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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DARRIN H. D.,¹
Plaintiff,
v.
ANDREW SAUL,
Commissioner of Social Security,
Defendant.

Case No. 5:20-cv-00479-AFM

**MEMORANDUM OPINION AND
ORDER REVERSING AND
REMANDING DECISION OF
THE COMMISSIONER**

Plaintiff filed this action seeking review of the Commissioner's final decision denying his applications for disability insurance benefits. In accordance with the Court's case management order, the parties have filed briefs addressing the merits of the disputed issues. The matter is now ready for decision.

BACKGROUND

On December 2, 2015 and October 31, 2018, Plaintiff applied for disability insurance benefits, alleging disability beginning January 15, 2014. Plaintiff's applications were denied initially and upon reconsideration. (Administrative Record

¹ Plaintiff's name has been partially redacted in accordance with Federal Rule of Civil Procedure 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

1 ["AR"] 82-86, 92-97.) A hearing took place on October 31, 2018 before an
2 Administrative Law Judge ("ALJ"). Plaintiff, who was represented by counsel, and
3 a vocational expert ("VE") testified at the hearing. (AR 31-57.)

4 In a decision dated January 16, 2019, the ALJ found that Plaintiff suffered
5 from the following severe impairments: osteomyelitis of the left foot; bilateral
6 neuropathy; deep vein thrombosis; and obesity. (AR 17.) After finding that Plaintiff's
7 impairments did not meet or equal any listed impairment or combination of
8 impairments (AR 19), the ALJ assessed Plaintiff with the residual functional capacity
9 ("RFC") to perform a sedentary work as follows: can occasionally push and pull
10 with the bilateral lower extremities; can occasionally climb ramps and stairs; can
11 never climb ladders, ropes and scaffolds, and crawl; can occasionally balance, stoop,
12 kneel, and crouch; can have no concentrated exposure to fumes, odors, dusts, gases,
13 and poor ventilation; no exposure to hazards such as machinery, unprotected heights
14 or open bodies of water; would require sit/stand option, meaning every hour an
15 individual needs to stand for period of five minutes without needing to leave the
16 workplace; and limited to simple routine tasks due to pain and effects of medication.
17 (AR 20.) Relying on the testimony of the VE, the ALJ concluded that Plaintiff was
18 unable to perform his past relevant work, but based on Plaintiff's age, education, work
19 experience, and RFC, was able to perform other work existing in significant
20 numbers in the national economy. (AR 25-26.) Accordingly, the ALJ found
21 Plaintiff not disabled. (AR 26.)

22 The Appeals Council subsequently denied Plaintiff's request for review (AR
23 1-6), rendering the ALJ's decision the final decision of the Commissioner.

24 **DISPUTED ISSUE**

25 Whether the ALJ erred in evaluating Plaintiff's subjective symptom testimony.

26 **STANDARD OF REVIEW**

27 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to
28 determine whether the Commissioner's findings are supported by substantial

1 evidence and whether the proper legal standards were applied. *See Treichler v.*
2 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014). Substantial
3 evidence means “more than a mere scintilla” but less than a preponderance. *See*
4 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter v. Astrue*, 504 F.3d
5 1028, 1035 (9th Cir. 2007). Substantial evidence is “such relevant evidence as a
6 reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402
7 U.S. at 401. In the social security context, the threshold for substantial evidence is
8 “not high.” *Biestek v. Berryhill*, 139 S. Ct. 1149, 1154 (2019). This Court must
9 review the record as a whole, weighing both the evidence that supports and the
10 evidence that detracts from the Commissioner’s conclusion. *Lingenfelter*, 504 F.3d
11 at 1035. Where evidence is susceptible of more than one rational interpretation, the
12 Commissioner’s decision must be upheld. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th
13 Cir. 2007).

14 DISCUSSION

15 Where, as here, a claimant has presented evidence of an underlying impairment
16 that could reasonably be expected to produce pain or other symptoms, the ALJ must
17 “evaluate the intensity and persistence of [the] individual’s symptoms ... and
18 determine the extent to which [those] symptoms limit his ... ability to perform work-
19 related activities” SSR 16–3p, 2016 WL 1119029, at *4. Absent a finding that the
20 claimant is malingering, an ALJ must provide specific, clear and convincing reasons
21 before rejecting a claimant’s testimony about the severity of her symptoms. *Trevizo*
22 *v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017) (citing *Garrison v. Colvin*, 759 F.3d
23 995, 1014-1015 (9th Cir. 2014)). “General findings [regarding a claimant’s
24 credibility] are insufficient; rather, the ALJ must identify what testimony is not
25 credible and what evidence undermines the claimant’s complaints.” *Burrell v. Colvin*,
26 775 F.3d 1133, 1138 (9th Cir. 2014) (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th
27 Cir. 1995)). The ALJ’s findings “must be sufficiently specific to allow a reviewing
28 court to conclude the adjudicator rejected the claimant’s testimony on permissible

1 grounds and did not arbitrarily discredit a claimant’s testimony regarding pain.”
2 *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015) (quoting *Bunnell v.*
3 *Sullivan*, 947 F.2d 341, 345-346 (9th Cir. 1991) (en banc)).

4 Factors an ALJ may consider in evaluating the claimant’s subjective symptoms
5 include conflicts between the claimant’s testimony and the claimant’s conduct – such
6 as daily activities, work record, or an unexplained failure to pursue or follow
7 treatment – as well as ordinary techniques of credibility evaluation, such as internal
8 contradictions in the claimant’s statements and testimony. *See Ghanim v. Colvin*, 763
9 F.3d 1154, 1163 (9th Cir. 2014). In addition, an ALJ may not disregard a claimant’s
10 testimony solely because it is not substantiated by objective medical evidence,
11 although the lack of medical evidence is a factor that the ALJ can consider in making
12 a credibility assessment. *Burch v. Barnhart*, 400 F.3d 676, 680-681 (9th Cir. 2005).

13 In discounting Plaintiff’s allegations and testimony concerning his symptoms,
14 the ALJ here found that Plaintiff’s “statements concerning the intensity, persistence
15 and limiting effects of these symptoms are not entirely consistent with the medical
16 evidence and other evidence in the record for the reasons explained in this decision.”
17 (AR 21.) The Ninth Circuit has observed that this is simply a boilerplate statement
18 that is routinely included in an ALJ’s decision “as an introduction to the ALJ’s
19 credibility determination” after which the ALJ “typically identify what parts of the
20 claimant’s testimony were not credible and why.” *Treichler*, 775 F.3d at 1103.

21 The ALJ then provided three more specific grounds for her adverse assessment
22 of Plaintiff’s subjective symptom evidence: (1) the claimant’s subjective statements
23 are inconsistent with – or not supported by – the objective medical evidence; (2)
24 “[t]he degree of claimant’s subjective complaints is not comparable to the frequency
25 or extent of the treatment sought by the claimant”; and (3) Plaintiff’s subjective
26 symptoms statements regarding significant pain are inconsistent with the evidence

1 that “he has been working at a construction site laying tiles” (AR 21.)² The Court
2 assesses these three reasons below.

3 First, an ALJ may not rely solely on lack of objective evidence to support a
4 credibility determination. *See Burch*, 400 F.3d at 681; *Rollins v. Massanari*, 261 F.3d
5 853, 856 (9th Cir. 2001). However, it is also true that a contradiction between a
6 claimant’s subjective complaints and specific medical evidence may constitute a
7 distinct basis for discounting the claimant’s subjective symptom allegations. *See Sills*
8 *v. Astrue*, 2013 WL 782076, at *3 (C.D. Cal. Mar. 1, 2013) (“there is an analytical
9 difference between a lack of corroborating medical evidence and a contradiction
10 between subjective claims and existing medical evidence”) (citing *Morgan v.*
11 *Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 599-600 (9th Cir. 1999). Accordingly,
12 an ALJ may properly rely upon a contradiction between a claimant’s allegations and
13 the medical evidence in reaching a credibility determination. *See Carmickle v.*
14 *Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) (“Contradiction with
15 the medical record is a sufficient basis for rejecting the claimant’s subjective
16 testimony.”); *Garcia v. Comm’r of Soc. Sec. Admin.*, 498 F. App’x 710, 711 (9th Cir.
17 2012) (claimant’s testimony properly discounted based on contradiction between that
18 testimony and his doctor).

19 Here, the ALJ’s decision does not clearly describe a contradiction with the
20 medical evidence – as opposed to a lack of support in the objective medical record.
21 Although the ALJ uses the word “inconsistent,” the decision does not cite medical
22 evidence that affirmatively contradicts Plaintiff’s subjective complaints and claims
23 of severe pain. Instead, the ALJ discusses Plaintiff alleged pain in his left foot and
24 leg. In discounting that pain, the ALJ focuses on the lack of objective medical
25 evidence regarding impairments of the left leg and points to a musculoskeletal
26 examination with “mild” findings and x-rays which were “all well” and showed “mild

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28 ² This court can only review the ALJ’s articulated rationale. *See, e.g., Barbato v. Comm’r of Soc. Sec. Admin.*, 923 F. Supp. 1273, 1276 n.2 (C.D. Cal. 1996)

1 degenerative changes.” (AR 21.) From this discussion by the ALJ, the Court
2 concludes that the first reason for the ALJ’s adverse credibility finding is based upon
3 the lack of supporting objective evidence – which by itself is legally insufficient
4 under Ninth Circuit law. *See, e.g., Burch*, 400 F.3d at 681

5 The ALJ’s second ground is that the degree of Plaintiff’s subjective symptoms
6 is allegedly “not comparable to the frequency or extent” of the treatment that he
7 received. (AR 21.) Although an ALJ may rely on conservative treatment (or lack of
8 treatment) as a valid reason for discounting subjective claims, it is undisputed here
9 that Plaintiff had multiple surgeries to address impairments and pain in his left foot.
10 Thus, not only did Plaintiff repeatedly seek medical treatment for his pain, but the
11 form of the treatment (multiple surgeries) provided to him was not conservative. *See*
12 *Ritchotte v. Astrue*, 281 F. App’x 757, 759 (9th Cir. 2008); *Diaz v. Berryhill*, 2018
13 WL 4998120, at *6 (C.D. Cal. Oct. 15, 2018) (collecting cases for the proposition
14 that “[s]urgery is generally not a ‘conservative’ treatment”). And the ALJ cited no
15 evidence that Plaintiff’s surgeries should be considered conservative. The
16 Commissioner acknowledges this, but points out that the ALJ also noted a post-
17 surgery record stating that Plaintiff’s surgical site was well healed and without
18 infection and another record indicating lack of swelling and a full range of motion in
19 Plaintiff’s extremities. (AR 21, citing AR 1248 and 1370.) Those records may bolster
20 the ALJ’s point that Plaintiff’s subjective complaints lack support in the objective
21 record, but they are not evidence that the frequency and extent of Plaintiff’s surgical
22 treatment somehow undermine his claims of severe pain.

23 As a third ground, the ALJ states that Plaintiff’s assertion of severe pain is
24 contradicted by his work laying tiles during his alleged period of disability. The
25 ALJ’s decision cites three treatment records that mention the tile work (AR 21 citing
26 AR 1158, 1246, and 1318). While these documents refer to Plaintiff occasionally
27 doing work at a construction site, they also report that the increased weight bearing
28 from this activity caused Plaintiff to develop a new infection and that Plaintiff could

1 not tolerate the associated standing and walking due to the pain. Thus, when placed
2 in their proper context, Plaintiff's short attempts at laying tile actually support his
3 statements of severe pain, *see Lingenfelter v. Astrue*, 504 F.3d 1028, 1038 (9th Cir.
4 2007), and the ALJ's reference to this work is not a legitimate basis for discounting
5 Plaintiff's subjective symptom claims because it fails to accurately characterize the
6 record. *See Regennitter v. Comm'r of Soc. Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir.
7 1999).

8 Accordingly, for the above reasons, the Court concludes that the ALJ erred by
9 not providing a specific, clear and convincing reason for discounting Plaintiff's
10 claims about the severity of his symptoms and pain. *See Trevizo*, 871 F.3d at 678.

11 **REMEDY**

12 Ninth Circuit case law "precludes a district court from remanding a case for an
13 award of benefits unless certain prerequisites are met." *Dominguez v. Colvin*, 808
14 F.3d 403, 407 (9th Cir. 2016) (citations omitted). "The district court must first
15 determine that the ALJ made a legal error, such as failing to provide legally sufficient
16 reasons for rejecting evidence. . . . If the court finds such an error, it must next review
17 the record as a whole and determine whether it is fully developed, is free from
18 conflicts and ambiguities, and all essential factual issues have been resolved."
19 *Dominguez*, 808 F.3d at 407 (citation and internal quotation marks omitted).

20 Although the Court has found error as discussed above, the record on the whole is
21 not fully developed, and factual issues remain outstanding. The issues concerning
22 Plaintiff's alleged disability "should be resolved through further proceedings on an
23 open record before a proper disability determination can be made by the ALJ in the
24 first instance." *See Brown-Hunter*, 806 F.3d at 496; *see also Treichler*, 775 F.3d at
25 1101 (remand for award of benefits is inappropriate where "there is conflicting
26 evidence, and not all essential factual issues have been resolved") (citation omitted);
27 *Strauss v. Comm'r of the Soc. Sec. Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011) (same
28 where the record does not clearly demonstrate the claimant is disabled within the

1 meaning of the Social Security Act). Accordingly, the appropriate remedy is a
2 remand for further administrative proceedings.³

3 * * *

4 IT IS ORDERED that Judgment be entered reversing the decision of the
5 Commissioner of Social Security and remanding this matter for further
6 administrative proceedings consistent with this opinion.

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8 DATED: 1/28/2021



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ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

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³ It is not the Court's intent to limit the scope of the remand.