.

3 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
4 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920). The claimant has the burden
5 of proof at steps one through four, and the Commissioner has the burden of proof
6 at step five. Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001)
7 (citing Tackett, 180 F.3d at 1098); see also Burch, 400 F.3d at 679 (claimant
8 carries initial burden of proving disability).

9 **B. Standard of Review**

10 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
11 benefits only if it is not supported by substantial evidence or if it is based on legal
12 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
13 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457
14 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
15 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
16 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
17 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
18 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

19 To determine whether substantial evidence supports a finding, a court must
20 “consider the record as a whole, weighing both evidence that supports and
21 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.
22 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d
23 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
24 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that
25 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

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1 **IV. DISCUSSION**

2 **A. The ALJ Improperly Assessed Plaintiff’s Credibility.**

3 The Court construes plaintiff’s argument that the ALJ failed “to adequately
4 consider the functional limitations imposed by [plaintiff’s] morbid obesity and
5 sleep apnea” (Plaintiff’s Motion at 8-10) as a contention that the ALJ improperly
6 evaluated the credibility of plaintiff’s subjective complaints. (See Defendant’s
7 Motion at 6-10) (arguing that the ALJ’s adverse credibility determination was
8 proper). Plaintiff’s argument is persuasive.

9 **1. Pertinent Law**

10 “To determine whether a claimant’s testimony regarding subjective pain or
11 symptoms is credible, an ALJ must engage in a two-step analysis.” Lingenfelter v.
12 Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, “the ALJ must determine
13 whether the claimant has presented objective medical evidence of an underlying
14 impairment ‘which could reasonably be expected to produce the pain or other
15 symptoms alleged.’” Id. (quoting Bunnell v. Sullivan, 947 F.2d 341, 344 (9th Cir.
16 1991) (en banc)).

17 “Second, if the claimant meets this first test, and there is no evidence of
18 malingering, ‘the ALJ can reject the claimant’s testimony about the severity of
19 [his] symptoms only by offering specific, clear and convincing reasons for doing
20 so.’” Lingenfelter, 504 F.3d at 1036 (citations omitted). “In making a credibility
21 determination, the ALJ ‘must specifically identify what testimony is credible and
22 what testimony undermines the claimant’s complaints.’” Greger v. Barnhart, 464
23 F.3d 968, 972 (9th Cir. 2006) (citation omitted). “The ALJ must cite the reasons
24 why the claimant’s testimony is unpersuasive.” Orn v. Astrue, 495 F.3d 625, 635
25 (9th Cir. 2007) (citation and quotation marks omitted). In weighing credibility,
26 the ALJ may consider factors including: the nature, location, onset, duration,
27 frequency, radiation, and intensity of any pain; precipitating and aggravating
28 factors (e.g., movement, activity, environmental conditions); type, dosage,

1 effectiveness, and adverse side effects of any pain medication; treatment, other
2 than medication, for relief of pain; functional restrictions; the claimant’s daily
3 activities; and “ordinary techniques of credibility evaluation.” Bunnell, 947 F.2d
4 at 346 (citing Social Security Ruling (“SSR”) 88-13²; quotation marks omitted).
5 The ALJ may consider (a) inconsistencies or discrepancies in a claimant’s
6 statements; (b) inconsistencies between a claimant’s statements and activities;
7 (c) exaggerated complaints; and (d) an unexplained failure to seek treatment.
8 Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If properly supported,
9 the ALJ’s credibility determination is entitled to “great deference.” See Green v.
10 Heckler, 803 F.2d 528, 532 (9th Cir. 1986).

11 **2. Analysis**

12 In this case, the ALJ found that plaintiff’s “medically determinable
13 impairments could reasonably be expected to produce the alleged symptoms;
14 however, [plaintiff’s] statements concerning the intensity, persistence and limiting
15 effects of these symptoms are not credible to the extent they are inconsistent with
16 the . . . residual functional capacity assessment.” (AR 59). The ALJ provided
17 several reasons for discounting plaintiff’s credibility. The Court finds none of
18 them to be clear and convincing.

19 First, the ALJ concluded that the objective medical evidence did not support
20 the extent of plaintiff’s subjective limitations. (AR 59-60). An ALJ may consider
21 lack of medical evidence supporting the degree of limitations, but it “cannot form
22 the sole basis for discounting” subjective symptom testimony. Burch, 400 F.3d at
23 681. As discussed below, the ALJ provided no other valid reason for discounting
24 plaintiff’s testimony. Thus, to the extent the ALJ correctly concluded that there
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26 ²Social Security rulings are binding on the Administration. See Terry v. Sullivan, 903
27 F.2d 1273, 1275 n.1 (9th Cir. 1990). Such rulings reflect the official interpretation of the Social
28 Security Administration and are entitled to some deference as long as they are consistent with the
Social Security Act and regulations. Massachi v. Astrue, 486 F.3d 1149, 1152 n.6 (9th Cir.
2007) (citing SSR 00-4p).

1 was a lack of objective medical evidence to substantiate plaintiff’s claims, this
2 reason does not alone suffice to discount her credibility.

3 Next, the ALJ observed that plaintiff stated he “requires a walker in order to
4 ambulate,” but no physician had prescribed a walker and plaintiff was using a
5 borrowed one. (AR 60). In addition, the ALJ noted that the consultative examiner
6 “reported that [plaintiff] could ambulate without the walker.” (AR 59 (citing
7 Exhibit 4F [AR 248-53])). Plaintiff testified that he began using the walker in
8 2006 and relied on it whenever he needed to walk more than about twenty paces.
9 (AR 89-90, 100). He stated that he needed the walker because he has difficulty
10 holding himself up, and the walker helps relieve back pain and leg weakness when
11 he stands. (AR 90, 99). Plaintiff testified that, unassisted, he can stand “barely
12 even five” minutes. (AR 100). One treating physician noted that plaintiff
13 “requires [a] walker to ambulate.” (AR 18, 274).³ That plaintiff borrowed a
14 walker, instead of obtaining and presumably paying for a prescribed one, does not
15 clearly and convincingly undermine his testimony concerning his reliance on the
16 walker. Similarly, the consultative examiner’s observation that “[n]o assistive
17 device is required for ambulation across the room” (AR 252) does not necessarily
18 conflict with plaintiff’s testimony that he depends on a walker whenever he walks
19 more than about twenty paces, and does not suffice to undermine his credibility.

20 Next, the ALJ faulted plaintiff for “fail[ing] to follow the advice of his
21 treating sources, who have frequently urged [plaintiff] to exercise more and make
22 dietary modifications.” (AR 60). As support for this assertion, the ALJ cites a
23 treatment note dated December 1, 2006, by Dr. Martha Melendez, stating that she
24 has “explained to him that the best way to treat his low back pain is by gradual
25 weight loss, and the patient may actually even be a candidate for bariatric surgery.

27 ³This evidence, which was not before the ALJ but was submitted to the Appeals Council,
28 is part of the Administrative Record for purposes of the Court’s analysis. See Harman v. Apfel,
211 F.3d 1172, 1179-80 (9th Cir.), cert. denied, 531 U.S. 1038 (2000); Ramirez v. Shalala, 8
F.3d 1449, 1452 (9th Cir. 1993); Penny v. Sullivan, 2 F.3d 953, 957 n.7 (9th Cir. 1993).

1 At this point, the patient feels that he has tried everything he can for weight loss
2” (AR 228). This evidence does not demonstrate that plaintiff has failed to
3 follow a prescribed weight loss regimen. In fact, as late as August 30, 2008 – less
4 than one month before the hearing – a physician noted that plaintiff “has not had
5 [a weight] loss program [with] a doctor.” (AR 270). At the hearing, plaintiff
6 testified that he was told he was not a candidate for weight loss surgery and that he
7 had recently begun taking a medication “for weight control for people that are
8 morbidly obese.” (AR 91). The ALJ’s statement plaintiff “has failed to follow the
9 advice of his treating sources” is not supported by the evidence and therefore does
10 not malign plaintiff’s credibility. See also Orn, 495 F.3d at 636-37 (noting that
11 Social Security Ruling 02-01p “precludes the ALJ from considering the effect of
12 any failure to follow treatment for obesity” unless the claimant has been found
13 disabled because of obesity and there is “clear evidence that treatment would be
14 successful”).

15 Finally, the ALJ made similar observations regarding plaintiff’s alleged
16 failure to follow prescribed treatments for sleep apnea and incontinence. (AR 60).
17 Plaintiff testified that although a continuous positive airway pressure (“CPAP”)
18 machine improved his breathing, he “wasn’t getting any sleep at all” because of
19 the machine’s noise and was “really sleepy” during the day. (AR 100). Under
20 those circumstances, his decision to cease using the CPAP machine does not
21 undermine his credibility. Regarding plaintiff’s incontinence, Dr. Melendez
22 recommended that he wear adult diapers and urinate on a regular basis. (AR 228).
23 Plaintiff testified that a physician ordered him “the biggest size” of diapers but
24 “[t]hey didn’t even fit.” (AR 102). In light of these circumstances, plaintiff’s
25 failure to follow Dr. Melendez’s recommended course of treatment does not
26 undermine his credibility.

27 Remand is warranted for the ALJ to reassess plaintiff’s credibility.

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1 **V. CONCLUSION⁴**

2 For the foregoing reasons, the decision of the Commissioner of Social
3 Security is reversed in part, and this matter is remanded for further administrative
4 action consistent with this Opinion.⁵

5 LET JUDGMENT BE ENTERED ACCORDINGLY.

6 DATED: December 15, 2010

7 /s/

8 Honorable Jacqueline Chooljian
9 UNITED STATES MAGISTRATE JUDGE

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23 ⁴The Court need not, and has not adjudicated plaintiff's other challenges to the ALJ's
24 decision, except insofar as to determine that a reversal and remand for immediate payment of
benefits would not be appropriate.

25 ⁵When a court reverses an administrative determination, "the proper course, except in rare
26 circumstances, is to remand to the agency for additional investigation or explanation."
27 Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and
28 quotations omitted). Remand is proper where, as here, additional administrative proceedings
could remedy the defects in the decision. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.
1989); see also Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) (remand is an option
where the ALJ stated invalid reasons for rejecting a claimant's excess pain testimony).