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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANKIE REIS VIEIRA,  
Plaintiff,  
v.  
NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,  
Defendant.

No. 2:15-cv-1685 DB

ORDER

This social security action was submitted to the court without oral argument for ruling on plaintiff’s motion for summary judgment.<sup>1</sup> Plaintiff’s motion argues that the ALJ committed the following three principal errors: (1) the ALJ’s treatment of the subjective testimony constituted error; (2) the ALJ’s treatment of the medical opinion evidence constituted error; and (3) the ALJ’s residual functional capacity determination and step five finding constituted error.

For the reasons explained below, plaintiff’s motion is granted in part and denied in part, the decision of the Commissioner of Social Security (“Commissioner”) is reversed, and the matter is remanded for further proceedings consistent with this order.

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<sup>1</sup> Both parties have previously consented to Magistrate Judge jurisdiction in this action pursuant to 28 U.S.C. § 636(c). (See ECF Nos. 6 & 9.)

1 PROCEDURAL BACKGROUND

2 On December 10, 2010, plaintiff filed applications for Disability Insurance Benefits  
3 (“DIB”) under Title II of the Social Security Act (“the Act”) and for Supplemental Security  
4 Income (“SSI”) under Title XVI of the Act alleging disability beginning on January 14, 2008.  
5 (Transcript (“Tr.”) at 245, 428-43.) Plaintiff’s applications were denied initially, (id. at 279-83),  
6 upon reconsideration, (id. at 285-90), and later by an Administrative Law Judge. (Id. at 245-64.)

7 On February 28, 2014, the Appeal Council vacated the ALJ’s decision and remanded the  
8 matter to the ALJ for further proceedings. (Id. at 271-74.) On December 3, 2014, a hearing was  
9 held before an ALJ. (Id. at 48-94.) Plaintiff was represented by an attorney and testified at the  
10 administrative hearing. (Id. at 48-49.)

11 In a decision issued on February 18, 2015, the ALJ found that plaintiff was not disabled.  
12 (Id. at 39.) The ALJ entered the following findings:

- 13 1. The claimant meets the insured status requirements of the Social  
14 Security Act through December 31, 2012.
- 15 2. The claimant has not engaged in substantial gainful activity  
16 since January 14, 2008, the alleged onset date (20 CFR 404.1571 *et*  
17 *seq.*, and 416.971 *et seq.*).
- 18 3. The claimant has the following severe impairments: major  
19 depression, alcohol abuse disorder in remission, cannabis abuse  
20 disorder, bipolar disorder, borderline intellectual functioning,  
21 attention deficit hyperactivity disorder, cervical spine stenosis  
22 status post surgery with residual degenerative disk disease at the C3  
23 and C4 levels, status post bilateral posterior cervical  
24 foraminotomies at the C5-6 level, right shoulder arthritis, and  
25 bilateral carpal tunnel syndrome (20 CFR 404.1520(c) and  
26 416.920(c)).
- 27 4. The claimant does not have an impairment or combination of  
28 impairments that meets or medically equals the severity of one of  
the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1  
(20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925  
and 416.926).
5. After careful consideration of the entire record, the undersigned  
finds that the claimant has the residual functional capacity to  
perform light work as defined in 20 CFR 404.1567(b) and  
416.967(b). The claimant can lift, carry, push and or pull 20  
pounds occasionally and 10 pounds frequently. The claimant can  
stand and/or walk, with normal breaks, for 6 hours in an 8-hour  
workday. The claimant can sit, with normal breaks, for 6-hours in  
an 8-hour workday. The claimant can never climb ladders, ropes,

1 or scaffolds. The claimant can frequently kneel, crouch, bend, and  
2 can frequently climb ramps and stairs. The claimant can  
3 occasionally crawl. The claimant can frequently perform fingering,  
4 fine and gross manipulation with the bilateral upper extremities.  
5 The claimant can perform simple, repetitive, routine-type tasks.  
6 The claimant can frequently interact with supervisors, co-workers,  
7 and the public. The claimant can maintain concentration,  
8 persistence, and pace for simple, repetitive, and routine tasks.

9 6. The claimant is unable to perform any past relevant work (20  
10 CFR 404.1565 and 416.965).

11 7. The claimant was born on November 27, 1968 and was 39 years  
12 old, which is defined as a younger individual age 18-49, on the  
13 alleged disability onset date (20 CFR 404.1563 and 416.963).

14 8. The claimant has a limited education and is able to communicate  
15 in English (20 CFR 404.1564 and 416.964).

16 9. Transferability of job skills is not an issue in this case because  
17 the claimant's past relevant work is unskilled (20 CFR 404.1568  
18 and 416.968).

19 10. Considering the claimant's age, education, work experience,  
20 and residual functional capacity, there are jobs that exist in  
21 significant numbers in the national economy that the claimant can  
22 perform (20 CFR 404.1569, 404.1569(a), 416.969, and 416.969(a)).

23 11. The claimant has not been under a disability, as defined in the  
24 Social Security Act, from January 14, 2008, through the date of this  
25 decision (20 CFR 404.1520(g) and 416.920(g)).

26 (Id. at 19-39.)

27 On May 29, 2015, the Appeals Council denied plaintiff's request for review of the ALJ's  
28 February 18, 2015 decision. (Id. at 5-7.) Plaintiff sought judicial review pursuant to 42 U.S.C. §  
405(g) by filing the complaint in this action on August 7, 2015. (ECF No. 1.)

#### LEGAL STANDARD

"The district court reviews the Commissioner's final decision for substantial evidence,  
and the Commissioner's decision will be disturbed only if it is not supported by substantial  
evidence or is based on legal error." Hill v. Astrue, 698 F.3d 1153, 1158-59 (9th Cir. 2012).  
Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to  
support a conclusion. Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Sandgathe v.  
Chater, 108 F.3d 978, 980 (9th Cir. 1997).

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1            “[A] reviewing court must consider the entire record as a whole and may not affirm  
2 simply by isolating a ‘specific quantum of supporting evidence.’” Robbins v. Soc. Sec. Admin.,  
3 466 F.3d 880, 882 (9th Cir. 2006) (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.  
4 1989)). If, however, “the record considered as a whole can reasonably support either affirming or  
5 reversing the Commissioner’s decision, we must affirm.” McCartey v. Massanari, 298 F.3d  
6 1072, 1075 (9th Cir. 2002).

7            A five-step evaluation process is used to determine whether a claimant is disabled. 20  
8 C.F.R. § 404.1520; see also Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). The five-step  
9 process has been summarized as follows:

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

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

14            Step three: Does the claimant’s impairment or combination of  
15            impairments meet or equal an impairment listed in 20 C.F.R., Pt.  
16            404, Subpt. P, App. 1? If so, the claimant is automatically  
17            determined disabled. If not, proceed to step four.

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

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

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

21            The claimant bears the burden of proof in the first four steps of the sequential evaluation  
22            process. Bowen v. Yuckert, 482 U.S. 137, 146 n. 5 (1987). The Commissioner bears the burden  
23            if the sequential evaluation process proceeds to step five. Id.; Tackett v. Apfel, 180 F.3d 1094,  
24            1098 (9th Cir. 1999).

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1 APPLICATION

2 In his pending motion plaintiff argues that the ALJ committed the following three  
3 principal errors<sup>2</sup>: (1) the ALJ’s treatment of the subjective testimony constituted error; (2) the  
4 ALJ’s treatment of the medical opinion evidence constituted error; and (3) the ALJ’s residual  
5 functional capacity determination and step five finding constituted error.<sup>3</sup> (Pl.’s MSJ (ECF No.  
6 17) at 10-26.<sup>4</sup>)

7 **I. Subjective Testimony**

8 Plaintiff argues that the ALJ’s treatment of plaintiff’s testimony and the testimony of his  
9 mother constituted error. (Id. at 20-24.)

10 **A) Plaintiff’s Testimony**

11 The Ninth Circuit has summarized the ALJ’s task with respect to assessing a claimant’s  
12 credibility as follows:

13 To determine whether a claimant’s testimony regarding subjective  
14 pain or symptoms is credible, an ALJ must engage in a two-step  
15 analysis. First, the ALJ must determine whether the claimant has  
16 presented objective medical evidence of an underlying impairment  
17 which could reasonably be expected to produce the pain or other  
18 symptoms alleged. The claimant, however, need not show that her  
19 impairment could reasonably be expected to cause the severity of  
20 the symptom she has alleged; she need only show that it could  
21 reasonably have caused some degree of the symptom. Thus, the  
22 ALJ may not reject subjective symptom testimony . . . simply  
23 because there is no showing that the impairment can reasonably  
24 produce the degree of symptom alleged.

25 Second, if the claimant meets this first test, and there is no evidence  
26 of malingering, the ALJ can reject the claimant’s testimony about  
27 the severity of her symptoms only by offering specific, clear and  
28 convincing reasons for doing so . . . .

22 Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007) (citations and quotation marks  
23 omitted). “The clear and convincing standard is the most demanding required in Social Security  
24 cases.” Moore v. Commissioner of Social Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002). “At

25 <sup>2</sup> As noted by defendant, it is difficult to discern all of the arguments found in plaintiff’s motion  
26 for summary judgment. In this regard, the court has attempted to comprehend and analyze  
27 plaintiff’s arguments to the extent possible.

27 <sup>3</sup> The court has reordered plaintiff’s arguments for purposes of clarity and efficiency.

28 <sup>4</sup> Page number citations such as this one are to the page number reflected on the court’s CM/ECF  
system and not to page numbers assigned by the parties.

1 the same time, the ALJ is not required to believe every allegation of disabling pain, or else  
2 disability benefits would be available for the asking . . . .” Molina v. Astrue, 674 F.3d 1104, 1112  
3 (9th Cir. 2012).

4 “The ALJ must specifically identify what testimony is credible and what testimony  
5 undermines the claimant’s complaints.” Valentine v. Commissioner Social Sec. Admin., 574  
6 F.3d 685, 693 (9th Cir. 2009) (quoting Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d 595,  
7 599 (9th Cir. 1999)). In weighing a claimant’s credibility, an ALJ may consider, among other  
8 things, the “[claimant’s] reputation for truthfulness, inconsistencies either in [claimant’s]  
9 testimony or between [her] testimony and [her] conduct, [claimant’s] daily activities, [her] work  
10 record, and testimony from physicians and third parties concerning the nature, severity, and effect  
11 of the symptoms of which [claimant] complains.” Thomas v. Barnhart, 278 F.3d 947, 958-59  
12 (9th Cir. 2002) (modification in original) (quoting Light v. Soc. Sec. Admin., 119 F.3d 789, 792  
13 (9th Cir. 1997)). If the ALJ’s credibility finding is supported by substantial evidence in the  
14 record, the court “may not engage in second-guessing.” Id.

15 Here, the ALJ found that plaintiff’s medically determinable impairments could reasonably  
16 be expected to cause his alleged symptoms, but that plaintiff’s statements concerning the  
17 intensity, persistence and limiting effects of those symptoms were not “entirely credible for the  
18 reasons explained in this decision.” (Tr. at 24.) That is the entirety of the ALJ’s specific analysis  
19 of plaintiff’s credibility. In this regard, the ALJ’s decision fails to provide a clear and convincing  
20 reason for discrediting plaintiff’s testimony.

21 Defendant’s motion argues that the ALJ “appropriately found Plaintiff’s testimony not  
22 fully credible.” (Def.’s MSJ (ECF No. 18) at 14.) In support of this argument, defendant cites to  
23 the ALJ’s decision pages “20-36.” (Id.) Defendant then proceeds to assert that the ALJ did  
24 provide specific reasons for rejecting plaintiff’s testimony, referencing various parts of the ALJ’s  
25 decision in which the ALJ “noted” or “pointed to” evidence that defendant contends undermined  
26 plaintiff’s credibility. (Id. at 14-18.)

27 Although the ALJ’s decision did generally discuss the findings and evidence cited by  
28 defendant, the ALJ did not specifically refer to any of these as a reason for discrediting plaintiff’s

1 testimony. This is perhaps most easily recognized from defendant’s attempt to support her  
2 argument with citations to the ALJ’s decision. Such citations are not found on a single page or  
3 spanning two pages, but from disparate parts of the ALJ’s decision. And the ALJ’s decision  
4 made no effort to specifically link the discussion of these items of evidence to the rejection of  
5 plaintiff’s testimony.

6 It is well established that the court is required “to review the ALJ’s decision based on the  
7 reasoning and factual findings offered by the ALJ-not post hoc rationalizations that attempt to  
8 intuit what the adjudicator may have been thinking.” Bray v. Comm’r of Soc. Sec. Admin., 554  
9 F.3d 1219, 1225 (9th Cir. 2009). Rather, the Commissioner’s decision “must stand or fall with  
10 the reasons set forth in the ALJ’s decision, as adopted by the Appeals Council.” Barbato v.  
11 Comm’r of Soc. Sec. Admin., 923 F. Supp. 1273, 1276 n. 2 (C.D. Cal. 1996); see also Gonzalez  
12 v. Sullivan, 914 F.2d 1197, 1201 (9th Cir. 1990) (“[W]e are wary of speculating about the basis  
13 of the ALJ’s conclusion . . .”).

14 In this regard, it simply cannot be said that the ALJ offered specific, clear, and convincing  
15 reasons for rejecting plaintiff’s testimony.

16 **B) Plaintiff’s Mother’s Testimony**

17 The testimony of lay witnesses, including family members and friends, reflecting their  
18 own observations of how the claimant’s impairments affect his activities must be considered and  
19 discussed by the ALJ. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006); Smolen  
20 v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996); Sprague v. Bowen, 812 F.2d 1226, 1232 (9th Cir.  
21 1987). Persons who see the claimant on a daily basis are competent to testify as to their  
22 observations. Regennitter v. Comm’r of Soc. Sec. Admin., 166 F.3d 1294, 1298 (9th Cir. 1999);  
23 Dodrill v. Shalala, 12 F.3d 915, 918-19 (9th Cir. 1993). If the ALJ chooses to reject or discount  
24 the testimony of a lay witness, he or she must give reasons germane to each particular witness in  
25 doing so. Regennitter, 166 F.3d at 1298; Dodrill, 12 F.3d at 919.

26 The mere fact that a lay witness is a relative of the claimant cannot be a ground for  
27 rejecting the witness’s testimony. Regennitter, 166 F.3d at 1298; Smolen, 80 F.3d at 1289.  
28 Moreover, “the reasons ‘germane to each witness’ must be specific.” Bruce v. Astrue, 557 F.3d

1 1113, 1115 (9th Cir. 2009) (quoting Stout v. Comm’r, 454 F.3d 1050, 1054 (9th Cir. 2006)).

2 Here, the ALJ’s decisions discussed the testimony of plaintiff’s mother, noting that  
3 plaintiff’s mother had “prepared several statements on behalf of her son.” (Tr. at 23.) Those  
4 statements reflected that plaintiff was “easily sidetracked,” “experienced many failed  
5 relationships,” was unable to handle money, was violent and had “memory difficulty.” (Id.)  
6 Moreover, plaintiff struggled to perform simple tasks, required “a book of reminders,” had  
7 difficulty understanding directions, and could not “fill out, or read, paperwork.” (Id.) Plaintiff’s  
8 mother also recounted that he suffered mood swings, and numbness and pain in his arms and  
9 hands. (Id.) Plaintiff’s violence resulted in physical fights with his brother, the destruction of  
10 property, and threats “forcing [his mother] to obtain a restraining order against” him. (Id.)

11 The ALJ ultimately found that plaintiff’s mother’s testimony was not credible because  
12 “the evidence shows otherwise.” (Id. at 37.) In this regard, the ALJ found that her statements  
13 were “not consistent with the preponderance of the evidence in this case.” (Id.) That is the extent  
14 of the reasoning offered by the ALJ in support of the decision to reject the testimony of plaintiff’s  
15 mother.

16 “[A]n ALJ may discount lay testimony . . . that . . . conflicts with medical evidence.”  
17 Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001). From the ALJ’s vague and conclusory  
18 assertion, however, the court is unable to determine whether the ALJ’s finding is accurate. In this  
19 regard, the ALJ’s decision only informs the court that the testimony of plaintiff’s mother was not  
20 consistent with the preponderance of evidence. The court is left in the dark as to what evidence  
21 the ALJ found supported and what evidence contradicted the testimony of plaintiff’s mother and  
22 whether the ALJ’s findings are accurate.

23 Accordingly, the court finds that plaintiff is entitled to summary judgment on his claim  
24 that the ALJ’s treatment of the subjective testimony constituted error.

## 25 **II. Medical Opinion Evidence**

26 The weight to be given to medical opinions in Social Security disability cases depends in  
27 part on whether the opinions are proffered by treating, examining, or nonexamining health  
28 professionals. Lester, 81 F.3d at 830; Fair v. Bowen, 885 F.2d 597, 604 (9th Cir. 1989). “As a

1 general rule, more weight should be given to the opinion of a treating source than to the opinion  
2 of doctors who do not treat the claimant . . . .” Lester, 81 F.3d at 830. This is so because a  
3 treating doctor is employed to cure and has a greater opportunity to know and observe the patient  
4 as an individual. Smolen, 80 F.3d at 1285; Bates v. Sullivan, 894 F.2d 1059, 1063 (9th Cir.  
5 1990).

6 The uncontradicted opinion of a treating or examining physician may be rejected only for  
7 clear and convincing reasons, while the opinion of a treating or examining physician that is  
8 controverted by another doctor may be rejected only for specific and legitimate reasons supported  
9 by substantial evidence in the record. Lester, 81 F.3d at 830-31. “The opinion of a nonexamining  
10 physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion  
11 of either an examining physician or a treating physician.” (Id. at 831.) Finally, although a  
12 treating physician’s opinion is generally entitled to significant weight, “[t]he ALJ need not  
13 accept the opinion of any physician, including a treating physician, if that opinion is brief,  
14 conclusory, and inadequately supported by clinical findings.” Chaudhry v. Astrue, 688 F.3d 661,  
15 671 (9th Cir. 2012) (quoting Bray, 554 F.3d at 1228).

16 **A. Dr. A. Genest**

17 Plaintiff challenges the ALJ’s treatment of the opinion of Dr. A. Genest. (Pl.’s MSJ  
18 (ECF No. 17) at 13-16.) In this regard, Dr. Genest testified at the December 3, 2014  
19 administrative hearing. (Tr. at 49.) The ALJ’s decision recounted Dr. Genest’s opinion, noting  
20 first that “Dr. Genest opined that the [plaintiff’s] major depression combined with ADHD and  
21 borderline intellectual functioning equaled listing 12.04,”<sup>5</sup> and that “it was not unreasonable for a  
22 person with such psychiatric issues to miss work more than three times per month.” (Id. at 33.)

23 The ALJ, however, assigned Dr. Genest’s opinion “little weight,” finding the opinion to  
24 be “not wholly consistent with the medical evidence of record or with his medical specialty[.]”

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25 <sup>5</sup> At step three of the sequential evaluation, the ALJ must determine whether a claimant’s  
26 impairment or impairments meet or equal one of the specific impairments set forth in the Listings.  
27 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). The physical and mental conditions  
28 contained in the Listings are considered so severe that “they are irrebuttably presumed disabling,  
without any specific finding as to the claimant’s ability to perform his past relevant work or any  
other jobs.” Lester, 81 F.3d at 828.

1 (Id.) In this regard, the ALJ began by noting that Dr. Genest was a “neurosurgeon whose  
2 specialty is not consistent with psychiatric disorders.” (Id.) It is true that greater weight should  
3 be given to the “opinion of a specialist about medical issues related to his or her area of  
4 specialty.” Benecke v. Barnhart, 379 F.3d 587, 594 (9th Cir. 2004) (quoting 20 C.F.R. §  
5 404.1527(d)(5)). However, that Dr. Genest is not a specialist is not cause to reject his opinion.<sup>6</sup>

6 The ALJ then stated that Dr. Genest’s opinion was given little weight because “[t]here is  
7 no support in the record that the claimant’s concussions caused borderline intellectual  
8 functioning.” (Tr. at 33.) Dr. Genest testified, however, that his opinion was based, in part, on  
9 plaintiff’s January 2, 2014 Learning Disability Evaluation, performed by Dr. Kenneth  
10 Brynjolfsson. (Tr. at 64.) That evaluation stated that plaintiff “reported a significant history of  
11 concussions,” and that testing revealed that plaintiff was “functioning intellectually within the  
12 borderline range (4th percentile).”<sup>7</sup> (Id. at 1385, 1388.) In this regard, it cannot be said that there  
13 was no support in the record that plaintiff’s concussions caused borderline intellectual  
14 functioning.

15 Nonetheless, the ALJ also rejected Dr. Genest’s opinion that plaintiff equaled Listing  
16 12.04 because “[t]he record shows that when the claimant does stop consuming alcohol, his  
17 symptoms stabilize.” (Tr. at 33.) The ALJ noted that treatment notes from Dr. Imran Khan  
18 reflected that plaintiff’s drug and alcohol use “exacerbates some symptoms.”<sup>8</sup> (Id.) Dr. Khan’s  
19 treatment notes support the ALJ’s findings. (Id. at 1324, 1327, 1340.) “The Commissioner may  
20 reject the opinion of a non-examining physician by reference to specific evidence in the medical  
21 record.” Sousa v. Callahan, 143 F.3d 1240, 1244 (9th Cir. 1998).

22 Dr. Genest also opined that plaintiff’s cervical spine stenosis with degenerative disk  
23 disease met the criteria for listing 1.04. (Tr. at 33.) The ALJ’s decision, however, found that Dr.  
24 Genest’s opinion was “not consistent with the medical evidence of record” and assigned the

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25 <sup>6</sup> It is somewhat puzzling that the ALJ would call Dr. Genest to testify as an expert, ask him to  
26 opine as to plaintiff’s mental impairments, and then reject his opinion because he is not a  
specialist.

27 <sup>7</sup> The ALJ assigned this opinion “significant weight.” (Tr. at 36.)

28 <sup>8</sup> At the administrative hearing, Dr. Genest seemed to acknowledge that he “missed” the fact that  
plaintiff was again consuming alcohol during a relevant period of time. (Tr. at 67.)

1 opinion “little weight.” (Id. at 33, 34.)

2 The ALJ noted that although plaintiff alleges disability beginning in 2008, he hurt his  
3 shoulder playing softball in August of 2010, and again in December of 2010 by jumping off a  
4 bridge. (Id. at 34.) Moreover, the ALJ noted that on September 19, 2013, plaintiff’s treating  
5 physician opined that plaintiff could return to “light duty” for six weeks and then “return to full  
6 duty.” (Id. at 34, 1209.) As noted above, “[t]he Commissioner may reject the opinion of a non-  
7 examining physician by reference to specific evidence in the medical record.” Sousa, 143 F.3d at  
8 1244.

9 **B. Dr. Kimberly A Page**

10 Plaintiff argues that the ALJ’s decision ignored the medical opinions provided by  
11 plaintiff’s treating surgeon, Dr. Kimberly Page. (Pl.’s MSJ (ECF No. 17) at 17-18.) As noted by  
12 defendant, however, plaintiff is mistaken. (Def.’s MSJ (ECF No. 18) at 12.) In this regard, Dr.  
13 Page’s opinions can be found in her treatment notes. And the ALJ’s decision thoroughly  
14 discussed Dr. Page’s treatment notes.

15 With respect to Dr. Page, the ALJ’s decision stated:

16 Dr. Mikulecky referred the claimant to neurosurgeon, Dr. Kimberly  
17 Page, who . . . recommended anterior cervical discectomy with  
18 fusion (ACDF) at the most stenotic cervical levels at C3-4 and C4-  
5. Dr. Page performed the surgery on February 1, 2012 without  
incident.

19 \*\*\*

20 Follow up imaging revealed a broad-based disc osteophyte complex  
21 at the C5-6 level, which Dr. Page opined, was causing moderate  
22 bilateral neural foraminal narrowing. She recommended posterior  
23 cervical decompression surgery. The claimant underwent the  
24 recommended surgery on July 25, 2013 . . . . In a follow up  
25 appointment with Dr. Page in August 2013, the claimant reported  
26 doing well with only some residual weakness. Examination of the  
27 cervical spine revealed no tenderness to palpation, no pain, normal  
28 cervical spine movements, and normal postures. Examination of  
the thoracic and lumbar spine were unremarkable as well. On  
September 19, 2013, Dr. Page returned the claimant to work with  
restriction to a twenty-five pound weight restriction.

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Treatment notes however indicate that the claimant presented to  
care with Dr. Page again in August 2014 reporting an 8-month

1 history of cervical pain with radiation to the left arm and hand. He  
2 helped move furniture in January 2014 and experienced neck pain  
3 with radiation down the left arm. Dr. Page noted positive Tinel's  
4 sign of the left wrist. She opined his symptoms were related to  
5 spasms in his neck and referred the claimant to physical therapy but  
6 ordered EMG studies as well. The EMG study performed in  
7 September 2014 revealed moderate right carpal tunnel syndrome  
8 and no evidence of cervical radiculopathy or other entrapment or  
9 peripheral neuropathy. She opined no surgery was currently  
10 indicated for the claimant's carpal tunnel syndrome.

11 (Id. at 30-31) (citations omitted).

12 The ALJ's decision also acknowledged that, after plaintiff experienced pain playing  
13 basketball in the fall of 2012, Dr. Page opined that plaintiff's "broad-based disc osteophyte  
14 complex at the C5-6 level . . . was causing moderate neural foraminal narrowing not cord  
15 compression." (Id. at 34.) Dr. Page performed bilateral posterior cervical foraminotomies in July  
16 2013. (Id.) In September of 2014 plaintiff underwent EMG studies which "were consistent with  
17 bilateral carpal tunnel syndrome," however, Dr. Page "opined [it] did not require surgery." (Id.)  
18 (citations omitted).

19 In this regard, it cannot be said that the ALJ's decision ignored Dr. Page's opinions.

### 20 **C. Other Source Opinions**

21 Plaintiff also makes a vague and conclusory assertion that the ALJ improperly discredited  
22 "other" medical source testimony. (Pl.'s MSJ (ECF No. 17) at 21.) In addition to evidence from  
23 acceptable medical sources, a plaintiff may offer opinions from "other sources" to establish the  
24 severity of impairments. See 20 C.F.R. §§ 404.1513(d), 416.913(d). However, the ALJ may  
25 afford less weight to other source opinions. Nonetheless, the ALJ may only reject evidence from  
26 an "other source," if the ALJ gives a germane reason for doing so. See Molina v. Astrue, 674  
27 F.3d 1104, 1111 (9th Cir. 2012); Bain v. Astrue, 319 Fed. Appx. 543, 546 (9th Cir. 2009); Petty  
28 v. Colvin, 954 F.Supp.2d 914, 926 (D. Ariz. 2013) ("An ALJ is free to discount testimony from  
other sources, but as the Commissioner concedes, he must give reasons germane to each witness  
for doing so.").

Here, plaintiff argues that the ALJ improperly rejected the opinion of Ernesto Cervantes, a  
Licensed Clinical Social Worker. (Pl.'s MSJ (ECF No. 17) at 22.) The ALJ's decision, however,

1 found that Cervantes' opinion was "not consistent with the record as a whole." (Tr. at 35.) In  
2 this regard, although Cervantes opined that plaintiff suffered from panic attacks, "the record does  
3 not show medical evidence in support of panic attacks." (Id.) Cervantes opinion also described  
4 plaintiff as "not a team player," yet the record showed that plaintiff participated in a baseball  
5 league. (Id. at 36.) Moreover, the record established that when claimant abstained from  
6 substance use and complied with his treatment, his symptoms improved. (Id. at 35-36.)  
7 Inconsistency with medical evidence is a germane reason to afford less weight to an "other  
8 source" opinion. See Ball v. Colvin, 607 Fed. Appx. 709, 710 (9th Cir. 2015) (inconsistency with  
9 "contemporaneous medical evidence" is a germane reason).

10 Plaintiff also argues that the ALJ erred with respect to the August 24, 2010 opinion of  
11 Barbara Nolet, a Psychiatric Nurse Practitioner. (Pl.'s MSJ (ECF No. 17) at 21-22.) Nolet  
12 opined, in part, that plaintiff was "severely disabled" and "unable to sustain employment or earn  
13 even a GED" due to his symptoms. (Tr. at 645.) The ALJ's decision fails to address Nolet's  
14 August 24, 2010 opinion.

15 The opinions from other sources are important and must be evaluated by the ALJ. See  
16 Garrison v. Colvin, 759 F.3d 995, 1013-14 (9th Cir. 2014) (ALJ erred by failing to recognize  
17 "other source that can provide evidence about the severity of a claimant's impairments and how it  
18 affects the claimant's ability to work"); SSR 06-03p, 2006 WL 2329939, at \*3 ("Opinions from  
19 these medical sources, who are not technically deemed 'acceptable medical sources' under our  
20 rules, are important and should be evaluated on key issues such as impairment severity and  
21 functional effects, along with the other relevant evidence in the file.").

22 Accordingly, the court finds that plaintiff is entitled to summary judgment on his claim  
23 that the ALJ's treatment of Nolet's other source opinion constituted error. Plaintiff is not entitled  
24 to summary judgment with respect to the ALJ's treatment of the medical opinions of Dr. Genest  
25 or Dr. Page.

## 26 CONCLUSION

27 Plaintiff's motion for summary judgment is granted with respect to plaintiff's claims  
28 concerning the ALJ's treatment of the subjective evidence and Nolet's other source opinion.

1 Plaintiff's motion is denied as to plaintiff's claims that the ALJ's treatment of the medical  
2 opinions of Dr. Genest or Dr. Page constituted error.<sup>9</sup>

3 With error established, the court has the discretion to remand or reverse and award  
4 benefits. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989). A case may be remanded  
5 under the "credit-as-true" rule for an award of benefits where:

6 (1) the record has been fully developed and further administrative  
7 proceedings would serve no useful purpose; (2) the ALJ has failed  
8 to provide legally sufficient reasons for rejecting evidence, whether  
9 claimant testimony or medical opinion; and (3) if the improperly  
discredited evidence were credited as true, the ALJ would be  
required to find the claimant disabled on remand.

10 Garrison, 759 F.3d at 1020. Even where all the conditions for the "credit-as-true" rule are met,  
11 the court retains "flexibility to remand for further proceedings when the record as a whole creates  
12 serious doubt as to whether the claimant is, in fact, disabled within the meaning of the Social  
13 Security Act." Id. at 1021; see also Dominguez v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015)  
14 ("Unless the district court concludes that further administrative proceedings would serve no  
15 useful purpose, it may not remand with a direction to provide benefits."); Treichler v.  
16 Commissioner of Social Sec. Admin., 775 F.3d 1090, 1105 (9th Cir. 2014) ("Where . . . an ALJ  
17 makes a legal error, but the record is uncertain and ambiguous, the proper approach is to remand  
18 the case to the agency.").

19 Here, although the ALJ has erred, those errors are not such that the court can say that  
20 "further administrative proceedings would serve no useful purpose." Dominguez, 808 F.3d at  
21 407; see also Treichler, 775 F.3d at 1103-04 ("In evaluating this issue, we consider whether the  
22 record as a whole is free from conflicts, ambiguities, or gaps, whether all factual issues have been  
23 resolved, and whether the claimant's entitlement to benefits is clear under the applicable legal  
24 rules.").

25 <sup>9</sup> Plaintiff's third claim—that the ALJ's residual functional capacity determination and step five  
26 finding constituted error—is premised on his arguments that the ALJ's treatment of the  
27 subjective testimony and the medical opinion evidence constituted error. As explained above, the  
28 court has found that the ALJ's treatment of the subjective testimony and some of the medical  
opinion evidence constituted error. Those errors call into question that ALJ's residual functional  
capacity determination and step five finding. Accordingly, the court need not address this claim.

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Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff’s motion for summary judgment (ECF No. 17) is granted in part and denied in part;
2. Defendant’s cross-motion for summary judgment (ECF No. 18) is granted in part and denied in part;
3. The Commissioner’s decision is reversed; and
4. This matter is remanded for further proceedings consistent with this order.

Dated: March 8, 2017

  
DEBORAH BARNES  
UNITED STATES MAGISTRATE JUDGE

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