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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

SHAUN PAUL MOORE,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:23-CV-0169-DMC

MEMORANDUM OPINION AND ORDER

Plaintiff, who is proceeding with retained counsel, brings this action for judicial review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). Pursuant to the written consent of all parties, ECF Nos. 7 and 8, this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c); see also ECF No. 9 (minute order reassigning case to Magistrate Judge). Pending before the Court are the parties’ briefs on the merits, ECF Nos. 15 and 17.

The Court reviews the Commissioner’s final decision to determine whether it is: (1) based on proper legal standards; and (2) supported by substantial evidence in the record as a whole. See Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). “Substantial evidence” is more than a mere scintilla, but less than a preponderance. See Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996). It is “. . . such evidence as a reasonable mind might accept as adequate to support

1 a conclusion.” Richardson v. Perales, 402 U.S. 389, 402 (1971). The record as a whole,
2 including both the evidence that supports and detracts from the Commissioner’s conclusion, must
3 be considered and weighed. See Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986); Jones
4 v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The Court may not affirm the Commissioner’s
5 decision simply by isolating a specific quantum of supporting evidence. See Hammock v.
6 Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the administrative
7 findings, or if there is conflicting evidence supporting a particular finding, the finding of the
8 Commissioner is conclusive. See Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987).
9 Therefore, where the evidence is susceptible to more than one rational interpretation, one of
10 which supports the Commissioner’s decision, the decision must be affirmed, see Thomas v.
11 Barnhart, 278 F.3d 947, 954 (9th Cir. 2002), and may be set aside only if an improper legal
12 standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th
13 Cir. 1988).

14 For the reasons discussed below, the Commissioner’s final decision is affirmed.

15 16 I. THE DISABILITY EVALUATION PROCESS

17 To achieve uniformity of decisions, the Commissioner employs a five-step
18 sequential evaluation process to determine whether a claimant is disabled. See 20 C.F.R. §§
19 404.1520 (a)-(f) and 416.920(a)-(f). The sequential evaluation proceeds as follows:

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| 20 | Step 1 | Determination whether the claimant is engaged in
21 substantial gainful activity; if so, the claimant is presumed
not disabled and the claim is denied; |
| 22 | Step 2 | If the claimant is not engaged in substantial gainful activity,
23 determination whether the claimant has a severe
impairment; if not, the claimant is presumed not disabled
24 and the claim is denied; |
| 25 | Step 3 | If the claimant has one or more severe impairments,
26 determination whether any such severe impairment meets
or medically equals an impairment listed in the regulations;
27 if the claimant has such an impairment, the claimant is
presumed disabled and the claim is granted; |

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1 Step 4 If the claimant's impairment is not listed in the regulations,
2 determination whether the impairment prevents the
3 claimant from performing past work in light of the
4 claimant's residual functional capacity; if not, the claimant
5 is presumed not disabled and the claim is denied;

6 Step 5 If the impairment prevents the claimant from performing
7 past work, determination whether, in light of the claimant's
8 residual functional capacity, the claimant can engage in
9 other types of substantial gainful work that exist in the
10 national economy; if so, the claimant is not disabled and
11 the claim is denied.

12 See 20 C.F.R. §§ 404.1520 (a)-(f) and 416.920(a)-(f).

13 To qualify for benefits, the claimant must establish the inability to engage in
14 substantial gainful activity due to a medically determinable physical or mental impairment which
15 has lasted, or can be expected to last, a continuous period of not less than 12 months. See 42
16 U.S.C. § 1382c(a)(3)(A). The claimant must provide evidence of a physical or mental
17 impairment of such severity the claimant is unable to engage in previous work and cannot,
18 considering the claimant's age, education, and work experience, engage in any other kind of
19 substantial gainful work which exists in the national economy. See Quang Van Han v. Bower,
20 882 F.2d 1453, 1456 (9th Cir. 1989). The claimant has the initial burden of proving the existence
21 of a disability. See Terry v. Sullivan, 903 F.2d 1273, 1275 (9th Cir. 1990).

22 The claimant establishes a prima facie case by showing that a physical or mental
23 impairment prevents the claimant from engaging in previous work. See Gallant v. Heckler, 753
24 F.2d 1450, 1452 (9th Cir. 1984); 20 C.F.R. §§ 404.1520(f) and 416.920(f). If the claimant
25 establishes a prima facie case, the burden then shifts to the Commissioner to show the claimant
26 can perform other work existing in the national economy. See Burkhart v. Bowen, 856 F.2d
27 1335, 1340 (9th Cir. 1988); Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); Hammock
28 v. Bowen, 867 F.2d 1209, 1212-1213 (9th Cir. 1989).

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1 **II. THE COMMISSIONER’S FINDINGS**

2 Plaintiff applied for social security benefits on July 28, 2021. See CAR 166.¹ In
3 the application, Plaintiff claims disability began on September 24, 2019, due to hernias. See id. at
4 171. Plaintiff’s claim was initially denied. Following denial of reconsideration, Plaintiff
5 requested an administrative hearing, which was held on August 3, 2022, before Administrative
6 Law Judge (ALJ) Mark Triplett. In a September 19, 2022, decision, the ALJ concluded Plaintiff
7 is not disabled based on the following relevant findings:

- 8 1. The claimant has the following severe impairment(s): hernias,
9 depressive disorder, and anxiety disorder;
- 10 2. The claimant does not have an impairment or combination of
11 impairments that meets or medically equals an impairment listed in
12 the regulations;
- 13 3. The claimant has the following residual functional capacity: the
14 claimant can perform light work except he is limited to only
15 occasionally climbing ramps and stairs and never climbing ladders,
16 ropes, or scaffolds; he can occasionally stoop, crouch, and crawl;
17 he requires the ability to alternate between sitting and standing at
18 will while remaining on task; he can tolerate occasional exposure
19 to workspace hazards such as unprotected heights and exposed,
20 moving machinery; he can perform simple, routine tasks and can
21 tolerate occasional interactions with coworkers, supervisors, and
22 the general public;
- 23 4. Considering the claimant’s age, education, work experience,
24 residual functional capacity, and vocational expert testimony, there
25 are jobs that exist in significant numbers in the national economy
26 that the claimant can perform.

27 See id. at 166-77.

28 After the Appeals Council declined review on November 30, 2022, this appeal followed.

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¹ Citations are to the Certified Administrative Record (CAR) lodged on May 3, 2023, ECF No. 10.

1 **III. DISCUSSION**

2 In his opening brief, Plaintiff argues that the ALJ failed to properly evaluate his
3 subjective statements and testimony. See ECF No. 15.

4 The Commissioner determines the weight to be given to a claimant’s own
5 statements and testimony, and the court defers to the Commissioner’s discretion if the
6 Commissioner used the proper process and provided proper reasons. See Saelee v. Chater, 94
7 F.3d 520, 522 (9th Cir. 1996). An explicit finding must be supported by specific, cogent reasons.
8 See Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990). General findings are insufficient.
9 See Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995). Rather, the Commissioner must identify
10 what testimony is not afforded weight and what evidence undermines the testimony. See id.
11 Moreover, unless there is affirmative evidence in the record of malingering, the Commissioner’s
12 reasons for rejecting testimony as not credible must be “clear and convincing.” See id.; see also
13 Carmickle v. Commissioner, 533 F.3d 1155, 1160 (9th Cir. 2008) (citing Lingenfelter v Astrue,
14 504 F.3d 1028, 1936 (9th Cir. 2007), and Gregor v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006)).

15 If there is objective medical evidence of an underlying impairment, the
16 Commissioner may not discredit a claimant’s testimony as to the severity of symptoms merely
17 because they are unsupported by objective medical evidence. See Bunnell v. Sullivan, 947 F.2d
18 341, 347-48 (9th Cir. 1991) (en banc). As the Ninth Circuit explained in Smolen v. Chater:

19 The claimant need not produce objective medical evidence of the
20 [symptom] itself, or the severity thereof. Nor must the claimant produce
21 objective medical evidence of the causal relationship between the
22 medically determinable impairment and the symptom. By requiring that
the medical impairment “could reasonably be expected to produce” pain or
another symptom, the Cotton test requires only that the causal relationship
be a reasonable inference, not a medically proven phenomenon.

23 80 F.3d 1273, 1282 (9th Cir. 1996) (referring to the test established in
24 Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986)).

25 The Commissioner may, however, consider the nature of the symptoms alleged,
26 including aggravating factors, medication, treatment, and functional restrictions. See Bunnell,
27 947 F.2d at 345-47. In weighing a claimant’s statements and testimony, the Commissioner may
28 also consider: (1) the claimant’s reputation for truthfulness, prior inconsistent statements, or other

1 inconsistent testimony; (2) unexplained or inadequately explained failure to seek treatment or to
2 follow a prescribed course of treatment; (3) the claimant's daily activities; (4) work records; and
3 (5) physician and third-party testimony about the nature, severity, and effect of symptoms. See
4 Smolen, 80 F.3d at 1284 (citations omitted). It is also appropriate to consider whether the
5 claimant cooperated during physical examinations or provided conflicting statements concerning
6 drug and/or alcohol use. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If the
7 claimant testifies as to symptoms greater than would normally be produced by a given
8 impairment, the ALJ may disbelieve that testimony provided specific findings are made. See
9 Carmickle, 533 F.3d at 1161 (citing Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)).

10 At Step 4 of the sequential evaluation process, the ALJ summarized Plaintiff's
11 statements and testimony as follows:

12 The claimant testified that he lives in a broken down bus. He testified that
13 he does not have a driver's license so his wife drives him to appointments.
14 He testified that his past work includes manager of an RV park mowing
15 lawns and dealing with customers from 2007 through 2015. He testified
16 that he performed the same kind of work on another property in 2015 and
17 2016. The claimant testified that he stopped working and he has not
18 worked since 2016 due to pain causing poor sleep quality. He testified that
19 he has a hernia on his left side that hurts "all the time" and he is unable to
20 maintain his own environment or "ecosystem". He testified that it is
21 aggravated by "just waking up". The claimant testified that he takes
22 Cymbalta, Norco, amitriptyline, and gabapentin and stretches for the pain.
23 He testified that the medications bring the pain down but the side effects
24 are limiting.

19 The claimant testified that his hernia pain is constant. He testified that he
20 is in pain when getting up and moving around. He testified that that
21 injections are "less than satisfactory" and the only relief he gets is when he
22 is "knocked out on the table" for the injections. He testified that the
23 pain returns when he arises and gets off the surgical table. He testified that
24 he has a high level of depression. The claimant testified that he uses
25 scooters when he goes to Walmart. He testified that he is unable to stand
26 or walk 100 yards. He later estimated that he is able to stand up to five
27 minutes. He testified that he uses a cane and a walker regularly when he
28 has to walk or stand. He testified that he also uses ski poles for ambulation
lasting 100 to 200 yards. The claimant testified that he is able to sit for 30
minutes before he has to get up and stretch. He testified that he is able to
lift a gallon of milk in each hand. He said helping his wife with groceries
"kills him". He testified that he is most comfortable is the half prone
position and he cannot bend over because of his hernia.

The claimant testified that he is able to do his own personal hygiene and
he has no hobbies. He testified that he lives vicariously through people on
social media. He testified that he does not own a television. He testified

1 that he is able to prepare simple meals. He testified that his depression is
2 demoralizing and he has nothing to look forward to in his future. He
3 testified that he has stage 2 cancer diagnosed four months ago. The
4 claimant testified that his wife is on disability. He testified that he uses his
5 cane 90 percent of the time on and off for some time. He testified that he
6 attempted to connect online for the scheduled consultative psychological
7 evaluation but his internet was not working.

8 CAR 171-72.

9 The ALJ then went on to summarize Plaintiff's treatment history, which the Court
10 does not repeat here. See id. at 172-74. The ALJ gave little weight to Plaintiff's statements and
11 testimony, concluding as follows:

12 As for the claimant's statements about the intensity, persistence, and
13 limiting effects of his symptoms, they are inconsistent because the clinical
14 evidence and diagnostic findings do not substantiate disabling limitations
15 with respect to his ability to sit, stand, walk, or use his extremities. The
16 claimant testified and wrote in his Function Reports that he has to use a
17 cane, walker, and ski poles for ambulation but the record does not support
18 his testimony. His gait is noted in the record as normal since his amended
19 alleged onset date (B1F/3). Treatment records since September 2019 show
20 that he was able to walk on his own (B2F/163, 166, 167, 170, 172, 180,
21 B5F/52, 54, 56, 58, 60). The record also indicates in September 2019 that
22 the claimant was ambulatory, self-assisted off the gurney/chair (B2F/249).
23 The claimant testified that he is unable to work because of constant pain
24 that occurs as soon as he wakes up and persists all day. The undersigned
25 finds that the claimant's abdominal pain and inguinal pain due to hernias
26 are well documented in the record. However, the record does not support a
27 finding that he is unable to work because no treating provider has
28 indicated that the claimant has ambulatory problems resulting from his
chronic pain at any time during the relevant period. He testified that he
requires the use of an assistive device 90 percent of the time but there is
no evidence to substantiate his testimony. Nevertheless, the undersigned
has limited the claimant to light work with postural limits as well as the
ability to alternate between sitting and standing at will while remaining on
task. The claimant testified to a "high level of depression" but the record
does not support his testimony because he has been prescribed
medications to address his depression and anxiety but there is no evidence
of any behavioral health treatment that would support disabling depression
or anxiety. Yet, the undersigned has limited that claimant to no more than
simple, routine tasks, with no more than occasional interactive contact.
Considering the record as a whole, the evidence fails to support a finding
of disability with respect to the claimant's ability to perform light work
activity with the limitations set forth in the residual functional capacity.

CAR 174.

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1 Plaintiff contends that the ALJ's analysis is "legally inadequate." ECF No. 15, pg.

2 11. According to Plaintiff:

3 The record shows that Plaintiff has been diagnosed with and
4 treated for post-hernia pain syndrome. T 628. This is "a serious problem,"
5 resulting from either "nerve injury, entrapment, or reaction to mesh and
6 scar" following a hernia repair, leaving the individual with "chronic" and
7 "severe pain." *UCLA HEALTH: Chronic Pain After Hernia Surgery*.
8 [footnote omitted]. Where there is a lack of response to conservative, non-
9 operative measures, mesh removal, reoperation, and inguinal neurectomy
10 may be recommended. *Id.* The medical evidence shows that Plaintiff
11 underwent each of these options, both conservative and aggressive/
12 surgical, but "this complex problem" was not resolved by any of them. *Id.*
13 His pain was so great that even morphine provided no relief, and his
14 physicians continued to find the prescription of multiple narcotics
15 appropriate even after Plaintiff had developed opioid dependence.
16 Evidently, not a single medical provider who observed and treated
17 Plaintiff believed his pain to be incongruent with the "clinical evidence
18 and diagnostic findings," as the ALJ asserts. While they may not have
19 specifically documented Plaintiff to be using an assistive device or
20 exhibiting an abnormal gait, they did document their observations of his
21 obvious distress or pain, his limited range of motion, diffuse tenderness,
22 nausea/vomiting, and tearful outburst in "a lot of" pain. Here, as in *Perez*,
23 "[w]hile the ALJ cherry-picked certain evidence to contradict [Plaintiff's]
24 statements, [his] testimony aligns with 'the overall diagnostic record.'" 855 F. App'x 365, 369.

25 The ALJ declined to explain why those observations were
26 apparently less informative than the absence of documentation that
27 Plaintiff used a cane during his frequent emergency room visits. Indeed,
28 Plaintiff testified that he brings his cane or walker with him only when he
anticipates having to be on his feet for a prolonged period of time,
something one typically does not do while being treated in the emergency
room. T 71. Thus, the absence of a cane from emergency room records
does not contradict Plaintiff's testimony that he can only walk short
distances, uses a scooter when grocery shopping, or has debilitating pain
which prevents him from functioning on a regular and continuing basis in
a typical work environment. *See* SSR 96-8p (At issue is Plaintiff's
capacity perform "sustained work-related physical and mental activities in
a work setting on a regular and continuing basis. A 'regular and
continuing basis' means 8 hours a day, for 5 days a week,"). The ALJ did
not find that Plaintiff is a malingerer in this case, yet he failed to provide
specific, clear, and convincing reasons to discount the alleged severity of
Plaintiff's symptoms in the face of the corroborating evidence above.
Thus, he has not met the demanding clear and convincing standard
required to justify his finding. *Perez*, 855 F. App'x 365, 368-69.

ECF No. 15, pgs. 11-13.

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1 Plaintiff's argument is not persuasive. As explained above, the ALJ must identify
2 the specific portions of the claimant's testimony which are not afforded any weight and the
3 evidence which undermines that testimony. The ALJ has done so here with respect to Plaintiff's
4 statements and testimony concerning ambulation and depression. As to Plaintiff's testimony
5 concerning ambulation, the ALJ noted that the evidence of record is inconsistent with the need to
6 use a cane. Specifically, objective evidence regarding normal gait, as well as various treatment
7 notes, showed that Plaintiff was able to walk on his own. Likewise, with respect to depression,
8 the record reflected no behavioral therapy to support Plaintiff's contention that he is unable to
9 work due to a high level of depression, which was being treated with medication.

10 Because the ALJ identified the testimony found to have no weight and the
11 evidence undermining that testimony, and because the ALJ did so in turn by separately discussing
12 Plaintiff's statements concerning both ambulation and depression, the Court finds no error in the
13 ALJ's analysis or conclusion.

14 15 **IV. CONCLUSION**

16 Based on the foregoing, the Court concludes that the Commissioner's final
17 decision is based on substantial evidence and proper legal analysis. Accordingly, IT IS HEREBY
18 ORDERED that:

- 19 1. Plaintiff's motion for summary judgment, ECF No. 15, is denied;
- 20 2. Defendant's motion for summary judgment, ECF No. 17, is granted;
- 21 3. The Commissioner's final decision is affirmed; and
- 22 4. The Clerk of the Court is directed to enter judgment and close this file.

23
24 Dated: December 4, 2023



25 DENNIS M. COTA
26 UNITED STATES MAGISTRATE JUDGE