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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 GEORGE WAYNE ANDERSON, No. CIV S-09-3416-CMK
12 Plaintiff,
13 vs. MEMORANDUM OPINION AND ORDER
14 COMMISSIONER OF SOCIAL SECURITY,
15
Defendant.
16 ________________________________/

17 Plaintiff, who is proceeding with retained counsel, brings this action for judicial
18 review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g).
19 Pursuant to the written consent of all parties, this case is before the undersigned as the presiding
20 judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). Pending
21 before the court are plaintiff's motion for summary judgment (Doc. 17) and defendant's cross-
22 motion for summary judgment (Doc. 19). For the reasons discussed below, the court will grant
23 plaintiff's motion for summary judgment and remand this matter for either payment of benefits or
24 further proceedings.
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I. PROCEDURAL HISTORY[1]

Plaintiff applied for social security benefits on May 25, 2006, alleging an onset of disability on September 8, 2002, due to physical impairments. (Certified administrative record ("CAR") 43, 67-74, 77-87.) Specifically, plaintiff claims disability based on impairments of the back, knee injury, arthritis, headaches, and bilateral carpal tunnel. (CAR 78). Plaintiff's claim was denied initially and upon reconsideration. Plaintiff requested an administrative hearing, which was held on October 23, 2007, before Administrative Law Judge ("ALJ") Sandra K. Rogers. In a February 20, 2008, decision, the ALJ concluded that plaintiff is not disabled[2] based

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[1] Because the parties are familiar with the factual background of this case, including plaintiff's medical history, the undersigned does not exhaustively relate those facts here. The facts related to plaintiff's impairments and medical history will be addressed insofar as they are relevant to the issues presented by the parties' respective motions.

[2] Disability Insurance Benefits are paid to disabled persons who have contributed to the Social Security program, 42 U.S.C. § 401 et seq. Supplemental Security Income ("SSI") is paid to disabled persons with low income. 42 U.S.C. § 1382 et seq. Under both provisions, disability is defined, in part, as an "inability to engage in any substantial gainful activity" due to "a medically determinable physical or mental impairment." 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. See 20 C.F.R. §§ 423(d)(1)(a), 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987). The following summarizes the sequential evaluation:

> Step one: Is the claimant engaging in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.
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> Step two: Does the claimant have a "severe" impairment? If so, proceed to step three. If not, then a finding of not disabled is appropriate.
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> Step three: Does the claimant's impairment or combination of impairments meet or equal an impairment listed in 20 C.F.R., Pt. 404, Subpt. P, App.1? If so, the claimant is automatically determined disabled. If not, proceed to step four.
>
> Step four: Is the claimant capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five.
>
> Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

The claimant bears the burden of proof in the first four steps of the sequential evaluation

on the following findings:

1. The claimant meets the insured status requirements of the Social Security Act though September 30, 2007.

2. The claimant has not engaged in substantial gainful activity since September 8, 2002, the alleged onset date (20 CFR 404.1520(b) and 404.1571 *et seq*.).

3. The claimant has the following severe impairments: back, knee and bilateral carpal tunnel syndrome impairments. (20 CFR 404.1520(c)).

4. The claimant does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, and 404.1526).

5. After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform light work as follows: able to lift 20 pounds occasionally and 10 pounds frequently; stand, walk or sit for 6 hours in an 8 hour day; could occasionally balance, stoop kneel, crouch, crawl and climb; cannot do any forceful gripping, grasping, torquing or twisting with either hand.

6. The claimant is unable to perform any past relevant work. (20 CFR 404.1565).

7. The claimant was born on June 6, 1954 and was 48 years old, which is defined as a younger individual age 18-49, on the alleged disability onset date (20 CFR 404.1563).

8. The claimant has at least a high school education and is able to communicate in English (20 CFR 404.1564).

9. Transferability of job skills is not material to the determination of disability because using the Medical-Vocational Rules as a framework supports a finding that the claimant is "not disabled," whether or not the claimant has transferable job skills (See SSR 82-41 and 20 CFR Part 404, Subpart P, Appendix 2).

10. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform (20 CFR 404.1560(c) and 404.1566).

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process. Bowen, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential evaluation process proceeds to step five. Id.

11. The claimant has not been under a disability, as defined in the Social Security Act, from September 8, 2002 through the date of this decision (20 CFR 404.1520(g)).

CAR 17-24. After the Appeals Council declined review on October 30, 2009, this appeal followed.

II. STANDARD OF REVIEW

The court reviews the Commissioner's final decision to determine whether it is: (1) based on proper legal standards; and (2) supported by substantial evidence in the record as a whole. See Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). "Substantial evidence" is more than a mere scintilla, but less than a preponderance. See Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996). It is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 402 (1971). The record as a whole, including both the evidence that supports and detracts from the Commissioner's conclusion, must be considered and weighed. See Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986); Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not affirm the Commissioner's decision simply by isolating a specific quantum of supporting evidence. See Hammock v. 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). Therefore, where the evidence is susceptible to more than one rational interpretation, one of which supports the Commissioner's decision, the decision must be affirmed, see Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002), and may be set aside only if an improper legal standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).

III. DISCUSSION

Plaintiff argues the ALJ erred in four ways: (1) the ALJ erred in her treatment of the medical opinions; (2) the ALJ improperly discounted plaintiff's credibility; (4) the ALJ's

residual functional capacity assessment was erroneous; and (4) the ALJ improperly rejected the vocational expert's testimony and improperly utilized the "Grids[3]".

A. MEDICAL OPINIONS

Plaintiff contends the ALJ made a reversible error in finding him capable of light work when both the treating and examining physicians found he could not. Defendant argues the ALJ appropriately weighed the medical opinions, and resolved the disputes among contradicting opinions.

The weight given to medical opinions depends in part on whether they are proffered by treating, examining, or non-examining professionals. See Lester v. Chater, 81 F.3d 821, 830-31 (9th Cir. 1995). Ordinarily, more weight is given to the opinion of a treating professional, who has a greater opportunity to know and observe the patient as an individual, than the opinion of a non-treating professional. See id.; Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996); Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987). The least weight is given to the opinion of a non-examining professional. See Pitzer v. Sullivan, 908 F.2d 502, 506 & n.4 (9th Cir. 1990).

In addition to considering its source, to evaluate whether the Commissioner properly rejected a medical opinion the court considers whether: (1) contradictory opinions are in the record; and (2) clinical findings support the opinions. The Commissioner may reject an uncontradicted opinion of a treating or examining medical professional only for "clear and convincing" reasons supported by substantial evidence in the record. See Lester, 81 F.3d at 831. While a treating professional's opinion generally is accorded superior weight, if it is contradicted by an examining professional's opinion which is supported by different independent clinical findings, the Commissioner may resolve the conflict. See Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995). A contradicted opinion of a treating or examining professional may be

[3] The Medical-Vocational Guidelines are commonly referred to as the "Grids." See 20 C.F.R., Part 404, Subpart P, Appendix 2.

rejected only for "specific and legitimate" reasons supported by substantial evidence. See Lester, 81 F.3d at 830. This test is met if the Commissioner sets out a detailed and thorough summary of the facts and conflicting clinical evidence, states her interpretation of the evidence, and makes a finding. See Magallanes v. Bowen, 881 F.2d 747, 751-55 (9th Cir. 1989). Absent specific and legitimate reasons, the Commissioner must defer to the opinion of a treating or examining professional. See Lester, 81 F.3d at 830-31. The opinion of a non-examining professional, without other evidence, is insufficient to reject the opinion of a treating or examining professional. See id. at 831. In any event, the Commissioner need not give weight to any conclusory opinion supported by minimal clinical findings. See Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999) (rejecting treating physician's conclusory, minimally supported opinion); see also Magallanes, 881 F.2d at 751.

In her decision, the ALJ discussed the medical opinions as follows:

> A Complete Medical Report (Physical) was prepared by Gilbert Silva, PAC. It diagnosed the claimant with osteoarthritis, chronic back pain, diabetes mellitus II, obesity and recurrent kidney stones. The claimant could occasionally lift/carry up to 20 pounds. The claimant could sit for a total of 4 hours; stand for a total of 3 hours and walk for a total of 1 hour in an 8 hour workday. The claimant could occasionally use his right hand and feet. He could occasionally climb, balance, stoop, kneel and crawl but never crouch. He could also occasionally reach, handle and push/pull but frequently feel, hear and speak. The claimant was to avoid all exposure to heights, moving machinery, temperature extremes and vibrations. He was to avoid even moderate exposure to chemicals, noise, humidity, dust and fumes. The individual who completed this form is not a medical doctor and cannot provide evidence to establish a medically determinable impairment; the individual's views can, however, be considered as evidence of the severity of the claimant's impairments and as evidence of how those impairments affect the claimant's ability to work (20 CFR § 404.1513(a) & (d)). Appropriately limited to the severity of the claimant's impairments and their affect on the claimant's ability to work, I give little weight to this assessment as it is inconsistent with the weight of the evidence of record.
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> A Physical Residual Functional Capacity Assessment was prepared by a Social Security Administration medical consultant and dated September 21, 2006. It determined that the claimant could lift/carry 20 pounds occasionally and 10 pounds frequently;

stand and/or walk (with normal breaks) for a total of about 6 hours in an 8-hour workday; sit (with normal breaks) for a total of about 6 hours in an 8-hour workday; and, push and/or pull was limited in the upper extremities. The claimant could occasionally climb, balance, stoop, kneel, crouch and crawl. Fingering (fine manipulation) was limited. The claimant had no visual, communicative or environmental limitations. I give great weight to these findings because the form is complete, the findings are greatly consistent with the record as a whole and the medical consultant's specialty is internal medicine.

> A Complete Internal Medicine Evaluation was completed by Joseph Garfinkel, M.D., and dated August 10, 2006. It noted the following impressions: chronic low back pain with some radicular signs; migraine headaches; carpal tunnel, left wrist; status post carpal tunnel surgery to right wrist; and arthritis of multiple joints most likely from moderate osteoarthritis. The claimant could lift or carry 20 pounds occasionally and 10 pounds frequently; could stand or walk/sit for up to 6 hours out of an 8-hour day; must periodically alternate sitting and standing to relieve pain or discomfort every 2 hours; can occasionally climb, stoop, kneel or crouch; and is limited in fine manipulation of the bilateral hands. I give some weight to these findings because they are somewhat consistent with the record as a whole and Dr. Garfinkel is board eligible in internal medicine.

> A Qualified Medical Legal Evaluation was prepared by Max Moses, M.D., and dated November 20, 2004. It noted that the claimant fell at work on September 8, 2002. The claimant was precluded from very heavy lifting, prolonged weight bearing or prolonged sitting. Dr. Moses noted in a Supplemental Qualified Medical Legal Report that he would not change the opinions and recommendations outlined in his original evaluation. I give appropriate weight to these findings because they are the result of an in-person examination and are contained in a thorough and detailed report.

(CAR at 21-22).

Plaintiff's argument as to the medical opinions is that "[i]t was reversible error for Judge Rogers to find the claimant capable of light work when the claimant's treating and examining physicians found he could not." This is the sum of his argument, without enlightening the court any further. A review of the medical opinions, however, reveals that, as

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defendant contends, none of the medical opinions[4] found plaintiff incapable of light work. Rather, the opinions were somewhat inconsistent in the assessment of plaintiff's ability to use his hands.

The medical opinions, as outlined in the ALJ's decision, all found plaintiff capable of light work, including the ability to lift 10 to 20 pounds, but generally limited his ability as to fine manipulation with his hands. There are treatment notes included in the record where no manipulative limitations are noted; however, those treatment notes simply do not address manipulative limitations. There is no medical opinion in the record which the court has found or the parties have cited which actually state that plaintiff has no manipulative limitations. This is the case with the Qualified Medical Legal Evaluation (QME) discussed in the ALJ's opinion. Dr. Moses evaluated Plaintiff relating to his workers' compensation injury, his back, and was not evaluating his manipulative abilities. While Dr. Moses indicates no specific limitations as to plaintiff's manipulative abilities and notes no deformity or tenderness in plaintiff's wrist, as well as a normal range of motion, Dr. Moses was assessing plaintiff's abilities relating to his back injury. Thus, the lack of finding manipulation limitations is not necessarily contradictory to the other opinions.[5] (CAR 187-197).

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[4] An opinion by a physician's assistant, as set forth in the ALJ's opinion, did find plaintiff more limited as to his sit/stand/walk abilities. However, as discussed infra, this opinion, even if credited, would not change the outcome of this case. In addition, the ALJ properly addressed it as a physician's assistant's opinion is not an "acceptable medical source." See 20 CFR § 404.1513(d). The ALJ stated she gave the assessment little weight as it was inconsistent with the other evidence. The undersigned finds no error in this assessment.

[5] Similarly, the opinion submitted by Dr. Wall after the ALJ had rendered her decision is not necessary a conflicting opinion as Dr. Wall also assesses plaintiff with some, but not complete, limitations in the use of his hands. In addition, as defendant argues, Dr. Wall's opinion does not provide sufficient explanation for the limitations assessed. Instead of setting forth the medical findings supporting the assessment, as required by the form, Dr. Wall simply notes pain and stiffness related to osteoarthritis ("Pain R/T OA; Pain + joint stiffness R/T OA") (CAR 290). The failure of the Appeals Council to address Dr. Wall's opinion may therefore be harmless. However, as discussed infra, even without Dr. Wall's opinion, the RFC determination was not supported by the medical opinions accepted by the ALJ.

The undersigned finds no error in the ALJ's treatment of the medical opinions in the record. The ALJ provided sufficient reasons as to her decision to accord appropriate weight to each of the decisions, and that decision is supported by the evidence in the record. In addition, the undersigned does not find significant differences in the medical opinions rendered and accepted by the ALJ. Both the examining and non-examining physicians found Plaintiff capable of lifting 20 pounds occasionally, ten pounds frequently; sitting, standing and/or walking for six hours in an eight-hour workday (with normal breaks and alternating); postural limitations relating to climbing, balancing, etc.; and limitations of fine manipulations. These opinions are not contradicted by the QME who only addressed plaintiff's lifting and sitting abilities. Thus, the undersigned finds no error in ALJ's acceptance, and treatment, of these medical opinions.

B. PLAINTIFF'S CREDIBILITY

Plaintiff contends the ALJ erred in her credibility determination, finding "plaintiff's testimony not credible when his testimony was supported by all of the medical record and by the testimony of the vocational expert."

The Commissioner determines whether a disability applicant is credible, and the court defers to the Commissioner's discretion if the Commissioner used the proper process and provided proper reasons. See Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1996). An explicit credibility finding must be supported by specific, cogent reasons. See Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990). General findings are insufficient. See Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995). Rather, the Commissioner must identify what testimony is not credible and what evidence undermines the testimony. See id. Moreover, unless there is affirmative evidence in the record of malingering, the Commissioner's reasons for rejecting testimony as not credible must be "clear and convincing." See id.; see also Carmickle v. Commissioner, 533 F.3d 1155, 1160 (9th Cir. 2008) (citing Lingenfelter v Astrue, 504 F.3d 1028, 1936 (9th Cir. 2007), and Gregor v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006)).

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If there is objective medical evidence of an underlying impairment, the Commissioner may not discredit a claimant's testimony as to the severity of symptoms merely because they are unsupported by objective medical evidence. See Bunnell v. Sullivan, 947 F.2d 341, 347-48 (9th Cir. 1991) (en banc). As the Ninth Circuit explained in Smolen v. Chater:

> The claimant need not produce objective medical evidence of the [symptom] itself, or the severity thereof. Nor must the claimant produce objective medical evidence of the causal relationship between the medically determinable impairment and the symptom. By requiring that the medical impairment "could reasonably be expected to produce" pain or another symptom, the Cotton test requires only that the causal relationship be a reasonable inference, not a medically proven phenomenon.

80 F.3d 1273, 1282 (9th Cir. 1996) (referring to the test established in Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986)).

The Commissioner may, however, consider the nature of the symptoms alleged, including aggravating factors, medication, treatment, and functional restrictions. See Bunnell, 947 F.2d at 345-47. In weighing credibility, the Commissioner may also consider: (1) the claimant's reputation for truthfulness, prior inconsistent statements, or other inconsistent testimony; (2) unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment; (3) the claimant's daily activities; (4) work records; and (5) physician and third-party testimony about the nature, severity, and effect of symptoms. See Smolen, 80 F.3d at 1284 (citations omitted). It is also appropriate to consider whether the claimant cooperated during physical examinations or provided conflicting statements concerning drug and/or alcohol use. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If the claimant testifies as to symptoms greater than would normally be produced by a given impairment, the ALJ may disbelieve that testimony provided specific findings are made. See Carmickle, 533 F.3d at 1161 (citing Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)).

Regarding reliance on a claimant's daily activities to find testimony of disabling pain not credible, the Social Security Act does not require that disability claimants be utterly incapacitated. See Fair v. Bowen, 885 F.2d 597, 602 (9th Cir. 1989). The Ninth Circuit has

repeatedly held that the "mere fact that a plaintiff has carried out certain daily activities . . . does not . . .[necessarily] detract from her credibility as to her overall disability." See Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007) (quoting Vertigan v. Heller, 260 F.3d 1044, 1050 (9th Cir. 2001)); see also Howard v. Heckler, 782 F.2d 1484, 1488 (9th Cir. 1986) (observing that a claim of pain-induced disability is not necessarily gainsaid by a capacity to engage in periodic restricted travel); Gallant v. Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984) (concluding that the claimant was entitled to benefits based on constant leg and back pain despite the claimant's ability to cook meals and wash dishes); Fair, 885 F.2d at 603 (observing that "many home activities are not easily transferable to what may be the more grueling environment of the workplace, where it might be impossible to periodically rest or take medication"). Daily activities must be such that they show that the claimant is "able to spend a substantial part of his day engaged in pursuits involving the performance of physical functions that are transferable to a work setting." Fair, 885 F.2d at 603. The ALJ must make specific findings in this regard before relying on daily activities to find a claimant's pain testimony not credible. See Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005).

Here, the ALJ stated:

> The claimant's statements and those of third parties concerning the claimant's impairments and their impact on the claimant's ability to work are not credible in light of discrepancies between the claimant's assertions and information contained in the documentary reports and the reports of the treating and examining practitioners. Although I do not find the claimant at all times symptom free, the evidence does not support the degree of limitation the claimant alleges.
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> Although the claimant has described daily activities which are fairly limited, two factors weigh against considering these allegations to be strong evidence in favor of finding the claimant disabled. First, the allegedly limited daily activities cannot be objectively verified with any reasonable degree of certainty. Secondly, even if the claimant's daily activities are truly as limited as alleged, it is difficult to attribute that degree of limitation to the claimant's medical condition, as opposed to other reasons, in view of the relatively weak medical evidence and other factors discussed in this decision.

> The claimant has not generally received on-going and continuous medical treatment of the type one would expect for a totally disabled individual and the claimant's alleged loss of function is not supported by objective medical findings. I also note that some of the claimant's subjective symptoms are unsupported by objective medical tests.
>
> Another factor influencing the conclusions reached in this decision is the claimant's generally unpersuasive appearance, presentation and demeanor while testifying at the hearing. It is emphasized that this observation is only one among many being relied on in reaching a conclusion regarding the credibility of the claimant's allegations and the claimant's residual functional capacity and not determinative.

(CAR 20-21).

Plaintiff argues the ALJ erred in her determination that his testimony was not credible as it was supported by the medical records and the ALJ based her determination of his appearance at the hearing. Defendant counters that the ALJ supported her determination based on several legally sound reasons.

The ALJ noted several reasons for finding plaintiff's testimony not credible. She noted the "discrepancies between the claimant's assertions and information contained in the documentary reports and the reports of the treating and examining practitioners." She also noted that plaintiff's limited daily activities could not be verified, and that it was not clear the limitations in his daily activities are attributed to his medical condition as opposed to other reasons. The ALJ further noted the relatively weak medical evidence, including the lack of "on-going and continuous medical treatment of the type one would expect for a totally disabled individual" and the lack of objective medical findings to support his alleged loss of function and subjective symptoms. Finally, the ALJ found plaintiff's "appearance, presentation and demeanor" at the hearing to be unpersuasive.

The court does not substitute its own judgment over that of the ALJ's when there is evidence which reasonably supports either confirming or reversing the ALJ's decision. See Tackett v. Apfel, 180 F.3d 1094,1098 (9th Cir. 1999). This applies to the ALJ's credibility determination as well. Contrary to plaintiff's argument, the ALJ did not rely solely on his

appearance at the hearing. Instead, the ALJ set forth several reasons for her determination, including the weak medical evidence and inconsistencies in the record. These are clear and convincing reasons, as set forth in the ALJ's opinion, and they are supported by substantial evidence in the record. While the ALJ's interpretation of plaintiff's testimony and other evidence may not be the only reasonable one, it is still a reasonable interpretation and is supported by substantial evidence. Providing the ALJ's decision with the proper deference, the court finds the ALJ's credibility determination was not erroneous.

C. RESIDUAL FUNCTIONAL CAPACITY DETERMINATION

Plaintiff next contends the ALJ erred in her assessment of his residual functional capacity (RFC). He specifically takes issue with the ALJ's determination that he could perform a variety of light work because all light work requires the good use of both hands for fine manipulation, where plaintiff is limited. Defendant counters that the ALJ's determination was proper in light of the medical evidence and opinions.

As noted above, the medical opinions in the record all basically determined plaintiff was capable of light work, defined as that involving lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. See 20 C.F.R. §§ 404.1567(b) and 416.967(b). In addition, they assessed plaintiff with limited fine manipulation abilities. The ALJ, however, assessed plaintiff with a limitation in his ability to forcefully grip, grasp, torque or twist, rather than a limited fine manipulation ability. The ALJ fails to support this modification. None of the examining or reviewing physicians indicate a limitation in plaintiff's ability to forcefully grip, grasp, torque or twist. Instead, they found his fine manipulation ability was limited. The fine manipulaiton limitation is missing from the ALJ's RFC. This is material in that the hypothetical posed to the vocational expert (VE) at the hearing failed to include the proper limitation, which then provided the incorrect assessment of the availability of jobs in the national economy which plaintiff is able to perform.

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The undersigned therefore finds the ALJ erred in her determination of plaintiff's RFC. The ALJ credited the agency physician's opinion as to plaintiff's limitations, which included a fine manipulation limitation. The ALJ gave no reasons in her decision to modify that fine manipulation limitation into a limitation relating to the forceful gripping, grasping, torquing or twisting as set forth in the RFC. The proper RFC determination should have included the following limitations, as supported by the medical opinions the ALJ gave great weight to:

> The plaintiff has the residual functional capacity to perform light work as follows: able to lift 20 pounds occasionally and 10 pounds frequently; stand, walk or sit for 6 hours in an 8 hour day; could occasionally balance, stoop kneel, crouch, crawl and climb; is limited in fine manipulation of both hands.

As discussed in more detail below, the undersigned finds this error to be reversible.

D. VOCATIONAL EXPERT

Finally, plaintiff argues the ALJ erred by failing to pose a proper hypothetical[6] to the vocational expert at the hearing. Defendant counters that the ALJ's hypothetical question was proper as it contained all of plaintiff's limitations the ALJ assessed in his RFC.

The ALJ may meet his burden under step five of the sequential analysis by propounding to a vocational expert hypothetical questions based on medical assumptions, supported by substantial evidence, that reflect all the plaintiff's limitations. See Roberts v. Shalala, 66 F.3d 179, 184 (9th Cir. 1995). Specifically, where the Medical-Vocational Guidelines are inapplicable because the plaintiff has sufficient non-exertional limitations, the ALJ is required to obtain vocational expert testimony. See Burkhart v. Bowen, 587 F.2d 1335,

[6] Plaintiff also argues that the ALJ erred in her use of the Medical-Vocational Rules (the "Grids") based on the use of an incorrect age. However, the use of the Grids is not an issue here as the undersigned finds the use of a vocational expert is necessary to determine plaintiff's abilities given his non-exertional limitations relating to the use of his hands. As discussed below, the hypothetical posed to the VE was insufficient. He also argues the hypothetical should have included the need for five to six breaks per day for taking medication. The undersigned agrees with defendant that such a limitation is not supported by the record.

1341 (9th Cir. 1988).

Hypothetical questions posed to a vocational expert must set out all the substantial, supported limitations and restrictions of the particular claimant. See Magallanes v. Bowen, 881 F.2d 747, 756 (9th Cir. 1989). If a hypothetical does not reflect all the claimant's limitations, the expert's testimony as to jobs in the national economy the claimant can perform has no evidentiary value. See DeLorme v. Sullivan, 924 F.2d 841, 850 (9th Cir. 1991). While the ALJ may pose to the expert a range of hypothetical questions based on alternate interpretations of the evidence, the hypothetical that ultimately serves as the basis for the ALJ's determination must be supported by substantial evidence in the record as a whole. See Embrey v. Bowen, 849 F.2d 418, 422-23 (9th Cir. 1988).

Here, the hypothetical the ALJ posed to the VE failed to include plaintiff's fine manipulation limitation. Instead, the ALJ posed the following hypothetical:

> If we assume a person the same age, education, and work experience as the claimant and if we assume as is set forth in Exhibit 11F that they're able to lift 20 pounds occasionally, ten frequently; let's see, stand, walk, or sit six hours in an eight-hour day; could occasionally balance, stoop, kneel, crouch, crawl, and climb; and I'm just trying to see if they quantify this somewhere, cannot do any forceful gripping, grasping, torquing, or twisting with either hand. Would such a person be ale to perform the claimant's past relevant work?(CAR 39-40).

Based on the erroneous RFC, this hypothetical was insufficient. The ALJ cited Exhibit 11F as the basis for this hypothetical, which is the same opinion she cited as giving great weight to for assessing the RFC. As discussed above, however, the medical opinion did not put a limitation on plaintiff's ability to forcefully grip, grasp, torque or twist with his hands. Rather, the limitation was to avoid frequent fingering (fine manipulation) with both hands. (CAR 229). In response to this hypothetical, the VE testifed that plaintiff would be precluded from his past relevant work, due to the forceful gripping and grasping limitation. (CAR 40). The VE then provided two examples of jobs that plaintiff would be able to perform, available in sufficient numbers even with the limitation in forcefully gripping, grasping, torquing and twisting.

Plaintiff's attorney then followed up on the ALJ's hypothetical with the following question posed to the VE:

> On the same hypothetical on this Exhibit F, with the limitation of being able to only occasionally perform fine manipulation, would that erode the jobs that, that you discussed? (CAR 40).

In response, the VE stated that the additional limitation, fine manipulation, would completely erode the two examples of jobs the VE provided. The VE was not, however, questioned further as to whether there would be jobs in the national economy plaintiff could do based on all of his limitations.

The undersigned therefore finds the testimony elicited from the VE was insufficient to conclusively determine whether jobs exist that plaintiff is capable of performing. This also constitutes reversible error.

E. APPROPRIATE REMEDY

The undersigned finds, based on the errors set forth above, it appropriate to remand this matter. It is in the court's discretion whether to remand for benefits or further proceedings. See Sprague v. Bowen, 812 F.2d 1226, 1232 (9th Cir. 1987). The appropriate remedy in this matter may in fact be a remand for payments of benefits. If assessed with the proper limitations, and based on the VE's testimony as to job availability with the proper limitations assessed, it would appear that plaintiff would be considered disabled as there are no jobs for which plaintiff can perform. However, the testimony of the VE, while hinting at such a finding, stops short of conclusively finding no jobs available as the specific question was not asked. As such, upon remand, defendant may either decide to simply find plaintiff disabled, based on the discussion above, and award payment; or in the alternative, defendant may resubmit this matter to the ALJ with the specific direction to conduct a new hearing in which a VE is called to testify about job availability based on the proper RFC set forth above. If defendant decides to hold a new hearing, the VE must be questioned as to plaintiff's ability to perform jobs in the national economy given all of plaintiff's limitations, including his lifting/carrying

limitations and his fine manipulation limitations.

IV. CONCLUSION

For the foregoing reasons, this matter will be remanded under sentence four of 42 U.S.C. § 405(g) for payment of benefits or further development of the record as specifically set forth above.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment (Doc. 17) is granted;
2. Defendant's cross motion for summary judgment (Doc. 19) is denied;
3. This matter is remanded for payment or further proceedings consistent with this order; and
4. The Clerk of the Court is directed to enter judgment and close this file.

DATED: March 15, 2011

CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE