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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

SERGIO GARCIA,

 Plaintiff,

 v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

 Defendant.

} Case No. EDCV 17-00391-JDE
}
} MEMORANDUM OPINION AND
} ORDER

Plaintiff Sergio Garcia (“Plaintiff”) filed a Complaint on March 1, 2017, seeking review of the denial of his application for disability insurance benefits (“DIB”) by the Commissioner of Social Security (“Commissioner” or “Defendant”). Dkt. No. 1. The parties filed consents to proceed before the undersigned Magistrate Judge. Dkt. Nos. 11, 13. In accordance with the Court’s Order Re: Procedures in Social Security Appeal (Dkt. No. 12), the parties filed a Joint Stipulation on January 16, 2018, addressing their respective positions. Dkt. No. 20 (“Jt. Stip.”). The Court has taken the Joint Stipulation under submission without oral argument and as such, this matter now is ready for decision.

1 I.

2 BACKGROUND

3 On June 23, 2014, Plaintiff applied for DIB alleging disability beginning
4 September 1, 2013. Administrative Record (“AR”) 334-36. After his
5 applications were denied initially and upon reconsideration, Plaintiff requested
6 an administrative hearing. AR 211-14, 217-19, 221-22. Plaintiff, represented by
7 counsel, appeared and testified at a hearing before an Administrative Law
8 Judge (“ALJ”) on September 2, 2015 (AR 143-82), as well as at supplemental
9 hearings on February 1 and August 8, 2016. AR 42-68, 69-142.

10 On September 2, 2016, the ALJ issued a written decision finding
11 Plaintiff was not disabled. AR 17-41. The ALJ found that Plaintiff had not
12 engaged in substantial gainful activity since September 1, 2013 and suffered
13 from the following severe impairments: osteoarthritis, sleep disorder, affective
14 disorder, and anxiety disorder. AR 22. The ALJ found that Plaintiff did not
15 have an impairment or combination of impairments that met or medically
16 equaled a listed impairment and had the residual functional capacity (“RFC”)
17 to perform light work, with the following limitations: Plaintiff could “only
18 occasionally climb ladders/ropes/scaffolding; occasionally perform overhead
19 reaching; perform simple, repetitive tasks; no contact with the public with
20 occasional contact with coworkers and supervisors.” AR 23-24. The ALJ
21 found that Plaintiff was incapable of performing his past relevant work as an
22 infantry crew member, heavy truck driver, or signalman. AR 33. The ALJ
23 determined Plaintiff was capable of performing the following jobs that exist in
24 significant numbers in the national economy: housekeeper/cleaner (Dictionary
25 of Occupational Titles (“DOT”) 823.687-014), assembler (DOT 729.687-010),
26 conductor (DOT 726.687-030), and touch-up screener (DOT 726.684-110). AR
27 34. The ALJ concluded that Plaintiff was not disabled from the alleged onset
28 date through the date of the decision. AR 35.

1 Plaintiff filed a request with the Appeals Council for review of the ALJ's
2 decision. AR 13-14. On January 3, 2017, the Appeals Council denied
3 Plaintiff's request for review, making the ALJ's decision the Commissioner's
4 final decision. AR 1-6. This action followed.

5 II.

6 LEGAL STANDARDS

7 **A. Standard of Review**

8 Under 42 U.S.C. § 405(g), a district court may review a decision to deny
9 benefits. The ALJ's findings and decision should be upheld if they are free
10 from legal error and supported by substantial evidence based on the record as a
11 whole. Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015) (as
12 amended); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
13 evidence means such relevant evidence as a reasonable person might accept as
14 adequate to support a conclusion. Lingenfelter v. Astrue, 504 F.3d 1028, 1035
15 (9th Cir. 2007). It is more than a scintilla, but less than a preponderance. Id.
16 To determine whether substantial evidence supports a finding, the reviewing
17 court "must review the administrative record as a whole, weighing both the
18 evidence that supports and the evidence that detracts from the Commissioner's
19 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). The
20 standard of review of a decision by an ALJ is "highly deferential." Rounds v.
21 Comm'r Soc. Sec. Admin., 807 F.3d 996, 1002 (9th Cir. 2015) (citation
22 omitted). "If the evidence can reasonably support either affirming or
23 reversing," the reviewing court "may not substitute its judgment" for that of
24 the Commissioner. Reddick, 157 F.3d at 720-21; see also Molina v. Astrue,
25 674 F.3d 1104, 1111 (9th Cir. 2012) ("Even when the evidence is susceptible to
26 more than one rational interpretation, [the court] must uphold the ALJ's
27 findings if they are supported by inferences reasonably drawn from the
28 record."). However, a court may review only the reasons stated by the ALJ in

1 his decision “and may not affirm the ALJ on a ground upon which he did not
2 rely.” Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

3 Lastly, even when the ALJ commits legal error, the Court upholds the
4 decision where that error is harmless. Molina, 674 F.3d at 1115. An error is
5 harmless if it is “inconsequential to the ultimate nondisability determination,”
6 or if “the agency’s path may reasonably be discerned, even if the agency
7 explains its decision with less than ideal clarity.” Brown-Hunter, 806 F.3d at
8 492 (citation omitted).

9 **B. Standard for Determining Disability Benefits**

10 When the claimant’s case has proceeded to consideration by an ALJ, the
11 ALJ conducts a five-step sequential evaluation to determine at each step if the
12 claimant is or is not disabled. See Molina, 674 F.3d at 1110 (citing, inter alia,
13 20 C.F.R. §§ 404.1520(a), 416.920(a)). First, the ALJ considers whether the
14 claimant currently performs “substantial gainful activity.” Id. If not, the ALJ
15 proceeds to a second step to determine if the claimant has a “severe” medically
16 determinable physical or mental impairment or combination of impairments
17 that has lasted for more than 12 months. Id. If so, the ALJ proceeds to a third
18 step to determine if the claimant’s impairments render the claimant disabled
19 because they “meet or equal” any of the “listed impairments” set forth in the
20 Social Security regulations. See Rounds, 807 F.3d at 1001. If the claimant’s
21 impairments do not meet or equal a “listed impairment,” before proceeding to
22 the fourth step, the ALJ assesses the claimant’s RFC, that is, what the claimant
23 can do on a sustained basis despite the limitations from her impairments. See
24 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); Social Security Ruling (“SSR”)
25 96-8p. After determining the claimant’s RFC, the ALJ proceeds to the fourth
26 step and determines whether the claimant has the RFC to perform her past
27 relevant work, either as she performed it when she worked in the past, or as
28 that same job is generally performed in the national economy. See Stacy v.

1 Colvin, 825 F.3d 563, 569 (9th Cir. 2016) (citing, inter alia, SSR 82-61); see
2 also 20 C.F.R. §§ 404.1560(b), 416.960(b).

3 If the claimant cannot perform her past relevant work, the ALJ proceeds
4 to a fifth and final step to determine whether there is any other work, in light of
5 the claimant’s RFC, age, education, and work experience, that the claimant
6 can perform and that exists in “significant numbers” in either the national or
7 regional economies. See 20 C.F.R. §§ 404.1520(g), 416.920(g); Tackett v.
8 Apfel, 180 F.3d 1094, 1100-01 (9th Cir. 1999). If the claimant can do other
9 work, she is not disabled; if the claimant cannot do other work and meets the
10 duration requirement, the claimant is disabled. See id. at 1099 (citing 20
11 C.F.R. § 404.1560(b)(3)); see also 20 C.F.R. § 416.960(b)(3).

12 The claimant generally bears the burden at each of steps one through
13 four to show that she is disabled or that she meets the requirements to proceed
14 to the next step; the claimant bears the ultimate burden to show that she is
15 disabled. See, e.g., Molina, 674 F.3d at 1110; Johnson v. Shalala, 60 F.3d
16 1428, 1432 (9th Cir. 1995). However, if the analysis reaches step five, at step
17 five the ALJ has a “limited” burden of production to identify representative
18 jobs that the claimant can perform and that exist in “significant” numbers in
19 the economy. See 20 C.F.R. §§ 404.1560(c)(1)-(2), 416.960(c)(1)-(2); Hill v.
20 Astrue, 698 F.3d 1153, 1161 (9th Cir. 2012); Tackett, 180 F.3d at 1100.

21 III.

22 DISCUSSION

23 The parties present one issue: “[w]hether the ALJ properly considered
24 the opinions of [examining physicians] Drs. Sabourin and Schweller.” Jt. Stip.
25 at 4. Plaintiff contends that the ALJ failed to account for limitations assessed
26 by Plaintiff’s examining physicians with respect to reaching. Jt. Stip. at 6-8.
27 The Commissioner argues that the ALJ appropriately incorporated the phrases
28 offered by multiple physicians in assessing the RFC. Jt. Stip. at 9-13.

1 **A. Applicable Law**

2 Three types of doctors may offer opinions in Social Security cases: (1)
3 those who treated the plaintiff; (2) those who examined but did not treat the
4 plaintiff; and (3) those who did neither. Lester v. Chater, 81 F.3d 821, 830 (9th
5 Cir. 1995). Treating doctors' opinions are generally given more weight than
6 those of examining doctors, and examining doctors' opinions generally receive
7 more weight than those of non-examining doctors. Id. Treating doctors'
8 opinions receive greater weight because they are employed to cure and have
9 more opportunity to know and observe patients as individuals. See Magallanes
10 v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). "The treating physician's opinion
11 is not, however, necessarily conclusive as to either a physical condition or the
12 ultimate issue of disability." Id. However, "[t]he ALJ may disregard the
13 treating physician's opinion whether or not that opinion is contradicted." Id.
14 An "ALJ need not accept the opinion of any physician . . . if that opinion is
15 brief, conclusory, and inadequately supported by clinical findings." Bray v.
16 Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1228 (9th Cir. 2009);
17 Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001). To reject the un-
18 contradicted opinion of a treating doctor, the ALJ must provide "clear and
19 convincing reasons that are supported by substantial evidence." Bayliss v.
20 Barhnart, 427 F.3d 1211, 1216 (9th Cir. 2005). Where a treating doctor's
21 opinion is contradicted, the "ALJ may only reject it by providing specific and
22 legitimate reasons that are supported by substantial evidence." Id.

23 An ALJ need not recite "magic words" to reject a treating physician's
24 opinion; the court may draw "specific and legitimate inferences" from the
25 ALJ's opinion. Magallanes, 881 F.2d at 755. "[I]n interpreting the evidence
26 and developing the record, the ALJ does not need to 'discuss every piece of
27 evidence.'" Howard ex rel. Wolff v. Barnhart, 341 F.3d 1006, 1012 (9th Cir.
28 2003) (quoting Black v. Apfel, 143 F.3d 383, 386 (8th Cir. 1998)).

1 **B. Analysis**

2 At issue is whether the RFC determined by the ALJ properly reflects the
3 limitations assessed by examining physicians, Drs. Sabourin and Schweller.
4 Plaintiff's RFC, as determined by the ALJ, limited Plaintiff to "occasionally
5 perform[ing] overhead reaching." AR 24. Dr. Sabourin, a consultative doctor,
6 opined that Plaintiff could only occasionally work with arms above shoulder
7 level. AR 1113. Dr. Schweller, also a consultative doctor, opined that Plaintiff
8 "should avoid above eye-level reaching." AR 1126. The ALJ accorded these
9 opinions "significant weight."¹ AR 28, 29.

10 Plaintiff contends that the RFC deviates from the opinions of Drs.
11 Sabourin and Schweller. Jt. Stip. at 6. Specifically, Plaintiff takes issue with an
12 asserted failure to recognize the "difference between a restriction to occasional
13 overhead reaching, as assessed by the ALJ; a restriction to occasional above
14 shoulder level reaching, as assessed by Dr. Sabourin; and a restriction to no
15 above-eye-level reaching, as assessed by Dr. Schweller." Id. Plaintiff argues
16 that the ALJ's RFC functionally rejected the opinions of both physicians as the
17 ALJ did not offer an explanation for failing to adopt a reaching limitation at
18 the shoulder or eye levels. See id. at 8. The Commissioner argues that Plaintiff
19 misstates the opinion of Dr. Schweller and that the ALJ appropriately
20 translated the various similar opinions offered by different physicians into a
21 concrete RFC. Id. 9-14. The Court agrees with the Commissioner.

22 As a preliminary matter, the Court views the issue Plaintiff raises here as
23 one that he arguably waived for failing to raise it during the course of three
24 administrative hearings. On September 2, 2015, the ALJ posed a hypothetical
25 to a Vocational Expert ("VE") asking whether there was work in the national
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27 ¹ Though some of Dr. Sabourin's opinion was given "less" and "partial" weight, the
28 portion relating to reaching limitations was accorded "significant" weight. AR 28.

1 economy for someone with Plaintiff's age, education, and experience, along
2 with certain limitations, *inter alia*, a limitation that Plaintiff could only
3 occasionally engage in overhead reaching. AR 179. On February 6 and August
4 8, 2016, the ALJ posed hypotheticals to the VE that included the same
5 limitation with respect to reaching. AR 65, 111. Over the course of three
6 separate hearings, the ALJ asked whether Plaintiff's counsel wished to ask any
7 questions of the VE. AR 67, 113, 180. Each time, counsel declined. *Id.* "[A]t
8 least when claimants are represented by counsel, they must raise all issues and
9 evidence at their administrative hearings in order to preserve them on appeal."
10 *Shaibi v. Berryhill*, 870 F.3d 874, 881 (9th Cir. 2017) (quoting *Meanel v. Apfel*,
11 172 F.3d 1111, 1115 (9th Cir. 1999) (as amended)). While it is true that a
12 claimant's failure to raise a conflict between VE testimony and the DOT
13 during the administrative hearing does not constitute a waiver, *see Lamear v.*
14 *Berryhill*, 865 F.3d 1201, 1206 (9th Cir. 2017), that is not the case here.

15 The Court nonetheless declines to decide the issue of waiver. Instead, the
16 Court finds that the ALJ appropriately interpreted the opinions of the
17 examining physicians in formulating the RFC. The ALJ is required to consider
18 all medical opinion evidence and is responsible for resolving conflicts and
19 ambiguities in the medical testimony. *Tommasetti v. Astrue*, 533 F.3d 1035,
20 1041 (9th Cir. 2008); *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)
21 ("Where evidence is susceptible to more than one rational interpretation, it is
22 the ALJ's conclusion that must be upheld."). Here, the ALJ was presented
23 with three slightly differently worded but functionally similar, if not identical,
24 opinions relating to Plaintiff's reaching limitations. The ALJ considered the
25 medical opinion evidence and translated them into a concrete RFC – precisely
26 what he is required to do. *See* 20 C.F.R. § 416.920(e).

27 Plaintiff contends that the ALJ implicitly rejected the opinions of Drs.
28 Sabourin and Schweller and, instead, impermissibly relied on the opinions of

1 two non-examining state physicians. Jt. Stip. at 8. The two non-examining
2 state agency doctors found that Plaintiff could perform occasional overhead
3 reaching bilaterally. AR 191, 204. These opinions were given “great weight.”
4 AR 30. However, the ALJ’s decision does not state that the ALJ gave greater
5 weight to the state agency doctors’ opinions over those offered by Drs.
6 Schweller and Sabourin with respect to the lifting restriction at issue. As the
7 ALJ did not reject the state agency opinions, he of course was not required to
8 articulate specific and legitimate reasons for doing so.

9 In parsing the phrases used by the various physicians, Plaintiff purports
10 to create a conflict where none exists. Although Plaintiff asserts that other
11 circuits distinguish between “overhead reaching” and “above the shoulder
12 reaching” (Jt. Stip. at 6-7), the Ninth Circuit has recently decided two cases
13 involving “reaching” assessments, and in both cases, the Ninth Circuit used
14 the terms “overhead” and “above shoulder level” interchangeably in describing
15 claimants’ reaching limitations. See Lamear, 865 F.3d at 1205; see also
16 Gutierrez v. Colvin, 844 F.3d 804, 807 (9th Cir. 2016). Other recent decisions
17 from within this district similarly use the terms interchangeably. Ledesma v.
18 Berryhill, SACV 16-882-AGR, 2017 WL 2347181, at *4 (C.D. Cal. May 30,
19 2017); Ibach v. Colvin, No. EDCV 15-2647-AJW, 2017 WL 651940, at *4-5
20 (C.D. Cal. Feb. 17, 2017) (analyzing claimant’s above-the-shoulder reaching
21 limitation from his RFC using the term “overhead”); Riad v. Colvin, No.
22 EDCV 13-1720 RNB, 2014 WL 2938512, at * 5 (C.D. Cal. June 30, 2014)
23 (noting “the Ninth Circuit supports the proposition that ‘reaching’
24 encompasses overhead or above-shoulder-reaching”).

25 In addition, Plaintiff does not ever appear to assert what Plaintiff
26 considers to be the appropriate limitation – above eye-level, or above shoulder-
27 level. That failure may be because, as the Commissioner aptly notes, it is “hard
28 to imagine how the small space between the shoulder, the eye, and the top of

1 the head could matter in the ultimate disability determination here[.]” Jt. Stip.
2 at 9. “[T]he venerable maxim *de minimis non curat lex* (‘the law cares not for
3 trifles’) is part of the established background of legal principles against which
4 all enactments are adopted, and which all enactments (absent contrary
5 indication) are deemed to accept.” Wisconsin Dep’t of Revenue v. William
6 Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) (collecting cases); see also Skaff v.
7 Meridien North America Beverly Hills, LLC, 506 F.3d 832, 839-840 (9th Cir.
8 2007). As Plaintiff does not even purport to specify what other limitation
9 should apply, nor explain how a difference between a limitation involving
10 occasional overheard versus occasion above eye-level or shoulder-level would
11 affect the ultimate determination here, the Court, again noting that the Ninth
12 Circuit uses the phrases above-the-shoulder and overhead interchangeably,
13 finds the ALJ properly synthesized the various language used by various
14 consulting doctors to properly assess Plaintiff’s RFC.

15 **IV.**

16 **ORDER**

17 IT IS ORDERED that Judgment be entered affirming the decision of the
18 Commissioner and dismissing this action with prejudice.

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20 Dated: February 13, 2018

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23 JOHN D. EARLY
24 United States Magistrate Judge
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