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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

DWIGHT D. GILBERT,	)	CV 13-02347-SH
	)	
Plaintiff,	)	MEMORANDUM DECISION
	)	AND ORDER
v.	)	
	)	
CAROLYN W. COLVIN,	)	
Commissioner,	)	
Social Security Administration,	)	
	)	
Defendant.	)	

This matter is before the Court for review of the decision by the Commissioner of Social Security denying plaintiff’s application for Disability Insurance Benefits and Supplemental Security Income. Pursuant to 28 U.S.C. § 636(c), the parties have consented that the case may be handled by the undersigned. The action arises under 42 U.S.C. § 405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the record before the Commissioner. The parties have filed their pleadings. The plaintiff has also filed a Brief in Support

1 of the Complaint, and the defendant has filed a Memorandum in Support of Motion  
2 for Summary Judgment as well as the certified Administrative Record. After  
3 reviewing the matter, the Court concludes that the decision of the Commissioner  
4 should be reversed and remanded.

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6 **I. BACKGROUND**

7 The plaintiff Dwight D. Gilbert filed applications for Disability Insurance  
8 Benefits and Supplemental Security Income payments under Title II and XVI of the  
9 Social Security Act. In his applications, Gilbert alleged an inability to work since  
10 March 7, 2004. (See Administrative Record [“AR”] 132-37). The Commissioner  
11 initially denied his applications. (See AR 83-94). A hearing on the claim was  
12 conducted on June 10, 2011. (See AR 35-61). On August 2, 2011, the  
13 Administrative Law Judge (“ALJ”) issued an unfavorable decision finding that  
14 Gilbert was not disabled. (See AR 21-34). Upon Gilbert’s request, the Appeals  
15 Council reviewed the ALJ’s decision. (See AR 4-7). The Appeals Council  
16 affirmed and adopted the findings and conclusions of the ALJ regarding whether  
17 Gilbert was disabled. (See AR 4-7).

18 Plaintiff makes one challenge to the ALJ’s Decision. He solely alleges the  
19 ALJ erred by failing to properly consider his testimony.

20  
21 **II. DISCUSSION**

22 Social Security Ruling (“SSR”) 96-7p states in relevant part:

23 “The regulations describe a two-step process for evaluating symptoms,  
24 such as pain, fatigue, shortness of breath, weakness, or nervousness:

25  
26 \* First, the adjudicator must consider whether there is an underlying  
27 medically determinable physical or mental impairment(s) ... that could  
28 reasonably be expected to produce the individual's pain or other

1 symptoms.

2 \* Second, once an underlying physical or mental impairment(s) that  
3 could reasonably be expected to produce the individual's pain or other  
4 symptoms has been shown, the adjudicator must evaluate the intensity,  
5 persistence, and limiting effects of the individual's symptoms to  
6 determine the extent to which the symptoms limit the individual's  
7 ability to do basic work activities. For this purpose, whenever the  
8 individual's statements about the intensity, persistence, or functionally  
9 limiting effects of pain or other symptoms are not substantiated by  
10 objective medical evidence, the adjudicator must make a finding on the  
11 credibility of the individual's statements based on a consideration of the  
12 entire case record. This includes the medical signs and laboratory  
13 findings, the individual's own statements about the symptoms, any  
14 statements and other information provided by treating or examining  
15 physicians or psychologists and other persons about the symptoms and  
16 how they affect the individual, and any other relevant evidence in the  
17 case record.”

18 The ALJ found that the Plaintiff’s medically determinable impairments<sup>1</sup>  
19 could reasonably be expected to cause the alleged symptoms, but that plaintiff’s  
20 statements concerning the intensity, persistence and limiting effects of these  
21 symptoms were not credible to the extent they were inconsistent with the residual  
22 functional capacity assessment in the decision. (See AR 28).

23 In his credibility analysis, among other evidence, the ALJ relied on evidence  
24 of purported non-compliance with prescribed treatment as a basis to question the  
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26 <sup>1</sup> (a) degenerative disc disease at C5-C6; (b) facet arthrosis at L5-S1 with retrolisthesis of L4 on  
27 L5; and (c) obesity. (See AR 26).

1 Plaintiff's credibility. For example, the ALJ found that (1) the Plaintiff had been  
2 instructed to follow a low fat diet and to exercise in order to lose weight; (2)  
3 however, contrary to doctor's instructions, Plaintiff had gained more weight without  
4 reasonable explanation; and (3) the Plaintiff acknowledged that his current diet and  
5 exercise was not what it needed to be to decrease his weight to a lower level.  
6 Additionally, the ALJ made the following findings: (1) the Plaintiff was diagnosed  
7 with chronic low back pain and obesity; (2) he had a body mass index score greater  
8 than 33; (3) he had gained over 80 pounds in the last few years; and (4)  
9 notwithstanding the weight gain and the body mass index, there were no opinions  
10 that reflected any functional limitations due to the condition. (See AR 28).

11  
12 Additionally, SSR 02-1p states in relevant part:

13 "14. How Do We Evaluate Failure To Follow Prescribed Treatment in  
14 Obesity Cases?"

15 Before failure to follow prescribed treatment for obesity can become  
16 an issue in a case, we must first find that the individual is disabled  
17 because of obesity or a combination of obesity and another  
18 impairment(s). Our regulations at 20 CFR 404.1530 and 416.930  
19 provide that, in order to get benefits, an individual must follow  
20 treatment prescribed by his or her physician if the treatment can restore  
21 the ability to work, unless the individual has an acceptable reason for  
22 failing to follow the prescribed treatment. We will rarely use 'failure  
23 to follow prescribed treatment' for obesity to deny or cease benefits.

24 SSR 82-59, 'Titles II and XVI: Failure To Follow Prescribed  
25 Treatment,' explains that we will find failure to follow prescribed  
26 treatment only when all of the following conditions exist:

- 27 \* The individual has an impairment(s) that meets the definition of  
28 disability, including the duration requirement, and
- \* A treating source has prescribed treatment that is clearly expected to  
restore the ability to engage in substantial gainful activity, and
- \* The evidence shows that the individual has failed to follow  
prescribed treatment without a good reason.

...

26 The treatment must be prescribed by a treating source, as defined in  
27 our regulations at 20 CFR 404.1502 and 416.902, not simply  
28 recommended. A treating source's statement that an individual  
"should" lose weight or has "been advised" to get more exercise is not  
prescribed treatment.

1 When a treating source has prescribed treatment for obesity, the  
2 treatment must clearly be expected to improve the impairment to the  
3 extent that the person will not be disabled. The goals of treatment for  
4 obesity are generally modest, and treatment is often ineffective.  
5 Therefore, we will not find failure to follow prescribed treatment  
6 unless there is clear evidence that treatment would be successful. The  
7 obesity must be expected to improve to the point at which the  
8 individual would not meet our definition of disability, considering not  
9 only the obesity, but any other impairment(s).

6 Finally, even if we find that a treating source has prescribed treatment  
7 for obesity, that the treatment is clearly expected to restore the ability  
8 to engage in SGA, and that the individual is not following the  
9 prescribed treatment, we must still consider whether the individual has  
10 a good reason for doing so. In making this finding, we will follow the  
11 guidance in our regulations and SSR 82-59, which provide that  
12 acceptable justifications for failing to follow prescribed treatment  
13 include, but are not limited to, the following:

10 \* The specific medical treatment is contrary to the teaching and tenets  
11 of the individual's religion.

12 \* The individual is unable to afford prescribed treatment that he or she  
13 is willing to accept, but for which free community resources are  
14 unavailable.

14 \* The treatment carries a high degree of risk because of the enormity  
15 or unusual nature of the procedure.”

16 The record reveals no concrete “prescribed treatment” for the Plaintiff’s  
17 obesity as required by SSR 02-1p. During each visit with the treating doctor, it  
18 appears that the Plaintiff was given mere suggestions to exercise more, change diet  
19 and lose weight, rather than being prescribed a treatment. (See, e.g., AR 191, 198,  
20 199). Furthermore, the record lacks support of any certainty whether the treatment  
21 suggestions regarding obesity would be “clearly expected to restore [Plaintiff’s]  
22 ability to engage in substantial gainful activity.” Lastly, even if it was established  
23 that there was a prescribed treatment for the Plaintiff’s obesity and the Plaintiff did  
24 not follow it, the ALJ was required to consider whether the Plaintiff had a good  
25 reason for doing so. The Plaintiff testified that he was not able to exercise because  
26 of pain (AR 48-49), and that he tried to follow the doctor’s advice to lose weight by  
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1 walking 30 minutes a day but could not do it without being in really bad pain (AR  
2 46-47). However, the ALJ made no mention of that testimony.

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4 The Ninth Circuit has held that where there is evidence of obesity, the ALJ  
5 must determine the effect of the plaintiff's obesity upon his other impairments,  
6 ability to work, and general health. Celaya v. Halter, 332 F.3d 1177, 1182 (9th Cir  
7 2003); See also SSR 02-1p (requiring an ALJ to consider effects of obesity in all  
8 steps of the 5-step sequential evaluation); See also Burch v. Barnhart, 400 F.3d 676,  
9 681-82 (9th Cir. 2005) (distinguishing Celaya and noting that the ALJ must only  
10 consider obesity when the record demonstrates that obesity exacerbates other  
11 impairments).

12 The ALJ made no specific findings about the effect the Plaintiff's obesity had  
13 upon his ability to work and his general health. In his decision, the ALJ said:  
14 "Notwithstanding the weight gain and a body mass index score greater than 30,  
15 there are no opinions that reflect functional limitations due to [obesity]." (See AR  
16 26).

17 However, there is certainly evidence in the record that the Plaintiff's obesity  
18 affected other impairments. For example, the ALJ found that the Plaintiff's "obesity  
19 exacerbates his low back pain." The Plaintiff also testified that he tried to follow  
20 the doctor's advice to lose weight by walking 30 minutes a day but could not do it  
21 without being in serious pain. (See AR 46-47). Therefore, the record shows that  
22 obesity had effects on other impairments of the Plaintiff, however, the ALJ failed  
23 to make specific findings as to its effects on the Plaintiff's ability to work and his  
24 general health.

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26 In light of SSR 02-1p, SSR 82-59, SSR 96-7p and the Ninth Circuit authority  
27 in Celaya and Burch, the ALJ must make specific findings regarding the effects of  
28 obesity on the Plaintiff's other impairments, his general health and ability to work

1 and then use those findings in assessing the Plaintiff's credibility. The court,  
2 therefore, reverses the ALJ's decision and remands with direction to the ALJ to  
3 make the proper findings regarding obesity consistent with this decision.

4 ORDER

5 For the foregoing reasons, the decision of the Commissioner is reversed, and  
6 the matter is remanded for further proceedings in accordance with this decision,  
7 pursuant to Sentence 4 of 42 U.S.C. § 405(g).  
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9 DATED: February 6, 2014

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13 STEPHEN J. HILLMAN  
14 UNITED STATES MAGISTRATE JUDGE  
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