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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RODNEY LIDDELL,)	Case No. CV 17-2703-JPR
)	
Plaintiff,)	
)	MEMORANDUM DECISION AND ORDER
v.)	REVERSING COMMISSIONER
)	
NANCY A. BERRYHILL, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner’s final decision denying his application for Social Security disability insurance benefits (“DIB”). The parties consented to the jurisdiction of the undersigned under 28 U.S.C. § 636(c). The matter is before the Court on the parties’ Joint Stipulation, filed December 5, 2017, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner’s decision is reversed and this action is remanded for further proceedings.

1 **II. BACKGROUND**

2 Plaintiff was born in 1951. (Administrative Record ("AR")
3 90, 101.) He completed 12th grade (AR 89, 199, 310) and last
4 worked as a security guard (AR 48-49, 199, 205).

5 On September 25, 2013, Plaintiff applied for DIB, alleging
6 that he had been disabled since August 15, 2008, because of
7 bipolar disorder, arthralgia, a left-shoulder injury, hepatitis
8 B, dermatitis, hyperlipidemia, and lymphadenopathy.¹ (AR 90,
9 101-02.) After his application was denied initially and on
10 reconsideration (AR 89, 100, 110, 112), he requested a hearing
11 before an Administrative Law Judge (AR 127-28). A hearing was
12 held on June 18, 2015, at which Plaintiff, who was represented by
13 counsel, testified, as did a vocational expert. (AR 41-68, 119.)
14 In a written decision issued August 25, 2015, the ALJ found
15 Plaintiff not disabled because his "substance abuse disorder
16 [was] a contributing factor material to the determination of
17 disability." (AR 20-40.) Plaintiff requested review from the
18

19 ¹ The ALJ denied Plaintiff's earlier applications for DIB
20 and SSI, which had alleged an onset date of November 10, 2008, on
21 December 13, 2010 (AR 72-87); the decision was apparently not
22 appealed and became final (see AR 20). His current application
23 alleged a new onset date of August 15, 2008 (see AR 90), and his
24 date last insured was September 30, 2013 (see AR 24). Thus, the
25 relevant periods for the ALJ to adjudicate were August 15 to
26 November 10, 2008, and December 13, 2010, through September 30,
27 2013. The ALJ found that Plaintiff had not demonstrated changed
28 circumstances since that prior decision for either unadjudicated
period (AR 24-25) and thus had not rebutted the presumption of
nondisability (AR 36). See Lester v. Chater, 81 F.3d 821, 827-28
(9th Cir. 1995) (as amended Apr. 9, 1996) (citing Chavez v.
Bowen, 844 F.2d 691, 693 (9th Cir. 1988), as holding that certain
changed circumstances preclude application of res judicata).
Plaintiff challenges the finding only as to the second
unadjudicated period. (See generally J. Stip.)

1 Appeals Council (AR 15), and on February 14, 2017, it denied
2 review (AR 1-6). This action followed.

3 **III. STANDARD OF REVIEW**

4 Under 42 U.S.C. § 405(g), a district court may review the
5 Commissioner's decision to deny benefits. The ALJ's findings and
6 decision should be upheld if they are free of legal error and
7 supported by substantial evidence based on the record as a whole.
8 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra
9 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
10 evidence means such evidence as a reasonable person might accept
11 as adequate to support a conclusion. Richardson, 402 U.S. at
12 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
13 It is more than a scintilla but less than a preponderance.
14 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
15 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
16 substantial evidence supports a finding, the reviewing court
17 "must review the administrative record as a whole, weighing both
18 the evidence that supports and the evidence that detracts from
19 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
20 720 (9th Cir. 1998). "If the evidence can reasonably support
21 either affirming or reversing," the reviewing court "may not
22 substitute its judgment" for the Commissioner's. Id. at 720-21.

23 **IV. THE EVALUATION OF DISABILITY**

24 People are "disabled" for purposes of receiving Social
25 Security benefits if they are unable to engage in any substantial
26 gainful activity owing to a physical or mental impairment that is
27 expected to result in death or has lasted, or is expected to
28 last, for a continuous period of at least 12 months. 42 U.S.C.

1 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
2 1992).

3 A. The Five-Step Evaluation Process

4 The ALJ follows a five-step sequential evaluation process to
5 assess whether a claimant is disabled. 20 C.F.R.

6 § 404.1520(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th
7 Cir. 1995) (as amended Apr. 9, 1996). In the first step, the
8 Commissioner must determine whether the claimant is currently
9 engaged in substantial gainful activity; if so, the claimant is
10 not disabled and the claim must be denied. § 404.1520(a)(4)(i).

11 If the claimant is not engaged in substantial gainful
12 activity, the second step requires the Commissioner to determine
13 whether the claimant has a "severe" impairment or combination of
14 impairments significantly limiting his ability to do basic work
15 activities; if not, the claimant is not disabled and his claim
16 must be denied. § 404.1520(a)(4)(ii).

17 If the claimant has a "severe" impairment or combination of
18 impairments, the third step requires the Commissioner to
19 determine whether the impairment or combination of impairments
20 meets or equals an impairment in the Listing of Impairments set
21 forth at 20 C.F.R. part 404, subpart P, appendix 1; if so,
22 disability is conclusively presumed. § 404.1520(a)(4)(iii).

23 If the claimant's impairment or combination of impairments
24 does not meet or equal an impairment in the Listing, the fourth
25 step requires the Commissioner to determine whether the claimant
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1 has sufficient residual functional capacity ("RFC")² to perform
2 his past work; if so, he is not disabled and the claim must be
3 denied. § 404.1520(a)(4)(iv). The claimant has the burden of
4 proving he is unable to perform past relevant work. Drouin, 966
5 F.2d at 1257. If the claimant meets that burden, a prima facie
6 case of disability is established. Id.

7 If that happens or if the claimant has no past relevant
8 work, the Commissioner then bears the burden of establishing that
9 the claimant is not disabled because he can perform other
10 substantial gainful work available in the national economy.
11 § 404.1520(a)(4)(v); Drouin, 966 F.2d at 1257. That
12 determination comprises the fifth and final step in the
13 sequential analysis. § 404.1520(a)(4)(v); Lester, 81 F.3d at 828
14 n.5; Drouin, 966 F.2d at 1257.

15 A claimant whose alcoholism or drug addiction is a
16 contributing factor material to the determination of disability
17 is not entitled to Social Security disability benefits. See 42
18 U.S.C. § 423(d)(2)(C) ("An individual shall not be considered to
19 be disabled for purposes of this subchapter if alcoholism or drug
20 addiction would . . . be a contributing factor material to the
21 Commissioner's determination that the individual is disabled.");
22 see also 20 C.F.R. § 404.1535(a) (same);³ Ball v. Massanari, 254

24 ² RFC is what a claimant can do despite existing exertional
25 and nonexertional limitations. § 404.1545; see Cooper v.
26 Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). The
27 Commissioner assesses the claimant's RFC between steps three and
28 four. Laborin v. Berryhill, 867 F.3d 1151, 1153 (9th Cir. 2017)
(citing § 416.920(a)(4)).

³ Section 404.1535(b)(1) further provides that "[t]he key
factor we will examine in determining whether drug addiction or

1 F.3d 817, 824 (9th Cir. 2001). When the claimant has a history
2 of drug or alcohol abuse, the five-step sequential evaluation
3 must first be conducted "without separating out the impact of
4 alcoholism or drug addiction." Bustamante v. Massanari, 262 F.3d
5 949, 955 (9th Cir. 2001); see also Parra, 481 F.3d at 747-48. If
6 the ALJ finds that the claimant is not disabled under the five-
7 step inquiry, then the claimant is not entitled to benefits and
8 there is no need to proceed with the analysis under § 404.1535.
9 If, however, the ALJ concludes that the claimant is disabled and
10 medical evidence exists of drug addiction or alcoholism, then he
11 must analyze whether the claimant would still be disabled if he
12 stopped using alcohol or drugs. Bustamante, 262 F.3d at 955
13 (citing § 404.1535); Parra, 481 F.3d at 747. The claimant bears
14 the burden of proving that his alcoholism or drug addiction is
15 not a contributing factor material to his disability
16 determination. Ball, 254 F.3d at 822-23; see also Sousa v.
17 Callahan, 143 F.3d 1240, 1245 (9th Cir. 1998) (remanding to give
18 claimant opportunity to present evidence relevant to issue).

19 B. The ALJ's Application of the Five-Step Process

20 At step one, the ALJ found that Plaintiff had not engaged in
21 substantial gainful activity between August 15, 2008, the alleged
22 disability-onset date, and September 30, 2013, his date last
23 insured. (AR 24-25.) At step two, he concluded that he had the
24 following severe impairments: "polysubstance abuse, alcohol
25 dependency, and mood disorder, not otherwise specified." (AR

26 _____
27 alcoholism is a contributing factor material to the determination
28 of disability is whether we would still find you disabled if you
stopped using drugs or alcohol."

1 25.)⁴ At step three, the ALJ determined that Plaintiff's
2 impairments, "including the substance use disorders," met
3 "section 12.09 (with reference to section 12.04)" (AR 28) but
4 that if Plaintiff stopped the substance use he "would not have a
5 severe impairment or combination of impairments" (AR 31). Thus,
6 the ALJ found that Plaintiff's substance use was a contributing
7 factor material to the determination of disability under
8 § 404.1535. (AR 35.) Because the ALJ initially found Plaintiff
9 disabled at step three, he did not reach steps four or five.

13 ⁴ Plaintiff thus rebutted the presumption of continuing
14 nondisability by presenting a changed circumstance, a severe mood
15 disorder, and the ALJ erred in finding otherwise. (See AR 25-28,
16 75-78); Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988);
17 Lester, 81 F.3d at 827. The error was likely harmless, however.
18 See Cha Yang v. Comm'r of Soc. Sec. Admin., 488 F. App'x 203, 204
19 (9th Cir. 2012) (finding that ALJ's misapplication of Chavez was
20 harmless because ALJ considered plaintiff's medical evidence in
21 formulating RFC). The ALJ in fact reviewed the medical evidence
22 from after Plaintiff's December 2010 decision and used that
23 evidence to determine the severity of his impairments (AR 25-28),
24 whether those impairments met a listing "including the substance
25 use disorders" (AR 28-30), and whether any remaining limitations
26 would cause "more than a minimal impact on [his] ability to
27 perform basic work activities" if he stopped his substance abuse
28 (AR 31-35). Accordingly, his stated reliance on the Chavez
presumption was harmless. See Cha Yang, 488 F. App'x at 204;
Gutierrez v. Colvin, No. CV 15-01584 FFM, 2016 WL 5402941, at *5
(C.D. Cal. Sept. 26, 2016) (finding that Plaintiff established
changed circumstances and that ALJ's stated application of
"continuing non-disability theory pursuant to Chavez" was
harmless error because "ALJ went on to review and assess
plaintiff's" medical records from after prior ALJ decision);
McGlothen v. Colvin, No. 2:15-cv-204-GJS, 2015 WL 5706186, at *3
(C.D. Cal. Sept. 29, 2015) (finding that ALJ's "invocation of res
judicata" was harmless error because "ALJ proceeded with a review
of the medical evidence – a review that approximated the
traditional five-step approach").

1 **V. DISCUSSION**

2 Plaintiff argues that the ALJ erred in failing to find
3 changed circumstances overcoming the presumption of continuing
4 nondisability from his prior decision (J. Stip. at 3-7, 9-11),
5 failing to consider the "paragraph C" criteria as to Listing
6 12.04 (id. at 11-14), and rejecting his subjective symptom
7 testimony (id. at 14-17). Because the ALJ materially erred in
8 the third regard, the case is remanded for further proceedings
9 and the Court does not reach Plaintiff's contention regarding
10 paragraph C. As previously discussed, any error concerning the
11 presumption of continuing nondisability was harmless.

12 A. The ALJ Erred in Discounting Plaintiff's Subjective
13 Symptoms

14 1. Applicable law

15 An ALJ's assessment of a claimant's allegations concerning
16 the severity of his symptoms is entitled to "great weight." See
17 Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir. 1989) (as
18 amended); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985) (as
19 amended Feb. 24, 1986). "[T]he ALJ is not 'required to believe
20 every allegation of disabling pain, or else disability benefits
21 would be available for the asking, a result plainly contrary to
22 42 U.S.C. § 423(d)(5)(A).'" Molina v. Astrue, 674 F.3d 1104,
23 1112 (9th Cir. 2012) (quoting Fair v. Bowen, 885 F.2d 597, 603
24 (9th Cir. 1989)).

25 In evaluating a claimant's subjective symptom testimony, the
26 ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d
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1 at 1035-36; see also SSR 96-7p, 1996 WL 374186 (July 2, 1996).⁵
2 "First, the ALJ must determine whether the claimant has presented
3 objective medical evidence of an underlying impairment [that]
4 could reasonably be expected to produce the pain or other
5 symptoms alleged." Lingenfelter, 504 F.3d at 1036. If such
6 objective medical evidence exists, the ALJ may not reject a
7 claimant's testimony "simply because there is no showing that the
8 impairment can reasonably produce the degree of symptom alleged."
9 Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996) (emphasis in
10 original).

11 If the claimant meets the first test, the ALJ may discredit
12 the claimant's subjective symptom testimony only if he makes
13 specific findings that support the conclusion. See Berry v.
14 Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding or
15 affirmative evidence of malingering, the ALJ must provide "clear
16 and convincing" reasons for rejecting the claimant's testimony.
17 Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir. 2015) (as

18 _____
19 ⁵ Social Security Ruling 16-3p, 2016 WL 1119029, effective
20 March 16, 2016, rescinded SSR 96-7p, which provided the framework
21 for assessing the credibility of a claimant's statements. SSR
22 16-3p was not in effect at the time of the ALJ's decision in this
23 case, however, and therefore does not apply. Still, the Ninth
24 Circuit has clarified:

23 [SSR 16-3p] makes clear what our precedent already
24 required: that assessments of an individual's testimony
25 by an ALJ are designed to "evaluate the intensity and
26 persistence of symptoms after [the ALJ] find[s] that the
27 individual has a medically determinable impairment(s)
28 that could reasonably be expected to produce those
symptoms," and not to delve into wide-ranging scrutiny of
the claimant's character and apparent truthfulness.

27 Trevizo v. Berryhill, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (as
28 amended) (alterations in original) (quoting SSR 16-3p).

1 amended); Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090,
2 1102 (9th Cir. 2014). In assessing credibility, the ALJ may
3 consider, among other factors, (1) ordinary techniques of
4 credibility evaluation, such as the claimant's reputation for
5 lying, prior inconsistent statements, and other testimony by the
6 claimant that appears less than candid; (2) unexplained or
7 inadequately explained failure to seek treatment or to follow a
8 prescribed course of treatment; (3) the claimant's daily
9 activities; (4) the claimant's work record; and (5) testimony
10 from physicians and third parties. Rounds v. Comm'r Soc. Sec.
11 Admin., 807 F.3d 996, 1006 (9th Cir. 2015) (as amended); Thomas
12 v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If the ALJ's
13 finding is supported by substantial evidence in the record, the
14 reviewing court "may not engage in second-guessing." Thomas, 278
15 F.3d at 959.

16 2. Relevant background

17 Plaintiff has a history of a variety of mental-health
18 diagnoses, including bipolar disorder, mood disorder, psychosis,
19 personality disorder, and alcohol and cocaine dependence. (See
20 AR 333-36; see also AR 272-73, 302-03, 306, 508, 514, 532, 585,
21 613, 795.) He received psychiatric treatment and clinical group
22 therapy for those conditions through the U.S. Department of
23 Veterans Affairs. (See generally AR 272-352, 395-635, 641-1156.)

24 Plaintiff attended therapy through a VA Addictive Behaviors
25 Clinic as early as June 2013. (See AR 351.) To participate in
26 the clinic, he was required to comply with breathalyzer tests
27 every other week (see AR 55, 348-49) and provide urine samples
28 once a week for toxicology testing (see AR 56, 321, 323-24, 341-

1 42, 349). He attended group-therapy sessions on topics such as
2 stress management (see AR 320, 324, 348), co-occurring disorders
3 (see AR 322, 324-25, 328, 331-32, 351), nutrition and health
4 education (see AR 319-21, 323), relapse prevention (see AR 322,
5 346), recovery concepts (see AR 350), and anxiety management (see
6 AR 326, 351-52). He also received individual psychological
7 treatment. (See, e.g., AR 332-39, 347.)

8 In August 2013, Plaintiff was invited to begin a 30-day
9 trial period at the VA Psychosocial Rehabilitation and Recovery
10 Center because the results of his psychological testing showed
11 that he might "benefit from the structure and support available
12 within the PRRC program." (AR 327-29.) PRRC offered "additional
13 support regarding medication management; psycho[logical]
14 education regarding the nature of his mental health conditions to
15 increase awareness of symptoms and relapse prevention; and
16 increased social support and social skills training with other
17 Veterans." (AR 328.) Plaintiff did not complete his 30-day
18 trial and become an "active member" of the PRRC until January 31,
19 2014, however, after the relevant period. (AR 508, 535-36.)

20 Plaintiff lived in VA Supportive Housing during the relevant
21 period.⁶ (See AR 934 (stating that Plaintiff was admitted to
22 VASH on Aug. 3, 2011).) The VASH program required regular home
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24 ⁶ VASH serves "chronically homeless" veterans, who often
25 have "severe mental or physical health problems and/or substance
26 use disorders." See HUD-VASH Eligibility Criteria, U.S. Dep't of
27 Veterans Affairs, [https://www.va.gov/homeless/hud-vash_](https://www.va.gov/homeless/hud-vash_eligibility.asp)
28 [eligibility.asp](https://www.va.gov/homeless/hud-vash_eligibility.asp) (last visited May 17, 2018). A "key component"
of the program is case-management services that are designed to
engage veterans "in needed treatment and other supportive
services." Id.

1 visits and check-ins. (See, e.g., AR 330, 408.) He was
2 "discharged from VASH case management into [VASH] aftercare" on
3 September 30, 2014, but "remain[ed] housed" in the VASH community
4 and "continue[d] involvement" in mental-health treatment. (AR
5 330, 934-36.)

6 Plaintiff testified that he "ha[d] a problem relapsing" by
7 drinking alcohol but that he "ha[dn't] used any drugs" since his
8 prior decision. (AR 56-57.) When asked about VA records showing
9 that he tested "positive for opiates a couple of times in 2013,"
10 he stated that he "was on [pain] medication" at those times, not
11 using illicit drugs. (AR 60.)

12 3. Analysis

13 The ALJ found that Plaintiff's "statements regarding
14 substance abuse [were] not credible" because he "testified that
15 he ha[d] abstained from alcohol use since the prior adjudicated
16 period" but "ha[d] admitted [in the record] to periods of relapse
17 during the current unadjudicated period." (AR 30.) The ALJ
18 further found that "the fact that he continue[d] to drink alcohol
19 in spite of his program requirements and personal goals" of
20 complete abstinence "suggest[ed] that [his] assertion that his
21 substance dependence [was] in remission [was] not credible."
22 (Id.) Plaintiff argues that those reasons for discounting his
23 subjective symptom statements were "entirely unsupported by the
24 record." (J. Stip. at 15.) He is correct.

25 Inconsistent statements "regarding . . . drinking" are a
26 "clear and convincing reason[]" to reject a plaintiff's
27 testimony. Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir.
28 1999); Thomas, 278 F.3d at 959. "[L]ack of candor carries over"

1 to other relevant issues and "supports [an] ALJ's negative
2 conclusions about [a plaintiff's] veracity." Thomas, 278 F.3d at
3 959. Here, however, the supposed inconsistencies that the ALJ
4 cited are not reflected in the record. His finding that
5 Plaintiff "testified that he ha[d] abstained from alcohol use
6 since the prior adjudicated period" is inaccurate. (See AR 30.)
7 At Plaintiff's hearing, when asked by the ALJ whether he was
8 "still drinking alcohol," he answered that he had "relapsed a
9 month ago." (AR 54.) Although at two points he answered the
10 ALJ's followup questions about whether he "w[as] drinking" with
11 "[n]ot really" and "[n]o" (AR 55-56), he then clarified that he
12 "ha[d] a problem relapsing" (AR 56) and admitted to relapses in
13 May 2015, January 2015, and May 2014 (AR 54-57). At no time did
14 he claim to have completely "abstained from alcohol use" since
15 his prior decision, as stated by the ALJ. (See AR 30.) Indeed,
16 elsewhere in his decision the ALJ acknowledged Plaintiff's candor
17 on this issue, writing that he "testified that he has periodic
18 relapses." (AR 26.)

19 The ALJ further noted that Plaintiff "may also have used
20 drugs, since drug tests were positive for opiate use in January,
21 April and November 2013." (AR 30; see AR 27.) In fact,
22 Plaintiff tested positive for opioid use in March and June 2013
23 in addition to the instances cited by the ALJ. (AR 374-76.) But
24 Plaintiff testified that those positive findings were
25 attributable to prescribed pain medications (AR 60), and the
26 record supports that assertion for at least two of the positive
27 tests. In January 2013, he was hospitalized for a urinary
28 obstruction causing renal failure. (AR 302-03.) Upon discharge,

1 he was prescribed hydrocodone-acetaminophen⁷ "as needed for
2 severe pain." (AR 304-05.) In November 2013, he was prescribed
3 Vicodin⁸ "for breakthrough [pain]" from a tooth "needing
4 extraction." (AR 545.) It is unclear whether those
5 prescriptions were refillable or how long Plaintiff's medical
6 conditions continued and thus whether that could explain the
7 remaining positive tests. But Plaintiff's evidence supports at
8 least an inference that the positive tests resulted from his
9 legitimate use of prescribed opiate pain-relieving medication,
10 particularly in light of his consistently negative test results
11 for all other drug use.⁹ (See AR 371-77.)

12 Finally, the ALJ found that Plaintiff's failure to meet his
13 personal goals and the program's requirements of complete
14 abstinence from alcohol "suggest[ed] that [his] assertion that
15 his substance dependence [was] in remission [was] not credible."
16 (AR 30 (citing AR 535).) But Plaintiff's testimony about his
17 general substance-abuse remission was bolstered by the record.
18 His clinic treatment records from the relevant period regularly
19 noted "how well he [was] compl[y]ing [with] the clinic rules in
20

21 ⁷ Hydrocodone-acetaminophen is an opioid pain medication
22 used to relieve moderate to severe pain. See Hydrocodone-
23 Acetaminophen, WebMD, [https://www.webmd.com/drugs/2/drug-251/
24 hydrocodone-acetaminophen-oral/details](https://www.webmd.com/drugs/2/drug-251/hydrocodone-acetaminophen-oral/details) (last visited May 17,
25 2018).

26 ⁸ Vicodin is an opioid pain reliever used to relieve
27 moderate to severe pain. See Vicodin, WebMD, [https://
28 www.webmd.com/drugs/2/drug-3459/vicodin-oral/details](https://www.webmd.com/drugs/2/drug-3459/vicodin-oral/details) (last
visited May 17, 2018).

⁹ On remand, the ALJ can develop the record to determine the
circumstances of the unexplained periods when Plaintiff tested
positive for opiates.

1 providing a urine sample for testing" (AR 321, 323-24, 341-42,
2 349), and each of his urine toxicology tests from that time were
3 negative for cocaine and cannabis (AR 371-77). Regarding his
4 alcohol use and goals, the ALJ cites and relies on Plaintiff's
5 PRRC treatment, but he did not enroll in PRRC or adopt its goals
6 until after the relevant period. (See AR 535 (completing 30-day
7 trial on January 31, 2014), 620 (reporting in November 2013,
8 before beginning PRRC, that "in the past year" he drank "[f]our
9 or more times a week").)

10 And though Plaintiff relapsed at times even after beginning
11 the program and despite "his long-term goal [of] sobriety" (see
12 AR 535), those occurrences more reflect his struggle to get sober
13 than show a "lack of candor" in the information he presented to
14 the ALJ. Cf. Thomas, 278 F.3d at 959 (plaintiff had not "been a
15 reliable historian, presenting conflicting information about her
16 drug and alcohol usage"). This is particularly so given that
17 Plaintiff acknowledged his relapses to his VA care providers.
18 (See, e.g., AR 585 (Jan. 2014: reporting that he "still
19 struggle[d] with periodic alcohol use lapses, most recently
20 drinking 3 beers on Monday of [that] week"), 777 (Feb. 2015:
21 reporting that he had been "'up and down' with alcohol use" and
22 "last consumed alcohol on Super Bowl Sunday")); cf. Guerrero v.
23 Colvin, No. CV-13-01354-TUC-BPV, 2015 WL 875378, at *8-9 (D.
24 Ariz. Mar. 2, 2015) (affirming ALJ's credibility finding when
25 Plaintiff made contradictory statements, reporting sustained
26 sobriety to his treatment providers but testifying at hearing to
27 marijuana use during same time period); Frazier v. Berryhill, No.
28 2:16-cv-01808 TLN CKD, 2017 WL 6017139, at *8 (E.D. Cal. Dec. 5,

1 2017) (holding that plaintiff's "less than candid statements
2 about her drug use" was "valid reason[] for discounting [her]
3 subjective complaints").

4 Thus, Plaintiff's statements about his substance abuse did
5 not present a "dramatic inconsistenc[y]" amounting to a clear and
6 convincing reason to discount them. See Bechelli-Gonzalez v.
7 Comm'r of Soc. Sec. Admin., No. 16-cv-07284-MEJ, 2018 WL 1014610,
8 at *6 (N.D. Cal. Feb. 22, 2018) (holding that plaintiff's
9 "misstating the date of her last drink by one month [was] not a
10 clear and convincing reason" "[c]ompared to the dramatic
11 inconsistencies at issue in Verduzco," in which plaintiff's
12 statements to different sources varied between "drink[ing] an
13 average of 24 bottles of beer a day" and "not abus[ing] alcohol
14 or [being] in remission").

15 Accordingly, the ALJ failed to provide a clear and
16 convincing reason for finding Plaintiff's statements regarding
17 substance abuse "not credible." See Brown-Hunter, 806 F.3d at
18 493; Treichler, 775 F.3d at 1102.

19 B. Remand for Further Proceedings Is Appropriate

20 Plaintiff requests that the Court "credit evidence that was
21 rejected" and order an "immediate award of benefits." (J. Stip.
22 at 17-18.) When, as here, an ALJ errs, the Court "ordinarily
23 must remand . . . for further proceedings." Leon v. Berryhill,
24 880 F.3d 1041, 1045 (9th Cir. 2017) (as amended Jan. 25, 2018)
25 (explaining that "a direct award of benefits was intended as a
26 rare and prophylactic exception to the ordinary remand rule");
27 see also Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000)
28 (as amended). "[T]he decision of whether to remand for further

1 proceedings turns upon the likely utility of such proceedings.”
2 Harman, 211 F.3d at 1179; see also Garrison v. Colvin, 759 F.3d
3 995, 1019-20 (9th Cir. 2014).

4 Here, given Plaintiff’s continued alcohol and drug use and
5 the possibility that the ALJ might have been correct that his
6 symptoms would subside sufficiently to render him not disabled if
7 he stopped substance use altogether, remand is warranted. See
8 Garrison, 759 F.3d at 1021 (Court has “flexibility to remand for
9 further proceedings when the record as a whole creates serious
10 doubt as to whether the claimant is, in fact, disabled within the
11 meaning of the Social Security Act”). On remand, the ALJ must
12 reconsider his evaluation of Plaintiff’s statements regarding
13 substance abuse. If he again discounts them, he can provide an
14 adequate reason for doing so. The ALJ may also expressly
15 consider paragraph C of Listing 12.04. Thus, remand is
16 appropriate. See id. at 1020 n.26.

17 **VI. CONCLUSION**


18 Consistent with the foregoing and under sentence four of 42
19 U.S.C. § 405(g),¹⁰ IT IS ORDERED that judgment be entered
20 REVERSING the Commissioner’s decision, GRANTING Plaintiff’s
21 request for remand, and REMANDING this action for further
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26 ¹⁰ That sentence provides: “The [district] court shall have
27 power to enter, upon the pleadings and transcript of the record,
28 a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing.”

1 proceedings consistent with this memorandum decision.

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3 DATED: May 18, 2018



JEAN ROSENBLUTH
U.S. Magistrate Judge

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