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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

|  |   |                               |
|--|---|-------------------------------|
| REYNALDO SEGURA,   | ) | No. ED CV 15-1311 AS          |
|  | ) |                               |
| Plaintiff,   | ) |                               |
| v.   | ) |                               |
|  | ) | <b>MEMORANDUM OPINION AND</b> |
| CAROLYN W. COLVIN,<br>Acting Commissioner of Social<br>Security, | ) | <b>ORDER OF REMAND</b>        |
|  | ) |                               |
| Defendant.   | ) |                               |
|  | ) |                               |

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Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter is remanded for further administrative action consistent with this Opinion.

**I. PROCEEDINGS**

In 2011, Plaintiff Renaldo Segura ("Plaintiff") applied for disability insurance benefits based on a disabling condition beginning December 15, 2008. (AR 69, 205, 290). On September 4, 2013, Administrative Law Judge ("ALJ") Joseph D. Schloss heard

1 testimony from Plaintiff, medical expert ("M.E.") Dr. Anthony J.  
2 Francis, and vocational expert ("V.E.") Joseph H. Torres. (AR 36-  
3 58). On September 19, 2013, the ALJ denied Plaintiff benefits in a  
4 written decision. (AR 20-30). The Appeals Council denied review of  
5 the ALJ's decision. (AR 1-4).

6  
7 On July 2, 2015, Plaintiff filed a Complaint pursuant to  
8 42 U.S.C. §§ 405(g) and 1383(c)(3) alleging that the Social Security  
9 Administration erred in denying benefits. (Docket Entry No. 1). On  
10 November 4, 2015, Defendant filed an Answer to the Complaint, (Docket  
11 Entry No. 12), and the Certified Administrative Record ("AR"),  
12 (Docket Entry No. 13). The parties have consented to proceed before  
13 a United States Magistrate Judge. (Docket Entry Nos. 9, 10). On  
14 March 8, 2016, the parties filed a Joint Stipulation ("Joint Stip.")  
15 setting forth their respective positions on Plaintiff's claims.  
16 (Docket Entry No. 17).

## 17 18 **II. SUMMARY OF TESTIMONY AND ALJ'S DECISION**

19  
20 At the September 4, 2013 hearing, the M.E. testified that  
21 Plaintiff suffered from lumbar and sacral radiculopathy on or about  
22 the alleged onset date, underwent fusion surgery in 2010, and  
23 continued to suffer from "persistent radiculopathy" after that. (AR  
24 40-41). The M.E. noted that Plaintiff was injured in August 2008  
25 while lifting heavy rebar, which caused lumbar radiculopathy and a  
26 herniated nucleus pulposus (disc). (AR 40). Plaintiff had one  
27 steroid injection that afforded him relief for about a week. (AR  
28 40). In 2013, Plaintiff was "a candidate for a spinal cord

1 stimulator." (AR 41). The M.E. stated that there were "no opinions"  
2 in Plaintiff's records that Plaintiff could not work, but cases  
3 involving "failed spinal surgery" severe enough to merit spinal cord  
4 stimulation are generally cases in which the claimant's impairments  
5 meet Listing 1.04A, Disorders of the Spine. (See AR 42). The M.E.  
6 opined that Plaintiff would probably be unable to work at a sedentary  
7 level because his was a "failed spinal surgery case with a continued  
8 radiculopathy," although the M.E. also stated that he was unable to  
9 point to "something in this case that says" that Plaintiff was unable  
10 to work. (AR 43).

11  
12 Plaintiff then testified as follows: he has "problems" bending,  
13 stooping, sitting for a long time, standing, walking, reaching,  
14 pushing, and pulling. (AR 44). He has pain in his lower back and  
15 all the way down his legs and numbness in his left foot. (AR 44).  
16 Plaintiff's "daily routine" involves washing dishes, but even the  
17 "little bit of pivoting" involved in washing dishes causes his back  
18 to "turn[] into a pretzel." (AR 44). He then has to sit down for a  
19 while and "ice it" but he cannot sit very long because his legs  
20 "start to pinch," and the "pinch" is "an ongoing thing all day long  
21 any time [he does] something." (AR 44). Plaintiff can sit for  
22 between five and thirty minutes before needing to stand: about four  
23 days of the week, he can only sit for about ten minutes. (AR 45-46).  
24 Plaintiff can stand for thirty minutes or walk about two blocks  
25 before needing to rest for thirty to sixty minutes. (AR 46-47).

26  
27 Plaintiff can clean his bathtub, toilet, counter, and sinks for  
28 about twenty minutes before needing to sit for about an hour to apply

1 ice or heat. (AR 47). About once a week, Plaintiff's pain is severe  
2 enough that his wife has to help him dress. (AR 47). Plaintiff can  
3 bend enough to touch his knees without difficulty and lift twenty  
4 pounds, although not repeatedly, without injury. (AR 48). Plaintiff  
5 gets five hours of sleep per night and naps thirty minutes or an hour  
6 every day. (AR 49). Plaintiff drives for thirty minutes about twice  
7 a week. (AR 53). Plaintiff has taken medication, including  
8 hydrocodone, for his pain; the medication "cloud[s]" his pain but  
9 does not "take it away," and it makes him constipated, sick to his  
10 stomach, irritable, and depressed. (AR 50).

11  
12 In response to hypotheticals posed by the ALJ, the V.E.  
13 testified that there were jobs existing in significant numbers in the  
14 national economy for: (1) a forty-six-year-old individual limited to  
15 a complete range of light work; and (2) a person able to perform a  
16 complete range of sedentary work except "no ladders, ropes or  
17 scaffolds; no working at heights; no vibratory tools or instruments;  
18 no dangerous, moving machinery; no unprotected heights . . . can  
19 stand and walk 30 minutes at a time, for a total of 6 hours in each  
20 category; can sit 6 hours, 30 minutes at a time; and can lift and  
21 carry ten pounds occasionally, frequently less than ten pounds; push  
22 and pull is occasional with the lower extremities; no limitations on  
23 the upper extremities; occasionally can climb ramps, stairs, bend  
24 stoop, kneel, crouch; no squatting and no crawling." (AR at 55-57).

25  
26 The ALJ applied the five-step process in evaluating Plaintiff's  
27 case. (AR 20-22). At step one, the ALJ determined that Plaintiff  
28 had not engaged in substantial gainful activity after the alleged

1 onset date. (AR 22). At step two, the ALJ found that Plaintiff had  
2 the following severe impairment: lumbar radiculopathy status post  
3 fusion. (AR 22). The ALJ found Plaintiff's obesity and depression  
4 to be non-severe. (AR 23). At step three, the ALJ found that  
5 Plaintiff's impairments did not meet or equal a listing found in 20  
6 C.F.R. Part 404, Subpart P, Appendix 1. (AR 24).

7  
8 The ALJ found that Plaintiff had the residual functional  
9 capacity ("RFC") to perform sedentary work with the following  
10 additional limitations: able to lift and/or carry 10 pounds  
11 occasionally and less than 10 pounds frequently; stand and/or walk  
12 for a total of six hours in an eight-hour workday with customary  
13 breaks, but no more than 30 minutes at a time; sit for a total of six  
14 hours in an eight-hour workday with customary breaks, but no more  
15 than 30 minutes at a time; and push and/or pull with the lower  
16 extremities on an occasional basis with his lower extremities within  
17 the weight limits provided for lifting and/or carrying, but no  
18 limitations on pushing and/or pulling with the bilateral upper  
19 extremities; occasional climbing of ramps and stairs; occasional  
20 bending, stooping, kneeling, or crouching; no squatting, crawling, or  
21 climbing ladders, ropes, or scaffolds; no working at unprotected  
22 heights, around dangerous and/or moving machinery, or with vibratory  
23 tools or instruments. (AR 24). In making this finding, the ALJ  
24 found that, although Plaintiff's medically determinable impairments  
25 could reasonably be expected to cause his symptoms, Plaintiff's  
26 testimony regarding the intensity, persistence, and limiting effects  
27 of his symptoms was not entirely credible. (AR 25).

1 At steps four and five, the ALJ determined that Plaintiff could  
2 not return to his past work, but he could perform jobs existing in  
3 significant numbers in the national economy, including that of  
4 assembler and table worker. (AR 28-30). The ALJ accordingly  
5 determined that Plaintiff was not disabled within the meaning of the  
6 Social Security Act. (AR 30).

7  
8 **III. STANDARD OF REVIEW**  
9

10 This court reviews the Commissioner's decision to determine if  
11 the decision is free of legal error and supported by substantial  
12 evidence. See Brewes v. Commissioner of Social Sec. Admin., 682 F.3d  
13 1157, 1161 (9th Cir. 2012). "Substantial evidence" is more than a  
14 mere scintilla, but less than a preponderance. Garrison v. Colvin,  
15 759 F.3d 995, 1009 (9th Cir. 2014). To determine whether substantial  
16 evidence supports a finding, "a court must consider the record as a  
17 whole, weighing both evidence that supports and evidence that  
18 detracts from the [Commissioner's] conclusion." Aukland v.  
19 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (internal quotation  
20 omitted). As a result, "[i]f the evidence can reasonably support  
21 either affirming or reversing the ALJ's conclusion, [a court] may not  
22 substitute [its] judgment for that of the ALJ." Robbins v. Soc. Sec.  
23 Admin., 466 F.3d 880, 882 (9th Cir. 2006).

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1 **IV. PLAINTIFF'S CONTENTIONS**

2  
3 Plaintiff contends that the ALJ improperly considered his  
4 testimony and improperly found him not credible. (Joint Stip. at 3-  
5 12).  
6

7 **V. DISCUSSION**

8  
9 After reviewing the record, the Court finds that Plaintiff's  
10 claim warrants a remand for further consideration.  
11

12 **A. The ALJ Erred in Rejecting Plaintiff's Testimony as Not Credible**

13  
14 A claimant initially must produce objective medical evidence  
15 establishing a medical impairment reasonably likely to be the cause  
16 of his subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281  
17 (9th Cir. 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.  
18 1991). Once a claimant produces objective medical evidence of an  
19 underlying impairment that could reasonably be expected to produce  
20 pain or other symptoms alleged, and there is no evidence of  
21 malingering, the ALJ may reject the claimant's testimony regarding  
22 the severity of his pain and symptoms only by articulating specific,  
23 clear and convincing reasons for doing so. Brown-Hunter v. Colvin,  
24 806 F.3d 487, 493 (9th Cir. 2015) (citing Lingenfelter v. Astrue, 504  
25 F.3d 1028, 1036 (9th Cir. 2007)); see also Smolen, 80 F.3d at 1281;  
26 Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998); Light v. Social  
27 Sec. Admin., 119 F.3d 789, 792 (9th Cir. 1997). In this case,  
28

1 because there is no evidence of malingering, the "clear and  
2 convincing reasons" standard applies.

3  
4 The ALJ gave the following reasons for finding Plaintiff's  
5 testimony not credible:

6  
7 [Plaintiff] testified he is unable to engage in work  
8 activity due to his back pain and numbness in his feet. He  
9 alleged he has difficulties with bending, stooping,  
10 pushing, pulling, and sitting and walking for a prolonged  
11 period despite ongoing treatment. He contended even simple  
12 chores, such as washing the dishes[,] cause back pain. He  
13 asserted that he is able to sit for about 15 minutes and  
14 walk for about 30 minutes at a time. At the same time, he  
15 admitted he can mop, clean bathtubs and toilets, wash the  
16 dishes, and drive.

17  
18 The [ALJ] has read and considered the Exertion  
19 Questionnaire, completed by [Plaintiff] in [sic] December  
20 27, 2011. [Plaintiff] alleged he has difficulties with  
21 bending and stooping, and that he is unable to walk for a  
22 prolonged period due to his back pain. Yet, he admitted he  
23 is able to perform household chores, shop, and drive.

24  
25 After careful consideration of the evidence, the [ALJ]  
26 finds that [Plaintiff's] medically determinable impairments  
27 could reasonably be expected to cause the alleged symptoms;  
28 however, [Plaintiff's] statements concerning the intensity,



1 persistence and limiting effects of these symptoms are not  
2 entirely credible for the reasons explained in this  
3 decision. [. . .]

4  
5 [Plaintiff's] treatment notes show that he sustained a  
6 work-related injury in August of 2008 when he felt a pinch  
7 in his left lower extremity while squatting and lifting off  
8 the ground. . . . [Plaintiff] was treated conservatively  
9 with physical therapy, chiropractic adjustments, and  
10 epidural injections. However, when conservative treatment  
11 failed, he underwent a fusion surgery in July of 2010.

12  
13 Even after the surgery, he made persistent complaints of  
14 pain, tingling, and numbness in his legs. However,  
15 findings from the physical examinations were generally  
16 benign. . . . [Plaintiff's] treating chiropractor indicated  
17 that [Plaintiff] would be treated with chiropractic  
18 adjustments, physical therapy, and oral medications.

19  
20 Recent physical examinations revealed improvement in  
21 [Plaintiff's] symptoms. . . . In fact, [Plaintiff] reported  
22 that he stopped taking oral medications for pain relief.  
23 Yet, his doctor suggested [a] spinal cord stimulator trial,  
24 although it is unclear if [Plaintiff] did in fact undergo a  
25 spinal cord stimulator trial.

26  
27 In February of 2012, Robert Nguyen, M.D., conducted a  
28 complete consultative internal medicine evaluation of

1 [Plaintiff]. A physical examination revealed the range of  
2 motion of [Plaintiff's] back was restricted and that he was  
3 unable to stretch his legs in a supine position.  
4 Otherwise, findings from the physical examination were  
5 within normal limits.

6  
7 In arriving at a decision, the [ALJ] must assess the  
8 credibility of each person who gives evidence, either by  
9 testimony during the hearing or by pre-hearing statements  
10 or reports. When the [ALJ] assess each person's  
11 credibility, the [ALJ] considers a number of factors and  
12 utilize [sic] those factors that are relevant to his claim  
13 and that are applicable to his credibility. As a result,  
14 the [ALJ] finds the [Plaintiff's] allegations are less than  
15 fully credible.

16  
17 Despite his impairments, [Plaintiff] has engaged in a  
18 somewhat normal level of daily activity and interaction.  
19 [Plaintiff] admitted activities of daily living, including  
20 performing household chores, such as cleaning the bathtub,  
21 cleaning the toilet, and mopping; shopping; and driving.  
22 Some of the physical and mental abilities and social  
23 interactions required to perform these activities are the  
24 same as those necessary for obtaining and maintaining  
25 employment. [Plaintiff's] ability to participate in such  
26 activities undermined the credibility of [his] allegations  
27 of disabling functional limitations.

1 [Plaintiff] has not generally received the type of medical  
2 treatment one would expect for a totally disabled  
3 individual. Although [Plaintiff] has received treatment for  
4 the allegedly disabling impairment, that treatment has been  
5 essentially routine and conservative in nature.

6  
7 After his fusion surgery, [Plaintiff] was treated with oral  
8 medications, chiropractic adjustments, and physical  
9 therapy. The lack of a more aggressive treatment, surgical  
10 intervention, or even a referral to a specialist since his  
11 fusion surgery suggests [Plaintiff's] symptoms and  
12 limitations are not as severe as he alleges. The  
13 credibility of [Plaintiff's] allegations regarding the  
14 severity of his symptoms and limitations is diminished  
15 because those allegations are greater than expected in  
16 light of the objective evidence of record.

17  
18 [Plaintiff] underwent fusion surgery in July of 2010 for  
19 the alleged impairment, which certainly suggests that  
20 his/her [sic] symptoms were genuine. While that fact would  
21 normally weigh in [Plaintiff's] favor, it is offset by the  
22 fact that the record reflects that the surgery was  
23 generally successful in relieving the symptoms. With time,  
24 [Plaintiff's] symptoms improved, as evidenced by the  
25 findings from physical examinations.

26 [Plaintiff] alleged back pain that radiated down to his  
27 lower extremities. Muscle atrophy is a common side effect  
28 of prolonged and/or chronic pain due to lack of use of a

1 muscle in order to avoid pain. There is no evidence of  
2 atrophy in [Plaintiff's] lower extremities. It can be  
3 inferred that although [Plaintiff] experienced some degree  
4 of pain in his back and lower extremities, the pain has not  
5 altered his use of those muscles to an extent that has  
6 resulted in atrophy.

7  
8 [Plaintiff] alleged he has difficulty concentrating. The  
9 [ALJ] observed her [sic] throughout the hearing. He did not  
10 demonstrate or manifest any difficulty concentrating during  
11 the hearing. During the time when he was being questioned,  
12 he appeared to process the questions without difficulty,  
13 and to respond to the questions appropriately and without  
14 delay. He also paid attention throughout the hearing. While  
15 the Administrative Law Judges are not free to accept or  
16 reject a claimant's allegations solely on the basis of  
17 personal observations, such observations should be  
18 considered in the overall evaluation of credibility.

19  
20 (AR at 25-27 (citations omitted)).

21  
22 In challenging the ALJ's decision, Plaintiff alleges, inter  
23 alia, that: (1) the severity of a claimant's pain need not be  
24 substantiated by objective medical evidence; (2) Plaintiff's  
25 treatment was not "routine and conservative," as he underwent fusion  
26 surgery and expressed interest in a spinal cord stimulator trial; (3)  
27 the M.E. testified that he would not be able to perform sedentary  
28 work; and (4) the mere fact that Plaintiff engaged in household

1 chores, shopping, and driving does not warrant a finding that he is  
2 able to work. (Joint Stip. at 5-12). Defendant contends that the  
3 ALJ's credibility finding was proper based on Plaintiff's daily  
4 activities, the success of surgery in alleviating Plaintiff's  
5 symptoms, the lack of evidence of atrophy in Plaintiff's lower  
6 extremities, and Plaintiff's ability to concentrate and respond  
7 during the hearing. (Joint Stip. at 12-15). The Court does not  
8 agree.

9  
10 The ALJ overstates the degree to which Plaintiff's daily  
11 activities are consistent with the abilities necessary to secure and  
12 maintain employment. For example, Plaintiff testified that he can  
13 generally perform household chores for twenty to thirty minutes  
14 before requiring a break lasting up to an hour. (AR 44, 47).  
15 Plaintiff also naps for up to an hour every day and drives only twice  
16 a week for about half an hour each time. (AR 49, 53). The duration  
17 and intensity of Plaintiff's activities provide very little evidence  
18 that Plaintiff can secure and maintain employment or that Plaintiff's  
19 pain is not as severe as he suggests. As the Ninth Circuit has  
20 repeatedly asserted, "the mere fact that a plaintiff has carried on  
21 certain daily activities, such as grocery shopping, driving a car, or  
22 limited walking for exercise, does not in any way detract from her  
23 credibility as to [his] overall disability. One does not need to be  
24 utterly incapacitated in order to be disabled." Vertigan v. Halter,  
25 260 F.3d 1044, 1050 (9th Cir. 2001) (finding "only a scintilla" of  
26 evidence supporting ALJ's adverse credibility finding where claimant  
27 was able to go grocery shopping with assistance, walk approximately  
28 an hour in the mall, get together with friends, play cards, swim,

1 watch television, read, undergo physical therapy, and exercise at  
2 home); see also Reddick, 157 F.3d at 722 (activities of daily living  
3 affect a claimant's credibility "[o]nly if the level of activity [is]  
4 inconsistent with the [c]laimant's claimed limitations"; ALJ erred by  
5 "not fully accounting for the context of materials or all parts of  
6 the testimony and reports," resulting in paraphrasing of record  
7 material that was "not entirely accurate regarding the content or  
8 tone of the record").

9  
10 The ALJ also erred in characterizing Plaintiff's post-surgical  
11 treatment as "routine and conservative" simply because it consisted  
12 primarily of "chiropractic adjustments, physical therapy, and oral  
13 medications." (AR 26-27). For example, Plaintiff was prescribed  
14 Norco, which contains hydrocodone, for an extended period after his  
15 surgery. (See, e.g., AR 718, 755; see also id. at 50). Hydrocodone  
16 is a narcotic pain reliever that is not generally characterized as  
17 "routine" or "conservative" treatment. See Lasane v. Colvin, 2013 WL  
18 3121315 at \*4 (C.D. Cal. 2013); Hill v. Colvin, 2013 WL 3866768 at \*7  
19 (C.D. Cal. 2013) (collecting cases). The ALJ also does not  
20 meaningfully address why Plaintiff would have contemplated spinal  
21 cord stimulation therapy<sup>1</sup> if his pain were well controlled with  
22 chiropractic adjustments, physical therapy, and oral medications.  
23 Although, as the ALJ notes, Plaintiff reported in February 2013 that

24  
25 <sup>1</sup> Spinal cord stimulation therapy involves placing electrodes under a  
26 patient's skin "into the space on top of [his] spinal cord" and  
27 connecting them to a small current generator outside the patient's  
28 body. If an initial trial electrode reduces the patient's pain "by  
50% or more," a permanent generator may be installed. Spinal Cord  
Stimulation, Medical Encyclopedia, U.S. National Library of Medicine,  
available at <https://www.nlm.nih.gov/medlineplus/ency> (visited May 6,  
2016).

1 he had stopped taking medications entirely, (AR 26, 746), Plaintiff  
2 still complained of, and sought treatment for, pain during that  
3 visit, (AR 746-48). One month later, Plaintiff reported that he was  
4 taking Norco again, but also reported that Norco caused him  
5 constipation, (AR 755), suggesting that he may have temporarily  
6 stopped taking Norco due to its side effects rather than because his  
7 pain had lessened. At the same meeting, Plaintiff received  
8 information about spinal cord stimulation therapy which suggests that  
9 his pain was not well controlled with the treatment he was currently  
10 receiving. See Gambrell v. Comm'r, Soc. Sec. Admin., 2015 WL 2168717  
11 at \*2 (D. Md. 2015) ("Although the ALJ accurately stated that . . .  
12 certain medications provided 'some' and/or 'significant' pain relief,  
13 the ALJ completely ignored . . . simultaneous statements documenting  
14 soreness, weakness, tenderness, worsening pain, current pain at 7/10  
15 and 8/10, discomfort with certain movements, and failed conservative  
16 treatments. Temporary relief of pain from medications, even if  
17 significant, does not necessarily equate with adequate control of  
18 pain. If [claimant's] pain was controlled with medications, it is  
19 unclear why her pain management physician would have continued to  
20 perform injections and hardware blocks, or why he would recommend a  
21 spinal cord stimulation trial.").

22  
23 The ALJ also erred in relying on the absence of muscle atrophy  
24 to support his credibility finding. (AR 27). "[W]hile an [ALJ] is  
25 free to resolve issue of credibility as to lay testimony or to choose  
26 between properly submitted medical opinions, he is not free to set  
27 his own expertise against that of a physician who [submitted an  
28 opinion to or] testified before him." McBrayer v. Sec'y of Health &

1 Human Servs., 712 F.2d 795, 799 (2d Cir. 1983); see also Tackett v.  
2 Apfel, 180 F.3d 1094, 1102-03 (9th Cir. 1999) (ALJ improperly relied  
3 on his interpretation of Plaintiff's testimony over medical  
4 opinions); Gonzalez Perez v. Sec'y of Health & Human Servs., 812 F.2d  
5 747, 749 (1st Cir. 1987) ("The ALJ may not substitute his own  
6 layman's opinion for the findings and opinion of a physician....").  
7

8 Here, although the ALJ cited medical evidence indicating that  
9 Plaintiff's strength and muscle mass were normal, (AR 696-700), the  
10 ALJ cited no evidence that the absence of atrophy was inconsistent  
11 with Plaintiff's pain levels, particularly given that Plaintiff  
12 admitted that he was not confined to his bed or otherwise unable to  
13 walk or move. Compare Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir.  
14 1999) (ALJ permissibly discounted claimant's complaint that her pain  
15 required her to "lie in a fetal position all day" because she "did  
16 not exhibit muscular atrophy or any other physical signs of an  
17 inactive, totally incapacitated individual"); see also Lapeirre-Gutt  
18 v. Astrue, 382 F. App'x 662, 665 (9th Cir. 2010) (ALJ's reliance on  
19 lack of muscle atrophy inappropriate where "no medical evidence  
20 suggest[ed] that high inactivity levels necessarily lead to muscle  
21 atrophy"); Winans v. Colvin, 2014 WL 4259471 at \*6 (D. Ariz. 2014)  
22 (an ALJ's observation regarding lack of atrophy was "consistent with  
23 the fact that several physicians observed that Plaintiff had no  
24 muscle weakness;" nevertheless, ALJ's reliance on his own  
25 observations regarding "the significance of the absence of those  
26 findings" was error).  
27  
28



1           The ALJ also rejected Plaintiff's statements that he had  
2 "difficulty concentrating" based on the ALJ's own observations of  
3 Plaintiff's conduct during the hearing. (AR 27). The Ninth Circuit  
4 has repeatedly condemned so-called "sit and squirm" jurisprudence.  
5 Perminster v. Heckler, 765 F.2d 870, 872 (9th Cir. 1985) ("Denial of  
6 benefits cannot be based on the ALJ's observation of [the claimant],  
7 when [the claimant's] statements . . . are supported by objective  
8 evidence."). However, inclusion of an ALJ's personal observations  
9 does not necessarily render the decision improper. See Verduzco v.  
10 Apfel, 188 F.3d 1087, 1090 (9th Cir. 1989). Here, the ALJ's  
11 observations during the twenty-six minute hearing, (AR 38, 58), do  
12 not justify an adverse credibility finding, particularly where  
13 Plaintiff's testimony suggests that Plaintiff's symptoms wax and  
14 wane. (AR 45-47); see Gallant v. Heckler, 753 F.2d 1450, 1455 (9th  
15 Cir. 1984) ("The fact that a claimant does not exhibit physical  
16 manifestations of prolonged pain at the hearing provides little, if  
17 any, support for the ALJ's ultimate conclusion that the claimant is  
18 not disabled or that his allegations of constant pain are not  
19 credible."). Additionally, Plaintiff asked to stand and stretch  
20 during the hearing, (AR 52), which, if it alleviated his pain, would  
21 likely improve his ability to concentrate.

22  
23           Finally, to the extent that Plaintiff's pain levels were not  
24 substantiated by medical evidence, this finding does not provide an  
25 appropriate basis upon which to affirm in the absence of other  
26 appropriate reasons to find Plaintiff's testimony not fully credible.  
27 Light, 119 F.3d at 792-793 ("[A] finding that the claimant lacks  
28

1 credibility cannot be premised wholly on a lack of medical support  
2 for the severity of his pain." ).

3  
4 **B. The ALJ's Error Was Not Harmless**

5  
6 "[H]armless error principles apply in the Social Security . . .  
7 context." Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012)  
8 (citing Stout v. Comm'r Soc. Sec. Admin., 454 F.3d 1050, 1054 (9th  
9 Cir. 2006)). Generally, "an ALJ's error is harmless where it is  
10 'inconsequential to the ultimate nondisability determination.'" Id.  
11 (citing Carmickle v. Comm'r Soc. Sec. Admin., 466 F.3d 880, 885 (9th  
12 Cir. 2006)).

13  
14 The Court cannot conclude that the ALJ's errors were harmless.  
15 The limiting effects of Plaintiff's pain are directly relevant to  
16 assessing his RFC. A claimant's RFC "may be the most critical  
17 finding contributing to the final . . . decision about disability."  
18 See McCawley v. Astrue, 423 F. App'x 687, 689 (9th Cir. 2011)  
19 (quoting SSR 96-5p). Here, Plaintiff's RFC was central to the ALJ's  
20 determination that there was work that he could perform despite his  
21 limitations. (AR 29-30). Because the Court cannot determine that  
22 the ALJ's errors are "inconsequential to the ultimate disability  
23 determination," the errors cannot be deemed harmless. See Carmickle,  
24 466 F.3d at 885.

25  
26 **C. Remand Is Warranted**

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

1 an immediate award of benefits is within the district court's  
2 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000).  
3 Where no useful purpose would be served by further administrative  
4 proceedings, or where the record has been fully developed, it is  
5 appropriate to exercise this discretion to direct an immediate award  
6 of benefits. Id. at 1179 ("[T]he decision of whether to remand for  
7 further proceedings turns upon the likely utility of such  
8 proceedings."). However, where the circumstances of the case suggest  
9 that further administrative review could remedy the Commissioner's  
10 errors, remand is appropriate. McLeod v. Astrue, 640 F.3d 881, 888  
11 (9th Cir. 2011); Harman, 211 F.3d at 1179-81.

12  
13 Here, the Court remands because the ALJ did not properly analyze  
14 Plaintiff's credibility. The record does not establish that the ALJ  
15 would necessarily be required to find Plaintiff disabled if this  
16 deficiency were remedied. Remand is therefore appropriate.

17  
18 The Court has not reached issues not discussed supra except to  
19 determine that reversal with a directive for the immediate payment of  
20 benefits would be inappropriate at this time. In addition to the  
21 issues addressed in this order, the ALJ should consider on remand any  
22 other issues raised by Plaintiff, if necessary.

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1 **VI. CONCLUSION**

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3 For the foregoing reasons, the decision of the Administrative  
4 Law Judge is VACATED, and the matter is REMANDED, without benefits,  
5 for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).  
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7 LET JUDGMENT BE ENTERED ACCORDINGLY.  
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9 Dated: May 31, 2016

10 \_\_\_\_\_/s/\_\_\_\_\_  
11 ALKA SAGAR  
12 UNITED STATES MAGISTRATE JUDGE  
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