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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MITCHELL DARIN HAWK,
Plaintiff,

v.

NANCY A. BERRYHILL,¹ Acting
Commissioner of Social Security,
Defendant.

) **NO. CV 16-2821-KS**

) **MEMORANDUM OPINION AND ORDER**

INTRODUCTION

Mitchell Darin Hawk (“Plaintiff”) filed a Complaint on April 25, 2016, seeking review of the denial of his application for a period of disability and disability insurance benefits (“DIB”). (Dkt. No. 1.) On May 18, 2016, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. (Dkt. Nos. 11, 12, 15.) On January 5, 2017, the parties filed a Joint Stipulation (“Joint Stip.”). (Dkt. No 23.) Plaintiff seeks an order reversing the Commissioner’s decision and remanding for further

¹ The Court notes that Nancy A. Berryhill is now the Acting Commissioner of the Social Security Administration. Accordingly, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Court orders that the caption be amended to substitute Nancy A. Berryhill for Carolyn Colvin as the defendant in this action.

1 proceedings or an immediate award of benefits. (Joint Stip. at 18.) The Commissioner
2 requests that the ALJ’s decision be affirmed or, in the alternative, remanded for further
3 proceedings. (*See id.* at 18-19.) The Court has taken the matter under submission without
4 oral argument.

5
6 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
7

8 On October 30, 2012, Plaintiff, who was born on November 25, 1967, protectively
9 filed an application for DIB.² (*See* Administrative Record (“AR”) 9, 178.) Plaintiff alleged
10 disability commencing February 6, 2012 due to “collapsed lung with pleural effusion [and] 3
11 fractured ribs; back injury; difficulty breathing – chest pain; anxiety; depression; head injury
12 trauma; sleep apnea; diagnosed with pneumothorax; psychological issues; severe memory
13 loss due to accident.” (AR 204.) Plaintiff previously worked as a dump truck driver (DOT
14 902.683-010). (AR 23, 196.) After the Commissioner denied Plaintiff’s application initially
15 (AR 74) and on reconsideration (*id.* 89), Plaintiff requested a hearing (*see id.*
16 109). Administrative Law Judge Helen E. Hesse (“ALJ”) held a hearing on December 9,
17 2014 (*id.* 30). Plaintiff, who was represented by counsel, testified before the ALJ as did
18 vocational expert (“VE”) Alan Boroskin. (*See* AR 33-54.) On January 14, 2015, the ALJ
19 issued an unfavorable decision, denying Plaintiff’s application for a period of disability and
20 DIB. (*Id.* 9-24.) On March 24, 2016, the Appeals Council denied Plaintiff’s request for
21 review. (*Id.* 1-4.)
22

23 **SUMMARY OF ADMINISTRATIVE DECISION**
24

25 The ALJ found that Plaintiff meets the insured status requirements of the Social
26 Security Act through December 31, 2017. (AR 11.) The ALJ found that Plaintiff had not
27

28 ² Plaintiff was 44 years old on the application date and thus met the agency’s definition of a younger individual.
See 20 C.F.R. § 404.1563(c).

1 engaged in substantial gainful activity since his February 6, 2012 alleged onset date. (AR
2 11.) The ALJ further found that Plaintiff had the following severe impairments: muscle
3 strain/sprain; alleged back pain; and mild obesity. (AR 12.) The ALJ found that Plaintiff’s
4 medically determinable mental impairments of anxiety disorder, posttraumatic stress disorder
5 (PTSD), and organic brain syndrome, considered singly and in combination, were nonsevere.
6 (AR 12.) The ALJ concluded that Plaintiff did not have an impairment or combination of
7 impairments that met or medically equaled the severity of any impairments listed in 20
8 C.F.R. part 404, subpart P, appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526). (*Id.*
9 14.) The ALJ determined that Plaintiff had the residual functional capacity (“RFC”) to
10 perform medium work with the following limitations:

11
12 [Plaintiff] can lift and/or carry fifty pounds occasionally, twenty-five pounds
13 frequently; . . . can sit, stand, or walk for six hours out [of] an eight-hour
14 workday; . . . can occasionally climb ladders, ropes or scaffolds; . . . can
15 frequently climb stairs, bend, balance, kneel, stoop crouch, and crawl.

16
17 (AR 15.)

18
19 The ALJ found that Plaintiff was able perform his past relevant work as a dump truck
20 driver (DOT 902.683-010). (AR 23.) Accordingly, the ALJ determined that Plaintiff had
21 not been under a disability, as defined in the Social Security Act, from the alleged onset date
22 through the date of the ALJ’s decision. (*Id.* at 23-24.)

23 24 **STANDARD OF REVIEW**

25
26 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to
27 determine whether it is free from legal error and supported by substantial evidence in the
28 record as a whole. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). “Substantial evidence

1 is ‘more than a mere scintilla but less than a preponderance; it is such relevant evidence as a
2 reasonable mind might accept as adequate to support a conclusion.’” *Gutierrez v. Comm’r of*
3 *Soc. Sec.*, 740 F.3d 519, 522-23 (9th Cir. 2014) (internal citations omitted). “Even when the
4 evidence is susceptible to more than one rational interpretation, we must uphold the ALJ’s
5 findings if they are supported by inferences reasonably drawn from the record.” *Molina v.*
6 *Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012).

7
8 Although this Court cannot substitute its discretion for the Commissioner’s, the Court
9 nonetheless must review the record as a whole, “weighing both the evidence that supports
10 and the evidence that detracts from the [Commissioner’s] conclusion.” *Lingenfelter v.*
11 *Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (internal quotation marks and citation omitted);
12 *Desrosiers v. Sec’y of Health and Hum. Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). “The ALJ
13 is responsible for determining credibility, resolving conflicts in medical testimony, and for
14 resolving ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

15
16 The Court will uphold the Commissioner’s decision when the evidence is susceptible
17 to more than one rational interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir.
18 2005). However, the Court may review only the reasons stated by the ALJ in his decision
19 “and may not affirm the ALJ on a ground upon which he did not rely.” *Orn*, 495 F.3d at
20 630; *see also Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). The Court will not
21 reverse the Commissioner’s decision if it is based on harmless error, which exists if the error
22 is “‘inconsequential to the ultimate nondisability determination,’ or if despite the legal error,
23 ‘the agency’s path may reasonably be discerned.’” *Brown-Hunter v. Colvin*, 806 F.3d 487,
24 492 (9th Cir. 2015) (internal citations omitted).

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1 **DISCUSSION**

2
3 The sole issue in dispute is whether the ALJ properly considered the opinions of
4 Plaintiff's treating orthopedist.

5
6 **I. The ALJ's Evaluation Of The Records Of Plaintiff's Treating Physician**

7
8 **A. Treatment Records of Dr. Gibson**

9
10 Plaintiff contends that the ALJ improperly evaluated the opinion of Dr. Harry L.
11 Gibson, M.D., Plaintiff's treating orthopedist. (Joint Stip. at 3-10.) The record reflects that
12 Dr. Gibson treated Plaintiff in connection with his workers' compensation claim between
13 February 2012 and February 2013. (AR 491-513.) At his first appointment with Dr. Gibson,
14 Plaintiff reported that, on December 29, 2010, while operating a back hoe, he fell backwards
15 and landed on some of the equipment on the ground. He immediately felt pain in his chest
16 and was unconscious for a while. (AR 509, 510.) Plaintiff was transported to UCI
17 Emergency Room in Orange, California, where they initially did not recognize that he had
18 fractured his ribs and discharged him. (AR 510.) Plaintiff returned to the emergency room
19 to report trouble breathing, at which point further studies were conducted and it was
20 determined that Plaintiff had broken several ribs and had a considerable amount of blood and
21 fluid in his chest space. (AR 510.) After taking some time off to heal, Plaintiff returned to
22 "light duty" work in the office but continued to experience pain and shortness of breath that
23 worsened over time. (AR 511.)

24
25 At that initial visit, Dr. Gibson had a film made of Plaintiff's thoracic spine, which
26 showed that Plaintiff had two rib fractures that had not healed despite more than a year
27 passing since the date of injury. (AR 512.) The film also revealed that Plaintiff's diaphragm
28 was elevated on the right side. (AR 512.) X-rays of Plaintiff's thoracic spine showed four

1 discs that had developed a considerable amount of bone formation and the disc spaces
2 looked like they were going to fuse spontaneously. (AR 512.) Finally, x-rays of Plaintiff's
3 lumbar spine showed reverse spondylolisthesis L4 on L5, which explained Plaintiff's
4 chronic back pain. (AR 512.) Dr. Gibson recommended a bone stimulator to try to get
5 Plaintiff's ribs to heal and a visit to a chest medical specialist to address Plaintiff's lungs.
6 (AR 512.) Dr. Gibson opined that Plaintiff was totally disabled and might need long-term
7 disability if his chest medical problems did not resolve. (AR 513.) The following month, on
8 March 21, 2012, Dr. Gibson stated that because "the patient tells me there is no light duty
9 work, until we got some progress to see if the ribs would heal, I think it is appropriate that he
10 be off work." (AR 508.)

11
12 In May 2012, Dr. Gibson stated that Plaintiff was "clinically short of breath." (AR
13 506.) In July 2012, Dr. Gibson observed that Plaintiff's fractured ribs still had not healed.
14 (AR 501.) However, Plaintiff reported that physiotherapy was helping, and Dr. Gibson
15 recommended that he continue. (AR 501.) At that time, Plaintiff's medications included
16 two different strength dosages of Norco, a highly addictive combination of acetaminophen
17 and hydrocodone, Vicodin, another highly addictive combination of acetaminophen and
18 hydrocodone, and Zolpidem (to treat insomnia). (AR 501.) Dr. Gibson also advised that
19 Plaintiff seek a pulmonary physician due to a thick pleural effusion and elevated diaphragm
20 on his right side. (AR 504.)

21
22 In October 2012, nearly two years after Plaintiff's injury, Dr. Gibson observed that one
23 rib had healed but the other had not. (AR 500.) Dr. Gibson recommended the continued use
24 of the bone stimulator. (AR 500.) In January 2013, a full two years after Plaintiff's injury,
25 Plaintiff reported that he was in constant pain and taking approximately 3-4 Norco a day to
26 control the pain. (AR 494.) Dr. Gibson thought it would be helpful to refer Plaintiff to a
27 chest surgeon and also to consider surgery on the ribs to obtain healing. (AR 494.) Finally,
28 in February 2013, the date of the last treatment notes in the record, Dr. Gibson reported that

1 Plaintiff's condition remained "about the same" and indicated that one of Plaintiff's
2 fractured ribs still had not healed. (AR 492.) Plaintiff's medications continued to include
3 prescriptions for both strengths of Norco (7.5 mg hydrocodone/325 mg acetaminophen and
4 10 mg hydrocodone/325 acetaminophen), a prescription for Vicodin, and a prescription for
5 Zolpidem. (AR 491.)

6 7 **B. ALJ's Decision**

8
9 As noted above, the ALJ determined that, from the alleged onset date of February 6,
10 2012 through the January 14, 2015 date of decision, Plaintiff did not suffer from a severe
11 medically determinable impairment of rib or bone fractures (AR 12 (finding Plaintiff's only
12 severe impairments were "muscle strain/sprain, alleged back pain, and mild obesity") and
13 could perform medium work as follows:

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15 [Plaintiff] can lift and/or carry fifty pounds occasionally, twenty-five pounds
16 frequently; . . . can sit, stand, or walk for six hours out [of] an eight-hour
17 workday; . . . can occasionally climb ladders, ropes or scaffolds; . . . can
18 frequently climb stairs, bend, balance, kneel, stoop crouch, and crawl.

19
20 (AR 15).

21
22 In reaching these conclusions, the ALJ mentioned but did not discuss Dr. Gibson's
23 diagnosis of rib fractures (AR 18) and gave "little weight" to Dr. Gibson's opinion that, due
24 to his fractured ribs, Plaintiff was unable to return to his job as a dump truck driver. (AR
25 22.) Specifically, the ALJ described Dr. Gibson's opinions as "conclusory," "inadequately
26 supported by clinical findings," and opinions on an issue reserved to the Commissioner.
27 (AR 22.) The ALJ also noted that Dr. Gibson did not assess any specific functional
28 limitations and she stated that "it is unclear whether Dr. Gibson opined that [Plaintiff] could

1 not work due [Plaintiff] informing him that his employer did not have any light work
2 available.” (AR 22.)
3

4 **C. Applicable Law**

5

6 The opinion of a treating source is generally entitled to greater weight than the
7 opinion of doctors who do not treat the claimant because treating sources are “most able to
8 provide a detailed, longitudinal picture” of a claimant’s medical impairments and bring a
9 perspective to the medical evidence that cannot be obtained from objective medical findings
10 alone. *See Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014); *see also* 20 C.F.R. §
11 404.1527(c)(2). To reject an uncontradicted opinion of a treating physician, the ALJ must
12 provide “clear and convincing reasons that are supported by substantial evidence.” *Ghanim*
13 *v. Colvin*, 763 F.3d 1154, 1160-61 (9th Cir. 2014). If, however, the treating physician’s
14 opinion is contradicted by another medical source, the ALJ must consider the factors set out
15 in 20 C.F.R. § 404.1527(c)(2)-(6) in determining how much weight to accord it. These
16 factors include the “[l]ength of the treatment relationship and the frequency of examination”
17 by the treating physician, the “[n]ature and extent of the treatment relationship” between the
18 patient and the treating physician, the “[s]upportability” of the physician’s opinion with
19 medical evidence, and the consistency of the physician’s opinion with the record as a whole.
20 The ALJ must articulate “specific and legitimate reasons that are supported by substantial
21 evidence” to reject the contradicted opinions of a treating physician. *Ghanim*, 763 F.3d at
22 1161.

23
24 A medical source’s opinion that a claimant is disabled or unable to work are not
25 entitled to “special significance” because they are “opinions on issues reserved to the
26 Commissioner.” 20 C.F.R. § 404.1527. Further, an ALJ may properly reject a treating
27 physician’s conclusions that do not “mesh” with the treating physician’s objective data or
28 history, *see, e.g., Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008); *Rollins v.*

1 *Massanari*, 261 F.3d 853, 856 (9th Cir. 2001), and need not accept the opinion of any
2 physician if that opinion is “conclusory and inadequately supported by clinical findings.”
3 *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Bayliss v. Barnhart*, 427 F.3d 1211,
4 1216 (9th Cir. 2005) (“discrepancy” between treating physician’s assessment and clinical
5 notes is a clear and convincing reason for not relying on the doctor’s opinion). However,
6 “[w]hen there is ambiguous evidence or when the record is inadequate to allow for proper
7 evaluation of the evidence” in a disability benefits case, the ALJ has an independent “duty to
8 fully and fairly develop the record and to assure that the claimant’s interests are considered.”
9 *Mayer v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d
10 1144, 1150 (9th Cir. 2001) (internal quotation marks and citation omitted).

11 12 **D. Discussion**

13
14 The ALJ failed to articulate specific and legitimate reasons supported by substantial
15 evidence in the record for discounting Dr. Gibson’s opinions. Although Dr. Gibson’s
16 opinions that Plaintiff was totally disabled (AR 512) and needed to remain off of work until
17 his ribs heal (AR 508) are not controlling, *see*, 20 C.F.R. § 404.1527, Dr. Gibson’s
18 assessment that “there is no light duty work, so until we we got some progress to see if the
19 ribs would heal, I think it is appropriate that he be off of work” indicates that Dr. Gibson
20 believed Plaintiff had some functional limitations due to his fractured ribs. Nevertheless, the
21 ALJ rejected this assessment because Dr. Gibson did not specify Plaintiff’s functional
22 limitations and it was “unclear whether Dr. Gibson opined that [Plaintiff] could not work due
23 to [Plaintiff] informing him that his employer did not have any light work available,” the
24 ALJ rejected Dr. Gibson’s assessment. (AR 22.)

25
26 As stated above, “[w]hen there is ambiguous evidence or when the record is
27 inadequate to allow for proper evaluation of the evidence,” the ALJ has an independent
28 “duty to fully and fairly develop the record and to assure that the claimant’s interests are

1 considered.” *Tonapetyan*, 242 F.3d at 1150 (internal quotation marks and citation omitted).
2 Here, the ALJ conceded that the basis for and precise contours of Dr. Gibson’s March 21,
3 2012 opinion that Plaintiff should stay off of work while his ribs heal was “unclear.” (AR
4 22.) This finding that Dr. Gibson’s opinion was ambiguous and inadequate to permit a
5 proper evaluation of the evidence triggered the ALJ’s to recontact Dr. Gibson’s office for
6 clarification and further development of the record. The ALJ erred in failing to do so.

7
8 The ALJ’s other reason for discounting Dr. Gibson’s opinions is that they were
9 “conclusory” and “inadequately supported by clinical findings.” (AR 22.) However,
10 substantial evidence in the record does not support this characterization of Dr. Gibson’s
11 opinions. To the contrary, Dr. Gibson’s treatment notes reveal that he based his diagnosis,
12 recommended course of treatment, and medical opinions on x-rays (*see, e.g.*, AR 506 (May
13 8, 2012 – x-ray showed fluid in the right lung field and elevated diaphragm on the right
14 side), 512 (February 27, 2012 – x-ray of thoracic spine show four disks have developed a
15 considerable amount of bone formation)) and a film of the thoracic spine (*see, e.g.*, AR 512
16 (February 27, 2012 – film of the thoracic spine showed two rib fractures that have not
17 healed)). Based on these images, his conversations with Plaintiff, and his physical
18 examinations, Dr. Gibson diagnosed two fractured ribs at the start of treatment (AR 512
19 (February 27, 2012)) – one of which remained broken a full year after treatment began (AR
20 492 (February 20, 2013)). Dr. Gibson also observed that Plaintiff was “clinically short of
21 breath” (AR 506 (May 8, 2012)) and prescribed three highly addictive prescription pain
22 medications to address Plaintiff’s constant pain from his unhealed ribs (AR 491). In light of
23 these extensive clinical findings, substantial evidence does not support the ALJ’s
24 characterization of Dr. Gibson’s opinions regarding Plaintiff’s diagnosis and inability to
25 return to work as a dump truck driver as conclusory and inadequately supported.

26
27 Finally, Defendant argues that the ALJ properly assigned little weight to Dr. Gibson’s
28 opinion because the Agreed Medical Examiner for Plaintiff’s workers’ compensation claim,

1 Edward J. O’Neill, M.D., a Diplomate of the American Board of Preventative Medicine,
2 concluded in August 2012 that Plaintiff had “recovered” from his chest wall injuries and
3 chest surgery and “does not have residual impairment or disability.” (Joint Stip. at 13-14;
4 AR 431.) The ALJ, however, did not cite Dr. O’Neill’s opinion as one of her reasons for
5 discounting Dr. Gibson’s opinion (*see generally* AR 22), and the Court declines to affirm the
6 ALJ’s decision based on grounds on which the ALJ did not rely. *See Bray v. Comm’r of*
7 *Soc. Sec. Admin.*, 554 F.3d 1219, 1225 (9th Cir. 2009) (“Long-standing principles of
8 administrative law require us to review the ALJ’s decision based on the reasoning and
9 factual findings offered by the ALJ – not *post hoc* rationalizations that attempt to intuit what
10 the adjudicator may have been thinking.”); *Stout v. Comm’r of Soc. Sec. Admin.*, 454 F.3d
11 1050, 1054 (9th Cir. 2006). Furthermore, Dr. O’Neill did not review Dr. Gibson’s records –
12 or indeed *any* records reflecting treatment after Plaintiff’s alleged onset date – and, therefore,
13 Dr. O’Neill’s conclusion was not an informed rejection of Dr. Gibson’s assessment. (*See*
14 *generally* AR 432-36 (listing the medical records Dr. O’Neill reviewed in reaching his
15 conclusion).)

16
17 The Court acknowledges that Defendant may be correct that, to the extent Plaintiff’s
18 severe impairments rendered him unable to work on the alleged onset date of February 6,
19 2012, his impairments were not disabling for a full year and thus Plaintiff was not under a
20 disability, as that term is defined in the Social Security Act. (*See* Joint Stip. at 15.)
21 However, the record before the Court does not support the conclusion that the ALJ’s error in
22 failing to fully develop the record was “inconsequential to the ultimate nondisability
23 determination” or that, despite the legal error, “the agency’s path may reasonably be
24 discerned.” *See Brown-Hunter*, 806 F.3d at 492. Instead, it is also possible that a more fully
25 developed record will support an award of benefits for either an open or a closed period of
26 disability. Accordingly, the matter must be remanded for further development of the record
27 and consideration of Dr. Gibson’s opinion. On remand, the ALJ must articulate specific and
28 legitimate reasons supported by substantial evidence *and* “fully and fairly develop the

1 record” before discounting the opinion and diagnosis of the orthopedist with whom Plaintiff
2 had a year-long treatment relationship.

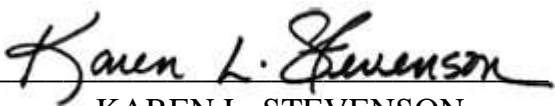
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4 **CONCLUSION**

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6 Accordingly, for the reasons stated above, IT IS ORDERED that the decision of the
7 Commissioner is REVERSED, and this case is REMANDED for further proceedings
8 consistent with this Memorandum Opinion and Order.

9
10 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this
11 Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for
12 defendant.

13
14 LET JUDGMENT BE ENTERED ACCORDINGLY.

15
16 DATE: May 4, 2017

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18 KAREN L. STEVENSON
19 UNITED STATES MAGISTRATE JUDGE
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