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

EDWARD RALPH LIMONES,

Plaintiff,

v.

NANCY A. BERRYHILL, ACTING
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. 1:17-cv-01511 (EPG)

**FINAL JUDGMENT AND ORDER
REGARDING PLAINTIFF’S SOCIAL
SECURITY COMPLAINT**

This matter is before the Court on Plaintiff’s complaint for judicial review of an unfavorable decision of the Commissioner of the Social Security Administration regarding his application for Supplemental Security Income. The parties have consented to entry of final judgment by the United States Magistrate Judge under the provisions of 28 U.S.C. § 636(c) with any appeal to the Court of Appeals for the Ninth Circuit. (ECF Nos. 7, 8).

At the hearing on November 8, 2018, the Court heard from the parties and, having reviewed the record, administrative transcript, the briefs of the parties, and the applicable law, finds as follows:

Plaintiff challenges the Administrative Law Judge’s (“ALJ”) adverse credibility determination of Plaintiff. The parties agree the applicable legal standards are as follows¹:

¹ The Commissioner maintains her objections to the clear and convincing standard, but concedes that the Ninth Circuit has held that this standard applies and is controlling law in this court.

1 For the ALJ to reject the claimant's complaints, she must provide
2 "specific, cogent reasons for the disbelief." *Rashad v. Sullivan*, 903
3 F.2d 1229, 1231 (9th Cir.1990). Once the claimant produces medical
4 evidence of an underlying impairment, the Commissioner may not
5 discredit the claimant's testimony as to subjective symptoms merely
6 because they are unsupported by objective evidence. *Bunnell v.*
7 *Sullivan*, 947 F.2d 341, 343 (9th Cir.1991) (en banc); *see also Cotton*
8 *v. Bowen*, 799 F.2d 1403, 1407 (9th Cir.1986) ("it is improper as a
9 matter of law to discredit excess pain testimony solely on the ground
10 that it is not fully corroborated by objective medical findings").
11 Unless there is affirmative evidence showing that the claimant is
12 malingering, the Commissioner's reasons for rejecting the claimant's
13 testimony must be "clear and convincing." *Swenson v. Sullivan*, 876
14 F.2d 683, 687 (9th Cir.1989). General findings are insufficient;
15 rather, the ALJ must identify what testimony is not credible and what
16 evidence undermines the claimant's complaints. *Dodrill v.*
17 *Shalala*, 12 F.3d 915, 918 (9th Cir.1993); *Varney v. Secretary of*
18 *Health and Human Services*, 846 F.2d 581, 584 (9th Cir.1988)
19 (*Varney I*).

20 *Lester v. Chater*, 81 F.3d 821, 834, (9th Cir. 1995) *as amended* (Apr. 9, 1996).

21 Because the parties agree that there was medical evidence of the underlying impairment
22 and no affirmative evidence of malingering, the clear and convincing standard applies. Thus, this
23 Court looks to whether the ALJ set forth specific, cogent reasons for the disbelief of Plaintiff's
24 complaints that are clear and convincing, and identified which testimony is not credible and what
25 evidence undermines the Plaintiff's complaints.

26 The ALJ only specifically addressed inconsistencies in the Plaintiff's testimony in the
27 following discussion:

28 I point out that the medical record documents inconsistencies in the
claimant's alleged residuals from brain surgery. In April 2016 with
[sic] complained of left-sided weakness and shattering. The claimant
thought he had a *stroke*. On exam, the left side upper and lower
extremities was 0/5 on the strength scale. However, the attending
physician noted that the claimant appeared to be functional as he was
able to lift his left hand to face level while avoiding his face. In
September 2016, he presented to the emergency room with
complaints of dizziness, vomiting and nausea. On exam, he was able
to move all four extremities. His strength was 5/5 in upper and lower
extremities. Gross sensation was intact. Furthermore, the claimant
left the hospital against medical advice. (Exhibits 14F/30; 18F/5).

Despite claims of severe limitations a treating source recommended
that the claimant take part in regular activity and exercise. He also
referred to physical therapy. (Exhibit 16F/6).

(A.R. 23-24).

1 At oral argument, the Court and parties discussed each of these reasons extensively. The
2 Court incorporates its comments made on the record into this decision. In short, these reasons do
3 not meet the clear and convincing standard. The fact that a test showed 0/5 strength while
4 Plaintiff could raise his hand to his face does not demonstrate that he is being dishonest or is
5 exaggerating symptoms. No one appears to argue that Plaintiff was faking his strength or not
6 genuinely concerned that he had a stroke. Indeed, he had cervical spine surgery after this event.
7 Similarly, the fact that he complained of dizziness, vomiting and nausea on another occasion, yet
8 could move his extremities and had strength in them does not provide a reason to discount his
9 testimony—they are merely different measurements of his symptoms. Moreover, it is
10 uncontested that he received serious medical treatment following these episodes. As for his
11 leaving the hospital against medical advice, the parties agree that he left the hospital to
12 immediately seek medical care with another provider—not because he did not believe he needed
13 serious medical care.

14 The ALJ’s reasoning that “[d]espite claims of severe limitations a treating source
15 recommended that the claimant take part in regular activity and exercise. He also referred to
16 physical therapy” gives the Court the most pause. The claimant testified to impairments that
17 would limit his functions to a greater extent than would be compatible with the ordinary
18 understanding of “regular activity and exercise.” But, upon closer examination, it is unclear what
19 is meant by the recommendation to exercise and whether it is truly inconsistent with Plaintiff’s
20 testimony. Plaintiff did testify that he performed limited exercise, stating at the hearing, “The
21 only exercise I do or [sic] the things that the therapist showed me to do with my legs and my
22 arms.” (A.R. 40). Moreover, a more detailed recommendation regarding exercise appears
23 consistent with Plaintiff’s testimony. (A.R. 577) (“we will consider requesting physical therapy
24 to instruct the patient in a home exercise program to improve core strengthening to hopefully
25 delay the progression of the patient’s facet arthropathy, discogenic disease and lumbar
26 radiculopathy.”). These statements suggest that the recommendation to engage in exercise did not
27 mean that doctors believed he could do the type of ordinary exercise such as running, biking or
28 swimming that would truly be inconsistent with Plaintiff’s stated impairments.

1 The Commissioner also pointed elsewhere in the ALJ's opinion where he notes that
2 "[Plaintiff] was out of Norco and requested to stay on Tramadol. However, it was also found that
3 the claimant had been out of pain medication because of none [sic] follow-up." (A.R. 23). This
4 statement was not in the section regarding Plaintiff's credibility, so arguably was not specific and
5 cogent enough to meet the above standard. In any event, medical records repeatedly confirm pain
6 symptoms and prescriptions for such medications, indicating that his medical providers believed
7 his complaints of pain notwithstanding a failure to timely refill one prescription. (Exhibit 16F).

8 After thorough consideration, this Court finds that the reasons that the ALJ set forth for
9 discrediting Plaintiff's complaints were not sufficiently specific, cogent, and clear and
10 convincing.

11 Both parties agree that remand is the appropriate course given the Court's ruling. This
12 Court does not take a position on whether Plaintiff will be found disabled once his complaints are
13 fully credited. The Court also notes that Plaintiff's medical situation did not appear to be stable,
14 and many of his complaints stemmed from the side effects of medication taken at that time. The
15 ALJ should consider whether any further proceedings are necessary to evaluate Plaintiff's
16 disability in light of this decision.

17 Accordingly, the decision of the Commissioner of the Social Security Administration is
18 REVERSED and REMANDED for further administrative proceedings consistent with this
19 opinion.

20 IT IS SO ORDERED.

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22 Dated: November 19, 2018

23 /s/ Eric P. Gray
24 UNITED STATES MAGISTRATE JUDGE
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