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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ERIC HILLIARD HARWELL,
Plaintiff,
v.
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

Case No. CV 16-8151-KK

MEMORANDUM AND ORDER

Plaintiff Eric Hilliard Harwell (“Plaintiff”) seeks review of the final decision of the Commissioner of the Social Security Administration (“Commissioner” or “Agency”) denying his application for Title II Disability Insurance Benefits (“DIB”) and Title XVI Supplemental Security Income (“SSI”). For the reasons stated below, the Court recommends the Commissioner’s decision be REVERSED and this action REMANDED for further proceedings consistent with this Order.

I.

PROCEDURAL HISTORY

On September 12, 2013, Plaintiff filed applications for DIB and SSI, alleging a disability onset date of November 1, 2012. Administrative Record (“AR”) at 269-82. Plaintiff’s applications were denied initially on January 21, 2014, and upon reconsideration on February 18, 2014. *Id.* at 101-02, 122-23.

1 On February 27, 2014, Plaintiff requested a hearing before an Administrative
2 Law Judge (“ALJ”). Id. at 141-42. On April 30, 2015, Plaintiff appeared with
3 counsel and testified at a hearing before the assigned ALJ. Id. at 45-51, 60-66. A
4 medical expert (“ME”) and a vocational expert (“VE”) also testified at the
5 hearing. Id. at 51-60, 66-75. On June 2, 2015, the ALJ issued a decision denying
6 Plaintiff’s applications for DIB and SSI. Id. at 18-35.

7 On July 27, 2015, Plaintiff filed a request to the Agency’s Appeals Council to
8 review the ALJ’s decision. Id. at 11-15. On September 9, 2016, the Appeals
9 Council denied Plaintiff’s request for review. Id. at 1-7.

10 On November 2, 2016, Plaintiff filed the instant action. ECF Docket No.
11 (“Dkt.”) 1, Compl. This matter is before the Court on the Parties’ Joint
12 Stipulation (“JS”), filed on July 26, 2017. Dkt. 20, JS.

13 II.

14 PLAINTIFF’S BACKGROUND

15 Plaintiff was born on January 17, 1962, and his alleged disability onset date is
16 November 1, 2012. AR at 270, 277. He was fifty years old on the alleged disability
17 onset date and fifty-three years old at the time of the hearing before the ALJ. Id. at
18 32. Plaintiff completed one year of college and has work experience as a tow truck
19 operator. Id. at 46-47, 50. Plaintiff alleges disability based on back pain, abdominal
20 pain, COPD, congestive heart failure, diabetes, neuropathy, and Bell’s palsy. Id. at
21 63, 77, 89, 112.

22 III.

23 STANDARD FOR EVALUATING DISABILITY

24 To qualify for benefits, a claimant must demonstrate a medically
25 determinable physical or mental impairment that prevents him from engaging in
26 substantial gainful activity, and that is expected to result in death or to last for a
27 continuous period of at least twelve months. Reddick v. Chater, 157 F.3d 715, 721
28 (9th Cir. 1998). The impairment must render the claimant incapable of performing

1 the work he previously performed and incapable of performing any other
2 substantial gainful employment that exists in the national economy. Tackett v.
3 Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999).

4 To decide if a claimant is disabled, and therefore entitled to benefits, an ALJ
5 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are:

- 6 1. Is the claimant presently engaged in substantial gainful activity? If so, the
7 claimant is found not disabled. If not, proceed to step two.
- 8 2. Is the claimant's impairment severe? If not, the claimant is found not
9 disabled. If so, proceed to step three.
- 10 3. Does the claimant's impairment meet or equal one of the specific
11 impairments described in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so,
12 the claimant is found disabled. If not, proceed to step four.¹
- 13 4. Is the claimant capable of performing work he has done in the past? If so, the
14 claimant is found not disabled. If not, proceed to step five.
- 15 5. Is the claimant able to do any other work? If not, the claimant is found
16 disabled. If so, the claimant is found not disabled.

17 See Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d 949,
18 953-54 (9th Cir. 2001); 20 C.F.R. §§ 404.1520(b)-(g)(1), 416.920(b)-(g)(1).

19 The claimant has the burden of proof at steps one through four, and the
20 Commissioner has the burden of proof at step five. Bustamante, 262 F.3d at 953-
21 54. Additionally, the ALJ has an affirmative duty to assist the claimant in
22 developing the record at every step of the inquiry. Id. at 954. If, at step four, the
23 claimant meets his burden of establishing an inability to perform past work, the
24 Commissioner must show that the claimant can perform some other work that
25

26 ¹ “Between steps three and four, the ALJ must, as an intermediate step, assess the
27 claimant's [residual functional capacity],” or ability to work after accounting for
28 his verifiable impairments. Bray v. Comm'r of Soc. Sec. Admin., 554 F.3d 1219,
1222-23 (9th Cir. 2009) (citing 20 C.F.R. § 416.920(e)). In determining a
claimant's residual functional capacity, an ALJ must consider all relevant evidence
in the record. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006).

1 exists in “significant numbers” in the national economy, taking into account the
2 claimant’s residual functional capacity (“RFC”), age, education, and work
3 experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20 C.F.R.
4 §§ 404.1520(g)(1), 416.920(g)(1).

5 **IV.**

6 **THE ALJ’S DECISION**

7 **A. STEP ONE**

8 At step one, the ALJ found Plaintiff “has not engaged in substantial gainful
9 activity since November 1, 2012, the alleged onset date.” AR at 23.

10 **B. STEP TWO**

11 At step two, the ALJ found Plaintiff “ha[d] the following severe
12 impairments: diabetes mellitus; hypertension; congestive heart failure; obesity;
13 chronic umbilical wou[n]d; chronic obstructive pulmonary disease (COPD);
14 obstructive sleep apnea; cervical discogenic disease; pancreatitis; depression;
15 amphetamine dependence, currently in remission; and bilateral knee and hip
16 arthritis.” Id.

17 **C. STEP THREE**

18 At step three, the ALJ found Plaintiff “does not have an impairment or
19 combination of impairments that meets or medically equals the severity of one of
20 the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.” Id. at 24.

21 **D. RFC DETERMINATION**

22 The ALJ found Plaintiff had the following RFC:
23 to perform light work as defined in 20 CFR 404.1567(b) and
24 416.967(b) except: lift and/or carry 10 pounds frequently, 20 pounds
25 occasionally; stand and/or walk 6 hours out of an 8-hour day with the
26 use of a cane to walk outside the immediate work area; sit 6 hours out
27 of an 8-hour day with the ability to stand and stretch every hour
28 estimated to take 1 to 3 minutes per hours; occasionally climb stairs,

1 no ladders, ropes, or scaffolds; no work above shoulder level bilateral;
2 occasionally balance, stoop, kneel, crouch, and crawl; avoid even
3 moderate exposure to dust, fumes, and other pulmonary irritants; no
4 work at unprotected heights or work around moving and dangerous
5 machinery; and limited to simple routine tasks.

6 Id. at 28.

7 **E. STEP FOUR**

8 At step four, the ALJ found Plaintiff is “unable to perform any past relevant
9 work.” Id. at 32.

10 **F. STEP FIVE**

11 At step five, the ALJ found “[c]onsidering [Plaintiff’s] age, education, work
12 experience, and residual functional capacity, there are jobs that exist in significant
13 numbers in the national economy that [Plaintiff] can perform.” Id. at 33.

14 **V.**

15 **PLAINTIFF’S CLAIMS**

16 Plaintiff presents four disputed issues: (1) whether the ALJ erred by failing to
17 make a finding regarding the reduction of the light occupational base; (2) whether
18 the ALJ failed to include an adequate accommodation for Plaintiff’s use of a cane in
19 the RFC finding; (3) whether the ALJ failed to provide adequate reasons for
20 rejecting the opinions of Plaintiff’s treating physician; and (4) whether the ALJ
21 properly assessed Plaintiff’s credibility.²

22 _____
23 ² Social Security Regulations regarding the evaluation of opinion evidence and
24 credibility were amended effective March 27, 2017. Where, as here, the ALJ’s
25 decision is the final decision of the Commissioner, the reviewing court generally
26 applies the law in effect at the time of the ALJ’s decision. See Lowry v. Astrue, 474
27 Fed. Appx. 801, 805 n.2 (2d Cir. 2012) (applying version of regulation in effect at
28 time of ALJ’s decision despite subsequent amendment); 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.”); Spencer v. Colvin, No. 15-05925, 2016 WL 7046848, at *9 n.4 (W.D. Wash. Dec. 1, 2016) (“42 U.S.C. § 405 does not contain any express authorization from Congress allowing the Commissioner to engage in retroactive rulemaking”); cf. Revised Medical Criteria for Determination of Disability, Musculoskeletal System and Related Criteria, 66 Fed. Reg. 58010, 58011 (Nov. 19, 2001) (“With respect to claims in which we have

1 The Court finds the third and fourth issues dispositive of this matter and
2 thus declines to address the remaining issues. See Hiler v. Astrue, 687 F.3d 1208,
3 1212 (9th Cir. 2012) (“Because we remand the case to the ALJ for the reasons
4 stated, we decline to reach [Plaintiff’s] alternative ground for remand.”).

5 VI.

6 **STANDARD OF REVIEW**

7 Pursuant to 42 U.S.C. § 405(g), a district court may review the
8 Commissioner’s decision to deny benefits. The ALJ’s findings and decision should
9 be upheld if they are free of legal error and supported by substantial evidence based
10 on the record as a whole. Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420,
11 28 L. Ed. 2d 842 (1971); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007).

12 “Substantial evidence” is evidence that a reasonable person might accept as
13 adequate to support a conclusion. Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th
14 Cir. 2007). It is more than a scintilla but less than a preponderance. Id. To
15 determine whether substantial evidence supports a finding, the reviewing court
16 “must review the administrative record as a whole, weighing both the evidence that
17 supports and the evidence that detracts from the Commissioner’s conclusion.”
18 Reddick, 157 F.3d at 720 (citation omitted); see also Hill v. Astrue, 698 F.3d 1153,
19 1159 (9th Cir. 2012) (stating that a reviewing court “may not affirm simply by
20 isolating a ‘specific quantum of supporting evidence’”) (citation omitted). “If the
21 evidence can reasonably support either affirming or reversing,” the reviewing court
22 “may not substitute its judgment” for that of the Commissioner. Reddick, 157
23 F.3d at 720-21; see also Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012)
24 (“Even when the evidence is susceptible to more than one rational interpretation,

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26 _____
27 made a final decision, and that are pending judicial review in Federal court, we
28 expect that the court’s review of the Commissioner’s final decision would be made
in accordance with the rules in effect at the time of the final decision.”).
Accordingly, the Court applies the versions of 20 C.F.R. §§ 416.927 and 416.929
that were in effect at the time of the ALJ’s June 2, 2015 decision.

1 we must uphold the ALJ’s findings if they are supported by inferences reasonably
2 drawn from the record.”).

3 The Court may review only the reasons stated by the ALJ in her decision
4 “and may not affirm the ALJ on a ground upon which she did not rely.” Orn v.
5 Astrue, 495 F.3d 625, 630 (9th Cir. 2007). If the ALJ erred, the error may only be
6 considered harmless if it is “clear from the record” that the error was
7 “inconsequential to the ultimate nondisability determination.” Robbins, 466 F.3d
8 at 885 (citation omitted).

9 VII.

10 DISCUSSION

11 **A. THE ALJ ERRONEOUSLY REJECTED DR. SADR’S MEDICAL** 12 **OPINION**

13 **1. RELEVANT FACTS**

14 **a. Dr. Sadr’s Opinion**

15 Dr. Sadr is a family medicine physician who treated Plaintiff at University of
16 California, Irvine Health Center between April 2014 and July 2015. AR at 1170-75,
17 1251-61, 1263-67, 1270-74, 1290-94, 1454-58, 1512-18, 1554-60, 1564-80, 1585-88,
18 1608-12. On May 12, 2014, Dr. Sadr completed a Medical Source Statement on
19 Plaintiff’s behalf. Id. at 1034-37. Dr. Sadr stated Plaintiff had been diagnosed with
20 COPD, ventral hernia, diabetes, and diastolic heart failure. Id. at 1034. Dr. Sadr
21 reported Plaintiff suffered from shortness of breath, wheezing, swelling, and
22 abdominal pain, and that his prognosis was fair. Id. Dr. Sadr estimated that
23 Plaintiff’s symptoms would “often” interfere with Plaintiff’s ability to pay
24 attention and concentrate as required to perform simple work-related tasks. Id.

25 Dr. Sadr recommended Plaintiff be limited to sitting, standing, and walking
26 each for one hour out of an eight-hour work day, and explained Plaintiff could not
27 “be in one position for an extended period of time secondary to pain and
28 discomfort.” Id. Dr. Sadr further estimated Plaintiff could engage in simple

1 grasping for 80% of an eight-hour work day, pushing and pulling for 50% of an eight-
2 hour work day, and fine manipulation for 100% of an eight-hour work day. Id. at
3 1035. Dr. Sadr recommended Plaintiff never lift or carry any amount of weight and
4 never squat, crawl, climb, or reach above shoulder level. Id. at 1035-36. Dr. Sadr
5 stated Plaintiff could occasionally bend, but was to be totally restricted from
6 activities involving unprotected heights, moving machinery, exposure to marked
7 changes in temperature and humidity, driving automotive equipment, and exposure
8 to dust, fumes, and gases. Id. at 1036. Finally, Dr. Sadr explained Plaintiff would
9 require unscheduled breaks during an eight-hour day because (1) he needs “to
10 check blood sugars and take medications,” (2) he “gets short of breath extremely
11 fast requiring frequent inhaler use,” and (3) “[b]ecause of hernia[, he]cannot be in
12 one position for a long time.” Id.

13 **b. ALJ’s Rejection of Dr. Sadr’s Opinion**

14 The ALJ rejected Dr. Sadr’s opinion in favor of the non-examining medical
15 expert. Id. at 30-31. Specifically, the ALJ gave little weight to Dr. Sadr’s May 2014
16 Medical Source Statement. Id. at 31. In rejecting Dr. Sadr’s opinion, the ALJ
17 claimed Dr. Sadr’s opinion was (1) not supported by the medical record, and (2) is
18 inconsistent with Plaintiff’s claims that he spends his days sitting and lying down.
19 Id.

20 **2. APPLICABLE LAW**

21 “There are three types of medical opinions in social security cases: those
22 from treating physicians, examining physicians, and non-examining physicians.”
23 Valentine v. Comm’r Soc. Sec. Admin., 574 F.3d 685, 692 (9th Cir. 2009); see also
24 20 C.F.R. §§ 404.1502, 404.1527.

25 “As a general rule, more weight should be given to the opinion of a treating
26 source than to the opinion of doctors who do not treat the claimant.” Lester v.
27 Chater, 81 F.3d 821, 830 (9th Cir. 1995); Garrison v. Colvin, 759 F.3d 995, 1012
28

1 (9th Cir. 2014) (citing Ryan v. Comm’r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir.
2 2008)); Turner v. Comm’r of Soc. Sec., 613 F.3d 1217, 1222 (9th Cir. 2010).

3 “[T]he ALJ may only reject a treating or examining physician’s
4 uncontradicted medical opinion based on clear and convincing reasons.”
5 Carmickle v. Comm’r, Soc. Sec. Admin., 533 F.3d 1155, 1164 (9th Cir. 2008)
6 (citation and internal quotation marks omitted); Widmark v. Barnhart, 454 F.3d
7 1063, 1066 (9th Cir. 2006). “Where such an opinion is contradicted, however, it
8 may be rejected for specific and legitimate reasons that are supported by substantial
9 evidence in the record.” Carmickle, 533 F.3d at 1164 (citation and internal
10 quotation marks omitted); Ryan, 528 F.3d at 1198; Ghanim v. Colvin, 763 F.3d
11 1154, 1160-61 (9th Cir. 2014); Garrison, 759 F.3d at 1012. The ALJ can meet the
12 requisite specific and legitimate standard “by setting out a detailed and thorough
13 summary of the facts and conflicting clinical evidence, stating [her] interpretation
14 thereof, and making findings.” Reddick, 157 F.3d at 725. The ALJ “must set forth
15 [her] own interpretations and explain why they, rather than the [treating or
16 examining] doctors’, are correct.” Id.

17 While an ALJ is not required to discuss all the evidence presented, she must
18 explain the rejection of uncontroverted medical evidence, as well as significant
19 probative evidence. Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir. 1984)
20 (citation omitted). Moreover, an ALJ must consider all of the relevant evidence in
21 the record and may not point to only those portions of the records that bolster her
22 findings. See, e.g., Holohan v. Massanari, 246 F.3d 1195, 1207-08 (9th Cir. 2001)
23 (holding an ALJ cannot selectively rely on some entries in plaintiff’s records while
24 ignoring others).

25 Lastly, while an ALJ is “not bound by an expert medical opinion on the
26 ultimate question of disability,” if the ALJ rejects an expert medical opinion’s
27 ultimate finding on disability, she “must provide ‘specific and legitimate’ reasons
28 for rejecting the opinion.” Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir.

1 2008) (quoting Lester v. Chater, 81 F.3d 821, 830-31 (9th Cir. 1995), as amended
2 (Apr. 9, 1996)). An ALJ is not precluded from relying upon a physician’s medical
3 findings, even if she refuses to accept the physician’s ultimate finding on disability.
4 See, e.g., Magallanes v. Bowen, 881 F.2d 747, 754 (9th Cir. 1989).

5 3. ANALYSIS

6 Here, because Dr. Sadr’s opinions were contradicted by the other medical
7 evidence of record, the ALJ was required to present “specific and legitimate
8 reasons that are supported by substantial evidence in the record” to reject Dr.
9 Sadr’s opinions. Carmickle, 533 F.3d at 1164 (citation and internal quotation marks
10 omitted); Ryan, 528 F.3d at 1198; Ghanim, 763 F.3d at 1160-61; Garrison, 759 F.3d
11 at 1012. As set forth below, although the ALJ presented specific reasons, they are
12 not legitimate or supported by the record.

13 a. Objective Medical Evidence

14 First, the ALJ rejected Dr. Sadr’s opinion because it was not supported by
15 objective medical evidence. AR at 31. In rejecting Dr. Sadr’s opinion based on a
16 lack of objective medical evidence, the ALJ reasoned: “The problem [with Dr.
17 Sadr’s opinion] is that the level of symptoms corroborated in the file are not
18 consistent with this opinion. [Plaintiff’s] lung functioning is only mildly reduced
19 and not near the level of dysfunction necessary to say he can only sit, stand and
20 walk for 1 hour each in a normal workday.” Id.

21 By focusing on Plaintiff’s lung functioning, however, the ALJ did not
22 account for the other impairments relied upon by Dr. Sadr in her assessment.
23 Specifically, the ALJ did not account for Dr. Sadr’s consideration of Plaintiff’s pain
24 caused by abdominal hernias, which were unresolved after surgery and resulted in
25 ongoing complications with open wounds. Id. at 397, 408, 415-16, 419, 422, 428,
26 430-31, 443, 454, 457-60, 464, 478, 480-81, 485-86, 497-98, 502-03, 536, 543, 548,
27 557, 559, 624-26, 628-29, 633, 641, 654-58, 772, 813, 894-95, 897, 905, 907, 1080,
28 1084, 1091, 1173-75, 1219, 1227, 1230-31, 1251, 1255, 1257, 1259, 1260, 1271-72,

1 1276, 1291, 1293, 1295, 1315-16, 1324, 1329-30, 1333, 1437-38, 1554, 1559, 1561-64,
2 1574, 1579, 1590-91, 1611, 1613. Significantly, Dr. Sadr’s assessment noted
3 Plaintiff’s hernias prevented him from remaining “in one position for a long time.”
4 Id. at 1036. Yet, the ALJ failed to explain why she was rejecting this reasoning in
5 Dr. Sadr’s assessment.

6 Furthermore, contrary to the ALJ’s findings, there does appear to be
7 objective medical evidence addressing Plaintiff’s lung functioning to support Dr.
8 Sadr’s opinion. While the record does not support a severe lung impairment, the
9 medical evidence does show Plaintiff suffered from some cardiac dysfunction with
10 intermittent reduced ejection fraction rates, id. at 448, 600, 619, 622, 626, 643, 767,
11 1233-34, 1355-56, 1365-66, and lung impairments resulting in intermittent
12 wheezing, coughing, shortness of breath, congestion, rales, crackles, and rhonchi.
13 Id. at 419, 431, 459, 462, 522, 527, 548, 702-03, 767, 772, 786, 830, 834-35, 853, 855,
14 1219, 1242, 1265, 1275, 1310, 1315-16, 1324-25, 1330, 1442, 1445, 1448, 1451, 1487,
15 1558, 1560, 1573, 1666, 1670.

16 Thus, because the ALJ’s finding did not account for all of the physical
17 impairments cited by Dr. Sadr and because there appears to be objective evidence
18 supporting Plaintiff’s lung and cardiac limitations, the ALJ’s reliance on a lack of
19 objective medical evidence is not a legitimate reason for rejecting Dr. Sadr’s
20 opinions.

21 **b. Plaintiff’s Allegations of Impairment**

22 The ALJ additionally rejected Dr. Sadr’s opinion because she concluded the
23 opinion was inconsistent with Plaintiff’s allegations that he spends his days sitting
24 and lying down. Id. at 31. Plaintiff testified at the hearing before the ALJ that he
25 mostly sits and lies down throughout the day. Id. at 62. Plaintiff estimated he can
26 sit still for only five to ten minutes at a time, and that he can sit for twenty to thirty
27 minutes at a time if allowed to move around. Id. at 61, 63-64. However, nothing
28 about Plaintiff’s claims is inherently inconsistent with Dr. Sadr’s recommendation

1 that Plaintiff be limited to sitting for a total of one hour out of an eight-hour day.
2 While Plaintiff testified that under certain conditions he could sit for twenty to
3 thirty minutes at a time, he did not state how often within an eight-hour period he
4 could do so. Moreover, while he claimed to spend most of his days sitting and lying
5 down, he did not estimate how much time he spent in each position. Thus,
6 Plaintiff's testimony that he spends most of the day sitting and lying down is not
7 inconsistent with Dr. Sadr's opinions, and therefore, does not constitute a
8 legitimate reason, supported by the record, for rejecting Dr. Sadr's opinion.

9 **B. THE ALJ ERRONEOUSLY REJECTED PLAINTIFF'S SUBJECTIVE**
10 **COMPLAINTS OF IMPAIRMENT**

11 **1. RELEVANT FACTS**

12 **a. Plaintiff's Testimony Regarding His Impairments**

13 Plaintiff testified at the hearing before the ALJ that he was no longer able to
14 perform his work as a tow truck driver because his physical impairments prevented
15 him from bending, lifting, pushing, and pulling. AR at 47. He further testified that
16 he climbs a few steps leading to his apartment, but that he takes a break while
17 climbing them. Id. at 48. Plaintiff estimated he can sit still and stand each for
18 about five to ten minutes at a time, but that he can sit for about twenty to thirty
19 minutes at a time if he is able to move around. Id. at 61, 63-64. He further
20 estimated he could be on his feet for a total of two hours out of an eight-hour day.
21 Id. at 61. Plaintiff explained that his back pain, breathing problems, and abdominal
22 pain make it difficult for him to stand. Id. at 61-62. He testified that he spends his
23 days mostly sitting and lying on his side. Id. at 62. He is able to do some
24 housework such as washing dishes and vacuuming, but he does them in fifteen-
25 minute increments for a total of one hour out of the day. Id. at 62-63. He explained
26 that if he pushed himself beyond this level of activity, it exacerbates his respiratory
27 problems and his back and abdominal pain. Id. at 63.

28 ///

1 **b. The ALJ’s Adverse Credibility Finding**

2 The ALJ found Plaintiff’s “medically determinable impairments could
3 reasonably be expected to cause the alleged symptoms,” but Plaintiff’s allegations
4 concerning the intensity, persistence, and limiting effects of his symptoms were
5 “not entirely credible.” *Id.* at 29. In support of this finding, the ALJ purported:
6 (1) Plaintiff has not complied with the treatment recommendation to lose weight;
7 and (2) Plaintiff’s allegations regarding significant shortness of breath are not
8 supported by the objective medical evidence. *Id.* at 31-32.

9 **2. APPLICABLE LAW**

10 If “the record establishes the existence of a medically determinable
11 impairment that could reasonably give rise to the reported symptoms, an ALJ must
12 make a finding as to the credibility of the claimant’s statements about the
13 symptoms and their functional effect.” *Robbins v. Social Security Administration*,
14 466 F.3d 880, 883 (2006) (citations omitted). The ALJ’s credibility determination
15 must be supported by “findings sufficiently specific to permit the court to conclude
16 that the ALJ did not arbitrarily discredit claimant’s testimony.” *Tommasetti v.*
17 *Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (citation and internal quotation marks
18 omitted).

19 The ALJ is required to engage in a two-step analysis. “First, the ALJ must
20 determine whether there is objective medical evidence of an underlying impairment
21 which could reasonably be expected to produce the pain or other symptoms
22 alleged.” *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citations and
23 internal quotation marks omitted). “If the claimant has presented such evidence,
24 and there is no evidence of malingering, then the ALJ must give specific, clear and
25 convincing reasons in order to reject the claimant’s testimony about the severity of
26 the symptoms.” *Id.* (citations and internal quotation marks omitted). “The ALJ
27 must state specifically which symptom testimony is not credible and what facts in
28 the record lead to that conclusion.” *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.

1 1996); see also Brown-Hunter v. Colvin, 806 F.3d 487, 489 (9th Cir. 2015) (holding
2 “an ALJ does not provide specific, clear, and convincing reasons for rejecting a
3 claimant’s testimony by simply reciting the medical evidence in support of his or
4 her residual functional capacity determination”).

5 “If the ALJ’s credibility finding is supported by substantial evidence, [a
6 court] may not engage in second-guessing.” Thomas v. Barnhart, 278 F.3d 947,
7 959 (9th Cir. 2002). However, an ALJ’s failure to give specific, clear, and
8 convincing reasons to reject the claimant’s testimony regarding the severity of the
9 symptoms is not harmless, because it precludes the Court from conducting a
10 meaningful review of the ALJ’s reasoning. Brown-Hunter, 806 F.3d at 489.

11 3. ANALYSIS

12 After finding Plaintiff suffered from “medically determinable impairments
13 [that] could reasonably be expected to cause the alleged symptoms,” and in the
14 absence of any indication of malingering, the ALJ was required to offer specific,
15 clear, and convincing reasons for rejecting Plaintiff’s subjective complaints of
16 impairment. AR at 29; Molina, 674 F.3d at 1112. The ALJ failed to provide such
17 reasons.

18 a. Noncompliance with Treatment

19 First, the ALJ relied on Plaintiff’s failure to comply with the treatment
20 recommendation to lose weight. AR at 32. However, the record reflects Plaintiff
21 attempted to watch his diet and includes a period when he successfully lost twenty
22 pounds. Id. at 1291, 1455. In addition, Plaintiff was a long-term participant in the
23 weight loss program at the VA clinic, but was unsuccessful in his attempts to lose
24 weight. Id. at 1251, 1390, 1395, 1407, 1410-12, 1414-15, 1418, 1424, 1436 1570.
25 Although it may be true that Plaintiff was unable to lose the weight recommended
26 by his physicians, the record supports a finding that Plaintiff attempted to lose the
27 weight and was not consciously refusing to comply with his treatment regimen.
28 Accordingly, this is not a clear and convincing reason for rejecting Plaintiff’s

1 subjective complaints of impairment. See Muldoon v. Colvin, No. CV 13-5188-
2 DFM, 2014 WL 4494461, at *3 (C.D. Cal. Sept. 12, 2014) (“[A]n obese claimant’s
3 failure to follow [] doctor’s recommendation to lose weight, as opposed to [a]
4 failure to follow ‘prescribed treatment,’ may not be used to support an adverse
5 credibility determination.” (citing Orn v. Astrue, 495 F.3d 625, 638 (9th Cir.
6 2007))).

7 **b. Objective Medical Evidence**

8 The ALJ additionally cited the lack of support from the objective medical
9 evidence as a reason for rejecting Plaintiff’s subjective complaints. AR at 31-32.
10 Specifically, the ALJ noted Plaintiff’s “allegations of shortness of breath would
11 lead one to believe the objective tests are worse than they show in the objective
12 medical records.” Id. at 31. However, as discussed above, there is objective
13 medical evidence to show Plaintiff suffered from lung impairments resulting in
14 intermittent wheezing, coughing, shortness of breath, congestion, rales, crackles,
15 and rhonchi. Id. at 419, 431, 459, 462, 522, 527, 548, 702-03, 767, 772, 786, 830,
16 834-35, 853, 855, 1219, 1242, 1265, 1275, 1310, 1315-16, 1324-25, 1330, 1442, 1445,
17 1448, 1451, 1487, 1558, 1560, 1573, 1666, 1670.

18 Nevertheless, even if the Court found there is no objective medical evidence
19 to support Plaintiff’s subjective complaints, a lack of objective medical evidence,
20 alone, cannot support an ALJ’s rejection of a plaintiff’s subjective complaints of
21 impairment. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001) (holding a lack
22 of objective medical evidence supporting claimant’s symptoms and limitations
23 cannot, by itself, support a credibility finding); Mendoza v. Berryhill, 2017 WL
24 2874622, at *1 (C.D. Cal. July 5, 2017) (“[T]he purported lack of objective medical
25 evidence supporting Plaintiff’s complaints cannot, by itself, support the credibility
26 determination.”). Thus, absent other specific, clear, and convincing reasons³ for

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28 ³ It appears the ALJ made some attempt to base a portion of her credibility
determination on a finding that Plaintiff’s subjective complaints of impairment are
inconsistent with Plaintiff’s daily activities. See AR at 32. However, the ALJ’s

1 rejecting Plaintiff's subjective complaints, the ALJ's conclusion that Plaintiff's
2 limitations are not supported by the objective medical evidence is not sufficient to
3 support an adverse credibility determination. Molina, 674 F.3d at 1112.

4 **VIII.**

5 **RELIEF**

6 **A. APPLICABLE LAW**

7 "When an ALJ's denial of benefits is not supported by the record, the
8 proper course, except in rare circumstances, is to remand to the agency for
9 additional investigation or explanation." Hill v. Astrue, 698 F.3d 1153, 1162 (9th
10 Cir. 2012) (citation omitted). "We may exercise our discretion and direct an award
11 of benefits where no useful purpose would be served by further administrative
12 proceedings and the record has been thoroughly developed." Id. (citation
13 omitted). "Remand for further proceedings is appropriate where there are
14 outstanding issues that must be resolved before a determination can be made, and it
15 is not clear from the record that the ALJ would be required to find the claimant
16 disabled if all the evidence were properly evaluated." Id. (citations omitted); see
17 also Reddick v. Chater, 157 F.3d 715, 729 (9th Cir. 1998) ("We do not remand this
18 case for further proceedings because it is clear from the administrative record that
19 Claimant is entitled to benefits.").

20 In this case, the record has not been fully developed. The ALJ must
21 specifically provide specific and legitimate reasons for rejecting the medical
22 opinions of Dr. Sadr, and clear and convincing reasons for rejecting Plaintiff's
23 subjective complaints of impairment. Accordingly, remand for further proceedings
24 is appropriate.

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27 ultimate finding in that regard was that, despite Plaintiff's claims that his daily
28 activities are limited, his allegations are not supported by the medical evidence. Id.
As discussed above, a lack of objective medical evidence, on its own, cannot
support an ALJ's rejection of Plaintiff's subjective complaints. Rollins, 261 F.3d at
857; Mendoza, 2017 WL 2874622, at *1.

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IX.

RECOMMENDATION

For the foregoing reasons, it is recommended that judgment be entered REVERSING the decision of the Commissioner and REMANDING this action for further proceedings consistent with this Order.

Dated: August 31, 2017



HONORABLE KENLY KIYA KATO
United States Magistrate Judge