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

MARCUS V.,¹)	NO. SACV 17-1787-KS
Plaintiff,)	
v.)	MEMORANDUM OPINION AND ORDER
NANCY A. BERRYHILL, Acting)	
Commissioner of Social Security,)	
Defendant.)	
_____)	

INTRODUCTION

Marcus V. (“Plaintiff”) filed a Complaint on October 13, 2017, seeking review of the denial of his application for a period of disability and disability insurance benefits (“DIB”). On November 24, 2017, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. (Dkt. Nos. 7, 10-11.) On August 7, 2018, the parties filed a Joint Stipulation (“Joint Stip.”). (Dkt. No. 18.) Plaintiff seeks an order reversing the Commissioner’s decision and ordering the payment of benefits or, in the alternative, remanding for further proceedings. (Joint Stip. at 33.) The

¹ Partially redacted in compliance with Federal Rule of Civil Procedure 5.2(c)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

1 Commissioner requests that the ALJ’s decision be affirmed or, in the alternative, remanded
2 for further proceedings. (*See id.* at 33-34.) The Court has taken the matter under submission
3 without oral argument.
4

5 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
6

7 On October 1, 2014, Plaintiff, who was born on November 3, 1970, filed an
8 application for a period of disability and DIB.² (*See* Administrative Record (“AR”) 16, 149;
9 Joint Stip. at 3.) Plaintiff alleged disability commencing November 28, 2013 due to: a back
10 injury at L4 and L5; hip dysplasia; deteriorating right hip; and arthritis in the back. (AR 149,
11 164.) Plaintiff previously worked as a data communications technician (DOT 823.261-030).
12 (AR 22, 71, 165.) After the Commissioner denied Plaintiff’s applications initially (AR 86)
13 and on reconsideration (AR 96), Plaintiff requested a hearing (AR 113-14). Administrative
14 Law Judge Sharilyn Hopson (“ALJ”) held a hearing on May 18, 2016. (AR 37.) Plaintiff,
15 who was represented by counsel, testified before the ALJ as did vocational expert (“VE”)
16 Susan Allison. (AR 37.) On June 30, 2016, the ALJ issued an unfavorable decision,
17 denying Plaintiff’s application. (AR 16-24.) Plaintiff submitted additional medical evidence
18 to the Appeals Council (AR 2), which denied Plaintiff’s request for review on September 15,
19 2017. (AR 1-4.)
20

21 **SUMMARY OF ADMINISTRATIVE DECISION**
22

23 The ALJ found that Plaintiff met the insured status requirements of the Social Security
24 Act through December 31, 2018. (AR 18.) The ALJ further found that Plaintiff had not
25 engaged in substantial gainful activity since his alleged onset date of November 28, 2013.
26 (AR 18.) The ALJ determined that Plaintiff had the following severe
27

28 ² Plaintiff was 43 years old on the alleged onset date and thus met the agency’s definition of a younger individual.
See 20 C.F.R. § 404.1563(c).

1 impairments: “narrowing of the bilateral superior hip joint space; degenerative changes of
2 the bilateral hip; large paracentral disc protrusion/extrusion; lumbar radiculopathy; and
3 congenital hip dysplasia.” (AR 18.) In reaching that determination, the ALJ found that
4 Plaintiff’s colitis was a nonsevere impairment and Plaintiff did not have a medically
5 determinable impairment of depression. (AR 18.) The ALJ concluded that Plaintiff did not
6 have an impairment or combination of impairments that met or medically equaled the
7 severity of any impairments listed in 20 C.F.R. part 404, subpart P, appendix 1 (20 C.F.R. §§
8 404.1520(d), 404.1525, 404.1526). (AR 19.) The ALJ determined that Plaintiff had the
9 residual functional capacity (“RFC”) to perform “sedentary work” as follows:

10
11 [Plaintiff] can lift and/or carry 10 pounds occasionally and less than 10 pounds
12 frequently; he can stand and/or walk for 1 hour of an 8-hour workday with
13 regular breaks; he can sit for 7 hours out of an 8-hour workday with regular
14 breaks; he should have the ability to stand and stretch estimated to take 1 to 3
15 minutes per hour; he should use a cane as necessary; he can occasionally climb
16 stairs; he cannot climb ladders, ropes, or scaffolds; he can occasionally balance,
17 stoop, kneel, crouch, and crawl; he should avoid concentrated exposure to
18 extreme cold, unprotected heights, and moving and dangerous machinery; and
19 he must be in close proximity to a restroom.

20
21 (AR 19.)
22

23 The ALJ found that Plaintiff was unable to perform his past relevant work as a data
24 communications technician (DOT 823.261-030). (AR 22.) However, the ALJ found that
25 there are jobs that exist in significant numbers in the national economy that Plaintiff could
26 perform, including the representative occupations of order clerk in food and beverage (DOT
27 209.567-014) and final assembler (DOT 713.687-018). (AR 22-23.) Accordingly, the ALJ
28

1 determined that Plaintiff had not been under a disability, as defined in the Social Security
2 Act, from the alleged onset date through the date of the ALJ's decision. (AR 23.)
3

4 STANDARD OF REVIEW

5
6 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to
7 determine whether it is free from legal error and supported by substantial evidence in the
8 record as a whole. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). "Substantial evidence
9 is 'more than a mere scintilla but less than a preponderance; it is such relevant evidence as a
10 reasonable mind might accept as adequate to support a conclusion.'" *Gutierrez v. Comm'r of*
11 *Soc. Sec.*, 740 F.3d 519, 522-23 (9th Cir. 2014) (internal citations omitted). "Even when the
12 evidence is susceptible to more than one rational interpretation, we must uphold the ALJ's
13 findings if they are supported by inferences reasonably drawn from the record." *Molina v.*
14 *Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012). Further, when a claimant submits evidence for
15 the first time to the Appeals Council, the new evidence is part of the administrative record,
16 which the district court must consider in determining whether the Commissioner's decision
17 is supported by substantial evidence. *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157,
18 1159-60 (9th Cir. 2012).
19

20 Although this Court cannot substitute its discretion for the Commissioner's, the Court
21 nonetheless must review the record as a whole, "weighing both the evidence that supports
22 and the evidence that detracts from the [Commissioner's] conclusion." *Lingenfelter v.*
23 *Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (internal quotation marks and citation omitted);
24 *Desrosiers v. Sec'y of Health and Hum. Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). "The ALJ
25 is responsible for determining credibility, resolving conflicts in medical testimony, and for
26 resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
27
28

1 The Court will uphold the Commissioner’s decision when the evidence is susceptible
2 to more than one rational interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir.
3 2005). However, the Court may review only the reasons stated by the ALJ in her decision
4 “and may not affirm the ALJ on a ground upon which he did not rely.” *Orn*, 495 F.3d at
5 630; *see also Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). The Court will not
6 reverse the Commissioner’s decision if it is based on harmless error, which exists if the error
7 is “‘inconsequential to the ultimate nondisability determination,’ or if despite the legal error,
8 ‘the agency’s path may reasonably be discerned.’” *Brown-Hunter v. Colvin*, 806 F.3d 487,
9 492 (9th Cir. 2015) (internal citations omitted).

10 11 **ISSUES IN DISPUTE**

12
13 The parties have placed in dispute the following four issues: (1) whether the ALJ
14 adequately assessed the credibility of Plaintiff’s statements about his pain and limitations; (2)
15 whether the ALJ properly considered the opinion of Dr. David Kim, Plaintiff’s treating
16 physician; (3) whether the ALJ’s finding that Plaintiff can sit for seven out of eight hours is
17 supported by the medical evidence; and (4) whether the new evidence provided to the
18 Appeals Council warrants remand. (Joint Stip. at 1.)

19 20 **DISCUSSION**

21 22 **I. Plaintiff’s Credibility**

23 24 **A. Plaintiff’s Statements**

25
26 On November 1, 2014, Plaintiff completed an “Exertion Questionnaire.” (AR 186-
27 88.) Plaintiff stated that the pain in his hips makes it very difficult to walk and his bad back
28 makes it almost impossible to lift anything. (AR 186.) In an average day, Plaintiff stated

1 that his sole activity was driving his daughter to and from school. (AR 186.) In response to
2 a question about how far Plaintiff could walk, Plaintiff wrote that he “tried to walk at least
3 3x a week around the block, which can take anywhere from a ½ [hour] to 45 min.” (AR
4 186.) Plaintiff added that after the walk he would lie flat on his back to help with the pain in
5 his hips. (AR 186.) In response to a question about whether Plaintiff climbed stairs,
6 Plaintiff checked “yes” and explained that he has “2 flights of stairs at home which [he]
7 avoid[s] as often as possible.” (AR 187.) Plaintiff wrote that “most days” he lifted nothing
8 more than light groceries. (AR 187.) He stated that he could carry items under 20 pounds
9 from the car to the house, which was a distance of approximately 40 feet. (AR 187.)
10 Plaintiff indicated that he spent 20-30 minutes a day cleaning the house by washing dishes
11 and picking up clothes and dishes. (AR 187.) Plaintiff stated that he is able to drive for
12 about an hour before the sitting “kills [his] back.” (AR 187.) Plaintiff stated that he does
13 “very light yard work, like watering plants and pruning dead leaves.” (AR 187.) Plaintiff
14 stated that he has difficulty finishing his housework and other chores because, after about 30
15 minutes, he needs to lay down and stretch. (AR 188.) Plaintiff stated that he rests on his
16 back for 30 minutes to an hour approximately twice a day. (AR 188.) Plaintiff stated that he
17 takes Norco and morphine three times a day. (AR 188.) Plaintiff indicated that he used a
18 cane for walking and sometimes a motor chair. (AR 188.)

19
20 A year and a half later, at the May 2016 hearing, Plaintiff testified that he stopped
21 working in Information Technology (“IT”) because his physical pain had become unbearable
22 and he could not complete his work tasks in a timely fashion. (See AR 41.) Plaintiff
23 testified that his house has stairs leading up to his daughter’s room and he does not go up
24 them. (AR 42.) Plaintiff testified that he drives his daughter to school twice a week. (AR
25 43.) The drive was about 15 minutes long. (AR 44.) Plaintiff testified that he could not
26 bend over or squat. (AR 42, 46.) Plaintiff testified that he has no problems, reaching up, to
27 the side, or forward. (AR 46.) He testified that he has no problems with his arms. (AR 47.)
28 On a scale of 1-10, with 10 being the worst, Plaintiff stated that his hip pain was, on average,

1 a six most days but occasionally spiked to a ten. (AR 48.) Plaintiff stated that his pain
2 medications brought his pain down from a six to a five. (AR 48-49.) Plaintiff also testified
3 that about once a week he experiences neck pain resulting from a fusion surgery in his neck.
4 (AR 50.) Plaintiff also testified that he had “recently” been prescribed a brace for his knee.
5 (AR 51.) Plaintiff testified that he had been using a cane for two years prior to the hearing.
6 (AR 51-52.) Plaintiff testified that he believed he could sit for 20 to 30 minutes before
7 having to change positions, although on some days he was unable to sit for any length of
8 time. (AR 52.) Plaintiff testified that he has two “bad days a week” and described a bad day
9 as one in which he is effectively bedridden. (AR 52-53.) Plaintiff testified that he could
10 stand in one position with his cane for about three minutes. (AR 53.) Plaintiff testified that
11 he believed he could walk for about ten minutes before having to stop. (AR 53-54.)
12 Plaintiff testified that during the day he spends about two hours lying down in the morning
13 and “at least a couple more hours” lying down in the afternoon. (AR 54-55.) Plaintiff
14 testified that he had seen several orthopedic surgeons about the pain in his hips and, although
15 he is a candidate for a hip replacement, he had been advised to wait because his dysplasia
16 could cause the hip replacement hardware to degrade faster. (See AR 55-56.) Plaintiff
17 testified that he is able to load the dishwasher sometimes. (AR 59.) Plaintiff testified that he
18 would be unable to do a grocery shopping trip on his own. (AR 60.) He testified that the
19 most he can lift is a gallon of milk, and he cannot lift a gallon of milk repetitively during a
20 day. (AR 61.) Plaintiff testified that his activities include reading (AR 62), watching TV
21 (AR 62), and going to church twice a week (AR 61) – although he has to “squirm[] around”
22 and sometimes get up and stand against a wall in order to make it through a service (AR 64-
23 65).

24 **B. Applicable Law**

25
26
27 An ALJ must make two findings before determining that a claimant’s pain or symptom
28 testimony is not credible. *Treichler v. Comm’r of Soc. Sec.*, 775 F.3d 1090, 1102 (9th Cir.

1 2014). “First, the ALJ must determine whether the claimant has presented objective medical
2 evidence of an underlying impairment which could reasonably be expected to produce the
3 pain or other symptoms alleged.” *Id.* (quoting *Lingenfelter*, 504 F.3d at 1036). “Second, if
4 the claimant has produced that evidence, and the ALJ has not determined that the claimant is
5 malingering, the ALJ must provide specific, clear and convincing reasons for rejecting the
6 claimant’s testimony regarding the severity of the claimant’s symptoms” and those reasons
7 must be supported by substantial evidence in the record. *Id.*; *see also Marsh v. Colvin*, 792
8 F.3d 1170, 1174 n.2 (9th Cir. 2015); *Carmickle v. Comm’r of Soc. Sec.*, 533 F.3d 1155, 1161
9 (9th Cir. 2008) (court must determine “whether the ALJ’s adverse credibility finding . . . is
10 supported by substantial evidence under the clear and convincing standard”).

11
12 With respect to the first step, a plaintiff “need not show that [his] impairment could
13 reasonably be expected to cause the severity of the symptom [he] has alleged; [he] need only
14 show that it could reasonably have caused *some* degree of the symptom.” *Lingenfelter v.*
15 *Astrue*, 504 F.3d 1028, 1035–36 (9th Cir. 2007) (quoting *Smolen v. Chater*, 80 F.3d 1273,
16 1282 (9th Cir. 1996)) (emphasis added). “Thus, the ALJ may not reject subjective symptom
17 testimony . . . simply because there is no showing that the impairment can reasonably
18 produce the *degree* of symptom alleged.” *Id.* (quoting *Smolen*, 80 F.3d at 1282); *see also*
19 *Reddick v. Chater*, 157 F.3d 715, 722 (1998) (“[T]he Commissioner may not discredit the
20 claimant’s testimony as to the severity of symptoms merely because they are unsupported by
21 objective medical evidence.”).

22
23 With respect to the second step, in weighing a plaintiff’s credibility, the ALJ may
24 consider many factors, including: “(1) ordinary techniques of credibility evaluation, such as
25 the claimant’s reputation for lying, prior inconsistent statements concerning the symptoms,
26 and other testimony . . . that appears less than candid; (2) unexplained or inadequately
27 explained failure to seek treatment or to follow a prescribed course of treatment; and (3) the
28 claimant’s daily activities.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008).

1 However, “subjective pain testimony cannot be rejected on the *sole* ground that it is not fully
2 corroborated by objective medical evidence.” *Rollins v. Massanari*, 261 F.3d 853, 857 (9th
3 Cir. 2001) (emphasis added) (citation omitted).

4
5 **C. ALJ’s Decision**
6

7 The ALJ found that Plaintiff’s medically determinable impairments could reasonably
8 be expected to cause the alleged symptoms, but Plaintiff’s statements concerning the
9 intensity, persistence, and limiting effects of these symptoms were not consistent with the
10 medical evidence and other evidence in the record. (AR 20.) Specifically, the ALJ stated
11 that Plaintiff had received “routine, conservative, and non-emergency treatment since the
12 alleged onset date.” (AR 20.) The ALJ noted that surgery had not been recommended for
13 Plaintiff because his hip socket was too shallow and would likely result in the metallic part
14 popping out of the socket after surgery. (AR 20.) The ALJ also pointed out that Plaintiff
15 had stated that his prescription medications provided “fair pain control” (AR 20) (citing Exs.
16 2F at 3; 8F at 78, 99-100), and, in March 2015, Plaintiff reported being able to perform all
17 activities of daily living, including driving, a report that the ALJ found difficult to reconcile
18 with Plaintiff’s statements about the severity and limiting effects of his impairments (AR 21)
19 (citing Ex. 6F at 48). Finally, the ALJ described Plaintiff’s testimony as internally
20 inconsistent because Plaintiff alleged that his pain and medications decreased his
21 concentration, which “essentially rendered him disabled,” but also stated that he read,
22 watched television, performed light household chores and yard work, and drove his daughter
23 to school. (AR 22.)

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1 **D. Analysis**

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3 ***1. Conservative Treatment***

4
5 The ALJ’s first reason for discrediting Plaintiff’s testimony is that Plaintiff received
6 conservative treatment. (AR 20.) Evidence that a severe impairment is effectively managed
7 with conservative treatment is sufficient to discount a claimant’s testimony regarding the
8 severity of that impairment. *See Tommasetti*, 533 F.3d at 1039-40; *Parra v. Astrue*, 481 F.3d
9 742, 751 (9th Cir. 2007). However, substantial evidence in the record does not support the
10 ALJ’s characterization of Plaintiff’s treatment as conservative nor does it support the view
11 that the conservative treatment Plaintiff did receive was effective.

12
13 Citing page 3 of Exhibit 2F, the ALJ stated that Plaintiff had stated that his
14 prescription medications provided “fair pain control.” (AR 20.) The ALJ’s citation
15 references Plaintiff’s January 6, 2015 appointment with Dr. David Bum-Soo Kim, at which
16 time Plaintiff’s pain medications included two narcotics with a high risk of addiction,
17 morphine and hydrocodone-acetaminophen (also known as Norco), and nortriptyline
18 (Pamelor), a nerve pain medication. (AR 295, 304, 324-25.) At the January 6, 2015
19 appointment, Plaintiff told Dr. Kim that this combination of medications resulted in “fair
20 control of pain,” but Dr. Kim wrote that Plaintiff appeared to be distressed, exhibited
21 musculoskeletal tenderness, and “laxity with pain on passive motion” during his physical
22 exam. (AR 295.) Within a week of the exam, Dr. Kim added 600 mg of Ibuprofen to
23 Plaintiff’s cocktail of pain medications. (AR 303 (medication started 1/13/15).)

24
25 Plaintiff’s January 6, 2015 report to Dr. Kim that his pain was “fairly controlled” was
26 an outlier in the medical record. A month earlier, Plaintiff had called Dr. Kim’s office to
27 report that he had been taking more morphine than prescribed and wanted an appointment to
28 discuss his “worsening pain.” (AR 297-98.) An x-ray from around the same time showed

1 that the degenerative changes in Plaintiff's hip joints had "progressed from prior study."
2 (AR 300 (October 27, 2014 x-ray of hips, pelvis).) At Plaintiff's October 27, 2014
3 appointment with Dr. Kim, Plaintiff had stated that his pain was "not controlled," and Dr.
4 Kim increased Plaintiff's dosage of morphine to 60mg three times a day. (AR 296.) Dr.
5 Kim wrote that this was the "maximum dosage" of morphine. (AR 296.) Indeed, the ALJ
6 noted that Plaintiff's dosage of morphine had been increased to the maximum amount in
7 October 2014. (AR 21.)

8
9 Perhaps even more significantly, just one month after Plaintiff's January 2015
10 appointment with Dr. Kim, Plaintiff reported to Dr. Kim that his pain medications were "not
11 working." (AR 3560 (February 23, 2015 appointment).) That same week Plaintiff had a
12 consultation with orthopedic surgeon Dr. Kamil Yousef Antonios. (AR 360 (February 25,
13 2015 appointment).) Plaintiff reported that he "want[ed] to have a total hip replacement
14 after having tried conservative therapy." (AR 360.) Dr. Antonios noted that Plaintiff had
15 received epidural injections in the past. (AR 360.) Dr. Antonios discussed Plaintiff's
16 condition and options and told Plaintiff to "think about surgical treatment" and "read about
17 total hip replacement." (AR 361.) In a subsequent treatment note, Dr. Kim wrote that Dr.
18 Antonios had advised that Plaintiff try taking Meloxicam (an anti-inflammatory) and lose 30
19 pounds before undergoing a total hip replacement. (AR 373.)

20
21 By March 15, 2015, Plaintiff's daily pain medications included: Norco three times a
22 day as needed for pain; morphine three times a day; Ibuprofen with food; nortriptyline one to
23 two capsules at bedtime; and Meloxicam once or twice daily as needed. (AR 367.) In
24 addition, Plaintiff tried epidural steroid injections. (AR 424 (June 18, 2015 plaintiff reported
25 some success with a previous epidural steroid injection)); *see also Hydat Yang v. Colvin*, No.
26 CV 14-2138-PLA, 2015 WL 248056, at *6 (C.D. Cal. Jan. 20, 2015) ("This Court has
27 previously found that spinal epidural injections are *not* 'conservative' treatment." (emphasis
28 added)) (citing, *inter alia*, *Harvey v. Colvin*, No. CV 13-5376-PLA, 2014 WL 3845088, at

1 *9 (C.D. Cal. Aug.5, 2014)). Plaintiff was encouraged to schedule a second steroid
2 injection. (AR 425 (June 18, 2015 appointment).) On November 9, 2015, Plaintiff received
3 a second epidural steroid injection. (AR 447.) The pain management specialist
4 administering the injection, Dr. Peter Chun-Ming Jong advised Plaintiff that “the lumbar
5 epidural steroid injection [would] not help with his hip osteoarthritis symptoms” and “any
6 relief from the lumbar epidural steroid injection [was] likely to be temporary.” (AR 447.)
7

8 Finally, on February 11, 2016, a few months before Plaintiff’s administrative hearing,
9 Plaintiff informed Dr. Kim that he desired to move forward with a hip replacement
10 procedure. (AR 453.) On May 11, 2017, Plaintiff received a left total hip replacement. (AR
11 710.) The orthopedic surgeon who performed the operation, Dr. Dhiren Shashikant Sheth,
12 stated that surgery was indicated “in view of the failure of nonoperative treatment and
13 advanced nature of the disease.” (AR 720.) Dr. Sheth also wrote that plaintiff had
14 “maximized conservative treatment.” (AR 712.)
15

16 In light of the foregoing, the ALJ’s determination that Plaintiff was less than fully
17 credible because his symptoms had been effectively controlled with “routine, conservative,
18 and non-emergency treatment since the alleged onset date” (AR 20) was not supported by
19 substantial evidence in the record. To the contrary, Plaintiff spent years taking a cocktail of
20 highly addictive narcotics, including the maximum daily dosage of morphine, as well as anti-
21 inflammatory and nerve pain medications, but only intermittently described his symptoms
22 as fairly controlled. He also tried epidural steroid injections, although the specialist pointed
23 out that these were unlikely to provide Plaintiff with long term relief. Finally, although the
24 doctors encouraged Plaintiff to delay surgery, in May 2017, after having “maximized” his
25 conservative treatment options to little avail, Plaintiff received a left total hip replacement.
26 In light of this evidence, the ALJ’s assertion that Plaintiff was not fully credible because his
27 condition was adequately managed with conservative treatment did not did not justify her
28 adverse credibility determination.

1 **2. Activities of Daily Living**

2
3 The ALJ’s second reason for finding Plaintiff less than fully credible was the ALJ’s
4 determination that: (1) in March 2015, Plaintiff reported to a medical provider that he was
5 able to perform all activities of daily living, including driving, (AR 21) (citing Ex. 6F at 48);
6 and (2) Plaintiff admitted to retaining the ability to read, watch television, perform light
7 household chores, do yard work, and drive his daughter at school, abilities that were
8 inconsistent with Plaintiff’s testimony that his pain and medications decreased his
9 concentration (AR 22). An ALJ may rely on a plaintiff’s daily activities to support an
10 adverse credibility determination only when those activities either: “contradict [the
11 plaintiff’s] other testimony”; or “meet the threshold for transferable work skills” – that is,
12 where the plaintiff “is able to spend a substantial part of his or her day performing household
13 chores or other activities that are transferable to a work setting.” *Orn*, 495 F.3d at 639;
14 *Smolen v. Chater*, 80 F.3d 1273, 1284 n. 7 (9th Cir. 1996).

15
16 Again, the ALJ’s characterization of the record is not supported by substantial
17 evidence. The ALJ states that, in March 2015, Plaintiff reporting being able to perform all
18 activities of daily living. (AR 21) (citing Ex. 6F at 48). However, the portion of the record
19 that the ALJ cites is a nurse’s note dated March 16, 2015. (AR 402.) At that time, Plaintiff
20 had been admitted to the hospital “for colitis, sepsis, r/o Cdiff,” his “primary problem” was
21 “abdominal pain/diarrhea,” and the nurse wrote that Plaintiff “drives, is indep with all
22 ADLs” without providing any additional detail. (AR 402.) Accordingly, it is not at all clear
23 what activities the nurse meant by “ADLs” and whether her notation does, in fact, conflict
24 with Plaintiff’s statements and testimony about the limitations imposed by his
25 musculoskeletal problems as opposed to his colitis. Certainly, the nurse’s vague notation
26 does not, without more, constitute substantial evidence for the ALJ’s adverse credibility
27 determination.

1 The ALJ also described Plaintiff's testimony as internally inconsistent because,
2 according to the ALJ, Plaintiff alleged that his pain and medications decreased his
3 concentration, which "essentially rendered him disabled," yet Plaintiff also stated that he
4 read, watched television, performed light household chores and yard work, and drove his
5 daughter to school. (AR 22.) Again, the ALJ mischaracterizes the record.

6
7 Plaintiff did not mention any deficits in concentration on his exertion questionnaire.
8 (See generally AR 186-88.) Accordingly, his only statements about concentration occurred
9 at the hearing, during the following interaction:

10
11 [ALJ]: As far as you're concerned, do they [your
12 medications] have any bad side effects on you? In other words, do they affect
13 you in a negative way?

14 [Plaintiff]: I –

15 [ALJ]: The –

16 [Plaintiff]: I get a little dingy. I mean the pills I take, I get a little
17 dingy.

18 [ALJ]: Okay. Do you think they affect your concentration level at
19 all?

20 [Plaintiff]: I guess they probably do. I mean I would have to say –

21 [ALJ]: Okay.

22 [Plaintiff]: -- yeah. To some degree.

23 [ALJ]: Okay. Well is it – do you feel it's the medicine or the pain
24 that affects your concentration?

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1 [Plaintiff]: I think it's a combination of both. The pain –

2 [ALJ]: Okay.

3 [Plaintiff]: -- when you're trying to – when you're dealing with the
4 pain all day long like this, I mean it's just . . . It kind of makes you crazy.

5
6 (AR 57-58.)

7
8 Given that this exchange is the only evidence in the record supporting the ALJ's
9 finding that Plaintiff claimed his deficits in concentration "essentially rendered him
10 disabled," the ALJ's characterization of Plaintiff's testimony is not supported by the record.
11 Plaintiff did not assert, as the ALJ claims, that his decreased concentration rendered him
12 disabled. Instead, at most, Plaintiff stated that his medications "probably" affected his
13 concentration "to some degree" and the unrelenting nature of his pain made him feel
14 "crazy." (AR 58.) Further, Plaintiff had consistently alleged that his *physical* symptoms left
15 him unable to work a full-time job because he would be unable to perform many of the
16 physical tasks involved and/or perform them at the frequency or speed required.
17 Accordingly, Plaintiff's testimony regarding his ability to concentrate is not at odds with his
18 professed ability to read, watch TV, perform light household chores and yard work, and
19 drive his daughter 15 minutes to a school. (AR 44.) For that reason, the ALJ's second
20 grounds for finding Plaintiff less than fully credible is not supported by substantial evidence
21 in the record and, as such, does not support the ALJ's adverse credibility determination.

22
23 **II. ALJ's Evaluation of Dr. Kim's Opinion**

24
25 **A. Dr. Kim's Opinion**

26
27 On October 2, 2015, Dr. Kim, Plaintiff's treating physician, completed a Medical
28 Evaluation form. (AR 344-46.) Dr. Kim stated that Plaintiff suffered severe pain and gait

1 abnormalities and his symptoms would likely increase if he was placed in a competitive
2 work environment. (AR 344.) Dr. Kim stated that Plaintiff would be unable to work at least
3 6-hours of an 8-hour workday regardless of whether the work was limited to either sitting or
4 standing or involved alternating between the two. (AR 345.) He stated that Plaintiff needed
5 to rest for 7-8 hours in an 8-hour workday. (AR 345.) He stated that Plaintiff “should do no
6 heavy lifting” and limited Plaintiff to lifting less than five pounds frequently. (AR 345.) Dr.
7 Kim stated that Plaintiff was unable to use his hands/arms frequently for grasping, pulling,
8 pushing, or fine manipulation work. (AR 345.) Dr. Kim stated that Plaintiff could not use
9 his legs to push or pull frequently. (AR 346.) Dr. Kim stated that Plaintiff was not able to
10 perform bending, squatting, kneeling, or climbing on a frequent, sustained daily basis. (AR
11 346.) Dr. Kim stated that Plaintiff should avoid exposure at work to unprotected heights,
12 moving machinery, and driving automotive equipment. (AR 346.)

13 14 **B. Applicable Law**

15
16 “The ALJ is responsible for translating and incorporating clinical findings into a
17 succinct RFC.” *Rounds v. Comm’r Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015). In
18 doing so, the ALJ must articulate a “substantive basis” for rejecting a medical opinion or
19 crediting one medical opinion over another. *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th
20 Cir. 2014); *see also Marsh v. Colvin*, 792 F.3d 1170, 1172-73 (9th Cir. 2015) (“an ALJ
21 cannot in its decision totally ignore a treating doctor and his or her notes, without even
22 mentioning them”). Generally, the opinion of a treating source is entitled to greater weight
23 than the opinion of doctors who do not treat the claimant because treating sources are “most
24 able to provide a detailed, longitudinal picture” of a claimant’s medical impairments and
25 bring a perspective to the medical evidence that cannot be obtained from objective medical
26 findings alone. *See Garrison*, 759 F.3d at 1012; *see also* 20 C.F.R. §§ 404.1527(c)(2)
27 (governing claims filed before March 27, 2017), 404.1520c(c) (governing claims filed on or
28 after March 27, 2017). Accordingly, to reject an uncontradicted opinion of a treating or

1 examining physician, the ALJ must provide “clear and convincing reasons that are supported
2 by substantial evidence.” *Trevizo v. Berryhill*, 871 F.3d 664, 675 (9th Cir. 2017); *Ghanim v.*
3 *Colvin*, 763 F.3d 1154, 1160-61 (9th Cir. 2014). Alternatively, “[i]f a treating or examining
4 doctor’s opinion *is* contradicted by another doctor’s opinion, an ALJ may only reject it by
5 providing specific and legitimate reasons that are supported by substantial evidence.”
6 *Trevizo*, 871 F.3d at 675 (emphasis added). “The ALJ can meet this burden by setting out a
7 detailed and thorough summary of the facts and conflicting clinical evidence, stating his
8 interpretation thereof, and making findings.” *Id.* (quoting *Magallanes v. Bowen*, 881 F.2d
9 747, 751 (9th Cir. 1989)).

10
11 An ALJ may properly reject a treating physician’s conclusions that do not “mesh” with
12 the treating physician’s objective data or history. *See, e.g., Tommasetti v. Astrue*, 533 F.3d
13 1035, 1041 (9th Cir. 2008); *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001).
14 However, the ALJ may not arbitrarily substitute her own judgment for competent medical
15 opinion, make her own independent medical findings, or assess an RFC that is not supported
16 by the medical evidence. *Banks v. Barnhart*, 434 F. Supp. 2d 800, 805 (C.D. Cal. 2006); *see*
17 *also Burgess v. Astrue*, 537 F.3d 117, 131 (2d Cir. 2008) (“Neither a reviewing judge nor the
18 Commissioner is permitted to substitute his own expertise or view of the medical proof for
19 the treating physician’s opinion, or indeed for any competent medical opinion.”) (internal
20 quotation marks and citations omitted); *Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir. 1999) (as
21 a lay person, an ALJ is “not at liberty to ignore medical evidence or substitute his own views
22 for uncontroverted medical opinion”; he is “simply not qualified to interpret raw medical
23 data in functional terms”).

24 25 **C. ALJ’s Decision**

26
27 The ALJ stated that she found “some aspects of Dr. Kim’s assessment entitled to some
28 weight.” (AR 21.) In particular, she wrote that “the limitations to standing, exposure to

1 unprotected heights, and exposure to moving machinery are supported by the objective
2 evidence: decreased range of motion of the left hip and lumbar spine, antalgic gait with
3 cane, and decreased sensation over the right lower extremity.” (AR 21.) However, the ALJ
4 found that “the rest of the limitations” – *i.e.*, Dr. Kim’s determination that Plaintiff is unable
5 to work six hours of an eight-hour workday, needs to rest for seven to eight hours in an
6 eight-hour workday, is unable to lift five pounds frequently, is unable to use his hands to
7 grasp, pull, push, or perform fine manipulation frequently, and is unable to push or pull with
8 legs frequently – “are not supported by the objective evidence and [Plaintiff’s] self-reported
9 ability to drive short distance, load the laundry machine, wash dishes, lift light grocery bags,
10 and carry up to 20 pounds.” (AR 21) (citing Exs. 4E at 2, 6F at 48, and Hearing).
11 Accordingly, the ALJ declined to adopt the rest of Dr. Kim’s assessment.

12
13 The ALJ also noted that the State agency medical consultants who reviewed Plaintiff’s
14 medical records opined that Plaintiff could: lift and carry 20 pounds occasionally and 10
15 pounds frequently; stand and walk four hours in an eight-hour workday; and, *inter alia*, sit
16 six hours in an eight-hour workday; occasionally climb, balance, stoop, kneel, crouch, and
17 crawl. (AR 21; *see also* AR 82-83 (November 10, 2014 opinion of H. Han, M.D.), 91-93
18 (February 11, 2015 opinion of J. Clift, M.D.)) The ALJ stated that she “cannot give much
19 weight to their determination that [Plaintiff] can stand and/or walk for four hours in an eight-
20 hour workday or lift and carry 20 pounds occasionally and 10 pounds frequently.” (AR 21.)
21 Instead, she stated that she “finds it more appropriate to conclude [Plaintiff] can stand and
22 walk 1 hour in an 8-hour workday, sit 6 hours in an 8-hour workday, stand and stretch for 1
23 to 3 minutes every hour, ambulate with a cane when necessary, and avoid climbing ladders,
24 ropes, or scaffolds.” (AR 21-22.)

25
26 There is no opinion from an examining physician.

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28 \\
29

1 **D. Analysis**

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3 Rather than articulating a “substantive basis” for rejecting portions of Dr. Kim’s
4 medical opinion in favor of the medical opinions of the reviewing physicians, or vice versa,
5 the ALJ arbitrarily substituted her own judgment for the medical opinions of record and
6 made her own independent medical findings about the extent of Plaintiff’s abilities. In doing
7 so, the ALJ erred. *See Banks*, 434 F. Supp. 2d at 805; *see also Burgess*, 537 F.3d at 131
8 (“Neither a reviewing judge nor the Commissioner is permitted to substitute his own
9 expertise or view of the medical proof for the treating physician’s opinion, or indeed for any
10 competent medical opinion.”) (internal quotation marks and citations omitted). The ALJ is
11 not qualified to interpret the raw medical data in functional terms. *See Nguyen*, 172 F.3d at
12 35 (as a lay person, an ALJ is “not at liberty to ignore medical evidence or substitute his own
13 views for uncontroverted medical opinion”; he is “simply not qualified to interpret raw
14 medical data in functional terms”). Accordingly, this matter must be remanded for proper
15 consideration of the medical evidence and, if appropriate, referral to an examining physician
16 for additional information about the extent of Plaintiff’s abilities and limitations.

17
18 **III. Remand is Warranted**

19
20 Having found that the ALJ failed to articulate clear and convincing reasons supported
21 by substantial evidence in the record for finding Plaintiff less than fully credible and also
22 erred in her evaluation of the medical evidence, the Court exercises its discretion to remand
23 on these grounds without reaching the merits of the remaining issues in dispute. In reaching
24 this conclusion, the Court notes that the ALJ’s errors were not inconsequential to the
25 ultimate nondisability determination, and the Court cannot reasonably discern the ALJ’s path
26 despite her errors, as would be required for the Court to find the errors harmless. *See*
27 *Brown-Hunter v. Colvin*, 806 F.3d at 492. However, the Court also cannot say that further
28 administrative proceedings would serve no useful purpose and, if the improperly discredited

1 evidence were credited as true, the ALJ would be required to find Plaintiff disabled on
2 remand. *See Garrison*, 759 F.3d at 1020. Accordingly, this case is not the “rare exception”
3 in which the credit as true rule should be applied and the matter remanded for the calculation
4 and award of benefits. *See Leon v. Berryhill*, 874 F.3d 1130, 1133 (9th Cir. 2017).
5 Therefore, the Court remands for further consideration and, if appropriate, development of
6 the record.

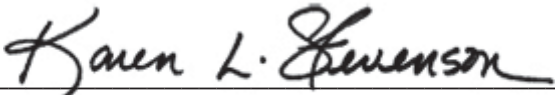
7
8 **CONCLUSION**
9

10 For the reasons stated above, IT IS ORDERED that the decision of the Commissioner
11 is REVERSED, and this case is REMANDED for further proceedings consistent with this
12 Memorandum Opinion and Order.

13
14 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this
15 Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for
16 defendant.

17
18 LET JUDGMENT BE ENTERED ACCORDINGLY
19

20 DATE: December 20, 2018

21
22 
23 _____
24 KAREN L. STEVENSON
25 UNITED STATES MAGISTRATE JUDGE
26
27
28