

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

ALFRED D. JOHNSON,)	Case No. SACV 15-01959-JEM
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	REVERSING DECISION OF THE
)	COMMISSIONER OF SOCIAL SECURITY
CAROLYN W. COLVIN,)	
Acting Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

PROCEEDINGS

On November 23, 2015, Alfred D. Johnson (“Plaintiff” or “Claimant”) filed a complaint seeking review of the decision by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s applications for Social Security Disability Insurance benefits and Supplemental Security Income (“SSI”) benefits. The Commissioner filed an Answer on March 15, 2016. On July 25, 2016, the parties filed a Joint Stipulation (“JS”). The matter is now ready for decision.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision must be reversed and this case

1 remanded for further proceedings in accordance with this Memorandum Opinion and Order and
2 with law.

3 **BACKGROUND**

4 Plaintiff is a 35-year-old male who applied for Social Security Disability Insurance
5 benefits on April 8, 2014, and Supplemental Security Income benefits on April 24, 2014,
6 alleging disability beginning September 27, 2011. (AR 21.) The ALJ determined that Plaintiff
7 has not engaged in substantial gainful activity since September 27, 2011, the alleged onset
8 date. (AR 23.)

9 Plaintiff's claims were denied initially on September 5, 2014 and on reconsideration on
10 December 12, 2014. (AR 21.) Plaintiff filed a timely request for hearing, which was held before
11 Administrative Law Judge ("ALJ") Joan Ho on April 7, 2015, in Orange, California. (AR 21.)
12 Plaintiff appeared and testified at the hearing without the assistance of an attorney or other
13 representative. (AR 21.) Vocational expert ("VE") Alan L. Ey also appeared and testified at the
14 hearing. (AR 21.)

15 The ALJ issued an unfavorable decision on May 11, 2015. (AR 21-30.) The Appeals
16 Council denied review on September 23, 2015. (AR 4-6.)

17 **DISPUTED ISSUES**

18 As reflected in the Joint Stipulation, Plaintiff raises the following disputed issues as
19 grounds for reversal and remand:

- 20 1. Whether the ALJ properly considered physician assistant Kathryn Thompson's
21 opinion.
- 22 2. Whether the ALJ properly considered Plaintiff's testimony.

23 **STANDARD OF REVIEW**

24 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether
25 the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v.
26 Chater, 80 F.3d 1273 , 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846
27 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and
28 based on the proper legal standards).

1 Substantial evidence means “more than a mere scintilla,’ but less than a
2 preponderance.” Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v.
3 Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a
4 reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S. at
5 401 (internal quotation marks and citation omitted).

6 This Court must review the record as a whole and consider adverse as well as
7 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006). Where
8 evidence is susceptible to more than one rational interpretation, the ALJ’s decision must be
9 upheld. Morgan v. Comm’r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).
10 “However, a reviewing court must consider the entire record as a whole and may not affirm
11 simply by isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882
12 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495
13 F.3d 625, 630 (9th Cir. 2007).

14 THE SEQUENTIAL EVALUATION

15 The Social Security Act defines disability as the “inability to engage in any substantial
16 gainful activity by reason of any medically determinable physical or mental impairment which
17 can be expected to result in death or . . . can be expected to last for a continuous period of not
18 less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner has
19 established a five-step sequential process to determine whether a claimant is disabled. 20
20 C.F.R. §§ 404.1520, 416.920.

21 The first step is to determine whether the claimant is presently engaging in substantial
22 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is engaging
23 in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S. 137,
24 140 (1987). Second, the ALJ must determine whether the claimant has a severe impairment or
25 combination of impairments. Parra, 481 F.3d at 746. An impairment is not severe if it does not
26 significantly limit the claimant’s ability to work. Smolen, 80 F.3d at 1290. Third, the ALJ must
27 determine whether the impairment is listed, or equivalent to an impairment listed, in 20 C.F.R.
28 Pt. 404, Subpt. P, Appendix I of the regulations. Parra, 481 F.3d at 746. If the impairment

1 meets or equals one of the listed impairments, the claimant is presumptively disabled. Bowen,
2 482 U.S. at 141. Fourth, the ALJ must determine whether the impairment prevents the
3 claimant from doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir.
4 2001). Before making the step four determination, the ALJ first must determine the claimant's
5 residual functional capacity ("RFC"). 20 C.F.R. § 416.920(e). The RFC is "the most [one] can
6 still do despite [his or her] limitations" and represents an assessment "based on all the relevant
7 evidence." 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The RFC must consider all of the
8 claimant's impairments, including those that are not severe. 20 C.F.R. §§ 416.920(e),
9 416.945(a)(2); Social Security Ruling ("SSR") 96-8p.

10 If the claimant cannot perform his or her past relevant work or has no past relevant work,
11 the ALJ proceeds to the fifth step and must determine whether the impairment prevents the
12 claimant from performing any other substantial gainful activity. Moore v. Apfel, 216 F.3d 864,
13 869 (9th Cir. 2000). The claimant bears the burden of proving steps one through four,
14 consistent with the general rule that at all times the burden is on the claimant to establish his or
15 her entitlement to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established
16 by the claimant, the burden shifts to the Commissioner to show that the claimant may perform
17 other gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support
18 a finding that a claimant is not disabled at step five, the Commissioner must provide evidence
19 demonstrating that other work exists in significant numbers in the national economy that the
20 claimant can do, given his or her RFC, age, education, and work experience. 20 C.F.R.
21 § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled and
22 entitled to benefits. Id.

23 THE ALJ DECISION

24 In this case, the ALJ determined at step one of the sequential process that Plaintiff has
25 not engaged in substantial gainful activity since September 27, 2011, the alleged onset date.
26 (AR 23.)

1 At step two, the ALJ determined that Plaintiff has the following medically determinable
2 severe impairments: chronic myelogenous leukemia (“CML”), generalized anxiety disorder, and
3 paroxysmal atrial fibrillation. (AR 23-24.)

4 At step three, the ALJ determined that Plaintiff does not have an impairment or
5 combination of impairments that meets or medically equals the severity of one of the listed
6 impairments. (AR 24-25.)

7 The ALJ then found that Plaintiff has the RFC to perform a range of sedentary work as
8 defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b), with the following limitations:

9 Claimant can lift and/or carry up to 20 pounds occasionally and 10 pounds
10 frequently; can stand and/or walk for a total of two hours, and sit for a total
11 of six hours, in an eight-hour workday; can occasionally push and/or pull
12 with the bilateral upper extremities; can occasionally operate foot controls
13 with the bilateral lower extremities; is limited to work involving simple, routine
14 and repetitive tasks but would be able to sustain attention and
15 concentration skills sufficient to carry out work-like tasks with reasonable
16 pace and persistence; and should have only occasional contact with
17 coworkers, supervisors and the general public.

18 (AR 25-27.) In determining the above RFC, the ALJ made an adverse credibility determination.
19 (AR 25.)

20 At step four, the ALJ found that Plaintiff is unable to perform his past relevant work as an
21 appointment clerk, customer complaint clerk, and usher. (AR 27-28.) The ALJ, however, also
22 found that, considering Claimant’s age, education, work experience, and RFC, there are jobs
23 that exist in significant numbers in the national economy that Claimant can perform, including
24 the jobs of final assembler, lens inserter, and document preparer. (AR 28-29.)

25 Consequently, the ALJ found that Claimant was not disabled, within the meaning of the
26 Social Security Act. (AR 29-30.)

DISCUSSION

1
2 The ALJ decision must be reversed. The ALJ properly rejected the opinion of physician
3 assistant Kathryn Thompson that Plaintiff is unable to work but erred in discounting Plaintiff's
4 subjective symptom allegations regarding medication side effects.

5 I. THE ALJ PROPERLY CONSIDERED THE MEDICAL EVIDENCE

6 The only aspect of the medical evidence challenged by Plaintiff is the ALJ's rejection of
7 physician assistant Kathryn Thompson's opinion that Plaintiff is unable to work because of
8 medication side effects. The ALJ, however, rejected Ms. Thompson's opinion for germane
9 reasons supported by substantial evidence.

10 A. Relevant Federal Law

11 The ALJ's RFC is not a medical determination but an administrative finding or legal
12 decision reserved to the Commissioner based on consideration of all the relevant evidence,
13 including medical evidence, lay witnesses, and subjective symptoms. See SSR 96-5p; 20
14 C.F.R. § 1527(e). In determining a claimant's RFC, an ALJ must consider all relevant evidence
15 in the record, including medical records, lay evidence, and the effects of symptoms, including
16 pain reasonably attributable to the medical condition. Robbins, 446 F.3d at 883.

17 In evaluating medical opinions, the case law and regulations distinguish among the
18 opinions of three types of physicians: (1) those who treat the claimant (treating physicians); (2)
19 those who examine but do not treat the claimant (examining physicians); and (3) those who
20 neither examine nor treat the claimant (non-examining, or consulting, physicians). See 20
21 C.F.R. §§ 404.1527, 416.927; see also Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). In
22 general, an ALJ must accord special weight to a treating physician's opinion because a treating
23 physician "is employed to cure and has a greater opportunity to know and observe the patient
24 as an individual." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citation omitted). If
25 a treating source's opinion on the issues of the nature and severity of a claimant's impairments
26 is well-supported by medically acceptable clinical and laboratory diagnostic techniques, and is
27 not inconsistent with other substantial evidence in the case record, the ALJ must give it
28 "controlling weight." 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

1 Where a treating doctor's opinion is not contradicted by another doctor, it may be
2 rejected only for "clear and convincing" reasons. Lester, 81 F.3d at 830. However, if the
3 treating physician's opinion is contradicted by another doctor, such as an examining physician,
4 the ALJ may reject the treating physician's opinion by providing specific, legitimate reasons,
5 supported by substantial evidence in the record. Lester, 81 F.3d at 830-31; see also Orn, 495
6 F.3d at 632; Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002). Where a treating
7 physician's opinion is contradicted by an examining professional's opinion, the Commissioner
8 may resolve the conflict by relying on the examining physician's opinion if the examining
9 physician's opinion is supported by different, independent clinical findings. See Andrews v.
10 Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995); Orn, 495 F.3d at 632. Similarly, to reject an
11 uncontradicted opinion of an examining physician, an ALJ must provide clear and convincing
12 reasons. Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005). If an examining physician's
13 opinion is contradicted by another physician's opinion, an ALJ must provide specific and
14 legitimate reasons to reject it. Id. However, "[t]he opinion of a non-examining physician cannot
15 by itself constitute substantial evidence that justifies the rejection of the opinion of either an
16 examining physician or a treating physician"; such an opinion may serve as substantial
17 evidence only when it is consistent with and supported by other independent evidence in the
18 record. Lester, 81 F.3d at 830-31; Morgan, 169 F.3d at 600.

19 **B. Analysis**

20 Plaintiff alleges disability beginning September 27, 2011 (AR 21), but the medical
21 evidence through September 2014 does not support disability. On April 14, 2012, Plaintiff
22 underwent a complete orthopedic evaluation performed by Dr. Randy Clark, who assessed a
23 medium work RFC despite complaints of low back pain. (AR 26, 349-353.) On July 19, 2012,
24 Plaintiff underwent a complete psychiatric evaluation by Dr. Sean Buckley, who diagnosed
25 generalized anxiety disorder. (AR 23, 24-26, 358-362.) Plaintiff's symptoms, however, were no
26 more than moderate in degree and Claimant received only inconsistent and conservative
27 mental health care for the period under review. (AR 24.) Dr. Buckley opined Plaintiff's
28 symptoms would not preclude the performance of work involving simple repetitive tasks and

1 limited interaction. (AR 26.) The ALJ gave substantial weight to Dr. Buckley's mental RFC
2 assessment (AR 27) and incorporated it into Plaintiff's RFC, which limits Plaintiff to simple,
3 routine, and repetitive tasks and only occasional contact with co-workers, supervisors, and the
4 general public. (AR 25.) The evidence of record documents no treatment for any impairment
5 between July 2012 and September 2014. (AR 26.)

6 In September and October 2014, however, Plaintiff's medical condition worsened
7 significantly when he was diagnosed with chronic myelogenous leukemia ("CML") and
8 paroxysmal atrial fibrillation. (AR 23, 26.) Plaintiff began chemotherapy with Sprycel in
9 December 2014 and also takes Diltiazem/Digoxin for his heart condition. (AR 378-79.) The
10 medications have resulted in fatigue, nausea, and diarrhea. (AR 457-459.) He also has
11 suffered weight loss, rectal bleeding, anemia, and lumps under his nipple due to his
12 medications. (AR 457-459.) Nonetheless, Dr. John Godes, a consulting internist who
13 examined Plaintiff on March 4, 2015, opined that Plaintiff could perform light work. (AR 26,
14 467-472.) Dr. Godes noted that Plaintiff had been feeling weak and tired, his weight dropped
15 from 140 pounds to 116, and he was suffering from nausea, diarrhea, and rectal bleeding. (AR
16 467, 471.) Dr. Godes limited Plaintiff to light work and 2 hours of walking and standing in an 8
17 hour day because of "Claimant's generalized weakness, secondary to his condition, and side
18 effects of medications." (AR 472.)

19 The ALJ found Dr. Godes' light work RFC consistent with the ALJ's sedentary RFC and
20 with the evidence of record as a whole, "including due consideration for the side effects of the
21 Claimant's treatment modalities." (AR 27.) The ALJ also found that Claimant's atrial fibrillation
22 symptoms have occurred only intermittently and his leukemia does not of itself result in
23 functional deficiencies. (AR 27.) The ALJ made a specific finding that Plaintiff's medication
24 side effects had been taken into account. (AR 27.)

25 Plaintiff does not directly challenge any of the above findings regarding the objective
26 medical evidence. Plaintiff, however, challenges the ALJ's rejection of the opinion of Kathryn
27 Thompson, a physician's assistant to Plaintiff's oncologist Dr. Tiberio Lindgren. (AR 26, 27.) In
28 a February 17, 2015 letter, Ms. Thompson stated that Plaintiff has "endured" the medication

1 side effects of “daily nausea, diarrhea and weight loss, rash, fatigue, headaches, body aches,
2 dizziness, erectile dysfunction and palpitations.” (AR 466.) She also noted rectal bleeding .
3 (AR 466.) She opined that Plaintiff is “unable to sustain a job due to his treatment related side
4 effects in addition to his various medical conditions.” (AR 466.) The ALJ afforded
5 Ms. Thompson’s opinion “little weight” because Claimant’s “treatment records as a whole do
6 not reflect the degree of limiting symptomology cited by Ms. Thompson.” (AR 27.)

7 The ALJ, of course, is not required to accept or give controlling or special weight to any
8 opinion that a claimant is unable to work, as the issue of whether a claimant is unable to work
9 is an administrative determination reserved to the Commissioner. See 20 C.F.R.
10 § 404.1527(d)(1); McLeod v. Astrue, 640 F.3d 881, 884-85 (9th Cir. 2011). Although the issue
11 of ability to work is reserved to the Commissioner, a treating source opinion that a claimant is
12 unable to work nonetheless must be considered. SSR 96-5p, at *3 (1996 WL 374183);
13 Carmona v. Astrue, 2012 WL 3257829, at *5 (C.D. Cal. Aug. 8, 2012). Similarly, as a lay
14 witness, Ms. Thompson’s testimony is “competent evidence that an ALJ must take into
15 account” unless the ALJ “expressly determines to disregard such testimony and gives reasons
16 germane to each witness for doing so.” Lewis v. Apfel, 236 F.3d 503, 511-12 (9th Cir. 2001);
17 Smolen, 80 F.3d at 1288-89. Inconsistency with the objective medical evidence is a germane
18 reason for discounting lay witness testimony. Bayliss, 427 F.3d at 1218. There is objective
19 medical evidence, most notably Dr. Godes’ RFC assessment, that contradicts Ms. Thompson’s
20 opinion that Plaintiff is unable to work.

21 Thus, the ALJ did not err in rejecting Ms. Thompson’s opinion that Plaintiff is unable to
22 work for a germane reason supported by substantial evidence.

23 **II. THE ALJ ERRED IN DISCOUNTING PLAINTIFF’S SUBJECTIVE**
24 **SYMPTOM ALLEGATIONS**

25 Claimant contends that the ALJ improperly rejected Plaintiff’s subjective symptom
26 allegations. The Court agrees.

27 *///*

28 *///*

1 **A. Relevant Federal Law**

2 The test for deciding whether to accept a claimant’s subjective symptom testimony turns
3 on whether the claimant produces medical evidence of an impairment that reasonably could be
4 expected to produce the pain or other symptoms alleged. Bunnell v. Sullivan, 947 F.2d 341,
5 346 (9th Cir. 1991); see also Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998); Smolen, 80
6 F.3d at 1281-82 esp. n.2. The Commissioner may not discredit a claimant’s testimony on the
7 severity of symptoms merely because they are unsupported by objective medical evidence.
8 Reddick, 157 F.3d at 722; Bunnell, 947 F.2d at 343, 345. If the ALJ finds the claimant’s pain
9 testimony not credible, the ALJ “must specifically make findings which support this conclusion.”
10 Bunnell, 947 F.2d at 345. The ALJ must set forth “findings sufficiently specific to permit the
11 court to conclude that the ALJ did not arbitrarily discredit claimant’s testimony.” Thomas, 278
12 F.3d at 958; see also Rollins, 261 F.3d at 856-57; Bunnell, 947 F.2d at 345-46. Unless there is
13 evidence of malingering, the ALJ can reject the claimant’s testimony about the severity of a
14 claimant’s symptoms only by offering “specific, clear and convincing reasons for doing so.”
15 Smolen, 80 F.3d at 1283-84; see also Reddick, 157 F.3d at 722. The ALJ must identify what
16 testimony is not credible and what evidence discredits the testimony. Reddick, 157 F.3d at
17 722; Smolen, 80 F.3d at 1284.

18 **B. Analysis**

19 In determining Plaintiff’s RFC, the ALJ concluded that Plaintiff’s medically determinable
20 impairments reasonably could be expected to cause the alleged symptoms. (AR 25.) The ALJ,
21 however, also found that Plaintiff’s statements regarding the intensity, persistence, and limiting
22 effects of these symptoms are “not entirely credible.” (AR 25.) Because the ALJ did not make
23 any finding of malingering, he was required to provide clear and convincing reasons supported
24 by substantial evidence for discounting Plaintiff’s credibility. Smolen, 80 F.3d at 1283-84;
25 Tommasetti v. Astrue, 533 F.3d 1035, 1039-40 (9th Cir. 2008). The ALJ failed to do so.

26 The ALJ found that the medical evidence of record supported the sedentary RFC
27 assessed. (AR 27.) An ALJ is permitted to consider whether there is a lack of medical
28 evidence to corroborate a claimant’s alleged symptoms so long as it is not the only reason for

1 discounting a claimant's credibility. Burch v. Barnhart, 400 F.3d 676, 680-81 (9th Cir. 2005).
2 As already noted, there is objective medical evidence supporting the ALJ's RFC, particularly Dr.
3 Godes' opinion.

4 Inconsistency with the medical evidence, however, is insufficient by itself to support
5 rejection of a claimant's subjective symptoms. Burch, 409 F.3d at 680-81. The rationale for
6 this restriction is that pain testimony may establish greater restrictions than can medical
7 evidence alone. Id.; SSR 96-7p (1996 WL 374186). The same rule applies to medication side
8 effects subjective testimony. Gallegos v. Astrue, 2010 WL 330242, at *2-3 (C.D. Cal. Jan. 20,
9 2010). Complaints of medication side effects must be accompanied by medical evidence and
10 may be disregarded if unsupported by clinical findings. Id.

11 In this case, the ALJ cites only medical evidence in rejecting the credibility of Plaintiff's
12 subjective testimony regarding medication side effects. There is a conclusory reference to "the
13 claimant's reported activity level," but this finding is not explained or supported by any other
14 evidence in the ALJ decision nor are any activities identified that are inconsistent with disability.
15 Although daily activities inconsistent with subjective symptom allegations would be a basis for
16 discounting credibility, Bunnell, 947 F.2d at 345-346, here the Commissioner concedes that the
17 ALJ failed to identify any inconsistent activities. The Commissioner regarded the omission as
18 harmless error because the ALJ enumerated other reasons for discounting Plaintiff's credibility.
19 All of these other reasons, however, are subsets of the medical evidence. They are: (1) the
20 objective medical evidence contradicts Plaintiff's subjective symptom allegations, (2) Plaintiff's
21 treatment records do not corroborate his testimony and (3) Plaintiff's subjective symptom
22 allegations are inconsistent with Dr. Godes' opinion. (JS 31-36.) Thus, the ALJ did not set
23 forth any reasons for discounting Plaintiff's subjective symptom allegations other than
24 inconsistency with the medical evidence.

25 The Commissioner contends that the ALJ adequately took into account Plaintiff's
26 medication side effects. The Court does not agree. Let us examine the evidence. At the
27 hearing, Plaintiff testified that he is unable to work because of medication side effects. (AR
28 67.) He identified nausea (AR 54), testified his weight was down to 122 pounds (AR 55), and

1 he has stopped going to school because he is always tired and fatigued and his brain is
2 scattered. (AR 57.) He also testified, “And I’m always nauseated. I have to use the restroom
3 all the time. It’s embarrassing. I used the restroom on myself two weeks ago a little bit,
4 because I couldn’t get to the restroom in time.” (AR 57.) He has to have his blood drawn all
5 the time. (AR 57.) He testified he cannot go to school because of diarrhea and fatigue. (AR
6 60.) Medications do not relieve his nausea and vomiting. (AR 61.) He has diarrhea three or
7 four times a day, “every day, all day.” (AR 63.) He also suffers from headaches, blackouts,
8 breast sensitivity, and rashes. (AR 67-68.) Plaintiff also submitted a statement to the Appeals
9 Council detailing again his medication side effects. (AR 306-308.) He provided a list of all his
10 side effects.¹ (AR 309.) When the ALJ asked the VE if Plaintiff would be able to work, if he
11 required three unscheduled breaks of 10 minutes in addition to regularly scheduled breaks, the
12 VE said no. (AR 76-77.)

13 Plaintiff’s medication side effects are documented in his treatment records. Dr. Godes
14 acknowledged that Plaintiff was feeling weak and tired, his weight dropped from 140 to 118
15 pounds, and he has nausea, diarrhea, and rectal bleeding. (AR 467.) The February 20, 2015
16 treatment note of the Hematology-Oncology Medical Group of Orange County documents
17 rectal bleeding, continuing breast sensitivity, and loose stools more frequent (AR 457), and
18 excessive fatigue, headaches, and nausea/loose stools. (AR 458.) The note also indicates
19 rectal bleeding and a prescription of Xofran for nausea. (AR 458.) The February 17, 2015
20 letter from physician assistant Kathryn Thompson reports daily nausea, diarrhea and weight
21 loss, rash, fatigue, headaches, body aches, dizziness, erectile dysfunction, palpitations, and
22 rectal bleeding. (AR 466.) The letter also reports multiple trips to the ER for chest pain and
23 palpitations. (AR 466.) A December 2014 treatment note indicated occasional difficulty of
24 exertion (“DOE”) episodes, one of which landed him in the ER. (AR 378.) The record also

25
26
27
28

¹ When the Appeals Council denies review, the ALJ’s decision becomes the final decision of the Commissioner, and the Court reviews that decision for substantial evidence based on the record as a whole, including any new evidence submitted to and considered by the Appeals Council. Brewes v. Comm’r, 682 F.3d 1157, 1161-62 (9th Cir. 2011).

1 contains a letter dated April 16, 2015, from occupational therapist Satch Purcell who reported
2 the Claimant's decreased mobility and inability to do everyday basic activities subsequent to his
3 chemotherapy. (AR 27, 303.) In a May 19, 2015 medical note from St. Joseph's Medical
4 Center that the Appeals Council made part of the record, Plaintiff's cardiologist Dr. Michael
5 Chan reported that Plaintiff had shortness of breath ("SOB"), was fatigued, and had breast
6 tenderness.² (AR 486.) He also reported fatigue and gastrointestinal bleeding. (AR 486.) As
7 noted by the ALJ, social worker Christine Plantier submitted a letter dated January 15, 2015,
8 indicating Plaintiff had withdrawn from school. (AR 26, 280.)

9 SSR 96-7p, at *2 indicates that an ALJ cannot make a single conclusory statement that
10 "the individual's allegations have been considered" or that "the allegations are (or are not)
11 credible" when evaluating subjective symptom testimony. The ALJ's determination must
12 contain specific reasons supported by evidence in the record to make clear what weight was
13 given to the individual's statements and the reasons for that weight. Id. Here, the ALJ's
14 statement that the Claimant's medication side effects "have been taken into account" in
15 formulating the ALJ's RFC assessment (AR 27) is plainly insufficient by itself.

16 The ALJ does offer other reasons. The ALJ gave Dr. Godes' sedentary RFC opinion
17 great weight because it is based on his clinical observations and is generally consistent with the
18 evidence of record "including due consideration for the side effects of the claimant's treating
19 modalities." (AR 27.) Dr. Godes, however, did not review any medical records. (AR 467.) The
20 Ninth Circuit gives limited weight to an opinion based on a one time examination without review
21 of medical records. Reddick, 157 F.3d at 727. Even the ALJ did not accept Dr. Godes' light
22 work RFC (AR 26), choosing instead a sedentary RFC. (AR 27.) In any event, Dr. Godes' RFC
23 assessment, even if fully credited, is a medical opinion legally insufficient by itself to support
24 rejection of Plaintiff's credibility.

25
26
27
28

² The one page medical note states it is 1 of 3 pages. The Court assumes there were two more pages not included.

1 The ALJ's most specific reason for questioning Plaintiff's credibility is that the evidence
2 of record does not corroborate excessive fatigue. (AR 27.) In fact, the ALJ states that Plaintiff
3 denied excessive fatigue in reports to his oncologist in October and December 2014, and there
4 are no reports of nausea and diarrhea in the October through December 2 medical records.
5 (AR 27.) An ALJ can discount a claimant's credibility for failure to tell physicians of side effects.
6 Eicholtz v. Astrue, 2008 WL 4642976, at *3 (C.D. Cal. Oct. 20, 2008). Plaintiff, however,
7 consistently told his physicians and others of his medication side effects after his
8 chemotherapy began. The problem with the ALJ's reasoning is that Plaintiff did not begin the
9 Sprycel chemotherapy, which is the cause of Plaintiff's fatigue, nausea, and diarrhea, until on
10 or after the December visit. Nor is it accurate to say that the only reports of excessive fatigue
11 and diarrhea appear to be in Ms. Thompson's notes. (AR 27.) Dr. Godes, on March 4, 2015,
12 after chemotherapy had begun, reported generalized weakness, nausea, and diarrhea. (AR
13 467, 471, 472.) Dr. Chan also reported fatigue. (AR 486.)

14 The ALJ also states that a January 2015 treatment note reflects no gastrointestinal
15 complaints. (AR 27.) The problem with this finding is that Dr. Godes on March 4, 2015,
16 acknowledged Plaintiff's GI symptoms of nausea and diarrhea. (AR 471.) So did the
17 oncologist's office in February 2015. (AR 458, 459, 466.) Dr. Chan also recognized
18 gastrointestinal bleeding. (AR 486.)

19 The ALJ has not provided clear and convincing reasons supported by substantial
20 evidence for discounting Plaintiff's credibility. There is no dispute that Plaintiff has the
21 medically determinable severe impairment of leukemia and atrial fibrillation. The medical
22 evidence and lay witness testimony subsequent to the inception of Plaintiff's chemotherapy
23 supports the existence of the medication side effects alleged by Plaintiff. The ALJ, therefore,
24 was required to proffer clear and convincing reasons supported by substantial evidence for
25 rejecting Plaintiff's subjective symptom testimony about the severity of his medication side
26 effects. The ALJ, however, only offers arguments based on medical evidence or lack thereof
27 that prove on analysis to be contrary to the record or inapplicable, and in any event are
28

1 insufficient alone. The ALJ's reasons for discounting Plaintiff's credibility for the period after
2 December 2014 are neither clear and convincing nor supported by substantial evidence.

3 The Court perceives another deficiency in the ALJ decision. The ALJ addressed
4 individual medication side effects such as fatigue, nausea, diarrhea, and gastrointestinal
5 complaints but, other than a generalized statement that the RFC takes into account Plaintiff's
6 medication side effects (AR 27), the ALJ does not appear to have considered the combined
7 effect of these side effects. An ALJ must consider a claimant's illness in combination and "not
8 be fragmentized in evaluating the effects." Beecher v. Heckler, 756 F.2d 693, 694-95 (9th Cir.
9 1985). An ALJ must consider the combined effect of all of a claimant's impairments in his or
10 her ability to function "without regard to whether each alone was sufficiently severe." Smolen,
11 80 F.3d at 1290. Claimant set forth a list of medication side effects. (AR 309.) These side
12 effects in combination were sufficient to compel Plaintiff to drop out of school. (AR 280, 303.)
13 The ALJ did not offer any explanation how a claimant who is unable to attend school because
14 of his impairments and limitations can work a full-time job.

15 The ALJ erred in discounting Plaintiff's subjective symptom allegations regarding his
16 medication side effects. Thus, the ALJ's RFC is not supported by substantial evidence. Nor is
17 the ALJ's finding at step five of the sequential process that Plaintiff is capable of performing
18 work in the national economy.

19 **III. REMAND IS APPROPRIATE**

20 Plaintiff argues that, under the "credit as true" doctrine, he is entitled to immediate
21 payment of benefits rather than a remand for further proceedings. Garrison v. Colvin, 759 F.3d
22 995, 1020 (9th Cir. 2014). As Plaintiff acknowledges, however, before crediting as true
23 rejected evidence, a district court must determine that the record has been fully developed and
24 further administrative proceedings would serve no useful purpose. Id.; see also Dominguez v.
25 Colvin, 808 F.3d 403, 409 (9th Cir. 2015) (district court must assess whether there are
26 outstanding issues requiring resolution before crediting improperly rejected testimony as true).

27 Here, there is an issue that is insufficiently developed and unresolved that bears on
28 Plaintiff's eligibility for benefits, namely the 12 month duration requirement. See 20 C.F.R. §

1 404.1509 (“Unless your impairment is expected to result in death, it must have lasted or must
2 be expected to last for a continuous period of at least 12 months”). Plaintiff was diagnosed
3 with leukemia and atrial fibrillation in September-October 2014, and medication side effects did
4 not begin until December 2014. The hearing in this case was held on April 7, 2015, the ALJ
5 decision was issued May 11, 2015, and the Appeals Council denied review on September 23,
6 2015. The Commissioner asserts that Plaintiff experienced side effects for at most five
7 months, but cites no evidence and offers no explanation for this assertion, nor does it address
8 whether those side effects would be “expected to last for a continuous period for at least 12
9 months” as the regulation provides. Additionally, the ALJ never addressed the duration
10 requirement in her decision. Plaintiff correctly notes that the Court is constrained to review only
11 the reasons the ALJ asserts. Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003). Plaintiff
12 testified at the hearing that he has to take his CML medication for the rest of his life (AR 65),
13 but there is no medical opinion in the record addressing how long Plaintiff will have to take his
14 medications and whether the side effects he has been experiencing since December 2014 are
15 likely to continue for 12 months through December 2015. The ALJ had a duty to fully develop
16 the record to assure the Claimant’s interests are considered, Tonapetyan v. Halter, 242 F.3d
17 1144, 1150 (9th Cir. 2001), particularly here where the Claimant was unrepresented by counsel
18 through the hearing stage and expressed his lack of understanding of the process. (AR 46-47,
19 51, 306.) The Court therefore is remanding for further proceedings on the duration
20 requirement.

21 **ORDER**

22 IT IS HEREBY ORDERED that Judgment be entered reversing the decision of the
23 Commissioner of Social Security and remanding this case for further proceedings in
24 accordance with this Memorandum Opinion and Order and with law.

25
26 DATED: August 29, 2016

27 /s/ John E. McDermott
28 JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE