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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOSE DEANDA,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

) 1:08cv1052 GSA
)
)

) ORDER REGARDING PLAINTIFF'S
) SOCIAL SECURITY COMPLAINT
)
)

) (Doc. 19)
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BACKGROUND

Plaintiff Jose Deanda (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying his application for disability insurance benefits pursuant to Title II and XVI of the Social Security Act. The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to the Honorable Gary S. Austin, United States Magistrate Judge.¹

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¹ Both Plaintiff and Defendant consented to the jurisdiction of the United States Magistrate Judge Gary S. Austin on August 5, and 20, 2009, respectively. (Docs. 10 and 11).

1 **FACTS AND PRIOR PROCEEDINGS²**

2 Plaintiff filed his initial application for Disability Insurance benefits and Supplemental
3 Security Income (“SSI”) on January 25, 2005, alleging disability since December 31, 2003. AR
4 49-58. His application was denied initially on July 1, 2005, and on reconsideration on September
5 28, 2005. A.R. 36-41. Plaintiff requested a hearing before an Administrative Law Judge
6 (“ALJ”). AR 10. ALJ William C. Thompson, Jr. held a hearing on May 25, 2007, and denied
7 benefits on September 13, 2007. AR 14-21;312-334. On May 24, 2008, the Appeals Council
8 denied review. AR 5-8.

9 Hearing Testimony

10 ALJ Williams held a video hearing on May 25, 2007. AR 312. Plaintiff appeared in
11 Fresno, California. ALJ Thompson presided over the hearing in Stockton, California. AR 312.
12 Plaintiff appeared with his attorney, Ms. Melissa Proudian. AR 314.

13 At the time of the hearing, Plaintiff was forty nine years old. AR 316. Plaintiff
14 completed the sixth grade. AR 316. He does not have a GED, however, Plaintiff is able to read
15 and write. AR 316. Plaintiff is five feet eleven inches tall and weighs two hundred and eighteen
16 pounds. AR 317. Plaintiff is married but is legally separated and is in the process of getting
17 divorced. AR 317.

18 From 1984 until 2003, Plaintiff worked for two different electronics companies testing
19 and inspecting computers. AR 318-319. He held each position for approximately ten years. AR
20 318- 319. He was laid off in 2003. AR 319. After he was laid off, he has held several short
21 term jobs. AR 318. He worked for a furniture company for approximately ten or eleven months.
22 AR 318. He also worked as a lab inspector for a juice company but was let go after one month.
23 318. Plaintiff most recently worked full-time in April 4, 2007, as a sales person for an auto
24 dealer for approximately three months. AR 317. Plaintiff was let go because the company was
25 not satisfied with his work. AR 318.

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² References to the Administrative Record will be designated as “AR,” followed by the appropriate page number.

1 Plaintiff was diagnosed with an eye tumor which was partially removed. AR 320.
2 Plaintiff is being treated by an endocrinologist, a cancer radiologist, and his primary care
3 physician. Plaintiff sees his endocrinologist once every six months, his neurologist once a year,
4 and his primary care physician once every two weeks. AR 320. Plaintiff goes for MRI's to
5 monitor the activity of the tumor. He takes Prednisone and Tylenol for headaches. AR 320.
6 Plaintiff did not receive radiation treatment after the surgery because the tumor is in between his
7 eyes and may cause burning on his optical nerve resulting in increased blindness. AR 320.

8 Plaintiff is unable to work currently because he has problems with concentration and he
9 suffers from fatigue. He also has poor vision and needs to eat and drink frequently. AR 321. He
10 suffers from back and shoulder pain. The shoulder pain is the result of a dislocated shoulder
11 which he suffered in 2004. AR 321. Plaintiff did not have surgery for his shoulder, however he
12 did receive physical therapy. AR 322. He does not receive treatment for his shoulder and he was
13 told there is no cure for the injury. AR 321, 322. Plaintiff has difficulty reaching above his right
14 shoulder and flexing his arm without experiencing pain. AR 322. He currently takes Tylenol for
15 pain management. AR. 322.

16 Plaintiff also has two or three herniated discs in the lower lumbar region of his back. AR
17 323. His problems with his back began in 2003 or 2004. He is able to walk four or five blocks
18 but not more because he becomes exhausted and experiences pain down his legs. AR 323.
19 Plaintiff does not use a cane or a crutch. AR 324. He is able to stand for approximately one half
20 hour and can sit in one position for approximately ten to fifteen minutes. AR 324. Plaintiff is
21 able to lift ten to fifteen pounds. He does not smoke and has not had any problems with drugs or
22 alcohol. AR 324-325.

