

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

| | | |
|--|---|------------------------------|
| ALFRED AHMED CAREW, | } | Case No. CV 17-01417-DFM |
| Plaintiff, | | MEMORANDUM OPINION AND ORDER |
| v. | | |
| NANCY A. BERRYHILL, Acting Commissioner of Social Security, | | } |
| Defendant. | | |

Alfred Ahmed Carew (“Plaintiff”) appeals from the Social Security Commissioner’s final decision denying his application for Disability Insurance Benefits (“DIB”). For the reasons discussed below, the Commissioner’s decision is reversed and this matter is remanded for further proceedings.

I.
BACKGROUND

Plaintiff filed an application for DIB alleging disability beginning on February 11, 2013. See Administrative Record (“AR”) 23, 170-71. After Plaintiff’s claim was denied, he requested a hearing before an administrative law judge (“ALJ”). See AR 72-73.

On April 29, 2015, at a hearing at which Plaintiff appeared with counsel,

1 the ALJ heard testimony from Plaintiff, a medical expert, and a vocational
2 expert. See AR 37-53.

3 On May 12, 2015, the ALJ issued a written decision denying Plaintiff's
4 claim for benefits after applying the five-step sequential evaluation. See AR 23-
5 31. First, Plaintiff had not engaged in substantial gainful activity since the
6 alleged onset date. See AR 25. Second, Plaintiff had severe impairments
7 consisting of carpal tunnel syndrome, osteoarthritis, degenerative disc disease,
8 and plantar fasciitis. See id. Third, Plaintiff did not have an impairment or
9 combination of impairments that met or equaled the requirements of a listed
10 impairment. See AR 26. Fourth, based on Plaintiff's residual functional
11 capacity for a reduced level of light work, he could return to his past relevant
12 work as a deli assistant manager. See AR 26, 29. Fifth, in the alternative,
13 Plaintiff could perform other jobs existing in significant numbers in the
14 national economy: case aide and information clerk. See AR 30-31.
15 Accordingly, the ALJ concluded that Plaintiff was not disabled. See AR 31.

16 On December 20, 2016, the Appeals Council denied review of the ALJ's
17 decision, which became the final decision of the Commissioner. See AR 1-5.
18 Plaintiff sought judicial review in this Court. See Dkt. 1.

19 II.

20 DISCUSSION

21 The parties dispute whether the ALJ properly considered Plaintiff's
22 testimony. See Joint Submission (Dkt. 17) ("JS") at 4.

23 A. Applicable Law

24 The court engages in a two-step analysis to review the ALJ's evaluation
25 of Plaintiff's symptom testimony. See Trevizo v. Berryhill, 871 F.3d 664, 678
26 (9th Cir. 2017). First, the ALJ must determine whether the claimant has
27 presented objective medical evidence of an underlying impairment that could
28 reasonably be expected to produce the symptoms alleged. See id. If the

1 claimant satisfies this first step, and there is no evidence of malingering, the
2 ALJ can reject the claimant’s testimony about the severity of symptoms only
3 by offering specific, clear and convincing reasons for doing so. See id.

4 **B. Analysis**

5 During the hearing, Plaintiff testified as follows about his alleged
6 impairments and symptoms. He stopped working in 2013, when he fell at his
7 job at a deli. See AR 41. He cannot work because of problems with his wrist,
8 back, and foot. See AR 42. He does not drive but uses Access, a paratransit
9 service for the disabled, for transportation. See AR 43; see also AR 308. A
10 typical day for him involves reading or going to church with his mother. See
11 AR 44. He can walk for “at least one block” but has problems with standing
12 because of his right leg. See AR 45. He uses a cane, but it was not prescribed
13 by a doctor. See id. He is right-handed, and his carpal tunnel syndrome in that
14 hand prevents him from typing. See AR 45-46. He does not drink alcohol but
15 occasionally uses medical marijuana. See AR 52.

16 The ALJ found that Plaintiff had underlying impairments that would
17 have “considerable exertional, postural, manipulative, and environmental
18 limitations.” AR 28. Nonetheless, the ALJ rejected Plaintiff’s subjective
19 symptom testimony with a two-paragraph explanation. See AR 28-29. The two
20 paragraphs had a single subject: Plaintiff’s testimony was inconsistent with the
21 medical record. See id.

22 Where, as in this case, “the claimant produces objective medical
23 evidence of an underlying impairment, an adjudicator may not reject a
24 claimant’s subjective complaints based solely on a lack of objective medical
25 evidence to fully corroborate the alleged severity of pain.” Bunnell v. Sullivan,
26 947 F.2d 341, 345 (9th Cir. 1991) (en banc) (citing Cotton v. Bowen, 799 F.2d
27 1403, 1407 (9th Cir. 1986)); see also Robbins v. Soc. Sec. Admin., 466 F.3d
28 880, 883 (9th Cir. 2006) (“While an ALJ may find testimony not credible in

1 part or in whole, he or she may not disregard it solely because it is not
2 substantiated affirmatively by objective medical evidence.”). Because the ALJ
3 rejected Plaintiff’s testimony solely for lack of objective medical support, that
4 determination was legally erroneous. See Moisa v. Barnhart, 367 F.3d 882, 885
5 (9th Cir. 2004) (“[T]he ALJ rejected Moisa’s pain testimony solely for lack of
6 objective medical evidence corroborating it. . . . His rejection of Moisa’s pain
7 testimony was therefore clear error.”).

8 The Commissioner contends that the ALJ relied on other reasons—
9 Plaintiff’s conservative treatment and inconsistent statements—to reject
10 Plaintiff’s testimony on legally adequate grounds. See JS at 11, 14. But the
11 ALJ did not actually articulate these other reasons to reject Plaintiff’s
12 testimony, so the Court cannot consider them. See Connett v. Barnhart, 340
13 F.3d 871, 874 (9th Cir. 2003) (“We are constrained to review the reasons the
14 ALJ asserts.”); Ceguerra v. Sec’y of Health and Human Servs., 933 F.2d 735,
15 738 (9th Cir. 1991) (“A reviewing court can evaluate an agency’s decision only
16 on the grounds articulated by the agency.”). In particular, the Court cannot
17 link the ALJ’s comments elsewhere in the decision about the evidence to the
18 ALJ’s rejection of Plaintiff’s testimony, because the ALJ did not articulate that
19 link in the first instance. See Brown-Hunter v. Colvin, 806 F.3d 487, 494 (9th
20 Cir. 2015) (“[The ALJ] did not link that testimony to the particular parts of the
21 record supporting her non-credibility determination. . . . [T]he error could not
22 be corrected by the district court’s statement of links between claimant
23 testimony and certain medical evidence.”) (citing Burrell v. Colvin, 775 F.3d
24 1133, 1138 (9th Cir. 2014)).

25 In any event, the sole reason articulated by the ALJ to reject Plaintiff’s
26 testimony, for lack of supporting objective medical evidence, did not reflect an
27 accurate view of the record as a whole. See Ghanim v. Colvin, 763 F.3d 1154,
28 1164 (9th Cir. 2014) (“[T]he treatment records must be viewed in light of the

1 overall diagnostic record.”) (citations omitted). For example, the ALJ found
2 that “there is no indication that [Plaintiff’s] cane has been prescribed or was
3 mentioned in any of his progress notes.” AR 28. This does not account for the
4 fact that Plaintiff openly acknowledged at the hearing that his cane was not
5 medically prescribed. See AR 45. Given Plaintiff’s candor on this point, it
6 provided no basis for the apparent inference that he was being dishonest about
7 the source of the cane.

8 The ALJ also found that the medical record showed Plaintiff’s “objective
9 clinical presentation remains mostly normal.” AR 28. This finding is called
10 into question by evidence that Plaintiff presented for the first time to the
11 Appeals Council. See Brewes v. Comm’r of Soc. Sec. Admin., 682 F.3d 1157,
12 1163 (9th Cir. 2012) (evidence presented for the first time to the Appeals
13 Council becomes part of the administrative record, which the district court
14 must consider when reviewing the Commissioner’s final decision for
15 substantial evidence). According to that evidence, Plaintiff has a “moderate
16 pathological sleep breathing respiratory disorder,” possibly has mild
17 autonomic dysfunction, and was repeatedly treated for lumbar radiculopathy,
18 lumbar disc protrusion, right wrist/hand internal derangement, and right
19 ankle/foot osteoarthritis. AR 499, 509, 531-50. Thus, the reason actually
20 articulated by the ALJ for rejecting Plaintiff’s subjective symptom testimony
21 would not have been supported by substantial evidence.

22 Finally, the error was not harmless. The Commissioner’s failure to state
23 legally adequate reasons for rejecting a claimant’s subjective symptom
24 testimony is harmless “only if it is inconsequential to the ultimate nondisability
25 determination.” Brown-Hunter, 806 F.3d at 494 (citation omitted). A district
26 court may not find the error harmless by supplying supporting reasons from its
27 own review of the record. See id. at 492 (“A reviewing court may not make
28 independent findings based on the evidence before the ALJ to conclude that

1 the ALJ's error was harmless."'). Because the only reason articulated by the
2 Commissioner in this case was legally insufficient, the "agency's path cannot
3 reasonably be discerned," and reversal is warranted. Id. at 495 (citation
4 omitted).

5 **C. Remand for Further Proceedings**

6 The decision whether to remand for further proceedings is within this
7 Court's discretion. See Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir.
8 2000) (as amended). Where no useful purpose would be served by further
9 administrative proceedings, or where the record has been fully developed, it is
10 appropriate to exercise this discretion to direct an immediate award of benefits.
11 See id. at 1179 (noting that "the decision of whether to remand for further
12 proceedings turns upon the likely utility of such proceedings"); Benecke v.
13 Barnhart, 379 F.3d 587, 593 (9th Cir. 2004).

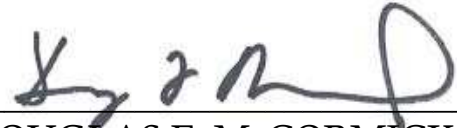
14 A remand is appropriate, however, where there are outstanding issues
15 that must be resolved before a determination of disability can be made and it is
16 not clear from the record that the ALJ would be required to find the claimant
17 disabled if all the evidence were properly evaluated. See Bunnell v. Barnhart,
18 336 F.3d 1112, 1115-16 (9th Cir. 2003); see also Garrison v. Colvin, 759 F.3d
19 995, 1021 (9th Cir. 2014) (explaining that courts have "flexibility to remand for
20 further proceedings when the record as a whole creates serious doubt as to
21 whether the claimant is, in fact, disabled within the meaning of the Social
22 Security Act."'). Here, remand for further proceedings would serve a useful
23 purpose because outstanding issues remain from the conflicting evidence about
24 whether Plaintiff is disabled. See Brown-Hunter, 806 F.3d at 495-96 (despite
25 the ALJ's failure to articulate reasons for finding a claimant's testimony not
26 credible, a reviewing court has discretion to remand for further proceedings
27 when the record raises doubts about disability) (citing Treichler v. Comm'r of
28 Soc. Sec. Admin., 775 F.3d 1090, 1101 (9th Cir. 2014) ("Where there is

1 conflicting evidence, and not all essential factual issues have been resolved, a
2 remand for an award of benefits is inappropriate.”)). Thus, this action is
3 remanded for further proceedings.

4 **III.**
5 **CONCLUSION**

6 For the reasons stated above, the decision of the Social Security
7 Commissioner is REVERSED and the action is REMANDED for further
8 proceedings.

9
10 Dated: March 22, 2018

11
12 
13 _____
14 DOUGLAS F. McCORMICK
15 United States Magistrate Judge
16
17
18
19
20
21
22
23
24
25
26
27
28