UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS HERNANDEZ RODRIGUEZ, Plaintiff, v. NANCY A. BERRYHILL, Acting Commissioner of Social Security, Defendant.	NO. ED CV 16-2337-JFW(E) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable John F. Walter, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Plaintiff filed a complaint on November 10, 2016, seeking review of the Commissioner's denial of disability benefits. Plaintiff filed a "Memorandum in Support of Complaint" on June 19, 2017, which the Court has construed as a motion for summary judgment. Defendant filed

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a motion for summary judgment on August 3, 2017. The Court has taken the motions under submission without oral argument. See L.R. 7-15; "Order," filed November 16, 2016.[1]

BACKGROUND

This Court previously remanded Plaintiff's disability claim for further administrative proceedings. See Administrative Record ("A.R.") 384-93 (Memorandum Opinion and Order of Remand filed on January 15, 2014, in Hernandez v. Colvin, ED CV 13-741-E). Plaintiff, a former carpenter, had asserted disability since September 27, 2002, based on a work-related injury to his back, neck, and shoulder, and also asserted depression allegedly beginning in approximately June of 2008 (A.R. 74-78, 94, 105). Plaintiff had testified in October of 2009 to physical symptomatology of disabling severity (A.R. 341-43; see also A.R. 352). An Administrative Law Judge ("ALJ") had found that Plaintiff has severe physical and psychological impairments, but the ALJ also found Plaintiff could perform a limited range of light work (A.R. 18-27 (adopting vocational expert's testimony at A.R. 350-51 that a person with the residual functional capacity the ALJ found to exist could work)). The ALJ deemed Plaintiff's contrary statements not credible (A.R. 20-21). The Appeals Council denied review (A.R. 4-6).

In previously remanding this matter, the Court held that the ALJ had erred by discounting Plaintiff's credibility without stating

[1] Counsel for both parties violated paragraph VI of this Order. Counsel shall heed the Court's orders in the future.

legally sufficient reasons for having done so. See A.R. 386-88. The Appeals Council then vacated the prior administrative decision and remanded the case for further proceedings consistent with this Court's order (A.R. 403).

On remand, a new ALJ received additional evidence but again found Plaintiff not disabled (A.R. 363-83, 401-03). Plaintiff had suffered a second work-related injury in September of 2013 (A.R. 766). The ALJ evaluated Plaintiff's alleged disability for two time periods, i.e., from the alleged onset date of September 27, 2002, until Plaintiff's later work-related injury on September 2, 2013 (the "First Alleged Disability Period"), and from the September 2, 2013 injury until the date of the ALJ's adverse decision (the "Second Alleged Disability Period") (A.R. 366-81). For the First Alleged Disability Period, the ALJ found that Plaintiff suffered from the following severe impairments: "degenerative changes to the lumbar spine, bilateral neuroforaminal stenosis at L4-5, degenerative changes to the cervical spine, depressive disorder, and generalized anxiety disorder" (A.R. 366). For the Second Alleged Disability Period, the ALJ found that Plaintiff suffered from additional severe impairments, i.e., "bilateral shoulder AC joint arthritis, bilateral carpal tunnel syndrome, and obesity" (A.R. 366). However, the ALJ found that, during each of these alleged disability periods, Plaintiff retained the residual functional capacity to perform work as an office cleaner, packer, and laundry worker (A.R. 367-83 (adopting vocational expert testimony at A.R. 786-90)). The ALJ therefore denied disability benefits (id.).

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STANDARD OF REVIEW

Under 42 U.S.C. section 405(g), this Court reviews the Administration's decision to determine if: (1) the Administration's findings are supported by substantial evidence; and (2) the Administration used correct legal standards. See Carmickle v. Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner of Social Sec. Admin., 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted); see Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

> If the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ. But the Commissioner's decision cannot be affirmed simply by isolating a specific quantum of supporting evidence. Rather, a court must consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [administrative] conclusion.

Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and quotations omitted).

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DISCUSSION

The Magistrate Judge recommends that the Court reverse the ALJ's decision in part and remand the matter for further administrative proceedings. As discussed below, the ALJ committed potentially material errors while evaluating the medical evidence.

I. **The ALJ Erred in Connection with Evaluating the Medical Opinions Concerning Plaintiff's Mental Limitations.**

Plaintiff argues, inter alia, that, in determining Plaintiff's residual functional capacity, the ALJ failed to consider whether Plaintiff's condition as a whole would interfere with his ability to perform work. See Plaintiff's Motion, pp. 3-11. In support of this argument, Plaintiff cites various portions of the medical record, including medical opinions regarding Plaintiff's mental limitations. Id.; see also Plaintiff's Motion, p. 17 (referencing the ALJ's alleged failure properly to assess Plaintiff's "emotion problems of depression and anxiety"). Nevertheless, Defendant claims that Plaintiff "does not challenge the ALJ's findings regarding his mental limitations" and thereby assertedly has waived any such challenge. See Defendant's Motion, p. 4 nn. 2-3. Although not a model of clarity, Plaintiff's motion sufficiently has presented the issue of Plaintiff's alleged mental limitations for this Court's review. In any event, under the applicable standard of review, this Court must determine whether the Administration's findings (including findings regarding mental limitations) are supported by "substantial evidence." See Carmickle v. Commissioner, 533 F.3d at 1159.

For both the First Alleged Disability Period and the Second Alleged Disability Period, the ALJ determined that Plaintiff's mental residual functional capacity was limited only by an inability to perform "complex tasks" (A.R. 367-68). In reaching this determination, the ALJ summarized the opinions of treating psychologist Dr. Nelson Flores and consultative examiner Dr. Divy Kikani. See A.R. 373-75. Both doctors opined Plaintiff has significant mental limitations. Id. The ALJ gave "little weight" to these doctors' opinions, stating: (1) the doctors' assessments assertedly were "vague" and allegedly did not contain any "specific functional restrictions"; and (2) "substantial evidence over the course of several years" purportedly showed that Plaintiff's "condition was largely controlled with a medication and treatment regimen" (A.R. 380). As explained below, these statements are not legally sufficient reasons for rejecting the doctors' opinions.

A. Summary of the Relevant Medical Records

Plaintiff has received extensive mental health evaluation and treatment during the past decade. In January of 2006, Plaintiff's treating chiropractor Dr. J. Carlos Vazquez observed that Plaintiff was "exhibiting suggested depression-anxiety regarding his pain" (A.R. 226). Dr. Vazquez referred Plaintiff to Dr. Flores for evaluation and treatment (A.R. 227, 268). Dr. Flores evaluated Plaintiff on February 9, 2006, and diagnosed Major Depressive Disorder (single episode, mild), Generalized Anxiety Disorder, Male Hypoactive Sexual Desire Disorder (due to chronic pain), and a Sleep Disorder (due to chronic pain, insomnia type) (A.R. 268). Plaintiff then participated

in individual and group psychotherapy and started treatment with Dr. Flores' staff psychiatrist, Dr. Amal Tanagho (A.R. 268-69).

Plaintiff had semi-regular visits with Dr. Tanagho from April 7, 2006, through at least August 15, 2008 (A.R. 235-58). Dr. Tanagho diagnosed Generalized Anxiety Disorder and Major Depressive Disorder, and prescribed Lexapro and Trazodone. See A.R. 248; see also A.R. 257 (reflecting diagnoses for the codes listed in treatment notes). During his treatment with Dr. Tanagho, Plaintiff often reported running out of his prescribed medications. When he was taking his medications, he reported that his symptoms improved. See A.R. 235-58.[2]

Dr. Flores prepared a "Comprehensive Psychological Medical-Legal Permanent and Stationary Evaluation" dated September 8, 2006 (A.R. 260-84). At his last appointment in August of 2006, Plaintiff had appeared "sad and worried," his posture was tense, and there were no evident histrionic demonstrations of pain (A.R. 264). Plaintiff reported improvement in his general emotional and psychological functioning, indicating that his medications had helped improve his

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[2] The record contains a "Psychiatric Consultation Report" by Dr. Tanagho dated February 28, 2006, for "Jesus Hernandez-Rodriguez" which reports a different employer, different work, a different injury date, a back surgery in 2004 not mentioned elsewhere in the record, and (other than Dr. Flores) different treatment providers (A.R. 249-58). This report also describes a different injury than the injury reported elsewhere in the record (id.). Thus, it seems likely that this report relates to a patient other than Plaintiff. The ALJ attributed this report to Plaintiff and factored the report into the ALJ's assessment of Plaintiff's residual functional capacity (A.R. 372-73).

sleep pattern and mood, but also stating that he continued to experience a number of symptoms (i.e., nervousness, restlessness, difficulty falling asleep and staying asleep due to his pain, low energy during the day, fatigue, sadness, irritability, difficulty controlling his emotions and impulses, crying easily, frequent temper outbursts, lack of motivation, no interest in his usual activities or his appearance, guilt, lost self confidence, difficulty concentrating and remembering, loss of sexual desire, fear, hopelessness, helplessness, and worry about persisting pain and physical limitations, his mental condition, his financial circumstances, and his future) (A.R. 269-70).

On mental status examination, Dr. Flores reported the following with respect to Plaintiff's mood and affect, cognitive functioning, and sensorium: (1) Plaintiff was emotionally involved in the evaluation, his mood was anxious and sad, he exhibited apprehension and he displayed body tension; (2) his thought content was focused on a preoccupation concerning his somatic pain, physical limitations, sexual difficulties, financial circumstances, and marital problems; and (3) he reported difficulty remembering recent dates and order of events, and his concentration sometimes was deficient (A.R. 269). Dr. Flores reportedly also administered a post-treatment psychological battery of tests and indicated that a detailed "Psychological Test Report" would be sent as an addendum. See A.R. 273-74. The record contains no such addendum.

Dr. Flores made diagnoses similar to those made on initial evaluation and assessed a Global Assessment of Functioning ("GAF")

score of 48 (A.R. 262-63, 274). A GAF score of 48 denotes "serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)." See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders ("DSM") 34 (4th Ed. 2000) (Text Revision) (GAF scale for range of 41-50).[3] Dr. Flores opined that Plaintiff had "slight to moderate to moderate" psychiatric disability (A.R. 263, 276). Dr. Flores recommended that, if Plaintiff returned to work and his symptoms persist, he should not work in any position where he might be at risk of being involved in an industrial accident if he becomes anxious and/or distracted, he should not work at high altitudes, and, due to his irritability and lack of impulse control, he should not work in any position where he might be required to handle stress and/or conflicts on a regular basis while interacting with the public and/or coworkers (A.R. 277-78; see also A.R. 280-84).

Consultative examiner Dr. Kikani prepared a Psychiatric Evaluation dated July 29, 2008 (A.R. 315-18). Plaintiff reported, inter alia, hearing voices off and on, having thoughts like he wants to give up but with no definite suicide plan, feeling despair, helplessness, and hopelessness, and difficulty sleeping at night due to pain (A.R. 315-16). He was being treated with Lexapro and Trazodone which offer "variable relief" for his symptoms (A.R. 315). Plaintiff said he could not work due to his work-related injuries but he could attend to his own personal needs (i.e., feeding himself,

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[3] Clinicians use the GAF scale to rate "psychological, social, and occupational functioning on a hypothetical continuum of mental health-illness." Id.

dressing himself, bathing, toileting) (A.R. 316). Dr. Kikani reviewed Dr. Flores' and Dr. Tanagho's records (A.R. 315-16).

On mental status examination, Plaintiff appeared depressed and anxious, and showed excessive agitation, pressured speech, and preoccupation with his work-related injury (A.R. 316-17). His insight into his current psychiatric problems was considered impaired (A.R. 317). Dr. Kikani diagnosed pain disorder associated with psychological factors and general medical condition (with a note to rule out mood disorder, depressed type, secondary to medical condition) (A.R. 317). Dr. Kikani rated as moderately severe the psychosocial stressors secondary to Plaintiff's medical condition and assigned a GAF of 50 (A.R. 317). Dr. Kikani opined that Plaintiff had "mild to moderate" impairment in: (1) his daily activities of living and social functioning; (2) concentration, persistence, and pace; (3) his ability to persist at normal work situations under normal work pressure; (4) his ability to respond appropriately to coworkers, supervisors, and the public; (5) his ability to respond appropriately to normal work situations, attendance, and safety; and (6) his ability to cope with changes in the routine work setting (A.R. 317). Plaintiff reportedly would have no problems remembering, understanding, and carrying out simple or complex instructions (A.R. 317). According to Dr. Kikani, Plaintiff may be expected to show mild to moderate episodes of emotional deterioration in normal work situations under customary work pressure (A.R. 317-18). Dr. Kikani described Plaintiff's prognosis as "fair" with treatment (A.R. 318).
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State agency physician Dr. R. Paxton reviewed the record and prepared a Psychiatric Review Technique form dated August 18, 2008, which purported to find no "severe" mental impairments (A.R. 329-33 (referencing A.R. 321 (summarizing Dr. Kikani's opinion and claiming the evidence supports a non-severity finding))). Dr. Paxton rated Plaintiff's functional limitations as "none" to "mild" (A.R. 331).[4]

The next available medical records reflect treatment with primary care physician Dr. Huy Truong from December 13, 2010 through at least March 19, 2015 (A.R. 471-519). In December of 2010, Plaintiff presented for a medication refill, complaining of, inter alia, trouble sleeping, chronic low back pain and sciatica, chronic insomnia, and depression (A.R. 519). Dr. Truong assessed a mood disorder, chronic insomnia, myalgia, stress, major depression, anxiety, acute bronchitis, and low back pain with sciatica (A.R. 519). Dr. Truong prescribed Naproxen for pain, Soma for spasm, lidocaine patches, and Saphris (A.R. 519). In February of 2011, Plaintiff reported he was depressed but sleeping well, and his mental "restlessness" had improved (A.R. 511). Dr. Truong prescribed Prozac (A.R. 511). In March of 2011, Plaintiff reported his mood was better, he was mentally "clearer," and he slept well on Saphris (A.R. 509). In April of 2011, Plaintiff reported he was depressed and sleeping "fair" (A.R. 507). In October of 2012, Plaintiff reported that he had run out of his medications for depression, was unable to sleep due to chronic back

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[4] The ALJ gave Dr. Paxton's opinion "little weight," generally stating that evidence received at the hearing level showed Plaintiff was more limited than Dr. Paxton had believed (A.R. 380).

pain, was unable to make decisions, and could not work due to active mental illness (A.R. 489). Plaintiff complained of visual and auditory hallucinations, frequent confusion, anxiety, depression, and an active schizophrenic state when unmedicated (A.R. 489). Dr. Truong assessed schizophrenia, anxiety disorder, depression, and insomnia (A.R. 489). Dr. Truong continued to prescribe Saphris (id.).

Plaintiff then received treatment at the Riverside County Department of Mental Health from February 25, 2013, through at least May 25, 2016 (A.R. 520-99). In February of 2013, Plaintiff complained of depressed mood, crying spells, difficulty concentrating, and feeling useless, as well as fatigue, agitation and difficulty sleeping (A.R. 587-89, 592, 594). He also claimed to have some auditory hallucinations (A.R. 589). He reportedly had never been stable on medication due to not "taking the right ones," and had been on and off medication for the past 10 years with minimal improvement (A.R. 587-88). On mental status examination, Plaintiff was tearful at times but his concentration seemed to be good, his mood was depressed, his affect was flat/depressed, but his insight and judgment were good (A.R. 588-89). Plaintiff reportedly helped his wife with cleaning the house and taking care of their seven children who were 21, 15, 13, 11, 5, 2, and 1 year(s) old (A.R. 589, 592).

Plaintiff was diagnosed with major depressive disorder, single episode, severe without psychotic features, and alcohol abuse in remission (A.R. 587). His GAF was 50 (A.R. 587). In April of 2013, he was prescribed Lexapro after reporting that Lexapro had been effective in the past (A.R. 582-85, 598). In June of 2013, he

reported “minimal” response to Lexapro and wanted the dosage increased (A.R. 580-81).

Subsequent notes concern Plaintiff’s medical treatment following his September 3, 2013 work-related injury. Plaintiff reportedly had fallen and injured his head and lower back (A.R. 600-757).

On September 19, 2013, Plaintiff returned to the Riverside County Department of Mental Health, reporting he had “minimal” response to Lexapro, he was sad, and his sister had passed way the night before from breast cancer (A.R. 578). Plaintiff’s Lexapro was increased and he was prescribed Vistaril (hyrdoxyzine) for anxiety (A.R. 579). In December of 2013, Plaintiff reported he was feeling better since the start of hydroxyzine at night for anxiety and for sleep, but he still had anxiety (A.R. 575). He was told he could take hydroxyzine up to three times per day when he feels anxious or needs to sleep (A.R. 575).

In January of 2014, Plaintiff received an updated psychiatric assessment which diagnosed major depressive disorder, recurrent, moderate, and anxiety disorder, unspecified (A.R. 569). On examination, he avoided eye contact, had psychomotor slowing, his mood was depressed, irritable, and anxious, and his affect was constricted, blunted, and depressed (A.R. 571). He was assigned a GAF of 48, with an estimated GAF between 41 and 50 for the past year, indicating “serious symptoms or impairment” (A.R. 569). In June of 2014, Plaintiff presented for a medication refill (A.R. 567).

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It appears that Plaintiff attempted to work sometime in 2013-14. On October 28, 2014, Plaintiff reported he was "ok," but had not had his medications for the past five or six months after becoming employed and not being able to get time off to make an appointment (A.R. 563). Plaintiff reportedly had fallen and hit his head and was released from work (A.R. 563). He complained of poor sleep and depression/anxiety and wanted to continue his medications (A.R. 563). He was ordered to resume his previous medications (A.R. 564).[5] In December of 2014, Plaintiff reported he was "stressed," but had fair response to current medications and still had anxiety related to his finances and inability to work consistently (A.R. 560). His Vistaril dosage was increased to help with anxiety (A.R. 561).

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[5] On October 1, 2014, neurologist Dr. M. Michael Mahdad evaluated Plaintiff (A.R. 709-16). Plaintiff did not report taking any psychotropic medications at that time and did not report any injury after the September 3, 2013 injury (A.R. 710, 712). On examination, Plaintiff became emotional, motor examination revealed "poor effort" with complaints of pain all over his body including all of his joints, but muscle testing was symmetric, with no atrophy, fasciculation, tremor, pronator drift, or leg lag (A.R. 713). Sensory examination revealed "strange subjective findings" (A.R. 713). Plaintiff reportedly could not feel vibratory sensation all over the body including his forehead, he could not feel pinprick throughout the upper back, neck, shoulders, or parts of his arms and legs, inconsistent with any anatomic distribution (A.R. 713). He had the same issues with cold sensation (A.R. 714). Plaintiff had painful range of motion in both shoulders and walked slowly (A.R. 714). Dr. Mahdad diagnosed diffuse pain with unusual sensory loss distribution more than likely of "non-organic symptoms/psychosomatic symptoms," possible traumatic fibromyalgia, but no definite neurologic deficit (A.R. 714-15). Dr. Mahdad suggested follow up with pain management and a psychological evaluation (A.R. 715).

In November and December 2014, orthopedist Dr. Timothy Gray, who had been treating Plaintiff since April of 2014 (A.R. 722), also requested a psychological evaluation (A.R. 700, 702).

In December of 2014, Plaintiff presented to Dr. Truong for his annual physical examination, reporting that he had a work-related injury 15 months prior (i.e., in September of 2013) (A.R. 482-94). Plaintiff complained he could not do all his activities of daily living and needed help with everything (A.R. 482). When Plaintiff returned in February of 2015 for a follow up, he reportedly was taking Lexapro (A.R. 476).

In February of 2015, Plaintiff reported to his provider at the Riverside County Department of Mental Health that his depression was under control but he continued to have anxiety and asked to increase his Lexapro dose (A.R. 557). His Lexapro dose was increased and he was restarted on Vistaril (A.R. 558). In May of 2015, Plaintiff received an updated psychiatric assessment (A.R. 548-51). Plaintiff reported he had good and bad days (A.R. 548). On examination, he was tearful at times, he moved slowly, his mood was "back and forth," his affect was dysthymic and constricted, and his concentration was slightly impaired (A.R. 550). Plaintiff was diagnosed with "MDD" (major depressive disorder) and anxiety disorder "NOS" (not otherwise specified) (A.R. 551). His medications were continued and he was referred to a support group (A.R. 551-54). In June of 2015, Plaintiff reported that his medications helped and that his depression and anxiety were improving, but back pain assertedly impacted his mood (A.R. 544-45). He reportedly was going to be having surgery in the upcoming months (A.R. 544). His Vistaril dose was increased (A.R. 545). In August of 2015, Plaintiff reported that he had run out of medications after missing his previous appointment (A.R. 541). His mood was "more anxious" (A.R. 542). His medications were continued

(A.R. 542). In September of 2015, Plaintiff reported he felt "so so," was frustrated with legal issues, had lots of pain in his arm and neck that contributed to his depression, had "some" anxiety, and was waiting for his operation (A.R. 538). His affect was "frustrated" (A.R. 539). His medications were continued (A.R. 539). Plaintiff missed his next appointment (A.R. 535-36). In November of 2015, Plaintiff reported he had been "feeling better," his back has been hurting and he was waiting to see a specialist about his back, shoulder, and wrists before having surgery (A.R. 532). He reported that he had been more adherent with his medication, his sleep was better, and he denied depression, anxiety, mania or psychosis (A.R. 532). His medications were continued (A.R. 533). Plaintiff missed his next three appointments (A.R. 529-31).

In March of 2016, Plaintiff received another psychiatric assessment (A.R. 524-27). He was out of his medications and felt very anxious (A.R. 524). Before he ran out of his medications, things were "well" and his mood and anxiety were under control (A.R. 524). His depression and anxiety returned when he went off his medications (A.R. 524). On mental status examination, his mood and affect were anxious (A.R. 526). His medications were continued (A.R. 527).

The record also contains a "Narrative Report" dated June 15, 2016, wherein one of Plaintiff's treating physicians with Riverside County Mental Health, Dr. Brauer Trammell, indicated that Plaintiff did not show an ability to: (1) maintain a sustained level of concentration; (2) sustain repetitive tasks for an extended period; and (3) adapt to new or stressful situations, and would not be able to

complete a 40 hour work week without decompensating (A.R. 523). The ALJ gave this opinion "little weight," as supposedly conclusory and not supported by the weight of the evidence (A.R. 380-81). According to the ALJ, Plaintiff's condition was "largely controlled" with a medication and treatment regimen (id.).

B. The ALJ's Stated Reasons for According "Little Weight" to the Opinions of Dr. Flores and Dr. Kikani are Legally Insufficient.

Under the law of the Ninth Circuit, the opinions of treating physicians command particular respect. "As a general rule, more weight should be given to the opinion of the 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) (citations omitted). A treating physician's conclusions "must be given substantial weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988); see Rodriguez v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989) ("the ALJ must give sufficient weight to the subjective aspects of a doctor's opinion. . . . This is especially true when the opinion is that of a treating physician") (citation omitted); see also Orn v. Astrue, 495 F.3d 625, 631-33 (9th Cir. 2007) (discussing deference owed to treating physicians' opinions). Even where the treating physician's opinions are contradicted,[6] "if the ALJ wishes to disregard the opinion[s] of

[6] Rejection of an uncontradicted opinion of a treating physician requires a statement of "clear and convincing" reasons. Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996); Gallant v. Heckler, 753 F.2d 1450, 1454 (9th Cir. 1984).

the treating physician he . . . must make findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record." Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987) (citation, quotations and brackets omitted); see Rodriguez v. Bowen, 876 F.2d at 762 ("The ALJ may disregard the treating physician's opinion, but only by setting forth specific, legitimate reasons for doing so, and this decision must itself be based on substantial evidence") (citation and quotations omitted).

Similarly, where an examining physician's opinion is contradicted by another physician's opinion, as here, some Ninth Circuit authorities suggest that an ALJ may reject the examining physician's opinion only "by providing specific and legitimate reasons that are supported by substantial evidence." Garrison v. Colvin, 759 F.3d 995, 1012 (9th Cir. 2014) (citation and footnote omitted); see also Lester v. Chater, 81 F.3d at 830-31; but see Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985) (ALJ need not explicitly detail the reasons for rejecting the contradicted opinion of a non-treating, examining physician).

In the present case, the ALJ failed to state legally sufficient reasons for rejecting the opinions of Dr. Flores, a treating psychologist, and the opinions of Dr. Kikani, a consultative examiner. The ALJ's statement that the opinions assertedly were vague and allegedly did not contain specific functional restrictions is inaccurate and cannot constitute specific, legitimate reasoning. As summarized above, the Flores' opinions were detailed and provided for specific functional restrictions (i.e., Plaintiff should not work in

any position where he might be at risk of being involved in an industrial accident if he becomes anxious and/or distracted, he should not work at high altitudes, and should not work in any position where he might be required to handle stress and/or conflicts on a regular basis while interacting with the public and/or coworkers (A.R. 277-78; see also A.R. 280-84). Dr. Kikani's opinions were also detailed and provided specific functional restrictions (i.e., "mild to moderate" impairment in: (1) activities of daily living, social functioning, and in concentration, persistence, and pace; (2) Plaintiff's ability to persist at normal work situations under normal work pressure, respond appropriately to coworkers, supervisors, and the public, respond appropriately to normal work situations, attendance, and safety; and (3) his ability to cope with changes in the routine work setting (A.R. 317-18). Dr. Kikani also specifically stated that Plaintiff would be expected to show mild to moderate episodes of emotional deterioration in normal work situations under normal work pressure (id.).

A proper finding that a claimant's condition is controlled with medication sometimes can constitute a specific, legitimate reason for discounting a physician's opinion. See Warre v. Commissioner, 439 F.3d 1001, 1006 (9th Cir. 2006) ("Impairments that can be controlled effectively with medication are not disabling for the purpose of determining eligibility for SSI benefits."). However, no medical source opinion in the record states that Plaintiff's anxiety, depression and related symptoms in fact have been controlled with medication. It is unclear from the treatment notes whether Plaintiff's depression and anxiety were controlled with medications during any or all of the First or Second Alleged Disability Periods.

As detailed above, the treatment notes show, at most, some symptom improvement with medication, unexplained gaps in treatment, some noncompliance with psychiatric medications, some changes in those medications over time, and some "control" reported by Plaintiff with adherence to his medications starting only around 2015.

The Ninth Circuit has observed that "it is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation." Nguyen v. Chater, 100 F.3d 1462, 1465 (9th Cir. 1996) (citations and quotations omitted); see also Garrison v. Colvin, 759 F.3d at 1018 n.24 (quoting Nguyen); Etter v. Colvin, 2014 WL 2931145, at *2-3 (C.D. Cal. June 26, 2014) (finding ALJ's residual functional capacity assessment not supported by substantial evidence where ALJ gave "little" weight to the psychiatric consultative examiner's opinion and, in doing so, highlighted that the claimant had not received mental health treatment; citing, inter alia, Nguyen); accord Pate-Fires v. Astrue, 564 F.3d 935, 945 (8th Cir. 2009) ("a mentally ill person's noncompliance with psychiatric medications can be, and usually is, the result of the mental impairment itself and, therefore, neither willful nor without a justifiable excuse") (internal citations and quotations omitted); Kangail v. Barnhart, 454 F.3d 627, 630 (7th Cir. 2006) ("mental illness in general. . . may prevent the sufferer from taking prescribed medications or otherwise submitting to treatment") (internal citations omitted).

In any event, the fact that Plaintiff reported improved symptoms when he was taking his medications does not mean his symptoms actually

were "controlled" by medications. "Cycles of improvement and debilitating symptoms are a common occurrence [with mental health impairments], and in such circumstances it is error for an ALJ to pick out a few isolated incidents of improvement over a period of months or years and to treat them as a basis for concluding that a claimant is capable of working." Garrison v. Colvin, 759 F.3d at 1017; see also Ghanim v. Colvin, 763 F.3d 1154, 1162 (9th Cir. 2014) ("The fact that a person suffering from depression makes some improvement 'does not mean that the person's impairment [] no longer seriously affect[s] [his] ability to function in a workplace.'") (quoting Holohan v. Massanari, 246 F.3d 1195, 1205 (9th Cir. 2001).

During the First Alleged Disability Period, Plaintiff had reported that his symptoms improved when he took Lexapro and Trazodone during his treatment with Dr. Tanagho from April 2006 through August 2008. See A.R. 235-38. However, there is no indication in Dr. Tanagho's notes that the medications ever effectively controlled Plaintiff's depression and anxiety. See id. Plaintiff was still taking Lexapro and Trazodone when he was examined by Dr. Kikani on July 29, 2008, and yet Plaintiff had reported on July 13, 2008 that he was doing only "a little better" (A.R. 236). He also reportedly was hearing voices off and on, having thoughts like he wanted to give up, and feeling despair, helplessness and hopelessness (A.R. 315-16). Plaintiff then appeared depressed and anxious, showed excessive anxiety, agitation and pressured speech, and exhibited a preoccupation with his work-related injury (A.R. 316-18). Dr. Kikani believed that Plaintiff's insight into his current psychiatric problems was impaired (A.R. 317). Based on this examination, Dr. Kikani opined that

Plaintiff would have significant mental functional limitations (A.R. 317-18).

There appears to be a gap in treatment between August of 2008 and December of 2010. Plaintiff thereafter reported continuing depressive symptoms with some improvement on Saphris and Prozac during his treatment with Dr. Truong from December of 2010 through April of 2011 (A.R. 507, 511, 519). There appears to be another gap in treatment between May of 2011 and October of 2012. In October of 2012, Plaintiff had run out of his medications for depression, and reported depressive symptoms for which he again was prescribed Saphris (A.R. 489). There appears to be a shorter gap in treatment between October 2012 and February 2013 when Plaintiff began treatment at the Riverside County Department of Mental Health. In February of 2013, Plaintiff reported depressive symptoms and claimed he had never been stable on medications (A.R. 587-89, 592, 594). In April of 2013, Plaintiff was prescribed Lexapro after reporting that Lexapro had been effective in the past (A.R. 582-85, 598). In June of 2013, he reported "minimal" response to Lexapro and wanted the dose increased (A.R. 580-81).

During the Second Alleged Disability Period, Plaintiff's depression and anxiety may have been controlled for a time when Plaintiff's medications were changed to a higher dose of Lexapro and hydroxyzine was added. In September of 2013, Plaintiff reported "minimal" response to Lexapro (A.R. 578). His Lexapro was increased and he was prescribed Vistaril (hyrdoxyzine) for anxiety (A.R. 579). In December of 2013, Plaintiff reported he was feeling better since the start of hydroxyzine but he still had anxiety, so he was told he

could take hydroxyzine more often (A.R. 575). In January of 2014, he presented with depressive symptoms (A.R. 571). Notwithstanding Plaintiff's continued depressive symptoms, it appears that Plaintiff began working sometime between June of 2014 and October of 2014 and was then off his medications. In October of 2014, Plaintiff reported he was "ok" without his medications for the past five or six months, but he complained of poor sleep, depression, and anxiety, so his Lexapro and Vistaril were resumed (A.R. 563-64). In December of 2014, Plaintiff reported he had a fair response to his current medications but he still had anxiety, so his Vistaril was increased (A.R. 560-61).

By February of 2015, Plaintiff reported that his depression was under control but he continued to have anxiety and asked to increase his Lexapro dose, so the does was increased (A.R. 557-58). In May of 2015, he reported depressive symptoms, his mood was "back and forth," his affect was dysthymic and constricted, and his concentration was slightly impaired, so his medications were continued (A.R. 548, 550-54). In June of 2015, Plaintiff reported that his depression and anxiety were improving, but his back pain impacted his mood (A.R. 544-45). In August of 2015, Plaintiff reported that he had run out of medications after missing his last appointment and that his mood was "more anxious," so his medications were continued (A.R. 541-42). In September of 2015, Plaintiff reported he felt "so so," had depression, and "some" anxiety, and his affect was "frustrated," so his medications were continued (A.R. 538-39). Plaintiff missed his next appointment (A.R. 535-36). In November of 2015, Plaintiff reported he had been "feeling better," and he denied depression, anxiety, mania or psychosis (A.R. 532-33). Plaintiff's medications were continued (A.R.

533). Plaintiff inexplicably missed his next three appointments (A.R. 529-31). In March of 2016, Plaintiff returned, out of his medications and feeling very anxious (A.R. 524). He reported that, before he ran out of his medications, things were "well" and his mood and anxiety were "under control" (A.R. 524). His depression and anxiety apparently returned when he went off his medications (A.R. 524).

Lastly, the Court observes that, to the extent the ALJ may have impliedly rejected Dr. Flores's opinion and Dr. Kikani's opinion because these doctors provided their opinions in the workers' compensation context,[7] such a consideration could not serve as a specific, legitimate reason for discounting the opinions. The purpose for which a medical opinion is obtained "does not provide a legitimate basis for rejecting it." Reddick v. Chater, 157 F.3d 715, 726 (9th Cir. 1998); see Nash v. Colvin, 2016 WL 67677, at *7 (E.D. Cal. Jan. 5, 2016) ("the ALJ may not disregard a physician's medical opinion simply because it was initially elicited in a state workers' compensation proceeding . . .") (citations and quotations omitted); Casillas v. Colvin, 2015 WL 6553414, at *3 (C.D. Cal. Oct. 29, 2015) (same); Franco v. Astrue, 2012 WL 3638609, at *10 (C.D. Cal. Aug. 23, 2012) (same); Booth v. Barnhart, 181 F. Supp. 2d 1099, 1105 (C.D. Cal. 2002) (same).

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[7] See A.R. 380 (ALJ noting these doctors were "workers' compensation providers").

II. Remand is Appropriate

The Court is unable to deem the ALJ's errors to have been harmless. See Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012) (an error "is harmless where it is inconsequential to the ultimate non-disability determination") (citations and quotations omitted); McLeod v. Astrue, 640 F.3d 881, 887 (9th Cir. 2011) (error not harmless where "the reviewing court can determine from the 'circumstances of the case' that further administrative review is needed to determine whether there was prejudice from the error"). There remain significant unanswered questions in the present record. Cf. Marsh v. Colvin, 792 F.3d 1170, 1173 (9th Cir. 2015) (remanding for further proceedings to allow the ALJ to "comment on" the treating physician's opinion). For instance, it is not clear that the ALJ would be required to find Plaintiff disabled throughout the alleged periods of disability even if the opinions of Dr. Flores and Dr. Kikani were fully credited.

Remand is appropriate because the circumstances of this case suggest that further administrative review could remedy the ALJ's errors. See McLeod v. Astrue, 640 F.3d at 888; see also INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an administrative determination, the proper course is remand for additional agency investigation or explanation, except in rare circumstances); Dominguez v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) ("Unless the district court concludes that further administrative proceedings would serve no useful purpose, it may not remand with a direction to provide benefits"); Treichler v. Commissioner, 775 F.3d 1090, 1101 n.5 (9th

Cir. 2014) (remand for further administrative proceedings is the proper remedy "in all but the rarest cases"); Garrison v. Colvin, 759 F.3d at 1020 (court will credit-as-true medical opinion evidence only where, inter alia, "the record has been fully developed and further administrative proceedings would serve no useful purpose"); Harman v. Apfel, 211 F.3d 1172, 1180-81 (9th Cir.), cert. denied, 531 U.S. 1038 (2000) (remand for further proceedings rather than for the immediate payment of benefits is appropriate where, as here, there are "sufficient unanswered questions in the record").

RECOMMENDATION

For the foregoing reasons,[8] IT IS RECOMMENDED that the Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered reversing in part the decision of the Administration and remanding the matter for further administrative action consistent with this Report and Recommendation.

DATED: September 7, 2017.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

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[8] The Court need not and does not reach any other issue raised by Plaintiff except insofar as to determine that reversal with a directive for the immediate payment of benefits would not be an appropriate remedy at this time.

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.