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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MIGUEL SANCHEZ,

Plaintiff,

v.

KILOKO KIJAKAZI, Acting Commissioner
of Social Security,¹

Defendant.

Case No. 1:21-cv-00907-ADA-BAM

**FINDINGS AND RECOMMENDATIONS
REGARDING PLAINTIFF’S SOCIAL
SECURITY COMPLAINT**

(Docs. 22, 24)

FOURTEEN-DAY DEADLINE

INTRODUCTION

Plaintiff Miguel Sanchez (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying his applications for disability insurance benefits under Title II of the Social Security Act and for supplemental security income under Title XVI of the Social Security Act. The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to Magistrate Judge Barbara A. McAuliffe, for issuance of findings and recommendations.

¹ Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew Saul as the defendant in this suit.

1 Having considered the briefing and record in this matter, the Court finds that the decision of
2 the Administrative Law Judge (“ALJ”) is supported by substantial evidence in the record as a whole
3 and based upon proper legal standards. Accordingly, this Court will recommend denying Plaintiff’s
4 appeal and affirming the agency’s determination to deny benefits.

5 **FACTS AND PRIOR PROCEEDINGS**

6 Plaintiff protectively filed an application for disability insurance benefits and for supplemental
7 security income on January 22, 2019. AR 15, 226-32, 236-37.² Plaintiff alleged that he became
8 disabled on January 1, 2015, due to ammonia in the liver, high blood pressure, and diabetes. AR 15,
9 236. Plaintiff’s applications were denied initially and on reconsideration. AR 136-40, 147-52.
10 Subsequently, Plaintiff requested a hearing before an ALJ. Following a hearing, ALJ Matthew
11 Kawalek issued an unfavorable decision on November 25, 2020. AR 12-33, 39-75. Thereafter,
12 Plaintiff sought review of the decision, which the Appeals Counsel denied, making the ALJ’s decision
13 the Commissioner’s final decision. AR 1-5. This appeal followed.

14 **Hearing Testimony**

15 On August 31, 2020, ALJ Kawalek held a telephonic hearing. Plaintiff appeared with his
16 attorney, Jonathan Pena. Cassie Mills, an impartial vocational expert, also appeared by telephone. AR
17 42-43.

18 In response to questions from his attorney, Plaintiff testified that his condition has kept him
19 from doing a full-time job. The ammonia in his liver affects his brain and he cannot comprehend or
20 function correctly. He also has to go to the restroom seven or eight times in an eight-hour day because
21 of his medications. On average, he spends 25 minutes in the restroom every time. He only takes
22 medication for this condition. AR 54-56.

23 Plaintiff also testified that he had surgery to remove cancer in his left kidney about a month
24 and two weeks prior to the hearing. As to his liver issues, Plaintiff occasionally gets dizzy spells,
25 about three to four times a week. The spells will last almost the whole day. It is hard to walk when
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28 ² References to the Administrative Record will be designated as “AR,” followed by the appropriate page number.

1 dizzy, and he has falls. He does not use an assistive device, like a cane or a walker. AR 56-58. He
2 also has tiredness from the ammonia issue. The fatigue usually affects him about twice a week. He
3 will lie down and try to nap. AR 58-59. With his diabetes, everything is good, and he does not have
4 any swelling. He takes medication for his cirrhosis of the liver. The medications have dropped the
5 ammonia. Plaintiff also has frequent anxiety attacks, once or twice every two weeks. AR 59-61.

6 Plaintiff further testified that he has difficulties with concentration. He can concentrate on the
7 TV for about 35 minutes. Plaintiff also testified that he can stand for one to three hours. He walks in
8 the park every day for about an hour. He does not have any problems with sitting for an extended
9 period of time. He can lift and carry about 50 pounds. He has to lie down about twice a day for at
10 least an hour each time. AR 62-63.

11 When asked about a typical day, Plaintiff testified that with the medication, he hardly gets out
12 of the house because he is constantly going to the restroom. He is mainly inside the house until the
13 medication wears off, and then he is able to go do things, like grocery shopping. Plaintiff helps out
14 around the house with chores, such as dishes and laundry. AR 63-64.

15 Following Plaintiff's testimony, the ALJ elicited testimony from the VE. The VE classified
16 Plaintiff's past work as pipe fitter, pipe fitter supervisor, and equipment installer. AR 68-69. The ALJ
17 also asked the VE hypothetical questions. For the first hypothetical, the ALJ asked the VE to assume
18 a hypothetical individual of Plaintiff's age, education, and work history. This individual would be
19 limited to occasionally lifting and carrying 50 pounds, frequently lifting and carrying 25 pounds, could
20 stand and/or walk six hours of an eight-hour workday, sit six hours of an eight-hour workday, could
21 never climb ladders, ropes, or scaffolds, could occasionally climb ramps and stairs, could frequently
22 stoop, kneel, crouch, or crawl, and could tolerate no exposure to hazards, including unprotected
23 heights or operating heavy machinery. This individual also was limited to understanding,
24 remembering, carrying out or maintaining concentration on no more than simple tasks and
25 instructions--defined as those job duties that can be learned in up to 30-days, could sustain only
26 ordinary routines, and could make no more than simple work-related decisions. The VE testified that
27 this individual could not perform any of Plaintiff's past jobs, but could perform other work in the
28 national economy, such as dishwasher, janitor, and hand packager. AR 69-70.

1 For the second hypothetical, the ALJ asked the VE to assume an individual of Plaintiff's age,
2 education, and work history. This individual could never lift any weight, could stand and/or walk for
3 less than two hours of an eight-hour workday, must be able to use a cane for standing or walking,
4 could sit about two hours of an eight-hour workday, would require a 20 to 30 minute break for every
5 two hours of work, would need to be able to elevate the bilateral lower extremities at least 50% of the
6 workday to chest level, could never twist, stoop, crouch, squat, or climb, could handle up to 5% of the
7 workday, could finger 1% of the workday, could reach in front of the body 1% of the workday, but
8 could never reach overhead with the bilateral upper extremities. This individual would be off task
9 25% or more of the workday and would be expected to miss more than four days of work per month
10 on average. The VE testified that this individual could not perform any of Plaintiff's past work or any
11 other work in the national economy. AR 70. The VE confirmed that she was drawing on her
12 professional experience for the limitations regarding climbing, absenteeism, reaching or handling,
13 fingering, off-task behavior, and elevating the lower extremities. AR 71.

14 For the third hypothetical, Plaintiff's attorney asked the VE to add to hypothetical one that the
15 individual would have to take restroom breaks every hour for 15 minutes on a daily basis. The VE
16 testified that this generally was not an accommodation that would be tolerated. AR 71-72.

17 **Medical Record**

18 The relevant medical record was reviewed by the Court and will be referenced below as
19 necessary to this Court's decision.

20 **The ALJ's Decision**

21 Using the Social Security Administration's five-step sequential evaluation process, the ALJ
22 determined that Plaintiff was not disabled under the Social Security Act. AR 15-33. Specifically, the
23 ALJ found that Plaintiff had not engaged in substantial gainful activity since January 1, 2015, his
24 alleged onset date. AR 17-18. The ALJ identified the following severe impairments: chronic liver
25 disease, including cirrhosis of the liver, alcoholic hepatitis, chronic hepatic failure, and portal
26 hypertension; obstructive sleep apnea, obesity; and hepatic encephalopathy. AR 18-19. The ALJ
27 determined that Plaintiff did not have an impairment or combination of impairments that met or
28 medically equaled any of the listed impairments. AR 19-21.

1 Based on a review of the entire record, the ALJ found that Plaintiff retained the residual
2 functional capacity (“RFC”) to perform a reduced range of medium work. Plaintiff could occasionally
3 lift/carry 50 pounds and frequently lift/carry 25 pounds. He could stand and/or walk 6 hours and sit 6
4 hours of an 8-hour workday. He could never climb ladders, ropes, or scaffolds, could occasionally
5 climb ramps and stairs, and could frequently stoop, kneel, crouch, or crawl. He could tolerate no
6 exposure to hazards, including unprotected heights or operating heavy machinery. He was limited to
7 understanding, remembering, carrying out, and maintaining attention and concentration on no more
8 than simple tasks and instructions, defined specifically as those job duties that can be learned in up to
9 30 days. He could sustain only ordinary routines and make no more than simple, work-related
10 decisions. AR 21-31. With this RFC, the ALJ found that Plaintiff was not capable of performing his
11 past relevant work, but there were other jobs in the national economy that he could perform, such as
12 dishwasher, janitor, and hand packager. AR 31-33. The ALJ therefore concluded that Plaintiff had
13 not been under a disability since January 1, 2015, through the date of the decision. AR 33.

14 **SCOPE OF REVIEW**

15 Congress has provided a limited scope of judicial review of the Commissioner’s decision to
16 deny benefits under the Act. In reviewing findings of fact with respect to such determinations, this
17 Court must determine whether the decision of the Commissioner is supported by substantial evidence.
18 42 U.S.C. § 405(g). Substantial evidence means “more than a mere scintilla,” *Richardson v. Perales*,
19 402 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112,
20 1119, n. 10 (9th Cir. 1975). It is “such relevant evidence as a reasonable mind might accept as
21 adequate to support a conclusion.” *Richardson*, 402 U.S. at 401. The record as a whole must be
22 considered, weighing both the evidence that supports and the evidence that detracts from the
23 Commissioner’s conclusion. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). In weighing the
24 evidence and making findings, the Commissioner must apply the proper legal standards. *E.g.*,
25 *Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must uphold the Commissioner’s
26 determination that the claimant is not disabled if the Commissioner applied the proper legal standards,
27 and if the Commissioner’s findings are supported by substantial evidence. *See Sanchez v. Sec’y of*
28 *Health and Human Servs.*, 812 F.2d 509, 510 (9th Cir. 1987).

