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5 UNITED STATES DISTRICT COURT
6 CENTRAL DISTRICT OF CALIFORNIA
7 EASTERN DIVISION
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9 SHAIN MICHAEL KERR,) Case No. EDCV 12-00782-MLG
10 Plaintiff,) MEMORANDUM OPINION AND ORDER
11 v.)
12 MICHAEL J. ASTRUE,)
13 Commissioner of the)
14 Social Security)
15 Administration,)
Defendant.)

16
17 Plaintiff Shain Michael Kerr ("Plaintiff") seeks judicial review of
18 the Commissioner's final decision denying his applications for
19 Disability Insurance Benefits ("DIB") and Supplemental Security Income
20 ("SSI") pursuant to Titles II and XVI of the Social Security Act. For
21 the reasons stated below, the Commissioner's decision is remanded for
22 further proceedings.

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24 **I. Factual and Procedural Background**

25 Plaintiff was born on October 2, 1980. (Administrative Record
26 ("AR") at 58.) He has work experience as a truck driver, tire changer,
27 and lubrication technician. (AR at 52.) On April 24, 2008, Plaintiff
28 filed applications for DIB and SSI, alleging that he has been disabled

1 since February 1, 2007, due to asthma and back pain. (AR at 11.) The
2 Social Security Administration denied Plaintiff's applications initially
3 and on reconsideration. (AR at 11, 57-58, 62-63.) An administrative
4 hearing was held before Administrative Law Judge ("the ALJ") Maxine R.
5 Benmour on September 22, 2010. (AR at 11.) Plaintiff, who was
6 represented by counsel, testified at the hearing, as did a vocational
7 expert ("VE"). (AR at 11.)

8 The ALJ issued a decision on October 21, 2010, denying Plaintiff's
9 application. (AR at 11-18.) The ALJ found that Plaintiff suffers from
10 the severe impairments of asthma and chronic obstructive pulmonary
11 disease (COPD), as well as the non-severe impairments of mild
12 degenerative disc disease and osteoporosis. (AR at 13-14.) She
13 determined that while Plaintiff is unable to perform his past relevant
14 work, he has the residual functional capacity ("RFC") to perform a
15 limited range of light work. (AR at 14.) The Appeals Council denied
16 review on March 16, 2012. (AR at 1-3.)

17 Plaintiff commenced this action for judicial review, and the
18 parties filed a Joint Stipulation of disputed factual and legal issues
19 on October 12, 2012. Plaintiff contends that the ALJ erred in assessing
20 Plaintiff's credibility and rejecting his subjective complaints. (Joint
21 Stip. at 3.) Plaintiff also argues that the ALJ erred in rejecting the
22 opinion of Plaintiff's treating physician, Allen Gorenberg, M.D. (Joint
23 Stip. at 9.) Plaintiff seeks remand for further proceedings, while the
24 Commissioner requests that the ALJ's decision be affirmed. (Joint Stip.
25 at 16.)

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1 **II. Standard of Review**

2 Under 42 U.S.C. § 405(g), a district court may review the
3 Commissioner's decision to deny benefits. The Commissioner or ALJ's
4 decision must be upheld unless "the ALJ's findings are based on legal
5 error or are not supported by substantial evidence in the record as a
6 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Parra v.*
7 *Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means
8 such evidence as a reasonable person might accept as adequate to support
9 a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Widmark*
10 *v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more than a
11 scintilla, but less than a preponderance. *Robbins v. Soc. Sec. Admin.*,
12 466 F.3d 880, 882 (9th Cir. 2006). To determine whether substantial
13 evidence supports a finding, the reviewing court "must review the
14 administrative record as a whole, weighing both the evidence that
15 supports and the evidence that detracts from the Commissioner's
16 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If
17 the evidence can support either affirming or reversing the ALJ's
18 conclusion," the reviewing court "may not substitute its judgment for
19 that of the ALJ." *Robbins*, 466 F.3d at 882

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21 **III. Discussion**

22 **A. The ALJ Improperly Evaluated Plaintiff's Credibility**

23 Plaintiff argues that the ALJ failed to properly evaluate his
24 credibility regarding his subjective complaints in determining his RFC.
25 At the hearing, Plaintiff testified that his asthma and related
26 conditions have been gradually getting worse over the years and finally
27 reached a point that prevented him from working in 2007. (AR at 31.) He
28 stated that due to problems including wheezing, shortness of breath, and

1 coughing, he uses albuterol every three or four hours. (AR at 32.) The
2 albuterol helps sometimes. (AR at 32-33.) Frequently, he also suffers
3 from severe attacks which necessitate the use of a breathing machine or
4 require him to go to the hospital. (AR at 33-34.) About two days per
5 week he spends most of the day in bed due to pain and shortness of
6 breath. (AR at 47.) He tries to limit his visits to the hospital and his
7 doctor because he cannot afford them and does not have insurance. (AR at
8 36, 40.) Regarding daily activities, Plaintiff testified he usually
9 watches television and uses his computer for a few hours. (AR at 43.) He
10 lives with his parents and cleans his room and occasionally does the
11 dishes, but he cannot vacuum or dust. (AR at 40.) Sometimes, he works in
12 the garage on his motorcycles, and every couple of months, he goes for
13 a local ride with friends. (AR at 44-45.) He also goes to the store and
14 drives his siblings to work or school several times a week, but not if
15 he is not having a bad day. (AR at 45, 48.)

16 To determine whether a claimant's testimony about subjective pain
17 or symptoms is credible, the ALJ must first determine whether the
18 claimant has presented objective medical evidence of an underlying
19 impairment which could reasonably be expected to produce the alleged
20 pain or other symptoms. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36
21 (9th Cir. 2007). Once the claimant produces such evidence, "an
22 adjudicator may not reject a claimant's subjective complaints based
23 solely on a lack of objective medical evidence to fully corroborate the
24 alleged severity of pain." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th
25 Cir. 1991) (en banc). Rather, the ALJ must provide specific, clear and
26 convincing reasons for discrediting a claimant's complaints, unless
27 there is affirmative evidence showing that the claimant is malingering.
28 *Robbins*, 466 F.3d at 883.

1 Here, the ALJ concluded that Plaintiff's "medically determinable
2 impairments could reasonably be expected to cause some of the alleged
3 symptoms." (AR at 16.) However, the ALJ rejected as not credible
4 Plaintiff's statements "concerning the intensity, persistence and
5 limiting effects of these symptoms" to the extent they are inconsistent
6 with the ALJ's RFC determination. (AR at 16.) As there was no evidence
7 of malingering, the ALJ was required to provide clear and convincing
8 reasons for rejecting this testimony.

9 The ALJ listed multiple reasons for rejecting Plaintiff's
10 testimony, none of which are supported by substantial evidence. First,
11 the ALJ stated that Plaintiff testified that his asthma is basically
12 under control with the use of albuterol, and that he is able to function
13 for two to three hours at a time when he gives himself a breathing
14 treatment. (AR at 16.) This mischaracterizes Plaintiff's testimony.
15 Plaintiff testified that albuterol helps sometimes but not when he is
16 having a severe attack. (AR at 32-33.) During severe attacks, which
17 occur frequently, he must go to the hospital or use a breathing machine
18 that he keeps at home.¹ Furthermore, none of the physician opinions in
19 the record, including those of the two state agency reviewing
20 physicians, explicitly opines on whether albuterol keeps Plaintiff's
21 asthma under control or the extent of his functioning after breathing
22 treatment. (AR at 214-18, 226-30, 247-48.)

23 Next, the ALJ discredited Plaintiff's symptom testimony based on
24 his daily activities, which the ALJ found to be inconsistent with
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26 ¹ It appears from the record that this breathing machine can only
27 be used while hooked up, unlike an inhaler. (AR at 33-34.) To the extent
28 the machine could be brought to work and used there, the ALJ did not
include the requirement of breaks to use it in the hypothetical given to
the VE. (AR at 52.)

1 disabling impairment. (AR at 16.) A disability claimant's daily
2 activities "may be grounds for an adverse credibility finding if a
3 claimant is able to spend a substantial part of his day engaged in
4 pursuits involving the performance of physical functions that are
5 transferable to a work setting." *Orn v. Astrue*, 495 F.3d 625, 639 (9th
6 Cir. 2007) (internal quotation marks omitted). Here, however, the
7 limited activities Plaintiff engages in are not inconsistent with his
8 testimony regarding his symptoms. None of the activities lasts longer
9 than a couple of hours, and their performance is therefore consistent
10 with Plaintiff's testimony that sometimes using albuterol stops him from
11 having an asthma attack for three or four hours. Additionally, Plaintiff
12 testified that he only engages in the more exertional activities, such
13 as giving his siblings a ride, when he is not having a bad day, and
14 therefore these activities are not inconsistent with his testimony that
15 he generally spends two days per week in bed. In short, these limited
16 activities are not the sort that are easily transferable to a work
17 setting "'where it might be impossible to periodically rest or take
18 medication.'" *Blau v. Astrue*, 263 Fed.Appx. 635, 637 (9th Cir. 2008)
19 (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). The fact
20 that Plaintiff is not "utterly incapacitated" does not prevent a finding
21 of disability nor render his symptom testimony not credible. See
22 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) (citing *Fair*,
23 885 F.2d at 603).

24 The ALJ also rejected Plaintiff's symptom testimony as not credible
25 based on the fact that Plaintiff had only been hospitalized once, for
26 twelve hours, in the year prior to the hearing. (AR at 16.) "[A]n
27 unexplained, or inadequately explained, failure to seek treatment may be
28 the basis for an adverse credibility finding unless one of a number of

1 good reasons for not doing so applies." *Orn*, 495 F.3d at 638 (9th Cir.
2 2007) (internal citations and quotation marks omitted). One such "good
3 reason" for failing to seek treatment is the inability to afford it. *Id.*
4 Here, Plaintiff did not have insurance and could not afford more
5 extensive treatment. (AR at 36, 40, 285, 288, 289). He testified that
6 when he has gone to the hospital, "they usually don't keep me long,"
7 because of his lack of insurance. Furthermore, despite his lack of
8 resources, Plaintiff did see his treating physician, Dr. Gorenberg, on
9 a near monthly basis in the years prior to the hearing. (AR at 49.)
10 Under these circumstances, the lack of additional hospitalizations is
11 not a clear and convincing reason for finding Plaintiff not credible.

12 Finally, the ALJ found that Plaintiff has been able to work at
13 demanding occupations while suffering from asthma and related
14 conditions, and that there was no evidence that his impairments have
15 become worse over time. (AR at 16.) The ALJ did not state on what
16 evidence she based her conclusion that Plaintiff's symptoms have not
17 deteriorated over time. While not entirely clear, the treatment records
18 from Dr. Gorenberg do seem to show that his impairments have worsened.
19 (See AR at 250-314.) For example, a note from a visit in 1999 states
20 that Plaintiff was there for a checkup but "feels fine," (AR at 270),
21 while a progress note from late 2007 note that Plaintiff's asthma is
22 "wildly uncontrolled." (AR at 282.) There is no evidence in the record
23 demonstrating that Plaintiff's impairments were as severe during the
24 years that he was employed as he now claims them to be.

25 In sum, the reasons given by the ALJ for rejecting Plaintiff's
26 testimony were not supported by substantial evidence in the record and
27 were therefore insufficient to reject his testimony regarding his
28 symptoms and related limitations.

