IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ERNEST ORTIZ,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

No. C-10-01632 RMW

ORDER GRANTING PLAINTIFF'S MOTION FOR REMAND FOR AN IMMEDIATE AWARD OF BENEFITS AND DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

[Re Docket Nos. 9, 13]

Plaintiff Ernest Ortiz ("Ortiz") brings this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision by the Commissioner of Social Security ("Commissioner") denying his claims for disability insurance benefits under the Social Security Act. Presently before the court are the parties' cross-motions for summary judgment. Having considered the papers submitted by the parties and the entire administrative record, and for the reasons set forth below, the court REMANDS to the Commissioner for an immediate award of benefits and DENIES the Commissioner's cross-motion for summary judgment.

I. BACKGROUND

A. Procedural Background

Ortiz filed an application for a period of disability and disability insurance benefits under Title II of the Social Security Act on February 16, 2006, alleging that he became unable to work due to a disabling condition on May 15, 2005. Administrative Transcript ("Tr.") 85. On March 1, 2006, he amended his application to state that he became unable to work due to his disabling condition on February 2, 2006. Tr. 92. The Commissioner initially denied Ortiz's claim on May 1, 2006, Tr. 55-58, and again on reconsideration on March 9, 2007, Tr. 60-64. Ortiz then filed a written request for hearing by an Administrative Law Judge ("ALJ"). Tr. 68. The initial hearing commenced on August 8, 2008, but was continued pending further psychiatric and mental health evaluation. Tr. 20-30. A full hearing then took place on April 3, 2009. Tr. 31-52. On May 4, 2009, the ALJ denied Ortiz's claim, Tr. 13-19, and the Appeals Council denied his request for review of the ALJ's decision, Tr. 1-3. Ortiz now seeks judicial review of the ALJ's decision under 42 U.S.C. § 405(g).

B. Ortiz's Age, Educational, and Vocational History

Ortiz was born on January 7, 1950, and completed approximately two years of college. Tr. 35, 85. He worked as a rehabilitation counselor for the Santa Clara County Department of Alcohol and Drug Abuse for nearly twenty-seven years, and receives a PERS pension. Tr. 26, 35-36. At his job, he counseled drug addicts and alcoholics, conducted group and individual therapy sessions, handled intake of patients, and wrote reports for court and social services. Tr. 127. He reduced his work hours to half time in May 2005 in connection with his alleged impairments, and then stopped working entirely on February 2, 2006. Tr. 126.

C. Ortiz's Medical History

Ortiz alleges disability beginning February 2, 2006 due to chronic abdominal pain, sleep apnea, and depression. In addition to these ailments upon which Ortiz asserts his disability, Ortiz's other health problems include but are not limited to irritable bowel syndrome, gastroesophageal reflux disease (GERD), diverticular disease, hypothyroidism, and prediabetes. Tr. 38, 158, 226.

1. Chronic Abdominal Pain

Ortiz asserts in his papers and has reported to some of his physicians that his abdominal pain

began after he had gall bladder surgery in 1991. Pl.'s Br. 3, Dkt. No. 9; *e.g.*, Tr. 197, 262. Ortiz underwent a follow-up laparotomy in 1994 because of his chronic abdominal pain, which Ortiz' reported did not provide any relief. Tr. 230. Ortiz has since been treated for adhesions with conservative treatment centered primarily on pain relief. *E.g.*, Tr. 226-35. For example, his physician S. Fisk, M.D. gave him nerve blocks and several abdominal injections, which apparently did not help with the pain. Tr. 200, 236.[1] Ortiz's medical records also reflect that he underwent abdominal surgery in 1998 for large intestine problems. Tr. 191.

In 2005 and 2006, Ortiz saw John R. Logan, M.D. at Kaiser Santa Clara. The record indicates that Dr. Logan was Ortiz's primary care physician who followed him for many years up until Dr. Logan's retirement in 2006. Tr. 236. Dr. Logan's notes from his visits consistently indicate chronic abdominal pain, Tr. 171-89, and, although somewhat difficult to decipher, the existence of abdominal adhesions, *e.g.*, Tr. 171, 176, 181. After Ortiz's visit on May 16, 2005, Dr. Logan restricted him to working four hours a day (half time) for three months. Tr. 179. Dr. Logan completed similar forms in August and November of 2005, indicating each time that Ortiz could work in the mornings, or for four hours a day. Tr. 174-75. Dr. Logan also referred Ortiz to Michael S. Ahn, M.D., a gastroenterologist, for "recurring abd[ominal] pain." Tr. 180. On the referral request form, Dr. Logan noted that Ortiz had undergone multiple tests, including a CT scan, which "look[ed] ok except for diverticulasr [sic] [disease]," and that he now had daily pain. *Id.* At the time of the referral, Ortiz's medications included Prozac, which he had been prescribed for pain. Tr. 180, 270.

Ortiz saw Dr. Ahn on December 20, 2005. Tr. 189. Dr. Ahn noted that Ortiz had chronic abdominal pain and came "with his wife who is concerned that symptoms have not improved." *Id.* Dr. Ahn also noted that Ortiz had started taking elavil but seen no improvement. *Id.* Ortiz was still taking Prozac (fluoxetine), as well as other medications. *Id.*

On February 3, 2006, Ortiz was seen again by Dr. Logan. Dr. Logan completed a form stating that Ortiz would be unable to work for several months but could return to full duties with no

[1] Dr. Peredy's May 29, 2008 report at Tr. 236 indicates that Ortiz's gall bladder surgery took place in 1995; however the rest of the record, including Dr. Peredy's earlier report, indicates that this surgery took place in 1991.

restrictions on June 1, 2006. Tr. 172. Nevertheless, Ortiz filed for disability shortly after Dr. Logan's evaluation, and retired from his position with the county. Tr. 26, 85.

