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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

RAYMOND GONZALES, JR.,	)	NO. EDCV 12-00372-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
CAROLYN W. COLVIN, <sup>1</sup>	)	
Acting Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on March 20, 2012, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for a period of disability ("POD"), disability insurance benefits ("DIB"), and supplemental security income ("SSI"). On April 24, 2012, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on November 15, 2012, in which: plaintiff seeks an order reversing the Commissioner's

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<sup>1</sup> Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013, and is substituted in place of former Commissioner Michael J. Astrue as the defendant in this action. (See Fed. R. Civ. P. 25(d).)

1 decision and awarding benefits or, alternatively, remanding for further  
2 administrative proceedings; and the Commissioner requests that her  
3 decision be affirmed.

4  
5 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**  
6

7 On August 13, 2008, plaintiff filed an application for SSI.  
8 (Administrative Record ("A.R.") 11.) On August 15, 2008, plaintiff  
9 filed an application for POD and DIB. (*Id.*) In the disability report  
10 accompanying his application, plaintiff alleged an inability to work  
11 since March 1, 2006, due to "[m]ultiple fracture[s of the] left leg,  
12 back, arthritis, dislocated disc, left ankle, anxiety, [and] hear[ing]  
13 voices." (A.R. 226.) At the reconsideration level, plaintiff  
14 additionally alleged that he suffers from severe back and leg pain, and  
15 that his hepatitis C is causing "severe fatigue." (A.R. 261.)  
16

17 The Commissioner denied plaintiff's claim initially and upon  
18 reconsideration. (A.R. 84-86, 121-25, 131-36.) On March 31, 2010,  
19 plaintiff, who was represented by counsel, testified at a hearing before  
20 Administrative Law Judge Mason D. Harrell, Jr. (the "ALJ"). (A.R. 55-  
21 79.) On June 2, 2010, a supplemental hearing was held, at which  
22 plaintiff, who was again represented by counsel, testified before the  
23 same ALJ. (A.R. 28-54.) Michael E. Kania, Ph.D., a medical expert in  
24 psychology, and Samuel Landau, M.D., a medical expert in internal  
25 medicine, testified. (A.R. 11, 28-54.) A vocational expert, Corinne J.  
26 Porter, also testified. (*Id.*)  
27

28 On May 13, 2011, the ALJ denied plaintiff's claim (A.R. 11-24), and

1 the Appeals Council subsequently denied plaintiff's request for review  
2 of the ALJ's decision (A.R. 1-3). That decision is now at issue in this  
3 action.

4  
5 **SUMMARY OF ADMINISTRATIVE DECISION**  
6

7 The ALJ found that plaintiff last met the insured status  
8 requirements of the Social Security Act on December 31, 2008, and he had  
9 not engaged in substantial gainful activity since his alleged onset date  
10 of March 1, 2006. (A.R. 14.) The ALJ determined that plaintiff has the  
11 severe impairments of: "fracture deformity of the left ankle; chronic  
12 low back strain; obesity; hepatitis C infection; depressive disorder,  
13 not otherwise specified (NOS); psychosis disorder, NOS; and opioid drug  
14 abuse." (A.R. 14.) Nevertheless, the ALJ concluded that plaintiff does  
15 not have an impairment or combination of impairments that meets or  
16 medically equals one of the listed impairments in 20 C.F.R. Part 404,  
17 Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(c), 416.920(d)). (*Id.*)  
18

19 After reviewing the record, the ALJ determined that, if plaintiff  
20 stopped his substance use,<sup>2</sup> he would have the residual functional  
21 capacity ("RFC") to perform "light work," consisting of the following:  
22

23 [He] could lift and carry 20 pounds occasionally and 10 pounds  
24 frequently. He could stand and walk for 15-30 minutes at a  
25

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26 <sup>2</sup> The ALJ also determined that when plaintiff is using drugs he:  
27 (1) cannot perform work at any exertional level on a consistent and  
28 sustained basis; (2) is unable to engage in an 8-hour work day or 40-  
hour work week without an unreasonable amount of time away from work due  
to intoxication and erratic behavior caused by drug usage; and (3) is  
unable to perform any past relevant work. (A.R. 15, 22.)

1 time for a total of 2 hours out of an 8-hour work day. He can  
2 use a cane on an as needed basis. He should avoid uneven  
3 surfaces. He can sit for 8 hours out of an 8-hour work day  
4 with normal breaks such as every 2 hours and with a provision  
5 to elevate his left leg 6 inches above the floor level as  
6 needed. He can occasionally stoop and bend. He cannot squat,  
7 kneel, crawl, run, or jump. He can climb stairs, but he  
8 cannot climb ladders, work at heights, or balance. He cannot  
9 operate motorized equipment or work around unprotected  
10 machinery. His mental impairment limits him to simple,  
11 repetitive tasks. He can deal with the public but he cannot  
12 perform complex tasks.

13  
14 (A.R. 17.)  
15

16 The ALJ found that plaintiff would be unable to perform his past  
17 relevant work ("PRW") as a barber. (A.R. 22.) However, based upon  
18 plaintiff's age, education, work experience, and RFC, the ALJ found that  
19 other jobs exist in the national economy that plaintiff could perform,  
20 including "electronic worker" and "small items assembler of hospital  
21 products." (A.R. 23.) The ALJ concluded that plaintiff's substance  
22 abuse was a "contributing factor" to the determination of disability,  
23 because if he stopped his substance abuse, he would not be disabled and  
24 could perform jobs in the national economy. (A.R. 23-24.) Accordingly,  
25 the ALJ determined that plaintiff has not been under a disability, as  
26 defined in the Social Security Act, since March 1, 2006, his alleged  
27 onset date, through the date of this decision. (A.R. 24.)  
28



1 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d  
2 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse  
3 the Commissioner's decision if it is based on harmless error, which  
4 exists only when it is "clear from the record that an ALJ's error was  
5 'inconsequential to the ultimate nondisability determination.'" Robbins  
6 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.  
7 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d  
8 at 679.

## 10 DISCUSSION

11  
12 Plaintiff alleges the following two issues: (1) whether the ALJ  
13 properly considered plaintiff's pain testimony; and (2) whether the ALJ  
14 properly considered plaintiff's credibility. (Joint Stipulation ("Joint  
15 Stip.") at 4.) The Court addresses these two issues together, as they  
16 are interrelated. For the reasons set forth below, the Court concludes  
17 that the ALJ set forth clear and convincing reasons for finding  
18 plaintiff's testimony regarding his subjective symptoms and pain to be  
19 not credible.

20  
21 Once a disability claimant produces objective medical evidence of  
22 an underlying impairment that is reasonably likely to be the source of  
23 claimant's subjective symptom(s), all subjective testimony as to the  
24 severity of the symptoms must be considered. Moisa v. Barnhart, 367  
25 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345  
26 (9th Cir. 1991); see also 20 C.F.R. §§ 404.1529(a), 416.929(a)  
27 (explaining how pain and other symptoms are evaluated). "[U]nless an  
28 ALJ makes a finding of malingering based on affirmative evidence

1 thereof, he or she may only find an applicant not credible by making  
2 specific findings as to credibility and stating clear and convincing  
3 reasons for each." Robbins, 466 F.3d at 883. The factors to be  
4 considered in weighing a claimant's credibility include: (1) the  
5 claimant's reputation for truthfulness; (2) inconsistencies either in  
6 the claimant's testimony or between the claimant's testimony and his  
7 conduct; (3) the claimant's daily activities; (4) the claimant's work  
8 record; and (5) testimony from physicians and third parties concerning  
9 the nature, severity, and effect of the symptoms of which the claimant  
10 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.  
11 2002); see also 20 C.F.R. §§ 404.1529(c), 416.929(c).

12  
13 Here, the ALJ found that "[a]fter careful consideration of the  
14 evidence . . . [plaintiff]'s medically determinable impairments could  
15 reasonably be expected to cause the alleged symptoms." (A.R. 18.)  
16 Further, the ALJ cited no evidence of malingering by plaintiff.  
17 Nonetheless, the ALJ concluded that plaintiff's "statements concerning  
18 the intensity, persistence and limiting effects of [his] symptoms are  
19 not credible" to the extent they varied from the ALJ's own RFC  
20 assessment. (*Id.*) Accordingly, the ALJ's reasons for finding that  
21 plaintiff was not credible with respect to his subjective symptom and  
22 pain testimony must be "clear and convincing."

23  
24 During the March 31, 2010 hearing, plaintiff testified that he is  
25 unable to work due to: severe pain in his leg and back; depression; his  
26 issues being around people; his tattoos; and his age. (A.R. 60-62, 69.)  
27 He also testified that he uses a cane everyday (A.R. 71), experiences  
28 pain in his hip, neck, and arms (A.R. 71), and takes Oxycontin for his

1 pain (A.R. 68). Plaintiff testified that he is unable to see a doctor,  
2 because he has no money and no medical insurance. (A.R. 70.) Plaintiff  
3 has Hepatitis C, but he has never been treated for it. (A.R. 72.) He  
4 hears voices nearly every day, because he ran out of his medication for  
5 the "voices." (A.R. 72.) He feels suicidal and has trouble with his  
6 concentration. (A.R. 73-74.) Plaintiff testified that he could sit up  
7 to 20 minutes and stand up to 10 minutes. (A.R. 75.) He stated that he  
8 has to lay down all day and would not be able to do a job that required  
9 being around people. (*Id.*) As discussed below, the ALJ offered several  
10 clear and convincing reasons for rejecting plaintiff's pain and symptoms  
11 testimony.  
12

13 First, the ALJ noted that the objective medical evidence did not  
14 support the level of disability alleged by plaintiff. (A.R. 21.)  
15 Although the lack of objective medicine cannot be the sole basis for  
16 rejecting a plaintiff's credibility, "it is a factor that the ALJ can  
17 consider in his credibility analysis." Burch, 400 F.3d at 681.  
18

19 Next, the ALJ premised his finding, in part, on plaintiff's  
20 drug-seeking behavior, which itself can constitute "a clear and  
21 convincing reason to discount a claimant's credibility about pain."  
22 (A.R. 21; A.R. 49 - medical expert noting that there was evidence in the  
23 record suggesting "drug-seeking" behavior; A.R. 276, 283, 351.) See  
24 Edlund v. Massanari, 253 F.3d 1152, 1157 (9th Cir. 2001)(holding that  
25 evidence of drug-seeking behavior undermines a claimant's credibility);  
26 Gray v. Comm'r of Soc. Sec., 365 Fed. Appx. 60, 63 (9th Cir. 2010)  
27 (evidence of drug-seeking behavior is a valid reason for finding a  
28 claimant not credible); Lewis v. Astrue, 238 Fed. Appx. 300, 302 (9th

1 Cir. 2007)(inconsistency with the medical evidence and drug-seeking  
2 behavior sufficient to discount credibility); Morton v. Astrue, 232 Fed.  
3 Appx. 718, 719 (9th Cir. 2007)(drug-seeking behavior is a valid reason  
4 for questioning a claimant's credibility). Indeed, plaintiff seeks out  
5 and manages to obtain Oxycontin prescriptions on an ongoing basis,  
6 notwithstanding the fact, noted in the ALJ's decision, that in June  
7 2009, emergency room personnel diagnosed him with not only heroin abuse  
8 but also Oxycontin abuse. (A.R. 20.) Thus, in view of plaintiff's  
9 history of polysubstance abuse, his drug-seeking behavior supports the  
10 ALJ's finding that plaintiff's description of his pain and symptoms was  
11 not wholly credible.

12  
13 The ALJ also noted that plaintiff understated his drug use,  
14 particularly as there is no evidence in the record that plaintiff has  
15 gone "extensive periods without opioid and occasional amphetamine  
16 abuse."<sup>3</sup> (A.R. 21.) At the March 2010 hearing, for example, plaintiff  
17 testified that he last used drugs two years prior, *i.e.*, in early 2008.  
18 (A.R. 62-63.) However, evidence in the record reflects that plaintiff  
19 was still abusing drugs as late as August 2009. (A.R. 377-79.) An ALJ  
20 may consider a claimant's inconsistent statements regarding his drug or  
21 alcohol use in discrediting a claimant's credibility. See Thomas, 278

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22  
23 <sup>3</sup> A review of the record reveals that Plaintiff has a long  
24 history of drug abuse, which may be ongoing. For example, plaintiff  
25 tested positive for opiates and amphetamines on September 7, 2006, and  
26 March 19, 2007. (A.R. 20.) In August 2008, plaintiff admitted to a  
27 long history of heroin abuse. (*Id.*) Further, plaintiff admitted to  
28 using heroin during his emergency room visits in June and August 2009.  
(*Id.*) In fact, during both of those emergency room visits, attending  
personnel were unable to draw blood due to scarring from plaintiff's  
intravenous drug abuse (A.R. 20), and plaintiff refused to submit a  
urine sample, which the ALJ noted is "consistent with using heroin."  
(A.R. 19-20.)

1 F.3d at 959 (citing Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir.  
2 1999)(relying on inconsistent statements about alcohol use to reject a  
3 claimant's testimony)).

4  
5 Finally, the ALJ discredited plaintiff, because his mental  
6 impairments were exacerbated by his medical non-compliance and drug  
7 abuse. (A.R. 21.) An ALJ may rely on "an unexplained, or inadequately  
8 explained, failure to seek treatment or follow a prescribed course of  
9 treatment" to assess a claimant's credibility. Fair v. Bowen, 885 F.2d  
10 at 603. Plaintiff testified that non-compliance with his psychiatric  
11 medication caused him to hear voices more often. (A.R. 72.) He  
12 testified that he was non-compliant, because he had run out of his  
13 medication. However, he apparently ran out of his medication, because  
14 he was dropped from a mental health or drug abuse program after missing  
15 two meetings.<sup>4</sup> (A.R. 44-45, 72-73; Montalvo v. Astrue, 237 Fed. Appx.  
16 259, 262 (9th Cir. 2007)(finding that plaintiff's failure to comply with  
17 certain aspects of her treatment plan was a clear and convincing reason  
18 to reject her testimony); Flaten v. Sec'y of Health & Hum. Servs., 44  
19 F.3d 1453, 1464 (9th Cir.1995)(finding it appropriate for the ALJ to  
20 discount plaintiff's credibility because of a lack of medical care  
21 during a period of claimed disability).)

22  
23 Accordingly, the ALJ satisfied his burden of providing clear and  
24

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25 <sup>4</sup> Notably, while plaintiff is non-compliant with his psychiatric  
26 medication, he does manage to obtain Oxycontin, which plaintiff  
27 testified is "expensive," "once a month or every two months, whenever  
28 [plaintiff] has the money to go see [his doctor]." (A.R. 68.)  
Moreover, plaintiff's admission that he sees his doctor regularly for  
Oxycontin contradicts his testimony, noted *supra*, that he cannot see  
doctors, because he has no medical insurance or money. (A.R. 70.)

1 convincing reasons for concluding that plaintiff's statements concerning  
2 his symptoms and limitations were not credible to the extent they were  
3 inconsistent with his RFC assessment.

4  
5 **CONCLUSION**

6  
7 For the foregoing reasons, the Court finds that the Commissioner's  
8 decision is supported by substantial evidence and is free from material  
9 legal error. Neither reversal of the Commissioner's decision nor remand  
10 is warranted. Accordingly, IT IS ORDERED that Judgment shall be entered  
11 affirming the decision of the Commissioner of the Social Security  
12 Administration and dismissing this case with prejudice.

13  
14 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
15 copies of this Memorandum Opinion and Order and the Judgment on counsel  
16 for plaintiff and for defendant.

17  
18 LET JUDGMENT BE ENTERED ACCORDINGLY.

19  
20 DATED: June 5, 2013

21 *Margaret A. Nagle*

22 \_\_\_\_\_  
23 MARGARET A. NAGLE  
24 UNITED STATES MAGISTRATE JUDGE