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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JESUS ROMERO,
Plaintiff,
vs.
MICHAEL J. ASTRUE, Commissioner of
Social Security,
Defendant.

NO. CV 08-544-TUC-CKJ (BPV)
REPORT AND RECOMMENDATION

Plaintiff filed this action for review of the final decision of the Commissioner for Social Security pursuant to 42 U.S.C. §§ 405(g). The case has been referred to the United States Magistrate Judge pursuant to the Rules of Practice of this Court.

Pending before the Court is Plaintiff’s appeal of the final decision of the Commissioner denying benefits. Plaintiff filed an opening brief on February 17, 2009 (Doc. No. 10)¹, and Defendant filed a brief in opposition on March 13, 2009 (Doc. No. 11). For the following reasons, the Magistrate Judge recommends that the District Court remand the case pursuant to sentence six of 42 U.S.C. § 405(g), for the purpose of consideration of the new evidence. Alternatively, the Magistrate Judge recommends that the District Court remand the case for further findings consistent with this report.

I. PROCEDURAL HISTORY

Plaintiff filed an Application for Social Security Disability Insurance Benefits and Supplemental Security Income (SSI) Benefits on January 22, 2004, alleging that he had

¹ “Doc. No.” refers to documents in this Court’s file.

1 suffered from a disability since January 2, 2004. (Transcript/Administrative Record (“Tr.”)
2 53-56, 201-04) Plaintiff alleged he was disabled due to “[b]oth shoulders tearing of tendons,
3 stomach hernia.” (Tr. 63)

4 The Social Security Administration (SSA) denied Plaintiff's Application initially, and
5 on reconsideration. (Tr. 28-29, 205-16) Plaintiff requested review (Tr. 44), and on March
6 29, 2005, appeared with counsel, and an interpreter, and testified at a hearing before
7 Administrative Law Judge (“ALJ”) Frederick Graf. (Tr. 217-28) After the record was
8 closed, Plaintiff alleges that he submitted additional evidence to the ALJ, along with a letter
9 stating that even though the record was closed, the evidence was relevant and should be
10 considered. (Opening Brief, Ex. A.) On July 6, 2005, the ALJ found Plaintiff was not
11 disabled because the “evidence of record is not fully supportive of a continuous 12 month
12 period or more of a disabling impairment.” (Tr. 16)

13 Plaintiff requested review of the decision by the Social Security Administration’s
14 Appeals Council. (Tr. 9A) The Appeals Council denied review on August 14, 2008, making
15 the decision of the ALJ the final decision of the Commissioner. (Tr. 4-8) *See* 20 C.F.R. §§
16 404.981. Plaintiff timely filed the instant Complaint in U.S. District Court appealing the
17 Commissioner's final decision (Doc. No. 1).

18 **II. THE COMMISSIONER'S DECISION AND EVIDENCE PRESENTED**

19 **A. Plaintiff's Education and Work History**

20 Plaintiff was born on April 3, 1960, and was forty-five year’s old on the ALJ’s date
21 of decision. (Tr. 21, 65) Plaintiff completed 6th grade and is a non-English speaker. (Tr.
22 62, 68) Plaintiff's past work consists of “car detailing” at a car dealership, and “press man”:
23 at a dry cleaners. (Tr. 63, 70)

24 **B. Plaintiff's Testimony**

25 On March 29, 2005, Plaintiff appeared before ALJ Graf, with an attorney
26 representative and an interpreter. (Tr. 217-228) Exhibits 1A -7F, and 1SSI to 5SSI were
27 admitted into evidence. (Tr. 219)

28 Plaintiff testified that his first shoulder surgery, on the right shoulder, took place in

1 2000. (Tr. 222) Plaintiff returned to work three months after surgery, and continued having
2 problems with his right arm, but kept working. (*Id.*) Plaintiff returned to see Dr. Sotelo in
3 2003, because he had pain in his left shoulder. (*Id.*) After an MRI in 2003 indicated a torn
4 rotator cuff, Plaintiff continued to work, and did not have the recommended surgery for his
5 shoulder because he was uninsured. (Tr. 222-23)

6 Plaintiff had surgery on his left shoulder in April, 2004. (Tr. 223) Plaintiff began
7 physical therapy following surgery which helped his left shoulder a little. (Tr. 223) Plaintiff
8 started to notice increasing symptoms in his right shoulder following surgery which he
9 attributed to compensating for his left shoulder by doing more with his right arm and
10 shoulder. (Tr. 224)

11 Plaintiff had surgery on his right shoulder on January 14, 2005. (Tr. 224) Plaintiff
12 received physical therapy after the surgery, but stated that it did not help his symptoms, and
13 his shoulder feels “just the same.” (Tr. 225) Plaintiff testified that both shoulders hurt, the
14 right hurting more than his left. (*Id.*) At the hearing Plaintiff could raise his left arm above
15 his chest and slightly above his head. (*Id.*) Plaintiff could not pick up his right arm. (*Id.*)
16 Plaintiff testified that lifting little weights at therapy increases his pain, and that he could lift
17 no more than five pounds. (Tr. 225-26)

18 Plaintiff testified that he takes pain medication, but it does not help. (Tr. 226) Plaintiff
19 has pain every day, that it bothers him while he is sleeping, and he cannot sleep an entire
20 evening. (Tr. 226)

21 Plaintiff testified that he does some dishes, and other “little things,” but no yard work.
22 (Tr. 226) Plaintiff gets sleepy and has to lie down after he takes his pills. (*Id.*) Plaintiff’s
23 therapist told him that “it was very possible” that he would need another surgery on his right
24 shoulder. (Tr. 227)

25 C. Plaintiff’s Medical History - Physical Impairment

26 An MRI of Plaintiff’s right shoulder on August 4, 2000, revealed findings consistent
27 with a rotator cuff tear, as well as possible predisposition to impingement syndrome. (Tr.
28 146) Dr. Abelardo Sotelo advised Plaintiff to undergo surgery, and Plaintiff underwent

1 surgery on November 15, 2000. (Tr. 160) On November 27, 2000, Dr. Sotelo reported that
2 neurovascular sensory was intact, and x-rays revealed excellent evidence of decompression;
3 Dr. Sotelo recommended that, because he was doing so well, he would like Plaintiff to
4 continue with physical therapy. (Tr. 160) A postoperative examination of Plaintiff on
5 December 5, 2000, noted satisfactory postoperative configuration of Plaintiff's right
6 shoulder. (Tr. 145) In December, 2000, Dr. Sotelo reported that Plaintiff was still doing well,
7 had virtually normal range of motion, and neurovascular sensory remained intact. (Tr. 159)

8 Plaintiff was seen by physicians for his shoulder problems, as well as for regular
9 medical care, at West Horizon Medical Center. (Tr. 123-158.) Dr. Horacio Ore-Giron,
10 Plaintiff's treating physician, noted on May 28, 2003, that Plaintiff was "having more severe
11 pain in the left shoulder and it has started in the right shoulder." (Tr. 133) An MRI of
12 Plaintiff's left shoulder on May 30, 2003, confirmed a tear of the supraspinatus tendon. (Tr.
13 138) Dr. Ore-Giron referred Plaintiff to an orthopedist for treatment. (Tr. 133) Dr. Sotelo
14 advised Plaintiff to undergo surgery to repair the rotator cuff. (Tr. 159) Plaintiff opted not
15 to do surgery, but to continue with exercise and medication. (Tr. 131) On November 5, 2003,
16 Plaintiff was seen again by Dr. Ore-Giron for bilateral shoulder pain. (Tr. 130) On
17 November 5, 2003, Dr. Ore-Giron explained that although an orthopedist recommended
18 surgery for a rupture of the rotator cuff, Plaintiff would wait for surgery until February, 2004,
19 because Plaintiff's insurance would not cover the surgery until he had been with the insurer
20 for one year. (Tr. 130) On January 7, 2004, treatment notes from Dr. Horacio Ore-Giron at
21 West Horizon Medical Center indicate that Plaintiff was experiencing shoulder pains in both
22 shoulders, and difficulty raising arms overhead; Dr. Ore-Giron attributed this to probable
23 rotator cuff rupture and referred him to Dr. Sotelo, an orthopedist. (Tr. 126) On February
24 22, 2004, after his insurance authorized the surgery, Dr. Ore-Giron again referred Plaintiff
25 to orthopedics. (Tr. 124, 158) Dr. Juan Peña noted a history of chronic osteoarticular pain
26 with bilateral shoulder problems after right shoulder surgery. (Tr. 124) On that basis, Dr.
27 Peña filled out a form for his work, the contents of which are not reproduced in the
28 administrative record. (Tr. 124)

1 Dr. Abelardo Sotelo performed surgery on Plaintiff's left shoulder on April 12, 2004.
2 (Tr. 141) Dr. Sotelo confirmed a rotator cuff tear, impingement syndrome, and degenerative
3 joint disease of Plaintiff's acromioclavicular joint during surgery. (Tr. 141) On April 19,
4 2004, Dr. Sotelo reported that the new x-rays "look very satisfactory," Plaintiff's
5 neurovascular sensory was intact, and he was "delighted with the progress" and would start
6 Plaintiff on physical therapy. (Tr. 158) A week later Dr. Sotelo reported similar progress.
7 (Tr. 158) Dr. Sotelo, noting a restricted range of motion, prescribed physical therapy for
8 Plaintiff on May 11, 2004. (Tr. 156-57)

9 Plaintiff was evaluated by a Disability Determinations Services ("DDS") doctor, Dr.
10 Hayden, on May 11, 2004. Dr. Hayden completed a Physical Residual Functional Capacity
11 Assessment and concluded that Plaintiff was capable of the following work-related activities:
12 Lift/carry 20 pounds occasionally and 10 pounds frequently. Stand/walk at least six hours
13 per an eight-hour workday. Sit at least six hours per an eight-hour workday. Unlimited
14 pushing and pulling. Occasional postural limitations were noted for climbing ladder, rope
15 or scaffolds, and frequent limitations for climbing ramps/stairs, balancing, stooping,
16 kneeling, crouching or crawling "[d]ue to [symptoms] of shoulder pain s/p bilat[eral] rotator
17 cuff repair' which could cause exacerbation of symptoms and loss of control. Limitations
18 were established for reaching in all directions (including overhead) for the same reasons
19 noted for postural limitations, but no restrictions for handling, fingering and feeling. There
20 were no visual limitations, communicative limitations, or environment limitations other than
21 height hazards. (Tr. 183) The DDS doctor noted that "although cl[aimant] may be credible
22 with [symptoms] at this time, evidence indicates good results from prior [treatment]. With
23 continued treatment, cl[aimant] should have the capacity noted in this RFC." (Tr. 152)

24 On June 14, 2004, Dr. Sotelo noted that Plaintiff was improving significantly, with
25 an excellent range of motion, but with some degree of weakness and a little bit of decreased
26 range of motion. (Tr. 156) Physical therapy notes show general improvement throughout
27 the duration of therapy related to decreased pain, increased strength, and increased active and
28 passive range of motion, (from April 28, 2004 to June 22, 2004); but without full resolution,

1 especially regarding continuing pain and limited active range of motion. (Tr. 160-186) In
2 July, 2004, Dr. Sotelo noted that Plaintiff had developed a little bit of arthrofibrosis, “nothing
3 major.” (Tr. 200)

4 Plaintiff was evaluated by a second DDS doctor on August 23, 2004. The DDS doctor
5 completed a Physical Residual Functional Capacity Assessment and concluded that Plaintiff
6 was capable of the following work-related activities: Lift/carry 20 pounds occasionally and
7 10 pounds frequently. Stand/walk at least six hours per an eight-hour workday. Sit at least
8 six hours per an eight-hour workday. Unlimited pushing and pulling. No postural,
9 manipulative, visual, communicative or environmental limitations were established. (Tr.
10 187-192) The DDS doctor noted that he reviewed Plaintiff’s chart, which the reviewer
11 explained was “[s]omewhat confusing,” but that he was able to determine that Plaintiff had
12 undergone two shoulder surgeries, but was “on the road to recovery.” (Tr. 194) The
13 reviewing doctor noted that Plaintiff’s Activities of Daily Living were “not exactly credible”
14 because he stated he could not drive, but drove to one of his interviews and also drives to
15 pick up his children from school. (Tr. 194)

16 In September, 2004, Dr. Sotelo noted that Plaintiff’s left side was asymptomatic with
17 normal range of motion, but that he wanted to see Plaintiff after an MRI of the right side was
18 done. (Tr. 200) The MRI revealed findings suspicious for high-grade, partial tears of the
19 supraspinatus tendon, without retraction. (Tr. 199) In October, 2004, Dr. Sotelo noted that
20 Plaintiff had a partial tear of the supraspinatus, but no retraction, and gave Plaintiff the option
21 of having surgery or waiting. (Tr. 200) Plaintiff chose to wait. (Tr. 200) In December,
22 2004, Plaintiff continued to have pain at the level of the right shoulder, and decided to
23 proceed with the surgery. (Tr. 196)

24 Dr. Sotelo performed surgery on January 24, 2005, confirming a rotator cuff tear
25 during surgery, which he proceeded to repair. (Tr. 198) Dr. Sotelo started Plaintiff on
26 physical therapy in February, 2005. (Tr. 196) In March, 2005, Plaintiff reported he was
27 doing a lot better with physical therapy, and Dr. Sotelo recommended Plaintiff continue with
28 physical therapy. (Tr. 195)

1 On June 14, 2005, after Plaintiff's hearing, but prior to the ALJ's decision, Plaintiff
2 asserts that Exhibit A was submitted to the ALJ along with a letter stating that even though
3 the record was closed, the evidence was relevant and should be considered. (Doc. No. 10 at
4 2) Medical records from Dr. Goode indicated that on April 28, 2005, Plaintiff was unable to
5 lift his arm, had significant pain at night, some pain at rest, and during the day had a lot of
6 pain with activity. (Doc. No. 10, Ex. A, Dr. Goode's' treatment notes dated 4/28/05) Dr.
7 Goode reviewed Plaintiff's record and ordered an MR scan to assess for a re-tear. (*Id*) The
8 MRI indicated a full thickness recurrent rotator cuff tear, some biceps tendinopathy and
9 subluxation of the biceps. (*Id*, MR Arthrogram of Right Shoulder 5/26/05) On June 1, 2005,
10 Dr. Goode noted that Plaintiff could "barely resist gravity on that side" but thought that it
11 was probably repairable, although it might not be. (*Id*) Dr. Goode stated that Plaintiff was
12 "young and has poor function" and thought his "best bet" was to try a revision of the rotator
13 cuff repair. (*Id*)

14 D. The Commissioner's Decision

15 On July 6, 2005, the ALJ made the following findings:

- 16 1. The claimant meets the nondisability requirements for a period of disability
17 and Disability Insurance benefits set forth in section 216(I) of the Social
Security Act and is insured for benefits through the date of this decision.
- 18 2. The claimant has not engaged in substantial gainful activity since the alleged
19 onset of disability.
- 20 3. The claimant has the following medically determinable impairment(s): status
21 post bilateral surgical rotator cuff tear repairs.
- 22 4. The claimant does not have any impairment or impairments that precluded the
23 ability to do substantial gainful activity which can be expected to result in
24 death or which has lasted or can be expected to last for a continuous period of
25 not less than 12 months.(20 CFR § § 404.1505 and 416.905)
- 26 5. The claimant was not under a "disability" as defined in the Social Security
27 Act, at any time through the date of this decision (20 CFR § § 404.1505(a) and
28 416.905(a))

(Tr. 16-17)

The ALJ noted that Plaintiff's statements regarding symptoms and resulting
limitations were generally credible, "but not to the extent alleged, because no determination

1 of a residual functional capacity limitation was made by any qualified treating physician that
2 would limit the claimant to the degree asserted by claimant.” (Tr. 16) There is no mention
3 in the ALJ’s decision of the additional evidence submitted from Dr. Goode. (Tr. 14-17)

4 The ALJ pointed out that in July, 2004, the claimant had developed a little bit of
5 arthrofibrosis which was reported to be “nothing major,” and, in October 2004, the claimant
6 exhibited “a little bit of pain.” On November 16, 2004, the claimant exhibited a totally
7 asymptomatic left side with normal range of motion. Thus, the ALJ found that the evidence
8 of record did not support a continuous 12 month period or more of a disabling impairment.

9 The ALJ concluded that there was insufficient evidence of record to establish disability
10 through the date of the ALJ’s decision. (Tr. 16.)

11 E. Additional Evidence Presented to the Appeals Council

12 Following the adverse decision by the ALJ, the Plaintiff submitted request for review
13 on July 6, 2005 (Tr. 4), and supporting memorandum asserting that Plaintiff was disabled for
14 twelve consecutive months on August 25, 2005. (Tr. 10b) Plaintiff asserts that he also
15 submitted additional evidence, found in Exhibit A to his opening brief in this Court.
16 Plaintiff’s memorandum to the Appeals Council references Exhibit A, records from Dr. Joel
17 Goode, but the exhibit itself is not attached to the memorandum found in the administrative
18 record. (Tr. 10-10c) Dr. Goode’s treatment notes reflected, in addition to the evidence
19 discussed above and submitted to the ALJ, that Plaintiff underwent a revision of the right
20 rotator cuff repair with repair of deltoid dehiscence on July 5, 2005. (Opening Brief, Ex. A,
21 Dr. Goode’s’ treatment notes dated 7/05/05) More than a year later, on November 16, 2006,
22 Plaintiff’s counsel sent a letter to the Appeals Council asking for the status of Plaintiff’s
23 appeal. (Tr. 9) Plaintiff noted that the Commissioner had previously misplaced the file in his
24 case, necessitating that the matter be sent back to hearing, and resulting in Plaintiff providing
25 his copy of the file with the ALJ. (Tr. 9) Plaintiff’s counsel asserts that he was advised that
26 the Appeals Council had no record of the Request for Review, and was later asked to send
27 another copy, and did so, including Dr. Goode’s updated records including a surgical report.
28 Nearly three years after Plaintiff’s initial request for review, on August 14, 2008, the Appeals

1 Council, without acknowledging Plaintiff's argument or evidence, denied Plaintiff's request
2 for review. (Tr. 4-6)

3 **III. ISSUES**

4 A. Plaintiff's Position

5 Plaintiff asserts that the ALJ erred in finding that the Plaintiff was not under a
6 "disability" as defined in the appropriate provisions of the Social Security Act, for the
7 required twelve months. (Doc. No. 10 at 3.)

8 B. Defendant's Position

9 Defendant contends that the ALJ (1) found that Plaintiff's left shoulder problems
10 totally resolved within 8 months of his alleged onset date and therefore the ALJ properly
11 found that his left shoulder impairment did not meet the statutory and regulatory duration
12 requirement; (2) reasonably found that Plaintiff's right shoulder impairment did not meet the
13 duration requirement because Plaintiff was doing a lot better only 6 months after he first
14 complained of right shoulder pain. (Doc. No. 11 at 4-5)

15 Defendant asserts that Plaintiff does not provide any documentary proof of the fact
16 that he submitted additional medical evidence relevant to his right shoulder to the ALJ after
17 the hearing. (*Id* at 5) Defendant also contends that remand based on the new evidence would
18 be improper because the additional evidence submitted by Plaintiff is not material because
19 it is not likely that the ALJ would have reached a different conclusion if he were presented
20 with the additional evidence because the last treatment record is dated July 14, 2005, less
21 than 12-months after Plaintiff complained to Dr. Sotelo of right shoulder pain. (*Id*)

22 **IV. DISCUSSION**

23 A. Standard of Review

24 An individual is entitled to Title II Social Security Disability Insurance benefits
25 ("SSDIB") if the individual is insured for those benefits, has not attained retirement age, has
26 applied for those benefits, and is disabled. 42 U.S.C. § 423(a)(1). An individual is entitled
27 to Title XVI Supplemental Security Income Disability benefits ("SSI") if the individual is
28 disabled and meets certain eligibility requirements. 42 U.S.C. § 1381a. The definition of

1 disability for SSDIB and SSI purposes is the same: the inability "to engage in any substantial
2 gainful activity by reason of any medically determinable physical or mental impairment
3 which can be expected to result in death or which has lasted or can be expected to last for a
4 continuous period of not less than twelve months." *Compare* 42 U.S.C. § 423(d)(1)(A) *with*
5 42 U.S.C. § 1382c (a)(3)(A).

6 The Ninth Circuit has stated that "a claimant will be found disabled only if the
7 impairment is so severe that, considering age, education, and work experience, that person
8 cannot engage in any other kind of substantial gainful work which exists in the national
9 economy." *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993) (*quoting Marcia v. Sullivan*,
10 900 F.2d 172, 174 (9th Cir. 1990)).

11 The claimant has the burden to establish a prima facie case showing an inability to
12 engage in previous occupations. *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).
13 The burden then shifts to the Commissioner to show that other substantial work, for which
14 the claimant is qualified, exists in the national economy. *Id* (citing *Hall v. Secretary of*
15 *HEW*, 602 F.2d 1372, 1375 (9th Cir. 1979); *Cox v. Califano*, 587 F.2d 988, 990 (9th Cir.
16 1978)).

17 The court will set aside a denial of benefits only if the Commissioner's findings are
18 based on legal error or are not supported by substantial evidence in the record as a whole.
19 *Kail v. Heckler*, 722 F.2d 1496, 1497 (9th Cir. 1984) (citing *Sample v. Schweiker*, 694 F.2d
20 639, 642 (9th Cir.1982), *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir.1982)); 42
21 U.S.C. § 405(g)). In determining whether there is substantial evidence, the Court must
22 consider the evidence as a whole, weighing both the evidence that supports and the evidence
23 that detracts from the Commissioner's conclusion. *Jones v. Heckler*, 760 F.2d 993, 995 (9th
24 Cir. 1985).

25 Substantial evidence is "more than a scintilla," *Richardson v. Perales*, 402 U.S. 389,
26 401 (1971), but "less than a preponderance." *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
27 n.10 (9th Cir. 1975); *Desrosiers v. Secretary of Health and Human Servs.*, 846 F.2d 573,
28 576 (9th Cir. 1988). Substantial evidence is "such relevant evidence as a reasonable mind

1 might accept as adequate to support a conclusion." *Richardson*, 402 U.S. at 401 (quoting
2 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

3 The Commissioner, not the court, is charged with the duty to weigh the evidence,
4 resolve material conflicts in the evidence and determine the case accordingly. Reviewing
5 courts must consider the evidence that supports as well as detracts from the examiner's
6 conclusion. *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975). Moreover, "if the
7 evidence can support either outcome, the court may not substitute its judgment for that of the
8 ALJ." *Matney v. Sullivan*, 981 F.2d 1016,1019 (9th Cir. 1992).

9 Disability claims are evaluated pursuant to a five-step sequential process. 20 C.F.R.
10 §§404.1520, 416.920; *Baxter v. Sullivan*, 923 F.2d 1391, 1395 (9th Cir. 1991). The first step
11 requires a determination of whether the claimant is engaged in substantial gainful activity.
12 20 C.F.R. §§ 404.1520(b). If so, then the claimant is not disabled under the Act and benefits
13 are denied. *Id* If the claimant is not engaged in substantial gainful activity, the ALJ then
14 proceeds to step two which requires a determination of whether the claimant has a medically
15 severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(c). In making a
16 determination at step two, the ALJ uses medical evidence to consider whether the claimant's
17 impairment more than minimally limits or restricts the claimant's physical or mental ability
18 to do basic work activities. *Id* If the ALJ concludes that the impairment is not severe, the
19 claim is denied. *Id* Upon a finding of severity, the ALJ proceeds to step three which requires
20 a determination of whether the impairment meets or equals one of several listed impairments
21 that the Commissioner acknowledges are so severe as to preclude substantial gainful activity.
22 20 C.F.R. §§ 404.1520(d); 20 C.F.R. Pt. 404, Subpt. P, App.1. If the claimant's impairment
23 meets or equals one of the listed impairments, then the claimant is presumed to be disabled
24 and no further inquiry is necessary. If a decision cannot be made based on the claimant's
25 then current work activity or on medical facts alone because the claimant's impairment does
26 not meet or equal a listed impairment, then evaluation proceeds to the fourth step. The fourth
27 step requires the ALJ to consider whether the claimant has sufficient residual functional
28 capacity ("RFC") to perform past work. 20 C.F.R. §§ 404.1520(e). If the ALJ concludes

1 that the claimant has RFC to perform past work, then the claim is denied. *Id* However, if
2 the claimant cannot perform any past work due to a severe impairment, then the ALJ must
3 move to the fifth step, which requires consideration of the claimant's RFC to perform other
4 substantial gainful work in the national economy in view of claimant's age, education, and
5 work experience. 20 C.F.R. §§ 404.1520(f). At step five, in determining whether the
6 claimant retained the ability to perform other work, the ALJ may refer to Medical Vocational
7 Guidelines ("grids") promulgated by the SSA. *Desrosiers*, 846 F.2d at 576-577. The grids
8 are a valid basis for denying claims where they accurately describe the claimant's abilities
9 and limitations. *Heckler v. Campbell*, 461 U.S. 458, 462, n.5 (1983). However, because the
10 grids are based on exertional or strength factors, where the claimant has significant
11 nonexertional limitations, the grids do not apply. *Penny*, 2 F.3d at 958-959; *Reddick v.*
12 *Chater*, 157 F.3d 715, 729 (9th Cir. 1998). Where the grids do not apply, the ALJ must use
13 a vocational expert in making a determination at step five. *Desrosiers*, 846 F.2d at 580.

14 A denial of Social Security benefits will be set aside if the Commissioner fails to
15 apply proper legal standards in weighing the evidence even though the findings may be
16 supported by substantial evidence. *Winans v. Bowen*, 853 F.2d 643, 644 (9th Cir. 1987).
17 When the ALJ has applied an incorrect legal standard in reaching a decision, we must
18 remand unless, as a matter of law, the result could not be affected. *See NLRB v. Enterprise*
19 *Assoc.*, 429 U.S. 507, 522 n.9 (1977); *Sagebrush Rebellion, Inc. V. Hodel*, 790 F.2d 760, 765
20 (9th Cir. 1986) (agency may rely on harmless error rule only when its mistake had no bearing
21 on the substance of the decision).

22 B. Analysis - Duration

23 The ALJ determined that Plaintiff's claim of physical impairment was not disabling
24 given that it was not expected to last for one year. Implicit in this determination is a finding
25 that the ALJ found the right and left shoulder impairment to be unrelated and did not "tack"
26 them together to meet the 12-month duration requirement. Generally, "two separate
27 disability causes ordinarily cannot be tacked to equal 12 months." *Ratto v. Secretary*, 839
28 F.Supp. 1415, 1427 (D.Or. 1993) (*citing* 20 CFR 404.1522(a)); *but see Smolen v. Chater*, 80

1 F.3d 1273, 1284 (9th Cir. 1996)(refusing to resolve the question of whether a plaintiff can
2 tack unrelated impairments in order to meet the duration requirement, but noting that Social
3 Security Ruling 82-52 allows tacking for re-entitlement purposes) However, “a different
4 rule applies where the first disability is related to the second. Where an emerging mental
5 impairment overlaps in time with a triggering but diminishing physical impairment, the
6 combined effect of the impairments should be considered to the extent it might bear on the
7 onset date of disability.” *Id* (citing *Lichter v. Bowen*, 814 F.2d 430, 436 (7th Cir. 1987)).
8 Moreover, “even if the two conditions are unrelated, the impairments may combine to created
9 [sic] a continuous period of disability so long as the duration of each impairment, taken
10 separately, lasted or was expected to last 12 months, and the initial onset of disability was
11 before the insured status date.” *Id*

12 The ALJ did not clarify if Plaintiff’s left and right shoulder injuries and surgery were
13 considered to be related, or unrelated, for purposes of determining if the disability met the
14 12-month duration requirement. Defendant assumes, without discussion, that the
15 impairments are unrelated. (*See* Doc. No. 11 at 4-5)² The ALJ did find Plaintiff’s medically
16 determinable impairment was “status post bilateral surgical rotator cuff tear repairs” (Tr. 16),
17 suggesting that the ALJ considered the impairments related, but simply found that together
18 they did not meet the duration requirement.

