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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

REGINALD R. BOLDEN,

Plaintiff,

No. 2:09-cv-00787 KJN

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

ORDER

Defendant.

_____/

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying plaintiff’s applications under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381 et seq. (the “Act”).¹ In his motion for summary judgment, plaintiff contends that the Administrative Law Judge (“ALJ”) erred by: (1) failing to properly credit the opinions of certain physicians; (2) improperly rejecting plaintiff and his third party witness’s statements; (3) failing to properly question the vocational expert and credit that expert’s testimony; and (4) identifying jobs inconsistent with the dictionary of occupational titles.

¹ This case was referred to the undersigned pursuant to Eastern District of California Local Rule 302(c)(15) and 28 U.S.C. § 636(c), and both parties have voluntarily consented to proceed before a United States Magistrate Judge, 28 U.S.C. § 636(c)(1); Fed. R. Civ. P. 73; Local Rule 301. (Dkt. Nos. 7, 9.) This case was reassigned to the undersigned by an order entered February 9, 2010. (Dkt. No. 14.)

1 (Dkt. No. 18 at 2.) The Commissioner filed an opposition to plaintiff’s motion for summary
2 judgment.² (Dkt. No. 22.)

3 After careful consideration of the entire record, the arguments presented, and for
4 the reasons stated below, the court will grant plaintiff’s request for remand.

5 I. BACKGROUND

6 A. Procedural Background

7 On April 29, 2005, plaintiff filed an application for supplemental security income
8 disability benefits alleging disability beginning on June 1, 2001. (Administrative Transcript
9 “AT” 30, 81.) The Social Security Administration denied plaintiff’s application initially and
10 upon reconsideration. (AT 51-62.) Plaintiff filed a timely request for a hearing, and the ALJ
11 conducted a hearing on December 18, 2007. (AT 208-40.) Plaintiff, who was represented by
12 counsel, testified at the hearing. (Id.) Susan Moranda, an impartial vocational expert, also
13 testified at the hearing. (AT 30.)

14 In a decision dated March 27, 2008, the ALJ denied plaintiff’s application for
15 benefits, finding he was not disabled within the meaning of the Social Security Act.³ (AT 27-
16

17 ² The Commissioner’s brief is entitled “DEFENDANT’S OPPOSITION TO
18 PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT,” and does not expressly move for
19 summary judgment on plaintiff’s claims. (See generally Dkt. No. 22; Scheduling Order at 1
20 (“Within 30 days after plaintiff’s motion for summary judgment and/or remand is served,
21 defendant shall file any opposition, including cross motions.”), Dkt. No. 4.) Notwithstanding the
22 absence of any express cross-motion for summary judgment by the Commissioner, the
23 undersigned will construe the Commissioner’s brief as including such a cross-motion in light of
24 the fact that the Commissioner’s brief requests only that the ALJ’s decision be affirmed.

25 ³ Disability Insurance Benefits are paid to disabled persons who have contributed to the
26 Social Security program, 42 U.S.C. §§ 401 et seq. Generally speaking, SSI is paid to disabled
persons with low income. 42 U.S.C. §§ 1382 et seq. Under both benefit structures, the term
“disability” is defined, in part, as an “inability to engage in any substantial gainful activity” due
to “any medically determinable physical or mental impairment which can be expected to result in
death or which has lasted or can be expected to last for a continuous period of not less than
twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A five-step sequential evaluation
governs eligibility for benefits. See 20 C.F.R. §§ 404.1520, 404.1571-1576, 416.920,
416.971-976; see also Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987). The Ninth Circuit Court
of Appeals has summarized the sequential evaluation as follows:

1 43.) Plaintiff filed an appeal with the Appeals Council for the Social Security Administration.
2 The Appeals Council, by order dated January 21, 2009, granted review but rendered an
3 unfavorable decision to plaintiff. (AT 5-10.) Plaintiff sought judicial review pursuant to 42
4 U.S.C. § 405(g).

5 B. Summary of Relevant Medical History and Evidence⁴

6 In his application for disability benefits, plaintiff claimed that diabetes and high
7 blood pressure limited his ability to work. (AT 75.) Plaintiff previously filed an application for
8 SSI payments on March 24, 2003. (AT 30.) That application was dismissed by order of
9 Administrative Law Judge Robert Ryan. (Id.) At the time of the hearing currently at issue,
10 plaintiff was 33 years old. (AT 42.)

11 On February 1, 2006, Dr. Joseph M. Garfinkel, M.D., examined plaintiff

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

16 Step two: Does the claimant have a “severe” impairment?
17 If so, proceed to step three. If not, then a finding of not disabled is
18 appropriate.

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

23 Step four: Is the claimant capable of performing his past
24 work? If so, the claimant is not disabled. If not, proceed to step
25 five.

26 Step five: Does the claimant have the residual functional
capacity to perform any other work? If so, the claimant is not
disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

The claimant bears the burden of proof in the first four steps of the sequential evaluation process. Bowen, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential evaluation process proceeds to step five. Id.

⁴ Because the parties are familiar with the factual background of this case, including plaintiff’s medical history, the undersigned does not exhaustively relate those facts here. The facts related to plaintiff’s impairments and medical history will be addressed only insofar as they are relevant to the issues presented by the parties’ respective motions.

1 following his application for benefits. During this internal medicine consultative examination,
2 Dr. Garfinkel issued the following diagnostic impressions:

- 3 1. Diabetes mellitus type II, does not cause any disability.
- 4 2. Hypertension with very good control, 104/70.
- 5 3. Back pain with normal back examination.

6 Dr. Garfinkel opined that from “an internal medicine standpoint, the claimant is without
7 restriction.” (AT 142.)

8 Plaintiff underwent a psychiatric consultative examination on January 27, 2007
9 with Dr. Lyle Forehand, M.D. (AT 158.) Following his examination, Dr. Forehand found that
10 plaintiff had a Global Assessment of Functioning (“GAF”) score of 51.⁵ Dr. Forehand opined
11 that plaintiff’s “primary issue is one of diabetes and his adjustment to that.” (AT 161.) He stated
12 that plaintiff would “likely have interruptions from his psychiatric symptoms during a normal
13 workday or workweek until he better accepts and learns to cope with the diagnosis of his serious
14 physical illness.” (AT 162.)

15 On February 21, 2007, plaintiff received a residual functional capacity (“RFC”)
16 assessment from a State agency physician. (AT 173-79.) This medical reviewer concluded that
17 plaintiff had a moderate degree of limitation in maintaining his social functioning and
18 maintaining concentration, persistence or pace. (*Id.*) He also found that plaintiff was
19 “moderately limited” in his ability to complete a normal workweek without interruption from
20 psychologically based symptoms. (AT 178.)

21 Plaintiff submitted additional evidence to the Social Security Appeals Council.
22 On January 8, 2008, plaintiff’s treating physician, Dr. Gabriel Tanson, M.D., completed a form
23 needed to evaluate plaintiff’s eligibility for public assistance. Dr. Tanson checked boxes on that
24 form that stated, inter alia, that plaintiff was unable to work and that he required someone to be

25 ⁵ A GAF score of 51-60 indicates ongoing “moderate symptoms (e.g. flat affect and
26 circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or
school functioning (e.g. few friends, conflicts with peers or co-workers.” Diagnostic and
Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), 32.

1 in his home to help care for him. (AT 26.)

2 C. Summary of the Appeals Council's Findings

3 The Appeals Council granted plaintiff's request for review of the ALJ's denial of
4 benefits. (AT 7.) The Appeals Council ultimately adopted the ALJ's findings and conclusions
5 that the claimant is not disabled, although the Appeals Council issued a slightly modified
6 decision. (AT 8-9.) The Appeals Council amended plaintiff's application date to April 29, 2005
7 and amended the Medical-Vocational Rule at issue from Rule 203.26 to Rule 202.18. (AT 7-10.)
8 The Appeals Council adopted and incorporated the remaining findings and conclusions of the
9 ALJ into its decision. (AT 8-10.)

10 The Appeals Council conducted the required five-step evaluation and concluded
11 that plaintiff was not disabled within the meaning of the Act. (AT 30-43.) At step one, the ALJ
12 found that plaintiff has not engaged in substantial gainful activity since April 29, 2005. (AT 9,
13 32.) At step two, the Appeals Council concluded that plaintiff had the severe impairments of
14 diabetes mellitus, depression and obesity.⁶ (Id.) At step three, it determined that plaintiff's
15 impairments did not meet or medically equal one of the impairments listed in the applicable
16 regulations. (AT 9, 33.) The Appeals Council further determined that plaintiff had the RFC to
17 perform medium work, except that he was limited to performing simple, repetitive tasks
18 requiring only occasional public contact. (AT 9, 34.) The Appeals Council also limited plaintiff
19 to only occasionally climbing ladders, balancing, stooping, bending, kneeling, crouching and
20 crawling. (Id.) The Appeals Council further precluded plaintiff from working around heights,
21 moving machinery or hazards. (Id.)

22 The Appeals Council found, at step four, that plaintiff was unable to perform any
23 past relevant work. (AT 42.) Finally, the Appeals Council found at step five that there are jobs

25 ⁶ The ALJ also stated that "[w]hile the claimant has also alleged disabling asthma,
26 hypertension, back pain, knee pain, wrist pain and diminished vision, I find no other severe
impairment here." (AT 32.)

1 that exist in significant numbers in the national economy that the claimant could perform,
2 considering his age, education, work experience, testimony of the vocational expert and RFC.
3 (AT 42.)

4 II. ISSUES PRESENTED

5 Plaintiff contends that the ALJ committed four principal errors in reviewing
6 plaintiff's claim. (Dkt. No. 18 at 14.) First, plaintiff argues that physician testimony was
7 improperly rejected. Specifically, plaintiff argues (a) that the ALJ erred by failing to credit the
8 opinions of Dr. Forehand and a State agency physician even though the ALJ gave them
9 "significant" weight; and (b) that the Appeals Council improperly rejected plaintiff's treating
10 physician's opinion without a legitimate basis for doing so. (Id.) Second, plaintiff argues that
11 the ALJ rejected plaintiff's third party witness statements without germane and specific reasons
12 for doing so. (Id.) Third, plaintiff argues that the ALJ failed to properly question the vocational
13 examiner ("VE") and to credit that VE's responses to hypothetical questions. (Id.) Fourth,
14 plaintiff argues that the jobs identified by the vocational expert were not consistent with the
15 Dictionary of Occupational Titles. (Id. at 14-15.)

16 III. STANDARDS OF REVIEW

17 The court reviews the Commissioner's decision to determine whether it is (1) free
18 of legal error; and (2) supported by substantial evidence in the record as a whole. Bruce v.
19 Astrue, 557 F.3d 1113, 1115 (9th Cir. 2009); accord Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th
20 Cir. 2009). This standard of review has been described as "highly deferential." Valentine v.
21 Comm'r of Soc. Sec. Admin., 574 F.3d 685, 690 (9th Cir. 2009). "Substantial evidence means
22 more than a mere scintilla but less than a preponderance; it is such relevant evidence as a
23 reasonable mind might accept as adequate to support a conclusion." Bray v. Comm'r of Soc.
24 Sec. Admin., 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting Andrews v. Shalala, 53 F.3d 1035,
25 1039 (9th Cir. 1995)); accord Valentine, 574 F.3d at 690 (citing Desrosiers v. Sec'y of Health &
26 Human Servs., 846 F.2d 573, 576 (9th Cir. 1988)). "The ALJ is responsible for determining

1 credibility, resolving conflicts in medical testimony, and for resolving ambiguities.” Andrews,
2 53 F.3d at 1039; see also Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008) (“[T]he
3 ALJ is the final arbiter with respect to resolving ambiguities in the medical evidence.”).

4 Findings of fact that are supported by substantial evidence are conclusive. 42
5 U.S.C. § 405(g); see also McCarthy v. Apfel, 221 F.3d 1119, 1125 (9th Cir. 2000). “Where the
6 evidence as a whole can support either a grant or a denial, [the court] may not substitute [its]
7 judgment for the ALJ’s.” Bray, 554 F.3d at 1222 (citing Massachi v. Astrue, 486 F.3d 1149,
8 1152 (9th Cir. 2007)); see also Ryan v. Comm’r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir.
9 2008) (“‘Where evidence is susceptible to more than one rational interpretation,’ the ALJ’s
10 decision should be upheld.”) (quoting Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005)).
11 However, the court “must consider the entire record as a whole and may not affirm simply by
12 isolating a ‘specific quantum of supporting evidence.’” Ryan, 528 F.3d at 1198 (quoting
13 Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006)); accord Lingenfelter v. Astrue,
14 504 F.3d 1028, 1035 (9th Cir. 2007).

15 IV. ANALYSIS

16 A. The Consideration of Physician’s Opinions

17 Plaintiff first contends that the ALJ erred by rejecting the opinions of certain
18 treating and examining physicians and psychologists without legally adequate reasons for doing
19 so. (Dkt. No. 18 at 15.) Plaintiff specifically argues that the ALJ failed to incorporate into
20 plaintiff’s RFC the fact that plaintiff would have interruptions in his workweek due to
21 psychologically based symptoms. (AT 38.)

22 Where a treating or examining physician’s opinion is uncontradicted by another
23 doctor, the Commissioner must provide “clear and convincing” reasons for failing to assign
24 controlling weight to the treating physician’s *ultimate conclusions*. Lester v. Chater, 81 F.3d
25 821, 830 (9th Cir. 1996) (emphasis added). However, the ALJ need not give weight to
26 conclusory opinions supported by minimal clinical findings. Meanel v. Apfel, 172 F.3d 1111,

1 1113 (9th Cir. 1999) (treating physician’s conclusory, minimally supported opinion rejected); see
2 also Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989).

3 Plaintiff argues that Dr. Forehand’s finding that plaintiff would continue to have
4 interruptions in the workday until he “better accepts and learns to cope with the diagnosis of his
5 serious physical illness,” and the State agency physician’s opinion that plaintiff was “moderately
6 limited” in his ability to complete a normal workweek without interruptions from psychologically
7 based symptoms should have been incorporated into his RFC.

8 The ALJ discussed these opinions, stating, inter alia:

9 Significant weight is given to [Dr. Forehand’s] opinion, although I
10 have not incorporated the opinion regarding interruptions in the
11 workday into the residual functional capacity, which was attributed
12 to his “serious physical illness.” As discussed below, the
13 claimant’s diabetes is well controlled, and his physical condition is
14 essentially stable.

13 (AT 38.) With respect to the State agency physician, the ALJ also stated that he gave “significant
14 weight to this opinion.” (Id.)

15 Yet in reviewing the ALJ’s analysis, despite the assertions of “significant weight,”
16 the court finds that the ALJ failed, in contravention of Ninth Circuit law, to defer to the
17 uncontradicted opinions of the treating professionals. Lester, 81 F.3d at 830-31. Although the
18 ALJ provided a thorough and detailed opinion, one which appears to reach an accurate ultimate
19 conclusion, the ALJ’s statement that he accorded significant weight to these physician’s opinions
20 is inconsistent with the remainder of his findings regarding plaintiff’s residual functional
21 capacity.⁷

22 As plaintiff contends, the ALJ’s statement that he accorded Dr. Forehand’s
23 opinion and that of the State agency physician significant weight is misleading and, in the final
24

25 ⁷ Although the ALJ accurately noted that the plaintiff’s diabetes is itself well controlled,
26 Dr. Forehand’s opinion spoke to plaintiff’s alleged inability to cope with the diagnosis of his
diabetes and not the seriousness of the illness itself. (AT 162.)

1 analysis, at least facially inaccurate. The ALJ did not reference or appear to give significant or
2 any other weight to the portion of Dr. Forehand's or the State agency physician's assessment that
3 plaintiff was facing moderate limitations in his ability to complete a workweek. In the absence
4 of psychological opinions to the contrary, this constitutes error.

5 The Commissioner counters that even "assuming [p]laintiff's interpretation was
6 accurate, it stands to reason that any psychological ramifications resulting from the diagnosis of
7 the [plaintiff's] disease improved as the physical symptoms grew less problematic, as they did for
8 [p]laintiff." (Dkt. No. 22 at 7.) Although the Commissioner's analysis is reasonable, such
9 speculation about plaintiff's current condition reaches beyond the bounds of the record presented.

10 Further compounding the erroneous RFC computation is the ALJ's failure to
11 adopt relevant testimony from the VE. The ALJ, despite his statement that he provided
12 significant weight to the aforementioned opinions, did not incorporate plaintiff's limitations in
13 his determination of plaintiff's RFC or in his hypothetical questions to the VE. At the hearing,
14 the VE testified that if moderate limitations were incorporated into plaintiff's RFC, including a
15 workweek with interruptions from psychologically based symptoms, that plaintiff would "not be
16 able to do any of the jobs identified in [the previous] hypothetical." (AT 239.) "In determining a
17 claimant's RFC, an ALJ must consider all relevant evidence in the record, including, inter alia,
18 medical records, lay evidence and 'the effects of symptoms, including pain, that are reasonably
19 attributed to a medically determinable impairment.'" Robbins v. SSA, 466 F.3d 880, 883 (9th
20 Cir. 2006) (citing SSR 96-8p, 20 C.F.R. §§ 404.1545(a)(3)). With the record presented to the
21 ALJ, specific treatment of this testimony was required.

22 "Hypothetical questions posed to the vocational expert must set out all the
23 limitations and restrictions of the particular claimant . . . 'If the assumptions in the hypothetical
24 are not supported by the record, the opinion of the vocational expert that the claimant has a
25 residual working capacity has no evidentiary value.'" Embrey v. Bowen, 849 F.2d 418, 422 (9th
26 Cir. 1988) (quoting Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984)). Instead, the ALJ's

1 hypothetical to the VE was based on an incomplete or inaccurate statement of plaintiff's
2 limitations based on the record presented. Accordingly, the VE's testimony that plaintiff could
3 work as a small parts assembler, fast food worker or general office helper are without evidentiary
4 value based upon the present record. (AT 237-38.)

5 Moreover, plaintiff's treating physician's opinion, although submitted to and
6 rejected by the Appeals Council, raises further ambiguity about the severity of plaintiff's
7 symptoms and additionally justifies remand for consideration of this evidence along with the
8 remainder of the record as a whole. It may be, upon remand, that the ALJ finds that clear and
9 convincing evidence permits rejection of the plaintiff's treating physician's conclusions about the
10 extent of plaintiff's limitations. Or, upon remand, the Commissioner may deem it necessary to
11 acquire additional testimony or evidence to incorporate into a RFC which accurately reflect's
12 plaintiff's mental limitations, if any.⁸

13 Finally, plaintiff claims that the ALJ committed several other errors. However,
14 the undersigned does not address those alleged errors in this order because the nature of the
15 remand ordered herein is of a sort that will likely impact the ALJ's sequential analysis from step
16 two through step five. Moreover, because the remaining claims of error derive, at least in part,
17 from the errors addressed above, the undersigned need not address those alleged errors here.

18 V. CONCLUSION

19 Based on the foregoing, IT IS HEREBY ORDERED that:

- 20 1. Plaintiff's motion for summary judgment or remand is granted in part.
- 21 2. The Commissioner's cross-motion for summary judgment is denied.
- 22 3. This matter be remanded for further proceedings pursuant to sentence four

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24 ⁸ As plaintiff highlights, the social security regulations provide that the Commissioner
25 will "seek additional evidence or clarification from your medical source when the report from
26 your medical source contains a conflict or ambiguity that must be resolved, the report does not
contain all the necessary information, or does not appear to be based on medically acceptable
clinical and laboratory diagnostic techniques." (Dkt. No. 18 at 18, citing 20 C.F.R. § 404.1512).

1 of 42 U.S.C. § 405(g).

2 4. The Clerk of Court is directed to enter judgment in plaintiff's favor.

3 DATED: September 21, 2010

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE