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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

PHILIP L. ROBINSON,	)	Case No. ED CV 13-00684-DFM
Plaintiff,	)	
v.	)	MEMORANDUM OPINION AND
	)	ORDER
CAROLYN COLVIN, Acting	)	
Commissioner of Social Security,	)	
Defendant.	)	

Plaintiff Philip Robinson (“Plaintiff”) seeks judicial review of the Commissioner’s final decision denying his application for disability insurance benefits. For the reasons stated below, the Commissioner’s decision is reversed and the matter is remanded for further proceedings.

**I.**

**FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff filed his application for disability insurance benefits on July 20, 2010, alleging disability beginning September 1, 2007. In an unfavorable decision, the Administrative Law Judge (“ALJ”) concluded that Plaintiff was not disabled because he could perform work that exists in significant numbers

1 in the national economy. Administrative Record (“AR”) 27-38.

2 **II.**

3 **ISSUE PRESENTED**

4 The parties dispute whether the ALJ erred in failing to properly consider  
5 the September 2, 2011 report of the United States Department of Veterans  
6 Affairs (“VA”), which granted Plaintiff entitlement to individual  
7 unemployment. See Plaintiff’s Motion for Summary Judgment (“Pltf’s MSJ”)  
8 at 3; Defendant’s Cross-Motion for Summary Judgment (“Deft’s MSJ”) at 3.

9 **III.**

10 **STANDARD OF REVIEW**

11 Under 42 U.S.C. § 405(g), a district court may review the  
12 Commissioner’s decision to deny benefits. The ALJ’s findings and decision  
13 should be upheld if they are free from legal error and are supported by  
14 substantial evidence based on the record as a whole. 42 U.S.C. § 405(g);  
15 Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v. Astrue, 481 F.3d  
16 742, 746 (9th Cir. 2007). Substantial evidence means such relevant evidence as  
17 a reasonable person might accept as adequate to support a conclusion.  
18 Richardson, 402 U.S. at 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th  
19 Cir. 2007). It is more than a scintilla, but less than a preponderance.  
20 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d  
21 880, 882 (9th Cir. 2006)). To determine whether substantial evidence supports  
22 a finding, the reviewing court “must review the administrative record as a  
23 whole, weighing both the evidence that supports and the evidence that detracts  
24 from the Commissioner’s conclusion.” Reddick v. Chater, 157 F.3d 715, 720  
25 (9th Cir. 1996). “If the evidence can reasonably support either affirming or  
26 reversing,” the reviewing court “may not substitute its judgment” for that of  
27 the Commissioner. Id. at 720-21.

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1 IV.

2 DISCUSSION

3 Plaintiff alleges that the ALJ erred in failing to consider the VA's second  
4 assessment of Plaintiff, issued on September 2, 2011, which granted Plaintiff  
5 entitlement to individual unemployability effective November 29, 2010. Pltf's  
6 MSJ at 3-8 (citing AR 118-25). Although the ALJ considered a 2010 VA  
7 disability rating which did not find Plaintiff unemployable, the ALJ did not  
8 specifically address the VA's 2011 assessment. See AR 27-38.

9 The ALJ must "ordinarily give great weight to a VA determination of  
10 disability." McCartey v. Massanari, 298 F.3d 1072, 1075 (9th Cir. 2002)  
11 (reversing a denial of benefits because the ALJ "failed to consider the VA  
12 finding and did not mention it in his opinion"). While a VA disability decision  
13 "does not necessarily compel the SSA to reach an identical result, ... the ALJ  
14 must consider the VA's finding in reaching his decision," because of the  
15 similarities between the VA disability program and the Social Security  
16 disability program. Id. However, because the two federal programs are not  
17 identical, "the ALJ may give less weight to a VA disability rating if he gives  
18 persuasive, specific, valid reasons for doing so that are supported by the  
19 record." Id. Furthermore, an "ALJ [is] justified in rejecting the VA's disability  
20 rating on the basis that she had evidence the VA did not, which undermined  
21 the evidence the VA did have," because "the acquisition of new evidence or  
22 properly justified reevaluation of old evidence constitutes a 'persuasive,  
23 specific, and valid reason ... supported by the record' under McCartey for  
24 according little weight to a VA disability rating." Valentine v. Commissioner  
25 Social Sec. Admin., 574 F.3d 685, 695 (9th Cir. 2009).

26 Here, the VA's first disability rating, issued on August 31, 2010, did not  
27 find Plaintiff unemployable, but rather granted Plaintiff a service connected  
28 disability rating of 20% for hypertension and 50% for obstructive sleep apnea.

1 AR 551-53. In contrast, the VA's second disability rating decision, issued  
2 September 2, 2011, granted Plaintiff entitlement to individual unemployability,  
3 effective November 29, 2010. AR 118. The 2011 VA decision granted Plaintiff  
4 a service connected disability rating of 50% for depressive disorder, 10% for left  
5 knee chondromalacia patella, 10% for right knee chondromalacia patella,  
6 50% for obstructive sleep apnea, and 20% for hypertension. AR 118-25.

7 In his decision, the ALJ noted that Plaintiff's attorney argued at the  
8 administrative hearing that the VA found Plaintiff unemployable, an assertion  
9 which the ALJ found to be a "mischaracterization" of the VA's decision. AR  
10 35. However, it appears from a review of the record and the administrative  
11 hearing transcript that Plaintiff's attorney was referring to the VA's September  
12 2011 decision, which did in fact grant Plaintiff entitlement to unemployability,  
13 see AR 45-46, while the ALJ's decision addressed the VA's earlier rating, see  
14 AR 35 (citing AR 551-53). Therefore, it is clear that the ALJ did not  
15 specifically address the VA's September 2, 2011 decision.

16 The Commissioner concedes that the ALJ failed to address the VA's  
17 2011 decision, but argues that any error was harmless because the ALJ relied  
18 upon evidence which the VA did not consider, namely a consultative  
19 examination by Dr. Nizar Salek and indices that Plaintiff's subjective symptom  
20 testimony was not entirely credible. Deft's MSJ at 9-10. Although an ALJ may  
21 disregard a VA rating if the ALJ considers evidence which the VA did not or if  
22 the VA rating is based upon evidence which the ALJ rejects, Valentine, 574  
23 F.3d at 695, this presupposes that the ALJ actually considers the VA rating  
24 and provides legitimate reasons for rejecting it. Here, the ALJ did not. He  
25 relied solely upon the VA's 2010 decision and ignored the 2011 decision. This  
26 constitutes reversible error. See Hiler v. Astrue, 687 F.3d 1208, 1212 (9th Cir.  
27 2012) (reversing and remanding where ALJ erred in relying upon only one VA  
28 disability rating and ignoring another VA decision which found that the

1 claimant was entitled to individual unemployability).

2 Accordingly, the case is remanded so that the ALJ may address the VA's  
3 September 2, 2011 decision. On remand, "the ALJ is not compelled to adopt  
4 the conclusions of the VA's decisions wholesale, but if [he] deviates from final  
5 VA decisions, [he] may do so based only on contrary evidence that is  
6 'persuasive, specific, valid' and supported by the record." Id. (citing McCartey,  
7 298 F.3d at 1076).

8 **V.**

9 **CONCLUSION**

10 For the reasons stated above, the decision of the Social Security  
11 Commissioner is REVERSED and the action is REMANDED for further  
12 proceedings consistent with this opinion.

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15 Dated: October 31, 2013



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18 DOUGLAS F. McCORMICK  
19 United States Magistrate Judge  
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