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

ESTEBAN TAPIA,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

Case No. CV 17-0027-RAO

**MEMORANDUM OF OPINION
AND ORDER**

I. INTRODUCTION

Plaintiff Esteban Tapia (“Plaintiff”) challenges the Commissioner’s denial of his application for supplemental security income (“SSI”) and disability insurance benefits (“DIB”). For the reasons stated below, the decision of the Commissioner is REVERSED and REMANDED.

II. PROCEEDINGS BELOW

On April 30 , 2013, Plaintiff protectively applied for SSI and DIB alleging disability beginning April 30, 2003. (Administrative Record (“AR”) 180, 186.) His application was denied initially on August 9 , 2013, and upon reconsideration on January 31, 2014. (AR 117-29.) On February 7, 2014, Plaintiff filed a written request for hearing, and a hearing was held on May 12, 2015. (*Id.* at 54-69, 131.)

1 Represented by counsel, Plaintiff appeared and testified, along with an impartial
2 vocational expert. (*Id.* at 56-69.) On June 4, 2015, the Administrative Law Judge
3 (“ALJ”) found that Plaintiff had not been under a disability, pursuant to the Social
4 Security Act, since April 15, 2013 . (*Id.* at 23.) The ALJ’s decision became the
5 Commissioner’s final decision when the Appeals Council denied Plaintiff’s request
6 for review. (*Id.* 1-6.) Plaintiff filed this action on January 7, 2017. (Dkt. No. 1.)

7 The ALJ followed a five-step sequential evaluation process to assess whether
8 Plaintiff was disabled under the Social Security Act. *Lester v. Chater*, 81 F.3d 821,
9 828 n.5 (9th Cir. 1995). At step one, the ALJ found that Plaintiff had not engaged
10 in substantial gainful activity since April 15, 2013 , the application date. (AR 18.)
11 At step two, the ALJ found that Plaintiff has the following severe impairments:
12 diabetes mellitus with peripheral neuropathy in the legs and feet; and chronic
13 kidney disease, stage III. (*Id.*) At step three, the ALJ found that Plaintiff “does not
14 have an impairment or combination of impairments that meets or medically equals
15 the severity of one of the listed impairments in 20 CFR Part 404, Subpart P,
16 Appendix 1.” (*Id.* at 20.)

17 Before proceeding to step four, the ALJ found that Plaintiff has the residual
18 functional capacity (“RFC”) to:

19 [P]erform a range of light work Specifically, the claimant can lift/carry
20 20 pounds occasionally and 10 pounds frequently; stand/walk for four hours
21 out of an eight-hour workday; sit for six hours out of an eight hour workday;
22 sit/stand at his own convenience; occasionally climb ramps and stairs; and
23 occasionally balance, stoop, kneel, and crouch. The claimant is precluded
24 from ladders and ropes; concentrated cold or heat; vibration; and hazardous
25 machinery. The claimant would miss work once a month.

26 (*Id.*)

27 At step four, based on the Plaintiff’s RFC and the VE’s testimony, the ALJ
28 found that Plaintiff is not capable of performing past relevant work as a carpenter.

1 (AR 22.) At step five, “[c]onsidering the claimant’s age, education, work
2 experience, and residual functional capacity,” the ALJ found that “there are jobs
3 that exist in significant numbers in the national economy that the claimant can
4 perform.” (*Id.*) Accordingly, the ALJ determined that Plaintiff has not been under
5 a disability from the date the application was filed through the date of the decision.
6 (*Id.* at 23.)

7 **III. STANDARD OF REVIEW**

8 Under 42 U.S.C. § 405(g), a district court may review the Commissioner’s
9 decision to deny benefits. A court must affirm an ALJ’s findings of fact if they are
10 supported by substantial evidence and if the proper legal standards were applied.
11 *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001). “‘Substantial evidence’
12 means more than a mere scintilla, but less than a preponderance; it is such relevant
13 evidence as a reasonable person might accept as adequate to support a conclusion.”
14 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citing *Robbins v. Soc.*
15 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)). An ALJ can satisfy the substantial
16 evidence requirement “by setting out a detailed and thorough summary of the facts
17 and conflicting clinical evidence, stating his interpretation thereof, and making
18 findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citation omitted).

19 “[T]he Commissioner’s decision cannot be affirmed simply by isolating a
20 specific quantum of supporting evidence. Rather, a court must consider the record
21 as a whole, weighing both evidence that supports and evidence that detracts from
22 the Secretary’s conclusion.” *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir.
23 2001) (citations and internal quotation marks omitted). “‘Where evidence is
24 susceptible to more than one rational interpretation,’ the ALJ’s decision should be
25 upheld.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (citing
26 *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)); *see Robbins*, 466 F.3d at
27 882 (“If the evidence can support either affirming or reversing the ALJ’s
28 conclusion, we may not substitute our judgment for that of the ALJ.”). The Court

1 may review only “the reasons provided by the ALJ in the disability determination
2 and may not affirm the ALJ on a ground upon which he did not rely.” *Orn v.*
3 *Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (citing *Connett v. Barnhart*, 340 F.3d
4 871, 874 (9th Cir. 2003)).

5 **IV. DISCUSSION**

6 Plaintiff’s sole contention is that the ALJ failed to properly consider his
7 subjective complaints and erred in finding them not credible. (Joint Stipulation
8 (“JS”) 4, Dkt. No. 19.) The Commissioner contends that the ALJ properly
9 evaluated Plaintiff’s credibility. (JS 12.) For the reasons below, the Court agrees
10 with Plaintiff.

11 **A. The ALJ’s Credibility Determination Is Not Supported By** 12 **Substantial Evidence**

13 Plaintiff argues that the ALJ’s finding that his subjective complaints are not
14 fully credible is unsupported by clear and convincing evidence. (See JS 4-12.) The
15 Commissioner argues that the ALJ’s reasons for finding Plaintiff not fully credible
16 are supported by substantial evidence. (See JS 12-16.)

17 **1. Plaintiff’s Testimony**

18 At the administrative hearing, Plaintiff testified that he would soon turn 50
19 years old. (AR 60.) He has an eleventh-grade education and earned a certificate in
20 carpentry. (*Id.*) He last worked in 2003 as a rough carpenter. (*Id.* at 58.) He
21 suffered a back injury while on the job and settled his workers’ compensation
22 claim. (*Id.*) Since filing his application for SSI, he has not looked for work. (*Id.* at
23 58-59.)

24 Plaintiff testified that he has pain in his feet due to nerve damage caused by
25 his diabetes. (AR 59.) He takes Levemir, Humalog, and Lantus to treat his
26 diabetes. (*Id.* at 61, 66.) He also has Stage 3 kidney disease and gets very fatigued.
27 (*Id.* at 59, 61.) Plaintiff is not on dialysis. (*Id.* at 61, 67.)

28 ///

1 Plaintiff testified that during the day, he sleeps, lies down, and walks around.
2 (AR 61.) He also watches TV and reads the Bible. (*Id.* at 65.) When he walks, he
3 feels pain “like [he] ha[s] knots under [his] feet.” (*Id.*) Plaintiff has specially made
4 shoes because regular shoes do not fit his feet. (*Id.*) He stands when his feet do not
5 hurt, but “can’t sit very long because of [his] pain in [his] thigh.” (*Id.* at 61.)
6 Plaintiff also indicated that he gets pain in his side by his kidney “due to sitting
7 down and standing up.” (*Id.*)

8 Plaintiff testified that he lives with family. (AR 61.) His family members
9 cook meals for him and understand that Plaintiff cannot help out around the house.
10 (*Id.*) Plaintiff’s nephew drove him to the hearing; the drive took 50 minutes. (*Id.* at
11 62.)

12 Plaintiff testified that he switched treatment doctors after recently moving.
13 (AR 63-64.) He had not yet seen his new kidney doctor because it was not time for
14 his monthly appointment. (*Id.* at 64.) He had already seen his new primary care
15 and diabetes doctor to get authorization for a prescription refill. (*Id.*)

16 Plaintiff testified that he has “unpredictable” days: a good day may be
17 followed by a “semi-good day”; the next day, Plaintiff may begin the day feeling
18 good but “all of a sudden [he] just fall[s] asleep.” (AR 65.) On a good day, he can
19 move around the house, but he “wouldn’t say [he] do[es] things.” (*Id.* at 66.) When
20 asked if a bad day involved staying in bed all day, Plaintiff responded, “Yeah, you
21 could say that, yeah. Absolutely.” (*Id.* at 65-66.)

22 2. Applicable Legal Standards

23 “In assessing the credibility of a claimant’s testimony regarding subjective
24 pain or the intensity of symptoms, the ALJ engages in a two-step analysis.” *Molina*
25 *v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citing *Vasquez v. Astrue*, 572 F.3d
26 586, 591 (9th Cir. 2009)). “First, the ALJ must determine whether the claimant has
27 presented objective medical evidence of an underlying impairment which could
28 reasonably be expected to produce the pain or other symptoms alleged.” *Treichler*

1 *v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1102 (9th Cir. 2014) (quoting
2 *Lingenfelter*, 504 F.3d at 1036) (internal quotation marks omitted). If so, and if the
3 ALJ does not find evidence of malingering, the ALJ must provide specific, clear
4 and convincing reasons for rejecting a claimant’s testimony regarding the severity
5 of his symptoms. *Id.* The ALJ must identify what testimony was found not
6 credible and explain what evidence undermines that testimony. *Holohan v.*
7 *Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001). “General findings are
8 insufficient.” *Lester*, 81 F.3d at 834.

9 **3. Discussion**

10 “After careful consideration of the evidence,” the ALJ found that Plaintiff’s
11 “medically determinable impairments could reasonably be expected to cause some
12 of the alleged symptoms,” but found that Plaintiff’s “statements concerning the
13 intensity, persistence and limiting effects of these symptoms are not credible to the
14 extent they are inconsistent with the above residual functional capacity
15 assessment.” (AR 21.) The ALJ relied on the following reasons: (1) failure to
16 follow treatment recommendations; (2) inconsistent statements about matters
17 relevant to the issue of disability; and (3) lack of objective medical evidence to
18 support the alleged severity of symptoms. (*Id.* at 21-22.) No malingering
19 allegation was made, and therefore, the ALJ’s reasons must be “clear and
20 convincing.”

21 **a. Reason No. 1: Failure to Follow Treatment** 22 **Recommendations**

23 The ALJ found that “treatment records showed the claimant failed to follow
24 treatment recommendations,” noting that Plaintiff’s medical records showed that he
25 “did not have diabetes medications.” (AR 21.) The ALJ noted that treatment
26 records from February 26, 2013, indicated that Plaintiff did not have diabetes
27 medications and that he went to the emergency room for treatment. (*Id.*) Plaintiff
28 “did not follow up after the emergency room discharge” and thereafter ran out of

1 medications. (*Id.*) The ALJ did not discuss any other instances of noncompliance.
2 Based on this treatment record, the ALJ determined that “[t]his demonstrates a
3 possible unwillingness to do what is necessary to improve his condition. It may
4 also be an indication that his symptoms are not as severe as he purported.” (*Id.*)
5 The Court disagrees with this characterization of the record.

6 According to medical records, Plaintiff’s February 26, 2013 visit to the
7 primary care clinic was to follow up after an earlier emergency room visit on
8 December 27, 2012, when Plaintiff did not have diabetes medications. (AR 254.)
9 As noted in the ALJ’s decision, the records indicate that Plaintiff did not follow up
10 and ran out of medications after the December 27, 2012 hospital discharge, where
11 he was diagnosed with diabetes, HTN, and diabetic neuropathy. (*Id.*) However, at
12 the February 2013 follow-up visit, Plaintiff reported taking Lantus, Humalog, and
13 Metformin. (*Id.*)

14 On March 26, 2013, Plaintiff returned to the clinic to follow up on his
15 diabetes and to obtain a refill of heart burn medication. (AR 248.) Treatment
16 records from that visit indicate that Plaintiff was compliant with his treatment
17 recommendations, stating that he was taking blood sugar medication three times a
18 day. (*Id.*)

19 Although later treatment records from June 3, 2013, state that Plaintiff was
20 “not taking meds as prescribed,” Plaintiff also reported nausea after taking Levemir,
21 one of his insulin medications. (AR 291.) A claimant’s failure to perfectly comply
22 with treatment in light of a medication’s side effect does not automatically
23 undermine his credibility. *See Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.
24 1996) (“Where a claimant provides evidence of a good reason for not taking
25 medication for her symptoms, her symptom testimony cannot be rejected for not
26 doing so.” (citing *Bunnell*, 947 F.2d at 346; *Fair*, 885 F.2d at 602)). The June 3,
27 2013 records also indicated general compliance, stating that Plaintiff “takes blood
28 sugar twice daily.” (AR 291.)

1 On another follow-up visit on August 12, 2013, treatment records again
2 indicate compliance, noting that Plaintiff was taking insulin medications. (AR
3 286.) At that examination, the physician recommended a new diabetes treatment
4 plan. (*Id.*)

5 Thereafter, records from a January 20, 2015, consultation indicate that
6 Plaintiff had been on insulin for the past two years and “[h]is diabetes ha[d] not
7 been controlled up until 2 yrs ago.” (AR 390.) Additional notes on March 20,
8 2015, show that Dr. Peter Lac “encouraged on going compliance with a diabetic
9 diet and insulin; he is doing well currently with glycemic control.” (*Id.* at 397.)

10 Because the record as a whole, following Plaintiff’s application in April
11 2013, does not establish that Plaintiff failed to follow treatment recommendations,
12 the Court concludes that the ALJ did not properly consider the entirety of the
13 record. *See Costa v. Berryhill*, ___ F. App’x ___, 2017 WL 2927978, at *1 (9th
14 Cir. July 10, 2017) (noting that an ALJ is not permitted to “cherry-pick from mixed
15 results” when reviewing a claimant’s response to treatment (citing *Garrison v.*
16 *Colvin*, 759 F.3d 995, 1017 & n.23 (9th Cir. 2014))).

17 The Court finds that this reason is not a clear and convincing reason,
18 supported by substantial evidence, to discount Plaintiff’s credibility.

19 **b. Reason No. 2: Inconsistent Statements**

20 The ALJ found that the record reflected that Plaintiff “made inconsistent
21 statements regarding matters relevant to the issue of disability.” (AR 21.) The ALJ
22 based this conclusion on Plaintiff’s testimony, on the one hand, that he “can’t sit
23 very long” due to pain (*Id.* at 61), and, on the other hand, Plaintiff’s subsequent
24 admission that he sat in the car for 50 minutes on the drive to the administrative
25 hearing and then sat through the 30-minute hearing “without evidence of pain or
26 discomfort.” (*Id.* at 21, 62.)

27 As part of the credibility determination, the ALJ may consider
28 inconsistencies between a claimant’s testimony and his conduct. *Thomas v.*

1 *Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002) (citing *Light v. Soc. Sec. Admin.*,
2 119 F.3d 789, 792 (9th Cir. 1997), as amended on reh’g (Sept. 17, 1997).
3 However, a single discrepancy fails to justify “the wholesale dismissal of a
4 claimant’s testimony.” *Popa v. Berryhill*, ___ F.3d ___, 2017 WL 4160041, at *5
5 (9th Cir. Aug. 18, 2017) (citing *Robbins*, 466 F.3d at 883-84). Here, the ALJ did
6 not identify any other reason for determining that Plaintiff had made inconsistent
7 statements. Moreover, the purported inconsistency noted by the ALJ is potentially
8 problematic, as a claimant’s failure to exhibit pain at a hearing “provides little, if
9 any, support for the ALJ’s ultimate conclusion that the claimant is not disabled or
10 that his allegations of constant pain are not credible.” *Gallant v. Heckler*, 753 F.2d
11 1450, 1455 (9th Cir. 1984) (citing *Day v. Weinberger*, 522 F.2d 1154, 1156-57 (9th
12 Cir. 1975)).

13 The Court finds that this reason is not a clear and convincing reason,
14 supported by substantial evidence, to discount Plaintiff’s credibility.

15 **c. Reason No. 3: Lack of Supporting Objective Medical**
16 **Evidence**

17 The remaining reason for discounting Plaintiff’s subjective testimony—lack
18 of supporting objective evidence—cannot form the sole basis for discounting pain
19 testimony. *See Burch*, 400 F.3d at 681 (“Although lack of medical evidence cannot
20 form the sole basis for discounting pain testimony, it is a factor that the ALJ can
21 consider in his credibility analysis.”).

22 The ALJ did not give clear and convincing reasons, supported by substantial
23 evidence, for discounting Plaintiff’s credibility. Accordingly, remand is warranted
24 on this issue.

25 **B. Remand For Further Administrative Proceedings**

26 Because further administrative review could remedy the ALJ’s errors,
27 remand for further administrative proceedings, rather than an award of benefits, is
28 warranted here. *See Brown-Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015)

1 (remanding for an award of benefits is appropriate in rare circumstances). Before
2 ordering remand for an award of benefits, three requirements must be met: (1) the
3 Court must conclude that the ALJ failed to provide legally sufficient reasons for
4 rejecting evidence; (2) the Court must conclude that the record has been fully
5 developed and further administrative proceedings would serve no useful purpose;
6 and (3) the Court must conclude that if the improperly discredited evidence were
7 credited as true, the ALJ would be required to find the claimant disabled on
8 remand. *Id.* (citations omitted). Even if all three requirements are met, the Court
9 retains flexibility to remand for further proceedings “when the record as a whole
10 creates serious doubt as to whether the claimant is, in fact, disabled within the
11 meaning of the Social Security Act.” *Id.* (citation omitted).

12 Here, remand for further administrative proceedings is appropriate. The
13 Court finds that the ALJ failed to provide clear and convincing reasons supported
14 by substantial evidence to discount the credibility of Plaintiff’s subjective
15 testimony. Additionally, the ALJ found that Plaintiff’s statements about his
16 symptoms were “not credible to the extent they are inconsistent with the above
17 residual functional capacity assessment.” (AR 21.) This generic language indicates
18 a failure to properly incorporate testimony about subjective symptoms and pain into
19 the RFC assessment. *See Trevizo v. Berryhill*, ___ F.3d ___, 2017 WL 4053751, at
20 *9 n.6 (9th Cir. Sept. 14, 2017). Because symptom testimony must be taken into
21 account when determining the RFC, “it cannot be discredited because it is
22 inconsistent with that RFC.” *Laborin v. Berryhill*, 867 F.3d 1151, 1154 (9th Cir.
23 2017); *see Garrison*, 759 F.3d at 1011 (citing 20 CFR 416.920(e)).

24 On remand, the ALJ shall reassess Plaintiff’s subjective allegations. The
25 ALJ shall then reassess Plaintiff’s RFC, if warranted, and proceed through steps
26 four and five to determine what work, if any, Plaintiff is capable of performing.

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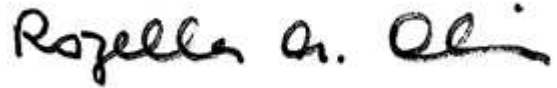
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V. CONCLUSION

IT IS ORDERED that Judgment shall be entered REVERSING the decision of the Commissioner denying benefits, and REMANDING the matter for further proceedings consistent with 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: October 16, 2017

ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

NOTICE

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