19 In addition to failing to find if the impairments were related, the ALJ did not make
20 findings clearly indicating the onset and duration of each impairment, either in combination
21 or separately. This lack of findings by the ALJ makes it difficult to determine if the new
22 evidence submitted by Plaintiff is material.

23 To justify a remand, Plaintiff must show that the new evidence is material to
24

25 ²Defendant states that Plaintiff stopped working in January 2004 due to left shoulder
26 pain which was resolved by September 2004. (Doc. No. 10 at 4) Defendant further states
27 that Plaintiff’s right shoulder problems began by September 2004, but were resolved by
28 March 2005. (*Id* at 5) Implicit in Defendant’s argument therefore, is that the impairments
are unrelated, and cannot be combined, or “tacked,” in order to meet the 12-month duration
requirement.

1 determining his disability, and that he had good cause for having failed to produce that
2 evidence earlier. *See* 42 U.S.C. § 405(g) (2001).

3 To demonstrate good cause, Plaintiff must demonstrate that the new evidence was
4 unavailable earlier. *See Mayes v. Massanari*, 276 F.3d 453, 463 (9th Cir. 2001). Because
5 Plaintiff's fourth shoulder surgery occurred after Plaintiff's request for review, Plaintiff has
6 demonstrated good cause. Although Defendant asserts that Plaintiff does not provide any
7 documentary proof of the fact that he submitted additional medical evidence relevant to his
8 right shoulder to the ALJ after the hearing, it seems, given the Defendant's demonstrated
9 unreliable record keeping in this case that it is likely that Plaintiff did submit such evidence.
10 Additionally, although the exhibit was not included in the administrative record's
11 reproduction of Plaintiff's memorandum to the Appeals Council, the memorandum clearly
12 makes reference to the missing exhibit, and to Dr. Goode's examination of Plaintiff in May,
13 2005.³ No mention of this new evidence was made in the Appeals Council action denying
14 review. (Tr. 4-6)

15 To be material under section 405(g), the new evidence must bear "directly and
16 substantially on the matter in dispute." *Ward v. Schweiker*, 686 F.2d 762, 764 (9th Cir.1982).
17 Plaintiff must additionally demonstrate that there is a "reasonable possibility" that the new
18 evidence would have changed the outcome of the administrative hearing. *See Booz v.*
19 *Secretary of Health & Human Servs.*, 734 F.2d 1378, 1380-81 (9th Cir.1983). Defendant
20 asserts that the new evidence would not be material because it is not likely the ALJ would
21 have reached a different conclusion if he were presented with the additional evidence
22 because the last treatment record is dated July 14, 2005, less than 12-months after Plaintiff
23 complained to Dr. Sotelo of right shoulder pain. This is inconsistent with both the evidence,

24
25 ³Plaintiff also referred to a surgery by Dr. Goode on Plaintiff's right shoulder in
26 January, 2005. This typographical error does not change this Court's recommendation. The
27 memorandum clearly referred to an examination by Dr. Goode in May, 2005. A review of
28 the administrative record would have revealed that Dr. Goode did not even treat Plaintiff
until after the administrative hearing, in March, 2005. Any discrepancy in dates could have
been resolved by referring to the actual exhibits.

1 and the ALJ's findings.

2 The evidence demonstrates that Plaintiff testified that he started to notice increasing
3 symptoms in his right shoulder following surgery of the left shoulder, in April, 2004.
4 Plaintiff attributed this to compensating for his left shoulder by doing more with his right arm
5 and shoulder. (Tr. 224) On January 7, 2004, treatment notes from Dr. Horacio Ore-Giron
6 at West Horizon Medical Center indicate that Plaintiff was experiencing shoulder pains in
7 both shoulders, and difficulty raising arms overhead⁴. (Tr. 126) Treatment notes indicate that
8 treating physicians considered the problem bilateral from January 2004 through March 2004.
9 (Tr. 124, 126) A right shoulder impairment that existed from January 2004 through at least
10 July, 2005, would meet the 12-month duration requirement. Thus, the evidence in the record
11 suggests that there is a "reasonable possibility" that the new evidence would have changed
12 the outcome of the administrative hearing.

13 Although the ALJ did not consider an onset date for the right shoulder impairment,
14 the ALJ noted that an MRI in September, 2004 revealed a partial tear. The ALJ found that
15 an MRI in September, 2004 demonstrated findings suspicious of a tear. Plaintiff's third
16 shoulder surgery was performed by Dr. Goode in July, 2005. Although Defendant implies
17 that, because the surgery was satisfactory and there are no treatment notes submitted after
18 July, 2005, that the evidence fails to show the impairment prevented him from performing
19 basic work activities a minimum of 12 consecutive months. This statement misconstrues the
20 legal standard, which provided for a finding of disability if the impairment has lasted or *can*
21 *be expected to last* for a continuous period of not less than twelve months." See 42 U.S.C.
22 § 423(d)(1)(A); 42 U.S.C. § 1382c (a)(3)(A) (emphasis added).

23 Dr. Goode's final treatment note in July indicates that, while Defendant correctly
24 states that the tear was "repaired relatively easily" and that Plaintiff was "neurologically
25 intact" and "did an excellent job" performing various upper extremity exercises, he was still
26 taking Percocet for pain, and that Dr. Goode would see him in a month, and would get him
27

28 ⁴Although the ALJ found Plaintiff's statements generally credible, the ALJ applied

1 into physical therapy at that time, but that meanwhile he *was to wear a sling*. (Ex. A,
2 Treatment notes dated 7/14/2005) Thus, Plaintiff's impairment clearly did not cease in July,
3 2005.

4 The ALJ concluded that Plaintiff was "doing a lot better by March 2005" (Tr. 16).
5 This fact, in conjunction with the ALJ's conclusion that Plaintiff did not meet the duration
6 requirement suggests that the ALJ considered the March 2005 date as the endpoint of
7 Plaintiff's right shoulder impairment. Although this much is not clearly stated by the ALJ,
8 it is implicit in his decision. Thus, if the ALJ considered the additional medical records from
9 Dr. Goode, there is a reasonable probability that he would not have found the endpoint of
10 Plaintiff's right shoulder impairment to be March 2005, but would have determined that the
11 impairment had not resolved even as late as July 2005, when Plaintiff's physician
12 recommended that Plaintiff wear a sling for another month and *then begin* physical therapy.
13 Dr. Goode also noted that, because it was a revision of a previous surgery, he was "not in a
14 rush to get him moving." (Opening Brief, Ex. A, treatment notes 7/14/05) This is highly
15 suggestive of the impairment continuing at least until August 2005 and quite likely beyond.
16 If the ALJ considered the onset date to be September 2004, there is a reasonable probability
17 that the new evidence would have changed the ALJ's determination of the endpoint of
18 Plaintiff's impairment to at least September 2005. It is also reasonable to conclude, given
19 the length of his previous physical therapy treatments, and thus, would have changed the
20 ALJ's decision that the evidence of record was not fully supportive of a continuous 12 month
21 period or more of a disabling impairment.

22 The Magistrate Judge finds that the new medical evidence satisfies these
23 requirements, and that there is a reasonable probability that the new evidence would have
24 changed the outcome of the administrative hearing.

25 C. Plaintiff's Credibility

26 "An ALJ is not required to believe every allegation of disabling pain or other
27 nonexertional impairment." *Orn v. Astrue*, 495 F.3d 625, 635 (9th Cir. 2007) (internal
28 quotation marks and citation omitted). When a medical impairment has been established,

1 however, the ALJ must provide “specific, cogent reasons for the disbelief” and may not
2 discredit a claimant’s testimony as to subjective symptoms merely because they are
3 unsupported by objective evidence. *Lester v. Chater*, 81 F.3d 821,834 (9th Cir. 1995).
4 Unless there is affirmative evidence showing that the claimant is malingering, the
5 Commissioner's reasons for rejecting the claimant's testimony must be “clear and
6 convincing.” *Id* (internal quotation marks omitted). While an ALJ is responsible for
7 determining the credibility of a claimant, an ALJ cannot reject a claimant's testimony without
8 giving clear and convincing reasons. *Holohon v. Massanari*, 246 F.3d 1195, 1208 (9th Cir.
9 2001) (citing *Reddick*, 157 F.3d at 722.) In addition, the ALJ must specifically identify the
10 testimony she or he finds not to be credible and must explain what evidence undermines the
11 testimony. *Id* The findings made in rejecting the pain complaints must be specific to provide
12 the court enough information to determine that the ALJ did not reject the claim arbitrarily,
13 but based his decision on permissible factors. *Orteza v. Shalala*, 50 F.3d 748, 750 (9th Cir.
14 1995); *Bunnell v. Sullivan*, 947 F.2d 341, 345- 46 (9th Cir.1991) (en banc). The evidence
15 upon which the ALJ relies must be substantial. *Id* In assessing the claimant's credibility, the
16 ALJ may consider ordinary techniques of credibility evaluation, such as the claimant's
17 reputation for lying, prior inconsistent statements about the symptoms, and other testimony
18 from the claimant that appears less than candid; unexplained or inadequately explained
19 failure to seek or follow a prescribed course of treatment; the claimant's daily activities; the
20 claimant's work record; observations of treating and examining physicians and other third
21 parties; precipitating and aggravating factors; and functional restrictions caused by the
22 symptoms. *Smolen*, 80 F.3d at 1284; *See also Robbins v. Social Security Sec. Admin.*, 466
23 F.3d 880, 884 (9th Cir. 2006) (“To find the claimant not credible, the ALJ must rely either on
24 reasons unrelated to the subjective testimony (*e.g.*, reputation for dishonesty), on conflicts
25 between his testimony and his own conduct; or internal contradictions in that testimony.”).

26 D. Analysis - Plaintiff’s Credibility

27 The ALJ concluded that, while Plaintiff’s statements regarding symptoms and
28 resulting limitations were “generally credible,” they were not credible “to the extent alleged”

1 because “no determination of a residual functional capacity limitation was made by any
2 qualified treating physician that would limit the claimant to the degree asserted by the
3 claimant.” (Tr. 16).

4 The ALJ’s conclusion is flawed. First, there was, in fact, no residual functional
5 capacity determination submitted by any of Plaintiff’s treating physicians. If it is error to
6 discredit a claimant’s subjective complaints based solely on the lack of objective medical
7 evidence to fully corroborate the alleged severity of those symptoms, then it follows that it
8 is error to discredit a claimant’s subjective complaints based on the lack of subjective
9 medical evidence to corroborate the severity of those symptoms. *Cf. Lester*, 81 F.3d at 834;
10 *Moisa v. Barnhart*, 367 F.3d 882, 885 (9th Cir. 2004).

11 Second, although this Court disagrees with the premise implicit in the ALJ’s
12 conclusion - that a claimant’s subject complaints may be discredited based on the lack of
13 subjective medical evidence - even if the lack of a residual functional capacity determination
14 by Plaintiff’s treating physician could suffice as a basis to reject Plaintiff’s otherwise credible
15 testimony, the ALJ committed error by noting the lack of evidence the ALJ thought
16 necessary to support Plaintiff’s testimony, and failing to conduct an appropriate inquiry to
17 obtain the medical evidence necessary. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th
18 Cir. 2001) (Ambiguous evidence, or the ALJ’s own finding that the record is inadequate to
19 allow for proper evaluation of the evidence, triggers the ALJ’s duty to conduct an appropriate
20 inquiry). This duty exists even when the claimant is represented by counsel. *Brown v.*
21 *Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). If the ALJ thought he needed to know how
22 Plaintiff’s treating physicians thought his impairment limited him, the ALJ could have
23 conducted the appropriate inquiry, by subpoenaing the physicians or submitting further
24 questions to them. *See Smolen v. Chater*, 80 F.3d 1273 (9th Cir. 1996)(citations omitted).

