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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RALPH M. OROSCO,
Plaintiff,
v.
ANDREW M. SAUL, Commissioner
of Social Security,¹
Defendant.

Case No. EDCV 18-00669-AS

MEMORANDUM OPINION AND
ORDER OF REMAND

Pursuant to Sentence Four of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter be remanded for further administrative action consistent with this Opinion.

I. PROCEEDINGS

On April 2, 2018, Ralph M. Orosco ("Plaintiff"), represented by counsel, filed a Complaint seeking review of the denial of his

¹ Andrew M. Saul is now the Commissioner of the Social Security Administration and is substituted for Acting Commissioner Nancy A. Berryhill in this case. See Fed. R. Civ. P. 25(d).

1 application for supplemental social security benefits. (Dkt. No.
2 1). The parties have consented to proceed before the undersigned
3 United States Magistrate Judge. (Dkt. Nos. 11, 12). On August
4 27, 2018, Defendant filed an Answer along with the Administrative
5 Record ("AR"). (Dkt. Nos. 15-16). On February 26, 2019, the
6 parties filed a Joint Submission ("Joint Stip."), setting forth
7 their respective positions regarding Plaintiff's sole claim. (Dkt.
8 No. 26).

9 10 **II. BACKGROUND AND SUMMARY OF THE ADMINISTRATIVE RECORD**

11
12 On March 21, 2014, Plaintiff, formerly employed as a landscape
13 laborer (see AR 51), filed an application for Supplemental Security
14 Income ("SSI"), pursuant to Titles II and XVI of the Social Security
15 Act. (See AR 185-190). The Commissioner denied Plaintiff's
16 application initially and on reconsideration. (See AR 111-124).
17 On October 28, 2016, Administrative Law Judge Norman L. Bennett,
18 ("ALJ"), held a hearing at which Plaintiff, represented by counsel,
19 and Bernard Preston, a vocational expert, testified. (See AR 45-
20 66).

21
22 On December 7, 2016, the ALJ denied Plaintiff's SSI
23 application. (See AR 23-44). Applying the five-step sequential
24 process, the ALJ found at step one that Plaintiff had not engaged
25 in substantial gainful activity since March 21, 2014, the
26 application filing date. (See AR 29). At step two, the ALJ found
27 that Plaintiff's degenerative disc disease of the lumbar spine,
28 degenerative joint disease of the right knee, hepatitis C,

1 hypertension, history of stroke with residual right arm and leg
2 weakness, and bipolar disorder were severe impairments. (See AR
3 29-30).² At step three, the ALJ determined that Plaintiff did not
4 have an impairment or combination of impairments that met or
5 medically equaled the severity of any of the Listings enumerated
6 in the regulations. (See AR 30-32).³

7
8 The ALJ then assessed Plaintiff's residual functional capacity
9 ("RFC")⁴ (see AR 32-38) and concluded that he can perform light
10 work, as defined in 20 C.F.R. §§ 416.967(b),⁵ with the following

11 _____
12 ² The ALJ found Plaintiff's other impairments,
13 specifically, emphysema, hearing loss in his left ear, neck pain,
14 and polysubstance dependence, were non-severe. (See AR 30).

15 ³ The ALJ considered whether Plaintiff's medically
16 determinable physical impairments, singly and in combination, met
17 or medically equaled the requirements of Listings 1.02 (major
18 dysfunction of a joint(s)), 1.04 (disorders of the spine), 5.05
(hepatic encephalopathy), and 11.04 (vascular insult to the brain).
(See AR 31). The ALJ also considered whether Plaintiff's medically
determinable mental impairment met or medically equaled the
requirements of Listing 12.04 (depressive, bipolar and related
disorders). (See AR 31).

19 ⁴ The RFC is what a claimant can still do despite existing
20 exertional and non-exertional limitations. See 20 C.F.R. §
416.945(a)(1).

21 ⁵ "Light work involves lifting no more than 20 pounds
22 at a time with frequent lifting or carrying of
23 objects weighing up to 10 pounds. Even though the
24 weight lifted may be very little, a job is in this
25 category when it requires a good deal of walking or
26 standing, or when it involves sitting most of the
27 time with some pushing and pulling of arm or leg
28 controls. To be considered capable of performing a
full or wide range of light work, you must have the
ability to do substantially all of these activities.
If someone can do light work, we determine that he
or she can also do sedentary work, unless there are
additional limiting factors such as loss of fine

1 limitations: lifting and carrying 20 pounds occasionally and 10
2 pounds frequently; standing and/or walking up to six hours out of
3 an eight-hour day; sitting up to six hours out of an eight-hour
4 day; frequent postural activities except occasional kneeling;
5 simple, repetitive tasks; and occasional contact with supervisors,
6 coworkers, and the general public. (See AR 32). At step four,
7 the ALJ found that Plaintiff was unable to perform any past relevant
8 work. (See AR 38). At step five, the ALJ determined, based on
9 Plaintiff's RFC, age, education, and work experience that Plaintiff
10 could perform jobs that exist in significant numbers in the
11 national economy, including cleaner, garment sorter, and inspector.
12 (See AR 38-39). Accordingly, the ALJ found that Plaintiff was not
13 under a disability as defined by the Social Security Act since
14 March 21, 2014, the SSI application filing date. (See AR 39).

15
16 The Appeals Council denied Plaintiff's request for review on
17 January 18, 2018. (See AR 1-6). Plaintiff now seeks judicial
18 review of the ALJ's decision, which stands as the final decision
19 of the Commissioner. 42 U.S.C. §§ 405(g), 1383(c).

20 21 **III. STANDARD OF REVIEW**

22
23 This Court reviews the Commissioner's decision to determine
24 if: (1) the Commissioner's findings are supported by substantial

25
26 _____
27 dexterity or inability to sit for long periods of
28 time." 20 C.F.R. § 416.967(b).

1 evidence; and (2) the Commissioner used proper legal standards. 42
2 U.S.C § 405(g); see Carmickle v. Comm'r, 533 F.3d 1155, 1159 (9th
3 Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007).
4 "Substantial evidence is more than a scintilla, but less than a
5 preponderance." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
6 1998)(citing Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir.
7 1997)). It is relevant evidence "which a reasonable person might
8 accept as adequate to support a conclusion." Hoopai, supra; Smolen
9 v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996). To determine whether
10 substantial evidence supports a finding, "a court must consider
11 the record as a whole, weighing both evidence that supports and
12 evidence that detracts from the [Commissioner's] conclusion."
13 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001)(citation
14 omitted); see Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir.
15 2006)(inferences "reasonably drawn from the record" can constitute
16 substantial evidence).

17
18 This Court "may not affirm [the Commissioner's] decision
19 simply by isolating a specific quantum of support evidence, but
20 must also consider evidence that detracts from [the Commissioner's]
21 conclusion." Ray v. Bowen, 813 F.2d 914, 915 (9th Cir.
22 1987)(citation and internal quotation marks omitted). However,
23 the Court cannot disturb findings supported by substantial
24 evidence, even though there may exist other evidence supporting
25 Plaintiff's claim. See Torske v. Richardson, 484 F.2d 59, 60 (9th
26 Cir. 1973). "If the evidence can reasonably support either
27 affirming or reversing the [Commissioner's] conclusion, [a] court
28

1 may not substitute its judgment for that of the [Commissioner]."
2 Reddick, 157 F.3d at 720-21 (citation omitted).

4 IV. DISCUSSION

5
6 Plaintiff's contends that the ALJ failed to provide specific,
7 clear, and convincing reasons for discrediting his testimony. (See
8 Joint Stip. at 4-13). Respondent contends that the ALJ did provide
9 specific, clear, and convincing reasons for discrediting
10 Plaintiff's testimony. (See Joint. Stip. at 13-17).

11
12 After consideration of the parties' arguments and the record
13 as a whole, the Court finds that Plaintiff's claim of error warrants
14 remand for further consideration.

15 16 **A. The ALJ Failed to Properly Assess Plaintiff's Testimony.**

17 18 **1. Plaintiff's Testimony**

19
20 In a Function Report dated April 24, 2014 (completed by the
21 girlfriend of Plaintiff, who is illiterate [see AR 55]), Plaintiff
22 detailed his abilities and limitations. (See AR 211-17).
23 Plaintiff lived in a home with his family, where his sister
24 primarily took care of him. (AR 211). With respect to employment,
25 Plaintiff attempted to "do labor work" prior to the onset of his
26 symptoms, but he "was not able to keep a job." (AR 212).

1 Plaintiff had difficulty sleeping, which was affected by his
2 anxiety and insomnia. (AR 212). His sister fed him in the morning
3 and helped prepare meals for him, as Plaintiff did not know how to
4 cook. (See AR 211, 213). His sister additionally performed various
5 household chores and gave his medications to him. (AR 213).
6 Plaintiff's inability to aid in these activities was the result of
7 his back pain and a recent stroke. (AR 214). Plaintiff needed
8 aid in ironing, laundry, cleaning, and going to doctor's
9 appointments. (AR 213). Plaintiff needed someone to accompany
10 him when he did leave the house and had difficulties with social
11 activities because he spent "most of his life . . . in prison,"
12 (215-16). Plaintiff did not like being around others and preferred
13 to only be around his mother and sister. (AR 216). Plaintiff was
14 only able to go out "about every three days," but also did not
15 "come home for days" at a time. (AR 214). When Plaintiff left
16 the house, he rode in a car; he did not know how to drive. (AR
17 214). Plaintiff had the ability to shave, feed himself, and put
18 on shoes, but needed help changing clothes, taking a bath, and
19 reminders to brush his teeth. (AR 212-13). Plaintiff watched
20 television approximately one hour a day. (AR 215). As for
21 budgeting and finance-related issues, Plaintiff was unable to pay
22 bills, count change, handle a savings account, and use a checkbook
23 and money orders. (AR 214).

24
25 Plaintiff had difficulty lifting, walking, stair-climbing,
26 understanding, squatting, sitting, following instructions,
27 kneeling, using hands, standing, talking, completing tasks, getting
28 along with others, reaching, hearing, lifting ten pounds at a time,

1 and had issues with memory and concentration. (AR 216). Plaintiff
2 could only walk around the house since the stroke affected his
3 ability to walk; he could go from the bedroom to the bathroom, and
4 needed to rest five minutes before resuming walking. (AR 216).
5 Plaintiff had difficulty following written or spoken instructions,
6 and could pay attention for ten minutes. (AR 216). Plaintiff had
7 difficulty getting along with authority figures, but he had never
8 been fired because of an inability to get along with others. (AR
9 217). Plaintiff did not handle changes in routine or stress well.
10 (AR 217). Plaintiff used "glasses all the time," a "cane
11 sometimes," and a "wheelchair right now ever since [he] had a
12 stroke." (AR 217).

13
14 At the hearing on October 28, 2016, Plaintiff testified to
15 his symptoms and limitations. (See AR 49-60). Plaintiff is 52-
16 years-old, five-foot seven-inches tall, weighing 167 pounds and
17 has a seventh-grade education. (AR 50). The last time Plaintiff
18 used any drugs or alcohol was some time in 2014. (AR 60). In
19 September 2014, he performed landscaping work, including "sweeping"
20 and "pick[ing] up papers and trash," wherein he lifted a "rake and
21 a broom" sweeping into a "rubber trashcan." (AR 51-52). However,
22 he was unable to continue due to knee pain, arthritis, and a "disc
23 in the lower back" causing pain. (AR 52). Plaintiff denied
24 receiving any surgery for his knee and received only steroids under
25 the kneecap for treatment. (AR 49). Plaintiff experiences issues
26 with his general health, arthritis, and right elbow. (AR 59).
27 "[B]ending or lifting" his right elbow creates pain and limits him
28 to lifting a half gallon of water or milk. (AR 59). His doctor

1 told him to "keep [his] pace" because of two ruptured discs. (AR
2 59). Plaintiff has high blood pressure, which "goes up and down,"
3 but has been stable lately due to medication. (AR 54). Plaintiff
4 experiences chest pains because of his high blood pressure, which
5 occurs usually when laying down. (AR 55).

6
7 Presently, Plaintiff lives with his daughter who helps him
8 with daily activities and driving (he does not drive himself). (AR
9 50, 58). Previously, Plaintiff lived with his older sister, who
10 helped take him to "all of [his] doctors' appointments, [made] sure
11 [he] got fed, [and] washed [his] clothes." (AR 57-58). Plaintiff
12 is unable to do any of those things presently, particularly washing
13 clothes, because the pain in his lower back and right knee flares
14 up. (AR 58).

15
16 In his daily life, Plaintiff can sleep only about "four hours
17 because . . . [his] back starts shaking." (AR 53). Seeking relief
18 from the pain of laying down, Plaintiff needs to sit for fifteen
19 to twenty minutes after waking up, then get up and walk around for
20 approximately forty-five minutes, which does not "relieve the pain
21 that much," but "help[s] it a little bit." (AR 53). Plaintiff
22 can stand and walk for forty-five minutes to an hour, before needing
23 to rest for two to three hours. (AR 54). Plaintiff can also sit
24 for about an hour, but needs to move around for another forty-five
25 minutes to relieve any stiffness. (AR 60). Plaintiff is unable
26 to write a simple note in English, read a grocery list or something
27 similar, but can write his own name. (AR 55).

28

1 Describing his mental health, Plaintiff feels depression that
2 comes and goes. (AR 55-56). He experiences crying spells three
3 to four days out of the week. (AR 56). He previously had issues
4 with nightmares or recalling things from his past. (AR 57).
5 Plaintiff dislikes large groups of people because he gets
6 "claustrophobic" and generally dislikes it. (AR 57). Plaintiff
7 also "very rarely" goes outside because of his depression, and
8 occasionally goes to "the store" with his daughter if asked. (AR
9 50, 58).

11 **2. Legal Authority**

13 When assessing a claimant's credibility regarding subjective
14 pain or intensity of symptoms, the ALJ must engage in a two-step
15 analysis. Trevizo v. Berryhill, 871 F.3d 664, 678 (9th Cir. 2017).
16 First, the ALJ must determine if there is medical evidence of an
17 impairment that could reasonably produce the symptoms alleged.
18 Garrison v. Colvin, 759 F.3d 995, 1014 (9th Cir. 2014). "In this
19 analysis, the claimant is not required to show that her impairment
20 could reasonably be expected to cause the severity of the symptom
21 she has alleged; she need only show that it could reasonably have
22 caused some degree of the symptom." Id. (emphasis in original)
23 (citation omitted). "Nor must a claimant produce objective medical
24 evidence of the pain or fatigue itself, or the severity thereof."
25 Id. (citation omitted).

27 If the claimant satisfies this first step, the ALJ must
28 evaluate the intensity, persistence, and limiting effects of the

1 alleged symptoms to determine the extent to which they limit the
2 ability to do work-related activities, taking into account the
3 objective medical evidence and other evidence in the record. If
4 there is no evidence of malingering, the ALJ must provide specific,
5 clear and convincing reasons for rejecting the claimant's testimony
6 about the severity of his symptoms. Trevizo, supra (citation
7 omitted); see also Smolen, supra, 80 F.3d at 1284 ("[T]he ALJ may
8 reject the claimant's testimony regarding the severity of her
9 symptoms only if he makes specific findings stating clear and
10 convincing reasons for doing so."); Robbins v. Soc. Sec. Admin.,
11 466 F.3d 880, 883 (9th Cir. 2006)("[U]nless an ALJ makes a finding
12 of malingering based on affirmative evidence thereof, he or she
13 may only find an applicant not credible by making specific findings
14 as to credibility and stating clear and convincing reasons for
15 each."). "This is not an easy requirement to meet: The clear and
16 convincing standard is the most demanding required in Social
17 Security cases." Garrison, 759 F.3d at 1015 (citation omitted).

18
19 In discrediting the claimant's subjective symptom testimony,
20 the ALJ may consider the following:

- 21
22 (1) ordinary techniques of credibility evaluation, such
23 as the claimant's reputation for lying, prior
24 inconsistent statements concerning the symptoms, and
25 other testimony by the claimant that appears less than
26 candid; (2) unexplained or inadequately explained
27 failure to seek treatment or to follow a prescribed
28

1 course of treatment; and (3) the claimant's daily
2 activities.

3
4 Ghanim v. Colvin, 763 F.3d 1154, 1163 (9th Cir. 2014)(citation
5 omitted). Inconsistencies between a claimant's testimony and
6 conduct, or internal contradictions in the claimant's testimony,
7 also may be relevant. Burrell v. Colvin, 775 F.3d 1133, 1137 (9th
8 Cir. 2014); Light v. Soc. Sec. Admin., 119 F.3d 789, 792 (9th Cir.
9 1997). However, it is improper for an ALJ to reject subjective
10 testimony based "solely" on its inconsistencies with the objective
11 medical evidence presented. Bray v. Comm'r of Soc. Sec. Admin.,
12 554 F.3d 1219, 1227 (9th Cir. 2009)(citation omitted).

13
14 Further, the ALJ must make a credibility determination with
15 findings that are "sufficiently specific to permit the court to
16 conclude that the ALJ did not arbitrarily discredit claimant's
17 testimony." Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir.
18 2008)(citation omitted); see also Brown-Hunter v. Colvin, 806 F.3d
19 487, 493 (9th Cir. 2015)("A finding that a claimant's testimony is
20 not credible must be sufficiently specific to allow a reviewing
21 court to conclude the adjudicator rejected the claimant's testimony
22 on permissible grounds and did not arbitrarily discredit a
23 claimant's testimony regarding pain," citation omitted). Although
24 an ALJ's interpretation of a claimant's testimony may not be the
25 only reasonable one, if it is supported by substantial evidence,
26 "it is not [the court's] role to second-guess it." Rollins v.
27 Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

1 **3. The ALJ's Assessment of Plaintiff's Testimony**

2
3 The ALJ addressed Plaintiff's testimony as follows:

4
5 The claimant's statements concerning the intensity,
6 persistence and limiting effects of his symptoms are not
7 entirely consistent with the medical evidence and other
8 evidence in the record for the reasons explained in this
9 decision.

10 As mentioned earlier, the record reflects that the
11 claimant was able to engage in work activity as a
12 landscape laborer after his application filing date and
13 through September 2014. (Hearing Testimony).
14 Specifically, the claimant testified that this work
15 activity sweeping and picking up trash (sic). (Hearing
16 Testimony). The claimant (sic) ability to engage in this
17 work activity is inconsistent with his allegations of
18 disabling physical and mental symptoms and limitations.

19 In addition, despite the claimant's allegations of
20 disabling musculoskeletal symptoms and limitations, the
21 record reflects that the course of treatment prescribed
22 for the claimant has been overall routine and
23 conservative in nature. Specifically, the claimant
24 treatment has consisted primarily of pain medications,
25 epidural steroid injections in the lumbar spine, and
26 cortisone injections in the right knee. (Exhibit B12F/2,
27 14, 18, and 29). Moreover, the claimant informed his
28 treating physician that this treatment helped to manage
29 and alleviate his pain. (Exhibit B12F/13-15). This
30 evidence is inconsistent with the claimant's alleged
31 severity of his symptoms and limitations.

32 Additionally, despite the claimant's allegations of
33 other disabling physical symptoms and limitations, the
34 record reflects that the claimant has not received
35 regular and consistent medical treatment for these
36 conditions. This evidence is also inconsistent with the
37 claimant's alleged severity of his symptoms and
38 limitations.

1 Furthermore, despite the claimant's allegations of
2 disabling mental symptoms and limitations, the claimant
3 denied seeing a psychiatrist, being hospitalized for
4 psychiatric treatment, or receiving any psychiatric
5 treatment including medications or psychotherapy.
(Exhibit B10F). This evidence is further inconsistent
with the claimant's alleged severity of symptoms and
limitations.

6
7 Moreover, despite the claimant's alleged use of a
8 wheelchair and cane, the medical records do not indicate
9 that the claimant presented for medical treatment using
10 such an assistive device. This evidence is again
11 inconsistent with the claimant's alleged severity of his
12 symptoms and limitations.

13 Overall, the claimant's statements concerning the
14 intensity, persistence and limiting effects of these
15 symptoms are not entirely consistent with the medical
16 evidence and other evidence in the record for the reasons
17 explained in this decision. Accordingly, these
18 statements have been found to affect the claimant's
19 ability to work only to the extent they can reasonably
20 be accepted as consistent with objective medical and
21 other evidence.

22 (AR 34-35).⁶

23
24 **A. Work Activity**

25
26 The ALJ's discrediting of Plaintiff's testimony based on
27 Plaintiff's work activity through September 2014 (see AR 35) is
28 not a specific, clear, and convincing reason. Where there are
"conflicts between [plaintiff's] testimony and his own conduct,"

⁶ The ALJ found Plaintiff's testimony with regard to
difficulty "handling workplace spaces and interacting
appropriately with supervisors, coworkers, and the general public"
partially credible. (AR 37).

1 an ALJ may find the plaintiff's testimony not credible. Light,
2 119 F.3d at 792. Here, there was no inconsistency between
3 Plaintiff's work activity through September 2014 and the alleged
4 disability onset date of January 1, 2014, since the alleged
5 disability onset date was amended at the administrative hearing to
6 September 1, 2014 (see AR 52).

7
8 **B. Routine and Conservative Treatment**

9
10 The ALJ's discrediting of Plaintiff's testimony based on the
11 "overall routine and conservative in nature" treatment of his
12 musculoskeletal symptoms (see AR 35) is not a specific, clear, and
13 convincing reason. See Childress v. Colvin, 2014 WL 4629593, *12
14 (N.D. Cal. Sept. 16, 2014) ("There is no guiding authority on what
15 exactly constitutes 'conservative' or 'routine' treatment."); see
16 also Boitnott v. Colvin, 2016 WL 362348, *4 (S.D. Cal. January 29,
17 2016) ("[t]here was no medical testimony at the hearing or
18 documentation in the medical record that the prescribed medication
19 constituted 'conservative' treatment of [the plaintiff's]
20 conditions," and the ALJ "was not qualified to draw his own
21 inference regarding whether more aggressive courses of treatments
22 were available for Plaintiff's conditions"). Here, the ALJ did
23 not ask Plaintiff at the hearing whether other treatment was
24 available and why he had not obtained more aggressive treatment
25 for his musculoskeletal symptoms.

26
27 Moreover, although the ALJ partially discredited Plaintiff's
28 testimony about his musculoskeletal symptoms and limitations

1 because he "informed his treating physician that his treatment
2 helped to manage and alleviate his pain" (AR 35, citing AR 418-
3 420, see Warre v. Comm'r of the SSA, 439 F.3d 1001, 1006 (9th Cir.
4 2006)("Impairments that can be controlled effectively with
5 medication are not disabling for the purpose of determining
6 eligibility for SSI benefits."); see also Tommasetti, supra, 533
7 F.3d at 1040 (Where a plaintiff "respond[s] favorable to
8 conservative treatment . . . such a response . . . undermines
9 [their] reports regarding the disabling nature of [their] pain.")),
10 the two Progress Notes cited by the ALJ do not support the ALJ's
11 position. (See AR 418 [On April 5, 2016 Plaintiff reported "9/10
12 average" pain], 420 [On May 3, 2016, Plaintiff reported "10/10
13 average" pain accompanied by "70-80%" pain relief that only "lasted
14 a week" from a recent lumbar spine epidural injection]).⁷

16 ⁷ Contrary to the ALJ's determination, the record reflects
17 that Plaintiff's pain was not alleviated significantly during the
18 course of his treatment, from June 11, 2014 to August 31, 2016.
19 (See AR 487 [Progress Note dated June 11, 2014, "6/10 average"
20 pain], 484 [Progress Note dated July 14, 2014, "5/10 average"
21 pain], 481 [Progress Note dated August 12, 2014, "4/10 average"
22 pain], 478 [Progress Note dated October 9, 2014, "5/10 average"
23 pain], 475 [Progress Note dated November 7, 2014, "5/10 average"
24 pain], 472 [Progress Note dated December 9, 2014, "8/10 average"
25 pain], 469 [Progress Note dated January 8, 2015, "6/10 average"
26 pain], 466 [Progress Note dated February 5, 2015, "8/10 average"
27 pain], 463 [Progress Note dated March 6, 2015, "8/10 average"
28 pain], 460 [Progress Note dated April 3, 2015, "10/10 average"
pain], 457 [Progress Note dated May 3, 2015, "9/10 average" pain],
454 [Progress Note dated June 2, 2015, "10/10 average" pain], 451
[Progress Note dated June 30, 2015, "10/10 average" pain], 448
[Progress Note dated July 28, 2015, "10/10 average" pain], 445
[Progress Note dated August 25, 2015, "9/10 average" pain], 442
[Progress Note dated September 22, 2016, "10/10 average" pain],
439 [Progress Note dated October 20, 2015, "7/10 average" pain],
436 [Progress Note dated November 17, 2015, "10/10 average" pain],
431 [Progress Note dated January 12, 2016, "5/10 average" pain and

1 **C. Lack of Treatment for Non-Musculoskeletal Symptoms**

2
3 The ALJ's discrediting of Plaintiff's testimony based on his
4 lack of treatment for his non-musculoskeletal symptoms,
5 specifically, hepatitis C, hypertension, and history of stroke
6 accompanied by residual right arm and leg weakness symptoms (see
7 AR 35), is a specific, clear, and convincing reason. See Fair v.
8 Bowen, 885 F.2d 597, 603 (9th Cir. 1989)(An "unexplained, or
9 inadequately explained, failure to seek treatment" may be a
10 relevant factor in assessing credibility); see also Burch v.
11 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005)("Although a lack of
12 medical evidence cannot form the sole basis for discounting pain
13 testimony, it is a factor that the ALJ can consider in his
14 credibility analysis."). There is no indication in the record that
15 Plaintiff sought specific treatment for hepatitis C and
16 hypertension. Moreover, as the ALJ discussed (see AR 33),
17 Plaintiff obtained treatment for his stroke issues during only two
18 emergency room visits (see AR 311-19, 218-89 [April 10, 2014 and
19 May 9, 2014]).

20
21
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23
24 _____
25 "not much pain relief" from first lumbar spine epidural injection],
26 428 [Progress Note dated February 9, 2016, "10/10 average" pain],
27 425 [Progress Note dated March 8, 2016, "9/10 average" pain], 415
28 [Progress Note dated June 3, 2016, "10/10 average" pain], 412
[Progress Note dated July 1, 2016, "10/10 average" pain], 409
[Progress Note dated July 3, 2016, "10/10 average" pain], 406
[Progress Note dated August 31, 2016, "7/10 average" pain]).

1 **D. Lack of Treatment for Psychiatric Symptoms**

2
3 The ALJ's discrediting of Plaintiff's testimony based on his
4 lack of treatment for his mental symptoms (see AR 35) is a specific,
5 clear, and convincing reason. See Johnson v. Shalala, 60 F.3d
6 1428, 1434 (9th Cir. 1995)(absence of medical treatment for
7 claimant's impairment was inconsistent with the claimant's
8 allegations of debilitating pain). As the ALJ discussed (see AR
9 35), Plaintiff received only one psychiatric evaluation to treat
10 and assess his mental symptoms (see AR 399-405 [November 4, 2014]).
11

12 **E. Assistive Devices**

13
14 The ALJ's discrediting of Plaintiff's testimony based upon
15 the fact that "the medical records do not indicate that the claimant
16 presented for medical treatment using . . . a wheelchair and cane"
17 (AR 35) is not a specific, clear, and convincing reason. While an
18 ALJ "may weigh inconsistencies between the claimant's testimony
19 and his or her conduct, daily activities, and work record, among
20 other factors," Bray, supra, 554 F.3d at 1227, the lack of reference
21 in the record to such assistive devices is not inconsistent with
22 Plaintiff's testimony.
23

24 **F. The ALJ's Error Was Not Harmless**

25
26 As discussed above, the ALJ gave three improper reasons (work
27 activity, routine and conservative treatment, and non-presentation
28 of assistive devices) and two proper reasons (lack of treatment

1 for non-musculoskeletal symptoms, and lack of treatment for
2 psychiatric symptoms) for discrediting Plaintiff's testimony. The
3 question is whether the ALJ's error in giving three improper
4 reasons is harmless error.⁸ See Tommasetti, supra, 533 F.3d at
5 1028 (ALJ's decision will not be reversed for harmless error "when
6 it is clear from the record that 'the ALJ's error was
7 inconsequential to the ultimate nondisability
8 determination.'")(citations omitted); see also Carmickle, supra,
9 533 F.3d at 1162 ("[T]he relevant inquiry in this context is . . .
10 whether the ALJ's decision remains legally valid, despite such
11 error"). Here, the ALJ properly discredited Plaintiff's symptom
12 testimony regarding his non-musculoskeletal symptoms, but did not
13 provide a specific, clear, and convincing reason for rejecting
14 Plaintiff's testimony as to his musculoskeletal symptoms and
15 limitations, which were a significant part of Plaintiff's treatment
16 and the record as a whole (see AR 52-54, 58-60 [Plaintiff's
17 testimony discussing his musculoskeletal symptoms], 392-96 [Dr.
18 Seung Lim's physical evaluation], 406-489 [Treatment record from
19 Global Pain Care]). Accordingly, the Court has no basis for finding
20 the ALJ's improper reasons for discrediting Plaintiff's testimony
21 to be harmless error.

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27 ⁸ The Court notes that neither party discusses the issue
28 of harmless error. (See Joint Stip.)

1 IV. REMAND IS WARRANTED

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3 The decision whether to remand for further proceedings or
4 order an immediate award of benefits is within the district court's
5 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir.
6 2000). Where no useful purpose would be served by further
7 administrative proceedings, or where the record has been fully
8 developed, it is appropriate to exercise this discretion to direct
9 an immediate award of benefits. Id. at 1179 ("[T]he decision of
10 whether to remand for further proceedings turns upon the likely
11 utility of such proceedings."). However, where, as here, the
12 circumstances of the case suggest that further administrative
13 review could remedy the Commissioner's errors, remand is
14 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011);
15 Harman, 211 F.3d at 1179-81.

16
17 Since the ALJ failed to properly assess Plaintiff's symptom
18 testimony, remand is appropriate. Because outstanding issues must
19 be resolved before a determination of disability can be made, and
20 "when the record as a whole creates serious doubt as to whether
21 the [Plaintiff] is, in fact, disabled within the meaning of the
22 Social Security Act," further administrative proceedings would
23 serve a useful purpose and remedy defects. Burrell, supra, 775 F.3d
24 at 1141 (citations omitted).

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ORDER

For the foregoing reasons, the decision of the Commissioner is reversed, and the matter is remanded for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 10, 2019

/s/
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE