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

RALPH MITCHEL NEWBERRY,
Plaintiff,
v.
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 2:17-CV-0316-DMC

MEMORANDUM OPINION AND ORDER

Plaintiff, who is proceeding with retained counsel, brings this action for judicial review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). Pursuant to the written consent of all parties (Docs. 7 and 8), this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). Pending before the court are the parties’ cross-motions for summary judgment (Docs. 19 and 20).

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 (9th Cir. 1996). It is “. . . such evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 402 (1971). The record as a whole,

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

13

14 I. THE DISABILITY EVALUATION PROCESS

15 To achieve uniformity of decisions, the Commissioner employs a five-step
16 sequential evaluation process to determine whether a claimant is disabled. See 20 C.F.R.
17 §§ 404.1520 (a)-(f) and 416.920(a)-(f). The sequential evaluation proceeds as follows:

- 18 Step 1 Determination whether the claimant is engaged in
19 substantial gainful activity; if so, the claimant is presumed
not disabled and the claim is denied;
- 20 Step 2 If the claimant is not engaged in substantial gainful activity,
21 determination whether the claimant has a severe
impairment; if not, the claimant is presumed not disabled
22 and the claim is denied;
- 23 Step 3 If the claimant has one or more severe impairments,
24 determination whether any such severe impairment meets
or medically equals an impairment listed in the regulations;
25 if the claimant has such an impairment, the claimant is
presumed disabled and the claim is granted;
- 26 Step 4 If the claimant's impairment is not listed in the regulations,
27 determination whether the impairment prevents the
claimant from performing past work in light of the
28 claimant's residual functional capacity; if not, the claimant
is presumed not disabled and the claim is denied;

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II. THE COMMISSIONER’S FINDINGS

Plaintiff applied for social security benefits on May 28, 2013. See CAR 21.¹ In the application, plaintiff claims disability began on April 19, 2011. See id. Plaintiff’s claim was initially denied. Following denial of reconsideration, plaintiff requested an administrative hearing, which was held on July 16, 2015, before Administrative Law Judge (ALJ) Cecilia LaCara. In an October 15, 2015, decision, the ALJ concluded plaintiff is not disabled based on the following relevant findings:

- 1. The claimant has the following severe impairment(s): degenerative disc disease;
- 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: medium work, except the claimant is limited to no more than frequent climbing of ramps and stairs, stooping, and crouching, and the claimant must avoid concentrated exposure to extreme cold, excessive vibration, and hazardous machinery;
- 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.

See id. at 23-29.

After the Appeals Council declined review on January 23, 2017, this appeal followed.

III. DISCUSSION

In his motion for summary judgment, plaintiff argues: (1) the ALJ erred in assessing his status post meningitis as non-severe; (2) the ALJ failed to state sufficient reasons for finding his testimony and statements not credible; and (3) the ALJ failed to consider the effects of all non-exertional limitations when assessing plaintiff’s residual functional capacity.

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¹ Citations are the to the Certified Administrative Record (CAR) lodged on August 15, 2017 (Doc. 12).

1 While plaintiff does not raise any arguments concerning the ALJ’s evaluation of
2 the medical opinions offered in this case, the ALJ’s evaluation of the opinion evidence is
3 nonetheless instructive. The ALJ primarily relied on the opinion of Dr. Sunde:

4 As for the opinion evidence, the opinion of Chester Sunde, Psy.D (Ex. 8F)
5 is granted significant weight. Dr. Sunde found the claimant limited in
6 areas regarding concentration, persistence, and pace due to symptoms of
7 depression associated with the claimant’s adjustment disorder arising from
8 life stressors and combined lingering effects of his various severe and non-
9 severe impairments. This is reasonable and consistent with the
10 longitudinal record and the claimant’s complaints. . . .

11 CAR 27.

12 The ALJ found the opinions of consultative reviewing psychologists, Drs. Foster-Valdez and
13 VanHoose, to be consistent with Dr. Sunde’s opinion. See id. at 27-28 (citing Exhibits 4A and
14 8A).

15 The ALJ gave “partial weight” to the opinions of Dr. Kalman: “An opinion by Les
16 Kalman, M.D. (Ex. 9F) is granted partial weight as to no limits in ADL’s [activities of daily
17 living] or social function, however, as per Dr. Sunde’s findings and the claimant; primary care
18 records he does have some mild limitation in concentration, persistence, and pace due to his
19 adjustment disorder/depression and pain.” Id. at 27. The ALJ also gave “partial weight” to the
20 opinions of consultative reviewing physicians, Drs. Jone and Amon, regarding plaintiff’s physical
21 capabilities. See id. at 28. As Drs. Jone and Amon, the ALJ concluded the doctors failed to
22 “place appropriate environmental limitations due to the claimant’s lingering symptoms of
23 dizziness status post-meningitis.” Id.

24 Finally, the ALJ gave the opinion of consultative examining physician, Dr. Corkill,
25 “little weight.” See id. The ALJ stated:

26 The opinion of consultative examiner Dr. Corkill (Ex. 10F) is given little
27 weight; it does not adequately consider the claimant’s combined serve
28 [sic] and non-severe impairments that would reasonably affect his
exertional and postural functional abilities, in addition Dr. Corkill did not
consider the claimant’s pain.

Id.

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1 **A. Severity Determination**

2 At Step 2, the ALJ determined that plaintiff's degenerative disc disease
3 impairment is severe. See CAR 23-24. To qualify for benefits, the plaintiff must have an
4 impairment severe enough to significantly limit the physical or mental ability to do basic work
5 activities. See 20 C.F.R. §§ 404.1520(c), 416.920(c).² In determining whether a claimant's
6 alleged impairment is sufficiently severe to limit the ability to work, the Commissioner must
7 consider the combined effect of all impairments on the ability to function, without regard to
8 whether each impairment alone would be sufficiently severe. See Smolen v. Chater, 80 F.3d
9 1273, 1289-90 (9th Cir. 1996); see also 42 U.S.C. § 423(d)(2)(B); 20 C.F.R. §§ 404.1523 and
10 416.923. An impairment, or combination of impairments, can only be found to be non-severe if
11 the evidence establishes a slight abnormality that has no more than a minimal effect on an
12 individual's ability to work. See Social Security Ruling (SSR) 85-28; see also Yuckert v. Bowen,
13 841 F.2d 303, 306 (9th Cir. 1988) (adopting SSR 85-28). The plaintiff has the burden of
14 establishing the severity of the impairment by providing medical evidence consisting of signs,
15 symptoms, and laboratory findings. See 20 C.F.R. §§ 404.1508, 416.908. The plaintiff's own
16 statement of symptoms alone is insufficient. See id.

17 Plaintiff argues the ALJ erred in determining his impairments status post
18 meningitis are not severe. In this regard, the ALJ stated:

19 The claimant has also exhibited symptoms of or been diagnosed with
20 status post meningitis, hypertension, hyperlipidemia, diabetes mellitus,
21 bilateral wrist neuropathy, and obesity (Ex. 1F, 2F, 3F, 4F, 6F, 12F, 14F,
22 20F). The objective medical evidence does not indicate that these
23 impairments have caused significant vocational limitations for at least 12
24 consecutive months, therefore they are deemed non-severe.

25 CAR 23.

26 According to plaintiff, the ALJ erred in concluding his status post-meningitis is not severe for
27 failure to satisfy a 12-month duration requirement because "primary care physician's treatment

28 ² Basic work activities include: (1) walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers, and usual work situations; and (6) dealing with changes in a routine work setting. See 20 C.F.R. §§ 404.1521, 416.921.

1 notes in June 2012 (more than 12 months later) unambiguously reflect that Mr. Newberry's
2 meningitis residual remained unresolved. AR 630."

3 Plaintiff's argument is unpersuasive. As the ALJ noted, the relevant inquiry at
4 Step 2 is whether an impairment has more than a minimal effect on the claimant's ability to work.
5 See SSR 85-28; see also Yuckert, 841 F.2d at 306 (adopting SSR 85-28). Evidence that
6 meningitis residuals persist does not inform this inquiry because it is not evidence of plaintiff's
7 ability to work in light of such residuals. Plaintiff has failed to meet his burden with respect to
8 the severity of meningitis residuals.

9 **B. Credibility Assessment**

10 At Step 4, the ALJ assessed plaintiff's credibility in determining his residual
11 functional capacity. See CAR 25-27. The Commissioner determines whether a disability
12 applicant is credible, and the court defers to the Commissioner's discretion if the Commissioner
13 used the proper process and provided proper reasons. See Saelee v. Chater, 94 F.3d 520, 522 (9th
14 Cir. 1996). An explicit credibility finding must be supported by specific, cogent reasons. See
15 Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990). General findings are insufficient. See
16 Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995). Rather, the Commissioner must identify what
17 testimony is not credible and what evidence undermines the testimony. See id. Moreover, unless
18 there is affirmative evidence in the record of malingering, the Commissioner's reasons for
19 rejecting testimony as not credible must be "clear and convincing." See id.; see also Carmickle v.
20 Commissioner, 533 F.3d 1155, 1160 (9th Cir. 2008) (citing Lingenfelter v Astrue, 504 F.3d 1028,
21 1936 (9th Cir. 2007), and Gregor v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006)).

22 If there is objective medical evidence of an underlying impairment, the
23 Commissioner may not discredit a claimant's testimony as to the severity of symptoms merely
24 because they are unsupported by objective medical evidence. See Bunnell v. Sullivan, 947 F.2d
25 341, 347-48 (9th Cir. 1991) (en banc). As the Ninth Circuit explained in Smolen v. Chater:

26 The claimant need not produce objective medical evidence of the
27 [symptom] itself, or the severity thereof. Nor must the claimant produce
28 objective medical evidence of the causal relationship between the
medically determinable impairment and the symptom. By requiring that
the medical impairment "could reasonably be expected to produce" pain or

1 another symptom, the Cotton test requires only that the causal relationship
2 be a reasonable inference, not a medically proven phenomenon.

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

5 The Commissioner may, however, consider the nature of the symptoms alleged,
6 including aggravating factors, medication, treatment, and functional restrictions. See Bunnell,
7 947 F.2d at 345-47. In weighing credibility, the Commissioner may also consider: (1) the
8 claimant's reputation for truthfulness, prior inconsistent statements, or other inconsistent
9 testimony; (2) unexplained or inadequately explained failure to seek treatment or to follow a
10 prescribed course of treatment; (3) the claimant's daily activities; (4) work records; and
11 (5) physician and third-party testimony about the nature, severity, and effect of symptoms. See
12 Smolen, 80 F.3d at 1284 (citations omitted). It is also appropriate to consider whether the
13 claimant cooperated during physical examinations or provided conflicting statements concerning
14 drug and/or alcohol use. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If the
15 claimant testifies as to symptoms greater than would normally be produced by a given
16 impairment, the ALJ may disbelieve that testimony provided specific findings are made. See
17 Carmickle, 533 F.3d at 1161 (citing Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)).

18 Regarding reliance on a claimant's daily activities to find testimony of disabling
19 pain not credible, the Social Security Act does not require that disability claimants be utterly
20 incapacitated. See Fair v. Bowen, 885 F.2d 597, 602 (9th Cir. 1989). The Ninth Circuit has
21 repeatedly held that the ". . . mere fact that a plaintiff has carried out certain daily activities . . .
22 does not . . . [necessarily] detract from her credibility as to her overall disability." See Orn v.
23 Astrue, 495 F.3d 625, 639 (9th Cir. 2007) (quoting Vertigan v. Heller, 260 F.3d 1044, 1050 (9th
24 Cir. 2001)); see also Howard v. Heckler, 782 F.2d 1484, 1488 (9th Cir. 1986) (observing that a
25 claim of pain-induced disability is not necessarily gainsaid by a capacity to engage in periodic
26 restricted travel); Gallant v. Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984) (concluding that the
27 claimant was entitled to benefits based on constant leg and back pain despite the claimant's
28 ability to cook meals and wash dishes); Fair, 885 F.2d at 603 (observing that "many home
activities are not easily transferable to what may be the more grueling environment of the

1 workplace, where it might be impossible to periodically rest or take medication”). Daily
2 activities must be such that they show that the claimant is “. . . able to spend a substantial part of
3 his day engaged in pursuits involving the performance of physical functions that are transferable
4 to a work setting.” Fair, 885 F.2d at 603. The ALJ must make specific findings in this regard
5 before relying on daily activities to find a claimant’s pain testimony not credible. See Burch v.
6 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005).

7 As to plaintiff’s credibility, the ALJ summarized plaintiff’s statements and
8 testimony as follows:

9 In applying for disability benefits, the claimant has alleged that he is
10 unable to sustain basic work activities on a regular and continuing basis
11 because of his impairments. On the function report filled out by the
12 claimant in conjunction with his application, the claimant contended that
13 his symptoms affect his ability to lift, squat, bend, stand, reach, walk, sit,
14 kneel, hear, climb stairs, remember, complete tasks, concentrate,
15 understand, and get along with others (Ex. 12E, pg. 6).

16 * * *

17 At the hearing, the claimant testified that he gets lightheaded and dizzy
18 from the lingering effects of meningitis. He testified that he does yard
19 work for his mother, including lawn mowing, weed eating, and watering.
20 He testified that uses a riding lawnmower, and after 45 minutes he has to
21 stop due to neck pain and fatigue. The claimant testified that he continues
22 to use marijuana for pain, and continues to smoke cigarettes.

23 CAR 25, 27.

24 The ALJ then held:

25 The claimant’s allegations are not fully credible. The longitudinal medical
26 evidence of record shows that despite the presence of degenerative disc
27 disease he has been asymptomatic for the majority of the period at issue
28 and he has never received narcotics, physical therapy, or other treatment
for his degenerative disc disease that would suggest he is significantly
functionally impaired. The claimant has not followed the medical advice
of his treating providers. The claimant is able to perform a broad array of
physical cavity [sic] such a chopping wood, perform self-care, stand, walk,
and yard work that are not consistent with his complaints of incapacitating
pain. For all of these reasons, the claimant’s allegations are not fully
credible.

Id. at 27.

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1 Regarding the longitudinal medical record, the ALJ noted the following:

2 November 2012 The claimant presented at Mercy Medical Center with
3 complaints of “neck pain after extensive truck driving
4 several months prior.” On examination, the claimant
5 demonstrated no tenderness on palpation and he had
6 full range of motion of the cervical spine. The doctor
7 noted the claimant is “generally asymptomatic” and
8 referred him back to primary care. Exhibit 14F.

9 December 2012 A cervical MRI showed cervical degenerative disc
10 disease from C2-3 to C7-T1, with variable discopathy,
11 neuroforaminal stenosis, and facet arthropathy. The
12 MIR also showed no significant spinal stenosis, though
13 it did reveal a left paracentral disc herniation with
14 anterior cord impingement. Lumbar x-rays showed
15 “mild to moderate degenerative disc disease from T12-
16 L1 to L5-S1. Exhibit 7F.

17 May 2013 The claimant was examined by consultative physician,
18 Harvinder Birk. On examination, Dr. Birk found spasm
19 and tenderness in the cervical paraspinal and
20 suboccipital muscles, with limited cervical range of
21 motion. Strength was 5/5 in all extremities, tone was
22 normal, and reflexes were 1+ and symmetrical. The
23 claimant also had normal bilateral lower and upper
24 extremity sensation and no other limitations in range of
25 motions. Dr. Birk recommended nerve conduction and
26 EMG studies, which ultimately showed no
27 electrophysiologic evidence of right S1 or cervical
28 radiculopathy. Exhibits 18F and 20F.

November 2013 The claimant was examined by consultative physician,
Guy Corkill, M.D. On examination, the claimant
“performed the maneuvers of the physical examination
without significant difficulty.” Objective signs showed
no abnormalities, loss of strength, sensation, or range of
motion. While there was reflex loss, otherwise the
claimant’s degenerative disc disease was asymptomatic.
Exhibit 10F.

December 2013 The claimant complained of “neck pain with any
prolonged vibratory exposure,” increased by bending
the head forward. On examination, there was no
localized joint stiffness and there were no neurological
symptoms. The claimant’s neck showed no decrease in
suppleness, though he did have some tenderness to
palpation throughout the spine. The doctor noted that
the claimant’s symptoms were “disproportionate to
injury” and derived from a “rough riding vehicle.”
Exhibit 11F.

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1 plaintiff suffers from meningitis residuals does not satisfy plaintiff's burden of showing how such
2 residuals impact his ability to work. In this regard, the court notes that plaintiff has not raised any
3 arguments challenging the ALJ's evaluation of the medical opinions.

4 Turning to the specific reasons offered by the ALJ in support of her adverse
5 credibility finding, the court finds plaintiff's remaining arguments unpersuasive because each
6 reason is legally sufficient and supported by substantial evidence.

7 1. Longitudinal Record

8 At the outset, the court finds plaintiff's continued reference to meningitis residuals
9 unavailing for the reasons discussed above. Turning to the longitudinal record more generally,
10 the ALJ's detailed discussion clearly reflects objective findings inconsistent with plaintiff's
11 allegation of total disability. For example, in November 2012, plaintiff presented at Mercy
12 Medical Center with complaints of pain after "extensive truck driving." CAR 26 (citing Exhibit
13 14F). Physical examination was unremarkable, and the doctor noted plaintiff was "generally
14 asymptomatic." Id. The ALJ was permitted to conclude plaintiff's subjective allegations are
15 undermined by evidence he was driving extensively as well as evidence of an unremarkable
16 examination. See Smolen, 80 F.3d at 1284; see also Carmickle, 533 F.3d at 1161.

17 Additionally, in November 2013 plaintiff was examined by Dr. Corkill, who noted
18 plaintiff "performed the maneuvers of the physical examination without significant difficulty."
19 CAR 26 (citing Exhibit 10F). Likewise, treating records reflect a normal examination in
20 December 2013 despite complaints of neck pain with "prolonged vibratory exposure." Id. (citing
21 Exhibit 11F). The doctor noted plaintiff's symptoms were "disproportionate to injury." Id. In
22 March 2014, treatment notes reflect plaintiff was performing a wide range of daily activities
23 inconsistent with total disability. See id. (citing Exhibit 12F). Specifically, the record indicates
24 plaintiff was able to "complete community errands, don/doff shirt/jacket, don/doff shows/socks,
25 drive, get into/out of bathtub, get in and out of vehicle, reach for seatbelt, stand form [sic] a
26 seated position, style hair, tuck in shirt, walk household distances, walk community distances,
27 wash armpits, wash back, and wash hair." Id. In March 2015, plaintiff's physical examination
28 was once again normal. See id. at 27 citing Exhibit 19F). The ALJ did not err in citing this

1 additional evidence which also undermines plaintiff's credibility. See Smolen, 80 F.3d at 1284;
2 see also Carmickle, 533 F.3d at 1161.

3 2. Failure to Follow Medical Advice

4 Plaintiff contends the ALJ erred by citing his failure to heed Dr. Corkill's advice to
5 take up swimming because that was a one-time recommendation that does not indicate a pattern
6 of refusing medical advice. While the court agrees that a one-time failure to heed medical advice
7 does not show a pattern, the ALJ was nonetheless entitled to consider the fact in assessing
8 plaintiff's credibility. See Smolen, 80 F.3d at 1284.

9 3. Activities of Daily Living

10 Plaintiff argues the activities of daily living cited by the ALJ do not constitute
11 substantial evidence supporting the ALJ's adverse credibility finding because they "do not
12 contradict the evidence of otherwise severe problems that he encountered in daily living and the
13 performance of tasks in the relevant period." The court does not agree. The ALJ observed
14 plaintiff's daily activities include the following: (1) yard work for his mother, including lawn
15 mowing, weed eating, and watering, see CAR 27 (referencing plaintiff's hearing testimony);
16 (2) extensive truck driving, see id. at 26 (citing Exhibit 14F); and (3) chopping wood, see id. at 27
17 (referencing Exhibit 19F). The ALJ properly relied on this evidence because the activities noted
18 reflect physical functions that are transferable to a work setting, see Fair, 885 F.2d at 603, and are
19 inconsistent with plaintiff's allegation of total disability, see Smolen, 80 F.3d at 1284.

20 C. Residual Functional Capacity Finding

21 At Step 4, the ALJ determined plaintiff has the residual functional capacity to
22 perform medium work despite limitations resulting from plaintiff's medical determinable severe
23 impairment of degenerative disc disease. See CAR 25-28. The ALJ did not find plaintiff can
24 perform the full range of medium work. Rather, the ALJ concluded plaintiff's capacity for
25 medium work is limited by the following restrictions: "no more than frequent climbing of ramps
26 and stairs, stooping, and crouching." Id. at 25. The ALJ also found plaintiff must avoid
27 concentrated exposure to extreme cold, excessive vibrations, and hazardous machinery. See id.

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1 Residual functional capacity is what a person “can still do despite [the
2 individual’s] limitations.” 20 C.F.R. §§ 404.1545(a), 416.945(a) (2003); see also Valencia v.
3 Heckler, 751 F.2d 1082, 1085 (9th Cir. 1985) (residual functional capacity reflects current
4 “physical and mental capabilities”). Thus, residual functional capacity describes a person’s
5 exertional capabilities in light of his or her limitations.³

6 Once again, plaintiff argues the ALJ erred by “sweeping Mr. Newberry’s
7 meningitis residual under the rug at Step-2. . . .” Plaintiff also argues the ALJ’s residual
8 functional capacity assessment is flawed because the ALJ failed to consider non-exertional
9 limitations related to “persistent fatigue.” According to plaintiff:

10 Indeed, the ALJ’s failure to discuss the evidence of Mr.
11 Newberry’s persistent fatigue is particularly problematic as SSR 96-8p,
12 requires the “RFC assessment . . . include a discussion of the individual’s
13 abilities to do sustained work-related physical and mental activities on a
14 regular and continuing basis.” Evaluation of the disability criteria requires
15 that the Commissioner assess the claimant’s “ability to work on a
16 sustained basis” and “[o]ccasional symptom-free periods – and even the
17 sporadic ability to work.” *Reddick v. Chater*, 157 F.3d 715, 724 (9th Cir.
18 1998), citing *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1996) (stating
19 that in evaluating whether a claimant is disabled, the Commissioner must
20 consider whether the claimant is unable to work on a “sustained” basis,
21 and a claimant’s occasional symptom-free period or the ability to work
22 sporadically is not inconsistent with disability).; see also, Gatliff v. Apfel,
23 172 F.3d 690, 692 (9th Cir. 1999)(“substantial gainful activity means
24 more than merely the ability to find a job and physically perform it; it also
25 requires the ability to hold the job for a significant period of time.”)

19 Next, plaintiff contends the ALJ’s residual functional capacity is flawed “when focus is given to
20 the full panoply of the requirements for medium work.” Specifically, plaintiff cites Social

21 ³ Exertional capabilities are the primary strength activities of sitting, standing,
22 walking, lifting, carrying, pushing, or pulling and are generally defined in terms of ability to
23 perform sedentary, light, medium, heavy, or very heavy work. See 20 C.F.R., Part 404, Subpart
24 P, Appendix 2, § 200.00(a). “Sedentary work” involves lifting no more than 10 pounds at a time
25 and occasionally lifting or carrying articles like docket files, ledgers, and small tools. See 20
26 C.F.R. §§ 404.1567(a) and 416.967(a). “Light work” involves lifting no more than 20 pounds at
27 a time with frequent lifting or carrying of objects weighing up to 10 pounds. See 20 C.F.R. §§
28 404.1567(b) and 416.967(b). “Medium work” involves lifting no more than 50 pounds at a time
with frequent lifting or carrying of objects weighing up to 25 pounds. See 20 C.F.R. §§
404.1567(c) and 416.967(c). “Heavy work” involves lifting no more than 100 pounds at a time
with frequent lifting or carrying of objects weighing up to 50 pounds. See 20 C.F.R. §§
404.1567(d) and 416.967(d). “Very heavy work” involves lifting objects weighing more than 100
pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more. See 20
C.F.R. §§ 404.1567(e) and 416.967(e).

1 Security Ruling 83-10, outlining the requirements of the “full range of medium work.” Finally,
2 plaintiff argues the ALJ’s residual functional capacity analysis fails to account for evidence from
3 primary care physicians, Drs. Williams, Rabinowitz, and Birk, as well as consultative examining
4 physician, Dr. Corkill.

5 Plaintiff’s arguments are unpersuasive.

6 1. Meningitis Residuals and Fatigue

7 For the reasons discussed several times throughout this opinion, plaintiff’s
8 references to symptoms from meningitis residuals and fatigue are unavailing absent evidence
9 showing how these symptoms impact plaintiff’s ability to work. See 20 C.F.R. §§ 404.1545(a),
10 416.945(a) (2003); see also Valencia, 751 F.2d at 1085.

11 2. Full Range of Medium Work (SSR 83-10)

12 Citing Social Security Ruling 83-10, which describes the requirements for the full
13 range of medium work, plaintiff contends the ALJ’s residual functional capacity finding is flawed
14 “when focus is given to the full panoply of the requirements of medium work.” This argument is
15 inapposite because, as outlined above, the ALJ found plaintiff capable of less than the full range
16 of medium work.

17 3. Drs. Williams, Rabinowitz, Birk, and Corkill

18 Though plaintiff does not raise any specific argument with respect to the ALJ’s
19 evaluation of the medical opinions, plaintiff argues the ALJ’s residual functional capacity
20 determination is flawed because she failed to consider records from Drs. Williams, Rabinowitz,
21 Birk, and Corkill. According to plaintiff:

22 In short, the RFC disregarded in their entirety each of Mr.
23 Newberry’s non-exertional limitations established by the administrative
24 record both through his treating and examining physicians, his own
25 testimony and the observations of others. First, the ALJ ignored and failed
26 to summarize at all the records of Dr. Williams, Mr. Newberry’s primary
27 care physician from the time he was hospitalized due to meningitis, AR
28 386-387; treated him for at least the next two years recording significant
impairments (AR 582 [chronic fatigue and mild chronic confusion], 608
[depression, postural limitations pain], 611 [cardiac evaluation follow up
with history], 625 [fatigue and back pain], 640 [fatigue, postural
limitations, degenerative disc disease, meningitis residual]); and, as late as
April 25, 2013, still carried Mr. Newberry’s meningitis residual as not
fully resolved. AR 588. So too, the records and findings of Mr.

1 Newberry's next primary care physician, Dr. Rabinowitz, are essentially
2 ignored or to the extent discussed are mined solely for nuggets
3 unindicative of those records as a whole, records again replete with
4 continued documentation of Mr. Newberry's non-exertional impairments
5 such as fatigue, fever, malaise, night sweats, dizziness, joint pain/swelling
6 and muscle weakness. Similarly, with Dr. Birk whose May 2015 findings
7 of dizziness after meningitis in 2011, trouble with balance and
8 coordination, wrist neuropathy and limitations to his range of motion were
9 dismissed without clear and convincing reasons or discussion. See, AR 23,
10 25-28, 735. Indeed, the ALJ even ignored limitations found by the
11 Commissioner's own consultative neurosurgeon, whose medical source
12 statement found, Mr. Newberry "has problems sitting, standing or walking
13 for any length of time and needs to get up and move around due to fatigue
14 and some pain." AR 579. Such an examining physician medical source
15 finding is wholly inconsistent with the ALJ's contention that Mr.
16 Newberry was able to stand or walk, off and on, for a total of
17 approximately 6 hours in an 8-hour workday and frequent [6 hours in an 8
18 hour-day] lift or carry objects weighing up to 25 pounds. Because the
19 ALJ's RFC determination is not adequately supported, remand is
20 appropriate under 42 U.S.C. 405(g), Sentence Four.

21 As to Dr. Williams, plaintiff identifies various observations made by the doctor,
22 such as chronic fatigue noted at CAR 582, depression, postural limitations, and pain noted at
23 CAR 611, fatigue and back pain noted at CAR 625, fatigue, postural limitations, degenerative
24 disc disease, and meningitis residuals noted at CAR 640, meningitis residuals noted at CAR 588.
25 Plaintiff does not, however, identify any opinions expressed by Dr. Williams concerning the
26 impact of these observations on plaintiff's ability to work. Similarly, plaintiff fails to identify any
27 opinions rendered by Drs. Rabinowitz or Birk related to plaintiff's functional capacity. The ALJ
28 did not err because residual functional capacity describes what a person can do despite
limitations, see 20 C.F.R. §§ 404.1545(a), 416.945(a) (2003); see also Valencia, 751 F.2d at
1085, and plaintiff has not identified evidence describing how the doctors' records inform
plaintiff's functional capabilities.

Finally, plaintiff argues the ALJ failed to account for limitations opined by
consultative examining physician, Dr. Corkill. Referencing Dr. Corkill's November 26, 2013,
report, see CAR 573-79, plaintiff notes the doctor's statement plaintiff "has problems sitting,
standing or walking for any length of time and needs to get up and move around due to fatigue
and some pain," id. at 579. According to plaintiff, the ALJ erred by ignoring this limitation.
Plaintiff's argument, however, is belied by the ALJ's conclusion that Dr. Corkill's opinions are

1 entitled to little weight. See CAR 28. Contrary to plaintiff's assertion the ALJ ignored this
2 evidence, the ALJ in fact considered and rejected it, and plaintiff does not explain how the ALJ
3 erred in doing so.

4
5 **IV. CONCLUSION**

6 Based on the foregoing, the court concludes that the Commissioner's final decision
7 is based on substantial evidence and proper legal analysis. Accordingly, IT IS HEREBY
8 ORDERED that:

- 9 1. Plaintiff's motion for summary judgment (Doc. 19) is denied;
- 10 2. Defendant's motion for summary judgment (Doc. 20) is granted;
- 11 3. The Commissioner's final decision is affirmed; and
- 12 4. The Clerk of the Court is directed to enter judgment and close this file.

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19 Dated: September 26, 2018



20 DENNIS M. COTA
21 UNITED STATES MAGISTRATE JUDGE