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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDER C.,¹

Plaintiff

v.

ANDREW M. SAUL, Commissioner
of Social Security,²

Defendant.

Case No. 5:19-cv-02125-GJS

**MEMORANDUM OPINION AND
ORDER**

I. PROCEDURAL HISTORY

Plaintiff Alexander C. (“Plaintiff”) filed a complaint seeking review of the decision of the Commissioner of Social Security denying his application for Disability Insurance Benefits (“DIB”). The parties filed consents to proceed before the undersigned United States Magistrate Judge [Dkts. 11 and 12] and briefs addressing disputed issues in the case [Dkt. 18 (“Pl. Br.”), Dkt. 19 (“Def. Br.”), Dkt. 20 (“Pl. Reply”)]. The matter is now ready for decision. For the reasons discussed

¹ In the interest of privacy, this Order uses only the first name and the initial of the last name of the non-governmental party.

² Andrew M. Saul, now Commissioner of the Social Security Administration, is substituted as defendant for Nancy A. Berryhill. *See* Fed. R. Civ. P. 25(d).

1 below, the Court finds that this matter should be remanded for further proceedings.

2
3 **II. ADMINISTRATIVE DECISION UNDER REVIEW**

4 Plaintiff filed for DIB on August 17, 2016, alleging a period of disability
5 beginning February 1, 2010. [AR 17.] After Plaintiff’s original application was
6 denied, Plaintiff appeared and testified at a hearing before Administrative Law
7 Judge Thomas Businger. [AR 40-65.]

8 Applying the five-step sequential evaluation process, the ALJ found that
9 Plaintiff was not disabled. *See* 20 C.F.R. §§ 416.920(b)-(g)(1). [AR 17-34.] At
10 step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity
11 since February 1, 2010, the alleged onset date. [AR 20.] At step two, the ALJ
12 found that Plaintiff suffered from the severe impairment of “status post spinal
13 fusion.” [AR 20.] The ALJ determined at step three that Plaintiff did not have an
14 impairment or combination of impairments that meets or medically equals the
15 severity of one of the listed impairments. [AR 22.]

16 The ALJ found that Plaintiff had the residual functional capacity (RFC) to
17 perform light work as defined in 20 CFR 404.1567(b) except:

18 He can lift and/or carry 20 pounds occasionally and 10
19 pounds frequently; stand and/or walk about two hours in
20 an eight-hour workday; sit about six hours in an eight-hour
21 workday; pushing and/or pulling is unlimited other than as
22 shown for lifting and/or carrying; can frequently balance;
23 can occasionally climb ladders, ropes, or scaffolds, climb
24 ramps and stairs, stoop, kneel, crouch, and crawl; must
avoid concentrated exposure to extreme cold; and cannot
work around unprotected heights or dangerous moving
machinery.

25 [AR 22.] Applying this RFC, the ALJ found that Plaintiff could not return to his
26 past relevant work as a plumber, but determined that based on his age (34 years old),
27 high school education, and ability to communicate in English, he could perform
28 representative occupations such as document preparer (Dictionary of Occupational

1 Titles (“DOT”) 249.587-018), final assembler (DOT 713.682-018), and table worker
2 (DOT 739.687-0182) and, thus, is not disabled. [AR 33-34.]

3 III. GOVERNING STANDARD

4 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner’s decision to
5 determine if: (1) the Commissioner’s findings are supported by substantial evidence;
6 and (2) the Commissioner used correct legal standards. *See Carmickle v. Comm’r*
7 *Soc. Sec. Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Brewes v. Comm’r Soc. Sec.*
8 *Admin.*, 682 F.3d 1157, 1161 (9th Cir. 2012) (internal citation omitted).

9 “Substantial evidence is more than a mere scintilla but less than a preponderance; it
10 is such relevant evidence as a reasonable mind might accept as adequate to support a
11 conclusion.” *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d 519, 522-23 (9th Cir.
12 2014) (internal citations omitted).

13 The Court will uphold the Commissioner’s decision when the evidence is
14 susceptible to more than one rational interpretation. *See Molina v. Astrue*, 674 F.3d
15 1104, 1110 (9th Cir. 2012). However, the Court may review only the reasons stated
16 by the ALJ in his decision “and may not affirm the ALJ on a ground upon which he
17 did not rely.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). The Court will not
18 reverse the Commissioner’s decision if it is based on harmless error, which exists if
19 the error is “inconsequential to the ultimate nondisability determination, or if despite
20 the legal error, the agency’s path may reasonably be discerned.” *Brown-Hunter v.*
21 *Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) (internal quotation marks and citations
22 omitted).

23 IV. DISCUSSION

24 1. The ALJ Failed to Provide Legally Sufficient Reasons for Rejecting 25 Plaintiff’s Credibility

26 In his first issue, Plaintiff contends the reasons the ALJ cited for discounting
27 his credibility were not clear and convincing. Specifically, Plaintiff argues that the
28 ALJ offered only one reason for discounting his testimony: that the medical

1 evidence is inconsistent with his allegations of the severity of his impairments,
2 which Plaintiff argues *cannot* be the sole reason for rejecting his complaints. [Pl.
3 Br. at 7-10.]

4 **A. Legal Standard**

5 “Where, as here, an ALJ concludes that a claimant is not malingering, and
6 that he has provided objective medical evidence of an underlying impairment which
7 might reasonably produce the pain or other symptoms alleged, the ALJ may reject
8 the claimant’s testimony about the severity of his symptoms only by offering
9 specific, clear and convincing reasons for doing so.” *Brown-Hunter v. Colvin*, 806
10 F.3d 487, 492-93 (9th Cir. 2015) (internal citation and quotations omitted). Even if
11 “the ALJ provided one or more invalid reasons for disbelieving a claimant’s
12 testimony,” if he “also provided valid reasons that were supported by the record,”
13 the ALJ’s error “is harmless so long as there remains substantial evidence
14 supporting the ALJ’s decision and the error does not negate the validity of the ALJ’s
15 ultimate conclusion.” *Molina*, 674 F.3d at 1115 (internal citation and quotations
16 omitted).

17 “The ALJ may consider many factors in weighing a claimant’s credibility,
18 including (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
19 claimant’s testimony or between his testimony and conduct; (3) claimant’s daily
20 living activities; (4) claimant’s work record; and (5) testimony from physicians or
21 third parties concerning the nature, severity, and effect of claimant’s condition.”
22 *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002).

23 **B. Plaintiff’s Testimony**

24 At the administrative hearing, Plaintiff testified that he had an accident where
25 he fell off a roof in 2010; he now suffers from significant pain in his low back that
26 travels down his legs. [AR 45, 47-48.] Following the accident, Plaintiff had several
27 spinal fusion surgeries occurring in 2012 and 2014. [AR 45.] Surgery has not
28 eliminated his impairments. Due to his continuing back pain, Plaintiff has difficulty

1 sitting and he spends most of the day lying down. [AR 45.] He can sit for up to 45
2 minutes at one time, however he cannot stand for very long. [AR 50.] He has
3 difficulty lifting a gallon of milk. [AR 56.] He also uses a cane or a walker to get
4 around. [AR 48.]

5 When asked about his daily medications, Plaintiff testified that he takes
6 Gabapentin for nerve pain; Flexeril, a muscle relaxer; Oxycodone, a narcotic
7 analgesic; and an anti-inflammatory. [AR 49.] These medications make him
8 drowsy. [AR 49.]

9 When asked about his daily activities, Plaintiff testified that he lives with his
10 girlfriend and his three children ages 4, 8, and 14. [AR 54.] Although he has young
11 children, Plaintiff testified that he is unable to provide any child care due to his back
12 pain. [AR 54.] Plaintiff relies on his mother and girlfriend to care for his four-year
13 old. [AR 54.] Plaintiff testified that he tries to walk around the block twice per
14 week. [AR 50.] He watches about four hours of television per day, but generally he
15 does not participate in many daily activities. [AR 55.]

16 C. Analysis

17 In addressing the credibility of Plaintiff's subjective complaints, the ALJ
18 found:

19 the alleged intensity, persistence, and limiting effects of symptoms are
20 inconsistent with and are not substantiated by the objective medical
21 evidence. The objective medical evidence only partially supports the
22 claimant's allegations. Further, the objective medical evidence is
23 inconsistent with the alleged severity of the functional limitations
24 imposed by the claimant's impairments and suggests the claimant's
25 symptoms and limitations were not severe as the claimant alleged. The
26 positive objective clinical and diagnostic findings detailed below do not
27 support more restrictive functional limitations than those assessed
28 herein. [AR 23.]

26 Defendant argues that "in addition to the lack of consistency with the
27 objective medical evidence," the ALJ found that the credibility of Plaintiff's
28 subjective symptom testimony was undermined because "Plaintiff's overall

1 conservative treatment *after his surgeries* was inconsistent with his claim of
2 disabling symptoms.” [Def.’s Br. at 5-6]; [AR 26.] Defendant thus argues that
3 viewing the ALJ’s decision liberally, the ALJ provided two reasons for finding
4 Plaintiff less credible: (1) Plaintiff was prescribed conservative treatment and (2)
5 there was a lack of objective medical evidence to support his complaints.

6 **i. Conservative Treatment**

7 There are several problems with Defendant’s argument that the ALJ
8 discounted Plaintiff’s credibility based on his conservative treatment “*after his*
9 *surgeries.*” [Def.’s Br. at 6.]

10 First, Defendant’s argument grossly mischaracterizes the ALJ’s statements
11 regarding Plaintiff’s course of treatment. Contrary to Defendant’s argument, the
12 ALJ never attributed Plaintiff’s conservative treatment to his back surgeries
13 generally. Rather, the ALJ specifically noted that Plaintiff received conservative
14 treatment after his first back surgery in 2012. However, as the ALJ noted, following
15 Plaintiff’s 2012 back surgery, Plaintiff underwent two revision surgeries on July 31,
16 2014 to repair his failed L5-S1 fusion, significant nerve compression from bony
17 hyperostosis at L5-S1, and to resection the distal tip of the coccyx. [AR 28.]
18 Plaintiff’s surgeon specifically noted that the reason for these revision surgeries was,
19 in part, because of the failure of Plaintiff’s “conservative care.” [AR 28, AR 822 “he
20 failed conservative care and is now here for permanent surgical fixation.”]

21 The ALJ’s specific statement regarding Plaintiff’s conservative care was as
22 follows:

23 [O]n March 3, 2012, the claimant underwent the following surgical
24 procedures: posterior spinal fusion at L5-S1 with interarticular process
25 and interfacet interspinal fusion; posterior spinal segmental pedicle
26 screw instrumentation bilaterally at L5-S1; left sided transforaminal
27 lumbar interbody fusion at L5-S1 with interbody fusion at L5-S1; right-
28 sided laminotomy/foraminotomy and microdiscectomies at L5-S1 with
neurolysis, nerve dissection, and decompression; left-sided

1 hemilaminectomies at L5-S1; and radical discectomies at L5-S1 with
2 interbody fusion.

3 ...

4 The claimant presented for follow-up appointments from March 2012
5 to March 2013. During this period, he exhibited some positive,
6 objective physical findings related to the lumbar spine, such as
7 tenderness, limited range of motion, and positive straight leg raising.
8 However, x-ray imagining showed the claimant's hardware, screws,
9 and interbody grafts were in good position. Further, by March 2013, he
10 exhibited normal five over five motor strength and only mildly
11 decreased sensation in the left L5 dermatomal distribution. His
12 assessment during this period included status post posterior lumbar
13 interbody fusion and decompression at L4-5 and L5-S1, as well as
14 lower extremity radiculopathy, left greater than right. **Continued**
15 **conservative treatment** with prescribed medication, post-operative
16 physical therapy, home exercises, and increased activity were was [sic]
17 **recommended throughout the abovementioned period.** [AR 26,
18 emphasis added.]

19 As seen above, while the ALJ did refer to some of Plaintiff's treatment as
20 conservative, in context, the ALJ limited his statements to the time period between
21 Plaintiff's first back surgery in 2012 and March 2013. The ALJ did not direct his
22 statements about Plaintiff's conservative care to Plaintiff's ongoing treatment that
23 continued well beyond March 2013. Evidence that Plaintiff was treated
24 conservatively for a short period of time following his first of three spine surgeries
25 does not provide clear, if any, evidence of Plaintiff's stability with conservative
26 treatment.

27 Second, even if the Court were to interpret the ALJ's statement regarding
28 Plaintiff's conservative treatment as a reason to discount Plaintiff's credibility, such
a reason would be insufficient as Plaintiff's treatment throughout his alleged period
of disability was far from conservative. After his first spine surgery, Plaintiff
received epidural pain injections on July 23, 2013, October 29, 2013, September 10,
2014, and April 16, 2015. [AR 973, 1100 and 1238.] In addition to these injections,
Plaintiff continued to use prescription narcotic pain medications every day, several

1 times a day. [AR 23, 800.] Finally, as addressed above, Plaintiff has had at least
2 three spinal surgeries since his disability onset date.

3 Courts have characterized injections as both conservative and not
4 conservative. Typically, in instances of limited or one-time injections, the courts
5 have deemed the treatment conservative. *See, e.g., Jones v. Comm’r*, 2014 WL
6 228590, at *7 (E. D. Cal. Jan. 21, 2014) (occasional use of epidural injections in
7 conjunction with massages and anti-inflammatory medications could be considered
8 conservative); *Veliz v. Colvin*, 2015 WL 1862924, at *8 (C.D. Cal. Apr. 23, 2015)
9 (single steroid injection did not undermine ALJ’s finding that plaintiff received
10 conservative treatment); *Gonzales v. Colvin*, 2015 WL 685347, at *11 (C.D. Cal.
11 Feb. 18, 2015) (treatment consisting of medication and a single steroid injection was
12 conservative). In contrast, other courts have deemed this treatment not conservative,
13 in particular when a claimant was treated with other injections and narcotic pain
14 medication. *See, e.g., Yang v. Colvin*, 2015 WL 248056, at *6 (C.D. Cal. Jan. 20,
15 2015) (collecting cases finding spinal epidural injections are not conservative);
16 *Christie v. Astrue*, 2011 WL 4368189, at *4 (C.D. Cal. Sept. 16, 2011) (refusing to
17 characterize steroid, trigger point, and epidural injections as conservative).

18 Similarly, the Ninth Circuit and its district courts have viewed the use of
19 narcotic pain medication as non-conservative treatment, particularly when in
20 conjunction with other treatments that were also not conservative. *See, e.g.,*
21 *Lapeirre–Gutt v. Astrue*, 382 Fed. Appx. 662, 664 (9th Cir. 2010) (treatment
22 consisting of “copious” amounts of narcotic pain medication, occipital nerve blocks,
23 and trigger point injections was not conservative); *Soltero De Rodriguez v. Colvin*,
24 2015 WL 5545038, at *4 (C.D. Cal. Sept. 18, 2015); *Christie v. Astrue*, 2011 WL
25 4368189, at *4 (C.D. Cal. Sept. 16, 2011) (treatment with narcotics, steroid
26 injections, trigger point injections, epidural injections, and cervical traction was not
27 conservative).

1 Here, Plaintiff did not receive only a single injection. Plaintiff testified that
2 he has received at least six pain injections since his accident, all of which only
3 provided temporary relief; he also takes prescription narcotic pain medication daily.
4 [See AR 46 (testimony about epidural injections, AR 56 (testimony that Plaintiff
5 takes 10 mg of Oxycodone three times a day).] In addition to pain relief injections
6 and narcotic pain medications, Plaintiff underwent physical therapy, and several
7 spinal surgeries. This cannot reasonably be characterized as “conservative”
8 treatment. *See Harvey v. Colvin*, 2014 U.S. Dist. LEXIS 107607, at *28 (C.D. Cal.
9 Aug. 5, 2014)(finding that ALJ erred in discounting credibility based on
10 “conservative” treatment where treatment included injections); *Yang v. Barnhart*,
11 2006 U.S. Dist. LEXIS 90358, at *12-14 (C.D. Cal. Dec. 12, 2006) (concluding that
12 physical therapy, neck surgery, prescription medication, and epidural injections
13 were not “conservative” treatment sufficient to discount claimant’s credibility).

14 Accordingly, taken all together, any finding by the ALJ that Plaintiff received
15 conservative treatment was not supported by substantial evidence. If the ALJ
16 intended this as a reason to discount Plaintiff’s credibility, it was not clear and
17 convincing.

18 **ii. Inconsistency with the Objective Medical Evidence**

19 The only other reason provided by the ALJ to discount Plaintiff’s credibility
20 was that the objective medical evidence was inconsistent with Plaintiff’s testimony
21 regarding his limitations. [AR 23.] It is well-established that an “ALJ may not
22 discredit a claimant’s subjective testimony on” the sole basis that “no objective
23 medical evidence” supports the claimant’s testimony as to “the severity of the
24 subjective symptoms from which he suffers.” *Light v. Comm’r of Soc. Sec. Admin.*,
25 119 F.3d 789, 792 (9th Cir. 1997). Indeed, “it is the very nature of excess pain to be
26 out of proportion to the medical evidence,” and thus, a finding that a claimant is not
27 credible because his pain testimony is out of proportion to the medical evidence is
28 an “inadequate reason.” *Gonzalez v. Sullivan*, 914 F.2d 1197, 1201 (9th Cir. 1990).

1 While the lack of medical evidence to support a claimant’s allegations of disabling
2 pain and symptoms “is a factor that the ALJ can consider in his credibility analysis,”
3 it “cannot form the sole basis for discounting pain testimony.” *Burch v. Barnhart*,
4 400 F.3d 676, 681 (9th Cir. 2005).

5 Thus, this reason, on its own, is inadequate to support the ALJ’s adverse
6 credibility determination, because the asserted failure of the medical record to
7 corroborate Plaintiff’s subjective symptom and pain testimony fully is not, by itself,
8 a legally sufficient basis for rejecting such testimony. *Rollins v. Massanari*, 261
9 F.3d 853, 856 (9th Cir. 2001). The ALJ may not make a negative credibility finding
10 “solely because” the claimant’s symptom/pain testimony “is not substantiated
11 affirmatively by objective medical evidence.” *Robbins v. Comm’r of Soc. Sec.*
12 *Admin.*, 466 F.3d 880, 883 (9th Cir. 2006); *Light*, 119 F.3d at 792 (“a finding that
13 the claimant lacks credibility cannot be premised wholly on a lack of medical
14 support for the severity of his pain”); *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th
15 Cir. 1991) (“an adjudicator may not reject a claimant’s subjective complaints based
16 solely on a lack of objective medical evidence to fully corroborate the alleged
17 severity of the [symptoms].”). The ALJ’s only other reason, therefore, is not clear
18 and convincing and cannot save the ALJ’s adverse credibility determination. As
19 there is no basis for finding this error to be harmless, reversal is required.

20 **2. Other Issues**

21 Finally, Plaintiff contends that the ALJ’s decision is additionally erroneous
22 because the ALJ failed to give proper weight to the opinion of the agreed medical
23 examiner involved with his worker’s compensation claim. [Pl.’s Br. at 10-15.] In
24 light of the Court’s conclusion that the case be remanded, it does not address the
25 final issue raised by Plaintiff, except to note that this issue would not warrant a
26 remand for benefits. However, given the errors in the ALJ’s opinion, the ALJ
27 should address Plaintiff’s additional contention of error on remand.

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V. CONCLUSION

The decision of whether to remand for further proceedings or order an immediate award of benefits is within the district court's discretion. *Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th Cir. 2000). When no useful purpose would be served by further administrative proceedings, or where the record has been fully developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. *Id.* at 1179 ("the decision of whether to remand for further proceedings turns upon the likely utility of such proceedings"). But when there are outstanding issues that must be resolved before a determination of disability can be made, and it is not clear from the record the ALJ would be required to find the claimant disabled if all the evidence were properly evaluated, remand is appropriate. *Id.* A remand for an immediate award of benefits is appropriate "only in rare circumstances." *Brown-Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015) (internal citation omitted).

The Court finds that remand is appropriate because the circumstances of this case do not preclude the possibility that further administrative review could remedy the ALJ's errors. On remand, the Commissioner must re-evaluate Plaintiff's pain/subjective symptom assertions and testimony properly, which in turn may lead to the formulation of a new RFC and the need for additional vocational expert testimony. The Court therefore declines to exercise its discretion to remand for an immediate award of benefits. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (upon reversal of an administrative determination, the proper course is remand for additional agency investigation or explanation, "except in rare circumstances"); *Dominguez v. Colvin*, 808 F.3d 403, 407 (9th Cir. 2015) ("Unless the district court concludes that further administrative proceedings would serve no useful purpose, it may not remand with a direction to provide benefits.").

For all of the foregoing reasons, **IT IS ORDERED** that:

(1) the Decision of the Commissioner is **REVERSED** and this matter

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REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings consistent with this Memorandum Opinion and Order; and

(2) Judgment be entered in favor of Plaintiff.

IT IS SO ORDERED.

DATED: October 28, 2020



GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE