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

JEFFREY WILDE,

No. 2:16-CV-0952-JAM-CMK

Plaintiff,

vs.

FINDINGS AND RECOMMENDATIONS

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

_____ /

Plaintiff, who is proceeding with retained counsel, brings this action under 42 U.S.C. § 405(g) for judicial review of a final decision of the Commissioner of Social Security. Pending before the court are plaintiff’s motion for summary judgment (Doc. 15) and defendant’s cross-motion for summary judgment (Doc. 20).

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I. PROCEDURAL HISTORY

Plaintiff applied for social security benefits on February 29, 2012. In the application, plaintiff claims that disability began on December 28, 2010. Plaintiff's claim was initially denied. Following denial of reconsideration, plaintiff requested an administrative hearing, which was held on February 27, 2014, before Administrative Law Judge ("ALJ") Carol A. Eckersen. In an August 4, 2014, decision, the ALJ concluded that plaintiff is not disabled based on the following relevant findings:

1. The claimant has the following severe impairment(s): ischemic heart disease, chronic obstructive pulmonary disease, mild hip osteoarthritis, lumbar degenerative disc disease, diabetes mellitus, and obesity;
2. The claimant does not have an impairment or combination of impairments that meets or medically equals an impairment listed in the regulations;
3. The claimant has the following residual functional capacity: the claimant can perform sedentary work; he can occasionally climb ramps or stairs, stoop, kneel, crouch, and crawl; he can frequently balance; he should never climb ladders and he should avoid concentrated exposure to cold, heat, wetness and humidity, noise, vibration, fumes, odors, and hazards; the claimant should have a sit/stand option to change position at the workstation twice per hour and take normal breaks; and
4. Considering the claimant's age, education, work experience, residual functional capacity, and vocational expert testimony, the claimant can perform his past relevant work as a data entry clerk and a telephone technician.

After the Appeals Council declined review on March 17, 2016, 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,

1 including both the evidence that supports and detracts from the Commissioner's conclusion, must
2 be considered and weighed. See Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986); Jones
3 v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not affirm the Commissioner's
4 decision simply by isolating a specific quantum of supporting evidence. See Hammock v.
5 Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the administrative
6 findings, or if there is conflicting evidence supporting a particular finding, the finding of the
7 Commissioner is conclusive. See Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987).
8 Therefore, where the evidence is susceptible to more than one rational interpretation, one of
9 which supports the Commissioner's decision, the decision must be affirmed, see Thomas v.
10 Barnhart, 278 F.3d 947, 954 (9th Cir. 2002), and may be set aside only if an improper legal
11 standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th
12 Cir. 1988).

14 III. DISCUSSION

15 In his motion for summary judgment, plaintiff argues: (1) the ALJ erred in
16 rejecting his testimony and statements as not credible; and (2) the ALJ failed to correctly identify
17 plaintiff's past relevant work.

18 A. Credibility Finding

19 The Commissioner determines whether a disability applicant is credible, and the
20 court defers to the Commissioner's discretion if the Commissioner used the proper process and
21 provided proper reasons. See Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1996). An explicit
22 credibility finding must be supported by specific, cogent reasons. See Rashad v. Sullivan, 903
23 F.2d 1229, 1231 (9th Cir. 1990). General findings are insufficient. See Lester v. Chater, 81 F.3d
24 821, 834 (9th Cir. 1995). Rather, the Commissioner must identify what testimony is not credible
25 and what evidence undermines the testimony. See id. Moreover, unless there is affirmative
26 evidence in the record of malingering, the Commissioner's reasons for rejecting testimony as not

1 credible must be “clear and convincing.” See id.; see also Carmickle v. Commissioner, 533 F.3d
2 1155, 1160 (9th Cir. 2008) (citing Lingenfelter v Astrue, 504 F.3d 1028, 1936 (9th Cir. 2007),
3 and Gregor v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006)).

4 If there is objective medical evidence of an underlying impairment, the
5 Commissioner may not discredit a claimant’s testimony as to the severity of symptoms merely
6 because they are unsupported by objective medical evidence. See Bunnell v. Sullivan, 947 F.2d
7 341, 347-48 (9th Cir. 1991) (en banc). As the Ninth Circuit explained in Smolen v. Chater:

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

15 80 F.3d 1273, 1282 (9th Cir. 1996) (referring to the test established in
16 Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986)).

17 The Commissioner may, however, consider the nature of the symptoms alleged,
18 including aggravating factors, medication, treatment, and functional restrictions. See Bunnell,
19 947 F.2d at 345-47. In weighing credibility, the Commissioner may also consider: (1) the
20 claimant’s reputation for truthfulness, prior inconsistent statements, or other inconsistent
21 testimony; (2) unexplained or inadequately explained failure to seek treatment or to follow a
22 prescribed course of treatment; (3) the claimant’s daily activities; (4) work records; and (5)
23 physician and third-party testimony about the nature, severity, and effect of symptoms. See
24 Smolen, 80 F.3d at 1284 (citations omitted). It is also appropriate to consider whether the
25 claimant cooperated during physical examinations or provided conflicting statements concerning
26 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)).

1 Regarding reliance on a claimant’s daily activities to find testimony of disabling
2 pain not credible, the Social Security Act does not require that disability claimants be utterly
3 incapacitated. See Fair v. Bowen, 885 F.2d 597, 602 (9th Cir. 1989). The Ninth Circuit has
4 repeatedly held that the “. . . mere fact that a plaintiff has carried out certain daily activities . . .
5 does not . . . [necessarily] detract from her credibility as to her overall disability.” See Orn v.
6 Astrue, 495 F.3d 625, 639 (9th Cir. 2007) (quoting Vertigan v. Heller, 260 F.3d 1044, 1050 (9th
7 Cir. 2001)); see also Howard v. Heckler, 782 F.2d 1484, 1488 (9th Cir. 1986) (observing that a
8 claim of pain-induced disability is not necessarily gainsaid by a capacity to engage in periodic
9 restricted travel); Gallant v. Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984) (concluding that the
10 claimant was entitled to benefits based on constant leg and back pain despite the claimant’s
11 ability to cook meals and wash dishes); Fair, 885 F.2d at 603 (observing that “many home
12 activities are not easily transferable to what may be the more grueling environment of the
13 workplace, where it might be impossible to periodically rest or take medication”). Daily
14 activities must be such that they show that the claimant is “. . . able to spend a substantial part of
15 his day engaged in pursuits involving the performance of physical functions that are transferable
16 to a work setting.” Fair, 885 F.2d at 603. The ALJ must make specific findings in this regard
17 before relying on daily activities to find a claimant’s pain testimony not credible. See Burch v.
18 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005).

19 As to plaintiff’s credibility, the ALJ stated:

20 The credibility of the claimant’s allegations regarding the severity of his
21 symptoms and limitations is diminished because those allegations are
22 greater than expected in light of the objective evidence of record. The
23 positive objective clinical and diagnostic findings since the alleged onset
24 date detailed above do not support more restrictive functional limitations
25 than those assessed herein. Specifically, the claimant continues to have
26 chest pain for which he takes Nitroglycerin weekly. He gets shortness of
breath and coughing, which is related to his COPD. Despite these
symptoms, he is able to take care of his own personal hygiene and keep
track of his own medications. He takes a long time to fall asleep but
sleeps for 10-12 hours a night and feels rested when he wakes up. He can
heat food in the microwave but only cleans a pan when he needs to use it
again. He cleans the bathroom but not much else because it is not

1 comfortable to squat or reach due to back pain. He could grocery shop,
2 attends church twice a week for one hour each time, and does not have
3 difficulty getting along with others. He takes his dog to the park to let him
4 play every 2 weeks. He can sit for one hour, stand or walk for 30 minutes
5 with breaks, and can lift 6 pounds.

6 Finally, as mentioned earlier, the record reflects work activity after the
7 alleged onset date. Although that work activity did not constitute
8 disqualifying substantial gainful activity, it does indicate that the
9 claimant's daily activities have, at least at times, been somewhat greater
10 than the claimant has generally reported.

11 Plaintiff argues that the ALJ's analysis is legally insufficient because the ALJ
12 does not state which specific portions of plaintiff's testimony are undermined by the referenced
13 portions of the medical record. The court agrees. As stated above, general findings are
14 insufficient and the ALJ must identify what testimony is not credible and what evidence
15 undermines the testimony. See Lester, 81 F.3d at 834; see also Garrison v. Colvin, 759 F.3d 995
16 (9th Cir. 2014); Treichler v. Commissioner, 775 F.3d 1090 (9th Cir. 2014); Brown-Hunter v.
17 Colvin, 806 F.3d 487 (9th Cir. 2015). In this case, the court has carefully reviewed the ALJ's
18 hearing decision and cannot find any references to plaintiff's specific allegations or symptoms.
19 Because the ALJ failed to identify plaintiff's specific allegations, the court cannot say that the
20 ALJ's discussion of plaintiff's credibility linked to any finding that any particular statement is
21 not credible. The court is left to guess which of plaintiff's symptoms allegations are undermined
22 by the evidence discussed by the ALJ.

23 The matter should be remanded for a new credibility finding.

24 **B. Vocational Finding**

25 Defendant concedes that the ALJ erred in concluding that plaintiff could perform
26 his past relevant work as a data entry clerk and a telephone technician because the vocational
expert testified that a person with the residual functional capacity found by the ALJ could not do
such work. Defendant, however, argues that the error is harmless because "there was substantial
evidence in the record of other work Plaintiff could perform. . . ." In particular, defendant
contends that the vocational expert testified that a hypothetical person with plaintiff's residual

1 functional capacity could perform the job of procurement clerk.

2 The Ninth Circuit has applied harmless error analysis in social security cases in a
3 number of contexts. For example, in Stout v. Commissioner of Social Security, 454 F.3d 1050
4 (9th Cir. 2006), the court stated that the ALJ's failure to consider uncontradicted lay witness
5 testimony could only be considered harmless “. . . if no reasonable ALJ, when fully crediting the
6 testimony, could have reached a different disability determination.” Id. at 1056; see also Robbins
7 v. Social Security Administration, 466 F.3d 880, 885 (9th Cir. 2006) (citing Stout, 454 F.3d at
8 1056). Similarly, in Batson v. Commissioner of Social Security, 359 F.3d 1190 (9th Cir. 2004),
9 the court applied harmless error analysis to the ALJ's failure to properly credit the claimant's
10 testimony. Specifically, the court held:

11 However, in light of all the other reasons given by the ALJ for
12 Batson's lack of credibility and his residual functional capacity, and in
13 light of the objective medical evidence on which the ALJ relied there was
14 substantial evidence supporting the ALJ's decision. Any error the ALJ
15 may have committed in assuming that Batson was sitting while watching
16 television, to the extent that this bore on an assessment of ability to work,
17 was in our view harmless and does not negate the validity of the ALJ's
18 ultimate conclusion that Batson's testimony was not credible.

19 Id. at 1197 (citing Curry v. Sullivan, 925 F.2d 1127, 1131 (9th Cir. 1990)).

20 In Curry, the Ninth Circuit applied the harmless error rule to the ALJ's error with respect to the
21 claimant's age and education. The Ninth Circuit also considered harmless error in the context of
22 the ALJ's failure to provide legally sufficient reasons supported by the record for rejecting a
23 medical opinion. See Widmark v. Barnhart, 454 F.3d 1063, 1069 n.4 (9th Cir. 2006).

24 The harmless error standard was applied in Carmickle v. Commissioner, 533 F.3d
25 1155 (9th Cir. 2008), to the ALJ's analysis of a claimant's credibility. Citing Batson, the court
26 stated: “Because we conclude that . . . the ALJ's reasons supporting his adverse credibility
finding are invalid, we must determine whether the ALJ's reliance on such reasons was harmless
error.” See id. at 1162. The court articulated the difference between harmless error standards set

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1 forth in Stout and Batson as follows:

2 . . . [T]he relevant inquiry [under the Batson standard] is not
3 whether the ALJ would have made a different decision absent any error. . .
4 it is whether the ALJ’s decision remains legally valid, despite such error.
5 In Batson, we concluded that the ALJ erred in relying on one of several
6 reasons in support of an adverse credibility determination, but that such
7 error did not affect the ALJ’s decision, and therefore was harmless,
8 because the ALJ’s remaining reasons *and ultimate credibility*
9 *determination* were adequately supported by substantial evidence in the
10 record. We never considered what the ALJ would do if directed to
11 reassess credibility on remand – we focused on whether the error impacted
12 the *validity* of the ALJ’s decision. Likewise, in Stout, after surveying our
13 precedent applying harmless error on social security cases, we concluded
14 that “in each case, the ALJ’s error . . . was inconsequential to the *ultimate*
15 *nondisability determination*.”

16 Our specific holding in Stout does require the court to consider
17 whether the ALJ would have made a different decision, but significantly,
18 in that case the ALJ failed to provide *any reasons* for rejecting the
19 evidence at issue. There was simply nothing in the record for the court to
20 review to determine whether the ALJ’s decision was adequately supported.

21 Carmickle, 533 F.3d at 1162-63 (emphasis in original; citations omitted).

22 Thus, where the ALJ errs in not providing any reasons supporting a particular determination (i.e.,
23 by failing to consider lay witness testimony), the Stout standard applies and the error is harmless
24 if no reasonable ALJ could have reached a different conclusion had the error not occurred.

25 Otherwise, where the ALJ provides analysis but some part of that analysis is flawed (i.e., some
26 but not all of the reasons given for rejecting a claimant’s credibility are either legally insufficient
or unsupported by the record), the Batson standard applies and any error is harmless if it is
inconsequential to the ultimate decision because the ALJ’s disability determination nonetheless
remains valid.

27 The court cannot say that the ALJ’s vocational error was harmless. As discussed
28 above, the ALJ’s credibility finding was not based on proper legal analysis. Absent this error, it
29 is possible that the ALJ would have made a different residual functional capacity assessment
30 which, in turn, would affect the vocational expert’s testimony that plaintiff could perform the job
31 of procurement clerk. Applying the Stout standard, it is impossible to determine whether no

1 reasonable ALJ could have reached a different conclusion had the vocational error not occurred
2 because the credibility error infected the vocational expert's testimony. Similarly, applying the
3 Batson standard, the credibility error makes it impossible to determine whether the vocational
4 error is inconsequential to the ultimate determination, again because the vocational expert's
5 testimony may have been undermined by a proper credibility analysis.

6
7 **IV. CONCLUSION**

8 For the foregoing reasons, this matter should be remanded under sentence four of
9 42 U.S.C. § 405(g) for further development of the record and/or further findings addressing the
10 deficiencies noted above. Accordingly, the undersigned recommends that:

- 11 1. Plaintiff's motion for summary judgment (Doc. 15) be granted;
12 2. Defendant's cross motion for summary judgment (Doc. 20) be denied; and
13 3. This matter be remanded for further proceedings.

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15 DATED: May 2, 2018

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