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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DAVID PANDO,)	No. CV 10-1965 CW
)	
Plaintiff,)	DECISION AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner, Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner's denial of disability benefits. As discussed below, the court finds that the Commissioner's decision should be reversed and this matter remanded for further proceedings.

I. BACKGROUND

Plaintiff David Pando was born on August 25, 1952, and was fifty-six years old at the time of his administrative hearing. [Administrative Record ("AR") 28.] He has a seventh grade education and past relevant work experience as a construction worker. [AR 36.]

1 Plaintiff alleges disability on the basis of pain in his back, arm,
2 shoulder, and feet. [AR 113, 202.]

3 **II. PROCEEDINGS IN THIS COURT**

4 Plaintiff's complaint was lodged on March 18, 2010, and filed on
5 March 23, 2010. On September 14, 2010, Defendant filed an answer and
6 Plaintiff's Administrative Record ("AR"). On November 9, 2010, the
7 parties filed their Joint Stipulation ("JS") identifying matters not
8 in dispute, issues in dispute, the positions of the parties, and the
9 relief sought by each party. This matter has been taken under
10 submission without oral argument.

11 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

12 Plaintiff applied for a period of disability and disability
13 insurance benefits ("DIB") on March 12, 2008, alleging disability
14 since January 1, 2008. [AR 15]. After the application was denied
15 initially and on reconsideration, Plaintiff requested an
16 administrative hearing, which was held on March 9, 2009, before an
17 Administrative Law Judge ("ALJ"). [AR 25.] Plaintiff appeared with
18 counsel, and testimony was taken from Plaintiff, medical expert Arthur
19 Brovender, and vocational expert Sandra Schneider. [AR 26.] The ALJ
20 denied benefits in a decision dated March 31, 2009. [AR 12-22.]
21 Plaintiff sought review with the Appeals Council and submitted
22 additional evidence. [AR 2.] When the Appeals Council denied review
23 on February 19, 2010, the ALJ's decision became the Commissioner's
24 final decision. [AR 1.]

25 **IV. STANDARD OF REVIEW**

26 Under 42 U.S.C. § 405(g), a district court may review the
27 Commissioner's decision to deny benefits. The Commissioner's (or
28 ALJ's) findings and decision should be upheld if they are free of

1 legal error and supported by substantial evidence. However, if the
2 court determines that a finding is based on legal error or is not
3 supported by substantial evidence in the record, the court may reject
4 the finding and set aside the decision to deny benefits. See Aukland
5 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
6 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
7 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,
8 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
9 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada
10 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

11 "Substantial evidence is more than a scintilla, but less than a
12 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
13 which a reasonable person might accept as adequate to support a
14 conclusion." Id. To determine whether substantial evidence supports
15 a finding, a court must review the administrative record as a whole,
16 "weighing both the evidence that supports and the evidence that
17 detracts from the Commissioner's conclusion." Id. "If the evidence
18 can reasonably support either affirming or reversing," the reviewing
19 court "may not substitute its judgment" for that of the Commissioner.
20 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

21 V. DISCUSSION

22 A. THE FIVE-STEP EVALUATION

23 To be eligible for disability benefits a claimant must
24 demonstrate a medically determinable impairment which prevents the
25 claimant from engaging in substantial gainful activity and which is
26 expected to result in death or to last for a continuous period of at
27 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at
28 721; 42 U.S.C. § 423(d)(1)(A).

1 Disability claims are evaluated using a five-step test:

2 Step one: Is the claimant engaging in substantial
3 gainful activity? If so, the claimant is found not
4 disabled. If not, proceed to step two.

5 Step two: Does the claimant have a "severe" impairment?
6 If so, proceed to step three. If not, then a finding of not
7 disabled is appropriate.

8 Step three: Does the claimant's impairment or
9 combination of impairments meet or equal an impairment
10 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If
11 so, the claimant is automatically determined disabled. If
12 not, proceed to step four.

13 Step four: Is the claimant capable of performing his
14 past work? If so, the claimant is not disabled. If not,
15 proceed to step five.

16 Step five: Does the claimant have the residual
17 functional capacity to perform any other work? If so, the
18 claimant is not disabled. If not, the claimant is disabled.

19 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended
20 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107
21 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20
22 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or
23 "not disabled" at any step, there is no need to complete further
24 steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

25 Claimants have the burden of proof at steps one through four,
26 subject to the presumption that Social Security hearings are non-
27 adversarial, and to the Commissioner's affirmative duty to assist
28 claimants in fully developing the record even if they are represented
by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at
1288. If this burden is met, a prima facie case of disability is
made, and the burden shifts to the Commissioner (at step five) to
prove that, considering residual functional capacity ("RFC")¹, age,

¹ Residual functional capacity measures what a claimant can still do despite existing "exertional" (strength-related) and "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to

1 education, and work experience, a claimant can perform other work
2 which is available in significant numbers. Tackett, 180 F.3d at 1098,
3 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

4 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

5 Here, the ALJ found that Plaintiff had not engaged in substantial
6 gainful activity since his alleged disability onset date (step one);
7 that Plaintiff had "severe" impairments, namely disorder of the
8 cervical spine, disorder of the lumbar spine, and right shoulder pain
9 (step two); and that Plaintiff did not have an impairment or
10 combination of impairments that met or equaled a "listing" (step
11 three). [AR 17-18.] The ALJ found that Plaintiff had an RFC to
12 perform less than the full range of medium work, which included the
13 ability to stand, walk, or sit for six hours in an eight-hour workday,
14 with normal breaks; lift or carry fifty pounds occasionally and
15 twenty-five pounds frequently; climb stairs and ramps frequently but
16 no climbing ropes, ladders or scaffolds; and postural activities
17 occasionally, but with no overhead reaching. [AR 18.] The vocational
18 expert testified that a person with such an RFC could not perform
19 Plaintiff's past relevant work as a construction worker (step four).
20 [AR 20.] The vocational expert also testified that a person with
21 Plaintiff's RFC could make a vocational adjustment to other work
22 existing in significant numbers in the national economy, such as hand
23 packager and laundry worker (step five). Accordingly, Plaintiff was
24 found not "disabled" as defined by the Social Security Act. [AR 21.]

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26 work without directly limiting strength, and include mental, sensory,
27 postural, manipulative, and environmental limitations. Penny v.
28 Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155
n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a
nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,
765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 **C. ISSUES IN DISPUTE**

2 The parties' Joint Stipulation raises the following disputed
3 issues:

- 4 1. Whether the ALJ erred in failing to provide a discussion of
5 Mr. Pando's credibility as required by Social Security
6 ruling 96-7p;
- 7 2. Whether the ALJ erred in his analysis of the vocational
8 issues;
- 9 3. Whether the ALJ erred in failing to find that Mr. Pando has
10 a severe impairment to his feet;
- 11 4. Whether the ALJ's decision was based on an incomplete
12 record.

13 [JS 3].

14 As discussed below, Issue Three is dispositive.

15 **D. SEVERE IMPAIRMENT TO PLAINTIFF'S FEET**

16 The ALJ explicitly found at Step Two of the five-step disability
17 evaluation that Petitioner did not have a severe impairment relating
18 to his knee and foot pain. [AR 18.] Specifically, the ALJ found that
19 these conditions were not "severe, medically determinable
20 impairments," that Petitioner was treated conservatively for his
21 conditions, and that his pain was noted to have improved with the use
22 of support pads and night splints. [Id.] Accordingly, this impairment
23 was omitted from the ALJ's evaluation at Step Two. [AR 17.]

24 The record shows, however, that Plaintiff was treated for pain in
25 both feet during a visit to Dr. Raisa Heifets on June 11, 2008, who
26 then referred Plaintiff to a podiatrist. [AR 202.] In August 23, 2008,
27 Plaintiff was diagnosed with plantar fasciitis while being treated at
28 Arroyo Vista Family Health Center. [AR 213-214.] Plaintiff saw "some

1 improvement" with the use of support pads and night splints, but he
2 continued to experience pain that required cortisone injections. [AR
3 209.]

