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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHNATHAN EDWARD SCHMIT,
Plaintiff,
v.
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 2:14-cv-2373-KJN

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying plaintiff’s application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“Act”).¹ In his motion for summary judgment, plaintiff principally contends that the Commissioner erred by finding that plaintiff was not disabled from August 5, 2007, plaintiff’s alleged disability onset date, through March 30, 2011, the date plaintiff was last insured. (ECF No. 15.) The Commissioner filed an opposition to plaintiff’s motion and a cross-motion for summary judgment. (ECF No. 18.) Thereafter, plaintiff filed a reply brief. (ECF No. 21.)

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¹ This action was initially referred to the undersigned pursuant to E.D. Cal. L.R. 302(c)(15), and both parties voluntarily consented to proceed before a United States Magistrate Judge for all purposes. (ECF Nos. 7, 9.)

1 For the reasons that follow, the court grants plaintiff's motion for summary judgment in
2 part, denies the Commissioner's cross-motion for summary judgment, and remands the case for
3 further proceedings under sentence four of 42 U.S.C. § 405(g).

4 I. BACKGROUND

5 Plaintiff was born on April 30, 1979, has a high school education, and previously worked
6 as a construction laborer.² (Administrative Transcript ("AT") 35, 46-47.) On April 3, 2010,
7 plaintiff applied for DIB, alleging disability beginning August 5, 2007. (AT 26, 47, 126-27.) On
8 October 11, 2010, the Commissioner determined that plaintiff was not disabled. (AT 26.) Upon
9 plaintiff's request for reconsideration, the determination was affirmed on January 27, 2011. (Id.)
10 Thereafter, plaintiff requested a hearing before an administrative law judge ("ALJ"), which took
11 place on August 10, 2011, and at which plaintiff (represented by counsel) and a Vocational
12 Expert ("VE") testified. (AT 26, 43-60.)

13 In a decision dated September 19, 2011, the ALJ determined that plaintiff had not been
14 under a disability, as defined in the Act, from August 5, 2007, plaintiff's alleged disability onset
15 date, through March 30, 2011, the date last insured. (AT 26-36.) The ALJ's decision became the
16 final decision of the Commissioner when the Appeals Council denied plaintiff's request for
17 review on May 8, 2013. (AT 5-11.) Thereafter, plaintiff filed this action in federal district court
18 on October 9, 2014, to obtain judicial review of the Commissioner's final decision. (ECF No. 1.)

19 II. ISSUES PRESENTED

20 Plaintiff raises the following issues: (1) whether the ALJ's residual functional capacity
21 determination ("RFC") was supported by substantial evidence and whether the ALJ improperly
22 failed to consider the treating opinions of Dr. Senegor when making that determination; (2)
23 whether the ALJ improperly assessed plaintiff's subjective testimony regarding the severity of the
24 functional limitations caused by his impairments; and (3) whether the Appeals Council failed to
25 properly consider an additional treating opinion issued by Dr. Senegor that was submitted into the

26 ² Because the parties are familiar with the factual background of this case, including plaintiff's
27 medical and mental health history, the court does not exhaustively relate those facts in this order.
28 The facts related to plaintiff's impairments and treatment will be addressed insofar as they are
relevant to the issues presented by the parties' respective motions.

1 record by plaintiff in connection with his application for review of the ALJ’s decision.

2 III. LEGAL STANDARD

3 The court reviews the Commissioner’s decision to determine whether (1) it is based on
4 proper legal standards pursuant to 42 U.S.C. § 405(g), and (2) substantial evidence in the record
5 as a whole supports it. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial
6 evidence is more than a mere scintilla, but less than a preponderance. Connett v. Barnhart, 340
7 F.3d 871, 873 (9th Cir. 2003) (citation omitted). It means “such relevant evidence as a reasonable
8 mind might accept as adequate to support a conclusion.” Orn v. Astrue, 495 F.3d 625, 630 (9th
9 Cir. 2007) (quoting Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005)). “The ALJ is
10 responsible for determining credibility, resolving conflicts in medical testimony, and resolving
11 ambiguities.” Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001) (citation omitted). “The
12 court will uphold the ALJ’s conclusion when the evidence is susceptible to more than one rational
13 interpretation.” Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

14 IV. DISCUSSION

15 A. Summary of the ALJ’s Findings

16 The ALJ evaluated plaintiff’s entitlement to DIB pursuant to the Commissioner’s standard
17 five-step analytical framework.³ At the first step, the ALJ concluded that plaintiff did not engage

18 ³ Disability Insurance Benefits are paid to disabled persons who have contributed to the Social
19 Security program. 42 U.S.C. §§ 401 et seq. Supplemental Security Income is paid to disabled
20 persons with low income. 42 U.S.C. §§ 1382 et seq. Both provisions define disability, in part, as
21 an “inability to engage in any substantial gainful activity” due to “a medically determinable
22 physical or mental impairment. . . .” 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A). A parallel
23 five-step sequential evaluation governs eligibility for benefits under both programs. See 20
24 C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-
25 42 (1987). The following summarizes the sequential evaluation:

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

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

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

1 in substantial gainful activity during the period between August 5, 2007, plaintiff's alleged
2 disability onset date, and March 30, 2011, the date plaintiff was last insured. (AT 28.) At step
3 two, the ALJ determined that plaintiff had the following "severe" impairments: "degenerative
4 disc disease and depressive disorder." (Id.) However, at step three, the ALJ determined that
5 plaintiff did not have an impairment or combination of impairments that meet or medically
6 equaled an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Id.)

7 Before proceeding to step four, the ALJ assessed plaintiff's residual functional capacity
8 ("RFC") for the relevant time period as follows:

9 After consideration of the entire record, the undersigned finds that, through the
10 date last insured, the claimant had the residual functional capacity to perform light
11 work as defined in 20 CFR 404.1567(b) except he was able to lift and carry twenty
12 pounds occasionally and ten pounds frequently. He was able to stand for two
13 hours in an eight-hour workday, walk for two hours in an eight-hour workday, and
14 sit for six hours in an eight-hour workday. The claimant was restricted to never
climbing ladders and only occasionally balancing, stooping, kneeling, crouching,
crawling, and climbing stairs. He had the fair ability to understand, remember, and
carry out complex and detailed job instructions.

15 (AT 30.)

16 At step four, the ALJ found that plaintiff was unable to perform any past relevant work.
17 (AT 35.) Finally, at step five, the ALJ determined, through the VE's testimony, that considering
18 plaintiff's age, education, work experience, and RFC, there were jobs that existed in significant
19 numbers in the national economy that plaintiff could have performed, specifically, the
20 representative occupations of small products assembler, lens-block gauger, and charge-account

21
22 Step four: Is the claimant capable of performing his past relevant work? If so, the
claimant is not disabled. If not, proceed to step five.

23
24 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.

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

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

1 clerk. (AT 36, 58-59.)

2 Accordingly, the ALJ concluded that plaintiff had not been under a disability as defined in
3 the Act from August 5, 2007, the alleged onset date, through March 30, 2011, the date last
4 insured. (AT 36.)

5 B. Plaintiff's Substantive Challenges to the Commissioner's Determinations

6 1. *Whether the ALJ's RFC Determination was Based on Substantial Evidence*
7 *and Whether the ALJ Erred in Considering Dr. Senegor's Treating Notes*

8 First, plaintiff argues that the ALJ erred in determining that plaintiff had the RFC to
9 perform a reduced range of light work because that determination was not based on substantial
10 evidence and did not properly address the medical opinion evidence in the record.

11 With regard to the medical opinion evidence, plaintiff argues that the ALJ completely
12 disregarded and failed to assign weight to the treating opinions Dr. Senegor developed in
13 connection with the treatment he provided plaintiff, including two spinal fusion surgeries,
14 between April 16, 2009, and January 21, 2011. Plaintiff claims that these treating records
15 demonstrate that Dr. Senegor provided multiple functional opinions regarding plaintiff's physical
16 capacity that the ALJ failed to address in a meaningful fashion in her decision. However, the
17 treating records plaintiff highlights in support of his argument provide no opinion regarding
18 plaintiff's functional limitations. Indeed, the two treating notes plaintiff specifically highlights in
19 his briefing as containing Dr. Senegor's opinions that the ALJ supposedly ignored are merely Dr.
20 Senegor's post-surgery recommendations to plaintiff upon discharge from the hospital after his
21 two spinal fusion surgeries.⁴ (AT 166, 244.) Furthermore, to the extent the records plaintiff
22 highlights could be construed as opinions, they provide only vague advisements that plaintiff not
23 engage in certain activities for an indeterminate time while he recovered from his spinal fusion
24 surgeries. (*Id.*) In addition, a review of the remaining treating notes in the record issued by Dr.
25 Senegor demonstrates that he did not provide an opinion as to what specific functional limitations

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27 ⁴ Plaintiff appears to acknowledge this fact in his briefing when he describes the opinions he
28 claims were present in Dr. Senegor's notes as advisements. (ECF No. 15-1 at 16.)

1 plaintiff's impairments imposed on him.⁵ Accordingly, the ALJ did not err by not explicitly
2 noting what weight, if any, she assigned to Dr. Senegor's treating notes. See Champagne v.
3 Colvin, 582 F. App'x 696, 697 (9th Cir. 2014) (unpublished) ("[Plaintiff's] contention that the
4 ALJ disregarded his treaters' opinions about his limitations lacks merit, because none of the
5 treating providers gave an opinion regarding his functional limitations.").

6 Furthermore, the ALJ's written decision demonstrates that she specifically considered Dr.
7 Senegor's treating records that plaintiff draws into contention along with the rest of the medical
8 and non-medical evidence in the record, including all of the opinion evidence available to her.
9 (AT 31-35.) Therefore, the ALJ did not err in considering Dr. Senegor's treating notes when
10 deciding plaintiff's RFC.

11 Nevertheless, even though the court finds that the ALJ did not err in considering Dr.
12 Senegor's treatment notes, it agrees with plaintiff's more general assertion that the ALJ's RFC
13 determination regarding plaintiff's physical functioning was not based on substantial evidence
14 from the record. In her discussion regarding the impact of plaintiff's physical impairments, the
15 ALJ considered the opinions of Dr. Boparai, an examining consultative physician who had
16 examined plaintiff just eight days after his second spinal fusion surgery, and two state agency
17 non-examining physicians, Dr. Brodsky and Dr. Fracchia. (AT 34.) The ALJ assigned "no
18 weight" to Dr. Boparai's opinion because Dr. Boparai's examination took place just after plaintiff
19 underwent his second spinal surgery and, therefore, did "not provide an appropriate assessment of
20 the claimant's functional capacity after recovery." (Id.) However, she accorded "significant
21 weight" to the non-examining opinions of Dr. Brodsky and Dr. Fracchia and largely adopted their
22 physical functional findings into her RFC determination, which found that plaintiff was capable
23 of performing a reduced level of light work. (AT 30, 34.) Even though the opinion of a non-
24 examining medical expert can constitute substantial evidence to support an ALJ's RFC

25 ⁵ The court recognizes that plaintiff later submitted to the Appeals Council a medical assessment
26 form issued by Dr. Senegor dated October 24, 2011, that opined on plaintiff's physical RFC. (AT
27 391-93.) However, this opinion was both dated and submitted after the date on which the ALJ
28 issued her adverse decision. Accordingly, the ALJ was not required to consider this opinion in
determining plaintiff's RFC as it was not a part of the record at the time she rendered her
decision.

1 determination when it is consistent with other independent evidence in the record, see Andrews v.
2 Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995), the record before the ALJ here did not support the
3 limitations opined by the non-examining physicians and adopted by the ALJ for the reasons
4 discussed below.

5 Dr. Brodsky issued his opinion on October 7, 2010, about a month after plaintiff had
6 undergone his second spinal fusion surgery, and based his opinion entirely on a review of the
7 record that had been developed prior to that operation, with the exception of Dr. Boporai's
8 examining opinion, which Dr. Brodsky dismissed as an inaccurate assessment of plaintiff's actual
9 physical RFC because Dr. Boporai had examined plaintiff just days after he had undergone the
10 surgery. Dr. Brodsky specifically noted in his opinion that plaintiff "may well be severely limited
11 by 9/17/11 (twelve months S/P surgery), but it is too early to make a specific assessment," and
12 that "a reasonable *assumption* is that [plaintiff] will be able to sustain LIGHT pRFC performance
13 by 9/17/11." (AT 287 (italics added).)

14 Not only did Dr. Brodsky opine limitations based on an assumption of what plaintiff's
15 physical condition would likely be as of September 17, 2011, nearly 6 months after the end of the
16 relevant period, as a result of an assumed successful second surgery, but his opinion also entirely
17 failed to address plaintiff's physical functional capacity prior to the time he underwent his second
18 surgery — a span of time which comprised the large majority of the relevant period at issue. To
19 be sure, the medical evidence in the record from before the date of the second surgery generally
20 indicates that the symptoms of plaintiff's degenerative disc disease continued to progressively
21 worsen even after plaintiff underwent his first spinal fusion surgery and generally caused plaintiff
22 debilitating pain throughout the portion of the relevant period prior to his second surgery. See,
23 e.g., AT 167-68, 198, 200, 203, 207, 227.

24 Furthermore, plaintiff's treatment records developed after his second spinal fusion surgery
25 indicate that plaintiff's physical condition generally did not improve and may have even begun to
26 decline further in the months after he underwent that second operation. On November 11, 2010,
27 roughly 2 months after plaintiff underwent his second spinal fusion surgery, Dr. Senegor,
28 plaintiff's treating physician, noted that plaintiff felt that his surgery had "worked out well,"

1 plaintiff's pain had been reduced, and "x-rays appear satisfactory for this stage of recovery." (AT
2 308.) However, on January 12, 2011, Dr. Senegor issued a report regarding his 4-month follow-
3 up examination of plaintiff that noted that while plaintiff had initially done well after the surgery,
4 he had "recently . . . developed new lumbar radicular symptoms," including "low back pain and
5 pain radiating down the right leg towards the foot in a fairly typical L5 radicular distribution with
6 numbness in the big toe of the right foot." (AT 363.) Dr. Senegor further noted that plaintiff's
7 pain had "been severe enough that [plaintiff] has once again taken to the use of a cane and
8 recently appeared in an emergency room." (*Id.*) He also determined that plaintiff's "foot drop on
9 the right, which has been chronic, is still present." (*Id.*) Similarly, Dr. Senegor noted in his 5-
10 month follow up report that plaintiff "still ha[d] a good deal of low back and leg pain," "had
11 trouble bearing weight with the right leg," and limped when he walked. (AT 362.) Finally, Dr.
12 Senegor noted after conducting an 8-month follow up on May 12, 2011 that plaintiff was
13 "experiencing a good deal of pain and muscle spasm in the right calf and the right calf and shin
14 areas are numb," and that plaintiff was "still using morphine with Norco for breakthrough pain as
15 well as muscle relaxers and Xanax." (AT 361.) In addition, a treating report from the Pain
16 Management Center regarding a clinic visit on August 5, 2011, shows that plaintiff continued to
17 suffer from chronic lower back pain, exhibited a positive straight leg raise on his right side, and
18 noted that it was "not clear whether [plaintiff would] require further surgical interventions in
19 order to stabilize his spine."⁶ (AT 387-90.) In short, the objective medical evidence in the record
20 produced after plaintiff's second surgery did not provide substantial support for Dr. Brodsky's
21 opined functional limitations, which were based entirely on a prediction that plaintiff's condition
22 would improve after his second surgery.

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25 ⁶ While the May 12, 2011, and August 5, 2011 examinations took place after the relevant period
26 had concluded, these documents were considered by the ALJ and were relevant to plaintiff's
27 physical functional capacity during the relevant period insofar as they reflected that plaintiff's
28 symptoms stemming from his physical impairments were still present in the months after plaintiff
underwent his second spinal fusion surgery and did not appear to improve as time progressed
after the surgery, contrary to Dr. Brodsky's prognostication.

1 Despite the fact that Dr. Brodsky’s opinion was based only on a consideration of evidence
2 developed prior to the date on which plaintiff underwent his second spinal fusion surgery, did not
3 address plaintiff’s functional capacity prior to that surgery, was based on an admitted speculation
4 as to what plaintiff’s physical RFC would likely be a year after that surgery, and was generally
5 not supported by the objective medical evidence developed both prior to and after that surgery,
6 the ALJ still accorded great weight to Dr. Brodsky’s opinion and largely adopted the functional
7 limitations contained therein. (AT 34.) That determination was in error.

8 The ALJ’s reliance on Dr. Fracchia’s non-examining opinion also did not constitute
9 substantial evidence in support of her RFC determination. Unlike Dr. Brodsky, Dr. Fracchia had
10 the benefit of reviewing the first post-operation treating report that Dr. Senegor issued in
11 November of 2010 that indicated that plaintiff’s second surgery was successful and he was
12 recovering at a satisfactory rate. (AT 343.) However, Dr. Fracchia did not have an opportunity to
13 review plaintiff’s treating records developed thereafter, in early-to-mid 2011, that indicated that
14 plaintiff began to again suffer from severe symptoms as a result of his physical impairments soon
15 after that first follow up visit with Dr. Senegor and continued to experience those symptoms in
16 the months after he underwent his second spinal fusion surgery. (See AT 361-63.) In addition,
17 Dr. Fracchia noted that Dr. Brodsky’s “initial determination [was] not correct in that it did not
18 address the period from [the alleged onset date] to 9/10 [the month plaintiff underwent his second
19 surgery,] in addition to projecting recovery after [plaintiff’s] recent surgery.” (AT 344.)
20 However, Dr. Fracchia still issued an opinion providing physical functional limitations
21 remarkably similar to those opined by Dr. Brodsky — that plaintiff was essentially capable of
22 performing light work with some additional physical functional limitations. Indeed, aside from
23 finding plaintiff somewhat more limited in his ability to stand or walk, Dr. Fracchia opined the
24 exact same limitations opined by Dr. Brodsky. (Compare AT 281-85 with AT 345-49.) As
25 discussed above with regard to Dr. Brodsky, those opined limitations were not supported by the
26 objective medical evidence in the record from both before and after plaintiff’s second spinal
27 fusion surgery. Because the functional limitations contained in Dr. Fracchia’s opinion were not
28 generally supported by the other medical evidence in the record, the ALJ could not rely on that

1 opinion as substantial support for her RFC determination that largely adopted those limitations.

2 In sum, the non-examining opinions of Dr. Brodsky and Dr. Fracchia did not constitute
3 substantial evidence in support of the ALJ's RFC determination because they were not supported
4 by the other medical evidence in the record from throughout the relevant period. See Lester v.
5 Chater, 81 F.3d 821, 831 (9th Cir. 1995). Accordingly, the ALJ's sole reliance on those opinions
6 to support her RFC determination was prejudicial error.

7 Furthermore, while the ALJ correctly highlighted the fact that Dr. Boporai's examining
8 opinion likely did not accurately reflect plaintiff's physical RFC throughout the course of the
9 relevant period because his orthopedic examination of plaintiff was conducted while plaintiff was
10 still recovering from his second spinal fusion surgery, this invalid examination was entirely the
11 Commissioner's own doing because it was the Administration that had scheduled it to take place
12 in such close temporal proximity to plaintiff's surgery. See 20 C.F.R. § 404.1517 ("If we arrange
13 for the examination or test, we will give you reasonable notice of the date, time, and place the
14 examination or test will be given, and the name of the person or facility who will do it."). Given
15 the lack of other examining or treating opinions in the record addressing plaintiff's physical
16 impairments, and the fact that the medical evidence in the record did not support the non-
17 examining physicians' opinions on which the ALJ relied, the ALJ should have obtained a second
18 consultative examination of plaintiff's physical impairments. Accordingly, the ALJ failed to
19 properly develop the record with regard to the impact of plaintiff's physical impairments in a
20 manner that accurately depicted plaintiff's physical functioning throughout the course of the
21 relevant period and erroneously based her RFC determination on the less-than-substantial opinion
22 evidence that was in the record.

23 2. *The ALJ's Error Warrants Remand for Further Administrative*
24 *Proceedings*

25 When the court finds that the ALJ committed prejudicial error, it has the discretion to
26 remand or reverse and award benefits. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989).
27 Generally, if the court finds that the ALJ's decision was erroneous or not supported by substantial
28 evidence, the court must follow the "ordinary remand rule," meaning that "the proper course,

1 except in rare circumstances, is to remand to the agency for additional investigation or
2 explanation.” Treichler v. Comm’r of Soc. Sec. Admin., 775 F.3d 1090, 1099 (9th Cir. 2014). A
3 remand for an award of benefits is inappropriate where the record has not been fully developed or
4 there is a need to resolve conflicts, ambiguities, or other outstanding issues. Id. at 1101.

5 Here, plaintiff argues that the ALJ’s error requires this matter to be remanded for further
6 administrative proceedings. The court agrees. As discussed above, the opinion evidence in the
7 record regarding plaintiff’s spinal impairments has not been adequately developed such that the
8 ALJ could make a proper RFC determination regarding the functional impact of those
9 impairments on plaintiff’s ability to perform physical work-related activities throughout the
10 course of the relevant period. Accordingly, development of the record through further
11 administrative proceedings is warranted.

12 On remand, the ALJ shall obtain a consultative examination of plaintiff by a physician
13 who has full access to plaintiff’s past medical records. The consultative examination shall be
14 focused on ascertaining what plaintiff’s functional limitations were between August 5, 2007,
15 plaintiff’s alleged disability onset date, and March 30, 2011, plaintiff’s date last insured, but shall
16 also consider whether plaintiff’s impairments and functional capacity improved or worsened
17 thereafter through the present.⁷ Furthermore, the ALJ shall consider the full treating opinion of
18 Dr. Senegor dated October 24, 2011, that plaintiff provided to the Appeals Council in connection
19 with his request for review of the ALJ’s decision.⁸

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22 ⁷ Although the consultative examination will take place in the present, the consultative examiner
23 shall use best efforts, utilizing the findings of the present physical examination, plaintiff’s past
24 medical records, and the examiner’s clinical expertise and judgment, to render an opinion
regarding plaintiff’s functional capacity during the relevant period.

25 ⁸ Plaintiff asserts in his briefing that the Appeals Council did not review the entirety of Dr.
26 Senegor’s opinion because only two of the five pages of that document were included as part of
27 the administrative transcript. (See AT 392-93.) While the court declines to address the merits of
28 plaintiff’s contention for the reasons discussed below, on remand the ALJ shall permit plaintiff to
supply a new copy of Dr. Senegor’s opinion dated October 24, 2011, and shall consider that
opinion in conjunction with the other evidence in the record.

