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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WALTER HARDY,)	No. CV 16-0779 AS
)	
Plaintiff,)	MEMORANDUM OPINION AND
v.)	ORDER OF REMAND
)	
CAROLYN W. COLVIN,)	
Acting Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter is remanded for further administrative action consistent with this Opinion.

I. PROCEEDINGS

On December 6, 2012, Plaintiff Walter Hardy ("Plaintiff") applied for Supplemental Security Income benefits alleging a disabling condition beginning March 1, 2008. (AR 114). On June 3, 2014, Administrative Law Judge ("ALJ") David G. Marcus examined

1 records and heard testimony from Plaintiff and vocational expert
2 ("V.E.") Dr. Martin Brodwin. (AR 36-62). On August 5, 2014, the ALJ
3 denied Plaintiff benefits in a written decision. (AR 26-32). The
4 Appeals Council denied review of the ALJ's decision. (AR 1-4).

5
6 On February 3, 2016, Plaintiff filed a Complaint pursuant to
7 42 U.S.C. §§ 405(g) and 1383(c) alleging that the Social Security
8 Administration erred in denying benefits. (Docket Entry No. 1). On
9 June 20, 2016, Defendant filed an Answer to the Complaint, (Docket
10 Entry No. 14), and the Certified Administrative Record ("AR"),
11 (Docket Entry No. 15). The parties have consented to proceed before
12 a United States Magistrate Judge. (Docket Entry Nos. 11, 12). On
13 October 26, 2016, the parties filed a Joint Stipulation ("Joint
14 Stip.") setting forth their respective positions on Plaintiff's
15 claims. (Docket Entry No. 22).

16 17 **II. SUMMARY OF ALJ'S DECISION**

18
19 The ALJ applied the five-step process in evaluating Plaintiff's
20 case. (AR 26-28). At step one, the ALJ determined that Plaintiff
21 had not engaged in substantial gainful activity since the application
22 date. (AR 28). At step two, the ALJ found that Plaintiff's severe
23 impairments included diabetes mellitus, obesity, and bilateral knee
24 osteoarthritis. (AR 28-29). At step three, the ALJ found that
25 Plaintiff's impairments did not meet or equal a listing found in 20
26 C.F.R. Part 404, Subpart P, Appendix 1. (AR 29).

1 Before proceeding to step four, the ALJ found that Plaintiff had
2 the residual functional capacity ("RFC") to perform less than a full
3 range of medium work. (AR 29). Specifically, the ALJ ruled that
4 Plaintiff "can lift/carry 50 pounds occasionally and 25 pounds
5 frequently. He can stand/walk 6 hours and sit 6 hours each in an 8-
6 hour workday. [Plaintiff] can engage in occasional climbing,
7 kneeling and squatting." (AR 29). In making his RFC finding, the
8 ALJ stated that Plaintiff's subjective complaints regarding the
9 extent of his limitations were "not entirely credible." (AR 30).

10
11 At step four, the ALJ determined that Plaintiff could return to
12 his past relevant work as a van driver. (AR 31-32). Accordingly,
13 the ALJ determined that Plaintiff was not disabled within the meaning
14 of the Social Security Act. (AR 32).

15 16 **III. STANDARD OF REVIEW**

17
18 This court reviews the Administration's decision to determine if
19 the decision is free of legal error and supported by substantial
20 evidence. See Brewes v. Commissioner of Soc. Sec. Admin., 682 F.3d
21 1157, 1161 (9th Cir. 2012). "Substantial evidence" is more than a
22 mere scintilla, but less than a preponderance. Garrison v. Colvin,
23 759 F.3d 995, 1009 (9th Cir. 2014). To determine whether substantial
24 evidence supports a finding, "a court must consider the record as a
25 whole, weighing both evidence that supports and evidence that
26 detracts from the [Commissioner's] conclusion." Aukland v.
27 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (internal quotation
28 omitted). As a result, "[i]f the evidence can support either

1 affirming or reversing the ALJ's conclusion, [a court] may not
2 substitute [its] judgment for that of the ALJ." Robbins v. Soc. Sec.
3 Admin., 466 F.3d 880, 882 (9th Cir. 2006).

4 5 **IV. PLAINTIFF'S CONTENTIONS**

6
7 Plaintiff's sole claim is that the ALJ failed to provide
8 adequate reasons for rejecting his subjective complaints. (See Joint
9 Stip. at 4-8).

10 11 **V. DISCUSSION**

12
13 After reviewing the record, the Court finds that Plaintiff's
14 claim warrants remand for further consideration.

15 16 **A. The ALJ Failed To Provide Adequate Reasons For Rejecting** 17 **Plaintiff's Subjective Complaints**

18
19 A claimant initially must produce objective medical evidence
20 establishing a medical impairment reasonably likely to be the cause
21 of his subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281
22 (9th Cir. 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.
23 1991). Once a claimant produces objective medical evidence of an
24 underlying impairment that could reasonably be expected to produce
25 pain or other symptoms alleged, and there is no evidence of
26 malingering, the ALJ may reject the claimant's testimony regarding
27 the severity of his pain and symptoms only by articulating specific,
28 clear and convincing reasons for doing so. Brown-Hunter v. Colvin,

1 806 F.3d 487, 492-93 (9th Cir. 2015) (citing Lingenfelter v. Astrue,
2 504 F.3d 1028, 1036 (9th Cir. 2007)). In this case, because there is
3 no evidence of malingering, the "clear and convincing reasons"
4 standard applies.

5
6 During the hearing, Plaintiff testified that he had last worked
7 in 2006 and had previously been a driver and performed "shipping and
8 receiving dock work." (AR 39-42). Plaintiff claimed that, at the
9 time of the hearing, he was seeing a doctor every two weeks for his
10 diabetes and hypertension. (AR 42-43). Plaintiff also observed that
11 he was insulin dependent and had high cholesterol. (AR 44).

12
13 Plaintiff testified that he suffered from swollen joints, hands,
14 and feet every day, as well as heart palpitations three times a week
15 that caused burning in his chest and could last for hours at a time.
16 (AR 45-46, 55). Plaintiff also testified that he had constant pain
17 in his knees and ankles along with numbness, tingling, and burning in
18 his feet for hours at a time. (AR 46-47). Plaintiff further stated
19 that his legs sometimes "lock up" for between twenty and sixty
20 minutes and that he gets severe headaches three or four times a week
21 for a few hours at a time. (AR 47-49). Plaintiff also claimed to
22 experience numbness in his fingertips, dizziness, back pain after
23 lifting heavy objects, and blurry vision. (AR 51-54).

24
25 Plaintiff testified that he walked for between 45 minutes and an
26 hour three times a week and that doctors recommended additional
27 exercise to prevent his legs from "lock[ing] up." (AR 56). He also
28

1 stated that, to control his conditions, he had modified his diet,
2 drank "lots of water," and took his insulin regularly. (AR 56-57).
3

4 The ALJ partially rejected Plaintiff's subjective complaints in
5 the following excerpt:
6

7 After careful consideration of the evidence, the
8 undersigned finds that [Plaintiff's] medically determinable
9 impairments could reasonably be expected to cause the
10 alleged symptoms; however, [Plaintiff's] statements
11 concerning the intensity, persistence and limiting effects
12 of these symptoms are not entirely credible for the reasons
13 explained in this decision.
14

15 While [Plaintiff's] impairments do limit certain aspects of
16 [his] functioning, there is no evidence establishing the
17 impairments are so severe as to prevent [Plaintiff] from
18 basic work activities.
19

20 In order for an impairment to be severe, the impairment
21 must last or be expected to last at the "severe" level for
22 a continuous period of 12 months or be expected to result
23 in death. The records show [Plaintiff] was treated only in
24 December 2012 and January 2013. Thus, it could be argued
25 that [Plaintiff's] impairments do not meet the durational
26 requirement. However, giving [Plaintiff] the benefit of
27 the doubt, the undersigned finds that the above-listed
28 impairments are severe.

1 As for [Plaintiff's] diabetes, [Plaintiff's] record
2 indicates that he has insulin-dependent diabetes. However,
3 the record does not indicate significant limitations
4 associated with [Plaintiff's] diabetes. [Plaintiff] is
5 currently receiving treatment for diabetes, and he
6 testified that he was compliant, taking two doses of
7 insulin per day. There is no evidence that he was not
8 responsive to prescribed medication.

9
10 The undersigned finds that [Plaintiff] is not fully
11 credible. The objective evidence does not support
12 [Plaintiff's] allegations of severity and subjective
13 complaints.

14
15 He testified that he has occasional numbness in his
16 fingertips, but there is no sensory loss documented in the
17 medical evidence of record. The consultant noted that
18 [Plaintiff's] history may suggest the beginnings of
19 diabetic peripheral neuropathy, but noted that if that was
20 the case, it would be mild, and has not resulted in
21 atrophy. Although [Plaintiff] was fitted for orthopedic
22 shoes, the record shows no evidence of lower extremity
23 swelling. Also, he has not actually been diagnosed with
24 more serious conditions associated with diabetes, including
25 diabetic nephropathy, peripheral neuropathy or retinopathy.

26
27 [Plaintiff] also testified that he has high blood pressure
28 and cholesterol, but there is no significantly elevated

1 blood pressure documented in the medical records. The
2 record shows that on December 27, 2012, [Plaintiff's] blood
3 pressure was noted to be 140/86, which is not abnormally
4 high. The record also shows that there is no evidence of
5 congestive heart failure or a cardiac diagnosis.
6 [Plaintiff] reports that he has dizzy spells when he gets
7 up too fast, but there is no evidence of complaints of
8 dizziness in the treatment records or a medical diagnosis
9 related to this symptom.

10
11 As for the knees, [Plaintiff] has alleged pain, and on
12 examination, there was mild osteoarthritic changes in the
13 knees with crepitus on flexion noted. However, there was
14 no indication of abnormal gait in the record. [Plaintiff]
15 ambulated without an assistive device. [Plaintiff] was
16 able to stand on toes/heels, and perform tandem gait.
17 Although he complained of the swelling in the extremities,
18 there was no documented problem with edema. [Plaintiff]
19 indicated that he was able to walk for exercise between 45
20 minutes and one hour 3 times per week. In fact,
21 [Plaintiff] testified that when he told his doctors that
22 his legs lock up, they told him to exercise more.

23
24 [Plaintiff] has a history of obesity, as evidenced by his
25 weight of 244 pounds at 6' tall, which calculates to a body
26 mass index (BMI) of 33.1. The undersigned has considered
27 the potential impact of obesity in causing or contributing
28

1 to the co-existing impairments as required by Social
2 Security Ruling 02-01p. . . .

3
4 After considering the record as a whole, the undersigned
5 finds that [Plaintiff's] residual functional capacity takes
6 into account [Plaintiff's] limitations, and is reasonable
7 in light of the objective medical evidence.

8
9 (AR 30-31 (record citation and footnote omitted)).

10
11 Remand is warranted. As Defendant notes, the ALJ rejected
12 Plaintiff's testimony in part because Plaintiff was able to walk for
13 exercise for up to one hour three times per week. (AR 31; Joint
14 Stip. at 10, 13). However, the record does not demonstrate that
15 Plaintiff's ability to walk three times weekly for exercise is
16 consistent with the ability to perform full time work or inconsistent
17 with his subjective complaints. See Vertigan v. Halter, 260 F.3d
18 1044, 1050 (9th Cir. 2001) (finding "only a scintilla" of evidence
19 supporting ALJ's adverse credibility finding where claimant was able
20 to go grocery shopping with assistance, walk approximately an hour in
21 the mall, get together with friends, play cards, swim, watch
22 television, read, undergo physical therapy, and exercise at home);
23 see also Reddick v. Chater, 157 F.3d 715, 722-23 (9th Cir. 1998)
24 (activities of daily living affect a claimant's credibility "[o]nly
25 if the level of activity [is] inconsistent with [the claimant's]
26 claimed limitations;" ALJ erred by "not fully accounting for the
27 context of materials or all parts of the testimony and reports,"

1 resulting in paraphrasing of record material that was "not entirely
2 accurate regarding the content or tone of the record").

3
4 The ALJ also rejected Plaintiff's testimony partially because
5 there is "no evidence" that Plaintiff was not responsive to
6 prescribed diabetes medication. (AR 30; Joint Stip. at 10, 12). It
7 is unclear if this finding is distinct from the ALJ's conclusion,
8 addressed infra, that objective evidence and the treatment record did
9 not substantiate Plaintiff's testimony regarding the severity of his
10 limitations. In any event, Respondent acknowledges that the record
11 contains "indications" based on blood work that "Plaintiff's diabetes
12 was not well-controlled." (Joint Stip. at 12). The ALJ's discussion
13 of Plaintiff's credibility does not analyze these indications and
14 fails to provide necessary factual context for the ALJ's finding.
15 The finding therefore provides an insufficient basis upon which to
16 affirm. See Reddick, 157 F.3d at 723 (it is impermissible for the
17 ALJ to develop an evidentiary basis by "not fully accounting for the
18 context of materials or all parts of the testimony and reports"); see
19 also Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984) (an ALJ
20 may not reach a conclusion and justify it by ignoring competent
21 evidence in the record that would suggest the opposite result).

22
23 Otherwise, it appears that the ALJ's rejected Plaintiff's
24 complaints as inconsistent with the objective medical evidence and
25 treatment records. (AR 30-31). Lack of objective medical support
26 cannot be the sole basis for finding a claimant not credible. Burch
27 v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) ("lack of medical
28 evidence" can be "a factor" in rejecting credibility, but cannot

1 "form the sole basis"). The ALJ did not provide any other reasons
2 for rejecting Plaintiff's testimony with the degree of specificity
3 required by case law. See Burrell, 775 F.3d at 1138-39; Brown-
4 Hunter, 806 F.3d at 494 ("Because the ALJ failed to identify the
5 testimony she found not credible, she did not link that testimony to
6 the particular parts of the record supporting her non-credibility
7 determination. This was legal error.").

8
9 In light of the foregoing, the Court concludes that the ALJ
10 provided insufficient support for his decision to discount
11 Plaintiff's subjective complaints.

12
13 **B. The Court Cannot Conclude That The ALJ's Error Was Harmless**

14
15 "[H]armless error principles apply in the Social Security . . .
16 context." Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012)
17 (citing Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1054 (9th
18 Cir. 2006)). Generally, "an ALJ's error is harmless where it is
19 'inconsequential to the ultimate nondisability determination.'" Id.
20 (citing Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1162
21 (9th Cir. 2008)).

22
23 The Court cannot conclude that the ALJ's errors were harmless.
24 The limiting effects of Plaintiff's pain are directly relevant to
25 assessing his RFC. A claimant's RFC "may be the most critical
26 finding contributing to the final . . . decision about disability."
27 See McCawley v. Astrue, 423 F. App'x 687, 689 (9th Cir. 2011)
28 (quoting SSR 96-5p). Here, Plaintiff's RFC was central to the ALJ's

1 determination that he could return to his past work. (AR 31-32).
2 Because the Court cannot determine that the ALJ's errors were
3 "inconsequential to the ultimate nondisability determination," the
4 errors cannot be deemed harmless. See Carmickle, 533 F.3d at 1162.

5 6 **C. Remand Is Warranted**

7
8 The decision whether to remand for further proceedings or order
9 an immediate award of benefits is within the district court's
10 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000).
11 Where no useful purpose would be served by further administrative
12 proceedings, or where the record has been fully developed, it is
13 appropriate to exercise this discretion to direct an immediate award
14 of benefits. Id. at 1179 ("[T]he decision of whether to remand for
15 further proceedings turns upon the likely utility of such
16 proceedings."). However, where the circumstances of the case suggest
17 that further administrative review could remedy the Commissioner's
18 errors, remand is appropriate. McLeod v. Astrue, 640 F.3d 881, 888
19 (9th Cir. 2011); Harman, 211 F.3d at 1179-81.

20
21 Here, the Court remands because the ALJ provided insufficient
22 support for his decision to discount Plaintiff's subjective
23 complaints. The record does not affirmatively establish that the ALJ
24 could not have found Plaintiff not fully credible for other reasons,
25 nor does it establish that the ALJ would necessarily be required to
26 find Plaintiff disabled if these deficiencies were remedied. Remand
27 is therefore appropriate.

1 The Court has not reached issues not discussed supra except to
2 determine that reversal with a directive for the immediate payment of
3 benefits would be inappropriate at this time.

4
5 **VI. CONCLUSION**

6
7 For the foregoing reasons, the decision of the Administrative
8 Law Judge is VACATED, and the matter is REMANDED, without benefits,
9 for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).

10
11 LET JUDGMENT BE ENTERED ACCORDINGLY.

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13 Dated: November 30, 2016

14 _____/s/_____
15 ALKA SAGAR
16 UNITED STATES MAGISTRATE JUDGE
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