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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Russell McElhinney,)
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Plaintiff,)
)
v.)
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Michael J. Astrue, Commissioner of Social Security,)
)
Defendant,)
_____)

CV 07-212 TUC DCB

ORDER

On August 13, 2008, the Honorable Hector C. Estrada, United States Magistrate Judge, filed a Report and Recommendation (R&R) in this action. The Magistrate Judge advises the Court to grant in part and deny in part the Plaintiff’s Motion for Summary Judgment, deny the Defendant’s Crossmotion for Summary Judgment, and remand this case to the social Security Administration for further proceedings.

The Magistrate Judge finds that the Administrative Law Judge (ALJ) erred when he rejected the opinion of Dr. Rothbaum regarding pushing, pulling, and reaching limitations caused by Plaintiff’s neck pain because Dr. Rothbaum’s opinion was supported by substantial evidence. (R&R at 26-33.) This error invalidated the vocational expert’s opinion regarding the level of work Plaintiff would be able to perform. *Id.* at 33. The Magistrate Judge finds the same flaw in the ALJ’s rejection of Dr. Rothbaum’s opinion regarding limitations in Plaintiff’s ability to lift. *Id.* At the ALJ’s request, Dr. Rothbaum examined Plaintiff after the administrative hearing, and therefore, had the advantage of reviewing all the Plaintiff’s medical records and incorporating those findings into his opinion.

1 The ALJ also discounted the Plaintiff's credibility regarding the degree of pain
2 associated with his musculoskeletal conditions because he found the record did not support a
3 finding that Plaintiff's pain was disabling in and of itself. *Id.* at 39. Given Dr. Rothbaum's
4 opinion, however, the record also supports the conclusion that Plaintiff's neck pain may limit
5 Plaintiff more than a slight degree. Because the ALJ rejected this part of Dr. Rothbaum's
6 opinion, the ALJ's Residual Functional Capacity (RFC) assessment failed to consider Plaintiff's
7 neck pain in combination with his asthma. *Id.*

8 The Magistrate Judge recommends remanding this case to the ALJ for further
9 development of the record because the case requires further testimony from the vocational
10 expert based on Dr. Rothbaum's opinions. *Id.* at 40.

11 The parties were sent copies of the Report and Recommendation and instructed that,
12 pursuant to 28 U.S.C. § 636(b), they had 10 days to file written objections to it. *See also,*
13 Federal Rule of Civil Procedure 72(b) (party objecting to the recommended disposition has ten
14 (10) days to file specific, written objections). Neither party has filed any objection.

15 Pursuant to 28 U.S.C. § 636(b), this Court makes a *de novo* determination as to those
16 portions of the Report and Recommendation to which there are objections. 28 U.S.C. §
17 636(b)(1)(C) ("A judge of the court shall make a de novo determination of those portions of the
18 report or specified proposed findings and recommendations to which objection is made.") To
19 the extent that no objection has been made, arguments to the contrary have been waived.
20 *McCall v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980) (failure to object to Magistrate's report
21 waives right to do so on appeal); *see also*, Advisory Committee Notes to Fed. R. Civ. P. 72
22 (citing *Campbell v. United States Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974) (when no timely
23 objection is filed, the court need only satisfy itself that there is no clear error on the face of the
24 record in order to accept the recommendation).

25 The Court considers the Report and Recommendation to be thorough and well reasoned;
26 it is neither clearly erroneous nor contrary to law. *United States v. Remsing*, 874 F.2d 614, 617-
27 618 (9th Cir. 1989). The Report and Recommendation shall, therefore, be accepted pursuant to
28 28 U.S.C. § 636(b)(1). The Court adopts the recommendation of the Magistrate Judge. For the

1 reasons stated in the Report and Recommendation, the Court remands this case for further
2 proceedings.

3 **Accordingly,**

4 **IT IS ORDERED** that the Report and Recommendation [Doc. # 34] is adopted as the
5 opinion of the Court.

6 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Summary Judgment [Doc.
7 #20] is granted in part as to Plaintiff's request for remand and denied in part as to Plaintiff's
8 request for an immediate award of benefits.

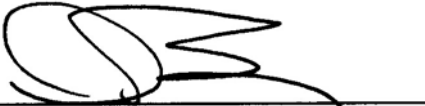
9 **IT IS FURTHER ORDERED** that the Defendant's Crossmotion for Summary
10 Judgment [Doc. # 30] is denied.

11 **IT IS FURTHER ORDERED** that this case is remanded for further proceedings
12 consistent with this Order and the Report and Recommendation.

13 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment
14 accordingly.

15 DATED this 5th day of September, 2008.

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David C. Bury
United States District Judge