In March 2006, Dr. Ahn re-referred Ortiz to Dr. Fisk. Dr. Fisk saw Ortiz on May 4, 2006 and prescribed gabapentin. Tr. 202. Dr. Fisk saw Ortiz again in June 2006, and noted Ortiz was taking one vicodin per day, with Ortiz reporting increasing pain. Tr. 200. Ortiz was given injections to his chest, which Dr. Fisk noted provided "good local relief," but Ortiz still felt abdominal pain. *Id.* Dr. Fisk noted that the "only thing that has helped is scar inject[ions]." *Id.* On July 26, 2006, Dr. Fisk noted that a switch from vicodin to endocet "works better in terms of severity." Tr. 199. Dr. Fisk also recommended a trial of Lyrica. *Id.*

On October 20, 2006, Ortiz saw George Peredy, M.D., who switched him from endocet to oxycontin. Tr. 197. Dr. Peredy's notes state that Ortiz complained of pain all day and evening, including chronic right upper quadrant abdominal wall pain. *Id.* Ortiz continued to see Dr. Peredy at least through June 2008. Tr. 226. On May 21, 2008, Dr. Peredy noted that Ortiz's "[p]ain continues to increase despite slow increase in opiate pain med." Tr. 239. On May 29, 2008, Dr. Peredy wrote: "Plan: Worsening pain vs/opiate tolerance. Trial of tapering opiate along with neurontin/Lyrica vs Cymbalta. Level II program." Tr. 237.

On March 5, 2007, James V. Glaser, M.D., conducted a case analysis of Ortiz's complaints of sleep apnea and chronic severe abdominal pain. Tr. 203. Upon reviewing records from Kaiser, Dr. Glaser recommended: "No point in getting a CE [consultative examiner], because that will not likely show us his episodic abdominal wall pain. No etiology for pain, and it is episodic– per MER. Suggest [n]ot severe now. . . . Not severe, no 12 month duration." *Id.*

On May 9, 2007, Tram N. Dao, M.D., partially completed an Irritable Bowel Syndrome Residual Functional Capacity Questionnaire ("IBS Questionnaire") for Ortiz. Tr. 208-11. Dr. Dao noted that Ortiz had been diagnosed with "chronic abdominal wall pain due to nerve injury due to previous surgery, irritable bowel syndrome, [and] reflux." Tr. 208. Dr. Dao reported that Ortiz's examination was normal except for mild to moderate abdominal pain with palpation in the anterior abdominal wall, and that "patient's pain is stable on pain meds." Tr. 208-09. Dr. Dao did not answer any questions about the duration of Ortiz's impairments, noting: "I do not treat patient for his pain.

Patient is being followed by pain clinic. Dr. Peredy or Dr. Fisk can answer these questions more accurately." Tr. 209. Dr. Dao left the rest of the questionnaire blank after writing that he would "defer answering these questions further due to lack of knowledge about patient's ongoing pain and activities" and again noted that Ortiz was being treated and followed by a pain clinic. *Id.* Dr. Dao concluded: "About patient's bowel movement condition[,] it is not significant enough to explain for his disability." *Id.*

On May 29, 2008, pursuant to a referral by Dr. Peredy, Ortiz was evaluated by Christine Leung, a physical therapist. Tr. 230-34. The Physical Therapy Evaluation indicates that he had a "dull ache in right epigastric area going to the low back all the time at 7-8/10 [on pain scale] with occasional sharp pain at 9/10. Sometimes this area is numb to touch." Tr. 231. Aggravating factors included twisting, lifting, and standing after sitting. *Id.* Ms. Leung also noted that spicy food would irritate his irritable bowel syndrome and GERD but did not affect the abdominal pain. Tr. 231. She further noted that he had problems with sleep due to his pain, and that his functional tolerance was limited to short periods of time with regard to walking, driving, sitting, standing in one place, and lying in the same position. *Id.* Ms. Leung observed that, with palpation, he had tenderness all over his abdomen. Tr. 232. In Ms. Leung's assessment, Ortiz showed signs and symptoms compatible with chronic abdominal pain relating in particular to the gall bladder area. Tr. 233. Ms. Leung noted that "[p]atient is holding his body rigid and very sensitive to light manual touch" and "is at a low functional level and is scared of moving." *Id.* Ms. Leung believed he would benefit from several treatments, including "learning self-management skills in level II pain management group appointments." *Id.* Also on May 29, 2008, Ortiz had a pain psychology consultation with Judy Embry, Ph.D. Tr. 234-35.

In June 2008, Ortiz continued to see Ms. Leung and Dr. Embry and was also in contact with a pharmacist who Dr. Peredy asked to assist with his transition from oxycontin to methadone. Tr. 215-25. On June 9, the pharmacist noted that "[p]atient reports doing well with methadone" and "believes pain is under control." Tr. 220. However, on June 17, the pharmacist noted that "[p]atient reports doing a little better with pain, but pain 'is still there,' which is 'not tolerable.'" Tr. 219. Based on Ortiz's report, the pharmacist stated that she would titrate gabapentin more aggressively.

Id. On June 25, the pharmacist noted Ortiz was reporting side effects of tiredness and lightheadedness as before, and that "[p]ain is still there, but pain level remains unchanged." Tr. 216. Also on June 25, Ortiz spoke to Dr. Embry and reported high stress relating to trying to get a loan to save his house and his upcoming Social Security disability hearing. *Id.* Ortiz declined biofeedback, "saying there are too many things going on right now." *Id.* On July 2, the pharmacist left a message for Ortiz and discharged him from regular follow-up since he had been successfully converted from oxycontin to methadone. Tr. 214.

In early 2008, Ortiz began seeing Emir Bubalo, M.D., for his chronic abdominal pain and prediabetes. Dr. Bubalo's clinical assessment notes from a July 9, 2008 visit for prediabetes indicate that Ortiz's systems, when reviewed, came back negative for any issues; that he was "not in an acute distress"; and that his abdomen had "no tenderness, no distension," and "normal bowel sounds." Tr. 251. Dr. Bubalo also noted that, with respect to his chronic pain syndrome, that a change in medication from oxycodone to methadone and gabapentin seemed to result in him "doing better." *Id.*

On July 21, 2008, Dr. Bubalo filled out a Physical Residual Functional Capacity Questionnaire for Ortiz. Tr. 243-47. Dr. Bubalo wrote that his diagnoses were prediabetes and chronic pain syndrome, with a prognosis of fair, and symptoms included abdominal chronic pain, fatigue, and depression. Tr. 243. Dr. Bubalo further wrote that his clinical findings included intraabdominal adhesions and objective signs of colon diverticulosis. *Id.* Dr. Bubalo indicated that Ortiz's impairments would be expected to last at least twelve months and that depression contributed to the severity of his symptoms. Tr. 243-44. Further, Dr. Bubalo noted that Ortiz was "incapable of even 'low stress jobs,'" but followed that by explaining that this assessment was arrived at "according to the [patient's] statements." Tr. 244. Finally, Dr. Bubalo listed various functional limitations, including that Ortiz would need to take four unscheduled breaks of ten minutes during an 8-hour work day and would likely be absent from work more than four days per month. Tr. 244-47.

2. Sleep Apnea

The record indicates that Ortiz has been diagnosed with and treated for sleep apnea since the early 1990s. Tr. 40-41, 191, 231. Ortiz was prescribed a continuous positive airway pressure (CPAP) device, but he testified that he "couldn't tolerate" it. Tr. 40, 231. Ortiz also had two surgeries in 1993 and 2000[2] to help alleviate his sleep apnea. Tr. 191. Ortiz testified that the surgeries helped somewhat but that he still snored a lot and woke up roughly four times a night. Tr. 41. Ortiz further testified that he wakes up tired, loses attention during the day, and falls asleep when trying to read or talking to people. Tr. 41-42. Ortiz testified that his treating physicians at Kaiser told him that his sleep apnea and daytime sleeping problem were something he would have to live with. Tr. 42.

3. Depression

Finally, Ortiz's more recent medical records indicate that he has been diagnosed with and receives treatment for depression. Ortiz testified that he has been depressed since May 2005, when he began to work half-time as a result of his alleged disability. Tr. 42.

As noted above, Ortiz began seeing Dr. Embry in May 2008. During the initial visit, Dr. Embry noted that his mood was depressed but his insight and judgment were "good/socially appropriate." Tr. 235. In addition, Dr. Bubalo indicated in his July 2008 Physical Residual Functional Capacity Questionnaire that emotional factors contributed to the severity of his symptoms and functional limitations, and that depression was a psychological condition affecting his physical condition. Tr. 244. On August 8, 2008, the ALJ continued Ortiz's hearing to wait for a psychiatric consultative examiner ("CE") because Ortiz's counsel took the position that Ortiz's depression was a severe impairment. Tr. 29-30.

On August 25, 2008, Sheila B. Snyder, Ph.D., a clinical psychologist, conducted a psychological evaluation of Ortiz in which she diagnosed him with major depressive disorder, anxiety, and chronic pain. Tr. 262-69. Dr. Snyder noted that he presented as alert and oriented but his "[m]ood is distinctly depressed and dysphoric due to pain and financial stress." Tr. 263. Dr. Snyder administered multiple tests; Ortiz tested, for the most part, within the average range or

[2] Although Ortiz testified to surgeries in 1994 and 2001, Tr. 40-41, the record reflects that the surgeries took place in 1993 and 2000, Tr. 191.

normal limits, but some scores indicated some attention, concentration, and memory problems. Tr. 264. Dr. Snyder concluded that he:

> is [in] the loop where depression probably exacerbates the subjective experience of pain and the pain further exacerbates his sense of helplessness and frustration increasing the depression. He feels unable to function at work because of the pain and is easily fatigued as noted in the interview. He is very limited in what he can do on a daily basis to even perform simple chores and has restricted his driving. As his condition is of long duration there is little chance that he will improve significantly.

Tr. 265.

In September 2008, Ortiz saw Barbara J. Largent, a marriage and family therapist, who indicated he had been referred by his wife and attorney for evaluation and treatment regarding depression. Tr. 291. Ortiz initially told Ms. Largent he did not want a medical evaluation in the psychiatric department because he "already take[s] too many pills" but in a follow-up visit indicated he was willing to see a psychiatric M.D. Tr. 289, 291. Ms. Largent did not note any concerns regarding his mental status, except that he stated his mood was "tired." Tr. 289, 293. On February 12, 2009, he was evaluated by a different marriage and family therapist, Betsy Mae Lieberman, who noted that his mood was "dysphoric and irritable" and that he had short-term and long-term memory impairment that may have been related to methadone or his other pain medications. Tr. 286-87. After reading the notes from Ms. Lieberman, Ms. Largent called Ortiz and indicated she thought a depression group might be beneficial. Tr. 284. Ms. Largent noted that he agreed to start a depression group on March 12 and was pleased about having a scheduled medical evaluation with JoAnne Markle, M.D. *Id.*

On March 4, 2009, Dr. Markle conducted an intake visit, reviewing Ortiz's chart and history. Tr. 276. Dr. Markle's assessment was that Ortiz had depression and chronic pain, had financial stressors and concerns about whether he would receive social security disability benefits, and "will benefit from switch from prozac, which doesn't seem to be working well now, to effexor." Tr. 281. On March 19, 2009, Dr. Markle saw Ortiz again and completed a Mental Residual Functional Capacity Questionnaire. Tr. 298-303. Dr. Markle indicated that he had decreased memory and concentration and that his prognosis was fair. Tr. 298. In rating Ortiz's mental abilities and aptitudes needed to do unskilled work, Dr. Markle indicated that he would be unable to meet competitive standards in "complet[ing] a normal workday and workweek without interruptions from

psychologically based symptoms" and would be seriously limited in maintaining regular attendance and being punctual, and performing at a consistent pace without an unreasonable number and length of rest periods. Tr. 300. Dr. Markle explained these limitations by noting that "[patient] has pain, poor sleep [and] poor memory [and] concentration. He tires easily [and] has reduced frustration tolerance for irritating situations in a work-like setting." Tr. 301. Dr. Markle also indicated that Ortiz's psychiatric condition exacerbated his experience of pain or other physical symptoms, explaining that "[patient] has chronic pain, which results in a cycle of increased depression, increased anxiety [and] poor sleep." Tr. 302. Dr. Markle indicated that Ortiz's impairment had lasted or could be expected to last at least twelve months. *Id.*

Meanwhile, on March 7, 2009, Ortiz was assessed by Stefan Lampe, M.D., a certified psychiatrist, on behalf of the Social Security Administration. Tr. 270-74. Dr. Lampe's diagnosis stated that "[t]his is a gentleman with depressive symptons" and gave Ortiz a global assessment of functioning (GAF) score of 50.[3] Tr. 271. But Dr. Lampe's prognosis was that "[w]ith appropriate treatment, this claimant should be better in three to six months." *Id.* As to his ability to function, Dr. Lampe's assessment was that Ortiz could "relate to and interact with supervisors and co-workers"; could "understand, remember, and carry out simple as well as complex instructions"; and could "maintain concentration and attention for two-hour increments." *Id.* Dr. Lampe concluded, "[f]rom a purely psychiatric standpoint, *not considering anything physical*, [Ortiz] would be able to withstand the stress and pressure of an eight-hour workday on an ongoing basis." *Id.* (emphasis added).

D. ALJ Hearing Vocational Expert Testimony

At the ALJ hearing, the vocational expert ("VE") Ronald Morrell testified that if the Ortiz's testimony was credited as true, Ortiz could not do his past work and could not do any other work. Tr. 49-51. The VE made this assessment based on: (1) the suggestion that Ortiz would have problems with "nodding off" and concentrating; (2) Dr. Bubalo's conclusions that Ortiz had sitting and standing and walking restrictions, would require unscheduled breaks four times a day for ten

[3] The GAF scale ranges from 1 (persistent danger of hurting self or others/suicidal) to 100 (no symptoms), where a score of 41-50 denotes "serious symptoms." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 34 (4th ed., rev. 2000) ("DSM IV-TR").

minutes, and would miss more than four missed days of work per month; and (3) Dr. Snyder's conclusion that Ortiz would be unable to complete a normal workday without interruptions from psychological symptoms and the need for rest periods. *Id.*

E. ALJ Findings and Conclusions

The ALJ found Ortiz to be "not disabled" at step two of a five-step analysis. Tr. 15.[4] At step two, the ALJ found that Ortiz had three medically determinable impairments: chronic abdominal pain, sleep apnea, and major depressive disorder. Tr. 15. The ALJ concluded, however, that Ortiz did not have an impairment or combination of impairments that significantly limited his ability to perform basic work-related activities for twelve consecutive months, and therefore Ortiz did not have a severe impairment or combination of impairments. *Id.*

In arriving at this conclusion, the ALJ applied a two-step analysis adopted by the Ninth Circuit and the agency regulations, *see Smolen v. Chater*, 80 F.3d 1273, 1281 n.1 (9th Cir. 1996), to analyze Ortiz's symptoms. Where symptoms are subjective, such as Ortiz's pain here, a claimant must first produce objective medical evidence of an underlying impairment or combination of impairments which could reasonably be expected to produce pain or other symptoms alleged (step one). *Id.* at 1282; *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991); *Cotton v. Bowen*, 799 F.2d 1403, 1407-08 (9th Cir. 1986). If claimant meets step one, absent evidence of malingering, the ALJ may reject claimant's testimony regarding the severity of the symptoms *only* by offering specific, clear and convincing reasons (step 2). *Smolen*, 80 F.3d at 1283-84; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). If the ALJ discredits the claimant's testimony regarding the severity of the symptoms, "[t]he ALJ must state specifically which symptom testimony is not credible and what facts in the record lead to that conclusion." *Smolen*, 80 F.3d at 1284.

Applying this two part test to Ortiz's symptoms, the ALJ found: (1) that Ortiz's "medically

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[4] Pursuant to 20 C.F.R. § 404.1520(a), the Social Security Administration follows a five-step sequential inquiry for determining whether an individual is disabled. If the applicant is deemed "not disabled" at any of the steps, the analysis ends there. *Id.* § 404.1520(a)(4). Step one requires the ALJ to determine whether the claimant is engaging in "substantial gainful" work activity, and if so, the inquiry stops. *Id.* §§ 404.1520(a)(4)(i), 404.1520(b). Step two requires the ALJ to determine whether the claimant has a "severe" medical impairment or combination of impairments that (1) "significantly limits [claimant's] physical or mental ability to do basic work activities" and (2) meets the durational requirement (a continuous period of at least twelve months). *Id.* §§ 404.1520(a)(4)(ii), 404.1520(c), 404.1509. The ALJ's inquiry here ended at step 2. Tr. 15.

determinable impairments could not reasonably be expected to produce the alleged symptoms," i.e., there was "no clear etiology for [his] abdominal pain"; and (2) that "[Ortiz's] statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the finding the claimant has no severe impairment or combination of impairments." Tr. 16-17. In reaching the first conclusion, the ALJ gave substantial weight to the opinions of agency consulting sources, including Dr. Glaser's conclusion that there was no clear etiology for Ortiz's abdominal pain. Tr. 16-17. The ALJ further relied on Dr. Dao's IBS Questionnaire, which noted that Ortiz's "bowel movement condition [wa]s not significant enough to explain for his disability." Tr. 17, 209. The ALJ gave little weight to Dr. Bubalo's assessment, Tr. 17, where Dr. Bubalo noted objective signs of intraabdominal adhesions and colon diverticulosis with symptoms of "abdominal chronic pain, fatigue, [and] depression" that have "lasted or can . . . be expected to last at least twelve months." Tr. 243. The ALJ rejected Dr. Bubalo's assessment on the basis that it "does not comport with [Ortiz's] clinical treatment record at Kaiser and is not supported with specific clinical or diagnostic evidence from Dr. Bubalo." Tr. 17.

At step two, the ALJ rejected Ortiz's testimony regarding the severity of his symptoms because, *inter alia*: (1) his "chronic abdominal pain, also diagnosed as irritable bowel syndrome, is well controlled with prescription medication"; (2) he had "significant activities of daily living with his family"; (3) he "worked for years following [the 1991 surgery] with his alleged pain and symptoms and worked despite his treated sleep apnea since 1994"; and (4) there was no evidence that his condition had worsened. Tr. 16. The ALJ concluded that, "if anything, [Ortiz's] treatment records indicate [his conditions] have been controlled and alleviated with conservative measures." *Id.*

In considering Ortiz's psychiatric condition, the ALJ gave "greatest weight to the treatment record from Kaiser (Exhibit 13F) as supported by the persuasive report of the CE [Dr. Lampe]." Tr. 18. The ALJ gave less weight to Dr. Snyder's and Dr. Markle's opinions, finding, *inter alia*, that they were inconsistent with the treatment record at Kaiser and did not discuss Ortiz's use of narcotic medication or its effect on his mental symptoms. Tr. 17-18. Ultimately, the ALJ found that: (1) Ortiz's "brief treatment for depression at Kaiser does not support a finding that [he] has a severe

mental impairment[]" that would not improve with treatment or that met the twelve-month durational requirement; and (2) his mental impairment caused no more than mild limitation in the four broad functional areas known as "paragraph B" criteria. Tr. 18-19.

The ALJ concluded with respect to all impairments: "In sum, the Ortiz's physical and mental impairments, considered singly and in combination, do not significantly limit the Ortiz's ability to perform basic work activities. Thus, the claimant does not have a severe impairment or combination of impairments." Tr. 19. Upon the Appeals Council's denial of Ortiz's appeal, the decision of the ALJ became the final decision of the Commissioner.

II. LEGAL STANDARD

The court has jurisdiction to review the Commissioner's decision denying benefits pursuant to 42 U.S.C. § 405(g). However, the district court's scope of review is limited. The Commissioner's decision (here the decision of the ALJ) will be disturbed only if it is not supported by substantial evidence or if it is based upon the application of improper legal standards. 42 U.S.C. 405(g); *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). In this context, evidence is substantial if it is "more than a mere scintilla but less than a preponderance; it is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Sandgathe v. Charter*, 108 F.3d 978, 980 (9th Cir. 1997). To determine whether substantial evidence exists to support the ALJ's decision, the court examines the administrative record as a whole and considers evidence both supporting and detracting from the Commissioner's conclusion. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). Where evidence exists to support more than one rational interpretation, the court must defer to the ALJ's decision. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *Sandgathe*, 108 F.3d at 980.

III. ANALYSIS

Ortiz alleges that the ALJ erred at the second step of the five-step disability determination. Specifically, Ortiz argues that: (1) the ALJ's decision that there is no clear etiology for his symptoms is not supported by substantial evidence; (2) the ALJ's credibility analysis is erroneous; (3) the ALJ incorrectly failed to sufficiently consider his sleep apnea and depression when making the overall disability determination; (4) the ALJ failed to properly credit the opinions of Ortiz's treating

physicians, Dr. Bubalo and Dr. Markle; and (5) the ALJ misapplied the law regarding the effects of Ortiz's prescription medications. Ortiz further asserts that the court should not remand the case for a new hearing, but should instead reverse the ALJ's opinion, remanding solely for an award of benefits.

A. Substantial Evidence

In asserting that the ALJ's decision with respect to his abdominal pain is not supported by substantial evidence, Ortiz appears to make two arguments: (1) the record does, in fact, disclose a medical basis for Ortiz's pain: abdominal adhesions following his 1991 gall bladder surgery; and (2) the ALJ wrongly conflated Ortiz's abdominal adhesions with his IBS, and thus erroneously concluded that there is no clear etiology for Ortiz's abdominal pain.

In finding no clear etiology for Ortiz's complaints of abdominal pain, the ALJ relied on Dr. Glaser's assessment and Dr. Logan's and Dr. Ahn's records. Tr. 17. The ALJ rejected Dr. Bubalo's assessment, which provided clear etiology (intraabdominal adhesions, Tr. 243) for Ortiz's symptoms on the basis that "it does not comport with the claimant's clinical treatment record at Kaiser and is not supported with specific clinical or diagnostic evidence from Dr. Bubalo." Tr. 17. Contrary to the ALJ's finding, Dr. Bubalo's explicit clinical findings of intraabdominal adhesions with objective signs of colon diverticulosis *do* comport with Ortiz's treatment record at Kaiser. Dr. Logan's treatment record consistently notes the possibility that Ortiz's chronic abdominal pain is caused by abdominal adhesions. *See*, *e.g.*, Tr. 171, 176, 181. Moreover, Dr. Peredy's treatment notes, the fact that Ortiz underwent a laparotomy in 1994 and Ortiz's past treatment with abdominal scar injections, *see* Tr. 200, 236, are consistent with Dr. Bubalo's assessment that Ortiz has abdominal adhesions caused by his gall bladder surgery in 1991.

Importantly, no other doctor expresses an opinion contrary to Dr. Bubalo's. Dr. Glaser's case analysis—upon which the ALJ primarily relies— predates Dr. Bubalo's treatment and diagnosis, so Dr. Glaser was unable to consider or address Dr. Bubalo's finding of abdominal adhesions in his assessment. Here, the ALJ stated that Dr. Bubalo's assessment was unsupported by the record but, as discussed above, failed to consider the supporting treatment notes from Dr. Logan, Dr. Fisk, and Dr. Peredy. "Where the treating doctor's opinion is not contradicted by another doctor, it may be

rejected only for 'clear and convincing' reasons supported by substantial evidence in the record." *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007). Here, the record supports Dr. Bubalo's opinion that abdominal adhesions are the etiology for Ortiz's abdominal pain. The ALJ's conclusion to the contrary is not based on clear and convincing reasons supported by substantial evidence.

With respect to Ortiz's second argument, the ALJ does appear to conflate Ortiz's chronic abdominal pain with irritable bowel syndrome. Tr. 16 ("[T]he clinical record establishes that his chronic abdominal pain, *also diagnosed as irritable bowel syndrome*, is well controlled with prescription medication." (emphasis added)). The ALJ then relied in large part on Dr. Dao's *IBS Questionnaire* in determining that there is no clear etiology for Ortiz's pain. Tr. 17. However, the record is replete with medical opinions distinguishing Ortiz's abdominal pain and IBS as separate conditions. *E.g.*, Tr. 208-09 (Dr. Dao), 226 (Dr. Peredy). Ortiz also testified at the hearing that his abdominal pain and IBS cause him pain in different areas and are aggravated by different things:

> [ALJ:] [I]f you could clarify for me, is the irritable bowel a separate problem?
> [Ortiz:] Um-hum. Yes, it is."
> [ALJ:] Okay and where does [the irritable bowel syndrome] cause you pain?
> [Ortiz:] That's more in the central area.
> [ALJ:] Central part of your abdomen?
> [Ortiz:] Yeah.
> . . .
> [ALJ:] So is the irritable bowel more like diarrhea, and, and stuff —
> [Ortiz:] Yes.
> [ALJ:] —it's more like digestive problems?
> [Ortiz:] Yes, it is.
> . . .
> [ALJ:] Okay. Of those two problems . . . which is the one that most prohibits you from some work or work activity?
> [Ortiz:] Oh, the abdominal pain from the —
> [ALJ:] The abdominal pain.
> [Ortiz:] —surgery.

Tr. 38-40.

It was thus improper for the ALJ to effectively define Ortiz's IBS as the *only* possible etiology for Ortiz's chronic abdominal pain. *See* Tr. 16. Likewise, it was improper for the ALJ to consider Dr. Dao's IBS Questionnaire as bearing on any alternate etiologies for Ortiz's chronic abdominal pain. Dr. Dao's questionnaire contains multiple emphatic disclaimers that he only treats

Ortiz for irritable bowl syndrome and not for pain, and that he could not answer as to Ortiz's pain. Tr. 209. ("I do not treat patient for pain" and "I will defer answering these questions further due to lack of knowledge about patient's ongoing pain and activities."). Thus, by its own terms, Dr. Dao's opinion—that "patient's *bowel movement condition . . .* is not significant enough to explain for disability"—cannot support any conclusions regarding other etiologies for Ortiz's abdominal pain. *Id.* (emphasis added). The ALJ summarily discredits Dr. Bubalo's opinion as inconsistent with Ortiz's treatement record (which, as explained *supra*, is incorrect) without ever specifically addressing abdominal adhesions as a possible etiology for Ortiz's chronic abdominal pain. *See* Tr. 17. Any conclusion that there is no clear etiology for Ortiz's chronic abdominal pain based on Dr. Dao's IBS Questionnaire was unwarranted.

B. Ortiz's Credibility

As explained *supra*, the ALJ applied a two-step analysis for analyzing Ortiz's claimed symptoms. At step two, once a claimant produces objective evidence of an underlying medical condition that could give rise to the alleged symptoms, absent evidence of malingering, the ALJ may reject Ortiz's testimony about the severity of the symptoms only by offering specific, clear and convincing reasons. *Smolen*, 80 F.3d at 1283-84; *Dodrill*, 12 F.3d at 918. The ALJ may not reject Ortiz's testimony regarding the severity of the symptoms simply because there is no showing that the impairment could reasonably produce the degree of symptom alleged. *Smolen*, 80 F.3d at 1282; 20 C.F.R. §§ 404.1529(c)(2) and 416.929(c)(2). The ALJ may, however, consider the medical evidence as well as other factors, including Ortiz's daily activities; the location, duration, frequency and intensity of the symptoms; precipitating and aggravating factors; the type, dosage, effectiveness and side effects of medication; treatment other than medication; measures used to relieve symptoms; and functional limitations caused by the symptoms. *Smolen*, 80 F.3d at 1284; 20 C.F.R. §404.1529(c)(3).

At step two, the ALJ relied in part on Dr. Dao's IBS Questionnaire to find that Ortiz's pain was well controlled with medication. Tr. 17. Given Dr. Dao's disclaimers discussed *supra*, however, his statements about Ortiz's pain should have been given little, if any, weight. Similarly, the ALJ relied on Dr. Lampe's report (Ex. 12F) to conclude that Ortiz's depressive symptoms "do not

present any functional limitations." *Id.* Dr. Lampe, however, as the psychiatric CE, focused exclusively on psychological issues, not Ortiz's pain. Tr. 271 ("From a *purely psychiatric standpoint, not considering anything physical*, he would be able to withstand the stress and pressure of an eight-hour workday on an ongoing basis."). Thus, it was also improper for the ALJ to consider Dr. Lampe's assessment as bearing on Ortiz's physical pain, if he did. And while there are some other statements in the record that Ortiz was "doing better" or getting his pain under control, the record as a whole does not support a finding that Ortiz's pain had been controlled and alleviated by medication. The record shows that Ortiz was continually being switched from one medication to another, and that some medications lost effectiveness with continued use. In addition, there is no evidence that any medication ever completely eliminated Ortiz's pain.

The ALJ also relied on Ortiz's activities of daily living with his family to discredit his testimony regarding the severity of his symptoms. Tr. 17. However, the record does not support a finding that his symptoms did not significantly limit his activities. Ortiz testified that on a normal day, he would get up, have breakfast, straighten up the house as much as he could, and then try to read the paper. Tr. 47. Ortiz testified, however, that it would take him about an hour-and-a-half to read the paper because in the middle of an article he would "kind of block out or go out, go numb for a while" and have to keep going back and re-reading what he had already read. *Id.* Ortiz further testified that he would help his grandson with homework as much as he could and play or talk with him. *Id.* He additionally testified that he might do laundry if his pain was not too bad, but it hurt to lift the clothes out of the washer and carry them to the dryer. *Id.* Finally, Ortiz testified that he no longer goes out, possibly because of his depression. *Id.* Ortiz also told his psychologist, Dr. Synder, that "he is limited at home and cannot do yard work" and that "[h]e drives when he feels okay but often is in too much pain to trust himself driving and then his wife will drive." Tr. 263. Thus, in Ortiz's own testimony, while he is able to do some low energy activities, he is still significantly limited and affected by his pain and other symptoms.

Finally, the ALJ discredited Ortiz on the basis that Ortiz's had worked for years with his claimed symptoms, and "[t]here is no showing [in] the record that those conditions have worsened." Tr. 16. However, Ortiz did complain to multiple of his physicians that his pain had gotten worse,

becoming more frequent or persistent. *See, e.g.*, Tr. 235 (Dr. Embry), 197 (Dr. Peredy). In addition, Dr. Logan, who treated Ortiz for many years, ordered a half time work schedule in 2005 for three months. Tr. 179. While this evidence is not conclusive, it undermines the ALJ's finding that Ortiz's condition did not worsen. There is also evidence that the various medications prescribed to treat Ortiz's pain did not help *improve* his pain. *See, e.g.*, Tr. 216, 219.

In sum, the ALJ's reasons for rejecting Ortiz's testimony about his symptoms are neither clear and convincing nor supported by substantial evidence.

C. Consideration of Sleep Apnea and Depression in Overall Determination

Ortiz argues that: (1) the ALJ failed to consider the effects of Ortiz's sleep apnea; and (2) that the ALJ's finding that Ortiz's depression was non-severe is not supported by the record.

i. Sleep Apnea

The record regarding Ortiz's sleep apnea is limited and not entirely clear. While Ortiz testified at the hearing that he woke up at night because he either stopped breathing or was gasping for air, Tr. 41, he stated to some of his doctors that he would wake up due to pain, Tr. 231, 264. In addition, there is some evidence that Ortiz's drowsiness during the day was a side effect of his medications. Nor does the record clarify why Ortiz "can't tolerate" the CPAP device as a means for dealing with his sleep apnea. While the precise cause(s) of Ortiz's fatigue, poor sleep, and lack of concentration is unclear, these symptoms are nevertheless well-documented in the record. Because the ALJ did not explicitly address these symptoms, it is unclear what role they played in his decision, if any.

ii. Depression

As to Ortiz's depression, the court finds that the ALJ's conclusion that Ortiz's depression is not severe is supported by substantial evidence. Ortiz argues that he had long been taking anti-depressants and treated by a psychologist. However, the record reflects that Ortiz's medications, including Prozac, were prescribed for pain. Tr. 270. Similarly, Ortiz's visits with Dr. Embry related primarily to pain management. Tr. 216. Thus, these do not compel a conclusion that Ortiz suffered longstanding depression. Ortiz also argues that the ALJ improperly weighed the medical psychiatric

medical reports, arguing that Dr. Markle's and Dr. Snyder's assessments were entitled to more weight than Dr. Lampe's.

a. Dr. Markle's and Dr. Snyder's assessments

Both Dr. Markle and Dr. Snyder concluded that Ortiz's psychological symptoms severely limited his ability to function in a work environment, with little chance of improvement. Tr. 262-64 (Dr. Snyder); Tr. 298-303 (Dr. Markle). The ALJ gave less weight to Dr. Snyder's and Dr. Markle's opinions on the bases that, *inter alia*: (1) Dr. Snyder was not the treating physician and her opinion was conclusory and based on subjective statements, Tr. 17; and (2) Dr. Markles opinion was related only to Ortiz's "very recent treatment for subjective complaints of depressive symptoms" and was "not consistent with the treatment record from Kaiser," Tr. 18. Ortiz argues that Dr. Markle's opinion, as a treating physician, should be giving controlling weight over Dr. Lampe's. He also argues that Dr. Snyder's opinion is more thorough and more objective than Dr. Lampe's.

At the hearing, the ALJ stated he would give Dr. Markle's report "the traps of treating source" but would not give it much weight because Dr. Markle had only seen Ortiz twice. Tr. 34. The court finds a reasonable basis in the record for the ALJ to give Dr. Markle's opinion less weight. Given Dr. Markle's limited treatment, and the content of her report, it is reasonable to conclude that Dr. Markle's report is primarily based on Ortiz's subjective statements regarding his depression. Similarly, the ALJ's finding that Dr. Snyder's report was "conclusory based upon only [Ortiz's] subjective statements, particularly in light of limited mental health treatment history and the reports of that treatment," Tr. 17, is also a reasonable assessment of Dr. Snyder's report. Although Dr. Snyder administered tests, those results did not highlight any major problems. Tr. 264 (indicating "average," "normal," "mild slowing," and "low average" results for each of four tests, yet concluding without further explanation that Ortiz suffers from "Major Depressive Disorder"). The court finds that the ALJ gave sufficient, supported reasons for according less weight to Dr. Markle's and Dr. Snyder's opinions.

b. Dr. Lampe

Dr. Lampe, a non examining source, concluded that Ortiz's depressive symptoms were mild and presented no functional limitations, and that he would recover in three to six months, but he

nevertheless assigned Ortiz a GAF score of 50, indicating "severe symptoms." The ALJ gave the most weight to Dr. Lampe's opinion, which he found to be consistent with Ortiz's treatment record. *Id.* According to Ortiz, Dr. Lampe's report is partial and inconsistent with the DSM IV-TR. The court disagrees, finding substantial evidence in the record supports Dr. Lampe's conclusions. As to Dr. Lampe's conclusion that Ortiz's depression would improve with treatment, although both Dr. Snyder and Dr. Markle believed the impairment would be long-lasting, Dr. Markle also indicated that Ortiz would benefit from switching to Effexor. Tr. 280. This at least somewhat supports Dr. Lampe's opinion that Ortiz's depression would improve with proper treatment. Ortiz's therapist, Ms. Largent, also noted, "Mental status normal," and gave him a GAF score of "61-70 mild symptoms," Tr. 289, even higher than Dr. Lampe's score, and was thus consistent with Dr. Lampe's conclusion that Ortiz's depressive symptoms were mild. Similarly, Ortiz's therapist, Ms. Lieberman, indicated that Ortiz's mental status was generally normal with the exception that he was "withdrawn and irritable" and assigned him a GAF score of "51-60, moderate symptoms." Tr. 286-87. Even Dr. Markle gave Ortiz a higher GAF score than did Dr. Lampe, thus indicating that Ortiz's symptoms were only moderate. Tr. 280. Ms. Largent further noted that Ortiz agreed to start depression group in March 2009. Tr. 284. On the record as a whole, it would be reasonable to conclude, as Dr. Lampe did, that Ortiz's depression would not last for twelve months. Thus, the ALJ's finding was supported by substantial evidence.

D. Dr. Bubalo's and Dr. Markle's Opinions

As discussed above, the ALJ failed to properly consider Dr. Bubalo's opinion or to give sufficient reasons for rejecting it with respect to the abdominal pain analysis. There was not substantial evidence in the record upon which to reject Dr. Bubalo's testimony.

Also as discussed above, however, the ALJ gave sufficient reasons for giving Dr. Markle's opinion less weight that Dr. Lampe's with respect to Ortiz's psychological symptoms. The ALJ's findings of no severe *psychological* impairment are supported by substantial evidence in the record.

E. Prescription Medications

The ALJ must consider "the type, dosage, effectiveness, and side effects of any medication" in analyzing a Ortiz's symptoms. 20 C.F.R. § 404.1529(c)(3)(iv). Ortiz argues that the ALJ flipped

this regulation on its head by stating that his "symptoms may only be related to his use of pain medication." Tr. 18. Ortiz contends that, "[u]nder the regulations, the side effects of prescription medication are to be considered in evaluating, not used as a basis for discounting symptoms or punshing [him] for compliance with prescribed medication regimens." Pl.'s Br. 9.

The court disagrees that the ALJ relied on the side effects of Ortiz's pain medications as a basis for discounting his symptoms. The ALJ was referring to Ms. Lieberman's report that Ortiz's memory impairment "may be related to methadone and other pain meds," Tr. 287, and Ms. Largent's report that it was "not clear how much of [Ortiz's symptoms were] related to the pain meds," Tr. 294. The point of the ALJ's statement was not to discount the symptoms, but rather to show that Ortiz's treating sources found only moderate symptoms that would likely improve to mild symptoms with the use of antidepressants. Tr. 18. Even if the ALJ treated the medication side effects improperly, this was not a determinative factor in his reasoning and does not amount to a reversible legal error.

F. Remand

Ortiz argues that this court should remand for an award of benefits based on the errors in the ALJ's decision that, if corrected, would require a finding of compensable disability. A remand for an immediate award of benefits is proper when, after the court of appeals reverses an administrative determination, there are no remaining issues for the agency to consider in the first instance. *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004). "More specifically, the district court should remand for an immediate award of benefits if (1) the ALJ failed to provide legally sufficient reasons for rejecting the evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited." *Id.* at 593 (citing *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000).

As discussed, the ALJ failed to provide legally sufficient reasons for discrediting Dr. Bubalo's conclusion that abdominal adhesions are the cause of Ortiz's abdominal pain. Absent evidence of malingering (not present here), once Ortiz has established an objective medical condition capable of giving rise to his symptoms, the ALJ can only discredit his testimony regarding the severity of his symptoms, with specific, clear and convincing reasons. *Smolen*, 80 F.3d at 1283-

84; *Dodrill*, 12 F.3d at 918. The ALJ may not reject Ortiz's testimony regarding the severity of the symptoms simply because there is no showing that the impairment could reasonably produce the *degree* of symptom alleged. *Smolen*, 80 F.3d at 1282; 20 C.F.R. §§ 404.1529(c)(2) and 416.929(c)(2). As discussed, the ALJ failed to provide legally sufficient reasons for discrediting Ortiz's testimony regarding the severity of his pain. "Because the ALJ failed to provide legally sufficient reasons for rejecting [Ortiz's] testimony and [Dr. Bubalo's] opinion[], we credit the evidence as true." *Benecke*, 379 F.3d at 594. Crediting Dr. Bubalo's opinion and Ortiz's testimony regarding the severity of his pain as true, the ALJ would be required to find that Ortiz's abdominal pain stemming from his abdominal adhesions is severe. *See Smolen*, 80 F.3d at 1282-84; 20 C.F.R. §§ 404.1529(c)(2) and 416.929(c)(2). Ortiz therefore meets the disability requirements at step two of the analysis, regardless of the ALJ's determination on Ortiz's depression.

The remaining three steps in the five-step sequential disability analysis are: (steps 3 and 4) whether Ortiz is able to perform his past relevant work, 20 C.F.R. §§ 414.1520(d)-(f); and (step 5) if not, whether Ortiz "can make an adjustment to other work" (step 5, *id.* § 414.1520(g)). Here, the VE's testimony unequivocally establishes that Ortiz can neither return to his past relevant work nor make an adjustment to other work. Tr. 49-50. The issue is thus whether this court should nevertheless remand to the ALJ for a determination on steps 3-5 of the analysis. In *Benecke*, the district court remanded to the ALJ for further proceedings because the VE testimony in that case was "quite limited." 379 F.3d at 595. But the Ninth Circuit reversed, holding that where "it is clear form the record that the claimant is unable to perform gainful employment in the national economy, even though the vocational expert did not address the precise work limitations established by the improperly discredited testimony, remanding for an immediate award of benefits is appropriate." *Id.* Here, the VE's testimony actually *does* address the precise work limitations established by the improperly discredited opinion of Dr. Bubalo as well as claimant's testimony:

> [Attorney:] Mr. Morell, if you credit it's [sic] true the Claimant's testimony, as you've heard it today, I assume he can't do his past work?
>
> [VE:] That's correct.
>
> [Attorney:] Is there any other work in the economy that he could do?
>
> [VE:] Not if he is nodding off and unable to concentrate.

> [Attorney:] Okay. Secondly, refer to 9F which is Dr. Bubballo [sic], and that RFC.
>
> . . .
>
> [Counsel then calls the VE's attention to Dr. Bubalo's noted restrictions]
>
> . . .
>
> [Attorney:] With those restrictions, again I assume [Ortiz] can't do his past work. Is there any other work in the economy?
>
> [VE:] Your assumption is correct. He could not do his past relevant work, nor he – could he do any of the, any other work.

Tr. 49-50. Accordingly, the VE testimony here is either equivalent to or more extensive than the VE testimony in *Benecke* and thus sufficient to show that Ortiz is "unable to perform gainful employment in the national economy." 379 F.3d at 595. "Remanding a disability claim for further proceedings can delay much needed income for claimants who are unable to work and are entitled to benefits, often subjecting them to 'tremendous financial difficulties while awaiting the outcome of their appeals and proceedings on remand.'" *Id.* (quoting *Varney v. Sec'y of Health & Human Servs.*, 859 F.2d 1396, 1398 (9th Cir. 1988). Like in *Benecke*, here, "remanding for further administrative proceedings would serve no useful purpose and would unnecessarily extend [Ortiz's] long wait for benefits." *Id.* Accordingly, the court remands to the administration for an immediate award of benefits.

IV. ORDER

For the foregoing reasons, the court REMANDS to the Commissioner for an immediate award of benefits. The Commissioner's cross-motion for summary judgment is DENIED.

DATED: February 18. 2014

Ronald M. Whyte
RONALD M. WHYTE
United States District Judge