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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MATTHEW J. SWANSON,
Plaintiff,
v.
CAROLYN W. COLVIN,
Commissioner of Social Security,
Defendant.

NO. EDCV 12-2108 AGR

MEMORANDUM OPINION AND
ORDER

Matthew J. Swanson filed this action on November 29, 2012. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge on January 4 and 10, 2013. (Dkt. Nos. 6-7.) On June 28, 2013, 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 affirms the decision of the Commissioner.

I.

PROCEDURAL BACKGROUND

On April 30, 2009, Swanson filed applications for disability insurance benefits and supplemental security income benefits. In both applications, Swanson alleged an onset date of November 28, 2008. Administrative Record (“AR”) 24, 158. The applications were denied initially and upon reconsideration. AR 24, 80-83. Swanson requested a hearing. On July 1, 2011, an Administrative Law Judge (“ALJ”) conducted a hearing at which Swanson, a medical expert and a vocational expert (“VE”) testified. AR 43-79. On August 19, 2011, the ALJ issued a decision denying benefits. AR 21-38. On October 5, 2012, the Appeals Council denied the request for review. AR 1-5. This action followed.

II.

STANDARD OF REVIEW

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

“Substantial evidence” means “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 the conclusion.” *Moncada*, 60 F.3d at 523. In determining whether substantial evidence exists to support the Commissioner’s decision, the Court examines the administrative record as a whole, considering adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than one rational interpretation, the Court must defer to the Commissioner’s decision. *Moncada*, 60 F.3d at 523.

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III.

DISCUSSION

A. Disability

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

B. The ALJ’s Findings

The ALJ found that Swanson met the insured status requirements through December 31, 2009. AR 26. He had the severe impairments of degenerative disc disease of the lumbosacral spine, chronic liver disease and asthma. AR 26.

Swanson had the residual functional capacity (“RFC”) to perform light work.¹ He “can lift and/ or carry 20 pounds occasionally and 10 pounds frequently; he can stand and/or walk for four to five hours out of an eight-hour workday with regular breaks; he can sit for three to four hours out of an eight-hour workday with regular breaks; he must have opportunity to change position 1-3 minutes every hour; [he] is unlimited with respect to pushing and/or pulling, he can occasionally stoop and bend; he can climb stairs, but he cannot climb ladders, work at heights, or balance; [his] work environment should be controlled, with no excessive inhaled pollutants (such as an office or a hearing room), the claimant may miss work twice a month.” AR 27. Although Swanson could not perform past relevant work, there were jobs in significant numbers in the national

¹ Light work involves lifting and/or carrying no more than 20 pounds occasionally and 10 pounds frequently; sitting, standing and/or walking for six hours out of an eight-hour workday with regular breaks; pushing or pulling within those weight limits; occasionally climbing ramps, stairs, ladders, ropes, and/or scaffolds; occasionally stooping, kneeling, crouching, and/or crawling; and performing simple repetitive tasks. 20 C.F.R. §§ 404.1567(b), 416.967(b).

1 economy that he could perform, such as assembler, small products; cashier II;
2 information clerk; and counter clerk. AR 35-37.

3 **C. Treating and Examining Physicians**

4 An opinion of a treating physician is given more weight than the opinion of
5 a non-treating physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). To
6 reject an uncontradicted opinion of a treating physician, an ALJ must state clear
7 and convincing reasons that are supported by substantial evidence. *Bayliss v.*
8 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). When, as here, a treating
9 physician's opinion is contradicted by another doctor, "the ALJ may not reject this
10 opinion without providing specific and legitimate reasons supported by substantial
11 evidence in the record. This can be done by setting out a detailed and thorough
12 summary of the facts and conflicting clinical evidence, stating his interpretation
13 thereof, and making findings." *Orn*, 495 F.3d at 632 (citations and quotation
14 marks omitted). When the ALJ declines to give a treating physician's opinion
15 controlling weight, the ALJ considers several factors, including the following: (1)
16 the length of the treatment relationship and frequency of examination;² (2) the
17 nature and extent of the treatment relationship;³ (3) the amount of relevant
18 evidence supporting the opinion and the quality of the explanation provided; (4)
19 the consistency with the record as a whole; and (5) the specialty of the physician
20 providing the opinion. See *Orn*, 495 F.3d at 631; 20 C.F.R. § 404.1527(d)(1)-(6).

21 An examining physician's opinion constitutes substantial evidence when it
22 is based on independent clinical findings. *Orn*, 495 F.3d at 632.

23
24 ² "Generally, the longer a treating source has treated you and the more
25 times you have been seen by a treating source, the more weight we will give to
26 the source's medical opinion. When the treating source has seen you a number
of times and long enough to have obtained a longitudinal picture of your
impairment, we will give the source's opinion more weight than we would give it if
it were from a nontreating source." 20 C.F.R. § 404.1527(d)(2)(i).

27 ³ "Generally, the more knowledge a treating source has about your
28 impairment(s) the more weight we will give to the source's medical opinion." 20
C.F.R. § 404.1527(d)(2)(ii).

1 “The opinion of a nonexamining physician cannot by itself constitute
2 substantial evidence that justifies the rejection of the opinion of either an
3 examining physician or a treating physician.” *Ryan v. Comm’r*, 528 F.3d 1194,
4 1202 (9th Cir. 2008) (citation omitted) (emphasis omitted). However, a
5 non-examining physician’s opinion may serve as substantial evidence when it is
6 supported by other evidence in the record and is consistent with it. *Andrews v.*
7 *Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

8 **1. Dr. Thomas and Dr. Steinberg**

9 On January 10, 2011, Dr. Thomas completed a Multiple Impairment
10 Questionnaire. AR 336-43. Dr. Thomas saw Swanson once every 1-2 months,
11 and diagnosed chronic low back pain with recent exacerbation due to progression
12 of osteoarthritis and degenerative disc disease. AR 336. Dr. Thomas cited
13 reduced range of motion of the low back and paravertebral spasm. AR 336-37.

14 Dr. Thomas noted that Swanson’s pain significantly worsened in December
15 2009. AR 342. Swanson could sit three hours and stand/walk five hours in an
16 eight-hour workday on a sustained basis. AR 338. Swanson would move around
17 once or twice per hour for five to ten minutes. AR 338-39. Swanson could carry
18 five pounds frequently and up to twenty pounds occasionally, and should avoid
19 repetitive reaching, handling, fingering or lifting. AR 339. He had moderate
20 limitations in grasping, turning and twisting objects; minimal limitations in
21 reaching; and no limitations in fine manipulations. AR 339-40. Swanson was not
22 limited in keeping his neck in a constant position. AR 340. Swanson’s pain
23 “periodically” was severe enough to interfere with attention and concentration.⁴
24 Swanson was capable of tolerating a low stress work environment. AR 341. Dr.
25 Thomas anticipated that Swanson would take unscheduled breaks once every
26 two to three hours for about twenty minutes, and would be absent more than

27 ⁴ The options were never, seldom, periodically, frequently and constantly.
28 AR 341.

1 three times per month. AR 341-42. Dr. Thomas precluded Swanson from
2 pulling, kneeling, bending and stooping. AR 342.

3 On June 16, 2011, Dr. Thomas essentially reiterated the same limitations
4 except that he did not repeat that Swanson would have to move around once or
5 twice per hour for five to ten minutes. AR 385.

6 On June 21, 2011, Dr. Steinberg examined Swanson and submitted a
7 report to his counsel. AR 387-99. Dr. Steinberg reviewed Dr. Thomas'
8 questionnaire. AR 389. Dr. Steinberg stated that the earliest the limitations
9 would apply is 2009. AR 398.

10 Swanson complained of low back pain and upper extremity pain when
11 reaching above his head. AR 390. Swanson denied shortness of breath. AR
12 390, 392.

13 Dr. Steinberg noted positive clinical findings of lumbosacral spasms and
14 decreased range of motion of the lumbosacral spine.⁵ AR 396. Shoulder range
15 of motion was full with no pain or tenderness. AR 393. Grip strength was
16 normal. AR 394-95. Range of motion in the lower extremities was intact with no
17 pain or tenderness. AR 394.

18 Dr. Steinberg noted that Swanson described his pain and fatigue as 8 on a
19 scale of 1-10. Swanson stated that he had constant aching and at times sharp
20 pain with exertion. His pain occurs daily and is aggravated by movement,
21 positioning and reaching above his head. AR 396.

22 Dr. Steinberg opined that Swanson could sit three hours, and stand/walk
23 for about two hours. Swanson would be required to get up from sitting and move
24 around for 30 minutes about every two hours. AR 396. Swanson could lift /carry

25
26 ⁵ Dr. Steinberg noted some loss of lordosis of the thoraco-lumbar spine,
27 tenderness on palpation and range-of-motion testing, reduced range of motion,
28 and para-lumbar muscle spasms. Dr. Steinberg noted tenderness to palpation
along the spinous processes and paraspinal musculature from the thoracic spine
to the lumbosacral junction, and para-vertebral muscle spasm. AR 393. Strength
was 5/5 in all extremities. AR 395.

1 up to five pounds frequently and up to ten pounds occasionally. Dr. Steinberg
2 assessed significant limitations in repetitive reaching, handling, fingering and
3 lifting; moderate limitations in grasping, turning or twisting objects; no limitations
4 in fine manipulation; and marked limitations in reaching (including overhead
5 reaching). Swanson should not keep his neck in a constant position, and his
6 pain/fatigue would be severe enough to interfere with his attention and
7 concentration on a frequent basis. AR 397. Swanson would be capable of
8 tolerating a low stress work environment. He would take unscheduled breaks for
9 about thirty minutes every two hours, and be absent more than three times per
10 month. He would be precluded from pushing, pulling, kneeling, bending or
11 stooping. AR 398.

12 **2. Analysis**

13 Swanson argues that the ALJ did not credit these physicians' opinions,
14 particularly the statements that he would likely be absent more than three times
15 per month, and could tolerate only a low stress work environment. JS at 10.

16 With respect to mental impairment issues, the ALJ gave greatest weight to
17 examining psychiatrist Dr. Bedrin. AR 31. Dr. Bedrin specifically found that
18 Swanson was not impaired in his ability to concentrate or pay attention, or in his
19 ability to withstand workplace stress in day-to-day work activities in eight-hour
20 workdays. AR 32, 271. Swanson's mental status examination indicated that his
21 recent remote memory was intact, his intellect was average and his immediate
22 recall was only mildly impaired. AR 270. An examining physician's opinion
23 based on independent clinical findings constitutes substantial evidence. *Orn*, 495
24 F.3d at 632.

25 With respect to physical impairment issues, the ALJ discounted to some
26 extent the opinions of both Dr. Thomas and Dr. Steinberg "because the doctors
27 apparently relied quite heavily on the subjective report of symptoms and
28 limitations provided by [Swanson], and seemed to uncritically to accept as true

1 most, if not all, of what [Swanson] reported. Yet, as explained elsewhere in this
2 decision, there exist good reasons for questioning the reliability of the claimant's
3 subjective complaints."⁶ AR 34. The ALJ noted that Dr. Thomas' opinion
4 departed substantially from the objective medical evidence and his conservative
5 course of treatment for Swanson.⁷ AR 35.

6 The ALJ's analysis is supported by substantial evidence. In November
7 2009, tests indicated mild pulmonary overexpansion. AR 30, 331. In February
8 2010, a pulmonary function study indicated that Swanson had "minimal
9 hypoxemia".⁸ AR 30, 300. The DLCO (carbon monoxide diffusing capacity) was
10 "mildly reduced," indicating ventilation/perfusion abnormalities and/or a reduction
11 in the pulmonary capillary and alveolar surface areas. AR 30, 300. A pulmonary
12 function test in August 2010 showed slight improvement. AR 308. In May 2010,
13 the CT scan of the chest showed no acute disease and no evidence of interstitial
14 pulmonary fibrosis. AR 31, 293.

15 In October and December 2010, tests of the lumbar spine revealed mild
16 degenerative changes and mild bilateral neural foraminal stenosis at L4-L5 and
17 L5-S1. AR 31, 305, 379. In February 2011, Swanson was diagnosed with mild
18 lumbar degenerative disk disease, mild lumbar spinal stenosis, deconditioning
19 and chronic low back pain. AR 31, 377. Swanson had muscle spasm in the
20 paraspinal muscles, right greater than left, from the midthoracic to lumbosacral
21 junction. Muscle strength was 5/5 in all extremities. Gait was steady and even.

22
23 ⁶ Swanson does not challenge the ALJ's findings on his credibility. The
24 ALJ's findings are fully supported by substantial evidence.

25 ⁷ The ALJ referred to the course of treatment prescribed by Dr. Steinberg.
26 AR 35. The court assumes that this is a typographical error and that the ALJ
27 actually referred to the treating physician, Dr. Thomas. There is no indication Dr.
28 Steinberg treated Swanson. Dr. Steinberg stated that he saw Swanson in June
2011 for a Qualified Medical Evaluation. AR 387. He prescribed no treatment.

⁸ Lung capacity was normal and reduction in the PaO₂ was minimal. AR
300.

1 AR 376-77. As of March 2011, after Swanson was apparently in a car accident, a
2 CT of Swanson's cervical spine revealed normal alignment, unremarkable
3 prevertebral soft tissue, a small disk margin osteophyte at the C5-C6 level and
4 mild mucosal thickening in bilateral maxillary sinus, left greater than right. AR 31,
5 371. The chest examination showed slightly expanded lungs. AR 31, 374. The
6 CT scan of the abdomen and pelvis was normal. AR 31, 375.

7 Dr. Thomas acknowledged the mild results in the pulmonary function tests,
8 MRIs and x-rays. AR 292, 297, 302, 357. In November 2010, Swanson
9 complained of lower back pain for the past three months. Dr. Thomas noted that
10 the spine had normal symmetry, gait was normal and range of motion was full or
11 within normal limits. AR 355, 358-59, 361. Swanson was treated conservatively
12 with medication. The progress notes reflect Swanson's complaints of pain or
13 shortness of breath. *E.g.*, AR 295 (pain when sitting a long time), 307 (shortness
14 of breath when walking uphill or climbing ladders), 355 (lower back pain for past
15 three months), 376 (low back pain described as "constant throb"). The treatment
16 notes do not reflect the degree of limitations expressed in Dr. Thomas'
17 questionnaire responses. AR 307 (pt able to perform activities of daily living
18 without difficulty), 335 (shooting pain in right leg did not interfere with day to day
19 life), 349-64.

20 Swanson argues that the ALJ improperly speculated that Dr. Thomas acted
21 as an advocate. The ALJ noted that such a motive is "more likely in situations
22 where the opinion in question departs substantially from the rest of the evidence
23 of record, as in the current case." AR 35. Because the ALJ could reasonably
24 discount a treating physician's opinion that was inconsistent with the objective
25 clinical findings in the treatment record, whether or not the treating physician
26 acted out of sympathy for his patient is immaterial.

27 Dr. Steinberg expressly relied upon Swanson's reported symptoms,
28 including his degree of pain. For example, whereas Dr. Steinberg found on

1 examination full range of motion in the shoulders without pain or tenderness, Dr.
2 Steinberg accepted Swanson's stated pain of 8/10 when reaching overhead in
3 formulating Swanson's limitations. AR 396-97. Whereas Dr. Steinberg's
4 examination of Swanson's neck was normal, Dr. Steinberg accepted that
5 Swanson could not keep his neck in a constant position.

6 Swanson argues that the ALJ improperly discounted Dr. Steinberg's
7 opinion because it was solicited by counsel. "[I]n the absence of other evidence
8 to undermine the credibility of a medical report, the purpose for which the report
9 was obtained does not provide a legitimate basis for rejecting it." *Reddick v.*
10 *Chater*, 157 F.3d 715, 726 (9th Cir. 1998). Here, the ALJ acknowledged that Dr.
11 Steinberg's opinion "is certainly legitimate and deserves due consideration." AR
12 34. However, the ALJ discounted Dr. Steinberg's opinion because it relied upon
13 Swanson's subjective complaints and was inconsistent with the objective clinical
14 findings. See *Saelee v. Chater*, 94 F.3d 520, 522-23 (9th Cir. 1996) (per curiam)
15 (ALJ may discount solicited opinion inconsistent with physician's notes and
16 unsupported by objective medical evidence); *Burkhart v. Bowen*, 856 F.2d 1335,
17 1339-40 (9th Cir. 1988) (ALJ may reject solicited opinion unsupported by medical
18 findings, observations or test results).

19 In addition, the ALJ accorded weight to the medical expert because he is
20 an orthopedic specialist, reviewed the medical records, observed Swanson at the
21 hearing and expressed opinions consistent with the objective medical evidence.
22 AR 33, 49, 51-53. The opinion of a nonexamining physician may constitute
23 substantial evidence when it is "consistent with independent clinical findings or
24 other evidence in the record." *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir.
25 2002). Dr. Landau noted that Swanson's MRIs showed mild degenerative
26 changes that were normal in a man of his age. AR 54. Dr. Landau opined that
27 Swanson could stand/walk for two hours in an eight-hour workday; sit with normal
28 breaks every two hours; lift/carry up to ten pounds frequently and twenty pounds

1 occasionally; stoop and bend occasionally; climb stairs but cannot climb ladders
2 or ropes, or balance; and work in an environment that was free of excessive
3 inhaled pollutants (such as an office). AR 50-51. Dr. Landau did not anticipate
4 that Swanson would miss work due to his conditions. AR 51. When asked to
5 explain why his opinion was less restrictive than the treating physician, Dr.
6 Thomas, Dr. Landau stated that he did not find objective evidence of severe
7 disease. AR 54-55.

8 The ALJ did not err.

9 **D. Vocational Expert**

10 An ALJ may rely on a VE's testimony given in response to a hypothetical
11 question that contains all of the limitations the ALJ found credible and supported
12 by substantial evidence. *Bayliss*, 427 F.3d at 1217-18. An ALJ is not required to
13 include limitations that are not in his findings. *Rollins v. Massanari*, 261 F.3d 853,
14 857 (9th Cir. 2001); *Osenbrock v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001).

15 The VE testified that a person with Swanson's RFC could perform the
16 representative jobs of assembler, small products; cashier II; information clerk;
17 and counter clerk. AR 73. The claimant would be able to miss work up to two
18 times per month, but not more than that.⁹ AR 73-74. The ALJ was entitled to rely
19 on the VE's testimony. "A VE's recognized expertise provides the necessary
20 foundation for his or her testimony. Thus, no additional foundation is required."
21 *Bayliss*, 427 F.3d at 1218.

22 Swanson argues that the VE's testimony was inherently unreliable based
23 on information that is not in the administrative record. Swanson cites a 2009
24 study indicating that the average number of paid sick days per year in private
25 industry is eight or nine days. JS at 19. Swanson's information is not supported
26 by analysis or explanation by a VE. Even assuming the court could consider this

27 ⁹ Contrary to Swanson's argument, no one asked for the basis of the VE's
28 testimony on this point.

1 information,¹⁰ it is incomplete and would not by itself undermine the VE's
2 testimony. For example, Swanson does not provide information about the
3 average number of paid vacation days per year in private industry. Without that
4 information, Swanson cannot undermine the VE's testimony about an employee's
5 ability to miss work for an average of twice per month. Swanson has not shown
6 any conflict between the VE's testimony and the Dictionary of Occupational Titles.
7 The ALJ did not err.

8 **IV.**

9 **ORDER**

10 IT IS HEREBY ORDERED that the decision of the Commissioner is
11 affirmed.

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

14
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16 DATED: August 20, 2013

17 _____
18 ALICIA G. ROSENBERG
19 United States Magistrate Judge
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23

24 _____
25 ¹⁰ On judicial review of the Commissioner's final decision, "[t]he findings of
26 the Commissioner of Social Security as to any fact, if supported by substantial
27 evidence, shall be conclusive." 42 U.S.C. § 405(g). A court "may at any time
28 order additional evidence to be taken before the Commissioner of Social Security,
but only upon a showing that there is new evidence which is material and that
there is good cause for the failure to incorporate such evidence into the record in
a prior proceeding." *Id.* Swanson does not attempt to make the required
showing.