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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESUS F.G.C., ¹)	Case No. CV 17-8187-JPR
)	
Plaintiff,)	
)	MEMORANDUM DECISION AND ORDER
v.)	REVERSING COMMISSIONER
)	
NANCY A. BERRYHILL, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner’s final decision denying his applications for disability income benefits (“DIB”) and supplemental security income benefits (“SSI”). The parties consented to the jurisdiction of the undersigned under 28 U.S.C. § 636(c). The matter is before the Court on the parties’ Joint Stipulation, filed July 30, 2018, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner’s decision is reversed and this action is

¹ Plaintiff’s name is partially redacted in compliance with Federal Rule of Civil Procedure 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

1 remanded for further proceedings.

2 **II. BACKGROUND**

3 Plaintiff was born in 1976. (Administrative Record ("AR")
4 34, 183, 187.) Though he can "read and understand" English, he
5 prefers communicating in Spanish. (AR 207.) He apparently
6 completed high school and possibly some college in Mexico.² (AR
7 209.) He testified that he last worked as a "supervisor" or
8 "manager" of a sports bar. (AR 45.)

9 On December 3, 2013, Plaintiff applied for DIB, alleging
10 that he had been unable to work since August 17, 2013, because of
11 left-tibia fracture, "[d]iabetes," hypertension, "[c]holesterol,"
12 and "[h]eart [c]ondition." (AR 183-86, 208; see also AR 21.) On
13 December 12, 2013, he applied for SSI, alleging the same. (AR
14 187-92, 208; see also AR 21.) His applications were denied (see
15 AR 76-106), and he requested a hearing before an Administrative
16 Law Judge (AR 111-12). A hearing was held on April 21, 2016, at
17 which Plaintiff, who was represented by counsel and aided by a
18 Spanish-language interpreter, testified, as did a vocational
19 expert. (See AR 42-75.) Leslie Saavedra, an unlicensed social
20 worker who had worked with Plaintiff, also testified. (AR 62-
21 66.) In a written decision issued June 2, 2016, the ALJ found
22 Plaintiff not disabled. (AR 21-36.) Plaintiff sought Appeals
23 Council review (AR 180-82, 262-64; see also AR 9-13), which was
24

25 ² Plaintiff seemed confused during the hearing about the
26 level of schooling he had completed in American terms but clearly
27 stated that he did not go to college. (See AR 47-48.) He marked
28 that he had finished four years of college in his disability
report (see AR 209), however, and told the consulting
psychiatrist that he completed 12th grade and attended the
University of Mexico (AR 444).

1 denied on September 27, 2017 (AR 1-8). This action followed.

2 **III. STANDARD OF REVIEW**

3 Under 42 U.S.C. § 405(g), a district court may review the
4 Commissioner's decision to deny benefits. The ALJ's findings and
5 decision should be upheld if they are free of legal error and
6 supported by substantial evidence based on the record as a whole.
7 See Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v.
8 Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence
9 means such evidence as a reasonable person might accept as
10 adequate to support a conclusion. Richardson, 402 U.S. at 401;
11 Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It
12 is more than a scintilla but less than a preponderance.
13 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
14 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
15 substantial evidence supports a finding, the reviewing court
16 "must review the administrative record as a whole, weighing both
17 the evidence that supports and the evidence that detracts from
18 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
19 720 (9th Cir. 1998). "If the evidence can reasonably support
20 either affirming or reversing," the reviewing court "may not
21 substitute its judgment" for the Commissioner's. Id. at 720-21.

22 **IV. THE EVALUATION OF DISABILITY**

23 People are "disabled" for purposes of receiving Social
24 Security benefits if they are unable to engage in any substantial
25 gainful activity owing to a physical or mental impairment that is
26 expected to result in death or has lasted, or is expected to
27 last, for a continuous period of at least 12 months. 42 U.S.C.
28 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.

1 1992).

2 A. The Five-Step Evaluation Process

3 The ALJ follows a five-step evaluation process to assess
4 whether a claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4),
5 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
6 1995) (as amended Apr. 9, 1996). In the first step, the
7 Commissioner must determine whether the claimant is currently
8 engaged in substantial gainful activity; if so, the claimant is
9 not disabled and the claim must be denied. §§ 404.1520(a)(4)(i),
10 416.920(a)(4)(i).

11 If the claimant is not engaged in substantial gainful
12 activity, the second step requires the Commissioner to determine
13 whether the claimant has a "severe" impairment or combination of
14 impairments significantly limiting his ability to do basic work
15 activities; if not, the claimant is not disabled and his claim
16 must be denied. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

17 If the claimant has a "severe" impairment or combination of
18 impairments, the third step requires the Commissioner to
19 determine whether the impairment or combination of impairments
20 meets or equals an impairment in the Listing of Impairments set
21 forth at 20 C.F.R. part 404, subpart P, appendix 1; if so,
22 disability is conclusively presumed. §§ 404.1520(a)(4)(iii),
23 416.920(a)(4)(iii).

24 If the claimant's impairment or combination of impairments
25 does not meet or equal an impairment in the Listing, the fourth
26 step requires the Commissioner to determine whether the claimant
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1 has sufficient residual functional capacity ("RFC")³ to perform
2 his past work; if so, he is not disabled and the claim must be
3 denied. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The claimant
4 has the burden of proving he is unable to perform past relevant
5 work. Drouin, 966 F.2d at 1257. If the claimant meets that
6 burden, a prima facie case of disability is established. Id. If
7 that happens or if the claimant has no past relevant work, the
8 Commissioner then bears the burden of establishing that the
9 claimant is not disabled because he can perform other substantial
10 gainful work available in the national economy.

11 §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); Drouin, 966 F.2d at 1257.
12 That determination comprises the fifth and final step in the
13 sequential analysis. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);
14 Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

15 B. The ALJ's Application of the Five-Step Process

16 At step one, the ALJ found that Plaintiff had not engaged in
17 substantial gainful activity since August 17, 2013, the alleged
18 onset date. (AR 23.) At step two, he concluded that Plaintiff
19 had severe impairments of "history of fracture to left knee,
20 status post open reduction internal fixation; history of left leg
21 fracture; diabetes mellitus; left wrist strain; left elbow
22 sprain; left ankle sprain; headaches; lumbar strain;
23 hypertension; mood disorder; and anxiety disorder." (Id.) At
24 step three, he determined that Plaintiff's impairments did not

25
26 ³ RFC is what a claimant can do despite existing exertional
27 and nonexertional limitations. §§ 404.1545, 416.945; see Cooper
28 v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). The
Commissioner assesses the claimant's RFC between steps three and
four. Laborin v. Berryhill, 867 F.3d 1151, 1153 (9th Cir. 2017)
(citing § 416.920(a)(4)).

1 meet or equal a listing. (AR 24-26.) At step four, he found
2 that Plaintiff had the RFC to perform light work⁴ with the
3 following limitations:

4 [Plaintiff can] stand[] or walk[] for two hours with use
5 of assistive device for prolonged ambulation; perform
6 occasional postural activities, but no ladders,
7 scaffolds, or ropes; avoid unprotected heights or
8 dangerous machinery; no repetitive or forceful pushing,
9 pulling, gripping, grasping, squeezing, holding and
10 torquing with the left upper extremity (right hand
11 dominant); . . . perform non-complex routine tasks, but
12 no tasks requiring hypervigilance, responsibility for the
13 safety of others, or significant public interaction.

14 (AR 26.) The ALJ found that Plaintiff could not do any past
15 relevant work. (AR 33.) But at step five, he determined that
16 given Plaintiff's age, education, work experience, and RFC, he
17 could perform three "representative" jobs in the national
18 economy. (AR 34-35.) Thus, the ALJ found Plaintiff not
19 disabled. (AR 35-36.)

22 ⁴ "Light work" involves "lifting no more than 20 pounds at a
23 time with frequent lifting or carrying of objects weighing up to
24 10 pounds." §§ 404.1567(b), 416.967(b). The regulations further
25 specify that "[e]ven though the weight lifted may be very little,
26 a job is in this category when it requires a good deal of walking
27 or standing, or when it involves sitting most of the time with
28 some pushing and pulling of arm or leg controls." *Id.* A person
capable of light work is also capable of "sedentary work," which
involves lifting "no more than 10 pounds at a time and
occasionally lifting or carrying [small articles]" and may
include occasional walking or standing. §§ 404.1567(a)-(b),
416.967(a)-(b).

1 **V. DISCUSSION⁵**

2 Plaintiff argues that the ALJ erred by discounting his
3 subjective pain statements, rejecting the opinions of
4 psychiatrist Pedro Florescio and social worker Saavedra, and
5 ignoring his alleged depression at step two. (See J. Stip. at 2-
6 3.) As discussed below, remand is necessary based on the ALJ's
7 improper evaluation of Plaintiff's subjective statements.
8 Accordingly, the Court does not reach the other issues.

9 A. The ALJ Did Not Properly Evaluate Plaintiff's
10 Subjective Symptom Testimony

11 Plaintiff claims that the ALJ "fail[ed] to provide specific,
12 clear or convincing reasons for rejecting [his] subjective
13 complaints." (J. Stip. at 11.) As explained below, because one
14 of the at most two reasons the ALJ gave for partially discounting
15 Plaintiff's subjective symptom statements and testimony was not
16 supported by substantial evidence and the other was insufficient
17 by itself, remand is necessary.

21 ⁵ In Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018), the Supreme
22 Court recently held that ALJs of the Securities and Exchange
23 Commission are "Officers of the United States" and thus subject
24 to the Appointments Clause. To the extent Lucia applies to
25 Social Security ALJs, Plaintiff has forfeited the issue by
26 failing to raise it during his administrative proceedings. (See
27 AR 262-64; J. Stip. at 2-6, 9-11, 14-15); Meanel v. Apfel, 172
28 F.3d 1111, 1115 (9th Cir. 1999) (as amended) (plaintiff forfeits
issues not raised before ALJ or Appeals Council); see also
generally Kabani & Co. v. SEC, 733 F. App'x 918, 919 (9th Cir.
2018) (rejecting Lucia challenge because plaintiff did not raise
it during administrative proceedings); Davidson v. Comm'r of Soc.
Sec., No. 2:16-cv-00102, 2018 WL 4680327 (M.D. Tenn. Sept. 28,
2018) (same).

1 1. Applicable law

2 An ALJ's assessment of a claimant's allegations concerning
3 the severity of his symptoms is entitled to "great weight."
4 Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir. 1989) (as amended)
5 (citation omitted); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir.
6 1985) (as amended Feb. 24, 1986). "[T]he ALJ is not required to
7 believe every allegation of disabling pain, or else disability
8 benefits would be available for the asking, a result plainly
9 contrary to 42 U.S.C. § 423(d)(5)(A)." Molina v. Astrue, 674
10 F.3d 1104, 1112 (9th Cir. 2012) (citing Fair v. Bowen, 885 F.2d
11 597, 603 (9th Cir. 1989)).

12 In evaluating a claimant's subjective symptom testimony, the
13 ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d
14 at 1035-36; see also SSR 16-3p, 2016 WL 1119029, at *3 (Mar. 16,
15 2016).⁶ "First, the ALJ must determine whether the claimant has

16 _____
17 ⁶ The Commissioner applies SSR 16-3p, which went into
18 effect a few months before the ALJ issued his decision, on June
19 2, 2016, to all "determinations and decisions on or after March
20 28, 2016." Soc. Sec. Admin., Policy Interpretation Ruling, SSR
21 16-3p n.27, [https://www.ssa.gov/OPHome/rulings/di/01/
22 SSR2016-03-di-01.html](https://www.ssa.gov/OPHome/rulings/di/01/SSR2016-03-di-01.html) (last visited Jan. 16, 2019). Though the
23 new ruling eliminates the term "credibility" and focuses on
24 "consistency" instead, Plaintiff refers to his "credibility" (J.
25 Stip. at 2), and much of the relevant case law uses that language
26 too (see, e.g., id. at 10 (discussing applicable case law)). But
27 as the Ninth Circuit has clarified, SSR 16-3p

28 makes clear what our precedent already required: that
assessments of an individual's testimony by an ALJ are
designed to "evaluate the intensity and persistence of
symptoms after [the ALJ] find[s] that the individual has
a medically determinable impairment(s) that could
reasonably be expected to produce those symptoms," and
not to delve into wide-ranging scrutiny of the claimant's
character and apparent truthfulness.

Trevizo v. Berryhill, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (as

1 presented objective medical evidence of an underlying impairment
2 [that] could reasonably be expected to produce the pain or other
3 symptoms alleged." Lingenfelter, 504 F.3d at 1036. If such
4 objective medical evidence exists, the ALJ may not reject a
5 claimant's testimony "simply because there is no showing that the
6 impairment can reasonably produce the degree of symptom alleged."
7 Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996) (emphasis in
8 original), superseded in part by statute on other grounds,
9 §§ 404.1529, 416.929.

10 If the claimant meets the first test, the ALJ may discount
11 the claimant's subjective symptom testimony only if he makes
12 specific findings that support the conclusion. See Berry v.
13 Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding or
14 affirmative evidence of malingering, the ALJ must provide a
15 "clear and convincing" reason for rejecting the claimant's
16 testimony. Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir.
17 2015) (as amended) (citing Lingenfelter, 504 F.3d at 1036);
18 Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th
19 Cir. 2014). If the ALJ's evaluation of a plaintiff's alleged
20 symptoms is supported by substantial evidence in the record, the
21 reviewing court "may not engage in second-guessing." Thomas v.
22 Barnhart, 278 F.3d 947, 959 (9th Cir. 2002).

23 Contradiction with evidence in the medical record is a
24 "sufficient basis" for rejecting a claimant's subjective symptom
25 testimony. Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155,
26 1161 (9th Cir. 2008); see also Morgan v. Comm'r of Soc. Sec.

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amended) (alterations in original) (quoting SSR 16-3p).

1 Admin., 169 F.3d 595, 600 (9th Cir. 1999) (upholding "conflict
2 between [plaintiff's] testimony of subjective complaints and the
3 objective medical evidence in the record" as "specific and
4 substantial" reason undermining statements). But it "cannot form
5 the sole basis for discounting pain testimony." Burch v.
6 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005); Rollins v.
7 Massanari, 261 F.3d 853, 857 (9th Cir. 2001) (citing then-current
8 version of § 404.1529(c)(2)).

9 2. Relevant background

10 a. *Plaintiff's statements*

11 In his December 2013 SSI application, Plaintiff apparently
12 indicated that he did "not need help in personal care, hygiene or
13 upkeep of a home." (AR 188.) And he purportedly reported to the
14 consulting examining psychiatrist that he was able to "do
15 cooking, shopping, and housekeeping." (AR 445.) But in his
16 August 2014 appeal of the initial finding of nondisability, he
17 wrote that he "require[d] assistance to bathe/dress and use
18 restroom," and "someone ha[d] to cook for [him] and buy [his]
19 groceries/necessities." (AR 243.)

20 Similarly, in his June 4, 2014 function report, Plaintiff
21 stated that he took care of his teenaged son by "mak[ing] sure he
22 [went] to school, and ha[d] his meals," but he clarified that he
23 could not "do it physically." (AR 231; see also AR 54 (Plaintiff
24 testifying that as of April 21, 2016 hearing date, his son was
25 18).) Rather, his roommate actually took the son to school, made
26 his meals, and helped him with laundry, groceries, and school
27 assignments. (AR 231.) Plaintiff required help with his own
28 dressing, bathing, sitting on the toilet, and doing laundry.

1 (Id.) He couldn't "ben[d]" or "walk" and had "difficulty moving
2 [his] left arm." (Id.) The roommate helped him with personal
3 grooming because he lacked motivation. (AR 232.) Plaintiff also
4 needed help remembering to take his medication. (Id.) He did
5 not do any cooking and was "not able to do any[]" house or yard
6 work. (Id.) For outings, his friend took him or he used
7 accessible transportation. (AR 233.) He went to church two or
8 three times a week, saw doctors, and had visits from his mother.
9 (Id.; see also AR 234.) He could not go out alone because he
10 needed "help moving, walking down and upstairs [sic]." (AR 233.)
11 He could not drive or shop, but he could handle his financial
12 affairs. (Id.) He was starting to "do groceries" once a week
13 since he had begun receiving "Cal Fresh," but he went with his
14 son, a caregiver, or a friend. (AR 234.) He got along "well"
15 with his family, friends, and neighbors but "d[id]n't see friends
16 only family" and "g[o]t sad and uncomfortable seeing others."
17 (AR 235.)

18 Plaintiff marked that he had trouble "[l]ifting,
19 [s]quatting, [b]ending, [s]tanding, [r]eaching, [w]alking,
20 [s]itting, [k]neeling, [s]tair-[c]limbing, [s]eeing, [m]emory,
21 [c]ompleting [t]asks, [c]oncentration, [u]nderstanding,
22 [f]ollowing [i]nstructions, [u]sing [h]ands [specifying "left
23 hand"],⁷ [and] [g]etting [a]long with [o]thers," and he wrote
24 that he "g[ot] 'depressed.'" (Id.) In response to questions
25 about how well he followed spoken directions and got along with
26 authority figures, he wrote, "I am OK." (AR 235-36.) But he

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⁷ Plaintiff is right-handed. (AR 235.)

1 didn't handle stress well; he was "starting to get anxious mood
2 every day" and "worried about everything." (AR 236.) He checked
3 boxes indicating that he used crutches, a walker, a wheelchair,
4 and a "[b]race/[s]plint," all of which "were [recommended] by
5 doctor in USC" after he was injured in August 2013. (Id.) He
6 used the aids "every day, all times." (Id.)

7 At the April 2016 hearing, Plaintiff testified that his knee
8 did "not bend" and that he had "weakness." (AR 49.) The
9 physical therapy was helping "[a] little," but for "long periods"
10 he still used a wheelchair and a "crutch" or "walker" otherwise.
11 (AR 50-52.) He left his home only to go to "therapy,"⁸ "church
12 two times a week," and "the doctor's." (AR 51.) He indicated
13 that despite "[l]ots of [mental health] treatment," he still felt
14 "sad," had thoughts of suicide "[a]t times," slept "very little,"
15 and cried "[a]ll the time." (AR 52-53.) He did not socialize
16 with friends, and he apparently went to a "private place" for
17 church prayers, not a mass service. (AR 53-54.) His friend and
18 his son, with whom he lived, helped him "a lot" by giving him
19 "massages, sometimes therapy"; taking him to doctors; checking
20 his blood pressure and sugar; and reminding him to take his
21 medicine. (AR 54.) They also fed him, changed his diapers,⁹ and
22 did his laundry. (AR 54, 58.) He testified that he "never" went
23 to the store and spent most of his time "sitting" at home. (AR

24
25 ⁸ At some point, Saavedra and other clinic providers began
26 sometimes seeing Plaintiff in his home rather than at the clinic.
(See, e.g., AR 550, 618, 667.)

27 ⁹ Plaintiff was apparently incontinent, although the cause
28 was unknown. (See AR 30; cf. AR 560 (Plaintiff reporting to
Saavedra that he urinated on himself because he was afraid he'd
fall while using restroom).)

1 55.) Sometimes, his mother visited him. (AR 57.) He testified
2 to anxiety and flashbacks and suggested that because he "always
3 ha[d] pain," he always thought about his problems. (AR 55-56.)

4 b. *The ALJ's findings relating to Plaintiff's*
5 *subjective symptom statements*

6 The ALJ found that Plaintiff's impairments had "more than a
7 minimal effect on [his] ability to function" (AR 24), but they
8 "could not reasonably be expected to cause the alleged symptoms"
9 (AR 28). Further, his "statements concerning the intensity,
10 persistence and limiting effects of these symptoms [were] not
11 entirely consistent with the medical evidence and other evidence
12 in the record." (Id.) The ALJ expressly stated only one reason
13 for discounting Plaintiff's statements concerning his symptoms,
14 their inconsistency with the objective medical evidence, but he
15 also observed in that same general discussion that some of
16 Plaintiff's statements were inconsistent with his activities of
17 daily living. (See id.; see also generally AR 26-33.)

18 In analyzing Plaintiff's statements and testimony, the ALJ
19 recounted them and the evidence allegedly undermining them at
20 length. (See AR 27-31.) As to Plaintiff's physical limitations,
21 he found that Plaintiff "and his clinical social worker endorse
22 debilitating symptoms that are not supported by objective medical
23 evidence." (AR 28.) For example, he wrote, "[t]hey indicate
24 that [Plaintiff] is essentially bedridden and unable to lift his
25 arms to reach for objects . . . [but] he is able to go to the
26 grocery store, attend church weekly, and go to medical and
27 psychiatric appointments." (Id.) He noted Plaintiff's two
28 accidents but found his reported "level of functioning" "not

1 reasonable considering that he has healed." (Id.) And
2 "[d]espite many subjective complaints of pain at earlier pain
3 management sessions," his "actual functioning ha[d] significantly
4 improved." (AR 29.) He found that "[r]ecent physical therapy
5 notes . . . indicate that [Plaintiff] has met his goal of
6 increasing his range of motion, increasing his lower extremity
7 strength, standing and walking for more than 30 minutes with
8 minimal pain and use of an assistive device, and ability to
9 transfer positions." (Id.)

10 As to Plaintiff's mental limitations, the ALJ found that
11 "[d]espite extreme subjective complaints of depression, [he] has
12 never been hospitalized for mental health reasons." (AR 31.) He
13 noted that Plaintiff "continues to be able to socialize with
14 those close to him and attend church regularly." (Id.) He was
15 also "able to go to the grocery store in the evening and attend
16 his doctor's appointments." (Id.)

17 3. Analysis

18 Plaintiff may be right that the ALJ provided only one reason
19 for discounting his subjective symptom statements: their alleged
20 inconsistency with the objective medical evidence. (See J. Stip.
21 at 11.) That is certainly the only one he expressly articulated.
22 (See generally AR 28.) If so, remand is necessary on that basis
23 alone. See Burch, 400 F.3d at 681. But even if the Court
24 extrapolates another reason from the ALJ's discussion – that
25 Plaintiff's daily activities were inconsistent with his alleged
26 symptoms – remand is still warranted, as explained below.

27

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1 a. *Activities of daily living*

2 The ALJ noted that some of Plaintiff's activities of daily
3 living were inconsistent with the alleged degree of his symptoms,
4 at least as to his mental health.¹⁰ (See AR 31.) An ALJ may
5 discount a claimant's subjective symptom testimony when it is
6 inconsistent with his daily activities. See Molina, 674 F.3d at
7 1113. "Even where those [daily] activities suggest some
8 difficulty functioning, they may be grounds for discrediting the
9 claimant's testimony to the extent that they contradict claims of
10 a totally debilitating impairment." Id.

11 On several occasions, the ALJ's decision did not accurately
12 or completely reflect the record concerning Plaintiff's
13 activities. For example, the ALJ wrote that Plaintiff was "able
14 to . . . attend church regularly," "go to the grocery store in
15 the evening," and "attend his doctor's appointments." (AR 31.)
16 But the record does not show that Plaintiff was capable of doing
17 any of those things (or any other activities of daily living)
18 without significant help from a caregiver, friend, or adult son.
19 (See, e.g., AR 54-55, 231-35.) Even with their help, his
20 activities were apparently limited. (See AR 54-55 (Plaintiff
21 testifying that he mostly sat at home while his friend and son
22 cooked for him, did his laundry, drove him to appointments and
23 church, changed his diapers, and reminded him to take
24 medications)); see also Smolen, 80 F.3d at 1284 n.7 ("The Social
25 Security Act does not require that claimants be utterly
26 incapacitated to be eligible for benefits, and many home

27
28 ¹⁰ At step three, the ALJ found that Plaintiff was
moderately limited in his activities of daily living. (AR 25.)

1 activities may not be easily transferable to a work environment
2"). Moreover, Plaintiff apparently did not attend church
3 in the traditional sense, but rather went to a "private place"
4 where he could "pray individually." (AR 53-54.)

5 Likewise, the ALJ's representation that Plaintiff "takes
6 care of his son, including preparing him for school, overseeing
7 his meals, and seeing to his other needs" leaves out Plaintiff's
8 critical qualification that he did none of those things
9 "physically"; rather, he directed his roommate, who was the one
10 to actually care for the son. (AR 231.) Further, by the time of
11 the hearing Plaintiff's son was an adult, and he appeared to take
12 care of his father, not the other way around. (See AR 54.)

13 And the same recent physical-therapy report the ALJ cited as
14 evidence that Plaintiff had met "his goal" in various areas (see
15 AR 29 (citing AR 962-65)) also states that he had "[s]evere
16 [l]imitation" in walking and "[s]tairs" (AR 962), and some of his
17 limitations had worsened or failed to improve even after four
18 months of physical therapy (see, e.g., AR 963 (showing left-knee
19 range-of-motion extension decreasing), 964 (showing hip and spine
20 range-of-motion measurements remaining stagnant)). The physical
21 therapist noted that he had "not made as much improvement as
22 expected" and that what improvement he had made generally did not
23 last beyond "the end of the visit." (AR 964.) And although
24 Plaintiff had indeed met some goals, as the ALJ noted (see AR
25 29), they were almost all short- or midterm goals, a fact the ALJ
26 neglected to mention; he had not met any of his "[l]ong [t]erm"
27 goals nearly a year after his second accident (AR 965).

28 Although the ALJ may have believed Plaintiff capable of

1 doing more activities based on the objective medical evidence,
2 the record consistently showed that he was unable to care for
3 himself or do regular daily activities in a meaningful way.
4 (See, e.g., AR 54-55, 231-35.) The ALJ appears to have relied
5 primarily on the consulting psychiatrist's note that Plaintiff
6 "reported being able to cook, shop, and perform housekeeping" for
7 support. (AR 30 (citing AR 445).) But given that the doctor
8 communicated with Plaintiff through an interpreter (AR 442), the
9 statement's inconsistency with the rest of the record, and the
10 ALJ's own discounting of the doctor's opinion (AR 32-33), that
11 note is not substantial evidence of Plaintiff's daily activities.
12 Also, the doctor saw Plaintiff only once; other treating
13 professionals with much longer treatment histories consistently
14 recorded notes indicating that Plaintiff was not able to do those
15 things on his own or, as to some of them, even with help (see,
16 e.g., AR 580, 667), and Plaintiff repeatedly wrote and testified
17 that he was unable to care for himself or engage in daily
18 activities (see, e.g., AR 54-55, 231-35).

19 Therefore, to the extent the ALJ relied on Plaintiff's
20 activities of daily living as a reason for discounting his
21 subjective symptom testimony, he erred in doing so. See *Diedrich*
22 *v. Berryhill*, 874 F.3d 634, 643 (9th Cir. 2017).

23 b. *Inconsistency with medical evidence*

24 The only potentially valid reason the ALJ gave for
25 discounting Plaintiff's subjective symptom statements and
26 testimony was their alleged inconsistency with the medical
27 record. (See generally AR 28.) But "an ALJ may not reject a
28 claimant's subjective complaints based solely on a lack of

1 medical evidence to fully corroborate the alleged severity of
2 pain." Burch, 400 F.3d at 680; see also Robbins, 466 F.3d at 883
3 ("While an ALJ may find testimony not credible in part or in
4 whole, he or she may not disregard it solely because it is not
5 substantiated affirmatively by objective medical evidence.");
6 Gama v. Colvin, 611 F. App'x 445, 446 (9th Cir. 2015) (when one
7 reason ALJ gave for discounting plaintiff's credibility was
8 erroneous and "only remaining reason . . . was a lack of
9 objective medical evidence," "error was not harmless"). Thus,
10 Plaintiff is entitled to remand on this ground regardless of
11 whether the ALJ was correct that the severity of Plaintiff's pain
12 allegations was not substantially supported by the objective
13 evidence.

14 B. Remand for Further Proceedings Is Appropriate

15 When an ALJ errs, as here, the Court "ordinarily must remand
16 for further proceedings." Leon v. Berryhill, 880 F.3d 1041, 1045
17 (9th Cir. 2017) (as amended Jan. 25, 2018); see also Harman v.
18 Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000) (as amended). The
19 Court has discretion to do so or to award benefits under the
20 "credit as true" rule. Leon, 880 F.3d at 1045 (citation
21 omitted). "[A] direct award of benefits was intended as a rare
22 and prophylactic exception to the ordinary remand rule[.]" Id.
23 The "decision of whether to remand for further proceedings turns
24 upon the likely utility of such proceedings," Harman, 211 F.3d at
25 1179, and when an "ALJ makes a legal error, but the record is
26 uncertain and ambiguous, the proper approach is to remand the
27 case to the agency," Leon, 880 F.3d at 1045 (citing Treichler,
28 775 F.3d at 1105).

1 Here, further administrative proceedings would serve the
2 useful purpose of allowing the ALJ to give proper consideration
3 to Plaintiff's subjective symptom testimony. See Arredondo v.
4 Colvin, No. CV 15-01927-RAO, 2016 WL 3902307, at *7 (C.D. Cal.
5 July 18, 2016) (remand "rather than an award of benefits"
6 appropriate when only valid reason ALJ gave for discounting
7 plaintiff's subjective pain testimony was "lack of supporting
8 objective evidence"). If the ALJ chooses to discount Plaintiff's
9 subjective symptoms on remand, he can then provide an adequate
10 discussion of the reasons why. See Payan v. Colvin, 672 F. App'x
11 732, 733 (9th Cir. 2016). Because of Plaintiff's recent improved
12 physical functioning in some areas, as noted by the ALJ (see AR
13 29); the documented connection between his physical and emotional
14 conditions (see, e.g., AR 573, 592); and his varying abilities as
15 he healed from two separate accidents separated by two years, the
16 Court has serious doubt as to whether Plaintiff was disabled
17 during any or all of the relevant period. For this reason, too,
18 remand is appropriate. See Garrison v. Colvin, 759 F.3d 995,
19 1021 (9th Cir. 2014) (recognizing flexibility to remand for
20 further proceedings when "record as a whole creates serious doubt
21 as to whether the [plaintiff] is, in fact, disabled").

22 Because the contested medical opinions were based to a
23 large degree on Plaintiff's subjective symptom statements (see J.
24 Stip. at 7, 8; see also AR 31 (ALJ noting same)) and the ALJ
25 improperly assessed those statements, he should on remand
26 reconsider the weight to give those opinions. Similarly, he
27 should clarify whether he finds Plaintiff's alleged depression to
28 be a severe impairment and, if not, explain why not.

1 Accordingly, the Court does not reach those issues. See Hiler v.
2 Astrue, 687 F.3d 1208, 1212 (9th Cir. 2012) ("Because we remand
3 the case to the ALJ for the reasons stated, we decline to reach
4 [plaintiff's] alternative ground for remand.")

5 **VI. CONCLUSION**

6 Consistent with the foregoing and under sentence four of 42
7 U.S.C. § 405(g),¹¹ IT IS ORDERED that judgment be entered
8 REVERSING the Commissioner's decision, GRANTING Plaintiff's
9 request for remand, and REMANDING this action for further
10 proceedings consistent with this memorandum decision.

11
12 DATED: January 18, 2019



13 JEAN ROSENBLUTH
14 U.S. MAGISTRATE JUDGE
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26 ¹¹ That sentence provides: "The [district] court shall have
27 power to enter, upon the pleadings and transcript of the record,
28 a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."