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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHARLES DIXON,)	Case No. CV 16-5844-JPR
)	
Plaintiff,)	
)	MEMORANDUM DECISION AND ORDER
v.)	REVERSING COMMISSIONER IN PART
)	
NANCY A. BERRYHILL, Acting)	
Commissioner of Social)	
Security, ¹)	
)	
Defendant.)	
_____)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner’s final decision denying his applications for Social Security disability insurance benefits (“DIB”) and supplemental security income benefits (“SSI”). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). The matter is before the Court on the parties’ Joint Stipulation, filed August 14, 2017, which the Court has taken under submission without oral argument. For the reasons stated below, the

¹ Nancy A. Berryhill is substituted in as the correct Defendant.

1 Commissioner's decision is reversed as to Plaintiff's SSI
2 application and this action is remanded for further proceedings.

3 **II. BACKGROUND**

4 Plaintiff was born in 1969. (Administrative Record ("AR")
5 110, 174.) He has an 11th-grade education (AR 63)² and last
6 worked in 2003 as a railroad worker (AR 191).

7 On October 1, 2013, Plaintiff applied for DIB and SSI,
8 alleging that he had been unable to work since November 28, 2007
9 (AR 110, 174-77), because of lower-back pain, gout flare-ups,
10 gunshot wounds, and injury to the fingers on his left hand and to
11 his femur bone (see id.).³ After his applications were denied
12 initially and upon reconsideration (see AR 137-38, 141-45), he

14 ² Though Plaintiff testified at his hearing that he
15 completed 11th grade and never received a high-school diploma (AR
16 63), the record shows elsewhere that he has a 12th-grade
17 education (AR 115, 190).

18 ³ An ALJ denied Plaintiff's earlier applications for DIB
19 and SSI on December 12, 2011. (AR 125-33.) The ALJ here made
20 conflicting findings on whether Plaintiff had demonstrated
21 changed circumstances indicating greater disability since that
22 final decision and whether the presumption of continuing
23 nondisability therefore applied. (See AR 43 (presumption
24 applies), 50 (presumption does not apply)); Lester v. Chater, 81
25 F.3d 821, 827-28 (9th Cir. 1995) (as amended Apr. 9, 1996)
26 (citing Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988), as
27 holding that certain changed circumstances preclude application
28 of res judicata). Defendant does not contend that the
presumption applies, so the Court assumes it doesn't.

24 Plaintiff's insured status expired on December 31, 2007 (see
25 AR 43), and thus the 2011 final finding of "not disabled" (see AR
26 125-33) makes him ineligible to receive DIB because a DIB
27 claimant must establish that he became disabled on or before the
28 expiration of his insured status. 20 C.F.R. § 404.131; see also
Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005); Chavez, 844
F.2d at 693 ("The principles of res judicata apply to
administrative decisions[.]"). Thus, the Commissioner's denial
of Plaintiff's DIB application is affirmed.

1 requested a hearing before an Administrative Law Judge (AR 140).
2 A hearing was held on November 19, 2014, at which Plaintiff, who
3 was represented by counsel, testified, as did a vocational
4 expert. (See AR 56-82.) In a written decision issued on
5 December 9, 2014, the ALJ found Plaintiff not disabled. (AR 42-
6 55.) Plaintiff requested review and submitted additional
7 evidence. (See AR 36-37, 229-30, 441-95.) On June 6, 2016, the
8 Appeals Council denied review, finding that the additional
9 evidence did not provide a basis for changing the ALJ's decision.
10 (AR 1-5.) The council ordered that the new evidence be made part
11 of the administrative record. (AR 6.) This action followed.

12 **III. STANDARD OF REVIEW**

13 Under 42 U.S.C. § 405(g), a district court may review the
14 Commissioner's decision to deny benefits. The ALJ's findings and
15 decision should be upheld if they are free of legal error and
16 supported by substantial evidence based on the record as a whole.
17 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra
18 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
19 evidence means such evidence as a reasonable person might accept
20 as adequate to support a conclusion. Richardson, 402 U.S. at
21 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
22 It is more than a scintilla but less than a preponderance.
23 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
24 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
25 substantial evidence supports a finding, the reviewing court
26 "must review the administrative record as a whole, weighing both
27 the evidence that supports and the evidence that detracts from
28 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,

1 720 (9th Cir. 1998). "If the evidence can reasonably support
2 either affirming or reversing," the reviewing court "may not
3 substitute its judgment" for the Commissioner's. Id. at 720-21.

4 **IV. THE EVALUATION OF DISABILITY**

5 People are "disabled" for purposes of receiving Social
6 Security benefits if they are unable to engage in any substantial
7 gainful activity owing to a physical or mental impairment that is
8 expected to result in death or has lasted, or is expected to
9 last, for a continuous period of at least 12 months. 42 U.S.C.
10 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
11 1992).

12 A. The Five-Step Evaluation Process

13 The ALJ follows a five-step sequential evaluation process to
14 assess whether a claimant is disabled. 20 C.F.R.
15 § 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
16 1995) (as amended Apr. 9, 1996). In the first step, the
17 Commissioner must determine whether the claimant is currently
18 engaged in substantial gainful activity; if so, the claimant is
19 not disabled and the claim must be denied. § 416.920(a)(4)(i).

20 If the claimant is not engaged in substantial gainful
21 activity, the second step requires the Commissioner to determine
22 whether the claimant has a "severe" impairment or combination of
23 impairments significantly limiting his ability to do basic work
24 activities; if not, the claimant is not disabled and his claim
25 must be denied. § 416.920(a)(4)(ii).

26 If the claimant has a "severe" impairment or combination of
27 impairments, the third step requires the Commissioner to
28 determine whether the impairment or combination of impairments

1 meets or equals an impairment in the Listing of Impairments set
2 forth at 20 C.F.R. part 404, subpart P, appendix 1; if so,
3 disability is conclusively presumed. § 416.920(a)(4)(iii).

4 If the claimant's impairment or combination of impairments
5 does not meet or equal an impairment in the Listing, the fourth
6 step requires the Commissioner to determine whether the claimant
7 has sufficient residual functional capacity ("RFC")⁴ to perform
8 his past work; if so, he is not disabled and the claim must be
9 denied. § 416.920(a)(4)(iv). The claimant has the burden of
10 proving he is unable to perform past relevant work. Drouin, 966
11 F.2d at 1257. If the claimant meets that burden, a prima facie
12 case of disability is established. Id.

13 If that happens or if the claimant has no past relevant
14 work, the Commissioner then bears the burden of establishing that
15 the claimant is not disabled because he can perform other
16 substantial gainful work available in the national economy.
17 § 416.920(a)(4)(v); Drouin, 966 F.2d at 1257. That determination
18 comprises the fifth and final step in the sequential analysis.
19 § 416.920(a)(4)(v); Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d
20 at 1257.

21 B. The ALJ's Application of the Five-Step Process

22 At step one, the ALJ found that Plaintiff had not engaged in
23 substantial gainful activity since November 28, 2007, the alleged
24

25 ⁴ RFC is what a claimant can do despite existing exertional
26 and nonexertional limitations. § 416.945; see Cooper v.
27 Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). The
28 Commissioner assesses the claimant's RFC between steps three and
four. Laborin v. Berryhill, 867 F.3d 1151, 1153 (9th Cir. 2017)
(citing § 416.920(a)(4)).

1 onset date. (AR 45.) At step two, he concluded that he had
2 severe impairments of "a back disorder and gout." (Id.) At step
3 three, he found that he did not have an impairment or combination
4 of impairments falling under a Listing. (AR 45-46.)

5 At step four, the ALJ found that Plaintiff had the RFC to
6 perform light work with additional limitations:

7 [Plaintiff] can lift and carry 20 pounds occasionally and
8 10 pounds frequently. He can stand and walk for 6 hours
9 out of an 8 hour day and can sit for 6 hours out of an 8
10 hour day with normal breaks. He can perform postural
11 activities (bending, stooping, crouching, crawling and
12 kneeling) occasionally. He can handle and finger
13 frequently. He has reduced grip strength.⁵ He can push
14 and pull without significant limitations. He has no
15 other limitations.

16 (AR 46-48.) Based on the VE's testimony, the ALJ concluded that
17 Plaintiff could not perform any past relevant work. (AR 48-49.)
18 At step five, however, given Plaintiff's "age, education, work
19 experience, and [RFC]," he determined that he could successfully
20 perform work available in the national economy, such as "cashier
21 II" and "sales attendant." (AR 49-50.) Thus, the ALJ found
22 Plaintiff not disabled. (AR 50.)

23 **V. DISCUSSION**

24 Plaintiff argues that the ALJ erred in (1) evaluating the
25 credibility of his subjective symptom statements and (2)
26 considering and evaluating the opinion of Dr. Randall Gilbert.

27 ⁵ At the hearing, the ALJ clarified that this translated
28 into "no forceful gripping." (AR 78.)

1 (J. Stip. at 4.) Because the ALJ erred in the first regard, the
2 matter must be remanded for further analysis and findings.

3 A. The ALJ Erred in Assessing the Credibility of
4 Plaintiff's Subjective Symptom Statements

5 Plaintiff argues that the ALJ "failed to articulate legally
6 sufficient reasons" for finding his subjective symptom statements
7 "not fully credible." (See J. Stip. at 4-13, 23-26; AR 48.) He
8 is correct.

9 1. Applicable law

10 An ALJ's assessment of the credibility of a claimant's
11 allegations concerning the severity of his symptoms is entitled
12 to "great weight." See Weetman v. Sullivan, 877 F.2d 20, 22 (9th
13 Cir. 1989) (as amended); Nyman v. Heckler, 779 F.2d 528, 531 (9th
14 Cir. 1985) (as amended Feb. 24, 1986). "[T]he ALJ is not
15 'required to believe every allegation of disabling pain, or else
16 disability benefits would be available for the asking, a result
17 plainly contrary to 42 U.S.C. § 423(d)(5)(A).'" Molina v.
18 Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012) (quoting Fair v.
19 Bowen, 885 F.2d 597, 603 (9th Cir. 1989)).

20 In evaluating a claimant's subjective symptom testimony, the
21 ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d
22 at 1035-36; see also SSR 96-7p, 1996 WL 374186 (July 2, 1996).⁶

23
24 ⁶ Social Security Ruling 16-3p, 2016 WL 1119029, effective
25 March 28, 2016, rescinded SSR 96-7p, which provided the framework
26 for assessing the credibility of a claimant's statements. SSR
27 16-3p was not in effect at the time of the ALJ's decision in this
28 case, however, and therefore does not apply. Still, the Ninth
Circuit has clarified that SSR 16-3p "makes clear what our
precedent already required: that assessments of an individual's
testimony by an ALJ are designed to 'evaluate the intensity and
persistence of symptoms after [the ALJ] find[s] that the

1 "First, the ALJ must determine whether the claimant has presented
2 objective medical evidence of an underlying impairment [that]
3 could reasonably be expected to produce the pain or other
4 symptoms alleged." Lingenfelter, 504 F.3d at 1036. If such
5 objective medical evidence exists, the ALJ may not reject a
6 claimant's testimony "simply because there is no showing that the
7 impairment can reasonably produce the degree of symptom alleged."
8 Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996) (emphasis in
9 original).

10 If the claimant meets the first test, the ALJ may discredit
11 the claimant's subjective symptom testimony only if he makes
12 specific findings that support the conclusion. See Berry v.
13 Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding or
14 affirmative evidence of malingering, the ALJ must provide "clear
15 and convincing" reasons for rejecting the claimant's testimony.
16 Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir. 2015) (as
17 amended); Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090,
18 1102 (9th Cir. 2014). The ALJ may consider, among other factors,
19 (1) ordinary techniques of credibility evaluation, such as the
20 claimant's reputation for lying, prior inconsistent statements,
21 and other testimony by the claimant that appears less than
22 candid; (2) unexplained or inadequately explained failure to seek
23 treatment or to follow a prescribed course of treatment; (3) the

24 _____
25 individual has a medically determinable impairment(s) that could
26 reasonably be expected to produce those symptoms,' and not to
27 delve into wide-ranging scrutiny of the claimant's character and
28 apparent truthfulness." Trevizo v. Berryhill, 871 F.3d 664, 678
n.5 (9th Cir. 2017) (as amended) (alterations in original)
(quoting SSR 16-3p).

1 claimant's daily activities; (4) the claimant's work record; and
2 (5) testimony from physicians and third parties. Rounds v.
3 Comm'r Soc. Sec. Admin., 807 F.3d 996, 1006 (9th Cir. 2015) (as
4 amended); Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.
5 2002). If the ALJ's credibility finding is supported by
6 substantial evidence in the record, the reviewing court "may not
7 engage in second-guessing." Thomas, 278 F.3d at 959.

8 2. Relevant background

9 Plaintiff applied for DIB and SSI in 2010, alleging
10 disability beginning September 25, 2006. (AR 125.) Although his
11 medical records from before December 2011 are not in the record,
12 it appears he claimed to suffer from "bilateral knee problems,
13 gout, and chronic foot, knee, and wrist pain 2 to 3 times a
14 month." (AR 129.) He stated that he was hospitalized for about
15 one month in 2007 because of liver and kidney problems caused by
16 medication. (Id.) A March 20, 2010 consultative exam showed
17 "chronic back pain with some tenderness of the lumbar spine with
18 preserved range of movement and no signs of radiculopathy." (AR
19 128.)

20 In December 2011, Plaintiff sustained gunshot wounds to his
21 "abdomen, back, face, and left lower extremity." (AR 304.) His
22 "principal diagnoses" were gunshot wounds to his "right cheek,"
23 his "right lower quadrant, tangential injury," and his "left
24 thigh with femur fracture." (AR 303.) He had an "intramedullary
25 nailing of the left femur fracture," during which a rod was put
26 in his leg to help his bone heal. (AR 67, 303.) He was

1 prescribed Vicodin⁷ for his pain. (AR 303-04.) At a follow-up
2 appointment two weeks after his surgery, Plaintiff was "still
3 having difficulty ambulating" but was "recoveri[n]g well." (AR
4 297-98.) He "denie[d] any pain" and "[said] the symptoms [were]
5 mild." (Id.)

6 Family-care physician Daniel Harvey first treated Plaintiff
7 in early 2012 for lingering pain related to his gunshot wounds.
8 (AR 279-80.) On February 13, 2012, Plaintiff was "able to walk
9 [with a] walker" despite his "slow rehab." (AR 279.) In April
10 2012, Dr. Harvey diagnosed gout and prescribed colchicine⁸ (AR
11 278) and oxycodone⁹ (AR 277). He referred Plaintiff to Dr.
12 Annette Billings, an orthopaedic surgeon. (See AR 246-47.) On
13 April 26, 2012, she evaluated Plaintiff for "right upper
14 extremity edema."¹⁰ (AR 246.) He reported that the edema was
15 "intermittent" but could "sometimes" "be quite severe." (Id.)
16 He stated that it did not cause "a lot of pain" or "really any
17 dysfunction." (Id.) He also complained of a painful mass on his
18

19
20 ⁷ Vicodin is a narcotic pain medication used to relieve
21 moderate to moderately severe pain. See Vicodin, Drugs.com,
22 <https://www.drugs.com/vicodin.html> (last updated Sept. 29, 2016).

23 ⁸ Colchicine prevents or treats gout flare-ups by decreasing
24 swelling and lessening the buildup of uric-acid crystals in the
25 affected joints. See Colchicine, WebMD, [https://www.webmd.com/
26 drugs/2/drug-8640/colchicine-oral/details](https://www.webmd.com/drugs/2/drug-8640/colchicine-oral/details) (last visited Jan. 9,
27 2018). Colchicine is the generic name for Colcrys. Id.

28 ⁹ Oxycodone is a narcotic pain medication used to treat
moderate to severe pain. See Oxycodone, Drugs.com, [https://
www.drugs.com/oxycodone.html](https://www.drugs.com/oxycodone.html) (last updated Oct. 4, 2017).

¹⁰ Edema is the medical term for swelling. See What is
Edema?, WebMD, [https://www.webmd.com/heart-disease/heart-failure/
edema-overview](https://www.webmd.com/heart-disease/heart-failure/edema-overview) (last visited Jan. 9, 2018).

1 finger. (Id.) Dr. Billings noted that it was "very difficult
2 for [her] to ascertain edema in the right upper extremity but
3 [Plaintiff's] right upper extremity [did] appear to be a little
4 bit larger than the left upper extremity." (AR 247.) On August
5 15, 2012, she performed an "[e]xcisional biopsy of [Plaintiff's]
6 right hand mass." (AR 250-51.)

7 Plaintiff had a gout flare-up on May 7, 2012, but by May 21
8 it was stable. (AR 275-76.) In July 2012, Dr. Harvey continued
9 to treat his gout flare-ups with antiinflammatory medication and
10 referred him to another physician for "long term pain
11 [management]" for his gunshot wounds. (AR 273.) At an August 8,
12 2012 physical, Plaintiff showed no "edema" or "tender[ness]."
13 (AR 272.) He next saw Dr. Harvey on November 14, 2012, for pain
14 in his right hand, feet, and back from a gout flare-up. (AR
15 271.) He described his pain as being a "7" out of 10, but though
16 Dr. Harvey "advised [a] Solu[-]medrol"¹¹ injection, he "refused"
17 and apparently continued taking colchicine. (Id.) Dr. Harvey
18 recommended he return in two weeks, but Plaintiff didn't see him
19 again for almost a year; at his next appointment, in September
20 2013, he was stable with no pain and still taking colchicine (AR
21 262, 267), but his blood work showed elevated uric-acid levels
22 (AR 266).

23 Plaintiff began seeing rheumatologist Randall Gilbert on
24

25 ¹¹ Solu-Medrol reduces symptoms such as swelling and pain by
26 decreasing a patient's immune system's response to various
27 diseases. See Solu-Medrol Solution, WebMD, [https://
28 www.webmd.com/drugs/2/drug-6135/solu-medrol-injection/details](https://www.webmd.com/drugs/2/drug-6135/solu-medrol-injection/details)
(last visited Dec. 20, 2017). It is usually administered by
injection. Id.

1 August 12, 2013, for "flare[-up]s involving [his] hands, knees,
2 and feet," complaining specifically of "several months of [left]
3 lateral wrist pain." (AR 365.) Dr. Gilbert noted that
4 Plaintiff's hands had "[g]ood fist closures," his right wrist had
5 a "full [range of motion]," his back had "mild [to] moderate
6 referred pain," and his knees had "full" bilateral range of
7 motion. (Id.) He assessed "wrist lateral tendonitis," gout, and
8 "discogenic" lumbar pain; administered an injection to
9 Plaintiff's left wrist; recommended "maintain[ing] colchicine";
10 and continued Plaintiff's oxycodone prescription. (Id.) On
11 September 17, 2013, Plaintiff reported that the injection on his
12 left wrist had "provided excellent benefit," and Dr. Gilbert
13 noted that he now had "full [range of motion]" in that wrist.
14 (AR 364.) He further complained of "moderate referred pain" and
15 "mild swelling" in his right wrist and "mild" pain in his back.
16 (Id.) Dr. Gilbert injected his right wrist, continued his
17 colchicine prescription, and recommended decreasing his oxycodone
18 prescription. (Id.)

19 On October 21, 2013, Plaintiff reported that the right-wrist
20 injection "provided good benefit" until he "developed a
21 recurrence of [right] lateral wrist pain." (AR 363.) He also
22 had "developed a gouty flare[-up]" of his feet, but his "low back
23 pain [was mild and] reasonably controlled." (Id.) Dr. Gilbert
24 treated his right wrist with a "lateral tendon inject[ion]" and
25 continued his prescription for oxycodone. (Id.) On January 17,
26 2014, Plaintiff complained of gout flare-ups in his left wrist
27 and right ankle and foot, but his lower-back pain was "mild" and
28 "stable on medication." (AR 362.) Dr. Gilbert injected his left

1 wrist, prescribed Uloric¹² to treat his gout, and continued his
2 oxycodone prescription. (Id.)

3 On March 20, 2014,¹³ Plaintiff reported that his left wrist
4 "greatly improved" following the January 17 injection, and he
5 showed "full" range of motion in that wrist. (AR 491.) He
6 complained of "[left] foot swelling and associated pain" but had
7 only "mild forefoot edema [and] minimal tenderness" in that foot,
8 with "good" range of motion in his right foot. (Id.) He also
9 complained of "persist[ent]" "moderate" lumbar pain. (Id.) He
10 had not yet begun taking Uloric, and Dr. Gilbert again prescribed
11 it for him. (Id.) He also recommended that Plaintiff continue
12 taking colchicine and oxycodone. (Id.) On June 16, 2014,

14 ¹² Uloric lowers uric-acid levels in people with gout. See
15 Uloric, WebMD, [https://www.webmd.com/drugs/2/drug-151872/
uloric-oral/details](https://www.webmd.com/drugs/2/drug-151872/uloric-oral/details) (last visited Jan. 9, 2018).

16 ¹³ Dr. Gilbert's treatment notes after Plaintiff's January
17 17, 2014 appointment were apparently not in the record at the
18 time of the ALJ's decision but were submitted to the Appeals
19 Council. (See AR 5, 52-55; compare AR 392 (incomplete Mar. 20,
20 2014 notes), with AR 491 (complete Mar. 20, 2014 notes).) Social
21 Security Administration regulations "permit claimants to submit
22 new and material evidence to the Appeals Council and require the
23 Council to consider that evidence in determining whether to
24 review the ALJ's decision, so long as the evidence relates to the
25 period on or before the ALJ's decision." Brewes v. Comm'r of
26 Soc. Sec. Admin., 682 F.3d 1157, 1162 (9th Cir. 2012); see also
27 § 416.1470(b). "[W]hen the Appeals Council considers new
28 evidence in deciding whether to review a decision of the ALJ,
that evidence becomes part of the administrative record, which
the district court must consider when reviewing the
Commissioner's final decision for substantial evidence." Brewes,
682 F.3d at 1163; accord Taylor v. Comm'r of Soc. Sec. Admin.,
659 F.3d 1228, 1232 (9th Cir. 2011); see also Borrelli v. Comm'r
of Soc. Sec., 570 F. App'x 651, 652 (9th Cir. 2014) (remand
necessary when "reasonable possibility" exists that "the new
evidence might change the outcome of the administrative
hearing"). Thus, the Court includes these additional 2014
records in its review.

1 Plaintiff said he had taken Uloric for two months and tolerated
2 it well, but apparently he stopped at some point because Dr.
3 Gilbert wrote in his notes for Plaintiff to "re-start Uloric."
4 (AR 490.) He reported "mild" wrist pain, "moderate" back pain,
5 and hand pain with "mildly weak fist closures." (Id.) Dr.
6 Gilbert continued his prescriptions for oxycodone and colchicine.
7 (Id.)

8 On August 13, 2014, Plaintiff complained of "markedly
9 increased [left] knee pain with weight-bearing," "mild" left-
10 wrist pain, and "moderate" "lumbar pain with activity." (AR
11 489.) His right knee had a "full" range of motion. (Id.) Dr.
12 Gilbert injected his left knee and continued his prescriptions
13 for Uloric, colchicine, and oxycodone. (Id.) On October 23,
14 2014, Plaintiff reported that his left knee was "partially
15 improved following [his August 13] injection." (AR 488.) He had
16 "halted [Uloric] for 1 month." (Id.) He complained of "moderate
17 persistent plantor feet pain with ambulation," "mild" left-knee
18 pain, "mild" hand pain, and "moderate" back pain. (Id.) His
19 hands showed "adequate fist closures." (Id.) Dr. Gilbert
20 recommended increasing Uloric and maintaining colchicine and
21 oxycodone. (Id.) On November 26, 2014, Dr. Gilbert opined that
22 Plaintiff's "moderately severe active tophaceous¹⁴ gouty
23 arthritis" had "markedly impaired the function of his hands for
24 activities of daily living and fine motor movements of his
25

26 ¹⁴ Tophaceous gout is a form of chronic gout in which
27 nodular masses of uric-acid crystals are deposited in soft-tissue
28 areas of the body. Medical Definition of Gout, tophaceous,
MedicineNet.com, [https://www.medicinenet.com/script/main/
art.asp?articlekey=3625](https://www.medicinenet.com/script/main/art.asp?articlekey=3625) (last updated May 13, 2016).

1 fingers." (AR 441.)¹⁵

2 Consulting internist Steven Gerber evaluated Plaintiff on
3 February 7, 2014. (AR 366-70.) Plaintiff's chief complaint was
4 "constant, sharp lower back pain without radiation" that was
5 "exacerbated by prolonged standing and walking" but "relieved
6 with medications." (AR 366.) He stated that "he [was] able to
7 walk one-half block and attend church services for 35 minutes
8 without difficulty." (AR 367.) Dr. Gerber noted that he was
9 able to "get[] on and off the examination table without
10 difficulty." (Id.) Plaintiff's lumbar spine showed "no
11 tenderness to palpation in the midline," his "[s]traight leg
12 raising test [was] positive bilaterally at 60 degrees," and his
13 range of motion showed "[l]ateral flexion . . . 20/25 degrees,
14 extension 20/25 degrees, and forward flexion 50/90 degrees." (AR
15 368.) His extremities generally showed "no . . . edema." (AR
16 369.) "There [was] no evidence of tenderness to palpation of the
17 wrists," and his wrist "[r]ange of motion [was] intact" and
18 "within normal limits." (Id.) His hands showed "no evidence of
19 joint deformities" and could be "fully extended," and he was
20 "able to make a fist and oppose the thumbs." (Id.) His ankles
21 showed "no joint deformities" or "swelling," and their "[r]ange

22
23 ¹⁵ Additional medical records from Dr. Gilbert dated March
24 5, 2015, through March 17, 2016, were "looked at" by the Appeals
25 Council (see AR 20-27) but not considered because his case was
26 decided on December 9, 2014, and the records were "about a later
27 time" (AR 2). Medical examinations that take place after the
28 ALJ's decision may still relate to a claimant's conditions
"during the relevant time period." Handy v. Colvin, No. CV
14-02149-SH, 2014 WL 4895678, at *3 (C.D. Cal. Sept. 30, 2014).
Plaintiff does not contend that the Appeals Council erred in
rejecting the medical records from 2015 and 2016, however, so the
Court does not address them.

1 of motion [was] intact" and "within normal limits." (Id.)
2 Plaintiff "[did] not require the use of an assistive device to
3 ambulate throughout the clinic area." (AR 370.) Based on his
4 examination, Dr. Gerber assessed Plaintiff as being able to "lift
5 or carry 20 pounds occasionally and 10 pounds frequently," "stand
6 or walk for 6 hours in an 8-hour day," "sit for 6 hours in an 8-
7 hour day," and "occasionally climb, crouch, stoop, bend, kneel,
8 and crawl." (Id.)

9 Plaintiff filled out a Pain Questionnaire on December 24,
10 2013. (AR 199-201.) He reported feeling "constant [and]
11 throbbing" pain "daily" in his joints, lower back, feet, knees,
12 legs, and hands. (AR 199.) Rest and medicine "help[ed]" but
13 "[didn't] stop" his pain, and the medicine caused "fatigue,
14 weakness, dizziness[, and] diarrhea." (AR 199-200.) He said no
15 surgery was scheduled to attempt to relieve his pain. (AR 200.)
16 His family helped him "constant[ly]" with activities such as
17 bathing, getting up, buying groceries, completing errands, and
18 getting dressed. (AR 201.) He also filled out an undated
19 Exertional Daily Activities Questionnaire. (AR 202-04.) He
20 stated that he "[couldn't] do . . . much of anything without
21 someone helping [him because his] joints [were] constantly in
22 pain." (AR 202.) He couldn't "lift or carry anything [or] stand
23 for a long period of time." (Id.) He required rest periods or
24 naps twice a day and "[had] to use [a] cane on a daily [basis]."
25 (AR 204.)

26 At his November 19, 2014 hearing, Plaintiff stated that
27 despite treatment for his gout, his "hands . . . constantly hurt"
28 and felt "weak." (AR 65.) He testified that he got flare-ups in

1 "particular part[s] of [his] body" "[e]very other week" and that
2 his "gout [had] gotten a lot worse." (AR 65-66, 68.) He said he
3 could "move [his] fingers," but if he "pick[ed] things up with
4 [his] hands" "it [would] start hurting." (AR 69.) He testified
5 that he received injections "once or twice a month," and his last
6 injection had been on his left wrist two months before the
7 hearing. (AR 70.) Finally, he stated that he did not have any
8 side effects from the colchicine and oxycodone he took aside from
9 drowsiness. (AR 73.)

10 3. Analysis

11 The ALJ was required to provide "clear and convincing"
12 reasons for rejecting Plaintiff's testimony. See Brown-Hunter,
13 806 F.3d at 493; Treichler, 775 F.3d at 1102. As argued by
14 Plaintiff (see J. Stip. at 4-13, 23-26) and discussed below, he
15 failed to do so.

16 First, the ALJ gave "limited weight to [Plaintiff's]
17 testimony and statements" because his "treatment [had] been
18 conservative at best." (AR 48.) He wrote that "no surgery or
19 other intense treatment modalities [had] been necessary" and that
20 Plaintiff "[had] not been prescribed narcotic pain medication."
21 (Id.) But none of those assertions is accurate. The record
22 shows that Plaintiff had two surgeries, at least one of which was
23 for "treatment." On December 6, 2011, he had a rod inserted in
24 his femur following a gunshot wound (AR 303), and on August 15,
25 2012, he had a biopsy and removal of a 10-year-old mass on his
26 right hand (see AR 246, 250-51). Plaintiff testified that he had
27 "a rod from [his] hip to [his] knee" because a "bullet . . .
28 shattered [his] whole femur bone" (see AR 67), and the ALJ

1 himself noted that the surgery involved debridement¹⁶ and
2 anterior washout¹⁷ (AR 47), which is "treatment." See, e.g.,
3 Sanchez v. Berryhill, No. CV 16-8043-KK, 2017 WL 3530342, at *6
4 (C.D. Cal. Aug. 16, 2017) (describing debridement as
5 "treatment").

6 Further, Plaintiff was prescribed Vicodin after his femur
7 surgery in December 2011 (AR 303-04), and Drs. Harvey and Gilbert
8 prescribed oxycodone to treat Plaintiff's pain beginning in April
9 2012 and continuing to the time of the Appeals Council's review.
10 (AR 276-77, 362-65, 488-91.) Both Vicodin and oxycodone are
11 narcotic pain medications.

12 Nor was Plaintiff's treatment "conservative." Dr. Gilbert
13 treated Plaintiff's gout and lower-back pain with colchicine,
14 Uloric, and multiple joint injections. (See AR 362-65, 488-91.)
15 The use of narcotics to control pain in conjunction with a series
16 of regular injections does not constitute "conservative"
17 treatment. See, e.g., Lapeirre-Gutt v. Astrue, 382 F. App'x 662,
18 664 (9th Cir. 2010) (treatment with narcotic pain medication,
19 occipital nerve blocks, trigger-point injections, and
20 cervical-fusion surgery not conservative); Samaniego v. Astrue,
21 No. EDCV 11-865 JC, 2012 WL 254030, at *4 (C.D. Cal. Jan. 27,
22 2012) (treatment not conservative when claimant was treated "on a
23

24 ¹⁶ Debridement is the excision of devitalized tissue and
25 foreign matter from a wound. Stedman's Medical Dictionary 460
(27th ed. 2000).

26 ¹⁷ "Washout" means to disperse or empty by flooding with
27 water or another solvent. See Washout, Medical Dictionary,
28 <https://medical-dictionary.thefreedictionary.com/washout> (last
visited Jan. 9, 2018).

1 continuing basis" with steroid and anesthetic "trigger point
2 injections," occasional epidural injections, and narcotic
3 medication and doctor recommended surgery); Christie v. Astrue,
4 No. CV 10-3448-PJW, 2011 WL 4368189, at *4 (C.D. Cal. Sept. 16,
5 2011) (treatment with "narcotic pain medication, steroid
6 injections, trigger point injections, epidural shots, and
7 cervical traction" not conservative); Ruiz v. Berryhill, No. CV
8 16-2580-SP, 2017 WL 4570811, at *5-6 (C.D. Cal. Oct. 11, 2017)
9 (treatment by "narcotic medication, facet joint injections, and
10 epidural steroid injections" not conservative).

11 The ALJ also found that Plaintiff "did not report any
12 adverse side-effects from any of his prescribed medications."
13 (AR 48.) That too is incorrect. Although Plaintiff testified at
14 the hearing that he had no side effects from the medications he
15 was then taking other than "drowsiness" (AR 73), he wrote in his
16 Pain Questionnaire that the medicines caused "fatigue, weakness,
17 dizziness[, and] diarrhea" (AR 200). Further, in the past he had
18 experienced significant side effects, such as "hepatic and renal
19 failure," when he took allopurinol¹⁸ to treat his gout. (See AR
20 491.) Although the ALJ is "allowed to consider . . . the lack of
21 side effects from prescribed medications" in making a credibility
22 determination, see Orteza v. Shalala, 50 F.3d 748, 750 (9th Cir.
23 1995) (per curiam), here the ALJ misconstrued the record.

24 Moreover, the relevant analysis is whether Plaintiff's
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26
27 ¹⁸ Allopurinol treats gout by reducing the amount of uric
28 acid made by the body. See Allopurinol, WebMD, <https://www.webmd.com/drugs/2/drug-8610/allopurinol-oral/details> (last visited Jan. 9, 2018).

1 severe impairments caused disabling pain rather than whether his
2 medication caused side effects. Plaintiff alleged "daily" pain
3 and received multiple injections to treat it. (See AR 70, 199.)
4 He said he experienced "constant," "throbbing" pain, heat, and
5 swelling in his joints, lower back, feet, knees, legs, and hands.
6 (AR 199.) The ALJ found that Plaintiff's "characterization of
7 pain [was] consistent with the medical records" but then held
8 that "his pain [did] not preclude work activity" without
9 providing a clear and convincing reason why. (See AR 48.) He
10 stated that Plaintiff "was able to fully participate in the
11 hearing without being distracted by pain" (id.), but his being
12 able to sit through a 30-minute hearing does not show that he
13 could work eight hours a day for five days a week on a sustained
14 basis. See Permitter v. Heckler, 765 F.2d 870, 872 (9th Cir.
15 1985) (per curiam) ("Denial of benefits cannot be based on the
16 ALJ's observation of [Plaintiff], when [Plaintiff]'s statements
17 to the contrary . . . are supported by objective evidence.").

18 For all these reasons, the ALJ failed to provide a clear and
19 convincing reason for his adverse credibility determination.
20 Plaintiff is therefore entitled to remand on this ground.¹⁹

21
22 ¹⁹ The ALJ also noted that "there were no opinions of record
23 that found that the [Plaintiff] was disabled." (AR 48.) As
24 Plaintiff argues (see J. Stip. at 26-27), Dr. Gilbert's November
25 26, 2014 statement may have been before the ALJ (compare AR 440-
26 41 (showing that statement was faxed on Dec. 5, 2014, four days
27 before ALJ's decision), with AR 6 (showing Appeals Council making
28 statement part of record on June 6, 2016)), and yet the ALJ did
not discuss it. Though Dr. Gilbert does not directly opine in
the statement that Plaintiff was disabled, he does find
limitations significantly more serious than those assessed by the
ALJ. (See AR 441.) On remand, the ALJ should expressly consider
Dr. Gilbert's treating-physician opinion.

1 B. Remand for Further Proceedings Is Appropriate

2 Plaintiff “seeks an order from the Court reversing the final
3 decision and awarding benefits.” (J. Stip. at 33.) When, as
4 here, an ALJ errs, the Court generally has discretion to remand
5 for further proceedings. See Leon v. Berryhill, 874 F.3d 1130,
6 1132 (9th Cir. 2017); Harman v. Apfel, 211 F.3d 1172, 1175-78
7 (9th Cir. 2000) (as amended); Connett v. Barnhart, 340 F.3d 871,
8 876 (9th Cir. 2003) (“credit as true” doctrine is not mandatory).
9 When no useful purpose would be served by further administrative
10 proceedings, however, or when the record has been fully
11 developed, it is appropriate under the “credit as true” rule to
12 direct an immediate award of benefits. See Harman, 211 F.3d at
13 1179 (noting that “the decision of whether to remand for further
14 proceedings turns upon the likely utility of such proceedings”);
15 Garrison v. Colvin, 759 F.3d 995, 1019-20 (9th Cir. 2014).

16 When the ALJ’s findings are so “insufficient” that the Court
17 cannot determine whether the rejected testimony should be
18 credited as true, the Court has “some flexibility” in applying
19 the credit-as-true rule. Connett, 340 F.3d at 876; see also
20 Garrison, 759 F.3d at 1020 (noting that Connett established that
21 credit-as-true rule may not be dispositive in all cases). This
22 flexibility should be exercised “when the record as a whole
23 creates serious doubt as to whether the claimant is, in fact,
24 disabled within the meaning of the Social Security Act.”
25 Garrison, 759 F.3d at 1021. Such doubt exists here, given that
26 each injection significantly relieved Plaintiff’s joint pain and
27 his lower-back pain was reasonably controlled by medication.

28 Accordingly, further administrative proceedings would serve

1 the useful purpose of allowing the ALJ to reassess Plaintiff's
2 statements' credibility, and if he again finds them "not fully
3 credible" (AR 48), provide a clear and convincing reason for that
4 finding. He may also assess Dr. Gilbert's November 26, 2014
5 opinion and reevaluate Plaintiff's RFC in light of that evidence.
6 Thus, remand is appropriate. See Garrison, 759 F.3d at 1020
7 n.26.

8 **VI. CONCLUSION**

9 Consistent with the foregoing and under sentence four of 42
10 U.S.C. § 405(g),²⁰ IT IS ORDERED that judgment be entered
11 REVERSING the Commissioner's decision as to Plaintiff's SSI
12 application only, GRANTING Plaintiff's request for remand, and
13 REMANDING this action for further proceedings consistent with
14 this memorandum decision.

15
16 DATED: January 10, 2018



JEAN ROSENBLUTH
U.S. Magistrate Judge

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26 _____
27 ²⁰ That sentence provides: "The [district] court shall have
28 power to enter, upon the pleadings and transcript of the record,
a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."