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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSE DE LA TORRE ORTIZ,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. 2:17-cv-06243-JDE

MEMORANDUM OPINION AND
ORDER

Plaintiff Jose De La Torre Ortiz (“Plaintiff”) filed a Complaint on August 23, 2017, seeking review of the Commissioner’s denial of his application for disability insurance benefits (“DIB”). The parties filed consents to proceed before the undersigned Magistrate Judge. In accordance with the Court’s Order Re: Procedures in Social Security Appeal, the parties filed a Joint Stipulation (“Jt. Stip.”) on June 8, 2018, addressing their respective positions. The Court has taken the Joint Stipulation under submission without oral argument and as such, this matter now is ready for decision.

1 I.

2 BACKGROUND

3 On October 30, 2013, Plaintiff applied for DIB, alleging disability
4 beginning August 30, 2013. Administrative Record ["AR"] 29. After his
5 application was denied initially (AR 70), and on reconsideration (AR 81),
6 Plaintiff requested an administrative hearing, which was held on January 21,
7 2016. AR 43, 45, 100. Plaintiff, represented by counsel, appeared and testified
8 before an Administrative Law Judge ("ALJ"), as did Dr. Joselyn Bailey, a
9 medical expert ("ME"), and Alan Cummings, a vocational expert. AR 45-61.

10 On February 16, 2016, the ALJ issued a written decision finding Plaintiff
11 was not disabled. AR 29-37. The ALJ found that Plaintiff had not engaged in
12 substantial gainful activity since the alleged onset date. AR 31. The ALJ
13 determined that Plaintiff suffered from the following severe impairments:
14 gastritis, gastroesophageal reflux disease, anxiety disorder, and depressive
15 disorder. AR 31. The ALJ found that Plaintiff did not have an impairment or
16 combination of impairments that met or medically equaled a listed
17 impairment. AR 32. The ALJ also found that Plaintiff had the residual
18 functional capacity ("RFC") to work, but with the following limitations:
19 Plaintiff could (1) lift, carry, push, or pull 50 pounds occasionally and 25
20 pounds frequently; (2) stand and walk for about six hours out of eight; and (3)
21 sit for about six hours out of eight. *Id.* The ALJ also found that Plaintiff should
22 avoid all exposure to hazards, such as operating dangerous machinery and
23 unprotected heights, and requires a work environment free of fast-paced
24 production requirements. *Id.* The ALJ determined that Plaintiff was unable to
25 perform his past relevant work as a sanding machine operator, and that he was
26 closely approaching advanced age on the alleged onset date. AR 36. The ALJ
27 also found that Plaintiff could not communicate in English and therefore is
28 considered in the same fashion as an individual who is illiterate. AR 36.

1 Considering Plaintiff's age, education, work experience, and RFC, the ALJ
2 concluded he was capable of performing jobs that exist in significant numbers
3 in the national economy, including: packager (Dictionary of Occupational
4 Titles ["DOT"] 920.587-018); assembler (DOT 806.684-010); and cleaner
5 (DOT 381.687-018). AR 36-37. Accordingly, the ALJ concluded that Plaintiff
6 was not under a "disability," as defined in the Social Security Act. AR 37.

7 On June 23, 2017, the Appeals Council denied Plaintiff's request for
8 review, making the ALJ's decision the Commissioner's final decision. AR 1-3.
9 This action followed.

10 II.

11 STANDARD OF REVIEW

12 Under 42 U.S.C. § 405(g), a district court may review a decision to deny
13 benefits. The ALJ's findings and decision should be upheld if they are free
14 from legal error and supported by substantial evidence based on the record as a
15 whole. Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015) (as
16 amended); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
17 evidence means such relevant evidence as a reasonable person might accept as
18 adequate to support a conclusion. Lingenfelter v. Astrue, 504 F.3d 1028, 1035
19 (9th Cir. 2007). It is more than a scintilla, but less than a preponderance. Id.
20 To determine whether substantial evidence supports a finding, the reviewing
21 court "must review the administrative record as a whole, weighing both the
22 evidence that supports and the evidence that detracts from the Commissioner's
23 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). "If the
24 evidence can reasonably support either affirming or reversing," the reviewing
25 court "may not substitute its judgment" for that of the Commissioner. Id. at
26 720-21; see also Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012) ("Even
27 when the evidence is susceptible to more than one rational interpretation, [the
28 court] must uphold the ALJ's findings if they are supported by inferences

1 reasonably drawn from the record.”). However, a court may review only the
2 reasons stated by the ALJ in his decision “and may not affirm the ALJ on a
3 ground upon which he did not rely.” Orn v. Astrue, 495 F.3d 625, 630 (9th
4 Cir. 2007).

5 Lastly, even when the ALJ commits legal error, the Court upholds the
6 decision where that error is harmless. Molina, 674 F.3d at 1115. An error is
7 harmless if it is “inconsequential to the ultimate nondisability determination,”
8 or if “the agency’s path may reasonably be discerned, even if the agency
9 explains its decision with less than ideal clarity.” Brown-Hunter, 806 F.3d at
10 492 (citation omitted).

11 III.

12 DISCUSSION

13 The parties present five disputed issues (Jt. Stip. at 3)¹:

14 Issue No. 1: Whether the ALJ properly found Plaintiff partially credible;

15 Issue No. 2: Whether the ALJ conducted a proper analysis at step three;

16 Issue No. 3: Whether the ALJ erred by failing to summarize and weigh
17 evidence of chronic pain;

18 Issue No. 4: Whether the RFC is defective because the ALJ failed to
19 address all the limitations related to Plaintiff’s anxiety and depression; and

20 Issue No. 5: Whether the ALJ erred in evaluating medical opinions.

21 A. Plaintiff’s subjective symptom testimony

22 Where a disability claimant produces objective medical evidence of an
23 underlying impairment that could reasonably be expected to produce the pain
24 or other symptoms alleged, absent evidence of malingering, the ALJ must
25 provide “‘specific, clear and convincing reasons for’ rejecting the claimant’s
26

27 ¹ The Court has reordered the issues as presented by the parties because they are
28 interrelated and dependent on a proper determination of the first issue.

1 testimony regarding the severity of the claimant’s symptoms.” Treichler v.
2 Comm’r Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th Cir. 2014) (citation
3 omitted); Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); see also 20
4 C.F.R. § 404.1529(a). The ALJ’s findings “must be sufficiently specific to
5 allow a reviewing court to conclude that the [ALJ] rejected [the] claimant’s
6 testimony on permissible grounds and did not arbitrarily discredit the
7 claimant’s testimony.” Moisa, 367 F.3d at 885 (citation omitted). However, if
8 the ALJ’s assessment of the claimant’s testimony is reasonable and is
9 supported by substantial evidence, it is not the court’s role to “second-guess” it.
10 See Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).²

11 During the administrative hearings, Plaintiff testified that he is 55 years
12 old, cannot read or write English, and has a sixth grade education. AR 51, 57.
13 He worked for 22 years operating machines and metal grinders at a company,
14 but he stopped in 2013 when his doctor “put [him] on Disability.” AR 52, 54-
15 55. He lives in an apartment with a woman who helps him with his daily
16 activities. AR 51. He can assist with grocery shopping, but he cannot clean the
17 apartment, cook, do his own laundry, or drive. AR 51, 55-56. He is limited to
18 sitting for only 20 to 30 minutes, and standing for about 20 minutes. AR 52.
19 He can walk two to three blocks before he experiences shortness of breath,

20 ² After the ALJ’s decision, SSR 16-3p went into effect. See SSR 16-3p, 2016 WL
21 1119029 (Mar. 16, 2016). SSR 16-3p provides that “we are eliminating the use of the
22 term ‘credibility’ from our sub-regulatory policy, as our regulations do not use this
23 term.” Id. Moreover, “[i]n doing so, we clarify that subjective symptom evaluation is
24 not an examination of an individual’s character” and requires that the ALJ consider
25 all of the evidence in an individual’s record when evaluating the intensity and
26 persistence of symptoms. Id.; Trevizo v. Berryhill, 871 F.3d 664, 678 n.5 (9th Cir.
27 2017) (as amended). Thus, the adjudicator “will not assess an individual’s overall
28 character or truthfulness in the manner typically used during an adversarial court
litigation. The focus of the evaluation of an individual’s symptoms should not be to
determine whether he or she is a truthful person.” SSR 16-3p, 2016 WL 1119029, at
*10.

1 asphyxiation, and gassiness. AR 52-53. He also experiences anxiety,
2 nervousness, panic, poor concentration, forgetfulness, and he has phobias. AR
3 53, 56-57. His condition makes him feel like he is choking. AR 53. He cannot
4 be around people without feeling anxious, desperate, and like he should flee.
5 AR 57. He also has to lay down regularly on the sofa. AR 55. He is being
6 treated for his mental health condition with medication. AR 53.

7 In the decision, the ALJ summarized a portion of Plaintiff's subjective
8 allegations, and determined Plaintiff's "severe impairments can reasonably be
9 expected to cause some functional limitations," but "the extent of his alleged
10 symptoms and functional restrictions are only partially credible as the medical
11 records do not support the alleged severity of his symptoms." AR 33. The ALJ
12 then proceeded to summarize the medical evidence of record, fashion the
13 RFC, and make his non-disability determination. AR 33-36. As explained
14 below, the Court finds the ALJ failed to provide legally sufficient reasons for
15 discrediting Plaintiff's testimony.

16 Preliminarily, the Court disagrees with Defendant that the ALJ found
17 Plaintiff's daily activities undermined his credibility. Jt. Stip. at 37-38. The
18 footnote cited by Defendant explains the ALJ's finding that Plaintiff had
19 "mild" limitation in social functioning, in part because Plaintiff could use
20 public transportation, go out alone, and attend church. *Id.* at 38, citing AR at
21 35 n.2. The ALJ did not specifically indicate this as a reason for doubting
22 Plaintiff's credibility; rather he examined the factor "[i]n formulating the
23 mental aspects of the [RFC.]" AR 34.³ Even if it could be gleaned from the
24 decision that the ALJ relied on those daily activities to discount Plaintiff's
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26 ³ Plaintiff contends that the ALJ's mention of daily activities was taken from the
27 analysis of the "paragraph B" sections of listing 12.00, in the ALJ's determination of
28 whether Plaintiff met and/or equaled a listing at step three. *See* Jt. Stip. at 39.

1 testimony, the finding is insufficient. The ability to engage in such meager
2 activities has been found unpersuasive in discounting subjective symptom
3 testimony. *See, e.g., Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001)
4 (“This court has repeatedly asserted that the mere fact that a plaintiff has
5 carried on certain daily activities, such as grocery shopping, driving a car, or
6 limited walking for exercise, does not in any way detract from her credibility as
7 to her overall disability.”); *Goodman v. Berryhill*, 2017 WL 2610043, at *11
8 (W.D. Wash. June 16, 2017) (ALJ improperly discounted credibility based on
9 claimant’s ability to go outside alone, use public transportation, and attend
10 church, among other activities, because it was “unclear how these rather basic,
11 low-stress activities, which [claimant] ha[d] the flexibility to perform on her
12 own schedule, necessarily undermine[d] her testimony”). The Ninth Circuit
13 has “repeatedly warned that ALJs must be especially cautious in concluding
14 that daily activities are inconsistent with testimony about pain, because
15 impairments that would unquestionably preclude work and all the pressures of
16 a workplace environment will often be consistent with doing more than merely
17 resting in bed all day.” *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014).
18 “[O]nly if [her] level of activity [was] inconsistent with [a claimant’s] claimed
19 limitations would these activities have any bearing on [her] credibility.” *Id.*

20 Moreover, the ALJ failed to make any finding as to the transferability of
21 his minimal activities to the workplace. (Jt. Stip. at 13-14; AR at 35 n.2); *see*
22 *Martinez v. Berryhill*, 721 F. App’x 597, 600 (9th Cir. 2017) (ALJ improperly
23 “discounted [claimant]’s testimony based on her daily activities . . . [without]
24 support[ing] the conclusions as to the frequency of those activities or their
25 transferability to the workplace.”); *Orn*, 495 F.3d at 630 (ALJ must make
26 “specific findings related to [the daily] activities and their transferability to
27 conclude that a claimant’s daily activities warrant an adverse credibility
28 determination”); *Goodman*, 2017 WL 2610043 at *11.

1 The only articulated reason for finding Plaintiff only partially credible
2 was “the medical records do not support the alleged severity of his symptoms.”
3 AR 33.⁴ This is insufficient for two reasons. First, the Ninth Circuit has found
4 that such a finding finding, followed by a summary of the evidence, is
5 inadequate to support a finding upon review. See Brown-Hunter, 806 F.3d at
6 494 (credibility determination insufficient when ALJ “simply state[s] her non-
7 credibility conclusion and then summarize[s] the medical evidence”).

8 Second, because the ALJ did not provide any other clear and convincing
9 reason for discounting Plaintiff's subjective complaints, reliance on the lack of
10 objective evidence alone is not a sufficient basis for the ALJ's credibility
11 determination. See Rollins, 261 F.3d at 856-57; Burch v. Barnhart, 400 F.3d
12 676, 681 (9th Cir. 2005) (lack of objective medical evidence to support
13 subjective symptom allegations cannot form the sole basis for discounting pain
14 testimony); Dschaak v. Astrue, 2011 WL 4498835, at *1 (D. Or. Sept. 27,
15 2011) (“[O]nce the[] other bases for the ALJ's decision were discarded as
16 erroneous, the ALJ's credibility determination could not rely solely on
17 conflicts with the medical evidence.”).

18 The Commissioner contends that the ALJ also relied on Plaintiff's
19 response to mental health treatment. (Jt. Stip. 37.) However, the ALJ did not
20 specifically delineate that as a reason in discounting Plaintiff's subjective
21 symptoms. The Court is “constrained to review the reasons the ALJ asserts”
22 and may not affirm the decision of the Commissioner on a ground the ALJ did
23 not invoke in reaching her decision. Connett v. Barnhart, 340 F.3d 871, 874

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25 ⁴ Later in the decision, the ALJ noted the ME's testimony that Plaintiff's
26 subjective complaint that he needed to lay down was “objectively supported by the
27 record.” AR 35. However, the ALJ thereafter concluded the record did not support
28 the complaint and determined that the ME and another doctor did not provide any
“specific, objective explanation” for why Plaintiff would need to lie down. Id.

1 (9th Cir. 2003); Orn, 495 F.3d at 630. Although the ALJ mentioned that some
2 records showed improvement in response to mental health medication, those
3 notations appear in the summary of the evidence and are not tethered to any
4 specific testimony. AR 34. Without any attempt to explain how Plaintiff’s
5 treatment reflected unfavorably on specific testimony, the finding does not
6 allow for meaningful review. Brown-Hunter, 806 F.3d at 492 (federal courts
7 “demand that the agency set forth the reasoning behind its decisions in a way
8 that allows for meaningful review”).

9 Accordingly, the ALJ did not provide specific, clear and convincing
10 reasons supported by substantial evidence to discount Plaintiff’s subjective
11 symptom testimony. In this instance, the Court cannot conclude that the ALJ’s
12 error was harmless. See, e.g., Brown-Hunter, 806 F.3d at 492-93 (ALJ’s failure
13 adequately to specify reasons for discrediting claimant testimony “will usually
14 not be harmless”). In light of the significant functional limitations reflected in
15 Plaintiff’s subjective statements, the Court cannot “confidently conclude that
16 no reasonable ALJ, when fully crediting the [Plaintiff’s] testimony, could have
17 reached a different disability determination.” Stout v. Comm’r, Soc. Sec.
18 Admin., 454 F.3d 1050, 1055-56 (9th Cir. 2006).

19 **B. Remand is appropriate.**

20 The decision whether to remand for further proceedings is within this
21 Court’s discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000)
22 (as amended). Where no useful purpose would be served by further
23 administrative proceedings, or where the record has been fully developed, it is
24 appropriate to exercise this discretion to direct an immediate award of benefits.
25 See Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004); Harman, 211 F.3d
26 at 1179 (noting that “the decision of whether to remand for further proceedings
27 turns upon the likely utility of such proceedings”). A remand for further
28 proceedings is appropriate where outstanding issues must be resolved before a

1 determination of disability can be made and it is not clear from the record that
2 the ALJ would be required to find the claimant disabled and award disability
3 benefits. See Bunnell v. Barnhart, 336 F.3d 1112, 1115-16 (9th Cir. 2003).

4 Here, the Court concludes remand for further proceedings is warranted.
5 The resolution of Plaintiff's credibility affects other issues raised in the Joint
6 Stipulation. Plaintiff notes in Issue Nos. 3 and 5 that the ALJ discounted the
7 ME and another doctor in part because they took Plaintiff's subjective
8 allegations into account when rendering opinions. Jt. Stip. at 9, 19-20; AR 35.
9 Thus, a remand will allow the ALJ to reconsider those determinations, and the
10 objective evidence Plaintiff contends supported his testimony and the opinions.
11 Jt. Stip. at 9-10, 19-20. Moreover, as mentioned, Plaintiff contends that the
12 daily activities relied on by Defendant were merely a part of the step three
13 determination challenged in Issue 2. Jt. Stip. at 39. Finally, Plaintiff's
14 credibility necessarily affects his RFC, challenged in Issue No. 4. See e.g.,
15 Vaughn v. Berryhill, 242 F. Supp. 3d 998, 1010 (E.D. Cal. 2017) (dispensing of
16 exhaustive analysis of plaintiff's remaining issues because "[t]he ALJ's . . .
17 evaluations of [p]laintiff's credibility . . . are inescapably linked to conclusions
18 regarding the medical evidence"); Alderman v. Colvin, 2015 WL 12661933, at
19 *8 (E.D. Wash. Jan. 14, 2015) (remanding in light of interrelated nature of
20 ALJ's decision to discount claimant's credibility and give appropriate
21 consideration to physician's opinions).

22 Because it is unclear, in light of these issues, whether Plaintiff is in fact
23 disabled, remand here is on an "open record." See Brown-Hunter, 806 F.3d at
24 495; Bunnell, 336 F.3d at 1115-16. The parties may freely take up all issues
25 raised in the Joint Stipulation, and any other issues relevant to resolving
26 Plaintiff's claim of disability, before the ALJ.

27 Accordingly, on remand, the ALJ shall reassess Plaintiff's subjective
28 complaints, and then reassess Plaintiff's RFC in light of the subjective

1 symptom testimony and proceed through the remaining steps of the disability
2 analysis to determine what work, if any, Plaintiff is capable of performing that
3 exists in significant numbers.

4 **IV.**
5 **ORDER**

6 Pursuant to sentence four of 42 U.S.C. § 405(g), IT THEREFORE IS
7 ORDERED that Judgment be entered reversing the decision of the
8 Commissioner of Social Security and remanding this matter for further
9 administrative proceedings consistent with this Order.

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11 Dated: July 31, 2018

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14 JOHN D. EARLY
15 United States Magistrate Judge
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