

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**

EASTERN DISTRICT OF CALIFORNIA

PIO RODRIGUEZ,	)	1:10-cv-01255 GSA
	)	
Plaintiff,	)	
	)	<b>ORDER REGARDING PLAINTIFF'S</b>
v.	)	<b>SOCIAL SECURITY COMPLAINT</b>
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	

---

**BACKGROUND**

Plaintiff Pio Rodriguez (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying his application for supplemental security income benefits pursuant to Title 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.<sup>1</sup>

---

<sup>1</sup> The parties consented to the jurisdiction of the United States Magistrate Judge. (See Docs. 8 & 9.)

1 **FACTS AND PRIOR PROCEEDINGS<sup>2</sup>**

2 Plaintiff filed an application for supplemental security income benefits in November  
3 2006, alleging disability beginning January 1, 2002.<sup>3</sup> AR 154-162. Plaintiff’s application was  
4 denied initially and on reconsideration, and Plaintiff requested a hearing before an  
5 Administrative Law Judge (“ALJ”). AR 88-101, 103-105. ALJ James P. Berry held a hearing  
6 and issued an order denying benefits on November 19, 2009, finding Plaintiff was not disabled.  
7 AR 8-16. On May 13, 2010, the Appeals Council denied review. AR 1-3.

8 **Hearing Testimony**

9 ALJ Berry held a hearing on September 2, 2009, in Fresno, California. Plaintiff appeared  
10 and testified; he was assisted by non attorney representative Anthony Gonzales. Vocational  
11 Expert (“VE”) Judith Najarian also testified. AR 17-56.

12 Plaintiff was born June 7, 1962,<sup>4</sup> and was forty-seven years old on the date of the hearing.  
13 AR 23. He lives by himself in Fresno<sup>5</sup>, and receives general relief and food stamp assistance.  
14 AR 25; *see also* AR 41. Plaintiff dropped out of high school in the tenth grade. He has not  
15 received any vocational training. AR 24. Plaintiff does not have a driver’s license because it  
16 was “taken away” as a result of drunk driving offenses. AR 25. He relies primarily upon his  
17 sister for transportation, but will use his bus pass “[o]nce in awhile.” AR 26. Plaintiff believes  
18 he last worked in 1990 or 1991 delivering auto parts.<sup>6</sup> AR 39.

---

21 <sup>2</sup> References to the Administrative Record will be designated as “AR,” followed by the appropriate page  
22 number.

23 <sup>3</sup>A prior application made in 2004 was denied in 2006. AR 73-82.

24 <sup>4</sup>The ALJ’s findings record Plaintiff’s date of birth as “June 17, 1961” (AR 14), however, Plaintiff’s  
25 application for benefits corresponds with his own testimony. AR 154.

26 <sup>5</sup>Prior to living in his current apartment, Plaintiff had an apartment at the Home Center facility that provided  
27 housing for its patients with substance abuse problems. *See* AR 41-42, 49.

28 <sup>6</sup>The record contains evidence that Plaintiff worked after 1991 as the following earnings were recorded:  
1993 - \$3032.90; 1994 - \$11803.86; 1995 - \$9690.50; 1996 - \$388.42. AR 164-168. Plaintiff did testify that he was  
“no good with dates.” AR 48. In an undated Disability Report - Adult Form (AR 174-181), Plaintiff responded to  
the question “when did you stop working?” with “07/15/1996.” *See* AR 175.

1 Plaintiff applied for supplemental security income benefits in November 2006, alleging  
2 he has been disabled due to liver problems. AR 20-21. The doctors have diagnosed him with  
3 hepatitis C and cirrhosis of the liver. AR 22. He understands the condition was caused by his  
4 drinking too much alcohol; he quit drinking about four years ago. AR 22-23. Plaintiff is treated  
5 for this condition at Community Medical Centers. He was treated a week prior to the hearing for  
6 “banding” in his throat, having received the same treatment about six months prior. AR 27-28.  
7 The banding treatment is to repair damage in his throat caused by his drinking. As he  
8 understands it, without the banding, “the veins in there are ready to bust so it’s like they have to  
9 like put rubber bands around them to like cut the pieces off that, that are there so that way I won’t  
10 throw up blood . . .” AR 29. While he does not “throw up” blood, he does spit up blood nearly  
11 every day. AR 29. He is to return to Community Medical Center for another banding procedure  
12 in two weeks’ time. AR 30. His treating physician, Dr. Dominic, told him to “sign up” for a  
13 liver transplant. AR 37-38.

14 Plaintiff feels a burning “ugly feeling” in his stomach. AR 29. He takes Nexium on a  
15 daily basis, and understands that the medication acts to coat his stomach as a result of the damage  
16 caused by drinking. AR 28.

17 In addition to his liver problems, Plaintiff suffers from “a lot of pain” and anxiety. AR  
18 24-25. He experiences anxiety a couple times a week and does not like being around others. AR  
19 25; *see also* AR 50-51. When he was asked to describe what happens when he is around too  
20 many other people, Plaintiff replied he “can’t breathe” as if someone was choking him. He has  
21 reported those symptoms to his physicians and has been prescribed medication for the condition.  
22 AR 26. The medications prescribed were identified as Seroquel, Ambien and Paroxetine (or  
23 Paxil). AR 27. Plaintiff indicated the medications help a little, but “[n]ot really.” AR 27; *see*  
24 *also* AR 45. Plaintiff has been taking these medications for three or four years. AR 45-46.

25 Plaintiff obtains treatment for anxiety at Kingsview. He sees a psychiatrist. AR 33.  
26 When he was asked whether the staff at Kingsview suggested he return to work or go to school,  
27 Plaintiff replied, “they wanted me to, but they, like they know my condition already because of  
28

1 my anxiety and stuff so they, they just ask me how would you feel about going to something like  
2 that, and I told them I don't think I could handle that . . .” AR 33-34.

3 Plaintiff testified that the liver problems, throat problems, and anxiety keep him from  
4 working. AR 30. On a typical day, he gets up late. AR 30-31. When asked what he does all  
5 day, Plaintiff replied, “[r]eally nothing.” AR 31. He explained that he is often in bed or on the  
6 couch, and that he “change[s] from place to place” because he cannot stand too long. AR 31. He  
7 watches television and sleeps during the day. AR 32. Once in a while Plaintiff will prepare his  
8 own meals. AR 31. He does very little housekeeping, and his sister does his laundry. AR 31.  
9 He leaves the house when he has an appointment then returns home, otherwise he becomes  
10 anxious and his feet swell. AR 31-32. With regard to social activities, Plaintiff indicated he  
11 does not go to church on a regular basis, nor does he visit with friends or go to the movies. AR  
12 32-33; *see also* AR 37.

13 When asked how long he could walk, Plaintiff indicated he could walk about forty-five  
14 minutes at a regular pace before his feet would hurt. AR 34-35. He can sit less than an hour.  
15 AR 35; *see also* 42-43. He can lift two gallons of milk. AR 36. Plaintiff indicated he cannot  
16 maintain concentration by stating he is “[n]ot too good at it,” and could not provide an estimate  
17 as to the period of time he would be able to concentrate on a task. AR 36-37.

18 The ALJ asked Plaintiff whether he could do a job that required him to sit in a chair for  
19 eight hours counting trucks and taking its number; Plaintiff testified he could not because he  
20 cannot sit that long. AR 46-47. When he was asked whether he could perform that job if he  
21 could sit *or* stand, Plaintiff replied he still could not do the job. AR 47.

22 Plaintiff's past work involves work as a temporary laborer in 1996. VE Najarian  
23 indicated that such a position might involve stacking and loading items in a warehouse, which  
24 would be classified as medium, unskilled work with an SVP<sup>7</sup> of two. AR 53.

25 The VE was asked to consider a hypothetical worker of Plaintiff's age, education and  
26 work history, who can lift and carry fifty pounds occasionally and twenty-five pounds frequently,  
27

---

28 <sup>7</sup>“SVP” refers to specific vocational preparation.

1 can stand, walk, and sit for six hours each in an eight-hour work day, has the ability to perform  
2 simple, repetitive tasks and maintain attention, concentration, persistence and pace, and can  
3 relate to and interact with others in a work setting and can adapt to usual changes and adhere to  
4 safety rules. AR 54. The VE indicated such an individual could perform Plaintiff's past relevant  
5 work as a store laborer. AR 54. The individual could also perform the full range of unskilled,  
6 medium, light and sedentary work. AR 54. Three examples of medium work would include:  
7 industrial cleaner, DOT<sup>8</sup> 381.687-018, with approximately 115,181 jobs available in California;  
8 machine packager, DOT 920.685-078, with approximately 5,483 jobs available in California; and  
9 hand packer, DOT 920.587-018, with approximately 23,514 jobs available in California.  
10 National figures are obtained by multiplying these figures by nine. AR 54-55.

11 In a second hypothetical, the VE was asked to assume the same factors as indicated  
12 previously, however, the individual could lift and carry about sixteen pounds maximum, could sit  
13 for forty-five minutes total, stand less than one hour and walk thirty minutes total. The  
14 individual would require unscheduled breaks throughout the work day and would have difficulty  
15 interacting and relating to others, as well as maintaining persistence and pace. AR 55. VE  
16 Najarian indicated such an individual could not perform Plaintiff's past work, nor could such an  
17 individual perform any work as typically found in the regional or national economy. AR 55.

### 18 **Medical Record**

19 The entire medical record was reviewed by the Court. AR 234-531. The medical  
20 evidence will be referenced below as necessary to the Court's decision.

### 21 **ALJ's Findings**

22 Using the Social Security Administration's five-step sequential evaluation process, the  
23 ALJ determined that Plaintiff did not meet the disability standard. AR 8-16.

24 More particularly, the ALJ found that Plaintiff had not engaged in substantial gainful  
25 activity since November 29, 2006. AR 10. Further, the ALJ identified schizoaffective disorder,  
26 cirrhosis, and alcohol dependence as severe impairments. AR 10-11. Nonetheless, the ALJ  
27

---

28 <sup>8</sup>"DOT" refers to the Dictionary of Occupational Titles.

1 determined that the severity of the Plaintiff's impairments did not meet or exceed any of the  
2 listed impairments. AR 11.

3 Based on his review of the entire record, the ALJ determined that Plaintiff has the  
4 residual functional capacity ("RFC") to perform medium work, and that he can: perform simple  
5 repetitive tasks; maintain concentration, persistence and pace; relate to others; and adapt to  
6 changes in work setting; and adhere to work safety rules. AR 11-14.

7 Next, the ALJ determined that Plaintiff could perform his past work as a store laborer.  
8 AR 14. Additionally, based upon Plaintiff's age, education, work experience and RFC, the ALJ  
9 determined there were other jobs that existed in significant numbers in the national economy that  
10 Plaintiff could perform. Specifically, the ALJ found Plaintiff could perform the work of an  
11 industrial cleaner, machine tender, and hand packer. AR 14-15.

#### 12 **SCOPE OF REVIEW**

13 Congress has provided a limited scope of judicial review of the Commissioner's decision  
14 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,  
15 this Court must determine whether the decision of the Commissioner is supported by substantial  
16 evidence. 42 U.S.C. § 405 (g). Substantial evidence means "more than a mere scintilla,"  
17 *Richardson v. Perales*, 402 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v.*  
18 *Weinberger*, 514 F.2d 1112, 1119, n. 10 (9th Cir. 1975). It is "such relevant evidence as a  
19 reasonable mind might accept as adequate to support a conclusion." *Richardson*, 402 U.S. at  
20 401. The record as a whole must be considered, weighing both the evidence that supports and  
21 the evidence that detracts from the Commissioner's conclusion. *Jones v. Heckler*, 760 F.2d 993,  
22 995 (9th Cir. 1985). In weighing the evidence and making findings, the Commissioner must  
23 apply the proper legal standards. *E.g.*, *Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988).  
24 This Court must uphold the Commissioner's determination that the claimant is not disabled if the  
25 Secretary applied the proper legal standards, and if the Commissioner's findings are supported by  
26 substantial evidence. *See Sanchez v. Sec'y of Health and Human Serv.*, 812 F.2d 509, 510 (9th  
27 Cir. 1987).

1 **REVIEW**

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

11 Here, Plaintiff argues that the ALJ’s findings are not supported by substantial evidence  
12 and are not free of legal error because the ALJ failed to (1) properly evaluate the medical  
13 evidence and (2) properly evaluate Plaintiff’s subjective complaints. (Doc. 14.)

14 **DISCUSSION**

15 ***The ALJ’s Consideration of the Medical Opinion Evidence***

16 Plaintiff argues that the ALJ erred in finding that he did not demonstrate changed  
17 circumstances to rebut a prior decision denying benefits pursuant to *Chavez v. Bowen*, 844 F.2d  
18 691 (9th Cir. 1988). More specifically, Plaintiff asserts the medical evidence demonstrates  
19 “deterioration of [his] liver impairment” to “end stage liver disease.” (Doc. 14 at 8-11; Doc. 24  
20 at 3-5.) The Commissioner contends Plaintiff failed to establish that he was precluded from  
21 performing his past work and that ALJ Berry properly applied *Chavez’s* continuing presumption  
22 of non-disability. (Doc. 21 at 7-11.) Plaintiff also argues the ALJ erred in assessing his mental  
23 impairment. (Doc. 14 at 11.)

24 **1. Applicable Legal Standards**

25 When an applicant has one or more previous denials of applications for disability  
26 benefits, as Plaintiff does here, he or she must overcome a presumption of nondisability. The  
27 principles of res judicata apply to administrative decisions, although the doctrine is less rigidly  
28 applied to administrative proceedings than in court. *Chavez v. Bowen*, 844 F.2d at 693; *Gregory*

1 *v. Bowen*, 844 F.2d 664, 666 (9th Cir. 1988). Acquiescence Ruling 97-4(9), adopting *Chavez*,  
2 applies to cases involving a subsequent disability claim with an unadjudicated period arising  
3 under the same title of the Social Security Act as a prior claim in which there has been a final  
4 administrative decision that the claimant is not disabled. A previous final determination of  
5 nondisability creates a presumption of continuing nondisability in the unadjudicated period.  
6 *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1995). The presumption may be overcome by a  
7 showing of changed circumstances, such as new and material changes to the claimant's residual  
8 functional capacity, age, education, or work experience. *Lester*, at 827-28; *Chavez*, 844 F.2d at  
9 693.

10 Cases in this circuit distinguish among the opinions of three types of physicians: (1) those  
11 who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant  
12 (examining physicians); and (3) those who neither examine nor treat the claimant (nonexamining  
13 physicians). As a general rule, more weight should be given to the opinion of a treating source  
14 than to the opinion of doctors who do not treat the claimant. *Winans v. Bowen*, 853 F.2d 643,  
15 647 (9th Cir. 1987). At least where the treating doctor's opinion is not contradicted by another  
16 doctor, it may be rejected only for "clear and convincing" reasons. *Baxter v. Sullivan*, 923 F.2d  
17 1391, 1396 (9th Cir. 1991). Even if the treating doctor's opinion is contradicted by another  
18 doctor, the Commissioner may not reject this opinion without providing "specific and legitimate  
19 reasons" supported by substantial evidence in the record for so doing. *Murray v. Heckler*, 722  
20 F.2d 499, 502 (9th Cir. 1983).

21 The opinion of an examining physician is, in turn, entitled to greater weight than the  
22 opinion of a nonexamining physician. *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990);  
23 *Gallant v. Heckler*, 753 F.2d 1450 (9th Cir. 1984). As is the case with the opinion of a treating  
24 physician, the Commissioner must provide "clear and convincing" reasons for rejecting the  
25 uncontradicted opinion of an examining physician. *Pitzer*, 908 F.2d at 506. And like the opinion  
26 of a treating doctor, the opinion of an examining doctor, even if contradicted by another doctor,  
27 can only be rejected for specific and legitimate reasons that are supported by substantial evidence  
28 in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).



1 The opinion of a nonexamining physician cannot, by itself, constitute substantial evidence  
2 that justifies the rejection of the opinion of either an examining physician or a treating physician.  
3 *Pitzer v. Sullivan*, 908 F.2d at 506 n.4; *Gallant v. Sullivan*, 753 F.2d at 1456. In some cases,  
4 however, the ALJ can reject the opinion of a treating or examining physician, based in part on the  
5 testimony of a nonexamining medical advisor. *E.g.*, *Magallanes v. Bowen*, 881 F.2d 747, 751-55  
6 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d at 1043; *Roberts v. Shalala*, 66 F.3d 179 (9th Cir.  
7 1995). For example, in *Magallanes*, the Ninth Circuit explained that in rejecting the opinion of a  
8 treating physician, “the ALJ did not rely on [the nonexamining physician’s] testimony alone to  
9 reject the opinions of Magallanes's treating physicians . . .” *Magallanes*, 881 F.2d at 752.  
10 Rather, there was an abundance of evidence that supported the ALJ’s decision: the ALJ also  
11 relied on laboratory test results, on contrary reports from examining physicians, and on testimony  
12 from the claimant that conflicted with her treating physician's opinion. *Id.* at 751-52.

## 13 2. Summary of Relevant Medical Evidence

### 14 *Ekram Michiel, M.D.*

15 On December 30, 2006, a psychiatric evaluation was performed by board certified  
16 psychiatrist Ekram Michiel. AR 368-370. The mental status examination revealed fair  
17 grooming, normal gait and posture, no involuntary movements, good eye contact and normal  
18 speech. Plaintiff was oriented to person, place and date; insight and judgment were intact. AR  
19 369. His mood was depressed and affect restricted; he denied suicidal or homicidal ideation. AR  
20 369-370. Plaintiff’s thought process was goal directed, content was not delusional and there was  
21 no evidence of response to internal stimuli. He did state he becomes paranoid around people and  
22 admitted to auditory and visual hallucinations. AR 370.

23 At Axis I, Dr. Michiel diagnosed a psychotic disorder not otherwise specified and  
24 recorded a GAF<sup>9</sup> score of 65 at Axis V. With specific regard to adaption to work or work-like

---

25  
26 <sup>9</sup>The Global Assessment of Functioning or “GAF” scale reflects a clinician’s assessment of the individual’s  
27 overall level of functioning. *American Psychiatric Association, Diagnostic & Statistical Manual of Mental*  
28 *Disorders* 30 (4th ed. 2000) (“DSM IV”). The DSM-IV states a GAF score from 61 to 70 indicates: “Some mild  
symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social, occupational, or school  
functioning (e.g., occasional truancy, or theft within the household), but generally functioning pretty well, has some  
meaningful interpersonal relationships.” DSM-IV at 34.

1 situations, the doctor opined that Plaintiff is able to maintain concentration and attention and can  
2 carry out simple one and two step instructions, but he is not able to carry out an extensive variety  
3 of technical or complex instructions. Additionally, Dr. Michiel opined Plaintiff is able to relate  
4 and interact with coworkers, supervisors and the general public. AR 370.

5 ***Steven Stoltz, M.D.***

6 Board certified internist Dr. Steven Stoltz performed an internal medicine evaluation on  
7 January 6, 2007. AR 371-375. Upon physical examination, Dr. Stoltz noted normal vital signs,  
8 normal range of motion in neck, and normal findings in the head, ear, nose and throat and lungs.  
9 Cardiovascular findings were normal, as were those regarding Plaintiff's chest and abdomen.  
10 AR 373. With regard to Plaintiff's back, range of motion findings were all within normal limits,  
11 straight leg raising was negative and no muscle spasm was noted. AR 374. Upper extremity and  
12 lower extremity range of motion findings were all within normal limits as well. AR 374-375.  
13 Gait and pulses were normal and all neurological findings were normal or intact. AR 375.

14 Dr. Stoltz diagnosed liver disease with hepatitis C and "Psychiatric," further noting he  
15 found "no evidence for any impairments that would limit the claimant's work-related activities"  
16 and noting attention should be given "to any recommendations made from his previous  
17 psychiatric evaluation." AR 375.

18 ***Mental Residual Functional Capacity Assessment***

19 In a March 26, 2007, mental RFC assessment, psychiatrist L. T. Luu found Plaintiff was  
20 not significantly limited with regard to his ability to remember locations and work-like  
21 procedures, and to understand and remember very short and simple instructions. Plaintiff was  
22 noted to be moderately limited in his ability to understand and remember detailed instructions.  
23 AR 390. Dr. Luu also concluded that Plaintiff was moderately limited in his ability to carry out  
24 detailed instructions. AR 390. Nevertheless, the doctor also concluded that Plaintiff was not  
25 significantly limited in the remaining seven categories regarding sustained concentration and  
26 persistence, nor was Plaintiff significantly limited in any category of social interaction or  
27 adaptation. AR 391. In conclusion, Dr. Luu opined that Plaintiff had the ability to understand  
28 and remember simple instructions, carry out short instructions, perform activities with direction

1 and maintain attention for two hours at a time, maintain appropriate behavior and accept  
2 instructions and respond appropriately to others, and respond appropriately to changes in work  
3 setting. AR 392.

4 ***Psychiatric Review Technique***

5 In a Psychiatric Review Technique, also dated March 26, 2007, Dr. Luu found  
6 insufficient evidence of an organic mental disorder, affective disorder, mental retardation or  
7 somatoform disorder. The doctor further noted with regard to schizophrenic, paranoid, and other  
8 psychotic disorders, personality disorders and substance abuse disorders, that these were  
9 medically determinable impairments that did not precisely satisfy the diagnostic criteria of the  
10 listings. AR 393-400. The functional limitations were identified as mild with regard to  
11 restriction of activities of daily living, and difficulties in maintaining concentration, persistence,  
12 or pace. Plaintiff was moderately limited in maintaining social functioning. There were no  
13 repeated episodes of decompensation. AR 401.

14 Dr. Luu's findings were reviewed and affirmed on December 13, 2007, by reviewing  
15 psychologist P. Davis. AR 462.

16 ***Physical Residual Functional Capacity Assessment***

17 On November 29, 2007, regarding Plaintiff's exertional limitations, Paul F. Frye, M.D.,  
18 opined that Plaintiff could occasionally lift and carry fifty pounds, frequently lift and carry  
19 twenty-five pounds, could stand or walk about six hours in an eight-hour workday, and sit about  
20 six hours in an eight-hour workday, and could push or pull without limitation. AR 455. No  
21 postural, manipulative, visual, communicative or environmental limitations were identified. AR  
22 455-457; *see also* AR 459-461.

23 ***Susan Dominic, M.D.***

24 **The November 2008 opinion**

25 On November 24, 2008, Dr. Susan Dominic, Associate Clinical Professor of Medicine at  
26 UCSF Fresno and attending physician, noted she had been asked by Plaintiff to provide  
27 information regarding the extent of his "medical illness and disabilities." Dr. Dominic stated that  
28 Plaintiff has chronic hepatitis C and cirrhosis with end stage liver disease, noting a "Child's-

1 Pugh classification of A and a MELD<sup>[10]</sup> score of 8, both of which are good.” While Plaintiff  
2 was “fairly well compensated” at that time, Dr. Dominic opined he was “at risk of  
3 decompensation and [that] there is no effective treatment for the liver disease available to him.”  
4 Further, the doctor stated Plaintiff “would potentially be a candidate” for treatment, but that the  
5 risks outweighed the benefit. Finally, Dr. Dominic indicated that she considered him to have  
6 “permanent and irreversible chronic liver disease . . . a disabling condition” that will worsen with  
7 time. AR 463.

8 The related treatment notes dated November 24, 2008, refer to cirrhosis and the Child  
9 Pugh “A” classification and MELD score of 8. With regard to treatment specifically, the doctor’s  
10 notes indicate she “discussed risks/benefits of [treatment]” and the “poor likelihood of complete  
11 response.” Plaintiff was to be monitored for complications. AR 506-507.

### 12 **Other Treatment of Note**

13 An abdominal ultrasound ordered by Dr. Dominic in July 2008 revealed a liver normal in  
14 size and hepatic echotexture, with subtle nodularity of the hepatic capsule compatible with  
15 cirrhosis, and splenomegaly suggesting portal hypertension. AR 475.

16 In treatment notes dated October 27, 2008, Plaintiff’s MELD score was recorded as 10.  
17 AR 508. The cirrhosis was “well compensated” and Plaintiff was not interested in treatment for  
18 hepatitis. AR 509. No other MELD scores or Child Pugh classifications were recorded.

### 19 **3. ALJ’s Findings**

20 ALJ Berry found as follows:

21 As for the opinion evidence, the undersigned credits the consultative  
22 examiners and the State agency [physicians] over the treating physician based on  
23 supportability with medical signs and laboratory findings; consistency with the  
24 record; and, area of specialization. The medical source statement from this  
25 treating source appears to be based primarily on the subjective statements of the  
26 claimant. The underlying documentation from the treating source provided in the  
27 record reveals little, if any, objective observation of signs or symptoms or  
28 administration of an appropriate diagnostic examination along with a description  
of results. Such lack of documentation fails to support the limitations provided in

---

<sup>10</sup>“MELD” refers to Mayo End-Stage Liver Disease.

1 the medical source statement. Additionally, the ultimate conclusion of permanent  
2 disability and inability to work is reserved to the commissioner to determine.

3 AR 14, internal citations omitted.

#### 4 **4. Analysis**

##### 5 **a. Listing 5.05G**

6 ALJ Berry provided specific and legitimate reasons for rejecting the contradicted opinion  
7 of Plaintiff's treating physician, Dr. Dominic.

8 The ALJ pointed to the fact that the medical record supports a diagnosis of cirrhosis, yet  
9 does not rise to the level of the listings, as discussed more fully below. Additionally, the ALJ  
10 pointed to inconsistency with the record, and noted Dr. Dominic's 2008 opinion appeared to be  
11 based on Plaintiff's subjective complaints. These are specific and legitimate reasons for adopting  
12 the opinions of the examining physicians over that of Dr. Dominic with regard to Plaintiff's  
13 physical complaints. *See Thomas v. Barnhart*, 278 F.3d 948, 957 (9th Cir. 2002); *Fair v. Bowen*,  
14 885 F.2d 597, 605 (9th Cir. 1989); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001)  
15 (noting that contrary opinion of examining source constituted "specific and legitimate reason" for  
16 rejecting opinion of a treating source); *Andrews v. Shalala*, 53 F.3d at 1041 ("Where the opinion  
17 of the claimant's treating physician is contradicted, and the opinion of a nontreating source is  
18 based on independent clinical findings that differ from those of the treating physician, the  
19 opinion of the nontreating source may itself be substantial evidence; it is then solely the province  
20 of the ALJ to resolve the conflict").

21 The MELD score "is a marker of disease severity and mortality in persons with chronic  
22 alcoholic liver disease." [Http://www.ncbi.nlm.nih.gov/pmc/articles/PMC65516](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC65516). A MELD score  
23 less than 9, such as Plaintiff's, indicates a mortality rate of 1.9% in a three-month period. *See*  
24 [http://wikipedia.org/wiki/Model\\_for\\_End-Stage\\_Liver\\_Disease#cite\\_note-5](http://wikipedia.org/wiki/Model_for_End-Stage_Liver_Disease#cite_note-5), *citing to*  
25 <http://www.ncbi.nlm.nih.gov/pubmed/12512033>.

26 Listing 5.00 pertains to the digestive system. In particular, listing 5.05 concerns chronic  
27 liver disease and 5.05G refers to end stage liver disease. The Social Security Administration uses  
28 the "SSA Chronic Liver Disease (SSA CLD) calculation" similar to the MELD calculation. An

1 individual meets the criteria of the listing if he or she has two SSA CLD scores in excess of 22.  
2 The Commissioner’s Chronic Liver Disease Calculator “has been adapted from the MELD  
3 formula documented on the UNOS Website.” [Http://www.ssa.gov/disability/professionals](http://www.ssa.gov/disability/professionals)  
4 [bluebook/impairments\\_digestive\\_cld.htm](http://www.ssa.gov/disability/professionals/bluebook/impairments_digestive_cld.htm).

5 Dr. Dominic expressly noted Plaintiff’s Child’s Pugh<sup>11</sup> and MELD scores. Her opinion  
6 does not support a finding of disability. She noted Plaintiff was “fairly well compensated” at the  
7 time of her opinion and that statement would seem to comport with the opinions of the  
8 examining physicians. Further, MELD scores of 8 or 10 do not rise to the equivalent of an SSA  
9 CLD score of 22. AR 463.

10 Moreover, Plaintiff does not identify any evidence that establishes he meets or exceeds  
11 the listing criteria. To qualify for a listed impairment, a claimant must satisfy all of the specified  
12 medical criteria. *Sullivan v. Zebley*, 493 U.S. 521, 530, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990);  
13 *see also Roberts v. Shalala*, 66 F.3d at 182 (plaintiff has the burden of demonstrating disability  
14 under the listings). A thorough discussion of the evidence may adequately identify the basis for  
15 the step three finding. *See Gonzalez v. Sullivan*, 914 F.2d 1197, 1201 (9th Cir. 1990) (“It is  
16 unnecessary to require the [ALJ], as a matter of law, to state why a claimant failed to satisfy  
17 every different section of the Listing of Impairments. The [ALJ’s] four page ‘evaluation of the  
18 evidence’ is an adequate statement of the ‘foundations on which the ultimate factual conclusions  
19 are based’”); *see also Key v. Heckler*, 754 F.2d 1545, 1549 n. 2 (9th Cir. 1985) (“the ALJ  
20 examined the medical reports submitted by the various physicians and concluded that the  
21 preponderance of the evidence did not establish the existence of the findings necessary to support  
22 a showing of disability under the Listing of Impairments”).

23 Here, ALJ Berry discussed the evidence of record which formed the basis of the step  
24 three finding. AR 11-14. Plaintiff’s citation to pages 247 and 463 of the administrative record  
25 does not establish disability. A generalized assertion of functional problems is not enough to  
26

---

27  
28 <sup>11</sup>An “A” in the Child-Pugh classification indicates a 92 percent survival rate.  
[Http://www.ncbi.nlm.nih.gov/pubmed/10347102](http://www.ncbi.nlm.nih.gov/pubmed/10347102). Dr. Dominic noted Plaintiff’s classification as “A.” AR 463.

1 establish disability at step three. *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). On this  
2 record, Plaintiff did not meet the burden of showing he meets or equals the criteria in listing 5.05.

3 Plaintiff also contends that the ALJ should have recontacted Dr. Dominic “to clarify her  
4 opinions,” and that his failure to do so amounts to reversible error. (Doc. 14 at 10-11.) It is  
5 Plaintiff’s burden to produce full and complete medical records, not the Commissioner’s.  
6 *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). However, when the evidence is  
7 ambiguous or “the record is inadequate” to allow for proper evaluation of the evidence, the ALJ  
8 has a duty to develop the record. *Tonapetyan v. Halter*, 242 F.3d at 1150. The ALJ may  
9 discharge this duty in one of several ways, including subpoenaing claimant’s doctors, submitting  
10 questions to claimant’s physicians, continuing the hearing, or keeping the record open after the  
11 hearing to allow supplementation of the record. *Id.* However, here there was no need for ALJ  
12 Berry to recontact Dr. Dominic as the record was neither ambiguous nor inadequate. Simply put,  
13 there was no need for the ALJ to ask Dr. Dominic for clarification.

#### 14 **b. Mental Impairment**

15 Plaintiff also contends the ALJ failed to properly evaluate his mental impairment. He  
16 cites to conflicting notations at pages 11 and 14, respectively, of the ALJ’s findings. (Doc. 14 at  
17 11.) Here, the Commissioner did not address Plaintiff’s argument, claiming Plaintiff had waived  
18 any argument “regarding the ALJ’s step three analysis of psychological impairments” and citing  
19 to Ninth Circuit authority refusing to address an argument not raised in a party’s opening brief.  
20 (Doc. 21 at 8.) Plaintiff did indeed raise the argument in his opening brief, and thus the Court is  
21 perplexed by the Commissioner’s failure to address it.

22 In any event, at page 11 of his findings, ALJ Berry’s RFC includes Plaintiff’s ability “to  
23 relate to others.” At page 14 of those same findings however, the ALJ included the following:

24 The claimant has the following mental limitations set forth in “Part B” of  
25 the mental listings: mild restriction of activities of daily living; *moderate*  
26 *difficulties in maintaining social functioning*; moderate difficulties in maintaining  
concentration, persistence or pace; 1-2 episodes of decompensation and no  
evidence of “C” criteria.

27 Emphasis added.

1           It appears the ALJ relied upon the opinions of state agency physician Dr. Luu in this  
2 regard. A comparison of Dr. Luu's opinion in the Mental RFC Assessment reveals it is  
3 inconsistent with the Psychiatric Review Technique prepared the same day. More particularly, in  
4 the Mental RFC Assessment Dr. Luu opined Plaintiff was not significantly limited in any area of  
5 social interaction. AR 391-392. Yet, in the Psychiatric Review Technique, Dr. Luu identified  
6 Plaintiff as moderately limited in maintaining social functions. AR 401.

7           This inconsistency cannot be overlooked. The ALJ posed two hypothetical questions to  
8 the VE at the administrative hearing. In the first hypothetical, the VE was asked to consider a  
9 worker who, *inter alia*, had the ability to relate to others (comparable to the ALJ's RFC finding  
10 at AR 11) and the VE indicated work was available for the individual. AR 54-55. However, in  
11 the second hypothetical wherein the worker would have difficulty relating to others (comparable  
12 to the ALJ's notation at AR 14), the VE indicated that no work was available to such an  
13 individual. AR 55.

14           Due to this inconsistency in the ALJ's findings, it cannot be said his determination in this  
15 regard is supported by substantial evidence and is free of legal error.

16           ***The Findings Regarding Plaintiff's Credibility***

17           Next, Plaintiff contends the ALJ improperly evaluated his testimony and credibility.  
18 (Doc. 16 at 12-14; Doc. 24 at 5-6.) The Commissioner asserts the ALJ's analysis is proper.  
19 (Doc. 21 at 11-13.)

20           A two step analysis applies at the administrative level when considering a claimant's  
21 subjective symptom testimony. *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). First, the  
22 claimant must produce objective medical evidence of an impairment that could reasonably be  
23 expected to produce some degree of the symptom or pain alleged. *Id.* at 1281-1282. If the  
24 claimant satisfies the first step and there is no evidence of malingering, the ALJ may reject the  
25 claimant's testimony regarding the severity of his symptoms only if he makes specific findings  
26 that include clear and convincing reasons for doing so. *Id.* at 1281. The ALJ must "state which  
27 testimony is not credible and what evidence suggests the complaints are not credible." *Mersman*  
28 *v. Halter*, 161 F.Supp.2d 1078, 1086 (N.D. Cal. 2001), quotations & citations omitted ("The lack



1 of specific, clear, and convincing reasons why Plaintiff's testimony is not credible renders it  
2 impossible for [the] Court to determine whether the ALJ's conclusion is supported by substantial  
3 evidence"); Social Security Ruling ("SSR") 96-7p (ALJ's decision "must be sufficiently specific  
4 to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave  
5 to the individual's statements and reasons for that weight").

6 An ALJ may consider many factors when assessing the claimant's credibility. *See Light*  
7 *v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). The ALJ can consider the claimant's  
8 reputation for truthfulness, prior inconsistent statements concerning his symptoms, other  
9 testimony by the claimant that appears less than candid, unexplained or inadequately explained  
10 failure to seek treatment, failure to follow a prescribed course of treatment, claimant's daily  
11 activities, claimant's work record, or the observations of treating and examining physicians.  
12 *Smolen v. Chater*, 80 F.3d at 1284; *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). "An ALJ is  
13 not 'required to believe every allegation of disabling pain' or other non-exertional impairment."  
14 *Orn*, 495 F.3d at 635.

15 The first step in assessing Plaintiff's subjective complaints is to determine whether  
16 Plaintiff's condition could reasonably be expected to produce the pain or other symptoms  
17 alleged. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). Here, the ALJ found that  
18 Plaintiff had the severe impairments of schizoaffective disorder, cirrhosis and alcohol  
19 dependence. AR 10. Further, the ALJ noted those conditions could reasonably be expected to  
20 cause the symptoms alleged. AR 12. This finding satisfied step one of the credibility analysis.  
21 *Smolen*, 80 F.3d at 1281-1282.

22 "Despite the inability to measure and describe it, pain can have real and severe  
23 debilitating effects; it is, without a doubt, capable of entirely precluding a claimant from  
24 working." *Fair v. Bowen*, 885 F.2d at 601. It is possible to suffer disabling pain even where the  
25 degree of pain is unsupported by objective medical findings. *Id.* "In order to disbelieve a claim  
26 of excess pain, an ALJ must make specific findings justifying that decision." *Id.* (citing  
27 *Magallanes v. Bowen*, 881 F.2d at 755). The findings must convincingly justify the ALJ's  
28 rejection of the plaintiff's excess pain testimony. *Id.* at 602. However, an ALJ cannot be

1 required to believe every allegation of disabling pain. “This holds true even where the claimant  
2 introduces medical evidence showing that he has an ailment reasonably expected to produce  
3 some pain.” *Id.* at 603.

4 ALJ Berry’s credibility analysis provides as follows:

5 After careful consideration of the evidence, the undersigned finds that the  
6 claimant’s medically determinable impairments could reasonably be expected to  
7 cause the alleged symptoms; however, the claimant’s statements concerning the  
8 intensity, persistence and limiting effects of these symptoms are not credible to  
9 the extent they are inconsistent with the above residual functional capacity  
assessment. The claimant’s medical records show that treating physician(s)  
10 responded with limited and conservative treatment. Such treatment is inconsistent  
11 with the medical response than would be expected if the physician(s) found the  
12 symptoms and limitations to be as severe as reported by the claimant.

13 At the hearing, the claimant testified that the last worked in 1990 or 1991.  
14 He lives alone and gets around by having his sister drive him. He has a bus pass  
15 which he uses intermittently. The people on the bus make him feel anxious and  
16 he feels like he is unable to breath[e]. He stated that he is unable to work  
17 secondary to his anxiety, liver problems, and throat problems. He previously  
18 drank too much alcohol and the veins in his throat burst. He spits up blood on a  
19 daily basis. The claimant stated that he has not had a drink of alcohol in 4-5 years.  
20 The claimant indicated that he does nothing all day long. He prepares his meals  
21 once in a while. His sister does his laundry. His legs are in constant pain and his  
22 feet swell due to his liver condition. He spends most of his time alone and he does  
23 not socialize. Twice a month the claimant goes to Kingsview for treatment. He is  
24 not enrolled in group or individual therapy sessions. The claimant stated he is  
25 able to stand 45 minutes; walk 45 minutes; and, sit 60 minutes. He is able to carry  
26 2 gallons of milk for short distances. Additionally the claimant testified that his  
27 liver gives him a lot of pain.

28 .....  
The objective medical evidence fails to fully support the claimant. . . .

AR 11-12, internal citations omitted.

20 Plaintiff argues that the ALJ’s rejection of his testimony based only on a lack of objective  
21 evidence was improper. However, the lack of objective evidence was not the only basis the ALJ  
22 relied on in making his credibility determination. Therefore, this Court finds Plaintiff’s argument  
23 to lack merit. The ALJ provided clear and convincing reasons for rejecting Plaintiff’s testimony,  
24 including a lack of objective medical evidence to support Plaintiff’s assertions *and* limited and  
25 conservative treatment.

26 The foregoing reasons are proper reasons to discount Plaintiff’s credibility. *See Johnson*  
27 *v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995) (no medical treatment or a conservative level of  
28 medical treatment has been found to suggest a lower level of pain and functional limitations);

1 *Fair v. Bowen*, 885 F.2d at 603-604 (claiming severe conditions yet receiving minimal,  
2 conservative, or no treatment is a basis to reject claimant's testimony); *see also Morgan v.*  
3 *Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999) (ALJ may discount  
4 claimant's credibility on basis of medical improvement); *Tidwell v. Apfel*, 161 F.3d 599, 601-602  
5 (9th Cir. 1998) (finding a mild or minor medical condition with all other tests reporting normal  
6 provides a basis for rejecting claimant's testimony of severity of symptoms).

7 In sum, the ALJ made specific findings and identified the testimony he found not  
8 credible, as well as the evidence in the record that led to his conclusion. *Dodrill v. Shalala*, 12  
9 F.3d 915, 918 (9th Cir. 1993); *Bunnell v. Sullivan*, 947 F.2d 341, 345-346 (9th Cir. 1991). Thus,  
10 the ALJ's credibility findings are supported by substantial evidence and are free of legal error.

#### 11 REMAND

12 Section 405(g) of Title 42 of the United States Code provides: "the court shall have the  
13 power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying,  
14 or reversing the decision of the Secretary, with or without remanding the cause for a rehearing."  
15 In Social Security cases, the decision to remand to the Commissioner for further proceedings or  
16 simply to award benefits is within the discretion of the court. *McAllister v. Sullivan*, 888 F.2d  
17 599, 603 (9th Cir. 1989). "If additional proceedings can remedy defects in the original  
18 administrative proceedings, a social security case should be remanded. Where, however, a  
19 rehearing would simply delay receipt of benefits, reversal and an award of benefits is  
20 appropriate." *Id.* (citation omitted); *see also Varney v. Secretary of Health & Human Serv.*, 859  
21 F.2d 1396, 1399 (9th Cir. 1988) ("Generally, we direct the award of benefits in cases where no  
22 useful purpose would be served by further administrative proceedings, or where the record has  
23 been thoroughly developed").

24 Here, the Court finds that remand for further proceedings will to allow the ALJ to  
25 properly review all of the medical and psychological evidence as outlined above. Moreover,  
26 because more than three years have passed since the ALJ issued his findings, he may wish to  
27 revisit the severity of Plaintiff's cirrhosis in accordance with listing 5.05.

1 **CONCLUSION**

2 Based on the foregoing, the Court finds that the ALJ's decision is not supported by  
3 substantial evidence and is therefore REVERSED and the case is REMANDED to the ALJ for  
4 further proceedings consistent with this opinion. The Clerk of this Court is DIRECTED to enter  
5 judgment in favor of Plaintiff Pio Rodriguez and against Defendant Michael J. Astrue,  
6 Commissioner of Social Security.

7  
8 IT IS SO ORDERED.

9 **Dated: March 12, 2012**

**/s/ Gary S. Austin**  
UNITED STATES MAGISTRATE JUDGE