UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

NGHIA NGUYEN,

Plaintiffs,

v.

NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY

Defendant.

Case No. 3:16-cv-00748-LB

ORDER GRANTING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REMANDING CASE

[ECF Nos. 15 & 21]

INTRODUCTION

Plaintiff Nghia Nguyen moves for summary judgment on judicial review of a final decision of the Commissioner of Social Security Administration denying him Social Security Disability Insurance ("SSDI") and Supplemental Security Income ("SSI") under Titles II and XVI of the Social Security Act.[1] The Administrative Law Judge ("ALJ") held that Mr. Nguyen was not disabled within the meaning of the Act by reason of either lower-back impairments or any mental impairment.[2] Under Civil Local Rule 16-5, the matter is deemed submitted for decision by this court without oral argument. All parties have consented to magistrate jurisdiction.[3] The court

[1] Motion — ECF No. 15. Record citations (other than to the administrative record below) refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] Admin. Record ("AR") 19.

[3] ECF No. 6, 7.

grants Mr. Nguyen's motion, denies the Commissioner's motion, and remands the case for further administrative proceedings.

STATEMENT

1. Procedural History

Mr. Nguyen filed his SSDI and SSI claims on August 30, 2011 and September 8, 2011, alleging disability beginning on January 1, 2009.[4] The Social Security Administration ("SSA") denied those claims initially on January 25, 2012,[5] and on reconsideration on July 26, 2012.[6]

Mr. Nguyen timely appealed SSA's decisions and requested a hearing before the ALJ.[7] ALJ Michael Blume held a hearing on November 13, 2013, in Oakland, California; Mr. Nguyen appeared with his counsel Nancy McCombs.[8] Robert Raschke, a vocational expert ("VE"), also appeared and testified at the hearing.

After the hearing, Mr. Nguyen had consultative psychological and orthopedic examinations, and the Cooperative Disability Investigations Unit ("CDI") initiated an investigation.[9] Plaintiff's counsel asked for, and the ALJ held, a supplemental hearing on May 22, 2014 to give the plaintiff a chance to respond to the CDI report.[10] Mr. Nguyen, his counsel, and vocational expert Freeman Leeth, Jr. were present and testified at the hearing.[11] After the supplemental hearing, the ALJ asked that the plaintiff undergo additional consultative orthopedic and psychological examinations.[12] On August 1, 2014, ALJ found that Mr. Nguyen was not disabled within the meaning of the Social Security Act and issued a decision denying him SSDI and SSI benefits.[13] On August 28, 2014, Mr.

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[4] AR 156–57.

[5] AR 193.

[6] AR 208.

[7] AR 220.

[8] AR 73.

[9] AR 384–771, 800–16.

[10] AR 399.

[11] AR 94.

[12] AR 400–03, 872–86.

Nguyen asked the Appeals Council to review the decision.[14] The Appeals Council denied the request, and the Commissioner's decision became final.[15] Mr. Nguyen then sought judicial review.

Previously, on February 7, 2006, Mr. Nguyen filed an application for disability and disability insurance benefits. The SSA denied the application initially and on reconsideration. After a hearing, ALJ Blume issued an unfavorable decision on December 23, 2008, finding that Mr. Blume was not disabled.[16]

2. Summary of Records and Administrative Findings

2.1 Medical Records

This section summarizes Mr. Nguyen's medical records after he suffered a work-related injury in November 2003, when — while working as a delivery driver — he fell trying to secure a load.[17]

2.1.1 Dr. John D. Warbritton III, M. D. — Qualified Medical Evaluation

On August 4, 2008, Mr. Nguyen met with Dr. Warbritton, who was the "agreed medical evaluator" for the worker's compensation claim and who completed electrodiagnostic testing. The testing was "[a]bnormal" and "showed evidence of chronic left L5 and S1 radiculopathies with mild ongoing denervation."[18] There was "no electrodiagnostic evidence of a right lower extremity radiculopathy, plexopathy, or other mononeuropathy, or left lower extremity plexopathy or other mononeuropathy."[19]

On August 26, 2008, Dr. Warbritton performed a qualified medical examination.[20] He summarized Mr. Nguyen's medical records, including Dr. Oda's evaluation in 2005; she diagnosed

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[13] AR 16.

[14] AR 15.

[15] AR 1.

[16] AR 107–19.

[17] AR 443.

[18] AR 442.

[19] *Id.*

[20] AR 442–51.

spondylolisthesis.[21] Mr. Nguyen had difficulty sitting throughout the one-hour interview.[22] He exhibited: (1) lumbar strain that was "moderate" and "chronic"; (2) grade-I spondylolisthesis, along L5-S1, that was pre-existing and was "likely aggravated by" his work injury; (3) secondary spinal stenosis at L5-S1, secondary to spondylolisthesis; (4) left L5 and S1 radiculopathies, confirmed by electrodiagnostic testing; and (5) chronic-pain syndrome "with subjective complaints grossly disproportional to objective findings."[23] Dr. Warbritton opined that Mr. Nguyen had a spinal disability that would preclude him from heavy work at Category E and from performing prolonged or continuous weight-bearing activities, such as standing and walking.[24] Dr. Warbritton opined that 20% of Mr. Nguyen's permanent disability was due to preexisting underlying spondylolisthesis, and the remaining 80% was due to the November 2003 injury.[25]

2.1.3 Dr. Marjorie Oda — Qualified Medical Evaluation

In September 2005, Dr. Oda functioned as the "agreed medical evaluator."[26] On February 24, 2009, she performed an orthopedic re-evaluation.[27] Mr. Nguyen reported ongoing pain in the midline of his lower back, which radiated into his legs and feet.[28] As a result of his pain, he reported problems dressing and difficulty putting on shoes.[29] His examination revealed mild tenderness to palpitation from T11 to S 1, mainly in T11.[30] He had decreased range of motion in the thoracolumbar spine.[31] The diagnosis was grade I spondylolisthesis at L4–5 with chronic

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[21] AR 443–44.

[22] AR 447.

[23] AR 448–49.

[24] AR 449.

[25] AR 450.

[26] AR 421.

[27] *Id.*

[28] AR 423.

[29] *Id.*

[30] *Id.* These letters reflecting the familiar shorthand: "C" for cervical, "T" for thoracic, "L" for lumbar, and "S" for sacral vertebrae.

[31] *Id.*

lumbosacral strain.[32] Mr. Nguyen appeared to have a progression of the spondylolisthesis, and recent electrodiagnostic evidence showed radiculopathy at two levels.[33] A February 25, 2009 X-ray of the lumbar spine showed retrolisthesis of L5 with respect to L4, which measured 1.1 cm with the patient standing in flexion, neutral, and extension.[34] It showed bilateral L4 spondylolisthesis and a moderate narrowing of the L4–5 disc space.[35] It showed mild narrowing of the disc spaces from L1–L2 and mild facet arthropathy of L4–L5 and L5–S1.[36]

On July 9, 2009, Dr. Oda wrote a supplemental Agreed Medical Report.[37] Mr. Nguyen had an increase in disability, shown by the electrodiagnostic study, which showed left L5 and S1 radiculopathies.[38] Dr. Oda agreed with Dr. Warbritton that a preclusion from heavy work probably was appropriate, but she wanted to review the flexion-extension views, which she ordered.[39]

> The L4-5 spondylolisthesis, which I have previously described, he designates the L5-S1 level, this either being correct in so much as there was sacralization of the fifth lumbar vertebra. Apparently, it was a 25 to 30% slip of L into S1, and given that he now has radiculopathies, I wonder if this is unstable. It would appear that with respect to apportionment in so much as Mr. Nguyen's activity level is so minimal in that he does essentially nothing during the day that the new findings on the EMG have changed from previously are more likely, with reasonable medical probability, caused by the progression of his underlying spondylolisthesis with a small canal than any progression of the original injury. I will discuss apportionment upon receipt of the x-rays.[40]

2.1.3 Dr. Babak Jamasbi — Treating Physician

In December 2008, Dr. Jamasbi examined Mr. Nguyen for his low-back pain and found no evidence of spinal "atrophy, asymmetry[,] or pelvic obliquity." There was tenderness to palpation

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[32] AR 424.

[33] AR 425.

[34] AR 453.

[35] *Id.*

[36] *Id.*

[37] AR 432–34.

[38] AR 433.

[39] *Id.*

[40] *Id.*

over the bilateral paraspinal muscles, especially over L4–5 and L5–S1[41] facets bilaterally, and "tenderness over the right PSIS." Flexion was "limited to 50? due to pain," "extension limited to 5 due to increased pain," and "side bending [was] limited to around 30? bilaterally."[42] Mr. Nguyen gets along very well with his family and on a scale of 1 to 10 (from poor to perfect), he rates his relationship with them as 10. Mr. Nguyen appeared anxious and depressed, he "mentioned suicidal thoughts before," but he did not currently "have any suicidal ideation."[43] Dr. Jamasbi prescribed Cymbalta and Gabapentin for pain and Ambien for sleep. He referred Mr. Nguyen to physical therapy and gave him home exercises for core strengthening."[44]

In January 2009, Mr. Nguyen reported that his sleep and pain had improved significantly.[45] The pain decreased in intensity by about 30%.[46] The patient appeared in no acute distress. He was alert and oriented and did not appear drowsy, lethargic, or confused. His speech, insight, judgment, and emotional state were normal.[47]

By February 2009, Mr. Nguyen had started computer classes that involved a lot of sitting. He reported that his low-back pain worsened from sitting in the class because the computer keyboard was not comfortably placed.[48] He was not in acute distress. He was alert and oriented and did not appear drowsy, lethargic, or confused. His speech, insight, judgment, and emotional state were normal.[49] Dr. Jamasbi increased the Cymbalta dosage from the "low dose" of 20mg to 40mg because it had lost some effectiveness.[50]

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[41] The areas mentioned here — L4–S1 — are in the lower back.

[42] AR 660–63.

[43] AR 663.

[44] *Id.*

[45] AR 654.

[46] *Id*

[47] AR 655.

[48] AR 651.

[49] AR 652.

[50] AR 653.

In March 2009, Dr. Jamasbi reported no change in the plaintiff's mental condition. Mr. Nguyen appeared in no acute distress. He was alert and oriented and did not appear drowsy, lethargic, or confused. His speech, insight, judgment, and emotional state were normal. Dr. Jamasbi increased the daily Cymbalta dosage to 60mg.[51]

In a follow-up visit later that month, Mr. Nguyen mentioned that he filled out an in-home support form to help take care of his child who had cerebral palsy.[52] Dr. Jamasbi reviewed Dr. Oda's reports and noted the following. In September 2005, after physically examining him, Dr. Oda found that Mr. Nguyen had a "diminished range of motion of the back out of proportion to the nature of the injury."[53] Her "opinion" was that he had a "disability with respect to the back" that "would preclude very heavy work as contemplated in Category B of the Workers' Compensation Guidelines."[54] In September 2009, she "again found diminished range of motion out of proportion to the nature of the injury."[55] She noted "what appears to be some nerve[-]root irritation on EMG," and opined that Mr. Nguyen had a "disability" that "would preclude heavy lifting, repeated bending and stooping as contemplated in Category D of the Workers' Compensation Guidelines."[56]

In April 2009, Mr. Nguyen's pain had worsened because of changes in the weather, but his overall condition was stable.[57]

In May 2009, Mr. Nguyen's mental condition was the same ("no acute distress"; not confused, lethargic, etc.).[58] His pain continued to be "somewhat controlled" with medication — though he

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[51] AR 648–49.

[52] AR 645–47.

[53] AR 415.

[54] *Id.* (capitalization removed).

[55] AR 420.

[56] *Id.*

[57] AR 642–43.

[58] AR 640.

thought this "could be better."[59] Physical therapy had improved his range of motion and flexibility. He continued taking classes to train for another line of work.[60]

In June 2009, Mr. Nguyen complained that his pain had not changed. For depression and the back pain, Cymbalta and topical creams continued to help.[61]

In July, August, and September 2009, Mr. Nguyen's pain had not changed, and he continued to take medication as instructed. In August 2009, Dr. Jamasbi requested authorization for a Vietnamese interpreter for Mr. Nguyen's future visits.[62] In late September 2009, Mr. Nguyen complained of low-back pain with radiation into both legs.[63] He described a pulling sensation in both legs, greater in the left than in the right.[64] His prescriptions for Gabapentin and Cymbalta were refilled for neuropathic pain, and TheraCare heat wraps were prescribed for pain when walking or standing for prolonged periods.[65]

In October 2009, Mr. Nguyen reported that the pain was primarily localized in his lower back and was a dull, deep, sharp pain that sometimes radiated down his lower extremities, with the left side worse than the right. The pain worsened with prolonged standing and improved with lying on his back. He described the intensity of the pain as 7–8 out of 10.[66] He felt depressed, and his appetite had decreased. He had lost weight and lost interest in doing things that he used to enjoy but denied having thoughts of suicide. Dr. Jamasbi prescribed the anti-depressant Nortriptyline.[67]

In November 2009, Mr. Nguyen reported that his low-back pain had not changed and was aggravated by sitting and standing. The pain was dull, deep, needle-like, stabbing, and sharp. The pain was better at night when he would lie down flat. He slept only 2 to 3 hours, was "very

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[59] *Id.*

[60] *Id.*

[61] AR 636.

[62] AR 631.

[63] AR 624.

[64] *Id.*

[65] *Id.*

[66] AR 621–23.

[67] AR 622.

depressed," and had a decreased appetite.[68] After inspecting Mr. Nguyen's lumbar spine, Dr. Jamasbi reported that there was no tenderness to palpation in the lower back. Lumbar flexion was 70 degrees, and lumbar extension was 15 degrees with pain. Rotation and side-bending elicited pain to his lower back region bilaterally.[69] Dr. Jamasbi discontinued the Nortriptyline medication and recommended cognitive–behavioral therapy with the assistance of an interpreter because Mr. Nguyen was a Vietnamese-speaking immigrant, English was not his first language, and this at times created a communication barrier.[70]

In December 2009, Mr. Nguyen rated his back pain at 7–8 out of 10 and said that it worsened with prolonged standing. Physical therapy and TENS did not help, and he was not interested in surgery.[71] He "appeared to be in moderate pain."[72] He "was depressed" but his psychological state remained as it had been: he was not anxious, confused, tearful, lethargic, and so on.[73] Dr. Jamasbi discontinued Nortriptyline and Neurontin because Mr. Nguyen said that neither was effective.[74]

In January 2010, Mr. Nguyen complained of continued, significant pain that was "predominantly axial in nature."[75] He experienced increased episodes of numbness and tingling in his lower extremities over the previous month.[76] He had lost 12 pounds.[77] Dr. Jamasbi noted that he had recommended surgery in the past, but Mr. Nguyen declined it. The doctor discontinued the Ambien, prescribed Darvocet-N for pain reduction, and restarted Gabapentin.[78]

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[68] AR 617.
[69] AR 618.
[70] AR 619.
[71] AR 614.
[72] AR 615.
[73] *Id.*
[74] AR 616.
[75] AR 611.
[76] *Id.*
[77] *Id.*
[78] AR 612.

In February 2010, Mr. Nguyen reported "significant improvement" in his low-back pain since starting Darvocet. The numbness and tingling in his low back had resolved, the pain had reduced significantly, and he was able "to do more activity."[79] He appeared to be in "mild pain" but did not otherwise appear ill. He remained depressed but his psychological state was otherwise the same.[80] Mr. Nguyen saw Dr. Ghannam for cognitive-behavioral therapy, and his mood had "improved."[81] At Dr. Ghannam's recommendation, Dr. Jamasbi requested a six-month gym membership for Mr. Nguyen to work on "behavioral techniques" to improve his core strength.[82]

In March 2010, Mr. Nguyen's pain level had remained consistent: neither worse nor better.[83] He was sleeping fine and denied thoughts of suicide.[84]

In April 2010, Mr. Nguyen said that the cognitive therapy with Dr. Ghannam had been helpful.[85] Dr. Jamasbi had requested a six-month gym membership for the patient in the past, but this request was modified to four physical therapy sessions.[86] Mr. Nguyen was very motivated to get the gym membership since physical-therapy sessions were too short and did not help much. Mr. Nguyen stated that at the gym, he could work on core strengthening with various machines and do light weight workouts for aerobic and anaerobic activities.[87] Mr. Nguyen still could not vacuum or perform forward-bending or twisting activities, and had pain with prolonged sitting, but he could groom and bathe "on an independent level."[88] "Any excessive truncal activity" "exacerbate[d] his pain."[89] His pain was intermittent and 6 to 7 out of 10 on the visual analog

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[79] AR 607.

[80] *See* AR 608 ("does not appear tearful"; "does not appear nervous"; etc.).

[81] *Id.*

[82] AR 609.

[83] AR 603.

[84] AR 604.

[85] AR 599.

[86] *Id.*

[87] AR 601.

[88] AR 600.

[89] *Id.*

scale.[90] He had tenderness to palpation of the lumbar paraspinal musculature.[91] Diagnoses were spondylolitsthesis, stenosis spinal lumbar, sciatica, and symptoms of back NEC, with long-term use medications necessary.[92]

In May 2010, there were no acute changes in Mr. Nguyen's condition, and he was looking forward to using the gym.[93] Dr. Jamasbi suggested a cardiovascular workout and aerobic exercise using a treadmill.[94]

In June 2010, after examining Mr. Nguyen's lumbar spine, Dr. Jamasbi reported limited lumbar flexion. There was a "paraspinal musculature hypertrophy greater on the left than right side" and "[t]enderness to palpation at L1–2 and L2–3 spinous processes." "Extension demonstrate[s]" a "limited active range of motion which measure at 5?."[95] Mr. Nguyen reported that he awoke a week earlier with sharp pain in his lower back that he attributed to his sleeping position.[96] He complained about the deterioration of his memory and noticed that he was more forgetful (which Dr. Jamasbi attributed to chronic pain and depression).[97] He had not used the gym due to paperwork problems.[98]

In July 2010, Mr. Nguyen reported that his pain level was 4 to 5 out of 10, and that he was exercising at home three times a week because his gym membership had not yet been approved.[99] He stated that his memory loss was "not worsening."[100]

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[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] AR 596.

[94] AR 597.

[95] AR 591.

[96] AR 590.

[97] AR 591.

[98] *Id.*

[99] AR 587.

[100] *Id.*

In August 2010, Mr. Nguyen continued to have low-back pain and leg pain secondary to his "spondylolisthesis and lumbar spinal stenosis."[101] His "function" continued to improve. He continued to undergo cognitive–behavioral therapy which he found beneficial.[102] Dr. Jamasbi suggested "facet injections" for facetogenic pain, but Mr. Nguyen "decline[d] injections."[103]

In September 2010, Mr. Nguyen continued to have low-back pain and intermittent leg pain. The previous gym request was denied, so Dr. Jamasbi provided another.[104]

In November 2010, Mr. Nguyen continued to have symptoms of intractable low-back pain and intermittent transitory leg pain.[105] Dr. Jamasbi recommended physical therapy and discontinued the Darvocet because Mr. Nguyen wanted to do without opiate pain medications and other alternatives.[106] Dr. Jamasbi reviewed the preliminary report of the patient's urine screening, which was negative for illicit substances and negative for opiates (Mr. Nguyen had been unable to get his Darvocet because the product was "taken off the market").[107]

In December 2010, Mr. Nguyen continued to have back and leg pain. Mr. Nguyen was authorized for an extension on cognitive–behavioral therapy but was still waiting on his gym authorization.[108]

In January 2011, Mr. Nguyen had low-back and leg pain, but he was able to sit comfortably on the examination table without difficulty or evidence of pain.[109] He was doing his home-exercise program, and it reduced his pain a little, but his pain remained at about 5 out of 10.[110] The cognitive–behavioral therapy was helping him cope with his pain and anxiety.[111] Dr. Jamasbi

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[101] AR 583.
[102] *Id.*
[103] AR 584.
[104] AD 581.
[105] AR 578.
[106] *Id.*
[107] *Id.*
[108] AR 574.
[109] AR 570.
[110] *Id.*
[111] AR 571.

reviewed correspondence from a physical therapist, who recommended a home-exercise program for Mr. Nguyen.[112] Mr. Nguyen wanted the gym membership but it was denied.[113]

In March 2011, Dr. Jamasbi observed Mr. Nguyen sit comfortably on the examination table without difficulty or evidence of pain.[114] Mr. Nguyen had leg and low-back pain of about 5 out of 10 intensity. He had "sharp electrical pain" a few days earlier coming from the spine and going into the left leg.[115] He was doing his home-exercise program, "consisting of about 4 exercises" from handouts that he had been given, two or three times a day, but had not seen improvements.[116]

In April 2011, Mr. Nguyen continued to have leg and low back pain which he rated at five out of ten. He was able to sit comfortably on the examination table without difficulty or evident pain.[117] The gym membership was approved, and Mr. Nguyen was eager to start exercising that week.[118] Mr. Nguyen mentioned a new symptom, which was "pain, locking and giving out of the right knee." He said that he would see his primary-care doctor to evaluate this new symptom.[119]

In May 2011, Mr. Nguyen saw Dr. Jamasbi for a follow-up exam. On the first page of his report, Dr. Jamasbi said that the patient was approved for gym membership and had started two weeks earlier; on the next page, he said that Mr. Nguyen would start at the gym that week.[120]

In June 2011, Dr. Jamasbi reported that Mr. Nguyen was going to the gym, it helped with his pain, and he was making gradual progress.[121] He was getting stronger overall and was using the stationary bicycle, the treadmill, and the pool for water exercise.[122] Later that month, on a follow-

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[112] *Id.*
[113] *Id*.
[114] AR 567.
[115] *Id.*
[116] *Id.*
[117] AR 564.
[118] *Id.*
[119] AR 565.
[120] AR 561–62.
[121] AR 558.
[122] *Id.*

up visit, Mr. Nguyen complained that for the past four days he had a lot of tingling and sharp pain in the low back on the right side. He also complained about the pain on the left side, but the right side was worse.[123] He denied that any change in his activities preceding this flare-up.[124] The diagnoses were spondylolisthesis, stenosis spinal lumbar, sciatica, unspecified major depression (recurrent episode), symptoms of back NEC, and a new diagnosis of chronic pain.[125]

In August 2011, Dr. Jamasbi reported that the patient kept exercising in the gym; Mr. Nguyen had noticed improvement in his ability to stand and walk, and reported that his "overall pain level ha[d] decreased while his function ha[d] improved.[126] He continued to have back pain, which was mostly in a band-like distribution.[127] The gym membership was about to expire but Dr. Jamasbi asked to continue it because it was "effective."[128]

In October 2011, Mr. Nguyen had "tenderness to palpation at bilateral facets as [*sic*] L5/S1 and T12/L1."[129] "Lumbar paraspinal muscle spasm [was] pronounced."[130] "Facet loading maneuvers" increased his pain.[131] During the previous two weeks, Mr. Nguyen had "severe right leg pain to the calf," but this was not bothering him at the time of the examination.[132] Dr. Jamasbi noted significant midline lower-back pain, which previously had been located around L4–5 and T12–L1, but had recently radiated up his upper back, and the pain had increased.[133]

In December 2011, Mr. Nguyen had "tenderness to palpation at bilateral facets as [*sic*] L5/S1 and T12/L1."[134] "Lumbar paraspinal muscle spasm" was "pronounced."[135] Facet loading

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[123] AR 555.
[124] *Id.*
[125] *Id.*
[126] AR 552.
[127] AR 553.
[128] *Id.*
[129] AR 549.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] AR 544.

maneuvers increased his pain.[136] Mr. Nguyen's low-back pain was gradually worsening.[137] In the past two weeks, he had radicular pain and burning, which radiated into both thighs (with the left greater than the right).[138] Mr. Nguyen could sit comfortably on the examination table without difficulty or evidence of pain.[139] Dr. Jamasbi requested authorization for bilateral lumbar facet joint injections at T12–L1 and L5–S1.[140] The gym authorization was denied because it was not "advisable" without supervision; Dr. Jamasbi requested a membership with a personal trainer.[141]

In February 2012, Mr. Nguyen appeared in "moderate pain." His gait was "normal," and he exhibited "normal lordosis with no scolioitic deformity."[142] Lumbar extension was measured to be 15 degrees. Lumbar flexion was 60 degrees. "Sensation [was] decreased in the dermatiome(s). Spasm and guarding was noted lumbar spine.[143] He still had "tenderness to palpation at bilateral facets as L5/S1 and T12/L1."[144] "Lumbar paraspinal muscle spasm" was "pronounced."[145] The doctor requested gym membership with a personal trainer and appealed the denial of a "Bilateral Lumbar Facet Joint Injection."[146] He noted that Mr. Nguyen's pain was "gradually worsening," the medications were "helpful," but Mr. Nguyen "remained symptomatic."[147]

In April 2012, Mr. Nguyen complained that his low-back pain worsened with standing, sitting, or walking for too long.[148] He expressed depressive symptoms secondary to his chronic pain.[149]

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[135] *Id.*
[136] *Id.*
[137] AR 545.
[138] *Id.*
[139] AR 544.
[140] *Id.*
[141] AR 545.
[142] AR 769.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] AR 770.
[148] AR 762.
[149] *Id.*

Dr. Jamasbi noted that the authorization for a facet-joint injection had been approved, but the gym-membership appeal had been denied.[150] He asked for an authorization of further cognitive-behavioral sessions with Dr. Ghannam due to Mr. Nguyen's depressive symptoms.[151] Medications had been helpful in reducing Mr. Nguyen's pain, and he mainly used Lidoderm patches and cream because he wanted to avoid dependency on medications.[152]

In May 2012, Mr. Nguyen complained of continued back pain that worsened with standing, walking, and prolonged sitting and with rotation or extension of the lumbar spine.[153] He reported "symptoms of major depression" including "feelings of hopelessness, helplessness," "anxiousness," "excess worrying," "easy fatigability," and "difficulty with concentration."[154]

On May 15, 2012, Mr. Nguyen received left and right diagnostic lumbar-facet injections.[155] Later that month, Mr. Nguyen reported 100% pain relief for two hours immediately after the injection, and he was able to sit for longer. After two hours, the pain increased, and he was not able to sit for longer than five minutes.[156] He was going to start psychiatric treatment with Karin Vandervoort for his depressive symptoms.[157] Dr. Jamasbi reviewed the CT Myelography of Mr. Nguyen's lumbar spine (dated August 11, 2004) and a lumbar MRI (dated January 19, 2004). For the CT scan, he found: (1) anatomically small canal at L1–L2 and L2–3 without other findings; (2) "mild compression of the thecal sac at L4–5 in association with a grade I spondylolisthesis with bilateral spondylolytic defects," with "narrow lateral recesses . . . present"; (3) L3–4 had an anatomically small canal without other abnormality; and (4) "L5–S1 [was] normal."[158] For the MRI, Dr. Jamasbi found: (1) sacralization of the L5 vertebral body; (2) grade I anterolisthesis of

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[150] AR 763.

[151] *Id.*

[152] *Id.*

[153] AR 758.

[154] AR 759–60.

[155] AR 756–57.

[156] AR 749.

[157] AR 749–50.

[158] AR 750.

L4–5 secondary to bilateral parts defects; and (3) mild left L3–4 neural foraminal stenosis.[159] The examination showed tenderness to palpation over facet joints, and his range of motion had decreased by "60% with flexion, 80% with extension, and 40% with lateral tilt and rotation bilaterally."[160] He had pain with axial loading of the facet joints.[161] The diagnoses were stenosis spinal lumbar, spondylolisthesis, recurrent depression unspecified, and sciatica.[162] Dr. Jamasbi stopped the Davrocet, prescribed Norco, and recommended bilateral permanent facet injection at L3–L4 and L4–L5 and "permanent lumbar radiofrequency ablation."[163]

Dr. Jamasbi filled out a medical summary on May 4, 2012 that included the following. Mr. Nguyen had been treated for spondylolisthesis, lumbar spinal stenosis, and sciatica.[164] He continued to have low-back pain that worsened with prolonged standing for more than 10 to 15 minutes or with repetitive bending at the back. Medication included Lidoderm 5% patch, capsaicin cream 0.075%, Ketamine cream 5% 60gr, and ThermaCare heat wraps.[165] He needed to lie down for 10 minutes at a time to rest his lower back. He could not lift more than 10 pounds. His activities of daily living, social functioning, and ability to concentrate were impacted by his back pain and depressive symptoms. He would likely miss two to three days of work per month due to "flare[-]up" of pain.[166]

In July 2012, Mr. Nguyen saw Dr. Jamasbi after the radiofrequency ablation (which had been performed about nine days earlier).[167] He reported "only mild" pain relief.[168] Before the injection, he had pain intensity 7/10, and after the injection it was 4/10.[169] His pain was "not as severe and

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[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] AR 751.
[164] AR 513.
[165] *Id.*
[166] AR 514.
[167] AR 743–44.
[168] AR 743.
[169] *Id.*

constant as before the procedure," and he was able to sit and walk longer.[170] He "taper[ed] down his medications since the procedure" and used them "intermittently" for flare-ups of pain.[171] He was seeing Karin Vandervoort for psychological consultations about his depressive symptoms.[172] Diagnoses were stenosis spinal lumbar and unspecified major depression, recurrent episode.[173]

In August 2012, Mr. Nguyen "subjectively" complained of "back pain with radicular pain in his legs."[174] He used a "small amount" of Norco 5/325, ketamine 5% cream, and capsaicin 0.075% cream. He "occasionally" used Lidoderm 5% patches.[175] The recent "bilateral lumbar radiofrequency facet injection" had yielded "some pain reduction and improvement in function," but he continued to have intractable lower back and leg pain.[176] Dr. Jamasbi was "not insinuating that [Mr. Nguyen] has a psychological claim" although he continued to report symptoms of depression associated with his chronic pain and losing his status as an "adequate breadwinner."[177] Dr. Jamasbi opined that the depression needed to be treated.[178] The medications worked "reasonably well" even while using a "minimal amount . . . not even filling the monthly basis."[179] The topical pain creams reduced his back pain and improved his "ability to stand and walk . . . by about 30-50%" and his ability "to do activities of daily living."[180]

In September 2012, Mr. Nguyen reported that in the past week he had pain in the posterolateral thigh into the right calf. He rated the pain 5-6/10 on the visual analog scale. Walking for more than 5 to 10 minutes increased his pain to a seven. He had difficulty sleeping and the "occasional

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[170] *Id.*
[171] AR 743–44.
[172] AR 745.
[173] *Id.*
[174] AR 736.
[175] *Id.*
[176] *Id.*
[177] AR 737.
[178] *Id.*
[179] *Id.*
[180] AR 737–38.

sensation of the right leg giving out" but he "ha[d] not fallen from this." He had a visit with the clinical psychologist for biofeedback training, which was "helpful" in relieving stress and anxiety related to his disability. He continued to express feelings of sadness, frustration, and hopelessness.[181] Mr. Nguyen's range of motion at the lumbar spine was "limited to 60 degrees in flexion, 10 degrees in extension, 30 degrees in lateral rotation bilaterally," and "pain [was] eleicited [*sic*] with axial loading to the right."[182] Dr. Jamasbi diagnosed "[s]tenosis spinal lumbar," "[s]ciatica," and "Unspecified Major Depression."[183]

In October 2012, Mr. Nguyen noted no acute changes in his pain. He reported pain in the anterior-medial thigh off and on. The pain switched sides and was 5 out of 10.[184] Mr. Nguyen had "ongoing" lumbar-back pain and "occasional" extremity pain, "but no radicular symptoms."[185] "He gets aching pain in his lower extremities."[186] The patient had "significant complaints of depression" and was awaiting authorization for 12 psychological therapy sessions.[187]

In November 2012, Mr. Nguyen had some relief from lumbar radiofrequency ablation, but his pain was "gradually worsening," and he would get "flare[-]ups" of pain.[188]

In December 2012, Mr. Nguyen continued to have low-back pain but wished to avoid invasive procedures and continue with conservative treatment.[189] He reported "no acute changes" in his pain. His pain worsened "with any kind of lifting or repetitive bending at the back."[190]

On December 7, 2012, Dr. Jamasbi filled out a medical assessment and diagnosed spondylolisthesis; "stenosis spinal lumbar," and sciatica.[191] Symptoms included low-back pain that

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[181] AR 731–32.
[182] AR 732.
[183] *Id.*
[184] AR 727.
[185] AR 729.
[186] *Id.*
[187] *Id.*
[188] AR 722.
[189] AR 720.
[190] AR 719.
[191] AR 539.

radiated with a band-like distribution. His pain worsened with repetitive bending and prolonged standing, sitting, and walking. Because of his back pain, Dr. Jamasbi concluded that Mr. Nguyen could not sit, stand, or walk for more than 15 minutes at a time or more than 4 hours per 8-hour period, and he could lift no more than 10 pounds occasionally.[192] Mr. Nguyen's pain would affect concentration, persistence, and pace to such an extent that it would seriously interfere with his ability to perform simple, routine work on a productive basis.[193] Dr. Jamasbi relied on the lumbar MRI (from 01/19/2004) and an EMG (from 9/21/05) that was "suggestive of L5–S1 radiculopathy" as objective findings that confirmed the plaintiff's conditions.[194]

In January 2013, Mr. Nguyen reported that his pain was gradually worsening, and he could no longer sit, stand, or walk for longer than 10-15 minutes. He did not want to repeat the injection but wanted to continue with aquatic therapy, which helped significantly.[195] Norco helped his pain but not significantly; Dr. Jamasbi increased the dosage.[196]

In February 2013, Mr. Nguyen reported that the Norco 10/325mg pain medication was too strong for him, and he wanted to switch back to 5/325mg.[197] He declined "any other invasive procedures" and wanted to "stay conservative" with his care.[198]

In March 2013, a physical exam showed "tenderness to palpitation at the lumbrosacral junction with associated muscle tension extending into the thoracic back," Mr. Nguyen's range of motion in the lumbar spine had decreased, and he had "lower extremity weakness."[199] Mr. Nguyen reported flare-ups of pain and adverse side effects from the Norco; he was unsure if the medication was helping.[200] He had depressive symptoms secondary to his chronic pain and was continuing

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[192] AR 539–41.

[193] AR 540.

[194] AR 539.

[195] AR 713.

[196] *Id.*

[197] AR 710.

[198] AR 711.

[199] AR 704–05.

[200] AR 703.

cognitive–behavioral therapy.[201] Dr. Jamasbi discontinued the hydrocodone medication because the patient had side effects.[202] Diagnoses were stenosis spinal lumbar, sciatica, unspecified major depression (recurrent), long-term medication use, and therapeutic drug monitoring.[203]

In April 2013, Mr. Nguyen reported that he had no acute change in his condition. Medication continued to reduce pain and allowed for greater function.[204] Lidoderm patches had been especially helpful in giving local pain relief. He could sit and stand for longer with less pain and could avoid using oral pain medication.[205] He continued "to report some depressive symptoms secondary to his chronic pain."[206] He denied fatigue, change in appetite, or change of weight.[207] Examining his lumbar spine revealed tenderness to palpation at the lumbosacral junction with associated muscle tension extending into the thoracic back. Range of motion of lumbar spine was decreased by 50% with flexion and 30% with extension.[208]

In May 2013, Mr. Nguyen reported that his situation was generally stable though he had some flare-ups of pain throughout the month.[209] He was having depressive symptoms but was continuing his cognitive-behavioral therapy with Dr. Ghannam, which he found "helpful with some of his symptoms."[210] Mr. Nguyen did not want invasive procedures, including injections or surgery. He did not like taking oral medications and wanted to stay with creams only.[211] The creams were reduced pain locally and improved his "function."[212] He denied fatigue, change in

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[201] AR 705.
[202] *Id.*
[203] *Id.*
[204] AR 699.
[205] *Id.*
[206] *Id.*
[207] AR 699–700.
[208] AR 700.
[209] AR 695.
[210] *Id.*
[211] *Id.*
[212] *Id.*

appetite, and change of weight.[213] He complained of anxiety and depression but denied suicidal thoughts.[214] Dr. Jamasbi suggested to Mr. Nguyen that he return to some level or work and recommended the Northern California functional-restoration program.[215]

In June 2013, Mr. Nguyen had no acute changes in his pain. He continued to have chronic low-back pain, which worsened with prolonged standing and sitting.[216] He could not stand for longer than 15 minutes or sit for longer than 20 minutes without aggravating his pain. Ketamine and Capsacin creams reduced his pain locally and temporarily throughout the day and night, and he could sleep, sit, and stand with less pain. He said that the creams allowed him to avoid further injections or surgery.[217] Seeing Dr. Ghannam was "helpful" for his depressive symptoms.[218] He denied fatigue, change in appetite, or change of weight and reported anxiety and depression.[219]

In July 2013, Mr. Nguyen reported that he continued to have chronic pain and that it worsened with any lifting or prolonged sitting. His depressive symptoms were worsening, but he denied having suicidal thoughts.[220] He continued to see Dr. Ghannam for psychological treatment and felt that it was helpful.[221] At Dr. Ghannam's recommendation, Dr. Jamasbi prescribed Mr. Nguyen 20mg of Fluoxetine-Prozac, an anti-depressant.[222]

In August 2013, Mr. Nguyen reported no changes to his condition.[223] He continued to have chronic low-back pain, which worsened with increased activity.[224] He reported using pain creams

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[213] AR 695–96.
[214] AR 696.
[215] AR 697.
[216] AR 690.
[217] *Id.*
[218] AR 691.
[219] *Id.*
[220] AR 683.
[221] *Id.*
[222] AR 685.
[223] AR 679.
[224] *Id.*

effectively: with the creams his pain dropped to 3/10, but without them his pain was a 5/10.[225] He reported depressive symptoms and seeing Dr. Ghannam.[226] He had trouble sleeping at night, and the home exercise program no longer helped.[227] The Prozac and psychological treatments had "improved" his depressive symptoms.[228] His gait was "grossly normal," and he walked into the room "without any assistance."[229] Dr. Jamasbi noted that lumbar injections had helped Mr. Nguyen previously for a short period of time, but his pain always returned.[230]

In September 2013, Mr. Nguyen continued to have fluctuations in pain throughout the month. In the previous few days, his pain had increased.[231] He reported more stiffness and throbbing pain in his back that radiated into his left lower extremity with associated intermittent numbness and tingling.[232] His "activities of daily living" had "decreased," and he could not perform certain household chores as he once did due to his chronic pain.[233] He saw Dr. Ghannam for psychological treatment and found it helpful.[234] He denied suicidal ideation and said that the Prozac helped reduce some of his depressive symptoms.[235] An examination revealed tenderness to palpation at the lumbosacral junction with associated muscle tension extending into the middle back. The range of motion of Mr. Nguyen's lumbar spine "is decreased by 50% with flexion, 40% with extension and 30% with rotation bilaterally."[236] Motor strength was decreased in the left foot dorsiflexion and left leg extension compared to the right leg.[237] He continued to have neuropathic

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[225] *Id.*
[226] AR 679.
[227] *Id.*
[228] AR 681.
[229] AR 680.
[230] *Id.*
[231] AR 666.
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] AR 667.
[236] AR 668.
[237] *Id.*

pain, which was revealed on the EMG (electromyography) in 2008, and showed left L5 and S1 radiculopathy.[238] Dr. Jamasbi asked for authorization for an initial evaluation at the Northern California Functional Restoration Program[239] and increased Mr. Nguyen's daily Prozac dose from 20mg to 40mg for his depression.[240]

In October, November, and December 2013, Dr. Jamasbi generally reported that Mr. Nguyen continued to have neuropathic pain as seen on his EMG in 2008 which "showed left L5 and S1 radiculopath[y]." He continued to have low-back pain that radiated down both his legs.[241] Mr. Nguyen reported "no acute changes" to his pain, which he graded as 6/10 on the visual analog scale.[242] He noted that his pain aggravated with colder weather and alleviated with stretching and exercising.[243] In December 2013, Mr. Nguyen reported that his lower back pain had gradually worsened.[244] His cognitive-behavioral sessions with Dr. Ghannam helped.[245] His exam revealed tenderness to palpation at the lumbosacral junction with muscle tension extending into the mid back, and decreased range of motion with flexion by 50% and extension by 40%, and rotation bilaterally by 30%.[246] On the motor-strength exam, he had decreased strength in his left foot dorsiflexion and left leg extension compared to his right leg.[247]

In January 2014, Mr. Nguyen reported increased pain with radiation into his left leg and extending to his knee.[248] He described his pain as "needles pricking."[249] In January and February 2014, Mr. Nguyen reported that he was using topical creams and Lidoderm patches which helped

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[238] *Id.*

[239] *Id.*

[240] AR 669.

[241] AR 834, 838–39, 842–44.

[242] AR 833, 838, 842–44.

[243] AR 833, 838.

[244] AR 842.

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] AR 846.

[249] *Id.*

with pain. He avoided use of oral medication. He continued to have depressive symptoms, but felt that they were stable with the use of Prozac, and he did not have suicidal thoughts.[250]

In April 2014, Mr. Nguyen reported that his Prozac prescription had "not been authorized" and that he stopped taking it.[251] He stated that, without the Prozac, his depressive symptoms had worsened by about 30%; he still denied thinking of suicide.[252] He further reported that he was not able to attend the functional restoration program due to his family obligations.[253] He kept using topical creams and avoiding oral medicine.[254]

2.1.4 Jess Ghannam, Ph.D. — Treating Psychologist

In February 2010, Mr. Nguyen met with Dr. Ghannam for a behavioral-medicine consultation. Dr. Ghannam reported that Mr. Nguyen had a profound underlying major depressive disorder with extremely poor coping skills and a rigid preoccupation with his chronic low-back pain.[255] The plan was to work with the patient and develop a behavioral program that involved Mr. Nguyen's being more physically active. Dr. Ghannam requested authorization for a gym membership.[256]

In March 2010, Dr. Ghannam reported that the patient decided to stop taking his Cymbalta prescription. Although Mr. Nguyen found it moderately helpful, it caused him too much gastrointestinal distress.[257] Mr. Nguyen's mental status was stable as was his depressed mood.[258]

In August 2010, Mr. Nguyen was approved for a gym membership, and they discussed Mr. Nguyen's transition back to work in some capacity.[259]

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[250] AR 846, 849.

[251] AR 852.

[252] AR 852–53.

[253] AR 852.

[254] *Id.*

[255] AR 797.

[256] *Id.*

[257] AR 796.

[258] *Id.*

[259] AR 795.

In September 2010, Mr. Nguyen continued to have signs of depression.[260] Mr. Nguyen had a fully valid class 2 or 3 driver's license including Hazmat permits.[261]

In December 2010, Dr. Ghannam reported that Mr. Nguyen had "a 60% reduction in his symptoms, anxiety, and depression."[262]

In May 2011, Dr. Ghannam noted that Mr. Nguyen continued to make "excellent progress in all aspects of his psychological and behavioral capacities."[263]

In June 2012, Mr. Nguyen was re-referred to Dr. Ghannam for behavioral and psychological evaluation, and he also was seen by Karin Vandervoort, Psy.D.M.A.[264] Mr. Nguyen's speech was "unremarkable although prone to become pressured at times" with likely autonomic arousal of racing thoughts, agitation, and rapid heartbeat.[265] Symptoms included moodiness, anger, and increased arguments with his wife.[266] He had insomnia, decreased concentration, memory loss, lethargy, constant worrying, rapid thoughts, low self-esteem, and the inability to function outside of his home.[267] Mr. Nguyen reported that his pain affected many aspects of his ability to function and he dealt with the pain partly by drinking alcohol.[268] Mr. Nguyen was administered a structured clinical interview along with the following psychological questionnaires: The Millon Behavioral Medicine Diagnostic Scale (MBMD); the Pain Patient Profile (PPP); and the "Symptom Check List–90–Revised" (SCL-90-R).[269] Mr. Nguyen's MBMD produced an "invalid profile."[270] The PPP showed that Mr. Nguyen was "able to read the items, and appropriately attend to item

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[260] AR 793.

[261] *Id.*

[262] AR 792.

[263] AR 790.

[264] AR 783–788.

[265] AR 784.

[266] *Id.*

[267] *Id.*

[268] AR 786.

[269] *Id.*

[270] *Id.*

content."[271] Mr. Nguyen got an "extremely high score on the depression scale and higher than average score on the anxiety scale."[272] Mr. Nguyen felt worthless, helpless, hopeless, and pessimistic about the future.[273] The SCL-90-R revealed that Mr. Nguyen was a "positive clinical case" with an "intensity of distress" that was "extremely high."[274]

Dr. Ghannam opined that Mr. Nguyen was exhibiting significant amounts of emotional distress including major depression, agitation, autonomic arousal, and generalized anxiety. If Mr. Nguyen went untreated, he could present a suicide risk.[275] Dr. Ghannam's diagnostic impressions were: AXIS I major depressive disorder, chronic, severe; AXIS IV psychological and environmental problems; AXIS V GAF - 30.[276]

In April 2013, Dr. Ghannam reported that Mr. Nguyen's symptoms of depression had become more severe and referred Mr. Nguyen to his primary physician for medication ("pharmacotherapy adjunct").[277] He had deteriorated significantly over the past year and developed symptoms related to major depressive disorder, which included depressed mood, sad affect, anhedonia, lethargy, difficulty sleeping, attention and concentration problems, and spontaneous crying.[278]

In July 2013, Dr. Ghannam reported that Mr. Nguyen responded well to cognitive-behavioral therapy to help manage how to cope with his chronic pain.[279] But he had some vegetative signs of depression, and Dr. Ghannam recommended that he consider a trial of Fluoxetine.[280]

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[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] AR 787.
[275] AR 788.
[276] *Id.*
[277] AR 781.
[278] AR 782.
[279] AR 779.
[280] *Id.*

In August 2013, Dr. Ghannam noted Mr. Nguyen's own report that his symptoms of depression had remitted by 20% after Dr. Jamasbi put him on Fluoxetine. He still had "some symptoms of mild dysphoria" and reported "some sleep difficulties."[281]

In October 2013, Dr. Ghannam reported that Mr. Nguyen "continued to suffer from severe depression" but was "not suicidal."[282]

By October 22, 2013, Dr. Ghannam had been treating Mr. Nguyen since February 2, 2010 and was seeing him once a month.[283] In a treating source statement dated October 22, 2013, Dr. Ghannam diagnosed Axis I major depression and Axis V GAF 50.[284] She noted "major depression", "chronic pain", and "inability to work", and symptoms included depressed mood, anergia, poor concentration, poor attention, and decline in activities of daily living.[285] The patient was receiving "CBT" (cognitive-behavioral treatment), and it was moderately effective.[286] In the functional-assessment section, Dr. Ghannam marked Mr. Nguyen as "moderately limited" (*i.e.*, impairments that affect individuals approximately 25% of the work day) in the following areas: (1) understanding and remembering very short and simple instructions; (2) carrying out very short and simple instructions; (3) sustaining an ordinary routine without special supervision; (4) making simple work-related decisions; and (5) getting along with coworkers.[287] Dr. Ghannam marked the following abilities as "markedly limited" (*i.e.*, affecting more than 25% of the work day): (1) performing activities within a schedule, maintaining regular attendance, and being punctual within customary tolerances; (2) performing at a consistent pace without an unreasonable number and length of rest periods; (3) accepting instructions and responding appropriately to criticism from supervisors; and (4) tolerating the usual stress encountered in competitive employment.[288]

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[281] AR 778.

[282] AR 776.

[283] AR 773.

[284] *Id.* The term "GAF-50" reflects a score of 50 out of 100 on the Global Assessment of Functioning.

[285] *Id.*

[286] *Id.*

[287] AR 774.

[288] *Id.*

2.1.5 Dr. Bayne — State Examining Consultant

On December 14, 2011, Dr. Bayne's diagnostic impressions were: (1) "chronic recurrent episodic low[-]back pain with spasms" which showed entailed "[n]o motor, sensory, or reflex changes"; (2) history of chronic anxiety; (3) history of chronic depression; (4) history of chronic insomnia; (5) and history of suicidal ideation.[289] Symptoms included low-back pain, which radiated down both legs, right worse than left.[290] His exam showed Mr. Nguyen's obvious discomfort with a depressive-type mood. He could sit and get up from a sitting to a standing position without difficulty. He was unable to walk on his heels or toes and was unable to squat.[291] He had loss of normal lordotic curve of his lumbar spine; forward flexion of the lumbar spine was limited to 30 degrees, and extension was 10 degrees; lateral bending and rotation was 10 degrees with significant low back spasms.[292]

Dr. Bayne opined that Mr. Nguyen should be able to converse, communicate, understand, read, and write in English. He should be able to drive or take public transportation. He should be able to sit with appropriate breaks for six hours during an eight-hour workday and lift and carry 10 pounds frequently and 20 pounds occasionally. Repetitive bending, twisting, crouching, crawling, kneeling, stooping, climbing up and down stairs, inclines, ramps or ladders should be limited to occasionally. He should also be able to perform "bilateral repetitive leg, ankle, and foot control frequently." He should be able to work in any environment except on unprotected heights.[293]

In December 2013, Dr. Bayne conducted a second orthopedic examination. Mr. Nguyen sat and moved from sitting to standing erect "with some loss of his normal spinal rhythm." He was unable to squat more than 50% of normal. He could not walk on his heels or toes. He was "significantly depressed" and his "affect was anxious and nervous." "He communicated well in English."[294] The exam showed tenderness to deep palpation over the thoracolumbar spine, over the

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[289] AR 461.

[290] *Id.*

[291] AR 460.

[292] AR 461.

[293] *Id.*

[294] AR 808.

sciatic notches bilaterally and over the SI joints bilaterally. Forward flexion of his lumbar spine was 60 degrees and extension was 0 degrees; lateral bending and rotation were 5 degrees with significant low-back spasms.[295] Dr. Bayne opined that Mr. Nguyen could sit with appropriate breaks for six hours during an eight-hour workday and could stand and walk for four hours out of an eight-hour workday. He could lift and carry 10 pounds frequently and 20 pounds occasionally. Postural activities were limited to occasionally.[296]

In July 2014, Dr. Bayne conducted a third orthopedic examination. Mr. Nguyen ambulated slowly, had difficulty walking on his heels and his toes, and could squat 50% of normal. He could sit and move from sitting to a standing erect position with some loss of his normal spinal rhythm. His mood and affect were moderately depressed but he was cognizant of past and present circumstances.[297] His spine was tender to palpation over the L4–5 vertebral segments. Forward flexion of his lumbar spine was 60 degrees, extension was 10 degrees, and lateral bending and rotation was 10 degrees with associated low-back spasms.[298] Dr. Bayne opined that Mr. Nguyen could stand and walk with appropriate breaks for two hours during an eight-hour workday. He could sit with appropriate breaks for six hours during an eight-hour workday. He could lift and carry 10 pounds frequently and 20 pounds occasionally. Postural activities were limited to occasionally. Mr. Nguyen should be able to work in any environment except on unprotected heights, and he should be able to communicate, understand, read, and write in English.

2.1.6 Dr. Hardy — State Examining Consultant

On December 15, 2011, Dr. Hardey performed a psychological consultative evaluation of Mr. Nguyen, with the assistance of an interpreter. Diagnoses included: "Pain Disorder Associated With Psychological Factors And General Medical Condition," and Dr. Hardy noted Mr. Nguyen's

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[295] AR 809.

[296] *Id.*

[297] AR 876.

[298] AR 877.

"[s]pondylolisthesis, lumbar spinal stenosis, sciatica, [and] chronic pain."[299] Mr. Nguyen's movement was stiff, his walking was slow and somewhat labored, and he was pleasant and cooperative but guarded.[300] His intelligence appeared in the low-average range.[301] His cognitive abilities were in the low end of the low-average end, perceptional reasoning ability was in the mid-borderline range, and processing speed ability was in the middle of the low-average range.[302]

Dr. Hardey's conclusions were as follows. Mr. Nguyen's current memory and cognitive abilities were "within the borderline to low-average range, which is probably a reasonable estimate of his abilities, but due to his pain and anxiety and depression his scores might have depressed to some degree."[303] "[H]e probably has overall low-average abilities premorbidly. It appears from the medical record that it would be unlikely that he could return to his former employment, and he probably needs some kind of vocational rehabilitation to return to the world of work in some other capacity. He does have the cognitive ability to function in the competitive job market given additional training" and the ability to manage his own financial resources.[304] Mr. Nguyen was moderately impaired in communicating effectively with others verbally and in writing.[305] He had mild to moderate impairment in the following: following and remembering complex or detailed instructions; maintaining adequate pace or persistence at complex tasks; maintaining adequate attention or concentration; adapting to changes in his job routine; withstanding the stress of a routine workday; interacting appropriately with coworkers and supervisors on a regular basis; and interacting appropriately with the public on a regular basis.[306] He had mild impairment in

[299] AR 464.
[300] AR 462, 464.
[301] AR 464.
[302] *Id.*
[303] AR 464–65.
[304] AR 465.
[305] *Id.*
[306] *Id.*

following and remembering simple instructions and maintaining adequate pace or persistence to maintain one- or two-step simple repetitive tasks.[307]

2.1.6 Dr. Kollath — State Examining Consultant

In December 2013, Dr. Kollath conducted a psychological consultative evaluation of Mr. Nguyen, with the assistance of a translator. He diagnosed an Axis I depressive disorder NOS by history and an Axis V GAF 65.[308] Dr. Kollath performed several tests but the "results are considered to be an unreliable representation of the claimant's current psychological functioning."[309] As to cognitive status, Mr. Nguyen's performance was "inconclusive. He had no difficulty following simple and moderately complex directions. His history and clinical presentation [are] not indicative of a neurocognitive disorder. He should have no functional disruption due to a cognitive disorder. Claimant presented with variable motivation and results cannot be considered as a reasonably valid or reliable estimate of his level of functioning and previous testing from 2011 established cognitive functioning in the low average range."[310] "Emotional" was "mildly impaired.[311] "[F]rom a psychological standpoint," Dr. Kollath concluded that Mr. Nguyen was "unimpaired" and assessed that his work-related abilities were unimpaired.[312]

2.1.7 Dr. Howard — State Examining Consultant

In June 2014, Dr. Howard conducted a psychological consultative evaluation, with the assistance of a translator. His diagnoses were (1) Axis I mood disorder, NOS, with depressed and reported anxious procedures, (2) cognitive disorder, NOS, with borderline and extremely low functioning; and (3) Axis V GAF 55–57.[313] Mr. Nguyen reported that he suffered from back pain

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[307] *Id.*

[308] AR 805.

[309] AR 804.

[310] AR 804–05.

[311] AR 805.

[312] *Id.*

[313] AR 874.

after his November 2003 accident, and his "mood disturbance" began about five years ago.[314] HE reported difficulty with memory and concentration.[315] He had at least average language competency shown by his ability to follow instructions, and once rapport was established, he was cooperative and required little encouragement.[316] He could repeat three words but not remember them five minutes later. His attention and concentration appeared impaired; he could not "perform serial three's" and could not accurately subtract $7.50 from $18.00. He reported suicidal thoughts two years before the evaluation and being psychiatrically hospitalized in Oakland.[317] He appeared depressed and reported a depressed and anxious mood with sleep disturbance, tearfulness, decreased energy, irritability, and difficulty with memory and concentration. [318]

His test results were as follows. Trail Making Test, Parts A and B: slowed psychomotor ability and difficulty shifting mental sets; completed Part A in 129 seconds; "Errorless scores over 59 on Part A are strongly suggestive of individuals with deficits. Results indicated that his executive functioning ability, and his planning, organization and sequencing skills[,] were impaired." He did not complete Part B.[319] Nonverbal Intelligence: 3rd percentile of intelligence.[320] Weschler Memory Scale: "his ability to learn and recall visual information appeared severely impaired."[321] He "demonstrated Borderline intellectual functioning, impaired immediate visual memory, slowed psychomotor ability, and difficulty shifting mental sets."[322] Based on behavioral observations, reported psychiatric history, review of records, and results of testing, he "showed moderate to marked impairment in his ability to attend to and concentrate on usual work situations. He had

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[314] AR 873.
[315] *Id.*
[316] *Id.*
[317] *Id.*
[318] *Id.*
[319] *Id.*
[320] *Id.*
[321] *Id.*
[322] *Id.*

market impairment in his ability to adapt to changes in a working environment."[323] Because of his English skills, Mr. Nguyen would have marked difficulty accepting simple instructions from supervisors and marked difficulty interacting with coworkers and the public. He demonstrated marked impairment in his pace and persistence at tasks and moderate to marked impairment in his ability to perform activities within a schedule and maintain regular attendance.[324]

2.2 Cooperative Disability Investigations Unit Report (February 2013)

In February 2013, the Cooperative Disability Investigations Unit ("CDI") produced a report[325] to evaluate Mr. Nguyen's "questionable information regarding his ability to communicate in English."[326] They tried to interview Mr. Nguyen in December 2012 (but he refused to be interviewed without his attorney), and they observed Mr. Nguyen walking normally without any assistive devices. He spoke and responded entirely in English without assistance. He "did not appear to be in any pain while standing and walking" and "did not appear depressed."[327]

CDI agents obtained Department of Motor Vehicles records from 2009 to February 10, 2013, showing that Mr. Nguyen had held a commercial driver's license for that entire period.[328] To maintain such a license, Mr. Nguyen had to submit a DMV Form DL-51 filled out by a qualified medical practitioner after physically examining the applicant.[329] From 2009 to 2013, Mr. Nguyen filled out his part of the form in English (even though it was available in Vietnamese), and he and his doctor stated that he had no chronic back pain, no neurological problems, was in good health, and had no medical conditions that impaired his ability to be a commercial truck driver.[330]

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[323] *Id.*

[324] *Id.*

[325] AR 385–89.

[326] AR 387.

[327] AR 386.

[328] *Id.*

[329] *Id.*

[330] AR 386–87.

2.3 Social Security Administration Proceedings

2.3.1 Mr. Nguyen's Testimony at the November 13, 2013 Hearing

The ALJ questioned Mr. Nguyen first.

Mr. Nguyen came to the United States from Vietnam in 1983 at age 16.[331] He completed high school in Oakland; all of his classes were in English.[332] The ALJ asked Mr. Nguyen questions without an interpreter. He asked if Mr. Nguyen spoke English, and Mr. Nguyen responded, "Yes, when I came here I learned but I didn't learn much."[333] The ALJ asked, "when you submitted your application you said you could read and write and speaking English, right?" Mr. Nguyen responded, "Yes, but it's not 100%."[334] The ALJ asked Mr. Nguyen his height and weight, and Mr. Nguyen said that he was 5'3" and "Before I weigh 170. Now 155."[335] The ALJ asked questions about Mr. Nguyen's home, children, and driving, and Mr. Nguyen answered.[336] When the ALJ asked Mr. Nguyen how often he drives in a typical week, Mr. Nguyen did not understand the question, the ALJ rephrased, and Mr. Nguyen answered.[337] His attorney interjected, "Your honor, I just want to make it clear that I thought he needed an interpreter because I have a hard time communicating with him, so he didn't particularly object to doing it in English."[338]

The ALJ asked Mr. Nguyen whether he had trained for new kinds of work and Mr. Nguyen asked for a translation and responded that he took a two-month computer class and finished it in 2009.[339] He learned data input and the functioning of the computer system.[340] He did not take

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[331] AR 77.
[332] *Id.*
[333] *Id.*
[334] *Id.*
[335] *Id.*
[336] AR 77–78.
[337] AR 78.
[338] *Id.*
[339] AR 79.
[340] *Id.*

other classes because of his pain and because he did not have enough time.[341] He clarified that it was because of his pain and he was unable to take classes.[342]

Mr. Nguyen testified that he had not worked since 2003 and lived on his wife's income.[343] He settled his worker's compensation case in 2009 and received $16,000.[344] He can't work because he is in pain, can't stand up, can stand for ten to fifteen minutes at most, needs to sit for 20 minutes and then has to change positions before he can get up, and can lift five to ten pounds without any problem.[345] His condition has worsened since 2011; his pain is in the middle of his lower back, and he can walk about two blocks before he needed to sit, and has pain when he sits and needs to get up after 20 or 25 minutes.[346] He provided a list of medications that included hydrocodone, Lidoderm patch, and Prozac.[347] Mr. Nguyen's lawyer explained that Mr. Nguyen's insurer no longer approved the hydrocodone, and Mr. Nguyen had stopped taking it.[348] He uses two creams and the Lidoderm patch, which help, and Prozac.[349] In 2012, he had facet injections and radiofrequency ablation, but these did not help much.[350] Dr. Jamasbi has recommended more injections and surgery, but Mr. Nguyen felt that surgery was very complicated, dangerous, and risky.[351] Mr. Nguyen's last injection was "maybe eight months ago."[352]

Mr. Nguyen usually gets up by 5:30 or 6:00 in the morning and spends a typical day doing "[b]asically nothing" but trying "to position myself to prevent the further pain in my body and

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[341] *Id.*
[342] AR 80.
[343] *Id.*
[344] AR 80.
[345] AR 81.
[346] AR 81–82.
[347] AR 82.
[348] *Id.*
[349] *Id.*
[350] *Id.*
[351] AR 83.
[352] *Id.*

relax lying down."[353] He doesn't help with chores; his wife does everything and also cares for their disabled child.[354] He does not sleep during the day, goes to sleep at 12:30 or 1:00 a.m., and gets only about four hours of sleep at most because he had to move his body due to his pain.[355]

He does not have friends anymore but gets along "okay" with his wife and children.[356] He used to play volleyball and basketball and bowl, but can't anymore.[357] He can no longer play chess "because my life is now full of pain and I feel very depressed. Sometimes because of my sleep problem, I start crying."[358] He used to go to the gym, enjoyed it, and found the water therapy useful, but later his insurance denied the service.[359] He was unable to use the treadmill or stationary bike and used only the water therapy.[360] Mr. Nguyen sees Dr. Ghannam — who prescribed the Prozac — every one to two months.[361]

Mr. Nguyen's attorney then asked Mr. Nguyen questions. She first asked him to describe his symptoms, observing that he had been "treated for depression for several years."[362] Mr. Nguyen responded, "I feel very sad and I cry . . . because I was unable to help my family, my children."[363] He gets angry a lot of times without any reason.[364] "When I get angry I only think of holding my head and crying."[365] He sometimes thinks of suicide: "because of my pain I feel, you know, useless, and I feel rather than to die than living."[366] He did not suffer from depression before the

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[353] *Id.*
[354] *Id.*
[355] AR 84.
[356] *Id.*
[357] *Id.*
[358] AR 84–85.
[359] AR 85.
[360] *Id.*
[361] AR 86.
[362] *Id.*
[363] *Id.*
[364] AR 87.
[365] *Id.*
[366] *Id.*

accident and was "a normal person."[367] He thinks if his pain resolved, he would stop being depressed; the Prozac helps a little.[368] His most comfortable position is lying down with pillows underneath his knees to elevate his legs.[369]

The ALJ then asked if Mr. Nguyen thought about killing himself, and he responded yes. The ALJL asked if he thought how he would do it, and Mr. Nguyen said yes. Mr. Nguyen talked to Dr. Ghannam about it, but not Dr. Jamasbi. The ALJ asked "how long have you been thinking about killing yourself," and Mr. Nguyen responded "[a]bout two or three years ago."[370]

2.3.2 Vocational-Expert Testimony

Vocational expert (VE) Robert A. Raschke then testified.[371] The ALJ asked the VE to classify Mr. Nguyen's past work, which was "driver delivery work," with "medium exertion."[372] The ALJ asked the VE hypothetically whether an individual of Mr. Nguyen's education and work background, who is limited to sedentary work and simple work, could perform the claimant's past work, and the VE responded that it would be "eliminated on exertional level alone."[373] The ALJ asked the VE whether there would be any other work that that person could do, and the VE responded that the person could do entry-level sedentary work that was available in the economy.[374] He explained that the "production arena" offered "lots of job titles" — "essentially 2,000" such jobs "in different categories."[375] An example is "shade assembler," which is considered sedentary.[376] He mentioned other sedentary job categories such as "inspectors, testers,

[367] *Id.*
[368] *Id.*
[369] AR 88.
[370] *Id.*
[371] *Id.*
[372] AR 89.
[373] *Id.*
[374] *Id.*
[375] *Id.*
[376] *Id.*

and sorters", a "lens block gauger" (involving the manufacture of eyewear), telephone solicitor, and master laborer in precision instruments.[377]

The ALJ added a limitation that the person would need to change his position from sitting to standing every 15 or 20 minutes.[378] The VE testified that based on his 40 years' experience in job development, on-the-job training programs, and job analysis, 80% of the jobs he mentioned would work for that hypothetical person because they were performed at higher benches, which would let a person working on a stool to stand or sit at will.[379]

The ALJ then said, if that hypothetical person "had a marked limitation in performing within a schedule and being punctual, he could not do any work in the competitive economy."[380] The VE answered, "That's correct."[381]

2.3.3 Mr. Nguyen's Testimony at May 2014 Supplemental Hearing

After the first hearing in November 2013, the ALJ asked for orthopedic and psychological consultative examinations and for the CDI investigation and then held a supplemental hearing at Mr. Nguyen's request.[382] Mr. Nguyen's attorney objected for the record: "I am wondering how a judge who has denied my claimant before, and who initiated an investigation, can make an unbiased decision in this case."[383] The ALJ responded that if the attorney showed that the investigative findings were irrelevant or wrong, he'd issue a favorable decision.[384]

The ALJ swore in the interpreter first, but Mr. Nguyen's attorney said that given the questions about his English skills, they were willing to have the hearing in English.[385] Mr. Nguyen's attorney

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[377] AR 89–90.

[378] AR 91.

[379] *Id.*

[380] *Id.*

[381] *Id.*

[382] AR 96.

[383] AR 97.

[384] *Id.*

[385] *Id.*

then questioned Mr. Nguyen. She asked if he had said at various times that his English was not very good.[386] Mr. Nguyen answered, "Yes, correct, my English is understand, but not completely understand fully completely the language."[387] Then the attorney asked Mr. Nguyen how he was able to graduate from high school in the U.S. if his English was so poor.[388] Mr. Nguyen responded: "I came here to the United States when I was young and then I go to high school, and so I am able to learn, so I graduate in English, but after I graduate I go straight to work, so all right now my English all memory are gone. I cannot do more than like before. That's why some stuff I need an interpreter, that's the reason why."[389]

The attorney asked Mr. Nguyen if he had to speak English when he was working and how much contact he had with other people at work.[390] Mr. Nguyen testified that he did not speak English at work much. He only talked to his supervisor at the beginning and the end of the day.[391]

The attorney asked whether Mr. Nguyen remembered saying at the first hearing that he could not read a newspaper in English.[392] Mr. Nguyen did not remember, but said that there were "a lot of words" that he did not "understand[] completely" in a "regular" newspaper.[393] The attorney asked whether Mr. Nguyen's ability to read English deteriorated after graduating high school, and Mr. Nguyen said that he did not understand the question.[394] The ALJ rephrased the question and asked Mr. Nguyen if his ability to read English gotten better, or worse, or stayed about the same, since high school.[395] Mr. Nguyen responded that it had gotten worse because after high school he did not go to college but started working instead.[396]

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[386] *Id.*

[387] *Id.*

[388] *Id.*

[389] AR 98–99.

[390] AR 99.

[391] *Id.*

[392] *Id.*

[393] *Id.*

[394] *Id.*

[395] AR 99–100.

[396] AR 100.

Mr. Nguyen's attorney asked whether his ability in written English had gotten worse, and Mr. Nguyen said that it had.[397] She asked when he obtained his driver's licenses; Mr. Nguyen responded that he obtained the regular license while in high school in 1987 and the truck driver's license right after high school in 1988.[398] The attorney asked about the reports he submitted to DMV from his doctor regarding his commercial license; Mr. Nguyen said that he did not want to lose the license and so "lie[d]" to his family doctor about his health and "did not tell the truth that [he] was hurt."[399] The attorney asked whether the doctor examined him when he completed the form.[400] Mr. Nguyen stated: "Yes, he asks some questions . . . like vision, some basically . . . — he would have the form asking me as he examines me."[401] The attorney asked why he wanted to keep the trucking license if he was unable to work.[402] Mr. Nguyen answered that his friends had told him that if he lost his commercial driver's license, he would need to do the written and driving tests again.[403] He testified, "so I'm afraid they['d] give me a hard time. That's why I lie to him to keep the license, just renew, continue, but I'm not trying to keep license to go back to work. I cannot."[404] The attorney asked if Mr. Nguyen believed or hoped that someday he would be able to return to work as a truck driver.[405] Mr. Nguyen said that he wished that he could work so that he could support his family, but after the accident, he doubted he could.[406]

The attorney asked about the CDI investigators' visit to Mr. Nguyen at home.[407] Mr. Nguyen did not remember "what day they came" but remembered their visit.[408] His attorney asked whether

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[397] *Id.*
[398] *Id.*
[399] *Id.*
[400] *Id.*
[401] *Id.*
[402] *Id.*
[403] AR 101–02.
[404] AR 102.
[405] *Id.*
[406] *Id.*
[407] *Id.*
[408] *Id.*

he refused to talk with them and whether they showed identification.[409] Mr. Nguyen knew who they were but did not want to talk to them before he talked to his attorney. They showed their identification "real quick" and did not tell him why they were there except to say that they were Social Security agents and wanted to ask some questions.[410] The attorney asked whether Mr. Nguyen was walking without assistance (such as a cane), as the agents reported.[411] Mr. Nguyen said that he does not use a cane but walks "real slow."[412]

2.3.4 Vocational-Expert Testimony at Supplemental Hearing (22/05/2014)

VE Freeman Leeth, Jr. testified on May 5, 2014.[413] Mr. Nguyen's lawyer posited the following hypothetical person: A person with Mr. Nguyen's age, education and work background with the following limitations: (1) can sit continuously for fifteen minutes at a time, sitting for a total of four hours in an eight-hour day, and can stand or walk for four hours in an eight-hour day; (2) can lift up to ten pounds, rarely bend, and occasionally reach above shoulder level; (3) has severe pain that interferes with maintaining concentration, persistence, and pace such that he would be off task for 20% of an eight-hour day; and (5) suffers from major depression that so limits his ability to maintain a schedule, maintain regular attendance, and be punctual such that he would miss two days of work per month.[414] She then asked, "Would this individual be able to perform Mr. Nguyen's past work," and the VE responded, "No."[415] She asked whether there would be any other jobs he could perform, and the VE responded, "Not in my opinion."[416]

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[409] AR 103.
[410] *Id.*
[411] *Id.*
[412] AR 104.
[413] *Id.*
[414] AR 105.
[415] *Id.*
[416] AR 106.

2.4 Administrative Findings

The ALJ held that, from January 1, 2009 through August 1, 2014, Mr. Nguyen was not disabled within the meaning of the Social Security Act.[417]

The ALJ observed that the Commissioner has established a sequential five-step evaluation process to determine if an individual is disabled. At step one, the ALJ must determine whether the individual is engaging in "substantial gainful activity." At step two, the ALJ must determine whether the individual has a "medically determinable impairment" that is "severe" or a combination of impairments that is "severe." At step three, the ALJ must determine whether the individual's impairments are severe enough to meet a listed impairment. At step four, the ALJ must determine the individual's "residual functional capacity" and determine whether the individual can perform "past relevant work." At step five, the ALJ must determine whether the individual can perform any other work.[418]

At step one, the ALJ found that that Mr. Nguyen had not engaged in substantial gainful activity since January 1, 2009, the application date.[419]

At step two, the ALJ found that Mr. Nguyen had the following severe impairments: degenerative disc disease of the lumbar spine; lumbar strain; and chronic-pain syndrome.[420] Mr. Nguyen also alleged disability in part due to depression, but the ALJ found that the medical record did not support more than a minimal effect on his ability to perform basic mental-work activities.[421] Dr. Jamasbi observed depression and anxiety in 2008, but he noted that Mr. Nguyen denied suicidal ideation, and he characterized Mr. Nguyen as having normal insight, judgment, and emotional state.[422] By December 2009, Mr. Nguyen's mood and sleep had improved with medication.[423] Similarly, while Dr. Ghannam diagnosed Mr. Nguyen with major depressive

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[417] AR 33.

[418] AR 20–21.

[419] AR 22.

[420] *Id.*

[421] *Id.*

[422] AR 22–23.

[423] AR 23.

disorder, by March 2010, the psychotropic medication had been moderately helpful, and by December 2010, he had a 60% reduction in depression and anxiety.[424] In January 2011, the cognitive-behavioral therapy was helping.[425] By December 2011, consultative psychologist Dr. Hardey found Mr. Nguyen's mental status unremarkable and only mild-moderate impairment.[426] The ALJ contrasted Dr. Jamasbi's observation of symptoms of major depression in May 2012 with Dr. Ghannam's report the next month that Mr. Nguyen had not received mental-health treatment for approximately a year.[427] By April 2013, Dr. Ghannam reported deterioration and recommended medication; by October 2013, he noted mild improvement but continued severe symptoms.[428] In December 2013, Dr. Kollath found that Mr. Nguyen was unimpaired in his ability to meet the mental demands of work.[429] In June 2014, consultative psychologist Dr. Howard diagnosed mood disorder and cognitive disorder with moderate-market impairment of work-related abilities.[430]

In concluding that the medical record did not support severe depression (and instead showed that Mr. Nguyen experienced depression based on his pain), the ALJ pointed to the following: a lack of positive objective findings in psychological testing and mental-status examinations performed by Dr. Hardey and Dr. Kollath; improvements in Mr. Nguyen's reported depression with treatment; the absence of any objective assessment of Mr. Nguyen by Dr. Ghannam to support the limitations; the lack of reliability of Dr. Howard's findings (because they were based upon Mr. Nguyen's inaccurate portrayal of himself as not speaking English); and Dr. Jamasbi's recognition that Mr. Nguyen did not have an independent mental impairment but experienced depression associated with his pain disorder.[431]

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[424] *Id.*
[425] *Id.*
[426] *Id.*
[427] *Id.*
[428] AR 24.
[429] *Id.*
[430] *Id.*
[431] AR 25.

The ALJ considered the four broad functional areas in the disability regulations in finding that the claimant's symptoms of anxiety and depression were not severe.[432] The four areas are (1) activities of daily living, (2) social functioning, (3) concentration, persistence, and pace, and (4) extended periods of decompression.[433] 20 C.F.R. § 404.1520a(d)(1). Mr. Nguyen had had mild limitations for the first three functional areas, and no episodes of decompensation of extended duration in the fourth.[434]

For activities of daily living, the ALJ noted that Mr. Nguyen told the Administration that he helped his children get ready for school, sometimes helped his wife wash dishes, and went shopping. He reported to Dr. Jamasbi in June 2011 that he worked out at the gym on a treadmill and a stationary bike and could do light household chores.[435] For social functioning, Mr. Nguyen gets along well with his family members, and he interacted appropriately with Dr. Kollath.[436] For the third functional area of concentration, pace, and persistence, Dr. Hardey's and Dr. Howard's examinations suggested significant limitations, but their results are unreliable because Mr. Nguyen misrepresented his English skills.[437] For the fourth functional area, Mr. Nguyen experienced no episodes of extended periods of decompensation.[438]

The ALJ concluded that the mental impairments were non-severe under 20 C.F.R. § 404.1520a(d)(1) because there was insufficient reliable evidence documenting a medically determinable mental impairment that caused more than a "mild" limitation in the first three functional areas or caused any episodes of decompensation of extended duration in the fourth.[439]

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[432] *Id.* As the ALJ explained, these "four broad functional areas are known as the 'paragraph B' criteria" and appear at 20 C.F.R. Part 404 Subpart P, Appendix 1. *Id.*

[433] AR 31–32.

[434] *Id.*

[435] *Id.*

[436] *Id.*

[437] *Id.*

[438] *Id.*

[439] *Id.*

At step three, the ALJ found that Mr. Nguyen did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments.[440] The ALJ explained that the "record[] does not document nerve root compression characterized by pain, limitation of motion in the spine, motor loss and sensory, or reflex loss, as required under Section 1.04" of the Administration's impairment listings. The ALJ thus concluded that "a Listing level disorder of the spine is not established here."[441]

The ALJ next concluded that Mr. Nguyen had not carried his burden of showing changed circumstances in his condition since December 23, 2008 (when the ALJ denied Mr. Nguyen's prior claim for benefits) and concluded that Mr. Nguyen continued to have the "residual functional capacity to perform the full range of sedentary work, as defined in 20 C.F.R. §§ 404.1467(a) and 416.967(a).[442] The ALJ reviewed records starting with Dr. Oda's diagnosis in 2005 through his many years of treatment with Dr. Jamasbi.[443] The ALJ determined that there was no continuous 12-month period during which Mr. Nguyen had been precluded from performing sedentary work. To support this conclusion, the ALJ relied on "the limited positive objective findings reported on EMG, MRI, CT scan and x-rays, with the minimal positive objective findings reported on physical examinations, and . . . the evidence of a marked improvement in [Mr. Nguyen]'s back pain and other symptoms with treatment."[444]

The ALJ gave "great weigh[t]" to Dr. Oda's conclusions regarding Mr. Nguyen's work capacity because they were "consistent with the limited positive objective findings reported in connection with his back-pain complaints."[445] The ALJ gave "some weight" to Dr. Warbritton's assessment of Mr. Nguyen's work capacity because it was "not inconsistent" with the objective medical records.[446] The ALJ found "persuasive" Dr. Bayne's conclusions from December 2011

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[440] AR 26.

[441] *Id.*

[442] *Id.*

[443] AR 26–28.

[444] AR 28.

[445] AR 29.

[446] *Id.*

and December 2013 that Mr. Nguyen could perform sedentary work because they are supported by objective medical records.[447]

The ALJ "reject[ed]" the opinion of the treating physician Dr. Jamasbi. While acknowledging that such testimony is "normally afford[ed] . . . great weight," here the ALJ concluded that Dr. Jamasbi's opinion was because it is "not well-supported by objective medical evidence" and is "inconsistent with [Dr. Jamasbi's] own observations that Mr. Nguyen's symptoms improved and his function increased over time."[448] Moreover, Dr. Jamasbi "relied largely" on Mr. Nguyen's "subjective complaints" which were "questionable at best" for several reasons that the ALJ enumerated separately — and which are discussed later in this section.[449]

The ALJ gave "great weight" to consultative psychologist Dr. Kollath's conclusion regarding Mr. Nguyen's mental condition, as they are "consistent with the lack of any reliable objective evidence on psychological testing or mental[-]status examinations suggesting work-related limitations."[450]

The ALJ gave "no weight" to treating psychologist Dr. Ghannam's conclusions because there was "no evidence that he ever performed a comprehensive psychological examination" of Mr. Nguyen and his opinion is "unsupported by any reported positive objective findings on mental[-]status examination or psychological testing."[451] "Rather," explained the ALJ, Dr. Ghannam's conclusions "appear to be largely, if not wholly, based upon [Mr. Nguyen]'s subjective reports."[452]

The ALJ gave "no weight" to Dr. Hardey's and Dr. Howard's conclusions, which he found "unreliable."[453] According to the ALJ:

> At the time of their examinations, the claimant misrepresented himself as unable to communicate in English. Indeed, Dr. Howard specifically relied upon the

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[447] *Id.*

[448] *Id.*

[449] *Id.*

[450] *Id.*

[451] *Id.*

[452] *Id.*

[453] *Id.*

> claimant's misrepresentation of the quality of his English abilities in identifying specific work-related limitations. Moreover, Dr. Howard reported that the claimant scored in the 3rd percentile of intelligence on psychological testing, but that score is wholly inconsistent with the claimant's report that he has been able to complete a college-level course and his ability to obtain and maintain a commercial driver's license.[454]

The ALJ specifically mentioned that Mr. Nguyen's credibility was severely undermined and he rejected his statements about his health because he made many inconsistent statements about his English language abilities and his activities.[455] Furthermore, Mr. Nguyen's credibility also was undermined by extensive evidence including treatment records from both Dr. Ghannam and Dr. Jamasbi reflecting repeated reports that Mr. Nguyen's symptoms had improved with treatment.[456]

Crucially, the ALJ found that Mr. Nguyen's "statements regarding his symptoms do not establish that he is disabled."[457] The ALJ explained: "I have . . . considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the" applicable regulations.[458] First, the ALJ found the "objective medical findings" to be "limited."[459] Equally important, the ALJ found "specific and legitimate reasons to reject the claimant's statements regarding his symptoms."[460] "First," Mr. Nguyen had "made many inconsistent statements regarding his English language abilities that severely undermine his credibility."[461] The ALJ then specified some of these inconsistencies, such as Mr. Nguyen's repeated ability over time to fill out forms and conduct interviews in English, even when he could have done so in Vietnamese.[462] Against this backdrop, "[h]is attempt to portray himself as limited in his ability to communicate in English during examinations scheduled

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[454] *Id.*
[455] AR 30.
[456] AR 31.
[457] AR 29.
[458] *Id.*
[459] AR 30.
[460] *Id.*
[461] *Id.*
[462] *Id.*

to assess his ability to work for purposes of Social Security claims significantly undermines his credibility."[463]

"Moreover," the ALJ continued, "his credibility is further undermined by inconsistencies in his statements regarding his activities."[464] Against his occasional claim that he did "nothing all day but rest," the ALJ noted his contrary testimony that he helped with his children, "one of whom is 'handicapped'. . . with cerebral palsy," shopped, helped with housework, and had "successfully completed a two-month college-level computer course in 2009."[465] Similarly, Mr. Nguyen "testified that he has never used a stationary bike or treadmill."[466] "However, he told Dr. Jamasbi in June 2011 that he was working out at a gym, using a stationary bicycle and a treadmill."[467]

The ALJ found still further reasons to reject Mr. Nguyen's self-reported symptoms: "The credibility of the claimant's allegations of disabling pain and other symptoms is also undermined by extensive evidence, including treatment records from both Dr. Ghannam and from Dr. Jamasbi, reflecting repeated reports by the claimant that his symptoms had improved with treatment."[468] While Mr. Nguyen claimed that he could not sit for more than short periods, "Dr. Jamasbi repeatedly observed that the claimant was able to sit comfortably and was in no apparent pain during his examination."[469] "Moreover, despite his allegation of an inability to do prolonged sitting, he stood for perhaps 15 seconds during the 45[-]minute hearing before me in November 2013, and sat throughout the May 2014 hearing."[470] "Further," the ALJ found "evidence of symptom magnification."[471]

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[463] *Id.*
[464] *Id.*
[465] *Id.*
[466] *Id.*
[467] *Id.*
[468] AR 21.
[469] *Id.*
[470] *Id.*
[471] *Id.*

"Finally" on Mr. Nguyen's credibility, the ALJ noted his long history of holding a commercial driving license. While Mr. Nguyen "alleged ongoing disabling pain and other symptoms precluding all work," to keep his commercial license he had "for years" stated in DMV forms "that he had no chronic low[-]back pain, that he had no neurological problems and that he was in excellent health."[472]

"Thus, after carefully considering the evidence," the ALJ concluded that "the claimant's medically determinable impairments could reasonably be expected to cause the alleged symptoms, but that his statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible . . . ."[473]

Returning to the main heads of the five-step evaluation, at step four, the ALJ determined that Mr. Nguyen was unable to perform any past relevant work.[474]

At step five, considering Mr. Nguyen's age, education, work experience, and residual functional capacity, the ALJ found that there were jobs that existed in significant numbers in the national economy that Mr. Nguyen could perform.[475] The ALJ also mentioned that even if he were to find that Mr. Nguyen had a severe mental impairment, and accepted the conclusion that Mr. Nguyen was limited to "simple work at the sedentary exertional level," VE Raschke had testified that an individual with such residual functional capacity, and with Mr. Nguyen's age, education, and work experience, could perform multiple jobs available in the national economy in significant numbers.[476] The ALJ "accept[ed] this opinion."[477]

The ALJ thus reached two holdings. He held that "Mr. Nguyen" was "not disabled" for "disability and disability insurance benefits . . . under sections 216(i) and 223(d) of the Social

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[472] *Id.*

[473] *Id.*

[474] AR 32.

[475] *Id.*

[476] *Id.*

[477] *Id.*

Security Act."[478] He also held that Mr. Nguyen was "not disabled" for "supplemental security income . . . under section 1614(a)(3)(A) of the Social Security Act."[479]

ANALYSIS

1. Standard of Review

Under 42 U.S.C. § 405(g), district courts have jurisdiction to review any final decision of the Commissioner if the claimant initiates the suit within 60 days of the decision. District courts may set aside the Commissioner's denial of benefits only if the ALJ's "findings are based on legal error or are not supported by substantial evidence in the record as a whole." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotations omitted); 42 U.S.C. § 405(g). "Substantial evidence means more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). If the evidence in the administrative record supports both the ALJ's decision and a different outcome, the court must defer to the ALJ's decision and may not substitute its own decision. *See id.* at 1039–40; *Tackett v. Apfel*, 180 F.3d 1094, 1097–98 (9th Cir. 1999).

2. Applicable Law

An SSI claimant is considered disabled if he or she suffers from a "medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months," and the "impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 1382c(a)(3)(A), (B).

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[478] *Id.*

[479] *Id.*

There is a five-step analysis for determining whether a claimant is disabled within the meaning of the Social Security Act. *See* 20 C.F.R. § 404.1520. The five steps are as follows:

> **Step One.** Is the claimant presently working in a substantially gainful activity? If so, then the claimant is "not disabled" and is not entitled to benefits. If the claimant is not working in a substantially gainful activity, then the claimant's case cannot be resolved at step one, and the evaluation proceeds to step two. *See* 20 C.F.R. § 404.1520(a)(4)(i).
>
> **Step Two.** Is the claimant's impairment (or combination of impairments) severe? If not, the claimant is not disabled. If so, the evaluation proceeds to step three. *See* 20 C.F.R. § 404.1520(a)(4)(ii).
>
> **Step Three.** Does the impairment "meet or equal" one of a list of specified impairments described in the regulations? If so, the claimant is disabled and is entitled to benefits. If the claimant's impairment does not meet or equal one of the impairments listed in the regulations, then the case cannot be resolved at step three, and the evaluation proceeds to step four. *See* 20 C.F.R. § 404.1520(a)(4)(iii).
>
> **Step Four.** Considering the claimant's residual functional capacity ("RFC"), is the claimant able to do any work that he or she has done in the past? If so, then the claimant is not disabled and is not entitled to benefits. If the claimant cannot do any work he or she did in the past, then the case cannot be resolved at step four, and the case proceeds to the fifth and final step. *See* 20 C.F.R. § 404.1520(a)(4)(iv).
>
> **Step Five.** Considering the claimant's RFC, age, education, and work experience, is the claimant able to "make an adjustment to other work?" If not, then the claimant is disabled and entitled to benefits. *See* 20 C.F.R. § 404.1520(a)(4)(v). If the claimant is able to do other work, the Commissioner must establish that there are a significant number of jobs in the national economy that the claimant can do. There are two ways for the Commissioner to show other jobs in significant numbers in the national economy: (1) by the testimony of a vocational expert or (2) by reference to the Medical-Vocational Guidelines at 20 C.F.R., part 404, subpart P, app. 2. *See* 20 C.F.R. § 404.1520(a)(4)(v).

For steps one through four, the burden of proof is on the claimant. *Tackett*, 180 F.3d at 1098. At step five, the burden shifts to the Commissioner to show that the claimant can do other kinds of work. *Id.*

3. Application

Mr. Nguyen contends that the ALJ erred in two ways.[480] First, he argues that the ALJ did not "assign[] . . . adequate weight" to the opinion of his treating physician, Dr. Jamasbi.[481] Second, he

[480] Mot. – ECF No. 15 at 1.

[481] *Id.* (capitalization removed).

argues that the ALJ did not "follow the 'slight abnormality' standard'" in finding that his depression was "non-severe."[482] These are the only two issues that Mr. Nguyen raises for this court's review.[483]

3.1 Dr. Jamasbi — Back Pain

3.1.1 Governing law

The ALJ is responsible for "'resolving conflicts in medical testimony, and for resolving ambiguities.'" *Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir. 2014) (quoting *Andrews*, 53 F.3d at 1039). An ALJ may not, however, interject or substitute his own medical opinion or diagnosis for that of the claimant's physician. *See Tackett*, 180 F.3d at 1102–03; *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975) (an ALJ is forbidden from making his own medical assessment beyond that demonstrated by the record); *see also Ladue v. Chater*, No. C-95-0754 EFL, 1996 WL 83880, at *3 (N.D. Cal. Feb. 16, 1996) (stating that "[d]isability hearings are not adversarial in nature" and "the ALJ has duty to develop the record" and "inform himself about [the] facts," even if "the claimant is represented by counsel").

In weighing and evaluating the evidence, the ALJ must consider the entire case record, including each medical opinion in the record, together with the rest of the relevant evidence. 20 C.F.R. § 416.927(b); *see also Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) ("[A] reviewing court must [also] consider the entire record as a whole and may not affirm simply by isolating a specific quantum of supporting evidence.") (internal quotations omitted)).

Social Security regulations distinguish between three types of physicians: treating physicians; examining physicians; and non-examining physicians. 20 C.F.R. § 416.927(c), (e); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). "Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing [non-examining] physician's." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th

[482] *Id.* (capitalization removed).

[483] *See id.*

Cir. 2001) (citing *Lester*, 81 F.3d at 830); *see also Sprague v. Bowen*, 812 F.2d 1226, 1231 (9th Cir. 1987) (the opinion of a treating physician is generally given the greatest weight because the treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual"); *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996).

Accordingly, "[i]n conjunction with the relevant regulations, [the Ninth Circuit has] developed standards that guide [the] analysis of an ALJ's weighing of medical evidence." *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (citing 20 C.F.R. § 404.1527). "To reject [the] uncontradicted opinion of a treating or examining doctor, an ALJ must state clear and convincing reasons that are supported by substantial evidence." *Id.* (alteration in original) (internal quotations omitted). If the ALJ finds that the opinion of a treating physician is contradicted, the ALJ must provide "specific and legitimate reasons supported by substantial evidence in the record." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (internal quotations omitted); *see also Garrison*, 759 F.3d at 1012 ("If a treating or examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported by substantial evidence.") (internal quotations omitted)). "Where an ALJ does not explicitly reject a medical opinion or set forth specific, legitimate reasons for crediting one medical opinion over another, he errs." *Id.*; *see also* 20 C.F.R. § 404.1527(c)(2) ("If we find that a treating source's opinion on the issue(s) of the nature and severity of [the claimant's] impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the claimant's] case record, we will give it controlling weight.").

"If a treating physician's opinion is not given 'controlling weight' because it is not 'well-supported' or because it is inconsistent with other substantial evidence in the record, the [Social Security] Administration considers specified factors in determining the weight it will be given." *Orn*, 495 F.3d at 631. "Those factors include the '[l]ength of the treatment relationship and the frequency of examination' by the treating physician; and the 'nature and extent of the treatment relationship' between the patient and the treating physician." *Id.* (quoting 20 C.F.R. § 404.1527(b)(2)(i)–(ii)) (alteration in original). "Additional factors relevant to evaluating any

medical opinion, not limited to the opinion of the treating physician, include the amount of relevant evidence that supports the opinion and the quality of the explanation provided[,] the consistency of the medical opinion with the record as a whole[, and] the specialty of the physician providing the opinion . . . ." *Id.* (citing 20 C.F.R. § 404.1527(d)(3)–(6)). Even if the treating physician's opinion is not entitled to controlling weight, it is still entitled to deference. *See id.* at 632 (citing SSR 96-02p at 4 (Cum. Ed. 1996), 61 Fed. Reg. 34,490, 34,491 (July 2, 1996)). Indeed, "[i]n many cases, a treating source's medical opinion will be entitled to the greatest weight and should be adopted, even if it does not meet the test for controlling weight." *Id.* (quoting SSR 96-02p at 4).

Finally, an "ALJ errs when he rejects a medical opinion or assigns it little weight" without explanation or without explaining why "another medical opinion is more persuasive, or criticiz[es] it with boilerplate language that fails to offer a substantive basis for his conclusion." *Garrison*, 759 F.3d at 1012–13.

3.1.2 Application

The ALJ gave thoughtful consideration to the question of Mr. Nguyen's claimed disability. Nevertheless, three errors in the ALJ's analysis compel this court to remand this case.

First, most significantly, the ALJ made a factual error concerning Dr. Oda's opinions. Dr. Oda is the orthopedist who twice evaluated Mr. Nguyen; at least the first of these evaluations involved her personally examining Mr. Nguyen.[484] The ALJ gave Dr. Oda's opinions "great weight."[485] "[H]er conclusions are consistent with the limited positive objective findings reported in connection with the back complaints," the ALJ wrote.[486] He "contrast[ed]" Dr. Oda's conclusions with the "reject[ed] ones of Dr. Jamasbi.[487] In her examinations, Dr. Oda found that Mr. Nguyen exhibited a "limitation of motion in the back" that was "out of proportion" to his claimed injury.[488]

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[484] *See* AR 409–20.

[485] AR 29.

[486] *Id.*

[487] AR 27.

[488] AR 27–28; *see* AR 415, 420.

More to the present point, the ALJ cited Dr. Oda's conclusion in September 2005 that Mr. Nguyen's "condition would not preclude even very heavy work."[489] The ALJ also cited her September 2009 opinion that Mr. Nguyen's disability left him "limited to no more than heavy work."[490]

These latter points are incorrect. On both occasions, Dr. Oda reached the opposite conclusion. In 2005, contrary to the ALJ's recitation, she concluded that Mr. Nguyen had a back-related "disability" that "*would* preclude very heavy work."[491] And in 2009, again contrary to the ALJ's discussion, Dr. Oda opined that Mr. Nguyen did "have a disability [that] *would preclude* heavy lifting."[492] The ALJ seems to have simply misread the record. Given the role that Dr. Oda's opinion plays in the ALJ's decision, and perhaps even on general doctrinal grounds, this error alone compels a remand.

Second, in "reject[ing]" Dr. Jamasbi's opinions, the ALJ did not consider the factors discussed in *Orn, supra*. As stated above, where an ALJ does not give a treating physician's opinion "'controlling weight' because it is not 'well-supported' or because it is inconsistent with other substantial evidence in the record" — both of which are grounds that the ALJ gives here[493] — then Social Security regulations "consider[] specified factors in determining the weight [that opinion] will be given." *Orn*, 495 F.3d at 631. "Those factors include the '[l]ength of the treatment relationship and the frequency of examination' by the treating physician; and the 'nature and extent of the treatment relationship' between the patient and the treating physician." *Id*. (quoting 20 C.F.R. § 404.1527(b)(2)(i)–(ii)) (alteration in original). The ALJ discussed none of these. Their absence from the analysis here further undermines the ALJ's reasoning on this crucial point.

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[489] AR 26.

[490] AR 27.

[491] AR 415 (capitalization removed) (emphasis added).

[492] AR 420 (emphasis added).

[493] AR 29.

Third, the ALJ "reject[ed]" Dr. Jamasbi's opinions partly because the physician had "relied largely on" Mr. Nguyen's "subjective complaints," which the ALJ found "questionable at best."[494] "The claimant's statements regarding his symptoms do not establish that he is disabled," the ALJ wrote.[495] The ALJ discussed several problems that "undermine[d]" Mr. Nguyen's "credibility."[496] In the end, the ALJ concluded that Mr. Nguyen's "statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible . . . ."[497] Among the things that undermined Mr. Nguyen's credibility, however, was the ALJ's own observation of Mr. Nguyen at the two hearings.[498] The ALJ wrote: ""[D]espite his allegation of an inability to do prolonged sitting, he stood for perhaps 15 seconds during the 45 minute hearing before me in November 2013, and sat throughout the May 2014 hearing."[499]

This is not a "legitimate" basis for questioning Mr. Nguyen's credibility; and so, by extension, it is not a legitimate ground for rejecting Dr. Jamasbi's opinions. The Ninth Circuit has repeatedly spurned denying benefits "based on the ALJ's observation of [the claimant], when [the claimant's] statements . . . are supported by objective evidence." *Perminter v. Heckler*, 765 F.2d 870, 872 (9th Cir. 1985) (the court "condemned" "[t]he ALJ's reliance on his personal observations . . . at the hearing," characterizing it "as 'sit and squirm' jurisprudence") (quoting *Freeman v. Schweiker,* 681 F.2d 727, 731 (11th Cir. 1982)). The court recognizes that the ALJ here gave other reasons for doubting Mr. Nguyen's credibility. The ALJ's own observations perhaps played a minor role. Indeed, the ALJ pointed to similar observations (about Mr. Nguyen's ability "to sit comfortably") by Dr. Jamasbi and Dr. Kollath.[500] Still, invoking his own observation to essentially override the medical opinion of Dr. Jamasbi was inappropriate under Ninth Circuit precedent.

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[494] *Id.*

[495] *Id.*

[496] *See* AR 29–31.

[497] AR 31.

[498] *Id.*

[499] *Id.*

[500] *Id.*

3.2 Dr. Ghannam — Depression

The court also remands the ALJ's decision at step two that Mr. Nguyen's diagnosed depression did not constitute a "severe" impairment — *i.e.*,, one that had a "more than minimal effect" on his "ability to do basic work activities." *See Powell v. Chater*, 959 F. Supp. 1238, 1242 (C.D. Cal. 1997).[501]

At step two of the five-step sequential inquiry, the ALJ determines whether the claimant has a medically severe impairment or combination of impairments. *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). The ALJ must consider the record as a whole, including evidence that both supports and detracts from their final decision. *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). An impairment is not severe if it does not significantly limit the claimant's mental or physical abilities to do basic work activities. 20 C.F.R. § 404.1521(a).[502] Basic work activities are "abilities and aptitudes necessary to do most jobs," including, for example, "walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling." 20 C.F.R. § 404.1521(b).[503] To determine the severity of a mental impairment specifically, the ALJ must consider four broad functional areas: activities of daily living; social functioning; concentration, persistence, and pace; and episodes of decompensation. 20 C.F.R. § 404.1520a.[504]

The problem again lies in the ALJ's rejecting the conclusion of Mr. Nguyen's treating psychologist, Dr. Ghannam. The ALJ recognized that Dr. Ghannam had diagnosed Mr. Nguyen with a "profound . . . major depressive disorder."[505] The ALJ, however, chose to "give no weight to . . . Dr. Ghannam's conclusions."[506] The ALJ first (accurately) noted the evidence that Mr.

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[501] *See* AR 25 ("[T]he record does not describe 'severe' depression or any other 'severe' mental impairment that significantly limited the claimant's ability to work for 12 consecutive months.").

[502] The Social Security Administration promulgated new regulations, including a new § 404.1521, effective as of March 27, 2017. The previous version, effective to March 26, 2017, was in effect as of the date of the ALJ's hearing.

[503] *See supra* n.245.

[504] *Id.*

[505] AR 23 (citing AR 797–98).

[506] AR 29.

Ghannam's depressive symptoms had improved with treatment.[507] He also pointed to Mr. Nguyen's continuous maintenance of a commercial driver's license and his occasional use of a gym.[508] Finally for present purposes, and most significantly, the ALJ found "no evidence that [Dr. Ghannam] ever performed a comprehensive psychological examination of the claimant."[509] Beneath Dr. Ghannam's diagnosis, the ALJ indeed saw an "absence of any objective assessment of the claimant by Dr. Ghannam at any time,"[510] and found the treating psychologist's opinion "unsupported by any reported positive objective findings on mental[-]status examination or psychological testing."[511]

This last concern, in particular, is not accurate. The record shows that in June 2012 Dr. Ghannam completed a "behavioral and psychological evaluation" of Mr. Nguyen.[512] In this evaluation, "Mr. Nguyen was administered a structured clinical interview along with" three "psychological questionnaires."[513] (One of these questionnaires "produced an invalid profile."[514]) A symptom checklist indicated that, "His overall intensity of distress is clinical nature, and extremely high. His highest elevation is on the obsessive-compulsive, . . . depression, [and] anxiety . . . subscales . . . ."[515] Based on these test results, in connection with other considerations (such as his "psychosocial history"), Dr. Ghannam arrived at his diagnosis of a "chronic" and "severe" "major depressive disorder," and "generalized anxiety disorder."[516] If this is not all *purely* "objective," it nonetheless is inaccurate to say that Dr. Ghannam had not made "any objective assessment" or "findings" based on "psychological testing." It is also relevant that Dr. Ghannam

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[507] AR 23.

[508] AR 25.

[509] AR 29.

[510] AR 25.

[511] AR 29.

[512] AR 783–89.

[513] AR 786.

[514] *Id.*

[515] AR 787.

[516] *Id.*

treated Mr. Nguyen, with some regularity, for almost four years. *See* 20 C.F.R. § 404.1527(b)(2)(i)–(ii)) (disability analysis considers the length, frequency, nature, and extent of the treatment relationship). In the light of governing precedent, *e.g.*, *Orn*, 495 F.3d at 631–32, it is also too dismissive to simply "give no weight" to the opinion of a treating psychologist who has some history of personally caring for the claimant. On remand, the ALJ should reconsider his assessment of Dr. Ghannam's evaluations and ultimate diagnosis.

CONCLUSION

The court grants Mr. Nguyen's motion and remands the case for further administrative proceedings consistent with this order.

This disposes of ECF Nos. 15 and 21.

IT IS SO ORDERED.

Dated: March 31, 2017

LAUREL BEELER
United States Magistrate Judge

United States District Court
Northern District of California