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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JAMES BROWN,

No. 2:16-CV-2349-TLN-CMK

Plaintiff,

vs.

FINDINGS AND RECOMMENDATIONS

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

_____ /

Plaintiff, who is proceeding with retained counsel, brings this action under 42 U.S.C. § 405(g) for judicial review of a final decision of the Commissioner of Social Security. Pending before the court are plaintiff’s motion for summary judgment (Doc. 24) and defendant’s cross-motion for summary judgment (Doc. 28).

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I. PROCEDURAL HISTORY

Plaintiff applied for social security benefits on September 13, 2013. In the application, plaintiff claims that disability began on November 11, 2010. Plaintiff's claim was initially denied. Following denial of reconsideration, plaintiff requested an administrative hearing, which was held on February 23, 2015, before Administrative Law Judge ("ALJ") Daniel G. Heely. In an April 8, 2015, decision, the ALJ concluded that plaintiff is not disabled based on the following relevant findings:

1. The claimant has the following severe impairment(s): psychotic disorder, depression, substance abuse, and musculoskeletal strain of the low back;
2. The claimant does not have an impairment or combination of impairments that meets or medically equals an impairment listed in the regulations;
3. The claimant has the following residual functional capacity: he can perform work activities with the following limitations: he is capable of only simple reading, writing, and speaking in English; he is limited to simple, routine, and repetitive tasks; he is limited to no more than occasional public contact; he can lift and carry 25 pounds frequently and 50 pounds occasionally; he can stand for 6 hours in an 8-hour workday with normal breaks; he can walk for 6 hours in an 8-hour workday with normal breaks; he can sit for 6 hours in an 8-hour workday with normal breaks; he can never climb ladders, ropes, or scaffolds; he can occasionally climb ramps and stairs; he can never work around hazards such as dangerous moving machinery and unprotected heights; he cannot operate motor vehicles; and
4. Considering the claimant's age, education, work experience, residual functional capacity, and vocational expert testimony, there are jobs that exist in significant numbers in the national economy that the claimant can perform.

After the Appeals Council declined review on August 3, 2016, this appeal followed.

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II. STANDARD OF REVIEW

The court reviews the Commissioner's final decision to determine whether it is: (1) based on proper legal standards; and (2) supported by substantial evidence in the record as a whole. See Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). "Substantial evidence" is more than a mere scintilla, but less than a preponderance. See Saelee v. Chater, 94 F.3d 520, 521

1 (9th Cir. 1996). It is “. . . such evidence as a reasonable mind might accept as adequate to
2 support a conclusion.” Richardson v. Perales, 402 U.S. 389, 402 (1971). The record as a whole,
3 including both the evidence that supports and detracts from the Commissioner’s conclusion, must
4 be considered and weighed. See Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986); Jones
5 v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not affirm the Commissioner’s
6 decision simply by isolating a specific quantum of supporting evidence. See Hammock v.
7 Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the administrative
8 findings, or if there is conflicting evidence supporting a particular finding, the finding of the
9 Commissioner is conclusive. See Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987).
10 Therefore, where the evidence is susceptible to more than one rational interpretation, one of
11 which supports the Commissioner’s decision, the decision must be affirmed, see Thomas v.
12 Barnhart, 278 F.3d 947, 954 (9th Cir. 2002), and may be set aside only if an improper legal
13 standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th
14 Cir. 1988).

16 III. DISCUSSION

17 In his motion for summary judgment, plaintiff argues: (1) the ALJ improperly
18 rejected Dr. Weiss’ opinion; (2) the ALJ erred in rejecting plaintiff’s statements and testimony as
19 not credible; and (3) the ALJ improperly rejected lay witness testimony from plaintiff’s mother,
20 Veverly McCoy, and plaintiff’s sister, Chyvon Johnson.

21 A. Evaluation of Medical Opinions

22 The weight given to medical opinions depends in part on whether they are
23 proffered by treating, examining, or non-examining professionals. See Lester v. Chater, 81 F.3d
24 821, 830-31 (9th Cir. 1995). Ordinarily, more weight is given to the opinion of a treating
25 professional, who has a greater opportunity to know and observe the patient as an individual,
26 than the opinion of a non-treating professional. See id.; Smolen v. Chater, 80 F.3d 1273, 1285

1 (9th Cir. 1996); Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987). The least weight is given
2 to the opinion of a non-examining professional. See Pitzer v. Sullivan, 908 F.2d 502, 506 & n.4
3 (9th Cir. 1990).

4 In addition to considering its source, to evaluate whether the Commissioner
5 properly rejected a medical opinion the court considers whether: (1) contradictory opinions are
6 in the record; and (2) clinical findings support the opinions. The Commissioner may reject an
7 uncontradicted opinion of a treating or examining medical professional only for “clear and
8 convincing” reasons supported by substantial evidence in the record. See Lester, 81 F.3d at 831.
9 While a treating professional’s opinion generally is accorded superior weight, if it is contradicted
10 by an examining professional’s opinion which is supported by different independent clinical
11 findings, the Commissioner may resolve the conflict. See Andrews v. Shalala, 53 F.3d 1035,
12 1041 (9th Cir. 1995). A contradicted opinion of a treating or examining professional may be
13 rejected only for “specific and legitimate” reasons supported by substantial evidence. See Lester,
14 81 F.3d at 830. This test is met if the Commissioner sets out a detailed and thorough summary of
15 the facts and conflicting clinical evidence, states her interpretation of the evidence, and makes a
16 finding. See Magallanes v. Bowen, 881 F.2d 747, 751-55 (9th Cir. 1989). Absent specific and
17 legitimate reasons, the Commissioner must defer to the opinion of a treating or examining
18 professional. See Lester, 81 F.3d at 830-31. The opinion of a non-examining professional,
19 without other evidence, is insufficient to reject the opinion of a treating or examining
20 professional. See id. at 831. In any event, the Commissioner need not give weight to any
21 conclusory opinion supported by minimal clinical findings. See Meanel v. Apfel, 172 F.3d 1111,
22 1113 (9th Cir. 1999) (rejecting treating physician’s conclusory, minimally supported opinion);
23 see also Magallanes, 881 F.2d at 751.

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1 In this case, the ALJ relied on the opinions of state agency non-examining
2 consultants Drs. K. Gregg (see CAR at Exhibit C3A) and Jacobson (see CAR at Exhibit C1A).¹
3 Both doctors found that plaintiff can perform unskilled work with limited public contact. The
4 ALJ concluded these opinions are “. . .supported by the generally adequate mental functioning
5 that the claimant exhibited at mental evaluations held during the period from October 2013
6 through November 2014" and “consistent with the admitted effectiveness of the claimant’s
7 psychiatric medications.” The ALJ also found that the opinions of Drs. Gregg and Jacobson are
8 supported by plaintiff’s improvement following increased compliance with medication as well as
9 the absence of evidence of ongoing interpersonal problems.

10 As to Dr. Weiss, the ALJ stated:

11 The claimant’s treating source occasionally assigned the claimant Global
12 Assessment of Functioning scores that reflect serious to extreme difficulty
13 in social or occupational functioning during the adjudicated period
14 (Exhibits C3F, C4F, and C8F). Wendy S. Weiss, Ph.D., a psychologist
15 who examined the claimant on February 11, 2015, also concluded that the
16 claimant had a markedly limited ability to maintain attention and
17 concentration, perform activities within a schedule, maintain regular
18 attendance, be punctual, complete a normal workday or workweek, set
19 realistic goals, and make plans independently of others. According to Dr.
20 Weiss, the claimant also had a moderately limited ability to remember
21 information, perform detailed tasks, sustain an ordinary routine without
22 special supervision, work in coordination with or proximity to others,
23 make simple work-related decisions, interact appropriately with the
24 general public, accept instructions, and respond appropriately to criticism
25 from supervisors, maintain socially appropriate behavior, adhere to basic
26 standards of neatness and cleanliness, respond appropriately to changes in
the work setting, travel in unfamiliar places, and use public transportation.
Dr .Weiss further stated that the claimant would be unable to complete a
workday more than 3 or 4 times per month and that even unskilled work
would exacerbate the claimant’s mental symptoms (Exhibit C9F). . . .

22 The ALJ rejected Dr. Weiss’ opinions because he found, among other things, that they are
23 inconsistent with evidence of adequate mental functioning from October 2013 through November
24 2014 (citing CAR at Exhibits C4F, C6F, and C8F).

25 ¹ Citations are to the Certified Administrative Record lodged on May 3, 2017 (Doc.
26 15).

1 The court finds that the ALJ’s reasoning is supported by substantial evidence.
2 Specifically, regarding the period from October 2013 to November 2014, plaintiff acknowledges
3 that “beginning in October 2013, the record does show some improvement in Plaintiff’s mental
4 functioning. . . .” The exhibits cited by the ALJ show adequate mental functioning during this
5 time period. Records from San Joaquin County Behavioral Health Services reflect that, on
6 October 15, 2013, plaintiff reported no side effects of medications, that is doing “alright,” that he
7 is compliant with his medications, and that his sleep was improved. See CAR 447. Nurse
8 Practitioner Glenda Castro noted that plaintiff’s hygiene and attire were appropriate and that his
9 affect was labile. See id. She also noted that his condition was “improved compared to last
10 visit.” See id. Observations were essentially the same on December 10, 2013, though Ms.
11 Castro noted that plaintiff was shaking due to missed medication. See CAR 459. In January
12 2014, Ms. Castro noted appropriate hygiene and attire, appropriate eye contact, and no
13 involuntary movement beyond teeth grinding. See CAR 461. Ms. Castro also noted no paranoia.
14 See id. Findings through the remainder of 2014 are consistent. See CAR at Exhibit C8F.

15 **B. Plaintiff’s Credibility**

16 The Commissioner determines whether a disability applicant is credible, and the
17 court defers to the Commissioner’s discretion if the Commissioner used the proper process and
18 provided proper reasons. See Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1996). An explicit
19 credibility finding must be supported by specific, cogent reasons. See Rashad v. Sullivan, 903
20 F.2d 1229, 1231 (9th Cir. 1990). General findings are insufficient. See Lester v. Chater, 81 F.3d
21 821, 834 (9th Cir. 1995). Rather, the Commissioner must identify what testimony is not credible
22 and what evidence undermines the testimony. See id. Moreover, unless there is affirmative
23 evidence in the record of malingering, the Commissioner’s reasons for rejecting testimony as not
24 credible must be “clear and convincing.” See id.; see also Carmickle v. Commissioner, 533 F.3d
25 1155, 1160 (9th Cir. 2008) (citing Lingenfelter v Astrue, 504 F.3d 1028, 1936 (9th Cir. 2007),
26 and Gregor v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006)).

1 If there is objective medical evidence of an underlying impairment, the
2 Commissioner may not discredit a claimant’s testimony as to the severity of symptoms merely
3 because they are unsupported by objective medical evidence. See Bunnell v. Sullivan, 947 F.2d
4 341, 347-48 (9th Cir. 1991) (en banc). As the Ninth Circuit explained in Smolen v. Chater:

5 The claimant need not produce objective medical evidence of the
6 [symptom] itself, or the severity thereof. Nor must the claimant produce
7 objective medical evidence of the causal relationship between the
8 medically determinable impairment and the symptom. By requiring that
9 the medical impairment “could reasonably be expected to produce” pain or
10 another symptom, the Cotton test requires only that the causal relationship
11 be a reasonable inference, not a medically proven phenomenon.

12 80 F.3d 1273, 1282 (9th Cir. 1996) (referring to the test established in
13 Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986)).

14 The Commissioner may, however, consider the nature of the symptoms alleged,
15 including aggravating factors, medication, treatment, and functional restrictions. See Bunnell,
16 947 F.2d at 345-47. In weighing credibility, the Commissioner may also consider: (1) the
17 claimant’s reputation for truthfulness, prior inconsistent statements, or other inconsistent
18 testimony; (2) unexplained or inadequately explained failure to seek treatment or to follow a
19 prescribed course of treatment; (3) the claimant’s daily activities; (4) work records; and (5)
20 physician and third-party testimony about the nature, severity, and effect of symptoms. See
21 Smolen, 80 F.3d at 1284 (citations omitted). It is also appropriate to consider whether the
22 claimant cooperated during physical examinations or provided conflicting statements concerning
23 drug and/or alcohol use. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If the
24 claimant testifies as to symptoms greater than would normally be produced by a given
25 impairment, the ALJ may disbelieve that testimony provided specific findings are made. See
26 Carmickle, 533 F.3d at 1161 (citing Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)).

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1 Plaintiff alleges that his impairments cause totally debilitating limitations.
2 Specifically, plaintiff testified that he is left-handed and that this left hand shakes. See CAR at
3 59-74. According to plaintiff, he suffers from depression and memory loss. See id. He stated
4 that he watches television but does not really absorb what he sees. See id. Plaintiff stated that he
5 does not drive any longer due to tremors. See id. He has auditory hallucinations telling him
6 what to do. See id. Plaintiff stated that he needs reminders to bathe and change his clothes.
7 See id. He also testified that he is depressed and prefers to be alone. See id.

8 The ALJ described plaintiff and his allegations as follows:

9 The claimant is a 35-year old individual who complains of chronic back
10 pain, depression, auditory and visual hallucinations, paranoia, delusions,
11 flashbacks, suicidal ideation, sleep and appetite disturbance, decreased
12 energy, irritability, anger outburst, social withdrawal, poor memory, and
13 poor concentration. His back pain radiates to the lower extremities,
14 causing pain and weakness. He allegedly has difficulty performing
household chores, maintaining personal care, completing tasks, following
instructions, going out alone, being around people, getting along with
others, dealing with stress, and handling changes in routine. He allegedly
needs reminders to take medications and take care of personal needs and
grooming (Exhibits C2E, C5E, C8E, C10E, and hearing testimony).

15 The ALJ cited the following reasons for finding plaintiff's allegations not credible:

- 16 1. Plaintiff's allegations of debilitating physical limitations are inconsistent
17 with the December 5, 2013, findings of agency examining doctor Satish
18 Sharma, M.D., who observed that plaintiff was able to walk with a normal
19 gait and perform tandem gait, toe walking, and heel walking. The ALJ
20 also cited Dr. Sharma's observations that plaintiff did not use an assistive
21 device, Romberg test was negative, straight-leg raising was negative, range
22 of motion was normal, motor strength was normal, sensory functioning
23 was normal, and deep tendon reflexes were normal.
- 24 2. Plaintiff's allegations of debilitating mental limitations are inconsistent
25 with generally appropriate psychiatric observations at mental evaluations
26 conducted from October 2013 through November 2014.
3. Plaintiff's mental symptoms are reduced with compliance with appropriate
medications. The ALJ noted plaintiff's testimony that he does not
experience hallucinations when he takes his medications. Moreover, the
ALJ cited evidence that hospitalizations in 2013 occurred when plaintiff
was not compliant with medications and was using illegal drugs.

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- 1 4. Plaintiff's work history reflects that he worked only sporadically prior to
2 the alleged onset date and that he has only worked on a full-time basis for
3 several months in his entire adult life, suggesting that plaintiff's continued
4 unemployment may not be due to the alleged limitations.
- 5 5. Plaintiff has made inconsistent statements. On October 25, 2013, plaintiff
6 stated that he could not prepare any meals, but he stated during the hearing
7 that he could make sandwiches. In addition, plaintiff reported in July 2013
8 that his childhood was terrible, but he stated on November 25, 2014, that
9 his childhood was good.
- 10 6. Plaintiff showed no evidence of physical discomfort during the hearing,
11 and he was able to respond to questions and interact appropriately.
12 Plaintiff was also able to follow closely and participate fully in the
13 hearing.

14 While plaintiff challenges the ALJ's reliance on his work history, demeanor at the
15 hearing, and mental status during the October 2013 to November 2014 time period, plaintiff does
16 not address physical findings by Dr. Sharma which are inconsistent with plaintiff's allegations
17 and plaintiff acknowledges his own inconsistent statements. The court finds that the ALJ's
18 reliance on Dr. Sharma's findings as well as plaintiff's admitted inconsistent statements was
19 proper.

20 C. Lay Witness Testimony

21 In determining whether a claimant is disabled, an ALJ generally must consider lay
22 witness testimony concerning a claimant's ability to work. See *Dodrill v. Shalala*, 12 F.3d 915,
23 919 (9th Cir. 1993); 20 C.F.R. §§ 404.1513(d)(4) & (e), 416.913(d)(4) & (e). Indeed, "lay
24 testimony as to a claimant's symptoms or how an impairment affects ability to work is competent
25 evidence . . . and therefore cannot be disregarded without comment." See *Nguyen v. Chater*, 100
26 F.3d 1462, 1467 (9th Cir. 1996). Consequently, "[i]f the ALJ wishes to discount the testimony
of lay witnesses, he must give reasons that are germane to each witness." *Dodrill*, 12 F.3d at
919. The ALJ may cite same reasons for rejecting plaintiff's statements to reject third-party
statements where the statements are similar. See *Valentine v. Commissioner Soc. Sec. Admin.*,
574 F.3d 685, 694 (9th Cir. 2009) (approving rejection of a third-party family member's
testimony, which was similar to the claimant's, for the same reasons given for rejection of the

1 claimant's complaints).

2 As to statements from plaintiff's mother and sister, the ALJ noted that both
3 statements largely corroborate plaintiff's allegations and stated:

4 . . . These statements are given little weight for the same reasons provided
5 above for the opinions of the treating source and Dr. Weiss. In addition,
6 the claimant's mother and sister are not acceptable medical sources and
7 lack the medical proficiency to render a reliable opinion on the claimant's
limitations. The statements are also contradicted by the absence of
positive laboratory findings concerning the claimant's back disorder and
lumbar radiculopathy.

8 The ALJ did not err by citing the same reasons for rejecting lay witness statements as for
9 rejecting plaintiff's statements where, as here, the reasons for rejecting plaintiff's statements –
10 notably, the contradictory findings by Dr. Sharma – are proper. See Valentine, 574 F.3d at 694.

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IV. CONCLUSION

Based on the foregoing, the court concludes that the Commissioner's final decision is based on substantial evidence and proper legal analysis. Accordingly, the undersigned recommends that:

1. Plaintiff's motion for summary judgment (Doc. 24) be denied;
2. Defendant's cross-motion for summary judgment (Doc. 28) be granted;

and

3. The Clerk of the Court be directed to enter judgment and close this file.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days after being served with these findings and recommendations, any party may file written objections with the court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal.

See *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: March 8, 2018



CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE