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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ROSENDO SOTO VALENZUELA,  
Plaintiff,

v.

NANCY A. BERRYHILL, Acting  
Commissioner of Social  
Security,  
Defendant.

CASE NO. EDCV 18-1303 SS

**MEMORANDUM DECISION AND ORDER**

**I.**

**INTRODUCTION**

Rosendo Soto Valenzuela ("Plaintiff") brings this action seeking to overturn the decision of the Acting Commissioner of Social Security (the "Commissioner" or "Agency") denying his application for Disability Insurance Benefits ("DIB"). The parties consented pursuant to 28 U.S.C. § 636(c) to the jurisdiction of the undersigned United States Magistrate Judge. (Dkt. Nos. 11-13). For the reasons stated below, the decision of the Commissioner

1 is REVERSED, and this case is REMANDED for further administrative  
2 proceedings consistent with this decision.

3  
4 **II.**

5 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

6  
7 To qualify for disability benefits, a claimant must  
8 demonstrate a medically determinable physical or mental impairment  
9 that prevents the claimant from engaging in substantial gainful  
10 activity and that is expected to result in death or to last for a  
11 continuous period of at least twelve months. Reddick v. Chater,  
12 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)).  
13 The impairment must render the claimant incapable of performing  
14 work previously performed or any other substantial gainful  
15 employment that exists in the national economy. Tackett v. Apfel,  
16 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C.  
17 § 423(d)(2)(A)).

18  
19 To decide if a claimant is entitled to benefits, an  
20 Administrative Law Judge ("ALJ") conducts a five-step inquiry. 20  
21 C.F.R. §§ 404.1520, 416.920. The steps are:

- 22  
23 (1) Is the claimant presently engaged in substantial gainful  
24 activity? If so, the claimant is found not disabled. If  
25 not, proceed to step two.  
26 (2) Is the claimant's impairment severe? If not, the  
27 claimant is found not disabled. If so, proceed to step  
28 three.

1 (3) Does the claimant's impairment meet or equal one of the  
2 specific impairments described in 20 C.F.R. Part 404,  
3 Subpart P, Appendix 1? If so, the claimant is found  
4 disabled. If not, proceed to step four.

5 (4) Is the claimant capable of performing his past work? If  
6 so, the claimant is found not disabled. If not, proceed  
7 to step five.

8 (5) Is the claimant able to do any other work? If not, the  
9 claimant is found disabled. If so, the claimant is found  
10 not disabled.

11  
12 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,  
13 262 F.3d 949, 953-54 (9th Cir. 2001); 20 C.F.R. §§ 404.1520(b)-  
14 (g)(1), 416.920(b)-(g)(1).

15  
16 The claimant has the burden of proof at steps one through four  
17 and the Commissioner has the burden of proof at step five.  
18 Bustamante, 262 F.3d at 953-54. Additionally, the ALJ has an  
19 affirmative duty to assist the claimant in developing the record  
20 at every step of the inquiry. Id. at 954. If, at step four, the  
21 claimant meets his or her burden of establishing an inability to  
22 perform past work, the Commissioner must show that the claimant  
23 can perform some other work that exists in "significant numbers"  
24 in the national economy, taking into account the claimant's  
25 residual functional capacity ("RFC"), age, education, and work  
26 experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at  
27 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner  
28 may do so by the testimony of a vocational expert ("VE") or by

1 reference to the Medical-Vocational Guidelines appearing in 20  
2 C.F.R. Part 404, Subpart P, Appendix 2 (commonly known as "the  
3 grids"). Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001).  
4 When a claimant has both exertional (strength-related) and non-  
5 exertional limitations, the grids are inapplicable and the ALJ must  
6 take the testimony of a VE. Moore v. Apfel, 216 F.3d 864, 869 (9th  
7 Cir. 2000) (citing Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir.  
8 1988)).

9  
10 **III.**

11 **THE ALJ'S DECISION**

12  
13 The ALJ employed the five-step sequential evaluation process  
14 and concluded that Plaintiff was not disabled within the meaning  
15 of the Social Security Act. (AR 22-29). At step one, the ALJ  
16 found that Plaintiff has not engaged in substantial gainful since  
17 October 14, 2013, the alleged onset date. (AR 24). At step two,  
18 the ALJ found that Plaintiff's mild lumbar spondylosis with lumbago  
19 and mild degenerative joint disease of the left knee are severe  
20 impairments.<sup>1</sup> (AR 24). At step three, the ALJ determined that  
21 Plaintiff does not have an impairment or combination of impairments  
22 that meet or medically equal the severity of any of the listings  
23 enumerated in the regulations. (AR 18-19).

24  
25  
26 <sup>1</sup> The ALJ also found that Plaintiff's medically determinable  
27 impairments of obstructive sleep apnea, hypertension, diabetes,  
28 obesity, and Bell's palsy do not limit Plaintiff more than  
minimally and are therefore nonsevere. (AR 24-25).

1 The ALJ then assessed Plaintiff's RFC and concluded that he  
2 can perform the full range of medium work as defined in 20 C.F.R.  
3 § 404.1567(c).<sup>2</sup> (AR 25). At step four, the ALJ found that  
4 Plaintiff is capable of performing past relevant work as a truck  
5 driver, as generally performed in the national and regional  
6 economy. (AR 29). Accordingly, the ALJ found that Plaintiff was  
7 not under a disability as defined in the Act from October 14, 2013,  
8 through the date of the decision. (AR 29).

9  
10 **IV.**

11 **STANDARD OF REVIEW**

12  
13 Under 42 U.S.C. § 405(g), a district court may review the  
14 Commissioner's decision to deny benefits. "[The] court may set  
15 aside the Commissioner's denial of benefits when the ALJ's findings  
16 are based on legal error or are not supported by substantial  
17 evidence in the record as a whole." Aukland v. Massanari, 257 F.3d  
18 1033, 1035 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1097); see  
19 also Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing  
20 Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

21  
22 "Substantial evidence is more than a scintilla, but less than  
23 a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v.  
24 Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant  
25

26 <sup>2</sup> "Medium work involves lifting no more than 50 pounds at a time  
27 with frequent lifting or carrying of objects weighing up to 25  
28 pounds. If someone can do medium work, we determine that he or  
she can also do sedentary and light work." 20 C.F.R. § 404.1567(c).

1 evidence which a reasonable person might accept as adequate to  
2 support a conclusion." (Id.). To determine whether substantial  
3 evidence supports a finding, the court must "'consider the record  
4 as a whole, weighing both evidence that supports and evidence that  
5 detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d  
6 at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir.  
7 1993)). If the evidence can reasonably support either affirming  
8 or reversing that conclusion, the court may not substitute its  
9 judgment for that of the Commissioner. Reddick, 157 F.3d at 720-  
10 21 (citing Flaten v. Sec'y of Health & Human Servs., 44 F.3d 1453,  
11 1457 (9th Cir. 1995)).

## 12 13 **V.**

### 14 **DISCUSSION**

15  
16 On June 4, 2014, Sohail K. Afra, M.D., performed a complete  
17 internal medicine evaluation at the request of the Agency. (AR  
18 594-600). Plaintiff, who Dr. Afra found to be a "reliable" and  
19 "credible" historian (AR 594, 596), complained of pain in the mid  
20 back, hips, lower back, buttocks, left shoulder, right elbow, and  
21 both knees. (AR 595). His primary complaint was chronic severe  
22 back pain, with occasional radiation to the lower extremities, and  
23 knee pain bilaterally, more pronounced on the left. (AR 595).

24  
25 On examination, Dr. Afra found reproducible pain in the  
26 shoulder, hip, and elbow joints with internal rotation of the  
27 shoulder joints painful and decreased. (AR 595, 597, 598). In  
28 the dorsolumbar region, moderate tenderness with pain was noted

1 over the paraspinal areas, with flexion decreased to 40° (normal  
2 is 0-90°), extension to 15° (0-25°), lateral bending to 20° (0-  
3 25°), and rotation to 20°. (0-30°). (AR 597-98). Dr. Afra noted  
4 moderate-to-severe edema of the left knee with range of motion  
5 painful and limited to 110-120° (0-150°), with significant  
6 crepitus. (AR 595, 598). Because of the left knee pain, flexion  
7 of the left hip was painful and decreased to 50° with knees straight  
8 (0-70°). (AR 598). With knees flexed, flexion was painful and  
9 reduced to 90° (0-100°), internal rotation "very painful" and  
10 decreased to 35° (0-40°), and external rotation "very painful" and  
11 reduced to 35° (0-50°). (AR 598). Plaintiff's gait was within  
12 normal limits but he had difficulty walking on toes or heels. (AR  
13 599).

14  
15 Dr. Afra assessed chronic low back pain, chronic knee pain  
16 bilaterally, with objective evidence of moderate-to-severe  
17 swelling of the left knee with painful and limited range of motion  
18 and associated muscular atrophy on the left calf, and mechanical-  
19 type shoulder pain. (AR 599). Dr. Afra opined that Plaintiff was  
20 limited to pushing, pulling, lifting and carrying 20 pounds  
21 occasionally and 10 pounds frequently, and walking, sitting, or  
22 standing six hours in an eight-hour day. (AR 599-600). Dr. Afra  
23 limited Plaintiff to occasional bending, kneeling, stooping,  
24 crawling, and crouching. (AR 600). He precluded Plaintiff from  
25 walking on uneven terrain, climbing ladders, and working with  
26 heights. (AR 600).<sup>3</sup> The state Agency consultants gave Dr. Afra's

27  
28 <sup>3</sup> If a person of Plaintiff's age (he turned 50 on October 20,  
2013), unable to communicate in English (an interpreter was used

1 opinion "great weight" and concluded that Plaintiff was limited to  
2 light work. (AR 351-52, 360-62).

3  
4 An ALJ must take into account all medical opinions of record.  
5 20 C.F.R. §§ 404.1527(b), 416.927(b). The regulations "distinguish  
6 among the opinions of three types of physicians: (1) those who  
7 treat the claimant (treating physicians); (2) those who examine  
8 but do not treat the claimant (examining physicians); and (3) those  
9 who neither examine nor treat the claimant (nonexamining  
10 physicians)." Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995),  
11 as amended (Apr. 9, 1996). "Generally, a treating physician's  
12 opinion carries more weight than an examining physician's, and an  
13 examining physician's opinion carries more weight than a reviewing  
14 [(nonexamining)] physician's." Holohan v. Massanari, 246 F.3d  
15 1195, 1202 (9th Cir. 2001); accord Garrison v. Colvin, 759 F.3d  
16 995, 1012 (9th Cir. 2014). "The weight afforded a non-examining  
17 physician's testimony depends 'on the degree to which they provide  
18 supporting explanations for their opinions.'" Ryan v. Comm'r of  
19 Soc. Sec., 528 F.3d 1194, 1201 (9th Cir. 2008) (quoting 20 C.F.R.  
20 § 404.1527(d)(3)).

21  
22 "To reject an uncontradicted opinion of a treating or  
23 examining doctor, an ALJ must state clear and convincing reasons  
24 that are supported by substantial evidence." Bayliss v. Barnhart,

25  
26 at the hearing and at Dr. Afra's examination), and with unskilled  
27 past relevant work and no transferable skills (AR 342) was limited  
28 to light work as Dr. Afra's opinion indicates, he would be found  
disabled. See grids Rule 202.09.



1 427 F.3d 1211, 1216 (9th Cir. 2005). "If a treating or examining  
2 doctor's opinion is contradicted by another doctor's opinion, an  
3 ALJ may only reject it by providing specific and legitimate reasons  
4 that are supported by substantial evidence." Id.; see also  
5 Reddick, 157 F.3d at 725 (the "reasons for rejecting a treating  
6 doctor's credible opinion on disability are comparable to those  
7 required for rejecting a treating doctor's medical opinion.").  
8 "The ALJ can meet this burden by setting out a detailed and thorough  
9 summary of the facts and conflicting clinical evidence, stating  
10 his interpretation thereof, and making findings." Trevizo v.  
11 Berryhill, 871 F.3d 664, 675 (9th Cir. 2017) (citation omitted).  
12 "When an examining physician relies on the same clinical findings  
13 as a treating physician, but differs only in his or her conclusions,  
14 the conclusions of the examining physician are not 'substantial  
15 evidence.'" Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007).

16  
17 The ALJ gave Dr. Afra's opinion "little weight." (AR 27).  
18 He found the opinion to be "inconsistent with the mild and minimal  
19 degenerative changes revealed in imaging studies, and with the  
20 normal strength, reflexes, gait, coordination, and range of motion  
21 [Plaintiff] exhibited in physical examinations." (AR 27)  
22 (citations omitted).<sup>4</sup> Dr. Afra's opinion was contradicted by the  
23 opinion of Herman R. Schoene, M.D., who conducted an orthopedic  
24 evaluation in October 2016 (AR 769-73). As Dr. Afra's opinion  
25 was contradicted by a later medical evaluation, the ALJ was

26 \_\_\_\_\_  
27 <sup>4</sup> The ALJ similarly rejected the opinions expressed by the state  
28 Agency consultants, who had given Dr. Afra's opinion "great  
weight." (AR 27).

1 required to give specific and legitimate reasons that are supported  
2 by substantial evidence in the record for rejecting Dr. Afra's  
3 opinion. See Lester, 81 F.3d at 830-31 ("the opinion of an  
4 examining doctor, even if contradicted by another doctor, can only  
5 be rejected for specific and legitimate reasons that are supported  
6 by substantial evidence in the record"). The ALJ's rejection of  
7 Dr. Afra's opinion does not satisfy these standards.

8  
9 First, Dr. Afra's opinion is supported by his own objective  
10 examinations. In evaluating a consultative examiner's opinion,  
11 the ALJ must consider the extent to which the opinion is supported  
12 by clinical and diagnostic examinations in determining the weight  
13 to give the opinion. Revels v. Berryhill, 874 F.3d 648, 654 (9th  
14 Cir. 2017); 20 C.F.R. §§ 404.1527(c)(2)-(6), 416.927(c)(2)-(6).  
15 While the ALJ summarized some of Dr. Afra's clinical conclusions  
16 (AR 27), the ALJ failed to acknowledge that Plaintiff had painful  
17 and limited range of motion in his shoulders, elbows, hips, knees,  
18 and lumbar spine (AR 597-98). "[A]n ALJ may not pick and choose  
19 evidence unfavorable to the claimant while ignoring evidence  
20 favorable to the claimant." Cox v. Colvin, 639 F. App'x 476, 477  
21 (9th Cir. 2016) (citing Ghanim v. Colvin, 763 F.3d 1154, 1164 (9th  
22 Cir. 2014)). Plaintiff's reduced range of motion in both his upper  
23 and lower body accompanied with significant pain is consistent with  
24 being physically limited to light work, as Dr. Afra (and the state  
25 Agency physicians) opined.

26  
27 Second, the imaging studies cited by the ALJ were neither  
28 "mild" nor indicated "minimal" degenerative changes. X-rays of

1 Plaintiff's right knee in October 2015 indicated moderate knee  
2 joint effusion. (AR 583-84). Further, while x-rays of Plaintiff's  
3 cervical and thoracic spine indicated "degenerative changes," they  
4 did not indicate whether the changes were mild, moderate, or  
5 severe. (AR 583). Indeed, the ALJ is not qualified to make such  
6 a medical assessment on his own. The ALJ's lay opinion of  
7 Plaintiff's medical condition cannot provide the medical evidence  
8 needed to support the ALJ's RFC determination. See Tackett, 180  
9 F.3d at 1102-03 (there was no medical evidence to support the ALJ's  
10 determination); Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir.  
11 1975) (an ALJ is forbidden from making his or her own medical  
12 assessment beyond that demonstrated by the record); Rohan v.  
13 Chater, 98 F.3d 966, 970 (7th Cir. 1996) ("ALJs must not succumb  
14 to the temptation to play doctor and make their own independent  
15 medical findings"). Similarly, while a May 2014 MRI of Plaintiff's  
16 lumbar spine found mild discogenic spondylosis at L4-L5 and L5-S1  
17 and mild facet arthrosis at L5-S1, the same study indicated  
18 moderate facet arthrosis at L4-15. (AR 728; see id. 61-62). The  
19 ALJ appears to have substituted his own judgment for that of Dr.  
20 Afra's and failed to give specific and legitimate reasons for doing  
21 so. The MRI study also found effacements and encroachment of the  
22 nerve roots, without indicating whether they were mild, moderate  
23 or severe. (AR 728). An August 2016 x-ray of Plaintiff's thoracic  
24 spine indicated "moderate degenerative changes at all thoracic  
25 levels with marginal spur formation present." (AR 796) (emphasis  
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1 added). Thus, imaging studies indicated more than "mild and  
2 minimal" findings and were consistent with Dr. Afra's opinion.<sup>5</sup>

3  
4 Finally, the physical examinations cited by the decision below  
5 were consistent with some of Dr. Afra's findings. In March 2015,  
6 Plaintiff exhibited reduced dorsolumbar range of motion similar to  
7 Dr. Afra's assessment. (Compare AR 597-98, with id. 751). While  
8 Dr. Schoene came to a different conclusion as to Plaintiff's  
9 functional abilities, he too found that Plaintiff had limited range  
10 of motion in his lumbar spine: lateral flexion limited to 15/25°  
11 bilaterally, extension to 10/25°, and forward flexion to 45/90°.  
12 (AR 771). Further, while physical examinations in October and  
13 December 2016 found full range of motion in Plaintiff's neck, the  
14 examinations did not assess the range of motion in Plaintiff's  
15 lumbar spine. (AR 829, 835).

16  
17 Defendant argues that in rejecting the opinions of Dr. Afra  
18 and the Agency consultants, the ALJ properly relied on the  
19 subsequent orthopedic consultative examination by Dr. Schoene.  
20 (Dkt. No. 24 at 3-7). Dr. Schoene examined Plaintiff at the request  
21 of the Agency on October 18, 2016. (AR 769-73). Dr. Schoene found

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22  
23 <sup>5</sup> Defendant emphasizes that the August 2016 x-ray indicated that  
24 "the moderate changes in Plaintiff's spine were 'unremarkable for  
25 the patient's age.'" (Dkt. No. 4 at 5) (quoting AR 796).  
26 Nevertheless, "unremarkable" degenerative narrowing of the  
27 thoracic spine for an individual of age 52 does not contradict Dr.  
28 Afra's clinical findings that Plaintiff had diminished range of  
motion in his lumbar spine, hips, and knees. (AR 597-98). Indeed,  
while Dr. Afra did not explicitly test Plaintiff's thoracic spine,  
he found full range of motion in Plaintiff's cervical spine. (AR  
597).

1 full range of motion in Plaintiff's neck, shoulders, elbows,  
2 wrists, hands, hips, ankles, and knees. (AR 771-72).  
3 Nevertheless, as noted above, Plaintiff displayed reduced range of  
4 motion in his back that was consistent with Dr. Afra's findings.  
5 (Compare AR 771, with id. 597-98). Dr. Schoene opined that  
6 Plaintiff can lift/carry 50 pounds occasionally and 25 pounds  
7 frequently and can stand, walk, or sit six hours in an eight-hour  
8 workday. (AR 772).

9  
10 The ALJ gave Dr. Schoene's opinion "great weight," finding it  
11 consistent with the "normal" x-ray performed by Schoene, the "very  
12 conservative" course of treatment, and the "normal" physical  
13 examinations. (AR 28). The ALJ's assessment is not supported by  
14 substantial evidence. First, as discussed above, imaging studies  
15 and physical examinations were not "normal." While Dr. Schoene  
16 indicated that he "obtained x-rays of the lumbosacral spine, and  
17 these are normal" (AR 772), the x-ray results were not included in  
18 the record. Plaintiff objected to Dr. Schoene's report, requesting  
19 that the ALJ obtain a copy of the x-rays, if they in fact exist.  
20 (AR 323-24). The ALJ acknowledged the objection, stating he would  
21 investigate and issue a ruling (AR 324), but the ALJ's decision  
22 was issued without the ALJ ruling on this particular issue. Further  
23 calling into doubt the existence of the normal x-rays, just two  
24 months prior to Dr. Schoene's examination, x-rays of Plaintiff's  
25 lumbar spine indicated hypertrophic degenerative changes at  
26 multiple lumbar levels and arthritic disease of facet joints at  
27 all levels. (AR 797). Finally, the decision below erred in  
28 concluding that Plaintiff's care was conservative. Plaintiff was

1 treated for his chronic back and joint pain with epidural steroid  
2 injections and hydrocodone.<sup>6</sup> (AR 732, 861). The consistent use  
3 of hydrocodone, a strong opioid medication, and epidural injections  
4 cannot fairly be described as “conservative” treatment. See  
5 Lapeirre-Gutt v. Astrue, 382 F. App’x 662, 664 (9th Cir. 2010)  
6 (treatment consisting of “copious” amounts of narcotics, occipital  
7 nerve blocks, and trigger point injections not conservative);  
8 Madrigal v. Berryhill, No. CV 17 0824, 2017 WL 5633028, at \*6 (C.D.  
9 Cal. Nov. 21, 2017) (“[P]laintiff has been prescribed strong  
10 prescription pain medications, including the narcotic medication  
11 Norco, has received spinal injections, and has been referred for a  
12 lap band surgery consultation, treatment that is not necessarily  
13 conservative.”). Thus, the ALJ’s determination that Dr. Schoene’s  
14 opinion is due great weight is not supported by substantial  
15 evidence.

16  
17 In sum, the ALJ failed to provide specific and legitimate  
18 reasons for rejecting Dr. Afra’s opinion. On remand, the ALJ shall  
19 reevaluate the weight to be afforded Dr. Afra’s opinion.<sup>7</sup>  
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23 <sup>6</sup> Hydrocodone is “an opioid used to treat severe pain of a  
24 prolonged duration.” <<https://en.wikipedia.org/wiki/Hydrocodone>>  
(last visited April 29, 2019).

25 <sup>7</sup> Plaintiff also argues that the ALJ erred in rejecting his  
26 subjective symptoms. (Dkt. No. 21 at 12-17). However, it is  
27 unnecessary to reach Plaintiff’s arguments on this ground, as the  
28 matter is remanded for the alternative reasons discussed at length  
in this Order.

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**VI.**

**CONCLUSION**

Accordingly, IT IS ORDERED that Judgment be entered REVERSING the decision of the Commissioner and REMANDING this matter for further proceedings consistent with this decision. IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment on counsel for both parties.

DATED: May 1, 2019

\_\_\_\_\_  
/s/  
SUZANNE H. SEGAL  
UNITED STATES MAGISTRATE JUDGE

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