

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DANIEL KRUGER,

No. C-12-5820 EMC

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT; AND DENYING  
DEFENDANT'S CROSS-MOTION FOR  
SUMMARY JUDGMENT**

**(Docket Nos. 10, 13)**

---

On February 9, 2009, Plaintiff Dan Kruger protectively filed for disability insurance benefits under Title II of the Social Security Act. Mr. Kruger claimed an inability to work beginning October 20, 1995, based on, *inter alia*, degenerative disc disease of the lumbar spine and Ehlers-Danlos syndrome. *See* AR 212 (disability report). Mr. Kruger has exhausted his administrative remedies with respect to his claim of disability. This Court has jurisdiction for judicial review pursuant to 42 U.S.C. § 405(g). Mr. Kruger has moved for summary judgment or, in the alternative, a remand for additional proceedings. The Commissioner has cross-moved for summary judgment. Having considered the parties' briefs and accompanying submissions, including but not limited to the administrative record, and good cause appearing therefor, the Court hereby **GRANTS** in part and **DENIES** in part Mr. Kruger's motion and **DENIES** the Commissioner's.

**I. FACTUAL & PROCEDURAL BACKGROUND**

On February 9, 2009, Mr. Kruger applied for disability insurance, claiming an inability to work since October 20, 1995, due to, *inter alia*, degenerative disc disease of the lumbar spine and

1 Ehlers-Danlos syndrome (“EDS”).<sup>1</sup> See AR 212 (disability report). Mr. Kruger’s application was  
2 initially denied on April 3, 2009, and upon reconsideration on November 9, 2009. See AR 97 (initial  
3 disability determination); AR 98 (reconsideration disability determination). Mr. Kruger then sought  
4 an administrative hearing before an Administrative Law Judge (“ALJ”). See AR 114 (request for  
5 ALJ hearing). After holding a hearing, Judge Benmour issued an opinion on January 28, 2011, in  
6 which she denied Mr. Kruger’s claim for benefits. See AR 26-42 (ALJ decision).

7 Judge Benmour went through the five-step sequential evaluation process for disability  
8 required under 20 C.F.R. § 404.1520.

9 Step one disqualifies claimants who are engaged in substantial gainful  
10 activity from being considered disabled under the regulations. Step  
11 two disqualifies those claimants who do not have one or more severe  
12 impairments that significantly limit their physical or mental ability to  
13 conduct basic work activities. Step three automatically labels as  
14 disabled those claimants whose impairment or impairments meet the  
15 duration requirement and are listed or equal to those listed in a given  
16 appendix. Benefits are awarded at step three if claimants are disabled.  
17 Step four disqualifies those remaining claimants whose impairments  
18 do not prevent them from doing past relevant work. Step five  
19 disqualifies those claimants whose impairments do not prevent them  
20 from doing other work, but at this last step the burden of proof shifts  
21 from the claimant to the government. Claimants not disqualified by  
22 step five are eligible for benefits.

23 *Celaya v. Halter*, 332 F.3d 1177, 1180 (9th Cir. 2003).

24 However, before making the step one finding, Judge Benmour noted first that Mr. Kruger’s  
25 date last insured (“DLI”) for purposes of his claim for benefits was December 31, 2000. See AR 31  
26 (ALJ decision). Mr. Kruger has not contested this finding as a part of this lawsuit. Thus, for  
27 purposes of this opinion, the question is whether Mr. Kruger was disabled between October 20,  
28 1995, and December 31, 2000.

At step one, the ALJ found that Mr. Kruger did not engage in substantial gainful activity  
during the period from his alleged onset date through his DLI. See AR 31 (ALJ decision). At step  
two, the ALJ found that, through the DLI, Mr. Kruger had the following severe impairments:  
degenerative disc disease of the lumbar spine and EDS resulting in chronic pain. See AR 31. At

---

<sup>1</sup> EDS is a disorder that is characterized by “[d]eilitating chronic pain out of proportion to objective joint findings.” AR 336 (Dr. Blumberg report).

1 step three, the ALJ concluded that Mr. Kruger did not have an impairment or combination of  
2 impairments that met or medically equaled one of the impairments listed in the relevant appendix.  
3 *See* AR 31. At step four, the ALJ found that, through the DLI, Mr. Kruger had the residual  
4 functional capacity to perform sedentary work as defined in 20 C.F.R. § 404.1567(a), with certain  
5 exceptions. *See* AR 32. The ALJ then found that, based on this residual functional capacity, Mr.  
6 Kruger was unable to perform any of his past relevant work, including acupuncture. *See* AR 36. At  
7 step five, the ALJ concluded that, through the DLI, there were jobs that existed in significant  
8 numbers in the national economy that Mr. Kruger could have performed. *See* AR 37. Consequently,  
9 the ALJ issued a decision adverse to Mr. Kruger. *See* AR 26-38.

10 Subsequently, Mr. Kruger sought review of the ALJ decision. *See* AR 25 (request for review  
11 of ALJ decision). For review by the Appeals Council, Mr. Kruger supplemented the record with a  
12 letter from a treating chiropractor, who is also a friend. *See* AR 521 (Sherman letter); AR 4 (exhibit  
13 list attached to notice of Appeals Council action). The Appeals Council denied the request for  
14 review on September 11, 2012. *See* AR 1 (notice of Appeals Council action). Mr. Kruger now  
15 seeks judicial review through this action.

## 16 II. DISCUSSION

17 Administrative decisions in Social Security Disability cases are typically reviewed under a  
18 “substantial evidence test.” *See Lewis v. Apfel*, 236 F.3d 503, 509 (9th Cir. 2001). That is, a district  
19 court

20 may set aside the Commissioner’s denial of benefits when the ALJ’s  
21 findings are based on legal error or are not supported by substantial  
22 evidence in the record as a whole. Substantial evidence means more  
23 than a mere scintilla but less than a preponderance; it is such relevant  
24 evidence as a reasonable mind might accept as adequate to support a  
conclusion. A court review[s] the administrative record as a whole to  
determine whether substantial evidence supports the ALJ’s decision. .  
. . [W]here the evidence is susceptible to more than one rational  
interpretation, the ALJ’s decision must be affirmed.

25 *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal citations omitted).

26 In the instant case, Mr. Kruger makes two main arguments: (1) that the ALJ’s findings  
27 regarding his credibility were not adequately substantiated and (2) that the ALJ erred in failing to  
28 give appropriate weight to the opinions of Dr. Saal, one of his treating physicians. Both parties have

1 addressed Mr. Kruger’s arguments through the lens of the above legal standard. The Court,  
2 however, in evaluating the arguments presented by Mr. Kruger, concludes that it is not appropriate  
3 to apply that legal standard here – at least, not yet – because further development of the record was  
4 needed before the ALJ and Appeals Council should have rendered a decision as to whether Mr.  
5 Kruger was disabled.

6 Even where a claimant is represented, an “ALJ in a social security case has an independent  
7 duty to fully and fairly develop the record and to assure that the claimant’s interests are considered.”  
8 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (internal quotation marks omitted). “The  
9 duty to develop the record extends to the Appeals Council.” *Butler v. Astrue*, No. 11-cv-00452  
10 (WGY), 2013 U.S. Dist. LEXIS 28082, at \*29 (N.D.N.Y. Feb. 28, 2013); *see also Sims v. Apfel*, 530  
11 U.S. 103, 111 (2000) (stating that “[i]t is the ALJ’s duty to investigate the facts and develop the  
12 arguments both for and against granting benefits, and the [Appeals] Council’s review is similarly  
13 broad”). The duty to develop the record is triggered “when there is ambiguous evidence or when the  
14 record is inadequate to allow for proper evaluation of the evidence.” *Mayes v. Massanari*, 276 F.3d  
15 453, 459-60 (9th Cir. 2001).

16 Here, the Court finds that that duty was triggered because (1) for the period October 1995 to  
17 October 1998 (*i.e.*, from the alleged onset date up to the time that Mr. Kruger sought treatment from  
18 Dr. Saal), there was a clear gap in the record, as even the ALJ expressly recognized, *see* AR 33 (ALJ  
19 decision) (noting that Mr. Kruger claimed a serious injury as of October 1995 but “the earliest  
20 treatment record is from November of 1998, over three years after his injury”), and (2) for the period  
21 November 1998 to December 2000 (*i.e.*, from the time that Dr. Saal treated Mr. Kruger to the DLI),  
22 there was a critical ambiguity regarding the opinion of Dr. Saal.

