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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

CLAYTON CRAINE, )  
 ) No. CV 09-8851-PLA  
 )  
 ) Plaintiff, )  
 )  
 ) v. )  
 ) **MEMORANDUM OPINION AND ORDER**  
 )  
 ) MICHAEL J. ASTRUE, )  
 ) COMMISSIONER OF SOCIAL )  
 ) SECURITY ADMINISTRATION, )  
 )  
 ) Defendant. )

**I.**

**PROCEEDINGS**

Plaintiff filed this action on December 8, 2009, seeking review of the Commissioner’s denial of his application for Supplemental Security Income payments. The parties filed Consents to proceed before the undersigned Magistrate Judge on March 25, 2010, and December 22, 2010. Pursuant to the Court’s Order, the parties filed a Joint Stipulation on October 21, 2010, that addresses their positions concerning the disputed issues in the case. The Court has taken the Joint Stipulation under submission without oral argument.

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II.

**BACKGROUND**

Plaintiff was born on August 24, 1963. [Administrative Record (“AR”) at 31, 61, 127.] He has an eleventh grade education and past relevant work experience as a metal bender, construction worker, store stocker, telephone technician, warehouseman, and delivery driver. [AR at 32, 145-46, 148, 151-62, 166-73.]

On April 20, 2007, plaintiff protectively filed his application for Supplemental Security Income payments, alleging that he has been unable to work since April 20, 2007, due to problems with his lower back, neck, hand, elbow, knee, and wrist. [AR at 21, 127-33, 139-50.] After plaintiff’s application was denied initially and on reconsideration, he requested a hearing before an Administrative Law Judge (“ALJ”). [AR at 63-74.] A hearing was held on January 7, 2009, at which time plaintiff appeared with counsel and testified on his own behalf. A medical expert and a vocational expert also testified. [AR at 29-60.] On May 4, 2009, the ALJ issued an unfavorable decision. [AR at 18-28.] When the Appeals Council denied plaintiff’s request for review of the hearing decision on August 12, 2009, the ALJ’s decision became the final decision of the Commissioner. [AR at 5-8.] This action followed.

III.

**STANDARD OF REVIEW**

Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence or if it is based upon the application of improper legal standards. Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

In this context, the term “substantial evidence” means “more than a mere scintilla but less than a preponderance -- it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion.” Moncada, 60 F.3d at 523; see also Drouin, 966 F.2d at 1257. When determining whether substantial evidence exists to support the Commissioner’s decision, the Court examines the administrative record as a whole, considering adverse as well

1 as supporting evidence. Drouin, 966 F.2d at 1257; Hammock v. Bowen, 879 F.2d 498, 501 (9th  
2 Cir. 1989). Where the evidence is susceptible to more than one rational interpretation, the Court  
3 must defer to the decision of the Commissioner. Moncada, 60 F.3d at 523; Andrews v. Shalala,  
4 53 F.3d 1035, 1039-40 (9th Cir. 1995); Drouin, 966 F.2d at 1258.

#### 6 IV.

#### 7 THE EVALUATION OF DISABILITY

8 Persons are “disabled” for purposes of receiving Social Security benefits if they are unable  
9 to engage in any substantial gainful activity owing to a physical or mental impairment that is  
10 expected to result in death or which has lasted or is expected to last for a continuous period of at  
11 least twelve months. 42 U.S.C. § 423(d)(1)(A); Drouin, 966 F.2d at 1257.

#### 12

#### 13 A. THE FIVE-STEP EVALUATION PROCESS

14 The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing  
15 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lester v. Chater, 81 F.3d 821,  
16 828 n.5 (9th Cir. 1995, as amended April 9, 1996). In the first step, the Commissioner must  
17 determine whether the claimant is currently engaged in substantial gainful activity; if so, the  
18 claimant is not disabled and the claim is denied. Id. If the claimant is not currently engaged in  
19 substantial gainful activity, the second step requires the Commissioner to determine whether the  
20 claimant has a “severe” impairment or combination of impairments significantly limiting his ability  
21 to do basic work activities; if not, a finding of nondisability is made and the claim is denied. Id.  
22 If the claimant has a “severe” impairment or combination of impairments, the third step requires  
23 the Commissioner to determine whether the impairment or combination of impairments meets or  
24 equals an impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R., Part 404,  
25 Subpart P, Appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id.  
26 If the claimant’s impairment or combination of impairments does not meet or equal an impairment  
27 in the Listing, the fourth step requires the Commissioner to determine whether the claimant has  
28 sufficient “residual functional capacity” to perform his past work; if so, the claimant is not disabled

1 and the claim is denied. Id. The claimant has the burden of proving that he is unable to perform  
2 past relevant work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a prima facie  
3 case of disability is established. The Commissioner then bears the burden of establishing that the  
4 claimant is not disabled, because he can perform other substantial gainful work available in the  
5 national economy. The determination of this issue comprises the fifth and final step in the  
6 sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d  
7 at 1257.

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9 **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

10 In this case, at step one, the ALJ concluded that plaintiff has not engaged in any substantial  
11 gainful activity since April 20, 2007, the date of his application for Supplemental Security Income  
12 payments. [AR at 23.] At step two, the ALJ concluded that plaintiff has the following severe  
13 impairments: “[d]isorders of the lumbar spine, right wrist, left knee and shoulders; gout; and lupus.”  
14 [Id.] At step three, the ALJ concluded that plaintiff’s impairments do not meet or equal any of the  
15 impairments in the Listing. [AR at 24.] The ALJ further found that plaintiff retained the residual  
16 functional capacity (“RFC”)<sup>1</sup> to perform light work,<sup>2</sup> except that plaintiff “is able to stand and/or walk  
17 4 hours out of a[n] 8-hour workday. [Plaintiff] is occasionally able to bend, stoop, and climb ramps  
18 and stairs; but is unable to balance or climb ladders, scaffolds, or ropes. [Plaintiff] is occasionally  
19 able to reach above the shoulder, and frequently able to finger and frequently able to forcefully  
20 handle (grip, grasp, and twist). [Plaintiff] should avoid all exposure to unprotected heights.” [Id.]  
21 At step four, the ALJ concluded that plaintiff can perform his past relevant work as a delivery  
22 driver-courier. [AR at 27.] Accordingly, the ALJ found plaintiff not disabled. [AR at 28.]

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26 <sup>1</sup> RFC is what a claimant can still do despite existing exertional and nonexertional limitations.  
Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

27 <sup>2</sup> Light work is defined as work involving “lifting no more than 20 pounds at a time with  
28 frequent lifting or carrying of objects weighing up to 10 pounds.” 20 C.F.R. §§ 404.1567(b),  
416.967(b).

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V.

**THE ALJ'S DECISION**

Plaintiff contends that the ALJ erred in rejecting: (1) the opinion of plaintiff's treating physician; and (2) plaintiff's subjective testimony. [Joint Stipulation ("JS") at 4.] As set forth below, the Court agrees with plaintiff, in part, and remands the matter for further proceedings.

**TREATING PHYSICIAN'S OPINION**

Plaintiff contends that the ALJ erred in rejecting the opinion of treating physician Dr. W. Joseph Atiya. [JS at 4-7.]

In evaluating medical opinions, the case law and regulations distinguish among the opinions of three types of physicians: (1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant (nonexamining physicians). See 20 C.F.R. §§ 404.1502, 404.1527, 416.902, 416.927; see also Lester, 81 F.3d at 830. Generally, the opinions of treating physicians are given greater weight than those of other physicians, because treating physicians are employed to cure and therefore have a greater opportunity to know and observe the claimant. Orn v. Astrue, 495 F.3d 625, 631 (9th Cir. 2007); Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996). Despite the presumption of special weight afforded to treating physicians' opinions, an ALJ is not bound to accept the opinion of a treating physician. However, the ALJ may only give less weight to a treating physician's opinion that conflicts with the medical evidence if the ALJ provides explicit and legitimate reasons for discounting the opinion. See Lester, 81 F.3d at 830-31 (the opinion of a treating doctor, even if contradicted by another doctor, can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record); see also Orn, 495 F.3d at 632-33 ("Even when contradicted by an opinion of an examining physician that constitutes substantial evidence, the treating physician's opinion is 'still entitled to deference.'") (citations

1 omitted); Social Security Ruling<sup>3</sup> 96-2p (a finding that a treating physician’s opinion is not entitled  
2 to controlling weight does not mean that the opinion is rejected).

3 The record shows that plaintiff received medical treatment from January 2006 to at least  
4 October 2008 from the three physicians at Primary Care Medical Group of Hemet Valley -- Dr.  
5 Atiya, Dr. Robert Loera, and Dr. Ingela Elhenawi -- for, among other things, lower back pain. [See  
6 AR at 243-47, 257-301.] On April 8, 2008, Dr. Atiya completed a Statement of Provider form, in  
7 which he opined that plaintiff has a medically verifiable condition that would prevent him from  
8 performing certain tasks, his condition began in 2001 and is chronic, he is actively seeking  
9 treatment, and he is unable to work.<sup>4</sup> [AR at 287.] On October 28, 2008, Dr. Atiya completed a  
10 Multiple Impairment Questionnaire form, in which he diagnosed plaintiff as having intractable back  
11 pain, post laminectomy, and degenerative arthritis of the lower spine; asserted that plaintiff’s  
12 prognosis was poor; and stated that plaintiff’s clinical condition and pain as well as his old medical  
13 history and x-rays supported the diagnosis and prognosis. [AR at 292-93.] Dr. Atiya described  
14 plaintiff’s symptoms as including intractable and persistent low back pain and leg pain that lasts  
15 all day for which plaintiff is treated with Norco, a prescription pain medication. [AR at 293-94, 296.]  
16 Dr. Atiya opined, among things, that plaintiff has a “severe” level of pain of 9 out of 10; he can sit  
17 and stand/walk each for one hour out of an eight-hour workday; he should not sit continuously in  
18 a work setting; he would need to get up and move around every one to two hours and would need  
19 to wait two hours before sitting again; he can never lift or carry any weight; he is significantly  
20 limited in his abilities to repetitively reach, handle, finger, or lift; his symptoms would likely increase  
21 if he were placed in a competitive work environment; his symptoms would frequently interfere with  
22 his ability to concentrate and pay attention; his impairments are ongoing (i.e., expected to last at

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24 <sup>3</sup> Social Security Rulings (“SSR”) do not have the force of law. Nevertheless, they “constitute  
25 Social Security Administration interpretations of the statute it administers and of its own  
26 regulations,” and are given deference “unless they are plainly erroneous or inconsistent with the  
27 Act or regulations.” Han v. Bowen, 882 F.2d 1453, 1457 (9th Cir. 1989).

28 <sup>4</sup> On May 29, 2007, Dr. Loera completed a Statement of Provider form expressing a nearly  
identical opinion concerning plaintiff’s condition as the opinion expressed by Dr. Atiya in the 2008  
Statement of Provider form, except that Dr. Loera opined that plaintiff’s condition began in 1997,  
rather than in 2001. [See AR at 286.]

1 least 12 months); he is not a malingerer; during an eight-hour workday, he would need to take  
2 unscheduled one-hour breaks every one to two hours; his impairments would likely produce “good”  
3 and “bad” days; he would likely miss work more than three times a month as a result of his  
4 impairments or treatment; and he should not push, pull, kneel, bend, or stoop. [AR at 294-99.]

