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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**

11
12 RICHARD G.,

13 Plaintiff,

14 v.

15 ANDREW M. SAUL, COMMISSIONER
16 OF SOCIAL SECURITY
ADMINISTRATION,

17 Defendant.

) No. CV 18-7583-PLA

) **MEMORANDUM OPINION AND ORDER**

18
19 **I.**

20 **PROCEEDINGS**

21 Plaintiff¹ filed this action on August 30, 2018, seeking review of the Commissioner's² denial
22 of his application for Disability Insurance Benefits ("DIB") payment. The parties filed Consents to
23 proceed before a Magistrate Judge on August 30, 2018, and September 21, 2018. Pursuant to

24
25 ¹ In the interest of protecting plaintiff's privacy, this Memorandum Opinion and Order uses
26 plaintiff's (1) first name and last initial, and (2) year of birth in lieu of a complete birth date. See
Fed. R. Civ. P. 5.2(c)(2)(B), Local Rule 5.2-1.

27 ² Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Andrew M. Saul, the
28 newly-appointed Commissioner of the Social Security Administration, is hereby substituted as the
defendant herein.

1 the Court's Order, the parties filed a Joint Submission (alternatively "JS") on May 24, 2019, that
2 addresses their positions concerning the disputed issues in the case. The Court has taken the
3 Joint Submission under submission without oral argument.
4

5 II.

6 **BACKGROUND**

7 Plaintiff was born in 1955. [Administrative Record ("AR") at 139.] He has past relevant
8 work experience as a film editor. [AR at 15, 37, 39.]

9 On July 23, 2015, plaintiff filed an application for a period of disability and DIB, alleging that
10 he has been unable to work since January 1, 2013. [AR at 11; see AR at 139-42.] After his
11 application was denied initially and upon reconsideration, plaintiff timely filed a request for a
12 hearing before an Administrative Law Judge ("ALJ"). [AR at 11, 89-90.] A hearing was held on
13 October 10, 2017, at which time plaintiff appeared represented by an attorney, and testified on his
14 own behalf. [AR at 11, 31-55.] A vocational expert ("VE") also testified. [AR at 48-53.] On
15 February 7, 2018, the ALJ issued a decision concluding that plaintiff was not under a disability
16 from January 1, 2013, the alleged onset date, through June 30, 2014, the date last insured. [AR
17 at 11-20.] Plaintiff requested review of the ALJ's decision by the Appeals Council. [AR at 138.]
18 When the Appeals Council denied plaintiff's request for review on July 17, 2018 [AR at 1-6], the
19 ALJ's decision became the final decision of the Commissioner. See Sam v. Astrue, 550 F.3d 808,
20 810 (9th Cir. 2008) (per curiam) (citations omitted). This action followed.
21

22 III.

23 **STANDARD OF REVIEW**

24 Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner's
25 decision to deny benefits. The decision will be disturbed only if it is not supported by substantial
26 evidence or if it is based upon the application of improper legal standards. Berry v. Astrue, 622
27 F.3d 1228, 1231 (9th Cir. 2010) (citation omitted).

28 "Substantial evidence means more than a mere scintilla but less than a preponderance; it

1 is such relevant evidence as a reasonable mind might accept as adequate to support a
2 conclusion.” Revels v. Berryhill, 874 F.3d 648, 654 (9th Cir. 2017) (citation omitted). “Where
3 evidence is susceptible to more than one rational interpretation, the ALJ’s decision should be
4 upheld.” Id. (internal quotation marks and citation omitted). However, the Court “must consider
5 the entire record as a whole, weighing both the evidence that supports and the evidence that
6 detracts from the Commissioner’s conclusion, and may not affirm simply by isolating a specific
7 quantum of supporting evidence.” Id. (quoting Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir.
8 2014) (internal quotation marks omitted)). The Court will “review only the reasons provided by the
9 ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not
10 rely.” Id. (internal quotation marks and citation omitted); see also SEC v. Chenery Corp., 318 U.S.
11 80, 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943) (“The grounds upon which an administrative order
12 must be judged are those upon which the record discloses that its action was based.”).

13 14 IV.

15 THE EVALUATION OF DISABILITY

16 Persons are “disabled” for purposes of receiving Social Security benefits if they are unable
17 to engage in any substantial gainful activity owing to a physical or mental impairment that is
18 expected to result in death or which has lasted or is expected to last for a continuous period of at
19 least twelve months. Garcia v. Comm’r of Soc. Sec., 768 F.3d 925, 930 (9th Cir. 2014) (quoting
20 42 U.S.C. § 423(d)(1)(A)).

21 22 A. THE FIVE-STEP EVALUATION PROCESS

23 The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing
24 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lounsbury v. Barnhart, 468
25 F.3d 1111, 1114 (9th Cir. 2006) (citing Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999)).
26 In the first step, the Commissioner must determine whether the claimant is currently engaged in
27 substantial gainful activity; if so, the claimant is not disabled and the claim is denied. Lounsbury,
28 468 F.3d at 1114. If the claimant is not currently engaged in substantial gainful activity, the

1 second step requires the Commissioner to determine whether the claimant has a “severe”
2 impairment or combination of impairments significantly limiting his ability to do basic work
3 activities; if not, a finding of nondisability is made and the claim is denied. Id. If the claimant has
4 a “severe” impairment or combination of impairments, the third step requires the Commissioner
5 to determine whether the impairment or combination of impairments meets or equals an
6 impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R. § 404, subpart P,
7 appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id. If the
8 claimant’s impairment or combination of impairments does not meet or equal an impairment in the
9 Listing, the fourth step requires the Commissioner to determine whether the claimant has sufficient
10 “residual functional capacity” to perform his past work; if so, the claimant is not disabled and the
11 claim is denied. Id. The claimant has the burden of proving that he is unable to perform past
12 relevant work. Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992). If the claimant meets
13 this burden, a prima facie case of disability is established. Id. The Commissioner then bears
14 the burden of establishing that the claimant is not disabled because there is other work existing
15 in “significant numbers” in the national or regional economy the claimant can do, either (1) by
16 the testimony of a VE, or (2) by reference to the Medical-Vocational Guidelines at 20 C.F.R. part
17 404, subpart P, appendix 2. Lounsbury, 468 F.3d at 1114. The determination of this issue
18 comprises the fifth and final step in the sequential analysis. 20 C.F.R. §§ 404.1520, 416.920;
19 Lester v. Chater, 81 F.3d 721, 828 n.5 (9th Cir. 1995); Drouin, 966 F.2d at 1257.

21 **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

22 At step one, the ALJ found that plaintiff had not engaged in substantial gainful activity from
23 January 1, 2013, the alleged onset date, through June 30, 2014, his date last insured. [AR at 13.]
24 At step two, the ALJ concluded that through the date last insured, plaintiff had the medically
25 determinable impairments of renal insufficiency, obesity, and obstructive sleep apnea, but that
26 they were not severe. [Id.] Accordingly, the ALJ determined that plaintiff was not disabled at any
27 time from the alleged onset date of January 1, 2013, through June 30, 2014, the date last insured.
28 [AR at 19.]

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V.

THE ALJ'S DECISION

Plaintiff contends that: (1) the ALJ's decision does not have the support of substantial evidence; and (2) the ALJ incorrectly assessed the probative medical opinions of treating physicians Ramin Gabbai, M.D., and Reza Khorsan, M.D. [JS at 3-4.] As set forth below, the Court respectfully disagrees with plaintiff and affirms the decision of the ALJ.

A. THE ALJ'S STEP TWO FINDING

1. Legal Standard

At step two of the five-step process, plaintiff has the burden to provide evidence of a medically determinable physical or mental impairment that is severe and that has lasted or can be expected to last for a continuous period of at least twelve months. Ukolov v. Barnhart, 420 F.3d 1002, 1004-05 (9th Cir. 2005) (citing 42 U.S.C. §§ 423(d)(3), 1382c(a)(3)(D)); see 20 C.F.R. §§ 404.1508 (effective through March 26, 2017), 404.1509, 404.1520(a)(4)(ii); see generally Bowen v. Yuckert, 482 U.S. 137, 148, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987) (Secretary may deny Social Security disability benefits at step two if claimant does not present evidence of a "medically severe impairment"). This must be "established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by [the claimant's] statement of symptoms." 20 C.F.R. § 404.1508 (effective through March 26, 2017). The Commissioner's regulations define "symptoms" as a claimant's own description of his physical or mental impairment. 20 C.F.R. § 404.1528 (effective through March 26, 2017). "Signs," by contrast, "are anatomical, physiological, or psychological abnormalities which can be observed, apart from [the claimant's] statements . . . [,] [and] must be shown by medically acceptable clinical diagnostic techniques." Id. Finally, "[l]aboratory findings are anatomical, physiological, or psychological phenomena which can be shown by the use of medically acceptable laboratory diagnostic techniques." Id. A claimant's statements about an impairment (i.e., "symptoms") "are not enough [by themselves] to establish that there is a physical or mental impairment." Id.

Step two is "a de minimis screening device [used] to dispose of groundless claims."

1 Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996). A “severe” impairment, or combination of
2 impairments, is defined as one that significantly limits physical or mental ability to do basic work
3 activities. 20 C.F.R. § 404.1520. An impairment or combination of impairments should be found
4 to be “non-severe” only when the evidence establishes merely a slight abnormality that has no
5 more than a minimal effect on an individual’s physical or mental ability to do basic work activities.
6 Yuckert, 482 U.S. at 153-54 & n.11 (Social Security claimants must make “de minimis” showing
7 that impairment interferes with ability to engage in basic work activities) (citations omitted); Webb
8 v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005); see also 20 C.F.R. § 404.1521(a). “Basic work
9 activities” mean the abilities and aptitudes necessary to do most jobs, including “[p]hysical
10 functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or
11 handling” 20 C.F.R. § 404.1521(b). It also includes mental functions such as the ability to
12 understand, carry out, and remember simple instructions, deal with changes in a routine work
13 setting, use judgment, and respond appropriately to supervisors, coworkers, and usual work
14 situations. See SSR 85-28.

15 When reviewing an ALJ’s findings at step two, the Court “must determine whether the ALJ
16 had substantial evidence to find that the medical evidence clearly established that [the claimant]
17 did not have a medically severe impairment or combination of impairments.” Webb, 433 F.3d at
18 687 (citing Yuckert, 841 F.2d at 306 (“Despite the deference usually accorded to the Secretary’s
19 application of regulations, numerous appellate courts have imposed a narrow construction upon
20 the severity regulation applied here.”)).

21 22 **2. Analysis**

23 The ALJ found that through plaintiff’s date last insured, “[plaintiff] did not have an
24 impairment or combination of impairments that significantly limited the ability to perform basic
25 work-related activities for 12 consecutive months; therefore, [plaintiff] did not have a severe
26 impairment or combination of impairments.” [AR at 13.] She noted that plaintiff “currently suffers
27 from chronic kidney disease and has been on dialysis since 2015,” but that “the cumulative
28 medical evidence shows that a chronic disease, with the level of symptoms alleged, was not

1 established” by the date last insured of June 30, 2014. [AR at 14.]

2 Plaintiff contends that the April 12, 2018, letter from his treating physician, Dr. Gabbai,
3 submitted to and considered by the Appeals Council after the ALJ had issued her decision,
4 constitutes “new evidence that was not available to the ALJ,” and renders the ALJ’s decision “not
5 supported by substantial evidence.” [JS at 5.] In his letter, Dr. Gabbai stated that he first saw
6 plaintiff on December 6, 2013, when he treated him in the hospital for an acute kidney infection,
7 “which was due to a serious infection and due to obstruction as well [as] infection of [his] left
8 kidney.” [AR at 30.] He stated that at the time he was hospitalized, plaintiff was “significantly
9 debilitated.” [Id.] Dr. Gabbai further stated “[i]t is likely [that at the time of the hospitalization]
10 [plaintiff] had started developing fibrillary glomerulonephropathy.” [Id.] Dr. Gabbai also stated that
11 it is his opinion that “by June 30, 2014, [plaintiff] would have been on a regular and continuous
12 basis, . . . only able to lift and carry ten or more pounds occasionally (up to 1/3 of the workday) or
13 be on his feet less than even two hours in an eight-hour workday.” [Id.] Plaintiff asserts that this
14 additional opinion evidence submitted by Dr. Gabbai directly addresses the ALJ’s concern as
15 expressed in her decision that Dr. Gabbai’s “functional assessment does not describe [plaintiff’s]
16 status before June 30, 2014.”³ [JS at 6 (citing AR at 18).]

17 Defendant responds that the ALJ properly found that plaintiff’s alleged impairments and
18 limitations “could not be substantiated or linked to any *contemporaneously* reported symptom
19 evidence found in the record, prior to June 30, 2014.” [JS at 8-9; AR at 15-18 (emphasis added).]
20 Defendant asserts that “[p]laintiff relies on statements made by his treatment providers, obtained
21 years after his date last insured,” and that he did not report his alleged symptoms and limitations
22 to his treating providers until “well after his date last insured.” [JS at 8, 9.]

23 The Court finds that plaintiff has not rebutted the ALJ’s determination that plaintiff did not

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25 ³ In addition to the April 12, 2018, letter, on September 25, 2015, Dr. Gabbai completed a
26 Physical Residual Functional Capacity Questionnaire (“Questionnaire”) describing plaintiff’s
27 condition and its effect on his ability to work. [AR at 985-92.] The ALJ gave little weight to the Dr.
28 Gabbai’s opinions of plaintiff’s functional capacity because those opinions did not correlate with
the contemporaneous evidence through June 30, 2014, and, therefore, did not describe plaintiff’s
status during the relevant time period. [AR at 17-18.] The ALJ’s assessment of Dr. Gabbai’s
September 25, 2015, is discussed in more detail with respect to plaintiff’s second issue.

1 have a severe impairment prior to his date last insured. While plaintiff contends that Dr. Gabbai's
2 April 12, 2018, letter constitutes an additional opinion that directly addresses the ALJ's expressed
3 concern that Dr. Gabbai's September 25, 2015, functional assessment did not describe plaintiff's
4 status before June 30, 2014, for the reasons discussed below with regard to plaintiff's second
5 issue, Dr. Gabbai's letter did not provide substantially *new* information that the ALJ did not have
6 at the time of her decision.⁴ [JS at 6 (citing AR at 18).] As noted by the ALJ, despite plaintiff's
7 claim that his onset date was January 1, 2013, plaintiff provided no medical records prior to *July*
8 2013 to support his testimony of disabling chills and fatigue with a disability commencement date
9 of January 1, 2013. [AR at 16, 40-45, 240-41.] Additionally, based on the Court's review of
10 plaintiff's medical records from the period before June 30, 2014, and through his date last insured,
11 those records simply do not reflect the severity of the symptoms and limitations that plaintiff now
12 claims existed during that period of time. [See, e.g., AR at 237-42, 249-50, 259-61, 267, 270-75,
13 296-303, 489-515, 554-66, 705-42, 969-84, 1059-81.] In fact, from July 2013 through June 30,
14 2014, plaintiff's medical records only provide one instance -- on December 5, 2013 -- where
15 plaintiff mentioned "feeling weak and tired" -- a day before he had surgery for kidney stones. [AR
16 at 497-99, 709.] In the period following this procedure through plaintiff's date last insured, the
17 record reflects that plaintiff's kidney function improved and plaintiff made no new or continuing
18 mention of the debilitating symptoms he now alleges. [AR at 296-305.] In fact, it was not until a
19 medical visit on June 14, 2015, almost a full year after plaintiff's date last insured, that the record
20 reflects that plaintiff told his care provider that he had "become bedridden." [AR at 542.]

21 Based on the foregoing, the Court determines that the ALJ's finding that the record does
22 not reflect a severe impairment prior to plaintiff's date last insured is supported by substantial
23 evidence, and Dr. Gabbai's 2018 letter did not provide evidence that was not already in the record
24 at the time of the ALJ's decision. Remand is not warranted on this issue.

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26 ⁴ In the decision, the ALJ reviewed and discussed both Dr. Gabbai's September 25, 2015,
27 Questionnaire as well as the October 22, 2015, letter from another of plaintiff's treating physicians,
28 Dr. Khorsan, both of which are discussed below in connection with plaintiff's second issue. The
ALJ found that Dr. Khorsan's letter -- *which also opines that plaintiff was disabled prior to his date
last insured* -- suffers from the same deficiencies as Dr. Gabbai's opinions.

1 **B. MEDICAL OPINIONS**

2 **1. Legal Standard**

3 “There are three types of medical opinions in social security cases: those from treating
4 physicians, examining physicians, and non-examining physicians.” Valentine v. Comm’r Soc. Sec.
5 Admin., 574 F.3d 685, 692 (9th Cir. 2009); see also 20 C.F.R. §§ 404.1502, 404.1527.⁵ The Ninth
6 Circuit has recently reaffirmed that “[t]he medical opinion of a claimant’s treating physician is given
7 ‘controlling weight’ so long as it ‘is well-supported by medically acceptable clinical and laboratory
8 diagnostic techniques and is not inconsistent with the other substantial evidence in [the claimant’s]
9 case record.” Trevizo v. Berryhill, 871 F.3d 664, 675 (9th Cir. 2017) (quoting 20 C.F.R. §
10 404.1527(c)(2)) (second alteration in original). Thus, “[a]s a general rule, more weight should be
11 given to the opinion of a treating source than to the opinion of doctors who do not treat the
12 claimant.” Lester, 81 F.3d at 830; Garrison, 759 F.3d at 1012 (citing Ryan v. Comm’r of Soc. Sec.,
13 528 F.3d 1194, 1198 (9th Cir. 2008); Turner v. Comm’r of Soc. Sec., 613 F.3d 1217, 1222 (9th Cir.
14 2010)).

15 “[T]he ALJ may only reject a treating or examining physician’s uncontradicted medical
16 opinion based on clear and convincing reasons.” Trevizo, 871 F.3d at 675 (citing Ryan, 528 F.3d
17 at 1198). “Where such an opinion is contradicted, however, it may be rejected for specific and
18 legitimate reasons that are supported by substantial evidence in the record.” Id. (citing Ryan, 528
19 F.3d at 1198). The ALJ can meet the requisite specific and legitimate standard “by setting out a
20 detailed and thorough summary of the facts and conflicting clinical evidence, stating his
21 interpretation thereof, and making findings.” Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998).

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23 ⁵ The Court notes that for all claims filed on or after March 27, 2017, the Rules in 20 C.F.R.
24 § 404.1520c (not § 404.1527) shall apply. The new regulations provide that the Social Security
25 Administration “will not defer or give any specific evidentiary weight, including controlling weight,
26 to any medical opinion(s) or prior administrative medical finding(s), including those from your
27 medical sources.” 20 C.F.R. § 404.1520c. Thus, the new regulations eliminate the term “treating
28 source,” as well as what is customarily known as the treating source or treating physician rule.
See 20 C.F.R. § 404.1520c; see also 81 Fed. Reg. 62560, at 62573-74 (Sept. 9, 2016). However,
the claim in the present case was filed before March 27, 2017, and the Court therefore analyzed
plaintiff’s claim pursuant to the treating source rule set out herein. See also 20 C.F.R. § 404.1527
(the evaluation of opinion evidence for claims filed prior to March 27, 2017).

1 The ALJ “must set forth his own interpretations and explain why they, rather than the [treating or
2 examining] doctors’, are correct.” Id.

3 Although the opinion of a non-examining physician “cannot by itself constitute substantial
4 evidence that justifies the rejection of the opinion of either an examining physician or a treating
5 physician,” Lester, 81 F.3d at 831, state agency physicians are “highly qualified physicians,
6 psychologists, and other medical specialists who are also experts in Social Security disability
7 evaluation.” 20 C.F.R. §§ 404.1527(e)(2)(i), 416.927(e)(2)(i); Soc. Sec. Ruling 96-6p; Bray v.
8 Comm’r Soc. Sec. Admin., 554 F.3d 1219, 1221, 1227 (9th Cir. 2009) (the ALJ properly relied “in
9 large part on the DDS physician’s assessment” in determining the claimant’s RFC and in rejecting
10 the treating doctor’s testimony regarding the claimant’s functional limitations).

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12 **2. The Opinions of Treating Physicians Dr. Gabbai and Dr. Khorsan**

13 Dr. Gabbai, plaintiff’s treating physician and nephrologist, began treating plaintiff on
14 December 6, 2013, in connection with his hospitalization for an acute kidney injury, which was due
15 to an infection and kidney stones. [AR at 30; see AR at 985-92, 1026-53.] Although the day prior
16 to his surgery plaintiff complained of feeling weak and tired [AR at 709], it was not until November
17 25, 2014, that plaintiff reported “increasing fatigue,” among other things, to Jonathan Wiebe, M.D.
18 [AR at 305.] Plaintiff was referred to Dr. Khorsan, who then treated plaintiff from December 4,
19 2014, through spring 2015. [AR at 18, 1214.] On December 3, 2014, plaintiff reported that “he
20 ha[d] been complaining over the past several months of having worsening dyspnea on exertion,
21 can barely go up one flight of stairs, some orthopnea and increasing peripheral edema.” [AR at
22 310.] At this visit, plaintiff denied the existence of abdominal pain, cough, fever, or chills. [AR at
23 311.] Plaintiff had a kidney biopsy on December 29, 2014, and was diagnosed with fibrillary
24 glomerulonephropathy by Dr. Khorsan. [AR at 1004-05, 1214.]

25 On September 25, 2015, Dr. Gabbai completed the above-mentioned physical RFC
26 Questionnaire on plaintiff’s behalf. [AR 985-90.] In that Questionnaire, he opined that plaintiff
27 could stand for ten minutes in an eight-hour work day; could sit for three hours in an eight-hour
28 work day; could only walk twenty steps without needing to stop; could occasionally lift five pounds;

1 was too weak to travel alone; and that the disability was not likely to change. [Id.] Dr. Gabbai
2 stated that his opinions were based on his weekly visits with plaintiff and plaintiff's blood tests.
3 [AR at 985.]

4 On October 22, 2015, Dr. Khorsan, plaintiff's treating physician from December 4, 2014,
5 through the spring of 2015, submitted a letter to the "Social Security Claims Examiner" on plaintiff's
6 behalf. [AR at 1214-15.] In his letter, Dr. Khorsan noted that plaintiff presented to him in
7 December 2014 with symptoms of fluid retention, massive weight gain, and difficulty breathing,
8 and stated that plaintiff's symptoms had started 18 months earlier and continued to advance. [AR
9 at 1214.] He remarked that in December 2013, plaintiff was "noted to have worsening kidney
10 function . . . but at that time it was thought to be d[ue] to kidney stones." [Id.] He continued: "As
11 it turns out, it was not due to kidney stones, but to a rare condition call[ed] fibrillary
12 glomerulonephritis," which Dr. Khorsan diagnosed through a biopsy in December 2014. [Id.] He
13 concluded that, in his opinion, when plaintiff "saw a physician in December of 2013 complaining
14 about exhaustion and inability to get out of bed, he was already suffering from the kidney disease,"
15 and that his "disease progressed leaving him now with end stage kidney disease on dialysis." [Id.]

16
17 Finally, on April 12, 2018, after the ALJ's decision, and apparently in response to the ALJ's
18 decision discounting Dr. Gabbai's opinions as reflected in the September 25, 2015, Questionnaire,
19 plaintiff submitted the letter from Dr. Gabbai to the Appeals Council, discussed above. [AR at 30.]
20 In that letter, Dr. Gabbai remarked:

21 [B]y June 30, 2014, [plaintiff] would have been on a regular and continuous basis,
22 been [sic] only able to lift and carry ten or more pounds occasionally (up to 1/3 of the
23 workday) or be on his feet less than even two hours in an eight-hour workday. Any
job would have had to accommodate his need to take unscheduled rest breaks to
lie down as well.

24 [Id.]

26 3. The ALJ's Decision

27 The ALJ gave little weight to the opinion of Dr. Gabbai as set forth in the Questionnaire
28 because "this does not correlate with the contemporaneous evidence through June 30, 2014." [AR

1 at 17.] She noted that “[Dr. Gabbai] indicates that [plaintiff] has chronic kidney disease and is on
2 hemodialysis, relates symptoms of fatigue, dizziness, nausea, etc., and essentially precludes him
3 from sustaining any work activity. [T]his functional assessment does not describe [plaintiff’s]
4 status before June 30, 2014.” [AR at 18.]

5 For much the same reasons, the ALJ also gave little weight to the October 22, 2015,
6 opinion of Dr. Khorsan. [AR at 18.] The ALJ noted that Dr. Khorsan, who did not see plaintiff until
7 December 2014, “relied on [plaintiff’s] after-the-fact statements to him (at least in terms of severity)
8 that these symptoms had started 18 months prior (and continued to advance).” [Id.] The ALJ
9 further noted that she did not find “any specific subjective evidence of exhaustion reported in
10 December 2013 . . . [and] . . . minimal contemporaneous recorded evidence in this regard,
11 notwithstanding multiple medical entries through and subsequent to June 2014, in contrast to
12 mention of same in June 2015.” [Id.]

13 Instead, the ALJ gave “great weight” to the opinions of the state agency physicians who
14 “reviewed all of the medical records through the date last insured” and “determin[ed] that [plaintiff]
15 did not have a severe impairment by June 30, 2014.” [AR at 18.] The ALJ also examined
16 plaintiff’s records after his date last insured and noted that the evidence in 2015 reflecting acute
17 symptoms and stage 5 chronic kidney disease consistent with Listing level severity, “contrasts with
18 the pre-existing evidence and does not relate back to June 30, 2014, or earlier.” [AR at 17.]
19 Moreover, the ALJ noted that Dr. Gabbai’s September 2015 report, which reflected that plaintiff
20 was “then on hemodialysis, has fatigue, dizziness, poor functional state, infections, nausea, and
21 dry heaves,” also did not “correlate with the contemporaneous evidence through June 30, 2014.”
22 [Id.]

23 The ALJ also made it clear that “the crucial issue assessment relates to [plaintiff’s]
24 functional capacity”:

25 Regardless of whether Fibrillary GN was present by June 30, 2014, of any effects
26 from kidney stones or obesity; and of the lab results by June 30, 2014; we
27 essentially find no contemporaneous complaints of fatigue/exhaustion/lack of
28 energy. [He] related concerns about obesity in February 2014, but did not relate
these symptoms, even though he was establishing care with a new facility. More
generally, I find it highly significant that there is little mention of these symptoms
from any cause. Additionally, with few exceptions, we find specific denials of -- or

1 no mention of -- chills, as well as shortness of breath, chest pain, or other
2 symptoms, save for complaints of intermittent abdominal pain. This evidence -- or
3 lack thereof -- seems to counter [plaintiff's] assertions of daily exhaustion and chills
4 and of significant shortness of breath.

5 [Id.]

6 **4. Analysis**

7 Plaintiff contends that the ALJ failed to provide specific and legitimate reasons based on
8 the substantial evidence of record for discounting the opinions of Dr. Gabbai and Dr. Khorsan.
9 [AR at 15.] He notes that the ALJ rejected the opinions of both of these physicians because they
10 were not consistent with the objective medical evidence through June 30, 2014, and/or did not
11 describe plaintiff's status before June 30, 2014. [JS at 15-17.] He also suggests that "contrary
12 to the ALJ's opinion that the records do not contain subjective evidence [of plaintiff's allegations]
13 in December, 2013, the ALJ is wrong," because on December 5, 2013, plaintiff reported feeling
14 weak and tired. [AR at 17 (citing AR at 709).] Plaintiff contends that as a treating physician, Dr.
15 Gabbai's opinion should be "at a hierarchy of medical opinions in the record because he treated
16 [plaintiff] prior to the date last insured and during the entire adjudication period." [JS at 6.]

17 After reviewing the records, the Court finds that while Dr. Gabbai's and Dr. Khorsan's
18 opinions may be consistent with plaintiff's pre-June 30, 2014, symptoms as reported by him during
19 the hearing, the ALJ did not commit error in her determination that the medical records simply do
20 not reflect these same symptoms prior to that date. [See, e.g., AR at 237-42, 249-50, 259-61,
21 267, 270-75, 296-303, 489-515, 554-66, 705-42, 969-84, 1059-81.] As the ALJ found, from the
22 alleged onset date through the date last insured, there is little to no documentation to support
23 plaintiff's complaints of disabling fatigue, loss of energy, immobility, or bedridden status. [Id.] As
24 the ALJ stated in her decision, "[o]ne would expect to see significant reporting of these symptoms
25 if they had been as problematic as the [plaintiff] now contends in retrospect." [AR at 16.]
26 Moreover, as discussed above, the one record prior to June 2014 that reflects plaintiff's complaint
27 that he was feeling weak and tired was in a record dated one day prior to his surgery for kidney
28 stones. [AR at 497-99, 709.] After that, there is nothing in the record until plaintiff's complaint of

1 "increasing fatigue" to Dr. Wiebe on November 25, 2014, well after his date last insured.

2 Based on the foregoing, the ALJ provided specific and legitimate reasons for rejecting the
3 opinions of Dr. Gabbai and Dr. Khorsan and giving greater weight to the state agency reviewing
4 physicians. Remand is not warranted on this issue.

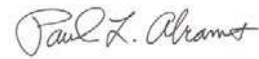
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6 **VI.**

7 **ORDER**

8 **IT IS HEREBY ORDERED** that: (1) plaintiff's request for remand is **denied**; and (2) the
9 decision of the Commissioner is **affirmed**.

10 **IT IS FURTHER ORDERED** that the Clerk of the Court serve copies of this Order and the
11 Judgment herein on all parties or their counsel.

12 **This Memorandum Opinion and Order is not intended for publication, nor is it**
13 **intended to be included in or submitted to any online service such as Westlaw or Lexis.**

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15 DATED: August 5, 2019

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17 PAUL L. ABRAMS
18 UNITED STATES MAGISTRATE JUDGE
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