25 Finally, the ALJ failed to specifically identify the testimony he found not to be
26 credible. The findings made in rejecting the pain complaints must be specific to provide the
27 court enough information to determine that the ALJ did not reject the claim arbitrarily, but
28 based his decision on permissible factors. *Orteza v. Shalala*, 50 F.3d 748, 750 (9th Cir. 1995);

1 *Bunnell v. Sullivan*, 947 F.2d 341, 345- 46 (9th Cir.1991) (en banc). Further, the ALJ did
2 not point to specific reasons for his finding, supported by the evidence in the case record; nor
3 was his brief explanation “sufficiently specific to make clear ... the weight the adjudicator
4 gave to the individual’s statements and the reasons for that weight” as he is required to do.
5 *See Robbins*, 466 F.3d at 884 (citing SSR 96-7p, 1996 WL 374186, SR 96-8p, 19996 WL
6 374184, at *7).

7 For the reasons set forth above, the Magistrate Judge recommends a finding that the
8 ALJ’s reasons for discrediting Plaintiff’s subjective symptom testimony were legally
9 insufficient and not based on substantial evidence in the record.

10 E. Remand/Reverse

11 The district court has discretion to remand for further proceedings or to award
12 benefits. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir.1989). Remand for an award of
13 benefits is appropriate where:

14 (1) the ALJ failed to provide legally sufficient reasons for rejecting the
15 evidence; (2) there are no outstanding issues that must be resolved before a
16 determination of disability can be made; and (3) it is clear from the record that
the ALJ would be required to find the claimant disabled were such evidence
credited.

17 *Benecke v. Barnhart*, 379 F.3d 587, 593, (9th Cir. 2004) (citations omitted). Where the test
18 is met, "we will not remand solely to allow the ALJ to make specific findings...Rather we
19 take the relevant testimony to be established as true and remand for an award of benefits."
20 *Id* (citations omitted); *see also Lester*, 81 F.3d at 834.

21 Although the district court has discretion to remand for further proceedings or to
22 award benefits, it would be inappropriate to remand for a finding of benefits as a matter of
23 law based on evidence which the ALJ has not had the opportunity to consider. *Harman v.*
24 *Apfel*, 211 F.3d 1172, 1180 (9th Cir. 2000). Remand for further proceedings is appropriate
25 upon a showing that there is new evidence which is material and that there is good cause for
26 the failure to incorporate such evidence into the record in the prior proceeding.

27 The Magistrate Judge recommends that the District Court remand the case pursuant
28 to sentence six of 42 U.S.C. § 405(g), for the purpose of consideration of the new evidence.

1 Alternatively, because the ALJ found that Plaintiff did not meet the duration
2 requirement at step two of the evaluation, no findings were made as to whether or not
3 Plaintiff could perform his past relevant work or other work, under the fourth and fifth step
4 of the five step disability evaluation. Thus, there are outstanding issues that would preclude
5 this Court from making a recommendation for an award of benefits. Remand is appropriate
6 where the ALJ is in a better position to evaluate medical evidence. *See Marcia*, 900 F.3d at
7 176. Should the District Court reject the Magistrate Judge’s recommendation to remand this
8 case pursuant to sentence six of 42 U.S.C. 405(g), the Magistrate Judge recommends that the
9 appropriate remedy is to remand the case to the Commissioner of Social Security with
10 instruction to reconsider Plaintiff’s credibility, develop the record and take such further
11 evidence as is required to determine Plaintiffs eligibility for benefits under the current law,
12 and make appropriate findings consistent with this report, including clear findings that
13 Plaintiff’s impairments are, or are not, related for purposes of calculating whether the
14 duration requirement has been met.

15 **V. RECOMMENDATION**

16 For the foregoing reasons, it is the recommendation of this Court that the District
17 Judge, after her independent review and consideration, remand the case pursuant to sentence
18 six of 42 U.S.C. § 405(g), for the purpose of consideration of the new evidence.

19 Alternatively, should the District Court reject the Magistrate Judge’s recommendation
20 to remand this case pursuant to sentence six of 42 U.S.C. 405(g), the Magistrate Judge
21 recommends that the appropriate remedy is to remand the case to the Commissioner of Social
22 Security with instruction to reconsider Plaintiff’s credibility, take such further evidence as
23 is required to determine Plaintiffs eligibility for benefits under the current law, and make
24 appropriate findings consistent with this report.

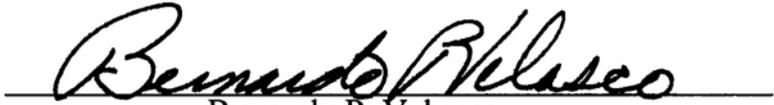
25 Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections within
26 ten days after being served with a copy of this Report and Recommendation. A party may
27 respond to another party's objections within ten days after being served with a copy thereof.
28 Fed.R.Civ.P. 72(b). If objections are filed, the parties should use the following case number:

1 **CV 08-544-TUC-CKJ.**

2 If objections are not timely filed, then the parties' right to *de novo* review by the
3 District Court may be deemed waived. *See United States v. Reyna-Tapia*, 328 F.3d 1114,
4 1121 (9th Cir. 2003) (*en banc*).

5 DATED this 4th day of November, 2009.

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Bernardo P. Velasco
United States Magistrate Judge