23 A. October 1995 to October 1998

24 As indicated above, the period from October 1995 to October 1998 covers the time from the  
25 alleged onset date up to the date that Mr. Kruger sought treatment from Dr. Saal. This was clearly a  
26 critical time because it was right after Mr. Kruger sustained the injury at issue. At the hearing  
27 before the ALJ, Mr. Kruger claimed that some of the medical records for this period were not  
28 available – *e.g.*, records from a physical therapy clinic and records from his treating psychiatrist,

1 Chaz Salzberg. *See* AR 60 (ALJ hearing). According to Mr. Kruger, the clinic “is no longer in  
2 existence [and so] doesn’t have the record[s]”; as for Dr. Salzberg, he “is no longer in practice” and  
3 “[t]he people who’ve taken over his practice have not kept his records.” AR 60-61.

4 The Court does not fault the ALJ for taking these statements by Mr. Kruger at face value –  
5 *i.e.*, that the clinic and Dr. Salzberg records were not available. What is problematic is that other  
6 medical records might have been available but there is no indication that the ALJ did any follow up  
7 as to these records. At the hearing, for example, Mr. Kruger noted that not only did he contact Dr.  
8 Salzberg but he also contacted a chiropractor in a clinic.<sup>2</sup> *See* AR 64. Furthermore, Mr. Kruger  
9 stated that he contacted an “acupuncturist who was working in my practice.” AR 64. Although  
10 chiropractors and acupuncturists are not acceptable medical sources under 20 C.F.R. § 404.1513(a),  
11 they are still “other” medical sources whose opinions should be considered under § 404.1513(d)(1).  
12 *See Sanfilippo v. Astrue*, 274 Fed. Appx. 551, 553 (9th Cir. 2008) (acknowledging that a  
13 chiropractor is not an acceptable medical source but adding that an ALJ may consider the opinion of  
14 an other medical source such as a chiropractor to determine the severity of an impairment).  
15 Furthermore, in the absence of any evidence from an acceptable medical source, it put even more of  
16 a premium on the ALJ to develop the record as to the opinions of any other medical source – or for  
17 that matter other nonmedical sources who might have firsthand knowledge as to Mr. Kruger’s  
18 condition. *See* 20 C.F.R. § 404.1513(d)(4) (noting that evidence may be obtained from nonmedical  
19 sources such as family, friends, and neighbors in assessing the severity of a claimant’s impairment);  
20 *cf. Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996) (noting that then-existing SSR 88-13  
21 “states that where a claimant alleges pain or other symptoms that are ‘not supported by medical  
22 evidence in the file, the adjudicator shall obtain detailed descriptions of daily activities by directing

23 ///

24 ///

25 ///

26

---

27 <sup>2</sup> Because Mr. Kruger did not identify the chiropractor by name, the Court cannot determine  
28 whether the chiropractor was Dr. Sherman, a chiropractor who treated him after the alleged onset  
date and who ultimately referred him to Dr. Saal.

1 specific inquiries about the pain and its effects to . . . third parties who would be likely to have such  
2 knowledge”) (emphasis in original).<sup>3</sup>

3         The ALJ’s failure to develop the record was not subsequently cured when Mr. Kruger  
4 submitted a letter to the Appeals Council from a chiropractor friend, Dr. Sherman, who treated him  
5 shortly after the alleged onset date. *See* AR 521-22 (Dr. Sherman letter). First, it is not clear that  
6 Dr. Sherman was the chiropractor that Mr. Kruger mentioned during the hearing before the ALJ.  
7 Second, even if he was, the Appeals Council should have solicited Dr. Sherman’s records –  
8 particularly because Dr. Sherman’s letter was somewhat conclusory, *see, e.g.*, AR 521 (stating  
9 “conservative care” was provided and “ordered radiological studies [were] inconclusive”) – and  
10 there is no indication that the Appeals Council did such. *See* 20 C.F.R. § 404.1512(d) (“Before we  
11 make a determination that you are not disabled, we will develop your complete medical history for  
12 at least the 12 months preceding the month in which you file your application unless there is a  
13 reason to believe that development of an earlier period is necessary or unless you say that your  
14 disability began less than 12 months before you filed your application.”); *see also id.* §  
15 404.950(d)(1) (“When it is reasonably necessary for the full presentation of a case, an administrative  
16 law judge or a member of the Appeals Council may, on his or her own initiative or at the request of a  
17 party, issue subpoenas for the appearance and testimony of witnesses and for the production of  
18 books, records, correspondence, papers, or other documents that are material to an issue at the  
19 hearing.”). Finally, regardless of Dr. Sherman, there was still the unidentified acupuncturist who  
20 may have given some treatment to Mr. Kruger as well as the possibility of nonmedical sources who  
21 could have opined on Mr. Kruger’s condition. Indeed, given the contents of Dr. Sherman’s letter –  
22 which provided at least some corroboration or substantiation for Mr. Kruger’s position – the Appeals  
23 Council arguably had even more of an obligation to make an inquiry as to whether there might be  
24 additional evidence.

---

25  
26         <sup>3</sup> The Court acknowledges that SSR 88-13 has since been superseded. Nevertheless, in a  
27 situation such as this where there was *no* medical evidence of record, the Court concludes that the  
28 ALJ’s duty to fully and fairly develop the record and to assure that Mr. Kruger’s interests were  
considered required her to conduct some inquiry as to whether there might be nonmedical sources  
who could provide insight as to his condition during the period October 1995 to October 1998.

1 B. November 1998 to December 2000

2 For the period November 1998 to December 2000, it is clear – both from the parties’ briefs  
3 as well as the administrative record – that the critical medical evidence of record was that provided  
4 by Dr. Saal.<sup>4</sup> The problem is that the evidence provided by Dr. Saal was ambiguous as to a crucial  
5 point – namely, whether the limitations referenced in the medical records of the time (*e.g.*, how long  
6 Mr. Kruger could sit) were simply limitations reported by Mr. Kruger or rather were limitations that  
7 Dr. Saal found. Even a subsequent letter authored by Dr. Saal many years later does not provide  
8 sufficient clarity on the matter. *See* AR 511 (Dr. Saal letter). This is an important distinction  
9 because, if the limitations were simply limitations claimed by Mr. Kruger, then they would  
10 essentially be evaluated under a credibility analysis. *See, e.g., Taylor v. Astrue*, 386 Fed. Appx. 629,  
11 633 (9th Cir. 2010) (stating that “the ALJ could properly reject the reports and opinions of the  
12 treating physician and examining psychologist regarding her functional limitations, as they were  
13 based primarily on [the claimant’s] discredited self-reports”). In contrast, if the limitations were  
14 actually limitations found by Dr. Saal, then his opinions could only be rejected – if uncontradicted –  
15 for clear and convincing reasons supported by substantial evidence in the record or – if contradicted  
16 – for specific and legitimate reasons supported by substantial evidence in the record. *See Reddick v.*  
17 *Chater*, 157 F.3d 715, 725 (9th Cir. 1998).

18 To the extent the government suggests that the ALJ assumed or actually concluded that those  
19 limitations were in fact limitations found by Dr. Saal, it still is not clear that Dr. Saal expressed any  
20 opinion as to whether those limitations would persist or whether there would be a continued trend of  
21 improvement. For example, in his post-June 2009 letter, Dr. Saal does state that Mr. Kruger “never  
22 progressed significantly above this level” – *i.e.*, able to sit for up to two hours a day, AR 511 (Dr.  
23 Saal letter), but there is ambiguity as to whether this was an opinion of Dr. Saal or a reported  
24 limitation by Mr. Kruger. *See* AR 511 (stating that, “[a]fter the November 1999 epidural, Dr.  
25 Kruger reported that he had not experienced any significant improvement to his overall functional  
26 status”).

---

27  
28 <sup>4</sup> Of course, any opinions expressed by Dr. Saal as to Mr. Kruger’s condition at a later time –  
*i.e.*, in or about June 2009 – are not relevant.

1 Given the ambiguity with respect to the opinion of Dr. Saal, the ALJ should have contacted  
2 Dr. Saal for clarification. *Cf. Smolen*, 80 F.3d at 1288 (stating that, “[i]f the ALJ thought he needed  
3 to know the basis of [the doctor’s] opinions in order to evaluate them, he had a duty to conduct an  
4 appropriate inquiry, for example, by subpoenaing the physicians or submitting further questions to  
5 them”).

6 To the extent the government suggests that the ALJ assumed or actually concluded that Dr.  
7 Saal found that the limitations would persist, then there would a contradiction between Dr. Saal’s  
8 opinion and the opinion of state agency medical consultant, *see* AR 408 (Dr. Sheehy opinion)  
9 (concluding that there was no evidence to support a severe persistent impairment before the DLI),  
10 such that the ALJ could reject Dr. Saal’s opinion only for specific and legitimate reasons supported  
11 by substantial evidence.<sup>5</sup> The ALJ made no such finding below. Here, this assessment could be  
12 affected by what is uncovered for the October 1995-October 1998 period, discussed above, and thus  
13 the issue should be revisited.

14 C. Remand

15 Because the ALJ and/or Appeals Council failed to adequately develop the record, the Court  
16 concludes that a remand is warranted so that the record may be so developed. As a part of the  
17 remand, the ALJ may also wish to consider development of the record as to the EDS disorder (*e.g.*,  
18 is it in fact a genetic disorder, in which case the fact that Mr. Kruger was not diagnosed with the  
19 condition until 2007 does not mean that he did not have the disorder during the relevant period)<sup>6</sup> and  
20 the statement that Mr. Kruger appears to have made to Dr. Saal that he had been “working at  
21 modified work duty.” AR 266 (Dr. Saal medical records).

---

23 <sup>5</sup> While the government argues that the opinion of a state agency medical consultant can be a  
24 specific and legitimate reasons and substantial evidence, that is only where the opinion is “based on  
25 independent clinical findings that differ from those of the treating physician.” *Andrews v. Shalala*,  
26 53 F.3d 1035, 1041 (9th Cir. 1995); *see also Tonapetyan*, 242 F.3d at 1149 (stating that “the  
contrary opinion of a non-examining medical expert does not alone constitute a specific, legitimate  
reason for rejecting a treating or examining physician’s opinion, it may constitute substantial  
evidence when it is consistent with other independent evidence in the record”).

27 <sup>6</sup> Of course, even if EDS is a genetic disorder that Mr. Kruger had during the relevant period,  
28 the question is what symptoms Mr. Kruger had during that time. The lack of a formal diagnosis  
should have no bearing on what symptoms he had at the time.



1 The Court underscores here that, in ordering a remand, it is not expressing any opinion that  
2 Mr. Kruger was in fact disabled during either the October 1995-October 1998 or November 1998-  
3 December 2000 timeframe. Indeed, the Court notes that, for the latter period, it shares some of the  
4 same concerns as articulated by the ALJ – *e.g.*, why Mr. Kruger did not seek treatment after the  
5 second epidural in November 1999.<sup>7</sup> Nevertheless, those concerns are not enough at this point to  
6 justify even a limited affirmance of the ALJ’s decision (*i.e.*, as to the latter time period) given the  
7 need for the development of the factual record.

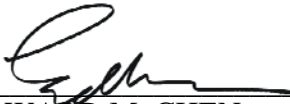
8 **III. CONCLUSION**

9 For the foregoing reasons, the Court grants in part and denies in part Mr. Kruger’s motion for  
10 relief and denies the Commissioner’s. The case is remanded to the ALJ for further development of  
11 the factual record.

12 This order disposes of Docket Nos. 10 and 13.

14 IT IS SO ORDERED.

15  
16 Dated: August 29, 2013

17  
18   
EDWARD M. CHEN  
United States District Judge

19  
20 \_\_\_\_\_  
21 <sup>7</sup> Even if the Court accepts Mr. Kruger’s claim of financial inability, such a claim does not  
22 automatically preclude negative findings regarding credibility, particularly because Mr. Kruger has  
23 not indicated that medical care for those with financial difficulties was not available to him. *Cf.* SSR  
24 82-59 (in evaluating the ramifications of an individual’s failure to follow prescribed treatment,  
25 noting that there are justifiable reasons for not following such treatment, including inability “to  
26 afford prescribed treatment . . . *but for which free community resources are unavailable*”; adding  
27 that “[a]ll possible resources (e.g., clinics, charitable and public agencies, etc.), must be explored”)  
28 (emphasis added). As for Mr. Kruger’s point that he did seek informal treatment through his doctor-  
friend (Dr. Buckman), the ALJ correctly noted that treatment did not begin until 2002 – *i.e.*, well  
beyond the date of the second epidural as well as the date last insured. Moreover, even if the  
treatment by Dr. Buckman between 2002 and 2005 sheds some light on Mr. Kruger’s condition at or  
about the DLI, the treatment provided does not suggest that Mr. Kruger had any significant  
limitations. In his letter, Dr. Buckman only asserts that, on “several occasions,” he “prescribed and  
provided [Mr. Kruger] with various sample medications for his back and leg pain.” *See id.* Sample  
medications on “several occasions” from 2002 to 2005 does not lead to an inference of significant  
limitations.