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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL HUGH SIMS,  
Plaintiff,  
  
v.  
CAROLYN W. COLVIN,  
Commissioner of Social Security,  
Defendant.

No. CV 15-9980-AGR  
  
MEMORANDUM OPINION AND  
ORDER

Plaintiff Sims filed this action on December 30, 2015. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge. (Dkt. Nos. 11, 12.) On August 3, 2016, the parties filed a Joint Stipulation (“JS”) that addressed the disputed issues. The court has taken the matter under submission without oral argument.

Having reviewed the entire file, the court affirms the decision of the Commissioner.

1 I.

2 **PROCEDURAL BACKGROUND**

3 On July 17, 2012, Sims filed an application for disability insurance benefits and  
4 supplemental security income benefits, alleging an onset date of August 1, 2009.  
5 Administrative Record (“AR”) 20. The applications were denied initially and on  
6 reconsideration. AR 20, 89-90, 125-26. Sims requested a hearing before an  
7 Administrative Law Judge (“ALJ”). On March 5, 2014, the ALJ conducted a hearing at  
8 which Sims and a vocational expert (“VE”) testified. AR 33-56. On April 4, 2014, the  
9 ALJ issued a decision denying benefits. AR 17-29. On November 2, 2015, the Appeals  
10 Council denied the request for review. AR 1-6. This action followed.

11 II.

12 **STANDARD OF REVIEW**

13 Pursuant to 42 U.S.C. § 405(g), this court has authority to review the  
14 Commissioner’s decision to deny benefits. The decision will be disturbed only if it is not  
15 supported by substantial evidence, or if it is based upon the application of improper  
16 legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam);  
17 *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

18 “Substantial evidence” means “more than a mere scintilla but less than a  
19 preponderance – it is such relevant evidence that a reasonable mind might accept as  
20 adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In determining whether  
21 substantial evidence exists to support the Commissioner’s decision, the court examines  
22 the administrative record as a whole, considering adverse as well as supporting  
23 evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than  
24 one rational interpretation, the court must defer to the Commissioner’s decision.  
25 *Moncada*, 60 F.3d at 523.

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III.

**DISCUSSION**

**A. Disability**

A person qualifies as disabled, and thereby eligible for such benefits, “only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003) (citation and quotation marks omitted).

**B. The ALJ’s Findings**

The ALJ found that Sims last met the insured status requirements on September 30, 2014. AR 22.

Following the five-step sequential analysis applicable to disability determinations, *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006),<sup>1</sup> the ALJ found that Sims had the following severe impairments through the date last insured: COPD (chronic obstructive pulmonary disease) and multiple joint arthralgia. AR 22.

The ALJ found that, through the date last insured, Sims had the residual functional capacity (“RFC”) to perform light work except he cannot climb ladders, ropes or scaffolds; can occasionally climb ramps or stairs, balance, stoop, crouch, crawl or kneel; must avoid concentrated exposure to extreme cold and heat; and must avoid all exposure to pulmonary irritants and industrial hazards. AR 24. The ALJ found that Sims was capable of performing past relevant work as an inventory specialist as generally performed. AR 28.

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<sup>1</sup> The five-step sequential analysis examines whether the claimant engaged in substantial gainful activity, whether the claimant’s impairment is severe, whether the impairment meets or equals a listed impairment, whether the claimant is able to do his or her past relevant work, and whether the claimant is able to do any other work. *Lounsbury*, 468 F.3d at 1114.

1           **C.     Treating Physician**

2           Sims contends the ALJ erred in evaluating the opinion of his treating physician,  
3 Dr. Moe.

4           An opinion of a treating physician is given more weight than the opinion of  
5 non-treating physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). To reject an  
6 uncontradicted opinion of a medically acceptable treating source, an ALJ must state  
7 clear and convincing reasons that are supported by substantial evidence. *Bayliss v.*  
8 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). When a treating physician’s opinion is  
9 contradicted by another doctor, “the ALJ may not reject this opinion without providing  
10 specific and legitimate reasons supported by substantial evidence in the record. This  
11 can be done by setting out a detailed and thorough summary of the facts and conflicting  
12 clinical evidence, stating his interpretation thereof, and making findings.” *Orn*, 495 F.3d  
13 at 632 (citations and quotation marks omitted). “When there is conflicting medical  
14 evidence, the Secretary must determine credibility and resolve the conflict.” *Thomas v.*  
15 *Barnhart*, 278 F.3d 947, 956-57 (9th Cir. 2002) (citation and quotation marks omitted).

16           “The opinion of a nonexamining physician cannot by itself constitute substantial  
17 evidence that justifies the rejection of the opinion of either an examining physician *or* a  
18 treating physician.” *Ryan v. Comm’r*, 528 F.3d 1194, 1202 (9th Cir. 2008) (citation  
19 omitted) (emphasis in original). However, a non-examining physician’s opinion may  
20 serve as substantial evidence when it is supported by other evidence in the record and  
21 is consistent with it. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995); *see also*  
22 *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).

23           The ALJ discussed Dr. Moe’s treating records. AR 25-26 (citing Exhs. 1F, 2F.)  
24 However, the ALJ appears to have overlooked Dr. Moe’s opinion dated December 21,  
25 2012, which is included at the end of a 98-page exhibit that otherwise contained  
26 duplicative medical records. AR 576-79.

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1           The Commissioner argues that the ALJ's error was harmless. The Ninth Circuit  
2 has not absolutely precluded harmless error when an ALJ does not mention a treating  
3 physician's opinion. "Our precedents do not quantify the degree of certainty needed to  
4 conclude that an ALJ's error was harmless, and we would hesitate to suggest a rigid  
5 rule for all such cases. But it does seem that where the magnitude of an ALJ error is  
6 more significant, then the degree of certainty of harmlessness must also be heightened  
7 before an error can be determined to be harmless. In other words, the more serious the  
8 ALJ's error, the more difficult it should be to show the error was harmless." *Marsh v.*  
9 *Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015). In *Marsh*, the ALJ did not mention Dr.  
10 Betat's notes or his clinical progress notes. *Id.* at 1171. The Ninth Circuit noted that the  
11 district court "gave persuasive reasons to determine harmlessness" from the ALJ's error  
12 to mention the treating physician's opinion. *Id.* at 1173. Nevertheless, "[i]n the  
13 circumstances of this case, where the ALJ did not even mention Dr. Betat's opinion that  
14 Marsh's chronic bursitis rendered her 'pretty much nonfunctional,' we cannot  
15 'confidently conclude' that the error was harmless. *Id.* (citation omitted). The court  
16 remanded with instructions to the district court to remand to the ALJ and invite the ALJ  
17 to comment on Dr. Betat's medical opinions and records. *Id.*

18           In a report dated December 21, 2012, Dr. Moe opined that Sims was incapable of  
19 even low stress work due to his chronic, constant pain and shortness of breath. AR  
20 577. Dr. Moe further opined that Sims could sit, stand or walk less than two hours total  
21 in an eight-hour workday, and could never lift even items less than 10 pounds. AR 578.

22           In contrast to *Marsh*, the ALJ cited and relied upon the treating records of Dr.  
23 Moe and Northeast Valley Health Corp. AR 25-26. The ALJ noted that, according to  
24 the intake form in November 2011, Sims stated he rides a bike 10-15 minutes twice a  
25 day to and from a bar, drinks about a six-pack of beer per week, and cooks for himself.  
26 AR 25, 336. The ALJ further noted that in April 2013, the most recent of Dr. Moe's  
27 treating records, Sims had normal range of motion and muscle strength with no pain  
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1 upon inspection. AR 26 (citing AR 403-05.)<sup>2</sup> Sims was negative for fatigue and  
2 malaise; negative for anxiety, depression and insomnia; and negative for memory  
3 impairment. AR 403-04. Sims had normal insight and judgment, and appropriate mood  
4 and affect. AR 405. Dr. Moe noted that Sims' pain is actually "worse when lying down"  
5 and improves with Ibuprofen. His lungs were clear and his respiratory effort was  
6 normal. *Id.* The ALJ also relied upon the treating records in between November 2011  
7 and April 2013. The ALJ noted that Sims indicated his arthritic pain was "controlled with  
8 motrin alone" in November 2012. AR 26, 383; see AR 384 (pain at 4/10). He had bouts  
9 of shortness of breath and coughing after quitting cigarettes for 15 days. AR 383. The  
10 ALJ noted that Sims presented with improved symptoms but requested that Dr. Moe fill  
11 out disability paperwork one month later on December 21, 2012 (the date of Dr. Moe's  
12 report). AR 26, 391 (reporting occasional shortness of breath, coughing and fatigue).  
13 Sims then reported he started smoking again in January 2013. AR 395. The ALJ noted  
14 that, when Sims complained of shortness of breath, coughing and wheezing during the  
15 next visit in February 2013, Sims had decreased range of motion in the shoulders and  
16 normal respiratory effort upon examination. Sims' pain was 3/10. AR 26, 400-01.

17 In addition to citing Dr. Moe's treating records, the ALJ also reviewed Sims'  
18 statements and other medical reports. Sims reported in October 2012 that he can lift 20  
19 to 30 pounds, goes shopping for 30-45 minutes at a time, and walks, rides a bike or  
20 takes public transportation. AR 25, 27, 249, 251. He thought he handled stress and  
21 changes in routine "ok, I gu[e]ss." AR 252. At the hearing in March 2014, Sims testified  
22 that he could lift 10 or 15 pounds. AR 47, 50. Sims testified that he does not get  
23 mental health treatment because he does not feel he needs it. AR 44. His memory and  
24 concentration are pretty good. AR 51-52. This is consistent with Dr. Moe's treating  
25 records, which indicate negative for memory impairment. AR 369, 388, 396, 404.

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27 <sup>2</sup> Although the ALJ cited the correct pages, his citation to Exhibit 1F is a  
28 typographical error. The citation should read Exhibit 2F, which the ALJ correctly cited in  
the immediately preceding citation.

1           The ALJ gave great weight to the opinions of the examining physician and state  
2 agency review physician, which agreed with the objective findings in the record and  
3 Sims' statements regarding his capacity to perform daily activities. AR 27. The ALJ  
4 discussed Dr. Taylor's internal medicine evaluation in October 2012. AR 26-27. Sims  
5 has smoked for 40 years and continues to smoke. He reported getting frequent  
6 shortness of breath. AR 590. Sims was neat and clean, and had normal muscle tone.  
7 He did not have swelling or tenderness to direct palpation of any joint. His range of  
8 motion was normal. AR 592. Palpation of the paravertebral muscles in his back did not  
9 elicit pain or spasm. His back has decreased range of motion, and x-rays indicated mild  
10 scoliosis and mild degenerative disc disease. AR 592-93. Sims had a dry hacking  
11 cough on several occasions during the examination and had fair air movement. AR  
12 592-93. Dr. Taylor limited Sims to light work due to his HIV status and shortness of  
13 breath. Sims had no sitting limitations and could stand or walk up to six hours in an  
14 eight-hour workday. AR 594. The ALJ incorporated the limitations opined by Dr.  
15 Zheutlin. AR 27.

16           Based on the ALJ's interpretation of, and reliance on, Dr. Moe's treating records,  
17 Sims' own statements and the other medical sources, it is evident that remand for  
18 reconsideration of Dr. Moe's opinion would be an exercise in futility. Dr. Moe's opinion  
19 is inconsistent with the ALJ's findings regarding Dr. Moe's treating records, Sims'  
20 statements and the other medical sources. The ALJ's error in overlooking Dr. Moe's  
21 opinion is harmless and inconsequential to the disability determination on this record.

22           The court notes that Sims' age category changed in June 2015. There is  
23 indication, such as reduction in lift capacity and the Appeals Council's reference to  
24 medical records in late 2014, that Sims' condition may have deteriorated. The Appeals  
25 Council correctly advised that Sims must apply again to the extent that he seeks to  
26 establish disability after the date of the ALJ's decision, April 4, 2014. AR 2.

1           **D. State Agency Review Physicians and Mental Limitations**

2           Sims argues that the ALJ erred in rejecting the opinions of state agency review  
3 physicians Dr. Martin and Dr. Balson, who reaffirmed Dr. Martin’s findings. AR 64-69,  
4 98-104.

5           The ALJ found no limitations in the area of daily activities and mild limitations in  
6 social functioning. The ALJ found no limitations in the area of concentration,  
7 persistence of pace. AR 23. The ALJ relied on the examining physician’s opinion. AR  
8 23. In the October 2012 psychiatric examination, Sims reported that he had smoked  
9 crystal methamphetamine for 39 years and had used cocaine and alcohol. He had  
10 been sober since July 2012. He felt depressed since he separated from his girlfriend in  
11 July 2011 after 18 years together. AR 23, 596-97. His clothing was clean and  
12 appropriate. He was calm, focused and not distracted or restless. His attention and  
13 immediate recall were intact, and his past memories were fairly intact. His mood was  
14 depressed and anxious, and his thought process was logically connected with no  
15 derailment. He was diagnosed with major depressive disorder, mild with anxious mood.  
16 AR 23, 598-99. Sims had no limitations on simple functioning, mild limitations on  
17 complex functioning and moderate limitations on interpersonal functioning. His  
18 prognosis was fair. AR 599.

19           Dr. Martin, a nonexamining physician, disagreed with the examining physician’s  
20 opinion that Sims had mild limitations in complex functioning “due to residual  
21 depression.” AR 66. Dr. Martin opined that Sims had moderate limitations in  
22 concentration, persistence or pace. AR 65. In her view, Sims was capable of “carrying  
23 out simple and some detailed instructions of low to intermediate complexity,” but “would  
24 have difficulty with highly detailed due to residual anxiety and depression.” AR 69.

25           To the extent that the ALJ erred in not explicitly addressing the disagreement  
26 between the examining physician and state agency review physician, the error was  
27 harmless. The opinion of a nonexamining physician cannot by itself constitute  
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1 substantial evidence to justify rejecting the opinion of an examining physician. *Hill v.*  
2 *Astrue*, 698 F.3d 1153, 1160 (9th Cir. 2012). Dr. Martin’s opinion that a person with  
3 depression is limited to unskilled work is conclusory and unsupported.<sup>3</sup> The ALJ noted  
4 that Sims worked as an inventory specialist for 10 years until August 2009. AR 28, 196-  
5 97. That 10-year period occurred during the 39-year time frame that he was smoking  
6 crystal methamphetamine according to his own reports. AR 597. To summarize, an  
7 inventory specialist compiles data, maintains inventory records, keeps a back-order file  
8 in an established sequence, tracks stock supply and need for replenishment, prepares  
9 requisitions, verifies their accuracy and recommends disposal of excess stock. The job  
10 is classified as Reasoning Level 4<sup>4</sup> and SVP 5 (over six months up to one year). DOT  
11 219.387-030. Sims testified at the hearing that he concentrates “fairly well.” AR 52.

12 The ALJ evaluated the opinion of the treating physician, who also noted Sims’  
13 long history of methamphetamine dependence since age 18. AR 23, 582. In response  
14 to a question about intellectual functioning (which included concentration), the treating  
15 physician responded that Sims’ cognition was OK and his judgment was fair. AR 23,  
16 582. Sims needed no assistance with daily activities. AR 583. On the other hand, the  
17 treating physician opined that Sims had “decreased focusing takes longer to complete  
18 things.” The ALJ rejected that opinion as self-contradictory and not supported by the  
19 objective medical record. AR 23, 584.

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22 <sup>3</sup> Dr. Martin opined that Sims has moderate limitations in social functioning due to  
23 depression with anxiety component. The moderate limitations were in Sims’ ability to  
24 interact with the general public and get along with coworkers without distracting them.  
25 AR 69. Dr. Martin’s opinion is conclusory. Dr. Martin noted that the examining  
physician found intact social skills. AR 65. The ALJ found mild limitations in social  
functioning. AR 24.

26 <sup>4</sup> Reasoning Level 4 means to “[a]pply principles of rational systems to solve  
27 practical problems and deal with a variety of concrete variables in situations where only  
28 limited standardization exists. Interpret a variety of instructions furnished in written,  
oral, diagrammatic, or schedule form.” DOT 219.387-030.

1 The Ninth Circuit has made clear that a “reviewing court may not make  
2 independent findings based on the evidence before the ALJ to conclude that the ALJ’s  
3 error was harmless.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015). A  
4 reviewing court is not, however, “deprived of our faculties for drawing specific and  
5 legitimate inferences from the ALJ’s opinion.” *Magallanes v. Bowen*, 881 F.2d 747, 755  
6 (9th Cir. 1989). The ALJ relied on the examining physician’s opinion that Sims was  
7 focused and not distracted, his attention was intact, and his thought process was  
8 logically connected without derailment. AR 23. Given the ALJ’s rejection of the treating  
9 physician’s milder assessment of Sims’ decreased focus, any error in failing to  
10 expressly reject Dr. Martin’s opinion is harmless.

11 **IV.**

12 **ORDER**

13 IT IS HEREBY ORDERED that the decision of the Commissioner is affirmed.

14 IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the  
15 Judgment herein on all parties or their counsel.

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18 DATED: August 29, 2016



19 ALICIA G. ROSENBERG  
20 United States Magistrate Judge  
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