

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

TAREK F.,  
Plaintiff,  
v.  
KILOLO KIJAKAZI, Acting  
Commissioner of Social Security,  
Defendant.

Case No. 5:22-cv-894-GJS

**MEMORANDUM OPINION AND  
ORDER**

**I. PROCEDURAL HISTORY**

Plaintiff Tarek F.<sup>1</sup> filed a Complaint seeking review of the decision of the Commissioner of Social Security denying his applications for a period of disability and Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) payments. The parties filed consents to proceed before a United States Magistrate Judge (ECF Nos. 12, 13) and briefs (ECF Nos. 19 (“Pl.’s Br.”), and 22 (“Def.’s Br.”)), addressing the disputed issue in the case. The matter is now ready for decision. For the reasons set forth below, the Court finds that this matter should

---

<sup>1</sup> In the interest of privacy, this Order uses only the first name and last initial of the non-governmental party in this case.

1 be remanded for further proceedings.

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

4 Plaintiff filed an application for a period of disability and DIB on March 16,  
5 2020, and an application for SSI on March 13, 2020, alleging disability commencing  
6 on February 14, 2020. (ECF No. 16, Administrative Record (“AR”) 15; *see also* AR  
7 187, 189.) Plaintiff’s applications were denied at the initial level of review and on  
8 reconsideration. (AR 15, 77, 78, 97, 98.) A telephonic hearing was held before  
9 Administrative Law Judge Jeannine Lesperance (“the ALJ”) on February 10, 2021.  
10 (AR 15, 28-58.)

11 On May 13, 2021, the ALJ issued an unfavorable decision applying the five-  
12 step sequential evaluation process for assessing disability. (AR 15-23); *see* 20  
13 C.F.R. §§ 404.1520(b)-(g)(1), 416.920(b)-(g)(1). At step one, the ALJ determined  
14 that Plaintiff has not engaged in substantial gainful activity since the alleged onset  
15 date. (AR 17.) At step two, the ALJ determined that Plaintiff has the severe  
16 impairment of myotonic dystrophy type I.<sup>2</sup> (AR 17.) At step three, the ALJ  
17 determined that Plaintiff does not have an impairment or combination of impairments  
18 that meets or medically equals the severity of one of the impairments listed in  
19 Appendix 1 of the Regulations. (AR 18); *see* 20 C.F.R. pt. 404, subpt. P, app. 1.  
20 The ALJ found that Plaintiff has the residual functional capacity (“RFC”) to perform  
21 sedentary work, as defined in 20 C.F.R. §§ 404.1567(a), 416.967(a), except as  
22 follows:

23 [H]e can occasionally climb ramps and stairs, balance, stoop, kneel,  
24 crouch, or crawl; occasionally push, pull or operate . . . foot controls  
bilaterally; and never climb ladders, ropes or scaffolds or work at

25  
26 <sup>2</sup> Plaintiff describes this as “a multisystem disorder that affects skeletal and  
27 smooth muscle as well as the eye, heart, endocrine system, and central nervous  
28 system.” (Pl.’s Br. 5 n.2 (citing <https://www.ncbi.nlm.nih.gov/books/NBK1165>)). It  
is characterized by progressive muscle wasting and weakness.  
<https://medlineplus.gov> (last visited March 27, 2023).

1 unprotected heights.  
2 (AR 18.) At step four, the ALJ determined that Plaintiff is not able to perform his  
3 past relevant work in the composite job of translator and teacher aide I, and in the  
4 jobs of retail sales clerk, department manager, and cashier/checker. (AR 21, 53-54.)  
5 At step five, based on the testimony of the vocational expert (“VE”), the ALJ found  
6 that Plaintiff could perform other jobs existing in significant numbers in the national  
7 economy, including representative jobs such as a sealer, a telephone quote clerk, and  
8 an electronic assembler. (AR 22-23.) Based on these findings, the ALJ found  
9 Plaintiff not disabled through the date of the decision. (AR 23.)

10 The Appeals Council denied review of the ALJ’s decision on March 28, 2022.  
11 (AR 1-5.) This action followed.

### 12 13 **III. GOVERNING STANDARD**

14 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner’s decision to  
15 determine if: (1) the Commissioner’s findings are supported by substantial evidence;  
16 and (2) the Commissioner used correct legal standards. *See le v. Comm’r Soc. Sec.*  
17 *Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Brewes v. Comm’r Soc. Sec. Admin.*,  
18 682 F.3d 1157, 1161 (9th Cir. 2012). “Substantial evidence . . . is ‘more than a mere  
19 scintilla.’ It means -- and only means -- ‘such relevant evidence as a reasonable  
20 mind might accept as adequate to support a conclusion.’” *Biestek v. Berryhill*, 139 S.  
21 Ct. 1148, 1154 (2019) (citations omitted); *Gutierrez v. Comm’r of Soc. Sec.*, 740  
22 F.3d 519, 522-23 (9th Cir. 2014) (internal quotation marks and citation omitted).

23 The Court will uphold the Commissioner’s decision when “the evidence is  
24 susceptible to more than one rational interpretation.” *See Molina v. Astrue*, 674 F.3d  
25 1104, 1110 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §  
26 404.1502(a). However, the Court may review only the reasons stated by the ALJ in  
27 his decision “and may not affirm the ALJ on a ground upon which he did not rely.”  
28

1 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). The Court will not reverse the  
2 Commissioner’s decision if it is based on harmless error, which exists if the error is  
3 “inconsequential to the ultimate nondisability determination, or if despite the legal  
4 error, the agency’s path may reasonably be discerned.” *Brown-Hunter v. Colvin*, 806  
5 F.3d 487, 492 (9th Cir. 2015) (internal quotation marks and citations omitted).

#### 7 **IV. DISCUSSION**

8 Plaintiff raises the following issue challenging the ALJ’s findings and  
9 determination of non-disability: the ALJ failed to properly evaluate Plaintiff’s  
10 subjective symptom testimony. (Pl.’s Br. 5.) As discussed below, the Court agrees  
11 with Plaintiff and finds that remand is appropriate.

#### 13 **A. LEGAL STANDARD**

14 In evaluating a claimant’s subjective symptom testimony, an ALJ must engage  
15 in a two-step analysis. *See Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir.  
16 2007); 20 C.F.R. § 404.1529(c). First, the ALJ must determine whether the claimant  
17 has presented objective medical evidence of an underlying impairment which “could  
18 reasonably be expected to produce the pain or other symptoms alleged.”  
19 *Lingenfelter*, 504 F.3d at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th  
20 Cir. 1991) (en banc)). Second, if the claimant meets the first step and there is no  
21 evidence of malingering, “the ALJ can reject the claimant’s testimony about the  
22 severity of her symptoms only by offering specific, clear and convincing reasons for  
23 doing so.” *Id.* at 1036 (quoting *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996)  
24 (internal quotation marks omitted)). At the same time, the “ALJ is not required to  
25 believe every allegation of disabling pain, or else disability benefits would be  
26 available for the asking, a result plainly contrary to the Social Security Act.” *Smartt*  
27 *v. Kijakazi*, 53 F.4th 489, 499 (9th Cir. 2022) (citation and internal quotation marks  
28

1 omitted).

2

3 **B. ANALYSIS**

4 In the present case, the ALJ discounted Plaintiff’s subjective complaints as  
5 follows:

6 After careful consideration of the evidence, I find that [Plaintiff’s]  
7 medically determinable impairment could reasonably be expected to  
8 cause at least some of the alleged symptoms; however, [his] statements  
9 concerning the intensity, persistence and limiting effects of these  
10 symptoms are not entirely consistent with the medical evidence and other  
11 evidence in the record for the reasons explained in this decision. ¶ [Plaintiff’s]  
12 statements about the alleged intensity, persistence, and  
13 limiting effects of symptoms are inconsistent with the medical evidence  
14 of record. [He] alleged that muscle weakness with difficulty lifting,  
15 standing, walking, and sitting reduced his ability to perform work-related  
16 activities. The alleged intensity, persistence, and limiting effects of these  
17 symptoms, however, are inconsistent with the evidence in the case record,  
18 as further discussed below. Accordingly, the medical evidence of record  
19 does not support the level of symptomology that [Plaintiff] alleged and is  
20 inconsistent with [his] statements concerning the alleged intensity,  
21 persistence, and limiting effects of symptoms. ¶ [Plaintiff’s] statements  
22 concerning the alleged intensity, persistence, and limiting effects of [his]  
23 symptoms on the ability to ambulate are inconsistent with the objective  
24 medical evidence and the other evidence of record.

17 (AR 19.) The ALJ then summarized a number of Plaintiff’s medical records,  
18 discussed her consideration of the persuasibility and consistency of the  
19 administrative findings at initial review and on reconsideration, and noted her RFC  
20 findings relating to Plaintiff’s limitations. (AR 20.) She concluded as follows:

21 In sum, the above residual functional capacity assessment in this finding  
22 is based on all of the relevant evidence in the record. The relevant  
23 medical evidence and other evidence in the case record only partially  
24 support [Plaintiff’s] statements regarding the alleged intensity,  
25 persistence, and limiting effects of symptoms.

24 (AR 20.)

25 Plaintiff generally contends that “[b]eyond a discussion of the objective  
26 medical evidence, it does not appear that the ALJ actually offered any rationale to  
27 reject [Plaintiff’s] testimony.” (Pl.’s Br. 9 (citations omitted).) He points out that the  
28

1 ALJ also failed to connect any of Plaintiff’s testimony to the parts of the record  
2 supporting her decision thereby preventing the Court from determining whether the  
3 decision was supported by substantial evidence. (Pl.’s Br. 9 (citations omitted).) He  
4 further contends that the ALJ’s conclusory statement, without explanation, regarding  
5 the lack of consistency between Plaintiff’s testimony and the “other evidence” also is  
6 not legally sufficient as it is too vague to permit the Court to conclude the ALJ did  
7 not arbitrarily discredit his testimony. (Pl.’s Br. 10 (citations omitted).)

8 Plaintiff argues that, in any event, the ALJ’s discussion of the objective  
9 medical evidence supports Plaintiff’s testimony. (Pl.’s Br. 11.) For instance, as the  
10 ALJ noted, Plaintiff has symptoms including moderate right foot drop; mild left foot  
11 drop; “mild persistent non-fatigable ptosis [drooping upper eyelid], moderate  
12 weakness with eye closure bilaterally, unable to bury eyelids, positive for air leak  
13 with cheek puff”; sensory motor testing at 2/5 for right knee extension, 2/5 bilaterally  
14 for ankle dorsiflexion, and 3/5 “extensor hallicus longus” on right; positive  
15 percussion myotonia of the thenar eminences (located on the radial portion of the  
16 hand at the base of the thumb); and progressive weakness in the hand and knee  
17 extensors.<sup>3</sup> (Pl.’s Br. 11 (citing AR 20, 302).)

18 Defendant responds that “the ALJ reasonably found that Plaintiff’s testimony  
19 of greater limitations was not entirely consistent with the medical evidence and other  
20 evidence,” and “identified several inconsistencies in the record that supported this  
21 conclusion.” (Def’s. Br. 6.) For instance, Defendant notes the following: (1) the  
22 ALJ found Plaintiff’s allegations regarding difficulties walking, balance problems,  
23

---

24 <sup>3</sup> Although Plaintiff notes that the ALJ did *not* articulate Plaintiff’s “sporadic  
25 daily activities as reason to reject his testimony,” he nevertheless discusses why  
26 those activities fail to demonstrate that he is capable of maintaining substantial  
27 gainful work activity. (Pl.’s Br. 12-13.) Because this was *not* a reason articulated by  
28 the ALJ for discounting Plaintiff’s testimony, the Court declines to consider it.  
*Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003) (“We are constrained to  
review the reasons the ALJ asserts.”).

1 fatigue, and need for an assistive device to be inconsistent with provider reports that  
2 he had a normal gait and was active; (2) the objective clinical findings reflecting  
3 Plaintiff's strength as 2 out of 5 on right knee extension and ankle dorsiflexion on  
4 one examination, was inconsistent with other records showing "only mildly reduced  
5 strength,"<sup>4</sup> and "no more than moderate or mild foot drop"; and (3) the medical  
6 evidence of record was minimal. (Def's. Br. 6 (citing AR 18, 19-20, 296, 298, 301-  
7 02, 305).) Defendant suggests that despite the "meager evidence, the ALJ did not  
8 entirely reject Plaintiff's symptom allegations," and limited him to sedentary work  
9 with a number of limitations. (Def's. Br. 7-8.)

10 The ALJ's reasons for discounting Plaintiff's testimony as described by  
11 Defendant serve only to emphasize the fact that the ALJ relied *solely* on the medical  
12 evidence of record to discount that testimony. In fact, the ALJ simply restated her  
13 position -- that either Plaintiff's testimony was inconsistent and unsupported by the  
14 medical record, or that the medical record failed to support Plaintiff's testimony -- no  
15 fewer than six times, generally without tying his testimony to the record evidence.  
16 Beyond that, the ALJ provided no other legally sufficient reason to discount  
17 Plaintiff's subjective symptom testimony.

18 Even assuming the ALJ's reasons for discounting Plaintiff's testimony based  
19 on their inconsistency with the medical evidence of evidence were specific, clear,  
20 and convincing, and supported by substantial evidence -- which the Court does not  
21 decide -- the lack of supporting medical evidence cannot "form the sole basis for  
22 discounting . . . testimony." *See Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.  
23 2005); *Bunnell*, 947 F.2d at 345 ("[O]nce the claimant produces objective medical  
24 evidence of an underlying impairment, an [ALJ] may not reject a claimant's  
25

---

26 <sup>4</sup> The ALJ specifically acknowledged, however, that the later examiner "noted  
27 that [Plaintiff's] weakness had progressed since he was last seen." (AR 20.) Indeed,  
28 as previously noted, myotonic dystrophy is characterized by progressive muscle  
wasting and weakness. <https://medlineplus.gov> (last visited March 27, 2023).



1 subjective complaints based solely on a lack of objective medical evidence to fully  
2 corroborate the alleged severity” of his impairment).

3 Where, as here, the ALJ fails to state legally sufficient reasons for discounting  
4 a claimant’s subjective complaints, a court ordinarily cannot properly affirm the  
5 administrative decision. *See Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 884-85 (9th  
6 Cir. 2006). The Court is unable to conclude that the ALJ’s errors in evaluating  
7 Plaintiff’s subjective complaints were “harmless” or “inconsequential to the ultimate  
8 non-disability determination.” *Brown-Hunter*, 806 F.3d at 492.

9 Remand is warranted on this issue.

## 10 11 **V. REMAND FOR FURTHER PROCEEDINGS**

12 As the circumstances of this case suggest that further administrative  
13 proceedings could remedy the ALJ’s errors, remand is appropriate. *See Dominguez*  
14 *v. Colvin*, 808 F.3d 403, 407 (9th Cir. 2015) (“Unless the district court concludes that  
15 further administrative proceedings would serve no useful purpose, it may not remand  
16 with a direction to provide benefits.”); *Treichler v. Comm’r of Soc. Sec. Admin.*, 775  
17 F.3d 1090, 1101, n.5 (9th Cir. 2014) (remand for further administrative proceedings  
18 is the proper remedy “in all but the rarest cases”); *Harman v. Apfel*, 211 F.3d 1172,  
19 1180-81 (9th Cir. 2000) (remand for further proceedings rather than for the  
20 immediate payment of benefits is appropriate where there are “sufficient unanswered  
21 questions in the record”).

## 22 23 **VI. CONCLUSION**

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

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

26 **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) for further  
27 administrative proceedings consistent with this Memorandum Opinion and  
28



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Order; and  
(2) Judgment be entered in favor of Plaintiff.

**IT IS SO ORDERED.**

DATED: March 27, 2023



---

GAIL J. STANDISH  
UNITED STATES MAGISTRATE JUDGE