

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MAURILLO VARGAS JUAREZ,)	No. CV 10-00435-VBK
)	
Plaintiff,)	MEMORANDUM OPINION
)	AND ORDER
v.)	
)	(Social Security Case)
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the Administrative Record ("AR") before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified AR.

Plaintiff raises the following issues:

1. Whether the Administrative Law Judge ("ALJ") erred in the

1 assessment of Plaintiff's physical residual functional
2 capacity;

3 2. Whether the ALJ erred in finding that Plaintiff did not have
4 a "severe" mental impairment; and

5 3. Whether the ALJ erred in the credibility findings.

6 (JS at 2-3.)

7
8 This Memorandum Opinion will constitute the Court's findings of
9 fact and conclusions of law. After reviewing the matter, the Court
10 concludes that for the reasons set forth, the decision of the
11 Commissioner must be reversed.

12
13 I

14 **THE ALJ ERRED IN REJECTING THE RESIDUAL FUNCTIONAL CAPACITY**

15 **ASSESSMENT OF PLAINTIFF'S TREATING PHYSICIAN**

16 **WITHOUT PROVIDING SPECIFIC AND LEGITIMATE REASONS**

17
18 **A. Introduction.**

19 Plaintiff's treating physician, Dr. Capen, is an orthopedic
20 surgeon. Plaintiff was first evaluated by Dr. Capen on October 10,
21 2006, based on injuries Plaintiff sustained during industrial
22 accidents connected to his work as a laborer. (AR 210-226.) These
23 injuries were sustained from accidents which occurred on May 30, 2002;
24 June 20, 2005; February 28, 2006; and March 6, 2006. (AR 215-217.)
25 Plaintiff treated with Dr. Capen, or another physician in his office
26 (Dr. Jarminski) until December 11, 2007. (AR 184-206, 394-414.) In
27 Dr. Capen's report of December 11, 2007, he diagnosed Plaintiff with
28 left shoulder impingement; lumbar sprain - strain syndrome; L4-5 disc

1 protrusion with annular tear; and L5-S1 right-sided radiculopathy per
2 EMG. (AR 396.) On April 30, 2008, Dr. Capen provided the following
3 exertional limitations: Plaintiff could occasionally lift and carry 20
4 pounds, and frequently lift and carry less than ten pounds.¹ (AR 393.)

5 Plaintiff was also seen in a one-time consultative examination
6 performed at the request of the Department of Social Services by
7 orthopedist Dr. Bleecker. (AR 335-338.) After Dr. Bleecker's
8 examination of May 15, 2007, he diagnosed Plaintiff with impingement
9 syndrome left shoulder; and, degenerative disc disease lumbar spine.
10 He rendered an impression that Plaintiff can lift 25 pounds
11 occasionally, and ten pounds frequently. (AR 338.)

12 Dr. Geiger, a neurologist, examined Plaintiff at the request of
13 Dr. Capen on February 8, 2007. (AR 156-182.) Dr. Geiger reviewed
14 extensive medical treatment records, but it is apparent that his
15 examination was not done for the purpose of testing Plaintiff's
16 exertional abilities. Indeed, Dr. Geiger rendered no opinion in that
17 regard.

18 Finally, the State Agency physician, Dr. Halpern, completed a
19 Physical Residual Functional Capacity Assessment on May 25, 2007 (AR
20 347-352), and concluded that Plaintiff could occasionally lift 20
21 pounds, and frequently could lift ten pounds. (AR 348.) Dr. Halpern,
22 however, did not indicate what records she may have reviewed in coming
23 to these conclusions.

24 The ALJ assessed that Plaintiff was capable of light exertional
25 level work, as defined in 20 C.F.R. §404.1567(b). (AR 16.) According
26 to the definitions provided in that regulation, "light" work entails

27
28 ¹ The remainder of the exertional limitations are not relevant
to this discussion.

