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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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10 Jimmy R. Wolfe, )

No. CIV 08-293-TUC-FRZ (GEE)

11 Plaintiff, )

**REPORT AND RECOMMENDATION**

12 vs. )

13 Michael J. Astrue, Commissioner of the )  
Social Security Administration, )

14 Defendant. )

15

16 The plaintiff filed this action for review of the final decision of the Commissioner for  
17 Social Security pursuant to 42 U.S.C. §405(g).

18 The case has been referred to the United States Magistrate Judge pursuant to the Rules  
19 of Practice of this court.

20 Pending before the court is a motion for summary judgment filed by the plaintiff on  
21 March 12, 2010. (Doc. 23).

22 The Magistrate Judge recommends that the District Court, after its independent review,  
23 remand this action for further proceedings. The final decision of the Commissioner is not  
24 supported by substantial evidence.

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1           PROCEDURAL HISTORY

2           On June 1, 2005, Wolfe filed an application for disability insurance benefits and  
3 supplemental security income. (Tr. 16). He alleged disability beginning on October 20, 2004,  
4 due to HIV status, joint pain, and memory loss. (Tr. 62). His claim was denied initially (Tr. 62-  
5 65) and upon reconsideration. (Tr. 55-59). Wolfe requested review and appeared with counsel  
6 at a hearing before Administrative Law Judge (ALJ) Milan M. Dostal on October 26, 2006. (Tr.  
7 16-24). In his decision, dated February 15, 2007, the ALJ found Wolfe was not disabled from  
8 the alleged onset date, October 20, 2004, until the date of the decision. *Id.* Wolfe appealed, but  
9 the Appeals Council denied review making the decision of the ALJ the final decision of the  
10 Commissioner. (Tr. 3-5); *Bass v. Social Sec. Admin.*, 872 F.2d 832, 833 (9<sup>th</sup> Cir. 1989).

11           Wolfe subsequently filed this action appealing the Commissioner’s final decision. *See*  
12 20 C.F.R. § 422.210(a). He filed his opening brief on March 12, 2010. (Doc. 23). He argues  
13 the ALJ’s decision improperly discounted (1) the opinions of the treating physicians and the  
14 State agency physicians, (2) the lay witness testimony, and (3) his own subjective testimony of  
15 disability. *Id.* The Commissioner filed an answering brief on July 13, 2010. (Doc. 32). Wolfe  
16 filed a reply on August 31, 2010. (Doc. 35).

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18           Claimant’s Work History and Medical History

19           At the time of the hearing, Wolfe was 41 years old and had completed 11 years of  
20 schooling. (Tr. 466-67).

21           Wolfe worked as a tractor trailer driver off and on for 15 years. (Tr. 194, 472). He  
22 stopped working in November of 2001 when he was “laid off for the season.” (Tr. 193). After  
23 that, he worked briefly as a dump truck driver and a plumber’s helper. (Tr. 470-71). He  
24 explained he was unable to continue as a plumber’s helper because “my knees wouldn’t keep  
25 up with the walking around and carrying materials.” (Tr. 468).

26           The medical record contains a large number of entries dating to the beginning of 2002  
27 when Wolfe filed a prior application for disability insurance benefits. That application was  
28 denied initially and on reconsideration. (Tr. 75-76, 87). Wolfe chose not to pursue that

1 application but instead filed the pending application alleging disability since October 20, 2004.  
2 (Tr. 16).

3 In November of 2002, Wolfe was given a psychological evaluation by Robert E.  
4 Hammer, Ph.D., at the behest of the disability determination services. (Tr. 383-88). Hammer's  
5 diagnosis reads in pertinent part as follows:

6	Axis I:	296.32	Major Depressive Disorder, Recurrent, Moderate.
		294.9	Cognitive Disorder.
7			History of Polysubstance Abuse (304.80).
8	Axis II:	V72.89	Borderline Intellectual functioning.
9	Axis III:		Chronic Neck and Back Pain, Daily Vomiting, Bloody Stools and Torn Cartilage in Right Knee.
10	Axis IV:		Psychosocial Stressors: Unemployed and Without Income.
11	Axis V:		Global Assessment of Functioning: Current GAF = 45 Highest GAF past year = 45

11 *Id.*

12 In December of 2002, Claude H. Koons, M.D., reviewed the medical record and  
13 completed a Physical Residual Functional Capacity Assessment of Wolfe's ability to perform  
14 work related tasks. (Tr. 82, 336-43). Koons noted a primary diagnosis of "right shoulder . . .  
15 degenerative changes" and a secondary diagnosis of low back pain and HIV. (Tr. 336-43).  
16 Koons concluded Wolfe could lift 20 pounds occasionally and 10 pounds frequently. *Id.* He  
17 could stand, walk, or sit about 6 hours in an 8-hour day. *Id.* He noted Wolfe should avoid  
18 climbing ladders, ropes, and scaffolds and avoid repetitive overhead reaching. *Id.*

19 In December of 2002, David Beeman, Ph.D., reviewed the medical record and completed  
20 a Psychiatric Review Technique form assessing Wolfe's psychological limitations. (Tr. 82,  
21 361-74). Beeman assessed an Organic Mental Disorder (Cognitive Disorder NOS), Affective  
22 Disorder (Depressive syndrome), and Substance Addiction Disorder. (Tr. 361-74). Beeman  
23 found Wolfe to be moderately limited in "activities of daily living," "maintaining social  
24 functioning," and "maintaining concentration, persistence or pace." *Id.* He found "one or two"  
25 "episodes of decompensation, each of extended duration." *Id.*

26 Beeman also found Wolfe "moderately limited" in his ability to perform work-related  
27 tasks in the areas of "understanding and memory," "sustaining concentration and persistence,"  
28 "social interaction," and "adaptation." (Tr. 375-76).

1 In May of 2005, John D. Bayless, Ph.D., performed a neuropsychological assessment.  
2 (Tr. 284-86). His impression was:

- 3 (1) Cognitive disorder, most likely secondary to depression with clear evidence  
4 for impairments of effort. . . .
- 5 (2) Depression, severe, with suicidal ideation.
- 6 (3) Present findings, coupled with history and previous assessment suggest  
7 lifelong verbal learning difficulties, with particular impairments in spelling and  
8 arithmetic skills.

9 *Id.* He opined that “the combination of physical limitations from his orthopedic problems with  
10 verbal learning difficulties and psychiatric disorder may serve to severely limit his available  
11 vocational options.” *Id.*

12 Treatment notes from June of 2005 indicate that Wolfe was recently involved in a fight  
13 and received a number of facial fractures. (Tr. 306). He stated he was currently laid off and  
14 was looking for another job. *Id.* James Amos, M.D., offered the following comments:

15 Alert and fully oriented. Has limited vocabulary but is otherwise able to follow  
16 instructions and answer questions appropriately. He has a longstanding pattern  
17 of problems with mood and relationship instabilities indicating that the  
18 underlying difficulty is a personality disorder. His depressive symptoms may or  
19 may not respond to antidepressant[s] although the situational stressors that he’s  
20 reacting to are unlikely to be removed in the near future. Ongoing substance  
21 abuse is another pressure that is probably exacerbating his psychiatric difficulties.  
22 At the moment, however, he’s not ready to change this facet of his life.

23 (Tr. 307).

24 In July of 2005, Philip R. Laughlin, Ph.D., reviewed the medical record and completed  
25 a Psychiatric Review Technique form assessing Wolfe’s psychological limitations. (Tr. 79,  
26 246-62). Laughlin assessed an Organic Mental Disorder (Cognitive Disorder), Affective  
27 Disorder (Adjustment Disorder), and Substance Addiction Disorder. (Tr. 246-62). Laughlin  
28 found Wolfe to be moderately limited in performing “activities of daily living,” “difficulties in  
maintaining social functioning,” and “difficulties in maintaining concentration, persistence or  
pace.” *Id.* He found “one or two” “episodes of decompensation, each of extended duration.”  
*Id.*

Laughlin also found Wolfe “moderately limited” in his ability to perform work-related  
tasks in the areas of “understanding and memory,” “sustaining concentration and persistence,”  
“social interaction,” and “adaptation.” (Tr. 260-61).

1 In July of 2005, Wolfe was examined by Robert J. Schultes, M.D., at the behest of the  
2 State disability determination service. (Tr. 272). Wolfe claimed he was unable to work because  
3 of depression; anger; decreased concentration; and pain in his neck, shoulders, knees, elbows,  
4 and wrists. *Id.* Wolfe reported he could lift and carry 20 pounds throughout an 8-hour day. *Id.*  
5 He could move about and sit for 8-hours per day, and he could walk about 8 blocks per day.  
6 *Id.*

7 Schultes found “some tenderness over the knee on the right” and “tenderness over the  
8 entire medial part of the right knee.” *Id.* He found on examination that Wolfe had significantly  
9 decreased range of motion while elevating his right shoulder. (Tr. 274).

10 Schultes offered the following diagnoses:

- 11 1. Rotator cuff tendinitis.
- 12 2. Low back pain.
- 13 3. Wrist pain.
- 14 4. Lateral epicondylitis.<sup>1</sup>
- 15 5. Right knee sprain.
- 16 6. Depression.

17 (Tr. 273).

18 In August of 2005, Jan Hunter, D.O., reviewed the medical record and completed a  
19 Physical Residual Functional Capacity Assessment of Wolfe’s ability to perform work-related  
20 tasks. (Tr. 79, 264-71). Hunter noted a primary diagnosis of shoulder tendonitis and  
21 asymptomatic HIV and a secondary diagnosis of back pain, wrist pain, and epicondylitis. (Tr.  
22 264-71). Hunter concluded Wolfe could lift 20 pounds occasionally and 10 pounds frequently.  
23 *Id.* He could stand, walk, or sit about 6 hours in an 8-hour day. *Id.* He noted Wolfe should  
24 avoid work above the shoulder level with the right arm due to tendonitis. *Id.*

25 In September of 2005, Wolfe’s father, Roger Wolfe, completed a Third Party Function  
26 Report. (Tr. 142-49). He reported that Wolfe has pain and weakness in his shoulder and legs.  
27 (Tr. 147). He further reported that Wolfe’s depression has caused him to limit his contact with  
28 other people. (Tr. 142, 149).

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<sup>1</sup> Pain in the extensor tendons of the elbow. The Merck Manual of Diagnosis and Therapy, 505  
(17<sup>th</sup> ed.1999).

1 In October of 2005, Robert Bob Hughes, M.D., re-examined the medical record for the  
2 disability determination service. (Tr. 80). Hughes concluded that Hunter’s “initial assessment  
3 can be affirmed as written.” (Tr. 412).

4 In October of 2005, Beverly Westra, Ph.D., re-examined the medical record for the  
5 disability determination service. (Tr. 80). Westra concluded that Laughlin’s “initial assessment  
6 can be affirmed as written.” (Tr. 410).

7 In September of 2006, Wolfe’s wife, DeDee Wolfe, completed a Third Party Function  
8 Report. (Tr. 203-11). She reported that Wolfe’s bad knee affects his ability to climb, kneel,  
9 walk, and stand. (Tr. 210). She further reported he has trouble understanding, remembering,  
10 and following instructions; completing tasks; maintaining concentration; and getting along with  
11 others. *Id.*

12 In October of 2006, Wolfe appeared with counsel at a hearing before ALJ Milan M.  
13 Dostal. (Tr. 461-95). Wolfe explained he was taking Lexapro for depression and Atripla for  
14 HIV. (Tr. 474). He was also taking a “stomach pill” and medication for an infection. (Tr. 474-  
15 75). He reported joint pain in his knees, ankles, elbow, and shoulder. (Tr. 475). He explained  
16 he could stand for no more than ten minutes before he has to take a break. (Tr. 476). At home,  
17 he could perform simple cleaning and cooking. (Tr. 478). He complained his HIV makes him  
18 tired and depressed. (Tr. 481).

19 At the hearing, the vocational expert, Stacey Schonbrun, was asked a hypothetical about  
20 a person with the ability to perform medium work but who must avoid lifting his right arm  
21 above the shoulder arm and who has moderate joint pain, depression, learning deficits, and  
22 fatigue. (Tr. 487-92). Schonbrun testified that such a person could not perform Wolfe’s  
23 previous work as a truck driver or fast food worker but could work as a hand packager or night  
24 cleaner. *Id.*

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26  
27 CLAIM EVALUATION  
28

1 Social Security Administration (SSA) regulations require that disability claims be  
2 evaluated pursuant to a five-step sequential process. 20 C.F.R. §§ 404.1520, 416.920; *Baxter*  
3 *v. Sullivan*, 923 F.2d 1391, 1395 (9<sup>th</sup> Cir. 1991). The first step requires a determination of  
4 whether the claimant is engaged in substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4),  
5 416.920(a)(4). If so, then the claimant is not disabled, and benefits are denied. *Id.* If the  
6 claimant is not engaged in substantial gainful activity, the ALJ proceeds to step two which  
7 requires a determination of whether the claimant has a “medically severe impairment or  
8 combination of impairments.” 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4).

9 In making a determination at step two, the ALJ uses medical evidence to consider  
10 whether the claimant’s impairment more than minimally limits or restricts his or her “physical  
11 or mental ability to do basic work activities.” *Id.* If the ALJ concludes the impairment is not  
12 severe, the claim is denied. *Id.* Upon a finding of severity, the ALJ proceeds to step three  
13 which requires a determination of whether the impairment meets or equals one of several listed  
14 impairments that the Commissioner acknowledges are so severe as to preclude substantial  
15 gainful activity. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); 20 C.F.R. Pt. 404, Subpt. P,  
16 App.1. If the claimant’s impairment meets or equals one of the listed impairments, then the  
17 claimant is presumed to be disabled, and no further inquiry is necessary. *Ramirez v Shalala*,  
18 8 F.3d 1449, 1452 (9<sup>th</sup> Cir. 1993). If the claimant’s impairment does not meet or equal a listed  
19 impairment, evaluation proceeds to the next step.

20 The fourth step requires the ALJ to consider whether the claimant has sufficient residual  
21 functional capacity<sup>2</sup> (RFC) to perform past work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4).  
22 If the ALJ concludes the claimant has sufficient RFC, then the claim is denied. *Id.* If the  
23 claimant cannot perform any past work, then the ALJ must move to the fifth step which requires  
24 consideration of the claimant’s RFC to perform other substantial gainful work in the national  
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28 <sup>2</sup> Residual functional capacity is defined as that which an individual can still do despite his or  
her limitations. 20 C.F.R. §§ 404.1545, 416.945.

1 economy in view of claimant’s age, education, and work experience. 20 C.F.R. §§  
2 404.1520(a)(4); 416.920(a)(4).

3 “The burden of proof is on the claimant as to steps one to four.” *Tackett v. Apfel*, 180  
4 F.3d 1094, 1098 (9<sup>th</sup> Cir. 1999). “As to step five, the burden shifts to the Commissioner.” *Id.*

5  
6 The ALJ’s Findings

7 At step one of the disability analysis, the ALJ found Wolfe “has not engaged in  
8 substantial gainful activity at any time relevant to [the] decision.” (Tr. 18). At step two, he  
9 found Wolfe has “the following severe combination of impairment[s]: HIV . . . infection;  
10 shoulder tendonitis; pain in the back, wrist, and knee; history of special education; adjustment  
11 disorder; and substance use disorder, in remission. . . .” *Id.* At step three, the ALJ found  
12 Wolfe’s impairments did not meet or equal the criteria for any impairment found in the Listing  
13 of Impairments, Appendix 1, Subpart P, of 20 C.F.R., Part 404. (Tr. 19).

14 The ALJ then analyzed Wolfe’s residual functional capacity (RFC). (Tr. 19). He found  
15 Wolfe has the residual functional capacity to perform a limited range of medium work activity.  
16 (Tr. 19). He could “lift and carry 50 pounds occasionally and 25 pounds frequently” and “sit,  
17 stand and/or walk for about six hours in 8-hour day.” (Tr. 19). “His ability to climb, balance,  
18 stoop, kneel, crouch, and crawl is limited to an occasional basis.” *Id.* “He should avoid work  
19 above the right shoulder level.” *Id.* “He has moderate pain in the head, neck, back, right  
20 shoulder, elbow, wrist, knees, and ankles which is or can be adequately controlled with  
21 medication without significant adverse side effects.” *Id.* “His anxiety and depression are  
22 moderate in nature and result in decreased memory, learning, and ability to get along with others  
23 but are or can be adequately controlled with medication without significant adverse side  
24 effects.” *Id.* “[S]ymptoms from a hernia and HIV infection including fatigue are also moderate  
25 in nature but are or can be adequately controlled with medicine without significant side  
26 [e]ffects.” *Id.*

27 At step four, the ALJ found Wolfe could not perform his past relevant work. (Tr. 23).  
28 At step five, the ALJ found, based on the testimony of the vocational expert, that Wolfe could



1 work as a hand packer or night cleaner. (Tr. 24). Accordingly, he concluded Wolfe was not  
2 disabled.

### 3 4 STANDARD OF REVIEW

5 An individual is entitled to disability benefits if he or she demonstrates, through  
6 medically acceptable clinical or laboratory standards, an inability to engage in substantial  
7 gainful activity due to a physical or mental impairment that can be expected to last for a  
8 continuous period of at least twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). “[A]  
9 claimant will be found disabled only if the impairment is so severe that, considering age,  
10 education, and work experience, that person cannot engage in any other kind of substantial  
11 gainful work which exists in the national economy.” *Penny v. Sullivan*, 2 F.3d 953, 956 (9<sup>th</sup> Cir.  
12 1993) (quoting *Marcia v. Sullivan*, 900 F.2d 172, 174 (9<sup>th</sup> Cir. 1990)).

13 The findings of the Commissioner are meant to be conclusive. 42 U.S.C. §§ 405(g),  
14 1383(c)(3). The decision to deny benefits “should be upheld unless it contains legal error or is  
15 not supported by substantial evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9<sup>th</sup> Cir. 2007).  
16 Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept  
17 as adequate to support a conclusion.” *Id.* It is “more than a mere scintilla but less than a  
18 preponderance.” *Id.*

19 “Where evidence is susceptible to more than one rational interpretation, the ALJ’s  
20 decision should be upheld.” *Orn*, 495 F.3d at 630. “However, a reviewing court must consider  
21 the entire record as a whole and may not affirm simply by isolating a specific quantum of  
22 supporting evidence.” *Id.*

23 In evaluating evidence to determine whether a claimant is disabled, the opinion of a  
24 treating physician is entitled to great weight. *Ramirez v. Shalala*, 8 F.3d 1449, 1453-54 (9<sup>th</sup> Cir.  
25 1993). The Commissioner may reject a treating physician’s uncontradicted opinion only if he  
26 sets forth clear and convincing reasons for doing so. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir.  
27 1995). If the treating physician’s opinion is contradicted by another doctor, the Commissioner  
28 may reject that opinion only if he provides specific and legitimate reasons supported by

1 substantial evidence in the record. *Lester*, 81 F.3d at 830. No distinction is drawn “between  
2 a medical opinion as to a physical condition and a medical opinion on the ultimate issue of  
3 disability.” *Rodriguez v. Bowen*, 876 F.2d 759, 761 n.7 (9<sup>th</sup> Cir. 1989).

4 “The opinion of an examining physician is, in turn, entitled to greater weight than the  
5 opinion of a non[-]examining physician.” *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996).  
6 “[T]he Commissioner must provide ‘clear and convincing’ reasons for rejecting the  
7 uncontradicted opinion of an examining physician.” *Id.* “[T]he opinion of an examining doctor,  
8 even if contradicted by another doctor, can only be rejected for specific and legitimate reasons  
9 that are supported by substantial evidence in the record.” *Id.* at 830-31.

10 “Where medical reports are inconclusive, questions of credibility and resolution of  
11 conflicts in the testimony are functions solely of the [Commissioner].” *Magallanes*, 881 F.2d  
12 747, 751 (9<sup>th</sup> Cir. 1989) (punctuation omitted). The Commissioner’s finding that a claimant is  
13 less than credible, however, must have some support in the record. *See Light v. Social Security*  
14 *Administration*, 119 F.3d 789 (9<sup>th</sup> Cir. 1997).

15 The ALJ need not accept the claimant’s subjective testimony of disability, but if he  
16 decides to reject it, “[he] must provide specific, cogent reasons for the disbelief.” *Lester*, 81  
17 F.3d at 834. “Unless there is affirmative evidence showing that the claimant is malingering, the  
18 Commissioner’s reasons for rejecting the claimant’s testimony must be clear and convincing.”  
19 *Id.* “General findings are insufficient; rather, the ALJ must identify what testimony is not  
20 credible and what evidence undermines the claimant’s complaints.” *Id.*

## 21 22 DISCUSSION

23 The ALJ in this case found Wolfe retains the ability to perform at the exertional level  
24 required for medium work. *See* 20 C.F.R. §§ 404.1567, 416.967. This finding is not supported  
25 by substantial evidence in the record. Accordingly, this case must be remanded for further  
26 proceedings by the Commissioner for Social Security. The court expresses no opinion on  
27 Wolfe’s alternate grounds for relief.

1 The disability determination physicians, Koons, Hunter, and Hughes, reviewed the  
2 medical record and concluded that Wolfe can lift 20 pounds occasionally and 10 pounds  
3 frequently. This exertional level is consistent with the demands of light work. 20 C.F.R. §§  
4 404.1567, 416.967.

5 The ALJ, however, rejected the opinions of the disability determination physicians and  
6 concluded that Wolfe could lift 50 pounds occasionally and 25 pounds frequently. He therefore  
7 found that Wolfe could meet the exertional demands of medium work. *See* 20 C.F.R. §§  
8 404.1567, 416.967. This was error.

9 The ALJ's finding that Wolfe retains the ability to perform the exertional demands of  
10 medium work was based solely on his review of the medical record and his evaluation of how  
11 those medical findings would affect Wolfe's functional abilities. The ALJ, however, is not a  
12 medical expert and may not offer his own expert evaluation of the raw medical data. *Day v.*  
13 *Weinberger*, 522 F.2d 1154, 1156 (9<sup>th</sup> Cir. 1975); *Nguyen v. Chater*, 172 F.3d 31, 35 (1<sup>st</sup> Cir.  
14 1999); *Balsamo v. Chater*, 142 F.3d 75, 81 (2<sup>nd</sup> Cir. 1998); *Ferguson v. Schweiker*, 765 F.2d  
15 31, 37 (3<sup>rd</sup> Cir. 1985); *Liskowitz v. Astrue*, 559 F.3d 736, 741(7<sup>th</sup> Cir. 2009).

16 The Commissioner argues that while the ALJ must consider the medical opinions in the  
17 record he is not obliged to adopt them. The Commissioner is correct. The ALJ may reject the  
18 medical opinions in the record if, for example, they are inconsistent with other substantial  
19 evidence in the record. 20 C.F.R. §§ 404.1527(e), 416.927(e). Having rejected those opinions,  
20 however, the ALJ is not at liberty to become his own medical expert and interpret the raw  
21 medical data for himself.

22 The Commissioner further argues that Wolfe's own admission that he can "lift and carry  
23 20 pounds for eight hours a day" is "consistent with an ability to perform medium work."  
24 (Response, p. 19). He maintains the ALJ's RFC may be inferred in part from the claimant's  
25 own concessions. The Commissioner is incorrect. In order to perform medium work, one must  
26 be able to lift 50 pounds occasionally and 25 pounds frequently. *See* 20 C.F.R. §§ 404.1567,  
27 416.967. Wolfe's admissions are not consistent with the ALJ's finding that he can perform the  
28 exertional requirements of medium work.

1 Finally, the Commissioner argues that even if Wolfe only had the ability to perform light  
2 or sedentary work, there are still jobs in the economy that he could perform and he is not  
3 disabled. While that might be true, the ALJ did not advance this argument in his decision. The  
4 court, therefore, cannot consider it. *Connett v. Barnhart*, 340 F.3d 871, 874 (9<sup>th</sup> Cir. 2003);  
5 *Pinto v. Massanari*, 249 F.3d 840, 847-48 (9<sup>th</sup> Cir. 2001).

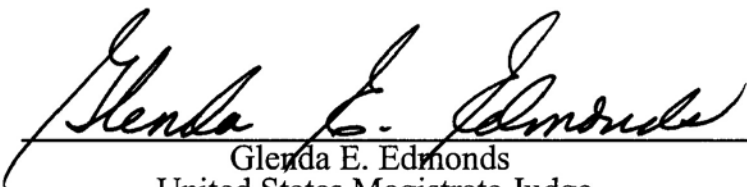
6  
7 RECOMMENDATION

8 For the foregoing reasons, the Magistrate Judge recommends that the District Court, after  
9 its independent review, enter an order granting the plaintiff's motion for summary judgment in  
10 part and remanding the plaintiff's claim for further proceedings. (Doc. 23).

11 Pursuant to 28 U.S.C. § 636(b), any party may file and serve written objections within  
12 14 days after being served with a copy of this Report and Recommendation. If objections are  
13 not timely filed, the party's right to de novo review may be waived. *See United States v. Reyna-*  
14 *Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003) (en banc), *cert. denied*, 540 U.S. 900 (2003).

15 The Clerk of the Court is directed to send a copy of this Report and Recommendation  
16 to all parties.

17 DATED this 1<sup>st</sup> day of October, 2010.

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21 Glenda E. Edmonds  
22 United States Magistrate Judge  
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