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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL L. LOGAN,	)	No. ED CV 12-107-PJW
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM OPINION AND ORDER
	)	
CAROLYN W. COLVIN,	)	
Acting Commissioner of the	)	
Social Security Administration,	)	
	)	
Defendant.	)	

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I. INTRODUCTION

Plaintiff Michael Logan appeals a decision by Defendant Social Security Administration ("the Agency"), denying his application for Disability Insurance Benefits ("DIB"). He claims that the Administrative Law Judge ("ALJ") erred when she found that his allegations were not fully credible and when she determined that he could perform light work. (Joint Stip. at 4-9, 13-17.) For the reasons explained below, the Court concludes that the ALJ erred and remands the case to the Agency for further proceedings consistent with this decision.

1 II. SUMMARY OF PROCEEDINGS

2 In January 2009, Plaintiff applied for DIB, alleging that he had  
3 been disabled since December 12, 2008, due to abdominal adhesions and  
4 an infection stemming from a recent surgery.<sup>1</sup> (Administrative Record  
5 ("AR") 102, 115.) The Agency denied the application initially and on  
6 reconsideration. (AR 45-50, 56-60.) He then requested and was  
7 granted a hearing before an ALJ. (AR 62-65.) On October 18, 2010,  
8 Plaintiff appeared with counsel and testified at the hearing. (AR 23-  
9 44.) On November 22, 2010, the ALJ issued a decision denying  
10 benefits. (AR 6-14.) Plaintiff appealed to the Appeals Council,  
11 which denied review. (AR 1-5.) This action followed.

12 III. DISCUSSION

13 A. The Credibility Determination

14 According to Plaintiff, he is essentially incapacitated, unable  
15 to sit or stand for more than five minutes at a time and precluded  
16 from lifting more than five pounds. Plaintiff claims that he takes  
17 Vicodin every day and that he spends most of the day in a reclined  
18 position to alleviate his pain. The ALJ rejected these allegations,  
19 finding that Plaintiff could perform light work. Plaintiff contends  
20 that the ALJ erred in doing so. (Joint Stip. at 13-17.) For the  
21 following reasons, the Court agrees.

22 ALJs are tasked with judging the credibility of witnesses. In  
23 making these credibility determinations, they may employ ordinary  
24 credibility evaluation techniques. *Smolen v. Chater*, 80 F.3d 1273,  
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26 <sup>1</sup> Abdominal adhesions are bands of tissue that form between  
27 abdominal tissues and organs, causing them to stick together. These  
28 adhesions can pull and twist organs out of place.  
<http://digestive.niddk.nih.gov/ddiseases/pubs/intestinaladhesions/>.

1 1284 (9th Cir. 1996). Where a claimant has produced objective medical  
2 evidence of an impairment which could reasonably be expected to  
3 produce the symptoms alleged and there is no evidence of malingering,  
4 the ALJ can only reject the claimant's testimony for specific, clear,  
5 and convincing reasons, *id.* at 1283-84, that are supported by  
6 substantial evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947,  
7 959 (9th Cir. 2002).

8 Here, the ALJ found that Plaintiff's multiple hospitalizations  
9 and surgeries (for abdominal pain and bowel obstruction) were severe  
10 impairments that could reasonably be expected to cause his alleged  
11 symptoms. (AR 11, 12.) The ALJ found, however, that Plaintiff's  
12 allegations of disabling pain and incapacity were not credible  
13 because: (1) they were contained in written reports that were  
14 completed soon after Plaintiff was discharged from the hospital  
15 following surgery; and (2) the overall evidence did not support a  
16 finding of such severe functional limitations. (AR 12.)

17 Neither of these reasons constitutes a valid excuse for rejecting  
18 Plaintiff's credibility. As to the written reports, though it is true  
19 that Plaintiff completed them soon after he was released from the  
20 hospital following surgery and, therefore, his perception of his  
21 condition could have been overly influenced by the fact that he was  
22 recovering from surgery, Plaintiff testified to essentially the same  
23 ailments at the administrative hearing 18 months later. (AR 34-36,  
24 124-26.) The ALJ never addressed that testimony, however. As such,  
25 her finding that Plaintiff's allegations were questionable because  
26 they were made at the time he was recovering from surgery is rejected.

27 As to the ALJ's finding that Plaintiff's claims of debilitating  
28 pain were not supported by the overall evidence in the record, that

1 finding is not sufficiently specific to withstand appellate review.  
2 See, e.g., *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883-85 (9th Cir.  
3 2006) (ALJ's conclusion that claimant's testimony "was 'not consistent  
4 with or supported by the overall medical evidence of record'" did not  
5 constitute a "meaningful explanation" for the court to assess); *Embrey*  
6 *v. Bowen*, 849 F.2d 418, 423 (9th Cir. 1988) (holding ALJ's finding  
7 that the "'totality of the evidence of record does not substantiate  
8 the claimant's allegations'" "does not achieve the level of  
9 specificity" required to disregard claimant's excess pain testimony).  
10 There is no way for the parties or the Court to determine which  
11 evidence the ALJ was referring to and why it undermined Plaintiff's  
12 testimony. As a result, there is no possibility of meaningful review  
13 and, therefore, this reason, too, is rejected. On remand, the ALJ  
14 should reconsider the credibility issue.

15 B. The Medical Evidence

16 Plaintiff complains in general that the ALJ erred in addressing  
17 the medical evidence and, more particularly, that she improperly  
18 assessed the doctors' opinions. He faults the ALJ for not accepting  
19 the opinion of his surgeon, Dr. Turner, who opined that he could not  
20 perform any work. (Joint Stip. at 8-9.) He also questions the ALJ's  
21 reliance on the medical expert, Dr. Sami Nafsoosi. (Joint Stip. at 4-  
22 9.) For the reasons discussed below, the Court concludes that the ALJ  
23 erred in failing to address Dr. Turner's opinion and remands the case  
24 for further consideration of the doctors' opinions.

25 ALJs are responsible for assessing the medical evidence and  
26 determining which opinions to accept and which ones to reject. As a  
27 general rule, a treating doctor's opinion is entitled to deference.  
28 *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Despite this rule,

1 an ALJ may reject a treating doctor's opinion for "specific and  
2 legitimate reasons" that are supported by substantial evidence in the  
3 record. *Id.* at 632.

4 Dr. Turner performed three major surgeries on Plaintiff for small  
5 bowel obstructions and ventral hernias between September 2007 and  
6 January 2009. He observed that Plaintiff "does not have much  
7 abdominal wall or stomach muscles left." (AR 696.) In a brief, "To  
8 Whom it May Concern," note, Dr. Turner opined that Plaintiff was  
9 unable to perform "any type of regular working duties" because of  
10 severe abdominal pain. (AR 696.) The ALJ did not mention Dr. Turner  
11 by name or address this opinion in her decision. This was error. As  
12 the treating physician, Dr. Turner's opinion was entitled to  
13 deference, absent a valid reason to discount it. At the very least,  
14 the ALJ was required to address it and explain why she was not relying  
15 on it.

16 The Agency concedes that the ALJ failed to address Dr. Turner's  
17 opinion but argues, it seems, that any error in doing so was harmless  
18 because the opinion: (1) was written eight months after Plaintiff's  
19 insurance ran out; and (2) was contradicted by "at least four other  
20 physicians." (Joint Stip. at 12.) The Court does not find either of  
21 these arguments persuasive. To begin with, the fact that the opinion  
22 was written after the date last insured does not mean that it was not  
23 relevant to the question of disability. Two of the surgeries the  
24 doctor performed on Plaintiff occurred before the date last insured;  
25 the third, the following month. In addition, because Plaintiff's  
26 burden in this case was to establish that he became disabled before  
27 December 31, 2008, his date last insured, and that his impairment  
28 lasted or was expected to last for at least 12 months, the ending date

1 for purposes of the disability analysis was December 31, 2009. See 42  
2 U.S.C. § 423(d)(1)(A). Dr. Turner's August 5, 2009 opinion was  
3 clearly relevant to that analysis. See generally *Smith v. Bowen*, 849  
4 F.2d 1222, 1225 (9th Cir. 1988) (noting general rule that "reports  
5 containing observations made after the period for disability are  
6 relevant to assess the claimant's disability."); see also *Lingenfelter*  
7 *v. Astrue*, 504 F.3d 1028, 1033 n.3 (9th Cir. 2007) (noting medical  
8 reports made after the claimant's disability insurance lapsed were  
9 relevant and were properly considered by the ALJ and the Appeals  
10 Council under *Smith*).<sup>2</sup>

11 As to the Agency's argument that Dr. Turner's opinion was  
12 properly ignored because it was contradicted by at least four other  
13 doctors, that argument misses the point. All things being equal,  
14 where the doctors' opinions are in conflict, it is the treating  
15 doctor's opinion that is entitled to deference--even if it happens to  
16 be the minority view--unless there is a valid reason for questioning  
17 it.

18 In addition, the Court notes that the ALJ never suggested that  
19 she was rejecting Dr. Turner's opinion because it was contradicted by  
20 the other doctors' opinions. She simply, it appears, overlooked it.  
21 In this situation, the Agency may not champion justifications that the  
22 ALJ did not rely on in an effort to explain her decision. See *Bray v.*

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24 <sup>2</sup> The Agency based its initial denial of Plaintiff's application  
25 on its expectation that he would regain the ability to return to work  
26 by December 2009. (AR 48, 686.) The January surgery and the August  
27 2009 opinion are relevant to that inquiry. The Court also observes  
28 that Plaintiff's 2010 surgery is, arguably, relevant, too. It follows  
that the ALJ should not have curtailed the medical expert's testimony  
regarding that surgery on the basis that it was beyond Plaintiff's  
date last insured. (AR 38.)

1 Astrue, 554 F.3d 1219, 1225 (9th Cir. 2009) ("Long-standing principles  
2 of administrative law require us to review the ALJ's decision based on  
3 the reasoning and factual findings offered by the ALJ--not post hoc  
4 rationalizations that attempt to intuit what the adjudicator may have  
5 been thinking.")

6 Having concluded that the ALJ erred, the Court must now decide  
7 whether the error was harmless. For the error to be harmless in this  
8 context, the Court would have to confidently conclude that, after  
9 fully crediting Dr. Turner's opinion that Plaintiff was unable to  
10 work, no reasonable ALJ could have found Plaintiff disabled. *Stout v.*  
11 *Comm'r*, 454 F.3d 1050, 1056 (9th Cir. 2006); *see also Carmickle v.*  
12 *Comm'r*, 533 F.3d 1155, 1162-63 (9th Cir. 2008) (explaining, under  
13 *Stout*, where ALJ provides no reason for rejecting evidence at issue,  
14 reviewing court must consider whether ALJ would have made different  
15 decision if he relied on the rejected evidence). Obviously, that is  
16 not the case here and, therefore, remand on this issue is warranted.

17 Finally, Plaintiff complains that the ALJ erred in relying on  
18 medical expert Dr. Nafosi, who opined, essentially, that Plaintiff  
19 was not precluded from working. In a vacuum, the ALJ's reliance on  
20 the medical expert's opinion was proper because the opinion was  
21 consistent with the opinion of the examining doctor, Dr. To. *See*  
22 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (holding  
23 opinion of non-examining medical expert constitutes substantial  
24 evidence "when it is consistent with other independent evidence in the  
25 record").<sup>3</sup> However, in light of the fact that the Court is remanding

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27 <sup>3</sup> Plaintiff points out that Dr. Nafosi's opinion is  
28 inconsistent with the reviewing physician Dr. Naiman's opinion, i.e.,  
that Plaintiff would be limited to only occasional climbing, stooping,

1 the case for the ALJ to reconsider the credibility issue and the  
2 treating doctor's opinion, it remands this issue as well. On remand,  
3 the ALJ should take another look at the medical evidence, including  
4 the doctors' opinions, and decide which ones she finds to be the most  
5 persuasive.<sup>4</sup>

6 IV. CONCLUSION

7 For the reasons set forth above, the Agency's decision is  
8 reversed and the case is remanded for further proceedings consistent  
9 with this opinion and order.<sup>5</sup>

10 IT IS SO ORDERED.

11 Dated: September 23, 2013



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12 PATRICK J. WALSH  
13 UNITED STATES MAGISTRATE JUDGE

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15  
16 and kneeling. (AR 684.) The ALJ was entitled to rely on Dr.  
17 Nafosi's and Dr. To's opinions over Dr. Naiman's, however, and  
18 evidently did so. See *Smolen*, 80 F.3d at 1285-86 (noting nonexamining  
19 physician's opinion granted less weight than opinion of examining  
20 physician) (citation omitted).

21 <sup>4</sup> Plaintiff argues that the ALJ ignored the existence of his  
22 other impairments, including small bowel obstruction, sleep apnea,  
23 hernias, depression, and acute respiratory failure. (Joint Stip. at  
24 7-8.) This argument is rejected. Plaintiff never claimed that these  
25 impairments prevented him from working and has not pointed to any  
26 medical records showing that they had any impact on his ability to  
27 perform basic work activities. In fact, the only mention of most of  
28 them is in a December 24, 2008 discharge summary diagnosis. (AR 387-  
88.) Further, even assuming that he did suffer from them, the mere  
existence of an impairment is not proof of disability. *Matthews v.*  
*Shalala*, 10 F.3d 678, 680 (9th Cir. 1993).

<sup>5</sup> The Court has considered Plaintiff's request that the case be  
remanded for an award of benefits and denies that request because it  
is not clear from the record that Plaintiff is disabled and/or  
entitled to benefits.