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

MICHAEL H.,¹

Plaintiff,

v.

ANDREW M. SAUL,
Commissioner of Social Security,
Defendant.

Case No. 2:20-cv-03634-MAA

**MEMORANDUM DECISION AND
ORDER REVERSING DECISION OF
THE COMMISSIONER AND
REMANDING FOR FURTHER
ADMINISTRATIVE PROCEEDINGS**

On April 20, 2020, Plaintiff filed a Complaint seeking review of the Social Security Commissioner's final decision denying his application for a period of disability and disability insurance benefits pursuant to Title II of the Social Security Act. This matter is fully briefed and ready for decision. For the reasons discussed below, the Commissioner's final decision is reversed, and this action is remanded for further administrative proceedings.

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¹ Plaintiff's name is partially redacted in accordance 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.

ADMINISTRATIVE HISTORY

1
2 On August 29, 2016, Plaintiff protectively filed an application for a period of
3 disability and disability insurance benefits, alleging disability beginning on
4 September 29, 2015. (Administrative Record [AR] 433, 583.) Plaintiff alleged
5 disability because of “ptsd; L5; S1 fusion with hardware.” (AR 494.) After the
6 application was denied initially and on reconsideration, Plaintiff requested a hearing
7 before an Administrative Law Judge (“ALJ”). (AR 526-27.) During a hearing held
8 on June 18, 2019, at which Plaintiff appeared with counsel, the ALJ heard
9 testimony from Plaintiff and a vocational expert. (AR 451-77.)

10 In a decision issued on July 25, 2019, the ALJ denied Plaintiff’s disability
11 claim after making the following findings pursuant to the Commissioner’s five-step
12 evaluation. (AR 433-46.) Plaintiff had not engaged in substantial gainful activity
13 since his alleged disability onset date of September 29, 2015. (AR 435.) He had
14 severe impairments consisting of status post lumbar disc fusion, post traumatic
15 stress disorder, and bipolar disorder. (*Id.*) He did not have an impairment or
16 combination of impairments that met or medically equaled the requirements of one
17 of the impairments from the Commissioner’s Listing of Impairments. (*Id.*) He had
18 a residual functional capacity for medium work “except limited to understanding,
19 remembering and carrying out simple routine and repetitive tasks using judgment
20 limited to simple work related decisions; capable of socially responding
21 appropriately to coworkers and the public occasionally; and capable of socially
22 responding appropriately to supervisors frequently.” (AR 437.) He could no longer
23 perform his past relevant work as a dump truck driver. (AR 444.) However, he
24 could perform the requirements of medium unskilled occupations, under Rules
25 203.21 and 203.14 of the Medical-Vocational Guidelines. (AR 445.) Thus, the
26 ALJ concluded that Plaintiff was not disabled, as defined by the Social Security
27 Act, from September 29, 2015 through the date of the ALJ’s decision. (*Id.*)

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1 Plaintiff requested review by the Appeals Council. (AR 579-82, 641-43.) As
2 part of the request, Plaintiff submitted several pages of additional evidence (AR 7-
3 424), which the Appeals Council made a part of the record (AR 2). On March 24,
4 2020, the Appeals Council denied Plaintiff’s request for review (AR 1-6), making
5 the ALJ’s decision the final decision of the Commissioner.

7 **DISPUTED ISSUES**

8 The parties raise the following disputed issues:

- 9 1. Whether the ALJ’s residual functional capacity assessment is
10 supported by substantial evidence; and
- 11 2. Whether the ALJ properly evaluated Plaintiff’s subjective complaints.
12 (ECF No. 16, Parties’ Joint Stipulation [“Joint Stip.”] at 4.)

14 **STANDARD OF REVIEW**

15 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner’s final
16 decision to determine whether the Commissioner’s findings are supported by
17 substantial evidence and whether the proper legal standards were applied. *See*
18 *Treichler v. Commissioner of Social Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir.
19 2014). Substantial evidence means “more than a mere scintilla” but less than a
20 preponderance. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter*
21 *v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007). 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 must review the record as a
24 whole, weighing both the evidence that supports and the evidence that detracts from
25 the Commissioner’s conclusion. *Lingenfelter*, 504 F.3d at 1035. Where evidence is
26 susceptible of more than one rational interpretation, the Commissioner’s
27 interpretation must be upheld. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir.
28 2007).

DISCUSSION

I. Residual Functional Capacity Assessment (Issue One).

In Issue One, Plaintiff claims that the ALJ’s residual functional capacity (“RFC”) assessment is not supported by substantial evidence. (Joint Stip. at 5-7, 12-13.)

The ALJ found, as noted above, that Plaintiff had an RFC for medium work with additional mental functional limitations. (AR 437.) Plaintiff claims that the ALJ’s finding of medium work, in particular, is belied by the medical record and by the opinions of a nurse practitioner and two state agency review physicians. (Joint Stip. at 5-7.)

Plaintiff has not shown that reversal is warranted for the reasons he states. First, Plaintiff’s argument that an RFC for medium work is belied by the medical record relies on objective laboratory findings and medications that purportedly contradict an ability for medium work. (Joint Stip. at 5.) But this evidence, without further explanation, is not clearly inconsistent with an RFC for medium work. *See Decker v. Berryhill*, 856 F.3d 659, 665 (9th Cir. 2017) (commenting that “[j]udges are not physicians” and holding that abnormal medical laboratory reports, without more, do not compel a different result from that reached by the ALJ).

Second, Plaintiff’s argument that an RFC for medium work is belied by the opinions of a nurse practitioner and two state agency review physicians is not properly developed. The ALJ stated several specific reasons not to credit these opinions (AR 441, 442-43), yet Plaintiff has failed to respond to the ALJ’s reasons with a corresponding specificity (Joint Stip. at 5-6). Accordingly, the Court will not address whether the ALJ, as part of the RFC assessment, properly considered the opinions of the nurse practitioner and the two state agency review physicians. *See Carmickle v. Commissioner, Social Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (declining to address an ALJ’s finding because the claimant failed to argue this issue with any specificity in his briefing).

1 In sum, Plaintiff has not shown that the ALJ's RFC assessment warrants
2 reversal for the reasons stated in Issue One.

3
4 **II. Subjective Symptom Testimony (Issue Two).**

5 In Issue Two, Plaintiff claims that the ALJ did not properly evaluate his
6 subjective symptom testimony. (Joint Stip. at 14-16, 21-24.)

7
8 **A. Legal Standard.**

9 An ALJ must make two findings in assessing a claimant's pain or symptom
10 testimony. SSR 16-3P, 2017 WL 5180304, at *3; *Treichler*, 775 F.3d at 1102.
11 "First, the ALJ must determine whether the claimant has presented objective
12 medical evidence of an underlying impairment which could reasonably be expected
13 to produce the pain or other symptoms alleged." *Treichler*, 775 F.3d at 1102
14 (citation omitted). "Second, if the claimant has produced that evidence, and the ALJ
15 has not determined that the claimant is malingering, the ALJ must provide specific,
16 clear and convincing reasons for rejecting the claimant's testimony regarding the
17 severity of the claimant's symptoms" and those reasons must be supported by
18 substantial evidence in the record. *Id.*; see also *Marsh v. Colvin*, 792 F.3d 1170,
19 1174 n.2 (9th Cir. 2015).

20 "A finding that a claimant's testimony is not credible 'must be sufficiently
21 specific to allow a reviewing court to conclude the adjudicator rejected the
22 claimant's testimony on permissible grounds and did not arbitrarily discredit a
23 claimant's testimony regarding pain.'" *Brown-Hunter v. Colvin*, 806 F.3d 487, 493
24 (9th Cir. 2015) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991)
25 (*en banc*)).

26 Beginning on March 28, 2016, SSR 16-3P rescinded and superseded the
27 Commissioner's prior rulings as to how the Commissioner will evaluate a
28 claimant's statements regarding the intensity, persistence, and limiting effects of

1 symptoms in disability claims. *See* SSR 16-3P, 2017 WL 5180304, at *1. Because
2 the ALJ’s decision in this case was issued on July 25, 2019, it is governed by SSR
3 16-3P. *See id.* at *13 and n.27. In pertinent part, SSR 16-3P eliminated the use of
4 the term “credibility” and clarified that the Commissioner’s subjective symptom
5 evaluation “is not an examination of an individual’s character.” SSR 16-3P, 2017
6 WL 5180304, at *2; *see also Trevizo v. Berryhill*, 871 F.3d 664, 678 n.5 (9th Cir.
7 2017). These changes are largely stylistic and are consistent in substance with
8 Ninth Circuit precedent that existed before the effective date of SSR16-3P. *See*
9 *Trevizo*, 871 F.3d at 678 n.5.

10
11 **B. Background.**

12 Plaintiff testified at the hearing as follows about his medical condition and
13 limitations:

14 The biggest problem preventing him from working is post traumatic stress
15 disorder. (AR 458.) He also suffers from bipolar disorder with depression, and he
16 “broke [his] back in 2000.” (*Id.*) His physical condition makes it difficult to lift
17 things or walk for long distances. (*Id.*) His mental condition causes sleep
18 problems, flashbacks, anxiety, hypervigilance, irritability, a short temper, and
19 problems getting along with others. (AR 459.) His treatment has included, among
20 other things, group therapy (AR 459-60), Gabapentin (AR 460), and Depakote (AR
21 462). He was psychiatrically hospitalized for suicidal thoughts. (AR 463).

22 He can sit for an hour at a time, stand for thirty minutes to an hour at a time,
23 walk for a hundred feet or twenty minutes at a time, and lift less than five pounds.
24 (AR 466.) He washes dishes and does some vacuuming, but his daughter helps him
25 with chores such as taking out the trash. (*Id.*) He rarely goes anywhere except to
26 restaurants on occasion. (*Id.*) His wife uses a wheelchair, so he helps her with her
27 personal care (AR 467) and takes her to medical appointments (AR 468). His wife
28 does the shopping, cooking, and laundry, but he helps her. (AR 467-68.) He takes

1 care of other household chores such as making the bed and changing the sheets.
2 (AR 469.)

3
4 **C. Analysis.**

5 The ALJ first found that Plaintiff's medically determinable impairments
6 could reasonably be expected to cause the alleged symptoms. (AR 438.) However,
7 the ALJ next found that Plaintiff's statements concerning the intensity, persistence,
8 and limiting effects of these symptoms were not entirely consistent with the
9 medical evidence and other evidence in the record. (AR 438-49.)

10 The Court's review of the ALJ's findings includes consideration of evidence
11 presented for the first time to the Appeals Council, even though the ALJ did not
12 have an opportunity to consider that evidence. *See Brewes v. Commissioner of*
13 *Social Sec. Admin.*, 682 F.3d 1157, 1159-60 (9th Cir. 2012) ("We hold that when a
14 claimant submits evidence for the first time to the Appeals Council, which
15 considers that evidence in denying review of the ALJ's decision, the new evidence
16 is part of the administrative record, which the district court must consider in
17 determining whether the Commissioner's decision is supported by substantial
18 evidence."). As discussed below, the ALJ's reasoning for rejecting Plaintiff's
19 subjective symptom testimony was not supported by substantial evidence, largely
20 because of evidence presented to the Appeals Council.

21
22 **1. normal level of daily activity.**

23 Evidence of a claimant's daily activities may be used to discredit the
24 claimant's subjective symptom testimony on two grounds: the activities contradict
25 the claimant's other testimony, or the activities meet the threshold for transferable
26 work skills. *See Orn*, 495 F.3d at 639.

27 Here, the ALJ relied on evidence of Plaintiff's daily activities to discredit
28 Plaintiff's testimony on both grounds. (AR 439.) The ALJ found both that the

1 activities required mental abilities and social interactions that were “the same as
2 those necessary for obtaining and maintaining employment” and that the activities
3 “undermine [Plaintiff’s] allegations of disabling functional limitations.” (*Id.*) The
4 specific activities the ALJ cited were Plaintiff’s ability to “attend to his personal
5 care and hygiene, manage medications and appointments, perform household
6 chores, travel, attend various family events, care for his wife, help with shopping,
7 drive, engage in woodworking, and participate in various therapeutic groups.” (*Id.*)

8 With respect to the first ground, evidence of Plaintiff’s activities did not
9 clearly and convincingly show that he engaged in mental abilities and social
10 interactions that were transferable to a work environment. The evidence showed
11 that some of the activities resulted in a recurrence of symptoms or required support
12 from mental health providers. Specifically, a trip to Indiana for a family event
13 resulted in “frequent and intense anxiety” and encouragement from his mental
14 health providers to leave the house. (AR 842.) Another trip to Indiana, which
15 Plaintiff took to visit his dying father, resulted in increased anxiety and an increase
16 in Lorazepam. (AR 2133.) Plaintiff’s other activities—personal care, medication
17 management, household chores, assisting his wife, woodworking, and group
18 therapy—were performed in a private or supportive environment, which is not
19 easily compared to a work environment. More significantly, evidence presented to
20 the Appeals Council showed that Plaintiff performed his daily activities with the
21 help of occupational therapy (AR 309), where he was encouraged to break up tasks
22 into smaller tasks and to take frequent breaks or naps (AR 309, 312-13; *see also* AR
23 116-17, 179-80, 208). Activities performed in this limited context, which
24 sometimes resulted in increased anxiety and setbacks, were not clearly transferable
25 to a work environment. *See Smolen v. Chater*, 80 F.3d 1273, 1287 n.7 (9th Cir.
26 1996) (“[M]any home activities may not be easily transferable to a work
27 environment where it might be impossible to periodically rest or take medication.”)
28 (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). Thus, this was not a

1 clear and convincing reason based on substantial evidence to discount Plaintiff’s
2 subjective symptom testimony.

3 With respect to the second ground, evidence of Plaintiff’s activities did not
4 clearly and convincingly show a contradiction with Plaintiff’s other testimony.
5 Evidence presented to the Appeals Council, as noted above, showed that Plaintiff
6 required adaptive strategies for many of the activities, such as breaking up tasks
7 into smaller tasks (AR 116-17, 312), taking frequent breaks (AR 312), taking naps
8 (AR 313), asking for help (AR 179), using “activity/rest pacing” (*id.*), using a back
9 brace to stabilize his lumbar spine (AR 208), and avoiding repetition with
10 aggravating movements (AR 309). Activities performed with these limitations did
11 not show a clear contradiction with Plaintiff’s testimony about his limitations. *See*
12 *Revels v. Berryhill*, 874 F.3d 648, 667-68 (9th Cir. 2017) (claimant’s performance
13 of various household tasks with regular breaks did not show a wide disparity with
14 her symptom testimony). Thus, this also was not a clear and convincing reason
15 based on substantial evidence to discount Plaintiff’s subjective symptom testimony.

16 17 **2. additional findings.**

18 After making the findings about Plaintiff’s daily activities, the ALJ then
19 made additional findings about Plaintiff’s mental impairments and lumbar pain, but
20 without specifically tying these latter findings to Plaintiff’s subjective symptom
21 testimony. (AR 439.) Without this requisite specificity, the Court cannot construe
22 these latter findings as reasons to discount Plaintiff’s subjective symptom
23 testimony. *See Burrell v. Colvin*, 775 F.3d 1133, 1139 (9th Cir. 2014) (“Although
24 the ALJ made findings . . . concerning Claimant’s treatment for headaches, he never
25 stated that he rested his adverse credibility determination on those findings.”); *see*
26 *also Lambert v. Saul*, 980 F.3d 1266, 1278 (9th Cir. 2020) (general findings from
27 the medical record are insufficient to reject a claimant’s testimony) (citing *Brown-*
28 *Hunter*, 806 F.3d at 493-94 (an ALJ’s summary of the medical evidence does not

1 suffice to explain a non-credibility determination); and *Vasquez v. Astrue*, 572 F.3d
2 586, 592 (9th Cir. 2009) (an ALJ’s discussion of physicians’ findings did not
3 suffice to reject a claimant’s subjective complaints of pain)); *Treichler*, 775 F.3d at
4 1103 (a reviewing court cannot speculate that an ALJ rejected a claimant’s
5 testimony to the extent it conflicted with the medical evidence); *Dodrill v. Shalala*,
6 12 F.3d 915, 918 (9th Cir. 1993) (“It’s not sufficient for the ALJ to make only
7 general findings; he must state which pain testimony is not credible and what
8 evidence suggests the complaints are not credible.”); *Gonzalez v. Sullivan*, 914 F.2d
9 1197, 1201-02 (9th Cir. 1990) (ALJ’s discussion of a claimant’s daily activities,
10 which the ALJ did not specifically link to a conclusion that the claimant lacked
11 credibility, was too speculative to uphold the credibility determination).

12 Even assuming that the ALJ’s findings regarding Plaintiff’s mental
13 impairments and lumbar pain were stated as reasons to reject Plaintiff’s subjective
14 symptom testimony, they would not appear to be clear and convincing reasons
15 based on substantial evidence, particularly in light of the evidence presented to the
16 Appeals Council. First, the ALJ’s finding that Plaintiff’s mental impairments
17 showed overall improvement (AR 439) would not be convincing in light of
18 evidence of suicidal ideation (AR 756, 885), an emergency room visit for panic
19 attacks (AR 1025), frequent anxiety attacks (AR 756, 777, 1460, 2691), and a
20 psychiatric hospitalization two months before the ALJ’s decision (AR 3002-156).
21 Second, the ALJ’s findings that Plaintiff’s lumbar pain was managed with
22 injections and that Plaintiff had a normal gait (AR 439) would not be convincing in
23 light of evidence that Plaintiff required bilateral radiofrequency neuroablation (AR
24 107, 181, 261-62) and was prescribed a walker (AR 78). Thus, these findings
25 would not be legally sufficient reasons to reject Plaintiff’s subjective symptom
26 testimony in any event.

27 ///

28 ///

1 **D. Conclusion.**

2 Clear and convincing reasons based on substantial evidence were not stated
3 to reject Plaintiff’s subjective symptom testimony, particularly in light of evidence
4 presented for the first time to the Appeals Council. Thus, reversal is warranted for
5 Issue Two.

6
7 **III. Remand for Further Administrative Proceedings.**

8 Ninth Circuit case law “precludes a district court from remanding a case for
9 an award of benefits unless certain prerequisites are met.” *Dominguez v. Colvin*,
10 808 F.3d 403, 407 (9th Cir. 2015) (citations omitted). “The district court must first
11 determine that the ALJ made a legal error, such as failing to provide legally
12 sufficient reasons for rejecting evidence.” *Id.* “If the court finds such an error, it
13 must next review the record as a whole and determine whether it is fully developed,
14 is free from conflicts and ambiguities, and all essential factual issues have been
15 resolved.” *Id.* (citation and internal quotation marks omitted).

16 Here, the record is not free from conflicts and ambiguities, and all essential
17 factual issues have not been resolved. The record includes evidence that the ALJ
18 never had an opportunity to consider and discuss, because it was presented for the
19 first time to the Appeals Council. *See Harman v. Apfel*, 211 F.3d 1172, 1180 (9th
20 Cir. 2000) (where the ALJ’s findings lack substantial support because of evidence
21 presented to the Appeals Council, the appropriate remedy is to remand the case to
22 the ALJ to consider the evidence). Because of these outstanding issues, the Court
23 declines to credit Plaintiff’s testimony as true. *See Leon v. Berryhill*, 880 F.3d
24 1041, 1046 (9th Cir. 2017) (“A district court cannot proceed directly to credit a
25 claimant’s testimony as true and then look to the record to determine whether there
26 are any issues outstanding, as ‘this reverses the required order of analysis.’”) (quoting *Dominguez*, 808 F.3d at 409); *see also Treichler*, 775 F.3d at 1106 (“[A]
27 reviewing court is not required to credit claimants’ allegations regarding the extent
28

1 of their impairments as true merely because the ALJ made a legal error in
2 discrediting their testimony.”).

3 The record raises factual conflicts about Plaintiff’s level of functioning that
4 “should be resolved through further proceedings on an open record before a proper
5 disability determination can be made by the ALJ in the first instance.” *See Brown-*
6 *Hunter*, 806 F.3d at 496; *see also Treichler*, 775 F.3d at 1101 (stating that remand
7 for an award of benefits is inappropriate where “there is conflicting evidence, and
8 not all essential factual issues have been resolved”) (citation omitted); *Burrell*, 775
9 F.3d at 1141 (remand is appropriate where the record creates doubt as to whether
10 claimant is disabled); *Strauss v. Commissioner of the Social Sec. Admin.*, 635 F.3d
11 1135, 1138 (9th Cir. 2011) (same where the existing record does not clearly
12 demonstrate that the claimant is disabled within the meaning of the Social Security
13 Act).

14 Therefore, based on its review and consideration of the entire record, the
15 Court has concluded on balance that a remand for further administrative
16 proceedings pursuant to sentence four of 42 U.S.C. § 405(g) is warranted here. It is
17 not the Court’s intent to limit the scope of the remand.

18
19 **ORDER**

20 It is ordered that Judgment be entered reversing the final decision of the
21 Commissioner of Social Security and remanding this matter for further
22 administrative proceedings.

23
24 DATED: April 23, 2021

25
26 
27 _____
28 MARIA A. AUDERO
UNITED STATES MAGISTRATE JUDGE