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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

ROCKLIN J. BERSCHNEIDER II,

 Plaintiff,

 v.

CAROLYN COLVIN, Acting
Commissioner of Social Security

 Defendant.

1:13-cv-01945-GSA

**ORDER REGARDING PLAINTIFF’S
SOCIAL SECURITY COMPLAINT**

I. INTRODUCTION

Rocklin Berschneider (“Plaintiff”) seeks judicial review of a final decision by the Commissioner of Social Security (“Commissioner” or “Defendant”) denying Mr. Berschneider’s application for disability insurance benefits pursuant to Title II of the Social Security Act. The matter is currently before the Court on the parties’ briefs, which were submitted without oral argument to the Honorable Gary S. Austin, United States Magistrate Judge.¹

II. BACKGROUND AND PRIOR PROCEEDINGS²

Plaintiff was born on August 7, 1970. AR 126. He graduated from high school and

¹ The parties consented to the jurisdiction of the United States Magistrate Judge. ECF Nos. 8, 9.
² References to the Administrative Record will be designated as “AR,” followed by the appropriate page number.

1 received a degree in culinary arts in 1995. AR 138. Plaintiff worked as a cook at a restaurant from
2 1994 until 2000, when he began working as a security guard at a winery. AR 138. He held that
3 job until 2008, when he was reassigned to work as a telephone operator because he was
4 experiencing weakness in his hands and was no longer able to pull the trigger on his handgun. AR
5 208, 214. He held that job until April 2010, when his employment was terminated.³ AR 138.
6 Plaintiff lives with his wife and adopted minor son. AR 214. More recently, the family moved in
7 with Plaintiff's mother-in-law following the foreclosure of their house. AR 209.

8 Plaintiff's alleged physical conditions include obesity and myotonic dystrophy.⁴ AR 137.
9 Plaintiff's symptoms include general weakness in his extremities, including his arms, fingers, and
10 legs, as well as pain and numbness in his leg. AR 45-46. Plaintiff also alleges gastrointestinal
11 difficulties. AR 269. There is no treatment for myotonic dystrophy. AR 216.

12 On August 27, 2010, Plaintiff filed an application for disability insurance benefits under
13 Title II. AR 124-25. The application was denied initially on February 4, 2011 and on
14 reconsideration on May 4, 2011. AR 67-71, 75-79. Plaintiff filed a request for a hearing on June
15 23, 2011. AR 88-89. The hearing was then conducted before Administrative Law Judge Daniel G.
16 Heely (the "ALJ") on January 24, 2012. AR 41. On August 10, 2012, the ALJ issued an
17 unfavorable decision determining that Plaintiff was not disabled. AR 18-29. Plaintiff filed an
18 appeal of this decision with the Appeals Council. The Appeals Council denied the appeal,
19 rendering the order the final decision of the Commissioner. AR 1-7.

20 Plaintiff now challenges that decision. Specifically, he objects to the ALJ's findings that:
21 (1) myotonic dystrophy and obesity were the only two severe medical impairments at step two of
22 the five-step evaluative process; (2) Plaintiff was not credible when discussing the severity of his
23 impairments; (3) the third party statements about Plaintiff's impairments were not credible; and
24 (4) the opinions of Plaintiff's two treating physicians were entitled to little weight.

25 _____
26 ³ The reason for the termination of his employment is not entirely clear. Although Plaintiff states that the job position
27 was eliminated, several third party statements assert that his employment ended because of his medical impairments.
28 AR 137, 204, 207.

⁴ According to Plaintiff's genetic evaluation report from the University of California, San Francisco, myotonic
dystrophy "is the most common form of muscular dystrophy in adults. It is a quite variable, multi-system disorder,
affecting the voluntary muscle system as well as possibly contributing to a large spectrum of conditions." AR 215.

1 **III. THE DISABILITY DETERMINATION PROCESS**

2 To qualify for benefits under the Social Security Act, a plaintiff must establish that he or
3 she is unable to engage in substantial gainful activity due to a medically determinable physical or
4 mental impairment that has lasted or can be expected to last for a continuous period of not less
5 than twelve months. 42 U.S.C. § 1382c(a)(3)(A). An individual shall be considered to have a
6 disability only if:

7 . . . his physical or mental impairment or impairments are of such severity that he
8 is not only unable to do his previous work, but cannot, considering his age,
9 education, and work experience, engage in any other kind of substantial gainful
10 work which exists in the national economy, regardless of whether such work
exists in the immediate area in which he lives, or whether a specific job vacancy
exists for him, or whether he would be hired if he applied for work.

11 42 U.S.C. § 1382c(a)(3)(B).

12 To achieve uniformity in the decision-making process, the Commissioner has established
13 a sequential five-step process for evaluating a claimant’s alleged disability. 20 C.F.R. §
14 404.1520(a)-(f). The ALJ proceeds through the steps and stops upon reaching a dispositive
15 finding that the claimant is or is not disabled. 20 C.F.R. § 404.1520(a)(4). The ALJ must consider
16 objective medical evidence and opinion testimony. 20 C.F.R. § 404.1527, 404.1529.

17 Specifically, the ALJ is required to determine: (1) whether a claimant engaged in
18 substantial gainful activity during the period of alleged disability; (2) whether the claimant had
19 medically-determinable “severe” impairments;⁵ (3) whether these impairments meet or are
20 medically equivalent to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P,
21 Appendix 1; (4) whether the claimant retained the residual functional capacity (“RFC”) to
22 perform his past relevant work;⁶ and (5) whether the claimant had the ability to perform other
23 jobs existing in significant numbers at the regional and national level. 20 C.F.R. § 404.1520(a)-
24 (f).

25 _____
26 ⁵ “Severe” simply means that the impairment significantly limits the claimant’s physical or mental ability to do basic
work activities. *See* 20 C.F.R. §§ 404.1520(c) and 416.920(c).

27 ⁶ Residual functional capacity captures what a claimant “can still do despite [his or her] limitations.” 20 C.F.R. §§
404.1545 and 416.945. “Between steps three and four of the five-step evaluation, the ALJ must proceed to an
28 intermediate step in which the ALJ assesses the claimant’s residual functional capacity.” *Massachi v. Astrue*, 486
F.3d 1149, 1151 n. 2 (9th Cir. 2007).

1 Using the Social Security Administration’s five-step sequential evaluation process, the
2 ALJ determined that Plaintiff did not meet the disability standard. AR 18-29. In particular, the
3 ALJ found that Plaintiff had not engaged in substantial gainful activity since April 5, 2010, the
4 date specified in his application. AR 23. Further, the ALJ identified obesity and myotonic
5 dystrophy as medically determinable impairments. AR 23. Nonetheless, the ALJ determined that
6 the severity of Plaintiff’s impairments did not meet or exceed any of the listed impairments. AR
7 23.

8 Based on a review of the entire record, the ALJ determined that Plaintiff had the RFC to
9 perform “light work as defined in 20 C.F.R. § 404.1567(b) as follows: could work at jobs
10 sitting/standing/walking 6 out of 8 hours each with normal breaks, lifting and carrying 50 pounds
11 occasionally and 25 pounds frequently; could engage in frequent but not constant handling and
12 fingering with the bilateral upper extremities.” AR 24. Although Plaintiff could not perform his
13 past relevant work, he could perform other work that exists in national economy. AR 20.

14 **IV. STANDARD OF REVIEW**

15 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine
16 whether: (1) it is supported by substantial evidence; and (2) it applies the correct legal standards.
17 *See Carmickle v. Commissioner*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*, 499 F.3d
18 1071, 1074 (9th Cir. 2007).

19 “Substantial evidence means more than a scintilla but less than a preponderance.” *Thomas*
20 *v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). It is “relevant evidence which, considering the
21 record as a whole, a reasonable person might accept as adequate to support a conclusion.” *Id.*
22 “Where the evidence is susceptible to more than one rational interpretation, one of which supports
23 the ALJ's decision, the ALJ's conclusion must be upheld.” *Id.*

24 **V. DISCUSSION**

25 **A. The Impact of Plaintiff’s Medically Determinable Impairments**

26 Plaintiff argues that the ALJ failed to consider the “severity and impact” of several of
27 Plaintiff’s medical impairments at step two of his analysis. Plaintiff’s Opening Brief (“Opening
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1 Brief”) 20:16-19, ECF No. 15. Although the ALJ ultimately determined that the Plaintiff’s
2 obesity and myotonic dystrophy were both severe impairments under 20 C.F.R. § 404.1520(c),
3 Plaintiff argues that he should also have included the Plaintiff’s “pulmonary insufficiency, sleep
4 disorder, peripheral neuropathy, gall stones, and other impairments associated with Myotonic
5 Dystrophy.” *Id.* Plaintiff further argues that this failure was prejudicial to Plaintiff because it
6 ultimately discounted several of Plaintiff’s complaints.

7 The Commissioner responds that any such failure constituted harmless error and thus does
8 not require remand to the ALJ.

9 A failure to include an impairment in the analysis at step two is only error if the ALJ fails
10 to consider that impairment when considering the Plaintiff’s functional limitations at later steps in
11 the sequential evaluation. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (“The decision
12 reflects that the ALJ considered any limitations posed by the bursitis at Step 4. As such, any error
13 that the ALJ made in failing to include the bursitis at Step 2 was harmless”).

14 Plaintiff argues that the ALJ’s failure to explicitly include his other medical impairments
15 at step two was prejudicial because the decision did not reflect “Plaintiff’s complaints of such
16 symptoms as shortness of breath, leg pain and abdominal symptoms.” Opening Brief 21:22-24. A
17 review of the ALJ’s decision, however, establishes that the ALJ considered Plaintiff’s pulmonary
18 functions (AR 26, *citing* AR 238, 312), leg pain (AR 24 (“According to the Disability Report-
19 Adult, the claimant’s ability to work is limited by myotonic dystrophy and meralgia
20 paresthetica”⁷)), and abdominal symptoms (AR 27 (“The claimant’s reports that ½ of the time he
21 has bowel/diarrhea frequency [sic] and has to go to the bathroom 4-6 times in an 8 hour day (on
22 bad days) for around 10 minutes each time were consistent with his statements to Dr. Ralph”))
23 while determining the Plaintiff’s RFC. The ALJ thus considered the additional limitations in his
24 decision, even if they were not expressly listed as severe limitations at step two of his analysis.
25 Any error in failing to list these impairments was thus harmless and remand on these grounds is
26 not warranted.

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28 ⁷ “Meralgia paresthetica” refers to numbness or pain in the outer thigh.

1 **B. Plaintiff’s Credibility**

2 Plaintiff challenges the ALJ’s rejection of Plaintiff’s statements about the “intensity,
3 persistence and functionally limiting effects” of his symptoms. AR 24; Opening Brief 14:1-6.
4 Specifically, Plaintiff argues that: (1) the ALJ’s finding that Plaintiff’s daily activities contradict
5 his testimony misrepresents Plaintiff’s daily activities; (2) the ALJ’s argument that the
6 conservative course of treatment disproves Plaintiff’s claims is not supported by substantial
7 evidence; (3) discounting Plaintiff’s testimony because of the Plaintiff’s “demeanor” is
8 inappropriate; and (4) a lack of corroboration with objective medical findings is not a valid reason
9 to find Plaintiff not credible. Opening Brief 14-17.

10 The Commissioner disputes Plaintiff’s characterization of the ALJ’s decision, arguing
11 that: (1) Plaintiff stopped working because his position was eliminated (and not due to any
12 medical impairments)⁸; (2) it was entirely appropriate for the ALJ to determine that Plaintiff’s
13 daily activities were inconsistent with his alleged symptoms; (3) the ALJ is entitled to consider
14 the course of treatment in evaluating credibility; and (4) the Plaintiff’s demeanor at a hearing is a
15 relevant tool to assess credibility. Defendant’s Opposition Brief (“Opposition Brief”) 9:12-10:21,
16 ECF No. 19.

17 *i. Legal standards*

18 To evaluate the credibility of a claimant’s testimony regarding subjective complaints of
19 pain and other symptoms, an ALJ must engage in a two-step analysis. *Vasquez v. Astrue*, 572
20 F.3d 586, 591 (9th Cir. 2009). First, the ALJ must determine whether the claimant has presented
21 objective medical evidence of an underlying impairment that could reasonably be expected to
22 produce the pain or other symptoms alleged. *Id.* The claimant is not required to show that the
23 impairment “could reasonably be expected to cause the severity of the symptom she has alleged;
24 she need only show that it could reasonably have caused some degree of the symptom.” *Id.* If the
25 claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the

26 ⁸ It is not clear why this would mean that Plaintiff is not credible—there does not appear to be any inconsistency in
27 Plaintiff’s statements about the reason he stopped working. Likewise, the case that the Commissioner cites to support
28 this argument, *Macri v. Chater*, 93 F.3d 540 (9th Cir. 1996) seems only to apply to the situation where a claimant
testifies that they were suffering from symptoms, but was simultaneously searching for new employment (thus
suggesting that the testimony was false). That is not the case here.

1 claimant's testimony regarding the severity of the symptoms for “specific, clear and convincing
2 reasons” that are supported by substantial evidence. *Id.* In this case, the ALJ only doubts
3 Plaintiff’s credibility with respect to the “degree of limitation” alleged. AR 25. Thus, the ALJ
4 must provide specific, clear, and convincing reasons to disbelieve the testimony.

5 An ALJ can consider a variety of factors in assessing a claimant’s credibility, including:

6 (1) ordinary techniques of credibility evaluation, such as the claimant’s reputation
7 for lying, prior inconsistent statements concerning the symptoms, and other
8 testimony by the claimant that appears less than candid; (2) unexplained or
inadequately explained failure to seek treatment or to follow a prescribed course
of treatment; and (3) the claimant’s daily activities. If the ALJ’s finding is
supported by substantial evidence, the court may not engage in second-guessing.

9 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (citations and internal quotation marks
10 omitted). Other factors can include a claimant’s work record and testimony from physicians and
11 third parties concerning the nature, severity, and effect of the symptoms of which the claimant
12 complains. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). An ALJ can only rely on
13 an inconsistency between a claimant’s testimony and the objective medical evidence to reject that
14 testimony where the ALJ specifies which “complaints are contradicted by what clinical
15 observations.” *Regennitter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1999).
16 An ALJ properly discounts credibility if she makes specific credibility findings that are properly
17 supported by the record and are sufficiently specific to ensure a reviewing court that she did not
18 “arbitrarily discredit” the testimony. *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991).

19 ***ii. Plaintiff’s demeanor***

20 The ALJ’s decision regarding Plaintiff’s demeanor at the hearing states only that “the
21 claimant’s demeanor while testifying at the hearing was generally unpersuasive. It is emphasized
22 that this observation is only one among many being relied on in assessing credibility and is not
23 determinative.” AR 26. The Commissioner correctly argues that an ALJ’s personal observations
24 of a claimant at a hearing can form a part of the credibility analysis. *Nyman v. Heckler*, 779 F.2d
25 528, 531 (9th Cir. 1985). Such observations, however, cannot “form the sole basis for discrediting
26 a person’s testimony.” *Orn v. Astrue*, 495 F.3d 625, 640 (9th Cir. 2007). Moreover, the ALJ’s
27 observation in this instance is less detailed than in those cases suggesting that personal
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1 observations can form a portion of the credibility analysis—it is not clear from the decision what
2 it was about Plaintiff’s demeanor that made him unpersuasive. Thus, while Plaintiff’s demeanor
3 can play some role in the credibility analysis, it is not, in this instance, a dispositive one.

4 ***iii. Conservative course of treatment***

5 The ALJ found that: “The Claimant has not generally received on-going and continuous
6 medical treatment of the type one would expect for a totally disabled individual and the
7 claimant’s alleged loss of function is not supported by objective medical findings.” AR 25. It is
8 true that an “***unexplained, or inadequately explained***, failure to seek treatment or follow a
9 prescribed course of treatment” can constitute an appropriate reason to disbelieve a Plaintiff.
10 *Bunnell v. Sullivan*, 947 F.2d 341, 346 (9th Cir. 1991) (emphasis added). Here, however,
11 Plaintiff’s minimal course of treatment appears to have a valid explanation. Evidence in the
12 record expressly states that “[t]here is no specific treatment for Myotonic Dystrophy.” AR 216.
13 Indeed, the prescribed steps that Plaintiff’s treatment team at UCSF suggested seem to include
14 little more than regular checkups to monitor potential complications because of his condition. AR
15 216, 327-28. Plaintiff appears to have complied, in large part, with these suggestions. AR 316,
16 319, 320, 329-28. The course of treatment thus does not appear to constitute a clear or convincing
17 reason to find Plaintiff not credible.

18 ***iv. Lack of corroboration with objective evidence***

19 The ALJ also found that: “The claimant’s statements and those of third parties concerning
20 the claimant’s impairments and their impact on the claimant’s ability to work are not credible in
21 light of discrepancies between the claimant’s assertions and information contained in the
22 documentary reports and the reports of the treating and examining practitioners.” AR 25. The
23 Commissioner does not contest Plaintiff’s argument that this is an invalid reason to find Plaintiff
24 not credible.

25 To the extent the objective evidence does not support the severity of the limitations
26 asserted by the Plaintiff, however, the ALJ’s decision does not specify which statements by
27 Plaintiff are contradicted by which evidence in the record. As a result, this reason is not
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1 sufficiently specific to constitute a valid reason to reject Plaintiff’s testimony.⁹ *Regennitter*, 166
2 F.3d at 1297 (“The ALJ also determined that Regennitter’s complaints are ‘inconsistent with
3 clinical observations.’ This determination could satisfy the requirement of a clear and convincing
4 reason for discrediting a claimant’s testimony, except that the ALJ did not specify what
5 complaints are contradicted by what clinical observations”).

6 ***v. Inconsistency with daily activities***

7 A Plaintiff’s daily activities can be considered in an ALJ’s credibility analysis. *Burch v.*
8 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). Such an analysis must be conducted with care,
9 however, because “impairments that would unquestionably preclude work and all the pressures of
10 a workplace environment will often be consistent with doing more than merely resting in bed all
11 day.” *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014). In other words, the ability to
12 perform some daily activities may still be consistent with a finding that a claimant is disabled.

13 With respect to the Plaintiff’s daily activities, the ALJ writes that:

14 The daily activities described by the claimant are not limited to the extent one
15 would expect, given the complaints of disabling symptoms and limitations. The
16 claimant is able to prepare meals, watch television, do some housework, socialize,
17 use the Internet, manage personal finances, go camping and drive a car. I note that
18 driving inherently involves constant and complex coordination.

19 AR 25.

20 The evidence in the record, however, suggests that each of these tasks is accomplished
21 only with significant accommodations or caveats. Plaintiff does prepare meals, for example, but
22 this preparation appears to consist, at least in part, of microwaving sandwiches or heating frozen
23 pizzas.¹⁰ AR 155, 210. When preparing more complex meals, he requires assistance in lifting or
24 handling pots and pans and cannot operate a bottle or can opener by himself. AR 152, 154, 155.
25 While Plaintiff is able to perform some household chores, such as placing dishes in a dishwasher
26 and doing laundry, he requires assistance with other chores, such as when feeding household pets

26 ⁹ This does not necessarily mean that Plaintiff’s testimony is, in fact, corroborated by the bulk of the objective
27 evidence. Rather, it means only that a general statement that the Plaintiff’s testimony is inconsistent with the reports
28 of doctors is inadequate to meet the burden of stating specific, clear, and convincing reasons for doubting a Plaintiff’s
testimony.

¹⁰ Plaintiff also has a degree in culinary arts, suggesting that he should be capable of significantly more complex meal
preparation, absent any limitations.

1 (AR 146) or going grocery shopping (AR 210). He also elevates his legs for approximately four
2 hours every day. AR 56. And although he was able to go camping in one instance and drive a car,
3 it appears that his family performed the bulk of the labor associated with the camping trip and he
4 had to make special accommodations in his driving to compensate for the weakness in his
5 hands.¹¹ AR 54, 55. He appears to have difficulty throwing a football or baseball and in
6 maintaining his balance. AR 211.

7 The reasons the ALJ cites, while legitimate reasons to discredit a Plaintiff's testimony, do
8 not appear to be supported by substantial evidence. *Garrison*, 759 F.3d at 1016 ("The ability to
9 talk on the phone, prepare meals once or twice a day, occasionally clean one's room, and, with
10 significant assistance, care for one's daughter, all while taking frequent hours-long rests, avoiding
11 any heavy lifting, and lying in bed most of the day, is consistent . . . with an inability to function
12 in a workplace environment"); *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) ("reading,
13 watching television, and coloring in coloring books are activities that are so undemanding that
14 they cannot be said to bear a meaningful relationship to the activities of the workplace"). Thus,
15 the inconsistencies between Plaintiff's daily activities and his testimony do not establish the clear,
16 convincing, and specific reasons needed to discredit his testimony as to the severity of his
17 symptoms.

18 Plaintiff urges the Court to apply the "credit-as-true" rule and require the ALJ to find "the
19 relevant testimony credible as a matter of law." *Treichler v. Comm'r of Soc. Sec. Admin.*, 775
20 F.3d 1090, 1101 (9th Cir. 2014). Such a rule is only called for "where there are no outstanding
21 issues that must be resolved before a proper disability determination can be made, and where it is
22 clear from the administrative record that the ALJ would be required to award benefits if the
23 claimant's . . . testimony were credited." *Id.* at 1107. Such is not the case here—further
24 administrative proceedings may yet be useful. *Id.* at 1101. As noted above, there are some
25 inconsistencies within the administrative record. Indeed, Plaintiff himself seemed to believe that
26 the record was in need of supplementation; he opted to submit additional third party statements to

27 ¹¹ The record does appear to have some inconsistencies regarding Plaintiff's camping trip. Although Plaintiff states
28 that the last time he was camping was in November 2010 and he has "never been camping more than twice a year,"
Brenda Miller, Plaintiff's mother-in-law, states that the family goes camping "4-5 times a year." AR 149, 210.

1 the Appeals Council. AR 202-211. The ALJ need not credit Plaintiff’s testimony as true on
2 remand.

3 **C. Third Party Credibility**

4 Plaintiff also challenges the ALJ’s rejection of a third party statement by Brenda Miller,
5 the Plaintiff’s mother-in-law.

6 Lay witness testimony as to a claimant’s symptoms is competent evidence which the
7 Commissioner must take into account. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). The
8 ALJ may reject such testimony if he does so expressly by providing “reasons that are germane to
9 each witness.” *Dodrill* 12 F.3d at 919. An ALJ need not reconsider each witness individually;
10 “[i]f the ALJ gives germane reasons for rejecting testimony by one witness, the ALJ need only
11 point to those reasons when rejecting similar testimony by a different witness.” *Molina v. Astrue*,
12 674 F.3d 1104, 1114 (9th Cir. 2012), *citing Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685,
13 694 (9th Cir. 2009). An ALJ can disregard a third party statement, for example, that “conflicts
14 with medical evidence.” *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001). Similarly, lay witness
15 testimony can be discounted if there is substantial evidence of “[b]ias and financial motive.”
16 *Perkins v. Colvin*, 45 F.Supp.3d 1137 (D. Ariz. 2014), *citing Greger v. Barnhart*, 464 F.3d 968,
17 972 (9th Cir. 2006). To reject lay testimony, “the ALJ need not cite to the specific record as long
18 as ‘arguably germane reasons’ for dismissing the testimony are noted.” *Caldwell v. Astrue*, 804
19 F.Supp.2d 1098, 1104 (D. Or. 2011).

20 **i. Brenda Miller’s Third Party Statement**

21 In rejecting a statement by Brenda Miller, the ALJ writes that:

22 The third party statements of the claimant’s mother-in-law do not establish that
23 the claimant is disabled. Since she makes no reference to being trained to make
24 exacting observations as to dates, frequencies, types and degrees of medical signs
25 and symptoms, or of the frequency or intensity of unusual moods or mannerisms,
26 the accuracy of the third party statements is questionable. This third party
27 evidence may also reflect symptomatological exaggerations. Moreover, by virtue
28 of the familial relationship with the claimant, she cannot be considered a
disinterested third party whose statements would not tend to be influenced by
affection for the claimant and/or a natural tendency to agree with the symptoms
and limitations the claimant alleges. Most importantly, significant weight cannot
be given to the third party’s statements because they, like the claimant’s, are
simply not consistent with the preponderance of the opinions and observations by

1 medical doctors in this case.

2 AR 25.

3 The mere fact that a third party is related to a claimant is not a germane reason to reject
4 that third party's statements. *Smolen v. Chater*, 80 F.3d 1273, 1289 (9th Cir. 1996) ("The fact that
5 a lay witness is a family member cannot be a ground for rejecting his or her testimony").
6 Evidence of economic bias, however, may form a germane reason to discredit third party
7 testimony. The record indicates that Plaintiff and his family recently moved in with Miller, which
8 has caused a significant financial hardship for her. AR 204 ("they are living here with me and I
9 am not a young person plus on a fixed income so it makes it hard on me also"; "I am having a
10 problem with this because I don't have the money to help them out"). It would not be
11 unreasonable for the ALJ to believe that such a financial hardship could create bias on the part of
12 Miller. Thus, this constitutes a germane reason to reject Miller's statements.¹²

13 Similarly, it was appropriate to discredit at least portions of Miller's statement which
14 related to medical diagnoses. *Tobeler v. Colvin*, 749 F.3d 830, 834 (9th Cir. 2014) ("lay witness
15 testimony as to a claimant's symptoms or how an impairment affects ability to work is competent
16 evidence," but it is proper to disregard "medical diagnoses . . . that they were not competent to
17 make"). Miller's statement appears to consist of both descriptions of symptoms as well as
18 potential diagnoses. AR 150 (e.g., Plaintiff has a "hard time breathing do [sic] to onset of
19 COPD"; "gradual hearing loss"). It was well within the ALJ's discretion to determine whether
20 such statements constitute competent evidence.

21 ***ii. Consideration of Third Party Statements by the Appeals Council***

22 After the ALJ issued his decision, but before the Appeals Council considered the decision,
23 Plaintiff submitted seven additional statements to be included in the record. AR 202-213. One
24 statement is from Plaintiff and the other six statements are from his wife, his son, Brenda Miller,
25 and three family friends. Plaintiff now contends that the Appeals Council was "required to give
26

27 ¹² While the ALJ appropriately rejected this third party statement, it is notable that several portions of the Miller
28 statement are inconsistent with Plaintiff's statements. On remand, the ALJ may wish to reconcile these
inconsistencies. *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001).

1 reasons germane to each witness” if it declined to consider them. Opening Brief 20:1-3.

2 Federal courts “do not have jurisdiction to review a decision of the Appeals Council
3 denying a request for review of an ALJ’s decision, because the Appeals Council decision is a
4 non-final agency action.” *Brewes v. Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157, 1161 (9th Cir.
5 2012). Once a party submits new and material evidence to the Appeals Council, however, “that
6 evidence becomes part of the administrative record, which the district court must consider when
7 reviewing the Commissioner’s final decision for substantial evidence.” *Id.* at 1163. The Court has
8 considered these statements in conjunction with the rest of the record in reviewing the ALJ’s
9 decision. As explained by the *Brewes* court, however, the Court cannot remand based solely on
10 the actions of the Appeals Council, nor can it hold that it was error for the Appeals Council not to
11 comment on the new evidence.

12 The Commissioner argues that the statements contain material substantially similar to
13 those of Miller’s original statement and should thus be excluded on the same bases. Opposition
14 Brief 11:22-28. This may be true, to the extent that they overlap with Miller’s original statement.
15 And the germane reasons the ALJ cites for rejecting Miller’s statement may apply equally to each
16 of the new parties, as well. Several of the statements introduce additional facts or ambiguities into
17 the record, however, including facts about Plaintiff’s functional limitations (AR 205 (Plaintiff
18 “cannot even stand for more than 10-15 minutes at a time”); AR 208 (Plaintiff cannot “throw a
19 ball, hold a bat or kick a soccer ball”)).

20 There appear to be ambiguities in the record originally considered by the ALJ and the
21 newly-supplemented record. For example, in his initial statement, Plaintiff states that he is able to
22 throw a football or baseball. AR 157. In the later submitted statement, however, he indicates that
23 he is “unable to throw a football or baseball and have been for some time.” AR 210. Several of
24 the other statements include references to Plaintiff’s ability to hold or throw balls. AR 149, 203,
25 204, 208. Because this case will be remanded based on the Court’s findings with respect to
26 Plaintiff’s credibility, the ALJ may wish to reconcile these ambiguities. *Tonapetyan v. Halter*,
27 242 F.3d 1144, 1150 (9th Cir. 2001). On remand, the ALJ should consider whether these third
28 party statements constitute credible and competent lay testimony as to the severity of Plaintiff’s

1 impairments.

2 **D. Evaluation of Plaintiff's Treating Physicians**

3 Plaintiff argues that the ALJ incorrectly evaluated the opinions of Plaintiff's two treating
4 physicians, Bernard Hunt, D.O., and Jeffrey Ralph, M.D., who both filled out questionnaires
5 indicating that Plaintiff was unable to perform "any full-time work at any exertion level,
6 including the sedentary level (defined by Social Security as lifting no more than 10 pounds,
7 sitting for 6 hours in an 8-hour work day, and standing/walking for 2 hours in an 8-hour work
8 day)." ¹³ AR 332, 333. They also state that Plaintiff "has been disabled to the degree set forth
9 above" since January 2007. AR 334, 345.

10 The ALJ gave little weight to these opinions, citing the contradictory findings of Frank
11 Chen, M.D., a consultative examiner, S. Reddy, M.D., and J. Linder, M.D., reviewing
12 physicians, to whom the ALJ gave great weight. ¹⁴ In particular, the ALJ rejected the opinions of
13 Drs. Hunt and Ralph because they were not consistent with the fact that Plaintiff worked until
14 2010 in positions that had requirements beyond the limitations cited, despite the claims by the
15 doctors that Plaintiff's date of onset occurred in 2007. AR 27. Similarly, the ALJ determined that
16 the doctors were motivated merely by "sympathy for the patient" or were attempting "to avoid
17 unnecessary tension after a demand for supporting material by the patient." AR 27.

18 Plaintiff asserts that the ALJ incorrectly gave little weight to these opinions because: (1)
19 there is no evidence that the opinions were rendered as a result of undue sympathy or pressure by
20 the Plaintiff; and (2) the fact that Plaintiff briefly worked after 2007, the date of onset of the
21 alleged disability, should not controvert the opinions. Opening Brief 11:21-26; 12:4-12. Plaintiff
22 argues that, at the very least, the ambiguities in the date of onset should have triggered a duty to
23

24 ¹³ The two questionnaires are substantially identical and include: (1) a brief description of Plaintiff's impairments; (2)
25 a list of the tests used to verify those impairments; (3) an indication that Plaintiff can sit for approximately one hour
26 and stand/walk for approximately thirty minutes during an 8-hour work day; (4) a statement that Plaintiff must lie
27 down or elevate his legs at least once every hour; and (5) a list of Plaintiff's limitations with respect to various
28 activities such as reaching, pushing/pulling, etc. AR 333, 344. The only distinction between the two questionnaires is
that Dr. Ralph's includes a short statement about Plaintiff's gastrointestinal symptoms. AR 345.

¹⁴ Dr. Chen found that Plaintiff had no functional limitations. AR 250. Drs. Reddy and Linder found that Plaintiff
could: lift/carry 50 pounds occasionally and 25 pounds frequently; stand/walk for 6 hours in an 8-hour day; sit for 6
hours in an 8-hour workday; push/pull without limits; and have frequent handling (gross manipulation) and fingering
(fine manipulation). AR 251-57; 273-74.

1 further develop the record as to what the physicians meant when they stated that January 2007
2 was the date of disability. Opening Brief 12:13-19.

3 The Commissioner responds that: (1) the fact that Plaintiff worked after January 2007 was
4 a legitimate reason to give the doctors' opinions little weight; and (2) medical opinions that are
5 motivated purely by sympathy are entitled to little weight. Opposition Brief 6:19-27; 7-13.

6 *i. Legal Standard*

7 Cases in this circuit distinguish among the opinions of three types of physicians: (1) those
8 who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant
9 (examining physicians); and (3) those who neither examine nor treat the claimant (non-examining
10 physicians). As a general rule, more weight should be given to the opinion of a treating source
11 than to the opinion of doctors who do not treat the claimant. *Winans v. Bowen*, 853 F.2d 643, 647
12 (9th Cir. 1987). However, a "treating physician's opinion is not . . . necessarily conclusive as to
13 either a physical condition or the ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d
14 747, 751 (9th Cir. 1989) ("the ALJ need not accept a treating physician's opinion which is 'brief
15 and conclusionary in form with little in the way of clinical findings to support [its] conclusion'").

16 When the treating doctor's opinion is not contradicted by another doctor, it can be rejected
17 for "clear and convincing" reasons. *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). If
18 the treating doctor's opinion is contradicted by another doctor, the Commissioner may reject it by
19 providing "specific and legitimate reasons" supported by substantial evidence in the record for the
20 rejection. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Here, the opinions of Drs. Hunt
21 and Ralph (i.e., that Plaintiff cannot perform any work) are contradicted by the opinions of Drs.
22 Chen, Linder, and Reddy (i.e., that Plaintiff can perform at least some work). Thus, the ALJ must
23 have provided specific and legitimate reasons supported by substantial evidence to reject their
24 opinions.

25 *ii. Analysis*

26 Evidence that a doctor has "agreed to become an advocate and assist in presenting a
27 meaningful petition for Social Security benefits" can constitute a specific, legitimate reason to
28

1 give a medical opinion little weight. *Matney v. Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992);
2 *Burkhart v. Bowen*, 856 F.2d 1335, 1339 (9th Cir. 1988) (evidence that doctor’s opinion was
3 solicited by claimant’s counsel a “permissible credibility determination”). However, a search of
4 the record does not reveal any evidence to suggest that this was the case here. Thus, there is not
5 substantial evidence to support rejection of the opinions on these grounds.

6 The ALJ is correct that Plaintiff appears to have worked after his condition was diagnosed
7 in 2007. AR 138. However, there is also evidence in the record that establishes that myotonic
8 dystrophy is a progressive disease that can cause the affected individual to lose control over
9 muscle contractions, particularly in the hands and fingers. AR 215. Plaintiff’s functional
10 limitations also appear to have progressed over a period of years. AR 214 (“Mr. Berschneider
11 reports gastrointestinal concerns and over the past~4-5 years, he has experienced progressive
12 weakness of his hands which ultimately resulted in his inability to shoot a gun and thus perform
13 adequately for his work”); 316 (“Overall, strength has decreased with gross grasp as the attached
14 data confirms”).

15 Plaintiff’s work history appears to exemplify this progression of the disease—although he
16 was employed in 2007, he transferred to a more sedentary position soon thereafter to
17 accommodate his increasing functional limitations. AR 161-164, 214. While Plaintiff may have
18 been diagnosed in 2007, it is not clear that the questionnaires completed by Drs. Hunt and Ralph
19 are intended to represent his limitations as of 2007 (rather than as of the dates the forms were
20 filled out—January 9, 2012 and May 4, 2011, respectively). AR 334, 345. Indeed, Plaintiff
21 appears not to have met Dr. Ralph until 2011.¹⁵ AR 57. Some evidence establishes that Plaintiff
22 was, in fact, suffering from relatively severe difficulties by 2007: his occupational therapist
23 found that his grip strength was “less than 30% of expected norms” in 2007. AR 322.

24 The fact that Plaintiff worked (albeit in a more limited capacity) while he had the asserted
25 functional limitations does seem to weigh against the opinions of Drs. Hunt and Ralph. However,
26 the nature of Plaintiff’s condition, as well as his work history, suggest that the two doctors may

27 ¹⁵ Notably, Dr. Ralph, unlike Drs. Chen, Linder, and Reddy, specializes in neurology. His opinion, even if not given
28 controlling weight, is thus entitled to more weight “than the opinion of a source who is not a specialist.” 20 C.F.R. §
404.1527(c)(5).

1 have understood the question to request the date of diagnosis, rather than the date on which
2 Plaintiff suffered the listed functional limitations. Indeed, given the degenerative nature of
3 myotonic dystrophy, it may not even make sense to ask for a discrete “date of onset” for the
4 purpose of assessing functional limitations. Such a material ambiguity in the record requires
5 further inquiry. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). On remand, the ALJ
6 should determine whether the functional limitations listed by Drs. Hunt and Ralph existed as of
7 2007 or as of the respective dates they filled out their questionnaires, then re-evaluate how this
8 affects the weight of their respective opinions, given the factors for the assessment of medical
9 source opinions described in 20 C.F.R. § 404.1527.

10 **VI. CONCLUSION**

11 Based on the foregoing, the Court finds that the ALJ’s decision is not supported by
12 substantial evidence as described above. Accordingly, this Court GRANTS Plaintiff’s appeal
13 from the administrative decision of the Commissioner of Social Security and the case is remanded
14 to the ALJ for further proceedings consistent with this opinion. The Clerk of this Court is
15 DIRECTED to enter judgment in favor of Plaintiff Rocklin Berschneider and against Defendant
16 Carolyn W. Colvin, Commissioner of Social Security.

17 IT IS SO ORDERED.

18
19 Dated: March 31, 2015

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE