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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

ROBERT DALE ARTHUR,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,<sup>1</sup>

Defendant.

Case No. CV 16-07693-DFM

MEMORANDUM OPINION  
AND ORDER

Robert Dale Arthur (“Plaintiff”) appeals from the Social Security Commissioner’s final decision denying his applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”). For the reasons discussed below, the Commissioner’s decision is affirmed and this matter is dismissed with prejudice.

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<sup>1</sup> 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 DIB and SSI on March 18, 2013, and  
4 March 22, 2013, respectively. See Administrative Record (“AR”) 221-33.  
5 Plaintiff alleged that his disability began on March 13, 2012. See AR 221, 228.  
6 After his applications were denied, he requested a hearing before an  
7 administrative law judge (“ALJ”). See AR 111. The ALJ conducted an initial  
8 hearing on December 2, 2014, when the ALJ heard testimony by a vocational  
9 expert (“VE”), a medical expert, and Plaintiff, who was represented by  
10 counsel. See AR 63-77. On March 30, 2015, the ALJ held a supplemental  
11 hearing where she heard testimony from another VE, medical experts Drs.  
12 Samuel Berman and David Peterson, and Plaintiff, who was again represented  
13 by counsel. See AR 43-62.

14 On May 5, 2015, the ALJ denied Plaintiff’s claims. See AR 25-42. The  
15 ALJ found that Plaintiff last met the insured status requirements on September  
16 30, 2013, and that Plaintiff had not engaged in substantial gainful activity since  
17 March 13, 2012. See AR 30. The ALJ then found that Plaintiff had severe  
18 impairments of obesity, lumbar spine degenerative disc disease, arthritis of the  
19 lower extremities, attention-deficit hyperactivity disorder (ADHD), and  
20 borderline intellectual functioning—none of which met or medically equaled  
21 any of the impairments in the Listing of Impairments (“Listing”) set forth at 20  
22 C.F.R., Part 404, Subpart P, Appendix 1. See AR 30-33.

23 Despite Plaintiff’s impairments, the ALJ found that Plaintiff had the  
24 residual functional capacity (“RFC”) to perform light work with the following  
25 limitations: no lifting or carrying in excess of 10-20 pounds, no standing or  
26 walking in excess of 2 hours total per 8-hour workday, no sitting in excess of 6  
27 hours total per 8-hour workday, no climbing activities, no working without  
28 being able to change positions on an hourly basis, no performing more than

1 occasional postural movements, no performing more than simple, repetitive  
2 tasks, and no having more than occasional contact with others in a work  
3 setting. See AR 33-34. Based on the VE’s testimony, the ALJ found that given  
4 Plaintiff’s age, education, work experience, and RFC, Plaintiff could work as  
5 an addresser, document preparer, and assembler. See AR 38. Thus, the ALJ  
6 found that Plaintiff was not disabled. See id.

7 The Appeals Council denied review of the ALJ’s decision, which  
8 became the final decision of the Commissioner. See AR 10-15; see also 20  
9 C.F.R. §§ 404.981, 416.1481. Plaintiff sought review in this Court. See Dkt. 1.

## 10 II.

### 11 DISCUSSION

12 Plaintiff argues that the ALJ erred in rejecting Dr. Berman’s medical  
13 opinion. See Joint Stipulation (Dkt. 22) (“JS”) at 4. Specifically, Plaintiff  
14 contends that the ALJ improperly rejected Dr. Berman’s diagnosis of a severe  
15 impairment of arthritis to Plaintiff’s upper extremities, improperly gave more  
16 weight to an examining physician’s opinion, and incorrectly rejected Dr.  
17 Berman’s opinion based on Plaintiff’s conflicting testimony. See id. at 4-12.

#### 18 A. Relevant Facts

19 At the March 2015 hearing, after reviewing Plaintiff’s medical evidence,  
20 Dr. Berman testified that Plaintiff had, among other impairments,  
21 “[a]rthropathy involving multiple joints consistent with rheumatoid arthritis.”  
22 AR 49. He also testified that Plaintiff had the following limitations:

23 No standing over two hours in an eight hour period of time.  
24 Lifting limited to 20 pounds occasionally and 10 pounds  
25 frequently. No climbing of ladders, ropes or scaffolds. And the  
26 opportunity for the applicant to stand after sitting for more than  
27 one hour.

28 Id. Dr. Berman then reported that there was not “anything in the record that

1 suggests a need for any greater limitations.” Id.

2 When later questioned by Plaintiff’s counsel, however, Dr. Berman  
3 stated that Plaintiff had additional limitations on his upper extremities and  
4 recommended restricting Plaintiff’s fine manipulation to one hour in an eight-  
5 hour workday. See AR 57-58. Dr. Berman testified that while nothing in the  
6 record specifically supported this limitation, Plaintiff’s testimony suggested  
7 that “excessive use of [his] fingers and hands” may aggravate his arthritis. See  
8 AR 57.

9 In her decision, the ALJ discussed but ultimately rejected Dr. Berman’s  
10 opinion. See AR 35-36. The ALJ noted Dr. Berman’s “drastic” change in  
11 testimony—originally stating only general limitations to sitting, standing,  
12 lifting, and climbing, but later limiting Plaintiff’s fine manipulation to one hour  
13 in an eight-hour period. See AR 36. The ALJ also cited to Dr. Berman’s  
14 admission that nothing in the medical record supported the limitations he  
15 assigned and noted Plaintiff’s testimony that the only reason he stopped his  
16 last job was that it required “too much standing and too heavy weights.” Id.  
17 The ALJ found Dr. Berman’s limitations were unsupported by the record and  
18 relied instead on examining physician Dr. Martin Perer’s assessment of  
19 Plaintiff’s limitations. See AR 32, 35.

20 **B. Applicable Law**

21 Three types of physicians may offer opinions in Social Security cases:  
22 those who treated the plaintiff, those who examined but did not treat the  
23 plaintiff, and those who did neither. See 20 C.F.R. §§ 404.1527(c), 416.927(c);  
24 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995) (as amended).<sup>2</sup> A treating

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25 <sup>2</sup> Social Security Regulations regarding the evaluation of opinion  
26 evidence were amended effective March 27, 2017. Where, as here, the ALJ’s  
27 decision is the final decision of the Commissioner, the reviewing court  
28 generally applies the law in effect at the time of the ALJ’s decision. See Lowry

1 physician's opinion is generally entitled to more weight than an examining  
2 physician's opinion, which is generally entitled to more weight than a  
3 nonexamining physician's. See Lester, 81 F.3d at 830. When a treating or  
4 examining physician's opinion is uncontroverted by another doctor, it may be  
5 rejected only for "clear and convincing reasons." Carmickle v. Comm'r, Soc.  
6 Sec. Admin., 533 F.3d 1155, 1164 (9th Cir. 2008) (citing Lester, 81 F.3d at  
7 830-31). Where such an opinion is contradicted, the ALJ may reject it for  
8 "specific and legitimate reasons that are supported by substantial evidence in  
9 the record." Id. (citations omitted); see also Garrison v. Colvin, 759 F.3d 995,  
10 1012 (9th Cir. 2014). Moreover, "[t]he ALJ need not accept the opinion of any  
11 physician, including a treating physician, if that opinion is brief, conclusory,  
12 and inadequately supported by clinical findings." Thomas v. Barnhart, 278  
13 F.3d 947, 957 (9th Cir. 2002); see also Tonapetyan v. Halter, 242 F.3d 1144,  
14 1149 (9th Cir. 2001); Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595,  
15 600 (9th Cir. 1999) ("Opinions of a nonexamining, testifying medical advisor  
16 may serve as substantial evidence when they are supported by other evidence  
17 in the record and are consistent with it."). The weight accorded to a  
18 physician's opinion depends on whether it is consistent with the record and  
19 accompanied by adequate explanation, the nature and extent of the treatment  
20 relationship, and the doctor's specialty, among other factors. See 20 C.F.R.  
21 §§ 404.1527(c), 416.927(c).

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23 v. Astrue, 474 F. App'x 801, 804 n.2 (2d Cir. 2012) (applying version of  
24 regulation in effect at time of ALJ's decision despite subsequent amendment);  
25 Garrett ex rel. Moore v. Barnhart, 366 F.3d 643, 647 (8th Cir. 2004) ("We  
26 apply the rules that were in effect at the time the Commissioner's decision  
27 became final."). Accordingly, the Court applies the versions of 20 C.F.R.  
28 §§ 404.1527 and 416.927 that were in effect at the time of the ALJ's May 2015  
decision.

1 **C. Analysis**

2 Plaintiff argues that the ALJ failed to explain why she rejected Dr.  
3 Berman’s opinion that Plaintiff’s arthritis in his upper extremities was severe.  
4 See JS at 6-7. Plaintiff notes that Dr. Berman never testified that Plaintiff’s  
5 gross manipulation should be limited to one hour per eight-hour workday and  
6 that Plaintiff’s attorney did not lead Dr. Berman to increase Plaintiff’s fine  
7 manipulation limitations at the hearing. See id. at 8-9. Despite conceding that  
8 nothing in the medical record supports Dr. Berman’s one-hour per workday  
9 limitation for fine manipulation, Plaintiff maintains that “[i]t is unreasonable  
10 to assume that a medical expert [Dr. Berman] would articulate such a  
11 restriction without any evidentiary support.” Id. at 10. Plaintiff further argues  
12 that Dr. Perer’s opinion is inaccurate because he “does not appear to have  
13 reviewed” any medical records, and when Dr. Perer examined Plaintiff, none  
14 of Plaintiff’s upper extremity arthritic impairments presented. Id. at 11. Last,  
15 Plaintiff contends that the ALJ erred by rejecting Dr. Berman’s opinion,  
16 because it contradicted Plaintiff’s testimony for why he stopped his last job.  
17 See id.

18 The ALJ was well within her discretion to reject Dr. Berman’s opinion,  
19 which he admitted was unsupported by the medical record. See AR 57. Unable  
20 to point to any supporting evidence, Plaintiff’s conclusory contention that Dr.  
21 Berman would not have limited Plaintiff’s fine manipulation without  
22 evidentiary support is not grounds for reversal. See Thomas, 278 F.3d at 957.  
23 Moreover, the ALJ provided other reasons supported by substantial  
24 evidence—e.g., Dr. Berman’s ambiguous explanation for his change in  
25 testimony and Dr. Perer’s contradicting medical opinion—to justify her  
26 rejection of Dr. Berman’s opinion. See AR 32, 35-36; see also Sousa v.  
27 Callahan, 143 F.3d 1240, 1244 (9th Cir. 1998) (“The Commissioner may reject  
28 the opinion of a non-examining physician by reference to specific evidence in

1 the medical record.”). While Plaintiff is correct that the ALJ mischaracterized  
2 Dr. Berman’s one-hour per workday limitation as applying to both fine and  
3 gross manipulations, the ALJ’s mistake was inconsequential; Dr. Berman’s  
4 testimony still changed over the course of the hearing from Plaintiff only  
5 having limited limitations to sitting, standing, lifting, and climbing, to having  
6 additional discrete fine manipulation limitations. See Stout v. Comm’r, Soc.  
7 Sec. Admin., 454 F.3d 1050, 1055 (9th Cir. 2006) (holding that ALJ’s error is  
8 harmless where such error is inconsequential to ultimate non-disability  
9 determination).

10 As to Plaintiff’s contention that the ALJ erred by failing to find a severe  
11 impairment in Plaintiff’s arthritis in his upper extremities, any error was also  
12 harmless because the ALJ considered Plaintiff’s upper extremity limitations  
13 when she assessed Plaintiff’s RFC. See AR 36 (discussing Dr. Berman’s  
14 testimony regarding Plaintiff’s upper extremity fine manipulation limitations);  
15 see also Lewis v. Astrue, 498 F.3d 909, 911 (9th Cir. 2007) (noting that error in  
16 labeling condition as non-severe is harmless where ALJ finds at least one  
17 severe impairment and continued sequential analysis considering all of  
18 claimant’s symptoms).

19 The ALJ also properly relied on examining physician Dr. Perer’s  
20 medical opinion to discount Dr. Berman’s testimony. See Lester, 81 F.3d at  
21 830 (“The opinion of an examining physician is . . . entitled to greater weight  
22 than the opinion of a nonexamining physician.”). That Dr. Perer examined  
23 Plaintiff on a day without arthritic “flare-ups” is immaterial because Plaintiff  
24 has not shown through the evidence to what extent, if any, Plaintiff’s ability to  
25 do work activities on a sustained basis was limited as a result. See 20 C.F.R. §§  
26 404.1509, 404.1545, 416.909, 416.945.

27 Finally, the ALJ’s discounting of Dr. Berman’s opinion because it  
28 contradicted Plaintiff’s reason for stopping his prior job is also ultimately

1 harmless. The Commissioner concedes that the ALJ's rejection of Dr.  
2 Berman's opinion on grounds that "the only reasons [Plaintiff] stopped his last  
3 job with [sic] too much standing and too heavy weights" was flawed. JS at 18  
4 (quoting AR 36). Even so, substantial evidence in the form of Dr. Perer's  
5 medical opinion and the longitudinal medical record still supports the ALJ's  
6 ultimate rejection of Dr. Berman's opinion.

7 In sum, the ALJ provided sufficiently specific reasons supported by  
8 substantial evidence in the record for her rejection of Dr. Berman's hearing  
9 testimony. Remand is not warranted on this basis.

10 **III.**

11 **CONCLUSION**

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

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15 Dated: March 14, 2018

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17 DOUGLAS F. McCORMICK  
18 United States Magistrate Judge  
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