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

MANUEL RAMON SILVA,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. CV 17-07808 AFM

**MEMORANDUM OPINION AND
ORDER AFFIRMING DECISION
OF COMMISSIONER**

Plaintiff filed this action seeking review of the Commissioner’s final decision denying his applications for disability insurance benefits (“DIB”) and supplemental security income (“SSI”). In accordance with the Court’s case management order, the parties have filed memorandum briefs addressing the merits of the disputed issues. This matter now is ready for decision.

BACKGROUND

On July 8, 2014, Plaintiff filed applications for DIB and SSI alleging disability beginning November 2, 2012. (Administrative Record (“AR”) 188-98.) His applications were denied initially and upon reconsideration. (AR 92-96, 102-07.)

1 Plaintiff appeared with counsel at a hearing conducted before an
2 Administrative Law Judge (“ALJ”) on March 10, 2016. (AR 33-52.) A vocational
3 expert (“VE”) also testified. On May 11, 2016, the ALJ issued a decision denying
4 benefits and finding Plaintiff not disabled (AR 28.) The ALJ found that Plaintiff had
5 not engaged in substantial gainful activity since November 2, 2012, and had the
6 following severe impairments: morbid obesity, obstructive sleep apnea (“OSA”),
7 chronic obstructive pulmonary disease (“COPD”), degenerative joint disease in the
8 bilateral knees, lumbar spinal stenosis, degenerative disc disease of the lumbar spine,
9 lumbago, myalgia, and myositis. (AR 21.) The ALJ further found Plaintiff did not
10 have an impairment or combination of impairments that met or medically equaled
11 the severity of one of the listed impairments. (AR 22.)

12 After consideration of Plaintiff’s subjective symptom testimony and the
13 medical evidence, the ALJ found that Plaintiff retained the residual functional
14 capacity (“RFC”) to perform less than the full range of sedentary work as defined in
15 20 C.F.R. §§ 404.1567(a) and 416.967(a) with occasional postural limitations. (AR
16 22.) The ALJ specified that Plaintiff could: lift and/or carry ten pounds occasionally
17 and less than that frequently, stand and/or walk with normal breaks for two hours in
18 an eight-hour work day, sit with normal breaks for six hours in an eight-hour work
19 day, and push and pull frequently with upper and lower extremities bilaterally. *Id.*
20 The ALJ also found that Plaintiff should avoid climbing ladders, ropes, or scaffolds;
21 avoid crawling, unprotected heights or dangerous machinery; avoid extreme
22 exposure to fumes, odors, dusts, gases, and poor ventilation; and avoid extremes in
23 temperature hot or cold, wetness and vibration. *Id.*

24 The ALJ determined that “the claimant’s statements concerning the intensity,
25 persistence and limiting effects of these symptoms are not entirely consistent with
26 the medical evidence and other evidence in the record....” (AR 23.) The ALJ
27 concluded, “the [RFC] is consistent with the objective medical evidence of record
28

1 and represents the most the claimant is able to perform on a regular and continuing
2 basis.” (AR 27.)

3 The ALJ found Plaintiff’s RFC did not permit him to perform his past relevant
4 work as “a childcare,” “dishwasher,” or “framer.” (AR 27.) Based on the VE’s
5 testimony, the ALJ found that Plaintiff could perform other work as “assembler” and
6 “packager.” (AR 28.) The ALJ thus concluded that Plaintiff had not been under a
7 disability as defined by the Social Security Act at any time from November 2, 2012
8 through the date of the ALJ’s decision. *Id.*

9 On August 28, 2017, the Appeals Council denied review, rendering the ALJ’s
10 decision the final decision of the Commissioner. (AR 1-4.)

11 **DISPUTED ISSUES**

- 12 1. Whether the ALJ properly assessed the treating physician’s opinion in
13 determining Plaintiff’s RFC.
- 14 2. Whether the ALJ properly assessed Plaintiff’s credibility.

15 **STANDARD OF REVIEW**

16 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to
17 determine whether the Commissioner’s findings are supported by substantial
18 evidence and whether the proper legal standards were applied. *See Treichler v.*
19 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014). Substantial
20 evidence means “more than a mere scintilla” but less than a preponderance. *See*
21 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Substantial evidence is “such
22 relevant evidence as a reasonable mind might accept as adequate to support a
23 conclusion.” *Richardson*, 402 U.S. at 401. The Court reviews the record as a whole,
24 weighing both the evidence that supports and the evidence that detracts from the
25 Commissioner’s conclusion. *See Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir.
26 2014). Where evidence is susceptible of more than one rational interpretation, the
27 Commissioner’s decision must be upheld. *See Garrison*, 759 F.3d at 1010; *Ryan v.*
28 *Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008); *Orn v. Astrue*, 495 F.3d

1 625, 630 (9th Cir. 2007). Even when an ALJ’s decision contains error, it must be
2 affirmed if the error was harmless. *Treichler*, 775 F.3d at 1099.

3 DISCUSSION

4 I. THE ALJ’S ASSESSMENT OF THE TREATING PHYSICIAN’S 5 OPINION AND THE RFC DETERMINATION

6 “Although a treating physician’s opinion is generally afforded the greatest
7 weight in disability cases, it is not binding on an ALJ with respect to the existence of
8 an impairment or the ultimate determination of disability.” *Tonapetyan v. Halter*, 242
9 F.3d 1144, 1148 (9th Cir. 2001). An ALJ who sets forth sufficient specific and
10 legitimate reasons supported by substantial evidence may give reduced weight to a
11 treating physician’s opinion where there is a conflict between that opinion and the
12 opinions of other physicians. *See id.*; *Carmickle v. Comm’r Soc. Sec. Admin.*, 533
13 F.3d 1155, 1164 (9th Cir. 2008), *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d
14 685, 692 (9th Cir. 2009). “The ALJ can meet this burden by setting out a detailed and
15 thorough summary of the facts and conflicting clinical evidence, stating his
16 interpretation thereof, and making findings.” *Magallanes v. Bowen*, 881 F.2d 747,
17 751 (9th Cir. 1989). In addition, an “ALJ need not accept the opinion of any
18 physician, including a treating physician, if that opinion is brief, conclusory, and
19 inadequately supported by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*,
20 554 F.3d 1219, 1228 (9th Cir. 2009) (internal quotation marks and citation omitted.)

21 On October 3, 2014, Plaintiff’s primary pain management physician, Dr. Lee,
22 signed a “Physical Residual Function Capacity Statement.” (AR 363-66.) The
23 answers to this questionnaire indicated that Plaintiff could not climb steps without
24 the use of a handrail, nor could he stoop, crouch, or bend. (AR 364.) They also stated
25 that Plaintiff’s pain levels would require twenty-minute rest breaks, totaling one hour
26 per eight-hour work day. *Id.* In addition, Plaintiff could sit for one hour before
27 needing to stand up and stand and walk for thirty minutes at a time for a total of two
28 hours in an eight-hour work day, but would often require unscheduled breaks. (AR

1 364-65.) Plaintiff could lift and carry fifteen pounds occasionally, he could not push
2 or pull arm or leg controls for six or more hours a day, and he could not climb ladders,
3 scaffolds, ropes, or ramps. (AR 366.) Every month, Plaintiff would be absent from
4 work for three days and he could not complete an eight-hour work day for five days
5 or more. *Id.*

6 As one reason for discounting Dr. Lee's October 2014 opinion, the ALJ found
7 that "the claimant provided the answers" in the questionnaire. (AR 26, citing AR 366
8 (the questionnaire stating, "The answers are given by the patient himself . . ."). This
9 is a valid basis for giving reduced weight to the opinion of the treating physician. *See*
10 *Tonapetyan*, 242 F.3d at 1149 (physician's opinion may be properly discounted if it
11 is based on the claimant's subjective complaints and testing within the complainant's
12 control); *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995) ("an opinion of
13 disability premised to a large extent upon the claimant's own accounts of his
14 symptoms and limitations may be disregarded, once those complaints have
15 themselves been properly discounted"). The ALJ also properly discounted Dr. Lee's
16 opinion because it was conclusory and lacking in explanation (AR 26), *see Crane v.*
17 *Shalala*, 76 F.3d 251, 253 (9th Cir. 1996), and because the ALJ found that treatment
18 records did not support Dr. Lee's conclusion on Plaintiff's ability to work (AR 26).
19 *See Magallanes*, 881 F.2d at 751; *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir.
20 2001).

21 While Plaintiff contends that the totality of the evidence was consistent with a
22 more restrictive RFC and with certain aspects of Dr. Lee's opinion, the ALJ
23 summarized and analyzed in detail the medical evidence in assessing Plaintiff's RFC.
24 (AR 23-26.) Plaintiff argues essentially that the Court should reweigh the evidence
25 in his favor. However, it is the ALJ's duty to resolve ambiguities in the medical
26 evidence, and when "evidence can reasonably support either affirming or reversing
27 the [ALJ's] conclusion, the court may not substitute its judgment for that of the
28 [ALJ]." *Flaten v. Sec'y of Health & Human Services*, 44 F.3d 1453, 1457 (9th Cir.

1 1995). Accordingly, the ALJ’s assessment of Dr. Lee’s opinion and the RFC finding
2 were not erroneous and do not provide a basis for reversal.

3 **II. THE ALJ’S ADVERSE CREDIBILITY DETERMINATION**

4 Where a claimant has presented evidence of an underlying impairment and the
5 record is devoid of affirmative evidence of malingering, the ALJ’s reasons for
6 rejecting the claimant’s subjective symptom statements must be “specific, clear and
7 convincing.” *Burrell v. Colvin*, 775 F.3d 1133, 1136 (9th Cir. 2014) (quoting *Molina*
8 *v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012)). “General findings [regarding a
9 claimant’s credibility] are insufficient; rather, the ALJ must identify what testimony
10 is not credible and what evidence undermines the claimant’s complaints.” *Burrell*,
11 775 F.3d at 1138 (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)). The
12 ALJ’s findings “must be sufficiently specific to allow a reviewing court to conclude
13 the adjudicator rejected the claimant’s testimony on permissible grounds and did not
14 arbitrarily discredit a claimant’s testimony regarding pain.” *Brown-Hunter v. Colvin*,
15 806 F.3d 487, 493 (9th Cir. 2015) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 345-
16 46 (9th Cir. 1991) (en banc)).

17 Factors the ALJ may consider when making such determinations include the
18 claimant’s treatment history, the claimant’s daily activities, and inconsistencies in
19 testimony. *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014); *Tommasetti v.*
20 *Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *see generally* 20 C.F.R. §§ 404.1529(a),
21 416.929(a) (explaining how pain and other symptoms are evaluated). Although
22 comparison of the subjective testimony with the objective medical evidence may not
23 be the sole basis for discounting pain testimony, the ALJ can consider it as a factor
24 in the credibility analysis. *See Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005).

25 Here, Plaintiff alleged that he was disabled due to COPD, GERD, obesity,
26 chronic back and knee pain and muscle spasms, diabetes, high cholesterol, and high
27 blood pressure. Additionally, he claimed that his COPD and prescribed medications
28 caused him to constantly feel tired and drowsy, that he can sit for only thirty minutes

1 at a time, and that he must lie down for four hours during a normal nine to five day.
2 Plaintiff stated that he can lift (but not carry) a gallon of milk and that he requires
3 assistance from his family to raise his son. Plaintiff takes Tramadol, cyclobenzaprine,
4 a patch, gel, and Toradol injections to manage his pain.

5 Initially, the ALJ found that Plaintiff – despite alleging the onset of his
6 disabilities to be November 2, 2012 – did not seek treatment for his conditions until
7 2014. (AR 25.) According to the ALJ, this delay in seeking treatment diminished
8 Plaintiff’s persuasiveness. (*Id.*) This finding is supported by substantial evidence and
9 constitutes a valid basis for the ALJ’s adverse credibility determination. *See Molina*,
10 674 F.3d at 1113 (ALJ may rely on unexplained failure to seek treatment in assessing
11 credibility); *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995) (upholding ALJ’s
12 adverse credibility determination where claimant’s absence of treatment suggested
13 she had not actually been in debilitating pain). Moreover, although Plaintiff
14 complained of disabling back and knee pain, he did not receive treatment from an
15 orthopedic specialist for his musculoskeletal complaints. (AR 25.) This begs the
16 question why Plaintiff did not go to a specialist who could identify the source of and
17 treat his claimed symptoms, and it is also valid ground for the ALJ’s credibility
18 determination. *See Johnson*, 60 F.3d at 1434.

19 In addition, the ALJ found that Plaintiff’s subjective claims were not entitled
20 to full weight because of inconsistencies with the objective record. For instance,
21 although Plaintiff alleged disability caused by COPD and OSA, recent examinations
22 noted no obvious obstructions, no evidence of bronchodilator response, and normal
23 diffusing capacity limits. (AR 23, citing 309, 310.) Similarly, Plaintiff’s use of the
24 recommended CPAP machine showed significant improvements in that he felt much
25 better and less tired during the day. (AR 309-10, 316, 321, 355, 410, 413.) No
26 evidence showed Plaintiff needing emergency care or hospitalizations in connection
27 with his COPD or OSA. Regarding Plaintiff’s claims of debilitating low back pain
28 and muscle spasms, the objective medical record evidence showed effective

1 treatment of these conditions and a reduction of the symptoms he allegedly suffered.
2 (AR 23, citing AR 298, 299, 302.) Studies revealed only “mild degenerative
3 spurring” in the thoracic spine, and no acute abnormalities altogether. By February
4 2015, Plaintiff’s pain control was “fair” and “better.” (AR 24, citing AR 443, 447.)
5 He continued to experience tenderness of the lumbar spine and had positive lumbar
6 facet loading; however, no evidence of neurological, motor, or sensory defects was
7 provided. (AR 518-19.) The ALJ also found that contrary to Plaintiff’s claim of
8 disability due to bilateral knee pain, MRIs and exams in 2015 showed that while
9 some pain existed in Plaintiff’s knees, it did not limit his range of motion or ability
10 to independently walk and exercise. (AR 24-25, citing AR 465, 509.)

11 Based on this evidence and as discussed in the written decision, the ALJ found
12 multiple conflicts between Plaintiff’s subjective pain testimony and the objective
13 medical evidence. Because those findings are supported by substantial evidence, the
14 Court may not substitute its judgment for that of the ALJ. *See Batson v. Comm’r of*
15 *Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004) (“When evidence reasonably
16 supports either confirming or reversing the ALJ’s decision, [the court] may not
17 substitute [its] judgment for that of the ALJ.”). The ALJ properly considered these
18 inconsistencies as a factor in his assessment of Plaintiff’s credibility. *See Bray*, 554
19 F.3d at 1227 (upholding ALJ’s adverse credibility determination in part where
20 claimant’s statements at the hearing did not “comport with objective evidence in her
21 medical record”); *Burch*, 400 F.3d at 680-81 (same, where claimant’s testimony was
22 belied by objective medical findings); *Morgan v. Comm’r Soc. Sec. Admin.*, 169 F.3d
23 595, 600 (9th Cir. 1999); 20 C.F.R. § 404.1529(c)(2).

24 Finally, the ALJ’s decision referred to Plaintiff’s “activities of daily living”
25 and “essentially conservative” treatment as additional reasons for discounting his
26 credibility. (AR 25.) In general, these considerations may be valid reasons that will
27 support an adverse credibility determination. *See, e.g., Molina*, 674 F.3d at 1113
28 (daily activities); *Johnson*, 60 F.3d at 1434 (conservative treatment). However, even

1 if the ALJ's decision here did not provide sufficient specificity in analyzing these
2 two reasons, any error in this regard is harmless because (as discussed above) other
3 valid reasons were provided that justify the credibility finding. *See Batson*, 359 F.3d
4 at 1197.

5 * * * * *

6 Accordingly, IT IS ORDERED that Judgment be entered affirming the
7 decision of the Commissioner of Social Security and dismissing this action with
8 prejudice.

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10 DATED: 8/23/2018

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13 ALEXANDER F. MacKINNON
14 UNITED STATES MAGISTRATE JUDGE
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