

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
SOUTHERN DIVISION

DALLAS SCOTT HERRING,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,¹

Defendant.

Case No. SA CV 16-01230-DFM

MEMORANDUM OPINION
AND ORDER

Dallas Scott Herring (“Plaintiff”) appeals from the Social Security Commissioner’s final decision denying his application for Supplemental Security Income (“SSI”). For the reasons discussed below, the Commissioner’s decision is affirmed and this matter is dismissed with prejudice.

///

///

///

¹ On January 23, 2017, Berryhill became the Acting Social Security Commissioner. Thus, she is automatically substituted as defendant under Federal Rule of Civil Procedure 25(d).

1 I.

2 BACKGROUND

3 Plaintiff filed an application for SSI on May 3, 2013, alleging disability
4 beginning on April 15, 2004. Administrative Record (“AR”) 203-08. After his
5 application was denied, he requested a hearing before an administrative law
6 judge (“ALJ”). AR 83-85. At a November 7, 2013 hearing, the ALJ heard
7 testimony by a vocational expert (“VE”), an impartial medical expert, and
8 Plaintiff, who was represented by counsel. AR 38-54.

9 In a written decision issued January 15, 2015, the ALJ denied Plaintiff’s
10 claim for benefits. AR 15-37. He found that Plaintiff had medically-
11 determinable severe impairments consisting of degenerative disc disease,
12 degenerative arthritis of the lumbar spine, and bipolar disorder. AR 20. He
13 found that despite those impairments, Plaintiff retained the residual functional
14 capacity (“RFC”) to perform light work with the following limitations: he can
15 “occasionally lift and carry 20 pounds and frequently lift and carry 10 pounds;
16 he can stand and walk with normal breaks for a total of six hours of an eight-
17 hour day; he can sit with normal breaks for a total of six hours of an eight-hour
18 day; he is limited to simple routine tasks with a reasoning level of 3 or below;
19 object oriented so no work with the general public, in a habitual setting; and no
20 safety related operations.” AR 23.

21 Based on the VE’s testimony, the ALJ found that given Plaintiff’s age,
22 education, work experience, and RFC, Plaintiff would be able to perform the
23 requirements of representative occupations such as packer, with
24 “approximately 344,500 jobs available nationally,” or assembler, with
25 “approximately 83,000 jobs available in the national economy.” AR 32. The
26 ALJ found that because Plaintiff could perform jobs that existed in significant
27 numbers in the national economy, he was not disabled. AR 32-33.

28 ///

1 The Appeals Council denied review of the ALJ's decision, which
2 became the final decision of the Commissioner. AR 1-7; see 20 C.F.R.
3 § 416.1481. Plaintiff then sought judicial review in this Court. Dkt. 1.

4 II.

5 DISCUSSION

6 Plaintiff argues that (1) the ALJ failed to properly consider two
7 physicians' opinions on Plaintiff's mental limitations and (2) the VE's job
8 availability estimates conflict with County Business Patterns ("CBP") data. See
9 Joint Stipulation ("JS") at 4. For the reasons discussed below, the Court finds
10 that the ALJ did not err.

11 A. Evidence of Mental Limitations

12 Plaintiff claims that the ALJ improperly gave greater weight to the
13 opinion of the testifying, impartial medical expert than the opinions of an
14 examining psychologist and a state-agency consulting psychologist. See JS at
15 10-12.

16 1. Relevant Facts

17 a. Dr. Howard S. Leizer: State-Agency Consulting 18 Psychologist

19 Dr. Leizer was the state-agency psychologist who reviewed Plaintiff's
20 medical records when Plaintiff's application was initially denied. AR 66.
21 Regarding social interaction limitations, Dr. Leizer determined that Plaintiff
22 was not significantly limited in his ability to ask simple questions, request
23 assistance, and maintain socially appropriate behavior. Id. He found that
24 Plaintiff was moderately limited in his ability to interact appropriately with the
25 general public, accept instructions, respond appropriately to criticism from
26 supervisors, and get along with coworkers or peers without distracting them.
27 Id. In sum, he found that Plaintiff "would be able to interact with the public
28 only for brief periods. Criticism from supervisors would likely exacerbate

1 [Plaintiff's] symptoms. His best performance would be realized in a well-
2 spaced location with only a few co-workers." Id.

3 Regarding adaptation limitations, Dr. Leizer found that Plaintiff was not
4 significantly limited in his ability to be aware of normal hazards, take
5 appropriate precautions, travel in unfamiliar places, and use public
6 transportation; he found that Plaintiff was moderately limited in his ability to
7 respond appropriately to changes in the work setting, set realistic goals, and
8 make plans independently of others. Id. In sum, he found that Plaintiff "would
9 need assistance in adapting to change, unless infrequent or implemented
10 gradually." Id.

11 b. Dr. Sohini P. Parikh: Examining Psychiatrist

12 Dr. Parikh conducted a full psychiatric examination of Plaintiff. AR 336-
13 43. She found that "from a psychiatric standpoint, [Plaintiff] did not seem to
14 have moderate impairment in the ability to reason and make social,
15 occupational, and personal adjustments." AR 342. Further, she found no
16 mental limitations in social functioning, daily activities, concentration,
17 persistence, pace, and emotional deterioration in work-like situations. AR 342.
18 Dr. Parikh found moderate impairments in Plaintiff's ability to understand,
19 carry out, and remember both simple and complex instructions, respond to
20 coworkers, supervisors, and the general public, respond appropriately to usual
21 work situations, and deal with changes in a routine work setting. AR 342-43.
22 Additionally, she found that Plaintiff had a good relationship with family and
23 friends, was cooperative during the examination, was able to focus attention,
24 had normal speech patterns, and could follow simple instructions, although his
25 attention was poor and his mood was depressed. AR 338-40. She noted that in
26 addition to her own examination, she had reviewed records from another
27 physician's examination. AR 337.

28 ///

1 c. Dr. Joseph Malancharuvil: Impartial Medical Expert

2 Dr. Malancharuvil is a licensed clinical psychologist. AR 42. At
3 Plaintiff's hearing, Dr. Malancharuvil testified that Plaintiff has no limitations
4 of daily living, mild-to-moderate limitations in social functioning, and "retains
5 the capacity for simple work, up to four or five step instructions in a routine
6 setting." AR 43-44. Dr. Malancharuvil came to this conclusion based on a
7 review of the entire record. AR 42-45. He disagreed with an assessment by
8 Plaintiff's treating physician that Plaintiff could not work steadily because it
9 contradicted Dr. Parikh's psychiatric evaluation, which found that Plaintiff
10 had moderate, but not marked, functional limitations. AR 42-45. He further
11 noted that Plaintiff has a recorded history of faking symptoms and should have
12 been able to continue taking his medication. AR 43-45. Dr. Malancharuvil
13 noted that Plaintiff "has a word problem and . . . some bipolar features to his
14 mental status. But [in] other ways, his mental status is intact." AR 46. He
15 therefore concluded that Plaintiff could consistently work without being
16 frequently absent. AR 46.

17 d. ALJ Decision

18 The ALJ found that Plaintiff's mental impairments did not constitute a
19 disability despite his moderate social limitations. AR 21-22. He noted that
20 "[t]he opinions of the impartial psychological medical expert, independent
21 psychiatric consultative examiner, and the [state-agency] psychological
22 consultants support this finding" and were consistent with the record. AR 22,
23 27-28. The ALJ also noted that on a daily basis, Plaintiff finds food,
24 panhandles, travels alone, does not bother others, gets along with authority
25 figures, and has never been dismissed from a job because of his trouble with
26 other people. AR 22. The ALJ's RFC to perform light work with some
27 limitations was "supported by the opinions of the impartial medical expert,
28 independent consultative examiners and the [state-agency] medical

1 consultants, the treatment record, the claimant's [activities of daily living], the
2 Social Security Administration field office interviewer's observations, and the
3 claimant's demeanor and testimony at the hearing." AR 31.

4 The ALJ assessed the opinions of Dr. Malancharuvil, Dr. Parikh, and
5 Dr. Leizer as follows. The ALJ gave Dr. Malancharuvil's opinion "great
6 weight because he is an impartial medical expert, he is a licensed clinical
7 psychologist, he reviewed the [Plaintiff's] records, and he is familiar with the
8 Social Security Administration's precise disability guidelines. More
9 importantly, his opinion is consistent with the medical record as a whole." AR
10 27. The ALJ gave "Dr. Parikh's opinion significant weight (less than great, but
11 more than substantial or little) because she is an independent consultative
12 examiner, she examined the [Plaintiff], she is familiar with the Social Security
13 Administration's precise disability guidelines, and her opinion is consistent
14 with her exam findings and the medical evidence record as a whole. Dr.
15 Parikh's opinion is reasonable but given less weight than Dr. Malancharuvil's
16 opinion because Dr. Malancharuvil is an impartial medical expert who
17 reviewed the entire medical record." AR 28. Finally, the ALJ gave Dr. Leizer's
18 opinions "substantial weight because he reviewed the [Plaintiff's] records, he is
19 familiar with the Social Security Administration's precise disability guidelines,
20 and his opinion is consistent with the medical record as a whole. His opinion is
21 reasonable based on the medical evidence record but it is given less weight
22 because he is not an impartial medical expert and he did not examine the
23 claimant." AR 28.

24 **2. Applicable Law**

25 Three types of physicians may offer opinions in Social Security cases:
26 those who treated the plaintiff, those who examined but did not treat the
27 plaintiff, and those who did neither. See 20 C.F.R. § 416.927(c); Lester v.
28

1 Chater, 81 F.3d 821, 830 (9th Cir. 1995) (as amended Apr. 9, 1996).² The
2 weight accorded to each physician’s opinion depends on several factors,
3 including whether the opinion is consistent with the record and accompanied
4 by adequate explanation, the nature and extent of the treatment relationship,
5 and the degree to which it provides supporting explanations that consider all
6 pertinent evidence in a Plaintiff’s claim. § 416.927(c). A treating physician’s
7 opinion is generally entitled to more weight than an examining physician’s
8 opinion, which is generally entitled to more weight than a nonexamining
9 physician’s. Lester, 81 F.3d at 830.

10 “To evaluate whether an ALJ properly rejected a medical opinion, in
11 addition to considering its source, the court considers whether (1)
12 contradictory opinions are in the record, and (2) clinical findings support the
13 opinions. An ALJ may reject an uncontradicted opinion of a treating or
14

15 ² Social Security Regulations regarding the evaluation of opinion
16 evidence were amended effective March 27, 2017. Where, as here, the ALJ’s
17 decision is the final decision of the Commissioner, the reviewing court
18 generally applies the law in effect at the time of the ALJ’s decision. See Lowry
19 v. Astrue, 474 F. App’x 801, 805 n.2 (2d Cir. 2012) (applying version of
20 regulation in effect at time of ALJ’s decision despite subsequent amendment);
21 Garrett ex rel. Moore v. Barnhart, 366 F.3d 643, 647 (8th Cir. 2004) (“We
22 apply the rules that were in effect at the time the Commissioner’s decision
23 became final.”); Spencer v. Colvin, No. 15-05925, 2016 WL 7046848, at *9 n.4
24 (W.D. Wash. Dec. 1, 2016) (“42 U.S.C. § 405 does not contain any express
25 authorization from Congress allowing the Commissioner to engage in
26 retroactive rulemaking”); cf. Revised Medical Criteria for Determination of
27 Disability, Musculoskeletal System and Related Criteria, 66 Fed. Reg. 58010,
28 58011 (Nov. 19, 2001) (“With respect to claims in which we have made a final
decision, and that are pending judicial review in Federal court, we expect that
the court’s review of the Commissioner’s final decision would be made in
accordance with the rules in effect at the time of the final decision.”).
Accordingly, the Court applies the versions of 20 C.F.R. §§ 416.927 that was in
effect at the time of the ALJ’s August 2014 decision.

1 examining medical professional only for ‘clear and convincing’ reasons.”
2 Nicholas v. Colvin, No. 13-2551, 2014 WL 5242584, at *2 (E.D. Cal. Oct. 14,
3 2014) (quoting Lester, 81 F.3d at 830-31); see Bayliss v. Barnhart, 427 F.3d
4 1211, 1216 (9th Cir. 2005).

5 “In contrast, a contradicted opinion of a treating or examining
6 professional may be rejected for ‘specific and legitimate’ reasons that are
7 supported by substantial evidence.” Nicholas, 2014 WL 5242584, at *2
8 (citation omitted). “Where the opinion of the claimant’s treating physician is
9 contradicted, and the opinion of a nontreating source is based on independent
10 clinical findings that differ from those of the treating physician, the opinion of
11 the nontreating source may itself be substantial evidence; it is then solely the
12 province of the ALJ to resolve the conflict.” Andrews v. Shalala, 53 F.3d 1035,
13 1041 (9th Cir. 1995) (citing Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir.
14 1989)); Morgan v. Comm’r, Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir.
15 1999) (testifying medical-expert opinions may serve as substantial evidence
16 when “they are supported by other evidence in the record and are consistent
17 with it”); Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1996) (per curiam) (as
18 amended) (noting that the findings of a nontreating physician can amount to
19 substantial evidence so long as other evidence in the record supports those
20 findings).

21 3. Analysis

22 Plaintiff claims that the ALJ “rejected” without explanation Dr. Parikh’s
23 and Dr. Leizer’s findings of moderate limitations in social functioning and
24 adaptation at work in favor of Dr. Malancharuvil’s finding of no such
25 limitations. JS at 10, 18. Contrary to Plaintiff’s claim, the ALJ did not reject
26 the opinions of Dr. Parikh and Dr. Leizer. He simply gave them less weight.
27 See AR 28. The ALJ gave Dr. Parikh’s opinion “significant weight” and
28 formulated an RFC incorporating her findings of moderate limitations in

1 following simple instructions, dealing with coworkers and the public, and
2 responding to changes in work situations. AR 27. The RFC limiting Plaintiff to
3 simple, routine tasks in a habitual setting with no work with the general public
4 also incorporated Dr. Leizer's findings of moderate impairment in responding
5 to changes at work and making plans independently of others.

6 The physicians' opinions do not contain any major inconsistencies about
7 Plaintiff's social functioning and adaptation limitations. The ALJ concluded
8 that Plaintiff could not perform more than simple, routine tasks away from the
9 general public. This conclusion is consistent with all three medical opinions.
10 See Lester, 81 F.3d at 830. Additionally, the ALJ's decision to give less weight
11 to Dr. Parikh's and Dr. Leizer's opinions accrued to Plaintiff's benefit. Dr.
12 Parikh found no limitations in social functioning while Dr. Malancharuvil
13 found mild-to-moderate limitations. Dr. Malancharuvil's finding likely
14 contributed to the ALJ's decision that Plaintiff could not perform work with
15 the general public.

16 To the extent that the ALJ appears to have discredited Dr. Parikh's
17 opinion, he did so only where Dr. Malancharuvil's opinion contradicted it. Dr.
18 Malancharuvil's assessment that Plaintiff's mental status was largely intact
19 such that he could work consistently does not seamlessly align with Dr.
20 Parikh's opinion that Plaintiff had moderate impairments in his ability to carry
21 out simple instructions and respond appropriately to the usual work situations.
22 See AR 46, 337. Yet where their opinions differed, Dr. Malancharuvil's
23 findings were consistent with the record as a whole and took into account
24 Plaintiff's well-documented history of faking symptoms and inexplicable
25 failure to take medication or undergo consistent treatment. See AR 43-45.

26 Moreover, the record shows Dr. Parikh did not have access to this
27 history when conducting her examination. As a result, the ALJ discounted her
28 opinion "in reliance on the testimony of a nonexamining advisor," Dr.

1 Malancharuvil, whose opinion was “supported by other evidence in the record
2 and [is] consistent with it.” See Andrews, 53 F.3d at 1041. The ALJ thus gave
3 “specific and legitimate” reasons for giving Dr. Malancharuvil’s opinions
4 greater weight. See Carmickle v. Comm’r, Soc. Sec. Admin., 533 F.3d 1155,
5 1164 (9th Cir. 2008). Dr. Malancharuvil’s opinion also benefits from the fact
6 that greater weight may be given to a nonexamining doctor who is subject to
7 cross-examination, as he was during Plaintiff’s hearing. Andrews, 53 F.3d at
8 1042. Thus, his opinion “need not be discounted and may serve as substantial
9 evidence.” Id.

10 As to Plaintiff’s claim that Dr. Leizer’s opinion warranted greater weight
11 than Dr. Malancharuvil’s or Dr. Parikh’s opinions, nothing in the record
12 supports this conclusion. Unlike Dr. Parikh, Dr. Leizer did not examine
13 Plaintiff, and examining physicians are generally entitled to more weight.
14 Lester, 81 F.3d at 830. The ALJ followed the general rule when weighing the
15 two medical opinions. AR 28. The ALJ also explained that she gave Dr.
16 Leizer’s opinion less weight than Dr. Malancharuvil’s opinion because he was
17 not an impartial medical expert. AR 28. Substantial evidence within the record
18 supported the decision, including Plaintiff’s medical records, testimony, and
19 the opinions of several other doctors.

20 Even if giving Dr. Malancharuvil’s opinion greater weight than Dr.
21 Parikh’s opinion had not been supported by substantial evidence, any error
22 was harmless. Plaintiff’s RFC was for simple and routine tasks with no public
23 interaction, to be performed in a habitual setting. This takes into account the
24 moderate limitations found by both Dr. Parikh and Dr. Leizer. See Stubbs-
25 Danielson v. Astrue, 539 F.3d 1169, 1173-74 (9th Cir. 2008) (finding that an
26 RFC limiting a plaintiff to “simple tasks” adequately translated the plaintiff’s
27 “moderate” limitations in adaptation and concentration); Lawhorn v. Colvin,
28 609 Fed. App’x 449, 450 (9th Cir. 2015) (finding that RFC for simple, routine

1 tasks encompassed medical opinion that plaintiff could perform both simple,
2 repetitive tasks and detailed, complex ones despite difficulty concentrating).

3 In sum, the ALJ's RFC assessment was supported by substantial
4 evidence. Remand is not warranted on this basis.

5 **B. VE Testimony Regarding Job Numbers**

6 Plaintiff contends that the ALJ improperly accepted the VE's testimony
7 that he would be able to perform unskilled positions of light exertional level
8 such as packer/hand packager (DOT 920.687-166), which has "approximately
9 344,500 jobs available nationally," and assembler (DOT 701.687-010), which
10 has "approximately 82,000 jobs available in the national economy." AR 32.

11 **1. Relevant Facts**

12 At Plaintiff's hearing, the VE testified that a hypothetical person with
13 Plaintiff's RFC could perform representative jobs such as packer or assembler.
14 AR 52-53. He stated that there were approximately 344,500 packer jobs and
15 83,000 assembler jobs nationally and that his testimony was consistent with the
16 Dictionary of Occupational Titles ("DOT"). AR 53. Plaintiff's attorney did not
17 challenge the VE's job numbers, ask about their source, or present any
18 alternative job data.

19 In his written decision, the ALJ determined that under SSR 00-4P, the
20 VE's testimony was "consistent with the information contained in the [DOT]
21 and the record." AR 32. Based on the VE's testimony, the ALJ found that
22 Plaintiff was "capable of making a successful adjustment to other work that
23 exists in significant numbers in the national economy." Id.

24 **2. Applicable Law**

25 At step five of the sequential evaluation process, an ALJ must determine
26 whether a disability claimant who cannot perform past relevant work is
27 nevertheless capable of performing other work that exists in significant
28 numbers in the national economy. 20 C.F.R. § 404.1520(a). The DOT is the

1 best source of information about how a job is generally performed. Carmickle,
2 533 F.3d at 1166; see also 20 C.F.R. § 416.966(d)(1) (noting that the Social
3 Security Administration takes administrative notice of DOT). To rely on a
4 VE’s testimony regarding the requirements of a particular job, an ALJ must
5 first inquire as to whether the testimony conflicts with the DOT. Massachi v.
6 Astrue, 486 F.3d 1149, 1152-53 (9th Cir. 2007) (citing SSR 00-4p, 2000 WL
7 1898704, *4 (Dec. 4, 2000)). When such a conflict exists, the ALJ may accept
8 VE testimony that contradicts the DOT only if the record contains “persuasive
9 evidence to support the deviation.” Pinto v. Massanari, 249 F.3d 840, 846 (9th
10 Cir. 2001) (citing Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995)).

11 Claimants may challenge an ALJ’s acceptance of a VE’s testimony, but
12 “they must raise all issues and evidence at their administrative hearings in
13 order to preserve them on appeal.” Meanel v. Apfel, 172 F.3d 1111, 1115 (9th
14 Cir. 1999) (as amended). Although a plaintiff may challenge the reliability or
15 evidentiary basis for a VE’s job numbers, “when a claimant fails entirely to
16 challenge a [VE’s] job numbers during administrative proceedings before the
17 agency, the claimant waives such a challenge on appeal, at least when the
18 claimant is represented by counsel.” Shaibi v. Berryhill, 870 F.3d 874, 881 (9th
19 Cir. 2017). This “encompasses challenges based on an alleged conflict with
20 alternative job numbers gleaned from the CBP,” which is published by the
21 U.S. Census Bureau. Id.; see also Valenzuela v. Colvin, No. 12-0754, 2013
22 WL 2285232, at *3 (C.D. Cal. May 23, 2013) (rejecting argument that ALJ
23 erred in relying on VE’s job estimate testimony in part because “plaintiff
24 waited until after the ALJ’s adverse decision to submit alternative jobs data”).

25 **3. Analysis**

26 Plaintiff argues that the ALJ erred in relying on the VE’s testimony that
27 the representative jobs existed in significant numbers in the national economy.
28 See JS at 21. He “requests that the court take judicial notice of administratively

1 noticed facts pursuant to 20 CFR § 416.966(d).” Dkt. 20 at 1. Plaintiff attached
2 CBP data indicating that the cutlery and handtool manufacturing industry has
3 34,970 paid employees and the footwear manufacturing industry has 11,414
4 paid employees as of 2014. Dkt. 20 at 4, 9. Noting that the DOT describes the
5 two representative occupations as occurring in these industries, Plaintiff
6 suggests that the VE’s job numbers are mathematically impossible and “no
7 reasonable person would believe that the national economy supports 83,000
8 assemblers of cutlery and hardware tools when the entire cutlery and hardware
9 industry employees 34,970 people in all designations.” JS at 19-21.

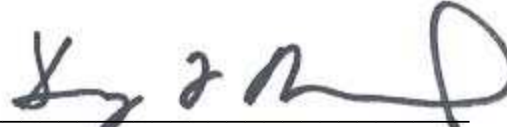
10 Plaintiff failed to raise this issue or submit the CBP data to the Social
11 Security Administration at any point during administrative proceedings.
12 Because Plaintiff was represented by counsel yet failed to address any
13 inconsistent job numbers, he was “waive[d] such a challenge on appeal.”
14 Shaibi, 870 F.3d at 881. Thus, remand is not warranted.

15 **III.**

16 **CONCLUSION**

17 For the reasons stated above, the decision of the Social Security
18 Commissioner is AFFIRMED and the action is DISMISSED with prejudice.

19
20 Dated: October 16, 2017

21 
22 DOUGLAS F. McCORMICK
23 United States Magistrate Judge
24
25
26
27
28