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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VICTOR A.,¹

Plaintiff

v.

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,

Defendant.

Case No. 2:21-cv-07482-GJS

**MEMORANDUM OPINION AND
ORDER**

I. PROCEDURAL HISTORY

Plaintiff Victor A. (“Plaintiff”) filed a complaint seeking review of the decision of the Commissioner of Social Security denying his applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”). The parties filed consents to proceed before the undersigned United States Magistrate Judge [Dkts. 11 and 17] and briefs [Dkts. 15 (“Pl. Br.”), 20 (“Def. Br.”) & 21 (“Reply”)] addressing disputed issues in the case. The matter is now ready for decision. For the reasons set forth below, the Court finds that this matter should be affirmed.

¹ In the interest of privacy, this Order uses only the first name and the initial of the last name of the non-governmental party in this case.

1 **II. ADMINISTRATIVE DECISION UNDER REVIEW**

2 Plaintiff filed applications for DIB and SSI on December 5, 2019, alleging
3 disability beginning October 18, 2019. [Dkt. 13, Administrative Record (“AR”) 36,
4 154-59, 208-09.] Plaintiff’s applications were denied at the initial level of review
5 and on reconsideration. [AR 36, 117-21, 124-36.] A telephone hearing was held
6 before Administrative Law Judge James Carberry (“the ALJ”) on December 17,
7 2020. [AR 36, 50-68.]

8 On January 6, 2021, the ALJ issued an unfavorable decision applying the
9 five-step sequential evaluation process for assessing disability. [AR 36-43.] *See* 20
10 C.F.R. §§ 404.1520(b)-(g)(1), 416.920(b)-(g)(1). At step one, the ALJ determined
11 that Plaintiff had not engaged in substantial gainful activity since October 18, 2019,
12 the alleged onset date. [AR 38.] At step two, the ALJ determined that Plaintiff has
13 the following severe impairments: coronary artery disease; congestive heart failure;
14 and diabetes mellitus. [AR 39.] At step three, the ALJ determined that Plaintiff
15 does not have an impairment or combination of impairments that meets or medically
16 equals the severity of one of the impairments listed in Appendix I of the
17 Regulations. [AR 39.] *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1. The ALJ found that
18 Plaintiff has the residual functional capacity (“RFC”) to perform sedentary work, as
19 defined in 20 C.F.R. §§ 404.1567(a), 416.967(a), except he is precluded from
20 climbing ladders, ropes and scaffolds and working around unprotected heights and
21 dangerous machinery and he is limited to lifting and carrying 10 pounds
22 occasionally and less than 10 pounds frequently, standing and/or walking 2 out of 8
23 hours, sitting 6 out of 8 hours, and occasionally balancing, stooping, kneeling,
24 crouching, crawling, and climbing of ramps and stairs. [AR 40.] At step four, the
25 ALJ determined that Plaintiff is able to perform his past relevant work as a
26 telephone solicitor, as actually and generally performed. [AR 42-43.] Based on
27 these findings, the ALJ concluded that Plaintiff was not disabled from the alleged
28 onset date, October 18, 2019, through the date of the decision, January 6, 2021.

1 [AR 43.]

2 The Appeals Council denied review of the ALJ's decision on July 26, 2021.

3 [AR 1-7.] This action followed.

4 Plaintiff raises the following issues challenging the ALJ's findings and
5 determination of non-disability:

- 6 1. The ALJ failed to obtain and evaluate the complete medical record.
- 7 2. The Appeals Council failed to consider new and material evidence.
- 8 3. The ALJ erred in determining Plaintiff's RFC.

9 The Commissioner asserts that the ALJ's decision is supported by substantial
10 evidence and should be affirmed.

11 12 III. GOVERNING STANDARD

13 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner's decision to
14 determine if: (1) the Commissioner's findings are supported by substantial
15 evidence; and (2) the Commissioner used correct legal standards. *See Carmickle v.*
16 *Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Brewes v. Comm'r*
17 *Soc. Sec. Admin.*, 682 F.3d 1157, 1161 (9th Cir. 2012). "Substantial evidence ... is
18 'more than a mere scintilla' ... [i]t means – and only means – 'such relevant
19 evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citations omitted); *Gutierrez v.*
20 *Comm'r of Soc. Sec.*, 740 F.3d 519, 522 (9th Cir. 2014) ("[s]ubstantial evidence is
21 more than a mere scintilla but less than a preponderance") (internal quotation marks
22 and citation omitted).

