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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

BRIAN NELSON,	)	NO. EDCV 10-00804-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

18 Plaintiff filed a Complaint on June 11, 2010, seeking review of the  
19 denial by the Social Security Commissioner ("Commissioner") of  
20 plaintiff's application for supplemental security income ("SSI"). On  
21 July 9, 2010, the parties consented to proceed, pursuant to 28 U.S.C. §  
22 636(c), before the undersigned United States Magistrate Judge. The  
23 parties filed a Joint Stipulation on February 14, 2011, in which:  
24 plaintiff seeks an order reversing the Commissioner's decision, awarding  
25 plaintiff costs and reasonable attorneys' fees pursuant to the Equal  
26 Access to Justice Act, 28 U.S.C.A. § 2412(d), and remanding this case  
27 for the payment of benefits or, alternatively, for further  
28 administrative proceedings; and defendant requests that the

1 Commissioner's decision be affirmed. The Court has taken the parties'  
2 Joint Stipulation under submission without oral argument.

3  
4 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

5  
6 On January, 25, 2006, plaintiff filed an application for SSI.  
7 (Administrative Record ("A.R.") 14.) Plaintiff, who was born on  
8 September 4, 1960,<sup>1</sup> claims to have been disabled since January 1, 1999,  
9 due to seizures, total hip replacement, right thigh damage, back, right  
10 knee, and left shoulder pain.<sup>2</sup> (A.R. 44-54.) Plaintiff has past  
11 relevant work experience as a printer feeder. (A.R. 21.)  
12

13 After the Commissioner denied plaintiff's claim initially and upon  
14 reconsideration (A.R. 44-54), plaintiff requested a hearing. (A.R. 55-  
15 56.) On June 16, 2008, plaintiff, who was represented by counsel,  
16 appeared and testified at a hearing before Administrative Law Judge F.  
17 Keith Varni (the "ALJ"). (A.R. 31-41.) On July 10, 2008, the ALJ  
18 denied plaintiff's claim (A.R. 14-22), and the Appeals Council  
19 subsequently denied plaintiff's request for review of the ALJ's decision  
20 (A.R. 1-3). That decision is now at issue in this action.

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24  
25 <sup>1</sup> On the date the application for SSI was filed, plaintiff was 45  
26 years old, which is defined as a younger individual. (A.R. 21; citing  
27 C.F.R. § 416.964.)

28 <sup>2</sup> Plaintiff claimed only seizures, total hip replacement, and right  
thigh damage on his initial SSI claim (A.R. 44-48); on appeal, he added  
back pain, right knee pain, left shoulder pain, and panic attacks to his  
list of impairments (A.R. 49-54).

1 **SUMMARY OF ADMINISTRATIVE DECISION**  
2

3 The ALJ found that plaintiff has not engaged in substantial gainful  
4 activity since January 25, 2006, the application date. (A.R. 16.) The  
5 ALJ determined that plaintiff has severe impairments in the  
6 musculoskeletal system.<sup>3</sup> (Id.) The ALJ also determined that plaintiff  
7 does not have an impairment or combination of impairments that meets or  
8 medically equals in severity any impairment listed in 20 C.F.R. Part  
9 404, Subpart P, Appendix 1 (20 C.F.R. §§ 416.920(d), 416.925, 416.926).  
10 (A.R. 17.)  
11

12 After reviewing the record, the ALJ determined that plaintiff has  
13 the residual functional capacity ("RFC") to perform light work as  
14 defined in 20 C.F.R. § 416.967(b), except plaintiff is "precluded from  
15 pushing and/or pulling with the right lower extremity[,] and he is  
16 limited to occasional postural activities."<sup>4</sup> (A.R. 17.)  
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18 <sup>3</sup> On January 17, 2007, Dr. Reynaldo Abejuela, a psychiatrist,  
19 diagnosed plaintiff with mild depression, mild anxiety, and an alcohol-  
20 induced mood disorder, but determined that plaintiff's "occupational and  
21 social functioning impairment is none to mild." (A.R. 224-31.) Based  
22 on this report, and the fact that plaintiff has never been  
23 psychiatrically hospitalized or participated in psychotherapy, the ALJ  
24 found plaintiff's mental disorders to be "non-severe." (A.R. 16-17.)  
The ALJ also considered substance abuse as a basis for disability, but  
determined that "[plaintiff]'s mood disorder would still be present  
absent substance abuse and, therefore, substance abuse is not material  
to a finding of disabled." (A.R. 16.) The ALJ briefly mentioned  
plaintiff's history of seizures, but did not appear to consider it  
further. (A.R. 17.)

25 <sup>4</sup> The ALJ relied heavily on the RFC assessment of State Agency Review  
26 physician Dr. Sainten, M.D., who found: plaintiff could lift 20 pounds  
27 occasionally, 10 pounds often; could stand or walk six hours in an eight  
hour day and sit for six hours with appropriate breaks; pushing and  
28 pulling was limited in the right lower extremity; and climbing,  
stooping, kneeling, and crouching should be limited to occasionally.  
(A.R. 182-88.)

1 The ALJ concluded that plaintiff's past relevant work as a printer  
2 feeder requires the performance of work-related activities precluded by  
3 plaintiff's RFC. (A.R. 21.) The ALJ further concluded that  
4 "[t]ransferability of job skills is not material to the determination of  
5 disability because using the Medical-Vocational Rules as a framework  
6 supports a finding that [plaintiff] is 'not disabled,' whether or not  
7 [plaintiff] has transferable job skills." (*Id.*) The ALJ found that  
8 based on plaintiff's age, education, work experience, and RFC, there are  
9 jobs that exist in significant numbers in the national economy that  
10 plaintiff can perform. (*Id.*) Accordingly, the ALJ concluded that  
11 plaintiff has not been disabled within the meaning of the Social  
12 Security Act from January 25, 2006, the date the application was filed,  
13 through the date of his decision. (A.R. 22.)

#### 14 15 STANDARD OF REVIEW 16

17 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
18 decision to determine whether it is free from legal error and supported  
19 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
20 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant  
21 evidence as a reasonable mind might accept as adequate to support a  
22 conclusion.'" *Id.* (citation omitted). The "evidence must be more than  
23 a mere scintilla but not necessarily a preponderance." Connett v.  
24 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the  
25 record can constitute substantial evidence, only those 'reasonably drawn  
26 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,  
27 1066 (9th Cir. 2006)(citation omitted).

1 Although this Court cannot substitute its discretion for that of  
2 the Commissioner, the Court nonetheless must review the record as a  
3 whole, "weighing both the evidence that supports and the evidence that  
4 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
5 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also  
6 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
7 responsible for determining credibility, resolving conflicts in medical  
8 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
9 1035, 1039 (9th Cir. 1995).

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

23  
24 **DISCUSSION**

25  
26 Plaintiff makes the following claims: (1) the ALJ improperly  
27 determined not to obtain the testimony of a vocational expert; and (2)  
28 the ALJ failed to give clear and convincing reasons for finding

1 plaintiff to be not credible. (Joint Stipulation ("Joint Stip.") at 2.)  
2 The Court addresses these issues, in reverse order, below.

3  
4 **I. The ALJ Failed To Give Clear And Convincing Reasons For**  
5 **Finding Plaintiff's Testimony To Be Not Credible.**

6  
7 Once a disability claimant produces objective evidence of an  
8 underlying impairment that is reasonably likely to be the source of his  
9 subjective symptom(s), all subjective testimony as to the severity of  
10 the symptoms must be considered. Moisa v. Barnhart, 367 F.3d 882, 885  
11 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.  
12 1991)(*en banc*); see also 20 C.F.R. § 416.929© (explaining how pain and  
13 other symptoms are evaluated). "[U]nless an ALJ makes a finding of  
14 malingering based on affirmative evidence thereof, he or she may only  
15 find an applicant not credible by making specific findings as to  
16 credibility and stating clear and convincing reasons for each." Robbins  
17 v. Soc. Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006). The factors to  
18 be considered in weighing a claimant's credibility include: (1) the  
19 claimant's reputation for truthfulness; (2) inconsistencies either in  
20 the claimant's testimony or between the claimant's testimony and his  
21 conduct; (3) the claimant's daily activities; (4) the claimant's work  
22 record; and (5) testimony from physicians and third parties concerning  
23 the nature, severity, and effect of the symptoms of which the claimant  
24 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.  
25 2002); see also 20 C.F.R. § 416.929(a).

26  
27 The ALJ found that plaintiff's "medically determinable impairments  
28 could reasonably be expected to produce the alleged symptoms." (A.R.

1 18.) Further, the ALJ cited no evidence of malingering by plaintiff.  
2 Accordingly, the ALJ's reason for rejecting plaintiff's credibility must  
3 be "clear and convincing."  
4

5 In his decision, the ALJ stated that plaintiff's "statements  
6 concerning the intensity, persistence and limiting effects of  
7 [plaintiff's] symptoms are not credible to the extent they are  
8 inconsistent with the [RFC] assessment." (A.R. 18.) Specifically, the  
9 ALJ found plaintiff to be not credible because: (1) the "treatment  
10 records suggest that [plaintiff]'s symptoms [are] not as severe as he  
11 alleges" (A.R. 18); (2) "[plaintiff]'s physician suggested [plaintiff]  
12 exhibited drug-seeking behavior" (*Id.*); (3) plaintiff's testimony is  
13 inconsistent with his own statements and his son's statements in the  
14 record (A.R. 20); and (4) plaintiff "basically dropped out of the labor  
15 market in 1995 and has not even looked for work since that time" (A.R.  
16 20-21).  
17

18 The ALJ's first ground for finding plaintiff's statements not  
19 credible is not clear and convincing. On February 12, 2006, in an  
20 exertional daily activity questionnaire, plaintiff claimed that, after  
21 his hip replacement, his leg was weak and it was painful to walk, but  
22 that he could walk to the store and back, which took about 20 minutes.  
23 (A.R. 100-05.) Plaintiff claimed that he could only stay in a seated  
24 position or stand for a short time. (*Id.*) He could do laundry, cook,  
25 and clean "in spurts," but the pain was always present. (*Id.*) He was  
26 able to do light lifting, such as picking up a bag of food from the  
27 store, and he could mow his small lawn, which took about ten minutes,  
28 when he "[felt] good," otherwise his children would do it. (*Id.*) He

1 tried to perform all the chores he used to do, but it was "just more  
2 difficult" now and he could only do "a little at a time." (*Id.*)

3  
4 On a functional report dated November 20, 2006, plaintiff claimed  
5 similar limitations. (A.R. 117-25.) He said that he took care of his  
6 three teens; walked his dog; could walk about 300 yards without  
7 stopping; and did as much cooking, cleaning, and laundry as he could.  
8 (*Id.*) He said that he could only do household and yard chores when he  
9 was on medication, and the extent of the activity he could perform  
10 depended on his pain that day. (*Id.*)

11  
12 Contrary to the ALJ's findings, plaintiff's statements about his  
13 limited abilities are not unsupported by the medical record.  
14 Plaintiff's treatment history shows that he has a history of pain  
15 related to degenerative musculoskeletal conditions. Specifically, in  
16 January 1999, plaintiff was first diagnosed with hip problems and  
17 prescribed physical therapy and Voltaren. (A.R. 175.) Diagnostic  
18 imaging performed in April and May 2001 showed evidence of disc bulging,  
19 mild degenerative disc disease of the lumbar spine, mild atrophy in the  
20 lower right extremity, mild facet hypertrophy of the spine, mild  
21 posterior endplate osteophytosis, mild right neural foraminal stenosis,  
22 and transitional vertebrae, for which plaintiff was prescribed Vicodin  
23 and epidural injections. (A.R. 144-81, 190-96, 258-74.)

24  
25 An x-ray of plaintiff's hip taken in May 2002 showed "severe right  
26 degenerative change and/or superimposing aseptic necrosis of the right  
27 femoral head." (A.R. 162.) On June 19, 2002, plaintiff's treating  
28 physician, Dr. Karim A. Shaikley, M.D., an orthopaedic surgeon, reported

1 that plaintiff: (1) had been complaining of hip pain for the past two  
2 years; (2) had severe shoulder pain after a significant fall caused by  
3 a seizure; (3) was limping; (4) needed an articular fragment removed  
4 from his left shoulder; and (5) needed a total right hip replacement.<sup>5</sup>  
5 (A.R. 161.)  
6

7 In March 2003, plaintiff was prescribed Vicodin for pain in his  
8 knee. (A.R. 157.) Diagnostic imaging of the right knee taken on July  
9 11, 2003, showed demineralization of the bone, a shallow concave  
10 articular defect on the right lateral femoral condyle, and  
11 osteochondrites dessicans. (A.R. 156.) In August 2005, examination  
12 findings showed a decreased range of motion and slight swelling of the  
13 right knee. (A.R. 150.) Plaintiff was diagnosed with degenerative  
14 joint disease of the knee and was treated with prescription pain  
15 medication. (*Id.*)  
16

17 On March 17, 2006, plaintiff was diagnosed with muscle cramps and  
18 was prescribed Ultram, a pain medication used to treat moderately severe  
19 pain, and Baclofen, a muscle relaxer. (A.R. 148.) A report dated May  
20 11, 2006, shows that plaintiff was on Dilantin for his seizures,  
21 Tramadol for pain, and continued to be on Baclofen. (A.R. 183.) On May  
22 22, 2007, plaintiff was diagnosed with right thigh pain and mild  
23 quadriceps atrophy and was prescribed physical therapy and a right knee  
24 stabilizing brace. (A.R. 277.) On August 1, 2007, he was diagnosed  
25 with right knee arthralgia, with a possible internal derangement, and  
26 right quadriceps atrophy. (A.R. 278.) On September 5, 2007, a CT scan  
27

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28 <sup>5</sup> Plaintiff underwent total right hip replacement surgery in  
2003. (A.R. 145.)

1 showed no derangement of the knee, but plaintiff was still experiencing  
2 pain. (A.R. 279.)

3  
4 In 2008, plaintiff started to have problems with his left hip, and  
5 on May 22, 2008, he was diagnosed with left hip arthralgia, moderate  
6 degenerative joint disease of the left hip, and questionable avascular  
7 necrosis. (A.R. 281.) He had tenderness to palpitation and decreased  
8 range of motion, and he was found by the treating physician to be able  
9 to bear only 80% of his body weight.<sup>6</sup> (*Id.*)

10  
11 Plaintiff's statements in 2006 -- that he could lift only light  
12 weight, walk 300 yards or 20 minutes, cook and take care of teenagers  
13 (aged 14, 18, and 19), and perform house and yard chores "in spurts"  
14 with medication -- are not inconsistent with a history a musculoskeletal  
15 disorders, surgery, and pain medication. (A.R. 100-05, 117-25.) His  
16 claims of more limited abilities during the hearing in 2008 are  
17 consistent with his worsening degenerative disease of the left hip and  
18 another hip replacement surgery.<sup>7</sup> The ALJ's assertion -- that

19  
20 <sup>6</sup> In a series of letters sent to the Appeals Council at the  
21 Office of Disability Adjudication and Review in which plaintiff sought  
22 more time for his new medical problems to be addressed, plaintiff  
23 claimed that he had a full left hip replacement surgery on August 20,  
2008. (A.R. 23, 25, 27-28.) No medical records verifying that the  
surgery took place have been added to the record.

24 <sup>7</sup> During his testimony before the ALJ, plaintiff claimed that:  
25 his left hip started to hurt eight months prior; he can't walk at all  
26 without medication and, even with medication, walking is painful; the  
27 pain in his left side is "pretty much unbearable"; "total [left] hip  
28 replacement needs to be done"; he can walk "I don't know, twenty yards  
maybe and then . . . [has] to stop"; he has fallen down "a couple  
times"; he can sit in one position for no more than 20 minutes before  
either getting up or laying down; he can stand for only 20 minutes  
before needing to sit or lay down; he spends his days resting, watching  
movies, and periodically cooking; "right now" he is not "supposed to

1 plaintiff's treatment records show that his symptoms are not as severe  
2 as plaintiff alleges -- is, therefore, not clear and convincing.<sup>8</sup>

3  
4 The ALJ's second ground for rejecting plaintiff's subjective pain  
5 testimony is also not clear and convincing. While evidence of drug-  
6 seeking behavior could detract from plaintiff's credibility, the  
7 evidence cited by the ALJ -- namely, that "in August 2005, [one of  
8 plaintiff]'s physicians suggested that [plaintiff] exhibited drug-  
9 seeking behavior" -- does not constitute clear and convincing evidence  
10 to support the conclusion that plaintiff's entire testimony is not  
11 credible.<sup>9</sup> (A.R. 18.) Plaintiff saw numerous treating physicians over  
12 a course of ten years, many of whom prescribed him various types of pain  
13 medication. The fact that one page, out of more than 200 pages of  
14 medical records, says that plaintiff exhibited drug-seeking behavior is

15 \_\_\_\_\_  
16 lift anything," and that "they say" he can lift zero to five pounds  
17 right now. (A.R. 31-41.)

18 <sup>8</sup> To the extent the ALJ rejects plaintiff's subjective pain testimony  
19 because plaintiff has received conservative treatment, the ALJ's  
20 reasoning is not clear and convincing. While "evidence of 'conservative  
21 treatment' is sufficient to discount a claimant's testimony regarding  
22 severity of an impairment," Parra v. Astrue, 481 F.3d 742, 751 (9th Cir.  
2007), substantial evidence of record does not support the finding that  
23 plaintiff's pain treatment was conservative in nature. Indeed, as noted  
24 *supra*, plaintiff was prescribed strong medications, including, *inter*  
25 *alia*, Vicodin and Ultram, and underwent two surgeries to help alleviate  
26 his pain. Accordingly, the ALJ's reasoning is unpersuasive.

27 <sup>9</sup> "Several cases approve discounting the testimony of a claimant who  
28 has engaged in drug-seeking behavior, . . . but none has defined what  
constitutes drug-seeking behavior." Kellems v. Astrue, 2010 U.S.App.  
LEXIS 13263, \*8 (7th Cir. 2010). However, "[plaintiffs] in these cases  
do have a common thread, . . . each obtained, or attempted to obtain,  
pain medication by deceiving or manipulating a medical 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).

1 not a clear and convincing reason to discredit the entirety of  
2 plaintiff's testimony. (A.R. 196.) In fact, instead of detracting from  
3 plaintiff's credibility, plaintiff's behavior could support a finding of  
4 significant pain. See Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir.  
5 2001)(noting that plaintiff's "constant quest for medical treatment and  
6 pain relief" refuted the ALJ's finding that claimant lacked credibility  
7 about her pain and physical limitations).

8  
9 The ALJ's third ground for rejecting plaintiff's subjective pain  
10 testimony is also not clear and convincing. The ALJ stated that  
11 plaintiff's testimony "that he cooked, but otherwise he did nothing but  
12 watch television," was inconsistent with the plaintiff's statements in  
13 the record, as well as the statements of plaintiff's son, "which reflect  
14 that he is independent for all self-care activities, performs a variety  
15 of daily activities, interacts well with others, and engages in  
16 purposeful activity when he is motivated to do so." (A.R. 20.)

17  
18 The Court does not find plaintiff's statements to be inconsistent.  
19 The exertional daily activity questionnaire and functional report  
20 completed by plaintiff in 2006, described above, and the assessment  
21 completed by his son in 2006,<sup>10</sup> portrayed plaintiff to be more able and  
22

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23 <sup>10</sup> Plaintiff's son, Trent Kevin Nelson, completed a functional  
24 report on December, 18, 2006, in which he described his father as being  
25 able to: get the kids to school; take the dog to get a paper; walk for  
26 20 minutes without resting; take care of personal grooming; remember to  
27 take medicine; prepare sandwiches and frozen dinners; clean and feed the  
28 dog; do chores, both indoors and outdoors, "whenever he can, it "depends  
on how many meds he takes"; go to the grocery store two times a month;  
handle money and finances; watch his son's football games; and spend  
time with his own father; but he has trouble "walk sit etc. (sic)," and  
lifting, squatting, bending, standing, reaching, walking, sitting,  
kneeling, hearing, stair climbing, seeing, and memory have been affected

1 active than his testimony in 2008, also described above, portray him to  
2 be. This does not make plaintiff's statements inconsistent. There is  
3 a two-year difference between the statements in the record and  
4 plaintiff's testimony, and plaintiff has been diagnosed with  
5 degenerative diseases of the hip and knee -- both of which would be  
6 expected to worsen over time. Also, it appears that plaintiff had a  
7 full left hip replacement just two months after his testimony, so it  
8 would be expected that his abilities were more limited in 2008 than in  
9 2006. Further, plaintiff's testimony in 2008 includes temporal language  
10 such as, "*right now* I'm not supposed to lift anything," which indicates  
11 that his testimony refers only to his current condition -- *i.e.*, two  
12 months prior to major surgery -- and not to his abilities over the  
13 period of the last few years. (A.R. 37; emphasis added.) For these  
14 reasons the Court does not find this a clear and convincing reason to  
15 discredit plaintiff's testimony.

16  
17 The ALJ's final ground is also not clear and convincing. While a  
18 poor work record may negatively affect a plaintiff's credibility, see  
19 Thomas, 278 F.3d at 958-59, this alone is not a clear and convincing  
20 reason for discrediting plaintiff's entire testimony. The ALJ stated  
21 that plaintiff's "earnings record reflects that he basically dropped out  
22 of the labor market in 1995[, ] and he has not even looked for work since  
23 that time." (A.R. 20-21.) Plaintiff claims that he stopped working at  
24 the end of 1995, because "[his] hip went out and [he] stayed home to

25  
26  
27  
28 by his conditions; and he should use a cane or walker. (A.R. 126-33.)

1 take care of [his] kids."<sup>11</sup> (A.R. 94.) While a plaintiff's work history  
2 is a valid consideration, and in this instance, plaintiff is far from a  
3 model worker, it alone is not a clear and convincing reason for  
4 rejecting plaintiff's credibility.

5  
6 Accordingly, for the aforementioned reasons, the ALJ failed to give  
7 clear and convincing reasons, as required, for discrediting plaintiff.

8  
9 **II. The ALJ Must Review And Reconsider The Need For A Vocational**  
10 **Expert.**

11  
12 Plaintiff contends that the ALJ erred in using the Grids as a  
13 framework to determine that plaintiff was capable of performing other  
14 work in the national economy, rather than seeking testimony from a  
15 vocational expert. (Joint Stip. at 2-3.) It is well-settled that when  
16 a claimant suffers only from exertional limitations, has no  
17 nonexertional limitations such as postural limitations and pain, the ALJ  
18 may apply the Grids, at step five, to match claimant with appropriate  
19 work. Holohan v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001);  
20 Reddick v. Chater, 157 F.3d 715, 729 (9th Cir. 1998); Burkhart v. Bowen,  
21 856 F.2d 1335, 1340 (9th Cir. 1988). However, an ALJ "may apply the  
22 [G]rids in lieu of taking testimony of a vocational expert *only* when the  
23 [G]rids accurately and completely describe the claimant's abilities and  
24 limitations . . . ." Reddick, 157 F.3d at 729 (emphasis added); see  
25 also Holohan, 246 F.3d at 1208 (as the Grids "are based only on strength  
26

27  
28 <sup>11</sup> However, on the same form he said he became unable to work because  
of his condition in the beginning of 1999. (A.R. 94.)

1 factors," they are sufficient to meet the Commissioner's burden at step  
2 five "only when claimant suffers only from the exertional limitations").

3  
4 Based on the fact that the ALJ must reconsider plaintiff's  
5 testimony regarding his pain and limitations, on remand, the ALJ's  
6 ultimate RFC assessment may change. If, on remand, the ALJ finds that  
7 plaintiff's non-exertional postural limitations and pain significantly  
8 limit the range of work permitted by his exertional limitations, the ALJ  
9 must seek testimony from a vocational expert.<sup>12</sup> See Reddick, 157 F.3d  
10 at 729 (because the claimant had non-exertional limitations, it was  
11 error not to seek the testimony of a vocational expert); Desrosiers, 846  
12 F.2d at 580 (Pregerson, J., concurring)(stating that postural  
13 limitations barring repeated stooping or bending prevented the claimant  
14 from performing the full range of light work, making use of the Grids  
15 inappropriate).

16  
17 **III. Remand Is Required.**

18  
19 The decision whether to remand for further proceedings or order an  
20 immediate award of benefits is within the district court's discretion.  
21 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
22 useful purpose would be served by further administrative proceedings, or  
23 where the record has been fully developed, it is appropriate to exercise  
24 this discretion to direct an immediate award of benefits. *Id.* at 1179  
25 ("[T]he decision of whether to remand for further proceedings turns upon

26  
27 

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<sup>12</sup> The ALJ also needs to account for plaintiff's non-severe mental  
28 conditions and seizure disorder in deciding whether to use a vocational  
expert.

1 the likely utility of such proceedings."). However, where there are  
2 outstanding issues that must be resolved before a determination of  
3 disability can be made, and it is not clear from the record that the ALJ  
4 would be required to find the claimant disabled if all the evidence were  
5 properly evaluated, remand is appropriate. *Id.* at 1179-81.

6  
7 Remand is the appropriate remedy to allow the ALJ the opportunity  
8 to remedy the above-mentioned deficiencies and errors. *See, e.g.,*  
9 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for  
10 further proceedings is appropriate if enhancement of the record would be  
11 useful; McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989)(remand  
12 appropriate to remedy defects in the record).

13  
14 On remand, the ALJ must either credit plaintiff's testimony or give  
15 clear and convincing reasons why plaintiff's testimony is not credible.  
16 After so doing, the ALJ may need to reassess plaintiff's RFC, in which  
17 case, testimony from a vocational expert likely will be needed to  
18 determine what work, if any, plaintiff can perform. Also, the ALJ may  
19 need to further develop the record with regard to plaintiff's full left  
20 hip replacement and any effect that may have on plaintiff's RFC.

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1 **CONCLUSION**

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3 Accordingly, for the reasons stated above IT IS ORDERED that the  
4 decision of the Commissioner is REVERSED, and this case is REMANDED for  
5 further proceedings consistent with this Memorandum Opinion and Order.  
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7 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
8 copies of this Memorandum Opinion and Order and the Judgment on counsel  
9 for plaintiff and for defendant.  
10

11 LET JUDGMENT BE ENTERED ACCORDINGLY.  
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13 DATED: August 9, 2011

14 *Margaret A. Nagle*  
15 MARGARET A. NAGLE  
16 UNITED STATES MAGISTRATE JUDGE  
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