

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH RUBEN MARTINEZ,
Claimant,
v.
CAROLYN W. COLVIN,
Commissioner.

Case No. 14-cv-03314-NC

**ORDER RE: MOTION FOR
SUMMARY JUDGMENT AND
CROSS-MOTION FOR SUMMARY
JUDGMENT**

Re: Dkt. Nos. 16, 17

Claimant Joseph Ruben Martinez seeks judicial review of the Commissioner of Social Security’s final decision denying his claim for disability insurance benefits. Claimant argues that the Administrative Law Judge (“ALJ”) improperly discredited his subjective symptom testimony. Because the Court finds that the ALJ failed to properly address claimant’s complete record of subjective testimony, the Court GRANTS Martinez’s motion for summary judgment and DENIES the Commissioner’s cross-motion for summary judgment. Accordingly, the Court REVERSES the ALJ’s decision, and REMANDS the case for further proceedings. On remand, the ALJ must consider all subjective symptom testimony in the record and provide specific, clear and convincing reasons if discrediting any testimony.

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Case No. 14-cv-03314-NC

1 requested review with the Appeals Council. A.R. 168. On April 24, 2012, the Appeals
2 Council vacated the ALJ’s decision and remanded the case for further proceedings to
3 determine what jobs the claimant would be capable of despite his impairments.

4 A.R. 101-04.

5 Pursuant to the order of the Appeals Council, the ALJ held a supplemental hearing
6 on September 12, 2012, to determine whether the claimant had any transferrable skills to
7 other occupations. A.R. 47-66. At that hearing, claimant testified that he had total knee
8 replacement in his left knee, and that he was not using assistive devices to walk. A.R. 51.
9 Claimant testified that he also feels pain in his right knee. A.R. 55. Claimant estimated
10 that he could lift about 25 to 30 lbs., but could not lift regularly through a work day.

11 A.R. 56. He also stated that he has to stretch out his knees two to three times per hour if he
12 is sitting. *Id.* Additionally, claimant testified that his lower back and shoulders start to
13 hurt if he stands for 30 minutes. A.R. 57. Martinez also stated that he was still
14 experiencing peripheral neuropathy, causing numbness in his feet. A.R. 53. He explained
15 that the numbness made it hard to control his balance while he walked. *Id.*

16 On November 15, 2012, the ALJ denied Martinez’s claim for benefits. A.R. 17-32.
17 At step one, the ALJ determined that claimant had not engaged in substantial gainful
18 activity during the period from his alleged onset date of June 13, 2007, through his date
19 last insured of June 30, 2010. AR. 23. At step two, the ALJ determined that claimant
20 suffered from severe impairments consisting of degenerative joint disease of the left knee,
21 status post arthroscopy for meniscus tear; diabetes mellitus; and peripheral neuropathy. *Id.*
22 At step three, the ALJ concluded that claimant did not have an impairment or combination
23 of impairments that met or equaled listing. *Id.* At step four, the ALJ found that claimant
24 had the residual functional capacity to perform a full range of light work, acknowledging
25 that she mistakenly characterized the residual functional capacity as “sedentary” in the
26 previous order. A.R. 20-21.

27 In evaluating claimant’s subjective symptom testimony the ALJ stated, “At the most
28 recent hearing, the claimant alleged numbness in his feet, making it difficult to sustain his

1 balance. While I do not doubt that his condition is advancing, I am limited to considering
2 the claimant’s condition prior to his last date insured of June 30, 2010.” A.R. 25. The
3 ALJ explained that claimant alleged he could walk two miles, and that claimant estimated
4 he could lift 40 lbs. Id. She also observed that claimant “only takes over the counter
5 Motrin at night.” Id. The ALJ found that these statements were not “inconsistent with a
6 residual functional capacity for light work.” Id. Finally at step five, the ALJ held that
7 claimant could not perform his past work, however, retained transferrable skills to a
8 significant number of alternate occupations. A.R. 26. Claimant appealed, and the Appeals
9 Council denied claimant’s request for review. A.R. 1-6. The ALJ’s decision dated
10 November 15, 2012, became the final decision of the Commissioner.

11 Claimant filed suit in federal court on July 22, 2014. Dkt. No. 1. Both parties
12 consented to magistrate judge jurisdiction. Dkt. Nos. 9, 10.

13 **II. LEGAL STANDARD**

14 A district court has the “power to enter, upon the pleadings and transcript of the
15 record, a judgment affirming, modifying, or reversing the decision of the Commissioner of
16 Social Security, with or without remanding the case for a rehearing.” 42 U.S.C. § 405(g).
17 “When the Appeals Council denies a request for review, . . . the ALJ’s decision becomes
18 the final decision of the Commissioner.” *Taylor v. Comm’r of Soc. Sec. Admin.*, 659 F.3d
19 1228, 1231 (9th Cir. 2011).

20 The decision of the Commissioner should only be disturbed if it is not supported by
21 substantial evidence or it is based on legal error. *Burch v. Barnhart*, 400 F.3d 676, 679
22 (9th Cir. 2005) (internal citation and quotation omitted). “Substantial evidence is more
23 than a mere scintilla but less than a preponderance.” *Bayliss v. Barnhart*, 427 F.3d 1211,
24 1214 (9th Cir. 2005) (internal citation and quotation marks omitted). It is evidence that a
25 reasonable mind would accept as adequate to support the conclusion. Id. “Where
26 evidence is susceptible to more than one rational interpretation, the ALJ’s decision should
27 be upheld.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (internal
28 citation and quotation omitted). Furthermore, a decision by the ALJ will not be reversed

1 for errors that are harmless. Burch, 400 F.3d at 679.

2 **III. DISCUSSION**

3 Martinez contends that the ALJ’s adverse credibility finding was not supported by
4 the record because the ALJ failed to consider claimant’s subjective pain testimony given
5 on June 10, 2010, twenty days prior to his last date insured. Dkt. No. 16 at 10. The
6 Commissioner, however, asserts that the ALJ reasonably relied on claimant’s Exertion
7 Questionnaire completed on July 7, 2008, “comfortably within the disability benefits
8 period,” rather than the hearing testimony on June 10, 2010. Dkt. No. 17 at 3. Claimant
9 alleged that he qualified as disabled on June 13, 2007, and he last met insured status
10 requirements on June 30, 2010. Dkt. Nos. 16 at 3; 17 at 3. Although the Commissioner
11 argues that the ALJ was entitled to decide that “it was the former testimony rather than the
12 latter that mattered in this case,” the Court finds that the ALJ failed to provide clear and
13 convincing reasons for rejecting claimant’s subjective hearing testimony. Dkt. No. 17 at 3.

14 **A. ALJ’s Adverse Credibility Determination Was Not Supported by Clear and**
15 **Convincing Reasons**

16 To evaluate a claimant’s residual function capacity, the ALJ “must consider all
17 relevant evidence in the record, including, . . . medical records, lay evidence, and the
18 effects of symptoms, including pain, that are reasonably attributed to a medically
19 determinable impairment.” Robbins v. Social Sec. Admin., 466 F.3d 880, 883 (9th Cir.
20 2006) (internal quotations omitted). If an ALJ discredits claimant’s subjective symptom
21 testimony, the ALJ is “required to make a ‘credibility determination with findings
22 sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily
23 discredit claimant’s testimony.’” Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir.
24 2008) (quoting Thomas v. Barnhart, 278 F.3d 947, 958 (9th Cir. 2002)).

25 To evaluate the claimant’s subjective symptoms, the ALJ must follow a two-step
26 process. Tommasetti, 533 F.3d at 1039. At step one, the claimant has the burden to
27 produce objective medical evidence of the underlying impairment that could reasonably
28 give rise to some degree of the symptoms alleged. Id. If the claimant meets the burden

1 and there is no affirmative evidence of malingering, the ALJ moves on to step two. *Id.*

2 At step two, the ALJ must determine the credibility of the claimant's statements
3 about the symptoms and severity of pain. *Robbins*, 466 F.3d at 883. The ALJ can reject
4 the claimant's testimony about the severity of his symptoms by offering "specific, clear
5 and convincing reasons for doing so." *Tommasetti*, 533 F.3d at 1039. The ALJ may not
6 disregard a claimant's subjective symptom testimony solely because it is not substantiated
7 affirmatively by objective medical evidence. *Robbins*, 466 F.3d at 883. Furthermore, an
8 ALJ is not permitted to reach a conclusion "simply by isolating a specific quantum of
9 supporting evidence." *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975); cf. *Marsh*
10 *v. Colvin*, No. 12-17014, 2015 WL 3773004, at *2 (9th Cir. June 18, 2015) (holding that
11 the ALJ erred by failing to address the treating physician's opinion because the ALJ must
12 give "specific and legitimate" reasons for rejecting a treating doctor's opinion).

13 At step one of the ALJ's credibility determination, the ALJ concluded that the
14 claimant suffered from an underlying impairment that could reasonably produce some
15 degree of the symptoms alleged. A.R. 25. Specifically, the ALJ found that claimant
16 suffered a severe impairment of degenerative joint disease of the left knee, status post
17 arthroscopy for meniscus tear; diabetes mellitus; and peripheral neuropathy. A.R. 23.
18 Therefore, with no evidence of malingering, the ALJ must provide specific, clear and
19 convincing reasons for finding claimant's subjective symptom testimony not credible in
20 step two of her credibility analysis.

21 The ALJ made the following credibility determinations in step two of her analysis:

22 The claimant's statements . . . are not credible to the extent
23 they are inconsistent with the above residual functional
24 capacity assessment. The claimant alleged that he has pain in
25 the left knee when he walks, goes up and down stairs, or
26 climbs a ladder. He also said that his knee hurts after he walks
for 2 miles. He estimated that he can lift up to 40 lbs. and
acknowledged doing housework such as sweeping, mopping,
laundry, and making his bed. He drives a car. He takes only
over the counter Motrin at night. Exhibit 3E.

27 A.R. 25. Claimant's complete record of subjective testimony included: (1) July 7, 2008
28 Exertion Questionnaire, (2) June 10, 2010 hearing testimony, and (3) September 4, 2012

1 hearing testimony. A.R. 275-77, 67-81, 47-66. Martinez argues that at step two of the
2 ALJ’s credibility determination, the ALJ improperly rejected his June 10, 2010, and
3 September 4, 2012, hearing testimonies because she failed to provide clear and convincing
4 reasons for doing so. Dkt. No. 16 at 11.

5 It is unclear which subjective symptom testimony in the record the ALJ relied on in
6 her decision. A.R. 25. The ALJ did not cite every subjective symptom that she considered
7 in her credibility assessment. *Id.* The Court infers, however, that the ALJ relied on the
8 July 7, 2008 Exertion Questionnaire because the symptoms appear to be taken from
9 claimant’s responses there. A.R. 275-77. The ALJ did not clearly address claimant’s
10 June 10, 2010 hearing testimony or his September 4, 2012 hearing testimony. Specifically,
11 the ALJ wrote:

12 At the most recent hearing, the claimant alleged numbness in
13 his feet, making it difficult for him to sustain his balance.
14 While I do not doubt that his condition is advancing, I am
limited to considering the claimant’s condition prior to his date
last insured of June 30, 2010.

15 A.R. 25. The ALJ acknowledged that claimant complained of numbness in his feet at “the
16 most recent hearing,” but she dismissed claimant’s assertion, reasoning that it was after his
17 last date insured of June 30, 2010. A.R. 25. However, the record shows that Martinez
18 testified he experienced numbness in his feet at both his June 10, 2010 hearing—20 days
19 before his last date insured—and at his September 4, 2012 hearing, two years after his last
20 date insured. A.R. 75, 53. Because the ALJ did not clearly articulate which testimony she
21 was addressing, the Court is unable to determine which hearing testimony the ALJ
22 considered or rejected. A.R. 25.

23 Moreover, the ALJ did not provide sufficiently specific, clear and convincing
24 reasons for rejecting claimant’s complete record of subjective testimony. The ALJ’s
25 rationale for dismissing claimant’s hearing testimony that he experienced numbness was
26 that she was “limited to considering claimant’s condition prior to his date last insured of
27 June 30, 2010.” A.R. 25. But claimant’s June 10, 2010 hearing took place before his date
28 last insured, and yet the ALJ did not discuss it in her decision. The Court finds the ALJ

1 did not provide specific, clear and convincing reasons for rejecting claimant’s subjective
2 hearing testimony.

3 **B. The Court Cannot Confidently Conclude the ALJ’s Failure to Properly**
4 **Address Claimant’s Hearing Testimony Was Harmless Error**

5 “A decision of the ALJ will not be reversed for errors that are harmless.” Burch,
6 400 F.3d at 679. The Ninth Circuit held that “a reviewing court cannot consider the error
7 harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting
8 the testimony, could have reached a different disability determination.” *Stout v. Comm’r,*
9 *Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006). In *Stout v. Comm’r, Soc. Sec.*
10 *Admin.*, the Ninth Circuit held that the ALJ’s “silent disregard of lay testimony” was not
11 harmless error. *Id.* at 1055. There, the court explained that an error is harmless if the
12 ALJ’s error was “inconsequential to the ultimate nondisability determination.” *Id.* When
13 fully crediting the lay testimony the ALJ erroneously omitted in *Stout*, the Ninth Circuit
14 held that the claimant’s mental impairments precluded claimant from working. *Stout*, 454
15 F.3d at 1056. More recently, the Ninth Circuit provided a guideline for applying the
16 doctrine of harmless error. *Marsh*, 2015 WL 3773004, at *3. In *Marsh*, the Ninth Circuit
17 did not find the ALJ’s omission of a treating doctor’s medical opinion harmless. *Id.* The
18 Ninth Circuit explained, “it does seem that where the magnitude of an ALJ error is more
19 significant, then the degree of certainty of harmlessness must also be heightened before an
20 error can be determined to be harmless.” *Id.*

21 Here, the Court cannot confidently conclude that the ALJ’s failure to clearly
22 address claimant’s June 10, 2010 hearing testimony was harmless. The claimant’s
23 condition in 2010 was not the same as his condition in 2008, when he completed the
24 Exertion Questionnaire. According to his testimony on June 10, 2010, he experienced his
25 knee “pop[ping] in and out of [his] joints” in as little as five minutes and as much as 20
26 minutes of walking. A.R. 71. He also testified that if he was standing for 15 minutes to a
27 half-hour, his knee would lock up, and if he was sitting for longer than 30 minutes, he had
28 to flex out his knee for five to ten minutes until he could walk. A.R. 72. Indeed, the ALJ

1 said that she “do[es] not doubt that his condition is advancing.” A.R. 25. Therefore, the
2 Court finds remand appropriate.

3 **IV. CONCLUSION**

4 The Court GRANTS Martinez’s motion for summary judgment and DENIES the
5 Commissioner’s cross-motion for summary judgment. The Court REMANDS with
6 instructions to the ALJ to properly conduct step two of her credibility determination by
7 addressing claimant’s (1) July 7, 2008 Exertion Questionnaire, (2) June 10, 2010 hearing
8 testimony, and (3) September 4, 2012 hearing testimony. If the ALJ discredits any of
9 Martinez’s testimony, she should provide specific, clear and convincing reasons.

10 **IT IS SO ORDERED.**

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12 Dated: June 26, 2015



NATHANAEL M. COUSINS
United States Magistrate Judge

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