23 Plaintiff has difficulty with his memory and concentration. AR 324-325. He is only able
24 to concentrate for five to fifteen minutes and then he needs to take a break for approximately five
25 to ten minutes before returning to his task. AR 325. Plaintiff also experiences blurred vision and
26 sees black spots. AR 326. The episodes of blurred vision occurs approximately fifteen times a
27 day and lasts five minutes. AR 327. He needs to take a break for approximately five to ten
28 minutes before returning to his activity. AR 327.

1 Plaintiff also has difficulty with balance due to his vision and back problems. AR 327.
2 He is unable to walk in a straight line. AR 327. Plaintiff used a walker in late 2003 and early
3 2004. AR 328. He also has problems with numbness in his legs which prevents his ability to
4 function and creates difficulty sleeping. AR 328.

5 Vocational Expert (VE) Dave Detmer testified and classified Plaintiff's past work
6 experience in electronics and in automobile sales as light. AR 330. The VE was asked to assume
7 a worker of Plaintiff's education and work experience who can lift and carry twenty pounds
8 occasionally, ten pounds frequently, can stand and walk a total of four hours, can sit a for an
9 unlimited period of time, can occasionally reach overhead, bend, stoop, twist, squat, kneel, crawl,
10 and climb stairs, but should not be required to climb ladders or scaffolding or work at heights or
11 around hazardous moving machinery. AR 330.

12 VE Detmer advised that a worker possessing these characteristics could not perform
13 Plaintiff's past relevant work, however this worker could perform other jobs in the regional or
14 national economy. A.R. 331. Consistent with a unskilled light level which accommodates the
15 four hour sitting and standing limitation, this worker could perform jobs such as an office helper,
16 cashier, and parking lot attendant. AR 331. There are 16,000, 27,500, and 8,500 of those jobs,
17 respectively, in California. AR 331. The VE also testified that Plaintiff could perform sedentary
18 jobs as an electronics assembler and that there are approximately 50,000 of these jobs in the
19 California. AR 332. However, when non-exertional restrictions are added to the hypothetical
20 consisting of taking ten to fifteen breaks throughout the day for five to ten minutes due to blurred
21 vision, the alternative jobs previously identified would be eliminated. A.R. 333.

22 Medical Record

23 In December 2003, Plaintiff had acute headaches and blurred vision which led to the
24 diagnosis of a 2.8 cm pituitary tumor. AR 105. In February 2004, Plaintiff received treatment at
25 Community Outpatient Rehabilitation Center. AR 283-288, 293-296. At that time, the physical
26 therapist noted that the risk of falls was low, but that Plaintiff veered to left side, was kyptotic,
27 and had occasional dizzy spells. AR 288, 293.

1 On March 16, 2004, Dr. Brian Curtis M.D., surgically removed Plaintiff's tumor at
2 Community Medical Center. AR 191-203. AR 105-108. Plaintiff was seen at the University
3 Medical Center on June 6, 2004, after falling off his bicycle, dislocating his shoulder, and
4 injuring his leg. AR 122-126. A Magnetic Resonance Imaging scan ("MRI") dated October 8,
5 2004, showed L5-S "Left NNP" and "C5-6, C 6-7, 1 + NP." AR 175. Plaintiff was referred to
6 physical therapy. AR 175. Discharge notes dated April 8, 2005, indicated that Plaintiff was
7 doing better and met his treatment goals but that he continued to experience pain. AR 162.
8 Plaintiff continued to receive treatment at the University Medical Center from August through
9 September 2004. AR 121-126, 179-190.

10 On September 15, 2004, Plaintiff was evaluated by Dr. Wong of the California Cancer
11 Center at the request of Dr. Curtis. AR 105-108. Dr. Wong noted that Plaintiff's headaches had
12 resolved and that blurred vision still existed but was much improved. AR 105. Dr. Wong also
13 noted that Plaintiff was enjoying stable and good overall health and that his vision was stable.
14 AR 106.

15 On October 4, 2004, an ophthalmology consult at Eye-Q Vision Care revealed moderate
16 visual field defects in the right eye's lower quadrant and the left eye's upper quadrant. AR 111-
17 113. On January 21, 2005, Plaintiff was seen at the University Medical Center for complaints of
18 blurred vision, fatigue and night sweats. AR 169. At that time, the doctor diagnosed him with
19 pituitary apoplexy, panhypopituitarism, and visual field defects. AR 168. The doctor also
20 noted that Plaintiff had a permanent endocrine deficiency which is a permanent disability and
21 requires permanent lifetime hormonal treatment. AR 168.

22 On March 1, 2005, a MRI of Plaintiff's brain revealed no recurrent tumor however,
23 Plaintiff was diagnosed with left maxillary acute sinusitis with chronic disease in the left
24 maxillary sinus and ethmoid sinus. AR 115, 230. On April 5, 2005, further examination at Eye-
25 Q Vision Care indicated a temporal defect with improvement of the inferior temporal defect in
26 the right eye, and on the left eye, an inferior temporal defect with improvement in the superior
27 temporal defect. AR 236. Plaintiff was diagnosed with bitemporal visual field defect-migrating.
28 AR 236. On May 9, 2005, notes from Eye-Q Vision Care indicate a large dense superior temporal

1 defect in the right eye extending into a moderate superior defect. In the left eye, a large dense
2 interior temporal defect was noted that was unchanged from one month ago but migrated from
3 October 2004. AR 235. Plaintiff was again diagnosed with bitemperal visual field defect with a
4 history of migration. AR 235.

5 On May 20, 2005, Gary Waters, M.D., completed a ophthalmological examination. AR
6 136. After noting Plaintiff's history of pituitary adema with visual field defects, Dr. Watson
7 noted Plaintiff's visual acuity was consistent with the degree of pathology and diagnosed
8 Plaintiff with a visual field deficit, secondary to pituitary ademona effect. AR 136-137.

9 On May 26, 2005, Plaintiff was examined by Paul Casner, M.D., of MDSI Physician
10 Services, at the request of the Social Security Administration. AR 140-144. The evaluation
11 revealed mild limitations in the extension of the lumbar spine with full forward flexion and
12 positive straight leg raising. AR 142-143. Dr. Casner diagnosed Plaintiff with : 1) lumbar pain
13 with radiculitis, possibly due to disc disease, 2) fatigue due to hypogonadism and other effects of
14 panhypopituitarism and medications, and 3) recurrent shoulder pain due to past dislocation. Dr.
15 Casner opined that the claimant could stand and walk four hours in an eight hour day, sit for an
16 eight hour work day, lift/carry up to twenty pounds occasionally and ten pounds frequently,
17 perform no forward bending, stopping squatting and kneeling, was limited in overhead reaching
18 and limited in walking distance and stairs. AR 143.

19 On June 20, 2005, Dr. James Peery, M.D., a state agency doctor reviewed Plaintiff's file
20 and opined that Plaintiff could perform light work with standing/walking limited to four hours,
21 sitting for six hours, occasional pushing/pulling with the right upper extremity, occasional
22 climbing, frequent balancing, and occasional stooping, kneeling, crouching, crawling, and limited
23 overhead reaching. AR 145- 151. Dr. Perry opined that Plaintiff's vision was sufficient to read
24 most printed materials and that his visual field restriction was not significant. AR 148.
25 This assessment was reviewed and adopted on September 21, 2005, by Dr. Lavanya Bobba,
26 M.D., another state agency doctor. AR 152.

27 A subsequent MRI of Plaintiff's pituitary gland was performed on September 7, 2009, at
28 the Community Regional Medical Center which revealed that a "small amount of soft tissue

1 along the right lateral sella of undetermined significance ”was present [and] “minimal frontal
2 white matter T2 hyperintensities may be seen with migraine headaches among other
3 possibilities.” AR 229.

4 ALJ’s Findings

5 The ALJ determined that Plaintiff had not engaged in substantial gainful activity since
6 December 31, 2008. AR 16. Although the ALJ determined that Plaintiff suffered from the severe
7 impairments of status post pituitary tumor and degenerative disc disease of the lumbar spine, he
8 nonetheless found that this severe impairments did not meet or equal any listing impairments
9 resulting in a disability finding. A.R. 16 . Based on his review of the medical evidence, the ALJ
10 determined that Plaintiff retained the residual functional capacity (“RFC”) to perform a range of
11 work between sedentary and light work.³ AR 16. Considering that functional limitation, the ALJ
12 found that Plaintiff was unable to perform any past relevant work. AR 18. Applying the Medical-
13 Vocational Guidelines at 20 C.F.R. Part 404, Subpt. P, App. 2, the ALJ determined that Plaintiff
14 was capable of performing a significant number of jobs in the national economy. A.R. 19. Based
15 on these factors, the ALJ concluded that Plaintiff was not disabled within the meaning of the Act.
16 AR 20.

17 SCOPE OF REVIEW

18 Congress has provided a limited scope of judicial review of the Commissioner’s decision
19 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,
20 the Court must determine whether the decision of the Commissioner is supported by substantial
21 evidence. [42 U.S.C. 405 \(g\)](#). Substantial evidence means “more than a mere scintilla,”
22 [Richardson v. Perales, 402 U.S. 389, 402 \(1971\)](#), but less than a preponderance. [Sorenson v.](#)
23 [Weinberger, 514 F.2d 1112, 1119, n. 10 \(9th Cir. 1975\)](#). It is “such relevant evidence as a
24 reasonable mind might accept as adequate to support a conclusion.” [Richardson, 402 U.S. at 401](#).

26 ³ Specifically, the ALJ found that Plaintiff can lift and carry twenty pounds occasionally, ten pounds
27 frequently, can stand and walk a total of four hours in an eight hour day, can sit a for a six hour period, can
28 occasionally balance, reach overhead, stoop, kneel, crouch and crawl, but should not be required to climb ladders,
scaffolding, stairs or work at heights or around dangerous machinery. AR 17.

1 The record as a whole must be considered, weighing both the evidence that supports and the
2 evidence that detracts from the Commissioner’s conclusion. [Jones v. Heckler, 760 F.2d 993, 995](#)
3 [\(9th Cir. 1985\)](#). In weighing the evidence and making findings, the Commissioner must apply the
4 proper legal standards. *E.g.*, [Burkhart v. Bowen, 856 F.2d 1335, 1338 \(9th Cir. 1988\)](#). This Court
5 must uphold the Commissioner’s determination that the claimant is not disabled if the Secretary
6 applied the proper legal standards, and if the Commissioner’s findings are supported by
7 substantial evidence. *See* [Sanchez v. Sec’y of Health and Human Serv., 812 F.2d 509, 510 \(9th](#)
8 [Cir. 1987\)](#).

9 REVIEW

10 In order to qualify for benefits, a claimant must establish that he or she is unable to engage
11 in substantial gainful activity due to a medically determinable physical or mental impairment
12 which has lasted or can be expected to last for a continuous period of not less than 12 months. [42](#)
13 [U.S.C. § 1382c](#) (a)(3)(A). A claimant must show that he or she has a physical or mental
14 impairment of such severity that she is not only unable to do her previous work, but cannot,
15 considering his or her age, education, and work experience, engage in any other kind of
16 substantial gainful work which exists in the national economy. [Quang Van Han v. Bowen, 882](#)
17 [F.2d 1453, 1456 \(9th Cir. 1989\)](#). The burden is on the claimant to establish disability. [Terry v.](#)
18 [Sullivan, 903 F.2d 1273, 1275 \(9th Cir. 1990\)](#).

19 In an effort to achieve uniformity of decisions, the Commissioner has promulgated
20 regulations which contain, inter alia, a five-step sequential disability evaluation process. [20](#)
21 [C.F.R. §§ 404.1520](#) (a)-(f), 416.920 (a)-(f). Applying this process in this case, the ALJ found that
22 Plaintiff: (1) had not engaged in substantial gainful activity since December 31, 2008; (2) did have
23 impairments including status post pituitary tumor and degenerative disc disease of the lumbar
24 spine that are considered “severe” based on the requirements in the [Regulations \(20 CFR](#)
25 [404.1520\(c\)](#) and [20 CFR §§ 416.920](#) (c)); (3) did not have an impairment or combination of
26 impairments which meets or equals one of the impairments set forth in [20 CFR Part 404](#), Subpart
27 P, [Appendix 1\(20 CFR §§ 404.1520\(d\)](#), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926,);
28 (4) had a residual functional capacity to perform a range of work between sedentary and light

1 work; and (5) that he could perform jobs that exist in significant numbers in the national
2 economy. AR 16-20.

3 In reaching these conclusions, the ALJ found although Plaintiff's condition could be
4 expected to produce some symptoms, Plaintiff was not entirely credible regarding the intensity,
5 persistence, and limiting effects of those symptoms. AR 18. Plaintiff contends that the ALJ's
6 decision is erroneous because he failed to assess his visual impairment and improperly rejected his
7 testimony.⁴

8 DISCUSSION

9 A. Assessment of Plaintiff's Visual Impairment

10 Plaintiff argues that the ALJ failed to adequately assess his visual impairment.
11 Specifically, Plaintiff contends that the ALJ misread the medical record and that Plaintiff's visual
12 impairment is a significant nonexertional impairment which the ALJ failed to properly consider.
13 Plaintiff concedes that his visual impairment does not "meet" the criteria of listing under [20](#)
14 [C.F.R. Pt. 404](#), Subpt P, App. 1. However, contrary to the ALJ's characterization of his visual
15 impairment as slight, Plaintiff contends that the medical records indicate that Plaintiff's visual
16 impairment is moderate, chronic, and progressively getting worse and therefore his condition
17 equals one of the listed impairments.

18 As a preliminary matter, the Court disagrees with the basis of Plaintiff's contention that
19 his condition worsened after his tumor was removed. In support of this assertion, Plaintiff argues
20 that he continued to veer to his right side, had dizzy spells, and was kryptotic after his surgery and
21 after completing two months of physical therapy. AR 288. However, a review of the records
22 Plaintiff relies upon indicates that he received physical therapy in February 2004, *prior* to his
23 surgery in March 2004, not after. In fact, an evaluation done by Dr. Wong shortly after his
24 surgery in September 2004, indicates that Plaintiff still had blurred vision, but his vision had
25 stabilized, and that Plaintiff was enjoying stable and good overall health. AR 105-106.

27 ⁴ In the Opening Brief Plaintiff made a general allegation that the ALJ failed to carry the Administration's
28 burden at step 5, however, Plaintiff never expounded on this argument. Accordingly, the Court has not addressed
this issue.

1 Additionally, the Court is not persuaded by Plaintiff's argument that in January 2005,
2 statements in treatment notes made by his physician indicating that Plaintiff has a permanent
3 endocrine deficiency, will never get better, and that his permanent disability requires lifetime
4 hormone replacement establishes that he is disabled. The Court agrees with the Social Security
5 Administration that this note appears to be describing Plaintiff's endocrine deficiency and was not
6 intended to be a diagnosis for establishing permanent disability. There is also no indication in that
7 note that Plaintiff's condition cannot be regulated by medication.

8 Notwithstanding the above, the Court agrees that the ALJ mischaracterized Plaintiff's
9 visual defect as slight. In reviewing the Plaintiff's visual impairment, the ALJ noted that while
10 Plaintiff's medical impairments could reasonably expect to produce some of the symptoms, the
11 Plaintiff's statements concerning the intensity, persistence, and limiting effects of the symptoms
12 were not credible. AR 18. The ALJ specifically noted the following:⁵

13 On March 16, 2004, the claimant underwent a pituitary tumor resection. On June 6,
14 2004, the claimant fell off his bicycle and injured his right shoulder. On
15 September 15, 2004, the claimant was doing well and was enjoying stable and
16 overall good health. On March 1, 2005, a brain MRI revealed no recurrent tumor.
17 On May 20, 2005, an ophthalmologist opined that claimant *has a slight visual field*
18 *defect secondary to pituitary adenoma status post resection.* The claimant has been
19 treated with testosterone since the brain surgery.
20 AR 18 (citations omitted).

21 In addition to the above, the ALJ noted that Plaintiff's history of pituitary surgery was
22 severe but the ongoing effects were minor and Plaintiff's hypopituitarism is regulated with

23 ⁵ The Court notes that the ALJ makes the following statement with regard to Plaintiff's testimony :

24 The claimant testified that he injured his back in December 1997 and still has
25 back pain. He said that he takes Ibuprofen for the pain. He said that he also
26 takes medication for depression and high blood pressure. He said that he is not
27 able to stand for long periods and cannot stand while washing dishes. He said
28 that he can lift 15-20 pounds and sit/stand for 30 minutes. He said that he has
neck pain all the time and that he is not able to type for more than 15 minutes.
AR 18.

29 The Court has reviewed the record and was unable to locate these facts in Plaintiff's hearing testimony. Since
30 the ALJ did not list citations to the record, it is not clear that this information even relates this Plaintiff or whether
31 this information exists elsewhere in the record.

1 medication. AR. 19. When addressing Plaintiff's visual impairment, the ALJ also noted that
2 Plaintiff was able to ride a bicycle only a few months after brain surgery and was stable and doing
3 well in less than twelve months. AR 19.

4 Although the ALJ correctly summarizes Plaintiff's condition shortly after the surgery, a
5 review of the record shows that Plaintiff subsequently had visual defects, the severity of which are
6 unclear. Although the MRI performed in March 2005 showed no signs of a recurrent tumor,
7 other evaluations did not characterize Plaintiff's visual defect as slight as the ALJ contends. AR
8 111-113;115, 230; 235-236.

9 For example, on October 4, 2004, an ophthalmology consult at Eye-Q Vision Care revealed
10 *moderate* visual field defects in the right eye's lower quadrant and the left eye's upper quadrant.
11 AR 111-113. On April 5, 2005, further examination indicated a temporal defect with
12 improvement of the inferior temporal defect in the right eye, and on the left eye, an inferior
13 temporal defect with improvement in the superior temporal defect. AR 236. However, Plaintiff
14 was diagnosed with bitemporal visual field defect-migrating. AR 236. On May 9, 2005, notes
15 from Eye-Q Vision Care indicate a large dense superior temporal defect in the right eye extending
16 into a moderate superior defect. AR 235. In the left eye, a large dense interior temporal defect
17 was noted that was unchanged from one month ago but migrated from October 2004. AR 235.

18 Finally, nowhere in Dr. Watson's May 20, 2005 report which the ALJ relies upon does it
19 state that the Plaintiff has a *slight* visual field defect. In fact, after noting Plaintiff's history of
20 pituitary adema with visual field defects, Dr. Watson only noted Plaintiff's visual acuity was
21 consistent with the degree of pathology and diagnosed Plaintiff with a visual field deficit,
22 secondary to pituitary adema effect. AR 136-137. On the evaluation form, Dr. Watson *did not*
23 check the box indicating that no significant visual field deficit is expected. AR 137. Thus, the
24 true extent of Plaintiff's visual impairment is unclear as none of these physicians identified the
25 extent of the limitations, or how these limitations effect Plaintiff's daily activities or his ability to
26 work.

27 The regulations in Appendix I specify the requirements to establish medical equivalence of
28 a listed impairment in Appendix I. Medical equivalence will be found "if the medical findings

1 are at least equal in severity and duration to the listed findings.” [Marcia v. Sullivan, 900 F.2d 172,](#)
2 [174-177 \(9th Cir. 1990\); 20 C.F.R. § 404.1526.](#) Equivalence is determined on the basis of a
3 comparison between the “symptoms, signs and laboratory findings” about the claimant's
4 impairment as evidenced by the medical records with the medical criteria shown with the listed
5 impairment. S20 C.F.R. § 404.1526. “In determining whether a claimant equal a listing under
6 step three of the disability process, the ALJ must adequately explain his evaluation or alterative
7 tests and the combined effects of other impairments. [Marcia v. Sullivan, 900 F.2d at 176.](#) Here,
8 the ALJ did not do so as his characterization of the medical evidence was not consistent with the
9 documents themselves.

10 The court recognizes that it is the duty of the claimant to prove to the ALJ that he is
11 disabled. [20 C.F.R. § 404.1512\(a\).](#) To this end, he must bring to the ALJ’s attention everything
12 that supports a disability determination, including medical or other evidence relating to the alleged
13 impairment and its effect on her ability to work. [Id.](#) For his part, the ALJ has the responsibility to
14 develop “a complete medical history” and to “make every reasonable effort to help [the plaintiff]
15 get medical reports.” [20 C.F.R. § 404.1512\(d\).](#) If this information fails to provide a sufficient
16 basis for making a disability determination, or the evidence conflicts to the extent that the ALJ
17 cannot reach a conclusion, he may seek additional evidence from other sources. [20 C.F.R. §§](#)
18 [404.1512\(e\); 404.1527\(c\)\(3\), see also Mayes v. Massanari, 262 F.3d 963, 968 \(9th Cir.2001\).](#)
19 However, the ALJ’s obligation to obtain additional evidence is triggered only “when the evidence
20 from the treating medical source is inadequate to make a determination as to the claimant's
21 disability.” [Thomas v. Barnhart, 278 F.3d 947, 958 \(9th Cir. 2002\); Tonapetyan v. Halter, 242](#)
22 [F.3d 1144, 1150 \(9th Cir.2001\)](#) (holding that ALJs have a duty fully and fairly to develop the
23 record when the evidence is ambiguous or "the record is inadequate" to allow for proper
24 evaluation of the evidence). When the ALJ finds support in the record adequate to make a
25 determination regarding the claimant’s disability, he does not have a duty to contact the doctors.”
26 [Bayliss, v. Barnhart, 427 F. 3d 1211, 1217 \(9th Cir. 2005\).](#)

27 Here, it appears that the ALJ has misread the medical reports which he relied upon in his
28 decision. Additionally, the medical records are unclear. Therefore, the Court will remand the

1 case for proper consideration of step three so that the ALJ can properly evaluate the medical
2 evidence and order additional testimony or evaluations, as well as to articulate the basis of his
3 decision.

4 The Social Security Administration urges this Court to consider the fact that Plaintiff did
5 not complain of work-related visual limitations in questionnaires. It also argues that the state
6 agency non-examining physician indicated that Plaintiff's visual field restriction was not
7 significant. However, the ALJ did not rely on these factors as part of his analysis and the Court is
8 not permitted to make ad hoc rationalizations for the [ALJ](#).⁶ [AR 62-64, 80-81, 83. *Barbato v.*](#)
9 [Commissioner of Social Sec. Admin., 923 F.Supp. 1273, 1276, n. 2 \(C.D.Cal. 1996\)](#). Further, the
10 Court may not speculate as to the ALJ's findings or the basis of the ALJ's unexplained
11 conclusions, [Lewin v. Schweiker, 654 F.2d 631, 634-35 \(9th Cir. 1981\)](#). A reviewing court cannot
12 affirm an ALJ's decision denying benefits on a ground not invoked by the Commissioner. [Stout v.](#)
13 [Comm'r, 454 F.3d 1050, 1054 \(9th Cir. 2006\)](#) (citing [Pinto v. Massanari, 249 F.3d 840, 847 \(9th](#)
14 [Cir. 2001\)](#)). Finally, the opinions of non-treating physicians are substantial evidence where they
15 are supported by clinical findings and objective tests. See [Magallanes v. Bowen, 881 F.2d 747,](#)
16 [751 \(9th Cir. 1989\)](#). When the ALJ rejects the opinion of an examining physician in reliance on
17 the non-examining physician, "reports of the nonexamining advisor need not be discounted and
18 may serve as substantial evidence when they are supported by other evidence in the record and are
19 consistent with it." [Andrews v. Shalala, 53 F.3d 1035, 1041 \(9th Cir. 1995\)](#); [Saelee v. Chater, 94](#)
20 [F. 3d 520, 522 \(9th Cir. 1996\)](#). However, in this case, the medical record is ambiguous. Although
21 Plaintiff appeared to be doing better in September 2004, subsequent evaluations by the doctors
22 indicate that Plaintiff was still experiencing visual defects that the ALJ failed to address.

23 Therefore, the Court rejects these arguments.

24 B. Rejection of Plaintiff's Testimony

25 Plaintiff also argues that the ALJ improperly rejected his testimony. Specifically, Plaintiff
26 contends that the ALJ did not perform the required excess pain analysis. Instead, the ALJ relied
27

28 ⁶ The Court notes that Plaintiff did indicate in 2004 that he could no longer see. AR 69.

1 on the fact that Plaintiff was able to ride a bicycle only a few months after surgery, was stable, and
2 was doing well in less than twelve months. AR 19. Plaintiff argues that the record shows
3 evidence of large migrating blind spots which was the primary reason Plaintiff was unable to
4 return to work. He contends that his visual field remains severely reduced as he testified.

5 The ALJ is required to make specific findings assessing the credibility of plaintiff's
6 subjective complaints. [Cequerra v. Secretary of HHS, 933 F.2d 735 \(9th Cir. 1991\)](#). "An ALJ is
7 not 'required to believe every allegation of disabling pain' or other non-exertional impairment,"
8 [Orn v. Astrue, 495 F.3d 625, 635 \(9th Cir. 2007\)](#) (citation omitted). In rejecting the complainant's
9 testimony, "the ALJ must identify what testimony is not credible and what evidence undermines
10 the claimant's complaints." [Lester v. Chater, 81 F.3d 821, 834 \(9th Cir. 1996\)](#) quoting [Varney v.](#)
11 [Secretary of Health and Human Services, 846 F.2d 581, 584 \(9th Cir. 1988\)](#)).

12 In making this determination, the ALJ conducts a two-step analysis to assess subjective
13 testimony. Under step one, the claimant "must produce objective medical evidence of an
14 underlying impairment" or impairments that could reasonably be expected to produce some
15 degree of symptom. [Tommasetti v. Astrue, 533 F. 3d at 1039](#). If the first step is met and there is
16 no affirmative evidence of malingering, "the ALJ can reject the claimant's testimony about the
17 severity of her symptoms only by offering specific, clear and convincing reasons for doing so." *Id.*
18 Factors the ALJ may consider in weighing a claimant's credibility include "(1) ordinary techniques
19 of credibility evaluation, such as the claimant's reputation for lying, prior inconsistent statements
20 concerning the symptoms, and other testimony by the claimant that appears less than candid; (2)
21 unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of
22 treatment; and (3) the claimant's daily activities." *Id.* citing [Smolen v. Chater, 80 F. 3d 1273 \(9th](#)
23 [Cir. 1996\)](#). If the ALJ's finding is supported by substantial evidence, the court "may not engage in
24 second-guessing." [Thomas v. Barnhart, 278 F.3d at 959](#).

25 In [Orn v. Astrue, 495 F.3d 625, 635 \(9th Cir. 2007\)](#), the Ninth Circuit summarized the
26 pertinent standards for evaluating the sufficiency of an ALJ's reasoning in rejecting a claimant's
27 subjective complaints:
28

1 An ALJ is not “required to believe every allegation of disabling pain” or other
2 non-exertional impairment. See [Fair v. Bowen, 885 F.2d 597, 603 \(9th Cir.1989\)](#).
3 However, to discredit a claimant’s testimony when a medical impairment has been
4 established, the ALJ must provide “specific, cogent reasons for the disbelief.” [Morgan,](#)
5 [169 F.3d at 599](#) (quoting [Lester, 81 F.3d at 834](#)). The ALJ must “cit[e] the reasons why
6 the [claimant’s] testimony is unpersuasive.” [Id.](#) Where, as here, the ALJ did not find
7 “affirmative evidence” that the claimant was a malingerer, those “reasons for rejecting the
8 claimant’s testimony must be clear and convincing.” [Id.](#)

9 Social Security Administration rulings specify the proper bases for rejection of a
10 claimant’s testimony. . . An ALJ’s decision to reject a claimant’s testimony cannot be
11 supported by reasons that do not comport with the agency’s rules. See 67 Fed.Reg. at
12 57860 (“Although Social Security Rulings do not have the same force and effect as the
13 statute or regulations, they are binding on all components of the Social Security
14 Administration, ... and are to be relied upon as precedents in adjudicating cases.”); see
15 [Daniels v. Apfel, 154 F.3d 1129, 1131 \(10th Cir.1998\)](#) (concluding that ALJ’s decision at
16 step three of the disability determination was contrary to agency regulations and rulings
17 and therefore warranted remand). Factors that an ALJ may consider in weighing a
18 claimant’s credibility include reputation for truthfulness, inconsistencies in testimony or
19 between testimony and conduct, daily activities, and “unexplained, or inadequately
20 explained, failure to seek treatment or follow a prescribed course of treatment.” [Fair, 885](#)
21 [F.2d at 603](#); see also [Thomas, 278 F.3d at 958-59](#).

22 Here, Plaintiff testified that he is only able to concentrate for five to fifteen minutes and
23 that he needs to take a break for approximately ten minutes before returning to his task. AR 325.
24 Plaintiff further testified that he experiences episodes of blurred vision which last for five minutes
25 approximately fifteen times per day. AR 327. As a result, he needs to take a break for
26 approximately five to ten minutes before returning to his activity. AR 327. Plaintiff also reported
27 seeing black spots. AR 326.

28 In rejecting this testimony, the ALJ relied on the fact that Plaintiff’s suffered from a *slight*
visual field defect, that Plaintiff was able to ride a bicycle only a few months after brain surgery,
and he was stable and doing well in less than twelve months. AR 18-19. Given the in evidence in
the medical record previously outlined, the ALJ did not provide specific, clear and convincing
reasons for rejecting Plaintiff’s testimony. Further, the fact that Plaintiff was able to ride a bike
only a few months after surgery is also not a clear and convincing reason for rejecting Plaintiff’s
testimony. This is especially true because as the ALJ noted, when doing so, Plaintiff had fallen
off of the bicycle and injured his shoulder. AR 18, 19, 122-126. Accordingly, the ALJ’s decision
is not supported by substantial evidence.

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1 ///

2 **REMAND**

3 Section 405(g) of Title 42 of the United States Code provides: “the court shall have the
4 power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying,
5 or reversing the decision of the Secretary, with or without remanding the cause for a rehearing.”
6 In social security cases, the decision to remand to the Commissioner for further proceedings or
7 simply to award benefits is within the discretion of the court. [McAllister v. Sullivan, 888 F.2d](#)
8 [599, 603 \(9th Cir. 1989\)](#). “If additional proceedings can remedy defects in the original
9 administrative proceedings, a social security case should be remanded. Where, however, a
10 rehearing would simply delay receipt of benefits, reversal and an award of benefits is
11 appropriate.” *Id.* (citation omitted); *see also Varney v. Secretary of Health & Human Serv., 859*
12 [F.2d 1396, 1399 \(9th Cir.1988\)](#) (“Generally, we direct the award of benefits in cases where no
13 useful purpose would be served by further administrative proceedings, or where the record has
14 been thoroughly developed.”).

15 In this case, the Court finds that remand for further proceedings is proper to allow the ALJ
16 to properly review all of the medical evidence as outlined above and to reassess Plaintiff’s
17 credibility if necessary.

18 **CONCLUSION**

19 Based on the foregoing, the Court finds that the ALJ’s decision is not supported by
20 substantial evidence and is therefore REVERSED and the case is REMANDED to the ALJ for
21 further proceedings consistent with this opinion. The Clerk of this Court is DIRECTED to enter
22 judgment in favor of Plaintiff Jose DeAnda and against Defendant Michael J. Astrue,
23 Commissioner of Social Security.

24

25

26 IT IS SO ORDERED.

27 **Dated: December 16, 2009**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

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