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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

DAVID B. LABATO, SR.,)	NO. EDCV 09-01710 SS
)	
Plaintiff,)	
)	
v.)	MEMORANDUM DECISION AND ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
)	

**I.
INTRODUCTION**

David B. Labato, Sr. ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying his application for Disability Insurance Benefits ("DIB"). The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Agency is REVERSED and REMANDED for further proceedings.

1 In a report dated January 14, 2009, the VE concluded that Plaintiff
2 had a sedentary Residual Functional Capacity ("RFC")¹ based on the ME's
3 conclusions. (AR 140). The VE reported that Plaintiff had the ability
4 to work as a document preparer, an order clerk, and an information
5 clerk. (AR 140).

6
7 On April 17, 2009, the ALJ issued a decision denying benefits. (AR
8 15). Plaintiff sought review of this decision before the Appeals
9 Council. On July 13, 2009, the Appeals Council denied review. (AR 1).
10 Plaintiff filed the instant action on March 5, 2010.

11
12 **III.**

13 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

14
15 To qualify for disability benefits, a claimant must demonstrate a
16 medically determinable physical or mental impairment that prevents him
17 from engaging in substantial gainful activity² and that is expected to
18 result in death or to last for a continuous period of at least twelve
19 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing
20 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant
21 incapable of performing the work he previously performed and incapable
22 of performing any other substantial gainful employment that exists in
23

24
25 ¹ Residual functional capacity is "the most [one] can still do
26 despite [his] limitations" and represents an assessment "based on all
the relevant evidence." 20 C.F.R. § 416.945(a).

27 ² Substantial gainful activity means work that involves doing
28 significant and productive physical or mental duties and is done for pay
or profit. 20 C.F.R. § 416.910.

1 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
2 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

3
4 To decide if a claimant is entitled to benefits, an ALJ conducts
5 a five-step inquiry. 20 C.F.R. § 416.920. The steps are:

6
7 (1) Is the claimant presently engaged in substantial gainful
8 activity? If so, the claimant is found not disabled.
9 If not, proceed to step two.

10 (2) Is the claimant's impairment severe? If not, the
11 claimant is found not disabled. If so, proceed to step
12 three.

13 (3) Does the claimant's impairment meet or equal the
14 requirements of any impairment listed at 20 C.F.R. Part
15 404, Subpart P, Appendix 1? If so, the claimant is
16 found disabled. If not, proceed to step four.

17 (4) Is the claimant capable of performing his past work? If
18 so, the claimant is found not disabled. If not, proceed
19 to step five.

20 (5) Is the claimant able to do any other work? If not, the
21 claimant is found disabled. If so, the claimant is
22 found not disabled.

23
24 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d
25 949, 953-54 (9th Cir. 2001); 20 C.F.R. § 416.920(b)-(g)(1).

26
27 The claimant has the burden of proof at steps one through four, and
28 the Commissioner has the burden of proof at step five. Bustamante, 262

1 F.3d at 953-54. If, at step four, the claimant meets his burden of
2 establishing an inability to perform the past work, the Commissioner
3 must show that the claimant can perform some other work that exists in
4 "significant numbers" in the national economy, taking into account the
5 claimant's RFC, age, education and work experience. Tackett, 180 F.3d
6 at 1100; 20 C.F.R. § 416.920(g)(1). The Commissioner may do so by the
7 testimony of a VE or by reference to the Medical-Vocational Guidelines
8 appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2 (commonly known
9 as "the Grids"). Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir.
10 2001). When a claimant has both exertional (strength-related) and
11 nonexertional limitations, the Grids are inapplicable and the ALJ must
12 take the testimony of a VE. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir.
13 2000).

14
15 **IV.**

16 **THE ALJ'S DECISION**

17
18 The ALJ employed the five-step sequential evaluation process and
19 concluded that Plaintiff was not disabled within the meaning of the
20 Social Security Act. (AR 15). At step one, the ALJ found that
21 Plaintiff had not engaged in substantial gainful activity since
22 September 1, 2006. (AR 10). At step two, he found that Plaintiff had
23 the severe impairments of bilateral osteoarthritis of the knees, status
24 post bilateral partial medial meniscectomy, morbid obesity, and status
25 post anterior cruciate ligament reconstruction of the right knee. (AR
26 10).

27
28 \\

1 At step three, the ALJ found that the severe impairments at step
2 two did not meet or medically equal a listed impairment. (AR 10).

3
4 At step four, the ALJ found that Plaintiff was not capable of
5 performing his past relevant work as a fork lift operator, sale clerk,
6 automobile parts manager, truck driver, and an insulator installer. (AR
7 13). He also found that Plaintiff had the RFC to perform a "wide range
8 of sedentary work" and was able to "sit 6 hours in an 8 hour day; stand
9 and walk 2 hours in an 8 hour day; can lift and carry occasionally 20
10 pounds and 10 pounds frequently; can use upper extremities without any
11 restrictions; can use bilateral lower extremities for repetitive
12 movements; is moderately restricted from unprotected heights and
13 exposure in marked changes in temperature and humidity; and is mildly
14 restricted from being around moving machinery and driving automotive
15 equipment." (AR 10).

16
17 At step five, the ALJ found that there were jobs existing in
18 significant numbers in the national economy that Plaintiff could
19 perform. (AR 14). Specifically, the ALJ concluded that Plaintiff could
20 perform the job requirements of a document preparer, order clerk, and
21 an information clerk. (AR 14). Thus, the ALJ concluded that Plaintiff
22 was not disabled. (AR 15).

23
24 **V.**

25 **STANDARD OF REVIEW**

26
27 Under 42 U.S.C. § 405(g), a district court may review the
28 Commissioner's decision to deny benefits. The court may set aside the

1 Commissioner's decision when the ALJ's findings are based on legal error
2 or are not supported by substantial evidence in the record as a whole.
3 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v.
4 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

5
6 "Substantial evidence is more than a scintilla, but less than a
7 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
8 which a reasonable person might accept as adequate to support a
9 conclusion." Id. To determine whether substantial evidence supports
10 a finding, the court must "'consider the record as a whole, weighing
11 both evidence that supports and evidence that detracts from the
12 [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny
13 v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can
14 reasonably support either affirming or reversing that conclusion, the
15 court may not substitute its judgment for that of the Commissioner.
16 Reddick, 157 F.3d at 720-21.

17
18 **VI.**
19 **DISCUSSION**
20

21 Plaintiff contends the ALJ erred for four reasons: (1) Plaintiff
22 was prejudiced by the ALJ's failure to advise him of his right to
23 representation and obtain a knowing waiver (Memorandum in Support of
24 Plaintiff's Complaint ("Complaint Memo.") at 3-4); (2) the ALJ erred by
25 relying on a non-testifying medical witness whose report was flawed by
26 failing to address all the medical evidence of record (id. at 5-7); (3)
27 the ALJ erred by failing to properly assess Plaintiff's credibility (id.
28

1 at 7-9); and (4) the ALJ failed to fully and fairly develop the record.
2 (Id. at 9-11).

3
4 The Court agrees with Plaintiff's first and fourth contentions.
5 For the reasons discussed below, the Court finds that the ALJ's decision
6 should be reversed and this action remanded for further proceedings.

7
8 **A. Remand Is Required Because The ALJ Failed To Properly Advise**
9 **Plaintiff Regarding His Right To Representation**

10
11 Plaintiff claims that the ALJ failed to properly advise him
12 regarding his right to representation. (Complaint Memo. at 3-4). The
13 Court agrees.

14
15 When a claimant appears at a hearing without counsel, the ALJ has
16 an obligation to inform the claimant of options other than self-
17 representation. The Ninth Circuit has held that an ALJ must explain to
18 a pro se claimant in a disability case the "avenues which [the pro se
19 claimant] could pursue in obtaining counsel." Cruz v. Schweiker, 645
20 F.2d 812, 814 (9th Cir. 1981). In the alternative, the ALJ must probe
21 for additional facts and "explain to the claimant the type of showing
22 which the applicant had to make in order to prove his case
23 successfully." Id.

24
25 Here, the transcript of the hearing demonstrates that the ALJ
26 failed to explain to Plaintiff the avenues he could pursue in obtaining
27 counsel. (See AR 24-39). In his opening statement, the ALJ stated,
28 "I'm an Administrative Law Judge with the Office of Disability

1 Adjudication and Review of the Social Security Administration. Now do
2 you have any objection to my receiving into evidence the documents that
3 are now in your exhibit file?" (AR 26). The ALJ then discussed
4 subsequent medical records that Plaintiff would submit into the record,
5 before swearing Plaintiff in and beginning to take Plaintiff's testimony
6 by asking "Now your name is David B. Labato, Sr., is that right?" (AR
7 27). The ALJ then continued to ask Plaintiff questions, without even
8 an inquiry as to whether the Plaintiff wished to proceed without
9 counsel. (AR 27-38).

10
11 In addition, the ALJ failed to "probe for additional facts and
12 explain to the claimant the type of showing which the applicant had to
13 make in order to prove his case successfully." Cruz, 645 F.2d at 813.
14 Although the ALJ briefly explained the hearing process, he nevertheless
15 failed to satisfy Cruz because he offered no explanation to Plaintiff
16 regarding the showing he needed to make to prove his case. (See AR 26-
17 27).

18
19 The ALJ failed in other respects to satisfy his obligations to a
20 pro se claimant in a disability action. As the Ninth Circuit has
21 repeatedly observed:

22
23 [W]here the claimant is not represented, it is incumbent upon
24 the ALJ to scrupulously and conscientiously probe into,
25 inquire of and explore for all the relevant facts. He must
26 be especially diligent in ensuring that favorable as well as
27 unfavorable facts and circumstances are elicited.

1 Higbee v. Sullivan, 975 F.2d 558, 560 (9th Cir. 1992) (citing Cox v.
2 Califano, 587 F.2d 988, 991 (1978) (citations omitted); and Heckler v.
3 Campbell, 461 U.S. 458, 470-73, 103 S. Ct. 1952, 1959-60, 76 L. Ed. 2d
4 66 (1983)). This record does not demonstrate that the ALJ was diligent
5 in ensuring that both the "favorable and unfavorable facts" were
6 elicited. Plaintiff was further prejudiced by the ALJ's failure to
7 comply with his obligations because Plaintiff did not have the
8 opportunity to cross-examine the ME and the VE. (See AR 24-39).

9
10 The Supreme Court has held that a written report by an examining
11 physician may constitute substantial evidence when a plaintiff has not
12 exercised the right to subpoena the reporting physician and thus has
13 forfeited the opportunity for cross-examination. See Richardson v.
14 Perales, 402 U.S. 389, 402, 91 S. Ct. 1420, 28 L. Ed. 2d. 842 (1971).
15 However, a plaintiff cannot be denied the opportunity to cross examine
16 or rebut testimony. Burkhart v. Bowen, 856 F.2d 1335, 1341 (9th Cir.
17 1988). In Burkhart, the ALJ had concluded that the plaintiff could not
18 perform any past relevant work. Id. The ALJ, though, did not consult
19 a VE, and instead speculated as to the work that the plaintiff could
20 perform. Id. Such actions "effectively deprived [plaintiff] of an
21 opportunity to cross-examine a witness or rebut testimony." Id.

