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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

HELADIO DIAZ,)	Case No. EDCV 12-00363-MLG
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the)	
Social Security)	
Administration,)	
)	
Defendant.)	
_____)	

Plaintiff Heladio Diaz seeks judicial review of the Commissioner's final decision denying his application for disability insurance benefits ("DIB") and Supplemental Security Income ("SSI") under the Social Security Act. For the reasons discussed below, the Commissioner's decision is reversed, and this action is remanded for further proceedings.

I. Background

Plaintiff was born on February 18, 1959. (Administrative Record ("AR") at 52.) He speaks limited English and has relevant work experience as a small engine mechanic and as a truck driver. (AR at 47.) Plaintiff filed his applications for DIB and SSI on September 4, 2008,

1 alleging disability beginning July 5, 2008, due to pulmonary
2 tuberculosis, diabetes, and seizures. (AR at 16, 198.)

3 Plaintiff's applications were denied initially on September 26,
4 2008, and upon reconsideration on December 18, 2008. (AR at 16.) An
5 administrative hearing was held on November 19, 2010, before
6 Administrative Law Judge ("ALJ") Maxine R. Benmour. Plaintiff,
7 represented by counsel, testified with the assistance of a Spanish
8 interpreter. A Vocational Expert ("VE") also testified. (AR at 16.)

9 On January 10, 2011, the ALJ issued an unfavorable decision. (AR at
10 22-28.) At the first step of the five-step sequential evaluation process
11 for determining whether an individual is disabled, the ALJ found that
12 Plaintiff had not engaged in substantial gainful activity since the
13 disability onset date. (AR at 18.) At step two, the ALJ found that
14 though the Plaintiff suffers from a seizure disorder, diabetes, diabetic
15 neuropathy, pulmonary tuberculosis, and neck pain, these impairments are
16 not severe, either individually or in combination. (AR at 18-19.)
17 Accordingly, the ALJ concluded that Plaintiff was not disabled within
18 the meaning of the Social Security Act. On January 23, 2012, the Appeals
19 Council denied review. (AR at 1-3.)

20 Plaintiff commenced this action for judicial review, and on
21 September 18, 2012, the parties filed a Joint Stipulation ("Joint
22 Stip.") of disputed facts and issues. Plaintiff contends that the ALJ
23 erred in finding that his medical impairments were not severe by failing
24 to properly consider both the relevant medical evidence and plaintiff's
25 subjective complaints. (Joint Stip. at 3.) Plaintiff seeks remand for a
26 new administrative hearing. (Joint Stip. at 23-24.) The Commissioner
27 requests that the ALJ's decision be affirmed. (Joint Stip. at 24.)

28 //

1 **II. Standard of Review**

2 Under 42 U.S.C. § 405(g), a district court may review the
3 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
4 decision must be upheld unless "the ALJ's findings are based on legal
5 error or are not supported by substantial evidence in the record as a
6 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Batson v.*
7 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Parra*
8 *v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means
9 such evidence as a reasonable person might accept as adequate to support
10 a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Widmark*
11 *v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more than a
12 scintilla, but less than a preponderance. *Robbins v. Soc. Sec. Admin.*,
13 466 F.3d 880, 882 (9th Cir. 2006). To determine whether substantial
14 evidence supports a finding, the reviewing court "must review the
15 administrative record as a whole, weighing both the evidence that
16 supports and the evidence that detracts from the Commissioner's
17 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If
18 the evidence can support either affirming or reversing the ALJ's
19 conclusion," the reviewing court "may not substitute its judgment for
20 that of the ALJ." *Robbins*, 466 F.3d at 882.

21
22 **III. Discussion**

23 **A. The ALJ's Finding that Plaintiff Suffers from No Severe Impairment**
24 **is not Supported by Substantial Evidence**

25 Plaintiff contends that the ALJ's conclusion that his impairments
26 are non-severe is not supported by substantial evidence. (AR at 4.) In
27 particular, Plaintiff maintains that his diabetes is a severe impairment
28 in and of itself. (AR at 6.) The Court agrees that the ALJ erred in

1 finding that Plaintiff's diabetes and diabetic neuropathy are non-
2 severe, and therefore remand is appropriate.¹

3 The existence of a severe impairment is demonstrated when the
4 evidence establishes that an impairment has more than a minimal effect
5 on an individual's ability to perform basic work activities. *Webb v.*
6 *Barnhart*, 433 F.3d 683, 686-87 (9th Cir. 2005); *Smolen v. Chater*, 80
7 F.3d 1273, 1290 (9th Cir. 1996); 20 C.F.R. §§ 404.1521(a), 416.921(a).
8 The regulations define "basic work activities" as "the abilities and
9 aptitudes necessary to do most jobs," which include physical functions
10 such as walking, standing, sitting, pushing, carrying; capacities for
11 seeing, hearing and speaking; understanding and remembering simple
12 instructions; responding appropriately in a work setting; and dealing
13 with changes in a work setting. 20 C.F.R. § 404.1521(b). The inquiry at
14 this stage is "a de minimis screening device to dispose of groundless
15 claims." *Smolen*, 80 F.3d at 1290 (citing *Bowen v. Yuckert*, 482 U.S. 137,
16 153-54 (1987)). An impairment is not severe *only* if it is a slight
17 abnormality with "no more than a minimal effect on an individual's
18 ability to work." See SSR 85-28²; *Yuckert v. Bowen*, 841 F.2d 303, 306
19 (9th Cir. 1988). An ALJ's conclusion at step two that the claimant lacks
20 a medically severe impairment should be affirmed only where it is
21 "'clearly established by medical evidence.'" *Webb*, 433 F.3d at 687
22

23 ¹ Because the finding that Plaintiff's diabetes constitutes a
24 severe impairment warrants remand, Plaintiff's contentions regarding his
25 other impairments will not be discussed.

26 ² "The Secretary issues Social Security Rulings to clarify the
27 Secretary's regulations and policy.... Although SSRs are not published
28 in the federal register and do not have the force of law, [the Ninth
Circuit] nevertheless give[s] deference to the Secretary's
interpretation of its regulations." *Bunnell v. Sullivan*, 947 F.2d 341,
346 n. 3 (9th Cir. 1991).

1 (quoting S.S.R. 85-28) (reversing a step two determination "because
2 there was not substantial evidence to show that Webb's claim was
3 'groundless'").

4 Here, Plaintiff has offered sufficient evidence to demonstrate that
5 his diabetes and diabetic neuropathy have more than a minimal effect on
6 his ability to perform work-related functions. First, Plaintiff has
7 provided one year of medical records documenting that during monthly
8 visits, his glucose levels were extremely high and that his diabetes was
9 "uncontrolled." (AR at 375, 376, 383, 387, 389, 388, 391, 392, 395, 399,
10 400.) Additionally, a radiology report dated November 7, 2008, notes
11 that Plaintiff had complained of numbness in both feet, and that x-rays
12 revealed arterial calcification in his left foot, indicating diabetes
13 and diabetic neuropathy. (AR at 378-80.) A progress note dated January
14 14, 2009, states that Plaintiff was referred to an ophthalmologist for
15 a retinal hemorrhage, which can be caused by uncontrolled diabetes. (AR
16 at 386); see also Mayo Clinic, [http://www.mayoclinic.com/health/
17 diabetic-retinopathy/DS00447](http://www.mayoclinic.com/health/diabetic-retinopathy/DS00447). On September 25, 2008, a state agency
18 reviewing physician completed a residual functional capacity assessment
19 indicating that Plaintiff suffered from exertional limitations with
20 respect to his ability to lift and/or carry, and to stand, walk, and
21 sit. (AR at 334.)

22 While the ALJ provided several reasons for finding that Plaintiff's
23 diabetes did not constitute a severe impairment, these reasons are not
24 supported by substantial evidence. *Webb*, 433 F.3d at 687. First, the ALJ
25 found that Plaintiff was not compliant with his doctor's recommendations
26 regarding exercise and diet, as there were at least two notations in the
27 medical record that Plaintiff was not cooperating with these
28 recommendations. (AR at 21, 389, 399.) A claimant who refuses to follow

1 prescribed treatment without good reason will be denied benefits. 20
2 C.F.R. § 404.1530; § 416.930. However, there must be evidence that
3 compliance with the treatment would restore the claimant's ability to
4 work. 20 C.F.R. §§ 404.1530(a); *Byrnes v. Shalala*, 60 F.3d 639, 641 (9th
5 Cir. 1995).

6 Here, there is no evidence that compliance with his physician's
7 recommendations related to diet and exercise would have fully remedied
8 his diabetes-related symptoms. To support a finding that Plaintiff could
9 keep his diabetes under control by following recommendations, the ALJ
10 appears to have relied on a July 2008 consultation stating that
11 Plaintiff was taking his medications and that his blood sugar was
12 controlled. (AR at 20.) However, the July 2008 consultation makes no
13 mention of Plaintiff's diet or exercise habits, (AR at 293), and the
14 medical records documenting his high glucose levels between November
15 2008 and October 2009 also state that Plaintiff was taking his
16 medication as directed and was regularly refilling his prescription. (AR
17 at 384, 386, 389, 391, 397, 399, 400, 404.) These records show that
18 Plaintiff was experiencing complications despite taking his medications,
19 and contain no evidence that compliance with his doctor's exercise and
20 diet directions would fully restore his ability to work.

21 Next, the ALJ found that Plaintiff's neuropathy was not severe
22 because his extremities have appeared normal during all appointments,
23 aside from a radiology report dated November 7, 2008, finding
24 calcification in Plaintiff's left foot (AR at 21.) However, the ALJ's
25 reliance on these findings is inconsistent with his determination that
26 Plaintiff does suffer from diabetic neuropathy. To the extent the ALJ
27 was convinced that Plaintiff's extremities were, in fact, normal, he
28 should not have concluded that he suffers from neuropathy. Furthermore,

1 the findings noting that Plaintiff's extremities were normal were part
2 of a long check-the-box list without explanation as to what type of test
3 was administered or whether it was one likely to document symptoms
4 related to diabetic neuropathy. (See, e.g., AR at 371.) In light of the
5 evidence documenting Plaintiff's consistently high blood sugar levels,³
6 the x-ray showing calcification in Plaintiff's foot, and Plaintiff's
7 testimony regarding his symptoms, discussed more fully below, the
8 notations that Plaintiff's extremities were normal do not constitute
9 substantial evidence to support the ALJ's finding that Plaintiff's
10 diabetic neuropathy was not severe.

11 Third, the ALJ noted that the medical record suggests that
12 Plaintiff did not receive treatment for his diabetes in the year prior
13 to the hearing, as it appears that there were no records submitted for
14 that time period related to diabetes. (AR at 21.) However, both diabetes
15 and diabetic neuropathy are not curable medical conditions. The year's
16 worth of records covering the period between November 2008 and November
17 2009 document consistently high blood sugar levels and other signs that
18 Plaintiff's diabetes was out of control. There is no indication that
19 Plaintiff's symptoms were improving over time or that they ended after
20 this time period. In fact, Plaintiff testified that he was seeing a
21 doctor on a monthly basis regarding diabetes-related symptoms at the
22 time of the hearing. (AR at 36.) Accordingly, the lack of medical
23 records for this time period does not support a finding that Plaintiff
24 does not suffer from a severe impairment.

26
27 ³ Prolonged exposure to high blood sugar causes diabetic neuropathy
28 and continued high blood sugar levels can prevent improvement of its
symptoms. See [http://www.mayoclinic.com/health/diabetic-neuropathy/
DS01045/DSECTION=causes](http://www.mayoclinic.com/health/diabetic-neuropathy/DS01045/DSECTION=causes).

1 Finally, the ALJ rejected the sit/stand/walk and lift/carry
2 limitations assessed by the state agency reviewing physician in his
3 September 2008 assessment because they were based on not only on
4 Plaintiffs diabetes, but also on his tuberculosis and seizure disorder,
5 which subsequently improved. (AR at 22.) The assessment does not,
6 however, explain which limitations are based on which medical condition.
7 (AR at 334-37.) The fact that this assessment was not based on
8 plaintiff's diabetes in isolation is not substantial evidence that
9 supports a finding plaintiff lacks a medically severe impairment.

10 Given the minimal threshold required to show that an impairment is
11 severe, the ALJ's stated reasons for concluding that Plaintiff's
12 diabetes is not a severe impairment are not supported by substantial
13 evidence in the record.

14 **B. The ALJ Improperly Evaluated Plaintiff's Credibility**

15 Plaintiff contends that the ALJ failed to properly evaluate his
16 credibility in determining that he has no severe impairment. At the
17 hearing, Plaintiff testified that his legs feel numb and weak. As a
18 result, he has difficulty walking and had been using a cane for
19 approximately one year. (AR at 35-36.) He experiences similar sensations
20 in his hands, which prevent him from performing the mechanic work he did
21 in the past. (AR at 43.) He also testified that he experiences extreme
22 fatigue on a daily basis. (AR at 39-40.)

23 To determine whether a claimant's testimony about subjective pain
24 or symptoms is credible, the ALJ must first determine whether the
25 claimant has presented objective medical evidence of an underlying
26 impairment which could reasonably be expected to produce the alleged
27 pain or other symptoms. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36
28 (9th Cir. 2007). Once the claimant produces such evidence, the ALJ must

1 provide specific, clear and convincing reasons for discrediting a
2 claimant's complaints, unless there is affirmative evidence showing that
3 the claimant is malingering. *Robbins*, 466 F.3d at 883.

4 Here, the ALJ concluded that Plaintiff's "medically determinable
5 impairments could reasonably be expected to produce the alleged
6 symptoms." (AR at 21). However, the ALJ found Plaintiff's statements
7 "concerning the intensity, persistence and limiting effects of these
8 symptoms [were] not credible to the extent that they are inconsistent
9 with finding that the claimant has no severe impairment or combination
10 of impairments." (AR at 21). Because there was no evidence of
11 malingering, the ALJ was required to provide clear and convincing
12 reasons for rejecting this testimony.

13 The ALJ provided several reasons for determining that Plaintiff was
14 not credible. First, the ALJ discredited Plaintiff's symptom testimony
15 based on his daily activities. (AR at 21.) Plaintiff testified he washes
16 dishes and does garden work "a little bit"; feeds the dogs; sometimes
17 makes meals for himself; and can dress himself, though only while
18 sitting down. (AR at 42.) The issue at step two, however, is not whether
19 the Plaintiff is disabled, but whether the medical impairment has "more
20 than a minimal effect on an individual's ability to work." See SSR 85-
21 28. Plaintiff's ability to perform these limited activities is not
22 inconsistent with his testimony that his diabetes has at least a minimal
23 effect on his ability to work.

24 Next, the ALJ discredited Plaintiff's testimony because he
25 discussed his symptoms related to leg numbness only once with his
26 primary care provider and did not mention difficulty with his hands or
27 fatigue. (AR at 21-22.) This explanation improperly discounts the fact
28 that Plaintiff's discussion of his leg numbness with his primary care

1 provider was sufficient to warrant diagnostic x-rays, and that the x-
2 rays revealed objective evidence of neuropathy in his left foot. (AR at
3 378-80.) Additionally, Plaintiff testified that he was regularly seeing
4 his doctor at the time of the hearing and had repeatedly discussed his
5 leg problems with him. (AR at 36-37.) Furthermore, the records dated
6 between October 2008 and November 2009 show that Plaintiff was
7 repeatedly seen for diabetes that was out of control and that his blood
8 sugar levels were consistently very high. Fatigue is one of the
9 principal symptoms of uncontrolled diabetes. See
10 <http://www.mayoclinic.com/health/diabetes/DS01121/DSECTION=symptoms>.
11 Additionally, continued exposure to high blood sugar levels cause the
12 symptoms of diabetic neuropathy to worsen, and can cause the neuropathy
13 to progress from feet and legs to hands and arms. See
14 [http://www.mayoclinic.com/health/diabetic-neuropathy/DS01045/](http://www.mayoclinic.com/health/diabetic-neuropathy/DS01045/DSECTION=symptoms)
15 [DSECTION=symptoms](http://www.mayoclinic.com/health/diabetic-neuropathy/DS01045/DSECTION=symptoms). Plaintiff's early complaints in 2008 of numbness in
16 his feet and legs, followed by more recent complaints of numbness in his
17 hands, is consistent with the typical progression of neuropathy. Under
18 these circumstances, the absence of records noting complaints
19 specifically related to Plaintiff's hand numbness and fatigue do not
20 constitute a legitimate reason for finding Plaintiff not credible.

21 Finally, the ALJ found Plaintiff not credible because he did not
22 comply with his physician's recommendations related to diet and
23 exercise. An ALJ may properly rely on "unexplained or inadequately
24 explained failure to seek treatment or to follow a course of treatment"
25 in assessing credibility. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th
26 Cir. 2008). Here, the same records stating that Plaintiff was not
27 compliant with diet and exercise recommendations also note that
28 Plaintiff was compliant in taking his prescribed medication and was

1 coming in regularly for checkups. (AR at 370-406.) Given that Plaintiff
2 has not been wholly noncompliant with his physician's recommendations,
3 this reason does not constitute substantial evidence sufficient to
4 discredit Plaintiff's testimony that he suffered from impairments with
5 at least more than a minimal effect on his ability to work.

6 In sum, the principal reasons upon which the ALJ based her decision
7 to reject Plaintiff's testimony to the extent they support a finding
8 that his diabetes and diabetic neuropathy were severe impairments is
9 unsupported by substantial evidence in the record.

10
11 **IV. Conclusion**

12 As a general rule, remand is warranted where additional
13 administrative proceedings could remedy defects in the Commissioner's
14 decision. *See Harman v. Apfel*, 211 F.3d 1172, 1179 (9th Cir. 2000).
15 Here, the evidence shows that Plaintiff suffers from an impairment or
16 impairments that can be considered "severe" within the meaning of the
17 Social Security Regulations. Whether these impairments prevent Plaintiff
18 from performing either his past work or some work in the national
19 economy is not a determination that this Court can make. Accordingly,
20 the case is remanded for further evaluation in accordance with the five-
21 step sequential process.

22
23 DATED: October 3, 2012



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26 _____
Marc L. Goldman
United States Magistrate Judge