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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 DAVID CASWELL,) Case No. ED CV 11-513-PJW
11 Plaintiff,)
12 v.) MEMORANDUM OPINION AND ORDER
13 MICHAEL J. ASTRUE,)
14 COMMISSIONER OF THE)
15 SOCIAL SECURITY ADMINISTRATION,)
16 Defendant.)

17 I. INTRODUCTION

18 Plaintiff appeals a decision by Defendant Social Security
19 Administration ("the Agency"), denying his application for
20 Supplemental Security Income ("SSI") and Disability Insurance benefits
21 ("DIB"). He claims that the Administrative Law Judge ("ALJ") erred
22 when he: (1) failed to properly consider the doctors' opinions; and
23 (2) concluded that Plaintiff was not credible. For the reasons
24 discussed below, the Court finds that the ALJ erred in addressing the
25 medical evidence but did not err in his credibility finding. As such,
26 the Agency's decision is reversed and the case is remanded for further
27 proceedings consistent with this opinion.
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1 II. SUMMARY OF PROCEEDINGS

2 In October 2008, Plaintiff applied for SSI and DIB, alleging that
3 he was disabled as of 1998. (Administrative Record ("AR") 106-14.)
4 His application was denied initially and on reconsideration. (AR 48-
5 52, 56-60.) He then requested and was granted a hearing before an
6 ALJ. On March 5, 2010, he appeared for the hearing. (AR 22-42.) On
7 June 25, 2010, the ALJ issued a decision denying benefits. (AR 9-16.)
8 Plaintiff appealed the ALJ's decision but the Appeals Council denied
9 review. (AR 1-5.) This appeal followed.

10 III. ANALYSIS

11 A. The ALJ's Findings Regarding The Doctors' Opinions

12 Plaintiff suffers from thoracic outlet syndrome, myofascial pain
13 syndrome, and spondylosis of the spine. (AR 12.) Dr. Andrew
14 Hesseltine, a board certified anesthesiologist who specializes in pain
15 management, treated Plaintiff from 2006 to 2009. (AR 207-46.)
16 According to Dr. Hesseltine, Plaintiff is incapable of performing a
17 full range of work due to his conditions and the pain caused by them.
18 (AR 262-64.) The ALJ rejected this opinion and accepted, instead, the
19 opinion of a non-treating, non-examining physician G. Taylor Holmes.
20 (AR 14.) Plaintiff alleges that the ALJ erred in doing so. For the
21 following reasons, the Court agrees.

22 Generally speaking, as a treating physician, Dr. Hesseltine's
23 opinion was entitled to deference. *Orn v. Astrue*, 495 F.3d 625, 631
24 (9th Cir. 2007); *see also Morgan v. Comm'r*, 169 F.3d 595, 600 (9th
25 Cir. 1999) (explaining treating physician's opinion "is given
26 deference because 'he is employed to cure and has a greater
27 opportunity to know and observe the patient as an individual.'")
28 (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987)).

1 Thus, all things being equal, Dr. Hesseltine's opinion regarding
2 Plaintiff's capacity to work should have been given controlling
3 weight. *Orn*, 495 F.3d at 631; *Embrey v. Bowen*, 849 F.2d 418, 421 (9th
4 Cir. 1988). That being said, however, the ALJ was not required to
5 simply accept Dr. Hesseltine's opinion and, where, as here, it was
6 contradicted by Dr. Holmes's opinion, the ALJ was empowered to reject
7 it for specific and legitimate reasons supported by substantial
8 evidence in the record. *See Thomas v. Barnhart*, 278 F.3d 947, 957
9 (9th Cir. 2002) (quoting *Magallanes v. Bowen* 881 F.2d 747, 751 (9th
10 Cir. 1989)); *Morgan*, 169 F.3d at 600.

11 The ALJ rejected Dr. Hesseltine's opinion because: (1) there was
12 no evidence that he performed a thorough physical examination; (2) the
13 treatment regimen he employed consisted of only steroid injections and
14 pain medication; (3) the record does not contain objective findings
15 that support Dr. Hesseltine's "extreme" limitations; and (4) Dr.
16 Hesseltine's limitations are not consistent with the "tone" of his
17 treatment notes, showing Plaintiff doing well and able to work with
18 pain management. (AR 14.) The Court does not find these reasons
19 persuasive.

20 The notes from Dr. Hesseltine's many visits suggest that he
21 performed a physical examination each time he saw Plaintiff. Though
22 many of the notes documenting the exams set forth that the results of
23 the exams were "unchanged from previous [exams]," (AR 221, 223, 224,
24 227, 228, 230, 231, 232, 233, 234, 235, 236, 237, 240, 242, 243, 244,
25 245, 246), they clearly suggest that Dr. Hesseltine performed a
26 physical exam each time he saw Plaintiff. Even were the Court to
27 ignore the exams when the doctor merely noted that Plaintiff's
28 condition was unchanged, there are still numerous other times when the

1 doctor recorded the specific results of the exams. (AR 207, 209, 211,
2 213, 214, 216, 218, and 220.)

3 As to the ALJ's finding that the exams were not "thorough," the
4 Court is not clear as to what the ALJ meant. There is no explanation
5 in his decision as to what was lacking. And a review of the file does
6 not reveal what the doctor failed to do. Nor is the Court aware of
7 any standard norms required for an examination to be deemed
8 "thorough." As such, the Court finds that the ALJ's first reason for
9 rejecting Dr. Hesseltine's opinion is not supported by the record.

10 The ALJ's second reason for rejecting Dr. Hesseltine's opinion
11 was that the treatment regimen he prescribed, which consisted of
12 steroid injections and pain medications, undercut the doctor's opinion
13 that Plaintiff's condition was so serious. (AR 14.) But there is no
14 evidence before the Court that more aggressive measures were available
15 and would have been used had Plaintiff really suffered from the level
16 of pain that he claimed. Dr. Hesseltine did not mention any. Nor did
17 Dr. Holmes, the reviewing physician. According to Plaintiff, he had
18 undergone surgery to remove one of his extra ribs and could have
19 undergone a similar procedure to remove the other one. (AR 24-29.)
20 He testified, however, that he did not have the second surgery because
21 his doctor told him it would be risky and because he did not have
22 insurance and could not afford it. (AR 28-29.) Assuming that
23 Plaintiff's testimony about this surgery amounted to medical evidence
24 that surgery was a viable treatment option, Plaintiff explained why he
25 elected not to undergo it and his explanation is not contradicted in
26 the record. Thus, this is not a valid reason for rejecting Dr.
27 Hesseltine's opinion.

1 The third reason cited by the ALJ for rejecting Dr. Hesseltine's
2 opinion was that the record did not contain any objective findings
3 that would support the "extreme" limitations found by Dr. Hesseltine.
4 (AR 14.) The problem with the ALJ's reasoning here is that he did not
5 explain what objective evidence is missing. See, e.g., *Embrey*, 849
6 F.2d at 421 ("To say that medical opinions are not supported by
7 sufficient objective findings or are contrary to the preponderant
8 conclusions mandated by the objective findings does not achieve the
9 level of specificity our prior cases have required, even when the
10 objective factors are listed seriatim."). Plaintiff was born with
11 extra ribs. He had surgery to remove the one on his right side and,
12 presumably, the x-rays showed that he still has an extra one on his
13 left side. For years, his doctor treated this condition and the pain
14 caused by it with fairly strong pain medication. Thus, the Court is
15 at a loss to understand what objective medical evidence of Plaintiff's
16 condition is missing.

17 Perhaps what the ALJ was referring to was the objective evidence
18 that Plaintiff was not as incapacitated as he claimed, i.e., the fact
19 that for ten years after he allegedly became disabled he was still
20 working as a laborer installing sprinkler systems. (AR 23, 145.)
21 During this period, Plaintiff worked ten hour days and occasionally
22 lifted more than 100 pounds at a time, frequently lifting more than 50
23 pounds. (AR 146.) When Dr. Hesseltine tested his strength during
24 examinations, Plaintiff regularly tested 5/5 on all four limbs. (AR
25 211, 214, 225.) During this same time frame, however, Plaintiff was
26 reporting pain at an "8" or "10" out of "10." (AR 209, 211, 213.) In
27 the end, the Court concludes that Dr. Hesseltine's opinion regarding
28 Plaintiff's limitations is undermined by the objective evidence before

1 the doctor that, despite reporting extreme levels of pain, Plaintiff
2 was performing heavy work and the doctor knew it. (AR 209, 211, 213,
3 221.)

4 The doctor's opinion is further called into question by the fact
5 that, the last time he saw Plaintiff, in January 2009, Plaintiff
6 reported his pain was at a level "6," the lowest he had ever reported
7 it. (AR 207.) Yet, six months later, when Dr. Hesseltine filled out
8 the form documenting his opinion, he concluded, essentially, that
9 Plaintiff did not have the capacity to perform any work. This makes
10 no sense. If Plaintiff could perform heavy work when he was
11 experiencing pain at a level "10," there is no reason why he could not
12 perform any work when he was experiencing pain at a level "6."
13 Presumably, this is what the ALJ was referring to when he concluded
14 that the "tone" of Dr. Hesseltine's notes were inconsistent with the
15 conclusion that Plaintiff was incapacitated, the ALJ's fourth reason
16 for discounting Dr. Hesseltine's opinion.

17 Rather than rely on Dr. Hesseltine's opinion, the ALJ relied on
18 the opinion of the non-treating, non-examining consulting doctor G.
19 Taylor Holmes. (AR 14.) Dr. Holmes reviewed most, though not all, of
20 Dr. Hesseltine's records and, based on them, concluded that Plaintiff
21 was not as disabled as he claimed to be or as Dr. Hesseltine had
22 found. (AR 197-203.) What seems clear from the record, however, is
23 that Dr. Holmes did not review any records other than Dr. Hesseltine's
24 to reach this conclusion. (AR 202.) This is problematic because it
25 amounts to Dr. Holmes simply reaching a different conclusion than Dr.
26 Hesseltine based solely on Dr. Hesseltine's records, which is not
27 allowed. See *Orn*, 495 F.3d at 631-32.

1 Ultimately, the Court finds that, though some of the objective
2 evidence did not fully support Dr. Hesseltine's opinion, that reason
3 alone is not enough to uphold the ALJ's decision to reject the
4 opinion. Further, the ALJ's reliance on Dr. Holmes's opinion was in
5 error because it was premised solely on Dr. Hesseltine's records. For
6 these reasons, the Court finds that the ALJ erred in addressing the
7 doctors' opinions and that remand is necessary to allow him another
8 opportunity to do so.

9 B. The Credibility Finding

10 The ALJ found that Plaintiff was not entirely credible because:
11 (1) he performed "heavy" work for years after he allegedly became
12 disabled; (2) despite claims of an inability to move his arms above
13 his head without difficulty and pain, he was able to do so at the
14 administrative hearing without apparent pain or difficulty; (3) the
15 claim reviewer who met in person with Plaintiff did not observe any
16 physical limitations; and (4) the reviewing physician opined that
17 Plaintiff could function normally, which is consistent with the ALJ's
18 observations of Plaintiff at the hearing. (AR 13-14.) For the
19 reasons explained below, the ALJ's credibility finding will be
20 affirmed.

21 The ALJ found that Plaintiff's testimony that he could not work
22 because of pain was undermined by the fact that he had been able to
23 perform heavy work for ten years after the alleged onset of
24 disability. (AR 11-12 ("Both the earnings and the exertional level of
25 the work indicate the claimant's functional capacity was greater than
26 he alleged."); 14 (noting Plaintiff's earnings and his ability to do
27 heavy work "seriously diminish[] [his] allegations concerning his
28 disability.")) This finding is supported by the record. Plaintiff

1 claimed that he was disabled as of January 1998, but he worked
2 installing fire sprinkler systems for ten years after that date. (AR
3 23.) This job required him to lift more than 100 pounds at times and
4 frequently lift more than 50 pounds. (AR 146.)

5 It stands to reason that, if Plaintiff was performing heavy work
6 for ten years after the alleged onset date, he was not disabled during
7 that period and his testimony that he was not able to perform any
8 work, (AR 35), was not credible. This is not because Plaintiff was
9 trying to conceal the fact that he worked after 1998. He freely
10 admitted in his submissions to the Agency before the hearing and in
11 his testimony at the hearing that he had worked for this entire
12 period. (AR 23, 145.) The problem is that he never amended his
13 application to change his alleged onset date to a date after he
14 stopped working. Thus, he was asking the ALJ to find that he was
15 disabled as of 1998 in the face of evidence that he submitted that
16 showed that he was performing heavy work during this same period. In
17 a word, Plaintiff's approach was schizophrenic. And the ALJ did not
18 err in questioning Plaintiff's testimony in light of the fact that he
19 was working during the same time that he alleged that he was disabled.

20 Plaintiff seems to concede the error in his approach and tries,
21 it appears, to amend his application in this court: "[Plaintiff]
22 disputes the ALJ's findings of non-disability for the period of
23 September 2008 forward." (Joint Stip. at 4.) This is not the time or
24 place to amend the application. That should have been done before the
25 Agency. Had Plaintiff done so, the result might have been different.
26 This Court is charged with reviewing the correctness of the ALJ's
27 decision as it was presented to the ALJ. As is clear from the record,
28 Plaintiff claimed that he was disabled as of January 1, 1998, and

1 presented evidence that he was not disabled during most of this
2 period. Though the ALJ recognized that Plaintiff's employment barred
3 him from recovering benefits through most of the period from January
4 1998 through December 2006 (AR 11), he was still left to grapple with
5 the issue of whether Plaintiff was disabled after that date in light
6 of the fact that Plaintiff was able to install sprinkler systems for
7 21 more months (from January 2007 to September 2008). The ALJ's
8 ultimate conclusion that Plaintiff was not credible in claiming that
9 he could not perform work was a reasonable one.

10 The ALJ cited several other reasons for questioning Plaintiff's
11 testimony. He pointed out that the reviewing physician concluded that
12 Plaintiff could function normally, which was consistent with the ALJ's
13 observations. In light of the Court's ruling regarding the ALJ's
14 treatment of the doctors' opinions, this reason does not appear to
15 still be valid. Further, the ALJ's observation that Plaintiff was
16 able to raise his arms above his head when gesturing during the
17 hearing and that the claim reviewer did not observe any physical
18 limitations are questionable bases for credibility findings. See,
19 e.g., *Perminter v. Heckler*, 765 F.2d 870, 872 (9th Cir. 1985)
20 (criticizing "'sit and squirm' jurisprudence"). The ALJ also noted,
21 however, that Plaintiff's treating physician reported in September
22 2008 that Plaintiff could move his arms and legs without difficulty,
23 (AR 13-14, 209), which is obviously a valid reason for questioning
24 Plaintiff's claim that he could not. In the end, the Court affirms
25 the ALJ's credibility finding based on the fact that Plaintiff's
26 testimony that he could not perform even sedentary work was undermined
27 by the fact that for most of the period of alleged disability he could
28 and did perform heavy work. This finding is further supported by the

1 fact that, contrary to his claim that he could not move his arms above
2 his head, he could.

3 IV. CONCLUSION

4 For the reasons set forth above, the Agency's decision is
5 reversed and the case is remanded for further proceedings consistent
6 with this opinion.¹

7 IT IS SO ORDERED.

8 DATED: June 19, 2012.

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PATRICK J. WALSH
12 UNITED STATES MAGISTRATE JUDGE
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27 ¹ The Court has considered Plaintiff's request that the case be
28 remanded for an award of benefits. That request is denied. It is not
clear from this record that Plaintiff is entitled to benefits and
further proceedings are necessary to resolve that issue.