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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

JOSE CALDERON,	)	Case No. CV 07-07312-MLG
	)	
Plaintiff,	)	MEMORANDUM OPINION AND ORDER
	)	
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the	)	
Social Security	)	
Administration,	)	
	)	
Defendant.	)	
	)	

Plaintiff Jose Calderon ("Plaintiff") seeks review of the Commissioner's final decision denying his applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"). For the reasons discussed below, the Commissioner's decision is reversed and remanded for further proceedings.

**I. Factual and Procedural Background**

Plaintiff was born on January 24, 1965. (Administrative Record ("AR") at 23, 56, 248). He has past relevant work experience as a

1 janitor. (AR at 607). Plaintiff has a tenth grade education.<sup>1</sup> (AR at  
2 595).

3 Plaintiff filed applications for DIB and SSI on March 21, 1994,  
4 alleging that he has been disabled and unable to work since February 19,  
5 1993, due to: injuries to his right hand and back; pain and stiffness in  
6 his right hand, back, left hip and left shoulder; difficulty sitting,  
7 standing, walking, bending, squatting; and an inability to grip, grasp  
8 or squeeze objects for a long time.<sup>2</sup> (AR at 23, 62-67, 91, 99). Plaintiff  
9 also asserts that he suffers from a mental impairment. (AR at 26). The  
10 Social Security Administration denied benefits at the initial and  
11 reconsideration stages of the administrative process. (AR at 68-74, 77-  
12 80, 247).

13 At Plaintiff's request, an administrative hearing was held before  
14 Administrative Law Judge Earl J. Waits ("ALJ Waits"). (AR at 45-61,  
15 247). On May 26, 1995, ALJ Waits issued a decision ("Decision #1")  
16 finding that Plaintiff was not under a disability, as defined in the  
17 Social Security Act. (AR at 22-31); see 20 C.F.R. §§ 404.1520(e),  
18 416.920(e). The Appeals Council denied review. (AR at 3-4).

19 Plaintiff commenced an action seeking review in this Court. On July  
20 29, 1998, this Court remanded the case to the Commissioner for further  
21 consideration of medical evidence concerning Plaintiff's right wrist  
22 impairment. *Calderon v. Apfel*, Case No. CV 96-4891-HLH (BQR); (AR at  
23 328-52).

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26 <sup>1</sup> Plaintiff claims he did not complete the eighth grade. (AR at  
27 101, 270, 1041).

28 <sup>2</sup> Plaintiff filed a second set of applications for DIB and SSI on  
March 26, 1997. (AR at 594).

1 A supplemental hearing was conducted, and on March 16, 2001, ALJ  
2 Waits issued a decision ("Decision #2") denying Plaintiff's requests for  
3 benefits. (AR at 247-59, 261-306). Plaintiff sought review in this  
4 Court. On October 14, 2004, this Court remanded the case to the  
5 Commissioner for further consideration of medical records from the  
6 Hollywood Sunset Free Clinic and psychiatrist William Vicary, M.D.  
7 concerning Plaintiff's alleged mental impairment. *Calderon v. Barnhart*,  
8 Case No. CV 03-5655-MLG; (AR at 610-20).

9 On October 3, 2005, an administrative hearing was held before  
10 Administrative Law Judge Alexander Weir III ("ALJ Weir"). (AR at 941-  
11 1011). On January 5, 2006, ALJ Weir issued a decision ("Decision #3")  
12 concluding that Plaintiff was not disabled. (AR at 796-816). The Appeals  
13 Council disagreed with ALJ Weir and remanded Plaintiff's case for  
14 further consideration of the medical evidence. (AR at 824-25).

15 A fourth administrative hearing was conducted, and on June 22,  
16 2007, ALJ Weir determined that Plaintiff was not disabled ("Decision  
17 #4"). (AR at 593-608). Specifically, ALJ Weir found that Plaintiff  
18 suffered from chronic neck and back strain, and that Plaintiff has a  
19 history of a cartilage tear in the right wrist, but that Plaintiff's  
20 impairments did not meet or medically equal one of the listed  
21 impairments in 20 C.F.R., Part 404, Subpart P, Appendix 1. (AR at 605-  
22 06). While Plaintiff had been receiving treatment for anxiety and  
23 depression, ALJ Weir found that Plaintiff's mental condition was under  
24 good control and therefore, not a severe impairment (*i.e.*, Plaintiff's  
25 mental condition had only a mild impact on his daily living activities,  
26 social functioning and ability to maintain concentration, persistence  
27 and pace, and there was no evidence of any episodes of decompensation of  
28 extended duration). (AR at 605). After rejecting Plaintiff's allegations

1 regarding his limitations as not credible, ALJ Weir assessed Plaintiff  
2 with the residual functional capacity for medium work (*i.e.*, lift and  
3 carry 50 pounds occasionally and 25 pounds frequently, and stand, walk  
4 and sit for about six hours in an eight-hour workday). (AR at 604-07).  
5 ALJ Weir concluded that Plaintiff remains capable of performing his past  
6 relevant work as a janitor, as that work is generally performed in the  
7 national economy. (AR at 606-08). The Appeals Council denied review and  
8 Decision #4 became the final decision of the Commissioner. Plaintiff  
9 then commenced this action for judicial review.

10 Plaintiff raises the following arguments:

- 11 1. ALJ Weir erred by disregarding the opinions of  
12 Plaintiff's treating physicians. (Joint Stipulation  
13 at 20-27, 39-44).
- 14 2. ALJ Weir erred in finding that Plaintiff's mental  
15 impairment was not "severe." (Joint Stipulation at  
16 44-47, 49-52).
- 17 3. ALJ Weir erred in his assessment of Plaintiff's  
18 credibility. (Joint Stipulation at 52-55, 58-59).
- 19 4. ALJ Weir's assessment of Plaintiff's residual  
20 functional capacity is not supported by substantial  
21 evidence. (Joint Stipulation at 59-64).
- 22 5. ALJ Weir failed to properly consider Plaintiff's  
23 obesity. (Joint Stipulation at 64-67).

24 Plaintiff seeks a remand for payment of benefits. (Joint Stipulation at  
25 67-68). The Commissioner requests that Decision #4 be affirmed. (AR at  
26 69-70). The Joint Stipulation has been taken under submission without  
27 oral argument.

28 //

1 **II. Standard of Review**

2 The Court must uphold the Social Security Administrations's  
3 disability determination unless it is not supported by substantial  
4 evidence or is based on legal error. *Ryan v. Comm'r of Soc. Sec.*, 528  
5 F.3d 1194, 1198 (9th Cir. 2008)(citing *Stout v. Comm'r of Soc. Sec.*  
6 *Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006)). Substantial evidence means  
7 more than a scintilla, but less than a preponderance; it is evidence  
8 that a reasonable person might accept as adequate to support a  
9 conclusion. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir.  
10 2007)(citing *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir.  
11 2006)). To determine whether substantial evidence supports a finding,  
12 the reviewing court "must review the administrative record as a whole,  
13 weighing both the evidence that supports and the evidence that detracts  
14 from the Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715,  
15 720 (9th Cir. 1996). "If the evidence can support either affirming or  
16 reversing the ALJ's conclusion," the reviewing court "may not substitute  
17 [its] judgment for that of the ALJ." *Robbins*, 466 F.3d at 882.

18  
19 **III. Discussion**

20 **A. Plaintiff's Mental Impairment**

21 Plaintiff contends that ALJ Weir improperly disregarded the  
22 opinions of his treating psychiatrist, William Vicary, M.D., and other  
23 treating physicians at the Hollywood Sunset Community Clinic concerning  
24 his mental impairment.<sup>3</sup>

25 \_\_\_\_\_  
26 <sup>3</sup> Most of Plaintiff's mental health progress reports from the  
27 Hollywood Sunset Community Clinic bear illegible initials on the  
28 physician's signature line. (AR at 315, 318, 320-26, 696, 703, 725, 735,  
746, 750, 752, 760, 767, 772, 779, 781, 875, 879, 892, 925, 928). These  
reports appear to have been signed by Dr. Vicary. (See AR at 876; see

1 Plaintiff began receiving mental health treatment at the Hollywood  
2 Sunset Community Clinic in January 1997. (AR at 313, 327). Plaintiff  
3 complained of hearing voices, sleep disturbance, and stress. (AR at  
4 327). Dr. Vicary diagnosed Plaintiff with anxiety and depression. (AR at  
5 326).

6 Dr. Vicary continued to treat Plaintiff on a regular basis over the  
7 next ten years. His records suggest an increasing level of mental  
8 impairment. (AR at 314-15, 318, 320-26, 696, 703, 725, 735, 750, 752,  
9 760, 767, 772, 779, 781, 784-87, 874-75, 879, 892, 899, 911-14, 925,  
10 928). For example, in July 2000, Dr. Vicary assessed Plaintiff's ability  
11 to perform various work-related activities on a day-to-day basis as  
12 "fair" to "poor."<sup>4</sup> (AR at 314).

13 On September 1, 2000, and June 7, 2002, Dr. Vicary opined that  
14 Plaintiff was disabled due to a generalized anxiety disorder and  
15 cyclothymia.<sup>5</sup> (AR at 556, 689).

16 In a Mental Impairment Questionnaire completed in September 2005,  
17 Dr. Vicary diagnosed Plaintiff with major depression and assessed  
18 Plaintiff with a Global Assessment of Functioning ("GAF") scale of 50

19 \_\_\_\_\_  
20 also Joint Stipulation at 35).

21 <sup>4</sup> Specifically, Dr. Vicary rated Plaintiff as "poor" in his ability  
22 to: deal with the public; use judgment; deal with work stresses;  
23 function independently; understand, remember, and carry out complex or  
24 detailed instructions; and relate predictably in social situations. (AR  
25 at 314). Dr. Vicary rated Plaintiff as "fair" in his ability to: follow  
26 work rules; relate to coworkers; interact with supervisors; function  
independently; understand, remember, and carry out simple instructions;  
maintain personal appearance; behave in an emotionally stable manner;  
and demonstrate reliability. *Id.*

27 <sup>5</sup> Cyclothymia is "a mood disorder characterized by numerous  
28 alternating short cycles of hypomanic and depressive periods with  
symptoms like those of manic and major depressive episodes but of lesser  
severity." Dorland's Illustrated Medical Dictionary 529 (29th ed. 2000).

1 indicating serious symptoms or serious impairment with social and  
2 occupational functioning. Diagnostic and Statistical Manual of Mental  
3 Disorders (4th ed.) ("DSM-IV") at 32. (AR at 784). Dr. Vicary found that  
4 Plaintiff had "moderate" restrictions of activities of daily living,  
5 "marked" difficulties in maintaining social functioning, "extreme"  
6 deficiencies of concentrations persistence or pace, and "four or more"  
7 episodes of decompensation. (AR at 786). In support of his opinion, Dr.  
8 Vicary referred to clinical findings such as dysphoria, sleep  
9 disturbance, irritability, and social withdrawal. (AR at 784). Dr.  
10 Vicary also noted the presence of a variety of other symptoms (*i.e.*,  
11 anhedonia; decreased energy; feelings of guilt or worthlessness;  
12 impairment in impulse control; generalized persistent anxiety;  
13 somatization unexplained by organic disturbance; mood disturbance;  
14 pathological dependence; passivity or aggressivity; persistent  
15 disturbances of mood or affect; change in personality; paranoid thinking  
16 or inappropriate suspiciousness; emotional withdrawal or isolation;  
17 intense and unstable interpersonal relationships and impulsive and  
18 damaging behavior; emotional lability; deeply ingrained, maladaptive  
19 patterns of behavior; sleep disturbance; oddities of thought,  
20 perception, speech or behavior; and a history of multiple physical  
21 symptoms). (AR at 785). Dr. Vicary concluded that Plaintiff's prognosis  
22 was "poor." (AR at 784).

23 In January 2007, Dr. Vicary opined that Plaintiff's major  
24 depression prevented Plaintiff from being gainfully employed. (AR at  
25 899).

26 Dr. Vicary completed a second Mental Impairment Questionnaire in  
27 May 2007. (AR at 911-14). As in the September 2005 questionnaire, Dr.  
28 Vicary diagnosed Plaintiff with major depression. (AR at 911). In

1 addition to citing the clinical findings and symptoms previously  
2 identified, Dr. Vicary also reported that Plaintiff had been  
3 experiencing tearful episodes, anxiety attacks, appetite disturbance  
4 with weight change, difficulty thinking or concentrating, motor tension,  
5 inflated self-esteem, unrealistic interpretation of physical signs or  
6 sensations, easy distractibility, autonomic hyperactivity, and memory  
7 impairment. (AR at 911-12). Dr. Vicary further noted that Plaintiff  
8 suffered from reduced intellectual functioning that was related to his  
9 depression, and that Plaintiff's anxiety and depression intensified his  
10 physical pain. (AR at 913). Dr. Vicary concluded that Plaintiff's  
11 prognosis was "poor." (AR at 911).

12 The medications that Dr. Vicary prescribed for Plaintiff's mental  
13 condition also indicated a mental impairment of increasing severity.  
14 Initially, Plaintiff was treated with a single antidepressant or anti-  
15 anxiety medication (amitriptyline or diazepam). (AR at 323-27). In 1998,  
16 Dr. Vicary modified Plaintiff's medication regimen to include both an  
17 anti-anxiety medication (Buspar) and an antidepressant (amitriptyline).  
18 (AR at 321). In 1999, Dr. Vicary added a medication indicated for the  
19 treatment of schizophrenia (Risperdal). (AR at 315, 694). Since November  
20 2004, Plaintiff has been taking a combination of three drugs: an  
21 antidepressant (Lexapro), medication for the treatment of major  
22 depressive disorder (Wellbutrin) and Risperdal. (AR at 779, 781, 874-75,  
23 879, 884, 890, 892, 899).

24 ALJ Weir reviewed Dr. Vicary's treatment notes and his opinions as  
25 to Plaintiff's mental impairment. (AR at 601-03, 807). However, ALJ Weir  
26 rejected Dr. Vicary's opinion and concluded that Plaintiff did not even  
27 suffer from a severe mental impairment. (AR at 603, 605). In support of  
28 his decision, ALJ Weir criticized Dr. Vicary's treatment records as



1 "sketchy" and "lacking in rationale." (AR at 603). He explained that Dr.  
2 Vicary's records did not show that Plaintiff had the degree of mental  
3 problems identified in the Mental Impairment Questionnaires. (AR at  
4 603). While Dr. Vicary's opinion may not have been conclusive on the  
5 ultimate issue of disability, *Magallanes v. Bowen*, 881 F.2d 747, 751  
6 (9th Cir. 1989), it was improper for ALJ Weir to reject Dr. Vicary's  
7 opinion solely due to a lack of supporting evidence. *See Sprague v.*  
8 *Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (When a treating physician  
9 diagnosed claimant with depression, set forth clinical observations  
10 supporting the diagnosis, and prescribed psychotherapeutic drugs, ALJ  
11 erred in finding claimant had not set forth sufficient evidence to  
12 substantiate mental impairment). Dr. Vicary's records reveal that every  
13 time he examined Plaintiff, he assessed Plaintiff's mental status and  
14 evaluated Plaintiff's medications. While his notations were often brief,  
15 he described his clinical findings and Plaintiff's symptoms in greater  
16 detail in the Mental Impairment Questionnaires. (AR at 784-87, 911-14).  
17 If ALJ Weir questioned the objective basis for Dr. Vicary's opinion, he  
18 should have inquired further. *See, e.g., Smolen v. Chater*, 80 F.3d 1273,  
19 1288 (9th Cir. 1996); *see also Brown v. Heckler*, 713 F.2d 441, 443 (9th  
20 Cir. 1983) (ALJ's duty to fully and fairly develop the record exists  
21 even when the claimant is represented by counsel).

22 In rejecting Dr. Vicary's opinion, ALJ Weir adopted the opinions of  
23 three examining doctors, psychologist Harrell Reznick, Ph.D.,  
24 psychologist David Fox, Ph.D., and psychiatrist Ernest Bagner, III, M.D.  
25 (AR at 603, 605, 807, 812). These doctors, each of whom examined  
26 Plaintiff on only a single occasion,<sup>6</sup> concluded that Plaintiff did not

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28 <sup>6</sup> Dr. Reznick examined Plaintiff in 2000, and Dr. Fox and Dr.  
Bagner examined Plaintiff in 2005. (AR at 359-66, 630-36, 646-48).

1 suffer from a mental impairment that would preclude him from performing  
2 work related activities. (AR at 367-68, 630-33, 646-47). Specifically,  
3 Dr. Reznick found that Plaintiff was capable of: performing simple and  
4 repetitive tasks with minimal supervision and with appropriate  
5 persistence and pace over a normal work cycle; adjusting adequately to  
6 minor to moderate variation in work routine; understanding, remembering  
7 and carrying out all simple and most moderately complex verbal  
8 instructions; adhering to basic work and safety standards; and getting  
9 along satisfactorily with others in the workplace, including some  
10 contact with the general public. (AR at 365-66). Dr. Fox found that  
11 Plaintiff had no clinical disorder and did "not demonstrate impairment  
12 which would preclude him, at a cognitive or emotional level, from  
13 pursuing some level of productive functioning at a low normal level."  
14 (AR at 648). Dr. Bagner diagnosed Plaintiff with depressive disorder,  
15 NOS in remission and rule out anti-social personality disorder. (AR at  
16 632). He opined that Plaintiff would have "no limitations" completing  
17 simple or complex tasks, completing a normal work week without  
18 interruption, maintaining concentration and attention, interacting with  
19 supervisors, peers and the public, or handling normal stresses at work.  
20 (AR at 633). Plaintiff contends, and the Court agrees, that these  
21 examining doctors' opinions were not a valid basis for rejecting Dr.  
22 Vicary's opinion.

23 A treating physician's opinion must be given controlling weight if  
24 it is well-supported and not inconsistent with the other substantial  
25 evidence in the record. *Orn v. Astrue*, 495 F.3d 625, 631-32 (9th Cir.  
26 2007); 20 C.F.R. § 404.1527(d)(2). The ALJ may not reject the opinion of  
27 a treating physician, even if it is contradicted by the opinion of  
28 another doctor, without first providing specific and legitimate reasons

1 supported by substantial evidence in the record. *Lester v. Chater*, 81  
2 F.3d 821, 830-31 (9th Cir. 1996); *Rollins v. Massanari*, 261 F.3d 853,  
3 856 (9th Cir. 2001); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.  
4 1983) ("if the ALJ wishes to disregard the opinion of the treating  
5 physician, he or she must make findings setting forth specific,  
6 legitimate reasons for doing so that are based on substantial evidence  
7 in the record"). An examining physician's opinion constitutes  
8 substantial evidence if the physician relied on "independent clinical  
9 findings that differ from the findings of the treating physician." *Orn*,  
10 495 F.3d at 631-32. Even if there is substantial evidence in the record  
11 contradicting a treating physician's opinion, the opinion is "still  
12 entitled to deference and must be weighed using the following factors:  
13 "[l]ength of the treatment relationship and the frequency of  
14 examination" by the treating physician; and the "nature and extent of  
15 the treatment relationship" between the patient and the treating  
16 physician. 20 C.F.R. §§ 404.1527(d)(2)(i)-(ii), 416.927(d)(2)(i)-(ii);  
17 *Orn*, 495 F.3d at 631-33. Other factors to be considered include the  
18 supportability of the treating physician's opinion, consistency with  
19 the record as a whole, the specialization of the physician, and the  
20 extent to which the physician is familiar with disability programs and  
21 evidentiary requirements. 20 C.F.R. §§ 404.1527(d)(3)-(6),  
22 416.927(d)(3)-(6). Thus, "[i]n many cases, a treating source's medical  
23 opinion will be entitled to the greatest weight and should be adopted,  
24 even if it does not meet the test for controlling weight." S.S.R. 96-2p;  
25 *Orn*, 495 F.3d at 632-633.

26 Here, while the opinions of Dr. Reznick, Dr. Fox and Dr. Bagner  
27 constitute substantial evidence, Dr. Vicary's opinion was still entitled  
28 to deference. SSR 96-2p; *Orn*, 495 F.3d at 632-633. Indeed, the factors

1 identified in the regulations weigh in favor of Dr. Vicary's opinion. 20  
2 C.F.R. §§ 404.1527, 416.927. For example, the nature and extent of  
3 Plaintiff's relationship with Dr. Vicary provides a unique longitudinal  
4 perspective on Plaintiff's mental condition, adding weight to Dr.  
5 Vicary's opinion. See 20 C.F.R. §§ 404.1527(d)(2)(i)-(ii),  
6 416.927(d)(2)(i)-(ii); *Orn*, 495 F.3d at 633. As discussed above, the  
7 lengthy administrative record contains countless medical forms and  
8 progress reports completed by Dr. Vicary over a 10 year period. Dr.  
9 Vicary offered diagnoses of Plaintiff's mental condition, made clinical  
10 findings, assessed Plaintiff's ability to work, and prescribed a variety  
11 of medications. While Dr. Vicary's progress notes do not reveal detailed  
12 discussions regarding Plaintiff's mental condition, "[t]he primary  
13 function of medical records is to promote communication and  
14 recordkeeping for health care personnel - not to provide evidence for  
15 disability determinations." *Orn*, 495 F.3d at 634. And, Dr. Vicary did  
16 provide a more reasoned explanation for his opinion in the Mental  
17 Impairment Questionnaires by referring to Plaintiff's symptoms, signs,  
18 and prognosis. (AR at 784-87, 911-14); see 20 C.F.R. §§ 404.1527(d)(3)  
19 ("Supportability. The more a medical source presents relevant evidence  
20 to support an opinion, particularly medical signs and laboratory  
21 findings, the more weight we will give that opinion."), 416.927(d)(3)  
22 (same); see also *Orn*, 495 F.3d at 634 ("a medical condition [need not]  
23 be mentioned in every report to conclude that a physician's opinion is  
24 supported by the record"). Thus, when viewed in its entirety, the record  
25 provides ample support for Dr. Vicary's opinion.

26 ALJ Weir's finding at step two of the sequential analysis is also  
27 not supported by substantial evidence. In concluding that Plaintiff does  
28 not suffer from a severe mental impairment, ALJ Weir listed two reasons

1 in addition to his reliance on the examining doctors' opinions. (AR at  
2 605). Neither of these reasons were proper. ALJ Weir discounted  
3 Plaintiff's mental impairment because he received "fairly irregular"  
4 treatment and had not visited the emergency room with mental complaints.  
5 (AR at 605, 807). As the record reflects, however, Plaintiff was treated  
6 by Dr. Vicary on numerous occasions over a ten year period. (AR at 315,  
7 318, 320-26, 696, 703, 725, 735, 746, 750, 752, 760, 767, 772, 779, 781,  
8 875, 879, 892, 925, 928). And, claimants are not required to seek  
9 psychiatric treatment in order to establish a mental illness. See *Nguyen*  
10 *v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) ("it is a questionable  
11 practice to chastise one with a mental impairment for the exercise of  
12 poor judgment in seeking rehabilitation"); see also *Fair v. Bowen*, 885  
13 F.2d 597, 604 (9th Cir. 1989) (explaining that a failure to seek  
14 treatment should not be used as a basis for rejecting a physician's  
15 opinion). Thus, ALJ Weir's finding that Plaintiff does not suffer from  
16 a severe mental impairment is not supported by substantial evidence.<sup>7</sup>  
17 *Corrao v. Shalala*, 20 F.3d 943, 949 (9th Cir. 1994) (an impairment  
18 should be found to be "non-severe" only when the evidence establishes  
19 merely a slight abnormality, with no more than minimal effect on ability  
20 to work) (citing *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)  
21 (citing Social Security Ruling 85-28 (1985)); *Smolen*, 80 F.3d at 1290  
22 ("the step two inquiry is a *de minimis* screening device to dispose of

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26 <sup>7</sup> Although this Court previously determined that ALJ Waits'  
27 Decision #1 finding that Plaintiff did not suffer from a severe mental  
28 impairment was supported by substantial evidence, the evidence from Dr.  
Vicary and the Hollywood Sunset Community Clinic pertained to treatment  
received after Decision #1 was issued. (AR at 22-31, 350).

1 groundless claims") (citations omitted).<sup>8</sup>

2  
3 **IV. Conclusion**

4 The decision whether to remand for further proceedings is within  
5 this Court's discretion. See *Connett v. Barnhart*, 340 F.3d 871, 876 (9th  
6 Cir. 2003); *Harman v. Apfel*, 211 F.3d 1172, 1175-1178 (9th Cir. 2000).  
7 Where no useful purpose would be served by further administrative  
8 proceedings, or where the record has been fully developed, it is  
9 appropriate to exercise this discretion to direct an immediate award of  
10 benefits. *Harman*, 211 F.3d at 1179 ("the decision of whether to remand  
11 for further proceedings turns upon the likely utility of such  
12 proceedings"). However, where there are outstanding issues that must be  
13 resolved before a determination of disability can be made, and it is not  
14 clear from the record that the ALJ would be required to find the  
15 claimant disabled if all the evidence were properly evaluated, remand is  
16 appropriate. *Id.*; *Bunnell v. Barnhart*, 336 F.3d 1112, 1115-16 (9th Cir.  
17 2003).

18 Here, there are outstanding issues that must be resolved before a  
19 determination of disability can be made. See, e.g. *Bunnell*, 336 F.3d at  
20 1115-16 (remanding for reconsideration where, inter alia, ALJ "failed to  
21 provide adequate reasons for rejecting the opinion of the treating  
22 physicians" and "did not properly reject [the claimant's] subjective  
23

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24 <sup>8</sup> As noted above, Plaintiff raises several other challenges to  
25 Decision #4 in the Joint Stipulation. As the issue of Plaintiff's mental  
26 impairment requires further consideration on remand, and the record is  
27 not sufficiently developed to support a determination of disability  
28 without further proceedings, the Court will not decide whether the  
remaining issues raised by Plaintiff would independently require  
reversal. However, the Court recommends that, on remand, the  
Commissioner consider all of Plaintiff's arguments when determining the  
merits of his case.

1 complaints"). As ALJ Weir failed to adequately evaluate Dr. Vicary's  
2 opinion and the severity of Plaintiff's mental condition, issues remain  
3 as to Plaintiff's ability to perform his past work or other work that  
4 exists in significant numbers in the economy. Thus, the Court cannot  
5 find that "the record has been fully developed" or that "further  
6 administrative proceedings would serve no useful purpose." See *Smolen*,  
7 80 F.3d at 1292. Consequently, the Court will not grant Plaintiff's  
8 request to remand the action for calculation of benefits. Instead the  
9 Court finds that further administrative proceedings is necessary.

10  
11 **ORDER**

12 **IT IS HEREBY ORDERED** that this action is **REMANDED** to defendant,  
13 pursuant to Sentence Four of 42 U.S.C. § 405(g), for further proceedings  
14 as described above.

15 Dated: September 18, 2008

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17 \_\_\_\_\_  
18 Marc L. Goldman  
19 United States Magistrate Judge  
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