UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DWAYNE NEAL, Plaintiff, v. CAROLYN W. COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION, Defendant.	No. CV 15-4179-PLA **MEMORANDUM OPINION AND ORDER**

I.

PROCEEDINGS

Plaintiff filed this action on June 3, 2015, seeking review of the Commissioner's denial of his applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") payments. The parties filed Consents to proceed before the undersigned Magistrate Judge on June 30, 2015, and July 14, 2015. Pursuant to the Court's Order, the parties filed a Joint Stipulation on February 10, 2016, 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 July 5, 1971. [Administrative Record ("AR") at 13, 157, 161.] He has past relevant work experience as a bus driver and construction laborer. [AR at 13, 41.]

On July 10, 2013, plaintiff filed an application for a period of disability and DIB, and an application for SSI payments, alleging that he has been unable to work since June 14, 2013. [AR at 13, 157-60, 161-68.] After his applications were denied initially and upon reconsideration, plaintiff timely filed a request for a hearing before an Administrative Law Judge ("ALJ"). [AR at 19, 104-05.] A hearing was held on November 17, 2014, at which time plaintiff appeared represented by an attorney, and testified on his own behalf. [AR at 26-45.] A vocational expert ("VE") also testified. [AR at 41-43.] On January 15, 2015, the ALJ issued a decision concluding that plaintiff was not under a disability from June 14, 2013, the alleged onset date, through January 15, 2015, the date of the decision. [AR at 13-21.] Plaintiff requested review of the ALJ's decision by the Appeals Council. [AR at 6-7.] When the Appeals Council denied plaintiff's request for review on April 10, 2015 [AR at 1-5], the ALJ's decision became the final decision of the Commissioner. See Sam v. Astrue, 550 F.3d 808, 810 (9th Cir. 2008) (per curiam) (citations omitted). 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. Berry v. Astrue, 622 F.3d 1228, 1231 (9th Cir. 2010) (citation omitted).

"Substantial evidence means more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1159 (9th Cir. 2008) (citation and internal quotation marks omitted); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998)

(same). 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 as supporting evidence. Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001) (citation omitted); see Ryan v. Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008) ("[A] reviewing court must consider the entire record as a whole and may not affirm simply by isolating a specific quantum of supporting evidence.") (citation and internal quotation marks omitted). "Where evidence is susceptible to more than one rational interpretation, the ALJ's decision should be upheld." Ryan, 528 F.3d at 1198 (citation and internal quotation marks omitted); see Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006) ("If the evidence can support either affirming or reversing the ALJ's conclusion, [the reviewing court] may not substitute [its] judgment for that of the ALJ.") (citation omitted).

IV.

THE EVALUATION OF DISABILITY

Persons are "disabled" for purposes of receiving Social Security benefits if they are unable to engage in any substantial gainful activity owing to a physical or mental impairment that is expected to result in death or which has lasted or is expected to last for a continuous period of at least twelve months. 42 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

A. THE FIVE-STEP EVALUATION PROCESS

The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995), as amended April 9, 1996. In the first step, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity; if so, the claimant is not disabled and the claim is denied. Id. If the claimant is not currently engaged in substantial gainful activity, the second step requires the Commissioner to determine whether the claimant has a "severe" impairment or combination of impairments significantly limiting his ability

to do basic work activities; if not, a finding of nondisability is made and the claim is denied. Id. If the claimant has a "severe" impairment or combination of impairments, the third step requires the Commissioner to determine whether the impairment or combination of impairments meets or equals an impairment in the Listing of Impairments ("Listing") set forth at 20 C.F.R. part 404, subpart P, appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id. If the claimant's impairment or combination of impairments does not meet or equal an impairment in the Listing, the fourth step requires the Commissioner to determine whether the claimant has sufficient "residual functional capacity" to perform his past work; if so, the claimant is not disabled and the claim is denied. Id. The claimant has the burden of proving that he is unable to perform past relevant work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a prima facie case of disability is established. Id. The Commissioner then bears the burden of establishing that the claimant is not disabled, because he can perform other substantial gainful work available in the national economy. Id. The determination of this issue comprises the fifth and final step in the sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

B. THE ALJ'S APPLICATION OF THE FIVE-STEP PROCESS

At step one, the ALJ found that plaintiff had not engaged in substantial gainful activity since June 14, 2013, the alleged onset date.[1] [AR at 15.] At step two, the ALJ concluded that plaintiff has the severe impairments of insulin dependent diabetes mellitus; chronic obstructive pulmonary disease ("COPD"); tobacco abuse; and hypertension. [Id.] At step three, the ALJ determined that plaintiff does not have an impairment or a combination of impairments that meets or medically equals any of the impairments in the Listings. [AR at 15-16.] The ALJ further found that plaintiff retained the residual functional capacity ("RFC")[2] to perform sedentary work as defined in 20

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[1] The ALJ concluded that plaintiff meets the insured status requirements of the Social Security Act through December 31, 2017. [AR at 15.]

[2] RFC is what a claimant can still do despite existing exertional and nonexertional (continued...)

C.F.R. §§ 404.1567(a) and 416.967(a),[3] except for occasional bending/stooping, and preclusion from exposure to pulmonary irritants and to temperature extremes. [AR at 16.] At step four, based on plaintiff's RFC and the testimony of the VE, the ALJ concluded that plaintiff is unable to perform his past relevant work as a bus driver and construction laborer. [AR at 19, 41-42.] At step five, based on plaintiff's RFC, vocational factors, and the VE's testimony, the ALJ found that there are jobs existing in significant numbers in the national economy that plaintiff can perform, including work as an "assembler" (Dictionary of Occupational Titles ("DOT") No. 706.684-030), and "toy stuffer" (DOT No. 731.685-014). [AR at 20, 41-43.] Accordingly, the ALJ determined that plaintiff was not disabled at any time from the alleged onset date of June 14, 2013, through January 15, 2015, the date of the decision. [AR at 32.]

V.

THE ALJ'S DECISION

Plaintiff contends that the ALJ erred when he: (1) considered whether plaintiff met or equaled Listing 3.02; (2) considered the opinion evidence of treating physician Genevieve Moya, M.D.; and (3) considered plaintiff's subjective symptom testimony. [Joint Stipulation ("JS") at 4.] As set forth below, the Court agrees with plaintiff, in part, and remands for further proceedings.

A. LISTING 3.02

Plaintiff contends that his November 3, 2014, pulmonary function test demonstrates that

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[2](...continued)
limitations. See Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). "Between steps three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which the ALJ assesses the claimant's residual functional capacity." Massachi v. Astrue, 486 F.3d 1149, 1151 n.2 (9th Cir. 2007) (citation omitted).

[3] "Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 C.F.R. § 404.1567(a), 416.967(a).

he meets Listing 3.02, "chronic pulmonary insufficiency." [JS at 5-6.] According to plaintiff, in order for an individual whose height without shoes is between 66 and 67 inches to meet Listing 3.02, the forced vital capacity ("FVC") test result must be 1.55 or less, the forced expiratory volume in the first second ("FEV1") test result must be 1.35 or less, or the single breath diffusing capacity of the lungs for carbon monoxide ("DLCO") test result must be 10.5 or less. [JS at 5-6 (citing Listing 3.02A, 3.02B and 3.02C).]

Plaintiff's November 3, 2014, pulmonary function test results found, in relevant part, that plaintiff had an FVC reading of 1.25; an FEV1 reading of 1.02; and a DLCO reading of 9.5.[4] [AR at 721.] Comments on the report interpreting the results state that "[t]here is a *severe restrictive* lung defect. There is a *severe* decrease in diffusing capacity." [AR at 721 (emphases added).] And, after reviewing the November 2014 test results, Dr. Lim requested authorization for a portable gaseous oxygen system.[5] [AR at 722, 825.] At the hearing, counsel argued that although the readings in August 2013 were "borderline," the fact that plaintiff did not respond to the bronchodilator is "somewhat telling as far as his condition is concerned," and that the November 2014 findings were themselves at Listing levels. [AR at 43-44.] Counsel further argued that plaintiff also equaled Listing 3.02 if his "co-morbidities of diabetes and hypertension" were taken into consideration. [AR at 44.] Counsel pointed out that in October 2014, the treating physician, Dr. Moya, had completed a Listings Questionnaire that was consistent with the argument that plaintiff met or equaled Listing 3.02, and in September 2014, Dr. Moya had determined that plaintiff was capable of only a "significantly reduced range of sedentary" work. [Id. (citing AR at 304-05, 324-31, 628, 721).] Both of Dr. Moya's opinions were issued prior to the November 2014 pulmonary function test results. Here, plaintiff contends that based on the November 3, 2014, test results, he meets the requirements of Listing 3.02 "three different ways." [JS at 6.]

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[4] More than a year earlier, an August 2013 pulmonary function test showed FVC readings of 1.61 and 1.71 liters before and after administration of a bronchodilator; an FEV1 of 1.43 with no change with the bronchodilator; and a DLCO of 13.5. [AR at 628.]

[5] The record shows that the request was denied "because it is not a covered benefit." [AR at 825.]

Where disability is alleged under Listing 3.02, pulmonary function tests are performed under the protocols set forth in 20 C.F.R. pt. 404, subpt. P, app. 1, §§ 3.00E ("Listing 3.00E") and 3.00F ("Listing 3.00F"). Listing 3.00E requires the following protocols: (1) the reported forced respiratory maneuver (FVC or FEV1) "should represent the largest of at least three satisfactory forced expiratory maneuvers"; and (2) "[s]pirometry should be repeated after administration of an aerosolized bronchodilator," if the pre-bronchodilator FEV1 value is less than 70 percent of the predicted normal value. Listing 3.00E also provides that where the use of a bronchodilator is indicated based on the assessed FEV1 value, "[p]ulmonary function studies performed to assess airflow obstruction without testing after bronchodilators cannot be used to assess levels of impairment in the range that prevents any gainful work activity. . . ." Additionally, DLCO results should represent the mean of at least two acceptable measurements, and the two acceptable tests should be "within 10 percent of each other or 3 ml CO(STPD)/min/mm Hg, whichever is larger." Listing 3.00F.

Defendant argues that Listing 3.00E requires "three instances of [FVC or FEV1] testing," and that plaintiff has only had two instances of testing: one in August 2013, and the other in November 2014.[6] [AR at 6-7.] Plaintiff responds that because the November 2014 report states that the results are "ACCEPTABLE and REPRODUCIBLE," and that reproducibility is a term of art describing the range of results from multiple tests,[7] the question is raised as to how many administrations of the various tests actually occurred at the testing in November 2014, i.e., consistent with the protocols, there must have been multiple tests to meet the requirements for

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[6] Defendant makes a similar argument regarding the DLCO results -- i.e., that the protocol requirement that the DLCO value used for adjudication should represent the average of at least two acceptable measurements that are within 10 percent of each other, suggests that it is appropriate to average plaintiff's August 2013 and November 2014 DLCO score results and, therefore, plaintiff's DLCO scores did not meet the testing requirements as they were not within ten percent of each other or 3 ml CO(STPD)/min/mm HG. [JS at 8 (citing Listing 3.00F)].

[7] Listing 3.00E specifically provides that "[a] value is considered reproducible if it does not differ from the largest value by more than 5 percent or 0.1 L, whichever is greater. The highest values of the FEV1 and FVC, whether from the same or different tracings, should be used to assess the severity of the respiratory impairment."

the results to be "ACCEPTABLE and REPRODUCIBLE." [JS at 9.] He contends that the Listing does not require that the readings occur on different days or be separated by any specific time period. [Id.]

Based on the language of Listing 3.02 and the associated protocols of Listing 3.00, as well as existing case authority, the Court agrees with plaintiff that the regulations require that for purposes of adjudicating whether a claimant meets Listings 3.02A or 3.02B, FEV1 and FVC values should be determined based on three satisfactory forced expiratory maneuvers *during one session* at which the results were acceptable and reproducible. See Beckham v. Comm'r of Soc. Sec., 2013 WL 935529 (M.D. Fla. Mar. 11, 2013) (noting the "relatively sparse case law on this issue," and citing Johnson v. Barnhart, 66 F. App'x 285 (3d Cir. Jan. 29, 2003) (unpublished), which held that the ALJ should not have ignored or dismissed the claimant's latest FEV1 scores simply because they were inconsistent with earlier FEV1 scores, but should have clearly articulated why he was crediting the earlier scores over the later and, if unable to reconcile the two sets of scores, the ALJ should have either consulted a medical expert or obtained additional medical evidence); see also Ford v. Colvin, 2014 WL 4961155, at *4 (S.D. Ind. Sept. 29, 2014) (holding that the "three satisfactory forced expiratory maneuvers" contemplated by Listing 3.00E should occur during one pulmonary function test and not on different dates). In this case, however, the November 2014 pulmonary function test report does not make clear whether the FVC and FEV1 scores were obtained after the requisite three maneuvers were conducted, or whether the DLCO result was based on two acceptable tests, and the Court thus cannot determine if these tests were conducted according to the protocols. [See also supra note 6.]

Defendant also argues that the November 2014 testing did not comply with the testing protocols because plaintiff did not show that a bronchodilator was contraindicated, and there is no evidence that the testing was repeated after administration of a bronchodilator, which "should be" done if the FEV1 value was "less than 70 percent of the predicted normal value." [JS at 7 (citing Listing 3.00E).] Without such repeat testing with a bronchodilator when that condition is met, as it was here, "[p]ulmonary function studies used to assess airflow obstruction without bronchodilators cannot be used to assess levels of impairment in the range that prevents any

gainful work activity." [Id. (citing Listing 3.00E).] Defendant contends that failure to administer the bronchodilator based on plaintiff's FEV1 score invalidates *both* the FEV1 *and* the FVC results. [AR at 7.] Here, with respect to the FEV1 results, the report indicates a "Ref" value of 3.07, and notes that plaintiff's "Pre Meas" FEV1 value of 1.02 was 33 percent of the "Ref" value. [AR at 721.] Assuming that the "Ref" value of 3.07 is the "predicted normal value," then it appears that the testing should have been repeated after administration of a bronchodilator. However, again there is no indication in the report why that was not done. See Listing 3.00E ("If a bronchodilator is not administered, the reason should be clearly stated in the report.").

Notwithstanding that the FEV1 testing was apparently not repeated after administration of a bronchodilator, Listing 3.02 only requires that the claimant meet or equal the requirements of Listing 3.02A (COPD diagnosis and FEV1 results) *or* 3.02B (chronic restrictive ventilatory disease and FVC results) *or* 3.02C (chronic impairment of gas exchange due to clinically documented pulmonary disease and DLCO results). 20 C.F.R. pt. 404, subpt. P, app. 1, §§ 3.02A, 3.02B, 3.02C. Although somewhat unclear, it appears to the Court, therefore, that although the FEV1 test was not repeated after use of a bronchodilator -- even though plaintiff's FEV1 value was apparently less than 70 percent of the predicted normal value -- this failure to repeat the FEV1 test after use of a bronchodilator *only* impacts the validity and consideration of the FEV1 pulmonary function test and not -- as defendant argues [JS at 7] -- the other pulmonary function test results. Plaintiff's scores still meet the Listing levels with respect to his FVC and DLCO test results and, even before the November 2014 test results, Dr. Moya opined that plaintiff suffered from chronic restrictive ventilatory disease and chronic impairment of gas exchange[8] -- diagnoses required to meet Listings 3.02B and 3.02C. [See AR at 327, 328; see also 20 C.F.R. pt. 404, subpt. P, app. 1, §§ 3.02B, 3.02C).] This issue will not be decided here but may need to be considered by the

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[8] The Court also observes that the ALJ gave "great weight" to the opinions of the State agency reviewing physicians, R. Fast, M.D., and A. Nasrabadi, M.D., who opined that plaintiff was capable of a "wide range of sedentary work." [AR at 19 (citing AR at 57-65, 77-85, 306-23).] However, these physicians did not have the benefit of the November 2014 test results when they did their reviews in November 2013 and February 2014, respectively. [AR at 57-65, 77-85, 306-23.]

ALJ on remand. Indeed, the ALJ may need to obtain the testimony of a medical expert or additional medical evidence on remand to fully and fairly develop all of the issues discussed herein.

In considering the ALJ's decision, the Court is "constrained to review the reasons the ALJ asserts," Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. Nov. 3, 2015) (citation omitted), and cannot consider post hoc reasoning by defendant, or even the evidence upon which the ALJ could have relied. Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003) (noting that a reviewing court "is constrained to review the reasons the ALJ asserts" and finding error where the court affirmed the ALJ's decision "based on evidence that the ALJ did not discuss") (citing Pinto v. Massanari, 249 F.3d 840, 847-48 (9th Cir. 2001)). In his decision, the ALJ addressed only the August 2013 pulmonary function test results when he found that plaintiff's impairments did not meet or equal the requirements of Listing 3.02. [See AR at 16, 17 (noting that the August 2013 pulmonary function tests "demonstrated severe chest restriction without obstruction and with moderately severe impairment of the uncorrected DLCO.").] The ALJ never mentioned, discussed, or dismissed the November 2014 pulmonary function test results in the decision, other than to note in passing that plaintiff had been denied a portable gaseous oxygen system in November 2014.[9] [AR at 18.] If any of the pulmonary function tests from November 2014 were conducted in accordance with the provisions of Listing 3.00E, then plaintiff may be entitled to benefits under Listing 3.02A, 3.02B, and/or 3.02C. If any of the pulmonary function tests at issue were not conducted in accordance with listing 3.00E, then he may not be, at least based on those results. It cannot be determined from the decision why the ALJ did not mention that report. In fact, the ALJ's decision provides no valid reason, supported by substantial evidence, for failing to discuss, weigh, or otherwise analyze the results of the seemingly highly relevant November 2014 pulmonary function tests. In short, defendant's speculative arguments that the November 2014 testing did not follow the required protocols, either in the number of instances of FVC and FEV1

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[9] Because the unit apparently was denied as it was not covered by insurance [AR at 825], any implication on the part of the ALJ that the authorization was denied because plaintiff's condition did not warrant such a unit is not supported by the evidence.

tests performed, or in the examiner's failure to repeat the tests after administering a bronchodilator, or in the consideration of the DLCO results, were not conclusions reached *by the ALJ*, and therefore, are unpersuasive. Moreover, it is the ALJ's responsibility, not the Court's, to weigh the evidence and to resolve conflicts of evidence, and to fully and fairly develop the record and inquire fully into each relevant issue. An ALJ has the duty "to fully and fairly develop the record." Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001) (citations omitted). This duty is triggered when, as here, the evidence in the record is ambiguous or inadequate to allow for proper evaluation thereof. Id.; Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001). At a minimum, the ALJ should have provided a legally adequate explanation as to why he was discounting, discrediting, or otherwise refusing to consider the November 2014 test results, which otherwise appear to support a finding that plaintiff met Listing 3.02.

Remand is warranted on this issue.

B. TREATING PHYSICIAN AND CREDIBILITY

Because the Court finds that the ALJ's failure to properly explain his consideration of the Listing 3.02 criteria in light of the record evidence is a sufficient basis to remand the case to the Commissioner, the Court declines to specifically address plaintiff's additional allegations of error by the ALJ. However, upon remand, the Commissioner should take into consideration plaintiff's remaining allegations of error, including the ALJ's consideration of Dr. Moya's opinions and plaintiff's credibility.

VI.

REMAND FOR FURTHER PROCEEDINGS

The Court has discretion to remand or reverse and award benefits. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989). Where no useful purpose would be served by further proceedings, or where the record has been fully developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. See Lingenfelter v. Astrue, 504 F.3d 1028, 1041 (9th Cir. 2007); Benecke v. Barnhart, 379 F.3d 587, 595-96 (9th Cir. 2004). Where there are

outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find plaintiff disabled if all the evidence were properly evaluated, remand is appropriate. See Benecke, 379 F.3d at 593-96.

In this case, there are outstanding issues that must be resolved before a final determination can be made. In an effort to expedite these proceedings and to avoid any confusion or misunderstanding as to what the Court intends, the Court will set forth the scope of the remand proceedings. First, the ALJ shall reassess all of the medical opinion evidence, including the November 3, 2014, pulmonary function test results, and must explain the weight afforded to each opinion and provide legally adequate reasons for any portion of an opinion that the ALJ discounts or rejects, including a legally sufficient explanation for crediting one doctor's opinion over any of the others, or for rejecting any significant and probative evidence. The ALJ shall obtain additional medical evidence or the testimony of a medical expert, if necessary to fully and fairly develop the record. Second, if the ALJ determines that plaintiff does not meet or equal a Listing at step 3 of the analysis, the ALJ shall also reassess plaintiff's subjective allegations, and either credit his testimony as true, or provide specific, clear and convincing reasons, supported by substantial evidence in the case record, for discounting or rejecting any testimony. Finally, the ALJ shall reassess plaintiff's RFC and determine, at step five, with the assistance of a VE if necessary, whether there are jobs existing in significant numbers in the national economy that plaintiff can still perform.[10]

VII.

CONCLUSION

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

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[10] Nothing herein is intended to disrupt the ALJ's step four finding that plaintiff is unable to return to his past relevant work.

IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment herein on all parties or their counsel.

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

DATED: March 1, 2016

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE