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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

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11 JAVIER Z.,

12 Plaintiff,

13 v.

14 KILOLO KIJAKAZI, Acting
15 Commissioner of Social Security,

16 Defendant.

Case No. 5:22-cv-02079-KES

MEMORANDUM OPINION AND
ORDER

17
18 **I.**

19 **INTRODUCTION**

20 On November 23, 2022, Plaintiff Javier Z. (“Plaintiff”) filed a Complaint for
21 review of denial of social security disability benefits. (Dkt. 1.) Plaintiff filed
22 Plaintiff’s Brief (“PB”) under the Rule 6 of the Supplemental Rules for Social
23 Security Actions under 42 U.S.C. § 405(g). (Dkt. 14.) Defendant filed a
24 responding Commissioner’s Brief (“CB”) under the Rule 7. (Dkt. 17.) Plaintiff
25 filed a reply brief (“PRB”) on June 9, 2023. (Dkt. 18.)

26 For the reasons stated below, Plaintiff’s motion for remand is GRANTED.
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II.

BACKGROUND

In June 2020, Plaintiff applied for Title II Disability Insurance Benefits alleging a disability onset date of April 20, 2012, due to an industrial accident. Administrative Record (“AR”) 21, 158-75. On September 21, 2021, an Administrative Law Judge (“ALJ”) conducted a telephonic hearing at which Plaintiff, who was represented by counsel, appeared and testified with the assistance of an interpreter, along with a vocational expert (“VE”). AR 38-62.

On November 29, 2021, the ALJ issued an unfavorable decision. AR 21-33. First, the ALJ determined that Plaintiff’s last date insured (“LDI”) was December 31, 2017, such that Plaintiff needed to establish disability on or before that date. AR 22. He had not engaged in substantial gainful activity from April 2012 through December 2017. AR 23.

Next, the ALJ determined that through his LDI, Plaintiff suffered from the severe, medically determinable impairments (“MDIs”) of “degenerative disc disease; degenerative joint disease right shoulder; tendonitis right elbow; degenerative joint disease right knee; and umbilical hernia.” AR 24. The ALJ found that Plaintiff’s impairments of gastroesophageal reflux disease, irritable bowel syndrome, sleep apnea, and adjustment disorder with depression/anxiety were not severe. AR 24-25.

To determine Plaintiff’s residual functional capacity (“RFC”), the ALJ considered Plaintiff’s testimony about the limiting effects of his symptoms (AR 27) as well as Plaintiff’s medical records (AR 28-29). The ALJ also considered the medical opinion evidence. AR 29-31. The ALJ found that despite Plaintiff’s MDIs, he had the RFC to perform light work with additional limitations including (1) occasionally¹ pushing/pulling with his arms; (2) occasionally performing

¹ In the context of social security claims, “occasionally” means up to 1/3 of

1 postural activities; (3) frequently reaching with his dominate right arm; (4) never
2 climbing ladders, ropes, or scaffolds; and (5) never working in hazardous
3 environments. AR 26-27.

4 The ALJ found that Plaintiff could no longer perform his past relevant work
5 as a metalizing supervisor or metal finisher. AR 31. Plaintiff had, however,
6 acquired skills from those jobs involving metal working. AR 31. Based on the
7 RFC findings, the VE’s testimony, and other evidence, the ALJ found that Plaintiff
8 could work as a metal finish inspector (Dictionary of Occupational Titles [“DOT”]
9 703.687-014), metal sander and finisher (DOT 705.687-018), and Hand I blocker
10 (DOT 580.684-010). AR 26-27. The ALJ concluded that Plaintiff was not
11 disabled. AR 32-33.

12 III.

13 ISSUES PRESENTED

14 Issue One: Whether the ALJ “failed to provide clear, convincing, and well-
15 supported reasons for rejecting Plaintiff’s allegations of physical pain and
16 dysfunction.” (PB at 5.)

17 Issue Two: Whether the ALJ erred by failing to evaluate the medical
18 opinions from Pedram Navab, D.O., and Ted Tribble, Psy.D. (PB at 5.)

19 Issue Three: Whether the ALJ failed to properly evaluate the medical
20 opinions from Zenia Cortes, M.D., and Scott Small, D.O. (PB at 5.)

21 IV.

22 DISCUSSION

23 A. ISSUE ONE: Plaintiff’s Symptom Testimony.

24 1. Relevant Law.

25 The ALJ engages in a two-step analysis to evaluate a claimant’s subjective
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27 the workday, while “frequently” means up to 2/3 of the workday. Social Security
28 Ruling (“SSR”) 83-10, 1983 WL 31251, at *5-*6.

1 symptom testimony. Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir.
2 2007). “First, the ALJ must determine whether the claimant has presented
3 objective medical evidence of an underlying impairment [that] could reasonably be
4 expected to produce the pain or other symptoms alleged.” Id. at 1036. If so, the
5 ALJ may not reject a claimant’s testimony “simply because there is no showing
6 that the impairment can reasonably produce the degree of symptom alleged.”
7 Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996).

8 Second, if the claimant meets the first test, the ALJ may discredit the
9 claimant’s subjective symptom testimony only by making specific findings that
10 support the conclusion. Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010);
11 Burrell v. Colvin, 775 F.3d 1133, 1137 (9th Cir. 2014). Unless an ALJ finds that a
12 claimant is malingering or has failed to provide objective medical evidence in
13 support of his or her testimony, an ALJ must provide clear and convincing reasons
14 for rejecting a claimant’s subjective testimony about the severity of experienced
15 symptoms. Brown-Hunter v. Colvin, 806 F.3d 487, 488-89 (9th Cir. 2015). While
16 one reason for discrediting symptom testimony can be the lack of supporting or
17 consistent objective medical evidence, that cannot be the sole reason. Burch v.
18 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005). The district court may review only
19 those reasons given by the ALJ and may not affirm an ALJ’s decision to discredit
20 symptom testimony on grounds upon which the ALJ did not rely. Garrison v.
21 Colvin, 759 F.3d 995, 1010 (9th Cir. 2014).

22 **2. The ALJ’s Evaluation of Plaintiff’s Testimony.**

23 After summarizing Plaintiff’s testimony, the ALJ found that while Plaintiff’s
24 MDIs “could reasonably be expected to cause the alleged symptoms,” Plaintiff’s
25 “statements concerning the intensity, persistence and limiting effects of these
26 symptoms are not entirely consistent with the medical evidence and other evidence
27 in the record for the reasons explained in this decision.” AR 27. The ALJ then
28 summarized the medical evidence under the heading “Medical Evidence.” AR 27-

1 28. At the end of that summary, the ALJ wrote in a concluding paragraph that he
2 had determined Plaintiff's RFC after considering certain listed facts from the
3 medical evidence, Plaintiff's "subjective complaints and [his] activities of daily
4 living." AR 29. The ALJ noted that the RFC did not need "greater or additional
5 limitations" because listed medical evidence showed "normal" or "intact" physical
6 functioning. AR 29.

7 **3. Summary of the Parties' Arguments.**

8 Plaintiff contends that the ALJ's summary of the medical evidence does not
9 clearly set forth a reason for rejecting Plaintiff's symptom testimony. Plaintiff
10 further contends that even if the ALJ's concluding paragraph was intended to set
11 forth and support one reason (i.e., the lack of supporting objective evidence), that
12 one reason is not enough. (PB at 11-12.)

13 Defendant counters that ALJ gave two reasons: (1) lack of supporting
14 objective evidence and (2) improvement following a conservative course of
15 treatment. (CB at 8.) As evidence that the ALJ actually gave this second reason,
16 Defendant points to the ALJ's reference in the concluding paragraph to Plaintiff's
17 "positive response to chiropractic care." AR 29. Defendant notes that on the
18 preceding page, the ALJ summarized treating records that include a reference to
19 improvement with chiropractic treatment, as follows:

20 The claimant was treated with injections, medication, chiropractic
21 treatment, extracorporeal shockwave therapy, a right knee brace, and
22 LSO brace (Exhibit 3F/30/40/136/149/150/151; 7F/26; 8F).

23 Additionally, in November 2012, the claimant reported that he was
24 using a one point cane/walker/and was in a wheelchair (Exhibit
25 3F/83). The claimant reported improvement in his neck due to
26 medication and improvement in his lower back due to chiropractic
27 care (Exhibit 3F/136/137 [AR 599-600]). The claimant also declined
28 surgical intervention for his right shoulder in March 2013 (Exhibit

1 3F/79). In February 2014, the claimant underwent surgery on his
2 right shoulder, and also underwent surgery on his right elbow in
3 October 2014 (Exhibit 5F/215). Additionally, the claimant
4 underwent a second right shoulder surgery and right knee arthroscopy
5 in 2016 (Exhibit 8F).

6 AR 28.

7 Plaintiff replies that the ALJ did not identify positive response to
8 conservative care as a clear and convincing reason for discounting his testimony.
9 (PRB at 4.) Even if the ALJ's decision is interpreted as providing this reason, it
10 lacks substantial evidentiary support, because the records cited by the ALJ and the
11 medical evidence generally show that Plaintiff did not experience material
12 improvement due to chiropractic care. (PRB at 5.)

13 **4. Analysis.**

14 Other than the lack of supporting objective medical evidence, the Court does
15 not see a second reason in the ALJ's written decision for discounting Plaintiff's
16 symptom testimony. If the ALJ meant to rely on Plaintiff's positive response to
17 conservative treatment, then the ALJ failed to indicate that sufficiently clearly in
18 his written decision. The ALJ never used the words "conservative treatment." The
19 above-quoted paragraph in which the ALJ mentions some lower-back pain
20 improvement due to chiropractic care also mentions multiple surgeries and
21 Plaintiff's use of a wheelchair. The ALJ acknowledged that Plaintiff's physical
22 examinations at various times revealed lumbar pain and degenerative spinal
23 changes. AR 28.

24 The medical records cited by the ALJ as evidence of improvement with
25 chiropractic care (AR 599-600) do not contradict Plaintiff's symptom testimony.
26 The cited records are part of a workers' compensation January 2014 Qualified
27 Medical Re-Evaluation that summarizes Plaintiff's earlier treatment. AR 586. The
28 summarized records date from January and February 2013 and do say that

1 Plaintiff's "lower back complaints have improved 25 to 50% due to chiropractic."
2 AR 599-600. The January 2013 record, however, also reports that Plaintiff was
3 still experiencing pain rated 7/10, felt his condition was "worse overall," and was
4 awaiting hernia surgery. AR 599. In February 2013, Plaintiff reported that he felt
5 the "same overall" as in January 2013, which included pain in many body parts in
6 addition to his lower back. AR 599-600. Plaintiff reported that immediately after
7 his industrial accident in April 2012, he received "chiropractic treatment with Dr.
8 Rodriguez, twice a week, with partial and temporary benefit noted for a few
9 hours." AR 600. By 2014, however, he was still complaining of lower back pain
10 and was diagnosed with conditions including "lumbar spine disc herniation." AR
11 587. In sum, the cited records do not show a positive response to conservative
12 treatment that undermines Plaintiff's testimony about the limiting effects of his
13 pain.

14 Ultimately, the Court can discern neither a second specific, clear, and
15 convincing reason stated in the ALJ's decision for discrediting Plaintiff's symptom
16 testimony nor the evidence on which the ALJ relied to support that reason.

17 V.

18 **CONCLUSION**

19 For the reasons stated above, IT IS ORDERED that Judgment be entered
20 VACATING the decision of the Commissioner denying benefits and
21 REMANDING this case for further administrative proceedings. On remand, the
22 ALJ may wish to consider Plaintiff's other claims of error.

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24 DATED: June 12, 2023

Karen E. Scott

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26 KAREN E. SCOTT
27 United States Magistrate Judge
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