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

VICTOR MEDINA,)	NO. EDCV 10-00038-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff filed a Complaint on January 19, 2010, seeking review of the denial by the Social Security Commissioner (the "Commissioner") of plaintiff's application for a period of disability, disability insurance benefits ("DIB"), and social security income ("SSI"). On January 7, 2011, the parties consented to proceed before the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(c).¹ The parties filed a Joint Stipulation on July 21, 2010, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits or, alternatively, for further

¹ The parties initially consented to proceed before United States Magistrate Judge Rosalyn M. Chapman. Due to Judge Chapman's retirement, however, the case was transferred to the undersigned United States Magistrate Judge.

1 administrative proceedings; and defendant requests that the
2 Commissioner's decision be affirmed. The Court has taken the parties'
3 Joint Stipulation under submission without oral argument.
4

5 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
6

7 Plaintiff filed an application for a period of disability, DIB, and
8 SSI on November 27, 2007. (Administrative Record ("A.R.") 110-20.)
9 Plaintiff claims to have been disabled since February 17, 2005, due to
10 bipolar disorder, asthma, and a torn anterior-cruciate ligament ("ACL")
11 on his left knee.² (A.R. 110, 128.) Plaintiff has past relevant work
12 experience as an assembler and laborer.³ (A.R. 13.)
13

14 After the Commissioner denied plaintiff's claim initially and upon
15 reconsideration (A.R. 47-51, 55-60), plaintiff requested a hearing
16 (A.R. 62). On June 8, 2009, plaintiff, who was represented by counsel,
17 appeared and testified at a hearing before Administrative Law Judge
18 Jesse J. Pease (the "ALJ"). (A.R. 16-42.) Vocational expert Troy L.
19 Scott also testified. (*Id.*) On September 15, 2009, the ALJ denied
20 plaintiff's claim (A.R. 8-15), and the Appeals Council subsequently
21 denied plaintiff's request for review of the ALJ's decision (A.R. 1-3).
22 That decision is now at issue in this action
23
24

25 ² It appears that plaintiff also has hepatitis C and
26 gastroesophageal disease ("GERD"). (*see, e.g.*, A.R. 10.)

27 ³ Although not discussed in the ALJ's decision, it appears that
28 plaintiff also had past relevant work experience as a janitor and tow
truck driver. (*See, e.g.*, A.R. 35-36, 129.)

1 electronics assembler, and sewing machine operator. (A.R. 14.)
2 Accordingly, the ALJ concluded that plaintiff was not disabled within
3 the meaning of the Social Security Act from February 17, 2005, through
4 the date of his decision. (A.R. 8, 14-15.)

5
6 **STANDARD OF REVIEW**
7

8 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
9 decision to determine whether it is free from legal error and supported
10 by substantial evidence in the record as a whole. Orn v. Astrue, 495
11 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
12 evidence as a reasonable mind might accept as adequate to support a
13 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
14 a mere scintilla but not necessarily a preponderance." Connett v.
15 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the
16 record can constitute substantial evidence, only those 'reasonably drawn
17 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,
18 1066 (9th Cir. 2006)(citation omitted).

19
20 Although this Court cannot substitute its discretion for that of
21 the Commissioner, the Court nonetheless must review the record as a
22 whole, "weighing both the evidence that supports and the evidence that
23 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
24 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*
25 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
26 responsible for determining credibility, resolving conflicts in medical
27 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
28 1035, 1039 (9th Cir. 1995).

1 The Court will uphold the Commissioner's decision when the evidence
2 is susceptible to more than one rational interpretation. Burch v.
3 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
4 review only the reasons stated by the ALJ in his decision "and may not
5 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
6 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
7 the Commissioner's decision if it is based on harmless error, which
8 exists only when it is "clear from the record that an ALJ's error was
9 'inconsequential to the ultimate nondisability determination.'" Robbins
10 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
11 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d
12 at 679.

14 DISCUSSION

16 Plaintiff makes the following claims: (1) the ALJ did not consider
17 plaintiff's credibility properly; (2) the ALJ failed to consider the
18 statement of lay witness Martin Ramirez; (3) the ALJ did not consider
19 the statement of plaintiff's physician properly; and (4) the ALJ did not
20 consider plaintiff's ability to do "other" work properly.⁴ (Joint
21 Stipulation ("Joint Stip.") at 1-23.)

22 ///

23 ///

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25 ///

27 ⁴ Plaintiff initially raised another claim -- *to wit*, that the
28 ALJ did not address whether plaintiff met a Listing properly -- however,
plaintiff has since "withdrawn this argument." (Joint Stip. at 2-3.)

1 **I. The ALJ Failed To Give Clear And Convincing Reasons For Finding**
2 **Plaintiff To Be Not Credible.**

3
4 Once a disability claimant produces objective evidence of an
5 underlying impairment that is reasonably likely to be the source of his
6 subjective symptom(s), all subjective testimony as to the severity of
7 the symptoms must be considered. Moisa v. Barnhart, 367 F.3d 882, 885
8 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.
9 1991)(*en banc*); see also 20 C.F.R. §§ 404.1529(a), 416.929(a)
10 (explaining how pain and other symptoms are evaluated). "[U]nless an
11 ALJ makes a finding of malingering based on affirmative evidence
12 thereof, he or she may only find an applicant not credible by making
13 specific findings as to credibility and stating clear and convincing
14 reasons for each." Robbins, 466 F.3d at 883. The factors to be
15 considered in weighing a claimant's credibility include: (1) the
16 claimant's reputation for truthfulness; (2) inconsistencies either in
17 the claimant's testimony or between the claimant's testimony and his
18 conduct; (3) the claimant's daily activities; (4) the claimant's work
19 record; and (5) testimony from physicians and third parties concerning
20 the nature, severity, and effect of the symptoms of which the claimant
21 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.
22 2002); see also 20 C.F.R. §§ 404.1529(c), 416.929(c).

23
24 The ALJ found that plaintiff's "medically determinable impairments
25 could reasonably be expected to cause the alleged symptoms." (A.R. 12.)
26 Further, the ALJ cited no evidence of malingering by plaintiff.
27 Accordingly, the ALJ's reason for rejecting plaintiff's credibility must
28 be "clear and convincing."

1 At the hearing, plaintiff testified that he can sit for 20 or 30
2 minutes before his knee hurts him, he can stand for 45 minutes before it
3 starts to swell, and cold weather causes him to experience knee pain.
4 (A.R. 22.) He also testified that he cannot walk for long periods of
5 time or "climb because [his knee] starts to . . . make funny noises."
6 (A.R. 27.) Plaintiff testified that he could climb a ladder, if it were
7 not too high. (*Id.*) With respect to his mental health problems,
8 plaintiff testified that he is "nervous," "depressed at times," has
9 trouble concentrating, "has thoughts of suicide," and has "manic
10 phase[s]."⁵ (A.R. 20, 30.) Plaintiff also testified that, while his
11 medication helps, "it doesn't . . . calm [his] anxiety or . . . calm
12 [him] down. It just sedates [him]."⁶ (A.R. 21.)

13
14 In his decision, the ALJ stated that plaintiff's "statements
15 concerning the intensity, persistence and limiting effects of [his
16 alleged] symptoms are not credible to the extent they are inconsistent
17 with the [RFC] assessment." (A.R. 12.) In determining plaintiff's RFC,
18 however, the ALJ failed to provide any clear and convincing reasons for
19 rejecting plaintiff's testimony regarding the nature and extent of his
20 physical and mental limitations.⁷ Rather, the ALJ merely summarized

21
22
23 ⁵ Plaintiff testified that, while in a manic phase, he gets
24 agitated, "won't sleep at all," feels funny and weird, and will lock
25 himself in a room. (A.R. 29-30.)

26 ⁶ Plaintiff also testified that his medications make him drowsy
27 and sleepy. (A.R. 28.)

28 ⁷ Although the ALJ's RFC assessment provides for some physical
and mental limitations and restrictions, it does not encompass all of
plaintiff's alleged limitations. For example, plaintiff alleged greater
sit-stand limitations than the two hour standing limitation contained in
the ALJ's RFC assessment.

1 plaintiff's daily activities, plaintiff's criminal record, the medical
2 record, and the medical opinions. The ALJ's summary and his boilerplate
3 statement do not constitute clear and convincing reasons, as required,
4 for finding plaintiff's testimony to be not credible. Further, they are
5 not sufficiently specific to allow this Court to determine whether the
6 ALJ rejected plaintiff's testimony on permissible grounds.

7
8 Moreover, although defendant attempts to manufacture reasons from
9 the ALJ's various summaries to discredit plaintiff, the Court cannot
10 engage in post hoc rationalizations. See, e.g., Orn, 395 F.2d at 630
11 (noting that the court may "review only the reasons provided by the ALJ
12 in the disability determination and may not affirm the ALJ on a ground
13 upon which he did not rely"); see also Connett, 340 F.3d at 874.
14 Accordingly, because the ALJ did not give clear and convincing reasons
15 for discrediting plaintiff's testimony, the ALJ committed error.

