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5 UNITED STATES DISTRICT COURT
6 CENTRAL DISTRICT OF CALIFORNIA
7 SOUTHERN DIVISION
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9 OSCAR ANDRES NARVAEZ)
10 MIRAMONTEZ,)
11 Plaintiff,)
12 v.)
13 MICHAEL J. ASTRUE,)
14 Commissioner of the)
15 Social Security)
16 Administration,)
17 Defendant.)
18

Case No. SACV 12-00866-MLG
MEMORANDUM OPINION AND ORDER

17 Plaintiff Oscar Miramontez seeks judicial review of the
18 Commissioner's final decision denying his application for disability
19 insurance benefits ("DIB"). For the reasons stated below, the decision
20 of the Commissioner is affirmed and the matter is dismissed with
21 prejudice.
22

23 **I. Background**

24 Plaintiff was born on March 9, 1970, and was 38 years old at the
25 time he filed his application for benefits. (Administrative Record
26 ("AR") at 131.) He has a high school education and has relevant work
27 experience as an air conditioning installer, painter and drywall
28 installer. (AR at 160, 162.) Plaintiff filed his DIB application on

1 November 3, 2008, alleging disability beginning November 15, 2003, due
2 to lower back pain, insomnia and depression. (AR at 65, 131-34.)

3 Plaintiff's application was denied initially on December 8, 2008,
4 and upon reconsideration on February 18, 2009. (AR at 71-74, 77-81.) An
5 administrative hearing was held on March 16, 2010, before Administrative
6 Law Judge ("ALJ") Alexander Weir, III. Plaintiff, represented by
7 counsel, testified, as did a vocational expert. (AR at 36-64.)

8 On April 5, 2010, the ALJ issued an unfavorable decision. (AR at
9 21-35.) He found that the medical evidence established that Plaintiff
10 suffered from a severe back impairment. (AR at 24.) However, the ALJ
11 determined that Plaintiff's impairment did not meet, and was not
12 medically equal to, one of the listed impairments in 20 C.F.R., Part
13 404, Subpart P, Appendix 1. (AR at 26.) The ALJ further found that
14 Plaintiff retained the residual functional capacity ("RFC") to perform
15 light work as defined in 20 C.F.R. 404.1567(b) with the following
16 limitations:

17 Specifically, the claimant could lift or carry 10 pounds
18 frequently and 20 pounds occasionally. He could stand and walk
19 for 2 hours in an 8-hour work day (with normal breaks), and
20 could sit for 6 hours in an 8 hour day. He could push or pull
21 without limitation. He would need to be able to alternate
22 sitting and standing, as needed. In addition he was precluded
23 from climbing ladders, ropes or scaffolds, but he was able to
24 occasionally climb ramps and stairs, balance, stoop, kneel,
25 crouch, and crawl. He has no other manipulative, visual,
26 environmental or communicative limitations.

27 (AR at 27.)

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1 The ALJ concluded that although Plaintiff was incapable of
2 performing any past relevant work, there were jobs that existed in
3 significant numbers in the national economy that Plaintiff could
4 perform, and therefore Plaintiff was not disabled within the meaning of
5 the Social Security Act. See 20 C.F.R. § 416.920(f). (AR at 30-31.)

6 On February 23, 2012, the Appeals Council denied review. (AR at 1-
7 6.) Plaintiff then timely commenced this action for judicial review. On
8 December 14, 2012, the parties filed a Joint Stipulation ("Joint Stip.")
9 of disputed facts and issues. Plaintiff contends that the ALJ erred by:
10 (1) failing to give proper weight to the opinion of Plaintiff's treating
11 physician; and (2) failing to perform a proper credibility analysis.
12 (Joint Stip. at 4.) Plaintiff seeks reversal of the Commissioner's
13 denial of his application and payment of benefits or, in the
14 alternative, remand for a new administrative hearing. (Joint Stip. at
15 20-21.) The Commissioner requests that the ALJ's decision be affirmed.
16 (Joint Stip. at 21.)

17 18 **II. Standard of Review**

19 Under 42 U.S.C. § 405(g), a district court may review the
20 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
21 decision must be upheld unless "the ALJ's findings are based on legal
22 error or are not supported by substantial evidence in the record as a
23 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Batson v.*
24 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Parra*
25 *v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means
26 such evidence as a reasonable person might accept as adequate to support
27 a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Widmark*
28 *v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more than a

1 scintilla, but less than a preponderance. *Robbins v. Soc. Sec. Admin.*,
2 466 F.3d 880, 882 (9th Cir. 2006). To determine whether substantial
3 evidence supports a finding, the reviewing court "must review the
4 administrative record as a whole, weighing both the evidence that
5 supports and the evidence that detracts from the Commissioner's
6 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If
7 the evidence can support either affirming or reversing the ALJ's
8 conclusion," the reviewing court "may not substitute its judgment for
9 that of the ALJ." *Robbins*, 466 F.3d at 882.

10
11 **III. Discussion**

12 **A. The ALJ Accorded Appropriate Weight to the Opinion of**
13 **Plaintiff's Treating Physician**

14 Plaintiff contends that the ALJ erred in failing to give
15 controlling weight to the opinion of his treating physician, Dr.
16 Jonathan M. Wong, M.D. (Joint Stip. at 15.) On February 12, 2010, Dr.
17 Wong completed a Residual Functional Capacity Questionnaire, which
18 diagnosed Plaintiff with displacement of the intervertebral disc with
19 myelopathy. (AR at 613.) Dr. Wong opined that Plaintiff could sit for
20 less than two hours and could stand and walk for about two hours in an
21 eight-hour workday. (AR at 616.) Dr. Wong also stated that Plaintiff
22 would likely miss work three times a month as the result of his
23 impairments. (AR at 618.) Dr. Wong determined that Plaintiff's symptoms
24 and limitations began in 2002. (AR at 619.)

25 An ALJ should generally accord greater probative weight to a
26 treating physician's opinion than to opinions from non-treating sources.
27 See 20 C.F.R. § 404.1527(d)(2). The ALJ must give specific and
28 legitimate reasons for rejecting a treating physician's opinion in favor

1 of a non-treating physician's contradictory opinion. *Orn v. Astrue*, 495
2 F.3d 625 (9th Cir. 2007); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
3 1996). However, the ALJ need not accept the opinion of any medical
4 source, including a treating medical source, "if that opinion is brief,
5 conclusory, and inadequately supported by clinical findings." *Thomas v.*
6 *Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); accord *Tonapetyan v.*
7 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). The factors to be
8 considered by the adjudicator in determining the weight to give a
9 medical opinion include: "[l]ength of the treatment relationship and the
10 frequency of examination" by the treating physician; and the "nature and
11 extent of the treatment relationship" between the patient and the
12 treating physician. *Orn*, 495 F.3d at 631-33; 20 C.F.R. §§
13 404.1527(d)(2)(i)-(ii), 416.927(d)(2)(i)-(ii).

14 The ALJ provided several legitimate reasons for refusing to give
15 Dr. Wong's opinion controlling weight, which were supported by
16 substantial evidence in the record. The ALJ reviewed and summarized
17 Plaintiff's relevant medical records from July 2008 to February 2010.
18 (AR at 29-30.) After discussing these records in detail, the ALJ noted
19 that Dr. Wong's opinion was entitled to less weight because it covered
20 a period five years before Dr. Wong actually began treating Plaintiff in
21 2007. (AR at 29.) It was reasonable for the ALJ not to give probative
22 weight to Dr. Wong's retrospective opinion, particularly given that the
23 state agency physician and the qualified medical examiner both concluded
24 that Plaintiff could perform a range of light work. (AR at 519, 541,
25 543). See *Magallanes v. Bowen*, 881 F.2d 747, 754 (9th Cir. 1989)
26 (affirming rejection of treating physician's retrospective opinion where
27 physician had no direct personal knowledge of the claimant's condition
28 until more than two years after alleged onset date of disability and

1 which was contradicted by findings of several doctors who had the
2 opportunity to examine the claimant during the relevant time period).

3 The ALJ also gave less weight to Dr. Wong's opinion because he is
4 a family physician and not an orthopedic surgeon or other back
5 specialist. (AR at 29.) Plaintiff generally received medical treatment
6 for his back impairment from an orthopedic surgeon, Dr. Jacob Tauber,
7 M.D., rather than Dr. Wong, his primary care physician. (AR at 232-34,
8 243-64, 366.) Although Dr. Wong occasionally refilled Plaintiff's
9 Vicodin prescription for back pain, Dr. Wong primarily treated Plaintiff
10 for anxiety, depression and sleep problems, not for a back impairment.
11 (AR at 313, 336, 356-57, 366.) This was a proper basis under the Social
12 Security regulations for giving less weight to Dr. Wong's opinion
13 regarding Plaintiff's back impairment. See 20 C.F.R. §
14 404.1527(c)(2)(ii) ("For example, if your ophthalmologist notices that
15 you have complained of neck pain during your eye examinations, we will
16 consider his or her opinion with respect to your neck pain, but we will
17 give it less weight than that of another physician who has treated you
18 for the neck pain.").

19 Finally, the ALJ rejected Dr. Wong's opinion because Dr. Wong's own
20 treatment records contradicted his finding of extreme limitations. (AR
21 at 29.) As noted by the ALJ, Dr. Wong's few examinations of Plaintiff's
22 back found no tenderness, a full range of motion and a negative straight
23 leg raise. (AR at 29, 357, 580.) An ALJ may discredit a treating
24 physician's opinion if it is conclusory, brief, and unsupported by the
25 record as a whole or by objective medical findings. *Batson v. Comm'r*,
26 359 F.3d 1190, 1195 (9th Cir. 2004); *Tonapetyan*, 242 F.3d at 1149.

27 Accordingly, because the ALJ provided legitimate reasons supported
28 by the record for refusing to give Dr. Wong's February 12, 2010 opinion

1 controlling weight, Plaintiff is not entitled to relief with respect to
2 this issue.

3 **B. The ALJ Properly Evaluated Plaintiff's Subjective Symptom**
4 **Testimony**

5 Plaintiff contends that the ALJ erred by failing to provide clear
6 and convincing reasons for discounting his subjective symptom testimony.
7 (Joint Stip. at 12.) To determine whether a claimant's testimony about
8 subjective pain or symptoms is credible, an ALJ must engage in a two-
9 step analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009)
10 (citing *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007)).
11 First, the ALJ must determine whether the claimant has presented
12 objective medical evidence of an underlying impairment which could
13 reasonably be expected to produce the alleged pain or other symptoms.
14 *Lingenfelter*, 504 F.3d at 1036. "[O]nce the claimant produces objective
15 medical evidence of an underlying impairment, an adjudicator may not
16 reject a claimant's subjective complaints based solely on a lack of
17 objective medical evidence to fully corroborate the alleged severity of
18 pain." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc).
19 To the extent that an individual's claims of functional limitations and
20 restrictions due to alleged pain is reasonably consistent with the
21 objective medical evidence and other evidence in the case, the
22 claimant's allegations will be credited. SSR 96-7p, 1996 WL 374186 at *2
23 (explaining 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4)).¹

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26 ¹ "The Secretary issues Social Security Rulings to clarify the
27 Secretary's regulations and policy Although SSRs are not published
28 in the federal register and do not have the force of law, [the Ninth
Circuit] nevertheless give[s] deference to the Secretary's
interpretation of its regulations." *Bunnell*, 947 F.2d at 346 n.3.

1 Unless there is affirmative evidence showing that the claimant is
2 malingering, the ALJ must provide specific, clear and convincing reasons
3 for discrediting a claimant's complaints. *Robbins*, 466 F.3d at 883.
4 "General findings are insufficient; rather, the ALJ must identify what
5 testimony is not credible and what evidence undermines the claimant's
6 complaints." *Reddick*, 157 F.3d at 722 (quoting *Lester v. Chater*, 81 F.3d
7 821, 834 (9th Cir. 1996)). The ALJ must consider a claimant's work
8 record, observations of medical providers and third parties with
9 knowledge of claimant's limitations, aggravating factors, functional
10 restrictions caused by symptoms, effects of medication, and the
11 claimant's daily activities. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 &
12 n.8 (9th Cir. 1996). The ALJ may also consider an unexplained failure to
13 seek treatment or follow a prescribed course of treatment and employ
14 other ordinary techniques of credibility evaluation. *Id.* (citations
15 omitted).

16 Plaintiff testified at the administrative hearing to the following
17 symptoms and functional limitations: he has back pain almost every day;
18 his medication makes him feel "out of it;" he loses sensation in his leg
19 from a pinched nerve; he has rejected surgery but has received physical
20 therapy, which provided only temporary relief; he wears a back brace and
21 walks with a cane to help with his back pain; he can sit for about 20
22 minutes to a few hours before having to get up; he can walk for only 100
23 yards at a time; and he must lie down approximately ten times a day for
24 30-40 minutes to control the pain. (AR at 43-51.)

25 The ALJ found that Plaintiff's medical impairments could reasonably
26 be expected to produce the alleged symptoms. (AR at 28.) The ALJ was
27 therefore required to provide specific, clear and convincing reasons for
28 rejecting Plaintiff's subjective allegations of pain and functional

1 limitations. The ALJ provided various reasons for discrediting
2 Plaintiff's testimony, each of which is fully supported by the record.
3 First, the ALJ noted that Plaintiff's activities of daily living were at
4 odds with his claims of debilitating pain and serious functional
5 limitations. (AR at 28-29.) For example, the ALJ noted that, despite
6 Plaintiff's testimony that he could not lift more than 10 to 15 pounds,
7 Plaintiff reported to Dr. Wong in June 2008 that he carried around his
8 two small children. See *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.
9 1996) (the ALJ may use ordinary techniques of credibility evaluation,
10 such as considering inconsistent statements and whether the claimant has
11 been candid).

12 The ALJ also noted that Plaintiff's other daily activities were
13 also inconsistent with his allegations of severe pain and limitations.
14 Plaintiff helped prepare his children for school, dropped them off and
15 picked them up from school, watched the youngest child alone during the
16 day five days a week, ran errands, did laundry, washed dishes, cleaned,
17 and traveled to Mexico for two months in December 2008. (AR at 28, 139,
18 140, 142, 147, 595.) Although a claimant "does not need to be 'utterly
19 incapacitated' in order to be disabled," *Vertigan v. Halter*, 260 F.3d
20 1044, 1050 (9th Cir. 2001), the ability to perform certain activities of
21 daily life can support a finding that the claimant's reports of his or
22 her impairment are not fully credible. See *Bray v. Comm'r of Soc. Sec.*
23 *Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009); *Curry v. Sullivan*, 925 F.2d
24 1127, 1130 (9th Cir. 1990) (finding that the claimant's ability to "take
25 care of her personal needs, prepare easy meals, do light housework and
26 shop for some groceries ... may be seen as inconsistent with the
27 presence of a condition which would preclude all work activity") (citing
28 *Fair v. Bower*, 885 F.2d 597, 604 (9th Cir. 1989)). The activity that

1 Plaintiff reported performing, particularly daily child care for three
2 children, is much more strenuous than that found in *Curry*.

3 Finally, the ALJ noted that Plaintiff had declined surgery and been
4 recommended psychotropic medication, which undermined his subjective
5 complaints of pain and depression. (AR at 29.) An ALJ may properly rely
6 on "unexplained or inadequately explained failure to seek treatment or
7 to follow a course of treatment" in assessing credibility. See
8 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Fair*, 885 at
9 604 (finding that the claimant's allegations of persistent, severe pain
10 and discomfort were belied by "minimal conservative treatment" and
11 failure to follow doctor's advice). Here, Plaintiff apparently refused
12 surgery because he was afraid of the possible complications and because
13 Dr. Tauber stated that surgery might not be successful. (AR at 234-35,
14 286.) As Plaintiff notes, this is a legitimate reason for refusing back
15 surgery. See *Nichols v. Califano*, 556 F.2d 931, 933 (9th Cir. 1977) ("A
16 patient may be acting reasonably in refusing surgery that is painful or
17 dangerous."). However, the fact that Plaintiff discontinued taking anti-
18 depressant medication after only three weeks when he reported a 70%
19 improvement in his mental symptoms after taking the medication (AR at
20 29, 336, 565), does demonstrate an unwillingness to improve his
21 condition and could indicate that his symptoms were not as severe as
22 reported. See *id.* (noting that a failure to follow a simple and
23 effective medical procedure could undermine a claimant's credibility).

24 It is the responsibility of the ALJ to determine credibility and
25 resolve conflicts or ambiguities in the evidence, *Magallanes*, 881 F.2d
26 at 750, and a reviewing court may not second-guess the ALJ's credibility
27 determination when it is supported by substantial evidence in the
28 record, as here. See *Fair*, 885 F.2d at 604. Accordingly, it was

1 reasonable for the ALJ to rely on the reasons stated above in finding
2 that Plaintiff's subjective testimony regarding the severity of his
3 symptoms was not wholly credible.

4
5 **IV. Conclusion**

6 For the reasons stated above, the decision of the Social Security
7 Commissioner is **AFFIRMED** and the action is **DISMISSED** with prejudice.

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10 DATED: January 2, 2013



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12
13 Marc L. Goldman
United States Magistrate Judge