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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FERNANDO LEON,)	Case No. CV 14-08559-JEM
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION AND
)	ORDER AFFIRMING DECISION OF
CAROLYN W. COLVIN,)	THE COMMISSIONER OF SOCIAL
Acting Commissioner of Social Security,)	SECURITY
)	
Defendant.)	

PROCEEDINGS

On November 7, 2014, Fernando Leon (“Plaintiff” or “Claimant”) filed a complaint seeking review of the decision by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s applications for Social Security Disability Insurance benefits and Supplemental Security Income (“SSI”) benefits. The Commissioner filed an Answer on February 24, 2015. On May 8, 2015, the parties filed a Joint Stipulation (“JS”). The matter is now ready for decision.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision must be affirmed and this case dismissed with prejudice.

BACKGROUND

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2 Plaintiff is a 56-year-old male who applied for Social Security Disability Insurance
3 benefits and Supplemental Security Income benefits on October 28, 2008, alleging
4 disability beginning July 25, 1997. (AR 586.) The Administrative Law Judge (“ALJ”)
5 determined that Plaintiff has not engaged in substantial gainful activity since July 25,
6 1997, the alleged onset date. (AR 590.)

7 Plaintiff’s claims were denied initially on January 9, 2009. (AR 586.) The ALJ
8 issued an unfavorable decision on May 28, 2010. (AR 586.) The Appeals Council
9 denied review on September 8, 2011. (AR 586.)

10 On June 26, 2012, however, the District Court remanded the case. (AR 586.)
11 Subsequently, hearings were held before ALJ David G. Marcus on October 23, 2012 and
12 July 3, 2013. (AR 586.) Psychologist Edward Joseph Jasinski testified as an impartial
13 medical expert at the October 23, 2012 hearing. (AR 586.) Elizabeth G. Brown-Ramos
14 testified as an impartial vocational expert at the July 3, 2013 hearing. (AR 586.)
15 Claimant testified at both hearings and was represented by counsel at both hearings.
16 (AR 586.)

17 The ALJ issued an unfavorable decision on July 30, 2013. (AR 601.) Plaintiff
18 requested the Appeals Council to review the decision by written exceptions on August
19 29, 2013. (AR 572-80.) The Appeals Council denied the written exceptions on August
20 29, 2014. (AR 567-671.)

DISPUTED ISSUES

21
22 As reflected in the Joint Stipulation, Plaintiff only raises the following disputed
23 issue as ground for reversal and remand:

- 24 1. Whether the ALJ improperly rejected the medical evidence from the
25 examining physician.

STANDARD OF REVIEW

26
27 Under 42 U.S.C. § 405(g), this Court reviews the ALJ’s decision to determine
28 whether the ALJ’s findings are supported by substantial evidence and free of legal error.

1 Smolen v. Chater, 80 F.3d 1273 , 1279 (9th Cir. 1996); see also DeLorme v. Sullivan,
2 924 F.2d 841, 846 (9th Cir. 1991) (ALJ’s disability determination must be supported by
3 substantial evidence and based on the proper legal standards).

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

10 This Court must review the record as a whole and consider adverse as well as
11 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).
12 Where evidence is susceptible to more than one rational interpretation, the ALJ’s
13 decision must be upheld. Morgan v. Comm’r of the Soc. Sec. Admin., 169 F.3d 595, 599
14 (9th Cir. 1999). “However, a reviewing court must consider the entire record as a whole
15 and may not affirm simply by isolating a ‘specific quantum of supporting evidence.’”
16 Robbins, 466 F.3d at 882 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.
17 1989)); see also Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

18 **THE SEQUENTIAL EVALUATION**

19 The Social Security Act defines disability as the “inability to engage in any
20 substantial gainful activity by reason of any medically determinable physical or mental
21 impairment which can be expected to result in death or . . . can be expected to last for a
22 continuous period of not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A),
23 1382c(a)(3)(A). The Commissioner has established a five-step sequential process to
24 determine whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920.

25 The first step is to determine whether the claimant is presently engaging in
26 substantial gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the
27 claimant is engaging in substantial gainful activity, disability benefits will be denied.
28 Bowen v. Yuckert, 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether

1 the claimant has a severe impairment or combination of impairments. Parra, 481 F.3d at
2 746. An impairment is not severe if it does not significantly limit the claimant's ability to
3 work. Smolen, 80 F.3d at 1290. Third, the ALJ must determine whether the impairment
4 is listed, or equivalent to an impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I
5 of the regulations. Parra, 481 F.3d at 746. If the impairment meets or equals one of the
6 listed impairments, the claimant is presumptively disabled. Bowen, 482 U.S. at 141.
7 Fourth, the ALJ must determine whether the impairment prevents the claimant from
8 doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001).
9 Before making the step four determination, the ALJ first must determine the claimant's
10 residual functional capacity ("RFC"). 20 C.F.R. § 416.920(e). The RFC is "the most
11 [one] can still do despite [his or her] limitations" and represents an assessment "based
12 on all the relevant evidence." 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The RFC
13 must consider all of the claimant's impairments, including those that are not severe. 20
14 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling ("SSR") 96-8p.

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

THE ALJ DECISION

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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 July 25, 1997, the alleged onset
4 date. (AR 590.)

5 At step two, the ALJ determined that Plaintiff has the following medically
6 determinable severe impairments: degenerative disc disease, status post left knee
7 surgery and mood disorder not otherwise specified. (AR 590.)

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 591.)

11 The ALJ then found that Plaintiff has the RFC to perform medium work with the
12 following limitations:

13 Claimant can lift and carry 50 pounds occasionally and 25 pounds
14 frequently; stand and walk six hours in an eight hour day; sit 6 hours in
15 an eight hour day; frequently bend and stoop; perform jobs involving
16 no more than simple repetitive tasks; and he is able to occasionally
17 interact with the general public and frequently interact with coworkers
18 and supervisors.

19 (AR 592.) In determining the above RFC, the ALJ made an adverse credibility
20 determination, which Plaintiff does not challenge here. (AR 593.)

21 At step four, the ALJ found that Plaintiff is unable to perform his past relevant work
22 as a forklift operator, heavy equipment operator and salvage laborer. (AR 597-98.) The
23 ALJ, however, also found that, considering Claimant's age, education, work experience,
24 and RFC, there are medium, unskilled jobs that exist in significant numbers in the
25 national economy that Claimant can perform, including the jobs of machine feeder, hand
26 packager and rack loader. (AR 599.) Even if Plaintiff were limited to unskilled light jobs,
27 he could perform the jobs of basket filler, bagger and folder, laundry, all of which are
28 unskilled light jobs that require Level 1 or Level 2 reasoning. (AR 600.)

1 Where a treating doctor's opinion is not contradicted by another doctor, it may be
2 rejected only for "clear and convincing" reasons. Lester, 81 F.3d at 830. However, if the
3 treating physician's opinion is contradicted by another doctor, such as an examining
4 physician, the ALJ may reject the treating physician's opinion by providing specific,
5 legitimate reasons, supported by substantial evidence in the record. Lester, 81 F.3d at
6 830-31; see also Orn, 495 F.3d at 632; Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir.
7 2002). Where a treating physician's opinion is contradicted by an examining
8 professional's opinion, the Commissioner may resolve the conflict by relying on the
9 examining physician's opinion if the examining physician's opinion is supported by
10 different, independent clinical findings. See Andrews v. Shalala, 53 F.3d 1035, 1041
11 (9th Cir. 1995); Orn, 495 F.3d at 632. Similarly, to reject an uncontradicted opinion of an
12 examining physician, an ALJ must provide clear and convincing reasons. Bayliss v.
13 Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005). If an examining physician's opinion is
14 contradicted by another physician's opinion, an ALJ must provide specific and legitimate
15 reasons to reject it. Id. However, "[t]he opinion of a non-examining physician cannot by
16 itself constitute substantial evidence that justifies the rejection of the opinion of either an
17 examining physician or a treating physician"; such an opinion may serve as substantial
18 evidence only when it is consistent with and supported by other independent evidence in
19 the record. Lester, 81 F.3d at 830-31; Morgan, 169 F.3d at 600.

20 **B. Analysis**

21 In the May 28, 2010 ALJ decision, the ALJ found Plaintiff has the severe
22 impairments of degenerative disc disease and status post left knee surgery. (AR 25.)
23 The ALJ determined that Plaintiff does not have a severe mental impairment. (AR 26.)
24 The ALJ assessed Claimant with a light work RFC with physical limitations but no mental
25 limitations. (AR 26.)

26 This Court reversed and remanded for further assessment of Plaintiff's mental
27 impairments. In the July 30, 2013 ALJ decision, the ALJ determined that Plaintiff has the
28 severe mental impairment of mood disorder not otherwise specified. (AR 590.) The ALJ

1 assessed a medium work RFC that included the mental limitations of performing jobs
2 involving no more than simple, repetitive tasks, occasional interaction with the general
3 public and frequent interaction with coworkers and supervisors. (AR 592.)

4 On mental impairments and limitations, the ALJ gave “great weight” to the
5 testifying medical expert Dr. Jasinski. (AR 590, 597.) A psychologist, he concluded
6 from the record, which consisted solely of a vocational report from psychologist Dr.
7 Edward Dunbar in March 2009, that Plaintiff had a mood disorder not otherwise
8 specified. (AR 590.) Dr. Jasinski testified at the October 23, 2012 hearing that Claimant
9 has mild restriction of daily activities, and moderate difficulties in maintaining
10 concentration, persistence and pace for complex and detailed tasks. (AR 590.)
11 Dr. Jasinski testified that Claimant’s test scores are “consistent with simple, repetitive
12 tasks” (AR 596) and that he could perform unskilled work. (AR 597.)

13 Plaintiff cites the treating physician opinion of Dr. Nynn Soe, an internist. (AR 28,
14 594-595 and 955-959.) The ALJ in the May 28, 2010 decision determined that Dr. Soe’s
15 extreme physical findings were not supported by the objective medical evidence. (AR
16 28.) The ALJ’s physical findings in the May 28, 2010 decision were not challenged and
17 have been re-adopted by the ALJ in the July 30, 2013 decision. (AR 593.) Plaintiff
18 nonetheless submitted a December 5, 2012 Physical Residual Functional Capacity
19 Questionnaire by Dr. Soe who opined Plaintiff would miss work more than three times a
20 month. (AR 955-959.) The ALJ rejected this Questionnaire as no more than a
21 restatement of the check box Medical Source Statements previously submitted and
22 rejected. (AR 594-595.) The ALJ further found that Dr. Soe’s Medical Source
23 Statements are inconsistent with Claimant’s workers’ compensation records, the CE
24 reports and the determination of examining physicians at USC who found Claimant
25 needed physical therapy and strengthening exercises, not surgery as Dr. Soe had
26 suggested. (AR 595.) Plaintiff acknowledges the ALJ rejected Dr. Soe’s opinion but
27 fails to address the reasons given by the ALJ for rejecting that opinion. The ALJ

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1 properly rejected Dr. Soe's opinion for specific, legitimate reasons supported by
2 substantial evidence. Lester, 81 F.3d at 830-31.

3 Plaintiff relies primarily on the consulting psychological examiner, Dr. Betty
4 Borden, Ph.D. (AR 590, 940-45.) She stated that the Claimant has marked impairment
5 in concentration, persistence and pace as a result of depression and memory difficulties.
6 (AR 590.) Dr. Borden also found that Plaintiff had no impairment in social functioning,
7 should be able to interact with supervisors and coworkers and moderate impairment in
8 interacting with the general public. (AR 590.) Dr. Borden concluded that Claimant could
9 perform activities of daily living, could complete simple repetitive tasks and would have
10 moderate impairment in interacting with the general public but should be able to interact
11 with supervisors and coworkers. (AR 597.)

12 The ALJ adopted some of Dr. Borden's mental functional limitations (AR 597) but
13 not Dr. Borden's opinion that the Claimant has marked impairments in concentration,
14 persistence and pace as a result of depression and memory difficulties. (AR 590.) The
15 ALJ concluded from all the evidence that the limitation in concentration, persistence and
16 pace should be moderate only, given Plaintiff's lack of significant mental health
17 treatment (AR 590) and not taking medication. (AR 593.) The ALJ's decision to
18 downgrade Dr. Borden's marked limitation in concentration, persistence and pace to
19 moderate is a credibility finding. Failure to seek treatment is a legitimate basis for an
20 ALJ to discount credibility. Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991) (an
21 unexplained failure to follow a prescribed course of treatment can undermine a
22 claimant's credibility). Dr. Borden also found that Plaintiff could perform activities of daily
23 living, which is another legitimate consideration in evaluating credibility. Bunnell, 947
24 F.2d at 345-6. The ALJ specifically re-adopted the credibility findings from the May 28,
25 2010 ALJ decision because they are not contradicted on remand. (AR 593.) Plaintiff
26 does not challenge the ALJ's adverse credibility finding or even mention it. An ALJ may
27 discount a treating physician's opinion when it is based on subjective symptoms that
28 have been discredited. Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (a

1 treating physician's opinion based on subjective complaints of a claimant whose
2 credibility has been discounted can be properly disregarded). The ALJ's adverse
3 credibility findings are a proper basis for any limitations he did not accept.

4 The ALJ also noted an inconsistency in Dr. Borden's marked impairment
5 assessment in that she gave Claimant no Axis I diagnosis (AR 597, 944) and
6 nonetheless opined Plaintiff could complete simple repetitive tasks. (AR 597, 945.) The
7 ALJ also noted Plaintiff told nurses at USC he was feeling down and depressed in March
8 2012 (AR 597, 972) but by July and November 2012 was not feeling any mental
9 symptoms (AR 597, 977, 982), suggesting his mental impairments and limitations have
10 not been consistent for 12 months. (AR 597.) These variations in symptoms further
11 undermine Plaintiff's credibility. Light v. Social Sec. Adm., 119 F.3d 789, 792 (9th Cir.
12 1997) (inconsistent statements regarding his subjective symptoms and his other
13 statements and conduct may be considered when evaluating credibility).

14 Plaintiff asserts that, because Dr. Borden was the only medical opinion that
15 assessed Mr. Leon's mental limitations for the relevant time period, the ALJ can reject it
16 only for clear and convincing reasons. Lester, 81 F.3d at 830. The ALJ did so.

17 Plaintiff disputes the ALJ's treatment of the medical evidence but it is the ALJ who
18 has the responsibility to resolve conflicts in the medical evidence and ambiguities in the
19 medical evidence. Andrews, 53 F.3d at 1039. Where the ALJ's interpretation of the
20 record evidence is reasonable as it is here, it should not be second-guessed. Rollins v.
21 Massanari, 261 F.3d 853, 857 (9th Cir. 1991).

22 The ALJ properly considered the medical evidence. The ALJ properly discounted
23 the opinion of Dr. Borden for clear and convincing reasons supported by substantial
24 evidence.

25 The ALJ's RFC is supported by substantial evidence. The ALJ's nondisability
26 determination is supported by substantial evidence and free of legal error.

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ORDER

IT IS HEREBY ORDERED that Judgment be entered affirming the decision of the Commissioner of Social Security and dismissing this case with prejudice.

DATED: June 30, 2015

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

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