

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

DWAYNE L. JACKSON,	)	NO. EDCV 12-00606-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
CAROLYN W. COLVIN, <sup>1</sup>	)	
Acting Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on May 3, 2012, seeking review of the denial of plaintiff's application for a period of disability, disability insurance benefits ("DIB"), and supplemental security income ("SSI"). On June 15, 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 January 31, 2013, in which: plaintiff seeks an order reversing the Commissioner's decision

<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 and remanding this case for further administrative proceedings,  
2 including, but not limited to, the taking of additional vocational  
3 testimony; and the Commissioner requests that his decision be affirmed  
4 or, alternatively, remanded for further administrative proceedings.

5  
6 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

7  
8 Plaintiff filed an application for a period of disability, DIB, and  
9 SSI on August 20, 2007. (Administrative Record ("A.R.") 20.)  
10 Plaintiff, who was born on April 22, 1960,<sup>2</sup> claims to have been disabled  
11 since February 1, 2001 (A.R. 22), due to chronic pain in his back and  
12 legs, right foot pain, left shoulder pain, nervousness, and depression  
13 (A.R. 35, 67, 73). Plaintiff has past relevant work experience as a  
14 school bus driver. (A.R. 25.)

15  
16 After the Commissioner denied plaintiff's claims initially and upon  
17 reconsideration (A.R. 67-71, 73-78), plaintiff requested a hearing (A.R.  
18 79). On April 29, 2010, plaintiff, who was represented by counsel,  
19 appeared and testified at a hearing before Administrative Law Judge  
20 Mason D. Harrell, Jr. (the "ALJ"). (A.R. 32-62.) Vocational expert  
21 David A. Rinehart also testified. (*Id.*) On May 20, 2010, the ALJ  
22 denied plaintiff's claim (A.R. 20-27), and the Appeals Council  
23 subsequently denied plaintiff's request for review of the ALJ's decision  
24 (A.R. 1-4). That decision is now at issue in this action.

25  
26  
27 

---

<sup>2</sup> On the alleged onset date, plaintiff was 40 years old, which  
28 is defined as a younger individual. (A.R. 25; citing 20 C.F.R.  
§§ 404.1563, 416.963.)



1 The ALJ found that plaintiff is unable to perform his past relevant  
2 work. (A.R. 25.) However, based upon his RFC assessment for plaintiff  
3 and after having considered plaintiff's age, education,<sup>3</sup> work experience,  
4 and the testimony of the vocational expert, the ALJ found "there are  
5 jobs that exist in significant numbers in the national economy that  
6 [plaintiff] can perform," including "electronics worker" and "sewing  
7 machine operator." (A.R. 26.) Accordingly, the ALJ concluded that  
8 plaintiff has not been under a disability, as defined in the Social  
9 Security Act, from February 1, 2001, through the date of the ALJ's  
10 decision. (A.R. 27.)

#### 11 12 STANDARD OF REVIEW

13  
14 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
15 decision to determine whether it is free from legal error and supported  
16 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
17 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant  
18 evidence as a reasonable mind might accept as adequate to support a  
19 conclusion.'" *Id.* (citation omitted). The "evidence must be more than  
20 a mere scintilla but not necessarily a preponderance." Connett v.  
21 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the  
22 record can constitute substantial evidence, only those 'reasonably drawn  
23 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,  
24 1066 (9th Cir. 2006)(citation omitted).

25  
26 Although this Court cannot substitute its discretion for that of

27  
28 <sup>3</sup> The ALJ found that plaintiff has at least a high school  
education and is able to communicate in English. (A.R. 26.)

1 the Commissioner, the Court nonetheless must review the record as a  
2 whole, "weighing both the evidence that supports and the evidence that  
3 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
4 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also  
5 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
6 responsible for determining credibility, resolving conflicts in medical  
7 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
8 1035, 1039 (9th Cir. 1995).

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

## 22 23 DISCUSSION

24  
25 Plaintiff claims the ALJ erred by not considering properly:  
26 (1) plaintiff's subjective symptom testimony; and (2) the RFC assessment  
27 for plaintiff. (Joint Stipulation ("Joint Stip.") at 4-6, 13-17, 22-  
28 23.)

1           I.    The ALJ Failed To Provide Clear And Convincing Reasons  
2                    For Finding Plaintiff's Subjective Symptom Testimony To  
3                    Be Not Credible.  
4

5           Once a disability claimant produces objective medical evidence of  
6 an underlying impairment that is reasonably likely to be the source of  
7 claimant's subjective symptom(s), all subjective testimony as to the  
8 severity of the symptoms must be considered. Moisa v. Barnhart, 367  
9 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 346  
10 (9th Cir. 1991); see also 20 C.F.R. §§ 404.1529(a), 416.929(a)  
11 (explaining how pain and other symptoms are evaluated). "[U]nless an  
12 ALJ makes a finding of malingering based on affirmative evidence  
13 thereof, he or she may only find an applicant not credible by making  
14 specific findings as to credibility and stating clear and convincing  
15 reasons for each." Robbins, 466 F.3d at 883. The factors to be  
16 considered in weighing a claimant's credibility include: (1) the  
17 claimant's reputation for truthfulness; (2) inconsistencies either in  
18 the claimant's testimony or between the claimant's testimony and her  
19 conduct; (3) the claimant's daily activities; (4) the claimant's work  
20 record; and (5) testimony from physicians and third parties concerning  
21 the nature, severity, and effect of the symptoms of which the claimant  
22 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.  
23 2002); see also 20 C.F.R. §§ 404.1529(c), 416.929(c).

24  
25           At the April 29, 2010 administrative hearing, plaintiff testified  
26 that he has: major depression; chronic back pain; aching legs; bad  
27 circulation in his knees; and arthritis in his right ankle. (A.R. 35,  
28 37-38.) Plaintiff also testified that he was shot in his left shoulder

1 and "can't function with it like [he] normally could." (A.R. 44.)  
2 Plaintiff indicated that he presently is taking Darvocet<sup>4</sup> for his pain  
3 and Lexapro for his depression. (A.R. 46, 50.) With respect to his  
4 physical limitations, plaintiff testified that he has difficulty  
5 sitting for long periods of time due to his impairments. (A.R. 46.) He  
6 also testified that he has problems using his left hand. (A.R.  
7 47.) For example, plaintiff stated that he has difficulty lifting  
8 anything that weighs 20 pounds, because "it strains [his] back shoulder  
9 section." (*Id.*) He also stated that he limits himself to "smaller  
10 tasks around the house so that [he does not] continue to reinjure or re-  
11 aggravate [his] shoulder." (*Id.*) With respect to his depression,  
12 plaintiff testified that: he has no energy; it is hard for him to "get  
13 up [and] get going in the morning"; he "pretty much stay[s] to  
14 [him]self"; he has problems concentrating; he has "very low confidence"  
15 and is "always in fear . . . of someone finding something or [a] reason  
16 to fire [him]"; he has no motivation; he does not trust anyone; and he  
17 has crying spells. (A.R. 50-54.)

18  
19 The ALJ found that plaintiff has the severe impairments of "status  
20 post gunshot wound to the left shoulder, and depression." (A.R. 22.)  
21 The ALJ cited no evidence of malingering by plaintiff. Accordingly, the  
22 ALJ's reasons for discrediting plaintiff's subjective complaints must be  
23 clear and convincing.

24  
25 In his decision, the ALJ found that "[plaintiff]'s allegations were  
26 not fully credible." (A.R. 25.) In finding plaintiff to be not fully

---

27 <sup>4</sup> Plaintiff indicated that the Darvocet causes him to sleep for  
28 a few hours during the day. (A.R. 50-51.)

1 credible, the ALJ stated that “[plaintiff]’s statements concerning the  
2 intensity, persistence and limiting effects of the alleged symptoms are  
3 credible only to the extent that they are consistent with [the ALJ’s RFC  
4 assessment for plaintiff].” (*Id.*) Contrary to the Commissioner’s  
5 contention, no others reasons were cited by the ALJ for finding  
6 plaintiff to be not credible.<sup>5</sup> As noted *supra*, plaintiff testified to  
7 various symptoms and limitations. While the ALJ may find these  
8 allegations to be not credible, the ALJ’s boilerplate statement is not  
9 “sufficiently specific” to allow this Court to determine whether the ALJ  
10 rejected plaintiff’s statements on permissible grounds. Therefore, the  
11 ALJ’s reasoning does not constitute a clear and convincing reasons, as  
12 required, for finding plaintiff to be not credible.

13  
14 Accordingly, because the ALJ failed to give clear and convincing  
15 reasons for finding plaintiff to be not credible, the ALJ committed  
16 reversible error.

17  
18 **II. The ALJ Failed To Consider Properly The Opinion Of**  
19 **Plaintiff’s Treating Physician, And Therefore, On Remand,**  
20 **The ALJ Needs To Revisit Plaintiff’s RFC.**

21  
22 Plaintiff claims that the ALJ erred in failing to include in his  
23 assessment of plaintiff’s RFC the opinion of consultative psychiatrist  
24 Ernest A. Bagner, M.D., that plaintiff would have mild to moderate  
25

---

26 <sup>5</sup> While the Commissioner now offers other reasons to explain the  
27 ALJ’s credibility determination, the Court cannot entertain these post  
28 hoc rationalizations. See, e.g., *Connett*, 340 F.3d at 874 (finding that  
“[i]t was error for the district court to affirm the ALJ’s credibility  
decision based on evidence that the ALJ did not discuss”).

1 limitations with respect to handling normal stresses at work -- the  
2 inclusion of which could have affected the ALJ's determination that  
3 plaintiff can perform other work. (Joint Stip. at 4-6, 13-14.)  
4

5 It is the responsibility of the ALJ to analyze evidence and resolve  
6 conflicts in medical testimony. Magallanes v. Bowen, 881 F.2d 747, 750  
7 (9th Cir. 1989). In the hierarchy of physician opinions considered in  
8 assessing a social security claim, "[g]enerally, a treating physician's  
9 opinion carries more weight than an examining physician's, and an  
10 examining physician's opinion carries more weight than a reviewing  
11 physician's." Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir.  
12 2001); 20 C.F.R. §§ 404.1527(d), 416.927(d).  
13

14 An ALJ must provide "clear and convincing reasons" for rejecting  
15 the uncontradicted opinion of an examining physician. Lester v. Chater,  
16 81 F.3d 821, 830 (9th Cir. 1995). To reject the contradicted opinion of  
17 an examining physician, an ALJ must provide "specific and legitimate  
18 reasons that are supported by substantial evidence in the record." *Id.*  
19 at 830-31. The opinion of an examining physician may constitute  
20 substantial evidence upon which an ALJ may rely in assessing a  
21 claimant's RFC, if it is properly supported by the medical evidence.  
22 See, e.g., Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.  
23 2001)(consultative examiner's opinion on its own constitute substantial  
24 evidence, because it rested on independent examination of claimant).  
25

26 In determining a claimant's RFC, an ALJ will consider all the  
27 relevant evidence in the record. 20 C.F.R. §§ 404.1545(a)(1),  
28 416.945(a)(1). In so doing, the ALJ will consider all claimant's

1 medically determinable impairments, including those that are not  
2 "'severe.'" 20 C.F.R. §§ 404.1545(a)(2), 416.945(a)(2). The ALJ also  
3 will consider "any statement about what [the claimant] can still do that  
4 have been provided by medical sources." 20 C.F.R. §§ 404.1545(a)(3),  
5 416.945(a)(3).

6  
7 In a March 27, 2008 psychiatric evaluation, Dr. Bagner diagnosed  
8 plaintiff with, *inter alia*, depressive disorder, not otherwise  
9 specified, and alcohol abuse. (A.R. 235.) Dr. Bagner opined that  
10 plaintiff would have: "no limitations interacting with supervisors,  
11 peers or the public"; "zero to mild limitations maintaining  
12 concentration and attention and completing simple tasks"; "mild  
13 limitations completing complex tasks and completing a normal workweek  
14 without interruption"; and "*mild to moderate limitations handling normal*  
15 *stresses at work.*" (A.R. 236; emphasis added.)

16  
17 In his decision, the ALJ summarized the various medical opinions  
18 regarding plaintiff's mental impairment and resulting limitations. For  
19 example, the ALJ noted: (1) Dr. Bagner's diagnoses and opinions  
20 regarding plaintiff's mental impairment and functional limitations; (2)  
21 treatment notes from Stuart Finkelstein, M.D., which indicated that  
22 plaintiff was depressed and drinking alcohol; and (3) the opinion of the  
23 State Agency psychiatrist who opined that plaintiff's mental impairment  
24 was non-severe. (A.R. 24-25.) After summarizing the various opinions,  
25 the ALJ stated that notwithstanding the opinion of the State Agency  
26 psychiatrist, the ALJ was giving plaintiff "the benefit of the doubt by  
27 finding that his depression results in some work-related mental  
28 limitations." (A.R. 25.) Notably, however, the ALJ never specifically

1 indicated the physician's opinion upon which he relied in determining  
2 the extent of plaintiff's mental limitations.

3  
4 Although not entirely clear, it appears that the ALJ afforded the  
5 greatest weight to the opinion of Dr. Bagner, because many of Dr.  
6 Bagner's limitations are reflected in the ALJ's RFC assessment for  
7 plaintiff. For example, consistently with Dr. Bagner's opinion, the  
8 ALJ's RFC assessment for plaintiff includes a limitation to simple  
9 repetitive tasks and no "fast paced" work or work that requires  
10 hypervigilance. However, the ALJ's RFC assessment does not incorporate  
11 Dr. Bagner's opinion that plaintiff would have mild to moderate  
12 limitations in handling normal stresses at work. While the ALJ need not  
13 accept the full extent of Dr. Bagner's opinion, the ALJ may not reject  
14 it, or significant parts of it, without giving specific and legitimate  
15 reasons for so doing. See Salvador v. Sullivan, 917 F.2d 13, 14 (9th  
16 Cir. 1990)(mere summarization and implicit rejection of physician's  
17 opinion does not suffice). The ALJ's failure to proffer any reason, let  
18 alone an appropriate reason, for failing to incorporate properly and/or  
19 to explain the dismissal of a portion of Dr. Bagner's opinion  
20 constitutes error.<sup>6</sup> Accordingly, on remand, the ALJ needs to properly  
21 consider Dr. Bagner's opinion and revisit his RFC assessment for  
22 plaintiff.

23 ///

24 ///

---

25  
26 <sup>6</sup> Although the Commissioner now offers other reasons to explain  
27 the ALJ's rejection of the opinion of Dr. Ahmed, the Court cannot  
28 entertain these post hoc rationalizations. See, e.g., Orn, 495 F.3d at  
630 ("We review only the reasons provided by the ALJ in the disability  
determination and may not affirm on a ground upon which he did not  
rely").

1           **III. Remand Is Required.**

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

15  
16           Remand is the appropriate remedy to allow the ALJ the opportunity  
17 to remedy the above-mentioned deficiencies and errors. See *Dodrill v.*  
18 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)(ordering remand so that the  
19 ALJ could articulate specific and appropriate findings, if any existed,  
20 for rejecting the claimant's subjective pain testimony). On remand, the  
21 ALJ must revisit plaintiff's testimony and must either credit  
22 plaintiff's testimony or give clear and convincing reasons why  
23 plaintiff's testimony is not credible. Additionally, the ALJ must  
24 either credit Dr. Bagner's opinion or provide appropriate reasons  
25 supported by substantial evidence for rejecting it. After doing so, the  
26 ALJ may need to reassess plaintiff's RFC, in which case additional  
27 testimony from a vocational expert likely will be needed to determine  
28 what work, if any, plaintiff can perform.

1 **CONCLUSION**

2  
3 Accordingly, for the reasons stated above, IT IS ORDERED that the  
4 decision of the Commissioner is REVERSED, and this case is REMANDED for  
5 further proceedings consistent with this Memorandum Opinion and Order.  
6

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

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

13 DATED: May 2, 2013

14   
15 \_\_\_\_\_  
16 MARGARET A. NAGLE  
17 UNITED STATES MAGISTRATE JUDGE  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28