5 In the decision, the ALJ asserted that he rejected Dr. Atiya’s opinions expressed in the  
6 Statement of Provider and Multiple Impairment Questionnaire forms as “brief, conclusory, and  
7 inadequately supported by clinical findings.” [AR at 27.] Specifically the ALJ asserted that no  
8 objective documentation or clinical findings supported Dr. Atiya’s opinions; Dr. Atiya did not  
9 provide a clinical treatment history “to explain why [plaintiff] has back pain, what has been  
10 prescribed to treat his back pain and [plaintiff’s] response to the various treatment options;” and  
11 Dr. Atiya “only” saw plaintiff up to nine times since June 2006 during “routine follow up visits.” [Id.]  
12 In rejecting Dr. Atiya’s opinions, the ALJ also cited the medical expert’s hearing testimony<sup>5</sup> that  
13 there was a lack of objective evidence supporting the extent of the limitations assessed by Dr.  
14 Atiya. [AR at 27; see also AR at 32-38.]

15 The Court concludes that the ALJ provided insufficient reasons for rejecting Dr. Atiya’s  
16 treating opinion. First, the ALJ’s bare assertion that Dr. Atiya’s opinion was not sufficiently  
17 supported by the treatment record or the objective medical findings is not a proper reason, by  
18 itself, for rejecting the opinion because it fails to reach the level of specificity required for rejecting  
19 a treating physician’s opinion. See Embrey v. Bowen, 849 F.2d 418, 421-23 (9th Cir. 1988) (“To  
20 say that medical opinions are not supported by sufficient objective findings or are contrary to the  
21 preponderant conclusions mandated by the objective findings does not achieve the level of  
22 specificity our prior cases have required ... The ALJ must do more than offer his conclusions. He  
23 must set forth his own interpretations and explain why they, rather than the doctors’, are correct.”)  
24 (footnote omitted). An ALJ can meet the requisite specific and legitimate standard for rejecting  
25 a treating physician’s opinion deemed inconsistent with or unsupported by the medical evidence

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27 <sup>5</sup> The ALJ referred to the medical expert who testified at the administrative hearing as Dr.  
28 Landau. [See AR at 24, 27.] However, the Court observes that Dr. John Orlando was the medical  
expert who testified at plaintiff’s hearing. [See AR at 32-38.]

1 “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,  
2 stating his interpretation thereof, and making findings.” Reddick v. Chater, 157 F.3d 715, 725 (9th  
3 Cir. 1998). Here, the ALJ’s conclusory assertion that Dr. Atiya’s opinion was inadequately  
4 supported by the clinical findings, objective evidence, or the frequency of plaintiff’s treatment [see  
5 AR at 27] does not constitute a specific and legitimate reason for rejecting Dr. Atiya’s treating  
6 opinion. See McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989) (finding that rejecting the  
7 treating physician’s opinion on the ground that it was contrary to clinical findings in the record was  
8 “broad and vague, failing to specify why the ALJ felt the treating physician’s opinion was flawed”);  
9 see also, e.g., Payne v. Astrue, 2009 WL 176071, at \*6 (C.D. Cal. Jan. 23, 2009) (finding  
10 inadequate an ALJ’s conclusory rejection of a treating physician’s opinion as inconsistent with the  
11 medical treatment, where the ALJ did not specify how the treatment record was inconsistent with  
12 the physician’s opinion).

13 Furthermore, the ALJ’s assertions that Dr. Atiya’s opinion was not supported by any  
14 objective medical evidence or clinical findings and that Dr. Atiya did not describe plaintiff’s  
15 treatment history are not entirely accurate. Dr. Atiya stated in the Multiple Impairment  
16 Questionnaire form that his assessment of plaintiff’s limitations was based on plaintiff’s clinical  
17 condition, pain symptoms, old x-rays, and treatment history [see AR at 292-93], and that he had  
18 treated plaintiff from January 2006 to October 2008 with pain medication. [AR at 293, 296.]  
19 Plaintiff’s treatment records corroborate Dr. Atiya’s statement, showing that plaintiff was treated  
20 for lower back pain with pain medication by the physicians of Primary Care Medical Group of  
21 Hemet Valley during the time period specified by Dr. Atiya. [See AR at 243-47, 257-301.] To the  
22 extent the ALJ overlooked or ignored this evidence to support his rejection of Dr. Atiya’s opinion,  
23 that was erroneous. See Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984) (error for an  
24 ALJ to ignore or misstate the competent evidence in the record in order to justify his conclusion.)

25 Moreover, to the extent the ALJ rejected Dr. Atiya’s opinion based on the number of times  
26 he treated plaintiff, such a basis for rejection was improper because a treating physician’s opinion  
27 should be afforded great weight so long as the physician has seen the claimant “a number of times  
28 and long enough to have obtained a longitudinal picture of [the claimant’s] impairment.” 20 C.F.R



1 §§ 404.1527(d)(2)(i), 416.927(d)(2)(i). The ALJ provided no basis for assuming that Dr. Atiya did  
2 not form a longitudinal picture of plaintiff's impairments in the course of seeing plaintiff nine times  
3 from January 2006 to October 2008. Further, the ALJ's apparent rejection of Dr. Atiya's opinion  
4 on the basis that the ALJ found the treatment to be "routine" or conservative was also erroneous,  
5 as the record shows that Dr. Atiya treated plaintiff with prescription pain medication [see, e.g., AR  
6 at 282, 284], and the ALJ did not indicate any appropriate treatment that was available to plaintiff  
7 that Dr. Atiya did not prescribe. The record also reveals that plaintiff underwent a spine fusion  
8 surgery, apparently in 2001 [see AR at 235], and neither plaintiff's treating physicians nor the ALJ  
9 indicated what more plaintiff should have done to treat his continuing back pain. See Yang v.  
10 Barnhart, 2006 WL 3694857, at \*4 (C.D. Cal. Dec. 12, 2006) (ALJ's characterization of the treating  
11 physician's treatment of plaintiff as "conservative" did not support the ALJ's rejection of the  
12 physician's opinion, where plaintiff was prescribed pain medication to alleviate his back pain and  
13 "[n]either the Agency nor the ALJ has suggested what more radical treatment would have been  
14 appropriate"); Cronin v. Astrue, 2010 WL 702033, at \*3 (C.D. Cal. Feb. 25, 2010) (ALJ erred in  
15 rejecting as conservative a treating physician's treatment of plaintiff's pain symptoms with  
16 medication management, where "the ALJ failed to articulate what other treatment was available").

17 Next, insomuch as the ALJ rejected Dr. Atiya's opinion in favor of the opinion of the  
18 nonexamining medical expert who testified at the hearing, that was also error. A nonexamining  
19 physician's opinion with nothing more cannot constitute substantial evidence to support the ALJ's  
20 rejection of Dr. Atiya's opinion. See Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 602  
21 (9th Cir. 1999) ("The opinion of a nonexamining medical advisor cannot by itself constitute  
22 substantial evidence that justifies the rejection of the opinion of an examining or treating  
23 physician."); Lester, 81 F.3d at 831-32 (holding that the opinion of a nonexamining physician  
24 cannot by itself constitute substantial evidence that justifies the rejection of the opinion of a  
25 treating physician). A contrary medical opinion may constitute substantial evidence upon which  
26 the ALJ may rely in evaluating the weight to afford a treating physician's opinion only when the  
27 contrary opinion is based on independent clinical findings. See Andrews, 53 F.3d at 1041. Here,  
28 however, it appears that the medical expert's testimony was based on the same clinical findings

