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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID CHARLES PANGUS,)	NO. EDCV 12-00103-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
CAROLYN W. COLVIN, ¹)	
Acting Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	
_____)	

Plaintiff filed a Complaint on January 25, 2012, seeking review of the denial of plaintiff's application for a period of disability, disability insurance benefits ("DIB"), and supplemental security income ("SSI"). On March 1, 2012, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on October 11, 2012, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits or, alternatively,

¹ Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013, and is substituted in place of former Commissioner Michael J. Astrue as the defendant in this action. (See Fed. R. Civ. P. 25(d).)

1 for further administrative proceedings; and the Commissioner requests
2 that his decision be affirmed or, alternatively, remanded for further
3 administrative proceedings.

4
5 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
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7 On August 17, 2010, plaintiff filed an application for a period of
8 disability and DIB. (Administrative Record ("A.R.") 25.) On August 18,
9 2010, plaintiff filed an application for SSI. (*Id.*) Plaintiff, who was
10 born on April 18, 1963 (A.R. 32),² claims to have been disabled since
11 July 19, 2010 (A.R. 25), due to heart disease, heart attack,
12 cirrhosis/liver failure, confusion, depression, anxiety, and Hepatitis
13 C (A.R. 29-30, 73, 80).
14

15 After the Commissioner denied plaintiff's claim initially and upon
16 reconsideration (A.R. 25, 73-77, 80-84), plaintiff requested a hearing
17 (A.R. 25, 86-87). On July 20, 2011, plaintiff, who was represented by
18 an attorney, appeared and testified at a hearing before Administrative
19 Law Judge Sharilyn Hopson (the "ALJ"). (A.R. 25, 38-68.) Medical
20 expert Samuel Landau, M.D., and vocational expert Troy Scott also
21 testified. (*Id.*) On July 28, 2011, the ALJ denied plaintiff's claim
22 (A.R. 25-33), and the Appeals Council subsequently denied plaintiff's
23 request for review of the ALJ's decision (A.R. 4-6). That decision is
24 now at issue in this action.
25
26

27 ² On the alleged disability onset date, plaintiff was 47 years
28 old, which is defined as a younger individual. (A.R. 32; citing 20
C.F.R. §§ 404.1563, 416.963.)

1 for temperature control. [Plaintiff] is limited to simple
2 routine tasks.

3
4 (A.R. 28-29.)
5

6 The ALJ found that plaintiff is unable to perform any past relevant
7 work. (A.R. 31.) However, based upon his RFC assessment for plaintiff
8 and after having considered plaintiff's age, education,³ work experience,
9 and the testimony of the vocational expert, the ALJ found "there are
10 jobs that exist in significant numbers in the national economy that
11 [plaintiff] can perform," including that of "electronics worker,"
12 "packing machine operator," and "house cleaner." (A.R. 32.)
13 Accordingly, the ALJ concluded that plaintiff has not been under a
14 disability, as defined in the Social Security Act, from July 19, 2010,
15 through July 28, 2011, the date of the ALJ's decision. (A.R. 33.)
16

17 STANDARD OF REVIEW

18

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

27
28 ³ The ALJ found that plaintiff has at least a high school
education and is able to communicate in English. (A.R. 32.)

1 record can constitute substantial evidence, only those 'reasonably drawn
2 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,
3 1066 (9th Cir. 2006)(citation omitted).

4
5 Although this Court cannot substitute its discretion for that of
6 the Commissioner, the Court nonetheless must review the record as a
7 whole, "weighing both the evidence that supports and the evidence that
8 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
9 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also
10 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
11 responsible for determining credibility, resolving conflicts in medical
12 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
13 1035, 1039 (9th Cir. 1995).

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

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1 record; and (5) testimony from physicians and third parties concerning
2 the nature, severity, and effect of the symptoms of which the claimant
3 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.
4 2002); see also 20 C.F.R. §§ 404.1529(c), 416.929(c).

5
6 At the July 20, 2011 Administrative Hearing, when asked to discuss
7 his symptoms, plaintiff testified that he experiences: weakness and
8 fatigue; confusion; abdominal pain; difficulties sleeping; and recurrent
9 dizzy spells. (A.R. 29, 61-63.) He testified that if he sits down to
10 do paperwork, he gets a headache. (A.R. 59.) With respect to his daily
11 activities, plaintiff testified that he can: take care of his personal
12 hygiene; perform light household chores, including sweeping, mopping,
13 and washing dishes (A.R. 45); and drive short distances without feeling
14 fatigued (A.R. 46). Plaintiff also testified that he did not know
15 whether he experienced any side effects from his medications. (A.R.
16 63.)

17
18 The ALJ found, as noted *supra*, that plaintiff has the severe
19 impairments of: a "learning disorder[;] mood disorder[;] chronic active
20 hepatitis cause[d] by alcohol (in sustained remission)/HCV [(Hepatitis
21 C virus)] with liver cirrhosis[;] Childs-Pugh A[;] ischemic heart
22 disease with successful [stent placement] in 2005 and chronic stable
23 angina pectoris, NYHA [(New York Heart Association)] 2C." (A.R. 27.)
24 The ALJ also found that "[plaintiff]'s medically determinable
25 impairments could reasonably be expected to cause the alleged symptoms."
26 (A.R. 29.) Further, the ALJ cited no evidence of malingering by
27 plaintiff. Accordingly, the ALJ's reason for discrediting plaintiff's
28 subjective complaints must be clear and convincing.

1 The ALJ found that "[plaintiff]'s statements concerning the
2 intensity, persistence, and limiting effects of [his] symptoms are not
3 credible to the extent they are inconsistent with [the ALJ's RFC]
4 assessment." (A.R. 29.) Specifically, the ALJ found plaintiff to be
5 not credible, because: (1) the medical evidence does not support the
6 level of limitations alleged by plaintiff; (2) plaintiff is a poor
7 historian; and (3) plaintiff made an inconsistent statement regarding
8 his daily activities.⁴ (A.R. 29-30.)

9
10 The ALJ's first reason for discrediting plaintiff -- *i.e.*, that the
11 medical record does not corroborate plaintiff's subjective symptom
12 testimony fully -- is, by itself and without being buttressed by other
13 appropriate reasons, an insufficient basis upon which to reject
14 plaintiff's credibility. Rollins v. Massanari, 261 F.3d 853, 856 (9th
15 Cir. 2001); Bunnell, 947 F.2d at 347 (noting that "[i]f an adjudicator
16 could reject a claim of disability simple because [plaintiff] fails to
17 produce evidence supporting the severity of the pain, there would be no
18 reason for an adjudicator to consider anything other than medical
19 findings"). Accordingly, the ALJ's finding that the *level* of
20 plaintiff's alleged limitations is not supported by the medical evidence

21
22 ⁴ The Commissioner also contends that the ALJ found plaintiff to
23 be not credible, because his treatment was conservative. (Joint Stip.
24 at 11.) Contrary to the Commissioner's contention, the ALJ never
25 specifically discredited plaintiff because his treatment was
26 conservative. Rather, in summarizing plaintiff's treatment, the ALJ
27 stated that the medical records "show[ed] some treatment and one
28 problematic episode that resolved in a relatively short period of time."
(A.R. 30.) Critically, however, the ALJ never explained *how* or *why*
plaintiff's treatment detracted from his credibility. Moreover, the ALJ
does not suggest, and the medical record does not appear to contain, any
specific treatment to ameliorate plaintiff's chief complaint of fatigue
from his cirrhosis of the liver. Accordingly, to the extent the ALJ
discredited plaintiff because his treatment was "conservative," the
ALJ's reasoning is unpersuasive.

1 cannot, alone, constitute a clear and convincing reason for rejecting
2 plaintiff's testimony. See Varney v. Secretary, 846 F.2d 581, 584 (9th
3 Cir. 1988); Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986).

4
5 The ALJ's second reason for discrediting plaintiff -- *i.e.*, that he
6 is a "poor historian" -- is unpersuasive. The ALJ notes that, after
7 performing a "complete internal examination" of plaintiff, Dr. Sandra
8 Eriks, M.D., "considered [plaintiff] a 'poor historian.'" (A.R. 30.)
9 The ALJ concluded that "Dr. Eriks' opinion of [plaintiff]'s ability as
10 a historian . . . detract[s] from the credibility of [plaintiff]'s
11 allegations concerning his symptoms and impairments." (*Id.*) After
12 reviewing Dr. Eriks' evaluation of plaintiff, however, it appears that
13 Dr. Eriks found plaintiff to be a "poor historian," because he could not
14 remember, *inter alia*, exactly what procedures he had undergone and how
15 his "diagnosis was made."⁵ (A.R. 217.) Rather than detracting from
16 plaintiff's credibility, as the ALJ concluded, plaintiff's inability to
17 recall the details surrounding the procedures he has undergone and his
18 diagnoses appears to be consistent with his learning disability and his
19 testimony that he experiences confusion. Accordingly, in this case, the
20 fact that Dr. Eriks found plaintiff to be a poor historian does not
21 constitute a clear and convincing reason for discrediting plaintiff.

22
23 The ALJ's last reason for finding plaintiff to be not credible is
24 also neither clear nor convincing. In her decision, the ALJ found that

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26
27 ⁵ Notably, in finding plaintiff to be a poor historian, Dr.
28 Eriks did not suggest that plaintiff was not forthcoming and/or candid
with his responses.

1 plaintiff's statement, in his December 30, 2010⁶ Disability Appeal
2 Report, that he "can't have any physical activities" due to his "heart
3 disease . . . worsen[ing]" and "need [for] a liver transplant" is
4 inconsistent with his July 20, 2011 testimony that he does household
5 chores and walks around his neighborhood. (A.R. 29.) While the ALJ may
6 consider inconsistent statements in rendering her credibility
7 assessment, the two statements by plaintiff are not necessarily
8 inconsistent. As an initial matter, it appears that days prior to
9 completing his Disability Appeal Report, plaintiff had been hospitalized
10 for chest pains and underwent, *inter alia*, a left heart catheterization
11 and left ventriculography. (A.R. 261.) As such, the fact that
12 plaintiff felt that he could not perform any physical activities at that
13 time is not inconsistent with his testimony, given months later, that he
14 could perform light household chores and walk around his neighborhood.
15 Moreover, in stating that he "can't perform any physical activities," it
16 does not appear that plaintiff was stating that he could not perform any
17 activity whatsoever, and it is unclear whether plaintiff's basic
18 activities would amount to what plaintiff considered "physical
19 activity." Certainly, on the record before the Court, plaintiff's
20 minimal daily activities do not translate into the ability to perform
21 full-time work.⁷ See Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir.

23
24 ⁶ Although not dated, it appears that plaintiff's Disability
25 Appeal Report was completed on December 30, 2010. (A.R. 176, noting in
a subsequent report that plaintiff's last Disability Report was
completed on December 30, 2010.)

26 ⁷ Perhaps, on remand, if the ALJ inquired further into
27 plaintiff's activities, she would find them to be consistent with full-
28 time employment. However, as noted *supra*, based on the record before
the Court, plaintiff's minimal activities do not appear to be consistent
with full-time employment.

1 2001)(noting that the "mere fact that a plaintiff has carried on certain
2 daily activities, such as grocery shopping, driving a car, or limited
3 walking for exercise, does not in any way detract from her credibility
4 as to her overall disability"); Smolen v. Chater, 80 F.3d 1272, 1283 n.7
5 (9th Cir. 1996)("The Social Security Act does not require that claimants
6 be utterly incapacitated to be eligible for benefits, and many home
7 activities may not be easily transferable to a work environment where it
8 might be impossible to rest periodically or take medication.").
9 Therefore, the ALJ's reasoning does not constitute a clear and
10 convincing reason for discrediting plaintiff.

11
12 Accordingly, for the aforementioned reasons, the ALJ failed to give
13 clear and convincing reasons, as required, for finding plaintiff to be
14 not credible.⁸ This constitutes error.

15
16 **II. Remand Is Required.**

17
18 The decision whether to remand for further proceedings or order an
19 immediate award of benefits is within the district court's discretion.
20 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
21 useful purpose would be served by further administrative proceedings, or
22 where the record has been fully developed, it is appropriate to exercise
23 this discretion to direct an immediate award of benefits. *Id.* at 1179
24 ("[T]he decision of whether to remand for further proceedings turns upon
25

26 ⁸ While the Commissioner now offers other reasons to explain the
27 ALJ's credibility determination, the Court cannot entertain these post
28 hoc rationalizations. See, e.g., Connett, 340 F.3d at 874 (finding that
"[i]t was error for the district court to affirm the ALJ's credibility
decision based on evidence that the ALJ did not discuss").

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.⁹ See, e.g.,
9 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)(ordering remand so
10 that the ALJ could articulate specific and appropriate findings, if any
11 existed, for rejecting the claimant's subjective pain testimony). On
12 remand, the ALJ must revisit plaintiff's testimony and must either
13 credit plaintiff's testimony or give clear and convincing reasons why
14 plaintiff's testimony, particularly his testimony regarding his fatigue,
15 is not credible. After so doing, the ALJ may need to reassess

16
17 ⁹ In the Ninth Circuit, courts have the discretion to "credit as
18 true" the testimony of claimants when the ALJ has failed to provide
19 legally sufficient reasons for rejecting the same. See, e.g., *Connett*,
20 340 F.3d at 876 (holding that "[i]nstead of being a mandatory rule, we
21 have some flexibility in applying the 'credit as true' theory"). In
22 cases where there are no outstanding issues that must be resolved before
23 a proper disability determination can be made, and where it is clear
24 from the administrative record that the ALJ would be required to award
25 benefits if the claimant's excess pain testimony were credited, applying
26 the "credit as true" rule is appropriate. *Vasquez v. Astrue*, 572 F.3d
27 586, 593 (9th Cir. 2009).

28 Here, if plaintiff's testimony were credited as true, it is
unclear whether plaintiff would be considered disabled under the Social
Security Act. At the hearing, the vocational expert testified that a
hypothetical person with plaintiff's RFC who was "off-task 20 percent of
the time due to fatigue" would not be able to perform any work. (A.R.
66.) Critically, however, while plaintiff testified that he felt
fatigued, he did not specifically testify for what duration he would be
"off task" as a result of his fatigue. Accordingly, because it is
unclear whether plaintiff's testimony, if credited as true, would
require a finding of disability, the Court declines to credit his
testimony as true.

1 plaintiff's RFC, in which case additional testimony from a vocational
2 expert likely will be needed to determine what work, if any, plaintiff
3 can perform.

4
5 **CONCLUSION**

6
7 Accordingly, for the reasons stated above, IT IS ORDERED that the
8 decision of the Commissioner is REVERSED, and this case is REMANDED for
9 further proceedings consistent with this Memorandum Opinion and Order.

10
11 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
12 copies of this Memorandum Opinion and Order and the Judgment on counsel
13 for plaintiff and for defendant.

14
15 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

16
17 DATED: May 23, 2013

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19

MARGARET A. NAGLE
20 UNITED STATES MAGISTRATE JUDGE