

O

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

TERRON M.,  
Plaintiff,  
v.  
ANDREW M. SAUL, Commissioner  
of Social Security,<sup>1</sup>  
Defendant.

Case No. 2:18-cv-09737-KES

MEMORANDUM OPINION AND  
ORDER

**I.**  
**BACKGROUND**

Plaintiff Terron M. (“Plaintiff”) stopped working in December 2005. Administrative Record (“AR”) 188. He applied for Social Security disability benefits in January 2015, alleging disability commencing December 1, 2014. AR 55. He identified paranoia (which he has had since 1993) and a right “boxer fracture” (i.e., a broken wrist/hand bone) as his disabling impairments. AR 55, 58.

---

<sup>1</sup> Mr. Saul was sworn in as Commissioner of Social Security in June 2019. See <https://blog.ssa.gov/social-security-welcomes-its-new-commissioner/>. Accordingly, he is substituted for Ms. Berryhill pursuant to Federal Rule of Civil Procedure 25(d).

1 In March 2015, he identified right arm and hand pain along with mental issues as  
2 his disabling conditions. AR 194-201. On March 8, 2017, an Administrative Law  
3 Judge (“ALJ”) conducted a hearing at which Plaintiff, who was represented by an  
4 attorney, appeared and testified, as did a vocational expert (“VE”). AR 31-44. A  
5 supplemental hearing was held on August 16, 2017. AR 45-54. On December 15,  
6 2017, the ALJ issued an unfavorable decision. AR 12-30. The ALJ found that  
7 Plaintiff suffered from medically determinable severe impairments consisting of  
8 “history of pancreatitis”; “history of ‘benign’ pancreatic mass”; degenerative joint  
9 disease of the right wrist; and a history of substance abuse. AR 17. Despite these  
10 impairments, the ALJ found that Plaintiff had a residual functional capacity  
11 (“RFC”) to perform a narrowed range of medium work. AR 20.

12 Based on the RFC analysis and the VE’s testimony, the ALJ found that  
13 Plaintiff could work perform his past relevant work as a home attendant. AR 24.  
14 The ALJ concluded that Plaintiff was not disabled. AR 25.

## 15 II.

### 16 ISSUES PRESENTED

17 Issue One: Whether the ALJ properly considered the applicability of Listing  
18 5.08.

19 Issue Two: Whether the ALJ properly considered the opinions of treating  
20 physician Naemah Ghafur in the February 2016 “Medical Opinion Re: Ability to  
21 do Work-Related Activities (Physical)” form (the “Medical Opinion Form” at AR  
22 729-31).

23 (Dkt. 23, Joint Stipulation [“JS”] at 3.)

## 24 III.

### 25 DISCUSSION

#### 26 A. ISSUE ONE: Listing 5.08.

##### 27 1. Steps Two and Three of the Sequential Evaluation Process.

28 At step two, ALJs must determine whether the claimant has “a severe

1 medically determinable physical or mental impairment that meets the duration  
2 requirement in [20 C.F.R.] § 404.1509, or a combination of impairments that is  
3 severe and meets the duration requirement.” 20 C.F.R. § 404.1520(a)(4)(ii).

4 Section 404.1509’s duration requirement provides that an impairment “must have  
5 lasted or must be expected to last for a continuous period of at least 12 months.”  
6 Id. § 404.1509.

7 Step three of the sequential evaluation process requires ALJs to consider  
8 whether a claimant’s severe impairments meet or equal a listed impairment. Id.  
9 § 404.1520(a)(4)(iii). Listed impairments are presumed severe enough to preclude  
10 gainful work. Id. § 404.1520(d); see 20 C.F.R. Part 404, Subpt. P, App. 1  
11 (“Appendix I” or “the Listings”). If the claimant meets or equals one of the listed  
12 impairments, a conclusive presumption of disability applies. Marcia v. Sullivan,  
13 900 F.2d 172, 174 (9th Cir. 1990).

14 The listing of impairments in Appendix I “describes for each of the major  
15 body systems impairments . . . severe enough to prevent an individual from doing  
16 any gainful activity.” 20 C.F.R. § 404.1525(a). The Social Security  
17 Administration does not consider a claimant’s impairment to be one listed in  
18 Appendix I solely because it has the diagnosis of a listed impairment. Id.  
19 § 404.1525(d). The impairment “must [satisfy] all of the criteria in the listing.”  
20 Id. Medical equivalence will be found if the medical findings are “at least equal in  
21 severity and duration to the criteria of any listed impairment.” 20 C.F.R.  
22 § 404.1526.

23 In determining whether a claimant’s impairment equals a listing at step  
24 three, the ALJ “must explain adequately his evaluation of alternative tests and the  
25 combined effects of the impairments.” Marcia v. Sullivan, 900 F.2d 172, 176 (9th  
26 Cir. 1990) (finding error where ALJ stated claimant did not equal a listing without  
27 explanation despite presentation of relevant medical evidence). The ALJ,  
28 however, is not required to discuss the combined effects of a claimant’s

1 impairments or compare them to any listing in an equivalency determination,  
2 unless the claimant presents evidence in an effort to establish equivalence. See  
3 Lewis v. Apfel, 236 F.3d 503, 514 (9th Cir. 2001) (distinguishing Marcia and  
4 determining that the ALJ’s failure to consider equivalence was not reversible error  
5 because the claimant did not offer any theory, plausible or otherwise, as to how his  
6 impairments combined to equal a listing impairment, or any evidence to support  
7 such a theory).

8 While ALJs must discuss and evaluate evidence that supports their step-  
9 three conclusion, they need not do so under any specific heading. Id. at 513; see  
10 also Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th Cir. 1990) (finding the ALJ’s  
11 discussion of equivalence sufficient despite the ALJ’s failure to “state what  
12 evidence supported the conclusion that appellant’s impairments do not meet or  
13 exceed the Listing of Impairments,” because summary of medical evidence was  
14 “an adequate statement of the foundations on which the ultimate factual  
15 conclusions are based”). ALJs need not identify which listing(s) they considered  
16 so long as their conclusions are supported by substantial evidence. Pedregon v.  
17 Colvin, No. 12-0361-JPR, 2013 U.S. Dist. LEXIS 79229, at \*39 (C.D. Cal. June 5,  
18 2013).

## 19 **2. The ALJ’s Step Two and Three Findings.**

20 The ALJ found that Plaintiff suffered from severe impairments potentially  
21 affecting his digestive system, including “a history of ‘benign’ pancreatic mass”  
22 and “a history of pancreatitis.” AR 17. His treating records contain multiple  
23 references to “chronic pancreatitis” and discuss how a pancreatic mass was  
24 pressing on his stomach.<sup>2</sup> AR

---

25 <sup>2</sup> Plaintiff reported abdominal pain in June 2015. AR 333-34. An  
26 abdominal CT scan showed abnormalities including a “mass with calcifications”  
27 involving the head of the pancreas. AR 339. In September 2015, Plaintiff was still  
28 diagnosed with a “pancreatic mass and chronic abdominal pain,” but he reported  
his pain was “minimal to gone.” AR 322, 335. An abdominal CT scan showed

1           The ALJ considered whether Plaintiff’s severe impairments met or equaled  
2 “all sections of the Listing of Impairments and, in particular, those sections of the  
3 Listing pertaining to the Digestive System and the Musculoskeletal System.” AR  
4 20. The ALJ concluded that Plaintiff “does not have a physical impairment or  
5 combination of physical impairments that meets or medically equals one of the  
6 Listings.” Id. Later in her opinion, the ALJ noted, “treatment records do not  
7 document continued weight loss ....” AR 22. The ALJ supported this note with a  
8 detailed chronological summary of treating records from August 2014 through  
9 May 2017. AR 22-23.

10           Based on Plaintiff’s reported right hand pain and diagnosis of degenerative  
11 joint disease (AR 316), the state agency consultants considered whether he met or  
12 equaled Listing 1.02 for joint dysfunction. AR 59, 67. They did not consider  
13 Listing 5.08. Id. Plaintiff has not cited anywhere in the AR where he asked the  
14 ALJ to consider whether his digestive impairments met or equaled Listing 5.08.

### 15           **3. Analysis of Claimed Error.**

16           On appeal, Plaintiff argues that he satisfies Listing 5.08 addressing weight  
17 loss caused by any digestive disorder. (JS at 3.) Listing 5.08 presumes disability  
18 in cases of “[w]eight-loss due to any digestive disorder despite continuing  
19 treatment as prescribed, with BMI<sup>3</sup> of less than 17.50 calculated on at least two

20 \_\_\_\_\_  
21 “calcification around the pancreatic head” that “may indicate chronic pancreatitis,”  
22 but the pancreatic “mass” was “less pronounced” than seen in the earlier June 2015  
23 study. AR 332. In February 2016, a radiology report notes that Plaintiff has a  
24 “history of pancreatic cancer” with “chronic pancreatitis.” AR 359-60. In October  
25 2015, he underwent an endoscopic retrograde cholangiopancreatography  
26 (“ERCP”), a procedure that enables doctors to examine the pancreatic and bile  
27 ducts by inserting a lighted, bendable tube through the mouth into the stomach.  
28 AR 340. It revealed findings “consistent with chronic pancreatitis.” Id.

<sup>3</sup> The formula for body mass index, or BMI, is weight in kilograms divided  
by height in meters squared. When using English measurements, pounds should be  
divided by inches squared. This should then be multiplied by 703 to convert from

1 evaluations at least 60 days apart within a consecutive 6-month period.” Appendix  
2 I § 5.08.

3 To support this argument, Plaintiff points to the ALJ’s step two findings  
4 establishing that he has severe impairments affecting his digestive system.<sup>4</sup> Next,  
5 Plaintiff argues that he was “received active and consistent treatment for his  
6 digestive impairments in the form of prescription medications and proton pump  
7 inhibitor therapy.” (JS at 4, citing AR 346, 351, 377, 494.) Finally, Plaintiff  
8 points to three physical examinations when he had a BMI less than 17.50:

9 During a September 22, 2015 physical examination, Plaintiff was  
10 found to have a body mass index (BMI) of 17.00. [AR 665 (noting  
11 Plaintiff’s height as 5’5” and his weight as 102 lbs).] Shortly  
12 thereafter, during a September 30, 2015 examination, Plaintiff’s BMI  
13 was found to have decreased to 16.31. [AR 640 (noting Plaintiff’s  
14 height as 5’6” and his weight as 101 lbs).] During a February 18,  
15 2016 examination, Plaintiff was noted to have a BMI of 15.64. [AR  
16 636 (noting Plaintiff’s height as 5’5” and his weight as 94 lbs).]  
17 (JS at 4.) The September 22, 2015 examination and the February 18, 2016  
18 examination are more than 60 days apart and fall within a consecutive 6-month  
19 period.

20 The Commissioner contends, “In order to meet the Listing, Plaintiff has to  
21 prove that he was below 17.50 BMI consistently for at least a year.” (JS at 7.) The  
22 Court disagrees. Plaintiff must show that his underlying digestive impairments

23 \_\_\_\_\_  
24 lbs/inches<sup>2</sup> to kg/m<sup>2</sup>. (JS at 6 n.3, citing Listing 5.00G.2.)

25 <sup>4</sup> The Court notes some ambiguity in the step two findings. The ALJ  
26 described Plaintiff’s pancreatic impairments as historical (suggesting Plaintiff did  
27 not suffer from them at the time of the hearing) but did not make findings about  
28 when he had them. It is unclear what time frame the ALJ considered in finding  
Plaintiff’s pancreatic impairments “severe.”

1 lasted for at least a year – a finding usually encompassed in the ALJ’s finding of  
2 severity at step two. Listing 5.08 only requires weight loss caused by a severe  
3 digestive impairment (and shown by a BMI of less than 17.50 calculated on at least  
4 two evaluations at least 60 days apart within a consecutive 6-month period) despite  
5 continuous treatment.

6 The Commissioner also argues that Plaintiff has not cited to “any specific  
7 treatment recommended by his physicians for weight loss,” and that this is also a  
8 requirement of the listing. (JS at 7.) Again, the Court disagrees. The listing  
9 requires treatment of the underlying digestive disorder, not treatment specific to  
10 weight loss (which is a symptom of the impairment, not the impairment itself).  
11 The Court will not decide if the record reflects “continuing treatment,” as the  
12 listing requires, but notes that the records cited by Plaintiff show at least that in  
13 2015, Plaintiff was prescribed two anti-inflammatory drugs, Omeprazole (used to  
14 treat stomach problems), MiraLAX (to treat constipation), as well as Norco, and in  
15 February 2016, he was being treated with Bentyl (used to treat irritable bowel  
16 syndrome), Phenergan (used to treat nausea and vomiting), and Albuterol (used to  
17 treat bronchospasm). AR 637, 665.

18 Consequently, the ALJ’s step three conclusion lacks substantial evidentiary  
19 support.

#### 20 **4. Remand is the Appropriate Remedy.**

21 District courts have discretion to remand a case either for additional  
22 evidence and findings or to award benefits. Smolen v. Chater, 80 F.3d 1273, 1292  
23 (9th Cir. 1996). Courts should only remand for an award of benefits where further  
24 administrative proceedings would serve no useful purpose. Id.

25 Here, further administrative proceedings are required to determine whether  
26 Plaintiff was disabled for part of all of his claimed period of disability. On  
27 remand, the ALJ should make findings as to when Plaintiff’s digestive  
28 impairments were “severe” and then consider Plaintiff’s evidence concerning the

1 requirements of Listing 5.08 during the relevant times. If Plaintiff is  
2 presumptively disabled as a result of this step-three analysis, then the ALJ may  
3 need to consider the impact (if any) of Plaintiff's history of substance abuse. See  
4 20 C.F.R. § 404.1535; Sax v. Colvin, 31 F. Supp. 3d 1156, 1161 (E.D. Wash.  
5 2014) ("However, because substance abuse was at issue, rather than immediately  
6 awarding benefits (as would ordinarily be the case for a claimant whose  
7 impairments met several of the Listings impairments) . . . , the ALJ was required to  
8 conduct the sequential evaluation a second time to consider whether Plaintiff  
9 would still be disabled absent substance abuse.").

10 The ALJ may also consider Plaintiff's other claims of error not addressed by  
11 this Court.

12 **IV.**  
13 **CONCLUSION**

14 For the reasons stated above, IT IS ORDERED that judgment shall be  
15 entered REVERSING the decision of the Commissioner and REMANDING for  
16 further administrative proceedings consistent with this opinion.

17 DATED: July 11, 2019

18   
19 KAREN E. SCOTT  
20 United States Magistrate Judge  
21  
22  
23  
24  
25  
26  
27  
28