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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RIGOBERTO GALVAN ALCAZAR  
Plaintiff,  
v.  
COMMISSIONER OF SOCIAL  
SECURITY,  
Defendant.

No. 2:15-cv-2203-KJN

ORDER

Plaintiff Rigoberto Galvan Alcazar seeks judicial review of a final decision by the Commissioner of Social Security (“Commissioner”) denying plaintiff’s application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“Act”).<sup>1</sup> In his motion for summary judgment, plaintiff principally contends that the Commissioner erred by finding that plaintiff was not disabled from August 14, 2008, his alleged disability onset date, through March 31, 2013, plaintiff’s date last insured. (ECF No. 20.) The Commissioner opposed plaintiff’s motion and filed a cross-motion for summary judgment. (ECF No. 27.) Thereafter, plaintiff filed a reply brief. (ECF No. 30.)

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<sup>1</sup> This action was referred to the undersigned pursuant to Local Rule 302(c)(15), and both parties voluntarily consented to proceed before a United States Magistrate Judge for all purposes. (ECF Nos. 6, 9.)

1 After carefully considering the record and the parties' briefing, the court GRANTS IN  
2 PART plaintiff's motion for summary judgment, DENIES the Commissioner's cross-motion for  
3 summary judgment, and REMANDS the action for further administrative proceedings consistent  
4 with this order.

5 I. BACKGROUND

6 Plaintiff was born on December 26, 1963, has a sixth grade education, speaks Spanish and  
7 only a little bit of English, and previously worked as a cement mason. (Administrative Transcript  
8 ("AT") 14, 17, 27-28, 36, 129, 152.)<sup>2</sup> On September 12, 2012, plaintiff applied for DIB, alleging  
9 that his disability began on August 14, 2008, and that he was disabled primarily due to lower back  
10 pain. (AT 11, 129, 151, 157.) After plaintiff's application was denied initially and on  
11 reconsideration, plaintiff requested a hearing before an administrative law judge ("ALJ"), which  
12 took place on January 13, 2014, and at which plaintiff, represented by an attorney, and a  
13 vocational expert ("VE") testified. (AT 11, 23-43.) The ALJ subsequently issued a decision  
14 dated February 21, 2014, determining that plaintiff had not been under a disability, as defined in  
15 the Act, from August 14, 2008, plaintiff's alleged disability onset date, through March 31, 2013,  
16 plaintiff's date last insured. (AT 11-18.) The ALJ's decision became the final decision of the  
17 Commissioner when the Appeals Council denied plaintiff's request for review on August 27,  
18 2015. (AT 1-3.) Plaintiff then filed this action in federal district court on October 22, 2015, to  
19 obtain judicial review of the Commissioner's final decision. (ECF No. 1.)

20 II. ISSUES PRESENTED

21 On appeal, plaintiff raises the following issues: (1) whether the ALJ improperly rejected  
22 the opinion of plaintiff's chiropractor; (2) whether the ALJ's finding of transferrable skills is not  
23 properly supported by the record; and (3) whether plaintiff should be found disabled under the  
24 Grids.

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26 <sup>2</sup> 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 III. LEGAL STANDARD

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

13 IV. DISCUSSION

14 Summary of the ALJ’s Findings

15 The ALJ evaluated plaintiff’s entitlement to DIB pursuant to the Commissioner’s standard  
16 five-step analytical framework.<sup>3</sup> As an initial matter, the ALJ determined that plaintiff met the

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

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

27 Step two: Does the claimant have a “severe” impairment? If so, proceed to step  
28 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.

Step four: Is the claimant capable of performing her past relevant work? If so, the

1 insured status requirements of the Act for purposes of DIB through March 31, 2013. (AT 13.) At  
2 the first step, the ALJ concluded that plaintiff had not engaged in substantial gainful activity from  
3 August 14, 2008, his alleged disability onset date, through March 31, 2013, his date last insured.  
4 (Id.) At step two, the ALJ found that plaintiff had the following severe impairment through the  
5 date last insured: degenerative disc disease. (Id.) However, at step three, the ALJ determined  
6 that, through the date last insured, plaintiff did not have an impairment or combination of  
7 impairments that met or medically equaled the severity of an impairment listed in 20 C.F.R. Part  
8 404, Subpart P, Appendix 1. (Id.)

9 Before proceeding to step four, the ALJ assessed plaintiff's residual functional capacity  
10 ("RFC") as follows:

11 After careful consideration of the entire record, the undersigned  
12 finds that, through the date last insured, the claimant had the  
13 residual functional capacity to perform a wide range of medium  
14 work as defined in 20 CFR 404.1567(c). The claimant is able to lift  
15 and carry 50 pounds occasionally, 25 pounds frequently, sit six  
16 hours, and stand and walk each for six hours during a normal eight  
17 hour workday. The claimant is able to frequently stoop. He has  
18 very limited ability to communicate in English.

19 (AT 13-14.)

20 At step four, the ALJ determined that, through the date last insured, plaintiff was unable to  
21 perform any past relevant work. (AT 17.) However, at step five, the ALJ found that, in light of  
22 plaintiff's age, education, work experience, transferable skills, and RFC, and based on the VE's  
23 testimony, there were jobs that existed in significant numbers in the national economy that  
24 plaintiff could have performed through the date last insured. (Id.) Thus, the ALJ concluded that

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25 claimant is not disabled. If not, proceed to step five.

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

28 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.

1 plaintiff had not been under a disability, as defined in the Act, from August 14, 2008, plaintiff's  
2 alleged disability onset date, through March 31, 2013, plaintiff's date last insured. (AT 18.)

3 Plaintiff's Substantive Challenges to the Commissioner's Determinations

4 *Whether the ALJ improperly rejected the opinion of plaintiff's chiropractor*

5 As noted above, plaintiff argues that the ALJ improperly rejected the opinion of plaintiff's  
6 chiropractor, Dr. Antonio Soto.

7 The weight given to medical opinions depends in part on whether they are proffered by  
8 treating, examining, or non-examining professionals. Holohan v. Massanari, 246 F.3d 1195,  
9 1201-02 (9th Cir. 2001); Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). Generally speaking,  
10 a treating physician's opinion carries more weight than an examining physician's opinion, and an  
11 examining physician's opinion carries more weight than a non-examining physician's opinion.  
12 Holohan, 246 F.3d at 1202.

13 To evaluate whether an ALJ properly rejected a medical opinion, in addition to  
14 considering its source, the court considers whether (1) contradictory opinions are in the record;  
15 and (2) clinical findings support the opinions. An ALJ may reject an uncontradicted opinion of a  
16 treating or examining medical professional only for "clear and convincing" reasons. Lester, 81  
17 F.3d at 830-31. In contrast, a contradicted opinion of a treating or examining professional may be  
18 rejected for "specific and legitimate" reasons. Id. at 830. While a treating professional's opinion  
19 generally is accorded superior weight, if it is contradicted by a supported examining  
20 professional's opinion (supported by different independent clinical findings), the ALJ may  
21 resolve the conflict. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995) (citing Magallanes  
22 v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)). The regulations require the ALJ to weigh the  
23 contradicted treating physician opinion, Edlund, 253 F.3d at 1157,<sup>4</sup> except that the ALJ in any  
24 event need not give it any weight if it is conclusory and supported by minimal clinical findings.  
25 Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (treating physician's conclusory, minimally

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27 <sup>4</sup> The factors include: (1) length of the treatment relationship; (2) frequency of examination;  
28 (3) nature and extent of the treatment relationship; (4) supportability of diagnosis;  
(5) consistency; and (6) specialization. 20 C.F.R. § 404.1527.

1 supported opinion rejected); see also Magallanes, 881 F.2d at 751. The opinion of a non-  
2 examining professional, by itself, is insufficient to reject the opinion of a treating or examining  
3 professional. Lester, 81 F.3d at 831.

4 In this case, plaintiff injured his back at work on August 14, 2008, while lifting a 300  
5 pound roll of metal wire mesh. (AT 197.) The record demonstrates that, although plaintiff  
6 received treatment and consultations from various physicians following the accident, he was  
7 treated fairly consistently by his chiropractor, Dr. Soto, over several years. On January 9, 2014,  
8 Dr. Soto completed a form diagnosing plaintiff with lumbar disc extrusion, and opining *inter alia*  
9 that plaintiff could only stand and walk for about 2 hours a day; sit for about 2 hours a day; could  
10 never stoop or crouch; and would be absent from work more than four times per month. (AT  
11 400-02.) Although, as the ALJ observed, a chiropractor is not an “acceptable medical source”  
12 under the Commissioner’s regulations to establish whether a claimant has a medically  
13 determinable impairment, Dr. Soto is nonetheless qualified to opine as to the severity of  
14 plaintiff’s impairments and how they affect his ability to work. (AT 16.) See 20 C.F.R. §  
15 404.1513(a), (d).

16 In giving little weight to Dr. Soto’s opinion, the ALJ substantially relied on the opinion of  
17 consultative examiner Dr. Jonathan Schwartz, who examined plaintiff on January 26, 2013. (AT  
18 16-17, 289-92.) Dr. Schwartz diagnosed plaintiff with lower back pain, likely secondary to strain  
19 and degenerative disc disease, with possible lumbar radiculopathy; and opined that plaintiff could  
20 stand and walk for up to 6 hours a day, sit without limitation, lift and carry 50 pounds  
21 occasionally and 25 pounds frequently, and stoop frequently. (AT 292.) Ordinarily, because a  
22 consultative examiner personally examines the claimant, his or her opinion would be substantial  
23 evidence on which the ALJ is entitled to rely. However, in this case, the court notes that Dr.  
24 Schwartz was not provided with plaintiff’s prior medical records—only a partial Social Security  
25 Administration disability report. (AT 289.)

26 The regulations require that a consultative examiner be given any necessary background  
27 information about the plaintiff’s condition. 20 C.F.R. § 404.1517. To be sure, in some cases, the  
28 failure to provide prior records to a consultative examiner may be harmless when the record as a

1 whole is considered. However, the court cannot confidently draw such a conclusion here. The  
2 record in this case contains fairly extensive treatment notes and clinical findings by Dr. Soto and  
3 other providers, as well as objective imaging studies. By way of example, an October 1, 2008  
4 MRI noted a disc protrusion at L4-5 on the left side compressing the exiting L3, L4, and  
5 descending L5 nerve roots. (AT 385.) A subsequent MRI reviewed in July 2011 showed  
6 degenerative disc disease at L4-5 and L5-S1 with no evidence of nerve root compression, and  
7 with the previous large extruded disc herniation no longer present. (AT 382.) In a July 11, 2012  
8 evaluation by orthopedic surgeon Dr. Jeffrey Holmes, who was an agreed medical evaluator in  
9 plaintiff's worker's compensation case, Dr. Holmes found that plaintiff should be precluded from  
10 lifting greater than 15 pounds at work as well as from repetitive bending and stooping. (AT 204.)  
11 In light of the above, it was imperative for Dr. Schwartz to review plaintiff's prior records in  
12 order to render a meaningful opinion concerning plaintiff's functional capacity. Therefore, the  
13 court finds that the case should be remanded for a supplemental consultative examination, as  
14 outlined below.

15 The court declines plaintiff's invitation to remand the case for an award of benefits.  
16 Generally, if the court finds that the ALJ's decision was erroneous or not supported by substantial  
17 evidence, the court must follow the "ordinary remand rule," meaning that "the proper course,  
18 except in rare circumstances, is to remand to the agency for additional investigation or  
19 explanation." Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1099 (9th Cir. 2014). A  
20 remand for an award of benefits is inappropriate where the record has not been fully developed or  
21 there is a need to resolve conflicts, ambiguities, or other outstanding issues. Id. at 1101.

22 Here, although the court finds that Dr. Schwartz's opinion does not amount to substantial  
23 evidence for the reasons discussed above, the record contains significant ambiguities and other  
24 evidence that at least arguably raises serious doubts as to plaintiff's disability. For example, even  
25 though Dr. Soto's treatment notes are extensive, he provides very little rationale for the severe  
26 limitations assessed in January 2014. Even assuming *arguendo* that plaintiff was disabled for a  
27 certain period of time after the August 2008 work injury, the second July 2011 MRI appears to  
28 show substantial improvement and casts doubt on plaintiff's alleged continuing disability.

1 Additionally, in a follow-up November 29, 2012 letter, agreed medical evaluator Dr. Holmes  
2 ambiguously suggested that the restrictions identified in his prior July 11, 2012 report, referenced  
3 above, were “prophylactic restrictions, not necessarily functional limitations.” (AT 363.)

4 Another provider, neurosurgeon Dr. Karl Gregorius, after reviewing plaintiff’s second July 2011  
5 MRI, opined that plaintiff does not need a surgical intervention. (AT 382.) Finally, some of  
6 plaintiff’s activities, such as his working in the garden, going to the flea market, attending soccer  
7 games, driving, and traveling to Mexico by car and/or plane about three times since his alleged  
8 disability onset date, also appear to conflict with Dr. Soto’s severe limitations. (AT 14, 16, 30-  
9 31, 285.)

10 Consequently, the court finds it appropriate to remand the action for further administrative  
11 proceedings—more specifically, for a supplemental consultative examination by an appropriate  
12 specialist who is provided full access to plaintiff’s prior medical records. The ALJ may also  
13 further develop the record evidence, as deemed appropriate. Importantly, the court does not  
14 instruct the ALJ to credit any particular medical opinion, and the court expresses no opinion  
15 regarding how the evidence should ultimately be weighed, and any ambiguities or inconsistencies  
16 resolved, on remand. The ALJ may find plaintiff disabled, find plaintiff disabled for only a  
17 closed period of time, or may find plaintiff not disabled at all, provided that the decision is based  
18 on proper legal standards and supported by substantial evidence in the record as a whole.

19 *Other Issues*

20 In light of the court’s conclusion that the case should be remanded for a supplemental  
21 consultative examination, which will likely necessitate re-weighing of the medical evidence, the  
22 court declines to reach plaintiff’s remaining issues. On remand, the ALJ will have an opportunity  
23 to reconsider those matters, if appropriate.

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V. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment (ECF No. 20) is GRANTED IN PART.
2. The Commissioner's cross-motion for summary judgment (ECF No. 27) is DENIED.
3. The final decision of the Commissioner is REVERSED, and the case is REMANDED for further administrative proceedings consistent with this order pursuant to sentence four of 42 U.S.C. § 405(g).
4. The Clerk of Court shall close this case.

IT IS SO ORDERED.

Dated: April 4, 2017

  
KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE