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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ALVARO G. M.,  
Plaintiff,  
v.  
KILOLO KIJAKAZI, Acting  
Commissioner of Social Security,  
Defendant.

No. CV 21-04438 AGR

MEMORANDUM OPINION AND ORDER

Plaintiff<sup>1</sup> filed this action on May 27, 2021. The parties filed a Joint Stipulation that addressed the disputed issues. The court has taken the matter under submission without oral argument.<sup>2</sup>

Having reviewed the entire file, the court reverses the decision of the Commissioner and remands for further proceedings at step five of the sequential analysis.

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<sup>1</sup> Plaintiff's name has been partially redacted in compliance with Fed. R. Civ. P. 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.

<sup>2</sup> Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge. (Dkt. Nos. 10, 12.)

I.

**PROCEDURAL BACKGROUND**

On May 17, 2019, Plaintiff protectively filed applications for disability insurance benefits and supplemental security income benefits. Both applications alleged an onset date of August 6, 2017. Administrative Record (“AR”) 15. The applications were denied initially and upon reconsideration. AR 15, 77-78, 97-98. Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). On August 14, 2020, the ALJ conducted a hearing at which Plaintiff and a vocational expert testified. AR 28-60. On November 4, 2020, the ALJ issued a decision denying benefits. AR 12-23. On April 8, 2021, the Appeals Council denied review. AR 1-5. This action followed.

II.

**STANDARD OF REVIEW**

Pursuant to 42 U.S.C. § 405(g), this court has authority to review the Commissioner’s decision to deny benefits. *Smith v. Berryhill*, 139 S. Ct. 1765, 1774 (2019). The decision will be disturbed only if it is not supported by substantial evidence, or if it is based upon the application of improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam).

“Substantial evidence” means “more than a mere scintilla.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citation omitted). “It means – and means only – ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Id.* (citation omitted). In determining whether substantial evidence exists to support the Commissioner’s decision, the court examines the administrative record as a whole, considering adverse as well as supporting evidence. When the evidence is susceptible to more than one rational interpretation, the court must defer to the Commissioner’s decision. *Attmore v. Colvin*, 827 F.3d 872, 875 (9th Cir. 2016).

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III.

**DISCUSSION**

**A. Disability**

A person qualifies as disabled, and thereby eligible for such benefits, “only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20, 21-22 (2003) (citation and quotation marks omitted).

**B. The ALJ’s Findings**

The ALJ found that Plaintiff met the insured status requirements through December 31, 2020. AR 18. Following the five-step sequential analysis applicable to disability determinations, *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006),<sup>3</sup> the ALJ found that Plaintiff has the severe impairments of degenerative disc disease of the lumbar spine and residual effects of degenerative osteoarthritis of the right shoulder, status post arthroscopic subacromial decompression in December 2016. AR 18. Plaintiff has the residual functional capacity to perform light work except he can frequently climb ramps and stairs; frequently stoop, kneel, crouch and crawl; and occasionally reach overhead bilaterally. AR 20.

The ALJ concluded that Plaintiff can perform his past relevant work as a gas servicer (DOT 637.261-018). Plaintiff, therefore, was not under a disability from August 6, 2017 through the date of the ALJ’s decision on November 4, 2020. AR 23.

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<sup>3</sup> The five-step sequential analysis examines whether the claimant engaged in substantial gainful activity, whether the claimant’s impairment is severe, whether the impairment meets or equals a listed impairment, whether the claimant is able to do his or her past relevant work, and whether the claimant is able to do any other work. *Lounsbury*, 468 F.3d at 1114.

1           **C.     Past Relevant Work**

2           The RFC assessment measures the claimant’s capacity to engage in basic work  
3 activities. *Bowen v. New York*, 476 U.S. 467, 471 (1986). The RFC is a determination  
4 of “the most [the claimant] can still do despite [the claimant’s] limitations.” *Treichler v.*  
5 *Comm’r*, 775 F.3d 1090, 1097 (9th Cir. 2014) (citation omitted).

6           “At step four, a claimant has the burden to prove that he cannot perform his past  
7 relevant work ‘either as actually performed or as generally performed in the national  
8 economy.’” *Stacy v. Colvin*, 825 F.3d 563, 569 (9th Cir. 2016) (citation omitted). The  
9 ALJ “may not classify a past occupation ‘according to the least demanding function.’” *Id.*  
10 (citation omitted). “An ALJ may ask a VE to provide testimony as to the physical and  
11 mental demands of a claimant’s past relevant work to assess whether the claimant is  
12 still able to perform such past relevant work.” *White v. Kijakazi*, 2022 U.S. App. LEXIS  
13 21838, \*15 (9th Cir. Aug. 8, 2022).

14           Relying on the VE’s testimony, the ALJ found that Plaintiff could perform his past  
15 relevant work as a gas servicer as actually performed at the light level but not as  
16 generally performed at the medium level. AR 23, 57.

17           Plaintiff argues that the ALJ erred because he did not actually perform his past  
18 relevant work at the light level according to his hearing testimony and written statement.  
19 The vocational expert attended the hearing. AR 30-31. Plaintiff testified that he had  
20 worked as a service technician to repair cooking equipment in restaurants and fast food  
21 locations. AR 36, 43. In response to a question from the ALJ, the VE testified that  
22 Plaintiff worked as a gas servicer, DOT 637.261-018, rated as medium work “but his  
23 description in 4E puts it at light.” AR 45.

24           The ALJ then asked Plaintiff why he would not be able to do that work “as you did  
25 that job?” AR 49. Plaintiff responded that he could not do his past job for three  
26 reasons. First, “you got to use wrenches and take heavy bolts and nuts and you got to  
27 sometimes carry some heavy stuff like 50 pounds up from the truck or whatever you’re  
28 working on.” AR 49-50. Second, he could not turn bolts, nuts, or screwdrivers given

1 that he cannot even open a bottle of Gatorade without using a channel lock. Third, “you  
2 got to be on your knees most of the time because of the fryer. You open the door and  
3 you’re on your knees. I’d spend all of the days on my knees actually.” AR 50.

4 The ALJ asked the VE to assume a claimant limited to, among other things, light  
5 work and frequent kneeling. AR 56-57. The ALJ asked whether that claimant could  
6 perform the gas servicer job as actually performed but not generally performed. The VE  
7 answered “Yes.” AR 57.

8 The ALJ found that the VE’s testimony “is consistent with the claimant’s testimony  
9 at the hearing and his statement of the physical requirements of this work at [AR 230].”  
10 AR 23. The ALJ’s finding is unsupported by the evidence. The VE’s testimony is  
11 clearly inconsistent with Plaintiff’s hearing testimony, which described a gas servicer job  
12 at a medium level with constant kneeling. The Commissioner argues that the ALJ could  
13 have relied solely on Plaintiff’s written statement (AR 230) and discounted the hearing  
14 testimony. The ALJ expressly found the VE’s testimony to be consistent with Plaintiff’s  
15 hearing testimony and written statement, however, and the court is “constrained to  
16 review the reasons the ALJ asserts.” *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir.  
17 2003). The Commissioner further argues that Plaintiff waived this argument by failing to  
18 cross-examine the VE on this subject. The court finds no waiver. The VE’s testimony  
19 was complete, and the error was not apparent until the ALJ issued her findings.  
20 Accordingly, this matter must be reminded for further proceedings at step five of the  
21 sequential analysis.

#### 22 **D. Subjective Allegations**

23 “An ALJ engages in a two-step analysis to determine whether a claimant’s  
24 testimony regarding subjective pain or symptoms is credible. First, the ALJ must  
25 determine whether the claimant has presented objective medical evidence of an  
26 underlying impairment which could reasonably be expected to produce the pain or other  
27 symptoms alleged.” *Smith v. Kijakazi*, 14 F.4th 1108, 1111 (9th Cir. 2021) (citation  
28 omitted). “At this step, the medical evidence need not corroborate the severity of the

1 alleged symptoms; the medical evidence need only establish that the impairment could  
2 reasonably be expected to cause some degree of the alleged symptoms.” *Id.* “Then,  
3 provided ‘there is no evidence of malingering, the ALJ can reject the claimant’s  
4 testimony about the severity of her symptoms only by offering specific, clear and  
5 convincing reasons for doing so.” *Id.* at 1112 (citation omitted). The Ninth Circuit  
6 requires that the ALJ “‘specify which testimony she finds not credible, and then provide  
7 clear and convincing reasons, supported by evidence in the record, to support that  
8 credibility determination.” *Id.* (citation omitted). “[A]n ALJ cannot be required to believe  
9 every allegation of disabling pain, or else disability benefits would be available for the  
10 asking.” *Treichler v. Comm’r*, 775 F.3d 1090, 1106 (9th Cir. 2014) (citation omitted).

11 The ALJ found that Plaintiff’s medically determinable impairments could  
12 reasonably be expected to cause the alleged symptoms, but concluded that his  
13 statements about the intensity, persistence, and limiting effects “are not entirely  
14 consistent with the medical evidence and other evidence in the record” and are  
15 internally inconsistent. AR 22.

16 The ALJ noted that Plaintiff does have medically determinable impairments. On  
17 April 12, 2018, Plaintiff reported daily chronic right shoulder pain and stiffness. AR 305.  
18 On May 8, 2018, an MRI of the right shoulder indicated postsurgical changes of the  
19 prior supraspinatus tendon repair, mild articular surface fraying of the tendon construct  
20 without recurrent full-thickness tendon defect; moderate infraspinatus tendinosis with  
21 low-grade partial-thickness bursal surface tear/fraying anteriorly, moderate  
22 subscapularis tendinosis; posterior labral tear associated with mild to moderate  
23 degenerative changes of the glenohumeral joint posteriorly; moderate osteoarthritis of  
24 the acromioclavicular joint, prior acromioplasty; and mild to moderate subacromial  
25 subdeltoid bursal fluid. AR 451.

26 On June 5, 2018, Plaintiff reported chronic neck pain and stiffness. He denied  
27 radiation, numbness or tingling in his hands. On examination, he had paraspinous  
28 tenderness in the neck. AR 301-02. Cervical spine imaging showed no acute findings

1 other than cervical straightening that may be due to spasm. AR 318. On July 16, 2018,  
2 Plaintiff reported shoulder pain and was scheduled for surgery within one month. AR  
3 299. On September 17 and November 27, 2018, Plaintiff was seen for routine follow-up  
4 and denied current symptoms. Physical examinations were within normal limits. The  
5 orthopedic surgeon had prescribed physical therapy. AR 295-96, 297-98.

6 On February 11, 2019, Plaintiff reported increasing low back pain and stiffness  
7 over the last two months and that current pain medications are not working well. The  
8 physician ordered an x-ray of the lumbar spine and discussed proper lifting techniques.  
9 AR 293-94.

10 On August 29, 2019, Plaintiff reported worsening and severe low back pain  
11 radiating down both legs. AR 384. On examination, Plaintiff had lumbar paraspinous  
12 tenderness and negative straight leg raising. The physician ordered imaging. AR 385.  
13 On September 27, 2019, an MRI of the lumbar spine indicated mild levoscoliosis;  
14 posterior disc bulges measuring 2-3 mm at the L3-4 and L4-5 levels; degenerative  
15 changes of the facet joints at L3-4 and L5-6; and anterior disc bulge measuring 2-3 mm  
16 at the L2-3, L3-4, L4-5 and L5-S1 levels. AR 448-49, 453.

17 Plaintiff was treated at Synovation with caudal epidural steroid injections on April  
18 1, June 7, and October 9, 2019 (AR 401, 403, 405) and left sacroiliac joint injections on  
19 April 10 and June 23, 2020 (AR 397, 399). The Synovation records cover the period  
20 March 2019 – May 2020. On March 21, 2019, Plaintiff was referred for low back pain  
21 radiating down to buttock and bilateral legs, and shoulder pain. Plaintiff reported that  
22 the pain was aggravated by prolonged standing and activities. AR 393. On  
23 examination, Plaintiff had a stable and non-antalgic gait, tenderness to palpation of  
24 lumbar paraspinals, reduced range of motion, positive straight leg raising bilaterally,  
25 positive facet loading, 5/5 motor strength, and intact sensation. AR 395. Subsequent  
26 records repeat these complaints and findings. AR 407, 410, 412, 414-15, 417, 419-20,  
27 422, 424-25, 427, 429-30, 432, 434, 436, 438, 440, 442, 444, 446. On April 30, 2019,  
28 Plaintiff reported that the injection was therapeutic. AR 443-44. On June 26, 2019,

1 Plaintiff reported that the most recent injection was minimally therapeutic. A TENS unit  
2 was authorized. AR 439. On July 25, 2019, Plaintiff reported that the TENS unit was  
3 therapeutic but he started having more back pain two weeks ago. AR 432, 435. After  
4 the September 2019 MRI, Plaintiff reported that the TENS unit, injections and  
5 medications were therapeutic. A lumbar corset brace for his low back was denied. AR  
6 423, 425. On January 7, 2020, Plaintiff complained of right-side mid back pain for the  
7 past month. He was continued on the same treatment plan. AR 418, 420-21. On  
8 March 20, 2020, Plaintiff reported that he fell a month earlier and had left buttock and  
9 left elbow pain. He was scheduled for left sacroiliac joint injection and otherwise  
10 continued on the same treatment plan. AR 413, 416. On May 21, 2020, Plaintiff  
11 reported that the injection was therapeutic and walking alleviated the pain. AR 408.

12         Otherwise, the ALJ's findings of inconsistencies within Plaintiff's complaints, and  
13 between his complaints and activities, are supported by substantial evidence. See  
14 *Berry v. Astrue*, 622 F.3d 1228, 1234-35 (9th Cir. 2010). The ALJ noted that Plaintiff  
15 complained of numbness in his fingers, but medical records after the alleged onset date  
16 indicated denial of radiation, numbness or tingling in the hands. AR 18, 301-02.  
17 Plaintiff testified that he had chronic neck pain, but pain management treatment records  
18 in 2020 were devoid of complaints of neck pain. AR 19, 38. In his August 2019  
19 statement, Plaintiff stated that he drove a car with an automatic transmission but, at the  
20 hearing, he testified that he did not drive and had not had a car in four or five years. AR  
21 21-22, 51, 225. Plaintiff testified that he could lift maybe five pounds, but in his August  
22 2019 statement acknowledged that he does grocery shopping once per week and  
23 carries a couple of grocery bags into his home. AR 21-22, 51, 225. In a written  
24 statement, Plaintiff's representative claimed that shaving, if it took too long, would cause  
25 finger spasms out of control, but Plaintiff testified that he took care of his son, who has  
26 cerebral palsy, three hours per day including shaving him, cutting his hair, preparing  
27 meals and doing laundry. AR 40, 55, 258. Moreover, Plaintiff testified that when he  
28 sits, "that's when I don't really have pain." AR 50. This statement undermines Plaintiff's



1 testimony that he can sit only 30-40 minutes. Plaintiff's self-reported activities suggest  
2 a greater functional capacity than Plaintiff claimed in his testimony. See *Berry*, 622  
3 F.3d at 1235. Plaintiff has not shown error.

4 **IV.**

5 **ORDER**

6 IT IS HEREBY ORDERED that the decision of the Commissioner is reversed and  
7 this matter is remanded for further proceedings at step five of the sequential analysis.

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10 DATED: September 16, 2022



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ALICIA G. ROSENBERG  
United States Magistrate Judge