1 the capacity to lift no more than 20 pounds at a time with frequent
2 lifting or carrying of objects weighing up to ten pounds.

3 In reaching his assessment, the ALJ found that Plaintiff's
4 residual functional capacity ("RFC") is "generally consistent with the
5 May 2007 report of consultative examiner Dr. H. Harlan Bleecker, ..."
6 (AR 17.) He also found it to be generally consistent with the May
7 2007 report of the non-examining medical consultant, Dr. Halpern.
8 (Id.) Finally, he found that his RFC assessment was also "generally
9 consistent" with the April 2008 report of Dr. Capen. (Id.) While
10 acknowledging Dr. Capen's opinion that Plaintiff could lift or carry
11 less than ten pounds frequently, he rejected that limitation for the
12 following reasons:

13 "... because there is no evidence that supports this level
14 of restriction, this opinion is not compatible with the May
15 2000 opinions of the consultative examiner and the medical
16 consultant (exhibit citations omitted), and this opinion is
17 not compatible with the medical record as a whole (exhibit
18 citations omitted)."

19 (AR 17.)
20

21 **B. Analysis.**

22 In the hierarchy of the evaluation of physicians' opinions,
23 Social Security analysis gives greatest weight, generally, to that of
24 the treating physician. If the treating physician's opinion is
25 controverted by that of another examining physician, an ALJ may only
26 reject the treating physician's opinion by setting forth "specific and
27 legitimate" reasons based on substantial evidence in the record. See
28

1 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995).²

2 It is the Court's task, then, to analyze whether the reasons
3 provided by the ALJ, and those reasons only³ provide substantial
4 evidence to support the ALJ's conclusion.

5 The first reason provided by the ALJ is that Dr. Capen's opinion
6 provides "no evidence that supports [his] level of restriction." One
7 must be mindful, in reviewing reasons provided by the ALJ such as
8 this, that the main contradiction between Dr. Capen's opinion and the
9 other physicians' opinions is that Dr. Capen assessed that Plaintiff
10 could lift and carry less than ten pounds frequently, while the other
11 physicians opined that Plaintiff could lift up to ten pounds
12 frequently. This would appear to be a fine line, but has significant
13 legal ramifications because it sets up a demarcation between light
14 exertional work and work which requires lesser exertional ability,
15 such as sedentary work. But is there "no evidence" that supports Dr.
16 Capen's conclusions? This is clearly not the case. Dr. Capen's
17 diagnostic reports indicate, for example, a significant disc
18 protrusion of 5-5 millimeters at L4-5 (AR 153), and an abnormal EMG
19 study consistent with right L5-S1 radiculopathy. (AR 286.) Dr. Capen
20 also found abnormal objective physical examination findings, such as

21
22 ² The Commissioner makes a somewhat surprising argument, in
23 passing, that while he acknowledges the holding of Lester, and many
24 cases which establish the same principle, he also believes that, "to
25 the extent the Ninth Circuit's judicially-created standard exceeds the
26 requirements set forth by Congress and by the Commissioner at the
27 behest of Congress, it would appear to be improper." (JS at 6.) This
28 argument would appear to be in the form of an aside, as the
Commissioner analyzes Plaintiff's case in light of the "specific and
legitimate reasons" principles annunciated in Lester and subsequent
cases.

³ See Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003).

1 tenderness and limited range of motion of the lumbar spine, positive
2 straight leg raising bilaterally, and positive impingement maneuver,
3 positive Neer's test, positive Hawkin's maneuver, and restriction of
4 motion in the left shoulder. There is simply no way that these
5 findings constitute "no evidence" supporting Dr. Capen's diagnostic
6 conclusions especially, when, as the Court has noted, the distinction
7 between Dr. Capen's findings that Plaintiff could lift less than ten
8 pounds frequently, and the other physicians' findings that Plaintiff
9 could lift up to ten pounds frequently, would appear to be very slight
10 from a medical point of view. Certainly, the Court cannot find that
11 the ALJ's conclusion that there is no evidence supporting the level of
12 restrictions assessed by Dr. Capen constitutes a specific and
13 legitimate finding.

14 The ALJ also rejected Dr. Capen's opinion because it was not
15 compatible with the opinions of the consultative examiner and the
16 medical consultant. Again, this is not a specific and legitimate
17 reason. If it were, then the citation, per se, of any inconsistency
18 between a treating physician's conclusions and the conclusions of
19 consultative and/or non-examining physicians would amount to specific
20 and legitimate reasons. It is not the citation to such differences,
21 but the explanation of why the differences are justified, and that the
22 treating physician's opinion should be rejected, that amounts to a
23 specific and legitimate reason. The Commissioner cites Morgan v.
24 Social Security Administration, 169 F.3d 595, 602-603 (9th Cir. 1999)
25 for the proposition that the mere fact of the inconsistency between
26 the report of a treating physician and that of a consultative examiner
27 and a non-examining physician is sufficient basis upon which to reject
28 the opinion of the treating physician. This in not, however, a

1 correct reading of the holding in Morgan. In that case, the appellate
2 court went through a recital of the evidence, and particularly cited
3 numerous instances in which the opinion of the treating physician was
4 not supported by objective evidence. (See Morgan, 169 F.3d at 600-
5 602.) The Commissioner's citation to Batson v. Commissioner of Social
6 Security, 359 F.3d 1190, 1195 (9th Cir. 2004) is no more availing.
7 Batson did not hold that the mere fact of a discrepancy between
8 treating and consultative examiners' opinions constituted specific and
9 legitimate reasons to reject the former; rather, in Batson, the
10 appellate court upheld the discounting of the views of the treating
11 physician because the opinion was in the form of a checklist, did not
12 have supporting objective evidence, was contradicted by other
13 statements and assessments of the claimants' medical condition, and
14 was based on the claimants' subjective descriptions of pain. (Id. at
15 1194.)

16 The third reason cited by the ALJ, that the treating physician's
17 opinion was not compatible with the medical record as a whole, is one
18 which is often cited by ALJs in their opinions, and is normally found
19 to be insufficient to constitute a specific and legitimate reason.

20 Based on the foregoing, the Court finds merit in Plaintiff's
21 first issue, which will require remand so that Dr. Capen's opinion may
22 be assessed pursuant to proper legal standards.

24 II

25 THE ALJ ERRED IN ASSESSING PLAINTIFF'S MENTAL STATE

26 The ALJ, at Step Two of the sequential evaluation process, found
27 that Plaintiff has no severe mental impairment or combination of
28 mental impairments. (AR 15.) The ALJ found that the finding of no

1 severe mental impairment was substantiated by the psychiatric
2 diagnosis of Dr. Scheinbaum conducted on August 31, 2006, which found
3 that Plaintiff has no evidence of any significant psychiatric symptoms
4 to warrant a diagnosis on Axis I. (AR 251.) It is curious to note
5 that Dr. Scheinbaum's report is not included in the Administrative
6 Record; rather, the ALJ seemed to form her opinion based upon a
7 summary of Dr. Scheinbaum's report contained in the extensive report
8 of Dr. Friedman, a psychiatrist who examined Plaintiff on March 15,
9 2007 at the request of Plaintiff's worker's compensation lawyer. (AR
10 236-263.) Further, the ALJ selectively quoted from Dr. Friedman's
11 report, concluding that he found that Plaintiff is not precluded from
12 a psychiatric viewpoint from performing his usual work. (AR 15.)

13 As to the ALJ's reliance on Dr. Scheinbaum, the Court cannot
14 validate that based upon a summary of that report contained in another
15 psychiatrist's report. Further, Dr. Friedman, who apparently did
16 examine Dr. Scheinbaum's report, noted that it failed to provide any
17 results of psychological testing. The lack of objective testing is
18 often cited as a basis to reject the opinion of a medical
19 professional. Moreover, Dr. Friedman's report contains a detailed
20 critique by both himself and by Dr. Servedio, who also signed his
21 report, of Dr. Scheinbaum's conclusions. None of this, however, is
22 addressed by the ALJ, who simply seemed to accept the summary of Dr.
23 Scheinbaum's apparent conclusion that Plaintiff has no psychiatric
24 diagnosis. Moreover, as Plaintiff's counsel aptly points out, the ALJ
25 selectively quoted from the opinion of Dr. Friedman, but omitted any
26 discussion of Dr. Friedman's conclusion that Plaintiff was totally
27 disabled from a psychiatric viewpoint. (AR 261.) Dr. Friedman found
28 that Plaintiff has slight to moderate impairment in his ability to

1 maintain a work pace appropriate to given work. This conclusion,
2 which also would have significant impact on Plaintiff's vocational
3 abilities if it were accepted, was seemingly ignored by the ALJ.

4 Finally, the ALJ's reliance upon the psychiatric evaluation
5 conducted by Dr. Ritvo on May 18, 2007 at the request of the
6 Department of Social Services, is also unsupportable, because Dr.
7 Ritvo apparently did nothing more than conduct a mental status
8 examination without doing any psychological testing whatsoever. (AR
9 341-345.)

10 For the foregoing reasons, on remand, the issue of whether
11 Plaintiff has a severe mental impairment will be properly reevaluated.

12 13 III

14 THE ALJ ERRED IN THE CREDIBILITY FINDINGS

15 The ALJ rejected Plaintiff's credibility, finding that his
16 assertions were internally inconsistent and incompatible with the
17 evidence of record, that although he contends he lacks the ability to
18 work, he has reported that he runs errands without assistance, engages
19 in walking on a daily basis, and performs household chores.
20 Furthermore, the ALJ found there is no evidence to support the level
21 of restrictions claimed by Plaintiff because they are inconsistent
22 with medical evidence. The ALJ finally detracted from Plaintiff's
23 credibility because of his past history of alcoholism. (AR 17.)

24 It is well established that an ALJ may reject a plaintiff's
25 testimony regarding severity of pain or other symptoms if, after a
26 claimant produces objective medical evidence of an impairment or
27 impairments sufficient to cause such pain, findings are made which set
28 forth specific, clear and convincing reasons for rejecting

1 credibility.

2 Here, Plaintiff certainly produced objective medical evidence
3 which could reasonably be expected to produce the symptoms of which he
4 complained. The reasons for rejecting his testimony, however, are
5 insufficient. The fact that Plaintiff is able to run errands, or walk
6 on a daily basis, or do some household chores is not related to the
7 level of exertion required on a sustained basis to perform productive
8 work. See Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989).

9 The finding that Plaintiff's credibility is weakened by a past
10 history of alcoholism is little more than a non sequitur, and the
11 Court will not devote any attention to it, other than indicating it
12 will be rejected, and will not be cited as a reason for detracting
13 from credibility on remand, unless specific and clear reasons are set
14 forth which tie a past history of alcoholism to a present lack of
15 credibility.

16 Finally, the ALJ's notation that Plaintiff's subjective claims
17 are not compatible with "the medical record as a whole" has the same
18 infirmity that the Court has previously noted because such a generic
19 finding is not amenable to judicial review. With regard to the
20 citation to specific opinions in the record, the Court has already
21 addressed the limitations of those opinions as a basis upon which to
22 rely in assessing Plaintiff's exertional capacities.

23 Plaintiff's credibility will be reassessed on remand pursuant to
24 correct legal standards.

25 //

26 //

27 //

28 //

1 For the foregoing reasons, this matter will be remanded for
2 further hearing consistent with this Memorandum Opinion.

3 **IT IS SO ORDERED.**

4
5 DATED: February 9, 2011 _____ /s/
6 VICTOR B. KENTON
7 UNITED STATES MAGISTRATE JUDGE
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28