

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

MICHAEL D. SCHMIDT,)	Case No. CV 18-01212-AS
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	
)	
NANCY A. BERRYHILL,)	
Acting Commissioner of the)	
Social Security Administration,)	
)	
Defendant.)	
_____)	

PROCEEDINGS

On February 14, 2018, Plaintiff filed a Complaint seeking review of the denial of his application for Disability Insurance Benefits. (Docket Entry No. 1). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Docket Entry Nos. 11-12). On July 12, 2018, Defendant filed an Answer along with the Administrative Record ("AR"). (Docket Entry Nos. 15-16). On November 9, 2018, the parties filed a Joint Stipulation ("Joint Stip.") setting

1 forth their respective positions regarding Plaintiff's claim. (Docket
2 Entry No. 19).

3
4 The Court has taken this matter under submission without oral
5 argument. See C.D. Cal. L.R. 7-15.

6
7 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
8

9 On March 7, 2014, Plaintiff, formerly employed as the president of
10 a telephone repair company and the captain of a charter boat (see AR
11 165-67, 306, 314), filed an application for Disability Insurance
12 Benefits, alleging an inability to work because of a disabling condition
13 since January 1, 2012. (See AR 21, 287-90). On October 13, 2016, the
14 Administrative Law Judge ("ALJ"), Lawrence Wheeler, heard testimony from
15 Plaintiff (represented by counsel) and vocational expert June Hagen.
16 (See AR 162-86). On October 21, 2016, the ALJ issued a decision denying
17 Plaintiff's application. (See AR 21-30). After determining that
18 Plaintiff had severe impairments -- "degenerative disc disease of the
19 cervical and lumbar spine, status-post L5-S1 fusion in 2007; history of
20 aortic valve replacement; hypertension; and high cholesterol" (AR 23)¹
21 --, but did not have an impairment or combination of impairments that
22 met or medically equaled the severity of one of the listed impairments
23 (AR 24-25), the ALJ found that Plaintiff had the residual functional
24
25
26
27
28

¹ The ALJ found that Plaintiff's mental impairments, including adjustment disorder, were non-severe. (AR 16-17).

1 capacity ("RFC")² to perform sedentary work³ with the following
2 limitations: can lift up to 5 pounds frequently and up to 10 pounds
3 occasionally; can sit 6 hours total in an 8-hour workday; can stand/walk
4 up to 2 hours total in an 8-hour workday; and can kneel, stoop, crouch
5 and crawl frequently. (AR 25-29). The ALJ then determined that
6 Plaintiff was able to perform past relevant work as a sales and service
7 manager as generally performed (AR 29-30) and therefore found that
8 Plaintiff was not disabled within the meaning of the Social Security
9 Act. (AR 30).

10
11 Plaintiff requested that the Appeals Council review the ALJ's
12 Decision. (See AR 286). The request was denied on December 13, 2017.
13 (See AR 1-6). Plaintiff now seeks judicial review of the ALJ's Decision
14 which stands as the final decision of the Commissioner. See 42 U.S.C.
15 §§ 405(g), 1383(c).

16
17 **STANDARD OF REVIEW**
18

19 This Court reviews the Administration's decision to determine if
20 it is free of legal error and supported by substantial evidence. See
21

22
23 _____
24 ² A Residual Functional Capacity is what a claimant can still do
25 despite existing exertional and nonexertional limitations. See 20
26 C.F.R. § 404.1545(a)(1).

27 ³ "Sedentary work involves lifting no more than 10 pounds at a
28 time and occasionally lifting or carrying articles like docket files,
ledgers, and small tools. Although a sedentary job is defined as one
which involves sitting, a certain amount of walking and standing is
often necessary in carrying out job duties. Jobs are sedentary if
walking and standing are required occasionally and other sedentary
criteria are met." 20 C.F.R. § 404.1567(a).

1 Brewes v. Comm'r, 682 F.3d 1157, 1161 (9th Cir. 2012). "Substantial
2 evidence" is more than a mere scintilla, but less than a preponderance.
3 Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). To determine
4 whether substantial evidence supports a finding, "a court must consider
5 the record as a whole, weighing both evidence that supports and evidence
6 that detracts from the [Commissioner's] conclusion." Aukland v.
7 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (internal quotation
8 omitted). As a result, "[i]f the evidence can support either affirming
9 or reversing the ALJ's conclusion, [a court] may not substitute [its]
10 judgment for that of the ALJ." Robbins v. Soc. Sec. Admin., 466 F.3d
11 880, 882 (9th Cir. 2006).⁴

12 13 **PLAINTIFF'S CONTENTION**

14
15 Plaintiff alleges that the ALJ improperly rejected the opinion of
16 physician's assistant Beth Brown. (See Joint Stip. at 4-8, 21-22).

17 18 **DISCUSSION**

19
20 After consideration of the record as a whole, the Court finds that
21 the Commissioner's findings are supported by substantial evidence and
22 are free from legal error.

23
24
25
26
27 ⁴ The harmless error rule applies to the review of
28 administrative decisions regarding disability. See McLeod v. Astrue,
640 F.3d 881, 886-88 (9th Cir. 2011); Burch v. Barnhart, 400 F.3d 676,
679 (9th Cir. 2005)(An ALJ's decision will not be reversed for errors
that are harmless).

1 DISCUSSION

2
3 **A. The ALJ properly rejected Beth Brown's opinion**

4
5 Plaintiff asserts that the ALJ did not provide legally sufficient
6 reasons for rejecting Beth Brown's opinion. (See Joint Stip. at 4-11,
7 14-15). Defendant asserts that the ALJ gave proper reasons for
8 rejecting Beth Brown's opinion. (See Joint Stip. at 12-14).
9

10 An ALJ must take into account all medical opinions of record. 20
11 C.F.R. § 404.1527(b). Only "acceptable medical sources" can give
12 medical opinions. 20 C.F.R. § 404.1527(a)(1); Social Security Ruling
13 ("SSR") 06-03p, *2 (rescinded for claims filed after March 27, 2017,
14 2017 WL 3928298). A physician's assistant is not an "acceptable medical
15 source," but rather is an "other source." Molina v. Astrue, 674 F.3d
16 1104, 1111 (9th Cir. 2012); SSR 06-03p, *2; but see Molina, supra
17 (indicating that a physician's assistant might be considered a medically
18 acceptable source if he or she worked under a physician's close
19 supervision). The opinion of "other sources" cannot establish the
20 existence of a medically determinable impairment. SSR 06-03p, *2.
21 However, the opinion of "other sources" "are important and should be
22 evaluated on key issues such as impairment severity and functional
23 effects, along with other relevant evidence in the file." SSR 06-03p,
24 *3; Garrison v. Colvin, 759 F.3d 995, 1013-14 (9th Cir. 2014)("other
25 sources" "can provide evidence about the severity of a claimant's
26 impairment(s) and how it affects the claimant's ability to
27 work")(citation and alterations omitted); see also 20 C.F.R. §§
28 404.1527(a)(1)("Medical opinions are statements from acceptable medical

1 sources that reflect judgments about the nature and severity of your
2 impairment(s), including your symptoms, diagnosis and prognosis . . .
3 ."), (f)(1)("Opinions from medical sources who are not acceptable
4 medical sources . . . may reflect the source's judgment about some of
5 the same issues addressed in medical opinions from acceptable medical
6 sources."). The factors considered in weighing the opinions of "other
7 sources" are the examining relationship, the treatment relationship, the
8 length of the treatment relationship and the frequency of examination,
9 the nature and extent of the treatment relationship, supportability,
10 consistency, specialization and other factors. 20 C.F.R. §§
11 404.1527(f)(1), (c)(1)-(c)(6). The ALJ may discount the testimony of
12 "other sources" if the ALJ "gives reasons germane to each witness for
13 doing so." Ghanim v. Colvin, 763 F.3d 1154, 1161 (9th Cir.
14 2014)(citation and internal quotation marks omitted); see also Turner
15 v. Comm'r of Soc. Sec. Admin., 613 F.3d 1217, 1224 (9th Cir.
16 2010)(quoting Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001).

17
18 Beth Brown, PA-C ("PA Brown"), a physician's assistant at LAGS
19 Spine and Sportscare, treated Plaintiff from September 14, 2015 to July
20 28, 2016. (See AR 403-61).

21
22 In a "Cervical Spine Residual Functional Capacity Questionnaire"
23 dated July 14, 2016 ("Cervical Spine Questionnaire"), PA Brown reported
24 that Plaintiff's diagnoses are cervical spondylosis and degenerative
25 disc disease and that Plaintiff's prognosis is a chronic condition. PA
26 Brown stated that Plaintiff has chronic pain/parasthesia based on
27 constant pain that radiates to the bilateral shoulders and gets worse
28 with any activity; that the symptoms of Plaintiff's impairments are

1 tenderness, crepitus, muscle spasm, muscle weakness, chronic fatigue,
2 impaired sleep, impaired appetite, lack of coordination, abnormal
3 posture, swelling, drop things, and reduced group strength; and that
4 Plaintiff's cervical range of motion is 50 percent for extension, left
5 lateral bending and right lateral bending and 30 percent for left
6 rotation, flexion and right rotation. PA Brown stated that Plaintiff
7 has the following symptoms associated with his cervical spine
8 impairment: headaches (2 times per week, lasting 24 hours, which
9 improved by lying down, taking medication, and being in a quiet place
10 or a dark room); vertigo; malaise; photosensitivity; inability to
11 concentrate; impaired sleep; exhaustion; and visual disturbances. PA
12 Brown also stated that Plaintiff is a malingerer, and that emotional
13 factors contribute to the severity of Plaintiff's symptoms and
14 functional limitations. PA Brown stated that psychological conditions
15 -- depression, somatoform disorder, psychological factors, anxiety --
16 are reasonably consistent with the symptoms and functional limitations
17 described in the Cervical Spine Questionnaire.

18
19 PA Brown opined that Plaintiff's impairments lasted or can be
20 expected to last at least 12 months, and that Plaintiff has the
21 following functional limitations: Plaintiff's pain or other symptoms
22 constantly are severe enough to interfere with attention and
23 concentration needed to perform simple work tasks; Plaintiff is
24 incapable of even "low stress" jobs; Plaintiff cannot walk any city
25 blocks without rest or severe pain; Plaintiff can sit 10 minutes at one
26 time; Plaintiff can stand for 10 minutes at one time; Plaintiff can sit
27 and stand/walk less than 2 hours in an 8-hour workday; Plaintiff must
28 walk every 10 minutes for 5 minutes; Plaintiff needs a job that permits

1 shifting positions at will from sitting, standing or walking; Plaintiff
2 sometimes (every 5 to 10 minutes) needs to take unscheduled breaks (for
3 5 to 10 minutes) during an 8-hour workday; Plaintiff can lift and carry
4 up to 10 pounds occasionally, 20 pounds rarely, and never 50 pounds;
5 Plaintiff can rarely look down, turn his head right or left, look up,
6 or hold his head in a static position; Plaintiff can never twist, climb
7 ladders, or climb stairs, and can rarely stoop or crouch/squat;
8 Plaintiff has significant limitations with reaching, including overhead
9 reaching (he can use his right and left arms 10 percent of the time
10 during an 8-hour workday), handling, including grasping, turning and
11 twisting objects (he can use his right and left hands 80 percent of the
12 time during an 8-hour workday), and fingering, including fine
13 manipulations (he can use his right and left fingers 80 percent of the
14 time during an 8-hour workday); Plaintiff impairments are likely to
15 produce "good days" and "bad days"; and on the average Plaintiff is
16 likely to be absent from work more than four days per month as a result
17 of the impairments or treatment. (See AR 549-53).

18
19 In a "Lumbar Spine Residual Functional Capacity Questionnaire"
20 dated July 14, 2016 ("Lumbar Spine Questionnaire"), PA Brown stated that
21 Plaintiff's diagnoses are lumbago, lumbar disc degeneration, and fusion
22 of the lumbar spine, and that Plaintiff's prognosis is a chronic
23 condition, and that the fusion of the spine (L4-L5), disc degeneration
24 (L3-L4, as shown by a recent X-ray), and tenderness over the lumbar
25 spine/paraspinals show Plaintiff's impairments. PA Brown stated that
26 Plaintiff's symptoms are constant pain and constant fatigue (Plaintiff
27 cannot sleep although he is taking insomnia medication). PA Brown
28 stated that Plaintiff has a constant, sharp, aching pain (5 to 10 pain

1 level) in the lumbar L4-L5 area which gets worse when walking, sitting
2 or standing and does not necessarily improve with rest. PA Brown stated
3 that positive objective signs of pain are reduced range of motion (to
4 about 50 percent), sensory loss, reflex changes, tenderness, crepitus,
5 swelling, muscle spasm, muscle weakness and impaired sleep. PA Brown
6 stated that emotional factors contribute to the severity of Plaintiff's
7 symptoms and functional limitations. PA Brown stated that Plaintiff's
8 impairments are reasonably consistent with the symptoms and functional
9 limitations described in the Lumbar Spine Questionnaire. PA Brown
10 stated that the side effects of Plaintiff's medications are daily
11 dizziness and drowsiness and almost daily stomach upset.

12
13 PA Brown provided the same opinions about the duration of
14 Plaintiff's impairments and Plaintiff's functional limitations as in the
15 Cervical Spine Questionnaire, adding that, with prolonged sitting,
16 Plaintiff's legs should be elevated waist high and should be elevated
17 25 percent of the time during an 8-hour workday for a sedentary job.
18 PA Brown did not provide opinions about whether Plaintiff was capable
19 of even "low stress" jobs, Plaintiff's head position, or about reaching,
20 handling or fingering limitations. PA Brown stated that the description
21 of the symptoms and limitations in the Lumbar Spine Questionnaire go
22 back to 2011. (See AR 554-57, 559).

23
24 In a "Medical Statement Regarding Shoulders for Social Security
25 Disability Claim" dated July 28, 2016, PA Brown stated that Plaintiff
26 has problems with limitation of motion, weakness, pain and tendinitis
27 in the left and right shoulders. (AR 525). PA Brown opined about
28 Plaintiff's limitations and abilities as follows: Plaintiff cannot work

1 any hours per day; Plaintiff can stand at one time for 15 minutes;
2 Plaintiff can sit at one time for 15 minutes; Plaintiff can lift 10
3 pounds occasionally, but cannot lift any weight frequently; Plaintiff
4 can use his left arm below shoulder level occasionally; Plaintiff cannot
5 raise his right or left arms over shoulder level; and Plaintiff suffers
6 from moderate to severe pain. (Id.).

7
8 The ALJ described PA Brown's treatment of Plaintiff as follows:

9
10 Meanwhile, in September 2015, the claimant initiated
11 specialized treatment with a physician's assistant, Beth
12 Brown, P.A.-C, at LAGS Spine and Sports Care Center (Exhibit
13 5F). At that time, he reported primarily neck pain and a
14 history of fusion of the lumbar spine in 2007, which was
15 noted to be "stable" at that time (Id. at 60). Upon
16 examination, the claimant demonstrated decreased range of
17 motion of the cervical and lumbar spine, tenderness of the
18 cervical spine, negative straight leg raising tests, normal
19 motor strength, sensation, and reflexes, in the bilateral
20 upper and lower extremities (Id. at 60). He continued to see
21 Ms. Brown on a monthly basis for the remainder of 2015 during
22 which the clinical findings noted during examination did not
23 drastically change, and he was consistently prescribed
24 narcotic pain medications (Id. at 30-60). In December 2015,
25 the claimant underwent his first of two medical (sic) branch
26 blocks to the cervical spine (Id. at 43), followed by a
27 second in February 2016 (Id. at 32). In April 2016, the
28 claimant underwent neurolysis of the cervical spine in an

1 attempt to control ongoing neck pain (Id. at 21). In June
2 2016, the claimant reported ongoing neck pain and,
3 additionally, back pain, for which Ms. Brown ordered trigger
4 point injections (Id. at 10-20). Upon physical examination
5 in July 2016, the claimant continued to exhibit decreased
6 range of motion of the lumbar spine, but negative straight
7 leg raising tests (Id. at 5). His sensation in the lower
8 extremities was normal, and his motor strength in the lower
9 extremities continued to be normal (Id. at 5). Additionally,
10 he demonstrated some tenderness and loss of lordosis of the
11 lumbar spine (Id.). He also demonstrated decreased range of
12 motion of the cervical spine, but normal motor strength and
13 sensation in the upper extremities.

14
15 (AR 27).

16
17 After briefly summarizing PA Brown's opinions (see AR 29), the
18 ALJ addressed PA Brown's opinions as follows:

19
20 [T]he undersigned affords the opinion of Ms. Brown little
21 weight for several reasons. First and foremost, although Ms.
22 Brown is the claimant's treating physician's assistant, her
23 opinion is not entitled to controlling weight because, as an
24 assistant, she is not considered an acceptable medical source
25 under the Regulations (20 CFR 404.1527(a)(2), 416.927(a)(2),
26 SSR 96-2p; and SSR 06-03p). Additionally, Ms. Brown indicates
27 that the claimant has extremely restrictive work-related
28 limitations; but her progress notes do not support his (sic)

1 findings. The basis for Ms. Brown's opinion is therefore
2 unclear, and the undersigned gives it little weight.
3 (AR 25).
4

5 The ALJ's first reason for discounting PA Brown's opinion - that
6 she was a physician's assistant - was impermissible. See Haagenson v.
7 Colvin, 656 Fed. Appx. 800 (9th Cir. 2016) ("The only reason that the ALJ
8 offered for rejecting their opinions is that they are not 'acceptable
9 medical sources' within the meaning of the federal regulation. However,
10 the regulation already presumes that nurses and counselors are non-
11 acceptable medical sources, yet still requires the ALJ to consider them
12 as 'other sources.'").
13

14 However, the ALJ's second reason -- that PA Brown's progress notes
15 did not support her restrictive opinions about Plaintiff's work
16 limitations -- was a germane reason for discounting her opinions. See
17 Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005) ("Inconsistency
18 with medical evidence" is a germane reason for discounting the opinion
19 of a lay witness.); Lewis, 236 F.3d at 511 ("One reason for which an ALJ
20 may discount lay testimony is that it conflicts with medical
21 evidence."); Molina, 674 F.3d at 1112 (the ALJ's finding that the
22 physician assistant's opinion was conclusory and conflicted with her
23 earlier assessment was a germane reason for discounting the opinion);
24 Vincent v. Heckler, 739 F.2d 1393, 1395 (9th Cir. 1984) ("The ALJ
25 properly discounted lay testimony that conflicted with the available
26 medical evidence.").

1 PA Brown's Progress Notes dated September 14, 2015, state, inter
2 alia, that Plaintiff went for the first time to the LAGS Spine and
3 Sportscares for neck and bilateral shoulder pain (local, stiff and
4 swollen, a pain level of 3 to 4); Plaintiff had had chronic neck pain
5 for several years; Plaintiff was managing the pain with injections, HEP
6 and medications (Noroco and Tramadol for pain, Ambien for sleep);
7 Plaintiff's lumbar spine fusion (L4-L5) was stable; a bilateral lumbar
8 examination revealed an abnormal lumbar spine range of motion (45
9 degrees of true flexion, 10 degree of extension, 15 degrees of right
10 lateral flexion, 15 degrees of left lateral flexion, 10 degrees or right
11 rotation, and 10 degrees of left rotation), negative straight leg tests,
12 a negative Slump test, a positive Patrick test, a positive Reverse
13 Thomas test, a normal lower extremity neurological examination, normal
14 sensation, normal motor strength, no tenderness to palpation over the
15 bilateral lumbar paraspinals, bilateal thoracic paraspinals, and
16 bilateral SI Joints, and tenderness to palpation over the lumbar facet
17 joints; a cervical examination revealed abnormal cervical spine range
18 of motion (15 degrees of flexion, 20 degrees of extension, 65 degrees
19 of right rotation, 20 degrees of right rotation, 65 degrees of left
20 rotation, 20 degrees of right lateral flexion, and 20 degrees of left
21 lateral flexion), a normal upper extremity neurological exam, 0 out of
22 18 trigger points and no tenderness to palpation over the biceps tendon,
23 suprasupinatus tendon, cervical paraspinals and trapezius, normal
24 sensation, normal reflexes, (following reflexes) 0 out of 18 trigger
25 points and no tenderness to palpation over the biceps tendon,
26 supraspinatus tendon, AC Joint, and trapezius, and tenderness to
27 palpation over the cervical paraspinals. (See AR 458-61).
28

1 Progress Notes dated October 14, 2015, November 13, 2015, December
2 11, 2015, January 11, 2016, February 9, 2016, March 4, 2016, April 4,
3 2016, May 4, 2016, June 3, 2016, June 29, 2016, July 14, 2016, and July
4 28, 2016, state, inter alia, that Plaintiff continued to complain about
5 pain in his neck, lower back and bilateral shoulders (pain level range
6 of 3-6); after receiving medial branch blocks for spondylosis of the
7 cervical joint, Plaintiff reported getting 40 percent pain relief
8 overall, that the medial branch blocks "worked for him" and that he "had
9 excellent relief from both blocks, about 50% for at least 4 hours;
10 Ambien and Norco were refilled, Norco intake was increased temporarily;
11 Nortryptiline for sleep was prescribed; epidural steroid injections
12 within the past two years were successful; Plaintiff slept 3 to 4 hours
13 per night, and woke up not rested; Plaintiff's pain was improved with
14 medications which did not have any side effects; Plaintiff denied
15 fatigue; Plaintiff admitted joint stiffness and painful joints; and
16 bilateral lumbar and cervical examinations revealed, with few
17 exceptions, the same results as on September 14, 2015. (See AR 403-06,
18 413-20, 423-30, 434-41, 445-56).

19
20 An Operative Report dated December 24, 2016 states, inter alia,
21 that Plaintiff received a cervical medial branch blocks and reported
22 pre-operative pain of 4/10 and post-operative pain of 0/10. Operative
23 Reports dated February 22, 2016 and April 25, 2016 report, inter alia,
24 that Plaintiff received a cervical medial branch radiofrequency
25 neurolysis and reported pre-operative pain of 6/10 and post-operative
26 pain of 1/10. (See AR 421-22, 432-33). In June 2016, Plaintiff had a
27 trigger point injection in the lumbar spine, and "tolerated the
28 procedure well, with decreased pain post procedure." (See AR 411-12).

1 The notations in PA Brown's Progress Notes and Operative Reports,
2 as discussed above, do not reflect or show that Plaintiff's functional
3 work abilities were severely limited. Therefore, the ALJ's
4 determination that PA Brown's Progress Notes do not support PA Brown's
5 opinions about Plaintiff's work limitations is supported by the record.
6

7 Although the ALJ's first reason for discounting PA Brown's opinions
8 was improper, the fact that the ALJ gave a germane reason for
9 discounting PA Brown's opinions renders the error harmless. See
10 Tommasetti v. Astrue, 533 F.3d 1035, 1038(9th Cir. 2008)(an ALJ's error
11 is harmless "when it is clear from the record . . . that it was
12 'inconsequential to the ultimate nondisability determination.'"); Burch,
13 supra, 400 F.3d at 679 ("A decision of the ALJ will not be reversed for
14 errors that are harmless.").

15
16 **ORDER**

17
18 For the foregoing reasons, the decision of the Commissioner is
19 AFFIRMED.
20

21 LET JUDGMENT BE ENTERED ACCORDINGLY.

22
23 DATED: November 28, 2018
24
25

26 _____/s/
27 ALKA SAGAR
28 UNITED STATES MAGISTRATE JUDGE