

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
CENTRAL DISTRICT OF CALIFORNIA

MANUEL TRUJILLO,)	Case No. EDCV 08-1930-OP
)	
Plaintiff,)	
v.)	MEMORANDUM OPINION; ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	

The Court¹ now rules as follows with respect to the disputed issues listed in the Joint Stipulation (“JS”).²

///
///
///

¹ Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the United States Magistrate Judge in the current action. (See Dkt. Nos. 8, 9.)

² As the Court advised the parties in its Case Management Order, the decision in this case is being made on the basis of the pleadings, the Administrative Record, and the Joint Stipulation filed by the parties. In accordance with Rule 12(c) of the Federal Rules of Civil Procedure, the Court has determined which party is entitled to judgment under the standards set forth in 42 U.S.C. § 405(g).

1 I.

2 **DISPUTED ISSUES**

3 As reflected in the Joint Stipulation, the disputed issues which Plaintiff
4 raises as the grounds for reversal and/or remand are as follows:

- 5 1. Whether the Administrative Law Judge (“ALJ”) properly developed
6 the record, as ordered by the Appeals Council Order;
7 2. Whether the ALJ properly considered certain treating and
8 consultative opinions;³ and
9 3. Whether the ALJ properly considered Plaintiff’s obesity.

10 (JS at 3.)

11 II.

12 **STANDARD OF REVIEW**

13 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision
14 to determine whether the Commissioner’s findings are supported by substantial
15 evidence and whether the proper legal standards were applied. DeLorme v.
16 Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence means “more
17 than a mere scintilla” but less than a preponderance. Richardson v. Perales, 402
18 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971); Desrosiers v. Sec’y of
19 Health & Human Servs., 846 F.2d 573, 575-76 (9th Cir. 1988). Substantial
20 evidence is “such relevant evidence as a reasonable mind might accept as adequate
21 to support a conclusion.” Richardson, 402 U.S. at 401 (citation omitted). The
22 Court must review the record as a whole and consider adverse as well as
23 supporting evidence. Green v. Heckler, 803 F.2d 528, 529-30 (9th Cir. 1986).
24 Where evidence is susceptible of more than one rational interpretation, the
25 Commissioner’s decision must be upheld. Gallant v. Heckler, 753 F.2d 1450,
26 1452 (9th Cir. 1984).

27
28 ³ The Court combines Plaintiff’s second and third contentions into one
discussion. (JS at 3.)

1 functioning (based on the Full Scale IQ score of 65), or discuss that score
2 at all. If necessary, the Administrative Law Judge will recontact the
3 doctor to clarify the situation.

4 (Administrative Record (“AR”) at 100.) Notably, the Appeals Council mistakenly
5 stated “a Full Scale IQ score of 65.” Dr. Rose Colonna’s psychiatric evaluation
6 indicated a Full Scale IQ score of 88. (*Id.* at 340.)⁴ Nevertheless, Dr. Colonna
7 opined, “Given the test results and clinical data, the claimant is functioning in low
8 average range of intellectual ability.” (*Id.* at 341.) Dr. Colonna also assessed
9 Plaintiff with a Global Assessment of Functioning (“GAF”)⁵ score of 45, or
10 “[s]erious symptoms . . . OR any serious impairment in social, occupational, or
11 school functioning.” (AR at 342); DSM-IV at 34.

12 Contrary to Plaintiff’s contention, the Appeals Council did not order the
13 ALJ to contact Dr. Colonna, but rather gave the ALJ discretion to seek
14 clarification. (AR at 98-101.) In complying with the Appeals Council order, the
15 ALJ relied upon the testimony of the medical expert to interpret Dr. Colonna’s
16 findings. (*Id.* at 24, 449-56.) In the current decision, the ALJ stated:

17 Dr. David Anderson testified as a psychiatric expert. He concluded
18 from the file that the claimant has an affective disorder with moderate
19 difficulties maintaining concentration, persistence and pace, but
20 otherwise only mild difficulties in performing activities of daily living

21
22 ⁴ On January 14, 2005, Dr. Colonna completed a consultative psychiatric
23 evaluation on Plaintiff. (AR at 338-42.)

24 ⁵ GAF scores reflect the “clinician’s judgment of the individual’s overall
25 level of functioning . . . [including] psychological, social and occupational
26 functioning” and are not meant to be a conclusive medical assessment of overall
27 functioning, but rather, are only intended to be “useful in planning treatment[,] . . .
28 measuring its impact, and in predicting outcome.” Diagnostic and Statistical
Manual of Mental Disorders (“DSM-IV”), 32-34 (American Psychiatric Ass’n ed.,
4th ed. 2000).

1 and social interaction. Dr. Anderson specifically found that the GAF
2 score of 45 as determined by Dr. Rose Colonna in January 2005 was
3 inconsistent with the record.

4 (Id. at 24.) Thus, the ALJ properly relied on substantial evidence, i.e., the
5 testimony of the medical expert, to discredit Dr. Colonna's inconsistent GAF
6 finding.

7 Plaintiff mistakenly argues that the ALJ rejected Dr. Colonna's testimony
8 completely. (JS at 3-8, 10-11.) The ALJ only rejected Dr. Colonna's inconsistent
9 GAF finding and other similar observations indicating serious social,
10 occupational, or school functioning. (AR at 24.) In her opinion, Dr. Colonna
11 opined that Plaintiff could perform at least simple, unskilled work, which was
12 consistent with the ALJ's residual functional capacity ("RFC") assessment). (Id.
13 at 26, 342.)⁶

14 Additionally, the ALJ relied upon the subsequent psychiatric examination
15 performed by Dr. Steven Brawer to determine the extent, if any, of Plaintiff's
16 mental impairments.⁷ (Id. at 22, 24, 375-81.) The ALJ stated:

17 At the claimant's request, he was sent out for psychological testing
18 which showed only mild functional limitations. It is noted that the
19

20 ⁶ The ALJ provided the following RFC assessment:

21 [T]he claimant has the residual functional capacity to perform light work
22 with a preclusion from kneeling and crawling, a limitation to occasional
23 crouching and occasional pushing, pulling and reaching overhead with
24 the left upper extremity, an avoidance of hazards and pulmonary irritants
25 and moderate limitations in the ability to understand, remember and
26 carry out detailed work instructions, maintain concentration and
27 attention for extended periods of time, interact appropriately with the
28 general public and get along with coworkers or peers.

(AR at 26.)

⁷ On December 3, 2007, Dr. Brawer completed a psychological evaluation
on Plaintiff. (AR at 375-81.)

1 claimant has never had treatment from any mental health provider, only
2 having taken psychotropic medications prescribed by the family
3 physician.

4 (Id. at 24, 449-56.) The record supports the ALJ’s finding. Similar to Dr.
5 Colonna, Dr. Brawer concluded that Plaintiff had a “Full Scale IQ score of 89.”
6 (Id. at 340, 379.) This IQ score would, as Dr. Colonna also opined, “place the
7 patient in the Low Average Range of general intelligence.” (Id. at 341, 379.) Like
8 Dr. Colonna, Dr. Brawer concluded that Plaintiff could perform at least simple,
9 repetitive tasks. (Id. at 342, 380.) The ALJ relied upon Dr. Brawer’s opinion, and
10 implicitly Dr. Colonna’s opinion, to assess Plaintiff’s RFC. (Id. at 26.)

11 Accordingly, the record contains no ambiguous or inadequate evidence
12 regarding Dr. Colonna’s opinion, as the ALJ relied upon the opinion of the
13 medical expert to partially reject the inconsistent GAF score. Additionally, the
14 ALJ relied on a subsequent examination, similar to Dr. Colonna’s opinion, to
15 assess Plaintiff’s RFC. As a result, the ALJ’s duty to develop the record as to
16 ambiguous evidence is not triggered. See Tonapetyan, 242 F.3d at 1150; see also
17 Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001). Moreover, the record
18 was adequate for the ALJ to interpret Dr. Colonna’s opinion, as the ALJ relied
19 upon the medical expert testimony and a subsequent psychological evaluation for
20 further clarification. (AR at 22-26.) Thus, Plaintiff fails to explain how the
21 medical record was ambiguous or inadequate regarding Dr. Colonna’s opinion.
22 See Mayes, 276 F.3d at 458 (citing 42 U.S.C. § 423(d)(5) (Supp. 2001) and Clem
23 v. Sullivan, 894 F.2d 328, 330 (9th Cir. 1990)) (plaintiff has a duty to prove that
24 she is disabled).

25 Based on the foregoing, the Court finds that the ALJ fully and fairly
26 developed the record with respect to Plaintiff’s alleged mental impairments. Thus,
27 there was no error.

28 ///

1 **B. The ALJ Properly Considered the Opinions of the Consultative and**
2 **Treating Sources.**

3 Plaintiff contends the ALJ failed to provide specific and legitimate reasons,
4 supported by substantial evidence, to reject the findings of consultative physician,
5 Dr. Colonna, and treating physician, Dr. Hector Flores. (JS at 10-11, 13-17.)

6 **1. Applicable Law.**

7 It is well-established in the Ninth Circuit that a treating physician's opinions
8 are entitled to special weight, because a treating physician is employed to cure and
9 has a greater opportunity to know and observe the patient as an individual.

10 McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989). "The treating
11 physician's opinion is not, however, necessarily conclusive as to either a physical
12 condition or the ultimate issue of disability." Magallanes v. Bowen, 881 F.2d 747,
13 751 (9th Cir. 1989). The weight given a treating physician's opinion depends on
14 whether it is supported by sufficient medical data and is consistent with other
15 evidence in the record. See 20 C.F.R. § 404.1527(d)(2). If the treating
16 physician's opinion is uncontroverted by another doctor, it may be rejected only
17 for "clear and convincing" reasons. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.
18 1995); Baxter v. Sullivan, 923 F.2d 1391, 1396 (9th Cir. 1991). If the treating
19 physician's opinion is controverted, it may be rejected only if the ALJ makes
20 findings setting forth specific and legitimate reasons that are based on the
21 substantial evidence of record. Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir.
22 2002); Magallanes, 881 F.2d at 751; Winans v. Bowen, 853 F.2d 643, 647 (9th
23 Cir. 1987).

24 However, the Ninth Circuit also has held that "[t]he ALJ need not accept the
25 opinion of any physician, including a treating physician, if that opinion is brief,
26 conclusory, and inadequately supported by clinical findings." Thomas, 278 F.3d
27 at 957; see also Matney ex rel. Matney v. Sullivan, 981 F.2d 1016, 1019 (9th Cir.
28 1992). A treating or examining physician's opinion based on the plaintiff's own

1 complaints may be disregarded if the plaintiff's complaints have been properly
2 discounted. Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 602 (9th Cir.
3 1999); see also Sandgathe v. Chater, 108 F.3d 978, 980 (9th Cir. 1997); Andrews
4 v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995). Additionally, "[w]here the opinion
5 of the claimant's treating physician is contradicted, and the opinion of a
6 nontreating source is based on independent clinical findings that differ from those
7 of the treating physician, the opinion of the nontreating source may itself be
8 substantial evidence; it is then solely the province of the ALJ to resolve the
9 conflict." Andrews, 53 F.3d at 1041; Magallanes, 881 F.2d at 751; Miller v.
10 Heckler, 770 F.2d 845, 849 (9th Cir. 1985).

11 **2. The Opinion of Dr. Colonna.**

12 Plaintiff argues the ALJ failed to provide specific and legitimate reasons,
13 supported by substantial evidence, to reject the opinion of Dr. Colonna. (JS at 10-
14 11.) The Court disagrees.

15 As stated above, the ALJ relied on medical expert testimony to partially
16 reject Dr. Colonna's opinion as to Plaintiff's GAF score. See supra, Discussion
17 Part III.A.2; see also Thomas, 278 F.3d at 957; Matney, 981 F.2d at 1019. To the
18 extent that Plaintiff argues the ALJ reject all of Dr. Colonna's findings, that
19 contention is without merit. The ALJ relied upon a subsequent psychological
20 evaluation, consistent with Dr. Colonna's opinion, to assess Plaintiff's RFC. See
21 supra, Discussion Part III.A.2. Thus, the ALJ provided specific and legitimate
22 reasons, based upon substantial evidence, to partially reject Dr. Colonna's opinion.

23 **3. The Opinion of Dr. Flores.**

24 Plaintiff next contends that the ALJ failed to provide specific and legitimate
25 reasons, supported by substantial evidence, to reject the findings of Dr. Flores. (JS
26 at 16-17.) The Court disagrees.

27 On September 14, 2007, Dr. Flores completed a physical RFC
28 questionnaire. (AR at 367-71.) In the questionnaire, Dr. Flores diagnosed

1 Plaintiff with diabetes mellitus, hypertension, left shoulder impingement
2 syndrome, right knee degenerative joint disease, and major depression. (Id. at
3 367.) He indicated Plaintiff’s prognosis was “fair.” (Id.) Based on the severity of
4 Plaintiff’s pain, Dr. Flores opined that Plaintiff cannot lift more than fifteen
5 pounds and was precluded from a full range of motion in his left shoulder. (Id.)
6 Dr. Flores also opined that Plaintiff is unable to climb stairs, squat, or stand for a
7 prolonged period due to pain in his right knee. (Id.) Dr. Flores opined Plaintiff’s
8 functional limitations as follows: (i) Plaintiff can walk one block without rest; (ii)
9 Plaintiff can continuously sit for thirty minutes and stand for ten minutes; (iii)
10 Plaintiff can stand or walk for about two hours, and sit for about four hours, in an
11 eight-hour workday with normal breaks; (iv) Plaintiff requires a job which permits
12 shifting at will from sitting, standing, and walking; (v) Plaintiff will need to take
13 unscheduled breaks for about twenty minutes during an eight-hour workday; (vi)
14 Plaintiff can occasionally lift ten pounds or less, and can never lift twenty pounds
15 or more; (vii) Plaintiff is unable to reach out with his left arm at a full extension;
16 (viii) Plaintiff has limitations with grasping, turning, twisting, fine manipulation,
17 reaching, and overhead reaching; and (ix) Plaintiff requires the use of an assistive
18 device for ambulation. (Id. at 367-71.) Dr. Flores also concluded that Plaintiff
19 would be absent from work at least three days per month due to his impairments or
20 treatment. (Id. at 371.)

21 Here, the ALJ rejected Dr. Flores’ opinion as follows:

22 I do not give weight to the unsupported assertions Dr. Flores makes in
23 the disability form. I give greater weight to the treatment notes that the
24 doctors made at the time claimant was examined and that were created
25 for the sole purpose of making an official record of the claimant’s
26 medical condition, treatment, and response to treatment, than I give
27 weight to a disability form that was completed solely for the purpose of
28 qualifying the claimant for benefits, and which is inconsistent with those

1 treatment notes and the claimant's actual daily functioning. I also give
2 weight to the objective findings and observed functional limitations
3 from the consultative examiners. I do not give weight to any assessment
4 that relies solely on the claimant's subjective complaints and self
5 assessed functional limitations because the claimant's complaints and
6 statements are not credible. Thus, Dr. Flores' recordation and repetition
7 of the claimant's subjective assertions and contentions in the disability
8 form, in the absence of corroborative medical findings, is not an
9 independent, well supported medical evaluation and assessment of the
10 claimant's condition and functional abilities.

11 (Id. at 23.)

12 The record supports the ALJ's contention, as Dr. Flores' treatment notes do
13 not validate the above functional limitations. (AR at 217-23, 271-332, 343-55,
14 367-71.) For example, in June 2001, Dr. Flores noted that Plaintiff suffered from
15 mild left shoulder pain but was able to perform normal activities. (Id. at 287, 331.)
16 On July 9, 2001, Dr. Flores noted that Plaintiff had a full range of motion in his
17 left shoulder. (Id. at 286, 330.) On April 27, 2006, Dr. Flores reported that
18 Plaintiff's knee condition was stable. (Id. at 347.) On July 14, 2006, Dr. Flores
19 stated that Plaintiff had an improved range of motion in his left shoulder. Thus,
20 the ALJ rejected the opinion of Dr. Flores, as it was inadequately supported by the
21 doctor's treatment records. Thomas, 278 F.3d at 957; see also Matney, 981 F.2d at
22 1019.

23 Moreover, Dr. Flores's findings are largely based upon Plaintiff's subjective
24 complaints, which the ALJ properly discounted.⁸ (AR at 26-28.) As a result, the
25 ALJ properly rejected Dr. Flores' opinion. Morgan, 169 F.3d at 602; see also
26 Sandgathe, 108 F.3d at 980; Andrews, 53 F.3d at 1043. The ALJ also relied upon

27
28 ⁸ Plaintiff does not contest the ALJ's credibility finding. Thus, the Court declines to discuss this issue.

1 the opinions of the consultative examiners, whose findings were supported by
2 independent clinical evidence, to reject the opinion of Dr. Flores.⁹ (AR at 22-24,
3 356-66, 375-87); see also Andrews, 53 F.3d at 1041; Magallanes, 881 F.2d at 751;
4 Miller, 770 F.2d at 849.

5 Based upon the foregoing, the Court finds that the ALJ provided specific
6 and legitimate reasons, supported by substantial evidence, to properly reject Dr.
7 Flores' opinion. Thus, there was no error.¹⁰

8 **C. Reversal Is Not Warranted Based on the ALJ's Alleged Error with**
9 **Respect to His Failure to Consider Plaintiff's Obesity.**

10 Plaintiff's final contention is that the ALJ should have taken into account
11 Plaintiff's obesity in arriving at the decision. (JS at 20-23.) Plaintiff bases his
12 contention on the opinion of Dr. Flores, who indicated that Plaintiff's chronic knee
13 pain worsened from weight gain. (Id. at 21; AR at 344.) Plaintiff also argues that
14 he suffered from hypertension, which was exacerbated by his obesity. (JS at 21.)
15

16 ⁹ Plaintiff does not contest the validity of the consultative examiners'
17 opinions. Thus, the Court declines to elaborate on the individual findings of the
18 consultative examiners.

19 ¹⁰ Plaintiff also argues that the ALJ failed to properly develop the record as
20 to Dr. Flores' opinion. However, the record contains no ambiguous or inadequate
21 evidence regarding Dr. Flores' opinion, as the ALJ reviewed and summarized Dr.
22 Flores' treatment records and related findings. (AR at 22-24.) Plaintiff fails to
23 identify how the record was ambiguous or inadequate regarding Dr. Flores'
24 opinion. See Mayes, 276 F.3d at 458 (citing 42 U.S.C. § 423(d)(5) (Supp. 2001)
25 and Clem v. Sullivan, 894 F.2d 328, 330 (9th Cir. 1990)) (plaintiff has a duty to
26 prove that she is disabled). As a result, the ALJ's duty to develop the record as to
27 ambiguous or inadequate evidence is not triggered. See Tonapetyan, 242 F.3d at
28 1150; see also Mayes, 276 F.3d at 459-60. Additionally, the record was adequate
for the ALJ to determine Plaintiff's RFC, as the ALJ relied upon the findings of
consultative examiners, the medical expert's opinion, and Plaintiff's testimony and
statements regarding his daily activities. (AR at 22-26.) Thus, there was no error.

1 The Court disagrees.

2 Generally, where there is evidence of obesity, the ALJ must determine the
3 effect of the plaintiff's obesity upon his other impairments, his ability to work, and
4 his general health. See, e.g., Celaya v. Halter, 332 F.3d at 1181; see also SSR 02-
5 01p (requiring an ALJ to consider the effects of obesity at several points in the
6 ALJ's evaluation). In Celaya, the Ninth Circuit held that it was error for an ALJ
7 not to develop the record on an obesity condition when that condition was likely a
8 partial basis for the claimant's disability, or could exacerbate her reported
9 illnesses, and where the claimant had proceeded *pro se* and likely never knew that
10 "she *could* assert obesity as a partial basis for her disability." Celaya, 332 F.3d at
11 1183.

12 In Burch, the Ninth Circuit distinguished its holding in Celaya, reasoning
13 that the ALJ had no duty to consider the represented plaintiff's obesity because
14 there was no indication in the record that her obesity exacerbated her other
15 impairments. Burch, 400 F.3d at 682. The court noted that there was no evidence
16 before the ALJ, and none in the record, indicating that Burch's obesity limited her
17 functioning; there were no treatment notes or any diagnoses addressing her
18 limitations due to obesity; the record was silent as to whether and how her obesity
19 might have exacerbated her condition; Burch did not specify which listing she
20 believed she would have met or equaled had her obesity been considered; and she
21 did not present any testimony or other evidence at the hearing that her obesity
22 impaired her ability to work. Id. at 682-83. Moreover, unlike the claimant in
23 Celaya, Burch had been represented by counsel throughout the proceedings. Id.
24 ("[m]ore significantly, Burch was represented by counsel.").

25 The facts in this case closely resemble those in Burch. Represented by
26 counsel throughout the proceedings, Plaintiff presented no evidence that his
27 obesity was disabling or that it exacerbated his hypertension or other severe
28 impairments. See Burch, 400 F.3d at 682. While Dr. Flores indicated the

1 Plaintiff's knee pain worsened due to weight gain, Dr. Flores did not opine that
2 Plaintiff suffered any functional limitations due to his obesity or even his greater
3 knee pain. (AR at 344.) This is not enough for this Court to find error. See, e.g.,
4 Burch, 400 F.3d at 683 (holding that there was no reversible error in the ALJ's
5 failure to consider the represented plaintiff's obesity where the only evidence in
6 the record consisted of notes from doctors observing weight gain, indicating
7 obesity, and recommending a medically supervised weight loss program). Nor
8 does Plaintiff in this case set forth any evidence which would support the finding
9 that Plaintiff's impairments met or equaled a Listing when obesity is included. Id.
10 at 683 (plaintiff bears the burden of proving the impairment meets or equals the
11 criteria of a listing; ALJ's failure to consider equivalence not error where claimant
12 did not offer any theory, plausible or otherwise, as to how his impairments
13 combined to equal a listing). Plaintiff cites to instances in the record indicating
14 hypertension, but there are no instances of doctors opining that his hypertension
15 was exacerbated due to his obesity or that he suffered any related functional
16 limitations. (AR at 275, 277-85, 300, 311-12, 314-16, 318-28, 365.) As in Burch,
17 there simply is no evidence in this record of any functional limitations as a result
18 of Plaintiff's obesity that the ALJ should have, yet failed, to consider.

19 Accordingly, the Court finds there was no error in the ALJ's failure to
20 address Plaintiff's obesity.

21 **IV.**

22 **ORDER**

23 Based on the foregoing, IT THEREFORE IS ORDERED that Judgment be
24 entered affirming the decision of the Commissioner, and dismissing this action
25 with prejudice.

26
27 Dated: December 11, 2009



28 **HONORABLE OSWALD PARADA**
United States Magistrate Judge