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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT MARTIN,)	
)	
Plaintiff(s),)	No. C10-4994 BZ
)	
v.)	
)	ORDER RE CROSS MOTIONS
MICHAEL J. ASTRUE,)	FOR SUMMARY JUDGMENT
)	
Defendant(s).)	
_____)	

Pursuant to 42 U.S.C. § 405(g), Robert Martin appeals from a final decision by the Commissioner of Social Security which affirmed the Administrative Law Judge’s (ALJ) order denying his claim for Social Security disability benefits.¹ See Administrative Record (AR) 16-27. Plaintiff’s motion for summary judgment asks me to reverse the ALJ’s decision and either award him benefits or remand this matter for further proceedings before the ALJ. Docket No. 15. Defendant has filed a cross motion for summary judgment arguing that the

¹ The parties have consented to the Court’s jurisdiction for all proceedings, including entry of final judgment under 28 U.S.C. § 636(c).

1 ALJ's decision should be upheld. Docket No. 16. For the
2 reasons explained below, plaintiff's motion is **GRANTED IN PART**
3 and this matter is **REMANDED** to the ALJ for further
4 administrative action consistent with this Order.
5 Defendant's cross motion for summary judgment is **DENIED**.

6 Plaintiff's claim for benefits asserted that he had been
7 disabled since November 17, 2006. Following the standard
8 five-step process for evaluating a Social Security claim,² the
9 ALJ first found that plaintiff had not performed substantial
10 gainful activity since the alleged onset date. AR 18. At
11 step 2, the ALJ determined that plaintiff suffered from
12 obesity and degenerative disc disease of the lumbar and
13 cervical spines.³ AR 18. Plaintiff has a history of back
14 problems for most of his adult life, including several
15 surgical procedures and epidural injections. At step 3, the
16 ALJ found that these impairments did not meet or equal any
17 impairment set out in the Listing of Impairments.⁴ AR 19-20.

18
19 ² See 20 C.F.R. § 404.1520.

20 ³ Plaintiff also claimed that he suffered from other
21 ailments, such as carpal tunnel syndrome and neck pain. AR 20.
22 The ALJ, however, did not consider these ailments past step 2
23 because they did not meet the durational requirements (12
24 months) for disabilities under the Social Security Act. AR 16,
25 20. Moreover, these ailments did not arise until after the
26 date that plaintiff was last insured which was December 31,
2007. AR 16, 20. Plaintiff has not challenged this decision.
Nor has he challenged the ALJ's finding that his obesity did
not prevent him from doing light work. AR 20. Accordingly,
this Order only addresses plaintiff's argument that the ALJ
erred when he concluded that plaintiff was not disabled by his
degenerative disc disease.

27 ⁴ The Commissioner has acknowledged that certain
28 impairments are so severe that they preclude substantial
gainful activity. These impairments are set out in the Listing
of Impairments, 20 C.F.R. Part 404, Subpt. P, App. 1. A

1 At step 4, the ALJ analyzed plaintiff's medical history,
2 including the residual functional capacity (RFC) evaluations
3 conducted by various doctors, and adopted the opinion of Dr.
4 Michael Gurvey, the impartial medical expert who testified by
5 telephone at the administrative hearing. AR 20-26. After
6 reviewing plaintiff's medical file, Dr. Gurvey concluded that
7 plaintiff could perform light exertional level work, with
8 certain exceptions, because he could sit, stand, and walk six
9 hours out of an eight hour work day if he took breaks. AR 25.
10 Based on this RFC evaluation, and the testimony of the
11 vocational expert, the ALJ determined that plaintiff was not
12 disabled since he was capable of performing his past relevant
13 work as an inventory clerk, land surveyor, and communication
14 technician. AR 26.

15 The Commissioner's decision to deny benefits will be
16 disturbed only if it is not supported by substantial evidence
17 or is based on legal error. 42 U.S.C. § 405(g); Batson v.
18 Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1193 (9th Cir.
19 2004). Plaintiff first argues that the ALJ committed legal
20 error by failing to provide clear and convincing reasons for
21 discrediting plaintiff's testimony about the severity of his
22 back pain. The Ninth Circuit has explained the applicable law
23 on this issue as follows:

24 To determine whether a claimant's testimony
25 regarding subjective pain or symptoms is credible,
26 an ALJ must engage in a two-step analysis. First,
the ALJ must determine whether the claimant has
presented objective medical evidence of an

27
28 claimant whose impairment or combination of impairments meet or
equal the "Listings" is presumptively disabled.

1 underlying impairment "which could reasonably be
2 expected to produce the pain or other symptoms
3 alleged." Bunnell v. Sullivan, 947 F.2d 341, 344
4 (9th Cir. 1991)(en banc)(internal quotation marks
5 omitted). The claimant, however, "need not show
6 that her impairment could reasonably be expected to
7 cause the severity of the symptom she has alleged;
8 she need only show that it could reasonably have
9 caused some degree of the symptom." Smolen v.
10 Chater, 80 F.3d 1273, 1282 (9th Cir. 1996). "Thus,
11 the ALJ may not reject subjective symptom testimony
12 ... simply because there is no showing that the
13 impairment can reasonably produce the degree of
14 symptom alleged." Id.; see also Reddick, 157 F.3d
15 at 722 ("[T]he Commissioner may not discredit the
16 claimant's testimony as to the severity of symptoms
17 merely because they are unsupported by objective
18 medical evidence.").

19 Second, if the claimant meets this first test,
20 and there is no evidence of malingering, "the ALJ
21 can reject the claimant's testimony about the
22 severity of her symptoms only by offering specific,
23 clear and convincing reasons for doing so." Smolen,
24 80 F.3d at 1281; see also Robbins, 466 F.3d at 883
25 ("[U]nless an ALJ makes a finding of malingering
26 based on affirmative evidence thereof, he or she may
27 only find an applicant not credible by making
28 specific findings as to credibility and stating
clear and convincing reasons for each.").

Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir.
2007). There is no dispute that the ALJ properly determined
that plaintiff's underlying impairment of degenerative disc
disease was supported by objective evidence. The parties also
agree that there is no evidence of malingering. Thus, the
only issue is whether the ALJ provided clear and convincing
reasons for discrediting plaintiff's pain testimony.

I find that the ALJ failed to do this. In his decision,
the ALJ concluded that plaintiff's "medically determinable
impairments could reasonably be expected to produce the
alleged symptoms, but that the claimant's statements
concerning the intensity, persistence and limiting effects of
these symptoms are generally credible, but only to the extent

1 consistent with the decision." AR 25. The ALJ never
2 explained why he discounted the parts of plaintiff's testimony
3 which were not consistent with the ALJ's decision, and, if
4 this testimony was credited, how plaintiff would be able to
5 work on a daily basis.

6 Plaintiff testified that his back problems caused him
7 severe pain and prevented him from working. See AR 62-65. He
8 explained that even while taking pain medication, such as
9 Vicodin and Norco, doing light work would "knock [his] back
10 out" and "lay [him] up" from a few days up to a few weeks. AR
11 63-65 (when the ALJ asked plaintiff how many days of the week
12 he would be out of commission, plaintiff replied that it was
13 three or four days per week); see also AR 71-72; 178-79 (in
14 plaintiff's application for disability benefits, he wrote that
15 after walking for about 30 minutes, he would experience sharp,
16 burning pain in his back). As explained in Lingenfelter, it
17 was legal error for the ALJ not to explain specifically why
18 he did not believe plaintiff's subjective pain testimony. 504
19 F.3d at 1035-36; see also Greger v. Barnhart, 464 F.3d 968,
20 972 (9th Cir. 2007)("In making a credibility determination,
21 the ALJ must specifically identify what testimony is credible
22 and what testimony undermines the claimant's complaints")
23 (citations and quotations omitted)).

24 Defendant points out that the ALJ's decision included a
25 review of his medical history in which the ALJ alluded to
26 several reasons that may help to explain why he did not
27 believe the entirety of plaintiff's testimony. For instance,
28 the ALJ explained that there was "scant objective evidence to

1 support a conclusion of disability." See AR 25. In reviewing
2 plaintiff's medical history, the ALJ also noted that there
3 were instances where plaintiff reported to his doctors that
4 treatment had reduced his pain. According to defendant, these
5 statements in the ALJ's decision are specific enough to
6 constitute clear and convincing reasons for why the ALJ
7 discounted plaintiff's subjective pain testimony. I disagree
8 and find that the ALJ's decision does not meet the Ninth
9 Circuit's requirement to "specifically identify what testimony
10 is credible and what testimony undermines" plaintiff's
11 complaints. Greger, 464 F.3d at 635; see also Dodrill v.
12 Shalala, 12 F.3d 915, 918 (9th Cir. 1993) ("If the ALJ wished
13 to reject [the claimant's] pain testimony, he was required to
14 point to specific facts in the record which demonstrate that
15 [the claimant] is in less pain than she claims").
16 Furthermore, a finding that there is no objective evidence to
17 substantiate plaintiff's claim "cannot form the sole basis for
18 discounting" subjective symptom testimony. Renteria v.
19 Astrue, 2010 WL 5175051 at *3 (C.D. Cal. 2010) (quoting Burch
20 v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005)); see also
21 Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991).

22 Plaintiff also challenges the ALJ's decision to give more
23 weight to the opinion of the nonexamining medical expert, Dr.
24 Gurvey, than to the examining doctor, Dr. Todd Nguyen. "In
25 order to discount the opinion of an examining physician in
26 favor of the opinion of a nonexamining medical advisor, the
27 ALJ must set forth specific, legitimate reasons that are
28 supported by substantial evidence in the record." Nguyen v.

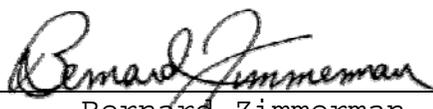
1 Chater, 100 F.3d 1462, 1466 (9th Cir. 1996). In his decision,
2 the ALJ explained that out of all the medical opinions about
3 plaintiff's condition, he gave "the greatest weight" to the
4 opinion of Dr. Gurvey because his assessment was
5 "comprehensive, and well explained, supported by objective
6 findings and he was the only medical source of record able to
7 review and consider the entire evidentiary file and to hear
8 the testimony of the claimant, which I found was generally
9 credible."⁵ AR 26. Defendant argues that this short
10 explanation for adopting Dr. Gurvey's opinion constitutes
11 specific and legitimate reasons which are supported by
12 substantial evidence in the record. I disagree. The ALJ is
13 essentially giving more weight to Dr. Gurvey because he was
14 the last doctor to evaluate plaintiff's claims and therefore
15 had the benefit of having plaintiff's "entire evidentiary
16 file," including hearing plaintiff's testimony, to perform a
17 "comprehensive" review. Dr. Nguyen, and the other state
18 doctors that evaluated plaintiff, should not be discounted for
19 the sole reason that they reviewed plaintiff's file during an
20 earlier time period. This is particularly true since Dr.
21 Nguyen personally examined plaintiff while Dr. Gurvey only
22 reviewed plaintiff's medical file. Moreover, I do not find
23 that the ALJ's explanation that Dr. Gurvey's opinion is
24 supported by objective findings meets the specificity standard
25 required by the Ninth Circuit. See Nguyen, 100 F.3d at 1466.
26 (9th Cir. 1996). Accordingly, on remand, the ALJ shall

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28 ⁵ Yet, since he testified by telephone, Dr. Gurvey
never observed the plaintiff.

1 provide specific and legitimate reasons for adopting Dr.
2 Gurvey's opinion, including the specific objective findings
3 that support Dr. Gurvey's opinion and are inconsistent with
4 Dr. Nguyen's opinion.

5 For the foregoing reasons, **IT IS HEREBY ORDERED** that
6 plaintiff's motion for summary judgment is **GRANTED IN PART** and
7 defendant's cross motion for summary judgment is **DENIED**. This
8 matter is **REMANDED** for the ALJ to provide clear and convincing
9 reasons for discrediting plaintiff's testimony about his
10 subjective pain. The ALJ must identify such reasons or accept
11 the plaintiff's testimony. See Dodrill, 12 F.3d at 418. The
12 ALJ shall also either adopt Dr. Nguyen's opinion or provide
13 specific and legitimate reasons for giving more weight to Dr.
14 Gurvey's opinion. **IT IS FURTHER ORDERED** that defendant shall
15 submit a proposed judgment consistent with this Order by
16 **October 11, 2011**.

17 Dated: October 4, 2011

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19 Bernard Zimmerman
United States Magistrate Judge

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