

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**

DAVID WALTER,
Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant.

NO. EDCV 09-1569 AGR

**MEMORANDUM OPINION AND
ORDER**

David Walter filed this action on August 21, 2009. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before Magistrate Judge Rosenberg on September 9 and 18, 2009. (Dkt. Nos. 8, 9.) On April 26, 2010, the parties filed a Joint Stipulation (“JS”) that addressed the disputed issues. The Court has taken the matter under submission without oral argument.

Having reviewed the entire file, the Court remands this matter to the Commissioner for proceedings consistent with this Opinion.

///

///

///

///

1 I.

2 **PROCEDURAL BACKGROUND**

3 On June 7, 2006, Walter filed an application for disability insurance
4 benefits. Administrative Record (“AR”) 11. On June 20, 2006, Walter filed an
5 application for supplemental security income benefits. *Id.* In both applications,
6 Walter alleged a disability onset date of April 15, 2006. *Id.* The applications were
7 denied initially and upon reconsideration. AR 11, 20-24. Walter requested a
8 hearing before an Administrative Law Judge (“ALJ”). AR 28. On November 6,
9 2008, the ALJ conducted a hearing at which Walter, two medical experts and a
10 vocational expert (“VE”) testified. AR 302-39. On March 18, 2009, the ALJ
11 issued a decision denying benefits. AR 11-18. On June 15, 2009, the Appeals
12 Council denied Walter’s request for review. AR 4-6. This action followed.

13 II.

14 **STANDARD OF REVIEW**

15 Pursuant to 42 U.S.C. § 405(g), this Court reviews the Commissioner’s
16 decision to deny benefits. The decision will be disturbed only if it is not supported
17 by substantial evidence, or if it is based upon the application of improper legal
18 standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995); *Drouin v.*
19 *Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

20 “Substantial evidence” means “more than a mere scintilla but less than a
21 preponderance – it is such relevant evidence that a reasonable mind might
22 accept as adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In
23 determining whether substantial evidence exists to support the Commissioner’s
24 decision, the Court examines the administrative record as a whole, considering
25 adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the
26 evidence is susceptible to more than one rational interpretation, the Court must
27 defer to the Commissioner’s decision. *Moncada*, 60 F.3d at 523.

1 III.

2 **DISCUSSION**

3 **A. Disability**

4 A person qualifies as disabled, and thereby eligible for such benefits, “only
5 if his physical or mental impairment or impairments are of such severity that he is
6 not only unable to do his previous work but cannot, considering his age,
7 education, and work experience, engage in any other kind of substantial gainful
8 work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20,
9 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

10 **B. The ALJ’s Findings**

11 The ALJ found that Walter met the insured status requirements through
12 December 31, 2009. AR 13.

13 Walter had the severe impairments of benign brain mass, depressive
14 disorder, not otherwise specified, chronic marijuana abuse, chronic alcohol
15 abuse, in partial remission, osteoarthritis of the right knee, and lumbar spine
16 disorder. AR 13. He had the residual functional capacity (“RFC”) to perform light
17 work, except that he can stand or walk two hours in an eight-hour workday, and
18 sit for six hours in an eight-hour workday with customary breaks. AR 15. He can
19 “occasionally push, pull, and finger with the left upper extremity,” and “frequently
20 reach and handle with the left upper extremity.” *Id.* He should “avoid hazards
21 such as dangerous or fast moving machinery, unprotected heights, and pools of
22 water,” take “no responsibility for the safety of others,” and “carry out no complex
23 tasks.” *Id.* He cannot be hypervigilant. *Id.* He can have “occasional, non-
24 intense interaction with coworkers and supervisors.” *Id.*

25 The ALJ found that Walter could not perform his past relevant work as a
26 glazier and a carpenter, but could perform jobs that exist in significant numbers in
27 the national economy. *Id.* at 17-18.

1 **C. Credibility**

2 “To determine whether a claimant’s testimony regarding subjective pain or
3 symptoms is credible, an ALJ must engage in a two-step analysis.” *Lingenfelter*
4 *v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, “the ALJ must determine
5 whether the claimant has presented objective medical evidence of an underlying
6 impairment ‘which could reasonably be expected to produce the pain or other
7 symptoms alleged.’” *Id.* (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir.
8 1991) (en banc)). The ALJ found Walter’s “medically determinable impairments
9 could reasonably be expected to cause the alleged symptoms.” AR 15.

10 “Second, if the claimant meets this first test, and there is no evidence of
11 malingering, ‘the ALJ can reject the claimant’s testimony about the severity of her
12 symptoms only by offering specific, clear and convincing reasons for doing so.’”
13 *Lingenfelter*, 504 F.3d at 1036 (citations omitted). “In making a credibility
14 determination, the ALJ ‘must specifically identify what testimony is credible and
15 what testimony undermines the claimant’s complaints.’” *Greger v. Barnhart*, 464
16 F.3d 968, 972 (9th Cir. 2006) (citation omitted).

17 The ALJ made no finding of malingering. He found that Walter’s
18 “statements concerning the intensity, persistence and limiting effects of [his]
19 symptoms are not credible to the extent they are inconsistent with the . . .
20 residual functional capacity assessment.” AR 15. “[T]o discredit a claimant’s
21 testimony when a medical impairment has been established, the ALJ must
22 provide specific, cogent reasons for the disbelief.” *Orn v. Astrue*, 495 F.3d 625,
23 635 (9th Cir. 2007) (citation and quotation marks omitted). “The ALJ must cite
24 the reasons why the claimant’s testimony is unpersuasive.” *Id.* (citation quotation
25 marks omitted). In weighing credibility, the ALJ may consider factors including:
26 the nature, location, onset, duration, frequency, radiation, and intensity of any
27 pain; precipitating and aggravating factors (*e.g.*, movement, activity,
28 environmental conditions); type, dosage, effectiveness, and adverse side effects

1 of any pain medication; treatment, other than medication, for relief of pain;
2 functional restrictions; the claimant's daily activities; and "ordinary techniques of
3 credibility evaluation." *Bunnell*, 947 F.2d at 346 (citing Social Security Ruling
4 ("SSR") 88-13¹) (quotation marks omitted). The ALJ may consider (a)
5 inconsistencies or discrepancies in a claimant's statements; (b) inconsistencies
6 between a claimant's statements and activities; (c) exaggerated complaints; and
7 (d) an unexplained failure to seek treatment. *Thomas v. Barnhart*, 278 F.3d 947,
8 958-59 (9th Cir. 2002).

9 "If the ALJ's credibility finding is supported by substantial evidence in the
10 record, we may not engage in second-guessing." *Id.* at 959 (citing *Morgan v.*
11 *Comm'r of the Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999)).

12 The ALJ discounted Walter's credibility for three reasons: (1) Walter's
13 inconsistent statements and conduct; (2) the lack of corroborating objective
14 evidence in the record to support the degree of Walter's complaints; and (3) the
15 "routine conservative treatment" Walter received. AR 16.

16 **1. Inconsistent Statements and Conduct**

17 The ALJ found that Walter's statements and conduct were inconsistent.
18 AR 16. Walter testified he was terminated from his glazier job because he was
19 not fast enough. *Id.*; AR 323. Walter told his doctor, however, that he left his job
20 due to his drinking. AR 16, 267. An ALJ may consider inconsistent statements
21 by a claimant. *Thomas*, 278 F.3d at 958-59. The ALJ also noted that Walter
22 testified he regularly drove his stick shift truck, despite his complaints about left
23 upper extremity weaknesses. AR 16, 321. The ALJ's finding is supported by
24 substantial evidence.

25
26 ¹ "Social Security Rulings do not have the force of law. Nevertheless, they
27 constitute Social Security Administration interpretations of the statute it
28 administers and of its own regulations," and are given deference "unless they are
plainly erroneous or inconsistent with the Act or regulations." *Han v. Bowen*, 882
F.2d 1453, 1457 (9th Cir. 1989).

1 **2. Objective Evidence**

2 Although lack of objective medical evidence supporting the degree of
3 limitation “cannot form the sole basis for discounting pain testimony,” it is a factor
4 that an ALJ may consider in assessing credibility. *Burch v. Barnhart*, 400 F.3d
5 676, 681 (9th Cir. 2005). The ALJ noted that the medical evidence did not
6 support Walter’s claims. AR 16. The objective medical evidence showed
7 Walter’s benign brain mass had been stable for years. AR 16, 228-29, 232. An
8 x-ray of the right knee showed only early osteoarthritis. AR 192. A lumbar spine
9 x-ray showed only mild spurring. AR 16, 239, 281. Diagnostic imaging of his
10 hips did not show significant degenerative change. AR 240. An EMG study of
11 the right lower extremity was negative. AR 225, 227. Further, there was no
12 gross disturbance of gait or strength, and no marked or extreme limitation of joint
13 motion. AR 13. The ALJ’s finding is supported by substantial evidence.

14 **3. Conservative Treatment**

15 “[E]vidence of ‘conservative treatment’ is sufficient to discount a claimant’s
16 testimony.” *Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007); *see also*
17 *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008). The ALJ found that
18 Walter’s complaints had been treated conservatively. AR 16. Walter primarily
19 took medication, did physical therapy, and had an injection. AR 203-06, 277-81,
20 285-90, 297; *see also Tommasetti*, 533 F.3d at 1040 (describing physical therapy
21 and anti-inflammatory medication as conservative treatment). He reported that

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Vicodin worked for his low back and right knee pain, and asked for refills.² AR
2 203, 206, 282, 290. The ALJ's finding is supported by substantial evidence.

3 The ALJ provided "specific, clear and convincing reasons" for declining to
4 fully credit Walter's testimony, see *Lingenfelter*, 405 F.3d at 1036, and his
5 credibility finding is supported by substantial evidence. The Court "may not
6 engage in second-guessing." *Thomas*, 278 F.3d at 959.

7 **D. Treating Physician**

8 An opinion of a treating physician is given more weight than the opinion of
9 non-treating physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). When
10 a treating physician's opinion is contradicted by another doctor, "the ALJ may not
11 reject this opinion without providing specific and legitimate reasons supported by
12 substantial evidence in the record. This can be done by setting out a detailed and
13 thorough summary of the facts and conflicting clinical evidence, stating his
14 interpretation thereof, and making findings." *Id.* at 632 (citations and quotation
15 marks omitted).

16 Walter contends the ALJ "failed to provide specific and legitimate reasons,
17 supported by substantial evidence, for rejecting" Dr. Gordon's opinions contained
18 in a 2007 Work Capacity Evaluation (Mental) form ("2007 Assessment") and a
19 2008 Work Capacity Evaluation (Mental) form ("2008 Assessment") (collectively,
20 "Dr. Gordon's Assessments"). JS 20. In the 2007 Assessment, Dr. Gordon
21 stated that Walter was extremely limited in his ability to maintain attention and
22 concentration for extended periods, markedly limited in three areas, moderately
23 limited in five areas, and that she was unable to assess Walter's limitations in
24 seven areas. AR 250-51. In the 2008 Assessment, Dr. Gordon stated that Walter
25 ///

26 _____
27 ² Impairments that can be controlled effectively with medication are not
28 considered disabling. *Warre v. Comm'r of the SSA*, 439 F.3d 1001, 1006 (9th
Cir. 2006).

1 was extremely limited in virtually every aspect of work, markedly limited in one
2 area, and moderately limited in four areas. AR 209-10.

3 The ALJ gave Dr. Gordon's Assessments "no weight" on the ground that
4 they are "inconsistent with the treating source records and do not appear to be
5 objective assessments" of Walter's impairments. AR 16. Dr. Gordon's
6 Assessments were also undermined by Dr. Gordon's "failure to diagnose
7 substance abuse properly." *Id.*

8 The ALJ provided adequate reasons for discounting Dr. Gordon's
9 Assessments. The ALJ found Dr. Gordon's Assessments "in stark contrast" to the
10 doctor's treatment notes. AR 14. Dr. Gordon's treatment notes from August
11 2007, November 2007, and July 2008 stated that Walter's attention and
12 concentration were "appropriate." AR 16-17, 253, 265, 266. Walter had
13 appropriate appearance, mood, affect and speech. AR 253, 265, 266. In
14 addition, the treatment notes dated June 25, 2008 stated Walter did not meet the
15 criteria for a "presumptive disability." AR 254. Dr. Gordon's treatment notes
16 undermined Dr. Gordon's Assessments. AR 14, 256, 263, 269. An ALJ need not
17 accept a treating physician's opinion if it is "inadequately supported by clinical
18 findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir.
19 2009) (citation omitted); *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190,
20 1195 (9th Cir. 2004).³

21 In addition, the ALJ discounted Dr. Gordon's Assessments because of Dr.
22 Gordon's failure to diagnose Walter's substance abuse. AR 16. Walter is correct
23 in pointing out that Dr. Gordon's Assessments were made "apart from the effects

24 ///

25 ///

26 ///

27 ³ In this regard, the ALJ discounted Dr. Gordon's Assessments on the
28 ground that they were not objective. AR 16.

1 of drug or alcohol use or abuse.”⁴ JS 19; AR 209, 250. The ALJ’s reliance on Dr.
2 Gordon’s failure to diagnose Walter’s substance abuse, however, is harmless
3 error. See *Stout v. Commissioner*, 454 F.3d 1050, 1055 (9th Cir. 2006) (an error
4 is harmless if it is “inconsequential to the ultimate nondisability determination”).
5 The ALJ set forth a host of other specific and legitimate reasons to discount Dr.
6 Gordon’s Assessments in addition to Dr. Gordon’s failure to diagnose Walter’s
7 substance abuse.

8 The ALJ provided adequate reasons, under the appropriate legal standard,
9 for discounting Dr. Gordon’s Assessments.⁵ The ALJ did not err.

10 **E. Step Five of the Sequential Analysis**

11 At Step Five, the Commissioner bears the burden of demonstrating there is
12 other work in significant numbers in the national economy the claimant can do.
13 *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006). If the
14 Commissioner satisfies this burden, the claimant is not disabled and not entitled
15 to disability benefits. If the Commissioner cannot meet this burden, the claimant
16 is “disabled” and entitled to disability benefits. *Id.*

17 “There are two ways for the Commissioner to meet the burden of showing
18 that there is other work in ‘significant numbers’ in the national economy that
19 claimant can do: (1) by the testimony of a vocational expert, or (2) by reference to
20 the Medical-Vocational Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2.” *Id.*

21 ⁴ Walter is incorrect, however, in asserting that the ALJ misrepresented the
22 record and determined that Walter’s impairments exist only in conjunction with
23 substance abuse. JS 20. The ALJ relied on the testimony of the examining
24 psychologist, Dr. Glassmire, who indicated his assessment of Walter’s
impairments would not change regardless of whether he considered substance

25 ⁵ Walter argues the ALJ erred in failing to contact Dr. Gordon for
26 clarification of her opinions. JS 24; See SSR 96-5p (“For treating sources, the
27 rules also require that we make every reasonable effort to recontact such sources
28 for clarification when they provide opinions on issues reserved to the
Commissioner and the bases for such opinions are not clear to us.”). The ALJ
did not err in failing to contact Dr. Gordon for clarification of her opinions because
there is no indication of any ambiguity in the record. AR 14, 16.

1 “[A]n ALJ may [not] rely on a vocational expert’s testimony regarding the
2 requirements of a particular job without first inquiring whether the testimony
3 conflicts with the *Dictionary of Occupational Titles*.”⁶ *Massachi v. Astrue*, 486
4 F.3d 1149, 1152 (9th Cir. 2007) (footnote omitted); see also *Bray v. Comm’r of*
5 *Soc. Sec. Admin.*, 554 F.3d 1219, 1234 (9th Cir. 2009). SSR 00-4p requires the
6 ALJ to “first determine whether a conflict exists” between the DOT and the VE’s
7 testimony, and “then determine whether the VE’s explanation for the conflict is
8 reasonable and whether a basis exists for relying on the expert rather than the
9 [DOT].” *Massachi*, 486 F.3d at 1153.

10 In evaluating the VE’s explanation for the conflict, “an ALJ may rely on
11 expert testimony which contradicts the DOT, but only insofar as the record
12 contains persuasive evidence to support the deviation.” *Johnson*, 60 F.3d at
13 1435. The ALJ’s explanation is satisfactory if the ALJ’s factual findings support a
14 deviation from the DOT and “persuasive testimony of available job categories”
15 matches “the specific requirements of a designated occupation with the specific
16 abilities and limitations of the claimant.” *Id.* at 1435.

17 Remand may not be necessary if the procedural error is harmless, *i.e.*,
18 when there is no conflict or if the VE had provided sufficient support for her
19 conclusion so as to justify any potential conflicts. *Massachi*, 486 F.3d at 1154
20 n.19.

21 Here, the ALJ found Walter has the RFC “to perform light work . . . except
22 stand or walk two hours in an eight-hour workday, . . . [and] occasionally push,
23 pull, and finger with the left upper extremity.” AR 15. The VE testified that Walter
24 could not perform his past relevant work as a glazier and a carpenter. AR 335-36.
25 The VE further testified that Walter could perform work as an inspector and hand

26
27 ⁶ The Dictionary of Occupational Titles (“DOT”) raises a rebuttable
28 presumption as to job classification. *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th
Cir. 1995).

1 packager, a bench assembler, and a cleaner as performed in the regional or the
2 national economy. AR 337-38.

3 Walter argues there is a conflict between the VE's testimony and the DOT.
4 Walter contends that a limitation to two hours of standing or walking per day and a
5 limitation of occasional fingering with the left upper extremity are inconsistent with
6 the requirements of inspector and hand packager, bench assembler, and cleaner.
7 JS 3-7; DOT Nos. 559.687-074, 706.684-042, 323.687-014. The DOT states that
8 the cleaner job is "light" work that "requires walking or standing to a significant
9 degree." DOT No. 323.687-014; see also SSR 83-10 (light work "requires a good
10 deal of walking or standing"). The DOT states that the inspector and hand
11 packager job and the bench assembler job require frequent fingering, defined as
12 existing from 1/3 to 2/3 of the time. DOT Nos. 559.687-074, 706.684-042.

13 Walter has made a sufficient showing of an apparent conflict between the
14 VE's testimony and the DOT to require the ALJ to ask the VE whether her
15 testimony conflicted with the DOT and, if so, whether there was a reasonable
16 explanation for any conflict. *Massachi*, 486 F.3d at 1153; *Bray*, 554 F.3d at 1234.
17 The VE properly explained the basis for her opinion that Walter could perform the
18 jobs as inspector and hand packager, bench assembler and cleaner as follows: "I
19 don't believe being the non-dominant hand that [limiting the left upper extremity
20 with regard to the fingering to occasional] would change any of those jobs." AR
21 337-38. However, the ALJ's hypothetical did not include a limitation as to
22 standing or walking two hours in an 8-hour workday. AR 336. Therefore, the
23 VE's explanation completely ignores the potential conflict with the walking and
24 standing limitation. See *Massachi*, 486 F.3d at 1154 n. 19 (error where a VE fails
25 to provide an adequate basis for a deviation from the DOT). The ALJ did not ask
26 the VE whether her testimony conflicted with the DOT and whether a reasonable
27 explanation existed for the apparent conflict. AR 337-38.

28

1 Under these circumstances, the Ninth Circuit has held that “we cannot
2 determine whether the ALJ properly relied on [the VE’s] testimony.” *Massachi*,
3 486 F.3d at 1154. Further, “we cannot determine whether substantial evidence
4 supports the ALJ’s step-five finding that Massachi could perform other work.” *Id.*
5 The remedy, according to the Ninth Circuit, is “to remand this case so that the ALJ
6 can perform the appropriate inquiries under SSR 00-4p.” *Id.*

7 **IV.**

8 **ORDER**

9 IT IS HEREBY ORDERED that this matter is remanded for further
10 proceedings at Step Five consistent with this Opinion.

11 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this
12 Order and the Judgment herein on all parties or their counsel.

13
14 DATED: April 6, 2011

15 
16 _____
17 ALICIA G. ROSENBERG
18 United States Magistrate Judge
19
20
21
22
23
24
25
26
27
28