16
17 **II. The ALJ Erred By Failing To Consider The Statement Of Lay Witness**
18 **Martin Ramirez.**

19
20 In evaluating the credibility of a claimant's assertions of
21 functional limitations, the ALJ must consider the lay witnesses'
22 reported observations of the claimant. Stout, 454 F.3d at 1053.
23 "[F]riends and family members in a position to observe a claimant's
24 symptoms and daily activities are competent to testify as to [the
25 claimant's] condition." Dodrill v. Shalala, 12 F.3d 915, 918-19 (9th
26 Cir. 1993); 20 C.F.R. §§ 404.1513(d)(4), 416.913(d)(4) ("[W]e may also
27 use evidence from other sources to show the severity of your
28 impairment(s). . . . Other sources include, but are not limited

1 to . . . spouses, parents and other care-givers, siblings, other
2 relatives, friends, neighbors, and clergy."). "If an ALJ disregards the
3 testimony of a lay witness, the ALJ must provide reasons 'that are
4 germane to each witness.'" Bruce v. Astrue, 557 F.3d 1113, 1115 (9th
5 Cir. 2009)(citation omitted). Further, the reasons "germane to each
6 witness" must be specific. Stout, 454 F.3d at 1054 (explaining that
7 "the ALJ, not the district court, is required to provide specific
8 reasons for rejecting lay testimony"). Lastly, "where the ALJ's error
9 lies in a failure to properly discuss competent lay testimony favorable
10 to the claimant, a reviewing court cannot consider the error harmless
11 unless it can confidently conclude that no reasonable ALJ, when fully
12 crediting the testimony, could have reached a different disability
13 determination." *Id.* at 1056.

14
15 In this case, the ALJ erred when he failed to discuss the lay
16 witness statement of plaintiff's brother, Martin Ramirez. When an ALJ
17 disregards a lay witness's testimony without comment, the Court applies
18 a harmless error analysis. Stout, 454 F.3d at 1054-56. Here,
19 plaintiff's brother stated, in pertinent part, that plaintiff has
20 difficulties with squatting, kneeling, stair climbing, memory,
21 completing tasks, concentration, and following instructions.⁸ (A.R.
22 156.) He noted that plaintiff's "torn ligament [in his left knee] . . .
23 limits him [from doing] certain tasks and his bipolar disorder keeps him
24

25 ⁸ While plaintiff concedes that the ALJ's postural restrictions
26 in his RFC assessment subsume the lay witness statement regarding
27 plaintiff's difficulties with squatting, kneeling, and stair climbing
28 (Joint Stip. at 13), the Court is not convinced that no reasonable ALJ
could have reached a different, possibly more restrictive,
determination, if Martin Ramirez's statement were considered and
credited.

1 from focusing on what . . . he has to do or accomplish overall." (A.R.
2 154, 158.) Ramirez also stated that plaintiff becomes "easily
3 distracted" when given oral instruction. (*Id.*) He stated that
4 plaintiff cannot handle stress -- noting that plaintiff "panics and gets
5 agitated" and that "[i]t takes a while for [plaintiff] to get
6 accustomed" to changes in routine. (A.R. 157.) While it is true that
7 the ALJ included certain mental and physical limitations and
8 restrictions in his RFC assessment of plaintiff, the Court cannot
9 confidently conclude that no reasonable ALJ, when fully crediting the
10 lay witness statement, could have reached a different disability
11 determination. Accordingly, the ALJ's error was not harmless.
12

13 **III. The ALJ Did Not Commit Reversible Error With Respect To His**
14 **Consideration Of The Statement Of Plaintiff's Physician.**
15

16 The determination of disability is reserved to the Commissioner.
17 20 C.F.R. §§ 404.1527(e), 416.927(e). A finding of disability is an
18 "administrative determination of how an impairment, in relation to
19 education, age, technological, economic, and social factors, affects
20 ability to engage in gainful activity." McLeod v. Astrue, 2010 U.S.
21 App. LEXIS 25617, *2 (9th Cir. 2010). Accordingly, a finding by a
22 medical source that a claimant is "disabled" or "unable to work" is not
23 binding on the ALJ with respect to the ultimate determination of
24 disability. 20 C.F.R. §§ 404.1527(6)(e)(1), 416.927(6)(e)(1);
25 Tonapetyan v. Halter, 242 F.3d 1144 (9th Cir. 2001). Further, the
26 rejection of a medical source's "opinion on ability to perform any
27 remunerative work does not by itself trigger a duty to contact the
28 physician for more explanation." McLeod, 2010 U.S. App. LEXIS, at *6-

1 *7. Moreover, an ALJ "need not discuss *all* evidence presented to him."
2 Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir. 1984)(citation
3 omitted)(emphasis in original); see also Howard v. Barnhart, 341 F.3d
4 1006, 1012 (9th Cir. 2003)(ALJ need not discuss every piece of
5 evidence). An ALJ must explain only why "significant probative evidence
6 has been rejected." Vincent, 739 F.3d at 1395 (internal quotations and
7 citation omitted).

8
9 The ALJ did not commit reversible error in failing to discuss the
10 "Certificate Of Disability" from plaintiff's physician, Cris Sherman,
11 D.O. The certificate stated, in pertinent part, that plaintiff would
12 not be able to perform his "regular duties" from August 25, 2008, to
13 November 25, 2008. (A.R. 403.) In the limitations/remarks section, it
14 was noted that plaintiff has an unstable knee and requires surgery
15 because of an ACL tear on his left knee. (*Id.*) In addition, there was
16 a note requesting expedited funding to allow for the elective procedure.
17 (*Id.*) Here, although Dr. Sherman opined that plaintiff could not
18 perform his "regular duties" for three months, Dr. Sherman's finding is
19 not binding on the ALJ, because it pertains to the determination of
20 disability -- a matter reserved exclusively to the Commissioner.
21 Moreover, an ALJ is not required to discuss every piece of evidence and
22 the rejection of an opinion regarding disability does not by itself
23 trigger a duty to re-contact the physician. Accordingly, no error
24 occurred.

25
26 However, even assuming *arguendo* that the ALJ committed error(s) --
27 in failing to discuss the "Certificate Of Disability" and/or in failing
28 to develop the record further -- any error committed was harmless. In

1 pertinent part, Dr. Sherman opined that plaintiff would be disabled for
2 only three months, which falls far short of the 12 month durational
3 requirement necessary for an impairment to be considered disabling. 42
4 U.S.C. § 1382c(a)(3)(A); 20 C.F.R. §§ 404.1509, 416.909. Further, as
5 pointed out by defendant, there is no evidence of record indicating a
6 disabling impairment for the requisite 12 months. Accordingly, no
7 reversible error occurred.

8
9 **IV. The ALJ Must Review And Reconsider Plaintiff's Ability To Perform**
10 **"Other Work."**

11
12 Based on the foregoing, there are several matters that the ALJ
13 needs to review and reconsider on remand. As a result, the ALJ's
14 conclusion regarding plaintiff's capacity to perform "other work" may
15 change. Therefore, the Court does not reach plaintiff's fourth claim,
16 to wit, that the ALJ erred in determining that plaintiff can perform
17 work other than his past relevant work. To properly review and
18 reconsider this issue, the ALJ needs to reconsider both the testimony of
19 plaintiff and the statement of lay witness Martin Ramirez to assess
20 properly what weight, if any, this evidence has on the ALJ's assessment
21 of plaintiff's ability to perform "other work." Further, to the extent
22 plaintiff's RFC may need to be reassessed, additional testimony from a
23 vocational expert likely will be required to determine whether plaintiff
24 can perform work other than his past relevant work.

25
26 **V. Remand Is Required.**

27
28 The decision whether to remand for further proceedings or order an

1 immediate award of benefits is within the district court's discretion.
2 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
3 useful purpose would be served by further administrative proceedings, or
4 where the record has been fully developed, it is appropriate to exercise
5 this discretion to direct an immediate award of benefits. *Id.* at 1179
6 ("[T]he decision of whether to remand for further proceedings turns upon
7 the likely utility of such proceedings."). However, where there are
8 outstanding issues that must be resolved before a determination of
9 disability can be made, and it is not clear from the record that the ALJ
10 would be required to find the claimant disabled if all the evidence were
11 properly evaluated, remand is appropriate. *Id.* at 1179-81.

12
13 Remand is the appropriate remedy to allow the ALJ the opportunity
14 to remedy the above-mentioned deficiencies and errors. *See, e.g.,*
15 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for
16 further proceedings is appropriate if enhancement of the record would be
17 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989)
18 (remand appropriate to remedy defects in the record).

19
20 On remand, the ALJ must correct the above-mentioned deficiencies
21 and errors. Specifically, the ALJ needs to reconsider plaintiff's
22 testimony and if applicable, give clear and convincing reasons for
23 rejecting it. In addition, the ALJ must provide germane reasons, if
24 they exist, for rejecting lay witness Martin Ramirez's statement
25 regarding his observation of the nature and extent of plaintiff's
26 alleged impairments and limitations. After correcting the above errors
27 and deficiencies, the ALJ may need to reassess plaintiff's RFC, in which
28 case, additional testimony from a vocational expert likely will be

1 needed to determine what work, if any, plaintiff can perform.

2
3 **CONCLUSION**

4
5 Accordingly, for the reasons stated above, IT IS ORDERED that the
6 decision of the Commissioner is REVERSED, and this case is REMANDED for
7 further proceedings consistent with this Memorandum Opinion and Order.

8
9 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
10 copies of this Memorandum Opinion and Order and the Judgment on counsel
11 for plaintiff and for defendant.

12
13 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

14
15 DATED: January 13, 2011

16 
17 MARGARET A. NAGLE
18 UNITED STATES MAGISTRATE JUDGE