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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NUTH PHEAKDEY PIN,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security

Defendant.

No. 2:15-cv-2450-EFB

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying his application for a period of disability and Disability Insurance Benefits (“DIB”) under Titles II of the Social Security Act. The parties have filed cross-motions for summary judgment. For the reasons discussed below, plaintiff’s motion for summary judgment is granted, the Commissioner’s motion is denied, and the matter is remanded for further proceedings.

I. BACKGROUND

Plaintiff filed an application for a period of disability and DIB, alleging that he had been disabled since April 6, 2012. Administrative Record (“AR”) 151-160. His application was denied initially and upon reconsideration. *Id.* at 86-89, 91-96. On May 5, 2014, a hearing was held before administrative law judge (“ALJ”) G. Ross Wheatley. *Id.* at 24-57. Plaintiff was represented by counsel at the hearing, at which he and a vocational expert testified. *Id.*

1 On June 5, 2014, the ALJ issued a decision finding that plaintiff was not disabled under
2 sections 216(i) and 223(d) of the Act.¹ *Id.* at 9-19. The ALJ made the following specific
3 findings:

- 4 1. The claimant meets the insured status requirements of the Social Security Act through
5 December 31, 2017.
- 6 2. The claimant has not engaged in Substantial Gainful Activity (SGA) since April 6, 2012,
7 the Alleged Onset Date (20 CFR 404.1571 *et seq.*).

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11 ¹ Disability Insurance Benefits are paid to disabled persons who have contributed to the
12 Social Security program, 42 U.S.C. §§ 401 *et seq.* Supplemental Security Income (“SSI”) is paid
13 to disabled persons with low income. 42 U.S.C. §§ 1382 *et seq.* Under both provisions,
14 disability is defined, in part, as an “inability to engage in any substantial gainful activity” due to
15 “a medically determinable physical or mental impairment.” 42 U.S.C. §§ 423(d)(1)(a) &
16 1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. *See* 20 C.F.R.
17 §§ 423(d)(1)(a), 416.920 & 416.971-76; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). The
18 following summarizes the sequential evaluation:

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

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

25 Step three: Does the claimant’s impairment or combination
26 of impairments meet or equal an impairment listed in 20 C.F.R., Pt.
27 404, Subpt. P, App.1? If so, the claimant is automatically
28 determined disabled. If not, proceed to step four.

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

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. *Yuckert*, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential
evaluation process proceeds to step five. *Id.*

1 3. The claimant has the following severe impairments: Valley Fever – fatigue – weakness;
2 left lung infection with shortness of breath; Hepatitis B; Fibromyalgia (20 CFR
3 404.1520(c)).

4 * * *

5 4. The claimant does not have an impairment or combination of impairments that meets or
6 medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart
7 P, Appendix 1 (20 CFR 404.1520(d), 404.1525 and 404.1526).

8 * * *

9 5. After careful consideration of the entire record, the undersigned finds that he claimant has
10 the Residual Functional Capacity (RFC) to perform sedentary work as defined in 20 CFR
11 404.1567(a) with the following additional limitations: can occasionally climb ladders,
ropes, or scaffolds; can frequently climb ramps or stairs; can frequently balance, stoop,
12 crouch, kneel, or crawl; must avoid all exposure to irritants, such as fumes, odors, dust,
and gases; must avoid all exposure to poorly ventilated areas; must avoid all use of
13 hazardous machinery and all exposure to unprotected heights.

14 * * *

15 6. The claimant is capable of performing Past Relevant Work (PRW) as a Cashier –
16 Gambling or Teacher Aide II. This work does not require the performance of work-
related activities precluded by the claimant’s Residual Functional Capacity (RFC) (20
17 CFR 404.1565).

18 * * *

19 7. The claimant has not been under a disability, as defined in the Social Security Act, from
20 April 6, 2012, through the date of this decision (20 CFR 404.1520(f)).

21 *Id.* at 11-19.

22 Plaintiff’s request for Appeals Council review was denied on September 30, 2015, leaving
23 the ALJ’s decision as the final decision of the Commissioner. *Id.* at 1-4.

24 II. LEGAL STANDARDS

25 The Commissioner’s decision that a claimant is not disabled will be upheld if the findings
26 of fact are supported by substantial evidence in the record and the proper legal standards were
27 applied. *Schneider v. Comm’r of the Soc. Sec. Admin.*, 223 F.3d 968, 973 (9th Cir. 2000);
28 *Morgan v. Comm’r of the Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999); *Tackett v. Apfel*,
180 F.3d 1094, 1097 (9th Cir. 1999).

1 The findings of the Commissioner as to any fact, if supported by substantial evidence, are
2 conclusive. *See Miller v. Heckler*, 770 F.2d 845, 847 (9th Cir. 1985). Substantial evidence is
3 more than a mere scintilla, but less than a preponderance. *Saelee v. Chater*, 94 F.3d 520, 521 (9th
4 Cir. 1996). “It means such evidence as a reasonable mind might accept as adequate to support a
5 conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v.*
6 *N.L.R.B.*, 305 U.S. 197, 229 (1938)).

7 “The ALJ is responsible for determining credibility, resolving conflicts in medical
8 testimony, and resolving ambiguities.” *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.
9 2001) (citations omitted). “Where the evidence is susceptible to more than one rational
10 interpretation, one of which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.”
11 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

12 III. ANALYSIS

13 Plaintiff argues that the ALJ erred in (1) failing to provide sufficient reasons for rejecting
14 the opinion of his treating psychologist; (2) discrediting his subjective complaints absent clear
15 and convincing reasons; and (3) failing to consider the side effects of his medication. ECF No. 15
16 at 10-18.

17 A. The ALJ Properly Rejected Dr. Acolaste’s Opinion

18 Plaintiff first contends that the ALJ erred by rejecting the opinion from her treating
19 psychologist, Dr. Julia Darko Acolatse, Ph.D. ECF No. 15 at 10-14. The weight given to
20 medical opinions depends in part on whether they are proffered by treating, examining, or non-
21 examining professionals. *Lester*, 81 F.3d at 834. Ordinarily, more weight is given to the opinion
22 of a treating professional, who has a greater opportunity to know and observe the patient as an
23 individual. *Id.*; *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996). To evaluate whether an
24 ALJ properly rejected a medical opinion, in addition to considering its source, the court considers
25 whether (1) contradictory opinions are in the record; and (2) clinical findings support the
26 opinions. An ALJ may reject an uncontradicted opinion of a treating or examining medical
27 professional only for “clear and convincing” reasons. *Lester*, 81 F.3d at 831. In contrast, a
28 contradicted opinion of a treating or examining medical professional may be rejected for “specific

1 and legitimate” reasons that are supported by substantial evidence. *Id.* at 830. While a treating
2 professional’s opinion generally is accorded superior weight, if it is contradicted by a supported
3 examining professional’s opinion (e.g., supported by different independent clinical findings), the
4 ALJ may resolve the conflict. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995) (citing
5 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)). However, “[w]hen an examining
6 physician relies on the same clinical findings as a treating physician, but differs only in his or her
7 conclusions, the conclusions of the examining physician are not ‘substantial evidence.’” *Orn v.*
8 *Astrue*, 495 F.3d 625, 632 (9th Cir. 2007).

9 Plaintiff began receiving treatment from psychologist Dr. Juliet Acolatse, Ph.D., in
10 January 2013. AR 252. In May 2014, Dr. Acolatse completed a Mental Disorder Questionnaires
11 Form. *Id.* at 462-468. She diagnosed plaintiff with adjustment disorder with mixed anxiety and
12 depression and post-traumatic stress disorder. *Id.* at 467. With regards to daily activities, Dr.
13 Acolatse noted plaintiff’s reports that he is able to take care of his activities of daily living, but
14 with great effort due to pain, fatigue, and lack of motivation. *Id.* at 465. With regards to social
15 function, she stated that plaintiff reported no pleasure in life, an inability to do anything due to
16 lack of energy, difficulty sleeping, memory problems, and feeling irritable, withdrawn, and
17 uncertain about how he would react to stress in the workplace. *Id.* at 465-466. Dr. Acolatse
18 noted that plaintiff presented with chronic depression from childhood trauma and abuse, and that
19 he “report[ed] more severe symptoms of depression and post-traumatic stress disorder with
20 delayed onset that significantly impact his daily functioning.” *Id.* at 466. As for any limitations
21 regarding adaptation to work situations, Dr. Acolatse noted plaintiff’s reports that chronic pain
22 made him easily irritable and caused frequent anger outbursts. *Id.* at 466. Plaintiff also reported
23 difficulty with short term memory and that he gets confused easily. *Id.*

24 In September 2012, plaintiff underwent a psychological evaluation, which was performed
25 by examining licensed psychologist Dr. Davis Richwerger, Ed.D. *Id.* at 451-457. Plaintiff
26 reported anger and short term memory problems, getting stressed easily, difficulty concentrating,
27 and often feeling anxious or depressed. *Id.* at 451-452. At that time, plaintiff denied receiving
28 psychiatric treatment or taking psychiatric medications. *Id.* at 452. On examination, plaintiff’s

1 mannerisms were within normal limits; he was fully oriented to time, place, person and purpose
2 of evaluation; verbal responses were within normal limits and not delayed or diminished; and
3 thought process was clear and rational. *Id.* at 453. With regards to understanding instructions,
4 plaintiff's performance was consistent with a low level of effort throughout the evaluation and
5 was inconsistent with early aspects of his verbal behavior. *Id.* at 453-454. Plaintiff's affect and
6 emotional expression was somewhat dysphoric and dramatic, and he tended to give up quickly on
7 many tasks. *Id.* at 454. Dr. Richwerger concluded that results from the tests performed appeared
8 to be invalid and to be significant underestimates of plaintiff's actual abilities due to performance
9 consistent with low effort. *Id.* As a result, Dr. Richwerger could not provide an accurate
10 diagnosis or functional assessment. *Id.* at 456-457.

11 Two non-examining sources, Dr. Joshua D. Schwartz, Ph.D., and Dr. G. Johnson, M.D.,
12 reviewed plaintiff's medical records and both concluded that there was insufficient evidence to
13 assess plaintiff's mental functional limitations. *Id.* at 65-66, 79-80.

14 In assessing plaintiff's RFC, the ALJ gave "less weight" to Dr. Acolatse's opinion. As
15 noted, Drs. Richwerger, Schwartz, and Johnson did not provide any opinion regarding plaintiff's
16 functional limitations. This left Dr. Acolatse's opinion uncontradicted. Therefore it could be
17 rejected if based upon clear and convincing reasons supported by substantial evidence.² *Lester*,
18 81 F.3d at 831. As discussed below, the ALJ's rejection of Dr. Acolatse's opinion does not meet
19 that standard.

20 The ALJ found that Dr. Acolatse's treating opinion was "unsupported by the objective
21 Medical Evidence of Record." AR at 16. However, no explanation is provided for that
22 conclusion. This conclusory statement, without more, cannot constitute a clear and convincing
23 reason for rejecting the treating physician's opinion. An ALJ may satisfy his burden of providing
24 sufficient reasons for rejecting a medical opinion "by setting out a detailed and thorough
25 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
26

27 ² While the ALJ purported to give the opinion "less weight," it is clear that he rejected
28 Dr. Acolatse's opinion as plaintiff's RFC does not include any mental functional limitations. *See*
AR 13.

1 making findings.” *Embrey v. Bowen*, 849 F.2d 418, 421 (9th Cir.1988). As explained by the
2 Ninth Circuit:

3 To say that medical opinions are not supported by sufficient
4 objective findings does not achieve the level of specificity our prior
5 cases have required even when the objective factors are listed
6 seriatim. The ALJ must do more than offer his own conclusions.
He must set forth his own interpretation and explain why he, rather
than the doctors, are correct.

7 *Regenniter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1299 (9th Cir. 1999).

8 The ALJ failed to identify any records that were contrary to Dr. Acolaste’s opinion or
9 explain why the medical evidence of record did not support this treating doctor’s opinion.
10 Accordingly, the ALJ’s conclusory statement does not constitute a clear and convincing reason
11 for rejecting the uncontradicted treating opinion from Dr. Acolatse.

12 In the same vein, the ALJ concluded, without explanation, that Dr. Acolatse’s opinion was
13 unsupported by plaintiff’s admitted daily activities. AR 16. Again, the ALJ failed to point to any
14 particulars for why he reached this conclusion. He did not identify what activities performed by
15 plaintiff that were inconsistent with Dr. Acolatse’s opinion. In an earlier portion of the decision,
16 the ALJ stated that plaintiff could bathe and dress himself, and sometimes he does dishes and
17 other light household chores. *Id.* at 12. The ALJ, however, did not specify whether these
18 particular activities are the ones that he found to be inconsistent with Dr. Acolatse’s opinion, nor
19 did he specify how these very limited activities are inconsistent with Dr. Acolatse’s opinion.

20 Lastly, the ALJ rejected Dr. Acolatse’s opinion because it appeared to be based on
21 plaintiff’s subjective complaints rather than objective medical evidence. *Id.* “An ALJ may reject
22 a physician’s opinion where it is premised primarily on plaintiff’s subjective complaints and the
23 ALJ properly discounted plaintiff’s credibility.” *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041
24 (9th Cir. 2008). With the exception of a few objective observations, the vast majority of
25 statements provided by Dr. Acolatse were premised by either “patient reported” or “per patient’s
26 report.” AR 462-466. But the impairments under treatment were psychological and the diagnosis
27 and treatment necessarily dependent to some degree on plaintiff’s statements. However,
28 assuming that the record supports the ALJ’s finding that Dr. Acolatse relied heavily on plaintiff’s

1 subjective complaints, Dr. Acolatse’s reliance on those complaints does not constitute a clear and
2 convincing reasons because, as explained below, the ALJ failed to “properly discount[] plaintiff’s
3 credibility.” *Tommasetti v. Astrue*, 533 F.3d at 1041. Thus, the ALJ failed to provided legally
4 sufficient reasons for rejecting Dr. Acolatse’s opinion.

5 The ALJ’s failure to provide a sufficient explanation for his treatment of Dr. Acolatse’s
6 opinion is troubling under the circumstances of this case. The ALJ’s written decision is devoid of
7 any logical explanation for how the ALJ reached his conclusion that plaintiff has no mental
8 limitations impacting his ability to work. The ALJ rejected Dr. Acolatse’s treating opinion and
9 purported to give “significant weight” to Dr. Richwerger’s opinion because it was “consistent
10 with the longitudinal Medical Evidence of Record (MER) and with the claimant’s admitted
11 activities of daily living” *Id.* at 15-16. As noted above, Dr. Richwerger did not provide an
12 opinion regarding plaintiff’s functional limitations because the test results from his examination
13 of plaintiff were invalid. Thus, there was no opinion to accord significant weight. To add to the
14 confusion, the ALJ goes on to state that he “determined additional limitations [than those assessed
15 by Dr. Richwerger] are appropriate in light of the totality of the medical evidence of record and
16 the claimant’s subjective complaints.” *Id.* at 16. Again, Dr. Richwerger did not assess any
17 limitations. Moreover, despite finding that “additional limitations are appropriate,” plaintiff’s
18 RFC does not include any mental functional limitations.

19 As far as the court can discern, the ALJ appeared to rely on non-examining physicians Dr.
20 Schwarz and Dr. Johnson’s conclusion that there was insufficient evidence to establish mental
21 impairments. In reaching their conclusion, both physicians noted that there was an absence of
22 medication, treatment, or hospitalization to support a mental impairment. *Id.* at 65-66, 79. The
23 ALJ, while acknowledging that plaintiff was seeing a psychologist, similarly found that plaintiff
24 “has received limited treatment, and is not currently receiving any mental health treatment or
25 taking medication.” *Id.* at 14. This finding, however, is not supported by the record, which
26 documents treatment for anxiety and depression.

27 In October 2012, plaintiff reported being angry and stressed, and weight loss and
28 depression were noted. AR 304, 206. He was diagnosed with anxiety, state unspecified. January

1 2013 treatment note indicates that plaintiff complained of depression and anxiety, and that he was
2 prescribed Ativan. AR 312. He was diagnosed with depression and anxiety, state unspecified.
3 *Id.* at 314. In March 2013, plaintiff complained of depression and difficulty sleeping. *Id.* at 315.
4 He was diagnosed with major depressive disorder, unspecified, and anxiety, state unspecified, and
5 again prescribed Ativan. *Id.* at 317. In May 2013, plaintiff was seen for anxiety. *Id.* at 268. He
6 was diagnosed with major depressive disorder and anxiety, state unspecified, and prescribed
7 Ativan and Trazodone. *Id.* at 268-270. A November 2013 treatment notes reflect that plaintiff's
8 mood was depressed and no concentration to examination was noted. *Id.* at 278. His diagnosis
9 included major depression disorder and anxiety, state unspecified, and his medications list again
10 included Trazodone and Ativan. *Id.* Plaintiff was also seen in February 2014 for anxiety,
11 weakness, and weight loss, and it was noted that plaintiff continued to take antidepressant and
12 antianxiety medications. *Id.* at 459. Plaintiff also testified at the administrative hearing that he
13 was taking trazodone for his depression. *Id.* at 38. This directly contradicts the ALJ finding that
14 plaintiff was not receiving any mental treatment or medication.³

15 Based on the foregoing, the court finds that the ALJ erred by failing to provide legally
16 sufficient reasons for rejecting Acolatse's opinion, and also by failing to adequately explain his
17 finding that plaintiff had no mental impairments.

18 B. Plaintiff's Creditability

19 Plaintiff next argues that the ALJ erred by failing to give clear and convincing reasons for
20 rejecting his subjective complaints. ECF No. 15 at 14-16.

21 In evaluating whether subjective complaints are credible, the ALJ should first consider
22 objective medical evidence and then consider other factors. *Bunnell v. Sullivan*, 947 F.2d 341,
23 344 (9th Cir. 1991) (en banc). If there is objective medical evidence of impairment, the ALJ may
24 then consider the nature of the symptoms alleged, including aggravating factors, medication,
25 treatment and functional restrictions. *See id.* at 345-347. The ALJ also may consider: (1) the

26 ³ Dr. Schwarz's conclusion that there was insufficient evidence to assess plaintiff's
27 mental functional limitations is understandable, given that majority of medical evidence
28 concerning plaintiff's mental health treatment were produced after October 30, 2012, the date Dr.
Schwarz reviewed the record. *See* AR 65-66.

1 applicant's reputation for truthfulness, prior inconsistent statements or other inconsistent
2 testimony, (2) unexplained or inadequately explained failure to seek treatment or to follow a
3 prescribed course of treatment, and (3) the applicant's daily activities. *Smolen*, 80 F.3d at 1284.
4 Work records, physician and third party testimony about nature, severity and effect of symptoms,
5 and inconsistencies between testimony and conduct also may be relevant. *Light v. Soc. Sec.*
6 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). A failure to seek treatment for an allegedly
7 debilitating medical problem may be a valid consideration by the ALJ in determining whether the
8 alleged associated pain is not a significant nonexertional impairment. *See Flaten v. Secretary of*
9 *HHS*, 44 F.3d 1453, 1464 (9th Cir. 1995). The ALJ may rely, in part, on his or her own
10 observations, *see Quang Van Han v. Bowen*, 882 F.2d 1453, 1458 (9th Cir. 1989), which cannot
11 substitute for medical diagnosis. *Marcia v. Sullivan*, 900 F.2d 172, 177 n. 6 (9th Cir. 1990).
12 "Without affirmative evidence showing that the claimant is malingering, the Commissioner's
13 reasons for rejecting the claimant's testimony must be clear and convincing." *Morgan*, 169 F.3d
14 at 599.

15 At the administrative hearing, plaintiff testified that he suffers from Valley fever, which
16 presented as an infection in his left lung. AR 35. He also stated that he suffers from anxiety and
17 depression, which he attributed to several family members being executed in Cambodia prior to
18 plaintiff moving to the United States. *Id.* at 35-36. He also indicated that he suffers from back,
19 shoulder, knee, hip, and joint pain, but that his depression is his most significant impairment. *Id.*
20 at 36. He stated that he was taking trazodone for his depression and that his physician
21 recommended he undergo counseling, which he claimed he couldn't afford. *Id.* at 37-38.
22 Plaintiff also stated he takes gabapentin, which helps with pain but causes him to feel dizzy and
23 tired. *Id.* at 41.

24 Plaintiff further testified that on an average day his wife will wake him up to eat, he
25 watches a little television, and then goes back to sleep. *Id.* at 42. He can shower and dress
26 himself, but requires reminders from his wife. *Id.* He stated that he does not do any cooking, but
27 is able to clean his own dish after a meal. *Id.* at 42-43. He also indicated that he did not read due

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1 to difficulty concentrating. *Id.* at 44. He spends most of his time with his wife and five year old
2 son, but occasionally a friend will come over and listen to music. *Id.* at 45-46.

3 The ALJ concluded that there were several factors that reduced plaintiff’s credibility. AR
4 13-14. First, the ALJ found that plaintiff’s allegations of severe impairments were inconsistent
5 with his ability to “engage in a somewhat normal level of daily activity and interaction.” AR 14.
6 The ALJ elaborated that while plaintiff’s “activities of daily living were somewhat limited, some
7 of the physical and mental abilities and social interactions required in order to perform these
8 activities are the same as those necessary to obtain and maintain employment and are inconsistent
9 with the presence of an incapacitating or debilitating condition.” AR 14. An ALJ may discredit a
10 claimant’s allegations of severe limitations or pain where that the claimant “is able to spend a
11 substantial part of his day engaged in pursuits involving the performance of physical [or mental]
12 functions that *are* transferable to a work setting” *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
13 1989) (emphasis in original). But “[t]he ALJ must make ‘specific findings relating to [the daily]
14 activities’ and their transferability to conclude that a claimant’s daily activities warrant an adverse
15 credibility determination.” *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (quoting *Burch*, 400
16 F.3d at 681) (modification in original).

17 Here, none of the daily activities identified by the ALJ evidence a capability to engage in
18 normal personal activities, much less demonstrate an ability to engage in work related tasks on a
19 consistent basis. The ALJ observed that plaintiff was able to bathe and dress himself, and that
20 sometimes he did “the dishes and other light household chores.”⁴ *Id.* at 14. These limited
21 activities do not demonstrate that plaintiff can perform work related activities on a sustained
22 basis. *See Garrison v. Colvin*, 759 F.3d 995, 1015-16 (9th Cir. 2014) (“We have repeatedly
23 warned that ALJs must be especially cautious in concluding that daily activities are inconsistent
24 with testimony about pain, because impairments that would unquestionably preclude work and all
25 the pressures of a workplace environment will often be consistent with doing more than merely

26 ⁴ It’s unclear what “other light household chores” the ALJ believed plaintiff could
27 perform. Plaintiff testified that he doesn’t cook or take out the trash. AR 43-44. When asked if
28 he helps out his wife around the house, the only task he said he could do was clean his dish after
he finished eating a meal. *Id.* at 43.

1 resting in bed all day,” and holding that the ALJ erred in concluding that the plaintiff’s reported
2 daily activities, which “included talking on the phone, preparing meals, cleaning her room, and
3 helping to care for her daughter,” were inconsistent with her pain complaints); *Fair*, 885 F.2d
4 597, 603 (9th Cir. 1989) (“many home activities are not easily transferable to what may be the
5 more grueling environment of the workplace, where it might be impossible to periodically rest or
6 take medication”).

7 The only other activities identified by the ALJ as demonstrating an ability to work were
8 plaintiff’s ability to take his son to the park and perform personal care without any problems. AR
9 14. Both findings, however, are based on mischaracterizations of evidence. At the administrative
10 hearing, the ALJ asked plaintiff if he ever takes his son to the park. AR 46. Plaintiff’s response
11 was “Last week, I went, but I couldn’t go. I stayed in the car because my wife took him. I would
12 stay in the car.”⁵ AR 46. This testimony establishes little more than plaintiff’s ability to sit in a
13 car, and does not demonstrate an ability to perform work-related tasks.⁶ To the contrary, it
14 indicates that plaintiff was not capable of leaving the car and going to the park to engage in
15 physical activity with his son. The ALJ also found that plaintiff has “no problem with personal
16 care” based on third party functional report submitted by plaintiff’s friend. *Id.* at 14. On the
17 form, plaintiff’s friend checked a box indicating that plaintiff has no problem with personal care.
18 *Id.* at 207. However, directly below the box he explained that plaintiff needs to be reminded to
19 bathe, take care of his hair, and to feed himself. *Id.* In another section of the form, the friend also
20 reported that plaintiff needed help, encouragement, or reminders to go to sleep, bathe, change
21 clothes, eat, and take his medication. *Id.* at 208. Thus, the ALJ’s findings that plaintiff can care
22 for his personal needs and take his son to the park are not supported by substantial evidence.

24 ⁵ While this response, viewed in isolation, could possibly be conceived as equivocal,
25 English is plaintiff’s second language and the response is consistent in form with other statements
26 made by plaintiff at his administrative hearing.

27 ⁶ The mischaracterization of this evidence is particularly troubling given the ALJ’s strong
28 reliance on plaintiff’s ability to take his child to the park as evidence that he is not disabled. The
ALJ’s decision references plaintiff’s ability to take his son to the park no less than 5 times. *See*
generally AR 9-19.

1 The ALJ also found that plaintiff’s allegations regarding the severity of his impairments
2 were not consistent with the objective medical evidence of record. AR 14. Specifically, the ALJ
3 noted that plaintiff only received conservative treatment and that the objective medical findings
4 “do not support more restrictive functional limitations than those assessed” *Id.* The ALJ,
5 however, failed to identify specific medical records that were inconsistent with plaintiff’s
6 subjective complaint or evincing conservative treatment. Instead, the ALJ offered only his
7 general conclusions, which are insufficient to support the adverse credibility finding. *See Lester*,
8 81 F.3d at 834 (“General findings are insufficient; rather, the ALJ must identify what testimony is
9 not credible and what evidence undermines the claimant’s complaints.”).

10 The ALJ did provide specific findings for his conclusion that plaintiff’s complaints
11 regarding depression were not fully credibility. However, none of the specific findings are
12 supported by record. The ALJ noted, as he did in numerous other areas of the decision, that
13 plaintiff “reported he is unable to work or play with his son, but also acknowledged that they had
14 in fact gone to the park the previous week.” As explained above, plaintiff testified that he stayed
15 in the car while his wife and son played at the park. Thus, substantial evidence does not support
16 the inconsistency relied on by the ALJ. Next, the ALJ noted that plaintiff had “seen a
17 psychologist, but has received limited treatment, and is not currently receiving any mental health
18 treatment or taking any medications.” *Id.* As previously discussed, this finding is not supported
19 by the medical evidence of record, which consistently documents plaintiff’s complaints of
20 depression and anxiety, which were treated with medication.

21 The ALJ also concluded that plaintiff was not fully credible because he received
22 unemployment benefits during 2012 and 2013, and to be eligible for such benefits plaintiff was
23 required to certify that he was physically and mentally able and willing to work. AR 11. The
24 receipt of unemployment benefits is not necessarily inconsistent with disability under the Social
25 Security Act, as suggested by the ALJ. *See Freeman v. Colvin*, 2014 WL 793148, at *2 n.1
26 (W.D. Wash. Feb. 26, 2014) (quoting an Appeals Council decision noting that a memorandum,
27 dated August 9, 2010, from the Chief Administrative Law Judge “makes it clear that one’s claim
28 to be able to work doesn’t contradict one’s claim to be disabled under Social Security Rules.

1 Under our sequential evaluation process, one can be found able to perform some work, and still
2 be found disabled The Chief Administrative Law Judge’s memorandum also states that
3 applications for unemployment benefits must be considered as part of the overall evidence of
4 record that is to support the ultimate determination. While such an application cannot alone
5 disqualify one for disability benefits, as the hearing decision suggests, it is to be considered as
6 part of the sequential evaluation.”); *Mulanax v. Comm’r Soc. Sec.*, 293 F. Appx 522, 523 (9th Cir.
7 2008) (“[R]eceipt of unemployment benefits does not by itself support a conclusion that
8 [plaintiff] is not credible.”); *see also* Cal. Unemp. Ins. Code § 1253.8 (“An unemployed
9 individual shall not be disqualified for eligibility for unemployment compensation benefits solely
10 on the basis that he or she is only available for part-time work.”).

11 The record does not establish that plaintiff’s receipt of unemployment benefits was based
12 on plaintiff’s representation that he could perform full time work. *See Carmickle v. Comm’r, Soc.*
13 *Sec. Admin.*, 533 F.3d 1155, 1161-62 (“[W]hile receipt of unemployment benefits can undermine
14 a claimant’s alleged inability to work, the record here does not establish whether Carmickle held
15 himself out as available for full-time or part-time work. Only the former is inconsistent with his
16 disability allegations.”). Accordingly, the ALJ’s conclusory finding that the receipt of
17 unemployment benefits reduces plaintiff’s credibility is not supported by substantial evidence.

18 Lastly, the ALJ also found that plaintiff’s overall demeanor and appearance at the
19 administrative hearing was not consistent with the degree of his alleged limitations. AR 13.
20 While an ALJ may consider his own observations at the hearing in assessing the plaintiff’s
21 credibility, such observations cannot “form the sole basis for discrediting a person’s testimony.”
22 *Orn v. Astrue*, 495 F.3d 625, 640 (9th Cir. 2007). As all other reasons provided by the ALJ are
23 deficient, the ALJ’s own observations cannot support his adverse credibility finding.

24 C. Remand for Further Proceedings

25 “A district court may reverse the decision of the Commissioner of Social Security, with or
26 without remanding the cause for a rehearing, but the proper course, except in rare circumstances,
27 is to remand to the agency for additional investigation or explanation.” *Dominguez v. Colvin*, 808
28 F.3d 406, 407 (9th Cir. 2015) (internal quotes and citations omitted). “Unless the district court

1 concludes that further administrative proceedings would serve no useful purpose, it may not
2 remand with a direction to provide benefits.” *Id.*

3 Here, the record indicates that the ALJ failed to adequately consider evidence concerning
4 plaintiff’s mental impairments. Accordingly, remand for further proceedings is appropriate to
5 allow the ALJ to consider such evidence and make appropriate findings.

6 IV. CONCLUSION

7 Accordingly, it is hereby ORDERED that:

- 8 1. Plaintiff’s motion for summary judgment is granted;
- 9 2. The Commissioner’s cross-motion for summary judgment is denied;
- 10 3. The matter is remanded for further proceedings consistent with this order; and
- 11 4. The Clerk is directed to enter judgment in plaintiff’s favor.

12 DATED: March 28, 2017.

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14 EDMUND F. BRENNAN
15 UNITED STATES MAGISTRATE JUDGE
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