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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SALVADOR NIETO,
Plaintiff,
v.
CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

Case No. CV 14-5544 JC
MEMORANDUM OPINION AND
ORDER OF REMAND

I. SUMMARY

On July 17, 2014, plaintiff Salvador Nieto (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have consented to proceed before the undersigned United States Magistrate Judge.

This matter is before the Court on the parties’ cross motions for summary judgment, respectively (“Plaintiff’s Motion”) and (“Defendant’s Motion”). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; July 22, 2014 Case Management Order ¶ 5.

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1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is REVERSED AND REMANDED for further proceedings
3 consistent with this Memorandum Opinion and Order of Remand.

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
5 **DECISION**

6 On October 17, 2008, plaintiff filed an application for Disability Insurance
7 Benefits. (Administrative Record (“AR”) 34, 226). Plaintiff asserted that he
8 became disabled on August 2, 1999, due to injuries from a construction accident,
9 problems with his right leg, back, and right shoulder, dislocated disc in back with
10 swelling, anxiety, short temper, memory loss, irritability, insomnia, and
11 depression. (AR 12, 34, 252). The Administrative Law Judge (“ALJ”) examined
12 the medical record and heard testimony from plaintiff (who was represented by
13 counsel) and a vocational expert on July 6, 2010. (AR 106-43). On July 28, 2010,
14 the ALJ determined that plaintiff was not disabled through December 31, 2004
15 (*i.e.*, the date last insured). (AR 34-41).

16 On February 11, 2012, the Appeals Council granted review, vacated the
17 ALJ’s July 28, 2010 decision, and remanded the matter for further administrative
18 proceedings. (AR 12, 146-47).

19 On August 28, 2012, the ALJ again examined the medical record and also
20 heard testimony from plaintiff (who was represented by counsel), a medical
21 expert, and a vocational expert. (AR 72-104).

22 On October 30, 2012, the ALJ again determined that plaintiff was not
23 disabled through the date last insured.¹ (AR 12-20). Specifically, the ALJ found:
24 (1) plaintiff suffered from the following severe impairments: sclerosis of the right
25 thigh, status post trauma, degenerative disc disease of the lumbar spine, and right
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28 ¹The ALJ stated that her July 28, 2010 decision was adopted and incorporated by
reference into, and thus supplemented by, her October 30, 2012 decision. (AR 12).

1 shoulder impingement syndrome (AR 14); (2) plaintiff's impairments, considered
2 singly or in combination, did not meet or medically equal a listed impairment (AR
3 15-16); (3) plaintiff retained the residual functional capacity to perform light work
4 (20 C.F.R. § 404.1567(b) with additional limitations² (AR 16); (4) plaintiff could
5 not perform his past relevant work (AR 19); (5) there are jobs that exist in
6 significant numbers in the national economy that plaintiff could perform,
7 specifically Counter Clerk (photo finishing) and Cashier II, as well as Order Clerk
8 (food and beverage industry) and Sticker "[i]f [plaintiff] could perform the work
9 within the [same] residual functional capacity at the sedentary level of exertion"
10 (AR 19-20); and (6) plaintiff's allegations regarding his limitations were not
11 credible to the extent they were inconsistent with the ALJ's residual functional
12 capacity assessment (AR 17).

13 The Appeals Council denied plaintiff's application for review of the ALJ's
14 October 30, 2012 decision. (AR 1).

15 **III. APPLICABLE LEGAL STANDARDS**

16 **A. Sequential Evaluation Process**

17 To qualify for disability benefits, a claimant must show that the claimant is
18 unable "to engage in any substantial gainful activity by reason of any medically
19 determinable physical or mental impairment which can be expected to result in
20 death or which has lasted or can be expected to last for a continuous period of not
21 less than 12 months." Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012)
22 (quoting 42 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted). The
23 impairment must render the claimant incapable of performing the work the
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26 ²The ALJ determined that plaintiff could (i) lift and carry 20 pounds occasionally and 10
27 pounds frequently; (ii) stand or walk four hours and sit six hours in an eight-hour work day with
28 an option to sit or stand (switching positions once per hour); (iii) "occasionally perform postural
work functions (e.g., climbing, but no ladders, ropes or scaffolds, kneeling, stooping, balancing,
crouching or crawling)"; and (iv) perform occasional overhead reaching. (AR 16).

1 claimant previously performed and incapable of performing any other substantial
2 gainful employment that exists in the national economy. Tackett v. Apfel, 180
3 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

4 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
5 sequential evaluation process:

- 6 (1) Is the claimant presently engaged in substantial gainful activity? If
7 so, the claimant is not disabled. If not, proceed to step two.
- 8 (2) Is the claimant's alleged impairment sufficiently severe to limit
9 the claimant's ability to work? If not, the claimant is not
10 disabled. If so, proceed to step three.
- 11 (3) Does the claimant's impairment, or combination of
12 impairments, meet or equal an impairment listed in 20 C.F.R.
13 Part 404, Subpart P, Appendix 1? If so, the claimant is
14 disabled. If not, proceed to step four.
- 15 (4) Does the claimant possess the residual functional capacity to
16 perform claimant's past relevant work? If so, the claimant is
17 not disabled. If not, proceed to step five.
- 18 (5) Does the claimant's residual functional capacity, when
19 considered with the claimant's age, education, and work
20 experience, allow the claimant to adjust to other work that
21 exists in significant numbers in the national economy? If so,
22 the claimant is not disabled. If not, the claimant is disabled.

23 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
24 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920); see also Molina, 674 F.3d at
25 1110 (same).

26 The claimant has the burden of proof at steps one through four, and the
27 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262
28 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also Burch

1 v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (claimant carries initial burden of
2 proving disability).

3 **B. Standard of Review**

4 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
5 benefits only if it is not supported by substantial evidence or if it is based on legal
6 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
7 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457
8 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
9 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
10 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
11 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
12 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

13 To determine whether substantial evidence supports a finding, a court must
14 “consider the record as a whole, weighing both evidence that supports and
15 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.
16 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d
17 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
18 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that
19 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

20 **IV. DISCUSSION**

21 Plaintiff contends that the ALJ improperly evaluated the credibility of his
22 subjective complaints. (Plaintiff’s Motion at 8-10). The Court agrees. As the
23 Court cannot find that the ALJ’s error was harmless, a remand is warranted.

24 **A. Pertinent Law**

25 An ALJ is not required to believe every allegation of disabling pain or other
26 non-exertional impairment. Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007)
27 (citing Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). “To determine whether
28 a claimant’s testimony regarding subjective pain or symptoms is credible, an ALJ

1 must engage in a two-step analysis.” Lingenfelter v. Astrue, 504 F.3d 1028,
2 1035-36 (9th Cir. 2007). “First, the ALJ must determine whether the claimant has
3 presented objective medical evidence of an underlying impairment ‘which could
4 reasonably be expected to produce the pain or other symptoms alleged.’” Id.
5 (quoting Bunnell v. Sullivan, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)).

6 “Second, if the claimant meets this first test, and there is no evidence of
7 malingering, ‘the ALJ can reject the claimant’s testimony about the severity of
8 [his] symptoms only by offering specific, clear and convincing reasons for doing
9 so.’” Id. at 1036 (citations omitted). “In making a credibility determination, the
10 ALJ ‘must specifically identify what testimony is credible and what testimony
11 undermines the claimant’s complaints.’” Greger v. Barnhart, 464 F.3d 968, 972
12 (9th Cir. 2006) (citation omitted). The ALJ’s credibility findings “must be
13 sufficiently specific to allow a reviewing court to conclude the ALJ rejected the
14 claimant’s testimony on permissible grounds and did not arbitrarily discredit the
15 claimant’s testimony.” Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004).

16 To find a claimant not credible, an ALJ must rely either on reasons
17 unrelated to the subjective testimony (*e.g.*, reputation for dishonesty), internal
18 contradictions in the claimant’s statements and testimony, or conflicts between the
19 claimant’s testimony and the claimant’s conduct (*e.g.*, daily activities, work
20 record, unexplained or inadequately explained failure to seek treatment or to
21 follow prescribed course of treatment). Orn, 495 F.3d at 636; Robbins, 466 F.3d
22 at 883; Burch, 400 F.3d at 680-81; Social Security Ruling 96-7p. Although an
23 ALJ may not disregard a claimant’s testimony solely because it is not substantiated
24 affirmatively by objective medical evidence, the lack of medical evidence is a
25 factor that the ALJ may consider in assessing credibility. Burch, 400 F.3d at 681.

26 Questions of credibility and resolutions of conflicts in the testimony are
27 functions solely of the Commissioner. Greger, 464 F.3d at 972. Accordingly, if
28 the ALJ’s interpretation of the claimant’s testimony is reasonable and is supported

1 by substantial evidence, it is not the court’s role to “second-guess” it. Rollins v.
2 Massanari, 261 F.3d 853, 857 (9th Cir. 2001) (citation omitted).

3 **B. Analysis**

4 Here, none of the reasons the ALJ provided for discounting plaintiff’s
5 credibility is clear and convincing.

6 First, the ALJ stated that plaintiff had been given “conservative” medical
7 care because “surgical [treatment] options” had been “discussed” but never
8 “authorized.” (AR 17). Receipt of only conservative treatment can undermine the
9 credibility of a claimant’s subjective complaints. See, e.g., Parra v. Astrue, 481
10 F.3d 742, 751 (9th Cir. 2007), cert. denied, 552 U.S. 1141 (2008) (citation
11 omitted). Here, however, the ALJ’s characterization of plaintiff’s treatment as
12 “conservative” is not supported by substantial evidence. For example, the ALJ
13 noted that plaintiff “underwent a series of epidural injections in the lumbar spine
14 after 2004” (*i.e.*, after the date last insured). (AR 17) (emphasis added). Medical
15 records also reflect, however, that plaintiff was given several epidural steroid
16 injections in 2000, and in February 2001 a catheter was placed in plaintiff’s
17 lumbar spine to permit epidural infusion of Marcaine (an anesthetic). (AR 539,
18 547-48). Plaintiff’s testimony corroborates that he received multiple epidural
19 injections before the date last insured. (AR 124-26). In addition, at the July 6,
20 2010 hearing, plaintiff testified that his doctor had prescribed him “a lot of pills
21 for the pain” and that plaintiff had taken pain medication “every day,” but the
22 medication “[did not] do that much,” and made him feel dizzy and have blurred
23 vision. (AR 122). On the whole, the foregoing is insufficient to support a finding
24 that plaintiff received only “conservative” treatment. See, e.g., Huerta v. Astrue,
25 2009 WL 2241797, *4 (C.D. Cal. July 22, 2009) (rejecting ALJ’s finding that
26 claimant’s pain management treatment, which included “a series of epidural
27 steroid injections,” constituted conservative treatment) (citations omitted). In
28 addition, defendant points to no persuasive authority that would permit the ALJ to

1 infer that plaintiff received only “conservative” medical care from an
2 administrative decision not to authorize unspecified “surgical options” requested
3 in plaintiff’s worker’s compensation case.

4 Second, the ALJ also stated that “[plaintiff] could not provide any cogent
5 reason to explain why he was not approved for surgery.” (AR 17). At the July 6,
6 2010, hearing, however, plaintiff testified that he simply did not know why the
7 requested surgery was not authorized. (AR 132-34). Defendant does not explain
8 how plaintiff’s mere lack of knowledge about the basis for an administrative
9 determination made by some unspecified other individual in plaintiff’s workers’
10 compensation case reflects any inconsistency in plaintiff’s subjective symptom
11 statements or reveals any other clear and convincing reason for concluding that
12 plaintiff has been less than candid in his Social Security case.

13 Third, the ALJ stated that “it was difficult for [plaintiff] to describe in detail
14 his subjective symptoms and limitations prior to 2005. . . .” (AR 17). The ALJ’s
15 findings in this respect, however, are not supported by substantial evidence. The
16 transcript of the July 6, 2010 hearing reflects that before examining plaintiff about
17 his subjective symptoms and limitations, the ALJ explained at length that his
18 questions would be directed to “[plaintiff’s] condition . . . from the time [of his]
19 accident until the end of 2004,” and that plaintiff needed to limit his testimony to
20 that period of time only. (AR 114-15). Defendant points to nothing in the record
21 which plausibly suggests that plaintiff failed to follow the ALJ’s repeated
22 instructions. To the contrary, when the ALJ asked plaintiff to describe the
23 condition of his right leg “at the end of 2004,” plaintiff directly responded “I was
24 dragging myself with a lot of pain.” (AR 117). When the ALJ followed up “[a]nd
25 you were still having swelling at the time, at the end of 2004[,]” plaintiff answered
26 “[y]eah,” and explained “in that year I believe, if I recall . . . [it] was very painful.”
27 (AR 118) (emphasis added). When the ALJ reiterated “so I think before you said
28 that in 2004 you were still having a lot of pain, a lot of swelling in your right leg

1 still and that limited your – the amount of walking you could do,” plaintiff
2 answered “[y]eah.” (AR 119) (emphasis added). Also, when the ALJ asked about
3 “any other problems” plaintiff had besides with his right leg and right shoulder –
4 emphasizing twice that the ALJ “mean[t] through the end of 2004” – plaintiff
5 responded accordingly. (AR 119-20) (emphasis added).

6 Plaintiff responded similarly to questions about his functional limitations.
7 For example, when the ALJ asked plaintiff how his leg injury initially affected his
8 ability to walk, plaintiff testified that he had swelling as his injury “started” to heal
9 and as a result he “started to have a problem [walking].” (AR 115-16). When the
10 ALJ asked plaintiff “how long did the swelling last,” plaintiff sufficiently
11 explained that the swelling would come and go, and would be “well for a week,”
12 but would then cause plaintiff difficulty “for another three weeks.” (AR 117).
13 The ALJ specifically asked “how was your walking affected at the time?” (AR
14 118) (emphasis added). Plaintiff responded directly “[m]y walking was . . . to my
15 knowledge I was walking okay, but then I lost my balance. . . my whole leg started
16 burning . . . all the way to my toes. I had to stop walking for –” (AR 118). The
17 ALJ also asked “How long can you – how long could you be on your feet, or how
18 far could you walk at any given time during that period of time?” (AR 118)
19 (emphasis added). Plaintiff answered “I was walking [sic] about, if I recall,
20 between 10 minutes to 15 minutes before I started feel [sic] any pain.” (AR 119)
21 (emphasis added). When plaintiff’s attorney asked, for the period “[b]etween
22 1999 after the accident and the end of 2004,” how long plaintiff could sit at one
23 time without needing to stand, plaintiff answered that “at that time” he was able to
24 sit for up to half an hour, but as time passed his ability for prolonged sitting
25 decreased to 20 minutes at a time. (AR 130) (emphasis added).

26 To the extent it appeared that plaintiff was not following the ALJ’s repeated
27 instructions to confine his answers to the relevant time period, or that plaintiff was
28 otherwise confused by the ALJ’s questions about his subjective symptoms and

1 limits, the ALJ should have cleared up any resulting ambiguities when they arose
2 at the hearing.³ See. e.g., Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir.
3 2001) (citation omitted) (Although plaintiff bears the burden of proving disability,
4 the ALJ has an affirmative duty to assist the claimant in developing the record
5 “when there is ambiguous evidence or when the record is inadequate to allow for
6 proper evaluation of the evidence.”).

7 Finally, since the ALJ did not provide any other clear and convincing reason
8 for discounting plaintiff’s credibility, the ALJ’s only remaining reason – lack of
9 objective medical evidence to support plaintiff’s subjective complaints (AR 17) –
10 is insufficient to support the ALJ’s credibility determination. See Burch, 400 F.3d
11 at 681 (Lack of objective medical evidence to support subjective symptom
12 allegations cannot form the sole basis for discounting pain testimony.).

13 The Court cannot conclude that the ALJ’s error was harmless. For example,
14 plaintiff testified, in part, that due to severe pain he could walk only about 10 to 15
15 minutes before he needed to take a break and rest, and could sit for only half an
16 hour or less at a time. (AR 119, 130). The vocational expert testified, however,
17 that there would be no work available if plaintiff (or a hypothetical individual with
18 the same characteristics as plaintiff) “was off task for 10 percent of every hour due
19 to pain. . . .” (AR 103). Accordingly, the Court cannot “confidently conclude that
20 no reasonable ALJ, when fully crediting the [plaintiff’s] testimony, could have
21 reached a different disability determination.” Stout, 454 F.3d at 1055-56.

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25 ³The transcript from the July 6, 2010 hearing suggests that plaintiff may have responded
26 to several questions about his subjective symptoms and limitations with a present tense verb
27 instead of using the past tense which would likely have been more precise. To the extent
28 plaintiff had difficulty testifying clearly in English, however, the ALJ should have sought
clarification of any consequent ambiguity at the hearing, especially considering that, as the ALJ
noted, plaintiff had previously needed the assistance of a Spanish language interpreter during a
worker’s compensation doctor’s visit. (AR 108-09).

1 Therefore, remand is warranted to permit the ALJ to reassess plaintiff's
2 credibility.

3 **V. CONCLUSION⁴**

4 For the foregoing reasons, the decision of the Commissioner of Social
5 Security is reversed in part, and this matter is remanded for further administrative
6 action consistent with this Opinion.⁵

7 LET JUDGMENT BE ENTERED ACCORDINGLY.

8 DATED: November 25, 2014

9 /s/

10 Honorable Jacqueline Chooljian
11 UNITED STATES MAGISTRATE JUDGE
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15 ⁴The Court need not, and has not adjudicated plaintiff's other challenges to the ALJ's
16 decision, except insofar as to determine that a reversal and remand for immediate payment of
17 benefits would not be appropriate. On remand, however, the Commissioner may wish to reassess
18 plaintiff's residual functional capacity which currently (i) does not contain all of the limitations
19 the ALJ included in the hypothetical question posed to the vocational expert at the hearing
20 (compare AR 95 [hypothetical question at hearing which limited above shoulder activity with the
21 right upper extremity to two to five pounds and precluded work around "unprotected heights"]
22 with AR 16 (residual functional capacity assessment in ALJ's October 30, 2012 decision which
23 did not); and (ii) provides an ambiguous description of plaintiff's postural limitations (AR 16).
24 The Commissioner may also wish to revisit the ALJ's step five analysis which, among other
25 things, appears erroneously to rely on representative occupations that were provided by the
26 vocational expert at the first hearing in response to a different hypothetical question, and which
27 also contains several incorrect job numbers.

28 ⁵When a court reverses an administrative determination, "the proper course, except in rare
circumstances, is to remand to the agency for additional investigation or explanation."
Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and
quotations omitted). Remand is proper where, as here, "additional proceedings can remedy
defects in the original administrative proceeding. . . ." Garrison v. Colvin, 759 F.3d 995, 1019
(9th Cir. 2014) (citation and internal quotation marks omitted); see also Connett v. Barnhart, 340
F.3d 871, 876 (9th Cir. 2003) (remand is an option where the ALJ stated invalid reasons for
rejecting a claimant's excess pain testimony).