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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 JOSE HUMBERTO DURAN,) NO. ED CV 16-2480-SJO(E)
12)
13 Plaintiff,)
14)
15 v.) REPORT AND RECOMMENDATION OF
16) UNITED STATES MAGISTRATE JUDGE
17)
18 NANCY A. BERRYHILL, Acting)
19 Commissioner of Social Security,)
20)
21 Defendant.)
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18 This Report and Recommendation is submitted to the Honorable
19 S. James Otero, United States District Judge, pursuant to 28 U.S.C.
20 section 636 and General Order 05-07 of the United States District
21 Court for the Central District of California.
22

23 PROCEEDINGS
24

25 Plaintiff filed a complaint on December 1, 2016, seeking review
26 of the Commissioner's denial of disability benefits. Plaintiff filed
27 a motion for summary judgment on April 10, 2017. Defendant filed a
28 motion for summary judgment on June 9, 2017. The Court has taken the

1 motions under submission without oral argument. See L.R. 7-15;
2 "Order," filed December 7, 2016.

3 4 **BACKGROUND**

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6 Plaintiff, a former highway maintenance worker, asserted
7 disability since August 9, 2013, based primarily on alleged orthopedic
8 problems (Administrative Record ("A.R.") 34-50, 52, 60, 147, 201,
9 208). An Administrative Law Judge ("ALJ") examined the medical record
10 and heard testimony from Plaintiff and a vocational expert (A.R. 12-
11 249, 258-1030).

12
13 The ALJ found Plaintiff has some severe impairments but retains
14 the residual functional capacity to perform a limited range of medium
15 work, including Plaintiff's past relevant work (A.R. 17-23). The ALJ
16 deemed Plaintiff's contrary testimony "not entirely credible" (A.R.
17 19-22). The ALJ also discounted the opinions of Dr. Nathan Carlson,
18 Plaintiff's treating physician (A.R. 20-21). The Appeals Council
19 denied review (A.R. 1-4).

20
21 Plaintiff argues that the ALJ erred in connection with evaluating
22 Plaintiff's credibility. Plaintiff also argues that the ALJ erred in
23 connection with evaluating the opinions of Dr. Carlson.

24 25 **STANDARD OF REVIEW**

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27 Under 42 U.S.C. section 405(g), this Court reviews the
28 Administration's decision to determine if: (1) the Administration's

1 findings are supported by substantial evidence; and (2) the
2 Administration used correct legal standards. See Carmickle v.
3 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,
4 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,
5 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such
6 relevant evidence as a reasonable mind might accept as adequate to
7 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401
8 (1971) (citation and quotations omitted); see also Widmark v.
9 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

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

18
19 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and
20 quotations omitted).

21 22 DISCUSSION

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24 After consideration of the record as a whole, the Magistrate
25 Judge recommends that Defendant's motion be granted and Plaintiff's
26 motion be denied. The Administration's findings are supported by

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substantial evidence and are free from material¹ legal error.
Plaintiff's contrary arguments are unavailing.

I. The ALJ Did Not Materially Err in Connection With Evaluating Plaintiff's Credibility.

An ALJ's assessment of a claimant's credibility is entitled to "great weight." Anderson v. Sullivan, 914 F.2d 1121, 1124 (9th Cir. 1990); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985). Where the ALJ finds that the claimant's medically determinable impairments reasonably could be expected to cause some degree of the alleged symptoms of which the claimant subjectively complains, any discounting of the claimant's complaints must be supported by specific, cogent findings. See Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010); Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995); but see Smolen v. Chater, 80 F.3d 1273, 1282-84 (9th Cir. 1996) (indicating that ALJ must offer "specific, clear and convincing" reasons to reject a claimant's testimony where there is no evidence of malingering).² An

¹ The harmless error rule applies to the review of administrative decisions regarding disability. See Garcia v. Commissioner, 768 F.3d 925, 932-33 (9th Cir. 2014); McLeod v. Astrue, 640 F.3d 881, 886-88 (9th Cir. 2011).

² In the absence of an ALJ's reliance on evidence of "malingering," most recent Ninth Circuit cases have applied the "clear and convincing" standard. See, e.g., Brown-Hunter v. Colvin, 806 F.3d 487, 488-89 (9th Cir. 2015); Burrell v. Colvin, 775 F.3d 1133, 1136-37 (9th Cir. 2014); Treichler v. Commissioner, 775 F.3d 1090, 1102 (9th Cir. 2014); Ghanim v. Colvin, 763 F.3d 1154, 1163 n.9 (9th Cir. 2014); Garrison v. Colvin, 759 F.3d 995, 1014-15 & n.18 (9th Cir. 2014); see also Ballard v. Apfel, 2000 WL 1899797, at *2 n.1 (C.D. Cal. Dec. 19, 2000) (collecting earlier cases). In the present case, the ALJ's

(continued...)

1 ALJ's credibility findings "must be sufficiently specific to allow a
2 reviewing court to conclude the ALJ rejected the claimant's testimony
3 on permissible grounds and did not arbitrarily discredit the
4 claimant's testimony." Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir.
5 2004) (internal citations and quotations omitted); see Social Security
6 Ruling 96-7p (explaining how to assess a claimant's credibility),
7 superseded, Social Security Ruling 16-3p (eff. March 28, 2016).³ As
8 discussed below, the ALJ stated sufficient reasons for deeming
9 Plaintiff's subjective complaints less than fully credible.

10
11 The ALJ accurately stated that "the descriptions of [Plaintiff's]
12 alleged symptoms and limitations that he provided throughout the
13 record are quite vague, generally indicating that he cannot sit or
14 stand for 'prolonged' periods or lift/carry 'heavy' weight 'too often'
15 or without taking breaks (HT and Exhibits 2E; 4E; 6E; 9E; 14E)" (A.R.
16 19; see A.R. 36-38, 175-79, 190-92, 201-03, 219-24, 240). An ALJ
17 properly may discount a claimant's credibility based on the vagueness

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19 ²(...continued)
20 findings are sufficient under either standard, so the distinction
between the two standards (if any) is academic.

21 ³ Social Security Rulings ("SSRs") are binding on the
22 Administration. See Terry v. Sullivan, 903 F.2d 1273, 1275 n.1
23 (9th Cir. 1990). Plaintiff and Defendant appear to believe that
24 SSR 96-7 applies to the evaluation of Plaintiff's credibility
25 because the ALJ's decision predated the effective date of SSR 16-
26 3p (Plaintiff's Motion at 9; Defendant's Motion at 8 n.4). The
27 Court need not decide whether Ruling 16-3p applies herein because
28 the appropriate analysis in the present case would be
substantially the same under either SSR. See R.P. v. Colvin,
2016 WL 7042259, at *9 n.7 (E.D. Cal. Dec. 5, 2016) (observing
that only the Seventh Circuit has issued a published decision
applying Ruling 16-3p retroactively; also stating that Ruling 16-
3p "implemented a change in diction rather than substance")
(citations omitted).

1 of the claimant's subjective complaints. See Tommasetti v. Astrue,
2 533 F.3d 1035, 1040 (9th Cir. 2008); accord Hubbard v. Astrue, 371
3 Fed. App'x 785, 787 (9th Cir. 2010).

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5 The ALJ also pointed out that Plaintiff's level of daily
6 activities appears inconsistent with Plaintiff's claimed disability
7 (A.R. 22). For example, despite claiming an inability to walk more
8 than 30 minutes at a time, Plaintiff admitted that, during the period
9 of claimed disability, Plaintiff walked continuously for 50-60 minutes
10 at a time every morning (A.R. 201, 1012). Inconsistencies between
11 claimed incapacity and admitted activities properly can impugn a
12 claimant's credibility. See, e.g., Molina v. Astrue, 674 F.3d 1104,
13 1112 (9th Cir. 2012); Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th
14 Cir. 2002); Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999).

15
16 The ALJ also observed that Plaintiff "does not take narcotic
17 based pain relieving medications, and has declined any type of
18 corrective surgery despite his allegations of disabling pain" (A.R.
19 20; see A.R. 757, 850). Observations regarding the relatively
20 conservative nature of a claimant's treatment properly may factor into
21 the evaluation of a claimant's credibility. See Tommasetti v. Astrue,
22 533 F.3d at 1039-40; Parra v. Astrue, 481 F.3d 742, 751 (9th Cir.
23 2007), cert. denied, 552 U.S. 1141 (2008); Osenbrock v. Apfel, 240
24 F.3d 1157, 1166 (9th Cir. 2001).

25
26 The ALJ also stressed that the objective medical evidence
27 predominantly discloses only mild or minimal findings on x-rays, MRIs
28 and other testing (A.R. 19-20; see A.R. 259-60, 464, 475-76, 551, 593,

1 850). While a lack of objective medical evidence to corroborate the
2 claimed severity of alleged symptomatology cannot form the "sole"
3 basis for discounting a claimant's credibility, the objective medical
4 evidence is still a relevant factor. See Burch v. Barnhart, 400 F.3d
5 676, 680 (9th Cir. 2005); Rollins v. Massanari, 261 F.3d 853, 857 (9th
6 Cir. 2001).

7
8 To the extent one or more of the ALJ's stated reasons for
9 discounting Plaintiff's credibility may have been invalid, the Court
10 nevertheless should uphold the ALJ's credibility determination under
11 the circumstances presented. See Carmickle v. Commissioner, 533 F.3d
12 at 1162-63 (despite the invalidity of one or more of an ALJ's stated
13 reasons, a court properly may uphold the ALJ's credibility
14 determination where sufficient valid reasons have been stated). In
15 the present case, the ALJ stated sufficient valid reasons to allow
16 this Court to conclude that the ALJ discounted Plaintiff's credibility
17 on permissible grounds. See Moisa v. Barnhart, 367 F.3d at 885. The
18 Court therefore defers to the ALJ's credibility determination. See
19 Lasich v. Astrue, 252 Fed. App'x 823, 825 (9th Cir. 2007) (court will
20 defer to Administration's credibility determination when the proper
21 process is used and proper reasons for the decision are provided);
22 accord Flaten v. Secretary of Health & Human Services, 44 F.3d 1453,
23 1464 (9th Cir. 1995).⁴

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25 ⁴ The Court need not and does not determine herein
26 whether Plaintiff's subjective complaints are credible. Some
27 evidence suggests that those complaints may be credible.
28 However, it is for the Administration, and not this Court, to
evaluate the credibility of witnesses. See Magallanes v. Bowen,
881 F.2d 747, 750, 755-56 (9th Cir. 1989).

1 **II. The ALJ Did Not Materially Err in Connection with Evaluating the**
2 **Opinions of Dr. Carlson.**

3
4 Generally, a treating physician's conclusions "must be given
5 substantial weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir.
6 1988); see Rodriguez v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989) ("the
7 ALJ must give sufficient weight to the subjective aspects of a
8 doctor's opinion. . . . This is especially true when the opinion is
9 that of a treating physician") (citation omitted); see also Orn v.
10 Astrue, 495 F.3d 625, 631-33 (9th Cir. 2007) (discussing deference
11 owed to treating physician opinions). Even where the treating
12 physician's opinions are contradicted,⁵ "if the ALJ wishes to
13 disregard the opinion[s] of the treating physician he . . . must make
14 findings setting forth specific, legitimate reasons for doing so that
15 are based on substantial evidence in the record." Winans v. Bowen,
16 853 F.2d 643, 647 (9th Cir. 1987) (citation, quotations and brackets
17 omitted); see Rodriguez v. Bowen, 876 F.2d at 762 ("The ALJ may
18 disregard the treating physician's opinion, but only by setting forth
19 specific, legitimate reasons for doing so, and this decision must
20 itself be based on substantial evidence") (citation and quotations
21 omitted). Contrary to Plaintiff's arguments, the ALJ stated
22 sufficient reasons for discounting Dr. Carlson's opinions.

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27 ⁵ Rejection of an uncontradicted opinion of a treating
28 physician requires a statement of "clear and convincing" reasons.
Smolen v. Chater, 80 F.3d at 1285; Gallant v. Heckler, 753 F.2d
1450, 1454 (9th Cir. 1984).

1 The ALJ accurately stated that Dr. Carlson's opinions were
2 "extreme" in light of "the minimal objective findings" (A.R. 20-21).
3 An ALJ properly may reject a treating physician's opinion that is
4 "unsupported by the record as a whole . . . or by objective medical
5 findings." Batson v. Commissioner, 359 F.3d 1190, 1195 (9th Cir.
6 2004).

7
8 The ALJ also aptly stated that Dr. Carlson's extreme opinions
9 were inconsistent with Plaintiff's admitted activities (A.R. 20-21).
10 For example, Dr. Carlson opined Plaintiff must sit down every 10 to 20
11 minutes (A.R. 778). Yet, Plaintiff begins each day with a three mile
12 walk which takes him 55 to 60 minutes to complete (A.R. 201). Thus,
13 during the period of claimed disability, Plaintiff manifested a
14 standing/walking tolerance approximately three times greater than the
15 tolerance reflected in Dr. Carlson's opinion. Similarly, Dr. Carlson
16 opined Plaintiff cannot perform any "pushing" or "pulling," even
17 though Plaintiff admittedly works on cars and does "yard work" each
18 week, including cutting the grass (A.R. 536, 202). Such
19 inconsistencies between a treating physician's opinions and a
20 claimant's admitted activities can furnish a sufficient reason for
21 rejecting the treating physician's opinions. See, e.g., Rollins v.
22 Massanari, 261 F.3d at 856.

23
24 The ALJ also observed that Dr. Carlson "is not an orthopedist or
25 other specialist well qualified to opine as to the claimant's knee and
26 back limitations, but is rather a general family practitioner" (A.R.
27 20). Contrary to Plaintiff's argument, this observation does not
28 render infirm the ALJ's discounting of Dr. Carlson's opinions. The

1 applicable regulation provides that ALJs "generally give more weight
2 to the medical opinion of a specialist about medical issues related to
3 his or her area of speciality than to the medical opinion of a source
4 who is not a specialist." 20 C.F.R. § 404.1527(c)(5); see Belknap v.
5 Astrue, 364 Fed. App'x 353, 355 (9th Cir. 2010) (ALJ properly
6 discounted the opinions of a treating physician based on, inter alia,
7 the fact that the treating physician was not a specialist). It may be
8 that an ALJ may not properly discount a treating physician's opinion
9 based exclusively on the physician's lack of specialization. See
10 Lester v. Chater, 81 F.3d 821, 833 (9th Cir. 1995); Kennelly v.
11 Astrue, 313 Fed. App'x 977, 978 (9th Cir. 2009); Hickle v. Acting
12 Commissioner, 2017 WL 1731567, at *7 (D. Ariz. May 2, 2017). However,
13 in the present case, any such reliance was not exclusive.

14 15 **RECOMMENDATION**

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17 For all of the foregoing reasons,⁶ IT IS RECOMMENDED that the
18 Court issue an Order: (1) accepting and adopting this Report and
19 Recommendation; (2) granting Defendant's motion for summary

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25 ⁶ The Court has considered and rejected each of
26 Plaintiff's arguments. Neither Plaintiff's arguments nor the
27 circumstances of this case show any "substantial likelihood of
28 prejudice" resulting from any error allegedly committed by the
ALJ. See generally McLeod v. Astrue, 640 F.3d at 887-88
(discussing the standards applicable to evaluating prejudice).

1 judgment; (3) denying Plaintiff's motion for summary judgment; and
2 (4) directing that Judgment be entered in favor of Defendant.

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4 DATED: June 21, 2017.

5
6 /s/
7 CHARLES F. EICK
8 UNITED STATES MAGISTRATE JUDGE
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1 NOTICE

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