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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

DILLON S. SUITT,

No. CIV S-09-1847-CMK

Plaintiff,

vs.

MEMORANDUM OPINION AND ORDER

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

\_\_\_\_\_ /

Plaintiff, who is proceeding with retained counsel, brings this action for judicial review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). Pursuant to the written consent of all parties, this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). Pending before the court are plaintiff's motion for summary judgment (Doc. 18) and defendant's cross-motion for summary judgment (Doc. 19).

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1 **I. PROCEDURAL HISTORY**

2 Plaintiff applied for social security benefits on January 9, 2004.<sup>1</sup> In the  
3 application, plaintiff claims that disability began on January 1, 1999. Plaintiff claims that  
4 disability is caused by a combination of “depression, personality disorder, and suicide attempts.”  
5 Plaintiff’s claim was initially denied. Following denial of reconsideration, plaintiff requested an  
6 administrative hearing. The notice of hearing was sent on September 28, 2005. Plaintiff did not  
7 appear at the hearing and a notice to show cause was issued on October 31, 2005. After plaintiff  
8 failed to respond, plaintiff’s case was dismissed by order issued on January 3, 2006. On July 27,  
9 2007, the Appeals Council set aside the dismissal.<sup>2</sup> A new hearing was held on March 13, 2008,  
10 before Administrative Law Judge (“ALJ”) Brenton L. Rogozen. In a March 24, 2008, decision,  
11 the ALJ concluded that plaintiff is not disabled based on the following relevant findings:

- 12 1. The medical evidence establishes that the claimant that the “severe”  
13 impairments of a mood disorder, not otherwise specified, a personality  
14 disorder, not otherwise specified, and a history of polysubstance abuse and  
15 alcohol dependence/abuse in reportedly nearly-complete sustained  
16 remission since October 30, 2007;  
17 2. The severity of the claimant’s impairments, in combination, has medically  
18 equaled the requirements of Sections 12.04 and 12.06 of the regulations  
19 since October 30, 2007, and they are expected to preclude him from  
20 working for at least 12 continuous months:

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19 <sup>1</sup> The ALJ’s most recent hearing decision reflects the following relevant procedural  
20 history:

21 The record informs that the claimant had filed prior concurrent  
22 applications for Social Security disability benefits . . . which were denied  
23 initially . . . then at the reconsideration level. . . . Even though the  
24 claimant currently contends the same disability onset date as before, the  
25 undersigned finds no evidence that the Administration erred in any way in  
26 reaching those denials. Further, the determinations were not reviewed at  
that time. Therefore, the undersigned finds no “good cause” to reopen the  
prior determinations, and they shall remain in force pursuant to res  
judicata. . . .

<sup>2</sup> The Appeals Council concluded that plaintiff’s on-and-off-again homelessness  
and incarceration “lends some credibility that he may not have received the hearing notices.”



1                    November 25, 2002 – Plaintiff was admitted to Sequoia Hospital as a danger to  
2 self. On discharge, the doctor stated:

3                    He was initially noted to be somewhat dysphoric but over the next few  
4 days he seemed very pleasant and interacted appropriately with staff and  
5 peers. He was very focused on wanting to return home. He reported that  
6 he does have a job to go to. He works as a carpenter and had temporary  
7 housing with his boss. He was agreeable to follow up at mental health  
8 clinic upon discharge from the hospital. He was more stable in his mood  
9 and affect. With continued structured support and milieu therapy, he  
10 showed significant improvement and was discharged. . . .

11 The doctor diagnosed bipolar affective disorder in remission and amphetamine dependence.

12                    December 13, 2002 – Plaintiff was admitted to San Mateo County Health as a  
13 danger to self. Plaintiff’s blood tested positive for methamphetamine and marijuana. Plaintiff  
14 was diagnosed with amphetamine abuse, marijuana abuse, alcohol abuse, and “rule out mood  
15 disorder NOS.” The doctor’s instruction on discharge was: “The patient to stop substance use.”

16                    December 28, 2002 – Plaintiff was hospitalized after being brought in by police as  
17 a danger to self. The chart notes reflect that, while plaintiff was diagnosed two years prior with a  
18 bipolar disorder, it was unclear if plaintiff was clean and sober at the time of the diagnosis. The  
19 treating physician gave plaintiff a discharge diagnosis of amphetamine abuse, marijuana abuse,  
20 alcohol abuse, and a personality disorder, NOS. Plaintiff’s toxicology screen was negative for  
21 drugs.

22                    December 31, 2002 – Plaintiff was discharged from the hospital following his  
23 having self-reported with a complaint of “My emotions and feelings, they’re all mixed up and  
24 confusing.” The doctor noted a long history of substance abuse which plaintiff stated he did not  
25 see as a problem. Plaintiff stated: “I need it with the lifestyle that I live, since I have no place to  
26 live.” On discharge, plaintiff was diagnosed with amphetamine abuse, marijuana abuse, alcohol  
27 abuse, and a mood disorder, NOS.

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1                    January 5, 2003 – A form entitled “Assessment of Suicide or Self-Harm” prepared  
2 by staff at San Mateo County Health indicates that the only risk factor for suicide or self-harm is  
3 substance abuse.

4                    February 4, 2003 – A “Physical Nursing Assessment” form prepared at San Mateo  
5 County Health indicates that plaintiff admitted methamphetamine use one and one-half days  
6 prior.

7                    January 6, 2003 – Plaintiff was admitted to San Mateo County Health following a  
8 suicide attempt. Plaintiff’s blood tested positive for methamphetamine and marijuana. On  
9 discharge, plaintiff was diagnosed with amphetamine abuse, marijuana abuse, alcohol abuse, and  
10 mood disorder, NOS.

11                    June 7, 2003 – Plaintiff completed a daily activities questionnaire. Plaintiff stated  
12 that, at the time, he was living in a mental hospital. Plaintiff stated that he has no difficulties  
13 with providing for himself except lack of funds. Similarly, he says he does no shopping due to  
14 lack of funds. He added that he does his own laundry, cleans his room, and requires no  
15 assistance with personal care. He stated that he enjoys gardening and art. Plaintiff stated that he  
16 remembers what he sees on television, reads on a daily basis, and can remember what he reads.  
17 He did state that he has trouble concentrating and often becomes sidetracked.

18                    September 9, 2003 – A form entitled “Assessment of Suicide or Self-Harm”  
19 prepared by staff at San Mateo County Health indicates that the only risk factor for suicide or  
20 self-harm is substance abuse. Another form, entitled Physical Nursing Assessment,” indicates  
21 that plaintiff used methamphetamine two days prior and was not taking any prescription  
22 medications.

23                    September 25, 2003 – Admission assessment notes from San Mateo County  
24 Health indicates that plaintiff last used methamphetamine 4 days prior.

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1           October 7, 2003 – A form entitled “Assessment of Suicide or Self-Harm”  
2 prepared by staff at San Mateo County Health indicates that the only risk factor for suicide or  
3 self-harm is substance abuse.

4           October 8, 2003 – Discharge notes from San Mateo County Health indicate that  
5 plaintiff’s blood had tested positive for methamphetamine. The notes also indicate that plaintiff  
6 was not currently taking any psychiatric medications.

7           October 20, 2003 – Discharge notes from San Mateo County Health Center reflect  
8 that plaintiff was hospitalized after a suicide attempt. The notes indicate that plaintiff has a  
9 significant history of substance and alcohol abuse and that plaintiff admitted methamphetamine  
10 use four to five days before being admitted.

11           October 28, 2003 – Plaintiff was hospitalized again following a suicide attempt.  
12 At the time, plaintiff was not taking any medications. The doctor noted a history of drug and  
13 alcohol abuse.

14           November 24, 2003 – Nia T. Lozano, M.D., prepared a psychiatric discharge  
15 report following plaintiff’s hospitalization incident to a suicide attempt. The doctor noted  
16 plaintiff’s chief complaint as “. . . history of polysubstance abuse, mood disorder, and unclear  
17 personality disorder. . . .” Dr. Lozano noted that, at the time, plaintiff was not taking any  
18 medications. On discharge, the doctor provided the following assessment:

19           This is an appropriately groomed well-nourished male who is sitting  
20 calmly in the day room. He smiles on approach. He is pleasant and  
21 exhibits good eye contact. His speech is of normal rate and rhythm. His  
22 mood is “fine.” His affect is appropriate. His thoughts are linear. He  
denies suicidal ideation, homicidal ideation, and ACH. His insight and  
judgment are both fair.

23 Dr. Lozano diagnosed mood disorder, NOS, and polysubstance abuse in “early partial  
24 remission.”

25           February 1, 2004 – Plaintiff was taken to the hospital following complaints of  
26 chest pain. On admission, plaintiff denied any illegal drug use.

1            August 16, 2004 – Agency consultative doctor Danilo Lucila, M.D., completed a  
2 mental residual functional capacity assessment. The doctor opined that plaintiff is moderately  
3 limited in the ability to understand, remember, and carry out detailed instructions. In all other  
4 areas, no limitations were noted.

5            October 4, 2006 – Plaintiff self-reported to the hospital, having walked through  
6 the night to get there, complaining of grief and depression over the recent death of his mother.  
7 Plaintiff was diagnosed at that time with methamphetamine abuse and drug-induced psychotic  
8 and mood disorders. The doctor stated that plaintiff does not have a “pure” psychiatric illness,  
9 but opined that plaintiff’s problems likely stem from drug and alcohol abuse. The chart notes  
10 also reveal that plaintiff “recently” lost his job in construction due to methamphetamine use.

11            October 27, 2006 – The CAR indicates that plaintiff presented to the hospital with  
12 “some feeling of chills and malaise.” Toxicology notes reveal that plaintiff’s blood tested  
13 positive for illegal drugs. Plaintiff was diagnosed with alcohol dependence, methamphetamine  
14 dependence, substance abuse, and substance-induced psychotic disorder.

15            October 14, 2007 – Plaintiff was admitted to the hospital as a danger to self.  
16 Hospital admission notes indicate that plaintiff’s blood tested positive for methamphetamine and  
17 marijuana.

18            January 30, 2008 – Plaintiff was examined by agency examining doctor Ubaldo  
19 Sanchez submitted a report following a comprehensive psychological evaluation. Plaintiff  
20 reported that he last worked two to three years ago in construction. Plaintiff also reported that he  
21 had been clean and sober for “over three months.” On mental status examination, Dr. Ubaldo  
22 noted that plaintiff “did not have any difficulties understanding instructions and repetition and  
23 emphasis were not needed.” The doctor diagnosed bipolar disorder, polysubstance abuse, and

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1 indicated a need to rule out mood disorder, NOS. The doctor offered the following functional  
2 assessment:

3 Mr. Suitt is not limited to daily activities such as dressing, bathing, and  
4 eating.

5 He would have some difficulties being socially appropriate given his mood  
6 swings.

7 He needs to continue his medication and ongoing mental health treatment.

8 He is able to perform mildly to moderately complex tasks. He is currently  
9 unable to tolerate the stressors encountered in a normal working  
10 environment. He appears emotionally volatile, has a history of numerous  
11 suicide attempts, and has difficulty modulating his emotions.

12  
13 March 13, 2008 – Medical expert Dr. Dusay testified at the administrative  
14 hearing.

### 15 III. STANDARD OF REVIEW

16 The court reviews the Commissioner’s final decision to determine whether it is:  
17 (1) based on proper legal standards; and (2) supported by substantial evidence in the record as a  
18 whole. See Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). “Substantial evidence” is  
19 more than a mere scintilla, but less than a preponderance. See Saelee v. Chater, 94 F.3d 520, 521  
20 (9th Cir. 1996). It is “. . . such evidence as a reasonable mind might accept as adequate to  
21 support a conclusion.” Richardson v. Perales, 402 U.S. 389, 402 (1971). The record as a whole,  
22 including both the evidence that supports and detracts from the Commissioner’s conclusion, must  
23 be considered and weighed. See Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986); Jones  
24 v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not affirm the Commissioner’s  
25 decision simply by isolating a specific quantum of supporting evidence. See Hammock v.  
26 Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the administrative  
findings, or if there is conflicting evidence supporting a particular finding, the finding of the  
Commissioner is conclusive. See Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

1 Therefore, where the evidence is susceptible to more than one rational interpretation, one of  
2 which supports the Commissioner’s decision, the decision must be affirmed, see Thomas v.  
3 Barnhart, 278 F.3d 947, 954 (9th Cir. 2002), and may be set aside only if an improper legal  
4 standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th  
5 Cir. 1988).

#### 6 7 **IV. DISCUSSION**

8 In his motion for summary judgment, plaintiff argues the ALJ erred as a matter of  
9 law when he concluded that drug and alcohol abuse were a contributing factor material to  
10 disability prior to October 30, 2007. Plaintiff also argues that the ALJ’s finding with respect to  
11 drugs and alcohol abuse is not supported by substantial evidence. Plaintiff seeks a remand for  
12 the direct award of benefits.

13 If drug or alcohol use is a contributing factor material to a determination of  
14 disability, an individual is not entitled to benefits. See 20 C.F.R. §§ 404.1535 and 416.945; see  
15 also Sousa v. Callahan, 143 F.3d 1240, 1245 (9th Cir. 1998). The burden is on the plaintiff to  
16 demonstrate that drug and alcohol addiction is not a material factor by showing that an  
17 impairment would have been disabling even if drug and alcohol use ceased. See Parra v. Astrue,  
18 481 F.3d 742, 748 (9th Cir. 2007). To do so, the plaintiff would have to demonstrate that the  
19 impairment “. . . would remain during periods when she stopped using drugs and alcohol.” See  
20 Ball v. Massanari, 254 F.3d 817, 821 (9th Cir. 2001) (citing Sousa, 143 F.3d at 1245).

21 With respect to drugs and alcohol, the ALJ stated:

22 The claimant acknowledges that he has had a long history of  
23 polysubstance and alcohol abuse, and that in 1998-1999 he served jail time  
24 for domestic violence. The claimant was also diagnosed in 1999 with a  
25 bipolar disorder (Exh. 11-F). As discussed above, his prior claims were  
26 denied at the reconsideration level on January 31, 2000, and there was no  
further review granted at that time. The undersigned finds no significant  
medical evidence from the years 2000-2001. The current record informs  
that on January 5, 2002, he received the diagnoses of amphetamine abuse  
and dependence but only “rule-out” secondary to mood and personality

1 disorders (Exh. 4-F, p. 97). The claimant received a July 24, 2002 '5150'  
2 psychiatric hold secondary to an intentional overdose on sleeping pills.  
3 On November 25, 2002, repeat '5150,' the claimant was described as an  
4 individual with an "extensive" history of bipolar affective disorder  
5 complicated by polysubstance dependence. The claimant reported that he  
6 would be willing to attend A on this date (Exh. 3-F, pp. 20-21). However,  
7 his December 13-18, 2002 '5150' was characterized by findings of  
8 ongoing amphetamine abuse, marijuana abuse, and alcohol abuse, and  
9 again, only rule-out mood disorder. (Exh. 4-F, p. 29). The claimant was  
10 encouraged by clinicians to stop abusing substances (Exh. 3-F, pp. 13-15).  
11 The claimant apparently initially listened to this advice, but admitted on  
12 December 31, 2002, that he "went back to using methamphetamine,  
13 marijuana, and alcohol" as he "does not see it as a problem" stating, "I  
14 need it with the lifestyle that I have. . . . I could stop tomorrow." (Exh. 3-  
15 F, p. 10).

16 The claimant's Axis I impressions on January 6, 2003, were only  
17 amphetamine abuse and marijuana abuse (Exh. 3-F, p. 17), although by  
18 January 21, 2003, psychiatric evaluation these included amphetamine  
19 abuse, marijuana abuse, alcohol abuse, and mood disorder, not otherwise  
20 specified, but also provisionally rule-out drug-induced mood disorder  
21 (Exh. 4-F, p. 103). September 9, 2003's '5150' found at Axis I only  
22 "methamphetamine abuse" and provisionally "rule-out borderline  
23 personality disorder" when the claimant admitted that he used  
24 methamphetamine "as often as he can" and added, "they won't even accept  
25 me in mental health (due to) history of non-compliance" (Exh. 4-F, pp. 65,  
26 68 & 80). On October 7, 2003, the sole Axis I impression was  
"methamphetamine abuse" (Exh. 4-F, p. 68). Although his polysubstance  
dependence was said to be "in early partial remission" on October 9, 2003,  
evaluation (Exh. 3-F, p. 4), the claimant returned to the emergency room  
on October 28, 2003, following an intentional overdose (Exh. 4-F, p. 29).  
On November 24, 2003, the claimant was restarted on psychotropic  
medications, and received the diagnoses of "mood disorder, not otherwise  
specified, polysubstance abuse in early partial remission" (Exh. 3-F, pp. 1-  
2).

3 On February 1, 2004, the claimant was brought in by ambulance to the  
4 hospital from an inpatient psychiatric facility he was living, to evaluate for  
5 chest pain. However, on testing, all examination and vital signs were  
6 normal (Exh. 4-F, pp. 50-52). On February 25, 2004, the claimant's  
7 "primary diagnosis" was identified as "amphetamine dependence disorder"  
8 but he was reportedly trying to stop using (Exh. 7-F, p. 21). Circa  
9 September 2004, the claimant was described by clinicians as "doing  
10 better" having broken up with his girlfriend who was a drug abuser, and  
11 remaining "clean and sober" (Exh. 7-F, pp. 8-9). As of November 2004,  
12 the claimant promised that he was not taking methamphetamine and  
13 overall appeared to be taking medications as prescribed. The claimant's  
14 treating clinician observed that at this time he was able to interact better,  
15 and displayed better focus while abstaining from substances (Exh. 7-F, p.  
16 4). However, the record does not include any significant psychiatric  
17 records from 2005. On October 4, 2006, treating psychiatrist Stephen

1 Cummings, M.D., opined, “. . . he does not have a pure psychiatric  
2 illness. . . . the patient abuses methamphetamine and alcohol by his own  
3 free admission” (Exh. 9-F, pp. 26-28).

4 The record includes a series of drug-related emergency room presentations  
5 in 2007 (Exh. 9-F, pp. 14-16). For example, on October 16, 2007, the  
6 claimant refused a physical examination and all vital sign testing (Exh. 9-  
7 F, pp. 1-2).

8 On October 30, 2007, the claimant entered an at least 6 month inpatient  
9 program at Eagle Recovery. According to Deborah Couvillion, a clinician  
10 or administrator at that facility, the claimant’s prognosis for medical  
11 improvement depended upon his approval for SSI, presumably to continue  
12 to pay for that treatment and housing. Ms. Couvillion suggested that a full  
13 year duration would be necessary to meet the goals of being able to  
14 function in society without dependence upon drugs and alcohol (Exh. 12-  
15 F, p. 1).

16 In a consultative psychological evaluation dated February 9, 2008, the  
17 claimant informed Ubaldo F. Sanchez, M.D., that he was depressed that he  
18 was unable to work, contending that he was being compliant with his  
19 prescriptions for seroquel, topamax, and depakote, and also taking  
20 ibuprofen for right shoulder pain. The claimant further reported that with  
21 the exception of only a single episode of relapse over 3 months ago, he had  
22 been “clean and sober” for 1 1/2 years. Dr. Sanchez observed that the  
23 claimant was of average intelligence on testing, and diagnosed “bipolar  
24 disorder (and provisionally) rule-out mood disorder, not otherwise  
25 specified, (and) polysubstance abuse” with a “guarded” prognosis (Exh.  
26 10-F).

The medical expert, a board certified specialist in the field of psychiatry,  
testified that according to the record, the claimant had a severe mood  
disorder, not otherwise specified, and a personality disorder, not otherwise  
specified, which in combination would have equaled Listings 12.04 and  
12.06. However, the medical expert further opined that the claimant has  
also had severe, chronic addiction to methamphetamine, alcohol, and  
marijuana that according to the record would have definitely been material  
to the findings of “disability” until he entered prolonged residential  
treatment on October 30, 2007.

After giving careful consideration to all the documentary evidence, the  
undersigned Administrative Law Judge has concluded that the claimant  
has had impairments that would in combination equal the criterial of  
Sections 12.04 and 12.06 of the impairments listed [in the regulations]; but  
also, that prior to October 30, 2007, his drug and alcohol  
dependence/abuse would have been a contributing factor material to the  
finding of “disability.”

The undersigned primarily basis this determination upon the medical  
opinions of the testifying medical expert during the hearing, as well as in  
considering of the totality of medical evidence and restrictive medical

1 opinions in the record.

2 The claimant insists that he has remained almost entirely “clean and sober”  
3 since his October 30, 2007, residential treatment admission. On February  
4 9, 2008, consultative psychologist Dr. Sanchez still gave the claimant a  
5 GAF score of only ‘50’ with findings of a decline of memory skills on  
6 WMS-III. Dr. Sanchez further opined that the claimant could not tolerate  
7 the pressures of a normal working environment and that he needs to  
8 continue medication and treatment (Exh. 10-F). The undersigned has  
9 considered the medical opinions of the non-examining State Agency  
10 evaluators . . . but in view of the significantly more restrictive and severe  
11 medical opinions subsequently received from the testifying medical expert  
12 and psychiatric specialist during the hearing, along with corroborative  
13 reports of his sobriety from the Eagle Recovery Program and Transition  
14 Home (Exh. 12-F), they are no longer found to be consistent with the  
15 overall medical evidence – at least as and after October 30, 2007, the date  
16 he entered that prolonged inpatient program. Therefore, the undersigned  
17 has accorded the State Agency evaluator opinions less weight as of  
18 October 30, 2007, and thereafter. . . .

11 \* \* \*

12 As testified by the medical expert and detailed above, prior to October 30,  
13 2007, there is no documented period of extended sobriety for the claimant  
14 in the record. Therefore, to the extent that the claimant contends that prior  
15 to October 30, 2007, even if he had been fully medically compliant and  
16 abstinent to illegal drugs and alcohol, he still would have been unable to  
17 perform even simple repetitive tasks, the undersigned finds these  
18 contentions to be less than fully credible when compared to the record as a  
19 whole. . . . Thus a finding of “not disabled” would be reached for all  
20 periods prior to October 30, 2007. . . .

17 In his first argument, plaintiff contends that the ALJ misapplied the legal  
18 standards relating to drugs and alcohol abuse. Plaintiff argues:

19 Here, the ALJ found that Mr. Suitt was disabled by his mental  
20 impairments throughout the entire relevant period (Tr. 28). However, the  
21 ALJ found that drugs and alcohol were a contributing factor material to  
22 Mr. Suitt’s disability prior to October 30, 2007, and denied any benefits  
23 prior to that date (Tr. 28, 32-33). The ALJ then found that Mr. Suitt was  
24 still disabled by his mental impairments as of October 30, 2007, the date  
25 that Mr. Suitt entered the Eagle Recovery Program and became clean and  
26 sober (Tr. 28, 32-33). The ALJ awarded Mr. Suitt SSI benefits as of  
27 October 30, 2007 (Tr. 28, 32-33). . . .

24 The ALJ erred as a matter of law when he found that drugs and  
25 alcohol were a contributing factor material to the finding of disability  
26 because Mr. Suitt continued to be disabled by his mental impairments even  
27 after he became clean and sober. The regulations and controlling case law  
28 clearly states that the SSA will find that “drug addiction or alcoholism is  
29 not a contributing factor material to the determination of disability” if a

1 claimant is disabled independent of drug addiction or alcoholism. The  
2 ALJ's "materiality" determination was a clear error of law. For this reason  
3 alone, the Court should remand this case to the SSA for the payment of  
[benefits] dating back to January 1, 1999, the date Mr. Suitt claimed he  
became disabled.

4 The court disagrees with plaintiff that the ALJ's legal analysis is flawed.

5 Plaintiff's argument flows from the ALJ's finding that, after October 30, 2007, he was disabled  
6 by mental impairments which were not related directly to drug and/or alcohol abuse. Plaintiff  
7 appears to conclude that, if he had a disabling mental impairment independent of drug/alcohol  
8 use after October 30, 2007, he must have also had the same impairment before that date. While  
9 plaintiff is correct that the existence of a disabling impairment after October 30, 2007, may  
10 suggest that such an impairment existed before that date, such is not necessarily the situation in  
11 all cases. It is the plaintiff's obligation to present evidence that, during extended periods of  
12 sobriety occurring before October 30, 2007, plaintiff still had a disabling mental impairment.  
13 The ALJ concluded that no such evidence was presented and, based on this finding, properly  
14 concluded that plaintiff had not met his burden of proof.

15 In his second argument, plaintiff asserts that, even if the ALJ applied the correct  
16 legal standards, substantial evidence of record does not support the ALJ's ultimate disability  
17 finding with respect to drugs and alcohol use. Specifically, plaintiff argues: (1) the ALJ  
18 improperly relied on Dr. Dusay's hearing testimony; and (2) drug/alcohol use is not a material  
19 factor because plaintiff's mental impairment predates his drug/alcohol use. The court rejects any  
20 argument that the evidence does not support the ALJ's materiality conclusion for the period prior  
21 to October 30, 2007.

22 At the outset, the court notes that there is evidence in the record that plaintiff  
23 actually worked in the construction industry prior to October 30, 2007, but after the alleged  
24 January 1999 onset date. In October 2006, plaintiff reported upon admission to the hospital that  
25 he had "recently" lost his job due to methamphetamine use. In January 2008, plaintiff told Dr.  
26 Ubaldo that he last worked two to three years ago, consistent with his report in October 2006 that

1 he had “recently” lost his job. This evidence indicates that plaintiff worked sometime in 2006. If  
2 plaintiff was able to work in 2006, it stands to reason that his mental impairment was not  
3 disabling at that time.

4           Next, contrary to plaintiff’s assertion, the evidence does not establish any  
5 extended periods of sobriety between the alleged onset date of January 1999 and October 30,  
6 2007.<sup>3</sup> While plaintiff alleges an 11-month period of sobriety in 1999, there is no objective  
7 evidence to support this contention. Plaintiff merely relies on his own subjective report to Dr.  
8 Cheema in November 1999. The ALJ correctly concluded that plaintiff’s contention was less  
9 than credible in light of the weight of all the evidence. In July 1997, hospital notes indicate that  
10 plaintiff’s “drug behavior dates back at least one decade and has been unremitting.” In April  
11 1998, plaintiff’s toxicology screen showed positive results for illegal drugs. The evidence also  
12 indicates that, between November 2002 and October 2007, plaintiff consistently tested positive  
13 for methamphetamine and/or marijuana. The vast majority of the diagnoses offered during this  
14 period were directly related to drug use. In October 2006, a doctor opined that plaintiff did not  
15 have any “pure” psychological problem independent of drug and/or alcohol abuse.

16           The evidence indicating “unremitting” drug use since 1987 (i.e., a decade prior to  
17 July 1997) as well as consistent positive drug tests between 2002 and 2007 undermine plaintiff’s  
18 statement that he was sober for 11 months in 1999. Moreover, the court finds that the ALJ was  
19 correct in stating that plaintiff has not provided significant medical records for 2001 or 2002.<sup>4</sup>  
20 Plaintiff has simply failed to carry his burden of showing that he was sober for any extended  
21 period of time let alone showing that, during such time of sobriety, he still had a disabling mental  
22 impairment.

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23  
24 <sup>3</sup> Defendant is correct in noting that evidence pre-dating January 31, 2000, is not  
25 material as the agency previously determined that plaintiff was not disabled prior to this date and  
26 plaintiff did not challenge the decision which is entitled to administrative res judicata.

<sup>4</sup> Plaintiff’s own summary of the evidence skips from Dr. Cheema’s November  
1999 report to a hospitalization in November 2002.

1 Finally, the court finds no error with respect to the ALJ's consideration of Dr.  
2 Dusay's testimony. As the ALJ noted, Dr. Dusay stated that he could find no periods of extended  
3 sobriety prior to October 2007. In fact, Dr. Dusay stated that he could not be sure that  
4 polysubstance abuse was not the cause of plaintiff's problems.

5  
6 **V. CONCLUSION**

7 Based on the foregoing, the court concludes that the Commissioner's final  
8 decision is based on substantial evidence and proper legal analysis. Accordingly, IT IS HEREBY  
9 ORDERED that:

- 10 1. Plaintiff's motion for summary judgment (Doc. 18) is denied;  
11 2. Defendant's cross-motion for summary judgment (Doc. 19) is granted; and  
12 3. The Clerk of the Court is directed to enter judgment and close this file.

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14  
15 DATED: November 22, 2010

16   
17 **CRAIG M. KELLISON**  
18 UNITED STATES MAGISTRATE JUDGE  
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