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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEVE MORENO,)	Case No. EDCV 11-01822-JEM
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	AFFIRMING DECISION OF
)	COMMISSIONER
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

PROCEEDINGS

On November 18, 2011, Steve Moreno (“Plaintiff or Claimant”) filed a complaint seeking review of the decision by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for Social Security Disability Insurance benefits. The Commissioner filed an Answer on February 21, 2012. On May 24, 2012, the parties filed a Joint Stipulation (“JS”). The matter is now ready for decision.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision should be affirmed and the case dismissed with prejudice.

BACKGROUND

1
2 Plaintiff is a 40 year old male who applied for Social Security Disability Insurance
3 benefits on March 31, 2007, alleging disability beginning September 1, 2006. (AR 14.) Plaintiff
4 has not engaged in substantial gainful activity since that date. (AR 17.)

5 On July 16, 2009, Administrative Law Judge ("ALJ") Jesse J. Pease issued an
6 unfavorable decision denying benefits. (AR 14.) In this prior decision, the ALJ made the
7 following findings:

8 (1) the claimant met the insured status requirements of the Social Security
9 Act through December 31, 2001; (2) the claimant had not engaged in
10 substantial gainful activity; (3) the claimant had a severe impairment
11 consisting of status post gunshot wound to the right hip with hip fracture and
12 subsequent surgery; (4) the claimant did not have an impairment or
13 combination of impairments that met or medically equaled a listed
14 impairment; (5) the claimant had the residual functional capacity ("RFC") to
15 perform a narrow range of light exertion; (6) the claimant's RFC precluded
16 the performance of his past relevant work; (7) the claimant was a younger
17 person with a high school education and no transferable work skills; (8) the
18 claimant's vocational factors and RFC did not preclude the performance of a
19 significant number of jobs in the regional and national economy; and (9) the
20 claimant was not disabled.

21 (AR 14.)

22 Through his attorney, Plaintiff appealed the unfavorable decision and on June 5, 2010,
23 the Appeals Council granted the request for review, vacated the hearing decision, and
24 remanded the case for further administrative proceedings. (AR 14.) In its remand order, the
25 Appeals Council directed the ALJ to do the following:

- 26 • Further consider the claimant's RFC inaccordance with Social Security Rulings,
27 83-14, 83-15 and 96-8p.

- 1 • Obtain supplemental evidence from a vocational expert to clarify the effect of the
2 assessed limitations on Claimant's occupational base (Social Security Rulings 83-
3 12 and 85-15). The hypothetical questions should reflect the specific
4 capacity/limitations established by the records as a whole. Ask the vocational
5 expert to identify examples of such appropriate jobs and to state the incidence of
6 such jobs in the national economy (20 CFR 404.1566 and 416.966). Further,
7 before relying on the vocational expert evidence, identify and resolve any conflicts
8 between the occupational evidence provided by the vocational expert and
9 information in the Dictionary of Occupational Titles ("DOT") and its companion
10 publication, the Selected Characteristics of Occupations (Social Security Ruling
11 00-4p).

12 (AR 14-15.)

13 Subsequently, a hearing was held on November 1, 2010, in San Bernardino, California
14 before the same ALJ. (AR 15.) Plaintiff appeared and testified at the hearing and was
15 represented by counsel. (AR 15.) Medical expert Joseph E. Jensen and vocational expert
16 ("VE") Sandra M. Fioretti also appeared and testified at the hearing. (AR 15.)

17 The ALJ issued an unfavorable decision on November 12, 2010. (AR 14-22.) The prior
18 decision was incorporated by reference, as supplemented in this new decision. (AR 15.) The
19 Appeals Council denied review on September 13, 2011. (AR 1-4.)

20 **DISPUTED ISSUES**

21 As reflected in the Joint Stipulation, Plaintiff raises the following disputed issues as
22 grounds for reversal and remand:

- 23 1. Whether the ALJ properly considered Plaintiff's testimony and made proper
24 credibility findings.
- 25 2. Whether the ALJ properly considered Plaintiff's treating physician's opinion and
26 properly developed the record.

STANDARD OF REVIEW

1
2 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether
3 the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v.
4 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846
5 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and
6 based on the proper legal standards).

7 Substantial evidence means “more than a mere scintilla,’ but less than a
8 preponderance.” Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v.
9 Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a
10 reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S. at
11 401 (internal quotation marks and citation omitted).

12 This Court must review the record as a whole and consider adverse as well as
13 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006). Where
14 evidence is susceptible to more than one rational interpretation, the ALJ's decision must be
15 upheld. Morgan v. Comm’r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).
16 “However, a reviewing court must consider the entire record as a whole and may not affirm
17 simply by isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882
18 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495
19 F.3d 625, 630 (9th Cir. 2007).

THE SEQUENTIAL EVALUATION

20
21 The Social Security Act defines disability as the “inability to engage in any substantial
22 gainful activity by reason of any medically determinable physical or mental impairment which
23 can be expected to result in death or . . . can be expected to last for a continuous period of not
24 less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner has
25 established a five-step sequential process to determine whether a claimant is disabled. 20
26 C.F.R. §§ 404.1520, 416.920.

27 The first step is to determine whether the claimant is presently engaging in substantial
28 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is engaging

1 in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S. 137,
2 140 (1987). Second, the ALJ must determine whether the claimant has a severe impairment or
3 combination of impairments. Parra, 481 F.3d at 746. An impairment is not severe if it does not
4 significantly limit the claimant's ability to work. Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir.
5 1996). Third, the ALJ must determine whether the impairment is listed, or equivalent to an
6 impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I of the regulations. Parra, 481 F.3d
7 at 746. If the impediment meets or equals one of the listed impairments, the claimant is
8 presumptively disabled. Bowen v. Yuckert, 482 U.S. at 141. Fourth, the ALJ must determine
9 whether the impairment prevents the claimant from doing past relevant work. Pinto v.
10 Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001). Before making the step four determination,
11 the ALJ first must determine the claimant's residual functional capacity ("RFC").¹ 20 C.F.R. §
12 416.920(e). The RFC must consider all of the claimant's impairments, including those that are
13 not severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling ("SSR") 96-8p. If
14 the claimant cannot perform his or her past relevant work or has no past relevant work, the ALJ
15 proceeds to the fifth step and must determine whether the impairment prevents the claimant
16 from performing any other substantial gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th
17 Cir. 2000).

18 The claimant bears the burden of proving steps one through four, consistent with the
19 general rule that at all times the burden is on the claimant to establish his or her entitlement to
20 benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the claimant, the
21 burden shifts to the Commissioner to show that the claimant may perform other gainful activity.
22 Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a finding that a
23 claimant is not disabled at step five, the Commissioner must provide evidence demonstrating
24 that other work exists in significant numbers in the national economy that the claimant can do,
25 given his or her RFC, age, education, and work experience. 20 C.F.R. § 416.912(g). If the
26

27 ¹ Residual functional capacity ("RFC") is what one "can still do despite [his or her] limitations"
28 and represents an assessment "based on all the relevant evidence." 20 C.F.R. §§ 404.1545(a)(1),
416.945(a)(1).

1 Commissioner cannot meet this burden, then the claimant is disabled and entitled to benefits.

2 Id.

3 **THE ALJ DECISION**

4 In this case, the ALJ determined at step one of the sequential process that Plaintiff has
5 not engaged in substantial gainful activity since September 1, 2006, the alleged onset date.

6 (AR 17.)

7 At step two, the ALJ determined that Plaintiff has the following combination of medically
8 determinable severe impairments: status post gunshot wound to the right hip with surgical
9 repair, currently with residual changes in the right hip joint. (AR 17.)

10 At step three, the ALJ determined that Plaintiff does not have an impairment or
11 combination of impairments that meets or medically equals one of the listed impairments. (AR
12 17.)

13 The ALJ then found that the Plaintiff had the RFC to perform a limited range of light
14 work, with the following limitations:

15 Claimant can stand and walk for four hours out of eight hours, provided he
16 can sit every hour for five minutes. He requires the use of a cane in the left
17 non-dominant hand if out of the immediate work area. He can sit for six
18 hours out of an eight-hour workday. He can lift and carry 20 pounds
19 occasionally and 10 pounds frequently. He cannot squat or crouch, and he
20 cannot climb ladders, ropes, or scaffolds. He can occasionally climb ramps
21 and stairs; and he can occasionally balance, stoop, kneel, and crawl. He
22 cannot work at heights, and he cannot perform pedal operations with the
23 right lower extremity.

24 (AR 17-20.) In determining this RFC, the ALJ also made an adverse credibility determination.

25 (AR 18.)

26 At step four, the ALJ found that Plaintiff is unable to perform his past relevant work as an
27 auto detailer, materials handler, process service, truck driver, and industrial truck operator. (AR
28 20.) The ALJ, however, did find there were other jobs existing in significant numbers in the

1 national economy that Plaintiff can perform, including small products assembler, cashier II, and
2 optical assembler. (AR 21.)

3 Consequently, the ALJ concluded that Claimant is not disabled within the meaning of the
4 Social Security Act. (AR 21.)

5 **DISCUSSION**

6 The ALJ decision must be affirmed. The ALJ properly discounted Plaintiff's credibility.
7 The ALJ properly rejected the opinion of Plaintiff's treating physician.

8 The ALJ's RFC is supported by substantial evidence. The ALJ's non-disability
9 determination is supported by substantial evidence and free of legal error.

10 **I. THE ALJ'S RFC IS SUPPORTED BY SUBSTANTIAL EVIDENCE**

11 Both issues raised by Claimant concern the ALJ's RFC. An RFC is not a medical
12 determination but an administrative finding based on consideration of all the relevant evidence,
13 including medical evidence, lay witnesses and subjective symptoms. See SSR 96-5p; 20
14 C.F.R. § 1527(e). In determining a claimant's RFC, an ALJ must consider all relevant evidence
15 in the record, including medical records, lay evidence and the effects of symptoms, including
16 pain reasonably attributable to the medical condition. Robbins, 466 F.3d at 883.

17 **A. The ALJ Properly Discounted Plaintiff's Credibility**

18 Plaintiff suffered a gunshot wound which resulted in a comminuted fracture of the right
19 introchanteric area and femoral neck wound, for which he underwent several surgeries. (AR
20 17, 19.) The Claimant alleges chronic, disabling pain. (AR 19.) Despite painful range of
21 motion in the right hip, the ALJ assessed a RFC for a limited range of light work. (AR 17.) In
22 determining this RFC, the ALJ discounted Plaintiff's credibility. Plaintiff contends the ALJ
23 improperly discounted his credibility. The Court disagrees.

24 **1. Relevant Federal Law**

25 The test for deciding whether to accept a claimant's subjective symptom testimony turns
26 on whether the claimant produces medical evidence of an impairment that reasonably could be
27 expected to produce the pain or other symptoms alleged. Bunnell v. Sullivan, 947 F.2d 341,
28 346 (9th Cir. 1991); see also Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998); Smolen, 80

1 F.3d at 1281-82 & n.2. The Commissioner may not discredit a claimant's testimony on the
2 severity of symptoms merely because it is unsupported by objective medical evidence.
3 Reddick, 157 F.3d at 722; Bunnell, 947 F.2d at 343, 345. If the ALJ finds the claimant's
4 symptom testimony not credible, the ALJ "must specifically make findings which support this
5 conclusion." Bunnell, 947 F.2d at 345. These findings must be "sufficiently specific to permit
6 the court to conclude that the ALJ did not arbitrarily discredit [the] claimant's testimony."
7 Thomas v. Barnhart, 278 F.3d 947, 958 (9th Cir. 2002); see also Rollins v. Massanari, 261 F.3d
8 853, 856-57 (9th Cir. 2001); Bunnell, 947 F.2d at 345-46. Unless there is evidence of
9 malingering, the ALJ can reject the claimant's testimony about the severity of her symptoms
10 only by offering "specific, clear and convincing reasons for doing so." Smolen, 80 F.3d at
11 1283-84; see also Reddick, 157 F.3d at 722. The ALJ must identify what testimony is not
12 credible and what evidence discredits the testimony. Reddick, 157 F.3d at 722; Smolen, 80
13 F.3d at 1284.

14 2. Analysis

15 In determining Plaintiff's RFC, the ALJ concluded that Plaintiff's medically determinable
16 impairments reasonably could be expected to cause his alleged symptoms. (AR 18.) The ALJ,
17 however, found that Plaintiff's statements regarding the intensity, persistence and limiting
18 effects of his symptoms were not credible to the extent they are inconsistent with the ALJ's
19 RFC. (AR 18.) Because there was no finding of malingering, the ALJ was required to provide
20 clear and convincing reasons supported by substantial evidence to discount Plaintiff's
21 credibility. Smolen, 80 F.3d at 1283-84. The ALJ did so.

22 First, the ALJ found that the objective medical evidence does not support disability. (AR
23 18-20, 37-38, 323, 327-31, 334-35.) An ALJ is entitled to consider whether there is a lack of
24 medical evidence to corroborate a claimant's symptoms as long as it is not the only reason for
25 discounting a claimant's credibility. Burch v. Barnhart, 400 F.3d 676, 680-81 (9th Cir. 2005).
26 Here, the ALJ adopted the findings of medical expert Dr. Joseph Jensen who testified that there
27 was no evidence of any significant neurological impairment of the upper extremities and that
28 Plaintiff could lift 20 pounds occasionally, stand and walk for four hours in an eight hour day and

1 sit for six hours, with other limitations. (AR 18, 37-38.) Consulting orthopedic examiner Dr.
2 Sophon provided a similar RFC assessment and found no evidence of muscle atrophy,
3 swelling, deformity, or tenderness in the right hip. (AR 19-20, 319-23.) State agency reviewers
4 also provided the same RFC assessments as Dr. Jensen and Dr. Sophon. (AR 20, 326-31,
5 334-35.)

6 Second, the ALJ reasonably found that Plaintiff had not received or sought treatment
7 commensurate with his claim of disabling pain. Tommasetti v. Astrue, 533 F.3d 1035, 1039
8 (9th Cir. 2008) (ALJ inferred pain not as disabling as claimed because claimant did not seek
9 aggressive treatment); Parra, 481 F.3d at 750-51 (conservative treatment is a proper basis for
10 discounting credibility). Here, despite allegations of disabling pain at a July 3, 2008, orthopedic
11 clinic exam, he received no treatment in the year leading to the exam, never sought medical
12 attention, and never had been prescribed medication or pursued medication. (AR 91, 19.)
13 Indeed, the only medication Plaintiff takes is aspirin to thin his blood. (AR 91.) Claimant also
14 never has sought emergency room treatment. (AR 19.) Doctors evaluate his hip injury
15 annually and have not suggested further treatment. (AR 19.) The ALJ also found that Plaintiff
16 had not sought treatment for a claimed back injury. (AR 20.)

17 Third, Plaintiff's credibility is also undermined by statements to his doctors that are
18 inconsistent with his allegations of disabling pain. An ALJ may consider inconsistencies
19 between a claimant's statements and conduct. Thomas v. Barnhart, 278 F.3d at 958-59. On
20 several occasions, medical records indicate Claimant denied any pain in his hip and, as noted
21 above, did not return for treatment until a year later. (AR 92.) The ALJ concluded that Plaintiff
22 was exaggerating his subjective complaints. (AR 91, 92.)

23 Plaintiff does not specifically discuss, rebut or even respond to any of the ALJ's reasons
24 for discounting Plaintiff's credibility or the evidence supporting those reasons. Plaintiff offers
25 only conclusory arguments that the ALJ failed to explain why Plaintiff is not credible and that the
26 reasons given for rejecting Plaintiff's credibility are legally insufficient. These unsupported
27 arguments are plainly meritless.

28

1 The ALJ properly discounted Plaintiff's credibility for clear and convincing reasons based
2 on substantial evidence.

3 **B. The ALJ Properly Rejected The Opinion Of Plaintiff's Treating Physician**

4 Plaintiff next argues that the ALJ improperly rejected the decision of treating physician
5 Dr. Song to sign a form for a handicapped placard. The Court disagrees.

6 1. Relevant Federal Law

7 Plaintiff's challenges to the ALJ's RFC both concern the ALJ's treatment of the medical
8 evidence. In evaluating medical opinions, the case law and regulations distinguish among the
9 opinions of three types of physicians: (1) those who treat the claimant (treating physicians); (2)
10 those who examine but do not treat the claimant (examining physicians); and (3) those who
11 neither examine nor treat the claimant (non-examining, or consulting, physicians). See 20
12 C.F.R. §§ 404.1527, 416.927; see also Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). In
13 general, an ALJ must accord special weight to a treating physician's opinion because a treating
14 physician "is employed to cure and has a greater opportunity to know and observe the patient
15 as an individual." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citation omitted). If
16 a treating source's opinion on the issues of the nature and severity of a claimant's impairments
17 is well-supported by medically acceptable clinical and laboratory diagnostic techniques, and is
18 not inconsistent with other substantial evidence in the case record, the ALJ must give it
19 "controlling weight." 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

20 Where a treating doctor's opinion is not contradicted by another doctor, it may be
21 rejected only for "clear and convincing" reasons. Lester, 81 F.3d at 830. However, if the
22 treating physician's opinion is contradicted by another doctor, such as an examining physician,
23 the ALJ may reject the treating physician's opinion by providing specific, legitimate reasons,
24 supported by substantial evidence in the record. Lester, 81 F.3d at 830-31; see also Orn, 495
25 F.3d at 632; Thomas v. Barnhart, 278 F.3d at 957. Where a treating physician's opinion is
26 contradicted by an examining professional's opinion, the Commissioner may resolve the conflict
27 by relying on the examining physician's opinion if the examining physician's opinion is
28 supported by different, independent clinical findings. See Andrews v. Shalala, 53 F.3d 1035,

1 1041 (9th Cir. 1995); Orn, 495 F.3d at 632. Similarly, to reject an uncontradicted opinion of an
2 examining physician, an ALJ must provide clear and convincing reasons. Bayliss v. Barnhart,
3 427 F.3d 1211, 1216 (9th Cir. 2005). If an examining physician’s opinion is contradicted by
4 another physician’s opinion, an ALJ must provide specific and legitimate reasons to reject it. Id.
5 However, “[t]he opinion of a non-examining physician cannot by itself constitute substantial
6 evidence that justifies the rejection of the opinion of either an examining physician or a treating
7 physician”; such an opinion may serve as substantial evidence only when it is consistent with
8 and supported by other evidence of record. Lester, 81 F.3d at 830-31; Morgan, 169 F.3d at
9 600.

10 2. Analysis

11 Dr. Andrew Song made orthopedic clinical notes for a September 2, 2010, visit in which
12 Plaintiff reported pain with weather changes. (AR 339.) Plaintiff had reduced, painful range of
13 motion (AR 339), a condition diagnosed by other doctors, but ambulated well with a cane. (AR
14 339.) Testing results were unchanged. (AR 339.) The note further indicates that Dr. Song had
15 a “disability discussion” with Plaintiff and endorsed a handicapped placard for Plaintiff. (AR
16 339.) Plaintiff was to return in one year for an x-ray. (AR 339.) No medications appear to have
17 been prescribed.

18 The ALJ did not give “great weight” to Dr. Song’s note:

19 The undersigned does not give great weight to the treating source’s
20 decision to sign a form so that the claimant could obtain a handicap placard,
21 which is issued through the State of California. Different governmental
22 entities use their own methods of determining disability, which are quite
23 different from the guidelines and rules used by the Social Security
24 Administration. Generally speaking, these forms only require a diagnosis or
25 reason why the claimant seeks a placard, and does not indicate what the
26 claimant can do despite his impairment. Moreover, a copy of the form is not
27 in the file.

1 (AR 19.) In effect, the ALJ did not find Dr. Song's endorsement of a handicapped placard to be
2 a conclusive determination of disability or necessarily inconsistent with the ability to work. As
3 the ALJ noted, Dr. Song did not provide an RFC assessment.

4 Plaintiff argues that the ALJ's rationale was insufficient to dismiss the form Dr. Song
5 signed. He asserts that the objective medical evidence establishes disability, citing Dr. Song's
6 findings summarized by the ALJ. (AR 19.) As already noted, however, the objective medical
7 evidence supports an RFC for a limited range of light work. (AR 17.) Dr. Song himself, as the
8 ALJ noted, reviewed the x-rays, conducted a physical examination, and reported no changes
9 from the examination one year prior. (AR 19, 339.) Dr. Song provided no treatment or
10 medication and told Plaintiff to return in a year for another x-ray. (AR 339.) Dr. Song did not
11 say Plaintiff was precluded from all work or provide an RFC assessment of his own. Indeed, his
12 findings are consistent with those of Dr. Jensen, Dr. Sophon, and the State agency reviewers.
13 Nor was there any duty to recontact Dr. Song to obtain a copy of the form because the record is
14 not ambiguous or insufficient for the ALJ to make a disability determination. Bayliss, 427 F.3d
15 at 1217.

16 An ALJ is responsible for resolving conflicts in the evidence. Andrews, 53 F.3d at 1039,
17 and an ALJ's interpretation of the evidence if reasonable should not be second-guessed.
18 Rollins, 261 F.3d at 857. Here, the ALJ's interpretation of the evidence that the handicapped
19 placard is neither conclusive or indicative of disability nor inconsistent with the ability to work or
20 the assessed RFC is reasonable and should not be second-guessed.

21 The ALJ gave specific, legitimate reasons based on substantial evidence for discounting
22 Dr. Song's decision to sign a form for a handicapped placard.

23 * * *

24 The ALJ's RFC is supported by substantial evidence. The ALJ's non-disability
25 determination is supported by substantial evidence and free of legal error.

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ORDER

IT IS HEREBY ORDERED that the decision of the Commissioner of Social Security is AFFIRMED and this action dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: June 14, 2012

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

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