

1 administrative record (the “AR”) and the Joint Stipulation. For the reasons stated
2 below, the decision of the Commissioner is AFFIRMED.

3 **PRIOR PROCEEDINGS**

4 On December 28, 2012, plaintiff applied for Disability Insurance Benefits and
5 Supplemental Security Income, alleging an onset date of July 15, 2009. (AR 176-88.)
6 Plaintiff’s applications were denied initially and on reconsideration. (AR 56-116.)
7 Thereafter, plaintiff requested a hearing before an administrative law judge (“ALJ”).
8 (AR 138.) ALJ Dante M. Alegre held a hearing on December 3, 2014. (AR 36-55.)
9 Plaintiff appeared with counsel and testified at the hearing. (*See id.*) Furthermore,
10 Gregory Jones, a vocational expert (“VE”), testified at the hearing. (AR 49-53.)

11 On February 27, 2015, the ALJ issued a decision denying plaintiff benefits.
12 (AR 14-35.) Based on his review of the evidence, the ALJ determined that plaintiff
13 has the “following severe impairments: diabetes mellitus type II, peripheral
14 neuropathy, degenerative joint disease of the right shoulder, mild lumbar
15 osteoarthritis, minimal osteoarthritis of the left knee, obesity, major depressive
16 disorder, and bipolar disorder.” (AR 20.) Further, the ALJ found that plaintiff
17 possesses the residual functional capacity (“RFC”) to perform “light work” except that
18 plaintiff can:

19 lift 20 pounds occasionally and 10 pounds frequently, and can
20 sit, stand, or walk six hours each out of an eight-hour workday.
21 He can occasionally push and pull with the right upper
22 extremity. He an [sic] occasionally climb, balance, stoop,
23 kneel, crouch, and crawl. He can occasionally reach overhead
24 with the right upper extremity. He can perform unskilled,
25 nonpublic work.

26 (AR 23.)

27 In making these determinations, the ALJ discredited plaintiff’s claims about the
28 limitations caused by his impairments. (AR 28.) The ALJ gave great weight to the

1 state agency medical and psychiatric consultants and gave little weight to the opinions
2 of plaintiff's treating physician Dr. Arthur Jimenez, M.D., and the GAF scores. (AR
3 27-28.) Based on plaintiff's RFC and the testimony of the VE, the ALJ determined
4 that plaintiff is unable to perform any past relevant work, but there are jobs that exist
5 in significant numbers in the national economy that plaintiff can perform. (AR 28-
6 29.) Accordingly, the ALJ concluded that plaintiff has not been under a disability
7 within the meaning of the Social Security Act from the alleged onset date of July 15,
8 2009 through the date of the decision. (AR 30.)

9 On June 29, 2016, the Appeals Council denied plaintiff's request for review.
10 (AR 1-9.) Thereafter, plaintiff filed this action.

11 **CONTENTIONS**

12 Plaintiff raises two issues in this action:

- 13 1. Whether the ALJ provided clear and convincing reasons to reject the opinion of
14 the treating doctor.
- 15 2. Whether the ALJ failed to include all of the relevant mental limitations in the
16 residual functional capacity.

17 **STANDARD OF REVIEW**

18 Under 42 U.S.C. § 405(g), this Court reviews the Administration's decisions to
19 determine if: (1) the Administration's findings are supported by substantial evidence;
20 and (2) the Administration used proper legal standards. *Smolen v. Chater*, 80 F.3d
21 1273, 1279 (9th Cir. 1996) (citations omitted). "Substantial evidence is more than a
22 scintilla, but less than a preponderance." *Reddick v. Chater*, 157 F.3d 715, 720 (9th
23 Cir. 1998) (citation omitted). To determine whether substantial evidence supports a
24 finding, "a court must consider the record as a whole, weighing both evidence that
25 supports and evidence that detracts from the [Commissioner's] conclusion." *Auckland*
26 *v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001) (internal quotation marks omitted).

27 If the evidence in the record can reasonably support either affirming or
28 reversing the ALJ's conclusion, the Court may not substitute its judgment for that of

1 the ALJ. *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (citing
2 *Flaten v. Sec’y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995)).
3 However, even if substantial evidence exists to support the Commissioner’s decision,
4 the decision must be reversed if the proper legal standard was not applied. *Howard ex*
5 *rel. Wolff v. Barnhart*, 341 F.3d 1006, 1014-15 (9th Cir. 2003); *see also Smolen*, 80
6 F.3d at 1279.

7 DISCUSSION

8 **A. The ALJ Properly Evaluated The Treating Physician’s Opinion**

9 Plaintiff first alleges that the ALJ erred in failing to provide clear and
10 convincing reasons to reject the opinion of plaintiff’s treating physician, Dr. Arthur
11 Jimenez, M.D. (JS 4.)

12 **1. Background**

13 *a. Opinion of Treating Physician Dr. Jimenez*

14 Treatment records indicate that Dr. Jimenez treated plaintiff between October
15 2009 and September 2014. In November 2014, Dr. Jimenez completed a Physical
16 Residual Functional Capacity Questionnaire in connection with plaintiff’s disability
17 applications. (AR 535-40.) Based on the treatment history, Dr. Jimenez concluded
18 that plaintiff is incapable of performing even low stress jobs. (AR 537.) Specifically,
19 Dr. Jimenez opined that plaintiff can walk half a block without rest or severe pain; sit
20 for 30 minutes at a time; stand for 15 minutes at a time; and sit, stand, and walk each a
21 total of 2 hours in an 8-hour day. (*Id.*) Further, plaintiff must walk every 15 minutes
22 for 15 minutes at a time throughout an 8-hour workday; must be able to shift at will
23 from sitting, standing, or walking; must be able to take unscheduled breaks every 30
24 minutes for 15-30 minutes at a time; must elevate legs at 90 degrees while sitting for
25 half the day; and must use a cane or other assistive device when engaging in
26 occasional standing/walking. (AR 538.) Plaintiff is also limited to rarely lifting and
27 carrying less than 10 pounds; rarely looking down, turning his head, looking up,
28 holding his head in a static position, twisting, stooping, crouching, and climbing

1 ladders and stairs. (AR 538-39.) Plaintiff is also restricted from reaching, handling,
2 fingering, and pushing/pulling with his right hand. (AR 539.) Finally, plaintiff can
3 never use his left foot and can use his right foot occasionally. (AR 540.) Dr. Jimenez
4 concluded that because of these limitations, plaintiff is likely to be absent from work
5 for more than four days per month. (*Id.*)

6 *b. ALJ Decision*

7 In his written decision, the ALJ gave little weight to Dr. Jimenez's opinion.
8 (AR 26.) Based on his review of the record as a whole, the ALJ opined that plaintiff
9 has the RFC to perform light work except that plaintiff can:

10 lift 20 pounds occasionally and 10 pounds frequently, and can
11 sit, stand, or walk six hours each out of an eight-hour workday.
12 He can occasionally push and pull with the right upper
13 extremity. He an [sic] occasionally climb, balance, stoop,
14 kneel, crouch, and crawl. He can occasionally reach overhead
15 with the right upper extremity. He can perform unskilled,
16 nonpublic work.

17 (AR 23.) The ALJ rejected the severe limitations imposed by Dr. Jimenez, stating
18 that that the doctor's opinion was "brief, conclusory, and inadequately supported by
19 clinical findings." (AR 26.)

20 **2. Legal Standard**

21 In evaluating physicians' opinions, the case law and regulations distinguish
22 among three types of physicians: (1) those who treat the claimant (treating
23 physicians); (2) those who examine but do not treat the claimant (examining
24 physicians); and (3) those who neither treat nor examine the claimant (non-examining
25 physicians). *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995), *limited on other*
26 *grounds, Saelee v. Chater*, 94 F.3d 520, 523 (9th Cir. 1996); *see also* 20 C.F.R. §§
27 404.1502, 416.902, 404.1527(c), 416.927(c). As a general rule, more weight should
28 be given to the opinion of a treating source than to the opinions of physicians who do

1 not treat the claimant. *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987); 20 C.F.R.
2 §§ 404.1527(c)(2), 416.927(c)(2).

3 The Ninth Circuit has held that an ALJ may reject a treating physician's
4 uncontradicted opinion only with "clear and convincing" reasons supported by
5 substantial evidence in the record. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir.
6 1998) (internal quotation marks omitted). If the treating physician's opinion is
7 controverted, the ALJ must still provide "specific and legitimate" reasons, supported
8 by substantial evidence in the record, in order to reject the treating physician's
9 opinion. *Lester*, 81 F.3d at 830; *Holohan v. Massanari*, 246 F.3d 1195, 1202-03 (9th
10 Cir. 2001).

11 **3. Analysis**

12 Here, Dr. Jimenez's opinions are contradicted by the state agency consultants
13 on the initial and reconsideration levels. However, "[t]he opinion of a nonexamining
14 physician cannot by itself constitute substantial evidence that justifies the rejection of
15 the opinion of either an examining physician or a treating physician." *Lester*, 81 F.3d
16 at 831. The opinion of a non-examining physician may serve as substantial evidence
17 when it is consistent with other independent evidence in the record. *Id.* at 830-31.
18 The state agency consultants relied on a review of medical reports from a variety of
19 doctors, including but not limited to Dr. Jimenez. Only Dr. Jimenez assigned severe
20 restrictions to plaintiff's ability to work. Therefore, the ALJ must provide "specific
21 and legitimate" reasons for discrediting Dr. Jimenez's opinion. *See Lester*, 81 F.3d at
22 830.

23 The ALJ stated that he gave little weight to Dr. Jimenez's opinion "because it is
24 brief, conclusory, and inadequately supported by clinical findings." (AR 26.) The
25 ALJ then provided additional reasons for rejecting the specific opinions that plaintiff
26 was unable to work; that plaintiff suffered from functional limitations that would
27 preclude work; and that plaintiff has significant mental limitations.

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1 a. *The Opined Functional Limitations Are Inconsistent With the Objective*
2 *Medical Evidence*

3 The ALJ noted that with regard to claims based on plaintiff's diabetes mellitus
4 and peripheral neuropathy, Dr. Jimenez's treatment notes reflect that in most visits
5 plaintiff did not complain of any related symptoms. (AR 25.) The record indicates
6 that plaintiff visited Dr. Jimenez frequently between October 2009 and September
7 2014. However, the treatment notes indicate that plaintiff complained of difficulty of
8 grasping objects only once in April 2011. (AR 332.) Further, plaintiff complained of
9 numbness and tingling in his extremities only twice, once in September 2013 during a
10 visit with Dr. Jimenez and again in September 2014 during a neurological
11 examination. (AR 461, 493.) The ALJ noted that during the September 2014
12 neurological examination, a physical examination of plaintiff reflected that sensation
13 in his upper and lower extremities was normal and plaintiff had 5/5 muscle strength
14 throughout, including grip strength. (AR 25) (citing AR 494.) The infrequent
15 complaints and the inconsistent treatment notes contrast with a finding of ongoing and
16 disabling symptoms of diabetes mellitus and peripheral neuropathy.

17 Second, the ALJ explained that the record reflected routine and conservative
18 treatment with regard to plaintiff's alleged right shoulder degenerative joint disease.
19 "A conservative course of treatment can undermine allegations of debilitating pain."
20 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008). The
21 ALJ noted that plaintiff first complained of shoulder pain in 2011. (AR 25) (citing AR
22 329.) Plaintiff subsequently underwent physical therapy, which yielded only slight
23 improvements. (AR 349-50.) In 2012, a MRI was performed which yielded benign
24 results; there was moderate tendinosis, but no rotator cuff tear. (AR 378.) Plaintiff
25 received injections for his shoulder pain and the record reflects that by 2013, plaintiff
26 no longer complained of shoulder pain and did not receive any further treatment for it.
27 (See AR 389-94.) Plaintiff asserts that steroid injections are not considered

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1 conservative treatment. The record, however, does not reflect steroid injections;
2 rather, the medical record demonstrates only injections of lidocaine.

3 Third, the ALJ explained that the objective medical evidence regarding
4 plaintiff's mild lumbar osteoarthritis and minimal left knee osteoarthritis does not
5 support Dr. Jimenez's opinion. In December 2010, plaintiff had an X-ray of his
6 lumbar spine which revealed mild osteoarthritis with no evidence of spondylosis or
7 spondylolisthesis. (AR 385.) Plaintiff had an X-ray of his knee in December 2010,
8 which revealed normal results. (AR 386.) In a subsequent X-ray of plaintiff's left
9 knee in April 2011, there were "minimal changes of osteoarthritis," but the results
10 were otherwise normal. (AR 384.) As the ALJ noted, there is no evidence in the
11 record suggesting that plaintiff received or was recommended to receive further
12 treatment such as physical therapy or injections for either his back or knees. (AR 25.)

13 Accordingly, inconsistency with the objective medical evidence was a specific
14 and legitimate reason the ALJ provided for rejecting Dr. Jimenez's opinion.

15 *b. Inconsistency With Own Progress Notes*

16 The second reason the ALJ provided for rejecting Dr. Jimenez's opinion was
17 that his opinion was inconsistent with the documented findings in Dr. Jimenez's own
18 progress notes. The progress notes from each visit with Dr. Jimenez include
19 comments regarding physical examinations. As the ALJ noted, the progress notes do
20 not document any significant functional limitations. In fact, the physical examination
21 comments show largely normal results. (*See e.g.*, 324-44, 418-24, 453-57) (physical
22 examination comments reflecting "SPINE: no abnormalities, "EXTREMITIES: no
23 abnormalities," "LOW BACK: rom normal.") These findings are inconsistent with Dr.
24 Jimenez's opinions imposing extreme limitations of plaintiff's physical capabilities.
25 Accordingly, this inconsistency was a specific and legitimate reason the ALJ provided
26 for rejecting Dr. Jimenez's opinion.

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1 c. *Opinions On Mental Impairments*

2 Lastly, the ALJ rejected Dr. Jimenez’s opinion regarding plaintiff’s mental
3 impairments because Dr. Jimenez is not qualified to assess plaintiff’s mental
4 limitations and the record does not contain evidence of Dr. Jimenez performing a
5 mental evaluation or clinical assessment. Plaintiff contends that as a treating
6 physician, Dr. Jimenez is qualified to opine on plaintiff’s mental impairments even
7 though he is not an expert in the field. (JS 17.) Plaintiff is correct, but Dr. Jimenez’s
8 records do not support the contention that Dr. Jimenez ever treated plaintiff’s alleged
9 mental impairment. In this regard, the record includes a one-page questionnaire Dr.
10 Jimenez completed regarding plaintiff’s mental impairments. (AR 491.) Dr. Jimenez
11 opined that plaintiff’s mental impairments impose limitations in (a) daily activities and
12 task completion resulting from a lack of focus, (b) social function because of isolation,
13 and (c) adaptation to work because of behavioral issues. (*Id.*) Additionally, in the
14 Physical Residual Functional Capacity Questionnaire, Dr. Jimenez simply checked off
15 depression, anxiety, and schizophrenia as psychological conditions affecting
16 plaintiff’s physical condition. (AR 536.) These two questionnaires do not
17 demonstrate that Dr. Jimenez ever treated plaintiff’s mental impairments. Therefore,
18 the ALJ properly dismissed Dr. Jimenez’s opinion regarding plaintiff’s mental
19 impairment.

20 **B. The ALJ Properly Evaluated Plaintiff’s Mental RFC**

21 Plaintiff next contends the ALJ erred in his RFC determination by failing to
22 include the mental limitations assessed by Dr. Jimenez and the state agency. (JS 13,
23 16-18.)

24 **1. Legal Standard**

25 It is the solely the ALJ’s responsibility to determine a claimant’s RFC. *Vertigan*
26 *v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). RFC is the most the claimant can do
27 in a work setting despite the physical and mental limitations caused by the claimant’s
28 impairments and related symptoms, such as pain. 20 C.F.R. §§ 404.1545(a)(1),

1 416.945(a)(1); *see also* *Reddick v. Chater*, 157 F.3d 715, 724 (9th Cir. 1998) (residual
2 functional capacity is the “maximum degree to which the individual retains the
3 capacity for sustained performance of the physical-mental requirements of jobs”)
4 (internal quotation marks omitted) (citing 20 C.F.R. Part 404, subpt. P, app. 2 §
5 200.00(c)). The ALJ’s RFC finding “must be based on *all* of the relevant evidence in
6 the case record,” including, *inter alia*, medical signs and laboratory findings; medical
7 source statements; and effects of symptoms, including pain, that are reasonably
8 attributable to a medically-determinable impairment. Social Security Ruling
9 (“S.S.R.”) 96-8p, 1996 WL 374184 (S.S.A.) at *5. However, the ALJ is not required
10 to incorporate evidence from opinions of treating physicians which were permissibly
11 discounted. *Batson v. Commissioner, Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir.
12 2004).

13 **3. Analysis**

14 *a. Dr. Jimenez’s Opinion*

15 As discussed above, the ALJ properly rejected Dr. Jimenez’s opinions regarding
16 plaintiff’s mental impairments. The ALJ is not required to incorporate evidence from
17 opinions of treating physicians which were permissibly discounted. *Batson v.*
18 *Commissioner, Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004). Therefore, the
19 ALJ did not err by not incorporating Dr. Jimenez’s opinions regarding plaintiff’s
20 mental impairments.

21 *b. State Agency Opinion*

22 The state agency psychiatric consultants on the initial and reconsideration levels
23 opined that plaintiff suffered from moderate impairments in the ability to perform
24 activities within a schedule, sustain ordinary routine without special supervision,
25 accept instructions and respond appropriately to criticism from supervisors, and the
26 ability to complete normal workweek without an unreasonable number and length of
27 rest periods. (AR 77-78, 109-10.) The ALJ gave great weight to the opinions of the
28 state agency psychiatric consultants, and along with the medical evidence, the ALJ

1 opined that plaintiff's mental RFC is limited to "unskilled non-public work." (AR 23.)
2 Plaintiff argues that the ALJ committed error by not including all of the limitations
3 imposed by the state agency psychiatric consultants. (JS 13.) In particular, plaintiff
4 argues the ALJ erred by not including a limitation involving "interacting with
5 supervisors." (JS 19.)

6 Although the psychiatric consultants found the moderate impairments
7 referenced by plaintiff, all of them agreed that plaintiff's RFC resulting therefrom was
8 non-public, simple repetitive work. The consultants did not impose any restriction
9 relating to supervision in their recommended RFCs. Therefore, plaintiff's claim is
10 without merit.

11 **CONCLUSION**

12 For the foregoing reasons, the judgment of the Commissioner is affirmed.

13 IT IS SO ORDERED.

14 DATED: November 20, 2017

15 /S/ FREDERICK F. MUMM
16 FREDERICK F. MUMM
17 United States Magistrate Judge
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