UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

NGOC TRAN, Plaintiff, v. NANCY BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION, Defendant.	No. ED CV 16-751-PLA **MEMORANDUM OPINION AND ORDER**

I.

PROCEEDINGS

Plaintiff filed this action on April 20, 2016, seeking review of the Commissioner's[1] denial of his application for Disability Insurance Benefits ("DIB"). The parties filed Consents to proceed before the undersigned Magistrate Judge on May 17, 2016, and May 18, 2016. Pursuant to the Court's Order, the parties filed a Joint Submission (alternatively "JS") on February 13, 2017, that addresses their positions concerning the disputed issues in the case. The Court has taken the

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Nancy Berryhill, the current Acting Commissioner of Social Security, is hereby substituted as the defendant herein.

Joint Submission under submission without oral argument.

II.

BACKGROUND

Plaintiff was born on August 26, 1968. [Administrative Record ("AR") at 23.] He has past relevant work experience as a teacher's aide and a shipping/receiving clerk. [AR at 23, 48.]

On December 1, 2008, plaintiff filed an application for a period of disability and DIB, alleging that he has been unable to work since April 5, 2007. [AR at 70.] The Commissioner granted his claims and, on May 13, 2010, found continuing disability since April 5, 2007. [AR at 70-72.] The Commissioner initiated a continuing disability review and, on April 30, 2013, found that as of April 1, 2013, plaintiff was no longer disabled. [AR at 82-85.] Plaintiff requested reconsideration of the initial determination, which the Commissioner treated as a request for a hearing. [AR at 87-90.] A hearing was held on May 2, 2014, at which time plaintiff appeared represented by an attorney, and testified on his own behalf. [AR at 31-53.] A vocational expert ("VE") and a medical expert ("ME") also testified. [AR at 34-39, 47-52.] On September 25, 2014, the ALJ issued a decision concluding that plaintiff's disability ended on April 1, 2013. [AR at 13-24.] Plaintiff requested review of the ALJ's decision by the Appeals Council. [AR at 8-9.] When the Appeals Council denied plaintiff's request for review on February 23, 2016 [AR at 1-5], the ALJ's decision became the final decision of the Commissioner. See Sam v. Astrue, 550 F.3d 808, 810 (9th Cir. 2008) (per curiam) (citations omitted). This action followed.

III.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner's decision to deny benefits. 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. Berry v. Astrue, 622 F.3d 1228, 1231 (9th Cir. 2010) (citation omitted).

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

is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1159 (9th Cir. 2008) (citation and internal quotation marks omitted); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998) (same). When 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. Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001) (citation omitted); see Ryan v. Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008) ("[A] reviewing court must consider the entire record as a whole and may not affirm simply by isolating a specific quantum of supporting evidence.") (citation and internal quotation marks omitted). "Where evidence is susceptible to more than one rational interpretation, the ALJ's decision should be upheld." Ryan, 528 F.3d at 1198 (citation and internal quotation marks omitted); see Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006) ("If the evidence can support either affirming or reversing the ALJ's conclusion, [the reviewing court] may not substitute [its] judgment for that of the ALJ.") (citation omitted).

IV.

THE EVALUATION OF DISABILITY

Persons are "disabled" for purposes of receiving Social Security benefits if they are unable to engage in any substantial gainful activity owing to a physical or mental impairment that is expected to result in death or which has lasted or is expected to last for a continuous period of at least twelve months. 42 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

A. MEDICAL IMPROVEMENT AND CESSATION OF DISABILITY BENEFITS

Once the Commissioner (or ALJ) finds a claimant to be disabled, a presumption of continuing disability arises. Murray v. Heckler, 722 F.2d 499, 500 (9th Cir. 1983) (citation omitted). To revoke benefits, "the Commissioner bears the burden of establishing that a claimant has experienced medical improvement that would allow him to engage in substantial gainful activity."

McCalmon v. Astrue, 319 F. App'x 658, 659 (9th Cir. 2009) (citing Murray, 722 F.2d at 500). The Commissioner must follow an eight-step sequential evaluation process in determining whether the claimant's impairments have sufficiently improved to warrant a cessation of Disability Insurance Benefits. See 20 C.F.R. § 404.1594(f). The eight steps are as follows: (1) if the claimant is currently engaged in substantial gainful activity ("SGA"), disability has ended; (2) if not, and the claimant has an impairment or combination of impairments that meets or equals a listing, disability continues; (3) if the claimant does not meet or equal a listing, the ALJ will determine whether medical improvement has occurred; (4) if so, the ALJ will determine whether the improvement is related to the claimant's ability to work (i.e., to an increase in the claimant's residual functional capacity ("RFC")[2]); (5) if no medical improvement -- or no improvement related to ability to work -- has occurred, disability continues, unless certain exceptions apply[3]; (6) if there has been medical improvement related to the claimant's ability to work, the ALJ will determine whether all the current impairments, in combination, are "severe"; if not, disability ends; (7) if the claimant meets the "severity" criteria, the ALJ will determine the current RFC, and, if the claimant is able to do past work, disability ends; (8) if the claimant remains unable to do past work, the ALJ will determine whether the claimant can do other work, given his RFC, age, education and past work experience. If so, disability ends. If not, disability continues. 20 C.F.R. § 404.1594(f).

B. THE ALJ'S APPLICATION OF THE EIGHT-STEP EVALUATION PROCESS

In this case, on May 13, 2010, an ALJ determined that plaintiff became disabled on April

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[2] RFC is what a claimant can still do despite existing exertional and nonexertional limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

[3] The exceptions include advances in medical technology or vocational therapy related to the claimant's ability to work; new or improved diagnostic techniques or a prior evaluation error indicating that the impairment is not as disabling as once thought; evidence that the claimant is engaging in SGA; evidence of fraud in obtaining benefits; and evidence that the claimant failed to follow prescribed treatment. 20 C.F.R. § 404.1594(d)-(e), (f)(5).

5, 2007,[4] and had the medically determinable impairments of degenerative disc disease of the lumbar spine and status post-multilevel fusion, which were found to meet section 1.04 of the Listing. [AR at 70.] The ALJ also found that from April 5, 2007, through May 13, 2010, the hearing date, plaintiff was unable to work due to his disability. [AR at 54-69, 70-75.] On September 25, 2014, at step one of the eight-step medical improvement analysis, a different ALJ determined that through April 1, 2013, the date he determined that plaintiff's disability ended, plaintiff had not engaged in SGA. [AR at 15.] At step two, the ALJ determined that as of April 1, 2013, plaintiff had the medically determinable impairments of post laminectomy syndrome; degenerative disc disease; status post L4-S1 microdiscectomy and laminectomy; lumbosacral musculoligamentous strain; lumbar radiculopathy; and depressive disorder. [AR at 15.] The ALJ determined that since April 1, 2013, plaintiff's impairments did not meet or equal any of the impairments in the Listing. [Id.] At step three, the ALJ determined that medical improvement occurred as of April 1, 2013. [Id.] At step four, the ALJ determined that plaintiff's medical improvement is related to his ability to work. [AR at 16.] Due to the ALJ's step four finding, no step five finding was necessary. See 20 C.F.R. § 404.1594(f)(5). At step six, the ALJ concluded that as of April 1, 2013, plaintiff continued to have a severe impairment or combination of impairments. [AR at 17.] At step seven, the ALJ found that as of April 1, 2013, plaintiff had the RFC "to perform less than the full range of light work" as defined in 20 C.F.R. § 404.1567(b),[5] as follows:

> Specifically, [plaintiff] could lift and/or carry ten pounds frequently, twenty pounds occasionally; he could sit, stand and/or walk for six hours out of an eight-hour workday with a sit/stand option at will; he could occasionally push and pull, climb, balance, stoop, kneel, crouch, and crawl; he is not to climb ladders, ropes or

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[4] The ALJ concluded that plaintiff met the insured status requirements of the Social Security Act through December 31, 2012. [AR at 70.]

[5] "Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time." 20 C.F.R. § 404.1567(b).

> scaffolds; he is to avoid all exposure to extreme cold, extreme heat, and vibrations; he could understand, remember, and carry out simple job instructions, but would be unable to perform work that would require directing others, abstract thought, or planning; and he could maintain attention and concentration to perform simple, routine and repetitive tasks in a work environment free of fast-paced production requirements.

[AR at 17-18.] The ALJ also determined that as of April 1, 2013, plaintiff was unable to perform his past relevant work as a teacher's aide and a shipping/receiving clerk. [AR at 23.] At step eight, based on plaintiff's RFC, vocational factors, and the VE's testimony, the ALJ found that there are jobs existing in significant numbers in the national economy that plaintiff can perform, including work as an "electronics worker" (Dictionary of Occupational Titles ("DOT") No. 726.687-010), "small product assembler" (DOT No. 706.684-022), and "parking lot booth attendant" (DOT No. 211.462-038). [AR at 24, 48-50.] Accordingly, the ALJ determined that plaintiff's period of disability ended on April 1, 2013. [AR at 24.]

V.

THE ALJ'S DECISION

Plaintiff contends that the ALJ erred when he: (1) failed to make a finding that plaintiff had a disability "at any time after April 1, 2013, *through the date of decision*"; (2) assessed the medical evidence of physical impairment; (3) assessed the medical evidence of mental impairment; and (4) rejected plaintiff's subjective symptom testimony. [JS at 5 (emphasis added).] As set forth below, the Court agrees with plaintiff, in part, and remands for further proceedings.

A. RELEVANT TIME PERIOD FOR DISABILITY STATUS

Plaintiff contends that the ALJ failed to adjudicate plaintiff's disability status through the date of the decision as required by Social Security Ruling ("SSR")[6] 13-3p. [JS at 5-6.] Defendant

[6] "SSRs do not have the force of law. However, because they represent the Commissioner's interpretation of the agency's regulations, we give them some deference. We will not defer to SSRs if they are inconsistent with the statute or regulations." Holohan v. Massanari, 246 F.3d 1195, 1202 n.1 (9th Cir. 2001) (citations omitted).

responds that there was no error because the ALJ considered all the relevant medical evidence concerning plaintiff's condition from April 1, 2013, "up to and including all relevant evidence existing in Plaintiff's file as of the ALJ's September 23, 2014 decision." [JS at 7 (citations omitted).]

SSR 13-3p requires the ALJ to decide "whether the beneficiary is under a disability through the date of the [ALJ's] determination or decision." SSR 13-3p, 2013 WL 785484, at *4 (Feb. 21, 2013). Although defendant argues that plaintiff did not meet the insured status requirements as of the date of the ALJ's decision, the ALJ did not expressly *state* that plaintiff was not disabled through the date of the decision, nor did the ALJ provide a reason for not expressly determining plaintiff's disability status through the date of the decision.

While the Court cannot affirm the ALJ's decision on a ground that the ALJ did not consider in making his decision (see Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001) ("[W]e cannot affirm the decision of an agency on a ground that the agency did not invoke in making its decision.")), it is nonetheless evident from the record that the ALJ specifically considered whether plaintiff had been disabled from April 1, 2013, through September 25, 2014, the date of the decision. The ALJ summarized and discussed evidence spanning from 2009 through 2014 in determining plaintiff's RFC, including plaintiff's own testimony from the May 2, 2014, hearing. [AR at 18-23.] Thus, any failure of the ALJ to explicitly state that plaintiff had not been disabled from April 1, 2013, through the date of the decision on September 25, 2014, cannot be considered reversible error. This is particularly true given that the bulk of the evidence and testimony discussed by the ALJ was from the period of time after plaintiff's disability was found to have ended. See, e.g., Mendoza v. Colvin, 2016 WL 4126706, at *5 (E.D. Cal. Aug. 2, 2016) (stating that the "Court cannot find it a violation of SSR 13-3p to not use the magic words 'through the date of this decision' when virtually all the evidence and testimony mentioned and analyzed comes from the period after the Plaintiff's disability was found to have ceased").

Remand is not warranted on this issue.

B. MEDICAL OPINIONS

1. Legal Standard

"There are three types of medical opinions in social security cases: those from treating physicians, examining physicians, and non-examining physicians." Valentine v. Comm'r Soc. Sec. Admin., 574 F.3d 685, 692 (9th Cir. 2009); see also 20 C.F.R. §§ 404.1502, 404.1527. "As a general rule, more weight should be given to the opinion of a treating source than to the opinion of doctors who do not treat the claimant." Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995); Garrison v. Colvin, 759 F.3d 995, 1012 (9th Cir. 2014) (citing Ryan, 528 F.3d at 1198); Turner v. Comm'r of Soc. Sec., 613 F.3d 1217, 1222 (9th Cir. 2010). "The opinion of an examining physician is, in turn, entitled to greater weight than the opinion of a nonexamining physician." Lester, 81 F.3d at 830; Ryan, 528 F.3d at 1198.

"[T]he ALJ may only reject a treating or examining physician's uncontradicted medical opinion based on clear and convincing reasons." Carmickle, 533 F.3d at 1164 (citation and internal quotation marks omitted); Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006). "Where such an opinion is contradicted, however, it may be rejected for specific and legitimate reasons that are supported by substantial evidence in the record." Carmickle, 533 F.3d at 1164 (citation and internal quotation marks omitted); Ryan, 528 F.3d at 1198; Ghanim v. Colvin, 763 F.3d 1154, 1160-61 (9th Cir. 2014); Garrison, 759 F.3d at 1012. The ALJ can meet the requisite specific and legitimate standard "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." Reddick, 157 F.3d at 725. The ALJ "must set forth his own interpretations and explain why they, rather than the [treating or examining] doctors', are correct." Id.

Although the opinion of a non-examining physician "cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician," Lester, 81 F.3d at 831, state agency physicians are "highly qualified physicians, psychologists, and other medical specialists who are also experts in Social Security disability evaluation." 20 C.F.R. § 404.1527(e)(2)(i); SSR 96-6p; Bray v. Astrue, 554 F.3d 1219, 1221, 1227 (9th Cir. 2009) (the ALJ properly relied "in large part on the DDS physician's assessment" in

determining the claimant's RFC and in rejecting the treating doctor's testimony regarding the claimant's functional limitations). Reports of non-examining medical experts "may serve as substantial evidence when they are supported by other evidence in the record and are consistent with it." Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995).

2. Dr. Matos

The record reflects that orthopedic surgeon, Max Matos, M.D., treated plaintiff in 2007 and again from approximately April 2010, through March 2013. [AR at 372, 405-06, 420, 427, 654.] On April 27, 2010, Dr. Matos completed a Physical Residual Functional Capacity Questionnaire in which he noted the following: plaintiff was status post left L4-L5 and S1 laminectomy; his prognosis was guarded; he had decreased range of motion with leg pain and needed a cane to ambulate; he experienced symptoms of lumbar spine pain with left leg numbness and weakness; he had a 70% decrease in his range of motion in the lumbar spine; he had positive straight leg raising bilaterally (left at 10 degrees and right at 20 degrees); he had muscle spasms, reflex changes, muscle weakness, abnormal gait, sensory loss, tenderness, and muscle atrophy; his symptoms frequently interfere with his attention and concentration; he is severely limited in dealing with work stress; he cannot walk even one city block without needing to rest; he can continuously sit or stand for only 5 minutes; he can sit or stand/walk for less than two hours in an eight-hour workday; he must be able to shift positions at will from sitting, standing, or walking; he will constantly need to take unscheduled breaks during an eight-hour workday; he must use a cane for occasional standing/walking; he can occasionally lift less than 10 pounds; he can never bend and twist at the waist; he should avoid moderate exposure to extreme cold, extreme heat, and high humidity, and avoid concentrated exposure to solvents, cigarette smoke, perfumes, fumes, odors, dusts, and gases; and he had these symptoms and limitations since April 27, 2007. [AR at 634-40.] In August 2012, Dr. Matos issued plaintiff a new cane, noting that he uses a cane part-time and the rubber tip was broken. [AR at 458.] On that date, Dr. Matos also noted decreased range of motion in plaintiff's lumbar spine, as well as decreased sensation on the lateral aspect of the left leg and dorsum of the left foot. [Id.]

Dr. Matos also treated plaintiff on March 11, 2013. [AR at 360-69.] On that date, plaintiff complained of poor control of muscle spasms and intermittent chronic low back pain. [AR at 360.] Dr. Matos observed that plaintiff had difficulty with standing, sitting, and arising from a supine position, had loss of normal curvature of the spine, walked with a cane, moved about stiffly, and exhibited an antalgic gait. [AR at 364.] His straight leg raising test was positive bilaterally, as was his sitting nerve root test. [AR at 365.] His Lasegue's test was positive on the left, possibly indicative of a herniated disk. [Id.] Dr. Matos recommended treatment with Norco and Prilosec, a TENS Unit, and a lumbar corset brace. [AR at 366-67.]

Plaintiff contends that the ALJ failed to provide specific and legitimate reasons based on substantial evidence for giving the opinions of treating physician Dr. Matos "little weight":

> The undersigned has considered and gives little weight to M. Mates, [sic] M.D., who filled out a residual functional capacity form on April 27, 2010; and T. Le, M.D., who filled out a residual functional capacity form on May 7, 2013, and December 12, 2013. The undersigned has given little weight to this [sic] opinion because it is not supported by objective evidence and it is inconsistent with the record as a whole. Dr. Mates' [sic] [April 27, 2010,] opinion is three years before the date in issue. As an opinion on an issue reserved to the Commissioner, this statement is not entitled to controlling weight and is not given special significance . . . .

[AR at 21 (citations omitted).]

Plaintiff points out that although the ALJ noted that Dr. Matos' 2010 opinion was three years in the past, he did not compare Dr. Matos' 2010 findings and opinions to his March 2013 treatment notes and physical findings. [JS at 11.] He submits that the two reports "draw a continuous line that does not support rejection of the earlier opinions as out-of-date." [Id.] Moreover, the ALJ stated that Dr. Matos issued an opinion on an issue reserved to the Commissioner but did not identify the issue or opinion to which he was referring. [JS at 11 (citing AR at 21).]

Defendant responds that the ALJ "properly considered and gave little weight to the opinion of Dr. Matos, who completed a largely unexplained check-box form . . . in April 2010," as opinions provided in such forms are generally afforded little weight. [JS at 16 (citing AR at 21, 634-40).] She also states that the ALJ properly noted that Dr. Matos' 2010 opinion was unsupported by the objective evidence and inconsistent with the record as a whole, and that because it concerned the period from April 2007 through April 2010, it "was of little evidentiary value and entitled to little

weight in determining whether Plaintiff's disability ended as of April 2013." [JS at 17.] Finally, defendant conclusorily contends that "the ALJ properly considered that Dr. Matos' opinion was on an issue reserved to the Commissioner." [JS at 17.] Defendant does not address the ALJ's total failure to even mention the March 2013 opinion of Dr. Matos, which was completed less than one month prior to plaintiff's alleged improvement date and, therefore, could be relevant to his condition after April 2013.

Contrary to defendant's suggestion that Dr. Matos' 2010 opinion was little more than a check-box form, Dr. Matos specified the clinical findings supporting his opinions and provided explanations for his opinions where asked to do so. [See AR at 634-40.] Additionally, this was not a reason given by the ALJ for discounting Dr. Matos' 2010 opinion and "[l]ong-standing principles of administrative law require [this Court] to review the ALJ's decision based on the reasoning and factual findings offered *by the ALJ* -- not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking." Bray, 554 F.3d at 1225-26 (emphasis added; citation omitted); Pinto, 249 F.3d at 847. Neither is there evidence of the issue reserved to the Commissioner on which, according to the ALJ, Dr. Matos allegedly opined in his 2010 opinion. [See generally AR at 634-40.] Instead, it appears that Dr. Matos primarily offered his opinions as to plaintiff's impairments and functional limitations. [Id.] Moreover, Dr. Matos, an orthopedic surgeon, treated plaintiff for a six-year period, from 2007 to 2013. Despite this, the ALJ did not address any of the particulars of Dr. Matos' lengthy treatment of plaintiff or provide any details of his 2010 opinion, only conclusorily mentioning the existence of the 2010 opinion before stating his finding that it was inconsistent with and unsupported by other -- unspecified -- objective evidence in the record. [AR at 21.]

Furthermore, the ALJ's complete disregard of Dr. Matos' 2013 opinion was error. When a treating source's opinion is contradicted by another doctor's opinion it may be rejected only by providing specific and legitimate reasons supported by substantial evidence. Marsh v. Colvin, 792 F.3d 1170, 1172 (9th Cir. 2015) (citing Garrison, 759 F.3d at 1012). Because an ALJ must give specific and legitimate reasons for rejecting a treating doctor's opinions, "it follows even more strongly that an ALJ cannot in [his] decision totally ignore a treating doctor and his or her notes,

without even mentioning them." Id. at 1172-73 (citing Garrison, 759 F.3d at 1012). That is what the ALJ did here when he completely failed to mention Dr. Matos' 2013 opinion, and when he conclusorily discounted his 2010 opinion. See Garrison, 759 F.3d at 1012-13 ("an ALJ errs when he rejects a medical opinion or assigns it little weight while doing nothing more than ignoring it, asserting without explanation that another medical opinion is more persuasive, or criticizing it with boilerplate language that fails to offer a substantive basis for his conclusion") (citing Nguyen v. Chater, 100 F.3d 1462, 1464 (9th Cir. 1996)). Based on the foregoing, the ALJ did not provide specific and legitimate reasons for giving the 2010 opinion of Dr. Matos "little weight." Additionally, the ALJ's complete disregard of Dr. Matos' March 2013 opinion was error and that error was not harmless.

3. Dr. Le

Dr. Le, plaintiff's treating physician, completed a Residual Functional Capacity form on May 7, 2013. [AR at 607-11.] In that form he stated that he sees plaintiff every month for his back pain and severe degenerative disc disorder and noted the following: severe chronic lower back pain radiating down to both legs; needs to walk with a cane; severe weakness of lower extremities; and radiculopathy. [AR at 607-08.] He opined that plaintiff's pain and weakness are permanent; he can stand for one hour maximum; he cannot sit upright for six to eight hours; he needs to lie down during the day; he can only walk with a cane for one block without stopping; he can lift and carry less than five pounds; he is unable to stand by himself without pain and is prevented from lifting, pulling, or holding any weight; and plaintiff cannot continue or resume work at his current or previous employment and there is no other work plaintiff could do "given his . . . skills and disability or impairment." [AR at 610-11.] He found that plaintiff would permanently be unable to work. [AR at 611.]

On December 12, 2013, Dr. Le completed another Residual Functional Capacity Questionnaire in which he noted he had treated plaintiff monthly for 14 months. [AR at 700-05.] Dr. Le's testing showed positive straight leg raising bilaterally at 30 degrees; muscle spasm; impaired sleep; and significant limitation of motion of the cervical spine on extension, flexion,

rotation, and bending. [AR at 701.] Dr. Le noted that plaintiff suffered from depression; his constant pain would interfere with attention and concentration; he is incapable of even low stress jobs; he can walk only one block without resting or pain; he can sit and stand/walk less than 2 hours in an 8-hour day; he needs to shift positions at will from sitting, standing, or walking; he will need to take unscheduled breaks during an 8-hour workday; his legs should be elevated with prolonged sitting; he needs a cane for occasional standing/walking; he can never lift any weight; he can never hold his head in a static position and can occasionally look down, turn his head right or left, or look up; can never twist, stoop/bend, crouch/squat, climb ladders or stairs; can never reach in any direction with his right hand, and can only occasionally handle or finger with his right hand. [AR at 701-04.] He opined that plaintiff would be absent more than four days per month as a result of his impairments or treatment. [AR at 705.]

Plaintiff contends that the ALJ failed to provide specific and legitimate reasons based on substantial evidence for giving the opinions of treating physician Dr. Le "little weight":

> Dr. Le primarily summarized in the treatment notes [plaintiff's] subjective complaints, diagnoses, and treatment, but he did not provide objective clinical or diagnostic findings to support the functional assessment. This opinion is inconsistent with the objective findings already discussed above in this decision which show physical examinations within normal limits. This opinion is also inconsistent with [plaintiff's] admitted activities of daily living that have already been described above in this decision.

[AR at 21 (citations omitted).]

Plaintiff argues that Dr. Le's finding that plaintiff had only 30 degrees of forward flexion was "wholly consistent with those [findings] of Dr. Matos in 2010 and 2013 as well as the April 11, 2013, findings of Dr. Bernabe," the orthopedic consultant to whom the ALJ gave "great weight." [JS at 9, 12.] He notes that all three of these physicians agreed that plaintiff "has lost 60° of forward flexion or approximately 70% of normal." [JS at 12.] He observes that although Dr. Bernabe and the ALJ stated that plaintiff could occasionally bend and stoop, they did not explain how an individual who was capable of bending or stooping forward only 30° could nevertheless occasionally bend and stoop in a work setting. [Id. (citing AR at 21, 526).] Additionally, plaintiff contends that the ALJ's statement that the results of Dr. Bernabe's physical examination fell within the range of normal limits is unsupported by substantial evidence, given that Dr. Bernabe also

found plaintiff had limited forward flexion at 30° with the normal being 90°. [7] [Id.] Finally, plaintiff submits that the ALJ's finding that Dr. Le's opinions are inconsistent with plaintiff's admitted activities of daily living is also unsupported because the ALJ failed to explain how any of the daily activities required standing or walking without a cane, or bending as described by Dr. Matos and Dr. Le. [JS at 12-13 (citations omitted).] He claims that his minimal ability to perform certain daily activities "do[es] not reflect a capacity that includes bending or standing/walking without a cane." [JS at 13.]

Defendant does not refute plaintiff's arguments. Instead, defendant merely recites case law supporting an ALJ's rejection of opinions: (1) that are based to a large extent on a claimant's self reports, (2) that the ALJ considers lack any objective findings, and (3) that an ALJ finds are inconsistent with the record as a whole. [JS at 17-19 (citations omitted).] Defendant also conclusorily submits that an ALJ may give greater weight to testimony of a medical expert because that testimony "may serve as substantial evidence." [JS at 18 (citations omitted).]

The reasons given by the ALJ for discounting Dr. Le's opinions were not specific and legitimate. Dr. Le not only provided a summary of his treatment notes and plaintiff's subjective complaints, he provided the clinical bases for the opinions he expressed. [See, e.g., AR at 607, 609, 700, 701.] Specifically, his December 2013 report included clinical test results showing positive straight leg raising, and limited cervical range of motion, among other things. [AR at 701.] As with Dr. Matos' opinion, the ALJ did not address any of the particulars of Dr. Le's lengthy treatment of plaintiff, and provided only a conclusory mention of Dr. Le's two 2013 opinions before stating his finding that the opinions were inconsistent with and unsupported by other objective evidence in the record that he stated included "physical examinations within normal limits." [AR at 21 (citing AR at 706-16).] The Court notes, however, that the only physical examinations cited by the ALJ consist of Dr. Le's treatment notes from July 2013 through April 2014, which largely

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[7] Dr. Bernabe's clinical findings also revealed limited range of motion on forward flexion, extension, left and right side bending, and left and right rotation. [AR at 524.] He also reported positive straight leg raising on the left leg from a supine position at 60 degrees and from a seated position at 90 degrees. [Id.] Dr. Bernabe stated that although plaintiff was able to ambulate without a cane, he refused "to perform toe and heel walking secondary to back pain." [Id.]

reflect plaintiff's visits to Dr. Le for medication refills, Dr. Le's routine physical examination findings, and a notation that plaintiff "has been stable with the current amount of Narcotic medications." [AR at 706-16.] None of these treatment notes reflects that Dr. Le performed more in-depth clinical testing -- such as range of motion and straight leg raising tests -- at those routine visits. Additionally, the ALJ's sweeping statement that Dr. Le's opinion is inconsistent with plaintiff's admitted activities of daily living "as described above" -- which include living with his brother, driving, helping to clean the apartment, helping with the shopping and cooking, trying to exercise, doing light chores, preparing meals, handling finances, and socializing one to two times a week -- simply does not provide a specific and legitimate reason to discount Dr. Le's opinion given the minimal nature of plaintiff's activities, some of which do not even involve "physical" activities (e.g. living with his brother, handling finances, socializing), and others of which as described by plaintiff are clearly limited in nature.

Based on the foregoing, the ALJ did not provide specific and legitimate reasons for giving the 2013 opinions of Dr. Le "little weight."

4. Evidence of Mental Impairment

On April 14, 2013, Sohini P. Parikh, M.D., conducted a psychiatric evaluation of plaintiff. [AR at 530-36.] Dr. Parikh diagnosed the presence of a mood disorder because of a medical condition and a depressive order not otherwise specified. [AR at 534.] Dr. Parikh opined that plaintiff had either no or mild limitations in the ability to function mentally. [AR at 535.]

In 2012, Dr. Matos diagnosed plaintiff as suffering from anxiety and depressed mood based upon an historical diagnosis by a psychologist. [AR at 356.] In March 2013, he requested authorization to treat plaintiff with biofeedback or group therapy. [AR at 362.]

Liana Tanase, M.D., provided plaintiff with psychiatric treatment between 2009 and 2014. In February 2010 through January 2013, Dr. Tanase noted symptoms of sad mood, sleep problems, irritability, and explosive outbursts. [AR at 663-90.] Between November 2012 and March 2014, she prescribed different combinations of psychotropic medications. [AR at 621, 723-24.] Dr. Tanase completed mental impairment questionnaires in May 2013 and January 2014.

[AR at 575-78, 717-22.] She diagnosed major depressive disorder not otherwise specified; delusional disorder; status post back surgery; and chronic pain syndrome. [AR at 575, 717.] She described plaintiff as having serious limitations to no useful ability to function in most of the mental requirements of work activity. [AR at 576-78, 719-21.] She opined that he could not function outside of the home and if he was in a work environment he would be absent more than four days per month. [AR at 721.]

The ALJ gave "little weight" to the opinions of Dr. Tanase:

> The undersigned has given little weight to this opinion because it is not supported by objective evidence and it is inconsistent with the record as a whole. Dr. Tanase primarily summarized in the treatment notes [plaintiff's] subjective complaints, diagnoses, and treatment, but . . . did not provide objective clinical or diagnostic findings to support the functional assessment. This opinion is inconsistent with the objective findings already discussed above in this decision which show [plaintiff] is stable on medication. This opinion is also inconsistent with [plaintiff's] admitted activities of daily living that have already been described above in this decision.

[AR at 22.]

Plaintiff argues that these are not specific and legitimate reasons for rejecting Dr. Tanase's opinions. [JS at 23.] He notes that although the ALJ found the opinions inconsistent with the record, he did not cite to any example of this alleged inconsistency. [Id.] He also notes that Dr. Tanase's opinions contain her objective findings based on her treatment of plaintiff over time. [Id.] Moreover, he submits that merely because plaintiff was stable on his medications "does not imply functionality -- it means no further deterioration." [Id.] He also contends that although the ALJ noted that plaintiff's activities of daily living belie Dr. Tanase's assessments, the ALJ also stated that he found plaintiff's complaints of mental and emotional dysfunction "warrant the finding of at least moderate psychological limitations." [JS at 23 (citing AR at 22).] Finally, he argues that neither Dr. Parikh -- whose opinion the ALJ gave "some weight" based on the fact that plaintiff's subjective complaints showed a moderate rather than a mild psychological limitation -- nor the state agency physicians -- whose opinions of no severe mental impairment the ALJ gave "little

weight" for the same reasons -- ever saw or considered the findings and opinions of Dr. Tanase.[8] [Id.] The Court agrees with plaintiff that the reasons given by the ALJ for discounting Dr. Tanase's opinions were not specific or legitimate.

Because the matter is being remanded for reconsideration of the opinions of Dr. Matos and Dr. Le, the ALJ on remand shall also reconsider Dr. Tanase's opinions and either credit those opinions or provide specific and legitimate reasons for discounting them.

C. SUBJECTIVE SYMPTOM TESTIMONY

Plaintiff contends the ALJ failed to articulate legally sufficient reasons for rejecting plaintiff's subjective symptom testimony. [JS at 25.] Specifically, the ALJ discounted plaintiff's subjective symptom testimony as follows:

> The credibility of [plaintiff's] allegations regarding the severity of his symptoms and limitations is diminished because those allegations are greater than expected in light of the objective evidence of record. Even if [plaintiff's] daily activities are truly as limited as alleged, it is difficult to attribute that degree of limitation to [plaintiff's] medical condition, in view of the relatively benign medical evidence, discussed below.

[AR at 18.] The ALJ also determined that plaintiff "has engaged in a somewhat normal level of daily activity and interaction":

> [Plaintiff] admitted activities of daily living including he lives with his brother, has a driver license and drives, helps clean the apartment, helps with grocery shopping and cooking, he tries to exercise and do light chores, and walks one to two blocks. In a function report he acknowledged he can prepare meals, handle finances, and socializes at counseling club house one to two times a week. He reported to Dr. Sohini [sic] he takes care of grooming and hygiene; listens to music; gets along with family members; has close friends and has no problems with neighbors; and has no difficulty completing household tasks.
>
> These activities reflect a significant functional capacity and not an individual unable to sustain regular and continuing work due to medically determinable impairments. It appears that despite his impairment, he has engaged in a somewhat normal level of daily activity and interaction since April 1, 2013. It should be noted that the

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[8] As she did with the ALJ's opinion of plaintiff's physical assessments, defendant does not refute plaintiff's arguments, but merely recites case law supporting the propositions that the ALJ properly rejected opinions that are inconsistent with the record, that contain little in the way of clinical or diagnostic findings, or that are based to a large extent on a claimant's self reports. [JS at 24 (citations omitted).]

> physical and mental capabilities requisite to performing many of the tasks described above as well as the social interactions replicate those necessary for obtaining and maintaining employment.

[AR at 18-19 (citations omitted).]

"To determine whether a claimant's testimony regarding subjective pain or symptoms is credible, an ALJ must engage in a two-step analysis." Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007). "First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment 'which could reasonably be expected to produce the pain or other symptoms alleged.'" Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th Cir. 2014) (quoting Lingenfelter, 504 F.3d at 1036) (internal quotation marks omitted). If the claimant meets the first test, and the ALJ does not make a "finding of malingering based on affirmative evidence thereof" (Robbins, 466 F.3d at 883), the ALJ must "evaluate the intensity and persistence of [the] individual's symptoms . . . and determine the extent to which [those] symptoms limit his . . . ability to perform work-related activities . . . ." SSR 16-3p, 2016 WL 1119029, at *4. An ALJ must provide specific, clear and convincing reasons for rejecting a claimant's testimony about the severity of his symptoms. Treichler, 775 F.3d at 1102; Benton v. Barnhart, 331 F.3d 1030, 1040 (9th Cir. 2003). "General findings [regarding a claimant's credibility] are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." Burrell v. Colvin, 775 F.3d 1133, 1138 (9th Cir. 2014) (quoting Lester, 81 F.3d at 834) (quotation marks omitted). The ALJ's findings "'must be sufficiently specific to allow a reviewing court to conclude the adjudicator rejected the claimant's testimony on permissible grounds and did not arbitrarily discredit a claimant's testimony regarding pain.'" Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir. 2015) (quoting Bunnell v. Sullivan, 947 F.2d 345-46 (9th Cir. 1991) (en banc)). A "reviewing court should not be forced to speculate as to the grounds for an adjudicator's rejection of a claimant's allegations of disabling pain." Bunnell, 947 F.2d at 346. As such, an "implicit" finding that a plaintiff's testimony is not credible is insufficient. Albalos v. Sullivan, 907 F.2d 871, 874 (9th Cir. 1990) (per curiam).

On March 28, 2016, after the ALJ's assessment in this case, SSR 16-3p went into effect. See SSR 16-3p, 2016 WL 1119029 (Mar. 16, 2016). SSR 16-3p supersedes SSR 96-7p, the

previous policy governing the evaluation of subjective symptoms. Id. at *1. SSR 16-3p indicates that "we are eliminating the use of the term 'credibility' from our sub-regulatory policy, as our regulations do not use this term." Id. Moreover, "[i]n doing so, we clarify that subjective symptom evaluation is not an examination of an individual's character[;] [i]nstead, we will more closely follow our regulatory language regarding symptom evaluation." Id. Thus, the adjudicator "will not assess an individual's overall character or truthfulness in the manner typically used during an adversarial court litigation. The focus of the evaluation of an individual's symptoms should not be to determine whether he or she is a truthful person." Id. at *10. The ALJ is instructed to "consider all of the evidence in an individual's record," "to determine how symptoms limit ability to perform work-related activities." Id. at *2. The ALJ's 2014 decision was issued before March 28, 2016, when SSR 16-3p became effective, and there is no binding precedent interpreting this new ruling including whether it applies retroactively. Compare Ashlock v. Colvin, 2016 WL 3438490, at *5 n.1 (W.D. Wash. June 22, 2016) (declining to apply SSR 16-3p to an ALJ decision issued prior to the effective date), with Lockwood v. Colvin, 2016 WL 2622325, at *3 n.1 (N.D. Ill. May 9, 2016) (applying SSR 16-3p retroactively to a 2013 ALJ decision); see also Smolen v. Chater, 80 F.3d 1273, 1281 n.1 (9th Cir. 1996) ("We need not decide the issue of retroactivity [as to revised regulations] because the new regulations are consistent with the Commissioner's prior policies and with prior Ninth Circuit case law") (citing Pope v. Shalala, 998 F.2d 473, 483 (7th Cir. 1993) (because regulations were intended to incorporate prior Social Security Administration policy, they should be applied retroactively)). Here, SSR 16-3p on its face states that it is intended only to "clarify" the existing regulations. However, because this matter is being remanded for consideration of other issues, the Court need not resolve the retroactivity issue. Notwithstanding the foregoing, SSR 16-3p shall apply on remand.

Plaintiff argues that none of the reasons provided by the ALJ is clear and convincing. As with the prior issues discussed herein, defendant merely cites authority regarding the propriety of the ALJ considering certain factors when considering a claimant's "credibility." Because the matter is being remanded for reconsideration of the medical opinions, and the ALJ on remand as a result must reconsider plaintiff's RFC in light of the record evidence, on remand the ALJ shall also

reconsider plaintiff's subjective symptom testimony and, based on his reconsideration of plaintiff's RFC, provide specific, clear and convincing reasons for discounting plaintiff's subjective symptom testimony if warranted, applying SSR 16-3p. See Treichler, 775 F.3d at 1103 (citation omitted) (the "ALJ must identify the testimony that was not credible, and specify 'what evidence undermines the claimant's complaints.'"); Brown-Hunter, 806 F.3d at 493-94 (the ALJ must identify the testimony he found not credible and "link that testimony to the particular parts of the record" supporting his non-credibility determination).

VI.

REMAND FOR FURTHER PROCEEDINGS

The Court has discretion to remand or reverse and award benefits. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989). Where no useful purpose would be served by further proceedings, or where the record has been fully developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. See Lingenfelter, 504 F.3d at 1041; Benecke v. Barnhart, 379 F.3d 587, 595-96 (9th Cir. 2004). Where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find plaintiff disabled if all the evidence were properly evaluated, remand is appropriate. See Benecke, 379 F.3d at 593-96.

In this case, there are outstanding issues that must be resolved before a final determination can be made. In an effort to expedite these proceedings and to avoid any confusion or misunderstanding as to what the Court intends, the Court will set forth the scope of the remand proceedings. First, because the ALJ failed to provide specific and legitimate reasons for discounting the opinions of Dr. Matos and Dr. Le, the ALJ on remand shall reassess the opinions of these physicians. In assessing the medical opinion evidence of all of the doctors, the ALJ must explain the weight afforded to each opinion and provide legally adequate reasons for any portion of the opinion that the ALJ discounts or rejects, including a legally sufficient explanation for crediting one doctor's opinion over any of the others. Next, the ALJ on remand, in accordance with SSR 16-3p, shall reassess plaintiff's subjective allegations and either credit his testimony as

true, or provide specific, clear and convincing reasons, supported by substantial evidence in the case record, for discounting or rejecting any testimony. Finally, the ALJ shall reassess plaintiff's RFC and determine, at step five, with the assistance of a VE if necessary, whether there are jobs existing in significant numbers in the national economy that plaintiff can still perform.[9]

VII.

CONCLUSION

IT IS HEREBY ORDERED that: (1) plaintiff's request for remand is **granted**; (2) the decision of the Commissioner is **reversed**; and (3) this action is **remanded** to defendant for further proceedings consistent with this Memorandum Opinion.

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

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

Paul L. Abrams

DATED: April 7, 2017

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE

[9] Nothing herein is intended to disrupt the ALJ's step four finding that plaintiff is unable to return to his past relevant work.