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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

TARON GORGOYAN,

Plaintiff,

v.

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

Defendant.

Case No. CV 16-04668-DFM

MEMORANDUM OPINION
AND ORDER

Taron Gorgoyan (“Plaintiff”) appeals from the Social Security Commissioner’s final decision denying his applications for Supplemental Security Income and disability insurance benefits. For the reasons discussed below, the Commissioner’s decision is affirmed and this matter is dismissed with prejudice.

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¹ On January 23, 2017, Berryhill became the Acting Social Security Commissioner. Thus, she is automatically substituted as defendant under Federal Rule of Civil Procedure 25(d).

1 I.

2 BACKGROUND

3 Plaintiff filed applications for Supplemental Security Income and
4 disability insurance benefits in March 2012, alleging disability beginning on
5 May 15, 2002. See Administrative Record (“AR”) 178-88. After his
6 applications were denied, he requested a hearing before an administrative law
7 judge (“ALJ”). See AR 111-17. At a March 2014 hearing, the ALJ heard
8 testimony by a vocational expert (“VE”) and Plaintiff, who was represented by
9 counsel. See AR 44-76.

10 In April 2014, the ALJ denied Plaintiff’s claims. See AR 20-38. The ALJ
11 concluded that Plaintiff was ineligible for disability insurance benefits because
12 his earnings record only entitled him to benefits through March 31, 2002. See
13 AR 23. Turning to Plaintiff’s Supplemental Security Income application, the
14 ALJ found that Plaintiff had medically-determinable severe impairments of
15 history of gunshot wound to the left side of face from 2002, status post major
16 facial surgery, and resulting left eye blindness; status post motor vehicle
17 accident with internal derangement of the left knee; status post motor vehicle
18 accident with cervical and lumbar spine strain; and mood disorder. See AR 26-
19 27. He found that despite those impairments, Plaintiff had the residual
20 functional capacity (“RFC”) to perform light work with the following
21 limitations: he could sit, stand, and walk for six hours in an eight-hour
22 workday, occasionally performing postural activities; he had no distance or
23 depth perception, a limited field of vision, and no binocular vision due to left
24 eye blindness; he could not work in a setting requiring a good speaking ability
25 or communicate with others on a regular basis; he must avoid exposure to
26 hazards; and he could perform simple, routine, repetitive tasks. See AR 29-35.

27 Based on the VE’s testimony, the ALJ found that given Plaintiff’s age,
28 education, work experience, and RFC, Plaintiff would be able to work as an

1 apparel checker, bench assembler, or routing clerk. See AR 37. Because these
2 jobs existed in significant numbers in the national economy, the ALJ found
3 that Plaintiff was not disabled. See AR 37-38.

4 The Appeals Council denied review of the ALJ's decision, which
5 became the final decision of the Commissioner. See AR 5-8; see also 20 C.F.R.
6 §§ 404.981, 416.1481. Plaintiff sought judicial review in this Court. See Dkt. 1.

7 **II.**

8 **DISCUSSION**

9 Plaintiff argues that the ALJ (1) failed to properly evaluate Plaintiff's
10 symptom testimony; (2) failed to give proper weight to treating physicians and
11 relied too heavily on non-treating, non-examining physicians; (3) failed to
12 explicitly consider whether Plaintiff met three listings; (4) had insufficient
13 evidence to conclude that Plaintiff could perform jobs that exist in significant
14 numbers in the national economy; and (5) failed to develop the record on the
15 onset date of Plaintiff's mental impairment. See Joint Stipulation ("JS") at 4.

16 **A. Plaintiff's Symptom Testimony**

17 **1. Applicable Law**

18 The court engages in a two-step analysis to review the ALJ's evaluation
19 of Plaintiff's symptom testimony. See Trevizo v. Berryhill, 871 F.3d 664, 678
20 (9th Cir. 2017). First, the ALJ must determine whether the claimant has
21 presented objective medical evidence of an underlying impairment that could
22 reasonably be expected to produce the symptoms alleged. Id. If the claimant
23 satisfies this first step, and there is no evidence of malingering, the ALJ can
24 reject the claimant's testimony about the severity of symptoms only by offering
25 specific, clear and convincing reasons for doing so. Id.

26 In March 2016, the Social Security Administration issued Social Security
27 Ruling ("SSR") 16-3p and eliminated the term "credibility" from the agency's
28 policy. As the SSR explains:

1 In evaluating an individual's symptoms, our adjudicators
2 will not assess an individual's overall character or truthfulness in
3 the manner typically used during an adversarial court litigation.
4 The focus of the evaluation of an individual's symptoms should
5 not be to determine whether he or she is a truthful person. Rather,
6 our adjudicators will focus on whether the evidence establishes a
7 medically determinable impairment that could reasonably be
8 expected to produce the individual's symptoms and given the
9 adjudicator's evaluation of the individual's symptoms, whether the
10 intensity and persistence of the symptoms limit the individual's
11 ability to perform work-related activities

12 SSR 16-3p, 2017 WL 5180304 (Oct. 25, 2017).

13 Plaintiff argues that SSR 16-3p is a clarification of policy, not a new
14 policy, making retroactive application appropriate. See JS at 5-6. The Social
15 Security Administration recently revised SSR 16-3p to clarify that the agency
16 expects federal courts to review the Commissioner's decisions using the rules
17 that were in effect at the time the decision was made. See SSR 16-3p, 2017 WL
18 4180304, at *13 n.27. Before that decision, some district courts in the Ninth
19 Circuit applied SSR 16-3p retroactively. See, e.g., Rigole v. Berryhill, No. 15-
20 02072, 2017 WL 4839075, at *9 (D. Or. Oct. 26, 2017) ("SSR 16-3p is a
21 clarification of sub-regulatory policy rather than a new policy and thus is
22 appropriately applied retroactively."). Others did not. See, e.g., Wright v.
23 Colvin, No. 15-02495, 2017 WL 697542, at *9 (N.D. Cal. Feb. 22, 2017)
24 (concluding that SSR 16-3p does not apply retroactively). The Ninth Circuit
25 recently suggested that SSR 16-3p is consistent with existing Ninth Circuit case
26 law. See Trevizo, 871 F.3d at 678 n.5 (noting that SSR 16-3p "makes clear
27 what our precedent already required"—that the ALJ is "not to delve into wide-
28 ranging scrutiny of the claimant's character and apparent truthfulness" but

1 rather to focus on “evaluat[ing] the intensity and persistence of [the alleged]
2 symptoms”).²

3 **2. Analysis**

4 Plaintiff brought a cane to the hearing and alleged that he was in
5 constant, disabling pain from a 2002 self-inflicted gunshot to the face, resulting
6 reconstructive surgeries, and knee and spinal injuries from a 2012 car accident.
7 See AR 56-60, 64-67. He claimed that he was depressed and anxious “every
8 day, every hour, every 30 minutes, every 20 minutes, every 3 hours.” AR 66.
9 He stated that people have a hard time understanding his speech because of his
10 facial injuries. See AR 67-68.

11 The ALJ gave four reasons for discounting Plaintiff’s allegations
12 regarding the intensity, persistence, and limiting effects of his symptoms: (1)
13 the objective evidence and the consultative examiners’ findings did not support
14 Plaintiff’s allegations; (2) Plaintiff had a limited history of treatment for his
15 impairments; (3) Plaintiff’s activities of daily living were not consistent with
16 the alleged degree of impairment; and (4) Plaintiff’s criminal record showed a
17 propensity for dishonesty. See AR 34-35. The ALJ also considered a report
18 from Plaintiff’s brother but concluded that it did not overcome the rest of the
19 record. See AR 35.

20 a. Objective Evidence and Consultative Examiners’ Findings

21 Plaintiff shot himself in the face in 2002, after shooting and killing his
22 mother and shooting his brother (who survived) after his father’s death of
23 natural causes. See JS at 2; AR 734. Plaintiff underwent facial reconstructive

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25 ² Trevizo’s statement about SSR 16-3p’s consistency with existing
26 precedent is hard to reconcile with numerous Ninth Circuit cases stating that
27 ALJs may employ “ordinary techniques of credibility evaluation” when
28 evaluating a claimant’s symptom testimony. See, e.g., Burch v. Barnhart, 400
F.3d 676, 680 (9th Cir. 2005).

1 surgery in 2002 and 2011. See AR 29, 696, 840. He lost his left eye in the
2 shooting but, in May 2013, had 20/25 corrected vision in his right eye. See AR
3 30, 746-47. The RFC accounted for Plaintiff's limited vision. See AR 29.

4 Plaintiff was also in a car accident in November 2012. See AR 30, 1032.
5 He complained afterward of neck, lower back, and left knee pain. Id. In an
6 orthopedic consultation 11 days after the accident, he had spine tenderness and
7 a reduced spinal range of motion but could walk on his toes, had normal
8 reflexes, displayed normal alignment in his left knee, and, from his x-rays,
9 showed normal spinal alignment and normal left knee alignment, with a
10 possible calcified loose body. See AR 30, 1033-37. February 2013 MRIs
11 revealed some spinal disc protrusion and possible chronic systemic bone
12 disease with respect to his left knee. See AR 30, 1039-42. A June 2013
13 examination reflected back tenderness and reduced spinal range of motion,
14 with the examiner recommending continued chiropractic care and
15 "conservative treatment." AR 1029-31. A March 2014 examination reflected
16 temporomandibular joint pain, spinal and neck pain, and bilateral knee
17 tenderness. See AR 1111.

18 After a thorough review of Plaintiff's medical record, the ALJ concluded
19 that the record did not support limitations greater than those he imposed in his
20 RFC finding. See AR 30-31 ("[T]here is no evidence to suggest that the
21 claimant would be unable to perform light exertional work."). This review
22 included a review of the medical evidence after Plaintiff's 2012 accident. See
23 AR 30. The ALJ noted that the record reflected no surgical intervention other
24 than Plaintiff's left knee surgery, no pain relief injections, no nerve root
25 impingement in Plaintiff's back, and no evidence of significant deterioration in
26 Plaintiff's knee. See AR 30-31. The ALJ thus concluded that the "objective
27 evidence does not support the claimant's allegations." AR 34. Substantial
28 evidence supported the ALJ's conclusion that Plaintiff was capable of light

1 exertional work, which—with the ALJ’s additional RFC limitations—involved
2 being able to do substantially all of: lifting no more than 20 pounds at a time
3 with frequent lifting or carrying of objects weighing up to 10 pounds; walking
4 or standing six hours out of eight, or sitting most of the time with some
5 pushing and pulling of arm or leg controls; and occasional postural activities.
6 See 20 C.F.R. § 416.967.

7 Plaintiff argues that the ALJ “improperly relied on the August 2012
8 [consulting examiner] and September 2012 State Agency consultants.” JS at
9 18. But the record shows that the ALJ only gave the opinions of these
10 consultants partial weight, and further noted that their opinions did not include
11 exertional limitations “warranted by the record.” AR 31. The earlier of the two
12 is an opinion by Dr. Helen Rostamloo, who opined that Plaintiff had no
13 exertional limitations, despite having left-eye blindness. See AR 659-63. But
14 the ALJ only gave Dr. Rostamloo’s opinion some weight, noting that the
15 opinion “acknowledges the claimant’s visual limitations.” AR 31. Otherwise,
16 the ALJ noted that the Plaintiff’s record “as a whole is more consistent with
17 limiting the claimant to light exertional work, rather than finding that the
18 claimant has no exertional limitations.” Id. Likewise, the ALJ gave similar
19 treatment to the September 2012 medical consultant’s opinion by noting that
20 the “visual and speaking limitations” reported by the medical consultant “are
21 consistent with the record as a whole” but adding that the medical consultant
22 did not include any exertional limitations “as warranted by the record.” Id.

23 Plaintiff claims that he has “tremendous difficulty speaking” and
24 “profound psychiatric problems.” JS at 8. But the ALJ adequately accounted
25 for Plaintiff’s speaking difficulties in the RFC. See AR 29. Moreover, it is
26 apparent from the hearing transcript that Plaintiff could make himself
27 understood when necessary. See AR 51-68 (engaging in lengthy question and
28 answer session with ALJ, albeit with ALJ asking Plaintiff to repeat answers

1 occasionally, with court reporter able to transcribe most of conversation).

2 As for Plaintiff's psychiatric problems, the ALJ noted that no physician
3 or psychologist supported Plaintiff's claims and that the examining and
4 reviewing doctors' findings were not consistent with Plaintiff's complaints. See
5 AR 34-35. For example, consultative examiner Nina Kapitanski, M.D., opined
6 in August 2012 that Plaintiff had full cooperation, fair eye contact, normal
7 psychomotor activity, a linear and goal-directed thought process, no
8 hallucinations or delusions, no obsessions, compulsions, or paranoia, no
9 suicidal or homicidal ideation, full alertness and orientation, good memory,
10 and exhibited the ability to concentrate (including performing serial sevens),
11 think abstractly, and exercise good judgment.³ See AR 32, 666-67.

12 In sum, the ALJ's finding that the record lacked objective medical
13 evidence to support the alleged severity of Plaintiff's symptom testimony is
14 supported by substantial evidence and is a proper basis for discounting
15 Plaintiff's symptom testimony. See Burch, 400 F.3d at 681 ("Although lack of
16 medical evidence cannot form the sole basis for discounting pain testimony, it
17 is a factor that the ALJ can consider in his credibility analysis.").

18 ///

19 ³ Plaintiff claims that Dr. Kapitanski "lacks the subject matter expertise
20 in psychiatry." JS at 8. Plaintiff's support for this argument is Dr. Kapitanski's
21 statement that she was a "board eligible" psychiatrist (rather than "board
22 certified") at the time of her opinion. See id.; see also AR 668. Plaintiff cites
23 Daubert v. Merrell Dow Pharms, Inc., 509 U.S. 579 (1993), to support this
24 argument. See JS at 8. But Daubert and Federal Rule of Evidence 702 do not
25 govern the admissibility of evidence before an ALJ in a Social Security
26 disability case. See Bayliss v. Barnhart, 427 F.3d 1211, 1218 n.4 (9th Cir.
27 2005). As an M.D. who specialized in psychiatry at the time of her opinion,
28 Dr. Kapitanski was qualified to opine to the Social Security Administration on
Plaintiff's psychiatric condition. See 20 C.F.R. § 416.902(a) ("Acceptable
medical source means a medical source who is a . . . [l]icensed physican
(medical or osteopathic doctor)").

1 b. Conservative Treatment

2 The ALJ also cited Plaintiff's history of limited treatment, which belied
3 his subjective complaints. See AR 34-35. The ALJ noted: (1) the lack of a
4 prescription for Plaintiff's cane and that he "rose easily and walked quickly out
5 of the hearing room while putting no weight on the cane"⁴ (AR 34); (2) that
6 Plaintiff never underwent surgery or pain injections for his spine or knee (see
7 id.); (3) that Plaintiff had no history of admission to a psychiatric unit or
8 receipt of any psychotherapy treatment or mental health care, including
9 outpatient services, counseling, or therapy (see id.); (4) that in numerous
10 consultations in 2012 and 2013, Plaintiff discussed only reconstructive surgery
11 options and mandible pain (see AR 34, 691-711, 1059, 1065, 1087, 1103); (5)
12 that Plaintiff was prescribed medication and physical therapy following other
13 exams between 2012 and 2014 without any further course of treatment (see AR
14 34-35, 653-58, 741-47, 1031, 1038, 1107-12); and (6) that the only mental
15 health treatments in the record were three dates in 2012, when the "claimant
16 had cursory meetings with social workers, as a parolee" (AR 35, 728-35). All
17 of these reasons are supported by substantial evidence in the record and are
18 clear and convincing reasons to discount Plaintiff's symptom testimony. See
19 Tommasetti v. Astrue, 533 F.3d 1035, 1040 (9th Cir. 2008) (holding that ALJ
20 may infer that claimant's "response to conservative treatment undermines
21 [claimant's] reports"); see also Fair v. Bowen, 885 F.2d 597, 604 (9th Cir.
22 1989) (finding that the claimant's allegations of persistent, severe pain and
23 discomfort were belied by "minimal conservative treatment").

24 Plaintiff argues that the ALJ should have "follow[ed] up" on whether

25
26 ⁴ Plaintiff suggests that the ALJ relied "on this reason alone" as the "sole
27 basis" for discrediting Plaintiff's testimony. JS at 9. As explained herein, the
28 ALJ had several reasons for discrediting the testimony.

1 Plaintiff's conservative treatment was due to his finances and loss of Medicaid,
2 because Plaintiff testified about "financial impediments in relation to his need
3 for knee surgery." JS at 9. But at no point in the hearing transcript does
4 Plaintiff complain of financial impediments to obtaining knee surgery. Rather,
5 he testified that the only doctor qualified to perform reconstructive surgery on
6 his jaw accepted only Medicare, which Plaintiff did not have. See AR 60.
7 Furthermore, the record does not reflect that Plaintiff ever inquired about the
8 possibility and cost of more aggressive treatment, which one would expect
9 given the severity of his subjective complaints.

10 c. Activities of Daily Living

11 Plaintiff reported that he "goes for walks" and could adequately perform
12 self-care activities including dressing, bathing, eating, toileting, and taking
13 safety precautions. See AR 665-66. The ALJ noted that these reports "suggest
14 that he has a better physical and mental capacity than he has stated in the
15 record." AR 35. While it is true that "[o]ne does not need to be 'utterly
16 incapacitated' in order to be disabled," Vertigan v. Halter, 260 F.3d 1044, 1050
17 (9th Cir. 2001) (quoting Fair, 885 F.2d at 603), the extent of Plaintiff's
18 activities support the ALJ's finding that his reports of the severity of his
19 impairments were not fully credible. See Bray v. Comm'r of Soc. Sec. Admin.,
20 554 F.3d 1219, 1227 (9th Cir. 2009) (holding that ALJ may weigh
21 inconsistencies between claimant's testimony and daily activities); Curry v.
22 Sullivan, 925 F.2d 1127, 1130 (9th Cir. 1991) (finding that the claimant's
23 ability to "take care of her personal needs, prepare easy meals, do light
24 housework, and shop for some groceries[] . . . may be seen as inconsistent with
25 the presence of a condition which would preclude all work activity").

26 d. Criminal Record and SSR 16-3p

27 The ALJ also took into account Plaintiff's "criminal record showing a
28 propensity for dishonesty." AR 35. As noted above, under the SSA's new

1 regime for evaluating symptom testimony, SSR 16-3p, taking Plaintiff's
2 criminal history into account would be improper. But even if the Court
3 assumes that SSR 16-3p applies retroactively and the ALJ should not have
4 taken Plaintiff's criminal history into account, any error would be harmless.
5 The ALJ gave other clear and convincing reasons supported by substantial
6 evidence for rejecting Plaintiff's testimony. See Carmickle v. Comm'r, 533
7 F.3d 1155, 1162 (9th Cir. 2008) (holding that so long as remaining reasons and
8 ultimate credibility determination are adequately supported by substantial
9 evidence, any error affecting one of several reasons can be harmless).

10 e. Brother's Corroboration

11 In attacking the ALJ's evaluation of Plaintiff's symptom testimony,
12 Plaintiff cites his brother's report. See JS at 10. In that June 2012 report,
13 Plaintiff's brother wrote "unable to concentrate, pain, vision problem" and
14 then "same" for Plaintiff's ability to dress, bathe, shave, eat, use the toilet, and
15 "other." AR 221. He wrote that Plaintiff could not do chores, pay bills, or
16 count change. AR 222-24. In "remarks," Plaintiff's brother wrote, "disabled
17 person is constantly in medical and mental pain." AR 227.

18 An ALJ must consider all of the available evidence in the individual's
19 case record, including written statements from caregivers and siblings. See SSR
20 06-03P, 2006 WL 2329939 (Aug. 9, 2006); Stout v. Comm'r, Soc. Sec.
21 Admin., 454 F.3d 1050, 1052-54 (9th Cir. 2006). The ALJ may discount that
22 testimony, however, by providing "reasons that are germane to each witness."
23 Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993).

24 The ALJ concluded that Plaintiff's brother's report: (1) offered little
25 insight on Plaintiff's functional abilities, but simply indicated repeatedly and
26 "without elaboration" that Plaintiff was "unable to concentrate, regardless of
27 the activity addressed"; and (2) was of questionable accuracy, given that he
28 reported that Plaintiff had problems dressing and could not count change, but

1 elsewhere Plaintiff acknowledged that he could perform these activities. See
2 AR 35, 241-48, 666. These were appropriate and germane reasons to discount
3 Plaintiff's brother's claims.

4 During the hearing, Plaintiff stated that his brother had driven him to the
5 hearing and "was willing to come in and take – come in and – I don't know
6 why they didn't let him." AR 65. Plaintiff argues that the ALJ therefore
7 improperly criticized Plaintiff for failing to call his brother to testify,
8 "preventing cross-examination of his allegations." AR 35; see also JS at 10.
9 Plaintiff was represented by counsel at the hearing. Plaintiff and his counsel,
10 not the ALJ, had control over Plaintiff's brother. There was nothing improper
11 about the ALJ noting that Plaintiff's brother was not present at the hearing to
12 be cross-examined. Furthermore, even if this was error, it was harmless; the
13 ALJ gave additional germane reasons for disregarding the brother's claims.

14 **B. Treating Physicians**

15 **1. Applicable Law**

16 Three types of physicians may offer opinions in Social Security cases:
17 those who treated the plaintiff, those who examined but did not treat the
18 plaintiff, and those who did neither. See 20 C.F.R. § 416.927(c); Lester v.
19 Chater, 81 F.3d 821, 830 (9th Cir. 1995) (as amended Apr. 9, 1996).⁵ The
20 weight accorded to each physician's opinion depends on several factors,
21

22 ⁵ Social Security Regulations regarding the evaluation of opinion
23 evidence were amended effective March 27, 2017. Where, as here, the ALJ's
24 decision is the final decision of the Commissioner, the reviewing court
25 generally applies the law in effect at the time of the ALJ's decision. See Lowry
26 v. Astrue, 474 F. App'x 801, 805 n.2 (2d Cir. 2012) (applying version of
27 regulation in effect at time of ALJ's decision despite subsequent amendment);
28 Garrett ex rel. Moore v. Barnhart, 366 F.3d 643, 647 (8th Cir. 2004) ("We
apply the rules that were in effect at the time the Commissioner's decision
became final.").