1 **REVIEW**

2 In order to qualify for benefits, a claimant must establish that he or she is unable to engage in
3 substantial gainful activity due to a medically determinable physical or mental impairment which has
4 lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §
5 1382c(a)(3)(A). A claimant must show that he or she has a physical or mental impairment of such
6 severity that he or she is not only unable to do his or her previous work, but cannot, considering his or
7 her age, education, and work experience, engage in any other kind of substantial gainful work which
8 exists in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir. 1989). The
9 burden is on the claimant to establish disability. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir.
10 1990).

11 **DISCUSSION**³

12 Plaintiff asserts that the RFC is not supported by substantial evidence of record. Plaintiff also
13 asserts that the ALJ erred (1) in rejecting the treating providers’ off -task limitations based on
14 Plaintiff’s need to use the restroom every hour; and (2) by failing to provide clear and convincing
15 reasons for rejecting Plaintiff’s symptom testimony regarding his need to use the restroom every hour.

16 **A. RFC – Medical Opinion Evidence**

17 Plaintiff argues that the RFC is not supported by substantial evidence. In particular, Plaintiff
18 faults the ALJ for failing to adopt any of the medical opinions in developing Plaintiff’s RFC.
19 However, under the applicable regulations, the ALJ was not required to “defer or give any specific
20 evidentiary weight, including controlling weight, to any medical opinion(s) or prior administrative
21 medical finding(s).” 20 C.F. R. §§ 404.1520c(a), 416.920c(a). An RFC “is the most [one] can still do
22 despite [his or her] limitations” and it is “based on all the relevant evidence in [one’s] case record,”
23 rather than a single medical opinion or piece of evidence. 20 C.F.R. §§ 404.1545(a)(1) (“We will
24 assess your residual functional capacity based on all of the relevant medical in your case record.”),
25 416.945(a)(1) (same). Indeed, “[t]he RFC need not mirror a particular opinion; it is an assessment
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27 ³ The parties are advised that this Court has carefully reviewed and considered all of the briefs, including
28 arguments, points and authorities, declarations, and/or exhibits. Any omission of a reference to any specific
argument or brief is not to be construed that the Court did not consider the argument or brief.

1 formulated by the ALJ based on all relevant evidence.” *Ashlock v. Kijakazi*, No. 1:21-CV-01687-
2 GSA, 2022 WL 2307594, at *3 (E.D. Cal. June 27, 2022).

3 Here, the state agency medical consultants, Dr. Nancy Childs and Dr. G. Dale, determined that
4 Plaintiff’s physical impairments were non-severe. AR 101, 109, 120, 130. State agency medical
5 consultant Dr. K. Gregg, M.D., also determined that Plaintiff’s mental impairments were non-severe.
6 AR 120, 131. The ALJ found these opinions unpersuasive and inconsistent with the record. AR 28-
7 29. Plaintiff does not challenge this determination.

8 In addition to the state agency medical consultants, the ALJ considered the 2018 and 2019
9 opinions of Dr. Michael Komin, who opined that Plaintiff had several chronic conditions that left him
10 unable to work. AR 29, 434, 452, 462-64. The ALJ found Dr. Komin’s opinions unpersuasive and
11 inconsistent with the record. AR 29-30. The ALJ also considered the opinions of Donya Walker,
12 FNP-C, who completed physical and mental RFC questionnaires in late 2019. AR 30, 757-59, 760-63.
13 The ALJ found her opinions unpersuasive and inconsistent, particularly noting that there were no
14 treatment records from her in the record and that Plaintiff testified that she had seen him only twice.
15 AR 30-31.

16 Plaintiff does not appear to argue that the ALJ could not find these opinions unpersuasive, but
17 rather that because the ALJ did so, he improperly reviewed the raw objective evidence medical data
18 and developed the RFC based on his own lay opinion. (Doc. 22 at pp. 13-14.) This argument is not
19 compelling. The determination of a claimant’s RFC is wholly within the province of the ALJ. *See*
20 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007). The RFC assessment is based on all the
21 evidence in the record, and it is the ALJ’s duty to consider and weigh that evidence. *See id.*; *see also*
22 *Harrison v. Saul*, No. 1:19-CV-01683-BAM, 2021 WL 1173024, at *6 (E.D. Cal. Mar. 29, 2021). In
23 this case, the ALJ considered the medical opinions of both Dr. Komin and FNP Walker, compared
24 them with the medical evidence of record, and rendered a decision on Plaintiff’s RFC.

25 Plaintiff also claims that the ALJ “erred by failing to obtain an opinion from an examining
26 physician source.” (Doc. 22 at p. 14.) In other words, Plaintiff argues that the ALJ erred by “failing
27 in his duty to develop the record and send [Plaintiff] to a CE to examine him and review his records or
28 have a Medical Expert (ME) review the evidence.” (*Id.* at p. 15.) However, it is Plaintiff’s burden to

1 establish disability. *Terry*, 903 F.2d at 1275; 42 U.S.C. § 423(d)(5)(A). (“An individual shall not be
2 considered to be under a disability unless he furnishes such medical and other evidence of the
3 existence thereof as the Commissioner of Social Security may require.”); 20 C.F.R. §§ 404.1512(a)
4 (“[Y]ou have to prove to us that you are ... disabled ...”); 416.912(a) (same); *Harrison*, 2021 WL
5 1173024, at *5. Moreover, “[a]n ALJ’s duty to develop the record further is triggered only when there
6 is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the
7 evidence.” *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001). In this case, there is no
8 indication that the record was ambiguous or inadequate to allow for proper evaluation. The record
9 included Plaintiff’s treatment records, along with opinions from his medical providers. In addition,
10 the ALJ left the record open after the hearing to obtain additional medical evidence from Plaintiff’s
11 physician. AR 43-47. *See, e.g., Hines v. Berryhill*, No. 16-CV-03078-JSC, 2017 WL 3251915, at *12
12 (N.D. Cal. July 31, 2017) (concluding ALJ can discharge duty to develop the record in several ways,
13 including by making a reasonable attempt to obtain medical evidence from the claimant’s physician(s)
14 or keeping the record open for more supplementation).

15 Plaintiff also argues that the ALJ erred by failing to “submit the updated MRI record to an
16 ‘acceptable’ medical professional for interpretation.” (Doc. 22 at p. 14; Doc. 25 at p. 4.) However,
17 Plaintiff does not identify an MRI report that would require interpretation. Although the medical
18 record includes various tests, such as an esophagogastroduodenoscopy, ultrasounds, and CT scans
19 (*see, e.g.,* AR 324, 332-33, 334-35, 569, 595-96, 597-98, 599, 604, 766), the Court has not identified
20 any “updated MRI” results, nor is one identified in the ALJ’s decision. The only MRI in the certified
21 medical record is a brain MRI from 2014, which is prior to Plaintiff’s alleged onset date (AR 603).
22 Because the medical record does not appear to include an “updated MRI,” Plaintiff’s argument lacks
23 merit.

24 Based on the foregoing, the Court does not find that the ALJ committed reversible error in
25 developing Plaintiff’s RFC.

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1 **B. Medical Opinions – Medication Side Effects**

2 Plaintiff argues that the ALJ failed to account for the limitations identified by his treating
3 providers caused by side effects of his medication resulting in excessive need for bathroom use. (Doc.
4 22 at pp. 15-16.)

5 Because Plaintiff applied for benefits after March 27, 2017, his claim is governed by the
6 agency’s new regulations concerning how an ALJ must evaluate medical opinions. 20 C.F.R. §§
7 404.1520c, 416.920c. As noted above, under the new regulations, the Commissioner does “not defer
8 or give any specific evidentiary weight, including controlling weight, to any medical opinion(s).” 20
9 C.F.R. §§ 404.1520c(a), 416.920c(a). The Commissioner evaluates the persuasiveness of the medical
10 opinions based on the following factors: (1) supportability; (2) consistency; (3) relationship with the
11 claimant; (4) specialization; and (5) other factors, such as “evidence showing a medical source has
12 familiarity with the other evidence in the claim or an understanding of our disability program’s
13 policies and evidentiary requirements.” 20 C.F.R. §§ 404.1520c(c)(1)-(5), 416.920c(c)(1)-(5).
14 Supportability and consistency are the most important factors. 20 C.F.R. §§ 404.1520c(b)(2),
15 416.920c(b)(2). Supportability means the extent to which a medical source supports the medical
16 opinion by explaining the “relevant ... objective medical evidence.” 20 C.F.R. §§ 404.1520c(c)(1),
17 416.920c(c)(1); *see also Woods v. Kijakazi*, 32 F.4th 785, 792 (9th Cir. 2022). Consistency means the
18 extent to which a medical opinion or prior administrative finding is “consistent ... with the evidence
19 from other medical sources and nonmedical sources in the claim.” 20 C.F.R. §§ 404.1520c(c)(2),
20 416.920c(c)(2); *Woods*, 32 F.4th at 792.

21 Dr. Komin

22 On February 15, 2018, Dr. Komin opined that Plaintiff had a chronic condition and “is to
23 remain on social security.” AR 462, 463. On that same date, and again on May 7, 2018, Dr. Komin
24 opined that Plaintiff had several chronic conditions that left him unable to work. Dr. Komin indicated
25 that “patient states he also takes laxatives daily causing exclusive [sic] amount of stool throughout the
26 day.” AR 434, 452. 464. In August 2019, Dr. Komin completed a physician’s report for Kern County
27 Department of Human Services indicating that the claimant was unemployable from November 16,
28 2018 to November 20, 2020, due to hepatic failure chronic. AR 735. In April 2020, Dr. Komin

1 provided Plaintiff with a “no jury duty slip . . . due to [Plaintiff’s] immunocompromised state.” AR
2 657.

3 Based on these opinions, Plaintiff argues that the ALJ should have adopted Dr. Komin’s
4 assessed limitation that Plaintiff’s use of laxatives would cause an extensive amount of stool
5 throughout the day. (Doc. 22 at p. 16.) As the Commissioner points out, however, Dr. Komin’s
6 statement does not identify any specific functional limitations that the ALJ could evaluate or adopt in
7 the RFC. *See* 20 C.F.R. §§ 404.1513(a)(2) (“A medical opinion is a statement from a medical source
8 about what you can still do despite your impairment(s)”), 416.913(a)(2) (same). Accordingly, it was
9 not a medical opinion that the ALJ was required to address. *See* 20 C.F.R. §§ 404.1520c(b),
10 416.920c(b).

11 Further, the Court finds that the ALJ properly evaluated the supportability and consistency of
12 Dr. Komin’s opinions. As to supportability, the ALJ noted that Dr. Komin’s May 2018 statement was
13 contradicted by his contemporaneous note that Plaintiff reported being fine. *See* AR 29; *compare* AR
14 434 (May 7, 2018 letter) *with* AR 450 (May 7, 2018 treatment note documenting that Plaintiff reported
15 “doing fine” and stating that medication allowed him to “keep busy” with no symptoms of distress or
16 discomfort). Additionally, the ALJ considered subsequent treatment notes from Dr. Komin’s office in
17 which Plaintiff did not report symptoms of diarrhea.⁴ AR 30, citing AR 442, 444, 479, 709, 720, 747.
18 The lack of support from the treatment notes is a proper consideration in evaluating the supportability
19 of Dr. Komin’s opinion. *See, e.g., Villalon v. Kijakazi*, No. 1:20-CV-01830-SKO, 2022 WL 4388264,
20 at *7 (E.D. Cal. Sept. 22, 2022); *Trezona v. Comm’r of Soc. Sec.*, No. 1:21-CV-00792-EPG, 2022 WL
21 1693493, at *3 (E.D. Cal. May 26, 2022). Further, Dr. Komin’s opinion regarding Plaintiff’s inability
22 to work was based, in part, on Plaintiff’s subjective complaints. As discussed below, the ALJ properly
23 rejected those complaints. “A physician’s opinion of disability premised to a large extent upon the
24 claimant’s own accounts of his symptoms and limitations may be disregarded where those complaints
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⁴ The Court notes that certain of the cited records included treatment notes from “Komin Medical” with
treatment provider Dr. Monica Murphy. *See, e.g.,* AR 720, 747.

1 have been properly discounted.” *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017) (citation
2 omitted).

3 As to consistency, it is reasonable to infer from the decision that the ALJ found Dr. Komin’s
4 opinions regarding Plaintiff’s inability to work inconsistent with the opinions of the state agency
5 physicians, who opined that Plaintiff’s physical impairments were non-severe. AR 28-30. In addition,
6 the ALJ found Dr. Komin’s 2020 opinion, which indicated a “no jury duty slip given due to
7 [Plaintiff’s] immunocompromised state” to be persuasive and consistent with record evidence
8 demonstrating that Plaintiff was diagnosed with coronavirus and quarantined for the prescribed period.
9 AR 30, 657. The ALJ determined that the opinion was not intended to assess Plaintiff’s long-term
10 functioning and there was no other evidence in the record to support a compromised immune system.
11 AR 30. The ALJ’s reasoning invokes the consistency factor, which means the extent to which a
12 medical opinion is “consistent ... with the evidence from other medical sources and nonmedical
13 sources in the claim.” 20 C.F.R. §§ 404.1520c(c)(2), 416.920c(c)(2).

14 FNP Walker

15 Relevant here, in August 2020, FNP Walker completed a Physical Medical Source Statement
16 form. AR 760-63. She identified Plaintiff’s symptoms to include “frequent diarrhea up to 1-2x per
17 hour.” AR 760. She opined that Plaintiff could walk ½ block without rest or severe pain. He could
18 rarely lift less than 10 pounds and never lift 10, 20, or 50 pounds. She estimated that Plaintiff would
19 be off task for 25% or more of a typical workday due to his symptoms and that he was incapable of
20 even “low stress work.” AR 761. She explained due to “anxiety, depression and frequent diarrhea,
21 even low stress work will be overwhelming emotionally, physically.” AR 761. FNP Walker further
22 estimated that Plaintiff would be absent from work for more than four days per month. AR 761. He
23 could sit for 30 minutes at one time and stand for 20 minutes at one time. He could stand/walk less
24 than 2 hours and sit about 2 hours in an 8-hour working day. He would need a job that permitted
25 shifting positions at will, along with periods of walking every 30 minutes for 15 minutes each time.
26 Due to chronic fatigue, pain, adverse effects of medication, and frequent diarrhea, he would need to
27 take unscheduled breaks every 1-2 hours for 20-30 minutes each. He also would need to sit with his
28 legs elevated to chest level for 50% of an 8-hour working day and, due to imbalance, dizziness, and

1 weakness, would need a cane or other hand-held assistive device due to imbalance, dizziness, and
2 weakness. AR 762.

3 FNP Walker also completed a Mental RFC questionnaire.⁵ AR 757-59. She opined that
4 Plaintiff's impairments precluded remembering locations and work-like procedures and understanding
5 and remembering very short and simple instructions or detailed instructions for 15% or more of an 8-
6 hour workday. She explained that Plaintiff is lethargic and drowsy, dizzy most of the time. He also
7 has "diarrhea every 1-2 hrs interrupting work flow frequently." AR 757. She estimated Plaintiff
8 would likely to be absent from work 5 days or more per month and would be unable to complete an 8-
9 hour workday on 5 days or more a month. AR 758. She further opined that Plaintiff's impairments
10 precluded carrying out very short and simple instructions for 10% of an 8-hour workday and precluded
11 all other sustained concentration and memory for 15% or more of an 8-hour workday. She explained,
12 "The diarrhea is a necessary side effect of Lactulose to keep ammonia levels low enough for him to
13 stay awake, not fall, have clear cognition. Diarrhea is 1-2 hr daily, if not that often patient becomes
14 confused, disoriented, dizzy, drowsy and has frequent falls." AR 759. As to social interaction, she
15 opined that Plaintiff's impairments precluded interacting appropriately with the general public and
16 maintaining socially appropriate behavior and adherence to basic stands of neatness and cleanliness
17 for 10% of an 8-hour workday. His impairments also precluded him from accepting instructions and
18 responding appropriately to critics from supervisors and getting along with coworkers or peers without
19 distracting them or exhibiting behavioral extremes for 15% or more of an 8-hour workday. FNP
20 Walker explained that depending upon the severity of Plaintiff's symptoms, they could preclude
21 successful social interaction up to 50% or more of the day. FNP Walker further indicated that
22 Plaintiff's impairments precluded responding appropriately to changes in the work setting, being
23 aware of normal hazards and taking appropriate precautions, traveling in unfamiliar places or using
24 public transportation, and setting realistic goals or making plans independently of others for more than
25 15% of an 8-hour workday. AR 759.

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28 ⁵ This opinion is dated "8/14/04," which appears to be an error.

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In evaluating FNP Walker’s opinions, the ALJ reasoned as follows:

The opinions of Donya Walker, FNP-C, are unpersuasive and inconsistent with the record. As an initial point, there were no treatment records from Donya Walker, FNP-C, in the record. The claimant testified that she has seen him only twice. As such, her statements are not persuasive based on the lack of records and considering no evidence that she has examined, treated, or was otherwise familiar with his medical history. She relied upon symptoms rarely seen in his records, including Dr. Komin's records, to support her statement. Her findings are contradicted by the claimant’s own testimony. For example, the claimant reported not using a cane or other assistive device, which Donya Walker, FNP-C, indicated was required for his imbalance. She reported that the claimant could only sit for two hours in an 8-hour workday; that claimant reported no problems sitting. Donya Walker, FNP-C reported that the claimant should rarely lift less than 10 pounds and had manipulative limitations; the claimant testified that he could lift 50 pounds. Inconsistent with all of these limitations are findings of normal gait, stance, sensation, and strength []. There was no evidence to support he would be off task or incapable of even low stress jobs. With medication, his ammonia levels decreased and he had improvement in dizziness, weakness, diarrhea, lethargy, tiredness and mental function (Ex. B2F/35-36, B2F/42-43, and B2F/57).

In terms of his mental limitations, there was no evidence of treatment for anxiety or depression. He initially has some intermittent difficulties related to his ammonia levels and hepatic encephalopathy with slow responses, but maintained intact memory and orientation (Ex. B2F/1, B2F/3, B2F/17, B2F/41, B2F/52, B5F/25, and B9F/38). As such, the claimant was limited to understand, remember, and carry out, and maintain attention and concentration for more than simple tasks and instructions, sustain ordinary routines, and make no more than simple work-related decisions. It seems rather impossible that someone with such extensive limitations could do anything, particularly while living on his own. The social limitations are inconsistent with the record, the claimant was noted to be cooperative and pleasant with normal speech and appropriate mood and affect (Ex. B1F/1, B2F/42, B2F/50, B8F/43, B9F/71, and B9F/74). The claimant testified that he goes grocery shopping and does household chores. The record indicated that he was able to take his grandson to baseball practice and watch the games, and attend gym classes 4 to 5 times a week (Ex. B2F/9 and B5F/16).

AR 30-31.

Plaintiff contends that the ALJ committed harmful error by failing to consider FNP Walker’s assessed limitation for Plaintiff being off task and needing unscheduled breaks due frequent diarrhea, along with her opinion that Plaintiff’s frequent diarrhea precluded the performance of certain mental activities for at least 15 percent of the day. (Doc. 22 at pp. 16-17; Doc. 25 at p. 7.) The Court disagrees and finds that the ALJ properly evaluated the supportability and consistency of FNP Walker’s opinions, particularly as they relate to Plaintiff’s diarrhea and excessive bathroom use.

1 As to supportability, the ALJ noted the absence any treatment records from FNP Walker and
2 that Plaintiff testified she only saw him twice. AR 30, 65 (“I’ve seen her twice.”). The ALJ
3 concluded that FNP Walker’s statements were not persuasive based on the lack of records and
4 considering no evidence that she had examined, treated, or was otherwise familiar with Plaintiff’s
5 medical history. The lack of support from any treatment notes is a proper consideration in evaluating
6 the supportability of FNP Walker’s opinion. *Cf. Villalon*, 2022 WL 4388264, at *7; *Trezona*, 2022
7 WL 1693493, at *3. Additionally, FNP Walker’s lack of a relationship with Plaintiff, including an
8 absence of an examination or treatment history, is a proper factor for evaluating the persuasiveness of
9 her opinion. 20 C.F.R. §§ 404.1520c(c)(3), 416.920c(c)(3) (relationship with claimant factor
10 combines consideration of multiple issue, including length of treatment relationship, frequency of
11 examination, extent of treatment, and examining relationship).

12 As to consistency, the ALJ determined that FNP Walker relied upon symptoms rarely seen in
13 Plaintiff’s records, including Dr. Komin’s records, to support her statements. 20 C.F.R. §§
14 404.1520c(c)(2), 416.920c(c)(2). The ALJ also found FNP Walker’s findings were generally
15 contradicted by Plaintiff’s own statements. AR 31. For example, the ALJ contrasted Plaintiff’s report
16 of not using a cane or other assistive device (AR 58), with FNP Walker’s statement that a cane or
17 assistive device was required for his imbalance (AR 762). AR 31. The ALJ also contrasted FNP
18 Walker’s opinion that Plaintiff claimant could only sit for two hours in an 8-hour workday (AR 762),
19 with Plaintiff’s report of no problems sitting (AR 63). The ALJ additionally contrasted FNP Walker’s
20 report that Plaintiff should rarely lift less than 10 pounds (AR 761), with Plaintiff’s testimony that he
21 could lift 50 pounds (AR 63.)

22 Additionally, the ALJ considered evidence that with medication, Plaintiff’s ammonia levels
23 decreased, and he had improvement in diarrhea and mental function. AR 31, citing AR 375-76, 382-
24 83, and 397. Plaintiff argues that the ALJ failed “to link the control of [his] ammonia levels with
25 compliance with his medication, Lactulose, which per the Mayo clinic ‘helps increase the number of
26 bowel movements per day and the number of days on which bowel moments occur’ and which
27 specifically causes the side effect of ‘severe diarrhea’ according to both treating sources (AR 434,
28 739) and the Mayo Clinic.” (Doc. 22 at p. 18.) Yet, the ALJ determined that even treatment records

1 from Dr. Komin’s office reflected that Plaintiff’s complaints of diarrhea decreased. Plaintiff attempts
2 to challenge this determination, asserting that the reports of diarrhea were documented throughout the
3 treatment notes. (*Id.*) To support this assertion, Plaintiff relies on only two treatment records: (1) an
4 August 13, 2015 record documenting “patient is being compliant with all medications, taking lactulose
5 3 times a day. Having 7-8 bowel movements daily” (AR 838); and (2) a January 25, 2016 record
6 documenting “complains of diarrhea due to lactulose.” (AR 515). (*Id.*) However, the ALJ expressly
7 considered these records, acknowledging Plaintiff’s 2015 report of diarrhea due to his medication with
8 7 to 8 bowel movements, but contrasted that report with Plaintiff’s later report of 2 to 5 bowel
9 movements per day. AR 27, 383, 444, 514-15. Further, with regard to his complaints of diarrhea in
10 January 2016, the ALJ noted that Plaintiff was instructed at the same appointment to “titrate his
11 lactulose to two bowel movements a day.” AR 25, 515.

12 Based on the foregoing, the Court does not find that the ALJ committed reversible error and
13 properly evaluated the persuasiveness of the medical opinions from Dr. Komin and FNP Walker.

14 **C. Symptom Testimony**

15 Plaintiff argues that the ALJ failed to provide clear and convincing reasons to reject Plaintiff’s
16 symptomology evidence regarding his need to use the restroom every hour. (Doc. 22 at p. 19.)

17 In deciding whether to admit a claimant’s subjective complaints, the ALJ must engage in a
18 two-step analysis. *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014); *Batson*, 359 F.3d at 1196;
19 SSR 16-3p. First, the claimant must produce objective medical evidence of her impairment that could
20 reasonably be expected to produce some degree of the symptom or pain alleged. *Garrison*, 759 F.3d at
21 1014. If the claimant satisfies the first step and there is no evidence of malingering, the ALJ may reject
22 the claimant’s testimony regarding the severity of her symptoms only by offering specific, clear and
23 convincing reasons for doing so. *Id.* at 1015.

24 Here, the ALJ found that Plaintiff’s medically determinable impairments could reasonably be
25 expected to cause the alleged symptoms, but discounted his statements concerning the intensity,
26 persistence and limiting effects of those symptoms. AR 27. The ALJ was therefore required to
27 provide specific, clear and convincing reasons for discounting Plaintiff’s subjective complaints.

1 As to Plaintiff's subjective complaints regarding his bathroom use, the Court finds that the ALJ
2 provided specific, clear and convincing reasons to discount those complaints. First, the ALJ found
3 Plaintiff's allegations unsupported by the objective record. AR 27. Although lack of supporting
4 medical evidence cannot form the sole basis for discounting testimony, it is a factor that the ALJ can
5 consider. *See Burch*, 400 F.3d at 681. Here, for example, the ALJ cited record evidence that Plaintiff
6 reported ongoing improvement, with no diarrhea. AR 28, 343, 349, 353, 357-58, 364, 479, 442, 444,
7 709, 720, 747. Further, the ALJ considered there was no evidence of significant weight loss in the
8 record to support significant diarrhea. AR 28. Plaintiff was noted to be well developed and well
9 nourished, (AR 319, 706, 721), and remained obese throughout the period at issue (AR 375, 514, 709).
10 AR 28. The ALJ reasonably determined that this evidence was not consistent with Plaintiff's asserted
11 need for multiple bathroom breaks due to diarrhea.

12 Second, the ALJ considered that Plaintiff's high activities of daily living did not support his
13 allegations that he needed multiple restroom breaks. AR 28. An ALJ may properly discount a
14 claimant's subjective complaints when the daily activities demonstrate an inconsistency between what
15 the claimant can do and the degree that disability is alleged. *Molina v. Astrue*, 674 F.3d 1104, 1112-13
16 (9th Cir. 2012) (an ALJ may consider "whether the claimant engages in daily activities inconsistent
17 with the alleged symptoms"), superseded by regulation on other grounds. Even where a plaintiff's
18 activities suggest some difficulty functioning, they may be grounds for discrediting the claimant's
19 testimony to the extent that they contradict claims of a totally debilitating impairment. *Id.* at 1113.
20 Here, the ALJ cited evidence that Plaintiff was able to complete household chores, go to the gym 4 to
21 5 days a week, and attend his grandson's baseball practices and games. AR 28, 64, 349 (attending
22 gym classes 4-5 times a week), 364 (exercising daily, spend 1 hour on a treadmill and one hour lifting
23 weights), 450 (taking grandson to baseball practice and watching the games). The ALJ reasonably
24 determined that these extensive activities undermined Plaintiff's subjective complaints related to his
25 bathroom use.

26 Based on the above, the Court finds that the ALJ did not err in the evaluation of Plaintiff's
27 subjective complaints.

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CONCLUSION AND RECOMMENDATION

Based on the foregoing, the Court finds that the ALJ’s decision is supported by substantial evidence in the record as a whole and is based on proper legal standards. Accordingly, IT IS HEREBY RECOMMENDED as follows:

1. Plaintiff’s appeal from the administrative decision of the Commissioner of Social Security be denied; and
2. The Clerk of this Court be directed to enter judgment in favor of Defendant Kilolo Kijakazi, Acting Commissioner of Social Security, and against Plaintiff Miguel Sanchez.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, as required by 28 U.S.C. § 636(b)(1). Within **fourteen (14) days** after being served with these findings and recommendations, the parties may file written objections with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that the failure to file objections within the specified time may result in the waiver of the “right to challenge the magistrate’s factual findings” on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: July 24, 2023

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE