UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Dung T. N., Plaintiff, v. COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION, Defendant.	NO. SA CV 20-975-E **MEMORANDUM OPINION AND ORDER OF REMAND**

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS HEREBY ORDERED that Plaintiff's and Defendant's motions for summary judgment are denied, and this matter is remanded for further administrative action consistent with this Opinion.

PROCEEDINGS

Plaintiff filed a complaint on May 27, 2020, seeking review of the Commissioner's denial of benefits. On June 18, 2020, the parties consented to proceed before a United States Magistrate Judge. Plaintiff filed a motion for summary judgment on January 28, 2021.

Defendant filed a motion for summary judgment on April 7, 2021. The Court has taken the motions under submission without oral argument. See L.R. 7-15; "Order," filed May 28, 2020.

BACKGROUND

Plaintiff seeks disability insurance benefits beginning May 17, 2015, based on allegations of back, arm and wrist pain, heart disease, chronic chest pain, diabetes, major depressive disorder, anxiety disorder and insomnia (Administrative Record ("A.R.") 231-32, 254-55, 266, 308). Plaintiff's last insured date was December 31, 2018 (A.R. 250).

An Administrative Law Judge ("ALJ") reviewed the record and heard testimony from Plaintiff and a vocational expert (A.R. 15-27, 75-108).[1] The ALJ found that Plaintiff has severe coronary artery disease, status post coronary artery bypass graft in 2007, and severe degenerative disc disease of the lumbar spine and cervical spine (A.R. 18). The ALJ found "nonsevere" Plaintiff's carpal tunnel syndrome (A.R. 18-19). The ALJ found that Plaintiff retains the residual functional capacity to perform medium work with occasional climbing of ramps/stairs and ladders/ropes/scaffolds, and occasional balancing,

[1] Plaintiff had filed a previous application for benefits, which was denied for a time period ending May 16, 2015 – the day before Plaintiff's alleged onset date in the present case. See A.R. 112-21 (prior ALJ's adverse decision), 126-29 (Appeals Council's prior denial of review). Although the present ALJ found no changed circumstances, the ALJ proceeded through the sequential analysis anew based on the updated record (A.R. 16-27).

stooping, kneeling, crouching and crawling. See A.R. 22-26 (giving significant weight to the non-examining state agency physicians' opinions, partial weight to a consultative examiner's opinion, partial weight to a qualified medical examiner's opinion, and little or no weight to the treating medical opinions). In finding this capacity, the ALJ discounted Plaintiff's testimony and statements regarding his subjective symptomatology as "not entirely consistent with the medical evidence and other evidence in the record" (A.R. 23).

The ALJ found Plaintiff capable of performing his asserted past relevant work as a soils engineer (Dictionary of Occupational Titles ("DOT") 024.161-010) as generally performed (A.R. 27 (adopting vocational expert's testimony at A.R. 94-107)). Accordingly, the ALJ denied benefits (A.R. 27). The Appeals Council denied review (A.R. 1-3).

STANDARD OF REVIEW

Under 42 U.S.C. section 405(g), this Court reviews the Administration's decision to determine if: (1) the Administration's findings are supported by substantial evidence; and (2) the Administration used correct legal standards. See Carmickle v. Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner, 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted); see Widmark v. Barnhart, 454

F.3d 1063, 1067 (9th Cir. 2006).

> If the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ. But the Commissioner's decision cannot be affirmed simply by isolating a specific quantum of supporting evidence. Rather, a court must consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [administrative] conclusion.

Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and quotations omitted).

DISCUSSION

Plaintiff contends, inter alia, that the ALJ erred in the evaluation of Plaintiff's testimony and statements regarding Plaintiff's subjective symptoms and claimed limitations. For the reasons discussed below, the Court agrees.

I. Summary of the Medical Record

The medical record consists mostly of reports related to Plaintiff's workers' compensation claim(s) and several actual treatment notes. Workers' compensation physician Dr. Gary P. Jacobs prepared two Internal Medicine Evaluation Reports dated April 29, 2015 (A.R. 385-89). Plaintiff had complained of pain in his low back, arm, chest and wrist, heartburn, gastrointestinal issues, headaches,

depression, anxiety, insomnia, difficulty with ramps, stairs, and rising from a seated position, difficulty with above-the-shoulder activities and numbness and tingling in his extremities (A.R. 385, 387). Dr. Jacobs diagnosed chest pain and hypertension, and Dr. Jacobs deferred any orthopedic diagnosis, and any work status evaluation, to Plaintiff's primary treating physician (A.R. 386, 388).

Qualified Medical Examiner ("QME") Dr. Norman Nakata reviewed medical records and prepared a summary and an evaluation dated June 13, 2015 (A.R. 390-402). Plaintiff had complained of stiffness and pain in his cervical spine and lower back, headaches, weakness in both hands, numbness and decreased feeling in his fingers, an inability to sit longer than 30 minutes at a time, stand longer than five minutes at a time, walk longer than 30 minutes at a time, and lift 10 or more pounds (A.R. 396). Plaintiff had high blood pressure, atherosclerotic heart disease and had undergone cardiac surgery (A.R. 396). On examination, Plaintiff had tenderness along his sternal incision scar and in his cervical spine and shoulders, strength of 4/5 in the left hand and 5/5 in the right hand, positive carpal tunnel signs and decreased sensation in the hands (A.R. 397-99). Dr. Nakata diagnosed cervical and lumbar strain, degenerative disease of the cervical and lumbar spine, overuse syndrome and tendinitis in both hands and wrists, and bilateral carpal tunnel syndrome (left greater than right) (A.R. 400). Dr. Nakata recommended an EMG/nerve conduction study of Plaintiff's bilateral upper extremities (A.R. 400, 403). Dr. Nakata prepared a supplemental report dated October 28, 2015, opining that Plaintiff is precluded from heavy work and from repetitive bending and stooping (A.R. 584-91).

Workers' compensation physician Dr. Nimish Shah reviewed the record and prepared a Primary Treating Physician's Narrative Reevaluation Report dated June 17, 2015 (A.R. 410-32). Plaintiff had complained of neck pain radiating to the upper extremities with tingling, numbness, weakness, cramps and burning, bilateral wrist and hand pain, constant low back pain radiating to the lower extremities with tingling, numbness and pain, and sternal pain related to lifting (A.R. 410-11). On examination, Plaintiff had slow, guarded gait, tenderness in the cervical spine, tenderness in the low back, positive straight leg raising, inability to walk on toes and heels, positive carpal tunnel compression testing with positive Tinel's sign and Phalen's test, tenderness to the chest scar, grip strength of 20 pounds or less, hypoalgesia at C6-C7 and L5-S1, and mild weakness in the upper and lower extremities (A.R. 419-21). Dr. Shah diagnosed: (1) possible cervical and lumbar sprain/strain with discogenic and facet pain at C2-C3, C5-C6, L4-L5 and L5-S1; (2) possible bilateral carpal tunnel syndrome versus bilateral upper extremity pain related to cervical radiculopathy versus "double crush syndrome"; (3) bilateral lumbosacral radicular pain; (4) keloid formation on the chest surgery scar with tenderness; and (5) stress syndrome (anxiety, depression, insomnia) (A.R. 422). Dr. Shaw extended Plaintiff's temporary total disability through October 31, 2015 (A.R. 429, 457, 484, 515).

Psychologist/QME Dr. Nelson J. Flores prepared a Comprehensive Permanent and Stationary Psychological Evaluation Report/Medical Records Review dated September 24, 2015 (A.R. 522-73). Dr. Flores diagnosed major depressive disorder (single episode, mild),

generalized anxiety disorder, male hypoactive sexual desire disorder due to chronic pain, insomnia, stress-related physiological response affecting gastric disturbances, high blood pressure and headaches, which Plaintiff developed subsequent to work "overload," stress and harassment in the workplace and chronic pain from work injuries (A.R. 525). On mental status examination, Plaintiff was cooperative, although sad, anxious, apprehensive, tense and preoccupied with physical symptoms and financial circumstances (A.R. 539-40). Plaintiff's concentration was sometimes deficient (A.R. 540). Dr. Flores assessed a Global Assessment of Functioning ("GAF") score of 58 (A.R. 544).[2] Dr. Flores opined that Plaintiff should not be placed in any work position where he could be at risk for industrial accident if he becomes anxious and/or distracted, and Plaintiff should not work in a position where he is required to handle stress and/or conflicts on a regular basis while interacting with the public and/or coworkers (A.R. 552).

Dr. Nhan Nguyen treated Plaintiff with medications for hypertension, diabetes and hyperlipidemia from October of 2014 through August of 2015 (A.R. 332-33). Dr. Nguyen's treatment records are not detailed.

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[2] The GAF scale is used by clinicians to report an individual's overall level of functioning. See American Psychological Association, Diagnostic and Statistical Manual of Mental Disorders 34 (4th ed. 2000). A GAF of 51-60 indicates "[m]oderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning (e.g., temporarily falling behind in schoolwork)." Id.

Dr. Tuan Nguyen treated Plaintiff periodically from November of 2015 through at least January of 2019, with medications for diabetes, coronary artery disease, exertional chest pain, shortness of breath and hypertension (A.R. 361-64, 620-79). In May of 2017, Plaintiff reportedly was "clinically stable" (A.R. 636). By October of 2017, Plaintiff reported that he was doing well, with no active complaints or cardiac symptoms (A.R. 629). In April of 2018, Plaintiff reported that he could walk daily without chest pain, shortness of breath or dyspnea on exertion (A.R. 633). In August of 2018, Plaintiff reportedly was able to complete basic activities of daily living without cardiopulmonary exertional symptoms (A.R. 643). In January of 2019, however, Dr. Nguyen treated Plaintiff for shortness of breath (A.R. 361-64, 676-79). Plaintiff then complained of a history of asthma with worsening "SOB" (shortness of breath), "DOE" (dyspnea on exertion), and worsening bilateral hand tremor right more than left (A.R. 361). An EKG reportedly was normal, and Plaintiff was referred for an echocardiogram and to neurology for a Parkinson's Disease evaluation (A.R. 363-64).

Dr. Tuan Nguyen completed a Cardiac Residual Functional Capacity Questionnaire dated January 31, 2019 (A.R. 365-69). Dr. Nguyen diagnosed "CAD" (coronary artery disease) and "CHF" (congestive heart failure) with "NYHA Class 3" (New York Heart Association Classification), based on echo testing and Plaintiff's history of heart surgery (A.R. 365). Dr. Nguyen reported that Plaintiff has "substantial" chest pain exacerbated with exertion (A.R. 365). Dr. Nguyen indicated that Plaintiff has marked limitations of physical activity, is capable of a low stress job, but frequently would have

symptoms severe enough to interfere with his attention and concentration (A.R. 365-66).

Dr. Tuan Nguyen also completed a Pulmonary Residual Functional Capacity Questionnaire dated July 31, 2019 (A.R. 371-75). Dr. Nguyen diagnosed asthma with shortness of breath, chest tightness, rhonchi, episodic acute asthma and fatigue, with asthma attacks three times a year for 1-3 days precipitated by upper respiratory infection, allergens, exercise, irritants and cold air/change in weather (A.R. 371-72). Dr. Nguyen again indicated that Plaintiff's symptoms would frequently interfere with his attention and concentration, but Plaintiff would be capable of low stress jobs (A.R. 372).

In both residual functional capacity questionnaires, Dr. Nguyen opined that, since November of 2016, Plaintiff: (1) could lift less than 10 pounds; (2) could walk less than one block without rest or severe pain; (3) could sit and stand/walk for less than two hours each in an eight-hour workday; (4) could frequently twist, stoop, crouch/squat, climb ladders and stairs; (5) would need to shift positions at will from sitting, standing or walking; (6) would need to take unscheduled breaks to lie down every two hours for 15 minutes; and (7) would need to avoid all exposure to cigarettes, soldering fluxes, solvents, cleaners, fumes, odors, gases, dust and chemicals (A.R. 367-69, 373-75).

Dr. Vuong Nguyen and Physician's Assistant ("PA") Hong An Pham treated Plaintiff with medications for diabetes, hypertension, hyperlipidemia, coronary artery disease, exertional chest pain,

shortness of breath, and dyspnea on exertion from August of 2018 through at least January of 2019 (A.R. 660-79). Plaintiff's medications included Flovent, Albuterol, Pseudoephedrine, Flonase, Zyrtec, Vascepa, Metformin, Lisonopril, Atorvastatin, Isosorbide mononitrate and Metroprolol (A.R. 664). In January of 2019, Plaintiff complained of fatigue, muscle weakness and chest pain on exertion and with heavy lifting (A.R. 664). Plaintiff returned later in January with disability forms to be completed, at which time his physical examination findings reportedly were within normal limits (A.R. 666).

PA Pham completed a Physical Residual Functional Capacity Questionnaire dated February 7, 2019 (A.R. 377-83). PA Pham reportedly had treated Plaintiff every three months and as needed for "CAD" (coronary artery disease), "SOB" (shortness of breath) on exertion, insomnia, back pain with radiculopathy, diabetes, hypertension, hyperlipidemia, fatigue, weakness and chest pain, for which Plaintiff has a guarded prognosis (A.R. 377-78). Plaintiff reportedly had generalized weakness and fatigue and therefore could not walk or stand for long periods of time or lift more than 10 pounds (A.R. 377). PA Pham reported that Plaintiff has limited range of motion, muscle spasm, reflex changes, muscle weakness, impaired sleep, grip strength of less than 10 pounds, depression and anxiety (A.R. 378-79). PA Pham opined that Plaintiff's symptoms frequently would interfere with his attention and concentration (A.R. 379). PA Pham opined that Plaintiff: (1) could rarely lift less than 10 pounds; (2) could sit for 10 minutes at a time and stand for five minutes at a time; (3) could sit and stand/walk less than two hours each per day; (4) would need to walk every 10 minutes; (5) must be able to shift

positions at will from sitting, standing and walking; (6) must take unscheduled breaks every two hours for 30 minutes; (7) must elevate his legs at all times; (8) must use a cane or other assistive device when standing/walking; (9) could rarely look down or up, or turn his head right or left or hold his head in a static position; (10) could rarely twist, stoop, crouch/squat or climb stairs and could never climb ladders; (11) could occasionally use his hands for reaching, handling, fingering, etc., and could occasionally use his feet (A.R. 380-83). PA Pham opined that Plaintiff would miss more than four days of work per month (A.R. 383).

Meanwhile, consultative examiner Dr. Ernest A. Bagner, III, a psychiatrist, prepared a Complete Psychiatric Evaluation dated February 15, 2017 (A.R. 336-39). Dr. Bagner did not review any medical records (A.R. 337). Plaintiff reported a history of depression, anger, anxiety, tiredness and weakness, trouble concentrating, memory problems, heart problems status post heart attack with open heart surgery, diabetes, high blood pressure and arthritis (A.R. 336). Plaintiff reported that he walks around, watches television, makes very simple meals and can dress and bathe independently (A.R. 337-38). On mental status examination, Plaintiff was cooperative, although he appeared angry, had rapid speech, could not recall any of three objects in five minutes, and could not spell "world" (A.R. 338-39). Dr. Bagner diagnosed a mood disorder (not otherwise specified), and assigned a GAF of 60 with a fair prognosis (A.R. 339). Dr. Bagner opined that Plaintiff would have moderate limits in following detailed instructions, interacting appropriately with coworkers, supervisors and the public, and responding to work

pressures, and he would have mild limits in his daily activities and in his ability to follow simple instructions, comply with job rules such as safety rules and attendance rules and respond to changes in the work setting (A.R. 339).

Consultative examiner Dr. Jay Dhiman prepared an Internal Medicine Evaluation dated March 22, 2017 (A.R. 342-47). It is not clear whether Dr. Dhiman reviewed any medical records as part of his evaluation. Plaintiff reportedly complained of radiating low back pain since 2013 from heavy lifting at work, a history of open heart surgery in 2007, and diabetes since 2004 (A.R. 342-43). Plaintiff denied exertional chest pain and said he has occasional chest pain with bending and movement (A.R. 343). On examination, Plaintiff had a grip strength of 10 pounds on the right and five pounds on the left, tenderness in the lower lumbar spine at midline with limited range of motion, tenderness of the costochondral joints bilaterally, and otherwise normal findings (A.R. 343-46; see also A.R. 349 (lumbar spine x-ray which showed evidence of moderate hypertrophic changes in the lumbar spine with decrease in the L4-L5 disc level)). Dr. Dhiman observed that Plaintiff had a history of myocardial infarction status post surgery (erroneously referenced as "status post cabbage"), a history of diabetes, and tenderness on examination (A.R. 346). Dr. Dhiman did not make any diagnosis (A.R. 346). Dr. Dhiman opined that Plaintiff would be capable of medium work with no sitting limits or reaching/manipulation limits, but with no more than frequent bending, crouching and stooping (A.R. 346).

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State agency physicians reviewed the medical record in April and August of 2017 (A.R. 130-55). These physicians opined that, although Plaintiff suffered from severe degenerative disc disease, he is capable of medium work with occasional postural limits (A.R. 130-55 (assertedly giving great weight to the consultative examiners' opinions)).[3]

II. The ALJ Materially Erred in the Evaluation of Plaintiff's Testimony and Statements Regarding Plaintiff's Subjective Symptomatology and Claimed Limitations.

Plaintiff testified that he stopped working as a soil tester because he no longer has sufficient lifting strength and because he has heart problems, chest pain, asthma and "COPD" (chronic obstructive pulmonary disease) (A.R. 81-85). More specifically, Plaintiff stated that he has: (1) chest pain that worsens when he lifts heavy objects,

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[3] As noted above, in determining Plaintiff's residual functional capacity, the ALJ gave: (1) "significant" weight to the state agency physicians' opinions finding Plaintiff capable of medium work (A.R. 25); (2) "partial" weight to Dr. Dhiman's opinion finding Plaintiff capable of medium work limited to no more than frequent bending, crouching and stooping (A.R. 25); (3) "partial" weight to QME Nakata's opinion that Plaintiff is precluded from heavy work and repetitive bending and stooping (A.R. 26); (4) "little" weight to Dr. Tuan Nguyen's opinion finding Plaintiff capable of "less than sedentary work" as assertedly not consistent with the evidence as a whole (A.R. 26); (5) "little" weight to PA Pham's opinion finding Plaintiff capable of "less than sedentary work" as assertedly not consistent with the evidence and because a physician's assistant is not an acceptable medical source (A.R. 26); (6) "little" weight to Dr. Bagner's consultative examiner opinion that Plaintiff has mental limitations (A.R. 20-21); and (7) no weight to Dr. Flores' opinion that Plaintiff has mental limitations (A.R. 21).

climbs stairs or walks too far; (2) neck pain which keeps him from looking up too long; (3) nerve damage in his arm that prevents him from writing a whole page; (4) some problems holding onto objects and using his hands; and (5) back pain which limits sitting to 20 minutes, standing to ten minutes and walking to two or three blocks (A.R. 86-87, 91-92). Plaintiff also testified that he suffers from depression, which limits his socializing and concentration and which also manifests in problems such as losing his way home and being unable to follow a story when reading or watching television (A.R. 88-90).

In a Function Report - Adult form dated January 30, 2017, Plaintiff reported that he had chronic pain preventing him from lifting over 10 pounds, standing more than 10 minutes, or walking more than 1/10 of a mile without rest, and that his condition prevented him from paying attention for more than two minutes (A.R. 266-74). Plaintiff reported that he spent his days walking "a little," lying down, making sandwiches or frozen dinners and doing laundry (for "4-5 min.") (A.R. 267-69). Plaintiff reported he had no problems with his own personal care, but indicated he almost never went outside, other than for groceries (A.R. 267, 269).

The ALJ discounted Plaintiff's testimony and statements as assertedly "not entirely consistent with the medical evidence and other evidence in the record" (A.R. 23). The ALJ stated that Plaintiff's assertions were "inconsistent with the evidence as a whole," which reportedly showed an "unremarkable" physical examination, normal heart and lung functioning and no evidence of neurological deficits, shortness of breath, or any need for an

assistive device to ambulate (A.R. 23-26). The ALJ also observed that Plaintiff has been treated with pain medications, which reportedly had given Plaintiff "some improvement," that Plaintiff's heart condition assertedly was "stable," and it "appear[ed]" that Plaintiff's degenerative disc disease and coronary artery disease were "generally" "stable with medication" (A.R. 24-25).

Elsewhere in the ALJ's written decision, the ALJ stated: (1) there assertedly was no evidence Plaintiff had decreased ability to use his hands and Plaintiff reportedly was able to prepare simple meals, do laundry, and manage his personal care without assistance (A.R. 19 (citing A.R. 267 (Function Report - Adult form)); and (2) there assertedly was no evidence that Plaintiff continued to seek mental health treatment after his workers' compensation case was resolved (A.R. 20). Thus, construing the ALJ's decision liberally, it appears that the ALJ discounted Plaintiff's subjective testimony and statements based on Plaintiff's admitted daily activities, Plaintiff's failure to seek mental health treatment after his workers' compensation case resolved, and asserted inconsistencies between Plaintiff's subjective complaints and the medical record, including the medical treatment record.

Where, as here, an ALJ finds that a claimant's medically determinable impairments reasonably could be expected to cause some degree of the alleged symptoms of which the claimant subjectively complains (A.R. 23), any discounting of the claimant's complaints must be supported by "specific, cogent" findings. See Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010); Lester v. Chater, 81 F.3d 821, 834

(9th Cir. 1995); but see Smolen v. Chater, 80 F.3d 1273, 1282-84 (9th Cir. 1996) (indicating that ALJ must state "specific, clear and convincing" reasons to reject a claimant's testimony where there is no evidence of malingering).[4] Generalized, conclusory findings do not suffice. See Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004) (the ALJ's credibility findings "must be sufficiently specific to allow a reviewing court to conclude the ALJ rejected the claimant's testimony on permissible grounds and did not arbitrarily discredit the claimant's testimony") (internal citations and quotations omitted); Holohan v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001) (the ALJ must "specifically identify the testimony [the ALJ] finds not to be credible and must explain what evidence undermines the testimony"); Smolen v. Chater, 80 F.3d at 1284 ("The ALJ must state specifically which symptom testimony is not credible and what facts in the record lead to that conclusion."); see also Social Security Ruling ("SSR")

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[4] In the absence of an ALJ's reliance on evidence of "malingering," most recent Ninth Circuit cases have applied the "clear and convincing" standard. See, e.g., Leon v. Berryhill, 880 F.3d 1041, 1046 (9th Cir. 2017); Brown-Hunter v. Colvin, 806 F.3d 487, 488-89 (9th Cir. 2015); Burrell v. Colvin, 775 F.3d 1133, 1136-37 (9th Cir. 2014); Treichler v. Commissioner, 775 F.3d 1090, 1102 (9th Cir. 2014); Ghanim v. Colvin, 763 F.3d 1154, 1163 n.9 (9th Cir. 2014); Garrison v. Colvin, 759 F.3d 995, 1014-15 & n.18 (9th Cir. 2014); see also Ballard v. Apfel, 2000 WL 1899797, at *2 n.1 (C.D. Cal. Dec. 19, 2000) (collecting earlier cases). In Ahearn v. Saul, 988 F.3d 1111, 1116 (9th Cir. 2021), the Ninth Circuit appeared to apply both the "specific, cogent" standard and the "clear and convincing" standard. In the present case, the ALJ's findings are insufficient under either standard, so the distinction between the two standards (if any) is academic.

96-7p (explaining how to assess a claimant's credibility), superseded, SSR 16-3p (eff. March 28, 2016).[5]

The ALJ's stated reasons for discounting Plaintiff's subjective testimony and statements are legally insufficient. Turning first to Plaintiff's daily activities, inconsistencies between admitted daily activities and claimed incapacity properly may impugn the accuracy of a claimant's testimony and statements under certain circumstances. See, e.g., Thune v. Astrue, 499 Fed. App'x 701, 703 (9th Cir. 2012) (ALJ properly discredited pain allegations as contradicting claimant's testimony that she gardened, cleaned, cooked, and ran errands); Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1175 (9th Cir. 2008) (claimant's "normal activities of daily living, including cooking, house cleaning, doing laundry, and helping her husband in managing finances" provided sufficient explanation for discounting claimant's testimony). Yet, it is difficult to reconcile Ninth Circuit opinions discussing when a claimant's admitted activities may and may not justify a discounting of the claimant's testimony and statements. Compare Stubbs-Danielson v. Astrue with Vertigan v. Halter, 260 F.3d 1044, 1049-50 (9th Cir. 2001) ("the mere fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving

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[5] Social Security Rulings ("SSRs") are binding on the Administration. See Terry v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir. 1990). The appropriate analysis under the superseding SSR is substantially the same as the analysis under the superseded SSR. See R.P. v. Colvin, 2016 WL 7042259, at *9 n.7 (E.D. Cal. Dec. 5, 2016) (stating that SSR 16-3p "implemented a change in diction rather than substance") (citations omitted); see also Trevizo v. Berryhill, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (suggesting that SSR 16-3p "makes clear what our precedent already required").

a car, or limited walking for exercise, does not in any way detract from her credibility as to her overall disability"); see also Diedrich v. Berryhill, 874 F.3d 634, 642-43 (9th Cir. 2017) (daily activities of cooking, cleaning, vacuuming, washing dishes, shopping and cleaning a cat's litter box insufficient to discount the claimant's subjective complaints).

In the present case, Plaintiff's limited admitted daily activities do not significantly undermine his subjective complaints. Although Plaintiff reported no difficulty with personal care and indicated that he could make sandwiches or frozen meals and do laundry for a few minutes at a time, none of these activities necessarily contradict Plaintiff's claimed inability to function as required in a work setting, including a claimed inability to use his hands sufficiently to work at a job. Thus, Plaintiff's limited admitted daily activities do not furnish a legally sufficient reason to discount his subjective complaints. See Revels v. Berryhill, 874 F.3d 648, 667-68 (9th Cir. 2017).

With respect to Plaintiff's asserted failure to seek mental health treatment after his workers' compensation case resolved, an ALJ sometimes may discount a claimant's allegations based on a claimant's failure to seek treatment or follow a prescribed course of treatment. See Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012) (in assessing claimant's credibility, ALJ may properly rely on "unexplained or inadequately explained failure to seek treatment or to follow prescribed course of treatment"). However, "it is a questionable practice to chastise one with a mental impairment for the

exercise of poor judgment in seeking rehabilitation." Nguyen v. Chater, 100 F.3d 1462, 1465 (9th Cir. 1996) (citation omitted). In this case, there is no suggestion that Plaintiff failed to follow mental health treatment recommendations when treatment was available. On this record, Plaintiff's asserted failure to seek mental health treatment after his workers' compensation case resolved is not a legally sufficient reason to reject Plaintiff's testimony that his depression causes him to have significant issues with concentration.

With respect to perceived inconsistencies between Plaintiff's subjective complaints and the objective medical record, such perceived inconsistencies are not in themselves legally sufficient reasons for discounting Plaintiff's testimony and statements. An asserted lack of objective medical evidence can be a factor in discounting a claimant's subjective complaints, but cannot "form the sole basis." See Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005); Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001). To the extent the ALJ stated other reasons for rejecting Plaintiff's testimony, as discussed above, those other stated reasons are infirm. Thus, the ALJ's reliance on any alleged inconsistency between Plaintiff's subjective complaints and the objective medical evidence cannot properly support the ALJ's decision. See id.

Even if the law permitted an ALJ to rely solely on inconsistencies between a claimant's subjective complaints and the objective medical evidence, the ALJ's reasoning in the present case would still be deficient. As summarized above, the medical record includes diagnoses and examination findings consistent, rather than

inconsistent, with Plaintiff's subjective complaints. Diagnoses include cervical and lumbar strain, degenerative disc disease, overuse syndrome and tendinitis of both hands and wrists, bilateral carpal tunnel syndrome (left greater than right), asthma, shortness of breath, chest tightness and rhonchi. Examination findings include significant pain and limited range of motion, as well as positive test results on straight leg raising and carpal tunnel testing. Thus, Plaintiff's subjective complaints are not necessarily inconsistent with the objective medical evidence.[6]

The Court is unable to conclude that the ALJ's failure to state legally sufficient reasons for discounting Plaintiff's subjective complaints was harmless. "[A]n ALJ's error is harmless where it is inconsequential to the ultimate non-disability determination." Molina v. Astrue, 674 F.3d at 1115 (citations and quotations omitted). Here, the vocational expert did testify that a person limited to light work with occasional use of the hands and limited neck motion could perform Plaintiff's past relevant work as a soils engineer (A.R. 104-05; see also DOT 024.161-010, Engineer, Soils, 1991 WL 646509 (4th Ed. R. 1991) (listing job requirements)). However, the vocational expert also testified that, if Plaintiff were limited to sedentary work, there would be no skills transferrable to sedentary work and no jobs

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[6] To the extent Defendant may suggest additional reasons not expressly specified by the ALJ for discounting Plaintiff's subjective complaints, the Court may not rely on any such reasons. See Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001) (the court "cannot affirm the decision of an agency on a ground that the agency did not invoke in making its decision").

Plaintiff could perform (A.R. 106).[7] There is no substantial evidence in the record that a person as limited as Plaintiff claims to be could perform any job.

III. Remand is Appropriate.

Because the circumstances of this case suggest that further administrative proceedings could remedy the ALJ's errors, remand is appropriate. See McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see generally INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an administrative determination, the proper course is remand for additional agency investigation or explanation, except in rare circumstances); Leon v. Berryhill, 880 F.3d 1041, 1044 (9th Cir. 2017) (reversal with a directive for the immediate calculation of benefits is a "rare and prophylactic exception to the well-established ordinary remand rule"); Dominguez v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) ("Unless the district court concludes that further administrative proceedings would serve no useful purpose, it may not remand with a direction to provide benefits"); Treichler v. Commissioner, 775 F.3d 1090, 1101 n.5 (9th Cir. 2014) (remand for further administrative proceedings is the proper remedy "in all but the rarest cases"); Harman v. Apfel, 211 F.3d 1172, 1180-81 (9th Cir.), cert. denied, 531

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[7] A person of "advanced age" (i.e., over age 55) who is limited to sedentary work, and who has a high school education with no transferrable skills, is conclusively presumed to be disabled under the Medical Vocational guidelines, 20 C.F.R. Pt. 404, Subpt. P, App. 2 ("the Grids"). See Grid Rule 201.06; see also Cooper v. Sullivan, 880 F.2d 1152, 1157 (9th Cir. 1989) (a conclusion of disability, directed by the Grids, is irrebutable). Plaintiff is of "advanced age" (A.R. 231).

U.S. 1038 (2000) (remand for further proceedings rather than for the immediate payment of benefits is appropriate where there are "sufficient unanswered questions in the record"); Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) ("Connett") (remand is an option where the ALJ fails to state sufficient reasons for rejecting a claimant's excess symptom testimony); but see Orn v. Astrue, 495 F.3d 625, 640 (9th Cir. 2007) (citing Connett for the proposition that "[w]hen an ALJ's reasons for rejecting the claimant's testimony are legally insufficient and it is clear from the record that the ALJ would be required to determine the claimant disabled if he had credited the claimant's testimony, we remand for a calculation of benefits") (quotations omitted); see also Brown-Hunter v. Colvin, 806 F.3d 487, 495-96 (9th Cir. 2015) (discussing the narrow circumstances in which a court will order a benefits calculation rather than further proceedings); Ghanim v. Colvin, 763 F.3d 1154, 1166 (9th Cir. 2014) (remanding for further proceedings where the ALJ failed to state sufficient reasons for deeming a claimant's testimony not credible); Vasquez v. Astrue, 572 F.3d 586, 600-01 (9th Cir. 2009) (a court need not "credit as true" improperly rejected claimant testimony where there are outstanding issues that must be resolved before a proper disability determination can be made). There are outstanding issues that must be resolved before a proper disability determination can be made in the present case.

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CONCLUSION

For all of the foregoing reasons,[8] Plaintiff's and Defendant's motions for summary judgment are denied and this matter is remanded for further administrative action consistent with this Opinion.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: April 13, 2021.

/S/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[8] The Court has not reached any other issue raised by Plaintiff except insofar as to determine that reversal with a directive for the immediate payment of benefits would not be appropriate at this time.