

DEC 12 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MITCHELL SAWYER,

Plaintiff - Appellant,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security Administration,

Defendant - Appellee.

No. 07-35078

D.C. No. CV-05-01590 MO

MEMORANDUM *

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Submitted November 21, 2008**
Portland, Oregon

Before: W. FLETCHER and FISHER, Circuit Judges, and BREYER, District
Judge.***

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

Mitchell Sawyer appeals from denial of his application for Social Security disability benefits. The district court affirmed the denial, and this appeal followed.

We review the district court's decision de novo. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). The Commissioner's decision must be affirmed if it is supported by substantial evidence and is free of legal error. *Id.*

We reverse the district court. An ALJ is required to consider as opinion evidence the findings of state agency medical consultants; the ALJ is also required to explain in his decision the weight given to such opinions. 20 C.F.R. § 416.927(f)(2)(i)-(ii); *see also* SSR 96-6P (1996), 1996 WL 374180 *2 (S.S.A. 1996) (stating that an ALJ "may not ignore" the opinions of state agency medical consultants "and must explain the weight given to the opinions in their decisions"). The ALJ failed to consider the findings of state agency medical consultants Cathy Salinas and Dr. J. Scott Pritchard because he was mistaken as to what their findings were. Although the ALJ noted that he agreed with the limitations assessed by the state agency consultants, his RFC assessment did not accurately include the limitations found by Salinas and Dr. Pritchard and his decision did not otherwise explain the weight he gave these opinions.

The ALJ's failure to consider the opinions of state agency consultants Salinas and Dr. Pritchard is not harmless. While we may affirm "under the rubric of harmless error where the mistake was nonprejudicial to the claimant or irrelevant to the ALJ's ultimate disability conclusion," *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006), the error here is directly relevant to the ultimate issue: whether Sawyer can perform light work.

In light of our determination we need not address whether the ALJ's error regarding the transferability of job skills is harmless. We also do not address arguments Sawyer made in briefs before the district court but did not raise in his opening brief on appeal. *See Brookfield Commc'ns, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1046 n.7 (9th Cir. 1999). We reverse and remand to the Commissioner of Social Security for further administrative proceedings consistent with this memorandum disposition.

REVERSED AND REMANDED.