

BACKGROUND

1
2 Plaintiff is a 37-year-old male who applied for Social Security Disability Insurance
3 benefits on June 3, 2010, alleging disability beginning March 11, 2009. (AR 23, 136.)
4 The ALJ determined that Plaintiff has not engaged in substantial gainful activity since
5 March 11, 2009, the alleged onset date. (AR 25.)

6 Plaintiff's claim was denied initially on October 28, 2010, and on reconsideration
7 on March 4, 2011. (AR 23.) Plaintiff filed a timely request for hearing, which was held
8 before Administrative Law Judge ("ALJ") Joseph P. Lisiecki, III on October 27, 2011, in
9 Orange, California. (AR 23.) Claimant appeared and testified at the hearing and was
10 represented by counsel. (AR 23.) Medical expert ("ME") Dr. Steven B. Gerber and
11 vocational expert ("VE") Kelly Winn-Boaitey also appeared and testified at the hearing.
12 (AR 23.)

13 The ALJ issued an unfavorable decision on November 18, 2011. (AR 23-31.) The
14 Appeals Council denied review on July 2, 2013. (AR 1-3.)

DISPUTED ISSUES

15
16 As reflected in the Joint Stipulation, Plaintiff raises the following disputed issues as
17 grounds for reversal and remand:

- 18 1. Whether the ALJ erred in assessing the opinions/findings of Plaintiff's
19 treating, examining, and/or reviewing physicians, and whether this resulted
20 in an incomplete hypothetical question to the vocational consultant.
- 21 2. Whether the ALJ erred in his evaluation of Plaintiff's credibility and
22 subjective symptoms.

STANDARD OF REVIEW

23
24 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine
25 whether the ALJ's findings are supported by substantial evidence and free of legal error.
26 Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan,
27 924 F.2d 841, 846 (9th Cir. 1991) (ALJ's disability determination must be supported by
28 substantial evidence and based on the proper legal standards).

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

7 This Court must review the record as a whole and consider adverse as well as
8 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).
9 Where evidence is susceptible to more than one rational interpretation, the ALJ’s
10 decision must be upheld. Morgan v. Comm’r of the Soc. Sec. Admin., 169 F.3d 595, 599
11 (9th Cir. 1999). “However, a reviewing court must consider the entire record as a whole
12 and may not affirm simply by isolating a ‘specific quantum of supporting evidence.’”
13 Robbins, 466 F.3d at 882 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.
14 1989)); see also Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

15 THE SEQUENTIAL EVALUATION

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

22 The first step is to determine whether the claimant is presently engaging in
23 substantial gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the
24 claimant is engaging in substantial gainful activity, disability benefits will be denied.
25 Bowen v. Yuckert, 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether
26 the claimant has a severe impairment or combination of impairments. Parra, 481 F.3d at
27 746. An impairment is not severe if it does not significantly limit the claimant’s ability to
28 work. Smolen, 80 F.3d at 1290. Third, the ALJ must determine whether the impairment

1 is listed, or equivalent to an impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I
2 of the regulations. Parra, 481 F.3d at 746. If the impairment meets or equals one of the
3 listed impairments, the claimant is presumptively disabled. Bowen v. Yuckert, 482 U.S.
4 at 141. Fourth, the ALJ must determine whether the impairment prevents the claimant
5 from doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001).

6 Before making the step four determination, the ALJ first must determine the
7 claimant's residual functional capacity ("RFC"). 20 C.F.R. § 416.920(e). The RFC is
8 "the most [one] can still do despite [his or her] limitations" and represents an assessment
9 "based on all the relevant evidence." 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The
10 RFC must consider all of the claimant's impairments, including those that are not severe.
11 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling ("SSR") 96-8p.

12 If the claimant cannot perform his or her past relevant work or has no past
13 relevant work, the ALJ proceeds to the fifth step and must determine whether the
14 impairment prevents the claimant from performing any other substantial gainful activity.
15 Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000). The claimant bears the burden of
16 proving steps one through four, consistent with the general rule that at all times the
17 burden is on the claimant to establish his or her entitlement to benefits. Parra, 481 F.3d
18 at 746. Once this prima facie case is established by the claimant, the burden shifts to
19 the Commissioner to show that the claimant may perform other gainful activity.
20 Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a finding that a
21 claimant is not disabled at step five, the Commissioner must provide evidence
22 demonstrating that other work exists in significant numbers in the national economy that
23 the claimant can do, given his or her RFC, age, education, and work experience. 20
24 C.F.R. § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is
25 disabled and entitled to benefits. *Id.*

THE ALJ DECISION

1
2 In this case, the ALJ determined at step one of the sequential process that Plaintiff
3 has not engaged in substantial gainful activity since March 11, 2009, the alleged onset
4 date. (AR 25.)

5 At step two, the ALJ determined that Plaintiff has the following medically
6 determinable severe impairments: Crohn's colitis and bilateral avascular necrosis (20
7 C.F.R. § 404.1520(c)). (AR 25.)

8 At step three, the ALJ determined that Plaintiff does not have an impairment or
9 combination of impairments that meets or medically equals the severity of one of the
10 listed impairments. (AR 26.)

11 The ALJ then found that Plaintiff has the RFC to perform sedentary work as
12 defined in C.F.R. § 404.1567(a) with the following limitations:

13 Claimant is limited to lifting or carrying fifteen pounds occasionally and
14 ten pounds frequently; Claimant is limited to standing or walking for a
15 total of two hours in an eight hour workday; and Claimant is limited to
16 sitting for a total of six hours in an eight hour workday. In addition,
17 Claimant is able to occasionally engage in balancing, stooping,
18 kneeling, crouching, and climbing of ramps and scaffolds. Finally,
19 Claimant must avoid all exposure to workplace hazards such as
20 machinery and heights.

21 (AR 26-29.) In determining this RFC, the ALJ made an adverse credibility determination.
22 (AR 29.)

23 At step four, the ALJ found that Plaintiff is unable to perform his past relevant work
24 as a construction equipment mechanic. (AR 29.) The ALJ, however, also found that
25 considering Claimant's age, education, work experience and RFC, there are jobs that
26 exist in significant numbers in the national economy that Claimant can perform, including
27 the sedentary unskilled jobs of telephone information clerk and charge account clerk.
28 (AR 30, 59-60.)

1 **A. Relevant Federal Law**

2 The ALJ’s RFC is not a medical determination but an administrative finding or
3 legal decision reserved to the Commissioner based on consideration of all the relevant
4 evidence, including medical evidence, lay witnesses, and subjective symptoms. See
5 SSR 96-5p; 20 C.F.R. § 1527(e). In determining a claimant’s RFC, an ALJ must
6 consider all relevant evidence in the record, including medical records, lay evidence, and
7 the effects of symptoms, including pain reasonably attributable to the medical condition.
8 Robbins, 446 F.3d at 883.

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

22 Where a treating doctor’s opinion is not contradicted by another doctor, it may be
23 rejected only for “clear and convincing” reasons. Lester, 81 F.3d at 830. However, if the
24 treating physician’s opinion is contradicted by another doctor, such as an examining
25 physician, the ALJ may reject the treating physician’s opinion by providing specific,
26 legitimate reasons, supported by substantial evidence in the record. Lester, 81 F.3d at
27 830-31; see also Orn, 495 F.3d at 632; Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir.
28 2002). Where a treating physician's opinion is contradicted by an examining

1 professional's opinion, the Commissioner may resolve the conflict by relying on the
2 examining physician's opinion if the examining physician's opinion is supported by
3 different, independent clinical findings. See Andrews v. Shalala, 53 F.3d 1035, 1041
4 (9th Cir. 1995); Orn, 495 F.3d at 632. Similarly, to reject an uncontradicted opinion of an
5 examining physician, an ALJ must provide clear and convincing reasons. Bayliss v.
6 Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005). If an examining physician's opinion is
7 contradicted by another physician's opinion, an ALJ must provide specific and legitimate
8 reasons to reject it. Id. However, "[t]he opinion of a non-examining physician cannot by
9 itself constitute substantial evidence that justifies the rejection of the opinion of either an
10 examining physician or a treating physician"; such an opinion may serve as substantial
11 evidence only when it is consistent with and supported by other independent evidence in
12 the record. Lester, 81 F.3d at 830-31; Morgan, 169 F.3d at 600.

13 **B. Analysis**

14 1. Need For Assistive Device

15 During his treatment for colitis, Mr. Sanford was placed on a steroid treatment
16 regimen which caused avascular necrosis of the hips, bilaterally. (AR 28.) An MRI of
17 the pelvis revealed mild left hip joint effusion, sclerosis in the left femoral head with an
18 area of collapse and the presence of edema in the left femoral head. (AR 28.) X-rays
19 did not reveal any fractures or dislocations. (AR 28.) An orthopedic consulting
20 examiner, Dr. Anh Tat Hoang, found moderate tenderness in his hip joint and limited
21 Claimant to a light exertional RFC, sitting for six hours and standing/walking four hours
22 in an eight hour workday. (AR 28, 456-459.) State agency reviewing physicians,
23 however, assessed a sedentary RFC with occasional on all posturals and no heights,
24 hazards, ladders or scaffolding, as did Dr. Gerber. (AR 42-43.) The ALJ adopted the
25 latter RFC. (AR 26.)

26 Claimant appeared for his exam with Dr. Hoang on two crutches for ambulation
27 (AR 28, 457) and Dr. Hoang's report states, "A cane is medically necessary for
28 ambulation." (AR 459.) Two State agency physicians opined Plaintiff needed a cane for

1 “prolonged ambulation.” (AR 461, 498.) Plaintiff asserts error because the ALJ’s RFC
2 and hypothetical to the VE contain no limitation requiring a cane for ambulation.
3 Plaintiff’s contention lacks merit.

4 The ALJ found that during the hearing the Claimant stated that, although he does
5 use crutches occasionally, he generally does not need or use ambulatory devices. (AR
6 28.) The ALJ found Claimant was able to walk with only a slight limp favoring his left
7 extremity. (AR 28, 459.) More specifically, Plaintiff stated the following at the hearing:

8 Q. Okay - - do you use a cane? Have you used a cane in the
9 past?

10 A. I have been on crutches on and off ever since my hip
11 problems. It just kind of varies. Generally, I don’t use
12 them. I do occasionally when I have a real bad day.

13 Q. Okay.

14 A. I use crutches. But it’s pretty rare.

15 (AR 48-49.) (Emphasis added.) Based on Plaintiff’s own testimony, the ALJ’s decision
16 to reject physician RFC assessments requiring a cane, and not include such a limitation
17 in his RFC or in his hypothetical to the VE, was reasonable. The ALJ rejected Plaintiff’s
18 assertion that he needs a cane based on his inconsistent statements at the hearing.
19 Light v. Comm’r of Soc. Sec. Adm., 119 F.3d 789, 792 (9th Cir. 1997) (in weighing a
20 claimant’s credibility, an ALJ may consider “inconsistencies in his testimony or between
21 his testimony and conduct”). An ALJ may reject a physician’s opinion based on
22 discredited subjective symptoms, as was done here. Tonapetyan v. Halter, 242 F.3d
23 1144, 1149 (9th Cir. 2001).

24 Plaintiff disputes the ALJ’s interpretation of the evidence but it is the ALJ who has
25 the responsibility for resolving conflicts in the evidence. Andrews, 53 F.3d at 1039.
26 Where the ALJ’s interpretation of the evidence is reasonable as it is here, it should not
27 be second-guessed. Rollins v. Massanari, 264 F.3d 853, 857 (9th Cir. 2001).

1 2. Bathroom Breaks

2 Plaintiff also contends that the ALJ erred in not including in his RFC the time lost
3 at work because of frequent breaks to change or evacuate his colostomy bag. The
4 Court agrees that the ALJ's RFC is not supported by substantial evidence to justify
5 omission of this limitation and that the ALJ failed to develop the record adequately.

6 The ALJ acknowledged Plaintiff's contention that he must make frequent trips to
7 the restroom because of his colostomy bag. (AR 27.) At the hearing, Claimant was
8 asked why he cannot work and responded as follows:

9 I'm pretty limited as to what I would be able to do because of the
10 sitting and standing, but I'd say the biggest thing would be holding a
11 job due to bathroom trips. I mean, an average day for me is five to
12 seven bathroom trips probably lasting ten minutes plus . . .

13 (AR 48.)

14 Plaintiff's attorney then asked the VE whether there would be any work Plaintiff
15 could perform if he needed a job that would require restroom breaks "no less than five
16 times a day, and no more than seven, with ten minutes at each break." (AR 63.) The
17 VE's response was, "There wouldn't be any work." (AR 63.) The VE explained that
18 Claimant would be "away from their workstation for anywhere from a half-hour to an hour
19 more than regular breaks." (AR 63.)

20 The ALJ, however, assessed no limitation in his RFC for restroom breaks to empty
21 his colostomy bag (AR 26) and the ALJ's hypothetical question to the VE contained no
22 limitation in the RFC for unscheduled bathroom breaks. (AR 58-59.) The ALJ relied
23 exclusively on the opinion of Dr. Gerber, the medical expert, who opined that the use of
24 a colostomy bag "usually doesn't create any additional functional limitations beyond
25 those to which I have testified." (AR 43.) (Emphasis added.) The ALJ somewhat
26 misstates and overstates Dr. Gerber's testimony by finding that he "opined that the use
27 of such device would not cause the Claimant to experience any additional functional
28 limitations." (AR 28.) On cross-examination, moreover, Dr. Gerber admitted that

1 Plaintiff has no control over his bowel functions (AR 43) and, when asked if the passive
2 emptying of the intestinal contents would occur constantly, he stated, "It can. Yes." (AR
3 43-44.) This statement provides a medical basis for Plaintiff's testimony.

4 Dr. Gerber's testimony, as it stands, is insufficient to overcome the combined
5 testimony of Plaintiff that he would require five to seven bathroom breaks a day of ten
6 minutes each and the VE's testimony that such a limitation would preclude all work. Dr.
7 Gerber's statement was a generalization that use of a colostomy bag "usually" does not
8 create any additional functional limitations. Dr. Gerber made that comment and
9 presented his RFC before Plaintiff gave his testimony about the number of bathroom
10 breaks needed and before the VE opined there would be no work for the number of
11 breaks Plaintiff claimed he would need. Plaintiff contends that Dr. Gerber never even
12 heard either Plaintiff's testimony or the VE's testimony, as Dr. Gerber testified by phone
13 and disconnected after his testimony, but Plaintiff offers no citation to the record to
14 support this assertion and the Court finds nothing in the record to verify the assertion.
15 Nonetheless, the Court is not satisfied that Dr. Gerber considered how the number of
16 bathroom breaks this plaintiff requires might impact the RFC that was assessed. Dr.
17 Gerber's RFC relies on a generalization that a colostomy bag "usually" does not require
18 additional functional limitations rather than what limitations this particular plaintiff would
19 require. The Court, moreover, does not read Dr. Gerber's testimony to be saying that
20 Plaintiff's testimony is false or unbelievable. Therefore, because he did not consider
21 Plaintiff's testimony, Dr. Gerber's opinion is inconclusive and insufficient as a basis for
22 disregarding or rejecting Plaintiff's testimony about the number of breaks needed, for
23 omitting any limitation regarding bathroom breaks and for rejecting the VE's opinion that
24 all work is precluded. Batson v. Commissioner of Soc. Sec. Adm., 359 F.3d 1190, 1195
25 (9th Cir. 2004) (physician's opinion may be rejected when "unsupported by the record as
26 a whole"); Thomas, 278 F.3d at 987 (physician's opinion may be rejected when
27 inconsistent with "other evidence of record").

28

1 Both the ALJ and the Commissioner mistakenly rely on the medical evidence for
2 their determination of nondisability. They note that no treating physician provided a
3 medical source statement indicating disability (AR 27) and that State agency physicians
4 and Dr. Gerber found Plaintiff capable of sedentary work with some postural and
5 environmental limitations. (AR 28.) The medical evidence, however, predates Plaintiff's
6 testimony at the hearing that he needs five to seven restroom breaks a day of ten
7 minutes each. The medical evidence did not and could not consider Plaintiff's testimony.
8 The physician RFCs also did not and could not consider the limitation asserted by
9 Plaintiff, discuss it or offer any basis for excluding it from their RFCs. The ALJ erred in
10 relying on this uninformed medical evidence that failed to address Plaintiff's testimony or
11 to include an appropriate limitation in their RFCs. Batson, 359 F.3d at 1195; Thomas,
12 278 F.3d at 957.

13 Also, the ALJ's adverse credibility determination is of little relevance here. The
14 ALJ discounted Plaintiff's credibility on the basis of the medical evidence, which as noted
15 above did not consider Plaintiff's testimony. The ALJ also discounted Plaintiff's
16 testimony because of inconsistent daily activities that appear to relate to his hip issues
17 and have little to do with Plaintiff's need for bathroom breaks. The ALJ does not directly
18 challenge Plaintiff's veracity or credibility on the number of bathroom breaks needed
19 other than to cite Dr. Gerber's opinion which the Court has found to be an insufficient
20 basis for rejecting a limitation for bathroom breaks.

21 The Court, however, is not reaching a determination that Plaintiff is disabled, only
22 that the record is ambiguous and not fully developed. In Social Security cases, the ALJ
23 has special independent duty to develop the record fully and fairly to assure the
24 claimant's interests are considered. Tonapetyan, 242 F.3d at 1150; Smolen, 80 F.3d at
25 1288. Ambiguous evidence or the ALJ's own finding that the record is adequate to allow
26 for proper evaluation of the evidence triggers the ALJ's duty to conduct an appropriate
27 inquiry. Smolen, 80 F.3d at 1288; Tonapetyan, 242 F.3d at 1150. The ALJ may
28 discharge this duty by subpoenaing the claimant's physicians, submitting questions to

1 them, continuing the hearing or keeping the record open after the hearing to allow
2 supplementation of the record. Smolen, 80 F.3d at 1288; Tonapetyan, 242 F.3d at 1150.

3 Here, Plaintiff's testimony that he needed five to seven bathroom breaks a day of
4 ten minutes each and the VE's testimony that such a limitation would preclude all work
5 came at the end of the hearing, after the submission of medical evidence and testimony
6 which did not consider the limitation Plaintiff asserted at the hearing. The ALJ should
7 have asked Dr. Gerber (if he was still on the phone as claimed) or recontacted him (if as
8 Plaintiff contends he already had disconnected) to inquire if five to seven bathroom
9 breaks was plausible and if so whether his RFC should reflect that limitation. An ALJ is
10 required to recontact a doctor if his report is insufficient to make a disability
11 determination. Bayliss, 427 F.3d at 1217, citing 20 C.F.R. § 404.1512(e). The ALJ had
12 Plaintiff present and could have questioned him to test his credibility and asked him if the
13 five to seven breaks he requires was for an 8 hour period or all day. As a result, the
14 record is ambiguous and inconclusive on whether the ALJ erred by omitting a limitation
15 for bathroom breaks from his RFC, and from his hypothetical question to the VE. The
16 ALJ erred by not developing the record more fully. Partly because the medical
17 professionals never had an opportunity to consider Plaintiff's testimony and partly
18 because Plaintiff's testimony is ambiguous, the Court will remand the case for further
19 proceedings. If there exists no basis for challenging Plaintiff's assertion that he needs
20 five to seven bathroom breaks a day of ten minutes each, the VE's testimony that all
21 work is precluded would require a determination of disability.

22 ORDER

23 IT IS HEREBY ORDERED that Judgment be entered reversing the decision of the
24 Commissioner of Social Security and remanding this case for further proceedings in
25 accordance with this Memorandum Opinion and Order and with law.

26
27 DATED: April 25, 2014

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