Sanchez v. Colvin
Doc. 17

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AUGUSTIN SANCHEZ,

Plaintiff(s),

v.

CAROLYN W. COLVIN,

Defendant(s).

No. C-13-01865 DMR

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REMANDING FOR PAYMENT OF BENEFITS

Pursuant to 42 U.S.C. § 405(g), Plaintiff Augustin[1] Sanchez ("Plaintiff") seeks review of his application for disability insurance benefits. Defendant Social Security Commissioner ("Defendant" or "Commissioner") denied his application after determining that Plaintiff was not disabled under Title II of the Social Security Act, 42 U.S.C. §§ 401 *et seq*. Plaintiff now requests judicial review of the Commissioner's decision pursuant to 42 U.S.C. § 405(g). Both parties filed motions for summary judgment. For the reasons stated below, the court grants Plaintiff's motion for summary judgment and remands this action to the Commissioner for payment of benefits.

I. Procedural History

On July 1, 2010, Plaintiff filed an application for a period of disability and disability insurance benefits under Title II of the Act, alleging disability beginning July 26, 2008. A.R. 167.

[1] Documents in the Administrative Record ("A.R.") also refer to Plaintiff as "Agustin" Sanchez. *See, e.g.*, A.R. 17.

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The agency denied Plaintiff's claim on October 13, 2010, and subsequently denied it again upon reconsideration on January 12, 2011. A.R. 72, 73. On November 21, 2011, Administrative Law Judge (ALJ) Caroline H. Beers held a hearing at which Plaintiff, two of his daughters, and his wife were present. A.R. 33. Plaintiff was informed of his right to representation and chose to proceed without an attorney. A.R. 17, 34-42. Plaintiff's daughter Rocio Sanchez provided testimony. A.R. 42-45. The ALJ adjourned the hearing to provide additional time to obtain certain medical records. A.R. 42. The ALJ also noted that she would request an interpreter for the next hearing. A.R. 38.

On February 2, 2012, another hearing was held before ALJ Beers. A.R. 46-71. The ALJ did not schedule any medical experts to testify. Plaintiff was not represented by an attorney. Plaintiff testified, as did Kelly Bartlett, and a vocational expert. The hearing was conducted in Spanish and English; a Spanish-language interpreter was present.[2]

On February 10, 2012, the ALJ issued a written decision finding Plaintiff not disabled under Title II of the Social Security Act. A.R. 25. The Appeals Council denied Plaintiff's request for review of the ALJ's decision, making the ALJ's decision the Commissioner's final decision. A.R. 1-7. Plaintiff then filed this action.

II. Factual Background

A. Background

The record contains the following information. Plaintiff was born in Mexico in May 1947 and was 61 years old as of the alleged onset date of his disability. A.R. 24, 329. Plaintiff has a sixth grade education. A.R. 194. Plaintiff worked as a machinist from 1978 to 2008, with a two year period of unemployment between 1993 and 1995. A.R. 54-56, 183-84, 199.

Plaintiff testified that he stopped working in July 2008 because he experienced deep pain in his head and could not work the machines as carefully as he used to be able to and was worried about making mistakes. A.R. 55-57, 199. In October 2009, Plaintiff underwent surgery for cancer in his left ear canal, followed by six weeks of radiation therapy starting in November 2009. A.R. 58, 324-25, 259-62, 265. Plaintiff stated that strain and effort—e.g., when answering interview

[2] It is not always clear from the transcript of this hearing whether a statement was made in English or Spanish.

questions, reading, or looking carefully at something—made his vision blurry and his head heat up "as if it's going to blow up." A.R. 57. Plaintiff had experienced these sensations since the radiation treatment in his ear. A.R. 57-58.

At the February 2, 2012 hearing, Plaintiff testified that he could drive—e.g., he occasionally drove to attend citizenship classes seven blocks from his residence—but avoided traffic and freeways because he did not think it would be safe for himself or other people. A.R. 51-52. As of the date of the second hearing, Plaintiff had been attending citizenship classes conducted primarily in English with some Spanish translation twice a week for about a month. A.R. 52-53.

In addition, at the February 2, 2012 hearing, the interpreter translated and read aloud a written statement prepared by Plaintiff. A.R. 58. In the statement, Plaintiff described his condition: he had severe headaches deep in his head, face, and neck; dry mouth and a bad taste in his mouth as a result of burned saliva glands; pain and discomfort that prevented him from doing work efficiently and safely; inability to coordinate; dizziness; forgetfulness; blurry vision; sleeplessness; nightmares; fatigue; and weakness. A.R. 59-60, 252-54.

Plaintiff's daughter Rocio Sanchez testified that Plaintiff's cancer treatment had left him unable to do things he used to be able to do. A.R. 42. She testified that Plaintiff could not mow the lawn for long periods of time, and instead he had to come in and take frequent breaks to rehydrate and cool down; that Plaintiff could not be out in the sun and had to use special moisturizers to be exposed to any weather conditions; and that Plaintiff experienced a lot of pain and dizziness. A.R. 43. Ms. Sanchez also testified that Plaintiff experienced cognition and memory problems. A.R. 43. As examples, Ms. Sanchez testified that Plaintiff had to be reminded to close and lock the door when exiting the house, and that Plaintiff cut himself when slicing an onion because he wasn't paying attention. A.R. 43-44. She also stated that Plaintiff had the ability to drive but that Plaintiff's family members preferred to drive him around because they believed it was not safe to have Plaintiff driving. A.R. 44-45.

The ALJ presented several hypotheticals to VE Bartlett. A.R. 63-72. First, the ALJ inquired whether a person with no exertional limitations but who could not work around loud noises would be able to perform Plaintiff's past work. A.R. 63. VE Bartlett stated that such a person would not

be able to do so. A.R. 64. Then the ALJ posed a hypothetical person who could do medium work, had limited education and Plaintiff's work experience, and could not be around a noisy or loud environment. A.R. 64. VE Bartlett opined that such a person would not be able to perform Plaintiff's past work but that there were numerous jobs in the regional and national economy that an individual with those limitations could perform, including electronic mechanical assembler, inspector of wire products, and optical lens assembler. A.R. 65-69. Finally, the ALJ asked VE Bartlett whether a limitation of working only 30 minutes out of each hour would preclude all work; VE Bartlett stated that it would. A.R. 69-70.

B. Plaintiff's Relevant Medical History

i. Treatment at Kaiser

On November 5, 2008, Plaintiff was seen with an interpreter by Dr. Shalen, his primary care physician at Kaiser. A.R. 294-95. Plaintiff reported left ear pain and foul smelling saliva. A.R. 295. The next medical record is dated October 1, 2009, and records a visit with Dr. Rasgon, a head and neck surgeon. A.R. 255, 410. The record states that Plaintiff has adenoid cystic cancer of the left external auditory canal and has agreed to surgery requiring a wide local excision. A.R. 255. On October 13, 2009, surgery was performed, demonstrating "extensive involvement of the adenoid cystic carcinoma, involving complete ear canal skin, external meatal soft tissue and skin, [and] a small portion of the temporalis muscle." A.R. 324. Biopsy results showed perineural invasion.[3] A.R. 281. A tumor board recommended follow up radiation treatment. A.R. 258.

The medical evidence also contains a report of a visit with Dr. Kelly, a radiation oncologist, on October 22, 2009. A.R. 259-62. Plaintiff's family and a professional interpreter were present. A.R. 259. Radiation therapy was recommended due to the finding of perineural invasion and muscle invasion. A.R. 261. Plaintiff consented to this treatment, and radiation therapy began on November 4, 2009. A.R. 261, 265. During radiation treatment, Plaintiff made multiple visits to Dr. Rasgon to remove debris from Plaintiff's ear canal. A.R. 266-274 (medical records from November 20, 2009 to January 13, 2010).

[3] Plaintiff avers, and Defendant does not dispute, that perineural invasion refers to cancerous invasion into the nerves. Pl.'s Mot. at 3.

Medical records show that Plaintiff regularly visited Kaiser between 2010 and 2012 complaining of left ear pain and other symptoms.

On January 13, 2010, Plaintiff appeared for an appointment with his daughter. Dr. Byl reported that Plaintiff was experiencing intense left ear pain and was sensitive to the heat of the microscope light. A.R. 274. Dr. Byl reported no visible cause of pain and that the pain seemed more "neuritic in nature."[4] Dr. Byl recommended reducing Vicodin and substituting Motrin. Dr. Byl also noted, "I wonder if gabapentin [Neurontin] might be a better choice." A.R. 274.

On January 20, 2010, Plaintiff told Dr. Byl that the entire back of his head felt like it was burning and that he could not sleep. A.R. 276. Dr. Byl reported that Plaintiff had stopped taking Vicodin, and was on Motrin, as Dr. Byl had recommended the week prior. A.R. 274, 276. Dr. Byl prescribed Plaintiff gabapentin. A.R. 276.

On February 4, 2010, Dr. Rasgon reported that Plaintiff's radiation therapy had been completed and that Plaintiff reported a burning sensation at the side of his head. A.R. 277. Dr. Rasgon restarted the Neurontin prescription, which Plaintiff reported to Dr. Rasgon helped with the burning sensation. A.R. 277, 278, 280. However, on June 14, 2010, Dr. Rasgon reported that Neurontin was not helping and that burning pain in Plaintiff's left scalp continued. A.R. 306.

On October 22, 2010, Mr. Sanchez saw his longtime primary care physician Dr. Shalen. A.R. 353-356, 411 (Dr. Shalen noting in 2012 that he had been Plaintiff's physician for 17 years). Dr. Shalen used a professional interpreter. A.R. 353. Plaintiff's wife reported that Plaintiff was not as sharp mentally as he had previously been. Plaintiff was limiting his pain medication even though his pain was not controlled because he was worried that the medication was affecting his mentation. Dr. Shalen noted that Plaintiff had been on Neurontin intermittently for perineural invasion, and Dr. Shalen recommended continued use of pain medication so that Mr. Sanchez could sleep. Dr. Shalen ordered tests to check liver function and a CT scan of Plaintiff's brain, *see* A.R. 354-55; the CT scan showed that Plaintiff had had a minor lacunar infarct (stroke) but no acute changes. A.R. 359. Dr. Shalen noted that Plaintiff "also describes a pain which he states goes through the entire chest

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[4] Plaintiff avers, and Defendant does not contest, that neuritic pain refers to pain caused by nerve injury or inflammation. Pl.'s Mot. at 4.

down below left lower abdomen, constant, not exertional" that was "perhaps . . . worse when he moves his bowels or perhaps it's improved by moving the bowels." A.R. 353. With respect to Plaintiff's abdominal pain, Dr. Shalen noted that the exam was benign and recommended that Plaintiff increase fiber in his diet. A.R. 355.

On November 15, 2010, Dr. Rasgon noted Plaintiff's continued complaints of discomfort on the left side of his neck and head, as well as complaints of memory loss and difficulty concentrating. A.R. 357. Dr. Rasgon noted that Neurontin and Vicodin were helpful. A.R. 357.

Additional visits with Dr. Rasgon in January, April, September, and November of 2011 also include reports that Plaintiff's neck and head pain were continuing and were helped by Neurontin and Vicodin. A.R. 387, 394, 405-06. Plaintiff told Dr. Rasgon on September 23, 2011 that he "would like a letter addressed to Social Security saying that he is permanently disabled because of chronic pain and cognitive problems." A.R. 406. On November 10, 2011, Dr. Rasgon noted that Plaintiff had been seen in the chronic pain clinic, was using some of the clinic's suggestions and was sleeping better. A.R. 405.

On January 12, 2012, Dr. Rasgon generated a doctor's note stating that Plaintiff had been in seen in the office. A.R. 408.

ii. Examination by Dr. Prosise

On September 22, 2010, Plaintiff was seen by Dr. Prosise at the Bay View Medical Clinic in Richmond for psychological testing at the agency's request. A.R. 329-331. Plaintiff was accompanied by his wife as well as an interpreter; however, Dr. Prosise refused the assistance of the interpreter. A.R. 17-18, 222, 329.

Dr. Prosise reported that Plaintiff malingered the examination; that he feigned lack of comprehension of test instructions and inability to understand questions. A.R. 329. Dr. Prosise noted that Plaintiff "spoke and understood English competently," but "adopted the affect of perplexity in the face of spoken and pantomime instructions, alike . . ." and an "implausible persona of confusion." A.R. 329. Dr. Prosise found that Plaintiff's "mental status was unremarkable" and "[t]here were no valid signs of emotional or cognitive deficits," even though some of Plaintiff's scores regarding memory and cognitive ability were "in the Deficient range." A.R. 330. Dr. Prosise

opined that these deficient scores were invalid "due to transparently willful item rejections" and "inventive" and "exhibitionistic" errors by Plaintiff. A.R. 330. Dr. Prosise found that Plaintiff demonstrated an intact ability to understand, remember, and carry out simple and complex instructions in appropriate detail with no unusual accommodation; interacted appropriately with others; and was capable of adapting adequately to common workplace requirements and changes of routine. A.R. 331.

However, while Dr. Prosise opined about Plaintiff's mental status, emotional and cognitive deficits, he also noted that Plaintiff's "prospect of employment is limited by his physical resources in the wake of a 2009 ear canal malignancy and October surgery" and that "[a]ny opinion as to the severity of the stated conditions and their concerted impact upon work activity is deferred to medical authority." A.R. 331.

iii. Letter from Dr. Mogro

The record includes a letter dated November 23, 2010 from Ana Klatt Mogro, Ph.D., a psychiatrist at Kaiser. A.R. 361. The letter states that Dr. Mogro was "writing this at the request of Mr. Agustin Sanchez." Dr. Mogro noted: "Upon further psychiatric evaluation, Mr. Sanchez shows no mood disorder. His symptoms such as pain, fatigue, and cognitive dysfunction such as memory and concentration difficulties stem from his medical problem. He does not need psychiatric treatment at this time." A.R. 361. Dr. Mogro also noted that she would "recommend to Dr. Rasgon that he consider requesting neuropsych assessment." A.R. 361.

iv. Letters from Dr. Rasgon

The record includes a letter from Dr. Rasgon dated July 27, 2011. A.R. 402. Dr. Rasgon notes that Plaintiff underwent surgery for adenoid cystic carcinoma, and that Plaintiff has suffered from chronic pain, headaches, and dry mouth. A.R. 402. Dr. Rasgon noted that Plaintiff also complained of cognitive issues particularly related to memory, had been taking pain medication daily for chronic pain issues, and had been evaluated by the Psychology and Chronic Pain departments, but despite therapy Plaintiff continued to have issues with chronic pain, dryness, and memory. Dr. Rasgon noted that Plaintiff "will likely continue to have these issues for the rest of his life" and that "[Plaintiff] feels like he is unable to work because of these issues." A.R. 402.

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The record also includes a letter from Dr. Rasgon dated May 8, 2012, which Plaintiff submitted to the agency on appeal after the ALJ had rendered her decision that Plaintiff was not disabled. A.R. 410. Dr. Rasgon's second letter expresses significantly stronger opinions about Plaintiff's inability to work than his first letter. The letter states in its entirety:

> I have known Mr. Sanchez since 10/09. I am the operating surgeon who took care of Mr. Sanchez. He was diagnosed with an adenoid cystic carcinoma of the left ear and ear canal. He had aggressive surgery removing part of his left ear and ear canal down to the ear drum. There was extension of the cancer into his temporalis muscle above his ear. Mr. Sanchez required postoperative radiation therapy. His pain after surgery and radiation has been persistent and debilitating.
>
> Pain control has been difficult for Mr. Sanchez. He has been having cognitive difficulties and has not been able to function in the workforce. I have followed Mr. Sanchez since 10/09 and I feel that he [is] totally disabled and is unable to work in any capacity."

A.R. 410.

v. Letter from Dr. Shalen

The record includes a letter from Dr. Shalen dated March 27, 2012, which Plaintiff also submitted to the agency on appeal after the ALJ had rendered her decision. A.R. 411. This letter states in its entirety:

> The above named patient Agustin Sanchez is a patient under my care at our Kaiser Permanente Richmond Medical Center. He was diagnosed in 2009 with a left ear adenoid cystic carcinoma and surgery was performed to remove it. His pain has been persistent and quite debilitating. Adequate control of his pain by medication has not allowed him to maintain the mental clarity required to function in the workforce. Without adequate pain control his life is miserable.
>
> I have been Mr. Sanchez's physician for 17 years and I strongly feel that he unfortunately is totally disabled and is unable to work in any capacity. [¶] I hope this information will be helpful to you.

A.R. 411.

III. The Five-Step Sequential Evaluation Process

To qualify for disability benefits, a claimant must demonstrate a medically determinable physical or mental impairment that prevents her from engaging in substantial gainful activity[5] and

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[5] Substantial gainful activity means work that involves doing significant and productive physical or mental duties and is done for pay or profit. 20 C.F.R. §§ 404.1510, 416.910.

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that is expected to result in death or to last for a continuous period of at least twelve months. *Reddick v. Chater,* 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of performing the work she previously performed and incapable of performing any other substantial gainful employment that exists in the national economy. *Tackett v. Apfel,* 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

To decide if a claimant is entitled to benefits, an ALJ conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are as follows:

1. At the first step, the ALJ considers the claimant's work activity, if any. If the claimant is doing substantial gainful activity, the ALJ will find that the claimant is not disabled.
2. At the second step, the ALJ considers the medical severity of the claimant's impairment(s). If the claimant does not have a severe medically determinable physical or mental impairment that meets the duration requirement in [20 C.F.R.] § 416.909, or a combination of impairments that is severe and meets the duration requirement, the ALJ will find that the claimant is not disabled
3. At the third step, the ALJ also considers the medical severity of the claimant's impairment(s). If the claimant has an impairment(s) that meets or equals one of the listings in 20 C.F.R., Pt. 404, Subpt. P, App. 1 [the "Listings"] and meets the duration requirement, the ALJ will find that the claimant is disabled.
4. At the fourth step, the ALJ considers an assessment of the claimant's residual functional capacity ("RFC") and the claimant's past relevant work. If the claimant can still do his or her past relevant work, the ALJ will find that the claimant is not disabled.
5. At the fifth and last step, the ALJ considers the assessment of the claimant's RFC and age, education, and work experience to see if the claimant can make an adjustment to other work. If the claimant can make an adjustment to other work, the ALJ will find that the claimant is not disabled. If the claimant cannot make an adjustment to other work, the ALJ will find that the claimant is disabled.

20 C.F.R. § 416.920(a)(4); 20 C.F.R. §§ 404.1520; *Tackett,* 180 F.3d at 1098-99.

IV. The February 10, 2012 Decision By The ALJ

In the February 10, 2012 decision, the ALJ applied the five-step sequential evaluation to determine whether Plaintiff was disabled. A.R. 17-25. At Step One, the ALJ found that Plaintiff had not engaged in substantial gainful activity since July 26, 2008. A.R. 20. At Step Two, the ALJ found that the evidence did not establish that Plaintiff had a "severe" impairment or combination of impairments. A.R. 20. In the alternative, the ALJ found that Plaintiff had the following severe impairments: status post resection of adenoid cystic cancer in the left ear canal and periaurcular area, and hypertension. A.R. 20. At Step Three, the ALJ found that Plaintiff's impairment did not meet or equal a presumptively disabling impairment in the Listings. A.R. 21. At Step Four, the ALJ found that Plaintiff was "unable to perform any past relevant work." A.R. 21. 23. The ALJ determined that Plaintiff had the "residual functional capacity to perform work . . . in a quiet environment where he would not be exposed to loud noises." A.R. 21. At Step Five, the ALJ determined that Plaintiff was not disabled because there were a significant number of jobs in the national economy that Plaintiff could perform, considering his age, education, work experience, and RFC. A.R. 24-25.

V. Issues Presented

Plaintiff offers several arguments for reversing the ALJ's decision. The court will consider the following issues:

1. Whether the agency erred in its evaluation of the physicians' statements submitted to the Appeals Council after the ALJ rendered her decision;
2. Whether the ALJ erred in determining that Plaintiff did not have a severe impairment;
3. Whether the ALJ erred in rejecting the testimony of Plaintiff's daughter;
4. Whether the ALJ erred in determining Plaintiff's RFC;
5. Whether the ALJ failed to fully and fairly develop the record because (a) Plaintiff was examined by a psychologist without the assistance of a translator; (b) the ALJ failed to obtain the record of the psychologist's evaluation; (c) the ALJ failed to obtain Plaintiff's radiation oncology records.

VI. Standard of Review

The ALJ's underlying determination "will be disturbed only if it is not supported by substantial evidence or it is based on legal error." *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (internal quotation marks omitted). "Substantial evidence" is evidence within the record that could lead a reasonable mind to accept a conclusion regarding disability status. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971). It is "more than a mere scintilla" but less than a preponderance. *Id*. If the evidence reasonably could support two conclusions, the court "may not substitute its judgment for that of the Commissioner" and must affirm the decision. *Jamerson v. Chater*, 112 F.3d 1064, 1066 (9th Cir. 1997) (citation omitted). The ALJ is responsible for determining credibility and resolving conflicts in medical testimony, resolving ambiguities, and drawing inferences logically flowing from the evidence. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984); *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir.1982); *Vincent ex. rel. Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984). "Finally, the court will not reverse an ALJ's decision for harmless error, which exists when it is clear from the record that the ALJ's error was inconsequential to the ultimate nondisability determination." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (citations and internal quotation marks omitted).

VII. Discussion

A. Rejection of Uncontradicted Opinions of Treating Physicians

Plaintiff contends that Commissioner erred by rejecting Dr. Shalen's March 2012 letter and Dr. Rasgon's May 2012 letter.[6]

When reviewing an ALJ's medical opinion determinations, courts distinguish between three types of physicians: those who treat the claimant ("treating physicians"); and two categories of "nontreating physicians," those who examine but do not treat the claimant ("examining physicians")

[6] Their letters were accepted as evidence by the Appeals Council, *see* A.R. 1-2, 4-5, and thus this court must consider those letters part of the administrative record. *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1159-60 (9th Cir. 2012) ("[W]hen a claimant submits evidence for the first time to the Appeals Council, which considers that evidence in denying review of the ALJ's decision, the new evidence is part of the administrative record, which the district court must consider in determining whether the Commissioner's decision is supported by substantial evidence.").

The Appeals Council denied Plaintiff's request for review stating that it "considered the additional evidence . . . . [and] found that this information does not provide a basis for changing the Administrative Law Judge's decision." A.R. 2.

and those who neither examine nor treat the claimant ("nonexamining physicians"). *See Lester*, 81 F.3d at 830. A treating physician's opinion is entitled to more weight than an examining physician's opinion, and an examining physician's opinion is entitled to more weight than a nonexamining physician's opinion. *Id.* The ALJ is entitled to resolve conflicts in the medical evidence. *Sprague v. Bowen,* 812 F.2d 1226, 1230 (9th Cir. 1987). However, to reject the opinion of an uncontradicted treating or examining physician, an ALJ must provide "clear and convincing reasons." *Lester*, 81 F.3d at 830; *see also* 20 C.F.R. § 416.927(d)(2); SSR 96-2p, 1996 WL 374186. If another doctor contradicts a treating or examining physician, the ALJ must provide "specific and legitimate reasons" supported by substantial evidence to discount the treating or examining physician's opinion. *Lester*, 81 F.3d at 830-31. The ALJ meets this burden "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Reddick*, 157 F.3d at 725. A nonexamining physician's opinion alone cannot constitute substantial evidence to reject the opinion of an examining or treating physician, *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990), though it may be persuasive when supported by other factors. *See Tonapetyan*, 242 F.3d at 1149; *Magallanes*, 881 F.2d at 751-55 (upholding rejection of treating physician's opinion given contradictory laboratory test results, reports from examining physicians, and testimony from claimant). An opinion more consistent with the record as a whole generally carries more persuasiveness. *See* 20 C.F.R. § 416.927(d)(4).

1. Drs. Shalen and Rasgon's Opinions Were Uncontradicted

Both Dr. Shalen and Dr. Rasgon are Plaintiff's treating physicians with multi-year relationships with Plaintiff. Dr. Shalen's March 2012 letter and Dr. Rasgon's May 2012 letter both opine that Plaintiff is "totally disabled and unable to work in any capacity" as a result of his cancer and consequent treatment. A.R. 410, 411. Dr. Shalen's opinion is emphatic. A.R. 411 ("I have been Mr. Sanchez's physician for 17 years and I ***strongly*** feel that he unfortunately is totally disabled and is unable to work in any capacity.") (emphasis added).

These letters are evidence by Plaintiff's treating physicians uncontradicted by any other doctor. The Commissioner admits as much. Def.'s Mot. at 5 ("[T]he letters from Drs. Rasgon and Shalen may not have been contradicted by other physicians . . . .").

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The Commissioner does not argue that the opinion of Dr. Prosise contradicts the opinions of Drs. Shalen and Rasgon, for indeed it does not. Dr. Prosise discounted Plaintiff's deficient test scores in cognitive function and memory because he believed Plaintiff to be malingering the psychological exam. However, Dr. Prosise explicitly abstained from offering an opinion as to the severity of Plaintiff's *physical* condition and its impact on his ability to work. A.R. 331 (Dr. Prosise noting that Plaintiff's "prospect of employment is limited by his physical resources in the wake of a 2009 ear canal malignancy and October surgery" and that "[a]ny opinion as to the severity of the stated conditions and their concerted impact upon work activity is deferred to medical authority.").

Nor does Dr. Mogro's letter contradict Drs. Shalen and Rasgon: Dr. Mogro simply stated that Plaintiff "shows no mood disorder," and, like Dr. Prosise, found that Plaintiff's "pain, fatigue, and cognitive dysfunction such as memory and concentration difficulties stem from his medical problem." A.R. 361.

2. Failure to Provide "Clear and Convincing Reasons"

Because the Commissioner admits that the opinions of Drs. Shalen and Rasgon are uncontradicted, the Commissioner must offer "clear and convincing reasons" for rejecting their opinions. *See Lester*, 81 F.3d at 830 (to reject the opinion of an uncontradicted treating physician, an ALJ must provide "clear and convincing reasons"). The Commissioner argues several reasons: (1) their opinions are not medical opinions but rather opinions on an issue reserved to the Commissioner; (2) their opinions are "retrospective diagnoses" that the ALJ need not consider; and (3) their opinions are inconsistent with the record.

a. The Letters Express Medical Opinions

Defendant argues that Dr. Shalen and Dr. Rasgon's opinions that Plaintiff is totally disabled and unable to work are not medical opinion but rather opinions on an issue reserved to the Commissioner.

Under the governing regulations, "[o]pinions on some issues . . . are not medical opinions . . . but are, instead, opinions on issues reserved to the Commissioner because they are administrative findings . . . ." 20 C.F.R. § 416.927(d). These include opinions by medical sources that the claimant is disabled. 20 C.F.R. § 416.927(d)(1). The Commissioner "will not give any special significance

to the source of an opinion on issues reserved to the Commissioner . . . ." 20 C.F.R. § 416.927(d)(3). Thus, Dr. Shalen and Dr. Rasgon's statements that Plaintiff "is totally disabled" do not require the Commissioner to conclude that Plaintiff is indeed totally disabled.

However, their opinions go beyond mere conclusory statements that Plaintiff is disabled. Both doctors note their long-term relationships with Plaintiff. Both indicate that they are aware of Plaintiff's medical history and current symptoms; indeed, the medical evidence of record discloses many contemporaneous reports by Dr. Shalen and Dr. Rasgon documenting their treatment of Plaintiff. Dr. Rasgon's letter describes in detail the extent of Plaintiff's cancer and the treatment required. A.R. 410 (noting that Plaintiff required "aggressive surgery removing part of his left ear and ear canal down to the ear drum" and that the cancer had extended "into [Plaintiff's] temporalis muscle above his ear"). Both doctors described the symptoms Plaintiff experienced after his cancer treatment. A.R. 410 (Dr. Rasgon noting that Plaintiff's "pain after surgery and radiation has been persistent and debilitating"); 411 (Dr. Shalen noting that Plaintiff's "pain has been persistent and quite debilitating" and that the medication he was required to take to control the pain "has not allowed him to maintain the mental clarity required to function in the workforce"). Dr. Shalen stated that "[w]ithout adequate pain control [Plaintiff's] life is miserable." A.R. 411.

Therefore, the doctors' statements are meaningful not because they conclude that Plaintiff is disabled but because they offer medical source opinions regarding the veracity, nature, and severity of Plaintiff's impairments. These are medical opinions on subject matters clearly within a treating physician's ken. *See* 20 C.F.R. § 416.927(d)(2) (treating sources may "provide evidence, including opinions, on the nature and severity of [a claimant's] impairment(s)").

b. The Letters Were Not "Retrospective Diagnoses"

The Commissioner also argues that Dr. Shalen's March 2012 letter and Dr. Rasgon's May 2012 letter is each "a retrospective medical diagnosis that is not supported by objective medical signs," which may not serve as substantial evidence. Def.'s Mot. at 5. The Commissioner's sole source of support for this argument is *Magallanes*, 881 F.2d at 750.

However, the circumstances in *Magallanes* are distinguishable from the instant case. The "retrospective opinion" discussed in *Magallanes* was provided by a doctor who first saw the

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claimant in 1985, yet opined that the claimant had been disabled since 1983. The Ninth Circuit noted that that doctor's opinion "was contradicted by the findings and opinions of several doctors who did have an opportunity to examine Magallanes [between 1983 and 1985]," and therefore concluded that there was substantial evidence supporting the ALJ's decision to reject that doctor's opinion about the onset date of the claimant's disability. *Magallanes*, 881 F.2d at 754-55.

Whereas the doctor in *Magallanes* offered speculation without personal knowledge about Plaintiff's pre-visit physical condition that contradicted the opinions of other doctors with firsthand knowledge of Plaintiff's actual condition at the time, here the uncontradicted opinions of Dr. Shalen and Dr. Rasgon recapitulate their years of personal treatment of Plaintiff, which in Dr. Shalen's case extends thirteen years prior to the alleged onset date of Plaintiff's disability. Thus *Magallanes* provides no support for the Commissioner's decision to reject the opinions of Dr. Shalen and Dr. Rasgon.

c. Evaluation of the Record

The Commissioner also argues that the opinions of Drs. Shalen and Rasgon may be rejected because they are inconsistent with the record, specifically Plaintiff's treatment records and the opinions of Drs. Prosise and Mogro. This argument requires the court to look closer at the ALJ's evaluation of the record and her reasons for ultimately determining that Plaintiff was not disabled.

i. Treatment Records

Much of the ALJ's opinion hinges on her finding that Plaintiff's treatment records document "physical examinations are normal and routine." A.R. 20 (ALJ describing the Kaiser treatment notes as showing "essentially minimal treatment for his ear and no treatment for any psychiatric or cognitive issues"), 21-23 (describing the medical records as "mostly routine"). The ALJ offered this finding as a reason for discounting much of the evidence in Plaintiff's favor, including Plaintiff's subjective pain testimony, Ms. Sanchez's testimony regarding Plaintiff's pain and limitations, and Dr. Rasgon's 2010 letter. A.R. 22-23 (giving no weight to Ms. Sanchez testimony "because it is inconsistent with treatment notes" and no weight to Rasgon's 2010 letter because "the record does not support the severity of the claimant's allegations"). This finding also provided the foundation for the ALJ's decision to give great weight to the opinions of Dr. Mogro and the nonexamining state

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agency consultants who provided summaries of the medical records. A.R. 23 (giving great weight to Dr. Mogro's opinion "because it is consistent with the record as a whole" and to "the state agency consultants because their summaries are consistent with the medical evidence of record"), 327, 376 (state agency consultants' summaries).

However, the ALJ offered no explanation for her determination that the treatment records are "normal and routine." In fact, this determination is not supported by the medical record. The ALJ acknowledged that numerous treatment records show that Plaintiff reported intense, recurring pain. A.R. 21-22. The ALJ noted that Dr. Byl saw "nothing that should be painful in the ear canal and felt that [Plaintiff's] pain seemed more neuritic in nature," A.R. 21, but this evidence does not say that Plaintiff's pain did not exist or that his examinations were "normal"; it simply demonstrates that a doctor found that the source of Plaintiff's pain was not visible and may have resulted from nerve injury, which accords with medical evidence showing that Plaintiff's cancer had reached his nerves. A.R. 281. Similarly, the fact that Plaintiff's doctors noted that Neurontin and Vicodin were helpful in treating Plaintiff's pain and that Plaintiff did not appear to have a recurrence of cancerous lesions does not mean that Plaintiff's treatment was "normal." A.R. 20.

While the ALJ interpreted the Kaiser records as "normal and routine," Dr. Shalen and Dr. Rasgon considered the same records—many of which were in fact authored by Dr. Shalen and Dr. Rasgon—and arrived at a different conclusion: they found these records consistent with an individual who suffered from persistent and debilitating pain that left him unable to work in any capacity. Thus the ALJ's interpretation of the treatment records as showing "normal and routine" physical examinations is not supported by substantial evidence in the record.

ii. Subjective Pain Testimony

Another basis for the ALJ's determination that Plaintiff was not disabled was the ALJ's finding that Plaintiff's statements concerning the intensity, persistence, and limiting effects of his symptoms were not fully credible. A.R. 22. The court will examine this finding to determine whether it was supported by substantial evidence. *See Thomas v. Barnhart*, 278 F.3d 947, 950 (9th Cir. 2002) (the court may not second-guess the ALJ's credibility finding if it is supported by substantial evidence in the record).

In deciding whether to admit a claimant's subjective complaints of pain, the ALJ must engage in a two-step analysis. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004) (citing *Smolen v. Chater,* 80 F.3d 1273, 1281 (9th Cir. 1996)). First, "the claimant must produce objective medical evidence of underlying 'impairment,' and must show that the impairment, or a combination of impairments, 'could reasonably be expected to produce pain or other symptoms.'" *Id.* (quoting *Smolen*, 80 F.3d at 1281-82). The *Smolen* court further elaborated on this requirement:

> The claimant need not produce objective medical evidence of the pain or fatigue itself, or the severity thereof. Nor must the claimant produce objective medical evidence of the causal relationship between the medically determinable impairment and the symptom. By requiring that the medical impairment could reasonably be expected to produce pain or another symptom, [this step] requires only that the causal relationship be a reasonable inference, not a medically proven phenomenon . . . . This approach reflects the highly subjective and idiosyncratic nature of pain and other such symptoms.

Smolen, 80 F.3d at 1282 (citations omitted).

The ALJ found that Plaintiff had satisfied this first step of the analysis, noting that "treatment records document the claimant's surgical excision of an adenoid cystic cancer . . . followed by six weeks of radiation therapy" as well as Plaintiff's post-radiation therapy visits with doctors for "intense pain in the left ear" and "discomfort in the left upper back and side of the head." A.R. 21-22.

If the first step is satisfied, then the ALJ may consider whether the claimant's statements about the intensity, persistence, and limiting effects of those symptoms are credible and consistent with objective medical evidence. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007); 20 C.F.R. § 416.929(c). If an ALJ discredits a claimant's subjective symptom testimony, the ALJ cannot rely on general findings, but "must specifically identify what testimony is credible and what evidence undermines the claimant's complaints." *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (quotations omitted). The ALJ may consider "ordinary techniques of credibility evaluation," including the claimant's reputation for truthfulness and inconsistencies in testimony, and may also consider a claimant's daily activities, and "unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment." *Smolen*, 80 F.3d at 1284.

The ALJ gave five reasons for discounting Plaintiff's subjective pain testimony. Each reason shows flaws upon further examination. First, the ALJ found that "there is extensive evidence of noncompliance with treatment." A.R. 22. However, the only examples identified by the ALJ are "references to his failure to take his prescribed hypertension medication and failure to return to Kaiser for re-check of a rash" in Plaintiff's groin.[7] A.R. 22. Both instances predate Plaintiff's cancer treatment and his complaints of head and neck pain, and regard treatment for complaints (hypertension, cholesterol, and groin rash) other than those forming the basis for his application for disability benefits.

Second, the ALJ diminished Plaintiff's credibility because his daily activities exceeded what would be expected of an individual with his alleged level of pain. In arriving at this conclusion, the ALJ focused primarily on Plaintiff's testimony that he attended citizenship classes. A.R. 22. The ALJ stated, "The claimant described his pain as . . . very intense deep pain in his head . . . . However, Mr. Sanchez testified that he attends school several times per week. He would also need to study for his citizenship classes, which undermines his allegations of poor memory, headaches, and blurry vision." A.R. 22. Plaintiff testified that as of February 2, 2012, he that he had been attending citizenship classes twice per week since January 2012. A.R. 22. No evidence in the record suggests that Plaintiff needed to study, belying the ALJ's speculation that Plaintiff "would need to study for his citizenship classes."

Third, the ALJ discounted Plaintiff's credibility because Plaintiff claimed to require an interpreter but understood some of the ALJ's questions. A.R. 17-18, 23. The ALJ "observed that [Plaintiff] seemed able to understand the questions asked of him because he would start to answer before the interpreter translated the questions." A.R. 23. When the ALJ "asked him to try to speak

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[7] The two events are as follows: on April 25, 2008, Plaintiff visited his primary care physician with a complaint of a rash in his groin. A.R. 290. Dr. Shalen noted that Plaintiff "is taking none of his prescribed medications, for his hypertension or his cholesterol." A.R. 290. The record also includes notes from a nurse practitioner stating that she had seen Plaintiff regarding a groin rash in 2009, and that Plaintiff was to return for recheck but did not do so. A.R. 389.

The ALJ also noted that "[o]n January 20, 2010, Mr. Sanchez again complained of pain, but he had not taken either his prescribed Vicodin or Motrin." A.R. 21. This is not accurate. In reality, the records show that Plaintiff was following the prescribed treatment. On January 13, 2010, Dr. Byl had recommended that Plaintiff reduce Vicodin and substitute Motrin instead. A.R. 274. On January 20, 2010, Dr. Byl noted that Plaintiff "has not taken vicodin" and was "on motrin." A.R. 276.

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to her directly, he was very able to understand and respond to at least simple (and some complex) questions without the assistance of the interpreter." A.R. 23. The ALJ also noted that Plaintiff's citizenship classes were conducted mostly in English. A.R. 18, 23. However, other evidence in the record demonstrates that Plaintiff requires an interpreter at least in some circumstances. During the second administrative hearing, the ALJ explicitly requested the translator's assistance several times when communicating with Plaintiff. A.R. 53, 54, 56, 58. The medical evidence also demonstrates that Plaintiff's doctors used translation assistance provided by both professional interpreters, and found Plaintiff's family members, who sometimes attended doctors' visits with Plaintiff, to be helpful. *See, e.g.*, A.R. 274 (Dr. Byl's treatment notes from January 13, 2010 noting that Plaintiff "comes in today with Daughter who is a great help"); 353 (Plaintiff saw his primary care physician Dr. Shalen on October 22, 2010 with a professional interpreter).

Fourth, the ALJ found Plaintiff's credibility diminished because Dr. Prosise had found Plaintiff to be malingering, and found the "malingering diagnosis . . . [to be] consistent with his treating psychologist[] [Dr. Mogro's] evaluation." A.R. 22. However, Dr. Prosise's malingering diagnosis rests solely on his belief that Plaintiff feigned a lack of comprehension of Dr. Prosise's English-language instructions, but evidence in the record (as well as the transcript of the administrative hearings) suggest that Plaintiff may not have been able to express himself without the assistance of an interpreter. Furthermore, Dr. Mogro's letter does not support Dr. Prosise's assessment of malingering. There is no indication that Dr. Mogro believed Plaintiff to be malingering. Dr. Mogro simply states that Plaintiff "shows no mood disorder." A.R. 361. But rather than finding that Plaintiff did not experience pain or cognitive problems, Dr. Mogro found that Plaintiff's "pain, fatigue, and cognitive dysfunction such as memory and concentration difficulties stem from his medical problem." A.R. 361.

Finally, and most significantly, the ALJ found that Plaintiff's treatment record was "normal and routine," which, for the reasons stated above, is a finding unsupported by substantial evidence in the record. This finding underpins much of the ALJ's ultimate determination, including her assessment of the record as a whole and her decision to discount Plaintiff's subjective testimony.

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The court notes that no single factor in the ALJ's determination of Plaintiff's credibility is cause for reversal, but, as explained below, when that credibility determination is considered in light of the record as a whole, it does not amount to substantial evidence supporting the rejection of the opinions of Drs. Shalen and Rasgon.

iii. Other Opinion Evidence

The ALJ also relied on the medical opinion evidence in the record in concluding that Plaintiff was not disabled. The ALJ (1) gave no weight to Dr. Rasgon's 2010 letter because he "relied on subjective complaints, but record does not support severity of allegations"; (2) gave "great weight" to the letter from Dr. Mogro; and (3) gave "great weight" to Dr. Prosise's report.

As explained above, the medical opinions of Drs. Mogro and Prosise, even when given great weight, do not contradict the opinions of Drs. Shalen and Rasgon, because Drs. Mogro and Prosise offered psychological and psychiatric opinions, but explicitly withheld their opinions regarding Plaintiff's limitations to they extent they were caused by his physical condition or medical problems.

The ALJ's decision to give no weight to Dr. Rasgon's July 2010 letter was not in error, because the letter does not support a finding of disability. The letter only reports that Plaintiff has complained of pain, and that "[Plaintiff] feels like he is unable to work because of these issues." A.R. 402. These qualified statements simply restate *Plaintiff's* opinions, rather than the doctor's. In contrast with these relatively weak statements, Dr. Rasgon's May 2012 letter offers the *doctor's* emphatic opinion that Plaintiff experiences "persistent and debilitating" pain as a result of his surgery and radiation. Dr. Shalen's letter reiterates this opinion.

iv. Summary of Record as a Whole

Considering the record in light of all of the above—that the treatment records are not "normal and routine" but rather document Plaintiff's long history of pain, that the bases for the ALJ's credibility determination are questionable, and that the only opinion evidence regarding Plaintiff's physical and medical limitations describes him as being in "persistent and debilitating" pain—the court finds that substantial evidence does not support the rejection of the opinions of Drs. Shalen and Rasgon.

B. Finding of No Severe Impairment

The ALJ found in the alternative that Plaintiff did not have a "severe" impairment at Step Two of the sequential evaluation. A.R. 20.

"At step two, the ALJ assesses whether the claimant has a medically severe impairment or combination of impairments that significantly limits his ability to do basic work activities." *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005) (citing 20 C.F.R. § 404.1520(a)(4)(ii)). "The 'ability to do basic work activities' is defined as 'the abilities and aptitudes necessary to do most jobs' . . . including the ability to perform 'physical functions such as walking, sitting, lifting, pushing, pulling, reaching, carrying, or handling.'" *Id.* (citing 20 C.F.R. § 404.1521(b)). "An impairment is not severe if it is merely 'a slight abnormality (or combination of slight abnormalities) that has no more than a minimal effect on the ability to do basic work activities.'" *Id.* (citing S.S.R. No. 96–3(p) (1996)). Step two is "a de minimis screening device used to dispose of groundless claims, and an ALJ may find that a claimant lacks a medically severe impairment or combination of impairments only when his conclusion is 'clearly established by medical evidence.'" *Id.* (citing *Smolen,* 80 F.3d at 1290) (internal quotations and brackets removed).

The ALJ's determination at Step Two rested on her interpretation of the treatment notes. *See* A.R. 20 (ALJ describing the Kaiser treatment notes as showing "essentially minimal treatment for his ear and no treatment for any psychiatric or cognitive issues"). As described above, the medical record shows that Plaintiff underwent surgery and radiation therapy for cancer in his ear, and subsequently suffered pain in head and neck pain. Two of Plaintiff's treating physicians, both of whom authored some of the treatment notes that the ALJ interpreted, opined that the side effects of Plaintiff's cancer treatment left him in "persistent and debilitating pain" and rendered him incapable of working. Thus substantial evidence does not support the finding that Plaintiff did not have a severe impairment at Step Two.

In any event, the Commissioner appears to have abandoned the argument that the ALJ's determination that Plaintiff did not have a severe impairment was supported by substantial evidence. *See* Def.'s Mot. at 8 ("[T]he ALJ did not deny Plaintiff's claim at Step Two of the sequential evaluation but at step Five.").

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C. Other Issues

Because the court finds that the ALJ did not articulate clear and convincing reasons for rejecting the uncontradicted testimony of two of Plaintiff's treating physicians, and that substantial evidence does not support the ALJ's alternative basis for finding that Plaintiff did not have a severe impairment, the court declines to consider Plaintiff's other arguments for reversing the Commissioner's decision. Namely, the court will not consider whether the ALJ erred in rejecting the testimony of Plaintiff's daughter; in posing an incomplete hypothetical to the VE; and in failing to fully and fairly develop the record.

VIII. CONCLUSION

For the foregoing reasons, the Court finds that substantial evidence did not support the rejection of the uncontradicted opinions of Plaintiff's treating physicians, as expressed in Dr. Shalen's March 2012 letter and Dr. Rasgon's May 2012 letter. The introduction of these letters alters the balance of the record as a whole, as well as the interpretation of the treatment records, and has cascading consequences on many of the bases for the ALJ's ultimate determination that Plaintiff was not disabled. Thus the Commissioner's failure to consider this evidence was not harmless error.

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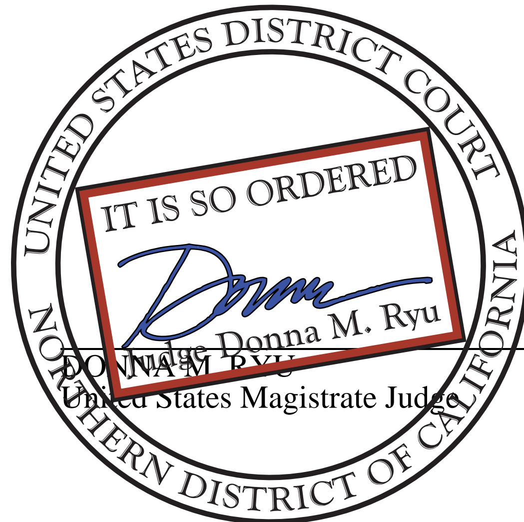
“[I]n cases in which it is evident from the record that benefits should be awarded, remanding for further proceedings would needlessly delay effectuating the primary purpose of the Social Security Act, to give financial assistance to disabled persons because they are without the ability to sustain themselves.” *Holohan v. Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001) (internal quotation marks and citation omitted). In this case, Plaintiff worked for thirty years as a machinist, suffered a stroke, and underwent surgery and radiation treatment for cancer. The uncontradicted testimony of two of Plaintiff’s treating physicians, one of whom has treated Plaintiff for at least seventeen years as his primary care physician and the other of whom operated on Plaintiff’s cancer, is that Plaintiff’s condition is so poor, and his pain so “persistent and debilitating,” that he is totally disabled and unable to work. In this circumstance, remand for further consideration would only delay benefits that Plaintiff is due.

The court therefore remands for payment of benefits.

Dated: July 15, 2014



DONNA M. RYU
United States Magistrate Judge