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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

WESLEY HALE,)	No. SACV 08-1310 CW
)	
Plaintiff,)	DECISION AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner, Social Security)	
Administration,)	
)	
Defendant.)	

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner’s denial of disability benefits. As discussed below, the court finds that the Commissioner’s decision should be reversed and this matter remanded for payment of benefits.

I. BACKGROUND

Plaintiff Wesley Hale was born on December 9, 1976, and was thirty years old at the time of his administrative hearing. [Administrative Record (“AR”) 16, 47.] Plaintiff has a high school education and past relevant work as a warehouse attendant, bouncer,

1 and grocery bagger. [AR 39-40.] Plaintiff alleges disability on the
2 basis of back problems and diabetes. [AR 50.]

3 **II. PROCEEDINGS IN THIS COURT**

4 Plaintiff's complaint was lodged on November 18, 2008, and filed
5 on November 25, 2008. On May 14, 2009, Defendant filed an answer and
6 Plaintiff's Administrative Record ("AR"). On October 9, 2009, the
7 parties filed their Joint Stipulation ("JS") identifying matters not
8 in dispute, issues in dispute, the positions of the parties, and the
9 relief sought by each party. This matter has been taken under
10 submission without oral argument.

11 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

12 Plaintiff applied for a period of disability and disability
13 insurance benefits ("DIB") under Title II of the Social Security Act
14 on April 25, 2006, alleging disability since April 19, 2005. [AR 9.]
15 After the application was denied initially and on reconsideration,
16 Plaintiff requested an administrative hearing, which was held on
17 November 28, 2007, before Administrative Law Judge ("ALJ") Charles E.
18 Stevenson. [AR 16.] Plaintiff appeared without counsel,¹ and
19 testimony was taken from Plaintiff and vocational expert Joseph
20 Torres. [AR 17.] The ALJ denied benefits in a decision issued on
21 January 25, 2008. [AR 9-15.] When the Appeals Council denied review
22 on September 25, 2008, the ALJ's decision became the Commissioner's
23 final decision. [AR 1-3.]

24
25 ¹ Plaintiff stated at the beginning of the hearing that he was
26 unrepresented because he did not have funds to pay an attorney. [AR
27 18.] The ALJ informed Plaintiff that Social Security plaintiffs'
28 attorneys typically work on contingency basis, provided the name of a
legal services agency, and asked Plaintiff twice whether he would like
to proceed with an attorney. [AR 19-22.] Plaintiff elected to remain
unrepresented at the hearing, stating that he had already submitted
all relevant medical records. [AR 20, 22.]

1 **IV. 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
4 ALJ's) findings and decision should be upheld if they are free of
5 legal error and supported by substantial evidence. However, if the
6 court determines that a finding is based on legal error or is not
7 supported by substantial evidence in the record, the court may reject
8 the finding and set aside the decision to deny benefits. See Aukland
9 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
10 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
11 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,
12 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
13 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada
14 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

15 "Substantial evidence is more than a scintilla, but less than a
16 preponderance." Reddick v. Chater, 157 F.3d at 720. It is "relevant
17 evidence which a reasonable person might accept as adequate to support
18 a conclusion." Id. To determine whether substantial evidence
19 supports a finding, a court must review the administrative record as a
20 whole, "weighing both the evidence that supports and the evidence that
21 detracts from the Commissioner's conclusion." Id. "If the evidence
22 can reasonably support either affirming or reversing," the reviewing
23 court "may not substitute its judgment" for that of the Commissioner.
24 Reddick, 157 F.3d at 720-721; see also Osenbrock v. Apfel, 240 F.3d at
25 1162.

26 **V. DISCUSSION**

27 **A. THE FIVE-STEP EVALUATION**

28 To be eligible for disability benefits a claimant must

1 demonstrate a medically determinable impairment which prevents the
2 claimant from engaging in substantial gainful activity and which is
3 expected to result in death or to last for a continuous period of at
4 least twelve months. Tackett v. Apfel, 180 F.3d at 1098; Reddick v.
5 Chater, 157 F.3d at 721; 42 U.S.C. § 423(d)(1)(A).

6 Disability claims are evaluated using a five-step test:

7 Step one: Is the claimant engaging in substantial
8 gainful activity? If so, the claimant is found not
9 disabled. If not, proceed to step two.

10 Step two: Does the claimant have a "severe" impairment?
11 If so, proceed to step three. If not, then a finding of not
12 disabled is appropriate.

13 Step three: Does the claimant's impairment or
14 combination of impairments meet or equal an impairment
15 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If
16 so, the claimant is automatically determined disabled. If
17 not, proceed to step four.

18 Step four: Is the claimant capable of performing his
19 past work? If so, the claimant is not disabled. If not,
20 proceed to step five.

21 Step five: Does the claimant have the residual
22 functional capacity to perform any other work? If so, the
23 claimant is not disabled. If not, the claimant is disabled.

24 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended
25 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107
26 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett v. Apfel, 180 F.3d at
27 1098-99; 20 C.F.R. § 404.1520, § 416.920. If a claimant is found
28 "disabled" or "not disabled" at any step, there is no need to complete
further steps. Tackett v. Apfel, 180 F.3d 1098; 20 C.F.R. § 404.1520.

Claimants have the burden of proof at steps one through four,
subject to the presumption that Social Security hearings are non-
adversarial, and to the Commissioner's affirmative duty to assist
claimants in fully developing the record even if they are represented
by counsel. Tackett v. Apfel, 180 F.3d at 1098 and n.3; Smolen v.
Chater, 80 F.3d at 1288. If this burden is met, a prima facie case of

1 disability is made, and the burden shifts to the Commissioner (at step
2 five) to prove that, considering residual functional capacity
3 ("RFC")², age, education, and work experience, a claimant can perform
4 other work which is available in significant numbers. Tackett v.
5 Apfel, 180 F.3d at 1098, 1100; Reddick v. Chater, 157 F.3d at 721; 20
6 C.F.R. § 404.1520, § 416.920.

7 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

8 Here, the ALJ found that plaintiff had not engaged in substantial
9 gainful activity since the alleged disability onset date (step one);
10 that plaintiff had "severe" impairments, namely degenerative disc
11 disease of the lumbar spine and non-insulin-dependent diabetes
12 mellitus (step two); and that plaintiff did not have an impairment or
13 combination of impairments that met or equaled a "listing" (step
14 three). [AR 11.] The ALJ determined that Plaintiff had an RFC for
15 light work with limitations to occasional climbing, kneeling, bending
16 and stooping, and restrictions from climbing ladders, working at
17 unprotected heights, and being around hazardous equipment. [AR 12.]
18 The vocational expert testified that a person with Plaintiff's RFC and
19 other vocational factors could perform Plaintiff's past relevant work
20 as a bouncer, as it is generally performed in the national economy
21 (step four). [AR 14-15.] Accordingly, Plaintiff was found not
22 "disabled" as defined by the Social Security Act. [AR 15.]

23
24 ² Residual functional capacity measures what a claimant can
25 still do despite existing "exertional" (strength-related) and
26 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155
27 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to
28 work without directly limiting strength, and include mental, sensory,
postural, manipulative, and environmental limitations. Penny v.
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155
n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a
nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,
765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 **C. ISSUES IN DISPUTE**

2 The parties' Joint Stipulation identifies four disputed issues:

- 3 1. Whether the ALJ properly considered the opinion of
4 Plaintiff's treating physician, Dr. Anne Ford;
- 5 2. Whether the ALJ properly considered the opinion of
6 Plaintiff's treating neurologist, Dr. Bradley Noblett;
- 7 3. Whether the ALJ properly considered the opinion of
8 Plaintiff's treating orthopedist, Dr. Raed Ali; and
- 9 4. Whether the ALJ properly considered whether Plaintiff's
10 impairments met or equaled the requirements of a listed
11 impairment.

12 [JS 2-3.]

13 As discussed below, Issue Two is dispositive.

14 **D. DR. NOBLETT**

15 In his second claim, Plaintiff asserts that the ALJ did not
16 properly account for the opinion of Dr. Bradley Noblett, a
17 neurological surgeon who twice saw Plaintiff, in June and November
18 2007, for complaints of back problems. [JS 9-10; AR 228, 230-32.]

19 **Background**

20 At the hearing, Plaintiff testified that he injured his back in a
21 gardening accident, apparently on or around his alleged disability
22 onset date of April 19, 2005. [AR 27.] At the time of the injury,
23 Plaintiff had worked for several years at a distribution center for
24 Ford Motor Company as a warehouse attendant, which involved lifting
25 and carrying car parts from a warehouse to a dock. [AR 26.] Plaintiff
26 was no longer able to perform his job at Ford, and he received a
27 buyout from the company. [AR 28.] Plaintiff has not worked since the
28 injury. [AR 11.]

1 According to the medical record, Plaintiff began receiving
2 ongoing treatment from Dr. Anne Ford to address his lower back pain
3 since the time of the injury. [AR 136-72.] Plaintiff's initial
4 treatment included pain killers and physical therapy. [Id.; AR 178-
5 82.] In August 2006, Dr. Ford wrote a letter stating, among other
6 things, that Plaintiff "is limited to lifting less than five pounds or
7 he has significant back pain and spasm." [AR 194.]

8 In June 2007, Dr. Ford arranged for Plaintiff to have an MRI of
9 the lumbar spine and referred Plaintiff to an examination by Dr.
10 Noblett. [AR 230-34.] A record of the MRI indicated an impression
11 that Plaintiff had mild degenerative disc disease most notable at the
12 L4-5 disc, level with moderate to severe left neural foraminal
13 narrowing, and that the test result was stable in comparison with a
14 similar study taken in May 2006. [AR 233-34.] Dr. Noblett, in his
15 examination, initially noted that Plaintiff's "symptoms have persisted
16 and remain present on a daily basis and quite aggravating." [AR 230.]
17 Dr. Noblett also noted that Plaintiff had been seen previously by an
18 orthopedic spine surgeon to discuss "potential operative
19 interventions." [Id.; see AR 222-23 (examination by Dr. Gerald
20 Alexander on October 27, 2006).] In reference to the MRI, Dr. Noblett
21 stated that the test showed, "most notably, I believe, a left L4-5
22 intra and extraforaminal disc protrusion, in other words a far lateral
23 disc protrusion that is likely compromising the existing L4 nerve
24 root." [AR 231.] As a recommendation to address the impairment, Dr.
25 Noblett gave the opinion that

26 Though much time has passed and it is less clear how successful
27 he would be, even with a surgical undertaking, I believe his
28 options are physical therapy which he has tried and failed,

1 epidural steroid injections which I would be unlikely to
2 recommend, not simply because of his diabetes but due to
3 suggesting that he will not heal or improve spontaneously and
4 finally the option of surgical resection of the disc through an
5 extraforaminal approach.

6 Notwithstanding the amount of time that has passed, I think the
7 odds are reasonably good that he would glean some benefit from a
8 decompression of that nerve root, though not necessarily be
9 cured.

10 [AR 231.]

11 Dr. Noblett further noted that Plaintiff "is unable to perform
12 any form of manual or physical labor" such as he performed at Ford,
13 and that Plaintiff was not currently considering surgical
14 intervention, but that "I would be happy to discuss further with him
15 the option of a surgical discectomy." [AR 232.]

16 Based on the findings of Dr. Noblett's examination, Dr. Ford
17 wrote another letter in October 2007, stating, among other things,
18 that in her opinion, "I do not believe Wesley is capable of working in
19 any field with any physical work of which he has been trained to do."
20 [AR 227.]

21 One month later, in November 2007, Dr. Noblett saw Plaintiff
22 again. [AR 228.] Dr. Noblett initially observed that Plaintiff was
23 "doing quite a bit worse than our last visit in June 2007" and that
24 "Plaintiff initially chose to be treated conservatively, but returns
25 today, doing quite a bit worse." [Id.] Dr. Noblett also observed that
26 Plaintiff "ambulates only with difficulty and whether standing or
27 sitting, is leaning dramatically over toward the right side, I suspect
28 thereby decompression the impinged nerve root at the foraminal level."

1 [Id.] Dr. Noblett recommended that Plaintiff have another MRI and
2 stated that, "My suspicions are that a surgical decompression or
3 discectomy, whether from an intra or an extraforaminal approach would
4 lead to significant clinical benefits, but that will be up to the
5 patient to decide." [Id.] Dr. Noblett also stated that "I do not feel
6 he is able to return to any form of work, as prolonged sitting,
7 standing or movement tend to aggravate his symptoms." [Id.] At the
8 hearing, held approximately three weeks later, Plaintiff testified
9 that he was still in discussions with Dr. Noblett about the
10 possibility of surgery. [AR 30.]

11 The Administrative Finding

12 In the administrative decision issued on January 25, 2008, the
13 ALJ stated that the medical evidence indicated, with respect to
14 Plaintiff's treatment recommendations, that, "Surgical intervention
15 has been discussed, but there is no indication that any physician was
16 proceeding in that direction. Instead, exhaustion of non-operative
17 modalities have been encouraged." [AR 13.] With respect to Dr.
18 Noblett's opinion in particular, the ALJ stated that both Dr. Ford and
19 Dr. Noblett's conclusion that Plaintiff was disabled was offered
20 "within the context of workers compensation that the claimant cannot
21 return to his highly exertional job as a warehouse attendant." [AR
22 14.] The ALJ also noted that Plaintiff has received conservative
23 care, "which is contraindicative of the severe, debilitating
24 conditions alleged by the claimant, or with the restrictions against
25 even sedentary work." [Id.] Accordingly, Dr. Noblett's opinion was
26 apparently given no weight.

27 Discussion

28 Ninth Circuit cases distinguish among the opinions of three types

1 of physicians: those who treat the claimant (treating physicians),
2 those who examine but do not treat the claimant (examining or
3 consultative physicians), and those who neither examine nor treat the
4 claimant (non-examining physicians). Lester v. Chater, 81 F.3d at
5 830. The opinion of a treating physician is given deference because
6 he is employed to cure and has a greater opportunity to know and
7 observe the patient as an individual. Sprague v. Bowen, 812 F.2d
8 1226, 1230 (9th Cir. 1987). The opinion of the treating physician,
9 however, is not necessarily conclusive as to either physical condition
10 or the ultimate issue of disability. Magallanes v. Bowen, 881 F.2d
11 747, 751 (9th Cir. 1989), Rodriguez v. Bowen, 876 F. 2d 759, 761-62 &
12 n.7 (9th Cir. 1989). "The administrative law judge is not bound by
13 the uncontroverted opinions of the claimant's physicians on the
14 ultimate issue of disability, but he cannot reject them without
15 presenting clear and convincing reasons for doing so." Reddick v.
16 Chater, 157 F.3d at 725. (quoting Matthews v. Shalala, 10 F.3d 678,
17 780 (9th Cir. 1993)(quoting Montijo v. Secretary of Health & Human
18 Servs., 729 F.2d 599, 601 (9th Cir. 1984)). Even if a treating
19 physician's opinion on disability is controverted, it can be rejected
20 only with specific and legitimate reasons supported by substantial
21 evidence in the record. Lester v. Chater, 81 F.3d at 830; see also
22 Benecke v. Barnhart, 379 F.3d 587, 591 & n.1 (9th Cir. 2004).

23 In this case, the rejection of Dr. Noblett's opinion did not meet
24 this standard. The conclusions reached in the ALJ's decision that
25 there was no indication that any physician was proceeding in the
26 direction of surgical intervention and that Plaintiff's physicians had
27 chosen to give him only conservative treatment are clearly refuted by
28 the record. Dr. Noblett's opinion, the most recent medical opinion

1 evidence in the record, established that prior conservative treatment
2 options had been exhausted and unsuccessful, that it was Plaintiff's
3 choice to proceed conservatively, that Dr. Noblett believed such
4 treatment options were of doubtful future benefit, and that surgical
5 intervention would probably lead to a significant clinical benefit if
6 Plaintiff decided to pursue that option upon review of a new MRI. [AR
7 228, 230-32.] The record does not support the interpretation that
8 Plaintiff was limited to conservative treatment because of a
9 perception that his impairment was not serious or that more aggressive
10 treatment options such as surgery were not seriously considered.
11 Accordingly, specific and legitimate reasons based on substantial
12 evidence in the record were not provided to discount Dr. Noblett's
13 opinion, and reversal on the basis of this issue is required. Lester
14 v. Chater, 81 F.3d at 830.

15 **E. REMAND FOR PAYMENT OF BENEFITS**

16 The decision whether to remand for further proceedings is within
17 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,
18 1175-1178 (9th Cir. 2000). Where there are outstanding issues that
19 must be resolved before a determination can be made, and it is not
20 clear from the record that the ALJ would be required to find the
21 claimant disabled if all the evidence were properly evaluated, remand
22 is appropriate. Id., 211 F.3d at 1179. However, where no useful
23 purpose would be served by further proceedings, or where the record
24 has been fully developed, it is appropriate to exercise this
25 discretion to direct an immediate award of benefits. Id. (decision
26 whether to remand for further proceedings turns upon their likely
27 utility).

28 Here, as set out above, specific and legitimate reasons supported

1 by substantial evidence in the record were not provided to reject Dr.
2 Noblett's opinion; accordingly, it is credited as true. Harman v.
3 Apfel, 211 F.3d at 1178; Lester v. Chater, 81 F.3d at 834.
4 Specifically, Dr. Noblett stated that from a functional standpoint,
5 Plaintiff is precluded from prolonged sitting, standing or movement.
6 [AR 228.] During the administrative hearing of November 28, 2007, the
7 vocational expert testified that a limitation to very short periods of
8 sitting, standing and walking would preclude Plaintiff from performing
9 his past relevant work or other work in the national economy. [AR 41-
10 42.] Accordingly, the existing record mandates a finding of
11 disability. See Harman v. Apfel, 211 F.3d at 1180 (citing cases where
12 award of benefits was directed when there was vocational expert
13 testimony that the limitations established by improperly discredited
14 medical evidence would render claimant unable to work). Under these
15 circumstances, remand for payment of benefits is appropriate.

16 **VI. ORDERS**

17 Accordingly, **IT IS ORDERED** that:

- 18 1. The decision of the Commissioner is **REVERSED**.
- 19 2. This action is **REMANDED** to defendant for payment of
20 benefits.
- 21 3. The Clerk of the Court shall serve this Decision and Order
22 and the Judgment herein on all parties or counsel.

23
24 DATED: November 17, 2009

25 _____/S/_____
26 CARLA M. WOEHRLE
27 United States Magistrate Judge
28