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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DIANA GUTIERREZ,	)	NO. SA CV 12-1851-E
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM OPINION</b>
	)	
CAROLYN W. COLVIN, ACTING	)	<b>AND ORDER OF REMAND</b>
COMMISSIONER OF SOCIAL SECURITY, <sup>1</sup>	)	
	)	
Defendant.	)	
_____	)	

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS  
HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
judgment are denied and this matter is remanded for further  
administrative action consistent with this Opinion.

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///

<sup>1</sup> Carolyn W. Colvin, who became Acting Commissioner of  
Social Security as of February 14, 2013, is hereby substituted as  
Defendant in this matter. See Fed. R. Civ. P. 25(d)(1); 42  
U.S.C. § 405(g).



1 Plaintiff's obesity, but the ALJ's decision does not mention obesity  
2 (A.R. 10-21, 297, 390, 416).<sup>2</sup> The Appeals Council denied review (A.R.  
3 1-3).

4  
5 **STANDARD OF REVIEW**  
6

7 Under 42 U.S.C. section 405(g), this Court reviews the  
8 Administration's decision to determine if: (1) the Administration's  
9 findings are supported by substantial evidence; and (2) the  
10 Administration used proper legal standards. See Carmickle v.  
11 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,  
12 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such  
13 relevant evidence as a reasonable mind might accept as adequate to  
14 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401  
15 (1971) (citation and quotations omitted); Widmark v. Barnhart, 454  
16 F.3d 1063, 1067 (9th Cir. 2006).

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25 <sup>2</sup> Plaintiff's body mass index ("BMI") has consistently  
26 exceeded 30.0, the "obesity" threshold in the Clinical Guidelines  
27 of the National Institutes of Health. See Social Security Ruling  
28 02-lp. "[I]n most cases, the BMI will show whether the  
individual has obesity." Id. Defendant does not appear to  
dispute the fact that Plaintiff is obese (Defendant's Motion at  
8).

1 DISCUSSION

2  
3 I. The Administration Erred in Failing to Consider or Discuss  
4 Plaintiff's Obesity.

5  
6 Social Security Ruling ("SSR") 02-1p governs the evaluation of  
7 obesity.<sup>3</sup> Obesity "commonly leads to, and often complicates, chronic  
8 diseases of the cardiovascular, respiratory, and musculoskeletal body  
9 systems." SSR 02-1p (emphasis added). The Administration should  
10 consider "the effect obesity has upon the individual's ability to  
11 perform routine movement and necessary physical activity within the  
12 work environment . . . The combined effects of obesity with other  
13 impairments may be greater than might be expected without obesity.  
14 . . . [W]e will explain how we reached our conclusions on whether  
15 obesity caused any physical or mental limitations." SSR 02-1p  
16 (emphasis added).

17  
18 In the present case, the ALJ failed to discharge the  
19 Administration's responsibilities under SSR 02-1p. If the ALJ failed  
20 to consider the possible effects of Plaintiff's obesity, the ALJ  
21 thereby erred. Id.; see Edwards-Alexander v. Astrue, 336 Fed. App'x  
22 634, 637 (9th Cir. June 16, 2009). If the ALJ did consider the  
23 possible effects of Plaintiff's obesity, but concluded that the  
24 obesity did not cause Plaintiff any additional limitations, the ALJ  
25 erred by failing to "explain how [he] reached [his] conclusions."  
26 Id.; see Celaya v. Halter, 332 F.3d 1177, 1182 (9th Cir. 2003)

27  
28 <sup>3</sup> SSRs are "binding on ALJs." Terry v. Sullivan, 903  
F.2d 1273, 1275 n.1 (9th Cir. 1990).

1 ("Celaya"); Gentle v. Barnhart, 430 F.3d 865, 868 (7th Cir. 2005); see  
2 also Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th Cir. 1990) ("We  
3 are wary of speculating about the basis of the ALJ's conclusion  
4 . . ."); Lewin v. Schweiker, 654 F.2d 631, 634-35 (9th Cir. 1981)  
5 (ALJ's decision should include a statement of the subordinate factual  
6 foundations on which the ALJ's ultimate factual conclusions are based,  
7 so that a reviewing court may know the basis for the decision).

8  
9 Defendant argues that "[b]ecause Plaintiff has presented no  
10 evidence that obesity resulted in any greater functional limitations  
11 than those identified by the ALJ in his RFC finding, Plaintiff cannot  
12 establish that the ALJ erred" (Defendant's Motion at 9). This  
13 argument must be rejected in light of the authorities cited above,  
14 particularly Celaya and SSR 02-1p. It is true that cryptic passages  
15 from two unpublished Ninth Circuit decisions appear to support  
16 Defendant's argument. See Burton v. Astrue, 310 Fed. App'x 960, 961  
17 n.1 (9th Cir. Feb. 2, 2009); Hoffman v. Astrue, 266 Fed. App'x 623,  
18 625 (9th Cir. Feb. 12, 2008). These decisions do not and cannot  
19 overrule Celaya, however. See Miller v. Gammie, 335 F.3d 889, 899-900  
20 (9th Cir. 2003) (published Ninth Circuit panel decision controls,  
21 absent express overruling by an en banc court or an intervening United  
22 States Supreme Court decision clearly irreconcilable with the panel  
23 decision); U.S. Ct. App. 9th Cir. Rule 36-3(a) (Ninth Circuit's  
24 unpublished dispositions generally "are not precedent"). Nor does  
25 either of the unpublished decisions purport to explain how an ALJ can  
26 comply with SSR 02-1p without even mentioning a claimant's evident  
27 obesity.

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1 The published decision of Burch v. Barnhart, 400 F.3d 676 (9th  
2 Cir. 2005) ("Burch"), cited by Defendant, is materially  
3 distinguishable from the present case. In Burch, unlike the present  
4 case, the ALJ acknowledged evidence of the claimant's weight gain,  
5 expressly "recognized that [the claimant's] obesity likely contributed  
6 to her back discomfort," and expressly "considered [the claimant's]  
7 obesity in making [the ALJ's] determinations regarding RFC and  
8 vocational ability." Burch at 683-84. Thus, in Burch, unlike the  
9 present case, the ALJ did something toward compliance with SSR 02-1p.

10  
11 The Court lacks sufficient information to determine whether the  
12 ALJ's error regarding Plaintiff's obesity was harmless. See, e.g.,  
13 Morris v. Barnhart, 2004 WL 1238397 \*4 (E.D. Pa. May 10, 2004) ("As  
14 the ALJ did not provide an explanation in her report as to whether  
15 Plaintiff's obesity was considered, the Magistrate Judge could not  
16 make a factual finding that the plaintiff's obesity did not have an  
17 impact").

18  
19 **II. Remand, Rather than Reversal With a Directive for the Payment of**  
20 **Benefits, is Appropriate.**

21  
22 Because the circumstances of this case suggest that further  
23 administrative review could remedy the ALJ's errors, remand is  
24 appropriate. See McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011);  
25 see generally INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of  
26 an administrative determination, the proper course is remand for  
27 additional agency investigation or explanation, except in rare  
28 circumstances).

1 **CONCLUSION**

2  
3 For all of the foregoing reasons,<sup>4</sup> Plaintiff's and Defendant's  
4 motions for summary judgment are denied and this matter is remanded  
5 for further administrative action consistent with this Opinion.  
6

7 LET JUDGMENT BE ENTERED ACCORDINGLY.  
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9 DATED: April 25, 2013.  
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11 \_\_\_\_\_/S/\_\_\_\_\_  
12 CHARLES F. EICK  
13 UNITED STATES MAGISTRATE JUDGE  
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27 <sup>4</sup> The Court has not reached any other issue raised by  
28 Plaintiff except insofar as to determine that reversal with a  
directive for the payment of benefits would not be appropriate at  
this time.