4 At step two of the five-step disability evaluation, an impairment
5 or combination of impairments may be found "not severe" only if the
6 evidence establishes a "slight abnormality that has no more than a
7 minimal effect on an individual's ability to work." Webb v. Barnhart,
8 433 F.3d 683, 686 (9th Cir. 2005)(quoting Smolen v. Chater, 80 F.3d
9 1273, 1290 (9th Cir. 1996)); see also Yuckert v. Bowen, 841 F.2d 303,
10 306 (9th Cir. 1988). If an ALJ is "unable to determine clearly the
11 effect of an impairment or combination of impairments on the
12 individual's ability to do basic work activities, the sequential
13 evaluation should not end with the not severe evaluation step" with
14 respect to that particular condition. Webb, 433 F.3d at 687 (quoting
15 SSR 85-28, 1985 WL 56856 at *4). Step two, then, involves a "de
16 minimis screening device used to dispose of groundless claims, and an
17 ALJ may find that a claimant lacks a medically severe impairment or
18 combination of impairments only when his conclusion is clearly
19 established by the medical evidence." Webb, 433 F.3d at 687
20 (citations omitted); see also Yuckert, 841 F.2d at 306 ("Despite the
21 deference usually accorded to the Secretary's application of
22 regulations, numerous appellate courts have imposed a narrow
23 construction upon the severity regulation applied here.").

24 Under this narrow standard for step two evaluations, the finding
25 that Plaintiff did not have a severe impairment of his feet is not
26 clearly established by the medical evidence. The record shows that
27 Plaintiff was diagnosed with a medically determinable condition,
28 received regular and continuous health treatments, and received

1 cortisone injections for pain. [AR 209-215.] Based on the existing
2 record, the evidence of Plaintiff's claim of feet impairment "is
3 sufficient to pass the de minimis threshold of step two." Webb, 433
4 F.3d at 687. Although the court "do[es] not intimate that [plaintiff]
5 will succeed in proving that he is disabled," the ALJ should have
6 continued the sequential analysis beyond step two with this particular
7 impairment "because there was not substantial evidence to show that
8 [plaintiff's] claim was groundless." Webb, 433 F.3d at 688.
9 Accordingly, the ALJ's finding at Step Two as to this impairment is
10 grounds for reversal, and the matter should be remanded for further
11 proceedings.²

12 **E. REMAND FOR FURTHER PROCEEDINGS**

13 The decision whether to remand for further proceedings is within
14 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,
15 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by
16 further proceedings, or where the record has been fully developed, it
17 is appropriate to exercise this discretion to direct an immediate
18 award of benefits. Harman, 211 F.3d at 1179 (decision whether to
19 remand for further proceedings turns upon their likely utility).
20 However, where there are outstanding issues that must be resolved
21 before a determination can be made, and it is not clear from the
22

23 ² Defendant argues that the ALJ did not commit reversible error
24 in this respect because, among other things, Plaintiff did not mention
25 any condition relating to his feet at the administrative hearing when
26 asked about his impairments. [JS 10.] However, the record does
27 clearly establish the existence of such a condition, so that the ALJ
28 had a duty to ensure that Plaintiff's claim was adequately developed
under these circumstances. See Sims v. Apfel, 530 U.S. 103, 110-111,
120 S. Ct. 2080, 147 L. Ed. 2d 80 (2000) ("Social Security proceedings
are inquisitorial rather than adversarial. It is the ALJ's duty to
investigate the facts and develop the arguments both for and against
granting benefits").

1 record that the ALJ would be required to find the claimant disabled if
2 all the evidence were properly evaluated, remand is appropriate. Id.
3 Here, as set out above in Issue Three, outstanding issues remain
4 before a finding of disability can be made.³ Accordingly, remand is
5 appropriate.

6 **VI. ORDERS**


7 Accordingly, **IT IS ORDERED** that:

8 1. The decision of the Commissioner is **REVERSED**.

9 2. This action is **REMANDED** to defendant, pursuant to Sentence
10 Four of 42 U.S.C. § 405(g), for further proceedings as discussed
11 above.

12 3. The Clerk of the Court shall serve this Decision and Order
13 and the Judgment herein on all parties or counsel.

14
15 DATED: February 10, 2011

16 
17 CARLA M. WOHRLE
18 United States Magistrate Judge
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26 ³ None of the remaining issues raised by Plaintiff in the Joint
27 Stipulation would warrant a finding of disability on the basis of the
28 current record even if resolved in Plaintiff's favor. Accordingly,
remand is the appropriate disposition of this appeal, and the court
does not need to reach the remaining disputed issues.