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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ASHOT SHIBOYAN
Plaintiff,
v.
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 2:16-cv-1152-KJN

ORDER

Plaintiff Ashot Shiboyan 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”).¹ In his motion for summary judgment, plaintiff principally contends that the Commissioner erred by finding that plaintiff was not disabled from November 1, 2013, plaintiff’s alleged disability onset date, through August 28, 2015, the date of the final administrative decision. (ECF No. 18.) The Commissioner opposed plaintiff’s motion and filed a cross-motion for summary judgment. (ECF No. 23.) No optional reply brief was filed.

¹ 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, 17.)

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.

4 I. BACKGROUND

5 Plaintiff was born on March 11, 1954; completed 2 years of college in the United States;
6 speaks Armenian with limited ability to communicate in English; and previously worked as a bus
7 driver and case worker. (Administrative Transcript ("AT") 29, 32-36, 46-47, 200, 202.)² On
8 January 14, 2014, plaintiff applied for DIB, alleging that his disability began on November 1,
9 2013, and that he was disabled due to back pain, left leg pain, headaches, and poor sleep. (AT 9,
10 184, 201.) After plaintiff's application was denied initially and on reconsideration, an
11 administrative law judge ("ALJ") conducted a hearing on July 30, 2015. (AT 20-50.) The ALJ
12 subsequently issued a decision dated August 28, 2015, determining that plaintiff had not been
13 under a disability, as defined in the Act, from November 1, 2013, plaintiff's alleged disability
14 onset date, through the date of the ALJ's decision. (AT 9-15.) The ALJ's decision became the
15 final decision of the Commissioner when the Appeals Council denied plaintiff's request for
16 review on March 31, 2016. (AT 1-3.) Plaintiff subsequently filed this action on May 27, 2016, to
17 obtain judicial review of the Commissioner's final decision. (ECF No. 1.)

18 II. ISSUES PRESENTED

19 On appeal, plaintiff raises the following issues: (1) whether the ALJ improperly
20 discounted the opinion of plaintiff's treating physician; (2) whether the ALJ failed to properly
21 consider plaintiff's obesity; (3) whether the ALJ erred at step four of the sequential disability
22 analysis; and (4) whether the ALJ improperly discounted plaintiff's credibility.³

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25 ² Because the parties are familiar with the factual background of this case, including plaintiff's
26 medical and mental health history, the court does not exhaustively relate those facts in this order.
27 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.

28 ³ Plaintiff's briefing raised these issues in a somewhat different order.

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.⁴ As an initial matter, the ALJ determined that plaintiff met the

17 ⁴ 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 December 31, 2018. (AT 11.)
2 At the first step, the ALJ concluded that plaintiff had not engaged in substantial gainful activity
3 since November 1, 2013, plaintiff's alleged disability onset date. (Id.) At step two, the ALJ
4 found that plaintiff had the following severe impairments: degenerative disc disease of the
5 lumbar and thoracic spine with radiculopathy and chronic lumbosacral strain, degenerative
6 disease of the left hip, and obesity. (Id.) However, at step three, the ALJ determined that plaintiff
7 did not have an impairment or combination of impairments that met or medically equaled the
8 severity of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AT 12.)

9 Before proceeding to step four, the ALJ assessed plaintiff's RFC as follows:

10 After careful consideration of the entire record, I find that the
11 claimant has the residual functional capacity to perform light work
12 as defined in 20 CFR 404.1567(b) except the claimant can
13 occasionally climb, balance, stoop, kneel, crouch and/or crawl and
14 must avoid concentrated exposure to extreme cold and to dampness.

15 (AT 12.) At step four, the ALJ determined that plaintiff was capable of performing his past
16 relevant work as a caseworker. (AT 14.) Thus, the ALJ concluded that plaintiff had not been
17 under a disability, as defined in the Act, from November 1, 2013, plaintiff's alleged disability
18 onset date, through August 28, 2015, the date of the ALJ's decision. (AT 15.)

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

20 *Whether the ALJ improperly discounted the opinion of plaintiff's treating*
21 *physician*

22 The weight given to medical opinions depends in part on whether they are proffered by

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

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

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

27 The claimant bears the burden of proof in the first four steps of the sequential evaluation
28 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 treating, examining, or non-examining professionals. Holohan v. Massanari, 246 F.3d 1195,
2 1201-02 (9th Cir. 2001); Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). Generally speaking,
3 a treating physician’s opinion carries more weight than an examining physician’s opinion, and an
4 examining physician’s opinion carries more weight than a non-examining physician’s opinion.
5 Holohan, 246 F.3d at 1202.

6 To evaluate whether an ALJ properly rejected a medical opinion, in addition to
7 considering its source, the court considers whether (1) contradictory opinions are in the record;
8 and (2) clinical findings support the opinions. An ALJ may reject an uncontradicted opinion of a
9 treating or examining medical professional only for “clear and convincing” reasons. Lester, 81
10 F.3d at 830-31. In contrast, a contradicted opinion of a treating or examining professional may be
11 rejected for “specific and legitimate” reasons. Id. at 830. While a treating professional’s opinion
12 generally is accorded superior weight, if it is contradicted by a supported examining
13 professional’s opinion (supported by different independent clinical findings), the ALJ may
14 resolve the conflict. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995) (citing Magallanes
15 v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)). The regulations require the ALJ to weigh the
16 contradicted treating physician opinion, Edlund, 253 F.3d at 1157,⁵ except that the ALJ in any
17 event need not give it any weight if it is conclusory and supported by minimal clinical findings.
18 Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (treating physician’s conclusory, minimally
19 supported opinion rejected); see also Magallanes, 881 F.2d at 751. The opinion of a non-
20 examining professional, by itself, is insufficient to reject the opinion of a treating or examining
21 professional. Lester, 81 F.3d at 831.

22 In this case, the ALJ provided several specific and legitimate reasons for discounting the
23 opinion of plaintiff’s treating physician, Dr. Michael Bass, who suggested, *inter alia*, that plaintiff
24 could only stand and walk for 1-2 hours per day, sit for less than 1 hour a day, lift a maximum of
25 5-10 pounds, concentrate sufficiently to perform simple tasks less than 50% of the day, and would

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

1 be absent from work more than 4 days per month. (AT 282-85, 313-14.)

2 As an initial matter, Dr. Bass’s opinion is brief, conclusory, and unsupported by any
3 detailed clinical findings or rationale. (AT 13.) Given the severity of the opinion, one would
4 expect greater substantiation and justification for the extreme limitations assessed. As such, the
5 ALJ permissibly gave the opinion little weight. See Meanel, 172 F.3d at 1114 (treating
6 physician’s conclusory, minimally supported opinion rejected); see also Magallanes, 881 F.2d at
7 751.

8 Additionally, the ALJ rationally observed that Dr. Bass’s opinion was inconsistent with
9 the imaging studies. (AT 13.) For example, a March 31, 2014 x-ray of the lumbar spine was
10 essentially normal, except for “slight narrowing of the disc space at L3-4 where there are anterior
11 osteophytes” suggestive of degenerative disc disease at L3-4. (AT 281.) A subsequent x-ray
12 performed on October 2, 2014, revealed some “degenerative changes of the lower thoracic spine
13 with bridging osteophytes,” but was ultimately described by the radiologist as unremarkable. (AT
14 317-18.) Such mild objective findings are not what one would expect from a person who
15 allegedly has disabling functional limitations.

16 Furthermore, the ALJ reasonably relied on the opinion of consultative examiner and board
17 certified orthopedic surgeon, Dr. Dale Van Kirk, who reviewed plaintiff’s medical records,
18 personally examined plaintiff on March 29, 2014, and prepared a detailed report of his clinical
19 findings. (AT 273-80.) Dr. Van Kirk opined that plaintiff could lift and carry 20 pounds
20 occasionally and 10 pounds frequently; stand and walk for up to 6 hours a day; sit without
21 restriction; and climb, balance, stoop, kneel, crouch, and crawl occasionally. He should not be
22 required to work in extremely cold and/or damp environments. (AT 278-79.) Because Dr. Van
23 Kirk is an orthopedic specialist who personally examined plaintiff and made independent clinical
24 findings, his opinion unquestionably constitutes substantial evidence on which the ALJ was
25 entitled to rely.

26 Finally, the ALJ properly relied on the opinions of the state agency physicians, who
27 essentially opined that plaintiff was capable of performing light work with postural limitations.
28 (AT 58-59, 71-73.) See Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (“Although

1 the contrary opinion of a non-examining medical expert does not alone constitute a specific,
2 legitimate reason for rejecting a treating or examining physician's opinion, it may constitute
3 substantial evidence when it is consistent with other independent evidence in the record.”).

4 Therefore, the court finds that the ALJ's evaluation of Dr. Bass's opinion is supported by
5 the record and by the proper analysis.

6 *Whether the ALJ failed to properly consider plaintiff's obesity*

7 Plaintiff's argument that the ALJ failed to properly consider plaintiff's obesity lacks merit.
8 At step two, the ALJ specifically calculated plaintiff's body mass index and listed plaintiff's
9 obesity as a severe impairment. (AT 11.) There is no reason to believe that the ALJ did not
10 consider all of plaintiff's impairments, severe and non-severe, in formulating the RFC, and
11 plaintiff fails to point to any specific functional limitation attributable to plaintiff's obesity that
12 was omitted from the RFC. Indeed, although consultative examiner and orthopedic specialist Dr.
13 Van Kirk expressly noted that plaintiff was “markedly overweight,” he still opined that plaintiff
14 was capable of performing essentially light work with postural limitations. (AT 276, 278-79.) As
15 such, plaintiff's obesity was properly considered.

16 *Whether the ALJ erred at step four of the sequential disability analysis*

17 A claimant is deemed not disabled at step four if he is found capable of performing his
18 past work either as actually performed or as generally performed in the national economy. 20
19 C.F.R. § 404.1560(b)(2). Here, the ALJ found that plaintiff was capable of performing plaintiff's
20 past relevant work of caseworker as he actually performed it. (AT 15.) However, at the hearing,
21 plaintiff testified that he actually had to lift items weighing up to 70-80 pounds as part of that job,
22 and the VE testified that plaintiff would consequently not be able to do his past work as actually
23 performed. (AT 34-35, 44, 48.)⁶ Thus, plaintiff correctly contends that the ALJ erred at step
24 four.

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27 ⁶ Curiously, in a disability questionnaire, plaintiff noted that the same job involved “all desk
28 work” with “no heavy lifting.” (AT 206.) However, because the ALJ's decision did not discredit
plaintiff's hearing testimony in light of that apparently inconsistent prior statement, this court
declines to do so in the first instance.

1 The Commissioner posits that any such error was harmless, because the VE testified that
2 plaintiff could nonetheless do his prior work as generally performed in the national economy.
3 (AT 47.) However, the VE also testified that the position of caseworker, as generally performed
4 in the economy, had a specific vocational profile (“SVP”) of 7, which would at least arguably be
5 inconsistent with the findings of the consultative psychiatrist, Dr. Michael Zoglio, who opined
6 that plaintiff may have low to borderline intellectual functioning: “The claimant would probably
7 have difficulty managing his funds. I do not think he seems to have the intellectual capacity to
8 write checks and do his bank account.” (AT 291.) To be sure, Dr. Zoglio’s opinion is somewhat
9 ambiguous; despite ostensibly finding low to borderline intellectual functioning, he also opined
10 that plaintiff could perform simple and repetitive tasks without limitation and was only mildly
11 limited in completing detailed and complex tasks. (AT 292.) However, the ALJ never addressed
12 and resolved those ambiguities, and instead purported to give substantial weight to Dr. Zoglio’s
13 opinion, but without incorporating any specific mental limitations into the RFC. Such unresolved
14 ambiguities and inconsistencies preclude the court from finding harmless error at step four.

15 Therefore, the court finds it appropriate to remand the action for further administrative
16 proceedings. On remand, the ALJ shall give further consideration to Dr. Zoglio’s opinion and
17 whether any additional mental limitations should be incorporated into the RFC. After such
18 clarification, the ALJ shall also reconsider his step four determination, and if necessary, proceed
19 to step five of the sequential disability analysis, utilizing supplemental vocational expert
20 testimony as appropriate. The ALJ is also free to develop the record in any other respects deemed
21 appropriate. Importantly, the court does not instruct the ALJ to credit any particular opinion or
22 evidence on remand. Indeed, the court expresses no opinion regarding how the evidence should
23 ultimately be weighed, and any ambiguities or inconsistencies resolved, at any particular step on
24 remand, provided that the ALJ’s decision is based on proper legal standards and supported by
25 substantial evidence in the record as a whole.

26 Whether the ALJ improperly discounted plaintiff’s credibility

27 The court declines to reach the issue of plaintiff’s credibility at this juncture. On remand,
28 the ALJ will have an opportunity to re-examine his credibility findings on the supplemented

1 record, if appropriate.

2 V. CONCLUSION

3 For the foregoing reasons, IT IS HEREBY ORDERED that:

4 1. Plaintiff's motion for summary judgment (ECF No. 18) is GRANTED IN PART.

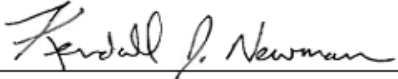
5 2. The Commissioner's cross-motion for summary judgment (ECF No. 23) is
6 DENIED.

7 3. The Commissioner's final decision is REVERSED, and the action is
8 REMANDED for further administrative proceedings consistent with this order pursuant to
9 sentence four of 42 U.S.C. § 405(g).

10 4. The Clerk of Court shall close this case.

11 IT IS SO ORDERED.

12 Dated: January 3, 2018

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15 KENDALL J. NEWMAN
16 UNITED STATES MAGISTRATE JUDGE
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