23
24 The Court will uphold the Commissioner's decision when "the evidence is
25 susceptible to more than one rational interpretation." *Burch v. Barnhart*, 400 F.3d
26 676, 681 (9th Cir. 2005) (quoting *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir.
27 1989)). However, the Court may review only the reasons stated by the ALJ in the
28 decision "and may not affirm the ALJ on a ground upon which he did not rely."

1 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). The Court will not reverse the
2 Commissioner’s decision if it is based on harmless error, which exists if the error is
3 “inconsequential to the ultimate nondisability determination, or that, despite the
4 error, the agency’s path may reasonably be discerned.” *Brown-Hunter v. Colvin*,
5 806 F.3d 487, 492 (9th Cir. 2015) (internal quotation marks and citations omitted).
6

7 **IV. DISCUSSION**

8 **A. New Evidence before the Appeals Council**

9 Plaintiff contends that remand for further proceedings is required because the
10 Appeals Council failed to properly “consider” and designate as exhibits certain new
11 medical evidence that Plaintiff submitted after the ALJ rendered his decision. [Pl.
12 Br. at 11-12; AR 1698-1713.]

13 The Regulations govern when the Appeals Council is obligated to review
14 additional evidence. *See* 20 C.F.R. §§ 404.970, 416.1470 (effective January 17,
15 2017). The Appeals Council “will review a case if ... the Appeals Council receives
16 additional evidence that is new, material, and relates to the period on or before the
17 date of the hearing decision, [] there is a reasonable probability that the additional
18 evidence would change the outcome of the decision,” and there is “good cause” for
19 not submitting the new evidence earlier. 20 C.F.R. §§ 404.970(a)(5), (b),
20 416.1470(a)(5), (b).

21 When the Appeals Council fails to “consider” additional evidence that
22 satisfies the requirements of Section 404.970 or Section 416.1470, a remand for
23 further administrative proceedings is appropriate. *See Taylor v. Comm’r of Soc. Sec.*
24 *Admin.*, 659 F.3d 1228, 1233 (9th Cir. 2011). A claimant has the burden to
25 demonstrate the new evidence should have been considered for the first time by the
26 Appeals Council. *See Garcia v. Saul*, No. 1:19-CV-1103-JLT, 2021 WL 223205, at
27 *4 (E.D. Cal. Jan. 22, 2021).

28 The Ninth Circuit has distinguished between evidence the Appeals Council

1 “considered” and evidence the Appeals Council merely “looked at” to determine
2 whether the additional evidence was incorporated into the record. Evidence
3 “considered” by the Appeals Council becomes part of the administrative record, as
4 “evidence upon which the findings and decision complained of are based.” *Brewes*
5 *v. Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157, 1162 (9th Cir. 2012). But if “the
6 Appeals Council only looked at the evidence ... the new evidence [does] not become
7 part of the record” and the Court “may not consider it.” *Amor v. Berryhill*, 743 F.
8 App’x 145, 146 (9th Cir. 2018); *de Orozco v. Comm’r of Soc. Sec.*, No. 1:18-CV-
9 00817-SAB, 2019 WL 2641490, at *11 (E.D. Cal. June 27, 2019) (observing that
10 the Ninth Circuit distinguished between instances where the Appeals Council
11 formally considered evidence and made it part of the administrative record with
12 instances where the Appeals Council only looked at the evidence).

13 Plaintiff was represented by an attorney at the hearing on December 17, 2020.
14 [AR 36, 50-68.] After the ALJ issued the decision on January 6, 2021, Plaintiff
15 requested Appeals Council review and retained new counsel. [AR 49, 206-07, 356-
16 57.] Plaintiff submitted to the Appeals Council a brief and three Los Angeles
17 County/USC Medical Center records, including cardiology reports dated October
18 21, 2020 and March 3, 2021, and a primary care provider report of a telephone visit
19 dated December 2, 2020. [AR 356-57, 1698-1711.]

20 On July 26, 2021, the Appeals Council denied Plaintiff’s request for review.
21 [AR 1-7.] The Notice of Appeals Council Action states that it considered the
22 reasons why Plaintiff disagreed with the ALJ’s decision and exhibited them on the
23 Order of the Appeals Council, but it concluded that “the reasons did not provide a
24 basis for changing the [ALJ’s] decision.” [AR 1.] The Appeals Council also
25 acknowledged the submission of the three additional medical records, but it did not
26 designate the records as exhibits. [AR 2, 5.] The Appeals Council explained that
27 the new medical evidence did not provide a basis for reviewing the ALJ’s decision,
28 as follows:

1 You submitted treatment records from USC Cardiology,
2 dated October 21, 2020 through December 2, 2020 (6
3 pages). We find this evidence does not show a reasonable
4 probability that it would change the outcome of the
5 decision. We did not exhibit this evidence.

6 You submitted Medical Records from USC Cardiology,
7 dated March 3, 2021 (10 pages). The Administrative Law
8 Judge decided your case through January 6, 2021. This
9 additional evidence does not relate to the period at issue.
10 Therefore, it does not affect the decision about whether
11 you were disabled beginning on or before January 6, 2021.

12 [AR 2.]

13 The Notice of Appeals Council Action indicates that the Appeals Council
14 “looked” at the new medical records in concluding that it was not likely to affect the
15 ALJ’s decision, but it did not “consider” the new records or make them part of the
16 record. *See Amor*, 743 F. App’x at 146; *see Garcia*, 2021 WL 223205, at *4
17 (finding no error by the Appeals Council “in merely looking at the evidence and not
18 incorporating it as exhibits into the administrative record”); *Matias v. Saul*, No. CV
19 19-00575 LEK-KJM, 2021 WL 531238, at *5 (D. Haw. Feb. 12, 2021) (construing
20 the Appeals Council’s statement that it did not “exhibit” newly submitted medical
21 evidence because it did “not show a reasonable probability that it would change the
22 outcome of the decision,” as indicating that the Appeals Council merely “looked at”
23 the additional medical evidence but did not “consider” it). Although the new
24 medical records were listed in the Court Transcript Index, they did not become part
25 of the record, as the Appeals Council did not exhibit them or list them in the
26 Appeals Council’s Exhibit List. [AR 5.] *See Guzman v. Kijakazi*, No. 1:20-CV-
27 0514 JLT, 2021 WL 6062645, at *3 (E.D. Cal. Dec. 22, 2021) (interpreting Appeals
28 Council statement that it “did not exhibit this evidence” to mean the Council “did
not consider the evidence but merely looked at it”).

Plaintiff asserts that the Appeals Council’s failure to consider the additional

1 medical evidence requires remand for further proceedings. He argues that the new
2 medical records show “the extent of Plaintiff’s cardiac decompensation prior to the
3 ALJ hearing and continuing after the hearing” and there is “a reasonable
4 probability” the newly submitted evidence would “change the outcome of the case
5 when considered.” [Pl. Br. at 12; Reply at 5.] Plaintiff points out that the two new
6 cardiology reports (dated October 21, 2020 and March 1, 2021) reflect that Plaintiff
7 underwent a transthoracic echocardiogram on October 1, 2020 and his ejection
8 fraction² was estimated at 20 percent. [AR 1699, 1711.]

9 Plaintiff fails to meet his burden of showing that the new evidence should
10 have been considered by the Appeals Council. *See Garcia*, 2021 WL 223205, at *4.
11 Significantly, the new cardiology reports indicate that Plaintiff’s October 1, 2020
12 echocardiogram showed “no appreciable changes,” as compared to Plaintiff’s prior
13 study. [AR 1699, 1711.] Indeed, Plaintiff’s echocardiogram from October 1, 2020,
14 like his echocardiogram from November 26, 2019, indicate that Plaintiff had an
15 estimated ejection fraction of 20 percent, left ventricle with moderately increased
16 cavity size, severe diffuse hypokinesis, grade III diastolic function, right ventricle
17 with severely reduced systolic function, left atrium moderately dilated, right atrium
18 severely dilated, aortic valve with trivial regurgitation, mitral valve with mild
19 regurgitation, and tricuspid valve with mild-moderate regurgitation. [AR 428,
20 1711.] Thus, Plaintiff has failed to show there is a “reasonable probability that the
21 additional evidence would change the outcome of the decision.” 20 C.F.R. §§
22 404.970(a)(5), 416.1470(a)(5).

23 Further, the record does not contain any evidence that Plaintiff satisfied his
24 burden of showing good cause for the failure to present the additional medical
25 evidence earlier. *See* 20 C.F.R. §§ 404.970(b), 416.1470(b).

27 ² Ejection fraction refers to the percentage of blood pumped out of the heart
28 with each contraction. *See* 20 C.F.R. Part 404, Subpart P, Appendix 1, §
4.00D(1)(a)(i).

1 Accordingly, the Appeals Council did not err in failing to remand the case for
2 further proceedings. *See* 20 C.F.R. §§ 404.970, 416.1470.

3 **B. Development of the Medical Record**

4 Plaintiff contends that the ALJ failed to fully develop the record by obtaining
5 all of Plaintiff’s treatment records. [Pl. Br. at 9-11.]

6 According to Plaintiff, his October 1, 2020 echocardiogram, as documented in
7 the October 21, 2020 cardiology report that was submitted to the Appeals Council,
8 establishes that he meets the requirements of Listing 4.02 for chronic heart failure.
9 [Pl. Br. at 9-11; AR 1711.] Plaintiff claims that he has “listing level systolic
10 failure,” as his estimated ejection fraction was “20% during a period of stability.”
11 [Pl. Br. at 10.] Plaintiff argues that the ALJ should have known that this “critical
12 medical information was missing,” because a June 2020 treatment note indicated
13 that Plaintiff had a reduced ejection fraction and could be reevaluated after
14 September 30, 2020. [Pl. Br. at 10 (citing AR 1622).]

15 “[T]he ALJ has a special duty to develop the record fully and fairly and
16 ensure that the claimant’s interests are considered.” *Mayes v. Massanari*, 276 F.3d
17 453, 459 (9th Cir. 2001). However, “[a]n ALJ’s duty to develop the record further
18 is triggered only when there is ambiguous evidence or when the record is inadequate
19 to allow for proper evaluation of the evidence.” *Id.* at 459-60.

20 Here, Plaintiff has failed to demonstrate that the record was ambiguous or
21 inadequate to allow for proper evaluation of his claim. The ALJ obtained and
22 reviewed Plaintiff’s medical records but found no ambiguities, inadequacies, or
23 conflicts in the record that had to be resolved. The ALJ even asked Plaintiff’s
24 counsel about medical records documenting Plaintiff’s ejection fraction at the
25 hearing. [AR 53-54, 62.] Plaintiff’s counsel failed to inform the ALJ that any
26 medical records were missing. Plaintiff’s argument that the ALJ should have known
27 medical records were missing is conclusory and not supported by the record.

28 Further, even if the ALJ erred by failing to develop the record, any error was

1 harmless. *See Brown-Hunter*, 806 F.3d at 492; *Garcia v. Comm’r of Soc. Sec.*, 768
2 F.3d 925, 932 n.10 (9th Cir. 2014) (stating that legal error in failing to develop the
3 record is subject to the traditional harmless error analysis). As noted above,
4 Plaintiff’s October 1, 2020 echocardiogram showed “no appreciable changes
5 compared to [his] prior study.” [AR 1711.] Plaintiff’s echocardiogram in October
6 2020, like his echocardiogram in November 2019 showed an estimated ejection
7 fraction of 20 percent. [AR 428, 1711.] The ALJ acknowledged at the hearing and
8 in the decision that Plaintiff’s had an estimated ejection fraction of just 20 percent in
9 November 2019. [AR 41, 53-54, 61-62.]

10 Moreover, evidence of a low ejection fraction, without more, does not satisfy
11 the requirements of Listing 4.02 for chronic heart failure. To be disabled under
12 Listing 4.02, a claimant must satisfy one set of criteria in Paragraph A of Listing
13 4.02 (requiring medical evidence of systolic or diastolic failure) and one set of
14 criteria Paragraph B of Listing 4.02 (describing symptoms and signs of heart
15 failure), while on a regimen of prescribed treatment. *See* 20 C.F.R. Part 404,
16 Subpart P, Appendix 1, § 4.02. Paragraph A of Listing 4.02 requires medically
17 documented evidence of either: 1) Systolic failure “with left ventricular end
18 diastolic dimensions greater than 6.0 cm or ejection fraction of 30 percent or less
19 during a period of stability (not during an episode of acute heart failure)” or 2)
20 Diastolic failure, “with left ventricular posterior wall plus septal thickness totaling
21 2.5 cm or greater on imaging, with an enlarged left atrium greater than or equal to
22 4.5 cm, with normal or elevated ejection fraction during a period of stability (not
23 during an episode of acute heart failure).” *Id.* Paragraph B of Listing 4.02 requires
24 one of the following: 1) “Persistent symptoms of heart failure which very seriously
25 limit the ability to independently initiate, sustain, or complete activities of daily
26 living in an individual for whom an MC [medical consultant], ..., has concluded that
27 the performance of an exercise test would present a significant risk to the
28 individual;” or 2) “Three or more separate episodes of acute congestive heart failure

1 within a consecutive 12-month period, ... with evidence of fluid retention ...,
2 requiring acute extended physician intervention...;” or 3) “Inability to perform an
3 exercise tolerance test at a workload equivalent to 5 METs (metabolic equivalents)
4 or less due to: a. Dyspnea, fatigue, palpitations, or chest discomfort; or b. Three or
5 more consecutive premature ventricular contractions (ventricular tachycardia), or
6 increasing frequency of ventricular ectopy with at least 6 premature ventricular
7 contractions per minute; or c. Decrease of 10 mm Hg or more in systolic pressure
8 below the baseline systolic blood pressure or the preceding systolic pressure
9 measured during exercise ... due to left ventricular dysfunction, despite an increase
10 in workload; or d. Signs attributable to inadequate cerebral perfusion, such as ataxic
11 gait or mental confusion.” *Id.*

12 Here, even if Plaintiff’s estimated ejection fraction of 20 percent establishes
13 systolic failure as described in Paragraph A of Listing 4.02, there is no evidence that
14 any of the Paragraph B criteria in Listing 4.02 are satisfied. Plaintiff cites no
15 evidence that a medical consultant opined Plaintiff could not perform an exercise
16 test, Plaintiff had three or more separate episodes of acute congestive heart failure in
17 a 12-month period, or Plaintiff could not perform an exercise tolerance test at a
18 workload equivalent to five METs or less. *See* 20 C.F.R. Part 404, Subpart P,
19 Appendix 1, § 4.02B. Although Plaintiff claims that the ALJ ignored his complaints
20 of “dizziness and brain fog,” Plaintiff’s subjective complaints do not satisfy the
21 criteria in Paragraph B of Listing 4.02. Because Plaintiff has failed to show how the
22 missing medical evidence would have affected the ALJ’s determination, any error in
23 the ALJ’s failure to develop the record was harmless. *See Brown-Hunter*, 806 F.3d
24 at 492; *Garcia*, 768 F.3d at 932 n.10.

25 C. The ALJ’s RFC Determination

26 Plaintiff contends that the ALJ improperly ALJ ignored his subjective
27 complaints in assessing his RFC and, consequently, posed an incomplete
28 hypothetical question to the vocational expert. [Pl. Br. at 13-15.]

1 An RFC is “an assessment of an individual’s ability to do sustained work-
2 related physical and mental activities in a work setting on a regular and continuing
3 basis.” Social Security Ruling (“SSR”) 96-9p, 1996 WL 374184, at *1 (S.S.A.
4 1996). An RFC reflects the most a claimant can do despite his limitations. *See*
5 *Smolen v. Chater*, 80 F.3d 1273, 1291 (9th Cir. 1996).

6 “The hypothetical an ALJ poses to a vocational expert, which derives from
7 the RFC, ‘must set out all the limitations and restrictions of the particular
8 claimant.’” *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir.
9 2009) (quoting *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)).

10 At the hearing, Plaintiff testified that he experiences shortness of breath,
11 fatigue, and brain fog. [AR 63-64.] He stated that he needs to take a break after 10
12 to 15 minutes of activity and he cannot work because his circulatory system would
13 fail. [AR 64-65.] In an Exertion Questionnaire, Plaintiff reported that he struggles
14 with dizziness from his medication, shortness of breath, and water retention. [AR
15 254-56.] Plaintiff also stated that he can climb four stairs, walk 20 to 30 minutes to
16 the store with rests, and clean his home with rests. [AR 254-55.]

17 The ALJ assessed Plaintiff with an RFC for a limited range of sedentary
18 work. [AR 40.] This RFC assessment reflects all of Plaintiff’s limitations that the
19 ALJ found to exist. [AR 40.] In making this determination, the ALJ provided
20 legally sufficient reasons for rejecting Plaintiff’s subjective complaints of dizziness,
21 brain fog, and other symptoms. [AR 39-40.]

22 The evaluation of a claimant’s subjective symptom testimony requires a two-
23 step analysis. *See Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007);
24 20 C.F.R. §§ 404.1529, 416.929. “First, the ALJ must determine whether the
25 claimant has presented objective medical evidence of an underlying impairment,
26 ‘which could reasonably be expected to produce the pain or other symptoms
27 alleged.’” *Lingenfelter*, 504 F.3d at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d
28 341, 344 (9th Cir. 1991) (en banc)). Second, if the claimant meets the first step and

1 there is no evidence of malingering, “the ALJ can reject the claimant’s testimony
2 about the severity of her symptoms only by offering specific, clear and convincing
3 reasons for doing so.” *Lingenfelter*, 504 F.3d at 1036 (quoting *Smolen*, 80 F.3d at
4 1281). “The ALJ must state specifically which symptom testimony is not credible
5 and what facts in the record lead to that conclusion.” *Smolen*, 80 F.3d at 1284; *see*
6 *also* SSR 16-3p, 2017 WL 5180304, *4 (S.S.A. Oct. 25, 2017) (explaining that the
7 ALJ must “evaluate the intensity and persistence of [the] individual’s symptoms ...
8 and determine the extent to which [those] symptoms limit [his] ... ability to perform
9 work-related activities”).

10 Here, the ALJ found that Plaintiff’s allegations of disabling symptoms and
11 limitations were unsupported by the medical evidence of record. [AR 40-42.] The
12 ALJ may consider objective medical evidence when assessing a claimant’s
13 testimony. *See* 20 C.F.R. §§ 404.1529(c)(2) (“Objective medical evidence ... is a
14 useful indicator to assist us in making reasonable conclusions about the intensity and
15 persistence of your symptoms and the effect those symptoms, such as pain, may
16 have on your ability to work...”), 416.929(c)(2) (same); *Burch*, 400 F.3d at 681
17 (“Although lack of medical evidence cannot form the sole basis for discounting pain
18 testimony, it is a factor that the ALJ can consider in his credibility analysis.”).
19 While Plaintiff produced objective medical evidence to support some degree of pain
20 and other symptoms, the ALJ found that Plaintiff’s treatment records revealed
21 generally unremarkable physical exams after he began receiving regular treatment
22 for his cardiac condition. [AR 42, 427, 835, 931, 936, 946, 1494.] The ALJ noted
23 that Plaintiff denied shortness of breath on multiple occasions and the medical
24 records did not support Plaintiff’s allegations of dizziness, brain fog or side effects
25 from medications. [AR 42, 427, 931, 936, 946, 1494.] The ALJ properly
26 considered the medical reports and clinical findings (or a lack thereof) to conclude
27 that Plaintiff did not exhibit the limitations and symptoms consistent with his
28 subjective complaints. *See* 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2). Although

1 the medical evidence could give rise to inferences more favorable to Plaintiff, the
2 ALJ's interpretation was rational and should be upheld. *See Burch*, 400 F.3d at 680.

3 The ALJ also found Plaintiff's admitted activities of daily living were
4 inconsistent with his allegations of disability. [AR 41-42.] One of the factors that
5 an ALJ may consider in weighing a claimant's subjective symptom testimony is the
6 inconsistency between the testimony and the claimant's statements to others. *See*
7 *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599-600 (9th Cir.
8 1999). The ALJ noted that in November 2019, Plaintiff reported to his doctor that
9 he was able to perform his daily activities "without much issue" and could walk up
10 to two miles without shortness of breath. [AR 41, 427.] In January 2020, Plaintiff
11 stated that he was still working full-time as a driver. [AR 41, 931.] Plaintiff also
12 reported that he was able to walk three to four blocks without shortness of breath in
13 January, April, and July of 2020. [AR 41-42, 931, 936, 1494.] In his Exertion
14 Questionnaire, Plaintiff stated that he was able to clean his home, which included
15 mopping, sweeping, and cleaning the shower, with rest periods. [AR 40-41, 254-
16 55.] Thus, the ALJ properly considered the extent of Plaintiff's daily activities in
17 discounting Plaintiff's subjective symptom testimony. [AR 40-42]; *Morgan*, 169
18 F.3d at 599-600.

19 Because the ALJ gave legally sufficient reasons for disregarding Plaintiff's
20 subjective complaints, the ALJ did not err in assessing Plaintiff's RFC or by posing
21 a hypothetical question to the vocational expert that did not include Plaintiff's
22 complaints of dizziness, brain fog, and other symptoms. *See Smolen*, 80 F.3d at
23 1291.

24 Next, Plaintiff contends that the ALJ's RFC assessment was erroneous
25 because the ALJ failed to assess Plaintiff's limitations on a function-by-function
26 basis pursuant to SSR 96-8p, 1996 WL 374184 (S.S.A. July 2, 1996). [Pl. Br. at
27 13.] Plaintiff's argument lacks merit, as the ALJ set forth a function-by-function
28 analysis of Plaintiff's abilities in the decision. The ALJ determined that Plaintiff

1 can perform sedentary work, as defined in 20 C.F.R. §§ 404.1567(a), 416.967(a),
2 except he is precluded from climbing ladders, ropes and scaffolds and working
3 around unprotected heights and dangerous machinery and he is limited to lifting and
4 carrying 10 pounds occasionally and less than 10 pounds frequently, standing and/or
5 walking 2 out of 8 hours, sitting 6 out of 8 hours, and occasionally balancing,
6 stooping, kneeling, crouching, crawling, and climbing of ramps and stairs. [AR 40.]
7 The ALJ was not required to prepare “a function-by-function analysis for medical
8 conditions or impairments that the ALJ found neither credible nor supported by the
9 record.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005); *Buckner-Larkin*
10 *v. Astrue*, 450 F. App’x 626, 627 (9th Cir. 2011) (finding ALJ’s determination that
11 claimant had an RFC to perform “sedentary work” pursuant to 20 C.F.R. §
12 404.1567(a) was a sufficient function-by-function assessment, as the definition of
13 “sedentary [work] ... includes well-defined function-by-function parameters”).

14 Plaintiff also challenges the vocational expert’s testimony that Plaintiff could
15 perform his past work as a telephone solicitor. [Pl. Br. at 13-14.] Plaintiff argues
16 that “[t]here is no detailed information or questioning in the record that describes
17 how Plaintiff actually performed” his prior job or about “the actual job
18 requirements,” such as information about quotas, pace, and rest periods. [Pl. Br. at
19 14.] However, it was Plaintiff’s burden at step four to establish that he could no
20 longer perform his past work. *See Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir.
21 2001). Moreover, Plaintiff’s testimony and work history report provided significant
22 evidence as to how Plaintiff actually performed his past job. At the hearing,
23 Plaintiff labeled his prior work as a “call center representative” for Direct TV and
24 described his job as follows: “clients would contact the call center for other
25 programming[,] for the costs and billings and ... for removal of the programming.”
26 [AR 54-55.] In his work history report, Plaintiff described the duties of the call
27 center job as: satellite service calls; offers for HBO, Starz, Cinemax, and special
28 programs; accepting payments; discontinuing service; and equipment exchanges.

1 [AR 243.] Plaintiff reported that the job involved eight hours of sitting, reaching,
2 writing, typing, or handling small objects and lifting less than 10 pounds. [AR 243.]
3 The vocational expert classified Plaintiff's past job as "telephone solicitor," number
4 299.357-014 in the Dictionary of Occupational Titles ("DOT") and testified that a
5 person with Plaintiff's RFC could perform that job as actually performed by
6 Plaintiff at the sedentary level. [AR 55, 61.] Thus, substantial evidence supported
7 the ALJ's determination that Plaintiff could perform his past work as actually
8 performed.

9 Further, any asserted error in determining that Plaintiff could perform his past
10 work as actually performed was harmless, as substantial evidence supports the
11 ALJ's determination that Plaintiff could perform his past work as a telephone
12 solicitor as it is generally performed in the national economy. [AR 43, 61]; *see*
13 *Brown-Hunter*, 806 F.3d at 492; SSR 82-62, *3 (S.S.A. 1982) ("The RFC to meet
14 the physical and mental demands of a job a claimant has performed in the past
15 (either the specific job a claimant performed or the same kind of work as it is
16 customarily performed throughout the economy) is generally a sufficient basis for a
17 finding of 'not disabled.'").

18 19 V. CONCLUSION

20 For all of the foregoing reasons, **IT IS ORDERED** that the decision of the
21 Commissioner finding Plaintiff not disabled is **AFFIRMED**

22
23 **IT IS SO ORDERED.**

24
25 DATED: March 23, 2023

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27 
28 _____
GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE