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

WILLIAM H. McKEITHEN,

Plaintiff,

v.

NANCY A. BERRYHILL¹,
Acting Commissioner of
Social Security,

Defendant.

No. EDCV 16-2224 SS

MEMORANDUM DECISION AND ORDER

I.

INTRODUCTION

Plaintiff William H. McKeithen ("Plaintiff") seeks review of the final decision of the Commissioner of the Social Security

¹ Nancy A. Berryhill is now the Acting Commissioner of Social Security and is substituted for former Acting Commissioner Carolyn W. Colvin in this case. See Fed. R. Civ. P. 25(d).

1 Administration (hereinafter the "Commissioner" of the "Agency")
2 concluding that Plaintiff was disabled as of September 3, 2014,
3 but was not disabled prior to that date. (Administrative Record
4 ("AR") 34). The parties consented, pursuant to 28 U.S.C. § 636(c),
5 to the jurisdiction of the undersigned United States Magistrate
6 Judge. For the reasons stated below, the decision of the
7 Commissioner is REVERSED and REMANDED for further proceedings.
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10 **II.**

11 **PROCEDURAL HISTORY**

12
13 In 2009, Plaintiff filed an application for a period of
14 disability and disability insurance benefits ("DIB"), and an
15 application for supplemental security income ("SSI"), alleging a
16 disability onset date of September 1, 2008. (AR 107). The Agency
17 initially denied both applications on January 27, 2010, and upon
18 reconsideration on May 27, 2010. (AR 107). Plaintiff requested a
19 hearing before an Administrative Law Judge ("ALJ"), which occurred
20 on July 21, 2011. (AR 41-54). After the hearing, the ALJ
21 determined that Plaintiff was not "disabled" under the Social
22 Security Act and denied benefits. (AR 114). Plaintiff sought
23 review by the Appeals Council, which later remanded the action back
24 to the ALJ. (AR 118-22).
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1 On remand, following a second hearing (AR 55-76), the ALJ again
2 denied benefits. (AR 133). On appeal, the Appeals Council remanded
3 the matter to the ALJ for a second time. (AR 139-44).
4

5 An ALJ held a third hearing. (AR 77-99). Following this
6 hearing, the ALJ issued a partially favorable ruling. (AR 22-40).
7 The ALJ concluded that Plaintiff was disabled as of September 3,
8 2014, but not from September 1, 2008 as Plaintiff contends. (AR
9 34). Plaintiff requested review of the partially favorable
10 decision. (AR 18). The Appeals Council denied the request on
11 August 22, 2016. (AR 1-7). Accordingly, Plaintiff filed this
12 action to challenge the ALJ's findings regarding his disability
13 onset date.
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16 III.

17 STANDARD OF REVIEW

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20 Under 42 U.S.C. § 405(g), a district court may review the
21 Commissioner's decision to deny benefits. "The court may set aside
22 the Commissioner's denial of benefits when the ALJ's findings are
23 based on legal error or are not supported by substantial evidence
24 in the record as a whole." Aukland v. Massanari, 257 F.3d 1033,
25 1035 (9th Cir. 2001) (citing Tackett v. Apfel, 180 F.3d 1094, 1097
26 (9th Cir. 1999)); accord Smolen v. Chater, 80 F.3d 1273, 1279 (9th
27 Cir. 1996) (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir.
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1 1989). However, the court must "affirm the denial of disability
2 benefits if it is supported by substantial evidence and the
3 Commissioner applied the correct legal standards." Marci v.
4 Chater, 93 F.3d 540, 543 (9th Cir. 1996).

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7 "Substantial evidence is more than a scintilla, but less than
8 a preponderance." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
9 1998) (citing Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir.
10 1997)). It is "relevant evidence which a reasonable person might
11 accept as adequate to support a conclusion." Id. To determine
12 whether substantial evidence supports a finding, the court must
13 "consider the record as a whole, weighing both evidence that
14 supports and evidence that detracts from the [Commissioner's]
15 conclusion." Aukland, 257 F.3d at 1035 (quoting Penny v. Sullivan,
16 2 F.3d 953, 956 (9th Cir. 1993). If the evidence could reasonably
17 support either affirming or reversing that conclusion, the court
18 may not substitute its judgment for that of the Commissioner.
19 Reddick, 157 F.3d at 720-21 (citing Flaten v. Sec'y of Health &
20 Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

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1 IV.

2 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

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4 To qualify for disability benefits, a claimant must demonstrate
5 a medically determinable physical or mental impairment that
6 prevents him from doing a substantial gainful activity, and that
7 is expected to result in death or last for a continuous period of
8 at least twelve months. Reddick, 157 F.3d at 721 (citing 42 U.S.C.
9 § 423 (d) (1) (A)). The impairment must render the claimant
10 incapable of performing any other substantial gainful employment
11 in the national economy. Tackett, 180 F.3d at 1098 (citing 42
12 U.S.C. § 423 (d) (2) (A)).
13
14

15 To decide if a claimant is entitled to benefits, an ALJ conducts
16 a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920.
17

18 (1) Is the claimant presently engaged in a substantial gainful
19 activity? If yes, the claimant is found not disabled. If
20 no, proceed to step two.

21 (2) Is the claimant's impairment severe? If no, the claimant
22 is found not disabled. If yes, proceed to step three.

23 (3) Does the claimant's impairment meet or equal one of the
24 specific impairments described in 20 C.F.R. Part 404,
25 Subpart P, Appendix 1? If yes, the claimant is found
26 disabled. If not, proceed to step four.
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1 (4) Is the claimant capable of performing his past work? If
2 yes, the claimant is found not disabled. If no, proceed
3 to step five.

4 (5) Is the claimant able to do any other work? If not, the
5 claimant is found disabled. If yes, the claimant is found
6 not disabled.
7

8 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,
9 262 F.3d 949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R.
10 §§ 404.1520 (a) - (g) (1) & 416.920 (a) - (g) (1).
11

12
13 The claimant has the burden of proof at steps one through four
14 and the Commissioner has the burden of proof at step five.
15 Bustamante, 262 F.3d at 953-54. "Additionally, the ALJ has an
16 affirmative duty to assist the claimant in developing the record
17 at every step of the inquiry." Id. at 954. If, at step four,
18 the claimant meets his burden of establishing an inability to
19 perform past work, the Commissioner must show that the claimant
20 can perform some other work that exists in "significant numbers"
21 in the national economy, taking into account the claimant's
22 residual functional capacity ("RFC"), age, education, and work
23 experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at
24 721; 20 C.F.R. §§ 404.1520 (g) (1), 416.920 (g) (1). The
25 Commissioner may do so by the testimony of a vocational expert
26 ("VE") or by reference to the Medical-Vocational Guidelines
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1 appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2 (commonly
2 known as "the Grids"). Osenbrock v. Apfel, 240 F.3d 1157, 1162
3 (9th Cir. 2001). When a claimant has both exertional and non-
4 exertional limitations, the Grids are inapplicable and thus the
5 ALJ must take VE testimony. Moore v. Apfel, 216 F.3d 864, 869 (9th
6 Cir. 2000) (citing Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir.
7 1988)).
8

9
10 Plaintiff contends that the ALJ failed to give proper weight
11 to the treating physicians' opinions in determining Plaintiff's
12 disability onset date. Plaintiff also argues that the ALJ failed
13 to provide clear and convincing reasons to reject Plaintiff's
14 subjective testimony. The Court agrees with Plaintiff's
15 contentions and REMANDS this action to the Agency for further
16 proceedings.
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18
19 Plaintiff contends that the ALJ erred by failing to give proper
20 weight to the physical functional assessments of treating doctors
21 Harold Luke, M.D., and Wilson Gomer, M.D., and the examining doctor
22 Robert Steinberg, M.D. (Plaintiff's Memorandum In Support of the
23 Complaint ("Pl. MSO") at 11-20). Plaintiff further argues that
24 had the ALJ properly credited the treating and examining
25 physicians' opinions, Plaintiff's disability onset date would have
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1 been September 1, 2008, not September 3, 2014. See Pl. MSO at 20.
2 The Court agrees that remand is required, as discussed below.
3

4 **V.**

5 **DISCUSSION**

6
7 **A. The ALJ Failed To Provide Specific And Legitimate Reasons To**
8 **Reject The Treating Physicians' Opinions**
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10
11 As a matter of law, the greatest weight is accorded to the
12 claimant's treating physician. Ghanim v. Golvin, 763 F.3d 1154,
13 1160-61 (9th Cir. 2014). The opinions of treating physicians are
14 entitled to special weight because the treating physician is hired
15 to cure and has a better opportunity to know and observe the
16 claimant as an individual. Id. Further, as a general rule, when
17 a treating or examining physician's opinion is not contradicted by
18 another physician, it may be rejected only for "clear and
19 convincing" reasons. See Trevizo v. Berryhill, 871 F.3d 664, 675
20 (9th Cir. 2017). The ALJ can meet this burden by setting forth a
21 detailed and thorough summary of the facts. Trevizo, 871 F.3d at
22 675.
23

24
25 When a treating or an examining physician's opinion is
26 contradicted by another doctor, it may only be rejected if the ALJ
27 provides "specific and legitimate" reasons supported by substantial
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1 evidence in the record. See Garrison v. Colvin, 759 F.3d 995, 1012
2 (9th Cir. 2014); see also Orn v. Astrue, 495 F.3d 625, 633 (9th
3 Cir. 2007.

4
5 Here, Consultative Examiner Azizollah Karamalou, M.D.,
6 contradicted the assessments of treating doctors Luke and Gomer,
7 and examining consultative physician Robert Steinberg. (Compare AR
8 619 with AR 522-28, 570-76, and 549-51). Dr. Luke's questionnaire
9 indicates his first date of treatment for Plaintiff's pulmonary
10 condition was June 2, 2004. (AR 522). Dr. Steinberg viewed records
11 dating back to September 24, 2008 and concluded that "the earliest
12 date that the patient's symptoms and limitations apply is 2009."
13 (AR 542-551). Because of the conflicting opinions, the ALJ must
14 provide "specific and legitimate" reasons for rejecting the
15 opinions of Doctors Luke, Gomer, and Steinberg.
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18
19 **1. Treating Physician Harold Luke, M.D.**

20
21 Dr. Harold Luke, M.D., practices pulmonary medicine in Redlands
22 and Grand Terrace, California. (See e.g., AR 516, 521, 528). Dr.
23 Luke is affiliated with Redlands Community Hospital and the Quality
24 Medical Corporation's Happy Care Clinic ("Quality Clinic"). (See
25 e.g., AR 514, 528). In a summary report drafted on June 30, 2011,
26 Dr. Luke noted that Plaintiff has received treatment from Quality
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1 Clinic since 2004. (AR 515). Further, in 2009, Plaintiff presented
2 to Dr. Luke at Quality Clinic after suffering from an episode of
3 severe shortness and breath and chest pain. (AR 515). Chest x-
4 rays demonstrated Plaintiff maintained only forty-six percent of
5 his lung capacity. (AR 515) Further, Dr. Luke assessed that
6 Plaintiff suffered from emphysema and diabetes. (AR 515).
7
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9 Dr. Luke assessed plaintiff on several occasions between 2009
10 and 2011. (See AR 497-528). During a visit in 2010, Dr. Luke
11 diagnosed plaintiff with COPD, chronic bronchitis, obesity, bipolar
12 disorder, hypertension, and diabetes. (AR 505). Dr. Luke
13 recommended that Plaintiff refrain from doing physical light work.
14 (AR 505). He further recommended that Plaintiff engage in "walking
15 exercise daily after meals for 20 minutes one way." (AR 505).
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18 On September 25 2011, Dr. Luke completed a Pulmonary Impairment
19 Questionnaire. (AR 522-28). Dr. Luke determined that, in an
20 eight-hour workday, Plaintiff could only sit, stand and walk for
21 up to one hour each day. (AR 525). Further, Plaintiff was limited
22 to lifting and carrying up to 10 pounds frequently, and up to 20
23 pounds occasionally. (AR 525). Dr. Luke also found that
24 Plaintiff's reported level of pain, a five on a one-to-ten scale,
25 would "frequently" interfere with his concentration and attention.
26 (AR 527).
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1 The ALJ incorporated the previous ALJ's decision and rejected
2 Dr. Luke's medical assessment of Plaintiff. (AR 30). The previous
3 ALJ rejected Dr. Luke's assessment for several reasons. (AR 130-
4 31). The ALJ found that Dr. Luke made a contradictory assessment
5 of Plaintiff's physical capabilities. (AR 130). The ALJ noted
6 that Dr. Luke determined in 2011 that Plaintiff could not stand or
7 walk for more than one hour in an eight-hour workday, despite his
8 2010 recommendation that Plaintiff engage in recreational walking
9 for exercise up to three times daily and for twenty minutes at a
10 time. (AR 130). In addition, the ALJ concluded that Dr. Luke
11 rendered his 2011 assessment only as "a series of checked boxes
12 that were marked without any specific clinical or objective
13 support." (AR 130-31). Finally, the ALJ found Dr. Luke never
14 administered any type of pulmonary function study when assessing
15 Plaintiff. (AR 131).

18
19 The Court finds that the ALJ's reasons for rejecting Dr. Luke's
20 assessments are not specific and legitimate. The ALJ's initial
21 determination that Dr. Luke made a contradictory assessment of
22 Plaintiff's physical capabilities is unfounded. Dr. Luke's
23 physical functional assessment of Plaintiff in 2011 was an
24 assessment of what Plaintiff could do at that particular time. (AR
25 505). His recommendation in 2010 that Plaintiff engage in
26 "recreational" walking for exercise was expressly worded as a goal
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1 for Plaintiff. (AR 505). For example, he recommended that
2 Plaintiff endeavor to walk "daily after meals for 20 minutes on
3 way . . . if possible to condition the heart." (AR 505). The
4 words "if possible" suggest that this was a goal. Accordingly,
5 the ALJ's reason for rejecting Dr. Luke's opinion because the
6 doctor's findings were "contradictory" is not supported by the
7 record.
8

9
10 Furthermore, the ALJ's rejection of Dr. Luke's assessment
11 because of a "series of checked boxes that were marked without any
12 specific clinical or objective support" is not supported by the
13 record. (AR 130-31). Contrary to the ALJ's finding, Dr. Luke
14 supplied handwritten responses and comments to nine of the twenty-
15 one questions on the assessment form. (AR 522-28). Moreover, Dr.
16 Luke submitted chart notes reflecting his own findings in support
17 of his responses, he referenced a chest x-ray demonstrating
18 Plaintiff's diminished lung capacity, and Dr. Luke detailed other
19 medical findings he made. (AR 515-16). See Garrison, 759 F.3d at
20 1014 n.17 (emphasizing that more than just the face of a "check-
21 box" form should be considered when considering its weight,
22 including notes and charts attached in support of a questionnaire's
23 responses.). Thus, the record does not support the ALJ's rejection
24 of Dr. Luke's opinion on the basis that the assessment was a "series
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1 of checked boxes that were marked without any specific clinical or
2 objective support.”

3
4 In addition, the ALJ erred by stating that Dr. Luke never
5 administered any type of pulmonary function study. Dr. Luke
6 administered and referenced a chest x-ray showing Plaintiff’s
7 significantly reduced lung capacity. (AR 515). Thus, Court finds
8 that the ALJ failed to provide specific and legitimate reasons to
9 reject Dr. Luke’s opinions.
10

11
12 **2. Treating Physician Wilson Gomer**

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14 Primary care physician, Dr. Wilson Gomer, M.D., treated
15 Plaintiff from July 2012 to October 2012. (AR 570). On October
16 26, 2012, Dr. Gomer completed a Multiple Impairment Questionnaire.
17 (AR 570-77). He concluded that Plaintiff suffers from COPD, sleep
18 apnea, depression, hypertension, chest pain, diabetes, emphysema,
19 hyperlipidemia, shortness of breath, and heart disease. (AR 570-
20 71). Based on his treatment, Dr. Gomer opined that that Plaintiff
21 could not sit, stand or walk for more than one hour in an eight-
22 hour workday. (AR 572). Further, he opined that Plaintiff could
23 occasionally lift and carry up to 10 pounds. (AR 573). Moreover,
24 based on Plaintiff’s reported pain level, Dr. Gomer concluded that
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1 Plaintiff's experience of pain was enough to "constantly" interfere
2 with Plaintiff's attention and concentration. (AR 575).

3
4 The ALJ rejected Dr. Gomer's physical assessment based on four
5 reasons. Initially, the ALJ characterized Dr. Gomer's assessment
6 as "vague and overly broad objective findings." (AR 31). The ALJ
7 pointed to the lack of a pulmonary function study, chest x-rays,
8 MRI studies, or other diagnostic tools in the treatment record.
9 (AR 31). Next, the ALJ concluded that Dr. Gomer's assessment
10 consists of "a series of checked boxes on a preprinted form
11 solicited by the claimant's representative." (AR 31). The ALJ
12 also found Dr. Gomer's assessment contradicted Dr. Luke's. (AR
13 31). The ALJ noted that Dr. Gomer concluded that Plaintiff could
14 not sit, stand, or walk more than one hour in an eight-hour workday,
15 but Dr. Luke also recommended that Plaintiff walk for exercise up
16 to three times a day and for twenty minutes at a time. (AR 31).
17 Finally, the ALJ rejected Dr. Gomer's assessment because he
18 responded "No" to the question, "Have you substituted medications
19 in an attempt to produce less symptomology or relieve side
20 effects?" (AR 31-32). The ALJ found that numerous medications
21 could be used to control Plaintiff's condition. (AR 31-32).
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26 The Court finds that the ALJ's reasons for rejecting the
27 treating physician Gomer's assessments are not specific and
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1 legitimate. First, Dr. Gomer's assessments are improperly
2 characterized as "vague findings." The findings are specific and
3 clear. Moreover, the ALJ did not explain what further studies
4 should have been done. Thus, "vague findings" was not a legitimate
5 reason to reject Dr. Gomer's report.
6

7
8 Second, Dr. Gomer's responses do not display a "series of
9 mindlessly checked boxes." Dr. Gomer submitted pages of charts
10 and notes in support of his assessment. (AR 529-36, 562-68, 597-
11 615, 664-98). Moreover, he supplied handwritten responses to
12 fourteen of the twenty-nine questions on the first questionnaire
13 form (AR 570-76), and he submitted handwritten responses to ten
14 out of fourteen responses on the most recent questionnaire. (AR
15 646-50). Thus, Dr. Gomer's responses were not just checked boxes.
16
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18 Third, Dr. Gomer's assessment of Plaintiff's ability to walk
19 and stand in an eight-hour workday does not contradict Dr. Luke's
20 "recommendation" that he walk for twenty minutes at a time up to
21 three times a day to condition his heart. (AR 549). As stated
22 before, Dr. Luke's recommendation was expressly worded as a goal
23 rather than an assessment of what Plaintiff could presently do.
24 (AR 505). For this reason, Dr. Gomer's assessment did not
25 contradict Dr. Luke's.
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1 Finally, the ALJ's decision to reject Dr. Gomer's assessment
2 because he responded "No" to a question on his assessment form
3 about providing substitute medication to Plaintiff is not a
4 specific and legitimate reason. (AR 574). Dr. Gomer adjusted
5 Plaintiff's diabetes medication and made several additions to the
6 medications in his regimen. (AR 698). Further, the ALJ is a
7 layperson, not a doctor. An ALJ cannot challenge a medical doctor's
8 treatment choices and a physician's awareness of the scope of
9 treatments available to his patient. See Tackett v. Apfel, 180
10 F.3d 1094, 1102 (9th Cir. 1999); Day v. Weinberger, 522 F.2d 1154,
11 1156 (9th Cir. 1975). Accordingly, the Court finds that the ALJ
12 failed to provide specific and legitimate reasons for rejecting
13 Dr. Gomer's assessment.
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16 **3. Examining Consultative Physician Robert Steinberg, M.D.**

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19 Plaintiff's counsel retained Dr. Robert Steinberg, M.D., to
20 assess Plaintiff. (AR 538-52). Dr. Steinberg is an Internal and
21 Integrative Medicine specialist. (AR 538). On September 27, 2012,
22 after examining Plaintiff and reviewing medical records dating back
23 to 2009, Dr. Steinberg provided a detailed report on Plaintiff's
24 limitations. (AR 538-52). Dr. Steinberg concluded that in an
25 eight-hour day, Plaintiff could sit only for about two hours, and
26 stand/walk for only about thirty minutes to one hour. (AR 549).
27 He also opined that Plaintiff can lift and carry up to 10 pounds
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1 frequently and up to 20 pounds occasionally. (AR 549). Dr.
2 Steinberg found that Plaintiff's pain symptoms would likely
3 increase in a competitive work environment. (AR 550).
4 Additionally, Dr. Steinberg advised that Plaintiff would need
5 unscheduled rest-breaks at unpredictable intervals during the
6 eight-hour work day, for twenty minutes a time at every hour. (AR.
7 550). He determined that the earliest date of Plaintiff's symptoms
8 and limitations was in 2009. (AR 551).
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10
11 The ALJ rejected examining doctor Steinberg's assessment on
12 three grounds. First, the ALJ asserted that a non-examining
13 medical advisor Ostrow found that the record supporting Dr.
14 Steinberg's assessment contained insufficient "objective findings"
15 to endorse the restrictive standing and walking limitations and
16 unscheduled rest breaks recommended by Dr. Steinberg. (AR 30-31).
17 Second, the ALJ concluded that Plaintiff's reported pain level, a
18 five on a one-to-ten scale, is intrinsically at odds with Dr.
19 Steinberg's opinion that the pain would "frequently" interfere with
20 Plaintiff's attention and concentration. (AR 31). Lastly, the
21 ALJ rejected Dr. Steinberg's assessment based on the ALJ's
22 determination that Plaintiff's lungs were essentially clear on
23 examination. (AR 31)
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1 The Court finds that the ALJ's reasons for rejecting examining
2 doctor Steinberg's assessment are not specific and legitimate. As
3 a matter of law, a non-examining medical advisor's opinion will
4 not suffice to override a treating or examining and consultative
5 physician's opinion. See Garrison, 759 F.3d at 1012; Lester v.
6 Chater, 81 F.3d 821, 830 (1995) ("The ALJ's primary reasons for
7 rejecting [the treating physicians'] opinions were that they
8 conflicted with the testimony of a non-examining medical advisor.
9 In so doing, the ALJ committed an error of law."); see also Pitzer
10 v. Sullivan, 908 F.2d 502, 506 n.4 (9th Cir. 1990) ("[T]he non-
11 examining physician's conclusion, with nothing more, does not
12 constitute substantial evidence, particularly in view of the
13 conflicting observations, opinions, and conclusions of an examining
14 physician."). Accordingly, because Dr. Steinberg is Plaintiff's
15 examining doctor, the non-examining medical advisor Ostrow's
16 opinion, by itself, may not stand to override Dr. Steinberg's
17 assessment.
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21 Next, the ALJ had no factual basis to determine that Plaintiff's
22 reported pain level as a five on a one-to-ten scale is intrinsically
23 at odds with Dr. Steinberg's opinion that the pain would
24 "frequently" interfere with Plaintiff's attention and
25 concentration. (AR 559). As a factual matter, the Court agrees
26 with Plaintiff that there is nothing inconsistent between a mid-
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1 range level of pain and an inference that such a pain would
2 "frequently" interfere with an individual's attention and
3 concentration.
4

5 Finally, the ALJ's finding that Plaintiff's lungs were
6 essentially clear on examination lacks merit. Dr. Steinberg found
7 decreased breath sounds in all lung fields in Plaintiff, with a
8 prolonged expiratory phase. (AR 544). Furthermore, Dr. Steinberg's
9 findings are consistent with the opinions of treating physicians
10 Luke and Gomer, who similarly determined that Plaintiff suffered
11 from wheezing (AR 523, 533), poor breath sounds (AR 505), and
12 diminished breathing. (AR 515).
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16 Thus, the Court finds the ALJ failed to give specific and
17 legitimate reasons for rejecting examining consultative doctor
18 Steinberg's assessment.
19

20 **B. The ALJ Failed To Provide Clear And Convincing Reasons To**
21 **Reject Plaintiff's Credibility**
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23
24 Plaintiff also challenges the ALJ's credibility
25 determination. Plaintiff contends that the ALJ failed to provide
26 clear and convincing reasons supported by substantial evidence in
27 the record for discrediting his testimony. (Pl. MSO at 20-22).
28

1 The Court agrees and remands this action for further proceedings
2 consistent with this decision.

3
4 The ALJ presented several reasons for discounting Plaintiff's
5 credibility. The ALJ initially concluded that Plaintiff was not
6 credible because the chest pain he experienced while trimming his
7 hedges subsided when he discontinued that activity. (AR 32).
8 The ALJ also found that Plaintiff's testimony lacked credibility
9 because Plaintiff failed to stop smoking after being medically
10 advised to do so. (AR 32). Consequently, the ALJ held that
11 Plaintiff's failure to quit smoking evinced his failure to follow
12 medical advice, thus undermining his credibility. (AR 32). For
13 the reasons stated below, the Court concludes that the ALJ failed
14 to provide clear and convincing reasons to reject Plaintiff's
15 credibility.
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18 19 **1. Chest Pain Testimony**

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21 Plaintiff challenges the ALJ's decision to reject his
22 credibility based on his alleged "inconsistent" testimony about
23 Plaintiff's chest pain. (Pl. MSO at 20). In particular, the ALJ
24 discredited Plaintiff's testimony regarding his chest pain because
25 the "chest pain ceased after [Plaintiff] stopped trimming" the
26 hedges. (AR 32).
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2 The ALJ may use “ordinary techniques of credibility
3 evaluation, such as . . . prior inconsistent statements.” Ghanim,
4 763 F.3d at 1163 (quoting Smolen, 80 F.3d at 1284). As a general
5 rule, the Ninth Circuit “do[es] not consider a cursory finding that
6 a single line of testimony is ‘equivocal’ sufficient to constitute
7 substantial evidence.” Robbins v. Soc. Sec. Admin., 466 F.3d 880,
8 884 (9th Cir. 2006). In Robbins, the Ninth Circuit held that an
9 ALJ failed to provide clear and convincing reasons to discount a
10 claimant’s credibility when relying on a “single line” of
11 inconsistent testimony regarding alcohol use. Id.
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14
15 Here, as in Robbins, the ALJ erroneously relied on a single
16 limited discrepancy to reject Plaintiff’s credibility. Although
17 the ALJ’s finding that Plaintiff is capable of light physical
18 exertion may conflict with Plaintiff’s claim that he endured pain
19 while trimming his hedges, that inconsistency alone is not
20 sufficient to wholly reject Plaintiff’s credibility. Thus, the
21 Court agrees that this rationale fails to provide a clear and
22 convincing reason to reject Plaintiff’s credibility.
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1 **2. Plaintiff's Failure To Quit Smoking**

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3 Plaintiff challenges the ALJ's decision to reject his
4 credibility based on his failure to follow medical advice to quit
5 smoking. (Pl. MSO at 21). "A claimant's subjective symptom
6 testimony may be undermined by an unexplained, or inadequately
7 explained, failure to ... follow a prescribed course of treatment."
8 Trevizo, 871 F.3d at 679 (citations omitted). Failure to assert a
9 reason for not following treatment "can cast doubt on the sincerity
10 of the claimant's pain testimony." Id.

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12
13 As a general rule, "in the case of impairments where the
14 stimulus to seek relief is less pronounced, and where medical
15 treatment is very unlikely to be successful, the approach to
16 credibility makes little sense." Orn, 495 F.3d at 638. For
17 example, in Orn, the Ninth Circuit, held that a claimant's failure
18 to follow a medically advised treatment for treating his obesity
19 was not sufficient to discount the claimant's credibility. Id.
20 Therefore, the court found that the ALJ erred in rejecting
21 claimant's credibility on this ground. Id.

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23
24 Additionally, the Court notes that the Seventh Circuit in
25 Shramek v Apfel followed several steps (omitted by the ALJ here)
26 before denying benefits for a failure to follow medical advice to
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1 quit smoking. Before denying benefits because of a failure to
2 follow medical advice, the Seventh Circuit found that an inquiry
3 must be conducted into the circumstances surrounding the failure,
4 and a determination must be made as to whether following the
5 treatment advice would have restored the person's ability to work
6 or sufficiently improve his condition. Shramek v. Apfel, 226 F.3d
7 809, 812-13 (7th Cir. 2000) (cited in Bray v. Comm'r of Soc. Sec.
8 Admin., 554 F.3d 1219, 1228 (9th Cir. 2009)).

10
11 Here, Plaintiff's failure to follow medical advice to quit
12 smoking is similar the plaintiff in Orn, who failed to follow
13 medical advice to lose weight. In neither situation is the failure
14 to follow medical advice, on the facts of the case, a clear and
15 convincing reason to reject the claimant's subjective testimony.
16 Furthermore, the ALJ here failed to consider whether quitting
17 smoking would have restored Plaintiff's ability to work or
18 sufficiently improved his health condition to allow him to work.
19 Without such an inquiry, Plaintiff's failure to quit smoking alone
20 cannot constitute a convincing reason to reject his credibility.
21 Therefore, the Court agrees that Plaintiff's failure to follow the
22 medical advice to quit smoking, under these facts, does not provide
23 a clear and convincing reason to reject his credibility.
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VI.

CONCLUSION

Consistent with the foregoing, and pursuant to sentence four of 42 U.S.C. § 405(g),¹ IT IS ORDERED that judgment be entered REVERSING the decision of the Commissioner and REMANDING this matter for further proceedings consistent with this decision. The Agency must reevaluate Plaintiff's disability onset date in light of the findings made in this Order. IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment on counsel for both parties.

DATED: November 13, 2017

/s/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

¹ This sentence provides: "The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."

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NOTICE

**THIS DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS/NEXIS,
WESTLAW OR ANY OTHER LEGAL DATABASE**