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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KEITH B. GERVAIS,)	Case No. EDCV 12-1115-JPR
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
vs.)	REVERSING COMMISSIONER AND
)	REMANDING FOR FURTHER
CAROLYN W. COLVIN, Acting)	PROCEEDINGS
Commissioner of Social)	
Security, ¹)	
)	
Defendant.)	
)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner's final decision denying his application for Social Security Supplemental Security Income benefits ("SSI"). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge pursuant to 28 U.S.C. § 636(c). This matter is before the Court on the parties' Joint Stipulation, filed March 27, 2013, which the Court has taken under submission without oral argument. For the

¹ On February 14, 2013, Colvin became the Acting Commissioner of Social Security. Pursuant to Federal Rule of Civil Procedure 25(d), the Court therefore substitutes Colvin for Michael J. Astrue as the proper Respondent.

1 reasons stated below, the Commissioner's decision is reversed and
2 this matter is remanded for further proceedings.

3 **II. BACKGROUND**

4 Plaintiff was born on May 11, 1970, and has a high school
5 education. (Administrative Record ("AR") 42, 137.) He
6 previously worked as a construction laborer, farm worker, and
7 tree trimmer. (AR 152, 201.)

8 Plaintiff filed an application for SSI on September 30,
9 2008.² (AR 137-43.) He alleged that he had been unable to work
10 since June 1, 2008, because of schizophrenia, manic depression,
11 psychosis, and tactile and auditory hallucinations. (AR 137,
12 151.) His application was denied initially, on January 29, 2009
13 (AR 76-79), and upon reconsideration, on June 9 (AR 74-75).

14 On July 21, 2009, Plaintiff requested a hearing before an
15 Administrative Law Judge ("ALJ"). (AR 89.) A hearing was held
16 on July 7, 2010, at which Plaintiff, who was represented by
17 counsel, appeared and testified. (AR 34-73.) Medical Expert Dr.
18 Joseph Malancharuvil and a vocational expert ("VE") also
19 testified. (Id.) In a written decision issued on August 17,
20 2010, the ALJ determined that Plaintiff was not disabled. (AR
21 15-33.) On September 22, 2010, Plaintiff requested review of the
22 ALJ's decision and submitted additional evidence to the Appeals
23 Council; on April 6, 2012, the Appeals Council incorporated the
24 additional evidence into the record and denied review. (AR 1-5.)

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26
27 ² Plaintiff also filed an SSI application on November 30,
28 2007, which was denied at the initial level on March 27, 2008.
(See AR 19.) Plaintiff apparently did not request review of that
decision. (See id.)

1 This action followed.

2 **III. STANDARD OF REVIEW**

3 Pursuant to 42 U.S.C. § 405(g), a district court may review
4 the Commissioner's decision to deny benefits. The ALJ's findings
5 and decision should be upheld if they are free of legal error and
6 supported by substantial evidence based on the record as a whole.
7 § 405(g); Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct.
8 1420, 1427, 28 L. Ed. 2d 842 (1971); Parra v. Astrue, 481 F.3d
9 742, 746 (9th Cir. 2007). Substantial evidence means such
10 evidence as a reasonable person might accept as adequate to
11 support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter
12 v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than
13 a scintilla but less than a preponderance. Lingenfelter, 504
14 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d 880,
15 882 (9th Cir. 2006)). To determine whether substantial evidence
16 supports a finding, the reviewing court "must review the
17 administrative record as a whole, weighing both the evidence that
18 supports and the evidence that detracts from the Commissioner's
19 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
20 1996). "If the evidence can reasonably support either affirming
21 or reversing," the reviewing court "may not substitute its
22 judgment" for that of the Commissioner. Id. at 720-21.

23 **IV. THE EVALUATION OF DISABILITY**

24 People are "disabled" for purposes of receiving Social
25 Security benefits if they are unable to engage in any substantial
26 gainful activity owing to a physical or mental impairment that is
27 expected to result in death or which has lasted, or is expected
28 to last, for a continuous period of at least 12 months. 42

1 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257
2 (9th Cir. 1992).

3 A. The Five-Step Evaluation Process

4 The ALJ follows a five-step sequential evaluation process in
5 assessing whether a claimant is disabled. 20 C.F.R.

6 § 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
7 1995) (as amended Apr. 9, 1996). In the first step, the

8 Commissioner must determine whether the claimant is currently
9 engaged in substantial gainful activity; if so, the claimant is
10 not disabled and the claim must be denied. § 416.920(a)(4)(i).

11 If the claimant is not engaged in substantial gainful activity,
12 the second step requires the Commissioner to determine whether
13 the claimant has a "severe" impairment or combination of

14 impairments significantly limiting his ability to do basic work
15 activities; if not, the claimant is not disabled and the claim
16 must be denied. § 416.920(a)(4)(ii). If the claimant has a

17 "severe" impairment or combination of impairments, the third step
18 requires the Commissioner to determine whether the impairment or
19 combination of impairments meets or equals an impairment in the

20 Listing of Impairments ("Listing") set forth at 20 C.F.R., Part
21 404, Subpart P, Appendix 1; if so, disability is conclusively
22 presumed and benefits are awarded. § 416.920(a)(4)(iii). If the

23 claimant's impairment or combination of impairments does not meet
24 or equal an impairment in the Listing, the fourth step requires
25 the Commissioner to determine whether the claimant has sufficient

1 residual functional capacity ("RFC")³ to perform his past work;
2 if so, the claimant is not disabled and the claim must be denied.
3 § 416.920(a)(4)(iv). The claimant has the burden of proving that
4 he is unable to perform past relevant work. Drouin, 966 F.2d at
5 1257. If the claimant meets that burden, a prima facie case of
6 disability is established. Id. If that happens or if the
7 claimant has no past relevant work, the Commissioner then bears
8 the burden of establishing that the claimant is not disabled
9 because he can perform other substantial gainful work available
10 in the national economy. § 416.920(a)(4)(v). That determination
11 comprises the fifth and final step in the sequential analysis.
12 § 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

13 A claimant whose alcoholism or drug addiction is a
14 contributing factor material to a determination of disability is
15 not entitled to Social Security disability benefits. See 42
16 U.S.C. § 423(d)(2)(C) ("An individual shall not be considered to
17 be disabled for purposes of this subchapter if alcoholism or drug
18 addiction would . . . be a contributing factor material to the
19 Commissioner's determination that the individual is disabled.");
20 see also 20 C.F.R. § 416.935(a);⁴ Ball v. Massanari, 254 F.3d
21 817, 824 (9th Cir. 2001). When the claimant has a history of
22 drug or alcohol abuse, the five-step sequential evaluation must

23
24 ³ RFC is what a claimant can do despite existing exertional
25 and nonexertional limitations. 20 C.F.R. § 416.945; see Cooper v.
Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

26 ⁴ 20 C.F.R. § 416.935(b)(1) further provides that "[t]he
27 key factor we will examine in determining whether drug addiction or
28 alcoholism is a contributing factor material to the determination
of disability is whether we would still find you disabled if you
stopped using drugs or alcohol."

1 first be conducted "without separating out the impact of
2 alcoholism or drug addiction." Bustamante v. Massanari, 262 F.3d
3 949, 955 (9th Cir. 2001); see also Parra v. Astrue, 481 F.3d 742,
4 748 (9th Cir. 2007). If the ALJ finds that the claimant is not
5 disabled under the five-step inquiry, then the claimant is not
6 entitled to benefits and there is no need to proceed with the
7 analysis under 20 C.F.R. § 416.935. If, however, after
8 conducting the five-step inquiry, the ALJ concludes that the
9 claimant is disabled and medical evidence exists of drug
10 addiction or alcoholism, then it must be determined whether the
11 claimant would still be found disabled if he stopped using
12 alcohol or drugs. Bustamante, 262 F.3d at 955 (citing 20 C.F.R.
13 § 416.935). At this stage, the claimant bears the burden of
14 proving that his alcoholism or drug addiction is not a
15 contributing factor material to his disability determination.
16 Ball, 254 F.3d at 822-23; see also Sousa v. Callahan, 143 F.3d
17 1240, 1245 (9th Cir. 1998) (remanding to give claimant
18 opportunity to present evidence relevant to this issue).

19 B. The ALJ's Application of the Five-Step Process

20 At step one, the ALJ found that Plaintiff had not engaged in
21 any substantial gainful activity since September 30, 2008. (AR
22 21.) At step two, the ALJ concluded that Plaintiff had the
23 severe impairments of "substance induced psychotic disorder with
24 schizoaffective features; personality disorder not otherwise
25 specified; and polysubstance abuse, amphetamine in early
26 remission for 8 months and alcohol abuse with intermittent use."
27 (Id. (citation omitted).) At step three, the ALJ determined that
28 Plaintiff's impairments, "including the substance use disorders,"

1 met section 12.02(c)(2) of the Listing, but if Plaintiff stopped
2 the substance use his impairments would not meet or equal any
3 listed impairments. (AR 22.) At step four, the ALJ made the
4 following finding:

5 If the claimant stopped the substance use, the claimant
6 would have the residual functional capacity to perform a
7 full range of work at all exertional levels but with the
8 following nonexertional limitations: [sic] hand packager,
9 DOT 920.587-018, . . .; industrial cleaner, DOT 381.687-
10 018 . . .; and small products assembler II, DOT 739.687-
11 030

12 (AR 23.) The ALJ found that if Plaintiff stopped substance use
13 he would be unable to perform his past relevant work. (AR 28.)
14 Based on the VE's testimony, however, the ALJ found that if
15 Plaintiff stopped substance use he could perform the jobs of hand
16 packager, industrial cleaner, and small-products assembler. (AR
17 28-29.) Thus, the ALJ found that Plaintiff's substance use was a
18 contributing factor material to the determination of disability
19 under 20 C.F.R. § 416.935, and that if Plaintiff stopped
20 substance use he would not be disabled. (AR 29.)

21 **V. DISCUSSION**

22 Plaintiff argues that the ALJ erred in the following ways:
23 (1) failing to identify Plaintiff's RFC in the written decision;
24 (2) relying on the consultative examination report of Dr.
25 Romulado Rodriguez because Dr. Rodriguez was on probation before
26 the state medical board at the time he evaluated Plaintiff; and
27 (3) evaluating the opinions of treating physician Dr. Christopher
28 Fichtner and the other medical evidence of record. (J. Stip. at

1 4.)⁵ Because the ALJ erred in her consideration of the medical
2 evidence, her decision must be reversed and this matter remanded
3 for further proceedings.

4 A. The ALJ's Evaluation of Dr. Malancharuvil's Testimony
5 Was Not Consistent with the Record

6 Plaintiff challenges the ALJ's evaluation of the medical
7 evidence. (See J. Stip. at 16-25, 31-32.) Specifically,
8 Plaintiff challenges the ALJ's rejection of the opinions of his
9 treating physician, Dr. Fichtner, in favor of the testimony of
10 Dr. Malancharuvil and the opinions of consulting doctors
11 Rodriguez and Reynald Abejuela. (Id.) Because the ALJ erred in
12 her assessment of Dr. Malancharuvil's testimony, which provided
13 the basis for much of her decision, reversal is warranted on this
14 basis.

15 1. Applicable law

16 Under 42 U.S.C. § 423(d)(2)(C), a claimant cannot receive
17 disability benefits "if alcoholism or drug addiction would . . .
18 be a contributing factor material to the determination that the
19 individual is disabled." The purpose of the statute is "to
20 discourage alcohol and drug abuse, or at least not to encourage
21 it with a permanent government subsidy." Ball, 254 F.3d at 824.
22 Under the implementing regulations, the ALJ must conduct a drug
23 abuse and alcoholism analysis ("DAA analysis") by determining
24 which of the claimant's disabling limitations would remain if the
25 claimant stopped using drugs or alcohol. 20 C.F.R. § 416.935(b).

26
27 ⁵ The Court addresses the issues raised in the Joint
28 Stipulation in an order different from that used by the parties, to
avoid repetition and for other reasons.

1 If the remaining limitations would still be disabling, then the
2 claimant's drug addiction or alcoholism is not a contributing
3 factor material to his disability. If the remaining limitations
4 would not be disabling, then the claimant's substance abuse is
5 material and benefits must be denied. Id. Plaintiff bears the
6 burden of proving that drug or alcohol addiction is not a
7 contributing factor material to the finding of disability.
8 Parra, 481 F.3d at 748.

9 An ALJ has an independent duty "to fully and fairly develop
10 the record and to assure that the claimant's interests are
11 considered." Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir.
12 1996) (internal quotation marks and citation omitted). This is
13 true even if the claimant is represented by counsel. See Celaya
14 v. Halter, 332 F.3d 1177, 1183 (9th Cir. 2003). The ALJ's duty
15 to develop the record is triggered when there is "ambiguous
16 evidence or when the record is insufficient to allow for proper
17 evaluation of the evidence." Mayes v. Massanari, 276 F.3d 453,
18 459-60 (9th Cir. 2001). "The ALJ may discharge this duty in
19 several ways, including: subpoenaing the claimant's physicians,
20 submitting questions to the claimant's physicians, continuing the
21 hearing, or keeping the record open after the hearing to allow
22 supplementation of the record." Tonapetyan v. Halter, 242 F.3d
23 1144, 1150 (9th Cir. 2001).

24 2. Background

25 At the hearing, Dr. Malancharuvil testified that with drug
26 and alcohol use, Plaintiff met Listings 12.02 ("substance induced
27 psychotic disorder with Schizo-[a]ffective features"), 12.08
28 ("personality disorder of not otherwise specified"), and 12.09

1 (amphetamine and alcohol abuse). (AR 51.) Without drug and
2 alcohol use, Dr. Malancharuvil testified that Plaintiff "has not
3 been sober long enough to notice." (Id.) He noted that
4 Plaintiff was currently "stable" and his hallucinations had
5 subsided, but he "recently was drinking, and that would aggravate
6 the situation." (AR 51-52.) He testified that if Plaintiff
7 stopped using drugs and alcohol, "the assumption" would be that
8 Plaintiff would not meet or equal any Listings and "[e]mployment
9 would be restricted when he's sober to definitely capable of
10 simple work but probably moderately complex tasks, up to four to
11 five step instructions in a habituated setting[, and] object
12 oriented work with preclusion of any type of safety operations or
13 operating of hazardous machinery." (AR 52.) He then qualified
14 that statement by noting, "But these are speculations because he
15 has not been sober long enough." (Id.) He concluded by noting
16 that "right now, [Plaintiff] cannot work" and was "not capable of
17 functioning in any type of work setting on a consistent basis."
18 (Id.) He then noted again that Plaintiff "has not been [sober]
19 long enough" to determine whether he could work, and "he has to
20 first become sober and then hopefully at that time it will be
21 easier for him to have a determination in his favor." (AR 52-
22 53.)

23 3. Analysis

24 In her written opinion, the ALJ gave "greatest weight" to
25 Dr. Malancharuvil's testimony. (AR 26.) The ALJ then
26 characterized Dr. Malancharuvil's testimony as follows:

27 Dr. Malancharuvil opined that with DAA the claimant
28 meets the requirements of listing 12.09 whereby he has

1 mild limitation in daily activities; marked limitation in
2 social activities; marked limitation in concentration,
3 persistence, or pace; and no repeated episodes of
4 decompensation.

5 In testimony, Dr. Malancharuvil reported the
6 claimant's drug and alcohol use was present and material
7 beginning December 2009; the claimant has been in recent
8 remission for approximately 8 months; and the claimant
9 has intermittent alcohol abuse. Dr. Malancharuvil noted
10 the claimant has not been sober very long, although the
11 treatment records indicate he is stable with medication
12 and he has fewer hallucinations.

13 The doctor testified that without DAA the claimant
14 does not meet or equal any listings and he has none to
15 mild limitation in daily activities; moderate limitation
16 in social functioning; mild to moderate limitation in
17 concentration, persistence, or pace; and no repeated
18 episodes of decompensation.

19 Based on these findings, Dr. Malancharuvil opined
20 the claimant can perform moderately complex tasks up to
21 4-5 step instructions in a habituated setting doing
22 object oriented work; and the claimant is precluded from
23 safety operations or operating hazardous machinery. The
24 doctor determined if the claimant's symptoms persist for
25 at least 1 year after sobriety, then it would be possible
26 to determine the residual effects of long-term effects of
27 drug use.

28 The findings of Dr. Malancharuvil are not

1 inconsistent with the findings of the undersigned; and
2 they are supported by the objective medical record. As
3 such, the findings of Dr. Malancharuvil are given
4 greatest weight.

5 (AR 26-27.)

6 The ALJ's characterization of Dr. Malancharuvil's testimony
7 was improper. The ALJ stated that Dr. Malancharuvil found that
8 if Plaintiff stopped drug use he would not meet any of the
9 Listings and could work. (See id.) In fact, Dr. Malancharuvil's
10 testimony was more equivocal. Dr. Malancharuvil repeatedly
11 qualified his testimony by noting that his assessment of
12 Plaintiff's ability to work if he were sober was "speculation"
13 and that Plaintiff had not been sober long enough to determine
14 whether he would be disabled notwithstanding his substance abuse.
15 (See AR 51-53.) Indeed, the only unequivocal statement Dr.
16 Malancharuvil made as to Plaintiff's ability to work was that
17 Plaintiff "right now . . . cannot work" and was "not capable of
18 functioning in any type of work setting on a consistent basis."
19 (AR 52.) The ALJ gave "greatest weight" to Dr. Malancharuvil's
20 testimony without adequately accounting for his repeated
21 equivocations; doing so was reversible error. See Tonapetyan,
22 242 F.3d at 1150-51 (holding that ALJ erred in relying "heavily"
23 on medical expert's equivocal testimony because "[g]iven this
24 reliance, the ALJ was not free to ignore [the medical expert's]
25 equivocations and his concern over the lack of a complete
26 record"); see also Tate v. Astrue, No. CV 11-3213 CW, 2012 WL
27 1229886, at *6 (C.D. Cal. Apr. 12, 2012) (ALJ erred in not
28 further developing record when "ME suggested that it was

1 difficult for her to form an opinion with respect to Plaintiff's
2 disability" and ultimate assessment of Plaintiff's RFC was
3 "highly equivocal"); see also Sousa, 143 F.3d at 1245 ("Claimants
4 subject to [§ 423(d)(2)(C)] must be given an opportunity to
5 present evidence as to whether their disability would have
6 remained if they stopped using drugs and alcohol.").⁶

7 It is certainly possible that in light of the other evidence
8 in the record regarding Plaintiff's functional capacity if he
9 stopped using drugs and alcohol, the ALJ could have discounted
10 Dr. Malancharuvil's equivocations. That seems unlikely, however,
11 given that she gave his views the "greatest weight." In any
12 event, the Court cannot make that determination based on the
13 record before it. See Bray v. Comm'r of Soc. Sec. Admin., 554
14 F.3d 1219, 1225 (9th Cir. 2009) (district court must "review the
15 ALJ's decision based on the reasoning and factual findings
16 offered by the ALJ – not *post hoc* rationalizations that attempt
17 to intuit what the adjudicator may have been thinking"). This
18 matter must therefore be remanded for further proceedings. On
19 remand, the ALJ should either develop further evidence as
20 necessary or explain why Dr. Malancharuvil's concerns over the
21 completeness of the record were unwarranted.

22 Plaintiff also challenges the ALJ's rejection of the
23 opinions of his treating physician, Dr. Fichtner. The ALJ
24 rejected those opinions in part based on their alleged
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27 ⁶ The ALJ stated that Dr. Malancharuvil found that with
28 drug use, Plaintiff met Listing 12.09. (AR 26.) In fact, Dr.
Malancharuvil testified that Plaintiff met Listings 12.02, 12.08,
and 12.09. (See AR 51.)

1 inconsistency with Dr. Malancharuvil's testimony. (See AR 26.)
2 Because the ALJ improperly characterized Dr. Malancharuvil's
3 testimony, this was error. See Nguyen v. Chater, 100 F.3d 1462,
4 1465 (9th Cir. 1996) ("Where the purported existence of an
5 inconsistency is squarely contradicted by the record, it may not
6 serve as the basis for the rejection of an examining [or
7 treating] physician's conclusions."). On remand, the ALJ should
8 reevaluate Dr. Fichtner's opinions in connection with her
9 reevaluation of Dr. Malancharuvil's testimony and her
10 consideration of any further evidence that is developed. To the
11 extent Plaintiff asserts that the new evidence from Dr. Fichtner
12 that was submitted to the Appeals Council warrants reversal, that
13 contention is now moot because the ALJ will have a chance to
14 evaluate that evidence on remand. See Johnson v. Astrue, No.
15 C09-5688RBL, 2010 WL 3998098, at *5 (W.D. Wash. Sept. 14, 2010)
16 ("Remand for reconsideration of the ALJ's residual functional
17 capacity finding . . . will necessarily require the
18 administration to reconsider all of the medical evidence,
19 plaintiff's testimony, the lay witness statements, and the
20 additional evidence submitted to the Administration's Appeals
21 Council in their entirety.").

22 B. The ALJ's Omission of Plaintiff's RFC From the Written
23 Decision

24 Plaintiff also challenges the ALJ's omission of Plaintiff's
25 RFC from her written decision, which appears to be a
26 transcription error. (J. Stip. at 5-7, 10; see AR 23.) In
27 evaluating a claimant's RFC, the ALJ must make "specific findings
28 as to the claimant's residual functional capacity, the physical

1 and mental demands of the past relevant work, and the relation of
2 the residual functional capacity to the past work." Pinto v.
3 Massanari, 249 F.3d 840, 845 (9th Cir. 2001); SSR 82-62, 1982 WL
4 31386, at *3-4; see also 20 C.F.R. § 416.920(e). Transcription
5 or similar errors are harmless if, notwithstanding the error, the
6 ALJ gave adequate explanation of her findings elsewhere in her
7 decision. See, e.g., Wright v. Comm'r of Soc. Sec., 386 F. App'x
8 105, 109 (3d Cir. 2010) (Tashima, J., sitting by designation)
9 (ALJ's misstatements in written decision harmless error when
10 regardless of them "ALJ gave an adequate explanation supported by
11 substantial evidence in the record"); Castel v. Comm'r of Soc.
12 Sec., 355 F. App'x 260, 265-66 (11th Cir. 2009) (ALJ's erroneous
13 reference to wrong medical reports harmless when he referred to
14 reports "in two sentences" but "dedicate[d] two paragraphs" to
15 correct reports, and decision conformed to medical evidence);
16 Taylor v. Astrue, No. 4:07-CV-160-FL, 2009 WL 50156, at *10
17 (E.D.N.C. Jan. 7, 2009) (ALJ's misstatement of claimant's RFC in
18 one sentence of decision "akin to a typographical error and
19 constitutes harmless error" given that ALJ correctly stated RFC
20 elsewhere in opinion and it was "overwhelmingly supported by
21 substantial evidence"). Although it appears that here, unlike in
22 Taylor, the ALJ nowhere fully stated her RFC finding, the Court
23 need not address whether the error was prejudicial because on
24 remand the ALJ will have the opportunity to correct it.

25 C. The ALJ Did Not Err in Relying on Dr. Rodriguez's
26 Opinion

27 Plaintiff also contends that the ALJ erred in relying on Dr.
28 Rodriguez's opinion because Dr. Rodriguez was on probation before

1 the medical board when he examined Plaintiff. (J. Stip. at 11-
2 13, 15-16.) This contention does not warrant reversal.

3 Plaintiff has the burden to prove that an alleged error was
4 harmful. See Shinseki v. Sanders, 556 U.S. 396, 409, 129 S. Ct.
5 1696, 1706, 173 L. Ed. 2d 532 (2009) (“[T]he burden of showing
6 that an error is harmful normally falls upon the party attacking
7 the agency’s determination.”); Ludwig v. Astrue, 681 F.3d 1047,
8 1054 (9th Cir. 2012) (citing Shinseki and noting that “[t]he
9 burden is on the party claiming error to demonstrate not only the
10 error, but also that it affected his ‘substantial rights,’ which
11 is to say, not merely his procedural rights”). Plaintiff has not
12 met his burden to show how Dr. Rodriguez’s probation rendered his
13 decision unreliable. Although Dr. Rodriguez apparently was on
14 probation at the time he examined Plaintiff, he was still allowed
15 to practice medicine. (See J. Stip. Exs. 1-3.) Plaintiff has
16 not pointed to any errors in Dr. Rodriguez’s diagnosis that he
17 alleges were caused by his probationary status. Reversal is
18 therefore not warranted on this basis.

19 VI. CONCLUSION

20 When error exists in an administrative determination, “the
21 proper course, except in rare circumstances, is to remand to the
22 agency for additional investigation or explanation.” INS v.
23 Ventura, 537 U.S. 12, 16, 123 S. Ct. 353, 355, 154 L. Ed. 2d 272
24 (2002) (citations and quotation marks omitted); Moisa v.
25 Barnhart, 367 F.3d 882, 886 (9th Cir. 2004). Accordingly,
26 remand, not an award of benefits, is the proper course in this
27 case. See Strauss v. Comm’r of Soc. Sec. Admin., 635 F.3d 1135,
28 1136 (9th Cir. 2011) (remand for automatic payment of benefits


1 inappropriate unless evidence unequivocally establishes
2 disability). As noted above, on remand, the ALJ shall reevaluate
3 Dr. Malancharuvil's testimony and the other evidence of record
4 and may develop further evidence if necessary to determine
5 Plaintiff's functional capacity without substance abuse.

6 **ORDER**

7 Accordingly, **IT IS HEREBY ORDERED** that (1) the decision of
8 the Commissioner is REVERSED; (2) Plaintiff's request for remand
9 is GRANTED; and (3) this action is REMANDED for further
10 proceedings consistent with this Memorandum Opinion.

11 **IT IS FURTHER ORDERED** that the Clerk of the Court serve
12 copies of this Order and the Judgment herein on all parties or
13 their counsel.

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15 DATED: June 24, 2013

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18 JEAN ROSENBLUTH
19 U.S. Magistrate Judge
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