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6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA
8 WESTERN DIVISION
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10 ROBERT L. DETWILER, JR.,
11 Plaintiff,
12 v.
13 MICHAEL J. ASTRUE,
14 Commissioner of Social Security,
15 Defendant.

No. SACV 06-1222 FFM
MEMORANDUM DECISION
(Social Security Case)

16 Plaintiff brings this action seeking to overturn the decision of the Commissioner
17 of the Social Security Administration denying his application for disability insurance
18 benefits. On January 24, 2007 and January 31, 2007, plaintiff and defendant,
19 respectively, consented to the jurisdiction of the undersigned United States Magistrate
20 Judge pursuant to 28 U.S.C. § 636(c). Pursuant to the case management order entered
21 on January 10, 2007, on September 5, 2007, the parties filed a Joint Stipulation
22 detailing each party's arguments and authorities. The Court has reviewed the
23 administrative record (the "AR"), filed by defendant on May 9, 2007, and the Joint
24 Stipulation (the "JS"). For the reasons stated below, the decision of the Commissioner
25 is reversed and remanded for further proceedings.

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PROCEDURAL HISTORY

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2 On September 10, 2004, plaintiff filed an application for disability insurance
3 benefits. Plaintiff's claim was denied. Plaintiff filed a request for a hearing before an
4 administrative law judge (the "ALJ"). ALJ Mason D. Harrell Jr. held a hearing on
5 December 9, 2005. Plaintiff appeared with counsel and testified at the hearing. (See
6 AR 329-440.)

7 On March 24, 2006, the ALJ issued a decision denying benefits. (AR 17-28.)
8 On May 30, 2006, plaintiff sought review of the decision before the Social Security
9 Administration Appeals Council. (AR 12.) The Council denied plaintiff's request for
10 review. (AR 5-8.)

11 Plaintiff filed his complaint herein on December 27, 2006.
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13 CONTENTIONS

14 Plaintiff raises five issues in this action:

- 15 1. Whether the ALJ properly considered the testimony of plaintiff;
- 16 2. Whether the ALJ properly considered the opinion of Dr. Wendell E.
17 Wettstein, a treating physician;
- 18 3. Whether the ALJ's hypothetical was complete;
- 19 4. Whether the ALJ properly considered the testimony of Ms. Detwiler,
20 plaintiff's mother; and
- 21 5. Whether the vocational evidence supports disability.

22 STANDARD OF REVIEW

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24 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to
25 determine whether the Commissioner's findings are supported by substantial evidence
26 and whether the proper legal standards were applied. *DeLorme v. Sullivan*, 924 F.2d
27 841, 846 (9th Cir. 1991). Substantial evidence means "more than a mere scintilla" but
28 less than a preponderance. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420,

1 28 L. Ed. 2d 842 (1971); *Desrosiers v. Secretary of Health & Human Servs.*, 846 F.2d
2 573, 575-76 (9th Cir. 1988). Substantial evidence is “such relevant evidence as a
3 reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402
4 U.S. at 401. This Court must review the record as a whole and consider adverse as well
5 as supporting evidence. *Green v. Heckler*, 803 F.2d 528, 529-30 (9th Cir. 1986).

6 Where evidence is susceptible to more than one rational interpretation, the
7 Commissioner’s decision must be upheld. *Gallant v. Heckler*, 753 F.2d 1450, 1452
8 (9th Cir. 1984). However, even if substantial evidence exists in the record to support
9 the Commissioner’s decision, the decision must be reversed if the proper legal standard
10 was not applied. *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1014-15 (9th Cir.
11 2003).

12 DISCUSSION

13 **Issue One - Whether the ALJ properly considered the testimony of plaintiff.**

14 Once a claimant produces medical evidence of an underlying impairment that is
15 reasonably likely to cause the alleged symptoms, medical findings are not required to
16 support their alleged severity. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991);
17 *see also Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997) (“[B]ecause a
18 claimant need not present clinical or diagnostic evidence to support the severity of his
19 pain . . . , a finding that the claimant lacks credibility cannot be premised wholly on a
20 lack of medical support for the severity of his pain”) (internal citation omitted); *Byrnes*
21 *v. Shalala*, 60 F.3d 639, 641-42 (9th Cir. 1995) (applying *Bunnell* to subjective
22 physical complaints). However, an ALJ may reject a claimant’s allegations upon: (1)
23 finding evidence of malingering; or (2) providing clear and convincing reasons for so
24 doing. *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003).

25 The following factors may be considered in weighing the claimant’s credibility
26 in the absence of evidence of malingering: (1) his reputation for truthfulness; (2)
27 inconsistencies either in the claimant’s testimony or between the claimant’s testimony
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1 and his conduct; (3) his daily activities; (4) his work record; and (5) testimony from
2 physicians and third parties concerning the nature, severity, and effect of the symptoms
3 of which he complains. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002); *see*
4 *also* 20 C.F.R. §§ 404.1529(c), 416.929(c); Social Security Ruling 96-7p, 1996 WL
5 374186 (S.S.A.). The ALJ may also use “ordinary techniques of credibility
6 evaluation.” *Thomas*, 278 F.3d at 960. “General findings are insufficient.” *Reddick v.*
7 *Chater*, 157 F.3d 715, 722 (1998). The ALJ must state which testimony is not credible
8 and identify the evidence that undermines the plaintiff’s complaints. *Id.*; *Benton*, 331
9 F.3d at 1041. The ALJ’s credibility determination is entitled to deference if his
10 reasoning is supported by substantial evidence in the record and is “sufficiently specific
11 to allow a reviewing court to conclude the adjudicator rejected the claimant’s testimony
12 on permissible grounds and did not arbitrarily discredit a claimant’s testimony”
13 *Bunnell*, 947 F.2d at 345 (internal quotation marks omitted); *see also Vasquez v.*
14 *Astrue*, 572 F.3d 586, 592 (9th Cir. 2009) (ALJ must “point to specific facts in the
15 record which demonstrate that [the claimant] is in less pain than she claims”).

16 The ALJ largely recounted and apparently accepted the majority of plaintiff’s
17 testimony. However, although stating that plaintiff testified that “[s]leep apnea keeps
18 him up at night,” the ALJ ignored plaintiff’s testimony that as a result plaintiff had to
19 lie down and rest three times a day, for a total of four to five hours. (AR 406-07; *see*
20 *also id.* at 380 (Dr. Wettstein’s “Fatigue Questionnaire” stating that plaintiff needed to
21 lie down every two hours).) Significantly, the Vocational Expert testified that if
22 plaintiff had to lie down more than just during the lunch break he would not be
23 employable. (AR 435.) Medical records substantiated that plaintiff suffered from sleep
24 apnea, although the severity is not clear from the record, other than from plaintiff’s
25 testimony. (AR 229-32.)

26 The ALJ’s sole discussion of plaintiff’s credibility was as follows:

27 The claimant’s statements regarding symptoms and resulting limitations
28 are generally credible, but only to the extent consistent with having the

1 ability to perform work as per below. I [sic] the claimant's COPD was a
2 more sever problem, the claimant would not be smoking 1/2 pack of
3 cigarettes a day.

4 AR 24.

5 Because the ALJ did not cite any evidence of malingering, he had to support his
6 adverse credibility finding with "specific, clear and convincing reasons." *Vasquez*, 572
7 F.3d at 591 (internal quotation marks omitted). Here, the ALJ did not even mention,
8 much less provide any reasons for discounting, plaintiff's testimony regarding his
9 exhaustion during the day. Remand is thus required for the ALJ to consider all of
10 plaintiff's testimony. If the ALJ again chooses to reject all or part of plaintiff's
11 testimony, he must provide clear and convincing reasons, supported by substantial
12 record evidence, for so doing. If the ALJ does not reject all or part of plaintiff's
13 testimony, he must redetermine plaintiff's RFC, and proceed with the sequential
14 evaluation process from there, if the testimony credited so requires.

15 **Issue Two - Whether the ALJ properly considered the opinion of Dr.**
16 **Wendell E. Wettstein, a treating physician.**

17 In evaluating physicians' opinions, the case law and regulations distinguish
18 among three types of physicians: (1) those who treat the claimant (treating physicians);
19 (2) those who examine but do not treat the claimant (examining physicians); and (3)
20 those who neither treat nor examine the claimant (non-examining physicians). *Lester v.*
21 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995), *limited on other grounds*, *Saelee v. Chater*,
22 94 F.3d 520, 523 (9th Cir. 1996); *see also* 20 C.F.R. §§ 404.1502, 416.902,
23 404.1527(d), 416.927(d). As a general rule, more weight should be given to the
24 opinion of a treating source than to the opinions of doctors who do not treat the
25 claimant. *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987); *see also* 20 C.F.R. §§
26 404.1527(d)(2), 416.927(d)(2).

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1 If a treating physician's opinion is "well-supported by medically acceptable
2 clinical and laboratory diagnostic techniques and is not inconsistent with the other
3 substantial evidence in [the] case record, [it will be given] controlling weight." 20
4 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2); *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir.
5 2007). If a treating physician's opinion is not given "controlling weight" because it is
6 not "well-supported" or because it is inconsistent with other substantial evidence in the
7 record, the Administration considers specified factors in determining the weight it will
8 be given. Those factors include the "[l]ength of the treatment relationship and the
9 frequency of examination" by the treating physician; and the "nature and extent of the
10 treatment relationship" between the patient and the treating physician. 20 §§
11 404.1527(d)(2)(i)-(ii), 416.927(d)(2)(i)-(ii); *Orn*, 495 F.3d at 631. Under those factors,
12 even if a treating physician's opinion does not meet the test for controlling weight, it
13 may still be entitled to the greatest weight and should be adopted. Social Security
14 Ruling 96-2p, 1996 WL 374188 (S.S.A.) at *4.

15 In turn, the Ninth Circuit has held that an ALJ may reject a treating physician's
16 uncontradicted opinion on a medical impairment or the ultimate issue of disability¹
17 only with "clear and convincing" reasons supported by substantial evidence in the
18 record. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (quoting *Matthews v.*
19 *Shalala*, 10 F.3d 678, 680 (9th Cir. 1993)) (internal quotation marks omitted). If the

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22 In order to meet the statutory definition of "disabled," a claimant must satisfy
23 both medical and vocational components. 42 U.S.C. § 1382c; *Frost v. Barnhart*,
24 314 F.3d 359, 365 (9th Cir. 2002). To satisfy the medical component, the claimant
25 must prove an inability to "engage in any substantial gainful activity by reason of
26 any medically determinable physical or mental impairment . . . which has lasted or
27 can be expected to last for a continuous period of not less than twelve months."
28 42 U.S.C. § 1382c(a)(3)(A). To satisfy the vocational component, a claimant must
prove that his or her impairments "are of such severity that [the claimant] is not
only unable to do his previous work but cannot, considering his age, education,
and work experience, engage in any other kind of substantial gainful work which
exists in the national economy" *Id.* at § 1382c(a)(3)(B).

1 treating physician's opinion on the issue of disability is controverted, the ALJ must still
2 provide "specific and legitimate" reasons supported by substantial evidence in the
3 record in order to reject the treating physician's opinion. *Lester*, 81 F.3d at 830;
4 *Holohan v. Massanari*, 246 F.3d 1195, 1202-03 (9th Cir. 2001). "The ALJ could meet
5 this burden by setting out a detailed and thorough summary of the facts and conflicting
6 clinical evidence, stating his interpretation thereof, and making findings." *Magallenes*
7 *v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (internal quotation marks omitted).

8 The ALJ discussed Dr. Wettstein's testimony as follows:

9 Wendell Wettstein, M.D., reported on July 25, 2005, that the
10 claimant was not able to maintain adequate attendance on a sustained daily
11 basis at any job. He opined that the claimant had the ability to sit/stand
12 less than 6 hours a day; needed to rest 3-5 hours throughout an 8 hour
13 workday; should do no lifting; should not use his hands repetitively;
14 should never bend, squat, kneel, climb or reach; and, should avoid
15 exposure to unprotected heights, dust/fumes/gases, moving machinery,
16 and driving automotive equipment (Exhibit 10F).

17 On April 7, 2005, Dr. Wettstein diagnosed COPD, permanent. He
18 concluded that the claimant was unable to perform any work. Chest x-rays
19 dated in April 2004 revealed moderately extensive pleural thickening in
20 the left chest with associated pleural parenchymal scarring, most likely
21 due to old inflammatory process. Other than this the chest x-rays were
22 unremarkable. Left knee x-rays from June 2005 established postoperative
23 knee with early minor degenerative arthritis (Exhibit 13F).

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25 The undersigned credits the consulting examiners (Exhibits 3F, 5F) and
26 the DDS reviewing physician (Exhibit 4F) based on supportability with
27 medical signs and laboratory findings; area of specialization, and,
28 consistency with the record. Dr. Wettstein's statements regarding

1 symptoms and resulting limitations (Exhibits 10F, 13F) are generally
2 credible, but not to the extent alleged, because the medical source
3 statement from this treating source appears to be based primarily on the
4 subjective statements of the claimant. The underlying documentation from
5 the treating source provided in the record reveals little, if any, objective
6 observation of signs or symptoms or administration of an appropriate
7 diagnostic examination along with a description of results. Such lack of
8 documentation fails to support the limitations provided in the statements.

9 AR 24.

10 Plaintiff contends that chest X-rays (“[m]oderately extensive pleural thickening
11 in the lateral aspect of the left chest with associated pleural parenchymal scarring in the
12 lateral aspect of the left midlung field” described in report of April 2004 X-ray (AR
13 159)); “positive findings concerning the lungs” (“ABN.” checked for “LUNGS” on
14 “Progress Notes” forms dated December 2003, April, November and December 2004
15 (AR 209-11, 224, 226)); reports of visual atrophy in the left thigh (“slight quadriceps
16 atrophy” in May 16, 2003 exam of plaintiff’s knee; “noticeable quadriceps atrophy of
17 the left thigh” in February 2004 exam of plaintiff’s knee; “visual atrophy in the left
18 thigh” in May 2004 exam of plaintiff’s knee); notations of anxiety and depression
19 (“[a]nxiety [d]isorder” or “[d]epression” scribbled on “Progress Notes” forms dated
20 September, October, and December 2003); indications of moderate obesity and sleep
21 disorder (“moderately obese male” stated in “Indications for Study” and “Moderate
22 Positional Sleep Apnea Syndrome” stated in “Diagnosis” sections of February 2005
23 “Report of Polysomnography”); and spirometry testing (“moderate obstruction as well
24 as low vital capacity, possibly from a concomitant restrictive defect” interpretation on
25 August 1992 “Spirometry Report”) provide objective evidence supporting Dr.
26 Wettstein’s conclusions. However, the ALJ was referring to underlying documentation
27 from Dr. Wettstein, which was virtually nonexistent. As to interpretation of the above
28 referenced X-rays, progress notes, knee examinations, sleep study, and spirometry

1 testing, Dr. Wettstein provided no interpretation of any of them. Under these
2 circumstances, the ALJ's findings that Dr. Wettstein's conclusions appeared "to be
3 based primarily on the subjective statements of the claimant"; that "[t]he underlying
4 documentation from the treating source provided in the record reveals little, if any,
5 objective observation of signs or symptoms or administration of an appropriate
6 diagnostic examination along with a description of results" are well founded.
7 Therefore, remand is not required on this issue.

8 **Remaining Issues.**

9 Depending on the ALJ's findings on remand, the hypothetical posed to the
10 Vocational Expert may or may not need to be reformulated. Similarly, because the ALJ
11 rejected Ms. Detwiler's testimony based in part on plaintiff's testimony, his rejection of
12 Ms. Detwiler's testimony may or may not be impacted by the ALJ's findings on remand
13 relating to plaintiff's testimony. Finally, the ALJ will have an opportunity to consider
14 the new evidence on remand.

15
16 **CONCLUSION**

17 For the foregoing reasons, the judgement of the Commissioner is reversed and
18 remanded for further proceedings consistent with this opinion.

19 **IT IS SO ORDERED.**

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21 DATED: 12/7/09

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24 FREDERICK F. MUMM
25 United States Magistrate Judge
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