22
23 Here, Plaintiff's hearing was held on August 28, 2008. (AR 24-39).
24 The ALJ submitted interrogatories to the ME and VE, which were completed
25 on November 11, 2008, and January 14, 2009, respectively. (AR 142-146;
26 136-140). The record does not indicate why the ALJ chose to use
27 interrogatories or whether Plaintiff received notice of the
28 interrogatories. It appears that Plaintiff was not provided with

1 sufficient information to make an informed decision about whether
2 Plaintiff needed to request that the ALJ subpoena the VE or ME to allow
3 for cross-examination. Thus, Plaintiff was effectively “deprived . .
4 . of an opportunity to cross examine a witness or rebut testimony.”
5 Burkhart, 853 F.2d at 1341. Accordingly, the case must be remanded to
6 provide Plaintiff an opportunity to cross-examine the ME and VE.

7
8 **B. The ALJ Failed To Properly Consider The Effect Of Plaintiff's**
9 **Obesity On His Other Impairments**

10
11 Plaintiff claims that the ALJ failed to fully and fairly develop
12 the record in three separate aspects. (Complaint Memo. at 9-11).
13 First, Plaintiff argues that the ALJ failed to develop the record
14 relating to the severe impairment of morbid obesity. (Id. at 9).
15 Second, Plaintiff argues that the ALJ failed to develop the record by
16 failing to contact his treating physician, Dr. Fisher. (Id. at 10).
17 Third, Plaintiff argues that the ALJ failed to develop the record by
18 failing to “scrupulously and conscientiously probe into, inquire of, and
19 explore all the relevant facts.” (Id. at 11) (internal quotation marks
20 omitted). The Court agrees with Plaintiff's first argument and
21 therefore need not reach his second and third arguments.

22
23 The Ninth Circuit has held that where there is evidence of
24 obesity, the ALJ must determine the effect of the claimant's obesity
25 upon his other impairments, his ability to work, and his general health.
26 See Celaya v. Halter, 332 F.3d 1177, 1181 (9th Cir. 2003) (“The ALJ was
27 responsible for determining the effect of [the claimant's] obesity upon
28 her other impairments, and its effect on her ability to work and general

1 health, given the presence of those impairments."); see also Social
2 Security Ruling 02-01p (requiring an ALJ to consider the effects of
3 obesity at several points in the five-step sequential evaluation).
4

5 Here, the record is replete with either diagnoses of, or references
6 to, Plaintiff's obesity. Indeed, the ALJ acknowledged that Plaintiff
7 had the severe impairment of morbid obesity. (AR 10). In response to
8 the ALJ's Medical Interrogatory, the ME listed morbid obesity as one of
9 Plaintiff's impairments. (AR 143). Nevertheless, the ALJ did not
10 analyze the effect of Plaintiff's obesity on his other impairments,
11 especially the arthritis in his knees. (See AR 11-13). This omission
12 was error. See Celaya, 332 F.3d at 1182; see also Barrett v. Barnhart,
13 355 F.3d 1065, 1068-69 (7th Cir. 2004) (ALJ erred in not considering
14 effect of Plaintiff's obesity on claimant's arthritis); Clifford v.
15 Apfel, 227 F.3d 863, 873 (7th Cir. 2000) (evidence of obesity required
16 ALJ to consider weight issue with the aggregate effect of claimant's
17 other impairments). Remand is appropriate on this basis as well. On
18 remand, the ALJ must consider the effect of Plaintiff's obesity as a
19 medically determinable impairment and its effect on his other
20 impairments.

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1 **VII.**

2 **CONCLUSION**

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4 Consistent with the foregoing, and pursuant to sentence four of 42
5 U.S.C. § 405(g),³ IT IS ORDERED that judgment be entered REVERSING the
6 decision of the Commissioner and REMANDING this matter for further
7 proceedings consistent with this decision. IT IS FURTHER ORDERED that
8 the Clerk of the Court serve copies of this Order and the Judgment on
9 counsel for both parties.

10
11 DATED: July 15, 2010

12
13 /s/ _____
14 SUZANNE H. SEGAL
15 UNITED STATES MAGISTRATE JUDGE
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27 ³ This sentence provides: "The [district] court shall have power
28 to enter, upon the pleadings and transcript of the record, a judgment
affirming, modifying, or reversing the decision of the Commissioner of
Social Security, with or without remanding the cause for a rehearing."