1 upon which Dr. Atiya based his own opinion (*i.e.*, plaintiff’s treatment history). [See AR at 35-36,  
2 293.] Accordingly, the medical expert’s testimony did not constitute substantial evidence to  
3 contradict Dr. Atiya’s treating opinion. See Murray v. Heckler, 722 F.2d 499, 501 (9th Cir. 1983)  
4 (ALJ improperly rejected treating physician’s opinion based on the opinion of a non-treating  
5 physician where “the *findings* of the non-treating physician were the same as those of the treating  
6 physician[, and] [i]t was his *conclusions* that differed”) (emphasis in original); Jefferson v. Astrue,  
7 2010 WL 4366389, at \*3 (C.D. Cal. Oct. 26, 2010) (ALJ erred in rejecting treating physician’s  
8 findings based only on the testimony of a nonexamining medical expert, where the medical expert  
9 premised his opinion on the same evidence as the treating physician).

10 In any event, the ALJ may not properly reject a treating physician’s opinion by merely  
11 referencing the contrary findings of another physician. Even when contradicted, a treating  
12 physician’s opinion is still entitled to deference, and the ALJ must provide specific and legitimate  
13 reasons supported by substantial evidence for rejecting it. See Orn, 495 F.3d at 632-33; SSR 96-  
14 2p; see also Valentine v. Comm’r Soc. Sec. Admin., 574 F.3d 685, 692 (9th Cir. 2009) (“to reject  
15 the opinion of a treating physician ‘in favor of a conflicting opinion of [a non-treating] physician[,]’  
16 an ALJ still must ‘make[] findings setting forth specific, legitimate reasons for doing so that are  
17 based on substantial evidence in the record’”) (quoting Thomas v. Barnhart, 278 F.3d 947, 957  
18 (9th Cir. 2002)). Here, the ALJ erred in failing to expressly explain how Dr. Atiya’s findings  
19 conflicted with other parts of the medical evidence and why his opinion was rejected in favor of  
20 a conflicting medical opinion. The ALJ’s rejection of Dr. Atiya’s opinion without expressly setting  
21 forth detailed, legitimate reasons for doing so was improper. See Hostrawser v. Astrue, 364  
22 Fed.Appx. 373, 376-77 (9th Cir. 2010) (citable for its persuasive value pursuant to Ninth Circuit  
23 Rule 36-3) (ALJ erred in affording nontreating physicians’ opinions controlling weight over the  
24 treating physicians’ opinions, where the ALJ did not provide a thorough summary of the conflicting  
25 clinical evidence and his interpretations thereof with an explanation as to why his interpretations

1 of the evidence, rather than those of the treating physicians, were correct). Remand is warranted  
2 on this issue.<sup>6</sup>

3  
4 **VI.**

5 **REMAND FOR FURTHER PROCEEDINGS**

6 As a general rule, remand is warranted where additional administrative proceedings could  
7 remedy defects in the Commissioner's decision. See Harman v. Apfel, 211 F.3d 1172, 1179 (9th  
8 Cir.), cert. denied, 531 U.S. 1038 (2000); Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984).  
9 In this case, remand is appropriate in order for the ALJ to reconsider Dr. Atiya's opinion. The ALJ  
10 is instructed to take whatever further action is deemed appropriate and consistent with this  
11 decision.

12 Accordingly, **IT IS HEREBY ORDERED** that: (1) plaintiff's request for remand is **granted**;  
13 (2) the decision of the Commissioner is **reversed**; and (3) this action is **remanded** to defendant  
14 for further proceedings consistent with this Memorandum Opinion.

15 **This Memorandum Opinion and Order is not intended for publication, nor is it**  
16 **intended to be included in or submitted to any online service such as Westlaw or Lexis.**

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18 DATED: January 3, 2011

19 \_\_\_\_\_  
20 PAUL L. ABRAMS  
21 UNITED STATES MAGISTRATE JUDGE

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27 <sup>6</sup> As the ALJ's determination of plaintiff's credibility may be impacted by further consideration  
28 of Dr. Atiya's opinion, the Court exercises its discretion not to consider plaintiff's contention that  
the ALJ improperly considered his subjective testimony. [See JS at 11-14.]