

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
10

11 **RAJVINDER S. DHALIWAL,**

12 **Plaintiff,**

13 **v.**

14 **COMMISSIONER OF SOCIAL**
15 **SECURITY,**

16 **Defendant.**

Case No. 1:18-cv-00219-SAB

**ORDER GRANTING PLAINTIFF’S SOCIAL
SECURITY APPEAL AND REMANDING
FOR FURTHER PROCEEDINGS**

(ECF Nos. 15, 17, 18)

17
18 **I.**

19 **INTRODUCTION**

20 Plaintiff Rajvinder S. Dhaliwal (“Plaintiff”) seeks judicial review of a final decision of
21 the Commissioner of Social Security (“Commissioner” or “Defendant”) denying his application
22 for disability benefits pursuant to the Social Security Act. The matter is currently before the
23 Court on the parties’ briefs, which were submitted, without oral argument, to Magistrate Judge
24 Stanley A. Boone.¹

25 Plaintiff suffers from hypertension, hyperlipidemia, plantar fasciitis, asthmatic bronchitis,
26 obstructive sleep apnea, obesity, insomnia, non-insulin dependent diabetes mellitus, left shoulder
27 rotator cuff tear, left knee arthritis, coronary artery disease, depression and anxiety. For the

28 ¹ The parties have consented to the jurisdiction of the United States Magistrate Judge. (See ECF Nos. 8, 9.)

1 reasons set forth below, Plaintiff’s Social Security appeal shall be granted.

2 **II.**

3 **FACTUAL AND PROCEDURAL BACKGROUND**

4 Plaintiff protectively filed an application for a period of disability and disability insurance
5 benefits on October 7, 2014, and a Title XVI application for supplemental security income on
6 November 4, 2014. (AR 85, 86.) Plaintiff’s applications were initially denied on December 8,
7 2014, and denied upon reconsideration on February 11, 2015. (AR 109-112; 118-123.) Plaintiff
8 requested and received a hearing before Administrative Law Judge Vincent A. Misenti (“the
9 ALJ”). Plaintiff appeared for a hearing on March 16, 2017. (AR 29-64.) On June 27, 2017, the
10 ALJ found that Plaintiff was not disabled. (AR 12-23.) The Appeals Council denied Plaintiff’s
11 request for review on December 26, 2017. (AR 1-3.)

12 **A. Hearing Testimony**

13 Plaintiff appeared with counsel and testified at a video hearing on March 16, 2017. (AR
14 33-52.) Plaintiff is married and has two children. (AR 33.) He lives in a house with his wife
15 and adult daughter. (AR 34.) Plaintiff’s wife and daughter both work. (AR 34.) Plaintiff is 5
16 feet, 11 inches tall and weighed 224 pounds. (AR 33.) He is left handed. (AR 33.) Plaintiff has
17 a high school education. (AR 34.)

18 Plaintiff has a driver’s license and drives for work two to three hours per day. (AR 34.)
19 Plaintiff is an Uber driver. (AR 34.) Plaintiff started driving for Uber around May 2015 and has
20 been driving for about two years. (AR 35.) He works three to four days a week. (AR 35.) He
21 works when he is not having any pain. (AR 35.) He has pain and swelling in his knee and
22 cannot sit too much. (AR 35.) He also has swelling in his ankle. (AR 35.) He only drives
23 locally. (AR 36.) He makes forty to fifty dollars per day. (AR 36.) He drives thirty to forty
24 miles per day. (AR 36.) He is notified when there is a job on his iPhone. (AR 36.) Plaintiff
25 netted \$5,074 in 2015, his gross was \$13,500. (AR 37.) In 2016, Plaintiff estimated that he
26 netted eighteen to nineteen thousand dollars. (AR 38.) He was to provide a 1099 for 2016 after
27 the hearing. (AR 39.)

28 Plaintiff is unable to lift much with his left hand. (AR 36.) Plaintiff is disabled because

1 he cannot pick anything up with his left arm and cannot do any work with the left arm. (AR 39.)
2 His doctor gave him disability because his total left rotator cuff is gone. (AR 39.) He also has
3 swelling in his knee and was scheduled for an arthroscopy the following week and was to have
4 an MRI because of the swelling. (AR 39.) Plaintiff continues to work for Uber because he has
5 to eat. (AR 40.) He needs money to make his house payment and cannot sit home. (AR 40.)
6 He found the job with Uber to provide income for his household. (AR 40.)

7 Plaintiff injured his shoulder in an accident in February and had shoulder surgery in
8 March. (AR 40.) He cannot move his arm up, cannot pick up anything, and cannot do too much
9 writing with his left arm. (AR 40.) He takes pain medication, but still has a lot of pain. (AR
10 40.) Plaintiff takes prescription ibuprofen for pain, 600 or 800 milligrams. (AR 40-41.)
11 Plaintiff takes the ibuprofen once a day. (AR 41.) Plaintiff sleeps better when he takes the
12 medication and also takes a sleeping pill. (AR 41-42.) Sometimes, he will be tired in the
13 morning. (AR 42.) When he is home he will relax and put ice on his shoulder. (AR 42.) When
14 he drives more than two to three hours he will have a lot of pain and will take atenolol. (AR 42.)

15 Since Plaintiff is left handed he sometimes has to change the shift and will have pain.
16 (AR 42.) He can use his left hand for steering. (AR 42.) If he does more activity with his left
17 hand while driving he will have pain. (AR 42.) Sometimes Plaintiff drives with one hand. (AR
18 42.) It is hard for Plaintiff to make a U-turn. (AR 43.) Plaintiff would not state the amount of
19 time that he used his left hand while driving. (AR 43.) He tries not to use his left hand, but if he
20 accidentally does use it then he will have pain. (AR 43.) Plaintiff had physical therapy for his
21 shoulder and a couple other therapies, but they will not approve anymore. (AR 44.) If Plaintiff
22 accidentally uses his left arm, he will have pain. (AR 49.)

23 Plaintiff has a surgery on his knee in 2011. (AR 44.) He started having pain and
24 swelling again. (AR 44.) He had some injections and the doctor said they cannot do anything.
25 (AR 44.) Plaintiff has swelling whether he is sitting or standing. (AR 44.) Plaintiff elevates and
26 ices his knee every night. (AR 48.) He cannot stand for more than an hour and a half an hour.
27 (AR 44.) Plaintiff cannot walk. (AR 44.) He can only be on his feet for less than one hour in an
28 eight-hour day. (AR 49.)

1 Plaintiff's doctor told him that he should walk as much as he can because he had he had a
2 heart attack. (AR 44.) But Plaintiff cannot walk because of his knees. (AR 44.) He saw the
3 doctor the prior day and the doctor recommended an MRI. (AR 44.) When he drives for Uber,
4 Plaintiff only sits. (AR 45.) But, after sitting he will have swelling. (AR 45.) Plaintiff does not
5 help his clients with their bags. (AR 45.) They have to take care of their bags themselves. (AR
6 45.) Plaintiff does not use any assistive devices, but they gave him exercises to do every day.
7 (AR 45.) He is to put ice on his shoulder, knee, and ankle for half an hour to an hour. (AR 45-
8 46.) He can only walk ten minutes. (AR 46.) Plaintiff can only stand for ten minutes because of
9 his knee swelling. (AR 49.) Plaintiff has more problems now than he did in March 2016. (AR
10 46.) Plaintiff's leg swelled even during the ten-minute drive from his house to the hearing. (AR
11 46.)

12 Plaintiff is unable to work because he cannot walk, he cannot pick up anything with his
13 left hand, he cannot write, and he has stents in his heart. (AR 46.) He lost his business because
14 of the problems with his heart, knee, and shoulder. (AR 46.) Plaintiff went to the doctor and
15 they told him that his cholesterol and calcium are too low. (AR 46.)

16 Sometimes Plaintiff has pain and he worries a little bit when he has stress. (AR 47.) He
17 takes four to five medications for his heart every day. (AR 47.) He has "9/11" medications.
18 (AR 47.) He takes nitroglycerin once a week for chest pain. (AR 47.) He has chest pain and
19 gets short of breath whenever he feels stress. (AR 47, 49.) The nitroglycerin resolves his chest
20 pain and shortness of breath. (AR 48, 49.)

21 During the day, Plaintiff does not nap, but he will lay down for two to three hours every
22 afternoon. (AR 50.) Plaintiff takes his medicine, eight or nine pills, in the morning and then will
23 drive at 9:00. (AR 50.) After work he will go home, lie down, and use ice or exercise. (AR 50.)
24 When he feels better he will go, if not he stays home. (AR 50.)

25 Plaintiff has been seeing Dr. Phiripes for more than two years. (AR 50.) He sees Dr.
26 Phiripes every month to six weeks. (AR 50.) Sometimes he will go every two and a half
27 months. (AR 50.) The last six months he has been seeing Dr. Phiripes every other week. (AR
28 50.) Dr. Phiripes prescribes medications and gives him exercises. (AR 51.) Plaintiff does not

1 have side effects from any of his medication. (AR 51.) Plaintiff does not do anything after he
2 comes home from driving. (AR 51.) His wife does the cooking and his wife and daughter do all
3 the housework. (AR 51.) He has someone who takes care of the yard. (AR 51.)

4 Plaintiff goes to the temple on Sundays. (AR 52.) But he does not go anywhere else.
5 (AR 52.)

6 Susan L. Creighton-Clavel, a vocational expert (“VE”), also testified at the hearing. (AR
7 52-62.)

8 **B. ALJ Findings**

9 The ALJ made the following findings of fact and conclusions of law.

- 10 • Plaintiff meets the insured status requirements of the Social Security Act through
11 December 31, 2017.
- 12 • Plaintiff has engaged in substantial gainful activity since August 11, 2014, the alleged
13 onset date.
- 14 • Plaintiff has had the following severe impairments: a history of left shoulder rotator cuff
15 tear, left knee arthritis, and coronary artery disease.
- 16 • Plaintiff has not had an impairment or combination of impairments that meets or
17 medically equals the severity of one of the listed impairments.
- 18 • Plaintiff has had a residual functional capacity to perform light work as defined in 20
19 CFR §§ 404.1567(b) and 416.967(b) with additional limitations as follows: with the left,
20 dominant upper extremity, he is able to perform frequent reaching in all directions. He is
21 able to perform occasional climbing of ramps and stairs, as well as occasional balancing,
22 stooping, kneeling, crouching, and crawling; unable to climb ladders and scaffolds;
23 unable to work around unprotected heights; and unable to work in environments with
24 concentrated exposure to moving mechanical parts.
- 25 • Plaintiff has been capable of performing his past relevant work. This work does not
26 require the performance of work-related activities precluded by Plaintiff’s residual
27 functional capacity.
- 28 • Plaintiff has not been under a disability as defined in the Social Security Act from August

1 11, 2014, through the date of this decision.

2 (AR 17-22.)

3 **III.**

4 **LEGAL STANDARD**

5 To qualify for disability insurance benefits under the Social Security Act, the claimant
6 must show that he is unable “to engage in any substantial gainful activity by reason of any
7 medically determinable physical or mental impairment which can be expected to result in death
8 or which has lasted or can be expected to last for a continuous period of not less than 12
9 months.” 42 U.S.C. § 423(d)(1)(A). The Social Security Regulations set out a five-step
10 sequential evaluation process to be used in determining if a claimant is disabled. 20 C.F.R. §
11 404.1520;² Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1194 (9th
12 Cir. 2004). The five steps in the sequential evaluation in assessing whether the claimant is
13 disabled are:

14 Step one: Is the claimant presently engaged in substantial gainful activity? If so,
15 the claimant is not disabled. If not, proceed to step two.

16 Step two: Is the claimant’s alleged impairment sufficiently severe to limit his or
17 her ability to work? If so, proceed to step three. If not, the claimant is not
18 disabled.

19 Step three: Does the claimant’s impairment, or combination of impairments, meet
20 or equal an impairment listed in 20 C.F.R., pt. 404, subpt. P, app. 1? If so, the
21 claimant is disabled. If not, proceed to step four.

22 Step four: Does the claimant possess the residual functional capacity (“RFC”) to
23 perform his or her past relevant work? If so, the claimant is not disabled. If not,
24 proceed to step five.

25 Step five: Does the claimant’s RFC, when considered with the claimant’s age,
26 education, and work experience, allow him or her to adjust to other work that
27 exists in significant numbers in the national economy? If so, the claimant is not
28 disabled. If not, the claimant is disabled.

29 Stout v. Commissioner, Social Sec. Admin., 454 F.3d 1050, 1052 (9th Cir. 2006).

30 Congress has provided that an individual may obtain judicial review of any final decision

31 ² The cases generally cited herein reference the regulations which apply to disability insurance benefits, 20 C.F.R.
32 §404.1501 et seq., however Plaintiff is also seeking supplemental security income, 20 C.F.R. § 416.901 et seq. The
33 regulations are generally the same for both types of benefits. Therefore, further references are to the disability
34 insurance benefits regulations, 20 C.F.R. §404.1501 et seq.

1 of the Commissioner of Social Security regarding entitlement to benefits. 42 U.S.C. § 405(g).
2 In reviewing findings of fact in respect to the denial of benefits, this court “reviews the
3 Commissioner’s final decision for substantial evidence, and the Commissioner’s decision will be
4 disturbed only if it is not supported by substantial evidence or is based on legal error.” Hill v.
5 Astrue, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means more than a
6 scintilla, but less than a preponderance. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996)
7 (internal quotations and citations omitted). “Substantial evidence is relevant evidence which,
8 considering the record as a whole, a reasonable person might accept as adequate to support a
9 conclusion.” Thomas v. Barnhart, 278 F.3d 947, 955 (9th Cir. 2002) (quoting Flaten v. Sec’y of
10 Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

11 “[A] reviewing court must consider the entire record as a whole and may not affirm
12 simply by isolating a specific quantum of supporting evidence.” Hill, 698 F.3d at 1159 (quoting
13 Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006). However, it is not
14 this Court’s function to second guess the ALJ’s conclusions and substitute the court’s judgment
15 for the ALJ’s. See Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (“Where evidence is
16 susceptible to more than one rational interpretation, it is the ALJ’s conclusion that must be
17 upheld.”).

18 IV.

19 DISCUSSION AND ANALYSIS

20 Plaintiff contends that the ALJ erred by rejecting the opinions of his treating physicians,
21 Drs. Simonian and Phiripes and by rejecting his symptom testimony. Plaintiff seeks for the
22 matter to be remanded for payment of benefits. Defendant counters that the ALJ properly
23 evaluated Plaintiff’s symptom testimony and assigned weight to the treating doctors’ opinions
24 which is supported by substantial evidence in the record. Plaintiff replies that the ALJ did not
25 provide specific and legitimate reasons to reject the treating physicians’ opinions and failed to
26 properly consider his symptom testimony.

27 A. Claimant Credibility

28 Plaintiff argues that the ALJ observed that Plaintiff was working two to three hours per

1 day finding that it did not amount to substantial gainful activity; and therefore, the fact that he
2 was working bears little in the disability process. Plaintiff explained that he only works a few
3 hours each day. Plaintiff also contends that, while the ALJ noted that Plaintiff traveled to India,
4 the activity has little to do with Plaintiff's left-hand limitations. Plaintiff asserts that since he has
5 a massive rotator cuff tear that is not repairable it does not matter that there is a lack of
6 assessment of his shoulder injury or description of impairment in subsequent medical records.
7 Plaintiff alleges that the ALJ did not articulate specific reasons to reject his testimony that he has
8 no significant function in his left arm.

9 Defendant counters that the ALJ properly considered Plaintiff's symptom testimony and
10 found that it was not fully supported by the record as a whole. First, the ALJ found that
11 Plaintiff's symptoms were not as limiting as he claimed in light of the fact that he was driving for
12 a taxi service during the relevant time period. Defendant contends that the ALJ gave Plaintiff the
13 benefit of the doubt in finding that his driving was not substantial gainful activity, but that
14 regardless his work activity demonstrates that he retained the ability to work. Second, Defendant
15 argues that the ALJ reasonably found that Plaintiff's ability to travel on a long distance
16 international flight to India contradicted his claims of markedly limited functioning, such as
17 having to lie down, ice his knee and shoulder and being limited to walking less than an hour per
18 day. Third, Defendant contends that the subsequent lack of objective findings in the medical
19 record supports the ALJ's finding that Plaintiff adequately recovered from his shoulder surgery
20 and cited to objective evidence in the record to support that his other severe impairments did not
21 prevent Plaintiff from working. Finally, Defendant argues that the ALJ cited to the objective
22 evidence, as well as Plaintiff's own statements that show he was capable of light exertional work
23 activity.

24 Plaintiff replies that he provided evidence to demonstrate that he had an impairment that
25 likely caused limitations in reaching, handling, pushing, and pulling with his upper left
26 extremity. Plaintiff argues that his attempts to work should not be used to prevent him from
27 receiving benefits because it would discourage that which the regulations encourage. Plaintiff
28 argues that it is common knowledge that passengers may receive extra time boarding an airplane

1 and may receive wheelchair assistance in the airport, and there is no evidence that he had to push
2 or pull his mode of transportation. Plaintiff contends that Dr. Simonian described his surgery as
3 failed and that the reasons provided by the ALJ must relate to his ability to lift, carry, push, and
4 pull with his upper left extremity.

5 “An ALJ is not required to believe every allegation of disabling pain or other non-
6 exertional impairment.” Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007) (internal punctuation
7 and citations omitted). Determining whether a claimant’s testimony regarding subjective pain or
8 symptoms is credible, requires the ALJ to engage in a two-step analysis. Molina v. Astrue, 674
9 F.3d 1104, 1112 (9th Cir. 2012). The ALJ must first determine if “the claimant has presented
10 objective medical evidence of an underlying impairment which could reasonably be expected to
11 produce the pain or other symptoms alleged.” Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th
12 Cir. 2007) (internal punctuation and citations omitted). This does not require the claimant to
13 show that his impairment could be expected to cause the severity of the symptoms that are
14 alleged, but only that it reasonably could have caused some degree of symptoms. Smolen, 80
15 F.3d at 1282.

16 Then “the ALJ may reject the claimant’s testimony about the severity of those symptoms
17 only by providing specific, clear, and convincing reasons for doing so.” Brown-Hunter v.
18 Colvin, 806 F.3d 487, 488–89 (9th Cir. 2015). “The ALJ must specifically make findings that
19 support this conclusion and the findings must be sufficiently specific to allow a reviewing court
20 to conclude the ALJ rejected the claimant’s testimony on permissible grounds and did not
21 arbitrarily discredit the claimant’s testimony.” Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir.
22 2004) (internal punctuation and citations omitted). Factors that may be considered in assessing a
23 claimant’s subjective pain and symptom testimony include the claimant’s daily activities; the
24 location, duration, intensity and frequency of the pain or symptoms; factors that cause or
25 aggravate the symptoms; the type, dosage, effectiveness or side effects of any medication; other
26 measures or treatment used for relief; functional restrictions; and other relevant factors.
27 Lingenfelter, 504 F.3d at 1040; Thomas, 278 F.3d at 958. In assessing the claimant’s credibility,
28 the ALJ may also consider “(1) ordinary techniques of credibility evaluation, such as the

1 claimant’s reputation for lying, prior inconsistent statements concerning the symptoms, and other
2 testimony by the claimant that appears less than candid; [and] (2) unexplained or inadequately
3 explained failure to seek treatment or to follow a prescribed course of treatment. . . .”
4 Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008) (quoting Smolen, 80 F.3d at 1284).
5 The district court is constrained to review those reasons that the ALJ provided in finding the
6 claimant’s testimony not credible. Brown-Hunter, 806 F.3d at 492.

7 The ALJ found that

8 the claimant’s medically determinable impairments could reasonably have been
9 expected to produce the above alleged symptoms; however, the claimant’s
10 statements concerning the intensity, persistence and limiting effects of these
11 symptoms are not entirely consistent with the medical evidence and other evidence
12 in the record for the reasons explained in this decision. Accordingly, these
13 statements have been found to affect the claimant’s ability to work only to the
14 extent they can reasonably be accepted as consistent with the objective medical
15 and other evidence.

13 (AR 20.)

14 1. Activity Inconsistent with Plaintiff’s Stated Limitations

15 The ALJ went on to discuss the inconsistencies in the record. “Throughout the record,
16 the claimant emphasizes that his condition has markedly limited his functioning. Notably, in his
17 statement accompanying his August 2014 application for Social Security Administration
18 disability benefits, he alleges that he has been unable to work due to a left shoulder injury and
19 heart problems.” (AR 20, 319.) At the March 16, 2017 hearing, Plaintiff added that his ongoing
20 impairments include left knee problems. (AR 20, 35, 39, 44, 46.) He alleged that he is able to
21 stand less than one-hour total per day and that he has to use ice on his knee and left shoulder.
22 (AR 20, 42, 44, 45-46, 48.) Further, Plaintiff testified that he has to lie down for two to three
23 hours during the day. (AR 20, 50.)

24 The ALJ found that the record reflects that Plaintiff has worked during the period at
25 issue. (AR 20.) The ALJ noted the February 12, 2017 prehearing memorandum filed by
26 Plaintiff’s counsel in which it is stated that Plaintiff has been working since 2015 as an Uber
27 driver and works three to five hours per day. (AR 20, 343.) Although Plaintiff stated at the
28 hearing that he drove with his right arm, using his left hand for steering, and only accidentally used

1 his left arm while driving (42-43), the ALJ reasonably concluded that Plaintiff's ability to drive a
2 car for two to five hours a day was inconsistent with his statements that he was unable to work
3 due to limited use of his left arm.

4 Similarly, the ALJ noted a March 2017 treatment record in which Plaintiff was seen for a
5 stomach bug after he returned from India. (AR 21, 591.) While Plaintiff argues that there is no
6 evidence in the record as to how Plaintiff transferred through the airport or what assistance he
7 received, the ALJ could reasonably conclude that Plaintiff's ability to travel to India was
8 inconsistent with his statements that he was required to ice his shoulder and knee every day for
9 half an hour to an hour; has to lay down for two to three hours every afternoon; cannot sit much;
10 and must elevate his leg every night. (AR 35, 44, 45-46, 48, 50.) Plaintiff argues that it is
11 common knowledge that travelers can receive assistance in navigating through the airport and
12 onto the plane, but the ALJ could reasonably find that the rigors of international travel are
13 inconsistent with Plaintiff's testimony that he is unable to walk and sit, must lay down for
14 several hours a day, elevate his leg, and apply ice to his shoulder and leg. The ALJ pointed to
15 specific activity that Plaintiff engaged in that was inconsistent with his symptom testimony. Orn,
16 495 F.3d at 639. The ALJ provided a clear and convincing reason to discount Plaintiff's
17 testimony.

18 Plaintiff argues that the ALJ did not articulate reasons to reject Plaintiff's testimony that
19 he was unable to use his left arm, but Plaintiff cites to no case, and the Court is unaware of any,
20 that require the ALJ to specifically address every alleged limitation in discussing a plaintiff's
21 symptom testimony. Here, the ALJ provided specific reasons for his finding that Plaintiff's
22 limitations were not as severe as he alleged. Further, as discussed in the next section, the ALJ
23 did provide reasons to reject Plaintiff's testimony regarding his arm limitations.

24 2. Inconsistency with Medical Record

25 The determination that a claimant's complaints are inconsistent with clinical evaluations
26 can satisfy the requirement of stating a clear and convincing reason for discrediting the
27 claimant's testimony. Regennitter v. Commissioner of Social Sec. Admin., 166 F.3d 1294, 1297
28 9th Cir. 1999). The ALJ properly considered this evidence in weighing Plaintiff's symptom

1 testimony. “While subjective pain testimony cannot be rejected on the sole ground that it is not
2 fully corroborated by objective medical evidence, the medical evidence is still a relevant factor
3 in determining the severity of the claimant’s pain and its disabling effects.” Rollins v.
4 Massanari, 261 F.3d 853, 857 (9th Cir. 2001) (citing 20 C.F.R. § 404.1529(c)(2)).

5 The ALJ found that the record shows that Plaintiff has had an adequate recovery from his
6 left shoulder surgery. (AR 21.) The ALJ noted that March 2017 treatment records indicate no
7 significant abnormality in his shoulder. (AR 21.) Plaintiff was examined on March 7, 2017, and
8 extremity examination revealed mild left knee effusion and crepitation, and trace edema of the
9 left distal tibial area. (AR 21, 594.) Extremity examination on follow up on March 14, 2017
10 shows only “[l]eft knee joint with moderate effusion. Positive popping with valgus shift of the
11 knee joint upon lateral stressing.” (AR 589.)

12 The ALJ also noted that while Plaintiff had a history of coronary artery disease, a
13 September 2014 treadmill test showed normal results and concurrent nuclear cardiology testing
14 indicated normal results including an ejection fraction of 62%. (AR 21, 438-439, 578-579.)

15 Finally, the ALJ noted that a January 25, 2017 treatment record showed that Plaintiff
16 denied any ongoing chest discomfort. (AR 21, 568.) Also, a March 14, 2017 treatment record
17 shows that while Plaintiff complained of joint pain and swelling in his knee, he denied cramps,
18 muscle weakness, stiffness, arthritis, and decreased strength. (AR 21, 588.)

19 The ALJ provided specific clear and convincing reasons to reject Plaintiff’s symptom
20 testimony.

21 **B. Physician Opinion**

22 The weight to be given to medical opinions depends upon whether the opinion is
23 proffered by a treating, examining, or non-examining professional. See Lester v. Chater, 81 F.3d
24 821, 830-831 (9th Cir. 1995). “Generally, the opinions of examining physicians are afforded
25 more weight than those of non-examining physicians, and the opinions of examining non-
26 treating physicians are afforded less weight than those of treating physicians. Orn, 495 F.3d at
27 631 (citing 20 C.F.R. § 404.1527(d)(1)-(2)). “If a treating or examining doctor’s opinion is
28 contradicted by another doctor’s opinion, an ALJ may only reject it by providing specific and

1 legitimate reasons that are supported by substantial evidence.” Garrison v. Colvin, 759 F.3d 995,
2 1012 (9th Cir. 2014) (citing 20 C.F.R. § 404.1527(d)(3)). The contrary opinion of a non-
3 examining expert is not sufficient by itself to constitute a specific, legitimate reason for rejecting
4 a treating or examining physician’s opinion, however, “it may constitute substantial evidence
5 when it is consistent with other independent evidence in the record.” Tonapetyan v. Halter, 242
6 F.3d 1144, 1149 (9th Cir. 2001). The ALJ need not accept the opinion of any physician that is
7 brief, conclusory, and unsupported by clinical findings. Thomas, 278 F.3d at 957.

8 1. Dr. Simonian

9 Plaintiff argues that the ALJ erred in rejecting the opinion of Dr. Simonian because it
10 came too soon after surgery. Defendant counters that the ALJ properly gave little weight to Dr.
11 Simonian’s opinion because it was proffered only five months after Plaintiff’s surgery and the
12 subsequent medical record demonstrates that Plaintiff adequately recovered from his surgery.
13 Plaintiff replies that Dr. Simonian’s opinion is consistent with the objective evidence in the
14 record.

15 Plaintiff argues that the objective evidence demonstrates that Plaintiff has a massive tear
16 in his rotator cuff and that this supports the physician’s opinion. However, the ALJ considered
17 that Plaintiff has a torn rotator cuff and the issue is how that affects his ability to use his left arm.
18 The ALJ found that Plaintiff has a severe shoulder impairment and went on to evaluate the
19 medical evidence in determining how the tear affected Plaintiff’s ability to perform work.

20 In addressing whether Plaintiff’s shoulder impairment met the listing requirements, the
21 ALJ found that Plaintiff had surgery on his shoulder in March 2014. (AR 19, 410-412.) After
22 Plaintiff’s failed shoulder surgery, the ALJ found that the record reflects adequate restoration of
23 function in his shoulder. (AR 19.) The ALJ considered the September 2014 MRI examination
24 showing no significant impairment; instead the MRI indicates a history of repair, a moderate to
25 large subacromial spur, and a soft tissue focus which could represent a displaced fragment or
26 other loose body. (AR 19, 420-421.)

27 The ALJ found that March 2017 treatment records indicate no significant abnormality in
28 Plaintiff’s shoulder. (AR 21, 589, 594.) The ALJ considered an August 2014 report completed

1 by Dr. Simonian. (AR 21, 406.) Dr. Simonian returned Plaintiff to light duty work on August
2 11, 2014. (AR 406.) Dr. Simonian opined that Plaintiff could lift, carry, push and pull no more
3 than 5 pounds and do no work above shoulder level. (AR 406.) The ALJ gave little weight to
4 this opinion because it was made very shortly after Plaintiff's March 2014 surgery and the
5 updated record reflects adequate recovery from his surgery and does not seem consistent with the
6 degree of limitation assessed by Dr. Simonian. (AR 21.)

7 Plaintiff contends the ALJ did not consider the MRI finding that Plaintiff's rotator cuff
8 had return and the post-MRI opinion that the surgery had failed. However, the ALJ did discuss
9 the September 2014 MRI results which showed a re-tear of the rotator cuff but found that Plaintiff
10 had received adequate restoration of function of his shoulder. (AR 19, 21, 420-421.)

11 The ALJ gave little weight to the opinion because it was given five months after surgery,
12 but on October 4, 2014, Dr. Simonian noted that the repeat MRI reveals evidence of tearing of
13 about half of the previous repair. (AR 394.) He recommended against another surgery due to
14 the extensiveness of the previous repair and that it had failed. (AR 394.) Defendant argues that
15 Dr. Simonian advised Plaintiff that he could receive cortisone injections if his symptoms
16 worsened and Plaintiff never sought such treatment. However, the ALJ did not provide this as a
17 reason to reject the physician opinions and the cannot consider Defendant's post hac
18 rationalizations. "A reviewing court can evaluate an agency's decision only on the grounds
19 articulated by the agency." Ceguerra v. Sec'y of Health & Human Servs., 933 F.2d 735, 738
20 (9th Cir. 1991).

21 On September 22, 2014, Plaintiff was examined at Dr. Simonian's office. (AR 395.) On
22 examination, Plaintiff could forward elevate actively to about 100 degrees; abduction was to
23 about 90 degrees; and external rotation to 50 degrees with pain with movement. (AR 395.)
24 Plaintiff was noted to have a degree of permanent impairment with the arm. (AR 395.)

25 The ALJ relied on records of visits in March 2017 to find that Plaintiff had adequate
26 restoration of function in his shoulder. However, Plaintiff was seen at these visits with
27 complaints of knee pain and swelling. (AR 585, 591.) The objective findings reflect only
28 examination of his lower extremities. (AR 589, 594.) The record does not reflect an

1 examination of the upper extremities nor can it reasonably be inferred that such examination took
2 place. Therefore, these records are not substantial evidence to support a finding that Plaintiff had
3 adequate shoulder function.

4 The ALJ did not provide a specific and legitimate reason to reject Dr. Simonian's August
5 2014 opinion.

6 2. Dr. Phiripes

7 Plaintiff contends that Dr. Phiripes opinion is consistent with the September 2014 MRI
8 and the findings of Dr. Simonian and that the ALJ erred by failing to articulate sufficient reasons
9 to reject the opinion. Defendant counters that the ALJ characterized the limitations opined by
10 Dr. Phiripes as less than a full range of sedentary work and this is a reasonable characterization
11 of the opinion. Defendant argues that the ALJ properly found that Dr. Phiripes opinion was not
12 consistent with the clinical signs and findings in the record and appeared to have been based to a
13 significant extent on Plaintiff's subjective complaints. Plaintiff replies that Dr. Phiripes' opinion
14 is not reasonable characterized as sedentary work, but addresses Plaintiff's capacity to perform
15 light exertion with significant limitations on his ability to use his upper left extremity.

16 The ALJ gave little weight to an evaluation, dated June 2016, by Plaintiff's treating
17 physician, Dr. Phiripes. (AR 21.) The ALJ described Dr. Phiripes opinion of Plaintiff's
18 "residual functional capacity in terms consistent with less than a full range of sedentary level
19 exertion. (AR 21.) Dr. Phiripes completed a Physical Residual Function Capacity Medical
20 Source Statement.³ (AR 564-567.) Dr. Phiripes stated that she has seen Plaintiff every 2-3
21 months for 9 months. (AR 564.) Plaintiff has been diagnosed with a massive rotator cuff tear on
22 the left; left arm weakness, CAD, stress, and insomnia. (AR 564.) His prognosis is poor. (AR
23 564.)

24 Plaintiff has left arm pain, numbness, weakness, and weak grip. (AR 564.) He has a dull
25 pain in his left shoulder that gets worse with range of motion. (AR 564.) The most significant
26 clinical findings and objective signs are decreased range of motion, unable to raise left arm
27

28 ³ The date that the report was completed is unclear. It appears to be dated either 6/31/16 or 10/31/16. (AR 567.)

1 greater than 40 degrees externally, forward elevation 90 degrees, and a weak grip of 2/5. (AR
2 564.) Plaintiff's medications cause side effects of drowsiness, fatigue, nausea, and upset
3 stomach. (AR 564.) His impairment has lasted since February 28, 2014. (AR 564.)

4 Dr. Phiripes opined that with his left-hand Plaintiff can rarely lift and carry less than 5
5 pounds, never lift more than 5 pounds, and there are no limitations with right hand. (AR 564-
6 565.) Plaintiff has no problems ambulating, balancing, stooping, or bending. (AR 565.) He
7 must lie down 15 minutes due to stress for less than one hour during an eight-hour day. (AR
8 565.) Plaintiff can sit about eight hours in an eight-hour day. (AR 565.) He would need an
9 unscheduled break every 1-2 hour for 15 minutes. (AR 565-566.) Plaintiff needs to elevate his
10 legs above the heart when sitting for 0 to 15 minutes every 2 hours. (AR 566.) Plaintiff has
11 significant limitations in reaching, handling, and fingering. (AR 566.) With his upper left
12 extremity, Plaintiff can grasp, turn, or twist objects 5 percent of an 8-hour workday; perform fine
13 manipulations 5 percent of an 8-hour workday; and reach with his arms 5 percent of an 8-hour
14 workday. (AR 566.) He cannot push or pull with left arm. (AR 566.)

15 Plaintiff can climb stairs and ramps, but no ladders, scaffolds, or ropes. (AR 566.)
16 Plaintiff has anxiety, stress, and insomnia. (AR 566.) Occasionally his severe pain will interfere
17 with attention and concentration. (AR 566.) Plaintiff would be off task and unable to work 15
18 percent of 8-hour workday. (AR 567.) Plaintiff would miss one day or less per month due to
19 impairments or treatment. (AR 567.) Compared to an average worker, Plaintiff would be 50
20 percent or less efficiently able to perform a job on a sustained basis. (AR 567.) Plaintiff is
21 unable to lift his left arm; unable to pick up, manipulate or hold things; has a very weak grip; and
22 limited range of motion. (AR 567.) Dr. Phiripes stated that her opinion was based on history,
23 progress and office notes, x-rays, physical exam, and consultative medical opinions. (AR 567.)

24 The ALJ noted that the record documents Plaintiff's history of treatment by Dr. Phiripes
25 citing to the treatment records from June 2015 to March 2017. (AR 21, 585-752.) However, the
26 ALJ found that the record does not seem to show clinical signs and findings consistent with the
27 degree of limitation assessed by Dr. Phiripes. (AR 21.)

28 On June 19, 2015, Plaintiff was seen by Dr. Purewall to establish care for his high blood

1 pressure. (AR 747.) Plaintiff reported that he walked daily for exercise. (AR 750.) He had an
2 unremarkable examination and extremity examination revealed no clubbing, cyanosis, edema, or
3 deformity noted with normal full range of motion of all joints. (AR 750.) Review of treatment
4 notes show generally unremarkable physical examinations and reveal no extremity examination
5 with the exceptions discussed as follows. (AR 503, 630, 687, 691-692, 696, 711, 721, 731, 743.)

6 The next record that reflects any examination findings of the extremities is on September
7 8, 2015, where it is noted that Plaintiff has no edema. (AR 737.) On December 17, 2015,
8 Plaintiff saw Dr. Phiripes and extremity examination notes no clubbing, cyanosis or edema. (AR
9 705.)

10 On March 18, 2016, Plaintiff saw a nurse practitioner complaining of shoulder pain and
11 examination notes decreased range of motion in the left shoulder. (AR 682.) On March 29,
12 2016, the nurse practitioner noted on musculoskeletal examination left arm has weak grip with
13 very minimal function. (AR 676.)

14 On May 7, 2016, Dr. Phiripes' extremity examination notes right foot tenderness at the
15 insertion of the plantar fascia. (AR 670.) Dr. Phiripes saw Plaintiff again on June 28, 2016; July
16 28, 2016; August 25, 2016; October 6, 2016; and October 28, 2016, and extremity examination
17 notes only no edema. (AR 624, 642, 650, 658-659, 664-665.)

18 On December 8, 2016, Dr. Phiripes noted no edema, but that Plaintiff had some point
19 tenderness in the right calcaneus consistent with plantar fasciitis. (AR 617.)

20 Further, during this same time period, Plaintiff was seen by Dr. Rugama due to difficulty
21 sleeping. On June 21, 2015, Dr. Rugama noted that Plaintiff had symmetric grip strength. (AR
22 726.) On September 21, 2015, Plaintiff reported that he was working as a store clerk from 9:30
23 a.m. to 8:30 p.m. on Mondays and driving for Uber Tuesdays through Saturdays between 8:00
24 a.m. and 7:00 p.m. (AR 723.) Extremity examination notes only that the lower extremities are
25 without pitting edema; no cyanosis and no clubbing of the nails. (AR 726.)

26 On June 22, 2016; October 10, 2016; and January 25, 2017, Dr. Sandhu examined
27 Plaintiff and extremity exam notes no leg edema with good and equal distal pulses. (AR 575.)

28 The ALJ need not accept the opinion of any physician that is brief, conclusory, and

1 unsupported by clinical findings. Thomas, 278 F.3d at 957. Here, the extreme limitations
2 opined by Dr. Phiripes are not supported by the record. While the record does have some
3 findings of limited range of motion, Dr. Purewall found that Plaintiff had full range of motion in
4 all joints in his extremities. Further, the only hand findings show that Plaintiff had symmetrical
5 grip strength and there are no findings that would support the extreme fingering limitations
6 opined by Dr. Phiripes. The ALJ provided a specific and legitimate reason for the weight
7 provided to Dr. Phiripes June 2016 opinion.

8 Due to the lack of support in the treatment notes, the ALJ found that Dr. Phiripes seemed
9 to uncritically endorse Plaintiff's subjective complaints to a significant extent. (AR 22.) Due to
10 the lack of findings to support the limitations in the opinion, the ALJ could reasonably conclude
11 that Dr. Phiripes was relying on Plaintiff's subjective complaints in completing the June 2016
12 report. An ALJ can reject a physician's opinion that is premised on a claimant's subjective
13 complaints that have been properly discounted. Fair v. Bowen, 885 F.2d 597, 605 (1989).

14 The ALJ provided specific and legitimate reasons for the weight provided to Dr. Phiripes
15 opinion testimony.

16 3. Agency Physicians

17 Plaintiff contends that the ALJ erred by giving weight to the agency physicians because
18 they did not state what Plaintiff's capabilities were but described that it was expected he would
19 have certain abilities in the future. Plaintiff argues that the agency physicians expected his
20 shoulder to have healed completely by September 2015, but there is no evidence to suggest that
21 such healing occurred.

22 Defendant counters that the agency physicians did not opine as to Plaintiff's abilities in
23 the future, but stated what he was currently able to do with the expectation that he would have
24 healed completely by September 2015. Defendant argues that the limitations opined by the
25 agency physicians were to accommodate the on-going shoulder impairment.

26 Plaintiff replies that the state agency physicians did not consider that Plaintiff's rotator
27 cuff was reinjured and further they found that Plaintiff would have limitations in reaching but did
28 quantify such limitations.

1 The contrary opinion of a non-examining expert is not sufficient by itself to constitute a
2 specific, legitimate reason for rejecting a treating or examining physician's opinion, however, "it
3 may constitute substantial evidence when it is consistent with other independent evidence in the
4 record." Tonapetyan, 242 F.3d at 1149. "The weight afforded a non-examining physician's
5 testimony depends 'on the degree to which [he] provide[s] supporting explanations for [his]
6 opinions.'" Garrison, 759 F.3d at 1012 (citations omitted).

7 The ALJ found that two State Agency physicians described Plaintiff's residual functional
8 capacity in terms consistent with a reduced range of light level exertion. (AR 21.) Plaintiff was
9 able to lift 10 pounds frequently and 20 pounds occasionally; able to stand and/or walk six hours
10 in an eight-hour workday; able to sit six hours in an eight-hour workday; able to perform
11 occasional climbing, balancing, stooping, kneeling, crouching, and crawling; limited in reaching
12 with the left upper extremity; and unable to work in environments with concentrated exposure to
13 significant hazards, including work at unprotected heights or near moving machinery. (AR 21-
14 22.) The ALJ gave these opinions significant weight finding that they were well-supported by
15 the overall record. (AR 22.)

16 On December 3, 2014, Dr. Lowell opined that from September 1, 2014, until September
17 1, 2015, Plaintiff had the ability to lift 20 pounds occasionally and 10 pounds frequently; stand
18 and/or walk 6 hours in an 8-hour day; sit six hours in an 8-hour day; occasionally climb ladders,
19 ropes, and scaffolds; occasionally balance, stoop, kneel, crouch and crawl. (AR 70-71, 80-82.)
20 Plaintiff was limited in reaching in front or laterally and overhead with his left arm. (AR 71.)
21 Plaintiff had no handling, fingering, or feeling limitations. (AR 71.) Dr. Lowell considered that
22 Plaintiff had a repair of the left rotator cuff but did not follow up with physical therapy and retore
23 the rotator cuff. (AR 71.) He opined that the left rotator cuff tear is expected to have healed
24 completely by September 15. (AR 71.) Plaintiff was to avoid concentrated exposure to hazards
25 such as machinery and heights. (AR 72.)

26 On reconsideration, Dr. Nasrabadi affirmed the residual functional capacity assessment
27 on February 10, 2015. (AR 92-94, 102-104.) Here, all physicians who have considered
28 Plaintiff's residual functional capacity have determined that he has limitations in his shoulder.

1 The agency physicians both found that Plaintiff would be limited in his left shoulder in reaching
2 to the front or laterally and overhead. (AR 103.) While the ALJ gave significant weight to the
3 agency physicians opinions, he did not impose any reaching limitations.

4 Further, while the agency physicians opined that Plaintiff's shoulder injury would be
5 completely healed by September 15, 2015, the record evidences that Plaintiff's shoulder injury
6 may not be completely healed. On January 2, 2015; and January 9, 2015, Plaintiff was examined
7 and was found to have range of motion from 0 to 130 degrees and received injections. (AR 551,
8 552.) On June 19, 2015, Dr. Purewall examined Plaintiff and found that he had normal full
9 range of motion in all his joints. (AR 750.) Plaintiff was seen complaining of shoulder pain in
10 March 2016 and was found to have decreased range of motion in his left shoulder. (AR 676,
11 682.) On September 17, 2016, Plaintiff appears to have attended physical therapy and his left
12 shoulder was found to have flexion of 100 degrees, abduction of 70 degrees and "ER" of 50
13 degrees with pain inhibition in all motion.⁴ (AR 414.) His left shoulder strength was 2+/5. (AR
14 414.)

15 The agency physicians' opinions are not substantial evidence to support the residual
16 functional capacity assessment.

17 **B. Remand**

18 Plaintiff argues that the physician opinions should be credited as true and this action
19 remanded for benefits. Defendant counters that remand for further development of the record is
20 proper as the later medical record contains very little assessment or treatment of Plaintiff's
21 shoulder and further development would be useful to determine Plaintiff's shoulder limitations.

22 The ordinary remand rule provides that when "the record before the agency does not
23 support the agency action, ... the agency has not considered all relevant factors, or ... the
24 reviewing court simply cannot evaluate the challenged agency action on the basis of the record
25 before it, the proper course, except in rare circumstances, is to remand to the agency for

26 _____
27 ⁴ The referral itself is dated September 17, 2014, and the notes indicate that it may be inappropriate healing or a
28 reinjury and that diagnostic imaging may be beneficial. Since at this time, Plaintiff had received a second MRI
indicating that he had return the rotator cuff and based on the date of the referral, the date of these findings is
questionable.

1 additional investigation or explanation.” Treichler v. Comm’r of Soc. Sec. Admin., 775 F.3d
2 1090, 1099 (9th Cir. 2014). This applies equally in Social Security cases. Treichler, 775 F.3d at
3 1099. Under the Social Security Act “courts are empowered to affirm, modify, or reverse a
4 decision by the Commissioner ‘with or without remanding the cause for a rehearing.’” Garrison,
5 759 F.3d at 1019 (emphasis in original) (quoting 42 U.S.C. § 405(g)). The decision to remand
6 for benefits is discretionary. Treichler, 775 F.3d at 1100. In Social Security cases, courts
7 generally remand with instructions to calculate and award benefits when it is clear from the
8 record that the claimant is entitled to benefits. Garrison, 759 F.3d at 1019.

9 The Ninth Circuit has “devised a three-part credit-as-true standard, each part of which
10 must be satisfied in order for a court to remand to an ALJ with instructions to calculate and
11 award benefits: (1) the record has been fully developed and further administrative proceedings
12 would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for
13 rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly
14 discredited evidence were credited as true, the ALJ would be required to find the claimant
15 disabled on remand.” Garrison, 759 F.3d at 1020.

16 Even if the Court was to credit Dr. Simonian’s opinion as true it would not necessarily
17 lead to finding that Plaintiff was disabled. At the hearing, the ALJ presented a hypothetical of an
18 individual that was limited to occasional reaching with the dominant extremity and the ALJ
19 found that there were jobs that this individual could perform. (AR 57.) No hypothetical was
20 presented of an individual who was limited to no overhead reaching.

21 Further, as discussed above, Plaintiff has received very limited if any treatment for his
22 left shoulder after June 2015. Additionally, the findings in the record are contradictory as some
23 records indicate that Plaintiff has full range of motion in his left arm and other records indicate
24 that his left shoulder range of motion is limited to some extent.

25 The Court finds that further development of the record would be beneficial to determine
26 what Plaintiff is capable of doing with his left arm due to his shoulder injury. Upon remand the
27 ALJ shall consider all medical evidence regarding Plaintiff’s shoulder injury anew, obtain
28 additional medical opinion evidence as to Plaintiff’s physical functioning from a consultative

1 examiner or a medical expert, and further develop the record as deemed necessary.

2 V.

3 **CONCLUSION AND ORDER**

4 Based on the foregoing, the Court finds that the ALJ's opinion regarding Plaintiff's left
5 shoulder impairment is not supported by substantial evidence. Accordingly, IT IS HEREBY
6 ORDERED that Plaintiff's appeal from the decision of the Commissioner of Social Security is
7 GRANTED and this matter is remanded back to the Commissioner of Social Security for further
8 proceedings consistent with this order. It is FURTHER ORDERED that judgment be entered in
9 favor of Plaintiff Rajvinder S. Dhaliwal and against Defendant Commissioner of Social
10 Security. The Clerk of the Court is directed to CLOSE this action.

11 IT IS SO ORDERED.

12 Dated: January 11, 2019



UNITED STATES MAGISTRATE JUDGE