1 including whether the opinion is consistent with the record and accompanied
2 by adequate explanation, the nature and extent of the treatment relationship,
3 and the degree to which it provides supporting explanations that consider all
4 pertinent evidence in a Plaintiff's claim. See 20 C.F.R. § 416.927(c). A treating
5 physician's opinion is generally entitled to more weight than an examining
6 physician's opinion, which is generally entitled to more weight than a non-
7 examining physician's. Lester, 81 F.3d at 830.

8 An ALJ may reject an uncontradicted opinion of a treating or examining
9 medical professional only for "clear and convincing" reasons. Id. A
10 contradicted opinion of a treating or examining professional may be rejected
11 for "specific and legitimate" reasons that are supported by substantial
12 evidence. Id. "Where the opinion of the claimant's treating physician is
13 contradicted, and the opinion of a nontreating source is based on independent
14 clinical findings that differ from those of the treating physician, the opinion of
15 the nontreating source may itself be substantial evidence; it is then solely the
16 province of the ALJ to resolve the conflict." Andrews v. Shalala, 53 F.3d 1035,
17 1041 (9th Cir. 1995).

18 **2. Analysis**

19 Plaintiff argues that the ALJ erred by (1) giving the June 2013 opinion by
20 treating physician Hakop Oganyan, M.D., little weight; and (2) failing to
21 "properly acknowledge diagnoses and prognoses made by his other treating
22 physicians."⁶ JS at 19.

23 a. Dr. Oganyan

24 In June 2013, Dr. Oganyan at All for Health Community Clinic in
25 Glendale, California, completed a physical residual functional capacity

26 ⁶ Plaintiff also mentions the May 2008 opinion by treating physician
27 Lindy Dugan, M.D., but offers no analysis or argument. See JS at 19.

1 questionnaire on Plaintiff's behalf. Dr. Oganyan, who had been treating
2 Plaintiff since 2011, opined that Plaintiff was incapable of even "low stress"
3 work because of his post-traumatic stress disorder, could not sit for more than
4 10 minutes at a time, could not stand for more than 15 minutes at a time, could
5 walk, stand, and sit for less than 2 hours out of 8, could rarely lift less than 10
6 pounds, and had severe limitations in repetitive reaching, handling, and
7 fingering. AR 738-40.

8 The ALJ gave specific and legitimate reasons for rejecting Dr.
9 Oganyan's report. See AR 31. Dr. Rostamloo's independent examination
10 strongly contradicted Dr. Oganyan's report; Dr. Oganyan opined that Plaintiff
11 was essentially incapacitated, whereas Dr. Rostamloo recommended no
12 exertional limitations. Plaintiff argues that the ALJ should have obtained an
13 updated consultative examination, because Dr. Rostamloo's report was made
14 before Plaintiff's November 2012 car accident. See JS at 25. As the ALJ noted,
15 examinations following the car accident showed normal reflexes, normal
16 alignment in Plaintiff's left knee, and normal spinal alignment and normal left
17 knee alignment. There is no indication that an updated consultative report was
18 required. It was "solely the province of the ALJ" to resolve this conflict.
19 Andrews, 53 F.3d at 1041. Furthermore, as the ALJ pointed out, Dr.
20 Oganyan's report was inconsistent with the objective medical evidence. It was
21 apparent, therefore, that Dr. Oganyan's opinion was based on Plaintiff's
22 subjective complaints, which the ALJ properly discounted. Dr. Oganyan
23 included no diagnostic or objective evidence to support his assessment of
24 Plaintiff's abilities. In short, the ALJ did not err in giving little weight to Dr.
25 Oganyan's opinion.

26 b. "Other Treating Physicians"

27 In the Joint Stipulation, Plaintiff references a number of treatment
28 records dated between 2002 and 2010 (while he was imprisoned) showing that

1 at various times, he reported feeling overwhelmed, depressed, suicidal, and
2 paranoid. See JS at 19-20. Plaintiff also cites post-incarceration treatment
3 records showing diagnoses of post-traumatic stress disorder and depression.
4 See JS at 20-21. None of these records suggest that these ailments were
5 disabling, except for the June 2013 form by Dr. Oganyan that the ALJ properly
6 discounted (as explained above).

7 Plaintiff criticizes the ALJ for “misstating” Dr. Kapitanski’s report. JS at
8 21-22. Dr. Kapitanski concluded, among other things, that Plaintiff had
9 moderate difficulty maintaining social functioning. See AR 667. The ALJ
10 disagreed with this assessment, based on Plaintiff’s “ability to interact with
11 others at the hearing and with Dr. Kapitanski during her examination,” but
12 otherwise gave Dr. Kaptanski’s opinion some weight—such as her opinion
13 that Plaintiff had full cooperation, fair eye contact, normal psychomotor
14 activity, a linear and goal-directed thought process, no hallucinations or
15 delusions, no obsessions, compulsions, or paranoia, no suicidal ideation, full
16 alertness and orientation, and good memory. AR 32, 664-67. Plaintiff does not
17 adequately explain how the ALJ misstated Dr. Kapitanski’s report.⁷

18 Plaintiff also argues that the ALJ improperly characterized treatment
19 notes in June 2013 and March 2014—which describe Plaintiff as having
20 “confused orientation, a severely impaired remote memory, a constricted
21 affect, obsessive thoughts, paranoia, poor insight, poor judgment, and poor
22 attention span and concentration”—as unreliable and “regurgitated.” JS at 22;
23 AR 32, 744-45, 1111. The ALJ did note that the treatment notes were
24 suspiciously similar despite being eight months apart, but “nonetheless”

25 ⁷ Plaintiff asks the Court to take judicial notice of a news article reporting
26 that Plaintiff was incarcerated in September 2013 for hitting a neighbor with a
27 metal object. See JS at 22. The Court takes judicial notice of the existence of
28 this article, although it has no bearing on the outcome of this case.

1 limited Plaintiff to simple, routine, repetitive work. AR 33.

2 Turning to Plaintiff's facial injuries, Plaintiff argues that the ALJ did not
3 sufficiently credit Plaintiff's potential right eye retinal detachment. See JS at
4 23. Plaintiff does not allege that his retina is in fact detached and does not cite
5 to anything in the record that supports a different RFC.

6 **C. Listings 2.09, 12.03, and 12.06**

7 Plaintiff complains that the ALJ erred in failing to consider whether
8 Plaintiff met Listings 2.09 (loss of speech), 12.03 (psychotic disorders), and
9 12.06 (anxiety related orders). See JS at 33-35, 39. While Plaintiff believes that
10 he meets these listings, his argument is that the ALJ's mere failure to consider
11 these listings warrants remand. See id. at 39.

12 The ALJ did not err by failing to list every listing that the ALJ
13 considered. The ALJ stated that he found that Plaintiff "has no listing-level
14 impairments" and that he "specifically considered sections of Appendix 1."
15 AR 27. This statement, supported by substantial evidence, was sufficient. See
16 Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th Cir. 1990) (holding that
17 requiring ALJ to state why claimant failed to satisfy every different section of
18 listing of impairments would "unduly burden the social security disability
19 process").

20 Even if the ALJ had a duty to state explicitly that he had considered
21 these three listings, any error was harmless. Plaintiff bore the burden of
22 demonstrating that he met these listings. See Sullivan v. Zebley, 493 U.S. 521,
23 531 (1990). He did not meet that burden.

24 With respect to Listing 2.09, Plaintiff did not show an "inability to
25 produce by any means speech that can be heard, understood, or sustained." 20
26 C.F.R. § 404, Subpart P, App. 1, § 2.09; see also 20 C.F.R. § 416.925
27 (incorporating by reference the Listing of Impairments in 20 C.F.R. § 404,
28 Subpart P, Appendix 1). Listing 12.03 has three parts, and a claimant must

1 meet Parts A and B or Part C. 20 C.F.R. § 404, Subpart P, App. 1, § 12.03.
2 Plaintiff has not shown “medically documented persistence” of delusions or
3 hallucinations, catatonia, incoherence, or emotional withdrawal or isolation
4 (Part A) or a “medically documented history of a chronic schizophrenic,
5 paranoid, or other psychotic disorder of at least 2 years’ duration that has
6 caused more than a minimal limitation of ability to do basic work activities”
7 (Part C). Last, Listing 12.06 has three parts, and a claimant must meet parts A
8 and B or parts A and C. Id. § 12.06. Plaintiff has not shown any marked
9 restriction of activities of daily living, marked difficulties in maintaining social
10 functioning or concentration, persistence, or pace; or repeated episodes of
11 decompensation of extended duration (Part B). Nor has Plaintiff has shown a
12 “complete inability to function independently outside the area of one’s home”
13 (Part C).

14 **D. Plaintiff’s Ability to Work**

15 In his fourth argument, Plaintiff purports to attack the ALJ’s
16 hypotheticals to the VE. See JS at 40-41. In fact, Plaintiff’s argument is that the
17 ALJ’s RFC should have included additional limitations: use of a cane, a knee
18 injury, needing to take more than four breaks in a two hour period, speech
19 problems, vision problems, and medication side effects. See JS at 40-43. As
20 explained above, the RFC adequately reflected Plaintiff’s speech and vision
21 problems. As also explained above, the ALJ gave clear and convincing reasons
22 for discounting Plaintiff’s testimony on the cane and other symptoms. Thus,
23 the ALJ did not need to address these matters in hypotheticals to the VE. See
24 Thomas v. Barnhart, 278 F.3d 947, 959 (9th Cir. 2002) (“While the record
25 contains conclusory statements that Ms. Thomas needed a cane, the only
26 objective medical evidence of a required assistive device was a wrist splint
27 prescribed for her carpal tunnel syndrome. Without objective medical evidence
28 that Ms. Thomas needed a cane or wheelchair, and in light of the ALJ’s

1 findings with respect to Ms. Thomas' lack of credibility, there was no reason to
2 include Ms. Thomas' subjective use of those devices in the hypothetical to the
3 VE.”).

4 Plaintiff also points out that, despite Plaintiff's lack of depth perception,
5 the occupation of bench assembler requires frequent depth perception,
6 according to the Dictionary of Occupational Titles (“DOT”).⁸ See JS at 40-41;
7 see also DOT 706.684-022. Where a VE's testimony conflicts with the DOT,
8 the ALJ must determine whether the VE's explanation for the conflict is
9 reasonable and whether a basis exists to rely on the expert rather than on the
10 DOT. See Massachi v. Astrue, 486 F.3d 1149, 1153 (9th Cir. 2007). Here, the
11 ALJ did not elicit an explanation for the conflict from the VE. See AR 72.
12 However, this error was harmless. The VE also found that Plaintiff could work
13 as an apparel checker or routing clerk; neither of these occupations requires
14 depth perception. See DOT 299.667-014, 222.687-022; 20 C.F.R. § 416.966(b)
15 (“Work exists in the national economy when there is a significant number of
16 jobs (in one or more occupations) having requirements which you are able to
17 meet with your physical or mental abilities and vocational qualifications.”
18 (emphasis added)); see also Carroll v. Colvin, No. 12-1181, 2013 WL 1935250,
19 at *1 (C.D. Cal. May 8, 2013) (finding alleged conflict with DOT harmless
20 where VE also correctly testified that claimant could work as a ticket
21 taker/usher).

22 **E. Onset Date for Mental Impairments**

23 Plaintiff argues that the ALJ had a duty to develop the record on the
24 onset date of Plaintiff's mental impairments, because Plaintiff did not “[wake]
25

26 ⁸ The Social Security Administration has taken administrative notice of
27 the DOT, which is published by the Department of Labor and gives detailed
28 physical requirements for a variety of jobs. See 20 C.F.R. § 416.966(d)(1).

1 up one morning and suddenly decide[] to gather his bereaved family together
2 in the afterlife by killing them all and then committing suicide, without the
3 predicate of a significant mental impairment.” JS at 44-45.

4 According to SSR 83-20 (“Titles II and XVI: Onset of Disability”), the
5 “starting point in determining the date of onset of disability is the individual’s
6 statement as to when disability began.” “The day the impairment caused the
7 individual to stop work is frequently of great significance in selecting the
8 proper onset date.” Id. Medical evidence is also helpful, where available,
9 including “post-onset date” medical evidence that assists the ALJ in inferring a
10 past onset date. Id.

11 Given the guidelines in SSR 83-20 and the evidence before him, the ALJ
12 did not err in determining Plaintiff’s onset date. In his applications, Plaintiff
13 alleged an onset date of May 15, 2002. See AR 178-88. At the hearing (where
14 he was represented by counsel), Plaintiff did not correct this date but rather
15 continued to allege that his disability began at the time of the shooting. See AR
16 55. Plaintiff worked at a family restaurant between 2000 and 2002, working
17 eight hours a day, five days a week; his testimony at the hearing suggests that
18 he continued working in this job until around the date of the shooting.⁹ See AR
19 51-52, 55, 233, 253. He also stated in a disability report that he stopped
20 working on May 15, 2002. See AR 232. The record does not include any
21 medical evidence before 2004, and Plaintiff cites to no medical evidence past
22 2004 that would support an onset date earlier than May 2002. In short, nothing
23 in the record made the onset date unclear, meaning the ALJ had no duty to
24 inquire further.


25 ///

26 ⁹ Plaintiff states in the Joint Stipulation that his father died in February
27 2002 and Plaintiff “continued to attempt to manage [the restaurant] after his
28 father died.” JS at 2, 17.

III. CONCLUSION

For the reasons stated above, the decision of the Social Security Commissioner is **AFFIRMED** and the action is **DISMISSED** with prejudice.

Dated: November 28, 2017


DOUGLAS F. McCORMICK
United States Magistrate Judge