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

DELIA A. GILLESPIE-BELLA,)	NO. CV 16-9534-KS
Plaintiff,)	
v.)	MEMORANDUM OPINION AND
)	ORDER
NANCY A. BERRYHILL, Acting)	
Commissioner of Social Security,)	
Defendant.)	

INTRODUCTION

Delia A. Gillespie-Bella (“Plaintiff”) filed a Complaint on December 27, 2016, seeking review of the denial of her application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act. (Dkt. No. 1.) The parties have consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. (Dkt. Nos. 12-14.) On June 12, 2018, the parties filed a Joint Stipulation. (Dkt. No. 31 (“Joint Stip.”).) Plaintiff seeks an order reversing the Commissioner’s decision and ordering the payment of benefits or, in the alternative, remanding for further proceedings. (Joint Stip. at 14-15, 20.) The Commissioner

1 requests that the ALJ's decision be affirmed or, in the alternative, remanded for
2 further proceedings. (*Id.* at 20-22.) The Court has taken the matter under submission
3 without oral argument.
4

5 **SUMMARY OF PRIOR PROCEEDINGS**

6

7 Prior to the instant application, Plaintiff filed two other applications for SSI.
8 (Administrative Record ("AR") 358-59.) The first was filed on January 16, 2008 and
9 denied on July 2, 2008. (*Id.*) The second was filed on December 29, 2009 and denied
10 on June 11, 2010. (AR 359.) Plaintiff's request to reopen the second application was
11 denied. (*Id.*)
12

13 On September 20, 2010, Plaintiff, who was born on November 22, 1961, filed
14 the instant application for SSI. (AR 61, 358.) Plaintiff alleged disability commencing
15 on January 1, 2005 due to asthma, arthritis, kidney disease, diabetes, lower back
16 problems, and a heart condition. (AR 67, 359.) After the Commissioner denied
17 Plaintiff's application initially (AR 26), Plaintiff requested a hearing (AR 73). At a
18 hearing held on September 21, 2011, at which Plaintiff appeared with counsel, an
19 Administrative Law Judge ("ALJ") heard testimony from Plaintiff and a vocational
20 expert. (AR 38-57.) On October 27, 2011, the ALJ issued an unfavorable decision
21 denying Plaintiff's application for SSI. (AR 26-33.) On May 10, 2013, the Appeals
22 Council denied Plaintiff's request for review. (AR 1-6.)
23

24 Plaintiff filed a Complaint in the district court in Case No. CV 13-4585-PLA.
25 On April 3, 2014, the Magistrate Judge reversed the final decision of the
26 Commissioner for failure to properly consider the opinion of an examining physician
27 and remanded the action for further administrative proceedings. (AR 440-49.)
28

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1 On April 11, 2016, an administrative hearing was held (AR 382-87) but was
2 continued until August 10, 2016 (AR 565-94). At the continued hearing, Plaintiff
3 appeared with counsel, and the ALJ heard testimony from two medical experts,
4 Plaintiff, and a vocational expert. (*Id.*) On September 7, 2016, the ALJ issued an
5 unfavorable decision denying Plaintiff's application for SSI. (AR 358-76.)
6

7 **SUMMARY OF LATEST ADMINISTRATIVE DECISION**

8

9 The ALJ found that Plaintiff had not engaged in substantial gainful activity since
10 her September 20, 2010 application date and that Plaintiff had the following severe
11 impairments: arthritis of the back and right shoulder, asthma, hypertension, history of
12 compensated liver cirrhosis due to ethanol abuse, diabetes mellitus, polyneuropathy
13 with decreased bilateral foot sensation with a normal gait, and depression. (AR 361.)
14 The ALJ found that Plaintiff did not have an impairment or combination of
15 impairments that met or medically equaled the severity of any impairment listed in the
16 Commissioner's Listing of Impairments. (AR 362.) The ALJ found that Plaintiff had
17 the residual functional capacity ("RFC") to perform the equivalent of light work with
18 additional postural limitations and a limitation to simple, repetitive work. (AR 364.)
19 Although Plaintiff had no past relevant work (AR 374), the ALJ found that she could
20 perform other work in the national economy: laundry worker, mail clerk, and office
21 helper (AR 375). Accordingly, the ALJ concluded that Plaintiff was not disabled
22 within the meaning of the Social Security Act. (*Id.*)
23

24 **STANDARD OF REVIEW**

25

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

1 evidence is ‘more than a mere scintilla but less than a preponderance; it is such
2 relevant evidence as a reasonable mind might accept as adequate to support a
3 conclusion.’” *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d 519, 522-23 (9th Cir. 2014)
4 (citations omitted). “Even when the evidence is susceptible to more than one rational
5 interpretation, we must uphold the ALJ’s findings if they are supported by inferences
6 reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir.
7 2012).

8
9 Although this Court cannot substitute its discretion for the Commissioner’s, the
10 Court nonetheless must review the record as a whole, “weighing both the evidence
11 that supports and the evidence that detracts from the [Commissioner’s]
12 conclusion.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citation
13 omitted); *Desrosiers v. Sec’y of Health and Human Servs.*, 846 F.2d 573, 576 (9th Cir.
14 1988). “The ALJ is responsible for determining credibility, resolving conflicts in
15 medical testimony, and for resolving ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035,
16 1039 (9th Cir. 1995).

17
18 The Court will uphold the Commissioner’s decision when the evidence is
19 susceptible to more than one rational interpretation. *Burch v. Barnhart*, 400 F.3d 676,
20 679 (9th Cir. 2005). However, the Court may review only the reasons stated by the
21 ALJ in his decision “and may not affirm the ALJ on a ground upon which he did not
22 rely.” *Orn*, 495 F.3d at 630; *see also Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir.
23 2003). The Court will not reverse the Commissioner’s decision if it is based on
24 harmless error, which exists if the error is “‘inconsequential to the ultimate
25 nondisability determination,’ or that, despite the legal error, ‘the agency’s path may
26 reasonably be discerned.’” *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir.
27 2015) (citations omitted).

28 ///

1 F.3d 1090, 1102 (9th Cir. 2014). “First, the ALJ must determine whether the claimant
2 has presented objective medical evidence of an underlying impairment which could
3 reasonably be expected to produce the pain or other symptoms alleged.” *Treichler*,
4 775 F.3d at 1102 (quoting *Lingenfelter*, 504 F.3d at 1036). “Second, if the claimant
5 has produced that evidence, and the ALJ has not determined that the claimant is
6 malingering, the ALJ must provide specific, clear and convincing reasons for rejecting
7 the claimant’s testimony regarding the severity of the claimant’s symptoms” and those
8 reasons must be supported by substantial evidence in the record. *Id.*; *see also Marsh*
9 *v. Colvin*, 792 F.3d 1170, 1174 n.2 (9th Cir. 2015).

10
11 In assessing a plaintiff’s testimony, the ALJ may consider a number of factors,
12 including: (1) daily activities; (2) the location, duration, frequency, and intensity of
13 pain and other symptoms; (3) factors that precipitate and aggravate the symptoms; (4)
14 the type, dosage, effectiveness, and side effects of any medication an individual takes
15 or has taken to alleviate pain or other symptoms; (5) treatment, other than medication,
16 an individual receives or has received for relief of pain or other symptoms; (6) any
17 measures other than treatment an individual uses or has used to relieve pain or other
18 symptoms; and (7) any other factors concerning an individual’s functional limitations
19 and restrictions due to pain or other symptoms. SSR 16-3P, 2017 WL 5180304, at *7-
20 *8; 20 C.F.R. § 416.929(c). The ALJ must also “specifically identify the testimony
21 [from the claimant that] she or he finds not to be credible and . . . explain what
22 evidence undermines the testimony.” *Treichler*, 775 F.3d at 1102 (quoting *Holohan*
23 *v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001)). “General findings are
24 insufficient.” *Brown-Hunter*, 806 F.3d at 493 (quoting *Reddick v. Chater*, 157 F.3d
25 715, 722 (9th Cir. 1998)).

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1 **B. Plaintiff’s Testimony**

2
3 During the administrative hearing, Plaintiff testified about her symptoms. She
4 said she is “completely deaf” in one ear. (AR 579.) She can stand and walk for five
5 to ten minutes at a time. (AR 579-80.) Sometimes, she cannot get out of bed on her
6 own because of low back pain. (AR 580.) She cannot stand, especially when she is
7 washing dishes. (*Id.*) She can sit for 25 minutes at a time. (AR 581.)

8
9 She takes many medications, including Neurontin and Gabapentin, but has no
10 side effects. (AR 582.) She has someone drive her to doctor’s appointments. (AR
11 583.) She cannot shop for groceries, has no social activities, and spends most of the
12 day watching television. (*Id.*) She can lift only about two pounds at a time, anything
13 heavier causes her back to hurt. (AR 584.) Although she attended the administrative
14 hearing with a cane, it was not medically prescribed. (*Id.*) She last drank alcohol in
15 2004, and any evidence to the contrary is “not true.” (AR 585-86.)

16
17 **C. Analysis**

18
19 As an initial matter, the Commissioner points out that the ALJ noted evidence
20 suggesting that Plaintiff engaged in malingering during a 2010 consultative
21 examination. (Joint Stip. at 17 (citing AR 258-59).) This evidence, however, does
22 not alter the Court’s legal standard, nor is it construed as a reason why the ALJ
23 rejected Plaintiff’s subjective complaints. First, because the Commissioner only
24 mentions this evidence but does not argue that it should lower the applicable legal
25 standard, the Court still applies the “clear and convincing” standard. *See Ghanim v.*
26 *Colvin*, 763 F.3d 1154, 1163 n.9 (9th Cir. 2014) (declining to apply a lesser legal
27 standard to the evaluation of a claimant’s subjective complaints in light of evidence of
28 malingering where the Commissioner did not expressly argue for it); *see also Burrell*

1 v. *Colvin*, 775 F.3d 1133, 1136 and n.1 (9th Cir. 2014) (same). Second, this evidence
2 is not construed as a reason why the ALJ rejected Plaintiff’s subjective complaints
3 because the ALJ never specifically linked this reason to her rejection of Plaintiff’s
4 complaints. See *Brown-Hunter*, 806 F.3d at 494.

5
6 Moreover, the Court may review only the reasons the ALJ actually asserts to
7 reject Plaintiff’s testimony. See *Burrell*, 775 F.3d at 1138 (citing *Connett*, 340 F.3d at
8 874). The Court may not take an ALJ’s general finding—about an unspecified
9 conflict between Plaintiff’s testimony and the evidence—and comb the administrative
10 record to find specific conflicts that the ALJ never identified. *Id.* Thus, the Court
11 may review only the reasons that the ALJ specifically identified as reasons to reject
12 Plaintiff’s subjective complaints, and only the evidence that the ALJ specifically
13 linked to those reasons.

14
15 Here, the ALJ determined that although Plaintiff’s “medically determinable
16 impairments could reasonably be expected to cause the alleged symptoms,” her
17 subjective symptom allegations were “not entirely consistent with the medical
18 evidence and other evidence in the record.” (AR 364-65.) As support for this
19 determination, in two separate parts of the ALJ’s decision, the ALJ made specific
20 findings with links to the medical record that, collectively, amounted to five reasons
21 to reject Plaintiff’s testimony. (AR 368, 374.)

22
23 First, the ALJ found that despite Plaintiff’s liver condition, she had continued to
24 use alcohol and had made statements that were inconsistent with her hearing
25 testimony that she last used alcohol in 2004, which led the ALJ to conclude that her
26 “efforts to improve her condition and symptoms are poor and reflect negatively on her
27 overall consistency.” (AR 368.) The ALJ identified two pieces of evidence in this
28 regard: (1) “a June 6, 2014, treatment note reflects active alcohol usage, which

1 contradicts her hearing testimony that she last drank in 2004” (AR 368 (citing AR
2 937)); and (2) in May 2010, Plaintiff told an examining psychologist that she last
3 drank two or three months earlier (AR 371 (citing AR 256)).¹
4

5 A claimant’s inconsistent statements about her use of drugs or alcohol may be a
6 legally sufficient reason to reject her subjective symptom testimony. *See Thomas v.*
7 *Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002); *Verduzco v. Apfel*, 188 F.3d 1087, 1090
8 (9th Cir. 1990). Here, although the first piece of cited evidence did not support the
9 ALJ’s determination in this regard, the second piece did. The first piece of cited
10 evidence, the treatment note from June 6, 2014, shows that although Plaintiff
11 reportedly smelled like alcohol, she affirmatively denied alcohol use and claimed to
12 have had an energy drink. (AR 937.) Regardless of whether Plaintiff was truthful,
13 this evidence did not clearly demonstrate that she had made an inconsistent statement
14 about alcohol use. However, the second piece of cited evidence, the May 2010
15 psychological examination, does show that Plaintiff told the psychologist that she last
16 used alcohol two or three months earlier (AR 256), which was inconsistent with her
17 hearing testimony that she last used alcohol in 2004 (AR 585-86). Thus, Plaintiff’s
18 statement to the examining psychologist in May 2010 was a legally sufficient reason
19 for the ALJ to reject Plaintiff’s subjective symptom testimony based on inconsistent
20 statements about alcohol use.

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23
24 ¹ Although the evidence of the May 2010 psychological examination was
25 discussed on a different page of the ALJ’s decision (AR 371) than the page discussing
26 Plaintiff’s alcohol use (AR 368), the ALJ’s discussion of the May 2010 examination
27 was sufficiently detailed and specific for the Court to determine that it was “linked” to
28 the ALJ’s evaluation of Plaintiff’s subjective symptom allegations based on the
inconsistency of her statements about alcohol use. *See Brown-Hunter*, 806 F.3d at
494.

1 Second, the ALJ found that Plaintiff’s allegations were not fully consistent with
2 the record, specifically because Plaintiff had informed two medical providers that she
3 was independent in her activities of daily living. (AR 374 (citing AR 957, 1755).) A
4 claimant’s statements about her daily activities that “contradict [her] other testimony”
5 may be a legally sufficient reason to reject her subjective symptom allegations. *See*
6 *Orn*, 495 F.3d at 639. Plaintiff disputes this reason, however, because the ALJ did not
7 “specifically identify” what testimony by Plaintiff was inconsistent with her two
8 statements to the medical providers about her daily activities. (Joint Stip. at 12.) The
9 Court concurs. *See Burrell*, 775 F.3d at 1138 (“[T]he ALJ did not elaborate on *which*
10 daily activities conflicted with *which* part of Claimant’s testimony.”) (emphasis in
11 original); *see also Ross v. Berryhill*, 711 F. App’x 384, 386 (9th Cir. 2017) (“[T]he
12 ALJ failed to identify specific symptom testimony the ALJ found to be inconsistent
13 with [the claimant’s] reported activities of daily living.”). Accordingly, this was not a
14 legally sufficient reason to reject Plaintiff’s subjective symptom allegations.

15
16 Third, the ALJ found medical non-compliance: “on repeated occasions,
17 treatment notes document that [Plaintiff] failed to keep her appointments, which
18 indicates that she was non-compliant with her medical regimen.” (AR 374.) As
19 support, the ALJ cited several instances from the record in which Plaintiff had failed
20 to keep a medical appointment. (AR 367 n.4.) According to the record submitted to
21 the Court, the missed appointments occurred over several years. (*Id.*, citing AR 238
22 [February 2, 2010]; 237 [February 22, 2010]; 276 [September 23, 2010]; 799
23 [February 22, 2011]; 345 [May 5, 2011]; 796 [May 31, 2011]; 792 [July 29, 2011];
24 343 [September 12, 2011]; 1016 [November 3, 2011]; 1014 [April 26, 2012]; 785
25 [December 6, 2012]; 1002 [May 2, 2013]; 930 [July 10, 2014]; 930 [July 24, 2014];
26 and 946 [August 5, 2014].) This was a legally sufficient reason to reject Plaintiff’s
27 subjective symptom allegations. *See, e.g., Molina*, 674 F.3d at 1113 (“We have long
28 held that, in assessing a claimant’s [subjective allegations], the ALJ may properly rely

1 on ‘unexplained or inadequately explained failure to follow a prescribed course of
2 treatment.’”) (quoting *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008));
3 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (noting that a failure to follow
4 prescribed treatment may “cast doubt on the sincerity of the claimant’s pain
5 testimony”); *see also Marsh v. Colvin*, 792 F.3d 1170, 1173 n.2 (9th Cir. 2015)
6 (holding that the ALJ properly rejected the claimant’s symptom testimony in part
7 because gaps existed in her treatment regimen).

8
9 Plaintiff disputes this reason on multiple grounds. (Joint Stip. at 12-13.)
10 Initially, Plaintiff argues that the missed appointments did not occur very often
11 because they were spread over several years. (*Id.* at 12.) But this circumstance does
12 not invalidate the ALJ’s reasoning. Plaintiff’s missed appointments were sufficiently
13 numerous and regular so that the ALJ could have reasonably inferred non-compliance.
14 *See Agatucci v. Berryhill*, 721 F. App’x 614, 618 (9th Cir. 2017) (upholding the ALJ’s
15 finding of non-compliance despite the claimant’s argument that she only missed two
16 appointments and could not afford treatment). Similarly, Plaintiff argues that the
17 medical record is otherwise voluminous and demonstrates her compliance with
18 treatment. (Joint Stip. at 12-13.) But the ALJ’s finding of non-compliance was not
19 precluded by the fact that Plaintiff did attend several other medical appointments. *See*
20 *Burch*, 400 F.3d at 681 (“That Burch’s pain was not severe enough to motivate her to
21 seek these forms of treatment, *even if she sought some treatment*, is powerful evidence
22 regarding the extent to which she was in pain.”) (emphasis added) (citation and
23 brackets omitted). Finally, Plaintiff suggests that her missed appointments should be
24 excused because of her depression. (Joint Stip. at 13.) But the Court has reviewed the
25 medical record and has found “no medical evidence that [Plaintiff’s] resistance [to
26 treatment] was attributable to her mental impairment rather than her own personal
27 preference.” *See Molina*, 674 F.3d at 1114. Indeed, the medical record contains little
28 evidence of any limitations from Plaintiff’s depression during the relevant period. In

1 sum, Plaintiff has not shown any legitimate explanation for her numerous missed
2 appointments. *See Fair*, 885 F.2d at 604 (affirming ALJ’s credibility evaluation
3 where the claimant “has not put forward any evidence that reconciles the
4 inconsistency between [her] words and [her] actions” regarding her non-compliance
5 with her treatment regimen). Thus, the Court cannot conclude that the ALJ made an
6 unreasonable inference of non-compliance from the evidence. *See Sample v.*
7 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (stating that in reaching findings the
8 ALJ “is entitled to draw inferences logically flowing from the evidence”).
9

10 Fourth, the ALJ found that Plaintiff used a cane that no doctor had prescribed:
11 “[T]here is no indication that [Plaintiff’s] use of a cane is medically necessary. . . . In
12 fact, [Plaintiff] admitted in her testimony that her cane is not prescribed [AR 584],
13 which suggests that she is able to walk away from such an assistance device without
14 significant difficulty.” (AR 374.) As Plaintiff points out, however, the ALJ did not
15 articulate how this fact warranted rejection of Plaintiff’s testimony. (Joint Stip. at 12.)
16 The Court concurs. Although a claimant’s use of a cane in an attempt to mislead the
17 ALJ may be a factor to discount his or her subjective allegations, *see Verduzco*, 188
18 F.3d at 1090, the record here does not demonstrate a similar attempt to mislead, given
19 Plaintiff’s admission that the cane was not medically prescribed (AR 584). The ALJ
20 did not give any other clear explanation for why Plaintiff’s use of a cane that she
21 admitted was not prescribed should cast doubt on her allegations. *See Lewin v.*
22 *Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981) (emphasizing that it is incumbent upon
23 an ALJ to make specific findings so the reviewing court “may not speculate” as to the
24 findings). Accordingly, this reason was not legally sufficient to reject Plaintiff’s
25 subjective symptom testimony.
26

27 Fifth, the ALJ found that “[b]oth [Plaintiff’s] physical and mental impairments
28 appear controlled with medication.” (AR 374.) The ALJ did not, however, cite any

1 evidence for this proposition as to Plaintiff's mental impairments. The only
2 supporting evidence cited by the ALJ for this reason is a reference to four pieces of
3 evidence that the ALJ construed as showing Plaintiff's diabetes, hypertension, and
4 asthma were "well-controlled" or "controlled." (AR 366 n.3, citing AR 989 [July 2,
5 2013]; 976 [February 13, 2014]; 963 [May 5, 2014]; and 927 [August 25, 2014].)
6 Although evidence from other time periods showed poor control of Plaintiff's diabetes
7 and hypertension (AR 275, 1264, 1352, 1523, 1697), the ALJ's interpretation of the
8 evidence as demonstrating apparent control with medication was rational. *See Burch*,
9 400 F.3d at 679. Accordingly, the Court finds that this reason was legally sufficient in
10 part: as to Plaintiff's impairments of diabetes, hypertension, and asthma, the ALJ's
11 identification of evidence showing control with medication gave rise to a legally
12 sufficient reason to reject Plaintiff's subjective symptom allegations as to those
13 physical impairments. *See Warre v. Comm'r of the SSA*, 439 F.3d 1001, 1006 (9th
14 Cir. 2006) ("Impairments that can be controlled effectively with medication are not
15 disabling for the purpose of determining eligibility for SSI benefits."); *see also*
16 *Morgan v. Comm'r of the SSA*, 169 F.3d 595, 600 (9th Cir. 1999) (holding that an
17 ALJ properly rejected a claimant's complaints by pointing to specific evidence of
18 improvement with the use of medication); *Odle v. Heckler*, 707 F.2d 439, 440 (9th
19 Cir. 1983) (noting that an ALJ may consider whether treatment produced a fair
20 response or control of pain that was satisfactory).

21
22 In sum, the ALJ provided three reasons that were legally sufficient to discount
23 Plaintiff's subjective symptom allegations: inconsistent statements about alcohol use;
24 non-compliance with her treatment regimen; and control of her diabetes, hypertension,
25 and asthma with medication. The ALJ also provided at least two other reasons, based
26 on Plaintiff's statements about daily activities and her use of a non-prescribed cane,
27 which were legally insufficient but amounted to harmless error. *See Carmickle v.*
28 *Comm'r, SSA*, 533 F.3d 1155, 1162-63 (9th Cir. 2008) (holding that an ALJ's reliance

1 on two unsupported reasons was harmless error where the adverse credibility
2 determination otherwise was supported by legally sufficient reasons). Accordingly,
3 this issue does not warrant reversal.

4
5 **CONCLUSION**
6

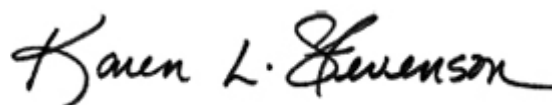
7 For the reasons stated above, the Court finds that the Commissioner's decision is
8 supported by substantial evidence and free from material legal error. Neither reversal
9 of the ALJ's decision nor remand is warranted.

10
11 Accordingly, IT IS ORDERED that Judgment shall be entered affirming the
12 decision of the Commissioner of the Social Security Administration.

13
14 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of
15 this Memorandum Opinion and Order and the Judgment on counsel for Plaintiff and
16 Defendant.

17
18 LET JUDGMENT BE ENTERED ACCORDINGLY.
19

20
21 DATE: August 20, 2018

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24

KAREN L. STEVENSON
25 UNITED STATES MAGISTRATE JUDGE
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