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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN M.,)	Case No. ED CV 17-1011-SP
Plaintiff,)	
v.)	MEMORANDUM OPINION AND ORDER
NANCY A. BERRYHILL, Acting Commissioner of Social Security Administration,)	
Defendant.)	

I.
INTRODUCTION

On May 21, 2017, plaintiff John M. filed a complaint against defendant, the Commissioner of the Social Security Administration (“Commissioner”), seeking a review of a denial of a period of disability and disability insurance benefits (“DIB”). The court deems the matter suitable for adjudication without oral argument.

Plaintiff presents one issue for decision, whether the Administrative Law Judge (“ALJ”) properly considered the opinion of plaintiff’s examining physician, Dr. Jack Akmakjian, M.D. Memorandum in Support of Complaint (“P. Mem.”) at 5-10; *see* Memorandum in Support of Defendant’s Answer (“D. Mem.”) at 2-5.

1 Having carefully studied the parties' memoranda, the Administrative
2 Record ("AR"), and the decision of the ALJ, the court concludes that the ALJ
3 erred in rejecting a portion of Dr. Akmakjian's opinion without explanation, but
4 such error was harmless. Consequently, the court affirms the decision of the
5 Commissioner denying benefits.

6 II.

7 FACTUAL AND PROCEDURAL BACKGROUND

8 Plaintiff has an eleventh grade education and was fifty (50) years old on his
9 alleged disability onset date. AR at 36, 57. He has past relevant work as a
10 production manager. *Id.* at 53.

11 On September 12, 2013, plaintiff filed an application for a period of
12 disability and DIB, alleging disability due to depression, anxiety, lower back pain,
13 lower hip pain, chronic pain, weakness, chronic fatigue, insomnia, nightmares,
14 and memory issues. *Id.* at 57-58. The Commissioner denied plaintiff's
15 application initially and upon reconsideration, after which plaintiff filed a request
16 for a hearing. *Id.* at 8-11, 90-102.

17 On July 22, 2015, plaintiff appeared and testified at a hearing before the
18 ALJ. *Id.* at 33-56. The ALJ also heard testimony from vocational expert Mary
19 Jesco. *Id.* at 51-56. On September 15, 2015, the ALJ denied plaintiff's claims for
20 benefits. *Id.* at 14-27.

21 Applying the five-step sequential evaluation process, the ALJ found, at step
22 one, that plaintiff had not engaged in substantial gainful activity since September
23 25, 2012, the alleged disability onset date. *Id.* at 16.

24 At step two, the ALJ found plaintiff suffered from the following severe
25 impairments: degenerative disc disease involving the lumbar spine with
26 radiculopathy on the left side, disorder of the left hip, obesity, fibromyalgia, and
27 depression. *Id.*

1 At step three, the ALJ found plaintiff’s impairments, whether individually
2 or in combination, did not meet or medically equal one of the listed impairments
3 set forth in 20 C.F.R. part 404, Subpart P, Appendix 1. *Id.*

4 The ALJ then assessed plaintiff’s residual functional capacity (“RFC”),¹
5 and determined he had the RFC to perform medium, with the limitations that
6 plaintiff could: lift and carry no more than 15 pounds occasionally and 10 pounds
7 frequently, and push and pull within those weight limits; stand and walk four
8 hours out of an eight-hour day, with no prolonged standing or walking greater
9 than 30 minutes at a time with the ability to use a cane if needed; and sit for six
10 hours out of an hour-hour workday. *Id.* at 18. The ALJ precluded plaintiff from:
11 climbing ladders, ropes, or scaffolds; work at unprotected heights or around
12 dangerous unguarded moving machinery; and driving commercial vehicles. *Id.*
13 The ALJ further determined that, mentally, plaintiff is limited to non-complex
14 tasks requiring no more than occasional contact with the general public,
15 performed in a static environment, and no more than occasional tasks which
16 require teamwork. *Id.*

17 At step four, the ALJ determined that plaintiff is incapable of performing
18 his past relevant work as a production manager. *Id.* at 26.

19 At step five, the ALJ found that there were jobs that existed in significant
20 numbers in the national economy that plaintiff could perform, including small
21 parts assembler, gluer, and textile assembler. *Id.* at 26-27. Consequently, the ALJ
22 concluded that plaintiff did not suffer from a disability as defined by the Social
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24 ¹ Residual functional capacity is what a claimant can do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-
26 56 n.5-7 (9th Cir. 1989). “Between steps three and four of the five-step evaluation,
27 the ALJ must proceed to an intermediate step in which the ALJ assesses the
28 claimant’s residual functional capacity.” *Massachi v. Astrue*, 486 F.3d 1149, 1151
n.2 (9th Cir. 2007).

1 Security Act. *Id.* at 27.

2 Plaintiff filed a timely request for review of the ALJ's decision, which was
3 denied by the Appeals Council. *Id.* at 1-4. The ALJ's decision stands as the final
4 decision of the Commissioner.

5 III.

6 STANDARD OF REVIEW

7 This court is empowered to review decisions by the Commissioner to deny
8 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security
9 Administration must be upheld if they are free of legal error and supported by
10 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001)
11 (as amended). But if the court determines the ALJ's findings are based on legal
12 error or are not supported by substantial evidence in the record, the court may
13 reject the findings and set aside the decision to deny benefits. *Aukland v.*
14 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d
15 1144, 1147 (9th Cir. 2001).

16 "Substantial evidence is more than a mere scintilla, but less than a
17 preponderance." *Aukland*, 257 F.3d at 1035. Substantial evidence is such
18 "relevant evidence which a reasonable person might accept as adequate to support
19 a conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276
20 F.3d at 459. To determine whether substantial evidence supports the ALJ's
21 finding, the reviewing court must review the administrative record as a whole,
22 "weighing both the evidence that supports and the evidence that detracts from the
23 ALJ's conclusion." *Mayes*, 276 F.3d at 459. The ALJ's decision "cannot be
24 affirmed simply by isolating a specific quantum of supporting evidence."
25 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th
26 Cir. 1998)). If the evidence can reasonably support either affirming or reversing
27 the ALJ's decision, the reviewing court "may not substitute its judgment for that
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1 of the ALJ.”” *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.
2 1992)).

3 IV.

4 DISCUSSION

5 Dr. Jack H. Akmakjian, an orthopedic surgeon, examined plaintiff on
6 January 17, 2014 in the context of his workers’ compensation claim. AR at 1531.
7 With respect to work restrictions, Dr. Akmakjian opined plaintiff should: be able
8 to change positions as needed; do no heavy lifting regarding the cervical or
9 lumbar spine; and do no repetitive work overhead for the cervical spine. *Id.* at
10 1539. The ALJ discussed Dr. Akmakjian’s findings, including the opinion just
11 stated. *Id.* at 20-21. But the ALJ did not incorporate all of these limitations into
12 her RFC determination. *See id.* at 18.

13 In determining whether a claimant has a medically determinable
14 impairment, among the evidence the ALJ considers is medical evidence. 20
15 C.F.R. §§ 404.1527(b), 416.927(b).² In evaluating medical opinions, the
16 regulations distinguish among three types of physicians: (1) treating physicians;
17 (2) examining physicians; and (3) non-examining physicians. 20 C.F.R.
18 §§ 404.1527(c), (e) 416.927(c),(3); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
19 1996) (as amended). “Generally, a treating physician’s opinion carries more
20 weight than an examining physician’s, and an examining physician’s opinion
21 carries more weight than a reviewing physician’s.” *Holohan v. Massanari*, 246
22 F.3d 1195, 1202 (9th Cir. 2001); 20 C.F.R. §§ 404.1527(c)(1)-(2), 416.927(c)(1)-
23 (2). The opinion of the treating physician is generally given the greatest weight
24 because the treating physician is employed to cure and has a greater opportunity to
25 understand and observe a claimant. *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th
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27 ² All citations to the Code of Federal Regulations refer to regulations
28 applicable to claims filed before March 27, 2017.

1 Cir. 1996); *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

2 Nevertheless, the ALJ is not bound by the opinion of the treating physician.
3 *Smolen*, 80 F.3d at 1285. If a treating physician's opinion is uncontradicted, the
4 ALJ must provide clear and convincing reasons for giving it less weight. *Lester*,
5 81 F.3d at 830. If the treating physician's opinion is contradicted by other
6 opinions, the ALJ must provide specific and legitimate reasons supported by
7 substantial evidence for rejecting it. *Id.* at 830. Likewise, the ALJ must provide
8 specific and legitimate reasons supported by substantial evidence in rejecting the
9 contradicted opinions of examining physicians. *Id.* at 830-31. The opinion of a
10 non-examining physician, standing alone, cannot constitute substantial evidence.
11 *Widmark v. Barnhart*, 454 F.3d 1063, 1067 n.2 (9th Cir. 2006); *Morgan v.*
12 *Comm'r*, 169 F.3d 595, 602 (9th Cir. 1999); *see also Erickson v. Shalala*, 9 F.3d
13 813, 818 n.7 (9th Cir. 1993).

14 Here, the ALJ did not articulate any reasons for rejecting part of Dr.
15 Akmakjian's opinion. Defendant argues it is apparent that she rejected the
16 opinion as inconsistent with the other medical evidence, given her discussion of
17 the record. That may well have been the ALJ's reasoning, but she failed to so
18 state. The ALJ did not provide that or any other reason for rejecting Dr.
19 Akmakjian's opinion. The court's review is limited to the reasons actually given
20 by the ALJ, not those she could have given. *See Orn v. Astrue*, 495 F.3d 625, 630
21 (9th Cir. 2007) ("We review only the reasons provided by the ALJ in the disability
22 determination and may not affirm the ALJ on a ground upon which he did not
23 rely." (citation omitted)).

24 Nonetheless, the ALJ's error in rejecting part of Dr. Akmakjian's opinion
25 without reason was harmless. Plaintiff argues it was not harmless error,
26 contending Dr. Akmakjian's opinion that plaintiff "should be able to change
27 positions as needed" undermines the ALJ's step five finding. P. Mem. at 9-10.

1 Plaintiff argues Dr. Akmakjian’s opinion is essentially that plaintiff should be able
2 to sit, stand, or walk at will, not just have a sit/stand option. *Id.* This is not a fair
3 interpretation of Dr. Akmakjian’s opinion.

4 As relevant here, the ALJ determined plaintiff’s RFC included the ability to
5 stand or walk for four hours out of eight, with no prolonged standing or walking
6 greater than thirty minutes at a time, and the ability to sit six hours out of eight.
7 AR at 18. The vocational expert (“VE”) testified that someone with this RFC
8 could perform the jobs of small parts assembler, gluer, and textile assembler. *Id.*
9 at 54. The ALJ included no option to change positions as needed in her RFC
10 determination, contrary to Dr. Akmakjian’s opinion. But at the hearing, plaintiff’s
11 counsel asked the VE whether a person who needed a sit-stand at will option
12 could perform the jobs cited by the VE, and the VE testified in the affirmative,
13 stating “these particular jobs would not be eroded.” *Id.* at 55. The ALJ
14 recognized this testimony in her decision, stating: “Even if the additional
15 limitations of an option to sit and stand at will and a limitation to low stress as
16 proposed by the claimant’s representative were adopted, the vocational expert
17 testified that the claimant could still perform the alternate work activity described
18 below.” *Id.* at 24.

19 Plaintiff argues this does not render the ALJ’s error in rejecting Dr.
20 Akmakjian’s opinion harmless, because Dr. Akmakjian opined plaintiff should be
21 able to sit, stand, *or walk* at will, and the VE’s testimony does not address a walk
22 at will option. The court disagrees with plaintiff’s interpretation of Dr.
23 Akmakjian’s opinion. His opinion was just that plaintiff should be able to change
24 positions. A sit-stand at will option fairly encompasses this. There is no basis to
25 find Dr. Akmakjian opined plaintiff also needed to walk at will.

26 Accordingly, given the VE’s testimony, which the ALJ indicated she
27 accepted, the ALJ’s error in not including a sit-stand at will option in her RFC
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1 determination without having provided specific and legitimate reasons to reject
2 Dr. Akmakjian's opinion was harmless. Had she included such an option, she still
3 would have concluded at step five that plaintiff is not disabled.

4 V.

5 **CONCLUSION**

6 IT IS THEREFORE ORDERED that Judgment shall be entered
7 AFFIRMING the decision of the Commissioner denying benefits, and dismissing
8 the complaint with prejudice.

9
10 DATED: March 30, 2019



11
12 SHERI PYM
United States Magistrate Judge