

1                                    IN THE UNITED STATES DISTRICT COURT  
2                                    FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4                    KELVIN SMITH,

No. C 10-4463 CW

5                                    Plaintiff,

ORDER DENYING  
CROSS MOTIONS FOR  
SUMMARY JUDGMENT  
AND REMANDING FOR  
FURTHER  
PROCEEDINGS

6                    v.

7                    MICHAEL J. ASTRUE,  
Commissioner of Social Security,

8                                    Defendant.

9                    \_\_\_\_\_/

10                    Plaintiff Kelvin Smith moves for summary judgment or, in the  
11                    alternative, requests that the case be remanded to the  
12                    Commissioner of the Social Security Administration (SSA) for  
13                    further proceedings. Defendant Michael Astrue, in his capacity as  
14                    the Commissioner, opposes the motions and cross-moves for summary  
15                    judgment affirming the Commissioner's denial of Supplemental  
16                    Security Income (SSI). The Court DENIES both motions for summary  
17                    judgment, GRANTS Plaintiff's motion to remand, and REMANDS the  
18                    case to the Commissioner for further proceedings.

19                                    BACKGROUND

20                    I. Procedural History

21                    Plaintiff filed an application for SSI on August 29, 2007,  
22                    claiming that he had been disabled since June 1, 1993. AR 74.  
23                    After this claim was denied he requested a hearing, which took  
24                    place December 1, 2009 before an Administrative Law Judge (ALJ).  
25                    The ALJ determined that Plaintiff was not disabled within the  
26                    meaning of the Social Security Act and was capable of performing  
27                    jobs that exist in the national and local economy. Plaintiff  
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1 filed a Request for Review of the Hearing Decision; the Appeals  
2 Council denied it. Plaintiff now moves for summary judgment or,  
3 in the alternative, remand for further proceedings. Defendant  
4 opposes the motions and cross-moves for summary judgment to affirm  
5 the Commissioner's denial of SSI.

6 II. Plaintiff's Personal History

7 Plaintiff was born on May 25, 1963, and has two young  
8 children. AR 37, 38. He graduated from high school and, in 1981,  
9 attended a trade school for electronics training. Id. He has  
10 some history of substance abuse but has been in recovery since  
11 1986. AR 408. He completed a year-long uncertified training at a  
12 school of ministry to become a worship leader. AR 39. He also  
13 worked as a forklift operator, and most recently, from 2005 to  
14 2006, was a customer service trainer for at-risk youth. AR 40-43.  
15 According to his testimony, Plaintiff held an unpaid position as  
16 pastor and executive director at a church between 1997 and 2006.  
17 AR 42-43.

18 III. Plaintiff's Medical History

19 Plaintiff began seeing doctors at Kaiser Redwood City in  
20 February 2007, complaining of back pain that worsened with  
21 prolonged sitting or driving, but no numbness or weakness. AR  
22 264, 266. He stated that the onset date of his back pain was in  
23 2006, when he was thrown down by police after being mistaken for a  
24 suspect. AR 258, 264. Medical records from 2007 list Plaintiff's  
25 ailments as chronic pain, neck pain, low back pain, cervical  
26 radiculopathy, sleep apnea disorder, and degeneration of lumbar  
27 intervertebral disc. AR 249-252. Throughout 2007 he treated his  
28 symptoms with physical therapy, Motrin, Vicodin, ice and a TENS

1 machine. AR 258, 266, 267, 269-272. He also reported visiting a  
2 chiropractor and receiving acupuncture. AR 264, 356.

3 In 2007 Plaintiff had a MRI at Kaiser which showed a  
4 posterior disc bulge at C5-6, lumbar spondylosis at L3-4 and  
5 minimal spondylosis of L5-S1. AR 276, 277. He had a second MRI  
6 in September 2007, which showed cervical cord abnormality at L2-3  
7 and bulge and hypertrophy at L5 but there was no change to the  
8 treatment at that time. AR 284-286. In March 2008 Plaintiff was  
9 given an epidural steroid injection to control the pain in his  
10 back. AR 421-422. While Plaintiff has usually reported his level  
11 of pain at seven or eight out of ten, at some doctor visits he  
12 noted improvement due to use of the TENS machine, exercise and  
13 Vicodin. AR 274, 428, 360, 369. He also reported periods when he  
14 was able to do household chores and walk up to a mile every day.  
15 AR 274. However, during other doctor visits he reported that the  
16 medication was not controlling the pain, or it had gotten worse.  
17 AR 348, 355, 428, 604, 669.

18 In November 2007 Plaintiff was examined for the SSA by Dr.  
19 Lightfoot, who found him to have a light RSF with postural  
20 limitation. AR 288-294. An MRI performed in February 2008 found  
21 the condition of Plaintiff's back largely unchanged, except that  
22 bulging at the L2-3 level was "slightly worse than the last  
23 examination." AR 309. Throughout this time Plaintiff was  
24 primarily treated by Drs. Hom and Hutchison at Kaiser, as well as  
25 various physical therapists, and he was not working. In 2008 he  
26 visited Kaiser twenty-one times and at one point attended a series  
27 of chronic pain management group meetings there. AR 547, 661,  
28 662. In May 2008, Plaintiff was examined by Dr. Gonick-Hallows, a

1 consulting psychologist, who found some mild deficits in his  
2 short-term memory and slight impairments in occupational function,  
3 but no psychiatric diagnosis. AR 407-411.

4 Plaintiff's two treating physicians, Drs. Hom and Hutchison,  
5 each filled out questionnaires assessing his ability to function.  
6 Dr. Hutchison, his pain management provider, said that Plaintiff  
7 could not lift, push or pull more than ten pounds and had only  
8 partial capacity for continuous sitting, standing, overhead work  
9 and squatting. Dr. Hutchison opined that Plaintiff had full use  
10 of his hands. AR 553.

11 His primary treating physician, Dr. Hom, reported that  
12 Plaintiff suffered from serious limitations. He opined that  
13 Plaintiff would need to take unscheduled breaks lasting ten to  
14 fifteen minutes every fifteen to twenty minutes and alternate  
15 between sitting and standing at will. He further asserted that  
16 Plaintiff could only sit, stand or walk for less than two hours  
17 total during an eight hour work day and would miss more than four  
18 days of work per month due to his impairments. AR 548, 549. He  
19 noted that Plaintiff "occasionally" suffered from depression and  
20 anxiety and opined that he was incapable of even low stress jobs.  
21 AR 548.

22 IV. Proceedings Below

23 At the hearing Plaintiff testified that he lives in a three  
24 bedroom apartment with a friend and her son and is able to do his  
25 own cooking, cleaning, and laundry. AR 50. He testified that he  
26 is taking online college courses but sometimes watches them on  
27 videotape because he does not feel well enough to participate at  
28 the correct time. AR 52-54.

1 Lynda Berkly, a Vocational Expert (VE), testified at the  
2 hearing that an individual capable of performing sedentary work  
3 who can only walk and stand for up to two hours in a day would be  
4 able to work as an assembler of optical goods, listed in the  
5 Dictionary of Occupational Titles (DOT) as code 713.684-014 or a  
6 bench inspector of electronic components, listed in the DOT as  
7 726.684-014, even with mild restrictions on concentration,  
8 persistence and pace. AR 66. However, she testified that a  
9 moderate limitation on concentration, persistence and pace would  
10 eliminate all sedentary production type jobs. She asserted that  
11 both of these positions offer a sit/stand option. AR 66. Upon  
12 questioning by Plaintiff's attorney, the VE testified that,  
13 although the DOT does not state that either position has a  
14 sit/stand option, based on her professional experience they do.  
15 AR 70-71. She based her opinion on job site analyses, including a  
16 survey at Lens-Crafters carried out two years earlier. Id.

17 In his February 17, 2010 decision, the ALJ addressed the  
18 five-step evaluation process outlined in 20 C.F.R. § 416.920 and  
19 found that Plaintiff was not disabled within the meaning of the  
20 Social Security Act. AR 10. At step one of the five-part  
21 analysis, the ALJ found that Plaintiff had not engaged in  
22 substantial gainful activity since the alleged disability onset  
23 date. AR 12. At step two, the ALJ found that Plaintiff's  
24 degenerative disc disease of the lumbar and cervical spine; sleep  
25 apnea; and myofascial pain syndrome are severe impairments within  
26 the meaning of the regulations. Id. At step three, the ALJ found  
27 that Plaintiff's impairments were not severe enough to meet or  
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1 medically equal any of the impairments listed in Appendix 1 of the  
2 regulations. Id.

3       Prior to steps four and five of the analysis, the ALJ weighed  
4 the medical and other evidence in the record to assess Plaintiff's  
5 residual functional capacity (RFC). He found that Plaintiff has  
6 physical impairments that can be reasonably expected to produce  
7 the symptoms alleged. AR 13. However, he found that Plaintiff's  
8 representations as to the intensity, persistence and limiting  
9 effects of these symptoms were not credible or substantiated by  
10 objective medical evidence. AR 13, 15. He also largely rejected  
11 Dr. Hom's conclusions as to the extent of Plaintiff's impairments,  
12 finding that the doctor's own reports failed to reveal the  
13 clinical abnormalities that one would expect to find with a  
14 disability. AR 14-15. He noted that the limitations provided by  
15 Dr. Hutchison, Plaintiff's pain management provider, were more  
16 consistent with the objective medical evidence. AR 15. The  
17 opinion of Dr. Gonick-Hallows, the psychological consultant, was  
18 afforded the most weight by the ALJ, along with the objective  
19 medical evidence and Plaintiff's admitted functional ability. Id.

20       The ALJ thus found that Plaintiff has the RFC to perform  
21 sedentary work with some accommodations. AR 12-13. Specifically,  
22 Plaintiff must be able to alternate between sitting and standing  
23 as needed; not climb ropes, ladders or scaffolds; and only  
24 occasionally climb stairs or ramps, balance, stoop, kneel, crouch  
25 or crawl. AR 12-13. He further found that Plaintiff has a mild  
26 limitation in the ability to maintain concentration, persistence  
27 and pace. AR 13.

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1 Because the ALJ found that Plaintiff would be unable to  
2 perform either his past relevant work or the full range of  
3 sedentary work, at step five he determined the extent that his  
4 additional limitations erode the unskilled sedentary occupational  
5 base. Relying on the VE's testimony, the ALJ concluded that  
6 Plaintiff was capable of performing sedentary jobs such as those  
7 identified by the VE. AR 16.

8 Plaintiff now moves for summary judgment on the grounds that  
9 the ALJ erred because he 1) failed to provide adequate reasons for  
10 discounting the treating physician's opinion and 2) failed to  
11 resolve the conflict between the testimony of the VE and the  
12 requirements of the jobs listed in DOT.

#### 13 DISCUSSION

#### 14 I. Legal Standard

15 The Commissioner's decision to deny benefits "will be  
16 disturbed only if it is not supported by substantial evidence or  
17 it is based on legal error." Magallanes v. Bowen, 881 F.2d 747  
18 (9th Cir. 1989); Brawner v. Secretary of Health & Human Services,  
19 839 F.2d 432, 433 (9th Cir. 1987), quoting Green v. Heckler, 803  
20 F.2d 528, 529 (9th Cir. 1986). "Substantial evidence means more  
21 than a mere scintilla but less than a preponderance." Davis v.  
22 Heckler, 868 F.2d 323, 325-26 (9th Cir. 1989)(quotations omitted).  
23 "It means such relevant evidence as a reasonable mind might accept  
24 as adequate to support a conclusion." Id. If there is  
25 substantial evidence to support the decision of the ALJ, it is  
26 well-settled that the decision must be upheld even when there is  
27 evidence on the other side, Hall v. Secretary of Health, Ed. and  
28 Welfare, 602 F.2d 1372, 1374 (9th Cir. 1979), or when the evidence

1 is susceptible of more than one rational interpretation, Gallant  
2 v. Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984).

3 To determine whether substantial evidence exists to support  
4 the ALJ's decision, a court reviews the record as a whole, not  
5 just the evidence supporting the decision of the ALJ. Walker v.  
6 Matthews, 546 F.2d 814, 818 (9th Cir. 1976). A court may not  
7 affirm the ALJ's decision simply by isolating a specific quantum  
8 of supporting evidence. Hammock v. Bowen, 879 F.2d 498, 501 (9th  
9 Cir. 1989). In short, a court must weigh the evidence that  
10 supports the Commissioner's conclusions and that which does not.  
11 Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

## 12 II. Discussion

### 13 A. Opinion of the Treating Physician

14 The ALJ states in his findings that he afforded "little  
15 weight to the medical source opinion of Dr. Hom as it is not  
16 supported by the substantial weight of the objective medical  
17 evidence." AR 14. Plaintiff argues that the ALJ improperly  
18 disregarded Dr. Hom's opinion when determining that Plaintiff's  
19 RFC was sedentary with additional limitations because he failed to  
20 provide any specific rationale for his decision.

21 Generally, greater weight is given to a treating physician's  
22 opinion because "he is employed to cure and has a greater  
23 opportunity to know and observe the patient as an individual."  
24 Magallanes, 881 F.2d at 750; Sprague v. Bowen, 812 F.2d 1226, 1230  
25 (9th Cir. 1987). Although the treating physician's opinion is not  
26 necessarily conclusive as to either a physical condition or the  
27 ultimate issue of disability, an ALJ must provide "specific and  
28 legitimate reasons for rejecting the opinion of the treating



1 physician." Murray v. Heckler, 722 F.2d 499, 502 (9th Cir. 1983).  
2 The ALJ can meet this burden by setting out a detailed and  
3 thorough summary of the facts and conflicting clinical evidence,  
4 stating an interpretation thereof, and making findings.  
5 Magallanes, 881 F.2d at 751.

6 Here, the ALJ's statement of his reasons for rejecting Dr.  
7 Hom's report was insufficient. "Merely to state that a medical  
8 opinion is not supported by enough objective findings does not  
9 achieve the level of specificity our prior cases have required,  
10 even when the objective factors are listed seriatim." Rodriguez  
11 v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989) (quotation marks  
12 omitted).

13 In his cross-motion, Defendant argues that Dr. Hom based his  
14 opinion on subjective reports that the ALJ had determined not to  
15 be credible. A treating physician's opinion about a claimant's  
16 pain can be disregarded to the extent that it is based on the  
17 claimant's unreliable self reporting. Tommasetti v. Astrue, 533  
18 F.3d 1035, 1040-41 (9th Cir. 2008).

19 The ALJ in this case fails to provide any detailed findings  
20 to support his decision. While he asserts that he does not find  
21 Plaintiff's statements completely credible as to the intensity,  
22 persistence and limiting effects of his impairment, he does not  
23 cite this in support of his decision to discount Dr. Hom. AR 13.  
24 The ALJ also notes the conservative nature of the treatment and  
25 Plaintiff's ability to engage in other daily activities as  
26 inconsistent with disabling pain. However, he does not accuse  
27 Plaintiff of malingering, despite finding his functional abilities  
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1 "to be in excess of his alleged limitations." AR 15. Rather, he  
2 gives Plaintiff "all benefit of the doubt." Id.

3 Despite Dr. Hom's assertion that Plaintiff would be incapable  
4 of even "low stress" jobs, his records do not support a finding of  
5 substantial mental or psychological limitations and he performed  
6 no relevant tests. His records indicate that this opinion was  
7 based on the Plaintiff's statement that he could "not function  
8 with any stress." AR 548. Defendant thus argues that the ALJ was  
9 justified in giving the most weight to the report of Dr. Gonick-  
10 Hallows, the consulting psychologist. This rationale was not  
11 given by the ALJ to explain his decision to discount the treating  
12 physician in favor of an examining doctor.

13 Where the ALJ failed to provide clear and convincing reasons  
14 for discounting the opinion of the claimant's treating physician,  
15 courts have accepted the physician's uncontradicted testimony as  
16 true and awarded benefits. Winans v. Bowen, 853 F.2d 643, 647  
17 (9th Cir.1988). Here, however, the ALJ has cited some factors  
18 that may be sufficient to discount the treating physician's  
19 opinion. Therefore, the Court DENIES summary judgment and REMANDS  
20 for further proceedings to determine whether the treating  
21 physician's opinion can properly be discounted in this case.

22 B. Testimony of the Vocational Expert

23 Plaintiff contends that the ALJ erred during the hearing by  
24 failing to ask the VE whether her testimony departed from the DOT  
25 and to explain any contradictions. He further asserts that the  
26 ALJ was required to explain in his written decision any conflicts  
27 between the VE's testimony and the DOT. Social Security Ruling  
28 00-4p requires that ALJs identify and obtain a reasonable

1 explanation for any conflicts between occupational evidence  
2 provided by VE's information and the DOT. It also requires that  
3 they explain in their decision how any identified conflict was  
4 resolved. SSR 00-4p. During the hearing in the instant case, the  
5 VE asserted that both the positions of optical assembler and bench  
6 inspector allow for a sit/stand option, which is not part of the  
7 DOT descriptions. AR 66. While the ALJ never asked for an  
8 explanation, Plaintiff's attorney elicited a response from the VE  
9 that she based this opinion on her professional experience,  
10 including a two-year-old study at Lens crafters. AR 70, 71.

11 The Ninth Circuit has allowed that failure to inquire about  
12 conflicts with the DOT could be deemed harmless where there were  
13 "no unresolved potential inconsistenc[ies] in the evidence."  
14 Massachi v. Astrue, 486 F.3d 1149, 1153, n.19 (9th Cir. 2007)  
15 (quotation marks omitted). The purpose of the rule is to ensure  
16 that the record is clear as to why the ALJ relied on the VE's  
17 testimony, particularly in cases where the VE's testimony  
18 conflicts with the DOT. Id. Expert testimony that contradicts  
19 the DOT may be upheld where there is persuasive testimony  
20 supporting the deviation. Johnson v. Shalala, 60 F.3d 1428, 1435  
21 (9th Cir. 1995); see also, Tommasetti, 533 F.3d at 1042.

22 Here, the ALJ fails to mention the departure in his written  
23 decision and, in fact, says that the occupations cited are  
24 consistent with the DOT title without further discussion.  
25 However, because the VE explained the basis for her departure from  
26 the DOT, the Court finds no prejudice from this error.

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CONCLUSION

The ALJ's decision is vacated and REMANDED for further proceedings to consider whether there are substantial grounds for rejecting Dr. Hom's opinion.

IT IS SO ORDERED.

Dated: 11/3/2011

  
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CLAUDIA WILKEN  
United States District Judge