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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ISMAEL MUNOZ FERRER,  
Plaintiff,

v.

ANDREW SAUL,<sup>1</sup> Commissioner of  
Social Security,  
Defendant.

No. 1:18-cv-00494-GSA

**ORDER REMANDING CASE FOR  
FURTHER PROCEEDINGS UNDER  
SENTENCE 4 OF 42 U.S.C. § 506(g)**

**I. Introduction**

Plaintiff Ismael Munoz Ferrer (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying his 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.<sup>2</sup> *See* Docs. 20, 21 and 22. Having reviewed the record as a whole, the Court finds that the ALJ erred in failing to give appropriate deference to Plaintiff’s VA disability rating, or to articulate a reasonable basis for disregarding it.

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<sup>1</sup> Commissioner of Social Security Andrew Saul is substituted as Defendant pursuant to Fed. R. Civ. P. 25(d). *See also* Section 205(g) of the Social Security Act, 42 USC 405(g) (action survives regardless of any change in the person occupying the office of Commissioner of Social Security).

<sup>2</sup> The parties consented to the jurisdiction of the United States Magistrate Judge. *See* Docs. 7 and 10.

1 Accordingly, the Court reverses the Commissioner's denial of benefits to Plaintiff and remands  
2 this matter to the Commissioner for further proceedings consistent with this order.

3 **II. Procedural Background**

4 On October 6, 2014, Plaintiff filed an application for disability insurance benefits alleging  
5 disability beginning April 17, 2013. AR 21. The Commissioner denied the application initially  
6 on January 20, 2015, and upon reconsideration on March 30, 2015. AR 21. On May 13, 2015,  
7 Plaintiff filed a timely request for a hearing before an Administrative Law Judge. AR 21.

8 Administrative Law Judge Sheila Walters presided over an administrative hearing on  
9 September 29, 2016. AR 57-95. Plaintiff appeared and was represented by an attorney. AR 57.  
10 Impartial vocational expert Timothy J. Farrell (the "VE") also testified. AR 57.

11 On December 22, 2016, the ALJ denied Plaintiff's application. AR 21-33. The Appeals  
12 Council denied review on February 7, 2018. AR 1-7. On April 10, 2018, Plaintiff filed a  
13 complaint in this Court. Doc. 1.

14 **III. Factual Background**

15 **A. Plaintiff's Testimony**

16 Plaintiff (born July 3, 1971) lived with his wife, two adult daughters and a granddaughter.  
17 AR 62. Plaintiff completed high school and spent two months studying air conditioning. AR 63.

18 Plaintiff served four years in the U.S. Navy. AR 64. He was rated 100 percent disabled  
19 and received VA compensation. AR 65. Other prior jobs included warehouse clerk, shipping  
20 clerk, blending wine, racking hose and wine company warehouse work. AR 69-70. He drove a  
21 truck and a forklift. AR 72. In April 2013, Plaintiff stopped working because of his mental and  
22 physical impairments. AR 72. Thereafter he was unable to secure other employment. AR 73.

23 On a typical day, Plaintiff waters the plants, dusts the house and sometimes cleans the  
24 backyard. AR 66. Plaintiff's wife does the housework, laundry, shopping and cooking. AR 67.

25 Plaintiff has painful headaches, often after a stressful day. AR 87. Plaintiff also  
26 experiences lower back, knee and ankle pain. AR 73-74. His doctors have discouraged surgery  
27 in favor of physical therapy. AR 73-74. Plaintiff has seen a physical therapist twice monthly

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1 since 2011. AR 74. Plaintiff participates in trauma counseling weekly as well as group therapy.  
2 AR 76. He has a history of alcohol abuse. AR 80-81.

3 Plaintiff can walk, stand or sit for an hour in an eight-hour work day. AR 76-77. He can  
4 sit for 20 to 30 minutes at a time. AR 77. He can lift about ten pounds. AR 77. Plaintiff  
5 reported memory problems, difficulty getting along with others and problems with crowds of  
6 more than six people. AR 78. He used a CPAP machine and hearing aids. AR 79.

7 The ALJ observed that Plaintiff paused before responding to questions. AR 82.  
8 Questioned about the reason, Plaintiff explained that he had “too much stuff” in his head,  
9 including memory and guilt. AR 83. Some days were worse than others. AR 84. On bad days,  
10 usually about 20 per month, Plaintiff did not leave his home. AR 84.

11 Plaintiff had difficulty concentrating and completing tasks. AR 84-85. He was distracted  
12 by things such as a reflection in the television screen which appeared to be a person behind him.  
13 AR 85. Plaintiff did not watch television because there were “things [he] might see on T.V. that  
14 [he did not] want to see.” AR 85. Although Plaintiff felt “safe” with other veterans, he did not  
15 enjoy socializing with friends or others who might ask him questions. AR 85-86. When the ALJ  
16 observed that Plaintiff appeared nervous during the hearing, Plaintiff confirmed that he was  
17 anxious around other people. AR 86.

### 18 **B. Adult Function Reports**

19 In his adult function report, dated November 20, 2014,<sup>3</sup> Plaintiff stated that his PTSD,  
20 anxiety, depression and panic attacks resulted in occupational and social impairments,  
21 hypervigilance and difficulty in adapting to a work-like setting as well as establishing and  
22 maintaining effective work. AR 235. He experienced nightmares, sleep apnea and “triggers.”  
23 AR 236. Plaintiff was easily overwhelmed and frustrated. AR 239.

24 Plaintiff had difficulty with nearly all physical and mental activities except using his  
25 hands. AR 240. He used prescription hearing aids. AR 241. He could not pay attention and  
26 became frustrated trying to follow instructions. AR 240. He had difficulty with authority figures,

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28 <sup>3</sup> Plaintiff’s adult function report was prepared by his wife Gloria L. Munoz. AR 242.

1 stress and changes in routine. AR 241. Noises at night triggered anxiety and nightmares. AR  
2 241.

3 Because he did not trust his surroundings, Plaintiff did not go out alone. AR 238.  
4 Generally, his wife drove him where he needed to go. AR 239. Twice weekly Plaintiff attended  
5 an alcohol and drug meeting and a PTSD group at a VA clinic. AR 239.

6 Plaintiff's daily activities included VA appointments, television, cleaning the garage or  
7 the yard and playing with his granddaughter. AR 236. He needed constant reminders to perform  
8 personal care and take his medications. AR 236. Although his chores included cleaning the  
9 garage, gardening, taking out trash, and sometimes doing the dishes, Plaintiff was not always able  
10 to complete the task without requiring many time-outs. AR 237. Usually, he preferred to just  
11 stay in his room. AR 237. Plaintiff enjoyed gardening and fishing. AR 239.

12 Plaintiff's wife acted as his caregiver.<sup>4</sup> AR 238. She cooked and paid the bills. AR 238.

13 **C. Medical Records**

14 Nearly all of Plaintiff's medical care was provided by the Veteran's Administration  
15 facilities in San Jose, Stockton, Livermore and Palo Alto (the "VA").<sup>5</sup> His diagnoses included  
16 obesity, diabetes mellitus without complication, depressive disorder, anxiety, headache,  
17 concussion with loss of consciousness of unspecified duration, metabolic disturbances, post-  
18 traumatic stress disorder, obstructive sleep apnea, unspecified sleep disturbances (anxiety),  
19 alcohol dependence, episodic alcohol abuse, lumbago, hyperlipidemia and elevated liver function.  
20 AR 289-90, 300. Treatment included peer support services and group psychotherapy; physical  
21 and recreational therapy; and, regular physical care.

22 Plaintiff's headaches and PTSD relate, at least in part, to the portion of his military career  
23 in which his unit built prison facilities for prisoners of war in Iraq. AR 563. Until construction  
24 was completed, Plaintiff's unit also had duty shifts to guard the prisoners in an inadequate facility  
25 with insecure fences. Because guards and prisoners sometimes occupied the same space,

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27 <sup>4</sup> The VA formally recognizes the role of a veteran's caregiver. Plaintiff's wife attended classes and received various  
forms of support in her care of Plaintiff. *See, e.g.*, AR 585-88.

28 <sup>5</sup> Plaintiff served as a petty officer in the U.S. Navy from 2002 to 2006. AR 317. He was honorably discharged. AR  
326.

1 prisoners could physically assault the guards. On three occasions Plaintiff suffered head injuries  
2 as the result of such attacks. AR 538. Plaintiff continued to experience intrusive memories about  
3 abusing and threatening prisoners. AR 557. Following his return from deployment, Plaintiff's  
4 drinking was "out of control." AR 562.

5 From July 2 to 6, 2012, Plaintiff was hospitalized for acute psychiatric issues of  
6 depression and suicidal ideation. AR 314-15. Plaintiff reported recent marital stress and alcohol  
7 abuse. AR 315. He had frequent nightmares following the traumatic experience of working as a  
8 prison guard while stationed in Iraq. AR 315. His discharge diagnosis was:

9  
10 Axis I Depressive Disorder NOS  
Alcohol abuse r/o dependence  
11 R/O PTSD  
12 Axis II Deferred  
13 Axis III CBP, OSA, HL  
14 Axis IV Marital conflict and recent separation  
15 Axis V Current GAF: 40

16 AR 314-15.<sup>6</sup>

17  
18 Psychiatrist Divya Reddy, M.D., encouraged Plaintiff to participate in PTSD outpatient  
19 treatment program following discharge. AR 320. Plaintiff attended the recommended programs.  
20 AR 328.

21 Magnetic Resonance imaging of Plaintiff's lumbar spine in June 2014 revealed  
22 degenerative changes, most severe at L1-2, L4-5 and L5-S1. AR 275-76. July 2014 x-rays of

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26 <sup>6</sup> The Global Assessment of Functioning (GAF) scale is a rating from 0 to 100 and considers psychological, social,  
27 and occupational functioning on a hypothetical continuum of mental health-illness. *Diagnostic and Statistical*  
28 *Manual of Mental Disorders*, 32-35 (4th ed. American Psychiatric Association 1994). A GAF of 31-40 corresponds  
to some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR  
major impairment in several areas, such as work or school, family relations, judgment, thinking, or moos (e.g.,  
depressed man avoids friends, neglects family, and is unable to work). *Id.*

1 Plaintiff's right hip showed mild superolateral acetabular degenerative spurring but no significant  
2 degenerative joint space loss, fracture or degenerative change. AR 274.

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4 **D. Medical Opinions**

5 1. **Agency Psychologist and Psychiatrist**

6 Based on evidence submitted before December 10, 2014, Richard Kaspar, Ph.D.,  
7 diagnosed Plaintiff with affective disorders and substance addiction disorders. AR 97, 101. Dr.  
8 Kaspar opined that Plaintiff had mild restriction of activities of daily living, moderate difficulties  
9 in maintaining social functioning and concentration, persistence and pace; and, no repeated  
10 episodes of decompensation of extended duration. AR 101. He concluded that Plaintiff's mental  
11 impairments did not meet or equal any listing, and that Plaintiff's primary impairment was  
12 sustaining sobriety. AR 102.

13 In response to the mental residual functional capacity assessment, Dr. Kaspar opined that  
14 Plaintiff had no significant limitations in remembering locations and work-like procedures;  
15 understanding, remembering and carrying out very short and simple instructions or detailed  
16 instructions; performing activities within a schedule, maintaining regular attendance and being  
17 punctual within a customary tolerance; sustaining an ordinary routine without special supervision;  
18 working in coordination with or in proximity to others without being distracted by them; making  
19 simple work-related decisions; asking simple questions or requesting assistance; and, maintaining  
20 socially appropriate behavior and adhering to basic standards of neatness and cleanliness. AR  
21 105-06. Plaintiff was moderately limited in the ability to maintain attention and concentration for  
22 extended periods; complete a normal workday and work week without interruptions from  
23 psychologically based symptoms and to perform at a consistent pace without an unreasonable  
24 number and length of rest periods; to interact appropriately with the general public; to accept  
25 instructions and respond appropriately to criticism from supervisors; and, to get along with  
26 coworkers or peers without distracting them or exhibiting behavioral extremes. AR 106. On  
27 reconsideration, A. Garcia, M.D., agreed. AR 118-120.

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1 inconsequential to the ultimate nondisability determination.” *Tommasetti v. Astrue*, 533 F.3d  
2 1035, 1038 (9<sup>th</sup> Cir. 2008) (citations and internal quotation marks omitted).

3 **V. The Disability Standard**

4 To qualify for benefits under the Social Security Act, a plaintiff must  
5 establish that he or she is unable to engage in substantial gainful  
6 activity due to a medically determinable physical or mental  
7 impairment that has lasted or can be expected to last for a continuous  
8 period of not less than twelve months. 42 U.S.C. § 1382c(a)(3)(A).  
9 An individual shall be considered to have a disability only if . . . his  
10 physical or mental impairment or impairments are of such severity  
11 that he is not only unable to do his previous work, but cannot,  
12 considering his age, education, and work experience, engage in any  
13 other kind of substantial gainful work which exists in the national  
14 economy, regardless of whether such work exists in the immediate  
15 area in which he lives, or whether a specific job vacancy exists for  
16 him, or whether he would be hired if he applied for work.

17 42 U.S.C. §1382c(a)(3)(B).

18 To achieve uniformity in the decision-making process, the Commissioner has established  
19 a sequential five-step process for evaluating a claimant’s alleged disability. 20 C.F.R. §§  
20 416.920(a)-(f). The ALJ proceeds through the steps and stops upon reaching a dispositive finding  
21 that the claimant is or is not disabled. 20 C.F.R. §§ 416.927, 416.929.

22 Specifically, the ALJ is required to determine: (1) whether a claimant engaged in  
23 substantial gainful activity during the period of alleged disability, (2) whether the claimant had  
24 medically determinable “severe impairments,” (3) whether these impairments meet or are  
25 medically equivalent to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P,  
26 Appendix 1, (4) whether the claimant retained the residual functional capacity (“RFC”) to  
27 perform his past relevant work, and (5) whether the claimant had the ability to perform other jobs  
28 existing in significant numbers at the national and regional level. 20 C.F.R. § 416.920(a)-(f).

29 **VI. Summary of the ALJ’s Decision**

30 The ALJ found that Plaintiff had not engaged in substantial gainful activity since the  
31 amended onset date of April 17, 2013. AR 23. His severe impairments included: obesity;  
32 obstructive sleep apnea; diabetes mellitus with associated peripheral neuropathy; degenerative  
33 disc disease of the lumbar spine with associated radiculitis; degenerative joint disease of the left  
34 knee, right ankle and toes; major depressive disorder; anxiety disorder; and, post-traumatic stress



1 disorder (PTSD). AR 23. None of the severe impairments met or medically equaled one of the  
2 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d);  
3 404.1525; 404.1526). AR 24.

4 The ALJ concluded that Plaintiff had the residual functional capacity to perform light  
5 work as defined in 20 C.F.R. § 404.1567(b). AR 26. He was limited to occasional stooping,  
6 kneeling, crouching and crawling; precluded from climbing ladders, ropes and scaffolds or  
7 working around hazards such as unprotected heights and dangerous machinery; and, needed to  
8 avoid concentrated exposure to extreme heat or cold, humidity, vibration and pulmonary irritants  
9 such as fumes, odors, dust, smoke, gases and poor ventilation. AR 26. Plaintiff was limited to  
10 simple, routine tasks and no more than occasional interaction with supervisors, coworkers and the  
11 public. AR 26.

12 Plaintiff was not able to perform any of his past relevant work. AR 31. Considering his  
13 age, education, work experience and residual functional capacity, jobs that Plaintiff was able to  
14 perform existed in significant numbers in the national economy. AR 32. Accordingly, the ALJ  
15 found that Plaintiff was not disabled from April 17, 2013, through December 22, 2016 (the date  
16 of the hearing decision). AR 33.

## 17 **VII. Evaluation of the Veterans' Administration Disability Rating**

18 Acknowledging that the Commissioner was not bound by the Veterans' Administration's  
19 determination that Plaintiff was completely disabled, Plaintiff contends that the ALJ nonetheless  
20 erred by failing to provide persuasive, specific or valid reasons for rejecting the VA rating. Doc.  
21 20 at 10. The Commissioner counters that the ALJ appropriately considered the VA disability  
22 rating and provided persuasive, specific and valid reasons for reaching a different conclusion.  
23 AR 22 at 15. The Court agrees with Plaintiff that the ALJ erred in failing either to give  
24 appropriate deference to the VA disability rating or to articulate a reasonable basis for  
25 disregarding it.

### 26 **A. Evidence of the VA Rating**

27 On July 30, 2014, clinical psychologist Lauren L. Dill completed an initial Post Traumatic  
28 Stress Disorder (PTSD) disability benefits questionnaire. AR 321-33. Dr. Dill found that

1 Plaintiff had three distinct mental disorders: PTSD, depressive disorder and alcohol use disorder  
2 as well as a traumatic brain injury which resulted in occupational and social impairment with  
3 deficiencies in most areas, such as working, school, family relations, judgment, thinking or mood.  
4 AR 322-23.

5 Also on July 30, 2014, Corine Cesana, M.D., reviewed Plaintiff's back problems which  
6 began with back sprain that Plaintiff incurred while moving stores on board the ship on which he  
7 was stationed. AR 333-35.<sup>7</sup> Following a physical examination, Dr. Cesana diagnosed  
8 degenerative arthritis and minimal degenerative disc disease at L4 and L5-S1. AR 335. The  
9 doctor concluded that it was as likely as not that Plaintiff's back problems were attributable to his  
10 military service. AR 335.

11 Plaintiff's verified 2014 service connected disability rating was PTSD, 70 percent; sleep  
12 apnea, 50 percent; and intervertebral disc syndrome, 20 percent. AR 313. The record does not  
13 include any later documents indicating Plaintiff's VA disability ratings.

14 On February 5, 2015, Howard H. Fenn, M.D., reviewed disability benefits for Plaintiff's  
15 PTSD. AR 549-59. After reviewing Plaintiff's symptoms and treatment, Dr. Fenn opined that  
16 Plaintiff's PTSD impairment remained unchanged since July 2014. AR 559. The doctor opined  
17 that Plaintiff's then-current GAF was 55.<sup>8</sup> AR 559.

18 On February 5, 2015, Laura B. Kinsel, M.D., reviewed disability benefits associated with  
19 Plaintiff's spinal condition and sleep apnea. AR 569-81. After examining Plaintiff and reviewing  
20 Plaintiff's medical records, Dr. Kinsel diagnosed degenerative arthritis of the spine. AR 570. Dr.  
21 Kinsel opined that (1) Plaintiff's degenerative disc disease and lumbar sprain preclude him from  
22 lifting and stooping and (2) chronic sleep disturbance and fatigue preclude his performing work  
23 accurately and safely. AR 579. Dr. Kinsel concluded that Plaintiff's sleep apnea was no longer a  
24 limiting factor in Plaintiff's ability to work since he used a CPAP device. AR 584.

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26 <sup>7</sup> The evidence is unclear whether these documents, which the VA printed on December 10, 2014, are complete.

27 <sup>8</sup> A global assessment of 51 to 60 indicates moderate symptoms (e.g., flat affect and circumstantial speech,  
28 occasional panic attacks) OR moderate difficulty in social, occupational or school functioning (e.g., no friends,  
unable to keep a job). *Diagnostic and Statistical Manual of Mental Disorders*, 32-35 (4th ed. American Psychiatric  
Association 1994).



1 *v. Berryhill*, 736 Fed.Appx. 670, 673 (9<sup>th</sup> Cir. 2018) (holding that the ALJ appropriately relied on  
2 evidence subsequent to the VA determination).

3 If the hearing decision fails “to articulate an acceptable reason for affording the ALJ’s  
4 determination little weight,” courts may not speculate on reasoning sufficient to justify rejection  
5 of the VA rating. *Taylor v. Colvin*, 196 F.Supp.3d 1120, 1127 (N.D. Cal. 2016). In the absence  
6 of a detailed explanation of the ALJ’s reasoning, a court must be “wary of speculating about the  
7 basis of the ALJ’s conclusion—especially when his opinion indicates that the conclusion may  
8 have been based exclusively upon an improper reason.” *See Valentine*, 574 F.3d at 695 (quoting  
9 *Gonzalez v. Sullivan*, 914 F.2d 1197, 1201 (9<sup>th</sup> Cir. 1990)).

10 **C. The ALJ’s Analysis in Plaintiff’s Case**

11 In this case, the hearing decision neither made factual findings concerning Plaintiff’s VA  
12 rating, nor specifically addressed the content of the VA rating questionnaires that were included  
13 in the record. In a single paragraph, the ALJ acknowledged the VA rating but gave it reduced  
14 weight in her disability analysis based generally on her analysis of the evidence in the  
15 administrative record:

16 The undersigned is mindful that the claimant has been found disabled  
17 by the Veteran[s]’ Administration (“VA”) and is currently receiving  
18 disability payments from that agency. Although the VA and Social  
19 Security Administration (“SSA”) disability programs are similar, the  
20 criteria for determining disability are not identical. The SSA makes  
21 determinations of disability according to Social Security law;  
22 therefore, a determination of disability by another agency is not  
23 binding on this proceeding (20 C.F.R. § 404.1504, *see also* S.S.R.  
24 96-5p on issues reserved to the Commissioner). The undersigned has  
25 taken this opinion into consideration; however, for the reasons  
26 discussed in detail with respect to the opinions of Drs. Lee, Kiger,  
27 Kaspar, and Garcia, the undersigned finds the claimant’s residual  
28 functional capacity sufficiently accounts for his impairments and  
associated limitations. Thus, the undersigned disagrees in light of  
this opinion being over-restrictive and gives it reduced weight.

AR 31 (citations to administrative record omitted).

As stated above, the ALJ’s finding that the criteria for Social Security and VA disability  
benefits differ is not a cognizable basis for rejecting a VA disability rating. *Valentine*, 574 F.3d  
at 695. The only question that the Court must resolve is whether the ALJ’s reference to the

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1 opinions of the agency physicians (Drs. Lee, Kiger, Kaspar, and Garcia) constituted a persuasive,  
2 specific and valid reason sufficient to reject Plaintiff's VA disability rating.

3 First, the Court cannot conclude that the agency physician's opinions represent the  
4 acquisition of new evidence. *See Valentine*, 574 F.3d at 695. For the initial review, the opinions  
5 of Drs. Kaspar and Lee were provided on January 20, 2015, before the VA's February 2015  
6 review and revision of Plaintiff's VA rating. Although Drs. Kiger and Garcia issued their  
7 respective reconsideration opinions following the February 2015 VA review and revision, both of  
8 the reconsideration opinions restated the language of the initial decisions and concluded that there  
9 had been no change in Plaintiff's condition since the agency's initial review. The ALJ did not  
10 explicitly state that she relied on later medical reports or the testimony of the claimant or the  
11 vocational expert. *See Atwood*, 742 F.Supp.2d at 1154.

12 In sum, the ALJ neither gave great weight to Plaintiff's VA disability rating, nor gave  
13 persuasive, specific, valid reasons for disregarding the VA rating that were supported by the  
14 record. *See McCartey*, 298 F.3d at 1076. On remand, the Commissioner is directed to consider  
15 fully the medical evidence and analysis performed of the VA treating and examining physicians  
16 and psychologists as well as the analysis set forth in the VA disability benefits questionnaires.

17 **VIII. Improper Analysis of Plaintiff's Residual Functional Capacity**

18 Plaintiff challenges the Commissioner's determination of his residual functional capacity,  
19 contending that no substantial evidence in the record supported the ALJ's determination of his  
20 residual functional capacity. The Commissioner disagrees, responding that the ALJ appropriately  
21 construed the evidence to reach her conclusion.

22 Analysis of this issue implicates two concerns. First, although the ALJ rejected the VA  
23 disability rating in favor of the opinions of the agency physicians, she never discussed the  
24 opinions of the VA physicians who examined Plaintiff and provided their opinions concerning his  
25 functional impairments. Second, as Plaintiff directly contends in her challenge to the residual  
26 functional capacity determination, the ALJ determined Plaintiff's residual exertional level with no  
27 explicit support in the evidence.

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1                   **A.     Weighing Medical Opinion**

2                   “[A]n ALJ is responsible for determining credibility and resolving conflicts in medical  
3 testimony.” *Magallanes v. Bowen*, 881 F.2d 747, 750 (9<sup>th</sup> Cir. 1989). An ALJ may choose to give  
4 more weight to opinions that are more consistent with the evidence in the record. 20 C.F.R. §§  
5 404.1527(c)(4), 416.927(c)(4) (“the more consistent an opinion is with the record as a whole, the  
6 more weight we will give to that opinion”).

7                   The opinions of treating physicians, examining physicians, and non-examining physicians  
8 are entitled to varying weight in disability determinations. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup>  
9 Cir. 1995). Ordinarily, more weight is given to the opinion of a treating professional, who has a  
10 greater opportunity to know and observe the patient as an individual. *Id.*; *Smolen v. Chater*, 80  
11 F.3d 1273, 1285 (9<sup>th</sup> Cir. 1996). The opinion of an examining physician is, in turn, entitled to  
12 greater weight than the opinion of a non-examining physician. *Pitzer v. Sullivan*, 908 F.2d 502,  
13 506 (9<sup>th</sup> Cir. 1990). An uncontradicted opinion of a treating or examining physician may be  
14 rejected only for “clear and convincing” reasons. *Lester*, 81 F.3d at 830. An ALJ may reject the  
15 opinion of a treating or examining physician that is contradicted by the opinion of another  
16 physician only for “specific and legitimate reasons that are supported by substantial evidence in  
17 the record.” *Id.* at 830-31.

18                   The Commissioner must generally give more weight to medical opinions from a  
19 claimant’s treating sources since treating professionals are most able to provide a detailed,  
20 longitudinal picture of the claimant’s medical impairments and may provide a unique perspective  
21 to the medical evidence that cannot be drawn from objective medical findings along or from  
22 reports of individual examinations. 20 C.F.R. § 404.1527(c)(2). “The Commissioner is required  
23 to give weight not only to the treating physician’s clinical findings and interpretation of test  
24 results, but also to his subjective judgments.” *Lester*, 81 F.3d at 833.

25                   In this case, the hearing decision does not name any of Plaintiff’s treating physicians nor  
26 discuss any of their diagnoses or prescribed treatment. Instead, the hearing decision generally  
27 refers to treatments and test results, without reference to time or provider. In addition, the hearing  
28 decision omits any explicit reference to the VA rating questionnaires, despite their preparation by

1 VA physicians who examined Plaintiff, reviewed his ongoing medical treatment by VA  
2 physicians and other medical professionals, and drew conclusions concerning his ability to  
3 perform in a work environment with his diagnosed conditions.

4         Instead, the ALJ focused almost exclusively on the opinions of the non-examining agency  
5 physicians, even though she disagreed with their assessments of Plaintiff's residual functional  
6 capacity. The opinion of a non-examining physician may constitute substantial evidence only  
7 when it is "consistent with independent clinical findings or other evidence in the record." *Thomas*  
8 *v. Barnhart*, 278 F.3d 947, 957 (9<sup>th</sup> Cir. 2002). Such independent reasons may include laboratory  
9 test results or contrary reports from examining physicians and Plaintiff's testimony when it  
10 conflicts with the treating physician's opinion. *Lester*, 81 F.3d at 831 (citing *Magallanes*, 881  
11 F.2d at 755). Here, the ALJ relied exclusively on the opinions of the agency physicians and  
12 psychologist with little consideration of the opinions of treating and examining physicians or the  
13 medical evidence of record provided by Plaintiff's treating physicians at the VA.

14         As stated above, "this court may set aside the Commissioner's denial of disability  
15 insurance benefits when the ALJ's findings . . . are not supported by *substantial evidence in the*  
16 *record as a whole.*" *Tackett*, 180 F.3d at 1097 (emphasis added). The Commissioner's decision  
17 cannot be affirmed simply by isolating a specific quantity of supporting evidence. *Sousa v.*  
18 *Callahan*, 143 F.3d 1240, 1243 (9<sup>th</sup> Cir. 1998). The reviewing court must look to the record as a  
19 whole. *Id.* For example, reversal may be necessary when an ALJ ignores substantial evidence in  
20 the record indicating that the Plaintiff is disabled within the Act, particularly when the omitted  
21 evidence concerns long-term impairments. *Penny v. Sullivan*, 2 F.3d 953, 957 (9<sup>th</sup> Cir. 1993).  
22 This is particularly true when the Commissioner relied on the opinion of a non-treating or non-  
23 examining physician. *Id.*

24         The ALJ's failure to consider all medical evidence and opinions, combined with her  
25 reliance on the opinions of the non-examining agency physicians and indifference to the treating  
26 and examining physicians resulted in an opinion that cannot be said to be supported by substantial  
27 evidence in the record as a whole.

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1                   **B.     The ALJ’s Determination that Plaintiff Can Perform Light Work**

2           Plaintiff further contends that the ALJ erred in determining the Plaintiff was capable of  
3 light work in the absence of a medical opinion that Plaintiff was capable of light work. The  
4 Commissioner counters that because residual functional capacity is a legal concept, the ALJ’s  
5 finding was reasonably supported by the evidence in the record despite the absence of supporting  
6 opinion.

7           “[A]n ALJ may not act as his own medical expert as he is “simply not qualified to  
8 interpret raw medical data in functional terms.” *Nguyen v. Chater*, 172 F.3d 31, 35 (1<sup>st</sup> Cir.  
9 1999). Decisions addressing this issue frequently speak of an ALJ’s “play[ing] doctor and  
10 making [his] own independent medical findings.” *See, e.g., Banks v. Barnhart*, 434 F.Supp.2d  
11 800, 805 (C.D. Cal. 2006). *See, e.g., Rohan v. Chater*, 98 F.3d 966, 970 (7<sup>th</sup> Cir. 1996) (ALJ  
12 erred in rejecting medical opinion based on the ALJ’s belief that claimant’s attempts to operate a  
13 small business were inconsistent with a diagnosis of major depression).

14           In this case, no medical or psychological opinion supported the conclusion that Plaintiff  
15 was able to perform light work. Despite the ALJ’s general statement that her determination of  
16 Plaintiff’s residual functional capacity was “supported by the medical evidence record, the  
17 claimant’s testimony, the opinions of Drs. Kaspar and Garcia, and the partial opinions of Drs. Lee  
18 and Kiger,” no substantial evidence in the record supported the ALJ’s conclusion that Plaintiff  
19 could perform light work.

20                   **C.     Summary**

21           By disregarding evidence relating to the VA’s determination of Plaintiff’s disability  
22 rating, the ALJ disregarded both Plaintiff’s medical treatment records and the opinions of his  
23 treating and examining physicians. On remand, the Commissioner will fully address the medical  
24 treatment evidence of record and the opinions of the treating and examining physicians.

25                   **IX.   Reliability of Plaintiff’s Subjective Testimony**

26           Plaintiff challenges the ALJ’s determination that Plaintiff’s testimony was not fully  
27 credible, contending that the determination was not supported by clear and convincing evidence.  
28 Doc. 20 at 12. The Commissioner counters that the hearing decision in this case appropriately



1 applied the regulatory requirement that the claimant’s alleged symptoms must “reasonably be  
2 accepted as consistent with the objective medical evidence and other evidence” to be considered  
3 limitations of the claimant’s capacity to work. Doc. 22 at 17-18 (citing 20 C.F.R. §  
4 404.1529(c)(4)).

5 In light of the ALJ’s failure to consider fully the evidence and opinions of record, the  
6 Court cannot affirm a reliability determination predicated on the inconsistency of Plaintiff’s  
7 testimony with the evidence of record. In reaching this conclusion the Court focuses primarily on  
8 the guidelines for evaluating symptoms in disability claims set forth in S.S.R. 16-3p, which  
9 applies to disability applications heard by the agency on or after March 28, 2016. Under S.S.R.  
10 16-3p, the ALJ’s “determination or decision must contain specific reasons for the weight given to  
11 the individual’s symptoms, be consistent with and supported by the evidence, and be clearly  
12 articulated so that the individual and any subsequent reviewer can assess how the adjudicator  
13 evaluated the individual’s symptoms.” S.S.R. 16-30, 2017 WL 5180304 at \*10 (October 25,  
14 2017).

15 An ALJ is responsible for determining credibility, resolving conflicts in medical  
16 testimony and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995).  
17 His or her findings of fact must be supported by “clear and convincing evidence.” *Burrell v.*  
18 *Colvin*, 775 F.3d 1133, 1136-37 (9<sup>th</sup> Cir. 2014). To determine whether the ALJ’s findings are  
19 supported by sufficient evidence a court must consider the record as a whole, weighing both the  
20 evidence that supports the ALJ’s determination and the evidence against it. *Magallanes*, 881 F.2d  
21 at 750.

22 “[O]bjective medical evidence is a useful indicator to help make reasonable conclusions  
23 about the intensity and persistence of symptoms, including the effects those symptoms may have  
24 on the ability to perform work-related activities.” S.S.R. 16-3p at \*6. Because objective medical  
25 evidence may reveal the intensity, persistence and limiting effects of a claimant’s symptoms, an  
26 ALJ must consider whether the symptoms reported by a claimant are consistent with medical  
27 signs and laboratory findings of record. *Id.*

28 ///

1 Because the Court determined that the ALJ erred in disregarding VA treatment records  
2 and the opinions of Plaintiff's treating and examining physicians in sections VII and VIII above,  
3 it cannot accept a reliability determination based on incomplete consideration of the evidence of  
4 record. Accordingly, the determination that Plaintiff's testimony was unreliable is reversed.

5 **IX. Conclusion and Order**

6 It is hereby ordered that this case be REVERSED and REMANDED to the Commissioner,  
7 pursuant to sentence four of 42 U.S.C. § 405(g), for further proceedings in accordance with this  
8 opinion. The Clerk of Court is directed to enter judgment in favor of Plaintiff, Ismael Munoz  
9 Ferrer, and against Defendant, Andrew Saul, Commissioner of Social Security.

10  
11 IT IS SO ORDERED.

12  
13 Dated: October 7, 2019

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE